IN THE WAITANGI TRIBUNAL **WAI 2180**
TAIHAPE - RANGITĪKEI KI RANGIPŌ INQUIRY DISTRICT **WAI 784**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Taihape - Rangitīkei ki Rangipō Inquiry (Wai 2180)

AND

IN THE MATTER of a claim by Rodney Graham and others on behalf of themselves and the Kauwhata Treaty Claims Komiti and nga uri tangata o Ngāti Kauwhata ki Te Tonga (Wai 784)

SUBMISSIONS IN REPLY FOR THE WAI 784 NGĀTI KAUWHATA CLAIM

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These are the submissions in reply for Wai 784, a claim by Rodney Graham and others on behalf of themselves and the Kauwhata Treaty Claims Komiti and nga uri tangata o Ngāti Kauwhata ki Te Tonga.

2. These submissions in reply should be read in conjunction with the final Amended Statement of Claim and the Opening and Closing Submissions for Wai 784 in the Taihape – Rangitīkei ki Rangipō inquiry district ("**inquiry district**").[1]

3. As the Tribunal will recall, at the heart of this claim lies the desire on the part of the claimants to prevent the footprint of Ngāti Kauwhata in this inquiry district from being diminished as a consequence of acts and omissions of the Crown, and to remedy what has already passed.

4. Due to the nature of the response by the Crown in its closing submissions for this inquiry district, these submissions in reply will be concise and to the point.

5. In general, the Crown has simply set out its own position on matters (this has included replicating submissions made in other inquiry districts), and has not engaged in a meaningful fashion with submissions made for this claim.

6. As a consequence, counsel confirm that the Wai 784 Ngāti Kauwhata claimants continue to rely on the position set out in their Closing Submissions,[2] and propose only to address submissions made for the Crown where further analysis or submission appears necessary.

7. To the extent they complement and are relevant to the Wai 784 Ngāti Kauwhata closing submissions, counsel anticipate adopting relevant generic claimant submissions in reply as appropriate, and will confirm the same once these have been received and considered.

[1] Amended Statement of Claim for the Rangitīkei ki Rangipō (Taihape) District Inquiry, dated 24 September 2021, Opening Submissions for the Wai 784 Ngāti Kauwhata Claim, dated 3 September 2018 (Wai 2180 #3.3.22), Closing Submissions for the Wai 784 Ngāti Kauwhata claim, dated 20 October 2020 (Wai 2180, #3.3.60).
[2] Including the relevant Generic Claimant Closing Submissions previously adopted.

CUSTOMARY INTERESTS

8. Closing submissions for Wai 784 canvassed evidence regarding the nature of Ngāti Kauwhata's customary rights and interests in whenua, awa and resources in this inquiry district, which lie chiefly within its lower reaches. As set out in those submissions, Ngāti Kauwhata today faces a situation where their boundaries inside and outside this inquiry district have been continually reduced, awa precious to them harmed, and their rangatiratanga, knowledge and tikanga, diminished.[3] It remains the case following receipt of the Crown's closing submissions that Ngāti Kauwhata's assertion of such customary rights and interests has not been challenged by any other party.

CAUSE OF ACTION: TINO RANGATIRATANGA

9. Counsel already addressed the position of Ngāti Kauwhata on the interplay of tino rangatiratanga and kāwanatanga in closing submissions for the claim and continue to rely on this position. Counsel only respond further to specific paragraphs of the Crown's closing submissions (#3.3.89) set out below.

Crown closing submissions

10. At paragraph 10 the Crown sets out that "*To a considerable extent, these submissions repeat submissions already presented by the Crown in Te Rohe Pōtae inquiry and Te Paparahi o te Raki stage 2 inquiry*". This position is expanded upon at paragraphs 55 to 71 with respect to the Crown's assertion that it obtained de jure sovereignty.

11. The Crown's closing submissions give significant weight to the Tribunal's findings in *He Whiritaunoka*, the Whanganui Land report, particularly in relation to the findings made there about the Crown's assumption of sovereignty.[4]

Reply

12. The Tribunal's findings in Te Rohe Pōtae assume particular significance in light of the Crown's indication that it has repeated its submissions previously made in that inquiry and given the emphasis on findings from *He Whiritaunoka.*

[3] See Claim-specific closing submissions for Wai 784 at [14]-[33].
[4] See for example #3.3.89 at [58], [69].

