KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF THE TAIHAPE: RANGITĪKEI KI RANGIPŌ DISTRICT INQUIRY

PRESENTATION SUMMARY FOR CLOSING SUBMISSIONS OF THE CROWN RELATING TO TRANCHE 1: LANDLOCKED LANDS TO 1975

21 January 2021

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INTRODUCTION

1. The cultural, spiritual, practical and economic implications of restricted access have been expressed strongly by claimants.[1] That experience has been heard by the Crown and is acknowledged within these submissions.

2. Māori retain approximately 14% of the land within the Taihape Rangitīkei inquiry district.[2] 70% of the land retained by Māori[3] in the inquiry district is landlocked. Nationally, as a broad estimate, up to 20% of land retained by Māori is estimated to be landlocked.[4]

3. The primary focus of these submissions is to assess how Taihape Māori retained lands came to be landlocked and the Crown's compliance with the Treaty in that history.

CONCESSIONS AND ACKNOWLEDGEMENTS

Impact of Native Land Laws

4. Concessions made earlier in this inquiry[5] concerning the impacts of the Native Land Laws in making Taihape Māori lands more susceptible to fragmentation, alienation and partition and thus contributing to the undermining of tribal structures have direct relevance to the issue of landlocking. The issue of landlocking assumes great importance in a context of undermined tribal structures and significantly reduced tribal landholdings.

Equality

5. The Tribunal has found that the Crown has a duty to act with fairness and justice to all citizens – describing this as the principle of equity.[6]

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1 Wai 2180, #E3 Herbert Steedman; #G1 Tama Wipaki; #G4 Ritchie Chase; #G13 Richard Steedman; #G14 Lewis Winiata; #G18 Merle Ormsby, Tiaho Pillot, and Daniel Ormsby; #H6 Ngahapeaparatuae Lomax; #H8 Peter Steedman; #H11 Te Rangianganoa Hawira; #H13 Maraea Elizabeth Oriwia Bellamy and Te Urumanao Kereti; #I2 Lewis Winiata; #I3 David Steedman; #N8 Hemi Biddle; #O1 Peter Steedman; #O3 Richard Steedman. See also Wai 2180, #2.6.36(a) for claimant evidence prior to February 2018.

2 Wai 2180, #A37 at 516.

3 "lands retained by Māori" is utilised throughout these submissions refers to land within the jurisdiction of the Māori Land Court and reflects the revised terminology of C Innes in Wai 2180 #A15(m) at [5] of "Māori Land Court title private land". ie lands that have not ceased to be Māori land at any point from Taihape Māori owners. It is not intended to include general lands owned by Māori that are not subject to that Act eg lands bought or otherwise acquired by Māori who may or may not have customary associations those lands where the customary association is not the basis on which they are currently owners of the land.

4 Te Puni Kōkori officials estimate that 20% of Māori freehold land is likely to have access restrictions. Email from Evan Martin to Te Arawhiti, 17 August 2020. Waitangi Tribunal *He Kura Whenua ka Rokohanga* 2015 at 68, 88 (estimate of 2006 Taumata), and at 243 Lillian Anderson reliant on regional evidence.

5 Wai 2180, #3.3.001 Crown Opening submissions at 8-10.

6 See for example, the Tribunal's most recent iteration of this principles Waitangi Tribunal, Te Mana Whatu Āhuru IV, 127.

6. The Crown concedes that:

6.1 Taihape Māori suffered indirect discrimination which limited their ability to alleviate access difficulties to lands they retained between 1912 and 1975 due to various consenting requirements in the legislation.

6.2 From 1922 those consenting requirements were largely removed, except where the land had ceased to be Māori land prior to 1913. That exception had particular impact on Taihape Māori in that, until 1975, unless the consent of their neighbours was secured, no effective legal remedy was available to Taihape Māori to improve access difficulties to most of the land they retained. (The most practical access routes into most of the high-altitude lands retained by Taihape Māori traverse private lands that had ceased to be Māori land prior to 1913 (primarily the large stations along the Napier Taihape Road).[7])

6.3 The Crown concedes the effect of the 1922 exception was that, between 1922 and 1975, the interests of owners of lands in the district that ceased to be Māori land prior to 1913 were prioritised over the access requirements of owners of retained Māori land.

