In the Waitangi Tribunal **Wai 2180**
Taihape – Rangitīkei ki Rangipō District Inquiry

In the Matter	of the Treaty of Waitangi Act 1975
And	
In the Matter	of the Taihape – Rangitīkei ki Rangipō District Inquiry (Wai 2180)

Presentation Summary of Generic Claimant Closing Submissions Regarding Crown Purchasing (Wai 2180, #3.3.49)

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MAY IT PLEASE THE TRIBUNAL

Introduction

1. In the 1860s, due to the growth of pastoralism and settler numbers, the Crown pressured Maori in the Taihape Inquiry District to purchase their land, through relinquishing their pre-emptive right of purchase in 1864, and establishing the Native Land Court (**NLC**) in 1865 to permit sales directly from the Maori owners to individual settlers, and then taking advantage of that situation through the implementation of its own purchasing programme, employing dubious tactics to do so.[1]

2. Large purchases were made in the Southern section of the Inquiry District in the 1870s – 1880s, including Paraekaretu, Mangaoira, Waitapu and Otamakapua, while the Northern section passed through the NLC last, including well into the twentieth century, as it was less suitable for pastoral settlement.[2] The Crown's purchasing throughout the 1880s and 1890s, focused particularly west of the Rangitikei River.

3. As the main purchaser of land in the region it was the Crown's responsibility to promote the development of a new society and economy. It appears the Crown deemed itself obliged to act as an active agent of such developments by acquiring and purchasing land.[3]

4. However, Counsel submit that the ruthless and aggressive manner in which the Crown purchased the lands within the Inquiry district was destructive and harmful for tangata whenua, particularly those who wished to retain their whenua. The processes contravened te Tiriti, its terms and its principles, particularly in terms of partnership between Maori and the Crown and the explicit guarantees of active protection, and land and resource retention in Article Two of Te Tiriti. Today, approximately 53% of

[1]Terry Hearn, *Sub-district block study – southern aspect* (Wai 2180, #A7) at 257.
[2] Bruce Stirling, *Taihape district nineteenth century overview* (Wai 2180, #A43) at 1; Martin Fisher and Bruce Stirling, *Sub-district block study – northern aspect* (Wai 2180, A6) at 4.
[3] Hearn, *Sub-district block study – southern aspect*, at 258.

land in the Inquiry District has been alienated through Crown purchase.[4]

Te Tiriti o Waitangi

5. In respect of the Crown purchasing of Taihape Maori land during the nineteenth century, Counsel have submitted in paragraphs 12 through to 42 of the Generic Closing Submissions (**GCS**) that:

    a. With respect to Maori land generally, the Crown should:
        i. actively protect the Maori interests in their lands;
        ii. consult with Maori in all matters which relate to their lands;
        iii. ensure sufficient and appropriate participation of Taihape Maori in all matters which relate to their lands; and
        iv. guarantee Taihape Maori the ability to retain their lands for as long as they wish.

    b. With respect to the Crown purchasing of land specifically, because of the special relationship of partnership created by the te Tiriti o Waitangi, the Crown must:
        i. consult with Maori in all Crown purchasing transactions;
        ii. ensure sufficient and appropriate participation of Taihape Maori in all Crown purchasing transactions;
        iii. ensure Taihape Maori are treated equally when it comes to Crown purchasing transactions; and
        iv. act honourably, reasonably and in good faith towards its Maori Tiriti partner.

6. In order to fulfil those obligations, the Crown should have recognised Maori customary rights over their lands.

7. Counsel submit that the Crown, instead:

[4] Fisher and Stirling, *Sub-district block study – northern aspect*, at 257; Hearn, *Sub-district block study – southern aspect*, at 38; Evald Subasic and Bruce Stirling, *Sub-district block study – central aspect* (Wai 2180, #A8) at 192; and Craig Innes, *Maori Land Retention and Alienation within the Taihape Inquiry District summary* (Wai 2180, #A15(h)), at [13] and [14].

a. Designed a system that enabled it to purchase ownership interests ahead of the Courts determining title, and to purchase individuals' undivided interests before the court could determine relative interests and partition them out. This allowed Maori land to be easily broken up and, therefore, more easily acquirable. This not only disregarded the tino rangatiratanga of Taihape Maori, but also, by actively enforcing a system which disentitled Taihape Maori from their lands, it demonstrates a failure on its part to meet its obligations in terms of the principles of active protection and good faith partnership;

b. Enforced, essentially, a monopoly on purchasing customary Maori land. It is noted that the Tribunal found in *the Whanganui Report* that the Crown manipulated the land market to give itself primacy as a dealer in Maori land and, in doing this, the Crown deliberately undermined tino rangatiratanga of Whanganui iwi and hapu, and breached its duties of good government and good faith. It is submitted that the Crown operated in a similar way in the Taihape District and, therefore, committed the same breaches as was found in *Whanganui*; and

c. Put in place and developed policies and practices did not take into account the benefit that Taihape Maori would have gained if they had willingly sold their land on the open market. The relentlessly Pakeha-centric nature of the Crown's policies and practices was based on the requirements of the British legal system, stressed fixed and exclusive ownership of surveyed clearly defined blocks of land, by certain specified individuals. These blocks had a certain economic value, based on their potential productivity under, again British models of pastoral farming. This policies excluded any consideration or incorporation of Taihape Maori priorities, whether regarding the special values Maori themselves put on their whenua, or the harm caused to Maori and their way of life by the loss of their lands and resources.

8. The specific evidence and examples supporting these submissions are noted

between paragraphs 13 and 42 of the GCS.

Crown Position and Concessions

9. As noted in paragraph 46 of the GCS, the Crown conceded that, where it held monopoly purchase powers, it had an enhanced duty to exercise its powers in good faith, to actively protect the interests of Maori; and, in particular, to actively protect interests of Maori in land they wished to retain.[5]

10. Counsel submit that the evidence of historian Samuel Carpenter remained at a high level of political and legal thought in relation to the development of the New Zealand Settler Government's Native Land laws during the nineteenth century and, therefore, had little relevance to Taihape Maori in the nineteenth century. The evidence did not address contemporary Maori perspectives, or the influence of tikanga. While it may be helpful to the Tribunal in terms of context, Counsel submit, at paragraph 49 of the GCS, that it does not provide value for addressing the question of whether the Crown had breached Te Tiriti and its principles.

11. Counsel submit that, as noted at paragraph 50 of the GCS, the Crown held monopoly purchasing powers throughout the nineteenth century, and agreed it had an enhanced duty to exercise good faith and actively protect Maori interests when purchasing Maori land. Despite this, the Crown has not conceded an overall, systemic problem with purchasing throughout this period, and continues to require each purchase to be proved as a breach.

The Maori Understanding and Expectation of Crown purchasing Transactions

12. The Crown has suggests that it is unclear whether Taihape Maori understood the processes and impacts surrounding Crown purchasing transactions with their whanaunga in adjoining blocks.[6] However, with the Taihape Inquiry district being one of the last affected areas in Aotearoa, this

[5] Wai 2180, #1.3.2, at [51].
[6] Wai 2180, #1.3.2 at [42].

is unlikely to have been subjected to Pakeha land purchasing. In particular, Mokai Patea – having experienced extensive and rapid land loss in the Hawkes Bay region to the east of the Taihape Inquiry district – were all too familiar with the machinery of early colonisation, including Crown purchasing, and the resulting land loss.[7]

13. However, the evidence and examples supporting the submissions (as noted between paragraphs 51 and 56 of the GCS) demonstrates that Taihape Maori were clearly aware of the processes and adverse impacts of them, particularly when it came to the methods used by the Crown.

14. As Tiriti partners, Taihape Maori would have expected to be treated in accordance with what the Crown promised and guaranteed under Te Tiriti and its principles. Taihape Maori often demonstrated this understanding by attempting to negotiated deal to bring themselves positive outcomes, or indicate their expectation of having the choice of how to deal with their lands – which are principles embedded in Te Tiriti.

Crown Purchasing Methods

The Native Land Court

15. The Native Land Court (**NLC**), introduced in 1865, was the main device used by Crown purchase officers to carry out and fulfil the Crown's land purchase programme. The NLC was introduced in order to give Maori lands a "recognised" and "legal" title, which in turn made the land legally purchasable. Such a title would be issued on a block by the NLC after title investigation hearings.

16. Taihape Maori had difficulty with the NLC, where they would commonly have to sell land to cover the costs of a process they entered to defend their interests in that land, as occurred in Awarua, or blocks would be awarded to certain applicants and paid for despite protests and applications for rehearing, as occurred in Te Kapua, or costs registered as mortgages or liens

[7] Subasic and Stirling, *Sub-district block study – central aspect*, at 192.

against land which forced Taihape Maori to sell land they wished to retain.[8] A more complete discussion of these examples is noted between paragraphs 58 and 69 of the GCS and we assume will be covered in the generic Native Land Court submissions, too.