13. Especially pertinent is the Tribunal's approach in *Te Mana Whatu Ahuru* to interpreting the understandings and agreement arising from Te Tiriti. In summary, the Tribunal took a different approach to several earlier Tribunal determinations. Rather than taking an approach to interpreting treaties solely derived from western legal traditions, such as occurred in the *Report on the Orakei claim* and *He Whiritaunoka*, the Tribunal placed western law and tikanga side by side. The Tribunal considered that taking the former approach led to the potential for "*Māori sources and understandings of law and authority to be read down as 'customary' concepts that are legitimate only to the extent that western law acknowledges and provides for them*", and elected instead to analyse the systems of law and authority that underpinned both Māori and British societies at the time of signing Te Tiriti.[5]

14. Counsel thus highlight the following findings of the Tribunal in *Te Mana Whatu Ahuru*, which considered the arguments for both claimants and the Crown and did not appear to accept Crown arguments made regarding the nature of the power it obtained in 1840, nor how it was obtained:[6]

> *This arrangement* [under Te Tiriti] *would not be capable of segmentation along de jure and de facto lines, in which the acquisition of nominal power by one party includes the actual assumption of power over another as a legal inevitability. It is rather a conception in which all forms of authority are given equal protection.* […]
>
> [Kāwanatanga] *involved a power to make and enforce laws which applied to the whole of New Zealand, but was qualified by the guarantee of tino rangatiranga, and was therefore considerably less than the supreme and unfettered governing and lawmaking power that the Crown had sought and believed it had acquired.* […]
>
> *Kāwanatanga was an authority to govern and make laws for the explicit purpose of controlling settlers and preventing the harm that might otherwise arise to Māori from uncontrolled settlement or foreign intervention. The guarantee of tino rangatiratanga was for the existing autonomy and authority of Māori communities in relation to their lands, resources, and all other valued things to continue, whilst Māori also enjoyed the same rights as British subjects.* […]
>
> *To summarise, the Treaty recognised two distinct spheres of authority, each with distinct functions. While each party had a duty to acknowledge the other's sphere of interest, and while the Treaty granted the Crown kāwanatanga powers, it also specifically provided for Māori to retain their tino rangatiratanga, and therefore their rights of autonomy and self-*

[5] See discussion in Waitangi Tribunal Te *Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* – Part I (Wai 898, 2018) at 141-189.
[6] See excerpts from Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* - Part I (Wai 898, 2018) at 180-182.

> *determination. As the Central North Island Tribunal put it, the Treaty provided for 'two authorities, two systems of law, and two overlapping spheres of population and interest'. From this are derived the principles of kāwanatanga and rangatiratanga, including Māori autonomy or self-government* [underline added].

15. Counsel submit that a similar approach ought to be taken in this inquiry district.

16. As set out in closing submissions, the understanding of what was agreed to between Māori and the Crown by Te Tiriti in 1840 has developed considerably in recent years, and has been aided particularly by the in-depth analysis undertaken by the Tribunal in Te Paparahi o Te Raki Inquiry of the lead up to and signing of Te Tiriti in that rohe, and subsequent Tribunal findings, such as in Te Rohe Pōtae inquiry. The wealth of evidence and Tribunal findings now available regarding the nature of the agreement reached in Te Tiriti inescapably indicate that the level of autonomy and the extent of the control and authority that Māori intended to retain was much more significant than what has been accepted or provided for by the Crown to date.

17. The Crown's erroneous assumption that it had obtained "*supreme and unfettered governing and lawmaking power*" has had devastating and wide-reaching consequences for Ngāti Kauwhata, who have been left with little option other than to sit as spectators while the Crown has exercised a level of power that has generally demonstrated little to no regard for the guarantees of Te Tiriti, including in particular those in Article II. This issue persists to the present day and flows through the Crown's closing submissions. The Crown continues to interpret the legitimate exercise of its "kāwanatanga" as enabling the imposition of laws affecting Article II rights, without the consent of and/or without consultation with Māori.

Crown closing submission

18. At paragraph 12 the Crown advises that it "*acknowledges te Tiriti/the Treaty was not signed within the inquiry district, but notes evidence of rangatira signatories who had whakapapa connections to and/or interests in the Taihape inquiry district and concurs with Tribunal jurisprudence that te Tiriti/the Treaty was of national effect (in terms of the obligations the Crown committed to through it*)".

19. At paragraph 32 the Crown submits that *"there is little evidence (if any) of Taihape Māori explicitly rejecting the Crown having assumed sovereignty*".

Reply

20. Counsel refer to submissions made above about the nature of the relationship between Māori and the Crown brought about by Te Tiriti, and state that they are not aware of, nor has the Crown pointed to, any evidence in this inquiry district to suggest Ngāti Kauwhata accepted the sovereignty of the Crown.

21. Counsel further observe that it is extremely dangerous to conflate silence with consent, and caution against interpreting any silence on the part of Ngāti Kauwhata in this way. In a similar vein, counsel further submit that any indication of acceptance should only be interpreted as such when it can truly be said to be free, prior informed consent.[7]

Crown closing submission

22. At paragraph 15 the Crown submits that "*when it signed Te Tiriti/the Treaty in 1840, it established a Tiriti/Treaty relationship with all Māori, including Māori from Taihape, regardless of where they lived and whether they had signed te Tiriti/the Treaty*". Later, at paragraph 34, the Crown submits:

> "*In the Te Urewera Report the Tribunal found that whilst te Tiriti/the Treaty applied nationally, it only did so to the extent it recorded obligations on the Crown, and that reciprocity of obligation depended on Tūhoe recognition of the relationship to them. For Tūhoe that occurred the last three decades of the nineteenth century, and then only incrementally. For Taihape, as set out below, that recognition appears to occur earlier via relationships and events outside of the inquiry district, and within the inquiry district only from the 1860s/1870s*".

Reply

23. In respect of the case of those who did not sign Te Tiriti, Tribunal jurisprudence appears to be clear that the Crown's Te Tiriti obligations arose at the time of the signing of Te Tiriti to all Māori, irrespective of whether they signed.[8]

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[7] A parameter used in the United Nations Declaration on the Rights of Indigenous Peoples (2007), support for which was announced by New Zealand in 2010, and in Tribunal decisions, see for example Waitangi Tribunal, He *Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, 2008) at 173, which was endorsed in Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai 2200, 2017) at 16.
[8] See for example in Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* (Wai 898, 2018) at 148, Waitangi Tribunal *Te Urewera* (Wai 894, 2017) Vol I at 164, Waitangi Tribunal, *Rekohu:* A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands (Wai 64, 2001) at 30.

24. The question of if and when reciprocal obligations arose for those Māori who did not sign seems less clear-cut. From recent Tribunal decisions, this seems to have been viewed as a matter that requires negotiation between the Crown and respective groups of Māori. To explain:

(a) In *He Maunga Rongo*, the Tribunal concluded that the Treaty was equally binding on Māori, irrespective of whether they signed Te Tiriti or not.[9]

(b) However, in more recent decisions, the Tribunal in *Te Urewera* report analysed when formal acknowledgement had occurred between the Crown and Tuhoe of each other's authority. The Tribunal was also careful to record that this was "*not to say that Tuhoe have at any time shared the Crown's view of the extent of its own authority: manifestly they have not*." Counsel do not consider that the finding in Te Urewera necessarily indicates the Tribunal viewed formal recognition of authority as giving rise to reciprocal obligations under Te Tiriti, as the Crown suggests; the Tribunal went on to observe that "*striking a practical balance between the Crown's authority and the authority of a particular iwi or other Maori group must be a matter for negotiation, conducted in the spirit of cooperation and tailored to the circumstances*".[10] In *Te Mana Whatu Ahuru*, the Tribunal appears to have considered that the obligations arose on the part of the Crown, but that the Crown and Māori would need to come together to build a workable relationship that was mutually consented to. There, the Tribunal found:[11]

> *"We also conclude that the Treaty applied to non-signatory hapū as a unilateral set of promises by the Crown to respect and protect their tino rangatiratanga and other rights just as it would for hapū whose leaders had signed. Out of practical necessity, all Māori needed to engage with the Crown on the basis of the Treaty's guarantees, whether they had signed the Treaty or not. At a minimum, however, the Crown was obliged to approach these groups on the basis that a workable relationship had to be put in place based on mutual consent, much as Māori needed to do the same with the Crown".*

[9] Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) at 206-207.
[10] Waitangi Tribunal *Te Urewera* (Wai 894, 2017) Vol I at 134, 164.
[11] Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* (Wai 898, 2018) at 188-189.

