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 for Defence, Issue 15.
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 Public Works Takings relating to the Waiōuru Defence Takings (Issue 15).[1]

Introduction

2. These replies address the Crown's closing submissions on this issue[2] and focus on the legal arguments and summary analysis of the evidence in relation to;
    a. the nature of past, future and current use of the Defence lands;
    b. the use of retrospective justification of "need";
    c. whether any or all of these takings of Māori land were a "last resort";
    d. the full extent of the impact of the takings on Māori and the nature of equal treatment (or lack thereof);
    e. notice, engagement with and consultation with Māori landowners before the takings were carried out;
    f. compensation and valuations; and
    g. the taking of Ōruamatua Kaimanawa 4.

Past, Current and Future Need: Is there heavy use?

3. Crown submissions acknowledge the evidence of their witnesses that "the permanent military population resident at Waiōuru has decreased since the 1980s."[3] Despite this those submissions suggest that the training areas at Waiōuru "are more heavily used currently than ever and that they anticipate that continuing to the be the case"[4] to the extent "that every part of the area is critical to training operations."[5]

4. The disconnect between a diminishing residential population, and a diminishing military population,[6] with what is described as an increasingly heavily used defence area is not clarified.

5. While it understood that some of the firing ranges need to be extensive due to the range of the firing trajectories, this does in itself does not explain the need for the full extent of the current Waiōuru Military Training Area (the WMTA).

6. This nature of the lands held, and up until recent times, the frequent use of these areas for recreational activities, and the licensing (or leasing) of those areas for farming undermines those arguments made by the Crown.

7. To begin with, the WMTA is split by State Highway One, due to the passage of the public along the Highway it is clear that there is not now and possibly has not ever been significant firing in the area immediately adjacent to the Highway on either side. There are also public roads that lead from SH1 to the maunga Ruapehu and Tongariro.

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[1] Wai 2180, #1.4.3, *Tribunal Statement of Issues*, Issue D (15).
[2] Wai 2180, #3.3.84, *Crown Closing Submissions of the Crown Relating to Issue 15: Public Works (Defence).*
[3] Wai 2180, #3.3.84 (14).
[4] Wai 2180, #3.3.84 (14).
[5] Wai 2180, #3.3.84 (15).
[6] Wai 2180, #3.3.84 (14).

8. Historically, there was extensive leasing along the western and southern sections of the WMTA. This was addressed in closing submissions.[7]

9. Appendix A to the closing submissions featured a summary of Cleaver's evidence and showed that eight of the blocks of land taken were licensed for farming use in the period after the acquisition.[8]

10. There were also eight blocks that were exchanged in whole or partially to become the property of Ohinewairua Station, or to become part of Kaimanawa Forest Park or Tongariro National Park.

11. Two of those exchanges happened in 1979, the other six in 1990, showing that the Crown recognised that there was land no longer needed and available for exchange that had not been compromised by the military activity that had taken place. This point is made because of the narrative of the submissions that suggest no other ownership model was (or is) possible and the suggestion that this was borne out by the evidence.[9]

12. On the contrary, the evidence suggests that the land to the west is not going to be utilised for dangerous activities, nor that it contains hazards as a result of former firing, and as a result the ownership of the land could now (as it could have from the beginning) be held in Māori ownership subject to military use for as long as that need existed.

13. Alternately, that land acquired in the earlier phases could have featured as a part of an exchange for later takings, although the evidence showed that the Crown did not want to seriously consider offering Māori land in exchange for the land taken,[10] with leases on those lands providing Defence with ongoing income and making them available to Defence for as long as needed.

Was the Māori land taken by Compulsory Acquisition as a Last Resort?

14. As noted briefly above, the presumption by the Crown from the outset was that full ownership of freehold title was required to establish and operate the WMTA.

15. Some of the areas acquired were licensed (or leased) for private use, and some of them have been exchanged, some have been used for large scale public events.