6.4 This unequal treatment under the law was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles. On the facts of Taihape, the inconsistent treatment also resulted in an inconsistent outcome akin to landlessness (addressed below).

7. This concession is to be read in the context of the particular demographics and land type, use, and alienation pattern of Taihape. The Tribunal's district inquiry programme is now largely complete (with the exception of Taihape, Eastern Bay of Plenty and Porirua ki Manawatū). No other inquiry has identified such a high proportion of retained lands being landlocked at a regional level.[8]

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7 And/or remained Māori-owned but were subject to lessees - in which cases the consent of the lessee was required.

8 Analysis as to the proportion of landlocking experienced by Māori at a more granular level (eg iwi or hapū) has not been undertaken for this inquiry or, to the best of Counsel's knowledge, in other district inquiries.

Landlessness

8. The Crown's Treaty responsibilities extend to both land retention and the ability to utilise lands – including for development. For Taihape Māori, the lack of reasonable access to the majority of the lands they retain has implications for retention, utilisation and development of their lands.

9. The high percentage of land retained by Taihape Māori which is landlocked means that Taihape Māori retain insufficient land with reasonable access for their present and future needs. A key factor contributing to this is, as acknowledged directly above, the failure of the relevant legislation between 1922 and 1975 to provide an effective remedy for accessing landlocked land for Taihape Māori.

10. The Crown further concedes that:

    10.1 most of the land retained by Taihape Māori is landlocked. The lack of reasonable access to their lands has made it difficult for owners to exercise rights of ownership or maintain obligations as kaitiaki.

    10.2 The experience of Taihape Māori has been that their practical, economic and cultural connections to the important lands they have striven for decades to retain and to utilise have been significantly disrupted and for Taihape Māori, this has been akin to being landless.

    10.3 The Crown's failure to ensure Taihape Māori retained sufficient lands with reasonable access for their present and future needs breached te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

HISTORICAL LEGISLATION

11. Government policy has been generally supportive of landowners being able to secure access to their lands. Legislation has been enabling and permissive and has, subject to certain conditions, included the ability to order access for Māori lands since 1886. This has included remedial measures that enabled access to be granted retrospectively where applications were not made at the point of the original title determination or partition being undertaken (subject to conditions). The policy presumption that has guided the law relating to

access from 1922 (consistent with the (now) longstanding case law) is that access at the whim of, or dependent of the goodwill of, another is not reasonable access.

12. From 1886 access to land could be ordered either upon creation of a title, upon partitioning, or at a later date to remedy a lack of access.

13. Until 1912 there was no requirement for the consent of the lessee or the adjoining landowner whose land the access would traverse. From 1912 the consent of the adjoining landowner or lessee was required if the access being sought traversed non-Māori land, or leased Māori land. Consent was not required for access over Māori land that was not leased.

14. In 1922 requirements for consent were abandoned, with one exception. The legislation created a new regime in which consent was not required for Māori lands or for lands that had become European land after 15 December 1913 - for which the Court could make arrangements for roads or rights of way as it saw fit. However, in some tension with the policy presumption of this Act, consent continued to be required to secure access across land that became European Land before 15 December 1913.[9]

15. In 1975, the pre-1913 consenting exception was removed with the result that landowners could not veto neighbours' applications for access (although other barriers remained).

16. Matters of compulsion, compensation, consent, and the remedial provisions are discussed in more detail in the main submissions.

HOW TAIHAPE LANDS CAME TO BE LANDLOCKED

17. Topography, climate, habitation patterns and predominant land uses have had a direct impact on the alienation and retention patterns in the inquiry district – and on landlocking.

18. A detailed summary of the key block histories is provided as **Appendix B** of the submissions**.** Common to each of the block histories is:

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9 It is not certain what can be read into the fact that the 1922 Act did not exempt lands that ceased to be Native Land between 1913 and 1922 from the retrospective remedial measure. It may give more weight to the view that the policy presumption of the 1922 Act was to remove consent issues from access considerations.

18.1 Some blocks (Owhaoko and Oruamatua Kaimanawa in particular) had extensive levels of partitioning early on that have not been well explained by technical witnesses. The pattern of early partitioning does not appear to reflect customary use patterns or the economic intentions of Taihape Māori (which were at the time focussed on lower altitude lands). The intensive partitioning might – in part – reflect the contested nature of these 'border lands' between Taihape and Hawkes Bay. The complexity of this partitioning may have had some bearing on the failure to consider access provisions to those lands.

18.2 At the time their titles were created, and/or partitioning was undertaken, applications were able to be made to secure legal access and no consent of the adjoining owners was required (all are after 1886 and prior to 1912).

18.3 A small number of applications for access were made and granted including: Taraketi 2, Owhaoko D5 section 1; Owhaoko D2, and for Oruamatua Kaimanawa 2G, 1K, 1L partitions. (Although not all were subsequently implemented on the ground eg 1902 Owhaoko D 5 section 1; and Mr Karaitiana's three access orders over some Oruamatua Kaimanawa and Owhaoko blocks.)

18.4 Applications for access were not made in relation to the majority of blocks/partitions (notwithstanding the legislation during that period permitting access applications and orders to be made).

18.5 The ability to utilise the remedial provisions to improve access from 1912 was, in every case, subject to the requirement of adjoining landowner/lessee consent as intervening lands along the most practical access routes ceased to be Māori land prior to 1913. This included:

18.5.1 Access to Owhaoko C and D blocks over land that ceased to be Māori land in 1901 (Owhaoko D5 No1);[10]

[10] Now Ngamatea Station lands. Wai 2180, #A06 at 110 Owhaoko D5 No 1. Note Woodley Wai 2180, #A037 at 398 located a 1902 order for access over this block however it appeared that the order was not subsequently executed and/or subsequent parties lost sight of it. She also (at 407) tracks Crown decline of further purchase

18.5.2 Access to Te Koau A over land that ceased to be Māori land in 1893 (Mangohane G); [11]

18.5.3 Access to Aorangi Awarua and to Awarua 1DB2 over land ceased to be Māori land in 1893 (Mangaohane); [12]

18.5.4 Oruamatua Kaimanawa IU and IV locked by IK by 1897 leasing and 1907 purchase;[13]

18.5.5 Access to Rangipo Waiu B6B, B6C and B1 to B5 over B6A which was sold in 1912 (to the previous lessees).[14]

18.6 Applications were nonetheless made between 1922 and 1975 under other remedial provisions (often by lessees). One of those applications was successful (Motukawa 2B) as it could demonstrate a technical error had occurred. The remainder failed.

PART 4: ANALYSIS

19. Landlocking came about through a mixture of historical circumstance. No single factor is solely causative. Some contributory factors were:

19.1 within the Crown's responsibility (policy and legislative frameworks including the efficacy of remedial measures, and direct Crown actions eg land dealings including partitioning, purchasing, land exchanges);

19.2 at some points in time, or to some extent, within the control of Māori (land dealings including partitioning, use of legal measures to secure access between 1886 and 1912, commercial decisions, and actions of individuals);[15]

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proposals in this area due in part to concerns about access; and (at 402) tracks the decline of a 1920s application for a public road to be formed over these lands by which the 1902 order is not mentioned.

11 Now Timahanga Station lands. Wai 2180, #A037 437-438; Wai 2180, #A06 at 229-230. 5 kilometres of the "Timihanga Track" traverses Mangohane G private purchased by Studholmes 1893.

12 Now Mangohane Station lands. Wai 2180, #A037 286; Wai 2180, #A06 at 224 Mangaohane purchases by Studholme in 1885 and 1886 validated by legislation in 1893.

13 Wai 2180, #A06 at 160.

14 Wai 2180, #A037 at 347.

15 It is noted that some access restrictions may be capable of remediation by the current generation (eg formalising access to some sites across adjoining lands within close ownership; future-proofing access across adjoining lands in substantially the same ownership or administration). The Crown acknowledges that other situations may no longer be reasonably capable of remediation by the current generation due to complexity

19.3 not within the control of either the Crown or Māori land owners but nonetheless relevant and significant. These include:

19.3.1 climate, topography, remoteness, and demographics (ie residential patterns and population sizes);

19.3.2 the decisions, actions and legal rights of private third parties and local authorities; and

19.3.3 the conduct of the Native Land Court or lawyers and advisors engaged by Māori landowners over time.

Reasonableness test

20. Reasonableness is a fundamental aspect of Treaty jurisprudence and is of direct relevance to the laws concerning access and landlocking.[16]

21. Investment in securing and developing access (whether funded by Māori owners, adjoining landowners, or public funds, or any combination of these) must bear some proportionality to the benefits to be realised through that access – ie must be reasonable. Any expectation that formed access should have been publicly funded to every block, no matter the topography, utilisation potential, expense, or intensity of occupation, is not reasonable.

Use of the access provisions

22. The ideal time for access routes to be legally secured on a title was at the creation of that title (whether parent block or subsequent partition).[17]

23. The fact that a number of applications were made, and orders granted, demonstrates the legislation was effective and that access could have been sought and secured for further Māori lands. It remains unknown why more applications were not made either when titles were granted or at the time of partition. It also remains unknown why the Court did not take a more active

or costs of resolving the situations. The post 1975 aspects of this, including prejudice and remedies, are addressed in Tranche 2.

16 Recent amendments to Te Ture Whenua Māori Act 1993 expanding/clarifying factors that inform what might be 'reasonable access' are set out above but will be discussed in more detail in Tranche 2 of these submissions.

17 Wai 2180, #A037 at 479.

rather than responsive approach (even with increasing legislative directions for it to do so).[18] The Crown is not responsible for the actions of the Court.[19]

24. Claimants have stated that from 1900 general land titles could not be created without access being provided, in contrast to the discretionary approach provided in the legislation for Māori lands.[20] This is not accurate, it applied only where owners were subdividing for "the purpose of disposing of the same by way of either sale or of lease" [exceeding 14 years].[21] The provision was not for private access but for public works takings of land – the roading created was vested in the Crown (with the developer having met the costs of forming the road).[22]

25. An allegation that partitioning processes for Taraketi 2 and Oruamatua Kaimanawa 3 demonstrate bias are not supported on the evidence.[23] The law operated either by application of any interested party or, alternately, the Court at its discretion.[24] A more straightforward explanation might be the owners (or their lawyers) of one party may have applied for access, the other may not have - Taraketi was a central hub of occupation (and thus applicants are likely to have turned their mind to access) and Oruamatua Kaimanawa 3 was not.

Crown knowledge and responses

26. There was Crown knowledge of block-specific access issues from the early 1900s eg possible routes into Motukawa 2B3C, Owhaoko or Oruamatua Kaimanawa.[25] The officials' responses in those cases were largely to point parties towards utilising the legal measures and remedies available to them or express caution about further partitioning.

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18 See Compulsion: at [14] above.

19 Treaty of Waitangi Act 1975 section 6 (claims against the Crown). Actions of the Court are not actions of the Crown. See for example https://www.waitangitribunal.govt.nz/claims-process/make-a-claim/ which states "The 'Crown' is the central Government. The Tribunal can only inquire into actions of the Crown/central Government. The Crown is not local government (district or regional councils) and it is not the Courts."

20 Referencing Woodley Wai 2180, #A037 at 242 who in turn is referencing earlier work by Hearn.

21 Public Works Acts Amendment Act 1900 s 20.

22 If the road was within three miles of a 'borough' the owner/developer was required to meet all costs in forming, metalling, and – where agreed with the local authority, establishing drains and footpaths. If not within three miles the road was required to be formed as agreed with the local authority.

23 Wai 2180, #3.3.34 at [61]; Wai 2180, #4.1.1 Transcript HW 4 at 351; Referencing matters discussed at Wai 2180, #A037 at 243-248, 476 (Woodley summary Wai 2180, #037(j) at 10).

24 Native Land Court Act 1886 s 91.

25 Wai 2180, #A037 at 272, 479.

27. At a systemic level, those measures and remedies evolved over time as tracked in the legislative history above. There is little record of systemic concern about access recorded between the 1913/1922 measures to the 1970s. They appear limited to:

27.1 1952: "Another real obstacle is the inconvenient areas into which Māori lands have been divided by the haphazard method of partition which was commonly employed by the Māori Land Court, not in recent years, but in former times. Lands were often cut up without regard to the use to which the resulting areas could or should be put, and without regard to access."[26]

27.2 1962: the "many and various laws made over the years concerning roadways" contributed to "an element of confusion … as to the relative authorities and requirements and procedure involved in obtaining access". This paper recommended removal of the pre-1913 consenting requirement.[27]

27.3 1972: review discussed below.

27.4 1980: Deputy Registrar of the Aotea Māori Land Court's retrospective summation that: "Māori Land Courts, when making partition orders in early days, did not seem to consider the question of access."[28]

28. The first significant review of the core issue (being unable to order access for pre-1913 lands over the objections of adjoining owners) emerged after a case in 1972. By that time, Crown officials appear somewhat surprised to be advised of a situation where a Rangitikei-Manawatu reserve:[29]

> "was completely landlocked and the owners were unable to obtain any form of access to the nearest public road. Adjoining owners were not prepared to negotiate and, indeed, there was a suggestion that some adjoining owners were in fact using the landlocked land."

26 Wai 2180, #A037 at 250.

27 Wai 2180, #A037 at 251.

28 Wai 2180, #A037 at 520.

29 Wai 2180, #A037 at 252.

29. The Maori Affairs Act 1953 was amended in 1975 to allow access be granted over pre-1913 titles - even over the objections of adjoining landowners.

30. During that policy process, the Whanganui District Office advised:[30]

> There are some very old Maori Land Court titles for which access was not adequately provided, eg some of the Owhaoko blocks, but again the policy has been to deal with them as the need arises and the requirements become known.
>
> Cases occasionally come to light through alienation proceedings where the occupier of adjoining or surrounding lands is the only person, because of access problems, able to purchase or lease. In many of these instances it is known that access by road would never be physically practicable because of the nature of the country.

31. Landlocked lands remedial provisions were subsequently located in (from 1975) the Property Law Act 1952[31] and the current 2007 successor Act[32] (ss 326 – 331). Under these provisions (both the 1952 Act as amended and the 2007 Acts):

31.1 consent from adjoining landowners is not necessary;

31.2 compensation to be paid is discretionary;

31.3 costs of works necessary to give effect to an order must be met by the applicant unless directed otherwise by the court (where just and equitable for other party to pay whole or share).

32. Māori were able to use the landlocking provisions that were inserted into the 1952 Act from 1975 by making applications to the general courts however few applications were made. The apparent reluctance to make applications to the general courts resulted in the legislation being further amended in 2003 to enable applications to be made to the specialist jurisdiction of the Māori Land Court.

CONCLUSION

33. Acknowledgements and concessions in relation to the above are set out at the start of this presentation summary. A number of matters addressed in

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30 Wai 2180, #A037 at 254.

31 Property Law Act 1952 s 129B as amended by Property Law Amendment Act 1975 to insert Landlocked Land.

32 Property Law Act 2007 ss 326-331.

the closing submissions themselves are not addressed in this (necessarily truncated) presentation summary. Further matters are to be addressed in Tranche 2 submissions.

34. Landlocking in the inquiry district is a significant and complex issue. It is fact specific (ie particular to Taihape high-altitude lands). Adequate (if not perfect) legislative measures were in place to secure legal access at the critical point of title creation or partition but were not always used. Multiple contributory factors inform why those provisions were not used, including factors outside the Crown's control. This elevated the need for effective remedial measures.

35. The Crown acknowledges through these submissions that, in the particular circumstances of Taihape:

    35.1 the remedial measures provided to enable access to be improved were not effective for Taihape Māori;

    35.2 the cumulative effect of landlocking for Taihape Māori has been an experience akin to being landless.

21 January 2021

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TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel