KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**THE TAIHAPE: RANGITĪKEI KI RANGIPŌ DISTRICT INQUIRY**

CLOSING SUBMISSIONS OF THE CROWN RELATING TO TRANCHE 1: LANDLOCKED LANDS TO 1975

1 September 2020

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INTRODUCTION

1. Māori retain approximately 14% of the land within the Taihape Rangitīkei inquiry district.[1] Over 70%[2] of the land retained by Māori[3] in the inquiry district is landlocked. Nationally, as a broad estimate, up to 20% of land retained by Māori is estimated to be landlocked.[4]

2. The cultural, spiritual, practical and economic implications of restricted access have been expressed strongly by claimants.[5] That experience has been heard by the Crown and is acknowledged within these submissions.

3. Landlocking in the inquiry district is highly fact specific – the Taihape experience is not representative of the national experience. Most (if not all)[6] of the lands retained by Taihape Māori today passed through the Native Land Court between 1886 and 1912 when legislative provisions were available to secure legal access. Where applications were made, access was ordered. There is little evidence of enduring access problems for lower altitude lands. There is little evidence of the reasons why very few applications were made for access to the high-altitude lands to the north

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1 Wai 2180, #A37 at 516.

2 Wai 2180, #A37 514-516, 533. Estimates on the record vary. The Te Puni Kōkori estimates were premised on a preliminary desk top exercise and therefore limited weight can be placed on them (Wai 2180, #A28(m) at 3; #A28(a). It is not possible to provide a definitive figure given: the level of scrutiny required to determine if each block meets the legal test of being landlocked has not been undertaken; Woodley's estimates are based on the #A015 alienation report data, Mr Innes acknowledged his report did not investigate alienation patterns for 10-20% of the land in the district (Wai 2180, 4.1.14 at 440). The Crown nonetheless accepts that more than 70% of the retained lands are, for the purposes of these submissions, landlocked.

3 "lands retained by Māori" is utilised throughout these submissions refers to land within the jurisdiction of the Māori Land Court and reflects the revised terminology of C Innes in Wai 2180 #A15(m) at [5] of "Māori Land Court title private land". ie lands that have not ceased to be Māori land at any point from Taihape Māori owners. It is not intended to include general lands owned by Māori that are not subject to that Act eg lands bought or otherwise acquired by Māori who may or may not have customary associations those lands where the customary association is not the basis on which they are currently owners of the land.

4 Te Puni Kōkori officials estimate that 20% of Māori freehold land is likely to have access restrictions. Email from Evan Martin to Te Arawhiti, 17 August 2020. Waitangi Tribunal *He Kura Whenua ka Rokohanga* 2015 at 68, 88 (estimate of 2006 Taumata), and at 243 Lillian Anderson reliant on regional evidence.

5 Wai 2180, #E3 Herbert Steedman; #G1 Tama Wipaki; #G4 Ritchie Chase; #G13 Richard Steedman; #G14 Lewis Winiata; #G18 Merle Ormsby, Tiaho Pillot, and Daniel Ormsby; #H6 Ngahapeaparatuae Lomax; #H8 Peter Steedman; #H11 Te Rangianganoa Hawira; #H13 Maraea Elizabeth Oriwia Bellamy and Te Urumanao Kereti; #I2 Lewis Winiata; #I3 David Steedman; #N8 Hemi Biddle; #O1 Peter Steedman; #O3 Richard Steedman. See also Wai 2180, #2.6.36(a) for claimant evidence prior to February 2018.

6 The analysis for these submissions has concentrated on the large landlocked blocks to the North and East of the inquiry district. All of these passed through the Native Land Court between 1886 and 1912.

and east of the District during that era however the character of these lands is likely to have been a prime contributing factor.[7]

4. The Crown acknowledges (in Part 5 of these submissions) that legislative requirements between 1912 and 1975 undermined the efficacy of remedial measures available to Taihape Māori to subsequently improve access to those high-altitude lands they retained. The Crown further acknowledges that the exceptionally high level of landlocking of Taihape retained lands meant that the experience of Taihape Māori has been akin to landlessness.

Structure of these submissions

5. These submissions address historical issues namely:

   5.1 The relevant legislative parameters up to 1975;

   5.2 How lands in the inquiry district became landlocked (up to 1975); and

   5.3 Acknowledgements relating to these matters.

6. A second tranche of Crown submissions will address the evidence on, and Treaty implications of:

   6.1 Direct Crown actions from 1950 that are relevant to access issues (including decisions of the New Zealand Defence Force and the Department of Conservation and predecessor agencies);

   6.2 Prejudice: the impacts on the land owners (economic and cultural, including whether access has contributed to sales of lands); and

   6.3 Remedies: what can now be done by the Crown as Treaty partner in relation to this issue.

7. Access issues, including landlocking, are closely intertwined with public works, roading, partitioning, fragmentation, succession and purchasing issues. Those matters will be addressed in separate submissions.

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[7] Residential and development efforts of Taihape Māori concentrated on lower altitude lands around Moawhango or to the centre and south of the inquiry district (few access difficulties have been identified for these lands).

8. The Tribunal released preliminary views in August 2018 to expedite this issue and to ensure its views were available to the Crown's review of the Te Ture Whenua Māori Act 1993.[8] Views of the Tribunal (and claimant submissions and evidence) that focus on contemporary consequences of landlocking and investigation into potential remedies will be directly addressed in Tranche 2 of Crown landlocking submissions.

9. The primary focus of these submissions is to assess how Taihape Māori retained lands came to be landlocked and the Crown's compliance with the Treaty in that history.

PART 1: CURRENT LAW AND TERMINOLOGY

Landlocked Land provisions & definitions

10. Although the focus of these submissions is on historical legislation pre-1975, a brief precis of the current law relating to landlocking is set out here to provide context to the evolution of that law.

11. Landlocked land is defined in the recently amended Te Ture Whenua Māori Act 1993 as:[9]

> **landlocked land** means a piece of land that has no reasonable access to it and is either—
>
> (a) Maori freehold land; or
>
> (b) General land owned by Maori that ceased to be Maori land under Part 1 of the Maori Affairs Amendment Act 1967
>
> **reasonable access** means physical access to land for persons or services that is of a nature and quality that are reasonably necessary to enable the owner or occupier to use and enjoy the land.

12. When considering applications to unlock access to lands, Court is required to have regard to (with emphasis added to recent amendments):[10]

> (a) **if the applicant purchased the land**, the nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased the land; and
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> (b) the circumstances in which the landlocked land became landlocked; and

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8 Wai 2180, #2.6.65 [1]-[2].

9 Te Ture Whenua Māori Act 1993 s 326A (as amended by Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020.

10 Te Ture Whenua Māori Act 1993 s 326B(4).

(c) the conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land; and

(d) the hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and

(da) the relationship that the applicant has with the landlocked land and with any water, site, place of cultural or traditional significance, or other taonga associated with the land; and

(db) the culture and traditions of the applicant with respect to the landlocked land; and

(e) the requirements of Part 3B of the Conservation Act 1987, if the application affects a conservation area; and

(f) issues of public safety raised by a rail operator, if the application affects a railway line; and

(g) such other matters as the court considers relevant.

13. Case law on "reasonable access" is well settled.[11] Whether land is landlocked requires a case-by-case, evidence-based assessment. Access at the whim of another is not considered reasonable, however reasonable access in the legal sense does not mean the best possible access, nor does it necessarily mean vehicular access (or for that matter, legal access) but will turn on what is practical. Whether access should be granted does not require the consent of adjoining owners but does require a balancing of the relative hardship between landowners if access is to be ordered.[12]

14. The Māori Land Court's approach to determining whether reasonable access exists (and consequently whether land is landlocked) reflects case law in the general jurisdiction of senior courts,[13] and has been summarised in *Huata v Robin - Rotopounamu 1B1A.*[14] Of particular relevance:

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11 *Murray v BC Group (2003) Ltd* HC Wellington CIV 2007-485-198 [2009] NZHC 114; [2009] 3 NZLR 257 (12 February 2009) per Williams J upheld as below.

Murray v BC Group [2010] NZCA 163 [19] citing *Wagg v Squally Cove Forestry Ltd; Asmussen* and *B A Trustees v Druskovich* [2007] NZCA 131, [2007] 3 NZLR 279 at [61]. See also *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364 (CA) where water access only was found to be reasonable in those circumstances.

12 Te Ture Whenua Māori Act 1993 s326B(4)(d).

13 *Murray v BC Group (2003) Ltd* HC Wellington CIV 2007-485-198 [2009] NZHC 114; [2009] 3 NZLR 257 (12 February 2009) per Williams J upheld as below.