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[7] Wai 2180, #3.3.47 (91-106).
[8] Wai 2180, #3.3.47 (a).
[9] Wai 2180, #3.3.84 (24) The point is made for the 1940 takings, at (39.2) referring to "alternative methods" regarding the takings of 1961 and at (70.4) in relation to the 1973 taking. The suggestion that alternate methods or forms of takings can be discussed and considered without engaging with the owners is in our submissions fundamentally flawed. The Crown has a duty to consider those options to begin with, but they must also feature in the engagement with the Tiriti partner, as the voice of those Māori affected by the proposal is where those alternatives become apparent and then must be considered. We note that Defence did produce a map showing the Defence Forces record of firing ranges and areas of possible unexploded ordinances see Appendix PH2 to the evidence of Major Hibbs Wai 218, #M2(a).
[10] Wai 2180, #3.3.47 (142).

16. A significant amount of those lands are once again in private ownership, a significant amount is also now a part of the national parks land-base under the control of the Department of Conservation.

17. The presumption that full title was needed then, and which continues to be the Crown's position now, is not supported by the history of the lands and should not be assumed for the future of these lands.

18. The Crown may very well argue that those lands are relatively minor in size and remote in location, but that just demonstrates once again the failure of the Crown to appreciate the significance of the retention of whenua tupuna in Māori control, and the significant of any opportunity to have those lands returned. It also demonstrates a lack of willingness by the Crown to do an accurate accounting of how the WMTA are now and have been used, the risks (if any) associated with that use, and options to remedy the historical breaches of Te Tiriti through alternate ownership models which places Taihape Māori back as owners of their whenua.

Total Takings and Release of WMTA lands

19. The Crown produced a table which suggests that 43,437 acres were taken from Māori for the WMTA.[11]

20. That table allocate 16,277 acres to the category of general land/European, being the interests in Ōruamatua Kaimanawa 1,2 and 4 acquired by Mr Koroneff.

21. That 16,277 is better categorised as Māori land acquired by Pākehā as a result of the failings of Māori land laws at the time. Categorised in this way, it increases the total Māori land which became a part of the WMTA to 59,714 acres, well over a third of the total WMTA of 146,822 acres.

22. That table also fails to show the land which has been taken out of the WMTA and placed in private non-Māori ownership and in comparison that Māori have been the recipients of none of the land released from the WMTA..

23. Appendix A to the Claimant Generic closing submissions shows that the Defence has released land from the WMTA on eight occasions.[12] The total amount of land released and now privately owned is 2,096 hectares or 5,179 acres; 3.5% of the total land acquired.

1961 Takings: Notice to Owners, Engagement and Consultation

24. The Crown makes the submission that the 1961 takings featured significant notice being given to Māori.

25. The Crown suggests that the evidence shows:

[11] Wai 2180, #3.3.84, 9.
[12] Wai 2180, #3.3.47 (a).

> 35. Officials ensured (at the instigation of Māori Affairs) that the notice of intention to take the land received the widest possible publicity, including notices in local papers and copies posted to the 112 owners whose addresses were known (out of a total of approximately 260 owners).[33] This was notwithstanding that notice was not required to be given for defence takings.[34]

26. The Crown then submits that:

> 39.3 Inherent in the negotiations and notification processes (and evident by the presence of owners at the compensation hearing) was full and genuine consultation with Māori owners, which included opportunities to object (which were exercised and carefully considered), notwithstanding there was no statutory duty to consult.

27. Submissions on the nature of consultation with owners have been provided.[13] Those submissions point out the prominence of the idea of an exchange in the minds of those Māori that engaged in these meetings.[14]

28. The lack of genuine commitment to calling and holding meetings was also shown in reference to evidence of the views of the Assistant District Officer.[15]

29. While there was a period of some nine years between commitment to acquisition and the reversion to compulsory acquisition, those nine years are not characterised by repeated engagement and meetings with the owners, or even attempts at meetings. There was only ever one meeting called, for the "principle owners" in 1950, and it was a private one, not publicly notified.[16]

30. As late as February 1957 the District Officer working at the Māori Land Court in Whanganui suggested that quorum would have been achievable for all but three of the blocks,[17] and at the same time the Secretary for Māori Affairs was suggesting again that those meetings needed to be called.[18] There were no further attempts, indeed the evidence shows that there were no attempts to call meetings of owners at all.

