

## CHAPTER 8

# THE CROWN'S SURPLUS IN THE NEW ZEALAND COMPANY'S PURCHASES

### 8.1 INTRODUCTION

It is perhaps a bit odd to be studying 'surplus lands in the Company's cases', as there was never a formal Crown claim to a 'surplus' arising from any of the New Zealand Company's purchases – or if there was, it has never been recognised as such.

Because of this, we should try to be particularly clear in this study what it is we are looking at or for when we refer to 'surplus' lands'. We will take 'surplus' lands' to refer to lands:

- which lay *within* the bounds of any of the company's claimed purchases;
- and which were *not* granted to the company by virtue of the claimed purchases;
- but which *were* claimed by the Crown by virtue of those claimed purchases.

On the first point, we should note at the outset that the company based its purchase claims on various combinations of:

- pre-Treaty transactions, mostly for 'overlord' Maori interests and some initial 'resident' interests (1839 to early 1840 at Port Nicholson, Kapiti, Queen Charlotte Sound, Manawatu, Wanganui, New Plymouth);
- Crown-supervised transactions under Hobson's pre-emption waiver, mostly for 'resident' Maori interests within the areas of the previous 'overlord' transactions (1841 to 1846, at Porirua, Port Nicholson/Hutt/Ohariu, Manawatu, Nelson/Golden Bay, Wairau, Wanganui, New Plymouth);
- Crown-supervised transactions under FitzRoy's pre-emption waiver for all interests within two entirely *new* purchase areas – namely Wairarapa and Otakou;
- Crown-supervised adjustments under Grey's pre-emption waiver, of purchases already successfully begun (that is, Port Nicholson–Hutt–Ohariu, Manawatu, Wanganui, New Plymouth, Nelson–Golden Bay);
- Crown-negotiated transactions under Grey's pre-emption waiver, for lands previously *unsuccessfully* transacted for (namely, Porirua and Wairau);
- Crown-negotiated transactions under Grey's pre-emption waiver, for lands not previously transacted for by the company (for example, Rangitikei, parts of Taranaki, the Kemp purchase).

## 8.2 THE LAND CLAIMS INQUIRY IN THE NEW ZEALAND COMPANY DISTRICTS

We can speak with relative confidence of which lands were included in the company's original claims, and hence, would have gone to the Crown as 'surplus' had those original claims succeeded.

In his initial May 1842 submission before the Land Claims Commission at Port Nicholson, Colonel William Wakefield submitted a plan entitled 'Plan of the Lands claimed in the cases of William Wakefield and John Dorset on behalf of the New Zealand Company claimants.'<sup>1</sup> It showed a large yellow area covering the south west corner of the North Island, enclosed by a straight dotted line running from the Mokau River on the northwest to just south of Castlepoint on the southeast. It also showed the northern end of the South Island, similarly coloured yellow and enclosed by the 43 degree south line of latitude.

Within this large yellow area, the plan showed three separate districts, each enclosed by a solid line and marked with a number corresponding to numbers in the key of the plan. The key read:

1st Deed	Port Nicholson purchase
2nd do	[Raupero's] and [Te Hiko]'s title to all their lands within the bounds coloured Yellow
3rd Deed	The same as regards the Ngatiawa tribe.
4th do	Wanganui
5th do	Taranaki
6th do	do

The boundaries of the first, second and third purchase areas on this plan matched the boundaries on the purchase deeds which Wakefield read out to the commission (below). The boundaries of the fourth, fifth, and sixth purchases areas – at Wanganui and Taranaki – did not, however, match the boundaries described on the Wanganui and Taranaki purchase deeds and read out to the Land Claims Commission. The boundary shown at Wanganui did match that shown in an 1842 company survey of Wanganui lands for sale, selection, and settlement (below). But the boundaries shown at Taranaki did not match either those of the Taranaki deeds or of the 1842 New Plymouth survey of lands for sale, selection, and settlement (below).

In sum, this 1842 plan was a hodge-podge even at the time the company submitted it to the Land Claims Commission. It did not subsequently feature in any of the company's claim presentations or the commission's reports or awards. A

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1. Wai 145 rod, doc e4, p 178

proper picture of the company's original claims requires a reconstruction of the boundaries described in their *deeds* and read out to the Land Claims Court in 1842 to 1844.

### 8.3 THE INITIAL TRANSACTIONS: PORT NICHOLSON

A brief sketch of the company's pre-Treaty land transactions illustrates why these transactions did not end up generating any 'surplus' outside of the lands awarded to the claimants themselves – company, Church, and private. Since the Land Claims Commission was the sole vehicle for identifying lands to be claimed as 'surplus', we need not try to see the transactions *themselves* as much as the *images* of those transactions as they appeared in evidence to the Land Claims Commission.

Colonel Wakefield opened the company's cases before the commission by submitting the above plan (which he had forwarded to the commissioner before the hearings opened), as well as the six deeds to which it referred. He read from his Journal how, from his arrival at Port Nicholson on 20 September 1839, to the day of signing the first deed, 27 September, he and his interpreters visited every kainga around the harbour, toured up the Hutt river, and participated in frank and open discussions of whether to sell the land to the company.<sup>2</sup> Having ascertained that Maori wanted to sell, on the 27 September Wakefield gathered the local chiefs on the deck of the *Tory*. There the Port Nicholson deed was read out, translated, explained, and signed.

The deed contained<sup>3</sup> a boundary description previously pointed out to Wakefield by Te Wharepouri,<sup>3</sup> and later read out in full by Wakefield before the Land Claims Commission. On the eastern side, the boundary ran along 'the summit of the range of mountains known by the name of Turakirai from the . . . sea . . . until the foot of the high range of mountains called Tararua.' The boundary then ran along the foot of the Tararuas until it ran into the 'Rimurap' range – roughly, the western Hutt hills. From there, the western boundary ran down 'along the summit of the . . . Rimarap range of mountains, at a distance of about twelve English miles . . . from the . . . Western shore of the . . . Harbour,' all the way to Cook Strait at Rimurapa, or Sinclair Head.<sup>4</sup>

Richard Barrett told the Land Claims Commission in February 1843 that he had translated Wakefield's deed and its boundary for the assembled vendors:

Listen natives, all the people of Port Nicholson. This is a paper respecting the purchasing of land of yours. This paper has the names of the places of Port Nicholson. Understand this is a good book. Listen, the whole of you natives, write your names in this book; and the names of the places are Tararua, continuing on to the other side of Port Nicholson, to the name of Parangarahu. This is a book of the names of the

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2. Wai 145 rod, doc e1, pp 28–35

3. Wai 145 rod, doc e4, vol 2, p 203

4. Wai 145 rod, doc a10(a):1, pp 1–2. I have not ascertained how the deed came to state that the foot of the Tararua Range would form a northeastern versus a northwestern boundary.

channels and the woods, and the whole of them to write in this book, people and children, the land to Wideawake [Wakefield]. When people arrive from England they will show you your part, the whole of you.

Both Wakefield's deed and Barrett's notoriously poor translation centred on their full descriptions of the boundaries – and those boundaries had been initially given to Wakefield by one of the leading vendors, Te Wharepouri. Also in the company's favour, the 1842 plan (above) showed a Port Nicholson purchase boundary that appears to follow the boundary described in the 1839 deed. For example, the western boundaries named in both the deed and the plan run through 'Rimurap' range, all the way from the Tararuas to the South Coast point of the same name (now also known as Sinclair Head). This Rimurapa 'ridgeline' is difficult to see from points around the harbour, but on-the-spot it is so distinct as to form virtual ramparts for much of the way from about Mount Kaukau to Rimurapa on the South Coast.<sup>6</sup> This is noteworthy, as by the *end* of the Land Claims Commission, the Port Nicholson 'purchase area' had come to include the large area to the west of this line, and by the end of the decade, the 'purchase area' had come to *exclude* a large area around the southern end of this line.

The evidence presented to Land Claims Commission regarding the eastern boundary was not as consistent. The southeastern-most point named in the 1839 deed, 'Turakirai,' is several miles farther east than Barrett's comparable point (above), 'Parangarahu.' Both are many miles farther west than the southeastern-most point in the 1848 'purchase area' – 'Muka Muka.'<sup>7</sup>

Immediately after it received Wakefield's evidence, the Land Claims Commission heard corroborating evidence from Wakefield's witnesses, George Evans, John Dorsett, E J Wakefield, Te Puni, and John Brook. Wakefield would have been content with closing at this point, but the commissioner insisted on hearing more evidence, especially on the point of boundaries. For the next few days, then, the commission alternated between hearing Wi Tako Ngatata and William Wakefield. Then, after a few days examining Robert Tod's purchase at Pipitea, the commission interrogated Taringa Kuri, Rōpiha Moturoa, and Mohi Ngaponga regarding Wakefield's Port Nicholson claim.

In this initial round of hearings, the commission did not hear much directly supporting or refuting Wakefield's boundaries, or particularly pertinent to the 'surplus' area of Wakefield's claim.<sup>10</sup> Instead, the court's examination of Wi Tako focused on his (mis)understanding of what was being sold, on the sources of his

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5. Wai 145 rod, doc c1, p 36

6. The author walked this western 'Rimurap ridge' from Mount Kaukau to just south of Wilton Bush in 1994, in order to see whether it formed either a physical barrier or legible boundary. It definitely does both.

7. All of these southern boundary end-points are shown on all of the maps of traditional place names, submitted in Wai 145 rod, doc c1, facing p 36, and in Wai 145 rod, doc e3, preceding p 1.

8. Wai 145 rod, doc e4, pp 190–191

9. Table summarizing all of the land claims hearings into the company's purchases (as well as all of the private claims in the Port Nicholson area) in Wai 145 rod, doc e4, vol 2, following p 340. The evidence is summarised and discussed in Wai 145 rod, doc e4, vol 2, pp 185–218.

10. Wai 145, rod, doc e4, p 192

customary rights, which individuals he acknowledged as 'chiefs' at the various kainga around the harbour, and the rough extent of lands he claimed personally. The court took a similar approach the next week with Ropiha Moturoa, from Pipitea, and then with Mohi Ngaponga, from Te Aro – though Ngaponga's description of tribal boundaries did extend to a mention of Rimurapa on the south coast.<sup>12</sup> Likewise, when Taringa Kuri recited tribal boundaries that week for the court, he appears to have gone right around the harbour, describing a sliced-pie pattern, with most of the pieces divided into a harbour-part and an 'interior' part.<sup>13</sup>

At neither of these points, though, did the land commission ask whether Ngaponga or Kuri's interests in the outlying or 'interior' areas had been included in the 1839 sale. Such a question would seem necessary for the commission to ascertain the equity of any Crown-claim to those areas as 'surplus' generated by that sale. However, such a question probably would have seemed silly at the time, since neither Ngaponga nor Kuri regarded the *harbour*-part sale as satisfactory and complete. Indeed, even Te Puni, when recalled to testify on 7 July, bluntly stated: 'Barrett said "come and hold the pen["]'. The Natives did not know what was in the deed'.<sup>14</sup> How could this otherwise unsatisfactory transaction have been *more* effective farther out towards its margins?

These large discrepancies in the colonists' own claims to the boundary lands, combined with the commission's early inattention to those boundary areas, begin to suggest why we now face a rather obscure and tortuous path from the company's 1839 Port Nicholson purchase to the Crown's 1848 (and later) claim of title to that purchase's 'surplus'.

#### **8.4 THE INITIAL TRANSACTIONS: WANGANUI**

The Land Claims Commission did not examine the company's purchases in their chronological order. So for instance, on 2 June 1842, between hearing Moturoa's and Ngaponga's versions of the Port Nicholson transaction, the commission skipped past the Kapiti and Queen Charlotte transactions, and began hearing Colonel Wakefield's Wanganui claim. Wakefield introduced the claim by producing the Wanganui deed, dated May 1840,<sup>15</sup> and telling what he knew of the preliminary transaction on the Tory at Kapiti. The deed described the area allegedly purchased:

Along the sea shore on the North of the said Cook's Straits from Manawatu to Patea and inland from either of the said points to the volcano or Mountain of Tonga Ridi.<sup>16</sup>

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11. Wai 145 rod, doc e4, vol 2, pp 190–202

12. Ibid, pp 209–215, and 217–219. The Rimurapa reference at p 219.

13. Ibid, pp 207–208

14. Ibid, p 252

15. Ibid, pp 215–217

16. Deed no 421 in H H Turton, *Maori Deeds of the Old Private Land Purchases*, 1887, p 395

The boundaries claimed in this deed appear extraordinary, but recall that just as the Port Nicholson boundaries had originated with Wharepouri, a Wanganui chief, Kurakau, had pointed from the deck of the *Tory* to the corners of the above ‘purchase area’ – the Patea River, the Manawatu River, and Mount Tongariro. Furthermore, the Wanganui transaction itself followed several times as long a period of negotiations as at Port Nicholson, and involved direct talks with several times as many Maori vendors. Proportionately, therefore, the Wanganui boundaries were perhaps no more (or less) far-fetched than those at Port Nicholson.<sup>17</sup>

After submitting his basic documents, Colonel Wakefield called his nephew, E J Wakefield, whom he had commissioned to complete the Wanganui purchase. Mr Wakefield explained how Te Kurakau had come to Port Nicholson to see the purchase goods for Wanganui loaded on to the schooner, and had returned to Wanganui, where he fetched about 500 or 600 Maori from up the river to sign the deed. There were a couple of weeks continuous meetings to discuss the sale, with John Brooks translating throughout.

According to Mr Wakefield, Maori initially understood that ‘they should retire higher up River, and leave the seaboard to the white men,’ but through the 17 days purchase negotiations, they learned that ‘the whole of the district bought would be divided up into small portions.’ In other words, according to Mr Wakefield, the Wanganui vendors distinctly understood that the ‘district bought’ included the upper river. Under Sub-Protector Clarke’s cross-examination, John Brook specified that for nine-to-ten days of these negotiations, Kurukau had sent messengers to the far reaches of the purchase area, enlisting support for the transaction. When all were agreed (again according to Mr Wakefield), the payment goods were handed off the schooner to Maori in canoes, taken ashore, and distributed. By Wakefield’s own admission, the distribution was chaotic.<sup>18</sup>

## **8.5 THE INITIAL TRANSACTIONS: KAPITI**

The Land Claims Commission heard the company’s evidence regarding the Kapiti transaction on the 9 to 11, 13 and 14 June 1842. Again Colonel Wakefield introduced the claim with the deed, dated 25 October 1839. The boundaries on this deed read:

The whole of the lands [on the South Island] . . . bounded on the South by the . . . [43rd] parallel . . . , and on the West, North and East by the Sea, including [a long list of particular places] . . . and also [lands on the North Island] . . . bounded on the North East by a direct line drawn from the Southern head of the River or Harbour of Mokau situate on the West Coast in the latitude of about 38 degrees South, to Cape Tekakore situate on the East Coast in the latitude of about 41 degrees South, and on the East, South, and West by the Sea.

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17. Wai 145 rod, doc e4, vol 2, pp 220–221

18. Ibid, pp 215–216, 220–221

Figure 13: 1842 claims based on 1839 transactions

Wakefield testified that the Kapiti discussions had been accompanied by a map, on which Te Rauparaha had pointed out the above as being the boundaries of his *rohe*. Wakefield also testified that John Brook and a visitor whom they had met at Kapiti, Captain Lewis, had translated to Te Rauparaha and Te Hiko. Their translation emphasized ‘that they were parting with all their land, that they would never get it back again . . .’

A few days later day John Brook translated in the dealings with Te Rangihaiata, along with the help of two of the Port Nicholson deed signatories, Tuarau and Henare Ware. Again, according to Wakefield’s sworn testimony, the translators explained to Rangihaiata ‘the nature of the transaction, the deed, and the Map.’<sup>19</sup>

A few days later, Brook corroborated this version of the origins of the exterior boundaries of the Kapiti deed.<sup>20</sup> So, similarly to his Port Nicholson and Wanganui claims, Wakefield’s initial presentation of the Kapiti transaction stressed how, after originating with the vendors themselves, and then being clearly translated and explained to the vendors, the exterior boundaries of the transaction must have been understood by those vendors.

## **8.6 THE INITIAL TRANSACTIONS: QUEEN CHARLOTTE**

The commission interspersed its initial hearing of Wakefield’s Queen Charlotte transaction with its hearing of the Kapiti transaction – on the 10, 14 and 16 June 1842.<sup>21</sup> Here again, Wakefield began by producing the deed, signed 8 November 1839 at Queen Charlotte Sound. The exterior boundary of this deed was the same as that for the preceding Kapiti deed (see above).

Wakefield presented a transaction quite similar to the Kapiti signing – chiefs visiting aboard the *Tory* for several days, looking at nautical charts on board and identifying on them their lands and the lands which Wakefield proposed for purchase. These discussions (and so presumably, the exterior boundaries) were translated by Barrett, Brook, two Maori missionaries named Duncan and Awite, and ‘several white men who had lived in Queen Charlotte’s Sound for many years.’<sup>22</sup>

The commission gave little attention to the outside boundary or the outlying lands of the Queen Charlotte and Kapiti claims in these June 1842 hearings. By this time, Protector Clarke, Commissioner Spain and Crown Prosecutor Hanson were all focusing their questions more on the relationship between ‘overlord’ and ‘resident’ interests – the distinction on which Wakefield built his Kapiti and Queen Charlotte claim-presentations. Indeed, when the commission returned to the Kapiti transaction after Wakefield’s Queen Charlotte presentation (June 14 and after), its examination focused quite closely on this relationship between ‘overlord’ and

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19. *Ibid*, pp 221–223

20. *Ibid*, p 227

21. *Ibid*, table 1, following p 340

22. *Ibid*, pp 223–224

'residents' interests.<sup>23</sup> To an extent, of course, this line of inquiry did amount to a look at the border-areas of those deeds – areas where 'residents' were whole other peoples who had neither signed any deeds nor had any apparent allegiance to anyone who had. This was the point in the hearings where Spain, Clarke, and Hanson all seem to have adopted Wakefield's general principle that 'residents interests' must be extinguished separately from 'overlord' interests. The commission turned the company's own principle against it.

## 8.7 THE INITIAL TRANSACTIONS: TARANAKI

The commission began hearing the company's Taranaki claim on 16 June 1842. John Dorset, the company surgeon, had acted as the company's main agent in these transactions. He opened the company's case by producing the deed of 15 February 1840. The particulars of this transaction are relatively unimportant, though, as the Land Claims Commissioner ultimately decided that the company did not pursue a claim based upon it, or present evidence in support of it.<sup>24</sup>

Dorset appeared again the next day and presented the second Taranaki deed, dated the same day, 15 February 1840. Many of the boundary points named in this deed are difficult to locate – especially along the inland north and eastern sides. It is plain, though, that the northwestern side was the sea shore at low water mark, from the mouth of the 'Wakatino River' to 'Auronga'. The former almost certainly refers to the 'Mohakatino River,' and the latter to 'Hauranga,' an old name for 'Oakara' just south of the present site of New Plymouth. The southern boundary was a crooked line from 'Auronga' to the summit of Mount Taranaki. Then for its eastern and northern sides, the line crossed over to a point 'Wanga to Kowai' on the 'Wakatino River,' and followed that river back out to sea.<sup>25</sup> This was the deed that Umpire/Commissioner Spain later took to have partly extinguished the Maori 'residents' interests in the company's 60,000 acre award area, and beyond.<sup>26</sup>

Colonel Wakefield told the commission that these Taranaki transactions originated in November 1839 when, while he was negotiating the Queen Charlotte deed:

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23. Wai 145 rod, doc e4, vol 2, pp 224–226. The commission returned to the Kapiti transaction on 14 June; see *ibid*, pp 227–231. See, for example, commission's myriad lists of 'principal chiefs' in Wai 145 rod, doc e4, vol 2, table 4 (following p 340). See also its 'consent of residents' question, discussed at *ibid*, pp 228–229, 247–248, which are primary instances.

24. Spain's Taranaki report, BPP, vol 5 [203], p 50. This is another of Spain's decisions that makes no sense at all to me. The old minutes of the company's 1842 evidence read throughout as a presentation of claim based on both deeds.

25. Deed 420 in H H Turton, *Maori Deeds of the Old Private Land Purchases*, 1887, pp 392–393. I have adopted the interpretation of the place names used in the Waitangi Tribunal's *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, with no attempt to decypher them myself.

26. Spain's Taranaki report, p 50

Ngatiawa Chiefs [of both Queen Charlotte and Waikanae] talked a great deal to [him] about Taranake, and some<sup>27</sup> of the Chiefs of Port Nicholson asked [him] to get white men to go and live there.

He said Tuarau and Henare Ware ‘were sent . . . with messages to the same effect to the Native residents at Taranaki.’ Wakefield also claimed that the boundaries of the deeds originated with two chiefs who came aboard the *Tory* when it first anchored off Sugar Loaf.<sup>28</sup> He explained that he had used two deeds ‘in consequence of the jealousies existing between the Taranake and Nga Motu tribes.’

Once again, the company’s presentation emphasised the great time and care devoted to ensuring the vendors understood the nature, extent, and consequences of their eager agreement to sell. They spent over two months discussing the transaction with all forty or so vendors. And once again, the ‘overlord/resident’ distinction featured prominently in their presentation. Indeed, Wakefield expressly characterised both of the Taranaki transactions as ‘resident’ complements of his Kapiti and Queen Charlotte ‘overlord’ transactions.<sup>29</sup>

After hearing the Taranaki presentation, over another twenty-two days between late-June and early-September 1842, the Land Claims Commission heard evidence on various Port Nicholson-area claims. It devoted twelve<sup>30</sup> of these days primarily to hearing Maori views on the company’s transaction. In these hearings Spain, Clarke and Hanson repeatedly asked their Maori witnesses whether they agreed with Wakefield’s view of their customary interests: that is, whether or not they thought that the assent of the ‘overlords’ was sufficient for extinguishing customary interests, or was the assent of the ‘residents’ also required? Interestingly, the witnesses gave conflicting responses on this point – they did not agree on whose consent was necessary to effect valid extra-tribal alienations of land.<sup>31</sup>

The Maori witnesses in these twelve hearings *were* quite consistent on a more fundamental point, though: nearly all (even Te Puni) denied having any real understanding of the company’s Port Nicholson deed.<sup>32</sup> It was this denial, coinciding as it did with increasingly hostile Maori resistance to yielding possession of the Hutt Valley, that convinced the land court to change into an arbitration for compensation. Of course, questions regarding any ‘surplus’ that might arise from such an ineffectual original transaction became for the moment irrelevant.

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27. Wai 145 rod, doc e4, vol 2, pp 231–232

28. Ibid. Recall that Wakefield said Tuarau and E Ware also helped translate at the Kapiti transaction (above).

29. Ibid, p 232

30. See Wai 145 rod, doc e4, vol 2, table 1 (following p 340)

31. The entire inquiry is summarized at Wai 145 rod, doc e4, vol 2, pp 245–275. Mangatuku (pp 247–248) testified to the effect that Maori custom did require ‘resident’ consent; Te Puni (pp 258–259) testified that there was no such specific custom. Henare Ware did not testify on the point, and Wairarapa (pp 266–267), Taringa Kuri (pp 268–269), and Mahau (pp 273–275) all testified ‘both ways’ on the point – suggesting that the distinction itself did not fit the Maori reality very well. Similarly, Wairarapa, at *ibid* pp 261–263, appears to have placed much more weight than the land court did on his fine distinctions between ‘selling’ and ‘tapuing’ land.

32. These hearings are summarized in Wai 145 rod, doc e4, vol 2, pp 245–275

## **8.8 THE CROWN'S PLEDGES BOUGHT PEACEFUL POSSESSION FOR THE COMPANY**

Clearly, there was not a great deal of difference in the company's six original transactions, especially as first presented to the Land Claims Commission in May–September 1842. All followed a similar format:

- (a) start with a 'reference' or introduction to the tribe by a member or close relative,
- (b) boundaries proposed (and sketched on a map) in initial conversation with (usually two) leading rangatira, following (as much as possible) easily recognisable features like rivers and mountains and coasts,
- (c) a period (ranging from one week to over two months) of open discussion and meetings with as many 'residents' as possible,
- (d) a great gathering on board the *Tory* where deeds are signed and consideration paid (in most cases, immediately followed by the vendors scramble to divide up that consideration amongst themselves),
- (e) a celebration (understood by the company to signify the occasion of the transfer, or in other words, to mark the transfer of possession),
- (f) followed by several months where one or a few company settlers held possession of the purchase area for the company,
- (g) followed by attempts at survey and organised settlement (especially, by building).