Murray v BC Group [2010] NZCA 163 [19] citing *Wagg v Squally Cove Forestry Ltd; Asmussen* and *B A Trustees v Druskovich* [2007] NZCA 131, [2007] 3 NZLR 279 at [61]. See also *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364 (CA) where water access only was found to be reasonable in those circumstances.

14 [2017] NZMLC 73 (7 July 2017) at [68].

> (a) Whether there is reasonable access to land is a question concerned with whether there is practical physical access in fact, rather than whether there is legal access.
>
> (e) Reasonable access is not necessarily the same as the best access that could be achieved. Other access may be convenient and reasonable but that does not mean that the access the land presently has is unreasonable.
>
> (f) Whether there is reasonable access is a value judgment that the Court has to make on the basis of the evidence. Factors such as the characteristics of the locality (residential, commercial or mixed), the topography of the land and contemporary transportation requirements are relevant.
>
> (h) Reasonable access does not invariably mean vehicular access, but nowadays the situations in which non-vehicular access will be regarded as reasonable are likely be few because of the great dependence people now have on motor vehicles.

15. The recent Te Ture Whenua Act amendments may result in greater weight being given to cultural relationships and practices for Māori land. This further distinguishes Māori landlocked land from land under the jurisdiction of the Property Law Act.[15] The principles and kaupapa of Te Ture Whenua Maori Act (along with s 326B(4)(g) ("such other matters as the court considers relevant") may be considered to provide more scope for the Māori Land Court to consider future utilisation of the land than the High Court does under the Property Law Act. For example, in *Tuson - Mangamuka West 3B2A* [2018] NZMLC 8 the Court noted:

> [100] I consider that the grant of access for the owners of Mangamuka West 3B2A would achieve the principal purpose of Part 14, given their expressed intention to occupy and utilise their land. This is also consistent with the overall principles and kaupapa of the Act as set out in the Preamble and s 17 of the Act.

16. The Tribunal has applied a working definition for the purposes of this inquiry, considering "as landlocked lands those Māori lands that have no legal or formed road or easement granting access to them."[16] This differs from the legislative definition or the case law in that:[17]

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15 The Property Law Act 2007 s 326 definition of reasonable use is narrower in that the "purposes of use" are those "enjoyed or granted under the Resource Management Act 1991". There are no equivalents in the Property Law Act regime to these additional relevant criteria recently inserted into Te Ture Whenua.

16 Wai 2180, #2.6.65 [4].

17 *Murray v BC Group (2003) Ltd* HC Wellington CIV 2007-485-198 [2009] NZHC 114; [2009] 3 NZLR 257 (12 February 2009).

16.1 it is a generalised statement - whereas land is landlocked requires assessment of the particular circumstances (including topography, context, reasonable usages etc).

16.2 the absence of a legal right of access does not always point to land being landlocked (pedestrian access over adjoining public land has been held to be 'reasonable' in particular contexts).

16.3 a formed road, or indeed, vehicular access is not necessarily required for access to be 'reasonable' (although it will be in the majority of cases).

17. The statutory definition of landlocking refers only to access **to** land, not to access **within** that block. This is of particular relevance to some blocks within the inquiry district which have road frontage but steep bluffs near that road frontage limit the ability to access the remainder of the block.[18] For the purposes of these submissions the Crown has included such blocks as being *prima facie* landlocked lands.[19]

Previous Tribunal views

18. Tribunal consideration of access issues in previous inquiries is relatively limited and concentrates on:

18.1 specific land transactions that involved direct Crown action;[20]

18.2 high level commentary and findings.[21]

19. The Tribunal in its Wairarapa Inquiry commented that "the frustrations associated with dealing effectively with landlocked blocks often leads

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18 For example Owhaoko C7. Wai 2180, #A37 at 397.

19 Closer scrutiny of each block is likely should access applications be made. There may be factors that come to light through that scrutiny that, although relevant to whether reasonable access exists (and therefore the land is landlocked), are not known to any technical witnesses to this inquiry.

The Court of Appeal has found (in *Murray v BC* at fn [14] above): "Obviously, if people cannot get onto their property it has no reasonable access. If they can access it from a public roadway or walkway through a suitable pedestrian route then such access may be reasonable, depending on the circumstances." […] "It cannot be the law that without access by foot – or by motor vehicle – a property is landlocked. It all depends upon what practical access exists to the property in question and whether that is reasonable."

20 For example, Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wellington: Legislation Direct, 2004), vol 1, pp 327-328; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 637-638.

21 Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993*, (Wellington: Legislation Direct, 2016), at 40 (summary) and high-level findings at 252; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 622-623; 637-638; Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* 3 vols, (Wellington: Legislation Direct, 2015), vol 3, p 1500.

ultimately to their sale";[22] In 2015 in *He Kura Whenua ka Rokohanga,* the Tribunal found (emphasis added):[23]

> […] Nonetheless, we do consider that issues such as landlocked land and rating and valuation require urgent consideration as part of the Bill. **These issues have arisen as a result of past Treaty breaches by the Crown, and it has a Treaty duty to remedy them.** We commend the Crown for now recognising that these issues need to be addressed. Investigation of and research into these issues is warranted as part of the broader goal of endeavouring to assist Māori landowners develop and utilise their lands, unencumbered by barriers created by past actions of the Crown. We encourage the Crown to continue its work on these enabler issues, and to address them where possible in the draft Bill.

20. The above finding that the issues arose as a result of a past Treaty breach is not particularised. In that inquiry the Tribunal proposed some generalised historical factors concerning the multiple pathways through which land may have become landlocked, and the consequences alleged to result:[24]

    20.1 Land sales and partitions instigated by Māori without securing access: "Often" [but not always] undertaken to pay debts incurred through Native Land Court processes and – in some cases - resulting fragmentation into small uneconomic blocks;

    20.2 Crown-initiated partitioning;

    20.3 Lack of effective collective land administration mechanisms impacting upon the ability of Māori communities to control or make strategic choices about what land would be sold or retained.

21. It falls to the Tribunal in this inquiry to consider more fully the contributory causes of landlocking, and its effect. This is fitting given the exceptionally high proportion of landlocking of lands retained by Māori in the inquiry district compared with other districts.

Terminology: Land retained by Taihape Māori

22. Clarity and consistency is required with definitions and statistical analysis dealing with lands. Ms Woodley, the author of the key technical report on

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22 Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 622-623.

23 Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993*, (Wellington: Legislation Direct, 2016), at 252.

24 Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993*, (Wellington: Legislation Direct, 2016), at 40.

landlocking issues for the inquiry,[25] analysis drew on Mr Innes' *Maori Land Retention and Alienation* report.[26] The commission for Mr Innes's report concerns "What land remains in Māori ownership?" That would appear to include all lands now in Māori ownership (including general lands). However, Mr Innes clarified that his analysis related only to lands "within the jurisdiction of the Māori Land Court" and submitted a revised report.[27]

23. Evidence was heard of Taihape Māori owning lands within the inquiry district that had at earlier points ceased to be Māori land and are now general lands. Mr Parker identified a number of blocks of general land owned by Māori.[28] These included lands:

23.1 bought by whānau over time as part of their own resilience strategy, in particular by members of whanau who have purchased almost double the amount of land as that which was retained in the Taraketi block;[29] and

23.2 owned by members of a whānau who hold customary interests in some Owhaoko lands as Ngāti Hinemanu and Ngāti Upokoiri (uri of Renata Kawepō), and other ownership interests in adjoining lands. That ownership is through their maternal Pakeha line or subsequent commercial dealings – approximately 60,000 ha rather than through their customary interests in those lands.[30]

24. If the general lands above (most of which have access and are today owned by Māori but were previously owned by non-Māori) were to be included in the assessment approximately 231,000 acres in the district would be "land owned by Māori" (compared to the 171,000 acres retained by Māori).[31] If these general lands owned by Māori were included, it would result in revised figures of approximately 20% of the lands within the inquiry district being owned by Māori, approximately 50% of which is landlocked.

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25 Wai 2180, #A037.

26 Wai 2180, #A015 Innes.

27 Wai 2180, #A015(m).

28 Wai 2180, #A015(j) Affidavit of James Brent Parker.

29 Wai 2180, #A015(j) Affidavit of James Brent Parker.

30 Wai 2180, #3.2.477 Ngamatea Trust interested party application; see also *Steedman v Apatu* 341 Aotea MB 164 Harvey J held that the Apatu whanau within 'preferred class of alienee' for Owhaoko D6/3.

31 Wai 2180, #A15(j) Affidavit Brent James Parker.

25. However, Judge Harvey indicated that the general lands discussed above that are now, again, owned by Māori should not be considered within the landlocked lands analysis for this inquiry given that they are not "subject to the jurisdiction of the Māori Land Court."[32] Distinguishing these general lands, from the retained lands, on the basis of these jurisdictional parameters may not be straightforward - the Māori Appellate Court appears to view jurisdiction over general lands owned by Māori more broadly in the absence of clear words excluding jurisdiction.[33]

26. The issue need not be finely litigated here.[34] What is required is simply transparency and consistency in the definitional terms.

