IN THE WAITANGI TRIBUNAL

UNDER The Treaty of Waitangi Act 1975

IN THE MATTER OF The Taihape District Inquiry
WAI 2180

AND IN THE MATTER OF A CLAIM BY: **Heeni Jayne Ranginui** and **Jenny Tamakehu-Ranginui** on behalf of the descendants of Heeni Matene and Pokairangi Ranginui. **WAI 2157.**

Claimant Generic submissions in response to Crown Closings Submissions on Issue 14 The North Island Main Trunk Railway.
27th September 2021

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May it Please the Tribunal

1 The Claimant Generic closing submissions were framed to respond to the Tribunal Statement of Issues- however in closing submissions the Crown have chosen not to respond directly to the claimant submissions nor to engage with the Tribunal Statement of Issues.

2 The Crown closing submissions focus on just a few issues, and generalised submissions are often made based on very little evidence, and inaccuracies abound. These submissions comment on specific matters in the Crown closing submissions, and are an addition to the Claimant generic submissions and not intended to replace them

3 **Construction of the NIMTR was vitally important for Taihape Maori**. The Crown in these submissions often characterise Taihape Maori as speaking with one voice on an issue- which as the fractious land court hearings show was not the case

4 At paragraph 1 the Crown say the construction of the NIMTR was *vitally important* for Taihape Maori. We can find no reference to any speech from Taihape Maori stating the construction of the railway was vitally important for them. The only Rangatira who spoke in those terms was Major Kemp -Te Keepa Rangihiwinui -who was instrumental in garnering support for construction of the NIMTR.[1]

5 However, construction of the NIMTR was certainly important to Taihape Maori- it meant:

(I) the loss to Taihape Maori of a vast estate in the central area blocks - a total of 304,958 acres in the railway alienation restriction zone.[2] This purchasing under monopoly provisions conceded by the Crown to have been carried out in breach of Treaty principles;[3]

(II) the loss of land taken for construction of the railway without compensation (596 acres)- this type of acquisition has been found by numerous Tribunals to be a breach of treaty principles,

> We do not have full figures on the amount of land taken, especially the pieces taken without compensation under the 5 per cent provision for roading. Nor do we have full evidence on the number of apparently voluntary transactions in which the threat of compulsion was a factor. In our view, a measure of quantity is not the right one to apply to compulsory takings. The compulsory taking of a single acre of Maori land, especially without compensation, is automatically in breach of treaty principles. If the land is truly required in the national interest, and the Crown has first honoured its partnership by negotiation, then the taking of land might be justified as a last resort. even in that circumstance, a compulsory lease (rather than outright taking) would be more compliant with the treaty[4]
>
> We conclude that takings without compensation or payment were in breach of the treaty, with prejudice to those not compensated or paid.[5]

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[1] For example his speech in support of construction of the NIMTR at Ranana Hui in January 1885.
[2] #A9 -p145
[3] Crown closing submissions on Crown Purchasing #3.3.078 -para 21 & 22.
[4] He Maunga Rongo -CNI Report -p819
[5] Ditto-p841

(iii) the loss of their ngahere and natural environment;

As the Main Trunk Line railhead moved northwards through the district forest lands were progressively exposed to rapid exploitation. In 1904 13 timber mills were operating at Potaka Township, Torere and Taihape. The Main Trunk Line reached Taihape in 1904, and by 1905 there were around 20 mills operating in the area. By 1896 there were 28 mills. Output for that year was 21,000,000 super feet.[6]

In a parallel and related process the hapu were also denied the opportunity to control or influence environmental change in a manner which might have served to protect their interests, particularly with respect to mahinga kai resources, which they continued to rely on, and wahi tapu. They were pushed into the social, political and economic margins. In short, kaitiakitanga was replaced by a settler ethic which demanded an almost complete destruction of the natural environment and its replacement with an intensive form of pastoralism.

There is no evidence to suggest that Mokai Patea Maori wittingly acceded to the wholesale denudation of forests in their district, which formed the most dramatic and far-reaching environmental transformation.[7]

(iv) the end of their vision of economic prosperity for the hapu and whanau of Awarua block.

As the chiefs saw it, economic opportunities for their people would be enormously enhanced by the Main Trunk Line and the growth of urban centres, including Taihape. In this way Maori would become 'good and useful settlers', assuming a position of equality with their European neighbours. For this reason it was accepted, at an early stage, that some land would be sold to the Crown for railway purposes.

The Main Trunk Line also formed a key consideration for the Crown. John Rochfort's recommendation of a 'central route' for the Line, traversing the Awarua block, was based partly on the existence of timber and potentially rich farm land, which the line would open up for European settlement. Once Rochfort's recommendation was accepted the Crown remained determined to secure not only land for the line itself, but also as much of the surrounding blocks as it could, including the Awarua block. This land would them be on-sold to settlers, and the profits used to help fund line construction. At no point in the Crown record can one find evidence of an appreciation that the Maori owners of Awarua should participate in the undoubted economic boon the Main Trunk Line would bring. They were rather seen as vendors from whom the land would need to be acquired.[8]

6 It's likely that Taihape Maori had the same feelings for their land as the petitioners of the the four tribes of the Rohe Potae in June 1883.

[6] #A45(a) -p5
[7] #A45(a) p3-4
[8] #A49(n) para 6-7

'What possible benefit would we derive from roads, railways, and Land Courts if they became the means of depriving us of our lands? We can live as we are situated at present, without roads, railways, or Courts, but we could not live without our lands'.[9]

7 The Crown purchased most of the land to construct the NIMTR- rather than take it under the PWA.

The Crown's acquisition of lands for the construction of the NIMTR is primarily a story of Crown purchasing rather than public works compulsory acquisition and is thus addressed in Crown closing submissions on Issue 4: Crown Purchasing. This contrasts with Te Rohe Pōtae where all the land required for railway construction was gifted or otherwise acquired through public works provisions and where different political and historical circumstances applied.[10]

8 All land for construction of the railway line was acquired for rail purposes under the provisions of the Public Works Acts- Part VI of the 1882 Act and Part VII of the 1894 Act. This is the same procedure as in the Rohe Potae and Whanganui districts.