All of the transactions reflected Wakefield's belief that one first extinguished 'overlords' interests and then 'residents'. By the end of these initial hearings, May to September 1842, the Land Claims Commission had adopted a similar view: namely, that Wakefield's initial 'overlord' transactions might well have been necessary, but they were certainly not sufficient for effecting a complete purchase (more on this below). The commissioner and protector apparently believed that the real test of the transactions arose *after* the initial transaction (around step 7 above) in the Maori 'residents' reactions to the settlers attempts to take physical possession.<sup>33</sup>

By mid-1842, though, when the Land Claims Commission began examining the company's claims, there had developed a steady stream of Maori–settler disputes at all of the company's settlements. These disputes continued well past the hearings – and everywhere they arose mainly in response to the company surveying, or settlers moving onto or building on, or their livestock trampling – lands which the 'resident' Maori denied having 'sold'.<sup>34</sup> Indeed, well before the start of the hearings (by mid-1840), Colonel Wakefield was openly expecting and readily compensating such 'resident' resistance to yielding physical possession to colonists.<sup>35</sup>

Again, the general approach adopted by the Crown from mid-1841 on was extremely similar to Wakefield's – only whereas Wakefield tried to buy 'residents' surrender of possession with direct payments, the Crown sought peaceful possession with promises. Starting with Shortland in August 1840, then Hobson in August 1841, and then in mid-1842 Clarke jnr, Bishop Selwyn, and the police magistrates

in the Port Nicholson, Wanganui, Taranaki and Nelson settlements, the Crown repeatedly stopped Maori from retaliating against colonist encroachments by promising a mix of reserves, funds, services, and protection.<sup>36</sup> Throughout, and in every settlement, the Crown promised (in its policies and direct pledges):

- a native reserves trust fulfilling the company's promises in its original transactions;
- another trust fund made up of 15–20 percent of all proceeds of eventual Crown land-sales (together, enabling provision of schools, hospitals, and income); plus
- that any lands Maori did not want to sell<sup>37</sup> would be excepted from sale (especially their pa, ngakinga, and wahi tapu).

The company and Crown's 'overlord/resident' distinction – and their staged-payments and pledges approach which it spawned – do not seem necessarily contrary to the Treaty of Waitangi. It seems quite clear, though: if the Crown took the Maori 'residents' surrender of peaceful possession as the real sign of their consent to land sales, then the particular Crown assurances which *won* that sign of surrender must have formed the 'real consideration' due to those vendors. The company's title – and therefore, the *Crown's* title to any company 'surplus' – appears highly dependent on how well the Crown honoured its early, possession-getting pledges.

There is another reason the Crown's title to the company's 'surplus' must depend on these early pledges versus any tacit Maori assent: basically, 'tacit assent' must have been more difficult to 'read' for lesser-used areas like the 'surplus' lands. Indeed, when applied to the outlying 'surplus' lands, the very 'overlord/resident' distinction itself would have begged some near-imponderables: for example, what physical acts in the *outlying areas* would have constituted 'residence'? Would not enjoyment of this 'residence' in these areas depend more heavily upon an 'overlord's' protective warrant (and hence, disappear more readily when that 'overlord' released his interests – regardless of whether his 'resident' fellows consented)? Clearly, the further out toward the *boundary areas* the commission

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33. This model of gauging residents assent to sale by their responses to actual intrusion or settlement could be said to begin with the 1840 colonial charter's definition of Maori customary property right as 'actual occupation' of lands. See Wai 145 rod, doc e3, vol 1, p 46. That focus on physical possession carried forward, then, in Colonial Secretary Shortland's 1840 agreement at Te Aro pa, *ibid*, pp 64–69; the company's 1841 charter, *ibid.*, p 70, note 142; Hobson's 1841 Land Claims Ordinance, *ibid*, pp 82–84; Chief Protector Clarke's analysis of the Port Nicholson situation in 1841, in *ibid*, p 90; Hobson's similar view in 1841, *ibid*, p 96; Hobson's authorisation 'to induce . . . natives who *reside* within [the company's districts] to yield up *possession*', *ibid*, pp 98–99 (emphasis added); Crown Prosecutor R D Hanson's view of the company's purchases, at *ibid*, p 156. Commissioner Spain expressly gauged the difference between the company's claims at Taitapu and Wakatu versus those at Porirua and Wairau on this principle. He said he allowed the former and disallowed the latter primarily on the basis of the 'residents' responses to the company's attempts at survey. See Spain's Nelson report, BPP, vol 5 [203], p 43. This focus on physical possession was wedded to Clarke, Hanson and Spain's adoption of, and focus upon, Wakefield's 'overlord/resident' distinction – see Clarke's questions at *ibid*, vol 2, pp 200, 253–255; Wakefield testifying, pp 222–225, 230–231; Hanson questioning Brook, pp 228–229, and Hanson writing home, pp 234–235; Spain questioning Mangatuku, *ibid* pp 247–248; Spain and Hanson questioning Te Puni, *ibid*, pp 258–259; Spain questioning Wairarapa, at *ibid*, pp 265–266; ditto Taringa Kuri, pp 268–269; and (with Evans) questioning Mahau, at pp 269–275.

looked, the more difficulty it would have had in discerning any supposed interplay of 'overlord/resident' consent (again, see the Hutt conflicts). Here even more than in the closely-settled areas, therefore, the Crown had a duty not to rely on surmises, and to stake its own claims only upon straightforward, open negotiations and prior, written evidences of the equity of its title.

In sum, the company's six initial transactions must have sounded to the Land Claims Commission like good beginnings – especially if one accepted the company's own model of how to conduct customary transfers of land:<sup>38</sup> namely, first compensate a handful of the 'highest' chiefs for the over-arching or tribal interests, and then *afterward*, when seeking actual possession, compensate the 'resident' Maori who formerly held actual possession.

However, when the commission went on to examine Maori views of the Port Nicholson transaction, it found them to be at variance with the company's views. The evidence did not, however, shake the commission's faith in the company's 'overlord/resident' model of effecting customary land transfers. Indeed, asking Maori whether 'higher' chiefs could sell the lands of 'lower' chiefs (and vice versa) became one of the commission's main lines of inquiry at all the company's claim areas.

Regardless of how well this 'overlord/resident' model of transfer matched the real situation at hand, we have seen it would have been an intrinsically difficult model to apply to relatively sparsely used areas, such as the company's 'surplus'. Applying the model to such areas would require special care, extra inquiry. We will see below that the commission did not pursue any such particular line of inquiry.

## **8.9 THE NEW ZEALAND COMPANY'S FEBRUARY 1841 ROYAL CHARTER**

There was an entirely different reason why the company's original land claims did not of themselves generate any 'surplus': in mid-1840 the New Zealand Company

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34. Disputes at time of survey of Port Nicholson, see Wai 145 rod, doc e3, vol 1, p 61; at selection, see *ibid* p 63; at settlement following selection, *ibid*, pp 64–69, 76 (esp note 155); Hobson's 1841 awareness of these disputes, *ibid*, pp 85–86; Clarke snr's 1841 report, *ibid*, pp 89–90; Hobson apparently 'playing' the disputes to the Crown's advantage, *ibid*, pp 104–105; disputes at settlement and selection of Wanganui lands, *ibid*, pp 108–109; at Taranaki in 1842, *ibid*, p 152; at Porirua, *ibid*, p 156; at the Hutt, *ibid*, pp 140, 158–161. Much Land Claims testimony focused on disputes: see *ibid*, vol 2, p 174 regarding the Hutt disputes, Moturoa at pp 204–206, 210, John Brook at pp 209–210, 217 regarding Wanganui, p 223 regarding the Hutt, Taringa Kuri disputing the entire Port Nicholson sale, at pp 250, 267, and similarly Wairarapa at pp 264–265. Regarding inter-tribal disputes at the Hutt (which would have precluded secure transfer of interests to pakeha) see pp 226–228, at Waikanae see pp 233, 250, 264–265, and 267.
  35. Moturoa mentioned to the Land Claims Commission how Wakefield had bargained for compensation in return for yielding physical possession of lands. See Wai 145 rod, doc e3, vol 2, pp 203–204, 209, 213–214, and 215; See also Wi Tako's testimony, *ibid*, pp 201–202. Wakefield's translators, John Brook and Captain Lewis, testified similarly – *ibid*, pp 210, 222. For views of the Kapiti and Queen Charlotte Maori signatories as 'overlords', see *ibid*, pp 222–223, 232. This purchase strategy naturally yielded Wakefield's 1841 proposal to Hobson, that the Crown allow survey and settlement of the 1840 company charter lands, on condition that the company pay further compensation (to resident chiefs), to be set by the protector, himself, and an umpire. See Wai 145 rod, doc e3, vol 1, pp 94–95, and vol 2, p 237.

learned that the New South Wales Land Claims Act 1840 voided whatever titles to land they had acquired by their large transactions with Maori. In October 1840 the company directors in London asked the Colonial Office to clarify how the Ordinance was to apply to the company's claims. The Colonial Office's reply, a few weeks later, was an offer of a royal charter. The company accepted the offer immediately.

This charter, formally issued in February 1841, effectively exempted the company from the normal operation of the Land Claims Act and its successor Ordinances, and 'guaranteed' the company a certain amount of land in New Zealand in return for a certain amount spent by the company (on behalf of the British public) in colonising New Zealand (an acre per five shillings).<sup>39</sup> In exchange for this 'guaranteed' area, the company expressly disclaimed any interest in all other areas in its original claims.<sup>40</sup> The Colonial Office completed its first tallies of the extent of the company's claim in mid-May and early April 1840, and forwarded them to Governor Hobson on 20 May. In his covering letter, Lord Russell instructed Governor Hobson to 'make the necessary assignments of land to the company in pursuance of the terms of the Agreement.'<sup>41</sup>

By August 1841, when Governor Hobson first visited the company's districts – starting at Port Nicholson – the mode of dealing with the company's claims had become a pressing issue. Hobson doubtless knew of the company's delegation to Governor Gipps, and Gipps proposal to 'confirm them in possession' of Port Nicholson regardless of land claims inquiry.<sup>42</sup> Hobson had received instructions to the Home Government's instructions over-riding Gipps proposal: the February 1841 charter. Hobson even knew that the company interpreted that charter as exempting them from inquiry under the Land Claims Ordinance.<sup>43</sup> Accordingly, when Hobson first arrived at the company's principal settlement, he immediately

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36. Specific statements that the Crown's pledges averted violence: by Shortland in 1840, Wai 145 rod, doc e3, vol 1, pp 64–69; by Clarke in 1841, *ibid*, pp 89–90; by Hobson in 1841, *ibid*, p 106; in Hobson's instructions to Clarke jnr in 1842, *ibid*, pp 173–174; by Brook and Barrett, *ibid*, p 210; by the missionary, Reihana Reweti, *ibid*, p 217; by Taringa Kuri, *ibid*, p 250. In 1842 Bishop Selwyn, as Native Reserves Trustee, averted violence by advancing £100 for a medical dispensary, *ibid*, p 305. When the Home Government demanded reports apportioning blame for the Wairau violence in 1843, most officials sought to absolve themselves with this view that, but for the pledges and actions of the Crown officials, Maori/company violence would have occurred even earlier and more often; see Wai 145 rod, doc e3, vol 3, pp 416–421. Clarke snr was especially clear on this point in his initial briefing for Governor FitzRoy; *ibid*, p 452.

37. The pledges that bought peaceful possession: 1841 negotiation terms at Wai 145 rod, doc e3, vol 1, pp 95–96; Hobson in 1841 pledging pa and cultivations, *ibid*, p 106; Hobsons promising a trust, *ibid*, p 135; Hobson in 1842 promising to except pa and cultivations specifically in addition to native reserves, *ibid*, p 140; R D Hanson in 1842 aware of the importance of excepting clearings (versus just cultivations), *ibid*, p 159; Lord Russell instructing Hobson to effect the company's native reserves scheme in 1840, *ibid*, p 134; the 1840 select committee recommending Lord Russell adopt the company's reserves scheme, *ibid*, p 45; the company directors list of aims for the reserves scheme, *ibid*, p 125; Gipps instructs further exceptions and reserves to be made in the 'surplus' areas, *ibid*, p 133; Lord Russell instructing likewise, *ibid*, p 134; Lord Russell instructing a 15–20 percent land-sales fund for Maori, *ibid*, pp 134–135 and Hobson initially following this, *ibid*, pp 144–145; early plan to provide education and health care from the proceeds of this land sales and native reserves trust, *ibid*, pp 142–143, 145–146.

asked Wakefield to submit a written proposal for dealing with the company's claims. Hobson's request was his initial response to the company's 1841 charter.

Wakefield responded with a proposal expressly 'to carry out the arrangement entered into in November last by [Lord Russell] and the Company' – that is, the charter – and referring specifically to the Colonial Office's authorisation<sup>44</sup> to select 110,000 acres at Port Nicholson and 50,000 acres at New Plymouth. Hobson countered with a Proclamation, waiving any Crown claims in the areas specified in an attached schedule, but otherwise promising little. When Wakefield objected to the Proclamation, Hobson replaced it with a more informal (and directly-worded) letter authorising Wakefield to try to satisfy outstanding Maori claims<sup>45</sup> against the company – again only in the areas specified in the attached schedule.

In both cases, the schedule referred to was one completed 1 September 1841 by the Surveyor General and published in the *Gazette* 9 September. Like Wakefield's initial proposal (expressly embodying the 1841 charter's four-acres per pound formula), this schedule authorised the company's selection, survey, and completion of purchase of 110,000 acres at Port Nicholson–Porirua–Manawatu, 50,000 acres at Wanganui, and 50,000 acres at New Plymouth. The schedule defined the latter two areas as eight-by-ten mile blocks (80 square miles equals 51,200 acres), situated at the mouth of<sup>46</sup> the Wanganui River and on the coast opposite the Sugarloafs, respectively.

Likewise a few months later, Hobson's 1842 update of the Land Claims Ordinance focused on the 1841 charter, in the sense that it extended the company's special acreage/award rate to all claimants.<sup>47</sup> Further, Hobson's instructions to Commissioner Spain under this Ordinance directed his attention to the company's 'blocks of land under their Charter from the Crown.' And finally, in his letter conveying the Ordinance and instructions to Commissioner Spain, Hobson

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38. It is clear that 'customary transfer' was what both company and commission sought to effect. See Wai 145 rod, doc e36, Colonial Secretary's 1 July 1841 answers to land commissioners questions, especially 'Proof of conveyance according to the customs of the country and in a manner deemed valid by the inhabitants, is all that is required'. This was simply the common law: see Wai 145 rod, doc e3, pp 18–19, regarding colonial law 'doctrine of continuity' – that upon a change in sovereignty, local customs amounting to laws (especially regarding property) must be respected until changed by treaty or statute.
39. 'Exempted' see Russell/Hobson, 16 April 1840, cited in Wai 145 rod, doc e3, vol 1, p 74. 'Guarantee' see *ibid*, pp 70–75.
40. Wai 145 rod, doc e3, vol 1, p 72. The 600,000 acre estimate was Colonel Wakefield's at the time he and Governor Hobson arranged the mode of implementing the 1841 charter, in September 1841. See *ibid*, p 94. By the time the Land Claims Commission began hearings, the first Pennington estimates had arrived, guaranteeing 531,929 acres so far, and signalling that another 400,000–500,000 acres might be added later. *Ibid*, p 179.
41. Wai 145 rod, doc e3, vol 1, p 75, and especially note 154
42. *Ibid*, p 70, note 142
43. In June 1841, for instance, one of the 'Company' members of the first Legislative Council, Edmund Halswell, had sought to exempt from the 1841 Land Claims Ordinance all claimants who were corporations with 'powers derived direct from Her Majesty' – namely, the New Zealand Company under its 1841 royal charter. Wai 145 rod, doc e3, vol 1, p 84.
44. Wai 145 rod, doc e3, vol 1, p 94. I have not discovered when or why, but shortly after this the New Plymouth allocation expanded from 50,000 to 60,000 acres.

deferred again to ‘Mr Pennington’s award’ – the Colonial Office’s calculations of the extent of lands the company was to select and acquire under its 1841 charter.<sup>48</sup>

By this time, Mr Pennington’s award had reached 531,929 acres, with an estimate of another 400,000 to 500,000 more to come (based on the Colonial Office’s on-going tally of the company’s expenditures). Wakefield (if not also Hobson) informed Commissioner Spain of this by enclosing the Colonial Office’s letter of 28 May 1841, in his initial May 1842 submission to Spain’s Land Claims Court.

As noted above, this submission also included a plan of all the lands comprised in the company’s original six transactions, as requested by the surveyor attached to the land commission.<sup>49</sup> Clearly, Wakefield’s submission of this plan does not support our hypothesis that Spain’s inquiry was, from the start, restricted to the company’s 1841 charter lands. As Spain himself noted later, though, making any submission at all was inconsistent with Wakefield’s understanding at the time – namely, that Spain’s inquiry was to be a mere formality preceding the granting of those 1841 charter lands. It would be a mistake to read Wakefield’s submission of the original transaction boundaries as evidence that the either the company’s claim or the Crown’s inquiry therefore extended out to those boundaries.

Rather, as we saw above, the subsequent land claims inquiry quickly turned its attention away from Wakefield’s deeds alleged terms and boundaries, to a consideration of the relationship between the original deed *signatories* interests and those of the ‘residents’ in the areas to be selected and acquired under the 1841 charter. This focus on ‘residents’ interests doubtless reflected the common law’s focus on ‘possession’ as the essence of ‘title’. Both apparently sat quite easily with Governor Hobson’s 1841 authorisation for the company<sup>50</sup> to satisfy outstanding claims of ‘Natives residing’ in their 1841 charter areas.

In short, from the start, the Land Claims Commission’s inquiry sought only to deal with the 1841 charter ‘guaranteed’ areas, and *avoided* attempting a full inquiry into the entire 20,000,000 acre ‘Company district’. Without inquiry into them, it is

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45. Wai 145, rod, doc e3, vol 1, pp 95–98. Note: this is frequently referred to as Hobson’s ‘pre-emption waiver’, but it was only ever a waiver of the Crown’s right to complete the partial sale that had been effected (generally, to treat for the ‘resident’ interests where the ‘overlord’ ones had already been surrendered). Hobson’s waiver on behalf of the company, unlike FitzRoy’s for Wairarapa and Otago, and then Grey’s for the entire company districts (below), did *not* authorise the company to undertake new transactions. See Wai 145 rod, doc e3, vol 1, pp 94–99.

46. Wai 145 rod, doc e3, vol 1, pp 99–100. The mile/acreage conversion: 10 miles = 17600 yards; 8 miles = 14080 yards; 80 sq miles = 247,808,000 sq yards. Divide this by 4840 sq yards per acre, equals 51,200 acres per 80 sq miles. I have not yet determined whether these 50,000 acre blocks represented a common British administrative unit, such as a parish.

47. Wai 145 rod, doc e4, vol 2, pp 168

48. Ibid, pp 172–73, 177

49. Ibid, p 179

50. There is some suggestion that the commission’s focus was in direct pursuance of Hobson’s arrangements, eg in Wakefield’s report that Spain arrived ‘disposed to take some steps to remedy’ the 1842 Ordinance’s lack of provisions for negotiating for ‘resident interests’. See Wai 145 rod, doc e4, vol 2, p 170. Phillipson also points out that Spain’s predisposition to arbitrating may have stemmed partially from his Colonial Office instruction that he was not so much to redress past wrongs as prevent any in the future. See Dr G Phillipson, *The Northern South Island*, Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), pt 1, June 1995, pp 70–73.

difficult to see any basis for a Crown claim to these areas that were 'surplus' in relation to these 'guaranteed' ones.

## **8.10 THE SURPLUS LANDS IN THE 1842–44 NEW ZEALAND COMPANY ARBITRATIONS**

There is a third reason that one would not expect the company's claims to have generated any 'surplus': in late 1842 Acting-Governor Shortland delegated authority to the Land Claims Commission officials in the company districts to conduct and umpire a binding Arbitration. There was no suggestion that the authority to arbitrate extended to Maori claims in the 'surplus' areas of the company's claim (that is, the areas *outside* the lands to be granted to the claimant, but *within* the claimant's alleged purchase boundaries). Rather, the express aim of the arbitrations was to compensate outstanding claims/interests of the Maori 'residents' *within* the 'neighbourhoods' scheduled and, by this time, already mostly surveyed for grant to the company.

The land claims inquiry was changed into a binding arbitration by a relatively straightforward sequence of events. First, by the time of Hobson's 1841 visit to Port Nicholson, it was clear that 'resident' Maori were opposing the company's claims. Maori had disrupted the survey and fought settlers taking up their selected Town Acres at Port Nicholson, 'up-river' Maori had disrupted the survey of Wanganui, and 'resident' Maori had stopped the Porirua survey.<sup>51</sup>

In late-1841, therefore, as we saw above, Governor Hobson authorised the company to compensate any outstanding Maori claims to the lands the company sought to select and acquire in pursuance of its 1841 charter 'guarantee'. Expressly upon this authority, in early 1842 the company transacted for the Maori 'resident' interests at Manawatu and at Nelson. At Manawatu, the company surveyor, William Mein-Smith, oversaw the purchase, survey, and selection of lands which, officially, formed part of the charter's 110,000 acre right of selection at Port Nicholson.<sup>52</sup> On 5 July 1842 Charles Brees completed a plan of these Manawatu lands, showing 185 country sections of 100 acres each.<sup>53</sup> Soon after, on 4 January 1843, the company published a lithograph of Manawatu Country District sections, showing 554 of these 100 acre country sections for selection by individual purchasers in England. The company's claim formed a block from the mouth of the Manawatu River south to the Horowenua River, and inland to just past Lake Horowhenua to about the current location of Levin. From there, the planned

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51. Port Nicholson at Wai 145 rod, doc e3, vol 1, pp 60–66, 85–86, and 89–91. Porirua, see George Clarke snr's late-1841 report in Wai 145 rod, doc a29, pp 352–354. Wanganui, see S Cross and B Bargh, *The Wanganui District*, Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), April 1996, pp 11–12.

52. Wai 145 rod, doc e3, vol 1, pp 99–102

53. Brees, C, 'Map of the Country Sections in the Districts of Manawatu and Horowenua', 5 July 1842 (aafv 997 series originals at National Archives, Wellington), LINZ [nee DOSLI] microfiche misc plan series w 105.

settlement swept northward, a strip running along the south side of the Manawatu River, past the present site of Tokomaru, to the confluence of the Manawatu and the Tureti Rivers.<sup>54</sup>

In like manner, the Colonial Office accountant, Mr Pennington, had by this time awarded the company another 221,000 acres to be selected and acquired for its Nelson settlement. At the same time as it was transacting at Manawatu, then, the company transacted for the 'resident' Maori interests in its 221,000 acres of 'guaranteed' lands at Nelson. By April 1842 the company's agent, Captain Wakefield, and its surveyors, Frederick Tuckett and Charles Heaphy, had purchased, surveyed, and overseen the selection of 1100 Town Acres at Nelson/Wakatu. By August, they had similarly acquired an additional 50,000 acres of 'suburban' land – described by Alf Saunders in *History of New Zealand* as 'every nook and corner of accessible land within forty miles of the port'.<sup>55</sup> By the end of 1842 the company was still having difficulty finding – let alone 'selecting or purchasing – land nearby for its 1100 Country District sections of 150 acres each. By the end of 1843, though, the company had laid out and almost completed survey of its remaining 170,000 acres at Motueka, Waimea, Moutere, and Wairau.<sup>56</sup> Its 1841 charter lands were selected and surveyed, ready for arbitration to complete their purchase.

As in the special cases of Manawatu and Nelson, in 1842 the company was also well along in its surveys of its lands for selection at Wanganui, New Plymouth, and Port Nicholson–Porirua. A lithograph of the Country Districts at Port Nicholson/Porirua was published in England on the same date as the Manawatu lithograph, 4 January 1843.<sup>57</sup> The plan of New Plymouth was well-begun by the end of 1842, with its entire 60,000 acre selection area blocked-out, and about 20,000 acres of sections laid out.<sup>58</sup> Likewise, the 1842 Wanganui plan showed an exterior boundary setting out its eight-by-ten mile 50,000 acre block, enclosing the hydra-shaped configuration of 100-acre sections for on-sale.<sup>59</sup>

A remarkable summary plan was also completed in August 1842, entitled 'Map of the First Settlement of the New Zealand Company shewing Port Nicholson,

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54. Unsigned lithograph, originally published as 'Plan of the Country Sections in the Districts of Manawatu and Horowenua', Smith, Elder and Co, 4 January 1843. Two copies at LINZ, Lambton House, microfiche misc plan series nos w118 and 119.

55. Roland Jellicoe, *The New Zealand Company's Native Reserves*, Wellington, Government Print, 1930, pp 36–37. See also Phillipson, pp 55–61.

56. Nelson Roll Plan 1 [locker 2] 'Sections in the Settlement of Nelson, New Zealand', dated February 1844, by Frederick Tuckett, Chief Surveyor, New Zealand Company. On microfiche at LINZ. This very large plan shows sections for selection in the suburban area, Motueka, Waimea, Moutere, Takaka and Motupipi, Aorere, and Wairau. I have not searched the surveyors' records to trace the progress of these surveys.

57. The best copies of this January 1843 lithograph are in the Alexander Turnbull Library, Wellington, cartographic collection.

58. See F A Carrington, 'Plan of the Settlement of New Plymouth, as Surveyed up to the End of the Year 1842', lithograph by Smith and Elder, 6 December 1843, t12 in misc plan series at LINZ.