25. Counsel respectfully suggest that the approach taken in *Te Urewera* and *Te Mana Whatu Ahuru* decisions is an appropriate one to adopt in the present inquiry, not only due to the similarities in terms of the lack of signatories from some or all groups involved, but also due to the contradiction that would seem to arise from unilaterally binding those with mana and tino rangatiratanga to constraints on their rights that they had not consented to.

26. In either case, recognition of a relationship cannot be equated with an acceptance of supreme and unfettered governing and law making power asserted by the Crown.

CAUSE OF ACTION: NATIVE LAND COURT

Crown submissions

27. In its closing submissions regarding the Native Land Court (#3.3.104), at paragraph 29, the Crown submits that "[t]*he investigation of title by the Native Land Court was a process set out in the Native land legislation and intended to provide a form of title that reflected customary rights and interests in land*." The Crown expands on this position, including at paragraph 34, where it is submitted that the "*attempt to accommodate customary ownership concepts within a new tenurial system*" was "*sincerely undertaken*". The Crown acknowledges that this endeavour "*involved a significant cost to Māori tribal structures*".

Reply

28. At the outset, counsel note that the implementation, operation and effect of the Native Land Court on Māori, their tino rangatiratanga and their whenua has been traversed in submissions and Tribunal findings for many years. The Wai 784 claimants are disappointed that the Crown continues to push back against multiple aspects of such findings to this day, including those relating to the intention of the Native Land Court and the title it yielded.

29. Beyond reaffirming support for the generic claimant closings and the specific closings for this claim, there is little to add by way of reply. Counsel simply highlight the following:

(a) The findings of the Tribunal in the *Turanga Tangata Turanga Whenua* report regarding the purpose of the Native Land Court system are worth reproducing:[12]

> *At the outset, it is clear that the purpose of the system was to ensure that the bulk of the Maori land base passed out of Maori ownership. The Crown acknowledged that this was the case. Dr Loveridge, in analysing the first Native Lands Acts, for example, said: 'The idea that Maori should be encouraged to retain most of their lands, or might want to maintain a separate identity, was not one which British settlers, missionaries and officials in the mid-Nineteenth century could readily grasp.'* […]
>
> *The fact is that if any of the Native Lands Acts had failed to ensure large scale Maori land alienation, in accordance with their design, the Legislature would have tried something else. It is to be remembered that the Acts themselves (introducing as they did an open market in individual interests), were a response to the failure of Crown pre-emption to produce lands for settlement in sufficient volumes to meet demand. In reality, it is obvious that any concerns that may have existed for Maori interests were completely subordinated to the primary purpose in the legislation; that is – as the Crown accepted – the need to provide enough land at a fast enough rate to meet the demands of settler immigration.*

(b) The Crown has failed to point to any evidence that materially changes the situation in this inquiry district (to the contrary, evidence in this inquiry appears to be consistent with the findings in the *Turanga* report)[13] and counsel encourage the Tribunal to make similar findings to those reproduced above in the present inquiry. The words of lead named claimant Mr Rodney Graham are highlighted in this regard:[14]

> *It seems to me that the Native Land Court system set up by the Crown was not worried about complex customary rights of Māori, and was more concerned with transferring land to settlers.*

Crown submissions

30. In its closing submissions on cultural taonga at paragraphs 9 and 12 (#3.3.94), the Crown submits:

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[12] Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 526-527.
[13] See for example the words of retired Chief Judge Fenton cited in the Crown closings #3.3.104 at [25] before the 1886 Ōwhāoko Ōruamatua-Kaimanawa Native Lands Committee "*The whole theory of the Native Lands Act, when the Court was created in 1862, was the putting an end to Maori communal ownership. To recognise the kind of agency contended for would be to build up communal ownership, and would tend to perpetuate the evil instead of removing it*".
[14] Amended brief of evidence of Rodney Graham, dated 25 September 2018 (Wai 2180, #L4) at [72].

9. Over time the Crown has established a range of institutions in the Taihape inquiry district, as it did in other areas of New Zealand. Those institutions included, but were not limited to, the Native Land Court, various Crown departments and agencies, Māori Land Boards, Māori Land Councils, and legislation that provided for local government structures.