9 Cleavers estimate of the status of land before being acquired for the NIMTR is that ¼ to a 1/3 was private land purchased from Maori-(that takes no account of land privately purchased from the Crown- or held under lease/ licence from the crown) and ¼ to a third was Maori land. That leaves only 1/3 to ½ for land purchased by settlers from the Crown; land held under lease/licence from the Crown and actual Crown land.[11]

10 Cleaver says that if the Solicitor-General's opinion is accepted- the Crown have indicated support for the opinion[12]- and the land for construction transferred to the Crown in 1885 then the proportion of the length of the railway taken from Maori would have been greater- roughly in the vicinity of 60 per cent.[13]

11 The Crown Solicitors letter of recommendation on the takings for the NIMTR- deal with the last takings in the Otairi block- the first takings in Motukawa and all the takings in Awarua. He notes the acreage of each separate taking- a rough counting of the takings in Awarua shows the total area taken at around 500 acres. Roughly half is Maori land, while the other half is held under lease in perpetuity or licence to occupy with right of purchase, and Crown land.[14]

Crown preference for purchasing the land.

12 *Crown policy was to, where possible, purchase the land needed for the railway (rather than compulsorily acquire.*[15]

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[9] RP Report p143

[10] Crown Closing submissions- #3.3.083 -at [2]

[11] #A9(d) page 18.

[12] *There would be little cause for the officials to second-guess legal advice from the Solicitor-General*.- Crown closing submissions -at [52]

[13] #A9(d) -p18

[14] #A32(c) -Of the three heads of taking in Awarua, a rough count from the Crown Solicitors letter is that there were 12 takings of settler land under some form of lease/ licence (72 acres); 13 takings of Crown land of around 155 acres, and 17 takings of Maori land of 247 acres. The other 20 odd acres were from roads.

[15] Crown closing submissions at [4]

13 If the Crown preferred to purchase the land to construct the NIMTR, rather than take it why did they not pay Maori for their land when payment was asked for.[16]

14 Crown took just enough land to construct the railway.

Ballance stated at both the Ranana and Kihikihi Hui, that the Crown required just enough land to safely construct the railway**.**

15 The Crown did not use the compulsory acquisition provisions to landbank for future construction but appears to have only utilised the provisions in a targeted manner, after the precise route had been fully surveyed, and immediately prior to construction to fill any gaps between the lands it had purchased.[17]

16 The Rohe Potae Tribunal said-Where Māori land is taken for a public work, no more Māori land should be included in the compulsory taking than is essential for the work. Even if only a small amount of Māori land must be taken, the same principles and protections must apply as for any compulsory taking of Māori land[18]

17 The Crown statement of positions and concession in the Rohe Potae inquiry said:

> Evidence on the record of inquiry states that the fact that the Department of Railways leased some railway land to private interests: indicates that the amount of land taken for railways in the Te Rohe Pōtae inquiry district was greater than what was required for immediate operational requirements, something that appears to have been standard practice.
>
> The same evidence draws on a New Zealand Railways publication to explain that: the amount of land taken for a railway was determined by an assessment of the area required to meet existing demand and an estimate of what would be required to meet future increases in traffic.[19]

18 Leasing land to settlers was a part of the Railways Dept. business model at the time. The Government Railways Act 1900 (s34-41) sets down the terms and conditions for leasing of Railways land and requires an annual report to Parliament. (s38) In 1903 the report of new leases by the Railways Dept. was 20 pages long- and this was said to be the continuation of a similar list in the 1902 report.[20]

19 In his advice to the PWD on compensation for land taken for rail in the Awarua block the Crown Solicitor said:

> With regard to all the land taken, the question might be somewhat clearer if the entire line of the railway had been proclaimed throughout its length. But when the railway line came to be actually surveyed, more lands adjacent have, it seems to me, been taken under the two proclamations I am reporting upon, than could possibly have been known to be required, before the detailed surveys were made'[21]

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[16] #A51(f) -p11
[17] Ditto at [6]
[18] Rohe Potae Report 153
[19] WAI 898 #1.3.1 at [903 -904]
[20] AJHR 1903 D4- 'Leases of Railway Property
[21] #A32(c)-p5-6

20 Ms Patricia Cross (#I14) spoke in week 5 of surveyors pegging out too much whanau land for construction of the NIMTR at Winiata.

> This is the history our dad would tell us about how our great grandfather Winiata Te Whaaro reacted when the surveyors come through Winiata to survey the land for the Railway Line and the State Highway. They would put the survey pegs well over the marks they should have been, taking too much of the whānau land. My koro Winiata Te Whaaro moved those pegs back to where he thought they should have been, time and time again.[22]

21 Crown submission: *The compulsory acquisition provisions were utilised to acquire land directly needed for the line, yards and stations. Lands that would benefit from the railway (for associated settlement) were purchased by the Crown (see Issue 4 submissions), not compulsorily acquired*[23]

> During the debate on the Railways Corporation Restructuring Bill in March 1990, the disposal of non-core assets including land was a central issue. Minister for Railways Richard Prebble stated in Parliament:
>
> New Zealand Railways owns very substantial landholdings in most cities and towns served by the railways. There is a very good reason — the railways opened up the country. The early engineers were good Scots; they pegged out very good land. They pegged out considerably more land than was needed to run a railways system. That issue was brought before the Government some years ago. As Minister of Railways I made it clear that those landholdings could be sold ....
>
> I am prepared to sell the land to people who are able to pay a good price for it .... The Government is continuing with those land sales because the taxpayers have had to put $1.1 billion into Railways. The taxpayers are entitled to get back as much of that money as possible. I make it clear that the landholdings are not worth anything like $1.1 billion; they are worth hundreds of millions of dollars. That sales programme will continue. It is not a new policy; it has been in existence for some time. For example, the Railways Corporation has sold its houses.[24]

22 **The Taihape section of the NIMTR last to be constructed**

the Taihape section of the NIMTR was the last to be constructed as it contained some of the most difficult engineering issues on the whole route.[25]

23 This is Inaccurate- Taihape section was not the last to be constructed. The NIMTR was open to Rangataua/ Ohakune from the south in 1907. The last spike is on the north bank of the Manganui o te ao River in the central Whanganui district- which contained the really difficult section requiring 3 large viaduct crossings and a number of high bridges over the rivers flowing from Mt Ruapehu- Hapuawhenua, Taonui, Mangaturuturu, Manganui o te ao and Makatote.

