**IN THE WAITANGI TRIBUNAL** **WAI 2180**

**IN THE MATTER** of the Treaty of Waitangi Act 1975

**AND**

**IN THE MATTER** of the Taihape: Rangitikei ki Rangipō inquiry

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# WĀHI TAPU GENERIC CLOSING SUBMISSIONS

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**MAY IT PLEASE THE TRIBUNAL**

**TRIBUNAL STATEMENT OF ISSUES – ISSUE 21 – WĀHI TAPU**

## Introduction

1. These closing submissions deal with Issue 21 of the Tribunal Statement of Issues ("TSOI"): Wāhi Tapu.[1] The responsibility of the Crown to actively protect, preserve and maintain sites of wāhi tapu significance to Māori is established through Article II and III of Te Tiriti o Waitangi ("Te Tiriti"). This fiduciary like role is strongly reinforced in Waitangi Tribunal jurisprudence to date, which unfortunately in many cases also details the blatant disregard that the Crown has shown toward sites of wāhi tapu significance to Māori. Taihape Māori are no exception. It is manifestly clear that the Crown was supposed to have had an active role in ensuring that sites of wāhi tapu significance to Taihape Māori were not destroyed and desecrated. It is unfortunate that the opposite has occurred, and the desecration and ultimate destruction of Taihape wāhi tapu is an all too prominent feature of the 19th and 20th centuries.

## Purpose of Generic Submissions

2. The generic closing submission are filed for the benefit of all claimants in the Taihape Inquiry District. Counsel wish to emphasise at the outset that this is not to prevent claimants from taking their own positions and presenting their own submissions on this issue.

3. This submission provides a generic overview and position only. Counsel understand that claimant specific closing submissions will address issues raised by individual claims.

4. The analysis that follows will divulge the history of the Crown's disparagement of Taihape Māori wāhi tapu and the often-deliberate denial of kaitiaki relationships that preserved those taonga. Counsel submit that the evidence is clear that upon a dispassionate analysis of the evidence it

[1] Waitangi Tribunal, *Tribunal Statement of Issues*, Wai 2180, #1.4.3, p 58.

will confirm that the Crown failed to uphold its duties and obligations under Te Tiriti o Waitangi, to the detriment and prejudice of Taihape Māori.

**The Evidence**

5. The Tribunal have heard significant evidence from both technical witnesses and Taihape Māori concerning their experiences with Crown policies; practices and Crown agents in relation to the obligation of active protection of wāhi tapu guaranteed by Te Tiriti in Article II. We attach herewith as Appendix "A" a comprehensive list of the evidence on the record for the Tribunals assistance to understand the breadth of evidence that has been tendered for consideration.

6. In counsels' submission wāhi tapu associated with Ngā Hapū o Taihape and their whānau and communities have been impacted detrimentally in a number of different ways and contexts both by way of express policies and legislative practice but also by failures and deliberate omissions on the part of the Crown and its agents to actively protect those taonga. As a result, Taihape Māori have experienced devastating consequences to their ability to exercise authority over urupā; sites of significance and their sacred sites. The denigration of kaitiakitanga over their own wāhi tapu and the continual desecration of wāhi tapu is also a significant feature of the evidence that has been placed before the Tribunal to emphasise how Crown policy is developed and then imposed in breach of the Article II guarantee of tino rangatiratanga

**Te Tiriti Promises**

7. Te Tiriti affirmed Māori customary law in Article II "*te tino rangatiratanga...o ratou taonga katoa*".[2] The Waitangi Tribunal has recognised taonga katoa as including "*all valued customs and possessions*".[3] The Tribunal has previously "*noted that taonga in a metaphorical sense covers a variety of possibilities rather than itemised specifics, or simply items of tangible*

[2] Treaty of Waitangi 1840, Article II.
[3] Waitangi Tribunal *Report of The Waitangi Tribunal on the Te Reo Māori Claim* (Wai 11, 1986) p 20.

*value*".[4] A number of Waitangi Tribunal reports and decisions have affirmed the notion of wāhi tapu being included as taonga within the meaning propounded by Article II of Te Tiriti of Waitangi.[5]

8. Article III of Te Tiriti reinforces the notion that Māori are entitled to the same rights as British subjects and citizens. It is submitted that a basic tenet of citizenship is the right to the protection of personal property, including those things that are of cultural/spiritual significance. It seems that for Māori in general, this right has been overlooked and the level of respect afforded to their wāhi tapu during the 19th and 20th centuries was severely lacking.

9. The definition of wāhi tapu adopted in the Hauraki report included "*those sites of significance which are sacred to the tribe for cultural, spiritual and historical reasons*".[6] In the Te Roroa Report, the Tribunal noted that the term wāhi tapu is an 'umbrella' term and not just applicable to urupā.[7] Wāhi tapu is a fluid concept that can differ from iwi to iwi, hapū to hapū, or region to region. Alex Nathan, a Wai 38 (Te Roroa) claimant, aptly defined wāhi tapu as:[8]

> any place or feature that has special significance to a particular iwi, hapū or whānau can be wāhi tapu but such places may not necessarily be significant to any other group. Hence a narrow definition is not possible. Wāhi tapu cannot be forced into preconceived categories of importance and one group cannot determine what is wāhi tapu to another.

10. In the submission below, we will outline how the Crown was in breach of its duties of active protection, partnership, good faith in the context of its failure to properly protect, preserve and maintain wāhi tapu sites of spiritual and historical significance to Taihape Māori.

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[4] Dr Robert Joseph "Legal Challenges At The Interface Of Māori Custom: Wāhi tapu" (2010 & 2011) Vols 13 & 14 YNZJ p 167.
[5] See Waitangi Tribunal *The Te Roroa Report 1992* (Wai 38, 1992); Waitangi Tribunal *The Hauraki Report VOL III* (Wai 686, 2010) p 964.
[6] Waitangi Tribunal *The Hauraki Report VOL III* (Wai 686, 2010) p 933.
[7] Waitangi Tribunal *The Te Roroa Report 1992* (Wai 38, 1992) p 227.
[8] Waitangi Tribunal *The Te Roroa Report 1992* (Wai 38, 1992) p 227.

**The Importance of Mana and Rangatiratanga**

12. The Meredith Joseph and Gifford report [9] reminded that: aspects of mana and rangatiratanga authority can be personal as well as expressive of authority over a place, people or taonga.

13. Furthermore rangatiratanga and mana include tribal authority and control which includes such actions as the kaitiaki obligation to care for the resources and the people. The report writers emphasised that many of the iwi and hapū of the Rangitīkei area had full authority and control over their waterways; their lands; their resources; their taonga at the time of the signing of Te Tiriti/the Treaty of Waitangi – and for some time afterwards. The mechanisms for the exercise of control included rāhui and tapu which enabled tangata whenua the ability to restrict and control usage.

14. Mana and rangatiratanga were also expressed through customary use such as fishing, physical occupation with community māra, pā, kainga and wāhi tapu; and most importantly, by carrying out whānaungatanga responsibilities by caring for relationships within and between tribal groups.[10]

15. It follows that any definition of wāhi tapu thus must be broad enough in conceptual terms to convey the importance of the connection of the exercise of authority to protect restrict or control the wāhi tapu being protected if the substantive relationship with wāhi tapu is to be protected for Taihape Māori.

16. We contrast such an approach with the kinds of definitions in the Heritage New Zealand Pouhere Taonga Act 2014 which replaced the Historic Places Act 1993. Section 6 defines wāhi tapu as a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense.

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[9] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report.* Wai 2180, #A44, p 129.

[10] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report.* Wai 2180, #A44, p 129.

17. One of the drivers behind the Heritage New Zealand Pouhere Taonga Act was to improve collaboration between agencies and improve integration with the Resource Management Act 1991 ("RMA"). The legislation was not designed to provide authority and control to Māori to protect; restrict or control wāhi tapu. It is the absence of the ability to properly exercise authority to protect their taonga which has been a common complaint of Taihape Māori in this inquiry. In the absence of the ability to exercise authority to protect wāhi tapu there is an abrogation of the active protection obligations to wāhi tapu guaranteed to Māori by virtue of the tino rangatiratanga authority that was preserved for Taihape Māori by the terms of the Treaty itself.

18. The evidence highlights that while understandings of what constitutes a wāhi tapu may vary from iwi to iwi, hapū to hapū and between regions it is clear that for much of the period under consideration, the Crown, through its various agencies, sought to define wāhi tapu without recourse to Taihape Māori. This the claimants maintain is a further denial of the active protection guarantee and the principle of tino rangatiratanga that gave force to that guarantee.

19. It was not until the RMA that Māori were given some scope to express their own definitions and expectations of what was required to maintain kaitaikitanga and authority over wāhi tapu. Even these provisions we say fall short of the kinds of decision-making frameworks that Te Tiriti obligations, and the principle of partnership contemplate.

20. A consistent feature of Crown policy is that Treaty considerations are given no primacy in decision-making processes as compared to other interests. This is a significant denial of tino rangatiratanga and absolute authority preserved to Māori in Te Tiriti and is the starting point to assess the breaches of Te Tiriti that are the gravamen of the claimants' allegations. It is difficult to conceive of a more important matter that is deserving of the full protection of Māori authority than the exercise of that authority over wāhi tapu.

**Desecration, destruction and loss of Wāhi Tapu**

21. Since 1840, the Crown has failed to actively protect the right of Taihape Māori to manage, control and exercise proper ownership over their cultural taonga. The Crown has failed to recognise Taihape Māori as kaitiaki over their wāhi tapu and consequently has failed through its agents, to adequately consult and engage in a meaningful manner with Taihape Māori regarding issues affecting their wāhi tapu.

22. The Crown assumed management, exerted control, and at times complete ownership over Taihape wāhi tapu, by promoting legislation and policy that weakened and undermined the role of Taihape Māori as kaitiaki. The inevitable result of this action was the desecration, destruction and loss of wāhi tapu in the Taihape rohe.

23. The Taihape inquiry boundary contains many wāhi tapu sites. Taihape Māori describe their relationship with wāhi tapu as one based on whakapapa, tikanga and ancestral relationships. They are spiritually vested in the land of the Taihape region, and as such, believe that their relationship with the land is supplementary of the spiritual relationship that they have with their tūpuna.

24. Kaitiakitanga is an inherent duty of all Māori, and rangatiratanga is a concept to which it is inherently linked. Taihape Māori have been greatly impeded in exercising culturally appropriate guardianship over their cultural taonga. This is due to large scale land acquisition by the Crown, and legislative action which has systematically removed their ability to act as kaitiaki over their own wāhi tapu. A lack of rangatiratanga at a whānau, hapū and iwi level has had a hugely detrimental impact on the ability of Taihape Māori to exercise mana whenua in this regard.

25. By way of these closing submissions, we focus in particular on the inadequacy of Crown legislative and policy endeavour pertaining to the protection of wāhi tapu sites that are of importance to Taihape Māori.

26. These submissions will utilise further Tribunal jurisprudence to show the deficiencies in the application of the principles of Te Tiriti by Crown agents,

when dealing with issues affecting sites of wāhi tapu significance. The submissions will also refer to contemporary New Zealand case law in order to demonstrate the failure of New Zealand Courts to properly apply the principles of Te Tiriti, and the provisions of key pieces of legislation introduced to provide protection for wāhi tapu.

**Overview of position regarding Wāhi Tapu**

27. By way of overview, the Taihape Māori position in relation to wāhi tapu is that:

a. In failing to protect wāhi tapu from desecration and destruction, the Crown is in clear breach of the principles of active protection, partnership and good faith and in breach of te tino rangatiratanga recognised in Article II of Te Tiriti o Waitangi;

b. The importance of wāhi tapu to Māori was well known both before and after the Treaty was signed. The Crown undertook in the Treaty to protect taonga but failed to do so;

c. The Crown, through ineffectual legislative enactment and unsuccessful policy endeavour has failed to appropriately protect, preserve and maintain sites of wāhi tapu significance in the Taihape region;

d. Worse, the Crown itself, through Public Works takings, imposition of rates and land alienation, has played an active role in the desecration of wāhi tapu sites of significance to Taihape Māori. In many instances it has cut Taihape Māori off from access to wāhi tapu such as through land which is landlocked which is prevalent in the Taihape inquiry district;

e. The Crown and many settlers had a complete disregard for Taihape Māori notions of spirituality pertaining to wāhi tapu sites of significance. This included ignorance of the associated tikanga or protocol that was expected of those who entered or came into contact with wāhi tapu;

f. Consultation with Taihape Māori by the Crown regarding the proposed development, or in many cases destruction of wāhi tapu sites in the Taihape region, has consistently been poor and severely lacking the level of interaction or engagement propounded by the provisions of Te Tiriti o Waitangi;

g. The Crown did not implement sufficient deterrent in any form that has effectively ensured that sites of Taihape wāhi tapu have been protected. This has meant that the ability of Taihape Māori to exercise rangatiratanga and kaitiakitanga over their own tribal taonga has been severely diminished.

**Crown's Position**

28. The Crown response to the TSOI was outlined in its Statement of Response.

29. The Crown acknowledges that Article II of the Treaty requires it to take steps that are reasonable in the prevailing circumstances to actively protect the taonga of Taihape Māori. This requires a careful assessment of what the taonga of Taihape Māori are they say. The Crown has also conceded that taonga may include particular wāhi tapu sites.[11]

30. Whether the Crown has fulfilled its Treaty obligations in respect of the protection and preservation of taonga the evidence must be assessed, the Crown further asserts, having regard to the following considerations:[12]

a. Notwithstanding any protective measures it might take, the Crown cannot guarantee the protection of the taonga of Taihape Māori;

b. Many cultural heritage places and taonga in New Zealand may be held on lands not owned by Māori;

[11] Wai 2180, #3.3.1, p 406.
[12] Wai 2180, #3.3.1, p 407.

c. The Crown is reliant on Māori identifying where wāhi tapu sites are and on members of the public reporting when wāhi tapu or archaeological sites are found; and

d. The Crown is required to consider and balance a complex range of other interests, including for example the interests of private land owners, and the community as a whole.

31. The claimants maintain that once that assessment has been made the Tribunal will still conclude that the Crown's Treaty obligations have not been met with respect to wāhi tapu.

**Crown Concessions**

32. The Crown has made the following, very limited, concession:[13]

> The Crown has accepted in a previous inquiry that the protections accorded Māori under Article II of the Treaty, with respect to the question of sufficiency, extend to the retention of mahinga kai and non-agrarian resources, wāhi tapu and sites of cultural importance.

33. In the *Hauraki Report,*[14] the Crown made a number of concessions in regard to wāhi tapu contained in the Hauraki rohe. This included acceptance of the fact that the Crown was solely responsible for failings in legislation relating to the protection of wāhi tapu. The Crown also acknowledged that it had a fiduciary obligation to set aside reserves for urupā and wāhi tapu when Māori made such requests. It was accepted that in many cases, this did not happen.[15]

34. The Crown in this instance has instead tried to reinforce the protections contained in various pieces of legislation from the 19th and 20th centuries, even though, relevant Tribunal jurisprudence and contemporary case law effectively demonstrates the numerous failings in legislation mentioned.

[13] Waitangi Tribunal, Tribunal Statement of Issues, Wai 2180, #1.4.3, p 58.
[14] Waitangi Tribunal *The Hauraki Report VOL III* (Wai 686, 2010).
[15] Waitangi Tribunal *The Hauraki Report VOL III* (Wai 686, 2010) p 964.

35. In this instance we submit that this extends to the failure of the Crown to properly incorporate principles of Te Tiriti into legislation that was related to the protection of wāhi tapu throughout the 19th and 20th centuries.

**Tribunal Statement of Issues**

36. The Tribunal has identified the following issues relating to wāhi tapu:[16]

a. How has the Crown provided for the protection of wāhi tapu through its legislation, policies and practices in the Taihape inquiry district? Has this protection been adequate and has it recognised the tino rangatiratanga of Taihape Māori?

b. To what extent has the Crown consulted Taihape Māori on decisions regarding wāhi tapu and taken into account any concerns raised by Taihape Māori?

c. What impacts have Crown legislation relating to land alienation, land management and use, resource management and environmental degradation, and riparian rights, policies and practices, had for the wāhi tapu of Taihape Māori?

**Tribunal Jurisprudence/Relevant Case Law**

37. The Tribunal has expressed the following relevant principles in its various judgments:

a. The principle of active protection includes the assurance that the Crown would protect existing rights in the utmost good faith[17] and to the fullest practicable extent.[18] This principle applies to non-kin based Māori communities.[19] The concept of taonga includes all valued resources and intangible cultural assets which are highly

[16] Wai 2180, #1.4.3, paragraph 21, p 58.
[17] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR p 715.
[18] Waitangi Tribunal *Turanga Tribunal* (Wai 814, 2004), Vol 1, p 120.
[19] Whānau Waipareira Report, 1998.

valued by Māori. [20] The Crown is to actively protect tino rangatiratanga which includes management of resources and other taonga according to Māori cultural preferences.[21]

b. The principle of partnership prescribes that Māori and the Crown should act honourably, reasonably and in good faith towards one another because of their special relationship created by Te Tiriti ō Waitangi.[22] Moreover, for this partnership to work, the Crown *must* deal openly and honestly with Māori.[23]

c. The principle of reciprocity is a fundamental cornerstone of partnership: exchanges required within a functioning partnership should involve benefits that are mutual, with advantages flowing in both directions.[24]

d. The principle of consultation sets out that the Crown has a duty to consult Māori. District hapū/iwi should be consulted with respect to local issues.[25] A failure to consult is likely to result in an affront to Māori.[26]

38. The Te Paparahi o Te Raki Tribunal, in the Stage One Report found that:

a. Te Raki rangatira did not cede their sovereignty to make and enforce law over their people or their territories when they signed Te Tiriti in 1840.[27] They agreed to share power and authority with Britain and for the Governor to have authority to control British

[20] Waitangi Tribunal, *The Orakei Claim* (Wai 3rd ed, 1996) p 147.
[21] Waitangi Tribunal, *Radio Spectrum Management and Development Final (1999)*, Wellington, page51; Waitangi Tribunal *Muriwhenua Fishing Claim* (1988), Wellington, p 183.
[22] *NZ Māori Council v Attorney-General* [1994] 1 NZLR 513 (Broadcasting Assets); *NZ Māori Council v Attorney-General* [1987] 1 NZLR 641 (Lands).
[23] Waitangi Tribunal *Whanganui Whenua* (Wai 903, 2015) p 156.
[24] Waitangi Tribunal *Whanganui Whenua* (Wai 903, 2015) p 156.
[25] Waitangi Tribunal, *The Mangonui Sewage Report*, (Wai 17, 1988) p 187.
[26] Waitangi Tribunal *The Manukau Report* (Wai 8, 2nd ed, 1989) p 87.
[27] Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 529.

subjects in New Zealand, to keep the peace and to protect Māori interests.[28]

39. In the Te Roroa Inquiry report, issued in 1992, the Tribunal held that:[29]

> Wāhi tapu are taonga of Māori, acknowledged as such in article 2 of the Treaty. The role of the department and Historic Places Trust in the "partnership" is not a decision-making role or being "included" in what is not theirs. Rather, it is to assist Te Roroa by the provision of services and advice when they are sought, to enable them to protect and care for the wāhi tapu.

40. The Te Roroa Tribunal found that the Crown had breached its Treaty obligations by:[30]

a. failure to exclude wāhi tapu from sale contrary to the intentions of tangata whenua.

b. failure to enforce the law in respect of acts of desecration of wāhi tapu and indignities to human remains.

c. denial of the rights of tangata whenua to control and protect wāhi tapu.

d. failure to sufficiently respect the spiritual and cultural values of tangata whenua in the use and management of its land, forests, and fisheries.

e. failure to provide adequate means for the effective participation of tangata whenua in the administration of its conservation estate.