17. The Crown effectively forced Taihape Maori into participating in the broken and unfair NLC system by establishing and frequently employing NLC mechanisms to facilitate its purchases. The Crown failed to act or respond when Taihape Maori advised it of their difficulty in retaining their lands due to these processes, and ignored solutions proposed by Taihape Maori. This almost always led to extensive land loss. Counsel conclude that Taihape Maori have been:

    a. Ignored when they showed willingness and ability to participate and partner with the Crown in making decisions in relation to their lands. They have, therefore, been:
        i. Constrained to exercising little to no decision-making powers over their lands – thereby demonstrating the Crown's lack of recognition or respect for the tino rangatiratanga of Taihape Maori as promised under Te Tiriti;
        ii. Prevented from retaining their lands for as long as they wished and desired to – thereby constituting a Crown breach of the principle of the Article Two guarantee;
        iii. Not given the opportunity to truly be treated as a legitimate Tiriti partner in the sale of their lands – thereby constituting a Crown breach of the principles of good faith and partnership.

Boundary and Surveying Issues

18. It is submitted that, by relying on faulty and incomplete surveys, or failing altogether to define boundaries in land purchases, in relation to Kaweka and Te Koau,[9] the Crown disentitled Taihape Maori from their lands. As detailed

[8] Subasic and Stirling, *Sub-district block study – central aspect*, at 92 – 162; Subasic and Stirling, *Sub-district block study* – central aspect, at 160 – 161.
[9] Fisher and Stirling, *Sub-district block study – northern aspect*, at 7 – 30.

in paragraphs 70 – 75 of the GCS, this reliance breaches its obligations under Te Tiriti in the following ways:

a. By not ensuring that adequate surveys were carried out to define proper boundaries, the Crown failed to actively protect the clear and accurate delineation of Maori lands and thereby ensuring that only the correct quantity was being transacted;

b. By not conducting its purchase transactions properly in terms of having defined boundaries and not paying the full promised price, the Crown failed to meet its duty to act in good faith; and

c. By permitting the sale of lands with unclear boundaries and incomplete survey, combined with the Crown then claiming interests and control over lands which they did not properly complete, the Crown breached its Article Two guarantee of ensuring Maori could retain their lands for as long as they wished.

Tamana and Advance Payments

19. The Crown used both tamana and advanced payments to secure interests in lands which it wanted to purchase. Tamana involved paying owners a deposit of money with a view to securing interests in Maori land yet to go through NLC title determination. The distribution of tamana was often followed by one party making applications to the NLC for title determination. Advance payments were used to purchase undivided shares, whereby the Crown made advance payments to owners after the NLC determined the title of the land, but before the share interests were assigned between the particular owners. Advance payments were often followed by Crown applications to the NLC to divide up and award interests according to advances paid. Submissions in relation to the Crown using such practices is found between paragraphs 76 and 115 of the GCS.

20. In paragraph 85 through to 91 of the GCS, the evidence shows that, when the Crown prematurely decided who to pay (and who not to pay) advances

to for land:

a. It took risks in paying individual who may have had no rights at all;
b. It allowed itself to deal with various individuals, rather than a collective group of owners, which, in turn, enabled the Crown to:
    i. treat substantial advance payments made to individuals as an advance against the purchase price and, therefore, into a levy imposed on all owners;
    ii. easily secure an interest in the block;
    iii. secure an agreement to purchase the block without needing to set a purchase price; and therefore
    iv. destroyed any ability for Taihape Maori to work as a collective group.
c. It often persuaded or forced the Maori owners to put their land through the NLC, leading to heavy partitioning and fragmentation of the land;
d. It could induce Maori to pay for the survey costs which were required to enable the Crown to purchase the land; and
e. It placed itself in a position where it was able to manipulate and influence the processes of NLC, creating an unfair playing field.

