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 21: WĀHI TAPU

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INTRODUCTION

1. The Crown acknowledges the cultural significance to Taihape Māori of the various wāhi tapu located in this inquiry district, and the important connection with those sites, described in the claimants' generic closing submissions as a relationship "based on whakapapa, tikanga and ancestral relationships".[1]

2. Issues relating to wāhi tapu and, in particular, protection of wāhi tapu have been traversed extensively in previous Tribunal inquiries.[2] The Crown's position on what te Tiriti/the Treaty principles require in terms of protection has been set out in those inquiries.

3. As such, these submissions will briefly summarise the Crown's position on wāhi tapu as expressed in previous district inquiries, and respond to the Tribunal's issue questions with reference to the claimants' closing submissions on this issue and the evidence on the record.

4. The Crown notes protection of wāhi tapu is inherently interlinked with other issues in this inquiry including landlocking, the Native Land laws, Crown purchasing activity, public works acquisitions, environmental management and the Tongariro Power Development Scheme. Submissions about those issues are advanced in the relevant sections of the Crown's closing submissions (Issues 3, 4, 11, 13, 15, 16 and 17).

EVIDENCE

5. The primary technical evidence concerning wāhi tapu on the record of inquiry compromises the following reports:

    5.1 Michael Belgrave et al "Environmental Impacts: Resource Management and Wāhi Tapu and Portable Taonga" (#A10);

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1 Wai 2180, #3.3.42 "Wāhi Tapu Generic Closing Submissions", at [23].

2 Wai 2180, #3.3.42, at 10–17: The claimant generic submissions are premised on Tribunal jurisprudence from 2004 or earlier with the exception of: a finding on partnership from *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015); *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) findings on sovereignty; *The Hauraki Report* (Wai 686, 2006); and 2004 – 2007 commentary on UNDRIP.

5.2 David Alexander "Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s-2010" (#A38);

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

5.4 Robert Joseph and Paul Meredith "Ko Rangitikei Te Awa: The Rangitikei River and its Tributaries Cultural Perspectives Report" (#A44); and

5.5 David Armstrong "The Impact of Environmental Change in the Taihape District, 1840-c1970" (#A45).

6. Tangata whenua evidence addresses specific wāhi tapu sites and is addressed in the submissions below.

7. The Crown did not present evidence on the legislative or systemic aspects of wāhi tapu protection and management. Crown witnesses did present evidence on the protection and management of wāhi tapu through the Department of Conservation and the New Zealand Army.[3]

CLAIMANTS' POSITION

8. The claimant generic closing submissions state:[4]

> The Taihape inquiry boundary contains many wāhi tapu sites. Taihape Māori describe their relationship with wāhi tapu as one based on whakapapa, tikanga and ancestral relationships. They are spiritually vested in the land of the Taihape region, and as such, believe that their relationship with the land is supplementary of the spiritual relationship that they have with their tūpuna.

9. The claimants argue the Crown has acted in breach of its duties of active protection, partnership and good faith recognised in te Tiriti o Waitangi/the Treaty of Waitangi by failing to properly protect, preserve and maintain wāhi tapu sites of significance to Taihape Māori, and protect the right of Taihape Māori to manage, control and exercise proper ownership over their

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3 Wai 2180, #M02 and #M03. The Crown notes that the claimant generic closing submissions have made various statements as to the Crown's position in the Hauraki Inquiry (as recorded in the Tribunal's *Hauraki Report*) which the Crown does not consider are accurate.

4 Wai 2180, #3.3.42, at [23].

cultural taonga.[5] It is also argued that the Crown has failed to recognise Taihape Māori as kaitiaki over their taonga and adequately consult and engage with Taihape Māori on issues affecting their wāhi tapu.[6]

10. The duty to ensure protection of wāhi tapu is said to arises from the Article II promise of te tino rangatiratanga over taonga, which includes wāhi tapu, as well as the Article III guarantee of equal citizenship, which is said to entail the right to protection of personal property.[7]

11. The claimants emphasise the kaitiaki responsibilities of tangata whenua and also the importance of mana and rangatiratanga over taonga,[8] as discussed in the Meredith, Joseph and Gifford Report.[9] That report refers to mechanisms such as rāhui and tapu which tangata whenua used to restrict and control use of wāhi tapu sites under customary law up to, and for some time following, the signing of te Tiriti/the Treaty.[10] Acquisition of land by the Crown and settlers is recognised by the claimants as significantly impeding the ability of Taihape Māori to exercise appropriate kaitiakitanga over their wāhi tapu.[11] In particular, it is argued that the Crown, through land alienation, public works takings and the taking of land for unpaid rates has played an active role in the desecration of wāhi tapu.[12]

12. The submissions advanced in the claimants' generic closing submissions focus largely on the alleged inadequacy of Crown legislation and policy in regard to protection of wāhi tapu sites.[13] This includes the failure of legislation such as the Heritage New Zealand Pouhere Taonga Act 2014 to provide authority and control to Māori over their taonga, which is said to be a breach of the Crown's duty of active protection.[14] Additionally, the failure to give Tiriti/Treaty considerations primacy in decision-making processes such as those under the Resource Management Act 1991 (**RMA**) is argued as a denial of tino rangatiratanga.

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5 Wai 2180, #3.3.42, at [10], [21].
6 Wai 2180, #3.3.42, at [10], [22].
7 Wai 2180, #3.3.42, at [7]–[8].
8 Wai 2180, #3.3.42, at [12]–[20].
9 Wai 2180, #A44.
10 Wai 2180, #3.3.42, at [12]–[14].
11 Wai 2180, #3.3.42, at [10, [24].
12 Wai 2180, #3.3.42, at [27(a)].
13 Wai 2180, #3.3.42, at [25].
14 Wai 2180, #3.3.42, at [17].

13. The claimants' generic closing submissions also appear to demonstrate the failure of the New Zealand courts to properly apply Tiriti/Treaty principles and legislative provisions intended to protect wāhi tapu.[15] Where the claimants' submissions have disputed the decisions of the courts, the Crown submits those matters are outside the scope of Crown actions, policies or practices about which findings can be made by the Waitangi Tribunal. The Tribunal has long recognised decisions of the courts as outside the sphere of influence of the Crown under New Zealand's constitutional arrangements.

CROWN'S POSITION

14. As noted in the Crown's opening submissions, the Crown acknowledges that Article II of te Tiriti/the Treaty requires it to take steps that are reasonable in the prevailing circumstances to actively protect the taonga of Taihape Māori. This requires a careful assessment of what the taonga of Taihape Māori are. The Crown recognises that taonga may include particular wāhi tapu sites. The Crown understands the term wāhi tapu to refer to places of particular spiritual, emotional or historic significance to Māori. The Crown acknowledges that real prejudice has resulted from the desecration, modification, and destruction of wāhi tapu sites.

15. The Crown has sought to meet the duty of active protection over wāhi tapu through a range of legislative measures, which have varied in comprehensiveness over time. The Crown acknowledges that the framework it provides for the protection of wāhi tapu sites to Māori is not perfect and has acknowledged previously,[16] and continues to here, that adequate funding is also an important issue.

16. While the responsibility for any deficiencies in the statutory framework lies with the Crown, in its opening submissions, the Crown set out a number of considerations for determining whether the Crown has fulfilled its Tiriti/Treaty obligations in regard to protection and preservation of taonga, including wāhi tapu sites.[17] These considerations recognise the reality that, regardless of any protective measures the Crown may put in place, it cannot

15 Wai 2180, #3.3.42, at [26], [103]–[116].

16 For example *The Hauraki Report* (Wai 686, 2006) at 950.

17 Wai 2180, #3.3.1 "Opening Comments and Submissions of the Crown", at [407].

guarantee the protection of wāhi tapu sites. They also recognise there are various limitations on the Crown's ability to protect wāhi tapu sites, including identification (for which the Crown is generally reliant on Māori, or members of the public to report when archaeological sites are uncovered) and competing private land interests where wāhi tapu sites are located on private land.

