In the Waitangi Tribunal **Wai 2180**

Under the Treaty of Waitangi Act 1975

in the matter of the Taihape: Rangītikei ki Rangipō District Inquiry (Wai 2180)

CLAIMANT CLOSING GENERIC SUBMISSIONS
NATIVE LAND COURT: ACCESS

Dated 21 December 2020

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May it please the Tribunal

1. Legislative provisions regarding access to Māori land were considered in paragraphs 53 to 69 of the landlocked land closing submissions.[1] This section of the closing legal submissions on the Native Land Court addresses the Court's consideration of access to Māori land and should be read in conjunction with the landlocked land closing submissions.

Public and private sector roles in provision of access in the Nineteenth Century

2. Marr notes that the "[t]he right of the state to take private land for public purposes was in fact one of the few principles that cut across the high regard normally attached to private landownership in English Law". In nineteenth century practice, however, this was fairly infrequent in respect of transport infrastructure.[2] Marr sets out a brief history of public works in England, and notes that in the eighteenth and nineteenth centuries, and in some cases into the twentieth century, much development of infrastructure was the domain of the private sector, with the Crown acting as:[3]

> a neutral umpire, limited to laying down the general principles and procedures for taking land and determining compensation. This included providing machinery for resolving disputes between the private promoters who had obtained compulsory powers and the landowners subject to them.

3. Marr continues:[4]

> Improvements in town planning and town amenities had also begun by this time – a new development in public works. Once again, in England, landowners played a significant role.

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[1] Wai 2180 #3.3.34.

[2] Cathy Marr *Rangahua Whanui National Theme G: Public Works Takings of Maori Land, 1840-1981* First release, Waitangi Tribunal, Wellington, 1997 at 8.

[3] Cathy Marr *Rangahua Whanui National Theme G: Public Works Takings of Maori Land, 1840-1981* First release, Waitangi Tribunal, Wellington, 1997 at 18.

[4] Cathy Marr *Rangahua Whanui National Theme G: Public Works Takings of Maori Land, 1840-1981* First release, Waitangi Tribunal, Wellington, 1997 at 19.

> The joint initiatives of industrialists and landowners resulted in the creation of new towns and considerable expansion in many old ones. Much of this was made possible by the development of rail transport and by the efforts of landowners and industrialists in providing land and establishing new industries on it. They laid out streets and built public amenities such as churches, schools, shops, and waterworks, and they reaped the profits from the industries the towns serviced.

4. The Crown made some movement toward facilitating a similar role for Māori via the Native District Road Boards Act 1871, passed on 14 November that year. The Preamble provided that:

> WHEREAS it would conduce to the settlement and pacification of the Colony if the Native inhabitants were authorized and encouraged to undertake the construction of roads and other works of public utility And whereas in furtherance of these objects it is expedient that provision should be made for the constitution of Road Boards within Native districts throughout the Colony:

5. Section 3 provided:

> Wherever the major part of the residents in any district or part of the Colony are Native inhabitants and a majority in number of such inhabitants shall be desirous that this Act shall be brought into operation within such district and shall signify such desire by a memorial in writing addressed to the Governor praying that the Act may be brought into operation therein it shall be lawful for the Governor upon being satisfied of the truth of the several matters set forth in any such memorial by Proclamation to be published in the New Zealand Gazette to declare the district or part of the Colony mentioned in such memorial or such part thereof as he may think fit to be a district within which this Act shall come into operation and in and by such Proclamation shall fix a day on which the same shall come into operation and the Governor may at any time revoke such Proclamation.

6. The section appears to require a majority of Māori in the area to sign a memorial stating their wish to have the Act in operation in that area.

This seems a potentially unworkable requirement, and unnecessary given that Māori already had tribal structures admirably suited to such decision-making which were delegitimised by this requirement in the Act.

7. Once a section 3 proclamation had been Gazetted, districts constituted under the Act were entitled to the highest class of funding as set out in section 13 of the Payments to Provinces Act 1871 (enacted on the same day).[5] The Governor could also constitute a Road Board, regulate its functioning, and empower it to make decisions and take action.[6] Powers included the ability to levy rates on all land, even customary land.[7] Marr notes:

> Papers published on the working of the Act show that the Government then interpreted the Act to mean that the boards would only have authority over customary land. Crowngranted land, including European land, was excluded and was still to come under the ordinary Highways Acts with separate roads boards. In effect the Act was simply being used to extend rating to customary land. Not unnaturally, Māori thought that boards that excluded Crown-granted land would be unworkable in a community. They made it clear that they wanted an organisation that included both natives and Europeans to cooperate together…

8. The Act required Māori to fit into an English paradigm. By 1871 there had been more than enough time for the Crown to understand Māori governance entities, and it is difficult to understand why these entities were not considered sufficient in their own right for the purposes of official roading development and funding.

9. Stirling records that in July 1872 Retimana Te Rango and Ngāti Tama petitioned the government opposing road boards (and roads) in Mokai Patea.[8] Unfortunately the original petition was not located; Stirling's reference is to Resident Magistrate Locke's "brief summary" of it, so it is not known precisely what Ngāti Tama were objecting to, whether

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[5] Section 4.

[6] Section 5.

[7] Section 5(8).

[8] Wai 2180 #A43, Bruce Stirling *Taihape District Nineteenth Century Overview* at 237.

they were aware of the November 1871 legislation or whether they were expressing their views on the prospect of the Rangitikei Highways Board, constituted sometime in the same year as their petition, or both.

10. The Provincial system was abolished in 1876, at which time local government was vested in borough and county councils. There was no comparable provision in the Counties Act 1876 for creating Māori road boards, though any existing at the time of transition continued until merged in the County at the direction of the County Council.[9] As no Māori Road Boards were constituted in the Inquiry District, none existed to make this transition.

11. Section 4 of the Native Land Act Amendment Act (No2) 1878 Act 1878 precluded Māori using their lands to raise development finance:

> It shall not be lawful for any person to pay any sum of money by way of mortgage on any land held by a Native under memorial of ownership or Crown grant.

12. The closing submissions regarding economic development and capability set out other barriers to development finance for Taihape Māori. Had Māori been able to access development finance through means other than the alienation or rating of land, and had they had proper governance jurisdiction over land that had been through the Native Land Court, we think it likely, given the many examples of their willingness to welcome settlers and contribute materially to the development of the nation, that in many places they would have undertaken a similar function to that of the large landowners in England that was happening concurrently.

Roading access in New Zealand

13. The Crown was well aware of the value and necessity of roads, and in terms of Native land laws was right from the start making provision for them – but for settlers, not for Māori. The Native Lands Act 1862 provided Māori with the opportunity to apply to the Court to recommend to the Governor regulations or plans for the settlement of their lands.[10]

[9] Counties Act 1876, section 4, section 37.

[10] Native Lands Act 1862, section XXI.

Those regulations or plans could include land to be "reserved or set apart for Public Roads and Highways…".[11] Further, funds could be reserved from the proceeds of the sale or lease of such lands to provide for public roads.[12] Other legislation had similar effect, and it was also Crown practice when it disposed of land to Europeans to retain from the grant land for roads.[13] Cleaver found two examples, in 1920 and 1949, of land being taken for public road after having been laid off in the Native Land Court, in once case for a private right of way.[14]

14. Additionally, Māori were required to pay for the surveys for partition, essentially paying a significant portion of the Crown's development cost.

15. The five percent rule in the Native land laws, which operated from 1862[15] to 1927 provided that the Crown could declare public roads through Māori land. And section 245 of the Counties Act 1886, which applied to most of the Inquiry District, provided:[16]

> All lines of roads or tracks passing through or over any Crown lands or Native lands, and generally used without obstruction as roads, shall, for the purposes of this section, be deemed to be public roads, not exceeding sixty-six feet in width, and under the control of the Council aforesaid, notwithstanding such lines of roads have not been surveyed, laid off, or dedicated in any special manner to public use.

16. We note the evidence of Bill Fleury for the Department of Conservation, which referred to historic tracks still being in use in the 1970s, and wonder if in fact there are a number of public roads in the

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[11] Native Lands Act 1862, section XXIII.

[12] Native Lands Act 1862, section XXV.

[13] See, for example, section 11(a) of the Native Land Purchase and Acquisition Act 1893, sections 29(3) and 50(5) of the Māori Land Administration Act 1900, the Native Townships Acts, section 84(1) of the Native Land Laws Amendment Act 1895; Marr *Rangahua Whanui* at 65.

[14] Wai 2180 #A9, Phillip Cleaver *Taking of Maori Land for Public Works in the Taihape Inquiry District* (Waitangi Tribunal, Wellington, 2012) at 192.

[15] Section XXVII.

[16] Section 8 excluded East Taupo County, which covered Oruamatua Kaimanawa (part 1X1, part 1X2, 1W2, 3A), Rangipo Waiu 2B2 and 2B1E and the top northern third of the Owhaoko block (part D1, part D2, part D3, D4, part D7B, D8, A and B. See Wai 2180, #A37 Suzanne Woodley *Maori Land Rating and Landlocked Blocks Report 1870-2015* (Crown Forestry Rental Trust, Wellington, 2015) at 205.

Inquiry District not marked on certificates of title (and which may therefore have the status of unregistered equities and be possible in personam exceptions to indefeasibility of title).[17]

17. By contrast, as noted in the landlocked land closing submissions, it was not until 1886 that Native land legislation explicitly provided the option for the Court to order roads for the benefit of Māori land. We think that, prior to that, it may have been *possible* for the Court to order land reserved to the owners for road, but there are no obvious provisions for this, and the Court would have been stretching the intent of the existing provisions to greater or lesser degrees depending on the enactment. In all cases the provisions were discretionary, not mandatory, and the road lines could traverse only the land before the Court for partition. We did not see evidence that the Court systematically considered the question of access to Māori land.

Discussion

18. We think the absence of systematic consideration by the Court of access to Māori land is largely responsible for the significant acreage taken under public works provisions. Cleaver's states that "at least 1240 acres" was taken for roads, most of which was taken between 1890 and 1905.[18] This indicates that compulsory takings were being used as a default clean-up tool, in which no consideration of Māori needs was required. Some of this land was for inter-county roading, such as parts of the Napier-Taihape road,[19] and some no doubt relates to settlement patterns not reasonably foreseable at the time of partition, however we think that careful consideration of access in each instance of partition and subdivision would have removed almost all necessity for public works takings, in precisely the way district plans

[17] Wai 2180 #M7(f) Evidence of William Eccles Fleury at 9.2, and #4.1.19 draft transcript of Hearing Week 11 at 286.

[18] Wai 2180 #A9, Phillip Cleaver *Taking of Maori Land for Public Works in the Taihape Inquiry District* (Waitangi Tribunal, Wellington, 2012) at 195.

[19] Wai 2180 #A9, Phillip Cleaver *Taking of Maori Land for Public Works in the Taihape Inquiry District* (Waitangi Tribunal, Wellington, 2012) at 186.

operate now. Marr summarises Tribunal findings up to 1997 addressing public works takings as:[20]

> Appear[ing] to indicate that the taking had to be measured in some way, for example as only a 'last resort' or where there were clearly issues of peace, security, and good order involved. In addition, related issues were also raised such as prior negotiation being a prerequisite before compulsory takings could be made and the need to compensate for compulsory takings.

19. The acreage taken in the Inquiry District is evidence that public works legislation was not used as a last resort, and we have seen no evidence of issues of peace, security, or good order in this Inquiry District.

20. The Crown was required to uphold the Article II guarantee of retention of lands. As discussed in the landlocked land closings, access is an integral part of retention. The Crown was required to – at the least – maintain access to ancestral lands. The question becomes how could the Crown implement a system for such access without imposing its own views on Māori landowners.

21. One option would be for the Court to go through a mandatory process of checking current access and considering future needs. Such a process might include a template of questions such as:

    a. Where is access now?

    b. What are the conditions of that access?

    c. Is that access likely to continue? Why/why not?

    d. What are Crown and/or local authority plans for the district, and how does this affect this block?

    e. Is the current access likely to be fit for future purpose, including facilitating commercial enterprise? Why/why not?

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[20] Cathy Marr *Rangahua Whanui National Theme G: Public Works Takings of Maori Land, 1840-1981* First release, Waitangi Tribunal, Wellington, 1997 at 23-24.

f. What alternatives are there?

g. Do the block owners want public access?

h. If not, what land should be reserved for private roads?

i. In the case of partition for sale, where will access to Crown/ European land meet access to Māori land?

j. What is the best access solution at this time, taking into account present and future needs?

22. The issue with this reasoning is that the Ngāti Tama letter of July 1872 indicates that, for a time at least, Taihape Māori did not want public roads through their lands. In that case, provision for private roads could be made. But even private roads could be at risk of being made public. While not all the Native land legislation included provision for making private roads public, as noted in the landlocked land closings much of it did. Should the Crown come into possession of a partition without public road frontage but with a private road leading to it, based on its known actions we think it is reasonable to suppose it would have made such private roads public. This would then be a breach of the Article II guarantee.

23. This exposes the fundamental flaw within the entire system; the opening up of land to settlement was not undertaken jointly and in partnership with Taihape Māori. The evidence before this Tribunal is that the claimants tupuna were highly capable in their land considerations, and generous in their approach to settlers and the Crown.[21] We think it is reasonable on the evidence to conclude that Taihape Māori would have worked with the Crown to accommodate settlement and access, and would have taken the same care and consideration with their own lands.

24. For completeness, we note that we did not see any evidence that the Crown considered waterways, including rivers and canals (as were being used and developed in England in the nineteenth century), as reasonable access to Māori land – or to Crown-granted land. In any

[21] Wai 2180, #4.1.15 at 165 and 185. See also further examples at pp 233-234, 251-252, and 298.

event, the Crown clearly considered roads to be the primary means of facilitating access and commerce in this country.

Conclusions

25. The generic closing submissions on rating reframed 1885 statements by John Ballance to reflect Crown actions as they had actually occurred.[22] Two of the statements apply equally to access, and we repeat them here:

> To understand how thoroughly unfair [the Crown's approach to access for] Taihape Māori land was, imagine if Ballance's 1885 statements had instead read:
>
> > You will have no recourse to any development finance except through sale;
> >
> > The low price at which you sell will not be recompensed in any form by government works in the area. In fact, roads will not be built near or through your land until you sell it;

26. The Article II guarantees required the Crown to protect and enable development of access to Māori land. In practice, this required it to implement the Treaty partnership with respect to opening up land to settlement, which would in turn have enabled Taihape Māori to protect and develop access to their lands as well as to settler lands.

27. The only exception to this would have been where the Native Land Court undertook a systematic inquiry into access at the time of partition AND the owners agreed that public roads could be laid over their lands.

28. Instead, the Crown simply removed access to Māori land through lack of consideration and used public works and other legislation to take land at and for its own convenience and that of settlers. Given the care that it took to ensure settlers had access to their land, this must be a deliberate setting aside of Māori needs and interests.

[22] Wai 2180 #3.3.51(a) at 154.

Findings and Remedies sought

29. We seek findings that:

    a. The Crown failure to implement the Treaty partnership in the Inquiry District meant that breaches of the Article II guarantee of retention of lands were virtually unavoidable in respect of access.

    b. Within the Native land legislation environment, opportunities to reduce Article II breaches via a systemic inquiry at the time of investigation and partition into access were not taken.

    c. Public works and other legislation was used as a 'clean-up' tool to provide access to settlers' lands but not to Māori lands, and this led to loss of Māori land.

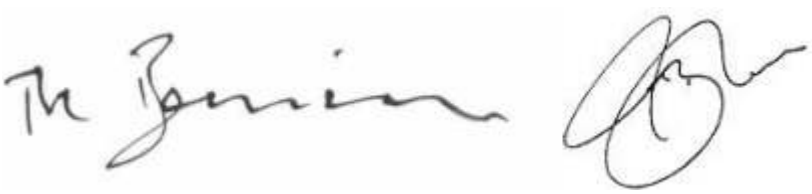
    d. The Crown's care in providing access to settler lands was not matched by retention or provision of access to Māori lands.

30. We seek recommendations that:

    a. As part of the settlement process, the Crown investigates which tracks in the Inquiry District became public roads under the Counties Act 1886.

    b. The Crown commits to resolving access issues in the Inquiry District that arise from its failures in implementing the Treaty partnership and in treating Taihape Māori fairly in respect of access.

Dated at Nelson this 21st day of December 2020



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