21. The Crown, through its practice of paying tamana or advance payments, while not illegal under the provisions of the various Native Land statutes at the time, breached its obligations under Te Tiriti and its principles in the following ways:

a. By permitting itself to, and even preferring to, deal with individuals rather than the collective hapu or iwi owners, the Crown:

    i. Undermined the collective ownership and community decision-making abilities of Taihape Maori, thereby disregarding and failing to recognise the tino rangatiratanga of Taihape Maori as guaranteed in Te Tiriti; and

ii. Denied the unwilling owners a chance to be properly consulted or participate in decisions regarding their lands, therefore, failing to meet its duty to consult, in breach of the principle of partnership.

b. In failing to take appropriate action in limiting or stopping the continual use of tamana, it permitted the ultimate result of land loss – thereby being in breach of its duty of active protection; and

c. By using tamana, it was able to proclaim the lands in question, thereby using its self-given statutory powers in locking out any private competition. This limited the options for Taihape Maori owners to deal with their lands, and thereby also breached the Article Two guarantee of Maori retention of their lands so long as they wished, and in relation to the principle of options; and

d. By using advance payments, the Crown enticed and ensured that individuals acted in accordance with their own self-interest, subverting the communal ownership and usufructuary rights.

22. It is further submitted that, when there is destruction and loss of communal decision making, this in turn leads to a loss of community title and control – which is yet a further prejudice upon Taihape Maori.

23. As noted at paragraph 78, the Tribunals in the Te Roroa, Ngati Awa Raupatu, Hauraki, Central North Island and Whanganui Inquiries have all found the Crown's practice of paying tamana/advances to individuals as constituting breaches of Te Tiriti, as it created division within communities, damaged traditional leadership, and undermined collective decision-making.[10]

24. The evidence shows, as detailed between paragraphs 76 – 115 of the GCS, that the practice of paying advances in the above Inquiries also took place similarly in Taihape. It is, therefore, submitted that similar findings of

[10] Waitangi Tribunal, He Whiritaunoka: The Whanganui Land Report, at 532.

undermining and breaches on part of the Crown are available to be made by this Tribunal.

Enlisting Assistance

25. In addition to tamana and advance payments, the Crown also made payments with the intention of enlisting the assistance of individuals for the purchase of the land the Crown was interested in. Unsurprisingly, these monies significantly compromised such individuals' ability to act in the interests of their co-owners.[11] Evidence and examples of this practice are detailed at paragraphs 116 to 121 of the GCS.

26. It is submitted that, the Crown, by paying individuals these monies (or bribes) to further its own purchasing intentions:

    a. Breached its duty to act in good faith and thereby also the principle of partnership; and
    b. Interfered with the ability of hapū/iwi to make their own communal decisions according to their own tikanga and preferences, and thereby undermining the customary social-structure – breaching its duty to actively protect Maori interests and tino rangatiratanga.

27. And, as cited in paragraph 120 of the GCS, the Whanaganui Tribunal found that the payment of such monies showed, on the Crown's part, an abuse of its position, and a lacking of good faith.[12] It is submitted that, as the situation in Taihape is akin to that of Whanganui, similar findings of Tiriti breaches are available to be made by this Tribunal.

Monopoly Powers

28. Counsel submit that the evidence, detailed between paragraphs 122 and 147 of the GCS, shows that through the nineteenth century the Crown had an policy of excluding any form of competition when it came to purchasing

[11] Hearn, Sub-district block study – southern aspect, at 265.
[12] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 535. Emphasis Added.

land, to give itself an advantage and "save" money by getting the land for a heavily discounted price. From 1840 to 1865, the Crown considered that it had a pre-emptive right to purchase land regardless of whether or not it had obtained agreement from Maori – this, essentially, established the Crown's monopoly powers.

29. In 1864, the Crown relinquished its pre-emptive right of purchase when it created the NLC which had as its primary task the conversion of customary rights and interested into Crown-derived title. The Crown, however, was able to continue locking out purchasing competition from private interests through section 42 of the Immigration and Public Works Act Amendment Act 1871. The effect of this provision was that, if the Crown were to enter into negotiations for purchasing customary land from Maori for the purposes of public works, no private party could seek to acquire such land. This was then extended by section 2 of the Immigration and Public Works Act 1874, which provided that section 42 would also cover any land which the Crown was negotiating to lease with an option to purchase. These notifications were placed on the title for two years, and could be re-issued.[13]

30. In 1877, the Crown's full right of pre-emption was reinstated with the passing of the Government Native Land Purchases Act 1877 (**GNLP Act**). Section 2, in particular, provided that if the Crown had paid any money or entered into any negotiations for the purposes of purchasing Maori land in the North Island, and such land had not yet passed through the NLC, a notification could be issued regarding such land, and it would be unlawful for any other person to attempt to deal with this land.

31. In the Taihape Inquiry district, it was evident that, in many cases, private purchasers were willing to offer terms of purchase more favourable than those offered by the Crown, with which the Crown often interfered (or attempted to interfere) to its own advantage. The Crown operated in a way which, essentially, meant that if Taihape Maori did not agree to sell it the land it sought and give it up forever, the Crown would put off, stall, or stop

[13] Hearn, *Sub-district block study – southern aspect*, at 266.

negotiating with them all together. It is submitted that the Crown acting coercively in its land purchase dealings completely goes against any notion of acting in good faith and, therefore, constitutes a breach of the principle of partnership.

32. It would use knowledge of the Taihape owners' weaknesses and struggles to its own advantage to either induce or force Taihape Maori owners into a position where they had to sell their land. The Crown has, therefore, not:

a. Acted in a good faith, and thereby has not observed the principle of partnership as required under Te Tiriti;
b. Met its obligation to actively protect Taihape Maori interests; and
c. Met its obligations in relation to the Article Two guarantee for Maori to retain their lands for as long as they wished.

33. The Crown, through its self-awarded pre-emption powers and other methods which it used to lock out competition, limited the options Taihape Maori had when looking to deal with their lands. This meant that it was able to impose a system by which it was able to set prices for land purchase – something that was very unfair towards Taihape Maori, closing down their options to operate competitively in the Pakeha cash economy. There is neither evidence that it accorded them the market value, nor evidence of Taihape Maori being given opportunities to obtain fair prices through methods such as independent valuations, auctions or tenders. Instead, the evidence points to the Crown excluding any competition through monopoly powers, and arbitrarily setting upper limits for its purchase agents to work within in order to purchase as much land as possible for as cheaply as possible.[14]

34. It is therefore submitted that the Crown, in practice, had a monopoly over land purchasing in the nineteenth century by which breached Te Tiriti in the following ways:

[14] Hearn, *Sub-district block study – southern aspect*, at 270.

a. It failed to recognize or give effect to the tino rangatiratanga of Taihape Maori as promised under Te Tiriti;

b. Through limiting the options Taihape Maori had in dealing with their land, acted in a way which constituted a breach:

   i. the principle of options under Article Two;

   ii. its duty of good faith and, therefore, the principle of partnership; and

c. By imposing a monopoly over land purchasing for its own interests, without proper consideration or implementation of Taihape Maori interests, is a clear breach of its duty to actively protect Maori interests under te Tiriti.

Relief Sought

35. The Claimants seek the following relief from the Waitangi Tribunal as a result of the prejudice the Claimants have suffered, and continue to suffer, from the Crown's breaches of the terms and principles of Te Tiriti o Waitangi which have caused the loss of the Claimants' use and retention of their land:

a. A finding that the Claimants' claims concerning the issues resulting from nineteenth-century Crown purchasing are well founded;

b. a finding that the Crown has thereby breached its obligations under te Tiriti and its principles;

c. a recommendation that the Crown apologise publicly to the Claimants for loss of land through its own purchasing activities and methodologies;

d. a recommendation that the Crown apologise publicly to the Claimants for causing, as a result of the loss of land, the loss or diminution of the Claimants':

   i. Tino rangatiratanga;

   ii. Kaitiakitanga;

   iii. Culture;

   iv. Identity;

   v. Wairua;

vi. Mana;

vii. Self-worth;

viii. Matauranga Maori; and

ix. Tikanga Maori.

e. Recommendations pursuant to sections 8A – 8HJ of the Treaty of Waitangi Act 1975 for the return to the Claimants of all:

i. Crown Forestry land within the claim rohe;

ii. land held by any State Owned Enterprises within the claim rohe;

iii. land held by any institution under the Educations Act 1989;

iv. land vested under the New Zealand Corporation Restructuring Act 1990; and

v. any interest in any such land and together with any improvements;

f. Recommendations that the Crown pay compensation to enable the Claimants to purchase any land wrongly acquired by the Crown but which is no longer in the ownership or control of the Crown;

g. Recommendations that the Crown pay compensation to the Claimants for the prejudice suffered by the Claimants as a result of the Crown's acts, omissions, policies, legislations and practices; and

h. Any other recommendations that the Tribunal considers to be appropriate.

Dated at Wellington this 20th day of October 2020

Dr B D Gilling and K Hu
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