In the Waitangi Tribunal **Wai 2180**

Under — the Treaty of Waitangi Act 1975

in the matter of — the Taihape: Rangītikei ki Rangipō District Inquiry (Wai 2180)

CLAIMANT GENERIC REPLY SUBMISSIONS
LOCAL GOVERNMENT AND RATING

Dated 27 September 2021

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MAY IT PLEASE THE TRIBUNAL

1. These claimant generic reply submissions respond to Crown generic closing submissions regarding Issue 10, Local Authorities and Rating, document #3.3.80 on the record of inquiry.

2. These submissions do not address those parts of the Crown's submission directed to specific claimant matters as we consider those are more appropriately addressed by claimants' counsel.

ABILITY OF TRIBUNAL TO REACH CONCLUSIONS OF BREACH

3. The Crown considers:

> there is an insufficient basis in evidence or law for a finding that the Crown breached its Tiriti/Treaty duties by virtue of acts or omissions by local authorities in this inquiry district.

4. We submit that the evidence available is enough to safely conclude breach. In itself, the notable absence of Taihape Māori from the records of local government, other than where Councils have pursued rates, indicates that the partnership has not been implemented in the Inquiry District. Absence of evidence is, in this case, evidence of absence. Further, interactions by Councils with mana whenua have been almost exclusively on the basis of land ownership, and not as hapū and iwi partners.[1]

5. As noted in our closing generic submissions, the Treaty promises partnership.[2] Despite this, as admitted by the Crown, Māori are absent in local government legislation until 1991.[3] Even then (and still today) there is no requirement in any legislation directing local government to give effect to the Treaty.

6. Mana whenua in the Inquiry District were active from a very early stage in engaging with the Crown regarding inclusion in, and leadership of, local government. In 1867 "te Rūnanga katoa o

[1] See, for example, Wai 2180, #A38, David Alexander *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s-2010* (CFRT, 2015) at209, 223.
[2] See, for example, Wai 2180, #3.3.51 at 21-25
[3] Wai 2180, #3.3.80 at [13.4].

Ngati Tama raua ko Ngati Whiti" wrote to Donald McLean.[4] Also in 1867, the Komiti of Mokai Patea (which pre-dated the Native Committees Act 1883) also wrote to McLean on matters arising out of the Poutu hui.[5] In 1885 Utiku Potaka and Winiata Te Whaaro wrote to Native Minister Ballance explaining that the division of their rohe between Whanganui and Hawke's Bay Committee Districts made it difficult for Taihape Māori to participate.[6] In 1894, Hiraka Te Rango "on behalf of the people of Mokai Patea" requested of Seddon the empowerment of a komiti Māori.[7] It was not until at "after 1989" that local government in the Inquiry District got its first Māori elected representative.[8]

7. The Colonial Office was supportive of Māori local government institutions – indeed, it anticipated them.[9] The wording of the Treaty, the support of the Colonial Office, section 71 of the New Zealand Constitution Act 1852 (Imp), and the Native Districts Regulation Act 1858 (NZ) indicate that current views of the Treaty relationship are accurate, and concerns about presentism are therefore misplaced. The Treaty and the actions and instructions of the (London-based) Crown to the settler government are the correct 19th century standard.

8. Claimant generic closing submissions on economic development note the interest of Taihape Māori in participating in the emerging settler economy, and record letters to the Crown setting out a blueprint for proposing solutions to the known roadblocks to their economic success, along with the Crown's failure to respond which led to failure of the Māori economy.[10] Despite this, rates were generally payable on unproductive and landlocked Māori land in the Inquiry District until as late as 2009. Until at least 1944, however, most Māori landowners could not vote in local body

[4] Wai 2180, #3.3.51 at [78].
[5] Wai 2180, #3.3.51 at [80].
[6] Wai 2180, #3.3.51 at [82].
[7] Wai 2180, #3.3.51 at [99].
[8] See Wai 2180, #3.3.51 at [91], [94],[95], [114], [119], [124], [131], [136]; Wai 2180, #A5, Bassett Kay Research *Local Government, Rating and Native Township Scoping Report* (CFRT, 2012) at 9.
[9] Wai 2180, #3.3.51 at [64].
[10] See Wai 2180, #3.3.50 at [12]-[14].

elections.[11] Between 1909 and at least 1924 this is known to be a particular issue in the Inquiry District, as the Rangitikei District Council complained during this period to the Premier that they did not receive accurate valuation rolls and therefore could not accurately collect rates (i.e. the concern was for the County coffers, not for civic participation by Māori).[12] This lack of information may have functioned as an inadvertent protection for some Māori land, as, in the same year that registration of all owners on the valuation rolls was legislated, the Rangitikei District Council started using receivership orders, and land began to again be lost to rates charges despite, in some cases, the issue being lessees not fulfiling their rates liabilities.[13]

9. Crown Counsel's instructions are that:[14]

> As a general proposition, consistent with the Crown's position in other inquiries, the development of a system of local government, undertaken in good faith and applying to all New Zealand citizens, is consistent with the principles of te Tiriti/the Treaty. It reflects a philosophy that decisions which affect local communities are most appropriately controlled by those communities, and Parliament's vesting of those local bodies with sufficient powers to make local decisions is a legitimate exercise of the Crown's right of kāwanatanga.

10. We have no issue with the statement on its face. What is at issue is whether the system as developed and implemented is appropriate to the needs of both Treaty partners. It is our submission that the current system reflects an entirely Pākehā worldview, and provides for te ao Māori only to the extent of a small degree of consultation, primarily in RMA matters. While the Māori wards (one of which is currently being implemented by the Rangitīkei District Council) are a step in the right direction, their limited provision and optional nature is insufficient to fulfil the

[11] Wai 2180, 3.3.51(a) at [43]-[48].
[12] Wai 2180, 3.3.51(a) at [45].
[13] See Wai 2180, #3.3.51(a) at [90] on.
[14] Wai 2180, #3.3.80 at [8].

partnership. In addition, there needs to be work on how hapū are recognised.

ENGAGEMENT BETWEEN LOCAL AUTHORITIES AND TAIHAPE MAORI

11. While council records in the Inquiry District are notable for the absence of records of engagement with mana whenua since the earliest days, in the modern era there have been concerning incidents. In the late 1970s the Rangitikei County Council constructed a dam and water intake at the Reporoa Bog on Aorangi in the full knowledge that it did not have the written consent of the owners.[15] It was not until 2006 that the easement was regularised by the Māori Land Court, with the Council agreeing to pay an annual fee.[16] The evidence does not record any back payment for the almost 30 years of unlawful Council occupation, and the technical evidence is that the Council did not agree to remit the rates owing on the block until 2007, some 34 years after the issue was first raised.[17] Crown submissions focus on claimant allegations of coercion, however, coercion or not, the Council's actions are not consistent with partnership. Crown submissions do not address the Crown's lack of oversight or monitoring and correction of such practices.

12. Also in the 1970s, after lobbying from Wanganui City Council,[18] the Rangitikei County Council notified Marae Community Zones for inclusion in its District Planning Scheme Review.[19] One of the purposes of the Zones was to provide 'as of right' development of dwellings "ancillary to the main function of the marae".[20] Several objections were received, all either wanting the size of the Zones expanded (to accomoodate papakāinga) or wanting Opaea marae included.[21] Only one response to the objections was located in the

[15] Wai 2180, #A46 Tony Walzl *Twentieth Century Overview* (2016) at 720.
[16] Wai 2180, #A46 Tony Walzl *Twentieth Century Overview* (2016) at 734.
[17] Wai 2180, #A37, at 300.
[18] Wai 2180, #A38 David Alexander *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s-2010* (CFRT, 2015) at 65.
[19] Wai 2180, #A38 at 66.
[20] Wai 2180, #A38 at 67.
[21] Wai 2180, #A38 at 68.

records: the Winiata request to expand the Zone was rejected on the basis that:[22]

> The inclusion of all the lands subject to objection would create an area far too large for that required for the basic purpose of a "Marae Community Zone" as defined in the Scheme.

13. Alexander records that the inability to build houses around the marae remains a concern for mana whenua.[23] He considers: [24]

> In this overall context, the eight Winiata objections can be seen as requests for the Council to recognise the circumstances of Winiata and allow the community established around the marae there to flourish and renew. When the objections were rejected, the scales were tipped against the Maori owners.

And:[25]

> The objections made to the Rangitikei County District Planning Scheme Review show that tangata whenua in Taihape Inquiry District were willing to become involved in the planning process when they perceived that their interests might be directly affected. However, the County Council in response was generally resistant to tangata whenua objections.

14. Even more recently, as noted in our closing submissions, Horizons Regional Council was criticised by the courts for "manipulat[ing] and pervert[ing]" the implementation of its own regional plan with respect to accepting farm pollution of waterways."[26] This is despite its engagement with Ngā Pae o Rangitīkei, a group set up by mana whenua to focus on Regional Council-level issues relating to waterways and held up by the

[22] Wai 2180, #A38 at 69.
[23] Wai 2180, #A38 at 69.
[24] Wai 2180, #A38 at 69-70.
[25] Wai 2180, #A38 at 70.
[26] Wai 2180, #3.3.51 at [187].

Crown in its closing submissions as evidence of Treaty compliance.[27]

15. The Crown admits that:[28]

> there have been significant improvements over time that have increased the potential for the views of Māori to be considered in decision-making processes. The RMA, the Local Government Act 2002 and the Conservation Act 1987 now better provide for the views of Taihape Māori to be taken into account, which are expected to be further strengthened by the RMA reform.

That is, there has been limited "potential" for the views of Māori to be considered in decision-making processes, and this has required significant improvement which is still very much in progress. Until 1944 the franchise was severely limited for Māori landowners, and local government elections have until relatively recently operated on a First Past the Post basis, so it is difficult to see where even low potential was located in the local government electoral system prior to this recent legislation.

16. At paragraphs 13.1 to 13.5 the Crown admits that recent legislation uses language never previously used, and that there is more engagement now than in the past. Because Taihape Māori are almost completely absent from the record of local government decision-making, the weight of evidence is toward limited ability to participate, and against Treaty compliance. We further submit that "potential for the views of Māori to be considered in decision-making processes" does not meet the Treaty standard of partnership.

17. The Crown notes the existence of local government committees and other groups as evidence of ongoing engagement between Taihape Māori and local government in respect of RMA matters.[29] While it is correct that these groups exist, claimant evidence is

[27] Wai 2180, #3.3.80 at [59].
[28] Wai 2180, #3.3.80 at [12].
[29] Wai 2180, #3.3.80 at [59].

that they are not effective and that there are differing views between mana whenua and the local authorities regarding the roles of these groups.[30] We also note that RMA matters are but one element of the functions and powers of local authorities. There was no evidence of formal ongoing engagement in respect of any other of the relevant local authorities' functions.

18. Whether or not the Crown has delegated its functions, powers, and Treaty responsibilities to local authorities, the Crown retains responsibility for Treaty breaches. The responsibility of the Crown in these circumstances must be to monitor local government performance and amend the regime as necessary, as well as to provide for mandatory correction of local government errors.

19. The Crown points to five legislative provisions in the Local Government Act 2002 and the Resource Management Act 1991 that it says provide accountability,[31] however the Crown's submissions do not point to any evidence of Crown oversight and enforcement occurring, or to any outcome from any monitoring and enforcement. Nor do they engage with claimant evidence or closing submissions setting out the failures of this legislation.[32] The legislated opportunities are ad-hoc and lack coherence, and relationships with the relevant local authorities are dependent on the Councils' goodwill or lack thereof. Additionally, three of the five do not involve the Crown at all, and arguably rely on mana whenua taking litigation. This does not fulfil the obligation of oversight and enforcement of the Treaty relationship.

20. The Crown also admits that:[33]

> participation is affected by a wide range of factors, including […] the views and biases of local government representatives.

[30] See Wai 2180, #3.3.51 at [182]-[189] for a summary of the evidence.
[31] Wai 2180, #3.3.80 at [13].
[32] See Wai 2180, #3.3.51 at [181]-[192].
[33] Wai 2180, #3.3.80 at [11].

We submit this is effectively a concession that the legislation allows breaches of the Treaty. It therefore cannot be the Treaty-consistent creation the Crown asserts it to be.

21. The Crown also discusses Māori wards and their entirely optional nature.[34] We cannot see any mandatory provision for rangatiratanga in this legislation. The aforementioned "views and biases of local representatives" are an issue in this matter also.

22. The Crown says:[35]

> … it has established the legislative regimes in which local authorities 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.
>
> […]
>
> The Crown acknowledges that local government legislation in the 19th and 20th centuries generally did not contain provisions for specific Māori representation in local government. The Crown does not accept, however, any general claim that the absence of specific provisions for Māori representation on its own caused prejudice to Taihape Māori or prevented them from participating in local government decision-making. […]

23. The Crown made an identical argument in the Rohe Pōtae Inquiry. The argument was not accepted by that Tribunal, which said:

> In our view, the Crown failed to ensure that local authorities established a relationship with Māori that was consistent with the Treaty of Waitangi and ensured Māori interests were incorporated and protected. Instead, local authorities were permitted to focus on Pākehā settlement and revenue-gathering endeavours. Consequently, Pākehā interests were served at the expense of Te Rohe

[34] Wai 2180, #3.3.80 at [14-16].
[35] Wai 2180, #3.3.80 at [10], [11].

> Pōtae Māori. The evidence presented to us clearly demonstrated that the system of local government that took hold in the district from the early twentieth century existed primarily to advance Pākehā settlement. We find the unequal distribution of benefits from local government to breach equity rights enshrined by article 3 of the Treaty, as well as the principle of participation.
>
> In our view, the Crown must also ensure that local authorities are acting consistently with the principles of the Treaty. Failure to do so is a breach of the duty of active protection. The Crown's policies, legislation, and actions failed to delegate to local authorities a requirement to give effect to these matters through arrangements worked through in a mutually beneficial manner, in accordance with the principles we identified in chapter 3. By failing to delegate that requirement, we find that the Crown acted in a manner inconsistent with the principles of partnership, rangatiratanga, and equity, and it breached its duty of active protection of Te Rohe Pōtae tino rangatiratanga.

24. In this Inquiry District, that lack of specific provision meant that mana whenua views were not considered, let alone applied, including in matters such as sewage, trade waste, and offal being discharged into rivers and waterways for several generations, by a Council notably resistant to taking action – and which, in at least one case, sent a deputation to Wellington to complain about strictures on such actions being imposed by central government.[36]

RATING

25. The Crown asserts that the principle of rating Māori land is both reasonable and Treaty-consistent,[37] but also "acknowledges that some of the rating decisions and practices utilised by local authorities caused hardship to Māori." It does not address the central question of whether a Treaty-compliant rating regime must

[36] Wai 2180, #A45 David Armstrong *The Impact of Environmental Change in the Taihape District, 1840-C1970* (CFRT, 2016) at 11, 322.
[37] Wai 2180, #3.3.80 at [18].

be inquiry-based, rather than exemption-based.[38] Nor does it point to any monitoring by the Crown of local authorities' decisions causing hardship to Māori, or any steps it has taken to ensure these practices are quickly corrected by the Councils in question.

26. Crown submissions note that between 1882 and 1888 the Crown paid rates applied against Māori land, and in 1927 "wrote off much of the rates owing to the Crown."[39] We submit that this is effectively a concession that rating Māori land was not reasonable during this period.

27. The Local Government (Rating of Whenua Māori) Amendment Bill was given assent on 12 April 2021, and those sections which did not come into force on that date did so on 1 July 2021.[40] Crown submissions do not refer to the concerns of the Māori Affairs Committee, which, as noted in our closing submissions, recorded it was unable to recommend the Bill be passed. The Committee report also which noted the view of the National Party that the interruption brought about by the 2020 lockdown period resulted in insufficient time to properly consider the Bill.[41]

28. There is no evidence that Taihape Māori were deliberately and proactively engaged with by the Crown in the development of this legislation at all, despite the rating issues raised in this Inquiry.

29. We submit that the very existence of this Act, and the existing provisions for exempting Māori land from rates, are admissions that rating Māori land is in many circumstances not, in fact, reasonable or Treaty-compliant.

CONCLUSIONS

30. The Crown did not consult at all on a transformative system of local government and associated laws which ignored and

[38] Wai 2180, #3.3.51(a) at [7(a)].
[39] Wai 2180, #3.3.80 at [17].
[40] Section 2. This partially delayed commencement likely reflects the start date of local authorities' financial years.
[41] Final report (Local Government (Rating of Whenua Māori) Amendment Bill), 226-2, English version at 4-5.

displaced custom law. Unguided by mandatory Treaty obligations, and without formal and systematic monitoring, local government inevitably functions as a tyranny of the majority and fails to partner with mana whenua. These are precisely the issues raised by claimants in this Inquiry.[42]

31. The Crown's implementation of local government, admitted to have not provided for Māori for most of its existence, and admitted to require yet more improvement, is responsible for the lack of engagement by local government with mana whenua in the Inquiry District. Further, it is difficult to reconcile the Crown's statement that the regime is Treaty compliant with its acknowledgement that the regime contributed to disproportionately high land loss.[43]

32. The Crown has not provided sufficient evidence to support its contentions that local government and rating have been and are Treaty compliant.

33. Māori rangatiratanga rights are not a matter for balance. They are not an externality and are not in conflict with any duty to govern for all New Zealanders: they are an integral part of the partnership. When the Crown and Māori are working together in partnership, each partner ensures the other is protected and validated. As noted in our generic closing submissions, to act otherwise is to undermine the partnership and to breach the Treaty in the most fundamental of ways.

Dated at Nelson this 27th day of September 2021

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[42] Wai 2180, #3.3.51 at [181]-[192].
[43] Wai 2180, #3.3.80 at [66].