31. The submission above must be addressed though, as the "presence of owners at the compensation hearing" does not show that the negotiations or notifications processes were satisfactory.

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[13] Wai 2180, #3.3.47, 22-26.
[14] Wai 2180, #3.3.47, 23.
[15] Wai 2180, #3.3.47, 24-25 (150).
[16] Wai 2180, #A9 Cleaver, 64.
[17] Wai 2180, #A9 Cleaver, 71.
[18] Wai 2180, #A9 Cleaver, 71.

32. The timing shows that there was not a meaningful attempt at engagement with the wider ownership list until notification of the taking, by which time the Crown had committed to the compulsory acquisition, and there is no meaningful opportunity for consultation.

33. There was just one owner who formally objected to the takings, made by Rini Williams (aka Rini Henare Whale) in relation to the taking of Ōruamatua Kaimanawa 3F.[19]

34. Just were also just three owners who attended the hearing compensation hearing in Whanganui; Te Harawira Downs, Hukutioterangi Whakatihi and Henry Hartley. These three owners were present without counsel, without evidence as to the value of the land, and the record shows that that despite their presence they would have had virtually no impact on the outcome of the hearing concerning the compensation.[20]

Compensation/Valuations

35. The Crown submits in relation to the 1961 takings that "The Māori Land Court assessed compensation for the takings based on "fair valuations" and it was paid soon after."[21]

36. The Crown points to "special government valuations" obtained to assist the Māori Land Court for the hearings for compensation in Whanganui in October 1961.[22]

37. However, at the outset of the negotiations the government had set aside a fund for the acquisition of all the land, Māori, general and Crown, and £14,040 had been set aside based on an increase in value of the land concerned from five shillings an acre to seven shillings an acre in the period from 1950 to 1953.[23]

38. The compensation for the 29,167 acres of Māori land taken which was ultimately awarded came to just £9,195.[24]

39. This compensation was awarded to all of the Māori land blocks in accordance with the evidence of the District Valuer, providing a special government valuation of 2s 6d per acre, with slightly more for those lands that had previously been grazed.[25]

40. By contrast, the compensation paid for the general land blocks of Ōruamatua Kaimanawa 2P and 3B (1,695 acres and 6,334 acres respectively) of £3,800 plus interest from the date of Proclamation. This compensation was in accordance with a special Government valuation which valued the land at

[19] Wai 2180, #A9 Cleaver, 79.
[20] Wai 2180, #A9 Cleaver, 81.
[21] Wai 2180, #3.3.84 (39.5).
[22] Wai 2180, #3.3.84 (37).
[23] Wai 2180, #A9, Phillip Cleaver, 69.
[24] Wai 2180, #A9, Phillip Cleaver, 58, 81-82.
[25] Wai 2180, #A9, Phillip Cleaver, 81.

close to 10 shillings per acre, rather than the 2 shilling 6 pence rate for Māori land.[26]

41. Attached as part of Appendix A are a number of maps which show the Land Use Capability of the Inquiry district and specifically Ōruamatua Kaimanawa.[27] Also supplied is the map showing the Ōruamatua-Kaimanawa leases and Māori land ownership.[28] Those maps suggest there was little materially different in the nature of these land blocks or their quality which can justify this discrepancy in the valuations.

42. The submission here is that Māori land owners suffer a Māori land status penalty, and that the valuation makes too much of the "Māori freehold title" aspect of the land. The circumstances here are that general land and Māori freehold land are being taken compulsory, there is no meaningful relevance of the status of the land in the context of a public works taking. The land should be valued as it is, regardless of general land or Māori freehold status, because the land is in the process of being transferred to the Crown, it is not part of any other kind of willing alienation.

43. On top of this the Crown and public works system fails to recognise that land is afforded a profoundly different status by Māori, as this Tribunal has heard on numerous occasions, land is not just an asset, something to be considered for its commercial utility. Despite that, these additional Māori land factors are not a feature of the valuation process. Taking those aspects into account, the taking of Māori land, should attract a higher valuation than takings for general land, sadly, and in breach of Te Tiriti, that has never been the case, and was not the case here.

Retrospective Justification

44. The submissions of the Crown adopt the position that because the land is in Crown ownership and is internally deemed to be "critical to training operations" that this justifies the current and ongoing retention of the land, ignoring the evidence which confirms that there was not an established need for that land at the time it was acquired. The taking of Ōruamatua Kaimanawa 4 is a case in point.

45. The only reason we have such extensive information on that taking is because the land ownership was organised, with trustees, and that the land was being developed.

46. The approach to the acquisition of Māori land as demonstrated by this key example shows that the Crown, even in circumstances where the land was held in trust and managed by trustees, did not take the requisite care to avoid taking any more than was necessary.

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[26] Wai 2180, #A9, Phillip Cleaver, 84.
[27] Wai 2180, #A46, Tony Walzl, *Twentieth Century Overview*, Map 4, 45. Plate 127 in the Mapbook, #A55, and Figure 10 in Wai 2180 #A48 Phillip Cleaver, *Māori and Economic Development in the Taihape Inquiry District, 1860-2013*, 181
[28] Wai 2180, #A6, Fisher & Stirling, *Northern Block History*, Plate 75 in the Mapbook #A55.

47. That the Crown *now* finds the land to be useful, if those statements by witnesses and as submissions is accepted at face value, is both self-serving and a demonstration of the lost opportunities to appropriately engage with owners.

48. In the event that the Crown had taken only what was "necessary" at the time, the Ōruamatua Kaimanawa 4 block would have continued in its reduced form, but being able to continue with the operations of an airstrip and the commercial activity to flow from that.

49. It is not to be assumed that, in the future, the Crown would have considered that additional area necessary, or that the taking was justified, especially if appropriate compensation was to be paid to the trust and owners for the loss of the land the complete loss of future income.

50. However, the Crown invites the Tribunal to adopt an approach that retrospectively applies the test, and ignore the breach and prejudice which arose at the time, it is our submission that such an approach is not warranted.

Retrospective Justification – Ōruamatua Kaimanawa 4

51. The Crown has made a concession concerning the 1973 takings of Māori land in Ōruamatua Kaimanawa:[29]

> 72. The Crown concedes that:
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> 72.1 it took nearly 8,000 acres of Māori land for the Waiōuru Military Training Area in 1973. The Crown, in breach of te Tiriti o Waitangi/Treaty of Waitangi and its principles, failed to consult with or adequately notify all of the Māori owners of the Ōruamatua-Kaimanawa 2C2, 2C3, 2C4 and Ōruamatua-Kaimanawa 4 blocks before these lands were compulsorily taken under the Public Works Act 1928.

52. The Crown also made a further concession in relation to Ōruamatua Kaimanawa 4:[30]

> 73. The Crown further concedes that:
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> 73.1 its decision to take all of Ōruamatua-Kaimanawa 4 without first adequately assessing how much land was in fact required for military training purposes meant it took more of the block than was reasonably necessary.

[29] Wai 2180, #3.3.84 (72).
[30] Wai 2180, #3.3.84 (73).

53. These concessions, while removing some of the onus of the claimants to make the case out, poorly articulate and misread the evidence that is available.

54. The concession relating to Ōruamatua Kaimanawa 4 should state simply that the balance of the block, ie that area to the north/east of the ridgeline, being 3,412 acres was not needed, only 845 acres of the block was needed, but the entire block was taken anyway.[31]

55. The evidence of Figure 10 from Cleaver's report shows this clearly:[32]

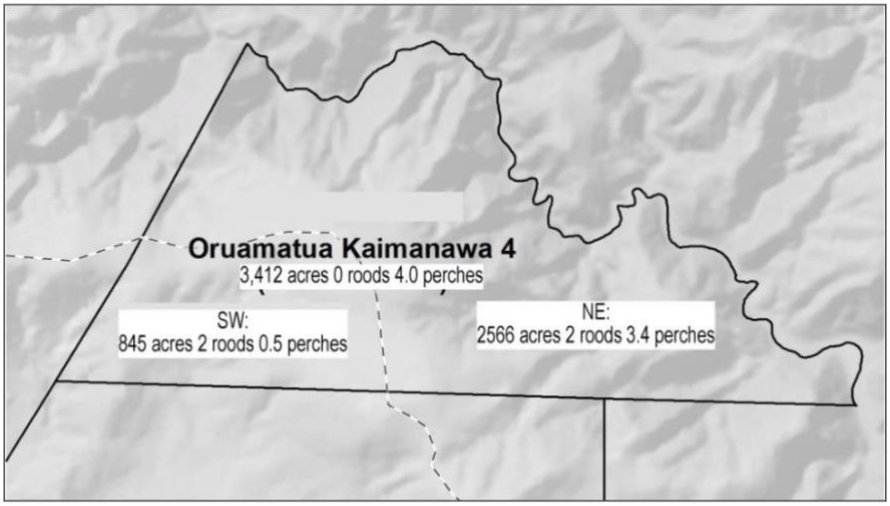

Figure 10: Oruamatua Kaimanawa 4 (dotted line shows ridge line)

56. The Crown's submissions summarise the issue this way, that "evidence of internal official and Defence staff correspondence indicates that, at the time of the 1973 taking (and for a period following), leading Defence personnel did not consider that the greater portion of the OK 4 block was in fact required defence purposes."[33]

57. The Crown goes on to submit that "evidence from Major Hibbs and Colonel Kaio, however, is that the land has subsequently been used for the purposes for which was acquired."[34]

58. Pointedly the evidence shows that Defence wanted to avoid taking land from private owners, but the use of that term seems to have applied only to non-Māori private landowners.[35]

[31] Wai 2180, #3.3.84 (65.2), see footnote 69 of the submissions also.
[32] Wai 2180, #A9 Cleaver, 104.
[33] Wai 2180, #3.3.84 (70.3),
[34] Wai 2180, #3.3.84 (70.3).
[35] Although it is important to note that Māori interests in Māori land are also private, and so all of the takings were from private owners. The distinct language used for Māori landowners is another sign that institutionally, the Crown, its agents and staff, viewed and dealt with the "private interests" which were Māori land holdings differently to the "private interests" of general land holdings.

59. Officials were concerned about Mr Koroneff's acquisitions and wanted to move quickly because if there was not immediate action any "sufficient capital investment by those private interests might prevent acquisition by Defence."[36]

60. Similarly, officials were mindful of the development that Ohinewairua Station had undertaken on its farm in the area and "had resisted more recent efforts to acquire more" and for this reason it was deemed to be "inappropriate" to take more land from the Station.[37] Those same officials were not concerned about the burden on Māori providing more land for defence, nor about the development that may have taken place on that land.

61. The approach to the acquisition shows that these blocks were dealt with together without specific analysis of landscape and need, or suitability to the stated purposes, being an approach by the Defence Force as a result of the impact of the Tongariro Power Development Scheme of Lake Moawhango on the wider WMTA.[38]

62. The record of evidence shows numerous places where it was not established that all of Ōruamatua Kaimanawa was needed, rather that only some of it was possibly needed:

    a. In January 1974 the District Land Purchase Officer expressed concern that not all of the land was required;[39]and
    b. In July 1974 both the Secretary of Defence and the Chief of General Staff of the Army acknowledged the Army did not really need the north slopes of the block.[40]

63. As the Crown's submissions note, the Crown negotiated extensively with Koroneff before heading to the Court to establish compensation, and the Ohinewairua Station lands were left untouched.

64. Meanwhile all of Ōruamatua Kaimanawa 4, featuring an airstrip that costs $8,000 to establish, was taken in full.[41]

Dated at Māngere this Monday the 27th of September 2021

Cameron Hockly

[36] Wai 2180, #3.3.84 (48).
[37] Wai 2180, #3.3.84 (49).
[38] Wai 2180, #3.3.84 (49-50).
[39] Wai 2180, #3.3.84 (65.1).
[40] Wai 2180, #3.3.84 (65.2), at that meeting the officials noted that this meant only 845 acres of the 3412 acres was actually required.
[41] Wai 2180, #3.3.84 (59).