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Wai 686 #T3

## HAURAKI AND EAST WAIROA

Barry Rigby

*A Report Commissioned by the Waitangi Tribunal  
April 2002*

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## Introduction

### Research commissions

This is a report about Hauraki rights within the East Wairoa confiscation area. In introducing it, I will begin by summarising the terms of my research commission. This will include a discussion of the relationship between my commission and the parallel research of Gael Ferguson and Bryan Gilling. I will then discuss very briefly the research methodology I have employed. This will include the way I have attempted to supplement documentary research with oral history. I complete the introduction with a preview of the main lines of interpretation that feature throughout the report.

The preparation of this report followed a scoping exercise in mid 2001. At that time I worked in parallel with Gael Ferguson. The Tribunal authorised Ngai Tai ki Tamaki claimants to commission Gael to examine the full spectrum of Crown actions affecting Ngai Tai within the Hauraki inquiry area.<sup>1</sup> Initially, my commission for this report envisaged an exploration of Crown actions regarding the rights of Ngati Paoa, Ngati Whanaunga, and Ngati Koheriki. This was based on the assumption that Ms Ferguson would cover the Ngai Tai side of the story in her report. After my preliminary research into Ngati Koheriki's participation in the immediate prelude to the East Wairoa confiscation, it gradually became clear that a fuller and separate report on that group was necessary. Consequently, the Tribunal commissioned Dr Gilling to complete the necessary Ngati Koheriki research.<sup>2</sup> While this report examines the part Ngati Koheriki played in the dramatic events of 1863, Dr Gilling's report will examine the Ngati Koheriki story in full.

I address the three key sections of my research commission in two chapters and a conclusion.<sup>3</sup> Section 1 (a) of my commission called for me to report on the Compensation Court's inquiry into Ngati Paoa, Ngati Whanaunga and Ngati Koheriki's rights within the East Wairoa confiscation area during 1865-1866. This is the subject of chapter two, Hauraki rights in East Wairoa. Chapter three on protest examines the question asked in section 1 (c) of my commission:

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<sup>1</sup> Gael Ferguson research commission, 30 September 2001, (Wai 686, 3.58)

<sup>2</sup> Bryan Gilling research commission, 14 March 2002(Wai 686, 3.60)

<sup>3</sup> See Barry Rigby research commission, 29 August 2001, (Wai 686, 3.57)

What was the nature of subsequent protest by members of the aforementioned groups about the deleterious effects of the East Wairoa confiscation?

My conclusion, subtitled 'Treaty issues arising', addresses section 1 (b) which asked whether the manner of the inquiry into Hauraki rights at East Wairoa raised any Treaty issues.

In addition to directly addressing sections of my research commission, I have provided a lengthy discussion of the historical background to the East Wairoa confiscation in chapter one. In this background chapter I explain the origins of what I refer to as the 1863 Hunua guerrilla campaign, a prelude to the 1865 East Wairoa confiscation. This background information is intended to allow readers to situate East Wairoa within the broader history of war and confiscation that went well beyond the limits of the Tribunal's Hauraki inquiry area.

### **Sources**

I have employed a relatively conventional approach to the research that went into this report. I relied mainly on written documentary sources, particularly those available in Wellington. The single most important source was the Raupatu Document Bank, originally assembled by Waitangi Tribunal staff in 1988-1990. This includes the surviving records of the Compensation Court. I have attempted to supplement documentary research with oral history, wherever possible. My primary oral history informants were Tipa Compain of Ngati Whanaunga and Hariata Gordon of Ngati Paoa, whom I interviewed in September 2001. Subsequently, I shared drafts of this report with them, and I am most grateful for their assistance in identifying some of the Maori actors in the story. Of course, neither Mr Compain nor Mrs Gordon is responsible for the interpretation I have advanced in this report. That responsibility is mine and mine alone.

### **Interpretation**

My interpretation in this report follows a cause and effect sequence. I argue in the historical background chapter that the Crown's allegations of a heinous Kingitanga conspiracy to drive Europeans into the sea provided an important part of the justification for the July 1863 invasion of the Waikato. Those allegations of conspiracy included references to Hauraki complicity. Were the conspiracy allegations, and the accusations of Hauraki complicity, based on verifiable evidence? The Crown's invasion of the Waikato, and the simultaneous expulsion of Tamaki Maori south of the Mangatawhiri, caused a Maori flanking action intended to threaten the Crown's supply lines. Kingitanga guerrillas used that part of

the rugged Hunua ranges to relieve pressure on the Waikato front line during late 1863. This guerrilla campaign offered the Crown a strategic motive for wanting to deny Maori access to the East Wairoa area in the future. On the other hand, Crown belief in a Kingitanga conspiracy provided convenient justification for both the invasion, and the subsequent confiscation. In concluding this interpretation of the origins of the East Wairoa confiscation, I attempt to relate it to other influential interpretations the Waikato war and its consequences.

The Compensation Court's inquiry into Hauraki rights within the East Wairoa area was conducted within a few months of the confiscation. The Court failed to give claimants the statutorily required six months before the 26-27 June 1865 hearing. It also failed to advertise publicly the hearing in the provincial gazette. James Mackay, one of the two judges at that hearing, probably knew enough about the nature of Hauraki rights at East Wairoa to inform his colleague, Chief Judge Francis Fenton. On the other hand, his role as a Judge, while he remained the chief Crown agent in Hauraki, meant that Mackay could not offer evidence to the Court publicly. This perhaps explains why the official records of the East Wairoa hearing and inquiry are so deficient. The Court was hampered by a lack of administrative support, and by the undue haste exhibited in attempting to close its East Wairoa inquiry in 1865. Considering these problems, historians must ask: was the Court's inquiry an adequate one?

Confusion also reigned because the Crown issued unclear and inconsistent proclamations and orders regarding what it was supposed to define as a confiscation district, and what it could define as sites for settlement. Section two of the New Zealand Settlements Act 1863 prescribed that the Governor in Council could proclaim a district within the meaning of the Act as one that contained the land of a tribe deemed to be in rebellion. By section three of the Act, the Governor, then, could 'set apart within any such District eligible sites for settlements'. Finally, 'for the purposes of such settlements', section four empowered the Governor in Council to 'reserve or take any Land' so defined.<sup>4</sup>

Governor George Grey complicated the application of this Act by proclaiming on 17 December 1864 an intention to confiscate the entire area between East Wairoa and South Waikato if the Maori inhabitants failed to submit to the Crown. He did so without any

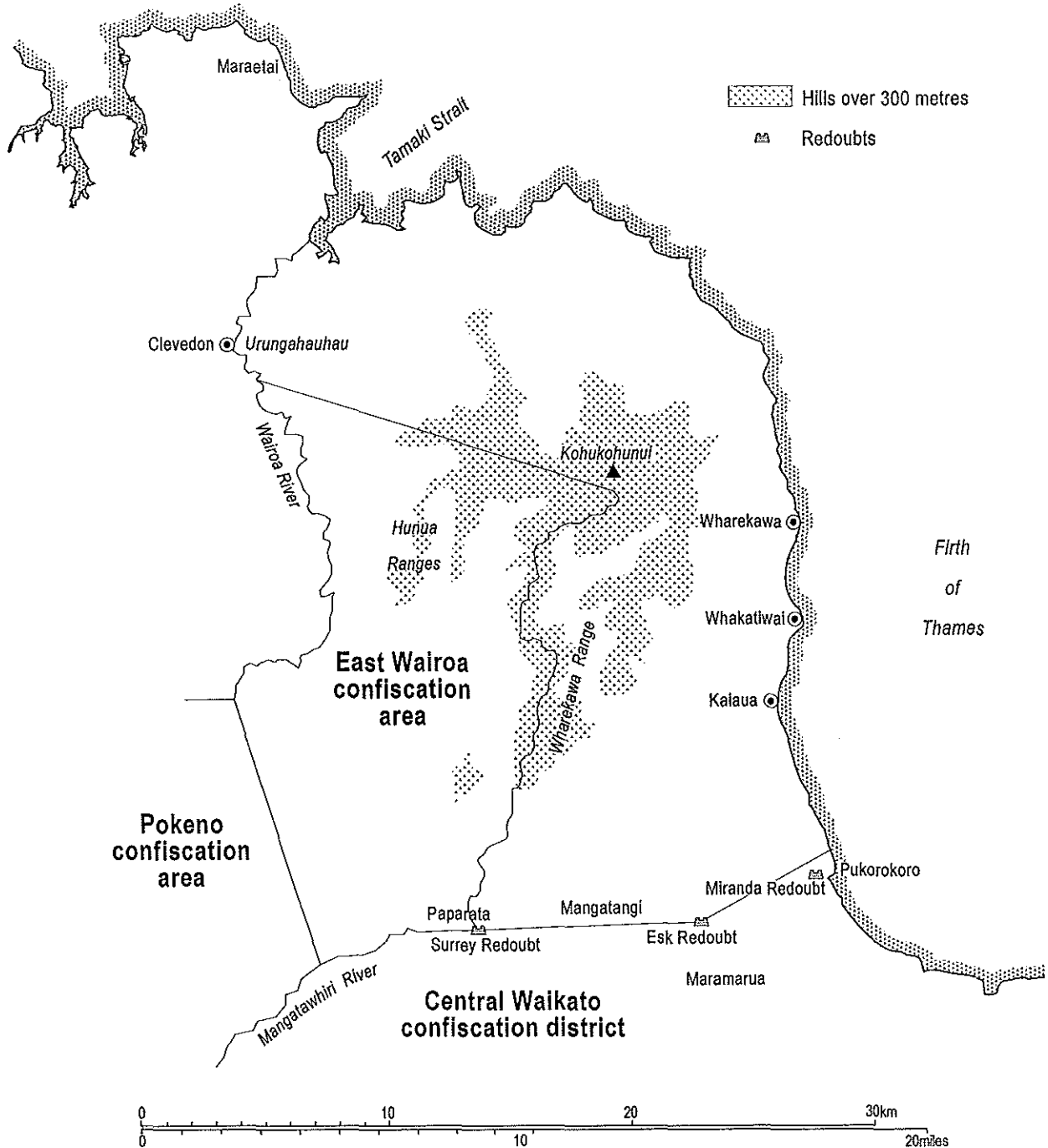
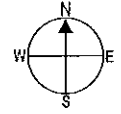
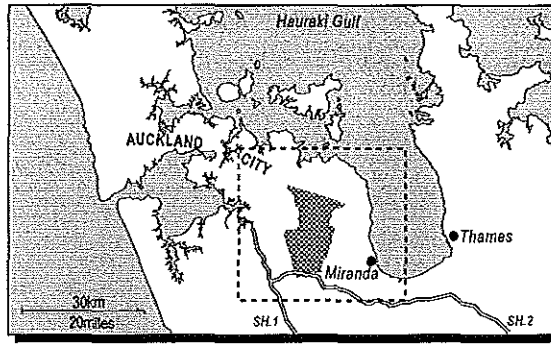
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<sup>4</sup> New Zealand Settlements Act, 1863, *New Zealand Statutes*, 1863, No 8, pp 19-23

reference to the terms of the New Zealand Settlements Act. When in June 1865 Wiremu Hoete of Ngati Paoa protested the effect of this proclamation, he assumed that it had been the effective act of confiscation. He also alluded to the fact that Grey exempted the land of Maori, such as himself, who supported the Crown during the wars. In fact, a 30 January 1865 Order in Council, invoking the terms of the Act in relation to East Wairoa, was probably the effective act of confiscation. Both Chief Judge Fenton and Native Minister Edward FitzGerald drew attention to the confusion created by the December 1864 proclamation, but the Crown failed to clarify the situation for people like Hoete. The continuing confusion about exactly what the Crown had confiscated, and about Maori rights under the 1863 Act, may have had the effect of muting Maori protests.

Proper public inquiry could have alleviated the prevalent confusion. During the events leading to the 1863 military escalation, Maori had called for an official inquiry into the conspiracy allegations. In setting conditions for the application of the New Zealand Settlements Act in 1864, Secretary of State for the Colonies Edward Cardwell, insisted on 'carefully chosen' commissioners examining what land was to be 'properly' confiscated, prior to confiscation. Wiremu Tamihana continued to call for an inquiry into conspiracy allegations during 1865 and 1866. After Tamihana's pleas fell on deaf ears in Wellington, Tawhiao took the Maori case to London in 1884. Could the Crown have responded more constructively to these calls for proper public inquiry?

Not until 1927 did the Crown-appointed Sim commission inquire into the sources of Maori grievances regarding war and confiscation. Then in 1995 the Crown finally admitted that its actions towards Waikato people in 1863-1865 were in breach of its obligations under the Treaty of Waitangi. While this statutory admission may not be directly applicable to Crown actions towards Hauraki groups with rights in the East Wairoa area, are there strong parallels and causal linkages between the Waikato and East Wairoa situations?



Source: Wai 686, G4

Figure 1: East Wairoa confiscation area 1865

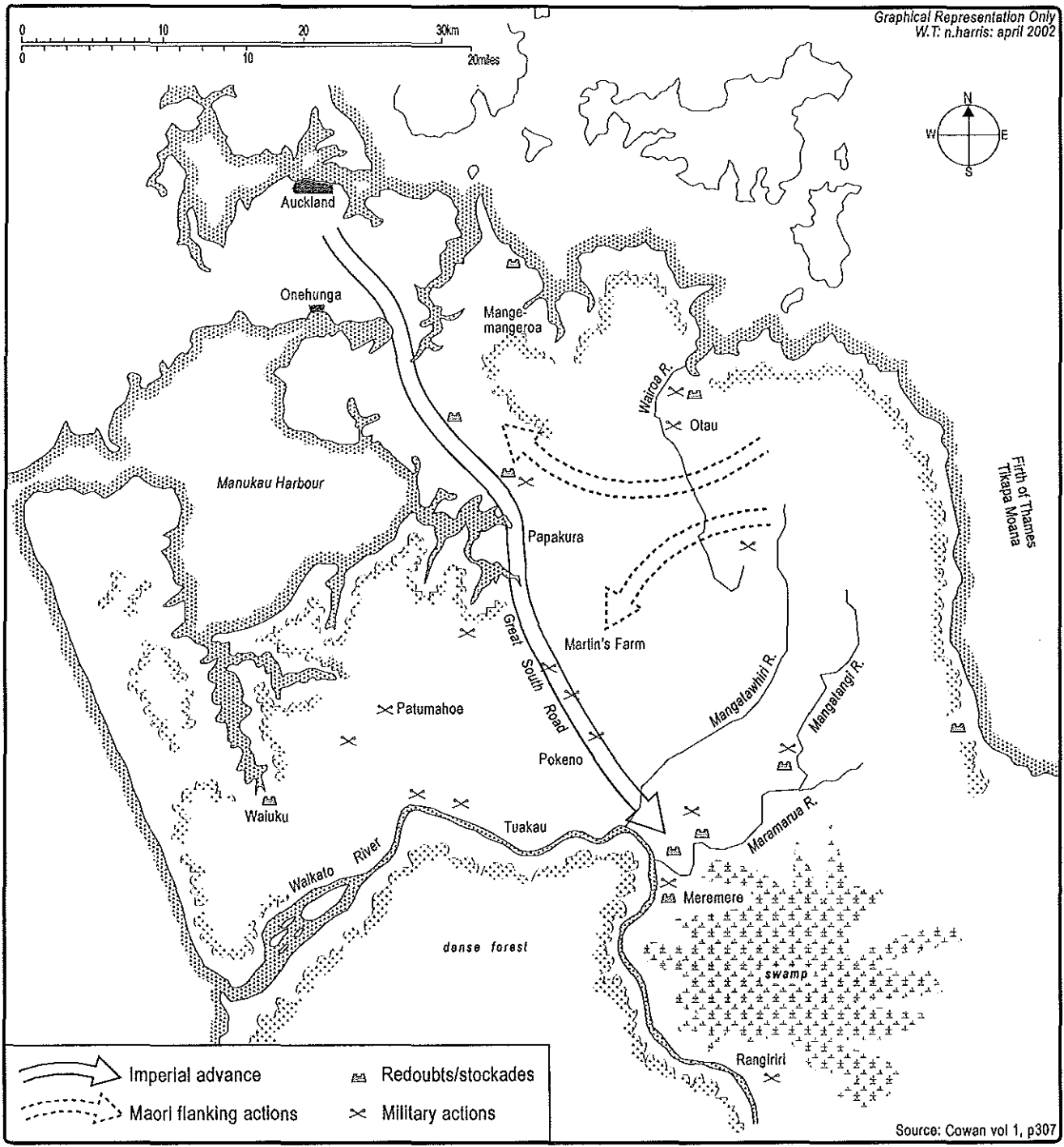


Figure 2 : Invasion of the Waikato 1863



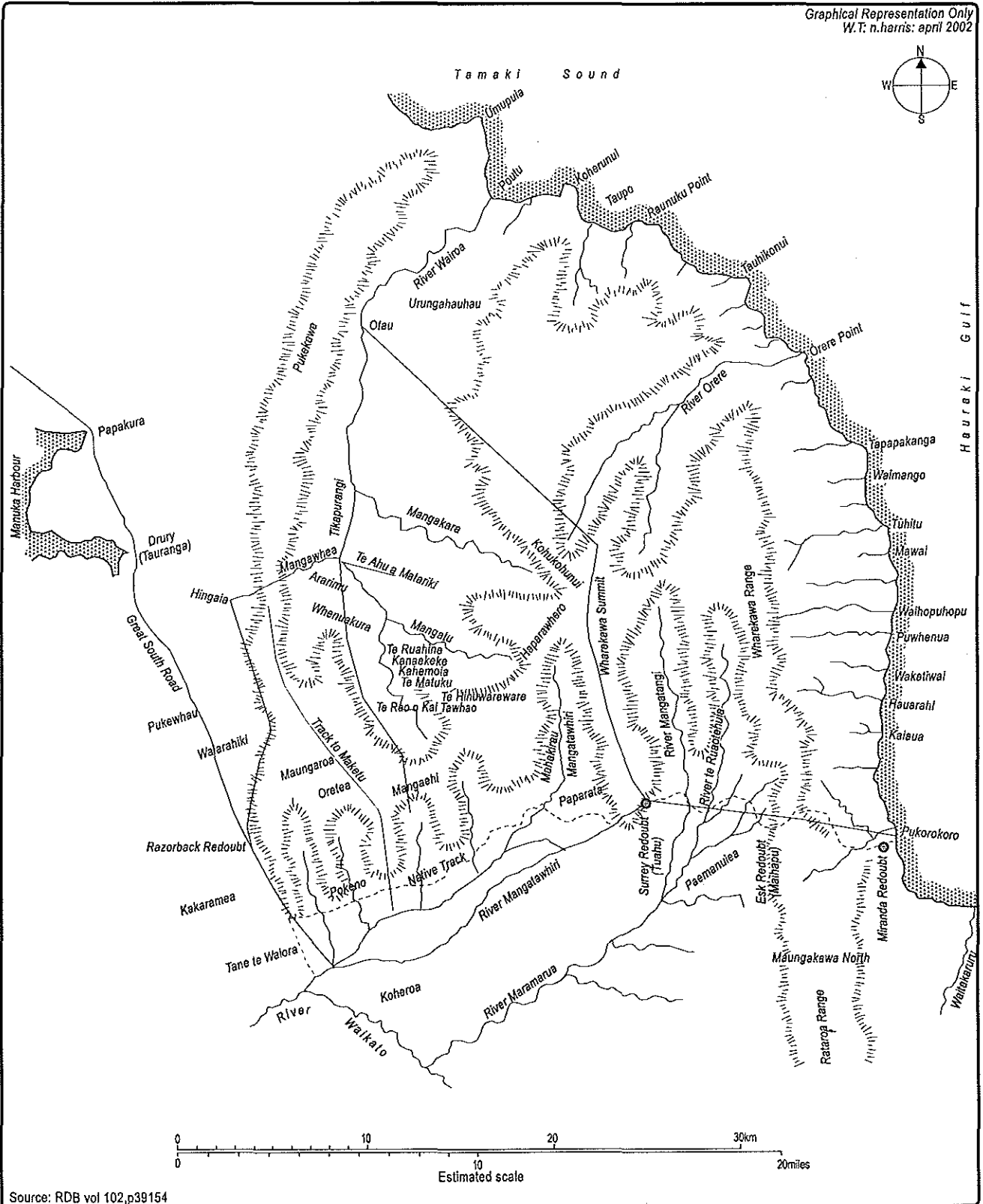


Figure 3: Compensation Court map of East Wairoa 1865

## Chapter one

### Historical Background to the East Wairoa confiscation

#### Why East Wairoa?

The Crown in 1865 confiscated from Maori what appears to be about 58,000 acres at East Wairoa. This area (illustrated in Figure 1: East Wairoa confiscation area 1865) extended in the north from near today's town of Clevedon on the Wairoa River to near Kohukohunui, the highest point in the Wharekawa range. It then followed the main ridge of that range to the Mangatawhiri valley in the south. The western boundary extended from the middle reaches of the Mangatawhiri valley to the upper reaches of the Wairoa River. Figure 1 shows that the Central Waikato confiscation district and the Pokeno confiscation area joined the southern and southwestern East Wairoa boundaries. The Crown declared both East Wairoa and Pokeno as 'sites for Settlement and Colonization' under the New Zealand Settlements Act 1863, but it declared the larger Central Waikato area to the south as only a district under section two of the Act. In Central Waikato the Crown failed to declare 'sites for Settlement' near the southern boundary of East Wairoa. For this reason I have distinguished between the East Wairoa confiscation 'area' and the Central Waikato 'district'.<sup>5</sup>

Why did the Crown confiscate this quite rugged East Wairoa area which today forms a major part of the Auckland city water supply? Two related considerations come to mind as possible answers to this question. In the first place, the Hunua ranges feeding the Wairoa were the scene of a bitterly fought guerrilla campaign in late 1863. Maori guerrilla forces used the rugged terrain to attack the Crown's supply lines along the Great South Road after its invasion of the Waikato on 12 July that year. When the Crown decided to extend its Waikato confiscations into East Wairoa, it did so apparently to remove Maori from an area it previously considered essential to guarantee the security of Auckland. These events leading

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<sup>5</sup> Order in Council (Pokeno), 29 December 1864, *New Zealand Gazette*, 5 January 1865, No 1, pp 1-2; Order in Council (East Wairoa), 30 January 1865, *New Zealand Gazette*, 31 January 1865, No 3, pp 15-16; Order in Council (Central Waikato) 16 May 1865, *New Zealand Gazette*, 7 June 1865, No 19, p 169

to the East Wairoa confiscation have been recounted in other reports presented to the Hauraki Tribunal.<sup>6</sup>

### **Conspiracy allegations**

Governor George Grey's allegation that the East Wairoa area featured in a pan-Maori conspiracy to drive Pakeha into the sea forms a second consideration. This allegation featured in Grey's justification for invading the Waikato in July 1863. The allegation fuelled the animosity towards Maori necessary for drumming up popular Pakeha support for widespread confiscations, and it has yet to be conclusively refuted by modern historians. In the remainder of this introduction, I will describe both the evolution of the allegation, and how it persists in colouring perceptions of responsibility for the New Zealand Wars and consequent confiscations. Obviously, there needed to be credible evidence in support of the allegations to justify Crown actions. How strong was this evidence?

James Fulloon or Hemi Te Mautaranui, the son of a Ngati Awa mother and a European father, may have unwittingly contributed to rumours of this pan-Maori conspiracy. Fulloon/Mautaranui, in 1863, was one of the few fluent Maori speakers serving the Crown's Native Office in Auckland. He regularly reported the results of hui in Waikato, Manukau and Tamaki to his superiors in both the Native Office, and for the imperial/colonial military authorities.<sup>7</sup> Fulloon reported in May 1863 that a Kingitanga envoy, Patara Tamaioha, had visited the Ngati Whatua rangatira, Apihai Te Kawau, at Orakei. According to Fulloon, Patara's waiata to Apihai 'in plain words, asks permission [from Ngati Whatua] to attack the Europeans'.<sup>8</sup>

A month later Fulloon reported the historical background to this conspiracy theory. In a 20 June 1863 memo, he wrote that when the Kingitanga concluded that Governor Gore Browne was likely to order an invasion of the Waikato on 1 September 1861, they planned their own offensive operations. They planned to gather their forces at Maramarua 'and proceed up that river to a place called Paparata . . . making that place their head-quarters'. They were then to occupy posts along the Great South Road, to destroy its bridges and to raid

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<sup>6</sup> Ann Parsonson, 'Tainui Claims to Onewhero and Maramarua Forests', (Wai 686, A2) pp 97-113; Tom Bennion, 'Ngai Tai and the East Wairoa Confiscation', (Wai 686, A46) pp 21-23; David Alexander, 'Statement of Evidence . . . on behalf of the [Hauraki] Claimants', (Wai 686, C3) pp 20-23

<sup>7</sup> See WT Parham's entry on Fulloon/Mautaranui in *The Dictionary of New Zealand Biography*, [DNZB], Wellington, Allen and Unwin, 1990, vol 1, pp 139-140

the Pakeha villages at Drury and Papakura. The Kingitanga, Fulloon believed, later changed this plan to a coordinated attack on Auckland. Furthermore, this attack was planned to feature Hauraki people:

The Thames natives were to meet in the neighbourhood of Taupo [northeast of the present-day town of Clevedon], and upon a given day, some natives (living in town for that purpose) would fire Auckland at different points, and whilst the citizens were extinguishing the conflagration, the assault was to be made both by sea and by land. The natives fully believed that they could have accomplished their design, and the 'Puku o te weke' [the belly of the octopus, or the colonial state] would have been theirs . . .

There were certain houses and persons to have been saved; the dwellings were to be recognised by a white cross upon all the doors,—a native to mark the houses on the same night that the town was to be attacked.

The attack was not to have been confined to Auckland alone. It was to have taken place simultaneously all over the Island. It was intended to have been a general war against the Pakeha . . .

According to Fulloon, Grey's appointment to succeed Browne 'averted the general rising of the natives'. On the other hand, Fulloon heard that the Waikato leaders of the Kingitanga were about to try the same revised plan in 1863. Wiremu Nero Te Awa-i-taia of Ngati Mahanga at Kawhia (a supporter of the Crown) told the Government about it 'shortly after he was requested to join the *conspiracy*' (emphasis added).<sup>9</sup>

Governor Grey gave full credence to Fulloon's hearsay evidence of this so-called Kingitanga conspiracy. In fact, Grey had been concocting his own conspiracy theory for some time. He first raised the alarm in 1861, when, according to James Belich, a mysterious Maori informant using a pseudonym talked about how the Kingitanga leadership (including Wiremu Tamihana) and Bishop Pompallier 'entered into a plot to attack Auckland . . .'.<sup>10</sup> Then on 6 April 1863, writing to the Secretary of State for the Colonies, the Duke of Newcastle, Grey alleged that unnamed 'Waikato tribes' who had fought in Taranaki never accepted Browne's 1861 Waitara 'truce'. Instead, he wrote, these tribes 'prepared themselves for war, and a general *conspiracy* was formed amongst the Native Tribes for a simultaneous attack on all the European settlements the moment that we attempted to attack the Waikato country' (emphasis added). Grey had therefore decided not to force the issue in 1862.

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<sup>8</sup> James Fulloon memo, 23 May 1863, MA 1/1863/144, Raupatu Document Bank [RDB], vol 55, pp 21016-27.

<sup>9</sup> James Fulloon memo, 20 June 1863, AJHR, 1863, E-5b, pp 4-5. See Gary Scott's entry on Wiremu Nera Te Awa-i-taia in DNZB, vol 1, pp 441-442

Nonetheless, Grey remained convinced that ‘the Waikato Tribes were evidently the head and front of this great and general *conspiracy* against us’ (emphasis added), and needed to be reckoned with. Hence, Grey decided to build his military road all the way to the Waikato River in an attempt to ‘overawe’ the Kingitanga.<sup>11</sup> A month later Grey again reported fears of a:

general rising of the native population . . . for the purpose of making a simultaneous attack upon several centres of European population, with a view to the total expulsion of the whole white race of this island.<sup>12</sup>

Premier Alfred Domett took up Grey’s refrain in his 24 June 1863 memo that described the prospect of war in the Waikato as ‘inevitable and imminent’. Domett listed various clashes between the Kingitanga and the Crown, and he cited ‘the abundant evidence of their attempts, to a considerable extent successful, to organise a general *conspiracy* to expel, or murder, the European population throughout the Northern Island . . . (emphasis added)’ Grey undoubtedly prompted these allegations, because Domett recorded that, at a recent (possibly 20 June) Executive Council meeting, Grey:

stated that it was impossible to settle the Taranaki question so long as the Waikato was the centre of disaffection, and the wealthy and prosperous settlement of Auckland was constantly threatened with invasion and destruction from that quarter . . .

Grey then outlined what later became known as the ‘Thames Expedition’ plan to seal off Waikato by establishing ‘a line of fortified posts’ between the Waikato River and the Hauraki Gulf. This line extended from the confluence of the Mangatawhiri and Waikato Rivers to Pukorokoro (see Figure 2: Invasion of the Waikato 1863). Furthermore, Grey would ‘clear out’ and ‘confiscate the lands of the hostile Natives’ living between Auckland and this ‘defensive’ line. Some of this confiscated land ‘would be given away and settled on military tenure to provide for the future security of the districts nearer Auckland, and the remainder sold to defray the expenses of War’. Domett and his Ministers fully supported what amounted to Grey’s private declaration of war and confiscation.<sup>13</sup> Instead, of reporting this bellicose

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<sup>10</sup> James Belich, *Making Peoples: A History of New Zealanders from Polynesian Settlement to the end of the Nineteenth Century*, Auckland, Allen Lane/Penguin, 1996, p 231

<sup>11</sup> Grey to Newcastle, 6 April 1863, AJHR, 1863, E-3, pp 22-23. Native Minister FD Bell had also used the term ‘overawe’. Bell memo, 28 October 1862, cited in Parsonson, *Tainui Claims*, p 77

<sup>12</sup> Grey to Newcastle, 9 May 1863, BPP, 1863-64, vol 13, p 365, cited in Parsonson, *Tainui Claims*, pp 94-95

<sup>13</sup> Domett memo, 24 June 1863, AJHR, 1863, E-7, pp 8-9, cited in Parsonson, *Tainui Claims*, pp 97-99  
Apparently no minutes were recorded of the discussion Domett referred to in the Executive Council. See Executive Council minutes, 20 June 1863, EC 1/2, Archives New Zealand, Wellington

and surreptitious decision to London, Grey explained to Newcastle four days before he ordered the invasion, that the Thames expedition plan was a necessary defensive precaution.<sup>14</sup>

A week before he ordered the invasion of the Waikato, Grey alleged in his despatch to Newcastle, that the same 'Chiefs of Waikato' who ordered the murders of Pakeha in Taranaki were 'quite prepared to attack [Auckland] . . . to commit similar murders here'. Grey offered as evidence in support of this allegation letters from Waikato missionaries Robert Maunsell and Benjamin Ashwell, and from one of their Maori assistants (Heta Tarawhiti), all bearing rumours of war. In addition, James Speedy, the Waiuku-based Resident Magistrate, reported rumours that 'disaffected Natives of Ngatiraukawa and Ngatiwhakane [sic], from . . . Maungatautari' were about to 'massacre the Europeans' around the Manukau area.<sup>15</sup> All this evidence was hearsay, and most of it lacked information linking the Kingitanga leadership to anything that could be described as a concerted military plan.

Grey sent to Newcastle on 11 July new documentary 'proof' of 'how completely this plan was matured, and how determined and bloodthirsty were' the Kingitanga's intentions. Grey's proof consisted of three anonymous Maori letters from Raglan dated 3, 4 and 6 July. The second of these referred to how 'letters for the killing of you Pakehas have been sent to all Hauraki'.<sup>16</sup> Grey also enclosed, without explanation in his covering despatch, Rev AG Purchas' report of the official Tamaki Kingitanga representative deploring hostile intent. Tamati Ngapora, then residing at Mangere, on Tuesday 7 July 1863 told Purchas:

He found that the talk of Waikato was very bad, and that many people were proposing to kill the Europeans without delay, while the peaceably disposed were doing their best to defeat these murderous designs, and to persuade the people to ask the Governor to 'whakawa' them for their misdeeds at Te Kohekohe and Te Awamutu.<sup>17</sup>

The 'misdeeds' Ngapora referred to were the Kingitanga's removal of a Crown 'police station' near its Ngaruawahia headquarters at Te Kohekohe in March 1863, and Rewi Maniopotu's effective expulsion of Crown agent John Gorst from Te Awamutu on 18 April

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<sup>14</sup> Grey to Newcastle, 4 July 1863, AJHR, 1863, E-3, p 54, cited in Parsonson, *Tainui Claims*, p 102

<sup>15</sup> Grey ordered the invasion on 11 July 1863. James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, Auckland University Press, 1986, p 119. Maunsell to Grey, 16 June 1863, Ashwell to Selwyn, 23 June 1863, Speedy report, 8 July 1863; encl. in Grey to Newcastle, 4 July 1863, AJHR, 1863, E-3, pp 54-56

<sup>16</sup> Letters from Raglan, 3,4, 6 July 1863, encl. in Grey to Newcastle, 11 July 1863, AJHR, 1863, E-3, pp 60-61

<sup>17</sup> Rev AG Purchas statement, 7 July 1863, encl. in Grey to Newcastle, 11 July 1863, AJHR, 1863, E-3, p 61

1863.<sup>18</sup> Ngapora told Purchas that he would urge the Kingitanga against precipitate action and 'to take care to let the Europeans know before any acts of violence were committed.' Ngapora hoped that if nothing happened immediately, the peacemakers rather than the 'tangata whakahihi' (agitators) would prevail and avert the crisis. He concluded by telling Purchas:

that he hoped the Governor would tell him very plainly if he was going to send the soldiers up Waikato, what the grounds were, that all men might know what to do.<sup>19</sup>

In his first report of the invasion of the Waikato to his imperial superiors (a full fortnight after the imperial troops crossed the Mangatawhiri), Grey stated that this military offensive was necessary to secure 'two posts' (probably Drury and Papakura, which featured in Fulloon's 20 June memo). Grey believed that 'an attack' on these posts 'formed a leading part of the plan of operations that the Chiefs of Waikato proposed to undertake with a view of invading this Settlement [ie. Auckland]'.<sup>20</sup>

Premier Domett's 31 July statement on confiscation treated the conspiracy allegation as 'beyond all question'. It began:

It is now beyond all question that the Native Tribes of Waikato the most powerful in New Zealand are resolved to attempt to drive out or destroy the Europeans of the Northern Island, and to establish a Native kingdom under a Native king. They are determined to try their strength with us, and to allow us no peace until we have inflicted upon them the punishment their acts of aggression deserve.

This was Premier Domett's preface to a declaration of intent to confiscate large areas of Maori land, particularly from offending Waikato tribes, and to establish military settlements on this confiscated land.<sup>21</sup> In forwarding Domett's declaration to London, Grey endorsed it wholeheartedly, because it was indubitably one Grey had prompted. Grey stated:

I feel certain that the Chiefs of Waikato having in so unprovoked a manner caused Europeans to be murdered, and having planned a wholesale destruction of some of the European settlements, it will be necessary now to take efficient steps for the permanent security of the country, and to inflict upon those Chiefs a punishment of such a nature as will deter other tribes from hereafter forming and attempting to carry out designs of a similar nature . . .<sup>22</sup>

<sup>18</sup> MPK Sorrenson's entry on John Gorst; and Gary Scott's entry on Wiremu Te Wheoro in DNZB, vol 1, pp 154-155; 524-526

<sup>19</sup> Rev AG Purchas statement, 7 July 1863, encl. in Grey to Newcastle, 11 July 1863, AJHR, 1863, E-3, p 61

<sup>20</sup> Grey to Newcastle, 28 July 1863, AJHR, 1863, E-3, p 66

<sup>21</sup> Domett memo, 31 July 1863, AJHR, 1863, A-8, pp 2-4

<sup>22</sup> Grey to Newcastle, 29 August 1863, AJHR, 1863, A-8, pp 1-2

Grey added that confiscation was necessary to convince the Kingitanga 'that it is hopeless to attempt either to drive the Europeans from the country' or to yield control to 'a king of the Native race . . .' Confiscation was also necessary to settle Europeans on the land of the offending tribes. If other tribes saw 'that such misconduct is followed by the forfeiture of large tracts of territory which they value highly', they would hesitate before following the example of Waikato.<sup>23</sup>

Ironically, Fulloon/Mautaranui, who fed the conspiracy rumours in May and June, soon came to regret the Pakeha hysteria provoked by press reports of the pan-Maori or Waikato plot.<sup>24</sup> In a private letter written from Auckland in early August to his Native Office colleague, Thomas H Smith, Fulloon deplored that 'we are now in the midst of a war . . . that is daily tending towards that of races'. He went on:

The public are now crying out already for a war of extermination . . . I never could believe that a civilised community could entertain the same bloodthirsty feelings as the Auckland public entertains towards the Natives. I have never witnessed anything like it amongst the Natives.<sup>25</sup>

Henry Sewell, a former and future Attorney General, privately recorded how Grey's misinterpretation of Wiremu Tamihana's 1 August letter fanned the flames of anti-Maori animosity. Tamihana's letter to Grey (as translated) read:

On this very day I came to Waikato with all my tribe [Ngati Haua] . . . [A]bout my letter to the Minister Brown [of Tauranga]; a warning from me to you to bring to the Town [probably Tauranga] the defenceless, lest they be killed at their farms in the country. But you are well acquainted with the customs of the Maori Race.<sup>26</sup>

Grey misunderstood Tamihana's friendly warnings to Rev Alfred Brown. Grey believed these warnings 'to be the beginning of an attack on our settlements generally'.<sup>27</sup> Later, Sewell commented that Brown explained to Grey that Tamihana's letter was nothing but 'a friendly warning of what other [less peaceful] natives might do . . .' Sewell even raised this matter in

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<sup>23</sup> Ibid.

<sup>24</sup> See for example the 7 August 1863 editorial in the Auckland-based paper with the widest circulation in New Zealand: 'The Maori is now known to us as . . . a man ignorant and savage, loving darkness and anarchy, hating light and order; a man of fierce and ungoverned passions, bloodthirsty, cruel, ungrateful, treacherous'. *Daily Southern Cross*, 7 August 1863; quoted in Belich, *NZ Wars*, p 328

<sup>25</sup> Fulloon to TH Smith, 8 August 1863 (Confidential), TH Smith Letterbook, Alexander Turnbull Library, Wellington

<sup>26</sup> Tamihana to Grey, 1 August 1863, AJHR, 1863, E-5c, p 1

<sup>27</sup> Sewell Journal, 9 August 1863, vol 2, pp 190-191, ATL



the Legislative Council.<sup>28</sup> He rejected the allegation that the letter was proof positive of Tamihana's support of a general conspiracy to drive Pakeha into the sea.<sup>29</sup>

Like Fulloon, Sewell found the climate of increasing hostility to all Maori in Auckland during 1863 most disturbing. The incidence of what appeared to be random killings on both sides after the invasion of the Waikato presented, in Sewell's words, the 'dismal prospect of a war of races, each having for its object simply the extermination of the other.'<sup>30</sup> Sewell firmly believed that the man who replaced him as Attorney General in early 1863, Frederick Whitaker, took advantage of this animosity to force through the General Assembly (meeting in Auckland) the New Zealand Settlements Bill (legalising confiscation), and the Suppression of Rebellion Bill (legalising suspension of habeas corpus).<sup>31</sup> When these Bills became law on 3 December 1863, both alluded to Grey's conspiracy allegations in their preamble sections. The Suppression of Rebellion Act began: 'Whereas a combination for the subversion of the authority of Her Majesty and her Majesty's Government has for some time existed amongst certain Aboriginal tribes . . . now . . . in . . . open Rebellion . . .' The New Zealand Settlements Act similarly recited that 'a large number of Inhabitants of several districts . . . have entered into combinations and taken up arms with the object of attempting the extermination or expulsion of the European settlers . . .'<sup>32</sup> Murderous Maori conspiracy became enshrined in law.

### **Invasion of the Waikato**

On the question of responsibility for the escalation of war in 1863, Sewell put it squarely on Grey's shoulders. The invasion of the Waikato, he wrote, 'was the first act of War. It was Sir George Grey's deliberate act, and, of course, it was met by resistance from the natives . . .' This, Sewell believed, had 'nothing of the character of a [Maori] criminal plot to exterminate the settlers, which the [Suppression of Rebellion and New Zealand Settlements] Bills . . . most basely and most falsely alledge [sic] . . .'<sup>33</sup> In the end, Sewell supported the transfer of the colonial capital to Wellington mainly because he saw Auckland in 1863 as rife with 'panic, fear, rapacity, political jobbery and intrigue . . .' Pakeha Aucklanders, Sewell thought, had become 'indiscriminately cruel' towards Maori in

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<sup>28</sup> Sewell, 10 November 1863, NZPD, 1861-1863, p 820

<sup>29</sup> Sewell Journal, 17 November 1863, vol 2, pp 224-225, ATL

<sup>30</sup> Sewell Journal, 17 October 1863, vol 2, p 204, ATL

<sup>31</sup> Sewell Journal, 19 November 1863, vol 2, p 234-235, ATL

<sup>32</sup> NZ Statutes 1863, Nos. 7 & 8, pp 15, 19

their haste to steal fertile Waikato Maori land.<sup>34</sup>

The allegations of Maori conspiracy, which implicated Hauraki people, formed an essential ingredient of the Crown's justification of its invasion of the Waikato. These allegations eventually came to influence the outcome at East Wairoa. The immediate prelude to invasion was the Crown's removal of most of the Maori inhabitants of the Tamaki area between the Waikato and Auckland (including East Wairoa) between 9-12 July 1863. In accordance with Grey's plan as recorded in Domett's 24 June memo, the Native Office prepared a Notice, dated 9 July, calling on all Tamaki Maori to either take an oath of allegiance to the Queen, or 'to . . . retire to Waikato, beyond Mangatawhiri'.<sup>35</sup> In the presence of Rev AG Purchas, Native Undersecretary Henry Halse served the 'Notice' on King Tawhiao's father-in law, and Tamaki Kingitanga envoy, Tamati Ngapora. Ngapora asked Purchas: 'Kua tata ranei te ra a te kotinga witi? (Is the day of harvest close at hand?)'.

Tamati then asked [Halse] why the Governor had not caused an investigation to be made into the wrongs of Waikato before moving the troops? I [Halse] said it was not my business to discuss that question; ample time had been given, and now that the troops had been moved forward to prevent Waikato Natives making an attack on Auckland, I heard of the desired investigation for the first time. Tamati then asked why the Natives could not have their king as well as the pakehas? I replied that I had come to read the notice and not to talk about the Maori king. Tamati, in a thoughtful mood, said that, if he had influence, there should be no fighting. He had dear friends living in the midst of the English, and dear friends living with the Maoris, and would like to know why they were to be killed. He would not cease to urge for the investigation.<sup>36</sup>

In this and another 10 July letter, Halse reported that Mangere Maori had decided to go to Waikato, rather than submit to the Crown. Ngapora thanked Grey for permitting 'his people to depart in peace'. Ngapora still questioned why Grey would not investigate the alleged wrongs of Waikato before attacking them.<sup>37</sup> In the event, virtually all Tamaki Maori refused to take the oath of allegiance, and were forced to flee to Waikato in July 1863.<sup>38</sup>

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<sup>33</sup> Sewell Journal, 17 November 1863, vol 2, p 234, ATL

<sup>34</sup> Sewell Journal, 21 November 1863, vol 2, p 242, ATL

<sup>35</sup> 'Notice to Natives of Mangere, Pukaki, Ihumatao, Te Kirikiri, Patumahoe, Pokeno and Tuakau', 9 July 1863, *Journals of the Legislative Council of New Zealand [JLCNZ]*, 1863, Appendix No 1, pp 3-4

<sup>36</sup> Halse to Native Minister, 13 July 1863, JLCNZ, 1863, App. No 1, pp 5-7. See Steven Oliver's entry on Tamati Ngapora in DNZB, vol 1, p 310

<sup>37</sup> Halse to Native Minister, 10 July 1863, MA 1/1863/867a, RDB, vol 55, pp 21183-4

<sup>38</sup> Halse to Native Minister, 11 July 1863, MA 1/1863/867a, RDB, vol 55, pp 21179-80

When Native Minister Dillon Bell discussed this same 'Notice' with Ihaka Takanini (Te Akitai of Pukaki) on 13 July, he said it was 'owing to the existence of a *conspiracy* to attack Auckland and murder all the Europeans . . .(emphasis added)' Takanini demanded proof, which Bell failed to provide, in the presence of John Gorst. According to Fulloon, Grey ordered the arrest of Takanini 'and the whole of his party' that same day.<sup>39</sup> Grey justified his arrest of Takanini, together with his 20 Akitai followers, by arguing that he had been an active participant in the pan-Maori conspiracy. In an undated memo, Grey wrote very much in the vein of Fulloon's 20 June memo:

A regular plan of military operations, as against the European race, had been agreed on by many Native Chiefs when I arrived in New Zealand. A part of this plan was that Paparata [see Figure 2: Invasion of the Waikato] should be the base of a series of operations against the European settlements; that the minor posts . . . along the South Road [should be attacked] . . . The inhabitants of Tuakau and the people of Ihaka and Mohi [Te Ahi-a-te-Ngu, also Te Akitai] were to take a leading part in these operations [and] . . . did their best to sew dissension between the races . . .

Grey went on with extraordinary allegations against Takanini:

The Government was several times informed that Ihaka was doing his best to raise the Natives against us, especially at the *Wairoa*.

Subsequently a plan was laid for a general rising, and for a massacre of a part of the European population. The chief planners of this were some of Ihaka's people . . .

He would not take the oath of allegiance, and when the troops moved, instead of retiring up the Waikato, [Takanini] fell back, [and fought] with parties of armed hostile Natives . . . (emphasis in original)

Grey concluded by accusing Takanini (without evidence) of having participated in the murders at the Meredith homestead near the Great South Road.<sup>40</sup>

While Grey's unsubstantiated accusations against Takanini did not directly implicate Hauraki people, they followed the pattern of Fulloon's reconstruction of a Hauraki-supported conspiracy. Furthermore, the imperial invasion of the Waikato along the Great South Road invited precisely the Maori flanking actions Fulloon had predicted in his 20 June memo. Although Grey never proved that Takanini had participated in any such military action, on 17 July Ngati Paoa and Ngati Whanaunga forces indeed attacked a military supply train at

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<sup>39</sup> Fulloon to Native Secretary, 2 September 1863, JLCNZ, 1863, App. No 1, pp 8-9. Grey eventually interned Takanini and his Te Akitai followers on Rakino Island in the Hauraki Gulf. Takanini died there in 1864. BJ Dalton, *War and Politics in New Zealand 1855-1870*, Sydney, Sydney University Press, 1967, p 205

<sup>40</sup> Grey memo, nd, JLCNZ, 1863, App. No 1, p 9

Martin's Farm (near the summit of the Bombay Hills).<sup>41</sup> This Ngati Paoa-Ngati Whanaunga action, however, must be seen as an essentially defensive response to the main British advance across the Mangatawhiri on 12 July. Henry Sewell believed the forcible removal of Tamaki Maori announced on 9 July may have provoked the 17 July attack. He asked the Legislative Council in early November:

If the Government had reason to believe that a plot was being concocted to attack the Europeans [throughout the colony], why did they not arrest the ringleaders of that plot.<sup>42</sup>

At the same time, Grey undoubtedly saw the Hauraki attack as confirmation of the conspiracy he had repeatedly alluded to for several years.

Just as Grey had unjustly accused Hauraki people of complicity in an unproven conspiracy, just as he had exiled Tamaki Maori with Tainui ancestry to the battlegrounds south of the Mangatawhiri, he also condemned the Tainui-led Kingitanga as the evil mastermind of the plot to massacre Pakeha. In addition to his 9 July notice to Tamaki Maori, Grey produced a 'proclamation' to 'Nga Rangatira o Waikato' (Chiefs of Waikato) dated 11 July demanding that they submit to imperial and colonial forces, or face the consequences. The consequences of resisting submission to the Crown were that Waikato people would brand themselves 'rebels', and risk having all their land confiscated. The English translation of Grey's notice began:

*Chiefs of Waikato*

Europeans quietly living on their own land in Waikato have been driven away; their property has been plundered; their wives and children have been taken from them. By the instigation of some of you, Officers and Soldiers were murdered at Taranaki. You have since expressed approval of these murders . . .

You are now assembling in armed bands; you are constantly threatening to come down the river to ravage the settlement of Auckland and to murder peaceable Settlers . . .

I am therefore compelled for our own protection to establish posts at several points on the Waikato river, and to take all necessary measures for the future security and safety of all persons inhabiting that district . . .

[It concluded:]

Those who remain in arms, or wage war against Her Majesty, threatening the lives of her peaceable Subjects, must take the consequences of their acts, and they must understand that they will forfeit the rights to the possession of their lands guaranteed to them by the Treaty of Waitangi, which

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<sup>41</sup> Belich, *New Zealand Wars*, p 134; Paul Monin, *This Is My Place: Hauraki Contested 1769-1875*, Wellington, Bridget Williams Books, 2001, p 191

<sup>42</sup> Sewell, 6 November 1863, NZPD, 1861-1863, p 801

lands will be occupied by a population capable of protecting [peaceable Subjects] . . . from the violence with which they are now so constantly threatened.<sup>43</sup>

According to John Gorst (former Crown agent in Waikato), the 11 July date on this 'proclamation' was 'fallacious'. Based on his own first-hand observations, he believed that the first Maori version of the above followed the invasion by several days. Indeed, it was not printed in the *New Zealand Gazette* until 15 July, three days after the invasion.<sup>44</sup>

Gorst's testimony on these events is quite instructive. He witnessed Native Minister Bell's meeting with Takanini at Kirikiri (near Papakura) on 13 July, the day after the invasion. Gorst gave a particularly detailed account of Mohi Te Ahi-a-te-Ngu's explanation of why Tamaki Maori chose to support their Waikato kin instead of the Crown. Mohi explained to Bell that his warnings were too late to deter the Maori retreat from Tamaki. Mohi conceded that Grey may have been within his rights to take action against militants, such as Rewi Maniapoto. But, rather than taking discrete action against Maniapoto and his supporters:

Grey had determined to punish all Waikato. He had crossed Mangatawhiri without notice, and without any investigation into the crimes of Waikato . . . The Pakehas had attacked Waikato. And he [Mohi] should therefore go to join his people, and live or die with them.

Mohi explicitly rejected Bell's statement 'that the cause of the invasion . . . was a secret *conspiracy* to attack Auckland and murder the Europeans (emphasis added)'. In reply, Bell failed to name the conspirators. When Grey had the ailing Ihaka Takanini arrested later that night, Mohi Te Ahi-a-te-Ngu escaped south to join his Waikato kin.<sup>45</sup>

In concluding his account of the escalation of conflict in July 1863, Gorst (like Sewell) lay the blame squarely on Grey's shoulders. He wrote less than a year later:

The immediate result of the invasion was the very evil which the movement had been hurried on to avert. War being declared by the crossing of Mangatawhiri, all those ill-disposed Maories whom Tamihana and his friends had with difficulty restrained in time of peace, swarmed into the Hunua forest, and there carried on guerrilla warfare with the raw colonial levies [militia], in the course of which much property was taken or destroyed, and many out-

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<sup>43</sup> Grey declaration to 'Nga Rangatira o Waikato', 11 July 1863, MA 1/1863/210, RDB, vol 55, pp 21132-21136. Published as 'Notification to the Chiefs of the Waikato/Panuitanga . . . ki nga Rangatira o Waikato', 11 July 1863, NZ Gazette, 15 July 1863, No 29, pp 277-278; RDB vol 11, pp 3764-5

<sup>44</sup> John Gorst, *The Maori King*, London, Macmillan, 1964 (Reed reprint, 2001), pp 162-163

<sup>45</sup> Gorst, *Maori King*, pp 164-165

settlers were murdered . . . All efforts to cut off the marauding parties from the Hunua forest failed; and, in spite of our twenty thousand men in arms, the farms on the skirts of the forest became a mere battleground.<sup>46</sup>

Much of the Hunua forest, of course, became, in January 1865, the East Wairoa confiscation area.

### **Hauraki involvement**

Although Ngati Paoa and Ngati Whanaunga mounted a successful raid on an imperial supply train near Bombay on 17 July 1863, Hauraki people had previously been remarkably peaceful. James Preece (the Coromandel Crown purchase agent) reported in August 1861 that both Ngati Paoa and Ngati Whanaunga were 'disaffected'.<sup>47</sup> On the other hand, G Drummond Hay, his Thames superior, contradicted Preece's report by stating that Ngati Paoa, Ngati Whanaunga and Ngati Tamatera were all 'well affected towards the Government . . .' He described Haora Tipa of Ngati Hura-Ngati Paoa (then living near Taupo) as loyal. He thought Patene Puhata (also Ngati Hura-Ngati Paoa) sympathised with the Kingitanga, but doubted that he would offer his active support. Ngati Whanaunga, with the exception of Hori Ngakapa Whanaunga, were 'loyal'. Hay also noted that Ngati Koheriki, living in 1861 near the mouth of the Wairoa, were 'disposed to join the Waikato Natives'.<sup>48</sup>

Grey in mid 1862 heard of Kingitanga activity in Hauraki. He wrote to Matutaera (or Tawhiao) warning him against 'going to Hauraki with arms and men . . .' Grey declared that such military activity was illegal. Matutaera had 'had no right to interfere' with Hauraki rangatira, whom he named as Taraia Ngakuti, Hira and Kiria. It was also illegal to tell them 'to send away the Europeans . . .' Grey concluded that Matutaera was foolish to offend in this way 'but the law is strong. Although I am patient and forbearing with you[,] I shall not forget [your transgressions] . . .'<sup>49</sup> Hauraki representatives (approximately 20-30 of them) attended the Kingitanga hui at Peria (near Matamata) in October 1862. The hui opposed the resumption of hostilities in Taranaki, it called for a public inquiry into the Waitara dispute,

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<sup>46</sup> Gorst, *Maori King*, p 167

<sup>47</sup> Preece report, 19 August 1861, AJHR, 1862, E-7, pp 13-16

<sup>48</sup> G Drummond Hay report, nd, AJHR, 1862, E-7, pp 11-12

<sup>49</sup> Grey to Matutaera, 9 June 1862, Browne papers, 1/2d, p 162, Archives New Zealand [hereafter ANZ], Wellington

and it supported Wiremu Tamihana's proposal to declare the Mangatawhiri to be the *aukati* for the Great South Road.<sup>50</sup>

Hauraki chiefs led by Taraia Ngakuti of Ngati Tamatera endorsed the Crown campaign to isolate Taranaki 'rebels' in May 1863.<sup>51</sup> The Hauraki attack on the imperial supply line on 17 July was not a whole-hearted declaration of hostilities. Ngakapa later attributed this action to a wish to avenge the death in Taranaki of Wetini Taiporutu (a Ngati Haua relative of Ngati Whanaunga) earlier that year.<sup>52</sup>

When the Crown planned its 'Thames Expedition' in October and November 1863, officials still refrained from describing Hauraki as hostile territory. Native Secretary Edward Shortland opposed the imposition of a naval blockade on the grounds that it would punish peaceful Hauraki Maori whom the Crown had 'frequently assured that if they remained quiet they would not be interfered with'. Shortland maintained that although 30 Ngati Paoa had joined the Kingitanga in Waikato, 'the rest remain under the friendly influence of [Patene] Puhata, Haora Tipa and Tamati'. A naval blockade, he thought, would punish these people. The Kingitanga frequently warned Hauraki Maori that the Crown would turn against them when it 'felt . . . strong enough . . .'.<sup>53</sup> Grey, nonetheless, went ahead with the Thames Expedition that same month, to establish the line of redoubts from the Waikato River to the Gulf he had discussed with his Ministers in June.<sup>54</sup> As Officer commanding the Thames Expeditionary Force, Colonel George Carey recorded establishing the Miranda Redoubt at Pukorokoro, the Esk Redoubt at Maiapu, and his forces sacked the Maori position at Paparata 'capable of holding some 700 Natives'. Carey proposed building the Surrey Redoubt in a more commanding position nearby. This completed a defensive line from the Firth of the Thames to the Queens Redoubt on the Great South Road at Pokeno.<sup>55</sup>

Grey sought to use this line to seal off Kingitanga infiltration into the Hunua guerrilla staging area, and to destroy the Kingitanga defensive line from Paparata in the east to

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<sup>50</sup> Bishop Selwyn's report, 23-27 October 1862; Te Hokiioi report, 10 November 1862, AJHR, 1863, E-12, pp 9-12, 14-16

<sup>51</sup> Taraia and others (on behalf of 'all the Hauraki tribes') to Bell, 25 May 1863, AJHR, 1863, E-3, p 62

<sup>52</sup> James Cowan, *The New Zealand Wars: A History of Maori Campaigns and the Pioneering Period*, Wellington, Government Printer, 1983, Vol 1, pp 255-257; Paul Monin, *Hauraki Contested*, pp 172-4

<sup>53</sup> Edward Shortland memo, 2 November 1863, MA 1/1863/342, RDB, vol 55, pp 21153-60

<sup>54</sup> Domett memo, 24 June 1863, AJHR, 1863, E-7, pp 8-9, cited in Parsonson, *Tainui Claims*, pp 97-99

<sup>55</sup> Col. George J Carey to Col. Gamble, 5 December 1863, NZ Gazette, 16 December 1863, No 64, pp 536-7; RDB vol 11, pp 3849-50

Pukekawa in the west. Belich refers to that Kingitanga line as the Meremere line.<sup>56</sup> The late 1863 destruction of the Meremere line, and the construction of Surrey Redoubt within sight of the ruins of the Kingitanga Pa at Paparata, followed a dramatic guerrilla campaign.

Hori Ngakapa Whanaunga launched this 5 month Kingitanga guerrilla campaign out of the Hunua ranges when he led the 17 July attack on the imperial supply train at Martin's Farm. Belich believes this campaign to tie up 'most of [General] Cameron's manpower' was one of the most successful military actions during the New Zealand Wars. Belich describes how Kingitanga guerrillas:

often remained at temporary camps deep in the bush during the day, and travelled at night, sometimes attacking at dawn. They ambushed messengers, sentries, and other individuals. They drew small parties of troops into the bush, and inflicted casualties on them. They launched, but rarely pressed home, attacks on strong patrols and redoubts.<sup>57</sup>

Belich concludes that this Hunua guerrilla campaign 'was not a scattering of revenge raids, but a co-ordinated part of a well-planned and effective Maori strategy . . .' About 1,500 Kingitanga guerrillas succeeded in tying down between 4,000 and 8,000 imperial and colonial troops. These troops found themselves guarding supply lines and South Auckland settlers, instead of fighting at Meremere and Rangiriri in late 1863.<sup>58</sup>

### **The Hunua guerrilla campaign**

Ngati Koheriki living in the lower Wairoa valley appear to have led the guerrilla campaign after the Ngati Paoa-Ngati Whanaunga force commanded by Ngakapa joined the Waikato theatre of operations in preparation for the major engagement at Rangiriri on 20 November. Just before the successful 17 July Hauraki attack, imperial troops took Takinini and his party of 20 Te Akitai people into custody, on suspicion of having aided the guerrillas.<sup>59</sup> Major William Lyon, commanding the Galloway Redoubt (near today's Clevedon), in mid September skirmished with Kingitanga forces (apparently Koheriki) across the Wairoa at Otau.<sup>60</sup> Imperial and colonial troops again fought Kingitanga guerrillas

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<sup>56</sup> Belich, *New Zealand Wars*, pp 135-141

<sup>57</sup> Belich, *New Zealand Wars*, p 137; John Battersby, 'Evidence . . . concerning War and Blokade Issues' (Wai 686, O2) p 10

<sup>58</sup> Belich, *New Zealand Wars*, pp 140-141

<sup>59</sup> Col. GF Murray to Asst. Military Secretary, 16 July 1863, AJHR, 1863, E-5, p 9

<sup>60</sup> Lyon to Military Secretary, 15, 15 September 1863, AJHR, 1863, E-5, pp 33-35



operating out of the Hunua area on 22 July near Otau, and also near Drury.<sup>61</sup> Southern Hunua based guerrillas also attacked General Cameron's main force of 700 men as it attempted to reconnoitre their fortified position at Paparata (near where the Crown eventually established the Surrey Redoubt) on 1 August 1863.<sup>62</sup> On 10 August the commander of the Wairoa Rifle Volunteers (a local militia unit) was astonished to stumble across 'a Maori encampment consisting of thirty-one whares, ranging from twenty to eighty feet in length, and capable . . . of containing about 1,500 persons'. Since it was unoccupied, he torched it.<sup>63</sup> Then, in mid September, the garrison at Galloway Redoubt (near today's Clevedon) skirmished with Koheriki-led forces at Otau on the eastern side of the Wairoa (see Figure 1: East Wairoa confiscation area 1865).<sup>64</sup>

The Koheriki side of the September 1863 Otau engagement was related to James Cowan (author of the first book entitled *The New Zealand Wars*) by Heni Te Kiri Karamu over 50 years later. Heni (also known as Jane Foley), before she became famous for her exploits at Pukehinahina (Gate Pa) in 1864, fought with Koheriki during the Hunua guerrilla campaign. Although she was Te Arawa by descent, Heni lived with her Koheriki relatives in the Maraetai and Otau areas after 1860. She told Cowan:

The Koheriki hapu had a number of villages and many beautiful cultivations, groves of peach trees, and many cattle and horses, on the banks and around the mouth of the Wairoa . . .<sup>65</sup>

She related how the 'white troops' attacked a group of 30-35 Koheriki led by 'Wi Unahi or Wi Koka' at Otau, presumably in September 1863. A month later she participated in an attack on the Trust farm at Mangemangeroa near Howick in which Maori killed both the farm manager and a young European boy (see Figure 2: Invasion of the Waikato 1863). Koheriki therefore led a campaign that was apparently designed to make the residents of Auckland feel insecure and to force the Crown to deploy large numbers of troops to protect the colonial capital.<sup>66</sup> Furthermore, about 100 Ngai Te Rangi, Pirirakau and Ngati Haua guerrillas

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<sup>61</sup> Col. FW Wyatt to Military Secretary, Capt. James Ring to Asst. Military Secretary, 23 July 1863, AJHR, 1863, E-5, pp 10-11

<sup>62</sup> Cameron to Grey, 3 August 1863, AJHR, 1863, E-5, pp 13-14

<sup>63</sup> Lieutenant William Steele to Minister Colonial defence, 11 August 1863, AJHR, 1863, E-5, pp 15-16

<sup>64</sup> Major William Lyon to Military Secretary, 15 September 1863, AJHR, 1863, E-5, pp 33-35; Cowan, *New Zealand Wars*, vol 1, pp 289-290

<sup>65</sup> 'The Story of Heni Te Kiri Karamu' (based on 2,4 January 1919 interviews), Cowan papers, MS 39, f. 41 E, ATL, Wellington

<sup>66</sup> Te Kiri Karamu, Cowan papers, f. 41 E; Cowan, *New Zealand Wars*, p 262

reinforced Koheriki in October, despite the fact that the main Kingitanga force was then fortifying their defences against Cameron's main invading force along the Waikato River.<sup>67</sup>

According to former Attorney General William Swainson, the Hunua guerrilla campaign created panic among the settler citizenry. He calculated that between 12 July and 27 October 1863, the guerrillas had inflicted the following casualties in the Tamaki area north of the Mangatawhiri:

	Killed	Wounded
Troops	18	37
Settlers	18	1
Totals	36	38

Swainson recorded privately:

Stockades as places of refuge for the outsettlers have also been built at 7 different places, Waiuku, Mauku, Pukekohe, Wairoa [today's Clevedon], Papakura Valley and Howick. And *exclusively for the regular Military force* there are between Auckland and Waikato . . . about 6000 men. Yet in spite of various forts, Flying Columns &c Houses are destroyed and Settlers Murdered at Wairoa, Mauku &c . . . far from keeping the district clear of Natives, the Natives are now more murderous . . . (emphasis in original)<sup>68</sup>

In fact, as Swainson pointed out, the Hunua guerrilla campaign meant the Crown could never deploy more than 1800 men at the Meremere-Rangiriri front during October and November when Cameron engaged the main Kingitanga force in conventional combat. Settler panic and the vulnerability of the imperial supply lines forced Cameron to deploy 6000 troops along the Great South Road and around the southern approaches to Auckland.<sup>69</sup>

Grey was so shaken by the success of the Hunua guerrilla campaign that, in August 1863, he collaborated with Colonial Defence Minister Thomas Russell to form New Zealand's first uniformed counterinsurgency force. This was the Forest Rangers, commanded by Papakura settler Lieutenant William Jackson, and it included both that celebrated Prussian mercenary Gustavus von Tempsky and the equally renowned Charles Heaphy (whom they used as a scout).<sup>70</sup> Grey and Russell authorised the formation of the Forest Rangers as a specially trained and highly paid 'Flying Column':

<sup>67</sup> The Ngati Haua contingent included two of Wiremu Tamihana's sons, Te Hoera, and Tana Taingakawa. Te Kiri Karamu, Cowan papers, f. 41 E

<sup>68</sup> William Swainson, 'Notes on the Maori War 1863-1864', Grey papers, GNZ MSS 226, APL

<sup>69</sup> Belich, *New Zealand Wars*, pp 140-141

<sup>70</sup> See the respective entries on Heaphy and Tempsky, DNZB, vol 1, pp 181-183; 529-531

for the purpose of following up the natives in the Bush and scouring the Hunua Ranges in the manner described this morning in conversation with His Excellency the Governor.<sup>71</sup>

One of the first actions of the newly formed Rangers was a highly dangerous night reconnoitre of the Kingitanga base at Paparata. Then the Rangers participated in the November 1863 Thames expedition designed to seal off the Kingitanga's southern access to the Hunuas.<sup>72</sup>

The Hunua guerrilla campaign should not be seen in isolation from Grey's conspiracy theory, and his allegations of Hauraki complicity in it. On the day after the Hauraki attack at Martin's Farm, Rev John Morgan (the CMS missionary at Otawhao or Te Awamutu), informed Grey that the Kingitanga would attack Auckland via Hauraki. One of Morgan's Maori teachers wrote:

The army for the destruction of Auckland have started. They will assemble at Kirikiri [near Papakura] . . . Ngatiwhatua, 300 men (will assemble) at Okahu [near Orakei] to destroy the town (Auckland). Ngatipawa [sic] (will land) at Mange[mange]roa (near Howick) also to attack the town. Waikato will show themselves at Kirikiri and at the Ia (Mangatawiri [sic]) to fish (draw) out the soldiers while Ngatiwhatua storm the town.<sup>73</sup>

Although the allegations of the Ngati Whatua role in the plot were preposterous, the October Koheriki attack on Mangemangeroa suggests that the Kingitanga had devised a well planned harrassment campaign. Koheriki, indeed, were often seen as Ngati Paoa, or Marutuahu, people.<sup>74</sup> Perhaps Grey had grounds for believing his own conspiracy theory, although Morgan and he completely misunderstood the defensive nature of the Kingitanga strategy.

Morgan reported to Governor Browne (who moved to Hobart in 1861) that Grey 'got alarmed' when he received several warnings (including one from Kingitanga supporter Aihepene Kaihau) on the rumoured attack on Auckland. Morgan repeated the Hauraki complicity allegations to Browne:

Sir G. Grey received private information . . . that a portion of the Thames and Kaipara natives had agreed to a combined attack on Auckland. The Waikatos .

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<sup>71</sup> Thomas Russell to William Jackson, 6 August 1863, Forest Rangers' file, Grey papers, GNZ MSS 177

<sup>72</sup> 'A Secret Expedition [to Paparata] by Night', October 1863; Narrative of Thames Expedition, November 1863, Thomas McDonnell papers, NZMS 406, APL

<sup>73</sup> Hohaia Ngakiwi to Morgan, 18 July 1863, Browne papers, 1/2d, pp 194-195

<sup>74</sup> Heni Te Kiri Karamu described Koheriki in 1919 as 'a subtribe of Ngati Paoa'. 'The Story of Heni Te Kiri Karamu', Cowan papers, f. 41E

. . . were to enter by the Wairoa valley and roads from Mangatawhiri . . . , the Thames by canoes and the Kaiparas from the north.

Grey summoned Morgan to the Native Office (apparently in June or July) to map 'every dray road and every maori path' from Waikato to Auckland. Morgan predicted that, if Cameron attacked down the Great South Road, 'the Waikatos would enter by the Wairoa and Hunua ranges . . . Sir George enquired about the Wairoa roads, the number of natives amongst the Wairoa settlers [and] the probable effect' of Cameron's invasion. Grey told Morgan 'that immediate measures should be taken to secure the Wairoa district'. Grey evidently saw the Hunuas as the Crown's achilles heel, and ultimately the Crown confiscated East Wairoa to eliminate any future threats to Auckland.<sup>75</sup>

Morgan also kept Grey up to date with the effects of the Hunua guerrilla campaign because he took fortnightly services at Wairoa during the second half of 1863. In late July he buried two Wairoa settlers. In a 27 July postscript, he predicted that 'Drury, Papakura and the Wairoa promise to be the great battle fields [of the Kingitanga counterattack] . . .'<sup>76</sup> After discussing the situation with Grey for nearly two hours on 28 July, the two agreed:

1. That the natives had started to attack Auckland.
2. They were to cross the [Hunua] ranges and muster at Kirikiri . . .
3. That ambushes would be laid between Otahuhu and Drury . . .
4. That Wm. Thompson had opposed the attack . . .
5. That Waikato as a body had agreed to it.
6. That 300 of the Ngatiwhatua would muster at Okahu to attack Auckland and that Ngatipaua [sic] of the Thames were to land at Howick for the attack . . .
7. That Waikato would attack Mangatawhiri [sic] and Drury and Papakura to draw away the troops from Auckland when Ngatiwhatua would make their attack . . .<sup>77</sup>

Grey told Morgan that he would defeat the Kingitanga militarily by putting armed steamers on the Waikato River, and by seizing Ngaruawahia. He then stated 'that he would confiscate the whole of Waikato excepting the lands of the loyal natives', and that, 'within six months' he would 'have 10,000 settlers in Waikato'. Grey talked very openly to Morgan, who

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<sup>75</sup> Morgan to Browne, 20 July 1863, Browne papers, 1/2d, pp 196-198, ANZ, Wellington. Grey's private secretary summoned Morgan to Government House on 15 July to discuss 'native canoes and . . . the track past' the Kingitanga base at Paparata. See to Morgan, 15 July 1863, Browne papers, 1/2d, p 203

<sup>76</sup> 27 July postscript to Morgan to Browne, 20 July 1863, Browne papers, 1/2d, pp 199-200

<sup>77</sup> 28 July postscript to Morgan to Browne, 20 July 1863, Browne papers, 1/2d, pp 200-201

evidently supported all these measures, about the 'probable consequences of the confiscation of Waikato . . .'<sup>78</sup>

Grey continued to confide in Morgan during August. He also relied a great deal on Morgan's estimation of Kingitanga morale. Morgan estimated that the Kingitanga would not submit until half their warriors had fallen in battle. His estimates of the numbers of Hunua guerrillas had proven accurate. 'It really is true', he wrote, 'that they threatened Auckland and the [Tamaki] out settlements'.<sup>79</sup> Morgan attempted to take church services at Urungahauhau (just north of Otau) in late August, but the resident Maori refused. They told him:

You come here defiled with blood (alluding to the war) you offer up prayers for the Queen, Prince Albert and the Royal Family. You endeavor to promote the pakeha mana and to lessen ours. We do not wish to have prayers for the Queen etc. and therefore we prefer having our own services.

This was probably the predominantly Kingitanga Koheriki community. Morgan expected Grey to 'expell' them from a strategic position at the foot of the Hunuas, near the mouth of the Wairoa. Morgan also reported that by late August Captain John Wilson (the son of another CMS missionary) had already formed a company of military settlers, ready to move into areas like East Wairoa.<sup>80</sup> In late September, Morgan reported that the 'Wairoa, Mauku and Waiuku districts . . . were entirely at their [the Kingitanga's] mercy. They plunder to within a mile of the stockades'.<sup>81</sup>

By the end of 1863, Morgan could reflect upon the entire Hunua campaign and its relationship to Grey's inauguration of confiscation. He reported to Browne that Auckland was no longer at risk. After the November Thames expedition a 'double line of posts', one in the north along the Wairoa, and one in the south along the Mangatawhiri, sealed off the Hunuas to Kingitanga guerrillas. He looked forward to the European settlement of the Thames, Piako, Waikato and Waipa valleys (partly on confiscated land) making Auckland 'the Prince of Provinces'.<sup>82</sup>

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<sup>78</sup> 28 July postscript to Morgan to Browne, 20 July 1863, Browne papers, 1/2d, p 201

<sup>79</sup> Morgan to Browne, 27 August 1863, Browne papers, 1/2d, p 204

<sup>80</sup> 31 August postscript to Morgan to Browne, 27 August 1863, Browne papers, 1/2d, pp 205-206. Morgan told Grey about the Urungahauhau community the following month. Morgan to Browne, 29 September 1863, Browne papers, 1/2d, p 207

<sup>81</sup> Morgan to Browne, 29 September 1863, Browne papers, 1/2d, pp 207-208

Cowan, in his 1922 'authorised' history of the New Zealand Wars, gave a dispassionate account of how Jackson's Forest Rangers effectively ended the Hunua insurgency in December 1863. They successfully attacked a Koheriki/Ngati Paoa group engaged in Sunday morning devotions on 13 December.<sup>83</sup> Former Attorney General Swainson had a less charitable view of this effective military action. He wrote that the Rangers attacked 'a party of Natives, men, women and children, few of them armed on a Sunday morning . . . while [they were] engaged at Prayers . . .' Swainson believed this attack was more 'Murderous than any attack by the Natives' in the preceding campaign.<sup>84</sup> Grey, however, used the public Pakeha hysteria evoked by the Hunua campaign, and magnified by the colonial press, to drum up political support for his confiscation policy.<sup>85</sup> Although Premier Domett first committed this policy to print in June and July, Grey inspired it, and he began implementing it long before it was legislated in the December 1863 New Zealand Settlements Act.<sup>86</sup>

### Confiscation plans and debate

In communicating Domett's 31 July confiscation memo to Newcastle, Grey explained to his superior in London that the policy was based upon his South African or 'Kafraria' model. Prior to legislative approval (and without imperial instructions), Grey authorised the recruitment of two thousand military settlers on 5 August 1863.<sup>87</sup> He drew upon both his conspiracy theory, and early reports of the guerrilla campaign, in justifying this policy. He wrote:

I feel certain that the Chiefs of Waikato having in so unprovoked a manner caused Europeans to be murdered, and having planned the wholesale destruction of some of the European settlements, it will be necessary now to take efficient steps for the permanent security of the country, and to inflict upon those Chiefs a punishment of such a nature as will deter other tribes from hereafter forming and attempting to carry out designs of a similar nature . . .

Thus the policy was designed to establish Pakeha military settlements in strategic locations (such as East Wairoa) that would give the Crown 'the entire command' of Auckland's fertile

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<sup>82</sup> Morgan to Browne, 30 December 1863, Browne papers, 1/2d, pp 223-224

<sup>83</sup> Jackson report, 14 December 1863, reprinted in Bob Brockie ed., *I Was There!: Dramatic First hand Accounts from New Zealand's History*, Auckland, Penguin, 1998, pp 61-63; Cowan, *New Zealand Wars*, pp 293-294

<sup>84</sup> 'Notes on the Maori War 1863-1864', Swainson papers, GNZ MSS 226, APL

<sup>85</sup> See for example the 7 August 1863 editorial in *Daily Southern Cross*, 7 August 1863; quoted in Belich, *NZ Wars*, p 328

<sup>86</sup> Domett memo, 24 June 1863, AJHR, 1863, E-7, pp 8-9; Domett memo, 31 July 1863, AJHR, 1863, A-8, pp 2-4

Waikato hinterland. Confiscating 'rebel' land, Grey believed, would deter neutral tribes from supporting the Kingitanga in their villainous attempt 'either to drive the Europeans from the country', or to replace Crown authority with Maori authority. He maintained that most reputable tribes would agree that 'such misconduct' of 'Waikato chiefs' should be punished 'by the forfeiture of large tracts of territory which they value highly . . .'.<sup>88</sup>

Newcastle was initially quite troubled by both the scale of confiscation proposed, and the inevitable punishment of the innocent with the guilty.<sup>89</sup> He privately revealed unease that no matter how justified the punishment of the 'Waikatos' was, the evidently unscrupulous settler 'thirst for land' associated with confiscation 'may rouse the alarm of the now friendly Natives and drive them over to the King Party . . .'.<sup>90</sup> Newcastle's last letter to Grey reiterated his concerns. He told Grey that it was bound to be 'difficult for me to defend such a policy in Parliament – where it is almost sure to be attacked – unless I have your reasons for it, and further an explanation of how you propose to carry it out'.<sup>91</sup> Since Newcastle's health deteriorated rapidly during early 1864, he was unable to write another letter to Grey. His Parliamentary Undersecretary, Chichester Fortescue, however, echoed the same cautionary sentiments. With regard to 'the intended confiscation', Fortescue wrote, it seemed 'to be planned on so huge a scale . . .' that Parliament was bound to demur. Newcastle, according to Fortescue, hoped:

That no attempt will be made to push it too far – so as not to distinguish between the guilty and the innocent, or so as not to leave 'ample space . . .' for the Natives, who in their present semi-barbarous state require a much greater extent of country to live and thrive upon, than wd. be enough for an equal number of civilized people. But over and above the question of justice to the Natives, I can't think that the process of colonization can go on so fast as your Ministers seem to contemplate . . .<sup>92</sup>

Imperial reservations about the extent of confiscation expressed in 1863-1864 initially failed to deter Grey and his Ministers. As previously noted, Grey told Morgan as early as July that 'he would confiscate the whole of Waikato . . . [and] have 10,000 settlers' there by early 1864.<sup>93</sup> Grey gazetted on 5 August, 'Conditions upon which Land in the Waikato country . . .

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<sup>87</sup> Grey memo, 5 August 1863; encl. in Grey to Newcastle, 29 August 1863, AJHR, 1863, A-8, p 7

<sup>88</sup> Grey to Newcastle, 29 August 1863, AJHR, 1863, A-8, pp 1-2

<sup>89</sup> Newcastle to Grey, 26 November 1863, *British Parliamentary Papers (IUP)*, vol 13, pp 452-453

<sup>90</sup> Newcastle to Grey, 26 November 1863 (private), Grey papers, GL N4, vol 29, pp 137-138, APL

<sup>91</sup> Newcastle to Grey, 26 December 1863 (private), Grey papers, GL N4, vol 29, pp 142-143

<sup>92</sup> Fortescue to Grey, 26 February 1863 (private), Grey papers, GL, vol 16, pp 119-126

<sup>93</sup> 28 July postscript in Morgan to Browne, 20 July 1863, Browne papers, 1/2d, pp 200-201, ANZ, Wellington

will be granted to [military] settlers . . .'<sup>94</sup> He then sent Native Minister Dillon Bell, ex-Waikato Crown agent John Gorst, and Major William Lyon (commander of the main Wairoa military post) to the Australian goldfields to recruit military settlers during August.<sup>95</sup> By late August Captain John Wilson had recruited almost 100 men in New Zealand to form 'one of the companies of Military Settlers for the Waikato'. Colonial Defence Minister Thomas Russell told Wilson that his recruits 'would be located on good land and that the Government felt anxious to fill up the Waikato as quickly as possible'.<sup>96</sup>

Encouraged by the success of recruiting military settlers with promises of free and fertile land, Domett and Grey announced greatly expanded confiscation plans in October. These new plans called for 20,000 settlers on 2.7 million acres of confiscated land, not just in Waikato but throughout the North Island.<sup>97</sup> According to Ann Parsonson, Grey failed to forward this greatly expanded confiscation proposal to his superiors in London.<sup>98</sup> Nonetheless, Newcastle probably found out about this from Gorst's 24 December 1863 letter to *The Times*, which was highly critical of the New Zealand 'war of extermination'. Two days later Newcastle began his last letter to Grey by expressing concern that he had received no recent official reports on 'the Confiscation of the Lands of the Waikatos and other Natives in rebellion'.<sup>99</sup>

Frederick Whitaker succeeded Domett as Premier before confiscation legislation could be prepared. Although Sewell initially held Whitaker (the man who apparently drafted the New Zealand Settlements Bill) responsible for a policy 'to seize all the native lands south of Auckland from Tauranga . . . to Raglan . . . [in all] about 6 or 7 million acres . . .', he later recognised that Grey called the shots.<sup>100</sup> Sewell, upon resuming the Attorney General position in late 1864 wrote that the confiscation 'Policy of 1863 [was] unmistakeably . . . Grey's and the late Ministers did but carry it out'.<sup>101</sup> When Whitaker moved the second reading of the Bill in the Legislative Council in November, Swainson (another ex-Attorney General)

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<sup>94</sup> 'Conditions upon which Land in the Waikato country . . . will be granted to [military] settlers . . .', 5 August 1863, NZ Gazette, 1863, No 35, pp 303-308; RDB, vol 11, pp 3773-6

<sup>95</sup> Dalton, War and Politics, pp 188-189; Entry on 'Military Settlers' in Ian McGibbon ed., *The Oxford Companion to New Zealand Military History*, Oxford University Press, Auckland, 2000, pp 325-326.

<sup>96</sup> 31 August postscript in Morgan to Browne, 27 August 1863, Morgan papers, 1/2d, pp 205-206

<sup>97</sup> Domett, 'Memorandum on Roads and Military Settlements . . .', 5 October 1863, AJHR, 1863, A-8a, pp 1-12

<sup>98</sup> Parsonson, *Tainui Claims*, p 136

<sup>99</sup> Editor's [Ken Arvidson's January 2001] Introduction to Gorst, Maori King, pp ix-xi; Newcastle to Grey, 26 December 1863 (private), Grey papers, GL N4, vol 29, pp 142-143, APL

<sup>100</sup> Sewell Journal, 17 November 1863, vol 2, pp 214-219



criticised it as one that 'set aside a treaty which had been entered into by the Crown . . .' He reminded the Council that Newcastle (in his 22 March 1863 instruction to Grey) had called for a policy consistent with 'the expectations which the Maoris have been allowed to base on the Treaty of Waitangi, and the apprehensions which they have been led to entertain respecting the observance of that treaty'.<sup>102</sup> Swainson also supported sentiments Tamati Ngapora and Mohi Te Ahi-a-te-Ngu expressed in July regarding the pressing need for a commission of inquiry into the causes of the Waikato war. In a veiled reference to Grey's back-down on Waitara, he said that the Crown should avoid repeating the past mistake of 'acting before inquiring'. He concluded by appealing to Maori (who were then not represented in the General Assembly) to forsake 'the vain hope of maintaining a separate nationality' in favour of 'hold[ing] fast to the Treaty of Waitangi and to the rights and privileges guaranteed to them as subjects of the Crown'.<sup>103</sup>

Daniel Pollen (later to become a Commissioner of Confiscated Lands) made even more explicit reference to the Bill's violation of the Crown's obligations under the Treaty of Waitangi. Pollen, as a young man, witnessed the Crown's solemn undertakings at Waitangi on 6 February 1840. He knew how Maori soon suspected bad faith when it appeared that the Crown's real object was not to protect its Maori subjects, but 'to obtain possession of the[ir] lands . . .' The Settlements Bill brazenly confirmed Maori suspicions. It would enable the Crown to take these lands by force, and to abrogate . . . the Treaty of 1840'. He believed that Maori would defend their land rights with their lives, so that only by 'extermination' could the Crown make confiscation effective. The inhuman consequences of confiscation convinced Pollen that it was 'immoral, and could not be made profitable financially'. He knew the measure had popular support, but he hoped imperial authorities far from the fray would intervene to uphold 'the dictates of justice, good faith and public honour'.<sup>104</sup>

Earlier, in the House of Representatives, James Edward FitzGerald (later to implement confiscation as Native Minister) condemned the New Zealand Settlements Bill as an 'enormous crime perpetrated against a race to whom we have refused the right of representation in this House . . . and who are unable to appear at our bar to plead their cause'.

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<sup>101</sup> Sewell Journal, 14 December 1864, vol 2, pp 289-290

<sup>102</sup> New Zealand Settlements Bill, 16 November 1863, NZPD, 1861-1863, pp 869-870; Newcastle to Grey, 22 March 1863, AJHR, 1863, E-3, pp 71-72

<sup>103</sup> Debate on New Zealand Settlements Bill, 16 November 1863, NZPD, 1861-63, p 871

<sup>104</sup> New Zealand Settlements Bill, 16 November 1863, NZPD, 1861-1863, pp 871-872

Like Swainson, FitzGerald argued that confiscation was 'contrary to the Treaty of Waitangi, which had distinctly guaranteed . . . that the lands of the Natives shall not be taken from them except by ordinary process of law . . . within the meaning of the Treaty'.<sup>105</sup> Premier Whitaker defended both the confiscation policy and its accompanying evocation of martial law in the Suppression of Rebellion Bill by arguing that the Kingitanga conspiracy called for a vigorous response. He told the Legislative Council that the Crown had reliable evidence:

That an attack upon Auckland was determined by the Natives, to take place on the 17<sup>th</sup> July . . . but their [the Kingitanga's] march to the city had been prevented by the . . . General in crossing the Maungatawhiri [sic] and placing troops in different positions to prevent it.

Whitaker argued that Cameron's preemptive strike saved Auckland. He asserted that Grey had a letter 'announcing this attack . . . written by Matutaera himself' (that neither he nor Grey ever produced). He also reminded members that the destruction of life and property during the Hunua campaign justified emergency measures.<sup>106</sup>

The government carried the day with both the New Zealand Settlements and Suppression of Rebellion Bills. Whitaker and Native Minister William Fox introduced both bills on 4 November.<sup>107</sup> Despite the bitter debate, they were rushed through both the House of Representatives and the Legislative Council in less than a month before receiving Grey's assent on 3 December 1863.<sup>108</sup> As previously stated, Grey's allegations of a Maori conspiracy featured in the text of the New Zealand Settlements Act. More importantly for the later East Wairoa confiscation, the Hunua guerrilla campaign formed an essential backdrop to the passage of both measures in the Auckland-based General Assembly.

Grey highlighted his need to justify the 3 December 1863 Acts, by attempting once again to 'prove' his heinous Maori conspiracy. Two days after assenting to the Acts, he sent London 'conclusive' evidence of this conspiracy. He produced a letter from a Maori Methodist teacher, Wiremu Patene, dated 28 November. In it Patene reported that the Kingitanga decided to attack Auckland shortly after the Crown, in June 1863, arrested Aporo Taratutu (a Ngati Maniapoto leader) there. According to Patene, the attacking force reached

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<sup>105</sup> New Zealand Settlements Bill, 5 November 1863, NZPD, 1861-1863, p 784

<sup>106</sup> Suppression of Rebellion Bill, 13 November 1863, NZPD, 1861-1863, pp 855-856

<sup>107</sup> Executive Council Minutes 30 October 1863 [EC] Vol 2, p 552, ANZ, Wellington; NZPD 1861-1863 pp 749, 769; Parsonson, 'New Zealand Settlements Act 1863', Wai 143, I22, p 27

<sup>108</sup> Suppression of Rebellion Act; New Zealand Settlements Act, NZ Statutes, 1863, Nos. 7 & 8, pp 15-23

Maramarua when Cameron crossed the Mangatawhiri on 12 July.<sup>109</sup> Grey wrote that this revealed what the Crown had 'known . . . for a considerable time' prior to 12 July. The Kingitanga, according to Grey, planned:

to establish a line of posts in a forest range [the Hunuwas], extending from the Waikato to the river Thames the central point of which position was to be at Paparata. They would then in the event of our moving from Auckland operate on our flank, and constantly cut our line of communication with our advanced posts.

This was probably a fair description of the Kingitanga's counter-offensive strategy, but Grey twisted Patene's account to make it appear a dastardly plot. He claimed that when Cameron 'crossed the Maungatawhiri [sic] their [the Kingitanga's] leading forces had already passed up the Maramarua to occupy Paparata . . .'<sup>110</sup> He failed to tell Newcastle that Maramarua and Paparata were on the Waikato side of the Hunua ranges, so that the Kingitanga were in no position to threaten Auckland militarily when Cameron invaded their territory on 12 July.

When Sir William Martin, the retired Chief Justice, came to the defence of Maori in his late 1863 critique of confiscation, Grey again reiterated his conspiracy theory. Martin argued that the 12 July invasion may have forced Maori to defend themselves.<sup>111</sup> Grey countered that the longstanding Kingitanga plot to attack Auckland refuted Martin's argument. In such circumstances, Grey wrote, the Crown's invasion was 'for the protection of the quiet and peaceable against the armed and turbulent . . . plotting their destruction . . .' He also produced yet another Maori statement which, he claimed, 'shows that the Waikato natives did their utmost . . . to induce William Thompson [Wiremu Tamihana] to join them with his tribe in a simultaneous attack upon the European population'.<sup>112</sup> This statement, made to Native Secretary Edward Shortland, however, was really less about an attack on Auckland, than an attempt to get Aporo Taratutu released from prison there. Tamihana was prepared to pay the Crown to release him, but he was unwilling to participate in military action 'because, in his judgement, he perceived no just cause'.<sup>113</sup> This was hardly the 'smoking gun' that Grey made it out to be.

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<sup>109</sup> Wirema [sic] Patena [sic] to Friends, 28 November 1863; encl. in Grey to Newcastle, 5 December 1863, BPP, 1862-64, vol 13, pp 503-504

<sup>110</sup> Grey to Newcastle, 5 December 1863, BPP, 1862-64, vol 13, p 503

<sup>111</sup> William Martin, 'Observations on the proposal to take Native Lands under an Act . . .'; encl. in Grey to Newcastle, 6 January 1864, AJHR, 1864, Appendix to E-2, pp 4-17

<sup>112</sup> Grey to Newcastle, 6 January 1864, AJHR, 1864, Appendix to E-2, p 1

<sup>113</sup> Edward Shortland note, 6 January 1864, encl. in Grey to Newcastle, 6 January 1864, AJHR, 1864, Appendix to E-2, pp 18-19. Only after the 17 July Koheroa clash was Tamihana willing to fight.

Matutaera's own account and other Maori reports (not used by Grey) of the so-called plot are seldom cited. Writing to Ahuriri chiefs Renata Tamakihikurangi, Karaitiana Takamoana and Te Wirihana Toatoa on 21 August 1863, Matutaera gave a straightforward explanation of the Crown's actions. Matutaera believed that Grey resolved to invade Waikato 'when I went to Hauraki [in mid 1862] . . . and although he went to Taranaki [in early 1863] his thoughts were upon Waikato'.<sup>114</sup> The Ahuriri chiefs made their own inquiry into the origins of the conflict. They sent their own agent 'to the seat of war to make enquiries . . .' According to the chiefs:

His report was that the Governor's war had not been caused by the murders [of outsettlers] as the Pakehas alleged . . . The only ground[s] that could be alleged were—first the expulsion of Maoris from Auckland, from their own lands, and the burning of their properties and houses; and secondly, the crossing of the Mangatawhiri.<sup>115</sup>

In a further letter the same chiefs repeated their belief that, contrary to loose Pakeha talk, Maori 'murders' of outsettlers had not caused the Waikato conflict. They insisted that Matutaera, Tamihana, and other Waikato chiefs had refused to heed Rewi Maniapoto's advice to free Aporo Taratutu forcibly from his Auckland prison. They believed that Waikato fought back only after they were invaded, and after they had seen how the Crown treated Tamaki Maori.<sup>116</sup>

John Gorst quoted these Maori sentiments in his book, *The Maori King*, published in London a few months later. The Maori version of the origins of the Waikato war, he maintained, was irrefutable. In Gorst's words:

No one can deny the truth of Renata's [one of the Ahuriri chiefs] facts. Thus, though the Waikato war may have added somewhat to our reputation for power, it has destroyed what little credit we previously had for benevolence and justice. It has long been a common belief amongst the natives, in spite of assurances to the contrary, that the Pakeha intended, when strong enough, to attack them and rob them of their lands. The invasion of Waikato has proved to them that their apprehension was well founded.<sup>117</sup>

Gorst's wholehearted support for the Maori version of these events should not be taken lightly. He later became a Member of Parliament and the Solicitor-General of the United

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<sup>114</sup> Matutaera to Chiefs of Ahuriri, 21 August 1863, AJHR, 1863, E-11, pp 1-2

<sup>115</sup> Chiefs of Ahuriri to Dr Featherston (Supt. Wellington), 7 September 1863, AJHR, 1863, E-11, pp 2-3

<sup>116</sup> Chiefs of Ahuriri to Dr Featherston, 19 October 1863, AJHR, 1863, E-11, pp 3-4

<sup>117</sup> Gorst, *Maori King*, pp 168-169

Kingdom. He also appeared for George Rusden in the famous *Bryce v Rusden* case featuring Crown mistreatment of Maori.<sup>118</sup>

Premier Whitaker's explanation of the purpose of the Suppression of Rebellion and Settlements Acts for the benefit of the imperial government failed to cite Grey's conspiracy theory. He stated, simply, that confiscation was 'intended to establish a permanent security against future rebellions . . .' by putting what amounted to an armed force into 'disturbed districts'. He indicated that the Crown had recruited 3,000 military settlers, and 'intended to increase that number to 20,000'. He admitted that the Crown would have to confiscate land from loyal Maori who lived in 'rebel' areas, because of the tribal nature of Maori land rights. The Crown, however, would compensate loyal subjects, in the same way that it compensated those affected by the Crown's exercise of 'eminent domain' in carrying out public works.<sup>119</sup> In forwarding Whitaker's explanation to London, Grey wrote that confiscation was necessary because the war had become 'a war of races'. At the same time, he exhibited reservations that would later lead to conflict with his Ministers. Grey stated that he thought the Crown should not be too severe. He, therefore, 'would not carry the [confiscation] system too far'.<sup>120</sup> Grey's apparent change of heart on the kind of confiscation necessary is hard to explain, but it caused a definite delay in the implementation of the New Zealand Settlements Act.

### **Imperial constraints**

Edward Cardwell, Newcastle's successor as Secretary of State for the Colonies, seized upon Grey's early misgivings. Cardwell's instructions to Grey in April 1864 expressed imperial concerns about the sweeping nature of the 1863 Act. Cardwell believed that the effect of 'the compulsory power of acquiring land within a proclaimed district . . . applied alike to the loyal and the disloyal' would be 'to form a standing qualification of [or to] the treaty of Waitangi'.<sup>121</sup> His remark about the Treaty apparently referred to Article II, by which the Crown guaranteed Maori full and free ownership of all of their property.

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<sup>118</sup> Editor's [Ken Arvidson's January 2001] Introduction to *Gorst, Maori King*, pp vii-ix; Hazel Riseborough, 'Caveat Historicus: *Bryce v Rusden* Revisited', *Australian Journal of Legal History*, vol 1, pp 199-219

<sup>119</sup> Whitaker memo, 4 January 1864, AJHR, 1864, A-1, pp 3-4

<sup>120</sup> Grey to Newcastle, 6 January 1864, AJHR, 1864, D-6, pp 1-2

<sup>121</sup> Cardwell to Grey, 26 April 1864, AJHR, 1864, Appendix to E-2, p 20

Cardwell indicated that, because the imperial government conducted military operations and paid for them, it could 'require that the cession or confiscation of territory shall not be carried further than may be consistent with the permanent pacification of the island and the honour of the English name'. Cardwell insisted that Grey, not his ministers, must control the implementation of the Act. He specified that, if possible, 'the proposed appropriation of land should take the form of a cession imposed by yourself and General Cameron upon the conquered tribes, and made by them . . . as a condition [of] . . . clemency'. Only if Grey failed to compel cession was he to resort to confiscation.<sup>122</sup>

Confiscation, Cardwell wrote, was to be a last resort, and it was to be 'subject to certain reservations'. These were:

- (a) The duration of the New Zealand Settlements Act was to be two years;
- (b) The Crown should announce the 'aggregate extent' and exact location of confiscated land without delay;
- (c) 'Carefully chosen' commissioners were to inquire into what land could be 'properly' confiscated;
- (d) Grey should ensure 'just and moderate' limits to confiscation to ensure that Maori were not driven to desperation;
- (e) Unless their land was absolutely necessary for defensive purposes, the Crown should not confiscate the land of 'loyal or neutral natives', and;
- (f) Grey should 'retain . . . ample power of doing substantial justice to every class of claimant for . . . compensation, and the Compensation Court should guarantee 'complete justice [to] . . . every innocent person'.

Cardwell, however, anticipated more cession than confiscation. He instructed Grey that when he had 'received all the cessions . . . [he deemed] necessary for the permanent pacification' of the North Island, he was to announce a 'general amnesty'.<sup>123</sup>

Cardwell communicated imperial intentions even more directly in his private letter sent on the same day as his official instructions. He confided in Grey that he understood 'that the Plan of establishing Military Settlements is originally your own: derived from your own experience at the Cape [Colony] . . .'. He knew Grey began to have misgivings about the

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<sup>122</sup> Ibid, pp 21–22

<sup>123</sup> Ibid, p 22

scale of confiscation proposed by the Whitaker-Fox ministry. He noted, however, that Grey supported the New Zealand Settlements Act, and the imperial government wished to support him. In Cardwell's words:

We intend to give full effect to what we believe to be your advice, and to limit the measures of cession and confiscation to the requirements of justice, seasoned with mercy.<sup>124</sup>

Cardwell was aware of Grey's potential conflict with his ministers over the implementation of the Act, and in this conflict he believed that Grey must prevail in the interests of justice.

Grey used the confidence the imperial government placed in him to great effect. By October 1864 the Whitaker-Fox Ministry was completely at odds with him, but he was more than a match for colonial politicians. Grey issued his own Peace Proclamation on 25 October against ministerial advice. In this proclamation, Grey pardoned all 'rebels' who were prepared to surrender 'and make the cession of such Territory as may in each instance be fixed' by Cameron and himself.<sup>125</sup> Native Minister Fox told his friend Donald McLean that he did not expect Waikato 'rebels' to heed Grey's Peace Proclamation.<sup>126</sup> Grey was in command, but whether he could muster any colonial support remained to be seen.

When, in November 1864, Frederick Weld took office to replace Whitaker as Premier, Grey believed he could rely upon 'a large majority of the Assembly' to support his views on limited confiscation. He informed Cameron that Weld agreed that the Crown could confiscate immediately only 'land sufficient to meet the promises made to the [military] settlers' recruited since August 1863.<sup>127</sup> Yet Weld's Attorney General, Henry Sewell, soon began recording the same sort of distrust that underlay Grey's conflicts with the Whitaker-Fox Ministry. Sewell ardently opposed the passage of the New Zealand Settlements Bill in 1863. He regarded Grey, not Whitaker, as the man who inspired it.<sup>128</sup> Sewell believed that Grey's refusal to implement the Act in 1864 was an attempt to disguise his role in inspiring it during the previous year. Ironically, Sewell, the man who condemned the Grey-inspired

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<sup>124</sup> Cardwell to Grey, 26 April 1864, (Private), Grey papers, GNZ MSS, 38/2, pp 132–133, APL

<sup>125</sup> Proclamation, 25 October 1864, encl in Grey to Cardwell, 27 October 1864, BPP, 1865–68, vol 14, p 184

<sup>126</sup> Fox to McLean, 12 November 1864, McLean papers, MS32, folio 278, ATL

<sup>127</sup> Grey to Cameron, 22 November 1864, G 36/4, pp 147–148, ANZ, Wellington

<sup>128</sup> See Henry Sewell, *The New Zealand Native Rebellion: Letter to Lord Lyttleton*, Auckland, printed privately, 1864, pp 9, 25–32

'Policy of 1863' as a 'plot against Native Rights' of 'gigantic wickedness', later cooperated with Grey in implementing that policy at East Wairoa and elsewhere.<sup>129</sup>

### **Confiscation in action**

When Waikato 'rebels' failed to cede their land voluntarily before the Peace Proclamation's 10 December 1864 deadline, Grey proclaimed on 17 December an intention to confiscate a vast area without any reference to the New Zealand Settlements Act. The area Grey proclaimed:

that the Governor will retain as land of the Crown . . . [included] all the land in the Waikato taken by the Queen's Forces, and from which the Rebel Natives have been driven . . .

This included virtually all Waikato as far north as the northern extremity of what became the East Wairoa confiscation. In addition, he proclaimed as Crown land all South Auckland 'rebel' land as far north as Waitemata. He did, however, specify in the 17 December proclamation that:

The land of those Natives who have adhered to the Queen shall be secured to them; and to those who have rebelled, but who shall at once submit to the Queen's authority, portions of the land taken will be given back for themselves and their families.<sup>130</sup>

The Executive Council, with Grey and all ministers in attendance, endorsed this sweeping proclamation at its 29 December meeting. The council resolved that within the boundaries Grey had proclaimed on 17 December:

The lands of all Natives believed to have been implicated in the Rebellion shall by Proclamations from time to time issued by the Governor be brought under the provisions of the New Zealand Settlements Act.

At the same council meeting Sewell submitted draft orders bringing the sites of Central Waikato and South Auckland military settlements (not including East Wairoa) under the Act.<sup>131</sup> The council approved Sewell's orders, and published the detailed descriptions of each settlement site in the *New Zealand Gazette*.<sup>132</sup>

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<sup>129</sup> Sewell Journal, 17 November 1863, vol 2, pp 222, ATL

<sup>130</sup> Proclamation, 17 December 1864, NZ Gazette, 17 December 1864, No 49, p 461; RDB, vol 11, p 3980

<sup>131</sup> Executive Council minutes (29 December 1864), EC 1/2, pp 610–613, ANZ, Wellington

<sup>132</sup> Order in Council, 5 January 1865, NZ Gazette, 1865, No 1, pp 1–2; RDB, vol 11, pp 3985–6



Sewell defended these actions against Fox's accusation that the 17 December proclamation confiscated everything that Grey had refused to confiscate under the previous ministry. Sewell maintained that Fox and Whitaker had earlier 'insisted on a principle of indiscriminate confiscation of land'. In contrast, according to Sewell, 'our proclamation limits and defines the maximum extent'.<sup>133</sup> On the face of it, Fox appeared to be perfectly justified in stating that Grey's proclamation of 17 December 1864 signalled confiscation on a massive scale. Sewell's defence, however, suggested that this proclamation only defined the district within which the Crown intended to establish military and other settlements. Whitaker had described his earliest draft orders in the same way.<sup>134</sup> In effect, the act of confiscation was not the 17 December proclamation, but the subsequent 29 December Central Waikato and South Auckland Order in Council that defined specific land to be confiscated within the district proclaimed 11 days earlier.

The pattern of a general proclamation followed by a specific order under the Act appeared to be a logical one. Grey had announced to the Whitaker-Fox ministry in October that he would not bring the New Zealand Settlements Act 'into operation until he had failed in obtaining cessions of land in the manner proposed by the [25 October Peace] Proclamation . . .'.<sup>135</sup> Selected Central Waikato and South Auckland sites, plus East Wairoa, were destined to be the first areas confiscated. When Sewell and Colonial Defence Minister AS Atkinson began to consider these confiscations on 7 January 1865, they did so in relation to Weld's policy of self-reliance. They proposed the formation of 'a purely Colonial quasi military force of about 1500 men' to replace all imperial troops in New Zealand. They also proposed:

The line of defence for Auckland to be the Waikato across to the Thames. Inside that line is to be filled up with settlers as fast as possible . . . For my own part [wrote Sewell] I have no great faith in the military settlement part of the scheme; but I can see that we have strength enough to hold the country and to defend it, so as to prevent adverse occupation by the natives; we have not strength enough to settle and colonize it, and never shall have so long as the Natives remain hostile.<sup>136</sup>

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<sup>133</sup> Sewell Journal, 19 January 1865, vol 2, pp 60–61

<sup>134</sup> Whitaker memo, 18 November 1864, AJHR, 1864, E-2c, p 3

<sup>135</sup> Grey memo, 10 October 1864, encl in Grey to Cardwell, 27 October 1864, BPP, 1865–68, vol 14, pp 166–164

<sup>136</sup> Sewell Journal, 7 January 1865, vol 2, pp 328–329

This suggests that Sewell, initially at least, contemplated an essentially defensive line of military settlements. He seems to have contemplated a *cordon sanitaire* from the Queens Redoubt near Pokeno to Pukorokoro near the Miranda Redoubt on the shores of the Firth in the south, and from perhaps Pukekohe to the mouth of the Wairoa along the northern slopes of the Bombay Hills and the Hunua Ranges.

Such a *cordon sanitaire* was consistent with the visual evidence of Crown intentions, dating back to 1860, regarding the East Wairoa. The Auckland Provincial Surveyor (later to be Forest Ranger scout and supervisor of confiscation surveys), Charles Heaphy, sketched military access to Waikato from Auckland in July 1860. This detailed sketch map showed the position of kainga in the East Wairoa area, and indicated that 'There is a track through the [Hunua] bush at the head of the Maramarua river to Meremere'.<sup>137</sup> Heaphy apparently found this track when he scouted for Jackson's Forest Rangers in the same area during late 1863, and he provided the Crown with its first sketch map of the proposed East Wairoa and Waikato confiscation areas in December 1864. Grey probably commissioned this sketch map in preparing his December proclamation, because Heaphy titled it 'Plan of Confiscated lands set forth in Proclamation of 17<sup>th</sup> Dec /64'.<sup>138</sup> The northern apex of the confiscated area is shown by Heaphy near the mouth of the Wairoa, and it is clearly marked 'Kowhairiki' (obviously Koheriki). The northern apex appears to include the Urungahauhau area north of Otau, an area later excluded at the behest of Ngai Tai. The identification of the northern apex with Koheriki, and two pencilled 'rebel' notations in the East Wairoa area, appears to indicate that Grey wanted to confiscate that area primarily because it had served as a sanctuary for Kingitanga guerrillas in late 1863. The 17 December proclamation referred to the apex as 'the North Eastern boundary of the land of the Kowhairiki Tribe . . .'.<sup>139</sup> The greater detail shown at the northern end of the Bombay Hills and Hunua Ranges is consistent with the Crown categorising East Wairoa as part of a strategic *cordon sanitaire*.<sup>140</sup>

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<sup>137</sup> Heaphy sketch map, 'Auckland and the Waikato', 9 July 1860, Statutory Miscellaneous Plan, AAFV 997/A67, ANZ, Wellington

<sup>138</sup> Proclamation, 17 December 1864, NZ Gazette, 1864, No 49, p 461; Heaphy sketch map, 'Plan of Confiscated lands set forth in Proclamation of 17<sup>th</sup> Dec /64', Statutory Miscellaneous Plan, AAFV 997/A22

<sup>139</sup> Proclamation, 17 December 1864, *New Zealand Gazette*, 1864, No 49, p 461; RDB, vol 11, p 3980

<sup>140</sup> The area Grey proclaimed on 17 December 1864 to be Crown land included 'all the land in the Waikato taken by the Queen's Forces, and from which the Rebel Natives have been driven . . .'. This included virtually

Grey reported his 17 December proclamation to Cardwell in a very ambiguous way on 7 January. He stated that he issued the proclamation with Ministerial support after he consulted General Cameron on what 'might be regarded as conquered territory, and which we thought ought to be ceded to the Crown . . .' Here, again, Grey preferred cession over confiscation. But then he stated that 'in this case in which we were able to fix the boundaries of these lands [in accordance with Heaphy's sketch map] I notified in my Proclamation that such lands would be retained and held as lands of the Crown.' This, Grey thought, was something Waikato people accepted, because they 'had on several occasions declared that they would not in any manner interfere in our occupation of them [ie., conquered lands]'.<sup>141</sup>

Cardwell's advocacy of cession over confiscation always specified a formal cession process, such as that Grey followed in Tauranga in August 1864. Grey's ambiguous reference to an implied Waikato cession as the basis of his 17 December 1864 proclamation must have mystified the assiduous Cardwell. In responding to Grey's proclamation, Cardwell referred to it as defining a much larger area of 'confiscated land' than he had anticipated. On the other hand, he noted that neither loyal Maori nor rebels who had surrendered were to suffer permanent loss of land. Cardwell indicated that he expected Grey to report fully on how Maori were to be informed and affected by the confiscation and compensation processes alluded to in the proclamation. He also warned Grey about the military dangers of an overextended colonial frontier after the departure of Imperial forces.<sup>142</sup>

Cardwell cautioned Grey about the 1864 Act to amend the New Zealand Settlements Act passed just prior to his 17 December proclamation. Premier Weld introduced this new Bill to bring the old Act into compliance with Cardwell's 26 April 1864 conditions attached to cession and confiscation. The General Assembly passed the New Zealand Settlements Amendment Act without serious debate on 9 December 1864.<sup>143</sup> The new Act simply extended the old Act to 3 December 1865, and it allowed the Governor to arrange compensation to parties that he decided were inadequately compensated by the Compensation

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all Waikato south of the East Wairoa confiscation area. Proclamation, 17 December 1864, NZ Gazette, 17 December 1864, No 49, p 461

<sup>141</sup> Grey to Cardwell, 7 January 1865, AJHR, 1865, A-5, p 2

<sup>142</sup> Cardwell to Grey, 27 March 1865, AJHR, 1865, A-6, p 16

<sup>143</sup> Various readings, 24 November-9 December 1864, NZPD, 1864, pp 44, 100, 125, 152, 165

Court.<sup>144</sup> After Grey reported this, Cardwell indicated his displeasure that the Amendment Act did not specify that it would not be extended beyond 1865. He further took exception to the additional compensation provision, because it appeared to encourage out-of-court settlements instead of the proper judicial determination of rights.<sup>145</sup> These matters later became important at East Wairoa because the General Assembly (contrary to Cardwell's explicit instructions) extended the Act well beyond 1865, and out-of-court settlements later featured in the history of East Wairoa.

The Sewell-Atkinson Ministerial 'plans for Colonial defence' proposed on 7 January 1865 (the same day on which Grey reported his December 1864 proclamation and Amendment Act to Cardwell) supported limiting confiscation.<sup>146</sup> Like Grey, Ministers were seeking to keep confiscation within strict limits when the Crown first ordered the East Wairoa area to be 'set apart and reserved' under the terms of the New Zealand Settlements Act in January 1865. Sewell wrote on 19 January that he felt 'sick to see the intense selfishness and rapacity of the people of Auckland' when he met a provincial official dealing with immigrants recruited to occupy confiscated lands.<sup>147</sup> In fact, on the day before Grey signed the first East Wairoa Order in Council, Sewell discussed with former Chief Justice Sir William Martin, and with Bishop Selwyn, his proposal to take 'the whole centre of the Northern Island out of the jurisdiction of the Province . . .' of Auckland. Sewell apparently remained convinced that Aucklanders eagerly awaited a Waikato land rush once the province took over the administration of confiscation.<sup>148</sup>

Grey's 30 January 1865 confiscation order was remarkably cryptic regarding the future of East Wairoa. The order both declared East Wairoa to 'be a district within the provisions of the "New Zealand Settlements Act, 1863"', and it also declared it to be 'set apart and reserved as sites for settlement and colonisation' in accordance with the Act. The geographic description of East Wairoa in the Schedule attached to the order was remarkably imprecise. It referred to the Wairoa River as part of the northern boundary, together with that

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<sup>144</sup> New Zealand Settlements Amendment Act 1864, NZ Statutes, 1864, No 4, p 11; RDB, vol 10, p 3304

<sup>145</sup> Cardwell to Grey, 24 April 1865, AJHR, 1865, A-6, pp 18-19

<sup>146</sup> Sewell Journal, 7 January 1865, vol 2, pp 328-9

<sup>147</sup> Sewell Journal, 19 January 1865, vol 3, pp 28-9

<sup>148</sup> Sewell Journal, 29 January 1865, vol 3, pp 73-4

'set forth' in the 17 December proclamation. In fact, the Wairoa was the northwestern boundary, and the proclamation referred to Koheriki's northeastern boundary. Since Koheriki had only recently inhabited Urungahauhau, and since the Crown failed to publish Heaphy's 1864 sketch map, this boundary line must have been incomprehensible to most Maori in 1865.<sup>149</sup>

An aspect of the 17 December proclamation little noted in relation to East Wairoa was the undertaking to restore the land of surrendered rebels. During early 1864 several Hauraki combatants residing near East Wairoa surrendered their weapons and took the oath of allegiance to the Crown. The surrendered rebels included Wiremu Waitangi of Koheriki who listed his residence as Wairoa. Several other residents of Kaiawa and Haurahi should also have been eligible for compensation under the terms of the December 1864 proclamation.<sup>150</sup> As we shall see, few of these people appeared at the Compensation Court. They probably believed that, as rebels, the 1863 Act disqualified them. Waitangi had to petition Parliament in 1879 to receive belated compensation.<sup>151</sup>

If Grey and his Ministers in January 1865 wanted to keep confiscation within strict limits, imprecise geographic descriptions were not the way to do it. Colonial Secretary Cardwell, writing from London that same month, called for both precision and limitation. Cardwell instructed Grey that he was to limit confiscation to that which was 'most consistent with justice, both towards tribes and individuals, and best calculated to secure the safety of the Colonists.' Cardwell believed that excessive confiscation would weaken rather than strengthen colonial defence, and his Ministers had to depend on their own resources in this regard. He reminded Grey that the Imperial government was determined to withdraw its forces as rapidly as possible.<sup>152</sup>

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<sup>149</sup> Order in Council, 30 January 1865, NZ Gazette, 31 January 1865, No 3, p 15; RDB, vol 11, p 3990

<sup>150</sup> 'Return of Rebel Natives who have subscribed to Declaration of Allegiance . . .', 5 February-31 May 1864, NZ Gazette, 1864, No 22, pp 267-8; RDB, vol 11, pp 3929-30

<sup>151</sup> House Native Affairs committee report, AJHR, 1879, I-2, p 6; Te Wheoro and Fenton evidence, 30 June, RDB, vol 2, pp 774-782; House Native Affairs committee report, AJHR, 1880, I-2, p 6

<sup>152</sup> Cardwell to Grey, 26 January 1865, AJHR, 1865, A-6, pp 11-14

More than anything else, Cardwell believed that the Crown's punishment of rebels had to be both just and merciful.<sup>153</sup> In his official instruction (discussed above), Cardwell set out the judicial standards he expected the Compensation Court (or 'commission') to uphold. These standards were:

- 1 Its membership was to be 'carefully chosen', and it was to inquire into what land should be 'properly' forfeited before any definitive confiscation.
- 2 It was to refrain from punishing 'loyal or neutral' Maori for being joint owners of land with rebels, unless the land in question was essential for defence purposes. And, finally;
- 3 While it was to guarantee 'complete justice [to] . . . every innocent person', he instructed the New Zealand Governor to 'retain . . . ample power of doing substantial justice to every class of claimant for . . . compensation'.<sup>154</sup>

Cardwell clarified the situation further in his instruction a year later regarding the judicial provisions of the New Zealand Settlements Amendment Act. He informed Grey that his discretion to remedy any miscarriage of justice arising from the Compensation Court had to be based on a proper public judicial determination of rights, not on a privately negotiated out-of-court deal. Such deals, or 'settlements', implied 'the concurrence of an authority essentially political [rather than judicial] . . . necessarily reflecting the popular feeling of the moment'.<sup>155</sup> Cardwell, like Attorney General Sewell, believed that New Zealand colonial feeling towards Maori was markedly punitive. He therefore entrusted Grey with the responsibility to ensure the integrity of a judicial regulation of the consequences of confiscation. In the next chapter we shall see whether or not the New Zealand Compensation Court fulfilled imperial expectations in this regard.

Finally, how does the foregoing interpretation relate to established New Zealand historiography? Probably the two most influential interpretations of the Waikato war and its

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<sup>153</sup> Cardwell to Grey, 26 April 1864, (private), Grey papers, GNZ MSS, 38/2, pp 132-133, APL. See my report for the Tauranga Moana inquiry, entitled "'Justice, Seasoned with Mercy": A report on the Katikati-Te Puna purchase', Wai 215, L1, pp 2-3

<sup>154</sup> Cardwell to Grey, 26 April 1864, AJHR, 1864, App. to E2, pp 171-2

<sup>155</sup> Cardwell to Grey, 24 April 1865, AJHR, 1865, A6, pp 18-9

consequences are those summarised in Keith Sinclair and James Belich's general histories.<sup>156</sup> Sinclair's interpretation, first advanced in his book entitled *The Origins of the Maori Wars* (published in 1957), emphasises the inevitability of the outcome. According to Sinclair, in 1860 the more militant 'Kingites . . . were advocating an attack on Auckland' in spite of Tamihana and Tawhiao's opposition.<sup>157</sup> The fundamental issues beneath the conflict between the Crown and the Kingitanga were, in Sinclair's words:

Could the Maoris keep their land, and in particular, the rich lands of Waitara and Waikato? Could they stop or perhaps turn the tide of settlement? . . .  
Could they ignore the authority of Queen and Parliament, and follow their King?

Sinclair implies that Maori could not do any of the above without special concessions from the Crown. The Crown, especially when Grey took over in 1861, was never prepared to allow the Kingitanga to set the terms in what amounted to a struggle for the mastery of New Zealand.<sup>158</sup>

If the influential Sinclair interpretation of the origins of the war emphasised inevitability, so too does Belich in his recent 'myths of empire' interpretation. Drawing on his major study of the New Zealand Wars, Belich believes that the Crown could concede the limits of its control over Maori prior to 1860, but that it became unwilling to yield to the Kingitanga challenge after the outbreak of hostilities that year.<sup>159</sup> One of the most pervasive myths of empire was that empire required direct rule. According to this myth, Maori had to accept their status as obedient subjects of the Crown. The Kingitanga vision of Maori autonomy threatened this pervasive myth. Belich believes that Grey's allegations of 'Kingite conspiracy' were 'false', but the pervasive myth of empire 'necessitated war to make it real'.<sup>160</sup>

Neither Belich nor Sinclair satisfactorily answer the question of whether the Treaty encouraged and protected Maori assertions of autonomy. If this was indeed the case, was the Crown entitled to insist upon loyalty to its own version of kawanatanga without Maori

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<sup>156</sup> Keith Sinclair, *A History of New Zealand*, Auckland, Penguin Books, (revised edition), 2000; James Belich, *Making Peoples: A History of New Zealanders from Polynesian Settlement to the end of the Nineteenth Century*, Auckland, Allen Lane/Penguin, 1996

<sup>157</sup> Sinclair, NZ History, pp 138-140; Keith Sinclair, *The Origins of the Maori Wars*, Wellington, NZ University Press, 1957

<sup>158</sup> Sinclair, NZ History, pp 135-136, 142-143

<sup>159</sup> Belich, *Making Peoples*, pp 230-234

consent? Furthermore, neither Belich nor Sinclair clarify the relationship between war and confiscation. Belich implies that confiscation automatically followed conquest, as though this requires no explanation.<sup>161</sup> Sinclair suggests that the Crown resorted to confiscation in the vain hope that it would pay for the war. He also condemns confiscation as 'the worst injustice ever perpetrated by a New Zealand Government'.<sup>162</sup>

If the East Wairoa example teaches us anything it is that confiscation there cannot have been motivated primarily by profit. The on-sale of confiscated land in the Hunua ranges could never pay for even a small part of the war. Strategic considerations were evidently much more important at East Wairoa. But were these legitimate strategic considerations? Was the myth that empire could subject all Maori to direct rule the converse of another myth: that Maori would willingly choose either to submit completely to Crown authority, or to overthrow it?

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<sup>160</sup> Belich, *Making Peoples*, pp 230-234

<sup>161</sup> Belich, *Making Peoples*, pp 239

<sup>162</sup> Sinclair, *NZ History*, pp 147-148



## Chapter two

### Hauraki rights in East Wairoa

#### The Compensation Court

The Compensation Court heard claims arising from the East Wairoa confiscation in Auckland on 26-27 May 1865. My commission requires me to ask the question: did the Compensation Court adequately inquire into the nature and quantum of Hauraki rights at East Wairoa during 1865-1866?

As explained in my July 2001 scoping report, the Compensation Court heard individual claims, largely in isolation from tribal rights.<sup>163</sup> The Court's focus on individual claims apparently presupposed that individual claimants with tribal affiliations would inevitably represent a larger community. The key Crown agent in Hauraki, James Mackay, who sat with Chief Judge Francis Fenton on the East Wairoa Compensation Court, testified to this effect to the 1891 Native Land Laws Commission. When asked by the Commission chairman William L Rees whether Maori land rights were 'tribal and communal', Mackay answered yes. In the case of Crown transactions with Maori, Mackay believed, it was not possible to obtain the consent of every individual. He said 'a title could not have been obtained in that way'. He agreed with Rees that the customary Maori practice was for 'representatives . . . appointed' by the owners to negotiate on their behalf.<sup>164</sup> The Compensation Court evidently saw individual claimants in this same representative capacity.

The New Zealand Settlements Act 1863 founded the Compensation Court. Section five of the 1863 Act provided for the compensation of 'all persons who shall have any title interest or claim to any Land taken under this Act', provided that such person had not been engaged in rebellion since the beginning of 1863. Section eight established courts for the purpose of considering individual claims for compensation. The Judge of each court, under section thirteen, was required 'to hear the claim and determine the right of the claimant to compensation and the amount of compensation to which he is entitled . . .'<sup>165</sup> Although the

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<sup>163</sup> Barry Rigby, 'Hauraki and the East Wairoa Confiscation', (Wai 686, R17), pp 5-9

<sup>164</sup> James Mackay evidence, 16 March 1891, Report of the Native Land Laws [Rees] commission, AJHR, 1891, G-1, p 42

<sup>165</sup> New Zealand Settlements Act, 3 December 1863, *New Zealand Statutes*, 1863, No 8, pp 19-23; RDB, vol 10, pp 3294-8

1863 Act did not specify that monetary compensation was the only form of compensation available, the Court awarded no land as compensation until after the 1865 amendment made this possible. The 1864 amendment to the Act (applicable at the May 1865 East Wairoa hearing) broadened its compensation provisions. The amendment allowed the Governor to compensate any individual or group to whom 'the Compensation Court shall have refused to award compensation or shall have awarded less compensation than may have been claimed . . .',<sup>166</sup>

Grey apparently negotiated the 1864 amendment with the new Weld ministry to increase his discretion in compensating those eligible under the original act. Although those deemed 'rebels' in section five of the 1863 act were ineligible, section six implied that the Governor could reverse this by providing for their submission to Crown authority. Prior to November 1864, Grey had rejected the previous Whitaker-Fox ministry's hardline on terms of surrender offered to rebels. The Whitaker-Fox ministry refused to support Grey's 25 October 1864 Peace Proclamation by which Grey offered to pardon rebels who submitted to Crown authority by 10 December 1864.<sup>167</sup> Grey's subsequent 17 December 1864 Proclamation, which defined East Wairoa as the northern extremity of a vast Waikato confiscation district, also stated:

The land of those Natives who have adhered to the Queen shall be secured to them . . . the Governor assures [them] of the full benefit and enjoyment of their lands.

Grey further proclaimed that, in the case of rebels 'who shall at once submit to the Queen's authority', the Crown would ensure that 'portions of the land taken will be given back to themselves and their families'.<sup>168</sup> Grey, thus, officially promised loyal Maori that they would not suffer the consequences of confiscation. He also assured surrendered rebels that the Crown would compensate them by returning land to them.

Since most Hauraki 'rebels' submitted to Crown authority during 1864 and 1865, they should have been legally eligible for compensation. In his recent history of nineteenth century Hauraki, Paul Monin cites Mackay as recording the surrender of Ngati Paoa at Whakatiwai in

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<sup>166</sup> New Zealand Settlements Amendment Act, 9 December 1864, NZ Statutes, 1864, No 4, p 11; RDB, vol 10, p 3304

<sup>167</sup> Proclamation, 25 October 1864, NZ Gazette, 1864, No 41; RDB, vol 11, p 3977

<sup>168</sup> Proclamation, 17 December 1864, NZ Gazette, 1864, No 49, p 461; RDB, vol 11, p 3980

early March 1864. Within a year, according to Monin, most other Hauraki groups had come to terms with the Crown.<sup>169</sup>

Subsequent legislation further amended the 1863 Act. Section ten of the 1865 Amendment Act made it possible for the Court to compensate with land, rather than restricting it to monetary compensation.<sup>170</sup> Section two of the Confiscated Lands Act 1867 repeated the provision of the 1864 amendment that allowed the Governor to intervene in cases where the Crown believed the Court had not adequately compensated individuals. After 1867 the Governor could compensate 'such persons of the several hapus or tribes whom he shall consider to be entitled to land' whether or not they had previously been ineligible for compensation.<sup>171</sup>

The government's instructions to the original and supervising judge of the Compensation Court highlighted the narrow emphasis of the 1863 Act. Native Minister Walter Mantell's January 1865 letter appointing and instructing Francis Dart Fenton as 'Senior Judge' in charge of the court restricted him to awards of monetary compensation. Mantell also prescribed that the court would adjudicate:

between the Crown and certain owners or alleged owners of the soil, who may claim to be entitled to compensation upon the compulsory taking of land by the Crown, on the ground that they have remained loyal during the insurrection.<sup>172</sup>

Mantell's instructions said nothing about surrendered rebels, nor did he give Fenton any guidance on how the Court might determine who had been in rebellion during 1863, and who had not.

### **The Court's early operations**

Well before the Crown set up the Compensation Court in early 1865, Maori anticipated a tribunal to hear their claims to confiscated areas. George Clarke, the Civil Commissioner in the Bay of Islands (and former Protector of Aborigines), reported in November 1863 two individual claims for compensation, one out of what became the East

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<sup>169</sup> Monin, *Hauraki Contested*, pp 201-202. See the Hauraki section of 'Return of Rebel Natives who have [sworn] . . . Allegiance', Feb-May 1864, NZ Gazette, 1864, No 22, pp 267-8; RDB, vol 11, pp 3929-30. See also John Battersby's account of several surrenders in March-April 1864. Battersby, *War and Blockade*, pp 12-14

<sup>170</sup> New Zealand Settlements Amendment and Continuance Act, 30 October 1865, NZ Statutes, 1865, No 66, pp 245-248; RDB, vol 10, pp 3323-6

<sup>171</sup> The Confiscated Lands Act, 10 October 1867, NZ Statutes, 1867, No 44, pp 483-485; RDB, vol 10, pp 3386-8

Wairoa confiscation area. Aperaniko Takaukau, a man with Wairoa and Waiohua affiliations, resided in the Bay of Islands after Nga Puhī captured him there (presumably during the Musket Wars). He wanted compensation in land for his not having joined the ‘rebel’ cause, and he claimed a substantial area. Clarke pointed out that the extent of the area Takaukau and another individual claimed was:

preposterous [because] . . . no individual native in New Zealand could make good such a claim, nor would venture upon it before his Tribe: and I need not inform the Government that such a tract of Country as that described and claimed is the joint property of many hundred Natives . . . Doubtless these two families would [only] be permitted to possess and cultivate this land in common with their Hapus . . .

Clarke, nonetheless, saw Takaukau’s claim as an indication of how well Maori understood the Crown’s intentions, even before the passage of the New Zealand Settlements Act.<sup>173</sup>

Eventually, Takaukau was one of three Maori individuals who received Crown grants within the East Wairoa confiscation area.<sup>174</sup>

When the Crown established the Compensation Court in early 1865, one of its first official acts was to prepare a form letter to be sent to prospective claimants. This letter identified ‘the sins of the Waikato Tribes’ as the cause of confiscation. The Colonial Secretary’s letter asked claimants to identify themselves with the following Maori language prompt:

Ko aku hoa i uru ki taua wahi, Ko

The official translation of this was:

My friends who claim that piece of land in common with myself are

The official translation of the form letter was as follows:

This is a word to inform you of my land [toku pīhi whenua] within the boundaries of the land which has been taken by the Governor for the sin of the Waikato Tribes [te whenua tangohia e te Kawana mo te hara o nga iwi o Waikato] — For I am desirous that my claim to the piece in question [toku pīhi whenua] be investigated by the Compensation Court [te Kooti Whakarite].<sup>175</sup>

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<sup>172</sup> Walter Mantell to FD Fenton, 11 January 1865, RDB, vol 101, pp 38983-4

<sup>173</sup> George Clarke Sr to Colonial Secretary, 28 November 1863, RDB, vol 104, pp 40022-5

<sup>174</sup> Mackay note, 20 June 1867, on Takaukau to Fenton, 8 January 1867, RDB, vol 105, p 40478; Ian Barton, *Auckland’s South Eastern Bulwark: A History of the Hunua Ranges*, Hunua, private publication, 1978, p 31

<sup>175</sup> English translation of claim form letter, RDB, vol 100, pp 38330-2

Hauraki claimants must have puzzled over the implication that they were to be held responsible 'for the sin of the Waikato Tribes'. Although Ngati Paoa and Ngati Whanaunga shared Tainui ancestry with Waikato tribes, when Grey gazetted a list of 13 'rebel Tribes' in April 1865, none of them were Hauraki tribes.<sup>176</sup> Moreover, when Mackay later published an official 'Sketch Map . . . Shewing approximately the loyal and rebel Districts' of the North Island, he shaded most of the East Wairoa and adjoining areas with 'Districts in which the minority have joined in the rebellion'. The rebel 'proportion' he gave as one third.<sup>177</sup>

The fact that the Crown styled the Compensation Court 'te Kooti Whakarite' (roughly the court to establish rights) may also have created a set of expectations among Maori claimants. Many Maori would have expected such a court to investigate the source of their land rights. Chief Judge Fenton, reviewing his Compensation Court work decades later, seemed to share this expectation. He told the 1891 Native Land Laws (or Rees) commission that (using a Taranaki example) the Compensation Court:

sat to determine what land in a block belonged to loyal Natives. Their land was to be preserved to them, and the Government was to take the rest . . . [Loyal Maori witnesses would] say that the people in the bush [ie. the rebels] had no title at all . . . [To verify this] was a very laborious business. In each case we had to go to the origin [of their rights] . . . The Court having only one side before it might be easily deceived . . . As a fact, the greatest men [entitled to land rights] were usually rebels. The result was that we gave half the land to the Governor, and half to these people in Court . . .<sup>178</sup>

Although Fenton was here discussing the Court's operations after several years of experience with inquiries, it is still clear that he believed that the Court was obligated to determine the full extent of the rights of loyal Maori. But was that the kind of inquiry he carried out with regard to East Wairoa in 1865?

Although the New Zealand Settlements Act, and its subsequent amendments, provided little statutory guidance for Court procedures, Fenton evidently believed that it needed to begin operations within weeks of his appointment in January 1865. He requested on 4 March 1865 that the Native Minister publish notices regarding East Wairoa and

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<sup>176</sup> Proclamation, 1 April 1865, NZ Gazette, 1865, 7 April 1865, No 11, pp 67-68; RDB, vol 11, pp 4001-02. For a different interpretation, see Battersby, *War and Blockade*, pp 26-28.

<sup>177</sup> Sketch map, AJHR, 1870, D-23. James Mackay showed the Coromandel Peninsula as far south as Ohinemuri in the same category of having a rebel minority. He showed the Hauraki Plains as a district 'in which the majority have joined the rebellion'. The rebel 'proportion' there he put as high as five sevenths.

<sup>178</sup> Fenton evidence, 18 March 1891, Report of the Native Land Laws [Rees] commission, AJHR, 1891, G-1, p 48

Taranaki confiscations.<sup>179</sup> Tom Bennion, in his 1997 report on the East Wairoa confiscation, noted some of the problems arising from Fenton's haste to begin hearings. Bennion also criticised the way the Crown applied different sections of the 1863 Act to East Wairoa. The following paragraphs look first at the application of the Act, and then at the Court's preparation for its May 1865 East Wairoa hearing.

### **Procedural problems**

Grey issued his 17 December 1864 proclamation of rebel areas (including East Wairoa) without reference to the terms of the Act. Even Fenton believed that this meant that the proclamation had 'no legal operation . . .'.<sup>180</sup> Bennion believed that the Crown's 30 January 1865 Order in Council confiscating the East Wairoa area also failed to implement section four of the 1863 Act that explicitly declared the confiscated area 'to be Crown land freed and discharged from all [Native] title, interest or claim'. He argued also that the Crown failed to publish the 30 January confiscation Order in Maori.<sup>181</sup>

Bennion identified further procedural problems with the Crown's notification of the East Wairoa confiscation boundaries. The January 1865 Order simply reiterated the imprecise northeastern boundary of the December 1864 proclamation ('to the North Eastern boundary of the land of the Kowhairiki [Koheriki] Tribe'). This included Urungahauhau on the northern side of Otau. A subsequent 16 May Order altered this boundary to exclude Urungahauhau, but the Crown failed to publish notice of this alteration until 7 June 1865.<sup>182</sup> Thus, claimants appearing at the 26-27 May East Wairoa hearing had no official information about an important boundary change (and others less important on the other three sides of the confiscation area).

Since Urungahauhau is of special interest to Ngai Tai, and is covered in considerable detail in Gael Ferguson's report, it need not be elaborated on here at any length.<sup>183</sup> A few details in the Urungahauhau matter, however, shed light on Hauraki interests. In an August

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<sup>179</sup> Fenton to Native Minister, 4 March 1865, RDB, vol 111, p 42994

<sup>180</sup> Tom Bennion, 'Ngai Tai and the East Wairoa Confiscation' (Wai 868, A46), p 26; Fenton to Native Minister, 4 March 1865, RDB, vol 111, pp 42995-6

<sup>181</sup> Order in Council, 30 January 1865, NZ Gazette, 31 January 1865, No 3, p 3990; RDB vol 11, p 3990; Bennion, East Wairoa Confiscation, p 26

<sup>182</sup> Order in Council, 16 May 1865, NZ Gazette, 7 June 1865, No 19, p 172; RDB vol 11, p 4022; Bennion, East Wairoa Confiscation, pp 26-27

<sup>183</sup> Gael Ferguson, 'Ngai Tai ki Tamaki within the Hauraki Inquiry' (Wai 686, T2), pp 61, 65, 75-76, 88-95

1864 letter to Governor Grey on this matter, Honatana Te Irirangi of Ngai Tai questioned the loyalty of Taraia Ngakuti (Ngati Tamatera) and other unnamed 'men of Hauraki'.<sup>184</sup> Te Irirangi pressed the matter of Urungahauhau with Fenton in February the following year. On that occasion, Fenton advised him 'if you have any land inside the [East Wairoa] boundaries you must send a [Compensation Court] claim'.<sup>185</sup> According to Bennion, Fenton recommended the exclusion of Urungahauhau on the basis of Te Irirangi's pressure. Hence, the Native Land Court eventually determined title to it.<sup>186</sup> The question remains, however, should Fenton have made this recommendation on the basis of such pressure? Furthermore, should the Crown have acted on his recommendation?

Bennion faulted the Compensation Court's hearing notification procedures. The Crown published a call for East Wairoa claims on 8 April, without indicating when and where they were to be heard. The notice specified, in accordance with the 1863 Act, that claims by New Zealand residents had to be filed within six months.<sup>187</sup> Nonetheless, Fenton did not allow East Wairoa claimants the required six months notice. He gave them about six weeks, not six months, before conducting the 26-27 May hearing in Auckland. The means by which he advertised that hearing also remains a mystery. He did not advertise it in the *Auckland Provincial Government Gazette*, nor have letters to claimants survived in the extant records of the Compensation Court.<sup>188</sup> We simply do not know how claimants found out about the hearing.

The sparseness of the surviving Compensation Court records made it difficult to reconstruct exactly what transpired at the 26-27 May East Wairoa hearing. At the same time, the importance of this proceeding makes it necessary to go through the Court's minutes in considerable detail. The East Wairoa hearing was the first at which two judges sat, with Fenton presiding. James Mackay, his fellow judge, may have taken the minutes.

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<sup>184</sup> Te Irirangi to Grey, 20 August 1864, RDB, vol 105, pp 40500-5

<sup>185</sup> Fenton minute, 25 February 1865, on Te Irirangi to Fenton, 18 February 1865, RDB, vol 105, pp 40512-4

<sup>186</sup> Fenton minute, 18 April 1865, on Te Irirangi to Fenton, 15 April 1865, RDB, vol 105, pp 40521-22; Bennion, *East Wairoa Confiscation*, p 34

<sup>187</sup> Notification to Claimants, 5 April 1864, *NZ Gazette*, 8 April 1865, No 12, pp 74-75; RDB, vol 100, pp 38168-69; Bennion, *East Wairoa Confiscation*, p 29

<sup>188</sup> The Compensation Court advertised its Tuhimata and Pokeno hearings, but not its East Wairoa hearing, in the *Auckland Provincial Government Gazette*. Tuakau/Pokeno notice, 7 April 1865, *Auckland Gazette*, 19 April 1865, vol 14, No 6, p 54; Patumahoe/Tuhimata notice, 27 April 1865, *Auckland Gazette*, 8 May 1865, vol 14, No 9, p 78. Bennion, *East Wairoa Confiscation*, pp 37-38

The Court's minutes of the two-day hearing indicate that most claimants were prepared to support a simple north-south division of rights within the confiscation area. Honatana Te Irirangi and Hori Te Whetuki claimed rights to the area north of Te Aho a Matariki on behalf of Ngai Tai (see Figure 3: Compensation Court map of East Wairoa 1865). They stressed that Ngai Tai were unrelated to Ngati Paoa and other Hauraki groups. Te Whetuki made a point of contrasting Ngai Tai loyalty with the participation of Koheriki and the 'Te Hingawaka people of Ngati Paoa' in the 1863 guerrilla campaign. He further stated that Ngati Paoa's Puhata Patene had rights south of Te Aho a Matariki, but not north of it.<sup>189</sup> In conclusion, Te Whetuki stated:

Ngatiteata have no claim upon this piece  
Ngatipaoa have no claim on our piece  
Ngati Whanaunga have no claim<sup>190</sup>

Ngati Paoa did not contest this north – south division that essentially corresponded with the Wairoa and Mangatawhiri watershed (see Figure3). Aihepene Paerua, on behalf of eight Ngati Paoa individuals, stated that he did not claim any of the land specified by Ngai Tai. His detailed list of place-names is hard to relate to the Court's map, but he concentrated particularly on Ngati Paoa claims in the vicinity of the 1863 Kingitanga staging area at Paparata.<sup>191</sup> Paerua asserted that none of the eight Ngati Paoa he spoke for 'went into rebellion'. These individuals included the well-known, largely Waiheke-based rangatira, Wiremu Hoete and Patene Puhata.<sup>192</sup> Paerua claimed that he gave permission to the Ngati Whanaunga hapu, Ngati Puku, to occupy Paparata during 1863. On the other hand, Hawira Maki of Ngati Pou disputed the Ngati Paoa claim to Paparata with the support of Rawiri Te Ua of Ngati Whanaunga.<sup>193</sup>

A *Daily Southern Cross* report of the hearing supplements the official Court minutes. The Court minutes, for example, fail to disclose a dramatic appearance in Court by a Hauraki witness on 26 May who declared himself to be an adherent of the Pai Marire faith. The Crown had been drumming up public opposition to Pai Marire, particularly after the murder of Rev Carl Volkner in Opotiki on 2 March 1865. Grey issued what amounted to a Pai Marire suppression order on 22 April. He labelled Pai Marire a 'fanatical sect . . . engaged in

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<sup>189</sup> Compensation Court minutes, 26 May 1865, RDB, vol 102, pp 39142-4

<sup>190</sup> Compensation Court minutes, 26 May 1865, RDB, vol 102, pp 39146

<sup>191</sup> Compensation Court minutes, 26 May 1865, RDB, vol 102, pp 39146

<sup>192</sup> On their prominence in Hauraki history, see Monin, *Hauraki Contested*, pp 113-114, 173, 175, 193

<sup>193</sup> Compensation Court minutes, 26-27 May 1865, RDB, vol 102, pp 39149-51



practices subversive of all order and morality'. He pledged that he would do his utmost to 'resist and suppress, by force of arms if necessary . . . [Pai Marire's] fanatical doctrines, rites and practices'.<sup>194</sup> During the weeks leading up to the East Wairoa hearing, James Mackay, in his capacity as Civil Commissioner, had sought to contain Pai Marire influence in Hauraki. In fact, Mackay escorted two adherents to Auckland for talks with Grey. One of these, Enoka of Ngati Paoa, was the person who attended the Compensation Court on 26 May 1865.<sup>195</sup>

Enoka, apparently, had the distinction of being one of the few surviving Hauraki signers of the Treaty of Waitangi.<sup>196</sup> When he appeared in Court on 26 May, Crown agent Henry Turton informed the bench of Maori opposition to his presence. Fenton ruled that the 'Court had no power to exclude his evidence', until he discovered that Enoka subscribed to Pai Marire. Fenton then summarily dismissed Enoka. The *Daily Southern Cross* reported Fenton condemning Enoka as a 'dusky fanatic' and a lunatic. Not to be deterred, Enoka 'left the Court laughing . . . evidently not displeased at the compliment paid him by the Chief Judge'.<sup>197</sup> The *Daily Southern Cross* made much of this sensational encounter. Its absence from the official record perhaps reflects Mackay's embarrassment at having been responsible for Enoka's attendance. This incident also highlighted the politically-charged nature of the proceedings.

The *Daily Southern Cross* supplemented the official Compensation Court record in other respects, as well. It reported Fenton's statement from the bench explaining the circumstances surrounding the Court's decision, announced on 27 May, with regard to both Pokeno and East Wairoa. Mackay heard the Pokeno evidence as sole judge immediately before the East Wairoa hearing. With particular reference to Pokeno evidence, Fenton stated, according to the *Daily Southern Cross* reporter:

One fact appears quite clear to us – that the great majority of the owners of the blocks are in rebellion, and of course all their interest in the land is estreated [escheated?] to the Crown.

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<sup>194</sup> Proclamation, 22 April 1865, NZ Gazette, 29 April 1865, p 129; RDB, vol 11, p 4014

<sup>195</sup> *Daily Southern Cross*, 27 May 1865, p 4

<sup>196</sup> He probably signed at Waitemata on 4 March 1840. Monin, Hauraki Contested, p 104

<sup>197</sup> *Daily Southern Cross*, 27 May 1865, p 4; 31 May 1865, p 7

In referring specifically to East Wairoa, Fenton reportedly stated that ‘the same remarks [about owners in rebellion] apply, a very considerable number of owners having gone to the King’.<sup>198</sup>

If this is indeed what he said, Fenton’s remarks departed from the evidence given in Court. Ngai Tai and Ngati Paoa witnesses indicated that few of their kin had taken up arms against the Crown. Mackay recorded that Ngati Paoa as a whole had laid down their arms in early March 1864, and the Kingitanga supporters among Ngati Whanaunga were negotiating terms with the Crown during 1865.<sup>199</sup> As previously noted, when the Crown gazetted the names of ‘rebel Tribes’ in April 1865, it included none of the Hauraki tribes.<sup>200</sup> In fact, Fenton contradicted himself in his concluding remarks by stating that in addition to £1,000 in monetary compensation, Ngai Tai would receive ‘the right of Crown grants to the piece that is left [presumably, after settlers had selected their land], and any rebel claims . . .’<sup>201</sup> Fenton’s extraordinary supplementing of Ngai Tai’s compensation in this way at least acknowledged the fact that they had been loyal throughout the wars.

The following table summarises the quantum and distribution of compensation awarded as a result of the Court’s East Wairoa hearing.

<b>South Auckland</b>		<b>Hauraki</b>		<b>Others</b>	
Ngai Tai	£1000	Ngati Paoa	£450	Individuals	£200
Ngati Pou	650	Ngati Whanaunga	350		
Individual	100				
<b>Totals</b>					
64%	£1750	29%	£800	7%	£200

If the official minutes of the 26-27 May 1865 East Wairoa hearing are incomplete, so too are the records of the claims filed both before and after the hearing. The sparse nature of these claims give some idea as to how unfamiliar Maori were with a formal judicial process. What appears to be Aihepene Paerua’s claim, when first filed in February 1865, focused on a place called Matakahikatea. This claim, however, extended from Pukorokoro (well outside

<sup>198</sup> *Daily Southern Cross*, 29 May 1865, p 5; RDB, vol 111, p 43067

<sup>199</sup> Monin, *Hauraki Contested*, pp 201-202

<sup>200</sup> Proclamation, 1 April 1865, *NZ Gazette*, 7 April 1865, No 11, pp 67-68; RDB, vol 11, pp 4001-2

the East Wairoa confiscation area) on the Gulf into the takiwa or district of Wairoa, but it also included Mangatawhiri, Mangatangi and Wharekawa that were probably outside the confiscation area.<sup>202</sup> A further Paerua claim filed in April defined his interests even more widely. It included both Tirikohua, well to the west of East Wairoa, and Maramarua to the southeast.<sup>203</sup> Neither of these claims make prominent mention of broader tribal Ngati Paoa interests. When he appeared in the 26-27 May hearing, Paerua spoke on behalf of eight other Ngati Paoa leaders. He stated that they 'and a great many others' had claims. Exactly whom he represented, and exactly what he claimed, remain unclear from the written record.

The other Ngati Paoa claims filed prior to the East Wairoa hearing came from Maora Rangituma, Mohi Te Puatau, Patene Puhata and Wiremu Hoete. Rangituma's claim also extended outside the East Wairoa area to Maramarua.<sup>204</sup> Te Puatau's claim (referred to in Court by Paerua) extended from the western boundary of the confiscation area, to Mangatangi (which could have been inside, outside, or on both sides, of the southeastern boundary).<sup>205</sup> Patene Puhata's claim, and the supporting evidence he gave in Court in the Pokeno hearing, was similarly well beyond the limits of the East Wairoa area from Te Rao o Kai Tawhao on its southwestern boundary, to Patumahoe, northwest of Pokeno (see Figure 2: Invasion of the Waikato 1863).<sup>206</sup> Wiremu Hoete's 28 March 1865 claim named interests that extended from named 'kainga kei runga o te Wairoa' (villages within the Wairoa area) to Pukorokoro, Maramarua, and even as far afield as Piako.<sup>207</sup> Perhaps this indicates that Hauraki claimants before the Compensation Court believed it would consider the full range of their land rights, and not just those affected by the East Wairoa confiscation.

The 'scatter-shot' approach of many Hauraki claimants could also be explained, in part, by the Crown's failure to define confiscated areas with clarity and consistency. The originally proclaimed boundaries referred to 'the ridge of Whare Kawa to the Surrey

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<sup>201</sup> *Daily Southern Cross*, 29 May 1865, p 5; RDB, vol 111, p 43067

<sup>202</sup> 'Ihipene' claim, 9 February 1865, RDB, vol 105, pp 40466-8

<sup>203</sup> Ahipene Paerua claim, 23 April 1865, RDB, vol 105, pp 40463-5

<sup>204</sup> Maora Rangituma claim, 22 May 1865, RDB, vol 105, pp 40537-9

<sup>205</sup> Compensation Court minutes, 26 May 1865, RDB, vol 102, pp 39149; Mohi Te Puatau claim, 22 May 1865, RDB, vol 105, pp 40542

<sup>206</sup> Compensation Court minutes, 22-25 May 1865, RDB, vol 102, pp 39087-8; Patene Puhata claim, 22 May 1865, RDB, vol 105, pp 40554

<sup>207</sup> The Piako area is probably 40 km ('as the crow flies') from East Wairoa. Wiremu Hoete claim, 28 March 1865, RDB, vol 105, pp 40610-2

Redoubt' as the eastern extent of what became the East Wairoa area.<sup>208</sup> This eastern boundary description was repeated in the April 1864 notification to claimants, with the change in the Maori rendition of 'Surrey [sic] Redoubt' as Paparata. This should have been rendered Tuahu.<sup>209</sup> When the Crown varied the East Wairoa boundaries by its 16 May 1865 Order in Council, it varied the eastern, southern and western boundaries of East Wairoa, as well as the northern (Otau-Urungahau) boundary.

The new eastern boundary proceeded south from 'the summit of that portion of the Wharekawa Range that leads in the most direct line to Tuahu or the Surrey Redoubt'. Instead of following the Mangatawhiri River in the south, the new boundary followed 'the southern margin of the Mangatawhiri Swamp'. Finally, the new western boundary omitted all mention of the Pokeno line, which, in fact, forms the western boundary, despite the wording of the 16 May order. That order stated that the western boundary went from the Swamp by compass bearing to the 'south-eastern boundary of the Hunua purchase'.<sup>210</sup> Although the Crown had the technical means with which to illustrate these boundaries in simple straightforward maps (such as those published in the *Journals to the Appendices of the House of Representatives*), it chose not to do so. As a result, many claimants were understandably confused.

The Central Waikato confiscation 'District' adjacent to East Wairoa's southern boundary did not alleviate this evident confusion. As previously indicated, places like Pukorokoro, Maramarua and Piako, which featured in East Wairoa claims, were within Central Waikato. The Executive Council defined more precise boundaries for this district, and several 'sites for settlement' within it, on the same day that it varied the East Wairoa boundaries. The order proclaiming Central Waikato a district meant that the Crown could confiscate 'sites for settlement' along the southern East Wairoa boundary. In May 1865, however, the Crown confiscated no areas for settlement along that boundary. This writer has not uncovered evidence that the Crown ever confiscated Pukorokoro, Maramarua, and Piako as 'sites for settlement', as required by section three of the New Zealand Settlements Act.<sup>211</sup>

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<sup>208</sup> Proclamation, 17 December 1864, NZ Gazette, 17 December 1864, No 49, p 461; RDB, vol 11, p 3980

<sup>209</sup> The pa named Paparata is a short distance northwest of Surrey Redoubt, or Tuahu. Notification to Claimants, 5 April 1864, NZ Gazette, 8 April 1865, No 12, pp 74-75; RDB, vol 100, pp 38168-9

<sup>210</sup> Order in Council, 16 May 1865, NZ Gazette, 7 June 1865, No 19, p 172; RDB, vol 11, p 4022

<sup>211</sup> The Crown confiscated areas at Onewhero, Whangape, Kupa Kupa, Rangiriri and Mangawhara on 16 May. None of these areas are close to East Wairoa. Order in Council, 16 May 1865, NZ Gazette, 7 June 1865, No 19, p 169-170; RDB, vol 11, p 4022

Soon after his appointment to the Compensation Court, Fenton recognised widespread confusion created by the Crown's failure to explain the difference between the proclamation of a district under the New Zealand Settlements Act, and the confiscation of a site for settlement. Fenton informed Native Minister Mantell in early March that he was receiving many claims for Central Waikato areas not yet confiscated. He wrote:

It has not appeared to me politic to return these claims and [to] tell the Claimants that I had no jurisdiction as the land was not yet confiscated, the proclamation of December [1864] having no legal operation, as such a course would again unsettle the Native mind and reopen the question. But of course my silence cannot continue long as some of the Maoris are now claiming grants for the same land under the [Native] Land Act.

Fenton recommended that the Crown should bring the entire area proclaimed in December 1864 within the terms of the 1863 Act, and that section three orders confiscating sites for settlement should 'be made from time to time as required'. This, Fenton believed, would provide Crown actions with necessary 'legal validity'.<sup>212</sup>

Mantell's assistant, Henry Halse, in reply to Fenton stated that 'you have erred in receiving claims for compensation in districts not yet confiscated'. Nonetheless, he instructed Fenton to inform claimants:

that as the lands mentioned in their applications are not yet included in a block proclaimed for settlement their claims will in the meantime be retained in your office to be noted when necessary.<sup>213</sup>

Rather than reprimanding Fenton, the Native Minister was apparently content to allow him to hold on to claims, in case the Crown eventually confiscated the areas in question.

This was not the end of the matter. Mantell's successor as Native Minister, James Edward FitzGerald (ironically one of the most passionate opponents of the New Zealand Settlements Bill in 1863) in September 1865 acknowledged continuing confusion. He noted that Maori were reoccupying many areas within the Central Waikato district. This, he thought, was 'incompatible with the settlement of the country in the manner proposed by the [confiscation] policy of the last two years'. He therefore advised Grey 'to issue proclamations confiscating the whole of the territory previously brought under the operations of the New Zealand Settlements Act'. He fully realised that Maori 'do not distinguish

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<sup>212</sup> Fenton to Native Minister, 4 March 1865, RDB, vol 111, pp 42995-6

<sup>213</sup> Halse to Fenton, 25 April 1865, RDB, vol 111, p 43018

between bringing the land under the operation of the Act, and taking it for settlement'. He thought that a blanket confiscation of the entire Central Waikato district would:

induce the Natives finally to accept the fact that the land is confiscated and to consent to hold what is now returned to them under Crown Grant.<sup>214</sup>

Although FitzGerald drafted proclamations to this effect, the Executive Council apparently never put them into effect. Confusion over confiscation evidently continued.<sup>215</sup>

Although the Central Waikato confiscation situation was more confused than East Wairoa, these adjacent areas had a lot in common. Although the Crown declared East Wairoa a site for settlement in January 1865, Bennion argued that it did not establish Crown title under section four of the 1863 Act. The lack of clarity regarding the geographic extent of confiscation affected both East Wairoa and Central Waikato. Hauraki Maori with interests in both of these adjacent areas suffered from poorly notified boundaries, and from confusing variations of them. In both areas, the Compensation Court deemed 'returned rebel' status to render claimants ineligible for compensation. This was despite the fact that section six of the 1863 Act suggested that submission to Crown authority restored such eligibility.

Quite apart from Fenton's firm belief that rebels had forfeited their rights is the question of how his Court decided who was rebel and who was loyal. The following discussion looks at how this question affected Hauraki claimants during the East Wairoa inquiry.

### **Hauraki loyalists**

Despite the fact that Rawiri Te Ua appeared as a representative for Ngati Whanaunga in both the Pokeno and East Wairoa hearings, no evidence of his formal written claim seems to have survived. The fact that Te Ua had functioned as a loyal Assessor assisting Mackay during the war years may have given him preferred access to the Court. During the month of the East Wairoa hearing, the *Daily Southern Cross* reported that he had represented the government (in Mackay's absence) at an important Hauraki hui held at Waiau, near Coromandel township. There he had urged his fellow rangatira to ban Pai Marire from

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<sup>214</sup> FitzGerald addressed this letter to Daniel Pollen, the then Agent for the General Government in Auckland, who he wished to appoint as a Commissioner for Confiscated Lands. FitzGerald to Pollen, 3 September 1865, MA 4/7, pp 193-196

<sup>215</sup> FitzGerald to Pollen, 10 September 1865, MA 4/7, p 207. On FitzGerald, see Edmund Bohan, *'Blest Madman': FitzGerald of Canterbury*, Christchurch, Canterbury University Press, 1998, pp 268-269

Hauraki.<sup>216</sup> Mackay also issued Te Ua with a revolver and a carbine, plus 130 rounds of ammunition, in early June 1865. No other Hauraki rangatira, Kitahi Te Taniwha, Honatana te Irirangi, Hori Te Whetuki, Patene Puhata and Haora Tipa included, received such generous treatment.<sup>217</sup>

Te Ua's position as a key Crown supporter in western Hauraki was probably enhanced, and not diminished, by the vigorous advocacy of the Kingitanga cause by his uncle, the more senior Ngati Whanaunga rangatira, Hori Ngakapa Whanaunga.<sup>218</sup> After escaping from imperial forces at Rangiriri in November 1863, Ngakapa lived with other Kingitanga supporters at Te Kerepehi on the Hauraki Plains. Decades later he related how Mackay and Rawiri Te Ua visited him there (presumably in 1865) and persuaded him to negotiate terms of submission with Grey in Auckland.<sup>219</sup> Despite the fact that Ngakapa could speak to Grey, he did not receive any attention from the Compensation Court.

Although the chief Hauraki beneficiaries of the compensation, given either by Court award or by subsequent 'out of Court' settlements, appear to have been rewarded for their loyalty to the Crown, the Court's records do not disclose evidence about their war-time activities. Instead of inquiring into the evidence behind a statement that a particular individual was either loyal or rebel, the Court seemed to accept the naming of rebels by loyal witnesses as sufficient evidence.

Hori Te Whetuki of Ngai Tai in the Compensation Court on 26 May 1865 named the entire Ngati Paoa hapu, Te Hingawaka, as having joined Koheriki in the konihi, or 'treacherous murders' during the 1863 guerrilla campaign. Nothing in either the Court minutes or the *Daily Southern Cross* report of its East Wairoa hearing indicate that either the Judges, or the Crown agents present, asked Te Whetuki to substantiate this allegation.<sup>220</sup> On the same day, Aihepene Paerua of Ngati Paoa stated that none of his co-claimants 'went into rebellion'. Again, neither the Judges, nor the Crown agents in Court appear to have cross-examined him on the veracity of this statement.<sup>221</sup> Rawiri Te Ua made a very brief statement that '3 of N.Whanaunga who belong to this piece have joined the rebels'. Te Ua identified

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<sup>216</sup> *Daily Southern Cross*, 31 May 1865, p 7

<sup>217</sup> 'Return of Arms . . . and Ammunition issued to Friendly Natives, 1865-1868', AJHR, 1868, D-21, p 3

<sup>218</sup> On Hori Ngakapa Whanaunga's war-time exploits, see Monin, *Hauraki Contested*, pp 191, 202

<sup>219</sup> Hori Ngakapa Whanaunga evidence 5 October 1897, *Hauraki Minute Book*, vol 46, pp 5-10

<sup>220</sup> Compensation Court minutes, 26 May 1865, RDB, vol. 102, pp 39144

none of these people, nor did the Court ask him to.<sup>222</sup> During his second appearance in Court on 27 May, Te Whetuki named three rebels belonging to 'Ngatirewha'. Paerua, also, described this hapu as supporting the Kingitanga. These statements, evidently, required no corroboration.<sup>223</sup>

In short, the Court failed to test the accuracy of allegations regarding loyalty and disloyalty. Then, 'in giving the decision of the Court', Fenton, according to the *Daily Southern Cross* reporter, stated that 'a very considerable number of [East Wairoa] owners' were rebels. He added that their claims 'so far as the Government is concerned, will be given up to Honotana [sic] and the others'.<sup>224</sup> In this statement, Fenton suggested that the Court considered all rebels ineligible for compensation, and that it would treat their 'claims' as compensation for Maori it deemed to be loyal. The Court could do this, it seems, without a proper inquiry into who had rebelled, and who had submitted to the Crown in accordance with Grey's proclamations of December 1864 and April 1865.<sup>225</sup>

### **Ancestral rights and Mackay**

Did the Compensation Court do anything to establish the nature and extent of the rights of Hauraki groups in the East Wairoa area? The following section examines whether the Court inquired into the ancestral origin of those rights. It will then examine the difficulties inherent in sizing up the role of James Mackay, particularly in post-hearing payments to claimants who had not appeared at the 26-27 May 1865 East Wairoa hearing. Finally, it examines briefly surrounding circumstances that may have constrained the Court in 1865.

Chief Judge Fenton later expressed a firm belief that his Compensation Court inquiries, at least in Taranaki, went all the way back to the ancestral origin of Maori rights. He told the 1891 Rees commission that, even though this was a 'laborious business', his Court 'were compelled to go back to the original ancestor, and discover all the descendants through fifteen or twenty generations . . .'.<sup>226</sup> This painstaking mode of inquiry may have occurred in Taranaki; it certainly was not the kind of inquiry carried out in East Wairoa.

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<sup>221</sup> Compensation Court minutes, 26 May 1865, RDB, vol. 102, pp 39147-8

<sup>222</sup> Compensation Court minutes, 27 May 1865, RDB, vol. 102, pp 39150

<sup>223</sup> Compensation Court minutes, 26-27 May 1865, RDB, vol. 102, pp 39148, 39151

<sup>224</sup> *Daily Southern Cross*, 29 May 1865, p 5; RDB, vol 111, 43067

<sup>225</sup> Proclamations, 17 December 1864, 1 April 1865; RDB, vol 11, pp 3980, 4001-2



At the East Wairoa hearing both Wiremu Kepa and Aihepene Paerua presented whakapapa evidence, but they presented it mainly to defend the proposition that their ancestor Parinui 'was the real owner of Paparata'. Hawira Maki of Ngati Pou challenged this proposition.<sup>227</sup> The grounds for Maki's challenge are not well explained in the Court minutes. Historian Graeme Murdoch, in his 1993 history of the Hunua area, indicated that Maki's challenge (which Rawiri Te Ua evidently supported) probably stemmed from the fact that Parinui was a Te Uri o Pou rather than a Marutuahu ancestor.<sup>228</sup> The Court awarded Ngati Paoa individuals (including Paerua and Kepa) a total of £400. On the other hand, Fenton and Mackay awarded Hawira Maki £650 'on behalf of the loyal portion of the tribe Ngatipou'. Likewise, they awarded Rawiri Te Ua, who brought his claim 'under Maki' £350 'on behalf of the Tribe Ngatiwhanaunga'.<sup>229</sup> The combined Ngati Pou-Ngati Whanaunga award, therefore, equalled that of Ngai Tai, while Ngati Paoa, in spite of their whakapapa evidence, received smaller individual awards. In general, the East Wairoa record did not give anything like an intelligible account of ancestral origin of the rights of different groups.

Subsequent Native Land Court investigations into areas adjoining East Wairoa provide few insights into the pattern of ancestral rights there. Native Land Court judges observed the limits of their jurisdiction. In other words, once the Compensation Court had dealt with East Wairoa, the Native Land Court had no jurisdiction to revisit the nature and distribution of customary rights there.<sup>230</sup>

Quite apart from failing to test claimant evidence on the ancestral origin of rights, the Court made no visible effort to examine the history of Hauraki rights in the East Wairoa area. Both Otau, which became the northern extremity of the area, and Kohukohunui, its northeastern extremity, feature prominently in Hauraki tribal history. When Marutuahu, the founder of the Hauraki confederation bearing his name, first came from Kawhia to Hauraki, he passed through the East Wairoa area. Otau (the place of 'the floating across') is named after how he crossed the Wairoa at that point. He then climbed Kohukohunui and from the

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<sup>226</sup> Fenton evidence, 18 March 1891, AJHR, 1891, G-1, p 48

<sup>227</sup> Compensation Court minutes, 27 May 1865, RDB, vol. 102, pp 39151-2

<sup>228</sup> Graeme Murdoch, 'A Brief History of the Human Occupation of the Hunua Catchment Parkland', Auckland Regional Council, 1993, p 18

<sup>229</sup> Maki and Te Ua awards, 27 May 1865, RDB, vol 102, pp 39164-5

<sup>230</sup> See, for example, vague allusions to East Wairoa in the Mangatangi, Mataitai, Wharekawa No 1-4 and Kiripaki/Orere Native Land Court cases heard between 1865 and 1871. Hauraki Minute Books, vol 1, pp 2-9, 52-55, 58-66; vol 4, pp 22-24; vol 6, pp 314-317, 374

summit he first saw Tikapa Moana (the Hauraki Gulf) and his future home along its shores.<sup>231</sup>

He commemorated his seventeenth-century arrival with a famous speech:

We have come to see Hauraki, the land and the waters that were traversed by  
Tainui, the canoe of our ancestors that sailed the Great Ocean of Kiwa. Tainui  
comes to Tainui, strangers to a strange land.<sup>232</sup>

From Whakatiwai, within sight of East Wairoa, Marutuahu founded what became the dominant polity of modern Hauraki tribal history.

Murdoch's 1992 account described how coastal Ngati Paoa and Ngati Whanaunga people referred to their bush-clad western hills as Te Ngaherehere o Kohunui. This was, in his words, 'an area of extreme tapu or sacredness'. It was also an area for gathering 'a huge variety of food, medicinal and building materials'.<sup>233</sup> Murdoch recorded how the western Hauraki coastal dwellers were among the most famous waka builders in Aotearoa before the sailing ship era. According to George Graham, an amateur ethnologist publishing in the early twentieth century, they 'possessed the largest fleet of all Maori tribes as well as the largest canoes'. Ngakapa's widow, Hera Puna, in 1905 observed that Ngati Whanaunga built these famous waka 'in the forests of Kohunui . . .'.<sup>234</sup> Kohukohunui today is the maunga of Ngati Paoa and Ngati Whanaunga in western Hauraki. It also appears to be the site of a sacred spring called Punewai, which features in Ngati Paoa oral traditions.<sup>235</sup> These Hauraki historical associations with East Wairoa were absent in the records of the Compensation Court.

In explaining the paucity of written records regarding the Compensation Court's work on East Wairoa, the role of the ubiquitous James Mackay must feature. Although Mackay arrived in Hauraki only a year or so before the establishment of the Compensation Court, he quickly became the human face of the Crown throughout his area of responsibility. Monin believes that Mackay's 'capacity to win the confidence and trust of Maori' meant that for

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<sup>231</sup> Graeme Murdoch, 'History of Human Occupation', in East Hunua Regional Parkland: Draft Management Plan, Auckland Regional Council, 1992, p 36

<sup>232</sup> Quoted in Malcolm McKinnon ed., *New Zealand Historical Atlas*, Auckland, David Bateman/Department of Internal Affairs, 1997, plate 19

<sup>233</sup> Murdoch, East Hunua, p 39

<sup>234</sup> Murdoch, East Hunua, p 39

<sup>235</sup> C Gregory, 'Tangata Whenua – Ngati Paoa Site report', Auckland Regional Authority, 1988, p 75

almost fifteen years 'he was to exert an immense influence over the affairs of Hauraki . . .'<sup>236</sup> Never an assiduous recorder of events, Mackay's surviving reports of his actions (let alone what motivated them) are few and far between. This may even help explain the paucity of East Wairoa Compensation Court records. Since Mackay knew much more about the witnesses who appeared before the Court than Fenton, he probably shared a lot of that information with the Chief Judge orally. He committed very little to writing. For example, the sensational appearance of Pai Marire adherent Enoka was recorded only in the columns of the *Daily Southern Cross*, not in the Court minutes.

The haste with which Fenton called the East Wairoa hearing, and the inadequate notice given, made subsequent claims inevitable. Fenton referred most of these claims to Mackay, who arranged a series of poorly documented out of Court settlements after May 1865. Like Fenton, Mackay testified to the 1891 Rees commission about his work with the Compensation Court. He related how, after sitting as a Judge in 1865, he reverted to acting as Crown agent assisting the Court at its 1866 and 1867 Central Waikato hearings.<sup>237</sup> Mackay proudly told the 1891 commission that at these hearings:

there were some thirteen or fourteen hundred claims to be disposed of. Only some five or six of these were heard in Court; all the remainder I arranged out of Court; and the lands, with the exception of one or two large blocks, were allocated in sections. This all had to be done without any maps or surveys, and yet no question respecting any title in the Waikato has since arisen. There have been no difficulties, nor any Supreme Court cases over these arrangements.<sup>238</sup>

While Mackay thought these arrangements were spectacularly successful, this was precisely the situation Grey's Colonial Office superior, Edward Cardwell, had warned about in April 1865. Cardwell believed that giving the Governor or his agents the ability to decide rights and compensation behind closed doors made a mockery of the judicial process. Instead of a public, judicial determination of rights, Crown agents could award compensation willy-nilly, without any form of public or judicial accountability.<sup>239</sup>

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<sup>236</sup> Monin, *Hauraki Contested*, p 201; John Hutton, "'Troublesome Specimens': A Study of the Relationship between the Crown and the Tangata Whenua of Hauraki 1863-1869", (University of Auckland MA thesis, 1995), pp 24-25, 158

<sup>237</sup> Mackay sat as sole Judge in the Tuhimata and Pokeno cases (the first to be heard by the Compensation Court), before the East Wairoa hearing. David McCan, *Whatiwhatihoe: The Waikato Raupatu Claim*, Wellington, Huia Publishers, 2001, p 56

<sup>238</sup> Mackay evidence, 16 March 1891, AJHR, 1891, G-1, pp 40-41

<sup>239</sup> Cardwell to Grey, 24 April 1865, AJHR, 1865, A-6, pp 18-19

Gael Ferguson has prepared a reasonably comprehensive list of East Wairoa compensation claims in her recent Ngai Tai report. She lists eight 'formal claims', and three informal ones, filed after the East Wairoa hearing. At least half of these suggest that the claimants had either Ngati Paoa or Ngati Whanaunga affiliations.<sup>240</sup> In addition, Mackay prepared several cryptic returns listing individual payments. One of these returns, compiled up until 30 June 1866, lists payments 'arranged out of Court' for a total of £110. The East Wairoa recipients were Wikitoria Titihuia, Mata Te Kaha, Maihi Te Rahui and Hana Parongaepa.<sup>241</sup> These recipients all belonged to Hauraki groups. Te Kaha and Te Rahui belonged to Te Uri Karaka of Ngati Paoa.<sup>242</sup>

In one case Mackay's out of court settlements caused the Crown to return land to Maori at East Wairoa. Three individuals, Wiremu Te Oka, Hetaraka Tiki and Aperaniko Takaukau, received Crown Grants under the authority of the New Zealand Settlements Act 1863. These three separate but adjoining grants issued in 1869 and 1871 for a total of 250 acres at Moumoukai probably represent the only confiscated land at East Wairoa returned to Maori by the Crown (see Figure 3: East Wairoa confiscation area 1865). In addition to land the grantees received a cash equivalent, ie £250 or a pound per acre.<sup>243</sup> Although Mackay failed to document his precise role in this 'settlement', a typically cryptic note suggests that he negotiated it. On Takaukau's letter to Chief Judge Fenton asking that he revisit claims 'at the head of the Wairoa', Mackay wrote these words in relation to Takaukau: 'Settled by £50 and 50 acres of land'.<sup>244</sup> He provided absolutely no explanation for the benefit of posterity.

Finally, Hori Ngakapa Whanaunga's descendants were evidently the beneficiaries of an equally mysterious land swap referred to briefly in my scoping report.<sup>245</sup> Although this appears to have been compensation for a Native Land Court award at Waipuna (near Whakatiwai) that left Ngati Whanaunga off the title, Mackay negotiated it. He recorded it with other poorly documented Hauraki out of Court agreements as a land swap of 600 acres. He valued it at £150, and he did not indicate anything about the circumstances surrounding

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<sup>240</sup> Ferguson, Ngai Tai within Hauraki, pp 62-64

<sup>241</sup> 'Return shewing the amount of cash compensation . . . up to 30 June 1866', RDB, vol 104, p 40006

<sup>242</sup> 'Payments agreed to . . .' 14 April 1866, 'Payments made . . .' 16-18 April 1866, RDB, vol 104, pp 40015, 40017

<sup>243</sup> Rigby, Scoping report, pp 11-12; Wiremu Te Oka, 1 December 1871, Hauraki Minute Book, vol 6, pp 310-

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<sup>244</sup> Mackay note, 20 June 1867, on Takaukau to Fenton, 8 January 1867, RDB, vol 105, p 40478

<sup>245</sup> Rigby, Scoping report, pp 10-11

it.<sup>246</sup> The compensation of Ngakapa's descendants was a rare example of Mackay departing from Fenton's practice of withholding rewards from 'returned rebels', but it was such a convoluted transaction that it is hard to read anything into it.

### **Constraining circumstances**

Finally, we must ask what could explain the cursory and hasty nature of the Court's East Wairoa inquiry. Neither the Judges, nor the Maori claimants, it seems, were familiar with what a full inquiry entailed. Although Fenton had served as a Resident Magistrate in Kaipara and Waikato prior to 1865, he had little legal training or formal inquisitorial experience. Neither had Mackay. Maori who appeared in the Compensation Court evidently found it to be an unfamiliar environment that took a long time for them to get used to. The hurried nature of the early hearings, reflected in the inadequate notice given, suggests that Fenton and Mackay wanted to get areas near enough to Auckland to hear them there 'settled' with a minimum delay.

Hori Te Whetuki revealed a key indication of the urgency associated with East Wairoa on 26 May 1865. Under cross-examination by Crown agent Crawford, Te Whetuki revealed that '300 emigrants are located at Otau' (across the Wairoa from today's Clevedon).<sup>247</sup> These 'emigrants' had arrived in Auckland aboard the ship *Viola* on 4 April 1865, having left Glasgow on 8 December 1864. According to the *Daily Southern Cross*, the *Viola* transported 340 special settlers, the majority of whom Crown authorities 'temporarily located on Government land at Wairoa' later in April.<sup>248</sup> Fenton and Mackay may have believed that they urgently needed to 'settle' Maori claims at East Wairoa in part because the Crown wanted to 'settle' a recently arrived group of predominantly Scottish settlers there.

Fenton and Mackay's parallel involvement in the establishment of the Native Land Court during the first half of 1865 further limited the time they could devote to the East Wairoa inquiry. Just as with the Compensation Court, the Native Land Court's enabling legislation preceded its actual operation by several years. Even though the 1862 Native Land Act authorised the establishment of the Native Land Court, prior to 1865 it operated briefly

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<sup>246</sup> 'Payments agreed to . . .' 14 April 1866, RDB, vol 104, pp 40015

<sup>247</sup> Compensation Court minutes, 26 May 1865, RDB, vol. 102, pp 39146

<sup>248</sup> *Daily Southern Cross*, 29 April 1865, pp 5, 9

only in Kaipara.<sup>249</sup> The Crown appointed Fenton as Chief Judge of the Native Land Court on 9 January 1865, just days before his and Mackay's Compensation Court appointments. A month later it appointed Mackay as a Native Land Court Judge. Having waited for years to establish these Courts, the Crown apparently expected that they would begin hearings almost immediately with a minimum of administrative support.<sup>250</sup>

Both Courts were equally unprepared for early hearings. Public notification of early hearings was not only inadequate, it was also inaccurate. The Compensation Court announced, with only one week's notice, that its Tuhimata hearing would begin on 15 May 1865. The hearing actually began on 17 May. The Compensation Court Pokeno hearing was gazetted (with three week's notice) to begin on 12 May. In the event, it did not begin until 22 May.<sup>251</sup> Similarly, the early Hauraki sittings of the Native Land Court featured inadequate and inaccurate notification. During the last day of the East Wairoa Compensation Court hearing, the Chief Clerk of both Courts (AJ Dickey) issued a notice for a Native Land Court sitting at Patene Puhata's house at Huruhi on Waiheke. Although the Court gazetted this hearing for 1-2 August 1865, it did not take place until 9 November that year.<sup>252</sup> Fenton attempted to arrange an Urungahau hearing in June 1865 at the Otau residence of local settler McNichol, but survey requirements forced a postponement until the following year.<sup>253</sup> A second Hauraki hearing into Patene Puhata's Pukemako (Waiiau) claim notified for 19 July 1865, giving about four and a half weeks notice, was not heard until 16 October 1866.<sup>254</sup> Patene Puhata, of course, had participated in the 26-27 May East Wairoa hearing as a leading Ngati Paoa witness.

This all suggests that the two different Courts, using some of the same people, organised their early hearings with great difficulty. Doubtless, Chief Judge Fenton and Judge Mackay, the two people most directly involved in the Hauraki related activities of both

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<sup>249</sup> See Donald Loveridge, "The Origins of the Native Land Act and the Native Land Court in New Zealand", (Wai 686, P1) pp 214-218

<sup>250</sup> Loveridge, *Origins*, pp 222-223. In spite of his appointment, I have found no evidence that Mackay ever sat as a Native Land Court Judge.

<sup>251</sup> Patumahoe/Tuhimata notice, 27 April 1865, *Auckland Provincial Government Gazette*, 8 May 1865, vol 14, No 9, p 78; Tuakau/Pokeno notice, 7 April 1865, *Auckland Provincial Government Gazette*, 19 April 1865, vol 14, No 6, p 54; Compensation Court sittings, 1865-1866, RDB, vol 100, p v

<sup>252</sup> Kauakarau hearing notice, 27 May 1865, *Auckland Gazette*, vol 14, No 14, pp 119-120; Kauakarau minutes, 9 November 1865, *Hauraki Minute Book*, vol 1, pp 30-33

<sup>253</sup> NLC 'Panui', 2 June 1865, Fenton memo, 13 June, NLC Urungahau Correspondence, H13, Maori Land Court, Hamilton

courts, underestimated the time and resources necessary to give adequate, accurate notice of proceedings, and to conduct proper inquiries. In the case of East Wairoa, the inquiry, given these circumstances, was never going to be more than a cursory one.

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<sup>254</sup> Pukemako hearing notice, 7 June 1865, Auckland Gazette, vol 14, No 15, p 124; Pukemako minutes, 16 October 1866, Coromandel Minute Book, vol 1, pp 45-47

## Chapter three

### Protest

#### Limits of protest

In this chapter I will examine protest by Hauraki and related groups inspired by the deleterious effects of the East Wairoa confiscation. At the outset, I should state that I found little recorded evidence of protest registered by members of either Ngati Paoa or Ngati Whanaunga. Their Ngati Haua and other Kingitanga relatives had more effect on the written record of protest. In the first part of this chapter, I will try to explain the relative paucity of written Hauraki protest evidence. I will pay some attention to Wiremu Tamihana's protests about the causes of confiscation, since he represented the Kingitanga and had even sent his sons to fight at East Wairoa. Kingitanga leadership also sustained twentieth century protests into the consequences of confiscation. I argue that Hauraki people provided significant support for such protests.

Why, then, is the historical record so weak regarding specifically Hauraki protest about the East Wairoa confiscation? The question is not easy to answer, because we cannot assume that the relative lack of recorded protest means the absence of significant protest. The poorly documented nature of the Crown's East Wairoa inquiry reminds historians of how incomplete the written record can be. The Crown had an official duty as the record keeper of the inquiry. Yet the official record is very sparse. Hauraki groups lacked the Crown's resources to record their side of the story. Members of these groups undoubtedly discussed their side with each other, but they had few opportunities to record publicly such discussions.

Public protest activity, like an organised petition campaign, required more than most Hauraki groups possessed. Firstly, such a campaign required a clear and compelling account of how the Crown may have disadvantaged Hauraki groups. The actions of the Crown and Compensation Court in relation to East Wairoa made it difficult to identify injustice. The Crown never made its position regarding Hauraki participation in punishable offences clear. Although the Crown premised its 30 January 1865 order confiscating East Wairoa on the allegation 'that certain Native tribes or sections of tribes' in the area had 'been engaged in



rebellion', it failed to identify these tribes.<sup>255</sup> The Crown refrained from labelling any Hauraki Tribes as 'rebel Tribes' in its 1 April proclamation on this very subject. Had the Crown branded either Ngati Paoa or Ngati Whanaunga as rebel, they would have had ample cause for protest. In the event, the Crown classified both Ngati Haua and Ngati Pou as rebel tribes, but it described no Hauraki group as rebel.<sup>256</sup>

Individual Hauraki claimants to the Compensation Court received no clear and compelling information on the form the Crown sent them. That form letter described 'te hara o nga iwi o Waikato' as the cause of confiscation. The official translation rendered hara as 'sin'. Although this translation implied Hauraki guilt by association, it contained insufficient clear information to arouse anything like indignant protest.<sup>257</sup> There is also an added element of confusion in that a modern Hauraki translation of hara renders it as 'grievance', rather than sin.<sup>258</sup> The question of how 1865 Hauraki claimants would have understood that word could best be answered by Hauraki claimants today. In any event, the slightest element of confusion is often all that is necessary to defuse potential protest.

The question of how confiscation may have disadvantaged Hauraki groups is also less straightforward than it appears to be. Although the Compensation Court heard evidence that Ngati Paoa and Ngati Whanaunga frequented kainga in the southern half of East Wairoa, it also heard that they avoided these areas during the intense fighting of late 1863. Presumably, those groups sought the relative safety of their coastal kainga during the war.<sup>259</sup> Departure from the area during the period of most violent conflict may have made it more difficult for Hauraki groups to reestablish themselves subsequently when they remained in their coastal kainga. Had they moved back inland they might have risked incurring accusations that they participated in the guerrilla campaign. East Wairoa appears to have been a vital Hauraki resource area, and one with rich ancestral and historical associations, but it was less vital than the core coastal area that remained in tribal ownership. The survival of their core area (outside East Wairoa) may have deterred Ngati Paoa and Ngati Whanaunga from protesting

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<sup>255</sup> Order in Council, 30 January 1865, NZ Gazette, 31 January 1865, No 3, p 15; RDB, vol 11, p 3990

<sup>256</sup> Proclamation, 1 April 1865, NZ Gazette, 7 April 1865, No 11, p 67-68; RDB, vol 11, p 4001-2

<sup>257</sup> English translation of claim form letter, RDB, vol 100, pp 38330-2

<sup>258</sup> See section 2.5 of the Hauraki Maori Trust Board amended statement of claim, 26 November 1997, (Wai 686, 1.3a)

<sup>259</sup> See Monin's account of this Hauraki flight from the scene of hostilities. Monin, Hauraki Contested, pp 199-201

the loss of their more remote hinterland. Inland groups like Ngati Pou and Ngati Koheriki who lost almost all their land had greater incentive to mount sustained protests.

The collaboration of key rangatira with the Crown also acted to dampen the possibility of vigorous Hauraki protest. Wiremu Hoete, Patene Puhata, and Rawiri Te Ua could be described as loyal Hauraki rangatira who consciously protected their people from the ravages of war. Hoete, a March 1840 signer of the Treaty of Waitangi, told the commander of *HMS Miranda* in October 1863 that 'he still remained firm to his old engagements with the Governor . . .'.<sup>260</sup> According to Monin, Patene Puhata moved from Waiheke to Pakihi during the Hunua guerrilla campaign to provide the Crown with reliable military intelligence. Monin further noted that Haora Tipa (like Puhata a member of the Ngati Hura hapu of Ngati Paoa) provided the Crown with similar military information during late 1863.<sup>261</sup> Native Secretary Edward Shortland valued the loyalty of the groups these rangatira represented so highly that he opposed the imposition of the Crown's naval blockade.<sup>262</sup> In fact, although it remains unclear whom the Crown consulted, loyal Hauraki rangatira apparently gave 'tacit consent' to the Thames expedition that succeeded in sealing off the East Wairoa area in late 1863.<sup>263</sup>

### **Hoete's protest**

When the Crown repaid these loyal Hauraki rangatira with less than generous compensation for their East Wairoa interests, at least one of them protested. On 9 June 1865 Hoete wrote a significant letter of protest to James Edward FitzGerald, an opponent of the New Zealand Settlements legislation who, in August 1865, succeeded Mantell as Native Minister. This open letter, written on behalf of 'all the Ngatipaoa', and published in both the *Christchurch Press* and in the *Daily Southern Cross*, is worth quoting at length. In English it read:

Friend FitzGerald, — Salutations. Turn towards me and hear my speech — a good speech.

My heart is looking at the dignity of the word of Governor Grey, in his [17 December 1864] proclamation.

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<sup>260</sup> Captain Jenkins, 'Log of HMS *Miranda*', 22 October 1863, ATL; cited by Monin, *Hauraki Contested*, p 193; and by Battersby, *War and Blockade*, p 23

<sup>261</sup> Monin, *Hauraki Contested*, pp 193-194. Battersby noted that Haora Tipa and Rawiri Te Ua also assisted the commander of HMS *Miranda* in locating 'hostile natives'. Battersby, *War and Blockade*, pp 22-23

<sup>262</sup> Shortland to Hoete, 13 November 1863, MA 1.2 1863/335; cited by Monin, *Hauraki Contested*, p 199

<sup>263</sup> Monin, *Hauraki Contested*, p 199

This word: — I will protect the people who sit peaceably — who rebel not.

The second: — I will protect them in the possession of their lands and their effects. Stop here.

Now! Hear the boundaries of the confiscated land. Beginning with Tau [Otau], in the Wairoa, stretching to Tetihi, of Wharekewa [sic], on to Tuahuorue Tuahu [or Surrey Redoubt], thence to Maiapu [or Esk Reboubt], to Pukorokoro, to Rataroa to Hapu Kohi, thence onward, onward, onward

Hear, then. The reason of the confiscation of the above territory is for the punishment of the sins of the Waikato. Is this right according to the law? Hear. The above land does not belong only to the fighting Maoris, but part of it to the non-combatants. Now, to my mind this is wrong. To my mind, it is right to take only what belongs to the hostile party. But the other way, it may be, is right according to your principles.

Hoete asked FitzGerald how the law could fail to distinguish between the innocent and the guilty in this way. He proposed that the Court should restore land to non-combatants. If ‘the many [owners] went to fight; [and] only one remained in peace’, he reasoned, then the Court should do justice to that one man’. He concluded by asking FitzGerald to correct him if he was wrong.<sup>264</sup>

According to FitzGerald’s biographer, this was one of a series of letters Hoete had written to the future Native Minister in mid 1865. In answer to Hoete’s question of whether: ‘confiscation was the European idea of justice’, FitzGerald told him (and the readers of the *Christchurch Press*) that this was certainly not the case. He believed that Hoete ‘had a truer instinct for good law than those lawyers “who had constituted the law-destroying cabinet of 1863”’.<sup>265</sup>

Hoete’s 9 June letter (written less than two weeks after the East Wairoa hearing) indicates his awareness of the contradiction between what Grey proclaimed on 17 December 1864, and what the Compensation Court awarded claimants on 27 May 1865. Hoete evidently believed that the December proclamation, not the 30 January 1865 Order in Council declaring East Wairoa as the location of sites for settlement, was the effective act of confiscation. Accordingly, Hoete believed that the Crown had confiscated most of Waikato, together with East Wairoa. Just as Fenton had suspected in early March, Maori were unlikely to distinguish

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<sup>264</sup> ‘Native Letter from the Ngatipaoa’, 9 June 1865, *Daily Southern Cross*, 3 August 1865, p 5

<sup>265</sup> FitzGerald editorial 20 July 1865, quoted in Bohan, *Blessed Madman*, p 259

between the declaration of a vast district in which confiscation could occur, and the statutory requirement for the designation of specific sites within that district.<sup>266</sup>

FitzGerald, furthermore, pursued the causes of unjust confiscation in a *Press* editorial published two days after his report of the Hoete correspondence. He argued that in 1863 the Crown forced Maori into rebellion 'by a lawless attack on their territory'.<sup>267</sup> Both William Swainson (ex Attorney General) and Sir William Martin (ex Chief Justice) raised the possibility that Maori were acting in self-defence during the 1863 debate on the New Zealand Settlements Bill. Swainson stated in the Legislative Council that some Maori had probably 'taken up arms . . . in defence of supposed rights . . .'<sup>268</sup> Martin wrote, on the same day that Swainson spoke, that Kingitanga supporters 'resisted, not because they were Traitors, but rather because they were New Zealanders . . .'<sup>269</sup> Loyal Maori other than Hoete questioned the legitimacy of confiscation. For them the punishment of rebel and loyal alike made a mockery of what they had pledged during the war.

### **Kingitanga-inspired protest**

Wiremu Tamihana, on behalf of Kingitanga supporters, protested the causes of confiscation in three successive petitions during 1865-1866. In the first, written on 5 April 1865, from Matamata, he argued for a full inquiry into the causes of the conflict that led to confiscation. He believed conflict over land formed the underlying cause. The more immediate causes he listed as the Crown's unwelcome imposition of direct rule (intended to undermine the Kingitanga) in Waikato, and the summary expulsion or detention of South Auckland Kingitanga supporters. Finally, the 12 July 1863 invasion forced Maori to defend hearth and home. Although Tamihana wrote specifically in defence of the Kingitanga, he also referred explicitly to 'the tribes of Hauraki, Waikato, Tauranga' and other areas (in that order) as having lived at peace with Pakeha for twenty years before the recent conflict. Thus, Tamihana spoke, at least in part, for Maori caught in the crossfire, as well as for those who had taken up arms in self-defence.<sup>270</sup>

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<sup>266</sup> Fenton to Native Minister, 4 March 1865, RDB, vol 111, pp 42995-6

<sup>267</sup> FitzGerald editorial 22 July 1865, quoted in Bohan, *Blessed Madman*, p 259

<sup>268</sup> William Swainson, 16 November 1865, NZ Parliamentary Debates, 1861-63, pp 870-871

<sup>269</sup> Martin to (Native Minister) William Fox, 16 November 1863, CO 209/178, pp 199-200; quoted in Parsonson, *Tainui Claims*, p 152

<sup>270</sup> Tamihana petition, 5 April 1865, AJHR, 1865, G-5, pp 1-2

Tamihana's July 1865 petition attempted to counter Grey's allegations of a murderous Maori conspiracy as both the root of the conflict and the justification for confiscation. He proposed that the Crown appoint either Chief Justice Sir George Arney, or Resident Magistrate Thomas Beckham to decide the veracity of Grey's allegations. Tamihana asked: 'Were the Europeans of Hauraki plundered . . .' when they were really at the mercy of their Maori hosts during 1863? He suggested that CMS missionaries Maunsell, Ashwell, and Brown, plus Bishop Selwyn and Sir William Martin, be called as witnesses in an inquiry into the truth of Grey's allegations.<sup>271</sup>

By the time Tamihana visited Wellington in July 1866 to plead the injustice of confiscation, he was prepared to concede the possibility that the mutual misunderstanding and groundless suspicions had fanned the flames of war three years earlier. Both sides, he regretted, 'rushed headlong to evil, and fell both of them into the ditch. Had our war been left, as I proposed, to be carried on by word of mouth only, then would it have been found out how groundless the alleged grievance of the Maori or Pakeha was'. He concluded his petition with an appeal to the goal of peace inherent in both Christianity and the Kingitanga. Peace in Waikato, however, required the return of confiscated land.<sup>272</sup>

Since Tamihana's 1865-1866 petitions fell on deaf ears in Wellington, Tawhiao took the same grievances to London. He addressed the sovereign, Queen Victoria, on behalf of 'nga Rangatira Maori', not just on behalf of the Kingitanga. He sought to remind her of the esteem Maori bestowed upon her and the great favour she had shown them 'in the Treaty of Waitangi'. He argued that unscrupulous Crown purchases had led the Kingitanga to assert its authority up to the Mangatawhiri boundary in the early 1860s. The July 1863 invasion, and the Crown's failure to respect the rights even of Maori such as Wiremu Te Wheoro who remained loyal, illustrated the injustice perpetrated in the name of the Queen. Te Wheoro, then a distinguished Maori member of Parliament, accompanied Tawhiao to London to seek royal redress. Tawhiao asked that the Queen restore to Maori their right of local self-government, and return to them 'lands wrongly obtained by the Government' in violation of the Treaty of Waitangi.<sup>273</sup>

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<sup>271</sup> Tamihana petition, 18 July 1865, AJHR, 1865, G-6, p 3

<sup>272</sup> Tamihana petition, 14 July 1866, AJHR, 1866, G-2, pp 5-7

<sup>273</sup> Tawhiao petition, 15 July 1884, JLCNZ, 1886, App. No 11, pp 1-4; McCan, *Whatiwhatiho*, pp 150-151

The imperial government denied Tawhiao an audience with Queen Victoria. It merely referred the substance of his petition back to Wellington. Again, Tawhiao's pleas, like those in an 1882 Nga Puhi petition (also taken to London) fell on deaf ears in Wellington. The Attorney General, Robert Stout, in 1885 claimed that there had 'been no infraction of the Treaty of Waitangi' since 1865, when the colony assumed full responsibility for the administration of Native affairs. On the specific points in Tawhiao's petition, he relied upon Premier Whitaker's response to the Nga Puhi petition that also condemned the Waikato war.<sup>274</sup> Yet Whitaker addressed none of the particulars of Tawhiao's petition. On the Waikato war, he disavowed colonial responsibility by stating that it occurred while Governor Grey controlled Native Affairs. Whitaker studiously ignored the whole subject of confiscation.<sup>275</sup>

Although Kingitanga-inspired protests emanated from Waikato, they affected Hauraki communities. Prior to the war, Ngati Whanaunga had placed some of their land in the Hunua foothills adjacent to East Wairoa under the mana of the Kingitanga. Hori Ngakapa Whanaunga told the Native Land Court in an 1896 papatipu investigation about 'land I gave to Potatau [Te Wherowhero] at Kohukohunui'. Murdoch believed that Ngakapa did this 'because of disputes as to its ownership'.<sup>276</sup> After 1865 other land further south 'was placed under Tawhiao's rule and so was not brought into the N[ative] L[and] Court'.<sup>277</sup> Murdoch noted that during the 1890s Ngakapa and Tutere of Ngati Whanaunga gifted coastal land beside the Waharau Stream to King Mahuta for his use when he wished to spend time in the Hauraki area'.<sup>278</sup> These gifts of Hauraki land to the Kingitanga were more in the nature of affirmations of its authority than protests against Crown action. At the same time, they may well have been designed to guarantee the mana of the Kingitanga in Hauraki after the fashion expressed in the whakatauki Robert Mahuta recited to the Maori Appellate Court in 1993:

tuku mana	to cede authority
tuku whenua	to cede lands
tuku taonga	to cede treasures
tuku tangata	to cede people
ki raro i te Kingitanga	under the mana of the Kingitanga. <sup>279</sup>

<sup>274</sup> Stout memorandum, 12 March 1885, JLCNZ, 1886, App. No 11, pp 4-5

<sup>275</sup> Whitaker memo, 12 December 1882, AJHR, 1883, A-6, pp 5-6; McCan, *Whatiwhatihoe*, pp 131-132

<sup>276</sup> Ngakapa evidence, 7 December 1896, HMB, vol 42, p 98; Murdoch, *Hunua History*, p 20

<sup>277</sup> Tukua Te Rauroha evidence, 9 December 1896, HMB, vol 42, p 121

<sup>278</sup> Murdoch, *East Hunua*, p 47

## Twentieth-century inquiries

Twentieth-century petitions from Waikato also alluded to the East Wairoa confiscation as a continuing grievance. Te Wharua Herewini's 1925 petition argued that confiscation violated the Treaty of Waitangi guarantee that Maori would not lose their land without their consent. Herewini argued that the Crown's 'fraudulent sales [hoko tahae]', not the Kingitanga, caused the conflict during the 1860s. He identified as unjust the Crown's ultimatum to Maori living in South Auckland to either swear allegiance, or to withdraw beyond the Mangatawhiri. This effectively dispossessed Maori from 'Mangere, Papakura, Wairoa and other places . . . though they had not committed any crime'.<sup>280</sup> The Native Department Undersecretary, Robert Noble Jones (also Chief Judge of the Native Land Court) dismissed the Herewini petition as 'contrary to history'. Jones believed that the Crown repeatedly warned Maori that confiscation was the consequence of rebellion.<sup>281</sup> He chose to ignore the part of the petition regarding South Auckland and, by implication, East Wairoa.

Despite this departmental dismissal, the House committee recommended that the government consider Herewini's petition. The Crown then referred it to the 1927 'Royal Commission to inquire into Confiscated Native Land and other grievances' that later became known as the Sim commission. The Crown charged this commission with the duty of determining whether confiscations may have been excessive, but not whether they may have been entirely unjust and in breach of the Crown's protective obligations towards Maori. In considering whether confiscations may have been excessive, the commission had to accept the Crown's proposition that Maori 'who denied the sovereignty of Her then Majesty and repudiated her authority could [not] claim the benefit of the provisions of the Treaty of Waitangi'.<sup>282</sup> This proposition almost condemned the Kingitanga to the invidious description of it by Crown officials in the 1860s. To the Crown, the Kingitanga remained an illegitimate rejection of all that the Crown represented, and its supporters therefore forfeited all Treaty protection.

While it was unable to question the legitimacy of the Crown's attack on the Kingitanga, the commission dealt with the Crown's treatment of South Auckland Maori in a

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<sup>279</sup> Robert Mahuta evidence, 23 December 1993, Maori Appellate Court, Waikato-Maniapoto, 1993/2; quoted by Parsonson, *Tainui Claims*, p 26

<sup>280</sup> Herewini petition, 3 June 1925, RDB, vol 4, pp 1437-44

<sup>281</sup> Jones to House Native Affairs committee, 25 August 1925, RDB, vol 4, p 1439

<sup>282</sup> Terms of commission, 18 October 1926, AJHR, 1928, G-7, p 2

forthright manner. It reported that the South Auckland confiscations were excessive, although it named only Mangere, Pukaki, and Ihumatao, not East Wairoa, in this regard.<sup>283</sup> The Sim commission's report on both the 1924 Makiwhara (Ngai Tai) East Wairoa petition, and on the 1925 Herewini petition stated that these matters were covered in its comments on the 1863 invasion of the Waikato. Although the Sim commission saw no justification for the Crown's ultimatum imposed upon Maori living north of the Mangatawhiri, it endorsed the Crown's view that the Kingitanga posed a real threat to the security of Auckland in 1863.<sup>284</sup>

The Sim commission considered no petitions from identifiably Hauraki-based groups. On the other hand, common Tainui ancestry involved both Ngati Paoa and Ngati Whanaunga in the outcome of these Waikato petitions. The late Taimoana Turoa pointed out these historical and ancestral connections in his posthumously published Hauraki history. In it he described the Hunua ranges (the site of the East Wairoa confiscation area) as the boundary between 'the Hauraki and Waikato divisions of Tainui'.<sup>285</sup>

Hauraki support for the 1947 Te Hau Tanawhea petition highlighted the ancestral and historical connections between Ngati Paoa, Ngati Whanaunga and other Tainui related groups. The signers of this petition, which called for the return of confiscated land, included six Ngati Tamaoho people from Mangatangi, 30 Te Urikaraka and Ngati Kapu people from Kaiaua, 18 Ngati Kauahi people from Whakatiwai, and eight Ngai Tai and 16 Ngati Paoa people from Kaiaua and Miranda.<sup>286</sup> McCan believes that this petition was taken around various marae in the tradition of the annual Kingitanga poukai. Tawhiao began this tradition upon his return from London in 1884, when the imperial authorities denied him an audience with Queen Victoria. Every year after 1884 the King would visit his supporters on their marae to sustain the protest tradition.<sup>287</sup>

The 1947 Tanawhea petition signalled the continuation of Maori grievances stemming from the 1865 confiscations, including East Wairoa, but the House Maori Affairs committee

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<sup>283</sup> Sim commission report, 29 June 1927, AJHR, 1928, G-7, pp 16-17

<sup>284</sup> Sim commission report, 29 June 1927, AJHR, 1928, G-7, pp 14-15

<sup>285</sup> Taimoana Turoa, *Te Takoto o Te Whenua o Hauraki: Hauraki Landmarks*, Auckland, Reed Publishing Ltd, 2000, pp 68, 74, 88

<sup>286</sup> Tanawhea petition, 1947, RDB, vol 6, pp 2038-40

<sup>287</sup> McCan, *Whatiwhatihoe*, pp 213-216



made 'no recommendation' to the government. It even failed to report the area affected by the petition correctly, stating that it concerned Taranaki confiscations.<sup>288</sup>

The continuing protest over the adverse effects of the East Wairoa confiscation surfaced again in 1988 when the Auckland Regional Authority called for submissions on Maori interests within its Hunua water catchment area. Ngati Paoa, Ngai Tai and Ngati Tamaoho responded to this invitation. The Ngati Paoa submission outlined how East Wairoa was a vital transit area for their tupuna between the coast and Waikato. It stated that the Auckland Regional Authority was responsible for the fact that no tribal land remained within the East Wairoa or Hunua catchment area. Ngati Paoa kaumatua identified the Mangatawhiri valley and Mangatangi as customary food-gathering areas, and they maintained that there was a special tribal association with the 'Kohukohunui Springs or Punewai'. They submitted that this area, which formed the eastern boundary of the confiscation area, was where Ngati Paoa collected 'Wai Tapu (sacred water)' at the 'source . . . of the Wairoa, Mangatawhiri and Mangatangi Rivers'.<sup>289</sup>

Finally, the 1995 Waikato Raupatu Claims Settlement Act reflected 130 years of Maori protest about the injustice of confiscation. The Tainui Maori Trust Board negotiated the settlement on behalf of Ngai Tai, Ngati Tamaoho, Ngati Koheriki, and Ngati Pou, among other Waikato hapu. These groups are all related to Ngati Paoa and Ngati Whanaunga, two groups not represented in settlement negotiations. The Act acknowledged several matters directly relevant to the East Wairoa confiscation. It acknowledged that in July 1863 Crown military forces 'unjustly invaded the Waikato south of the Mangatawhiri river, [thus] initiating hostilities against the Kiingitanga . . .' It also admitted that subsequent South Auckland and Waikato confiscations were 'wrongful'. Although the Act defined the 'East Wairoa Block' as outside the 'Waikato claim area', it specifically protected the rights of Waikato groups to pursue further 'claims . . . to the Wairoa Block'. It also specifically excluded Hauraki claims from the extinguishment provisions of the Act.<sup>290</sup> According to Tipa Compain of Ngati Whanaunga, a Hauraki delegation discussed the settlement provision affecting East Wairoa and Hauraki claims with Waikato negotiators during 1994. He believes

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<sup>288</sup> House Maori Affairs committee report, 15 October 1947, AJHR, 1947, I-3, p 13

<sup>289</sup> C Gregory (Ngati Paoa Research Team), 'Tangata Whenua—Ngati Paoa Site Report' in ARA, *Future Bulk Water Supply Study*, Auckland, ARA, 1989, pp 72-75

<sup>290</sup> The Waikato Raupatu Claims Settlement Act, 3 November 1995, NZ Statutes, 1995, Vol 2, No 58, pp 701-703, 706-707, 709-712

that these negotiators exempted East Wairoa and Hauraki claims from the settlement provisions limiting the right to appear before the Waitangi Tribunal. They did this, in part at least, out of respect for Hauraki rights at East Wairoa and Maramarua. Hariata Gordon of Ngati Paoa met with Robert Mahuta in 1994 when he assured her that Waikato would not limit further claims against Crown actions at East Wairoa.<sup>291</sup> Consequently, the Act directly affected Hauraki groups, and it strengthened their commitment to continue the protest against the injustice of confiscation.

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<sup>291</sup> Oral History interviews, Tipa Compain, 8 September 2001; Hariata Gordon, 9 September 2001

## **Conclusion: Treaty issues arising**

My commission specifies that I should answer the following question:

Does the manner in which the Crown inquired into, or failed to inquire into, the rights of Hauraki and related groups within the East Wairoa confiscation area raise any Treaty issues?

In concluding the interpretation presented in the preceding chapters, I will attempt to answer this question. I will begin with a summary of the Treaty issues that may arise from my discussion of the historical background to the East Wairoa confiscation. I will then revisit my interpretation of the extent to which the Crown and the Compensation Court inquired into Hauraki rights affected by this confiscation. Finally I will review evidence of protest, together with the Crown's response to it, in an effort to assess whether these protests warranted further inquiry.

### **Historical background**

My extended account of the historical background to the East Wairoa confiscation in chapter one goes well beyond the geographic limits of that area (estimated to contain 58,000 acres). It also examines the origins of the Waikato war in an attempt to explain why the Crown chose to confiscate an area with little valuable agricultural land. The available evidence suggests that Crown agents considered that much of this area was necessary for the defence of the nascent city of Auckland, even though most of it was patently unsuitable for European settlement. Key Crown agents believed that in 1863 a Kingitanga-inspired conspiracy endangered the lives and property of Aucklanders, and what was then the centre of colonial government. Governor Grey used fears of a murderous Maori conspiracy to justify the invasion of Waikato in July 1863. In his declaration to Waikato chiefs on the eve of the invasion, Grey proclaimed confiscation as the price of Maori resistance.<sup>292</sup> The December 1863 New Zealand Settlements Act, that legalised confiscation, contained in its preamble the allegation that Maori had 'taken up arms with the object of attempting the extermination or

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<sup>292</sup> 'Notification to the Chiefs of the Waikato/Panuitanga . . . ki nga Rangatira o Waikato', 11 July 1863, NZ Gazette, 15 July 1863, No 29, pp 277-278; RDB vol 11, pp 3764-5

expulsion of the European settlers . . .'<sup>293</sup> In my account of these allegations, I indicated my belief that they were uniformly unsubstantiated.

The first Treaty issue arising from the sequence of events leading to the invasion of Waikato, and the passage of the New Zealand Settlements Act, appears to be whether the Crown should have conducted a public inquiry into conspiracy allegations during 1863. Tamati Ngapora, Kingitanga's Tamaki envoy, asked Native Undersecretary Henry Halse on 9 July why the Crown had not 'caused an investigation to be made into the wrongs of Waikato before moving the troops'.<sup>294</sup> Furthermore, was Governor Grey entitled to say, in his 11 July 'Notification' to Waikato chiefs, that, unless they submitted to force, they would 'forfeit the rights to the possession of their lands guaranteed to them by the Treaty of Waitangi . . .'?<sup>295</sup> Essentially, Grey demanded that they submit to military occupation without any prior inquiry into whether they were guilty of the murderous intent he had accused them of. Was this consistent with the Crown's Treaty obligations?

Even if the Kingitanga had been found to have plans to massacre the inhabitants of Auckland, what did this have to do with the people of Hauraki? Although some Hauraki people supported the Kingitanga, they were not a majority.<sup>296</sup> Hori Ngakapa Whanaunga led the flanking action that inaugurated what I describe as the Hunua guerrilla campaign, but most of the guerrillas were neither Ngati Paoa nor Ngati Whanaunga. In any case, I argue that guerrilla action was a largely defensive response to the July invasion, designed to divert imperial and colonial troops from the front. The guerrilla campaign, nonetheless, allowed Grey to implicate Hauraki in his preconceived conspiracy theory. Guerrilla activity certainly alarmed Grey, and it reinforced his commitment to confiscation.<sup>297</sup>

### **Confiscation and compensation**

Several members of the Auckland-based General Assembly regarded confiscation as contrary to Treaty obligations in the November 1863 debates on the New Zealand Settlements Bill. FitzGerald summed up their fundamental objections with his statement that confiscation was:

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<sup>293</sup> New Zealand Settlements Act 1863, NZ Statutes, 1863, No 8, p 19

<sup>294</sup> Halse to Native Minister, 13 July 1863, JLCNZ, 1863, App. No 1, pp 5-7

<sup>295</sup> 'Notification', 11 July 1863, NZ Gazette, 15 July 1863, No 29, pp 277-278; RDB vol 11, pp 3764-5

<sup>296</sup> Mackay, Sketch map, AJHR, 1870, D-23

<sup>297</sup> Grey to Newcastle, 29 August 1863, AJHR, 1863, A-8, pp 1-2

Contrary to the Treaty of Waitangi, which had distinctly guaranteed . . . that the lands of the natives shall not be taken from them except by ordinary process of law . . . within the meaning of the Treaty.<sup>298</sup>

The Treaty issue here, then, seems to be whether the Crown could justify the effective suspension of Article II guarantees of protection with regard to Maori deemed to be ‘in rebellion’.

More generally, my discussion of the Treaty implications of currently influential historiography raises the possibility that the Crown may have compelled Maori to either submit or rebel. If this was the case, was it in contravention of the protective guarantees of the Treaty of Waitangi?

The Secretary of State for the Colonies also expressed grave reservations about the Treaty implications of confiscation. Edward Cardwell, who took over from the Duke of Newcastle in April 1864, believed confiscation would ‘form a standing qualification of [or to] the treaty of Waitangi . . .’ He saw confiscation as a last resort, to be exercised only under strict conditions. One of the conditions Cardwell specified required Grey to appoint ‘carefully chosen’ commissioners to inquire into what land could be ‘properly’ confiscated, prior to confiscation.<sup>299</sup>

Not only did Grey fail to order inquiries into confiscated areas, prior to invoking the New Zealand Settlements Act, he even proclaimed what amounted to the Crown’s intent to confiscate without reference to the terms of the Act. Grey on 17 December 1864 proclaimed a vast area from East Wairoa to South Waikato as subject to confiscation without referring to the legal basis of such action. Chief Judge Fenton later stated that this proclamation could have ‘no legal operation . . .’<sup>300</sup> In the same proclamation Grey stated that all land belonging to loyal Maori ‘shall be secured to them’, and surrendered rebels would receive land as a reward.<sup>301</sup>

Wiremu Hoete of Ngati Paoa later identified the contradiction between Grey’s proclamation and what happened in the Compensation Court. The Court compensated some

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<sup>298</sup> FitzGerald, 5 November 1863, NZPD, 1861-1863, p 784

<sup>299</sup> Cardwell to Grey, 26 April 1864, AJHR, 1864, Appendix to E-2, pp 20-22

<sup>300</sup> Fenton to Native Minister, 4 March 1865, RDB, vol 111, pp 42995-96

<sup>301</sup> Proclamation, 17 December 1864, NZ Gazette, 17 December 1864, No 49, p 461; RDB, vol 11, p 3980

'loyal' claimants. It did not 'secure to them' their East Wairoa land.<sup>302</sup> Furthermore, Hoete laboured under the illusion that Grey's proclamation was the effective act of confiscation. In fact, the 17 December proclamation could be only an indication of where, in general, the Crown intended to exercise its powers of confiscation. The Executive Council later resolved that specific confiscated areas 'shall by [subsequent] Proclamations . . . be brought under the provisions of the New Zealand Settlements Act'.<sup>303</sup> The key Treaty issue arising from the confusing December 1864 proclamation is probably the status of Grey's promise not to confiscate land belonging to loyal Maori. Did his failure to honour this promise impair the Crown's good faith implicit in its Treaty relationship with Maori?

In the event, the Crown issued the executive Order dated 30 January 1865 confiscating East Wairoa with military or security considerations in mind. The Crown evidently wished to deny Maori access to the area for any future guerrilla activity. Cardwell, in the conditions he attached to his 26 April 1864 instructions, allowed for the confiscation of land deemed necessary for defence purposes. He was even prepared to condone the confiscation of the land of loyal Maori in such circumstances. Of course, he also insisted that a carefully chosen 'commission' would decide these matters before the Crown confiscated areas such as East Wairoa.<sup>304</sup>

In creating the Compensation Court, the New Zealand Settlements Act made no provision for pre-confiscation inquiry. Neither did the 1864 amendment to the Act. How, then, could Grey promise not to confiscate the land of loyal Maori without undertaking some sort of inquiry into wartime activities? Grey's further promise to return land to surrendered rebels suggests that he believed that section six of the act rendered them eligible for compensation. This was, however, contrary to Fenton's practice in the Compensation Court, and indeed contrary to the wording of his letter of appointment. In this January 1865 letter, Native Minister Mantell referred only to loyal Maori as those eligible to claim compensation.<sup>305</sup> Was the Compensation Court's failure to consider the claims of surrendered rebels, therefore, contrary to the intent of section six of the New Zealand Settlements Act 1863, and in violation of Grey's promise to return land to surrendered rebels?

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<sup>302</sup> 'Native Letter from the Ngatipaoa', 9 June 1865, *Daily Southern Cross*, 3 August 1865, p 5

<sup>303</sup> Executive Council minutes, 29 December 1864, EC 1.2, pp 610-611

<sup>304</sup> Cardwell to Grey, 26 April 1864, AJHR, 1864, Appendix to E-2, pp 20-22

Chapter two, entitled Hauraki rights in East Wairoa, dwells on procedural problems associated with the infant Compensation Court. Just the fact that the Crown apparently failed to give public notice of the 26-27 May 1865 East Wairoa Compensation Court hearing, on the face of it, severely impaired the rights of Maori claimants. The fact that the Court sat less than six months after the first formal notice of application procedures was also contrary to law. Finally, the Crown changed the boundaries of the confiscation areas before the East Wairoa hearing, but it failed to notify the public (including claimants) of these changes until after the hearing. This, too, inevitably disadvantaged claimants. The question arising from these procedural problems is: did they amount to a miscarriage of justice with Treaty implications?

The very brief official minutes of the East Wairoa hearing provide only an incomplete account of what transpired there. While Hauraki claimants who appeared identified a pattern of land rights in the southern half of the confiscation area, the locations are confusing. The 'scatter-shot' approach of many of the Hauraki claimants meant that they claimed areas both inside and outside the confiscation area. This could be explained, in part, by the Crown's unclear and inconsistent descriptions of what it had confiscated. Above all, in 1865 it failed to publish maps of what it confiscated. In addition to changing East Wairoa boundaries in an irregular way, the Crown also led some claimants to believe that it confiscated everything from East Wairoa to South Waikato (described in Grey's 17 December 1864 proclamation). Crown officials even neglected to clarify for themselves the distinction between the declaration of a district under section two of the New Zealand Settlements Act 1863, and the selection of sites for settlement under section three. Both Fenton and FitzGerald brought this question up in 1865, but I have seen no evidence that it was ever satisfactorily answered.<sup>306</sup> Was the Crown's failure to answer this vital question consistent with its Treaty obligations?

The Compensation Court failed to test very subjective evidence brought before it on the question of who could be described as a rebel and what tribal groups could be described as rebel. Fenton's peremptory dismissal of a Ngati Paoa adherent of Pai Marire, after ruling his evidence to be admissible, indicates the politically charged nature of the proceedings. The Chief Judge's conclusion that 'a very considerable number of [East Wairoa] owners' were

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<sup>305</sup> Mantell to Fenton, 11 January 1865, RDB, vol 101, pp 38983-4

<sup>306</sup> Fenton to Native Minister, 4 March 1865, RDB, vol 111, pp 42995-6; FitzGerald to Pollen, 3, 10 September 1865, MA 4/7, pp 193-196, 207

rebels appears to be based on evidence that was not recorded in either the Court minutes or the *Daily Southern Cross* reports of the hearing.<sup>307</sup>

Fenton may have relied upon the observations of the key Crown agent in Hauraki, James Mackay, in determining the level of rebel activity associated with East Wairoa claimant groups. Few of the claimant witnesses who named rebels in Court were asked to substantiate their accusations. As a Crown agent, Mackay may have known the accused, but as a Judge he could not supply evidence in Court. Without a record of what the Court used to distinguish rebel from loyal, we can conclude only that Fenton and Mackay did not record enough to ensure that they employed an adequate standard of proof. Although under section six of the Act they may not have been entitled to disqualify surrendered rebels, we know that they did so. Given this, evidence of their grounds for disqualification became particularly important.

Fenton later described his Court as having inquired conscientiously into the ancestral origin of rights. Again, the record of the East Wairoa proceedings does not disclose any such thorough inquiry. Nor did the Court leave any record of having examined what could be described as Hauraki historical associations within the East Wairoa area.

Mackay's role appears to have been crucial in regard to the meagre documentation. By 1865 he had become familiar with the most important people and places in Hauraki. Fenton undoubtedly relied upon Mackay's local knowledge. At the same time, we cannot be sure of this, because Mackay recorded so little. His cryptic references to post-hearing 'out of court' settlements testify to how difficult it is to reconstruct his actions. He boasted in 1891 of settling hundreds of Waikato claims in this way. Such settlements were not only contrary to Cardwell's 1865 instructions on the subject, they were also plainly in violation of ordinary judicial standards.<sup>308</sup> Although the Treaty texts do not refer to judicial standards, in the discussions of the Treaty prior to its signing in 1840, the Governor had announced his intention to inquire into Maori land grievances.<sup>309</sup> Were Maori, then, entitled to a proper judicial inquiry into grievances arising out of confiscation?

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<sup>307</sup> *Daily Southern Cross*, 29 May 1865, p 5; RDB, vol 111, p 43067

<sup>308</sup> Cardwell to Grey, 24 April 1865, AJHR, 1865, A-6, pp 18-19

<sup>309</sup> Waitangi Tribunal, *Muriwhenua Land report*, Wellington, GP Publications, 1997, p 115



Having concluded that the Compensation Court conducted no more than a cursory inquiry into Hauraki rights (or, for that matter, any rights), the question remains: why were its activities so limited? I argue that Fenton and Mackay's lack of formal inquisitorial experience, and the hurried nature of their early hearings, severely limited the East Wairoa inquiry. The fact that the Crown had moved 300 special settlers to the Otau area in April 1865 may have added to the haste of the proceedings. The almost simultaneous establishment of the Compensation Court and the Native Land Court, with Fenton and Mackay serving as Judges in both, while the Crown provided meagre administrative support, hampered the effectiveness of both institutions. Early hearing notices for both Courts proved to be inadequate and inaccurate. Most of the advertised Hauraki hearings in 1865 had to be postponed. The Crown evidently underestimated the difficulty in bringing Maori into an unfamiliar judicial environment. Ultimately, the Tribunal may have to decide whether the inauspicious early inquiries of the Compensation Court were consistent with Treaty obligations.

The Treaty implications of poorly documented protest against the East Wairoa confiscation, and confiscation in general, forms the subject of chapter three. In that chapter I indicate that the relative lack of recorded protest should not be taken to mean the absence of all significant protest. Just as with the Crown's East Wairoa inquiry, the historical record of protest is very incomplete. Hauraki Maori disturbed by the consequences of confiscation suffered from multiple disadvantage. They lacked the Crown's record-keeping resources, and they also lacked a clear and compelling account of how Crown actions may have disadvantaged them.

### **Confused consequences**

The Crown never classified any Hauraki group as a 'rebel Tribe', so neither Ngati Paoa or Ngati Whanaunga could take exception to this invidious description. The Crown also never clarified whether they sought to punish Hauraki people for 'the sin of Waikato', or for the fact that some of their own people supported the Kingitanga. The fact that Ngati Paoa and Ngati Whanaunga avoided their East Wairoa kainga during the height of hostilities in 1863 made it more difficult for them to re-establish themselves there subsequently. The retention of their coastal kainga, north and east of the confiscated area, further may have deterred them from persisting with protests about the loss of less essential inland areas. Inland groups, like Koheriki and Ngati Pou, who found themselves almost landless, had greater cause to protest.

The active collaboration with the Crown of key Hauraki leaders, Wiremu Hoete, Patene Puhata and Haora Tipa, further complicated the situation. Hoete protested to FitzGerald about how confiscation condemned both the innocent and the guilty, both loyal and rebel Maori. Hoete could not understand why, if confiscation was designed to punish the sin of Waikato, loyal Hauraki Crown supporters were condemned to suffer as well. As editor of the Christchurch *Press*, FitzGerald was prepared to offer Hoete his full support. He wrote that Hoete 'had a truer instinct for good law' than the drafters of the New Zealand Settlements Act.<sup>310</sup> Unfortunately, FitzGerald was not prepared to act upon these sentiments when he became Native Minister two months later. As Minister he insisted on carrying on 'the policy of the last two years', a policy he opposed as contrary to Treaty obligations when it was adopted by (in his own words) 'the law-destroying cabinet of 1863'.<sup>311</sup>

Hoete's confusion about the legal status of Grey's December 1864 proclamation illustrates another disadvantage to Maori. The proclamation looked like an act of confiscation, but Fenton believed it had 'no legal operation . . .'.<sup>312</sup> Since neither Fenton nor FitzGerald were able to get the Crown to clarify the legal status of the proclamation, what was Hoete supposed to do? If the Crown created confusion with its own proclamations, surely it had a duty to remedy that situation as a basic responsibility to its own subjects. This should not have required the invoking of any Treaty obligations.

A former Attorney General, and a former Chief Justice challenged Grey's 11 July 1863 declaration that Maori who took up arms had forfeited all Treaty rights. William Swainson and Sir William Martin did this simply by raising the possibility that Maori opposing the invasion of Waikato acted in self-defence.<sup>313</sup> Wiremu Tamihana petitioned parliament on behalf of the Kingitanga in 1865 and 1866 on the legitimacy of resistance to invasion. He explicitly, and convincingly, rejected Grey's allegations that a murderous Kingitanga plot caused the war. On the other hand, he was prepared to concede that both

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<sup>310</sup> 'Native Letter from the Ngatipaoa', 9 June 1865, *Daily Southern Cross*, 3 August 1865, p 5; FitzGerald editorial 20 July 1865, quoted in Bohan, *Blessed Madman*, p 259

<sup>311</sup> FitzGerald to Pollen, 3 September 1865, MA 4/7, pp 193-196; FitzGerald editorial 20 July 1865, quoted in Bohan, *Blessed Madman*, p 259

<sup>312</sup> Fenton to Native Minister, 4 March 1865, RDB, vol 111, pp 42995-96

<sup>313</sup> William Swainson, 16 November 1865, NZ Parliamentary Debates, 1861-63, pp 870-871; Martin to (Native Minister) William Fox, 16 November 1863, CO 209/178, pp 199-200; quoted in Parsonson, *Tainui Claims*, p 152

sides miscalculated each other's intentions in 1863, with tragic consequences.<sup>314</sup> King Tawhiao took the same sort of grievances to London in 1884, with the Treaty of Waitangi at the forefront of his call for redress. Yet neither the imperial nor colonial governments were prepared to concede the need for a proper judicial inquiry. The imperial government simply passed the matter back to the colonial government in Wellington to deal with. The colonial government, however, denied responsibility for war (and, by implication, confiscation). War and its consequences, colonial officials said, stemmed from imperial actions.<sup>315</sup> Maori were therefore left without any form of effective redress until the twentieth century.

While Kingitanga-inspired protests may appear to be remote from Hauraki and East Wairoa, they were connected. Prior to 1863, Ngati Whanaunga gave land to the first Maori King, Potatau Te Wherowhero, at Kohukohunui (later the northeastern corner of the confiscation area). Hauraki followers of the Kingitanga gifted other land near East Wairoa to Tawhiao and to Mahuta later in the nineteenth century. These gifts apparently symbolised a continuing bond between the Kingitanga and Hauraki that sustained protest against confiscation into the twentieth century.

The Herewini petition that referred the matter of East Wairoa to the 1927 Sim commission protested the forced 1863 relocation of Tamaki groups to south of the Mangatawhiri. According to petitioners, this forced relocation effectively dispossessed the people of 'Mangere, Papakura, Wairoa and other places . . . though they had not committed any crime'.<sup>316</sup> The Sim commission found that the Crown acted unjustly in this instance, but it was still convinced that Maori threatened the security of Auckland in 1863. Moreover, the terms of its commission allowed it to consider that confiscation may have been excessive, but not that it could have been entirely unjust and in violation of Treaty obligations. The terms of the commission insisted that Maori who supposedly 'denied [Crown] . . . sovereignty' could not also 'claim the benefit of the provisions of the Treaty of Waitangi'.<sup>317</sup>

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<sup>314</sup> Tamihana petition, 5 April 1865, AJHR, 1865, G-5, pp 1-2; Tamihana petition, 18 July 1865, AJHR, 1865, G-6, p 3; Tamihana petition, 14 July 1866, AJHR, 1866, G-2, pp 5-7

<sup>315</sup> Tawhiao petition, 15 July 1884, JLCNZ, 1886, App. No 11, pp 1-4; McCan, Whatiwhatihoe, pp 150-151; Stout memorandum, 12 March 1885, JLCNZ, 1886, App. No 11, pp 4-5

<sup>316</sup> Herewini petition, 3 June 1925, RDB, vol 4, pp 1437-44

<sup>317</sup> Terms of commission, 18 October 1926, AJHR, 1928, G-7, p 2; Sim commission report, 29 June 1927, AJHR, 1928, G-7, pp 16-17

Only in the Waikato Raupatu Claims Settlement Act 1995 was the Crown willing to accept the fundamental injustice of confiscation. The Act stated that the 1863 invasion and subsequent confiscations were 'in breach of the Treaty of Waitangi'. The Act set out in Maori and English the Treaty of Waitangi in its First Schedule. It quoted the Waitangi Tribunal's finding in its 1985 Manukau report that the 1863 invasion of the Waikato was 'in direct violation of Article II of the Treaty of Waitangi'.<sup>318</sup>

The 1995 Act also protected the rights of Waikato groups to pursue further 'claims to the [East] Wairoa Block', and it excluded Hauraki claims from the list of those extinguished.<sup>319</sup> Tipa Compain and Hariata Gordon believe that the exclusion of East Wairoa and Hauraki claims from the bar on further claims in the terms of the Act resulted from Hauraki discussions with the Waikato negotiators.<sup>320</sup> Apparently, these negotiators were prepared to respect Hauraki rights to file claims with the Waitangi Tribunal against Crown actions at East Wairoa, and in other areas affected by confiscation.

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<sup>318</sup> The Waikato Raupatu Claims Settlement Act, 3 November 1995, NZ Statutes, 1995, Vol 2, No 58, pp 701-703, 706-707

<sup>319</sup> The Waikato Raupatu Claims Settlement Act, 3 November 1995, NZ Statutes, 1995, Vol 2, No 58, pp 709-711

<sup>320</sup> Oral History interviews, Tipa Compain, 8 September 2001; Hariata Gordon, 9 September 2001

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