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**

CROWN CLOSING SUBMISSIONS IN RELATION TO ISSUE 14: PUBLIC WORKS (NIMTR)

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INTRODUCTORY MATTERS

Key points and approach to these closing submissions

1. The contribution of Taihape Māori to the construction of the North Island Main Trunk Railway (**NIMTR**) was significant. Their decision(s) to encourage and enable the railway to be constructed through their district was a vitally important one for them. It was also one of considerable magnitude for the Crown, enabling the district to be opened to European settlement and economic development. The Crown saw mutual benefit in the railway – for settlers, for Taihape Māori, and for the nation as a whole.

2. The Crown's acquisition of lands for the construction of the NIMTR is primarily a story of Crown purchasing rather than public works compulsory acquisition and is thus addressed in Crown closing submissions on Issue 4: Crown Purchasing. This contrasts with Te Rohe Pōtae where all the land required for railway construction was gifted or otherwise acquired through public works provisions and where different political and historical circumstances applied.[1]

3. These submissions address the Taihape district public works takings for the construction of the railway.

What was taken, when and where from?

4. Crown policy was to, where possible, purchase the land needed for the railway (rather than compulsorily acquire). In Taihape, the railway primarily traversed private or Crown lands (purchased from Māori). Mr Cleaver concludes:[2]

> The amount of Maori land taken during the construction of the railway was limited by the purchase operations that began after construction commenced, which saw the Government acquire a significant portion of the lands though which the railway would pass in the Taihape inquiry district.

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1 *Te Mana Whata Ahuru* at 972, 993, and 994–1004. Some lands were gifted and others were compulsorily acquired. Both gifted land and the compulsory acquisitions were processed through the public works provisions.

2 Wai 2180, #A09, at 174.

5. Compulsory taking was only utilised in limited circumstances, as summarised in this table:[3]

Year	Land compulsorily acquired and NIMTR construction
1888	Taraketi 12 acres
1889	Rail to Rangatira
1899	Otairi (Pouwhakarua 1) 40 acres Route surveyed and finally confirmed Rail to Mangaonoho
1903	Awarua 4A and 4C 242 acres
1904	Rail to Taihape
1905	Motukawa 2B and Raketapauma 2 284 acres
1908	Rail to Waiōuru NIMTR completed

6. As shown above, land was compulsorily acquired from Taihape Māori in a limited number of blocks – mainly in the north-west section of the inquiry district. The land was predominantly acquired close to the time the track was constructed. The Crown did not use the compulsory acquisition provisions to landbank for future construction but appears to have only utilised the provisions in a targeted manner, after the precise route had been fully surveyed, and immediately prior to construction to fill any gaps between the lands it had purchased.

7. It is also relevant to note that, whilst alternative routes were explored, the final route selection (and thus the land it traversed) was largely informed by engineering considerations – the Taihape section of the NIMTR was the last to be constructed as it contained some of the most difficult engineering issues on the whole route.[4]

8. The compulsory acquisition provisions were utilised to acquire land directly needed for the line, yards and stations. Lands that would benefit from the railway (for associated settlement) were purchased by the Crown (see Issue 4 submissions), not compulsorily acquired.

9. A further 68 acres of land owned by Taihape Māori was compulsorily acquired between 1909 and 1990 for railway purposes.[5] Track realignment was necessitated in 1952 following a number of slips – the line was moved to

3 Wai 2180, #A09, at 148 from Table 23 – figures approximate and rounded to the acre.

4 AJHR 1892 I-09 NIMTR committee; see also Wai 2180, #A09, at 135 for 1899 final determination.

5 Wai 2180, #A09, at 155–156.

more stable land. The 1978 realignment was associated with a SH1 deviation was the most substantial realignment undertaken since the completion of the NIMTR in 1908.

10. It appears that consultation occurred prior to the 1909-1990 takings, the amount and location of the lands that were taken were agreed to by owners, and that compensation was paid for these takings at rates agreed with owners.[6]

Relevant law and Treaty jurisprudence

11. The Tribunal has considered NIMTR issues closely in its *Te Mana Whatu Ahuru* report for Te Rohe Pōtae. Those findings are premised on the particular historical, political, and legal circumstances that applied in Te Rohe Pōtae. Those circumstances differ in material ways from those in Taihape and, thus, the Tribunal's findings should not be applied uncritically to Taihape.

12. Negotiations between the Crown and Rohe Pōtae Māori concerning the railway (and other matters) concluded in 1885 at Kihikihi. Those negotiations were direct with Rohe Pōtae Māori and were specific to that district. The Crown has accepted that commitments were made by the Crown to Rohe Pōtae Māori in 1885 and that it was under a Treaty obligation to take all reasonable steps to honour those commitments.[7] Ballance made statements/commitments in the meetings at Kihikihi that, if the Crown took lands for the railway, it would pay for them. Having made these statements, the Crown was bound to honour them given Te Rohe Pōtae Māori relied on them. However, payment of compensation for the compulsory taking of land was also an obligation under the public works legislation and did not thus represent a further commitment over and above the legislation.[8] At Kihikihi, Ballance was speaking directly with Te Rohe Pōtae Māori about the railway going through their district. The commitments he made there were specific to them.

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6 Wai 2180, #A09, at 156–162. Mr Cleaver notes the possible exception to compensation being paid for these lands might be the 1909 taking of 1 acre from Raketapauma 2B3.

7 Wai 898, #3.4.293, at 1–2; see also Crown understandings of what was agreed to at 13.

8 See Wai 898, #3.4.293, at [24.2] and [24.4].

13. The direct dialogue that occurred between the Crown and Taihape Māori between 1889 and throughout the 1890s is, however, of more direct relevance to characterise understandings developed between Taihape Māori and the Crown regarding the railway. Taihape Māori intentions for the railway and their district differed from those of Te Rohe Pōtae Māori. As set out immediately below, the Crown engaged directly with Taihape Māori regarding the railway between 1885 and the compulsory acquisition of lands from Taihape Māori under the public works provisions in the late 1890s and it is the terms of that direct engagement that are of most relevance for the Taihape district – no evidence has been located from those discussions considering compensation issues directly or suggesting that any departure from the legislation applying to public works was contemplated.[9] The fact that railway-related acquisition of lands by the Crown in Taihape was primarily through purchase rather than through public works provisions may have meant that issues of compensation were not to the fore of discussions.

14. Other than the 12 acres acquired from Taraketi in 1888, the lands compulsorily acquired from Taihape Māori under public works provisions were acquired after 1898 – almost 15 years (and at least two government administrations) after Ballance's discussions with Rohe Pōtae Māori at Kihikihi. In the intervening time, Taihape Māori corresponded with the Crown concerning the railway; met in person several times with multiple Crown Ministers (including Premier Seddon twice); and an intensive phase of purchasing had occurred. These matters are set out in Crown closing submissions on Issue 4: Crown purchasing and are not repeated here.

15. The Tiriti/Treaty compliance of the Crown's compulsory acquisition of land for the railway requires assessment of Crown policy and conduct at the time of the taking – the late 1890s. The Crown's position overall is that the (limited) compulsory acquisition of Taihape lands for the railway was a legitimate exercise of kāwanatanga and consistent with Tiriti/Treaty principles.

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9 The Crown also submits that nothing in particular turns on this – Ballance's representation to Te Rohe Pōtae Māori was reflected in the legislation (under which compensation was required to be paid).

NORTH ISLAND MAIN TRUNK RAILWAY PUBLIC WORKS TAKINGS

Facts and evidence

Rail a matter of national significance

16. During the 1870s, the development of New Zealand's infrastructure, particularly roads and railways, became a major focus of the settler Government.[10] Public works were viewed as offering a means of stimulating the economy, which was in a period of stagnation following the wars of the 1860s.[11] Railways were seen as a way of opening up isolated areas of the country, gaining access to new lands and natural resources, and establishing communication links to further the expansion of settlement.[12]

17. Colonial Treasurer Julius Vogel advocated for a national rail network to be designed as a trunk system and spearheaded the Immigration and Public Works Act 1870, which included provisions for the taking of land and construction of works that were of immediate concern to the development of settlement.[13]

18. The national significance of the railway appears to be undisputed.

Survey phase – alternatives considered

19. In 1874, Public Works Department's Chief Engineer John Carruthers reported on the most suitable route for a railway to connect Auckland and Wellington.[14] He proposed four possible routes: three to the west of Lake Taupō and one to the east. This report intimated that the future NIMTR might pass through the Taihape inquiry district.[15] Mr Carruthers determined that construction of a railway east of Taupō was possible but undesirable due to the length of the line and the difficult engineering involved in crossing the eastern central plateau. He observed that one of the western routes and the eastern route converged at Raketapauma. From this point south, the broken

10 Wai 2180, #A09, at 134.

11 Wai 2180, #A09, at 134.

12 Wai 2180, #A09, at 133.

13 Wai 2180, #A09, at 134.

14 Wai 2180, #A09, at 135.

15 Wai 2180, #A09, at 135.

nature of the country meant that construction would be difficult and costly. He described two possible routes: [16]

19.1 following the Tuakina River – this would be the shortest line necessary to connect with the railway between Manawatū and Whanganui; and

19.2 following the Hautapu, Orowa and Pohingina Rivers – this would offer the shortest course to Wellington.

20. Carruthers and District Engineer A C Turner conducted explorations to determine whether the proposed routes would be feasible.[17] During this exploration, Carruthers communicated with Māori, some of whom may have had interests in the Taihape inquiry district.[18] In his report, Mr Carruthers stated that Māori suggested a number of lines south from Raketapauma, all of which Mr Carruthers called "unfortunately difficult". The exploration of the route from Raketapauma to Napier was undertaken because Mr Carruthers "heard a good deal from Māori and others" of the possibility of getting a line in between these two places.[19]

21. From mid-1883, John Rochfort, Engineer-in-Charge of the North Island, conducted an exploration of the central route, along which the NIMTR was eventually built. Rochfort began his survey in June 1883,[20] starting from Marton travelling north. Letters of introduction were sent to Hoani Mete and Wiari Turoa at Porewa; Nika Waiata, Teata Pikirau, and Ropana at Ngaurukehu; and Meriana and Patihapa at Raketapauma.[21] Rochfort reported that he did not encounter any Māori until he arrived at Turangarere (which is within the Taihape inquiry district), who were unwilling to let him pass until a general meeting was held.[22] However, he reported "as opposition was feeble" he disregarded the suggestion of a meeting and proceeded north. [23]

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16 Wai 2180, #A09, at 135.

17 Wai 2180, #A09, at 135.

18 Wai 2180, #A09, at 135.

19 Wai 2180, #A09, at 135.

20 Wai 2180, #A09(d,) Answers to Questions of Clarification, at 4.

21 Wai 2180, #A09, at 137.

22 Wai 2180, #A09, at 137.

23 Wai 2180, #A09, at 137.

He reported he later received a letter from the Turangarere people requesting him to return and "see the advantages they had to offer for the railway coming there", however a copy of this letter has not been located.[24] It is unclear who the writers were and whose views the letter represented.[25]

22. In 1884, a Parliamentary Select Committee was formed to report on the best route for the NIMTR. It decided the central route was most suitable.[26] The Railways Authorisation Act was passed in 1884, which authorised the construction of the railway along the central route.[27]

23. The route was reconsidered several times due to finances and engineering challenges. Detailed consideration took place in 1892.[28] A new select committee was formed to re-investigate the railway route which recommended the possible routes be fully surveyed before being finally confirmed.

24. The route for the section traversing the northwest part of the inquiry district between Rangatira and Waiōuru was only finalised in 1900 – the precise route being determined primarily by engineering considerations.[29]

25. Taihape Māori representations concerning the railway are addressed in submissions for Issue 4 (in short, they demonstrate the support of Taihape Māori for the railway traversing their district).

Takings for construction

26. When construction began, the Government took steps to comply with the provisions of the Public Works Act 1882 applicable to the taking of Māori land. This required the Governor to issue an Order in Council that specified the work that was to be carried out.[30]

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24 Wai 2180, #A09, at 137.

25 Wai 2180, #A09, at 141.

26 Wai 2180, #A09, at 139.

27 Wai 2180, #A09, at 140.

28 AJHR 1892, I-09.

29 Wai 2180, #A09, at 140; AJHR 1900, I-08.

30 Public Works Act 1882, s 24.

27. On 2 April 1885, the Governor issued an Order in Council advising that the NIMTR was to be built through Māori lands:[31]

> . . . a railway, having an average width of three hundred links [three chains], extending from a point on the right bank of the Puniu River, in the Provincial District of Auckland, to a point at the intersection of the railway-line from Foxton to New Plymouth . . . shall be constructed on or through all lands held or occupied by Native owners; the total length being two hundred and ten miles or thereabouts . . .

28. Construction in the south of the Taihape inquiry district took place between 1886 and 1888. Proclamations of land required to be taken were issued as the works advanced.[32] The Taraketi block remained in Māori ownership when construction began.[33] 12 acres of it was compulsorily acquired in 1888 with compensation (determined by the Native Land Court) being paid notwithstanding the Act not requiring it to be.[34]

29. Construction in the remainder of the inquiry district did not take place until after 1899 by which time the Public Works Act 1894 was in force (in combination with the railway purchasing legislation discussed in Issue 4). Mr Cleaver confirms appropriate proclamations were made as required by the legislation for the lands set out in the Table above (taken in 1899, 1903 and 1905).[35]

Consultation

30. Mr Cleaver states that there is no evidence that could be found that Taihape Māori were consulted in advance of the construction.[36] However, at the time construction began (north of Wellington and south from Auckland) there remained considerable uncertainty as to whether the route would even traverse the inquiry district (and, if so, what parts of it).

31. As set out above, the railway was constructed sectionally. It is more appropriate to consider what engagement occurred between the Crown and Taihape Māori as each of those sections were progressed.

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31 Wai 2180, #A09, at 146.

32 Wai 2180, #A09, at 147.

33 Wai 2180, #A09, at 142.

34 Under either the 1882 Act itself (see s 72)/Part VI ss 129-130; or under the 5% rule.

35 Wai 2180, #A09, at 147.

36 Wai 2180, #A09, at 144.

32. That engagement is set out in submissions on Issue 4. The Crown's view is that Taihape Māori were well aware of railway developments and, as their lands were contemplated as forming part of the route, more intensive engagement with the Crown occurred (with Crown officials but also with successive Native Ministers and the Premier).

33. There is limited record of specific discussions concerning the taking of specific lands (Mr Cleaver notes such documentation was not available).

34. Under the legislation, notice was required to be given to owners "insofar as they can be ascertained" before or after the taking, but the omission to do so would not invalidate the taking.[37]

Issue of whether more land taken than necessary for NIMTR – specific sites

35. The Crown did not utilise public works provisions to acquire the lands in Awarua and Motukawa that would be opened up by the railway. Those lands were purchased as addressed in Issue 4 submissions.

36. The land compulsorily acquired was restricted by the legislation to a quantum of land considered reasonable and necessary for the construction and operation of the railway (up to twenty chains, or 400 metres wide).

37. At the more granular level, there are two areas in Raketapauma 2B1 (acquired in 1905) that appear to have been not strictly required for the operation of the railway.

    37.1 The first is at the western end of the Raketapauma 2B1 block which was bounded by a loop of the Hautapu River. In late 1909, less than 5 years after the land was taken, the Lands and Survey Department approached the Railways Department, asking if it could take over the land and reserve it for scenery preservation purposes.[38] In 1910, the Public Works Department advised there was no statutory authority for the land to be taken for scenic purposes. This was later revisited and, in 1935, the Government Railways Board relinquished the land and it was proclaimed Crown land under s 35 of the Public

37 Public Works Act 1882, s 130(5); Public Works Act 1894, s 167(h).

38 Wai 2180, #A09, at 152.

Works Act 1928. In 1936, it was set aside as a scenic reserve under the Scenery Preservation Act.[39]

37.2 The second is at the eastern end of the Raketapauma 2B1 block. The three-and-a-half-acre area was occupied by two whare when the land was taken. Cleaver commented it appeared the owners were unaware the land had been taken. After discovering the land was railway property, in March 1935 Ropoama Pohe corresponded with Prime Minister George Forbes about the land, advising him that his deceased father had lived on the area and that he (Ropoama) continued to use it.[40] He said he was not notified of the intention to take the land, and did not receive compensation. He advised Prime Minister Forbes that he had been offered a lease, but suggested the land be returned instead (particularly because it was surplus to the railway).

37.3 In 1935, a District Engineer reported to the Railways Department that the land was not required for railway purposes.[41] Despite this, the land officer recommended it not be returned.[42] He considered that a concession with regard to this land would result in a "revival of many similar claims" given that all claims for compensation had been declined.[43] He suggested a lease at a peppercorn rent be offered instead. This was taken up. However, in the late 1990s, Wai 1632 claimant Hari Benevides sought to purchase the land back. New Zealand Railway Corporation advised it would not be possible for the land to be disposed of as it needed to be retained for rail purposes – the land might be required for a bridge replacement or track realignment in the future.[44]

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39 Wai 2180, #A09, at 153. See, also, the evidence of Hari Benevides (#J13, at [33]–[34]) which says, despite Mr Cleaver's suggestion that steps were taken to notify the former owners, whānau were not aware of the sale and believed the land always belonged to them. It was not until Mr Smith was charged for cutting down trees that it was discovered the land was part of the Ngaurukehu Scientific Reserve.

40 Wai 2180, #A09, at 153.

41 Wai 2180, #A09, at 153.

42 Wai 2180, #A09, at 153.

43 Wai 2180, #A09, at 154.

44 Wai 2180, #J13.

38. Whether these particular areas were reasonably required for the purposes of the railway when acquired is a real question on the available evidence. The Crown would welcome the Tribunal's guidance and findings on these matters.

Compensation

39. We turn finally to the issue of compensation. 594 acres of Māori land were taken for the railway in the Taihape inquiry district.[45] Compensation was paid for the 1888 acquisition. Compensation appears not to have been paid for the 1899-1905 acquisitions. The reasons different approaches were taken are not entirely clear from contemporaneous documentary evidence but appear to turn on legal advice provided to the government in 1903 as to the implementation of the "5% rule".

The legislation

40. Both the 1882 Act and the 1894 Public Works Act (which respectively governed the acquisitions) required compensation to be paid for the taking of both customary and Crown-granted Māori land, but exempted taking for roads and railways from that requirement.[46]

41. Both Acts included a provision that the Crown could take up to one-twentieth of a block for roading or for rail (within specified time periods from the title being created) – commonly referred to as the 5% rule.[47] The Public Works Act 1894, s 92 (1) provides:

> … it shall be lawful for the Governor, at any time hereafter, to take and lay off for public purposes one or more line or lines of road [and, via s 91(2), rail] through the said land [Māori owned land]: Provided that the total quantity of land which may be taken, inclusive of any already taken, for such line or lines of road [or rail] shall not exceed one-twentieth part of the whole.

42. This rule applied to Māori owned land and included a provision to exempt lands from the operation of the rule. Similar provisions applied to European lands (although not consistently and with shorter timeframes involved).

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45 Wai 2180, #A09, at 146.

46 Public Works Act 1882, ss 26 and 72.

47 See Public Works Act 1894, s 92(1).

43. Variations of this provision were in place for many decades and represented a balancing of national interest and private interests. The policy rationale appears to have been that contributing up to 5% of any block for public works constituted a reasonable contribution towards national development that was of benefit to all (including Māori).

44. The Crown acknowledges that the rule would raise Tiriti/Treaty concerns if:

44.1 the rule had a larger effect on Māori (in terms of having land taken) than non-Māori and if that effect was not proportionate to the benefits for Māori of the provision of road and rail infrastructure bringing access and the opportunity for commercial development; and

44.2 the provision was imposed on Māori without approval of some sort by Māori representatives, taking into account the standards of the day in respect of consultation.

45. There is not sufficient evidence on the record to assess these issues as a national or systemic matter. The application of this rule, and of these potential Tiriti/Treaty concerns, in the circumstances of Taihape is addressed below.

Compensation paid for taking for early construction despite not being required under legislation

46. As above, 12 acres, 1 rood, 30 perches of Taraketi block was taken in March 1888 for the first phase of construction in the inquiry district. Despite there being no statutory requirement that compensation be paid (in that less than 5% of the parent block was taken), the Crown did pay compensation for that land.[48]

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48 Wai 2180, #A09, at 146, 149–150. On 25 October 1888, the Native Land Court heard an application by the Minister of Public Works for an assessment of the compensation payable. Wirihana Hunia sought £10 per acre for the land taken, plus £10 per acre for the loss of access to the Rangitikei River. The Crown offered only £6 per acre, nothing to compensate for the loss of access, and for the rent to be deducted. This left £5 17s 6d per acre (a total of £73). Despite this, the total compensation ended up being £60, and the Court ordered that it be divided equally among the 16 owners listed on the certificate of title. See, also, Wai 2180, #A43, at 153 which notes that, in May 1899, another 19 acres, 1 rood, 26 perches was taken from Taraketi. That was for roading, not rail, and is thus not addressed in these submissions.

47. Some European landowners whose land was taken for the NIMTR in the Taihape inquiry district were also compensated for takings carried out in the late 1880s.[49]

48. There is no evidence as to why the government decided to pay compensation. Both Mr Cleaver and Mr McGhie suggest possible reasons but, in the absence of evidence, those suggestions can only be speculative.

Compensation not paid for land acquired for second phase of railway construction

49. It appears that compensation was not paid for the 1899, 1903 or 1905 acquisition of lands for the later phases of construction.[50] Whilst the evidence on this is not certain, no record of compensation being paid has been located and the fact that two applications for compensation were made relatively soon after those takings (in 1910 and 1912) strengthens the likelihood that compensation had not been paid.[51] As such, the Crown concurs with Mr Cleaver that it is unlikely compensation was paid (and these submissions proceed on that premise).

50. Mr Cleaver and Mr Parker (with the assistance of Mr McGhie) have tracked down further information as to why compensation was not paid.[52]

51. Crown officials took steps soon after the 1903 Awarua 4 takings to initiate compensation payments for those takings and the 1899 Pouwhakarua taking.[53]

52. The Crown Solicitor advised the officials that the Māori lands taken:[54]

    52.1 should be referred to the Native Land Court to ascertain compensation, how much and to whom payable, under ss 87-95 of the Public Works Act 1894;[55]

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49 Wai 2180, #A09, at 151.

50 Wai 2180, #A09, at 150.

51 Wai 2180, #A51(f), Parker at 4.4; Wai 2180, #A09(c), at 5. Applications made by Mr Chase for Awarua 4C5.

52 Wai 2180, #A32(a)–(c); See, also, Wai 2180, #A09(c).

53 Wai 2180, #A09(c), at 6; Wai 2180, #A32(c), at 4–15.

54 Wai 2180, #A32(c), 4–15.

55 Wai 2180, #A09(c), at 7.

52.2 compensation was not payable where provisions that enabled up to 5% of a block's area to be taken for roads and railway without compensation were, at the time of taking, applicable;[56] and

52.3 where there were multiple owners of a block of land, the block would need to be subdivided and their interests allocated before compensation could be awarded.[57] He advised that the Native Land Court cannot ascertain who the actual owner of the land is until it has been subdivided and surveyed. Of the 15 blocks of Māori land subject to the two proclamations, there was a need to subdivide and allocate interests in at least 8 cases. This posed an obstacle to quickly assessing and settling any compensation owed.

53. Three weeks after the Crown Solicitor provided this advice, the Public Works Department prepared to place the Māori land cases before the Native Land Court, however, although plans were prepared, no further action was taken.[58]

54. Officials identified that some of the Māori land subject to the railway proclamation had been sold to Europeans and sought legal advice on how the provisions should be applied.[59] The Solicitor-General provided advice on that question and some broader issues. Consistent with that legal advice, the Crown appears to have concluded that compensation was not required to be paid under the 5% rule.[60] That included sections where more than 5% was taken as, according to the legal advice, the 5% provision applied to the parent title of the block rather than to sections subdivided from that block.[61] The Crown considers the advice was applied equally to both Māori and non-

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56 Wai 2180, #A09(c), at 7.

57 Wai 2180, #A09(c,) at 8.

58 Wai 2180, #A09(c), at 8.

59 Wai 2180, #A09(c), at 9.

60 Public Works Act 1894, s 92(1).

61 Wai 2180, #A51(f), at [4.14]. Note: Mr Parker refers to legal advice from a later proceeding (in 1910) which, although the advice does discuss the application of the 5% rule to the parent title, turned on the application being made by an owner, not by the Minister as provided for in the legislation. Note, also, that Mr McGhie submits that the Minister was the author of the submission, but it was Mr Bold the Land Purchase Officer.

Note: Mr McGhie refers to findings in Kāhui Maunga, however that situation is distinguishable in that it was not taking related to the railway (the pages cited by Mr McGhie are 658 and 1517; it seems that 573 and 1279 may be the correct references).

Māori lands in that compensation was not paid to either Māori land owners or the European owners – the reasons for this view are set out below.

55. Mr Cleaver states: "No clear evidence has been located that definitively shows that the Department decided not to pay compensation to Maori owners on the basis of the five percent rule", but concludes that is the most likely explanation.[62] He also concludes that there is precedent for the view that the 5% applied to the parent title rather than subdivisions (or at least that Crown officials at the time believed that to be so).[63] The Crown agrees (whilst acknowledging that the example Mr McGhie has identified suggests there was inconsistent practice in this regard).

56. Although Crown officials had (as above) taken steps towards compensation being determined, there is no record of further action being taken after the Solicitor-General's advice. There would be little cause for the officials to second-guess legal advice from the Solicitor-General.

57. In summary, when the acquisitions were made, there was no predetermined position about whether compensation would or would not be paid – the events above reflect officials implementing the legislated process. The Crown officials acted reasonably by initiating the compensation process under the Act. They also acted reasonably in discontinuing that process given the Solicitor General's advice. There is no evidence the Solicitor-General knowingly or deliberately provided incorrect advice.

Compensation for land taken from Europeans

58. The Crown considers that the legislation was applied equally to the taking of Māori and non-Māori land in Taihape.

59. Compensation was paid to both Māori and Europeans for the 1888 acquisitions related to the first stage of construction in the inquiry district.[64]

60. Payments were paid to both Taihape Māori land owners and to European land owners in the early twentieth century for damages and other reasons

62 Wai 2180, #A09(c), at 10.

63 Wai 2180, #A09(c), at 11.

64 Wai 2180, #A09.

(reasons included the diversion of a stream, temporary use of land during construction and unspecified "damages").[65]

61. There is no evidence of European land owners being paid compensation for compulsory acquisitions in the second phase of construction in the inquiry district. Whilst absence of evidence is not evidence of absence, the Crown has reached the view that Taihape Māori landowners and non-Māori landowners were treated equally at this time because:

61.1 as set out above, the Crown treated non-Māori and Māori lands equally in regard to paying compensation in 1888, and in paying for damages to land in 1906 and 1909;

61.2 the 1903 Crown Solicitor's advice was that the "ordinary compensation provisions of the Public Works Act apply" – those ordinary provisions included the 5% rule for European lands as well as for Māori lands;[66]

61.3 the 1903 Crown Solicitor's opinion stated that compensation was not payable for land taken for the railway from Crown land occupied under licences as the rents had been abated in view of the railway line – ie there was no presumption that European land was entitled to compensation requirements other than where the legislation provided for it;[67]

61.4 the question the 1903 Solicitor-General's advice was sought for specifically concerned the application of the 5% rule to European owned land – it is reasonable to assume that the advice given (that the 5% rule applied and compensation was not to be paid) was then applied to that particular class of land;[68]

61.5 Mr Cleaver's evidence has been revised following the receipt of further information.[69] However for completeness, the Crown

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65 Wai 2180, #A09, at 150 records payments to Taihape Māori in 1906 and 1909; at 151 footnote 686, Mr Cleaver records a payment for damages being paid to a European land.

66 Wai 2180, #A09(f), at 8.

67 Wai 2180, #A09(f), at 9.

68 Wai 2180, #A09(f), at 9.

69 See Wai 2180, #A09, cf #A09(f).

records that Mr Cleaver's earlier evidence acknowledged that the evidence concerning compensation for European lands taken was no different to that available for Māori takings.[70] The only evidence he found of payments made to Europeans were for an 1888 compensation payment and for payments for damages made in 1908. As above, such payments were also made for Māori; and

61.6 the lack of evidence of compensation being paid applies to both Māori and non-Māori land. The Crown is accepting that absence of evidence means it is likely that Māori were not compensated. There is no reason to take a different approach in relation to non-Māori.

62. The Crown's view is, thus, that European landowners were not compensated for takings of land associated with the second phase of railway construction in the district.

ASSESSMENT AND CONCLUSIONS

63. The NIMTR is a significant and critical part of New Zealand's national infrastructure and was constructed for nationally important reasons, including stimulating the economy, opening up isolated parts of the country and connecting the two biggest cities.

64. The Crown preferred purchase over compulsory acquisition but turned to the compulsory acquisition powers due to gaps in the lands it had purchased and after the specific rail route was finally confirmed in 1900. The specific route was defined primarily due to geographical and engineering complexities, which would have restricted the flexibility available to avoid particular sections of land. Compulsory acquisition was necessary where efforts to purchase had not succeeded – the line is a national infrastructure asset and is permanent infrastructure; locating it on anything other than freehold tenure would not have achieved the necessary security of tenure.

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70 Wai 2180, #A09, at 151. Note Mr Cleaver states "In the absence of any detailed file evidence, it is uncertain whether all European land owners received compensation." The Crown suggests "any" may have been more correct than "all", It appears Mr Cleaver's starting points for Māori land (no compensation was paid unless there is proof of it having been paid) differs from that for non-Māori land (compensation can be presumed to have been paid unless there is evidence of it not being paid). The Crown can see no basis on the evidence for suggesting that that reversal of presumptions is warranted.

65. Evidence has been given by claimants that their tupuna supported the railway coming through their rohe.[71] Indeed, in the 1880s when the final decisions were being made on the central section of the route, Taihape Māori made representations that the route through their rohe should be preferred over others. In the series of meetings with Ministers (and those with Premier Seddon), the discussions did not reject the railway traversing Taihape Māori lands but discussed instead the terms on which it could be enabled.

66. There are two examples in the evidence where there is a real question whether more Māori land may have been included in the compulsory taking than was essential for the work. Two areas of Raketapauma 2B1 were acquired in 1905 but then the first was converted into a scenic reserve and the second retained for potential future rail purposes. As noted, the Crown welcomes the Tribunal's finding on these matters.

67. The precise location of the route appears to be have been determined primarily with consideration of geographical and engineering issues. The evidence shows that careful consideration was given to feasible alternatives to compulsory taking of Māori land in terms of alternative routes for the railway. The Crown also undertook significant steps to purchase rather than relying on the compulsorily acquisition provisions. Compulsory acquisition was utilised for relatively small portions of the route crossing the inquiry district and can properly be characterised as a reasonable measure in those circumstances. There is minimal evidence to suggest that was an inappropriate approach (or that the railway crossing specific pieces of land was objected to by Taihape Māori).

68. On compensation, it appears that for the Taihape district:

    68.1 the 1888 taking for the first phase of construction was compensated; and

    68.2 further takings occurred some years later for the second phase of construction (in 1899-1905). Crown officials initiated the

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71 See Crown closing submissions on Issue 4: Crown purchasing.

compensation process for these takings and acted in accordance with legal advice on how to apply the legislation in place at that time.

69. Except for one case (£60 paid to 16 owners for 12 acres, 1 rood, 30 perches of land from the Taraketi block), the evidence is imperfect but suggests that compensation or redress for the compulsory acquisitions were not provided. This appears to be a result of the contemporary legislative framework and, in particular, the 5% rule allowing takings to be carried out without paying compensation. The Crown treated Māori and non-Māori land owners equally in relation to compensation (in both phases of construction) and payments for damages and other reasons.

70. Given there was equality of treatment in Taihape, any remaining Tiriti/Treaty issues arising from the 5% rule itself sit with the policy presumption behind the provision and the legislation – rather than in its application within Taihape. Reaching conclusions on those matters would require evidence on the reasons for, and circumstances of, the provision being introduced and whether Māori land was targeted by the provision's development or its implementation in a manner that was inconsistent with te Tiriti/the Treaty. That evidence is not available to this inquiry.

71. The Crown considers that the compulsory acquisition undertaken to construct the NIMTR in the inquiry district was a legitimate exercise of kāwanatanga; was consistent with Tiriti/Treaty principles; and met also the national interest threshold proposed in Tribunal jurisprudence.

7 May 2021

R E Ennor / MGA Madden
Counsel for the Crown

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