IN THE WAITANGI TRIBUNAL

WAI 2200
Wai 237

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the **Taihape: Rangitīkei ki Rangipō** Inquiry District

AND

IN THE MATTER OF a claim by **RON TAUEKI** and **WILLIAM JAMES TAUEKI** on behalf of themselves and on behalf of Muaūpoko and the Taueki whanau

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CLAIMANT SPECIFIC CLOSING SUBMISSIONS FOR WAI 237
Dated 23 October 2020

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RECEIVED
Waitangi Tribunal
27 Oct 2020
Ministry of Justice
WELLINGTON

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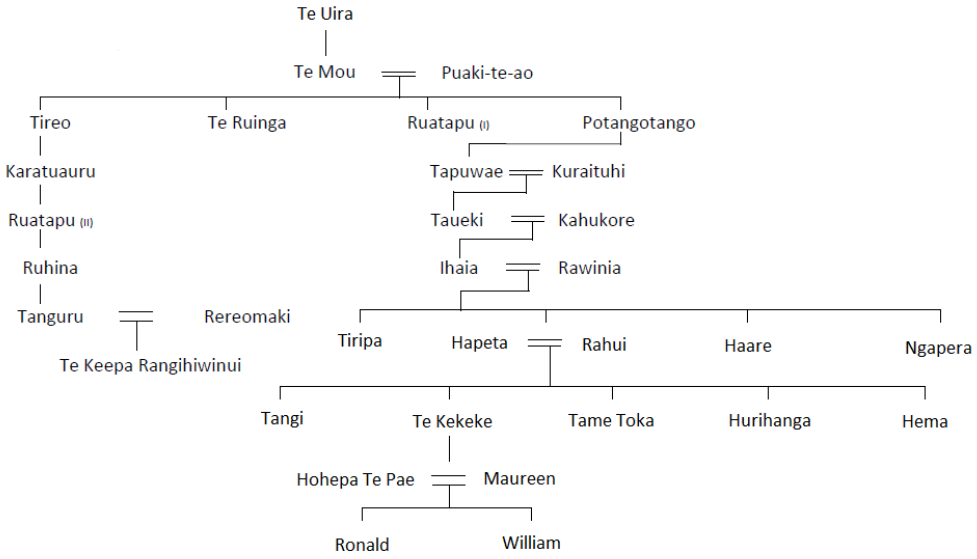
INTRODUCTION

1. These closing submissions are made on behalf of the Wai 237 named claimant William James Taueki ("Mr Taueki") and on behalf of the Taueki whānau, the hapū Ngāti Tamarangi and Muaūpoko ("Claimants"). Mr Taueki's whakapapa is as follows:[1]



2. In 1840, the Claimants' tupuna and Muaūpoko rangatira, Taueki, signed te Tiriti ō Waitangi ("te Tiriti" or "te Tiriti ō Waitangi"). These submissions address the Claimants' claims regarding Crown breaches of te Tiriti ō Waitangi that Muaūpoko suffered between 1840 and 1992. These breaches cover a wide spectrum of issues and focus on the Crown's punitive attitude towards Muaūpoko. Muaūpoko did not 'play the game' in the Crown's eyes. Yet for Muaūpoko, they were trying desperately to defend their lands from the Crown's pervasive reach. Because Muaūpoko did not conform, the Crown did its utmost to write them out of the script.

3. The first section concerns Issue 4 of the Tribunal Statement of Issues concerning the Crown's purchasing regime. We adopt generic closing submissions on the issue of Crown Purchasing ("Generic Submissions on Crown Purchasing").[2] Where the submissions made in the Generic

[1] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at 4.
[2] Mahony Horner Lawyers, Generic Submissions on Crown Purchasing dated 30 September 2020, Wai 2180, #3.3.49.

Submissions on Crown Purchasing are inconsistent with these submissions, the specific submissions are to be taken as the Claimants' position. In this first section, we describe the Claimants' claims to the Waitapu block and the origins of Waitapu as part of the greater Rangitīkei-Manawatū block. The submissions then address the Crown's awareness of uncertainties over Waitapu ownership and the Crown's subsequent failure to investigate and recognise Muaūpoko interests in the Waitapu block. Lastly, the submissions on Crown purchasing note the eventual exclusion of Muaūpoko from the sale of Waitapu.

4. The next section of these submissions covers issues in part 16 of the Tribunal's Statement of Issues in relation the environment. In these submissions, we adopt the Closing Submissions Regarding Environmental Issues,[3] and the Generic Closing Submissions for Waterways, Lakes and Aquifers and Non-Commercial Fisheries[4] ("Generic Submissions"). Where the submissions made those submissions are inconsistent with these specific submissions, the specific submissions are to be taken as the Claimants' position. These submissions address the rivers of the Taihape district concerning the Claimants' interests, interference compensation in relation to property of Taihape Māori, and finally, the effects of deforestation in the Taihape district.

5. The Claimants, Muaūpoko, are an ancient pre-waka people with an extensive mana whenua, who have long resided in many parts of Aotearoa from the top of Te Waka-a-Māui (South Island) to the north of the Rangitīkei River. However, social upheavals from the 1820s caused by the British challenged Muaūpoko and forced them to consolidate their power base. Even after 1840 through to today Muaūpoko have continued to fight for recognition of the immense prejudice suffered by Muaūpoko at the hands of the Crown. The Claimants have played a substantial role through their part the Porirua ki Manawatū Waitangi Tribunal's Muaūpoko Priority hearings and the they will continue to play a major role in the wider Porirua ki Manawatū inquiry. These submissions are intended to 'right the wrongs' of

[3] Bennion and Black, *Closing Submission Regarding Environmental Issues* dated 15 October 2020, Wai 2180, #3.3.56
[4] Bennion and Black, *Generic Closing Submissions For Waterways, Lakes And Aquifers And Non-Commercial Fisheries* dated 10 October 2020, Wai 2180, [no ROI number].

the Crown's attempts to limit Muaūpoko involvement to north of the Porirua ki Manawatū inquiry district into the Taihape district.

TRIBUNAL STATEMENT OF ISSUES – ISSUE 4 - CROWN PURCHASING

Introduction

6. Issue 4 of the Tribunal Statement of Issues concerns Crown purchasing. We set out below the Claimants' closing submissions on Crown purchasing.

7. On 30 September 2020, Mahony Horner Lawyers ("MH Lawyers") filed generic closing submissions on the issue of Crown Purchasing ("Generic Submissions on Crown Purchasing"),[5] which stated that Crown purchasing of lands in the Taihape inquiry district was destructive and harmful to tangata whenua.[6] These Claimant submissions should be read in conjunction with the Generic Submissions on Crown Purchasing. These submissions are supplementary to the Generic Crown purchasing submissions and we ask that where the submissions made in the Generic Submissions on Crown Purchasing are inconsistent with these submissions, the specific submissions are to be taken as the Claimants' position. Also relevant to these submissions are the:

   a. Brief of Evidence of William James Taueki;[7]

   b. Opening Submissions for Wai 237;[8]

   c. Sub-district block study – southern aspect report by TJ Hearn;[9]

   d. Muaūpoko Customary Interests report by B Stirling;[10]

[5] Mahony Horner Lawyers, Generic Submissions on Crown Purchasing dated 30 September 2020, Wai 2180, #3.3.49.
[6] Mahony Horner Lawyers, Generic Submissions on Crown Purchasing dated 30 September 2020, Wai 2180, #3.3.49. at [5].
[7] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3.
[8] Tamaki Legal, Opening Submissions dated 5 September 2018, Wai 2180, #3.3.25.
[9] TJ Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7.
[10] B Stirling, *Muaupoko Customary Interest* dated September 2015, Wai 2200, #A182.

e. One past, many histories: tribal land and politics in the nineteenth century report by TJ Hearn[11]; and

f. Muaupoko Interests Outside the Horowhenua Block report by DA Armstrong.[12]

8. These submissions outline the Claimants' position and evidence, before setting out in detail the history of the Waitapu block purchase in relation to Muaūpoko and the subsequent prejudice suffered as a result.

Overview

9. The Crown was the leading purchaser of Māori land in the Taihape district during the 19th century,[13] purchasing land through legislation that allowed it to monopolise land purchasing in the region.[14] Crown advanced payments to individuals compelled participation in the Native Land Court by all customary owners, whether willing to participate or not. Land title was then individualised by the Native Land Court to undermine the collective ownership of hapū and iwi,[15] making Māori land available for purchase.

10. These submissions address the Crown's purchase of the Waitapu block and the failure of the Crown to even put this block through a proper title investigation. We submit that Crown's failure to properly investigate ownership of Waitapu was the result of the Crown purposefully overlooking the customary interests of Muaūpoko in the region due to their known non-seller stance and support of the Kīngitanga.