17. Nonetheless, the Crown recognises that (as set out in submissions on Issues 3, 4, 11 and 12) 19th century land legislation, individualisation of title, and Crown purchase activity in the district contributed to Taihape Māori retaining only a fraction of the land they once owned, and with limited access to 70% of the lands they do retain. The loss of land and access has meant, in many cases, a loss of control of wāhi tapu. This has reduced the ability of Taihape Māori to protect and exercise tino rangatiratanga over wāhi tapu sites. Without the direct access and control that land ownership provided (with reasonable access), protection of wāhi tapu relied on legislative protections and on the actions of the Crown directly. Where land remained in Māori ownership, the individualisation of title through the Native Land Court process meant that wāhi tapu sites on those lands became the responsibility of individual owners and whānau.

18. The Crown recognises that Tiriti/Treaty settlements provide a further opportunity (beyond those sitting in existing legislation or through the existing implementation of that legislation by Crown agencies) for improving, on a case-by-case basis, Taihape Māori participation in matters that currently fall under the RMA and protection for specific sites of significance.[18]

19. The Crown's response to issues relating to wāhi tapu, how that has impacted Taihape Māori in the inquiry district, and whether that response has been consistent with te Tiriti/the Treaty and its principles, will be

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18 *The Hauraki Report: Vol III* (Wai 686, 2006) at 955–956 stated "We acknowledge that neither central nor local government has the resources to protect thousands of sites in any one area, especially if on private land, and particularly because many more sites undoubtedly remain to be discovered. We repeat the words of the Report on the Manakau Claim that if specific protection is to be provided, wahi tapu need to be defined as specific sites not general areas… In short, there must be an element of realism and pragmatism to the protection of wahi tapu. Most particularly, we believe that wahi tapu sites that are known to Maori without the need for academic research, are the sites most in need of protection. Such sites provide that vital link with the past and the future that keeps Maori culture vibrant and thriving."

addressed below in relation to the specific questions set out in the Tribunal's Statement of Issues for Issue 21.

ISSUES

Issue 1: How has the Crown provided for the protection of wāhi tapu through its legislation, policies and practices in the Taihape inquiry district? Has this protection been adequate, and has it recognised the tino rangatiratanga of Taihape Māori?

The protection of wāhi tapu through legislation, policies and practices

20. Since the early 20th century, the Crown has provided for the protection of wāhi tapu through its legislation, policies and practices. As the Alexander report states, historically, the protection of wāhi tapu has been "relatively straightforward" where those sites are on land owned by Māori – the Crown largely left Māori to exercise rangatiratanga over such sites, reinforced by the legislative protections that were developed in the 20th century.[19] To the extent that Māori land legislation affected the ability of Māori landowners to access wāhi tapu on Māori land, the Crown's position has been outlined in its submissions on Issue 11. Where a site has passed out of Māori ownership, the Crown's legislative regime for the protection of wāhi tapu has been limited by other considerations, such as identification issues and private landowner interests.

21. The Crown acknowledges that the extensiveness of its legislation, policies and practices has varied over time. During the 19th century, there is little evidence of any legislative protections for wāhi tapu. For example, there is no evidence that Crown officials considered it necessary to ensure that wāhi tapu were reserved from sales.[20] In the early 20th century, prior to the Historic Places Act 1954, the Crown's protection of wāhi tapu and other historic sites existed mostly in relation to urupā, for example:

    21.1 The Criminal Code Act 1893 and its successors criminalise interference with human remains in a grave, punishable by imprisonment.[21]

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19 Wai 2180, #A38, at 150; and Wai 2180, #A45, at 354.

20 Wai 2180, #A45, at 350.

21 Criminal Code Act 1893, s 147; Crimes Act 1908, s 165; and Crimes Act 1961, s 150.

21.2 The Maori Land Administration Act 1900 permitted the Native Land Court to set aside inalienable reserves on Māori-owned land for urupā, and this provision was carried into subsequent Māori land legislation.[22]

21.3 Section 16(11) of the Māori Councils Act 1900 assigned responsibility to Māori councils for the protection and control of urupā, and required councils to fence, regulate and manage burial grounds.

21.4 Section 11 of the Maori Councils Amendment Act 1903 made it an offence for "every person who knowingly and wantonly without due and lawful authority trespasses on or desecrates or interferes in any manner with any Maori grave cemetery, burial-cave, or place of sepulchre".

21.5 Section 274 of the Native Land Act 1931 required the Native Land Court to ensure that urupā were not included in sales.

21.6 Section 472 of the Native Land Act 1932 provided for the revesting of urupā on Crown land in Māori ownership. This was the first such provision relating to urupā located on Crown land. These reserves were absolutely inalienable without the consent of the Governor-General in Council.[23]

21.7 Under section 5 of the Native Purposes Act 1937, an application could be made to the Native Land Court to declare land to be an urupā.

21.8 The Maori Social and Economic Advancement Act 1945 empowered tribal executives to make bylaws protecting Māori burial grounds.[24]

21.9 Section 439 of the Māori Affairs Act 1953 provided for the Governor-General, on the recommendation of the Māori Land

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22 Māori Land Administration Act 1900, s 29(1); Native Land Act 1909, s 232; Native Land Act 1932, s 298; and Wai 2180, #A10, at 182.

23 Wai 2180, #A45, at 256.

24 Wai 2180, #A10, at 183; and Wai 2180, #A45, at 358–359.

> Court, to set apart any Māori freehold land or general land owned by Māori as a Māori reservation for the purposes of, among other things, burial grounds or places of "historical or scenic interest". Under this section, urupā on Māori land could be made inalienable without being publicly identified.[25]

22. Since the mid-20th century, the Crown submits that the legislative frameworks for the protection of wāhi tapu have improved significantly. Examples of legislation that have enhanced the protection of wāhi tapu sites and the ability for Māori to be involved in decision-making processes include the Town and Country Planning Act 1953 and its successors, the Historic Places Act 1954 and its successors, and the Resource Management Act 1991 (**RMA**). These are addressed further below.

23. The Town and Country Planning Act 1953 and the Town and Country Planning Act 1977 required district schemes to provide for the preservation of places of historical and special interest.[26]

Historic Places Act(s) and the Historic Places Trust

24. The Historic Places Act 1954 provided for the protection of historic places. The Act established the Historic Places Trust to develop a public interest in heritage protection, and aimed to identify and keep a permanent record of a wide range of places, including those associated with Māori.[27] The Trust was required to acquire any site it wanted to actively protect, or obtain appropriate agreement from the landowner.[28] A 12 member board was created for the Trust, which included the provision that one member be Māori.[29] In a 1975 amendment to the Act, all archaeological sites, whether registered or not, received a form of protection whereby it was unlawful to

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25 Wai 2180, #A45, at 359. The Armstrong report states that section 439 became the "best known and most preferred mechanism used by Māori throughout New Zealand to protect urupā on Māori-owned land, apparently because it had the advantage of limiting public disclosure of information about the site, apart from a land description in the gazette notice and such other information as was required by the Māori Land Court."

26 Wai 2180, #A38, at 172 (footnote 372).

27 Wai 2180, #A10, at 183.

28 Wai 2180, #A38, at 152.

29 Historic Places Act 1954, s 5(d).

destroy, damage or modify any archaeological site, for which offenders could be fined up to $5,000.[30]

25. The 1954 Act was replaced by the Historic Places Act 1980, which allowed for a greater degree of consultation between Māori iwi authorities and archaeologists.[31] It gave the Trust the power to classify buildings in historic areas and create a register of archaeologically significant sites.[32] The Trust also had the power to declare a place or site a "traditional site", defined as "a place or site that is important by reason of its historical significance or spiritual or emotional associated with the Māori people or to any group or section thereof".[33] The Trust was required to notify the Minister of Māori Affairs of any "traditional sites" as well as the local authority, and the Minister could decide if a site should be declared a Māori reservation.

26. The 1980 Act was replaced by the Historic Places Act 1993 to, among other things, better protect Māori heritage and bring the legislation in line with the RMA. Wāhi tapu was defined in the 1993 Act as "a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense".[34] The register was reformed to include all historic places, historic areas, wāhi tapu and wāhi tapu areas.[35] The 12 member board was now to have 11 members, with at least three being Māori. The 1993 Act also included provision for the established of a Māori Heritage Council.[36] There had been an earlier Māori Buildings Committee and a Māori Advisory Committee, but the new legislation gave greater power to the new Council, including the management of the processes for registering wāhi tapu.

27. The Heritage New Zealand Pouhere Taonga Act 2014, which repeals the Historic Places Act 1993, is the current Act administered by the Ministry for Culture and Heritage relating to the protection of wāhi tapu. The Act promotes "the identification, protection, preservation and conservation of

30 Historic Places Amendment Act 1975.

31 Wai 2180, #A10, at 183.

32 The provision for a register of archaeological sites was first inserted in the Historic Places Act 1954 by the Historic Places Amendment Act 1975, which inserted ss 9F-9N into the 1954 Act.

33 Historic Places Act 1980, s 2.

34 Historic Places Act 1993, s 2.

35 Historic Places Act 1993, ss 22–37.

36 Historic Places Act 1993, ss 84–96.

the historical and cultural heritage of New Zealand."[37] The main features of the Act relating to the protection of wāhi tapu and archaeological sites and the listing of wāhi tapu and wāhi tūpuna under the Act include:

27.1 The Act provides for the Māori Heritage Council, a specialist body, to advise and assist the Board of Heritage New Zealand on issues concerning Māori heritage. Other functions of the Council include developing Māori programmes for the identification and conservation of wāhi tūpuna, wāhi tapu, wāhi tapu areas, and historic places and historic areas of interest to Māori; considering and determining suitable applications to enter wāhi tūpuna, wāhi tapu and wāhi tapu areas on the Rārangi Kōrero/New Zealand Heritage List; proposing historical places and historic areas of interest to Māori to be entered on the Rārangi Kōrero; and developing its own iwi consultative and reporting processes.[38]

27.2 Under the Act, it is unlawful for a person to destroy or modify the whole or any part of an archaeological site without the prior authority of Heritage New Zealand.[39] Such archaeological sites include Māori pā sites and the remains of cultivation areas and gardens.[40]

27.3 Under section 39 of the Act, heritage covenants can be entered into with the owner of any historic place, historic area, wāhi tūpuna, wāhi tapu or wāhi tapu area to provide for the protection, conservation and maintenance of the place or area. They require owner consent and are usually registered on the legal title to land.

27.4 The Act provides for consultation with Māori in a number of ways, including: consultation requirements in relation to the Rārangi Kōrero process; consultation requirements for Heritage

37 Heritage New Zealand Pouhere Taonga Act 2014, s 3.

38 Heritage New Zealand Pouhere Taonga Act 2014, s 27.

39 Except in the case of an authority application for an activity which will have no more than minor effects, an application must include an assessment of the archaeological, Māori and other relevant values of the sites and of the effect of the proposed activity on those values. The application must also include a statement as to whether consultation, including with tangata whenua, has occurred, and if not, why not. There are significant penalties for modifying or destroying an archaeological site without authority: see Heritage New Zealand Pouhere Taonga Act 2014, ss 46(2)(g), 36(h) and 87.

40 Heritage New Zealand Pouhere Taonga Act 2014, s 42.

New Zealand regarding statements of general policy that must be adopted within 18 months of the Act;[41] and requiring all applications for authorities in relation to archaeological sites to include a statement as to whether consultation with tangata whenua has taken place and the reasons why if it has not occurred.[42]

RMA

28. The Heritage New Zealand Pouhere Taonga Act 2014 and the RMA should be seen "as part of an integrated system" after a wāhi tapu or wāhi tūpuna has been identified.[43] For example, when preparing or changing a regional policy statement or plan, a regional council must have regard to any relevant entry on the Rārangi Kōrero/New Zealand Heritage List.[44] A territorial authority, when preparing or changing a district plan, must also have regard to any relevant entry.[45] Additionally, the protection of historic heritage from inappropriate subdivision, use, and development is a matter which decision-makers are required to recognise and provide for under the RMA.[46] "Historic heritage" includes wāhi tapu.[47]

29. Under the RMA, Māori are involved in the management of natural and physical resources in two broad ways.

    29.1 As outlined in the Crown's submissions on Issue 16, Part A, decision-makers are required to recognise and provide for certain matters of national importance (section 6), and are also required to have particular regard to a number of other factors when exercising powers or functions (section 7). The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga is a matter of national importance (section 6(e)). Decision-makers are also required to have particular regard to kaitiakitanga (section 7(a)) and to take

41 Heritage New Zealand Pouhere Taonga Act 2014, ss 16 and 17.
42 Heritage New Zealand Pouhere Taonga Act 2014, s 46(2)(h).
43 Wai 898, #T08, at [61].
44 Resource Management Act 1991, ss 61 and 66.
45 Resource Management Act 1991, ss 61 and 74.
46 Resource Management Act 1991, s 6(f).
47 Resource Management Act 1991, s 2.

into account the principles of te Tiriti o Waitangi/the Treaty of Waitangi (section 8).

29.2 The RMA contains provisions specific to consultation with Māori, including specific consultation requirements for regional and district plans,[48] and provision for the development of resource management plans by iwi to influence local authorities when developing regional and district plans.[49]

30. The Crown submits that the combination of these provisions gives significant protection to Māori interests:

30.1 Sections 6 and 7 indicate the interests that must be balanced in the context of the RMA. In practice, many of the matters of national importance listed in section 6 are likely to be compatible and complementary to section 6(e). For example, the protection of historic heritage (the definition of which includes sites of significance to Māori) from inappropriate subdivision, use and development (section 6(f)). Other provisions relevant to Māori interests inform decision-makers when considering ss 6-8 in their decision-making process.

30.2 There is also substantial scope for practical Māori involvement. The range of consultative provisions has already been referred to in these submissions. Additionally, the RMA provides for local authorities to delegate or share some functions and powers with other authorities, including iwi authorities.[50]

31. Particularly in relation to wāhi tapu, the claimants accept that the RMA allows Māori to interpret the significance of wāhi tapu and the importance of the environment within their rohe according to Māori cultural values.[51]

32. As the Tribunal will be aware, the RMA is currently undergoing reform. As outlined in the Crown's submissions in Issue 16, Part A,[52] recommendations

48 Resource Management Act 1991, sch 1(3)(1)(d).

49 Resource Management Act 1991, s 66(2A)(a) and s 74(2A).

50 Resource Management Act 1991, ss 33, 36B and 188. See also the Crown's submissions on these provisions in Issue 16, Part A.

51 Wai 2180, #3.3.42 "Wāhi Tapu Generic Closing Submissions", at [164]; and Resource Management Act 1991, s 5.

have been made for the reform by an independent Resource Management Review Panel led by Hon Tony Randerson QC. These recommendations included that mana whenua should participate in decision-making for the proposed regional spatial strategies and in the making of combined plans at local government level; the current mana Whakahono ā Rohe provisions should be enhanced; and a National Māori Advisory Board should be created. Cabinet has agreed that the Panel recommendations relating to Māori involvement are "in the right direction".[53]

33. 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 Treaty of 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.[54]

Te Ture Whenua Māori Act 1993

34. Under Te Ture Whenua Māori Act, section 338 provides that the Māori Land Court may make an order to set apart as Māori reservation any Māori freehold land or any General land "that is a wāhi tapu, being a place of special significance according to tikanga Māori." Section 339 provides that, on the application of the Minister for Māori Affairs, the Court may consider a proposal that any Māori or Crown land "should, by reason of its historical significance or spiritual or emotional association with the Maori people… be set aside as a Maori reservation." With respect to privately-owned land, the Māori Land Court can recommend its acquisition by the Crown for the purpose of making it a reservation.[55]

Te Puni Kōkiri – Sites of Significance process

35. The Crown accepts responsibility to protect wāhi tapu and other sites of historical, spiritual and cultural significance to Māori on surplus Crown land. A mechanism that protects Crown-owned land of particular

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52 At [72]–[75].

