Kei mua i Te Rōpu Whakamana i Te Tiriti o Waitangi **Wai 2180**
Taihape: Rangitīkei ki Rangipō Inquiry

I te take o Te Ture o Te Tiriti o Waitangi 1975

Ā

I te take o the Taihape: Rangitīkei ki Rangipō Inquiry

Generic Claimant Closing Submissions in Reply
on Public Works Takings (Issue 13)
Dated Monday the 27th of September 2021

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May it please the Tribunal

1. These are the generic claimant closing submissions in reply on the issue of General Public Works Takings; Issue 13.

2. These submissions address four key issues of the Crown submission on this issue;[1]

    a. The Maungakaretu Scientific Reserve taking;
    b. The Moawhango Post Office taking;
    c. The Napier-Patea Road taking; and
    d. The review of and amendments to the Public Works Act 1981.

The Maungakaretu Scenic Reserve Taking

3. The Crown's submissions addressed the taking of Māori land for the Maungakaretu Scenic Reserve.[2]

4. Those submissions lead to a number of acknowledgements.[3]

5. The submissions note the evidence which showed the change of status from a scenic reserve to a scientific reserve and known as the Ngaurukehu Scenic Reserve, and is administered by the Department of Conservation.[4]

6. The Crown's submissions also records that the Reserve is now subject to a deed of recognition for the benefit of Ngāti Rangi which requires "the Director-General of Conservation to "consult the governance entity" and have regard to its views concerning Ngāti Rangi's association with the area" when "undertaking certain activities."

7. The place of Ngāti Rangi in this rohe and the overlap of interests with Taihape Māori is well established, and the recognition of those interests in the way described have been negotiated by Ngāti Rangi with the Crown. Clearly this Tribunal cannot make any comments on this issue insofar as Ngāti Rangi are concerned

8. Those details however do not allay the concerns and issues for Taihape Māori, and more specifically the interests of Ngāti Tamakōpiri in that area, and the submissions and acknowledgements require a response.

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[1] Wai 2180, #3.3.82, Closing Submissions of the Crown Relating to Issue 13:Public Works (General Takings).
[2] Wai 2180, #3.3.82, (13-35).
[3] Wai 2180, #3.3.82, (35).
[4] Wai 2180, #3.3.82, (24-25).

Change of Status

9. The acknowledgements do not note any issue or recognition of the impact of the change of status.

10. A change of status of a reserve like this should trigger a fresh engagement with the descendants of the owners. It is notable that this took place in 1973, and at that time the powers under the public works legislation were broad and enabling of the Crown acting in this way.

11. However, the change of status shows that the Scenic Reserve purpose for which the whenua Māori was taken had come to an end.

12. At this point the Crown should have engaged with the descendants of the original Māori owners to engage with them and consult on possible changes to the land status.

13. The assumption that the Crown can change the status and purpose of acquired land in this way demonstrates a Crown presumption and paternalism that it knows best and that its ways are preferred. Scientific Reserves exist for certain purposes.

14. Attached as Appendix A to these submissions is Section 21 of the Reserves Act which sets out the purpose and intention for scientific reserves.

15. There are no aspects of these intentions and purposes that cannot be achieved with Māori or under Māori ownership and management.

16. The presumption that Māori landowners have no interest in protecting whenua for scientific purposes is a relic of colonial governance thinking and has no place in a Tiriti based partnership which fully respects the tino rangatiratanga of Māori over their whenua. It was that view that the Tribunal addressed in the Wai 262 Report, where it said that the Wildlife Act should be amended so that no one owners protected wildlife and that the Act should provide for shared managed of protected wildlife species in line with the partnership principle.[5]

Offer-back Options

17. The Crown's submissions note the newfound role of Ngāti Rangi to have input in the management of the Reserve.

18. This Tribunal is able, and invited, to make findings and recommendations that discrete takings of this kind should be offered back to the descendants of the

[5] Waitangi Tribunal, *Ko Aotearoa Tēnei,* the Wai 262 Report, 2011, 147 , also recommendations in relation to the Environment 118-124, and the conservation estate, 145-146, 205.

original owners, that the ongoing desire of the Crown to protect certain scenic or now scientific features do not prevent that from taking place, and that at the very least an exploration of options that may be available needs to take place.

The Moawhango Post Office Taking

19. The Crown submissions on the taking of whenua Māori for the Moawhango Post Office[6] state that this acquisition need not be assessed as a public works taking due to evidence which "suggests this was a negotiated transfer for consideration from a willing seller and that the public works mechanisms were used only to effect the transfer for reasons of convenience."[7]

20. When the Crown decided the land was not needed it was sold to the Moawhango Social Club in the late 1930s, approximately 24 years after the acquisition.[8] The land was offered, and sold, for £2 2s, considerably less than the £30 which the Native Land Court determined was appropriate for compensation for the original taking.[9]

21. How the public works mechanisms served the Crown as "matter of convenience" are not elaborated on.

22. Importantly, the "negotiation" for the purchase was directly between the Post and Telegraph Department and the owner Hera Te Hinare. It is self-evident that having a Post Office would have been of value to the Māori (and wider) community living at Moawhango at the time. Indeed it is apparent that Moawhango Māori had already experience long waits for the provision of fundamental public services, such as a school[10] and police station.[11] These details were traversed in the initial submissions.[12]

23. When the Crown fails to deliver on that purpose, and when the Crown then demonstrates it is willing to release that land from ownership, the Crown has a duty to place its Tiriti partners, in this case the descendants of the original owners at the front of queue, and ensure the land is offered back to them, so that it can once again be whenua Māori under full control of Māori.

24. The Crown cannot in some cases of takings take the position that compliance with the legislation satisfied the Crown's legal duties (and by extension their Tiriti duties) and then in other cases suggest that the takings legislation mechanism which was used can be ignored because other factors make them irrelevant. The legislation was used, the terms did not protect Māori Tiriti

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[6] Wai 2180, #3.3.82, (52-55).
[7] Wai 2180, #3.3.82, (55).
[8] Wai 2180, #3.3.82, (54).
[9] Wai 2180, #3.3.82, (53).
[10] Wai 2180, #A9, Phillip Cleaver, 220-223.
[11] Wai 2180, #A9, Phillip Cleaver, 223-224.
[12] Wai 2180, #3.3.45, 30-32

rights, and the resulting impact is a breach of Tiriti resulting in prejudice to Taihape Māori.

25. For these reasons, the submission here is that while the taking may not have been in breach of Te Tiriti the way the Crown then released the land from its ownership, and sold it to private ownership was.

The Napier-Patea Road

26. The Crown addresses the issue of the acquisition of the Napier-Patea road.[13]Those submissions suggest that because the "provisions under which this land was taken did not include any requirements to consult with owners, to formally notify the taking or to compensate owners" that therefore the "legal formalisation" of the road was "reasonable and necessary in the context of the developing district."[14]

27. The submissions themselves though record that this was a case of "305 acres of customary Māori land, which was already being used as a road between Kuripapango and Moawhango"[15] and points to the evidence from Cleaver on that issue.[16]

28. The Crown acknowledges evidence that the Napier-Patea road "appears to have been utilised as a public road well before being legally formalised as such." The Crown does not point to any evidence that the customary status of the land had been the source of any issues or uncertainty about the use of that access.

29. The approach in these submissions by the Crown takes us into a kind of "wastelands" argument, suggesting that Māori, having allowed public passage on this road, either could not have retained customary ownership or by this action relinquished those customary interests.

30. Both of these propositions are legally incorrect, nor are they borne out by any evidence in support. The approach of those submissions show a lack of recognition of the nature of Māori interests in whenua, and a deliberate willingness to ignore what were clearly legally extant Māori customary rights, that had not been investigated or converted to Māori freehold rights in the way that the Native Land Court was so busy doing at this same time.

31. That the "conversion" of this title came in 1884 for the area from Mangaohane out to the east and in 1896 for Mangaohane west to Moawhango shows that the Crown was now well versed in the established legal mechanisms for the

[13] Wai 2180, #3.3.82, (60-65).
[14] Wai 2180, #3.3.82, (65).
[15] Wai 2180, #3.3.82, (61).
[16] Wai 2180, #A9, Phillip Cleaver, 188.

conversion of customary title to freehold title, and cannot claim ignorance for the sake of efficiency.

32. While an issue that received relatively less focus that other iconic features of this rohe, it is a discrete issue for this inquiry[17] and the rationale of the Crown's position obfuscates the issues that remain.

33. The legislation used to complete this acquisition, being Section 79 of the Public Works Act 1882 (which continued from Section 80 of the 1876 Act) for the first section of Māori customary land "converted" in this way and was also a part of the Public Works Act 1894 at Sections 100-101 used for the second section of Māori customary land.

