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Wai 2180, #3.3.66

In the Waitangi Tribunal
Taihape – Rangitīkei ki Rangipō District Inquiry

Wai 2180
Wai 378
Wai 382
Wai 400

In the Matter of the Treaty of Waitangi Act 1975

And

In the Matter of the Taihape – Rangitīkei ki Rangipō District Inquiry (Wai 2180)

And

In the Matter of a claim by Wero Karena on behalf of himself and those Maori who were owners of Ōwhāoko CB3 prior to 1967 (Wai 378)

And

In the Matter of a claim by Wero Karena on behalf of himself and the Trustees of the Ōwhāoko C7 Trust and Ngati Hinemanu, Ngati Te Upokoiri and the hapu of Ngati Kahungunu (Wai 382)

And

In the Matter of a claim by the late Ranui Toatoa, Rhonda Toatoa and Greg Toatoa and Wero Karena on behalf of Nga Hapu o Heretaunga ki Ahuriri (Wai 400)

Joint Claimant Specific Closing Submissions for Wai 378, 382, and 400

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MAY IT PLEASE THE TRIBUNAL

Introduction

1. These joint closing submissions are made on behalf of the following claims:

   a. **Wai 378** – a claim by Wero Karena on behalf of himself and those Maori who were owners of Ōwhāoko C3B prior to 1967;
   b. **Wai 382** – a claim by Wero Karena on behalf of himself and the Trustees of the Ōwhāoko C7 Trust and Ngati Hinemanu, Ngati Te Upokoiri and the hapu of Ngati Kahungunu; and
   c. **Wai 400** – a claim by Rhonda Toatoa, Greg Toatoa, Wero Karena, and late Ranui Toatoa on behalf of Nga Hapu o Heretaunga ki Ahuriri (**Claimants**).

2. The Claimants wish to acknowledge the late named Claimants, Henry Tiopira Mathews (Wai 378) and Ranui Toatoa (Wai 400), who passed before these claims could be heard in this Tribunal.

3. The Claimants are participating in the Taihape: Rangitikei ki Rangipo District Inquiry to acknowledge the link of their tupuna to the area, and to particular lands and resources within this district, in particular their links through Hinemanu, Punakiao and Renata Kawepo within the district.

The Claims

4. Counsel note that submissions for these claims are being presented together as, across each of the three claims, there is overlap of the interests, as well as the hapu or group of owners these claims have been made by or on behalf of.

5. As already outlined in the Claimants' opening submissions,[1] the particular land and resource interests that these claims cover within this Inquiry include, but are not limited to:

[1] Wai 2180, #3.3.14, *Opening submissions for Wai 378, 382 and 400*, dated 26 March 2018.

a. Awarua o Hinemanu Block;

b. Kaweka Block;

c. Kuripapango Block;

d. Mangaohane Blocks;

e. Omahaki Block;

f. Ōwhāoko Block – specifically Ōwhāoko C3A, Ōwhāoko C3B, Ōwhāoko C6, Ōwhāoko D2, Ōwhāoko D5 no 4, Ōwhāoko D7A, and Ōwhāoko D7B;

g. Te Koau Block;

h. Timahanga Blocks 1 – 8; and

i. Ngaruroro river and her tributaries.

Wai 378

6. The Wai 378 claim was originally lodged in 1993 by the late Henry Tiopira Mathews.[2] This claim was made on behalf of the original owners of Ōwhāoko C3B and outlined the circumstances behind the alienation of this land from the original owners.

7. Mr Karena was added as a named Claimant to this claim, and has continued progressing this claim following Mr Mathews' death, on behalf of the original owners, and the hapu of Ngati Hinemanu and Ngai Te Upokoiri. In August 2016, the Statement of Claim was amended to include other blocks in which Ngati Hinemanu and Ngai Te Upokoiri have interests, including other Ōwhāoko blocks, Te Koau and Timahanga.[3]

Wai 382

8. The Wai 382 claim was originally lodged in 1993 by Mr Wero Karena.[4] This claim was made on behalf of the trustees of Ōwhāoko C7 and the hapu of Ngati Hinemanu and Ngai Te Upokoiri (and others) and covered issues relating to the Kaweka forest and the Ngaruroro river. In August 2016, the Statement of Claim was amended to better particularise the Claimants'

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[2] Wai 2180, #1.1.6,*Statement of Claim for Wai 378*, dated 20 July 1993.
[3] Wai 2180, #1.1.10, *Statement of Claim for Wai 400*, dated 2 November 1993.
[4] Wai 2180, #1.1.7, *Statement of Claim for Wai 382*, dated 20 July 1993.

grievances and also included further particulars relating to the Gwavas forests.[5]

Wai 400

9. The Wai 400 claim was originally lodged in 1993 by Hoani Hohepa.[6] This claim was originally made on behalf of Ngati Hinepare and Ngati Mahu and was primarily focussed on the Ahuriri block. This claim as amended is on behalf of Nga Hapu o Heretaunga ki Ahuriri, and includes seven inter-related hapu: Ngati Hinemanu, Ngai Te Upokoiri, Ngati Mahu, Ngati Honomokai, Ngati Mahuika, Ngati Ruapirau and Ngati Hineiao.

10. When the late Ranui Toatoa and Wero Karena became named Claimants, this claim expanded as the Claimants undertook further research and their knowledge of their interests of the relevant hapu grew to extend to within this inquiry district.[7]

The Evidence

11. The Claimants rely on evidence from tangata whenua witnesses in the Inquiry, including:

    a. Mr Greg Toatoa; [8]
    b. Ms Rhonda Toatoa; and[9]
    c. Mr Wero Karena.[10]

12. The Claimants also rely on a number of technical reports within this inquiry to support their claims, including:

    a. Taihape District Nineteenth Century Overview, by Bruce Stirling (Wai 2180, #A43);

[5] Wai 2180, #1.2.7, *Amended Statement of Claim for Wai 382*, dated 19 August 2016.
[6] Wai 2180, #1.1.10, *Statement of Claim for Wai 400*, dated 2 November 1993.
[7] Wai 2180, #1.2.8, *Amended Statement of Claim for Wai 400*, dated 19 August 2016.
[8] Wai 2180, #P3, *Unsigned Brief of Evidence of Greg Toatoa*, dated 2020; and Wai 2180, #J9, *Amended Joint Brief of Evidence of Greg Toatoa and Rhonda Toatoa*, dated 17 April 2018.
[9] Wai 2180, #J9, *Amended Joint Brief of Evidence of Greg Toatoa and Rhonda Toatoa*, dated 17 April 2018.
[10] Wai 2180, #B11, *Brief of evidence of Wero Karena*, dated 19 January 2017; Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018; and Wai 2180, #P2, *Unsigned brief of evidence of Wero Karena*, dated 3 February 2020.

b. Maori Land Rating and Landlocked Blocks, by Suzanne Woodley (Wai 2180, #A37);

c. Environmental Issues and Resource Management (land) in the Taihape Inquiry District, 1970s-2010, by David Alexander (Wai 2180, #A38);

d. Sub-District Block Study – Northern Aspect, by Bruce Stirling and Martin Fisher (Wai 2180, #A6); and,

e. Sub-District Block Study – Central Aspect, by Evald Subasic and Bruce Stirling (Wai 2180, #A8).

13. It is noted that, where the Claimants' position differs from the technical evidence, this has been identified in tangata whenua evidence or in cross-examination of technical witnesses.

14. The Claimants' specific issues as identified by this Tribunal in its Statement of Issues relate to the following:

a. Twentieth-century land alienation;[11] and

b. Management of land, water and other resources.[12]

15. Counsel note that the Claimants' issues in relation to landlocked land issues are addressed separately in the landlocked land tranche of submissions.[13]

16. Likewise with the evidence regarding the Kaweka and Gwavas forests, presented in the February 2020 at Omahu and which comprised the evidence of Mr Wero Karena (Wai 2180, #P2), Mr Greg Toatoa (Wai 2180, #P3), Mr Jerry Hapuku (Wai 2180, #P4), Mr Bayden Barber (Wai 2180, #P5), and Dr Arapata Hakiwai (Wai 2180, #P12).