59. Wanganui selection at Cross and Barge, p 12. Wanganui survey, see Brees' 'Map of the Country Sections in the District of Wanganui', 6 June 1842 in L J B Chapple and H C Veitch, *Wanganui*, Hawera, Hawera Star Publishing Co, 1939, p 32. The copy held at LINZ, microfiche misc plan series w6 is signed by Brees, but dated 16 May 1842 (the day it was produced for the Land Claims Commission). Another company surveyor, Fred K Sheppard, later signed this copy, 'Additions in red ink made April 21 1843'.

Manawatu and Wanganui, with the Adjacent Country and Coast, As laid down by the Company's Surveying Staff from their Surveys and Reconnaissances'. On this plan, only the Wanganui area on this summary plan showed an exterior boundary of the lands for selection and acquisition by the company.<sup>60</sup>

Meanwhile, though, inter-racial disputes had worsened at Port Nicholson, Porirua, Wanganui, and New Plymouth – caused primarily by these very processes of survey and selection of land.<sup>61</sup> At the same time, the Land Claims Commission heard Wakefield's presentations of his initial Port Nicholson, Wanganui, New Plymouth, and Nelson transactions. Also, at each of these places Wakefield pursued a policy of paying 'resident' Maori who opposed settlers taking physical possession of their selected lands.

By August 1842, Wakefield and the Land Claims Commissioner found (so they believed) that these negotiations and payments (and possibly the hearings), by their very nature invited Maori to assert claims against the company's. It appeared to both Wakefield and Spain that the very act of recognising each 'new claim had a snowball effect of extending Wakefield's 'challenge on to the *next* most-plausible layer of Maori claims.

Hence, they concluded that Hobson's original approach to the 1841 charter's guarantee – his pre-emption waiver – needed an element of finality. In September, Wakefield and Spain sailed to Auckland to propose the arrangement to Acting-Governor Shortland. In effect, Wakefield and Spain combined the pre-emption waiver's directness with the Land Claims Commission's scrutiny and authority, and proposed a binding arbitration. Shortland received the proposal enthusiastically, and soon sent to England for approval. In January 1843 Shortland wrote instructions to Wakefield and Spain and Clarke jun, setting the terms for conducting a binding arbitration for satisfying Maori claims against the company, and delegating the necessary powers to Spain to umpire, Wakefield to referee for the company, and Clarke jnr to referee for Maori.<sup>62</sup>

It seems clear, in hindsight, that switching to an arbitration effectively deprived Maori in the company's settlement areas of many of the protections afforded by the strict provisions of the 1841 Land Claims Ordinance. Foremost amongst these was the right of any sub-groups or individuals to entirely *refuse* to sell the bulk of their interests within the company's 1841 charter areas. This is certain: at several points in their final reports, the land commission officials remarked that, *because* the company had acquired a *part-interest* through their initial transactions and subsequent possession, Maori no longer had a right of refusing the arbitrated award of compensation.<sup>63</sup> By mid-1842 at the latest, there was neither a chance that the bulk of the charter areas would return to Maori, nor that Maori would receive current market value for their lands, nor that Maori would be left with an adequate

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60. Unsigned, w113t microfiche misc plan series, at LINZ.

61. The 1842 reports of disputes – mostly from the police magistrates (Murphy, Dawson and King at Port Nicholson, Wanganui, and New Plymouth, respectively) – are summarised in Wai 145 rod, doc e4, pp 284–289.

62. The entire switch story: Wai 145 rod, doc e4, vol 2, pp 276–321.

written record of the basis for the Crown's assertion of title to the lands.<sup>64</sup> However, Spain's later reports suggest that the company and commission thought the 'long gray of arbitration was better-suited to the Maori network of 'overlord/resident' interests, than was the black-and-white of a single judicial decision.

Whatever their own motivations, according to Spain and Shortland, Maori at Port Nicholson and Porirua *consented* to be bound by whatever decision the Crown-appointed Umpire reached under these original terms.<sup>65</sup> Early on, the terms of arbitration were pretty clear regarding which lands the arbitration was to cover, and hence, whether the arbitration might generate any 'surplus':<sup>66</sup>

- Wakefield's proposal to Spain aimed only to 'carry out' the company's 1841 charter by compensating 'disputed possession' – not by completing the original transactions *per se*.<sup>67</sup>
- Spain's proposal to Hobson/Shortland was framed as a request for the 'necessary powers,' and the proposed authority reached only to situations where the sale was disputed<sup>68</sup> by 'natives who held lands for cultivation within the boundaries conveyed'.
- Shortland's initial approval to Wakefield and request for Colonial Office approval were both vague as to whether the arbitration would cover potential 'surplus' areas;
- Sub-Protector Clarke jnr<sup>69</sup> did not know about or agree with the proposal to negotiate compensation;
- Shortland's instructions to Spain as umpire likewise only covered 'cases of disputed possession', and strongly emphasized trying to 'carry out the arrangements already made by the company,' (that is, the 1841 charter)<sup>70</sup> even if that involved making tentative agreements or conditional grants;

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63. At Port Nicholson, see FitzRoy to Te Aro Maori, 24 February 1844, in Wai 145 rod, doc e5, p 495. Forsaith's final report, 8 April 1844, in *ibid*, p 513. Spain on partial purchases, *ibid*, pp 530–533. At Wanganui, Clarke told Maori at Putiki, 'If this was a new purchase, or an attempt to make a new purchase, you perhaps might object, but it is only making straight a former purchase'. BPP, vol 5, pp 90–91, cited in Cross and Barge, p 15. Note Gipps instruction to Hobson to regard native title as extinguished where Maori generally 'admit the sale'. Wai 145 rod, doc e3, pp 67–68.

64. Phillipson, pp 57–60, citing Tonks, complains of the injustice of this lack of record undergirding the Crown's title. My Port Nicholson report, Wai 145 rod, doc e3, vol 1, pp 23–25, citing McNeil, summarises the common law rule supporting Phillipson and Tonks common sense response: namely, that 'unless possession is cast upon it by law, for the Crown to be in possession of land its title *must appear as a matter of record*.'

65. The evidence is actually contradictory on whether Maori ever consented to the arbitrations: Clarke jnr reported that they did not; Spain and Shortland reported that they did. See Wai 145 rod, doc e5, vol 3, pp 381–384.

66. It is beyond the scope of this paper to examine the other terms of arbitration, especially what reserves and exceptions were pledged at the time Maori consented to arbitrate. See Wai 145 rod, doc e4, vol 2, pp 302–304 for a 'snapshot' of reserves policy at the time the arbitrations began.

67. Wai 145 rod, doc e4, vol 2, pp 277–278

68. *Ibid*, p 280

69. *Ibid*, pp 292–298

70. *Ibid*, pp 298–300

- Shortland's instruction to Clarke mentioned the 'tribes and families within the Company's *claims*,' but instructed Clarke to deal only with lands referred by Spain – and recall that Spain was only to deal with 'disputed lands'.<sup>71</sup>
- Wakefield's letter to Spain at the commencement of arbitration, requesting certain exceptions to the 1841 charter, clearly referred to Spain's land claims inquiry<sup>72</sup> as reaching only the 'lands thus designated' – that is, in that 1841 charter.
- Spain's rapid reply to Wakefield's proposals set out his view of the terms of arbitration. Spain clearly stated that the arbitration and the inquiry accompanying it would deal only with the lands to be selected under the 1841 charter. Further, he clearly stated that the arbitrations would not<sup>73</sup> extinguish the 'native title' to the remainder of the company's original claims.
- Shortland told Spain at the outset of the arbitration that he did not expect any lands to 'lapse' to the Crown from the company's arbitrations. That is, the authority to arbitrate, as understood by the person<sup>74</sup> who issued that authority, did not extend beyond the 1841 charter lands.

In sum, when the land commission officials converted the Land Claims Court into an arbitration, they believed that Maori at Port Nicholson and Porirua *agreed* to be bound by the arbitrations. They also understood (rightly or wrongly) that the company's 'partial purchases' and subsequent 'peaceful possession' had extinguished the Maori vendors right of possession. Hence, in *all* the company's settlements, Maori entered the arbitrations with only a right to *compensation* for any lands already surveyed and selected by the company, and a right to *retain* only the lands that already remained in their physical possession. Yet, for various reasons these same officials did not see the arbitrations as affecting interests in any possible 'surplus' areas. Hence, Maori did not initially consent to be bound by an arbitration for the purchase of the 'surplus' areas.

## **8.11 THE LAND CLAIMS INQUIRY DURING THE ARBITRATION**

Immediately after the arbitration was approved and its terms established, Commissioner Spain re-opened the land claims hearings at Port Nicholson. He hoped to run the inquiry concurrent with the arbitration. He continued<sup>75</sup> to hear evidence on the company's cases from early February to late June 1843. Probably from the beginning – but certainly by April at the latest – the commission had specifically restricted this second phase of inquiry to the lands under arbitration.

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71. Ibid, pp 301–302

72. Ibid, pp 315–316

73. Ibid, p 319

74. Ibid, p 320

75. See the table of hearings in Wai 145 rod, doc e4, vol 2, following p 340.

Figure 14: 1842–44 lands for selection or under arbitration

The only lands under arbitration were the lands the company was to select under their 1841 charter.

The inquiry resumed with the whaler-translator, Dicky Barrett, recently returned to Port Nicholson from Taranaki. Barrett started with the Port Nicholson transaction, followed by his versions of Nelson and Wanganui. Again, besides testing Colonel Wakefield's basic version of events, much of the commission's Port Nicholson questioning focused on the 'overlord/resident' relationship.<sup>76</sup> In particular, Clarke asked whether anyone had ever negotiated with any of the residents of Ohariu. Barrett said they had not.<sup>77</sup> There was some attention still to the original transaction boundaries: Barrett testified that Warepouri recited the boundaries of the sale there at the signing ceremony, on the deck of the *Tory* for all to hear.<sup>78</sup> Clarke specifically asked whether there had been any dissent over these boundaries;<sup>79</sup> Barrett said there had not.

Interspersed in these February hearings, Barrett testified about the Queen Charlotte transaction. He gave a very detailed account, which corroborated all of the main points in Wakefield's initial presentation. Barrett confirmed that the boundaries were read out at the deed signing, but he did not know how those boundaries (especially the forty-third parallel) had originated.<sup>80</sup> The commission followed its 'overlord/resident' line of inquiry quite closely here – confirming generally that there were many 'residents' outside Queen Charlotte Sound and Nelson<sup>81</sup> who had not participated in the transaction (and certainly had not sold their lands).

Similarly for the Wanganui transaction, Barrett corroborated most of Wakefield's version of the deed signing, but denied that<sup>82</sup> the boundaries were pointed out, or even visible from, the deck of the *Tory*. The commission accepted that the transaction *had* extinguished Maori interests but only *partially*: the transaction suffered from bad explanation of its nature and extent, bad distribution of the consideration, and it excluded and/or overlooked some of the rightful vendors and it remained opposed by some others.<sup>83</sup>

By mid-April 1843, when the commission heard the Maori evidence at Wanganui, the inquiry was thoroughly subsumed under the arbitration. To some extent, this was a result of Wakefield's actions: the commission arrived in Wanganui (straight from Port Nicholson) shortly after Wakefield had already been and gone. They found that Wakefield had left Wanganui Maori and settlers alike expecting the commission to set an amount of compensation, which Wakefield would pay on his way back down from Taranaki.

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76. Wai 145 rod, doc e5, vol 3, pp 344–346, re multiple payments to actual occupants upon taking possession, and pp 347–348 re the need for consent of 'residents'.

77. *Ibid*, p 349

78. *Ibid*, p 343

79. *Ibid*, p 349

80. *Ibid*, pp 350–352

81. *Ibid*, pp 351–353

82. *Ibid*, p 353

83. Spain concluded that the Maori signatories 'were utterly regardless of what land they proposed to sell'. See Spain's Wanganui report, BPP, vol 5 [203], pp 81–82.

This expectation apparently met the commission's own aims, though. At the end of the Wanganui hearings, Commissioner Spain ordered Colonel Wakefield to provide survey plans for the remainder of hearings between Wanganui and Port Nicholson. He specifically ordered plans of the lands to be claimed under the 1841 charter. Therefore, from this point forward (at the latest) even in the case of Wanganui, where the company had drawn a prospective 'surplus', the land claims inquiry would look exclusively at the 1841 charter lands, not the original transactions.<sup>84</sup>

The Maori evidence heard in April–May 1843 at Porirua to Otaki indicated a lack of any sale at Porirua, deep confusion and disagreement over the Manawatu transaction – for example, with Watanui now denying the sale – and a clear repudiation of the Kapiti transaction by 'resident' rangatira at Waikanae, Wainui (near Paekakariki), and Pukerua.<sup>85</sup>

In hearings at the end of May at Manawatu, the commission at last heard the company's presentation of its 2 February 1842 Manawatu transaction. The company submitted its deed, signed by 20 to 30 rangatira including Watanui and Taratoa, Ahu (from Ohau), and Upa (from Otaki Ngati Raukawa). The deed's north and south boundaries were, respectively, the Manawatu River and the Horowhenua River inland as far as Lake Horowhenua, then due east from the southern tip of that lake. Its western boundary was the sea, and its eastern (inland) boundary was simply 'the hills'.<sup>86</sup>

The company claimed that the Protector of Aborigines, E Halswell, and the company surveyor, W Mein-Smith, had arranged these boundaries in discussions with resident Maori (including Taikaporua) in December 1841. The missionary Maori, Reihana Davis, had interpreted. After receiving the vendors requests for specifically which goods they wanted in consideration for the land, the company's agents returned in late January 1842 with about £1000 worth of goods. The distribution<sup>87</sup> a few days later, unfortunately, soon turned riotous, and excluded Taikaporua.

None the less, the 1843 Manawatu hearings focused solely on the 1841 charter lands – if for no other reason than that Wakefield presented the Manawatu transaction *itself* as being conducted in pursuance of that charter (that is, as only extinguishing outstanding 'resident' Maori claims within the 110,000 acre Port Nicholson 'neighbourhood' lands to be selected by the company).

Throughout these hearings from Wanganui south, the commission gave little attention to the vast outlying reaches of the company's original claims – and what evidence it did hear regarding these areas<sup>88</sup> convinced it that there was little Maori support for its 'millions of acres' claims. The question of any 'surplus' for the Crown simply did not arise.

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84. Wai 145 rod, doc e5, vol 3, p 357

85. Ibid, pp 360–368

86. Deed encl in Spain's Manawatu report, BPP, vol 5 [203], p 105

87. Ibid, pp 98–99

88. Wai 145 rod, doc e5, vol 3, p 356

## **8.12 THE ARBITRATION UNDER SHORTLAND: FEBRUARY–MAY 1843**

The arbitrations began at the end of Barrett's land claims testimony. The umpire of the arbitration, William Spain, understood Clarke jun's first February 1843 proposal of £1050 compensation for Port Nicholson as only affecting the lands 'which the company had sold' (to settlers).

The first indication that a 'surplus' might be at stake in these arbitrations came a few months later, in Clarke jun's wording of his second compensation proposal. In May 1843, he proposed £1500 compensation for 'all claims of the natives resident within the limits described in the Company's Port Nicholson deed.'<sup>90</sup> Colonel Wakefield picked up this phrasing in his response (in which he also broke off the arbitrations altogether).<sup>91</sup> Wakefield then used the phrase again<sup>92</sup> in August 1843 in his letter to William Spain consenting to resume negotiations.

Otherwise, though, there was no suggestion that any other than the 'lands in dispute' were under negotiation at Port Nicholson. In July 1843, for instance, the Governor in Council instructed Commissioner Spain to report 'to what extent the lands in dispute can<sup>93</sup> be obtained by the Government.' They hoped to prevent any repeats of Wairau. The resulting interim Land Claims Commissioner's report, completed September 1843, declared that 'the greater portion' of the land from Port Nicholson to Wanganui had 'not been alienated by the Natives.' With regard to the potential 'surplus' areas, Spain concluded that the translations at *all* of the company's original transactions<sup>94</sup> had conveyed hardly 'any idea to the [Maori] of the extent of territory' involved.

Based on these conclusions, Spain recommended that the Crown should complete the arbitrations and advance the compensation to the 'resident' Maori in the company's surveyed and settled lands. The company would only receive its grants, then, when it reimbursed the Crown the amount of compensation. Again, though, Spain emphasized that this arrangement would only resolve titles to the company's 1841 charter lands which had already been surveyed, and for which title could therefore be determined. That is, Spain expressly forswore recommending<sup>95</sup> a means of generating any 'surplus' via the arbitrations for the 1841 charter lands.

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89. Ibid, p 384

90. Ibid, p 392

91. Ibid, p 394

92. Ibid, p 410

93. Ibid, p 412

94. Ibid, pp 419–420. Note below, Spain's final reports for the Port Nicholson, Ngamotu, and Manawatu claims variously gave somewhat more credence to the original deeds boundaries.

95. Wai 145 rod, doc e5, vol 3, p 421

### 8.13 THE ARBITRATIONS AND SETTLEMENTS UNDER FITZROY

The reports of the same disputes which led Wakefield and Spain to set up a binding arbitration caused a similar response in England in October 1842.<sup>96</sup> First the company directors tried to convince the Colonial Office that the Crown could fulfill its ‘guarantee’ to the company, if only their office would concede that the Crown demesne included all the lands in New Zealand except those in the ‘actual occupation’ of Maori – as literally stated in the colony’s 1841 royal charter.

The Colonial Office would not concede the point, insisting that only the commission on the spot could practically define ‘actual occupation.’ As a result, in February 1843 the company suspended its colonising operations and began liquidation procedures. The directors claimed they could only resume operations with a closer working relationship with the Crown.

In response, on 12 May 1843 Lord Stanley agreed to immediately issue a conditional Crown Grant to the company of the lands it selected under its 1841 charter. The condition was that the lands have no prior titles (leaving ‘prior titles’ to be defined by the Land Claims Commissioner). Stanley undertook that for any of the selected-and-granted lands found to be subject to prior titles, the Crown would *either*:

- (a) give the company the same number of acres in lieu, *or* (as at Otago, for lands not available at Port Nicholson, Manawatu, and Nelson),
- (b) at the company’s direction, *either*:
  - i) authorise the company to continue to negotiate for the unavailable lands (with Government assistance); *or*
  - ii) compensate the company the ‘original’ value of the unavailable lands.

Just days later, on 15 May 1843, prior to departing for New Zealand to take up his governorship, Captain FitzRoy requested clarification of the Colonial Office’s arrangements ‘respecting the confirmation of the New Zealand Company’s titles to land.’ In reply, on 26 June, Lord Stanley instructed FitzRoy only to issue the conditional grant after he was satisfied as to the ‘prior validity’ of the company’s titles.<sup>97</sup>

Unsurprisingly, given the climate of enmity and suspicion prevailing at the time of his arrival, FitzRoy did not issue any conditional grants to the company.

Notably though, FitzRoy’s actions did conform with what the Crown would have been obliged to do, had the conditional grants been issued as promised. First, he supervised the completion of the arbitration at Port Nicholson, designed to give the company’s claims the validity Stanley required him to ascertain prior to granting. FitzRoy personally emphasized that the arbitrated awards were ‘no new purchase,’ but merely the completion of the company’s purchase of its lands for selection

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96. I discuss this 1843 correspondence and conditional grant agreement more fully in Wai 145 rod, doc e4, vol 2, pp 321–336.

97. *Ibid*, p 336, especially note 556

under its 1841 charter. The umpire and interpreter subsequently emphasised the same point at Manawatu, Wanganui, Taranaki, and Nelson.

This 'partial' purchase point had three major implications: first, the compensation awarded was not a Crown purchase, but merely an adjustment of the company's original transactions. Second, in each of the above settlements, the compensation was calculated to satisfy Maori claims only in the *lands for selection* under the 1841 charter – not in the surrounding 'surplus' lands comprised in the company's districts. Third, FitzRoy, Spain, Clarke, and Forsaith each reported at various times that, *because* these were completions of partial purchases, Maori at the above settlements only had rights of compensation and of retaining such lands as they could show they had *not* sold. Their Treaty right of refusing to sell had already been extinguished.

In addition, in February 1844, FitzRoy waived pre-emption in favour of the company, authorising the company to transact for lands at Otago and Wairarapa, with Crown supervision. He appointed William Spain to supervise and assist the company's transactions at Wairarapa, and J J Symonds to do so at Otago. Wakefield apparently understood this pre-emption waiver as being *in lieu of* his conditional grant (which was held up, along with Spain's Wairarapa purchasing, by the company's 1844 suspension of operations).

FitzRoy possibly intended his Otakou/Wairarapa waiver as fulfilling the lands-in-lieu provision of the conditional grant. He understood that it was the company's plan to allow holders of land orders for unavailable lands at Nelson and Port Nicholson to exchange their orders in those places for holders in Otago and Wairarapa.

Neither FitzRoy's May 1843 questions nor the Colonial Office's responses directly mentioned any 'surplus'. FitzRoy did, however, understand the Colonial Office's current arrangements as requiring the company to prove 'the validity of their *purchase*.'<sup>100</sup> This might be taken as a loose reference to the full extent of the original transactions, that is, 20 million acres.

However the next day FitzRoy wrote to the Colonial Office requesting instructions on whether to claim the 'surplus' in *any* case – not just the company's. This would suggest that FitzRoy's reference the day before to the company's 'purchase' did not imply any expectation of a 'surplus' arising from that purchase.

Indeed, in this second letter FitzRoy offered his own conviction:

that the land in question ought to return to those aborigines first from whom it was purchased, unless they or their descendants should not now prefer any claim, in which latter case . . . it would lapse to the Crown.

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98. See *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 1, pp 30–31, and vol 2, p 269. The two main submissions on the Otakou purchase were Parsonson, Wai 27 rod, doc c1, and Loveridge, Wai 27 rod, doc p2.

99. Wakefield/directors, 30 March 1846, in co 209/48 [micro-z 427], pp 484–485

100. Wai 145 rod, doc e5, vol 3, p 431

FitzRoy opposed claiming the ‘surplus’ on the grounds that such a claim (and especially the subsequent on-selling of the ‘surplus’) would disrupt Maori habits and customs, and raise the social costs of colonisation.<sup>101</sup> The Colonial Office and the Secretary of State for the Colonies argued that the Crown could claim the surplus. The 1840 and 1841 Land Claims Ordinances left the claimed lands void of *either* Maori or settler interests, and so the land would rightfully vest in the Crown. The office acknowledged, though, that for reasons similar to those envisioned by FitzRoy, in many cases it would be prudent to allow the land to revert to Maori. Lord Stanley therefore gave FitzRoy<sup>102</sup> a wide discretion in deciding whether to press the Crown’s claim in each case.

Upon his arrival to New Zealand, FitzRoy made several public announcements that, consistent with his own conviction, he intended to allow the ‘surplus’ to revert to Maori.<sup>103</sup> Yet in January 1844, when he arranged to resume the arbitration for the company’s 1841 charter lands, FitzRoy gave no direct instructions as to whether the arbitration would generate any ‘surplus’, and his *indirect* references to the ‘surplus’ appear contradictory. First, he definitely understood that at the time of resuming arbitrations, at Port Nicholson at least, Maori understood the company’s original native reserves provisions as being ‘one-half of the land was for the settlers and one-half for themselves.’<sup>104</sup> This possibly reflected a Maori understanding of the relationship between the extent of the company’s original transactions and the extent of lands apparently now at stake in the arbitrations, their surveyed and selected 1841 charter lands.

Furthermore, FitzRoy continued speaking of the extent of lands involved in the same terms that Shortland, Spain, Wakefield, and Clarke had in their initial terms of arbitration (above). He instructed the vendor and purchaser referees and the arbitration Umpire that, when estimating compensation, they were only to consider:

all that had been surveyed or given out for selection in the Port Nicholson district, independent of paha, cultivations, and reserves.<sup>105</sup>

Immediately afterward, the vendors’ referee, Sub-Protector Clarke jnr, asked the purchasers’ referee, Colonel Wakefield, for information to enable him to estimate the amount of compensation. Clarke specifically requested a plan showing exactly

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101. Wai 145 rod, doc e5, vol 3, pp 435–436. Boast and Armstrong also interpreted FitzRoy’s remarks as opposing any general claim to ‘surplus’.

102. Stephen and Hope at the Colonial Office tried to agree on legal grounds for claiming the surplus, which they could provide to Lord Stanley. In as much as they succeeded, their grounds were that Maori sold *only* their interests as ‘Sovereigns’ to settlers, and so when the Land Claims Ordinance *voided* the settlers’ title to those interests, the title reverted to the Sovereign – which had changed by then from Maori to the British Crown. In short, their argument denied the existence of private or individually held Maori customary property, and so, could have equally served to ground a Crown claim to all of New Zealand by virtue of sovereignty alone. See Wai 145 rod, doc e5, vol 3, pp 438–443.