34. Section 79 and 80 of the Public Works Act 1882 and Sections 100-101 of the Public Works Act 1894 are attached as Appendix B.

35. Cleaver makes a number of significant observations about the process and records that "it may have been a traditional Māori track and early European leaseholders drove sheep along it reach Inland Patea and Murimotu plains."[18]

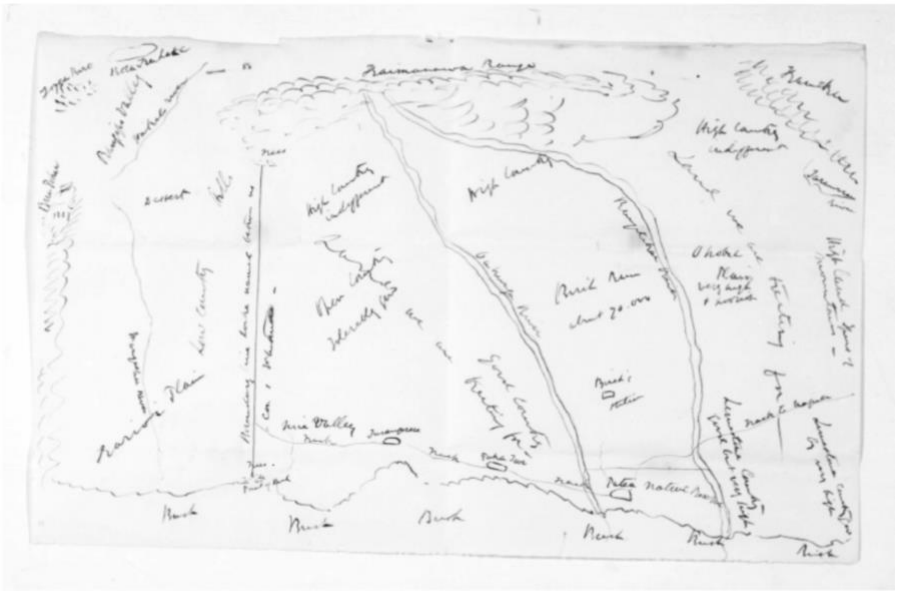

Figure 8: 'Sketch Plan of land being treated for: Murimotu, Rangipō Waiu, Birch's Run (Oruamatua Kaimanawa), Owhaoko: 17 Feb 1868' (McClean Collection, Alexander Turnbull Library)[19]

[17] Wai 2180, #1.4.3, *Tribunal Statement of Issues*, Issue D(13) Public Works Taking Question 3(b), *"What specific impacts, if any, resulted from the Crown or delegated authorities acquiring Taihape Māori land: By vesting existing roads in the Crown, such as the Napier-Pātea Road?"*
[18] Wai 2180, #A9, Phillip Cleaver, 188, citing Heinz Wai 2180, #A1 Adam Heinz, *Waiouru Defence Lands (Scoping Report*) 34.
[19] Wai 2180, #A1 Adam Heinz, *Waiouru Defence Lands (Scoping Report*) 34.

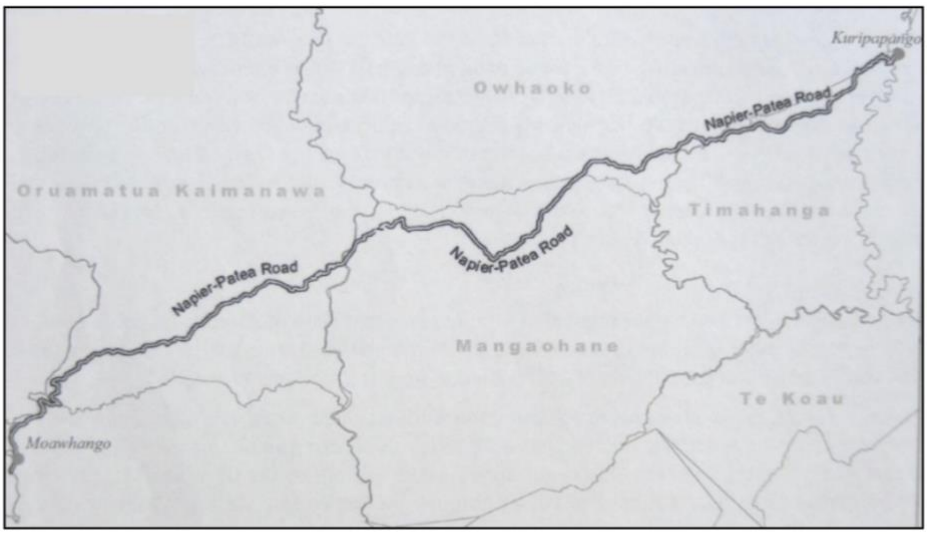

Figure 22: Napier-Patea Road

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36. The Mangaohane to Ōwhāoko section was surveyed in the early 1880s. The warrant for that survey was issued and letters relating to the warrant sent to the surveyor in October 1881 and April 1883, with the plans of the road through these blocks approved by the Chief Surveyor in August 1884.[21]

37. Cleaver points out that "Those warrant and plans record that the land occupied by the road was 'excluded from titles', but do not state when this happened or under what legislative provisions this action was taken. Presumably the land was taken under section 79 of the 1882 Act."[22]

38. Cleaver found no evidence of notice in the Gazette, and noted that no notice was required[23].

39. Cleaver was unable to confirm when the Timahanga section of the road was surveyed and legalised but presumes "it was around the same time as the neighbouring Mangaohane and Ōwhāoko blocks."[24]

40. The other section of the road between the western boundary of the Mangaohane block and Moawhango was surveyed in about 1896, several years after it had been formed.[25]

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[20] Wai 2180, #A9, Phillip Cleaver, 188.
[21] Wai 2180, #A9, Phillip Cleaver, 188.
[22] Wai 2180, #A9, Phillip Cleaver, 188.
[23] Wai 2180, #A9, Phillip Cleaver, 188.
[24] Wai 2180, #A9, Phillip Cleaver, 189.
[25] Wai 2180, #A9, Phillip Cleaver, 189.

41. The plans record the land as being taken under section 100 of the Public Works Act 1894 and the details of the taking appear on the land transfer records and county maps on 1 November 1897.[26]

42. Again, there was no notification in the Gazette and no apparent effort to advise the owners.[27]

43. The work the government did to develop the road was carried out some time later in connection with the construction of the NIMT.[28]

44. This evidence shows that this Crown acquisition of Māori customary land did not feature;

    a. investigation into the title;
    b. notice given to the Māori customary owners;
    c. conversion of Māori customary title to Māori freehold title (and establishment of owners of that freehold title; nor
    d. compensation.

45. The established test for the alienation of Māori customary land by legislation is that "native property rights are not to be extinguished by a side wind"[29] rather there must be "clear and plain "extinguishment.[30]

46. That Court also noted that "Public access is not, however, so necessarily inimical to the existence of the Māori customary title of some kind as to entitle the Court to draw the inference of intended extinguishment."[31]

47. For good measure, that Court also observed that when considering customary title in the foreshore and seabed that the lower Court was wrong to assume that "on the freeholding of a block of land immediately above high water mark, the adjacent foreshore land must necessarily be deemed to have been the subject of the investigation."[32] This finding suggests that the investigation by the Native Land Court into the Māori customary land either side of the Taihape-Patea road could not have had the impact of extinguishing the Māori customary title existing in the road itself.

48. While the Crown submissions point to the use of the legislation of the time, that legislation itself does not refer to the Taihape-Pātea road and as result it

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[26] Wai 2180, #A9, Phillip Cleaver, 189.
[27] Wai 2180, #A9, Phillip Cleaver, 189.
[28] Wai 2180, #A9, Phillip Cleaver, 188.
[29] The "Marlborough Sounds Case", recorded as *Ngāti Apa v Attorney-General* NZCA 117, or 3 NZLR 643, decided in July 2002, [154].
[30] The "Marlborough Sounds Case", recorded as *Ngāti Apa v Attorney-General* NZCA 117, or 3 NZLR 643, decided in July 2002, [154].
[31] *Ngāti Apa v Attorney-General* NZCA 117 [190].
[32] *Ngāti Apa v Attorney-General* NZCA 117 [209].

does effect a clear and plain extinguishment of the Māori customary title which undisputedly existed at that time.

Further Findings and Recommendations Sought

49. We seek findings that the Crown has a duty to recognise, protect and take in consideration the full breadth of customary rights and interests in the land being acquired for public works.

50. We seek recommendations that the Crown properly compensate Taihape Māori for the land which the Crown acquired for public works. Any compensation should take into account the full breadth of customary rights and interests and ancestral connections with their lands as well as the impact of any taking on their ongoing ability to exercise their customary rights and interests.

51. We seek recommendations that the current public works legislation be reviewed and reformed so that the takings system requires equitable protections for Māori concerns, their full breadth of customary rights and interests and ancestral connections with their land when considering a compulsory taking and timely restoration of land taken with the least cost and inconvenience to the former owners, their whānau and descendants.

The Government review of the Public Works Act 1981

52. The Tribunal sought a response in writing from the Crown on this issue and asked for clarity on when government reviews of the Public Works Act 1981 commenced.

53. The Crown provided the following response:[33]

[33] Wai 2180, #3.4.284,

Length of government review into Public Works Act 1981

20. The Crown closings on Public Works (General Takings) (TSOI 13), referred to ongoing review and reform of the Public Works Act 1981. It would assist us if Ms Ennor could clarify when government reviews into the Public Works Act 1981 commenced.

21. Counsel is instructed that:

21.1 The Whenua Māori Public Works Act proposals received partial Cabinet approval in late 2019. LINZ and TPK have been preparing a Bill on the approved proposals since then. Work had been paused during the first COVID lockdown and the 2020 election, but work is now progressing to Introduce a Bill by the end year.

21.2 When Te Ture Whenua Māori Bill 2016 was withdrawn in 2017, a new Whenua Māori programme was undertaken by TPK and partner agencies. The Whenua Māori Public Works Act project was undertaken as part of this new programme.[28]

21.3 While this new programme picked up some of the content of the Te Ture Whenua Māori Bill 2016, it is a separate piece of work under a different government.

54. This response fails to provide the information that the Tribunal has requested.

55. The proposal for Whenua Māori Public Works Act which have received partial Cabinet approval are not yet in Bill form and the details of the proposal are not yet readily available.

56. However, the longer background of the review of the Public Works Act 1981 needs to be set out.

57. A review discussion paper on the Public Works Act 1981 was released by Land Information New Zealand in 2000, a copy of that review could not be accessed from the LINZ website or elsewhere online but a search record showing that it is held in some library records attached as Appendix "C".[34]

58. The Minister for Land Information publicised that review in 2001, this is attached as Appendix "D".[35]

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[34] Website accessed 15 September 2021.
[35] Press release dated 14 January 2001, accessed from https://www.beehive.govt.nz/release/public-works-act-overdue-overhaul accessed 15 September 2021.

59. That review lead to amendments agreed in 2013 and passed in 2017.

60. The LINZ website record and factsheets of those amendments are attached as Appendix "E" and "F" respectively.

61. As the website record (Appendix E) shows:

> *"After a review of the Public Works Act 1981, Cabinet agreed in June 2013 to amend the Act to improve the fairness of the acquisition and compensation process. From 19 April 2017, the level of additional compensation has increased for acquiring land that includes the home of the landowner. The level of additional compensation has also increased for a landowner that does not have a home on the land."*

62. These records show that a review that took 17 years lead to amendments that do not address any of the concerns expressed by Tribunals such as the Rohe Potae Inquiry Panel.[36]

63. Attempts to remove the power of the Crown to take Māori customary land under a members bill drawn in 2017[37] did not proceed through the house, nor did changes proposed under the Te Ture Whenua Māori Amendment Bill of 2016 progress, as noted by Crown counsel in their written response.

64. The Public Works Act 1981 has been under review in some form or other since 2000, but those reviews have still not resulted in any of the fundamental changes which have been recommended on numerous occasions. Attached as Appendix G is the schedule of amendments to the Act, showing that the Crown has seen fit to address numerous aspects of the legislation, but still failed to make meaningful changes to make it Tiriti compliant.

65. There *may* be a Cabinet commitment to making amendments, however the Crown's failure to amend this legislation, insofar as it relates most profoundly to Māori and Māori land, means that indication is of little reassurance that the changes will in fact be made, will be made soon, and will address all those parts of the legislation that are fundamentally lacking compliance with Te Tiriti.

66. For these reasons and those submitted in the closing submissions proper, we again seek the findings and recommendations early set out.[38]

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[36] Waitangi Tribunal, *Te Mana Whatu Āhuru, Part 4,* 175.
[37] Public Works (Prohibition of Compulsory Acquisition of Māori Land) Amendment Bill.
[38] Wai 2180, #3.3.45.

Dated at Māngere this Monday the 27th of September 2021

Cameron Hockly