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[11] Wai 2180, #1.4.2, *Taihape: Rangitīkei ki Rangipō (Wai 2180) District Inquiry – Tribunal Statement of Issues*, dated October 2016, at 34.

[12] Wai 2180, #1.4.2, *Taihape: Rangitīkei ki Rangipō (Wai 2180) District Inquiry – Tribunal Statement of Issues*, dated October 2016, at 42-45.

[13] Wai 2180, #3.3.35, *Closing submissions regarding Landlocked Māori Land on behalf of Wai 378, 382 and 400*, dated 10 February 2020.

Te Tiriti o Waitangi

17. It is submitted that the Crown has failed to uphold its Tiriti o Waitangi (**te Tiriti**) obligations and duties in relation to land alienation and management of resources within the Taihape Inquiry district.

18. Counsel submit that the Crown by te Tiriti:

    a. Confirmed and guaranteed to Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri, tino rangatiratanga, including but not limited to the full, exclusive and undisturbed possession of their lands, forest, estates, fisheries, other properties, rivers, waterways and taonga;
    b. Promised to protect the rights of Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri guaranteed by te Tiriti and perform their obligations arising out of te Tiriti; and
    c. Extended to Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri all the rights and privileges of British subjects.

19. Counsel submit that the Crown has, and continues to have, duties to recognise and actively protect Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri rights and interests under te Tiriti. Further the Crown has a duty to act in partnership with Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri and to ensure it is acting in good faith in all its dealing with Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri.

20. As a consequence of te Tiriti, the Crown was and is required to:

    a. Ensure Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri retain their lands, estates, forests, fisheries, other properties and taonga for as long as they so wish;
    b. Recognise and protect Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri tino rangatiratanga;

c. Ensure Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri continue to exercise tino rangatiratanga, including the right to possess, manage and control all their property and resources in accordance with Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri lore, cultural preferences and customs; and

d. Ensure that the impact upon Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri from Crown actions and regulations was and remains consistent with te Tiriti and its principles; and

e. Actively protect tangata whenua, and in particular, Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri, rangatiratanga, customs, law and "properties".

21. In relation to Māori land alienation and resource management within the Taihape inquiry district, Counsel submit the Crown has failed the Claimants in its te Tiriti duties. It is submitted that the evidence supplied by the both the Claimants and technical report writers in relation to these issues demonstrates the Crown's failings in breach of te Tiriti and the prejudice suffered by the Claimants because of those failings.

22. In addition to the specific Tiriti terms, duties and principles set out below, Counsel also adopt the all te Tiriti terms, duties and principles set out in the generic closing submissions.

Partnership

23. The Hauraki Settlement Overlapping Claims Inquiry Report (2019) restated that crucial to the principle of partnership is mana:[14]

> *The Tribunal has noted that it is mana or authority that enables the exercise of tino rangatiratanga: Rangatiratanga signifies the mana of Māori not only to possess what they own but to manage and control it in accordance with their preferences.*

[14] Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019) at 11.

24. The principle of partnership is well-established in Te Tiriti of Waitangi jurisprudence. Partnership imposes a duty on Tiriti parties to act towards each other reasonably, honourably and in good faith. Partnership stems from the principles of reciprocity and mutual benefit. [15] Integral to the Tribunal's understanding are: accountability and status of the Tiriti partners, the Crown's fiduciary duty, the need for compromise and a balancing of interests, and the duty to make informed decisions.[16]

25. It is submitted that Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri had a reasonable expectation arising from te Tiriti that they would retain their authority, tino rangatiratanga, over their land, people, places and resources, and that the Crown would maintain its limited Kāwanatanga role, with each having distinct 'spheres' of authority while sharing authority over certain things.[17]

26. Counsel submit the Crown has failed to properly carry out its part of the partnership relationship when alienating the various land blocks from the Claimants and also in managing resources. It is submitted that this is in breach of its te Tiriti obligations, in respect of its relationship with Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri.

Active Protection

27. The Maniapoto Mandate Inquiry Report confirmed that tino rangatiratanga is intrinsically connected with Article 2 of te Tiriti and the principle of active protection, stating:[18]

> *Tino Rangatiratanga has been defined as 'full authority' and grants the mana 'not only to possess what one owns but, and we*

[15] Ministry of Māori Development, *He tirohanga o kawa kit e Tiriti o Waitangi: A guide to the principles of the Treaty of Waitangi as expressed by the Court and Waitangi Tribunal (*Wellington: Te Puni Kokiri, 2001) at 77.
[16] Ministry of Māori Development, *He tirohanga o kawa kit e Tiriti o Waitangi: A guide to the principles of the Treaty of Waitangi as expressed by the Court and Waitangi Tribunal (*Wellington: Te Puni Kokiri, 2001) at 80.
[17] Waitangi Tribunal, *He Whakaputanga me te Tiriti Report* (Wai 1040, 2014), at 529.
[18] Waitangi Tribunal, *The Maniapoto Mandate Inquiry Report* (Wai 2858, 2019), at 14; and Waitangi Tribunal*, Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1991), at 188–189.

emphasise this, to manage and control it in accordance with the preferences of the owner.'

28. The Crown has a duty of active protection that is central to recognising and protecting the rights guaranteed to tangata whenua by Article Two of te Tiriti.[19] The Waitangi Tribunal and the Courts of New Zealand have consistently reaffirmed this principle.

29. The 1987 Court of Appeal *decision New Zealand Māori Council v Attorney-General* adopted prior Tribunal findings that the duty of active protection imposes a positive obligation to protect Māori interests. In particular:

    a. The Crown's obligations of active protection of Māori include protecting their land and property interests, as well as their resources, both natural and economic; and [20]
    b. The Crown's active protection must be to the fullest extent reasonably practicable. [21]

30. It is submitted that the Crown has not attempted to do this in respect of the Claimants' traditional lands and resources, and is therefore in breach of its te Tiriti obligations.

Equal Treatment/Equity

31. Recent Tribunal reports have recognised the principle of equal treatment, whereby Māori and non-Māori are to be treated equally and fairly.[22]

32. The Maniapoto Mandate Inquiry Report has also further stated that: [23]

Similar to the Crown's duty to foster whanaungatanga among hapū and iwi in treating groups fairly and equally, the Crown must do all

[19] Ministry of Māori Development, *He tirohanga o kawa kit e Tiriti o Waitangi: A guide to the principles of the Treaty of Waitangi as expressed by the Court and Waitangi Tribunal (*Wellington: Te Puni Kokiri, 2001) at 93.
[20] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664.
[21] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664.
[22] Waitangi Tribunal, *Crown's Foreshore and Seabed Policy* (2004) at 133 – 134.
[23] Waitangi Tribunal, *The Maniapoto Mandate Inquiry Report* (Wai 2858, 2019), at 18.

> *that it can to avoid creating or exacerbating divisions and damaging relationships.*

33. In one respect, the principle of equal treatment means that the Crown cannot favour one group of Māori at the expense of another.[24]

34. In another respect, this principle relates to the equitable guarantee that Māori are to have "the rights and privileges" of British subjects under Article 3.

35. Article 3 should also be interpreted as requiring an equality of outcomes. It is, therefore, submitted that, if Māori are starting from a disadvantaged point or are impeded by barriers not experienced by non-Māori, then the Crown is obliged to provide greater assistance to ensure, or at least attempt to ensure, equality of outcomes.

Right to Development

36. The He Maunga Rongo Tribunal found that Māori have a right to develop as a people, and that right extends to cultural, social, economic and political development. Prior to this, the Tribunal acknowledged that Māori had a right to participate in the developing colonial society and economy. [25]

37. It is therefore submitted that the Claimants had, and continue to have, a right to development culturally, socially, economically and politically. Specifically, the Claimants have a right to develop their whenua according to their aspirations, despite the Crown-created or supported barriers which impede this development. Furthermore, the associated principle of options is also relevant to the right tangata whenua have to develop as they wish in all aspects of their life, in this case the use and enjoyment of their lands and resources.

[24] *Waitangi Tribunal Reports: Ngati Awa Settlement Cross-Claims* (2002) at 87-88; *The Te Arawa Mandate: Te Wahanga Tuarua (2004),* at 73 – 75; See also *Te Tau Ihu o te Waka a Maui* (2007) at 5; and *Te Tau Ihu o te Waka a Maui* (2008), at 5.
[25] Waitangi Tribunal, *Mohaka ki Ahurir Reporti (*Wai 201, 2004) at 26.

Options

38. The 1988 Muriwhenua Fishing Report first described the principle of options as being the right of Māori to choose a particular social and cultural path. Māori must be free to choose between tikanga Māori and other cultural options. Any act of the Crown that limits opportunities for Māori to 'walk in two worlds', or their freedom of options in respect of their social, cultural and economic pathway is a breach of the principle of options.[26]

39. Subsequent Tribunals have reiterated this principle of options in reports relating to forestry,[27] health services,[28] the foreshore and seabed,[29] and in various district inquiries. The principle of options emerges from Article Two which inter alia presupposes protection of tribal self-management in accordance with tikanga and from Article Three which confers upon Māori the rights and privileges of British subjects.[30]

40. It is therefore submitted that Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri had a reasonable expectation that being equal partners translates into an opportunity of participation in the Pakeha economy, the Pakeha way of life, and the settler government to the extent that Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri wished to do so. Equally, the same expectation translates into tangata whenua having the option to access and utilise their land and resources and to continue to live and operate autonomously, without interference or impediment by the settler government.

41. The reality – land loss resulting from the Crown's action, for example – is that Taihape Māori owners have no meaningful options at all.

[26] Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (Wai 22, 1988) at 195.
[27] Waitangi Tribunal, *Tarawera Forest Report* (Wai 411, 2003) at 29.
[28] Waitangi Tribunal, *Napier Hospital and Health Service Report* (Wai 692, 2001) at xxvii.
[29] Waitangi Tribunal, *Crown's Foreshore and Seabed Policy Report* (Wai 1071, 2004) at 133-134.
[30] Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 274.

Mutual Benefit

42. The Muriwhenua Fisheries Report noted that the principle of mutual benefit arises from both Tiriti partners' expectations that benefits would result from signing te Tiriti. In particular, the Tribunal found that neither party can demand benefits without also adhering to the objectives of common benefit as it "ought not be forgotten that there were pledges on both sides."[31]

43. It is submitted that Ngati Hinemanu, Ngai Te Upokoiri and Nga Hapu o Heretaunga ki Ahuriri reasonably expected to receive benefit from being a partner of the Crown through te Tiriti. Māori did not expect that signing te Tiriti would mean their whenua would be completely taken and alienated from them.

Redress

44. Arising from its duty to act reasonably and in good faith as a Tiriti partner, the Crown has an obligation to remedy past breaches of Te Tiriti o Waitangi, to put right what had been lost or taken. It is our submission that the claimants have suffered prejudice in many ways due to Crown breaches of te Tiriti and are therefore entitled to seek redress for those prejudices suffered.

45. It is essential that redress is provided for grievances suffered in order to restore the mana and status of Taihape Māori. The different forms of loss suffered by Taihape Māori groups also must be taken into account and different forms of redress must therefore be considered and offered by the Crown.[32] There is also an expectation that redress includes the Crown honouring the principles of te Tiriti into the future so as to not continue breaching te Tiriti as similar or new situations arise.[33]

[31] Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (Wai 22, 1988) at 189.
[32] Ministry of Māori Development, *He tirohanga o kawa kit e Tiriti o Waitangi: A guide to the principles of the Treaty of Waitangi as expressed by the Court and Waitangi Tribunal (*Wellington: Te Puni Kokiri, 2001) at 103.
[33] Ministry of Māori Development, *He tirohanga o kawa kit e Tiriti o Waitangi: A guide to the principles of the Treaty of Waitangi as expressed by the Court and Waitangi Tribunal (*Wellington: Te Puni Kokiri, 2001) at 99.

46. The Manukau Tribunal put it simply: "*Past wrongs can be put right, in a practical way, and it is not too late to begin again*."[34]

47. It is submitted that the principle of redress in relation to land alienation and resource management confers a positive obligation on the Crown to, for example, return the lands taken, pay compensation for land taken, and provide opportunities for tangata whenua to manage and develop their own resources and taonga.

Land Alienation

48. The land blocks covered by these claims are fraught with difficulties such as problems of access (which, as stated above, is addressed in the landlocked land specific submissions), land quality, fragmentation and disassociation.

49. It is submitted that the Crown, in breach of its duty to actively protect Maori rangatiratanga and lands in Taihape, compulsorily acquired Maori land in circumstances where:

   a. consultation with Maori owners did not occur;
   b. compensation was non-existent;
   c. the amount of land compulsorily acquired was excessive; and
   d. lands taken in excess of need were not offered for return.

50. This, obviously, led to a loss of lands and, therefore, generally, limited options to develop land, and also an inability to develop what little land remains in Maori ownership. This is in contravention to the Crown's obligations as promised under te Tiriti, specifically in relation to the principle of options and the Claimants' right to development.

[34] Waitangi Tribunal, *The Manukau Claim Report* (Wai 8, 1985) at 99.

Te Koau

A: The Education Reserve

51. The Claimants' Te Koau land originally contained approximately 25,000 acres. Mr Karena noted in his evidence that:[35]

> *Separating blocks and fragmenting land, is a Pakeha attitude towards land. When the Crown began interfering with these lands, the land that would have been collectively used was separated, and therefore acres of what should have been included in the Te Koau block were lost.*

52. The block was originally assumed by the Crown to have been acquired as part of the badly defined Otaranga deed in the 1850s.[36]

53. In 1873, the Crown proclaimed 7,100 acres of Te Koau as an Education Reserve. As this was without consultation with the owners, it was unknown to the owners what the reserve was for.[37] Subasic and Stirling noted that:[38]

> *It was only after sustained challenges by Mokai Patea Maori that the Otaranga deed was investigated by a commission of inquiry in 1890. The inquiry found that the large area comprising Te Koau had not been included in that deed, but also that 7,100 acres of Te Koau had already been alienated to establish an education endowment.*

54. It was not until the early 1900s that: [39]

> *The Native Land Court sat in Hastings in 1900-1906 to ascertain who the owners were and award compensation. It was awarded to those claiming through Hinemanu. An order was made that the rightful owners were to be given 2 shillings and 2 pence per acre for the*

[35] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [20].
[36] Evald Subasic and Bruce Stirling, *Sub-district block study – central aspect* (Wai 2180, #A8), at 17.
[37] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [22].
[38] Evald Subasic and Bruce Stirling, *Sub-district block study – central aspect* (Wai 2180, #A8), at 17.
[39] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [26].

7,100 acres wrongfully obtained, hence the reason for the Act. There is no record of compensation being paid as stated by both Stirling and Subasic and Fisher and Stirling, and confirmed by my own research.

55. In 1976, for reasons unknown to the Claimants, a further 4,570 acres of the northern portion of Te Koau was acquired and added to the existing education reserve. The land was never used for education purposes. The 4,570 acres now remains half in the possession of the Crown (administered by the Department of Conservation), and half in private ownership of Big Hill Station. It was not returned to the Claimants once its purpose as an education reserve had expired.

56. Due to these takings, the Maori owners, who would have been some of the original Te Koau Block owners, were unaware for a century of their connection with this "lost block" and did not know of its loss. For example, Ms Toatoa describes, in her evidence, the impact that this loss had on her own family. She expresses the disappointment felt in respect of the lack of access to lands which they have connections with:[40]

In the late nineties, Wero Karena had a lease of the Te Koau block. During this time I had a brief relationship with his son, Daryl Karena. Daryl took me out hunting with him. I had no idea where I was, and it was only through hearing the conversations Daryl had with his brothers that I realised this land was Te Koau. I immediately made the connection to the discussions my father and grandmother had all those years ago. It was a profound moment for me.

During the late nineties to early 2000's I have been fortunate enough to go to these lands 5 or 6 times, maybe more.

[…]It is a magical and amazing place. You can go fishing, hunting and exploring. There is so much potential for this land. I want to take

[40] Wai 2180, #J9, *Amended Joint Brief of Evidence of Greg Toatoa and Rhonda Toatoa*, dated 17 April 2018, at 5 – 7.

my mokos up there one day as I am sure many others who have interests in these lands do.

[…] It is such a shame that it is landlocked, it is criminal that this is by design of the Crown. It is really quite hurtful. We have these shares in the land but we can't even use it because we are locked out of it.

It's all based on relationships with landowners. If the relationship with the adjacent landowner goes sour, then there is a risk you will no longer have access. If there is a change in ownership and the new owner doesn't want you to go through their land then this creates another block. I don't think that the landowners have the empathy or understanding for Maori landowners who are trapped from accessing their own lands. There have been times where adjacent landowners have gotten angry at us for coming out a little bit later than the agreed time. It's like there are gate keepers to our own land.

[…] It is heartbreaking that we can't go to these lands easily and have been severed from this land and lost this part of our identity.

57. Mr Toatoa's evidence also touches on the impact this disassociation had, on his own knowledge and understanding of these lands, as well as the connected socio-economic impacts: [41]

When I was a trustee on Te Koau we couldn't even get to it because of Big Hill Station and Timahanga Station and we had to get approval every time to get to our own land. This approval was intermittent and was not guaranteed. My view of that block of land is that our people traditionally used it for gathering of food when they were doing treks to the Taihape side. I know that there was a track also used to pick up trout, pig and venison since the Pakeha

[41] Wai 2180, #J9, *Amended Joint Brief of Evidence of Greg Toatoa and Rhonda Toatoa*, dated 17 April 2018, at 12 - 13.

had released them up there. As a traditional resource of food, we have gained nothing from it by being landlocked.

I knew of Pakeha strangers who could get up to Te Koau because they knew the adjoining landowners or were tourists. I don't understand why they were able to get there but at times we couldn't. The effort it takes to get up there means we don't go there and that is still affecting our hapu today and means we are disassociated from it.

58. It is therefore submitted that the evidence here shows that the Crown, by alienating Te Koau in the above manner has breached the Tiriti principles in the following ways:

   a. Failure to actively protect Maori had interests, as promised under Article Two of te Tiriti;
   b. Failure to act in good faith and therefore, has acted in contradiction of the principle of partnership; and
   c. In alienating the Claimants'' land, and also doing essentially nothing with it, the Crown has failed to meet its obligations in relation to the principle of options and development.

B: Native Land Board Issue

59. In 1920, Alexander McDonald privately purchased 6,879 acres from the Maori owners of Te Koau from the Southern Te Koau block, this became known as Te Koau B. The remaining balance of the Southern Te Koau block then became known as Te Koau A (as distinct from the Education Reserve in the Northen Te Koau Block). Mr Karena asserts that the sale of Te Koau to Alexander and Rosie McDonald in 1920 was completed in an "*unlawful and unjust way*.[42]

60. Mr Karena also gave evidence that:[43]

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[42] Wai 2180, #P2, at [68].
[43] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [28].

> *The impact that this partitioning and sale of the Te Koau block has had, is still being felt today. We now no longer have access to both Te Koau B which is privately owned, or the Education Reserve. This has severed us from our land and the resources such as kereru and mahinga kai that we traditionally hunted on this land.*

61. In the *Generic Closing Submissions on Issue C(7): Land Boards and the Native/Māori Trustee*, an example was referred to in relation to the central block, that:[44]

> *The evidence demonstrates that the streamlined bureaucratic procedures of land boards enabled rapid transfer of almost half of the remaining Māori land in the central blocks of Motukawa 2 and Awarua, during which almost 40,000 acres was purchased under the Māori Trustee and Māori Land Board's oversight. The Crown offered no protection from further alienation, the statutory boards served to carry out the Crown's underlying policy and intentions.*

62. Counsel have read the *Generic Closing Submissions on Issue C(7): Land Boards and the Native/Māori Trustee*, and adopt the submissions made in relation to Native Land Boards, particularly in paragraphs 440(m) – 440(y).

63. In the present day, 3,451 acres of Te Koau remains in Maori ownership (Te Koau A). This block, however, is landlocked and this issue remains ongoing today.[45]

Ōwhāoko

64. In 1935, an application was made to the Maori Land Court by one of the eight owners of Ōwhāoko to summon a meeting of owners to pass a resolution to permit the land to be sold to Fernie Brothers and Roberts Co. While the meeting was abandoned, Fernie spoke with one of the owners,

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[44] Wai 2180, #3.3.48, *Generic Closing Submissions on Issue C(7): Land Boards and the Native/Māori Trustee*, at 434 and 435.

[45] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [30].

Ngamotu Kowahi, which resulted in her partitioning her shares out, creating C3A and C3B.[46]

A: Ōwhāoko C3A

65. Ōwhāoko C3A is 1,483 acres. The block was sold to John Roberts between 1962 and 1965. The purchase price was for £1,100 and, of this amount, £46.12.2 was deducted for survey costs.[47] The Maori Land Court played a very insignificant role with regard to this purchase. There was neither a meeting of all the eight owners, nor was there collective agreement by the owners. Fisher and Stirling also noted that:[48]

> *A meeting of owners was never assembled, so it is unclear how permission was obtained to purchase the land. As Judge Cull noted with regret in 1972, it was all toO easy to acquire undivided individual interests in Maori land without the owners as a group formally agreeing to any such thing.*

66. The mechanisms which were put in place by the Crown made it so *"easy to acquire undivided individual interests in Maori land*". This is in contradiction to the Crown's obligation under te Tiriti. In particular, the Claimants were:

    a. constrained to exercising little to no decision-making powers over their lands – thereby demonstrating the Crown's lack of recognition or respect for the tino rangatiratanga of Taihape Maori as promised under te Tiriti;
    b. prevented from retaining their lands for as long as they wished and desired to – thereby constituting a Crown breach of the principle of the Article Two guarantee; and
    c. not given the opportunity to truly be treated as a Tiriti partner in the sale of their lands – thereby constituting a Crown breach of the principles of good faith and partnership.

[46] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [44] – [45].
[47], *Amended Statement of Claim for Wai 378,* dated 19 August 2016 (Wai 2180, #1.2.10) at [11.6]; and Wai 2180, #J10 at [45].
[48] Fisher and Stirling, Sub-district block study – Northern aspect (Wai 2180, #A6), at 112.

B: Ōwhāoko C3B

67. In Ōwhāoko C3B, in September 1967, a valuation report was produced by the Valuation Department for the Maori Affairs Department. This report stated that the block was "a most unattractive property by contour and location," and recorded no millable timber. The report recorded the land to be valued at $3000.[49] However, as noted in the *20th Century Land Alienation Generic Closing Submissions* (**Land Alienation Subs**), this did not account for over $120,000 worth of millable timber that was actually growing on the block.[50] And:[51]

> *Due to a misleading valuation report the original Māori owners were misinformed about the true value of the block and ultimately missed out on realising the true value of the block which included $60,000.00 [sic] worth of timber in 1970.*

68. Mr Wero Karena's evidence also notes that:

> *The value of* Ōwhāoko *C3B was not known to us. The government valuation did not take into account the value of the timber of the land. From 1960 onward I used to hunt on the land and I saw all of the native trees. I know that from 1970 onward the purchasers sold timber off the land for a period of five years, earning more than $50,000 per year.*

69. The report by Brian Herlihy & Associates also notes, in relation to the valuation department in particular, that: [52]

> *There are reports of possible negligence or deficiencies on the part of various Government agencies.*

[49] Brian Herlihy & Associates, *Report on Ōwhāoko C3B Block* (Wai 2180 #A57, 1995) at 27.
[50] Wai 2180, #3.3.052, *Generic Closing Submissions regarding 20th Century Land*, dated 5 October 2020, at [9.3].
[51] Wai 2180, #3.3.052, *Generic Closing Submissions regarding 20th Century Land*, dated 5 October 2020, at [9.25].
[52] Brian Herlihy & Associates, *Report on Ōwhāoko C3B Block* (Wai 2180 #A57, 1995) at Summary Conclusion.

70. The Tribunal will be aware that the problem of Government valuers' failing to include the value of native forests in valuing Maori lands from the nineteenth until the twentieth century.

71. The Land Alienation Subs also outlines that the legislation at the time had provided opportunities for landowners to pay their debts on the block by utilising the land to make profit. However:[53]

> *Despite these options being made available through legislation and policy, there is no evidence to demonstrate that the Crown put these options to the landowners as potential alternatives to passing the resolution to sell the land.*

72. Mr Karena's evidence further details his personal experiences in attempting to retain the land block in Maori ownership, [54]

> *The late Henry Mathews continuously objected to this sale and was not quiet about it. In 1968, he objected to the sale in a letter to the Department of Maori Affairs only to be told that the Maori Land Court had already confirmed the resolution to sell. No help was offered to us at this time to rectify the situation. Henry Mathews and I then had to take matters further, at our own cost expense and time. In 1986 the Chief Judge cancelled the order for confirmation but by then it was too late to get practical relief. The only option would have been to go to the High Court and we did not have the money to do this.*

73. Despite significant efforts, Ōwhaōko C3B remains alienated: [55]

> *The loss of Ōwhāoko C3B was because of the Crown. Despite a finding that the order of confirmation of alienation was overturned* ***there was still no practical remedy for us to get this land back***

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[53] Wai 2180, #3.3.052, *Generic Closing Submissions regarding 20th Century Land*, dated 5 October 2020, at [9.22].
[54] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [50] – [51].
[55] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [50] – [51]. Emphasis added.

> ***under the legal system that the Crown has set up**. This land is still in private ownership and we have never been offered any compensation for this loss. This loss has divorced us from the Kaimoko bush and on this land there is a traditional pa site, Harurunui.*

74. Counsel have read the Land Alienation Subs, and adopt the submissions as set out in section 9, namely, that:

    a. The misleading valuation was a blatant breach of the good governance principle where the minimum standard required of the Crown is to, at least, adhere to its own laws. And the overall conduct was an unconscionable breach of the duty to actively protect Māori in the use of their lands;[56] and

    b. Counsel submit that by failing to advise the Māori landowners of the alternatives to selling Ōwhāoko, the Crown breached its duties of active protection and to act honourably and with the utmost good faith.[57] It was a best grossly negligent.

C: Ōwhāoko C6

75. Over a drawn-out period of time between October 1914 until April 1917, the Crown purchased individual interests off owners of Ōwhāoko C6, ultimately obtaining the entire block.[58] As Fisher and Stirling reported:[59]

> *Despite the government's earlier willingness to use the Maori Land Board process of meetings of assembled owners to put purchase offers to Ōwhāoko owners, in this case it instead resorted to picking off individual interests over a protracted period.*

76. And, as Mr Karena stated in his evidence: [60]

[56] Wai 2180, #3.3.052, *Generic Closing Submissions regarding 20th Century Land*, dated 5 October 2020, at at [9.19].
[57] Wai 2180, #3.3.052, *Generic Closing Submissions regarding 20th Century Land*, dated 5 October 2020, at [9.24].
[58] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [52] – [54].
[59] Fisher and Stirling, *Sub-district block study – northern aspect* (Wai 2180, #A6), at 100.
[60] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [54].

> *The price the Crown paid for Ōwhāoko C6 was also inadequate. In 1914 it was decided that the price was four shillings, and six pence per acre, despite the owners arguing it was worth twice as much. Given that it was over a period of three years nothing was taken into account regarding the increase in value of the land.*

77. In the Central North Island Claims Inquiry, the Tribunal found that:[61]

> *In our view the Crown was required both to check that Māori were getting a fair price from settlers and to pay a fair price itself, this was the standard set by the Treaty.*

78. It is submitted that it was not fair for the Crown, as Tiriti partner, to offer Taihape Maori a price below what their land was worth. This is consistent with numerous findings made by previous Tribunals that failing to ensure Maori owners could obtain market prices for their land was a breach of te Tiriti by the Crown.[62] It follows that, by offering inadequate prices in this inquiry district, the Crown also breached its fiduciary Tiriti duty to Taihape Maori inherent to the principles of good faith partnership and active protection.

D: Ōwhāoko C7

79. In 1970, Boy Tomoana created the Ōwhāoko C7 Trust in order to retain Maori ownership of the block and protect, albeit the land at the Claimants' own time and expense. The result is that this is one of the blocks which is, fortunately, still in Maori ownership. The block is currently managed by the Ōwhāoko C Trust. However, "*the Crown has done nothing to help us economically develop the land."*[63]

80. Counsel have read the generic submission regarding economic development, and adopt those submissions – in this instance in particular:

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[61] Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage 1, Volume 2 (Part 3)* (Wai 1200, 2008) at 436.
[62] Waitangi Tribunal, *Te Kāhui Maunga Volume 2* (Wai 1130, 2013) at 642 – 643.
[63] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [55] – [56].

a. The Crown failed through their acts and omissions to actively protect and facilitate Taihape Māori economic development and capability;[64] and

b. This failure by the Crown has had significant effects and long-lasting impact on Taihape Māori. [65]

E: Ōwhāoko D2

81. The Ōwhāoko D2 block was originally owned by Robert Karaitiana and Waerea Karaitiana.[66]

82. The evidence indicates that the Crown initially attempted to purchase the block in September 1972 – the Commissioner of Crown Lands (**Commissioner**) proposed to purchase Ōwhāoko D2 for $4,800.00.[67] In April 1973, Robert informed the Commissioner that he did not wish to sell his portion. Waerea, however, agreed to sell his portion in May of 1973, and the sale for it was completed a month later, June 1973.[68]

83. In July 1973, Robert passed away intestate. The evidence shows that, the Crown then proceeded to complete the sales and purchase of Robert's portion of the block with his widow, whom Robert was actually in the process of divorcing before he passed away.[69]

84. The evidence also shows that the Commissioner had gone ahead with this purchase despite:

a. Instructions from the Director-General of Lands not to do so. These instructions were due to the fact that section 257 of the Māori Affairs Act 1953 (which empowered the Crown to purchase Māori land) was about to be repealed by the Māori Purposes Act (no 2)

[64] Wai 2180 #3.3.50, *Closing submissions regarding economic development and capability*, dated 30 September 2020, at 68.
[65] Wai 2180 #3.3.50, *Closing submissions regarding economic development and capability*, dated 30 September 2020, at 68 – 71.
[66] M Fisher and B Stirling, *Supporting Documents to Block Study – Northern Aspect Volume 1* (Wai 2180 #A6(a), 2012) at 121.
[67] Fisher and Stirling, *Supporting Documents to Block Study – Northern Aspect Volume 1* (Wai 2180 #A6(a), 2012) at 121.
[68] Fisher and Stirling, *Supporting Documents to Block Study – Northern Aspect Volume 1* (Wai 2180 #A6(a), 2012) at 122-123.
[69] Fisher and Stirling, *Supporting Documents to Block Study – Northern Aspect Volume 1* (Wai 2180 #A6(a), 2012) at 134.

1973 (**MPA 1973**), which commenced on 23 November 1973 . The Commissioner completed the sales and purchase after the MPA 1973 had come into force, but backdated the agreement to avoid the application of the MPA 1973;[70] and

b. The succession laws which applied to Maori land – Part XI, section 116(3) of the Māori Affairs Act 1953 – which stated that:

> *Except as otherwise provided for in this Act, the persons entitled on the complete or partial intestacy of a Māori or the descendant of a Māori to succeed to his intestate estate so far as it consists of beneficial freehold interests in Māori land, and the shares in which they are so entitled, shall be determined by the Court in accordance with Māori custom.*

There is no evidence that the Crown consulted any of Robert's whanau to properly determine the rightful people to succeed his shares in Ōwhāoko D2.

85. In Mr Karena's evidence, he describes that:[71]

> *I understand that the Crown, in 1973, wrote to Waerea Karaitiana offering $3,979.20 for her share [of Ōwhaōko D2] and she accepted. Robert Karaitiana was more reluctant to sell his share but died intestate and his wife sold his share in 1973 for $4000. His wife and he were already separated. She did not have the right to sell it to the Crown.*
>
> *The sale of Robert Karaitiana's shares was riddled with issues. I do not believe that it was his intention to sell the land and I do not think that the Crown should have exploited the unfortunate circumstances of his death to get what they wanted.*

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[70] Fisher and Stirling, *Supporting Documents to Block Study – Northern Aspect Volume 1* (Wai 2180 #A6(a), 2012) at 141.

[71] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [58] – [59].

86. The *Land Alienation Subs* specifically make submissions on this block. Counsel have read those submissions and adopt them. In summary, Robert Karaitiana's blood-relatives and descendants, the correct rights holders, were alienated from Ōwhāoko D2 as a direct result of the Commissioner's unlawful premeditated actions. The Crown has, therefore, not only breached its obligation to consult under te Tiriti, but also failed in its obligation to keep its own laws.[72] Further, in denying the rightful individuals the the opportunity to succeed to their tūpuna lands, the Crown has also:

a. Failed to act in good faith, thereby breaching its obligations under the principle of partnership;
b. Failed to actively protect Maori interests in their lands, in breach of the guarantee in Article Two; and
c. Failed to abide by its guarantee in Article Two of te Tiriti to ensure Maori retain their lands for as long as they wish.

Timahanga

87. Timahanga was taken in C. 1890 for public road purposes.[73] In the *Public Works Takings – General Takings* Generic Closing Submissions (**Public Takings Subs**), it is noted that:[74]

> *In total, Cleaver records that "takings under the five percent rule involved more land than any other form of taking for road purposes… about 809 acres."*
>
> *These 809 acres of Māori land were lost through 32 discrete takings, and the five percent rule was used for 14 of those, the most recent in 1911.*

[72] Wai 2180, #3.3.052, *Generic Closing Submissions regarding 20th Century Land*, dated 5 October 2020, at [10.1] – [10.15].
[73] Phillip Cleaver, *Taking of Maori Land for Public Works in the Taihape Inquiry District* (Wai 2180, #A9), at 182 – 187.
[74] Wai 2180, #3.3.45, *Generic Closing submissions on Issue D Public Works Takings: General Takings (Section 13)*, at [105] – [115].

> *These 14 sets of takings resulted in takings impacting 43 blocks of Māori land (some of those repeatedly, such as Awarua 3A2D/E and K, see Appendix A).*
>
> ***The specific impact on Taihape Māori of these kinds of taking, was the loss of their land, without compensation, and without consultation as to planning or possible impact on them of the road formation. This lack of consultation also missed the potential for the taking and road formation to possibly serve those Taihape Māori owners which were losing land for this purpose.***
>
> *It cannot be presumed that the formation of a road through or along the boundary line of those Māori land blocks created access, as shown by the state of landlocked land in this rohe.*
>
> *Normally the formation of a road through or across land would create access for the land owners, but that is not the case for Māori land owners in this rohe.*
>
> ***The state of the landlocked block of Timahanga No. 1 is a case in point.***

88. The evidence also shows that the five percent rule actually had a harsher effect on Māori land than on general and European land. During Hearing Week Six, Mr Cleaver stated that:[75]

> *The Public Works Act 1882 certainly reflects discriminatory attitudes towards Māori and the taking of Māori land for public works. That Act was influenced quite strongly by the recent events at Parihaka in attempts to resist the surveying of roads there. The provisions for the taking of Māori land in the 1882 Act were harsh. All that was required was for the Governor to issue an Order in Council and then within two months they walk onto the land and take it without any*

[75] Wai 2180, #4.1.14, *Transcript of Hearing Week Six*, 215-216.

> *notification or right of objection. …However, in 1887 those harsh provisions were repealed and for Crown-granted lands at least it was put on a similar level to European land. Some of the provisions were fairly similar. As to your question about what the rationale was, we have the Parihaka influence on the 1882 Act but there was the continuing – the changes to the 5% rule are another example of where the law becomes worse for Māori as the time limit is extended for exercising the rule. Initially that's lengthened in '73 and then again in 1878.*

89. It is submitted that this difference in treatment shows a clear breach of the Crown's guarantee of equal treatment under Article Three of te Tiriti.

90. The *Public Takings Subs* also write that:[76]

> *The two most significant roads in this Inquiry District were taken using provisions where there was no need for compensation or consultation.*
>
> *There is no evidence of consultation with the Māori land owners for either of these takings. Cleaver recorded that that [sic] there was no evidence of notification of the taking or any gazetting, usually the minimal standard of notice utilised by the Crown.*
>
> *The first of the two roads established by the taking of an "existing road" is the "Gentle Annie"; the Napier-Patea Road. It appears that by this stage the use of this road by the public by this stage was well established.*
>
> *This was an "existing road vested in Crown" ownership according to Cleaver, who records that this was the result of takings of Māori land of the following amounts:*

[76] Wai 2180, #3.3.45, *Generic Closing Submissions on Issue D Public Works Takings: General Takings (Section 13)*, at [120] – [125].

a. 63 acres from the Timahanga block;

b. 36 acres from the Mangaohane 1 block;

c. 76 acres from the Ōwhāoko parent block;

d. 99 acres from Ōruamatua Kaimanawa 1; and

e. 27 acres from Awarua 2C.

91. With respect to these issues, Counsel adopt the submissions made in Public Works Takings Subs – that is, generally: takings of land in a manner such as what happened to Timahanga is profoundly inappropriate and a breach of Te Tiriti.

92. Further, in Mr Karena's evidence, he states:[77]

> *My ancestor Rakaiwerohia Ruataniwha Karena was an owner in the Timahanga lands and was placed on Timahanga 2, which was 7,499 acres.*
>
> *In 1911 Timahanga 2 was purchased by the Crown. My great Grandfather was given £22 for his shares.* ***They knew nothing about what it was worth, they were hoodwinked.***

93. Again, as already submitted in paragraphs 77 – 78 above, by offering the Claimants a price below what their land was worth, the Crown, as a Tiriti partner, was not only acting unfairly, but also inconsistently with their obligations under te Tiriti.

Awarua o Hinemanu

94. From the 1890s to the 1990s, the Crown had assumed ownership of the Awarua o Hinemanu block.[78] It was not until 1991 – a century later – that the Maori Land Court investigated the block's title, and awarded it to Ngati Hinemanu in 1992, that the block returned to Maori ownership.[79]

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[77] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [61] – [65]. Emphasis added.
[78] Subasic and Stirling, *Sub-district block study – Central aspect* (Wai 2180, A8) at 190.
[79] Subasic and Stirling, *Sub-district block study – Central aspect* (Wai 2180, A8) at 188.

95. Subasic and Stirling observed that:[80]

> ***The survival of this wedge of papatupu land into the late twentieth century*** *– 100 years after the customary title to nearly all the land in the vicinity had been extinguished –* ***can be ascribed in no little measure to yet another Government survey error****. Awarua o Hinemanu lies at the summit of the Ruahine range, between the Otaranga Crown purchase, Te Koau block, and Awarua block. As set out in the Kaweka and Te Koau block studies,* ***defining the boundaries of land in this area and surveying them accurately had long been a challenge the Government had failed to meet.*** *In the 1890s, this resulted in a Royal Commission of Inquiry into the boundary issues and unextinguished customary interests in the area, but even then the Awarua o Hinemanu block was overlooked.*

96. More specifically:[81]

> *The critical failure in the 1890s to properly identify the boundaries of Awarua lies with the Court and with the Government surveyors informing it.*

97. In Mr Karena's evidence, he states that this "*resulted in years of disassociation of us, as customary owners, from this whenua."*[82]

98. By relying on faulty and incomplete surveys, or failing altogether to define boundaries in land purchases, the Crown disentitled the Claimants from their lands, leading to dissociation from their whenua. This breaches its obligations to their under te Tiriti in the following ways:

    a. By not ensuring that adequate surveys were carried out to define proper boundaries, the Crown failed to actively protect the Claimants' whenua in accordance with Article Two;

[80] Subasic and Stirling, *Sub-district block study – Central aspect* (Wai 2180, A8) at 188. Emphasis added.
[81] Subasic and Stirling, *Sub-district block study – Central aspect* (Wai 2180, A8) at 189.
[82] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [67].

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

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

Management of land, water and other resources

99. The Claimants have interests in the Ngaruroro River. Mr Karena, in his evidence, sets out the Claimants' inherent connection to the river, in particular:[83]

> *As Ngati Hinemanu and Ngai Te Upokoiri, along with other hapu who may wish to present their own korero of their interests, we are the rightful traditional owners of the Ngaruroro River and its bed. All along the banks of the Ngaruroro River are wahi tapu sites of special significance to my hapu. A number of these are pa sites habituated [sic] by Te Uamairangi, the grandfather of Renata Kawepo.*

100. The Claimants state that the Crown has failed to protect the Ngaruroro River as a taonga of theirs. Mr Karena gave evidence that:[84]

> *The Ngaruroro river and her tributaries have not been looked after or protected by the Crown and its agencies. I have seen the pollution, degradation and destruction to the awa.*

101. It is also submitted that, under the Crown's management, the Crown has allowed the Ngaruroro to be polluted, allowing it to be dammed by private individuals, and thereby restricting water flow and use further downstream. Mr Karena has described that:[85]

[83] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [72] – [73].
[84] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [74].
[85] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [75].

> *When I was a child, my whanau and I had easy access to the Ngaruroro River and we used to use it for bathing and for kai. Now I must cross private lands and fences to get to the same places I used to swim and fish as a child. This is because surrounding land has been taken away from us, and nothing has been done to recognise our traditional customary interests to afford us access.*

102. The Crown's "management" has significantly affected the Claimants' ability to fish and sustain themselves with numerous fish species including, but not limited to, inanga, flounder, and kahawai which used to swim up the river in plentiful quantities. This has, therefore, led to the diminution of the river's availability as a source of food and other resources. In Mr Karena's evidence, he described that:[86]

> *I remember as a child of 10 years or so and some 65 years ago the Ngaruroro River was still a food resource supplier for our Maori people. The river supplied flounders, inanga, and mullet at a certain time of the year, Kereru, flappers which were young ducklings, Mutton bird, and Tuna in abundance, especially the month of March.*
>
> *We have been denied access to the Ngaruroro for resources such as water and kai awa. The Crown has allowed the Ngaruroro to be dammed by private individuals or diverted for irrigation. This restricts water flow and use further downstream, including at our marae such as Omahu.*
>
> *We can no longer fish to sustain ourselves from the river, because what were once large amounts of inanga, flounder and kahawai have now been substantially reduced. The streams where I used to catch crayfish have dried up. Watercress no longer grows in the river.*

[86] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [76] – [77]; and Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [81].

103. The same issues have been observed with respect to the Claimants' water supply at their marae:[87]

> *During summer when underground reservoirs are low, the Regional Council limits the water supply and local marae often run out of water, including the senior marae of the region at Omahu. We have been forced to obtain water for domestic purposes from outside the community. I say that this is a basic human right that we are being denied.*

104. It is submitted that although the Omahu marae is not within the inquiry district, this is an illustration of how damage permitted by the Crown in the headwaters had far reaching effects.

105. The pollution of the awa, particularly the Ngaruroro began in the headwaters with the Pakeha settlers' burning of the tussock and native flora and fauna from as early as the 1870s. The settlers burned off native tussock so as to be able to resow with new grass seed, but destroyed the native ecosystem and caused pollution of the Claimants' awa through erosion of the hills and then downstream sedimentation. David Armstrong, in his report, described the eventual consequences:[88]

> *Erosion was severe in this area as consequence of past indiscriminate burning, over-grazing and the impact of noxious animals, and it still carried a significant population of goats, red deer, Japanese deer, wild sheep and possums, which continued to 'severely deplete the vegetative cover'.*

106. The Hawke's Bay Herald also reported in 1966 that:[89]

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[87] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [80].
[88] D A Armstrong, *The* Impact of Environmental Change in the Taihape District 1840-C1970 (Wai 2180, #A45), at 120
[89] D A Armstrong, *The* Impact of Environmental Change in the Taihape District 1840-C1970 (Wai 2180, #A45), at 133. Emphasis added.

> *The Kaweka State Forest was the scene of a 'grim struggle between man and the land - a struggle in which man is striving to repair the damage done by fire and overgrazing during the past 100 years'.* ***This damage had resulted in parts of the Kaweka Range becoming the most heavily eroded high country area in the North Island. As a result the Ngaruroro and Tutaekuri rivers were carrying 'thousands of tons of eroded waste' onto the Heretaunga plains every year.***

107. A series of surveys carried out relating to the Ngaruroro River have also reported on the issues of erosion:

 a. A 1965 Hawke's Bay Catchment Board Land Capability Survey found:[90]

 > *That fires have had [sic] lit 'periodically' in the Ngaruroro catchment to remove regrowth of fern and scrub. This had 'contributed considerably to the general deterioration of the area'.*

 b. In February 1965, a survey party (consisting of Smith, Milne and Tonkin), at the request of the Hawke's Bay Catchment Board, also made reports:[91]

 > *They concluded that 'this area is an important section of the upper catchment of the Ngaruroro River, especially as it contributes a considerable quantity of detritus to the bed load of this river. As the majority of the eroded slopes fall directly into the main river channels, all the erosion material, rock, and soil, reaches these channels unimpeded'.*

 c. Smith, Milne and Tonkin also reported that:[92]

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[90] D A Armstrong, *The Impact of Environmental Change in the Taihape District 1840-C1970* (Wai 2180, #A45), at 130.
[91] D A Armstrong, *The Impact of Environmental Change in the Taihape District 1840-C1970* (Wai 2180, #A45), at 160.
[92] D A Armstrong, *The Impact of Environmental Change in the Taihape District 1840-C1970* (Wai 2180, #A45), at 160.

> *This 'large contribution of detrital material' had a highly detrimental effect 'on the life of downstream flood protection works. A secondary effect of this erosion is the destruction of any moisture retention potential, resulting in reduction of a reasonable basic flow, which is of extreme importance to the preservation of the artesian water supply'.*

d. Forester Painter, in his report on the eastern Ngaruroro catchment, also reported that:[93]

> *The area had suffered severely from erosion. While erosion was a natural occurrence in this area, brought about by 'tectonic movement and the unstable nature of the topsoil and parent rock', the process had been greatly accelerated through the removal of protective vegetation by deer, goats, sheep, pigs, hares and possums. Fire had also played a 'devastating role' in depleting vegetation since the 1870s.*

e. A further report was prepared in July 1966 by Forest Service officer F. Wallis:[94]

> *He confirmed that pastoral use of the Kawekas for around 30 years; i.e., until around 1900, and browsing by deer and possums had accelerated a natural tendency for erosion, especially in the southern and eastern parts of the main river catchments.*

108. These issues are confirmed by in the tangata whenua evidence of Mr Karena:[95]

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[93] D A Armstrong, *The Impact of Environmental Change in the Taihape District 1840-C1970* (Wai 21801, #A45), at 160.
[94] D A Armstrong, *The Impact of Environmental Change in the Taihape District 1840-C1970* (Wai 21801, #A45), at 161.
[95] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [78] – [79].

> *There is sediment and gravel in the lower part of the river, this is clearly a result of erosion from further up river inside the Taihape Inquiry District. This sediment must constantly be extracted from the River to keep it flowing and prevent flooding. The Ngaruroro alone has three gravel extraction points to keep it clear.*
>
> *The Hawkes Bay County Council dredged the River to extract metal. I have had two family members who have drowned in holes created by dredging conducted by the Hawkes Bay County Council, one of these victims was my son. In my career as a policeman, I have also recovered other drowning victims from the river. Proper management by the Crown and its agencies of the upper reaches of the river, inside the inquiry district, would prevent now and would have in the past prevented, much of the loss of life to our people and harm to our way of life.*

109. It is submitted that, prior to 1840, the Claimants had traditional rights over all the awa and roto within their rohe, including those within what is now the Wai 2180 Taihape Inquiry District, and exercised tino rangatiratanga over them and the food and other resources associated with them, in accordance with tikanga. These rights were what was guaranteed by the various provision of te Tiriti. The Crown, however, did not recognise these rights and interests possessed and not relinquished by the Claimants. For example, in 1973, an official from the Maori Affairs Department official had made a statement that:[96]

> *The Crown's purchase of land on the eastern bank of the Ngaruroro River was dubious, and that this gave Maori greater rights to be included in the membership of Kaweka Forest Park Advisory Committee. In reply the Conservator of Forests promised to investigate the historic land purchase claims.*

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[96] D Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s-2010* (Wai 2180, #A38), at 331.

110. However:[97]

> *Whether this investigation took place is not known, though nothing was located on the Crown files researched for this report to indicate that any Maori historic entitlement to greater involvement had a bearing on Crown management actions in the Forest Park.*

111. A further example was summarised by Alexander in his report:[98]

> *The Soil Conservation and Rivers Control Act 1941, and its amendments, said nothing about the Act's impact on Maori or its effect on Maori Land. It treated all land the same regardless of ownership.*
>
> *It was an absolutist expression of Crown kawanatanga. Catchment Boards, including the Rangitikei-Wanganui Catchment Board, took their lead from the legislation, and tended not to have regard for Maori values during the 1970s.*

112. In the *Local Government Generic Closing Submissions* (**Local Government Subs**) also, it is noted that Catchment Board decisions have also caused material losses to mana whenua. And, more importantly:[99]

> *At no point did in the legislation or its implementation did the Crown consider the Treaty guarantee of Māori participation in this form of governance.*

113. In light of the Crown's act and omissions outlined above in respect of the Ngaruroro River, the Crown has:

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[97] D Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s-2010* (Wai 2180, #A38), at 331.
[98] D Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s-2010* (Wai 2180, #A38), at 58.
[99] Wai 2180, #3.3.051, *Generic Closing Submissions on Local Government and Rating*, dated 6 October at [156].

a. failed to consult and engage with Maori with respect to matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga;

b. subverted the exercise of the Claimants' tino rangatiratanga, as promised by te Tiriti;

c. failed to act in good faith and, therefore, has acted in contradiction to the principle of partnership; and

d. failed to act consistently with its duty to actively protect Maori interests and taonga.

114. Counsel have read the *Local Government Subs* and adopt the submissions made in relation to the Tiriti obligations and the conclusions made in relation to of local governments. For example: [100]

> *Although it knew and articulated its Treaty responsibilities, the Crown enabled settlers to exercise their right of self-government but did not do the same for Māori. This situation is still fully in force today; Pākehā governance institutions are recognised and empowered, and Māori governance institutions are not.*

115. Counsel have read the *Environment (Part 1) Generic Closing Submissions* (**Environmental Subs**), and also adopt the submissions made there in respect to the degradation of waterways and lack of consultation:[101]

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

[100]Wai 2180, #3.3.051, *Generic Closing Submissions on Local Government and Rating*, dated 6 October, at [194].
[101] Wai 2180, #3.3.051, *Generic Closing Submissions on Local Government and Rating*, dated 6 October, at [316].

landholdings of Taihape Māori as sites of mitigation to protect the interests of lowland Pakeha farmers.

116. Once again, the interest and rights of Taihape Maori were set aside, along with the Tiriti guarantees and principled rights, and subordinated to the interests of newly arrived settlers and their pastoral economic policies.

117. Counsel have also read the submissions made in the *Waterways, lakes and aquifers and non-commercial fisheries* generic closing submissions (**Water Subs**).[102] In particular, Counsel adopt the submission that:[103]

> *It is difficult to see how depletion on the scale experienced by Taihape Māori could fail to affect their socio-economic wellbeing.*
>
> *Claimant and technical evidence is clear that indigenous freshwater fisheries are poorly managed, where they are managed at all, and stocks continue to decline, in some cases to extinction. The Crown admits it has done little in respect of indigenous freshwater fisheries in the Inquiry District. It also admits it does not know how to remedy the serious decline of the taonga species pātiki. Its regulations regarding commercial tuna catch have not been effective at halting or reversing the decline of tuna stocks in the Inquiry District. Likewise its whitebait regulations are ineffective in this regard. There is virtually no evidence of consultation with Taihape Māori, or of opportunities for them to participate in, or control, decision-making with respect to their Article II fisheries.*

118. It is submitted that all of the submissions made in relation to waterways in the *Water Subs*, *Environment Subs* and *Local Government Subs* apply to the Claimants and their relationship to and rights respecting the Ngaruroro River – they are, therefore, adopted in those respects. The Ngaruroro River is a taonga to the Claimants. The Crown, however, through numerous expressions of its assumed kawanatanga, undermined traditional water and

[102] Wai 2180, #3.3.58, *Generic closing submissions for waterways, lakes and aquifers and non-commercial fisheries*, dated 20 October 2020.
[103] Wai 2180, #3.3.58, *Generic closing submissions for waterways, lakes and aquifers and non-commercial fisheries*, dated 20 October 2020 at [90] – [91].

use rights on all the Claimant awa and roto. And, the Crown, as Mr Karena put it:[104]

> *Has not recognised the river's ecological and spiritual value and it has not given us the opportunity to kaitiaki and exercise our tino rangatiratanga.*

Conclusion

119. It is Counsels' submission that the Claimants' evidence, supported by this inquiry's technical evidence, shows that the issues the Claimants have, and continue to be faced with today, are directly linked to prejudicial actions by the Crown and its agents.

120. Counsel submit that the tangata whenua evidence, and technical evidence, presented to this Tribunal will show that the Crown has breached its duties under te Tiriti to protect the Claimants' lands and resources.

Relief Sought

121. The Claimants say that they have their own mana and grievances that the Crown should not ignore – it should acknowledge its role in the loss of the Claimants' lands, and inaction in helping the Claimants to truly utilise and develop their remaining lands. The Claimants, therefore, hope that the Crown would acknowledge them and their claims in their own right, and not to talk just to those larger groups who purport to talk on their behalf.

122. The Claimants hope that the Tribunal will assist their whanau and hapu to restore their social, cultural, resource and economic base so that they can move on and prosper as people. Specifically, the Claimants seek the following in respect of their land and resources:

    a. Unlimited legal access to Te Koau A for all owners and beneficiaries, at the cost of the Crown;

[104] Wai 2180, #J10, *Brief of Evidence of Wero Karena*, dated 19 March 2018, at [82].

b. Financial assistance from the Crown so that Te Koau A can be developed for the Claimants hapu;

c. Return of all Te Koau land that was wrongfully taken;

d. Compensation for the loss of Ōwhāoko C3B from the date of the confirmation of resolution of owners to sell Ōwhāoko C3B (6 February 1968) until the present day;

e. Return of Ōwhāoko C6 and D2;

f. Financial assistance from the Crown to develop Ōwhāoko C3B, C6 and D2 for our hapu;

g. Compensation for the cost of Timahanga 2 which the Claimants had to buy back for their hapu;

h. The return of remainder of Timahanga 2;

i. Unlimited legal access to Awarua o Hinemanu for all owners and beneficiaries, at the cost of the Crown;

j. Financial assistance from the Crown so that Awarua o Hinemanu can be developed for the Claimants' hapu;

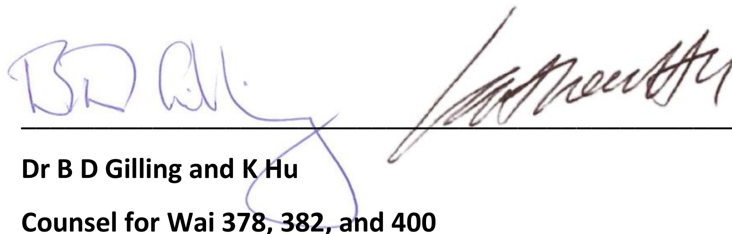
k. Acknowledgement of the Claimants' ownership over the Ngaruroro River and a role for the Claimants in the future management of the awa;

l. Redress for the degradation and pollution that the Ngaruroro River has suffered while under Crown management; and

m. Any other recommendations the Tribunal sees fit.

123. Counsel submit that the Claimants' claims are well-founded, and that the evidence enables the Tribunal to make the findings and recommend the relief as sought.

Dated at Wellington this 23rd day of October 2020



Dr B D Gilling and K Hu

Counsel for Wai 378, 382, and 400