    26.1 For example, the terminology "more than 70% of **land owned by Māori** in the inquiry district is landlocked" is not correct (as above, more land is owned by Māori than has gone into that calculation and if all lands owned by Māori were included it would be closer to 50%).

    26.2 The descriptor "**lands retained by Māori**" is therefore used in these submissions to connote lands that have been retained by Māori through to today without intervening alienation.[35]

    26.3 For the avoidance of any doubt, for the purposes of these submissions, the Crown accepts that over 70% of the lands retained by Taihape Māori are landlocked.

27. It should be noted that Mr Innes's reporting, Ms Woodley's analysis, and these submissions do not address Europeanised lands, ie land where the status of the land changed but the ownership didn't.

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32 Wai 2180, #4.1.014 Transcript Hearing Week 6, Moawhango Marae around 453 Judge Harvey made comparisons with various arrangements where Māori own land without customary relationships to it (eg Palmerston North). Here, whilst it is accepted that there may be a valid distinction to be drawn between lands retained by Māori and lands that were previously alienated being owned by Māori through subsequent intervening events, the situations within this inquiry district do involve customary relationships with the lands. Here, along a further complexity is that there are pathways for lands previously alienated to be brought back within the jurisdiction of the Act.

33 *Moke v Ngāti Tarāwhai Iwi Trust* Māori Appellate Court [2019] Māori Appellate Court MB 265 [60] – [61]. This case concerned whether activities of a post settlement governance entity Trust are within the jurisdiction of the Court.

34 In Treaty terms it is likely that the same considerations arise where more than 50% of retained lands are landlocked as arise when more than 70% are.

35 The Owhaoko gifted lands were alienated for a period but were ultimately returned to the customary owners and are therefore included for the purposes of these submissions as lands retained by Taihape Māori.

PART 2: HISTORICAL LEGISLATION

28. Government policy has been generally supportive of landowners being able to secure access to their lands. Legislation has been enabling and permissive and has, subject to certain conditions, included the ability to order access for Māori lands since 1886. This has included remedial measures that enabled access to be granted retrospectively where applications were not made at the point of the original title determination or partition being undertaken.

29. This section focusses on the conditions applying to these provisions.

30. The legislative provisions that provide for access to Māori land, and those providing for access across Māori lands for other parties (either through roading or private access of adjoining land owners) are both of relevance.

31. Other than where of direct relevance to the particular issue of landlocking, the taking of Māori land to enable access for others (ie by public roading or rail) will be addressed in submissions on Issue 13, Public Works.

Background: Development of law relating to lands for public roading 1840 - 1886

Access over Crown and European lands

32. Early intensive roading and access development concentrated on European lands and Crown lands. Māori lands (particularly customary lands) were largely protected from (but also therefore excluded from) these early initiatives.

33. Through to the 1860s compulsory taking provisions for public works, including for roading, applied to European lands only. Māori land was not included. Marr states:

> The earliest trends in public works concerns were also directed at a local level within established settler communities where some form of local control was established. In keeping with Crown policy, Maori land was protected from local settler authority, usually rating, but the price paid was often the exclusion of Maori from the local government [and infrastructure development] process[es]. [36]

[36] Waitangi Tribunal, Rangahaua Whanui Series Marr, C *Public Works Takings of Māori Land*, 1840-1987 (1997) at 49, referencing at fn 5 12 June 1861, NZPD, p 43.

34. Compulsory acquisition of European lands for public works was introduced from the late 1850s subject to certain "standard protections" (specificity; right of return if not used; etc).[37] Public works takings of Māori lands were enabled for lands under Crown grant in 1864; and for customary lands (by central government in 1864 (but not by provincial governments).[38]

35. Bringing Māori lands into roading developments was not a straightforward process, nor was it predetermined. Marr tracks tensions between the imperial and settler governments on these policy issues.[39] These early matters did not play out directly on the ground in Taihape as most roading and more intensive access issues took place after 1876 but are nonetheless relevant historical context for Taihape.

36. Of more direct relevance, the 1894 Public Works Act provided a remedial provision where people had purchased land from the Crown without existing access forming part of that title.[40] Where the adjoining land that had to be crossed was Crown land, the Minister was required to provide access. Where the adjoining land was private, access was to be provided subject to compensation to the owner (which, if less than 1/5th of the price of the title seeking access would be met by the Crown, with the applicant required to pay the balance). Variations on this provision, enabling access to be ordered over Crown and European lands, continued through to 1928.[41]

Access provisions specific to Māori lands

37. Rather than narrate the development of the legislation chronologically, these submissions address each of the key components relating to access. The relevant legislative provisions are provided for ease of reference as Appendix A to these submissions.

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37 Marr at 41.

38 New Zealand Constitution Act 1852 s 19(10) (see also Marr ibid at 40).

39 New Zealand Constitution Act 1852 s 19(10) (see also Marr ibid at 40); Waitangi Tribunal, Rangahaua Whanui Series Marr, C *Public Works Takings of Māori Land*, 1840-1987 (1997) at 49, referencing at fn 5 12 June 1861, NZPD, p 26, 43 and 51- 58, 66.

40 Public Works Act 1894 s 112.

41 Public Works Act 1928 s 124.

Access can be secured on grant of title or upon partition

38. Access to Māori land across adjoining lands with roadlines (private roads) or public roads could, from 1886, be ordered upon creation of a title or upon partitioning.

39. In the Taihape district, the titles or partitions of the majority of the lands retained by Māori today were granted between 1886 and 1912 (the key exception to this being Awarua o Hinemanu). Very few access applications appear to have been made to the Court (discussed below). Prior to 1912 the consent of adjoining landowners was not required.

Compulsion

40. From 1886 to today, the access provisions in legislation have been permissive rather than prescriptive. The legislation extends an ability to landowners to apply for legal access and the power to the court to order access over land, but does not compel either to do so. Some statutory direction was however provided for the exercise of that discretion.

41. For example, the Native Lands Act 1909 stated:

> 117 (1) Upon any partition the Court **shall** layout upon the land partitioned such road-lines (if any) as the Court thinks necessary or expedient for the due settlement and use of the several parcels. [emphasis added]
>
> 118 It shall be the duty of the Court so to exercise its jurisdiction under this Part of this Act as to avoid, so far as practicable, in the opinion of the Court, the subdivision of any land into areas which, because of their smallness, or their configuration, or for any other reason, are unsuitable for separate ownership or occupation.

42. The Court was required to turn its mind to access issues and was required to ("shall") lay out road-lines necessary for settlement and use. The Court's discretion in deciding what was necessary was guided by s 118 which required the court to avoid creating titles that were unsuitable for separate ownership or occupation.

43. Subsequent provisions became even more directive. The 1913 Act required, for any subdivision, that the:[42]

> Court shall have regard in as far as practicable, to water-supply, road access, aspect and fencing boundary … and generally shall have

42 Section 54.

> regard to the configuration of the country, the best system of roading, and facilities for settlement.

Remedial provisions

44. Since 1886, other than between 1909 and 1912, remedial measures have been available to enable parties to apply for private roads to be laid across any land previously divided under any of the Native Land Administration Acts to secure access over adjoining blocks.[43]

45. Under the 1886 Act remedial applications were to be made within two years of the Act being passed (this was subsequently extended).[44] Under the 1894 Act applications were able to be made within five years from the date of the partition.[45]

46. The 1909 Act was silent concerning the window within which any access order could be sought. It instead simply said "Upon any partition". Whether this was an intentional decision to remove a remedial capacity or not, that was its effect. Although the Māori Land Court was comfortable ordering access to a partition in 1910 (Rangipo Waiu B7B), that order was quashed by the Supreme Court for want of jurisdiction (by application of the adjoining owner Waikari Kariatiana and the lessee of his lands, Alexander).[46]

47. From 1912, the remedial provisions were clearly and explicitly provided and were linked to remedying landlocking, with power to lay down roadlines on application "either before or after the commencement of the Act" (ie no time restrictions within which applications must be made) from "any subdivision thereof [that] has no access to any public road."[47] Earlier provisions were phrased more generally.

48. The 1913 Native Land Act Amendment Act intended to remove any doubt as to whether access could be ordered over European lands. It formed part

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43 For example, Native Land Court Act 1886 s 92. Wai 2180, #A37 243 Ms Wooley has misinterpreted these provision as being restricted only to the land being partitioned, ie not adjacent Maori owned blocks or European lands. The 1886 Act uses the language of lands "appurtenant to". The 1894 provision states that it applies to land that "has been or shall be ordered to be divided" under the previous Act or the 1894 Act, and "each of such parcels shall be subject to such rights of private road for the purpose of access to other or others of such parts or parcels as may be ordered."