103. Wai 145 rod, doc e5, vol 3, pp 444–445

104. *Ibid*, pp 458 and 460

105. *Ibid*, p 468. See FitzRoy’s reference to the 1841 charter lands also in his instruction to Clarke jnr, *ibid*, p 469.

what FitzRoy had ordered – the lands either ‘surveyed or given out for selection’ at Port Nicholson.<sup>106</sup>

Wakefield responded with a report, plan, and schedule of lands prepared by his Principal Surveyor, Charles Brees. Brees’ plan and schedule showed the ‘lands surveyed or under survey’ (versus only ‘all that had been surveyed’). He listed 51,650 acres to be included in Clarke’s compensation estimate, including between 2200 and 2700 acres in his ‘under survey’ category. His report blamed the need to include these ‘under survey’ lands on ‘the state of the Native question.’ Apparently, Maori had obstructed even his surveys of the 51,650 acres of 1841 charter lands.

Furthermore, on Brees’ plan and schedule, even these 51,650 prospective acres included many parcels that fell outside the boundaries of the original Port Nicholson deed. In particular, many parcels were shown around Porirua and Ohariu, to the west of the original Port Nicholson claim area, and around Parangarau and Muka-Muka, to the east of the original claim area. Brees’ report argued that these areas:

having been included in some other purchases of the New Zealand Company, rendered it unnecessary to adhere to any particular boundaries in surveying the land for the holders of Preliminary Land Orders.<sup>107</sup>

Clarke acknowledged the ‘uncertainty’ over the west and east boundaries, and expressed the hope ‘not to embarrass the negotiation by including within those limits any land to which the natives of Porerua lay claim.’<sup>108</sup> Besides the obvious denial of sale at Porirua proper, Clarke might have been referring loosely here to problems with Ngati Tama: both Ohariu and Muka-Muka were areas claimed by Taringa Kuri in his land court testimony (above). Since mid-1842 Taringa Kuri had been leading a group of Ngati Tama, settling in the Hutt and repudiating Wakefield’s 1839 transaction on the grounds that the company was trying to settle areas not included in that original deed. It seems likely that Taringa Kuri’s actions were related to the company’s survey and sale of lands at Ohariu.<sup>109</sup>

Despite Clarke’s concerns over the boundaries, though, he gave Brees and Wakefield his estimate of compensation. Clarke based his estimate on his own enclosed schedule, entitled ‘the extent of Land for which it is proposed to compensate Native Claimants.’ He had expanded Brees’ schedule to include a total of 67,890 acres to be awarded to the company, including many parcels to be surveyed and sold in Ohariu. Clarke judiciously *excluded* the Porirua sections that Brees had requested, and pursuant to FitzRoy’s instructions, excluded the native reserve sections.

Clarke estimated that the Maori claims against the company within these 67,890 acres would require £1500 compensation. Soon after, Colonel Wakefield reported that the £1500 he paid at Port Nicholson was to compensate about 60,000 acres.<sup>110</sup>

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106. Ibid, p 470

107. Ibid, pp 471–472

108. Ibid, p 472

109. Note, though, Clarke only reported that Kuri objected to settlers at Kaiwharawhara, not Ohariu.

Similarly, in Lord Stanley's instructions to Lieutenant-Governor Grey, 6 July 1846, 'relative to the claims of the New Zealand Company,' Stanley stated that he understood the arrangements at Port Nicholson were 'intended to secure to the Company . . . something less than 60,000 acres.' Stanley did not mention (and does not appear to presume) any claim to surrounding 'surplus' lands.<sup>111</sup>

There is little doubt, therefore, that compensation was neither awarded nor paid for the 'surplus' areas at Port Nicholson (beyond what was paid in 1839). Probably, though, the Crown at this time would not have thought it necessary to pay any compensation for the 'surplus' lands. As of early 1843, it had been Acting-Governor Shortland's policy to purchase only large blocks, to pay threepence per acre for agricultural lands,<sup>112</sup> and to pay nothing for all non-agricultural lands comprised in the block.

#### **8.14 PAYING COMPENSATION AND SIGNING DEEDS OF RELEASE: PORT NICHOLSON**

From February to June 1844, the umpire and referees of the arbitration presented their arbitration results to Maori at Port Nicholson, Kapiti, Manawatu, Wanganui, Taranaki, and the Nelson area. Wherever they had decided an amount of compensation, they required Maori to sign deeds of release in order to get their share. These deeds (which have sometimes been mistaken as mere receipts) were of a fairly uniform construction and wording, stating that the signatories surrendered all their claims against the New Zealand Company within certain districts named in attached schedules. The attached schedules listed the company's 1841 charter areas – lands surveyed, sold, and/or selected by the company. We will see that in no case did the deeds or the attached schedules refer to interests outside the company's 1841 charter lands, that is, to any 'surplus'.<sup>113</sup>

The interpreter attached to the Land Claims Commission at the time, Thomas Forsaith, took very close minutes of these meetings. The meetings and signings began at Te Aro in Port Nicholson in late February, and by April had proceeded around the inner harbour and out to the kainga on the south-west coast. For various reasons, the Maori at most of the kainga at Port Nicholson rejected the umpire's award, but were told by Mr Spain that his decision<sup>114</sup> was final and binding, and that their land would go to the colonists regardless. The company's title, therefore,

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110. Ibid, p 479

111. Wai 145 rod, doc a10(a) no 8, pp 1–4. Note, these instructions enclosed a very helpful overview of the current status of the company's transactions – what compensation had been awarded and paid (or remained unpaid) for how much land in each settlement.

112. Wai 145 rod, doc e5, vol 3, p 312

113. The Port Nicholson deeds are at Wai 145 rod, doc a10(a) no 2, pp 2ff

114. All except the three small kainga of Pakuao, Waiariki, and Te Ika a Maru objected to the award and strongly resisted accepting the compensation. See Wai 145 rod, doc e5, vol 3, pp 510–511. For the rejections of the award, see *ibid*: Te Aro, Kumutoto and Pipitea – pp 488–496, 498; Upper Hutt (Ngati Toa) – pp 500–501, 503; Petone and Waiwhetu – pp 504–505, 510 (note: both rejected the award as an affront to their 1839 attempt to sell); Upper Hutt (Ngati Tama) – p 507; Oterongo and Ohaua – p 511.

rested firmly on the Crown officials belief that their arbitration was binding – a belief based on their view that the company already held ‘peaceful possession’ and that Maori had *consented* to be bound by these arbitrations.<sup>115</sup>

The week after finishing his job of interpreting at these Port Nicholson signing-meetings, Forsaith summarised the releases as securing:

the Company's title to their Town lands and the adjacent sections which have been given out for selection, excepting only the Hutt.<sup>116</sup>

That same week, the umpire/commissioner, Mr Spain, reported in almost identical terms:

the whole site of the town, upon which thousands of pounds have been expended by the settlers, and to which the Company's title was most defective, has been forever secured to the Europeans, together with a considerable country district; and the only part of the land contained in the before-mentioned Schedule now disputed . . . being the upper part of the Hutt.<sup>117</sup>

Notably, like the minutes of the release-signing meetings, both of these *reports* of those signings lacked any reference to any lands *surrounding* those scheduled to be granted to the company – lands which might go to the Crown as ‘surplus’.

## **8.15 PAYING COMPENSATION AND SIGNING DEEDS OF RELEASE: MANAWATU**

The week after writing these reports, 18 April 1844, the umpire, interpreter, and protector/referee all set off up the Kapiti Coast to complete the arbitrations at the other company settlements. At Otaki and Ohau, the umpire showed Ngati Raukawa a plan of the proposed Manawatu block and invited either dissent or participation in the coming award. All the Raukawa rangatira refused to even consider participating, including Watanui from Horowhenua. The umpire blamed this negative response on Te Rauparaha's presence at the hearings.<sup>118</sup>

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115. For warnings that the decision was final and/or that it would be enforced regardless, see *ibid*: Te Aro, Kumutoto and Pipitea – pp 485–488, 491, 494, 496, 498; Upper Hutt (Ngati Toa) – pp 501–502; Ngauranga, Petone and Waiwhetu – pp 505–506 (Binding regarding payment, but note that the reserves provisions were open to further adjustment); Upper Hutt (Ngati Tama) – pp 507–508; Oterongo and Ohau – p 511. Kaiwharawhara was only loosely minuted, so we cannot tell how strongly they objected or how strongly the umpire insisted on his award. Pakuao, Waiariki, and Te Ika a Maru did not object, and so were not threatened with the umpire's power to bind. The interpreter, Forsaith, understood that this power to bind only applied in cases where the company had already acquired a part-interest in the lands. In other cases, Maori ‘would be at liberty to consult their own inclinations exclusively.’ Wai 145 rod, doc e5, p 513. The commissioner/umpire similarly emphasized the binding nature of the awards in his report, written the week following the interpreter's report. Wai 145 rod, doc e5, pp 515–517.

116. Wai 145 rod, doc e5, p 512.

117. *Ibid*, p 514

118. Spain's Manawatu report, p 102

In contrast, at Manawatu on 25 April nearly all the rangatira affirmed the old sale – including several who had previously denied the sale at Otaki and Ohau. Only Taikaporua remained adamantly opposed, saying that he had been absent from the initial transaction, and had subsequently told the company's agents<sup>119</sup> that he would only sell if he was paid goods piled as high as the Tararuas. The umpire 'distinctly' told Taikaporua that regardless of his refusal, the land would go to the company, and his<sup>120</sup> share of the compensation would be invested for his (and his tribe's) benefit.

Here, as at Port Nicholson, the signals regarding any 'surplus' were crassly self-contradictory. The 1842 deed had transacted for lands to 'the hills' – a sizeable 'surplus' beyond the lands surveyed for selection over the following year. Here in 1844, the umpire displayed 'a plan' during the final discussions with the vendors. This was probably one of the three pre-1845 Manawatu surveys still held by the Department of Lands and Survey – all of which show *only* the lands surveyed and selected for settlement under the 1841 charter, at most about 75,000 acres running along the Manawatu River, with no sign of the 1842 deed's 'surplus' stretching inland to 'the hills.'<sup>121</sup>

Yet, in his 1845 land claims report, the umpire/commissioner mentioned that the almost-completed arbitration had affected 'hundreds of thousands of acres' of land – and he awarded the company a 'right of pre-emption' to the entire purchase area named in the original deed, all the way to the inland hills.<sup>122</sup>

## 8.16 PAYING COMPENSATION AND SIGNING DEEDS OF RELEASE: WANGANUI

A few days after the final meeting at Manawatu, the arbitration closed very similarly at Wanganui. Most rangatira accepted the arbitration award of £1000 compensation, but after about two weeks wrangling, one surprise 'holdout', Te Mawai (who had previously sent word to the commission that he wanted to sell), now refused to accept the award-payment. Again, the umpire 'made known his intention to the natives, to recommend a similar award as in the case of Manawatu' – that is, to award<sup>123</sup> the land to the company and to invest the compensation in trust for the vendors. Spain told Maori at Wanganui that their refusal would not prevent the Europeans from 'having<sup>124</sup> the land.' He explained: 'I have awarded the land to them, and I cannot alter it.'

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119. Wai 145 rod, doc e5, vol 3, pp 369–370, working direct from olc minutes. See also Spain's Manawatu report, pp 98–100.

120. Wai 145 rod, doc e5, p 519

121. See especially the untitled map of the Manawatu sections, signed by (or possibly only later ascribed to) John Campbell (the land commission's surveyor in 1844), dated 'about 1844', at LINZ, microfiche misc plans series, w9.

122. Spain's Manawatu report, p 104

123. Wai 145 rod, doc e5, pp 519–520

124. Report 4, encl 8, 16 May 1844, BPP, vol 5, p 97, cited in Cross and Barge, p 15

And again, the deeds, plans, and award contradicted each other regarding the presence of any 'surplus' part of the award. As we have seen, the company's 1842 and 1843 plans consistently threw a nice, square 'Boundary Line' around the approximately 40,000 acres of land shown for selection at Wanganui. Unsurprisingly, then, the plan signed by Spain, Clarke jun, and Wakefield as 'The Plan of the Wanganui District as agreed upon this 16th day of May 1844' likewise showed the same square boundary line enclosing a 'surplus' surrounding the lands to go to the company.<sup>125</sup>

Yet at Putikiwaranui on 9 May 1844, just a few days before signing the above plan, Clarke jnr announced to the assembled Maori vendors that the arbitrated £1000 compensation was:

not for the whole district, but the surveyed lands, exclusive of the cultivations, paha, and reserves.<sup>126</sup>

Similarly, when formally awarding the compensation on the same day that he signed the above plan, 16 May 1844, Spain declared that the payment was:

only for the 40,000 acres of land surveyed by the Company . . . All the rest of the district remains your own property.<sup>127</sup>

In short, the *written* 'Boundary Line' of the Wanganui award contradicted the *oral* boundary of the Wanganui award.

## **8.17 PAYING COMPENSATION AND SIGNING DEEDS OF RELEASE: NEW PLYMOUTH**

About three weeks after the close of arbitrations at Wanganui, 8 June 1844, the arbitrations ended similarly in New Plymouth. After hearing Maori witnesses called by George Clarke jun, the umpire decided that the original Ngamotu transaction was good: all four European witnesses had agreed that Te Puni had invited this purchase; Richard Barrett had taken two to three months to negotiate the deal with the mere forty 'residents' (and testified that he was certain they understood the boundaries); Dorsett had managed the deed signing and goods distribution well; and now – though pressured by the 300-or-so returnees to deny the sale – all the Maori signatories<sup>128</sup> admitted signing the 1840 deed, receiving payment, and selling their interests.

By the time of the arbitration award, however, Octavius Carrington had still only surveyed 25,000 of the 60,000 acres of sections which were for sale here and in

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125. Plan w7 at LINZ, microfiche misc plan series. The plan was marked 'Enclosure 10, Final Report'. Note 'GF' in 1871 re-labelled this plan as 'Plan of the District and the Block of Land awarded to the company.'

126. Spain's Wanganui report, p 88

127. Ibid, p 90. Spain also suggested that Te Mawai accompany the surveyor up river to see the boundaries for himself, but Te Mawai refused.

128. Spain, Taranaki report, pp 54–55

England. As a result, the plan attached to the 60,000 acre award showed the ‘extra 35,000 acres simply as a single boundary line laid out another couple of miles inland from the perimeter of the 100-acre country sections.’<sup>129</sup> Spain displayed this 60,000<sup>130</sup> acre plan on the table at the 8 June 1844 announcement of the arbitration result.

Upon Spain announcing his 60,000 acre award, Katatore (Puketapu) led a party of about 50 Maori to destroy outsettlers homes at Mangaoraka. Once again, Clarke stopped the violence by pledging that the Governor would hear their claims and protect their interests. He sent to FitzRoy for urgent assistance. FitzRoy came from Auckland in August with Bishop Selwyn, and told Maori that he would re-investigate their claims soon, after he had attended to the revolts in the north. Later that month, at Nelson at the Governor’s behest, Colonel Wakefield told Spain that FitzRoy intended to overturn his award. Once again, the company’s agent, Wicksteed, and the new protector, Donald McLean, began paying New Plymouth<sup>131</sup> Maori to allow the settlers peaceful possession until FitzRoy returned.

Throughout, despite the umpire’s high regard for the original 1840 Ngamotu transaction, there was no suggestion that the arbitrated ‘completion’ of that transaction had affected the vendors interests in all of the lands named in that original transaction – especially those lying *inland* from the 60,000 acres of ‘on-sold’ lands, reaching to the summit of Mount Taranaki.

## 8.18 A NEW PURCHASE UNDER FITZROY’S WAIVER OF PRE-EMPTION FOR THE COMPANY: OTAKOU

As we mentioned above, in early 1844 Governor FitzRoy had waived pre-emption on behalf of the company in Wairarapa and Otakou. In the midst of the Te Aro arbitration, 27 February 1844, he had instructed one of the police magistrates, J J Symonds, to ‘supervise and assist the agent of the New Zealand Company in effecting the purchases’ of 150,000 acres of land for selection as its New Edinburgh settlement. He instructed Spain similarly the same day, for 150,000 acres at Wairarapa. Their jobs were not so much to negotiate directly on behalf of the company as to superintend surveys and keep the peace and watch that the company, in its negotiating, respected Maori interests.<sup>132</sup>

On 2 April 1844, Wakefield appointed a surveyor, Frederick Tuckett, to act as the company’s agent at Otakou. For months, Tuckett and Symonds crossed swords, unable to agree on an appropriate balance of power between them – for example,

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129. Carrington surveys in LINZ, microfiche misc plan series (aafv 997 at National Archives, Wellington), microfiche copies t8. A printed version of Carrington’s survey is enclosed in Spain’s Taranaki report, facing p 132, but only shows the surveyed sections, not the 60,000 acre block claimed and awarded.

130. Spain, Taranaki report, pp 59 and 67

131. Wai 145 rod, doc e5, pp 520–521 and Wai 145 rod, doc a10(a) no 8, pp 4–5. FitzRoy/Wakefield, August 1844, in National Archives, Wellington, co 209/43, pp 284–285. E Wilson, *The Land Problems of the New Zealand Settlers of the ‘Forties*, Wellington, Reed, pp 182–186. Wai 143 rod, doc a1, pp 53–55.

132. FitzRoy/Symonds and FitzRoy/Spain, 27 February 1844, in BPP, vol 4 [369], pp 57–58

whether Symond's permission was required for coastal surveys of harbours. Eventually, Symonds abandoned the negotiations and returned to Wellington in protest of Tuckett's insubordinate attitude and actions. On 1 July 1844, Wakefield decided to accompany Symonds south, to conduct the negotiations himself. Symonds insisted on using Natural boundaries, though this entailed sanctioning an 'extension of the limits'<sup>133</sup> of Wakefield's purchase well beyond the 150,000 acres originally authorised.

In a memorandum dated 29 July 1844, and attached to the 31 July 1844 deed of sale, Colonel Wakefield agreed that the company would only take its selected 150,000 acres, and leave the 'unappropriated residue' for the Crown. It appears that one of the main results of the Crown's supervision of the company's transaction was to expand and secure its 'surplus' share of that transaction.

### **8.19 PAYING COMPENSATION AND SIGNING DEEDS OF RELEASE: NELSON-WAIRAU**

In August 1844, after the arbitrations closed at New Plymouth, and the umpire and referee had a few weeks break in Auckland, the arbitrations moved to Nelson. Wakefield arrived, no doubt buoyed by his recent Otakou purchase.

The company's surveyors here had by this time managed to find the 1100 sections of 150 acres each, and so submitted two plans for arbitration, each entitled 'Proposed Blocks from which it is intended to select the amount stated in the schedule.' Plan 1 and its schedule showed the blocks for selection at Wakatu (11,000 acres), Waimea (38,000 acres) and Moutere (15,000 acres), and the 45,000 acres partially laid out at Motueka/Golden Bay. Plan 2 and its schedule showed a block in the Wairau Valley.<sup>134</sup>

Spain, Clarke, and Wakefield all agreed to the former schedule and plan, and signed the plan 'as agreed upon this 20 August 1844.' They failed to agree on the Wairau schedule and plan, and signed the plan as merely 'exhibited in Court this 20 August 1844.'<sup>135</sup> Neither plan showed any enveloping boundary that would have indicated a 'surplus' to go to the Crown.

On 24 August 1844, Clarke jnr displayed the deeds of release, laid the signed plans out on the table, and indicated to Maori which lands had been selected as reserves. Maori at Wakatu, Waimea, and Moutere put their marks and signatures to the deeds fairly readily, and were paid their various awards then and there.<sup>136</sup> In September, though, Maori at Motupipi/Motueka refused the award. The umpire insisted (once again) that his decision must stand, and their compensation was deposited for them on trust. The deeds of release were similar to those at Port

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133. Ibid, pp 71–72

134. Ruth Allan, *Nelson: A History of Early Settlement*, Wellington, Reed, 1965, pp 297–298

135. Plan 1 is n7; plan 2 is t28, both at LINZ, microfiche misc series

136. The respective awards were Wakatu £200, Motueka £200, and Ngatiawa £100. Schedule and compensation amounts, in Spain, Nelson report, pp 49, 46.

Nicholson – quit claim deeds within certain areas – and did not refer to claims outside the company's 1841 charter lands.<sup>137</sup>

After meetings with Te Rauparaha at Kapiti, Spain decided not to award the company any of its 80,000 acre claim at Wairau.<sup>138</sup> For his part, Governor FitzRoy told William Fox around this time that the company should let the purchase of Wairau stand over for a year or two, at which time he thought Maori would be ready to discuss selling again.<sup>139</sup> There the Wairau transaction stood until March 1846 when a new Governor, Grey, reportedly adopted 'a different view of the question than his predecessor.'<sup>140</sup>

## 8.20 THE 1845 INTERREGNUM

For the rest of 1844, it remained to in effect 'come back in' under the Land Claims Ordinances, and to complete the requisite surveys, reports, and awards, so that grants could issue. The centre of Crown activity changed from inquiry to implementation – from umpire/commissioner to surveyors, police magistrates, and sub-protectors. At the same time, despite Spain's calls for his awards to be vigorously enforced, several of them quickly fell apart.

In a preliminary land claims report in April 1844, and again in his final land claims report in 1845, Spain described how he had arranged with Wakefield to 'obtain as quickly as possible, a correct plan of the lands in the Port Nicholson district, contained in the Schedule agreed upon.' In both reports, Spain defined the 'external boundary' of this 'correct plan' as being the fastest and easiest path around the approximately 60,000 acres of 1841 charter lands already scheduled and awarded to the company.<sup>141</sup> Spain did not discuss the discrepancy between this new 'external boundary' and his recent deeds and schedules (which stated that only the 1841 charter lands were under arbitration). Nor did he explain how this new 'external boundary' fit with his (and Shortland's) clear 1843 views that the arbitrations would not generate any 'surplus'.

Apparently the surveyors first sketched the instructed boundary on to a copy of the company's 1843 'Sketch' in September 1844, and then incorporated it into their own plan, entitled:

Plan of the Port Nicholson Purchase . . . as laid down by Mr Thomas Fitzgerald, Assistant Surveyor Attached to the Land Claims Commissioner and by the Officers of the New Zealand Company's Surveying Staff.

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137. Ibid, p 45. See the deeds in MacKay's *Compendium*, vol 1, pp 67–68; cited in *ibid*, p 296. Cf Jellicoe, *The New Zealand Company's Native Reserves*, Government Print, Wellington, 1930, p 43. Phillipson also queries whether this 'binding' aspect of the arbitration was fair. See Phillipson, pp 74–75 and 80–81.

138. Wai 145 rod, doc a10(a) no 8, p 5. See Phillipson, pp 81–82.

139. Allan, p 290

140. Wakefield/directors, 25 March 1847, nzc 3/7, cited in Phillipson, p 86

141. Spain/FitzRoy, in Wai 145 rod, doc a32, p 113

The latter was completed 7 October 1844, and signed off by William Spain as '[Enclosure] No 12 Case 374 Plan of the Port Nicholson District Referred to in my final Report.'<sup>142</sup>

Almost in spite of itself, the Crown thereby suddenly obtained a substantial Port Nicholson 'surplus'. The Crown's claim would appear a complete novelty, except that the actual job of surveying this 'exterior boundary' overlapped with the job of surveying the pa, ngakinga, and wahi tapu excepted from the 1844 award – both begun at the same time, all overseen by the same people: Land Claims Commission surveyor T H Fitzgerald, Sub-Protector G Clarke jnr, and company surveyor Charles Brees.

The survey of the excepted lands apparently involved Fitzgerald and Clarke in difficult discussions with Maori over the location and exact extent of their ngakinga outside the company's 1841 charter lands, that is, within the 'surplus' area. These discussions and surveys continued from mid-1844, through the disputes and skirmishes around the Hutt and Ohariu, for about twenty months past the October 1844 completion of the 'exterior boundary' – well into Governor Grey's time. In July 1846, Fitzgerald wrote his final report on the excepted ngakinga in the 'surplus' areas; he was still expecting to complete their survey once the district had been 'tranquilized.'<sup>143</sup>

The implication throughout must have been clear for Port Nicholson Maori: for the ngakinga to be 'excepted, the rest must be 'sold'. Certainly one must wonder, though, whether such a claim to the 'surplus' was fair, considering that the Crown neither paid, nor Maori received, any further consideration for it. We will discuss such matters after an overview of the 'surplus' situation in the other company settlements.

In Wanganui, immediately after Clarke and Spain announced the arbitrated award Te Mawai and three others appealed to Governor FitzRoy. FitzRoy assured them that no land would be taken without their consent, and soon sent J J Symonds to complete the company's transaction. Symonds first efforts were interrupted by Maori unrest (probably unrelated to the transaction). Symonds returned at Grey's instruction in early 1846, but was again stopped, this time by Maori disputing his placement of the southern boundary at Whangaehu (see below).<sup>144</sup> The Wanganui transaction, in short, dangled still open for two years following the 'closing' of the arbitration.

