**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 16A: ENVIRONMENT (LAND)

**7 May 2021**

**CROWN LAW**
**TE TARI TURE O TE KARAUNA**
Pouaka Poutāpeta PO Box 2858
TE WHANGANUI-Ā-TARA WELLINGTON 6140
Waea Tel: 04 472 1719
Waea Whakaahua Fax: 04 473 3482

**Whakapā mai: Contact:**

Michael Madden
Michael.Madden@crownlaw.govt.nz

**Barrister instructed:**
Rachael Ennor

# TABLE OF CONTENTS

## INTRODUCTION

1. The Crown recognises that Taihape Māori have a special relationship with the environment and its resources and, in particular, the awa in their rohe. The Crown recognises the importance the environment and its resources play in Māori culture and the Māori world view. The Crown also recognises that issues concerning the environment, and particularly environmental degradation, are of importance to Taihape Māori, and acknowledges the large number of claims and extent of tangata whenua evidence that has been presented concerning these issues.

2. The Crown accepts in particular the importance of waterways to Taihape Māori as a source of customary food resources and also a source of cultural and spiritual sustenance. The Crown acknowledges the tangata whenua evidence expressing concern at the current environmental health of specific waterways. Such issues are clearly of critical importance to Taihape Māori.

3. Since 1840, the Crown's involvement in the management of the environment and its associated resources, including waterways, in New Zealand has progressed from *ad hoc* legislation designed to meet specific economic or settlement objectives to a more holistic approach aimed at balancing economic growth with environmental sustainability. These various policies and processes, and their effects on the environment, have had implications for Taihape Māori and their ability to exercise their mana, tino rangatiratanga and kaitiakitanga.

4. This regulatory oversight of the environment is a legitimate aspect of the Crown's kāwanatanga function. In accordance with this function, the Crown has authority to develop regimes for the protection and management of the environment and natural resources, including waterways. In exercising its kāwanatanga function, the Crown seeks to balance its Tiriti o Waitangi/Treaty of Waitangi duties and the interests of various stakeholders in the environment.

5. While the environment as a whole is not a taonga (as detailed further below), the Crown accepts that aspects of the environment may constitute taonga. The Crown does not have a general obligation, under te Tiriti/the

Treaty or otherwise, to prevent all environmental effects that may be perceived as adverse.

6. Environmental change in the inquiry district has mirrored that of New Zealand more broadly, as landscapes were converted to more intensive primary production economic activity and waterways began to be managed under English common and statute law. The most dramatic environmental impact and the origin of most of the land-based environmental claims in the Taihape inquiry district is the conversion of the land from (native) flora to pasture for grazing sheep and beef.[1] Multiple variables and particular historical circumstances are relevant to this transition. The environmental aspects and consequences of this transition cannot be viewed in isolation from the economic aspirations, opportunities and outcomes involved. Nor can they be assessed against current standards, which are informed by current levels of knowledge (a point addressed further below).

7. Assessing the level and nature of the Crown's responsibility under te Tiriti o Waitangi/the Treaty of Waitangi in relation to the environmental effects of the transformation of land into a European economic model requires consideration of a number of causative factors and levels of contributory responsibility. Environmental effects of particular concern to claimants include deforestation, siltation, drainage schemes, introduced weeds and pests, the taking of gravel, farm run-off and other pollution, and the disposal of wastewater into the waterways of the inquiry district.

8. The following factors are relevant to the Tribunal's assessment of the Crown's Tiriti/Treaty duties in relation to environmental issues:

    8.1 whether the evidence is sufficient to allow for the conclusions claimed;

    8.2 the wide range of factors that contribute to the health of the environment and its resources, including waterways, and the Crown's varying ability to influence or control all or some of those factors;

1 Wai 2180, #A10, at [215].

8.3 the various interests held in respect of the environment which the Crown needs to balance in formulating and implementing environmental policy;

8.4 the Crown's broader policy objectives, including the national interest in having a strong economy;

8.5 the historical context in which environmental policy has been developed and applied, including the level of scientific knowledge and technology at the time;

8.6 fiscal and other constraints.

9. It is difficult to determine both causation in respect of environmental degradation and where responsibility for any such degradation lies. For example, although the periodic flooding of the Rangitīkei River has been attributed to deforestation, other factors, including the wide shingle bed of the lower reaches of the river, have also contributed to flooding, and occurred prior to European arrival.[2] It is therefore complex to deduce the degree to which periodic flooding is affected by deforestation, let alone to attribute flooding to the actions of the Crown.

**Summary of Claimant Position**

10. The Crown recognises that Taihape Māori consider their lands, mountains, forests, waters, and wetlands as taonga, as part of their identity, as traditionally significant sources of food and medicinal plants, and other resources, and as integral to their spiritual and material well-being. Over time, the Taihape environment has suffered from degradation through deforestation, erosion, river control works, and the pollution of waterways. Through these acts of environmental degradation, indigenous species of importance to Taihape Māori have suffered a decline in population.

11. The claimants contend that taonga under Article II of te Tiriti/the Treaty is a broad term and that the Crown's duty of active protection applies to "all of the [inquiry] district held under custom".[3] The claimants submit that the Crown, through its actions in the district, has adversely affected Taihape

2 Wai 2180, #A40, at 19, 44, and 49.

3 Wai 2180, #3.3.56 at [56].

Māori and their relationship with the natural environment in breach of the Crown's duties under te Tiriti/the Treaty.[4]

12. The claimants' position is that the Crown did not give effect to "the different preferences of Taihape Māori", which were informed by different values such as kaitiakitanga.[5] The claimants say:[6]

> Consequently, damage to the natural environment that adversely affected Taihape Māori, that occurred under the Crown regime of wilful ignorance and/or disregard of Māori values and interests, and without the free and informed consent of Taihape Māori, requires a remedy where it limited and continues to limit Taihape Māori options and preferences for the natural environment.

13. The claimants further say the Crown's "disregard of Taihape Māori values" was in breach of te Tiriti/the Treaty, and the Crown had and remains under a duty to actively deal with adverse effects to the environment as they arose. As such, they contend that "Taihape Māori remain vulnerable to adverse environmental effects of activities in the district. The steps that the Crown takes to mitigate those effects must take account not only of its ongoing duty of active protection, but also its historic role in creating that vulnerability."[7]

14. In particular, the claimants say that "in the initial period of contact in this district, every Crown intervention in Taihape Māori communities having an effect on their taonga would have been of such significance that consultation would have been effectively compulsory".[8]

15. The claimants submit that the Crown has breached its duties and responsibilities under Article II in respect of the environment. The claimants make the following allegations concerning the Crown's environmental management of land-based resources and waterways, lakes and aquifers in the inquiry district:

    15.1 The laws and initiatives of the Crown's land-based environmental management regime has not provided for active protection of

4 Wai 2180, #3.3.56 at [313].
5 Wai 2180, #3.3.56 at [70].
6 Wai 2180, #3.3.56 at [71].
7 Wai 2180, #3.3.56 at [71].
8 Wai 2180, #3.3.56 at [41].

Taihape Māori interests either as landowners or as tangata whenua in the district, at least in the period before 1977.[9] During this time, Taihape Māori mana, tino rangatiratanga and kaitiakitanga over environmental resources and taonga were not recognised in the scheme for managing land-based resources.[10]

15.2 Consultation opportunities on Crown lands were "grossly inadequate" for providing a voice for Taihape Māori in governance of Crown lands.[11]

15.3 Rongoā was severely affected by deforestation that occurred outside of the control of Taihape Māori and outside of Crown duties guaranteeing rangatiratanga over land and taonga.[12]

15.4 The Crown contemplated no particular role or future for Taihape Māori in the district, regarding most of the district as unused space necessary for Pakeha settlement. The Crown did not undertake a survey of Taihape Māori tribal organisation and interests in the district, and did not, in effect, know who its Tiriti/Treaty partner was.[13]

15.5 The Crown's rejection of proposals by Taihape Māori for the Native Department to be involved in catchment boards as a representative for Māori owners "demonstrates how completely the Crown rejected any notion of basic protection or equality of treatment with their fellow non-Māori property owners, let alone active protection."[14]

15.6 The Crown provided the legal framework for, and actively supported, efforts to eradicate indigenous species in the district by acclimatisation societies.[15]

---

9 Wai 2180, #3.3.56, at [98].

10 Wai 2180, #3.3.56, at [100].

11 Wai 2180, #3.3.56, at [104].

12 Wai 2180, #3.3.56, at [159].

13 Wai 2180, #3.3.56, at [179(a)].

14 Wai 2180, #3.3.56, at [185].

15 Wai 2180, #3.3.56 at [213]–[215].

15.7 The disposal of human waste and other contaminants onto the land and into the awa of the district is offensive to Taihape Māori and limits customary uses of the waterways.[16]

15.8 The Crown's statutory vesting of the legal title of riverbeds in the district did not uphold te tino rangatiratanga and the ability of Taihape Māori to choose how to manage their resources.[17]

15.9 The Crown's management of non-commercial fisheries in the district is inadequate, does not take into account Māori values, nor provide for consultation with Taihape Māori or their participation in decision-making, in breach of te Tiriti/the Treaty.[18]

15.10 The decline in non-commercial fisheries has affected the socio-economic wellbeing of Taihape Māori.[19]

15.11 The Crown has wrongly assumed ownership of the riverbeds in the inquiry district and on this basis authorised a regulatory scheme under which gravel has been illegally extracted without, at least until recently, consultation with Taihape Māori and consideration of their values and broader links to waterways.[20]

15.12 The Crown and local authorities failed to take into account the values, and even the existence of, Taihape Māori in relation to water conservation orders in the inquiry district.[21]

15.13 The Resource Management Act 1991 (**RMA**), including the provisions on te Tiriti/the Treaty and iwi engagement, "fall well short of what Taihape Māori require".[22]

**Summary of Crown Submission**

16. The Crown has a duty to actively protect taonga and the other matters listed in Article II of te Tiriti/the Treaty. The Crown recognises that particular

16 Wai 1280, #3.3.56 at [289].
17 Wai 1280, #3.3.58 at [4].
18 Wai 1280, #3.3.58 [46]–[77].
19 Wai 1280, #3.3.58 at [86]–[91].
20 Wai 1280, #3.3.72 at [78]–[80].
21 Wai 1280, #3.3.72 at [85], [98], [111].
22 Wai 1280, #3.3.56 at [140].

environmental features may be taonga, such as certain awa and species such as tuna.

17. The Crown accepts that it has a Tiriti/Treaty duty under Article III to ensure that its environmental policies and practices are applied equally as between Māori and non-Māori.

18. The Crown submits that management of the environment is a legitimate governance and regulatory function of the Crown. Kāwanatanga means it is appropriate for the Crown to develop nationally focused regimes for the protection and management of the environment and natural resources, including waterways.

19. The Tribunal has recognised that the Crown does not have a duty to ensure the environment is always pristine, unpolluted and undegraded.[23] Māori and non-Māori share responsibility for the state of the New Zealand environment. Adverse environmental impacts are an inevitable consequence of human development and progress, and some degree of environmental degradation will always occur. The Crown does not have a general obligation, under te Tiriti/the Treaty or otherwise, to prevent all adverse environmental effects resulting from human activity.

20. A consideration of the Crown's responsibility for environmental degradation must take into account the range of factors that the Crown cannot control or influence and overlooks the fact that the Crown cannot guarantee environmental outcomes, no matter what initiatives or measures it may implement.

21. Throughout the 19th and 20th centuries the Crown has acted in good faith to develop appropriate regimes for the protection and management of the environment and natural resources. The existence of environmental degradation does not automatically mean there has been a failure by the Crown, for the following reasons:

    21.1 Environmental health is influenced by a wide range of factors and a large number of actors.

---

23 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui Report on Northern South Island Claims* (Wai 785, 2008) vol 3 at 1199–1202.

21.2 Every individual has their own views in relation to the environment, and how the environment and its resources can and should be used. Even within Māori society there is no single authoritative conception of the environment or environmental management. The Crown must weigh up often competing interests of diverse groups and, at times, the avoidance of prejudicial environmental effects may be outweighed by other considerations or interests.

21.3 During the 19th century, Māori held varying views as to what role, if any, the government had in terms of protecting the environment. Nineteenth century government did not act improperly when it did not prevent Māori and non-Māori from doing things with adverse environmental impact.

21.4 Solutions to environmental issues are not always readily available, and the Crown's capacity to respond at any particular point in time is dependent on its awareness of the issue, the extent of the available environmental science and technology, and its financial resources.

22. The Crown continues to act in good faith to appropriately manage the environment and natural resources. The Crown has acted reasonably to balance the need for conservation and sustainability, and the need for economic development and land settlement. Further, the Crown has acted to adjust this balancing exercise as appropriate and necessary over time, amending and improving policies in response to changes in environmental knowledge and the views of the community, including Māori.

**Is the environment as a whole a taonga?**

23. The Wai 662, Wai 1835, and Wai 1868 claimants have submitted that there is "a developing jurisprudence" that suggests that the environment as a whole is a taonga.[24] The claimants rely on the Tribunal's findings in *Te Rohe Potae*[25] and various Crown documents, and effectively ask the Tribunal to

24 Submission on the Environment as a Taonga, 10 December 2020.

25 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV.

revisit its finding in *Ko Aotearoa Tēnei* (Wai 262) that the environment as a whole is not a taonga.[26]

### *Ko Aotearoa Tēnei (Wai 262)*

24. In Wai 262, the Waitangi Tribunal did "not consider the environment as a whole to be a taonga, in the sense that the term is used in the Treaty."[27] Rather, the Tribunal considered that taonga is "anything that is treasured",[28] including "tangible things, such as land, waters, plants, wildlife and cultural works; and intangible things, such as language, identity, and culture, including mātauranga Māori itself."[29]

25. The Tribunal explained that "Māori relationships with taonga in the environment – with landforms, waterways, flora and fauna, and so on – are articulated using kinship concepts."[30] "The idea of a kin relationship with taonga, and the kaitiakitanga obligation that kinship creates, explains why iwi refer to iconic mountains, rivers, lakes, and harbours in the same way that they refer to close human relations,"[31] and why kaitiaki obligations exist "in relation to taonga".[32]

26. The Tribunal found that to accept such an "all-encompassing interpretation" that the environment as a whole is a taonga "would be to accept that everything is a taonga, making the concept itself meaningless as a source of rights and obligations." It held that "[t]he environment in mātauranga Māori is the atua (gods) themselves: Ranginui, Papa-tu-a-nuku, Tane-mahuta, Haumia-tike-tike, etc. The atua transcend taonga. Indeed, the natural elements manifested as atua contain, or have dominion over, taonga, but it is wrong to think of the atua as taonga. Rather, the taonga are the

---

26 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 269.

27 At 269. This conclusion is consistent with the conclusions of a number of previous Tribunal reports, for example, Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998) at 89; and Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims, Stage 1* (Wai 1200, 2008) at 1251.

28 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 17.

29 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 17.

30 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) (summary version) at 105.

31 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) (summary version) at 106.

32 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) (summary version) at 23.

particular iconic mountains or rivers, for example, or specific species of flora or fauna having significance in mātauranga Māori."[33]

27. Linking this finding back to the concept of taonga, the Tribunal, in its full report, explained that "[w]hether a resource or a place is taonga can be tested, as it can for a taonga species".[34] It recognised that "[t]aonga have mātauranga Māori relating to them, and whakapapa that can be recited by tohunga. Certain iwi or hapū will say that they are kaitiaki. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested."[35]

28. The Tribunal went on to find that "the relationships between kaitiaki and the natural environment – entwined as they are with the fundamental concept of whanaungatanga – are crucial to Māori culture and identity. Under the Treaty, the Crown must actively protect the continuing obligations of kaitiaki towards the environment."[36] It identified that a Tiriti/Treaty compliant environmental management regime is one that allows for:

28.1 control by Māori of environmental management in respect of taonga where it is found that the kaitiaki interest should be accorded priority;

28.2 partnership models for environment management in respect of taonga, where it is found that kaitiaki should have a say in decision making but other voices should also be heard; and

---

33 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) (summary version) at 110.

34 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 269.

35 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 269.

36 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) (summary version) at 118.

28.3 effective influence and appropriate priority to the kaitiaki interests in all areas of environmental management when the decisions are made by others.[37]

29. The Tribunal made recommendations for reform of the RMA to ensure that those who have power under the Act are compelled to engage with kaitiaki.[38]

### *Te Rohe Pōtae*

30. In 2019, the Tribunal again discussed taonga and the environment in *Te Rohe Pōtae* report. In the context of summarising what other Tribunals have found, it referred to the finding in Wai 262 that the environment as a whole is not a taonga,[39] and noted that "over the years, the Tribunal has found a wide range of objects, organisms, and phenomena to be taonga protected under te Tiriti/the Treaty."[40] In *Te Rohe Pōtae*, the Tribunal, reflecting the discussion in the Wai 262 report, explained that "[w]hether something can be considered a taonga turns on the evidence of a particular case, but examples include a wide range of natural resources or features (such as rivers, fishing grounds, or wāhi tapu), species or populations of flora and fauna (such as harakeke, kūmara, and tuatara), intangibles (such as te reo Māori and the intellectual property behind certain waiata or tā moko)."[41]

31. The Tribunal noted that the Crown has a duty to actively protect taonga, but to only the extent reasonable in the circumstances. As a general principle, the more vulnerable or endangered a taonga is, the greater the protection of duty.[42] In addition to protecting rights over particular taonga, the Tribunal also recognised that "the Treaty also guaranteed Māori rangatiratanga over their affairs [including land] more generally."[43]

---

37 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) (summary version) at 118–119.

38 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) (summary version) at 119. Specific recommendations have been referred to in the claimant's submissions (at [3.9]).

39 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 318.

40 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 319.

41 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 319.

42 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 319.

43 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 321.

32. The Tribunal in *Te Rohe Pōtae* also repeated the Tribunal's finding in Wai 262 that "the degree of control and involvement that iwi Māori as kaitiaki have in relation to taonga should assist in setting the priorities in decision-making processes", and that in "all areas of environmental management, the system must provide for kaitiaki to effectively influence decisions".[44] Accordingly, the Tribunal recommended that the Crown, in conjunction with Te Rohe Pōtae Māori or the mandated settling group or groups in question, put in place means to give effect to their rangatiratanga in environmental management. It recommended a number of minimum conditions, including co-management regimes in which the iwi concerned have a real mandate to represent hapū and whanau. It recommended that these co-management bodies, and the relationship they reflect, "should be established on the basis that the environment is a taonga of Te Rohe Pōtae Māori."[45]

33. This final statement, referring to the environment as a taonga of Te Rohe Pōtae Māori, appears to be an anomaly in the Tribunal's report. The Crown does not consider this to be an acknowledgement that for Tiriti/Treaty purposes, the environment as a whole is a taonga.[46] That would be difficult to reconcile with the Tribunal's apparent acceptance of the approach in the Wai 262 report (outlined above), including the specific finding that the environment as a whole is not a taonga.[47] Consistent with this approach, the Tribunal in *Te Rohe Pōtae* otherwise uses the word "taonga" throughout its report to refer to discrete sites or phenomena.[48] In context, it appears that the word "taonga" has been used in the instance quoted above at [32] in a more informal way, simply reflecting something important to Te Rohe Pōtae Māori.

---

44 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 319. In this context, the *Ko Aotearoa Tēnei* Tribunal was still talking about influence over decisions regarding taonga in the environment, not the environment generally.

45 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 501–502.

46 This ties in with the Tribunal's discussion in the *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* on whether water in general is a taonga. In that report, the Tribunal rejected the notion that freshwater per se is a taonga or that all rivers, lakes and aquifers are taonga. The Tribunal stated "the question of whether a particular water body is a taonga is a matter for case-by-case inquiry. Again, we doubt anyone would dispute that point": Waitangi Tribunal *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 81.

47 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 318.

48 See for example specific things that are referred to as taonga, such as Hui te Rangiora, the kotahitanga movement, puna paru, meeting house, specific forests, specific harbours, specific lakes and wetlands, specific rivers and waterways, species (tuna), and the Māori language.

34. The Crown's view is that, in context, the Tribunal's recommendation in *Te Rohe Pōtae* provides for Te Rohe Pōtae Māori to better exercise their tino rangatiratanga in relation to environmental management generally. It does not recognise that the Crown's duty of active protection extends to the whole of the environment because it is a taonga, as the claimants contend.

### *Crown documents reflect development in Crown thinking about the environment*

35. The claimants reference a number of government department reports that acknowledge the interconnectedness of the environment and its composite parts as a whole.[49] The submission is that because these government departments are moving away from viewing the environment as individual, stand-alone parts and towards the view that the environment is an interconnected whole, the next logical step is to recognise that because some parts of the environment are taonga, then the whole environment is a taonga.

36. Undoubtedly, the reports discuss the interconnectedness of the environment and a closer alignment of the government's perspective with a traditional Māori worldview. For example, the *Environment Aotearoa* report is described as "a synthesis report – bringing together all the domain reports to help us step inside and view our environment as a whole, in all its complexity."[50] The report recognises a te ao Māori worldview which sees the environment as a whole.[51] Similarly, *Te Mana o te Wai* adopts a te ao Māori and tikanga based approach to the management of water in Aotearoa New Zealand and in considering the role of iwi and hapū in decision making,[52] as does *New Directions for Resource Management in New Zealand.*

37. The documents reveal that there has been a development in Crown thought about the environment, and a recognition of its interconnectedness.

---

49 *Environment Aotearoa 2019* (Ministry for the Environment & Stats NZ, New Zealand's Environmental Reporting Series, 2019); *Te Koiroa o Te Koirora: A Discussion Document on proposals for a Biodiversity Strategy for Aotearoa New Zealand* (Department of Conservation, August 2019); *Te Mana o Te Taiao: Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020); *Te Mana o Te Wai: The Health of our Wai, the Health of our Nation* (Kahui Wai Māori Report to Honourable Minister David Parker, April 2019); *New Directions for Resource Management in New Zealand* (Report of the Resource Management Review Panel, June 2020).

50 *Environment Aotearoa 2019* at 7.

51 Indeed, te ao Māori, the Māori world view, is referenced in the overview of the report as having "an important place in environmental reporting in New Zealand" and as having "a significant voice in this report." *Environment Aotearoa 2019* at 6.

52 *Te Mana o Te Wai* at 271.

However, the reports do not acknowledge or indicate that the environment as a whole is, therefore, a taonga. The claimants' submission that "current legislative drafting and policy reports concerning the environment now acknowledge clearly that the environment in its entirety is a taonga" is mistaken.

38. Taonga is not considered in much detail in any of the reports, but when it is mentioned, it is in the context of particular aspects of the environment which are taonga, such as wetlands, paua, fish and other taonga species, traditional knowledge, important places, and flora and fauna that are significant to iwi or hapū identity.[53] The reports do not suggest the whole environment is a taonga, despite recognising that the environment is an interconnected whole.

39. The consistent view in each report, by each department, is that taonga is understood in the sense outlined in the Wai 262 and *Te Rohe Pōtae* reports. It is "objects, organisms, and phenomena", with examples including discrete elements of the environment, such as natural resources or features (such as rivers, fishing grounds, or wāhi tapu), species or populations of flora and fauna (such as harakeke, kūmara, and tuatara), and intangibles (such as te reo Māori and the intellectual property behind certain waiata or tā moko)."[54]

### *No grounds for Tribunal to depart from previous understanding*

40. There is no dispute that in order to uphold te Tiriti o Waitangi/the Treaty of Waitangi and its principles, management of the environment requires a partnership approach between the Crown and Māori, including enhanced decision-making roles for Māori in respect of taonga. There is also no dispute that te ao Māori is an important lens through which to view environmental management.

41. It appears that the crux of the claimants' submission is that in order to uphold te Tiriti/the Treaty and its principles, and to have adequate

---

53 *Environment Aotearoa 2019* at 26, 37, 62, and 73; *Te Koiroa o Te Koirora:* at 24, 42, 43; and *Te Mana o te Taoioa* at 44, 48, 51, and 52. In one instance, *Te Koiroa o Te Koioa* report uses the term very broadly (at 20). The report states "There is growing recognition that we – all New Zealanders – have a duty of care. We are all stewards of this precious resource, our taonga." The Crown understands this to be using the word taonga in a generic sense – meaning something precious to all New Zealanders. It does not support the legal position that for Tiriti/Treaty purposes, the Crown recognises that the environment as a whole is a taonga. This is the same sense in which the word is used in *Te mana o te Wai*, which recognises the significance of "water as a taonga for the nation" (at 5).

54 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2019) pt IV at 319.

iwi/hapū influence in environmental decision making, the environment as a whole must be considered a taonga. The Crown agrees with the Tribunal's view that this is not necessary or appropriate. As the Tribunal identified in the Wai 262 inquiry, there is a risk that considering something so large and all-encompassing as the environment to be a taonga could risk the degradation of the concept of taonga. It could render the concept itself meaningless as a source of rights and obligations.

42. The Crown further submits there has been limited evidence put forward by the claimants on this matter. There is therefore no evidential basis which justifies a reassessment of the Tribunal's previous findings. In this regard, the Crown notes the Tribunal in the Wai 262 inquiry identified that the environment in mātauranga Māori includes the atua themselves, and in te ao Māori atua transcend taonga. It reached that view after considerable inquiry across a breadth of evidence that directly considered matters at the nexus of mātauranga Māori and the natural world. Without any evidence on the matter in this inquiry, the Crown submits there is no basis to depart from the Tribunal's view in Wai 262 of te ao Māori and mātauranga Māori.

43. The Crown recognises the Tribunal brings expertise in articulating matters of tikanga. If the Tribunal were minded to make a finding on whether the environment as a whole is a taonga, as submitted by Counsel for Wai 662, 1835 and 1868, it might also consider whether taonga can have different meanings in different circumstances (as with many words in te reo Māori). This was foreshadowed in the Wai 262 report with the comment "we do not think the environment as a whole is a taonga, at least not in the sense that the term is used in te Tiriti/the Treaty."[55]

44. Considering the Tribunal's findings in Wai 262, *Te Rohe Pōtae*, and various other reports mentioned, and in light of the lack of an evidential basis from which to reassess these findings, the Crown's view is that there are no grounds for the Tribunal to depart from its finding that the environment, as a whole, is not a taonga in the sense that term is used in te Tiriti/the Treaty.

55 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) summary version, at 110.

**Assessing the Evidence**

45. The primary technical evidence concerning land-based environmental issues on the record of inquiry compromises the following reports and brief of evidence for the Crown:

    45.1 David Alexander "Environmental Issues and resource management (land), 1970s-2010" (#A38);

    45.2 David Armstrong "The Impact of Environmental Change in the Taihape District, 1840-C1970" (#A45);

    45.3 Michael Belgrave et al "Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga" (#A10); and

    45.4 William Fleury, brief of evidence (#M07).

46. The primary technical evidence concerning water-related environmental issues on the record of inquiry compromises the following three reports and two briefs of evidence for the Crown:

    46.1 David Alexander "Rangitikei River and its Tributaries: Historical Report" (#A40);

    46.2 David Armstrong "The Impact of Environmental Change in the Taihape District, 1840-C1970" (#A45);

    46.3 Michael Belgrave et al "Environmental Impacts, Resource Management and Wahi Tapu and Portable Taonga" (#A10);

    46.4 Sheree De Malmanche, brief of evidence (#F11); and

    46.5 William Fleury, brief of evidence (#M07).

47. The Crown notes that the technical reports are not comprehensive. In particular:

    47.1 Issues have largely been examined from a contemporary scientific perspective with very little evidence concerning the scientific knowledge and understandings at the time particular issues arose.

47.2 There is no comprehensive coverage of all environmental management regimes that have applied since 1840.

47.3 There is often no comparison between the way in which policies and legislation were applied in the inquiry district and how they were applied in other parts of New Zealand.

47.4 There is little evidence before the Tribunal of contemporaneous Māori opposition to many of the activities that claimants now assert have caused significant damage to the environment in the inquiry district.

47.5 Where legislation and policy are discussed, there is little consideration, if any, of whether the Crown has applied its environmental policies equally as between Māori and non-Māori in the inquiry district.

48. The Crown says caution is required when making findings in respect of environmental issues. As noted above, the Tribunal should always have regard to the context of what was known and understood at any specific point in time, and a number of factors must be considered in making such findings. This is consistent with the previous findings of various Tribunals that the Crown's actions should not be assessed by current standards.[56]

49. Finally, the existence of environmental degradation does not automatically mean there has been a failure by the Crown. A consideration of the Crown's responsibility for environmental degradation must take into account the range of factors that the Crown cannot control or influence. Determining causation in respect of negative environmental impacts and attributing responsibility, especially in relation to the impact of legislation and policy on specific aspects of the environment, is therefore difficult.

50. The wide range of complex and interrelated factors that affect the environment, as well as the large number of stakeholders who utilise the environment and its resources, means that assigning responsibility for

---

56 See, for example, Waitangi Tribunal *The Mohaka ki Ahuriri Report* (Wai 201, 2004) vol 2 at 636: "it would be wrong to judge Crown actions or omissions by the standards expected in environmental management in the twenty-first century." See also the *Tauranga Moana 1886-2006 Report on the Post Raupatu Claims* (Wai 215, 2010) vol 2 at 524.

environmental degradation is not straightforward. These factors mean that assessing claims that the Crown has caused adverse environmental impacts requires a great deal of care.

**Approach to submissions**

51. The Crown's closing submissions on Issue 16 – Environment are being filed in two parts – broadly separated into land issues and water issues. These submissions address the land issues.

**ISSUES**

**Land**

**Issue 16.1: In what ways has the Crown sought to exercise its authority over the management of land-based environmental resources in the Taihape inquiry district since 1840, including the creation of local authorities and the delegation of powers and functions to such bodies?**

*The Crown's role*

52. In light of the importance of the environment to New Zealand as a whole, the range of complex factors that affect the environment, and the large number of interests in the environment and its resources, the development of environmental management regimes is necessary to help preserve and protect the environment for the benefit of all New Zealanders. To that end, and consistent with its right of kāwanatanga, over time the Crown has introduced a range of measures regulating the use and management of the environment and its resources. The implementation of such measures is a legitimate governance and regulatory function of the Crown,[57] and has affected the extent to which all New Zealanders can use and enjoy the environment and exploit its resources. The rights and interests that others may have in the environment, including Māori, are subject to the Crown's overriding kāwanatanga authority.[58]

*The implementation of measures to regulate the use and management of land-based environmental resources*

53. Local government in the Taihape region started with the Rangitīkei Highways Board in 1872, and in 1877 the Rangitīkei County Council was

---

57 See also the comments of the Court of Appeal in *Ngai Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553, at 8.

58 *Ngai Tahu Māori Trust Board v Director-General of Conservation (Whales)* [1995] 3 NZLR 553 at 558 per Cooke P.

established.[59] The Crown's submissions regarding Issue 10: local government bodies set out the Crown's position on local authority matters.

54. Statutes dealing with the management of the natural environment followed from the establishment of local authorities. The Belgrave et al report notes that much of the early environmental legislation was enacted to protect public health or property rights, or to guard against economic perils such as pests or navigation hazards. Examples include the Goldfields Act 1862 to regulate mining licences, the New Zealand Forests Act 1874 to conserve forests to provide timber for future industrial purposes, and the Public Health Act 1876. The focus was often on the economic or recreational use of the environment rather than on protection of the environment for protection's sake.[60]

55. Over time, a range of measures have been developed for the local governance of land including:[61]

55.1 the Town Planning Act 1926;

55.2 the Town and Country Planning Act 1953;

55.3 the Town and Country Planning Amendment Act 1973; and

55.4 the Water and Soil Conservation Act 1967.

56. By the early 1940s it was realised that soil erosion was a particularly significant issue in the district.[62] As a response the Soil Conservation and Rivers Control Act came into force during 1941, establishing the Rangitīkei Catchment Board.

57. By the 1970s, the way that the Crown interpreted its responsibilities in environmental and resource management changed significantly.[63] The Belgrave et al report notes that while the Crown continued to support the expansion of pastoral farming (by, for example, subsidising the transformation of marginal land into pasture or commercial forest), it

59 Wai 2180, #A05, at 7–8.

60 Wai 2180, #A10, at [351].

61 Legislative measures in relation to forests is set out further below.

62 Wai 2180, #A45, at 97.

63 Wai 2180, #A10, at [236].

shifted its attention to the management of the environment according to other priorities, such as the diminishing areas of indigenous forest and the need to preserve native species.

*Contemporary framework for local authorities*

58. The contemporary legislative framework for environmental management now authorises local authorities to exercise powers and functions in relation to the management, use and protection of the environment, subject to national parameters set out under the RMA. Local government legislation reflects the philosophy that it is preferable for decisions affecting the local community to be made by that community, with the Crown setting the legislative parameters within which those decisions are to be made.

59. The Crown is not responsible for the decisions of local authorities. As outlined earlier,[64] local authorities are not part of the Crown but are separate bodies corporate pursuant to section 12(1) of the Local Government Act 2002. They do not act on behalf of the Crown for the purposes of the Treaty of Waitangi Act 1975. However, local authorities have various obligations under Part 2 and other sections of the RMA to recognise and provide for Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga, as discussed below.

60. While the Crown has devolved the majority of management responsibilities to regional councils and territorial authorities through the RMA,[65] the Crown maintains overall responsibility for the statutory framework within which local government operates. It is responsible for ensuring that the broad parameters of the legislative schemes are Tiriti/Treaty compliant. The Crown must ensure its Tiriti/Treaty duties are fulfilled.[66] The Crown has an ongoing role in creating regulations, national direction (national policy statements and national environmental standards), water conservation orders and heritage protection orders. The devolved nature of the resource management framework enables local communities to be involved in the integrated management and control of natural and physical resources in the

64 See the Crown's submissions on Issue 10.

65 Resource Management Act 1991, ss 30 and 31.

66 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) vol 1 at 270.

region and, as accepted by Dr Robert Joseph, does not preclude local Māori from being actively involved in local government.[67]

61. Section 4 of the Local Government Act 2002 states explicitly that a number of principles have been incorporated into the Act to "recognise and respect the Crown's responsibility to take appropriate account of the principles of te Tiriti o Waitangi/the Treaty of Waitangi".[68] The Crown submits the RMA and its ongoing reform, the Local Government Act 2002 and the Conservation Act 1987 include sufficient provision for the views and values of Taihape Māori to be taken into account and for hapū and iwi to participate in the decision-making processes of these regulatory agencies, as discussed in more detail below.

62. The Crown has provided the legislative framework and the direction. Local authorities are monitored and accountable to the government and the community in a number of ways:

62.1 Section 98 of the Local Government Act 2002 requires local authorities to report annually in in respect of certain matters, and an annual report must include:[69]

> a report on the activities that the local authority has undertaken in the year to establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority.

62.2 The Minister for the Environment has a duty under s 24(f) of the RMA to monitor the effect and implementation of the RMA, national policy statements, national planning standards, and water conservation orders.

---

67 Wai 2180, #4.1.9, at 190. Dr Robert Joseph is one of the authors of Paul Meredith and Robert Joseph "Ko Rangitikei Te Awa: The Rangitikei River and its Tributaries Cultural Perspectives Report" Crown Forestry Rental Trust, May 2016 (Wai 2180, #A44).

68 Section 4: "In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes."

Another example of the Crown legislatively ensuring the views and concerns of Māori are considered in local authority decision-making processes is s 82 of the Local Government Act 2002 which relevantly provides that consultation that a local authority undertakes in relation to any decision or other matter must be undertaken in accordance with stated principles and local authorities must ensure that they have in place processes for consulting Māori: ss 82(1) and (2) Local Government Act 2002.

69 Under the Local Government Act 2002, sch 10, cl 35.

62.3 The Environment Court regulates local authority acts and omissions. The legislative regime, in establishing the Environment Court, allows for Taihape Māori to hold local authorities to account for decisions made by them that affect them, their taonga and lands in which they have interests. The requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga will often be compatible and complementary with other matters of national importance listed in section 6 of the RMA, such as the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development (section 6(d)), and so parties other than Māori may hold local authorities to account for any failing to properly give effect to Māori values.

62.4 The Auditor-General may at any time audit the performance of any public entity, including local authorities.[70] For example, in 2011 the Auditor-General audited four regional councils' performance in relation to managing land use and non-point source discharges for the purpose of maintaining and enhancing freshwater quality in their regions, which included Horizons Regional Council.[71]

62.5 Section 16 of the Environment Act 1986 provides for the functions of the Parliamentary Commissioner for the Environment. These include reviewing the system of agencies and processes established by the Government to manage the allocation, use, and preservation of natural and physical resources;[72] and investigating the effectiveness of environmental planning and environmental management carried out by public authorities, and advising them on remedial action.[73]

---

70 Public Audit Act 2001, s 16.

71 Office of the Auditor-General *Managing freshwater quality: Challenges for regional councils* (Performance audit report, September 2011).

72 Environment Act 1986, s 16(1)(a).

73 Environment Act 1986, s 16(1)(b).

62.6 The Environmental Reporting Act 2015 requires the Secretary for the Environment and the Government Statistician to jointly produce and publish reports on New Zealand's environment every 3 years.[74]

62.7 Section 35 of the RMA requires local authorities to gather information, monitor and keep records in relation to a number of matters, including the state of the whole or any part of the environment of its region or district, and the exercise of any functions or powers (including granting resource consents).[75] Every five years local authorities are required to compile a publicly-available review of their monitoring of these matters.[76]

*Treaty analysis of the contemporary environmental management framework*

63. The Crown considers the RMA to be consistent with te Tiriti/the Treaty and its principles. There are multiple interests in the environment and natural resources of the inquiry district, and the RMA requires a balancing of those interests. What has been viewed as an appropriate balance has altered over time in accordance with factors such as the state of the economy, knowledge of the environment and greater awareness of the need to provide for Māori participation in decision-making processes.

64. The RMA was the subject of detailed analysis in the Tribunal's Wai 262 inquiry, and again more recently in Wai 2358. In Wai 262, the Tribunal found that the Crown's obligation in developing a Tiriti/Treaty compliant environmental management system is to create a system which gives proper weight to the kaitiaki interest, alongside all other interests.[77] The Tribunal considered that:

64.1 There are many legitimate interests in the environment that must be balanced with the kaitiaki interest, including:[78]

64.1.1 the interests of the environment itself;

---

74 Environmental Reporting Act 2015, ss 7-9.

75 Resource Management Act 1991, s 35(2).

76 Resource Management Act 1991, s 35(2A).

77 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) vol 1 at 272.

78 *Ko Aotearoa Tēnei* at 270.

64.1.2 the interests of those who wish to use or develop environmental resources;

64.1.3 the interests of others who are affected by those uses; and

64.1.4 the interests of the community as a whole.

64.2 The interests at play are so many, varied, and complex that even individuals can have conflicting interests.[79] The boundaries between kaitiaki and other interested groups are "porous", and even for kaitiaki, the kaitiaki interest may be one interest among many: kaitiaki share wider community interests in overall access to resources such as water and energy, may run businesses, or have recreational interests in a resource.[80]

64.3 There can be no standard template for environmental decision-making that privileges one set of interests over others, "[t]he kaitiaki interest is important, and protections for it must be more than token, but it is not a trump card."[81] What is needed instead is an environmental management system that allows all legitimate interests to be considered against an agreed set of principles, and balanced on a case-by-case basis.[82]

64.4 The key requirements of an environmental management regime that is Tiriti/Treaty compliant and provides adequately for the kaitiaki interest are: it must deliver kaitiaki control, partnership, and influence, whichever of those outcomes is appropriate.[83]

65. The Wai 262 Tribunal acknowledged that the RMA regime provides for the key components it considered necessary for a Tiriti/Treaty compliant environmental management regime,[84] but was critical of its implementation.[85] The Tribunal said that the RMA was not delivering (or

---

79 *Ko Aotearoa Tēnei* at 271.

80 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) vol 1 at 272.

81 *Ko Aotearoa Tēnei* at 272.

82 *Ko Aotearoa Tēnei* at 272.

83 *Ko Aotearoa Tēnei* at 272.

84 *Ko Aotearoa Tēnei* at 273.

85 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) vol 1 at 286.

not delivering well enough) on its protections for the kaitiaki interest.[86] Despite the existence of the delegation or transfer of power mechanisms (sections 33 and 188) and the joint management provision (section 36B), the regime provided no requirement or incentives for such mechanisms to be used.[87]

66. The Wai 262 Tribunal recommended that the RMA regime be reformed, so that "those who have power under the Act are compelled to engage with kaitiaki in order to deliver control, partnership, and influence where each of these is justified".[88] Specifically, the Tribunal recommended:[89]

66.1 enhanced iwi management plans;

66.2 improved mechanisms for delivering control to Māori;

66.3 a commitment to capacity-building for Māori; and

66.4 greater use of the national policy statements and tools.

67. Since that time there have been multiple amendments to improve the RMA, taking account of evolving views in relation to the environment, and responding to new and evolving issues as they arise, including responding to tribunal findings and recommendations.

68. Deputy Chief Judge Caren Fox, in her plenary address to the Resource Management Law Association's 2014 conference noted the "significant steps" taken by successive Governments to "increase the practical involvement of Māori in resource management leading to increased opportunities for participation and appropriate consultation" and commented that there has been:[90]

> obvious massive effort to engage Māori in resource and environmental management and we consider that significant incremental progress has been made to address many of the Waitangi Tribunal findings and recommendations.

---

86 *Ko Aotearoa Tēnei* at 280.

87 *Ko Aotearoa Tēnei* at 282.

88 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) vol 1 at 286.

89 *Ko Aotearoa Tēnei* at 286.

90 Deputy Chief Judge Caren Fox and Chris Bretton "Māori Participation, Rights and Interests" (paper presented to the Resource Management Law Association Conference, Dunedin, September 2014) at 22, <www.rmla.org.nz>.

69. In April 2017 the RMA was amended to enhance opportunities for iwi input into the RMA plan-making processes; and to introduce the Mana Whakahono ā Rohe regime, a new process for establishing agreements between tangata whenua (through iwi authorities) and councils,[91] discussed in more detail below. The intent of these changes was to facilitate improved working relationships between iwi and councils, and enhance Māori participation in resource management processes.

70. The RMA has since been the subject of further analysis in the 2019 Wai 2358 inquiry, concerning freshwater, in which the Tribunal largely confirmed its findings in Wai 262.[92] In relation to Part 2 of the RMA, the Tribunal recognised that sections 6-8 introduced tikanga requirements in environmental management.[93]

71. However, the Tribunal found that s 8 was still failing in its role to provide for the degree of recognition and protection of Māori interests required. It recommended it be amended so that the specific Tiriti/Treaty obligations of the Crown and decision-makers under the Act are set out. The Tribunal also found that the provisions relating to rangatiratanga and kaitiakitanga (ss 33 and 36B) are inadequate and the Crown has not incentivised or required their use by Councils.[94] Section 33 has never been used to transfer power to an iwi authority, and s 36B has been used twice outside of mandatory use in some Tiriti/Treaty settlements. The Tribunal held that Māori need to be better involved in decision-making.[95]

72. In 2020, a review of the RMA was carried out by an independent Resource Management Review Panel led by Hon Tony Randerson QC.[96] The Panel recommended that the future resource management system should provide

---

91 Resource Legislation Amendment Act 2017, s 14 (amending s 32 of the RMA), sch1, cl 4A (amending sch 1, cl 4A of the RMA), and s 17 (amending s 34A(1A) of the RMA).

92 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Pre-Publication Version* (Wai 2358, 2019).

93 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Pre-Publication Version* (Wai 2358, 2019) at 66.

94 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Pre-Publication Version* (Wai 2358, 2019) at 101.

95 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Pre-Publication Version* (Wai 2358, 2019) at 102.

96 *New Directions for Resource Management in New Zealand* report of the Resource Management Review Panel, June 2020.

a more effective role for Māori and improved recognition of te Tiriti/the Treaty. It recommended that:[97]

72.1 Those involved in the administration of the legislation should give effect to the principles of te Tiriti/the Treaty, rather than taking them into account as currently provided in the RMA. To provide clarity about what this means, the Panel recommended that the Minister for the Environment be required to give national direction on how the principles of te Tiriti/the Treaty will be given effect through functions and powers exercised under the new Act.

72.2 Mana whenua should participate in decision making for the proposed regional spatial strategies and in the making of combined plans at local government level. This will give Māori an effective role in decision making on resource management issues at a strategic level.

72.3 The current Mana Whakahono ā Rohe provisions should be enhanced to provide for an integrated partnership process between Māori and local government to address resource management issues.

72.4 A National Māori Advisory Board should be created to advise central and local government on resource management from the perspective of mana whenua and provide an integrated partnership process between mana whenua and local government to address resource management issues at local government level.

73. This review provided the basis for complete reform of the RMA, and the Government currently has work underway to repeal and replace the RMA with three pieces of legislation. The Panel's recommendations will form the basis of the reform package. Cabinet has agreed that the Panel recommendations relating to Māori involvement in the resource management system are "in the right direction."[98]

---

97 *New Directions for Resource Management in New Zealand* report of the Resource Management Review Panel, June 2020 at 465–466.

98 "Resource Management System reform: Supporting information" (2020) Ministry for the Environment <www.mfe.govt.nz/rma/resource-management-system-reform>

74. Currently, the Crown is working with a collective of pan Māori entities, Te Tai Kaha, on key elements of the legislation, including the strengthened recognition of tikanga Māori and Te Tiriti o Waitangi. The Crown is engaging with Māori on the ongoing reform programme: whanau, hapū and iwi Māori have been invited to attend a number of regional hui to discuss the proposed changes to the new system and how it will impact them.[99]

75. The Crown continues to act in good faith to develop appropriate systems for the protection and management of the environment. Any regulatory regime requires ongoing adjustment to respond to developing circumstances and to address problems in its implementation. The Crown's position is that many of the problems the claimants have identified with the RMA are about its implementation. The Crown has demonstrated a commitment to improving the resource management regime to respond to changing needs and changing understandings (of both the community and the environment), but notes that the process of reform takes time, especially where deep and wide consultation is required. The fact that problems have arisen while the RMA has been in place is not, of itself, enough to render it non-compliant with te Tiriti/the Treaty. Neither are the efforts of the Crown to reform the RMA and provide guidance in its operation. To the contrary, adaptive steps show the Crown's reasonableness and good faith in responding to concerns as they emerge. The Crown therefore says that the current environmental management regime for land-based resources, in its constantly evolving and improving state, is consistent with te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

**Issue 16.2: To what extent, if at all, is the Crown under a duty to preserve and protect the land-based environmental resources that Taihape Māori have interests in?**

76. The Crown accepts that it has a Tiriti/Treaty duty under Article III to ensure that its environmental policies and practices are applied equally as between Māori and non-Māori. It also has a duty under Article II to take such steps as are reasonable in the circumstances to actively protect the taonga of Taihape Māori. While the environment as a whole is not a taonga,

99 "Reforming the Resource Management System" (2020) Ministry for the Environment <www.mfe.govt.nz/rma/resource-management-system-reform>

the Crown accepts that particular aspects of the environment may constitute taonga to which Article II duties attach.

77. However, as the Crown has submitted in previous district inquiries,[100] the Crown does not accept that the guarantee of rangatiratanga in respect of taonga under te Tiriti/the Treaty is an absolute one. There are multiple interests in the environment and natural resources of the inquiry district and any management regime must necessarily carefully weigh all of those interests. It is not possible to state generally what "priority" Māori interests might take. This will depend on a range of factors such as the relative importance of the taonga to Māori, any environmental threat to the taonga, available research, other extant interests in respect of it, and the human and monetary resources required for effecting Māori interests. As noted earlier, the Crown is required to balance many competing interests in its management of the environment. In carrying out that balancing exercise the Crown must adhere to its Tiriti/Treaty obligations of good faith, reasonableness and partnership.

78. Further, any obligations are qualified by the need to determine causation, and what matters the Crown can reasonably be expected to have had control over, given that the natural environment is an open system not under its control, and knowledge about it is constantly changing. The Crown does not accept the claimants' view that all that is required to prove causation is to "show, on the balance of probabilities, the link between the initial Crown action and the ultimate harm."[101] The initial Crown action must itself be in breach of te Tiriti/the Treaty and its principles.[102]

79. The Tribunal has also held that "the Treaty obliges the Crown to actively protect the continuing obligations of kaitiaki towards the environment, as one of the key components of te ao Māori."[103] The Crown's position is that tikanga and kaitiaki obligations relating to the environment are personal to and defined by iwi and hapū. Responsibility for maintaining such

---

100 For example, in its submissions to the Rohe Pōtae Tribunal (Wai 898).

101 Wai 2180, #3.3.56, at [75].

102 Waitangi Tribunal *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015) vol 3 at 1453. That paragraph states that once there has been an identified Tiriti/Treaty breach through an act or omission, and that act/omission, on the balance of probabilities, caused prejudicial effects to Māori, the Crown will be liable.

103 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) vol 1 at 269.

relationships therefore rests primarily with Taihape Māori. The Crown sees its duty, in pursuing and implementing policies that may impinge on those relationships, is to sufficiently inform itself and take those matters into account so as to avoid or minimise prejudice to those relationships.

**Issue 16.3: Has the Crown's environmental management regime for land-based resources:**

**a. Recognised the mana, tino rangatiratanga and kaitiakitanga of Taihape Māori over environmental resources and taonga?**

**b. Provided for Taihape Māori consultation and participation in decision-making? For example through:**

**i. State Forest Park Advisory Committees;**

**ii. National Parks and Reserve Boards;**

**iii. Conservation Boards and Covenants;**

**iv. Nga Whenua Rāhui;**

**v. The provisions of the Resource Management Act 1991 and the Local Government Act 2002;**

**vi. Local government committees such as Te Rōpu Ahi Kā; and**

**vii. Governance or co-governance.**

**c. Affected the ability of Taihape Māori to practise traditional activities such as food harvesting, rongoā, religious practices, manaakitanga, koha, and the use of environmental resources in traditional goods such as clothing?**

**d. Contributed to the degradation of the environment, including through permitting or encouraging deforestation, the introduction of noxious weeds and invasive species such as pinus contorta, Old Man's Beard, and the use of 1080 poison?**

**e. Contributed to the decline of indigenous species by declaring them vermin and actively encouraging attempts to eradicate them (for example shags, weka, ruru and kāhu or hawks)? Has the Crown actively contributed to this process by allowing the introduction of destructive species such as stoats and weasels?**

**16.3 (a) and (b): Has the Crown's environmental management regime for land-based resources recognised the mana, tino rangatiratanga and kaitiakitanga of Taihape Māori over environmental resources and taonga; and provided for Taihape Māori consultation and participation in decision-making?**

*Māori and other interests in the environment and natural resources*

80. The relationship between Māori and the environment is based on the concept of kaitiakitanga and the responsibilities and obligations it brings. The lands, forests and freshwater fisheries of the inquiry district are significant to Taihape Māori as a physical and spiritual resource, over which they are kaitiaki. Environmental management regimes prior to the RMA did not generally recognise or take into account Māori values or interests in a manner now regarded as important and necessary, and some Crown

environmental management measures may not have been consistent with tikanga tuku iho.

81. As noted earlier, there are multiple interests in the environment and natural resources of Taihape that the Crown must weigh up carefully in developing and pursuing its environmental policies. In that exercise, the Crown is entitled to seek to achieve a reasonable balance between its Tiriti/Treaty obligations and the wider national interest. This means that, at times, some interests may be outweighed by others; that is true for Māori and non-Māori alike. The Crown recognises that, at times, the practices of Māori in relation to the environment and its resources may have come into conflict with other interests under both statute and common law as part of that balancing exercise.

### *Statutory recognition for the mana, tino rangatiratanga and kaitiakitanga of Taihape Māori*

82. There have, of course, been significant advances in technology and our general understanding of environmental issues over the course of the 20th century, which is reflected in the changes in environmental management regimes over time. Since 1991, the RMA has confirmed the role of Māori in resource management decision-making. Tangata whenua can exercise tino rangatiratanga and practice kaitiakitanga alongside the Crown and local government under the current environmental and resource management frameworks. The Tribunal has recognised that the Act provides statutory recognition of the Māori relationship with the environment, the kaitiakitanga interest, and te Tiriti/the Treaty in the context of environmental management, and makes provision for Māori involvement in decision-making processes.[104]

83. As noted earlier, the combined effect of sections 6-8 of Part 2 of the RMA is to give protection to Māori interests in resource management decision making:

83.1 Under section 6, persons exercising powers and functions under the Act in relation to managing the use, development and protection of natural and physical resources "shall recognise and

104 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) vol 1 at 260.

provide for" listed matters of national importance, including the "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga",[105] historic heritage sites,[106] and the protection of customary rights.[107]

83.2 Under section 7(a), all persons exercising functions and powers under the RMA, in relation to managing the use, development, and protection of natural and physical resources are required to have particular regard to kaitiakitanga.

83.3 Under section 8, all persons exercising functions and powers under the RMA in relation to managing the use, development, and protection of natural and physical resources "shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".

83.4 The new Mana Whakahono a Rohe regime provides a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may participate in resource management and decision-making processes under the RMA.

84. In addition to particular Māori interests, sections 6 and 7 set out the other interests which must be balanced. In practice, many of the matters of national importance listed in section 6 are likely to be compatible and complementary to subsections 6(e) and (f). For example, the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development (section 6(d)) or the preservation of the natural character of the coastal environment "…wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development" (section 6(a)).

85. The RMA regime provides a number of ways in which Māori can participate in the resource management process. As described by the Supreme Court in *King Salmon*, the RMA "envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to

105 Resource Management Act 1991, s 6(e).

106 Resource Management Act 1991, s 6(f).

107 Resource Management Act 1991, s 6(g).

s 5, and to Part 2 more generally."[108] In the formulation of National Policy Statements, the statutory process provides for iwi consultation. The statutory processes for the formulation of regional policy statements and plans prioritise consultation with tangata whenua.

86. The Crown recognises that the RMA has not delivered as well as expected on its protections for the kaitiaki interest, as outlined above. For that reason, among others, the RMA is currently undergoing complete reform to provide for a more effective role for Māori.

87. Nonetheless, the Crown submits that under the current legislative regime, the tino rangatiratanga and kaitiakitanga of Taihape Māori over environmental resources and taonga has been appropriately recognised in the ways outlined above.

### *Provision for Taihape Māori consultation and participation in decision-making*

88. There is no absolute Tiriti/Treaty duty to consult. The Crown has an obligation to make informed decisions. This obligation is part of the general duty to act fairly, reasonably, and in good faith towards Māori. However, an obligation to make informed decisions is not the same as a standing plenary duty to consult with Māori. Such a duty, the Courts have said, is too vague an obligation to impose on the Crown.[109]

89. The Crown notes that the available evidence on the record of inquiry does not always provide the background detail relating to the establishment or changing of environmental planning and decision making regimes within the inquiry area. However, the Crown considers that the absence of evidence of consultation or participation does not necessarily mean that it did not occur.

90. The Crown submits that under the current legislative regime, opportunities for consultation and participation in decision making for Taihape Māori have been provided for, as outlined below.

---

108 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014 NZSC 38, [2014] 1 NZLR 593 at [30].

109 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 per Cooke P at 665.

*Consultation in planning processes*

91. The Environment Court has been clear that Māori participation and consultation does not amount to a right for Māori to direct the content of planning documents or the outcome of resource consent applications. While Māori are entitled to be heard and express themselves forcefully, such views will not necessarily prevail. A wide range of matters must be considered under Part II of the RMA, and the weighing of these matters against each other will prevail in determining what decision is made.

92. Nonetheless, "the balancing of Māori interests must be done in a manner consistent with the Treaty, and Māori rights cannot be balanced out of existence."[110] Regional and District Councils are unable to carry out their responsibilities under the RMA without obtaining input from tangata whenua.

93. Consultation with tangata whenua is provided for through a number of mechanisms:

    93.1 during the preparation of a proposed policy statement or plan, a local authority must consult with tangata whenua of the area who may be affected by the policy statement or plan, through iwi authorities, and any customary marine title group in the area.[111] When preparing or changing a regional policy statement or plan a regional council must, among other things, take into account any relevant iwi/hapū management plan.[112] Likewise, when preparing or changing any district plan, a territorial authority must take into account any relevant iwi/hapū management plan;[113]

    93.2 before notifying a proposed policy statement or plan, a local authority must provide a copy of the relevant draft proposed policy statement or plan to the iwi authorities consulted during its preparation, and must have particular regard to any advice received

---

110 Wai 2180, #A38, at 98, citing Waitangi Tribunal *He Maunga Rongo: the report on Central North Island claims, Stage 1* (Wai 1200, 2008) part V at 1673.

111 Resource Management Act 1991, sch1, cl 3(1).

112 Resource Management Act 1991, ss 61(2A(a)) and 66(2A(a)).

113 Resource Management Act 1991, s 74(2A). Prior to 2003, councils had to "have regard" to the plans.

on a draft proposed policy statement or plan from those iwi authorities;[114] and

93.3 a local authority that has prepared a proposed policy statement or plan must (if it decides to proceed with that plan) publicly notify the proposed policy statement and give the public, including Māori, the opportunity to make submissions on the proposed policy statement or plan.[115]

94. The first Regional Policy Statement for the Manawatū-Wanganui Region became operative in August 1998. Part IV was entitled "Te Ao Māori – He Ritenga mo Nga Takoha o Te Tai-ao (The Māori World – Management of Resources)". In this Part, a Māori view of resource management was outlined, and objectives and policies set out that would take account of the concerns of iwi and hapū. Mr Alexander, in his "Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s-2010" report, noted that Te Roopu Awhina, an iwi consultative committee, was closely involved in preparing Part IV of the Regional Policy Statement.[116]

95. The 1998 Regional Policy Statement was reviewed by the Horizons Regional Council in 2008 together with all its Regional Plans in a single planning document called "One Plan". Of the submissions lodged in November 2007 regarding "One Plan", two were from Maori organisations in the Taihape inquiry district: the Environmental Working Party of Ngāti Whitikaupeka and Ngāti Tamakōpiri, and Nga Pae o Rangitīkei.[117]

96. The submissions were generally supportive of the Proposed One Plan's provisions, and some improvements or changes to the Plan were requested, including a request for a greater Regional Council presence in the northern Rangitīkei district, allowing adequate time to respond to consultation requests, greater Council efforts through education and information to promote a stewardship ethic among landowners, provision for protocols to apply when human remains are uncovered, no further extraction from the upper and middle Moawhango River, greater collaboration with iwi to

114 Resource Management Act 1991, cl 4(1), sch 1.

115 Resource Management Act 1991, cl 5, sch 1.

116 Wai 2180, #A38, at 85.

117 Wai 2180, #A38, at 90.

maintain and enhance taonga species, and provision for the concept of interconnectedness between taonga landscapes.[118]

97. Mr Alexander has noted that the draft version of the Horizons One Plan "seems to have been developed with little if any involvement from tangata whenua",[119] however he has also noted that the chapter "Te Ao Maori – resource management issues of significance to Hapu and Iwi" was put together "as a medley or amalgam of statements from the 1998 Regional Policy Statement, and Te Ao Maori chapters in the Regional Coastal Plan and the Regional Plan for the Beds of Rivers and Lakes."[120] Mr Alexander noted that this was a "sound approach", as the Māori world view of the environment had not changed from a few years earlier, continuity of viewpoint was something to be valued, and he considered it was not necessary to start again in preparing a statement of Māori values.[121] Mr Alexander describes One Plan as finally implemented as seeming to meet many Māori aspirations relating to water quality.[122]

98. More generally, Mr Alexander has reported that the Whanganui office of Te Puni Kōkiri prepared a generic planning framework for the production of iwi management plans, but "despite this lead, iwi and hapū have not been able to complete the journey and produce final versions of Iwi Management Plans."[123] Mr Alexander reports that except for Ngāti Rangi, which was funded by Manawatū-Wanganui Regional Council to produce an iwi water environment management plan, none of the iwi in the inquiry district has produced environmental or iwi management plans.[124]

*Consultation on resource consent applications*

99. Section 104 of the RMA sets out the matters which a consent authority must "have regard to" when considering applications for resource consents (and s 107 sets out the restrictions on granting certain discharge permits). These include policy statements and plans, which must be prepared in consultation with Māori and in accordance with any applicable Mana

118 Wai 2180, #A38, at 90.
119 Wai 2180, #A40, at 682.
120 Wai 2180, #A38, at 90.
121 Wai 2180, #A38, at 90–91.
122 Wai 2180, #A40, at 684.
123 Wai 2180, #A38, at 142.
124 Wai 2180, #A38, at 145.

Whakahono a Rohe, discussed below. Where they have not had regard to the necessary considerations , those decisions can be challenged, and can be invalidated.

100. Consultation is routinely undertaken during the resource consent application process. However, while failure to consult is contrary to best practice, neither an applicant nor a local authority has a duty to consult any person (including Māori) about a resource consent application, unless required under other legislation.[125] As noted by the Environment Court in *Te Kura Pukeroa Maori Inc v Thames-Coromandel District Council*:[126]

> Although as a matter of practice consultation is something routinely undertaken during the resource consent application process, it is not a mandatory part of that process. Failure of an applicant to consult may have far reaching consequences such as, opposition to a proposal which might otherwise have been avoided, an applicant being insufficiently aware of how its proposal might affect other persons or an inadequate assessment of effects being undertaken. Failure to consult is accordingly contrary to best practice and has obvious risks however, as s 36A now makes abundantly clear (to the extent that was required), consultation is not mandatory and the Court has no power to order consultation.

101. While there is no statutory obligation to consult, an assessment of environmental effects must identify any persons who will be affected by a proposal, any consultation undertaken, and any response to the views of any person consulted.[127]

102. Parties will often engage prior to hearings to resolve and reduce issues that need to be determined.[128] A practice has emerged in which applicants will reach agreements with affected parties. Applicants are becoming increasingly aware that if they do not incorporate or provide for Māori values, their applications will not be consented, or there will be significant costs and delays due to council processes.

103. As noted by Mr Alexander, this occurs regardless of whether there has been a settlement in any particular rohe, and less-resourced iwi are treated no differently than larger, or settled, iwi, as was the case in relation to the confidential agreements reached with Genesis Power Limited for the

125 Section 36A of the RMA.

126 *Te Kura Pukeroa Maori Inc v Thames-Coromandel* DC EnvC W069/07, at [24].

127 Schedule 4, clause 6 of the RMA.

128 Wai 2180, #A38, at 117.

continued operation of the Tongariro Power Development Scheme, in 2000.[129] Mr Alexander stated that Genesis set a very high standard for the degree of consultation it had, and had it not done so, it otherwise "would have run into all sorts of trouble and it knew that".[130] While in that case the accord was reached as a product of litigation, agreements can otherwise be made to avoid the need to resort to the courts to ensure tino rangatiratanga and kaitiakitanga are recognised.

104. Mr Alexander provided two further case studies in which resource consent applications are examined in terms of the involvement of tangata whenua: the flying fox extension to the bungy-jumping operation at Mokai in 2001; and Project Central Wind, a wind farm on the Hihitahi Plateau in 2008.

105. In the case of the Mokai Gravity Canyon flying fox application, Māori appear to have been closely involved and from an early stage.[131] A cultural impact assessment report was commissioned from Te Rūnanga o Ngāti Whitikaupeka, and the applicant agreed to organise the operation to suit the needs of the Rūnanga as set out in the assessment report. The Rūnanga supported the application that was lodged.

106. With respect to an application for resource consents to construct a wind farm on farmland at Hihitahi in 2008, Meridian consulted with Ngāti Whitikaupeka, Ngāti Tamakōpiri and Ngāti Rangi to determine whether there were sites or matters of interest to tangata whenua arising from the application.[132] Various hui were held to understand the relationships of iwi with the site. The application was publicly notified, and submissions were made by a range of entities, including:

106.1 The Rangipō Waiū B6B1 Trust, who were supportive.

---

129 Wai 2180, #4.1.16, at 278. An accord was reached only after Genesis had successfully appealed against the Environment Court's decision to the High Court: *Genesis Power Ltd v Manawatu-Wanganui Regional Council* [2006] NZRMA 536; *Ngati Rangi Trust, Tamahaki Inc Society and Whanganui River Maori Trust Board v Genesis Power Limited* CA CA518/2007 [2 June 2009]. Proceedings to the Supreme Court were agreement consequent on the agreement having been reached.

130 Wai 2180, #4.1.9, at 301.

131 Wai 2180, #A38, at 119–121.

132 Wai 2180, #A38, at 134–140.

106.2 The Ngāti Rangi Trust, who opposed the application on the basis that they were still in consultation with Meridian and that discussions were ongoing.

106.3 The Environmental Working Group of Te Runanga o Ngāti Whitikaupeka and Te Rūnanga o Ngāti Tamakōpiri, who had initially opposed the application but later advised that their concerns had been discussed and appropriately addressed and set out in a memorandum of understanding.

107. There was no similar arrangement with Ngāti Rangi. While the hearing panel was critical of the extent of consultation undertaken by Meridian,[133] it recognised the kaitiakitanga of Ngāti Rangi and its shared responsibility with other groups, and considered that the proposal would not compromise those responsibilities.

108. Messrs Meredith and Joseph, in their report "'Ko Rangitīkei te awa: The Rangitīkei River and its Tributaries', Cultural Perspectives Report", also referred to specific examples of consultation, but in response to questions clarified that the examples provided are not examples of "meaningful consultation". They reported that "only one of the claimant groups stated that their relationship was amicable with the local authorities but they did not provide a specific example of meaningful consultation".[134]

109. There is not a statutory requirement for a resource consent applicant to consult with Māori. While consultation is permitted and encouraged, and in some instances has been thorough, the Crown acknowledges that there may have been times when the legislative framework for environmental management provided for only limited direct input for Taihape Māori into matters affecting them. This does not amount to a Tiriti/Treaty breach because there is no general Tiriti/Treaty duty to consult. However, this is one of the areas identified for change in the RMA reform process.

*State Forest Park Advisory Committees*

110. Advisory Committees and National Parks and Reserve Boards lasted from the early 1970s to around 1988. From 1990 they were replaced by up to 19

133 Wai 2180, #A38, at 138.

134 Wai 2180, #A44, at 280-306; and Wai 2180, #A44(c), at 16–17.

regional 12-member Conservation Boards, established under the Conservation Law Reform Act 1990. Advisory Committees were set up under the Forests Act 1949, as amended by the Forests Act Amendment Act 1965, and were constituted under regulations to advise the Minister on the recreational aspects of the administration of State forest parks.[135]

111. The Act and the associated regulations did not require the appointment of Māori to advisory committees. Nominations were sought from groups thought to have an interest in the recreational aspects of the park and names were then put forward to the Minister for approval.[136]

112. With respect to the Advisory Committee for the Kaimanawa Forest Park, it was recognised that the adjacent Māori land owners would have an interest, and the Tūwharetoa Tribal Committee was asked to put forward a nominee and John Hura was appointed as a result.[137] In 1975 he was reappointed for a term of five years.[138] The Kaimanawa Forest Park Advisory Committee was abolished in 1980 and replaced by a combined Kaimanawa-Kaweka State Forest Parks Advisory Committee.[139]

113. For the Kaweka Forest Park Advisory Committee, established in 1973, the Minister had wanted to see a nominee of the local Māori people, and a woman nominee on the committee.[140] The Heretaunga Māori Executive Committee was asked to nominate a member. In April 1973 M Benjamin, the District Ranger in Napier, wrote to the Conservator of Forests in Palmerston North to say that Māori Affairs had forwarded the nomination of Wero Karena. Mr Karena was not considered to be satisfactory nominee for the Advisory Committee, as the Forest Service was aware that he had been prosecuted for trespassing. As a result of the inquiries made by the Forest Service, they did not forward Mr Karena's nomination to the Minister. An alternative Māori nominee was not sought, however the

135 Forests Act 1949, s 63B(3), State Forest Park Regulations 1969 and the State Forest Parks and Forest Recreation Regulations 1979.

136 Wai 2180, #A38, at 227.

137 Wai 2180, #A38, at 230.

138 Wai 2180, #A38, at 233.

139 Wai 2180, #A38, at 234.

140 Wai 2180, #A38, at 234.

Conservator of Forests personally nominated Robert Magill, a member of the Ngāti Pirinui Marae Committee, to the committee.[141]

114. In 1978 the Minister of Forests changed the appointments system to one where vacancies on advisory committees were advertised rather than filled by nominees of selected agencies. When two Kaweka vacancies came up, advertisements attracted four applicants, none of them Māori.[142] Mr Alexander described the change from Forest Service officials being actively involved in seeking out applications to a more "hands off process".[143]

115. When the combined Kaimanawa-Kaweka State Forest Parks Advisory Committee was established in 1980, advertisements attracted 28 applicants for nine places. John Hura from the Kaimanawa Advisory Committee did not apply, and Mr Alexander notes that none of the applicants were recognisably Māori or nominated by Māori organisations.[144]

116. The Ruahine State Forest Park was established in 1976. In 1974 the Conservator of Forests suggested the Advisory Committee should have a Māori member, but this idea was not pursued and no Māori were appointed. When the terms of two members expired in 1978 the vacancies were advertised and Taylor Mihaere applied. He was not successful in being appointed because of concerns about his ability to do the physical part of the job.[145] In 1973 a Pākehā nominee for the Kaweka Committee was not appointed for similar reasons.[146] In 1985 Kay Te Rangi Kauia Tipene-Leach was appointed to the Ruahine Committee.[147]

117. Mr Alexander has suggested that the personal knowledge that Forest Service had of nominees was an important factor in determining who was recommended, and that the managers were keen to see persons who shared their views, and would be supportive of or amenable to their proposals when asked for advice, appointed to the Advisory Committees.[148] However,

141 Wai 2180, #A38, at 239.
142 Wai 2180, #A38, at 241.
143 Wai 2180, #A38, at 241.
144 Wai 2180, #A38, at 242.
145 Wai 2180, #A38, at 247.
146 Wai 2180, #A38(a), at 831.
147 Wai 2180, #A38, at 248.
148 Wai 2180, #A38, at 255.

the Forestry Service staff had little influence over who the interest groups nominated as members. In 1973, for example, four of the recreation groups - Federated Mountain Clubs, Heretaunga Tramping Club, 'youth groups' (ie, scouts etc), and the Hawkes Bay Acclimatisation Society each nominated only one person. This gave the Forestry Service staff little option as to who to recommend to the Minister. When the Royal Forest and Bird Protection Society of New Zealand nominated four people, one of the two female nominees was put forward by the Forestry Service because the Minister wanted women on the committee.[149] Recreation group members may have been 'like-minded individuals' to some extent, but it is submitted that their views were unlikely to automatically accord with those of the Forestry Service staff.

118. The Forests Act 1949 and associated regulations did not require the appointment of Māori to advisory committees. In this way, the Crown acknowledges that its pre-1990 regime did not actively encourage Māori participation in advisory committees. Nevertheless, there was nothing preventing Māori from being on advisory committees, and indeed some Māori members were appointed, as outlined above. From 1990, with the replacement of advisory committees with Conservation Boards, the legislation required at least one Māori member on each Board, as outlined below. The Crown therefore considers that the regime provided Taihape Māori with adequate opportunities for consultation and participation in the management of Crown forests, reserves and national parks.

*National Parks and Reserve Boards*

119. Under the National Parks Act 1980, each National Parks and Reserves Board was to be responsible for determining policy for all national parks, scientific reserves, and scenic reserves of national significance within its district. There was a public nominations process for Board members, and those persons appointed were required to comply with certain statutory criteria. Most of the Taihape inquiry district was in the Wellington Board's district.

149 Wai 2180, #A38(a), at 831–835; Wai 2180, #A38, at 234–235.

120. Nominations for the first 10-person Wellington National Parks and Reserves Board were received from 42 people. Two of the nominees, James Moses of Levin and James Takapua of Levin, were Māori, but none of the nominees resided within Taihape inquiry district. When the Minister of Lands made the final decision in 1981, the person with the closest association with the Taihape inquiry district was Margot Forde, a plant scientist from Palmerston North who was also a member of the Ruahine State Forest Park Advisory Committee.[150]

121. A year later, the New Zealand Māori Council advised the Minister of Lands that the Aotea District Māori Council sought a mandatory right to nominate persons to sit on the Wellington Board, because "there is strong Māori interest along the river which may not be taken into account during their deliberations".[151] The Minister was not prepared to amend the legislation to provide for a mandatory right, but was willing to "give serious consideration to Māori representation on the Board should a nomination from a suitably experienced person be forthcoming".[152]

122. In 1983, nominations again opened for the Wellington Board. There were no recognisably Māori nominees. There was, however, a late nomination of Te Reimana Bailey by the Aotea District Māori Council. He was appointed onto the Wellington Board in May 1984, and remained in that position until 1988 when the National Parks and Reserves Boards were replaced by regional Conservation Boards.[153] It does not appear that Mr Bailey is from the Taihape inquiry district.

*Conservation Act*

123. The Conservation Act 1987 provides a strong direction to decision makers: section 4 requires that the Act be so interpreted and administered as to give effect to te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

124. In compliance with section 4 of the Conservation Act, the Department of Conservation (**DOC**) must act fairly, honourable, reasonably, and in good faith towards Māori in carrying out its conservation functions. DOC

150 Wai 2180, #A38, at 251.

151 Wai 2180, #A38, at 251.

152 Wai 2180, #A38, at 252.

153 Wai 2180, #A38, at 253.

considers building strong relationships with tangata whenua to be fundamental in carrying out its functions, and the Department is committed to seeking practical ways, within the scope of the law, for tangata whenua to be involved in decision-making processes.

125. There are numerous examples of the Department supporting, including funding, tangata whenua in conservation and environmental restoration endeavours. One way it does this is through the Kahui Kaupapa Atawhai group, whose aims are to protect Māori cultural values on land managed by DOC and protect conservation values on land owned by Māori; empower Māori communities to fulfil their customary duty as kaitiaki of taonga and encourage participation in conservation delivery; balance cultural, social and ecological values in decision-making; interact with Māori to manage potential risk and maximise opportunities; engender Māori support for conservation and for DOC; and give effect to Tiriti/Treaty principles.[154] The regionally-based Pou Tairangahau are strongly connected to this group, considered part of the Kāhui Kaupapa Network, and contribute to the development of the cultural platform.[155]

126. To assist with this kaupapa, the Kahui Kaupapa Atawhai group developed Te Pukenga Atawhai training programme to enable staff to build and maintain effective working relationships with whānau, hapū and iwi. Reginald Kemper, Director Operations (at the time of giving evidence), Kaihautū, Matarautaki within DOC, gave evidence that it is an essential part of the staff development programme in DOC.[156]

127. The group also aims to help build Māori capability in conservation work outside DOC, and to work with Māori funding mechanisms, such as Ngā Whenua Rāhui. Ngā Whenua Rāhui is a Māori-led initiative to protect uneconomic land blocks from further degradation and put them to positive use. The Ngā Whenua Rāhui Committee is made up of seven people and is Māori led and managed. Michael Rereao Mohi, the Relationship Lead for

154 Wai 2180, #M08, at [46].

155 Wai 2180, #M08, at [45].

156 Wai 2180, #M08, at [49]–[50].

the initiative (at the time of giving evidence), explained it in the following way:[157]

> 16.… the pressure on Māori land owners to pay rates meant that people were looking to fund these demands from the land itself, which potentially would impact on the indigenous plants and animals which had been protected because the land had not been developed. The aim [of Ngā Whenua Rāhui] was to provide some form of formal protection for those values with the owners retaining tino rangatiratanga.
>
> 17. For this to be effective some payment was necessary. At least for the bigger blocks, that payment is a consideration for not harvesting [timber] and as some consideration for what biodiversity is within the blocks., The bigger costs, however, are not the one-off payments for entering the covenant or the kawenata, but are for the on-going work in maintaining and improving the land. These costs have been mainly for pest management. For some smaller areas, where it is feasible, costs have also included fencing. The contribution of management advice and actual pest control has developed over the years and so more practical support can now be offered.

128. Ngā Whenua Rāhui is a contestable Ministerial fund financed through Vote: Conservation and governed by the Ngā Whenua Rāhui Committee, which has a direct relationship with the Minister of Conservation. A Ngā Whenua Rāhui team existed in the Department as early as 1988, the Government established a Ngā Whenua Rāhui Fund in 1991, and in 1993, statutory recognition was given to Ngā Whenua Rāhui kawenata (covenants).[158] In essence, the Ngā Whenua Rāhui funding programme exists to protect the natural integrity of Māori land and preserve mātauranga Māori.[159] Mr Mohi gave evidence that during the 30 years he has worked for Ngā Whenua Rāhui, it has "shown its worth. Māori land is now being managed for the benefit of the people and the environment. The fact that all ten agreements, which were reviewed at the end of 25 years, have been renewed attests to this."[160]

129. Currently, Ngā Whenua Rāhui offers two funds: Ngā Whenua Rāhui Fund (which started as a $2.5 million fund and is now a $6 million fund annually) and Matauranga Kura Taiao Fund ($500,000 fund).[161] The Ngā Whenua Rāhui Fund provides protection for Māori landowners through the use of

157 Wai 2180, #M06, at [16]–[17].

158 Wai 2180, #A38, at 409.

159 Wai 2180, #M08, at [69]–[70].

160 Wai 2180, #M06, at [32].

161 Wai 2180, #4.1.18, at 210.

25 years reviewable kawenata. It supports the protection of indigenous ecosystems on Māori-owned land while honouring the rights guaranteed to landowners under te Tiriti/the Treaty. In the first 25 years of its existence (1991-2015), the Fund protected a significant segment of Māori land, with around 220 agreements protecting 180,000 hectares.[162] The Matauranga Kura Taiao Fund seeks to preserve the customs, history and stories associated with Māori land and tikanga.[163]

130. Over six kawenata have been negotiated in the Taihape inquiry district between DOC and various Trusts, all under s 77A of the Reserves Act 1977. Close to seven million dollars has been invested in the inquiry district since 1992.[164] An example of the type of work the managing Trust might undertake is the management of animal pests on covenanted lands. For example, the Aorangi Awarua Trust began a project known as Te Pōtae o Awarua in March 2007. The project began with research to assess the most effective bait to set in traps to catch stoats, and developed into an integrated pest management project covering a larger area than just the Māori owned land.[165]

131. Further examples of tangata whenua having input in conservation development include statutory planning documents, such as the establishment of conservation management strategies and conservation management plans. For the former, the legislation established a three-tier public consultation process. The Conservation Management Strategy (**CMS**) for Hawke's Bay Conservancy was approved in 1994 and had iwi involvement in the first "public submission" stage. Te Runanganui o Ngāti Kahungunu presented its submissions before the Conservation Board.

132. The final version of the CMS has a section about consultation with tangata whenua, outlining the various hapū groups that have mana whenua in the area and their spiritual relationship with the land and possession of knowledge on natural and historic resources of the area. The CMS provides that "[c]lose consultation and mutual information sharing between iwi…

162 Wai 2180, #M06, [29].

163 Wai 2180, #M08, at [70]–[72]; and Wai 2180, #M06, at [21]. This fund can be used for things such as preserving the story of a marae or repairing the tukutuku panels.

164 Wai 2180, #M06, [35].

165 Wai 2180, #A38, at 415.

and the Department can only be of benefit to both parties and to conservation in general."[166] It comprehensively outlined the ways in which the CMS should be implemented to give effect to s 4 of the Conservation Act, and meet the objective of consulting with and being responsive to "the views of tangata whenua on all aspects of the Department's work."[167] The Wanganui Conservancy CMS had similar provisions.[168]

133. Presently, the CMS is in a state of flux, largely due to the restructure of the central and lower North Island regions. The Taihape inquiry district is no longer within the Whanganui-Taranaki area (except for a small piece); more of it is covered in the Wellington CMS, which became operational on 20 January 2019. A review of the CMS is underway.[169]

134. Conservation Management Plans (**CMP**) are not common throughout Aotearoa. In the inquiry district there is the Ruahine Forest Park Management Plan (approved in 1992) and the Kaweka Forest Park Management Plan 1991. The Kaimanawa Forest Park Management Plan 2007 specifically acknowledges consultation with the Tūwharetoa Māori Trust Board.[170]

*Conservation Boards and Covenants*

135. Another way that the Conservation Act provides for Māori leadership of, and input into, conservation is through the New Zealand Conservation Authority and regional Conservation Boards. The Conservation Law Reform Act 1990 provided for the appointment of a New Zealand Conservation Authority,[171] and a number of regional Conservation Boards were set up. The general purpose of the Boards was to provide citizen advice to DOC on policy matters to do with the management of all areas of the conservation estate in a region.[172]

---

166 Wai 2180, #A38, at 398.

167 Wai 2180, #A38, at 398.

168 Wai 2180, #A38, at 399–401.

169 Wai 2180, #M08, at [23].

170 Wai 2180, #M08, at [35].

171 The Conservation Authority contributes a national perspective to the development and approval of statutory management strategies and plans. The Authority's membership is appointed from recognised interest groups and representatives. Two of the 13 members are appointed after consultation with the Minister of Māori Affairs. It does not appear there has been an appointment of Taihape Māori to the Authority: Wai 2180, #M08, at [22].

172 Wai 2180, #A38, at 383; and Wai 2180, #M08, at [23].

136. The legislation provided that the Board's members must be appointed having regard for "the interests of nature conservation, natural earth and marine sciences, recreation, tourism, and the local community including the tangata whenua of the area."[173] Effectively, this required the Boards to have at least one Māori member.

137. The Taihape inquiry district lay within the area covered by the Rangitīkei/Hawkes Bay Conservation Board. Because this Board covered a wide area, only one member was ever from within the inquiry district. The Board has had two to three Māori among its members.[174] To date, Mr Richard Steedman has been one of the longest serving Board Members.[175]

138. As the claimants acknowledge,[176] in the Boards' conservancy management plans that cover the inquiry district, the Department commits itself to meaningful consultation with tangata whenua on all key issues, and knows who the tangata whenua are.[177] This approach is consistent with s 4 of the Conservation Act 1987.

*Local government committees such as Te Rōpu Ahi Kā*

139. Messrs Alexander, and Meredith and Joseph, have reported that at least three consultative bodies have been established in the Rangitīkei region: Te Rōpū Āwhina, Te Rōpū Ahi Kā, and Ngā Pae o Rangitīkei.[178]

140. Te Rōpū Āwhina was established in 1991 on the advice of a Working Party on Iwi Consultation that was concerned that there was inadequate representation of tangata whenua living within the inquiry district.[179] It consisted of 11 iwi representatives and one councillor, with the chairperson being a full member of the Environment and Planning committee. In 1994, a staff paper from the Regional Council to Te Rōpū Āwhina outlined its place in the consultation structure as follows:[180]

---

173 Conservation Act 1987, s 6P(2).

174 Wai 2180, #A38, at 384.

175 Wai 2180, #M08, at [23].

176 Wai 2180, #3.3.56, at [112].

177 Wai 2180, #A38, at 397–402.

178 Wai 2180, #4.1.9, at 93.

179 Wai 2180, #A38, at 100.

180 Wai 2180, #A38, at 102–103.

> "Te Roopu Awhina has… become the focus for Council-iwi relations in the Region, working towards achieving effective communication among the Council and iwi. Te Roopu Awhina has provided input to the development of all Council planning, and has facilitated the link back to their respective iwi in relation to preferred consultation protocols. Ultimately, Te Roopu Awhina's role has been to ensure that the tangata whenua of the Region are participating in the management of resources".

One way of providing this feedback loop was through the establishment of an iwi liaison officer, appointed to the staff of the Regional Council in 1993.[181]

141. In 1994, in response to a request from Mr Ike Hunter as Chairperson of the Combined Marae Committee of Mōkai Pātea, Te Rōpū Āwhina recommended to the Regional Council that membership be expanded to include representatives of Mōkai Pātea and Rangitane o Tamakinui a Rua. The Regional Council confirmed the change and Terry Steedman became the Mōkai Pātea representative on Te Rōpū Āwhina.[182]

142. From 1995, Te Rōpū Āwhina reviewed its structure and functions. The concern was that the Committee was not meeting the expectations of iwi, and some members had not attended meetings for some time.[183] Mr Alexander reported that another issue was that the Regional Council was relying too heavily on Te Rōpū Āwhina for its links with the Māori community of the region and so was neglecting to build direct relationships with the iwi themselves.[184] There also appeared to be a view that the relationship between the Council and Te Rōpū Āwhina had deteriorated,[185] and a 2012 report from the Regional Council reflects that the "the participants lacked a common focus".[186] Despite various attempts to revive the Committee, by 2000 it had ceased to meet.

143. In 1993, the Rangitīkei District Council established an "iwi liaison committee", Te Rōpū Ahi Kā, "to provide input to Council work on those matters which particularly affect Maoridom in the District." Representatives on the committee represent a variety of groupings, some iwi, some marae-

181 Wai 2180, #A38, at 101.

182 Wai 2180, #A38, at 104.

183 Wai 2180, #A38, at 104.

184 Wai 2180, #A38, at 105.

185 Wai 2180, #A38, at 105–107.

186 Wai 2180, #A44, at 288.

based, and some community-based.[187] Mr Alexander has noted it was set up in the 1990s and it is still in existence today, and "so at least some people on both sides thinks it's worthwhile persevering with that as a medium for communication."[188] He notes that:[189]

> "The experience of tangata whenua involved with Te Roopu Ahi Kaa is that its usefulness and success is very dependant on the attitudes and enthusiasm of the Chief Executive Officer, other Council staff, and elected Council members who attend."

Messrs Meredith and Joseph have reported some positive effects resulting from the body, and have noted that for some iwi and hapū, Te Rōpū Ahi Kā has been an effective consultative committee for tangata whenua.[190]

144. Other people felt that the committee was put in place as a box-ticking exercise.[191] There is no evidence the Council has viewed the body in this way. Messrs Meredith and Joseph agreed that "there have been some genuine attempts to collaborate more effectively with Māori communities with some Council officials".[192] The Crown submits the Tribunal should be cautious in drawing conclusions in relation to these bodies given the absence of any evidence from the Council in this regard.

145. The Manawatu-Whanganui Regional Council explained in a 2012 report that, as a consequence of Te Rōpū Āwhina's lack of success, "Horizons changed its relationship-building approach to one of working with iwi and hapū on specific projects of interest. Supporting the development of Ngā Pae o Rangitīkei was a natural extension of this approach."[193] Ngā Pae o Rangitīkei was a separate initiative from the region-wide consultation structures of Te Rōpū Āwhina and Te Rōpū Ahi Kā established to boost council consultation with Māori. Instead, Ngā Pae o Rangitīkei is a hapū and iwi forum solely focused on the Rangitīkei River and its catchment.

146. The Council reported in 2012 that Ngā Pae o Rangitīkei "is ahead of its time", is likely to be replicated for other catchments, and that it would

187 Wai 2180, #A38, at 114.
188 Wai 2180, #4.1.9, at 280.
189 Wai 2180, #A38, at 116.
190 Wai 2180, #A44, at 290.
191 Wai 2180, #A44, at 290.
192 Wai 2180, #A44(c), at 17.
193 Wai 2180, #A44, at 288.

continue to provide financial support.[194] Messrs Meredith and Joseph have reported a number of specific successful achievements that have arisen as a result of the body.[195] Ngā Pae o Rangitīkei faces various challenges, as described in the evidence of Te Rina Warren,[196] however on balance the evidence indicates that it is beneficial in dealing with environmental concerns and aspirations as they relate to the River.

*Governance or co-governance*

147. The legislative regime currently provides for co-governance. As mentioned above, under s 33 of the RMA, local authorities can transfer or delegate authority. Tangata whenua can also be given status as a heritage protection authority over places of spiritual or cultural significance,[197] which would give them power to control use and development of that place. These powers have not been used to transfer RMA functions to iwi authorities or approve an iwi authority as a heritage protection authority. Mr Meredith has noted that there have been a number of section 33 applications made that have been rejected by the Regional Council,[198] although has also noted that the Council "has accepted the s 33 RMA submissions 'in part'", but that no delegation of authority has occurred to date.[199] There is no evidence as to what this means, or why this is. Messrs Meredith and Joseph have noted that none of the claimants that were interviewed mentioned section 33.[200]

148. Joint management agreements are able to be made under ss 36B–36D of the RMA. They are to be made between local authorities and public authorities, and iwi authorities or groups representing hapū. They allow the parties involved to jointly perform the local authority's functions in relation to a natural or physical resource in all or part of the region. Section 36B has been used twice outside of Tiriti/Treaty settlement uses.

194 Wai 2180, #A40(a), at 6192.

195 Wai 2180, #A44, at 298.

196 Wai 2180, #F001(b), Appendix B – "Nga Pae o Rangitikei - a model for collective hapu/iwi action?", 17 May 2017.

197 Resource Management Act 1991, s 188.

198 Wai 2180, #4.1.9, at 107.

199 Wai 2180, #A44(c), at 15.

200 Wai 2180, #A44(c), at 15.

149. In 2017 the RMA was amended to enhance opportunities for iwi input into the RMA plan-making process. Schedule 1 of the RMA was amended to allow local authorities to use a "collaborative planning process" to prepare or change a policy statement or plan.[201] The collaborative planning process allows local authorities to work together with a "collaborative group" from the community at the front-end of policy and plan development. Clause 40 of Schedule 1 sets out the criteria for appointing members of the collaborative group, at least one member of the collaborative group must be a person chosen by iwi authorities to represent the views of tangata whenua.[202]

150. As noted above, a new process for establishing agreements between tangata whenua, through iwi authorities, and councils, called Mana Whakahono ā Rohe: Iwi participation arrangements, was also introduced at that time. The purpose of the Mana Whakahono ā Rohe regime is to provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under the RMA; and to assist local authorities to comply with their statutory duties under the RMA, including through the implementation of sections 6(e), 7(a), and 8.[203] In its stage 2 Freshwater report, the Tribunal concluded that the Mana Whakahono a Rohe mechanism in its final form in the 2017 Act was "important but limited".[204]

151. Mana Whakahono ā Rohe provide iwi/hapū and local authorities with an opportunity to work collaboratively in a way they see fit within the RMA framework. They do not replace or override any existing Tiriti/Treaty settlement arrangements, nor prevent a different arrangement being agreed under a future settlement.

---

201 Resource Management Act 1991, sch 1, part 4.

202 Resource Management Act 1991, sch 1, cl 40(1)(a).

203 Resource Management Act 1991, s 58M.

204 It described the mechanism as "an important improvement over other RMA mechanisms" and "a useful starting point for iwi–council engagement". It considered that the key problem with the Mana Whakahono a Rohe arrangements is that the compulsory matters to be agreed are very limited and identified that "resourcing is also crucial": Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 2019) at 312–315.

152. In this context, as noted by Dr Ballara, often Māori committees are made up of volunteers who are not paid and are not professionally qualified to respond to councils.[205] The Crown is aware that resourcing, capability and capacity building is a large barrier for the public and Māori to engage in resource management processes. Clause 3B of Schedule 1 of the RMA expressly requires councils to consider ways to foster the development of iwi authorities' capacity to respond to an invitation to consult, in relation to policy statements and plans. Local authorities are also required to provide opportunities for Māori to contribute to decision-making processes, consider ways in which they may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and provide relevant information to Māori for the purposes.[206] Many local authorities have determined that they essentially have an obligation to ensure that tangata whenua groups are given both the requisite opportunities and resources to be able to actively participate in RMA processes.

153. The Environmental Legal Assistance Fund administered by the Ministry for the Environment, designed to overcome financial and technical barriers to participation, also provides not for-profit groups with financial assistance to advocate for an environmental issue of public interest at resource management cases in the Environment Court, and at boards of inquiry constituted under the 'call-in' provisions of the RMA. While many applications by Māori groups have been approved, no applications appear to have been made in respect of applications in the inquiry district.[207]

*Conclusion on Taihape Māori consultation and participation in decision-making*

154. The Crown acknowledges that the extent of Māori participation in local government processes generally has historically been low and that there may be some systemic aspects to this. Nonetheless, throughout the 20th century there have been opportunities across a wide range of different Boards and bodies for Taihape Māori consultation and participation, even if the Crown acknowledges it has not always actively encouraged such participation.

---

205 Wai 2180, #4.1.16, at 424.

206 Local Government Act 2002, s 81.

207 <https://www.mfe.govt.nz/more/funding/environmental-legal-assistance-fund/previous-applications>

155. However, there have been significant improvements that have increased the potential for the views of Māori to be considered in decision-making processes. The RMA, the Local Government Act 2002, and the Conservation Act 1987 (as well as the Acts listed at Schedule 1 of the Conservation Act 1987) now better provide for the views of Taihape Māori to be taken into account, which are expected to be further strengthened by the RMA reform.

156. The RMA is a legal framework that provides an integrated, comprehensive and coherent set of national strategies and rules to govern behaviour in in relation to the environment. It provides the flexibility to accommodate the local context. The processes, resources and outcomes of the resource management system across local authorities are inconsistent, the environment is variable, and the aspirations of Māori are divergent. The framework allows for this heterogeneity. To the extent that the various tools provided in the legislation have not been fully utilised, there will be a range of reasons for this. Striking the balances between the various interests, obligations, values, and principles is a difficult and complex task. Without evidence from local authorities, it is submitted that the Tribunal should exercise caution in drawing conclusions as to whether they have taken a minimalist approach to Māori interests, or whether there are other explanations for why the various mechanisms provided in the legislation are not being used in the inquiry district.

157. Further, the government is currently undertaking a full review and reform of the RMA. That work is at too early a stage to address in these submissions. As outlined earlier, the review panel has recommended that the reform should provide for a more effective role for Māori and improved recognition of te Tiriti/the Treaty. Cabinet has agreed that the recommendations relating to Māori involvement in the resource management system are "in the right direction"[208], and the Crown is working with Māori to develop the new legislation.

158. The Crown's view, therefore, is that the environmental management regime for land-based resources appropriately provides for Taihape Māori

208 "Resource Management System reform: Supporting information" (2020) Ministry for the Environment <www.mfe.govt.nz/rma/resource-management-system-reform>

consultation and participation in decision making through a range of different Boards and bodies.

**16.3 (c): Has the Crown's environmental management regime for land-based resources affected the ability of Taihape Māori to practise traditional activities such as food harvesting, rongoā, religious practices, manaakitanga, koha, and the use of environmental resources in traditional goods such as clothing?**

*The impacts of the changing environmental landscape in the Taihape district on traditional activities*

159. The Crown recognises that the environmental transition that has occurred - from native biota to primary production and intensive residential patterns - has affected the ability of Taihape Māori to practice traditional activities, including food harvesting, rongoā, religious practices, manaakitanga, koha, and the use of environmental resources in traditional goods such as clothing. The Crown also acknowledges that rongoā and their application are a taonga that the Crown has a duty to actively protect.

160. Prior to European settlement, the Ruahine Ranges were utilised by iwi for bird hunting and the gathering of medicinal plants (rongoā).[209] Neville Lomax gave evidence that this occurred well into the 20th century, describing that rongoā Māori was a way of life for his grandad and was utilised by his whānau at Ūtiku up until 1959:[210]

> He prepared medication from a wide variety of leaves, bark and resins from trees in the ngahere, and plants in the fields. These were dried, crushed and/or steeped in boiling water as required, for whatever ailment we happened to be suffering from at the time. While some of these practices were passed on orally to those who were prepared to learn, by the time of Pop's passing much of his knowledge on rongoa Māori was lost to us.

161. Mr Lomax put this loss of knowledge down to the Tohunga Suppression Act 1907. However, the environmental transition from native biota to pastural land no doubt had an impact. The Belgrave et al report notes that the loss of bush and swamplands and the associated plants and other resources had a significant cultural impact on the claimants, separating them from resources and the cultural uses associated with such resources. They quoted the following extract from a Mōkai Pātea claimant:[211]

---

209 Wai 2180, #A45, at 113.

210 Wai 2180, #H10, at [37].

211 Wai 2180, #A10, at [329].

> Practices like the paharekeke that has no harakeke, bit like waikakehe that has no kakehe. We got them all over the place so I guess it's the impact that it's had on lifestyle, for example on weaving. We spoke about that so there's been a loss of tradition I guess in terms of that. We've had a rejuvenation in terms of that a lot of the aunties now going and learning those practices but of course they've had to find their own little stashes of where they can find those fibres or they have to go for two hour treks to find specific plants to undertake traditional dying.

162. Several other claimants gave similar evidence in the Ngāti Hinemanu and Ngāti Paki Oral and Traditional Report, extracts of which are quoted in the claimants' generic environment submissions.[212]

163. Particular emphasis was placed in the Belgrave et al report on the resources associated with weaving and healing. This reported that claimants lamented the loss of resources such as paru, the natural dye used to create deep blacks in the dyeing of harakeke. Paru was soil and a highly prized resource, one kept relatively secret in places where whanau would both care for and harvest it. Belgrave et al reported that places where harakeke for weaving and lacebark (used for birthing and healing as well as making poi) grew were lost because of the changing landscape, and with this went the knowledge of the traditional practices surrounding such activities. They quoted the following extracts from Ngāti Hinemanu and Ngāti Paki claimants:

> I'm going to talk about our creek just outside here, my aunties, they did their weaving, to keep themselves occupied with the weaving. It's still goes on in our lifetime now, we still all weave as you can see. … I'm a weaver but what hurts me is that creek, where had our black paru where we could go and dye. My Aunty … that's where she used to go there and put her kete in there to dye our flax and that's all gone.[213]
>
> …
>
> … we didn't know the tikanga, we didn't know the karakia, we didn't know the whakatoki that go relevant to weaving. So consequently it was lost.[214]

164. In 2002, the Manawatū District Council produced a state of the environment report. This report included a tangata whenua chapter, which discussed "Indigenous Vegetation and Habitats". It reported that:[215]

---

212 Wai 2180, #A52, at 528 and 555, cited in Wai 2180, #3.3.56, at [151]–[157].

213 Wai 2180, #A10, at [479], citing Ngāti Hinemanu me Ngāti Paki claimant, Taihape, 21 November 2011.

214 Wai 2180, #A10, at [481], citing Ngāti Hinemanu me Ngāti Paki claimant, Taihape, 21 November 2011.

215 Wai 2180, #A38, at 23.

> The current state of the District's indigenous ecosystems, particularly the lowland forests and wetlands, is of great concern to the Tangata Whenua. These ecosystems have immense value as a taonga in their own right, and are a vital source of resources for rongoa Maori (medicine), for weaving (for example pingao, harakeke, kiekie, pigeon feathers), and wood for carving. The impact of introduced plants and animals, especially pests, upon remaining forests and wetlands is a particular concern. Tangata Whenua support the idea of restoring ecological viability by supplementary plantings, improving existing habitats, and establishing corridors to connect scattered bush and wetland remnants. Maori recognise that this work is part of their duty as kaitiaki, and they want to be involved in doing it.

*The Crown's attempts to protect such traditional activities*

165. In recognition of the impacts the loss of the native environment has had and continues to have on such practices, the Crown's environmental management regime, which provides the framework for actions to be taken by local government, has attempted to provide for their protection. The first Regional Policy Statement (1998) for the Manawatū-Wanganui Region has been described elsewhere in these submissions. One of the objectives of the Policy Statement was to "provide for the relationship of nga hapū and nga iwi of the Manawatū-Wanganui Region and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga", including "recognition of harvesting for traditional purposes".

166. Similarly, the Manawatū-Wanganui Regional Council's 2007 Regional Pest Plant Management Strategy contained a paragraph called "Effects on Māori Values" that recognised "the impact of pest plant species on natural areas and waterways is detrimental to values important to tangata whenua" and provided for "improved quality of plant species for food, fibre and rongoā (Māori medicinal) uses".[216] This may have been in part due to the participation of Taihape Māori in the draft process. Mr Alexander notes that when published in draft form for public comment in 2006, the Strategy attracted submission from Ngāti Kahungunu Iwi Inc which, while generally supportive of the approach adopted by the Strategy, wanted more recognition of iwi kaitiakitanga and the effect that herbicides could have on rongoā plants and on aquatic environments when aquatic pest plants were being controlled.[217]

---

216 Wai 2180, #A38, at 218.

217 Wai 2180, #A38, at 219.

167. Further, in negotiations of the Aorangi-Awarua Trust Ngā Whenua Rāhui kawenata (mentioned earlier), the Trust's application for the kawenata listed, among other things, some of the rongoā growing on the land, including kawakawa, makomako, totara and rimu. Alongside the wāhi tapu on the land and other ancestral places, the presence of these rongoā was used to explain the cultural and spiritual significance of the Aorangi maunga to the wellbeing of the tangata whenua of Mōkai Pātea and provide a basis for the necessity of a kawenata.

168. The Crown has also undertaken a number of initiatives to support Māori in the use of these traditional practices. These include:

168.1 The Ministry of Health's Rongoā Development Plan.[218] The Ministry works with Māori traditional healing practitioners to support rongoā Māori within the health and disability sector. In December 2011, a new national rongoā governance body, Te Kahui Rongoā Trust, was established to protect, nurture and promote rongoā Māori. The Ministry currently funds 20 providers across the country to deliver rongoā services. All Ministry funded rongoā providers are required to adhere to the rongoā standards, Tikanga-a-Rongoā.

168.2 Funding from the Māori Health Innovations Fund to support and improve the sustainability of rongoā resources and the ongoing evolution of Te Whanau Ora – a cross-government work programme jointly implemented by the Ministry of Health, Te Puni Kōkiri and the Ministry of Social Development that takes a culturally-based and whanau-centred approach to wellbeing.

169. The Crown accepts that the pre-RMA environmental management regime for land-based resources in the Taihape inquiry district affected the ability of Taihape Māori to practice traditional activities. However, the implementation of environmental management regimes has not in and of itself caused adverse environmental effects. There are a wide range of other

218 Ministry of Health "Rongoā Māori: Traditional Māori healing" (12 May 2020) <www.health.govt.nz/our-work/populations/maori-health/rongoa-maori-traditional-maori-healing>.

factors affecting the health of the environment, not all of which the Crown can control or influence.

170. Further, the Crown's responsibility to actively protect rongoā Māori practices must be reasonably balanced with the wider national interest. Over time, what has been viewed as an appropriate balance has changed in accordance with factors such as the state of the economy, knowledge of the environment, and a greater awareness of the need to protect Māori traditional practices. Since 1991, the Crown has made provisions to actively protect the ability of Taihape Māori to practice such activities, with some degree of success.

**16.3 (d): Has the Crown's environmental management regime for land-based resources contributed to the degradation of the environment, including through permitting or encouraging deforestation, the introduction of noxious weeds and invasive species such as *pinus contorta*, Old Man's Beard, and the use of 1080 poison?**

*The Crown's role in the protection and utilisation of the environment*

171. As outlined above at [48]–[50] and in the Crown's submissions in previous inquiries,[219] this question is essentially one of causation, and requires the finding of a causative link between a particular Crown action, omission, or policy and the environmental degradation complained of.

172. As a starting point, determining the causes of environmental degradation is difficult, especially where things such as legislation and policy, which can have a much less tangible impact on the environment, are concerned. The wide range of complex and interrelated factors that affect the environment, as well as the large number of stakeholders who utilise the environment and its resources, means that assigning responsibility for environmental degradation, let alone the degree of responsibility, is not straightforward. These factors mean that assessing claims that the Crown has caused adverse environmental impacts requires a great deal of care.

173. As outlined earlier, the Crown does not have an obligation, in either a Tiriti/Treaty or legal sense, to protect the environment from adverse environmental impacts or to prevent such impacts from occurring. Aside from the fact that the Crown simply cannot guarantee such protection,

219 For example, in its submissions to the Rohe Pōtae Tribunal (Wai 898).

adverse environmental impacts can be an unavoidable consequence of human development and progress, and a degree of adverse impacts must therefore be tolerated in order for New Zealand society at large to obtain the many benefits derived from the environment and its resources. To that end, environmental management regimes implemented by the Crown seek to balance the need for development and progress with the interests of environmental protection and conservation but, inevitably, adverse environmental impacts still occur.

*Deforestation*

174. The Crown recognises that extensive deforestation has contributed to significant environmental and ecological changes and degradation in the Taihape inquiry district. With the conversion from indigenous forest to pasture and the difficulty of the terrain, poor soils and the region's susceptibility to erosion, the transformation has contributed to damaging environmental impacts that include erosion, damage to the soil, siltation of watercourses, and flooding.[220] Several claimants gave evidence supporting that of the experts in this regard, detailing the issues now faced particularly with flooding and erosion.[221]

175. Historically the inquiry district contained large indigenous forests which have now been significantly cleared, particularly in the central and southern aspects of the inquiry district. Mr Armstrong commented that "forest denudation represented the most dramatic and far-reaching environmental modification of the Taihape district".[222]

176. Much of the deforestation in the inquiry district took place during the 1890s and 1900s. At this time, Māori and non-Māori were involved in deforestation. Messrs Bennion and Black raised questions of agency in this regard,[223] but it cannot be ignored that Taihape Māori were active participants in the forestry industry and shared in the benefits that it produced. In the 1890s, Taihape Māori owned and operated two of the mills in the inquiry district.[224] Māori were subject to the same economic

220 Wai 2180, #A45, at 6, 40; Wai 2180, #A10, at 8, 24.

221 Wai 2180, #F07, at [30]–[37]; Wai 2180, #G06; Wai 2180, #0L4.

222 Wai 2180, #A45, at 38.

223 Wai 2180, #3.3.56, at [62], [174]–[178].

224 Wai 2180, #A45, at 54.

drivers as European timber merchants and farmers. The prevailing societal view was that deforestation was necessary for settlement and economic development.[225]

177. There was some recognition by the Crown of the need to conserve forests for environmental reasons by the 1860s and 1870s, which lead to the enactment of the New Zealand Forests Act 1874.[226] The Act aimed to "make provision for reserving the soil and climate by tree planting, for providing timber for future industrial purposes, for subjecting some production of the native forests to skilled management and proper control".[227]

178. During the 1870s, Prime Minister Julius Vogel collated a significant amount of information on the effects of deforestation and, during the Parliamentary debates on the Bill, presented his view that the removal of forests prejudiced climate, produced flooding, destroyed water courses and washed away soils. Mr Vogel's position appears to have been that forests should be conserved, but the evidence does not disclose Mr Vogel's view on the forestry industry, what changes he thought should be introduced, or how forest conservation could be carried out in practice. It is difficult to gain a clear picture of Mr Vogel's views on forestry and forests conservation, or whether those views constituted the majority of thinking amongst the scientific community.

179. There is also evidence that several speakers at the introduction of Vogel's Conservation of Forests Bill doubted the reported rate of forest destruction and were unconvinced that climate or other environmental change was brought about by the removal of forest cover.[228] Again, it is unclear whether those views were in the minority or whether they were reflected by some scientists at the time.

180. By the late 1880s, there was a developing understanding of the effects of deforestation on the environment, including erosion, the sedimentation of

---

225 Wai 2180, #A45, at 50, 81–82.

226 Which enabled State Forests to be established for the purposes of preserving soil and the climate, and established a Commissioner of State Forests and Conservator of Forests.

227 New Zealand Forests Act 1874, preamble.

228 Wai 2180, #A45, at 42.

rivers, and flooding.[229] However, it would be unfair to expect such knowledge to have automatically influenced the Crown's policies in respect of forestry. Any assessment needs to consider what was known and by whom, and how widely accepted any views were amongst the scientific community generally and amongst the political decision makers and their advisors.[230]

181. Over time, the Crown has undertaken measures to protect certain forested areas, consistent with its kāwanatanga function:

181.1 The New Zealand State Forest Act 1885, which provided for the setting apart of State Forests to prevent timber waste, provide timber for future purposes, and provide for the proper conservation of climatic conditions by the preservation of forest growth in elevated situations.

181.2 The creation of climatic reserves in the Ruahine Ranges.[231]

181.3 The Timber Export Duty Act 1903, which increased the duty on all logs exported and aimed to conserve forest areas and protect the future of the sawmilling industry by discouraging the export of timber.

181.4 The establishment of the Timber and Timber Building Industries Commission in March 1909 in response to growing concern about the need to conserve timber supplies.

181.5 Section 34(6) of the War Legislation and Statute Law Amendment Act 1918, which enabled the Governor-General in Council to make regulations to limit the export of timber, to prohibit the sale of standing timber, and to require that licences be granted for the cutting of standing timber on public or private lands of any tenure.

181.6 The promulgation of regulations in August 1918 that imposed restrictions on the export of native timber, and also fixed limits on

229 Wai 2180, #A45, at 40–49.

230 Points which do not appear to be covered by the relevant technical evidence.

231 Wai 2180, #A45, at 47, 85.

the permissible quantities of sawn timber and required that detailed returns be furnished from all sawmills.

181.7 The establishment of the State Forest Service on 1 September 1919.

181.8 The State Forest Act 1921 which reflected growing concern about the future supply of timber and the need for remaining indigenous timber resources to be managed more effectively.

181.9 The Soil Conservation and Rivers Control Act 1941, which established the Soil Conservation and Rivers Control Council and a number of regional catchment boards, including the Rangitīkei Catchment Board, charged with preventing or mitigating erosion largely from deforestation.[232]

182. Today, indigenous forests are managed under multiple legislative regimes including the RMA, the Conservation Act 1987, the Reserves Act 1977, and the National Parks Act 1980 as well as (so far as extractive forestry is permitted) the Forests Act 1949 which:

182.1 promotes the sustainable forest management of indigenous forest land;[233]

182.2 prohibits the export of indigenous timber from New Zealand, except in certain circumstances;[234]

182.3 places restriction on the milling of indigenous timber;[235] and

182.4 places restrictions on the felling of indigenous timber.[236]

183. The Crown, through the Department of Conservation and the Ministry for Primary Industries, engages with some Taihape Māori on a number of forest issues, including management of the Ruahine Forest Park.[237]

---

232 See also the Crown's submissions on Issue 16, Part B.

233 Forests Act 1949, s 67B.

234 Forests Act 1949, s 67C.

235 Forests Act 1949, s 67D.

236 Forests Act 1949, s 67DB.

237 Wai 2180, #A10, at [383].

184. In general, there is no Tiriti/Treaty duty to prevent deforestation. Throughout the 19th and 20th centuries the Crown acted reasonably and in good faith to amend and improve forestry policies and practices, and to balance the need for conservation and sustainability and the need for economic development, including Māori economic development, and land settlement. Deforestation was, to a large extent, a necessary consequence of New Zealand's settlement and development over this time. A measure of deforestation was also a necessary consequence of pre-European Māori settlement of New Zealand. Since the 1990s, indigenous forests are managed through a number of legislative regimes, which have at their core the protection and preservation of the forests.

### *Introduction of noxious weeds*

185. The introduction of some exotic species has had detrimental impacts on indigenous species. The evidence indicates that *Pinus contorta* and Old Man's Beard (*Clematis vitalba*) have been problematic in the inquiry district.[238]

*Pinus contorta*

186. The Crown's role in the introduction of *pinus contorta* varies. In the inquiry district the Crown played a role, through the New Zealand Forest Service, the Rangitīkei Catchment Board and the Soil Conservation and Rivers Control Council, in the introduction of *Pinus contorta* in the early 20th century into the Kaweka ranges, the Waiōuru training area, and the Karioi Forest. The evidence suggests it was also planted on Māori-owned land adjoining the Karioi Forest, but it is not clear when that occurred or by whom.[239] It was introduced as an anti-erosion measure, planted in the belief it was the "most promising species" for the rehabilitation of eroded country. It was attractive to foresters because of its ability to grow well in the tussock country above the tree line and the then-climatic limits of cultivation. The risks, as they were understood at the time, were viewed as manageable and outweighed by the benefits of stabilising at risk land.[240]

238 Wai 2180, #A38, at 189.

239 Wai 2180, #A38, at 428.

240 Wai 2180, #A45, at 110–111.

187. Self-sown *pinus contorta* was recognised as a problem on the Army training area in the 1950s and 1960s.[241] In the 1960s, the Crown and other agencies began to realise that *Pinus contorta* was out of control and convinced the army to begin eradication. Throughout the 1970s, the army destroyed many trees as part of a comprehensive eradication programme with significant government funding, although it retained some in certain areas for "jungle training".[242]

188. In 1983 the Noxious Plants Council declared *Pinus contorta* a Class B noxious plant within specified local authority ridings, which included the Erewhon and Ruanui ridings of Rangitīkei County.[243] As a result various bodies increased their eradication efforts. A Noxious Plants Special Projects subsidy was available through Vote: Agriculture. $826,000 was spent on eradication efforts on Māori-owned blocks in the Tongariro area over six years.[244]

189. In 1985, the Noxious Plants Council approved a $233,000 subsidy towards a project run by the Rangitīkei District Noxious Plants Authority to control *Pinus contorta* on land in Erewhon and Ruanui ridings.[245] Around $120,000 of this was for control efforts on largely Māori-owned land.[246]

190. From the available evidence, it would appear likely that Māori landowners were consulted about, and gave their consent to, the eradication efforts on their lands in these two areas. One of the questions on the subsidy application form was: "Has an assurance been received in writing from the occupier(s) that the necessary follow up work will be done once subsidy has ceased?" The Authority's response was that the necessary discussions would take place if and when the subsidy was approved.[247]

191. The Biosecurity Act 1993 replaced the Noxious Plants Act 1978 and put responsibility for pest control strategies onto regional councils. In 1996 the Whanganui-Rangitīkei Regional Council stated that it aimed to eliminate

241 Wai 2180, #A38, at 428.
242 Wai 2180, #A45, at 268–275.
243 Wai 2180, #A38, at 200.
244 Wai 2180, #A38, at 203; #A38(a), at 3538–3539.
245 Wai 2180, #A38(a), at 3949.
246 Wai 2180, #A38(a), at 3948.
247 Wai 2180, #A38(a), at 3945.

*Pinus contorta* in certain areas by 2006. It reconfirmed this aim in its 2001 Regional Plant Pest Management Strategy.[248] Mr Alexander notes that "Maori landowners were supported by Manawatū-Wanganui Regional Council in a number of ways during the period that the 2001 Strategy was operative", and cites a 2006 letter from the Ōruamatua-Kaimanawa Trust to the Council:[249]

> I would like to take this opportunity to thank you and Horizon for the financial assistance to help control contorta on our land. I believe this is a great opportunity for the Trust and Horizon to work long side one another and best control the environment for everyone.
>
> As a token of our appreciation the Trust is prepared to make a one off financial commitment of $3,000.00 dollars to the Council for contorta work.

192. The 2007 Regional Plant Pest Management Strategy "set out the Regional Council's obligations towards iwi", and recognised the impact of plant pest species on tangata whenua, and the need to consult.[250] The aim was: "To control contorta pine within the Control Area…by 2012 (Year 5), and prevent invasion into the Ruahine and Tararua Ranges".[251] The programme would be undertaken by the New Zealand Defence Force on the Waiōuru Army Training Area land, and by DOC on the volcanic plateau, and by the Regional Council elsewhere on private rateable land.[252]

193. In 1994 and 1999 the Manawatū-Wanganui Regional Council commented positively on the work the army was doing to control re-infestation. By this time, *Pinus contorta* was said to be "under control".[253]

194. In December 2002, the Army met with adjourning landowners to discuss a co-ordinated strategy to get rid of the pest. Mr Alexander notes that present at this meeting were "John Greenhead for Ngāti Whiti and Ngāti Tama, plus Tony Batley and representatives of Ngamatea Station and Alpine Hunting Adventures."[254] The landowners agreed to hold an annual meeting

---

248 Wai 2180, #A38, at 214–215.

249 Wai 2180, #A38(a), at 4521.

250 Wai 2180, #A38, at 218.

251 Wai 2180, #A38(a), at 5986.

252 Wai 2180, #A38, at 218.

253 Wai 2180, #A38, at 460–461.

254 Wai 2180, #A38, at 461.

in October each year to plan the coming season's work programme.[255] There is no evidence on the record as to how the work programme is going or its success.

*Old Man's Beard*

195. Like *Pinus contorta*, Old Man's Beard is particularly prevalent in the inquiry district. Old Man's Beard is an imported climbing vine that if left unchecked can grow over and smother native trees.[256]

196. The Crown is not aware of evidence of the Crown having any role in the initial introduction of Old Man's Beard. The threat it posed only became apparent relatively recently: the evidence indicates it first became apparent in the region in 1960, being presumed to have escaped from a Taihape garden, and the Taihape Borough Council only sought financial assistance in relation to the control of Old Man's Beard from the Crown for the first time in 1971.[257]

197. Old Man's Beard was first noticed in the Taihape Scenic Reserve around 1960.[258] In 1961 the Department of Lands and Survey sent a sample to chemical manufacturer Ivan Watkins Dow and the company identified it as a native clematis. This was also the view of the Taihape Borough Council, which was responsible for the management of the reserve. In June 1962, the national Weed Control Officer of the Department of Agriculture again inspected the vine and identified it as a native clematis. The Department recommended no action was necessary.

198. By 1965, however, Borough Council staff had realised the plant was European rather than native. They sent a sample to Ruakura Agriculture Research Station, whose advisor identified it in 1967 as Old Man's Beard (*Clematis vitalba*). This same scientist was the national Weed Control Officer who had thought the plant was a native in 1962.[259] Ruakura advised that there was no trial data available, and that if it had not spread markedly, Old Man's Beard would probably do less damage than attempting to control it

255 Wai 2180, #A38, at 461.

256 Wai 2180, #A38, at 353.

257 Wai 2180, #A38, at 354, 190.

258 Wai 2180, #A38(a), at 1589; Wai 2180, #A38, at 354.

259 Wai 2180, #A38, at 356–357. Ruakura Agriculture Research Station was operated by the Department of Agriculture.

with herbicides which would harm the surrounding native plants.[260] Mr Alexander describes the Crown's response to the situation as a "complacent attitude" being displayed by the Crown.[261] The Crown disagrees and notes that the Crown's response has to be assessed in light of advice given at a time when there was limited knowledge or information available as to the risk of spread, and limited availability of safe weed control methods that would not harm the surrounding plants. In any event, further actions were taken to combat the spread of the plant once further spread was identified.

199. Borough Council staff remained concerned and asked Lands and Survey to conduct a field inspection, which it did in September 1967 and recommended various eradication measures. These began in the summer of 1968-1969 with a joint trial project between the Crown and Taihape Borough Council.[262] Reporting on the results of the trials in July 1970, a field officer stated that "the creeper has become increasingly noticeable in the last 3-4 years… [and] a large-scale control programme should be implemented now".[263]

200. In 1971 the Borough Council wrote to the local MP saying that Old Man's Beard "is now spreading rapidly, and if not controlled shortly will destroy the entire scenic reserves around Taihape".[264] In response Borough Council officials met with a field officer of Lands and Survey and an agricultural scientist from Ruakura (the same person who had been involved in 1967 and 1962) in March 1971. This resulted in a further report from Ruakura, confirming that "the clematis has spread considerably [in the scenic reserve] over the past five years".[265]

201. Later in 1971 the Botany Division of the Department of Science and Industrial Research also became involved and produced its own report with recommendations for how to control the plant.[266] In 1972 the newly-appointed Reserves Ranger in Palmerston North, who worked for Lands and Survey, also produced a report showing how far Old Man's Beard had

260 Wai 2180, #A38, at 354–356.
261 Wai 2180, #A38, at 357.
262 Wai 2180, #A38, at 357–358.
263 Wai 2180, #A38, at 358.
264 Wai 2180, #A38, at 359.
265 Wai 2180, #A38, at 359–360.
266 Wai 2180, #A38, at 360–361.

spread in the district.[267] A serious programme to eliminate the weed got underway in August 1972 and continued through 1973 and seemed to have some effect. Unemployed workers were recruited through a government work scheme to cut the vines, with the work being supervised by the Taihape Borough Council.[268]

202. Around the same time, in 1971, the Taihape Borough Council sought financial assistance from the Government, through the Department of Lands and Survey, to manage the plant. The Department suggested that the Council declare the plant a noxious weed within the areas it had infested in order for a control programme to be put in place.[269] This proved difficult because most of Taihape Scenic Reserve was outside the Taihape Borough Council's boundaries, and under Rangitīkei County Council's jurisdiction. Rangitīkei Council declined to declare the plant noxious, as it considered it had "yet to be proven that the plant represents a threat to agricultural productivity."[270]

203. In 1973, on receiving the response of Rangitīkei County, the Taihape Borough Council wrote to two Ministers asking to have Old Man's Beard added to the First Schedule of the Noxious Weeds Act 1950. This would have the effect of both making the plant a central Government management and financial responsibility and imposing obligations on local authorities to control a nationally significant weed.[271] The 1950 Act was soon to be replaced by the Noxious Plants Act 1978, which set up a national Noxious Plants Council and district noxious plants authorities. Because of the imminent change of legislation, government officials thought it would be impractical to add Old Man's Beard to the schedule at that time. (As noted above, the Biosecurity Act 1993 later replaced the Noxious Plants Act 1978, and put the responsibility for pest control strategies on regional councils.)

204. By this stage the Wellington National Parks and Reserves Board, the Rangitīkei District Noxious Plants Authority administered by Rangitīkei

267 Wai 2180, #A38, at 361.

268 Wai 2180, #A38, at 362.

269 Wai 2180, #A38, at 190.

270 Wai 2180, #A38, at 190–191.

271 Wai 2180, #A38, at 191.

County Council, and the Rangitīkei-Wanganui Catchment Board had become involved.[272] In 1981, a paper that had been prepared for the Wellington National Parks and Reserves Board outlined how the plant was resistant to control measures.[273]

205. In November 1982 the Lands and Survey Department hosted a seminar and released a report on Old Man's Beard.[274] The report noted that "what it boils down to is that we know very little about this vine or how to control it in a reasonably economic way".[275] The seminar recommended that the Noxious Plants Council declare Old Man's Beard a Class B noxious plant under the Noxious Plants Act 1978. The Noxious Plant Council responded that it was aware of the serious threat posed by the plant to the environment, especially to native forest, and that it meets the definition of a noxious plant for the purposes of the Act. However, the Council was not satisfied that it was "practical and reasonable to use the Act to require occupiers to take action to control the weed on their properties, as practical control measures have still to be developed."[276] Because there was no proven method of control known, it would have been unreasonable for the Authority to enforce control measures.[277]

206. Following the seminar the Lands and Survey Department prepared a programme for the eradication of Old Man's Beard in Wellington Land District.[278] As a result, work began on a number of reserves in the Taihape inquiry district, mainly using temporary workers employed under the government's Project Employment Programme scheme. By 1986 the gains made appeared to have been lost.[279] The Crown recognises that there is no evidence of the Crown having consulted with Māori as to how to deal with the problem throughout this time.

207. When the Department of Conservation became involved on its establishment in 1987, it applied itself promptly to the issue. For example,

272 Wai 2180, #A38, at 367–368.

273 Wai 2180, #A38, at 364.

274 Wai 2180, #A38, at 368; Wai 2180, #M07, at [46].

275 Wai 2180, #A38, at 368.

276 Wai 2180, #A38, at 194.

277 Wai 2180, #A38, at 196.

278 Wai 2180, #A38, at 369.

279 Wai 2180, #A38, at 369–371.

soon after the Department was established, it immediately employed four people to work full-time on the containment of Old Man's Beard in the Department of Conservation's Rangitikei district.[280] William Fleury, a DOC biodiversity planner in the Lower North Island Region (at the time of giving evidence) who worked for DOC since its creation in 1987, details that a major national awareness campaign was launched following DOC's involvement, and control strategies were prepared outlining priority areas, methods and estimated funding necessary to achieve control.[281] Control was carried out in most reserves in the general area by ground and aerial method.

208. In recent years, Mr Fleury records that DOC's priorities have focussed on a coordinated approach with Horizons Regional Council to protect the Ruahine Forest Park and some reserves.[282] DOC also contributes to a national programme of research to identify and establish biological control agents for Old Man's Beard. Four species of possible agent have been assessed and trialled, but the search is ongoing,[283] demonstrating the difficulty of controlling the weed even with the technological advances available in the twenty-first century.

*Treaty analysis on noxious weeds – pinus contorta and Old Man's Beard*

209. In assessing what is a responsible and reasonable Crown response to the introduction of noxious weeds, the Tribunal has previously considered a number of issues to be relevant, including the state of environmental knowledge at the time among Crown officials; what complaints were made by Māori about the effects of settlement; and what priority the Crown gave to those complaints.[284] In that context, the Tribunal has proceeded on the basis that Crown actions or omissions cannot be judged by the standards expected in environmental management in the twenty-first century.[285]

210. The Tribunal has identified in a number of reports that the question to ask in assessing whether the Crown has fulfilled its duties in similar

280 Wai 2180, #A38, at 406.

281 Wai 2180, #M07, at [48]–[49].

282 Wai 2180, #M07, at [50].

283 Wai 2180, #M07, at [50].

284 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (pre-publication version) (Wai 898, 2019) part IV at 319–320.

285 Waitangi Tribunal *Mohaka ki Ahuriri Report* (Wai 201, 2004) at 636.

circumstances is "whether the Crown had recognised and acted on evidence of the need for environmental controls with sufficient priority."[286] The question, in assessing breach, is when the Crown should have both recognised the effects of the absence of controls in land management and taken action to ameliorate the situation.[287]

211. The Tribunal has also noted previously in respect of newly introduced species, that "like the European colonists, they [Māori] were probably unaware for some time of the accompanying environmental dangers".[288] This observation applies equally to the Crown. In the case of both *pinus contorta* and Old Man's Beard, the Crown could not have reasonably known the future ecological effects at the time of introduction. Regarding Old Man's Beard, the evidence suggests that the Crown was not aware of its introduction at the time it was introduced or for some time afterwards.

212. The evidence for both *pinus contorta* and Old Man's Beard indicates that there was a lack of knowledge about the effects of the introduced species on the environment, and once such effects were realised, a lack of knowledge about how to deal with the problem. In its report on claims in the Whanganui inquiry district, the Tribunal considered the issue of the introduction of *pinus contorta* and found no Tiriti/Treaty breach because, like many others, the motivation for introduction was to improve the landscape.[289] It held that "[w]e can look back now on the introduction of *Pinus contorta*, and the failure to identify its disastrous potential and control it sooner, and wonder at the folly of our forebears", but it does not amount to a Tiriti/Treaty breach because current knowledge and understanding of the effects of such plants was simply not available.[290]

213. Once the Crown became aware that the species were spreading rapidly and destructively throughout the region, or certain areas of it, the Crown made attempts to ameliorate the situation and eradication programmes got

---

286 Waitangi Tribunal *Mohaka ki Ahuriri Report* (Wai 201, 2004) at 636; Waitangi Tribunal *Hauraki Report* (Wai 686, 2006) vol 3 at 1159–1160; Waitangi Tribunal *Te Tau Ihu o te Ika a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 3 at 1199-1200; and Waitangi Tribunal *Tauranga Moana, 1886-2006: Report on the Post-Raupatu Claims* (Wai 215, 2010) vol 2 at 615–619.

287 Waitangi Tribunal *Mohaka ki Ahuriri Report* (Wai 201, 2004) at 636–637.

288 Waitangi Tribunal *Mohaka ki Ahuriri Report* (Wai 201, 2004) at 627.

289 Waitangi Tribunal *He Whiritaunoke: The Whanganui Land Report* (Wai 903, 2015) vol 3 at 1483.

290 Waitangi Tribunal *He Whiritaunoke: The Whanganui Land Report* (Wai 903, 2015) vol 3 at 1483.

underway in respect of both plants in the 1970s, with varying levels of success. Since then, the Crown has made effort through various departments, including DOC, to continue to adequately control both species.

214. The Crown accepts that there is limited evidence of the Crown having consulted with Māori as to how to deal with control of *pinus contorta* or Old Man's Beard. There is also limited evidence of concern expressed by Taihape Māori about the prevalence of the imported species.[291] As already noted, the Tribunal has said that in respect of newly introduced species, Māori were probably unaware for some time of the accompanying environmental dangers,[292] just as the Crown were. The Crown's view is that the level of consultation that occurred was commensurate with the relevant interests.

215. Regarding the current pest plant management regime, Manawatū-Wanganui Regional Council has engaged with Taihape Māori who are owners of Māori land in the area and are therefore subject to the weed control programme.[293] In this respect, Māori landowners have been supported by Manawatū-Wanganui Regional Council in a number of ways concerning plant pest control since 2001,[294] and there is no evidence to suggest that the level of support provided has been inadequate.[295]

216. The Crown submits that it has exercised its kāwanatanga authority in a responsible and reasonable way, having regard to the information available to it, competing environmental priorities nationally and resource

---

291 For example, the Manawatū-Wanganui Regional Council produced its first Regional Plan Pest Management Strategy in 1996, specifying Old Man's Beard as a "total control" plant pest. There was only one submission to the draft Strategy from a Māori organisation, Te Rūnanga o Ngāti Apa, querying why wandering jew (*tradescantia*) was not regarded as a pest plant. Similarly, the Manawatū-Wanganui Regional Council's 2001 Regional Plant Pest Management Strategy attracted more than 70 submissions from the public when it was published in draft form for public comment in 2000. None of the submissions regarding the policy generally or Old Man's Beard specifically were from hapū or iwi organisations. When the 2006 Strategy was released for public comment, it received one submission from an iwi organisation, Ngāti Kahungungu Iwi Incorporated, which was generally supportive of the approach adopted by the Strategy though wanted more recognition of iwi kaitiakitanga (Wai 2180, #A38, at 214–216).

292 Waitangi Tribunal *Mohaka ki Ahuriri Report* (Wai 201, 2004) at 627.

293 Wai 2180, #A38, at 223.

294 Wai 2180, #A38, at 216; and Horizons Regional Council Regional Pest Management Plan 2017-2037 at 51–53.

295 In contrast, see Waitangi Tribunal *He Whiritaunoka: The Whanganui Land* Report (Wai 903, 2015) vol 3 at 1484, where the Tribunal recommended that the Crown "develops a strategy, implemented by regional councils, for funding pest management on Māori land, including non-rateable Māori land, which recognises the problems and difficulties faced by Māori landowners in Whanganui as a result of the inherent weaknesses in the Māori land tenure system it enacted."

constraints, and that there has been no breach of the principles of te Tiriti o Waitangi/the Treaty of Waitangi.

*1080*

217. As damage caused by introduced animals became better understood, the Crown moved to implement control and eradication programmes including trapping, culling and toxin controls. Sodium monofluoroacetate, commonly known as "1080", has been used by aerial drop in conjunction with ground-based trapping for the control of possums, rats and (through secondary kill) stoats within the inquiry district since the late 1950s.[296]

218. The use of 1080 is opposed by a number of individuals and groups including some claimants, often on the basis that it has a negative effect on bird life and fish, and is too poisonous or dangerous to broadly airdrop.[297] The Crown acknowledges that there is a range of views within Māori and the community generally on the appropriateness of aerial 1080 operations (and to a lesser extent ground operations) and has engaged more thoroughly with Māori in recent years. The applicable regulatory and policy regimes for DOC, TbFree NZ and NZDF, and the standard operating procedures of each agency, require consideration of the views of Māori impacted upon by operations. For example, in 2005 DOC and the Animal Health Board jointly applied for a reassessment of 1080 to enable its continued use, and as part of that process DOC held 22 hui throughout New Zealand.[298]

219. In some circumstances, aerial 1080 has not been used where other alternatives are available. For example, in February 2003, the Aorangi-Awarua Trust (which had successfully covenanted its land through the Ngā Whenua Rāhui scheme, discussed earlier) produced a possum control plan for the covenanted block.[299] This was prepared by a private pest destruction company in conjunction with Mr Tama Wipaki, one of the trustees. Because the Trust as a matter of policy would not agree to aerial application of 1080 poison, control was to be by ground baiting and trapping.[300] A two-year

296 Wai 2180, #A45, at 239.

297 Wai 2180, #M26, at [53].

298 Wai 2180, #M07, at [58].

299 Wai 2180, #A38, at 209.

300 Wai 2180, #A38, at 209.

initial contract was agreed upon, followed by two sequential two-year contracts for maintenance control.[301]

220. Although the Crown continues to employ and research alternatives for more general use, for example, bait stations and self-resetting trap technology, there has to date been no comparably cost-effective alternative to the aerial application of 1080. The scale of lands that DOC manages is a factor to consider, and the difficulty in undertaking land-based pest control methods in the backcountry. A 2011 report by the Parliamentary Commissioner for the Environment concluded that any risk posed by 1080 was minimal compared to the benefits to New Zealand biodiversity that were afforded by its use and recommended that use of 1080 in New Zealand should be increased.[302]

221. The Crown considers, based on the best available information, that the environmental effects of control operations, including through 1080, are outweighed by the benefits to the environment in the protection of native biota through the control of animal pests. Mr Fleury gave evidence that "New Zealand is seeing successful ecological restoration that would not have been possible using any other method of control currently available."[303] The Crown does not accept that 1080 has degraded the environment, or that the application of 1080 constitutes a Tiriti/Treaty breach.

222. Regulations have recently been enacted that simplify and standardise the regulatory regime for pest control.[304] The Crown considers the risks and effects of 1080 are robustly and effectively managed under the Hazardous

---

301 The Crown notes that this land is not public conservation land, but private Māori land subject to a kawenata. Pest control on land under such kawenata is the responsibility of the landowner, but the landowners have the right to request assistance for this from the Crown. In this instance, the Trust received Animal Health Board funding for possum control, provided through the Regional Council: Wai 2180, #A38, at 209.

302 Wai 2180, #A10, at [159].

303 Wai 2180, #M07, at [59].

304 Resource Management (Exemption) Regulations 2017. The regulations exempt discharges of 1080 from the requirements of section 15 of the RMA provided the discharge complies with certain conditions. The regulations will come into effect on 1 April 2017. The effect of these regulations is that discharges of 1080 will no longer need to be authorised by a rule or consent. Operators may now discharge in reliance on the authority of the regulations. The regulations do not affect the need for operators to comply with the many and varied controls imposed under the Hazardous Substances and New Organisms Act 1996, Health and Safety at Work Act 2015, or Agricultural Compounds and Veterinary Medicines Act 1997, nor from the need to comply with rules or obtain consents for non-1080 discharge activities related to an operation.

Substances and New Organisms Act 1996, the Agricultural Compounds and Veterinary Medicines Act 1997 and by the Ministry of Health.

**16.3 (e): Has the Crown's environmental management regime for land-based resources contributed to the decline of indigenous species by declaring them vermin and actively encouraging attempts to eradicate them (for example shags, weka, ruru and kāhu or hawks)? Has the Crown actively contributed to this process by allowing the introduction of destructive species such as stoats and weasels?**

223. There is limited claimant evidence on the record of inquiry of the decline of land-based indigenous species.

224. Te Rina Warren and Christina Chase, in their collection of personal narratives from kaumatua, provided evidence from Tony Batley about the state of the Moawhango River and his recollection of the number of kawau, black shags, that used to be present flying along the river. Mr Batley said they would regularly fly up and down stream, and nowadays you barely ever see one. He thought the decline might be for two reasons: one because the willow trees that have been planted prevent the kawau from seeing the trout that they fly up and down the river to prey on; and two because the trout themselves are not in the river anymore. He put this down to the reduction of flow because of the Moawhango Dam, discussed in the Crown's submissions on waterways. Mr Batley's evidence does not suggest there has been a decline in the general population of kawau, as he confirmed "there are plenty of kawau round the lake up there [where the Dam is]."[305]

225. The Crown is not aware of any evidence on the record that it has contributed to the decline of land-based indigenous species in the inquiry district by declaring them vermin or actively encouraging attempts to eradicate them. The Belgrave et al report states that "shags, eels, feral cats, wekas, and ruru (mopoke) were all considered a threat to game and therefore listed as vermin at one point in time",[306] but it provides no reference for the statement and nor is there any other evidence confirming it.

226. Nor is there any evidence of the Crown actively encouraging the decline of land-based indigenous species by allowing the introduction of destructive

305 Wai 2180, #G06(a), at 12.

306 Wai 2180, #A10, at [304].

species such as stoats and weasels. Rather, exotic species such as stouts and weasels were introduced to reduce the (introduced) rabbit population in the area.[307]

227. The Crown acknowledges it was slow to recognise that mustelids were posing a threat to the environment as a pest themselves: it was not until 1936 that the protections preventing such animals from being killed were removed. [308] In this respect, present-day knowledge and behaviour cannot be attributed to early Māori and European colonisers. With the benefit of hindsight, we know some of those introductions were unwise.

228. However, the Crown cautions against presentism in these matters. As the Tribunal has recognised in relation to some exotic plants, it is difficult to view such introductions as breaches of te Tiriti/the Treaty because often the introductions were motivated by the intention of adding to the beauty or utility of New Zealand's landscape.[309] The same is true for exotic animal species, many of which were introduced for clothing (rabbits) or, ironically, to control the pest population (stoats and weasels). While the Crown acknowledges there is some evidence that the importation of mustelids was known to be inherently dangerous and it was slow to react,[310] neither the Crown nor Māori could have envisaged the devastating consequences of some of the exotic species introduced.

**Issue 16.4: Has the Crown failed to adequately manage the removal or disposal of hazardous substances from the Taihape inquiry district, including industrial chemicals (timber treatment, sheep dipping etc), sewage, or unexploded ordnance? If so, how has this impacted on Taihape Māori?**

*Statutory framework for managing hazardous substances*

229. The statutory scheme for discharges of contaminants is outlined at ss 15-15C of the RMA and continues through national direction such as the National Environmental Standards for Air Quality and the National Policy Statement for Freshwater Management. Sections 30 and 31 of the RMA define, to some extent, the responsibility of local government with respect to contaminated land. Regional councils have responsibilities towards ensuring that natural resources are used sustainably, that air and water are

307 Wai 2180, #A10, at [304].

308 Wai 2180, #A45, at 217.

309 Waitangi Tribunal *He Whiritaunoke: The Whanganui Land Report* (Wai 903, 2015) vol 3 at 1483.

310 Wai 2180, #A45, at 217.

protected against contaminant discharge, that land is protected against erosion and natural hazards, and that waste disposal practices have minimal impact on land and water quality. In carrying out these duties, regional councils work with district and city councils, health authorities and Māori groups.[311]

230. The Hazardous Activities and Industries List (**HAIL**) is a compilation of activities and industries that are considered likely to cause land contamination resulting from hazardous substance use, storage or disposal.[312] The HAIL guides all regional and local councils in the management and reporting of sites that may pose an environmental risk. The Ministry for the Environment has generated a set of guidelines for reporting on contaminated sites, to ensure consistency of reporting on investigation, assessment and remediation of contaminated sites.[313]

231. There is also the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011, which is a nationally consistent set of planning controls and soil contaminant values. The Regulations ensure that land affected by contaminants in soil is appropriately identified and assessed before it is developed, and if necessary the land is remediated or the contaminants contained to make the land safe for human use.

### *HAIL sites in the inquiry district*

232. HAIL records 18 sites in the inquiry district as contaminated, likely to be contaminated, or remediated.[314] The causes and responsibility for each contamination require individual consideration; including taking into account social and economic factors and the knowledge available in respect of the causes of soil contamination.

233. Eleven out of the 18 sites relate to service stations, vehicle workshops and storage facilities, and have been assessed and defined as either acceptable; managed through containment to mitigate any environmental risk; or

311 Wai 2180, #A10, at 47.

312 Incorporated by reference in the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.

313 Ministry for the Environment, 2003. Contaminated land management guidelines No 1 – Reporting on contaminated sites in New Zealand. Report ME492, Wellington.

314 Wai 2180, #A10, at 53.

remediated.[315] Of the remaining seven sites, The Belgrave et al report makes the following comments:[316]

233.1 One is attributed to power transformers (related to the oil used as a lubricant in the transformers). The contamination at this location is regarded as acceptable or managed through remediation.

233.2 Three landfill sites are defined as potentially contaminated. The sites have not been assessed for contamination by a formal environmental impact assessment. However, the 2004 Rangitīkei District Council State of the Environment Report states that all landfills in the Rangitīkei District were closed by 2001, fenced off, capped and replanted where necessary. An independent report was commissioned to assess the health of the closed sites, and the resulting report appears to have given "a generally clean bill of health".[317] Belgrave et al reports that this suggests that the three landfills sites identified do not present an unacceptable level of environmental contamination.

233.3 One is attributed to defence works in the Ruapehu District. There is no indication of the nature of contamination, but the status "contamination confirmed" indicates that an environmental impact assessment has been conducted, and an appropriate remediation or environmental management plan should be implemented. Contamination is likely to be associated with the use of military munitions, and can be inorganic (heavy metals for munitions) or organic (nitrogen-based military explosives). Organic contamination, owing to residual levels of explosives and the breakdown products of these explosives in soil, is considered to present a major human health risk at military testing and shooting ranges around the world.[318] Environmental contamination associated with military explosives can occur at live firing ranges where residues can be widely dispersed, or where munitions fail to

315 Wai 2180, #A10, at 53.

316 Wai 2180, #A10, at 53–54.

317 Wai 2180, #A10, at 56.

318 Wai 2180, #A10, at 57.

explode. The casing of this unexploded ordnance can subsequently corrode or break open releasing the explosive to the environment.[319]

233.4 One is attributed to "chemical manufacture and formulation" in the Rangitīkei District. This indicates that an activity that may have led to contamination did occur at this location. It is not clear where the location is.

233.5 One is attributed to "wood preservation" in the Rangitīkei District. This indicates that timber treatment using chemicals known to lead to contamination *may* have occurred at this location. It is unclear where this location is. Belgrave et al reports that the listing of one unverified location where timber treatment chemicals were used on the HAIL database for the inquiry district indicates that only limited (if any) timber treatment has occurred within the inquiry district. The potential for land contamination owing to this activity is therefore low.

234. With respect to unexploded ordinances, the Waiōuru lands are subject to a "Defence Purposes Designation – (Waiōuru Military Training Area)" under the Ruapehu District Plan, which provides that district plan rules for the use of the land that would otherwise apply are set aside and the activity the designation provides for, including live-firing activities, essentially becomes a permitted activity. The Manawatū-Wanganui Regional Council's One Plan also contains an exemption from standards governing discharges of contaminants from live firing to land. The Crown recognises that unexploded munitions on these lands may make it difficult for tangata whenua to carry out kaitiaki obligations over the lands should they be returned to them, but at this stage any consideration of such matters is premature. The Crown's position in relation to the Defence lands is outlined in its submissions on public works.

235. None of the 18 HAIL sites have been individually visited or assessed for the purposes of this inquiry, and no specific contaminated sites (at a defined

319 Wai 2180, #A10, at 58.

location) have been identified.[320] Further, reported data for contamination and degradation in the soils and land of the Taihape inquiry district as a result of a number of these activities has "limited to non-existent availability". In the Belgrave et al report, the occurrence of these activities was reviewed in the context of posing "likely" environmental risk in the District.

*Other sources of contamination in the inquiry district*

236. The Crown acknowledges that other sources of contamination have had effects on the inquiry district's waterways, including sheep dipping, sawmilling waste, dairy factories, and sewage.

237. Sheep dipping was required by law for most of the 19th century and well into the 20th century. The Sheep Act 1878 imposed an obligation on farmers to dip sheep, and the Stock Act 1908 required every owner to dip sheep annually. Sheep were dipped in chemicals to control small parasites living under the sheep's skin, such as scab, lice and keds. During the 19th century, various types of dips were used, some of which were dug into the ground and lined with timber or concrete, and which resulted in a large amount of liquid chemical residue leaching into the soil and often into streams. The chemicals were highly damaging to the environment.

238. From 1908, and for much of the subsequent period, the operative legislation and regulations prohibited persons from causing or permitting sheep dip effluent to enter waters in which trout and salmon were present,[321] and from the 1940s sheep were sprayed, which was less harmful to the environment as the liquid was not collected in waterways. Mr Armstrong reports that there is little direct evidence of breaches of the Regulations with regard to sheep dips within the inquiry area.[322] There is no evidence on the record of the number of sheep dips within the inquiry district and whether, if present, they pose environmental risks.

239. Waste from sawmilling operations, of which there were several in the inquiry district, was generated by the removal of bark and some of the outer wood from logs in order to render them suitable for sawing, and from the

320 Wai 2180, #A10, at 55.

321 Wai 2180, #A45, at 304.

322 Wai 2180, #A45, at 307.

sawdust itself. Mills often dumped these wastes in gullies, watercourses or swampy areas, which creates a range of long-term environmental problems. From 1908, there were a range of legislative and regulatory provisions in place to prevent sawmill refuse being dumped in rivers or waterways.[323] It also appears that the Lands Department and Forest Service were in the habit, after 1908, of inserting a clause in all sawmill licenses stipulating that sawdust and other mill refuse must not be allowed to enter any watercourse.[324] Mr Armstrong questions the early enforcement of such clauses and regulations, but notes that "more rigorous enforcement may have resulted when Catchment Boards took over aspects of waterways management" in the mid-20th century.[325]

240. As mentioned, the current HAIL list includes one timber site that may have led to contamination, and Belgrave et al concludes that the potential for land contamination at the site is low.

241. Dairy factories were another cause of pollution to the waterways, largely due to sewage discharge. The same regulations preventing discharge of sawdust into waterways also prevented "any other matter or liquid that is noxious, poisonous or injurious or harmful to fish" from being discharged into waterways. It is not clear whether dairy waste was considered to fall under "poisonous", and it was not until 1954 that discharge from dairy factories (and other forms of industrial discharge) was specifically regulated by Catchment Boards.

242. Finally, the Crown recognises the disposal of human effluent into waterways is highly offensive to Māori due to the impact it has on the mauri of the waterways. This is discussed further in the Crown's submissions on waterways (Issue 16B).

### *Treaty analysis on hazardous substances*

243. As noted above, adverse environmental impacts are an inevitable consequence of human progress and development. There are public interest considerations in respect of each of the uses of activities of the

323 Fisheries Act 1908, ss 83(n) and 94 (and regulations made under s 94); Fisheries Amendment Act 1923, s 7; and Freshwater Fisheries Regulations 1951, reg 103.

324 Wai 2180, #A45, at 300.

325 Wai 2180, #A45, at 302.

environment and on waterways, including the discharge of waste, and the various interests must be carefully balanced. Any adverse impacts on environmental health has to be considered in light of any competing public interests and benefits in the activities causing those impacts.

244. The Crown's position is that it has not failed to adequately manage the removal or disposal of hazardous substances from the Taihape inquiry district. It recognises the impact that some discharges have had on Taihape Māori, particularly in relation to sewage discharge into waterways which is assessed below, but does not consider that the Crown's response to these is a breach of te Tiriti/Treaty principles.

**Issue 16.5: Have Taihape Māori raised concerns about the impact of the Crown's environmental management regime for land-based resources on the environment and traditional activities? If so, how has the Crown responded to these concerns, and was the response adequate?**

245. The Crown says, as it has in previous district inquiries,[326] that determining whether any response to concerns about the impact of the Crown's environmental management regime for land-based resources was "adequate" is difficult, and essentially relies on subjective value judgments. The Crown says that a better measure, and one which reflects its Tiriti/Treaty obligations, is whether the Crown has treated Taihape Māori equitably in respect of its land management regimes and whether the Crown has taken reasonable steps in the circumstances to actively protect the environmental taonga of Taihape Māori.

246. Concerns raised in regard to particular land-based resources, such as rongoā, deforestation, noxious weeds and invasive species, and hazardous substances have been addressed in the specific questions above. If the Tribunal wished to look into the Crown's response to each of the issues raised in further detail, the Crown submits that each instance of Taihape Māori raising concerns about adverse environmental impacts on land must be assessed on a case-by-case basis and in light of the prevailing circumstances of the time. In particular, the Crown submits that the following factors should be borne in mind:

246.1 what the substance of the concerns Māori were raising was;

326 For example, in its submissions to the Rohe Pōtae Tribunal (Wai 898).

246.2 how Māori considered the issue could or should be remedied;

246.3 who the complaint was made to and, in particular, whether the Crown was made aware of the issue;

246.4 when the Crown was made, or became, aware of the particular issue and, in particular, whether it was before or after the adverse environmental impact occurred;

246.5 the detail of the Crown's response;

246.6 whether there were any competing interests the Crown was required to weigh up; and

246.7 the Crown's capacity to respond to, prevent or mitigate any particular issue.

**Issue 16.25: What is the nature of the relationship between Taihape Māori and the Kaimanawa wild horses? Are the Kaimanawa wild horses a taonga?**

247. Horses were first introduced into the central North Island as early as 1844.[327] There is limited evidence on the record of inquiry concerning the status of Kaimanawa horses as a tāonga species.[328] The claimants written submissions do not allege taonga status,[329] although during the hearing the question was put to Mr Bennion who responded the horses are a taonga because of "the historical association".[330] While the Crown recognises the importance of the horses to Taihape Māori, as well as non-Māori, the evidence available does not support the position that the horses are a taonga species.

248. The horses were recorded as free ranging (wild or feral) since 1876. Since that time their population has been reported to have fluctuated between several thousand to less than two hundred.[331] Mr Armstrong notes that by the end of the 19th century the Kaimanawa horses had come to play an

327 Wai 2180, #A49(e), at 49; Wai 2180, #4.1.18, at 606.

328 The key evidence is from the Kaimanawa Horses Panel, Wai 2180, #4.1.18, at 604–615; and Jill Tutemahurangi Chase's evidence about the Waiōuru protest against the culling of the horses in 1996, #G03 and #4.1.10 at 253–256.

329 Neither the general environment submissions by Mr Bennion and Ms Black, Wai 2180, #3.3.56; nor the submissions by the Mōkai Pātea claimants at Wai 2180, #3.3.62; nor the Heritage Trust submissions at Wai 2180, #3.3.71.

330 Wai 2180, #4.1.22, at 256.

331 Wai 2180, #A49(e), at 2.

important role in the cultural, social and economic life of Taihape Māori.[332] While some witnesses have stated that the horses have had a negative impact on the environment,[333] many have an intimate relationship with the horses. The horses have been used by Taihape Māori as riding and stock horses,[334] as well as being used for their meat, hair and hides, and for racing.[335]

249. The Waitangi Tribunal has noted that taonga species are not easily defined, and accepted for the purposes of the Wai 262 inquiry that taonga species were what claimant communities said they were.[336] However, the Tribunal further noted that does not mean such claims are unaccountable or unreviewable. Whether a species is a taonga species can be tested. As discussed above at [27], taonga species have mātauranga Māori in relation to them, and have whakapapa able to be recited by tohunga.[337] The Tribunal further observed that certain iwi or hapū will say that they are kaitiaki in respect of the species, and their tohunga will be able to say what events in the history of the community led to that kaitiaki status, and what obligations this creates for them. The Tribunal stated: "In essence, a taonga species will have kōrero tuku iho, or inherited learnings, the existence and credibility of which can be tested."[338]

250. The Waitangi Tribunal has previously observed that some taonga species are emblematic of community or cultural identity, and that such emblematic species often have mystical or spiritual functions.[339] They act as spiritual guardians (kaitiaki) of the iwi or hapū in question, and are said to appear at important events or times for the community, and they will communicate with tribal matakite, or seers, to warn of dangers ahead.[340] A notable

---

332 Wai 2180, #A49, at 16–17, 192–197.

333 Wai 2180, #1.2.20, at [36]

334 Wai 2180, #4.1.6, at 268.

335 Wai 2180, #4.1.6, at 204; Wai 2180, #A49, at 192; Wai 2180, #A45, at 348.

336 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Volume 1* (Wai 262, Waitangi Tribunal, 2011) at 114. This finding was of course caveated by taonga being a specific concept not a generalised one applying to the entire environment.

337 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Volume 1* (Wai 262, Waitangi Tribunal, 2011) at 114–115.

338 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Volume 1* (Wai 262, Waitangi Tribunal, 2011) at 115.

339 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Volume 1* (Wai 262, Waitangi Tribunal, 2011) at 117.

340 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Volume 1* (Wai 262, Waitangi Tribunal, 2011) at 117.

example of a taonga species in the Taihape inquiry district is the pātiki (black flounder), one of which was a mōkai (pet) of Tamatea Pōkai Whenua, left at the confluence of the Rangitīkei and Hautapu Rivers,[341] and represented in many tukutuku panels in the district.[342]

251. The Crown observes that evidence was given in this inquiry that the Kaimanawa horse has also assumed a spiritual function, with mātauranga Māori, including whakapapa, in relation to them:[343]

> The tupuna whom we call, which we are about to talk about, the tupuna Tarapīkau. Tarapīkau was also known as the hoofed man. Tarapīkau, the hoofed man, known as the Hoofed Man. He was the kaitiaki for the horses of the Kaimanawa. At times he would be seen amongst the horses, as a protector, and of course as a kaitiaki. At times he could be seen walking along the Desert Road, and it has been said, the failure to pick up, or give, Tarapīkau a lift could be seen as bad luck. There were those who did pick him up and there were those who saw his legs as being the hoof of an animal.
>
> The relationship of the Kaimanawa Horses to Māori. The first lot of horses that came into this region came from a place called Pūkawa. Pūkawa is situated just north of Tokaanu, and close to Lake Taupō. One of the very first horses was given to the paramount chief of Ngāti Tūwharetoa and that was, Te Heuheu Tukino.
>
> As time went on, Ngāti Waewae, who are the predominant tribe living around the area, Pūkawa, bought horses into this area. I suppose it would be the start of the Kaimanawa Horses themselves. And of course, Tarapīkau was the one they followed, before that'd taken place around about 1844.
>
> Those horses that did come into this area were used as transport, or carriers of goods, between Mōkai Pātea and Tūwharetoa, in particular Tokaanu where our people lived as well.

252. The Kaimanawa horse is a defining feature of the local culture, both Māori and non-Māori.[344] However, there is limited evidence on the record of inquiry as to the taonga status of the horses. Mr Fleury's evidence was that it was not until the 1990s that some tangata whenua suggested to the Department of Conservation that the horses had taonga values.[345] The Crown notes of course the important evidence that was given by the Kaimanawa horse panel, some of which is quoted above. However, the

---

341 Wai 2180, #C03, at [32].

342 Wai 2180, #A44, at 57.

343 Wai 2180, #4.1.18, at 606.

344 Noting here that a horse's head motif was adopted by the Studholme family, and later adopted by the army in 1984, demonstrating the emblematic significance of the Kaimanawa horse and its association with the northern part of the inquiry district (Wai 2180, #4.1.14, at 223).

345 Wai 2180, #4.1.16, at 428–429.

bulk of tangata whenua evidence on this issue focuses on the horses use rather than a more spiritual relationship[346] – how they were used by Taihape Māori for work and general living – or discusses the horses in the context of wanting further consultation to recognise and provide for Māori interests in resources found on Māori land.[347]

253. The Crown submits that for present purposes, the horses should be considered in the same way as most other imported species that have become culturally important for Māori communities. For example, Te Urewera Tribunal recognised that horses, pigs, deer and dogs, introduced in the 19th century, were incorporated in the culture and lifestyle of Te Urewera people and by virtue of time are able to be included as "traditional" elements of modern Te Urewera culture.[348] While that Tribunal recognised the cultural importance of those exotic species and that customary rights, law and practices were applied to those species,[349] it did not find them to be taonga species, in contrast to tuna and kereru.[350]

254. Similarly, in *Te Kahui Maunga: The National Park District Inquiry Report*, Ngāti Tūwharetoa submitted that trout (an introduced species) has become "something of a customary fish",[351] or "a kind of taonga" because of the important food source it has become.[352] While the Tribunal recognised the importance of trout to customary fisheries, it found that when one looks at "the requisite relationship of tangata whenua with the resource in question… it is clear that trout fall short of this standard."[353] It concluded "we do not consider that trout can qualify as a taonga".[354]

---

346 Wai 2180, #G04, at [3], [9]; Wai 2180, #G05, at [15]–[18]; Wai 2180, #G06(a); Wai 2180, #4.1.18, at 608–609.

347 Wai 2180, #G01, at [39]–[40]; Wai 2180, #G03.

348 Waitangi Tribunal *Te Urewera, Volume V* (Wai 894, Waitangi Tribunal, 2017) at 2283.

349 Waitangi Tribunal *Te Urewera, Volume VII* (Wai 894, Waitangi Tribunal, 2017) at 3125.

350 Waitangi Tribunal *Te Urewera, Volume VII* (Wai 894, Waitangi Tribunal, 2017) at 3103.

351 Waitangi Tribunal *Te Kāhui Maunga: The National park District Inquiry Report* (Wai 1130, 2013) vol 3 at 981.

352 Waitangi Tribunal *Te Kāhui Maunga: The National park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1050.

353 Waitangi Tribunal *Te Kāhui Maunga: The National park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1050.

354 Waitangi Tribunal *Te Kāhui Maunga: The National park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1050. In the Ngāti Tūwharetoa deed of settlement dated 8 July 2017, the Crown conceded that redress should include rights to non-indigenous fish species because the introduction of non-indigenous fish species had eroded the supply of indigenous fish species. The Crown recognised that trout have "become a valued supplement to whanau and marae dining tables as well as a means to provide for manuhiri and to carry out traditional fishing practices", but there was no concession that trout was a taonga species.

255. Whilst Treaty jurisprudence recognises a development right in some cases (for example, whale watching[355]), and introduced species have been accepted by the Tribunal as taonga in rare occasions,[356] the Crown's view is that the evidence available does not support the position that the Kaimanawa horses are a taonga species.

256. Nonetheless, the Crown recognises that the Kaimanawa horses are of importance to many Taihape Māori, regardless of whether or not they are taonga, and that the principle of partnership therefore requires consultation with Taihape Māori on matters relating to the horses. If the Tribunal is minded to make findings that Kaimanawa Horses are a taonga species for Taihape Māori it would be useful for such findings to also set out what, if any, different obligations arise from the Crown than its current involvement with Taihape Māori in decision making concerning the horses might be required with them being recognised as taonga species.

**Issue 16.26: How has the Crown sought to manage and/or protect the Kaimanawa wild horses? How has this changed over time?**

257. The Kaimanawa horses, which for many are emblematic of the area in which they inhabit, need to be managed – primarily for environmental and land management purposes. By 1897, thousands of wild horses were said to roam along the base of the volcanic range and around Lake Taupō.[357] At this stage, the Crown had no management or protective role over the horses.

258. In 1908, the Report of the Board of the Tongariro National Park to the Houses of General Assembly recognised that Māori-owned horses grazing on Māori-owned land bordering Tongariro National Park were damaging undergrowth in stands of tōtara forest.[358] Mr Armstrong reports that it is not known whether any attempt was made to reduce horse numbers at this

---

355 In *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553, the Court said that although a commercial whale-watching business is not taonga or the enjoyment of a fishery within the contemplation of te Tiriti/the Treaty, it is so linked to taonga and fisheries that a reasonable Tiriti/Treaty partner would recognise the Tiriti/Treaty principles are relevant.

356 For example, the Tribunal has found kūmara to be a taonga species, despite not being endemic to New Zealand. The Tribunal reported that the fact kūmara arrived as canoe plants from Polynesia actually enhanced their status. In contrast to this species, the horse was introduced much later, by Europeans: Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Volume 1* (Wai 262, Waitangi Tribunal, 2011) at 134.

357 Wai 2180, #A49, at 192.

358 Robert McNab "Report of the Board of the Tongariro National Park" [1908] I *AJHR* C8 at 4.

time,[359] but it appears that from the 1920s the State Forest Service attempted to control their numbers, and in 1931 the State Forest Service reported that they were continuing to control wild pigs, rabbits and hares, goats, rats, wild cattle and wild horses for the purpose of limiting their damage to forest-growth "to the limits of the funds available".[360] Mr Armstrong notes that he was not able to find information about the response of Taihape Māori to the eradication and control measures which began in the 1930s, although it appears that Taihape Māori continued to catch and break in wild horses.[361]

259. At this time, the District Ranger in Turangi, the officer in charge of Kaimanawa Forest Park, reported that the range of the herd extended across five tenures:[362] the Defence Reserve, Ōhinewairua Station freehold and leasehold (a lease of Māori-owned land), Mr Tony Batley's private scenic reserve (Ōruamatua-Kaimanawa 1W2), Kaimanawa Forest Park (including the Forest Service leasehold of Māori-owned land Ōruamatua-Kaimanawa 1V), and Māori-owned blocks Kaimanawa 3B2A and 3B2B. While the Waiōuru defence land training grounds, acquired in the late-1930s and which covered a large part of the horses' range, had the effect of protecting a remnant of the herd due to the restricted public entry to the land,[363] by the early 1970s numbers had reduced considerably. Some locals began to fear that the Kaimanawa horses were threatened with extinction.[364] A small group of interested locals, led by Mr Tony Batley who was then-chair of the Kaimanawa Forest Park Advisory Committee, lobbied for the protection of the remnant herd.[365]

260. In response to calls for their protection, in 1977, the New Zealand Forest Service (previously known as the State Forest Service) advised that the hunting of horses in the Kaimanawa Forest Park was not permitted.[366] The herd within the Park was managed to ensure the health of the animals on

359 Wai 2180, #A49, at 197.

360 *AJHR* 1931. Sess. II. C3 at 6.

361 Wai 2180, #A49, at 198.

362 Wai 2180, #A38, at 614.

363 Wai 2180, #A49, at 198.

364 Wai 2180, #A49, at 198.

365 Wai 2180, #M07, at [10].

366 Wai 2180, #A49, at 199.

the condition that soil and water values were not threatened, and Army policy was to support the preservation of the horses. However, the legal position remained that the animals were not protected.[367]

261. That same year, in response to an increased awareness of the threat the horses were having to native flora and fauna, the Forest Service published a "Draft Kaimanawa Horse Management Plan".[368] A proposed "protection code" was prepared that would seek agreement from landowners to protect horses on their land; ensure that new animals would not be introduced to the herd to protect their genetic integrity; and, where numbers were considered to threaten conservation values, agree that the numbers should be reduced.[369]

262. Under the auspices of the New Zealand Forest Service, a meeting of "interested parties" convened in April 1978, and the Kaimanawa Wild Horse Committee was formed to make recommendations for the better management of the horses.[370] In 1979, a survey by Massey University was presented to the Committee which found there were only 174 horses remaining and some may have been counted twice. The report concluded the horses were not a threat to native or exotic plant life, and strongly recommended their preservation.[371]

263. In response, and in recognition of their uniqueness, the Crown provided official protection to the Kaimanawa wild horses in 1981, by amendment to Schedule 5 of the Wildlife Act 1953.[372] This was the first statutory protection for the horses, and it transferred primary responsibility to the Wildlife Service (later absorbed into the Department of Conservation), with the owners of lands over which the horses ranged having secondary responsibility.[373] The protected area covered Māori-owned land and privately-owned European land.[374]

---

367 Wai 2180, #A49, at 199.

368 Wai 2180, #A49, at 200.

369 Wai 2180, #A49, at 17, 200.

370 Wai 2180, #A49, at 17, 200.

371 Wai 2180, #A49, at 17, 200.

372 Wai 2180, #A49(e), at 30.

373 Wai 2180, #A38, at [15.1].

374 Wai 2180, #A49, at 17, 202.

264. As a result of this protection the herd numbers swelled. By 1990, numbers were over 1,000, and this extra grazing pressure put at risk the fragile ecology of the tussock rangelands.[375] Various reports and advice led to a 1991 Draft Management Strategy prepared under s 41(1)(e) of the Wildlife Act 1953, which gave the Minister the authority to prepare and issue plans and publications "for the advancement, conservation management, and control of wildlife and the eradication of harmful species of wildlife".[376]

265. The Draft Management Strategy was released for public comment in July 1991.[377] Discussions continued throughout 1991-1995, and a Draft Plan was released for public comment in May 1995. While there was no statutory requirement to do so, the Minister chose to consult widely on the implementation of the Draft Plan. This was done through an informal process led by the Kaimanawa Wild Horse Working Party, established in 1994 "to facilitate the development of an optimal management strategy."[378] This resulted in the Kaimanawa Wild Horses Plan issued by the Department of Conservation in May 1996.

266. The Kaimanawa Wild Horses Plan approved the withdrawal of the statutory protection as it was no longer serving its intended purpose; provided for the reduction of the herd to 500 at Waiōuru and its confinement to the Argo zone (of the Army base), with 300 others to be relocated to an area "outside the current range"; and recommended the creation of a trust to advise the Department of Conservation in relation to the management of any herd not on Defence land.[379]

267. In May 1996, an Order in Council revoked the 1981 Order protecting the horses. In 1997, the horses were reduced to around 500 at Waiōuru, and in 1999, instead of the proposed trust, the Minister of Conservation agreed to the creation of the Kaimanawa Wild Horse Advisory Group.[380] The

375 Wai 2180, #A49, at 17, 205.

376 Wai 2180, #A49, at 17, 205.

377 Wai 2180, #M07, at [17]; and Wai 2180, #A49, at 205, Kaimanawa Wild Horses Plan, Department of Conservation 1995 at 14 (Wai 588, 2.5(a)).

378 Wai 2180, #A49, at 17, 208; Wai 2180, #A38, at 645; Wai 2180, #M07, at [23].

379 Wai 2180, #A38, at [15.5].

380 Wai 2180, #A38, at 653.

Advisory Group includes representatives of landowners, including Māori landowners (the Ōruamatua Kaimanawa Trust).[381]

268. In 2004, the Advisory Group reviewed the Kaimanawa Wild Horses Plan and created a revised plan to guide management of the wild horses through to 2009, which included the maintenance of the horse population at around 500.[382] Following that, the Kaimanawa Wild Horses Working Plan 2012-2017 was produced, under which the horses were culled further to 300 in 2010 and continue to be managed at that level.[383]

269. The involvement of Taihape Māori in the processes set out above are discussed in the next section.

**Issue 16.27: To what extent, if at all, has the Crown's management and/or protection of the Kaimanawa wild horses recognised and provided for Taihape Māori consultation and participation in decision-making?**

270. The Tiriti/Treaty principle of partnership requires the Crown and Māori to act reasonably and in good faith towards each other.[384] That imports a duty on the Crown to engage with Māori on matters that affect Māori interests. The duty to consult sits within te Tiriti/the Treaty obligation of partnership and is not absolute or open-ended, but rather consultation must be reasonable in the circumstances, depending on the nature of the relevant Māori interest, and the likely effects of the policy, action, or legislation on that interest.[385] The Crown notes that if the Tribunal finds the horses are a taonga species, additional duties of active protection and tino rangatiratanga involvement in decision-making may be present.[386]

271. In its management and protection of the Kaimanawa horses, the Crown was not, until the 1990s, fully aware of the broader nature of Māori interests in the horses (beyond those affected Māori landowners), and consultation with relevant Māori interests reflected this. Consequently, the Crown's

---

381 Kaimanawa Wild Horses Working Plan 2004-2009, Department of Conservation, 2004 < http://www.doc.govt.nz/publications/conservation/threats-and-impacts/animal-pests/kaimanawa-wild-horses-working-plan->

382 Wai 2180, #A38, at 654.

383 Wai 2180, #A38, at 655.

384 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR (CA) at 667.

385 *He Maunga Rongo: Report on the Central North Island Claims* (Wai 1200, 2008) vol 4, at 1237; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142.

386 *New Zealand Māori Council v Attorney-General* (the *Broadcasting Assets* case) [1994] 1 NZLR 513 (PC).

management plans for control of the horses from 1970 to 1990 did not involve Mōkai Pātea in their exercise of kaitiakitanga.

272. For example, the Crown is not aware of evidence that Taihape Māori were specifically consulted with regard to the 1977 Draft Management Plan mentioned above (at [261]), or in any of the earlier informal attempts to manage the horse population. Mr Armstrong has noted that "the lack of effective tribal structures" may have contributed to the apparent minimal participation by Taihape Māori at this time.[387] He also notes that the then-chair of the Kaimanawa Forest Park Advisory Committee, Mr Tony Batley of Moawhango, is understood to have strong affiliations with the Māori community at Moawhango.[388]

273. It also appears that Taihape Māori interests were not represented in the Kaimanawa Wild Horse Committee that was established in 1978 to make recommendations on the better management of the horses. The Committee was made up of only those present at its initial meeting, being representatives from the New Zealand Forest Service, the Ministry of Defence, Massey University, and Messrs Batley, Haynes and Munro representing local landowners on whose land the horses roamed.[389]

274. There was no specific attempt to involve Māori perspectives in the 1981 decision to amend the Wildlife Act 1953, and the Working Party established in 1994 to develop an "optimal management strategy" for the horses had no specific Māori representation.[390]

275. However, during the 1990s, various attempts were made to understand Māori interests, weigh those interests against wider conservationist values, and make reasonable, informed decisions to protect and manage the Kaimanawa horses. As noted above, the 1996 Kaimanawa Wild Horses Plan was the result of extensive consultation, involving a wide variety of public interest and other groups, with 174 submissions received in response to the Draft Plan from people all around New Zealand (with a bias toward

387 Wai 2180, #A49, at 17.

388 Wai 2180, #A49, at 226.

389 Wai 2180, #A10, at [320], citing Minutes of the Kaimanawa Wild Horse Committee, 13 September 1978, AFIE W5683 6905 190, National Archives, Wellington; Wai 2180, #A49, at 201.

390 Wai 2180, #A10, at [324], citing "Kaimanawa Wild Horse Plan", Department of Conservation, Wanganui, December 1995, p 16.

the central North Island).[391] Despite the active encouragement of public involvement, it appears that no Māori group made a submission to inform the Crown of tangata whenua views. Particularly where the opportunity for input is provided, the Courts have held that tangata whenua groups have a responsibility to ensure that decision makers are appropriately informed of their concerns.[392]

276. Nonetheless, the Crown understands there was consultation with various iwi representatives throughout the draft process, including with Ngāti Tūwharetoa, Ngāti Rangi and Ngāti Tamakōpiri and Ngāti Whitikaupeka. A 1997 letter from the Director-General of DOC to the Director of OTS records as follows:[393]

276.1 A DOC/Tūwharetoa Conservation Committee provided a forum for discussions with Ngāti Tūwharetoa on the management of the horses. The Tongariro/Taupo Regional Conservator briefed the Committee on a number of occasions between 1993-1995, with no concerns being raised at the removal of the horses. The Tūwharetoa Trust Board was also sent copies of both the 1991 draft strategy and the 1995 Draft Plan with an invitation to comment, and no comment was received.[394]

276.2 Ngāti Tūwharetoa kaumātua Darkie Down represented iwi on the Taupo/Tongariro Conservation Board, and he was present at most meetings and on at least two occasions moved or seconded resolutions supporting management or removal of the horses.[395] Tumu Te Heuheu was also present at some meetings of the Board as a further iwi representative, and he expressed no concern at horse removal.[396]

276.3 The Department had some discussion with Ngāti Rangi kaumātua, Mr Mark Gray, about the management of the horse herd, but there

391 Wai 2180, #A38(a), at 4897.

392 *Greenpeace of New Zealand Inc v The Minister of Energy and Resources* [2012] NZHC 1422 at [133]-[136].

393 Wai 2180, #M07(a), BF3.

394 Wai 2180, #M07(a), BF3 at 4.

395 Wai 2180, #M07(a), BF3 at 4.

396 Wai 2180, #M07(a), BF3 at 4–5.

were no formal meetings with Ngāti Rangi other than via the Taupō/Tongariro Conservation Board.[397]

276.4 Staff from the Department had several meetings or discussions with representatives of the Ngāti Tama Whiti[398] owners of the Ōruamatua-Kaimanawa blocks 1U and 1V at Moawhango.[399] In particular, the Department discussed its plans with Tama Wipaki and Graeme Gummer.[400]

277. Bill Fleury, a senior conservation officer at DOC at the time, gave evidence confirming these discussions.[401] At a meeting in Taihape in October 1992, a sub-committee of the Rangitīkei/Hawkes Bay Conservation Board met with a number of owners of land within the wild horse range to discuss modifications of the protected status of the herd. Mr Wipaki spoke in support of the proposal to reduce the area in which the horses were protected and identified it as being important to protect conservation values of the protection area, including the Māori land.[402]

278. At a later meeting in 1995, Mr Fleury gave evidence that Mr Wipaki stated he agreed that the horses must be managed but his preference was that some horses remain on the Ōruamatua-Kaimanawa 1U and 1V blocks.[403] He requested that the 1U and 1V blocks be excluded from proposals to remove all horses from the area, and Mr Batley advised the same for block 1W.[404] These areas were consequently excluded from the plan.[405]

279. Although there was consultation with representatives of the Ngāti Tama Whiti owners of the Ōruamatua-Kaimanawa blocks 1U and 1V, there was no direct approach made to Ngāti Tama Whiti as an iwi. This is outlined in

397 Wai 2180, #M07(a), BF3 at 6.

398 The Crown understands "Ngāti Tama Whiti" is a shorthand term used to describe Ngāti Tamakōpiri and Ngāti Whitikaupeka.

399 Wai 2180, #M07(a), BF3 at 5.

400 Wai 2180, #M70(a), BF3 at 5.

401 Wai 2180, #M07, at [21]–[39].

402 Wai 2180, #M07, at [22].

403 Wai 2180, #M07, at [27]; Wai 2180, #M07(a), at 5.

404 Wai 2180, #M07, at [27].

405 Wai 2180, #M07, at [27]; Wai 2180, #M07(a), at 5.

a letter from the Minister of Conservation to Isaac Hunter following the closing of public submissions on the Plan in 1995.[406]

280. Mr Fleury notes that at this time, DOC viewed the Ngāti Tama Whiti interest in the horses "purely as landowner interests and did not understand the range of views held amongst some Taihape Māori concerning wider customary relationships with the horses."[407] The meetings described above with Tama Wipaki and Graeme Gummer were with Māori landowners as landowners of the blocks horses roamed on, rather than as iwi representatives.[408] Mr Fleury suggests this may be in part due to a lack of a properly mandated authority at iwi level.[409]

281. Shortly after the removal of the protective status for the herd, DOC recommended to the Minister that the management actions described in the plan to reduce the number of horses be implemented by way of shooting horses.[410] This decision led to significant protest and political involvement in the region. A staged protest was held at Waiōuru in 1996, with Taihape Māori at the centre.[411]

282. At around the same time, Mr Hunter filed an application for an urgent hearing before the Waitangi Tribunal on behalf of Ngāti Tama Whiti into the actions of the Crown in lifting the protection zone status (Wai 588). Specifically, the claim sought a recommendation that the removal programme be stayed until after the claim was reported on, on the basis that the removal is inconsistent with the Treaty because it "violates the rights of Ngāti Whiti Tama to exercise rangatiratanga over our ancestral lands and some products of those lands, namely the Kaimanawa Wild Horses".[412]

283. The Tribunal declined the application, noting that the Crown's intention to preserve and protect the wild horses at a sustainable level can be regarded as an exercise of kāwanatanga. Attempts were made by DOC at this stage to consult with Mr Hunter on behalf of Ngāti Tama Whiti, as outlined in the

406 Wai 2180, #A38, at 647.
407 Wai 2180, #M07, at [35].
408 Wai 2180, #M07, at [37].
409 Wai 2180, #M07, at [37].
410 Wai 2180, #M07, at [33].
411 Wai 2180, #G03, at [11]–[22].
412 Wai 2180, #1.1.14.

affidavit of Rangipō Mete Kingi filed by the Crown in response to the 1996 urgency application.[413] Mr Hunter declined to meet with DOC to discuss the concerns he had raised. Mr Fleury notes that he is not certain "about the degree of coherence between the owners of OK [Oruamatua Kaimanawa] 1U and 1V and the Wai 588 claimants."[414]

284. Since the 1990s Taihape Māori have had ongoing opportunities to be involved in the management of Kaimanawa wild horses. The Kaimanawa Wild Horse Advisory Group, established in 1999, includes a seat for the Ōruamatua Kaimanawa Trust, representing Māori landowners. Two representatives of that Trust, Tama Wipaki and John Greenhead, have routinely attended meetings of the Advisory Group.[415] An invitation was also extended to the Wai 588 claimants to participate in the Advisory Group and represent Ngāti Tama Whiti interests, but that invitation was declined.[416]

285. The activity and work of the Advisory Group includes deliberation about muster plans, population counts and reviews of musters; attendance at musters over the last 20 years (in recent years Mr Wipaki and Mr Greenhead have delegated their attendance to Hugh Best); a 2004 review of progress in implementing the 1996 Plan and the creation of an "Operational Plan for Implementation of the Kaimanawa Wild Horses Plan" to guide management of the wild horses through to 2009; and counts of the herd on 1U and 1V when approval has been given by the owners. Today, the Advisory Group focusses largely on the conduct of routine musters, horse re-homing initiatives, sharing of information and identification of options for problem resolution.[417]

286. The Crown agrees with the Tribunal's 1996 finding that the Crown's intention to preserve and protect the wild horses at a sustainable level can be regarded as an exercise of kāwanatanga.[418] The Crown has a duty to

413 Wai 588, #2.5(c).

414 Wai 2180, #M07, at [38].

415 Wai 2180, #M07, at [40].

416 Wai 2180, #M07, at [41].

417 Counsel is instructed that during ANZAC weekend 2021, the group completed another muster of horses with 125 horses mustered and rehomed. Hugh Best and representatives from Ngāti Rangi were in attendance.

418 Wai 588, #2.6, at 3.

govern in the interests of all New Zealanders, and to conserve resources for future generations. This includes preserving the flora of the Waiōuru tussock lands. There is a strong conservation imperative in managing the ecological impact of the horses.

287. Equally, the Crown submits that it has acted reasonably and in good faith in its engagement with Taihape Māori regarding the management of the Kaimanawa horses over time, with consultation with relevant Māori interests taking place as those interests were identified and to the extent participation was taken up. Such discussions informed the Kaimanawa Wild Horses Plan in 1996, with specific requests made complied with (for example, three Ōruamatua-Kaimanawa blocks were excluded from the Plan). Following that, particularly with the establishment of the Kaimanawa Wild Horse Advisory Group in 1999, Taihape Māori have had the opportunity to participate in the management and protection of the Kaimanawa horses, and Ngā Iwi o Mōkai Pātea were consulted in the 2012-2017 Kaimanawa Wild Horses Working Plan.

288. Weighing all the relevant interests, the Crown's view is that the consultation and participation of Taihape Māori in the management of the Kaimanawa wild horses has been reasonable. The Crown acknowledges there was no direct involvement for Taihape Māori in the decision-making process concerning the horses' management until the 1990s. However, no concerns were raised by Taihape Māori before the 1990s, the Crown was not informed of the special status the horses have for Taihape Māori prior to then, and there was no indication that the horses were a taonga species. Given the scope of consultation and participation of Taihape Māori on the horses' management since the 1990s, there has been no breach of Tiriti/Treaty principles.

7 May 2021

R E Ennor / MGA Madden
Counsel for the Crown

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