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 8: NATIVE TOWNSHIPS

21 May 2021

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INTRODUCTION

1. Two Native Townships were established in the Taihape inquiry district: the Pōtaka Native Township (now commonly known as Ūtiku) between modern-day Taihape and Rātā Marae, and the Tūrangarere Native Township located in the vicinity of Hihitahi, north of modern-day Taihape. Under the Native Townships legislation, the Crown was able to establish townships to facilitate settlement which in turn provided an income stream and opportunities for Maori owners.[1] Pōtaka Township was administered by the Lands and Survey Department until 1908 and then the Aotea District Māori Land Board. Tūrangarere was vested in the Aotea District Māori Land Board and both townships were subsequently administered by the Māori Trustee.

2. The Native Townships legislation, its implementation and its subsequent amendments have been extensively reviewed as part of previous Tribunal inquiries, including, most recently, the Whanganui lands inquiry and the Rohe Pōtae inquiry.

3. These Tribunal panels heard extensive claimant and Crown submissions on this topic. Conversely, native townships have not been a prominent issue in this inquiry; no generic claimant closing submissions have been filed on this issue,[2] while there are only discrete references to the issue in Wai claimant specific submissions.[3]

4. For these reasons, and because the township narratives in this inquiry have key distinguishing features from townships elsewhere in the country, the Crown does not propose to examine this matter at length, but rather confine itself to submissions on the Tribunal's statement of issues and the main issues identified in the Taihape Native Townships report by Bassett and Kay.[4]

5. At a high level, the Crown maintains the following broad position on the Native Townships regime (as advanced in its closing submissions in Te Rohe Pōtae and in its memorandum contributing to the draft statement of issues).[5]

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1 SOI 8.1–8.4 – see also Wai 2180, #A47(a).

2 Wai 2180, #3.3.48, at [19].

3 Wai 2180, #3.3.71(b); and #3.3.62.

4 Wai 2180, #A47, #A47(a).

5 Wai 2180, #1.3.2.

5.1 The Native Townships regime was genuinely motivated and reflected ongoing endeavours to provide statutory frameworks for local settlement and development.[6]

5.2 The Crown intended Māori to benefit from the scheme through retaining ownership of land and receiving economic returns through leases and the opportunities presented through settlement generally.[7]

5.3 The Crown considers Native Townships are best assessed as part of the wider consideration of the process of economic development and change in the early 20th century.[8]

5.4 The Crown could not determine the success or failure of a scheme in an economic sense as it could not control whether sufficient leases were taken up to provide a sufficient stream of rental income to owners.[9]

5.5 While the regime delivered uncertain and sometimes unsatisfactory outcomes for Māori owners, this did not involve any Tiriti/Treaty breach by the Crown.[10] Government sought to balance the interests of Māori and non-Māori in developing the structure of Native Townships and the Native allotments within the Native Townships.[11]

5.6 The Crown acknowledges that: [12]

5.6.1 The Native Townships Act allowed the Crown to take ownership of roads and public reserves in the townships without paying compensation to the owners. In the case of Pōtaka, 36.5 acres were taken for these purposes.

6 Wai 898, #3.4.291, at [2].
7 Wai 898, #3.4.291, at [3].
8 Wai 2180, #1.3.2, at [64].
9 Wai 898, #3.4.291, at [4].
10 Wai 898, #3.4.291, at [5].
11 Wai 2180, #1.3.2, at [67].
12 Wai 2180, #1.3.2, at [68]–[68.2].

5.6.2 A number of leases at Pōtaka were converted to perpetual leases without the consent of the owners.

5.7 The Act did not require the Crown to consult Māori before proclaiming a township on their land. However, given that both the Pōtaka/Ūtiku and Tūrangarere townships resulted from a dialogue with Taihape Māori landowners which lead to the consent to the establishment of the Townships, issues of consent differ here in comparison to other inquiry districts.[13]

5.8 The Crown's responsibility extends to the policy framework contained in the Native Township legislation. The Crown promoted that framework in good faith and with genuine intentions. The Crown was not responsible for the acts and omissions of the Māori Land Boards acting in their capacity as trustees for the beneficial owners of the Native Township lands vested in them.[14]

ISSUES

6. The issues addressed in these submissions, reflecting the Tribunal's statement of issues, will be framed as follows:

6.1 **Consultation and Consent:** Was there adequate (or Tiriti/Treaty consistent) consultation with Taihape Māori about the establishment of Native Townships? Were the townships that were actually established consistent with the understandings and expectations of Taihape Māori? (SOI 8.1 – 8.4. 1)

6.2 **Changes to Township Regime:** Did Taihape Māori agree or consent to any signficant changes in the management or legal structures of the townships, including the shift to perpetual leases? (SOI 8.5)

6.3 **Roads and Reserves:** Did Taihape Māori consent to the taking of land for public roads and reserves?

13 Wai 2180, #1.3.2, at [69].

14 Wai 898, #3.4.291, at [42]–[48].

6.4 **Compensation:** Was the compensation for the taking of land under the native townships adequate or Tiriti/Treaty consistent? (SOI 8.7)

6.5 **Management and control and effect on Māori and rangatiratanga/Article II rights:** Did the Native Townships regime allow for adequate levels of management input by Māori beneficial owners and how did the establishment of the Native Townships affect Māori exercise of tino rangatiratanga over their lands, villages and other taonga?[15] (SOI 8.8)

CROWN SUBMISSIONS

Pōtaka/Ūtiku township

Issue: consultation and consent

(SOI 8.4, 8.10, 8.11, 8.5(a), 7.6)

7. This section addresses consultation with Taihape Māori in establishing Native Townships, and the extent to which they were established in a way that was consistent with the understandings and expectations of Taihape Māori.

8. The Crown recognises that te Tiriti o Waitangi/the Treaty of Waitangi and its principles impose on it an obligation to make informed decisions on matters affecting the interests of Māori. Depending on the circumstances of the case, the duty may require the Crown to consult with those who are affected. There is, however, no absolute obligation to consult.

9. In this situation officials consulted with Ūtiku Pōtaka over the creation of the township – indeed Bassett and Kay set out that he initiated the proposal.[16] The evidence is that he initially considered developing the township on land immediately to the north of his existing developments at Kaikōura. Officials considered the existing Kaikōura site was better suited (the northern alternative site would be so close to Taihape as to limit the demand for sections, the railway station needed flat land, and potential leasees also were likely to prefer flat lands). Despite initial reluctance for this proposal, Ūtiku

15 See key issues set out in *Te Mana Whatu Ahuru*, Part 3, at 273.

16 Wai 2180, #A47(a), at 1.

Pōtaka agreed to it after personal discussions with the Surveyor-General.[17] Bassett and Kay note that the legislative provision under which control of the sections was to be vested in the Crown was discussed with Ūtiku (but also note that his subsequent actions may have indicated he had a different understanding as to how much control he would retain).

10. The Native Township legislation provided the ability to reserve up to 20 per cent of the Native Townships for Māori reserves and gave a two-month period for the Māori owners to review and object to the proposed layout of the townships. There was a process through which objections could be heard by a separate body.[18]

11. Some of Ūtiku's section choices for Native reserves or allotments in the above process were accepted, and others were not accepted, but in any event his agreement was sought to the changes made by the Surveyor-General. The township plan was shown to and approved by Ūtiku and Rora Pōtaka. Ūtiku's requests to exclude sections from the lease auction and for rights of way for his tramlines were granted. Bassett and Kay considered that, "Nevertheless, [Ūtiku] was disappointed that his interests had not been protected in the first place." There is some evidence that there may have been somewhat differing understandings or expectations as to how the township would be structured or work in practice.[19]

12. Nevertheless, in the circumstances of Pōtaka township, consultation did take place: Bassett and Kay record multiple discussions, including one to choose the name of the township – 'Pōtaka'.[20] The Crown acknowledges that the Ūtiku Pōtaka whānau did not get everything they wanted in relation to the location of the township, the selection of sections as Native reserves, and the operation of the township as a going-concern for Māori commercial benefit, but nevertheless there was genuine consultation.

13. Any assessment of the adequacy of consultation must have due regard to the prevailing circumstances of the period of time in question, including the

17 Wai 2180, #A47(a), at 2. Note, no account of those discussions has been located so it is not possible to know the precise content of those discussions.

18 Wai 898, #3.4.291, at [193].

19 Wai 2180, #A47, at 206.

20 Wai 2180, #A47(a), at [7].

expectations and standards of consultation that applied at that time. It is an error to apply today's contemporary understandings of consultation to a radically different period in history. That said, the evidence suggests that even contemporary standards of consultation processes may have been met leading to the establishment of the township. It appears that Ūtiku Pōtaka was intimately involved with multiple discussions with officials and the Surveyor-General.

14. The Crown submits that this level of consultation continued in the early years of the township.[21]

Issue: Changes to township regime (including perpetual leases)

(SOI 8.4.c.ii, 8.1, 8.5a, 8.8, 8.10, 8.11, 7.6)

15. This section addresses whether Taihape Māori agreed or consented to any signficant changes in the management or legal structures of the townships, including the shift to perpetual leases. This is a key issue raised with Native Townships by the Tribunal in its *He Whiritaunoka* Report. Although perpetually renewable leases were eventually acknowledged to be not in accordance with the Native Townships Act 1895, the nature of the leases meant they could not be overturned. Perpetual leases had lasting consequences for Native Townships throughout New Zealand.[22]

16. In Pōtaka, fewer perpetual leases were granted than in other Native Townships, at least initially. In the era of Judge Acheson as President of the Aotea Māori Land Board, the administration was sympathetic to owners' interests. Acheson, during the 1920s-30s, resisted the calls for perpetually renewable leases to be granted.[23]

17. After the Acheson era, from the mid-1940s onwards, there was growing pressure from settlers to allow for perpetual leasing. In the same period, Esther Pōtaka, Ūtiku Pōtaka and other owners unsuccessfully sought to have the land revested in owners – as the leases (of 42 years total) were expiring – this occurred in 1948.[24] From 1939 the Land Board consented to a number

21 Wai 2180, #A47(a), at [17].

22 Wai 2180, #A47, at 96 – error in 1936 legal opinion.

23 Wai 2180, #A47(a), at [18] and [29]. Wai 2180, #A47, at 83, 90, 94.

24 Wai 2180, #A47, at 90–101, 103, 106. 111.

of existing leases being reissued as leases in perpetuity (but also refused others – depending on whether they were original lesees or not).[25] In 1947 the Land Board revised its view back to the earlier 1922 position that perpetual leases could not be granted – no further perpetual leases were granted by the Board but those already in place could not be displaced.[26]

18. The Land Board was abolished and the Māori Trustee was established in 1952. The Maori Reserved Land Act 1955 provided for perpetually renewable leases, at the option of the leaseholders (after leaseholders had lobbied for this change for some years). There was no requirement for owners' agreement. By 1974 all the Pōtaka Māori Township leases were prescribed leases with perpetual right of renewal.[27]

19. The change to perpetual leases should be assessed in the context of the Crown's duty to balance relevant interests. Perpetual leases were seen as a way to guarantee more secure and ongoing rental income for beneficial owners by incentivising uptake of leases. It also promoted the development of Māori land as lessees were required to improve the land under the legislation. The Crown is aware that in other inquiries it has been heavily criticised where township lands did not attract lessee investment or leases were subsequently abandoned. These factors must be taken into account when assessing the reasonableness or otherwise of the granting of perpetual leases.

20. The passage of the Māori Reserved Land Amendment Act 1997 addressed some of the issues caused by the granting of perpetual leases. The legislation enabled improvement of the return from the perpetual leases by providing market rents and seven-yearly rent reviews.[28] It also provided for a compensation sum to be paid to owners to cover the three year delay before market rents were implemented, a solatium to cover costs of consulting and administration costs, and a payment of a sum to contribute to purchasing the

25 Wai 2180, #A47, at 102–104.

26 Wai 2180, #A47, at 106, 107.

27 Wai 2180, #A47, at 116.

28 Wai 2180, #A47, at 217.

lease should it become available (Māori owners were granted a first right of refusal).[29]

21. After the passing of the Act the Federation of Māori Authorities made a claim for compensation for the historically low rents from Māori reserved land. A settlement was reached in 2002 for past rentals, and a further payment for the Pōtaka township sections. The total paid under the 1997 Act and the 2002 settlement was $71,873.65 (excluding payments made directly to the Pōtaka Whanau Trust for the sections revested in 1995).[30]

Issue: Promises regarding Roads and Reserves

(SOI 8.7, 8.1, 8.4.c.iii-iv, 8.5(a), 7.6)

22. The setting aside of roads, public reserves and native allotments was part of the original township plan that Ūtiku and Rora Pōtaka were consulted on.

23. Under the Native Townships Act 1895, public reserves could be taken compulsorily with no notice and no compensation. The justification for this was that the ultimate benefit of the township rested with the beneficial owners and thus improvement costs were to be registered against the lands.

24. In Pōtaka, ten blocks were taken for public reserves for seven specific purposes.[31]

25. The school reserves, recreation reserves and post office reserve were used for their designated purposes. The public hall reserve was re-designated for education. The other reserves were not used for the purposes for which they were set aside (see **Appendix 1**).

26. Bassett states that there was no community demand for those lands to be used for these purposes, but rather "locally the preference was for the reserves to be made available as grazing land".[32] Requests were made by owners and the Department of Māori Affairs for the reserves to be returned to beneficial owners, but the Lands Department retained control for potential

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29 Wai 2180, #A47, at 217.

30 Wai 2180, #A47, at 217. See also Mr Lomax evidence at Wai 2180, #4.1.12, at 77 where he states that $4,000 was received for the Pōtaka lands compensation in the 2002 settlement.

31 Wai 2180, #A47, at 173.

32 Wai 2180, #A47, at 173.

future use. Bassett and Kay record, however, that "Eventually almost all the public reserves were returned to the beneficial owners, mostly following the efforts of the Pōtaka Whanau Trust."[33] Mr Neville Lomax gave oral evidence during the site visit of the efforts made by the whānau to regain the lands for the whānau (including by purchasing leases as they became available).[34]

27. As to issues of prejudice, all but one of the blocks taken for public reserves have now been returned to beneficial owners as is shown in the table at **Appendix 1**.

Issue: Compensation

(SOI 8.7)

28. This section addresses the extent of compensation paid for the taking of land under the Native Townships regime. The Crown acknowledged in its Opening Submissions that the acquisition of land for roads and public reserves without compensation appears to be an issue.[35]

29. In the Pōtaka township, 24 out of 138 acres (17.4%) became roads, and 12.5 acres became public reserves – nominally, all Crown land. As mentioned above, all the public reserve land (with the exception of the pound reserve) has been re-vested in Māori ownership.[36]

30. The owners paid the costs of subdivision and creation of public roads and reserves. According to Bassett and Kay, the policy justification was that Māori landowners would benefit financially from the township – both from rental returns, as well as increased land values given the provision of public infrastructure. The Crown notes that, despite these policy intentions, "the unimproved value of the Pōtaka township sections did not markedly increase throughout most of the twentieth century, and in some instances declined".[37]

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33 Wai 2180, #A47, at 173.

34 See also Wai 2180, #A47(a), at 5.

35 Wai 2180, #1.3.2, at [69].

36 Wai 2180, #A47, at 209.

37 Wai 2180, #A47, at 207.

31. The actual set-up costs for Pōtaka township appear to have been fairly minor – slightly more than one year's rental receipts from the township rentals.[38]

32. In summary, therefore, the Crown acknowledges that compensation was not given to Māori for the roads and reserves set aside under the township schemes, and that Māori were required to cover certain costs of setting up the townships. However, the establishment of such infrastructure benefited Māori as the beneficial landowners through making the township a viable, operational entity that would be attractive to third party lessees and business operators. Taking the overall policy and intention of the townships into account, and the limited set-up costs, the Crown does not accept it acted in breach of te Tiriti o Waitangi/the Treaty of Waitangi or that there was material prejudice from these provisions of the scheme.

Issue: Management input by Māori and effect on Māori and rangatiratanga/ Article II rights

(SOI 8.10, 8.11)

33. The Crown notes that in the case of Pōtaka/Ūtiku township, the evidence shows that in the early years, Ūtiku Pōtaka was consulted on some matters about the leases and had some of his requests granted to protect his tramlines and other interests.[39]

34. The Crown acknowledges that once the township was created, Māori became beneficial owners with legal management in the hands of a Crown department (Commissioner of Crown Lands) on their behalf. Later, direct Crown control was replaced with the Land Boards, followed by the Māori Trustee in 1952.

35. The Crown submits that in accepting the Crown's offer to establish and arrange for the administration of the townships on their behalf, Taihape Māori would have understood and accepted that they were ceding day to day control of the township land to a third party administrative entity (see consultation section above). For this reason, the Crown submits that an absence of consultation in respect of changes to management structures does not constitute a breach of te Tiriti/the Treaty and its principles. Despite the

38 Wai 2180, #A47, at 47–48.

39 Wai 2180, #A47, at 206–207.

changes to the composition of the management entities, the fundamental terms of the trust remained the same. The townships regime also had the effect of maintaining Māori ownership over a long period of time, while providing for economic benefit through lease returns. Issues arising from perpetual leasing were settled (at least in part) in 1997 and 2003 as set out above.

36. The Crown does acknowledge that some of the management changes meant that beneficial owners were unable to reoccupy their lands for longer periods of time. There is clear evidence of the Pōtaka whānau consistently seeking and working towards the return of the lands to their full use. From the 1940s, Esther Pōtaka, Ūtiku Pōtaka and other owners unsuccessfully sought to have the land revested in owners – as the leases expired. Esther's lands were returned for her use in in 1948.

37. As above, the Lomax/Pōtaka whānau have continued to actively repurchase leases or township lands as they have become available.[40]

Tūrangarere

(SOI 8.9)

38. There do not appear to be any claims by Taihape Māori or closing submissions specifically about this township. This township is on the 'boundary' of the area of interest of Taihape Māori. The block of land that was proclaimed as the township – Raketapauma 2B8 – is not one of the Taihape inquiry blocks. The Crown understands that this township was included in this Tribunal's Statement of Issues on the basis of the statement of claim filed on behalf of Wai 1632 (the closing submissions for Wai 1632 do not, however, address this matter).[41]

39. A further possible reason the township has been included in the Taihape inquiry is that it was left out of the Whanganui inquiry through a misapprehension of the township's location (this is suggested by Bassett and Kay).[42]

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40 Wai 2180, #A47(a), at 5.

41 Wai 2180, #3.3.059; and Wai 1632, #1.1.1(b).

42 Wai 2180, #A47, at 223.

40. The township narrative differs markedly from Pōtaka as it was created specifically for sale at the wish of the Māori owners. Most of the Tūrangarere sections sold at the February 1909 auction went to a Māori purchaser.[43] Many of these sections are owned by that individual's successors as Māori freehold land.

41. Given the lack of specific evidence and Wai claimant submissions on this matter, the Crown makes no further submissions on it.

21 May 2021

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Counsel for the Crown

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

[43] Wai 2180, #A47, at 235.

APPENDIX 1:

Status of Pōtaka Township Blocks		
Sections 4 and 5 Block I	Acquired under the Native Townships Act 1885 for a public recreation ground Dealt with as a reserve under the Public Reserves Act 1881 Used as Ūtiku Domain	Transferred to the Pōtaka Whanau Trust in 2001
Sections 6 and 15 Block I	Acquired for a public school site Used for Ūtiku School	Transferred to the Pōtaka Whanau Trust in 2001
Section 7 Block I	Acquired for a public pound site Used for grazing	Remains Crown land – part of Tokaanu Conservation Area
Section 14 Block I	Acquired for a public hall site Used for grazing/a school house	Transferred to the Pōtaka Whanau Trust in 2002
Sections 6 and 7 Block II	Acquired as a site for public buildings of the general government Used for grazing	Vested in the Pōtaka Whanau Trust in 2009
Section 1 Block IV	Acquired for a post office site Used for the Ūtiku Post Office	Revested in owners in 1994 and vested in the Pōtaka Whanau Trust in 1995
Section 5 Block VII	Acquired for a public cemetery Used for grazing	Revested in beneficial owners in 1958/1960. Sold privately by the owners