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

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

55 Te Ture Whenua Māori Act 1993, s 339.

significance to Māori is the "Sites of Significance" process.[56] This is administered by Te Puni Kōkiri (the Ministry of Māori Development) and is open to any Māori who can prove an association with the site, irrespective of whether or not they have a Tiriti o Waitangi/Treaty of Waitangi claim. The aim of the process is to obtain protection for sites that meet "significance" criteria using existing statutory and administrative provisions before land is transferred out of Crown ownership.[57]

Application of the legislative framework in the inquiry district

36. Section 232 of the Native Land Act 1909 and section 298 of the Native Land Act 1932, both of which permitted the Native Land Court to set aside inalienable reserves on Māori owned land for urupā, have been used in the Taihape inquiry district.

37. The Awarua 3D315 bock was created in June 1898. In 1928 an application was made to the Native Land Court to declare Awarua 3D315 a native reservation under section 232 of the Native Land Act 1909. A church and carved whare, the Tumakaurangi whare at Opaea, associated with Ngāti Tamakōpiri and Ngāti Whitikaupeka, were located on the block. The Court recommended that the land be set apart and reserved for the common use of the owners as a meeting place and church site. The land was deemed to be the "communal property" of the iwi under s 9 of the Native Land Amendment Act 1912 and was gazetted as a reservation in February 1929.[58]

38. In April 1936, an application was made to the Native Land Court at Taihape to have a 2 acre urupā, located in the centre of the 8-acre Awarua 2C13J7 block, declared a native reservation (with a right of way from the main road giving access to the urupā) under s 298 of the Native Land Act 1932. Hiraka Pine, one of the 14 owners of the block, told the Court that the urupā belong to Ngāti Whiti and members of the iwi were still being buried there. All of Ngāti Whiti were said to have had agreed to the application, and the Court duly recommended a reservation. The evidence does not reveal when the urupā reserve was finally gazetted, but it appears that it was.[59]

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56 Office of Treaty Settlements "Protection of Māori Interests in Surplus Crown-Owned Land" (June 2006).

57 Office of Treaty Settlements "Protection of Māori Interests in Surplus Crown-Owned Land" (June 2006).

58 Wai 2180, #A45, at 357; and Wai 2180, #J15, at 3.

59 Wai 2180, #A45, at 357.

39. Similar applications were made in 1937 in respect of part of the Awarua 4C15F1A2A block, which contained a meeting house and urupā, and in 1949 in respect of the Awarua 2C13L block, which contained an old pā and marae. In respect of the Awarua 4C15F1A2A block, the Court recommended a reservation, and the land was reserved under section 5 of the Native Purposes Act 1937.[60] In respect of the Awarua 2C13L block, it was reserved and vested in trustees under s 5 of the 1937 Act as a marae and meeting place.[61]

40. The Historic Places legislation was also applied in the inquiry district in the 1970s to protect wāhi tapu. The Rangitīkei County Council identified 17 Māori historical sites in the 1970s, which were recorded in the Historic Places Trust Rangitīkei County inventory.[62] The Alexander report details that seven of the sites on the inventory were located at the confluence of the Rangitīkei and Kawhātau Rivers and two were gunfighter pā (the Waiū Pā on the Waiōuru Army Training Area land and another on the Napier-Taihape Road).[63] As noted, these sites were recorded on the inventory of archaeological sites, rather than the register of important sites. None of the 30 traditional sites that were registered by the Trust under the Historic Places Act 1980 were within the Taihape inquiry district.

41. The Crown recognises that there are likely to have been other historic and wāhi tapu sites not recorded in the Rangitīkei County inventory at this time that the local authorities were unaware of. Where there may be gaps in the Historic Places Trust's contribution to the identification and protection of wāhi tapu at this time, the District Planning Scheme Review, under the Town and Country Planning Acts, also provided protection of historic places and wāhi tapu in the inquiry district.[64]

42. During the 1950s, the Rangitīkei County Council and its planning consultants undertook an assessment and compiled a Register of Objects and Places of Historic or Scientific Interest or Natural Beauty. Mr Tony

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60 Wai 2180, #A45, at 357.

61 Wai 2180, #A45, at 358.

62 Wai 2180, #A38, at 159; 172 (footnote 372). From 1980, the Historic Places Trust had both an inventory of all archaeological sites and a register of important sites (now called the Heritage List). These 17 sites were recorded on the former.

63 Wai 2180, #A38, at 159.

64 Wai 2180, #A38, at 171.

Batley supplied "virtually all" the information about sites within the Taihape inquiry district.[65] The Register contained 18 places of particular Māori interest within the Taihape inquiry district.[66] Discussions with Dr Soutar in Hearing Week 12 noted the sensitivity of the balance between protecting the tapu of a site by not disclosing its location, and the difficulty of any public body protecting sites that they don't know exist. *The Hauraki Report* also acknowledged this tension and noted the difficulties for the Crown in protecting sites it does not know about.[67] The Crown recognises that where relationships of trust are built measures may be developed to protect sites whilst also honouring the privacy of sites and obligations of tikanga attaching to the site.

43. Under the District Planning Scheme Review, sites included in the register could not be altered or otherwise damaged without an approval from the Council for cancellation or modification of the registration.[68] In giving approval to any such application, the Council was required to have regard to the classification of the site, and invite experts and the owner or occupier of the land to advance their views on the matter.[69] The Alexander report highlights that the registration of sites had important consequences. For example, "[t]he registration of Te Papa a Tarinuku river narrows as a historic place was a significant factor during consideration of the town and country planning application for logging on Awarua 1DB2 being declined in 1990".[70]

44. More recently, protection has been provided to five Māori sites in the inquiry district through registration on the Historic Places Trust national register under the Historic Places Act 1993. The five sites were identified as part of the Central Region Registration Pilot Project that took place from 2003 to 2006.[71] The purpose of the project, run by the Historic Places Trust, was to "improve the quality of the Register and the extent to which it is comprehensive, representative and accessible… by compiling an

65 Wai 2180, #A38, at 172.

66 Wai 2180, #A38, at 173–176.

67 Waitangi Tribunal *The Hauraki Report*, Part III (Wai 686, 2006) at 955.

68 Wai 2180, #A38, at 176.

69 Wai 2180, #A38, at 176–177.

70 Wai 2180, #A38, at 177.

71 Wai 2180, #A38, at 163.

inventory of heritage places to be investigated for registration purposes based on a thematic approach in a defined geographical area".[72] The Rangitīkei and Ruapehu district were chosen for the Trust's inquiries due to the lack of registered sites from those areas.[73]

45. As a result of the pilot project, the Alexander report provides that, as at January 2015, the following five sites were registered under the Historic Places Act 1993:[74]

45.1 Two historic place category 1 sites (for "places of special or outstanding historical or cultural heritage significance or value"). These are identified as "McManaway's Pataka and Waka, Rata" and "Waiu Pa, Waiouru".

45.2 Two historic place category 2 sites (for "places of historical or cultural heritage significance or value"). These are identified as "Te Aputa Pa, Upper Kawhatu" and "Okahupokia Pa, Otara".

45.3 One wāhi tapu site, identified as "Korihirau Pa and Omanono Pa, Otara".

46. The five sites are now listed on the Rārangi Kōrero/Heritage List under the Heritage New Zealand Pouhere Taonga Act 2014.[75] There also appears to be a sixth site on the Rārangi Kōrero that the Alexander report does not mention – the Whitikaupeka Church in Moawhango. This is listed as a Category 2 Historic Place. According to Heritage New Zealand, "local hapū Ngāti Whiti built Whitikaupeka Church between 1903 and 1905, to fulfil the dying request of important Rangatira Ihakata te Rao (1814-1902). The church also commemorates other tribal elders".[76] Whitikaupeka Church was included on the Rārangi Kōrero in February 2014.

47. The district plans of the two local authorities in the Taihape inquiry district, the Rangitīkei District Council and the Manawatū District Council, also provide a further layer of protection for wāhi tapu. As outlined, matters of

72 Wai 2180, #A38, at 163.

73 Wai 2180, #A38, at 163.

74 Wai 2180, #A38, at 162.

75 Wai 2180, #A38, at 161.

76 Whitikaupeka Church, 24 Wherewhere Road, Moawhango, <www.heritage.org.nz/the-list/details/948>

national importance, including wāhi tapu, must be recognised and provided for in regional and district planning documents and their administration. The Rangitīkei District Council District Plan and the Manawatū District Council District Plan both arrange their heritage protection around a list or schedule of heritage sites, similar to the approach adopted under the Town and Country Planning Act. The Rangitīkei District Council's District Plan provides for the recognition and provision for the relationship of tangata whenua with their wāhi tapu through a range of policies, outlined in the Alexander report, with similar provisions in place in the Manawatū District Council's District Plan.[77]

48. The evidence also suggests that direct iwi engagement with the Regional Council has resulted in further protections for wāhi tapu in the inquiry district. For example, Armstrong reported that Ngāti Hauiti have recently engaged with Horizons Regional Council to protect a pā site overlooking the Rangitīkei River.[78] The Council provided some sponsorship for fencing the Māori-owned land, which contains earthworks and terracing. Armstrong reports that this site might be Te Hue Pā and the associated kāinga kai īnanga, which are located near the junction of the Rangitīkei and Hautapu Rivers near Ūtiku Township, famous because of a battle fought there involving Ngāti Apa, Ngāti Hauiti, Ngāti Haukaha, Ngāti Whiti, Ngāti Hinemanu and Ngai Te Ohuake.[79]

Adequacy of legislative measures

49. As outlined in the Crown's submissions for previous district inquiries,[80] the Crown's obligations under its duty of active protection extend only to taking steps that are reasonable in the prevailing circumstances. As such, the reasonableness of any legislative measure would have to be considered on a case-by-case basis, having particular regard to the circumstances surrounding its enactment.

50. Further, while it is evident that over time the Crown has undertaken a number of initiatives to protect and preserve the wāhi tapu of Taihape Māori, the Crown notes that it cannot guarantee the success of such

77 Wai 2180, #A38, at 179–182.

78 Wai 2180, #A49, at 248.

79 Wai 2180, #A49, at 248.

80 See for example "Closing Submissions of the Crown on Social and Cultural Issues" in Wai 898, #3.4.286.

initiatives, or that the wāhi tapu of Taihape Māori will not be lost or disturbed. Such provisions can only go so far to prevent interference with wāhi tapu, and legislation is only part of the solution.

51. As noted previously, a number of other groups have a role to play in ensuring the protection of wāhi tapu. In practice, Heritage New Zealand must rely on iwi/hapū, local authorities, and the general public to identify wāhi tapu and also to report disturbances at sites as it cannot practicably police all wāhi tapu and other archaeological sites across New Zealand. Whether the location of the wāhi tapu has been revealed to, or is known by, the Crown is a factor to consider in assessing whether the Crown has fulfilled its Tiriti/Treaty obligations to protect wāhi tapu.

52. The claimants' generic closing submissions provide some examples of "known wāhi tapu site desecrations"[81] from the Taihape inquiry district, which, the claimants submit, indicate that the Crown's legislative regime failed to protect wāhi tapu and/or recognise the tino rangatiratanga of Taihape Māori. In the claimants' submissions, these include:

52.1 Te Awarua[82] – at an old kāinga on the eastern bank of the Rangitīkei River, a settler established a "run" in the vicinity of the old Te Awarua pā. When he began cultivating land on the river flats, a significant number of kōiwi and artefacts were uncovered. It is unclear how the settler came into possession of land that contained a wāhi tapu, and knowledge of its existence seems to have been lost from living memory.

52.2 Pokopoko Creek[83] – an urupā near the old pā on the Pokopoko Creek contained the remains of about 12 people. It was readily identifiable because it was surrounded by a paling fence. Around 1945, a "delegation" of elders heard that third parties intended to desecrate the wāhi tapu (open the graves in search of greenstone and other valuable Māori artefacts), and so they removed and burned the palings surrounding the burial grounds so the grounds could not be identified.

81 Wai 2180, #3.3.42 "Wāhi Tapu Generic Closing Submissions", at [118].

82 Wai 2180, #B1(d); and Wai 2180, #A045, at 351.

83 Wai 2180, #A45, at 351.

52.3 Waiū Pā[84] – when the land was acquired by Forest Farm Products Ltd, the wāhi tapu was not identified or excluded from the alienation. The land was then taken under the Public Works Act 1928 for Defence purposes in 1939 and became part of the Army Training Area. Mr Cleaver's evidence is that at no point does there appear to be an acknowledgement that the Public Works Act taking contained a wāhi tapu and the site deteriorated as part of the Army Training Area. It was recorded as an archaeological site in 1959 and registered under the Historic Places Act in 2006. This site was visited by the Tribunal and claimants during Hearing Week 9. Further evidence regarding it is set out below.

53. The Crown recognises that, in some instances, its relationships with tangata whenua are still developing, which has meant that protection of Māori tino rangatiratanga in respect of wāhi tapu located on Crown land has not been provided for in a manner now regarded as important and necessary.

54. An example of this is the Waiōuru Military Training Area. Che Wilson, from Ngāti Rangi, gave evidence that the area to the north of Waiōuru was traditionally known as Te Onetapu, and the Waiōuru Military Training Area is the site of a number of significant wāhi tapu, kāinga, and other important sites.[85] Mr Wilson says "many of these wāhi tapu are located on sites which are now used for bombing and other training activities, and are subject to ongoing desecration."[86]

55. Major Patrick Hibbs, from the New Zealand Defence Force, gave evidence that throughout the 1980s and 1990s, the Army made efforts to identify iwi who had mana over the area in order to, among other things, provide practical protection for wāhi tapu on Defence lands at Waiōuru.[87] Initially, Defence understood that the Waiōuru lands were "under the mana" of Ngāti Tūwharetoa.[88] That understanding has changed in the decades since "with Ngāti Tamakōpiri and Ngāti Whitikaupeka recovering earlier

84 Wai 2180, #A45, at 352–353.

85 Wai 2180, #J18, at [95]. See also Wai 2180, #J1, at [32]; and Wai 2180, #K13, at [37].

86 Wai 2180, #J18, at [95].

87 Wai 2180, #M02, at [34]–[37].

88 Wai 2180, #M02, at [34].

knowledge and through working with Ngāti Rangi."[89] As a result of these developing relationships, Taihape Māori with customary interests in Defence lands have at times had a limited ability to exercise tino rangatiratanga over wāhi tapu situated there.

56. More recently, the New Zealand Defence Force have taken further steps towards recognising Māori tino rangatiratanga over wāhi tapu on Defence lands, and this has become apparent in its policies and practices. Gary Pennefather, from the New Zealand Defence Force, gave evidence that during the development of a new Moving Target Range in the northern sector of the Training Area, Ngāti Tamakōpiri and Ngāti Whitikaupeka raised concerns that there were a number of "sites of significance" to iwi in the area.[90] Tauhuia Environmental Services, on behalf of Ngāti Tamakōpiri, asked that the Army conduct an archaeological survey of the site of Ngaumu Kakapo, although the site was beyond the zone of physical works for the new range. In response, the Army commissioned an archaeological survey of the Ngaumu Kakapo site before undertaking any work on the new Moving Target Range. Archaeology North Ltd undertook the archaeological assessment and carried out a ground survey. No archaeological remains were located during the assessment.[91]

57. Mr Wilson too says that Ngāti Rangi have, in recent years, "begun work with the New Zealand Defence Force to attempt to address [the protection of wāhi tapu] for the future."[92] Major Hibbs gave evidence that in order to establish better connections between the Army and tangata whenua, Ngāti Rangi initiated the establishment of the Ruapehu Whanau Transformation Plan in 2013. The focus is on the economic, social, health, education and spirit of the communities of Waiōuru, Ohakune and Raetihi. Major Hibbs gave evidence that its establishment has led to a "marked improvement" in communication and contact between the three communities:[93]

> During the recent negotiations for the Ngāti Rangi settlement the fact we knew and understood one another made for rapid progress and practical protection for their wishes in relation to wāhi tapu… As a

89 Wai 2180, #M02, at [34].

90 Wai 2180, #M03, at [63.8].

91 Wai 2180, #M03, at [63.8].

92 Wai 2180, #J18, at [95].

93 Wai 2180, #M02, at [37], [46].

> result, I believe during these discussions we moved very quickly to reach solutions and processes to ensure access and protection for mana whenua to wāhi tapu.
>
> …
>
> A practical demonstration of the progress made is the discussions that the Army had with Ngāti Rangi in relation to wāhi tapu. Once sites are identified it is a relatively simple task to have them identified in the WMTA [Waiōuru Military Training Area] Standing Orders. Acknowledgement of their significance and restrictions on access, if appropriate, are included and are read by all who use the relevant zones.

58. In Ngāti Rangi's Deed of Settlement, mentioned above, Auahitotara Pā was acknowledged as a wāhi tapu site in the Defence lands, and is to be protected through a Range Standing Order.[94] That includes a prohibition on live firing and vehicle movement within 500 metres of the protected site.[95] This is an example of Crown policy specifically relating to wāhi tapu in the Taihape inquiry district.

59. The Crown recognises that the protective provisions relating to wāhi tapu prior to the enactment of the Historic Places Act 1954 are not as comprehensive as might now be regarded as necessary. This has meant that some wāhi tapu sites have been damaged, despite the Crown's protective regime, such as those identified in the claimants' submissions at Te Awarua and Pokopoko Creek.

60. The Crown recognises that Ngāti Hinemanu and Ngāti Paki have customary interests in Te Awarua and Pokopoko. Lewis Winiata describes Te Awarua, specifically Te Koutu, as the place Winiata te Whaaro was born and where his mother Kinokino was buried,[96] and it appears there were numerous kāinga, pā, wāhi tapu, māra, fisheries, bird-catching places, caves, and other sites of significance on Te Awarua.[97] The arrest and eviction of Winiata Te Whaaro and the destruction of Pokopoko, and the extent to which it resulted in the damage or loss of wāhi tapu, taonga and property, is set out in the Crown's submissions on Issue 6.

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94 Wai 2180, #M03, at [61].

95 Wai 2180, #M03, at [59].

96 Wai 2180, #B01(d), at 3.

97 Wai 2180, #B01(d), at 2–6; and Wai 2180, #A52, at 279.

61. As outlined above, despite the Crown's attempts to provide a regime that protects wāhi tapu and provides for Māori tino rangatiratanga over such sites, the Crown cannot guarantee that the wāhi tapu of Taihape Māori will not be lost or disturbed. This is despite legislation being enacted from the beginning of the 20th century that explicitly prohibits the desecration of urupā such as those at Te Awarua and Pokopoko Creek. As outlined above at [51], legislation is only part of the solution.

62. The claimants' final example of their concerns to protect and provide for tino rangatiratanga over wāhi tapu is the Waiū Pā. The Waiū Pā was constructed by Ngāti Tama and Ngāti Whiti in early 1880 in connection with a dispute over Rangipō Waiū lands involving Ngāti Rangi.[98] It has been described as "well rifle pitted".[99] Not far from Waiū Pā, Ngāti Rangi built their own fortified pā. Ultimately, the parties arranged a peace between themselves and Waiū Pā was described in a 1894 *Christchurch Press* article as "a long deserted fighting pa, the last of its kind almost, with the stockade still standing old and lonely on the wild and green hills."[100]

63. Nearly 50 years later, the land on which the Pā stands was taken under the Public Works legislation for Defence purposes in 1939 and became part of the Army Training Area.[101] The Crown's position in relation to takings under the Public Works Act 1864 and its successors has been outlined in its submissions on Issues 13 and 15.

64. In this instance, as the claimants submit, there is no evidence indicating that there was any knowledge on the part of the Crown at this time that the land taken for the Waiōuru Army Training Area contained a wāhi tapu site. There is no evidence tangata whenua raised the existence of the Pā with Defence or any other Crown agency. The Armstrong report details that since its acquisition as Defence land, the Pā was first observed by archaeologists from the air in June 1954 and was eventually located on the ground through extensive searches.[102] It was recorded as an archaeological site by R A L Batley in November 1959, and "at some point" was included

98 Wai 2180, #A45, at 352.

99 Wai 2180, #A45, at 352.

100 Wai 2180, #A45, at 352.

101 Wai 2180, #A45, at 353.

102 Wai 2180, #A45, at 353.

in the Rangitīkei Council District Plan for preservation as a site of historical and archaeological interest.[103] This lack of identification – partly due to the difficulties with disclosing specific wāhi tapu sites and partly due to the lack of a constant relationship between the Crown and tangata whenua in the area – no doubt limited the ability of tangata whenua to effectively exercise tino rangatiratanga over their wāhi tapu at this time.

65. Since then, perhaps due to the stronger relationships developed between Defence and tangata whenua outlined by Major Hibbs above, a comprehensive site survey was carried out in 1995 by archaeologists that made suggestions for the better management and protection of Waiū Pā. It was registered by the Historic Places Trust in March 2006 and assigned "Category 1" status rating.

66. Since 2009, the New Zealand Defence Force maintains a "heritage management policy" for historically significant sites within the Waiōuru Army Training Area, including wāhi tapu.[104] Mr Pennefather gave evidence that two sites, Waiū Pā and Palisade Pā, have been recognised under the policy.[105] They are now protected through the development of a Heritage Management Plan together with Range Standing Orders.[106] As noted above, Auahitotara Pā has also recently been identified as wāhi tapu.[107] The Management Plans provide direction for the ongoing management of the sites, and the Range Standing Orders prohibit live firing and vehicle movement within 500 metres of protected sites.[108] Fencing was also installed around both the Waiū Pā and Palisade Pā in 2018.[109]

67. As above, a site visit to Waiū Pā was undertaken during the inquiry. Tangata whenua gave oral evidence on the site, as did Major Pat Hibbs. Major Hibbs outlined the work that had been undertaken to protect the site. This included physical measures at the site (signage, fencing) and as mentioned above, incorporation into Range Standing Orders (which sets

103 Wai 2180, #A45, at 353.
104 Wai 2180, #M03, at [59].
105 Wai 2180, #M03, at [59].
106 Wai 2180, #M03, at [59].
107 Wai 2180, #M03, at [61].
108 Wai 2180, #M03, at [59].
109 Wai 2180, #M03, at [59].

out some relevant knowledge about the site and standards for protecting it, including prohibiting military activities that would adversely affect it).[110]

68. The Crown has, in good faith, undertaken a number of initiatives to protect and preserve the wāhi tapu of Taihape Māori. The Crown submits that these provisions have been adequate in protecting wāhi tapu and recognising the tino rangatiratanga of Taihape Māori to the extent that is reasonable in the prevailing circumstances, including the difficulties around the identification of such sites. While legislation prior to the Historic Places Act 1954 focused largely on the protection of urupā, since 1954 the evidence outlined above indicates that the range of protective legislative measures in place has had some degree of success – although the Crown recognises there remains more to be done.

Issue 2: To what extent has the Crown consulted Taihape Māori on decisions regarding wāhi tapu, and taken into account any concerns raised by Taihape Māori?

69. The Crown recognises that the protective regime for wāhi tapu prior to the Historic Places Act 1954 did not generally require consultation with Māori in a manner now regarded as important and necessary. For example, when the Crown purchased land from Māori in the 19th century, it understood in accordance with English law that it had acquired all the rights associated with that land. The Crown did not consider that it had to consult with the sellers of Māori land (or any wider iwi or hapū groupings of local Māori) about how any physical features or cultural associations such as wāhi tapu should be dealt with.[111]

70. Where land has passed into non-Māori private property, the Crown has had to balance those private property rights with the protection of Māori heritage features, including wāhi tapu. The Crown has adjusted this balancing exercise as appropriate and necessary over time, amending and improving policies in response to changes in Crown knowledge and views of the community.

71. Over time, both Māori and non-Māori have expressed concerns regarding the effectiveness of legislative provisions for the protection of wāhi tapu.

110 Wai 2180, #M02, at [34].

111 Wai 2180, #A38, at 151.

The Crown has responded to concerns about the sale and desecration of wāhi tapu through the series of legislative enactments outlined above at [22], commencing in the early 1900s:

71.1 Section 29(1) of the Maori Land Administration Act 1900, which made provision for the creation of inalienable urupā reserves.