11. William Taueki ("Mr Taueki") provided evidence at Hearing Week 8 on behalf of the Muaūpoko Claimants. He traversed his whakapapa and mana whenua of Muaūpoko in-depth, which he maintains extended from "Horowhenua north to the Rangitīkei River".[16] Mr Taueki provided evidence on the inclusion of Muaūpoko in discussions concerning the sale of the greater Rangitīkei-

[11] TJ Hearn, *One past, many histories: tribal land and politics in the nineteenth century* dated June 2015, Wai 2200, #A152.
[12] DA Armstrong, *Muaupoko Interests Outside the Horowhenua Block* dated September 2015, Wai 2200, #A185.
[13] TJ Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at [7.1].
[14] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 25.
[15] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 259.
[16] Waitangi Tribunal, Transcript for Hearing Week 8 held at Rātā Marae on 17-20 September 2018, Wai 2180, #4.1.16 at 441.

Manawatū block, which included the Waitapu area, as well as Muaūpoko's inclusion in discussions concerning neighbouring land blocks to Waitapu.[17]

12. Mr Taueki's evidence is that Muaūpoko as pre-waka people, "had free range over much of the whenua of the lower North Island and upper South Island."[18] Their stance as non-sellers is recorded Donald McLean in relation to the Rangitīkei-Turakina land block purchase,[19] and in relation to the greater Rangitīkei-Manawatū land block purchase, which at the time of negotiations included Waitapu.[20] Mr Taueki stated:

> Throughout 1866, a number of hui took place concerning the sale of the Rangitikei-Manawatu block.
>
> Rangitāne and Muaūpoko rangatira wrote to McLean on 19 April 1866. They described how their land extended from the Manawatū River up into the Tararua ranges before stating that—'The right to all that land is ours … Rangitane and Muaupoko.'

13. Muaūpoko and Rangitāne gathered at Puketotara and wrote to Native Minister Russell in late April 1866, confirming Rangitāne and Muaūpoko ownership of the land but also their agreement to grant a 'small portion' to Ngāti Raukawa as recent settlers to their whenua.[21]

> …55 Muaūpoko and Rangitāne rangitira put their names to this letter including my tipuna Ihaia Taueki. At the time, Ihaia Taueki was the leading rangatira of Muaūpoko. I have **attached** the 1866 letter at **Page 2** of the Exhibits. This is a significant letter. Reflecting their common land and ancestral ties, the rangatira of Rangitāne and Muaūpoko are shown to be working together. Also, they claimed the entire land block, but for a 'small portion' that they were prepared to grant to a few Ngāti Raukawa as recent settlers to our whenua. The 2 letters show that our rangatira did not recognise Ngāti Apa in the Rangitīkei-Manawatū block. Although the letters are in relation to the Rangitīkei-Manawatū block, they cannot be said to be letters of sale. Instead, they are statements of ownership.

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[17] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, # L3, at [65].
[18] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3 at [14].
[19] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3 at [22] citing TJ Hearn, *One past, many histories: tribal land and politics in the nineteenth century* dated June 2015, Wai 2200, #A152, at 90 and, Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3 at [24] citing TJ Hearn, *One past, many histories: tribal land and politics in the nineteenth century* dated June 2015, Wai 2200, #A152, at 100.
[20] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3 at [29] and [33].
[21] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [34].

14. Mr Taueki's evidence also sets out the limited recognition Muaūpoko received from the Crown during the Rangitīkei-Manawatū purchase, even with Muaūpoko making their interests known to the Crown through 1866 letters[22] and through their presence in the wider block at the time.[23] Despite this, the Crown concluded that Ngāti Apa, Ngāti Raukawa and Rangitāne were 'principal' claimants and Muaūpoko were 'secondary' claimants and were not consulted further about their interests.[24] The Claimants evidence regarding the Waitapu block is as follows:[25]

> … because Waitapu was part of the Rangitīkei-Manawatu block and because Muaūpoko interests in that block were recognised by all iwi and the Crown, Muaūpoko should have been consulted about the block when the issues arose.
>
> The block was sold to the Crown in 1879…Muaūpoko should have received some of the sale proceeds. Muaūpoko should have been given the opportunity to establish our interests in the land but it was sold before any investigation could take place.

15. These submissions detail the evidence that the Crown was aware that native title had not been extinguished in relation to Waitapu, and that despite Muaūpoko having their customary interests recognised in the Rangitīkei-Manawatū purchase, the Crown failed to conduct an investigation into customary interests in Waitapu resulting in the Claimants suffering prejudice and disposition from the Crown's actions.

Waitapu

16. It is Mr Taueki's evidence that Muaūpoko land interests stretched northwards from Horowhenua across the Manawatū plains up to and including the area around Waitapu.[26] His Tupuna Taueki signed te Tiriti ō Waitangi in the Manawatū on 26 May 1840.[27] Muaūpoko rangatira are buried at the mouth of the Manawatū river.[28] Additionally, Crown officials at

[22] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3(a), Exhibit B.
[23] DA Armstrong, *Muaupoko Interests Outside the Horowhenua Block* dated September 2015, Wai 2200, #A185, at [28] – [30].
[24] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [35].
[25]Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [36].
[26] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [26].
[27] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [27].
[28] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [27].

the time acknowledged Muaūpoko interests in the greater Rangitīkei-Manawatū, which included Waitapu.[29] These submissions therefore set out:

a. the origins of Waitapu as part of the greater Rangitīkei-Manawatū block;

b. the Crown's awareness of uncertainties over Waitapu ownership;

c. the Crown's subsequent failure to investigate and recognise Muaūpoko interests in the Waitapu block; and

d. the eventual exclusion of Muaūpoko from the sale of Waitapu.

Greater Rangitīkei-Manawatū block

17. Waitapu was originally part of the greater Rangitīkei-Manawatū block.[30] This was the basis upon which the Crown chose not to investigate title in Waitapu. As has been well traversed in this inquiry, Kawana Hunia Te Hakeke of Ngāti Apa ("Hunia")[31] 'discovered' that the surveyors had erred, leaving a section of the Rangitīkei-Manawatū block that the Crown had not paid for. The block had been incorrectly surveyed to have a northern boundary from Waitapu Stream to Umotoi during the sale of the block. Hunia discovered that the border ran from the Waitapu Stream through to Parimanuka. After being correctly surveyed in 1872, Waitapu was established as a 29,484-acre block[32] unaccounted for in the Rangitīkei-Manawatū purchase payment.[33]

18. Mr Taueki's evidence details the negotiations for the greater Rangitīkei-Manawatū block. Muaūpoko agreed to join with Rangitāne, with their representative being Rangitāne rangatira Peeti Te Awe Awe.[34] This greater Rangitīkei-Manawatū block was the final significant Crown purchase

[29] B Stirling, *Muaupoko Customary Interest* dated September 2015, Wai 2200, #A182, at 162.
[30] TJ Hearn, *Sub-District Block Study- Southern Aspect,* dated 2012, Wai 2180 #A7 at 245.
[31] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3 at [37]; T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at [1.1].
[32] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 246.
[33] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 245.
[34] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [17] – [20]. See also, D Morrow, Iwi Interests in the Manawatu 1820 – 1910, Wai 2200, #A6, at 190 – 191.

affecting Muaūpoko prior to them being forced into the Native Land Court process to defend their interests against Ngāti Raukawa.[35]

19. The Crown considered the Native Land Court process when consensus to sell began to fracture, yet they chose to leave the decision to the Crown official Wellington Superintendent Issac Featherston ("Featherston") and his advisors.[36] What followed was Featherston facing increasing difficulties to ascertain who had what interest. Featherston could not "even approximately" ascertain the number of each of the tribal groups with customary interests, or "the value of one tribal claim as opposed to another."[37]

20. Stirling has noted that Featherston's approach and subsequent payment was "crude and simplistic".[38] Armstrong called it a "superficial exercise" with "no evidence that Featherston discussed his 'ranking system' with Muaupoko."[39] Armstrong continued that "[s]ome historians have uncritically accepted Featherston's characterisation of Muaupoko."[40] This, he concluded "has led to a less than full picture of the nature and extent of Muaupoko rights and interests."[41] Rather than investigating the nature and extent of customary rights in the land, his developed system relied on a hierarchy of interests formula with principle, secondary and remote claimants ("Featherston's formula") based on a limited understanding of prior leasing arrangements. In his evidence Mr Taueki states:[42]

> "He [Featherston] did not consult us about classifying us in this way. As a result, our iwi did not get as much of the sale money as the other tribes. Although we were relegated by Featherston, he knew at least that he had to include Muaūpoko in the purchase.

21. In 1866, Featherston noted that he had agreed that no reserves whatsoever should be made in the block to prevent any disputes in title to the iwi

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[35] B Stirling, *Muaupoko Customary Interest* dated September 2015, Wai 2200, #A182, at 156.
[36] B Stirling, *Muaupoko Customary Interest* dated September 2015, Wai 2200, #A182, at 156 to 157.
[37] B Gilling, *A Land of Fighting and Trouble: The Rangitikei-Manawatu Purchase, CFRT,* dated 2000, Wai 2200, #A9, at 72.
[38] B Stirling, *Muaupoko Customary Interest* dated September 2015, Wai 2200, #A182, at 161.
[39] DA Armstrong, *Muaupoko Interests Outside the Horowhenua Block* dated September 2015, Wai 2200, #A185, at 4.
[40] DA Armstrong, *Muaupoko Interests Outside the Horowhenua Block* dated September 2015, Wai 2200, #A185, at 4.
[41] DA Armstrong, *Muaupoko Interests Outside the Horowhenua Block* dated September 2015, Wai 2200, #A185, at 5-6.
[42] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [35].

involved.[43] Stirling stated that this was done "in order to end the 'endless' fighting over the land."[44] However the nature of Featherston's formula meant that Muaūpoko interests, as with all iwi interests in the block, were never defined on the ground and remained inchoate. These undivided interests resulted in all parties to the Rangitīkei-Manawatū block purchase selling a whole undivided block, with payments being in accordance with Featherston's formula alone. Armstrong stated, "in order to expedite a sale and avoid trouble Featherston simply acquired the undefined interests of each iwi."[45] We submit that Featherston, by delineating iwi interests, gave each iwi compensation for their rights and interests as a single 'blanket' purchase to Muaūpoko's detriment.

Crown awareness of ownership uncertainty of Waitapu

22. As these submissions note, Waitapu was formed following Kawana Hunia's discovery of a surveying error in the greater Rangitīkei-Manawatū block, leaving the Waitapu portion left unpaid by the Crown. Yet, Waitapu did not go through the Native Land Court,[46] because the Crown considered that Native Title was extinguished as part of the Rangitīkei-Manawatū purchase.[47] So, the Crown's very basis for not investigating customary title for Waitapu was that it was acquired from the same un-delineated combined interests of those tribes the Crown negotiated with for the greater Rangitīkei-Manawatū block, including Muaūpoko.

23. The wider context is also significant. It is well documented that the Crown had a fervent desire to resolve the issue of Waitapu, because they saw Waitapu as 'the key' to the Otamakapua block above.[48] Hearn noted:[49]

> According to [Native Minister] Bryce, it was 'highly desirable that this block should be acquired previous to the final payment on the

[43] TJ Hearn, *One past, many histories: tribal land and politics in the nineteenth century,* Wai 2200, #A152, at 385; Bruce Stirling, *Taihape District Ninteenth Century Overview,* 2016, Wai 2180, #A43
[44] B Stirling, *Muaupoko Customary Interest* dated September 2015, Wai 2200, #A182, at 165.
[45] DA Armstrong, *Muaupoko Interests Outside the Horowhenua Block* dated September 2015, Wai 2200, #A185 at 5 – 6.
[46] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 245.
[47] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 250.
[48] B Stirling, *Taihape District Ninteenth Century Overview,* 2016, Wai 2180, #A43 at 249; Archives New Zealand, *Walter Buller to Native Minister* dated 13 October 1879, Wellington MA-MLP 1 1886/344 Supporting Documents, Vol 3, at 160-264.
[49] TJ Hearn, *One past, many histories: tribal land and politics in the nineteenth century* dated June 2015, Wai 2200, #A152 at 651 to 652.

> Otamakapua block and the amount required will therefore be provided as soon as required.' Bryce subsequently reminded [Crown's land purchase officer, James] Booth [("Booth")] that the purchase of Waitapu was 'the key to the larger block [Otamakapua].'

24. The Crown's interest in acquiring Otamakapua arose from pressures for settlement following the Rangitīkei-Manawatū block purchase.[50] It was in this context, we submit, that Native Minster Bryce authorised Booth's request of £14,742 for the purchase of Waitapu.[51]

25. Yet, evidence of the Crown's awareness of ownership uncertainties is clear and compelling. Booth's approach to Crown Counsel, Walter Buller ("Buller") as to whether the Waitapu Block could be raised with the Otamakapua block in the Native Land Court and Buller's response confirmed unequivocally that the Crown was aware that the Waitapu block was potentially a reserve resultant of Crown legislative protective measures within the Rangitīkei-Manawatū purchase and over which Native Title had been extinguished.[52]

> The Waitapu Reserve is part of the Rangitīkei-Manawatū Block over which Native Title was extinguished by Gazette proclamation in 1869.

26. Furthermore, Buller proposed to Native Minister Bryce that a Royal Commission should be conducted to investigate entitlement to Waitapu.[53] However contrary to Buller's advice, Sir Francis Bell, the arbitrator under the Rangitīkei-Manawatū purchase, excluded Waitapu from his calculations of the Rangitīkei-Manawatū block. According to Bell, Waitapu was not within the purchase, nor was it named among the reserves of the purchase. Waitapu was customary Māori land and the Crown should have purchased it from those identified by the Native land Court as the owners of the block.[54]

27. From 1872 until 1888 the Crown was made aware of multiple Claimants who had an interest in the land. Having discovered the Crowns error, Hunia proceeded to become a key player in the sale of Waitapu. Māori

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[50] Bruce Stirling, *Taihape District Ninteenth Century Overview,* 2016, Wai 2180, #A43 at 35.
[51] Bruce Stirling, *Taihape District Ninteenth Century Overview,* 2016, Wai 2180, #A43 at 61.
[52] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 250; Archives New Zealand, *Walter Buller to Native Minister* dated 13 October 1879, Wellington MA-MLP 1 1886/344 Supporting Documents, Vol 3, at 160-264.
[53] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 250.
[54] Bruce Stirling, *Taihape District Ninteenth Century Overview,* 2016, Wai 2180, #A43 at 63.

representatives from Ngāti Apa, namely Aperahama Tipae, wrote to Native Minister McLean and urged him not to make any advance payments regarding the land. He confirmed that should the land pass through the Native Land Court, he would be willing to sell the land.[55] Utiku Potaka of Ngāti Hauiti recorded his claim to the area between Kiwitea and Oroua, asking for the addition of Arapeta and Rawinia Potaka to the grant to be issued concerning the Waitapu block.[56] Hamera Nga Puru Te Raikokiritia of Parewanui asked for the block to be divided with two grants to be issued.[57]

28. As with the Rangitīkei-Manawatū block purchase, the failure to investigate title to Waitapu by the Native Land Court meant that rightful interest in the block were not established prior to Crown purchase in 1879.[58] The extent of establishing rightful title to the land was recounted in a full report prepared by Booth while running as Gisborne's resident magistrate in 1886 in which Kawana Hunia, Renata Kawepo and Utiku Potaka were recognised as co-owners of Waitapu.[59] We adopt the conclusion of the Generic Submissions on Crown Purchasing:[60]

> On the evidence, the Crown did not employ any methods which could be described as amounting to an adequate investigation of customary interests in the block. The evidence does not appear to indicate that the Crown officially investigated any customary interests in the block. Instead, the evidence suggests that the Crown simply decided who it thought it should deal with.

29. The Crown actively pursued the purchase of Waitapu, while the evidence shows they acutely aware of the uncertainty surrounding the status of the block and the disputes regarding the rightful owners of the block. We set out in these submissions that the omission of Muaūpoko from these dealings arose from a Crown who viewed Muaūpoko as a block to land sales and who was anxious to complete the sale at all costs.

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[55] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 247.
[56] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 248.
[57] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 248.
[58] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 24.
[59] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 255.
[60] Mahony Horner Lawyers, Generic Submissions on Crown Purchasing dated 30 September 2020, Wai 2180, #3.3.49 at [99].

Crown Failure to recognise Muaūpoko Interests in Waitapu

30. The events which followed arose from the Crown's failure to adequately assess Muaūpoko and other interests in Waitapu and the Crown's failure to consult with Muaūpoko or other groups regarding the sale of Waitapu. In October 1879, Booth paid Hunia £10 for Waitapu. In November 1879 after a weeklong hui, Hunia and Aperahama Tipae signed the Deed of Transfer for Waitapu as representatives of Ngāti Apa.[61] By April 1880, ownership of the entire 29,484 acres established as Waitapu had passed into the hands of the Crown after payment of a negligible total purchase price of £14,742 equating to 10 shillings per acre. The total payment price was divided between Hunia and others, and the second half of the purchase price between Utiku Potaka ("Potaka") and others.[62] Mr Taueki states in his evidence, "I have not seen any records that show that Hunia shared the sale proceeds that he got for Waitapu with Muaūpoko."[63]

31. As these submissions have noted, the basis for the Crown not going through the Native Land Court was that native title was already extinguished through the Rangitīkei-Manawatū purchase. So, the Crown knowingly purchased Waitapu without consulting the Māori parties it negotiated the Rangitīkei-Manawatū purchase with, including Muaūpoko. Instead, the Crown chose the easy way out, by selling the block to those who were willing sellers.

Exclusion of Muaūpoko from the sale of Waitapu

32. Mr Taueki in his evidence has details how the Crown's marginalised and mistreatment of Muaūpoko due to their stance as non-sellers:[64]

> Muaūpoko's anti-selling stance continued for years to come and because of this, the Crown promoted other iwi over us in relation to our whenua. Ihaia, our hapū and many other Muaūpoko actively supported the Kīngitanga when it was formed in 1858. The Kīngitanga was created to hold on to our tino rangatiratanga. The Kīngitanga also opposed land

[61] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 252.
[62] T J Hearn, *Sub-District Block Study- Southern Aspect, 2012,* Wai 2180 #A7 at 253.
[63] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [39].
[64] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [44].

> sales. To the Crown however, Muaūpoko's active support for the Kīngitanga was another black mark against us.

33. Additionally, Mr Taueki's evidence is that Muaūpoko extermination myth was promoted by the Crown as a manoeuvre to acquire lands which Muaūpoko were not willing to sell.[65] The Claimant's evidence from the Porirua ki Manawatū inquiry should be read in conjunction with these submissions.[66] This situation was noted by the Tribunal and confirmed by the Claimant during Hearing Week 8:[67]

> Q. Do you think Mr Taueki that this attitude of Muaūpoko annihilation was a story, if you like, put about to meet Crown ends? You sort of say that you know if this crowd are not here anymore, then the ones who might be more willing to sell –
> A. No that's exactly what – you've hit it on the head. That's exactly what I'm trying to say. But we're not trying to sort of say we reinvent the wheel as a result.
>
> …
>
> Q. I mean the plain fact is that, despite those 19th and perhaps early 20th century efforts with that story, as you say, Muaūpoko is alive and well today –
> A. Yes.

34. Muaūpoko supported the Kīngitanga and were Pai Marire.[68] They actively participated in the fight against the Kīngitanga and were present during the Parihaka raid. The Crown feared that the Kīngitanga would "maintain and foster Māori independence rather than Māori submissions to the crown"[69] We submit the Crown held supporters of the Kīngitanga as rebels.

35. In addition to the Claimants' evidence on Muaūpoko as non-sellers, Peeti Te Awe Awe as the main negotiator for Rangitāne and Muaūpoko emphasised that Rangitāne, Ngāti Apa, and Muaūpoko were the "original owners" of Rangitīkei-Manawatū, "from the time of the ancestors".[70] Despite this,

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[65] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [48].
[66] Tamaki Legal, Brief of evidence of William James Taueki dated 11 November 2015, Wai 2200, #C10.
[67] Wai 2180, #4.1.16 Hearing Week 8 Transcript, at 452.
[68] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [58].
[69] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, #L3, at [55].
[70] B Stirling, *Muaupoko Customary Interest* dated September 2015, Wai 2200, #A182, at 159.

Featherston's formula resulted in the iwi receiving much less than other tribes for the purchase. Mr Taueki stated:[71]

> I think this hurt Muaūpoko because we had extensive interests there… He ignored the letters that Rangitāne and Muaūpoko rangatira wrote in April 1866 and he ignored how long we had been on the land.

As noted by Armstrong, when Rangitāne and Muaūpoko received their sum, "Featherston, however, insisted that they had been the authors of the own misfortune and had failed to heed his advice. Consequently he could do nothing for them."[72]

36. We submit the Crown promoted propaganda about the extermination of Muaūpoko and consequently denied mana whenua over their rohe, because their focus was on settlement and colonisation rather than ensuring proper investigations took place to establish native title. Then when they found willing sellers of the Waitapu block, it served their interests to sell to them. It also served their interests to undermine Muaūpoko's interests in the Rangitīkei-Manawatū purchase and it served their interests to do the same for Waitapu.

Conclusion

37. We submit the Claimants were wrongfully shut out of the Taihape region and particularly Waitapu by the Crown. The Crown purchase of Waitapu breached te Tiriti ō Waitangi principle of active protection. The Crown, despite its awareness of the uncertainties surrounding the status and true ownership of the block knowingly disregarded the Claimants' interests in the block. Worse still, their justification for not investigating title for the Waitapu block relied on their flawed negotiation of Rangitīkei-Manawatū, yet they failed to negotiate with those same parties, including Muaūpoko, over Waitapu.

38. The Claimant's interests the Rangitīkei-Manawatū block were recognised by the Crown and are demonstrated by their interests in blocks surrounding the Rangitīkei-Manawatū block include the Rangitīkei-Turakina block to the west

[71] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, # L3, at [35].
[72] DA Armstrong, *Muaupoko Interests Outside the Horowhenua Block* dated September 2015, Wai 2200, #A185 at 27.

and the Ahuaturanga block to the east.[73] It is this package of recognised interests in the lands around Waitapu that is relied on as well. We submit the Crown failed by not investigating customary ownership in Waitapu.

39. The Crown knowingly and purposefully disregarded their interests in Waitapu due to the fear that the Claimants would not consent to the sale of the block. The Crown's failure to consult, in breach of te Tiriti ō Waitangi, came about from the Crown's desire to purchase Otamakapua above to further their agenda of land acquisition to the benefit of their colonial endeavour.

TRIBUNAL STATEMENT OF ISSUES – ISSUE 16 - ENVIRONMENT

40. These closing submissions are filed on behalf of William ("Bill") Taueki and Richard Takuira on behalf of themselves, Ron Taueki (deceased), Muaūpoko, and the Taueki whānau ("Claimants").

Generics Adopted Where Relevant

41. It is intended for these submissions to be supplementary to the generic closing submissions regarding environmental issues and we ask that where the submissions made in the generic submissions on the environment are inconsistent with these submissions, that the specific submissions are to be taken as the Claimants' position. The following generic environment closing submissions have been filed:

    a. Closing Submissions Regarding Environmental Issues,[74] and

    b. Generic Closing Submissions for Waterways, Lakes and Aquifers and Non-Commercial Fisheries.[75]

    ("Generic Submissions")

[73] Tamaki Legal, Brief of evidence of William James Taueki dated 27 August 2018, Wai 2180, # L3, at [65].
[74] Bennion and Black, *Closing Submission Regarding Environmental Issues* dated 15 October 2020, Wai 2180, #3.3.56
[75] Bennion and Black, *Generic Closing Submissions For Waterways, Lakes And Aquifers And Non-Commercial Fisheries* dated 10 October 2020, Wai 2180, [No ROI number].

Rivers

42. The TSOI asks:[76]

> How has English common law and Crown statute law (in particular the Coal Mines Amendment Act 1903 and subsequent legislation) been interpreted by the Crown and local authorities to define riparian rights and the ownership of riverbeds within the Taihape inquiry district, in particular regarding the Rangitīkei River?

43. As for the Claimants who live in the northern region are kaitiaki for the Rangitīkei and Moawhango Rivers. They also use those rivers for transport and sustenance.

44. To determine issues related to the rivers in the rohe, we respectfully submit that it is logical to first determine the rightful owners of the rivers. If the common law were to apply in a vacuum, then riparian landowners would own the half of the riverbed adjacent to their abutting land under a presumption called "*usque ad medium filum aquae"*.[77] On the other hand, the water flowing in the river would be deemed "publici juris" – something incapable of being owned but common and usable to all who have right of access over the flowing water.[78] However, the common law does not apply in a vacuum. It is applied in the context of Māori already living Aotearoa New Zealand from time immemorial according to their customs and usages long before British sovereignty could have possibly applied. As a result, all property is held under aboriginal title unless expressly extinguished by statute. The Court of Appeal in *Te Runanganui o Te Ika Whenua Inc v AG*[79] explained as follows:[80]

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with

[76] Waitangi Tribunal, Tribunal Statement of Issues dated December 2016 , Wai 2180, #1.4.3 at 49
[77] F M Brookfield, *Laws of New Zealand,* Water (online ed) at [57]
[78] F M Brookfield, *Laws of New Zealand*, Water (online ed) at [39]
[79] [1994] 2 NZLR 20
[80] *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20 at 23-24 (Per Cooke P).

> sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, **the radical title is subject to the existing native rights** . . . It has been authoritatively said that **they cannot be extinguished** (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes. (Emphasis added)

45. Therefore, it is accepted and now settled as law that the Crown's underlying or radical title does not extend to places which are subject to aboriginal or native title. The Law Commission summarised the holistic application of common law as follows:[81]

> The common law doctrine of aboriginal rights is based largely on the presumption of continuity, namely that "customs, particularly long-standing and universally observed customs of a particular community or in relation to a particular piece of land, are granted the force of law under English domestic law and may be enforced in accordance with the remedies available at law and in equity". In the colonisation context, this means that aboriginal rights and titles are continued as a matter of law after a declaration of sovereignty and the imposition of English law throughout a particular territory. The presumption applies regardless of whether the new territory was acquired by conquest, cession, or settlement. (Footnotes removed)

46. Likewise, recently in *Paki v Attorney-General (No 2)*[82] the Supreme Court did not accept that the common law presumption regarding riparian rights applied automatically to Māori land and rivers. The Court held:

> The presumption that riparian land on conveyance takes the bed of the river to the middle of the flow arises only where the person conveying property has himself the interest in the lakebed or riverbed to convey. **I do not consider that it is established that the fact of conversion of riparian**

[81] Law Commission, Māori Custom and Values In New Zealand Law dated March 2001, on 11 at [47], accessed at https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20SP9.pdf
[82] [2014] NZSC 118; [2015] 1 NZLR 67 (29 August 2014)

> **ownership according to custom into Maori freehold title itself raised a presumption of ownership to the mid-point**. (Emphasis added)

47. As a result, all rivers were subject to the doctrine of native title and held outside the Crown's radical or underlying title until the Crown expressly extinguished the native title. To this end, the Crown extinguished the native title over all "navigable rivers" by vesting such rivers in the Crown under the Coal-mines Amendment Act 1903 the statutes. This was carried forward in subsequent amendments including the present day Resource Management Act 1991. Therefore, the rivers which are non-navigable are still owned by tangata whenua under the doctrine of native title and the navigable rivers are owned by the Crown under legislation.