Shortly after the arbitrations closed at Manawatu, in June 1844, a Presbyterian missionary, James Duncan, arrived and was welcomed warmly by Taikaporua and his Raukawa relation Ihakara Tukumarū. Evidently Duncan at first followed Ihakara to Kapahaka, but then by late 1844 had established a mission at

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142. The sketch-copy is dated 20 February 1844, by Thomas Fitzgerald, w5 in LINZ microfiche misc plan series. The final, award copy, is dated 7 October 1844, by T H Fitzgerald and Samuel C Brees, w4 in LINZ, microfiche misc plan series. Note, plan w117 in the same series appears to be a later copy of plan w4 (in Charles Heaphy's handwriting).

143. A close account of these two surveys is in Wai 145 rod, doc e5, vol 3, pp 536–555

144. Grey/Gladstone, 24 June 1846, in co 209/44(2) [micro-z 425], pp 384–385. Also in BPP, vol 5 [837], pp 49–61.

Taikaporua's kainga, Te Maire.<sup>145</sup> This could well have been Taikaporua's attempt to get 'his pakeha' to play off of Watanui's (Wakefield). Taikaporua and Wakefield, therefore, were apparently both distracted from completing the arbitrations. The transaction remained uncompleted when the wars of 1846–1847 moved everyone at Manawatu further from agreement or peaceful settlement.

Governor FitzRoy returned to New Plymouth in November 1844, and arranged, through Wicksteed and McLean, to pay the Te Ati Awa absentees an additional £350 compensation, reduce the company's award to 3500 acres, and to concentrate the outlying colonists in this small block, including the town belt lands. As he had at Port Nicholson earlier that year, FitzRoy expressly described his transaction as 'completing' a small part of the company's purchase. He authorised the company's agent, Wicksteed, to transact for its further completion – that is, to compensate outstanding Maori interests within the company's 60,000 acre 1841 charter/<sup>146</sup> arbitration/award area.

Like Clarke, Brees, and Fitzgerald previously at the Hutt, and Symonds and White later at Wanganui, the negotiators at New Plymouth (Wicksteed and McLean) were to value the settlers lands disputed by Maori and try to exchange them for <sup>147</sup> undisputed, unoccupied lands within the area to be taken by the company. Only a few colonists actually exchanged their lands and moved in to FitzRoy's 3500 acre block.

FitzRoy's November 1844 deed was very similar to the deeds of release used earlier in the year at the other company settlements.<sup>148</sup> Like the company's other 1844 arbitration results, FitzRoy's arrangements at New Plymouth did not address the status of the remainder of the lands in the original Ngamotu deed. The issue was hardly pressing at the time: Wicksteed foresaw a 'surplus' of land even within FitzRoy's 3500 acre settlement.<sup>149</sup>

Wakefield received private news of the 1844 select committee's pro-company recommendations in December 1844, doubtless making him more confident in rejecting FitzRoy's 3500-acre Crown grant on 5 February 1845. FitzRoy received news of his recall in March 1845. New Plymouth was left in limbo.<sup>150</sup>

Nelson was in anything but an expansive mode for the latter part of FitzRoy's governorship, the settlers there rising to sue the company for non-delivery of the

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145. 'Duncan, James' in DNZB, W H Oliver (ed), Wellington, Allen and Unwin, 1990, vol 1, pp 114–115

146. 'Completing' is at FitzRoy/Wicksteed, 22 November 1844, in BPP, vol 5 [203], pp 136–137. See also FitzRoy/Wicksteed, 25 November 1844, in *ibid*, and at Wai 143 rod, doc a1 pp 61, 64–65. Note that FitzRoy provided for the Crown to advance the money, the company to lead the negotiations, and then to reimburse the Crown's advances. This was remarkably similar to the approach adopted by the company, Colonial Office, and Governor Grey about two years later (see below). The plan of FitzRoy's 'completion', dated 28 November 1844, is t-7 in LINZ, microfiche misc plan series.

147. Wai 143 rod, doc a1, pp 59–60 and 64–65

148. *Ibid*, pp 59–60

149. *Ibid*, p 65

150. Wilson, pp 187–188. Also, from summary by Land and Emigration Board, 26 June 1846, in co 209/47 [micro-z 426], pp 198–204. Again, in Wai 143 rod, doc a1, p 66, Parsonson seemed surprised that the wording of FitzRoy's grant indicated that it 'derived from the New Zealand Company transaction of 6 February 1840 – the Ngamotu deed.' Grey (below) was probably right: FitzRoy intended that Spain's award was *good* as far as it went, but had left outstanding 'absentees' interests.

lands they had ordered and paid for. None the less, some steps were taken toward completing the arbitrated and awarded 1841 charter block. At Golden Bay, those Maori who had refused to accept their arbitrated compensation award in 1844 finally agreed to accept the money and release their interests in October 1845,<sup>151</sup> and others were presented releases for the first time, and signed, in May 1846.

FitzRoy could make no progress at Wairau, Porirua, or Manawatu, as Ngati Toa continued to violently refuse the company possession of the lands it had selected for settlement in those areas.

FitzRoy only despatched the reports of the arbitration efforts and results in September 1845, the month he received his recall. His cover was painfully brief:

The only settled claims are at Port Nicholson and Nelson. Excepting New Plymouth, all the other claims of the Company . . . are disputed by the natives and cannot be fully occupied by the settlers . . . until very large additional payments have been made.<sup>152</sup>

Even this was an exaggeration. FitzRoy's 3500 acres at Taranaki was barely a rump of the company's 'guaranteed' settlement, and just about a fortnight before the above despatch, FitzRoy had forwarded Stanley the company's refusals of his preferred Port Nicholson and Nelson grants.<sup>153</sup>

Clearly, by the end of FitzRoy's governorship, there remained only partial agreement over the disposition of the 1841 charter lands at *all* the settlements. Contradictions between the awards, schedules, plans, and oral assurances had forged a deep and genuine ambiguity over whether any 'surplus' was included at Port Nicholson, Wanganui, Manawatu, and Taranaki. FitzRoy reported that he had not issued conditional grants for any of the above settlements because he still lacked 'certain data' from William Spain which he considered prerequisite. In fact, though, no conditional grant could have been effected in compliance with Stanley's May 1843 instruction: the arrangements at *all* the settlements still required further adjustment to remove 'prior titles.'

## **8.21 STANLEY AND GLADSTONE'S INSTRUCTIONS TO GREY**

Near the time it was cajoling its conditional grant out of Stanley in 1843, the company also obtained a supplemental charter empowering it to raise up to £500,000 for colonising. Given the recent string of bad news (including Wairau), and their own recent suspension of trading, the directors discovered that they could not get the needed funds on the money market.<sup>154</sup> In February 1844, they applied for a loan from Government, but were refused.

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151. Phillipson, pp 101–102

152. FitzRoy/Stanley, BPP, vol 5 [203], p 3. Recall MacKay's *Compendium*, vol 1, p 17

153. Wakefield's refusals encl in FitzRoy/Stanley, 26 August 1845, *ibid*, pp 115–117

154. MacKay, *Compendium*, vol 1, p 14

To add insult to injury, the company learned this same month that Stanley had instructed FitzRoy to only issue their conditional grant *after* he had ascertained that the condition was fulfilled. The directors retaliated; they suspended operations again, and petitioned for, and received, an inquiry by a select committee of the House of Commons. This second suspension of operations caused great hardship in the company's settlements, bringing many settlers near to starvation.<sup>155</sup>

The 1844 select committee acknowledged that the company had a binding claim upon the Crown to the number of acres awarded under its 1841 charter, and in order to deliver on this claim, they recommended that the Governor be directed 'to establish the title of the Crown to all unoccupied land as soon as this can be safely accomplished.'<sup>156</sup>

Again Stanley resisted. On 30 June 1844 he forwarded the committee's report and recommendations to Governor FitzRoy. On the 13 August, he forwarded a fraught discussion of the report, followed by comments on its recommendations.<sup>157</sup> His discussion concluded that the report did not require him to 'in any way modify the instructions' he had already issued regarding FitzRoy's and the company's respective duties under the company's 1841 charter.<sup>158</sup> His comments concluded that his conditional grant, as instructed, remained the best means of fulfilling the committee's own recommendations regarding the charter's land guarantee.<sup>159</sup>

Stanley also conveyed cautious approval of the committee's seventh to ninth recommendations, proposing a 2d/acre tax on all lands, excepting company lands, Maori trust reserves, and Maori cultivation/occupation reserves. Stanley saw this as 'an easy mode of obtaining a large amount of disposable land in commutation or redemption of the tax upon the remainder.'<sup>160</sup> The rest of the committee's recommendations, and Stanley's comments on them, had little direct bearing on the issue of surplus lands in the company's districts.

When it became known, Stanley's non-response to the select committee deeply frustrated the company, E G Wakefield, and its great ally in Parliament, Charles Buller. Wakefield considered an appeal to the Prime Minister. In March 1845 and again more belligerently in June 1845, Buller raised 'the New Zealand problem' in the House of Commons. He charged the Government with continuing to violate its agreements with the company through needless delay.<sup>161</sup>

Little could be done, though. As of May 1845, the Home Government's latest information from FitzRoy was dated 28 September 1844 – and regarding the company's titles, this had merely said that FitzRoy was about to travel to the company settlements to finally arrange them.<sup>162</sup> In two despatches, 30 April and

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155. Wai 145 rod, doc e4, vol 2, p 336, note 556. Hardship, see MacKay, p 14.

156. Stanley/Grey 13 August 1844, BPP, vol 4 [1], pp 3, 5

157. Ibid, pp 3–9

158. Ibid, pp 5–6

159. Ibid, p 6

160. Ibid, pp 6–7

161. Bloomfield, Paul, *Edward Gibbon Wakefield: Builder of the British Commonwealth*, London, Longman's, 1961, p 280

162. Hope/Stanley, 19/5/1845, in co 209/41(2), p 278

14 May 1845, Stanley recalled FitzRoy, particularly for this failure to report home, and repeatedly acting against his instructions.<sup>163</sup>

That still left the Colonial Office seeking information elsewhere, especially in published company sources and in consultations with individuals recently returned from New Zealand. Willoughby Shortland was one such source. After returning to England and reading the 1844 select committee's recommendations, Shortland wrote a strongly-worded letter to Lord Stanley protesting against the committee's recommendation not to recognise any customary Maori title to the 'wild' lands. Shortland conceded (like Grey later) that Maori would probably sell their interests in these lands very cheaply. The committee were dangerously wrong, though, in thinking that the Crown could claim the 'wild' lands without prior recognition of the Maori interests.<sup>164</sup>

In May 1845, the Colonial Office also sought information from a Rev MacFarland, recently returned to England from Wellington, who claimed to have had considerable dealings with Maori at Wellington. The Office particularly asked how Maori there had responded to the arbitration-award payments. Rev MacFarland said that after Spain's award had been made he was not aware of any 'positive refusal' (excluding the Hutt) to give up lands to colonists.

On 13 June 1845, Lord Stanley forwarded George Grey his commission as Governor of New Zealand. In his first instructions to Grey, this same day, regarding his 'relations . . . to the settlers and agents of the New Zealand Company,' Stanley had 'little to observe in addition' to his 13 August 1844 despatch to Governor FitzRoy (above), discussing and commenting upon the select committee report and recommendations.<sup>165</sup> Regarding lands in general, Stanley emphasized the long-standing instructions to *register* all interests, presenting this again as the key to solving the colony's land problems. He urged Grey to try to effect this as soon as practicable or safe.<sup>166</sup>

The next week, publications and reports of Charles Buller's 17 and 19 June 1845 speeches in the House of Commons roused the British public behind the company. On 27 June 1845, therefore, Stanley received a delegation of the company's. His discussions with this delegation (which received Prime Minister Peel's blessing) set the outline subsequently filled-in by a brief flurry of company-Colonial Office correspondence, which effectively formed the second, third and fourth parts of Stanley's initial instructions to Governor Grey.<sup>167</sup>

The second part of Stanley's instructions to Grey, 27 June 1845 (which he showed to the company's delegation on 4 July), strongly emphasized compulsory land registration (again), and re-iterated his instruction to have Wakefield promptly

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163. MacKay's *Compendium*, vol 1, p 17

164. Shortland/Stanley, 18 January 1845, in co 209/41(2), pp 548-550

165. Stanley/Grey 13 June 1845, BPP, vol 5 [337], pp 68-72, especially p 72

166. *Ibid*, p 72

167. See Peel/Ingestre, 9 July 1845, BPP, vol 4 [517-i], p 4, and 'Minutes of Communications between Lord Stanley and a Deputation from the Directors of the New Zealand Company . . .', first two interviews 27 June and 1 July 1845, *ibid*, pp 4-6. Last interview 4 July 1845, *ibid*, pp 7-8.

identify all the lands he wanted to select under the 1841 charter, and then to issue him conditional grants of those lands ‘at once.’<sup>168</sup>

The day after this instruction and delegation, Stanley secretly forwarded £10,000 to Grey for ‘buying lands required for the use of the settlers of the New Zealand Company.’ Grey was to use the funds, of course, only as a last resource.

Stanley’s third instruction, 6 July 1845, contained a tentative update of the number of acres which the company had a right to select under its 1841 charter, and a breakdown of how many of these acres the company had selected in each of its settlements – 60,000 acres at Port Nicholson, 75,000 acres at Manawatu, 40,000 acres at Wanganui, 60,000 acres at New Plymouth, 160,000 acres at Nelson, and 150,000 acres at Otago. It also hazarded a summary of the Colonial Office’s best information on what arrangements had been made with Maori at each of the settlements, and what remained to be done before Grey could grant to the company.<sup>170</sup>

Still, on 24 July, the company complained that Stanley’s instructions to Grey were not yet ‘sufficiently full and precise.’<sup>171</sup> They set out the main points of a ‘practical solution’ which, if agreed to, would enable them to resume colonising operations – given that the Government would also advance a loan (to be discussed in other correspondence).

Stanley’s response, 7 August 1845, went ‘as far as . . . duty [would] permit’ on each of the company’s points.<sup>172</sup> Stanley sanctioned ‘compulsory proceedings against the natives’ in securing the company’s possession of the lands already arbitrated and/or awarded by Spain.<sup>173</sup> According to the Colonial Office summaries forwarded to Grey two weeks earlier (above), Stanley had thereby pledged to grant the company 395,000 acres (60,000 at Port Nicholson, 75,000 at Manawatu, etc).<sup>174</sup> ‘Whatever is beyond that . . . must be effected by their consent and acquiescence.’<sup>175</sup> So, for the settlements planned but not yet arbitrated/awarded – Porirua, Wairau, Otago, and Wairarapa – Stanley pledged to help the company gain Maori consent and acquiescence. His main means of helping was by continuing Governor FitzRoy’s waiver of pre-emption in Otago and Wairarapa, and expanding the waiver to cover the company’s entire ‘districts’ defined in its 1841 charter.<sup>176</sup> This ‘Company’s district’ was roughly the company’s old 20,000,000 acre claim area, all the land south of the line from the Mokau to the Ahuriri Rivers, with the addition of the remainder of the South Island south of the forty-third parallel.<sup>177</sup>

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168. Stanley/Grey, 27 June 1845, BPP, vol 5 [337], pp 72–75. Registration at p 73, conditional grants of selected lands at p 74. Shown to the delegation, see BPP, vol 4 [517-i], pp 7–8.

169. Stanley’s secret advance is described in Grey’s secret report of his Porirua, Wairau, and Taranaki arrangements, 8 April 1847, in co 209/52 [?] [micro-z 429], pp 57ff.

170. Stanley/Grey, 6 July 1845, BPP, vol 4 [517-i], pp 8–13

171. Ingestre/Stanley, 24 July 1845, BPP, vol 4 [661], pp 1–2

172. Hope/Ingestre, 7 August 1845, BPP, vol 4 [661], pp 3–5, especially p 3

173. *Ibid*, p 3

174. Stanley/Grey, 6 July 1845, BPP, vol 4 [517-i], pp 9–12

175. Hope/Ingestre, 7 August 1845, BPP, vol 4 [661], p 3

176. *Ibid*, pp 3–4

To help the company exercise its right of selection and acquisition within this 40,000,000 acre 'negotiable zone', and to 'judge the reasonableness' of the company's transactions for the lands so<sup>178</sup> selected, Stanley promised to send 'forthwith . . . a properly qualified person.'

Having heard of Symond's successful (expanded) transaction there, Stanley undertook 'at once' to instruct Grey to grant the company 400,000 acres at Otago, of which the company was to select 150,000 and 'reconvey the remainder' to the Crown.<sup>179</sup> He also sanctioned FitzRoy's authorisation for the company to select and buy 150,000 acres at Wairarapa – and expanded that right/waiver to cover 300,000 acres, provided it was in 20,000-plus block(s) and there was some oversight to prevent an injurious exercise of that right of selection.<sup>180</sup>

The directors responded the next day, 8 August 1845, with cordial thanks for each promised instruction 'as tending to obviate delay in the resumption of our colonising operations.' They closed, however, still non-committal on resuming operations,<sup>181</sup> as 'the pressure of financial difficulties' left the other concessions 'nugatory.'<sup>182</sup> On 15 August, Stanley forwarded the last two instructions (24 July and 7 August) and the directors replies to Governor Grey.

While the above line of discussion developed the political and legal terms under which the company was to resume colonising, a parallel line (starting from the same 24 July proposals, above) developed the accompanying financial arrangements.

On 5 August the directors confidentially submitted to the Colonial Office 'the particulars of the loan which [they] desire[d].'<sup>183</sup> They argued that insecure titles to land had inhibited land sales and local investment in their first settlements, which had required the company to subsidize employment there. As the insecure titles arose from lax Government and the expenditure on employment went chiefly toward public works, the directors argued they had 'a valid claim against Her Majesty's Government.'<sup>184</sup> Based on a rough initial breakdown of their expected future expenses, they requested a £150,000 credit-line loan, guaranteed available for seven years, secured by their lands,<sup>185</sup> and paid back by the uncommitted half of the proceeds of the company's land sales.

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177. I have not located the part of the 1840 agreement-to-1841-charter communications that defined this district. I take it on authority of the 1854 New Zealand House of Representatives Select Committee to inquire into the New Zealand Company's debt, chaired by E G Wakefield – who cite Earl Grey/Grey 28 February 1848, as clarifying this boundary as it had been defined in the company's charter. *Votes and Proceedings of the House of Representatives*, 1854, sess 1, 'Report of Select Committee', 20 July 1854, p 10. Grey evidently settled the boundary at Mokau River mouth to Rangitoto Mountain to Tongariro Mountain, along the crest of the central mountains, then east to the Ahuriri River mouth.

178. Hope/Ingestre, 7 August 1845, BPP, vol 4 [661], p 5

179. *Ibid*, p 3. Note: Symond's deal included the proviso that Wakefield would 'leave the unappropriated residue' to the Crown. See Wakefield annexure to Otago deed, 29 July 1844, in BPP, vol 4 [369], p 56.

180. Hope/Ingestre, 7 August 1845, BPP, vol 4 [661], p 3

181. Young/Stanley, 8 August 1845, BPP, vol 4 [661], pp 8–11

182. Stanley/Grey, 15 August 1845, BPP, vol 5 [337], pp 92–94

183. Young/Stanley, 5 August 1845, BPP, vol 5 [271], pp 3–5, especially p 3

184. *Ibid*, p 4

185. *Ibid*, p 5

On the 8 August, alongside their thanks for Stanley's political and legal arrangements (above), the directors estimated that their expenditure claimable against the Crown under their 1841 charter now amounted to £422,233, giving them a right of selection to 1,145,543 acres. Adding native reserves and expenditure <sup>186</sup> not yet reported from the colony, they claimed a right to select 1.2 million acres.

Stanley replied on 30 August. He unequivocally denied that the company had any strict right or claim against the Crown. <sup>187</sup> However, as a matter of general policy, he would recommend to Parliament to advance the company £100,000, subject to a mortgage of the lands selected under the 1841 charter. The funds were to be used only for outstanding claims against the company (for example, back-pay), compensating Maori, surveying, and for the Otago and Wairarapa settlements. The funds were not to be used to compensate Nelson settlers. The mortgage <sup>188</sup> was to be repaid (in seven years) from the proceeds of the company's land sales.

The company accepted the loan offer on 22 September. <sup>189</sup> The main remaining tasks, therefore, were first, to quantify the *security* for the mortgage – that is, determine the extent of the company's right of selection and acquisition under its charter – second, get the loan approved by Parliament, and third, find the person to oversee and aid the company's selection and acquisition of the remainder of its 1.3 million acres.

On 28 October 1845, knowing that both the company's and Mr Pennington's estimates were hovering around 1.2 million acres, Lord Stanley proposed that the first of these tasks be expedited by simply taking 1.3 million acres 'as that which the company should be empowered <sup>190</sup> to acquire, either by grant . . . or by purchase' with the help of the Crown. This power of acquiring 1,300,000 acres was to satisfy any and all Crown obligations under the 1841 charter for the company's expenditures, past and future, excepting future payments to Maori for land (which would be dealt with from time to time as they arose).

Two days later, expressly deferring the question of whether their 1.3 million acre estate was claimable as of *right* against the Crown, the company accepted the loan arrangement. <sup>191</sup> Stanley forwarded the loan correspondence to Governor Grey on 27 November 1845. <sup>192</sup> About three weeks later, on 18 December 1845, he despatched the news to Governor Grey that Major William Anson McCleverty had been appointed the 'properly qualified person' <sup>193</sup> to oversee and aid the company's selection, survey, and acquisition of lands.

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186. Young/Stanley, 8 August 1845, BPP, vol 5 [337], pp 94–97

187. Hope/Young, 30 August 1845, BPP, vol 5 [271], pp 6–8

188. *Ibid.*, pp 7–8

189. Young/Stanley, 22 September 1845, BPP, vol 5 [271], pp 8–9

190. Hope/Young, 28 October 1845, BPP, vol 5 [337], pp 97–98

191. Young/Stanley, 30 October 1845, BPP, vol 5 [337], pp 98–99

192. Stanley/Grey, 27 November 1845, BPP, vol 5 [337], p 94

193. Stanley/Grey, 18 December 1845, BPP, vol 5 [337], p 99

The 1845 loan arrangements concluded with a quick little twist. At the turn of 1845–1846, Stanley was replaced in office by Gladstone, and the New Zealand Company directors learned that the grants offered them at Port Nicholson and Nelson excluded pa and cultivations – possibly one-sixth to one-fourth of the town of Wellington. The directors refused these grants, which in effect forced the little twist: Grey would have to widen the duties of the ‘properly qualified person’ from overseeing and aiding ‘new’ selections and acquisitions (for example, Porirua and Wairau) to also now adjusting the arrangements already ‘concluded’ at some of the old selections and acquisitions (especially Port Nicholson).

## **8.22 GREY'S INITIAL STEPS IN THE COMPANY'S SETTLEMENTS**

Right from the start of Grey's governorship, then, the company enjoyed priority over the Crown in transacting for any and all Maori interests south of the line from the Mokau to Ahuriri River mouths. This is one of the crucial points which, in effect, establishes the existence of surplus lands in the company's districts: we will see below that most of Grey's ‘Crown purchases’ prior to the company's demise in July 1850 were in fact *company* purchases, merely undertaken or completed with Crown assistance and supervision. Further, Grey was instructed to purchase lands for the Crown in the company's districts only as a last resource for helping the company acquire its lands. He appears, therefore, only to have made bold to undertake ‘Crown purchases’ where highly profitable *surpluses* (that is, lands beyond the company's 1841 charter claims or requirements) presented themselves.

Grey arrived in New Zealand on 14 November 1845, and was installed as Governor three days later.<sup>194</sup> He received Stanley's June–August 1845 instructions (and £10,000 advance)<sup>195</sup> at the start of 1846, about the time he first visited the company settlements.

He acted immediately to fulfill his instructions and begin implementing the arrangements with the company: on 21 February 1846, he waived pre-emption in favour of the company in the entire ‘Company's districts’ as defined in their 1841 charter.<sup>196</sup>

On 13 April 1846, Grey executed the 400,000 acre Otago grant, as he had been instructed by Stanley, who had authorised the increase in the company's lands here<sup>197</sup> as a display of support to encourage the company to resume operations (above). The company, in turn, was to select 150,000 acres, and ‘reconvey’ the surplus to the Crown. The Otago Association settlers finally left England only in November 1847, by which time the company had only sold 10,240 acres, but by which time

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194. MacKay's *Compendium*, vol 1, p 18

195. Wakefield/directors, 12 March 1846, co 209/48 [micro-z 427], p 484, reports Grey's arrival as 12 February. Wilson, p 189, says March 1846.

196. Proclamation, BPP, vol 5 [837], p 1. Note: Earl Grey sanctioned this waiver 18 December 1846. Ibid, p 3.

197. Grey/Stanley, 14 April 1846, BPP, vol 5 [837], p 1. Copy of Crown Grant in McKay, *Compendium*, vol 2, pp 373–374.

Figure 15: 1845 Crown sanctioned partial purchases

also there was no need to reconvey anything to the Crown, as the demesne had been vested in the company anyway (see below).<sup>198</sup>

And similarly, on 17 April 1846 Grey despatched J J Symonds, T H Fitzgerald (assistant government surveyor at Port Nicholson), and a company surveyor to Wanganui 'to complete the purchase of the block of 40,000 acres of land' required by the company, as arbitrated and awarded by Spain.<sup>199</sup> Grey's directions to Symonds expressly referred to Stanley's instruction 'to afford the company every facility in acquiring the quantity of land to which they are entitled.'<sup>200</sup> He told Symonds to ensure Wanganui Maori 'clearly understand and recognise the extreme boundaries of the block,' and to ascertain 'which are the paha and cultivations which are to be reserved to the natives in the terms of Mr Spain's award.'<sup>201</sup> He directed T H Fitzgerald to stop his surveys of excepted pa and cultivations at Port Nicholson in order to help survey those at Wanganui.<sup>201</sup>

It is important to note that, as he had at Otago, Symonds sought to effect a purchase 'by the Company,' not the Crown. The £1000 compensation was to be paid 'by the Company.'<sup>202</sup> As did his own instructions, report, and the various letters covering and forwarding that report, Symonds initial address to the Wanganui Maori emphasized that he was not attempting any *new* purchase, but merely 'completing' the transaction begun in 1839.<sup>203</sup>

Similarly, in reporting Symonds failed negotiations, the Colonial Secretary referred first to 'the purchase of a block of land at Wanganui for the New Zealand Company, and then to 'the block to be purchased by the company.'<sup>204</sup> When Symonds broke off negotiations due to disputes over cutting the eastern boundary at Whangaehu, Wakefield pointed out to Grey that the surveyor had subsequently *resolved* those disputes. According to Wakefield, at that point the decision was his (not Grey's) as to whether or not to resume negotiations.<sup>205</sup> The will to buy was the company's; the power to sanction was the Crown's.

Throughout, Symonds was fulfilling Stanley's 1845 instruction and agreement to implement Spain's 1844 and 1845 awards. In April 1846, though, Wakefield reported that Grey had been too busy battling Maori and their protectors – most recently in the Hutt – to get around to reading the land commission reports and awards on the company's claims.<sup>206</sup> However, now that he had read them, Grey

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198. Memorandum [nd] encl in Harrington/Earl Grey, 7 April 1848, BPP, vol 8 [570], p 150

199. Grey/Stamley, 19 April 1846, BPP, vol 5 [837], p 2

200. Grey/Symonds, 17 April 1846, BPP, vol 5, pp 550–551, cited in Cross and Barge, p 16

201. Grey/Stamley, 19 April 1846, in co 209/43 [np] micro-z 379 counter at 1128.

202. Grey/Symonds, 17 April 1846, in BPP, vol 5 [837], pp 2–3

203. Symonds to the Chiefs of Wanganui District, May 1846, encl in Grey/Gladstone, 24 June 1846, BPP vol 5 [837], pp 51–52

204. Sinclair/Wakefield, 24 June 1846, BPP, vol 5 [837], p 58

205. Wakefield/directors, 18 July 1846, BPP, vol 5 [837], pp 57–58

206. Wakefield/directors, 23 April 1846, in co 209/48 [micro-z 427], pp 502–503. Ian Wards, *Shadow of the Land*, pp 230–260, remains the classic treatment of the 'Hutt war' of March 1846. Dr Robyn Anderson and Keith Pickens *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), pp 41–44, give a good quick summary.

apparently told Wakefield that he not only had to enforce Spain's awards *in favour* of the company, but that he *also* was:

bound by Mr Spain's awards in all the instances which are unfavourable to the Company, and as regards New Plymouth, which was fully awarded by Mr Spain . . .<sup>207</sup>

Grey had also evidently discussed Stanley's 'properly qualified person' with Wakefield, coming to oversee and aid the company's selection and acquisition of its 1841 charter lands. Wakefield reported that he looked forward to the help of the 'special commissioner' with both the Wairarapa and Port Nicholson.<sup>208</sup>

At the same time also, Grey's early-1846 tour of Port Nicholson, Wanganui, and Nelson convinced him that Port Nicholson must be made the central military position for the southern settlements. He argued to both Wakefield and the Colonial Office that, while there was no possible alternative site, the awkward position of Port Nicholson's harbour mouth meant that, to serve as an adequate southern stronghold, the settlement required good, secure overland access to the West Coast and better protection of its own hinterlands.<sup>209</sup> He immediately set about building the necessary roads and outposts.

In April 1846, despite his initial skirmishes with Maori in the Hutt, Gov Grey was confident in these plans for Port Nicholson. His reports of Te Atiawa's response to road-building do not suggest any resentment against Crown claims to a 'surplus' area at Port Nicholson. Grey reported that:

having learned from other sources an outline of the directions I had given for the adjustment of the land question in the neighbourhood of Port Nicholson, as well as my intention of opening up the country by the construction of roads, and the establishment of a Police Force, they [the Te Atiawa chiefs] manifested as great a degree of confidence in the Government . . . as I have seen in any other portion of the island.<sup>210</sup>

Grey even reported that the Te Atiawa chiefs appreciated the military *motives* behind his road-building – first among which was securing physical possession of the 'waste' (or 'surplus') areas around the lands selected by the company. Perhaps at the time, it appeared preferable to Te Atiawa that the inland hills and streams be subject to Crown ownership rather than customary dispute.

Grey was sanguine, too, about his prospects of appeasing those Maori not so ready to concede his claims to the Port Nicholson 'surplus', Ngati Tama and Ngati

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207. Wakefield/directors, 23 April 1846, co 209/48 [micro-z 427], pp 502–503. Wai 143 rod, doc a1, p 67 quotes this same remark, citing Wakefield to secretary of the company, 23 April 1846, nzc 3/6, no 24, pp 156–157. Again, though, Parsonson elided Wakefield's statement that Grey felt bound by Spain's award in the case of New Plymouth, and she emphasized that 'FitzRoy had disallowed the award.' The important point is that Grey believed that FitzRoy had not so much 'disallowed' the award as 'held it open' pending further adjustments, *still* focused on completing enough of the original transaction to enlarge the demesne sufficiently for the company to fulfill its 1841 charter.

208. Wairarapa in Wakefield/directors, 30 March 1846 in co 209/48 [micro-z 427], pp 484–485. Port Nicholson in Wakefield/directors, 23 April 1846, co 209/48 [micro-z 427], pp 502–503.

209. Argued to Wakefield, *ibid*, p 505

210. Grey/Stanley, 11 April 1846, in co 209/43 [micro-z 379], pp 71–72

Rangatahi. On 20 June 1846, Governor Grey reported his exchanges and purchases of lands to fulfill Commissioner Spain's old promise to Waiwhetu to exchange their unsuitable reserves for better, and his first purchases of 'extra' reserves to get Ngati Tama and Ngati Rangatahi to remove from the Hutt – mostly done in March–April that year.

As Grey wrote his report from his office in Auckland, he had just authorised and arranged construction of his hospital, Fitzgerald's surveys of pa and cultivation exceptions at Port Nicholson and the Hutt were all-but complete, those same areas were secure under a quasi-military local government, his roads were under construction,<sup>211</sup> and the paperwork securing new reserves for Ngati Tama was well underway.

There was not yet room for complacency, though. On 20 June 1846, Grey reported the attack at Boulcott's farm in the Hutt. This attack, he claimed, merely confirmed his opinion of what was needed: a good road up the coast and into the Hutt, with forts to make the territory thus opened secure for commerce.<sup>212</sup> On 26 June, he reported Symonds failure to complete the purchase at Wanganui.<sup>213</sup> In the same month also, the Audit Office reported that the colony's accounts were in gross disarray, and Major Arney reported that the troops at Porirua had mutinied.<sup>214</sup>

On the Nelson leg of this first tour, in March 1846, Grey's reappointment of the officials involved in the 1843 affray at Wairau suggested that he held Ngati Toa more responsible for the conflict than FitzRoy and Spain had. This invited mid-1846 complaints from Wakefield and Fox that Spain's 1845 award had failed to acknowledge the partial interest they had acquired there. They proposed that Grey should send an official to help the company complete its Wairau purchase (like Symonds at Otakou and Wanganui).<sup>215</sup>

Through the first half of 1846, though, Grey was becoming increasingly sure that the owners of Wairau, Ngati Toa – and especially Te Rauparaha – were playing a double game, openly supporting a Hutt settlement and development of the road past Porirua, while secretly also supporting those who were obstructing both. In July 1846, Grey raided Taupo pa and seized Te Rauparaha and four other Ngati Toa leaders whom he regarded as potentially troublesome. By the end of the year, leadership of Ngati Toa rested with its Christian chiefs with Europeanising tendencies.<sup>216</sup>

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211. Waiwhetu, see Wai 145 rod, doc e5, pp 505–506. Ngati Tama, see Wai 145 rod, doc c1, pp 240–244

212. Grey/Gladstone, 20 June 1846, in co 209/44 [micro-z 424], pp 178ff

213. Grey/Gladstone, 24 June 1846, in co 209/44(2) [micro-z 425], pp 384ff

214. Grey/Gladstone, 16 October 1846, in co 209/45 [micro-z 425]

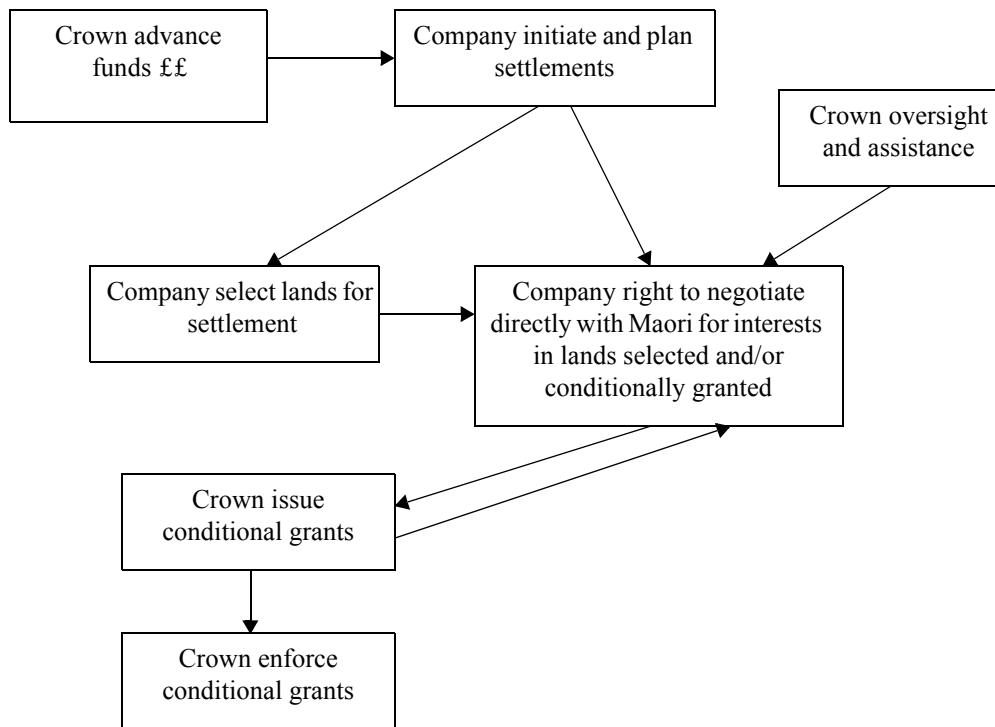
215. Phillipson, p 86

216. Ibid, pp 87–88

**8.23 GREY’S RETURN TO THE COMPANY DISTRICTS:  
FEBRUARY–APRIL 1847**

Grey returned to Wellington the next summer, December 1846. Upon his arrival, he reported a settled and cooperative spirit amongst all the Maori tribes around Port Nicholson. He took this as signifying the continued success of his earlier military campaigns, and his June–September<sup>217</sup> adjustments of the lands of Maori in the Hutt, Ohariu, and Waiwhetu.

We can venture a diagram of the broad company–Crown operational relationship at the end of 1846, established by Stanley’s 1845–1846 loan arrangements and instructions:



On 27 December 1846, though, Colonel Wakefield told Governor Grey that ‘large powers of Government were to be conferred immediately upon the company by the Crown.’ Wakefield was referring, of course, to the proposals for introducing representative government by dividing the colony into two districts and establishing municipal governments with large powers – changes the company directors had been lobbying for since 1844, and which Grey had recently recommended to Gladstone (for the company’s districts only).<sup>218</sup>

Initially in response, Grey reported that he should delay his planned ‘arrangements for the complete adjustment of the land question’ until he received

217. Grey/Earl Grey, 19 December 1846, in co 209/46(2) [micro-z 426], pp 484ff

218. Grey/Gladstone, 7 October 1846, BPP, vol 6 [892], pp 1–2

confirmation or denial of Wakefield's prediction. He chafed at making any commitments on the part of the Crown which he might subsequently have to rely upon the company to honor.<sup>219</sup>

Grey was probably still unsure whether the company could be relied upon to honour agreements he might complete, but he was frustrated with fifteen months waiting for the company to make steps 'towards securing their lands,' and now the military command had distracted the commissioner who was supposed to help with the company's land arrangements. Ironically, inasmuch as this was preventing the acquisition of a clear line of road from Port Nicholson to Porirua-and-beyond, it was delaying Grey's own most vital military measure.

In addition, as in late 1843, Maori were refusing to transact anymore with 'Wideawake' Wakefield. Grey himself thought Wakefield's refusal to recognise Maori rights to the 'waste' lands was unrealistic, and combined with his intransigence,<sup>220</sup> made him unlikely candidate for successfully completing land purchases.

On 17 February he met with Wakefield and undertook to make arrangements for the company to meet its obligations to its settlers. Grey promised 'to facilitate by every means, short of direct dictation to the natives, the accomplishment of the company's views,' but he and Wakefield disputed whether the Crown or the company ought to provide the funds for the transactions.<sup>221</sup>

By the end of February 1847, Grey was in New Plymouth. He had received extra instruction in this case, beyond Stanley's 1845–1846 loan arrangement instructions. On 2 July Gladstone told Grey he thought it improbable that FitzRoy's reversal of Spain's 60,000 acre award had been 'a wise and just measure.' He instructed Grey 'to do [his]<sup>222</sup> utmost to procure for the company' the land Spain had awarded at Taranaki.

Starting 1 March 1847, Grey and Wakefield had several days of talks with Maori at New Plymouth. Apparently by the second of March Grey was already resorting to threatening to place Wi Kingi 'under guard' if he dared try to settle at Waitara. By the fifth, Grey, Wakefield and McLean were discussing 'how military operations should be conducted in this settlement.'<sup>223</sup> Grey seems to have been doing his utmost.

Grey firmly believed that, in setting aside Spain's award, FitzRoy did not intend 'that the original *purchase* should be set aside' for the forty-or so resident Maori who had 'originally sold their land' and 'received payment' in the Ngamotu

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219. Grey/Earl Grey, 28 December 1846, in co 209/46(2) [micro-z 426], pp 532ff

220. Frustrated, Grey/Earl Grey, 8 April 1847, in co 209/52 [micro-z 429], pp 57ff. Absent commissioner, see Wai 145 rod, doc c-1, pp 253–257. Military dimension and Maori refusal to deal with Wakefield, Grey/Earl Grey, 26 March 1847, BPP vol 6 [892], p 7. Wakefield's unrealistic views on 'waste', Grey/Earl Grey, 7 April 1847, BPP vol 6 [892], pp 16–17. Wakefield's intransigence: Grey/Earl Grey, 9 April 1847, BPP, vol 6 [892], pp 19–20

221. Phillipson, p 88

222. Parsonson, p 68, and Grey/Earl Grey, 5 April 1847, BPP, vol 6 [892], p 12

223. Turton journal entry of 2 March 1847, in H H Turton to the editor, *Taranaki Herald*, 5 September 1855, and McLean, private letters and native correspondence, 1846–1847 (58), 'Taranaki Land Claims,' both cited in Parsonson, pp 69–70.

transaction.<sup>224</sup> And if this was a partial purchase, then presumably as in Spain's arbitrations, the company had a partial estate, and Maori had no remaining general right to refuse to sell. Maori had only a right to compensation for any unsatisfied claims against the company's possession.

On 5 March, Grey announced a five-step plan, and instructed McLean to implement it:

- (a) mark off reserves for both residents and likely returnees;
- (b) resume the remaining portion of the district for the Crown;<sup>225</sup>
- (c) assess the value of the resumed portion;
- (d) register the Maori interests in the resumed portion;
- (e) compensate the registered interest-holders, in annual instalments.<sup>226</sup>

Grey instructed McLean to be sure Maori dissenters understood 'that the Government do not admit that they are the true owners of the land.'<sup>227</sup> Also, as soon as the land was resumed, Grey intended to grant it to the company.

Grey clearly sought to enforce Spain's award as far as it went – namely in awarding the company the 'resident' vendors interests. To this extent, Grey was again following Stanley's (and Gladstone's) instruction to implement Spain's awards. He also had in mind his instructions to register Maori interests as a means of effecting their general extinguishment. His discussions show he had clearly embraced Stanley's authorisation to use force if necessary.

McLean set to work and Grey returned to Auckland. Interestingly, despite obviously seeking every advantage of Spain's award, it did not apparently interest Grey that Spain had sanctioned the entire Ngamotu transaction. The boundaries of this deed, albeit inscrutable, would almost certainly have given Grey an enormous 'surplus' up to the summit of Mount Taranaki. Instead, though, Grey foresaw 'for a comparatively small sum' *buying* a vast tract at Taranaki, of which the New Zealand Company would only ever require (or select under its charter) a small portion. Hence, Grey cooed to the Home Government, 'no difficulty will hereafter be found in re-paying these amounts from the Land fund.'<sup>228</sup>

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224. Grey/Earl Grey, 2 March 1847, BPP, vol 6 [892], pp 2–3. Parsonson acknowledged this same point, Wai 143 rod, doc a1, p 72, but seemed to think Grey only 'affected to believe' it. I think he was in earnest. Failure to acknowledge the integrity of Grey's interpretation might cause one to miss seeing whether McLean subsequently only compensated 'absentee' interests, which would cause one not to ask whether McLean was effecting new purchases or only 'completing' the company's. See for example *ibid*, p 75.

225. Note 'resumption' in both lay and legal terms, implies *prior* possession. Grey's constant use of the term is perhaps the surest sign that he conceived of New Plymouth as 'having *once* been the Crown's' (by virtue of having the Maori interests extinguished). The Oxford English Dictionary gives the legal definition as 'The action of the part of the Crown, or other authority, of re-assuming possession of land, rights, etc, which have been bestowed on others . . .'. Its examples suggest a context of enclosures (A Young, 1792 *Trav Franc* 46, and Burton, 1873, *Hist Scot* vi 78). See also John Burke, ed, *Jowitt's Dictionary of English Law*, [2 ed], vol 2, London, Sweet and Maxwell, 1977, p 1570: 'the taking again into the King's hands of lands which, upon false suggestion or other error, he had made livery of to anyone or granted by letters patent.' As Grey used it here, 'resumption' would have correctly applied only to the rights FitzRoy had bestowed upon the Taranaki absentee/returnees.

226. Grey/Earl Grey, 2 March 1847, BPP, vol 6 [892], pp 2, 4. Also Grey/McLean, 5 March 1847, BPP, vol 6 [892], pp 13–14, especially point 4. Also summed in Wilson, pp 190–191.

227. Grey/McLean, 5 March 1847, BPP, vol 6 [892], p 14, especially points 6 and 12

Once returned to Auckland, Grey requested guidance from the Colonial Office for this unique case: suppose he enforced Spain's award by resuming 60,000 acres and granting it to the company. According to Spain's award, the company had no obligation to pay for these lands. However, since FitzRoy had promised Maori that the lands would be 're-purchased,' some such payment would probably be both practically and morally necessary. But if so, then Grey asked, should the company or the Crown pay it?<sup>229</sup>

We have not examined the primary sources for McLean's negotiations yet. Although Parsonson concluded that McLean did not particularly follow Grey's five-point plan (reserves/resumption/registration, etc, above), her own description of McLean's transactions sounds like a good effort at it:

In general, . . . a survey of the external boundaries of the block would be undertaken, for the purposes both of estimating the amount of land involved, and of testing the reaction of other groups who might have claims. If there were [sic] no opposition, McLean considered the claim of the sellers as 'fully admitted'. Finally the deed would be signed and payment made.<sup>230</sup>

In this way, McLean acquired the Tataraimaka block on 11 May 1847, the Omata block on 30 August 1847, and the Grey block on 11 October 1847.<sup>231</sup> Of these, both the Tataraimaka and the Grey blocks had substantial portions within the company's old Ngamotu transaction/Spain award area. The plan that McLean prepared for the transactions prominently showed 'Spain's Boundary' from 1844, and the key stated that the block purchased from the Ngamotu Maori was 'principally within the limits of Mr Commissioner Spain's award in favour of the New Zealand Company, and is estimated to contain including waste land and roads 9770 acres.'<sup>232</sup>

As we would expect (given Grey's and McLean's instructions and views), Parsonson observed a particular concern in this transaction to extinguish the 'absentee' interests.<sup>233</sup>

In sum, much suggests that McLean's 1847 transactions at New Plymouth were consistent with transactions at other company settlements where the land commissioner acknowledged a partial purchase: a partial purchase extinguished 'Native title', leaving only 'adjustments' and 'compensation' of outstanding claims against the Crown's demesne, which had been 'guaranteed' to the company.

Shortly after McLean's Grey block transaction, news of the company's 1847 Loan agreement arrived, fundamentally changing the relationship between company and Crown, and their roles in purchasing Maori land.

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228. Grey/Earl Grey, 5 April 1847, BPP, vol 6 [892], p 13, and Grey/Earl Grey, 8 April 1847, in co 209/52 [micro-z 429], pp 57ff

229. Grey/Earl Grey, 5 April 1847, BPP, vol 6 [892], p 13. I am not sure that FitzRoy referred to his transaction as 're-purchasing'. Grey thought so, though, at Grey/Earl Grey, 2 March 1847 and 5 April 1847, BPP, vol 6 [892], pp 4 and 13 respectively.

230. Not followed: Parsonson, p 72. Description: *ibid*, p 74.

231. Parsonson, pp 73–74

232. Plans t5 and t6, LINZ, microfiche misc plan series

233. Parsonson, p 74

## 8.24 GREY AT PORIRUA AND WAIRAU UNDER STANLEY'S ARRANGEMENTS

In his April queries home about who would pay for the New Plymouth 'repurchasing,' perhaps Governor Grey was relaying something of his discussions with Wakefield at Wellington immediately before they had ventured to New Plymouth.

As we saw above, Stanley had secretly advanced Grey £10,000 – but he had done so just the day *after* instructing Grey to waive pre-emption so that the company could do its own purchasing. Stanley specifically told Grey to purchase land himself only as a last resource, and in any case to 'conduct [his] operations so as not to interfere with the new [loan] arrangements [with the company].'<sup>234</sup> Grey, however, now saw both the need and the opportunity to spur the company along. He determined that he would advance the money, and:

purchase on behalf of the Government . . . as much of the land which had been previously disposed [by sale] by the New Zealand Company as [he] could . . . and in addition . . . to include within the limits of the purchased land a very extensive block of country<sup>235</sup> to meet the probable prospective requirements of the Government and the settlers.

After the transaction, Wakefield was to select whatever portion of the purchased lands he needed for settlers, and then:

repay to the Government for the lands they might select, such proportion<sup>236</sup> of the purchase money as Her Majesty's Government might . . . direct to be refunded.

If the company wanted to (or could) expand upon or improve the transaction, they were welcome. Grey's transaction was not to interfere with their arrangements, central to which was their right of pre-emption.<sup>237</sup>

Difficulties with the purchase, of course, centre upon the fact that the purchaser, Grey, was holding the vendors beloved and feared chief captive at the time they 'agreed' to sell. On the other hand, though, Grey's purchase consideration (£2000 for about 70,000 acres) and reserves (about 10,000 out of 70,000 acres) were sanctioned at the time by Commissioner McCleverty, and have recently been said to appear generous by the standards of the day.<sup>238</sup>

Days after the Porirua transaction, Grey negotiated at Wellington<sup>239</sup> with the Ngati Toa chiefs for their interests from Wairau down to Kaiapoi. Phillipson's recent study concluded that, like Porirua, there were many irregularities and deficiencies

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234. Grey/Earl Grey, 8 April 1847, in co 209/52 [micro-z 429], pp 57ff

235. Grey/Earl Grey, 26 March 1847, BPP, vol 6 [892], pp 7–8

236. Ibid, p 8. Note, this same pattern of purchase/payment/selection/'refund' is reiterated in Grey's other report of the deal, Grey/Earl Grey, 7 April 1847, BPP, vol 6 [892], pp 15–17.

237. Grey/Earl Grey, 26 March 1847, BPP, vol 6 [892], p 8

238. See Anderson and Pickens, pp 45, 47. Plan w48, signed a true copy by T H Fitzgerald, 28 February 1848, in LINZ, microfiche misc plan series. The Crown grant is New Munster miscellaneous 6.