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[22] Transcript week 5 #4.1.12 -p528

[23] Crown closing submissions at[6]

[24] WAI 315 Te Maunga Railways Land Report 1994 p58-59. The report says Mr Doug Kidd-MP for Marlborough had raised the issue of protection of Maori land claims in the legislation

[25] Crown submissions at [7]

24 The Coach Road from Ohakune was constructed to bridge the gap between the railheads from the north and south as the NIMTR neared completion:

> From the first passenger coach in February 1907, the partially cobbled route carried travellers between the stations at Ohakune and Raurimu as well as supplying the engineers and labourers working to finish the railway and the phenomenal undertaking that was the Hapuawhenua Viaduct. In use for a mere 21 months, the trail was abandoned upon the completion of the Main Trunk Line on November 8th 1908.[26]

25 Native Minister Ballance's Hui with Maori

Negotiations between the Crown and Rohe Pōtae Māori concerning the railway (and other matters) concluded in 1885 at Kihikihi. Those negotiations were direct with Rohe Pōtae Māori and were specific to that district.[27]

Crown submissions refer only to the Kihikihi meeting- and not at all to the Ranana Hui which preceded it, and which was attended by some Taihape Maori. At the time most of the proposed route of the NIMTR was customary land still owned by Maori- including the large Waimarino and Awarua/ Motukawa blocks. It's unlikely in those circumstances the Native Minister would have appreciated where Whanganui district ended and Taihape began.

26 The statements made at Ranana were at public meeting. Unlike with the Rohe Potae tribes there was no official negotiation with tribes in the Whanganui region beyond the Hui at Ranana. A record of the proceedings at Ranana including Native Minister Ballance's speech was reported in newspapers around the country. The Press Association account of the Hui- sent by telegraph- was reprinted in newspapers from Clutha Times to the Auckland Star.[28]

27 In his letter to officials in Wellington, Utiku Potaka takes issue with Major Kemp claiming Te Houhou as one of his boundaries. That comment was not recorded in the press association version of events reprinted in newspapers, with the liklehood either Utiku was there in person or he had spoken to someone who did attend the Hui.

28 At neither the Ranana or Kihikihi Hui, nor in response to correspondence on compensation- did the Government indicate the promises to pay for land taken for the NIMTR were specific to any particular area or tribe.

> On 9 December 1884, Henare Tikini and others wrote to the Native Minister, asking whether compensation would be paid for the lands required for the railway. Commenting on this letter, Under-Secretary T W Lewis recommended that: the writers be informed that the Government intend to pay the natives found to be owners of all the land taken for the Trunk Railway. He thought that such a payment could not be made until ownership had been decided. Ballance approved Lewis' recommendation.[29]

29 Taihape Maori intentions for the railway were different from those of te Rohe Potae Maori.

The direct dialogue that occurred between the Crown and Taihape Māori between 1889 and throughout the 1890s is, however, of more direct relevance to characterise understandings

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[26] Website- 'Visit Ohakune'
[27] Crown closing submissions at [12]
[28] Papers Past- National Library of NZ- website
[29] WAI 2189 #A25 -p188

developed between Taihape Māori and the Crown regarding the railway. Taihape Māori intentions for the railway and their district differed from those of Te Rohe Pōtae Māori[30].

30 The Awarua/ Motukawa blocks have been referred to throughout the hearings as Taihape Māori's Rohe Potae- because the underlying intentions of Maori in both districts were similar- to preserve their land and taonga and to take advantage of the economic opportunities made available by the railway.

31 There is submission that the purchase of land was the focus of discussions with Taihape Maori rather than compensation. At the time of these discussions- the 1890s - the only example of Maori land taken for construction was at Taraketi. There, the Crown had acted honourably and negotiated with the landowners to reach agreement on compensation. Taihape Maori would have expected the process of compensating them for compulsory acquisition at Taraketi would continue.

32 **Compulsory acquisition of Taihape Maori land for construction of the NIMTR without consultation or compensation was legitimate exercise of kawanatanga.**

The Crown's position overall is that the (limited) compulsory acquisition of Taihape lands for the railway was a legitimate exercise of kāwanatanga and consistent with Tiriti/Treaty principles[31].

33 The Tribunal has stated in many reports that the compulsory acquisition of Maori land, without consultation or compensation is a clear breach of Treaty principles. It is the same in this district.

The Rohe Potae Tribunal said:

> There must be full and genuine consultation with Māori over any public works land taking regime and significant changes to it likely to impact Māori land This requirement for consultation extends to each proposed taking of Māori land with the Māori owners affected The Crown must ensure that Māori do not face inequitable or unreasonable barriers to participation in that consultation[32]

34 **Taihape Maori generally supported the construction of the Railway**

Taihape Māori representations concerning the railway are addressed in submissions for Issue 4 (in short, they demonstrate the support of Taihape Māori for the railway traversing their district).[33]

35 This is an inaccurate generalisation-Taihape Maori did not speak with one voice. Many could see benefits from the rail- but they expected to share those benefits. In all the districts there were Rangatira who could appreciate there would be advantages with rail connection to the rest of the country - but as with other the other tribes affected by the construction of the NIMTR Taihape Maori were to be left with little to show as those benefits went to settlers and the Crown.

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[30] Crown closing submissions at [13]
[31] Crown closing submissions at [15]
[32] Rohe Potae Report -p153
[33] Crown closing submissions at [25]

36 There were instances -such as at Winiata Marae- where Taihape Maori vigorously opposed the construction of the NIMTR through there *rohe.* Patricia Cross spoke in week 5 of opposition to the NIMTR at Winiata.

> Winiata Te Whaaro a chief and considerable land owner, commissioned a European builder named Mr Willouby to build the Wharepuni at Mangaone, known as Winiata Pā Marae, which is a traditional (kin based) whare tūpuna.
>
> Because he could not agree with the surveyors he did the best he could to stop progress of the main trunk railway line. He saw it as an unjust invasion of the people's land. The authorities escorted Winiata Te Whaaro to Wellington where he was a guest of His Majesty's Government until the work on the railway line had passed through the district.
>
> The railway line reached Taihape on the 1st November 1904. ...as the railway and the highway cut through our papakāinga, we have been disconnected from the kohi kai from the Hautapu, weaving and crafting resources, the recreational and spiritual use of the river and the mauri of the Mangaone Stream has been interfered with.[34]

37 **Consultation.**

Mr Cleaver states that there is no evidence that could be found that Taihape Māori were consulted in advance of the construction. However, at the time construction began (north of Wellington and south from Auckland) there remained considerable uncertainty as to whether the route would even traverse the inquiry district (and, if so, what parts of it)[35].

38 This is just obfuscation- Mr Cleaver refers to consultation at the relevant time- in 1885 prior to construction through the district- not years before when the NIMTR began construction from Auckland and Wellington.

39 Hui were held at Ranana and Kihikihi in advance of construction of the NIMTR from Te Awamutu to Marton. There was no meeting with Maori at that time in the Taihape District.

40 There was no consultation with Taihape Maori prior to the central route being confirmed in 1899- and no meetings with Awarua block land owners prior to actual construction over their land.

41 **Acquisition of land surrounding the NIMTR.**

The Crown did not utilise public works provisions to acquire the lands in Awarua and Motukawa that would be opened up by the railway. Those lands were purchased as addressed in Issue 4 submissions[36].

42 Unclear what is being asserted here, as PWA provisions did not allow the taking of land for settlement. Land could only be taken for a specific public works purpose. In the Rohe Potae District there was an example where land was taken for a road under 5% rule and the taking included land used for quarrying shingle. This was later determined to be an improper use of the rule and the land-owners were compensated.[37]

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[34] Transcript week 5- p529-530
[35] Ditto at [30]
[36] Ditto at [35]
[37] WAI 898 #A63 -p175

43 Takings in Raketapauma 2B1

At the more granular level, there are two areas in Raketapauma 2B1 (acquired in 1905) that appear to have been not strictly required for the operation of the railway.[38]

44 We understand the takings in Raketapauma 2B1 have already been considered by the Whanganui Tribunal; with findings and recommendations set down with in the Whanganui Land Report.[39]

45 **Compensation**

We turn finally to the issue of compensation. 594 acres of Māori land were taken for the railway in the Taihape inquiry district. Compensation was paid for the 1888 acquisition. Compensation appears not to have been paid for the 1899-1905 acquisitions. The reasons different approaches were taken are not entirely clear from contemporaneous documentary evidence but appear to turn on legal advice provided to the government in 1903 as to the implementation of the "5% rule"[40]

46 Crown attribute the failure to compensate Maori for the 594 acres -later corrected to 596 acres -to their officials misinterpreting the advice provided in 1903 by the Solicitor General. But that is hardly consistent with the Crown obligation to protect Maori interests. As Maori land owners could not take compensation matters to the court, and relied on the Minister to do so, there is a heightened obligation to ensure Maori interests were protected.[41]

Legislation.

40. Both the 1882 Act and the 1894 Public Works Act (which respectively governed the acquisitions) required compensation to be paid for the taking of both customary and Crown-granted Māori land, but exempted taking for roads and railways from that requirement.[42]

Both Acts included a provision that the Crown could take up to one twentieth of a block for roading or for rail (within specified time periods from the title being created) – commonly referred to as the 5% rule.

Both 1882 and 1894 Acts did not require compensation to be paid for both customary and crown granted Maori land[43]*.*

47 This is simply not correct, as the 5% rule allowing customary land to be taken for road and railways without compensation was not permitted under the 1882 Act- the right to take customary Maori land under the 5% rule was not included in Public Works Acts until 1894.[44]

48 **Comparison with right to take settler land.**

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[38] Crown closing submissions at [37]
[39] Hei Whiritaunoka -Chapter 25.7
[40] Crown closing submissions at [39]
[41] #A9(c)-p3
[42] Ditto at [40]
[43] Ditto at [41]
[44] Public works Act 1894 s91(2)

This rule applied to Māori owned land and included a provision to exempt lands from the operation of the rule. Similar provisions applied to European lands (although not consistently and with shorter timeframes involved).[45]

49 This issue has been considered by a number of Tribunals. The CNI Report said:

> It is not enough to say that both Maori and settlers were subjected to compulsion, and that this was in accordance with the obligations of citizenship and the legitimate execution of articles 1 and 3 of the treaty. What was needed, for both peoples, was community consent to infringements of their property rights. article 3 of the treaty involved the transplantation of British property protections. In Britain at the time, the first approach was to acquire the land by voluntary transaction. If that failed, property could be acquired compulsorily for full and fair compensation, but every single transaction had to be scrutinised and authorised by the community's representatives in parliament.[46]
>
> The settler community, as represented in the New Zealand parliament, enacted legislation that provided for the compulsory taking of land for public works. It also legislated for the taking of up to 5 per cent of new land titles for roading and railways purposes, without compensation. This provision was applied extensively in the Central North Island, with almost one-third of all Maori land taken for public works being acquired without compensation. It was perfectly legitimate for British subjects to qualify their own rights by legislation, in the new circumstances of a colony. What was not legitimate, however, was for a settler parliament to qualify Maori treaty rights, and Maori rights as British subjects, without the proper representation and consent of Maori. Qualifying the rights of British subjects, and violating the absolute guarantee of voluntary cession, both of which were promised in the treaty, was a very serious action.[47]

50 *Variations of this provision were in place for many decades and represented a balancing of national interest and private interests. The policy rationale appears to have been that contributing up to 5% of any block for public works constituted a reasonable contribution towards national development that was of benefit to all (including Māori)*[48]*.*

51 The 5% rule did not apply to all public works- only road and railway. This was said to be a reasonable contribution towards national development, which would benefit all. However:

The Crown acknowledges that the rule would raise Tiriti/Treaty concerns if:

the rule had a larger effect on Māori (in terms of having land taken) than non-Māori and if that effect was not proportionate to the benefits for Māori of the provision of road and rail infrastructure bringing access and the opportunity for commercial development;[49]

52 The Treaty principle involved here is that of equity: The **Crown has a duty of equitable and equal treatment.**

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[45] Crown closing submissions at [42]
[46] He Maunga Rongo -p836
[47] Ditto p837
[48] Crown closings submissions at [43]
[49] Ditto at [44.1]

> The crown could not favour settlers over Maori at an individual level, and nor could it favour settler interests over the interests of Maori communities.[50]

The Crown submissions are that the 5% rule applied to parent blocks in the Taihape Inquiry District. That would mean the obligation to give up 5% for 'national development 'was placed on the iwi/ hapu which were first awarded title to a block of land.

53 Later, when the NIMTR was being constructed, and the block had been partitioned into smaller areas, individual Maori could lose up to 100% of their land under this interpretation of the 5% rule- and they did with Henry Chase losing around 40% of his land in Awarua 4C5.

54 As has been noted by Tribunals in other Districts the rule was inequitable when individual Maori were subject to a possible loss of 5% of their land- because different time limits were applied to the taking of settler land- 5 years vs 15 years for Maori land, and settlers were compensated for any taking of their land.

55 How much more inequitable is it in this district, where the Crown implementation of the rule was based on the size of the parent block, and individual Maori lost up to 40% of their land as the NIMTR was being constructed.

56 It is important to note that Crown interpretation of the rule could not be challenged at Court by Maori land owners; as under Public Works Acts provisions only the Crown could take the issue of compensation to the Court - as Henry Chase found out when he took the matter to the Native Land Court.[51]

57 *The Crown acknowledges that the rule would raise Tiriti/Treaty concerns if: The provision was imposed on Māori without approval of some sort by Māori representatives, taking into account the standards of the day in respect of consultation[52].*

Crown acknowledge the rule would have Te Tiriti concerns if imposed on Maori without approval of some sort. There was no approval and this is an acknowledgement by Crown there are Treaty compliance issues with the 5% rule. There was no consultation with Maori around the country when the 5% rule was introduced, nor on the several occasions when it was amended. The Rohe Potae Tribunal said:

> As we have found above in part II, the Crown did not provide for Maori autonomy or self-government at a central or local level. During the period of the 5 per cent clause (from 1862 to 1928), Maori sought full and fair representation in the settler parliament, a national Maori body to decide policy and regulation for Maori land, and local self government through Runanga. and komiti. None of these things were granted by the Crown. Public Works acts and relevant parts of the native land laws could have been, at the very least, the subject of consultation in the way that the Native Minister, John Ballance, consulted over the Native Lands administration act in the 1880s, with local, regional, and national hui. They could have been submitted to the Kotahitanga paremata in the 1890s, as with other draft legislation.[53]

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[50] Rohe Potae District Report-TE MANA WHATU AHURU- p188
[51] #A9(c) p5
[52] Crown closing submission at [44.2]
[53] Rohe Potae Report -p

58 The CNI Tribunal commented in a similar fashion:

> as we have found, it is a major treaty breach that the Crown repressed Maori autonomy, and failed to provide for self-government. The evidence is clear that there was no consultation with Central North Island tribes before enacting laws for the compulsory acquisition of Maori land – with discriminatory provisions and fewer protections – in the nineteenth and early twentieth centuries. Indeed, the Crown either repressed or failed to provide legal powers for the very Maori institutions that could have consented to the introduction of a public works regime. together, the Crown, and settler and Maori local authorities could have agreed the circumstances in which the nations need would allow for compulsory taking.[54]

59 Crown submissions- *There is not sufficient evidence on the record to assess these issues as a national or systemic matter. The application of this rule, and of these potential Tiriti/Treaty concerns, in the circumstances of Taihape is addressed below*[55].

The application of the 5% rule has been considered in some depth in other inquiries, notably the CNI and Rohe Potae Inquiries. In both of these Inquiry districts databases were compiled of every public works takings, from which detailed consideration of the operation of the rule could be made[56].

60 The history of the 5% rule shows the Crown continually trying to bend the terms of the rule in its favour- unwilling to pay Maori for even 5% of their land taken for road or railway. The best summary of the Crowns operation of the rule is in David Alexanders Report *Public Works Takings in the Rohe Potae District.*[57]

61 An example is of the time allowed to take land. From 1886 until the rule was abolished in 1927 the Crown had taken Maori land under the 5% rule without any time limit- unless there was a crown grant or the land was registered under the land Transfer Act. This happened because of the wording of the rule in the 1886 Native Land Court Act, which was replicated in subsequent Public Works Acts. Reference is made to this issue in the claimant generic closing submissions.

62 The CNI Tribunal said about how this aspect of the rule was used and abused by the Crown:

> In practice, it meant that Maori land could be taken without any notification or consultation, not just if it had not been through the court, but also where it had not been registered under the Land transfer act. This definition appears to have included most Maori land, whether it had been through the court or not. [58]

63 The Crown obtained Solicitor-Generals opinions to confirm the legality of this practice- and later when the legality was challenged by settlers and Maori, the Supreme court supported

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[54] *He Maunga Rongo*- p837
[55] Crown closings at [45]
[56] WAI 898 #063(b)(i)
[57] WAI 898 #A63
[58] He Maunga Rongo -p847.

the Crown.[59] Alexander notes that the Crown taking of Maori land under the 5% rule, without time limitation continued until 1927:

> The response of the Government to this petition avoided discussion of any obligation to assist the Maori owners, advising Parliament only that the taking under the Native Land Act complied with the circumstances set out in the legislation.
> The law as construed by the Supreme Court was that the time in which the Crown was entitled to take land for roads without payment ran from the date of the registration under the Land Transfer Act, and not 15 years from 28 November 1900 when the title was investigated.
> An attached report from the Registrar of the Native Land Court showed that there had been no registration of any of the titles to the Rangitoto-Tuhua 77 partition blocks affected by the road taking. The Native Affairs Committee, as a consequence, was unable to address the failings of the legislation, and reported that it had no recommendation to make.[60]

Taraketi taking

64 Crown Submission-*As above, 12 acres, 1 rood, 30 perches of Taraketi block was taken in March 1888 for the first phase of construction in the inquiry district. Despite there being no statutory requirement that compensation be paid (in that less than 5% of the parent block was taken), the Crown did pay compensation for that land.[61]48*

> *48 (footnote) Wai 2180, #A09, at 146, 149–150. On 25 October 1888, the Native Land Court heard an application by the Minister of Public Works for an assessment of the compensation payable. Wirihana Hunia sought £10 per acre for the land taken, plus £10 per acre for the loss of access to the Rangitikei River. The Crown offered only £6 per acre, nothing to compensate for the loss of access, and for the rent to be deducted. This left £5 17s 6d per acre (a total of £73). Despite this, the total compensation ended up being £60, and the Court ordered that it be divided equally among the 16 owners listed on the certificate of title[62].*

65 The footnote refers to Mr Cleavers account of the Compensation hearing at the NLC- but there was a misreading of the £-s-d terminology and the figures are inaccurate. Mr Armstrong would provide the correct version of the negotiations and said that the error was caused by misreading the 26/-per acre paid to the lessee as 2/6.[63]

66 At the Taraketi compensation hearing the Maori owners asked for £10 per acre for the land- The government offered £6 less the 26/- per acre paid as compensation to the lessee - making the Crown counter offer a little over £57, and when this was raised to £60 the owners accepted.[64]

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[59] Solicitor General Fred Fitchett gave 2 opinions in support- in 1902 and 1910. The Supreme Court also approved in *Smith and others v Attorney General S.C 1912 [31 NZLR] 509*
[60] WAI898 #A63 -p127
[61] Crown closing submissions at [46]
[62] Crown closing submissions -footnote 48
[63] #A49(o) & -Mokai Patea Land, People and Politics- Response to questions of clarification p2
[64] #A49(o)(i)

67 This can be seen as the government adhering to Native Ministers Ballance's promise at Ranana to pay for every acre of land taken for the NIMTR- and by implication not to impose the 5% rule over these takings.

68 Compensation for land taken during second stage of construction.

Crown submissions - *Crown officials took steps soon after the 1903 Awarua 4 takings to initiate compensation payments for those takings and the 1899 Pouwhakarua taking.*[65]

69 The Under-secretary of the Public Works Dept. sought legal advice in June 1903 from the Crown solicitor as to compensation liability for takings for the NIMTR-mostly in the Awarua block. This resulted in The Crown solicitor making specific recommendations on how compensation should be determined for the land taken for the NIMTR in the Awarua block- both from settlers and from Maori.[66]

'The question of compensation may be divided into three heads:

(1) Freehold land owned by Europeans (of whch there are only a few)

(2) The licenses to occupy issued by the Land Board;

(3) Land owned by Natives.

In the first case the ordinary compensation provisions of the Public Works Act apply.

In the second case the Commissioner of Crown lands informed me in a number of instances that rent was abated to the licensee in respect of the part of the railway taken. This statement would make it appear that the licensee had been in occupation of the part taken by the railway, but I am of the opinion that section 125 of the Land Ac 1892 settles the question of compensation as regards the licensee

In the third case, that of Native Lands, I think that all these should be referred to the Native Land Court to ascertain compensation, how much, and to whom payable, in pursuance of Sections 87 to 95 of the Public works Act 1894.

In this connection, by section 92 subsection 2, no compensation is payable in respect of land taken for railway over which there is at the time of taking thereof an existing right in the Governor under the provisions of sections 92 to 94 to take the same or greater quantity of land for roads, or in respect of any native land taken for railway of which the ownership had not been defined by the Native Land Court, where the area taken does not exceed the quantity which the Governor could have taken under section 92 had the ownership been defined'[67]

70 It appears no concrete steps were taken to refer the matter to the NLC. Rather consideration was given in the PWD as to how payment of any compensation could be avoided- hence the letter to the Solicitor General of 13 Novenmber1903. This appears to have been one role for the Solicitor-Generals of the day- to provide legal support for the crowns land acquisition policies.[68]

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[65] Crown closing submissions at [51]
[66] Crown Solicitor, Wellington to Under-Secretary, Public Works Department, 6 October 1903
[67] #A32(c) -p5
[68] #A9(c)-p8

71 Under the terms regarding compensation in the PWA and the Lands Acts when settlers bought land off the Crown that land could be resumed within 5 years, and compensation would be double the rate the settler paid for the land.[69]

72 In circumstances where the settlers bought land off the Maori the 5% rule would apply. The letter to the SG refers to this specific situation- where settlers had bought land in the Otairi block from Maori.

73 It is notable that the request concerning paying compensation for settlers land- referred to as under the first head- where the advice was that the ordinary compensation provisions of the PWA applied.

74 Awarua takings

Crown submissions are that the Solicitor General advised that compensation was not due to the Maori land-owners in Awarua under the 5% rule, and that advice was followed.

Officials identified that some of the Māori land subject to the railway proclamation had been sold to Europeans and sought legal advice on how the provisions should be applied. The Solicitor-General provided advice on that question and some broader issues. Consistent with that legal advice, the Crown appears to have concluded that compensation was not required to be paid under the 5% rule.[70]

75 However, as noted above the SG's advice did not relate to compensation for taking Maori owned land, and as Mr Cleaver found there were problems with applying the SG advice to the takins of Maori land in the Awarua block.

(i) At the time of the proclamation in 1885 the Awarua block was customary land, and the 5% rule could not be applied to customary land until 1894;

(ii) If the crown had accepted the land taking proclamation as the date of taking then those takings in Awarua would have been exempted from the 5% rule by way of the 15 year time limit[71].

76 This indicates that the Ministers use of the 5% rule to justify paying no compensation for the takings in the Awarua block was a purely political decision without any legal foundation.

77 Crown submissions- *That included sections where more than 5% was taken as, according to the legal advice, the 5% provision applied to the parent title of the block rather than to sections subdivided from that block*[72].

The reference for this assertion is to report- #A51(f) at [4.14] where Mr Parker says:

> *This all means that in determining whether compensation was payable for the taking of land for the North Island Main Trunk Railway, the Public Works Department did apply the 5 percent rule. It did so under the Solicitor-General's 1903 opinion. That was that the Order in Council of 1885 took the land and that the 5 percent rule applied to the area of the whole block rather than individual partitions of the block.*

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[69] Land Act
[70] Crown closing submissions at [54]
[71] #A9(c)-p10
[72] Crown closing submissions at [54]

78 This statement is simply inaccurate- the SG was asked about whether the 5% rule applied to settler owned freehold land. Land owned by settlers would have title under the Land Transfer Act, and in that situation any taking was limited to 5% of the land in the title.

79 The SG opinion is set down in full in one of Mr Parkers reports. Mr Parker has transcribed it and it doesn't refer to the right to take 5% of a parent block- directly or indirectly.[73] Applying the SG opinion to the taking of Maori land has legal problems- as set down above at para 63.