71.2 The Maori Councils Act 1900, which assigned responsibility to Māori Councils for the protection and control of burial grounds.

71.3 The Maori Councils Amendment Act 1903, which made it an offence to desecrate or otherwise interfere with any Māori grave.

71.4 Section 232 of the Native Land Act 1909, which provided for the inalienable reservation of Māori land owned by more than ten owners for their common use as, among other things, 'a burial ground' or 'a place of historical or scenic interest'.

71.5 Section 274 of the Native Land Act 1931, which required the Native Land Court to ensure that urupā were not included in sales. Section 472 of the Native Land Act 1931, which provided for the re-vesting of burial grounds on Crown land in Māori ownership. These reserves were absolutely inalienable without the consent of the Governor-General in Council.

71.6 Section 5 of the Native Purposes Act 1937, under which an application could be made to the Native Land Court to declare land to be a burial ground.

71.7 Section 439 of the Maori Affairs Act 1953, which provided for the Governor-General, on the recommendation of the Māori Land Court, to set apart any Māori freehold land or general land owned by Māori as a Māori reservation for the purposes of, among other things, burial rounds or places of 'historical or scenic interest'.

71.8 Historic Places Act 1954, which constituted the National Historic Places Trust.

72. The consultative requirements in more recent statutes such as the Conservation Act 1987 and the RMA have been outlined in the Crown's submissions in Issue 16, Part A.[112] In particular, those submissions discuss in detail:

72.1 The Ngā Whenua Rāhui Committee and kawenata – which protect Māori tino rangatiratanga in preserving and protecting, among other things, the spiritual and cultural values that Māori associate with the land.[113]

72.2 The various ways in which Māori can participate in the resource management process through:

72.2.1 consultation in planning processes;

72.2.2 consultation on resource consent applications;

72.2.3 advisory committees and national parks and reserve boards; and

72.2.4 local government committees established in the Taihape inquiry district such as Te Rōpū Āwhina, Te Rōpū Ahi Kā, and Ngā Pae o Rangitīkei.[114]

73. In the inquiry district, the Historic Places Trust undertook substantial consultation with Taihape Māori as part of its 2003 to 2006 Central Region Registration Pilot Project, outlined above. In particular:

73.1 In the initial stages of the project (July 2003), the Trust contacted Māori rūnanga about the project. Both Ngāti Apa and Ngāti Hauiti responded.[115]

73.2 The Trust reached a draft memorandum of understanding with Te Rūnanga o Ngāti Apa regarding the pilot project. However, the iwi

112 Crown's Issue 16, Part A submissions.

113 Crown's Issue 16, Part A submissions at [127]–[130].

114 Crown's Issue 16, Part A submissions at [88]–[146].

115 Wai 2180, #A30, at 164.

needed to pull out after a flood placed additional workload on the iwi.[116]

73.3 The Trust and Te Rūnanga o Ngāti Hauiti signed a memorandum of understanding regarding the pilot project. [117] The memorandum committed the Trust and the Ngāti Hauiti to "work together to promote the identification, research and protection of sites of heritage significance to Ngāti Hauiti".[118]

73.4 As part of this engagement, Ngāti Hauiti provided the Trust with a list of 19 sites (urupā, papakāinga and pā) that should be examined during the project, with a view to them being registered.[119] These sites were discussed at a hui between the Trust and Ngāti Hauiti prior to the memorandum being signed.[120] This list helped inform the smaller number of sites Trust staff were prepared to research further to registration.[121]

73.5 Taihape Māori and non-Māori had the opportunity to submit on the draft registration proposals in the district.[122]

73.6 The Trust consulted with Ngāti Hauiti regarding press coverage of the proposed sites for registration. At Ngāti Hauiti's wishes, the Trust declined to provide specific information to the media on the relevant sites.[123]

74. The claimants used the following examples to, in their submission, highlight the failure of local and regional councils to adequately consult with Taihape Māori in regard to their wāhi tapu:[124]

74.1 Moawhango Dam – the Moawhango Dam was established on the Moawhango River in the 1970s. Despite the impacts the Dam

116 Wai 2180, #A30, at 164.
117 Wai 2180, #A30, at 164.
118 Wai 2180, #A30, at 165–166.
119 Wai 2180, #A38, at 167.
120 Wai 2180, #A30, at 167.
121 Wai 2180, #A30, at 167.
122 Wai 2180, #A30, at 168–169.
123 Wai 2180, #A30, at 168.
124 Wai 2180, #3.3.42 "Wāhi Tapu Generic Closing Submissions", at [206].

inevitably would have/has had on the Moawhango River and other tributaries, including on wāhi tapu sites along the rivers, the claimants submit that regional councils and local authorities did not adequately consult with Taihape Māori about its construction. The claimants relied on the following evidence of Ms Tina Warren:[125]

> My elders said to us, people in suits came to see them, came to their street and stopped a Māori in the street and asked them just casually, what do you think about a dam on the Moawhangao River and Māori said yes and next minute we have a dam on the Moawhango River.

The claimants submit this lack of consultation continues to occur to the present day. Despite local authorities making an effort to engage with Taihape Māori regarding the Dam, the claimants submit decisions have already been made regardless of whether Taihape Māori object. The Crown has acknowledged its failure to consult Taihape Māori prior to the construction of the Moawhango Dam in submissions on Issue 17.

74.2 Erewhon Rural Water Supply Scheme (**ERWSS**) – the ERWSS, a 16km long linkage pipeline established to provide a new water source to Pungatawa farmers, began operating in November 1980. The claimants submit that regional and local authorities failed to adequately consult with Taihape Māori about the establishment of the ERWSS, including the Aorangi Awarua Trust (**AAT**) on whose land part of the ERWSS was built.

74.3 Hautapu River – since the establishment of the Taihape Sewage Treatment Plant, the claimants submit the mauri of the river has changed significantly and has been adversely affected by pollution. They submit that the Crown and local council failed to consult with Māori before placing the sewage plant on the bank of the Hautapu River, and Taihape Māori were not given a voice despite being the kaitiaki of the inland waterways within the rohe.

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125 Wai 2180, #4.1.0, at 497.

75. The establishment of the ERWSS and the Taihape Sewage Treatment Plant and the consultation that took place with Taihape Māori in those circumstances have been outlined in the Crown's submissions on Local government (Issue 10)[126] and the Environment (Issue 16, Part B).[127]

76. In relation to the ERWSS, David Steedman gave evidence that during the inception of the ERWSS, the level of consultation between the Aorangi Awarua Trust, who administered 25 per cent of wetland connected to the ERWSS, and the Rangitīkei County Council was minimal.[128] Mr Steedman says the Council failed to give notice to the Trust that a decision had been made to establish the ERWSS, and it was only after 27 years of negotiations that an agreement with the Rangitīkei District Council was reached.[129] That agreement granted an easement to the Council over the Trust's lands in exchange for an annual payment and the right of a Trust member to sit on the ERWSS Committee.[130]

77. The evidence amongst the experts is not completely consistent, and the absence of evidence from the Rangitīkei District Council means it is difficult to ascertain a coherent narrative. However, the following points can be made in relation to the consultation that took place:

    77.1 The dam is on the Aorangi Awarua block and so required permission from the owners. Armstrong provides that the scheme was first raised with the trustees in 1976 at a meeting in Marton with the Forest Service and Mr Bull of the Rangitīkei County Council.[131] Alexander provides that verbal consent was obtained from some owners of Aorangi Awarua at a meeting called by the Catchment Board attended by six to eight owners (including "Steadman snr, jnr and boy") in November 1976.[132]

    77.2 In November 1977, the Council wrote to the owners via the Māori Affairs Department seeking written approval for work to start in

126 At [26]–[52].
127 At [50]–[58].
128 Wai 2180, #I03, at [37].
129 Wai 2180, #I03, at [31]–[45].
130 Wai 2180, #I03, at [45].
131 Wai 2180, #A49, at 447.
132 Wai 2180, #A38, at 532–535.

early 1978. The Department directed the Council to the Trust via Rangi Metekingi. A discussion took place between Mr Metekingi and the County engineer after which a letter was sent seeking approval.