239. Phillipson, p 90. See deed of cession, 18 March 1847, in MacKay, *Compendium*, vol 1, pp 204–205

with the Wairau transaction, and in contrast to Porirua, the £3000 payment for these approximately 2,000,000 acres of land was 'tiny' (though compensated for somewhat by the large areas excluded from the transaction).<sup>240</sup>

It is clear that Grey only very reluctantly 'pre-empted' the company's right of pre-emption at Porirua and Wairau. Even then, Grey did not speak of the Crown 're-selling' the land to the company, but rather of the company taking its portion and 'refunding' the Crown the purchase moneys advanced. Despite being Grey's instructed course of last resort, these purchases clearly met the wider aims of his instructions – and at any rate, Grey knew that:

even after the New Zealand Company ha[d] selected the land they require[d] for their settlers, many thousand pounds will be realized<sup>241</sup> by the Government from the sale of the remaining portions of the waste lands.

Upon his return to Auckland at the end of March 1847, Grey reported most satisfactory progress, with revenues rapidly increasing and a 'most gratifying contentment' restored throughout the islands. This spirit had enabled him to complete all the arrangements he had contemplated in the company's settlements, and to arrange 'the great mass of the land claims in the Southern districts.' He noted, though, that if Maori:

had not met me in a spirit<sup>242</sup> of fullest confidence, I should have found it most difficult to adjust satisfactorily.

At the Colonial Office, James Stephens noted how this 25 March despatch, like many of Grey's, opened with insurmountable problems and closed with happy endings. He grizzled that Grey was 'an alarmist and a croaker.'<sup>243</sup> Perhaps Stephens appreciated better how fine a line Grey was walking, though, after reading of the *next* month's violent disputes in most of the company's settlements.

Grey did little at Port Nicholson on this early 1847 trip. McCleverty was at work, though, and Grey received his main report on the troublesome pa and cultivation exceptions on 8 April.<sup>244</sup> Grey appears very confused in his April 1847 discussion of which lands were at his disposal for resolving the company's objections to the 1846 Port Nicholson grant. McCleverty reported to Grey on 8 April 1847 that the area of FitzRoy's Port Nicholson grant was:

209,372 acres within the boundaries, part of which only, viz., 71,900 acres, are surveyed by, and granted to, the Company . . . as part of 1,300,000 acres granted by Lord Stanley in liquidation of expenditure, etc. [that is, in pursuance of the company's 1841 charter].

McCleverty believed:

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240. Phillipson, pp 91–92

241. Grey/Earl Grey, 8 April 1847, in co 209/52 [micro-z 429], pp 57ff

242. Grey/Earl Grey, 25 March 1847, despatch 25 in co 209/51 [micro-z 429]. Also BPP, vol 6 [892], p 6.

243. Marginalia on despatch 25, Grey/Earl Grey, 25 March 1847, co 209/51 [micro-z 429]

244. McCleverty report, encl in Grey/Earl Grey, 21 April 1847, in Wai 145 rod, doc a10(a) no 9, p 1

the balance, . . . 137,472 [acres] includes<sup>245</sup> the Town Belt and other unsurveyed lands as waste and pertaining to the Crown.

On 21 April 1847 Governor Grey forwarded this report to Earl Grey. For some reason, Governor Grey reported that McCleverty:

remarks, that the Port Nicholson district not belonging to the Government, they have no land there applicable to the contemplated purpose . . .<sup>246</sup>

Grey's report seems bizarre, considering that McCleverty's report clearly discussed lands that were 'waste and pertaining to the Crown' (above). Grey specifically discussed McCleverty's plan of applying the town belt lands in exchanges for some Maori cultivations. Grey thought that settlers objected to this plan on the grounds:

that they bought their town land on the understanding that the town-belt was to be reserved for the use of the inhabitants of the town, . . . and . . . that any division of the town belt from the purposes originally contemplated will be a breach of contract.

Grey felt:

the answer to the above objections appears to be, that the Commissioner appointed to inquire into the land claims *disallowed* the original Port Nicholson purchase . . .<sup>247</sup>

In short, Grey argued that the settlers, through the company, could no longer claim a title to the town belt based on its original transaction, because that transaction had been disallowed and renegotiated by Commissioner Spain, who had given 'the natives certain rights which must be respected' – the right to retain their pah and ngakinga. The original claim having been disallowed, the settlers based their claim to the *town belt* on the same arbitrated award on which the Maori based their *counter-claim* to ngakinga *within* that town belt area. Grey felt compelled by 'the necessity of the case' to favour the Maori claim over the settlers.

Grey's argument for the Maori claim to the town belt helps put into sharper focus his understanding of the Crown's claim to the 'surplus': Grey understood that the commissioner had disallowed the original 1839 transaction, and that everyone's interests depended mostly on the 1844 arbitrated agreement (sanctioned as a land claims award). Therefore, he did not claim title to the Port Nicholson 'surplus' on the basis of the 'disallowed' 1839 transaction. But as we have seen, there was precious little evidence that any 'surplus' legitimately arose from the 1844 arbitrations and award. Indeed, it would seem its primary existence was as a path along the ridges, an east-west line cut from Horokiwi to Kiakia, and a red dotted line drawn on the land claims award plan – all originating in Spain's instruction to

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245. Ibid, p 6

246. Ibid, p 1

247. Ibid, p 2

mark out the shortest and easiest path around the lands which had been arbitrated and awarded.

Finally, early 1847 is the period when the company's claim at Manawatu started going dangerously cold. Recall that Spain had awarded the company its surveyed Manawatu settlement, conditional upon eventually winning over Taikaporua. Then, in late 1846, Rangihaeata had retreated to the south side of the Manawatu. As of February 1847, according to William Wakefield, Governor Grey:

had declared his opinion that it would be advisable to wait until the presence of a portion of the armed police intended to be placed there [at Manawatu] guaranteed the perfect tranquility of [Manawatu] at that moment inhabited by Rangihaeata and his supporters.<sup>248</sup>

In this same memo, Wakefield understood from Rangihaeata's sister that he was not intending any further resistance to colonisation. The next month, though, on 18 April 1847, Rangihaeata's taua ransacked Andrew Brown's residence at Kapiti, apparently especially to obtain Brown's supplies of gunpowder.

Grey thought this was 'an ordinary New Zealand outrage' which indicated 'neither disaffection nor malice on the part of the natives.'<sup>249</sup> That same month, Grey reported Maori from Horowhenua returning to Taranaki, some of whom may have been worried along by Rangihaeata.<sup>250</sup> Regardless, in May 1847, probably more as a result of the Gilfillan murders, the Government advised all settlers to leave Manawatu, even those at Taikaporua's missionized village at Te Maire.<sup>251</sup> The company's lands at Manawatu sat unavailable.

In sum, we have seen that in 1846 and the first part of 1847, Symonds at Wanganui, McCleverty at Port Nicholson, and McLean at Taranaki sought primarily to complete the company's purchases, not effect purchases for the Crown. Taranaki was a unique case, in that Grey sought to uphold Spain's award as far as it went (which he regarded as far enough to extinguish all legitimate Maori interests within the awarded area), while he also acknowledged that FitzRoy had promised Maori that 'absentee' interests would be recognised and compensated. Therefore, from the outset, the lands included in these three (sets of) transactions, beyond those intended to go to the company, were fairly normal 'surplus' lands. We will want to examine how the Crown pressed its claim to these lands, and why they appear to have been largely overlooked *as* surplus lands.

At the same time, Grey's transactions for the Porirua and Wairau districts, and probably McLean's first two transactions at New Plymouth, were Crown purchases, albeit entered into *primarily* to satisfy the company's needs, not the Crown's. Nevertheless, each was conducted with a clear understanding that, after

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248. Memo from Wakefield/directors, 23 February 1847, encl in Harrington/Earl Grey, 7 April 1848, in BPP, vol 8 [570], pp 147–148

249. Wai 145 rod, doc c-1, pp 265, 267–268

250. Ibid, p 266

251. 'Duncan, James' in DNZB, vol 1, pp 114–115. Utu was apparently in the air: the Gilfillans may have been killed in retaliation for the accidental shooting of a Wanganui Maori by a midshipman of the hms *Calliope*. MacKay, *Compendium*, vol 1, p 22.

the company had been granted its portion, the purchase would generate a profitable 'remainder for the Crown. In a sense, the surplus was the centre.

### **8.25 A COMPANY–CROWN JOINT VENTURE: 1847–50**

The most important determinants of Grey's approach to the company's 'land questions' after mid-1847 were two Imperial acts of 1846 and 1847: the August 1846 Act mandating a new charter for New Zealand – the fruit of the company's lobbying for increased representative government through municipal corporations, and the July 1847 Act 'to Promote Colonization in New Zealand and to authorize a Loan to the New Zealand Company' – the fruit of their lobbying for increased Crown responsibility for their lack of lands and their unwieldy debts.

In June 1846 important changes occurred in the Home Government. Peel resigned, and the following month John Russell (Bertrand's grandfather) became Prime Minister. Russell shifted the Colonial Office from Gladstone to Earl Grey – the new title of Lord Howick who had chaired the 1844 select committee. Howick/Grey evidently remained close to the company, as within days he met E G Wakefield and Charles Buller<sup>252</sup> at Buller's London house. The meeting, however, produced no clear result.

In August 1846, Wakefield had a stroke, leaving Buller the ideological reins of the company. Buller carried on meeting with Earl Grey, and arranging a further loan to continue operations. Eventually Buller obtained Grey's support for enacting 'a Parliamentary obligation upon New Zealand to recompense the company for its losses.'<sup>253</sup> The company's 'losses' included the as-yet unexercised portion of the 'right of selection' it had acquired under its 1841 charter and quantified under its 1845–1846 loan arrangement with Lord Stanley. Basically, Buller's great success was in getting Grey to concede that it was the Crown's<sup>254</sup> fault that the company had been unable to exercise or redeem its valuable right.

At the same time, in August 1846 several of the other main strands of the company's discussions with Stanley came together into an Imperial Act for a new charter. Since at least 1844, the company had lobbied for representative government, and we have seen that in 1845 both Colonial Office and company were already impatient for Lord Russell's instructions to effect a general land registration (including confiscation of Maori land for non-payment of land taxes), expressly as a means of obtaining a large demesne as easily and quickly as possible.

This desire for registration clearly animated the crucial thirteenth chapter of the 1846 charter's royal instructions, 'relating to the settlement of the Waste Lands of the Crown.' Foden summarized this thirteenth chapter:

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252. Bloomfield, pp 283–285

253. *Ibid.*, p 289

254. Buller's genius was perhaps in seeing how badly the Crown needed the company. He apparently argued that if the New Zealand Company were to fail, then its 'ghost' would 'scare every capitalist in the country from venturing on any similar enterprise.' Bloomfield, pp 289–291.

Charts of the whole Islands were to be prepared, especially of those parts over which either Maoris or Europeans had established titles, whether of property or of occupancy, but which were valid. Land Registries were to be kept in the district and province, while, by reference to the charts, the settled lands were to be distinguished from the unsettled lands. The obligation was then cast upon the owner of lands to send to the Registrar of his district a statement of the extent, situation, and boundaries of lands claimed, and of the title upon which the claim rested. All of these statements were to be provisionally registered.

Maori claims were likewise required to be registered within a certain time period, or else forfeited:

In this way it was thought to ascertain the unclaimed lands which could then be regarded as the waste lands of the Crown . . . All areas which had not been claimed or provisionally registered within a time limited became the demesne lands of the Crown . . . No Native claims were to be admitted unless (a) the right of the Native to the land had been acknowledged and ascertained . . . by . . . some court . . . or (b) the claimant and his progenitors or predecessors in title had actually had the occupation of the land claimed.

As the company had demanded in 1845, Crown pre-emption was to be restored and strictly enforced against all individual settlers, except that Maori were to be free to deal in any lands they held individually. And finally, the charter called for concentrating political powers in geographically proscribed municipalities (as Lord Normanby had anticipated – before Governor Hobson declared the Port Nicholson municipality ‘treasonous’ and suddenly proclaimed sovereignty over the entire islands). The complements of the Act’s geographically proscribed *colonial* political entities, of course, were ‘Aboriginal Districts’ within which Maori law and custom (if not repugnant to universal principles) was to be enforced by Crown-appointed Maori.<sup>255</sup>

The 1846 Charter Act also matched Governor Grey’s own recommendations, especially for the company’s districts. In November 1846, Grey argued that Maori themselves were pleading for firm regulation of their commercial and land interests – to collect commercial debts, to ‘register the claims of the various owners,’ and to ‘prevent a powerful chief from taking the lands of his weaker neighbours.’ The Colonial Office’s response to these reports was electric: they saw Grey’s reports as uncanny, virtually a *request* for their new charter’s requirements to register Maori property interests. Earl Grey sent his ‘entire approbation.’<sup>256</sup>

Grey argued similarly in February 1847 in his report of steps he had taken to be seen to be benefitting Maori. According to Grey, Maori were using their road-building wages to participate in the colony’s commercial life generally and in the

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255. N Foden, *The Constitutional Development of New Zealand in the First Decade (1839–1849)*, Wellington, Watkins, 1938, pp 146–148. Note, this was also an idea advocated by Wakefield to Gladstone, shortly before his stroke. Bloomfield, pp 283–284.

256. Grey/Earl Grey, 28 November 1846, in co 209/46(2), pp 367–368. Grey was here again arguing the ill-effects of his predecessors waivers of pre-emption. Colonial Office response, 30 April 1847, *ibid* pp 375–376.

new savings banks in particular. Maori were corresponding prolifically with him through their new Native Secretary, and using the new hospitals, Crown prosecutors, standing counsel, Magistrates Courts, and the more frequent Supreme Court sittings he had provided. Again, Earl Grey crowed loud approval and forwarded Grey's despatch to Queen Victoria.<sup>257</sup>

Governor Grey received a draft version of the 1846 Act, charter and instructions, shortly before 3 May 1847.<sup>258</sup> He received the final version at the end of June 1847.<sup>259</sup> However, much as the Act's registration approach to extinguishing Maori interests closely matched Governor Grey's current instructions, expectations, and recommendations for the company's districts, Grey saw that such registration could not be quickly instituted and enforced in the northern parts of the colony. He immediately pleaded patience and began postponing implementation.<sup>260</sup>

Earl Grey sent his acknowledgement and approval of Grey's non-implementation in November 1847. It arrived here about March 1848.<sup>261</sup> Shortly after, he suspended the 1846 charter and instructions in the northern province of New Ulster by means of the 1848 Suspension Act (and subsequent proclamations).<sup>262</sup>

Meanwhile, and in contrast, the company and Colonial Office worked out plans for *implementing* the 1846 charter and instruction in the company's districts – the Province of New Munster. On 23 April 1847, the company directors notified Earl Grey that, as their mostly-unspent 1843 advance of £50,000 to establish a settlement at Auckland was about to expire, and since Stanley's 1845–46 advance of £100,000 had so far failed to secure them any grants or actually restart their colonising operations, it was time for the company to decide 'as to the continuance of its proceedings and existence.'<sup>263</sup>

The directors preferred a claim for compensation, based on 'the injury which has been done to the company by the acts of Government.' They asked that Grey:

admit the general justice of their claim, and . . . that the Government relieve them of the enterprise which it has marred, and take to itself both their liabilities and their assets.<sup>264</sup>

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257. Grey/Earl Grey, 4 February 1847, co 209/51 [micro-z 429], pp 196–211. Earl Grey's response minuted 18 June 1847.

258. Foden, pp 164–165

259. Wilson, p 210

260. See Wilson, pp 211–215 re: Martin, Selwyn, Maunsell, and Te Wherowhero's protests against the charter in late 1847. Grey's famous plea to delay implementing the Act, 3 May 1847, extracts in BPP, vol 6 [892], pp 42–43, specifically restricted itself to New Ulster. Grey expressly stated that he *would* implement the Act in the Southern Province of New Munster, the company's districts. The whole despatch is in co 209/53 [micro-z 430], pp 258–259.

261. Earl Grey/Grey, 20 November 1847, in BPP December 1847 (confidential), p 46, cited in Wilson, pp 214–215.

262. Foden, pp 174–175

263. Harrington/Grey, 23 April 1847, BPP, vol 5 [837], pp 104–106. The reference to the Auckland loan is obscure in the directors letter. F D Bell explained the link to the select committee in New Zealand in 1854 re Auckland's liability for the company's debt. See *Votes and Proceedings of the House of Representatives*, sess 1, 1854, select committee minutes, pp 3–4.

264. Harrington/Grey, 23 April 1847, BPP, vol 5 [837], pp 104, 106

The company's only assets were its 1,049,000 acres of un-exercised right of selection, and its 24,000 acres of land. Its liabilities totalled £394,000, including £235,000 of paid-up shareholder capital. Note Earl Grey's position. Lords Russell and Stanley had earlier accepted the company's claim of a right to select 1.3 million acres of Crown land. As soon as the Crown *had* that land to grant, under then-current 1845–1846 loan arrangements and within minimal guidelines as to shape and position, the company could have *exercised* its right. 'It would therefore clearly have been in the power of the company to have selected some of the most valuable portions' of any of the areas so far acquired in their districts, and to have sold the lands for the most profitable terms obtainable.<sup>265</sup> Within a few months of the 1847 agreement, without the 1847 agreement, the company might have crippled Otago, Porirua, Wairau, and Port Nicholson.

Instead, Earl Grey replied that he was 'ready at once to admit that the company has established a claim against Her Majesty's Government.'<sup>266</sup> He agreed that, rather than assigning a monetary value to the claim, it would be better:

to make the Government a party to the fair trial of the experiment whether the Company can be placed in<sup>267</sup> a position that will enable it to continue its operations without further assistance.

Grey offered 'exclusive use of the Crown lands' in New Munster, an advance to meet existing liabilities and future outlays, with a commissioner to oversee the expenditure of the advance. While he did not point it out as clearly to the company directors as much as to Treasury, Grey expected the commissioner to 'give [the Crown] the most *complete control* over the expenditure of the company.'<sup>268</sup>

Grey assured the directors that the 1846 charter's prohibition against pre-emption waivers *outside* the company's districts would stand. He did not want 'Her Majesty's Government and the company' to be exposed to competition from small land traders in 'their combined operations, under the proposed arrangements.'<sup>269</sup>

Grey proposed the specific provisions for these 'combined operations' in an attached memorandum. In it, he surrendered 'entire and exclusive disposal of all Crown lands, and the exercise of the Crown's right of pre-emption' in the company's districts. He undertook 'to execute any grants . . . for which the Court of Directors and Commissioner shall engage.' He promised to advance £136,000 – £28,000 the first year, £72,000 the second year, and £36,000 the third.

If the company wished to continue colonizing after mid-1850, they would retain the commissioner, and they would obtain permanent possession of the demesne and the right of pre-emption. They would, however, have to abandon all claim against

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265. Stephen/Trevelyan, 6 May 1847, in *ibid*, p 102. This argument was recalled as the reasoning behind the 1847 Loan Act by the Provincial Council of Nelson in 1858. *AJHR*, 1858, g-5, pp 2–4.

266. Hawes/Harrington, [nd] April 1847, *BPP*, vol 5 [837], p 108. Also in Stephen/Trevelyan, 6 May 1847, in *ibid*, p 100.

267. Hawes/Harrington, [nd] April 1847, *ibid*, p 109

268. Stephens/Trevelyan, 6 May 1847, *ibid*, p 101 (emphasis added)

269. Hawes/Harrington, [nd] April 1847, *ibid*, p 111

the Crown, and start repaying both the old £100,000 loan and the current £136,000 loan.

If instead the company wished to fold, then (as proposed by the directors on 23 April) the Crown would ‘take the company’s assets, together with the liabilities.’ Remarkably, Grey undertook to wipe the company’s £236,000 advance/debt (or however much of it had been used by mid-1850) ‘in consideration of the company’s admitted claims on the Government.’ And more, Grey promised to buy back the company’s entire unexercised rights of selection, 1,049,991 acres – ‘so much land scrip’ – at the same rate at which they had been awarded to the company in its 1841 charter – 5 shillings per acre. He also promised to buy, at the same rate, the 24,491<sup>270</sup> acres which the company had purchased for itself out of its settlements.

After the collapse of the company on 5 July 1850, these undertakings amounted to a £268,000 debt, secured against the Crown lands of the colony, and requiring the young colonial Government to pay to the defunct<sup>271</sup> company in England one-fourth of the proceeds of all Government land sales.

The agreement was approved all around, Mr Cowell was appointed commissioner, and the whole immediately forwarded to Governor Grey on 19 July 1847 – four days before the authorising Act passed Parliament [Imperial Act 10 and 11 Victoria, c 112].<sup>272</sup> The news reached Governor Grey about October 1847.

The immediate, practical impact of the 1847 Loan Act was to establish a particular procedure for extinguishing Maori claims and interests in the company’s districts. It is important to grasp the internal logic of this procedure: the sixth chapter of the 1847 Loan Act empowered the company to handle the demesne lands as if it were the Crown, including on-selling the land and using the proceeds ‘for the Purchase or Satisfaction of [Maori] Claims, Rights, or Interests in the said Demesne Lands.’<sup>273</sup> On the face of it, this fulfilled the memorandum of agreement of May 1847 (above), which promised the Crown would surrender to the company ‘the exercise of the Crown’s right of pre-emption in the Southern Province.’

The second chapter of the 1847 Loan Act, though, suspended the provisions of the thirteenth chapter of the 1846 royal instructions *except*:

such as relate to the registration of titles to land, the means of ascertaining the demesne lands of the Crown, the claims of the aboriginal inhabitants to land, *and the*

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270. Memorandum encl in *ibid*, pp 111–112. ‘So much scrip’ is what the Provincial Council of Nelson called it in their 1858 petition, p 2. Total acreage = 1,072,000.

271. The 1847 Loan Act made the £268,000 a charge against the colony’s lands, but did not actually specify the rate at which the Crown had to pay this charge. In correspondence with the company subsequent to its passage, Lord Grey set the rate of payment at one-quarter of each year’s land fund. Lord Derby later wrote this rate of payment in to the 1852 Constitution [15 and 16 Victoria, c 72]. Pakington/Earl Grey, 16 July 1852, in BPP vol 5 [1779], p 303.

272. Stephen/Trevelyan (Treasury), 6 May 1847, *ibid* pp 100–103; Trevelyan/Stephen, 10 May 1847, *ibid*, p 113; Harrington/Grey, 12 May 1847, *ibid*, p 113, Grey/Harrington, 22 May 1847, *ibid*, p 115; and Harrington/Grey, 25 May 1847, *ibid*, p 115. The Act is in Wai 145 rod, doc e4, pt 2, p 313.

273. Chapters 2–6, in Wai 145 rod, doc e4, pt 2, p 313

*restrictions on the conveyance of lands belonging to the aboriginal Natives, unless to Her Majesty.* [Emphasis added]

Clearly, there was either confusion or else a fine line being drawn: pre-emption remained with the Crown, but the company could use its land fund to buy Maori land.

Earl Grey addressed this apparent conflict in his instructions to Governor Grey 19 July 1847. He directed Grey specifically:

You will continue to retain in your hands the exclusive management of all negotiations with the natives for the sale of their lands; but when any transactions of this sort are concluded in the southern province, the New Zealand Company will provide the means of payment from funds placed at their disposal, and have the disposal of the lands so acquired.<sup>274</sup>

The basic procedure was set: the company was to select, the Crown was to negotiate, and the company was to pay, acquire, and dispose of. Several months later, Earl Grey explained how he understood the arrangement:

If the language of the second and following sections . . . alone were looked at, it would seem . . . that the Company's agents alone could effect purchases from the natives. But the first section . . . restricts the conveyance of lands belonging to the aboriginal natives, unless to Her Majesty . . .

The Governor should continue to be, as he was before the Act, the sole authorised agent to effect such purchases . . . Lord Grey is anxious to adhere [to his 19 July 1847 instructions to Governor Grey], and will be ready to authorize Governor Grey to conclude the necessary negotiations, when the Company point out any tract in which they are willing to have such purchases effected out of the funds at their disposal:

At the same time, . . . Lord Grey thinks it desirable in any such case, that the Company should expressly authorize the Governor to take the steps of which they are desirous, in order that he may be invested with the character of their agent, possessing as they do, the right of pre-emption, as well as the agent of the Government.

In short, only the agent of the company had the right to purchase or acquire, but only the agent of the Crown had the right to negotiate or transact. Governor Grey was to be double agent in these 'combined operations.'

None of this should obscure the other often-ignored aspect of this 1847 Act: from 5 July 1847 to 5 July 1850, while they were suspended in the north, the 1846 charter's compulsory land registration provision, and confiscatory land tax provision, remained intact in the company's districts. As Earl Grey wrote in hindsight in 1851:

My great object in proposing to get rid of [the New Zealand Company's] claims was to facilitate the adoption<sup>275</sup> of measures for extinguishing the Native title to lands not yet acquired by the Crown.

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274. Earl Grey/Grey, BPP, vol 5 [837], p 117

275. Earl Grey/Grey (private), 7 August 1851, Grey mss 35

In combination, the company's 1841 charter, the 1846 charter, and the 1847 Loan Act effected a strange reversal: the imperial Government was using a land company to do most of its colonising work, and the land company was using the Government to do most of its land-purchasing work.

Unsurprisingly, the Loan Act's implementation varied in detail from settlement to settlement; the 'land question' at Port Nicholson differed from that at New Plymouth, which differed from that at Wanganui, and so forth. We will examine these various local applications of the Loan Act in the next section.

## **8.26 FIRST REACTIONS TO THE LOAN ACT: LATE 1847 NEGOTIATIONS AND GRANTS**

The first three of McLean's four transactions at Taranaki reflected Grey's March 1847 'resumption' approach to his 1845 instructions (above). By the end of 1847, the company had 31,000 acres at New Plymouth, which they regarded as ample for the time being.<sup>276</sup> Colonising operations remained slow,<sup>277</sup> although finances in the colony and public confidence in Britain were improving.

When news arrived of the 'combined operation' established by the 1847 Loan Act, Grey instructed the resident magistrate at New Plymouth that Crown purchasing must stop, and all land negotiations must be suspended.<sup>278</sup> Under Grey's 19 July instruction he was to retain exclusive management of negotiations, but only the company was to actually purchase. As we might expect, therefore, Grey came to New Plymouth in February 1848 and had long discussions with F. D. Bell, the company's Resident Agent. These resulted in additional instructions, March 1848, authorising Bell to negotiate with the Maori with every assistance the Crown could offer.<sup>279</sup>

According to Parsonson the instructions detailed how Bell was to:

only 'conduct the negotiation to the final point', before reporting to the Resident Magistrate 'the nature of the contracts the natives are prepared to enter into' . . . Captain King was then to ascertain from McLean that 'the intended native sellers are the true owners' . . . and King was then to conclude the transaction on behalf of the Government, and place the land at the disposal of the Company's Agent.<sup>280</sup>

Negotiations were long and difficult, but McLean did finally preside over the deed-signing on 29 November 1848. Even while doing so, McLean anticipated further adjustments with more 'outstanding claimants'.<sup>281</sup>

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276. Wilson, p 193

277. MacKay, *Compendium*, vol 1, p 23

278. H King to F D Bell, 6 December 1847, nzc 308/1, no 47/118, cited in Parsonson, p 78

279. Parsonson, p 78

280. *Ibid*, pp 78–79

The whole appears a first draft at pursuing the 1847 Loan Act's basic procedure: the company select, the Crown negotiate, and the company then pay, acquire, and dispose of.

## **8.27 GREY'S GRANTS AT PORT NICHOLSON AND PORIRUA: JANUARY 1848**

The second draft, as it were, was being written at Port Nicholson and Porirua. At Port Nicholson, Spain had only awarded the company 71,900 acres minus reserves. As we have seen, though, he had also instructed an 'exterior boundary' be surveyed along the easiest route around these 71,900 acres. In April 1847, Grey had received McCleverty's detailed proposals of how to rid the company's selected lands of the Maori cultivations which had been excepted in the 1844–1845 arbitrations, award, and grant. As we have seen, McCleverty proposed that the excess surrounding the company's selection but enclosed within the 'exterior boundary' was 'waste and pertaining to the Crown.' Throughout 1847, therefore, McCleverty had 'exchanged' large areas of this outlying surplus for the Maori cultivations in the company's selection.

Prior to the 1847 Loan Act, we would expect the arrangement to be secured by a Crown grant to the company of its selected lands, some kind of record of the remaining Maori exceptions and reserves, and a proclamation of the Crown's title to the remainder or 'surplus'.

Instead, Grey's Port Nicholson Crown grant (special grant 1), 27 January 1848, simply granted the company the entire area inside Spain's 'exterior boundary' (minus Maori reserves and exceptions). Lieutenant Governor Eyre stated the reason. In December 1847, he directed that the company's grant was to:

embrace the whole area comprised within the limits of the purchase (excepting the lands reserved) without reference to any specific quantity to which the New Zealand Company laid claim or which had been awarded them [by Commissioner Spain] in that particular district.

Eyre carefully explained that this was:

*in consequence* of the recent arrangements entered into between Her Majesty's Government and the New Zealand Company by which the demesne lands<sup>282</sup> of the Crown are for three years to be placed entirely in the hands of the Company.

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281. McLean/resident magistrate, 28 November 1848, ma/mlp/np 1, cited in Parsonson, p 82. Here Bell and McLean's 1848 purchase process resembled the open-ended deeds used in the 1880s and 1890s. These invited individuals named on a land court owners list to sell their interests one-by-one, and to each receive payment one-by-one, until one day – whenever the Crown chose – the Crown closed the deed and sought partition of its 'share' of the tribe's land.

282. Eyre/Grey, 24 December 1847, nm 4/1/47/96 pp 122–124, in Wai 145 rod, doc e4, vol 2, p 271e

In short, the land was to be vested in the company anyway, and including it in their grant was the easiest way to do this. He explained in the same despatch that he would follow this same approach for the grant of Porirua.

As a result, although the Crown acquired a large ‘surplus’ by virtue of the company’s transacting at Port Nicholson, and a similar ‘surplus’ at Porirua by virtue of transacting on behalf of the company, neither appeared as such, due to the 1847 Loan Act.

The effect was much the same at Nelson. There again, rather than separate out any proportionate parts or fiddle with internal surveys, in August 1848 Grey simply granted the entire 2 million acre purchase area to the company. The grant referred to seven annexed plans – one of the entire 2 million acre block, and six others of native reserves.<sup>283</sup>

The first plan ‘showing the Gross Block,’ was not signed-off by the assistant government surveyor, T H Fitzgerald, until 28 February 1850 (shortly before the expiry of the company’s 1847 arrangements).<sup>284</sup> The Nelson ‘grant’ was apparently left open to enable further adjustments, extinguishing outstanding interests immediately adjacent to and/or enveloped by the company’s existing estate.

In particular, at the end of 1848, the company needed the Waitohi Valley, just at the mouth of the Wairau Valley, as land to exchange with its disgruntled Nelson settlers. In December, Grey visited there at the request of F D Bell, resident agent of the company. On 30 December 1848, Grey and Bell both signed a Memorandum of Agreement with the Maori there, that when ‘he and Mr Bell’ had surveyed a native village and ploughed lands at Waikawa,<sup>285</sup> built a church, and paid £100, the Maori would leave Waitohi to the settlers.

Bell and Major Richmond returned the month after the Nelson grant had issued, to effect the details of the purchase. As we would expect under the 1847 Loan Act, Richmond inspected lands to be excepted from the transaction, assessed the Maori needs and resources, negotiated price and selected reserves direct with the Maori vendors. Throughout, Richmond<sup>286</sup> sought (and obtained) the ‘cordial concurrence’ of the company’s agent, Bell.

Note, a later deed, 4 March 1850, was expressly between the ‘Natives and Queen Victoria.’<sup>287</sup> This deed recited the the December 1847 deed with both the Governor and the agent of the New Zealand Company as a condition precedent, and then converted the purchase consideration in the earlier deed to a cash amount. The deed was signed by Richmond, Maori, and Bell. This apparent ‘exception of a deed between the Crown and Maori under the 1847 Loan Act, therefore probably only

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283. Copy of Grant in MacKay, *Compendium*, vol 2, pp 374–375. Official copy is New Munster Grants, vol r6, fol 36. The five latter plans may be the series produced by Heaphy [nd], and held as n(r)9–n(r)18, in LINZ, microfiche misc plan series

284. Plan is n(r)11, LINZ, microfiche misc plan series

285. MacKay’s *Compendium*, p 264. Phillipson, pp 96–97.

286. ‘Memorandum of Agreement between the Governor, Mr Bell, and the Natives, respecting the land at Waitohi’, 30 December 1848, encl in Grey/Earl Grey, 1 February 1849, MacKay’s *Compendium*, vol 1, pp 263–265. Richmond/Grey, 27 March 1849, *ibid*, p 264, and Richmond/Grey, 26 June 1849, *ibid*, pp 265–266.

287. Deed, 4 March 1850, *ibid*, p 266

proves our rule: as McLean did a few months later at Rangitikei, Richmond and Bell were probably anticipating the company's dissolution and the vesting of its lands in the Crown under the 1847 Act.<sup>288</sup>

## **8.28 NEW INSTRUCTIONS AND NEGOTIATIONS: MARCH–NOVEMBER 1848**

By March 1848, the Te Maire mission station had re-established itself at Te Awahou (Foxton),<sup>289</sup> leaving the company's purchase area south of the Manawatu still unsettled. By this time, Colonel Wakefield fully presumed a set of procedures under the 1847 Loan Act. He was to indicate to Government the lands he wished to acquire, a 'Crown Commissioner' would conduct all required negotiations with Maori, make arrangements amenable to him, and Wakefield was to have the funds immediately available to implement whatever agreements had been struck.<sup>290</sup> He fully endorsed the yearly instalments approach used the previous year, as well.

In April 1848, therefore, Wakefield wrote to Lieutenant Governor Eyre, noting Governor Grey's 'exclusive management of all negotiations with the natives' under the 1847 Act, and indicating which lands he wanted to acquire. Far and away, Wakefield's top priority was the 74,600 acres already surveyed by and conditionally awarded to the company by Spain at Manawatu–Horowhenua. Wakefield worried by this time that squatters were starting to make regular payments to the resident Maori to run cattle there, creating a clear incentive for the old vendors to repudiate their first sale. Realistically, though, Wakefield told Eyre that he understood that Rangihaeata and 'his followers' were still there, making purchase negotiations untimely.<sup>291</sup>

Wakefield noted that Taranaki and Wanganui were ready for payment of compensation. It remained for him only 'to solicit, by your Excellency's directions, the acquisition of the district of Wairarapa and the land . . . from Port Cooper to Otakou.'<sup>292</sup>

The effect of the 1847 Loan Act in Wanganui was similar in ways to both New Plymouth and Port Nicholson. Like at Taranaki, McLean's 26 to 29 May 1847 Wanganui deed and September 1848 report both characterised McLean's 1848 transaction as a mere continuation of the 1841 charter arbitrations – previously started and stopped in 1844 and 1846.

McLean's 1848 deed represented itself as between Maori signatories and himself, acting 'for the Governor or for such Europeans as he the Governor agrees

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288. McLean/Colonial Secretary, 9 November 1850, AJHR, 1861, c-1, p 83

289. 'Duncan, James' in DNZB, vol 1, pp 114–115

290. Wakefield/Eyre, 15 April 1848, encl in Wakefield/directors, 25 April 1848, encl in Harrington/Earl Grey, 23 August 1848, in BPP vol 8 [507], pp 226–229

291. Wakefield/Eyre, 15 April 1848, *ibid*, p 227. Rangihaeata appears to have continued to prevent the settlement of the Manawatu award right up to the dissolution of the company in 1850. See Kemp report no 3, 10 March 1850, in BPP, vol 7 [1420], pp 236–237.

292. Wakefield/Eyre, 15 April 1848, *ibid*, p 227

to give the said lands to.’ It represented the extent of the transaction as ‘the land which he [Mr Spain] . . . declared should be for the . . . Company.’ It represented the £1000 paid as ‘the last or concluding payment which was decided upon by Mr Spain in the year . . . 1844’ – almost as if this was just another yearly instalment.<sup>293</sup>

The deed referred throughout to numerous surveys of pa and cultivation reserves done in 1846 by Mr Wills – the Wanganui equivalent of the surveys at the same time at Port Nicholson and Nelson, all done in pursuance of the arbitration award, in pursuance of the 1841 charter.

McLean clearly understood himself as merely continuing the adjustment of the company’s single purchase. Throughout, his report spoke in terms of settling boundaries of reserves already set aside and surveyed, of paying ‘compensation’ for outstanding Maori ‘claims’ against a purchase and award already made; of his ‘adjustment of the Whanganui Land Question,’ and of having ‘finally adjusted’ the Whanganui purchase.<sup>294</sup>

Note that ‘adjustment’ was the term used by McLean at both the company’s Manawatu settlement and when acting ‘on behalf of the company’ at Rangitikei, and also by McCleverty at Port Nicholson.<sup>295</sup> And just as McCleverty ‘exchanged’ reserves in the company’s selected area for reserves in the surrounding ‘surplus’, so McLean (after Symonds) ‘exchanged’ reserves that ‘interfere[d] with the pursuits and prosperity of the settlers’ for reserves in the lands outside the company’s selection but inside their rectangular exterior boundary.<sup>296</sup> In other words, Maori at Wanganui (like those at Port Nicholson) ‘paid’ to exclude their pa and ngakinga from the prospective surplus.

McLean’s 1848–50 reports likewise presented him as the official who ‘finally adjusted’ the ‘inland boundaries’ of the 1844 award.<sup>297</sup> McLean recalled that Symonds had negotiated with Whangaehu Maori for their interests near the southeast boundary. McLean understood this boundary as one side of a rectangle which he understood to be the same rectangle shown on the company’s pre-1844 plans, and which had been recently found to enclose approximately 86,000 acres. McLean speculated that Spain had meant to award this rectangle, but had *mistaken*

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293. Wanganui deed, in Turton, pp 242–244

294. ‘Compensation’ (vs consideration) and ‘claims’ and ‘claimants’ (versus vendors), and ‘adjustment’ (versus purchase) are McLean’s vocabulary throughout: *ibid*, pp 248–250 and pp 255–256. Cross and Barge, p 21: ‘No additional payments were made for the increased acreage’.

295. Rangitikei purchase and Manawatu, in McLean/Colonial Secretary, 25 April 1849 at Rangitikei, pp 252–253, and 10 July 1849 at Manawatu, p 254.

296. Quote from Grey/Symonds, 17 April 1846, in BPP, vol 5, pp 550–551, cited in Cross and Barge, p 16. Wanganui deed, in *Turton*, p 244: the reserves chosen ‘with Mr Symond’s sanction’ – mostly in the surplus area – were exchanged for ‘the places which were made sacred for us by Colonel Wakefield and Mr Spain’. Wai 145 rod, doc e3, vol 1, pp 10–12 explains how, even afterward, this exchange was argued as ‘generous’ on the part of the Crown, and given as justifying Grey’s use of most of the ‘Tenth’ native reserves in Wellington proper to endow Wellington Hospital and Wellington College. The situation may differ for Wanganui, as Spain’s ‘40,000 acres’ may have referred to the entire rectangular block shown company’s plan at the deed signing. In this case the ‘surplus’ used in exchange was included in the £1000 compensation, and the company was evidently expected to take the ‘waste’ along with their saleable surveyed sections.

297. Commissioner McLean/Colonial Secretary Domett, September 1848, in AJHR, 1861, c-1, pp 248–250, and 4 November 1850, *ibid*, pp 255–256

the square boundary line on his plan of the 1841 charter lands for a 'marginal line of the map.'<sup>298</sup>

McLean was wrong, though. Recall that Spain and Clarke displayed the company's Wanganui plans at the 1844 arbitration award signing, and that those plans did show this rectangle. Spain and Clarke expressly told Wanganui Maori that their deeds of release and compensation only affected the lands surveyed and selected by the company, not the 'entire district.' They might have meant that Maori were surrendering the rectangular block shown on the company's plan (like at New Plymouth), or they might have meant they were surrendering the hydra-shaped area of surveyed sections, shown on the same plans (like at Port Nicholson).

Regardless, Spain specifically told Maori the number of acres which his award of £1000 was to compensate – 40,000. The number of acres was more essential to the award than the shape or boundaries of the section. McLean's payment of the £1000 award in 1848 could not have extinguished Maori interests in any more acres, unless Maori understood and agreed to an increase in the amount of land they wished to surrender for this same amount of consideration.

The Crown's 'surplus' claim at Wanganui consisted, then, of the lands acquired beyond the 40,000 acres Spain awarded to the company. This claim was inadvertently disguised by the 1847 Loan Act, in that McLean conducted his Wanganui transactions expecting that, as at Port Nicholson, Porirua, and Nelson, everything that had been alienated would simply be granted to the company. There was no need to distinguish, therefore, between the lands to go to the company and any 'surplus' in the 'adjusted' external boundary, which would have previously to the 1847 Loan Act gone to the Crown.

The Wanganui 'surplus' was also disguised by yet another 'adjustment': in November 1850, after the company had folded, McLean returned to complete the survey of the inland boundary of the Wanganui purchase. The surveyor, however did not show up, and:

not having a surveyor at [his] disposal, . . . the Natives . . . sanctioned the running of the line along the most prominent natural features of the country, conceding<sup>299</sup> without further remuneration a considerable enlargement of the [1844] purchases . . .

McLean again treated the 1850 transaction as only an adjustment, a point of clarification, of the *existing* agreement. So again he paid no additional consideration for an increase in the acreage. Under the 1847 Loan Act, this new boundary would have been shown on a grant to the company. But now under that same Act, the Crown did not only resume its 'surplus' demesne from the company's 40,000 acres out to the Whangaehu River. It also acquired the company's 40,000 acres. The Loan Act once again obscured the fact that the whole affair was a *company* purchase, which generated a substantial surplus for the Crown.

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298. McLean/Colonial Secretary, September 1848, *ibid*, p 250

299. McLean/Colonial Secretary, 4 November 1850, *ibid*, p 255

Figure 16: 1846–50 Crown sanctioned purchase completions

The Wanganui surplus paled, of course, in comparison to that obtained by Kemp in the South Island. Judging by the terminology used in the reports and deed, the Kemp purchase appears also to have been a company purchase, negotiated by the Crown under the 1847 Loan Act. We saw above that in April 1848 Wakefield included the area from Port Cooper to Otago in his list of places he wanted the Crown to transact for under the Act. It is not surprising, then, that Kemp's 12 June 1848 deed stated that the sale was to Wakefield and the directors of the New Zealand Company.<sup>300</sup> Grey reported the whole as a 'procurement' transacted 'with the concurrence and at the desire of the late Principal Agent of the New Zealand Company.'<sup>301</sup> Governor Grey's self-perception of acting 'at the desire of' the company seems much the same as Earl Grey's view that under the Loan Act, he was to act 'in the character of the company's agent' (above).

Goldsmith's recent summary of Kemp's November 1848 Wairarapa negotiations states that Kemp acted again 'on behalf of the New Zealand Company' with 'the aid of Bell,' and refers to Kemp and Bell as 'the New Zealand Company negotiators.'<sup>302</sup> Likewise, according to Goldsmith, on 24 September 1849, Donald McLean went to the Wairarapa 'to negotiate on behalf of the New Zealand Company.'<sup>303</sup> All of these attempts failed, though, to effect even a partial purchase. When the company folded in 1850, therefore, it passed no 'surplus' to the Crown at Wairarapa.

## **8.29 THE CROWN BUYS THE COMPANY'S ESTATE AND RESUMES ITS OWN SURPLUS: 1850**

Prior to the 1847 Loan Act, the portion of the company's purchases that was not selected (or selectable) by the company under its 1841 charter, was to have gone to the Crown. In the purchases that were completed *as* company purchases, this portion would have gone to the Crown as 'surplus'. Hence, we may not reasonably treat the residue at Porirua and Wairau as 'surplus', as we have seen that these transactions were probably more in the nature of Crown purchases, with the company only expected to pay for the portion it received. All of the *other* purchases by and on behalf of the company, though, can be fairly said to have generated surpluses for the Crown.

Estimating the area of this surplus is perhaps less daunting than one would expect. Under the 1847 Loan Act, upon the dissolution of the company in July 1850, the Crown *bought* back the company's 1.3 million acre right of selection or acquisition – the company's portion of each of its purchases – and the Crown

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300. MacKay, *Compendium*, vol 1, p 210. Note, the Waitangi Tribunal thought this was an error in the deed, evidencing carelessness. *The Ngai Tahu Report*, vol 1, 1991, p 56.

301. Grey/Earl Grey, 26 March 1849, MacKay, *Compendium*, vol 1, p 212

302. Paul Goldsmith, *Wairarapa*, Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), July 1996, pp 12 and 14

303. *Ibid*, p 19

merely *resumed* the remainder, which the company only held as demesne waived to it under the 1847 Act.

Excluding Porirua and Wairau, these 1.3 million acres therefore went to the Crown *as* the company's would-be selection or award. And everything *beyond* them went to the Crown as the 'surplus' of the company's purchases.

At the time it surrendered its charter, the company had already exercised 828,000 acres out of its 1.3 million acre 'right of selection.' These lands were locatable, and those that the Crown obtained, it did so by paying the company 5s per acre, as agreed under the Act. Of these 828,000 'realised acres, though, the company had already on-sold 199,000 to private purchasers. The company having already recovered its costs on these lands, the Crown did not need to 'buy them back. Or alternatively, these lands being owned by third parties, the Crown *could* not 'buy' them back.

That left a company estate of 628,000 acres of selected lands, plus 472,000 acres of unexercised 'right of selection.' These lands and rights were valued under the 1847 Act at five shillings per acre, or £275,000. The company handed these lands and rights over to the Crown,<sup>304</sup> and the Crown was required to pay over their value to the company.

In a sense, the Crown also paid for the rest of the company's lands, since under that same 1847 Act (above), the company was not required to repay the funds advanced by the Crown and used by the company.

Excluding Porirua and Wairau, the company's lands totalled roughly those shown in table 1 below<sup>305</sup>. This total estate, minus the 1.1 million acres that the Crown 'bought' from the company, leaves a company 'surplus' of (roundly) 21.2 million acres.

It took years for the company and Crown to apportion their acreages and debts, of course. Considering that the company did not repay the Crown's advanced funds, it is difficult to see any importance, though, in their long accounts and pitched battles – for example, over whether the company or the Crown should pay for the Porirua, Wairau and Taranaki purchases. The company did 'repay' these outlays, but it presumably did so out of the funds that the Crown had advanced to it (or at least from the £275,000 which the Crown paid for its scrip).<sup>306</sup> The whole is quite a hall of mirrors, full of ugly accusations that the company defrauded the Crown (which it probably did), and that the Crown obstructed the company after July 1847 (which it probably did not).<sup>307</sup>

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304. Under constraint of time, I have simply adopted the Petition of the Provincial Council of Nelson, AJHR, 1858, g-5, pp 2–3.

305. These are rough approximations, more to set out how we are defining the company's surplus than to count the acres involved. Wanganui, for instance, is a rough guess of how much more acres were added by extending boundaries to the Whangaehu than the original 40,000 acre block. The Kemp purchase estimate comes from *The Ngai Tahu Report 1991*, vol 1, p 51. The Nelson amount is the generally used 2,000,000 acre estimate, minus say 500,000 acres of 'pure Wairau purchase' acres. The Taranaki, Port Nicholson, and Otago acreages are from the original grants (cited above).

306. The repayments debate began before dissolution. See eg Fox/Harrington, 27 April 1849, BPP [1398], pp 60–63.

## *The Crown's Surplus in the NZC Purchases*

FitzRoy Block	3500
Grey Block	9770
Omata	12,000
Tataraima	4000
Nelson	1,500,000
Port Nicholson	210,000
Kemp purchase	20,000,000
Wanganui	110,000
Otago	400,000
Total	22,250,000

There would seem to be only one relevant outfall of the post-dissolution period. In 1856 the company commuted its £275,000 lien against the colony's lands for a single payment from the British Parliament of £200,000. This latter amount became simply a national debt to England, though still apportioned between each of the provinces according to how much they had 'benefitted' from the company's activities, and still primarily re-paid out of the proceeds of each province's land sales.<sup>308</sup> It would be difficult to guess the extent to which the need to repay this debt may have driven the Crown to purchase Maori land ahead of what it needed for its actual use and occupation.

Otherwise, we have tried to point out any troublesome aspects of this company surplus as and when they arose in our study. These have included how:

- the Crown expanded its surplus at Wanganui without expanding its payment
- the Crown acquired the surplus at Port Nicholson with no apparent consideration being paid beyond the company's 1839 payment;
- the Crown made Maori at Port Nicholson 'pay' their best cultivation lands in exchange for the lands it excluded for them from its surplus claim;
- the prices offered and paid at Taranaki may have reflected the belief that the 'resident' interests had already been extinguished within 'Spain's boundary;'
- where the Crown perceived partial purchases, Maori lost any further right of general refusal of sale.

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307. For example, Hawes/Drane et al, [nd] reply to the company review of events leading to dissolution, 9 July 1850, BPP, vol 7 [1398], pp 45–46

308. The process leading to the liquidation of the debt, *Votes and Proceedings of the Legislative Council 1854* pp 5–6, 33, 79. Also *ibid* for 1855 pp 33–34, 40. Also *Votes and Proceedings of the House of Representatives*, 1854, sess 1, 'Report of the Select Committee on . . .'; *ibid*, 1854, sess 2, 'Report of the Select Committee on . . .' pp 2–9, with 23 pp of minuted proceedings and inquiry, many allegations of fraud and abusive accounting. For final re-apportionment, see AJHR, 1861, d-7.

Finally, our view of ‘all the company’s purchases together’ has perhaps brought into sharper relief how the Crown doggedly reified the company’s incomplete purchases into unities. When confronted with partial and fragmented transactions, officials consistently projected ‘estates-to-be’. In contrast, they equally persistently refused to cast Maori tribal interests in so favourable a light, constantly seeing individual and conflicting interests when whole peoples were standing before them.

Figure 17: Rangahaua Whanui districts