
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 17: POWER DEVELOPMENT SCHEMES**

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INTRODUCTION

1. Hydro-electric power development schemes have been a part of New Zealand's power generation network since the early 20th century. The Crown and its delegated local authorities have played a major part in constructing and operating many of these schemes, including those located at Taihape and Mangaweka in the first half of the 20th century and the better known Tongariro Power Development (**TPD**) scheme from the 1950s. These schemes have had an impact on a number of rivers in the Taihape inquiry district, in particular the Moawhango and Rangitikei Rivers.
2. The TPD scheme is a hydro-electric power generation scheme primarily located in the adjoining Central North Island and National Park inquiry districts and has been closely assessed in the Waitangi Tribunal's *Te Kāhui Maunga National Park District Inquiry Report*.¹ These submissions do not revisit the scheme as a whole; the Crown's position on those matters was presented in closing submissions to those inquiries.² These submissions instead address only those parts of the TPD within the inquiry district – namely the Moawhango Dam and its effects on the Moawhango River.

CROWN POSITION AND CONCESSIONS

3. The Crown has recognised that the diversion of the headwaters of the Moawhango River for the TPD scheme is considered by iwi and hapū of the Taihape: Rangitikei ki Rangipō inquiry district to be inconsistent with their tikanga.³
4. The Crown acknowledges that Taihape Māori have customary associations and interests in the natural resources used in the construction and operation of the Moawhango Dam. Natural resources such as rivers are encompassed by the Article II guarantee and the associated duty of active protection.
5. The Crown acknowledged in its closing submissions in the National Park inquiry that there were disparities between consultation with Ngāti Tūwharetoa and with Whanganui Māori prior to the establishment of the

¹ Waitangi Tribunal *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1075–1080, at 1135 (Tribunal analysis of impacts) and 1163–1166 (Looking forward).

² Wai 1130, #3.3.45, at 19 and Chapter 12: Tongariro Power Development Issues.

³ Wai 2180, #1.3.2, at [74].

TPD scheme.⁴ The Crown acknowledged its failure to consult Whanganui Māori was in breach of te Tiriti/the Treaty.⁵

6. The same applies for Taihape Māori in that neither Ngāti Whitikaupeka or Ngāti Tamakōpiri were consulted even though the construction and effects of the scheme impacted upon their customary interests. The Tribunal has heard claimants describe a close association between themselves and Ngāti Tūwharetoa in the period during which the scheme was conducted and considers some of the engagement with Ngāti Tūwharetoa was accordingly known to Taihape Māori.⁶ However, the Crown recognises Ngāti Whitikaupeka and Ngāti Tamakōpiri as being distinct from Ngāti Tūwharetoa and accepts that they were not consulted in their own right.
7. The Crown acknowledges that:
 - 7.1 it failed to consult Taihape Māori when it established the TPD scheme; and
 - 7.2 this was inconsistent with the Crown's duty to act in good faith and was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.
8. The construction of the Moawhango dam does not constitute a breach of te Tiriti/the Treaty as it was necessary for the development of critical national infrastructure. The development of such infrastructure necessarily has environmental impacts. The Crown, and later Genesis, have worked with those impacted by the scheme to improve those environmental impacts over time. Most notably, DOC worked with Taihape Māori on successful litigation to increase the waterflow of the Moawhango River.
9. The Crown nonetheless acknowledges that the TPD scheme, including the Moawhango Dam, has made a significant contribution to the New Zealand nation, but that the scheme's benefits have come at a cost to Taihape Māori who have a long-standing customary relationship with the Moawhango River.

⁴ Wai 1130, #3.3.45, Chapter 12 at 3.

⁵ Wai 1130, #3.3.45, at 19; Chapter 12 at 9.

⁶ Wai 2180, #4.1.11, at 628; Wai 2180, #H11, at [18]–[19]; Wai 2180, #E05(c), at [8] and [12].

The construction and operation of the scheme adversely affected Taihape Māori because:

- 9.1 it severely diminished the water flow in the Moawhango River which suffered environmental degradation, including diminished populations and health of native species of flora and fauna; and
 - 9.2 the mixing of the waters of the Moawhango and Whangaehu rivers is considered by Taihape Māori to have affected the mauri of the rivers, which is inconsistent with tikanga and has harmed the cultural and spiritual well-being of Taihape Māori.
10. Submissions on Issue 16 addressing environmental issues are also relevant to these matters.

TONGARIRO POWER DEVELOPMENT SCHEME AND THE EASTERN DIVERSION

Background

11. Investigation of hydro-electric schemes in the central plateau began in the mid- 1940s. Legal authority was granted in 1958 to establish a scheme on the volcanic plateau, to divert water from one catchment into another catchment and to control water flow.⁷ In March 1964, Cabinet gave approval in principle to proceed with the TPD scheme, and in September of 1964 final approval was given.⁸
12. In 1979, the Moawhango river was diverted into the new Moawhango Dam. This part of the TPD scheme was constructed after most of the other major parts affecting the Lake Rotoaira, Tongariro and Whanganui river catchments. The Tribunal's *Te Kāhui Maunga/National Park* report describes the scheme and provides illustrations of its components and operation, including the "Eastern Diversion" that includes the Moawhango dam.⁹ The dam receives water from the Moawhango river headwaters and the Whangaehu headwaters (via the Wāhiaroa aqueduct), water which is then

⁷ Wai 2180, #A04, at 86.

⁸ Wai 2180, #A04, at 87.

⁹ Waitangi Tribunal *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1075–1080, at 1135 (Tribunal analysis of impacts) and 1163–1166 (Looking forward).

discharged through the eastern diversion into the Rangipō dam and Tongariro river.¹⁰

RELEVANT TRIBUNAL FINDINGS AND CLAIMANT SUBMISSIONS

13. The Tribunal in both its *Whanganui* and *Te Kāhui Maunga/National Park* reports, and the Environment Court in 2004, found:¹¹

... the diversion of waters for the TPD was, and is, having “effects on the cultural and spiritual values of Māori” that are both “deleterious” and “considerable”.

14. The Tribunal acknowledged senior court case law on both *kāwanatanga* and *rangatiratanga* and the relationship between them applied to the TPD scheme and found:¹²

The Crown erred in its duty of active protection not because it built the TPD scheme and the scheme impacted on the lands and the waters. The Crown erred because it provided minimal opportunity for mutual cooperation and trust. The waters were important for national electricity needs and the waters were of considerable practical, cultural, and spiritual importance for *ngā iwi o te kāhui maunga*. Consultation and a quest for a mutually satisfactory outcome were imperative if *kāwanatanga* and *rangatiratanga* were both to be recognised.

15. The Tribunal concluded in relation to the construction phase of the project:¹³

The Crown had the opportunity to act as a Treaty partner and to exercise reasonable *kāwanatanga* during the construction phase of the TPD. The opportunities were not taken and, in our view, the Crown’s inaction in this regard breached the principles of partnership and active protection, and *ngā iwi o te kāhui maunga* were prejudiced as a result.

16. The Crown agrees with the Tribunal that it erred in its duty of active protection in these regards.

Claimant submissions on the TPD scheme

17. Submissions on the TPD scheme from the Ngāti Hinemanu Ngāti Paki claimant group describe grievances about the lack of consultation over the scheme and the adverse effects it had on the environment, and identify adverse impacts upon fish life from increased sedimentation and water

¹⁰ Waitangi Tribunal *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1075–1080.

¹¹ Waitangi Tribunal *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1138, quoting Environment Court.

¹² Waitangi Tribunal *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1139.

¹³ Waitangi Tribunal *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1139.

quality, and erosion and exposure of the lakeshore as changes in water flows alter Lake Moawhango's level. They quote from the *Te Kāhui Maunga/National Park* report, which cited with approval the Environment Court's 2004 views (during the Genesis consents appeals) on the "deleterious" and "considerable" effects on the cultural and spiritual values of Māori resulting from the diversion of waters for the TPD scheme.¹⁴

18. Submissions for the Mōkai Pātea claimant group state:¹⁵

(7.29) The construction of the Moawhango Dam as part of the Tongariro Power Development did not include engagement with Mōkai Pātea, and resulted in significant environmental changes to the Moawhango River and tributaries, water quality and fish species.

TPD SCHEME IN TAIHAPE INQUIRY DISTRICT

Consultation

19. There is no evidence of consultation with Taihape Māori specifically prior to the Eastern Diversion and Moawhango Dam construction.
20. There was a series of consultation hui with Ngāti Tūwharetoa – a preliminary hui in 1955 and a series of hui in 1964 after Cabinet had already approved the scheme in principle. The Tūwharetoa Māori Trust Board played a prominent role, but the hui also involved local Ngāti Tūwharetoa landowners on the southern side of the lake (near the area that became modern Tūrangi township).¹⁶
21. There is no record of specific consideration of Māori interests within Mōkai Pātea in relation to the Moawhango river or Moawhango dam, or the effects on the Rangitikei catchment generally.
22. Expert evidence in the Tribunal's National Park and Whanganui inquiries found there was limited consultation with the iwi most affected by the TPD scheme, Ngāti Tūwharetoa, while consultation with other affected iwi was non-existent.¹⁷

¹⁴ Wai 2180, #3.3.71(b), at 216–219.

¹⁵ Wai 2180, #3.3.62, at 34–35 [7.29].

¹⁶ Ngāti Tūwharetoa Deed of Settlement, 2016, at [2.384]–[2.394].

¹⁷ Cited in Wai 2180, #A04, at 87.

23. David Alexander’s evidence in this inquiry has confirmed these findings for Taihape. Mr Alexander concludes that:¹⁸

[The Crown failed to involve Taihape or] Rangitikei River Maori in any shape or form while the TPD was being planned, constructed, and used to generate electricity during the first twenty years of its operation.

24. The Crown has acknowledged in the Ngāti Rangi and Whanganui River settlements that its failure to consult with those iwi concerning the TPD scheme was in breach of its te Tiriti o Waitangi/the Treaty of Waitangi duty of good faith.¹⁹
25. As set out at the beginning of these submissions, the Crown makes the same concession for Taihape Māori.

Environmental impacts of Moawhango Dam

26. After diversion of the Moawhango headwaters into the dam, flows in the Moawhango river below the dam were almost non-existent as water in the dam was diverted by tunnel into the Tongariro catchment.²⁰ This meant that the river was fed only by side streams below the dam.
27. The environmental effects of the TPD scheme on the Moawhango river included:
- 27.1 greatly reduced water levels and water flow on the Moawhango river: mean flow has been reduced by 62% at Moawhango bridge and by 13% at Mangaweka (after the Moawhango joins the Rangitikei river);²¹
- 27.2 adverse effects on water quality, including increased sedimentation and pollutants (due to significantly reduced water flows);²² and

¹⁸ Wai 2180, #A40, at 361.

¹⁹ Section 9(29) of Ngāti Rangi Claims Settlement Act 2019; Section 69(15) of Te Awa Tupua (Whanganui River Claims Settlement Act) 2017.

²⁰ Wai 2180, #A04, at 88.

²¹ Wai 2180, #A04, at 88; detailed analysis at Wai 2180, #A40, at 314, 336–341; the reduction of water flow by two thirds in the Moawhango river has been noted in the Ngāti Rangi Deed of Settlement, at [3.109]. Note: there is a statutory acknowledgment and deed of recognition of Ngāti Rangi’s customary association with “part of the Moawhango river” in the Ngāti Rangi Deed of Settlement, at [9.6], [9.9.3].

²² Wai 2180, #A40, at 341–346.

- 27.3 adverse effects on river fauna, including decline in fisheries stocks.²³
28. On expiry of the original consent for the TPD scheme in 2001, Genesis applied for fresh consents under the Resource Management Act 1991. Genesis engaged with iwi during the application process and this resulted in agreements with Taihape iwi, including Ngāti Whitikaupeka and Ngāti Tamakōpiri.²⁴
29. Mr Kemper gave evidence of DOC working with Taihape Māori in this successful process.²⁵ At the consent hearings, Ngāti Hauiti remained opposed on cultural and spiritual grounds to the transfer of Whangaehu waters into the Moawhango catchment, to any disturbance of flow in the Moawhango river, and to setting a residual flow requirement below Moawhango dam. (Ngāti Rangi had similar concerns.)²⁶ Litigation between the consent authorities (Horizons and Waikato Regional Council) and Ngāti Rangi and Whanganui River iwi – with the support of DOC – resulted eventually in relationship agreements and reinstatement of the originally granted 35-year consent term.²⁷ Working together, the parties were successful in getting some restoration of flows into the Moawhango River.²⁸
30. Since about 2001, Genesis has conducted independent annual environmental investigations into effects on catchments, including the Moawhango river and lake. Agreements between Genesis and iwi, including with Ngāti Whitikaupeka, Ngāti Tamakōpiri and Ngāti Hauiti are ongoing.²⁹ Mr Alexander has presented evidence showing that Genesis has adjusted its operations at various points to address build-up of sediment (by increasing volume and duration of flushing flows).³⁰

²³ Wai 2180, #A40, at 346–349.

²⁴ Wai 2180, #A04, at 89–90.

²⁵ Wai 2180, #M08 at [59].

²⁶ Wai 2180, #A04, at 90.

²⁷ Wai 2180, #A04, at 91; the agreements and hearings process, including Taihape involvement, is narrated in more detail in Wai 2180, #A38, at 123–134.

²⁸ Wai 2180, #M08, at [59].

²⁹ Wai 2180, #A04, at 91–92.

³⁰ Wai 2180, #A40, at 342–343.

31. As set out above, the impacts have also been severe for the Moawhango River, with the low waterflows at times coming close to dewatering a stretch of the river downstream of the dam.

Mixing of the waters

32. Taihape Māori have also expressed opposition to the mixing of waters of the Moawhango and Whangaehu rivers, and of those with the Tongariro catchment. Such mixing “diminishes the mauri and mana of these natural waterways”.³¹ Mr Alexander concludes similarly that these mixings constituted “particularly damaging impacts to the mauri, or life-essence, of the Moawhango River, and represent a damaging hurt caused to the spiritual connection of Rangitikei River Maori”.³²
33. Impacts on the mauri of waters through inter-mixing and other adverse effects on cultural and spiritual values of local iwi and hapū have been acknowledged by the Crown in the Ngāti Tūwharetoa, Ngāti Rangī and Whanganui River settlements.³³ Those impacts are also acknowledged for Taihape Māori.

Analysis and conclusions

34. The Crown agrees with the Tribunal’s finding in *Te Kāhui Maunga/National Park* report that the generation of electricity in the national interest forms part of the Crown’s kāwanatanga role.³⁴ The Crown also acknowledges its exercise of those functions is not unqualified.
35. The TPD scheme is located, and has its primary impacts, in inquiry districts adjoining Taihape. However, the impacts within the rohe of Taihape Māori mean they, too, deserved an opportunity to be heard about their concerns.
36. The Crown accepts the evidence that Taihape Māori were not consulted and that, under the principle of partnership, they should have been, given that the scheme had direct impact within their rohe and on the waters they value. A

³¹ Wai 2180, #A38, at 124–125.

³² Wai 2180, #A40, at 361.

³³ Section 9(33) of Ngāti Tūwharetoa Claims Settlement Act 2018; Section 9(29)-(31) of Ngāti Rangī Claims Settlement Act 2019; Section 69(15)-(16) of Te Awa Tupua (Whanganui River Claims Settlement Act) 2017. See further detail in historical accounts, including Ngāti Tūwharetoa Deed of Settlement, 2016, at [2.452]–[2.454].

³⁴ Waitangi Tribunal *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1139.

concession of Tiriti/Treaty breach is set out at the beginning of these submissions accordingly.

37. As set out above, in *Te Kāhui Maunga/National Park* report, the Tribunal locates the lack of due engagement with Māori as at the heart of the other adverse impacts of the scheme on Māori in those inquiry districts. In the absence of consultation, opportunities to design and construct the scheme that could have arisen through discussions Māori may have been missed.³⁵

Had the Crown shared its intentions, stage by stage, as it embarked on the TPD, it would have opened the door to a result that met the needs of partnership. Information would have been shared, some impacts would have been reduced or eliminated, and responsibility for other impacts would have been shared. Māori are not resistant to initiatives such as the TPD. However, they wish to be consulted in a reasonable and appropriate manner, they wish to be protected from inappropriate impacts, and they wish to share in the fruits of development.

38. Whilst it cannot now be known what may or may not have changed had consultation occurred, the Crown acknowledges the impacts of those parts of the scheme located within the Inquiry district – namely the Moawhango Dam and the effects on the Moawhango River. These acknowledgements are set out at the beginning of these submissions.

7 May 2021



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

³⁵ Waitangi Tribunal *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) vol 3 at 1139.