In the Waitangi Tribunal **Wai 2180**

Under the Treaty of Waitangi Act 1975

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

CLAIMANT GENERIC REPLY SUBMISSIONS ENVIRONMENT

Dated 27 September 2021

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These claimant generic reply submissions respond to Crown generic closing submissions regarding Issue 16, Environment, documents #3.3.85 (Land) and #3.3.93 (Waterways) on the record of inquiry.

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

3. The general ability of the Crown to legislate on environmental matters is not disputed. The question is whether it legislates appropriately, having regard to its Treaty responsibilities. We consider that the Crown's Treaty responsibilities can be divded into two periods.

4. During the first period, the Crown was certainly aware of, and there was a great deal of writing about and obsessing over, limits to the exploitation of natural resources in general terms, in Europe and the colonies. But everyone, including the Crown and mana whenua, was unaware of the exact biophysical limits to natural resources in Aotearoa that the colonisation programme might realise. (There are notable exceptions to this within mana whenua knowledge, such as pollution by sewage of waterways).

5. The evidence suggests that the cut-off dates for different limits in this period were fairly early. During this period the Crown engaged in Treaty breaches such as land takings, detrimental colonisation, and cutting Māori out of decision-making, that became important in setting up the situation in which Taihape Māori became sensitive to biophysical limits being reached. This created a vulnerability ('eggshell skull') in mana whenua of the Inquiry District.

6. In the second period, biophysical limits were reached, the eggshell skull vulnerability was realised, and there was (and is) a need for the Crown to legislate and take action to fix the vulnerability. Consequences of biophysical limits being reached in the Inquiry District were driven back to mana whenua, for example in the loss of

food and resource gathering locations, through declaring catchments to be unable to be used by them for farming activity, and through pressure not to alter, diminish, or remove remaining native forest on their land. These last two measures act to extend the life of the farms below the Māori-owned lands.

FORESEEABILITY AND CONTROL

7. At paragraphs 48 and 49 the Crown frames environmental problems as an "unexpected consequence of modernity", and that it had limited or no control over environmental impacts.[1] However, the Crown was well aware of hundreds of years of thinking about limits to natural resources, and had a scheme of settlement. Every Pākehā land block and section was Crown granted as part of an overall colonisation effort that deliberately altered and denuded the landscape.

8. The Rohe Pōtae report quotes with approval Wendy Pond's Rangahaua Whanui report *The Land with All Woods and Water:*[2]

> From 1600 to 1860, case studies of colonially induced ecological change had been published, attempts to counteract the process had been tried, conservationist attitudes had been formed, and sophisticated insight into mechanisms of ecological change had been arrived at. Programmes for environmental control had been developed in colonies administered by the Colonial Office, on St Helena and the East Caribbean islands; in Mauritius, new social polity and new forms of land use had been developed; <u>the state of India's forests had been a matter for frequent and detailed strategic discussions in London</u>.
>
> (Footnotes removed. Underlining added.)

9. In fact, Crown concern about deforestation in New Zealand was sufficient in 1869 for it to undertake a national stocktake of remaining forests.[3] Five years later, the New Zealand Forests Act 1874, which

[1] Christophe Bonneuil and Jean-Baptiste Fressoz, translated by David Fernbach *The Shock of the Anthropocene: The Earth, History and Us* (Verso, Brooklyn NY, 2016) at 171.
[2] Wai 898, Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), at 400 quoting Wendy Pond, *The Land with All Woods and Water, Rangahaua Whanui National Theme U* (Wellington: Waitangi Tribunal, 1997) at 45-46.
[3] Wai 2180, #A45 at 39-40.

established Crown forests, was enacted. In introducing it, Premier Julius Vogel explicitly noted the by then well-understood scientific link between deforestation and subsequent environmental damage:[4]

> how very large was the demand for timber which arose from our railway works and our telegraph construction and maintenance; how very great were the injuries caused by floods, and how much deterioration our climate was liable to sustain, from the destruction of forests.

10. In the same debate, John Sheehan, MP for Rodney, advanced the popular 'displacement theory' notion that linked the destruction of forests by colonists necessarily entailed the destruction of Māori themselves:[5]

> the same mysterious law which appears to operate ... by which the brown race, sooner or later, passes from the face of the earth – applies to native timber ... The moment civilization and the native forest come into contact, that moment the forest begins to go to the wall.

11. The Rohe Pōtae report notes "the debate over forest preservation in the 1870s and 1880s was essentially between two groups of Pākehā politicians advocating short-term economic interests. One side was concerned that forest conservation would hinder land settlement; the other that colonial prosperity would be hindered by timber shortages, flooding, and soil erosion."[6] Notwithstanding politics, reports were provided by experts with experience in forest management in 1877 and 1880, recommending increased conservation and selective felling only.[7] The 1877 report was by an expert on secondment from India as Conservator of State Forests under the 1874 Act, who also made explicit the causal connection between deforestation and erosion and flooding.[8] A second report by an India-based forest management expert was commissioned in 1885, a commission viewed positively by the Hawke's Bay Herald which was expressing

[4] Julius Vogel, 14 July 1874, New Zealand Parliamentary Debates, vol 16 at 79.
[5] John Sheehan, 31 July 1874, NZPD, vol 16 at 351.
[6] Wai 898, Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), at 400
[7] Wai 2180, #A45 at 43-46.
[8] Wai 2180, #A45 at 43.

concern about deforestation.[9] It is not known what the outcome of the 1885 commission was, as the report has not been located, however the very fact of its commissioning indicates concern.[10]

12. Pond says:[11]

> As Roche notes, the forest flora of New Zealand requires growing conditions which are different from the arboricultural and silvicultural techniques appropriate to European trees. By the 1870s several people had established how to propagate native trees successfully. Potts and Gray published 'On the Cultivation of Some Species of Native Trees and Shrubs' in Transactions of the New Zealand Institute in 1870, while Hay published 'On the Cultivation of Native Trees' in Transactions of the New Zealand Institute in 1872. Roche makes a pertinent comment: Potts and Hay, recognising that indigenous trees could be propagated when the shade and moisture of their forest habitat were replicated, did not use the 'inevitable displacement' arguments of some of their contemporaries. Potts was a member of Parliament, and made his views well known in parliamentary debates. Had there been the will to protect Maori interests in a sustainable forest economy, the Crown could have called on literature, forestry expertise, and original thinking that was immediately at hand.

(Footnotes removed.)

13. The Rohe Pōtae report summarised that "from as early as 1874":[12]

> The Crown knew that the removal of forests would accelerate soil erosion, and the debris that resulted would find its way into streams and rivers.
>
> The Crown knew that the removal of forests would increase run-off, and produce flooding.

[9] Wai 2180, #A45 at 47-48.
[10] Wai 2180, #A45 at 48.
[11] Wendy Pond, *The Land with All Woods and Water, Rangahaua Whanui National Theme U* (Wellington: Waitangi Tribunal, 1997) at 45.
[12] Wai 898, Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), at 428.

> The Crown knew that the flows of streams and rivers would be less constant and that some springs would fail if forests were removed.
>
> The Crown knew that the water quality of streams, rivers, and lakes, would deteriorate if forests were removed.
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> The Crown knew that the removal of forests could impact on climate, and the removal of trees from river banks would result in increases in water temperature.
>
> The Crown knew that lands were best protected if the headwaters of rivers were retained in forest.
>
> The Crown knew that riparian strips were especially important for the protection of streams, rivers, and lakes.

14. Despite this, large scale deforestation was allowed in the Inquiry District.[13] By the 1890s soil erosion in the District had reached concerning levels.[14] By 1896, a national timber shortage was being predicted,[15] and in 1901 it was estimated remaining forests would have disappeared in 20 years.[16] Specific concerns over deforestation within the Inquiry District were being expressed in newspapers in 1906.[17]

15. Pond records:[18]

> forest policy was not developed in consultation with Maori, and hapu interests in sustained forest harvests were not protected. At 1840 the Crown had already formed its agenda: land for settlement, timber supplies for export, and revenue for the colony would be secured by milling the forests as a single crop, whether or not Maori participated and benefited.

16. With respect to the introduction of new animal species into the Inquiry District, and the culling of native species, Armstrong records vocal concerns expressed in the newspapers as early as the 1870s.[19]

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[13] Wai 2180, #A10, at 89.
[14] Wai 2180, #A10, at 89.
[15] Wai 898, Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), at 400.
[16] Wai 898, Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), at 400.
[17] Wai 2180, #A45, at 63.
[18] Wendy Pond, *The Land with All Woods and Water, Rangahaua Whanui National Theme U* (Wellington: Waitangi Tribunal, 1997) at 46.

17. In light of this evidence, presentism is not a particularly strong argument in respect of environment management. Relevant knowledge was held by the Crown at an early stage, and had it partnered with Taihape Māori it would have had the benefit of their environment management experience, particularly on the issue of whether there should be sewage and offensive wastes discharge to waterways including the Hautapu River. We agree with the Rohe Pōtae approach:[20]

> In assessing what is reasonable, the Tribunal has considered a number of issues to be relevant, including the state of environmental knowledge at the time among Crown officials; what complaints were made by Māori about the effects of settlement on their taonga; and what priority the Crown gave to those complaints.

18. The Crown took complete control and did not partner with mana whenua to govern in the Inquiry District or to implement their environment management knowledge. Environmental outcomes now are severely sub-optimal, with mana whenua bearing the brunt. We submit that on the balance of probabilities the Crown is responsible.

19. The Crown has not responded to our submission that it made Māori vulnerable when environmental issues arose, and should assist Taihape Māori now by rehabilitating the environment.

TAONGA

20. Claimants and the Crown are not as far apart on taonga as the Crown submissions would suggest. The difference is whether the environment as a whole is a taonga. The Treaty recognises in the Article II guarantees that all elements of the environment are important. It seems to be accepted by the Crown that all significant features and resources (rivers, forests etc) were taonga.[21] We submit that if species (e.g. birds, plants) are accepted to be taonga, and features and resources are taonga, then it is difficult to escape the

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[19] Wai 2180, #45, Armstrong Environment 1840-1970 at 187.
[20] Wai 898, Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), at 318-319.
[21] Wai 2180, #3.3.85 at [2]-[3], [5].

conclusion that the whole is a taonga, or to put it another way, the list of things that are not taonga would be limited.

21. The seasonal nature of living and resource use in relation to the northern parts of the Inquiry District, the 'summer lands', is an example of the whole being considered a taonga. Pokopoko bush or forest, the Reporoa swamp, Tikitiki bush kainga, and the slopes of Aorangi are further examples.[22]

22. Crown settlement intentions are relevant to the question of taonga because destruction of the natural world made the remnants more precious in cultural terms. The Crown accepts that where something is under threat it is more likely to be important to Māori. In this Inquiry District, Crown intentions were settlement of the region, via farming and around the railway. It was inevitable, even intended, that settlement would have a significant impact on forests, rivers, taonga species, and the environment as a whole, and that limited areas of natural cover would remain.

Dated at Nelson this 27th day of September 2021

Tom Bennion / Lisa Black

Counsel for the claimants

[22] See Wai 2180, #A12 Tony Walzl *Tribal Landscape Overview* (2013).