44 Native Land Court Act 1886 s 92.

45 Native Land Court Act 1894 s 69.

46 Native Land Court Act 1909; Wai 2180, #A037 (b) Document Bank Volume 2 at 69. Wai 2180, #A037 at 339 – 344.

47 Native Land Amendment Act 1912 s 10 (3) (4).

of the newly elected Reform Party's new approach to Māori lands. Hon. Mr. Bell, Minister of Internal Affairs, described the purpose of the access provision as being to increase connectivity across blocks – whether Māori or European lands:[48]

> I shall not deal with the machinery relating to partition, as those provisions are only amendments and alterations of the present law of partition; but clauses 48 to 51 are new provisions for roads on partitions. The laying-out of the roads has been a subject which has created very considerable difficulty in the past. There must be some power to create roads on land when cutting pieces of land up into various strips, and that has been for years the power of the Court; but the object now is to enable the roadlines to be laid off so that a continuous road may be made through adjoining blocks; and even where the adjoining land belongs to a European, or where European land divides the blocks, the Maori Land Court in making its partition may have the power of laying off roads, which the sections shall front on. The Court's power hitherto has been limited to the single block and therefore the roads have not been continuous, excepting whether the parties themselves have sought to create continuous roads. Now, the Court's business is to see that the roads are roads with will serve the area in which the block is and the Court can approach the European for the purpose of continuing the road-line.

49. All remedial provisions were subject to the Crown's rights relating to roading not being prejudiced. They were also, from 1912, subject to some consenting restrictions (discussed below).

Consent

50. Until 1912 there was no requirement for the consent of the adjoining landowner whose land the access would traverse.[49]

51. From 1912 the consent of the lessee or the adjoining landowner was required if the access being sought traversed non-Māori land, or leased Māori land. Consent was not required for access over Māori land that was not leased.[50]

52. From 1922 those requirements for consent were dispatched with, with one exception.[51] Under the new regime, if the neighbouring land was either European land since 15 December 1913 or Native land, then consent was

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48 NZPD Native Lands Amendment Bill Committee Stage [December 10 1913] 866-867.

49 The 1886, 1894 and 1909 Acts are silent on consent.

50 Native Land Amendment Act 1912 ss 10 (3). Native Land Amendment Act 1913 s 49 (3) (leased land), s 52 (all lands).

51 Native Land Amendment and Native Land Claims Adjustment Act 1922 s 13 (3) and (4) – to be read with the 1913 provisions (that remained in force); Native Land Act 1931 ss 481 (lessee pre-1913), 482 (any freehold land), 483 (no consent for post 1913 lands), 485 (rights of way).

not required. The sole exception to this roadline regime was to preserve the existing regime for land that had ceased to be Native land prior to 15 December 1913 or was leased (pre-1913 titles) - the consent of the owners and lessees of such land was still required before access over that land could be ordered by the Court (the pre-1913 consenting requirements).

53. In effect, the 1922 amendment created a new category for post-1913 land, in which consent was not required. The policy presumption from this point forward is that access could be ordered over any land (whether Māori land or non-Māori land) to improve the access of any land (both Māori and non-Māori lands), even over the objection of an adjoining owner.

54. Given the significance of the consenting provision for the experience of landlocking in the inquiry district (early failures to secure access could not later be remedied unless the consent of the adjoining landowner was secured), it would be useful to have some further understanding of the policy rationale for the pre-1913 caveat. Unfortunately the Hansard is silent on the provision.[52]

55. In 1975, the pre-1913 consenting exception was removed with the result that the consent of adjoining landowners, regardless of the land tenure, could no longer form a barrier to their neighbours' applications for access.

56. Easements could be placed on titles by consent of both parties. Rights of way (rather than roadlines) could be ordered from 1928 over either European or Native land, for the benefit of either where the reciprocal landowners (Māori or European) consented.[53]

57. The availability of these mechanisms - where consent existed - further confirms that the policy intent of the remedial provisions was to provide a solution whereby the consent of the adjoining landowner was not determinative. This accords with longstanding acceptance that the balancing of reasonableness and fairness is warranted,[54] but access at the whim of, or dependent on the courtesy/goodwill of, another is not

52 NZPD [Oct. 30 1922] 775 – 776.

53 Native Land Amendment and Native Land Claims Adjustment Act 1928 s 12.

54 For example through the "reasonable access" test and Te Ture Whenua Māori Act 1993 s326B(d) "the hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order".

'reasonable access' for the purposes of the law.[55] Citing the Court of Appeal, Justice Williams in *Murray v BC Group* stated that the landlocking provision is:[56]

> "remedial in its intent. There is no presumption in favour of non-interference in the respondent's title"

Compensation

58. From 1912 discretion to consider whether any compensation was warranted, and if so, to direct that it be paid as part of access being granted was provided.[57] The compensation provisions applied to all lands over which access may be ordered. (Note, this refers to compensation for access orders between neighbouring lands – compensation for public works taking is a separate issue.)

PART 3: HOW TAIHAPE LANDS CAME TO BE LANDLOCKED

59. Neither the Tribunal's preliminary view nor the claimants' submissions engages in direct analysis of how the lands came to be landlocked. That history is relevant to analysis under the Tiriti/Treaty and is conducted in these submissions.

60. A detailed summary of the key block histories is provided as **Appendix B.** The summaries focus on the critical steps that have led to Taihape lands becoming landlocked, and then remaining landlocked until 1975. These summaries focus on the histories of the larger blocks that are today retained in the ownership of Taihape Māori but are landlocked (Owhaoko sections, Te Koau A, Awarua Aorangi and Awarua 1DB2). Oruamatua Kaimanawa and Rangipo Waiu landlocked partitions are also touched on.

61. As identified by Neal et al and by Mr R Steedman, unlocking most of these landlocked retained lands requires access over intervening private lands.[58]

62. These submissions therefore focus on whether the legislative provisions available between 1886 and 1912 (without consent) were utilised; and the

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55 *Murray v BC Group* [2010] NZCA 163 [19] citing *Asmussen* and *B A Trustees v Druskovich* [2007] NZCA 131, [2007] 3 NZLR 279 at [61].

56 *Murray v BC Group (2003) Ltd* HC Wellington CIV 2007-485-198 [2009] NZHC 114; [2009] 3 NZLR 257 (12 February 2009) per Williams J upheld as below. Citing *BA Trustees v Druskovich* [2007] NZCA 131 (para 15).

57 Native Land Amendment Act 1912 s 10 (4); Native Land Act Amendment Act 1913 s 49 (4), (5); s 52(2); Native Land Amendment and Native Land Claims Adjustment Act 1922 s 13(3) and (4).

58 Wai 2180, #N01.

historical circumstances and the timing by which land underlying the routes identified as the most practical access routes identified by Neal et al came to ceased to be Māori land.[59] As above, of particular importance is whether access to those blocks required lands to be traversed that had ceased to be Māori land pre-1913 (given the consenting requirements that remained place for those lands until 1975).

63. As set out below, the conclusion is that applications were not made for access to these large blocks at the critical times when they were partitioned (notwithstanding legislative provisions being available). These blocks were landlocked by land that ceased to be Māori land prior to 1913 (and thus, until 1975 could not, unless the consent of the adjoining owner was forthcoming, remedy the access difficulties).

Alienation and retention patterns in Taihape and quality of lands - overview

64. Topography and climate have had a direct impact on the alienation and retention patterns in the inquiry district – and on landlocking.

65. A further key factor in these habitation/alienation/retention patterns has been the productive land uses practised in different eras. This in turn is influenced by technology and infrastructure available at different periods (such as the 1860s-1880s international wool markets and the impact from the 1880s of refrigerated shipping on access to export markets on meat production).

66. Increasingly innovative land uses have developed over the last fifty years (eg venison farming, remote tourism, manuka honey production, carbon farming). However the primary economic land use in the key period between 1880 and 1900 when most lands in Taihape were clothed with titles and subsequently transacted was large scale pastoralism.

67. Relatively little land in the central, southern, and lower altitude parts of the inquiry district is landlocked. The suitability of those lands for more intensive settlement and production resulted in fairly comprehensive roading and access infrastructure. The lands retained by Māori in these

[59] The most practical access to a small portion of the landlocked land may be able to be gained over intervening public land (in particular access to Oruamatua Kaimanawa blocks via NZDF administered lands) and potentially a mixture of Big Hill station and public conservation lands (for Awarua o Hinemanu). These matters are discussed in the second tranche of Crown landlocked land submissions.

areas were, and are, the primary residential lands (and productive land) for hapū and iwi of Mokai Patea.

68. The higher altitude lands to the north and east of the district that were suitable for large scale agriculture were farmed from the 1860s and 1880s as large runs. Most of those lands were titled, partitioned, and sold or leased between 1880 and 1913 and formed into the stations that still exist today along the Napier-Taihape Road. Further lands owned by Māori which adjoined those lands were subsequently purchased during the twentieth century (largely by those stations). A portion was purchased or taken as Crown lands (primarily for Defence). Factors contributing to those sales include Taihape Māori raising capital for development, or for the servicing of debt; and/or the land being uneconomic as a unit on its own due to topography, climate and, in some cases access restrictions.

69. The higher altitude northern or eastern lands that were less suitable for large scale agriculture[60] either became public lands (primarily for soil conservation or biodiversity conservation) or were retained by Taihape Māori. Some of the lands retained by Māori were retained through determined actions of 'non-sellers' (for example, Te Koau A is the partitioned interests of "non-sellers").[61] Others lands are retained today, at least in part, because attempts to sell them in the early 20th century failed and/or because they formed part of the lands gifted and subsequently returned (Owhaoko C and D blocks).[62]

70. The lands that are landlocked in the inquiry district are predominantly located in the higher reaches of the north and east behind those large stations and/or adjoining those public lands. The actions that resulted in them being landlocked largely occurred prior to 1913.

Summary of access histories to key blocks

71. What is common to each of the block histories traversed in Appendix B is that:

71.1 Some blocks (Owhaoko and Oruamatua Kaimanawa in particular) had extensive levels of partitioning early on that have not been

60 Wai 2180, #A015(m) Innes LUC assessment.

61 Wai 2180, #A037 Woodley at 440.

62 Wai 2180, #A06 87 to 98 tracks lands being offered for sale to the Crown but agreements on price being unable to be reached and sales not proceeding.

well explained by technical witnesses. The pattern of early partitioning does not appear to reflect customary use patterns or the economic intentions of Taihape Māori (which were at the time focussed on lower altitude lands). The intensive partitioning might – in part - reflect the contested nature of these 'border lands' between Taihape and Hawkes Bay. The complexity of this partitioning may have had some bearing on the failure to consider access provisions to those lands;

71.2 At the time their titles were created, and/or partitioning was undertaken, applications were able to be made to secure legal access and no consent of the adjoining owners was required (all are after 1886 and prior to 1912);

71.3 A small number of applications for access to the high-altitude lands were made and granted (although not necessarily subsequently implemented on the ground eg the 1902 Owhaoko D 5 section 1; and Mr Karaitiana's three access orders over some Oruamatua Kaimanawa and Owhaoko blocks);

71.4 Applications for access were not made in relation to the majority of blocks/partitions (notwithstanding the legislation during that period permitting access applications and orders to be made);

71.5 The ability to utilise the remedial provisions to improve access from 1912 was, in every case, subject to the requirement of adjoining landowner/lessee consent as intervening lands along the most practical access routes ceased to be Māori land prior to 1913. This included:

71.5.1 Access to Owhaoko C and D blocks over land that ceased to be Māori land in 1901 (Owhaoko D5 No1);[63]

[63] Now Ngamatea Station lands. Wai 2180, #A06 at 110 Owhaoko D5 No 1. Note Woodley Wai 2180, #A037 at 398 located a 1902 order for access over this block however it appeared that the order was not subsequently executed and/or subsequent parties lost sight of it. She also (at 407) tracks Crown decline of further purchase proposals in this area due in part to concerns about access; and (at 402) tracks the decline of a 1920s application for a public road to be formed over these lands by which the 1902 order is not mentioned.

71.5.2 Access to Te Koau A over land that ceased to be Māori land in 1893 (Mangohane G); [64]

71.5.3 Access to Aorangi Awarua and to Awarua 1DB2 over land ceased to be Māori land in 1893 (Mangaohane); [65]

71.5.4 Oruamatua Kaimanawa IU and IV locked by IK by 1897 leasing and 1907 purchase.[66]

71.6 Applications were nonetheless made between 1922 and 1975 under other remedial provisions. One of those applications was successful (Motukawa 2B) as it could demonstrate a technical error had occurred. The remainder failed.

72. There is no discussion on the record of inquiry regarding the negotiation and registration of easements or rights of way over adjoining blocks pre-1975. There was legal provision in place from 1928 if not earlier.

73. There is little evidence in Woodley of complaints or concerns of Taihape Māori about access prior to 1970. Absence of that evidence is not necessarily evidence of no complaint or concern. Attempts to sell, or later gift, Owhaoko lands may indicate concerns about development potential of the land (partly due to access) or other matters such as debt servicing.

74. Sales and leases throughout the 20th century to adjoining landowners tells its own story (which may be strongly influenced by the access limitations of those lands), including indicating some tension between different customary owners as to land sales or retention. This is addressed in more detail in Tranche 2.

PART 4: ANALYSIS OF CROWN RESPONSIBILITIES

75. Landlocking came about through a mixture of historical circumstance. No single factor is solely causative. Some contributory factors were:

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64 Now Timahanga Station lands. Wai 2180, #A037 437-438; Wai 2180, #A06 at 229-230. 5 kilometres of the "Timihanga Track" traverses Mangohane G private purchased by Studholmes 1893.

65 Now Mangohane Station lands. Wai 2180, #A037 286; Wai 2180, #A06 at 224 Mangaohane purchases by Studholme in 1885 and 1886 validated by legislation in 1893.

66 Wai 2180, #A06 at 160.

75.1 within the Crown's responsibility (policy behind legislative frameworks including the efficacy of remedial measures, and direct Crown actions eg land dealings including partitioning, purchasing, land exchanges);

75.2 at some points in time, or to some extent, within the control of Māori (land dealings including partitioning, use of legal measures to secure access between 1886 and 1912, commercial decisions, and actions of individuals).[67]

75.3 not within the control of either the Crown or Māori land owners but nonetheless relevant and significant. These include:

75.3.1 climate, topography, remoteness, and demographics (ie residential patterns and population sizes);

75.3.2 the decisions, actions and legal rights of private third parties and local authorities; and

75.3.3 the conduct of the Native Land Court or lawyers and advisors engaged by Māori landowners over time.

Lens: Taihape landlocking is fact specific

76. The lands retained by Māori constitute approximately 14% of the inquiry district. The access history of these retained lands is fact specific – the character of these lands is a key contributing factor as to why they became landlocked. They are not representative of the access history of other lands in the district that did not share those same characteristics. Nor are they representative of Crown policy or actions relating to access nationally.

77. There is some indication on the record of inquiry that securing access rights was generally an accepted and uncontroversial matter, and the absence of them was exceptional rather than the norm. For example:

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[67] It is noted that some access restrictions may be capable of remediation by the current generation (eg formalising access to some sites across adjoining lands within close ownership; future-proofing access across adjoining lands in substantially the same ownership or administration). The Crown acknowledges that other situations may no longer be reasonably capable of remediation by the current generation due to complexity or costs of resolving the situations. The post 1975 aspects of this, including prejudice and remedies, are addressed in Tranche 2.

77.1 correspondence between the Native Affairs Department and the Public Trustee discusses securing access for Rangipo Waiu blocks in an entirely normative way – there is no sense of securing access being exceptional.[68]

77.2 In 1928 the Rangitikei County Council clerk stated, in correspondence with the Native Land Court in relation to Rangipo Waiu B6C "The Native owners state that no legal access has been given to the land, but it is hardly likely that the Native Land Court would lay off a block of this size without a reservation for access through the adjoining blocks."[69]

78. The lack of access applications made in relation to the lands now retained may not be indicative of general practice (either for other lands in the inquiry district, or nationally). It may instead be, in large part, attributable to those lands not being occupied or suitable for the farming methodology preferred at that time.

Use of the access provisions

79. The ideal time for access routes to be legally secured on a title was at the creation of that title (whether parent block or subsequent partition).[70] At the times that key Taihape high-altitude blocks were granted title or partitioned, legislative provisions that enabled access to be legally secured were available (1886 – 1913). Prior to 1912 there were no consenting requirements. Applications were made, and access orders were granted, for blocks including: Taraketi 2, Owhaoko D51; Owhaoko D2, and for Oruamatua Kaimanawa 2G, 1K, 1L partitions.

80. The fact that these applications were made, and orders granted, demonstrates the legislation was effective and that access could have been sought and secured for further Māori lands. It remains unknown why more applications were not made either at the time of partition. It also remains unknown why the Court did not take a more active rather than responsive

68 Wai 2180, #A037(g) Document Bank Volume 7 at 260 – 270. The Public Trustee applied on behalf of the estate of a deceased owner for access to that Rangipō Waiu Māori land in 1910 (B7B).

