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VMRA-0065-24
COMPLETED

Fax to: 076 57968

Attention: Claude Edwards.

Subject: Whakatahea claim.

No. of pages (inclusive cover sheet) 8

Claude, attached is my initial brief
of your case.

It should be treated as a discussion
document until issues become more
refined.

Kia ora

Tom.

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14 March 1991

Claim Manager
c/- Whakatohea Maori Trust Board
P O Box 207
Opotiki

Fax No. (076) 57968

Attention: Mr Claude Edwards

Tena koe e Claude

CASE OVERVIEW

It was so good meeting you and your researchers on the 19 February and apologise for not getting back to you sooner. As you appreciate there are a number of preliminary matters that I need to sort out from my end in order to focus on your claim.

At the outset, I wish to compliment the researchers and yourself in the way in which research to-date has been co-ordinated and catalogued.

Working from a relatively small community can be daunting at times and one can easily lose perspective of what is happening elsewhere.

I am left with the impression after meeting the team that matters are comfortably in control which leaves me to merely navigate the claim, as how the Whakatohea would, I am sure, want it to be.

In so far as the claim is concerned there are one or two observations I wish to make.

Firstly, it is important for you not to let others through legal counsel and witnesses interpret the Whakatohea grievance.

The presentation of the case insofar as it relates to an explanation of Crown conduct as it effected the Whakatohea people must be told by Whakatohea or by persons on their behalf.

A tendency has emerged and largely through the fault of lawyers, in my mind, of conducting cases such as your own as if it were litigation in Court. That should not happen before the Waitangi Tribunal.

There will be times when you will require expert evidence. However that should, in my opinion, be confined to discussion of general issues in order to provide an overall explanation of Crown action as it affected your people.

Secondly, and a matter which constantly should be borne in mind when formulating your case, is whether the policies or actions of the Crown, contrary to the principles of the Treaty have prejudiced Whakatohea.

You do not have to test the legality of the Crown's actions or prove that the Crown's actions within the framework of law was justified or not. That is what the Sim's Commission was authorised to do.

The wrongs of the Crown are only to be judged with the criteria set-out by Section 6 of the Treaty of Waitangi Act in reference to the Treaty signed at Opotiki.

That is very important. As I may have indicated to you, the circumstances that persuaded Whakatohea to sign a treaty are relevant as to what happened at Opotiki in June 1840.

Thirdly, in order to ensure a proper and orderly conduct of case preparation, that communications be well defined. I suggest that all correspondence should be sent to and pass through the Claims Manager. Overall, bringing a case before the Tribunal is a team effort.

Case research and presentation

My suggestion to you in formulating a strategy is to methodically unfold the case "story" to ensure that the Whakatohea perspective of the argument is preserved.

It is important for the Tribunal (who are the only people you have to persuade) to have a clear grasp of who the Whakatohea are which necessitates, if you like, a holistic appreciation of issues.

To assist your formulation of issues and to provide an indicative appreciation of how the case will be presented I suggest that the grievance be divided into a series of distinct phases.

I am not fully briefed as I would personally like to be on all facets of the Whakatohea grievance however, I am confident that the various phases should be addressed as follows:

First Phase

This phase is to introduce the Whakatohea. This is to ensure that the members of the Tribunal will fully appreciate the evidence and submissions that follow.

It is within this phase that the hapu of Whakatohea are able to make their own contribution or be given the opportunity to air their grievance unconstrained by formalities of the case.

In order to test an appreciation of the hurt occasioned by the Crown it is important to empathise as one is able to do so with the environment of the Whakatohea of the relevant period.

This matter should not be taken for granted for the "world" of that period is very much different as it is today.

The following information will need to be obtained.

1. The traditional make-up and distribution of the hapu o Whakatohea. We will need to know the personalities of the period and the inter-relationship of the hapu with each other as well as general demographic information and observations.
2. The geography/resources of the region. In other words, an appreciation of the landscape (bush, swamp, flats, fisheries, cultivations, etc.).
3. Alliances/interaction of Whakatohea with other iwi/hapu from the turn of the nineteenth century. This would involve, in particular, the impact of Ngapuhi and Ngati Maru invasions on Whakatohea throughout the 1830's and will put in perspective the position of the Whakatohea at the time the Treaty was made with the Crown.
4. Early pakeha influences. This would involve interaction with early traders (David Davids) and settlers (Shortland) as well as missionaries (Wilson and Burrows).
5. Pre-1840 land dealings re Sale to Burrows of land known as Papakanui and dealings (leases and "Sales") between hapu in the pre-Treaty period. I am aware such dealings took place especially with missionaries whose transactions were later brought to notice and validated by the Compensation Court in March-April 1867.

After thoroughly familiarising the Tribunal of the "traditional" Whakatohea the current position of the hapu should be illustrated.

A demographic, social and economic presentation would be required.

This will illustrate at the out-set the extent by which Whakatohea has "progressed" under the Treaty.

This evidence would need to be supported by maps showing in detail the position of Whakatohea pre-1840 and at the present time.

Second phase

This phase, as with the rest, will illustrate what happened between the time the Treaty was signed and present.

The second phase will deal with the signing of the Treaty in June 1840 to the the time of the war.

The Treaty signing must be viewed in the context of what happened at Opotiki in June 1840. What is important here is not merely the written word but discussions and representations resulting in the signing of the Treaty.

Information would be needed in respect of how the Treaty was presented by the Crown and the response made to it by Whakatohea.

This phase will also deal with Whakatohea's early interaction with the Crown within the framework of the Treaty and the effect of Crown policies on Whakatohea:

This will include consideration of Sir G Grey's policy to introduce to Whakatohea limited powers of Self-Government under the Native Courts Act 1858 and the Native Districts Regulations Act 1858.

This was also a period of relative peace and prosperity. The missionary influence should not be understated for a strained relationship grew between the missionary priests and the Pai-Marire apostles who arrived at Opotiki. There was also throughout this period a growing suspicion of the motives behind the missionary work that resulted in Whakatohea to question its support for the Crown.

Third phase

The third phase of the case will introduce Pai-Marire and war.

Pai-Marire is viewed very much negatively. An objective assessment of that religion is required as to what in fact it signified. Perhaps it should be understood in the context of Te Kooti and the Ringatu faith.

Expert evidence would need to be presented on Pai-Marire in order that it be reflected in its true context so that the actions of Kereopa can be properly related.

Whakatohea's response to Kereopa needs to be addressed in full. As I ascertain the position, the Pai-Marire influence on Whakatohea undertook a millennial appearance resulting in the breakdown of the traditional chiefly authority.

Most important of all, the hapu of Whakatohea must be distinguished from the influences and actions of Pai-Marire.

I would argue, that Pai-Marire was a product of Crown mismanagement and an inevitable consequence of a culture in crises.

A related issue is whether the Crown ought to have taken more interest in the influence of the activities of Kereopa and others and to have taken active steps to protect Whakatohea from the

influence of those people. The Crown took steps to protect Arawa and certain chiefs of Ngati-Porou when informed of their plight towards the Hau Hau.

Similarly, Whakatohea's response to the Taranaki/Waikato and Tauranga wars needs to be addressed. It appears that Whakatohea was very much aware of what was happening beyond its borders however initially remained neutral. A flow of emissaries and letters from Waikato and Ngati-Porou to Whakatohea resulted in Whakatohea participating in the Tai Rawhiti contingent to assist Waikato.

At this point the motives of the missionaries require attention. The details of the Te Rawhiti clash with Arawa needs to be investigated.

An issue resulting from this, is that on 2 September 1865 the Crown by Proclamation of Peace dated 1865 indemnified Whakatohea's active support for the Maori king and their fight against Arawa. All were indemnified except the persons individually responsible for the killing of Volkner.

The Proclamation of Peace commenced, in my mind, a change of direction by which the Crown sought to suppress rebellion and opted to enforce the criminal law by policing disorder.

To that end, the Outlying Districts Police Act 1865 was passed to capture suspected criminals and if necessary pursuant to that Act, confiscate their properties.

The record shows that the Government intended to deal with the killers of Volkner accordingly and there was no right in my mind for the Crown to undertake whole scale confiscation other than to confiscate individual interests upon investigation of title.

The Native Rights Act 1865 secured to Maori the protection of their rights in a manner secured by the Treaty.

The Proclamation of Peace was also used as a means of serving notice on Whakatohea to deliver up to the Crown the killers of Volkner.

However, six days after the Proclamation was gazetted troops attacked Whakatohea.

Two days after the Proclamation, Martial Law was proclaimed over the Opotiki District. The effect of Martial Law (which by the way had no validity) entitled the Colonial troops to summarily deal with Whakatohea without been accountable to law or the Crown.

The troops who attacked Whakatohea and undertook the plundering and destruction of property did so under Crown indemnity by Act of Parliament.

A specific aspect of the claim will directly cover the human suffering arising from:

1. The manner in which the Crown decided to use force of arms to attack Whakatohea.
2. The actions of the Crown in the act of aggression and plundering of Whakatohea resources.
3. The trials (Martial and Civil) and convictions of those arrested will need to be addressed in terms of the Treaty and Native Rights Act.

Finally, after Whakatohea were for all sense and purposes destroyed as an entity; survivors were required to undertake an Oath of allegiance to the Crown. Many did apart from those who fled into the Urewera.

The "loyalty" of Whakatohea was therefore insisted and in acceptance of their fate arising from their war joined forces with Major St. John and proceeded to track and attack Hau Hau in the Urewera.

Fourth Phase

The fourth phase of the case will deal with the confiscation and post-confiscation policies under the New Zealand Settlements Acts as they effected Whakatohea.

The issues concern:

- (a) The act and manner of confiscation.
- (b) The policy of the Crown and its dealings with the confiscated lands.

This will require consideration of:

- (a) The workings of the compensation Court at Opotiki, Whakatane and Maketu in 1867 and 1868.
- (b) Arrangements entered between claimants and the Crown in lieu of claims.
- (c) Constitution of reserve lands and re-settlements.
- (d) Award of land to the military, settlers and other iwi.
- (e) Crown retention of land.

This aspect of the case will go as far as the award of the first Crown grant. In some instances it will be necessary to follow the Grants to establish how lands were otherwise sold or become alienated from ownership.

Having dealt with the case as it relates to the Raupatu, it will then turn onto other specific but related grievances. They will be:

- (a) Crown purchase of land out-side the confiscation boundary.

This will require consideration of the Crowns policies under the Native Land Purchase Acts and effect of survey liens.

- (b) Sims Commission.

We need to consider the extent by which the terms of reference of this Commission has prejudiced Whakatohea. The Commission was duly authorised to determine whether the Crowns actions were justified or not within the frame-work of its confiscation policies.

Whakatohea has accepted a "binding" settlement with the Crown as a consequence of the findings of that Commission.

Details of that will need to be addressed quite apart from the context by which the commission was required to address the Whakatohea grievance.

All Whakatohea petitions would need to be researched.

Statutory takings of Land

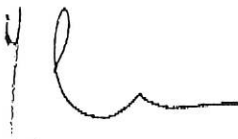
The effect of the Public Works Act on Whakatohea reserves and other statutory takings.

Reparation

At some stage we will need to address the question of compensation. I did discuss with you alternative processes such as the concept of Tatou Pounamu or traditional peace making procedures as well as addressing reparation question in the context of the community as a whole.

This is just a preliminary over-view of the case as I interpret the issues arising from information at hand. There may well be other issues or opinions of approach and if so I will need to address them with you.

Kia ora



Tom

SECTION ONE

1 WHAKATOHEA

- The Land
- The People
- Whakatohea's Neighbours and Relationships with other Tribes

Tuhoe

Arawa Ngati Awa

Ngati Te Rangi

Te Whanau a Apanui

Ngai Tai

Ngati Maru

Ngapuhi

2 COMING OF THE PAKEHA

- Trade and Economic Impact
- Missions and Spiritual Impact
- Land Allocations/Sales to Pakehas
- The Crown

3 THE TREATY OF WAITANGI

- The Signing
- The Expectations
- The Assurances

Understood

'Real'

SECTION ONE

-2-

4 EARLY RELATIONS WITH THE CROWN / PROVINCIAL GOVERNMENT

- RESIDENT AT MAKETU

Arawa Influence

- Implications for Whakatohea
Mana and Rangitiratanga

- Runanga System

SECTION TWO

5 KINGITANGA / WHAKATOHEA POSITION

- Whakatohea Attitudes
- Implications for Whakatohea Relations with the Crown
- The Whakatohea View
- The Crown's View

6 THE LAND WARS

- Whakatohea's Attitude and Policy
- Whakatohea's Actions
- Tai Rawhiti
Defeat by Arawa at Rotoiti and Maketu
- Relevance of Tai Rawhiti to Whakatohea consequences in Whakatohea's View of Relationship to Crown as seen by the Crown
- Situation of Whakatohea at Proclamation of Peace 1865
- Implications of the war and the Crown's attitudes and actions for Whakatohea

7 PAI MARIRE

- Te Ua Haumene
Attitudes of Whakatohea
- Kereopa and Horomoana
Divergence from Te Ua
- Whakatohea Mana and Vulnerability
Reasons for vulnerability
- Resistance of Whakatohea to Kereopa
and Horomona?
- Killing of Volkner
The circumstances
Extent of Whakatohea Participation
Effect on Whakatohea Mana
Crown Protection/Failure to Protect
Whakatohea under terms of Treaty

8 INDEMNITY TO WHAKATOHEA

- Legal Standing
- Whakatohea Understanding

9 POLICE OUTLYING DISTRICTS ACT

10 NATIVE RIGHTS ACT

11 INVASION OF NGATI AWA LANDS

- The Crown's Enemy: Ngati Awa or "Hau Hau"?
- Punitive Implications for Whakatohea
 - Legality of Invasion
 - Courts Martial as Expression of Invasion "mind-set"
 - Overturning of Courts Martial
 - Treaty Implications of Invasion
 - Treaty Implications of Colonial Force pillages
 - Whakatohea View of "Position" Situation
 - Crown's view of Position Situation
- War or law and order exercise?
- Was Whakatohea in fact or reasonable belief the "enemy" or "offender"?
- Was Whakatohea treated as the "enemy" or "offender"?
- If so, was this just under British Law or the Treaty?
- If not, what Restitution was made:
 - materially
 - spiritually
 - in terms of Rangitiratanga and Mana

12 GOVERNOR GREY'S PERCEPTION OF RESTORATION OF "LAW AND ORDER"

- Implications for the Crown
- Implications for Whakatohea (ways in which Whakatohea was left aggrieved?)

SECTION THREE

13 WHAKATOHEA LANDS AND SECURITY

- Assurances re allegiance to the Crown and capture of "Hau Hau" remnants and Te Kooti
- Whakatohea attitudes re "Hau Hau" remnants and Te Kooti
- Whakatohea's power to act in support of Crown
- Whakatohea's Actions in support of Crown
- Extent to which Whakatohea was in a position to do more
- What outcome could Whakatohea reasonably have expected
- in relation to the Treaty?
- on relation to the Law?

14 CONFISCATION

- Pakeha emotional atmosphere
- Seizure - Lands seized/papatipu
- Reallocation/Reserves/Compensation Court
- John Wilson
- Native Lands and Boundary Adjournalment Act 1920
- Final Allocation
- Land Purchase Acts 1870

15 IMPLICATIONS FOR WHAKATOHEA

16 ARTICLES OF TREATY BREACHED

- By Crown
- By Whakatohea

17 PRESENT STATUS

- Future Strategy

18 REPARATION

Section One

*Tom this is your
Original Copy.*

Whakatohea

*Regards
Claude*

1 ~~Ngati Awa~~

- The Land
- The People,
Whakatohea's
- ~~Ngati Awa's~~ neighbours and
relationships with other tribes

~~Arawa~~

Tuhoe

~~Whakatohea~~ Ngati Awa
Arawa

Ngati Te Rangi

~~Ngati Tuharetoa~~

~~Waikato~~ Te Whanau a Apanui
Ngati Tai

Ngati Maru

Ngapuhi

2 Coming of the Pakeha

- Trade and economic impact
- Missions and spiritual impact
- Land allocations/sales to Pakehas
- The Crown

3 The Treaty of Waitangi

- The signing
- The expectations
- The assurances

Understood

'Real'

4 Early relations with the Crown / Provincial Government

- Resident at Maketu

Arawa influence
whakahaere.

Implications for ~~Ngati~~ Awa mana
and rangitiratanga

- Runanga system

Section Two

KINGITANGA

5 Kingitanga / Whakatahea ~~title~~ position

- ~~Ngati Awa~~ attitudes
- Implications for ~~Ngati Awa~~ relations

with the Crown

The ~~Ngati Awa~~ view

The Crown's view

The Land Wars

- ~~Ngati Awa's~~ attitude and policy
- ~~Ngati Awa's~~ actions
- Tai Rawhiti

Defeat by Arawa at Rotoiti and

Maketu

- Relevance of Tai Rawhiti

*Whakatahea consequences,
to ~~Ngati Awa~~ and relationship*

with Arawa ~~and other tribes with the Crown~~

*Whakatahea's
in ~~Ngati Awa's~~ view of*

relationship to Crown

as seen by the Crown

- Situation of ~~Ngati Awa~~ at

Proclamation of Peace 1865

- Implications of the war and the
Crown's attitudes and actions for
~~Ngati Awa~~ *Whakatahea.*

7 Pai Marire

- Te Ua Haumene
Whakutūhā
Attitudes of ~~Ngati Awa~~ chiefs
- Kereopa and Horomona
Divergence from Te Ua
Whakutūhā
- ~~Ngati Awa~~ mana and vulnerability
Reasons for vulnerability
- Resistance of ~~Ngati Awa~~ to Kereopa
and Horomona ?
Whakutūhā
- Killing of ~~Falloon~~ *Wolke*
the circumstances
Whakutūhā
~~Ngati Awa~~ attitude
Whakutūhā
Extent of ~~Ngati Awa~~ participation
Whakutūhā
Effect on ~~Ngati Awa~~ mana
Crown protection/failure to
Whakutūhā
protect ~~Ngati Awa~~ under
terms of Treaty

8 Indemnity to ~~Ngati Awa~~ *Whakutūhā*

- Legal standing
Whakutūhā
- ~~Ngati Awa~~ understanding

9 Police Outlying Districts Act

10 Native Rights Act

11 Invasion of Ngati Awa lands

- The Crown's enemy: Ngati Awa or "Hau Hau"?
- Punitive implications for ~~Ngati Awa~~ *Whakatahe*

~~Role of Arawa~~

Legality of Invasion

Courts Martial as expression of

Invasion "mind-set"

Overturning of Courts Martial

Treaty implications of Invasion

Treaty implications of ~~Arawa~~ Colonial Force

pillages

Whakatahe
Ngati Awa's view of ~~Arawa~~ "post-war" situation

~~*pillages*~~

Crown's view of ~~Arawa~~ pillages post-war situation.

- War or law and order exercise?
- Was ~~Ngati Awa~~ *Whakatahe* in fact or reasonable belief the "enemy" or "offender"?
- Was ~~Ngati Awa~~ *Whakatahe* treated as the "enemy" or "offender"?
- If so, was this just under British law or the Treaty?
- If not, what restitution was made:
 - materially*
 - spiritually*
 - in terms of rangitiratanga and*
 - mana*

12 Governor Grey's perception of restoration of "law and order"

- Implications for the Crown
- Implications for ^{Whakatane} Ngati Awa (ways in which ~~Ngati Awa~~ ^{Whakatane} was left aggrieved?)

Section Three

Whakatarewa

13 Ngati Awa's Lands and Security

- Assurances re ^{allegiance to the Crown and} ~~lands in exchange for~~
~~help~~ to capture "Hau Hau" remnants
and Te Kooti

Whakatarewa

- Ngati Awa attitudes re "Hau Hau"

remnants and Te Kooti

Whakatarewa

- Ngati Awa's power to act in support
of Crown

- Ngati Awa's actions in support of

Crown

Whakatarewa

Extent to which Ngati Awa was in

a position to do more

- What outcome could Ngati Awa

reasonably have expected

in relation to the Treaty?

in relation to the Law?

~~Crown's subsequent~~

~~attitude to Rangi Te Kahu~~

~~in relation to natural justice?~~

14 Confiscation

- Pakeha emotional atmosphere
- Seizure - ~~lands seized~~ / Papatipu
- Reallocation / reserves / Compensation Court.
- John Wilson

~~Whakatane Grants Validation Act~~

Native Lands and Boundary Adjustment Act 1920

• ~~Rangi Te Kahu~~

• Final Allocation

• Land Purchase Acts 1870 - ~~P.P.T. Act~~

15 Implications for ~~Ngati Awa~~ Whakatohea

16 Articles of Treaty breached

• by Crown

• by ~~Ngati Awa~~ Whakatohea.

16 Present status

• Future strategy

- ~~Gap~~

17 Reparation