IN THE WAITANGI TRIBUNAL **WAI 2180**
TAIHAPE: RANGITIKEI KI RANGIPO DISTRICT INQUIRY **WAI 1632**

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**Taihape: Rangitīkei ki Rangipō District Inquiry (WAI 2180)**
AND	
IN THE MATTER OF	**a claim by the late Hoani Wiremu Hipango, the late Wilson Ropoama Smith and Hari Iria Benevides (WAI 1632)**

POHE WHANAU CLAIM-SPECIFIC CLOSING SUBMISSIONS

Dated 20 October 2020

MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

The Claimants

1. These Closing Submissions are filed on behalf of the **Wai 1632 Claimants** ("the Claimants"), whose claims were filed by the late Hoani Wiremu Hipango, the late Wilson Ropoama Smith and Hari Iria Benevides. Hari Benevides carries the claim today.

2. The Claimants descend from Merepaea Pohe (I) and Te Oti Pohe (I). Both Merepaea and Te Oti Pohe were land owners in the Raketapauma Block. The Claimants continue to live on and farm areas of Raketapauma and Motukawa today, living the legacy that was left by their tupuna Te Oti Pohe (I), but have faced substantial difficulties as a result of egregious Crown breaches over many years.

3. Te Oti Pohe (I) was of Ngāti Tamakōpiri and Whiti-Tama, descended from Tumakaurangi and Whitikaupeka through Rangipawhaitiri, Te Waihoto and Te Whakaheke and Rangitoea. Te Oti Pohe (I) was instrumental in calling the famous Kokako hui with other Rangatira in 1860 to encourage hapū and iwi of the rohe to halt all sales of their lands. He was a principal non-seller of Māori land in his day who opposed the efforts of the 'outside tribes', being Ngāti Apa, Ngāti Raukawa, and Ngāti Kahungunu.[1]

4. The Turangaarere Hui of 1871 is also of great importance to the Claimants, as they have a whakapapa connection to and are still ahi kaa to this whenua, the waterfall on their lands is named for Turangaarere.

5. The Claimants retain and maintain links to Ngāti Tamakōpiri, Ngāti Whitikaupeka, Ngāti Rangi and other hapū of the Taihape ki Rangipo rohe.

The Claim rohe

6. As of 1900, the Pohe whānau have/have had interests in the following blocks:

    a) Owhaoko, including B1B, B East and D1;

    b) Oruamatua – Kaimanawa, including 3B, 2C2, 2C3, and 2K;

[1] Wai 2180, #A43, page 17

c) Motukawa, including 2B5, 2B27, 2B4, and 2B6;

d) Awarua, including 2C4, 3A2D and 4A3C3;

e) Mangaohane, including 1A and 1F; and

f) Raketapauma 21BC

7. In 1930, the Pohe whānau held around 6,000 acres of land. As of today, only 899 acres are held by the whānau across the six blocks. Much of these land blocks were rugged and isolated and unsuitable for development to benefit the Claimants. Some of the blocks have limited access. Almost half of the land was under lease. No sales occurred and in 1909, the whānau holdings remained the same.

Identity and customary interests of the Claimants

8. The Claimants are descendants of Ropoama Pohe. Ropoama Pohe was ahi kaa through whakapapa by way of his mother Merepaea (I). Merepaea (1), the wife of Te Oti Pohe (I), was a descendant of Tutakaro who is renowned for having travelled in a war party. Raketepauma 2B1C, was her whenua.[2]

9. Ropoama Pohe had the land taken from him with his whare still on it. The land was acquired by the Crown for the North Island Main Trunk Line (NIMTL). Ropoama Pohe was a non-seller and was referred to by the Crown as a "squatter".[3] When he died, Ropoama's son Whatarangi attempted to stop land sales while in the Māori Land Court and was successful on some occasions. His main adversary was Mr Robert Ongly who was a local lawyer.

10. Ropoama owned several other blocks of the Pohe land. He had leased his Motukawa and Awarua blocks due to inability to get financing to be able to develop them. Selling the land was not an option for Ropoama. All but one of the blocks remains within the Pohe whānau. They are not adjacent to Raketapauma or part of this claim.[4] Through alienation from their land, some of the wider whānau moved away, and over the years lost their connection and sold the land they owned.

11. In 1923, the lease on the Motukawa was due, so Ropoama's son Whatarangi along with his wife and family returned to farm the land and built the homestead on the elevated site on

[2] Wai 2180, #C19, at [3]
[3] Wai 2180, #C19, at [8]
[4] Wai 2180, #C19 at [13]

Raketapauma 2B1C. Omoti is the family kainga and marae, a place where generations of tangihanga were held. It is the burial place of Ropoama Pohe. The Hautapu River was an abundant source of trout and tuna for the Claimants, but the river became contaminated as a result of Crown activity that was destructive to the awa.

The Claim

12. The original Wai 1632 claim was filed with the Tribunal on 1 September 2008 by the late Wilson Ropoama Smith, for himself and the descendants of the late Ropoama Pohe (his great-grandfather). The original claim set out that the Claimants were/are prejudicially affected by land taken under public works legislation, and no compensation was paid to the late Ropoama Pohe who resided on the land or to any of his descendants. The land belonging to the late Ropoama Pohe was taken in order to build the North Island Main Trunk line which was started in the late 1890s and opened in 1908. In doing this, the Crown breached its obligations under section 6 of the Treaty of Waitangi Act 1975.

13. The original claim alleged that the Crown breaches continued to impact on the descendants of Ropoama Pohe in that the descendants have had to lease back part of the railway land to gain access to their farm.

Overlap with Wai 903 Whanganui Inquiry

14. The Claimants maintain interests in lands in both the Crown defined Whanganui Inquiry (Wai 903) district as well as the Taihape ki Rangipo Inquiry (Wai 2180). They also have land interests in Ngāti Rangi, Ngāti Whitikaupeka, Ngāti Tamakōpiri and Tuwharetoa. This includes the aforementioned Raketaupama block, which is on the border of the two inquiry districts. The Crown may still argue that this claim has been heard, however, it must be emphasised that the Claimants did not have any participation or voice in the Whanganui hearings, as the Crown have suggested. Counsel sought to have the Claimants speak during the Whanganui Inquiry, but this request was declined by the presiding Judge at the time. The claim was then moved to the Taihape inquiry.

15. Therefore, the Claimants cannot be said to have had extensive participation in the Whanganui inquiry, neither are they in possession of the remedies that were promised to them in that inquiry. There are a large number of extant issues for the Claimants in this inquiry. It cannot be said that they were fully heard in the Wai 903 inquiry.

16. As such, the Claimants have extensively participated in the Wai 2180 inquiry on the grounds that their claim was not properly heard or considered by the Tribunal in the Wai 903 inquiry. Wai 1632 was aggregated into the Wai 2180 Taihape Inquiry as directed by Judge Layne Harvey in the Memorandum-Directions dated 30 April 2014.[5] The claim would not have been aggregated into the inquiry if the Tribunal did not consider it necessary to do so to fully hear the claim and make findings on the same.

17. Since the filing of the original claim, the Wai 1632 claim has been through six iterations. As it currently stands, the Wai 1632 Claimants allege that the Crown has breached its obligations under Te Tiriti / The Treaty of Waitangi in the following ways:

a) The Crown was dishonourable in not acknowledging Māori Chiefs of 1860 and their tino rangatiratanga to assert their Mana to hold their own tribal hui and to be self-governing with a view to hold their lands;

b) Traditional customary lands formerly in Pohe ownership went from the Crown to one of its agents under Scenic Reserves Act legislation. There was no provision in the Act to consult Māori owners or to return the land. The Crown blatantly breached its duty of consultation and to act fairly towards its Treaty partner;

c) Pohe owned land was subjected to rating for landlocked lands and land unsuitable for farming. Rates were pursued across all Māori land, regardless of use or quality;

d) The Crown failed in its duty to actively protect the land and resources of Māori, to act in good faith and to engage in meaningful consultation;

e) The Crown breached its duty by not acknowledging and respecting the stance the rangatira of the district adopted in the 1860 Kokako hui and the Turangaarere hui;

f) The Crown breached its duties under Te Tiriti / The Treaty of Waitangi through legislation and administration in the operation of the Native Land Court, as well as, Crown and local authority policies and practices that facilitated and assisted in the alienation of Pohe's lands and degradation of the Hautapu River;

[5] Wai 2180, #2.5.32

g) The Crown breached its duty to meaningfully consult with Māori by confiscating Raketapauma 21BC under the Public Works Act for the Maungakaretu Reserve without consulting with the Pohe whānau;

h) The Crown breached its duties under Te Tiriti/The Treaty of Waitangi in relation to Māori land rating and landlocked lands from 1870-2015, contributing to financial pressures, which was a significant factor in the sale of Pohe land;

i) The Crown made the Claimants lessees of land taken by the Crown without notice or consultation. In the Wai 903 Whanganui Lands Report, the Tribunal recommended the land be returned to the Claimants but to date this has not happened and constitutes a continuous Treaty breach by the Crown;

j) The Crown breached its obligations of good faith by failing to pay Ropoama Pohe compensation for the taking of land under the Public Works Act for the North Island Main Trunk line;

k) The Crown forced Ropoama's descendants to lease back part of the railway land to gain access to their own farm; and

l) The Crown never returned takings of Pohe land that was taken under scenic preservation legislation. Surplus lands not used in the North Island Main Trunk Railway construction were never returned.

18. It is submitted that the Crown has, in large measure, been responsible for the losses that the Pohe whānau and descendants have suffered since the Treaty was signed: losses that have left them almost landless in their own rohe, (or without adequate access to their land) their traditional way of life undermined and their resources gravely depleted.

Adoption of Generic Closing Submissions

19. Counsel support and adopt the Generic Closing Submissions filed by other counsel on the following issues:

a) Public Works Takings;[6]

[6] Generic Closing Submissions on Public Works Takings filed by Hockly Legal on 20 September 2020

b) Rating;[7]

c) North Island Main Trunk Railway;[8]

d) Constitutional Issues;[9] and

e) Environmental Issues.[10]

20. The Generic Closing Submissions are adopted to the extent that they relate to the Claimants' issues set out in this claim.

21. At the time of writing, the Generic Closing Submissions for Native Land Court have not been filed and as such the Claimants cannot comment on those submissions.

THE EVIDENCE

22. The Claimants have presented the following evidence:

Week 2 – Joint Rangitikei River Hearing Week:
Hari Benevides (#F8)
Mariana Waitai (#F9)

Week 3:
Hari Benevides (#G19)
Mariana Waitai (#G20)

Week 4:
Hari Benevides (#H1)
Mariana Waitai (#H2)

Week 6:
Mereana Kerr (#J8)
Hari Benevides (#J13)
Mariana Waitai (#J14)

[7] Generic Closing Submissions on Rating filed by Bennion Law on 13 October 2020
[8] Generic Closing Submissions on North Island Main Trunk Railway filed by Mark McGhie on 9 October 2020
[9] Generic Closing Submissions on Constitutional Issues, filed by Tamaki Legal on 12 October 2020
[10] Generic Closing Submissions on Environment, filed by Bennion Law on 14 October 2020

23. These submissions are largely based upon the evidence presented as well as the technical evidence that has been presented throughout the hearings. However, where appropriate these submissions will draw upon tangata whenua evidence presented by other claimants.

24. The evidence the Claimants have presented can be summarised as follows:

a) The Claimants have presented evidence about their tupuna Te Oti Pohe (I), of his importance in this rohe and the vital role he played in the history of the rohe in the second half of the 19th century, a role that is captured in the description of him as the "*principal non-seller of Māori land in his day*".[11]

b) Te Oti Pohe (I)'s tino rangatiratanga was undermined by the workings of the Native Land Court, particularly in relation to partition and the sub-partition of the Awarua and Motukawa blocks.

c) Te Oti Pohe was placed in severe financial difficulty by the burdens associated with appearing before the Native Land Court, financial burdens that were no doubt placed upon him by the Crown. For example, Te Oti Pohe requested an advance from the Crown to defray the costs of which he incurred in the Awarua hearing.[12]

d) In the 20th century, the Pohe whānau had sought to maintain the legacy of Te Oti Pohe by holding fast to the land that remained within their possession.

e) Ropoama Pohe, the Claimants' great-grandfather, had an intimate relationship with and commitment to the land and the lives of subsequent generations.

f) The value of the Hautapu river, it's importance to the Claimants and its desecration by the Crown.

CROWN CONCESSIONS

25. The Crown has not filed a complete list of Crown concessions in this inquiry, despite requests from the Tribunal and the Claimants to do so. The Crown has indicated it intends to file a complete list of concessions *after* the Claimant closing submissions have been filed.[13] Nonetheless the Crown accepts that the Tribunal and the Claimants have a strong

[11] Wai 2180, #A43, page 17
[12] Wai 2180, #A8, page 92
[13] Wai 2180, #3.2.687, at [8]

desire for clarification on what Treaty breaches the Crown acknowledges have occurred in this inquiry. Despite this understanding from the Crown, the lack of a full list of concessions place the Claimants in a disadvantageous position in the drafting of these closing submissions.

26. The concessions that the Crown have made are set out in documents Wai 2180, #3.3.1 – Opening Comments and submissions of the Crown. The concessions are as follows:

a) The Crown conceded that the individualisation of Māori land tenure provided for by the native land laws made the lands of iwi and hapū in the Taihape: Rangitīkei ki Rangipō inquiry district more susceptible to fragmentation, alienation and partition, and this contributed to the undermining of tribal structures in the district;[14]

b) The Crown conceded that it failed to include in the native land laws prior to 1894 an effective form of title that enabled Taihape Māori to control or administer their land and resources collectively. This has been acknowledged previously as a breach of the Treaty of Waitangi and is again acknowledged as such for the Taihape inquiry district.[15]

27. These are the only concessions the Crown has made in this inquiry thus far. The Crown submitted in February 2020 that it has made a number of concessions in this inquiry district.[16] The concessions relate only to Native Land Laws and the individualisation of title. The concessions are drafted in such vague terms that it is still necessary to advance submissions as to the nature and extent to which the individualisation of Māori land tenure through the imposition of the Native Land Laws made the lands of iwi and hapū in the inquiry district more susceptible to fragmentation, alienation and partition, and this contributed to the undermining of tribal structures in the district.

TE TIRITI PRINCIPLES AND GUARANTEES

Partnership

28. The Court of Appeal found in *New Zealand Māori Council v Attorney-General* that the Treaty / Te Tiriti signified a partnership requiring the Crown and Māori to 'act towards each other

[14] Wai 2180, #3.3.1, page 9
[15] Wai 2180, #3.3.1, at [27]
[16] Wai 2180, #3.2.687 at [6]

reasonably and with the utmost good faith.[17] However the duty was not one-sided, or was 'the standard of "reasonableness"…one of perfection'.[18]

29. The Waitangi Tribunal in the recently released *Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* commented on the principle of partnership with reference to case law and a number of previous Tribunal reports as follows:

a) The partnership principle has been developed in numerous court rulings and Tribunal findings. In 2007, the Tribunal stated that it derived from 'the guarantee to Māori of the right to exercise tino rangatiratanga over all their taonga, in exchange for the Crown's right to exercise kawanatanga'.[19]

b) The obligations arising from the Treaty partnership have been extensively elaborated. The principle of partnership requires the Crown 'to consult Māori on matters of importance to them' and avoid acting unilaterally on such matters'.[20]

c) Neither the courts nor the Tribunal have found consultation to be an automatic or immutable requirement. The need for it, and its nature, are determined by its circumstances.[21]

d) The Tribunal considers consultation *is* essential to protect the legitimate Treaty interests of Māori, namely, on matters of importance to them and where important resources are at stake. The Tribunal has emphasised that the principle of partnership requires the Crown to consult with hapū as well as larger groups.[22]

e) In 1994, the Tribunal described the partnership envisaged in the Treaty as one based on 'reasonableness, mutual co-operation and trust.[23]

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[17] *New Zealand Maori Council v Attorney–General* [1987] 1 NZLR 641 (CA), p667

[18] *New Zealand Maori Council v Attorney–General* [1987], p 664 (Waitangi Tribunal, The Mohaka ki Ahuriri Report, 2 vols (Wellington : Legislation Direct, 2004), vol 1, pp 22–23) ; *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA) (Waitangi Tribunal, The Offender Assessment Policies Report (Wellington : Legislation Direct, 2005), p 10)

[19] Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Report, Stage 1*, p17, citing Waitangi Tribunal, *The Te Arawa Settlement Process Report,* pages 20-21

[20] Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Report, Stage 1*, p18

[21] Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Report, Stage 1,* p18

[22] Waitangi Tribunal*, The Marine and Coastal Area* (Takutai Moana) Act 2011 Inquiry Report, Stage 1, p19

[23] Waitangi Tribunal*, The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Report*, Stage 1, p19, citing Waitangi Tribunal, *Maori Health Electoral Option Report*, p15

Active Protection

30. The Crown's Treaty obligation to actively protect Māori rights and interests has also been well established by the courts and the Tribunal. It resides in 'the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity'.[24]

31. The importance of the principles of active protection was affirmed *in New Zealand Māori Council v Attorney General* (1987). In that case, it was established that the Crown's duty to protect Māori rights and interests is not passive, but 'extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable'.[25] Since then, Tribunal reports have repeatedly emphasised the need for 'honourable conduct by, and fair processes from, the Crown and full consultation with and, where appropriate, decision-making by – those whose interests are to be protected'.[26]

Guarantee of Tino Rangatiratanga

32. Tino rangatiratanga has been extensively examined by the Tribunal in its reports over the years. The Treaty guaranteed to Māori their tino rangatiratanga, the Tribunal has found. This was a guarantee that Māori would be able to continue to exercise 'full authority over lands, homes, and all matters of importance to them. This, at a minimum, was the right to self-determination and autonomy or self-government in respect of their lands, forests, fisheries, and other taonga for so long as they wished to retain them'.[27]

33. At its most basic level, tino rangatiratanga is imbued with the Māori view of the world and is closely intertwined with tikanga. Tikanga underpins how tino rangatiratanga was exercised as it was relevant to land tenure, the environment, social and political relationships, and generally to the Māori was of life.[28] Tino rangatiratanga is guaranteed to all Māori under Article 2 of the Treaty/Te Tiriti, as has been found by the Tribunal in past inquiries.[29] Because the guarantee of tino rangatiratanga was a promise of protection for

[24] Waitangi Tribunal*, The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Report*, Stage 1, p19, citing Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, vol 1, p4
[25] *New Zealand Maori Council v Attorney-General* [1987], p665
[26] Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, vol 1, p4
[27] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims, Parts 1 and 2*, p158
[28] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims, Parts 1 and 2*, p157
[29] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims, Parts 1 and 2*, p158

Māori autonomy, the Crown was therefore obliged to respect Māori tikanga as a system of law, policy and practice.[30]

34. The Tribunal has found that the article 2 guarantee of tino rangatiratanga was inherently a guarantee of the right to exercise tikanga: 'the exercise of mana by Rangatira was underpinned and sustained by adherence to tikanga. The chiefs whose thoughts and actions lacked that essential and recognisable quality of being 'tika' would not be sustained in his leadership.[31] The Tribunal has concluded that the Crown's guarantee of tino rangatiratanga was meaningless, unless also accompanied by the tikanga that 'sustain and regulate the Rangatira and his relationship to the people, and the land'.[32]

LAND LOSS AND DAMAGE CAUSED TO CLAIMANT LAND BLOCKS AS A RESULT OF CROWN ACTION

Duty

35. At all times, the Crown has a duty to actively protect the land and resources of Māori and to actively protect Māori in the exercise of rangatiratanga over their lands and in accordance with tikanga. The Crown must act in good faith and must therefore not act towards Māori in a manner which it is aware will create significant division within the iwi and which will undermine iwi customary structures of decision making.

Breach

36. The Crown acted in breach of the above duties in its failure to properly manage land which the claimants had interests in and surrounding land, resulting in much of the Pohe land becoming landlocked, or unsuitable for economic development.

37. The Crown further acted in breach of the above duties through its imposition of the rating system on Māori land, and its acquisition of Pohe land under public works legislation without proper notice or compensation given to the Pohe whānau.

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[30] Waitangi Tribunal, *The Taranaki Report*, p5
[31] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims, Parts 1 and 2*, p157
[32] *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims, Parts 1 and 2*, p157, citing Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p3

Particulars

Raketapauma 2B1C

38. The Claimants are the sole surviving claimants of Raketapauma 2B1C and the adjourning land which was taken under the Public Works Act by Crown proclamation under s.167 of the Act 1894, NZ gazette 1914. The Claimants continue to farm Raketaupama 2B1C and make claim to the adjoining portion of land, which was taken by the Crown without proper notification or compensation.

39. Ropoama Pohe inherited the land from his mother, Merepaea (1) and cultivated the land on the flat side next to the river. He lived on and farmed Raketaupama 2B1C, beside the Hautapu awa on the southern end of the Raketaupama block (situated along/near the Whanganui and Taihape Inquiry District border). He farmed other parts of Raketaupama, Motukawa, Ruanui, and Ngaurukehu in his own right. He also farmed the Desert Road lands, Rangipo/Waiu blocks in partnership with Ngāti Waewae.[33]

Motukawa

40. Motukawa was farmed by the Pohe whānau in conjunction with Raketaupama. The Claimants have noted that development of the Motukawa land along with Raketaupama was essential in creating a viable economic living.[34] However the Pohe whānau were consistently prevented from developing the land by the Crown. As a result, Ropoama Pohe had to lease the Motukawa land due to inability to get financing to develop the land Selling this land was not an option for the Pohe whānau. Motukawa was left with built-uprate arrears. The impact of rating on Māori land is discussed further in this submission.

41. Motukawa lay in a border area where tribal interest and whakapapa overlapped. When it went through the Native Land Court, it was found that previously parties lived as one, but because of other claims to Motukawa, there were disputes and ill feeling. During cross examination at Hearing Week 3 on #A43 *Nineteenth Century Overview*, Bruce Stirling noted that Motukawa and Rangipo was a clear indication that the Native Land Court failed to grasp the complex nature of interest in this district.[35]

[33] Wai 1632 Sixth Amended Statement of Claim, at [127]
[34] Wai 2180, #C19, at [16]
[35] Wai 2180, #4.1.10, pages 587-594

Ōwhāoko

Gifting

42. Ōwhāoko D1 is a 4,603-acre block of land held by the Pohe whānau. It is rugged and isolated land that offers little economic potential. Much of it is landlocked. The greater Ōwhāoko block is 163,432 acres, with harsh winters discouraging permanent settlement. It became a land of seasonal occupation of the broad, undulating tussock-covered basic, much of which drained into the Ngamatea swamp.[36] The Ōwhāoko blocks owned by the Pohe whānau, despite being underdeveloped, were faced with the threat of the owners having to pay rates if they did not sell to the Crown at what was considered by the Crown to be a low price.

43. The Ōwhāoko land was the subject of controversial "gifting" in the early twentieth century. It has never been made clear who "gifted" the lands precisely, why the change in status occurred, who had their gifted lands returned and what lands remain to be identified, tracked, and returned to the rightful Pohe descendants. In the Sixth Amended Statement of Claim for Wai 1632, Counsel requested a report on this gifting after setting out full particulars for the same.[37] However, to date this request has never been actioned.

44. During Hearing Week 3, Counsel questioned Mr Martin Fisher and Mr Bruce Stirling on the #A6 report on *Sub-district block study – Northern aspect*.[38] The questioning concerned the gift of 2000 acres of Ōwhāoko land (as referred to above) to the Crown during the First World War, and whether details were provided in press reports such as the *Evening Post*. The witnesses noted during questioning that the *Evening Post* Report does not provide any indication of land gifted by any particular Rangatira, other than Hīraka Te Rango. Many at the hui were not actual owners, but had community interest, hence meetings were informal affairs.

45. The witnesses also agreed that meetings and press reports are not accurate, but the transfer of title was more formalised. It would have been up to the actual owners to make the process more rigorous in the later phases. Initial public gifting was not well defined but should have been properly defined for title to transfer in a clear, transparent matter. Further research into the details, i.e. looking at the owners of specific blocks is needed to

[36] Wai 2180, #A43, page 260
[37] Wai 1632, Sixth Amended Statement of Claim, at [123]
[38] Wai 2180, #4.1.10, pages 395-400

reveal whether the gifting was truly supported by owners. Thus, it is submitted that the questions surrounding the gifting of Ōwhāoko remain unanswered.

Claimant interests in Ōwhāoko

46. The Ōwhāoko blocks that the Claimants have an interest in are landlocked. Susan Woodley states that:

> *"The lack of access to the Ōwhāoko block stems from the Native Land Court not ordering road lines through the block at the time of partition. The ordering of road lines could have been done under Native Land legislation at that time but as the legislation did not specify that the provision of access was mandatory, it was not done, hence the landlocking occurred in many situations and have hampered Māori to this day. Several applications for access to the Court were made by owners around the turn of the 20th century but one was not ordered (to D2) and the other was for access from Ōwhāoko D5 section 4 to section 1 and does not appear to have ever been acted on"*[39]

47. Mr. Tony Walzl discussed Pohe interests in the Ōwhāoko block during questioning by counsel at hearing week 7.[40] In particular, the Ōwhāoko investigations were a subject of questioning. It was confirmed during questioning that Mr JB Jack was the President of the Board during the Ōwhāoko investigations, but no information was given on other members of the board or Māori representation. Those positions were temporary and a 3-year term. Mr. Black persuaded Māori to sell their land at a low price. He let them know what would happen if they did not, essentially threatening the owners. Mr Jack's role was to protect Māori in relation to private purchases, and as the Land Board President he was equivalent to a Land Court Judge. However, it was clear that Mr. Black failed to protect Māori land and there was no oversight to ensure that his obligations towards Māori as Land Board President were fulfilled.

[39] Wai 2180, #A37, pages 422-423
[40] Wai 2180, #4.1.15, page 242-252

Mangaohane

48. The Claimants had an interest in the Mangaohane block. At Hearing Week 4, Hari Benevides gave the following evidence in relation to Mangaohane:[41]

a) The Studholme brothers claimed to have purchased the interests of Te Oti Pohe (I) in the Mangaohane 1 block;

b) R.T Warren made two deeds to purchase interests of Māori land in Mangaohane. The first deed was for both Mangaohane 1 and 2 and was completed on 8 August 1885. The second deed was for Mangaohane 1 *only*, which was signed on 9 March 1886. Te Oti Pohe (I) is listed as one of the signatories on the second deed for Mangaohane 1;

c) When the deeds for the two blocks, Mangaohane 1 and Mangaohane 2 were executed, they were not held under a certificate of title;

d) The two deeds to purchase interests of Māori in Mangaohane 1 and 2, (including the interests of Te Oti Pohe (I) did not meet the requirements of the Native Land Court Act 1880 and the requirements of section 7 of the Native Land laws Amendments Act 1883, which required notices to be issued by the Chief Judge once rehearing applications had been dealt with;

e) The Court said that although the law had not been strictly complied with, the purchases were bona fide and suitable for validation, and the Court decided to grant its certificate. This is an example of where the colonial English law imposed in Aotearoa validated something illegal and made it legal. Hari Benevides described this in her Koro's words as "legalised theft".

49. At Hearing Week 4, Counsel questioned Dr Grant Young on his #A39 report *Mangaohane Legal History and the Destruction of Pokopoko.* Counsel questioned Dr. Young on the two deeds to purchase Mangaohane 1 and 2, among other matters. In the course of cross-examination, it was noted that no shares would have been issued as interests needed to be determined, which additional research should reveal.[42]

[41] Wai 2180, #H1, page 2
[42] Wai 2180, #4.1.11, page 538-542

50. Two blocks were held under a certificate of title under the Native Land Act 1880 by 146 people. Warren's deed purported to have the transfer of the interests of 64 people. Dr. Young could not confirm whether it was for Mangaohane 1 and 2 blocks and the total, or the total shares, of the 64 people. Dr. Young could also not say whether the signatories knew the implications of what they were signing or why they sold their land. Given the number of signatories, it is highly likely that they were not aware of the implications and there is no evidence that the Crown sought to properly inform the signatories of the implications of signing the deed.

51. There were requirements that deeds had to meet. To comply, the Trust Commissioner had to sign some off as part of the process. In that period, it was unusual to have records of private sales, although not unusual to have records of hui or meetings.[43] The Native Land Court issued certificates under the Native Land Valuation of Titles Act 1882 for a validation of purchase of interest by Warren in two deeds. Judge McKay advised that the Court was satisfied with the evidence to grant the certificate. Dr. Young could also not confirm how many witnesses gave evidence.

52. When the deed was executed, Mangaohane 1 and 2 were not held under a certificate of title. The transactions did not meet the requirement of the Native Land Court Act 1880, nor did they meet the requirements of section 7 of the Native Land Laws Amendment Act 1883. The fact remains that the purpose of the legislation was to deal with a situation where the earlier statutory requirements were not met. But this was not a consideration for the Court when it came to dealing with deeds under the Validation Act. These factors demonstrate the Crown validating transactions that did not meet legal requirements in order to acquire Pohe land, as set out in the evidence of Hari Benevides.

53. Dr. Young confirmed during cross-examination that no research was done on the extent of Te Oti Pohe and others' interests outside of Mangaohane in this instance, and there was no requirement to provide advice. Certain statutory powers were exercised by the Trust Commissioner, and a translator would need to translate the deed.

Awarua

54. Awarua was the subject of controversial Native Land Court hearings in the 1890s. Counsel questioned Mr. Tony Walzl at Hearing Week 7 on his #A43 report *Twentieth Century*

[43] Wai 2180, #4.1.11, page 538-542

Overview on Pohe whānau interests in Awarua. Mr Walzl set out the following when asked about Awarua:[44]

a) At the turn of the century, the Pohe whānau acreage owned by the whānau was one of the lowest, if not the lowest within this district.

b) A list of Pohe whānau assets as of 1900 shows that Awarua was substantial, reasonable quality land held by one whānau.

c) A particular asset was Awarua A43C3. In 1906, it was subject to lease. It was leased to John Anderson, a name that frequently crops up in records. Following shortly after the Native Lands Act 1909 that enabled Māori land to be held by private purchasers, it was sold.

d) The decade after 1909 was the most significant period regarding Awarua due to the loss of 47 percent of whānau landholdings.

e) Land Board paperwork included an alienation file on every single alienation that occurred, whether by lease, mortgage or sale, followed by a hearing with the Board with very brief minutes taken. Crown purchasing was exempt from going in front of the Board.

55. The answers given by Mr. Walzl demonstrate that the Awarua Native Land Court proceedings and alienations severely undermined the tino rangatiratanga of the Pohe whānau chiefs and other Taihape Rangatira, with the process clearly favouring Crown purchasers and Crown agents over the original owners of Awarua.

MAINTENANCE OF TINO RANGATIRATANGA

Duty

56. At all times the Crown has a duty to actively protect the land and resources of Māori and to actively protect Māori in the exercise of rangatiratanga over their lands and resources, in accordance with their lore and customs.

[44] Wai 2180, #A43, page 242-252

Breach

57. The Crown failed to respect and protect the tino rangatiratanga of the Pohe whānau. The Crown sought to acquire Pohe land and consistently undermined the tino rangatiratanga of the Pohe whānau.

Particulars

58. As discussed above, the Claimants are descendants of Te Oti Pohe (I). Te Oti Pohe (I) was a signatory to Te Tiriti / The Treaty and all that the document encompassed, yet the Crown consistently failed to acknowledge the Chieftainship of Te Oti Pohe (I). In particular, the Crown undermined Te Oti Pohe (I)'s tino rangatiratanga during the two significant hui of 1860 and 1871; the Kokako Hui and the Turangaarere Hui.

Kokako Hui 1860

59. Hari Benevides gave evidence about the participation of Te Oti Pohe (I) at the Kokako Hui of 1860.[45] The hui itself was proposed and convened by Te Oti Pohe (I) and was held at his marae, named Kokako. Te Oti Pohe (I) made it known at this hui that he was against the sale of his tribe's land. However, the Crown denied the chiefly status of Te Oti Pohe and other chiefs and ignored their authority to make decision in regard to their land. The Crown sought to pursue their land-grabbing agenda over and above their obligations to Taihape Māori.

60. The purpose of the hui was to set boundaries as cited in a statement by Winiata Te Whaaro. The emphasis was on the Kingitanga, perhaps as a means to protect land sales and to set boundaries to achieve that aim. Kokako was a broader hui than the later Turangaarere hui.[46]

61. There is no doubt that Te Oti Pohe (I) was a respected Rangatira who's position should have been respected at this hui. During questioning by counsel at Hearing Week 1, Mr. Tony Walzl agreed that Te Oti Pohe (I) was "deemed a chief".[47] Te Oti Pohe (I) sought to express the tino rangatiratanga of his tribe in the form of the Kokako hui. During questioning of the

[45] Wai 2180, #G19, page 2
[46] Wai 2180, #4.1.8, page 242-248
[47] Wai 2180, #4.1.8, page 242-248

#A43 report presented at Hearing Week 3, Mr. Bruce Stirling agreed that this was what Te Oti Pohe (I) sought to demonstrate.[48]

62. During dealings between Te Oti Pohe (I) and McLean, it was clear that when McLean was opposed by any Rangatira, McClean would dismiss that Rangatira's status or rights to the land that the Crown sought to acquire.[49] Furthermore, McLean did not uphold promises to Rangatira, such as refusing to fix the boundary of the interior of the land as he said he would.[50] In this way the Crown, through McClean, fragrantly undermined the tino rangatiratanga of Te Oti Pohe (I).

Turangaarere Hui 1871

63. The Turangaarere Hui of 1871 was held on Raketapauma 2B1C, being the site of the Niu Tireni Pataka.[51] It was the second major hui held in the rohe to address boundaries and attempts to stop further sales of land. Te Oti Pohe (I) was present at this hui and was protective of the Pohe lands. He again sought to prevent the land being sold to the Crown.

64. There were a number of incidents as at Kokako where Te Oti Pohe (I) came into confrontation with Crown agents in his efforts to stop his lands from being sold.[52] One incident involved Te Oti Pohe (I) preventing sheep brought by Europeans from entering the Motukawa block. Another incident saw Te Oti Pohe (I) burning the house belonging to one of his whanaunga from Ngāti Rangi to stop further occupation of Ngāti Rangi on their whenua due to a boundary dispute between Ngāti Rangi and Ngāti Tama.[53] These were both strong statements from Te Oti Pohe (I) asserting his tino rangatiratanga, but his position continued to be ignored by the Crown to the prejudice of himself, his whānau and his descendants.

65. The Crown was dishonourable in not acknowledging Māori Chiefs of 1860 and 1870 and their tino rangatiratanga stance to assert their mana to hold their own tribal hui and to be self-governing with a view to hold their lands for themselves, their whanau and for the benefit of future generations .

[48] Wai 2180, #4.1.10, page 587-594
[49] Wai 2180, #4.1.8, page 242-248
[50] Wai 2180, #4.1.8, page 242-248
[51] Wai 2180, #4.1.10, page 3
[52] Wai 2180, #A43, page 16-25
[53] Wai 2180, #G19, at [13]

Awarua Block Native Land Court proceedings, 1890

66. A further example of the Crown's denial of tino rangatiratanga can be observed in the Awarua Block Native Land Court proceedings during the 1890s. This example is used to apply generally to rangatira in the district rather than specifically Te Oti Pohe (I). These leaders urged the Crown not to embark on purchasing of land, but to let the Rangatira settle it. They sought a collective interest in consideration of the destructive effects in the Taihape area from Crown purchasing.

67. The outcome of the Awarua Native Land Court proceedings of 1890 was that it aided Crown purchasing. The Crown ultimately sought to acquire the land for the railway line and acquire the entire Awarua Block at a discount, in order to on-sell to fund the construction of the North Island Main Trunk Railway.

68. Messrs Evald Subasic and Bruce Stirling were questioned during Hearing Week 5 on the #A8 report *Sub-District Block Study – Central Aspect*.[54] The cross-examination focused on the decision for the hearing to take place in Marton rather than Moawhango, as was preferred by the Rangatira involved. There was a petition sent to Parliament in June 1890 urging the Crown to reconsider the location of the hearing. It was received by Parliament in August 1890 after the Awarua hearing had commenced. The petition was also presented during the Native Land Court hearing, but the Native Affairs Committee decided it was inconvenient for those attending to change the location. The matter was raised in Parliament by former Governor Gray, but that was not discussed in the report by Subasic and Stirling.

69. The hearings were held "in the depths of winter" at Marton, all but inaccessible to the elderly chiefs whose evidence would have been vital to getting a true account of the history of the land and the questions coming before the Court.[55] As a result they saw the insistence on sitting at Marton as a continuation of the "cruel and unjust practice" of the past, in holding courts at places "remote from the land and the people living in the localities under adjudication.[56] The hearing was adjourned in March 1891 after sitting for 8 months with no result.

[54] Wai 2180, #4.1.12, page 284-291
[55] Wai 2180, #A43, page 350
[56] Wai 2180, #A43, page 350

70. Whilst the Crown is not to be held responsible for the decisions of the Court, it was responsible for the legislation under which the Court operated and for the subsequent failure to correct the injustices to which the Awarua proceedings gave rise.

71. During cross-examination, Counsel suggested that the Native Land Court was acting in breach of section 18 of the Native Land Act 1880. Subasic and Stirling agreed, and also noted that:

a) Legislative amendments focused on land alienation more than the basic mechanisms governing title investigations. It was about facilitating alienation and not so much about the Court's operations at a day–to–day level; and

b) The Court had no real independence from the Crown. The Prime Minister or Native Minister would direct the Native Land Court, although the Native Land Court should not have taken directions from the Crown.

72. Counsel questioned Mr. David Armstrong on his #A49 report during Hearing Week 1.[57] Mr. Armstrong referred to three levels of Crown obligation:

a) a committee or runanga should have had the authority to settle the issues (which was what Te Oti Pohe (I) sought);

b) the Court should not have sat at Marton during those proceedings; and

c) the Crown should not have intervened thereby supporting debt incurred by Māori.

73. It is submitted that in choosing the location of this hearing, the Crown had the opportunity to play a protective role under the Treaty but did not take this opportunity. *He Whiritaunoka: The Whanganui Land Report* is clear that this is a Crown breach that needs to be compensated for, and the Claimants respectfully urge this Tribunal to take this finding into account and implement a recommendation for compensation.

[57] Wai 2180, #4.1.8, page 420-427

LAND ACQUIRED FOR THE NORTH ISLAND MAIN TRUNK RAILWAY

Duty

74. At all times, the Crown has a duty to actively protect the land and resources of Māori and to actively protect Māori in the exercise of rangatiratanga over their lands and resources, in accordance with their lore and customs. This gives rise to the following specific duties:

a) To consult, or otherwise ensure the Crown the wishes of the owners before acquiring land by way of compulsory purchase and give proper consideration to any well-founded objections by Māori to that acquisition;

b) To pay fair compensation for any acquisition of land and other resources; and

c) To offer back land taken for public works purposes when the land was/is no longer required for the original purpose for which it was taken.

Breach

75. Various takings for public works purposes, particularly the North Island Main Trunk Railway, within the rohe of the Pohe whānau were carried out under the aegis of the public works legislation in breach of the Treaty of Waitangi and its principles.

Particulars

76. A significant amount of land belonging to the Pohe whānau was taken for the purpose of constructing the North Island Main Trunk Railway ("NIMTR"), including Motukawa and Raketapauma. Almost 600 acres of land was taken from Taihape Māori in general for railway purposes. There is no evidence of payment of compensation for the lands taken, except for the Taraketi block.[58] The land was taken under the 5 percent rule, which enabled up to five percent of Māori land to be taken for road and railway purposes without payment of compensation.[59]

77. Previous Waitangi Tribunal reports have found that takings without consent or compensation were in breach of the Treaty, with prejudice to those who were not compensated or paid.[60] In the *Tauranga Moana* report, the Waitangi Tribunal found that

[58] Wai 2180, #A9, page 3
[59] Wai 2180, #A9, page 150-151
[60] Waitangi Tribunal, *He Maunga Rongo*, page 841

the way in which land has been assessed for compensation purposes is based solely on European principles and models, without any influence from Māori views or consideration of how Māori interests might be valued.[61]

78. It is acknowledged that the Crown has made some in-principle concessions relating to the Crown's failure to pay compensation for the railway takings. the Crown conceded that where Māori land was taken in the Taihape district for the NIMTR, under public works legislation that required compensation to be paid, and no compensation was paid, this did not meet the standards of good faith and fair dealing that found expression in the Treaty of Waitangi and was a breach of the Treaty of Waitangi and its principles.[62] However, the Crown then stated that:

> *"The Crown is not in a position to assess whether the same acknowledgement is warranted for Taihape in advance of the evidence on this being heard. There is a need to fully appraise any evidence that may support a concession similar to the Crown acknowledgement made in the context of the Ngāti Rangi deed of settlement."*[63]

79. The Crown therefore has not made any clear concessions in regard to the NIMTR land takings, despite acknowledgement that the takings are due consideration of a concession. The concession does not consider that compensation should have been paid to owners of Māori land when it was acquired under public works legislation, only that compensation should have been paid "when it was required to be paid". It is not clear from the Crown's concessions what the requirements, in the Crown's view, were to provide for compensation.

80. There was a deliberate Crown policy in Taihape to acquire land for development of the NIMTR as quickly and as cheaply as possible. The general views of Taihape Māori towards the NIMTR were not sought at any time. The Native Minister made a number of assurances towards Taihape Māori about the land that would be taken for the NIMTR, but these were not met. The Native Minister assured that:[64]

a) Only sufficient land for the track and stations would be taken;

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[61] Waitangi Tribunal, *Tauranga Moana Report*, page 292
[62] Wai 2180, #3.2.205
[63] Wai 2180, #3.2.205
[64] Wai 2180, #A9, page 140

b) That land alongside the railway belonged to Māori and would not be taken; and

c) Compensation would be paid for every acre taken, and the amount would be determined by arbitration once the land had registered owners.

81. Three-acres of land from Raketāpāuma 2B1 was taken for the North Island Main Trunk railway in 1905. The owners had no notice of the takings and received no compensation. They did not know that they did not have ownership of the land until 30 years later. The three-acre land block where Ropoama Pohe lived is now part of the Turangaarere railway reserve which is located between the Hautapu River and the railway line. Three generations of the Pohe whānau have sought the return of the land, but the Crown has consistently denied requests for the return of the land.[65]

82. Not until 1934, did Ropoama's son, Whatarangi, learn that the Crown owned this section of land. The New Zealand Railway Corporation has asserted that the land is needed for railway operations. However, it is submitted that this position is not tenable because the Claimants lease the land. If the land is available for long term lease, it clearly is not needed for railway operations.

Land taken for the Turangaarere Railway Reserve

83. The Crown took approximately 52 acres from Raketaupama 2B1 for the North Island Main Trunk Railway under the consolidated public works legislation of 1894. The taking included the residence of Ropoama Pohe who had lived there from the 1860s until his death in 1926. Legislation required all owners to be notified of a railway taking but also said that any failure to notify the owner 'shall not invalidate any Proclamation taking the land'. Whatarangi Pohe stated in a letter to the Native Trustee in November 1934 that he was not aware of the full extent of the 1905 taking.[66]

84. Whatarangi travelled to Wellington to petition the Prime Minister personally, asserting that his father was not notified that the Government intended to acquire this land, and no compensation was paid. Whatarangi's request to have the land returned was not granted. It was acknowledged that the original proclamation could be revoked, however, there were other factors to consider, such as whether the land can be spared and further applications from Māori in similar situations. In June 1935, Whatarangi signed a lease for an annual

[65] Wai 903, *He Whiritaunoka Report: The Whanganui Land Report*, at [25.7.2]
[66] Wai 903, *He Whiritaunoka Report: The Whanganui Land Report*, at [25.7.3]

rental of one peppercorn permitting use of the land for cropping or stock only. By 1995, the Crown had arranged some 656 leases for land it had acquired but was not in constant use, usually involving only small plots.

85. The New Zealand Railway Corporation now owns the Turangaarere railway reserve. In 1993, the section was used to access the NIMTR to install an electrification system. In 1997, the Claimant Hari Benevides asked the Corporation to return the land. It was not returned. In May 1997, the lease manager wrote to the Pohe whānau to inform them that the land was not surplus. The land was needed for 'soil stabilisation works' and could be used for bridge replacement. The land therefore remains in the possession of New Zealand Railway Corporation, although it is clearly surplus and should be returned to the Claimants. The continuing refusal to return this land to the Claimants is a clear Crown breach of the Treaty and a blatant disregard for the findings of previous Tribunal's on land taken under public works legislation.

THE IMPOSITION OF NATIVE LAND LEGISLATION

Duty

86. At all times, the Crown has a duty to actively protect the land and resources of Māori and to actively protect Māori in the exercise of tino rangatiratanga over their lands and resources, in accordance with their lore and customs.

Breach

87. The establishment and operation of the Native Land Court pursuant to the Native Land Act 1865 and successive legislation involved the deliberate imposition of a system of title that was intended to and did in fact lead to the alienation of Pohe land and to the undermining of their exercise of tino rangatiratanga.[67]

Particulars

88. The Native Land Court and associated legislation, as well as Crown and local authority policies and practices facilitated or assisted in the alienation of over half of the Pohe whānau lands. The Crown failed to protect hapū and whānau interests, ignoring objections in favour of protecting its own interests.

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[67] Waitangi Tribunal, *The Hauraki Report, Vol 2*, page 777

89. The system of individualised land ownership that the Crown imposed was incompatible with the ownership and management of land on a Hapū or Iwi wide basis and resulted in the erosion of the rangatiratanga of Taihape Māori land and facilitated the alienation of land.

90. The Tribunal's *Hauraki* Report made it clear that this incompatibility was not an unforeseen feature of the 1862 and 1865 Acts, but was the result of the intention of the Crown to replace the customary, collective system of ownership with individualised ownership that would facilitate the purchase of land by Pākehā settlers.[68]

91. Mariana Waitai presented evidence on the effects that Native Land Legislation and the Native Land Court had on the Claimants. In summary, the evidence set out that:[69]

a) The function of the Native Land Court as directed in the legislation was to assimilate the Claimants' native title into an individualised form of English title and to facilitate the rapid transfer of land out of Māori hands into Crown and settler hands;

b) The Claimants' land blocks were owned communally. When the Native Land Court decided what titles to put on the lands, the Court had to ascertain as accurately as possible those entitled to lands in accordance with native custom, even though it was unlikely a European court would know enough about native custom to determine those interests;

c) The result was the destruction of native custom of communal ownership. The 10-owner rule was applied, and it promoted the notion of a Pakeha system of ownership which converted the Claimants' system of ownership into individualised interests. This was prejudicial to the system of customary ownership;

d) The Court created a system which was simple to discern by their Court's rules. It was a Pakeha system that simplified tikanga, froze native entitlements pursuant to their rules and laws and removed them altogether;

e) Loss of land and autonomy highlights the vulnerability of Māori as they negotiated the shifting rules of pre-emption and the changing notions of ownership; and

[68] *The Hauraki Report* (Wai 686, 2006) Vol 2, at 683
[69] Wai 2180, #G20, pages 2-4

f) Participation in Native Land Court proceedings was a costly and fruitless exercise due to survey and court-related costs, and its only utility was to facilitate the alienation of the Claimants' lands.

CROWN FAILURE TO PROTECT TAIHAPE WATERWAYS FROM DAMAGE

Duty

92. By removing control and ownership of the waterways from the Pohe whānau, the Crown assumed the obligation to manage the Rangitikei River and its tributaries and the Hautapu River and waterways of the rohe in such a way as to ensure the continued flourishing of taonga species, that recognises the physical, economic, cultural and spiritual importance of the waterways to the Pohe whānau and ensures the Pohe whānau's ongoing ability to access the waterways and their resources.

Breach

93. The Crown has historically failed to manage the natural resources of the rohe in accordance with the above principles. The result of this failure has been the destruction of wetlands, decline of the quality of freshwater and the decline and endangerment of native species of flora and fauna.

94. Contemporary efforts to ameliorate and reverse this environmental damage, which commenced with the enactment of the Resource Management Act, have not only failed on their own terms to maintain a sustainable environment but they have failed to take sufficient account of the beliefs, interests or matauranga of the Pohe whānau or to consult meaningfully with them.

Particulars

95. The Taihape district has experienced a substantial transformation due to the widespread introduction of pastoral agriculture, and in particular the introduction of sheep farming.[70] Large areas of the district's indigenous forests have been felled or burnt to allow for agriculture and to a much lesser extent forestry. This transformation has had a significant impact on the biodiversity of the district, with a significant impact on flora and fauna which

[70] Wai 2180, #A10, page 8

were a key part of the pre-European Māori economy, and which remain highly valued by tangata whenua.[71]

96. Rivers and waterways have suffered as a result of Crown action. The Claimants have carried out customary activities within the Rangitikei River and its tributaries, the Hautapu River, and the Moawhango River, among others. Each of these awa have suffered from gradual deterioration of the quality of water and biodiversity as a result of Crown activity.

97. Authority over these rivers was transferred over the decades from Māori to Crown authority. This transfer has not occurred in the way that was anticipated by Te Tiriti – being that the different types of authority would operate side-by-side. The Crown authority was invariably administered as an "exclusive authority", with little or no space provided in the regulatory structures for Māori authority to serve and thrive.[72]

Rangitikei River and its tributaries

98. Mr. David Alexander closely examined Crown authority over the waterways in his *Rangitikei River and its Tributaries Historical Report* (#A187). The key points arising from the report are:

a) There was a lack of clear legal basis for Crown's authority over the Rangitikei River. Instead, there was gradual encroachment of the Crown's authority.

b) There was a general deterioration in the quality of water and biodiversity in the rivers following European settlement. There was greater damage to the lower rather than the upper reaches of the river.

c) There was a lack of consultation with Taihape Māori about management of the Rangitikei River up to the Resource Management Act 1991 (RMA). Even after the RMA, Māori faced significant difficulties in participating effectively in the management process.

d) There was an almost complete absence of Crown consideration for the customary fishing rights of Rangitikei River Māori.

[71] Wai 2180, #A10, page 8
[72] Wai 2180, #A40, page 11

e) There was an absence of effective consultation on gravel extraction.

f) There was a lack of consultation regarding commencement of human waste discharge into the Rangitikei River. Consultation under the RMA has led to local iwi indicating their opposition to discharge and proposing pragmatic remedial measures in the short term.

99. At Hearing Week 2, Counsel questioned Mr. Alexander on his report and the value of the waterways.[73] During questioning, Mr. Alexander confirmed that:

a) Fishing and sighting of the "black flounder" has declined. The species is not listed as nationally threated, so the Department of Conservation has not taken an interest in protecting the site.

b) Local iwi contribution can help to manage the waterways and to protect biodiversity. This would include sustainable management.

c) Cultural values are not given the same respect as scientific values by entities such as Department of Conservation.

d) Mr. Alexander was not aware if nga hapū o Rangitikei were/are consulted or involved with regional iwi in relation to setting quotas.

100. Gravel washing was an initial concern. Water rights were given to extract gravel, with downstream gravel being a form of water pollution.

101. The evidence filed and presented in this inquiry demonstrates the clear lack of consultation and consideration of iwi interests in the Crown's management of and assumed authority over the Rangitikei River and its tributaries. At no time have the Claimants ever been properly consulted regarding Crown activities that may affect their awa.

Hautapu River

102. The Hautapu river is a tributary of the Rangitikei river. The Pohe whānau homestead on Raketapauma 2B1C is located on the south side of the Hautapu river. The Hautapu river is

[73] Wai 2180, #4.1.9, pages 322-326

the Claimants' awa and water source.[74] The Hautapu played a significant role during the Kokako hui and the Turangaarere hui as a rich source of food for those who attended.[75]

103. The Hautapu river suffered immense deterioration as a result of Crown activity. As presented by Hari Benevides, the Hautapu river has been polluted by Gardner's mill, which remains today.[76] This prevented the Pohe whānau from carrying out their customary activities to support their whānau.

104. At Hearing Week 2, Counsel questioned Messrs Paul Meredith and Robert Joseph on the #A44 *Ko Rangitīkei Te Awa: The Rangitīkei River and Its Tributaries Cultural Perspectives Report*.[77] The line of questioning focused on the pollution of the Hautapu river and its significance of a Taonga. Meredith and Joseph confirmed that it was heavily polluted due to sewage, from the Taihape township, storm water, a nearby dump pit and a general dumping place for waste for the council. The water is not drinkable.

105. Gravel extraction from the river gave rise to a loss of tino rangatiratanga of the Claimants and diminished kaitiakitanga within the waterways. This was because there was no consent from tangata whenua for the gravel extraction, and their relationship with the awa was undermined. this cultural relationship was not discussed in the #A44 report, although the authors acknowledged the cultural relationship during questioning.

106. The Hautapu River was also the subject of cross examination during Hearing Week 8. Counsel questioned Mr. David Armstrong on the #A45 report *The Impact of Environmental Change in the Taihape District, 1840-c1970.*[78] Mr. Armstrong noted that the pollution from refuse, abattoir, sewage and sawdust from sawmills was a problem that the Crown was aware of, at least in 1908. The Crown has the legislative power to prevent pollution in respect of native and introduced species under the section 94(i) of the Fisheries Act 1908. The Minister of Health was aware of untreated sewage entering the river. It was legal under the Fisheries Act regulation and the Acclimatisation Society recognised this in 1963. However, there was no evidence that the Ministry of Health considered prosecution under the Water Pollution Act 1953. The issue was raised with the council in 1958 and again in 1969.[79]

[74] Wai 2180, #F8, page 2
[75] Wai 2180, #F8, page 3
[76] Wai 2180, #F8, page 5
[77] Wai 2180, #4.1.9, pages 174-179
[78] Wai 2180, #4.1.16, pages 222-224
[79] Wai 2180, #4.1.16, pages 222-224

107. What is patently clear is that the Crown had the knowledge of and the means to stop/prevent the degradation of the Rangitikei River and the Hautapu River, yet did not act to do so to the detriment of the Claimants and wider Taihape Māori who had an extensive cultural relationship with the rivers and waterways.

LAND TAKINGS FOR SCENIC RESERVES

Duty

108. Pursuant to the Treaty of Waitangi, the Crown has a duty to act fairly, reasonably and in good faith in all respects. The Crown has a duty to actively protect Māori in the exercise of their rangatiratanga over their lands and resources. The Crown has a duty to consult with Māori before making decisions which may impact on Māori interests protected by the Treaty.

Breach

109. Scenic reserves legislation and related enactments have been enacted by the Crown in breach of the duty outlined above.

110. Various takings for public works purposes within the rohe of the Pohe whānau were carried out under the aegis of the scenic reserve legislation in breach of the Treaty of Waitangi and its principles.

Particulars

111. There are lands adjoining the Pohe lands on the Raketapauma block within the district which are now held under the Scenic Reserves Act. The traditional customary lands formerly in Pohe ownership passed from the Crown to one of its agents under that Act. The Pohe whānau did not consent for the Scenic Reserves to be created or for any government agency to hold them in any capacity. The land taken from the Claimants for scenic reserves is detailed in this section.

Maungakaretu Scenic Reserve

112. In 1911, parts of Raketaupama 2B1 and Ngaurukehu A No. 10 sub 1 & 2A (Whanganui Inquiry District) and Motukawa 2B7A (located between Taihape and Turangaarere) were

taken for the Maungakaretu Scenic Reserve (now known as the Ngaurukehu Scientific Reserve).[80]

113. Counsel questioned Mr. Philip Cleaver on his #A9 report on *Taking of Māori Land for Public Works in the Taihape Inquiry District* during Hearing Week 6.[81] The questioning discussed the Scenic Reserves Act amendment to allow a flexible solution to create reserves without the owners having to relinquish full title. The relevant legislation was subject to constant amendments and revision to try and address new situations as they arose. It was confirmed during questioning that the Crown negotiated with European leaseholders regarding the reserves, but there was no evidence that the Crown negotiated with the Māori owners.

114. In terms of compensation, the Crown notified all of the owners regarding compensation, except the owners of Raketapauma. No reason why they failed to notify the owners of Raketapauma was given. Mr. Cleaver agreed that the owners could have been contacted and consulted in the first instance. In this way, the treatment and efforts to accommodate European interests by the Crown was different to the treatment of Māori interests. For example, lessees (sawmillers) of Raketapauma 2B1 were given cutting rights on the adjacent forested land that is Crown owned land and allowed an exchange from the scenic reserve. Ultimately the Crown determined the level of compensation not the Māori owners as no negotiations took place.[82]

Ngaurukehu Scientific/Scenic Reserve

115. Ngaurukehu was a scenic reserve that was designated as a scientific reserve. It was formally known as the Maungakaretu reserve. This was done without consultation with the Claimants and without public notification, as confirmed during questioning of Mr. David Alexander on the #A38 *Environmental Issues & Resource Management (Land) in Taihape Inquiry District, 1970s-2010* report during Hearing Week 8.[83]

116. The Ngaurukehu reserve was also the subject of questioning at Hearing Week 9. Counsel questioned Mr. Bill Fleury on evidence given on behalf of the Department of Conservation (#M7).[84] The line of questioning confirmed that:

[80] Wai 2180, #A9, page 197
[81] Wai 2180, #4.1.14, pages 325-337
[82] Wai 2180, #4.1.14, pages 325-327
[83] Wai 2180, #4.1.16, pages 336-337
[84] Wai 2180, #4.1.18, pages 497-505

a) Access to reserves are taken for granted by DOC workers, and Māori owners were not acknowledged. Whānau were not provided with information about what the workers will be doing, and there is no meaningful relationship with the workers. Other parties also have interests in the reserve land, but little is known about those interests.

b) The Conservation Management Strategy (CMS) 1997 consultation was done at a generic level. The focus was on consultation with the general public rather than the hapū and iwi who have mana whenua over the land.

RATING

Duty

117. At all times, the Crown has a duty to actively protect the land and resources of Māori and to actively protect Māori in the exercise of rangatiratanga over their lands and resources, in accordance with their lore and customs.

118. The Crown cannot by way of delegation to a third party divest itself from these Treaty obligations.

Breach

119. It is submitted that the Crown unfairly and without thought to its duties under Te Tiriti levied rates against mana whenua land and proceeded to use unpaid rates as a tool to forcibly acquire mana whenua land.

Particulars

120. As set out in the Sixth Amended Statement of Claim, the Pohe whānau have been prejudicially affected by legislation and instruments which ultimately made Māori land subject to rating, even if the Māori owners of the land received no tangible benefits from government utilities such as roads. .[85] Research has not been able to locate any consultation or discussion with Māori in the Inquiry district regarding the circumstances in which Māori would be required to pay rates. Government legislation or policies did not stipulate any consultation process. Māori were not represented in either the Rangitikei or Hawkes Bay County Councils.[86] Overall, the rating of Māori land contributed to financial pressures,

[85] Wai 2180, #A37, page 39
[86] Wai 2180, #A37, page 288

which were significant factors in the ultimate sale of Pohe land. It is submitted that the Crown unfairly and without consideration of its obligations under Te Tiriti levied rates against mana whenua land and proceeded to use unpaid rates as a tool to forcibly acquire mana whenua land.

121. From the date of the enactment of the Crown and Native Lands Rating Act 1882, successive legislation provided local authorities with wide powers to rate Māori land. It was not until the Local Government Rating Act 2002 that local authorities were required to adopt a policy on the remission of rates on Māori land. Councils actively pursued the owners for the non-payment of rates, taking out charging and receivership orders in respect of the land which gave rise to further alienation.

122. At Hearing Week 4, Counsel questioned Suzanne Woodley on the #A37 *Māori Land Rating and Landlocked Blocks Report 1870-2015*, with a focus on the burden of rates for Māori landowners in the Taihape district.[87] Ms. Woodley stated that the Crown were well-aware of the burden rates would impose on Māori in the district. In fact, the overall purpose of the rating system was to push Māori into selling or leasing their land to get some relief. If they could do this, then they would not have rating liabilities. Motukawa 2B5B had a build-up of rate arrears, as discussed earlier in this submission. The Pohe whānau had to lease land to pay the rates.

123. Different councils (such as the Hawkes Bay County Council) adopted different approaches to the rating of Māori land. For example, the Rating Schedule 1884 exempted lands that had not been put through the Māori Land Court. This changed when councils protested, and exempted blocks were included. The financial motive was that the council obtained payment from the colonial Treasurer even if the rates were not collected.

124. There were fundamental flaws in the 1882 Act. The principal flaw was that rating demands did not have to be served upon the owners. The Act was not consistent with the complex patters of communal land interests in the district. The Crown and/or local authorities were able to protect their own interests in recouping funds, without consultation with local Māori owners, and without due consideration and/or protection of Māori interests.

[87] Wai 2180, #4.1.11, pages 415-420

DISCRETE REMEDIES PROCESS

125. An extant issue remains for the Claimants concerning a Small Discrete Remedies Process that they have been seeking since long before the Taihape inquiry was initiated. The matter was submitted on in the Wai 903 Whanganui Inquiry, but the issue has not been resolved since its conclusion. It is submitted that the discrete remedies process and criteria (or lack thereof) has resulted in a grave injustice to the Claimants, particularly since the conclusion of the Wai 903 inquiry. Counsel acknowledge that the discrete remedies process no longer exists as an avenue for which the Claimants to pursue relief. It is submitted that the removal of the discrete remedies process by the Crown is a contemporary breach of Te Tiriti in and of itself.

126. It is acknowledged that the discrete remedies application has been traversed in the Wai 903 inquiry. However, no substantial response has been forthcoming from the Crown, beyond stating that the process no longer exists.

127. The purpose of the discrete remedies application that was made during the Wai 903 inquiry was to seek the return of Raketaupama 2B1, which was taken for the NIMTR in 1905. As has been referred to earlier in these submissions, the owners had no notice of the taking and received no compensation.[88] The owners did not know that they did not own the land until 30 years later.

128. During the Wai 903 hearing process, the Pohe whānau applied to have the land returned as part of the discrete remedy process but the claim did not meet the criteria of that process. The Crown has stated that they no longer own the land. It is owned by New Zealand Railway Corporation. In that inquiry, the Crown made no submissions on the taking of land for railways purposes in Raketaupama 2B1.

129. The Wai 903 panel made the following findings and recommendations regarding Raketapauma 2B1, although no clear findings were made about the discrete remedy application:

    a) The land is Crown land;

    b) The Crown failed to notify and pay compensation to the Pohe whānau;

[88] See paragraphs 58-60 of these submissions

c) The land was not vital to the railway;

d) Raketaupama 2B1 was not in sole ownership of the Pohe whānau at the time of the taking. However, about 150 years of occupancy, strong evidence of interest predominated;

e) The Crown failed give back the land in the 1930s when Whatarangi Pohe travelled to Wellington to resolve the matter; and

f) The Crown breached the principles of the Treaty and the Pohe whānau claim was well founded.

130. The Wai 903 Tribunal recommended that the Crown return the land to the Pohe whānau, one of four parcels of land that the Crown compulsorily acquired in Raketaupama 2B1 in 1905. This Crown has not carried out the recommendations from the Tribunal. The Claimants seek a response from the Crown on these matters and ultimately seek that the Crown give effect to the recommendations in the Wai 903 Tribunal report.

CONCLUSION

131. To conclude, the Claimants make the following submissions:

a) The Claimants' tipuna maintained his tino rangatiratanga at the Turangaarere hui and Kokako hui. The Crown agents of the time deliberately undermined his tino rangatiratanga;

b) Raketapauma 2B1C and the adjoining portion of land was taken by the Crown without proper notification or compensation. Despite recommendations and findings from the Wai 903 Whanganui District Inquiry. The Crown has taken no action in regard to the return of this land to the Claimants;

c) The Crown's ineffective management of land at the time of partition and its reluctance to use the Public Works Act to lay out roads to provide access to landlocked Māori land have inevitably resulted in landlocked lands such as the Pohe Ōwhāoko blocks;

d) The Crown failed to properly consult with the owners of Mangaohane 1 and 2 during the transfer of title of those blocks and did not ensure that the signatories knew the full implications of what they were signing;

e) The Awarua Native Land Court proceedings and alienations severely undermined the tino rangatiratanga of the Pohe whānau chiefs and other Taihape Rangatira;

f) The Native Land Court was in breach of legislation during the Awarua hearing and did not have true independence from the Crown as it should have;

g) The Crown allowed the Rangitikei River and its tributaries and the Hautapu river to suffer extensive environmental degradation due to its operations and activities around the rivers, as well as the Crown's failure to properly recognise the Claimants' connection to those rivers and allow them to prevent such degradation from occurring on the scale that it did;

h) The Pohe whānau did not consent for the Ngaurukehu Scientific Reserve to be created from the Maungakaretu Reserve or for any government agency to hold the reserve in any capacity;

i) The Crown unfairly levied rates against mana whenua land and proceeded to use unpaid rates as a tool to forcibly acquire mana whenua land; and

j) The Crown has continually ignored the Claimants' request for a Discrete Remedies Process to be implemented, so that they may seek the return of land that was acquired for the NIMTR.

132. The Claimants seek the following findings and recommendations from the Tribunal:

a) That their claims in the Taihape Inquiry District against the Crown are well founded;

b) That the Crown return to the Pohe whānau the lands as detailed above;

c) That the land interests gifted by Te Oti Pohe (II) to the Crown for the resettlement of Māori WWII veterans be returned directly to the Pohe descendants;

d) Recommendations that the Crown seeks to remedy their actions which have been found to be in breach of the Treaty of Waitangi, by way of compensation to the Claimants;

e) That the Crown consider implementing a new Discrete Remedies Process that the Claimants may use to seek the return of their land that was taken for the NIMTR; and

f) Any such other remedy as the Tribunal considers appropriate.

DATED this 20th day of October 2020

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