77.3 No entry agreement was signed by the Trust, though there are records indicating verbal consent from Mr Metekingi was forthcoming. In November 1978, the Trust was informed work was now proceeding on the dam and intake weir on Aorangi Awarua. The Trust was asked to inspect the area to ensure its satisfaction with the work and subsequent restoration. In March 1980, the Trust was informed re-grassing would be undertaken in the next growing season.

77.4 The Alexander report concludes that "the County Council operated in an open manner with the Trust, and went ahead with construction, even though no formal entry agreement had been signed, when it thought it had the verbal consent of the Trust." The County Council and its successor (the District Council) relied on the verbal agreement from 1977-1978 for the operation of the scheme.[133]

77.5 In 2002, when the District Council was instructed the verbal consent given by the Trust without the consent of the owners or confirmation by the Māori Land Court was ineffective, meetings between the Council and the Trust resulted in the parties signing a formal deed of settlement in December 2004. Under that agreement, among other things, the Trust and Council clarified their continuing relationship and a trustee would be appointed to sit on the scheme management committee.

78. In relation to the alleged failure to consult on the sewerage plant, Patricia Cross gave evidence that the Taihape Sewage Treatment Plant was placed on the bank of the Hautapu River but neither the Crown nor the Council consulted Ngāti Hinemanu and Ngāti Paki beforehand.[134] Ms Cross says

133 Wai 2180, #A38, at 605.

134 Wai 2180, #F03, at [11].

that Ngāti Hinemanu and Ngāti Paki are kaitiaki of the inland waterways within the rohe. Again, this matter is addressed in submissions on Issue 16B.

79. Similarly, in relation to the Moawhango Dam, located about 2km downstream from the confluence of the Moawhango River and Mangaio stream, Barbara Bell gave evidence that Ngāti Whitikaupeka and Ngāti Tamakōpiri were not consulted in relation to its establishment nor at the beginning of the resource consent process.[135] Ms Bell says that Ngāti Whiti and Ngāti Tama are tangata whenua over both sides of the Moawhango River.[136] Again, this matter is addressed in submissions on Issue 17.

80. To a large extent, these submissions allege the failure of local councils to undertake appropriate engagement with Māori when legislated by the Crown under the RMA to do so.[137] To that extent, the Crown repeats its submissions for Issue 10. The Crown does not exercise control over the decisions made under statute by local authorities or matters of their day-to-day operations. As such, the Crown cannot be responsible for those matters. The Crown has established the legislative regimes in which local authorities must operate in a Tiriti/Treaty-consistent manner, and has built safeguards into relevant statutory instruments in order to protect Tiriti/Treaty interests in local decision-making.

81. Some of the above-mentioned actions were, however, conducted by the Crown (either separate to local authorities or in conjunction with them) or occurred under legislative regimes the Crown has responsibility for. Those matters are accordingly addressed in submissions on Issues 16B and 17.

135 Wai 2180, #G06, at [31]–[32].

136 Wai 2180, #G06, at [30].

137 See also Wai 2180, #3.3.42 "Wāhi Tapu Generic Closing Submissions", at [199].

Issue 3: What impacts have Crown legislation relating to land alienation, land management and use, resource management and environmental degradation, and riparian rights, policies and practices, had for the wāhi tapu of Taihape Māori?

82. Crown legislation relating to land alienation, land management and use, resource management and environmental degradation, and riparian rights, policies and practices have been outlined in the Crown's submissions relating to those particular topics in this inquiry. This section focuses on the impacts of any such legislation on the wāhi tapu of Taihape Māori.

83. The tangata whenua evidence on the record details a number of "sites of significance" to Taihape Māori within the inquiry district, including "pā and kāinga, cultivations, urupā, wāhi tapu, eel weirs, snaring trees, battles sites etc."[138] For example, Lewis Winiata and Jordan Winiata-Haines, from Ngāti Paki and Ngāti Hinemanu, describe a number of sites of significance that were a part of the Awarua Block and along the Rangitīkei River and its tributaries.[139] Che Wilson, from Ngāti Rangi, describes a number of sites of significance within the Te Kapua, Motukawa and Rangipō-Waiū blocks.[140] Isaac Hunter and John Reweti describe a number of wāhi tapu sites on the Waiōuru Military Training Area.[141] The current state of the sites is not clear, nor is the extent to which any protections are in place, if required.

84. The Crown has made acknowledgements and concessions in submissions on Issues 3 and 4 concerning the contribution of 19th century land legislation and Crown purchasing on the retention of lands by Taihape Māori. Taihape Māori lost control of and access to wāhi tapu, which reduced their ability to protect and exercise tino rangatiratanga over wāhi tapu sites. The sale and passing of lands out of Māori ownership and into Crown or settler ownership meant that kaitiaki obligations and tino rangatiratanga over any wāhi tapu on such lands could not be exercised in the same manner as they had previously been exercised, if at all.[142] It also

138 Wai 2180, #F05, at [35].

139 Wai 2180, #B01(d). See also Wai 2180, #C04, which outlines many more sites in the same area.

140 Wai 2180, #J18, at [20]–[44].

141 Wai 2180, #J01, at [33]–[34]; and Wai 2180, #K13, at [24]–[63].

142 Wai 2180, #A49 at 213–214.

meant that at times, the precise location of sites of significance was lost. Mr Winiata-Haines said:[143]

> We can only point out the vicinity of many sites used by our ancestors. One map says a site is one side of the river and another map puts it on the other side of the river. We have relied on court minutes and maps to try and locate many areas and what they were used for as well as who used them.

85. Where such lands remained in Māori ownership, the individualisation of title through the Native Land Court process meant wāhi tapu sites on the land became the responsibility of individual owners and whanau, and access became a problem in some areas.[144] For example, Ngahapeaparatuae Lomax gave evidence that there are wāhi tapu on Te Koau, a landlocked block of about 1,396 acres, and because of the lack of a proper road it is difficult to access the wāhi tapu without "a good level of physical fitness."[145]

86. Similarly, the Crown recognises that environmental degradation has affected specific sites of significance. For example, Ms Cross gave evidence that her ancestors and herself as a child used a particular spot in the Hautapu River for baptisms, birthing, healing and other blessings.[146] This was at the meeting of the waters of the Hautapu and Rangitīkei, which the iwi believed to have healing qualities.[147] Ms Cross stated further that because of the pollution of the river, the site is no longer able to be used for such rituals. While pollution is discussed in more detail in the Crown's submissions on Issue 16, Part B, the Crown recognises the link between environmental degradation and the ability of Taihape Māori to exercise tino rangatiratanga over wāhi tapu.

87. As noted in the Crown's opening submissions, the Crown acknowledges that Article II of te Tiriti/the Treaty requires it to take steps that are reasonable in the prevailing circumstances to actively protect the taonga of Taihape Māori. The Crown submits that it has, in good faith, undertaken a number of initiatives to adequately protect and preserve the wāhi tapu and tino rangatiratanga of Taihape Māori.

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143 Wai 2180, #F05, at [50]. See also Wai 2180, #H04.

144 Wai 2180, #A45, at 354.

145 Wai 2180, #H06, at [25]; and Wai 2180, #H06(c).

146 Wai 2180, #H06, at [25]; and Wai 2180, #H06(c).

147 Wai 2180, #F03, at [13].

88. However, there are multiple interests involved in land and environmental management and use, and any management regime must carefully weigh up all of those interests. This will depend on a range of factors, including the relative importance of certain wāhi tapu to Māori, any threat to or current protection of the wāhi tapu, and competing private interests where wāhi tapu are located on private land. As outlined, there are also various limitations on the Crown's ability to protect wāhi tapu, in particular identification.

89. The Crown submits that any negative impacts of the broader land and environmental management regime, and the way it has been applied in the inquiry district, on the wāhi tapu of Taihape Māori are not the result of breaches of te Tiriti/the Treaty. Rather, the Crown has actively tried to protect such sites, and continues to do so in good faith and in consultation with Taihape Māori, as outlined above, and in other Crown submissions of relevance to these matters.

21 May 2021

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Counsel for the Crown

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