69 Wai 2180, #A037(b) Document Bank Volume 2 at 80.

70 Wai 2180, #A037 at 479.

approach (even with increasing legislative directions for it to do so).[71] The Crown is not responsible for the actions of the Court.[72]

81. Claimants have stated that from 1900 general land titles could not be created without access being provided, in contrast to the discretionary approach provided in the legislation for Māori lands.[73] This is not quite accurate. From 1900 the Public Works regime (through the Public Works Amendment Act 1900) reached into private developments of land by requiring developers to provide and dedicate public roads where subdividing to ensure that each subdivided title had access to a public road. However this did not apply to all general land transactions. It applied only to those where owners were subdividing for "the purpose of disposing of the same by way of either sale or of lease" [exceeding 14 years].[74] The provision was not for private access but for public works takings of land – the roading created was vested in the Crown (with the developer having met the costs of forming the road).[75] Similar provisions, intended to ensure those benefitting from development contribute significantly to the costs of that development, have continued from that time right through to current requirements under the Resource Management Act 1991.[76] This involved substantial cost for the landowner/developer; was part of the public works regime (not private roading access); and is not the same as legal access being a requirement precedent to a title being created as at 1900.

82. The claimant generic closing submissions refer to a discussion between Professor Temara and Ms Woodley of a situation under the 1886 Act where access was awarded over only one of two blocks that went through the court on the same day (Taraketi 2 and Oruamatua Kaimanawa 3

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71 See Compulsion: at [14] above.

72 Treaty of Waitangi Act 1975 section 6 (claims against the Crown). Actions of the Court are not actions of the Crown. See for example https://www.waitangitribunal.govt.nz/claims-process/make-a-claim/ which states "The 'Crown' is the central Government. The Tribunal can only inquire into actions of the Crown/central Government. The Crown is not local government (district or regional councils) and it is not the Courts."

73 Referencing Woodley Wai 2180, #A037 at 242 who in turn is referencing earlier work by Hearn.

74 Public Works Acts Amendment Act 1900 s 20.

75 If the road was within three miles of a 'borough' the owner/developer was required to meet all costs in forming, metalling, and – where agreed with the local authority, establishing drains and footpaths. If not within three miles the road was required to be formed as agreed with the local authority.

76 Public Works Act Amendment Act 1900 s 20; Public Works Act 1908 s 116, and Public Works Act 1928 s 125.

partitions).[77] Both Ms Woodley and the claimant generic closing submissions suggest this is evidence of a bias in the law regarding access, or in its application without any actual evidence to support that allegation.[78] There is no evidence to suggest that the example discussed with Ms Woodley was a case of bias. The law operated either by application of any interested party or, alternately, the Court at its discretion.[79] A more straightforward explanation might be that one party may have applied for access, the other may not have. An explanation for that difference might be that Taraketi was a central hub of occupation (and thus applicants are likely to have turned their mind to access) and Oruamatua Kaimanawa 3 was not.

83. Securing legal access – over either European lands or Māori lands - did not necessarily mean that the landowner then proceeded to invest the funds required to survey, form or maintain those access ways. Although public roads attracted public funding, private roading did not. At least one of the access orders granted was not subsequently implemented (1902 Owhaoko D5 1). This may suggest decisions being made by owners at the time that the costs of implementing that access were not warranted for the aspirations of the owners for those particular lands at that time.[80]

Levels of partitioning

84. The level of partitioning undertaken in the Owhaoko[81] and Oruamatua-Kaimanawa[82] blocks was extensive and resulted in uneconomic parcels for the land type early on. The technical witnesses have not provided clear explanations for this level of partitioning (particularly in relation to Oruamatua Kaimanawa). Conclusions cannot be drawn concerning any Crown responsibility for that level of partitioning. The resultant complexity of titles contributed to the difficulty of securing access across titles.

85. Not only were opportunities missed to secure access over adjoining titles when partitioning (discussed above and below), each sale or lease of land

77 Wai 2180, #3.3.34 at [61]; Wai 2180, #4.1.1 Transcript HW 4 at 351; Referencing matters discussed at Wai 2180, #A037, 243-248, 476 (Woodley summary Wai 2180, #037(j) at 10).

78 Wai 2180, #3.3.34 – T Bennion / L Black Closing submissions regarding Landlocked Māori Land issues, 7 Feb 20.

79 Native Land Court Act 1886 s 91.

80 Woodley has located little contemporaneous evidence of Taihape Māori views or actions in the 20th century (with the exception of Kingi Topia for Rangipō Waiu lands, she primarily locates correspondence or applications of lessees not Māori owners).

81 Wai 2180, #A06 at 68, and 136 (map).

82 Wai 2180, #A06 at 172 (map).

that was undertaken without first placing an access easement on the subject land was a lost opportunity (that is, as partitions were sold (including to the adjoining landowner), remedying access for the contiguous Māori owned blocks further back became more difficult). This pattern has continued through to more recent times (for example the eventual sale of Owhaoko D6/3 without placing legal access over it to the blocks behind it).

86. Whilst it may be said there was no point in securing such access given the title was being transferred, and/or that doing so would further limit the valuation of the land, each such transaction contributed to the increasing difficulty in gaining access to the remaining retained land. The Crown does not view this as a primary contributing factor. However, it does inform part of the contributing factors and difficulties with resolving landlocking in the district.

Reasonableness test

87. The claimants have strongly expressed the value of their retained lands to them (including the high altitude landlocked lands) both in customary terms and for their economic aspirations.[83]

88. Reasonableness is a fundamental aspect of Treaty jurisprudence and is of direct relevance to the laws concerning access and landlocking.[84]

89. Investment in securing and developing access (whether funded by Māori owners, adjoining landowners, or public funds, or any combination of these) must bear some proportionality to the benefits to be realised through that access – ie must be reasonable. Any expectation that formed access should have been publicly funded to every block, no matter the topography, utilisation potential, expense, or intensity of occupation, is not reasonable.

90. The 1899, 1902 and 1911 access orders (for blocks relatively close to the Napier-Taihape Road) made by the Court for this district do not go into

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83 Wai 2180, #E3 Herbert Steedman; #G1 Tama Wipaki; #G4 Ritchie Chase; #G13 Richard Steedman; #G14 Lewis Winiata; #G18 Merle Ormsby, Tiaho Pillot, and Daniel Ormsby; #H6 Ngahapeaparatuae Lomax; #H8 Peter Steedman; #H11 Te Rangianganoa Hawira; #H13 Maraea Elizabeth Oriwia Bellamy and Te Urumanao Kereti; #I2 Lewis Winiata; #I3 David Steedman; #N8 Hemi Biddle; #O1 Peter Steedman; #O3 Richard Steedman. See also Wai 2180, #2.6.36(a) for claimant evidence prior to February 2018.

84 Recent amendments to Te Ture Whenua Māori Act 1993 expanding/clarifying factors that inform what might be 'reasonable access' are set out above but will be discussed in more detail in Tranche 2 of these submissions.

what is or is not reasonable in any detail but simply order a right of way or private road of sufficient width (eg 33 feet or half a chain wide). None were declined on the basis they were not reasonable. The court did not make any directions (beyond payment for survey) as to how the beneficiary of that access should then go about forming the access – that was a matter either between the relative owners, or for negotiation with the local council.

91. The applications that were made stressed the practicality of the route being sought. It is unknown what approach might have been taken for access applications to the higher altitude lands if they had been made.

92. Implications of the reasonableness tests on the various remedies sought by claimants are discussed in Tranche 2 of these submissions.

Use of the remedial measures in Taihape: implications of consent requirements

93. The Crown says that its provision of means for access to be granted from 1886 satisfied its good governance requirements under the Treaty. The fact that there was relatively little uptake of those measures in the critical early period between 1886 and 1912 upon titles being granted and partitions being made was not the responsibility of the Crown. There was no legislative or institutional barrier that inhibited Māori landowners' uptake of the measures during the early period. The Crown was however responsible for also providing an effective remedial regime. This section, and the Acknowledgements section below discussed the impact of the pre-1913 consenting requirements on the efficacy of that regime and the impacts for Taihape Māori retained lands.

94. Few applications were made under the remedial measures. From 1912 this may be attributable to the consenting requirements that applied to the majority of the retained lands that were landlocked. Between 1912 and 1975, in the absence of the consent of adjoining owner/lessee there would be little value in making an application under the remedial provisions.

95. For example, in the 1920s Kingi Topia, an owner of Rangipo Waiu B6C complained to the Minister of Lands that a right of way to his lands had been cancelled, and as a consequence he had to re-apply for access to his land. Although access was ordered by the Māori Land Court in 1911 it was

quashed by the Supreme Court due to jurisdictional issues arising from the 1909 Act.[85] When Mr Topia reapplied, the legislation in place required the lessee of B6A and B7A to consent (at the time of the 1920s application, the land was Māori owned but leased). The lessee withheld that consent and no access was provided to B6C, or to any of the Maori owned partitions within Rangipo Waiu B.[86]

96. As discussed above, lessees of Māori lands also attempted to secure access in the 1920s and the 1940s under the provisions to remedy technical errors (given the remedial access provisions were not able to be relied upon if the access sought traversed land that ceased to be Māori land pre-1913 if consent was withheld). The only applications that succeeded under those provisions were ones where an error between the court order and its implementation could be identified.[87]

97. Whilst Woodley has not located other applications, it appears others were made for access that benefitted Māori owned lands (albeit by lessees where the Māori lands were leased).

97.1 A 1928 application for access over Māori land adjoining European land is notable for the written consent of the Māori owners and lessee being provided. Under the 1922 Act s 13, consent was not required but, in this instance at least, appears to have been sought anyway.[88]

97.2 A 1934 hearing for a public road to be declared over several Awarua 1 subdivisions. The application explained "when the land was partitioned a right of way was laid off giving access to a public road" and that right of way was to be cancelled with the provision

85 Wai 2180, #A037 342-344; Wai 2180, #A39(l) at 14.

86 Wai 2180, #A037 348-350.

87 Woodley's claim that 1980s and 1990s access applications all failed "because the legislation is based around securing the permission of the adjoining owners" is at odds with the fact that consent was not required from 1975. It could be though that a non-consenting adjoining owner can make it difficult for applications to proceed through other means (for example, maximising costs and compensation demands and litigating whether the legislative tests are met (including what kind of access is 'reasonable')). This is in the scope of Tranche 2 submissions.

88 Wai 2180, #A037 at 267. Under section 13 of the 1922 Act consent was only required from owners where the land had ceased to be Māori land prior to 1913. Woodley records that the land subject to this 1928 application did not come within that exception (ie it remained Māori land at the time of the application).

instead of a public road.[89] Consent of the Māori owners was again obtained.[90]

97.3 A 1954 land exchange was agreed between Motukawa 2B3D and Ohinewairua IX section 4 to provide access.[91]

Crown knowledge and responses

98. The claimant generic closing submissions suggest that the provision of a mechanism to order access in 1886 indicates access issues were a known and substantial problem at that time. The Crown's view is that the provisions were provided as standard land administration measures as increasing amounts of Māori land was being developed, (as it was for European owned private lands or Crown granted lands earlier). If indeed the issue was of such significance as at 1886, it is curious that the provisions were not more widely drawn on by landowners, the Court, or by the leading lawyers who represented Taihape Māori in their Court processes under the 1886 – 1912 provisions when most of the titles now landlocking Taihape retained lands were created and under which no consent was required.

99. There was Crown knowledge of block-specific access issues from the early 1900s eg possible routes into Motukawa 2B3C, Owhaoko or Oruamatua Kaimanawa.[92] The officials' responses in those cases were largely to point parties towards utilising the legal measures and remedies available to them or express caution about further partitioning.

100. At a systemic level, those measures and remedies evolved over time as tracked in the legislative history above. There is little record of systemic concern about access recorded in the period prior to the 1970s. Woodley has located the following comments from Crown officials:

100.1 1952: "Another real obstacle is the inconvenient areas into which Māori lands have been divided by the haphazard method of partition which was commonly employed by the Māori Land

89 Wai 2180, #A037 at 268.

90 Wai 2180, #A037 at 268.

91 Wai 2180, #A037 at 274-275. Woodley records that an initial approach was not consented to by the adjoining landowner but that later that year it appears mutually beneficial terms had been negotiated. There is not sufficient information on the record to determine whether the necessity for the consent of the adjoining landowner limited the leverage of the Māori owners/lease seeking access.

92 Wai 2180, #A037 272, 479.

Court, not in recent years, but in former times. Lands were often cut up without regard to the use to which the resulting areas could or should be put, and without regard to access."[93]

100.2 1962: the "many and various laws made over the years concerning roadways" contributed to "an element of confusion … as to the relative authorities and requirements and procedure involved in obtaining access". This paper recommended removal of the pre-1913 consenting requirement.[94]

100.3 1972: review discussed below.

100.4 1980: Deputy Registrar of the Aotea Māori Land Court's retrospective summation that: "Māori Land Courts, when making partition orders in early days, did not seem to consider the question of access."[95]

101. The first significant review of the core issue (being unable to order access for pre-1913 lands over the objections of adjoining owners) emerged after a case in 1972. By that time, Crown officials appear somewhat surprised to be advised of a situation where a Rangitikei-Manawatu reserve:[96]

> "was completely landlocked and the owners were unable to obtain any form of access to the nearest public road. Adjoining owners were not prepared to negotiate and, indeed, there was a suggestion that some adjoining owners were in fact using the landlocked land."

102. Three Crown agencies (led by the Ministry of Māori Affairs) considered change was needed, the Ministry of Works was of the view that it was not a widespread problem and need not be changed. The three agencies prevailed and the Maori Affairs Act 1953 was amended in 1975 to allow access be granted over pre-1913 titles - even over the objections of adjoining landowners.

103. During that policy process, the Whanganui District Office advised:[97]

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93 Wai 2180, #A037 250.

94 Wai 2180, #A037 251.

95 Wai 2180, #A037 520.

96 Wai 2180, #A037 at 252.

97 Wai 2180, #A037 at 254.

> There are some very old Maori Land Court titles for which access was not adequately provided, eg some of the Owhaoko blocks, but again the policy has been to deal with them as the need arises and the requirements become known.
>
> Cases occasionally come to light through alienation proceedings where the occupier of adjoining or surrounding lands is the only person, because of access problems, able to purchase or lease. In many of these instances it is known that access by road would never be physically practicable because of the nature of the country.

104. The prejudice experienced by Taihape Māori in relation to landlocking will be addressed in Tranche 2 of Crown landlocking submissions.

105. Concerns were raised a year after the 1975 amendment about judicial interpretation of the compensation provisions. This stemmed from a 1974 case where compensation took into consideration the increase in value to the lands gaining access rather than the losses to the lands that access crossed.[98] The Crown did not consider a legislative response was required at that time (primarily as legislation had only recently been reviewed).

106. Landlocked lands remedial provisions were subsequently located in (from 1975) the Property Law Act 1952[99] and the current 2007 successor Act[100] (ss 326 – 331). Under these provisions (both the 1952 Act as amended and the 2007 Acts):

106.1 consent from adjoining landowners is not necessary;

106.2 compensation to be paid is discretionary;

106.3 costs of works necessary to give effect to an order must be met by the applicant unless directed otherwise by the court (where just and equitable for other party to pay whole or share).

107. Māori were able to use the landlocking provisions that were inserted into the 1952 Act from 1975 by making applications to the general courts however few applications were made. The apparent reluctance to make applications to the general courts resulted in the legislation being further amended in 2003 to enable applications to be made to the specialist

98 AAVN W3599 869 Box 102 19/8/1 part 1 Maori Land Woodley Document Bank Vol 8 pp 101 – 110.

99 Property Law Act 1952 s 129B as amended by Property Law Amendment Act 1975 to insert Landlocked Land.

100 Property Law Act 2007 ss 326-331.

jurisdiction of the Maori Land Court. Events under that regime will be discussed in Tranche 2 submissions.

Comparisons with non-Māori landowners

108. The Crown accepts that landlocking in the Taihape inquiry district primarily effects Māori owned landholdings. There are examples of non-Māori landholdings being landlocked however they are relatively minor compared to the amount of Māori retained lands that are landlocked.[101] Access was identified as being a point of dispute between the Pakeha head lessee and subleasees of Otamakapua sections in the 1920s however detail is not provided.[102]

109. Some Crown lands were, or are, or may be, landlocked. Crown actions in relation to those lands will be discussed in Tranche 2.[103]

Access restrictions contributing to sales of Taihape retained lands

110. This topic will be discussed in Tranche 2 (given it extends into the post 1975 period).

PART 5: ACKNOWLEDGEMENTS

Equality

111. While Taihape Māori today retain a percentage of traditional lands (14%) higher than the national average (approximately 5%), over 70% of their retained land is landlocked.

112. From 1886 access to land could be ordered either upon creation of a title or at a later date to remedy a lack of access. Until 1912 there was no requirement for the consent of the lessee or the adjoining landowner whose land the access would traverse.

113. From 1912 the consent of the adjoining landowner or lessee was required if the access being sought traversed non-Māori land, or leased Māori land. Consent was not required for access over Māori land that was not leased.

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101 For example Wai 2180, #J12 Hemi Biddle discussing Rangipo Waiu B6B2 situation where the land owned by his whanau both landlocks some parts of the adjoining Station, but is also landlocked by that station.

102 Wai 2180, #A07 at 127.

103 For example Awarua 1A3A Wai 2180 #A037 at 317; See also Wai 2180, #A037 at 516 Kaweka, Kaimanawa and Ruahine Forest Parks classified as Crown blocks being landlocked. This assessment turns on what type of access is "reasonable access" in the circumstances. Tranche 2 will address efforts to improve access to some of these lands (for defence, conservation, or recreation purposes) and whether legal and practical access is required to each block.

114. From 1922 those requirements for consent were abandoned, with one exception. The legislation created a new regime in which consent was not required for Māori lands or for lands that had become European land after 15 December 1913 - for which the Court could make arrangements for roads or rights of way as it saw fit. However, consent continued to be required to secure access across land for that became European Land before 15 December 1913. The continuation of the pre-1913 consenting requirements in the 1922 Act is in some tension with the default policy presumption in that Act, that the consent of an adjoining landowner should no longer be a barrier to securing access to land.[104]

115. In 1975, the pre-1913 consenting exception was removed with the result that landowners could not veto neighbours' applications for access (although other barriers remained).

116. Between 1912 and 1975, most of the land retained in Taihape Māori ownership was subject to the pre-1913 consent requirements because the most practical access to those blocks traversed lands that had ceased to be Māori land prior to 1913 (primarily the large stations along the Napier Taihape Road). The practical effect for Taihape Māori was that, without lessee or adjoining landowner consent, access could not be secured to most of the lands retained by Taihape Māori today during that 1912 – 1975 period. This undermined the efficacy of the 1922 remedial provisions for Taihape Māori.

117. The Crown considers this to be unequal treatment because the owners of land that ceased to be Māori land prior to 1913 enjoyed legal rights (the ability to veto access applications by withholding consent) that were not equally available to Māori landowners (because their consent for access across their land was not required). The Crown also considers the 1922 provisions resulted in an unequal outcome in that more Taihape Māori lands than non-Māori lands were affected by the continuation of the pre-1913 consenting provisions. Whilst the consenting requirements were extant from 1912 (with some variations), the Crown views their continuance

[104] It is not certain what can be read into the fact that the 1922 Act did not exempt lands that ceased to be Native Land between 1913 and 1922 from the retrospective remedial measure. It may give more weight to the view that the policy presumption of the 1922 Act was to remove consent issues from access considerations.

in the 1922 Act as being in tension with the policy presumption in that Act which otherwise enabled access to be ordered even over the objection of the adjoining landowner (regardless of whether Māori or European land) without a Treaty-consistent rationale for the pre-1913 consenting requirement being preserved through to 1975. That policy presumption has guided the law relating to access from that time and is consistent with the (now) longstanding case law that access at the whim of, or dependent of the goodwill of, another is not reasonable access.

118. The 1922 legislation applied equally to Māori and non-Māori owners (of lands that ceased to be Māori land after 1913) but in Taihape its adverse effect was much greater on Māori landowners than on those non-Māori landowners. This was due to the proportion of retained Māori landholdings practically denied access to the remedial provision compared to non-Māori landholdings in the district. The legislation was therefore indirectly discriminatory.

119. The Tribunal has found that the Crown has a duty to act with fairness and justice to all citizens – describing this as the principle of equity.[105]

120. The Crown concedes that:

120.1 Taihape Māori suffered indirect discrimination which limited their ability to alleviate access difficulties to lands they retained between 1912 and 1975 due to various consenting requirements in the legislation.

120.2 From 1922 those consenting requirements were largely removed, except where the land had ceased to be Māori land prior to 1913. That exception had particular impact on Taihape Māori in that, until 1975, unless the consent of their neighbours was secured, no effective legal remedy was available to Taihape Māori to improve access difficulties to most of the land they retained.

120.3 The Crown concedes the effect of the exemption was that, between 1922 and 1975, the interests of owners of lands in the

105 See for example, the Tribunal's most recent iteration of this principles Waitangi Tribunal, Te Mana Whatu Āhuru IV, 127.

district that ceased to be Māori land prior to 1913 were prioritised over the access requirements of owners of retained Māori land and that the Crown therefore failed to accord Taihape Māori landowners equality of outcome and this was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

121. This concession is to be read in the context of the particular demographics and land type, use, and alienation pattern of Taihape. The Tribunal's district inquiry programme is now largely complete (with the exception of Taihape, Eastern Bay of Plenty and Porirua ki Manawatū). No other inquiry has identified such a high proportion of retained lands being landlocked at a regional level.[106] The topographic and climatic characteristics are significant contributing factors in this situation – the high altitude lands most suited for large scale pastoralism ceased to be Māori land in the early phase of Taihape district development (between 1880 and 1913).

122. The pre-1913 consenting requirements limited the ability of Taihape Māori to utilise remedial provisions to secure legal access along the most practical access routes:

122.1 Access to Owhaoko C and D blocks over land that ceased to be Māori land in 1901 (Owhaoko D5 No1);[107]

122.2 Access to Te Koau A over land that ceased to be Māori land in 1893 (Mangohane G);[108]

122.3 Access to Aorangi Awarua and to Awarua 1DB2 over land that ceased to be Māori land in 1893 (Mangaohane); [109]

122.4 Oruamatua Kaimanawa IU and IV locked by IK by 1897 leasing and 1907 purchase.[110]

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106 Analysis as to the proportion of landlocking experienced by Māori at a more granular level (eg iwi or hapū) has not been undertaken for this inquiry or, to the best of Counsel's knowledge, in other district inquiries.

107 Now Ngamatea Station lands. Wai 2180, #A06 at 110 Owhaoko D5 No 1. Note Woodley Wai 2180, #A037 at 398 located a 1902 order for access over this block however it appeared that the order was not subsequently executed and/or subsequent parties lost sight of it. She also (at 407) tracks Crown decline of further purchase proposals in this area due in part to concerns about access; and (at 402) tracks the decline of a 1920s application for a public road to be formed over these lands by which the 1902 order is not mentioned.

108 Now Timahanga Station lands. Wai 2180, #A037 437-438; Wai 2180, #A06 at 229-230. 5 kilometres of the "Timihanga Track" traverses Mangohane G private purchased by Studholmes 1893.

109 Now Mangohane Station lands. Wai 2180, #A037 286; Wai 2180, #A06 at 224 Mangaohane purchases by Studholme in 1885 and 1886 validated by legislation in 1893.

122.5 Access to Rangipo Waiu B6B, B6C and B1 to B5 over B6A which was sold in 1912 (to the previous lessees).[111]

Landlessness

123. The Preamble to the Te Ture Whenua Māori Act acknowledges land as a taonga tuku iho of special significance to Maori people and, for that reason, the Act has as one of its purposes:

> to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu.

124. That Act, and the Crown's Treaty responsibilities extend to both land retention and the ability to utilise lands – including for development. For Taihape Māori, the lack of reasonable access to the majority of the lands they retain has implications for retention, utilisation and development of their lands.

125. The high percentage of land retained by Taihape Māori which is landlocked means that Taihape Māori retain insufficient land with reasonable access for their present and future needs. A key factor contributing to this is, as acknowledged directly above, the failure of the relevant legislation between 1922 and 1975 to provide an effective remedy for accessing landlocked land for Taihape Māori.

126. The Crown further concedes that:

126.1 most of the land retained by Taihape Māori is landlocked. The lack of reasonable access to their lands has made it difficult for owners to exercise rights of ownership or maintain obligations as kaitiaki.

126.2 The experience of Taihape Māori has been that their practical, economic and cultural connections to the important lands they have striven for decades to retain and to utilise have been significantly disrupted and for Taihape Māori, this has been akin to being landless.

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110 Wai 2180, #A06 at 160.

111 Wai 2180, #A037 at 347.

126.3 The Crown's failure to ensure Taihape Māori retained sufficient lands with reasonable access for their present and future needs breached te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

CONCLUSION

127. Landlocking in the inquiry district is a significant and complex issue. It is fact specific (ie particular to Taihape high-altitude lands). Adequate legislative measures were in place to secure legal access at the critical point of title creation or partition but were not always used. Multiple contributory factors inform why those provisions were not used, including factors outside the Crown's control. This elevated the need for effective remedial measures.

128. The Crown acknowledges through these submissions that, in the particular circumstances of Taihape:

128.1 the remedial measures provided to enable access to be improved were not effective for Taihape Māori;

128.2 the cumulative effect of landlocking for Taihape Māori has been an experience akin to being landless.

129. Crown actions from the 1950s as land administrator (NZDF and DOC and predecessor agencies), as well as legislative developments and the experience of Taihape Māori with access issues for their lands post-1975, will be addressed in Tranche 2 of the Crown's submissions.

1 September 2020

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TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel