In the Waitangi Tribunal **Wai 2180**

Under the Treaty of Waitangi Act 1975

in the matter of the Taihape: Rangītikei ki Rangipō District Inquiry (Wai 2180)

CLAIMANT CLOSING GENERIC SUBMISSIONS
ENVIRONMENT

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. Environmental issues have been well covered in this inquiry. In 2012 Professor Belgrave and 6 other researchers produced a comprehensive scoping report of 297 pages, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga.*[1] The report covered a number of issues including:

    a. The Geography and Transformation of Inland Patea;

    b. Contamination of Soil in the Taihape Inquiry District;

    c. Land Use and Agriculture in the Taihape Inquiry District;

    d. Fauna and Flora;

    e. History of Environmental Law and Planning;

    f. Māori Environmental Management.

2. The report recommended further historical research and engagement with claimants.[2] In 2015, David Alexander produced a report on Environmental and Resource Management (Land) in Taihape Inquiry District 1970s - 2010.[3] In 2016, David Armstrong produced a report on The Impact of Environmental Change in the Taihape District 1840-c1970.[4]

3. The issues have been broken down into:

    a. Land related issues

    b. Kaimanawa wild horses

    c. Waterways, lakes and acquifers

[1] Wai 2180, #A10, Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga* (2012).
[2] Wai 2180, #A10, at paragraphs [511 to 542].
[3] Wai 2180, #A38, Alexander, *Environmental and Resource Management (Land) in Taihape Inquiry District 1970s – 2010,* (2015).
[4] Wai 2180, #A45, Armstrong, *The Impact of Environmental Change in the Taihape District 1840-c1970,* (2016).

d. Ownership of riverbeds

e. Non-commerical fisheries

4. They will be addressed in that order in these submissions.

TREATY OBLIGATIONS AND THE CROWN APPROACH

Tribunal Statement of Issues

5. Question two of the Tribunal Statement of Issues asks:

> To what extent, if at all, is the Crown under a duty to preserve and protect the land-based environmental resources that Taihape Māori have interests in?

6. To answer this, it is useful to first consider what the environmental resources and interests Tāihape Māori had in the district at 1840 and in the period up to the 1880s when major change occurred.

Environmental values of Taihape Māori

7. The Crown did not undertake any systemic assessment of the values Taihape Māori had for the natural environment in this early period of colonisation, but it was well aware that Taihape Māori valued both things that the Crown was familiar with and things that it was not. Belgrave gives this summary:[5]

> By the time of European contact, Māori had developed a system of regional economies between which flowed a large amount of communication and trade. These systems allowed for a detailed knowledge of the life-cycle and seasonal patterns of fish, birds and plants. This combined with an understanding of geographic, climatic and astrological patterns which, in turn, was bound in religious beliefs that featured in customary law. Knowledge of the environment was grounded in traditional Māori beliefs and values. This cosmology acknowledged interconnectedness in ecological, human and spiritual elements which gave priority to environmental sustainability. Protection of resources could be done by placing rahui on a resource which would restrict access. The rahui could then be lifted once the protection was no longer required.

[5] Wai 2180, #A10, at paragraph [339].

8. These values are discussed in the Belgrave report.[6] The report quotes a summary from the Waitangi Tribunal Muriwhenua report which stresses that a fundamental characteristic of Māori values is the human world being seen in close relationship to the natural environment:[7]

> The fundamental purpose of Māori law was to maintain appropriate relationships of people to their environment, their history and each other. In this it was by no means unique amongst the laws of the world but the emphasis was different… For Māori, the benefits of the lands, seas, and waterways accrued to all of the associated community and the individual's right of user was as a community member… Māori law described how people should relate to ancestors as the upholders of old values, to the demi- gods of the environment as the providers of life's necessities, to their hapu, which was the primary support system, and to other peoples as necessary for co-existence. Precise rules were made for respecting other people, ancestors, and deities, and genealogies were kept to show the connections.

9. Belgrave records one claimant expressing it this way:[8]

> … long before resource consent ever came about, long before - Ngati Hinemanu and Ngati Paki were part of everything on all the land and over the times we've been fragmented away to just being in that bit. The Native Land Court says you can have that bit there and over time the councils have used that, right down to right now today …. What makes them think that Ngati Hinemanu and Ngati Paki don't have the right everywhere. They do …

10. Armstrong draws on maps in Tony Walzl's *Tribal Landscape Overview* to give a picture of historic use of the district:[9]

[6] Wai 2180, #A10 at paragraphs 337 to 343.
[7] Wai 45, *Muriwhenua Land Report*, (Waitangi Tribunal, 1997), at page 21.
[8] Wai 2180, #A10, at paragraph [343].
[9] Wai 2180, #A10 pp15-16 and T.Walzl, Tribal Landscape Overview. April 5, 2013. Map 13, 471: Map 14, 527: Map 15, 610: Map 16, 671: Map 17, 719: Map 18, 728: Map 19, 883.

pre-1840 period. Mr Walzl's maps show extensive seasonal food gathering sites, cultivation sites and associated kainga - generally located on or near river flats - birding sites in the ranges, fishing sites, places where fernroot was collected and kiore runs.[7] Looking at Mr Walzl's maps together, one gains a sense that the extensive, rich and heavily populated Awarua/Motukawa lands formed a kind of hub of a wheel, with the spokes extending outwards to the northern tussock lands and the ranges, taking in birding and edible berry areas, fern gardens and places where medicinal plants and building materials were gathered.

Seasonal mahinga kai activities in the northern tussock lands included eeling and titi (muttonbird) gathering. Titi nesting grounds were located at Tikitiki, Ngawaiohutu, Reperoa, Manawamoemoe, Ngawharekokari, Puketapu and Aorangi.[8] Kiore were caught on the Taumatakariore ridge and at Pokopoko bush at Mangaohane.[9] One of the most celebrated eeling streams in the district was Tapuaengoto, which drained from the Ngamatea Swamp into the Taruarau River.[10] A famous pa tuna was also located at the Ngamatea Swamp.[11] The Oruamatua-Kaimanawa and Owhaoko lands, viewed by Europeans as barren wastes, were, according to Batley, prized not only for titi, but also for their kiore, kiwi, weka and kakapo. Mokai Patea Maori also utilised Motumatai as a camping area when hunting titi and weka. The track known as Te Puta o te Haki ran from the Rangipo 'desert' across Motumatai to the Owhaoko block, where there was a fern root area next to the Waingakia stream. People would also camp at this place when prevented by snow from crossing the Kaimanawa Range.[12]

11. The maps themselves note hundreds of sites and reference most of them Native Land Court minute books. For example:

1. Pawerawera	A place for catching rats and where fern root was dug.[2077]
2. Mangatawai	A stream flowing into the Ngarururoro River[2078] where a kainga was located at the edge of a black birch bush.[2079]
3. Otutu	Located at the source of the Taruarau River a post was erected by and named after Whitikaupeka. This cross was renewed at the time of the Kokako meeting[2080] although the post remained named Whitikaupeka.[2081]
4. Omarukoka	The name of a bush.[2082]
5. Horotea	Pits were located here where eels were kept.[2083] A kainga was also located here.[2084]
6. Waingakia	A kainga where kiwi, weka and eel were caught.[2085] A kainga and fern root were here.[2086]
7. Ngamatia	A lagoon on Owhaoko[2087] where Noa te Huke hunted and fished.[2088]
8. Raoraoroa	A kainga for digging fern root.[2089] Also a place for catching rats.[2090]
9. Kaimako	A kainga where birds were snared and where the wharepuni Te Aho o naui was located.[2091]
10. Whata a Tamakopiri (Te)	Where Tamakopiri climbed up to a range and where a post of Whitikaupeka was located.[2092]
11. Mangataramea	Camping ground stayed at on way to Tahuanui to collect food.[2093]
12. Turi o te Kanawa (Te)	Where titi were snared.[2094] Named from Kanawa's force going from Heretaunga to Whanganui to avenge death.[2095]
13. Tapuae Ngotoa Te Kapa	A fern root field and kainga.[2096]

[2077] Te Raro, Awarua 1890, W19/292
[2078] Te Rango, Owhaoko Rehearing and Partition 1888, N17/7
[2079] Te Rango, Owhaoko 1887, N13/36
[2080] Te Rango, Owhaoko 1887, N13/35
[2081] Te Raro, Owhaoko 1887, N13/75. Te Rango, Owhaoko Rehearing and Partition 1888, N17/6.
[2082] Te Rango, Owhaoko Rehearing and Partition 1888, N17/7
[2083] Te Raro, Owhaoko 1887, N13/75
[2084] Te Rango, Owhaoko Rehearing and Partition 1888, N17/6.
[2085] Te Raro, Owhaoko 1887, N13/75
[2086] Te Rango, Owhaoko 1887, N13/35
[2087] Noa te Hinga, Owhaoko 1885 Partition, N11/328
[2088] Noa te Hinga, Owhaoko 1888, N16/158.
[2089] Te Ahiko, Owhaoko 1887 Rehearing & Partition, N12/326
[2090] Paora Kaiwhata, Owhaoko 1887 Rehearing & Partition, N12/299. Te Ahiko, Owhaoko 1887 Rehearing & Partition, N16/238
[2091] Te Ahiko, Owhaoko 1887 Rehearing & Partition, N16/238 & 241
[2092] Te Rango, Owhaoko 1887, N13/35
[2093] Te Raro, Awarua 1890, W19/292
[2094] Te Ahiko, Owhaoko 1887 Rehearing & Partition, N16/238
[2095] Te Rango, Owhaoko Rehearing and Partition 1888, N17/7
[2096] Te Rango, Owhaoko 1887, N13/36

12. Claimant evidence supported this historic evidence. For example:

13. Lewis Winiata and Jordan Winiata-Haines in the joint evidence said:[10]

> "These rivers were our way of travel from the west to the east to the sea. They are a source ofkai and embodied our kaitiaki. We are the rivers and they are us. They are our life lines. These rivers did not cut us or our whakapapa off at the Kaweka or the Ruahine Ranges."

14. Raihania Potaka said:[11]

> "The land is a source of identity to our people. Ngai Te Ngaruru acted as kaitiaki of the whenua. Land alienation has disempowered our people which has, in turn, had a major impact on the social, physical, mental and spiritual wellbeing of the hapu and Iwi of Ngai Te Ohuake."

15. Moana Jackson said:[12]

> "The BoE further considers the contrary reality in tikanga that land is a part of whakapapa which therefore carries certain reciprocal rights and obligations cementing the relationship between humans and Papatūānuku. It positions that reality within tikanga as a legal or jural construct and focusses on the basic elements of that construct as they relate to the land and the authority and responsibility which Iwi

[10] Wai 2180, #H9, Joint Brief of Evidence of of Lewis Winiata and Jordan Winiata-Haines, at paragraph 14
[11] Wai 2180, #H12, Brief of Evidence of Raihania Potaka, at paragraph 7
[12] Wai 2180, #H7, Brief of Evidence of Moana Jackson, at 35

> and Hapū have always had in relation to the whenua within their rohe."

16. The values held by Taihape Māori were also changing.

17. Pigs were the first exotic animal introduced to the district.[13]

18. Sheep followed in the late 1860s with a flock of around 11,600 sheep by 1869-70 held on 45,000 acres leased from Taihape Māori between the Moawhango and Rangitikei Rivers.[14]

19. Colonisation led to new ways of using the environment. For example by 1888 Moawhango was a thriving settlement with 5 woolsheds and a flour mill.[15] A contemporary Pakeha observer commented:

> They are remarkably well to do. Their sources of income are rents from birch land [scrub country leased for sheep runs] wool, grown and scoured by themselves; and flour produced by them at Moawhango. They have five woolsheds and a flour mill; also an accommodation house conducted in the European fashion. In many instances the Maoris have Europeans working for them. There are two stores and a Post office here, but these belong to Europeans. On the whole, however the population of this interestingly [sic] little township is Māori, though no one passing through it without seeing the inhabitants would suspect this to be the case in view of the tokens of wealth and comfortable circumstances that are everywhere discernable'.

20. Horses were also in use.[16]

21. This meant that tikanga was evolving. Belgrave makes this point:[17]

> Māori customary law is also in constant development.

22. An interesting feature of this development was an observation that Pakeha observers made in the 1880s that "commonage pasturage rights" were "usual in tribal lands".[18] Taihape Māori had developed a

[13] Wai 2180, #A45, at page 16.
[14] Wai 2180, #A45, at page 18.
[15] Wai 2180, #A45, at page 20.
[16] Wai 2180, #A45, at pages 23 and 27.
[17] Wai 2180, #A10, at paragraph [346].
[18] Wai 2180, #A45, at page 27.

means of engagement in the colonial economy without the need for radical change to their tikanga and customs in relation to land.

23. The other noteworthy feature of the district was they way in which the population was located across the landscape. Even in nineteenth century terms, the population of the district overall was low in terms of the population permanently residing there. There were at most several hundred Māori residing in the district in the 1880s.[19]

Table 2: Maori population of the Taihape inquiry district, 1881 census[85]

Location	Tribe	Hapu	Total	Enumerator
Riuopuanga, Patea	Ngati Kahungunu	Ngati Whiti	81	Booth (Whanganui)
Waiu and Riuopuanga	Ngati Kahungunu	Ngati Tama	15	Booth (Whanganui)
Patea	Ngati Tuwharetoa	Ngati Tama	108	Scannell (Taupo)
Patea	Ngati Tuwharetoa	Ngati Whiti	29	Scannell (Taupo)
Patea	Ngati Tuwharetoa	Hapuiti	41	Scannell (Taupo)
Otara	Ngai Te Upokoiri	Ngati Hauiti	13	Ward (Rangitikei)

Table 3: Mokai Patea Maori living outside the Taihape inquiry district, 1881 census[86]

Location	Tribe	Hapu	Total	Enumerator
Motupuka	Ngati Tuwharetoa	Ngati Tama	30	Scannell (Taupo)
Kotukutuku	Ngati Tuwharetoa	Ngati Tama	15	Scannell (Taupo)
Poutu	Ngati Tuwharetoa	Ngati Tama	53	Scannell (Taupo)
Porewa	Ngai Te Upokoiri	Ngati Hauiti	17	Ward (Rangitikei)
Te Houhou	Ngai Te Upokoiri	Ngati Kahunga	17	Ward (Rangitikei)
Te Ruwai	Ngati Pamoana	Ngati Tama	17	Ward (Rangitikei)

24. A map in the Cleaver report shows that Taihape Māori were concentrated in settlements in river valleys.[20] Armstrong refers to a heavily populated hub with more sparsely populated our spokes.

25. The Moawhango settlement in 1888 conformed to this pattern and must have contained a substantial number of Taihape Māori who were permanent residents in the district.

26. Overall, there was a marked contrast between these values and the English common law approach.[21]

27. But while some of these values may have been unfamiliar to the Crown, such as the intense spiritual connection to the land and its

[19] Wai 2180, #A48, Cleaver, *Māori and Economic Development in the Taihape Inquiry District 1860-2013,* (2016), at page 38.
[20] Wai 2180, #A48, at page 28.
[21] Wai 2180, #A10, at paragraph [244].

resources, but there were analogies with English thinking, for example Christian stories about a god making the heavens and the earth.[22]

28. In addition, the English Empire in 1840 included parts of Asia, Africa, the Middle East and the Pacific, so that the Crown was familiar with many different epistemologies and cosmologies operating in the territories that it governed. An example is the 1924 Privy Council decision in *Mullick v Mullick* concerning the control and worship of a Hindu family idol which had been consecrated as a family idol in 1846. The Privy Council noted:[23]

> A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a "jursitic entity". It has a juridical status with the power of suing and being sued. .... It is unnecessary to quote the authorities; for this doctrine thus simply stated, is firmly established.

29. Pakeha settlers and missionaries, as well as colonial officials observed and carefully recorded and published information about Māori culture. Those published works inherently or directly compared the differences between Māori culture and English norms.

30. Finally, in the Taihape district, the observation that on “tribal lands” Taihape Māori were applying "commonage pasturage rights”[24] was an observation that drew from the concept of the contemporary English commons.[25]

The Crown approach

31. The Crown considers environmental issues to be key issues in the inquiry.[26] It made extensive opening submissions responding to the Tribunal Statement of Issues and some of the above historical reports which had been filed by that time.

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[22] Book of Genesis verses 1:1 to 1:31.
[23] (1925) L.R. 52 Ind. App. 245.
[24] Wai 2180, #A45, at page 27.
[25] Which were in the process of enclosure in the 1840s eg The Inclosure Act 1845 and following Acts.
[26] Wai 2180, #3.3.1, *Opening Comments and Submissions of the Crown*, (2017), at paragraph [262].

32. In summary, the Crown accepts that, for those parts of the natural environment that "may constitute taonga", its Treaty obligations are active protection and equitable treatment between Māori and non-Māori.[27]

33. This reference to ‘taonga’ contains the important qualification that the Crown is not under a Treaty obligation to protect the natural environment in its entirety.

34. In terms of active protection, the Crown argues that any obligation is heavily qualified by:

    - The need to determine causation.[28]

    - What matters the Crown can reasonably be expected to have had control over, given that the natural environment is an open system not under its control, and knowledge about it is constantly changing.[29]

35. The Crown says that the most dramatic change to the natural environment since 1840 has been the conversion from native flora (mostly forest of some kind) to pasture for grazing by introduced sheep and beef.[30]

36. In terms of land management issues, the Crown makes no concessions about management prior to the 1920s, urging against an “overly simplistic” causal analysis.[31]

37. The Crown makes limited concessions that general planning legislation since 1926 has not made any or much provision for rangatiratanga and kaitiakitanga.[32]

38. The Crown argues that the contemporary legislation is better in this regard, in particular under the Resource Management Act 1991 (RMA 1991).[33]

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[27] Wai 2180, #3.3.1 at paragraph [264-265].
[28] Wai 2180, #3.3.1 at paragraph [269].
[29] Wai 2180, #3.3.1 at paragraph [268].
[30] Wai 2180, #3.3.1 at paragraph [270], fn 272. Citing #A10 [215].
[31] Wai 2180, #3.3.1 at paragraph [270].
[32] Wai 2180, #3.3.1 at paragraph [273].

39. The Crown continues to resist the repeated finding of the Tribunal that the RMA 1991 is inconsistent with the Treaty in not requiring that actions under it should be consistent with the Treaty:[34]

> Furthermore, as with the control mechanisms we referred to above, it is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business, and that Māori are being made to expend the potential of their Treaty settlement packages to achieve results the resource management reform promised, two decades ago, would be delivered.
>
> …
>
> Although the RMA represented a significant step forward towards the end of last century in making room for the Māori voice in environmental management, much of its potential remains disappointingly unrealised.

40. The Crown submissions note limits on the Crown duty to consult about environmental matters:[35]

> While the Crown is not under an absolute duty to consult, it acknowledges that there may have been times when the legislative framework for environmental management provided no direct, or provided only limited, input for Taihape Māori into matters affecting them.

41. This appears to be a reference to the *NZMC v A-G (Lands)* case. While that submission may be technically correct, it is somewhat facile when applied over the entire period since 1840, since in the initial period of contact in this district, every Crown intervention in Taihape Māori communities having an effect on their taonga would have been of such significance that consultation would have been effectively compulsory. Indeed, in many circumstances, given the

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[33] Wai 2180, #3.3.1 at paragraph [276-279].
[34] Wai 262, *Ko Aotearoa Tēnei,* at pages 113 – 116.
[35] Wai 2180, #3.3.1 at paragraph [278].

Article 2 Treaty guarantee, the full and informed consent was required before interference could occur.[36]

Taonga and the natural environment

42. The Crown submission that it is only responsible under the Treaty for parts of the natural environment that are 'taonga' is similarly unhelpful. It appears to be based on comments made by the Waitangi Tribunal in its Wai 262 report.

43. In that inquiry, the Tribunal addressed "the claimants' concerns about environmental management in New Zealand in general, and the operation of the RMA in particular."[37] The claimants in that inquiry alleged that the Crown was obliged to protect "kaitiaki relationships with taonga in the environment".[38]

44. The claimants referred to "taonga in the environment" which they said included "natural resources; indigenous flora and fauna and the ecosystems and habitats that support them; geographic features such as rivers, lakes, maunga, and swamps; and sites such as pā and wāhi tapu."[39]

45. These arguments, and the Crown response, were primarily about the contemporary environmental management regime. They did not discuss roles and responsibilities in the 19th and early 20th centuries when many areas remained under Māori ownership and practical control.

46. The Wai 262 Tribunal found that:[40]

> "in te ao Māori the relationship between kaitiaki and the environment is founded in whanaungatanga – the web of relationships that embraces living and dead, present and past, human beings and the natural environment. Whanaungatanga is the basis on which the world is ordered, the organising principle of mātauranga Māori, the

[36] Wai 898, Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims,* (2018), at pages 148, 149, 154. Wai 2358,Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims,* (2019), at page 17.
[37] Wai 262, Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (2011), at page 263.
[38] Wai 262, *Ko Aotearoa Tēnei,* at page 263.
[39] Wai 262, *Ko Aotearoa Tēnei,* at page 263.
[40] Wai 262, *Ko Aotearoa Tēnei,* at pages 267-269.

> source of whakapapa, and the origin of all rights and obligations – including kaitiakitanga over the environment."

47. That Tribunal agreed that "the Treaty obliges the Crown to actively protect the continuing obligations of kaitiaki towards the environment, as one of the key components of te ao Māori."[41]

48. However, responding to the claimants' submissions, the Tribunal cautioned that:[42]

> "we do not consider the environment as a whole to be a taonga, in the sense that the term is used in the Treaty." It would devalue what is a specific term applied to particular items."
>
> Underlining added.

49. The Tribunal was critical of claimants for applying the word taonga in such a broad way. It was not limiting Crown Treaty obligations only to parts of the environment to which the word taonga could be applied.

50. In any event, it defined taonga broadly:[43]

> flow from them. In mātauranga Māori, the environment is the manifestation of the atua themselves – Rangi-nui, Papa-tū-ā-nuku, Tāne-mahuta, Haumia-tiketike, and so on – who transcend and have dominion over taonga. Thus, taonga are the particular iconic mountains or rivers, for example, or specific species of flora and fauna. Whether a resource or a place is a taonga can be tested, as it can for taonga species (we have discussed this in chapter 1, too, in relation to taonga works). Taonga have mātauranga Māori relating to them, and whakapapa that can be recited by tohunga. Certain iwi or hapū will say that they are kaitiaki. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have kōrero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.

51. Accordingly, the observations in Wai 262 must be put in their context.

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[41] Wai 262, *Ko Aotearoa Tēnei,* at page 269.
[42] Wai 262, *Ko Aotearoa Tēnei,* at page 269.
[43] Wai 262, *Ko Aotearoa Tēnei,* at page 269.

52. The Tribunal was discussing contemporary issues of environmental management – where Māori no longer retained possession of most of the natural environment;

53. The Tribunal defined taonga broadly in any event as including not only places and species but also ‘resources’.

54. In any event:

    a. It is hard to disentangle what is ‘taonga’ ie things highly valued by Taihape Māori, from the natural environment.

    b. The Crown historically accepted that Taihape Māori ‘owned’ under their customs all of the land of the district. The natural environment of the Taihape District was ‘their’ natural environment in 1840. Hence the Tribunal reference in the SOI to ‘land-based environmental resources’.

    c. Under Article II the Crown guaranteed possession not just of taonga, but whenua and kainga.

    d. Focussing only on evironmental resources which are specific taonga and not considering the broader natural landscape is unsettlingly close to the discredited idea of ‘waste lands’ ie lands or areas or places not valued by Māori.

55. In addition, what is taonga is not limited to a particular time. As forest places were converted to grazing, whether by Taihape Māori themselves or Pakeha settlers, or as control over areas was lost, remaining forest areas may have taken on a different or higher value as taonga. In the same way that the Crown came to consider hill country land as valuable for water catchment protection purposes, Māori values or the strength of attachment to places many also have changed.

56. Consequently, it is more appropriate to consider that under the Treaty the Crown duty of protection applied to all of the district held under custom, and to protect the values that Taihape Māori valued the district for.

57. The *Muriwhenua Fishing Report* and *He Maunga Rongo* reports also make the point that:[44]

> When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

58. This is because of the way taonga are considered to be linked to the ancestors and the "inherited guardianship" which comes from that:[45]

> To understand the significance of such key Treaty words as 'taonga' and 'tino rangatiratanga' each must be seen within the context of Māori cultural values. …. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements. This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources.

Values, agency, causation and active protection

59. There is a suggestion in the Crown submissions that Crown responsibility under Treaty principles for impacts on the natural environment that adversely affect Taihape Māori is reduced because Taihape Māori values embraced some of the destructive practices of colonisation.[46]

60. For example, Armstrong refers to Māori involvement in historic burning in the district:[47]

> "A number of large fires devastated much of the district in ancient times. A single conflagration is said to have deforested the western part of the district south to Hihitahi around 590 years ago. A further

[44] Wai 22, *Muriwhenua Fishing Report* (1988), at page 180, Wai 1200, *He Maunga Rongo: Report on Central North Island Claims,* (2008), vol 4, at page 1244.
[45] Wai 22, *Muriwhenua Fishing Report* (1988), at page 180.
[46] Wai 2180, #3.3.1 at paragraphs [270, 280, 281].
[47] Wai 2180, #A45, at page 49.

> fire around 450 years ago deforested the eastern district, probably extending north to Ngamatea, Oupae and the Mangaohane Plateau. Recurrent burning of secondary vegetation that relaced the forests is said to have been carried out by 'prehistoric' Māori, and may have eventually resulted in the creation of around 165,500ha of tussock grassland in the northern part of the district."

61. However, he considers that the burning during colonisation was of a different order as a factual matter:[48]

> These fires were destructive, and there may have been an element of Māori agency, but these forest clearances cannot be compared with the systematic forest denudation which commenced in the inquiry district in the 1890s, which reached its apotheosis in the first decade of the twentieth century. And as we shall see, extensive burning of tussock lands by runholders, which commenced in the 1870s, was still going almost a century later. Today more than 90% of former tussock country has been converted to pasture or plantation forest.

62. In addition, there is a prior issue about whether, or the extent to which, the preferences of Taihape Māori for engaging with the colonial economy and new practices such as major forest clearance were given effect. What agency for applying their values and preferences did they actually have in the situation?

63. Taihape Māori took a fundamentally different approach to land development in the colonial economy in the 1880s - as noted, on their pastoral holdings "commonage pasturage rights usual in tribal lands exist" separate from the ownership of the animals themselves.

64. The different values for land were also expressed in the Native Land Court hearings at which evidence about the multitude of uses and places on the land was given. As Armstrong puts it:[49]

> Looking at Mr Walzl's maps together, one gains a sense that the extensive, rich and heavily populated Awarua/Motukawa lands formed a kind of hub of a wheel, with the spokes extending outwards to the northern tussock lands and the ranges, taking in birding and

[48] Wai 2180, #A45, at page 49.
[49] Wai 2180, #A45, at page 15.

> edible berry areas, fern gardens and places where medicinal plants and building materials were gathered.

65. Colonial officials often pointed out that Taihape Māori did not view development of the district in the way that the Crown intended. Taihape Māori needed to be literally removed from the land for the Crown vision for its future to be thoroughly implemented.[50] It was suggested that there was a Darwinian inevitability to this:[51]

> the same mysterious law which appears to operate when the white and brown races come into contact - and by which the brown race, sooner or later, passes from the face of the earth - applies to native timber. Wherever grass, clover, and European plants and animals find their way into the native bush, the forest begins to decay away, and soon assumes a ragged and desolate condition. The moment civilisation and the native forest come into contact, that moment the forest begins to go to the wall...'.

66. Whatever view Taihape Māori had of their relationship to their forests and the future may have been in the 1880s, it was not that.

67. It was always the Government's intention that Taihape Māori would have, at most, limited reserves which they would use for their immediate daily needs. Take for example John Sheehan statement in Parliament about the Native Land Bill 1873, quoted in Samuel Carpenter's "The Native Land Laws: global contexts of tenure reform, individual and collective agency, and the structure of 'the Māori economy' – a 'landless brown proletariat'":[52]

> There was no question that the vast bulk of the Native territory must pass eventually into the hands of the Europeans; there was no use trying to disguise that fact, and talk philanthropic nonsense, because the colonization of the North Island would not, and could not, be accomplished unless we became masters of the greater portion of the territory. The duty of the House, in the first place, was to set apart ample reserves for all purposes of occupation and cultivation by the Natives inhabitants [but otherwise they should not impose unnecessary restrictions on the remainder].

[50] Wai 2180, #A45, at pages 21-22.
[51] Wai 2180, #A45, at page 42, quoting Sheehan.
[52] Wai 2180, #M29(a), at page 92.

68. That vision was completely at odds with work underway by Taihape Māori at Moawhango at that moment to build an extensive pastoral enterprise by leveraging their large tribal landholdings. When you add to Sheenhan's limiting vision the prevalent idea that Māori would die out anyway, and that there was always land 'somewhere else' that they might revert to to prevent landlessness, the gap between the Crown vision of Māori agency and the intentions of Taihape Māori was huge.

69. Taihape Māori were not allowed to manage land conversion and alienation on their own terms as the Treaty guaranteed. This is despite that being an option publicly promoted by at least one commentator at the time, who was concerned about land purchasing undermining Māori pastoral farming initiatives:[53]

> Instead of seeking to deprive Māori of these 'profitably worked estates', 'Patea' thought that the Government:
>
> 'in the interests of the public generally, should exercise their power and influence in fostering and encouraging the Maoris in their endeavours to emerge from the poverty and misery of their aboriginal condition... it will be nothing short of a national disgrace to us should we attempt to acquire these lands for the public of New Zealand without very large consideration being shown to the people of this remote region, who are showing such capacity for improvement. The proposed line of railway does not touch the country the Natives are utilising at present, but it traverses a portion of the lands which they do not use, and which they will be quite wiling to dispose of to the Crown for European settlement. What more should we ask? Let the Government see carefully to this, and instruct their officers to deal generously and wisely with this question, and they will find the Native owners ready and willing to meet the public requirements in a similar broad and generous spirit...'.

[53] Wai 2180, #A45, at pages 22-23 'Patea' writing in the Hawkes Bay Herald in 1890.

70. As a consequence, the different preferences of Taihape Māori, informed by different values, including kaitiakitanga and the related values, were not given effect.

71. Consequently, damage to the natural environment that adversely affected Taihape Māori, that occurred under the Crown regime of wilful ignorance and/or disregard of Māori values and interests, and without the free and informed consent of Taihape Māori, requires a remedy where it limited and continues to limit Taihape Māori options and preferences for the natural environment.

72. In terms of causation. Some of the adverse effects of activities were unknown at the time the activities took place. Given the earlier disregard of Taihape Māori values, in breach of the Treaty, meaning that Māori had reduced agency to give effect to their preferences, and the different scale of degredation that Armstrong refers to, the Crown was and remains under a duty to actively deal with adverse effects as they arose. Also, given this history, Taihape Māori remain vulnerable to adverse environmental effects of activities in the district. The steps that the Crown takes to mitigate those effects must take account not only of its ongoing duty of active protection, but also its historic role in creating that vulnerability.

73. Where new technologies allow better identification of pollution and mitigation of it, the Crown must ensure that Taihape Māori do not experience a disproportionate share of any negative environmental impacts, and "give some priority" to remedies to ameliorate those impacts because of the historic environmental injustice that has occurred.[54]

74. In its report on claims in the Whanganui Inquiry District, the Tribunal thoroughly examined issues of causation, agency and the extent of Crown liability. It found that the Treaty of Waitangi Act 1975:[55]

> seems to contemplate the Crown's being found liable for all the consequences of its acts and omissions that breached the principles of the Treaty and which we find, on the balance of probability,

[54] Wai 1200, *He Maunga Rongo: Report on Central North Island Claims,* (2008), vol 4, at page 1249.
[55] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 27.5.3 at page 1453.

> caused prejudicial effects to Māori. The Crown is liable whether or not the outcomes of its conduct were predicted or predictable.

75. This appears on its face to get close to absolute liability. That is, neither the intentions of the Crown, nor forseeability that its actions might lead to harm to Māori, is required. All that is required is proof of causation, in other words, to show, on the balance of probabilities, the link between the initial Crown action and the ultimate harm. This is analogous with legal regimes like the Fair Trading Act 1986 which makes defendants liable for misleading statements even if there were unintentionally uttered.

76. However, the Tribunal also pointed out that there was a large element of forseeability in the Crown's Treaty agreement with Māori. As Normanby's instructions made clear, the Crown was well aware that colonisation might have 'calamitous' effects on Māori and:[56]

> Implicit in the various guarantees – of te tino rangatiratanga over land and valuables, and the rights of British citizens – was a duty of care. The Crown entered into the treaty arrangements against a backdrop of knowledge about negative outcomes it was to try and avoid. In order to do that, it would be necessary to go about the business of colonisation in a manner that took seriously, and did not read down, the Treaty guarantees.

77. If the Crown did not carefully conduct itself, forseeable harm would ensue, for which it would be liable.[57]

78. In this respect, the Tribunal jurisdiction is analogous with the common law tort of nuisance and with strict liability under the RMA 1991 (s341) which both provide that motive is irrelevant, general forseeability of harm from an activity is required, and where the overwhelming focus is on proof of causation and for defendants to show a "total absence of fault".[58]

79. In terms of general forseeability, the approach under the RMA 1991 is to focus on whether the outcome which occurred was forseeable,

[56] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 27.5.2 at pages 1452-3.
[57] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 27.5.2 at pages 1453. Colonisation was, after all, conceived as a project of decades if not centuries..
[58] *Auckland CC v Selwyn Mews Ltd DC Auckland* CRN2004067301, 18 June 2003.

rather than whether a particular failure that caused the outcome was forseen.[59]

80. In addition, activities which, if they were subject to sabotage, or suffered a power failure or were inundated by 50 or 100 year return floods, might cause substantial environmental harm, are expected to have backup systems to meet these contingencies.

81. As an example, in one case involving a power failure in a local network that caused a failure of a pump station and a discharge of effluent, the court held that although the particular failure was out of the defendant's control, a power failure, for whatever reason, even if uncommon or rare, is foreseeable. The discharge event could reasonably have been provided against by the installation of a modern power and alarm system, and affordability reasons relating to the upgrade of pumping stations were not a satisfactory explanation for not addressing the known vulnerability of those stations.[60]

82. There is an analogy with the Crown's decision to colonise NZ and its undertaking, in the Treaty, to do so with due diligence and care, while being alive to both obvious and uncommon or even rare adverse consequences that might result for Māori, and having resources to remedy any harm which might occur.

83. The RMA 1991 also allows for defences of necessity, including protecting life, health and preventing serious property damage, provided that the defendant subsequently mitigates any environmental harm that occurs.[61] Continuing the analogy, the Crown might have justification to cause short term environmental harm, or prevent Taihape Māori themselves causing such harm, for similar reasons of urgent necessity. But it must then work to remedy any detriment caused. Obviously, the advance of colonisation could not be one of those reasons.

LAND

[59] *Glenholme Farms Ltd v Bay of Plenty RC* [2012] NZHC 2971.
[60] *Manawatu-Wanganui Regional Council v Whanganui District Council* [2018] NZDC 13732.
[61] Section 341(2) RMA 1991.

Crown authority in the management of land-based environmental resources

84. The TSOI asks:

> Land
>
> 1. In what ways has the Crown sought to exercise its authority over the management of land-based environmental resources in the Taihape inquiry district since 1840, including the creation of local authorities and the delegation of powers and functions to such bodies?

85. The basic scheme by which non-Māori law covering the natural environment came into the district is covered by Belgrave and by Bassett Kay Research in their *Local Government, Rating and Native Township Scoping Report*.[62]

86. Belgrave makes the important point that in the three to four decades after 1840, despite the introduction of the common law and English laws generally as part of the Crown assumption of sovereignty and the passage of the English Laws Act 1858, there was no wholesale replacement of custom law in the district but rather a "vague process" of the introduction of ideas and approaches antithetical to the practices and beliefs of Taihape Māori[63] such as the close association English common law made between property title to land and the ownership of all wild animals on land under that title.[64]

87. Belgrave considers that, before statute law brought in wholesale changes, there was little practical impact of the introduced common law in the district on the ground in terms of controlling land use activities.[65]

88. But there is an important caveat to that conclusion. Belgrave points out that the common law explicitly allowed for (and continues to allow for) Māori custom, and that in the assessment of customary interests by the Native Land Court in the 1880s and 1890s in the district,

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[62] Wai 2180, #A5, Bassett Kay Research, *Local Government, Rating and Native Township Scoping Report,* (2012).
[63] Wai 2189, #A10 para 346.
[64] Wai 2180, #A10, at paragraph 344.
[65] Wai 2180, #A10, at paragraph 346.

extensive evidence was provided by Taihape Māori about their customary uses of the natural environment, resulting in the written records that Walzl has documented (above).

89. However, the main purpose of native land legislation was to extinguish customary uses by conversion into a foreign form of title, even as those uses were noted. The Native Land Court process divided up the customary landscape in a quite different way from tikanga Māori. It was an enclosure of sorts, including of practices like "common pasturage rights" on "tribal lands", even if it took some decades for the full effects to become evident in the district.

90. Most land in the district had been alienated by 1900.

91. Bassett and Kay Research provide a useful summary of the establishment of local government followed the alienation of land:[66]

> Local government in the Taihape region started with the Rangitikei Highways Board in 1872. However, at this time, while the Taihape district was largely still in Māori ownership, it had little impact in the district. In 1877 Rangitikei County Council was established, but it was not until the large scale purchasing of the Taihape inquiry blocks in the 1890s that council authority really extended beyond Hunterville. There were many boundary adjustments over the years, but by 1977 Rangitikei County took in land between the Rangitikei River and up the coast to Turakina, and extended inland to north of Waiouru. In 1989 the county council became the Rangitikei District Council.
>
> Other local authorities which operated within the Rangitikei County include the Hunterville Town Board which was formed 1905. In 1975 it became a Community Council Town under the Rangitikei County Council. The Taihape Borough Council was formed in 1906.

92. Statutes dealing with the natural environment followed from the establishment of local authorities.

93. These statutes generally aimed to control the adverse effects of deforestation, in particular the two major effects, catchment

[66] Wai 2180, #A5, at pages 7-8.

degradation and pest infestations. Belgrave identifies the following statutes as significant in the district: the Forests Act 1874, Public Health Act 1876, Rabbit Nuisance Act 1882, Town-planning Act 1926, Native Plants Protection Act 1934.[67]

94. These statutes controlled land uses within common law property boundaries, and managed land uses with the traditional Envlish law deference to common law property rights. Since most Māori land had been alienated, these statutes did not concern themselves with Māori who did not own land titles. There was no equivalent of s6(e) Resource Management Act 1991 addressing ongoing relationships of Taihape Māori with alienated land.[68]

95. These statutes spawned catchment, pest and rabbit boards. There was the Hunterville Rabbit Board 1925, Rangitikei Catchment Board 1944 and the Ruahine Rabbit Board (subsequently the Ruahine Pest Destruction Board). These were all amalgamated into the Manawatu-Wanganui Regional Council in 1990.[69]

96. The generic submissions on local government outline the way in which the various authorities operated and their impact on remaining Māori land in the district still owned by Māori.

97. Taihape Māori essentially had no role in these boards because they were owners of relatively small areas of marginal land. Yet the boards in some cases affected the ability of Taihape Māori to retain their lands. This addressed in the closing generic submissions on Local Government.

98. The evidence does not identify any laws or initiatives in these statutes which amount to active protection of Taihape Māori interests either as landowners, or as tangata whenua in the district at least in the period before 1977. To the contrary, there is evidence that efforts to control the adverse effects of deforestation impacted most heavily on Taihape Māori because they were placed in a vulnerable position by

[67] Wai 2180, #A10, at paragraphs [348-354.]
[68] That did not arrive in any form until 1977. Town and Country Planning Act 1977, s3(1)(g).
[69] Wai 2180, #A5, at page 8.

having customary interests converted to a freehold title which was then mostly alienated in the purchases of the 1880s and 1890s.

Crown recognition of Taihape Māori in environmental management of land-based resources

99. The TSOI asks:

> 3. Has the Crown's environmental management regime for land-based resources:
>
> a. Recognised the mana, tino rangatiratanga and kaitiakitanga of Taihape Māori over environmental resources and taonga?
>
> b. Provided for Taihape Māori consultation and participation in decision-making? For example through:
>
> i. State Forest Park Advisory Committees;
>
> ii. National Parks and Reserve Boards;
>
> iii. Conservation Boards and Covenants;
>
> iv. Ngā Whenua Rāhui;
>
> v. The provisions of the Resource Management Act 1991 and the Local Government Act 2002;
>
> vi. Local government committees such as Te Ropu Ahi Ka; and
>
> vii. Governance or co-governance.

100. As noted above, before 1977, Taihape Māori mana, tino rangatiratanga and kaitiakitanga over environmental resources and taonga were not recognised in the scheme for managing land-based resources.

Consultation opportunities on Crown lands

101. In the 1970s and 1980s, there were opportunities for Taihape Māori to serve on various boards managing Crown forests, reserves and national parks, but only ever in a advisory capacity.

102. In terms of the State Forest Park Advisory Committees for the Kaimanawa, Kaweka and Ruahine State Forest Parks, while 1 or two Māori in the district were ultimately appointed to these committees:

    a. There was a view that Māori members were barely necessary since they because they did not represent any aspect of public recreation.[70]

    b. Attitudes towards the idea of Māori nominees were in the 1970s at best odd and unwelcoming,[71] at worst outright rascist.[[Wai 2180, #A38, at page 244.]]

    c. Māori members on these advisory boards were swamped by being 1 or 2 advisors among 6 or more other members representing local authorities, recreation and conservation groups, landowners and even "youth representatives".[72]

103. Māori advisers were more readily accepted on the Wellington, Tongariro/Taupo and East Coast National Parks and Reserves Boards that all operated over Crown lands witin the Inquiry District, but the 'in between' nature of the area in terms of the parks and reserves that the boards served meant that Māori appointees were in almost all cases not tangata whenua tuturu:[73]

> In the competition for places on both the Forest Park Advisory Committees and the National Parks and Reserves Boards, it is clear that the comparatively sparsely populated Taihape Inquiry District never achieved as substantial a profile with Crown officials as other better-populated districts such as Hawke's Bay, Manawatu and Wellington.

104. In summary, these provisions were grossly inadequate for providing a voice for Taihape Māori in governance of these Crown lands.

105. The Conservation Act 1987, with its requirement that in section 4 that the 1987 Act, and all the Acts listed in its First Schedule, must

[70] Wai 2180, #A38, at pages 228-229.
[71] Wai 2180, #A38 p232.
[72] Wai 2180, #A38, at page 243.
[73] Wai 2180, #A38, at page 255

be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi intended to set a new direction for greater tangata whenua engagement in the management of the Crown's public lands.

106. One of DoC's 'stretch goals' for 2025 is that "[w]hanau, hapu and iwi are able to practise their responsibilities as kaitiaki of natural and cultural resources on public conservation lands and waters."[74]

107. However, Alexander says that multiple restructurings since 1987 have been an issue, with the overall effect of reducing staffing in the region:

> The numerous changes of authority, responsibilities and personnel brought about by the multiple Departmental restructurings are an adverse environment for the development of long-term relationships between the Department of Conservation and iwi and hapu groupings in Taihape Inquiry District. When it comes to building and maintaining relationships between organisations, the individuals that make the relationship work, and the continuity of their involvement, do matter. Both Departmental staff and tangata whenua have been hindered in their professional dealings with one another by the constant change or threat of change. Past experience would suggest that the latest restructuring is unlikely to be the last one.

108. Mr Kemper for Doc, accepted that changes to conservation board boundaries during restructuring 2011 means that "it is fair to say that for this Inquiry district the boundaries have become more complex.'[75]

109. Once again, Taihape has 'fallen in the middle', this time between Whanganui and Hawkes Bay conservancy offices in terms of conservancy management,[[Wai 2180, #A38, at page 382.]] while its conservation board is the Rangitikei/Hawke's Bay Conservation Board.[76]

[74] Wai 2180, #M8, Brief of Evidence of Reginald Kemper, at paragraph [40].
[75] Wai 2180, #M8, at paragraph 25.
[76] Wai 2180, #A38, at page 383.

110. Conservation boards, which are serviced by DoC, but may act independently,[77] have up to 12 members, but at least appointees must include people representing "the local community including the tangata whenua of the area"[78] who are selected after consultation between the Minister of Conservation and the Minister of Māori Affairs.[79]

111. The Rangitikei/Hawke's Bay Conservation Board has had two to three Māori from the Inquiry District among its ten members.[80]

112. In its conservancy management plans that cover the Inquiry District the Department commits itself to meaningful consultation with tangata whenua on all key issues,[81] and the Department knows at least generally who tangata whenua are. For example the Hawke's Bay Conservancy CMS states:[82]

> The Hawke's Bay Conservancy has within its boundaries parts of the rohe of a number of tangata whenua groups. The tribes that exercise mana whenua, mana moana and mana awa within the Conservancy include Ngati Kahungunu, Ngati Apa, Rangitane o Manawatu, Rangitane o Tamaki nui a Rua, Tuwharetoa and Ngati Hineuru and their associated hapu.

113. This approach is consistent with section 4 of the Conservation Act 187 which, as noted provides that:

> This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

114. The Supreme Court has said that:[83]

> The requirement to "give effect to" the principles is also a strong directive, creating a firm obligation on the part of those subject to it.

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[77] Wai 2180, #M8, at paragraph 27.
[78] Section 6P(2) Conservation Act 1987
[79] Wai 2180, #A38, at page 383.
[80] Wai 2180, #A38, at pages 384-5.
[81] Wai 2180, #A38, at pages 398-402.
[82] Wai 2180, #A38, at page 397.
[83] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77] and confirmed in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 at [49].

115. It means, for example, that where there are competing applications for concessions on land managed by the Department, priority may need to be given to Māori in appropriate cases because it will enable iwi or hapū to reconnect to their ancestral lands.[84]

116. However, DoCs' approach to s4 has been hedged by the need it has seen to also give effect to other parts of its Act and other statutes that it administers.

117. The Department in its Conservation General Policy has interpreted section 4 to mean:

> The Conservation Act 1987, and all the Acts listed in its First Schedule, must be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi (section 4, Conservation Act 1987). Where, however, there is clearly an inconsistency between the provisions of any of these Acts and the principles of the Treaty, the provisions of the relevant Act will apply.

118. In its *Te Kahui Maunga: the National Park District Inquiry report*, Wai 1130, 2013, Section 12.5.2. the Tribunal considered that approach to be a fundamental flaw (and Treaty breach).

119. In *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 a majority of the Supreme Court appeared to agree, holding:

> [77] We disagree with that statement, which effectively says s 4 is trumped by other statutory provisions. As noted earlier, what is required is that those other statutory provisions be applied consistently with the s 4 requirement.

120. And:

> [54] We acknowledge that s 4 does not exist in a vacuum and a number of other factors must be taken into account in making a decision on a concession application. For example, in the present case, the direction given in s 4 must be reconciled with the values of public access and enjoyment in the Reserves Act designations relating to the Motu. Those values are also reflected in s 6(e) of the

[84] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 at [52].

> Conservation Act, which lists as one of the functions of DoC the fostering of the use of natural and historic resources for recreation and allowing their use for tourism to the extent that this is not inconsistent with the conservation of such resources. .... But s 4 should not be seen as being trumped by other considerations like those just mentioned. Nor should s 4 merely be part of an exercise balancing it against the other relevant considerations. What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles.

121. Mr Kemper for DOC said that the Crown is reviewing its policies in light of the Supreme Court decision which it accepts has 'profund implications' for DOC policy.[85] It had obviously not considered before that the Tribunal assessment in 2013 might be correct.

122. In Chapter 4 of the Wai 262 report ("Taonga and the Conservation Estate") the Tribunal made a range of recommendations for reform of the Department. In particular it recommended that the Conservation General Policy and the General Policy for National Parks be amended to include a requirement that the Department 'will' enter into partnership with iwi, and that this is achieved via a national Kura Taiao Council and conservancy-based Kura Taiao boards. It also recommended that these policies provide that the Department will whever practicable achieve it conservation goals in a manner consistent with the tino rangatiratanga of iwi and hapu.

123. The decision in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* provides the necessary clarification to make these changes nationally and for this district. Administrative history suggests that a distinct Kura Taiao board is considered to cover the Inquiry District.

Ngā Whenua Rāhui

124. Alexander suggested that six whenua rahui had been established in the Inquiry District over, Aorangi and Awarua 1DB2, Te Koau A, Te

[85] Wai 2180, #4.1.18, Hearing Week 9 Transcript, at pages 368-369.

Awarua o Hinemanu, Owhaoko B and D Blocks, Owhaoko C Blocks, Oruamatua-Kaimanawa 1V.[86] Michael Mohi suggests more, and says that $7 million has been spent on whenua rahui in the district since 1992. A map and table provided with his evidence show around 23 whenua rahui covering 51,611 hectares[87] but many appear to be north of the boundaries of the district and Alexander's number seems more accurate. Mr Mohi accepted that he went beyond the inquiry district with his map.[88]

125. Ngā Whenua Rāhui (NWR) are a Māori led intiative to save uneconomic land blocks from further degredation and possible long term leasing, and put them to a positive use while also allowing owners to enjoy continue to enjoy them. The NWR committee is Māori led and managed and is independent of DOC. Proposals about blocks to put under NWR are put forward by the committee.

126. Nevertheless, Alexander notes that the Crown provides all funding and makes all funding decisions.[89] Mr Mohi said that there was a constant political concern to keep costs low for the Department and Minister.[90] He also noted that while the Conservation Act 1987 may be used for covenanting, section 77A of the Reserves Act 1977 was preferred because it gave the Crown greater certainty that its expenditure would not be revoked at a future time.[91]

127. Standing back, the scheme is ingenious in its inception as a means of preserving Māori land blocks, but overall is an example of Crown frugality rather than robust active protection.

128. The Crown had its eye on the blocks for conservation/catchment purposes in forest service days.[92] Māori landowners are putting their lands under conservation covenants which remediate past damage to the local ecology, and potentially forgo other development options (eg subdivision, windfarms, ecotourism) and are being paid at

[86] Wai 2180, #A38, at page 410.
[87] Wai 2180, #MM36(a) and #4.1.18 at pages 230-244.
[88] Wai 2180, #4.1.18 at page 226.
[89] Wai 2180, #A38, at page 409.
[90] Wai 2180, #4.1.18 at page 228.
[91] Wai 2180, #4.1.18 at page 231.
[92] Wai 2180, #A38, at page 410.

relatively frugal valuations to do so.[93] They may be compelled in some circumstances to do this to avoid rates or write off rates arrears, when they might not have to take this course if rates exemption policies in the district were properly applied.[94] They may even take this course because the land is landlocked and the Crown is the adjoining owner.[95]

129. Mr Mohi specifically noted the political imperative to keep sums paid per hectare and under the scheme generally low and avoid the question "why are you paying this huge amount of money to Māori land owners?"[96]

130. Given the Treaty breaches which placed the lands in this vulnerable position, there is a real question whether the level of payments, and incentives to get into the scheme, are compliant with Treaty principles. The Crown appears to be trading on the desire of owners to retain their vulnerable ancestral land to expand its own conservation goals.

General planning law

131. Before 1991, the only concession that Alexander has located to the ongoing links of Taihape Māori to their ancestral lands in general planning schemes were 'Marae Community Zones' which were proposed district scheme reviews in 1975, and even then the zones were limited to marae, and none seem to have been established in the Inquiry District. The rationale for the zones was:[97]

> Many Maoris have a strong feeling of attachment to their ancestral land. Inherited rights in Māori land not only give a person some right to use the land, but more importantly they give rights of membership to a kinship group and rights to speak on the marae. The marae is the focal point of Māori community life symbolising the close relationship between the land and the people.

[93] Wai 2180, #4.1.18 at pages 223-225, 228.
[94] Wai 2180, #4.1.18 at page 230.
[95] Wai 2180, #4.1.18 at page 231.
[96] Wai 2180, #4.1.18 at page 228.
[97] Wai 2180, #A38, at page 67.

132. In his report and in questioning, Alexander made it clear that district schemes under the 1953 and 1977 Acts involved Ministry of Works planners working with local authorities, with central government setting key directions and being a key adviser on late drafts, as well as a key submitter on the notified plans. The DNA of the planning schemes was a Ministry of Works DNA.[98]

133. Alexander said that central government control was ubiquitous in all planning in this era:[99]

> A. Bearing in mind you're dealing with Central Government Departments, Forest Service and Lands and Survey. You're dealing at the regional level with the Catchment Boards which were dominated by government appointees/members and you're dealing with the ability of the Ministry of Works to influence the local planning schemes. Well, there's three tiers that I've identified where the Crown can be actively involved in these matters.

134. Alexander notes that the Town and Country Planning Act 1977 provided for a Māori representative on a regional planning committee.[100] Section 6(3) stated:

> Where in the opinion of the united or regional council there are significant Māori land holdings within its region, the Council may request such District Māori Council as it considers most appropriate to nominate a representative of the Māori people of the region as a member of the regional planning committee.

135. He does not think that any such appointment was ever made.[101]

136. Alexander agreed that, overall, even today, a timid approach is being taken in the district to involving Taihape Māori in environmental governance:[102]

> "Q. … Just in general terms then on governance, you've said we seem to be somewhat gone a little bit backwards from the early – from the 1991 change in the Resource Management Act or maybe

[98] Wai 2180, #4.1.16, Hearing Week 8 Transcript, at pages 320-321 & Wai 2180, #A38, at page 64.
[99] Wai 2180, #4.1.16, at pages 321-322.
[100] Wai 2180, #A38, at page 78
[101] Wai 2180, #A38, at page 78 and Wai 2180, #4.1.16, at page 315.
[102] Wai 2180, #4.1.16, at page 316.

> just stood still but would it be fair to say that in broader terms there's a fear about having tangata whenua clearly in a decision-making role that all of the district can see but there's a willingness of councils to sort of discuss in a slightly backdoor way the issues of tangata whenua but never to put them up front as decision-makers, is that a fair way of characterising it?
>
> A. Yes, again it's a lack of direct, not direction but advice from the Crown as to how to deal with your obligation under section eight and that is still ongoing.
>
> Q. Have there been any efforts to place people on regional councils through the idea of Māori wards, votes on that in this region, do you know?
>
> A. In this region, no, not that I'm aware of."

137. Indeed, there are few if any iwi management plans in the Inquiry District that councils are required to consider under the RMA 1991. Alexander says that "[n]o iwi management plans endorsed by iwi authorities and recognised as statutory documents by Manawatu-Wanganui Regional Council or by district authorities have been produced in the Manawatu-Wanganui region."[103]

138. He provides a good example of how the RMA 1991 is working in the district today through the way in which consents for Meridian's 53 turbine Hihitahi windfarm were dealt with in 2008-9. The project required consents from Manawatu-Wanganui Regional Council, Ruapehu District Council, and Rangitikei District Council. Ngati Whitikaupeka, Ngati Tamakopiri and Ngati Rangi were consulted and actively involved by the applicant in the consenting process.[104] From Alexander's description, particularly given the lack of iwi plans, iwi involvement, while full, was necessarily reactive, and dependent on the applicant's desire for a high level of engagement.

139. The Resource Legislation Amendment Act 2017 provides for Mana Whakahono a Rohe: Iwi participation arrangements under new sections 58L to 58U. Section 58M states:

[103] Wai 2180, #A38, at pages 141-145.
[104] Wai 2180, #A38, at pages 134-140

> The purpose of a Mana Whakahono a Rohe is—
>
> (a) to provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act; and;
>
> (b) to assist local authorities to comply with their statutory duties under this Act, including through the implementation of sections 6(e), 7(a), and 8.

140. These provisions allow an iwi to require local authorities to engage in a discussion about formalising their engagement with iwi under the RMA. But they fall well short of what Taihape Māori require, and they are also well short of the proposals from the Wai 262 Tribunal for enhanced iwi management plans.

141. In that report, *Ko Aotearoa Tēnei* the Tribunal commented:[105]

> ... it is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing to see that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway. As we have pointed out, the Crown accepts that the transfer of exclusive or shared decision making power should not depend upon proof of customary title or historical wrongs. It follows that what must be proven is the existence of a kaitiaki relationship with the taonga in question. That ought to be enough. The RMA regime should make this clear.

142. That Tribunal called for the RMA to be reformed to provide for "enhanced iwi management plans". Engagement in them at the request of kaitiaki would be compulsory. In those plans “[s]pecific section 33 control and section 36B partnership opportunities would be identified for formal negotiation with councils. The plans would also identify section 188 HPA [Heritage Protection Authority] opportunities in respect of iconic areas for the iwi. They would set

[105] Wai 262, *Ko Aotearoa Tēnei*, (2011), at page 279.

out the iwi's general resource management priorities in respect of taonga and resources within their rohe." After negotiations and mediation, matters could be referred to the Environment Court for a final determination.[106]

143. It also called for the Ministry for the Environment to develop national policy statements on Māori participation in resource management processes.[107]

144. Alexander notes that the independent review report on Te Roopu Awhina identified in 1998 what it described as "five main criticisms by Māori" of the Resource Management Act, which still remain valid in 2020:[108]

> (a) The Act does not recognise Māori tribes as legitimate resource authorities in the way that it recognises regional councils and territorial authorities as primary resource managers;
>
> (b) The Act does not attempt to grapple with the concept of rangatiratanga and what it may mean for resource management;
>
> (c) The Act does not give any positive direction to regional council and territorial local authorities as to their obligations under the Treaty, but leaves it to them for better or for worse to find their own way;
>
> (d) The Act lacks a mechanism for ensuring that Māori tribal resource management plans are given the statutory recognition they deserve as autonomous statements of tribal resource policy;
>
> (e) Key mechanisms in the Act, such as Section 33(2), which provide for transfer of power to Māori to carry out resource decision-making have been met with either a mute response or outright rejection.

Rongoa

145. The TSOI asks:

[106] Ibid at page 281.
[107] Ibid, at page 284.
[108] Wai 2180, #A38, at page 149.

> 3. Has the Crown's environmental management regime for land-based resources:
>
> c. Affected the ability of Taihape Māori to practise traditional activities such as food harvesting, rongoa, religious practices, manaakitanga, koha, and the use of environmental resources in traditional goods such as clothing?

146. The Crown in its Opening Submissions said that the extent of any impacts on food harvesting and rongoa and any Crown responsibility for them required analysis before any breach could be determined:

> The Crown acknowledges that the environmental transition that has occurred, from native biota to primary production and intensive residential patterns, has affected the ability of Taihape Māori to practise traditional activities such as food harvesting and the use of rongoā. However, the extent and nature of such impacts and the Crown's Treaty responsibility for such changes remain to be explored through the inquiry itself.[109]

147. In his research, Armstrong noted that "In pre-settlement times the Ruahine Ranges were utilised by the iwi for bird hunting and the gathering of medicinal plants."[110]

148. He came to this conclusion after considering Walzl's analysis of Native Land Court evidence:[111]

> Looking at Mr Walzl's maps together, one gains a sense that the extensive, rich and heavily populated Awarua/Motukawa lands formed a kind of hub of a wheel, with the spokes extending outwards to the northern tussock lands and the ranges, taking in birding and edible berry areas, fern gardens and places where medicinal plants and building materials were gathered.

149. This also meant that rongoa were generally present throughout the landscape and not in a few specific areas. The historical evidence on land tenure changes and the degree of forest clearance strongly suggest that both of those processes created a current scarcity.

[109] Wai 2180, #3.3.1, at page 87.
[110] Wai 2180, #A45 at page 113.
[111] Wai 2180, #A45 at page 15.

150. Comments from the claimants themselves back this up.

151. In the Ngati Hinemanu and Ngati Paki Oral and Traditional Report informant MHW said:[112]

> MHW - Part of this question talks about the indigenous resources within the environment. I want to go back to the felling of the ngahere and the area within Mōkai Patea and I would say and I don't think I'm too much wrong, that with the felling of the ngahere, or Tane, went some resources. I wouldn't like to say all of the resources, there are still some resources. I wouldn't like to say all of the resources. I wouldn't like to say all of the resources, there are still some resources around but it's not like it's at your back door now unless you want to plant it there. I am thinking about the Rongoa for birthing and things that may have been used for birthing and those things that women used at those times. The harakeke is around and it's at our back door now because it's been planted there but it's not there because it's naturally there and been left there so that's one example of a resource that we've had to replant around us so that we've still got those resources. With the cutting down of the ngahere, the felling of it, to make way for farming and all these other economic things that come along with the Pākehā , those environmental resources went out the door and we've had to bring it back…You cut away the ngahere and it interferes with the awa and the streams and the banks start falling into the stream. You start losing Papatuanuku, the whenua into the awa because it all starts slipping. All sorts of other things start happening, its just an off shoot.

152. Informant NL commented that the remaining areas where rongoa might be sourced were no longer under iwi control:[113]

> NL: Our right to source what we view as being our needs has been takahi by the Crown. Our right to access, we've got to go to them to ask if we can go and get some rongoa out of the bush. That bush is under the Crown's control, even though those reserves were set aside as being 10% of that land that they bought within that region; [that] was set aside for specific Māori needs and they were called Māori Reserves. But then they were put under the [Department of]

[112] Wai 2180, #A52, at pages 528/289.
[113] Wai 2180, #A52, at page 555.

> Lands & Survey's control and then eventually the local council's control and then onto DOC's control. And our right to access, and our right to consider our presence was takahi by the Crown, by the Resource Management Act and others.

153. The Manawatu District Council produced a state of the environment report in 2002. This report included a tangata whenua chapter. In a chapter on Indigenous Vegetation and Habitats chapter it noted:[114]

> The current state of the District's indigenous ecosystems, particularly the lowland forests and wetlands, is of great concern to the Tangata Whenua. These ecosystems have immense value as a taonga in their own right, and are a vital source of resources for Rongoa Māori (medicine), for weaving (for example pingao, harakeke, kiekie, pigeon feathers), and wood for carving. The impact of introduced plants and animals, especially pests, upon remaining forests and wetlands is a particular concern. Tangata Whenua support the idea of restoring ecological viability by supplementary plantings, improving existing habitats, and establishing corridors to connect scattered bush and wetland remnants. Māori recognise that this work is part of their duty as kaitiaki, and they want to be involved in doing it.

154. The Manawatu-Wanganui Regional Council's 2007 Regional Pest Plant Management Strategy discusses "Effects on Māori Values" of the introduction of pest plants reducing the availaibility of rongoa:[115]

> The impact of pest plant species on natural areas and waterways is detrimental to values important to tangata whenua. Pest plant management under this Strategy will have a positive effect by contributing to the protection of taonga plant species (treasured plants), mauri (life force), wahi tapu, and to tikanga values associated with indigenous biodiversity, landscapes and waterways. Positive results stemming from this Strategy include improved access to traditional food gathering sites (eg wetlands and estuaries), and improved quality of plant species for food, fibre and Rongoa (Māori medicinal) uses. The strategy will reduce risks to species of Māori cultural significance (eg pingao, harakeke) and to their associated habitats.

[114] Wai 2180, #A38, at page 23.
[115] Wai 2180, #A38, at page 218.

155. In terms of waterways as a source of food, materials and rongoa, Meredith recorded evidence from Taihape Māori about uses of the Rangitikei River for healing. A Ngati Manomano kaumatua discussed Rongoa in the Rangitikei area:[116]

> Koro Kereama had this wonderful knowledge of Māori medicines, and alot of the elders like Dick Searancke and all them, they knew; because of the bush lands we were surrounded by it; where they could go and pick the right thing and shew it and put it on. See I was running across the swamp one day and I cut my foot on a bottle, I was about 6. By the time I got to the other side I had lost a lot of blood and Koro grabbed my foot and he staunched it, and then he went into the bush, took me with him, grabbed the stuff off there, chewed it, put it on my foot and guess what? It stopped bleeding, and don't even see a scar. Because his people had that knowledge of the Rongoa – and they've all gone down here now, they've all gone! Koro Waapu and them, they were all known healers, not faith healers, but they knew the use of medicines.

156. Parewahawaha informants discussed the importance of the rivers and water for healing:[117]

> I remember Koro, Mum and them always used to say; especially if people weren't feeling well, kua tae mai he kēhua rānei, he wairua rānei; "Go to the wai! Haere kit e wai!" Someone would throw the water, some would completely immerse themselves, some would take the wai home for use later, for when they do blessing's, or lift tapu. It depends what their whakapono is. That was always the thing though – go to the wai – and I think it's still that way now. Well I've been up with out whānau at Hauiti where they've done that sort of thing. They've taken one of our nieces to the water, but not for three days. Immersed her in the awa and say karakia, and she recovered.

157. Ngati Hinemanu and Ngati Paki informants discussed the healing abilities of the Rangitikei River:[118]

> The Rangitikei has always been a healing river, for healing…[An] Uncle…had a lizard on his chest…That was the river. They bought

[116] Wai 2180, #A44, Meredith, *Ko Rangitikei Te Awa: The Rangitiki River and Its Tributaries Cultural Perspectives Report*, (2016), at page 142.
[117] Wai 2180, #A44, at page 140.
[118] Wai 2180, #A44, at page 140.

him out and they baptised him when he had the lizard on his chest, down at the Rangitikei River. So it was always a healing river. It still is with our family from the old generation to our kids of today…We'd always feed the eels and that…We've always lived on the Rangitikei River…our awa was very significant to our old people.

158. Meredith concludes that this is consistent with general Māori approaches to water and healing:[119]

> "Many Māori refer to the use of water of and of water bodies in rituals that were and are central to their spiritual life…Intrinsic to many Māori customary rituals was the use of particular wai (water) for karakia, for the sick, for protection, and for healing. Some informants explained that rivers and other waterways had many wāhi tapu including burial sites on their banks or in the waters. Special sites were used for Rongoā (healing) or to prepare the dead for burial. As a result, some places were tapu and were never used for drinking water, swimming, or for gathering food. On the other hand, other places are noa and are safe to swim, drink or take kai.
>
> Rangitikei River iwi and hapū continue to practice Rongoa Māori – spiritual rituals that are central to the spiritual life of the iwi and hapū. Rongoa Māori or traditional Māori medicine was a system of healing that comprised diverse practices with an emphasis on the spiritual dimension of health. Rongoa includes spiritual healing through karakia and rituals in rviers and streams, herbal remedies and physical therapies. Tohunga ahurewa were often responsible for rongoā, especially its spiritual aspects. Many of the informants discussed how the waterways were important for rituals that are central to the spiritual life of the iwi and hapū."
>
> The Crown recognises the importance of rongoā to Māori, and has undertaken a number of initiatives to support Māori in the use of these traditional practices. These initiatives include, but are not limited to, the Ministry of Health's Rongoā Development Plan and funding from the Māori Health Innovations Fund to support and improve the sustainability of rongoā resources and the ongoing evolution of Te Whānau Ora.[120]

[119] Wai 2180, #A44, at page 139.
[120] Wai 2180, #3.3.1, at page 121.

159. There is sufficient evidence for a finding that rongoa was severely affected by deforestation, simply by considering the evidence before the Native Land Court produced in the 1870s and 1880s about customary uses, and then considering the title conversion, alienation and extent of deforestation the occurred outside of the control of Taihape Māori and outside of Crown duties guaranteeing rantatiranga over land and taonga.

160. As noted above, local authorities have recorded the desire of tangata whenua to be involved in restoration efforts as "part of their duty as kaitiaki".[121]

DEFORESTATION, WEEDS

161. The TSOI asks:

> 3. Has the Crown's environmental management regime for land-based resources: ….
>
> d. Contributed to the degradation of the environment, including through permitting or encouraging deforestation, the introduction of noxious weeds and invasive species such as pinus contorta, Old Man's Beard, and the use of 1080 poison?

Deforestation

162. Armstrong identifies 1894 as a key date for change in the district for pastoral farming. Up to that date, around 26 Māori farmers were running between 60-88,000 sheep in the Māori Maowhanga area in what was reported at the time to be a very prosperous operation.[122]

163. Māori runholders were undoubtedly utilising custom to manage these properties, Pakeha observers noting that "commonage pasturage rights usual in tribal lands exist".[123]

164. The Inspector of Native Schools noted this, as Armstrong records:[124]

[121] Wai 2180, #A38, at page 23.
[122] Wai 2180, #A45, at page 26.
[123] Wai 2180, #A45, at page 27.
[124] Wai 2180, #A45, at page 21.

> Pope further noted that the land was used cooperatively for farming or pastoral purposes, and individuals shared the land 'by private arrangement'. In other words, individual Māori flockowners occupying land which had not yet been partitioned made their own arrangements. According to later 1890 press report, the sheep at Moawhango 'all run together', but at docking time ewes and lambs were mustered, and each man took lambs in proportion to the number of ewes he owned.

165. But matters changed dramatically with land purchasing and the end of “tribal lands”, so that "[b]By the end of the 1890s 200,000 acres of Awarua land was acquired, leaving just 50,000 acres in Māori hands."[125]

166. The NIMTR reached just south of Ohingaiti in 1891 and Taihape in 1904. While Taihape Māori appear to have attempted to leverage land sales to the Crown for access to the NIMTR, by 1904 a few large Pakeha runholders held most of the valuable pastoral land, purchased from the Crown with state assistance.[126]

167. Armstrong contrasts the support given to Pakeha settlers compared to a refusal to finance Māori runholders, even when the Mokai Patea chiefs specifically requested loan assistance in 1892.[127]

168. The key period of deforestation was after the 1890s, when most land had been alienated and after this refusal to consider financial assistance on any kind of collective basis. Armstrong says:

> "With a lack of detailed quantifiable records of pasture development in the Inquiry District it can be assumed that the 50 years following the 1890s were when the majority of native forest was removed and since then the current agricultural practices have remained static."[128]

169. Belgrave records that farms in the district are relatively large - around 242 ha in the southern part of the district and 343 ha in the north.[129] Clearance must have been instigated and controlled by a

[125] Wai 2180, #A45, at page 29.
[126] A Wai 2180, #A45, at pages 29-30.
[127] Wai 2180, #A45, at pages 31-32.
[128] Wai 2180, #A10, at page 87.
[129] Wai 2180, #A10, at page 89.

relatively small population of Pakeha settlers. Belgrave says that "within 15-20 years of forest clearance post-1890s soil erosion became evident. Also soils that were productive under 10,000 years of native forest could only sustain pasture for one or two years."[130]

170. While Belgrave does not provide a reference for that conclusion, Armstrong's subsequent report provides a detailed history that confirms it.

171. Central government concern about diminishing forests and erosion resulted led to a national stocktake of remaining forest being undertaken in 1869,[131] some two to three decades before the extensive deforestation in the Taihape district.

172. The issue of deforestation went through a period of argument equivalent to 'climate change skepticism'[132] but a Conservation of Forests Act 1873 was enacted and:[133]

> "it was clear that from at least 1868 there was a widespread and growing awareness that large scale deforestation, through fire or bush clearance for agricultural or pastoral purposes, was having a serious impact on the environment, manifested in what was described as 'climatic changes', erosion and the sedimentation of rivers and flooding."

173. Armstrong suggests that the NIMTR was the key factor in bringing about forest removal:[134]

> "The Main Trunk Line was perhaps the single most important agent of environmental change in the Taihape district, and it permitted a full expression of the prevailing ethos which, as discussed above, demanded bush clearance and close settlement by farmers and pastoralists. As the railhead moved through the district forest lands were progressively exposed to rapid and massive commercial exploitation, and the presence of the line virtually guaranteed the

[130] Wai 2180, #A10, at page 89.
[131] Wai 2180, #A45, at pages 39-40.
[132] Wai 2180, #A45, at page 42.
[133] Wai 2180, #A45, at page 42.
[134] Wai 2180, #A45, at page 50.

rapid development of large-scale pastoralism on the denuded lands."

174. Armstrong considers the question of Māori agency in relation to deforestation:[135]

> "Did Mokai Patea Māori embrace the new economy and the environmental change it entailed, including massive bush clearance, or did they intend to be selective about adopting elements of te ao hou as additions, rather than a replacement, of traditional systems of land and resource use?

175. He concludes that some leading Taihape Māori were enthusiastic participants in the timber milling boom that accompanied the development of the NIMTR, but that they were overwhelmed by the scale and impacts of the colonial economic and legal system that came along with it:[136]

> Mokai Patea Māori participated in massive bush clearance which took place in their district between the 1890s and the end of World War I, especially after the arrival of the Main Trunk Line. Some, including Utiku Potaka, who operated a mill at Potaka township for a period after the turn of the century, and Winiata Te Wharo, who appears to have established a mill near Taihape in 1898, ran their own mills. Others worked for European millers, and some sold timber rights on their remaining land. But having said that it cannot be assumed that the iwi foresaw or welcomed the manifold profound effects of massive deforestation on their traditional food-gathering patterns and wahi tapu. It is probably fair to say that initially Mokai Patea Māori sought to participate in new economic opportunities opened up by European settlement, including the timber industry, but had little or no inkling of the scale of transformation which was to take place and its wide-reaching effects. Their response appears to have been an initial involvement in return for economic benefits, followed by an awareness that that change was inevitable and required their engagement, and later, within a context of increasing economic marginalisation, the need to sell timber on their remaining land as a matter of economic necessity.

[135] Wai 2180, #A45, at page 54.
[136] Wai 2180, #A45, at page 54. Quoted above.

176. In questioning of Mr Armstrong, the Crown explored the extent of Māori agency[137] but did not move him from his overall conclusion quoted above.

177. The conclusion of Mr Armstrong, and the Crown questioning, do not assess the question of Crown agency and what the Crown did while under a duty of active protection to Taihape Māori.

178. We consider that a key question for the Tribunal to consider is: 'did the Crown create conditions which all but assured that efforts of Taihape Māori to engage in the colonial economy would lead to environmental degradation beyond their control?'

179. In this regard the Crown:

    a. Contemplated no particular role or future for Taihape Māori in their own district, regarding most of the district as unused space which was necessary, if not fated, for Pakeha settlement. Although the Crown had information readily available to it, it never undertook even a basic survey of Taihape Māori tribal organisation and interests in the district.[138] In effect, it did not even know who its Treaty partner was;

    b. Did not consult with Taihape Māori at all about the route or implications of the Main Trunk Line – a hugely transformative development in their rohe and quintessential piece of colonial vision and infrastructure;

    c. Did not consult at all about the introduction of a transformative system of property law before it was applied to the district. The land court process of individualisation is directly linked to loss of a collective tribal organisation to respond to new challenges of colonisation.[139]

[137] Eg Transcript Wai 2180, #4.1.16 p258-259.
[138] Wai 2180, #4.1.16, at pages 225-226.
[139] Wai 2180, # 4.1.16, at pages 175-178.

d. Did not consult at all on a transformative system of local government and associated laws which ignored and displaced custom law.

e. Aggressively purchased the best land for use in the new economy and actively advanced Pakeha settlement on it, while refusing to assist Māori owners to retain and develop their lands. Thirty-three applications under the Advances to Settlers Act over 30 years approved for Māori compared to "literally thousands of successful applications by Pākehā farmers including 100s from this area in the first two years of the operation of the Act".[140] These loans were at a 1% interest rate and were "basically free money" given private sector rates of 6 to 8%.[141]

f. Was well aware that there was a finite limit to the timber in the district and knew of contemporary concerns that the area might become "desolate and treeless".[142]

180. The Crown obtained lands from Taihape Māori with timber on them when both timber extraction and sales took place in circumstances where the owners were destitute. Armstrong records the sale of the 637 acre Awarua 1A2 East Block by owners who at first wanted to lease the land for timber cutting but then sold to the Crown because they were without sufficient food or clothing and this was the only land that they could readily dispose of to obtain cash to relieve their situation. The government had no problem with this approach.[143]

181. Overall, the evidence shows that the government was marginally more concerned about whether trees would survive in the district (and later huia) than about whether Taihape Māori would.

182. The inevitable outcome of these actions was that, when the Crown wanted to prevent erosion threatening the land holdings of settlers on lower more valuable productive lands, it turned to the

[140] Wai 2180, # 4.1.16, at pages 170.
[141] Wai 2180, # 4.1.16, at page 171.
[142] Wai 2180, #A45, at page 63.
[143] Wai 2180, #A45, at pages 55-56 and #A45(5) at page 2842.

economically marginal land holdings at higher elevations remaining in the ownership of Taihape Māori that retained their forest cover.[144] This was a bitter irony for Taihape Māori to contemplate.

183. Because Crown Treaty breaches were the key drivers for Taihape Māori being left with mostly marginal lands, subsequent and current policies restricting land uses, such as the passing of the Soil Conservation and Rivers Control Act 1941, cannot be seen as neutral in their effects. This is despite the Crown characterising catchment protection as "a 'community problem', and a solution required the setting aside of 'narrow self-interest'."[145] Taihape Māori owners were not just 'unfortunate' to have lands where farming and other developments need to be restricted for catchment protection purposes.

184. Compounding the Treaty breaches which created the issue, including the fact that these marginal forested lands were, due to the operation of native land legislation, in fragmented multiple ownership and without any over-arching customary management, the Crown determined to further disadvantage Taihape Māori by rejecting proposals for the Native Department to be involved in catchment boards as a representative for the fragmented freehold property interests of the Māori owners, and notices affecting land uses to be given to the Native Secretary to consider.[146]

185. These were very limited safeguards, given the many Treaty breaches which had led to the situation in the first place. Their rejection demonstrates how completely the Crown rejected any notion of basic protection or equality of treatment with their fellow non-Māori property owners, let alone active protection.

186. Armstrong and Alexander note in their reports the efforts to purchase remaining marginal lands and restrictions on their use.

187. Alexander discusses controls under the Soil Conservation and Rivers Control Act 1941 by the Rangitikei-Wanganui Catchment

[144] Wai 2180, #A45, at pages 87-89, 93.
[145] Wai 2180, #A45, at page 96.
[146] Wai 2180, #A45, at page 99.

Board in 1975-77 period, and its amendments which restricted uses of some Māori freehold land in the Inquiry District for erosion control purposes.

188. Consultation was only with owners of blocks of Māori freehold land, including the Māori Trustee for multiply owned lands which had no administration in place. limited effrots were ever made to get in contact with owners.[147] Beyond a map at the time recording "Registered sites of interest to Māori", many around Moawhango,[148] there was no regard for Māori values beyond the economic loss which might result from restrictions on land use.[149]

Noxious weeds and invasive species

189. The same logic applies to invasive species.

190. In its report on claims in the Whanganui Inquiry District, the Tribunal considered the issue of the introduction of pinus contorta. It found no Treaty breach in the introduction of that exotic species, like many others because the motivation for introduction were to improve the landscape.[150]

191. However, it was critical of the regime to manage noxious weeds in the 20th century because the Crown failed to acknowledge that Māori landowners started at a disadvantage because of the legacy of Native Land Court title conversion and fragmentation of ownership.[151]

192. Looking at the issue through the example of events on the Murimotu 3B1A2 block the Tribunal said:[152]

> These were tremendous obstacles to their developing their land to a standard where it would generate sufficient income to cover the cost of a weed control programme. This was the case at Murimotu 3B1A2, as Māori owners could earn nothing from the land, and

[147] Wai 2180, #4.1.16, at pages 317-18.
[148] Wai 2180, #A38, Map 1 at page 36
[149] Wai 2180, #A38, at pages 29-59.
[150] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 28.18.2(3), at page 1483.
[151] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 28.18.2(3), at page 1483.
[152] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 28.18.2(3), at page 1483.

> struggled to arrange meetings of owners or even gain access to their land to address the problem of noxious weeds.

193. In the Tribunal's view it was a Treaty breach to force Māori landowners in the disadvantaged situation to pay for the eradication of a weed that the Crown had introduced.[153] This is also consistent with *He Maunga Rongo vol 4*, where the Tribunal said that, in cases of clear Treaty breach, "Māori should not be expected by the Crown or its delegates to contribute to ameliorating the impacts of previous environmental mismanagement or failure to protect natural resources, where those resources are of importance to Māori and where such a contribution wouod further erod their remaining finite resources."[154]

194. In the *Whanganui report* the Tribunal recommended that the Crown:[155]

> "develops a strategy, implemented by regional councils, for funding pest management on Māori land, including non-rateable Māori land, which recognises the problems and difficulties faced by Māori landowners in Whanganui as a result of the inherent weaknesses in the Māori land tenure system it enacted."

195. That conclusion equally applies to this district.

196. With regard to other pest plant species, in particular Old Man's Beard and White Bryony, Fleury outlined efforts by DoC to control Old Man's Beard, some of which have been reasonably intensive.[156]

197. But Alexander is particularly concerned about the Regional Council and the Department of Conservation pulling back on the areas where they will actively control these pest plants.[157] Crown evidence did not provide any particular reassurance on that issue.[158]

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[153] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 28.18.2(3), at page 1484.
[154] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 28.18.2(3), at page 1244
[155] Wai 903, *He Whiritaunoka: The Whanganui Land Report* (2015), vol 3, 28.18.2(3), at page 1484.
[156] Wai 2180, #M7, at paragraphs [45-52].
[157] Wai 2180, #A38, at page 224 and Wai 2180, #4.1.16, at pages 306-309.
[158] Wai 2180, #4.1.18, at pages 455-457.

198. Alexander is critical of the current approach to pest plant management that is based entirely on property title and whether Māori hold shares in freehold land:[159]

> There has been no opportunity provided by the Crown, its central agencies (Noxious Plants Council, Agricultural Pests Council, Biosecurity NZ), or its delegated agencies (District Noxious Plants Authorities, Pest Destruction Boards, Manawatu-Wanganui Regional Council) for Māori as kaitiaki to express their views about pest management. This can in part be put down to an absence in the legislation of provisions requiring Māori involvement. In more recent years, however, with Māori involvement becoming more common across a range of administrative matters, there appears to have been a wilful blindness among Crown and delegated agencies to the need to apply that approach to pest management.
>
> In its pest management activities Manawatu-Wanganui Regional Council has consistently failed to engage with hapu and iwi in Taihape Inquiry District as kaitiaki, confining its interactions with tangata whenua to those who are owners of Māori Land.
>
> The kaitiaki will have views about priorities for pest management, and methods of control. Whether those views are similar to the views expressed in the Regional Council's policies is not known, as tangata whenua have not been asked.

199. Crown evidence has not countered that impression, in particular that pest plant management priorities are set at a high level without iwi input, and that individual owners are the other key operators in the system.[160]

Use of 1080 poison

200. The use of 1080 poison by aerial drop has occurred in the district for many decades. For example, it was used the Ruahine Ranges in the 1950s to control possums, at that time with limited information about its possible longer terms and short term effects on non-target

[159] Wai 2180, #A38, at page 223.
[160] Eg Fleury comments at Wai 2180, #4.1.18, at pages 455-457.

species.[161] It was used to control rabbits at Owhaoko in 1968, including unoccupied Māori land.[162]

201. The Crown opening submissions robustly defend continued large scale aerial drops of 1080 and argue that it is not in breach of the Treaty in using it:

> Although the Crown continues to employ and research alternatives, for example, bait stations and self-resetting trap technology, there has to date been no comparably cost-effective alternative to the aerial application of 1080. A 2011 report by the Parliamentary Commissioner for the Environment concluded that any risk posed by 1080 was minimal compared to the benefits to New Zealand biodiversity that were afforded by its use, and recommended that use of 1080 in New Zealand should be increased. (paragraph 293)

202. And:

> The Crown considers, based on the best available information, that the environmental effects of control operations, including through 1080, are outweighed by the benefits to the environment in the protection of native biota through the control of animal pests. The Crown does not accept that 1080 has degraded the environment, or that the application of 1080 constitutes a Treaty breach. (paragraph 294)

203. Mr Fleury said that "New Zealand is seeing successful ecological restoration that would not have been possible using any other method of control currently available."[163]

204. The largest current use in the district is in the Ruahine Range, and Māori owners of the Awaroa-Ohinemanu block have allowed its use on their block.[164]

205. The killing of non-target species is an accepted risk of using the poison.[165] Kiwis do not appear to be affected or other indigenous

[161] Wai 2180, #A45, at page 7.
[162] Wai 2180, #A45, at page 247.
[163] Wai 2180, #M7 at paragraph [59].
[164] Wai 2180, #4.1.18, at page 419.
[165] Wai 2180, #4.1.18, at page 463.

species that DOC seeks to protect in the areas it where it drops the poison.[166]

206. Belgrave concludes that in terms of any lasting residual effects, 1080 cannot be considered a contaminant of concern.[167]

207. Cost-effectiveness is a major driver in its use, but the Crown argues that this is not a margin call. The use of 1080 poison currently delivers very large benefits in a short time, relative to its cost and the costs of next-best alternatives.[168]

> Question (Duhamel) = "So, one of the main reasons that DOC continues to use aerial 1080 drops instead of ground control methods like traps is due to the cost effectiveness of it?"
>
> Answer (Fleury) = Absolutely. For the type of impact that we want to have on the pest populations to get the outcomes that we need, or the public expect of us, the cost of managing these pests with ground-based methods can be up to 100 times expensive than our aerial 1080 operations. We simply couldn't deliver the outcomes of our Battle for the Birds programme with ground-based methods and we have had the same advice from TB-free OSPRI, the people that are charged with eradication of Bovine TB from this country, they couldn't achieve the goals of eradication of Bovine TB from New Zealand without using 1080.

208. Private owners have demonstrated that the more expensive route of ground baiting and trapping is possible where there is a will and suitable funding. Aorangi-Awarua Trust have taken this approach on their land.[169]

209. Alexander notes that iwi had no input into the development of the Manawatu-Wanganui Regional Council's 2009 Regional Pest Animal Management Strategy and it contains the extraordinary statement that:[170]

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[166] Wai 2180, #4.1.18, at page 434.
[167] Wai 2180, #A10, at paragraph 159.
[168] Wai 2180, #4.1.18, at page 464.
[169] Wai 2180, #A38, at page 209.
[170] Wai 2180, #A38, at page 210.

> However, hapu exercising kaitiakitanga within the area for which they held manawhenua were not identified as stakeholders. Nor were hapu identified as partners with the Regional Council.

210. In 1994 the Defence Force was still so uninformed about Taihape Māori that it argued that when it came to consultation over 1080, the Waiouru Training Area was "unique in that it does not fall within any Iwi ancestral land" and that the army or Ngāti Tumatauenga was kaitiaki of the area.[171]

211. Particular claimants will have their submissions on this, but given the sensitivity that Taihape Māori obviously have about the offensiveness of continued aerial spread of a poison over wide areas, the current approach to pest management does not engage adequately with Taihape Māori preferences.

INDIGENOUS SPECIES

212. The TSOI asks:

> 3. Has the Crown's environmental management regime for land-based resources: ….
>
> e. Contributed to the decline of indigenous species by declaring them vermin and actively encouraging attempts to eradicate them (for example shags, weka, ruru and kahu or hawks)?
>
> Has the Crown actively contributed to this process by allowing the introduction of destructive species such as stoats and weasels?

213. The historic evidence on these matters is definitive. Attempts were made to eradicate these native species, and destructive species were deliberately introduced, by acclimatisation societies, acting under Protection of Animals Act 1867 ('An Act to provide for the protection of certain animals and for the encouragement of Acclimatisation Societies in New Zealand') and subsequent legislation:[172]

[171] Wai 2180, #A38, at page 505.
[172] Wai 2180, #A10, at paragraph [304].

> The kahu (New Zealand Hawk) was one of the first to be targeted by the acclimatisation societies. The Auckland society placed a sixpence bounty on the hawk in 1867. The first year saw £32-19/6 paid out for the destruction of 659 birds. Undesirable animals could be either native or introduced. Shags, eels, feral cats, wekas, and ruru (mopoke) were all considered a threat to game and therefore listed as vermin at one point in time. Claimants also believed that huia were treated as a pest as well. Hares were initially considered favourably as game until their damage to farming was realised and their status changed to vermin. The scourge of rabbits on farmland led to the intentional introduction of ferrets, stoats, and weasels in an attempt to control rabbit numbers. The folly of this endeavour was quickly recognised and those mustelids were also listed as vermin. Protection for desirable native species was also attempted. During this time pigs and goats were considered for control as vermin but this was due to the danger they posed to native birds, not to game.

214. Belgrave concludes that:[173]

> Acclimatisation societies not only introduced new species, but sought to eliminate those indigenous species which were seen, rightly or wrongly, as a threat to their aim of transforming the New Zealand wilderness into a British hunter's paradise. In dissusions with researchers claimants still remembered the persistence of this colonising project and the values which underpinned it.

215. The Crown provided the legal framework for these efforts and actively supported them, at times through direct funding.[174]

CONTAMINANTS

216. The TSOI asks:

> 4. Has the Crown failed to adequately manage the removal or disposal of hazardous substances from the Taihape inquiry district, including industrial chemicals (timber treatment, sheep dipping etc), sewage, or unexploded ordnance? If so, how has this impacted on Taihape Māori?

[173] Wai 2180, #A10, at paragraph [289]. See also Wai 2180, #A45, Chapter 12.
[174] Wai 2180, #A45, Chapter 12 page 181.

217. There was no framework for dealing with contamination before the 1970s.

218. The Resource Management Act 1991 and associated regulations, in particular the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011, apply a national framework to the assessment of contaminated sites. Regional Councils, which are responsible for contaminants under the RMA 1991, are required to monitor sites in their regions (Resource Management Act s30(1)(ca)). Developments on sites must meet the Act and guidelines, with certain activities limited or prohibited. There are limited funds at any level of government for remediation of sites.

219. The Hazardous Activities and Industries List (HAIL) for the Taihape district lists just 18 sites:[175]

[175] Wai 2180, #A10, at paragraph [104]. Table 9 on page 54 of #A10.

Table 9: *Extract from the Horizons Regional Council HAIL list of sites within the Taihape Inquiry District.*

Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Storage tanks and drum storage
Contamination Acceptable Managed/Remediated	MANAWATU DISTRICT	Storage tanks and drum storage
Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Electrical manufacturing (transformers)
Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Service stations
Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Motor Vehicle Workshops
Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Motor Vehicle Workshops
Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Storage tanks and drum storage
Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Service stations
Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Storage tanks and drum storage
Unverified History of Hazardous Industry or Activity	RANGITIKEI DISTRICT	Landfill site
Unverified History of Hazardous Industry or Activity	RANGITIKEI DISTRICT	Landfill site
Unverified History of Hazardous Industry or Activity	RANGITIKEI DISTRICT	Landfill site
Contamination Confirmed	RUAPEHU DISTRICT	Defence works
Unverified History of Hazardous Industry or Activity	RANGITIKEI DISTRICT	Wood preservative
Contamination Acceptable Managed/Remediated	RANGITIKEI DISTRICT	Storage tanks and drum storage
Contamination Acceptable Managed/Remediated	MANAWATU DISTRICT	Service stations
Contamination Acceptable Managed/Remediated	RUAPEHU DISTRICT	Service stations
Verified History of Hazardous Activity or Industry	RANGITIKEI DISTRICT	Chemicals manufacture and formulation

220. The Crown in its opening submissions notes that contamination at 11 of the 18 HAIL sites has been assessed "Managed/Remediated" to an acceptable level.[176] However, as submitted below, that is likely a significant under-assessment of sites that exist in the district.

Sheep dips

221. Given the historic extensive pastoral use in the district and timber milling operations, we might expect there to be many historic sheep dip sites and a number of contaminated timber sites.

222. Armstrong comments that:[177]

> Dipping sheep in chemicals to kill parasites was mandatory from the 1860s, and given the scale of pastoral farming in the Taihape district one would expect that a great deal of this material would have found

[176] Wai 2180, #3.3.1, at paragraph 39
[177] Wai 2180, # 4.1.16 at page 139.

its way into rivers and streams, especially as sheep dips were necessarily located near waterways and drained into them.

223. Armstrong found "little direct evidence of breaches of the Regulations with regard to sheep dips within the inquiry area prior to the 1960s." This may have been due to prevailing attitudes rather than the absence of offending.[178] Sheep dip chemicals were killing fish well into the 1960s with only light handed regulation.[179]

224. However, the Hazardous Activities and Industries List (HAIL) for the Taihape district there are 18 sites in total and no sheep dips.

225. Belgrave comments that:[180]

> The locations of New Zealand's estimated 50,000 historic sheep dip sites are poorly recorded, and this statement will be true for the Taihape Inquiry District. Interviews with claimants conducted on 21 November confirmed that historic dipping sites are present in the District, and that contamination associated with these sites is of concern to the claimants. Mention was made of two sites where 'farms used to do sheep dipping by the hundreds of thousands'. During interviews a link was voiced between the sheep dipping sites, and a current-day lack of koura in the downslope creeks, streams and rivers.

226. Alexander commented:[181]

> Q. It's possible, isn't it, that since I think all farms had to comply with the law and have a sheep dip, that we'd have to have one on each farm at least or something like that order in this district?
>
> A. No, I don't know the fine detail, but there would be many, many –
>
> Q. Okay, all right, and a dip could be put on a property that someone might not own, but perhaps be leasing. Do you know whether that was the case?
>
> A. Could be, yes, sometimes they were put on roadside gravel reserves or roadside strips.

[178] Wai 2180, #A45, at page 307.
[179] Wai 2180, #A45, at page 307-8.
[180] Wai 2180, #A10, para 214.
[181] Wai 2180, #4.1.16, at page 317.

227. The current RMA and HAIL approach most likely do not capture anywhere near the total number of sheep dips in the district, nor consider these types of effects. The evidence has not disclosed any systematic historic survey or interviews to locate sites.

Pesticides

228. Similarly, there is an "unknown or poorly quantified use of DDT and dioxin contaminated 2,4,5-T in the Taihape Inquiry District from the 1950s through to the early 1980s". This "represents perhaps the greatest unknown potential for land contamination in the District. Undisclosed storage of agrichemical residues and unknown farm dump sites for chemical residues and containers will present current environment hazards as these residues are slowly released into soil.[182]

229. The evidence discloses no systematic historic survey or interviews to try to measure this possible contamination.

Sawmilling contamination

230. There are many fewer historic wood treatment sites than sheep dips and pesticide dumps. But sawmilling would have had a historic impacts on fisheries well beyond the footprint of the timber mill. Armstrong said:[183]

> "During the period of massive forest clearance vast amounts of sawdust and other detritus (representing as much as 40% of the raw timber) was routinely left in vast heaps on river banks or was dumped directly into waterways"

231. This is likely to have had an adverse impact on fisheries that Taihape Māori relied upon.[184]

232. Armstrong records an incident with sawdust contamination from a sawmill on the Haputatu River as an illustration of what could occur

[182] Wai 2180, #A10, at paragraph 188.
[183] Wai 21890, #4.1.16 at page 138.
[184] Wai 2180, #A45, at page 300.

with such pollution.[185] Sawdust piles were associated with feared pollution of the Pourewa stream near Hunterville in the 1950s.[186]

233. As for the mill sites themselves:[187]

> All historic and current timber treatment locations can be regarded as potential locations for contamination. At all timber treatment locations there is a risk of chemical spill, improper disposal, or dripping of chemicals from the treated timber. The apparent risk increases with the size and age of the timber treatment facility.

234. For example, a tributary of the Turakina River was reported "inky black and very bitter" from sawmill waste in 1960.[188] Contamination at sites that milled only indigenous timber would have been less likely because chemical treatment was only required for exotic species.[189]

235. The current HAIL list includes only one timber site with an as yet unverified history of use of timber treatment chemicals:[190]

236. Overall, it seems that water pollution from sawmill sites occurred and was relatively unregulated until the 1940s onwards, and then only lightly and on an ad hoc basis at least until the 1970s.

Landfills

237. Several claimants expressed concern about leachate discharges from community landfills and dumps in the Inquiry District. Particular sites referred to were the Taihape landfill, dumps sites at Uruku and Moawhango, and an old landfill near the Mokai Gravity Canyon bungee jump.[191]

238. There were at least 20 formal and informal landfills and dumps that operated in the district prior to 2001.[192]

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[185] Wai 2180, #A45, at pages 300-301.
[186] Wai 2180, #A45, at page 302.
[187] Wai 2180, #A10, at paragraph [133].
[188] Wai 2180, #A45 page 303.
[189] Wai 2180, #A10, at paragraph [135].
[190] Wai 2180, #A10, at paragraph [135].
[191] Wai 2180, #A10, at paragraph [116].
[192] Wai 2180, #A10, at paragraph [113].

239. Historically, and well into the 1960s, there seems to have been a fairly casual approach to such community landfills and dumps and to the use of rivers to take rubbish away. A Mangaweka resident advise the Catchment Board in 1960 that “for many years 'all rubbish' from the town of Mangaweka was being periodically bulldozed into the Rangitikei River, 'and from there all washed away'.”[193]

240. The Taihape landfill was similarly unregulated in the 1960s. In 1969 the Wellington Acclimatisation Society reported “'refuse from the Taihape Borough Rubbish dump - including household garbage, dead animals, wool washings and other 'nauseous' material - 'going over the bank into the Hautapu River’.”[194]

241. Community landfill sites are readily identified and controlled. It is perhaps for this reason that the Rangitikei District Council considers, following an expert report prepared in 2001, that there is no legacy of contamination from its landfill sites at Taihape, Hunterville and Mangaweka and no issues at that time with any other closed sites.[195]

242. Three landfill sites are currently listed on the HAIL list for the Taihape Inquiry district. Curiously, each is noted as having an unverified history of use, which indicates that toxicity has yet to be assessed, and remediation/mitigation is not listed as having been achieved. If these are the landfills at Taihape, Hunterville and Mangaweka then this listing seems to be incomplete. This should be clarified. The most detailed information provided to this inquiry on these sites is, after all, 19 years old.

Defence lands

243. From 1937 the Defence Department was using 50,000 acres of Crown land in the Waiouru area.[196] Between 1961 and 1973 it purchased 37,109 further acres all in the Oruamatua Kaimanawa

[193] Wai 2180, #A45, at page 303.
[194] Wai 2180, #A45, at page 303.
[195] Wai 2180, #A10, at paragraph [114-5].
[196] Wai 2180, #A45, at page 255.

and Rangipo Waiu blocks.[197] There is a suggestion that some of this land which was in Māori ownership may have been purchased because of a concern that unexploded ordinance was already on it.[198] Some of this Māori land was also purchased because, during the development of Maowhango Lake as part of the Tongariro Power Development, the Defence Force had to set aside large areas due to concerns about contractors and the public coming into contact with unexploded ordinance.[199]

244. The Crown took a strictly common law property approach to the land. In training exercises it committed extensive damage (or in common law 'waste') to its property. Live firing exercises and heavy military vehicles tore up the land, and sparked numerous small fires, and all of this activity exacerbated previous overgrazing and soil erosion.[200] The area was also littered with unexploded ordinance.[201]

245. Limited efforts were made to mitigate the damage, while accepting that its ongoing military use necessarily precluded remediation.[202]

246. There has been essentially no legal limitation on Defence Force activities damaging the natural environment on its land titles before the passing of the RMA 1991.

247. The Defence Force is subject to the RMA 1991, including the requirement to think beyond its common law property rights and "recognise and provide" for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga".[203]

248. Section 4 of the RMA 1991 provides a limited exception to this:

> 4 Act to bind the Crown
>
> (1) This Act binds the Crown, except as provided in this section.

[197] Wai 2180, #A45, at pages 256-257.
[198] Wai 2180, #A45, at page 259.
[199] Wai 2180, #A45, at page 264.
[200] Wai 2180, #A45, at pages 257-258.
[201] Wai 2180, #A45, at pages 259-260 and Map on page 266.
[202] Wai 2180, #A45, at page 258.
[203] Section 6(e)

> (2) This Act does not apply to any work or activity of the Crown which—
>
> (a) is a use of land within the meaning of section 9 [which forbids activities on land in contravention of national standards, or district or regional plans]; and
>
> (b) the Minister of Defence certifies is necessary for reasons of national security.

249. Such certificates appear to be rarely issued. The Minister of Defence signed one in 2019 to allow Defence Force aircraft to continue to be tested with high noise levels at Whenuapai airbase when an Environment Court ruling threatened to shut them down.

250. The Minister's comments are revealing about the power which lies in this provision and his comments could equally apply to Waiouru lands:[204]

> "I make no apology for issuing this certificate and advise anyone who is thinking of purchasing a home near Whenuapai, that you are moving into an area where a military airbase has operated since World War II. There will continue to be noise generated by military aircraft and you need to accept that.

251. He also said:

> "This situation, and the other ones we are faced with around the country, is exactly why we are conducting a First Principles Review of the Defence Estate Footprint. We need to decide on, regenerate and protect our estate so that the Defence Force can continue to serve our nation effectively.

252. The review terms of reference do not make reference to Treaty principles and only make a passing mention to the need to "build closer partnerships with Māori."[205] The Minister of Māori Affairs is

[204] https://www.beehive.govt.nz/release/minister-ensures-continued-whenuapai-flight-operations.
[205] https://www.beehive.govt.nz/sites/default/files/2019-07/First%20Principles%20Review%20Terms%20of%20Reference_0.pdf.

not among the ministers in the review team. The review was due to be completed in September 2020.[206]

253. Colonel James Kaio gave evidence for the Defence Force that the Army expects seeks to use all of the current footprint at Waiouru for the foreseeable future. While his evidence made no mention of the Defence Estate Footprint Review, but it is reasonable to assume that the review will reach the same conclusion.[207]

254. For now, the Defence Force accepts that on its Waiouru lands it "has an obligation to manage its activities in a way which is generally consistent with the "sustainable management" purpose of the [Resource Management Act] 1991".[208]

255. That remains difficult given the ongoing use of the land for military exercises.

256. The Sustainable Land Management Strategy for Waiouru Military Training Area 2000 states:[209]

> 1.5.2 Integration of military and conservation objectives
>
> The Army acknowledges that military activities impact on vegetation and soils within the WMTA but it does not view military objectives and conservation objectives as being incompatible or mutually exclusive. In fact, it is the WMTA's combination of natural assets– the landforms, soils, climate and vegetation – that render it an outstanding training area. The Army therefore wishes to retain the natural values of the area. It has come to see itself as part of the ecosystem – both affecting it and being dependent upon it. Consequently, the Army places a high premium on understanding the functioning of the ecosystem(s) and the actions that it needs to take to avoid or minimise adverse effects on natural values.

257. Armstrong notes that munitions, exploded and unexploded, are contaminating the land with "[a] range of toxic organic and inorganic

[206] .https://www.beehive.govt.nz/release/terms-reference-defence-estate-review-released.
[207] Wai 2180, #M1, Brief of Evidence of Colonel James Kaio.
[208] Wai 2180, #A45, at page 267, quoting Sustainable Land Management Strategy for Waiouru Military Training Area 2000.
[209] http://docplayer.net/38577051-Sustainable-land-management-strategy-for-waiouru-military-training-area.html.

substances were deposited in the soil, including lead, zinc, copper, various nitrates, perchlorate, ethylbenzine, hexachloroethane, diphenylamine, nitroglycerine and nitrocellulose."[210]

258. Belgrave agrees:[211]

> A legacy of environmental contamination can be expected at defence works and is associated with the use of military munitions. Contamination can be inorganic (heavy metals that make up the munitions) or organic (nitrogen-based military explosives). Organic contamination, owing to residual levels of explosives and the breakdown products of these explosives in soil, is considered to present a major human health risk at military testing and shooting ranges around the world.

259. This contamination may be slowly released over decades:[212]

> These elements do not degrade in soil, but can be slowly released over time from individual bullets or pellets and contaminate soil water. From here, these potentially harmful heavy metals can move into ground water, or be taken up by plants for transfer into animals.

260. These matters could have been part of the First Principles Review of the Defence Estate Footprint – but are not.

261. The Waiouru lands are subject to a "Defence Purposes Designation - (Waiouru Military Training Area)" under the Ruapehu District Plan. The designation notes of the area:

> The military camp and training ground at Waiouru comprises approximately 62000 hectares of land (30km by 25km) alongside State Highway No 1 to the north and south of Waiouru township. It is bounded in the north by the Kaimanawa State Forest Park, in the east by the Rangitikei River, the Hautapu Stream in the south, and extends to the lower slopes of Mt Ruapehu in the west, which includes part of the Rangipo Desert (Te Onetapu).

[210] Wai 2180, #A45, at page 267.
[211] Wai 2180, #A10 at paragraph [118].
[212] Wai 2180, #A10 at paragraph 120.

> The Waiouru Military Training Area is the major military training area in the North Island. The area subject to the designation is primarily used as a camp and field firing/manoeuvre area.

262. Under the designation, district plan rules for the use of the land that would otherwise apply to the area are set aside and the activity the designation provides for essentially becomes a permitted activity without the need for any resource consents.[213] The activity provided for on the Waiouru lands is "defence purposes" and is defined extremely broadly in the district plan as:

> The Waiouru Military Training Area is administered by the New Zealand Defence Force (NZDF) and currently occupied by the New Zealand Army, Royal New Zealand Navy and on occasions units of the Royal New Zealand Airforce. The military camp and training area is a Defence Work and is designated for Defence Purposes to enable the NZDF to train and prepare for any or every purpose required of the Defence Force by section 5 of the Defence Act 1990, as follows:
>
> (a) The defence of New Zealand, and of any area for the defence of which New Zealand is responsible under any act.
>
> (b) The protection of the interests of New Zealand, whether in New Zealand or elsewhere.
>
> (c) The contribution of forces under collective security treaties, agreements or arrangements.
>
> (d) The contribution of forces to, or for any purposes of, the United Nations, or in association with other organisations or states in accordance with the principles of the charter of the United Nations.
>
> (e) The provision of assistance to the civil power either in New Zealand or elsewhere in times of emergency.
>
> (f) The provision of any public service.

263. Thus ‘defence purposes’ includes the erection of any structure with a military purpose, from housing accommodation, to barracks, to

[213] Section 176 RMA 1991 "Effect of Designation."

anti-tank bunkers, and also all military vehicle manouevres and live-firing activities.

264. The District Plan makes no reference to, or provision for tangata whenua values in relation to this designation on Waiouru lands. A modification of the designation, instigated by the Defence Force, which essentially issues the designation to itself, could do that.

265. Separately, if it has not issued a certificate, the Defence Force must follow any regional council rules that apply to the lands regarding erosion, water and air quality and contaminants.

266. The Manawatu-Wanganui (Horizons) Regional Council provides for activities at Waiouru in its One Plan. Vegetation and land clearance on the Waiouru defence lands are exempt from plan rules provided that:

> "those activities are undertaken in accordance with a management plan that has the same or similar outcome as an Erosion and Sediment Control Plan."

267. The One Plan also contains a specific exemption from standards governing discharges of contaminants from live firing to land - whether they may enter water or not:[214]

> With the exception of standard (c)(i) in relation to any rare habitat* or threatened habitat* these standards do not apply to the discharge of live ammunition for weapons training purposes on any defence area (as defined in section 2 of the Defence Act 1990) owned by the Crown where it is undertaken in accordance with that Act.

268. In addition, if it has not issued a certificate, the Defence Force must also comply with any national standards, such as the national standards for air quality which prohibit, aong other matters, the lighting of fires and burning of waste at landfills, and burning in the open tyres, bitumen, coated wire and oil.[215]

[214] Rules 14-27 & 14-28.
[215] Rules 6 to 10 Resource Management (National Environmental Standards for Air Quality) Regulations 2004.

269. The Sustainable Land Management Strategy for Waiouru Military Training Area manages activities on the area via policies such as:[216]

> Objective: To minimise the risk of fire and impact damage arising from shelling activity within the WMTA.
>
> Policy:
>
> (a) Avoid the targeting of:
>
> • areas of ecological significance including RAPs,forest remnants, wetlands, relatively unmodified sites and areas where rare or endangered species (eg blue duck) have been sighted.
>
> • fire-prone vegetation including scrub, shrubland,and tussock shrubland(where possible, shelling should be confined to tussock grassland vegetation).
>
> • sites with significant erosion potential (due to soil type, slope, altitude, exposure to wind or frost action or a combination of these factors), and
>
> (b) Maintain appropriate firefighting personnel and equipment on standby during shelling activities.

270. There is one HAIL listing for the defence works in the Ruapehu District. There is no indication of the nature of contamination, however the status as 'contamination confirmed' indicates that an environmental impact assessment has been conducted.[217]

271. However, the biggest issue for any future use and remediation of these lands to restore tangata whenua relationships with them is likely to be unexploded munitions. Just how difficult this issue is likely to be, is demonstrated in Armstrong's discussion of the creation of Moawhango Lake as part of the Tongariro Power Development Scheme in the 1970s.[218] In 1970 the cost of finding and removing unexploded ordinance was considered prohibitive, and restricting any public access was considered to be the best

[216] The Sustainable Land Management Strategy for Waiouru Military Training Area at page 30.
[217] Wai 2180, #A10, at paragraph 108.
[218] Wai 2180, #A45, at pages 259-267.

solution.[219] This is obviously undesirable as a long term solution as it will prevent the ancestal owners maintaining kaitiaki connections with their ancestral land.[220] An up-to-date study of the issue, including costs of removal, the quality of Defence Department records of live fire exercises, and whether new technologies can help, would assist with this issue.

272. The Sustainable Land Management Strategy for Waiouru Military Training Area 2000 said that the Defence Force was generally aware of Treaty claims and the possibility that statutory acknowledgments might be applied over its lands as a consequence of settlement negotations.[221]

273. There is scope both within the district and regional plans and in the Sustainable Land Management Strategy for Waiouru Military Training Area 2000 for designation, rule and strategy changes that accommodate tangata whenua interests in these lands. Currently, non of these instruments appear to have considered section 6(e) as it relates to these lands and adverse effects from the defence activity on them.

274. This is also a situation where the Tribunal's repeated insistence that the RMA 1991 is amended to give effect to the Treaty of Waitangi might have a significant impact on the way in with the Defence Force deals with these lands. The current general certification power provided in the Act and the way in which, in particular, the regional council puts aside sustainability to allow for contaminating activities that would otherwise be unacceptable in the region, requires change.

Sewage

275. The Crown in its Opening Submissions accepts that "for many years poorly treated sewage was discharged into streams and rivers…The Crown recognises the disposal of human effluent into waterways is highly offensive to Māori due to the impact it has on the mauri of the

[219] Wai 2180, #A45, at pages 263.
[220] Wai 2180, #A38, page 427.
[221] The Sustainable Land Management Strategy for Waiouru Military Training Area at paragraph 1.5.6.

waterways." However, it considers that more evidence is required before determining if there have been any Treaty breaches.

276. These 'point source' pollution sites include sewage outfalls, but also outfalls from dairy factories and abattoirs. The issue of Māori agency has been discussed above. Taihape Māori were not responsible for constructing, operating or decommissioning any of these outfalls.

277. In general, Armstrong finds that there was a:[222]

> universal use of waterways as a convenient point of discharge for untreated sewage and a range of industrial wastes – including sawmill refuse, sheep dip effluent, wool-scouring effluent, abattoir wastes – and a lack of control or regulation of these activities until the 1960s'.

278. Mangaweka discharged its sewage into the Rangitikei River.[223]

279. At Hunterville, a septic tank was installed in 1908. It discharged into the Porewa Stream, which joined the Rangitikei River: "[d]uring summer months there was insufficient water in the Porewa stream for dilution to take place."[224]

280. The Taihape sewage system, constructed in 1917, which consisted of two large septic tanks with a capacity of 51,000 gallons, drained directly into the Hautapu River.[225] This might have been acceptable at the time, when septic tanks were considered to be a reasonable means of treating sewage, but the system was known to be ineffective from at least the 1960s,[226] and in 1970 the local press reported that the town had been "spewing sewage into the Hautapu River for years."[227] The Taihape Borough Council at that time was "desperately seeking some legal authority to continue an unnotified discharge of sewage into the Hautapu River."[228]

[222] Wai 2180, #4.1.16 at page 127
[223] Wai 2180, #A45, at page 341.
[224] Wai 2180, #A45, at page 342.
[225] Wai 2180, #A45, at page 328.
[226] Wai 2180, #A45, at pages 328, 331-2.
[227] Wai 2180, #A45, at page 333.
[228] Wai 2180, #4.1.16, at page 228.

281. Waiouru Military Camp sewage was disposed into the Waitangi stream.[229] In 1959 the Health Department found that "Waitangi stream waters were polluted for a distance of 6 miles downstream from the treatment works."[230] Army sewage "found its way into the Ngamatea swamp and a number of watercourses."[231]

282. 'The Rātā Dairy Factory discharged waste into the Pourewa stream for a considerable period.'[232]

283. The Winiata abattoir, established in 1914, discharged effluent into local streams.[233]

284. Between 1921 and 1970, Taihape operated a municipal abattoir that discharged effluent into the Hautapu Stream.[234]

285. At the time, dairying and pastoral farming had the kind of social exemption from control that defence enjoys today (see below re defence lands). Any consideration of, let alone deference to Māori values would have been outside the values held by local government in the district. A 1948 report by the Marine Department thought that "over 90%" of freezing works discharged into rivers and streams, as well as "a considerable number of dairy factories, sawmills, flaxmills, wool scouring establishments, tanneries and other industries".[235]

286. These activities undoubtedly affected fisheries in the waterways, and must have been offensive to Taihape Māori, and their decendants find them offensive today.

287. Control of this pollution did not really begin before the 1970s. Before 1941, acclimatisation societies had power to prevent pollution but:[236]

[229] Wai 2180, #A45, page 336.
[230] Wai 2180, #A45, at page 339.
[231] Wai 2180, #4.1.16, at page 137.
[232] Wai 2180, #4.1.16, at page 137.
[233] Wai 2180, #4.1.16, at page 138.
[234] Wai 2180, #4.1.16, at page 138.
[235] Wai 2180, #4.1.16, at page 140.
[236] Wai 2180, #4.1.16, at page 139.

> The Wellington Acclimatisation Society hardly ever exercised its limited authority in the Mōkai Pātea district. In the decade or so after 1937 the Society did not prosecute a single offender.')

288. Researchers have not found any written evidence of Taihape Māori complaining about this pollution in this period.

289. But obviously the disposal of human waste into the Hautapu and Rangitikei Rivers, and the Porewa and Waitangi streams would have had been offensive to values held by Taihape Māori in relation to these waterways, as well as limiting food gathering and potentially limiting the collection of materials for weaving and dyeing.[237]

290. The values, based in whakapapa, obviously did not diminish. In 1984, the Rangitikei Catchment Board wrote to Taihape Māori concerning a proposed water conservation order over the Rangitikei river asking:[238]

> ... we are anxious to find someone who may be able to tell us of any cultural values of the Rangitikei River as it may affect the Māori people. It may be that there are none of any consequence, but ... it would be helpful to speak to a person or persons who can supply authentic information.

291. Tony Batley and the Moawhango Māori Committee replied:[239]

> the river named Rangitikei by Hau, has from time immemorial been associated with the traditions of our ancestors. ... Its existence has been the principal reason for our tribal presence within the region.

292. In this answer, Mr Batley epitomises the approach to taonga noted above from the *Muriwhenua Fishing Report*, namely, that they are linked to a long ancestral history and impacts to them are felt across that history.

[237] Wai 2180, #A45, at page 327
[238] Wai 2180, #A40, Alexander, Rangitikei River and Its Tributaries Historical Report, at page 622.
[239] 3 February 1985, Wai 2180, #A40, at page 625.

KAIMANAWA WILD HORSES

293. Feral or wild Kaimanawa horses have been in the Moawhango area since the 1870s.[240]

294. By the 1890s they numbered in their thousands, were being tamed by Māori in the region and traded as transport, raced at large gatherings, but also killed for their hair.[241]

295. They were very much part of Māori life in the area in this period. Large race meetings were often held. The races at Karioi in February 1889, for example, were attended by some 800 people, mainly Māori.[242]

296. Culling to prevent damage to the Tongariro National Park began in the 1920s, but it was also carried out because, as an introduced animal, they did not fit the intention of the park as a 'sanctuary' for indigenous flora and fauna.[243]

297. By the 1930s numbers had reduced considerably, and near eradication occurred in the 1970s.[244]

298. The Kaimanawa Wild Horses Plan explains that, before 1981 there was "no official monitoring of horse numbers, movements or range, or any formal management."[245] Alexander refers to this period as a ‘merry-go-round’ because no government department had responsibility for the horses.[246]

299. A protected area for "horses known as the Kaimanawa Wild Horses" was established in 1981. This was apparently because of concern at the time that numbers were dwindling.[247]

300. It is estimated that there were about 174 horses remaining at this time.[248]

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[240] Wai 2180, #A45, at pages 345-6.
[241] Wai 2180, #A45, at pages 346-8.
[242] Wai 2180, #A45, at page 348.
[243] Wai 2180, #A45, at pages 238-9.
[244] Wai 2180, #A45, at page 349 & Wai 2180, #A10 at paragraphs [319-326].
[245] Kaimanawa Wild Horses Plan para 1.1.
[246] Wai 2180, #A38, at pages 611-12.
[247] Kaimanawa Wild Horses Plan para 1.2.

301. The protected area was withdrawn in 1989 and there was an attempt to implement a management strategy under section 41(1)(e) of the Wildlife Act 1953, "in order to reduce or eliminate the impacts of horses on natural values in specific areas", but this was pulled due to public pressure.[249]

302. In October 1994 a "Kaimanawa Wild Horse Working Party" was convened by the Department of Conservation and produced a Kaimanawa Wild Horses Plan in 1996.[250]

303. In 1997 the horse population was about 1700.[251] They were culled back to 500 horses in 1997.[252]

304. Following the issue of review of the Kaimanawa Wild Horses Plan in 2004, the Kaimanawa Wild Horses Working Plan 2012 – 2017 was produced. Under that Plan, horses were culled further to 300 in 2010 and continue to be managed at that level.[253]

305. Under the Kaimanawa Wild Horses Working Plan 2012 – 2017 there is a Māori voice via the owners of the Oruamatua Kaimanawa Trust, and Māori membership on the Tongariro Whanganui Taranaki Conservation Board, but no specific hapu or iwi voice.[254] Neither plan refers to historic Māori uses of the horses or preferences of tangata whenua for them.

306. Alexander details the origins of the Ngati Tama Whiti claim about the horses and the rejection of an urgent hearing before the Waitangi Tribunal in 1996, prior to the cull to 500 horses in 1997.[255]

307. The claimants seek a greater say over this process.

308. The history of the Kaimanawa horses is complex. Being on the army land, and falling between government agencies, allowed the herd to

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[248] https://www.doc.govt.nz/nature/pests-and-threats/animal-pests/kaimanawa-horses/
[249] Kaimanawa Wild Horses Plan para 1.3.
[250] Kaimanawa Wild Horses Plan para 1.4. and https://www.doc.govt.nz/nature/pests-and-threats/animal-pests/kaimanawa-horses/
[251] https://www.doc.govt.nz/nature/pests-and-threats/animal-pests/kaimanawa-horses/
[252] https://www.doc.govt.nz/nature/pests-and-threats/animal-pests/kaimanawa-horses/
[253] https://www.doc.govt.nz/nature/pests-and-threats/animal-pests/kaimanawa-horses/
[254] Kaimanawa Wild Horses Working Plan 2012 – 2017 para 4.
[255] Wai 2180, #A38, at page 652.

grow. Yet culling them was essential to protect fragile areas also protected from development because they were on army land.

309. Mr Fleury said that in the 1980s DOC "relied really on the self-identification of people who were interested in this" and that the idea that the horses might have taonga values was not known to the Department until 1996.[256]

310. This is against the backdrop where he also acepted as a fact that:[257]

> The historic actions in relation to land acquisition and exchanges by DOC in the inquiry district show that there was little or no consultation with tangata whenua at the relevant times.

311. Mr Fleury also pointed out repeatedly that the national and international interest in the fate of the horses was a bigger factor in DOC thinking than issues iwi might raise. He remained concerned that any changes to management in the future occur.[258] DOC has not been a bold advocate of its s4 responsibilities in this respect. The evidence supports a finding of insufficient focus on that Treaty obligation.

312. As noted above, one of DoC's 'stretch goals' for 2025 is that "[w]hanau, hapu and iwi are able to practise their responsibilities as kaitiaki of natural and cultural resources on public conservation lands and waters."[259] This would apply to the Kaimanawa horses.

[256] Wai 2180, #4.1.18, at page 428.
[257] Wai 2180, #4.1.18, at page 430.
[258] Wai 2180, #4.1.18, at page 474.
[259] Wai 2180, #M8, at paragraph [40].

FINDINGS

313. The evidence points to three periods of Crown action in the district with adverse effects on Taihape Māori and their relationship with their natural environment. In each period the Treaty breaches have been significant.

314. A first period from 1840 to roughly 1890 where the Crown introduced native land legislation and reduced the agency of Taihape Māori to engage in the colonial project on their own terms.

315. A second period from roughly 1890 to the 1940s of large-scale transformation of the landscape with the development of the NIMTR being a main driver of deforestation of the district. Taihape Māori had a role in this, particularly as sellers of timber and timber lands, but the prior period had set the conditions for that role to be marginal, and grow increasingly marginal. Of this period Armstrong says:[260]

> There is an almost complete absence of a Māori voice in the written historical sources consulted during the preparation of this report (Armstrong). This does not mean that Mōkai Pātea Māori were unconcerned about the nature and scale of environmental transformation within their district. The discharge of sewage and other contaminants into waterways, for example, is particular offensive to Māori cultural and spiritual values…In my view, the absence of a Mōkai Pātea voice from the written record can be attributed to two main factors. Firstly, Crown agencies and the plethora of local bodies which administered the Taihape district focused entirely on developing land for pastoral purposes, or sought to protect acclimatised species, and paid no heed to the impact of environmental change on Māori. Secondly, Mōkai Pātea Māori suffered a significant erosion of rangatiratanga caused by land title individualisation, title fragmentation and land loss. Within a relatively short period they were transformed from collective tribal entities exercising rangatiratanga and kaitiakitanga over their natural world into a crowd of individuals often possessing no more than fragments of land or uneconomic shares in remote land blocks. In other words,

[260] David Armstrong – Transcript of Hearing Week 8, #4.1.16 on page 128 and 129.

> they no longer formed a polity; they were pushed into the social, political and economic margins. Had they been permitted to retain substantial land under a form of collective ownership or control, such as incorporation involving a substantial part of the Awarua block, things may have turned out differently.

316. The Crown promised under the Treaty to undertake colonisation project in the district in a way which gave them preferences as to how they were involved, and keeping any eye out for negative impacts on Taihape Māori. In terms of impacts on the natural environment, it quickly became apparent that forest clearance associated mainly with the development of the NIMTR had long term adverse effects for people in the region. Taihape Māori were already marginalised and the Crown not only failed to consider remedial action in their interests, it quickly turned to using the remaining landholdings of Taihape Māori as sites of mitigation to protect the interests of lowland Pakeha farmers.

317. In this period the Crown effectively forgot that its Treaty partner existed in the district in terms of the adverse impact that the colonial project was having on the natural environment. A few Māori landowners were infrequently consulted – mostly about restrictions on the use of their marginal lands, or the costs of pest control. Very occassionally, a few individuals – mainly from the Ruapehu district – were consulted when particular issues of a wider nature arose. This conduct was well below the standards the Treaty required and were in breach of it.

318. The third period brings us to the present day. The voice of Taihape Māori on environmental issues is recorded faintly in written records in the 1970s. This voice is mostly from landowners objecting to pest or catchment controls over their marginal landholdings. It becomes stronger in the 1980s and 1990s.

319. But it is not until the RMA 1991 included the requirement to consider Māori relationships to ancestral land a matter of national importance, whether owned or not, that anything approaching the Treaty principle of active protection was advanced with iwi and hapu of the district.

320. The inadequacies of the RMA 1991 in terms of Treaty requirements have been pointed out in other reports, and these submissions highlight the deficiencies whose remedy would make an impact in this district.

321. The evidence, including state of the environment reports from district and regional councils, has not demonstrated that central or local government is taking a proactive, let alone urgent, approach to its engagement with iwi and hapu of the district, given the environmental degredation that has occurred and the remediation that is required. There appear to be next to no iwi management plans in the district, and councils have not gone further than appointing advisory committees, with no decision-making or funding powers. No evidence was presented of any ambition to change that state of affairs. The intention instead appears to be to muddle along and address issues as they arise.

322. The comparison between this approach and the ambition in other areas, for example, for pest control in the region in 2009 ("[a]mong our more ambitious aims is to take on region-wide suppression of possum numbers"),[261] is revealing.

323. Similarly, DOC's engagement with iwi and hapu in the district has been limited because the district keeps falling between administrative boundaries, which are exacerbated by constant restructuring, and the Department taking a self-limiting view of its s4 responsibilities. The Ngā Whenua Rāhui initiative is perhaps a good example of the end result of this state of affairs. It is an ingenious Māori-led initiative to use DOC funds to rescue Māori freehold lands in a marginal state, but so far its main outcome is to give the Crown valuable additions to conservation lands, at the lowest practical and political cost. This is not the active approach that s4 requires or that DOC's own stated goals suggest.

[261] Manawatu-Wanganui Regional Council's 2009 Regional Pest Animal Management Strategy cited in Alexander, #A38 p210.

RECOMMENDATIONS

324. There should be a ‘reset’ or perhaps ‘jump-start’ in environmental governance in the district, starting with central and local government ‘finding the Treaty partner’ by developing a better and hopefully common overarching understanding of iwi and hapu with traditional interests in the region and their ambitions as kaitiaki.

325. Assistance in developing iwi environment plans is essential, but, as recommended by the Wai 262 report, they should be given a higher legal status. Related to this, there must be ambition for Māori governance or co-governance alongside local authorities on environmental issues in the region.