9. As explained later in our submissions, it is also settled law that when native title is extinguished, the disenfranchised title holders are entitled to compensation for loss of their former rights. The Claimants have had their rights over navigable rivers extinguished by the Crown and it follows that they are entitled to compensation from the Crown for losses they have suffered as a result. For this reason, the Claimants seek a recommendation that they be provided with compensation by the Crown.

Interference Compensation

48. In the following submissions, we address the following TSOI issue in relation to the freshwater river resource:

> What compensation, if any, was provided for the loss of any riparian rights or access to river resources?

We also provide submissions on the manner in which compensation for freshwater rights abrogation can be calculated. A recommendation is sought from the Waitangi Tribunal that the Crown include compensation for freshwater rights abrogation or interference in any historical treaty claims settlement with the Claimants.

49. As the resources of Taihape Māori have been usurped by the Crown over the years and then applied by the Crown for the benefit of itself and incoming settlers, Taihape Māori are entitled to monetary compensation for the

extinguishment of their rights over their resources. Compensation for the infringement of the Claimants' proprietary rights and interests in their respective freshwater resources is also legally available. Whilst the Waitangi Tribunal is not a court of law, nevertheless the law on such topics could assist the Tribunal with determining whether the Crown's failure to compensate the Claimants for river rights infringement breaches the principles of te Tiriti ō Waitangi. The concern with compensation for river rights infringement, as opposed to river rights extinguishment, is appropriate because the Claimants' rights in their waterways have not been extinguished altogether.

50. In *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General*, Cooke P stated that 'there is an assumption that, on any extinguishment of aboriginal title, proper compensation will be paid'.[83] President Cooke appeared to endorse compensation for rights infringement as well:[84]

> If any claims to compensation for interference with Māori customary or fiduciary or treaty rights to land or water can be mounted, they will not be diminished or prejudiced in any real sense by such transfers.

133. The interference with customary rights and native title in this context refers to an action that has limited or otherwise adversely affected the Claimants' ability to use, enjoy and dispose of their customary rights in their resources. The colonisation by the British of Canada, Australia and New Zealand resulted in numerous instances of the infringement by governments and others of the customary rights and native title of indigenes. The reports of numerous historical inquiries by the Waitangi Tribunal stand in support of this fact. In the Canadian Supreme Court case of *Delgamuukw v British Colombia*, relief in the form of monetary compensation was held to be available for infringement violations. Chief Justice Lamer stated:[85]

> In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation

[83] *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 24.
[84] *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 25.
[85] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 169.

> payable will vary with the nature of the particular aboriginal title affected with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

134. Kent McNeil is Professor Emeritus at York University and a noted Canadian academic on the topic of customary rights and aboriginal title.[86] He provides a telling rationale for why there should be compensation for infringement:[87]

> Although earlier decisions had intimated as much, *Delgamuukw* made clear that Aboriginal title is a real property right - in Chief Justice Lamer's words, it is "the right to the land itself." We have seen that it is also an exclusive right, which means that Aboriginal titleholders can keep others from intruding on their lands. As a result, any such intrusion, unless authorized by law, would be an actionable trespass. Stated more broadly, as a property right Aboriginal title is entitled to as much legal protection as any other property right in Canada.

135. The High Court of Australia recognised the native title and customary rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to the communal use of their land or its resources in the case of *Mabo v Queensland (No 2)* ("*Mabo (No 2)*").[88] The decision in *Mabo (No 2)* brought forth a great deal of legal commentary and it is said to have resulted in the passage of the Native Title Act 1993.[89] *The Wik Peoples v State of Queensland*[90] (*"Wik"*) followed *Mabo (No 2)*. In that case, Brennan CJ passed judgment on matters of compensation:

> This conclusion can more comfortably be reached with the assistance of the presumption that, without express words or necessary implication, Australian legislation will not be

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[86] Kent McNeil is Professor Emeritus at Osgoode Hall Law School, York University. A list of his publications can be found at <https://works.bepress.com/kent_mcneil>.
[87] K McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (*Robarts Centre for Canadian Studies,* 1998), at 8.
[88] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).
[89] *The Wik Peoples v The State of Queensland and Ors, The Thayorre People v The State of Queensland and Ors* (1996) 187 CLR 1 at 207.
[90] *The Wik Peoples v The State of Queensland and Ors, The Thayorre People v The State of Queensland and Ors* (1996) 187 CLR 1 at 250.

> construed to take away proprietary rights, particularly without compensation.

Compensation in the Waitangi Tribunal

136. In the *Muriwhenua Fishing Report*, the Waitangi Tribunal made the following finding:[91]

> In terms of the Treaty, it is not that the Crown had a right to licence a traditional user. In protecting the Māori interest, its duty was rather to acquire or negotiate for any major public user that might impinge upon it. In the circumstances of Muriwhenua, where the whole sea was used, and having regard to its solemn undertakings, the Crown ought not to have permitted a public commercial user at all, without negotiating for some greater right of public entry. It was not therefore that the Crown had merely to consult, in the case of Muriwhenua, the Crown had rather to negotiate for a right.

137. The Muriwhenua Fishing Tribunal was considering what it meant to protect Māori interests in relation to the fisheries. It found that the protection of the fisheries as a right was not limited to the business as it was or the places that were fished. It noted further that 'full exclusive and undisturbed' meant that Māori had the right to maintain their fishing business, activities and operations and, subject to that constraint, non-Māori fishing was allowed.

138. In applying the approach taken by the Waitangi Tribunal above to the Claimants' waterways, the right of non-Māori to use the freshwater resource is subject to the right of Māori to use the resource. It is submitted therefore that the Crown had a duty to acquire from or negotiate with the Claimants for the right to allocate use of the freshwater resource to the multiple users who have been or who are utilising the resource. Instead, the Crown vested the management of freshwater in itself by way of section 354 of the Resource Management Act 1991. There was no consultation by the Crown with our clients when the vesting occurred and certainly there were no negotiations between the parties. In doing so, the Crown breached the Treaty principles of good faith, partnership and active protection.

[91] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988), at 217.

Consequently as well, the Crown infringed our clients' freshwater rights and interests, to a significant degree, and for that the Crown is liable for compensation. By failing to negotiate with our clients for the right to allocate and manage their freshwater resources, and by failing to compensate them for the infringement of their rights and interests that resulted therefrom, our clients have suffered and continue to suffer significant prejudice.

139. The Muriwhenua Fishing Tribunal went further:[92]

> It is the fundamental right of all aboriginal people following the settlement of their country to retain what they wish of their properties and industries, to be encouraged to develop them as they should desire, and not to be dispossessed or restricted in the full enjoyment of them without a beneficial agreement.

140. In consummate violation of 'the fundamental right' referred to above, the Crown usurped our clients' rights and interests in the freshwater resource. Instead of assisting our clients with the management of one of their most important remaining resources, they were marginalised from any management role and as a result, inter alia, their freshwater resources have been heavily degraded. Furthermore, our clients were denied the ability to make any financial gain from the substantial use by others of their property/resource. Instead, the Crown enacted a legislative regime which allowed third parties to utilise and profit from the freshwater resource to our clients' detriment. At no point has the Crown expressed any interest in negotiating with our clients for a Crown right to allocate freshwater to users. There is no Crown policy proposal for the amendment of section 354 of the RMA to provide for our clients' management role.

141. In the *Te Ika Whenua Rivers Report*, the Tribunal found that while Māori shared rivers for non-commercial uses, it was 'quite unacceptable' that commercial profit could be made without any form of compensation or payment to Māori.[93] In particular, the Tribunal held that Te Ika Whenua were entitled to payment for the use of their river for power generation. While

[92] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988), at 220
[93] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012), at 46.

accepting the Court of Appeal's view in *Te Runanganui o Te Ika Whenua Inc Society v Attorney General*[94] that the Treaty did not envisage a Māori right of hydro-electric power generation in 1840, the Tribunal found that there is a Treaty right of development, and that includes the right to develop property—in this case, Te Ika Whenua rivers—for hydro-electric power generation.

142. Clearly, compensation is a reasonable expectation for the infringement of our clients' proprietary rights and interests in the freshwater resource. This is supported by both New Zealand and Canadian case law, by esteemed academics, the Waitangi Tribunal and by the Australian legislature. Where proprietary rights and interests in the freshwater resource exist, it is a real property right and as such it should be entitled to as much legal protection as any other property right. Professor McNeil insists that indigenous people have a right to compensation for any loss they incur as a result of infringement. In Australia, unless there is proper extinguishment of customary title by legislation, the Crown cannot take indigenous property rights away without compensation.

Compensation formula

143. We now turn to discuss the mechanics of compensation. Compensation for the loss or impairment of customary rights and interests was considered in the Australian case of *Griffiths v Northern Territory* of *Australia (No 3),* a case that is better known as *Timber Creek*.[95] *Timber Creek* is useful in that it outlines what compensation for Māori could look like.

144. In *Timber Creek,* Mansfield J outlined a three-step approach for the determination of compensation:[96]

a. Firstly, there is a calculation of the economic loss;

b. Secondly, a calculation of non-economic/intangible loss; and

[94] *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20.
[95] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900.
[96] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [42].

c. Thirdly, there is a calculation of pre-judgment interest.

145. Each of these factors will be considered to illustrate their practical application to the circumstances of the present Inquiry.

Calculating economic loss

146. We set out below several mechanisms for calculating the value of the losses incurred by the Claimants as a result of the infringement of their rights and interests in freshwater. These mechanisms are described mainly for the purpose of establishing that there is an approach, or several for that matter, to quantifying the losses incurred.

147. The first step towards determining the appropriate level of compensation is to calculate the value of the resource in plain economic terms. In *Timber Creek*, the claim was for compensation over land and waters in the relevant area.[97] The approach taken to value the resource involved calculating the freehold market value of the land. Whilst hardly agreeable, a discount of 20 percent was then applied to reflect the lower economic value of native title.

148. In the Lake Omapere decision of the Native Land Court, Acheson J recognised that Māori custom entailed the full ownership and usage of lakes.[98] Lakes were 'much more grand and noble than a mere sheet of water covering a muddy bed'.[99] Lake Omapere meant so much more to Māori as a lake than as dry land.[100] To Māori, freshwater bodies were[101]

> indivisible water regimes encompassing banks, bed, water, fish, aquatic plants, and even their spiritual guardians (taniwha). No element was severable; although fish were taken, plants were gathered, and the water flowed by, a whole and healthy body – cared for and used sustainability by its kaitiaki – remained as a fishery, a 'garden', a water resource.

[97] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [8].
[98] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012), at 39-41.
[99] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012), at 39-41.
[100] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012), at 39-41.
[101] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012), at 76.

> As Judge Acheson observed, without water the taonga was nothing more than a muddy piece of land.

149. Yet in determining compensation for infringed rights in freshwater bodies, it has become necessary to apply a degree of divisibility to them in order to determine the economic value of the resource and thereby a compensatory amount for infringement. Although a comprehensive market exists for land in New Zealand, no such market exists for freshwater bodies. While the market value for water is not ascertainable in the same manner as it is for land, it would be erroneous nevertheless to assume that it holds no market value at all. We do not here attempt to determine a specific dollar value for the infringement of freshwater rights and interests that has taken place. We merely contend that it is possible to establish an amount in compensation. Three methods for ascertaining the market value of freshwater resources are outlined in these submissions. They establish that freshwater resources can be priced and with that, the losses incurred by our clients as a result of infringing use can also be established:

a. Water permits as tradeable commodities;

b. Volumetric pricing; and

c. Auctions or tender.

Volumetric pricing

150. The Crown has produced a draft document for national allocation models, which contemplates volumetric pricing models. The cost of introducing a charge per litre of water has been assessed.[102] This model is already contemplated in a number of contexts such as town supply[103] and irrigation schemes.[104]

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[102] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b), at 622.
[103] Water Care, *Domestic Water and Wastewater Charges* (Watercare Services Ltd, 2014), at 1.
[104] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b): *Economic evaluation of instruments for the management of irrigation water on the Waimea Plains*, at 535.

151. A recent OECD study included comment on the pricing of water resources and it called for clearly defined, legal, volumetric water entitlements to promote efficiencies. It was stated that water pricing, typically in the form of abstraction charges, is a key element in a well-designed regime.[105] Various volumetric charges fixed through time were modelled and economic concepts of supply and demand were analysed.[106] This model further illustrates that a volumetric-based market model can be contemplated for the reformation of an allocation regime and notes the potential for ecological, socio-cultural, and most notably the economic gains individuals and society can obtain from freshwater resources.[107]

152. In an economic evaluation of the implications of various options for the management of irrigation water on the Waimea Plains, specific monetary amounts were outlined when discussing a volumetric water levy to fund dam costs for an irrigation scheme.[108] This means volumetric pricing is not just theoretical, but a substantive concept for calculating the marketable value of water.

Auction or tender

153. An auction-based model for freshwater allocation would set a standard market price for water and discharge rights.[109] The variability and elasticity one would expect in a property market would be illustrated. For example, rights with a higher reliability tranche would be expected to fetch a higher price than lower priority ones with an auction-based model. Likewise, as demonstrated in a case study of the Waimea Plains catchment, a permanent entitlement auction (modelled for 40 years), demonstrates large differences in water market price across the Waimea Plains catchment. This

[105] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b): *OECD Studies on Water, Water Resources Allocation, Sharing Risks And Opportunities*, at 535.
[106] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b): *Draft Regulatory Impact Statement – Freshwater Allocation: Interim Analysis*, at 659.
[107] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b): *OECD Studies on Water, Water Resources Allocation, Sharing Risks And Opportunities*, at 535.
[108] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b): *Economic evaluation of instruments for the management of irrigation water on the Waimea Plains*, at 535.
[109] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b): *Draft: Water Allocation & Use System: 'Auction-to-Auction'*, at 717.

form of auction would raise a significant amount of revenue for the regulator of the resource.[110] Revenues could also be accrued through a volumetric base charge on water and discharge rights.[111]

Market price

154. It is submitted that Māori rights and interests in freshwater resources have a market value that is analogous to that of freehold land. The Crown should refer to the available pricing mechanisms when setting compensation for the infringement of our clients' rights and interests in freshwater. Since the rate of water usage can be calculated and priced accordingly, and, in fact, since markets have been established for the sale and purchase of freshwater, it is feasible for the Crown to select an appropriate mechanism for the purpose of calculating the cost of rights infringement since 1992. It is submitted that millions of litres of water have been allocated to users in circumstances where such allocation infringed our clients' rights and interests in their freshwater resources. Compensation is now due for the wrongful, unauthorised allocations.

Non-economic, intangible loss

155. We turn now to discuss the prospect of compensation for the spiritual harm suffered and other intangible losses as a result of the infringing use of wai Māori. These have been termed non-economic losses by the courts. In the case of *Timber Creek*, the applicants sought an award *in globo* to account for the losses sustained and the prejudice experienced as a result of the extinguishment and impairment of their rights and interests in their lands and water. Compensation was sought for the harm caused to their spiritual and cultural connections with the land and water. In his judgment, Mansfield J exercised caution to ensure that there was no overlap between the economic and non-economic elements of compensation.[112]

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[110] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b): *Draft Regulatory Impact Statement – Freshwater Allocation: Interim Analysis*, at 659.
[111] Crown Law, Supporting documents to accompany brief of evidence of Peter Warrick Nelson dated 20 September 2018, Wai 2358, #F28(b): *Water Allocation & Use System: 'Auction-to- Market' (DRAFT)*, at 729.
[112] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [300].

156. The issue facing the court in *Timber Creek* was how to quantify in monetary terms the 'essentially spiritual' relationship between the indigenous peoples and their resources 'where there is no market for what is lost and where the value to the dispossessed holder rests on non-financial considerations'.[113] The translation of spiritual or religious hurt into compensation was required.[114] In response, Mansfield J decided that the law provides an entitlement to compensation even where there is no market for what is lost and where the value to the dispossessed holder of rights rests on non-financial considerations. He referred to the case of *Crampton v Nugawela* where Mahoney CJ observed the following:[115]

> There is no yardstick for measuring these matters. Value may be determined by a market: there is no market for this. There is no generally accepted or perceptible level of awards, made by juries or by judges, which can be isolated and which can indicate the "ongoing rate" or judicial consensus on these matters. And there is, of course, no statutory or other basis. In the end, damages for distress and anguish are the result of a social judgment, made by the jury and monitored by appellate courts, of what, in the given community at the given time, is an appropriate award or, perhaps, solatium for what has been done.

157. We submit that the first step in assessing non-economic loss is to determine the nature of the rights and interests in the resource which have been affected so as to provide an appropriate basis for assessing the detrimental effect, if any, that the acts of the Crown have had on the customary rights and interests of Māori. Mansfield J clarified:[116]

> Not all groups will be the same; hence it is not enough to make the inquiry about effects by reference only to a statement of what would be the determined native title rights were it not for extinguishment. An evaluation of what are the relevant compensable intangible disadvantages, with a view to assessing an amount that is fair and reasonable, requires an appreciation of the relevant effects on the native title holders

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[113] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [290].
[114] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [291].
[115] *Crampton v Nugawela* [1996] NSWSC 651; (1996) 41 NSWLR 176.
[116] *Griffiths v Northern Territory of Australia* (No 3) [2016] FCA 900 at [318].

> concerned, which, may include elements of 'loss of amenities' or 'pain and suffering' or reputational damage. In that respect, evidence about the relationship with country and the effect of acts on that will be paramount.

158. The approach taken by Mansfield J reflects earlier judicial discourse on how the claimed intangible rights and interests can be made manifest. In *Mabo (No 2)*,[117] it was clarified that native title has its origin in and is given its content by the traditional laws and customs observed by the indigenous inhabitants of a territory. In *Amodu v Tijani*,[118] the Privy Council clarified that the customary rights of indigenous cultures must be sourced from within their own cultural context. In *Ngati Apa v Attorney-General*,[119] Elias CJ clarified that the existence and content of customary interests is a question of fact discoverable, if necessary, by evidence[120] and determined as a matter of the custom and usage of the particular community.[121]

159. In *Timber Creek*, compensation was assessed in light of the communal ownership of native title.[122] Mansfield J further clarified that an evaluation of appropriate compensation for non-economic prejudice requires an appreciation of the relevant effects of the prejudice on the native title-holders concerned.[123] This may require the consideration of 'loss of amenities' or 'pain and suffering' or reputational damage. In that respect, evidence about the relationship with their natural resource and the effect of acts on that relationship will be paramount.[124] The determination of compensation must reflect the loss or diminution of the traditional attachment to land arising from the extinguishment or impairment in question (rather than from earlier or subsequent events or effects).[125] Mansfield J clarified:[126]

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[117] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) at 60.
[118] *Amodu v Tijani* [1921] 2 AC.
[119] *Ngati Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643 at [31]-[32].
[120] *Nireaha Tamaki v Baker* [1901] NZPC 1 at 577.
[121] *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 at 351.
[122] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [301].
[123] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [318].
[124] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [318].
[125] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [301].
[126] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [317].

> an assessment of the effect on native title rights cannot be divorced from the content of the traditional laws and customs acknowledged and observed by the Claim Group, that is under the laws and customs that sustain rights and duties in relation to land held under the relevant Claim Group's normative system, and the customary practices and beliefs of the Aboriginal peoples concerned.

160. While tort law provides an additional basis for determining non-economic loss, Mansfield J was cautious about its utility in calculating awards for damages since awards of that nature are primarily based on the plaintiff's subjective or personal loss, rather than the collective loss of a claim group.[127] Some of the cultural or spiritual values and practices that Crown acts or policies have interfered with include:

a. The whakapapa relationship that Māori have with the resource. In some cases, the freshwater body is a taonga tupuna (a revered ancestor), with its own personality and prestige and so it is worthy of protection.

b. Kaitiakitanga, which represents an immense responsibility for and the activity involved with maintaining the health and well-being of the awa. It includes harvesting and use of the resource, as well as the need to nurture the taonga.[128]

c. Cultural practices and knowledges are being lost and the status of Māori as tangata whenua (people of the land) is being diminished. This is evidenced, for instance, by the decline in:

i. mātauranga Māori (knowledge) about the awa, its associated flora and fauna, the spiritual components;

ii. use of the maramataka (lunar calendar) for determining when awa-related activities should be conducted; and

[127] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [300].
[128] I Mitchell, Brief of Evidence of Ian John Mitchell dated 23 September 2016, Wai 2358, #D62, at [50].

iii. the chanting of karakia (ritual chants and prayers) when the resource is in use.[129]

d. The desecration of the mauri or spiritual life force of the freshwater resource. Ian Mitchell describes the taniwhā as the guardian of the mauri that flows in the water, connecting all life.[130]

e. The desecration of freshwater bodies and of water-borne wāhi tapu (sacred areas) in particular has restricted the use of water for healing,[131] for the purposes of whakanoa (rituals to remove tapu) and for the preparation and washing of tūpāpaku (the dead).[132]

161. It is not possible to outline a complete list of non-economic harms because the content of Māori custom and usage of their freshwater resources varies across groups and areas. Furthermore, for some Māori, applying a monetary value to some of the non-economic aspects of a resource-based relationship may be deemed to be inappropriate.

162. We note however a growing trend with historical Treaty claim settlements for the inclusion of recompense for the kind of non-economic loss we are discussing. For example, the Ngāti Tūwharetoa Deed of Settlement Ratification Information Booklet[133] refers to specific cultural redress:

a. for a Whare Taonga, which is intended to preserve taonga tupuna and mātauranga;

b. to restore the mauri of Te Waiū o Tūwharetoa, a spring that fed the tūpuna Tūwharetoa as an infant, and which has since been polluted;

c. to support mahinga kai and cultural and environmental projects.

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[129] I Mitchell, Brief of Evidence of Ian John Mitchell dated 23 September 2016, Wai 2358, #D62, at [44].
[130] I Mitchell, Brief of Evidence of Ian John Mitchell dated 23 September 2016, Wai 2358, #D62, at [40].
[131] N Potts, Brief of Evidence of Noeline Henare Potts dated 23 September 2016, Wai 2358, #D70, at [24].
[132] C Walker-Grace, Brief of Evidence of Charlene Walker-Grace dated 23 September 2016, Wai 2358, #D60, at [24]; E Kereopa, Brief of Evidence of Te Urunga Aroha Evelyn Kereopa dated 23 September 2016, Wai 2358, #D59, at [19]-[20].
[133] Ngāti Tūwharetoa Hapū Forum Trust, *Ngāti Tūwharetoa Deed of Settlement: 2017 Ratification Information Booklet for Ngāti Tūwharetoa* (2017), at 7.

163. The Deed of Settlement in Relation to the Waikato River[134] provides cultural redress for cultural and environmental development projects related to the Waikato River, for restoring and protecting the relationship of the Waikato-Tainui iwi with the Waikato river, and for protecting and enhancing sites of significance, fisheries, flora and fauna.

164. It is submitted that while there is no hard or fast rule for valuing non-economic harm, there exists sufficient precedent and guidelines for appropriate calculations to be made with regard to the infringement of our clients' intangible rights and interests in their freshwater bodies.

Mass Deforestation

165. The TSOI asks:[135]

> 3. Has the Crown's environmental management regime for land-based resources: (d) Contributed to the degradation of the environment, including through permitting or encouraging deforestation …?

166. Mass deforestation occurred in the period after 1890[136] to make way for agriculture[137] and the North Island Main Trunk.[138] Insofar as it is relevant, we adopt the Generic Submissions in relation to deforestation.

167. Belgrave *et al* record that before the arrival of Europeans, "Maori had developed a system of regional economies between which flowed a large amount of communication and trade. These systems allowed for a detailed knowledge of the life-cycle and seasonal patterns of fish, birds and plants...This cosmology acknowledged interconnectedness in ecological, human and spiritual elements gave a priority to environmental sustainability."[139]

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[134] The Crown and Waikato-Tainui, *Deed of Settlement in Relation to the Waikato River* (17 December 2009), at [15.5].
[135] Waitangi Tribunal, Tribunal Statement of Issues dated December 2016 , Wai 2180, #1.4.3 at 47
[136] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga* dated December 2012, Wai 2180, #A10 at 87
[137] Belgrave et al, *Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga* dated December 2012, Wai 2180, #A10 at 87
[138] David Armstrong, *The Impact of Environmental Change in the Taihape District*, 1840-C1970, Wai 2180, #A45 at 50.
[139] Belgrave et al, *Te Rohe Potae Harbours and Coast, Inland Waterways, Indigenous Flora and Fauna, Sites of Significance and Environmental Management and Environmental Impacts Scoping Report*, Wai 898, #A64 at 19.

168. During the period of deforestation, resource management law was less about creating sustainable systems than producing the most economically desirable outcome for the settlers. Massive changes to the environment were permitted and even considered advantageous provided the colonists' desired outputs were achieved.[140]

169. Agriculture in New Zealand in the nineteenth century was seen as a more advanced land use, and if forest protection was to be done, it was to be done in the interests of agricultural development**.**[141]

170. Julius Vogel was a Member of Parliament and a key player in the expansion of the New Zealand economy. Vogel considered in-depth information about the effects of deforestation. He became aware that it leads to flooding, destroys ancient water courses, and it washes away the soil. His many and varied sources included official reports by colonial officials, scientific compilations, learned papers and books. He also considered information in relation to the effects of deforestation as it had occurred in Ceylon, Egypt, Mauritius, the West Indies, the Danish Island of Santa Cruz, and France.[142] It is clear that a large amount of information was available to the Crown between 1874 and 1909 in relation to the consequences of deforestation, and this is ably summarised by Dr Cant in his report: [143]

a. The Crown knew that the removal of forests would accelerate soil erosion, and the debris that resulted would find its way into streams and rivers.

b. The Crown knew that the removal of forests would increase run-off, and produce flooding.

c. The Crown knew that the flows of streams and rivers would be less constant and that some springs would fail if forests were removed.

[140] Dr Cant, *Crown Knowledge of the Impact of Deforestation 1874-1990*, Wai 898 #154(a) at 18.
[141] Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154(a) at 19.
[142] Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154 (a) at 25.
[143] Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154 (a) at 32.

d. The Crown knew that the water quality of streams, rivers, and lakes, would deteriorate if forests were removed.

e. The Crown knew that the ... removal of trees from river banks and lakesides would result in increases in water temperature.

f. The Crown knew that lands were best protected if the headwaters of the rivers were retained in forest. 'Guardian forests' included 'the sides, the crowns, as well as the steep declivities of mountains.

h. The Crown knew that riparian strips were especially important for the protection of streams, rivers, and lakes.

171. Despite the awareness that Vogel and the Crown had of the adverse effects of deforestation, and despite the passage of the New Zealand Forests Act 1874, it is submitted that the available knowledge was not properly utilised. Schofield sums up the outcome in these words:[144]

> But the benign intentions of Parliament were quite overridden during the next twenty years. Prosperity and expansion were heedless of the economic future. The beautiful bush was simply ravaged.

172. Schofield went further:[145]

> Even the settler became, by the terms of his lease, a wanton and a profligate. Under the strange definition of "improvements" he was compelled to hack down a certain area of bush each year. Whether he could convert the timber was immaterial. If there was no sawmill at hand, he had simply to destroy it and sow grass and graze sheep among the blackened logs.

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[144] Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154 (a) at 36.
[145] Schofield, G *New Zealand in Evolution: industrial, economic and political*, London, Fisher Unwin 1909, page 52 as quoted in Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154 (a) at 36.

173. The Timber Commission toured both islands in 1909 hearing evidence on the market price of kauri and the consequences of importing Oregon pine and not conservation. J P Grossman was a writer from Auckland. He was concerned that the Commission was preoccupied with timber, not conservation, and he determined to restore the balance by redirecting public attention to those aspects of the deforestation question which are usually ignored.[146] Grossman's articles were highly visual. There are photographs of deforestation and erosion, natural forests and commercial plantations, and rural and urban flooding.[147] Grossman pointed to the damage done by mass deforestation in a number of districts including Wanganui, Manawatu and the Hawkes Bay:[148]

> In the Hawke's Bay district similar conditions have produced similar results; and all over New Zealand, wherever the bush around the sources of streams has been cut away, floods of varying degrees of intensity and destructiveness have inevitably followed.

174. He elaborated on the impacts:[149]

> Already the penalty paid for our recklessness is a heavy one, reckoned only in the money value of land washed away or overlaid with debris, in stock drowned, and property destroyed, and in the huge and increasing outlay on bridges that must constantly be repaired and approaches that must continually be lengthened, and groins and embankments that must be perpetually strengthened against the encroachments of these turbulent streams.

175. Despite evidence of environmental degradation as a result of deforestation, the Crown did not heed the warnings and deforestation continued unregulated, or, if there was regulation, it went unpoliced. Amongst other significant harm caused to the Claimants as a result of the Crown's negligence, there has been significant siltation build up in the waterways of their rohe because when the bush was decimated, the hills literally fell down

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[146] Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154 (a) at 37.
[147] Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154 (a) at 37.
[148] Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154 (a) at 37.
[149] Dr Cant, *Crown Knowledge of the Impacts of Deforestation, 1874-1990*, Wai 898, #A154 (a) at 37-38.

and rampant soil erosion resulted. Much of the eroded soil ended up in the waterways as silt. Armstrong explains how the deforestation resulted in siltation as follows:[150]

> As we have seen the deleterious effects of large-scale forest clearance were well known by this time, and there was increasing evidence of erosion, river siltation and floods caused by forest denudation.

176. Armstrong further explains:[151]

> Destruction of the forest canopy and root system prevented rain from percolating slowly into the ground. On bare slopes it ran off rapidly, carrying away soil and rocks which caused siltation and serious problems, including flooding, in the lower reaches of streams and rivers. As well the effect of erosion on rivers, there was also a problem with hillside slips. This afflicted most of the Taihape district.

177. Due to heavy siltation of the waterways, water quantity and water quality have been adversely affected, as have the flora and fauna of the waterways. These disastrous environmental outcomes have adversely impacted the Claimants ability to practice kaitiakitanga over the waterways and their use of a variety of river resources.

PREJUDICE

178. As a result of the Crown's action and or omissions, the Claimants have suffered the following prejudice:

Crown Purchasing

179. The Claimants have been prejudiced by the Crown purchasing of the Rangitīkei-Manawatū block and the subsequent failure to investigate the error resulting in the creation of the Waitapu block. The original purchase of the Rangitīkei-Manawatū block relied on a flawed investigation which created an incomplete and distorted picture of the true nature and extent of

[150] Armstrong, *The Impact Of Environmental Change In The Taihape District, 1840-C1970* dated May 2016, Wai Wai 2180, #A45 at 55
[151] Armstrong, *The Impact Of Environmental Change In The Taihape District, 1840-C1970* dated May 2016, Wai Wai 2180, #A45 at 87

Muaūpoko rights and interests as tangata whenua. The resultant investigation into Waitapu was also incomplete, despite Crown officials being aware of uncertainties around the block. In the end, this gave the Crown the ability to buy lands from those who were willing to sell and allow the dispossession of Muaūpoko whenua in the process. This contributed to the destruction of the Muaūpoko economic and social base and contributed to their diminution as a tribe and a diminution of their mana.

Environment

180. As a result of the Crown's action and or omissions, the Claimants have suffered the following Environmental prejudice:

a. Deterioration in the quality of the soil;

b. Leaching into the Claimants waterways;

c. Changes in water quality as a result of changes from forest cover to pastoral agriculture;

d. Change in the habitat for the indigenous fishery;

e. Wetland drainage resulting in loss of indigenous fishery habitat; and

f. Turbid and silted waterways.

RELIEF

181. The Claimants seek the following relief in relation to the prejudice caused by the Crown's breaches of te Tiriti:

a. A finding that the claims submitted above are well-founded; and

b. A finding that the Crown breached the following principles of te Tiriti;

i. The principles of partnership and reciprocity;

ii. The principles of active protection; and especially active protection of tino rangatiratanga which includes management of researches of other taonga according to Māori cultural preferences;

iii. The principle of consultation especially in respect to local issues;

iv. The right to develop economically and politically; and

c. A recommendation that the Crown makes a full, public and unreserved apology for those actions and omissions that are found to be in breach of te Tiriti.

Crown Purchasing

d. A finding that the Crown was in breach of the duty of active protection when it failed to out the greater Rangitīkei-Manawatū block before the Native Land Court to establish true customary interests;

e. A finding that the Crown was in breach of the duty of active protection when it's official Featherston failed to establish true customary interests on the ground in the greater Rangitīkei-Manawatū block;

f. A finding that the Crown was in breach of the duty of active protection by incorrectly surveying the Rangitīkei-Manawatū block resulting in the Waitapu section being left unpaid;

g. A finding that the Crown was in breach of the duty of active protection by implementing Featherston's formula for establishing tribal interests in the Rangitīkei-Manawatū based on flawed and incomplete information;

h. A finding that the Crown was in breach of the duty to consult when Featherston made his formula without receiving consent from Muaūpoko;

i. A finding that the Crown was in breach of the duty to consult by not consulting with the original parties to the Rangitīkei-Manawatū purchase, including Muaūpoko, to establish customary interests in Waitapu;

j. A recommendation that the Crown compensate Muaūpoko for the economic loss suffered by Muaūpoko in Waitapu being classified as secondary claimants under Featherston's formula;

k. A recommendation that the Crown recognise Muaūpoko as tangata whenua in the greater Rangitīkei-Manawatū block area of Waitapu;

l. A recommendation that the Crown apologise to Muaūpoko for their punitive actions towards Muaūpoko as members of the Kīngitanga;

m. A recommendation that the Crown provide compensation to Muaūpoko for their punitive actions towards Muaūpoko as members of the Kīngitanga.

Environment

n. A recommendation that the Crown makes a full, public and unreserved apology for its mismanagement of the environment and of the waterways and the ngahere in particular; and

o. A recommendation that the Crown facilitates the Claimants' restoration as kaitiaki over the waterways of their rohe, and that the Crown properly fund and resource the Claimants so that they may fully engage with their role as kaitiaki in this respect; and

p. A recommendation that the Crown properly addresses the deterioration in water quality and quantity in the Claimants' waterways; and

q. A recommendation that the Crown properly addresses the marked decline in the quality and quantity of the native flora and fauna in the Claimants waterways; and

r. A recommendation that the Crown shares the management of the waterways and the tuna fishery within the Claimants' rohe with the Claimants, and that where there is a management-related dispute

between the Claimants and the Crown or its agents, any such dispute is to be resolved in accordance with the Claimants' tikanga; and

s. A recommendation that the Crown works to actively restore the ngahere that once existed in the Claimants' rohe by planting native trees on Crown-owned land in the Claimants' rohe, including any land owned by the Department of Conservation, by planting riparian strips along the banks of all waterways in the Claimants' rohe, by planting native trees on any land voluntarily proffered for such a purpose by any landowner with lands situated within the Claimants' rohe;

t. A recommendation that the Crown restores the quantity and quality of native flora and fauna in any ngahere that is situated within the Claimants' rohe;

u. A recommendation that the Crown recognise Taihape Māori ownership of their waterways; and

v. A recommendation that Crown compensate Taihape Māori for the Crown's and third-party use of their water ways.

Dated at **Auckland** this **23rd** day of **October 2020**

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