[28] Waitangi Tribunal, *He Whakaputanga me te Tiriti*, page 529.
[29] Waitangi Tribunal *The Te Roroa Report 1992* (Wai 38, 1992) page 254.
[30] Waitangi Tribunal *The Te Roroa Report 1992* (Wai 38, 1992) page 291-292.

41. The Te Roroa Tribunal recommended that the Crown:[31]

> re-affirms the traditional and Treaty rights of tangata whenua to control and protect their own wāhi tapu and requires the Department of Conservation and other of its agents concerned in the management of national and cultural resources to give practical effect to this commitment.

42. In the Hauraki inquiry the Tribunal stated that:[32]

> While acknowledging that the legislative protection on offer today might adequately protect both taonga and wāhi tapu, protection was not adequate for much of the nineteenth and twentieth centuries. …[R]eal prejudice has resulted from the desecration, modification, and even destruction of wāhi tapu sites. While the Crown may not have been directly responsible for all the loss and destruction, much of which resulted from the loss of control of land and the rise of private, non-Māori landholding, the Crown has itself acknowledged that it was responsible for failings in the legislation. We say these failings allowed the destruction of a cultural legacy to continue without prosecution. Moreover, due to the loss of so much land (mainly th[r]ough Native Land Court processes and Crown purchasing), protection was especially required from the dominant Treaty partner for the remaining sites. As the Crown has acknowledged, where Māori requested reserves to be set aside for urupā or wāhi tapu, its fiduciary obligations required the Crown do so. But often it did not happen.
>
> These failings were in breach of both articles 2 and 3 of the Treaty. Article 2 explicitly promised, in the Māori version, 'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa', that is, in the English version 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'. Clearly, wāhi tapu and taonga are covered by article 2. Article 3 promises to Māori the rights and privileges of all British citizens. A basic tenet of citizenship is the right to protect property and chattels, including items of great personal or cultural significance. But Māori spiritual sites and objects

[31] Waitangi Tribunal *The Te Roroa Report 1992* (Wai 38, 1992) page 294.
[32] Waitangi Tribunal *The Hauraki Report VOL III* (Wai 686, 2010) p 964.

> were usually treated as less important than the rights of private property owners.

43. The Manukau Tribunal found that wāhi tapu were "*not adequately protected and that ownership and control of wāhi tapu are not adequately secured to the tribes, and that these things are contrary to the Treaty.*"[33]

44. In a brief of evidence provided by Archaeologist, Ian Lawlor, during the Te Roroa inquiry, he stated:[34]

> An examination of various enactments, case law, the Treaty of Waitangi 1840 and the findings of Tribunals, indicates that Māori do not have prior authority over wāhi tapu and other taonga when decisions are made about their use, even when they are wāhi tapu and considered to be 'ancestral land' with significant cultural and spiritual associations. This is the case even though Article 2 of the Treaty of Waitangi 1840 guarantees te iwi Māori "te tino rangatiratanga o o ratou wenua o ratou kainga o ratou taonga katoa" (eg. cultural heritage).

45. We submit that the same failures and denial of rights have happened in Taihape and are equally breaches of the rights guaranteed by the Treaty. They have been denied both rangatiratanga and kaitiakitanga over their wāhi tapu, which has left them disenfranchised and spiritually disconnected.

46. The Crown in this inquiry has not acknowledged failings in the legislation or that it owed fiduciary duties to set aside wāhi tapu where requested. We submit that those concessions were properly made in the *Hauraki Report* and are equally applicable in this inquiry.

47. In *Mason-Riseborough v Matamata-Piako District Council,* [35] the Environment Court entered into discussion regarding the applicability of Treaty of Waitangi Principles in the context of a claim by Hauraki Iwi that a proposed Telecom cell site project on Mt Te Aroha, should not progress

[33] Waitangi Tribunal *Manakau Report* (Wai 8, 1985) p 98.
[34] Statement of Ian Lawlor, Wāhi tapu Protection and Manawhenua and Archaeology, Wai 38, #D22(b).
[35] *Mason-Riseborough v Matamata-Piako District Council* [1997] 4 ELRNZ 31.

because of the status of the mountain as wāhi tapu. In the judgement, the Environment Court took into account key principles of the Treaty of Waitangi and found:[36]

> that the relevant principles included the obligation to recognise tino rangatiratanga which includes management of resources and other taonga according to Māori cultural preference, and also the obligation of active protection.

**International Law and the protection of sites of historical, spiritual and religious significance to Māori**

48. The United Nations Declaration on the Rights of Indigenous People (UNDRIP), affords a number of key protections to sites of religious significance, customary importance and historical relevance. Although New Zealand has not officially ratified UNDRIP, it has endorsed it as aspirational.[37] It is submitted that the following provisions of UNDRIP are directly applicable in this instance.

49. Article 2 of UNDRIP states:[38]

> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

50. Article 2 essentially confirms that in exercising kaitiakitanga of their wāhi tapu, which are sites that define their origin and identity that Māori are to be free from any kind of discrimination.

[36] Jacinta Ruru and Janet Stephenson "Wāhi tapu and the Law" (2004) NZLJ 57 at p 59.
[37] Laura McKay "The United Nations Declaration on Indigenous Peoples; a step forward or two back" (2013) 117 NZPILJ.
[38] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 2.

51. Article 3 of UNDRIP states:[39]

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

52. Article 3 confirms that Māori have the right to determine their own cultural development which includes the right to develop policies to protect their wāhi tapu in a changing environment.

53. Article 4 of UNDRIP states:[40]

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

54. Article 4 confirms that Māori when exercising their right to self-determination have the right to manage internal and local affairs including the right to manage wāhi tapu located within their rohe.

55. Article 8 of UNDRIP states:[41]

    a. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

    b. States shall provide effective mechanisms for prevention of, and redress for:

        a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

[39] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 3.
[40] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 4.
[41] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 8.

b. Any action which has the aim or effect of dispossessing them of their lands, territories, or resources;

c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

d. Any form of forced assimilation or integration;

e. Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

56. Article 8 confirms that Māori have the right not to be subjected to destruction of their culture. Wāhi tapu is a significant part of Māori culture and any desecration of wāhi tapu ultimately leads to a diminishment of Māori culture. This is particularly apt when wāhi tapu becomes lost to living memory due to the failure of the Crown to assist Māori to protect them. Further, the Crown has failed to provide effective mechanisms for prevention of, and redress for the legislative regime which had the effect of dispossessing Māori of their wāhi tapu.

57. Article 11 of UNDRIP states:[42]

> Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

58. Article 12 of UNDRIP holds that:[43]

> Indigenous peoples have...the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

[42] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 11.
[43] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 12.

59. Articles 11 and 12, directly reinforce notions of active protection and the associated notions of kaitakitanga and rangatiratanga that are reinforced in Te Tiriti o Waitangi.

60. Minister for Māori Development Nanaia Mahuta announced in March 2019 that the Government would develop a plan of action to drive and measure New Zealand's progress towards the aspirations of the United Nations Declaration on the Rights of Indigenous Peoples.[44] These aspirations have not culminated in any measures to protect wāhi tapu. The lack of progress by the Crown to implement measures to protect wāhi tapu, or offer redress for past desecration of, or limited access to, wāhi tapu is a continuing breach of the Crowns duties of active protection. This is particularly so, in instances where wāhi tapu sites are located on landlocked lands in this district.

**Issue 21(1)**

**How has the Crown provided for the protection of wāhi tapu through its legislation, policies and practices in the Taihape inquiry district? Has this protection been adequate and has it recognised the tino rangatiratanga of Taihape Māori?**

61. The protection of wāhi tapu was largely limited to the protection of cemeteries until the passing of the historic places legislation in 1954.[45] The Crown provided some protection to urupā, as long as the urupā could be understood as similar to European cemeteries. This involved small plots of land allocated for burials. Larger burial areas were ignored.[46] The Māori Land Administration Act 1900 permitted the Native Land Court to set aside inalienable reserves on Māori owned land for urupā. Three years later,

[44] The Declaration Plan, Ministry of Maori Development, https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples

[45] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 182.

[46] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 182.

section 11 of the Māori Councils Amendment Act 1903 made it an offence for:[47]

> Every person who knowingly and wantonly without due and lawful authority trespasses on or desecrates or interferes in any manner with any Māori grave, cemetery, burial-cave, or place of sepulchre.

62. Crown attempts to properly protect and maintain sites of wāhi tapu significance to Taihape Māori have on the whole, been ineffectual. Although legislative provisions exist and have previously existed, that directly refer to and reinforce the cultural importance of wāhi tapu to Māori, these have failed to ensure that such sites within the Taihape rohe are properly protected and preserved. There are numerous occasions of Māori having to litigate of their own volition, purely to ensure that sites of wāhi tapu significance are afforded proper protection and recognition. This demonstrates that Crown policy and legislative initiative in relation to wāhi tapu has often failed.[48]

63. The Crowns' legislative regime has restricted Taihape Māori from being able to protect their wāhi tapu. The following is a non-exhaustive list of legislative enactments which have hindered Taihape Māori ability to protect wāhi tapu:

a. Public Works Act 1864 (and its amendments);

b. Criminal Code 1893;

c. Native Land Act 1909 and 1931;

d. Historic Places Act 1954;

e. Town and Country Planning Act 1977;

[47] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 182,183.

[48] See *Te Runanga o Ati Awa ki Whakarongotai Inc and Takamore Trustees v Kapiti District Counci*l [2002] 8 ELRNZ 265; *Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433; [2003] 3 NZLR 496 and *Te Runanga o Ati Awa ki Whakarongotai Inc and Takamore Trustees & Anor v Kapiti District Counci*l [2003] NZEnvC 50; *Mason-Riseborough v Matamata-Piako District Council* [1997] 4 ELRNZ 31; *Heta & Ors v Bay of Plenty Regional Council* [2000] NZEnvC 93.

f. Conservation Act 1987; and

g. Resource Management Act 1991.

64. Through these legislative regimes, the Crown delegated its powers of management of land and resources, including wāhi tapu to local Government and environmental authorities including the Department of Conservation. These authorities have not sufficiently recognised the importance of wāhi tapu to Taihape Māori resulting in the wide-spread desecration of wāhi tapu in and around the Taihape inquiry district.

*Technical Evidence*

65. Armstrong, O'Malley and Stirling say that "*the Crown made no attempt to protect wāhi tapu in the nineteenth century*" [49] despite a widespread knowledge among Pākehā of the importance and sanctity of wāhi tapu. "*The Crown did not recognise that it had a Treaty-based role to provide such protection until the end of the 1980s*."[50]

> The opportunity for Māori to protect wāhi tapu was greater on land they retained. But essentially Māori were required to look after the wāhi tapu themselves with little Crown support. In this they faced serious obstacles. Wāhi tapu and urupā were often located on isolated blocks in the midst of Pakeha-owned land, and frequently lacked ready access. Moreover, individualisation of title eroded hapū stewardship of these places, which made active and effective protection even more difficult. Māori communities often lacked the resources or ability to monitor and guard their sites against widespread desecration and looting. And even in respect of wāhi tapu on their own land, Māori continued for much of the period to face the issue of rates, the need to exploit minerals for the 'national good', tensions between their own desire to exploit land while at the same time protecting wāhi tapu, and urban and rural development which intruded on their sacred places.
>
> ...

[49] Armstrong, O'Malley, Stirling Wai 1040, #A14, p 2.
[50] Armstrong, O'Malley, Stirling, Wai 1040, #A14, p 88

> It was not until as recently as 1993 that wāhi tapu began to receive anything like comparable levels of recognition and protection as provided for Pakeha heritage sites. The situation today remains less than satisfactory, and key decision-making power essentially remains in Pakeha hands.

66. The evidence suggests that wāhi tapu and urupā were located in every part of the district, with a particular concentration near settled areas.[51] A significant number of these wāhi tapu sites were no doubt included in land sold to the Crown and third parties. The Māori vendors may have assumed that their sacred sites would remain undisturbed regardless of the legal status of the land.[52]

67. The level of awareness amongst Pākehā in regard to the existence of sites of wāhi tapu significance to Māori, can be demonstrated through reference to a deed of sale that dates back to 1858. Crown agents often used the promise of 'reserves' or protection of sacred sites as a way to secure a sale. In 1858 the Okaihau No. 1 block in the Te Paparahi o te Raki district was being prepared for sale. A plan which accompanied the deed of sale highlighted reserves and wāhi tapu and stated that those sites were excluded from the sale.[53] Although plans for such reserves almost always failed following the sale, this case demonstrates the level of awareness that Crown agents had regarding sites of spiritual significance to Māori.

68. It is important to trace the Crown's protection of wāhi tapu from 1840 as it would give the Tribunal a better picture of the Crowns' understanding of wāhi tapu by the time they began interacting with Taihape Māori in the 1870s. Armstrong, O'Malley and Armstrong provide apt commentary regarding the general failings of the Crown after 1840, to provide a proper level of respect for Māori customary concepts of tikanga, wāhi tapu and taonga:[54]

[51] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970,* Wai 2180, #A45, p 350.
[52] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970,* Wai 2180, #A45, p 350.
[53] Innes, Wai 1040, #A4, p 18.
[54] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 101.

> Scant regard was paid to the protection of wāhi tapu and urupā by the Crown during the period of extensive land sales after 1840. There is no evidence that Crown officials considered it necessary to ensure that wāhi tapu were reserved from sale….the Crown objective was to acquire as much land as possible, as quickly as possible…..the overarching assimilationist tendencies present in virtually every aspect of Crown policy from 1840 would tend to further mitigate against any wide-ranging recognition of wāhi tapu and their place in Māori culture and spiritual belief.

69. They also refer to a report titled *Northland Public Works* authored by Peter McBurney. His findings detail the disastrous effects that the passing of the Public Works Act 1864 into law, had on sites of wāhi tapu significance:[55]

> the Public Works Act 1864 (passed at a time when Māori were not represented in Parliament) was the first legislative measure permitting the Government to take both Māori customary and Crown granted land for public works purposes. It offered no protection for wāhi tapu. Although some felt that the measure was 'manifestly unjust' and flew in the face of the Treaty and established legal principles of the time – and might result in the taking of urupā – Ministers insisted that colonizing objectives must come first. Premier Weld rejected concerns over urupā, telling Parliament that the Treaty gave sovereign rights to the Crown. These included rights 'even of taking a road through a graveyard.

70. The Public Works Act 1864 allowed the Crown to take Māori land for public works. It did not protect wāhi tapu. Destruction of urupā on compulsorily acquired land was a common complaint.[56]

71. The Crown exhibited no real regard to the protection of wāhi tapu during the period of extensive Crown land acquisition in the Mōkai Pātea district between the 1870s and c1900. Armstrong goes further to state:[57]

> There is no evidence that Crown officials considered it necessary to ensure that wāhi tapu (or even historical urupā) were reserved from sale.

[55] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 110.
[56] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 110.
[57] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 350.

> The Crown's overarching objective was to acquire as much as it could as quickly as possible, and even ensuring that Maori retained sufficient for their present and future economic needs was not a high priority, if it was considered at all.

72. Mōkai Pātea Māori would not have anticipated the massive bush clearance and intense pastoral and agricultural activity which occurred in the district from the 1880s, resulting in a major transformation of the landscape and a range of adverse effects on wāhi tapu.[58] The protection of wāhi tapu on settler-owned land depended on the cooperation of landowners, and this was not always forthcoming.[59]

73. The Māori Land Administration Act 1900 made provision for the creation of inalienable urupā reserves on Māori land...but the onus was placed on Māori themselves to identify urupā for reservation. This assumed that Māori were prepared to disclose the precise locations of urupā at a time when grave-robbing and fossicking were not infrequent outcomes.[60] The Māori Councils Act 1900 assigned responsibility to Māori Councils for the protection and control of burial grounds (other than public cemeteries) and required Councils to fence, regulate and manage urupā.[61]

74. The Māori Antiquities Act 1901 was, "*directed at controlling the export of artefacts, not their removal from wāhi tapu and the desecration of sites*."[62]

75. Section 232 of the Native Land Act 1909 provided for the reservation of Māori land owned by more than 10 owners for their common use as burial ground or 'place of historical or scenic interest.'

76. Until 1924 wāhi tapu and urupā were subject to rates. The Native Land Rating Act 1924 exempted some, but not all, urupā but no other wāhi tapu.[63] The Native Lands Acts 1909 and 1931 and the Native Purposes Acts 1932 and 1937 did make provision for reservations of burial grounds

[58] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 350, 351.
[59] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 351.
[60] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 354.
[61] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 354.
[62] Armstrong, O'Malley, Stirling, Wai 1040, #A014, page104.
[63] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 112.

or places of historical or scenic interest on Māori land but not on European land.[64]

77. In 1941, the question of whether urupā on Pākeha-owned land should come under s5 of the Native Purposes Act 1937, which provided that on the recommendation of the Native Land Court or a Māori Land Board the Governor could reserve any Māori freehold land as a ...'place of historical or scenic interest.[65] It was debated by officials, who agreed that it was not wise policy to give the Native Land Court jurisdiction over urupā on settler-owned land, except in cases where the landowner consented. Urupā on European land therefore remained largely outside the scope of any protective mechanisms.[66]

78. The Māori Social and Economic Advancement Act 1945 provided for tribal executives to make by-laws protecting burial grounds. However, the lack of resources and, in many cases, lack of legal access to landlocked areas, made the provisions ineffective.[67] Section 439 of the Māori Affairs Act 1953 permitted the Governor on the recommendation of the Māori Land Court, to set apart as inalienable reserves any Māori freehold land as a burial ground or a place of 'historical and scenic interest.[68]. This became the "*most preferred mechanism used by Māori to protect wāhi tapu on their own land, principally because it had the advantage of limiting public disclosure of information about the site*".[69]

79. A meeting was held in 1952 which led to the Historic Places Act 1954. No Māori organisation was invited. The Historic Places Trust was overwhelmingly Eurocentric in its approach, and Māori representation was minimal.[70] Even into the 1970s, there was little protection for or interest in wāhi tapu. Armstrong, O'Malley and Stirling quote Tipene O'Regan, who was the Māori member of the Historic Places Trust saying it was "*easier to*

[64] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 116-117.
[65] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 357.
[66] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 357.
[67] Armstrong, O'Malley, Stirling, Wai 1040, #A014, page117, see also Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 358.
[68] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 359.
[69] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 359.
[70] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 359.

*protect an ancestral rubbish dump than a tuahu or a waka landing site or a maunga whakatauaki*."[71] According to a long-time Historic Places Trust Board member Janet Davidson, the Trust, at the time of its inception and for a considerable period thereafter, was 'a largely monocultural organisation with token Māori representation.[72] Whilst there was limited Māori representation *many Maori sites were destroyed*.[73] Later evidence seems to confirm that the Historic Places Trust paid little attention to Māori sites in the Mōkai Pātea district during earlier periods.[74]

80. In May 1975 the planner responsible for preparing the Rangitikei County District Scheme wrote to the central office of the Historic Places Trust in Wellington advising that each council was required to have a register of places or sites to be protected. The planner requested any background information on the sites presently listed and whether they had been designated as Historic Places by the Trust.[75] The reply from the Trust indicates how unprepared it was at that time to assist local authorities, with the only information they were able to provide being about European buildings.[76] There was nothing about specific Māori traditional sites on State Forest Park land in the Forest Service's first management plans for Ruahine, Kaweka and Kaimanawa Forest Parks that were prepared in the early and mid-1970s.[77]

*Town and County Planning Act 1977*

81. Under the Town and County Planning Act 1977 the Rangitikei County Council undertook their own assessment, and compiled a Register of Objects and Places of Historic or Scientific Interest or Natural Beauty. Although not a requirement of the 1977 Act, it was standard practice promoted by the Ministry of Works and Development to compile a Register

[71] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 131.
[72] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 360.
[73] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 360.
[74] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 360.
[75] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 153.
[76] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 153.
[77] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 154.

in order to meet statutory requirements for district schemes to provide for the preservation of places of historical and other special interest.[78] Eighteen sites of particular Māori interest within the Taihape Inquiry District were listed.[79] Inclusion in the Register meant that:[80]

> No person shall wilfully destroy, remove, damage or reconstruct, alter or add to any object or place registered by the Council as aforesaid, except that any such person claiming to be injuriously affected by such registration may make application to the Council for cancellation or modification of the registration. Such application shall be deemed to be a conditional use application, and the procedure set out in the regulations for conditional uses should be followed.

82. Despite the protection offered, the ability to remove protection of sites of special interest remained with the Council:[81]

> In giving or not giving its approval to the application, the Council shall have regard to the classification of the object or place in the Register, and may in enquiring into the merits therefore invite such persons and bodies as it considers have a greater interest than the public in general, together with the owner or occupier of the land, to advance their views in person at a meeting of the Council or one of its Committee.

83. Taihape Māori ability to exert tino rangatiratanga or be effective in this process was non-existent. Wāhi tapu would therefore be more vulnerable to desecration given that the site was known, and the ability to protect it would have been outweighed by any commercial gain.

[78] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 172.
[79] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 173.
[80] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 176.
[81] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 176, 177.

*The Historic Places Act 1980*

84. The Historic Places Act 1980 continued the passive protection and registration measures introduced in 1975. It also introduced a new category of heritage site, to be known as a traditional site. In 1988 a Ministerial review of Historic Places legislation called the 1980 provision introducing the category of 'traditional sites' "*an important first step in recognising the special concerns and heritage of the tangata whenua in historical sites.*"[82]

85. The Trust was required to notify the Minster of Māori Affairs as well as the local authority of the traditional site. The Minister of Māori affairs could then decide if a site should be declared to be a Māori Reservation. The local authority was required "to take into account the desirability" of protecting the site, without specifying what this protection might be.[83] In 1984, just eight Māori historical sites were recorded in Kiwitea County, seven of which had been identified at the confluence of the Rangitikei and Kawhatau Rivers during the sole systematic survey carried out in 1975-1976. None of these sites were given statutory recognition by being recorded in the Historic Places Trust's register of sites, or by being registered as traditional sites.[84] In a sites description in the Rangitikei Country inventory it was stated:[85]

> Few site surveys have been carried out in Rangitikei County, so the distribution of sites shown in Fig 1. Is to some extent a reflection of survey bias rather than trust site distribution... Many settlements are known to have existed along the Rangitikei in the mid-19th century. With further site surveying more sites can be expected along the major rivers and their tributaries, and in the coastal dunes.[86]

[82] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 143.
[83] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 155.
[84] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 158.
[85] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 158.
[86] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 158.

86. In a 1985 inventory of historic places, 17 Māori historical sites within the Taihape Inquiry District were recorded in the Historic Places Trust's Rangitikei County inventory. Two gun-fighter pā were identified, being the Waiu pa on Waiouru Army Training Area land, and another on the Napier-Taihape Road. No sites were given statutory recognition by being recorded in the Historic Places Trust's register of sites, or being registered as traditional sites.[87] The overall feature in this cataloguing of historic sites is how sparse was the knowledge held by Crown and local authority agencies about Māori places of historic interest.[88] Given this sparse knowledge, we can only conclude that protection of wāhi tapu was minimal.[89]

*The Public Works Act 1981*

87. The Public Works Act 1981 was deficient in provisions to protect Māori interests. Cathy Marr states that the Act 'failed to include provisions that actively protected Māori interests'. There were no specific provisions for wāhi tapu present (other than urupā).[90] Even with this, Johnny Edmonds, an employee of the Department of Survey and Land Information (DOSLI) had this to say:[91]

> current legislation does not appear to provide for the protection of such sites unless they happen to fulfil archaeological site requirements and effectively receive protection by virtue of their scientific rather than their Māori value

*The Conservation Act 1987*

88. The Conservation Act 1987 was the first measure to contain a "Treaty Clause". [92] However the Department of Conservation adopted a contradictory approach which "*acknowledged that wāhi tapu were a matter*

[87] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 159.
[88] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 159.
[89] Alexander, *Environment Issues Report and Resource Management in Taihape Inquiry District, 1970s to 2010*, Wai 2180, #A38, p 159.
[90] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 111.
[91] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 144.
[92] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 151.

*for Māori definition and control*" but wanted to develop a "*partnership model and joint management process*".[93] When the Crown was considering changes to resource management and historic places legislation in the late 1980s it also began to considering the options for more comprehensive protection of wāhi tapu. A number of committees were set up to coordinate this activity including an interdepartmental 'wāhi tapu group'.[94] The group recommended the following principles:[95]

a. legislation should give effect to the Treaty of Waitangi by requiring decision-makers to actively protect wāhi tapu;

b. legislation should recognise/reflect that the protection of wāhi tapu is crucial to cultural survival;

c. tangata whenua have responsibility for and control over their own heritage;

d. protection and identification of wāhi tapu be carried out in accordance with Māori process principles;

e. those wāhi tapu that are identified by iwi to be 'sacrosanct' should be preserved and protected in perpetuity.

89. However "*the resulting legislation [the Resource Management Act 1991 and the Historic Places Act 1993] did not fully reflect these recommendations, or the philosophy which underpinned them*."[96]

90. The Manukau Tribunal had real doubts that the Historic Places Act 1980 gave proper protection to wāhi tapu[97]. "*Bluntly put, there is one standard*

[93] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 153.
[94] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 179.
[95] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 179-180.
[96] Armstrong, O'Malley, Stirling, Wai 1040, #A014, p 181.
[97] Waitangi Tribunal *Manakau Report* (Wai 8, 1985) p 61.

*for sites of significance to New Zealanders as a whole, and another lesser standard for sites of significance to Māori people*"[98].

91. A 1996 report paper commissioned by the Parliamentary Commissioner for the Environment, at the time Helen Hughes. In the report, Ms Hughes identifies a number of "*major deficiencies in the present system in respect of Māori heritage issues*". These were based on issues that had arisen during the Ngunguru Sandspit wāhi tapu issue and included:[99]

a. A lack of coordination between statutory agencies involved in the management of historic and cultural heritage (the Historic Places Trust, Department of Conservation and local bodies), and between them and local organisations;

b. A lack of resources for the Historic Places Trust to actively assist Māori to protect wāhi tapu and taonga;

c. The limited-decision making ability of Māori organisations;

d. The inadequacy of the Historic Places Act when faced with Māori values associated with archaeological sites.

e. A potential gap between the archaeological site provisions of the Historic Places Act and the Resource Management Act when local bodies fail to provide for the protection of sites.

92. They further state that:[100]

> The report was particularly critical of the HPT – which was said to be deficient in its treatment of Māori issues – a 'ranking' of sites according to perceived 'importance' and the failure of the present law to provide for the confidentiality of information. A number of recommendations were made, including the development of options for addressing 'systemic problems in managing Māori heritage sites and increased resourcing.

[98] Waitangi Tribunal *Manakau Report* (Wai 8, 1985) p 62.
[99] Armstrong, O'Malley, Stirling, Wai 1040, #A014 p 201-202.
[100] Armstrong, O'Malley, Stirling, Wai 1040, #A014 at p 202.

93. In relation to tāonga works and intellectual property, the Wai 262 Tribunal found that:[101]

> Although the RMA represented a significant step forward towards the end of last century in making room for the Māori voice in environmental management, much of its potential remains disappointingly unrealised. In particular, the Act has failed to deliver any iwi control of iconic taonga within their environment, despite the existence of the section 33 transfer power and the section 188 heritage protection authority option. Nor has it even delivered an effective wide-ranging model for partnership via the section 36B joint management provision.

94. The Resource Management Act was also clearly failing to assist Māori kaitiakitanga relationships with the Environment. The Wai 262 Tribunal concluded that:[102]

> Nearly 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise. With central government stepping back from the national leadership role envisaged in the Act, interpreting and implementing the legislation has fallen mainly to local authorities. Very few have chosen to use the available mechanisms for delegating powers to iwi or sharing control. Between 1991 and 2010, not a single section 33 delegation of powers or functions to iwi occurred...for the most part they remain in the role of reactive consultees.

95. There had been instances where greater kaitiaki control, partnership or influence had been achieved such as the Ngāti Porou-Crown Deed of Agreement, the joint management agreement between Ngāti Tuwharetoa and the Taupō District Council or the Waikato Tainui co-governance of the Waikato River with local authorities and government agencies.[103] However,

[101] Waitangi Tribunal *Ko Aotearoa Tenei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) p 116.
[102] Waitangi Tribunal *Ko Aotearoa Tenei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) p 284 - 285.
[103] Waitangi Tribunal *Ko Aotearoa Tenei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) p 285.

they had largely arisen through the Treaty settlement process or customary rights claims:[104]

> They have not been achieved through the normal operations of the RMA, even though the Act provides for exactly this kind of kaitiaki partnership and control.

96. The Tribunal noted the frustrations of the RMA process given that the Crown had acknowledged that sharing or delegating powers to iwi need not be contingent on historical grievances or proof of customary title, rather the kaitiaki relationship with the tāonga.[105] The Wai 262 Tribunal went on to say that it:[106]

> ...failed to see why Māori should have to deplete their treaty settlement packages in order to assert this – especially when the RMLR (Resource Management Law Reform Project) process initially promised considerable statutory protection for kaitiaki interests in mātauranga Māori and tāonga Māori.

97. The Wai 262 Tribunal then went on to recommend that the RMA regime be reformed, so that those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where justified. Specifically:[107]

a. that the RMA be amended to provide for the development of enhanced iwi resource management plans, which were to be developed by iwi in consultation with local authorities;

b. that the RMAs existing mechanisms for delegation, transfer of powers, and joint management be amended to remove unnecessary barriers to their use;

[104] Waitangi Tribunal *Ko Aotearoa Tenei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) p 285.
[105] Waitangi Tribunal *Ko Aotearoa Tenei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) p 285.
[106] Waitangi Tribunal *Ko Aotearoa Tenei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) p 285.
[107] Waitangi Tribunal *Ko Aotearoa Tenei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) p 286.

c. that a commitment be made to building Māori capacity to participate in RMA processes and in the management of tāonga; and

d. that a national policy statement on Maori participation in resource management processes be developed.

98. As will be noted in the submissions under issue 21 (2) below, the RMA regime still does not compel those who have power under the RMA to engage with kaitiaki in order to deliver control, partnership, and influence over taonga.

99. The Te Roroa Tribunal was also critical of the Resource Management Act:[108]

a. The requirement that a heritage protection authority be a body corporate is contrary to traditional Māori concepts. A 'place' requiring protection for Māori is likely to relate to a community or hapū rather than an iwi. The cultural focus of such a community will be a marae or a number of marae which will be administered by trustees appointed by the Māori Land Court under s439 Māori Affairs Act 1953. Whilst the trustees have authority by way of an order of the court, they do not constitute a body corporate.

b. disclosing the whereabouts and significance of a wāhi tapu to the territorial authority is likely to violate its tapu. "*Wāhi tapu are very personal to the people to whom they are significant. Any exposure takes the tapu out of the wāhi tapu. Privacy is an ingredient in the "undisturbed possession" of taonga and any intrusion is a trespass.*"

c. A public hearing of an application for compensation by the landowner would cause further offence.

d. The procedure under the Resource Management Act for creating heritage protection authorities would violate the Claimants' rangatiratanga.

[108] Waitangi Tribunal *The Te Roroa Report 1992* (Wai 38, 1992) p 256-257.

100. The above analysis demonstrates that there were innumerable failings in Crown legislation relating to the protection of wāhi tapu sites of significance. Unlike in the *Hauraki Report*, where the Crown actively accepted its role in these failings, the Crown in this instance has failed to do the same.[109] The Claimants' wāhi tapu have been detrimentally affected by the myriad of ineffective legislation of the 19th and 20th centuries. The Crown has failed to ensure that the Claimants' wāhi tapu stayed in their ownership so that they could carry out their duties of kaitiakitanga.

*Portable taonga v Wāhi tapu*

101. The protection of portable taonga is significant for the Claimants, however, by protecting portable taonga, the Crown failed to protect wāhi tapu:[110]

> A series of legislative enactments passed in the early 1900s were supposed to provide some basic protection of taonga and urupā located on Maori land. These measures included the Māori Antiquities Act 1901. But this Act was directed at controlling the export of artefacts, not their removal from wāhi tapu or urupā.

The Crown's initial protection of portable taonga was not to protect the interests of Māori, rather it was for the protection of portable taonga for its own collections. The Crowns first attempt to control the export of tāonga was through the Māori Antiquities Act 1901 (the MAA 1901):[111]

> …the Act was not aimed in any way to protect the Māori ownership of valued possessions, but to prevent their export on the one hand and to ensure that the Dominion Museum's collection could be developed from indigenous material.

102. The MAA 1901 was amended in 1904, to give it more teeth however there was no intention to provide a blanket export prohibition for every Māori artefact. The Act required the minister to approve the export of Māori

[109] Waitangi Tribunal *The Hauraki Report VOL III* (Wai 686, 2010) p 933.
[110] D Armstrong, *The impact of environmental change in the Taihape district 1840-C1970,* Wai 2180 #A45, p 354
[111] Belgrave et al, *Enironmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 179.

artefacts.[112] The objectives of the legislation were initially focused on the development of a single, major collection for New Zealand.[113] We submit that such self-interest was a significant breach of the Crowns duty to protect the taonga katoa of Māori under Article II of te Tiriti. We submit further that such action to protect portable taonga whether it intended to or not, authorised the disturbance of wāhi tapu. Although not all portable taonga were extracted from wāhi tapu, some did come from wāhi tapu and therefore would have involved its desecration when portable taonga was taken. At no point did the legislation provide any protection to the wāhi tapu that was desecrated.

*The failure of the Courts*

103. The alienation of wāhi tapu has been a consistently inherent feature of Crown interaction with Māori on issues relating to land use since 1840. In the Te Paparahi o te Raki inquiry evidence was presented by Dr Manuka Henare which highlights the failings of the Native Land Court, to properly protect and maintain Māori customary interests. He states:[114]

> Land passed out of Māori ownership, as did control and kaitiakitanga, particularly in land transactions that had not been sanctioned by Māori, and many instances have arisen where wāhi tapu and other sites of significance have been vandalised and desecrated in a variety of ways in which the Crown has been instrumental.

104. Dr Robert Joseph in his article *"Legal challenges at the interface of Māori Custom and State Regulatory Systems: Wāhi tapu"* provides guidance regarding the difficulties that New Zealand Courts face when dealing with Māori custom and values. In his article, he refers to significant Environment and High Court decisions pertaining to wāhi tapu, and states:[115]

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[112] Belgrave et al, *Enironmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 179.
[113] Belgrave et al, *Enironmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 179.
[114] Brief of Evidence of Mānuka Arnold Hēnare, 21 November 2014, Wai 1040 , #O20 at [25].
[115] Dr Robert Joseph "Legal Challenges At The Interface Of Māori Custom: Wāhi tapu" (2010 & 2011) Vols 13 & 14 YNZJ p 189.

> while tikanga Māori values, customs and institutions have now re-entered the New Zealand legal system, there is evidence that the system may not yet have the tools or have developed a sufficiently informed approach to dealing appropriately with those values and customs.

105. He further states that:[116]

> it appears there is a divergence of approach in the Environment and High Court as to the elements which constitute a Wāhi tapu. There appears to be a difference of approach in discussing the activities associated with the site, the precise location of Wāhi tapu sites, the size and scale of Wāhi tapu, the use of outside experts and the emphasis to be placed on oral traditional kaumatua (elder) evidence. Such contradictory approaches heighten the tension in these landscape conflicts. Protracted conflict over Wāhi tapu is inevitable.

106. Dr Joseph's article highlights some of the issues and complexities that the Environment and High Courts have encountered when attempting to incorporate and define tikanga in the context of litigation relating to wāhi tapu. With this, it is submitted that legislation implemented at a national level, has had a direct and negative impact on the ability of Taihape Māori, to properly protect and maintain sites of wāhi tapu significance.

107. The *Takamore Trustee Litigation* primarily revolved around a proposal by Transit New Zealand and the Kapiti Coast District Council to develop a link road through land which was designated as Wāhi tapu by local iwi. They were represented at Court by the Takamore Trustees.[117] The case demonstrates the type of challenges that contemporary iwi/hapū Claimants face, in attempting to not only prove the existence of sites of cultural and spiritual importance, but also in receiving proper weighting for oral evidence, that is of such vital importance within Te Ao Māori. *The Takamore Trustee Litigation* demonstrates that even where it can be proven that a site contains the requisite characteristics of being wāhi tapu,

[116] Dr Robert Joseph "Legal Challenges At The Interface Of Māori Custom: Wāhi tapu" (2010 & 2011) Vols 13 & 14 YNZJ p 182.

[117] See *Te Runanga o Ati Awa ki Whakarongotai Inc and Takamore Trustees v Kapiti District Counci*l [2002] 8 ELRNZ 265; *Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433; [2003] 3 NZLR 496 and *Te Runanga o Ati Awa ki Whakarongotai Inc and Takamore Trustees & Anor v Kapiti District Counci*l [2003] NZEnvC 50.

that in many cases the public interest will outweigh any notions of cultural importance or relevance. In *Takamore*, the demands of the private motor car outweighed the need for cultural recognition, and protection of a site of spiritual and cultural significance to local iwi.[118]

108. The case highlights some of the difficulties that contemporary New Zealand Courts have experienced, in utilising and applying evidence from iwi and Kaumatua that is not of the usual requisite empirical standard expected of Court evidence, particularly within the context of litigation relating to Wāhi tapu. In the case, the Environment Court in the first instance, provided a relatively scathing analysis of oral evidence provided by iwi Kaumatua, in regard to the actual presence of a wāhi tapu site where a proposed new link road was to be constructed:[119]

> The majority found that, on the balance of probabilities, the swamps in the Takamore wāhi tapu do not contain burials, and that the evidence of Takamore witnesses in relation to the location of human remains was 'cryptic, assertive bereft of back-up history and tradition'.

109. In the High Court, Ronald Young J criticised the approach taken by the Environment Court stating:[120]

> The fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence. Nor could the kind of geographical precision apparently sought by the Court be reasonably expected. The claim of burials is within a defined area. To require a precise location of burial in such circumstances before satisfaction with the evidence is to potentially reduce many claims of wāhi tapu areas to unproven and reduce ss 6(e), 7 and 8 matters accordingly. If the test applied to koiwi presence by the Court was also applied to the presence of taonga, the Court would have logically been required to find their presence not proved. The fact it did not seems difficult to understand.

110. It was further stated that:[121]

[118] Jacinta Ruru and Janet Stephenson "Wāhi tapu and the Law" (2004) NZLJ 57 p 59.
[119] *Takamore Trustees v Kapiti Coast District Council* [2003] NZLR 496 at [41].
[120] *Takamore Trustees v Kapiti Coast District Council* [2003] NZLR 496 at [68].

> If oral history is to be reduced to assertion rather than evidence, then much of the evidence by Māori in support of ss 6(e), 7(a) and 8 matters will be rejected as assertion and not evidence. This is not at all the proper approach to oral history such as this.

111. Despite Ronald Young J's commentary, the type of challenges that contemporary iwi/hapū Claimants face, in attempting to not only prove the existence of sites of cultural and spiritual importance, but also in receiving proper weighting for oral evidence has not changed.

112. In the case of *Heta and others and Te Toka Tu Moana O Irakewa v Bay of Plenty Regional Council*[122], the Court seems to take a favourable position in relation to the credibility of Māori cultural evidence when ascertaining the existence of wāhi tapu. In the judgement it stated that the:[123]

> appropriate place to determine the status of [wāhi tapu] is the marae. This court is a statutory-constituted court of law. It is not a court of "lore". We must make decisions based on facts placed before us and we are required to have regard to the well-known principle that he who asserts must prove. Furthermore, the concepts of tikanga Māori and the relationship of Māori and their cultural traditions with their ancestral lands is better discussed at a hui on a marae, without evidentiary and other legal constraints. It is in such a setting that the subtle nuances of such concepts can be better aired and determine.

113. However even with this apparent judicial change for the better, decisions made in years directly following the *Heta*[124] decision have demonstrated that so called 'expert' evidence will often be pushed to the forefront and given primacy in many cases involving wāhi tapu. In most cases this comes at the detriment of iwi or hapū.

114. In *Watercare Services v Minhinnick*[125], the Court of Appeal held that the Court must 'make a value judgement on behalf of the community as a

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[121] *Takamore Trustees v Kapiti Coast District Council* [2003] NZLR 496 at [78].
[122] *Heta & Ors v Bay of Plenty Regional Council [2000] NZEnvC 93.*
[123] *Heta & Ors v Bay of Plenty Regional Council [2000] NZEnvC 93* at [27].
[124] *Heta & Ors v Bay of Plenty Regional Council [2000] NZEnvC 93.*
[125] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294.

whole' and that "Māori dimension as [it] arises will be important, but not decisive even if the subject matter is seen as involving Māori issues".[126] It further stated that:[127]

> While the Māori dimension, whether arising under s6(e) (of the Resource Management Act 1991) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of the New Zealand society as a whole, decides whether the subject matter is offensive or objectionable under s314. In the end a balanced judgment has to be made.

115. Analysis of relevant case law makes it invariably clear that the New Zealand judiciary has struggled to maintain a culturally appropriate approach to the analysis and dissection of 'cultural evidence'. This has meant that Māori have had extra impetus over and above that usually required, when making application to have wāhi tapu sites given the recognition they deserve. It is submitted that such an approach is representative of a wider struggle by the New Zealand judiciary to understand the finer aspects of Māori customary tikanga and kawa, and its importance in helping to determine the presence of wāhi tapu. This includes the relationship between oral testimony and its use in identifying lands that are of spiritual significance to Māori. Courts during the 19th and the majority of the 20th centuries were even less favourable mediums from which to voice their concerns regarding wāhi tapu.

116. These inherent issues are not addressed appropriately in Crown legislation, and as a result, this has in turn placed Taihape Māori at an obvious and distinct disadvantage when advocating for recognition and protection for wāhi tapu sites in their rohe.

**Instances of Crown failure**

117. The discussions above have highlighted the significant lack of protection afforded to wāhi tapu since 1840. For Taihape Māori, the Crown's failures

[126] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 p 306.
[127] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 p 306.

have not only resulted in a breach of the Crown's obligations under te Tiriti, but it has significantly impacted Taihape Māori relationships with their environment, their tupuna and their tikanga. The following are some examples of wāhi tapu in the rohe that the Crown legislative regime failed to protect. Despite Crown assurances that they have mechanisms available for the protection of wāhi tapu, wāhi tapu continues to be desecrated. These examples will highlight that despite a site being recognised as a wāhi tapu for Taihape Māori, it will continue to be subjected to desecration. In some instances, the Crown has direct control or ownership of an area that contains a wāhi tapu. Even in those circumstances, the wāhi tapu will continue to be desecrated.

118. It is important to note that the following examples are known wāhi tapu site desecrations. It does not and cannot include the significant number of wāhi tapu that have been desecrated but not recorded. It also cannot and never will include wāhi tapu sites that have been desecrated but lost to living memory.

*New Zealand Defence Force*

119. The Waiouru Military Training Area ("WMTA") comprises some 63,000 hectares and has been in the Crown's possession since at least 1913.[128] From between 1913 to at least 1985 it would appear that the Crown did not know who held mana whenua of the lands which they had taken, having only inquired into mana whenua in 1985.[129]

120. On the Crown's own admission, communications with the people of Ngāti Tamakōpiri and Ngāti Whitikaupeka is limited. Given the significant mana whenua interests of both Ngāti Tamakōpiri and Ngāti Whitikaupeka in this inquiry district and the great many marae of both iwi which are known, it is illogical to suggest that communications are hampered possibly due to having different points of contact and the groups themselves developing.[130] To suggest that their understanding of Iwi concerns at a local level are still

[128] Brief of Evidence of Major Patrick Hibbs, Wai 2180, #M2 at [8].
[129] Brief of Evidence of Major Patrick Harris appendix, Wai 2180, #M2(a), p 5.
[130] Brief of Evidence of Major Patrick Harris appendix, Wai 2180, #M2(a) p 39.

developing[131] is deplorable given that the lands under the military training area has been held by the Crown for over 100 years.

*Te Awarua*

121. At a once important kainga on the eastern bank of the Rangitikei River, a settler (E. C. Hammond) established a run in the vicinity of the old Te Awarua pa. When they began cultivating land on the river flats a significant number of koiwi and artefacts were uncovered.[132] This is an example of the lack of protection afforded to wāhi tapu. It is unclear whether E.C. Hammond knew that he was disturbing a wāhi tapu, however the question is raised. How did E C Hammond come into possession of land so close to a wāhi tapu? Given that wāhi tapu is so sacred to Taihape Māori, how could their wāhi tapu have been so vulnerable to desecration? We submit that it is the Crown's failure to implement protective measures for Taihape Māori wāhi tapu from the outset, that resulted in the above scenario occurring. The Crown when complicit in the alienation of lands from Māori failed to implement any protection mechanisms to ensure that wāhi tapu were protected, either by removing the sites from the land being sold or by enacting protection mechanisms to ensure that wāhi tapu was not subjected to the threat of desecration.

*Pokopoko Creek*

122. In another example, an urupā near the 'old pā' on the Pokopoko creek contained the remains of about a dozen people. It was readily identifiable because it was surrounded by a paling fence.[133] A wool-classer from Auckland had decided to open the graves in search of greenstone and other valuable Māori artefacts which could possibly be buried there.[134] A delegation of elders who heard of those plans arrived on the scene to prevent this from happening. They removed and burned the palings surrounding the burial grounds.[135] From the actions of the delegation of

[131] Brief of Evidence of Major Patrick Harris appendix, Wai 2180, #M2(a), p 39.
[132] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 351.
[133] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 351.
[134] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 351.
[135] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 350- 351.

elders, it is clear that the protection of wāhi tapu is a significant kaitiaki task. Removing identifying markers could potentially have significant consequences at later dates, particularly when the significance of the site is lost in memory. However, it was more important that the site was not desecrated resulting in the identifying markers being removed.

*Waiu Pā*

123. Waiu Pa is a pa that is significant to Ngati Tama and Ngati Whiti. It was built in the early 1880s and is located on tussock plateau north of the Hautapu Stream, about 16km from Moawhango. Waiu Pa is one of the last known musket pa to be built in New Zealand and is deemed now to be archaeologically important.[136] The land where the pa is located was taken for Defence purposes in 1939 and became part of the Army Training Area. Before the Public Works taking the land was owned by Forest Farm Products Limited.[137] This shows a further example of the Crown failing to protect wāhi tapu. The first when the land in question was acquired by Forest Farm Products Limited, the wāhi tapu was not identified or excluded from the alienation. Then when the Crown obtained the land from Forest Farm Products the wāhi tapu was again not identified. At the time of the taking there does not appear to be any acknowledgment that the taking contained a wāhi tapu. It was not recorded as an archaeological site until 20 years after the taking in November 1959. It was a further three years before the Historic Places Trust approved the erection of a notice-board to mark the site in 1962. The site was liable to damage because of military activity however the Crown provided no further protection.

124. A comprehensive site survey was carried out in 1995. It was found that the southern area of the site had sustained damage from horse grazing. The Historic Places Trust registered the site in March 2006 and assigned it a Category 1 status (the highest possible) rating. At no point from1959 did the Crown step in to remove the wāhi tapu site from the Army Training Area. The site continued to deteriorate as part of the Army Training Area for 36 years to when a comprehensive site survey was carried out in 1995.

[136] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970*, Wai 2180, #A45, p 352.
[137] Cleaver, *Public Works Takings for Defence and other purposes*, Wai 2180, #A009, p 27.

The site would not be registered under the Historic Places Act until 11 years later in 2006. Therefore for 47 years, a known wāhi tapu site suffered further desecration and continued without any Crown protective measures.

*Conclusion*

125. Further examples of the Crown's legislative regime failing to protect wāhi tapu are littered throughout these submissions. Despite the litany of legislative enactments and policies supposedly implemented by the Crown for the protection of wāhi tapu, wāhi tapu has been desecrated and continues to be subject to desecration.

**Issue 21(2)**

**To what extent has the Crown consulted Taihape Māori on decisions regarding wāhi tapu, and taken into account any concerns raised by Taihape Māori?**

126. Historically, the protection of wāhi tapu (sacred sites) has been relatively straightforward where those sites are on land owned by Māori. The Crown largely left Māori to exercise their rangatiratanga over such sites, subject of course to the extra difficulties, such as individualisation of title, that the Crown's intervention has imposed on the ability to exercise hapū and iwi rangatiratanga. Where a site has passed out of Māori ownership, however, the ability for rangatiratanga to apply has generally been lost.

127. When the Crown purchased land from Taihape Māori, it believed that it had acquired all the rights associated with that land. The Crown was therefore resistant to purchases being conditional on the continuation of any residual Māori interest in the land. Pākeha purchasers of land direct from Māori tended to adopt a less exclusionary approach than the Crown, especially during the first-generation period of European ownership and when the land remained thereafter owned by the same family.

128. As time went on, the attitude among the Pākeha landowning community changed which resulted in the Crown (and Pākeha) acquiring lands that

had been occupied to varying degrees prior to purchase, and contained physical evidence of that earlier occupation. The acquired land could also have particular cultural and traditional associations. The Crown did not consider that it had to consult with the sellers (or with any wider iwi or hapū grouping of local Māori) about how those physical features or cultural associations should be dealt with from that point on. Nor did it feel any obligation to understand a Māori perspective of what the land contained.

129. Taihape Māori have tried to exercise prudent rangatiratanga according to their tikanga by protecting the health and well-being of their wāhi tapu through engaging effectively and proactively with Local and Regional Councils.

130. Moreover, the relationships between local government and participants on the one hand, and the iwi and hapū of the area on the other, has not always been effective. If anything, previous engagement was either minimal or for the most part tokenistic.

**Duty of consultation**

131. A fundamental principle of the Treaty of Waitangi is the principle of partnership and good faith. It implies that Māori are entitled to the benefit of good government. Such good government should exhibit itself in a duty not to use any powers of compulsory acquisition of Māori land or resources without first consulting those Māori affected and without negotiating genuinely with them as to the purchase or, at least, paying proper compensation. [138]

132. The principle of partnership imposes a duty on Tiriti parties to act towards each other reasonably, honourably and in good faith. Furthermore, Māori have the right to be consulted with in relation to their wāhi tapu to ensure Māori the right to effectively protect their wāhi tapu. [139]

[138] Wai 2180, #1.1.17, p 16.
[139] Waitangi Tribunal *The Manukau Report* (Wai 8, 2nd ed, 1989) page 87.

133. Despite this, the evidence discloses that Taihape Māori have continuously been invisibilised by Crown processes through the enactment of legislation and policies and have suffered significant prejudice as a result. While some consultation with Māori may have been provided for through legislation, the Crown have overall failed to consult with Taihape Māori on decisions regarding wāhi tapu and to take into account any of their concerns. We particularly draw attention to the way that hapū have been marginalised in these processes. We now turn to consider some of the specific statutory provisions with appropriate examples from the case studies alluded to in the technical evidence to illustrate the point.

134. We emphasise from the outset that even where amendments have been affected by Parliament there has been little effective recognition or resourcing for iwi and hapū in the processes of local and regional government.

135. We consider some of the key legislative frameworks and policies that impacted on the duty to consult which must be read as part of the broader analysis in Issue 21(3) below, which is directed to the impacts of Crown legislation more generally.

**Legislation and policies**

*The Native Lands Act 1865*

136. The Native Lands Act under which the Native Land Court became operative, extended the five percent rule to all Crown-granted Māori land, whether sold or not. This provision applied to all Māori land investigated by the Court and for which a grant was issued. Under this Act, there was no requirement to consult with owners over the need for roads. The areas valued by Māori, such as urupā and other wāhi tapu, were essentially not protected.[140] When Māori raised concerns around this, they were ignored.

[140] Wai 2180, #1.1.17, p 81.

*The Historic Places Act 1954*

137. The Historical Places Act 1954 provided for some degree of protection of historical places as it aimed to identify and keep a permanent record of a wide range of places, including those associated with Māori and the country's early history.[141] There were few powers or resources to achieve this. A 12-member board was created for the trust, which included the provision (Section 5(d)) that one member be a Māori and be appointed to "represent the Māori race". By the 1970's, this regime was considered out of date and out of step with similar statutory protection available for heritage in other developed countries. Although the board was expanded from 12 to 15 members, there remained a provision for only one Māori member, but this time to be appointed by the New Zealand Māori Council.[142]

138. The fact that only one person of Māori descent was appointed to a 12 member board (under the 1954 Act) and was expected to sufficiently "represent the Māori race",[143] is an obvious criticism. In our submission the phrasing of this provision while particularly demeaning and improper, was reflective of Crown attitudes of the time. Significantly it failed to provide proportionate representation and decision-making power for Māori on this Board. No decision-making authority was afforded to hapū or iwi in relation to wāhi tapu throughout the 1954 Act, neither did it provide any requirement for the National Historic Places Trust to consult with Māori. It comes then as no surprise that by the 1970s this approach was considered inadequate and out of date.[144]

139. Under the Historic Places Act 1980, the Trust was constituted as the New Zealand Historic Places Trust pursuant to s 4. Further reforms were implemented with the intention of strengthening protections for Māori heritage sites and providing more opportunities for consultation between

[141] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 427.
[142] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 428.
[143] Historic Places Act 1954, s 5(d).
[144] Ibid.

the Trust and Māori. However, some of the core issues important to Māori were still left unresolved (primarily being a lack of provision for the expression of their tino rangatiratanga), as again, despite the Board membership being expanded to 15 members, the appointment of only one person of Māori descent remained the *status quo*.[145]

140. The Historical Places Trust legislation was significantly revamped in 1993, partly because of ongoing criticisms of the ability of the trust to protect heritage generally and Māori heritage specifically. By 1989 there was considerable criticism again of the legislation, reflecting the greater emphasis being placed on things Māori and the Treaty of Waitangi in the late 1980s.[146]

*Conservation Act 1987*

141. This Act established the Department of Conservation (DOC). DOC was established to integrate the environmental functions of the Department of Internal Affairs, the Forest Service, the Lands and Survey Department, the Wildlife Service and other Crown agencies.[147] This Act was the first measure to contain a 'Treaty clause', which required the measure to be 'interpreted and administered as to give effect to the principles of the Treaty of Waitangi'.

142. Wāhi tapu was not defined in the Act, but 'historic resource' was defined as an historic place within the meaning of the Historic Places Act 1980, and 'includes any interest in a historic resource'. DOC's functions were, inter alia, to:[148]

a. manage for conservation purposes, all land and all other natural and historic resources, for the time being held under this Act, and all other land and natural and historic resources whose owner agrees... that they should be managed by the Department;

[145] Ibid at [428].
[146] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 429.
[147] Waitangi Tribunal, Te Roroa Report, p.247.
[148] Conservation Act 1987, No. 65, s2 (Interpretation), s4, ss5-6,

b. to advocate the conservation of natural and historic resources generally;

c. to promote the benefits to present and future generations of –

i. the conservation of natural and historic resources... of New Zealand...

143. In respect of Māori land or Crown land leased by Māori, s 27(a) of the Act provided for land to be managed for conservation purposes so as to 'reserve and protect' the:

a. the natural and historic values of the land; or

b. the spiritual and cultural values which Māori associate with the land.

144. In such cases, the Minister was permitted to 'treat and agree' with the Māori owner or lessee for a 'Ngā Whenua Rahui Kawenata' to provide (in perpetuity or for a defined period, subject to review every 25 years) for the management of the land in a manner that would protect the historical, cultural or spiritual values associated with it.

145. Essentially the land would become a conservation area (under ss34-44 and 47 of the Act).[149]

146. The establishment of the Department of Conservation ("DOC") was another key feature of the restructuring programme that resulted from the legislation. Through the Conservation Act, the Treaty of Waitangi, and various policy statements, DOC is required to consult with Māori specifically. For instance, the Conservation Act requires the department to administer the Act to give "effect to the principles of the Treaty of Waitangi";[150] outlines public notice requirements and the public's rights of

[149] Conservation Act 1987, No. 65, s 27a.
[150] Conservation Act 1987, s 4.

objection; and requires the Minister to consult various Ministers and Bodies before appointing NZCA members.

147. DOC has since the development of the Whanganui/Taranaki Conservancy managed the Inquiry District in separate regimes: the Rangitikei Ecological area, the Moawhango Ecological Area and the Ruahine Forest Park. Combined, these areas encompass the Inquiry District and similar landscapes over to Whanganui and down to the Manawatu.[151]

148. The Department of Conservation through s 4 of the Conservation Act 1987 recognises the connection tangata whenua have with the indigenous species of New Zealand, and attempts to give effect to the Treaty of Waitangi. In this context a number of relationships have developed between hapū/whānau groups to jointly manage land primarily under Māori ownership with the most recognisable being the Te Pōtae o Awarua joint initiative between the Aorangi Awarua Trust and the Department of Conservation. The project was established to work towards an integrated pest management area of 20,000ha centred on the North West corner of the Ruahine Ranges which is recognised for its biodiversity values. The partnership attempts to capitalise on the knowledge and understanding of both DOC and the Trust.

149. Mr Mohi's testimony for the Crown identified that the Ngā Whenua Rāhui Komiti serves to encourage voluntary protection of indigenous biodiversity on Māori owned land with special emphasis to recognise the cultural and spiritual values of those lands, while recognising the rights guaranteed to Māori land owners under the Treaty of Waitangi.[152]

150. The Kōmiti is directly responsible to the Minister of Conservation; the Director-General of Conservation does not have a role in making recommendations.[153]

[151] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 166.
[152] Wai 2180, #M6 at [20].
[153] Wai 2180, #M6 at [20].

151. The Ngā Whenua Rāhui unit services the Kōmiti. The role includes the management and distribution of money through two contestable funds. One small fund (Mātauranga Kura Taiao Fund) seeks to preserve the customs, history and stories associated with Māori land and tikanga. It can be used for things such as preserving the story of a marae or repairing the tukutuku panels.[154]

152. Significantly, Mr Mohi's evidence discloses that no such funding has been provided in the Taihape district and, to his knowledge, no applications have ever been made to that fund from the Taihape district.

153. The main fund, Ngā Whenua Rāhui Fund, was the focus of his evidence. It supports the protection of indigenous ecosystems on Māori owned land and is geared towards the owners retaining tino rangatiratanga of their lands through Mr Mohi suggested:[155]

    a. helping to protect representative, sustainable, landscape integrity of indigenous ecosystems which have cultural importance to landowners;

    b. leaving the land in Māori ownership and control; and

    c. covenanting (kawenata) and management agreements.

154. The majority of the kawenata in place in the Taihape inquiry district are Reserves Act section 77A kawenata. These kawenata can be granted by the Minister so as to preserve and protect:[156]

    a. the natural environment, landscape amenity, wildlife or freshwater life or marine-life habitat, or historical value of the land; **or (emphasis added)**

[154] Wai 2180, #M6 at [21].
[155] Wai 2180, #M6 at [22].
[156] Wai 2180, #M6 at [26].

b. the spiritual and cultural values which Māori associate with the land.

155. It is, therefore, not a statutory requirement for a kawenata that there be both ecological values and Māori cultural and spiritual values. It could, in theory, be either although the evidence is overwhelming that for Māori all whenua will have spiritual and cultural values.

156. The evidence of Mr Kemper is also helpful in assessing Department of Conservation relationships with Taihape Māori. He observes:[157]

> 65. Giving effect to the Treaty partnership obliges DOC to engage with Treaty partners at each location, ensure there is good communication and attempt to achieve mutual understanding of one another's perspectives. Engagement is most likely to be built on relationships and recognition of issues and interests in each place. In some cases this is (or can be) supported or enhanced by formal documentation such as Memoranda of Understanding or protocols with tangata whenua regarding their interests in an area.
>
> 66. There are no formal agreements between DOC and Iwi in the Taihape district. Some Taihape Maori have expressed some interest within the last five years in such agreements. Although management arrangements have not been negotiated, there have been regular meetings held between DOC and some Taihape Maori and meetings on specific issues (for example whio and concession applications). Formal arrangements may, but need not, await the outcome of Treaty settlements. DOC's experience is that that process can be useful to ensure there is clarity within and between parties and the relevant issues are understood however settlement is not a necessary precondition for entering into such
>
> 67. In the Taihape area DOC has had a history of seeking to involve tangata whenua in DOC's activities both statutory and operational (although it is recognised that complexities over administrative boundaries may have resulted in less than ideal results). There has also

[157] Wai 2180, #M8 at [65]-[67].

> been a long history of DOC staff being engaged with local people and building strong personal bonds which DOC has tried to extend with the regular meetings discussed above and with tangata whenua involvement in the induction of new DOC managers through a whakatau or powhiri and involvement in practical conservation projects.

157. Claimants were conscious of the importance of this relationship, but had clear reservations:[158]

> If I don't have that relationship with them I won't have any relationship with our whenua and our rohe that they administer, manage, own, whatever. That's my way of becoming a part of what they've got that's ours. … A large part of our combined rohe is actually DOC estate.

158. Where iwi were able to work well with DOC, there was a feeling of partnership. Claimants certainly feared that restructuring or a decline in funding would reduce the department's ability to respond to the environmental and wāhi tapu needs of the district.[159]

159. The evidence reveals that, at the same time, claimants had significant concerns about the difficulties in working with the department on a day-to-day basis. Changes in personnel, redundancies and new and inexperienced staff made it difficult to maintain important personal relationships, so crucial in developing a common purpose. There was also a clear imbalance in resources and expertise. The department's full-time scientific staff did not necessarily produce research that was accessible or relevant to claimants, and claimants felt an inability to assess such research critically: [160]

> … we have to do all these relationships… we have to do all this extra work and we've got day jobs. Whereas other people come in and that is their day job and that's what they're doing. Twenty years or longer that

[158] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 168.
[159] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 168.
[160] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 169.

> these guys especially have been doing, of trying to move forward on two hours a day…

160. The evidence also highlighted how the imbalance in expertise undermined claimants' confidence in their own abilities to manage their own environmental and wāhi tapu resources in their own region. [161]

> This is our whenua and we know how to run it, it's very belittling when you always get oh well, you don't want to get all the DOC estate back do you because yous won't know how to run it...

161. While some claimants accepted that DOC did have a major role in the management of the district, many believed that the relationship between the department and the tangata whenua did not appropriately recognise partnership between the Crown and Māori.[162]

*Resource Management Act 1991*

162. The RMA re–ordered the statutory powers of the Crown into a single comprehensive package. We remind that this was the single most significant result of an era of Crown administration and environmental management restructuring that took place in the late 1980's.

163. The intention of the RMA is to provide opportunities for Māori to become more involved than existed previously particularly inter alia, in ss. 6(a), 7(a), 8, 33, 34 & 368, in addition to the Local Government Act 2002 and the developing Treaty of Waitangi 'principles' and partnership jurisprudence. The application of the RMA to particular activities and policies should allow Māori more of a say in certain activities and developments that affect them and the broader community.

164. From 1991, the RMA provided for more direct recognition of Māori interests. The RMA allowed Māori to interpret the significance of wāhi tapu

[161] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 169.
[162] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 169.

and the importance of the environment within their rohe according to Māori cultural values. Nonetheless, these Māori interests had to be seen alongside other values and other interests. They were not privileged in decision-making processes.[163]

165. The overriding principle of the RMA, set out in s 5(1), was to 'promote the sustainable management of natural and physical resources'.[164] The Act did not define wāhi tapu, but s 5 (1 )(iii) seems to provide Māori themselves with an opportunity to define what a wāhi tapu is. The section stated that wāhi tapu were 'sites of significance to Māori', and by definition only Māori could identify such sites. But the failure to define wāhi tapu, and the implication that it would be left to Māori, did not pass unnoticed by officials, and some were uncomfortable with anything that might be capable of broad (and uncontrolled) construction.

166. The original Resource Management Bill (s 5(1)(g)) referred to wāhi tapu as 'sites and other taonga'. This was a concern to the Crown Law Office, who at that time (1989) was fully involved in the Te Roroa claim (Wai38).

167. In December 1989, when the Bill was being prepared, S. E. Kenderdine of Crown Law pointed out that this definition (including 'other taonga') 'may be wider than place or site or land and interests in land'. The definition contained in the Historic Places Act 1980 was 'traditional site', which meant a place or site that is important by reason of its 'historical significance or spiritual or emotional association with the Māori people'. There appeared to Mrs Kenderdine to be a contradiction between the Historic Places Act and the Bill. She asked for clarification from Shane Jones, of the Ministry for the Environment, but none emerged. In the end the problem seems to have been overcome by omitting to offer a definition, but this too, could lead to unforeseen consequences.[165]

[163] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 433.
[164] Resource Management Act 1991 (2005 Reprint).
[165] Wai 1040, #A14 p 181 Letter S. Kenderdine to S. Jones. December 14, 1989. ABJZ 7019 W4644 63 TRI 5/1 pt. 2, ANZ, [Docs,
2:529].

168. According to its sponsors the RMA was designed to protect wāhi tapu in a number of specific ways, including heritage protection orders, heritage protection authorities and iwi management plans. Section 77 of the Runanga Iwi Act 1990 had provided that any iwi, Rūnanga or 'authorised voice' could prepare an iwi management plan including matters of importance to the group (such as wāhi tapu protection). It was envisaged that the RMA would provide for the recognition of these iwi plans in the formulation of policy statements and district schemes. But the Runanga Iwi Act was repealed by the incoming National Government, and this avenue was removed.[166]

169. Moreover, the general Treaty provisions in the Act (s8) were said to provide an added layer of security. There were a number of ways in which iwi could seek to protect their wāhi tapu. An iwi authority ('body corporate') could make an application to the Minister for the Environment for approval to act as a Heritage Protection Authority (HPA) for the purposes of protecting wāhi tapu. It was noted, however, that such approval was 'not automatic', but rather depended on the favourable recommendation of the Minister.

170. As the passage of time confirms since that legislation there are no Heritage Protection Authorities for Māori organisations; hapū or iwi that have so been recognised.

*Resource Management Act 1993*

171. The RMA is structured on the presumption that the Crown has exclusive authority to sustainably manage the natural resources of waterways. That exclusive authority is delegated to Regional and District Councils, who in turn have an ability to partially delegate their exclusive authority to iwi organisations. The delegation is partial only, because the Councils retain the power to make and withdraw the delegation, and because the Councils decide the limits of the delegations' scope.

[166] Tim Fraser 'The Resource Management Bill and Wahi Tapu' (2 November 1990) Ministry for the Environment) ABJZ 7019 see Wai 1040, #A14 p 183 W4644 44 POL 19/1/1 pt. 2, ANZ, [Docs, 2:664].

172. Of course, this Tribunal is well aware that the power of delegation to iwi organisations by virtue of ss 36B to 36E has hardly ever been used in New Zealand. Rather, decision making has been retained by Councils, and hapū and iwi have had little opportunity to influence decisions beyond those opportunities available to the public generally. The concept of a partnership has not had the chance to develop, and there is no equality between hapū and Councils.

173. Even where limited relationship agreements have been effected there is a significant limitation to their effectiveness in the failure of the same to be appropriately resourced.

174. The Act does not provide resourcing as of right. The Act prima facie gives the parties to the joint management agreement the freedom to determine between themselves how the agreement is to be resourced. [167] Moreover, for a joint management agreement to be implemented the local authority must also be satisfied that the agreement is an "efficient" method of exercising the function, power or duty.[168]

175. The consideration of mātauranga Māori has been given recognition in the Resource Management Act 1991 in sections 6(e), 7(a) and 8 through the identification of primarily wāhi tapu, kaitiakitanga and the Treaty of Waitangi. Sections 66 and 74 require regional councils and local authorities, in developing or changing their plans, to take into account any relevant planning documents recognised by iwi authorities affected by the plan/policy. Commonly referred to as iwi environmental management plans, they are seen as a tool to help streamline the process to incorporate Māori and iwi values into environmental management decisions by providing a generic set of values rather than responding to issues on a case by case basis.[169]

[167] Section 36B(1)(c).
[168] Section 36B(1)(b)(ii).
[169] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 171.

176. While having a generic understanding of Māori values can be of benefit, to be consistent with tikanga or rangatiratanga, iwi/hapū need to also participate on a case by case basis on certain issues.

177. Claimants in the Taihape Inquiry District repeatedly (at all of the meetings with clustered claimants with the relevant researchers on this matter) they made mention of responding to individual resource consents from local and regional authorities, while complaining that these authorities lacked knowledge of iwi/hapū structures and representatives. [170]

178. Claimants have emphasised to this Tribunal that this was not just because of the ignorance of non-Māori, but reflected the lack of structures to represent iwi and hapū interests in the region. While the problem is seen as persisting, the claimants have adopted formal structures and relationships to make their position much clearer. The effectiveness of these initiative we will turn to discuss more in detail shortly.[171]

179. The Ministry for the Environment has produced "Te Raranga a Mahi", a manual that seeks to provide whānau, hapū and iwi with tools to prepare Iwi Environmental Management Plans. This combined with other publications – such as 'Talking constructively: A practical guide for building agreements between iwi, hapū and whānau, and local authorities.' (2000) – has not resulted in the resourcing, capacity and encouragement from local authorities to actively pursue the creation of these relationships or plans. This problem is also witnessed in the lack of reference to cultural monitoring in State of the Environment Reports.[172]

[170] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 171.
[171] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 171.
[172] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 171-172.

180. In general the production of iwi plans has been relatively slow with very few iwi producing them while those that are produced are poorly adopted or even used by councils.[173]

*Resource Legislation Amendment Act 2017*

181. The Resource Legislation Amendment Act 2017 provides for Mana Whakahono a Rohe arrangement to be affected under ss 58L to 58U. Section 58M states the purpose of a Mana Whakahono ā Rohe:

182. The purpose of a Mana Whakahono ā Rohe is—

a. to provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act; and

b. to assist local authorities to comply with their statutory duties under this Act, including through the implementation of sections 6(e), 7(a), and 8.

183. Section 58M(a) refers to iwi participating in decision making processes, rather than necessarily in decision making itself. Section 58M(b) refers to iwi assisting local authorities in the exercise by the local authorities of their functions and powers.

184. However, the same risk seems to remain that afflicted earlier arrangements, where the role of iwi and hapū is treated as subordinate to the statutory authority of Regional and District Councils.

185. Representation and decision making relating to environmental developments, in particular large nationally significant engineering projects such as the Genesis hydroelectric power generation scheme, have caused some concern for the inability of iwi/hapū to articulate impacts on their

[173] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 172.

culture and have them recognised, mitigated, remedied or avoided as per the Resource Management Act 1991.

186. Ngāti Whiti and Ngāti Tama described the 12 years of engagement with Genesis as harrowing.[174]

187. Ngāti Hinemanu and Ngāti Paki claimants while their positive improvements in the ability of Māori to have a say in resource management and the protection of wāhi tapu the new regime still fell far short of what claimants considered was appropriate in exercising their rangatiratanga. 'Our full tino rangatiratanga, our full rangatiratanga status is not being upheld and for us that's at least a 50/50 share in the decision-making level':

> It's really good that we've got a bit of a part in it but at the end of the day, what I think that whānau and hapū really, really want is to be equal at the table with the management of all of these resources. Not just like - I know we've got a step there being an advisory or whatever it is, but that's not enough. So in a nutshell, we're playing a game.[175]

*Local Government Act 2002*

188. In addition, the Local Government Act 2002 requires local authorities to:

a. establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority;

b. consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and

[174] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 172.
[175] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga*, Wai 2180, #A10, p 174.

c. provide relevant information to Māori for the purposes of the above two requirements.

189. However, despite the rise of the Treaty of Waitangi ‘principles’ and the notion of Treaty ‘partnership’ during the 1980s evolution of Treaty of Waitangi jurisprudence, such sharing of responsibility for some has not been provided for adequately in the RMA or the Local Government Act 2002.

190. The New Zealand legislative and policy framework has never provided an appropriate level of protection, including control, regulation, preservation, development and/or transmission for the relationship of kaitiaki with their environment and the taonga within it. Without exception:

a. All environmental decision-making is at present retained by the Crown and/or its statutory delegates;

b. Where provision has been made for decision-making by iwi such delegation is invariably at the discretion of the current decision maker and no delegation to hapū or iwi has yet occurred:

c. Such input as is provided for hapū or iwi to participate in decision-making is invariable to non-substantive consultation; and

d. The Crown has either expropriated the ownership of particular resources or otherwise assumed the right to allocate resources as part of managing the environment, without ever addressing the nature and extent of Māori claims to ownership of particular resources with that environment.

**Kaitiakitanga and the Crown Duty of Active Protection**

191. The Crown has a duty of active protection pursuant to Article 2 of Te Tiriti o Waitangi to:

a. protect the kaitiakitanga relationship of Ngā Hapū o Taihape with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki;

b. provide for control and regulation of the kaitiaki relationship of Ngā Hapū o Taihape with the environment and their taonga within it; and

c. ensure the preservation and development of the relationship of the kaitiaki with the environment and their taonga within it from generation to generation.

192. These issues highlight the need for Māori protection and active participation and control of decision-making process that impact on wāhi tapu and the effective exercise of kaitiakitanga including the equal participation by Māori in decision making and implementation processes to give effect to these obligations.

193. We now turn to consider the evidence that supports these propositions and to illustrate how the present legislative policies and practices fall short of what the Treaty relationship demands.

**Experiences of Taihape Māori with the RMA**

194. Much attention was given by both the technical witnesses and the tangata whenua witnesses to the regime implemented following the passage of the RMA in 1981.

195. There is an overwhelming sense that there have been a few opportunities provided in the RMA for hapū and iwi authorities to have some control and joint management functions delegated to them by Regional and District Councils, but even where efforts to address this have occurred it has resulted in iwi and hapū authorities being subordinate to the Regional and District Councils decision making even where the opportunity was taken

up.[176] Furthermore, the relationships between Local Government and stakeholders on the one hand, and the iwi and hapū of the Rangitīkei area on the other, has not always been effective.

196. The report by Alexander emphasises that:[177]

> "the Environment Court has been quite clear that Maori participation and consultation does not amount to a right for Maori to direct the content of planning documents or the outcome of resource consent applications. While they are entitled to be heard and to express themselves as forcefully as they wish, their views will not necessarily prevail. There is a wide range of matters to be considered under Part II (the purposes and principles) of the Resource Management Act, and it is the weighing of these matters against each other that will prevail in determining what decision is made. However, as the Waitangi Tribunal has pointed out, "the balancing of Maori interests must be done in a manner consistent with the Treaty, and Maori rights cannot be balanced out of existence".

197. To ensure they are fulfilling their responsibilities under the RMA, the Regional and District Councils must get input from tangata whenua. An analysis of the evidence reveals most of the consultation that has occurred has tended to be driven by the local authorities' needs. An early initiative that many local authorities took, to assist them in their task of engaging with tangata whenua, was to recruit individuals from the local Māori communities to act as liaison persons.

198. This has raised some issues of concern for Māori in Taihape. It is doubtful that any one individual can have a depth of understanding on whakapapa links; whanaungatanga relations and personal knowledge of all hapū and iwi sacred sites of significance and wāhi tapu across any region or district. Where that does exist, the knowledge keeper is likely to be one of exceptional status and mana and should be remunerated to reflect that. Very rarely are there appropriate resources to support such knowledge

[176] Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970's-2010.* Wai 2180, #A38, p 119.

[177] Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970's-2010.* Wai 2180, #A38, p 98-99.

keepers. However, those same individuals are still better placed than non-Māori local authority staff members to establish contact with Māori communities. Those same liaison persons have also had a role to play in educating local authority staff about the new responsibilities towards tangata whenua that the 1991 Act introduced. This illustrates the wider concerns expressed by witnesses with respect to the lack of appropriate resources for hapū and iwi.

199. History has shown that Councils within Aotearoa have consistently not undertaken appropriate engagement with Māori even when legislated to do so.[178]

> From what I know about HRC and what I have read from the claimants, this pattern of engagement seems to follow here. Experience has shown that Māori are less likely or capable to continue engaging with Councils when past experience has been ineffective.

200. Regional Councils themselves have attested to the flaws in the RMA consultative processes. This is expressed in a number of briefs of evidence and was expressed in this way in Meredith and Joseph's Report:[179]

> Māori Councils around the country have developed committee structures to meet their legal obligations under the Resource Management and Local Government Acts. These institutional arrangements can be unwieldy and expensive and have limited success providing the level of relationship or engagement sought.

201. In the report prepared by Mr McBurney, it was highlighted by the Ngāti Hinemanu and Ngāti Paki claimants that the RMA only allows those in local government or those in authority mandated by the act of 1991, to be taken into account, but they don't have to make their decisions based on the Treaty.[180]

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[178] Wai 2180, #L7 at [9]

[179] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report.* Wai 2180, #A44, p 288.

[180] McBurney, *Ngāti Hinemanu and Ngāti Paki Oral and Traditional Report.* Wai 2180, #A52, p 550.

> We quite clearly see here that although it promises a right for Māori, it also clearly does not give set in concrete Māori rights in decision making.

202. Furthermore, the RMA doesn't allow Māori to sit at the decision-making table and have equal decision-making rights. Maurini Winiata-Haines made the following criticisms:[181]

> the RMA doesn't deal with the holistic view, a mātauranga Māori view that Māori have on kaitiakitanga.
>
> …
>
> It hasn't got a lot of teeth for us as Māori people to protect our resources and our environment because they don't see it in the same light. The RMA doesn't go anywhere near helping to do that…

203. Mr Ngahapeaparatuae Roy Lomax highlighted the importance of recognition:[182]

> We talk about the damage and effects and how can we improve the damage that has been done to those wāhi tapu. The improvement has to start at giving the recognition of Māori input and Māori ways of clearing it up. Māori can do it. We can do it. But first of all we have to be recognized by the authorities and the majority of New Zealanders as having the heart, the will and the spiritual values to do it. Because that's what you need. You can't have the economical values being dictated to you on how you can clear it up.

204. Ms Te Rina Warren presented evidence to the Tribunal and spoke about the lack of consultative processes that has occurred historically. Furthermore, Ms Warren sought a more effective representative path to lay down concerns and issues before the local bodies regarding land and waterways: [183]

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[181] McBurney, *Ngāti Hinemanu and Ngāti Paki Oral and Traditional Report.* Wai 2180, #A52, p 550.
[182] Mc Burney, *Ngāti Hinemanu and Ngāti Paki Oral and Traditional Report.* Wai 2180, #A52, p 554.
[183] Wai 2180, #4.1.9 at 496-497.

> Ko wā tātou māngai i ngā tau o mua he hui noa iho pea, a, ka whakamārama atu e aha ana rātou kātahi e aha ana te rangatōpū, kātahi ka hoki ōku kaumātua ki te kāinga. I ēnei rā kua āhua huri tērā āhuatanga nā te mea he reanga anō e puta ana, e mārama ana ki ngā pānga o a rātou mahi ki ngā mahi o te kāinga, ki ngā mahi o te marae, ki ngā awa anō hoki. Nō reira, he rerekē ngā tāngata i runga rā, ināia nei, ā, he rerekē hoki ō rātou whainga, o rātou pūkenga. Heoi anō, he ngāwari pea ki te kī, engari, kei konei tētahi rōpū Māori, kua kōrero mātou ki a rātou, me whai rautaki anō tātou katoa.
>
> Our leaders in years past, the council would call a meeting and they will just say what they were doing and there was no input from our kaumātua. But today things have changed, there's a new generation that is clear about their rights and so our leaders are different, their knowledge is different, their qualifications are different, and it's far too easy for councils to say, "Oh yes, we've spoken to some Māori about this issue so everything is okay.

205. Taihape Māori have suffered significant prejudice by the Crown. The following section documents some important case studies presented as evidence to underscore the point. They highlight the extent that local and regional councils failed to adequately consult with Taihape Māori in regard to their wāhi tapu.

**Case Studies**

*Aorangi*

206. This example is utilised to highlight how protections for sites of significance were very influenced by the Eurocentric perceptions that attached to sites of significance, certainly in the early part of engagement between the Crown and Taihape Māori. It is used to support recommendations sought that the protections accorded Māori under Article II of Te Tiriti, with respect to the question of sufficiency, extend to the retention of mahinga kai and non- agrarian resources; wāhi tapu and sites of cultural importance. It also highlights how only civilised uses such as gardens, orchards, and ornamental grounds were protected to the detriment over time of traditional

snaring and hunting areas that were not subject to protection with consequent loss and extinction of key native species.

207. Aorangi Maunga (a 1,216m peak) is situated 24km east of Taihape. Rested at its base is the Ruahine Ranges and Rangitikei River. Aorangi Maunga is a prominent landmark in the upper Rangitikei District for its rich history in Māori spiritual tradition and values. The Mōkai Pātea iwi in particular have strong spiritual and cultural associations with the maunga.

208. The history which was the subject of technical witness and tangata whenua witness testimony drew attention to the mokai ngarara named Pohokura that was placed on the Aorangi summit by the tupuna Tamatea Pokai Whenua, who visited the district in ancient times with his son Kahungunu. Pohokura later became a taniwha and protector of the maunga, and a symbol of Tamatea's mana over the surrounding whenua. After leaving Pohokura, Tamatea and Kahungunu descended the maunga and reached the banks of the Rangitikei River at a point where it narrows to a few metres. It was here that Tamatea came across a birding settlement belonging to a chief named Tarinuku of the Ngāti Hotu tribe, said to be the original occupiers of the land. Tarinuku welcomed Tamatea and his son and presented them with a calabash of preserved birds which had been stored in a natural hollow in the rock. Tamatea ate all the birds, which angered Kahungunu. They quarrelled and then took separate paths. Before departing, Tamatea named the place Te Papa a Tarinuku (The food trough of Tarinuku). These sites have retained their names and significance to Mōkai Pātea as has Pohokura as kaitiaki of Aorangi Maunga today.[184]

209. Aorangi Maunga lies on the main route from Mōkai Pātea to Hawke's Bay, thus being important for early travellers going from the interior country into the Hawkes Bay Region. The area was intersected by a number of trails, some of which were used by European explorers, including William Colenso. He described the Aorangi maunga as 'a huge table-topped spur, projecting towards the [north], and up-rearing its' dark and sharp outline against the sky'. According to Colenso this 'rampart' was named Te

[184] Armstrong, *The Impact of Environmental Change in the Taihape District 1840 – C1970,* Wai 2180, #A45, p 171-172, BoE #B2 Joint BoE of Paul Ngarimu and Jordan Winata-Haines 11 March 2016.

Papaki-a-kuuta' rendered by him in English as 'the barrier of the defender god of the interior', or 'the god defender of the interior'.

210. In 1850, Colenso finally climbed the maunga despite his Māori guides, aware of the tapu associated with the maunga, declining to accompany him. The importance of respecting these genuinely held beliefs were overridden despite these protests but is some of the earliest recorded testimony tracing how Aorangi Maunga was regarded as a site holding significant spiritual value to Māori and the Mōkai Pātea district. The significance of which is epitomised by the placing of Pohokura on the summit of Aorangi to protect the mauri of the maunga.

211. The lands at Aorangi Maunga have been long prized by Māori for its abundance of birdlife and natural food. In 1950, R. Batley visited Te Papa a Tarinuku noting signs of early Māori occupation and bird snaring. He also noticed damage caused by wild pigs and possums which were introduced species following European settlement. The evidence of Armstrong also emphasised that it apparently, was only around 1940 that kiwi become extinct in this area, the last few having been killed by dogs or possum traps. Forest Service staff later saw several totara trees from which strips of bark had been removed in former times to make kite for carrying birds. Between 1909 and 1912 several expeditions, organised by the Government and museum authorities, tried without success to locate huia, which although thought to be extinct were reported to have been seen or heard in the area from time to time.

*Moawhango Dam*

212. Ms Te Rina Warren presented evidence on the lack of consultation in relation to the establishment of the Moawhango Dam. She highlighted that there was no mechanism like the Resource Management Act to ‘protect’ wāhi tapu and the occupation sites of ancestors which meant that local

councils took advantage and did not adequately consult with Taihape Māori over their wāhi tapu.[185]

> Ko ōku kaumātua, nā rātou mai ki ahau, ki a mātou, i roto i ngā tau i tae atu ētahi tāngata ko a rātou he porohewa, e mau ana i te hūtu kiwikiwi, i tae atu ki te Tiriti, i whiu noa atu i te pātai ki tētahi Māori i te tiriti, he whakaaro pai tēnei ki te whakamahi i tētahi pāwai ki runga i tō awa, ki te whakautu, āe. Kātahi, i puta tēnei mea, ko te pāpuni, ko te pāwai o Moawhango. Nā, nō taua, kua tino kite ōku kaumātua i te rerekētanga o te awa o Moawhango. Heoi anō, ka rere tērā awa o Moawhango ki roto i a Rangitīkei. Nō reira, he pānga nui tērā mea ki te awa katoa.
>
> My elders said to us, people in suits came to see them, came to their street and stopped a Māori in the street and asked them just casually, what do you think about a dam on the Moawhango River and Māori said yes and next minute we have a dam on the Moawhango River. And from that time my elders saw the difference in the state of the Moawhango River but it used to flow to Rangitīkei so that dam impacts hugely on the river.

213. Ms Warren highlighted the impacts that the Dam had on this wāhi tapu. When the river flooded after the dam was constructed, it flooded some of the sites. The Mangaio River was an inundated stream. Te Piri a Paretutira was also inundated. This was a significant place because it was where mutton birds were taken. That is now gone also. Te Whakapai was another occupation site of the elders. There was a cave where our kaumātua lived which are submerged under water.[186]

> ...we had no opportunity for us to have a say. So that has a huge impact upon us. They did not discuss with us about what was going to happen about the emergence of a lake. So some of the places of our ancestors have been lost.

214. In recent years, discussions were had regarding the renewal of the agreement for that dam. Despite local authorities making an 'effort' to

[185] Wai 2180, #4.1.0 at 497.
[186] Wai 2180, #4.1.0 at 498.

engage with Taihape Māori, decisions had already been made regardless if Taihape Māori objected:[187]

> One of the principal things that we were told that dam will never be taken away, never. Although the Crown and this company came to talk with us, to ask us questions, "Do you agree that the dam remains there?" But they said we will never take the dam away. So what's the point of asking us the question? What's the point of coming to ask us if we agreed or not with the dam because they said the dam's not going away.
>
> …
>
> they stressed that the dam will not be taken away no matter what because it is in the national interests. That's the excuse they gave. So what shall we do? We just bow to what they say.

215. This illustrates the failure by local authorities to be compliant with te Tiriti o Waitangi and further disregards the role that Taihape Māori have as kaitiaki of their wāhi tapu.

*Erewhon Rural Water Scheme*

216. The Erewhon Rural Water Scheme was another scheme which impacted Taihape Māori on the awa. The consultative process with Taihape Māori or the lack thereof was highlighted by Ms Warren: [188]

> E ai ki ngā kōrero i puta noa mai tēnei āhuatanga ka pērā anō ngā kōrero ko tētahi tangata o te kaunihera i pātai ki tētahi Māori i te tiriti kāore i te maumahara ko wai taua Māori engari i kī āe nō reira i haere taua mahi. Heoi anō ko tērā mea he tauira anō o te mahi a te Kāwana a te Karauna a ngā rangatōpū ā-rohe ka haere tonu ngā mahi ahakoa te aha. Anō nei kāore a mātou ngā tangata whenua i whai wāhi ai ki roto i ērā whakaaro whakahaeretanga rānei.
>
> We have heard and same thing again, a council person just wondered along the streets saw a Māori and asked them, "Oh what do you think

[187] Wai 2180, #4.1.0 at 499-500.
[188] Wai 2180, #4.1.9 at 503-504.

> about this Erewhon Scheme," and that person say, "Yes," and that was the consultation. But that is another example of the ways of the Crown and the local government bodies that shows they will just carry on with their work no matter what. And seemingly they don't care if we have a role there or not.

217. During cross examination, Mr Potaka and Ms Warren were asked whether iwi were consulted or engaged with in relation to the Erewhon Rural Water Scheme to which they answered: [189]

> It would seem that the standard process of consultation at the time was to stop somebody Māori on the street and ask them if it was okay. That again has appeared in my investigations around Erewhon and what I've been told happened in that situation as well.

218. Further to Ms Warrens' evidence, evidence was also presented by Mr David Steedman on the Erewhon Rural Water Supply Scheme. Mr Steedman provided some background in relation to the establishment of the Erewhon Rural Water Supply Scheme ("ERWSS") and the failure of the Rangitikei County Council to consult with the Trustees and beneficial owners of the Aorangi Awarua Trust ("AAT") as part of its approval process.

219. The ERWSS officially opened on Friday 28 November 1980. [190] The ERWSS draws water from the Reporoa Stream running out of Reporoa Bog and distributes it to 28 farmers on both sides of the Rangitikei River involving a piped crossing of the river. There is up to 10 stations connected to the scheme with as many as 5 farmers owning or leasing two or more properties on the scheme. There are also 5 farms connected to the scheme that are in Māori ownership. 17.75% of the wetland is owned by Mangaohane Station and 25% by local Māori and administered by the Aorangi Awarua Trust ("AA T"). Mr Steedman was voted onto the AA T back in 2015.[191]

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189 Wai 2180, #4.1.9 at 522-523.
190 Wai 2180, #I3 at [15]-[17].
191 Wai 2180, #I3 at [7].

220. Despite section 46 of the Public Works Act 1928 stating that the local authority shall give written notice to the owner of their right of compensation, it appears that the Rangitikei County Council never gave such notice to the Aorangi Awarua Trustees.[192] Mr Steedman stated that:[193]

> ...there was no notice given by the Council to the AA T that a plan and description of the works had been deposited. There is, however, certainly correspondence on the file indicating that the council approached the Trust in relation to the water scheme.

221. On 23 March 1978, AA T sent a letter of concern to the Rangitikei County Council which put the Rangitikei County Council on notice that all was not right with the development of the ERWSS project.[194]

222. The Council failed to obtain the appropriate written consents of the owners of that time and insisted that they had verbal consent from well-known elder and Chairman, Rangi Metekingi. Furthermore, the Council did not call a meeting of owners under the provisions of the Māori Affairs Act 1953, the most appropriate statute available at that time.[195]

223. The level of consultation between the Trust and the Council at the inception of the ERWSS was minimal to say the least. In fact, Mr Steedman highlighted that the first consultation between the Rangitikei County Council and AA T had nothing to do with ERWSS. A meeting was called by AAT owners and the 7 Rangitīkei Whanganui Catchment Board ("RWCB") on 6 November 1976 to discuss a proposal put forward by T and J Mcilwain that $100.00 be paid to the AAT for milling of native timber at $10.000 per year:[196]

> Present at that meeting was Jim Bull and a RangitĪkei County Council Engineer. Both RWCB and Jim Bull opposed the project. Mr Metekingi

[192] Wai 2180, #I3 at [33].
[193] Wai 2180, #I3 at [31].
[194] Wai 2180, #I3 at [32].
[195] Wai 2180, #I3 at [35].
[196] Wai 2180, #I3 at [38].

> stated that the elders did not wish to have the area milled but were under considerable pressure from the younger members to derive benefit from their lands. The owners were then asked for permission for the Rangitīkei County Council to investigate the stream flows from the Reporoa Bog as a future water source for a rural water supply scheme.

224. The kaumātua at the time, including the Chairman of the AAT, Rangi Metekingi, felt the Act denied them of their mana and customary rights and that they had no leg to stand on.[197] The lack of consultation, conflicts of interest and disregard for their tino rangatiratanga has created extreme hardship for the mana whenua. Their rights have been ignored in favour of policies that are for a wider group of interests at the expense of Taihape Māori.

*Hautapu River*

225. The Hautapu River is located in the Manawatu region. The River originates from Ngamatea Swamp in the Waiouru Training area. From here it flows south, through private farmland and in some places following State Highway 1 for several kilometres before entering the Rangitīkei River south of Taihape. It was described in this way by Mr Che Wilson who gave evidence for Ngati Rangi:[198]

> 55. Hautapu – Ko ngā hau tapu a Peketahi: This awa starts on the slopes of Te Whakatara o Paerangi in the Waiū area and is shared with our whanaunga in this Inquiry.
>
> 56. For us, the name 'Hautapu' refers to the sacred winds of the kaitiaki, Peketahi, who frequents the Hautapu catchment. The name can also be taken as a reference to the sacred winds that come off the maunga. Peketahi is the intermediary for Ngāti Rangi to Te Pae Ururangi (and the associated cluster of stars). It was also in the Ngāti Rangituhia area of Ngāti Rangi where many of our offerings were given to the heavens, this evident in many names that also cross boundaries, namely:

[197] Wai 2180, #I3 at [34].
[198] Wai 2180, #J18 at [55]-[56].

- Tuhirangi: the sacred taumata where Paerangi had his tūahu and is also a star;
- Waiouru: Te Wai-o-Ururangi is a reference to the prominent Ngāti Rangi ancestor and star;
- Hautapu: a reference to offerings to Ururangi the star;
- Te Whakatara o Paerangi: a place to give offerings up to the heavens; and
- Te Rua o Puanga: an ephemeral tarn near Te Roro that was used for star gazing by looking at the reflection of the heavens in the lake.

226. The Hautapu River and the Moawhango River, both of which flow into the Rangitīkei River, and are seen in Pakeha law as tributaries of the Rangitīkei River, in the Māori worldview, are interconnected but very distinct parts of the whole. Mr Wilsons evidence is also illustrative of how the lens that Māori bring on what are cultural sites of significance and wāhi tapu is multidimensional in its reach encompassing as it does the multifaceted myriad of relationships that is encompassed by whakapapa that is very connected with questions of identity.

227. Traditionally, the Hautapu River was a pristine river which provided food and fresh water for everyday needs. Not only did the Māori people of Mōkai Pātea once swim and fish in the waters of the Hautapu, they also used the waters for baptisms, birthing, healing and other blessings. This took place particularly at the meeting of the waters of the Hautapu and the Rangitīkei which we believed to have healing qualities. Many of the older generation living today recall being baptised in the waters of the Hautapu.[199]

228. Since the establishment of the Taihape Sewage Treatment Plant, the mauri of the river has changed significantly and adversely affected by

[199] Wai 2180, #F3 at 4.

pollution. In establishing the Sewage Treatment Plant, the Crown and Council failed to consult with Māori before placing a sewage plant on the bank of the Hautapu River. Taihape Māori were not given a voice despite being the kaitiaki of the inland waterways within the rohe.[200]

229. At no time, did the Crown or Council ever consult with Taihape Māori before they placed a sewage plant on the bank of the Hautapu River. Taihape Māori were not given a voice despite being the kaitiaki of the inland waterways within the rohe.

**Consultative bodies**

230. There are some examples provided which show that Regional and District Councils at least have been prepared to engage with Māori groups on RMA matters. Iwi consultative committees were established to allow matters of interest to tangata whenua to be brought to the Council table. At least three consultative bodies were established in the Rangitīkei Region for this purpose:[201]

a. Te Roopu Āwhina;

b. Te Roopu Ahi Kaa for the Rangitīkei District Council; and

c. Nga Pae o Rangitīkei for the Horizons Regional Council.

*Te Roopu Āwhina*

231. As a consultative body in the Rangitīkei Region, Te Roopu Āwhina was established in 1998 but was apparently ineffective. Māori Councils around the country have developed committee structures to meet their legal obligations under the Resource Management and Local Government Acts. The purpose of this committee was to provide a sounding board for Māori in the Region. One of the reasons this did not succeed was that the participants lacked a common focus. As a consequence, Horizons changed

[200] Wai 2180, #F3 at 3.
[201] Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970's-2010.* Wai 2180, #A38, p 100.

its relationship-building approach to one of working with iwi and hapū on specific projects of interest. Supporting the development of Nga Pae o Rangitīkei was a natural extension of this approach. [202]

*Te Roopu Ahi Kaa*

232. One of the other Māori consultative bodies in the Rangitīkei Region established to engage with local government on RMA matters is Te Roopu Ahi Kaa which is a standing committee for the Rangitīkei District Council which represents local iwi and the Ratana Church.[203]

233. For some of the iwi and hapū, Te Roopu Ahi Kaa has been an effective consultative committee. However, not all share this view.

*Ngā Pae o Rangitīkei*

234. A further critical response of the Rangitīkei River iwi and hapū to the opportunities to exercise their inherent rangatiratanga with local government under the RMA and Local Government Act 2002 was to establish Ngā Pae o Rangitīkei ("NPOR"). This was a separate initiative from and additional region–wide consultation structures of Te Roopu Āwhina and Te Roopu Ahi Kaa which were established to boost council consultation with Māori. NPOR is a hapū and iwi forum solely focused on the Rangitīkei River and its catchment. The river was treated as a unifying force to bring together all of the hapū and iwi along the river for a common cause. [204]

235. Mōkai Pātea representative on NPOR, Te Rina Warren, stated that in response to concerns about the degradation of the Rangitīkei River and failings in the RMA process, iwi of the Rangitīkei catchment decided to take

[202] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report.* Wai 2180, #A44, p 287-288.
[203] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report.* Wai 2180, #A44, p 290.
[204] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report.* Wai 2180, #A44, p 292.

the initiative by forming their own body to represent iwi concerns and to co-ordinate consultation.[205]

236. A major concern at the time was that Council's did not know who were the appropriate tangata whenua to deal with and they tended to consult with larger more politically active groups. Consultation processes with Māori have historically been a contentious challenge for Māori and non-Māori alike. In this regard, it was suggested that NPOR could act as a vehicle to inform external agencies of the proper consultation processes that concerned the Rangitīkei River catchment.[206]

237. NPOR has struggled with a number of important challenges however, including unity of purpose, lack of resources and support, coordinating convenient meetings and iwi commitment given the large geographical area, reporting back to constituency groups effectively, administration, effective consultation, and Council engagement, and agreement with, and implementation of, iwi aspirations.

238. While there are at least three consultative roopu that were established in the Rangitīkei Region, the evidence highlights a genuine dissatisfaction with these mechanisms as sufficient to provide active protection to the hapū of Taihape who exercise their obligations as kaitiaki in the region. Mr Ngahapeaparatuae Roy Lomax highlighted in the Mc Burney report: [207]

> We have those Te Roopu Ahi Kaa structures in place but they are toothless because they don't give us a level playing field in the decision-making level.

239. Evidence was also presented by Mrs Puti Wilson which assessed recent relationship arrangements between local and regional councils and Taihape Māori against the Treaty guarantee of tino rangatiratanga. Mrs Wilson's evidences identifies clearly the flaws in respect of the joint

[205] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report.* Wai 2180, #A44, p 293.
[206] Meredith, Joseph and Gifford, *Ko Rangitīkei te Awa: The Rangitīkei River and its Tributaries Cultural Perspective Report.* Wai 2180, #A44, p 293.
[207] Wai 2180, #4.1.9 at 557.

management arrangements established under the Resource Management Act which are highlighted in these submissions. [208]

> The consultative groups became more of a mechanism of engagement to serve the interests of local government in allowing resource consents to be approved.

240. She further went on to say that: [209]

> ...these bodies do not adequately protect the Treaty relationship. Nor will they until there is some practical changes to the funding and resourcing and decision-making processes to enable sustainable management and development of these resources.

**Mana Whakahono Ā Rohe**

241. Mrs Wilson presented evidence relating to Mana Whakahono Ā Rohe agreements. She expressed how there were more mechanisms that enable Māori equal decision making other than the partnership model. "Mana Whakahono Ā Rohe agreements are but another relationship agreement that depends upon trust and co-operation."[210]

242. She confirmed that even where limited relationship agreements have been established, there is a significant limitation to their effectiveness. Even more so, when iwi and hapū are required to work with other iwi and hapū in ways that serve a common interest (i.e. kaitiakitanga of important taonga awa), MWAR agreements do not allow for the individual differences and nuances associated with individual iwi and hapū to be captured in an agreement. MWAR agreements predominantly serve individual iwi and hapū as they reflect the historical background of those iwi and hapū.[211]

243. A further difficulty is the failure of these agreements to be appropriately resourced to enable proper exercise of kaitiaki responsibilities and to

[208] Wai 2180, #L7 at [19].
[209] Wai 2180, #L7 at [20].
[210] Wai 2180, #L7 at [27].
[211] Wai 2180, #L7 at [27].

sustain the taonga and waterways that are integral to their identity. The Rangitīkei and Hautapu Rivers are particular examples.[212]

244. The Resource Management Act does not provide resourcing as of right. The Act prima facie gives the parties to the joint management agreement the freedom to determine between themselves how the agreement is to be resourced. Moreover, for a joint management agreement to be implemented, the local authority must also be satisfied that the agreement is an "efficient" method of exercising the function, power or duty.

245. Mrs Wilson argues that such a co-governance model is necessary as a minimum to provide Taihape Māori with equal decision-making powers. It is her evidence that co-governance arrangements have a number of characteristics which distinguish them from the joint management agreements and believes that they give true expression of hapū rangatiratanga and authority as envisioned in Te Tiriti o Waitangi.[213]

**Loss of Rangatiratanga and ability to be kaitiaki**

246. Taihape Māori described the impact of the RMA, as they attempted to take control of their wāhi tapu and have a say in the management of resources in the region. They described the experience as traumatic and having a fundamental impact on the way that iwi saw themselves and were organised. In general, they considered the legislation, and the statutory need to consult with Māori, as a positive change from what had occurred before. However, positive improvements in the ability of Māori to have a say in resource management and the protection of wāhi tapu still fell far short of what claimants considered was appropriate in exercising their rangatiratanga.

247. Taihape Māori have been regarded as submitters rather than kaitiaki of their wāhi tapu. The decision-maker/submitter relationship can never be one of partnership or of equality. Their role as "submitters" is restricted

[212] Wai 2180, #L7 at [27].
[213] Wai 2180, #L7 at [28].

within a regulatory process where their concerns are listened to at certain points in the process, and not at other points.

248. In the RMA process, once a resource consent application has been decided upon, relationship with the Regional or District Council is no longer needed. Ensuring Taihape Māori were consulted with, would bring them closer to being able to exercise their tino rangatiratanga.

249. Taihape Māori have been conscious of the impact of one and a half centuries of land loss, which marginalised their ability to exercise their traditional rangatiratanga over their rohe. Not only had this made them a much smaller player in environmental management, it also damaged the collective tribal structures which had exercised responsibility for resource management traditionally.

250. For some, this history of loss and marginalisation made it difficult to participate at all, particularly on the terms laid down by legislation or by local authorities. The past had left a high level of bitterness, which made it difficult to communicate effectively, particularly when the current process tended to throw up many obstacles over long and protracted negotiations.

**Issue 21(3)**

**What impacts have Crown legislation relating to land alienation, land management and use, resource management and environmental degradation, and riparian rights, policies and practices, had for the wāhi tapu of Taihape Māori?**

251. The Crowns' native land tenure process meant that wāhi tapu sites became the responsibility not of the hapū collective but of individuals or whānau, who were often less able to exercise an important and continuous kaitiaki role. This was especially difficult if wāhi tapu were located on remote or isolated land.

252. The Crown's native land tenure legislative regime was essentially another measure to effect rapid land alienation and accelerate land sales. In order for the Crown to properly colonise Aotearoa, the Crown needed to acquire

as much Māori land as possible for Pākehā settlers. This was achieved in a number of ways under the Native Lands Acts regime, including the breakdown of tikanga, the dismantling of the Māori communal way of life and the undermining of tino rangatiratanga. Land alienation removed the importance of whakapapa, as well as detrimentally affected Taihape Māori "socially, culturally and economically".[214] This was all in spite of the Te Tiriti guarantees given to Māori and manifested in the following treaty principles; duty of active protection,[215] duty to act in good faith,[216] and equal partnership.[217]

253. The opportunity for Taihape Māori to protect wāhi tapu was greater on land they retained, however, as has been raised in tangata whenua evidence, Taihape Māori landowners faced serious obstacles. Obstacles borne out of Crown legislation allowed for lands to be alienated by the Crown through its processes (underpinned by Crown policy to acquire as much Māori land as possible), or commonly through backdoor agreements between the Crown and private buyers.[218]

254. Some wāhi tapu were located on isolated blocks in the midst of Pākehā or Crown-owned land and access to them may have been limited.[219] Māori communities often lacked the resources or the ability to monitor and guard sites against desecration or fossicking. Māori became untrusting of the Crown and colonial settlers for fear of desecration of their wāhi tapu after disclosing their location. Professor Armstrong confirmed this under Tribunal questioning at hearing week one:[220]

> A. Of course, there was an issue that many Māori groups were very reluctant to disclose information about wāhi tapu –
>
> Q. Yes.

[214] Wai 2180, J17 *BoE of Jordan Winiata-Haines* at [74].
[215] Waitangi Tribunal Te Tau Ihu o te Waka a Maui The Report of the Northern South Island Claims Vol 1 (Wai 785, 2008) at [1.2.4].
[216] Waitangi Tribunal, *The Hauraki Report Volume 1* (Wai 686, 2006) at xxxiv.
[217] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 663-664;
Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim,* Wellington:
Brooker and Friend, 1987, at [11,IO.1].
[218] Wai 2180, J18 *BoE Che Wilson* – multiple examples given including Rangipō-Murimotu leasing.
[219] Wai 2180, #I3 *BoE David Steedman* at [41], [48]-[50]; Wai 2180, #H6 *BoE Ngahapeaparatuae Lomax* at [25]; [30]-[39].
[220] Wai 2180, #4.1.8 *Transcript Hearing Week One* at p 332.

A. – for fear of desecration and fossicking.
Q. Yes.

255. Taihape Māori had a difficult choice to make; either disclose the locations of their important and sacred sites and risk desecration through fossicking, or reserve that knowledge for their own people (under tikanga) and risk desecration. Unfortunately, the risk of desecration existed under both options and a decision wou/ld not have been made lightly. The Crown failed to provide Taihape Māori with an appropriate mechanism to properly protect their wāhi tapu, and certainly not one that recognised their tino rangatiratanga, or reflected equal partnership under Te Tiriti.

*Effects of Individualisation of Title Under the Native Land Tenure System*

256. Individualisation of title began under the Native Lands Act 1862 and would have a significant, detrimental effect on Taihape Māori's ability to protect their wāhi tapu.

257. Section 4 of the Native Lands Act 1862 authorised the governor to set up a court to grant certificates of title to individual owners:[221]

> IV. It shall be lawful of the Govenor from time to time by Commission or Order in Council to constitute a Court or Courts (hereinafter termed "The Court") for the purpose of ascertaining and declaring who according to Native Custom are the proprietors of any Native Lands and the estate or interest held in them therein, and for the purpose of granting to such proprietors Certificates of their title to such lands.

258. The communal approach used prior by Taihape Māori to exercise mana over their whenua was essentially brought to an end under this new legislation. Decision making power of hapū was now vested into individual owners, the impacts of which would be felt by all Taihape Māori hapū for decades to come. All Māori were now required to prove 'legal ownership' of their ancestral lands, a concept that was alien to many Māori at the time.

[221] Native Lands Act 1862, s 4.

Lands were surveyed and the now 'legal owners' were issued with certificates of title, the purpose of which was to convert Māori customary property rights to a type of legal title under Pākehā law. This signalled in a new era of land ownership for Māori and contributed significantly to the erosion of their rangatiratanga and kaitiakitanga over their urupā, wāhi tapu, and other sites of significance.

259. This Act began the end to Crown pre-emption (by around 1863-1864) and under s 17 of the Act, Māori owners now had the right to dispose of their land to individuals of their choosing:[222]

> XVII. The individual person or persons named in any Certificate as the owner or owners thereof or as having any particular estate or interest therein may dispose of the estate or interest which he or they may have in the Lands described in such Certificate by way of absolute sale or lease or in exchange for other lands or otherwise to any person or persons whomsoever.

260. Individualisation of title was further perpetuated by the Native Lands Act 1865. Land titles now issued by the court could list no more than 10 owners. Most importantly in regard to wāhi tapu there was no need to consult the hapū or the wider whānau on decisions about the land.

261. Fragmentation through increased partitioning of Māori land amounted to further erosion of hapū leadership structures over their whenua. Owners now had small portions of interests spread around various blocks and became unable to effectively manage and exercise control of those fragmented interests.

262. At hearing week one Professor Armstrong was asked by Professor Pou Temara to explain further on the impacts of fragmentation in regard to wāhi tapu:[223]

[222] Native Lands Act 1862, s 17.
[223] Wai 2180, #4.1.8 *Transcript of Hearing Week One* at 390.

> Q. And you're saying that the fragmentation had a direct correlation with the ability to protect wāhi tapu because of the failure to have cohesive decision-making?
>
> A. Yes and –
>
> Q. Could you elaborate?
>
> A. Yes, title individualisation eroded hapū control to the extent that the ability of the hapū to exercise kaitiakitanga was undermined.

263. Ngāti Hinemanu and Ngāti Paki descendant Jordan Winiata-Haines tells of how whakapapa connections became severed through the division of their land, and Taihape Māori's ability to exercise kaitiakitanga over their wāhi tapu diminished over time:[224]

> Our whakapapa became divided when the land was divided. We lost our resources, our access to our rivers, wāhi tapu, pā and kainga. We are no longer the kaitiaki over our lands. Others are making decisions on how those lands should be managed.

264. The evidence of Mr Winiata-Haines concurs with the evidence provided by technical witnesses,[225] namely, that Māori control over their lands became increasingly difficult due to partitioning, and 'Māori land blocks' could now be further fragmented, or onsold to non-Māori buyers. We submit that there is no question that fragmentation had a direct and substantive effect on Taihape Māori's ability to exercise their rangatiratanga over their own whenua, and to have such an important facet of their tikanga (kaitiakitanga) undermined due to the direct actions of the Crown is extremely disheartening. The breakdown of hapū leadership structures through the native land tenure process meant that Taihape Māori were unable to

[224] Wai 2180, J6 at [75].
[225] See #A45 and #A10 Reports.

properly exercise their mana over their own whenua. Their ability to exercise kaitiakitanga over their wāhi tapu suffered.

265. Further fractionisation of Taihape Māori land over their already diminishing tribal estates would cause generational inter-hapū and intra-hapū conflict, pitting "(b)rother against brother, father against son, nephew against uncle, cousin against cousin".[226] Tribal and hapū leadership structures meant very little under the native land tenure process and the decision making power of Māori land owners was now quantified against the amount of shares owned by each individual. Protection of their wāhi tapu under tikanga became extremely challenging in this new Pākehā world.

266. The Native Land Act 1865 also officially established the Native Land Court under s 5. Māori were now required to seek exercise of the provisions of the Native Lands Acts through the Native Land Court regime, which as this Tribunal has seen through technical and tangata whenua evidence, had been set up to progress the interests of Pākehā settlers and the Crown, *not* Māori.

267. At hearing week one, Mr Armstrong stated the following in relation to effects of the individualisation of title:[227]

> The transformation of functioning iwi collectives into a mass of individuals through the Native Land Court process also limited the ability of Mōkai Pātea to protect their wāhi tapu and urupā. Individualisation of title meant that wāhi tapu on land which remained in Māori ownership became the responsibility of individuals or whānau who may have been less able, for a variety of reasons, to exercise a demanding kaitiaki role, especially if wāhi tapu were located on landlocked or remote blocks.

268. Taihape Māori were now expected to navigate their way through a complex tenurial process they were not familiar. We submit that the challenges they

[226] Wai 2180, #I3 *BoE David Steedman* at [57].
[227] Wai 2180, 4.1.8 *Transcript Hearing Week One* at 314.

faced were particularly exacerbated as this process did not align with their own core values and protocols under their own tikanga, rangatiratanga, and mana whenua.

269. Native Land Court hearings were notoriously complex, lengthy and expensive. The Court could only investigate blocks after they had been surveyed, and the "costs for surveys and liabilities"[228] commonly fell on Māori owners. A significant portion of the value of a block could be consumed by its survey costs. Māori applicants were often at a disadvantage as they lacked the adequate resources or the requisite knowledge to properly traverse the Native Land Court's many processes. Court sittings sometimes lasted for months or even years, resulting in substantial additional court costs and legal fees, as well as travel and accommodation costs for the landowners and competing claimants. The stress and pressure put on Taihape Māori litigants would have been enormous.

270. In hearing week three, under cross-examination between counsel Mr Watson and technical witnesses, Dr Fisher and Mr Stirling, they discussed the lack of regard by the Native Land Court for Taihape Māori wāhi tapu:[229]

> Q. Would you then accept that in the context of both the setting up of this legislative system and then the application of it by the Native Land Court there tends to be scant regard for ensuring that the wāhi tapu of tangata whenua in the blocks are adequately noted and then provided for and protected in terms of how the various partitions and then alienations are given effect?
>
> A. I mean I think you'd have different situations, Court to Court, whether it would actually deal with it but certainly in many cases there was just a complete lack of effort on the part of the Court to lay out those, you know, perhaps partitioning and perhaps laying them as separate. But yes, related to that the Court acquired a lot of evidence from the claimants before it and that included wāhi tapu and urupā, and sites of significance and that was part of proving the claim so

[228] Wai 2180, J16 *BoE Jordan Winiata-Haines* at [80].
[229] Wai 2180, #4.1.10 *Transcript Hearing Week Three* at 381.

> clearly the evidence is in there but it's not really reflected in any protective mechanism subsequent.

271. It took considerable effort by Māori litigants and strain on their resources to participate in the Native Land Court process, yet despite their best efforts, no meaningful protective measures in regard to their wāhi tapu emerged. We submit that this is an indictment on the Crown, its legislation, and its processes. Despite what the Crown might say about its relationship with the Native Land Court, there can be no question that the Native Land Court perpetuated the loss of large tranches of Māori land in the Taihape rohe, and with it, the control of any associated wāhi tapu, urupā, and sites of significance.

**Native Lands Act 1873**

272. The Native Lands Act 1873 further undermined the rangatiratanga of Taihape Māori in regard to their whenua. The Act abolished the 10-owner rule and required the Native Land Court to list all the owners of a block in a memorial of title, as 'tenants in common'. Individual owners could now pass their shares on to their successors, and if they died without making a will, their shares were divided equally among their children. Māori land inevitably became more susceptible to fragmentation and fractionisation due to land titles becoming crowded with numerous owners.

273. Under questioning from the Tribunal at hearing week eight, Mr Armstrong stated that:[230]

> Q. But I wondered if you considered to what degree the fact that the knowledge about wāhi tapu resides in the memories of just a few, how much that is – what sort of impact that has so that I know in my own family's experience, when the knowledge holders pass away and they 30 haven't passed that information on, you're sitting as an owner of land that you don't know has wāhi tapu on it.

[230] Wai 2180, #4.1.16 at 162.

> A. Yes, yes, that's right, well yes, definitely. I think it's – I think as I discussed in my report, it's the hapū collective exercises kaitiakitanga over a number of natural resources and wāhi tapu. So,if you virtually obliterate the hapū as that functioning kaitiakitanga unit, then you seriously damage the ability of people to continue to look after those places in the way that you've described. The knowledge goes or it simply don't have the resources. They lack the ability for whatever reason to monitor the situation, you know landlocked blocks, remote blocks, they simply don't have the resources or the people.

274. We submit that there can be no doubt that the native land tenure process played a significant role in supressing Taihape Māori's ability to exercise their rangatiratanga and kaitiakitanga over their own whenua and wāhi tapu. From the Crown's point of view, the legislation under the native land regime did exactly what it was supposed to do, which was to alienate Māori from significant amounts of their whenua tīpuna. The desecration or alienation of any associated wāhi tapu became collateral damage, but did not affect the Crown in any way. The Crown was essentially able to do what it wanted without any fear of reprisal, and it would take decades before change would be ushered in under contemporary legislation, which we submit, is still severely lacking. Unfortunately, for many Taihape Māori the damage was done. Their wāhi tapu were either desecrated or no longer under their control due in large part to the Native Lands Acts and the Native Land Court.

**Criminal Code Act 1893**

275. Interference with human remains in a grave has been punishable by incarceration from 1893 until the current day, first under s 147 of the Criminal Code Act 1893 (which remained unchanged as s 165 of the Crimes Act 1908), and later as s 150 of the Crimes Act 1961.

276. However, we submit that Pākehā burial sites and urupā are not one in the same thing. Even under tikanga Māori it would be contrary to presume that all wāhi tapu have the same kawa, kōrero tuku iho, or significance from one group to another.

277. Both the Criminal Code Act 1893 and Crimes Act 1961 provisions are reproduced below:[231]

> **Criminal Code Act 1893:**
> 147. Every one is liable to two years' imprisonment with hard labour who-
>
> (1 ) Neglects to perform any duty either imposed upon him by law or undertaken by him with reference to the burial of any dead human body or human remains; or
> (2.) Improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.
>
> **Crimes Act 1961**
> 150. Misconduct in respect of human remains
>
> Every one is liable to imprisonment for a term not exceeding 2 years who—
>
> > (a) neglects to perform any duty imposed on him or her by law or undertaken by him or her with reference to the burial or cremation of any dead human body or human remains; or
> > (b) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

278. At no point within the provisions above has specific consideration been given to the various kawa and tikanga associated with the urupā of Taihape Māori.

[231] Criminal Code Act 1893, s 147.

**Early 1900s**

279. The Māori Land Administration Act 1900 made provision for the creation of inalienable urupā reserves on Māori land under s 29(1), but the onus was placed on Māori themselves to identify urupā for reservation. This assumed that Māori were prepared to disclose the precise locations of urupā at a time and as we have already stated, many Māori weren't prepared to do that due to desecration and fossicking.[232]

280. Section 16(11) of the Māori Councils Act 1900 assigned responsibility to Māori Councils for the protection and control of burial grounds (other than public cemeteries) and required Councils to fence, regulate and manage burial grounds:

> 16(11) For the protection and control of burial-grounds other than public cemeteries; to fence and repair fences of such burial-grounds, construct roads and paths in such grounds, plant trees or remove trees therein, and generally regulate and manage such burial-grounds.

281. However, like in the Criminal Code Act 1893, there is no specific mention or acknowledgment of Māori urupā throughout the Act or the important tikanga surrounding them. This is important as it incorrectly compounds Māori urupā and Pākehā burial sites. The Māori Councils Amendment Act 1903 (s11) improved on this and made it an offence for any person to trespass or desecrate a Māori grave and even had penalties including 3 months imprisonment.[233] However, we are unaware of whether this particular provision was tested or used within the Inquiry. The Act also made provision for complaints to be made to a Magistrate by the Chairman of the local Māori Council. But, researchers were unable to find evidence as to whether councils took an active role in the protection of wāhi tapu and urupā.[234]

[232] Wai 2180, #A45 at 354.
[233] Wai 2180, #A45 at 354.
[234] Wai 2180, #A45 at 355.

282. The Native Land Act 1909 was the consolidation of the many Native Lands Acts before it but with broader powers provided for within its provisions. For example, Armstrong noted that s 232 of the Act provided for the reservation of Māori land owned by more than 10 owners for their common use as a burial ground or 'place of historical or scenic interest'. These reserves were inalienable and created by an Order in Council on the recommendation of the Māori Land Board or the Native Land Court.[235] He also noted s 9 of the Native Land Amendment Act 1912 applied s 232 of the 1909 Act to 'any Native freehold land which is owned at law or in equity by not more than ten owners if there is situated on the land a church or meeting house or other public building, which, in the opinion of the Court or Board, is tribal or communal property.[236]

283. However, statutory decision-making authority was still vested in the Native Land Court (together now with the Native Appellate Court) which as we have already submitted advanced settler and Crown interests ahead of those of Māori. Furthermore, despite new amendments purporting to improve Māori administration of their lands and better land retention, the Act still perpetuated the erosion of *customary* Māori ownership and tikanga Māori, including but not limited to, the following provisions:

a. Māori customary title could not prevail against the Crown:[237]

> 84. Save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other manner.

b. Māori wills were not valid and had to be made in the same manner as wills made by Europeans:[238]

[235] Wai 2180, #A45 at 355.
[236] Wai 2180, #A45 at 355.
[237] Native Lands Act 1909, s 84.
[238] Native Lands Act 1909, s 133.

> 133. No will made by a Native, whether before or after the commencement of this Act, shall be valid unless executed in the same manner as is required by the law in force for the time being in respect of the will of a European, and all the provisions of that law as to the execution of a will and as to the attesting witnesses thereof shall apply accordingly.

c. Adoption of children by Māori custom was without any force or effect:[239]

> 161. (1.) No Native shall, after the commencement of this Act, be capable of adopting a child in accordance with Native custom whether the adoption is registered in the Native Land Court or not and, save as hereinafter in this section provided, no adoption in accordance with Native custom, whether made before or after the commencement of this Act, shall be of any force or effect, whether in respect of intestate succession to Native land or otherwise.

d. Marriages according to Māori custom had no standing and had to be constituted by way of Pākehā law:[240]

> 190. Every marriage between a Native and a European shall be celebrated in the same manner, and its validity shall be determined by the same law, as if each of the parties was a European; and all the provisions of the Marriage Act, 1908, shall apply accordingly.

284. We submit that in addition to the Crown's erosion of Māori customary rights through pervious Native Lands Acts, Māori tikanga was meticulously dismantled by the Crown through the 1909 Act (as evidenced in some of the provisions illustrated above). Taihape Māori were already disadvantaged through the imposition of a new Pākehā model of

[239] Native Lands Act 1909, s 161.
[240] Native Lands Act 1909, s 190.

ownership, but had to also contend with express attacks to their tikanga. This lack of respect for Māori cultural practices were common themes in laws passed between the 19th and mid-20th centuries. We submit that native land legislation was a prominent Crown mechanism in the acquiring of Māori land as it disproportionately favoured the Crown and Pākehā settlers, and the Native Land Court played a key role. The effects of which meant that wāhi tapu and urupā became extremely vulnerable to desecration and alienation.

**Historic Places Acts**

285. The purpose of the Historical Places Act 1954 was to identify and keep a permanent record of a wide range of places, including those associated with Māori and the country's early history,[241] through the constitution of the National Historic Places Trust under s 4. The intention of this Act was to provide relevant sites with certain protections under its provisions by recognising them as National sites of significance. However, predictably the focus of the Historic Places Trust at that time was "overwhelmingly Eurocentric",[242] and that "as far as can be ascertained there was little or no consideration of wāhi tapu or other Māori sites of significance".[243]

286. One of the purported protections under the 1980 Act was in relation to the scientific investigation of archaeological sites, provided under s 44. Namely, no investigation was to be conducted unless the following provision was observed:

> (2) Provided that no such investigation shall be carried out except with the concurrence of the owner and occupier of the land on which the site is situated and, where appropriate, with the concurrence of such Maori Association established under the Maori Community Development Act 1962 or Maori Land Advisory Committee established under Part V of the Maori Affairs Amendment Act 1974 or

[241] Wai 2180, #A10, Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga at 183.
[242] Wai 2180, #A45 at 12.
[243] Wai 2180, #A49(n) at [54].

> Maori tribal authority or any other Maori authority as the Trust considers appropriate.

287. However, Māori Land Advisory Committees were not exempt from criticism when it came to dealing with Māori lands. While the Māori Affairs Amendment Act 1974 provided for up to four of the members on the committee to "represent the Māori population",[244] there was no requirement for those persons to have Māori descent. Neither were those four positions guaranteed. Furthermore, members representing the Māori component of the committee were appointed by the Crown anyway[245] (under s 14(2)) which essentially rendered such provisions meaningless in a tino rangatiratanga and tikanga context.

288. The need for further reforms continued into the 1990s due to sustained criticisms regarding the ability of the Trust to adequately protect Māori heritage sites[246] and the need to make the provisions of the Act consistent with the Resource Management Act 1991. However, in regard to Māori representation on the Trust, the 1993 Act was a step backwards as Māori descent was no longer a requirement for Māori membership on the Board. The provision specifically states at s 42(3):

> (3) At least 3 of the persons appointed under subsection (1)(b) must, in the opinion of the Minister after consultation with the Minister of Maori Affairs, be qualified for appointment, having regard to their knowledge of te ao Maori (Maori worldview) and tikanga Maori (Maori protocol and culture).

289. Appointment is now knowledge based and Māori whakapapa is not important under the 1993 Act. Furthermore, criticisms of legislative regimes continued throughout the 1990s due to inadequacies in regard to "environmental management and in the protection of wāhi tapu and

[244] Maori Affairs Amendment Act 1974, s 14(c) – "Not more than 4 persons shall be appointed to represent the Maori population of the district for which the Committee is appointed."
[245] Maori Affairs Amendment Act 1974, s 14(2) – "The members of each Committee (other than the member who holds office under paragraph (a) of subsection (1) of this section) shall be appointed by the Minister who shall also appoint one member of the committee to be Chairman."
[246] Wai 2180, #A10 at [429].

taonga".[247] The impacts of this are deep-reaching for Taihape Māori as it adversely affects them at an emotional and spiritual level. We submit that the knowledge surrounding wāhi tapu is only enriched by whakapapa, so it is disconcerting to the claimants that the Crown does not recognise the value of this whakapapa connection or guarantee it under statute.

290. A report released in 1996 on environmental management by Parliamentary Commissioner for the Environment, Helen Hughes, was particularly critical of issues relating to Māori. The commissioner identified a number of issues which she considered important:[248]

a. The purpose of any information collection or assessment carried out by relevant public authorities;

b. The degree of confidentiality that can be maintained when necessary while still providing for effective protection of particular sites;

c. Whether legal provisions to protect confidential information are sufficiently clear and effective;

d. The kind of evidence which might be required, for example by the Māori Heritage Council (MHC) or the Courts about the existence or nature of wāhi tapu;

e. Whether it is appropriate for sites including wāhi tapu to be given a ranking, and if so how and by whom; and

f. How far systems of assessment reflect Māori priorities and ways of doing things.

291. The fact that the above criticisms were identified in the report despite all of the legislative reforms prior is deeply concerning. In our submission, many

[247] Wai 2180, #A10 at [435].
[248] Wai 2180, #A10 at [435].

of them appear rather obvious and it is worrying that such considerations would continue to be absent in contemporary legislation. Clearly, in relation to protecting sacred sites specifically Māori, legislators had been focussing on the wrong things. One would begin to question as to the usefulness of such legislation and it is no wonder Māori have been so untrusting of the Crown and its purported protections. The claimants remain resolute in their position that they are the ones that should have ultimate authority over their own wāhi tapu. This can only be realised through the full exercise of their tino rangatiratanga.

**Town and Country Planning Act 1977**

292. The Town and Country Planning Act 1977 ("TCPA") was an improvement on its 1953 predecessor (which did *not* provide for Māori interests to be taken into account in developing district schemes), but submit that the TCPA still fell well short of Māori aspirations and Te Tiriti principle duties in a number of areas.

a. First, while local bodies were to pay 'particular regard' to Māori associations with their ancestral land, there was no legal obligation to afford protection.

b. Second, while it gave some recognition to Māori values, planning legislation did not substantively address alienation issues. Processes such as zoning still restricted Māori land use which impacted on Taihape Māori access to and continued protection of their wāhi tapu.

**Conclusion**

293. The main aim of the Government had always been Pākehā land settlement and Māori land alienation was integral to achieving this. The Crown's aim was reflected in its very own statutes and Crown established itself as the primary speculator and broker for Māori lands acquired cheaply and on-sold at profit to its settlers.

294. Also key to Pākehā settlement was creating a strong and efficient infrastructure under a tenurial system that converted Māori land under tikanga to legal title. The subsequent impacts of which is that Māori sacred sites were given very little consideration, seen as irrelevant when measured against the needs of Pākehā settlers and Crown requirements.

295. The Native Lands Acts had the following effects:

a. Created a statutory waiver of Crown pre-emption;

b. Established a new judicial body, the Native Land Court with the power to make binding judgments; and

c. Set up a particular type of *process,* by which Māori customary titles could be converted into Crown-granted freehold titles.

d. Dismantled Māori customary and communal ownership;

e. Depleted Māori authority and control over their lands through fractionisation and land fragmentation.

296. By the mid-20th century much of Māori land was out of Māori ownership, not only affecting tribal land holdings but also whānau and hapū unity. It was common to find wāhi tapu and other sites of significance to be tied up in a bevy of land titles, partitions, Court orders, and sale and purchase transactions. The claimants and their ancestors were forced to conform to a new Pākehā way and anyone that was not properly prepared or adequately resourced were put at serious risk by Crown land legislation. When Taihape Māori lost control over their lands, exercising kaitiakitanga over any concomitant wāhi tapu became difficult or even non-existent. As already stated, whakapapa and cultural ties to wāhi tapu were diminished through the alienation of ancestral lands.

297. Many claimants discuss the impacts of being separated from their sacred rivers and tributaries, and the desecration of those waterways through water pollution,[249] which would detrimentally effect the mauri of the rivers; the health and wellbeing of traditional fisheries; and the ability to practice traditional activities such as preparing rongoa.[250] Other claimant evidence primarily discussed access issues or difficulties protecting their wāhi tapu due to them being out of their control.[251]

298. At Hearing Week 8, tangata whenua witness, Turoa Karatea stated:[252]

> We want the Crown, in true Treaty partnership, to establish a relationship with us, acknowledging the loss of our lands in this inquiry district where we once held significant interests as well as the recognition and protection of wāhi tapu and historical sites of significance on these blocks.

299. The above statement is embraced by all claimants within the Inquiry, and we submit that the Crown cannot purport to be an honourable Treaty partner and then fail to properly consider or make appropriate provision for tikanga particularly in relation to wāhi tapu and urupā, where a Māori lens is most vital. The claimants desire a true Te Tiriti partnership where the Crown acknowledges the loss of their lands in this inquiry district and offers proper protection of their wāhi tapu and historical sites of significance on these blocks[253] in accordance with their own tikanga.

**Prejudice**

300. Taihape Māori say that they have suffered significant prejudice as a result of Crown actions.

301. The Crown failed to consult with Taihape Māori prior to the enactment of any laws and policy that indirectly affected, or directly affected, Taihape Māori wāhi tapu, urupā, and sites of significance. This led to the enactment

[249] See prior examples within these submissions discussing Hautapu River and Rangitīkei River.
[250] Wai 2180, #F5 *BoE Jordan Winiata-Haines* at [97].
[251] See submissions within this submission in regard to Native Lands Acts, individualisation of title, fragmentation, Resource Management Act, and others.
[252] Wai 2180, #4.1.16 *Transcript Hearing Week 8* at 105.
[253] Wai 2180, #4.1.16 *Transcript Hearing Week Eight* at 110.

of ‘Eurocentric’ laws that were significantly bias towards the Crown and Pākehā settlers.

a. The Crown failed to constitute provisions within its laws and policies that properly provided for Taihape Māori tino rangatiratanga, which caused the diminishment of their tino rangatiratanga over their wāhi tapu, urupā, and sites of significance, and, contributed to the breakdown of iwi and hapū leadership structures.

b. The Crown failed to provide proper recognition of Taihape Māori tikanga and kawa in its laws and policies, which caused the undermining of their tikanga and kawa in relation to their whenua, mana, wāhi tapu, urupā, and sites of significance.

c. The Crown failed to constitute adequate protective mechanisms in its laws and policies, to enable Taihape Māori to retain ownership or authority over their whenua, which caused Taihape Māori the loss and/or desecration of any associated wāhi tapu, urupā, and other sites of significance.

d. The Crown constituted the Native Land Court, which had the following impacts:

    i. Alienation of, and with it, the loss of tino rangatiratanga over, vast amounts of Taihape Māori lands, and any associated wāhi tapu, urupā, and sites of significance.

    i. No protective measures were in place to ensure fair and reasonable legal proceedings for Taihape Maori litigants. This included, but is not limited to; access to adequate legal advice and financial assistance.

    ii. Enforced and applied the Crown’s, ‘Eurocentric’ laws and policies, for the benefit of the Crown and Pākehā settlers.

302. As a result of the Crown's actions and omissions, the Claimants have suffered the following prejudice:

a. Loss of mana as a result of the lack of recognition for the tino rangatiranga of Taihape Māori;

b. Diminution of spiritual and physical connections to the whenua due to the desecration of wāhi tapu;

c. Loss of matauranga Māori as a result of lost wāhi tapu;

d. The loss of connection to their sites of significance;

e. The consequent diminution of their mana;

f. Diminished whakapapa and cultural ties to wāhi tapu due to the alienation of ancestral lands;

g. Loss of resources and access to wāhi tapu such as rivers, pā and kainga; and

h. Loss of control and ability for Taihape Māori to exercise kaitiakitanga over areas of wāhi tapu.

**Relief**

303. As a result of the Crown's breaches of te Tiriti, the Claimants seek the following relief:

a. Finding that the Crown was aware of the significance of wāhi tapu to Maori from at least 1840.

b. Finding that despite the Crown's knowledge of the significance of wāhi tapu to Taihape Māori, it failed to implement a legislative regime to protect wāhi tapu.

c. Finding that the Crowns regulation of the movement of portable tāonga through the enactment of the Maori Antiquities Act 1901 placed the wāhi tapu of Taihape Maori at serious risk of desecration. Further, that by placing Taihape Maori wāhi tapu at serious risk of desecration, the Crown breached its duty to actively protect the wāhi tapu of Taihape Māori.

d. Finding that this failure to protect wāhi tapu was an egregious breach of the Crown's duties of active protection, partnership and good faith.

e. Finding that by the enactment of the Native Lands Act 1862, the Native Lands Act 1865, Native Lands Act 1873 and associated legislative enactments resulted in the alienation of lands from Taihape Māori and that those alienations would have contributed to the alienation and desecration of wāhi tapu located on those lands.

f. Finding that the Crown undermined the tino rangatiratanga of Taihape Māori by excluding Taihape Māori from exercising their kaitiaki role (in accordance with their tikanga) with respect to wāhi tapu.

g. Finding that despite the Crown's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples in 2019, the Crown has failed to make any material changes reflective of the articles in relation to wāhi tapu.

h. Finding that by enacting the Public Works Act 1864 permitting the Government to take both Māori customary and Crown granted land for public work purposes offered no protection for wāhi tapu.

i. Finding that when the Crown enacted the Maori Land Administration Act 1900 it created inalienable urupa reserve on Maori land however, undue onus was placed on Māori themselves

to identify urupa for reservation making them vulnerable to grave-robbing and fossicking.

j. Finding that the Crown regime under the Historic Places Act 1954 was Eurocentric and therefore offered ostensible, minimal protection of Taihape Māori wāhi tapu.

k. Finding that the Town and Country Planning Act 1977 gave the decision to determine the value of wāhi tapu to councils.

l. Finding that despite the Historic Places Act 1980 introducing a new category of heritage sites known as ‘traditional sites”, protection of wāhi tapu in the rohe was still ineffectual or superficial.

m. Finding that the Public Works Act 1981 was deficient in provisions to protect wāhi tapu.

n. Finding that the Crown whilst aware of the existence of Waiu Pa as a wāhi tapu, failed to afford it any protection;

o. Finding that the Resource Management Act 1991;

i. continues to undermine the tino rangatiratanga of Taihape Māori;
ii. fails to give recognition to Taihape Māori as equal partners;
iii. continues to create barriers for Taihape Māori to actively engage in the resource management process;
iv. continues to treat Taihape Māori as interested parties rather than as partners;
v. continues to invisibilise Taihape Maori;

p. Recommendation that the Crown provide monetary and administrative assistance to Taihape Māori to purchase lands containing wāhi tapu alienated as a result of the Crown’s land alienation legislative regime.

q. Recommendation that a suite of legislative changes be made to the RMA Act ; the Local Government Act; the Conservation Act and other associated legislation to ensure equal decision making and equal participation in the establishment of mechanisms to protect and monitor wāhi tapu, including proper allocation of resources to facilitate such processes;

r. Recommendation that consultation with Māori under the Resource Management Act is mandatory

s. Recommendation that where wāhi tapu is located on Crown lands, that it is mandatory for the Crown to enter into discussions with Taihape Māori for their return, failing that, their management of and accesses to the wāhi tapu.

t. Recommendation that the New Zealand Defence Force must engage with Taihape Māori for the purposes of discussing the kaitiaki of wāhi tapu located on NZ Defence Lands within the inquiry to create a management plan within 12 months of the recommendation being made.

**Dated at** Auckland this 5th day of May 2020

**Darrell Naden**
**Tamaki Legal**

**Neuton Lambert**
**Wackrow Williams**

**Dated at** Rotorua this 5th day of May 2020

**Annette Sykes**
**Annette Sykes & Co**

**Kalei Delamere-Rirnui**
**Annette Sykes & Co**