IN THE WAITANGI TRIBUNAL **WAI 2180**
TAIHAPE - RANGITĪKEI KI RANGIPŌ INQUIRY DISTRICT **WAI 784**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of Taihape - Rangitīkei ki Rangipō Inquiry (Wai 2180)

AND

IN THE MATTER of a claim by Rodney Graham and others on behalf of themselves and the Kauwhata Treaty Claims Komiti and Ngā Uri Tangata o Ngāti Kauwhata ki Te Tonga (Wai 784)

CLOSING SUBMISSIONS FOR THE WAI 784 NGĀTI KAUWHATA CLAIM

Dated: this 20th day of October 2020

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

> *What the Crown has done to Ngāti Kauwhata throughout the motu has destabilised us – society has been eroded, and we have been deprived of much of what it is to be Ngāti Kauwhata and to be Māori.*
>
> *Any loss of tikanga or kawa is detrimental to our people. The Crown has restricted us in so many ways. We have been left with almost no place to exist as Māori. Our ability to exercise rangatiratanga has been taken away from us. In Kauwhata, a resurgence has begun, but there is still a long way to go.*[1]
>
> - *Rodney Graham*

1. These are the closing submissions for Wai 784, a claim by Rodney Graham and others on behalf of themselves and the Kauwhata Treaty Claims Komiti and Ngā Uri Tangata o Ngāti Kauwhata ki Te Tonga ("**Wai 784 Ngāti Kauwhata claim**").

2. These closing submissions should be read in conjunction with the final Amended Statement of Claim and the Opening Submissions for the Wai 784 Ngāti Kauwhata claim for the Taihape – Rangitīkei ki Rangipō inquiry district (the "**inquiry district**").[2]

The Lasting Footprint of Ngāti Kauwhata

3. In the 1820s, large numbers of Ngāti Kauwhata travelled in great heke from their ancestral heartland in and around Maungatautari in the Waikato, settling in areas now covered by the Porirua ki Manawatū and Taihape – Rangitīkei ki Rangipō inquiry districts. Ngāti Kauwhata exercised mana and tino rangatiratanga throughout its rohe.

4. The interests of Ngāti Kauwhata within this inquiry district lie in its lower reaches.

5. The claimants do not seek to assert exclusive interests within this inquiry district; they seek recognition and protection of their overlapping customary

[1] Amended brief of evidence of Rodney Graham dated 25 September 2018 (Wai 2180, #L4) at [87], [88].
[2] Amended Statement of Claim for the Rangitīkei ki Rangipō (Taihape) District Inquiry, dated 19 August 2016 (Wai 2180 #1.2.3) and Opening Submissions for the Wai 784 Ngāti Kauwhata Claim, dated 3 September 2018 (Wai 2180 #3.3.22).

rights and interests and the recognition of the mana of Ngāti Kauwhata in its rohe.

6. It is the case for the Wai 784 Ngāti Kauwhata claim in this inquiry district that, in spite of an extensive ancestral rohe stretching over a vast area, the footprint of Ngāti Kauwhata in this inquiry district has been diminished as a consequence of acts and omissions of the Crown, and is at risk of being lost altogether.

7. At the heart of the Wai 784 Ngāti Kauwhata claim in this inquiry district, is the desire to prevent this from occurring, and to remedy what has already passed.

The Wai 784 Ngāti Kauwhata claim

> *This claim is not about promoting one account or certain tūpuna ahead of others. But I am not going to step back from the kōrero that I know as tika. I want to leave a historical account for my tamariki, mokopuna, and future generations of Kauwhata.*
>
> - *Rodney Graham*[3]

8. The Wai 784 Ngāti Kauwhata claimants are all descendants of the eponymous ancestor, Kauwhata, the founding ancestor of the iwi Ngāti Kauwhata, a Tainui people.[4]

9. Ngāti Kauwhata are a distinct people from ancient times, who exercised mana and tino rangatiratanga over their ancestral lands. No other group could speak for this iwi, or make decisions for them.[5]

10. The Tribunal will recall the kōrero of lead named claimant for the Wai 784 Ngāti Kauwhata claim, Mr Rodney Graham.[6]

11. Mr Graham, whose koro Tutete Kereama was recognised as the last paramount chief of Ngāti Kauwhata, shared how his personal journey of reconnection with his whakapapa began, and how the Wai 784 Ngāti Kauwhata claim came into being.[7]

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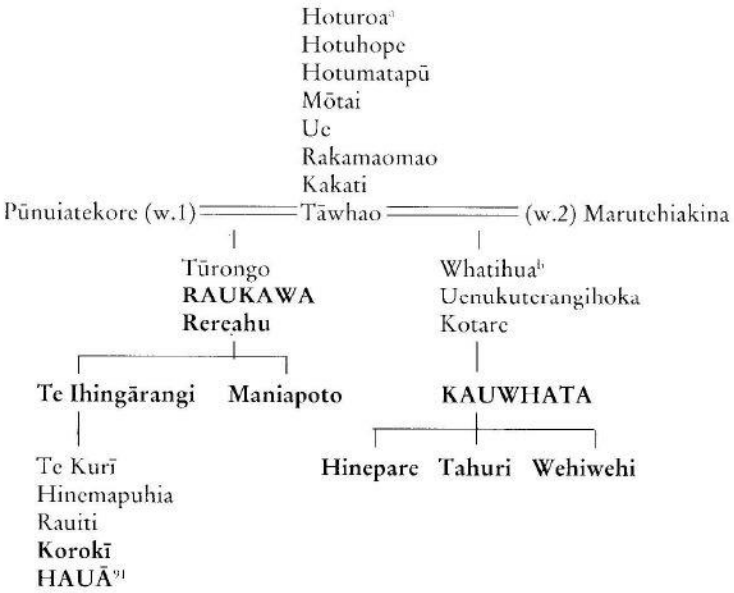
[3] #L4 at [18].
[4] #L4 at [2].
[5] #L4 at [3].
[6] Amended brief of evidence of Rodney Graham dated 25 September 2018 (Wai 2180, #L4).
[7] #L4 at [11]-[18].

12. Mr Graham shared kōrero about the origins of Kauwhata, including, importantly, the distinction between Ngāti Kauwhata and Ngāti Raukawa, a separate iwi with whom Ngāti Kauwhata has long been close allies, but also one with whom at times it has been mistakenly conflated.[8] The important distinction between Ngāti Kauwhata and its allies of Ngāti Raukawa, a separate iwi, is demonstrated by the following whakapapa chart:[9]



[NB: Despite the layout of the genealogy above, Whatihua was the elder brother.]

13. This kōrero then turned to the rohe of Ngāti Kauwhata. Mr Graham spoke about the boundaries of Ngāti Kauwhata and awa of significance that stretch between this inquiry district and further south, including the Ōroua, the Rangitīkei, and the Kiwitea. These awa formed, and continue to form, not only part of the food basket and highways of Ngāti Kauwhata, but also a source of guidance and spiritual sustenance.[10]

14. Mr Graham then spoke of Ngāti Kauwhata today; with boundaries inside and outside this inquiry district continually reduced, awa precious to them harmed, and their rangatiratanga, knowledge and tikanga diminished.[11]

[8] #L4 at [20]-[24].
[9] Walzl, *Tribal Landscape Overview* (Wai 2180 #A12) at 296. For further information around the difference between these iwi, see #L4 at [20]-[24].
[10] #L4 at [25]-[64].
[11] #L4 at [65]-[88].

ROHE

> *I am not fully versed on the history of our tūpuna in this area. So I am careful about what I say; don't go where you don't know. At the same time, I do not wish to disinherit Kauwhata of what it is entitled to.*
>
> *What I do know is that we were here, and that we travelled down in heke through what is now this inquiry district. We do not claim exclusive interests in this area. What we do seek, is recognition and protection of our overlapping customary interests and rights.*
>
> *-Rodney Graham*[12]

There is clear evidence Ngāti Kauwhata had interests within the inquiry district

15. There is clear evidence available on the record as to Ngāti Kauwhata's interests within the inquiry district.

16. This evidence is contained within tāngata whenua kōrero before the Tribunal, and within technical evidence and the Native Land Court minutes on the record of inquiry.

17. In particular, it is evident from these sources that:

    (a) Ngāti Kauwhata has customary rights and interests in a number of blocks in this inquiry district, including Waitapu, Otamakapua, and Mangoira.

    (b) Ngāti Kauwhata holds customary rights and interests in awa that flow within the inquiry district, such as the Ōroua awa, Rangitīkei awa, Kiwitea stream, and the Pohangina awa.

18. Ngāti Kauwhata's assertion of such customary rights and interests has not been challenged by any other claimant group or by the Crown.

Tāngata whenua kōrero before the Tribunal

19. Before the Tribunal, Mr Graham shared how many Ngāti Kauwhata travelled on migrations (including through the inquiry district) and came to settle in areas

[12] #L4 at [25]-[26].

now covered by this inquiry district and the Porirua ki Manawatū inquiry district.[13]

20. Mr Graham gave evidence about how many Ngāti Kauwhata had come down from Maungatautari in the Waikato on great heke starting in around 1825, while others remained in the Waikato, maintaining the ahi kā in those areas. Most of those who came south left after the battle of Taumatawīwī. These heke began following the call of Te Rauparaha's sister, Waitohi.[14]

21. Mr Graham set out how, as at 1840, Ngāti Kauwhata exercised mana and tino rangatiratanga over its rohe, which included lands within this inquiry district.[15]

22. Mr Graham shared how Ngāti Kauwhata assert customary rights and interests in a number of blocks in this inquiry district, including Waitapu, Otamakapua, and Mangoira.[16]

23. Mr Graham set out how Ngāti Kauwhata also asserts rights and interests more broadly throughout the inquiry district, such as those that enabled Ngāti Kauwhata tūpuna to gather resources (including birdlife, tuna and flax) in locations throughout the south of the inquiry district, and to freely travel from their southern kāinga, established after the heke, to and from their traditional homelands in the Waikato.[17]

24. Mr Graham shared kōrero regarding the connections of Ngāti Kauwhata and his tūpuna to the awa that flow within the inquiry district, such as the Ōroua awa, Rangitīkei awa, Kiwitea stream, and the Pohangina awa.[18]

25. Mr Graham detailed how Ngāti Kauwhata are a "river people", and focussed particularly on the connection of his iwi to the Ōroua awa:[19]

> *The Oroua runs through the heart of Kauwhata, and was used for many different purposes by our people. "We have already found a place – Oroua te awa!" – those were the words of our tūpuna to Te Rauparaha.*

[13] #L4 at [28]-[55].
[14] #L4 at [30]-[31].
[15] #L4 at [5].
[16] See #L4 at [52], [53].
[17] See #L4 at [54].
[18] See #L4 at [57], [58]-[64].
[19] See #L4 at [58]-[60], [62], [64].

> *Ngāti Kauwhata had numerous kainga along the Oroua. While the majority of these were located in the Porirua ki Manawatū District, I understand they would have extended up further into this inquiry district, including up to and around Otumore. …*
>
> *Our tūpuna called the awa food baskets. This was with good reason – in the Oroua, we used to catch tuna, flounder, freshwater koura, some whitebait, and lamprey. Our tūpuna would collect drinking water from this awa too – it was cleaner back then. …*
>
> *The awa also had a spiritual side. The ability of the awa to cleanse was important – if anything of gravity occurred, washing yourself in certain places of the awa was a way of cleansing the maemae or whatever was bothering you. …*
>
> *The awa had a protective side – in the same way that we sought to look after it, it was a kaitiaki to Ngāti Kauwhata too. I think it stops us from doing things we might regret.*

Native Land Court minutes on the record

26. Members of Ngāti Kauwhata gave evidence before the Native Land Court in this inquiry district.

27. In particular, Hepanaia Te Punga o Tainui and Takana Te Kawa, both of Ngāti Kauwhata, appeared in the re-hearing and title investigation for the Rangatira block in 1882. Their kōrero for Ngāti Kauwhata gives important information about the iwi's interests and connection to lands within the inquiry district and about its relationship with Ngāti Apa.

28. Hepanaia Te Punga o Tainui, who identified himself as Ngāti Kauwhata and Ngāti Wehi Wehi (and specifically declined to admit himself as Ngāti Raukawa), gave evidence about how members of Ngāti Kauwhata resided in areas within the inquiry district before 1840.

29. Counsel highlight the following evidence, which illustrates that a large group of Ngāti Kauwhata and Ngāti Wehi Wehi came up to Pohue, lived there undisturbed for two years, intermarried with Ngāti Apa, planted crops, hunted, and lived alongside Ngāti Apa:[20]

[20] Excerpts from Rangatira re-hearing and title reinvestigation 1882, Wanganui MB 6: 3-7, 12-13 (Wai 2180 #A30(a)(10)) at 417-421, 426-427.

> *There were 400* [illegible] *who came up to Pohue. We were well received – indeed the favour was on our side. We have always lived in the district since. …*
>
> *I know the Rangatira block now before this court. Rangatira is the name of a pa; it is in the spot which you mention. I was there in the year of the Haowhenua fight (1826). I have caught birds there on the same ranges; the birds (kaka) were feeding on the kowhai trees – we went under Tahataha, the Ngati Apa chief, up the river on the hunting ground for bird spearing. We landed at Tautautoke, below Te Kiekie; this is at Maungatapa, at the boundary, and above Te Houhou – it is the landing place of Rangatira. …*
>
> *At Pohue we resided two years, two planting seasons; and during that time Ngati Apa were never interfered with by any other tribe. After these two years, the young people returned to Waikawa, Otaki and Ohau, leaving the older people at Te Pohue. By this time, we had intermarried. At the time of the Kuititanga (1839) I was at Waikawa. I visited Pohue in the* [illegible] *occasionally. I took part in the Kuititanga. At that time Ngati Apa were here (i.e. in the Rangitikei) so also were Ngati Kauwhata. ….*
>
> *We lived at Te Pohue along with the Ngati Apa in the same houses as them. Turangapito was then resident in his pa Te Ika a Timata on Waituna. The clearings for the plantations on Te Houhou and Parororangi were made by us; it was (previous to this) forest – mahoe, Manuka and kareao. Ngati Apa made the first plantation there; we saw them living there. They had potatoes there in the clearings and we made fresh clearings alongside theirs. We planted potatoes also. That was also what Ngati Apa were doing there, also catching birds. The potatoes were from their supply. At Te Houhou, we merely stayed during the birding season, returning to Te Pohue, the Ngati Apa who were with us doing the same. I have not been higher up than Makaraka. We lived at Te Pohue along with Ngati Apa and we caught birds from there up to Makaraka as we did elsewhere; and returned to Te Pohue at the end of the season. We worked together, we as settlers or immigrants; Ngati Apa as it was their own country."*

30. Further, and crucially, Hepanaia is also clear in his kōrero that Ngāti Kauwhata and Ngāti Wehi Wehi were there on their own mana, while recognizing the mana of Ngāti Apa:[21]

> *It was in consequence of our alliance with the Ngati Apa that we lived at Te Pohue – in there was no other tribe concerned with our residence there. I was*

[21] Excerpts from Rangatira re-hearing and title reinvestigation 1882, Wanganui MB 6: 13 (see Wai 2180 #A30(a)(10)) at 427.

there on the "mana" of Ngati Apa and my own "mana" – and not in right or permission of any other tribe.

31. Taken together, the evidence illustrates the importance of the lands in the inquiry district for Ngāti Kauwhata as a food basket, where they had customary rights and interests that enabled them to live undisturbed and to gather important resources.

32. Takana Te Kawa, who identified himself as Ngāti Kauwhata, endorsed the words of Hepanaia Te Punga o Tainui regarding their occupation at Te Pohue and other places.[22]

Technical evidence on the record

33. Technical evidence ties in neatly with Mr Graham's evidence and that arising from the Rangatira re-hearing:

    (a) This evidence provides an insight into where Te Pohue, Parororangi, and Te Houhou are located within the inquiry district.

        (i) Te Pohue: appears to have included a kāinga, pā and cultivations, situated at the mouth of the Kauwhatau River, opposite the mouth of the Paiponga Stream, and sitting on or near the border between the Awarua and Otamakapua blocks.[23]

        (ii) Parororangi/Pororororangi:[24] was situated on the eastern part of the Otamakapua block. There was a high cliff with rata trees growing on it. There was a shingle bed below this cliff and a potato cultivation was located in this vicinity.[25]

        (iii) Te Houhou: it appears a settlement was located here on the Otamakapua block upriver on the west side of the Rangitīkei River between Mangaonoho and Tauahuruhuru, with birding and

[22] Excerpts from Rangatira re-hearing and title reinvestigation 1882, Wanganui MB 6: 14, 15 (see Wai 2180 #A30(a)(10)) at 428-429.
[23] Walzl, *Tribal Landscape Overview* (Wai 2180 #A12) at 201, 212, map 17B.
[24] It appears that these locations are the same, with different spellings found in different contexts on the record; see for example 641-642, 680-681 of Walzl, *Tribal Landscape Overview* (Wai 2180 #A12).
[25] Walzl, *Tribal Landscape Overview* (Wai 2180 #A12) at 680-681.

fishing sites.[26] There is also a reference in a separate source to there being a Te Houhou on the Taraketi block.[27]

(b) This evidence makes it clear that awa in which Ngāti Kauwhata assert important customary rights and interests flow through the inquiry district. For example:[28]

(i) The Ōroua awa catchment covers parts of the Waitapu, Otamakapua, and Mangoira blocks;

(ii) The Kiwitea awa catchment covers parts of the Waitapu and Otamakapua blocks; and

(iii) The Pohangina awa catchment covers parts of the Otumore block.

(c) This evidence illustrates that Ngāti Kauwhata also asserts customary interests in blocks just south of the inquiry district boundary, such as at Rangitīkei-Manawatū and Te Āhuaturanga. To elaborate:

(i) The evidence confirms that Ngāti Kauwhata holds interests in the Rangitīkei-Manawatū block, of which Waitapu was ostensibly intended by the Crown to be a part. The Crown acquired the Rangitīkei-Manawatū block (with the exception of very limited reserves) after a lengthy battle by much of Ngāti Kauwhata and other groups to retain their interests in the block.[29]

(ii) The evidence confirms that Ngāti Kauwhata held interests in lands within the Te Āhuaturanga block, which is the block to the south of the Mangoira and Otumore blocks and to the east/south-east of the Otamakapua block. Ngāti Kauwhata was a group with whom Rangitāne needed to negotiate with when it wished to sell the Te Āhuaturanga block, as is illustrated by the following

[26] Walzl, *Tribal Landscape Overview* (Wai 2180 #A12) at 199, map16A, 679.
[27] See Stirling, *Taihape District Nineteenth Century Overview* (Wai 2180, #A43) at 151.
[28] See for example, #L4(b), Alexander, *The Rangitikei River, Its Tributary Waterways, And Other Taihape Waterways Scoping Report* (Wai 2180, #A4) at 14, Map 6.
[29] See for example, Hearn, *One past, many histories: tribal land and politics in the nineteenth century* (Wai 2180, #A42) at 329, 420, 648 and Chapters 4 to 9 more generally.

excerpts from Dr Hearn's report, *One past, many histories: tribal land and politics in the nineteenth century*:[30]

> *Evidence presented during the Himatangi hearing of 1868 indicated that Ngati Raukawa considered the sale as proposed by Te Hirawanu and assented to by Rangitane. Some 40 rangatira and other 'principal men' of Ngati Raukawa accompanied Searancke to meet Ngati Kauwhata and Ngati Te Hiihi to discuss Rangitane's desire to sell. According to Parakaia Te Pouepa, the reason for the meeting at Puketotara was the 'tono' or request of Rangitane for consent to the proposed sale. The matter, he recorded, was 'not settled on account of the opposition of Ngati Kauwhata.' It was then that he, together with Nepia and Aperahama Te Huruhuru, suggested that a block bounded by the Oroua should be sold jointly by Ngati Kauwhata, Rangitane, and Ngati Te Hiihi. Neither Ngati Kauwhata nor Ngati Te Hiihi would accept that proposal. …*
>
> *It followed that Rangitane had not required Ngati Raukawa's consent to the sale of Te Ahuaturanga. According to Peeti Te Aweawe:*
>
> > *Te Hirawanu sold Te Ahu o Turanga. I fixed the boundaries. At the first I and my tribe were not willing to sell all that – did not approve of sale by Hirawanu – When Ngati Raukawa saw that I had assented they came also – The assent of Ngati Raukawa was not required … for the 'mana' was with Rangitane and Hirawanu. Ngatiraukawa had no right. The man who had a right was Tapa Te Whata he is Ngati Kauhata [sic].* [underline added].

TE TIRITI O WAITANGI

34. By Te Tiriti, the Crown:

(a) promised to protect the rights guaranteed by Te Tiriti and perform the obligations arising out of Te Tiriti;

[30] Hearn, *One past, many histories: tribal land and politics in the nineteenth century* (Wai 2180, #A42) at 148-161, see in particular 153, 157, 160.

(b) confirmed and guaranteed to Ngāti Kauwhata their tino rangatiratanga, including the full, exclusive and undisturbed possession of their whenua, estates, forests, fisheries, other properties, rivers, waterways and taonga; and

(c) extended to Ngāti Kauwhata all the rights and privileges of British subjects.

35. To the extent they complement and are relevant to the Wai 784 Ngāti Kauwhata closing submissions, counsel adopt the submissions relating to Te Tiriti duties as set out in the generic claimant closing submissions that address particular causes of action set out below, namely in relation to Crown purchasing, land-based environmental issues, public works, and cultural taonga.[31]

CAUSE OF ACTION: NATIVE LAND COURT

Private ownership was not us, it was not tikanga, whenua was not of so-and-so's to sell or divide up.[32]

- *Rodney Graham*

36. This section addresses issues including [3.1] – [3.34] of the Tribunal Statement of Issues ("**TSOI**").

37. Counsel will confirm if the generic claimant closing submissions on the Native Land Court are adopted by the Wai 784 Ngāti Kauwhata claim, once received and considered. Counsel reserve the right to amend the closing submissions for the Wai 784 Ngāti Kauwhata claim in relation to the Native Land Court, should this be necessary.

38. To the extent they complement and are relevant to the Wai 784 Ngāti Kauwhata closing submissions, counsel adopt the generic claimant closing submissions in relation to cultural taonga (and any associated appendices), which also address matters relating to the Native Land Court.

39. Counsel submit further:

[31] Counsel are yet to receive and/or to consider the generic claimant closing submissions regarding water-based environmental issues or the Native Land Court. Counsel will confirm if these are adopted by Wai 784, once received and considered. Counsel reserve the right to amend the closing submissions for Wai 784 in relation to these issues, should this be necessary.
[32] #L4 at [71].

(a) A key issue with the Native Land Court system for Ngāti Kauwhata in this inquiry district was that it was not a system set up by or with Māori, for the benefit of Māori. Rather, the Crown:

(i) Failed to engage sufficiently with Taihape Māori about the establishment and operation of the Native Land Court; and

(ii) Failed to provide a mechanism that adequately investigated, determined and, thereafter, recognised and protected the full range of customary rights and interests associated with whenua in the inquiry district, including those of Ngāti Kauwhata.

(b) The customary rights and interests of particular concern to Ngāti Kauwhata that were impacted by the Native Land Court's operation include their rights and interests in Otamakapua, Mangoira and Otumore, in ngā awa Ōroua, Rangitīkei and Kiwitea, and in rights to gather resources and pass through areas of the inquiry district.

40. To elaborate:

(a) The Crown failed to engage sufficiently with Taihape Māori, including Ngāti Kauwhata, about what the Native Land Court system would look like, in order to ensure that this was fit for purpose and to obtain their consent to a system that would come to impact so significantly on the exercise of their tino rangatiratanga. Counsel have not located any evidence on the record to suggest that the introduction of the Native Land Court system by the Crown was carried out with the consent of Ngāti Kauwhata, as an iwi with rights and interests in the inquiry district.

(b) It is clear that Māori customary land tenure incorporated a range of different rights and interests, including, for instance, rights of occupation, rights to access land for certain resources and resource collection, and the right to pass or travel over whenua. Rights and interests could also, for example, be overlapping or shared.[33]

[33] Hearing week one transcript (Wai 2180, #4.1.8) answers of T Walzl at 209.

(c) However, the Native Land Court applied a simplistic, narrow, and formulaic approach to custom,[34] conducted investigations and awarded individual and exclusive title to land in the inquiry district. Indeed, as acknowledged by Mr Tony Walzl, the Native Land Court system failed to reflect all rights and obligations under a customary tenure system. Under cross-examination he stated:[35]

> *But certainly when you go into that next level down that I think you're [Mr L Watson] talking about […] you know those ahi kā levels and how people were using lands and stuff like that like, well the Land Court system by its very nature never reflects that level. Because as soon as you start giving people individual interest in certain places you are moving away from that customary tenure. You know because customary tenure has an element of fluidity as well.* [emphasis added]
>
> *…*
>
> *I'd be surprised it encapsulated like all their interests and all the places they might've gather food or travelled to or et cetera, so I would answer that "I can't imagine how it could".*

(d) Indeed, the Crown has agreed that "*Native Land Laws undermine the communal nature and tribal structure of Taihape Māori society and thereby contributed to land loss*" is indicative of how far removed the Crown's Native Land Court system was from the realities of how customary rights and interests operated.[36]

(e) The issues with the form of title awarded also affected waterways in the inquiry district in which Ngāti Kauwhata asserts interests, including the Ōroua, Rangitīkei, and Kiwitea awa. The Native Land Court awarded individual and exclusive freehold land title to lands adjoining awa and (under common law) the riverbeds to other groups. This issue is expanded upon in the cause of action that follows.

(f) As set out above, members of Ngāti Kauwhata, in particular Hepanaia Te Punga o Tainui and Takana Te Kawa, appeared in one investigation

[34] See for example observations in Waitangi Tribunal, *Rekohu Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wai 64, 2001) at 135.
[35] Hearing week one transcript (Wai 2180, #4.1.8) answers of T Walzl at 207, 209.
[36] See Hearing week three transcript (Wai 2180, #4.1.10) at 608-609.

in this inquiry district, namely the Rangatira block re-hearing and title investigation in 1882. The reason for which they presented evidence at this particular hearing is unclear (although it appears likely they were called as part of the Ngāti Apa case),[37] but what is evident, is that they clearly set out their connections to areas within blocks in the inquiry district. Otamakapua, Mangoira and Otumore, three of the blocks in which Ngāti Kauwhata asserts customary interests the inquiry district, were put through the Native Land Court in the 1870s, 1880s and early 1900s.[38] Ngāti Kauwhata do not appear to have participated in these hearings or to have received recognition of their rights and interests by the Native Land Court.[39] It is unclear why they did not participate, exactly, but counsel submit that:

(i) The intense pressures faced by Ngāti Kauwhata during this time in both their northern rohe (around Te Rohe Pōtae and the Waikato) and southern rohe (Porirua ki Manawatū) appear likely to have played into this. Counsel refer particularly in this regard to Native Land Court hearings and Ngati Kauwhata Claims Commission of 1881 in the north, along with the acquisition of the Rangitīkei-Manawatū (and associated Native Land Court hearings) and other Native Land Court hearings,[40] which all took a significant toll on Ngāti Kauwhata, including financially. As acknowledged by Stirling, in "*addition to the costs of these title processes – in court fees, legal expenses, and survey costs – there was the enormous expense of travel, accommodation, living expenses away from home for many people, and lost production during these, at times, seemingly endless and expensive hearings in far-away places*"[41]. In short, Ngāti Kauwhata were already fighting a multitude of fires throughout their rohe. Counsel highlight submissions of counsel in the

[37] The minutes indicate the claimants were called by Ngāti Apa's counsel, Dr Buller.
[38] Otamakapua 2 in 1879, Mangoira in 1877, and Otamakapua 1 in 1880, Otumore in 1906. See Stirling, *Taihape District Nineteenth Century Overview* (Wai 2180, #A43) at 42, 71-73, 86-95, 128, Walzl, *Twentieth Century Overview* (Wai 2180, #A46) at 37, footnote 15.
[39] Although counsel note that Ngāti Kauwhata and Ngāti Wehi Wehi are mentioned in the Otumore investigation by a witness; see Otumore title investigation 1906, Otaki MB 80: 73-76 (see Wai 2180 #A30(a)(8)) at 528-531.
[40] See for example, Hearn, *One past, many histories: tribal land and politics in the nineteenth century* (Wai 2180, #A42) at 21, Chapters 5-9, 618-623.
[41] Stirling, *Taihape District Nineteenth Century Overview* (Wai 2180, #A43) at 4.

generic claimant closing submissions relating to cultural taonga as follows:[42]

> *Tribal identity was wholly undermined when certain groups with traditional interests in lands over which title was being determined were never given the opportunity to participate in a hearing, either because they were not aware of the proceeding or because they were incapacitated in some way from attending.*

(ii) The fact that the form of title provided for through the Native Land Court process did not cater appropriately to the nature of the customary rights and interests Ngāti Kauwhata asserted may also have been a factor in any decision not to appear.

41. Consequences of the failure of the Crown introduced and operated Native Land Court to provide a form of title which would protect the nature of Ngāti Kauwhata's customary rights and interests in the inquiry district were innumerable. These include that Ngāti Kauwhata became:[43]

(a) Unable to exercise their mana and tino rangatiratanga in respect of the customary rights and interests they hold in the inquiry district as their tūpuna did, including in respect of flora and fauna resources and their precious awa;

(b) Unable to access, use, enjoy and benefit from those resources or awa in the inquiry district due to land being privately owned;

(c) Unable to use the awa and adjacent lands as a means to access resources or to travel through the inquiry district as their tūpuna were able to do; and

(d) Unable to retain the full breadth of tribal knowledge once held about their customary rights and interests in the inquiry district.

42. Ngāti Kauwhata were not compensated for the loss of their ability to exercise these rights and interests.

[42] Generic Closing Submissions regarding cultural taonga, dated 13 October 2020 (Wai 2180, #3.3.55) at [317].
[43] See kōrero in #L4 at [65]-[69], [85], [88].

43. One of the significant concerns with the Native Land Court system for Ngāti Kauwhata was neatly summed up by Mr Graham before the Tribunal:[44]

> *It seems to me that the Native Land Court system set up by the Crown was not worried about complex customary rights of Māori, and was more concerned with transferring land to settlers.*

CAUSE OF ACTION: VESTED OWNERSHIP OF RIVERBEDS

44. This section addresses issues including [16.12] – [16.18] of the TSOI.

45. Counsel will confirm if the generic claimant closing submissions in relation to water-based environmental issues are adopted by the Wai 784 Ngāti Kauwhata claim, once considered. Counsel reserve the right to amend the closing submissions for the Wai 784 Ngāti Kauwhata claim in relation to the vested ownership of riverbeds, should this be necessary.

46. In respect of the vested ownership of riverbeds, counsel submit further:

(a) The key issue for the Wai 784 Ngāti Kauwhata claimants is that their tūpuna were not adequately consulted on and did not consent to the enactments or to the adoption of English common law into New Zealand that vested the ownership and control of riverbeds in others.

(b) These enactments and the common law resulted in the inadequate protection of and the alienation of customary rights and interests of Ngāti Kauwhata in their precious awa.

47. To elaborate:

(a) As set out above, Ngāti Kauwhata have customary rights and interests in awa that flow within the inquiry district, such as the Ōroua awa, Rangitīkei awa, Kiwitea stream, and the Pohangina awa. These awa are important taonga of Ngāti Kauwhata and offered bountiful resources:

(i) As set out earlier, Mr Graham's kōrero before the Tribunal expressed how:[45]

[44] #L4 at [72].
[45] See #L4 at [58]-[60], [62], [64].

The Oroua runs through the heart of Kauwhata, and was used for many different purposes by our people. "We have already found a place – Oroua te awa!" – those were the words of our tūpuna to Te Rauparaha. …

Our tūpuna called the awa food baskets. This was with good reason – in the Oroua, we used to catch tuna, flounder, freshwater koura, some whitebait, and lamprey. Our tūpuna would collect drinking water from this awa too – it was cleaner back then. …

The awa also had a spiritual side. The ability of the awa to cleanse was important – if anything of gravity occurred, washing yourself in certain places of the awa was a way of cleansing the maemae or whatever was bothering you. …

The awa had a protective side – in the same way that we sought to look after it, it was a kaitiaki to Ngāti Kauwhata too. I think it stops us from doing things we might regret.

(ii) Technical evidence confirms that these awa were a source of bountiful resources, for example, the Kiwitea Stream was renowned as a great eel river, while Ruoatutahi was an eel lagoon located between the Kiwitea and Ōroua Streams.[46]

(b) By Te Tiriti, Wai 784 Ngāti Kauwhata claimants were guaranteed tino rangatiratanga over their rohe, including over these awa.

(c) However, instead of recognising and protecting these rights, the Crown introduced common law and enactments generally resulted in the loss or reduction of control and/or ownership of these awa. In particular:

(i) The Crown imported English common law into New Zealand, in particular through the English Laws Act 1858. Under English common law, the holder of the title to adjoining riparian land was presumed to own to the centre of a river (known legally as the ad medium filum aquae presumption).[47] Counsel understand that

[46] Walzl, *Tribal Landscape Overview* (Wai 2180 #A12) at 199.
[47] Alexander, *Rangitīkei River and Its Tributaries Historical Report*, (Wai 2180 #A40) at 76.

this was the case for the Ōroua, Kiwitea, and Pohangina awa in this inquiry district.[48]

(ii) Further, the Crown enacted the Coal-mines Act Amendment Act 1903 which vested ownership of the riverbeds of "navigable" rivers in the Crown. Ownership of "non-navigable" rivers continued as per common law.[49] The Crown asserted that parts of the Rangitīkei River were "navigable" and therefore ownership of its riverbed vested to the Crown.[50] This was based on an extremely dubious interpretation of the Coal-mines Act Amendment Act,[51] which in turn led to significantly increased control over the awa and resources by the Crown and its delegated authorities, including catchment boards and later, regional councils.[52]

(d) Counsel have not located any evidence on the record to suggest that such actions by the Crown were carried out with the consent of Ngāti Kauwhata, as an iwi with interests in these awa.

(e) The vesting of the riverbeds of these awa (either in whole or in part) in the exclusive ownership and control of others has significantly reduced the ability of Ngāti Kauwhata to exercise their tino rangatiratanga or kaitiakitanga over their awa, or to use, enjoy and benefit from these awa and their resources.[53]

(f) As stated by David Alexander, if claims are valid:[54]

> *The stance adopted by the Crown arises from one and three-quarter centuries of reliance on imported English law, title assertions, and the enactment of New Zealand statutes that wholly or partially amount to*

[48] From the record of inquiry, Rangitīkei appears to be the only awa of which a portion in the inquiry district was considered "navigable" within the meaning of the Coal-mines Act Amendment Act 1903.
[49] Coal-mines Act Amendment Act 1903 (which amended and added to the Coal-mines Act 1891), s14.
[50] Alexander, Summary of *Rangitīkei River and Its Tributaries Historical Report* (Wai 2180 #A40(b)), at 5.
[51] A reliance on the ability of Māori to navigate the awa prior to the time the relevant legislation came into force; see Alexander, Summary of *Rangitīkei River and Its Tributaries Historical Report* (Wai 2180 #A40(b)), at 5.
[52] Alexander, Summary of *Rangitīkei River and Its Tributaries Historical Report*, (Wai 2180 #A40(b)), at 5, 12.
[53] #L4 at [84]. Counsel also note that, for example, royalties from gravel extraction would generally be paid to adjoining landowners where ad medium filum rights apply and to the relevant local authority when an awa is navigable; see for example Alexander, Summary of *Rangitīkei River and Its Tributaries Historical Report*, (Wai 2180 #A40(b)), at 12.
[54] Alexander, Summary of *Rangitīkei River and Its Tributaries Historical Report* (Wai 2180 #A40(b)), at 3. This was stated in particular in relation to the Rangitīkei awa, but counsel submit it has equal applicability to the other awa mentioned in these submissions, which were also impacted by the introduction of the English common law and various enactments.

> *confiscations… By a series of legal enactments and arguments, the Crown has incrementally spread its cloak of law and governance over water and waterways, to the extent that today virtually any activity in or on a waterway is subject to Crown regulation of one form or another. This regulation is almost invariably regarded by the Crown as being an exclusively-held authority, and contains little or no recognition of the survival or existence of any rangatiratanga authority, and little or no recognition of a Treaty partnership.*

CAUSE OF ACTION: ENVIRONMENTAL ISSUES

48. This section addresses issues including [16.1] – [16.11] and [16.19 – 16.24] of the TSOI.

49. To the extent they complement and are relevant to the Wai 784 Ngāti Kauwhata closing submissions, counsel adopt the generic claimant closing submissions in relation to land-based environmental issues (and any associated appendices). As above, counsel will confirm if the generic claimant closing submissions in relation to water-based environmental issues are adopted by the Wai 784 Ngāti Kauwhata claim, once considered. Counsel reserve the right to amend the closing submissions for the Wai 784 Ngāti Kauwhata claim in relation to ngā awa, should this be necessary.

50. Counsel submit further:

    (a) The vesting of the riverbeds of awa (either in whole or in part) in which Ngāti Kauwhata assert customary interests in the inquiry district in the ownership and control of others has:

        (i) Impacted on the ability of Ngāti Kauwhata to exercise tino rangatiratanga and kaitiakitanga over their awa; and

        (ii) Resulted in detrimental effects to the wellbeing of the awa, and consequently, to Ngāti Kauwhata.

    (b) Acts and omissions of the Crown have impacted on the ability of Ngāti Kauwhata to exercise rangatiratanga and kaitiakitanga over their environment, and have resulted in environmental degradation,

detrimentally affecting the ability of Ngāti Kauwhata to use, enjoy and benefit from the environment and its resources.

51. To illustrate, with respect to the awa:

(a) Ngāti Kauwhata holds customary rights and interests in awa that flow within the inquiry district, such as the Ōroua awa, Rangitīkei awa, Kiwitea stream, and the Pohangina awa. These awa are important taonga of Ngāti Kauwhata and offered bountiful resources. Counsel highlight the kōrero of Mr Graham in this regard:[55]

> *I consider the awa I have spoken of as taonga of Ngāti Kauwhata. The awa and their mauri form part of Ngāti Kauwhata's identity, nurturing and sustaining the people. Harm to the awa harms both the awa and Ngāti Kauwhata.*
>
> *We looked to the awa for so much – for nourishment from food and water, but also for enjoyment, and as a source of physical, psychological and mental health. Ngāti Kauwhata's kainga relied heavily on the rivers as a source of water, food, resources and as a route for travelling.*

(b) As already set out above, instead of recognising and protecting these rights and interests, the Crown introduced common law and enactments that generally resulted in the loss or reduction of control and/or ownership of these awa. This includes through the vesting of riverbeds of awa, but also through the Crown's failure to provide a role for Māori, including Ngāti Kauwhata, in environmental decision-making and to ensure that Māori values were and are properly protected and provided for in environmental decision-making. In this regard:

(i) Counsel highlight the Crown's acknowledgement that "*the environmental management regimes prior to the Resource Management Act 1991 did not generally recognise or take into account Māori values or interests in a manner now regarded as important and necessary*".[56]

[55] #L4 at [76], [77].
[56] Crown memorandum contributing to the preparation of a draft statement of issues (Wai 2180, #1.3.2) at [72]-[73].

(ii) Counsel submit that protecting and providing for Māori values and interests has *always* been important and necessary, and further, issues have continued under the Resource Management Act 1991, which by section 8, only requires that Te Tiriti principles are "taken into account" when exercising powers and functions under the Act, and generally contains extremely limited provision for Māori involvement in substantive decision-making beyond possible consultation in certain circumstances.[57]

(c) The Crown, having significantly reduced the ability of Ngāti Kauwhata to exercise their tino rangatiratanga or kaitiakitanga over their awa through vested ownership of riverbeds, also failed to protect these awa from degradation or to provide for an appropriate role for Ngāti Kauwhata to be involved in their management. As set out by Mr Graham:[58]

> *The pollution and flooding issues faced in the Oroua are classic examples of what happens upstream has an impact downstream.*
>
> *The Oroua runs through the heart of Ngāti Kauwhata is all polluted now and there are many issues with flooding.*
>
> *I understand the flood controls sit at the top end of the Oroua, the north eastern side, where stop banks have been placed to prevent flooding of the surrounding lands, as these are used for grazing by farmers. The issue is that this land was where flooding had always occurred naturally, since time immemorial – it was made for it. But if you put stop banks to stop overflow, it is likely just to hit the next weakest point. Now, it seems that the stop banks funnel the water down, flooding lands downstream instead; on the whenua we have retained downstream, in 2003 and 2004, there were two 100-year floods within six months. When damage is done upstream, the effects flow down. Now the Manawatū District Council has put stop banks further down the awa as well.*
>
> *A related issue is the metal in the awa. This tumbles downstream, changing the flow of water. If you go to Turakina, one of the awa*

[57] See Resource Management Act 1991, for example ss6-8, 33, 36B-E, 58L-U, 61, 66, 74 and Schedule 1, cl 3, cl 3B.
[58] #L4 at [78]-[81], [83], [84].

> *Kauwhata used as one of its highways during the heke south, it is so shallow; you'd never get a waka down there now. …*
>
> *As far as I am aware, I think a lot of the pollution in the Oroua awa is due to run-off from farms and the freezing works leaching into the water in the Porirua ki Manawatū area. This is something I will speak more about in that inquiry. Pollution in our rivers is not something new, but the Crown has yet to solve this longstanding and grave problem.*
>
> *We'd like to get involved in managing and cleaning up of our awa, but what we have at the moment is not kaitiakitanga. The councils know who to talk to if they want meaningful conversation and consultation. Not having a part to play in what happens in the upper reaches of the awa has a negative impact on both Kauwhata and the awa we treasure.*

52. To illustrate with respect to the environment more generally, counsel refer to the submissions at [51(b)(i)]-[51(b)(ii)] regarding involvement in environmental decision-making and say further:

    (a) As set out above, Ngāti Kauwhata holds customary rights and interests in a number of blocks in this inquiry district, including Waitapu, Otamakapua, and Mangoira. They also hold rights and interests more broadly throughout the inquiry district, such as those that enabled Ngāti Kauwhata tūpuna to gather resources and freely travel from their southern kāinga, established after the heke, to and from their traditional homelands in the Waikato. Areas within the inquiry district served as part of the food basket of Ngāti Kauwhata, and their customary rights and interests enabled them to live and move undisturbed and to gather important resources.

    (b) Since 1840, the environment in the inquiry district, including its flora and fauna resources in areas in which Ngāti Kauwhata holds interests, have been significantly degraded through deforestation, competition from alien/noxious species, and land development,[59] adding to the already significant difficulty Ngāti Kauwhata had begun experiencing in using, enjoying, and benefitting from the environment and its resources in the inquiry district.

[59] See for example Armstrong, Summary of *The Impact of Environmental Change in the Taihape District 1840-C1970,* (Wai 2180, #A45(a)) at 1, 2.

(c) The responsibility for this primarily lies squarely with the Crown, whose acts and omissions in the inquiry district have contributed significantly to the issues faced. This problem is well summarised by David Alexander, who observed that:[60]

> *A consistent thread which runs through all of these topics is that for much of the period under discussion the district was overwhelmingly viewed by Europeans and Crown officials exclusively in terms of its existing or potential pastoral farming value. When the interests of pastoral farming and environmental protection came into conflict the scales always tipped in favour of the former. From the 1940s some efforts were made to mitigate the more egregious forms of environmental damage, including flooding and erosion, but these measures were principally adopted to protect farming interests. Such measures themselves often created a whole raft of new problems which still affect the district today. At no time did the Crown acknowledge that it had a Treaty-based duty to exercise stewardship over the environment or include Mokai Patea Maori in decision making.*

CAUSE OF ACTION: CROWN PURCHASING

53. This section addresses issues including [4.1] – [4.19] of the TSOI.

54. To the extent they complement and are relevant to the Wai 784 Ngāti Kauwhata closing submissions, counsel adopt the generic claimant closing submissions in relation to Crown purchasing (and any associated appendices), and say further:

(a) Of particular concern to the Wai 784 Ngāti Kauwhata claimants was the Crown's purchase of the Waitapu block, in which Ngāti Kauwhata asserted customary interests. Indeed, Ngāti Kauwhata holds interests in the Rangitīkei-Manawatū block (a fact recognised by the Native Land Court)[61] of which Waitapu had ostensibly intended by the Crown to be a part. The Crown acquired the Rangitīkei-Manawatū block (with the exception of limited reserves) after a lengthy battle by much of Ngāti Kauwhata and other groups to retain their interests there.[62]

[60] Armstrong, Summary of *The Impact of Environmental Change in the Taihape District 1840-C1970*, (Wai 2180, #A45(a)) at 1, 2.
[61] See for example, Hearn, *One past, many histories: tribal land and politics in the nineteenth century* (Wai 2180, #A42) in Chapter 8, including in particular at 469.
[62] See for example, Hearn, *One past, many histories: tribal land and politics in the nineteenth century* (Wai 2180, #A42) at 329, 420, 648 and Chapters 4 to 9 more generally.

(b) The Crown determined ownership of the Waitapu Block and purchased it from those groups it identified as owners, without first properly determining who held interests in the block. No Native Land Court investigation was held prior to purchase.[63]

(c) The Crown failed to deal with Ngāti Kauwhata, failed to adequately investigate the Ngāti Kauwhata's rights and interests in the block, and failed to protect those rights and interests, which resulted in a significantly diminished ability to use, enjoy, and benefit from their customary rights and interests in the block.[64]

CAUSE OF ACTION: PUBLIC WORKS

55. This section addresses issues including [13.1] – [13.11] of the TSOI.

56. To the extent they complement and are relevant to the Wai 784 Ngāti Kauwhata closing submissions, counsel adopt the generic claimant closing submissions in relation to public works (and associated appendices), and say further that:

(a) Public works takings occurred on blocks in which Ngāti Kauwhata assert customary rights and interests, including in the Otamakapua Block for railway and roading purposes.[65]

(b) The particular issue for Ngāti Kauwhata, whose interests in the inquiry district the Crown had already failed to protect or provide for through the Native Land Court, purchasing, and the vesting of interests in riverbeds in others, was that on being acquired for public works, Ngāti Kauwhata's customary interests were subsequently further transformed and further removed from their control.

(c) The Crown failed to recognise, protect or take into consideration the full breadth of customary rights and interests in acquiring land.[66] No evidence has been located to suggest compensation was paid for the

[63] Innes, *Māori Land Retention and Alienation within Taihape Inquiry District 1840 – 2013*, (Wai 2180, #A15) at 24.
[64] #L4 at [73]-[74].
[65] Cleaver, *Taking Of Māori Land For Public Works in The Taihape Inquiry District*, (Wai 2180, #A9), at 182-185.
[66] Indeed, counsel highlight the submissions in the generic claimant closing submissions in relation to public works (Wai 2180, #3.4.45) at [276] to the effect that "*Public works legislation and the way it was utilised by the Crown was characterised by unilateral decision making, lack of consultation or engagement, lack of compensation, the failure to understand, or attempt to understand the value Taihape Māori placed on their land, and the handover of critical elements of the taking process to local authorities without suitable oversight and review*".

impact on Ngāti Kauwhata's ability to exercise these customary rights and interests.

CAUSE OF ACTION: LOSS OF KNOWLEDGE AND TIKANGA

57. This section addresses issues including [19.4] – [19.9] of the TSOI.

58. To the extent they complement and are relevant to the Wai 784 Ngāti Kauwhata closing submissions, counsel adopt the generic claimant closing submissions in relation to cultural taonga (and any associated appendices), and say further:

(a) The evidence has demonstrated that a large part of ngā kōrero tuku iho of Ngāti Kauwhata in this region has been not unlike Ngāti Kauwhata's footprint; diminished. This in turn has resulted in the disconnection of current and future generations from the kōrero of their tūpuna, from their knowledge and tikanga in relation to their customary rights and interests in the inquiry district, and from important parts of what it means to be Ngāti Kauwhata.

(b) Mr Graham expressed to the Tribunal the impact of the loss of knowledge on Ngāti Kauwhata, stating:[67]

> *My father or my koro would have known more about our interests in this inquiry district, but over time, large parts of that knowledge and history have been lost. These days, the Crown expects us to join the all dots of what happened, but with loss of korero, it can be very hard.*
>
> *The split of Taihape ki Kapiti Inquiry District into two separate inquiries has been disconcerting for us as well – because the rohe of Kauwhata stretches into both, the split has registered more; we have two fronts on which we have to prove our case in this area, rather than just one.*

CAUSE OF ACTION: TINO RANGATIRATANGA

59. This section addresses issues including [1.1] – [1.6] of the TSOI.

60. With respect to tino rangatiratanga of Ngāti Kauwhata in the inquiry district, counsel submit:

[67] #L4 at [85]-[86].

(a) The overarching interplay between tino rangatiratanga and kāwanatanga and what these terms mean in practice pervade all aspects of Crown-Taihape Māori engagement.

(b) The understanding of what was agreed to between Māori and the Crown by Te Tiriti in 1840 has developed considerably in recent years, and has been aided particularly by the in-depth analysis undertaken by the Tribunal in Te Paparahi o Te Raki Inquiry of the lead up to and signing of Te Tiriti in that rohe, and subsequent Tribunal findings, such in Te Rohe Pōtae inquiry:

(i) In the Te Paparahi o Te Raki Inquiry Stage One report, *He Whakaputanga me te Tiriti – The Declaration and the Treaty*, the Tribunal found that sovereignty *was not ceded* to the Crown by rangatira in that inquiry district in February 1840. That is, there was no cession of the authority of rangatira to make and enforce law over their people and within their territories. What was agreed to, was to share power and authority with the Governor, with parties having different roles and spheres of influence, and with the detail about how the relationship would work in practice being negotiated over time on a case-by-case basis.[68] The Tribunal did not make any conclusions on "*how and when the Crown acquired the sovereignty it exercises today*".[69]

(ii) In *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims*, the Tribunal concluded:[70]

> [Kāwanatanga] *involved a power to make and enforce laws which applied to the whole of New Zealand, but was qualified by the guarantee of tino rangatiranga, and <u>was therefore considerably less than the supreme and unfettered governing and lawmaking power that the Crown had sought and believed it had acquired</u>* [underline added].
>
> *Kāwanatanga was an authority to govern and make laws <u>for the explicit purpose</u> of controlling settlers and preventing the harm*

[68] *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014) at 526–527.
[69] *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014) at 527.
[70] See excerpts from Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* - Part I (Wai 898, 2018) at 177-182.

> *that might otherwise arise to Māori from uncontrolled settlement or foreign intervention. The guarantee of tino rangatiratanga was for the existing autonomy and authority of Māori communities in relation to their lands, resources, and all other valued things to continue, whilst Māori also enjoyed the same rights as British subjects. …*
>
> *To summarise, the Treaty recognised two distinct spheres of authority, each with distinct functions. While each party had a duty to acknowledge the other's sphere of interest, and while the Treaty granted the Crown kāwanatanga powers, it also specifically provided for Māori to retain their tino rangatiratanga, and therefore their rights of autonomy and self-determination. As the Central North Island Tribunal put it, the Treaty provided for 'two authorities, two systems of law, and two overlapping spheres of population and interest'. From this are derived the principles of kāwanatanga and rangatiratanga, including Māori autonomy or self-government* [underline added].

(iii) The Tribunal in *Te Mana Whatu Ahuru* further concluded:[71]

A. With respect to the principles of tino rangatiratanga, self-government, and autonomy, that "*Māori communities retain their tino rangatiratanga, including their right to autonomy and self-government, and their right to manage the full range of their affairs in accordance with their own tikanga*".

B. With respect to the principle of partnership, that Te Tiriti "*established a relationship that was subject to ongoing negotiation and dialogue, under which the Crown and Māori would work out the practical details of how kāwanatanga and tino rangatiratanga would co-exist*".

(c) Counsel submit that the wealth of evidence and Tribunal findings now available regarding the nature of the agreement reached in Te Tiriti inescapably indicate that the level of autonomy and the extent of the

[71] Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* - Part I (Wai 898, 2018) at 189.

control and authority that Māori intended to retain was much more significant than what has been accepted or provided by the Crown to date. Counsel note that it is clear from previous Tribunal findings that the Crown acquired obligations to all hapū and iwi, irrespective of whether they had signed Te Tiriti.[72] Counsel submit that these findings ought to apply equally for Ngāti Kauwhata in this inquiry district.

(d) As to the implications of the understandings surrounding Te Tiriti, counsel submit that these include the following:

(i) It is clear that the interplay of tino rangatiratanga and kāwanatanga envisaged in Te Tiriti will not function without provision for the exercise of tino rangatiratanga *in all matters* affecting Māori. The appropriate level of engagement by the Crown with Māori will depend on the extent to which the proposed action constitutes or is likely to constitute an interference with tino rangatiratanga. For example, with respect to the implementation of the Native Land Court system, anything less than the informed consent of Māori affected would be insufficient, given the degree of interference. This is further supported by the observations of the Tribunal in *Te Mana Whatu Ahuru* that the Crown "*could not alter or interfere with tino rangatiratanga except with consent*".[73]

(ii) The interplay of tino rangatiratanga and kāwanatanga must, among other things, provide for the ability of Māori to:

A. Exercise decision-making power over their affairs.[74]

B. Choose how to organise themselves, and how or through what organisations they express their tino rangatiratanga.[75]

(iii) It is the Crown's responsibility to maintain the equilibrium in the Te Tiriti partnership through its protection of rangatiratanga,

[72] See for example: Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* - Part I (Wai 898, 2018) at 148.
[73] See excerpts from Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* - Part I (Wai 898, 2018) at 188.
[74] Waitangi Tribunal *Hauora: Report on Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 30-33: "*The Treaty guarantee of tino rangatiratanga affords Māori, through their iwi, hapū or other organisations of their choice, the right to decision-making power over their affairs*".
[75] Waitangi Tribunal *Hauora: Report on Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 27-30.

because the power imbalance between Te Tiriti partners lies in the Crown's favour.[76]

(iv) The Crown is unable to avoid its Te Tiriti obligations by delegating functions to non-Crown entities.[77] It must also ensure its agents are performing well and, where they are not, the Crown must make a reasonable effort to improve performance.[78]

(e) The evidence is clear that the cumulative impact of the Crown's acts and omissions on Ngāti Kauwhata and its ability to exercise tino rangatiratanga in this inquiry district have been devastating. Crown, in exercising what it has defined as its kāwanatanga, has trampled on the tino rangatiratanga of Ngāti Kauwhata. Despite the guarantees of Te Tiriti, the Crown has:

(i) Failed to recognise and protect Ngāti Kauwhata's tino rangatiratanga and customary rights and interests in the inquiry district. For Ngāti Kauwhata, this has been particularly evident in the introduction and operation of the Native Land Court, Crown purchasing, the vesting of ownership and control of riverbeds in others, and management of the environment, as dealt with above.

(ii) Failed to provide for the ability of Ngāti Kauwhata to truly exercise decision-making power over their affairs in the inquiry district, or to choose how to organise themselves (including by meaningfully participating in decision-making affecting their interests). For Ngāti Kauwhata, this has been particularly evident in the introduction and operation of the Native Land Court, Crown purchasing, the vesting of ownership and control of riverbeds in others, and management of the environment, as dealt with above.

[76] Waitangi Tribunal *Tū Mai te Rangi: Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22.
[77] Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at xxiv, Waitangi Tribunal *Tū Mai te Rangi: Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22.
[78] Waitangi Tribunal *Hauora: Report on Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 32.

(iii) Failed to ensure its agents to whom it has delegated aspects of its authority are performing well and where this has not been the case, to make a reasonable effort to improve the performance of its agents. For Ngāti Kauwhata, this has been particularly evident in the management of the environment, as dealt with above.

(f) From a practical perspective, it must be emphasised that this issue stems from the fact the Crown has created a constitutional framework in which there is no provision or process in place to ensure it is able to *consistently meet the full ambit of its Te Tiriti obligations in respect of tino rangatiratanga* towards Ngāti Kauwhata. It is a framework designed on the *assumption* of sovereignty by the Crown, and as a consequence, stretches well beyond what can comfortably accommodate both the exercise of kāwanatanga by the Crown and tino rangatiratanga by Ngāti Kauwhata.

(g) The impacts of the Crown's acts and omissions on tino rangatiratanga was best expressed by Mr Graham himself, who shared with the Tribunal:[79]

> *When I look at where Ngāti Kauwhata were and what they had in the past, I see a people who had everything. They had mana over their whenua, and were respected by those around them. They had their awa and swamps, food baskets from which they would gather resources, and so they were self-sufficient. Their lands were clean and their rivers provided clean water.*
>
> *They were a people who knew their whakapapa, spoke their reo, and had the ability and knowledge to take care of their own. They built marae and carefully exercised kaitiakitanga over their resources, to protect them from overuse or harm. They were proud healthy people, people of mana, rich in resources and in culture.*
>
> *Sadly, much of that has changed, and we have lost a lot. Not only land and resources either – we have lost things like our reo, our unity, our health and for some even identity as Ngāti Kauwhata, which I will give kōrero about in the Porirua ki Manawatū Inquiry. That sort of change*

[79] #L4 at [65]-[69], [87]-[89].

doesn't just happen without reason or cause. People of mana don't lose the ability to exercise this – it gets fettered or taken from them, and that is what has happened to Ngāti Kauwhata.

When you look at the rohe that Ngāti Kauwhata had established for itself, it is a huge area. Now, very little of that land has been retained. In this inquiry district, as with outside it, I believe it has been a case of being squeezed from all angles into smaller and smaller areas, reducing Kauwhata's movement and boundaries.

I find it hard to speak about things which never should have happened to our people, especially because the effects of colonisation are still impacting on Ngāti Kauwhata.

The Crown's acts and omissions have caused great hurt. It is for this reason that there is raruraru and uncertainty remaining within me. We have lost so much in the colonisation process. In the Waikato, our people were denied their rights to land and resources through raupatu and processes like the Native Land Court. In our southern rohe, our people have been denied their full rights to lands and resources again through processes like the Native Land Court. In both areas, the loss of our lands and the loss of our culture and identity have been the cost. In many ways, history has repeated itself for Ngāti Kauwhata. …

What the Crown has done to Ngāti Kauwhata throughout the motu has destabilised us – society has been eroded, and we have been deprived of much of what it is to be Ngāti Kauwhata and to be Māori. This has happened in many ways, including through the pressure from many sides that has served to reduce Kauwhata's original boundaries.

Any loss of tikanga or kawa is detrimental to our people. The Crown has restricted us in so many ways. We have been left with almost no place to exist as Māori. Our ability to exercise rangatiratanga has been taken away from us. In Kauwhata, a resurgence has begun, but there is still a long way to go.

Our people of Kauwhata have suffered at the hands of the Crown. They have suffered loss of land, loss of culture and identity, loss of mana. Where is the justice and righteousness in that? There is none.

PREJUDICE

61. As a result of the Crown's acts and omissions, Ngāti Kauwhata has been and continues to be prejudicially affected, including in the following ways:

(a) The Wai 784 Ngāti Kauwhata claimants do not retain legally recognised rights and interests in lands and resources in accordance with their lore and customs in the inquiry district;

(b) The Wai 784 Ngāti Kauwhata claimants' mana, rangatiratanga, lore and customs have been undermined;

(c) The Wai 784 Ngāti Kauwhata claimants have been left without lands and resources upon which to build a future and flourish;

(d) The Wai 784 Ngāti Kauwhata claimants have lost their ability to directly exercise kaitiakitanga in relation to their resources;

(e) The Wai 784 Ngāti Kauwhata claimants have been prevented from developing, exploiting and managing their resources in a manner consistent with their cultural preferences; and

(f) The Wai 784 Ngāti Kauwhata claimants' resources and cultural taonga have been damaged.

RELIEF SOUGHT

What I focus on now is what needs to be corrected – there is a lot that needs to be recompensed by the Crown for the things it has done in the past. Now we must fight for oneness.[80]

- *Rodney Graham*

62. The Wai 784 Ngāti Kauwhata claim in this inquiry district is centred on how this iwi's footprint in the inquiry district has been diminished at the hands of the Crown, and is at risk of being lost altogether.

[80] #L4 at [70].

63. It is with preventing this from occurring further and remedying the wrongs of the past in mind, that relief is sought for the Wai 784 Ngāti Kauwhata claim in this inquiry.

64. The relief sought is set out in the Amended Statement of Claim[81] and the evidence of Mr Graham, which included practical steps that the Crown should take to address the injustices suffered by Ngāti Kauwhata at the hands of the Crown.

65. For the purpose of this closing submission, the following relief from these documents is highlighted, along with additional relief sought in respect of tino rangatiratanga:

    (a) That the Tribunal make a finding that this claim is well-founded.

    (b) That the Tribunal make recommendations that the Crown take action to:

        (i) Undertake a process of continued engagement and discussion with Ngāti Kauwhata about areas where the Crown's exercise of kāwanatanga overlaps or interferes with Ngāti Kauwhata's exercise of tino rangatiratanga and how these can be addressed;

        (ii) To review the Te Tiriti principle of partnership and the associated obligation of consultation, to impose strengthened engagement obligations on the Crown to require greater engagement and collaboration with Ngāti Kauwhata and, in certain circumstances, informed consent;

        (iii) Provide support and resources to enable Ngāti Kauwhata to reconnect and learn more about the upper reaches of the boundary of Ngāti Kauwhata, and appropriately recognise where sites of significance are located;

        (iv) Ensure that the awa of Ngāti Kauwhata, particularly the Ōroua, be restored to its former state and provide Ngāti Kauwhata with an ongoing and meaningful role in the management of these awa, with the pūtea and training to support this;

[81] Amended Statement of Claim for the Rangitīkei ki Rangipō (Taihape) District Inquiry, dated 19 August 2016 (Wai 2180 #1.2.3).

(v) Provide Ngāti Kauwhata an appropriate apology, and an acknowledgement of the impact of the Crown's acts and omissions on Ngāti Kauwhata throughout its rohe (both inside and outside this inquiry district). It is the Wai 784 Ngāti Kauwhata claimant's position that any settlement with Ngāti Kauwhata needs to take this cumulative impact into account.

(vi) Provide Ngāti Kauwhata appropriate compensation.

(c) Any other relief as the Tribunal sees fit.

Dated this 20th day of October 2020

P Johnston / E Martinez