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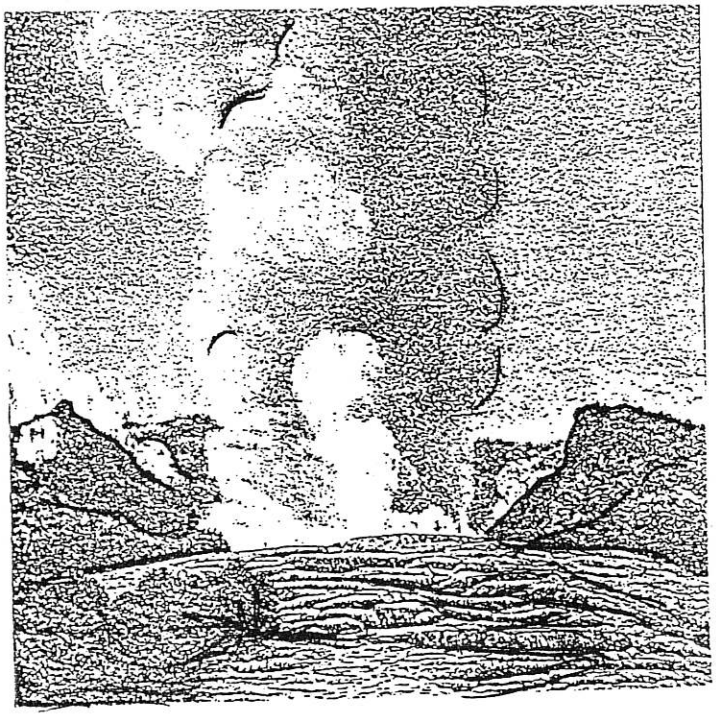
THE LEGAL FRAMEWORK FOR GEOTHERMAL RESOURCES: A HISTORICAL STUDY



A Report to the Waitangi Tribunal

by

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PREFACE

This report to the Waitangi Tribunal is set out in the form of a statement of evidence, although due to its length it is probably unlikely that the whole document will be read in evidence in its entirety at the Tribunal's inquiry into the geothermal claim.

This report does not attempt to deal with the "Maori perspective" on geothermal taonga. This is a task for those with the necessary expertise, expertise which I do not profess. Nor does it deal in any way with Maori customary law relating to geothermal resources. This last omission may strike many people as strange in a report which attempts to deal with "legal" and "legal-historical" issues relating to geothermal resources, and calls for an explanation.

The explanation for the omission of the subject of customary law is partly simply a matter of my personal complete lack of expertise. I have on a number of occasions argued that Maori customary law be given its due place in geothermal (as indeed in all) resource management, but this is a long way from claiming expertise in the content of the customary laws. This is obviously a task for others. I venture to express the hope that one of the outcomes of the geothermal claim will be a better understanding of the concepts and workings of Maori customary law. This can only be achieved, however, if those with the requisite knowledge feel willing to come forward in order to enlighten the rest of us.

Maori customary law is omitted not because it is unimportant, but because it is important. It deserves full exposition by those who have the capacity to grasp its subtleties and explain them to others.

This report focuses on the formal, normative, rules of the New Zealand legal system. I have tried to set this law in as broad a context as possible. I want to make it very clear that

in discussing the common law and statutory framework I am not implying that these rules ought to be the framework for geothermal resource management from now on. The simple fact is that for all practical intents and purposes these have been the rules until now. It is necessary that they be fully understood. Some features of the existing framework may have features which might be seen as being of continued usefulness by this tribunal, but in the present context I do not regard this as something for me to judge.

A further feature of this report which calls for explanation is the fact that the report does not begin with a discussion of the rules of common law, but begins instead with the "Fenton Agreement" of 1880. This is quite deliberate. Issues about ownership of the geothermal resource (meaning the underground resource) did not become relevant until the mid-twentieth century. Only then did New Zealand begin to develop the technology which led to the spectacular engineering successes at Wairakei and Ohaaki.

The concept of a geothermal "resource", in short, is recent. Prior to World War II the geothermal "resource", if it meant anything, meant geysers and hot springs - in other words geothermal surface features. To the government these features, the "thermal springs" or the "hot lakes" of the Rotorua-Taupo region were valuable as an asset for attracting tourists. The legal regime that was developed was linked to the objective of developing the tourist industry. The Thermal Springs Acts thus prohibited any but the Crown from purchasing land in the Rotorua-Taupo region, thus ensuring public ownership of hot springs wherever possible. The Scenery Preservation Act, which was in part specifically targeted at thermal springs, facilitated compulsory acquisition from Maori owners, proceeded with at Waiotapu and Awakeri. A further objective of the Thermal Springs Acts was to extend the zone of effective government authority.

With the realisation that geothermal energy beneath the earth was an energy resource came the necessity for the first

time to devise a legal framework for it. In discussing this it becomes necessary to deal with the common law rules of resource ownership. This is why this part of the discussion forms the central, rather than the beginning, section of this study.

This year I was fortunate enough to be commissioned to write a report for the Tuaropaki and Ngati Tahu trustees on geothermal issues. This was completed in May of this year and the report presented to the trustees as Ngatoro-i-Rangi's Legacy: Maori Interests in Geothermal Resources (1991). This present report naturally draws to a large extent from the earlier document. However, this report is a completely different text and has been completely rewritten. The report for Tuaropaki/Ngati Tahu was quite different in its scope and objectives. This report greatly expands on some material in the earlier report, and omits a great deal of it. Only the sections on the common law rules and the Scenery Preservation Act remain essentially the same, though even here there have been many changes made. I would like to take this opportunity to thank the Tuaropaki trustees and Ngati Tahu trustees for the earlier commission and the opportunity to discuss the situation with them. I would like to thank also the Waitangi Tribunal for this present commission. Grateful thanks are due also to Tom Bennion of the Waitangi Tribunal Division, Department of Justice, for his own helpful report on legislative issues, and to Dr Evelyn Stokes of Waikato University whose many papers on this subject have been of invaluable assistance.

R.P. Boast

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1.0 INTRODUCTION

1.1 My full name is Richard Peter Boast. I am a senior lecturer with the faculty of law of Victoria University of Wellington, where I teach courses on environmental law, Maori land law, legal history, indigenous peoples and the law and public law. I have an LL.M from Victoria University and an M.A. (1st-class honours) in history from Waikato University. In relation specifically to geothermal issues I was commissioned by the Manawhenua section of the Ministry for the Environment to write a working paper for the Resource Management Law reform process on Geothermal Energy: Maori and Related Issues (published by the Ministry for the Environment in 1989), and this year I have prepared a report for the Ngati Tahu and Tuaropaki trustees entitled Ngatoro-i-Rangi's Legacy:- Maori Interests in the Geothermal Resource (1991).

1.2 I regard myself primarily as a legal historian, and this report is intended to focus primarily on those aspects of New Zealand's legal history which impinge upon the ownership and management of geothermal resources. I have taken the view that a consideration of the implications of the Treaty of Waitangi is a matter for counsel to address by way of submissions than something to be traversed in evidence. Nor is this report intended to traverse matters concerning traditional use of the geothermal resource. Although I am familiar with some of the Rotorua and Taupo minute books of the Native Land Court, which do contain a certain amount of evidence regarding traditional use of the resource, it seems unnecessary for me to present this material to the Tribunal. For the Taupo region this has already been covered in the many scholarly and valuable reports and papers by Dr Evelyn Stokes which are already on the record and in any event a separate report on traditional use of the use as

documented in early travellers' records and the Minute Books of the Native Land Court will be commissioned by the Tribunal.

1.3 My focus is on legal history. I have, however, decided to interpret this fairly broadly. I have not confined myself to a discussion of the background to, and subsequent history of, the Geothermal Energy Act 1953. Although the principal focus today is on the value of the geothermal resource as an *energy* resource, for a much longer period the principal interest of government had much more to do with the scenic and therapeutic qualities of surface geothermal features. The narrative will begin, therefore, with the Fenton Agreement of 1880 and with its offshoot, the first Thermal Springs District Act. Some attention will be paid to the first major investigations of title by the Native Land Court in the Rotorua and Taupo regions (although it is not possible to cover this comprehensively). This will be followed by a consideration of the Scenery Preservation legislation, the management of the resource by the Crown in the years before World War II, and finally by a study of the background to the enactment of the Geothermal Energy Act 1953. This will include a detailed covered of the relevant common law rules.

1.4 I am mindful of the fact that New Zealand's geothermal resources are not confined to the Rotorua-Taupo region, but are to be found in the Bay of Plenty, the Wairoa area and at Ngawha in Northland as well. I have, however, decided to focus on Rotorua-Taupo for present purposes. The story of land alienation around Whakatane is a complex story in its own right, involving raupatu issues to a large extent; and of course the Bay of Islands has its own complicated story. I do not feel that I could do justice to these important histories in this report. In my opinion, the central and principal history follows a clear line from the Fenton Agreement through to the Thermal Springs Acts and the Scenery Preservation Acts, and it is on this I have decided to concentrate for present purposes.

2.0 THE FENTON AGREEMENT 1880

A. Introduction

2.1 The Fenton Agreement of 1880 was the precursor to the first of the Thermal Springs Acts. It also paved the way for the modern settlement of Rotorua and for a flood of investigations of title by the Land Court in the Rotorua-Taupo region in the early 1880s. It forms a convenient starting-point for the narrative.

2.2 On 25 November 1880 at the Tamatekapua meeting house at Ohinemutu an historic agreement was concluded between the Crown and Maori chiefs of the Arawa federation, principally from Ngati Whakaue. The Crown's representative was Francis Dart Fenton, then aged about forty, who had already made a name for himself as Chief Judge of the Native Land Court. Unlike the Treaty of Waitangi, the Fenton Agreement was directly negotiated with Arawa chiefs on Arawa territory and remains of vital importance to the present day - as the recent re-surfacing of the issue of medical treatment reminds us. As to whether Arawa ever signed the Treaty of Waitangi or not, I note only a reference in James Cowan's The New Zealand Wars where Cowan, when he discusses Arawa's refusal to join the Kingitanga, quotes the words of Temuera te Amohau at the meeting at Paetai in 1857:-

> "One of our chiefs, Timoti, was the only man of the Arawa people who signed the Treaty of Waitangi, but we shall not depart from the pledge he then gave. We will not join the king tribes. My king is Queen Victoria."[1]

2.3 The proliferation of recent commentary on the Treaty of Waitangi takes no account of the fact that the Treaty of Waitangi was not the only formal compact concluded between the Crown and the tribes. There has been no attention given to the constitutional position of texts such as the Fenton Agreement or - to take another example - of the Aotea Agreement of 1881 which brought the independence of the Rohe Potae (the so-called "King Country") to a close. If it was the case that the Maori ceded

this country to the Crown, is it not possible that the process of cession was in fact partial and gradual and took many years to complete?

B. The Rotorua Region in 1880

2.4 In 1880 the Rotorua region was part of a zone of autonomous Maori authority. It should not be assumed, simply because the hot springs of the area were already an internationally-famed tourist attraction, that the area was under the effective control of the state. In fact it lay completely outside the formal structures of government. At Rotorua the principal agency of authority was not the state but the Komiti Nui o Rotorua, the "great Committee" of chiefs. The Komiti held regular meetings at the Tamatekapua meeting house and had appointed a secretary to conduct the Komiti's formal business. The Komiti had organised its own process of investigations into customary ownership of land complete with formal hearings after which pieces of land were awarded to claimants on the basis of Maori custom.[2] Fenton himself, in his report to the government after the conclusion of the agreement, describes the Komiti as follows[3]:-

> "I should add that I found in existence, at Ohinemutu, a regularly organised head body with Chairman, Secretary and officers. It was constituted as a Land League for the prime object of preventing alienation to the Crown, and in a secondary degree, of obstructing or assisting, as the case may be, in association with private persons, but it subsequently assumed other powers and duties, and had acquired a position of some importance, being accepted by the tribe as the Witanagemot was accepted by our fathers, with little more than its own influence and strength to enforce its decrees."

2.5 Although the region was effectively under Maori control, life in the Rotorua region had nevertheless been much affected by European contact. The Christianity of the missionaries had

penetrated deeply: the Maori villages of the region were, of course, Christian communities. The Arawa tribes had mostly fought on the Crown's side during the wars of the 1860s. Arawa was in a strategic and exposed position during the wars and had provided a vital service for the Crown in blocking access to the main theatre of operations in the Waikato to pro-Kingitanga contingents from the East Coast[4]. Some Arawa officers rose to high positions in the Crown's armed forces. The social dislocation caused to Arawa by the wars and the extensive fighting in their region is an uncharted subject, but the effects must have been considerable. The wars had also led to a programme of road construction, and by the mid-1870s a road ran from Tauranga to Taupo via Ohinemutu and Atiamuri on the Waikato river[5]. With the road had come surveyors. The first telegraph office in the region was opened in 1871[6]. Most importantly Rotorua was the centre of a rapidly-growing tourist trade centred on the lakes and hot springs of the region[7]. For most tourists the highlight of their visit was the Pink and White Terraces of the Rotomahana area. The terraces, which were soon to be obliterated in the devastating eruption of Mt Tarawera, were located in the territory of Ngati Tuhourangi, who were certainly doing very well economically out of the tourist trade in their region[8]. And, at Whakarewarewa the local people, "well aware" as Stafford says[9] "of the commercial value of their springs" had constructed a number of "comfortable whares" for tourists (at 5s. a week). It was this thriving trade which had brought some European hotelkeepers and storekeepers into the district. The tourist trade must also have had important social and economic effects, but it likewise remains an uncharted subject.

2.6 These European residents were obliged to enter into lease arrangements with the Maori landownders. Strictly speaking such leases were legally void, a violation of the pre-emption doctrine (a lease, as an estate in land, could only be effective following the extinguishment of the native customary title). Fenton for some reason harbored a particular aversion for these European "squatters"[10].

2.7 In 1880 the whole Rotorua region was still uninvestigated Maori customary land. Apart from a few minor early and abortive inquiries, the Land Court had never sat there[11]. Thus land remained wholly Maori owned; control of the tourist trade was principally in Maori hands; and local Maori had devised their own system for regulating title without having recourse to the Land Court. Arawa had indeed strenuously resisted the coming of the Court into their region, and only at Maketu had its impact been in any way significant[12]. The European population of the region was tiny and basically lived under Maori sufferance. But the situation was an unstable one. Government interest in the region was growing. The coming of the road had involved of necessity the coming of surveyors, and there had been an incident at Ohinemutu in 1873 when two surveyors, Henry W. Mitchell and C.O. Davis, had been forced to leave[13]. The road and the telegraph had reduced the Rotorua region's isolation to some degree and the tourist potential of the region meant that its isolation and autonomy could not continue indefinitely.

C. Fenton at Rotorua

2.8 Although Rotorua chiefs such as Rotohiko Haupapa were keen to modernise the region and to develop education, the idea of concluding some sort of formal agreement between the Rotorua chiefs and the Crown appears to have originated in Fenton's own brain. Quite what his objectives were is not altogether clear. From what is known of Fenton[14], and from his evident distaste for the European tenants at Ohinemutu, it is possible that his main objective was initially to regularise land ownership around Rotorua by means of some process which would give an influential role to the Native Land Court. The government's main objectives were to make the area more attractive to tourists, and to obtain land in the region for the Crown. This can be seen by the formal instructions telegraphed by James Bryce to Fenton, on circuit in Hawkes Bay at the time, in November 1880[15]:-

"Mr Rolleston [the Native Minister] who is absent in

> Canterbury requested me to reply to your telegraph of the 5th instant re. the Rotorua business [not on the file]. Both he and I would be very glad if you would return overland as you suggested and endeavour to ascertain on what conditions the Maoris would be willing to dispose of enough land near Rotorua to remove the present difficulties and obviate future ones in respect to Hotel accommodation for visitors to the lake. Govt. would agree to almost anything which would be effectual as township should however be formed to secure sanitary regulations being enforced. This might be secured either by sale or by lease. If they [illegible].....the latter the lease should still be a long one. However you know what is required and Govt. will look forward with interest to your report in the hope that you will be able to advise some course which will render the Lake Country more agreeable to visitors that it is at present."

These instructions gave Fenton a remarkably free hand. Bryce and Rolleston seem to have been more than happy to let Fenton handle things as he wished. Although Rolleston was later to be somewhat taken aback when confronted with the text of the agreement Fenton was to conclude, he nevertheless needed little persuading to accept it and it was subsequently ratified by the government without difficulty.

2.9 Following receipt of his instructions Fenton made his way from Napier to Rotorua via Taupo, an arduous journey in those days, taking with him Wiremu Hikairo, an Assessor of the Native Land Court and (in Fenton's words) "a landowner and a man of importance in the Rotorua country"[16]. Fenton was at Ohinemutu for about a fortnight. During this time he had a number of meetings with Ngati Whakaue. In his report Fenton stated that he visited the "neighbouring tribes"[17] as well as Ngati Whakaue. He certainly discussed matters with representatives of Ngati Tuhourangi at Ohinemutu but what other tribes, if any, he visited is impossible to say. The agreement which Fenton concluded appears to have been primarily an agreement with Ngati Whakaue

only. A separate, and much shorter, agreement was concluded with Tuhourangi[18]. On his way home to Auckland Fenton travelled from Rotorua to Maketu on the Bay of Plenty Coast, also in Arawa territory, where he had some further discussions with Arawa chiefs.

2.10 The Fenton agreement is dated November 25th, 1880. The relevant Maori Affairs Department file contains a draft of the agreement in Maori and Fenton's own translation of this into English, as well as a separate English text which may have been re-worked from Fenton's translation[19]. There seems no reason to doubt that the contents of the agreement were worked out in Maori by Fenton (who spoke and wrote Maori fluently) and the chiefs, and that the Arawa chiefs present comprehended perfectly well what was transpiring. As to the actual drafting of the agreement Fenton says:-

> "The agreement which I enclose is abundantly signed, and will be faithfully kept. There may be some difficulty as to the boundary lines between this tribe and that of the adjoining tribe, Tuhourangi, but that difficulty will be the duty of the Native Land Court to overcome. It will not concern the government.....The several items of the agreement are mostly of my own proposing - The natives put themselves pretty well into my hands with the exception of not permitting cession to the Crown, and I inserted the conditions which under the circumstances I thought most advantageous - remembering that the town would not be a commercial town nor for many years to come couldn't [sic] be much interested in agriculture, but that its prosperity would be based on circumstances entirely exceptional."[20]

2.11 Whatever one thinks of Fenton or his objectives, it has to be conceded that the agreement he devised was a remarkable achievement. It was no small feat to have won the confidence of the Ngati Whakaue chiefs in the way he did. Fenton's attitude towards the chiefs seems to have ambivalent. With some of them he seems to have developed a reasonably close friendship,

evidenced by the flood of telegraphs in Maori which passed between them and Fenton. On the other hand there certainly was an element of condescension in Fenton's general attitude, as is shown in the revealing remark made in his report. Here he urged the government to make haste in giving effect to the agreement and that government:-

> "...should leave nothing unfinished or postponed. Dilatory and prevaricating as they are themselves, they [the chiefs] do not endure these qualities in others."[21]

D. The Contents of the Agreement

2.12 The agreement is entirely concerned with future arrangements for the new town of Rotorua. Following a survey to be conducted by the Chief Surveyor, the first principal step was to be a Native Land Court adjudication of the block later to be known as Pukeroa-Oruawhata.

1. The whole of the land commencing on the North of Te Pukeroa, going on to the Puerenga River, on the Rotorua Lake and extending on to the mountains must be adjudicated upon by the Native Land Court of New Zealand, but excluding the Maori settlement of Ohinemutu[22].

Following the adjudication and the survey of the block boundary Mr Smith was to survey out the new town sections. The agreement carefully detailed the arrangements regarding the new town as follows:-

3.1 The land that lies between Te Pukeroa and Rotorua shall be left for a settlement for the Maoris, but the present road shall be widened and carried on to the Town.

3.2 Te Pukeroa to be a Reserve for Public Recreation for everybody, be they Europeans or Maoris. This

Reserve shall be vested in certain Europeans and Maoris, to be chosen by the Committee.

3.3 Persons who own portions of the Pukeroa Block shall be paid for the same by pieces in the Town. This shall be carried out by the Committee of Rotorua.

3.4 The piece of land owned by Roman Catholics in the Pukeroa Block shall be exchanged for a piece in the Town.

3.5 A skilled doctor shall be located in the Town.

3.6 All the medicinal waters within the Town shall be Public Reserves under the management of the doctor, who may make laws regulating their use[23].

It was provided that the streets of the town were to vest in the Crown, that land would be given "without payment" for a water race from the Utuhina River to the town, and that "all Maori patients shall be received into the hospital free of charge"[24].

2.13 Some attention was given to questions of law and order and to ensuring that the Pakeha and Maori communities would be able to live peaceably together. It was provided in Clause 7 that "when the Town shall have grown up and become of importance" the government would appoint a resident Magistrate. The Magistrate, together with the doctor and a Maori representative chosen by the Komiti would control the issue of licences for taverns[25]. Provisions were made regarding the fencing of stock - a frequent source of trouble between Maori and Pakeha in other areas[26].

2.14 Arguably, the most important sections of the agreement related to the leasing of land. The idea was that the Town sections at Rotorua would not be sold but would be leased and the income be available for the Maori Owners. The leases were to be on advantageous terms to make them attractive to purchasers, who presumably would be expected to pay a lump sum plus an annual

rental. The leases were to be sold by auction in Auckland and were to be for a period of 99 years. The auction and the administration of the proceeds were to be conducted by the Commissioner of Crown Lands at Auckland[27].

2.15 Essential to the success of the scheme, in Fenton's view, was advertising the sale of the leases in Australia and India, emphasising the therapeutic qualities of the hot springs. Fenton states in his report:-

> "I nearly forgot to state that I persuaded the Maoris that the scheme should be advertised in the adjoining British possessions, including India. May I take the liberty of suggesting that Dr Hector's services would be of great value in performing this work and that the official Gazette would be a good medium. That gentleman is well acquainted with the peculiar and various character of the.....mineral waters of the place."[28]

E. The Land Court Investigates Title to Te Pukeroa

2.16 The first step in the process of implementing the agreement - and of land alienation in the Rotorua district - was the Native Land Court's adjudication of title in the case of the Pukeroa-Oruawhata Block. This is the major block of land which stretches east from Ohinemutu and which now accounts for most of the modern city of Rotorua. The case was heard not by Fenton but by Judge Symonds, the hearing beginning on 29 January 1881 with judgment being given on 28 June 1881. Fenton, however, retained a remarkable degree of control over events from behind the scenes. He was engaged in a very active correspondence not only with the Ngati Whakaue chiefs[29], but also with others sent by Fenton to help Ngati Whakaue in getting their case through the Court, and with the presiding judge himself[30]. He was furthermore in constant contact with Rolleston and other members of the government.

2.17 After the initial burst of enthusiasm some of Ngati Whakaue began to have their doubts about the whole scheme. Fenton sent Gilbert Mair to Ngati Whakaue ostensibly to assist them, although his principal task was to keep Fenton informed of events at Rotorua and to ensure that Ngati Whakaue continued with the project. On 1 July 1881 Mair telegraphed Fenton at Rotorua[31]:-

> "Reached here last night after ten o'clock. Ngati Whakaue will get all the block except 45 acres to Ngati Tuara. I am to get Komiti this afternoon to discuss the restrictions. The people are pleased that some one has come to help them in the matter but I am afraid they are not so keen about the scheme as they were originally. Indeed I find that some of them are dead against it. The Komiti have been trying for several days to prepare lists of names for certificate. Their difficulties in this direction may perhaps induce them more readily to accept a board of trustees instead. There is a strong feeling against all sharing alike.....I foresee a good deal of trouble.
>
> WG MAIR"

Fenton also sent E.W. Puckey, another Land Court Judge, "to watch the Court for the Crown"[32]. Puckey likewise kept Fenton closely informed as to events; Fenton in turn made sure that political difficulties with the agreement in Wellington were smoothed over[33]. Fenton's tenacity and energy certainly were remarkable, although whether what was proceeding was really to Ngati Whakaue's advantage is another matter.

2.18 Although the hearing lasted, by fits and starts, for nearly six months and generated quite a volume of evidence, Judge Symonds' decision is amazingly brief (9 short paragraphs). The case usefully illustrates the process of adjudication of title as it was typically conducted by the Land Court. Various Arawa tribes advanced claims to the block: Tuhourangi, Ngati Rangiwewehi, Ngati Uenukukopako. The evidence discloses a

complex tribal history and subtle linkages of interests between the tribes. Ngati Whakaue went last and had essentially only one witness, Hamuera Pango, who advanced claims to the block based on the standard categories of conquest, permanent occupation, fortification, cultivation, burial places, and "mana over this and the adjacent lands". In his cryptically brief judgment, Judge Symonds awarded the whole block to Ngati Whakaue, completely disallowing the claims of all other Arawa tribes. The other successful claimants were Ngati Kea and Ngati Tuara, two small groups who had fled to Rotorua as a refuge from the powerful Waikato tribes and who had been granted by Ngati Whakaue a small piece of land at a place known as Tarewa[34].

2.19 The next step in the process was for Ngati Whakaue to hand in a list of names, who would then be recognised by the Court as owners. This technique of leaving it to successful block claimants to work out their own names was also routine: only if names in the lists were challenged or if there were rival lists did the Court become involved in this stage of the process. Although lists of names finally were prepared, this was achieved only at the cost of considerable tension being generated within Ngati Whakaue. According to Puckey there was much distrust between the "people" and the chiefs, as well as a considerable amount of sheer personal jealousy - all no doubt exacerbated by the novel nature of the Land Court and its workings to Ngati Whakaue[35]. As if the tensions within Ngati Whakaue were not troublesome enough, the other Arawa tribes were far from happy about being excluded from the Pukeroa-Oruawhata Block as a consequence of Judge Symonds' decision. On August 12 Fenton received a letter from Makari Hikairo and others applying for a rehearing of the original case:-

> "Under pressure of pain for lost land (He karanga na te mamae ki te whenua iwio), we women make bold to write this letter to you: an application for the rehearing of Te Pukeroa-Oruawhata Block, situate at Ohinemutu.....recently heard by the Native Land Court.....The grounds of our application are these:

1. We are not clear as to the reason why the Court did not fully consider the many generations during which we cultivated and occupied the pieces in the northern end of the Block.

2. We are not clear as to ground on which the Court stated there remained no mana of Ngatirangiwewehi on all its pieces of land at Ohinemutu.

3. Our brother W. Hikairo was sent elsewhere as Assessor for some Judges at some other Courts, while the Court was sitting here at Ohinemutu. W. Hikairo is the one best able to set forth our claims and all our rights to the pieces of the land at the northern end of this Block.

4. During January last the "Komiti Nui o Rotorua" adjudicated upon those pieces. They were investigated before the four judges of that Komiti, and we appears to state our claims before that tribunal, and some of those pieces were awarded to us by reason of our claims under Maori custom."[36]

This may indicate, indeed, that the Komiti was far better able to appreciate the nuances and complexities of ownership around the region than was the Land Court itself. The Court's approach forced a complicated reality into a very Procrustean bed, leaving much dissatisfaction in its wake. However ,no action appears to have been taken with regard to the application from the women of Ngati Rangiwewehi.

F. Aftermath at Rotorua

2.20 One almost immediate consequence of the Pukeroa-Oruawhata Block hearing was a sudden flood of hearings concerning other blocks in the region[37]. For many years the Rotorua region had been a bastion of resistance to the Court. Now, within a space

of months, the whole structure of carefully-managed resistance simply caved in. The pattern in Rotorua was just the same as occurred in every other place where the Court was finally admitted after decades of resistance[38].

2.21 Legislative backing for the Fenton agreement came with the Thermal-Springs District Act 1881, which gave to the Crown the necessary statutory authority to act as Ngati Whakaue's agent in the administration of the leases and the collection of rent. Fenton had with characteristic energy devoted much effort to advertising the leases in Australia and elsewhere, and the first auctions were very successful. Fenton and the Ngati Whakaue chiefs were delighted at the apparent success of the scheme. One contemporary report of the auction states:-

> "At the close of the sale.....a disturbance was visible at one end of the room.....it was Fenton, the Chief Judge .....in an ecstacy of delight performing a haka with two old Rotorua savages.....The ecstacy of the trio arose from the success of the Rotorua scheme and the prospect of manipulating £2,700 per annum."[39]

In May 1881 the new town of Rotorua was surveyed out by A.B. Morrow. Areas were reserved for a hospital, sanatorium ground, and a railway station.

2.22 It was not long, however, before things began to turn very sour. Initial interest in the scheme waned. The new town of Rotorua, stigmatised by the European settlers at Ohinemutu as "Rotten Egg Town" failed to grow as planned. This seems mainly to be due to the deep economic recession of the 1880s. The eruption of Mt Tarawera in 1886 was a devastating blow, destroying the Pink and White Terraces (the major tourist destination in the region) and reducing the formerly prosperous Ngati Tuhourangi to virtual destitution. Existing lessees began to default, and unallocated leases became unsaleable. Ngati Whakaue were caught in a difficult situation. Locked into the agreement and caught by the provisions of the Thermal Springs Act

(which prevented the alienation of land to anyone but the Crown) they were unable to sell their land to anyone else. The agreement, far from being a boon, turned out to be a millstone around the necks of Ngati Whakaue. Unable to develop or sell the land, deprived of rental income but not themselves able to take any steps to collect it from the lessees, Ngati Whakaue took the only option open to them. In 1889 Pukeroa-Oruawhata was sold to the Crown.

2.23 More accurately, the Crown bought out the shares of nearly all of the owners of the block. The total amount paid for Pukeroa-Oruawhata was £9,750. The Crown was not able to acquire all of the shares as a handful of owners refused to sell. For a number of years the block remained technically Maori freehold land (albeit owned almost wholly by the Crown). The Crown did deal with parts of the block by Proclamation - for example on 2 March 1896 part of Pukeroa-Oruawhata was taken or set aside (depending on what view one takes of the status of the Pukeroa-Oruawhata Block) for railway purposes. The Crown could have applied to the Land Court to have its majority interest in the block partitioned out, but never did so. Parts of it were set aside by Proclamation but the formal status of Pukeroa-Oruawhata remained unchanged until 1910[40]. In this year the whole block was simply converted to Crown land by statute, extinguishing the remaining private interests and saving the Crown the trouble of bringing a partition application and the costs of having the block re-surveyed.

3.0 THE THERMAL SPRINGS ACTS

A. The 1881 Act

3.1 The first Thermal-Springs Districts Act 1881 was a follow-up to the Fenton Agreement, and its primary objective was to give the agreement legislative effect. After its enactment the agreement was formally ratified by the Governor, Sir Arthur Gordon, on behalf of the Crown. Endorsed on the Maori text of the agreement on MA 13/79 one finds the following:-

"In pursuance of the Thermal Springs District Act 1881, and in execution of the powers conferred upon me by the 5th section of the said Act, I hereby contract with the Tribe of Ngati Whakaue in terms of the above written instrument.

Dated the 16th day of February 1882
Signed: Arthur Gordon
Governor"

The formal endorsement, it will be noted, contracts specifically with Ngati Whakaue. The separate agreement with Tuhourangi had caused some concern to Rolleston, and he had earlier raised this with Fenton. On February 14, 1882 he telegraphed Fenton:-

"How about agreement with Tuhourangi is that to be signed by the Governor. Rolleston."[41]

But Fenton replied:-

"The agreement with Tuhourangi tribe need not be noticed. Their claim to this block [i.e. Pukeroa-Oruawhata] was disallowed. Presently I hope to see a town on their land at Rotomahana."[42]

This demonstrates, if nothing else, the remarkable degree to which the government was willing to let Fenton take charge of the whole process.

3.2 Although the agreement and the outcome of the Pukeroa case had caused dissatisfaction amongst the other Arawa tribes, and some elements of Ngati Whakaue began also to have their doubts, other chiefs were committed to the new relationship with the Crown. Chief amongst these was Paora te Amohau of Ngati Whakaue[43].

3.3 The Thermal-Springs Districts Act 1881 was described in its long title as an act "to provide for the settlement of the Thermal-Springs Districts of the Colony". The area was intended to pass out of the autonomous Maori zone and into the zone of European settlement and effective government control. It is not suggested that this was contrary to the wishes of Ngati Whakaue; the issue that arises with the legislation is what is meant by the "Thermal Districts". Even those groups that favoured settlement in their territories and the building of closer relationships with the Crown were not willing to do so on the basis of an agreement that, whatever its merits, had been concluded with just one Arawa tribe.

3.4 The Preamble to the 1881 Act read:-

> "Whereas it would be advantageous to the colony, and beneficial to the Maori owners of land in which natural mineral springs and thermal waters exists, that such localities should be opened to colonization and made available for settlement: And it is expedient that powers should be given to the Governor enabling him to make arrangements for effecting that object..."

The Act allowed the Governor to proclaim "localities in which there are considerable numbers of the ngawha, waiariki, or hot or mineral springs, lakes, rivers or waters"[44]. Once such an area had been proclaimed:-

> "...it shall not be lawful for any person other than Her Majesty to acquire any estate or interest in Native land therein."[45]

Thus only the Crown could buy Native land in areas subject to the Act.

3.5 It is important to put this in its historical context. By 1881 the pre-emption doctrine in Article II of the Treaty of Waitangi had been substituted by the process of investigation and

award of title by the Native Land Court acting under the Native Land Acts, the first of which was enacted in 1862. The underlying principle was that of free alienation following investigation - provided the Land Court had issued a title to it, any block was freely alienable[46]. The Thermal Springs Act was thus an exception to the general operation of the Native Land Acts. Following an investigation by the Court, only the Crown could purchase; or, to put it another way, the Crown had a complete monopoly of purchase of Maori land in areas subject to the Thermal Springs Acts. The legislation was not in any sense confiscatory, nor did it change the status of any Maori land. A number of hypotheses can be advanced to explain why this approach was taken. One is that a conviction had developed on the part of government that unfettered private purchase of investigated Maori blocks led to all kinds of abuse, typified by the sorts of practices that occurred in Hawkes Bay and which were explored (although not remedied) by the Hawkes Bay Native Lands Alienation Commission of 1873[47]. It is significant that in the later nineteenth century, similar regimes were adopted for those areas of remaining Maori autonomy - the King Country (Rohepotae), Rotorua and Te Urewera. A common feature was that in each case purchase of land was restricted to the Crown[48]. Another explanation for the Thermal Springs Act is that the government wanted to ensure that the thermal areas were not all sold off into private lands, as had happened at Wairakei[49]. Further research is necessary before either hypothesis can be fully tested. For present purposes it is enough to note the similarities in approach adopted in respect of the King Country, the Rotorua region and Te Urewera.

3.6 The Fenton agreement is nowhere referred to in the text of the 1881 Act, but it was discussed fully in parliament. The four Maori MPs and opposition members of parliament (a key figure in the opposition at the time was Sir George Grey) pointed out that although Fenton's agreement had been concluded only with Ngati Whakaue, the act itself had a much wider potential ambit - in fact anywhere where there were thermal springs[50]. The government's response was to amend the act by restricting its

application to the counties of Tauranga - which then included the whole Rotorua region - and East Taupo. This, of course, was still an enormous area, extending well beyond the limits not just of Ngati Whakaue but of the entire Arawa confederation, extending into the territories of Tuwharetoa, Ngati Awa, Ngai Te Rangi and others. The first area proclaimed was the Pukeroa-Oruawhata block at Rotorua, an area of 3,200 acres, proclaimed on 13 October 1881[51]. The concerns of Major Te Wheoro and Sir George Grey were fully realised, however, with the next proclamation, which proclaimed a staggering area of 616,890 acres to be subject to the Act[52]; and on the same day, 27 October, a substantial area in north of Taupo was likewise proclaimed. The effect was that the government at a stroke acquired a complete monopoly of land purchase in an enormous area stretching from Tauranga to Taupo.

3.7 The Act made further provision relating to thermal areas. Section 5(3) empowered the Governor to:-

> "...treat and agree with the Native proprietors for the use and enjoyment by the public of all mineral or other springs, lakes, rivers and waters."

Any by section 6(7) the Governor was empowered to:-

> "...manage and control the use of all mineral springs, hot springs, ngawha, waiariki, lakes, rivers and waters, and fix and authorise the collection of fees for the use thereof.....with the consent of the Native proprietors, to be ascertained in such manner as he may think fit."

Quite obviously this reflects one of the principal objectives of the agreement and the legislation - to give the government a pre-eminent role in the development of a tourist industry based on the hot springs.

3.8 Ian Rockel, in his book Taking the Waters: Early Spas in New Zealand (1986) has argued that William Rolleston, Minister of

Lands 1879-1884, had a particular interest in developing spas in New Zealand on the European model. The favoured localities were Rotorua and Te Aroha (also within the ambit of the Thermal Springs Act after the 1881 proclamations) in the North Island, and Hamner in the South Island. Certainly the legislative machinery of the Thermal Springs Act enabled this to be achieved in the North Island. The government had especially extensive powers to initiate development at Rotorua, since after 1890 it owned all the land in the town, with all the residents on 99-year lease (not until 1920 was it possible to purchase the freehold). Still, it is hard to see why, if developing spas were the main object, it was necessary to proclaim such an extensive region under the 1881 Act. Developing the tourist industry was unlikely to have been the sole, or perhaps not even the principal, objective of the government's action.

3.9 In order to form a true understanding of the effect of the Thermal Springs Act, it needs to be remembered that the Crown had already become involved in the purchasing of land in the proclaimed area well before 1881 (although not at Rotorua itself). An example is the Tauhara North block, which passed the Land Court as early as 1869. The block, which included a number of hot spring areas, was vested by the court in precisely two persons, Hare Reweti Te Kume and Hare Matenga Taua. In 1873 a large section of this block was cut off and sold to the Crown. In 1887 Hare Matenga explained what had happened[53]:-

> "What I wish to explain now is the sale of this land. In 1873 this land was sold. The man who bought it was Mr Mitchell. Reweti Te Kume was the only person who received the money at that time. In 1875 I received some money from Mr Mitchell - I received £100. I don't know what Te Reweti got. On the last occasion I received money I don't know what year it was. £15 was the amount of the last payment made to me. When that was done then the land was cut up for the government survey claims and start the sale. The part cut off was from Te Aratiatia straight to Hipaua but it was one mile distant from the swamp at

> Rotokawa. The reason I was so long before accepting the money was because I didn't want to sell - and the interest on the survey lien was increasing year by year. The part sold was on the western side of the line I speak of. That was why it was sold; because of the survey - and the money Te Reweti and I got was what was left after the survey lien was paid."

This illustrates usefully the point that the problems which bedeviled the alienation of Maori land (quite apart from the extra complication of the Thermal Springs legislation) were as much to the fore in the Taupo region as they were anywhere else in the country.

B. The 1883 Act

3.10 The purpose of the Thermal Springs District Act 1881 Amendment Act 1883 was essentially to give formal recognition to the Fenton Agreement, and also to a subsequent arrangement made between the Crown and Ngati Whakaue in 1883 (the "Clarke Agreement"). On 25 February 1883 Henry Clarke had met the Ngati Whakaue chiefs and it was agreed (quoting from the preamble of the 1883 Act) that "all those portions of the arrangement made between the said Francis Dart Fenton and the said tribe which remained unfulfilled should be carried out, subject to certain modifications in the said agreement mentioned". Section 2 of the 1883 Act provided that:-

> "The said hereinbefore recited arrangement (i.e. the Fenton Agreement) and agreement (the Clarke Agreement) are hereby confirmed, and shall be deemed to have been valid and effectual as from the twentieth day of November, one thousand eight hundred and eighty-one, and shall be deemed and taken on that date to have conferred on and given to the Governor all the rights, powers, and authorities specified or mentioned in the said Act in respect of the said lands the subject of the hereinbefore recited arrangement.

3.11 Perhaps not altogether surprisingly, the passage of the 1883 Act through parliament was marked by some concern about the amount of land proclaimed under the 1881 Act. One Mr Holmes said:-

> "The quantity of land, for example, was much greater than they had imagined when they passed the Thermal Springs Act; he believed it extended to six hundred thousand acres. He knew that the extent of the reserve on account of these Thermal Springs was vastly larger than they had imagined would be reserved at the time the Act was passed."[54]

But Whitaker, the Premier, defended the government's actions vigorously:-

> "The object was to prevent these springs being used by private individuals starting grog-shops, and making a number of small settlements over which there would be no control, and to include the chief springs in one block. That was why 600,000 acres were taken. When he said 'taken' he did not mean that it was taken from the Natives: the Government took the management of it for the benefit of the Natives."[55]

3.12 The principal issue by 1883 had become the Thames Valley and Rotorua Railway Company's proposed line to Rotorua. The Rotorua chiefs seem to have been keen to have a railway link with Rotorua, so much so that they were willing to donate land to the railway company both for the purpose of providing land for the track and stations and to allow the company to float its debentures in the English market. The Crown had itself concluded separate agreements with the railway company and the Maori landowners[56] to facilitate the venture, and specific provision authorising these further arrangements was included in the 1883 Act.[57]

C. The 1910 Act

3.13 This was the last in the succession of special enactments for the thermal-springs districts. Its main objective was to close the Crown's title to the Pukeroa-Oruawhata block and to extinguish the few remaining shares in the block which the Crown had been unsuccessful in obtaining by private negotiation. It also facilitated bringing to an end the special regime for the region and throwing it open to European settlement, although actual sites of thermal springs remained protected[58]. Mokoia Island was made an inalienable reserve[59].

4.0 THE SCENERY PRESERVATION ACTS

A. Scenery Preservation and Thermal Springs

4.1 The first statute concerning scenic reserves in New Zealand was the Land Act 1892. By s.2 of this Act, the Governor was empowered to set aside from sale areas of Crown land for reserves for the protection of scenery or of "natural curiosities". This was taken a step further with the Scenery Preservation Act 1903 which allowed private land to be compulsorily taken for the purpose of scenery preservation.

4.2 In 1904 Haupeta Hautehoro (of Rotorua) and about 100 others lodged a petition objecting to the compulsory taking of Maori land for the purposes of scenery preservation. The petition states:-

> "We your petitioners earnestly protest against section 5 of part 2 (ss.2 of s.5?) of "The Scenery Preservation Act 1903" aforesaid, which provides that certain portions of Native Lands be taken under this Act, and fixes the payments for the said Maori lands, and the paying of monies into the hands of the Public Trustee.
>
> The Maori lands that will be taken under this 'Scenery Preservation Act' are, the famous places, the lands

containing thermal springs, the famous pas, the canoe landing places of former days, the sites of famous whares, the sacred shares, the bird snaring places of olden time, that is to say all such places as are understood by this Act as likely to be much frequented by the Tourists of the World who visit here.

And the Maoris who are the owners of the said lands will be left to die; sufficient as to that. If any Maori or Maoris desire to work the timber on his or their lands as a means of earning money, or to clear the bush for a food cultivation, he will be fined £100.

Therefore we your petitioners will continually pray to your Hon. House that this Act shall not apply to Maori lands.

This is a very serious punishment to inflict upon your Maori people; inasmuch as your Honorable House has already passed another Act to preserve the balance of the Lands of your Maori people (i.e. the Maori Lands Administration Act)."[60]

In response Mr C.R.C. Robieson, the Acting-Superintendent of the Tourist Department, advised the Minister for Tourist and Health Resorts as follows:-

"...In general the Native suffers no more hardship than a European in cases where the Government requires any land for the purposes of this Act. The terms of acquirement are the same as under the Public Works Act 1892.....However, to exempt Native land from the operations of Clause 5 would practically nullify the effect of the Act as the bulk of the scenic and historic spots, especially in the North Island, are either Native owned or Native reserves."[61]

The 1903 Act was amended in 1906, and on that occasion all references to Native land were removed from the Act[62]. This protection was, however, in turn removed in 1910. Section 10 of the 1910 Act also validated takings of Native land for scenery preservation "prior to this Act" - the significance of which will become apparent when the acquisition of Waiotapu is discussed.

4.3 Acquisition of areas of land which contain thermal springs was a principal purpose of the Scenery Preservation Acts. The Long Title of the consolidating 1908 Act described it as:-

> "AN ACT to consolidate certain enactments of the General Assembly relating to the Acquisition of Lands of Scenic or Historic Interest, or on which there are Thermal Springs."

The 1903 Act established a Scenery Preservation Commission. Its task was to tour the country and to make recommendations as to whether areas of land (in Crown, private of "Native" ownership), should be reserved as "scenic", "thermal" or historic reserves. Within two years of its establishment in 1904 14,565 acres had been reserved. In 1904 the Assistant Inspector of the Tourist Department at Rotorua urged that Lake Rotokawa be taken under the Act. His report to the Acting Superintendent of the Tourist Department gives an interesting description of Rotokawa in the first decade of this century:-

> "Rotorua, July 3 1904:-
>
> Sir,
>
> I herewith forward you the report of my visit to Roto Kawa. I visited Roto Kawa in company with Messrs Crowther, Ingles and Mr Howe all of Taupo district and who know Roto Kawa well.
>
> I made a very careful examination of the whole place and found it to contain a number of boiling sulphur springs

and two very fine sulphur caves, the fumes would of course prevent any person from entering the caves.

I would say that the property containing the springs and sulphur beds would be about 300 acres. Their [sic] is no doubt that the whole place is nothing but sulphur under the outside crust. I noticed that visitors are in the habit of digging for sulphur specimens which is defacing the place and I think something should be done to stop this. The lake is a very pretty one and it is simply swarming with wild ducks. The land around the southwest side of the lake is of good soil and would grow anything, but the rest of the block which contains 2776 acres is poor.

I am strongly of opinion that the Department should have the whole of the springs and the sulphur beds reserved with its lake. I am sending you a map of the District and I have marked in red ink what I think the Crown should resume..."

J.G. Ward, the Minister for Tourist and Health Resorts forwarded this on to the Chairman of the Scenery Preservation Commission, but the file was noted:-

"Native Land. Action Cannot be Taken under Scenery Preservation Act at present."[63]

4.4 Relations between the Scenery Preservation Commissioners and Maori landowners had been difficult, as is shown in Apirana Ngata's speech on the Scenery Preservation Amendment Bill in 1906[64]:-

"Mr NGATA (Eastern Maori District) said he did not like to let that opportunity pass without making a few comments on the Bill. He did not want it to be understood that there had been any organised opposition on the part of the Native race to the government taking historic and other

spots as reserves under the Act. The objection of the Native people had been to the manner or method of reserving certain of these areas. While admitting that most of the historical spots and old burial-grounds should be reserved, under such protection as would ensure their protection from acts of vandalism in the future, there was a suspicion in the Maori mind that in the matter of compensation they did not receive full justice - that there was a disregard of what I [sic] he might call the sentimental side of the question. During the last three years a great deal of dissatisfaction had been felt by Natives throughout the colony - and more particularly by the Maoris in the Hot Lakes District - with respect to the action of the Commissioners under the Act of 1903. It very often happened that the Commissioners held their meetings a hundred miles from the lands proposed to be taken, and they made recommendations and reservations without viewing the spots proposed to be reserved. They were guided to a great extent by the reports of interested persons in the district, without, in many cases, consulting the Natives concerned; and owing to that a great many spots that should have been reserved had been deliberately destroyed by the Natives as a sort of protect against the methods of the Scenery Preservation Commissioners."

B. Compulsory Acquisition at Waiotapu and Awakeri[65]

4.5 The principal thermal area under Maori ownership taken under the Act was Waiotapu. Administration of Waiotapu had involved numerous problems, and the Tourist Department built up a substantial file on the place in the early twentieth century (TO, 1, 1901/36, Waiotapu Reserve). Various persons complained that the Maori owners were over-charging for conducting visitors around the thermal area (4s. per person). There were other problems, such as when a tourist named Fitchett carelessly set a sulphur patch alight (fortunately the fire was put out before too much damage was done), or when another group of tourists only

narrowly missed being scalded to death from an exploding mud volcano. There were problems with cattle belonging to Mr Falloona, the tavernkeeper at Waiotapu, damaging the thermal features. Government land at Waiotapu was originally used not for any tourist purpose but as a prison, giving rise to concern about the supposed menace to tourists posed by escaped criminals. The Tourist Department had raised with the Department of Lands the possibility that the Maori-owned part of the reserve be compulsorily taken, and this idea received encouragement when in 1907 Rukingi Rotohiko Haupapa of Ohinemutu wrote to the government stating that he wished to sell his shares in the Waiotapu Block[66]. Other others, however, were unwilling to sell.

4.6 The precise sequence of events at Waiotapu is rather difficult to reconstruct. In September 1907 it appears that a sizeable area of Maori land at Waiotapu was taken, pursuant to the Scenery Preservation Act[67] which was probably illegal, since the Scenery Preservation Act did not at the time allow the taking of native land. A further source of confusion was that on 27 January 1908 the Engineer in Charge, Department of Tourist and Health Resorts, Rotorua, wrote to the General Manager of the department at Wellington urging that the Maori land at Waiotapu be taken. This is puzzling in that this was, firstly, illegal and, secondly, appears to have been done already. There was a further proclamation relating to land at Waiotapu in 1908, but this relates quite clearly to an area which was already Crown land. (See NZG 1908 8937). Presumably the confused state of affairs at Waiotapu was the reason for s.10 of the Scenery Preservation Act 1910 which, as already indicated, validated the taking of native land prior to the 1910 Act. By 1908, in any case, the whole of the Waiotapu reserve was in Crown hands. This transaction really does deserve close examination, as it appears that the Crown illegally acquired compulsorily Maori land containing surface geothermal features against the will of the majority of the owners, and then validated its own actions with retrospective legislation in 1910. A further thermal area taken under this Act was Awakeri - see para. 7.11, below, and fn.111.