80 Crown submission-

Mr Cleaver states: "No clear evidence has been located that definitively shows that the Department decided not to pay compensation to Maori owners on the basis of the five percent rule", but concludes that is the most likely explanation. He also concludes that there is precedent for the view that the 5% applied to the parent title rather than subdivisions (or at least that Crown officials at the time believed that to be so[74])

81 However, Mr Cleaver does not say there was any precedent in 1903 for the view that the 5% rule applied to parent blocks. That was to come later- after a dispute over the provisions for taking Maori land in the 1909 Native Land Act.[75]

82 There is no evidence put forward, that in 1903 Crown officials anywhere in the country - except the Taihape district - believed the rule applied to parent blocks. Examples were provided in the claimant closing submissions from the Rohe Potae district where the 5% taking was applied to the area of the block at the time of the taking.

83 Another example is in the CNI report. A data base was compiled by Mr Alexander of all public works takings in the district. In the table each taking was categorised as being compensated or not compensated. Mr Alexander had been questioned on how accurate this categorisation was.

> Mr McBurney's evidence established that up to 5 per cent of various Ngati Whakaue blocks was taken in the 1890s for railways purposes, without compensation. When questioned on this, Mr Alexander explained that the net result was the issuing of compensation orders for blocks where the taking exceeded five per cent, and thus the entire taking appeared as 'compensated' in the database.[76]

84 We submit that it was a political decision not to compensate Maori for the land taken for the NIMTR- this was in line with the view taken by many politicians that Maori should contribute directly to the construction- as they would profit from an increase in the value of the land left to them.

85 This was the viewpoint that construction of the line was payment enough to Maori. It is the reason Armstrong put forward that compensation wasn't paid for land taken for rail at Turangarere; while the same reason was given by the Minister in response to the request from land owners for payment for land taken for the NIMTR at Waimarino.[77]

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[73] #A32(a) -p9
[74] Crown closing submissions- at [55]
[75] #A9(c)-p11
[76] CNI Report -p839
[77] #A49(o) -p2 & #A32(d).

86 The 5% rule was put forward by the Minister in response to requests from Maori land owners in the Awarua block, but it didn't really matter what excuse was used or whether it was legally sound or not, as the Ministers decision could not be challenged in Court.[78]

87 Crown submissions- *Although Crown officials had (as above) taken steps towards compensation being determined, there is no record of further action being taken after the Solicitor-General's advice. There would be little cause for the officials to second-guess legal advice from the Solicitor-General*.[79]

88 Second guess what advice? The SG gave no advice concerning compensation for the taking of land in the Awarua block. His advice responded specifically to the question asked- whether compensation was payable for the land taken from settlers located between Mangaonoho and Mangaweka in the Otairi block.[80]

89 Crown submissions say *There is no evidence the Solicitor-General knowingly or deliberately provided incorrect advice.* In his opinion the Solicitor-General - Australian Fred Fitchett- considered that the proclamation in April 1885 that the NIMTR would be constructed between Te Awamutu and Marton served to legally transfer to the Crown, all the land that would later be taken for construction of the NIMTR.[81]

90 This was under the provisions of sec. 24 of the Public Works Act 1882. Sections 24-26 of the Act set down an abbreviated process for the taking of Maori land for Public Works. Parliament decided this process was not effective for the taking of land for the NIMTR- and repealed this section of the Act in 1887.[82]

91 The SG said this repeal by Parliament could be treated by the PWD as invalid because the provisions which Parliament put in place for the taking of Maori land for rail under part VI of the 1882 Act were not an effective replacement.

92 This was despite the repeal having been treated as valid by all parties since 1887, and the provisions of Part VI/ 1882 and in Part VII of the 1894 PWA being used hundreds of times by the PWD to lay out and take land for the NIMTR. The SG gave no considered reasoning for why the detailed step by step procedure for taking Maori land for the NIMTR set down in Part VI of the 1882 PWA was ineffective compared with the abbreviated process of sec. 24-26 of that Act.

93 It appears to have been a role for SG of the time to provide a supporting legal basis for the Crowns cheap acquisition of Maori land. Alexander refers to other SG opinions supporting Crown practice of the 5% rule, from Fred Fitchett on 17 Dec 1902 and 10 January 1910,[83] and Sir John Salmond on the 21 February 1912 and the 5th November 1915.[84]

94 The opinion of 21 February 1912 concerned a taking in Rangitoto 12B and the rights of the PWD to take Maori land under the 5% rule under the provisions of the 1909 Native Land Act. The SG said the right could be exercised on the area of the parent block, as the provision in

[78] #A9(c) -p5
[79] Crown submissions at [56]
[80] #A9(c)-p8
[81] Crown submissions at [57]
[82] Public Works Acts Amendment Act 1887- s13 & 14
[83] WAI 898 #A63 p68. 129-130
[84] Ditto-p66. 135

the 1909 Act- which stated the 5% applied to the area of the block at time of the taking- did not act retrospectively.[85]

95 This was the first occasion when the right to take 5% of a parent block was mooted, and demonstrates the ongoing policy of the Crown to stretch the rule as far as possible in its own favour- and with little or no concern for Maori interests.

96 Another example is given by Mr Alexander of Crown officials reaction to an unexpected legal opinion from Sir John Salmond on rights to take a certain category of Maori lands under the 5% rule:

> The Solicitor General therefore concluded that takings of road between 1894 and 1909 from lands the title for which had been issued under the 1886 or 1894 Acts, citing the Native Land Court Act as authority, were lawful, but takings between those years citing the Public Works Act as authority would not be. The Solicitor General was Sir John Salmond, who had been the architect of the Native Land Act 1909, and who was regarded at the time as the person, more than any other, who had grappled with and been able to comprehend the multiple complexities of the nineteenth century Native land legislation. His experience meant that his opinion, even without taking into account his official position, therefore carried considerable weight.
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> ` Although Salmond, looking forward, regarded this distinction as "not one of much practical importance", there was consternation about the opinion within the Department of Lands and Survey, as it contemplated the status of all the roads that had been taken over the previous thirty years. In the light of the opinion now given in connection with the matter, there is no doubt that the taking of many of these roads would be considered invalid. On the other hand, however, it is not likely that the question will be raised, as the Proclamations have been registered, and the roads recorded on titles, etc. Some of the roads would of course be legal by right of user, formation, etc. The Under Secretary for Lands agreed that it was best to do nothing, and tell no one outside his Department. He minuted, "no action to be taken in regard to roads previously taken[86]

97 Crown submissions- *The Crown considers that the legislation was applied equally to the taking of Māori and non-Māori land in Taihape.*[87]

98 However, the legislative process was not equal. Mr Alexander said:

> The 5% provision was a draconian imposition on Maori landowners. It was also discriminatory. There was legislation affecting some (but not all) settler-owned land that shared some parallels with that for Maori-owned land, but it was nowhere near as harsh.
>
> The 5% provision, with its associated time limitations, applied to European settlers who had purchased their land from Maori owners within the time period, meaning that potentially they could lose some of their land without being compensated. Crown Land

[85] WAI 898 #A63-p135
[86] WAI 898 #A63- p65-66
[87] Crown submissions at [58]

> leased to settlers under the Land Act was also bound by some general provisions of that Act.
>
> One of these (Section 13 Land Act 1892, replaced by Section 11 Land Act 1908, in turn replaced by Section 12 Land Act 1924) gave the Crown the right to take roads through leased land. Because it was a power retained by the Crown when leasing out its own land, there was no provision for compensation. However, the significant difference, when compared with the Maori land legislation, was the requirement to obtain the approval of the lessee.[88]

99 The Rohe Potae Tribunal said:

> The Tribunal has consistently found that the 5 per cent regime failed the Treaty requirements for compulsory takings of Māori land. It failed Treaty protections in not requiring compensation and was discriminatory and inequitable. That included that taking authorities were given longer time periods during which they could apply the provision to Māori land than were available for application to general land and the process for applying the provisions, through the Native Land Court for Māori land meant that Māori land was made more generally available to the provision than was ever the case for general land.[89]

100 Crown submission -*Payments were paid to both Taihape Māori land owners and to European land owners in the early twentieth century for damages and other reasons*[90]

The reference is to Mr Cleavers repot where he says there were 2 small payments to Maori land owners in the Motukawa 2B block- possibly for damage to land; and one occasion where compensation was paid to a settler. We would submit that from these very small number of examples it cannot be taken that Maori and European land owners were treated equally.

101 An example from around the same time was the Crown response to a request for payment for damages to land from the owners of Waimarino 4. The response was that the potential increase in value of their land due to construction of the NIMTR was sufficient consideration[91].

102 Crown submissions do not consider the failure of the Crown to pay Maori for their stone resources used for ballast in construction of the NIMTR.

103 Crown submissions- *the lack of evidence of compensation being paid applies to both Māori and non-Māori land. The Crown is accepting that absence of evidence means it is likely that Māori were not compensated*.[92]

104 Because there is little evidence put forward of compensation payments, does not mean that Maori land-owners and settlers were treated equally. Owners of general land purchased from the Crown could take the issue of compensation to court, and a decision would be

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[88] WAI898 #A63 -p66
[89] Rohe Potae report p150
[90] Crown submissions at [60]
[91] #A32(d)
[92] Crown closing submissions at [61.6]

given in terms set down in the Lands Act. Maori did not have that easy option- the Wairarapa ki Tararua Tribunal said:

> For owners of multiply owned land, the ability to challenge takings was notional only because of the practical difficulties of doing so. This, and the absence of compensation, probably encouraged the laissez-faire attitude to documentation and procedure. The impact of the application of the rule to Māori land in its more than 60 years of operation was the effective confiscation of a substantial (but now incalculable) amount of Māori land without compensation.[93]

105 Crown submission- *The Crown preferred purchase over compulsory acquisition but turned to the compulsory acquisition powers due to gaps in the land it had purchased…*

106 There is no evidence put forward to support this statement. The land the Crown did purchase in the Awarua block was acquired under pre-emption in breach of Treaty principles.[94] The land acquired in Awarua under compulsory acquisition powers without consultation or compensation was also acquired in breach of treaty principles.

107 If the Crown did prefer to pay Maori for their land, rather than use compulsory powers- when that was an option- why did they not pay the owners of Awarua in August 1904 when payment was requested.[95]

108 Crown submissions- *The evidence shows that careful consideration as given to feasible alternatives to compulsory taking of Maori land in terms of alternative routes for the railway.*

109 Absolutely no evidence has been given to support this statement; and unclear what it is based on. Careful consideration of alternative routes in the 1890s focused on economics, settlement opportunities, and engineering issues- such as Raurimu and the incline to the Central Plateau.

Summary.

110 The Crown submissions state the Crown officials followed legal advice as to payment of compensation for Maori land-owners in the Awarua block. However, the only legal advice those officials received on that matter was from the Crown solicitor Mr H Bell in October 1903- that the matter should be taken to the Native land Court to have compensation determined. Crown officials chose to ignore that advice.[96]

111 The Solicitor General was asked about the application of the 5% rule to settler owned land. He was not asked, and he made no comment, on whether Maori land-owners in the Awarua block should be compensated.

112 The Crown submissions conclude with the assertion the compulsory acquisitions to construct the NIMTR in this district were a legitimate exercise in kawanatanga. We would say that is not the case. As referred to in these submissions Tribunals have generally found that takings under the 5% rule- without consultation or compensation- were in breach of the principles of the treaty.

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[93] Wairarapa ki Tararua Report -2010. -p746
[94] #3.3.078 -at [21]
[95] #A51(f) -para 4.10
[96] #A32(c)

113 Other tribunals have found that the different legislative policies for the taking of Maori and settler land were in breach of treaty principles; and there is no evidence the way this policy applied was any different in this district. The Wairarapa ki Tararua Report said the rule breached the principle of equity.

> The rule applied inequitably to Māori and settler-owned land. It applied to general land only for five years after sale or survey. And it applied to less and less general land, as districts became more closely settled and surveyed; whereas it applied to more and more Māori land, as it was brought before the Native Land Court. [97]

114 Crown interaction with Maori was different in this district in matters concerning the construction of the NIMTR, from that in the Whanganui and Rohe Potae districts:

(i) The land of consultation with Taihape Maori prior to construction beginning- in contrast with the well-attended Hui with Whanganui and Rohe Potae Maori.

(ii) The misuse of the 5% rule by the Crown was more extreme in this district- using the 5% rule to take up to 40% of a block from a Maori land owner- in contrast with the Ministerial reasoning in Whanganui District that construction of the NIMTR was sufficient payment for the land.

M McGhie

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Mark McGhie.

[97] Wairarapa ki Tararua Report 2010. -p746