10. These institutions were not introduced contrary to the wishes of Taihape Māori.

11. The broad purpose of introducing these institutions has been to further the settlement and development of New Zealand, for the mutual benefit of Māori and non-Māori and to enable the Crown to carry out its governance responsibilities effectively and efficiently. The introduction of such institutions per se is not inconsistent with the Crown's kāwanatanga right under Article I; nor is it necessarily inconsistent with Tiriti/Treaty principles.

12. The Crown notes that there was, and continues to be, a range of views among Taihape Māori as to the introduction of these institutions and governance entities. The Crown acknowledges that, in establishing these institutions and entities, it did not consult specifically with Taihape Māori. However, input from Māori politicians and leaders did influence the Crown's decision-making for some of the institutions.

Reply

31. The lack of input Taihape Māori had into the introduction of the Native Land Court has already been addressed in generic claimant closings[15] and claim specific closings for this claim. Counsel say further:

    (a) The fact that the Crown acknowledges that in establishing the Native Land Court it did not consult specifically with Taihape Māori (let alone seek their consent), suggests that the Crown had little to no idea about whether the Court they had introduced was "*contrary to the wishes of Taihape Māori*" or not.

    (b) Counsel question how the Crown can in good faith suggest, as it appears to do, that the Native Land Court system, which impacted so significantly on the rights guaranteed by Article II of Te Tiriti, could have been introduced without the consent of Ngāti Kauwhata and still be Te Tiriti compliant.

[15] See #3.3.36 and associated appendices.

CAUSE OF ACTION: CROWN PURCHASING

Crown submissions

32. Crown closing submissions on Crown purchasing (#3.3.78) do not engage with the submissions made for Wai 784, but do address the Waitapu block, in which Ngāti Kauwhata asserts customary rights and interests. At paragraphs 73 to 98 of the Crown's closing submissions the Crown addresses this block. Counsel highlight in particular the following:

> *93.* […] *The parties with customary interests took part in those discussions and appeared to have consented to the boundary adjustment being made (although they subsequently presented different views on their roles in those discussions).*
>
> *95. Following the creation of the block in 1872, individual owners pushing for sale in 1875 were told to wait until legal processes were completed. Disputes arose as to the relative interests within the block – but not about the Crown purchase of the land. The Crown considered taking those matters to the Native Land Court but did not do so (in accordance with legal advice it received).*

Reply

33. Counsel say in respect of the points highlighted:

    (a) The particular issue is that the evidence does not support the Crown's assertion that *"the parties with customary interests took part in those discussions and appeared to have consented to the boundary adjustment being made*".

    (b) Rather, the Crown determined ownership of the Waitapu Block and purchased it from those groups *it* identified as owners, without first properly determining who held interests in the block.[16] As set out in claim specific closings, the Crown failed to deal with Ngāti Kauwhata, failed to adequately investigate the Ngāti Kauwhata's rights and interests in the block, and failed to protect those rights and interests, which resulted in a significantly diminished ability to use, enjoy, and benefit from their customary rights and interests in the block.[17]

[16] Innes, *Māori Land Retention and Alienation within Taihape Inquiry District 1840 – 2013*, (Wai 2180, #A15) at 24.
[17] #3.3.60 at [54]-[54(c)], #L4 at [73]-[74].

CAUSE OF ACTION: VESTED OWNERSHIP OF RIVERBEDS

Crown closing submissions

34. The Crown's position regarding ownership of riverbeds is encapsulated in the following paragraphs of its closing submissions in relation to water (#3.3.93):

> *79. As outlined in submissions on the question above, the Crown relied on the Coal Mines Amendment Act 1903 and its successors to determine the ownership of the bed of the Rangitīkei River and its resources. There is no evidence to suggest misuse or bad faith on the part of the Crown in doing so.*
>
> *80. The Crown's kāwanatanga responsibility means it is appropriate for the Crown to develop nationally focused regimes for the protection and management of the environment and natural resources. The Crown's position is that the Coal Mines Amendment Act 1903 and its successors were a valid exercise of the Crown's kāwanatanga.*
>
> *81. The Crown's reliance on English common law principles and legislation such as the Coal Mines Amendment Act 1903 in relation to riverbeds in the inquiry district was appropriate, as was the Crown's reliance on its understanding of the law at that time. An example of reliance by the Crown on the statutory vesting of navigable riverbeds, in pursuit of its environmental management function, is the reservation of the Rangitīkei downstream of the Kawhātau for soil conservation and river control purposes.*

Reply

35. The issue at its core is that in essence, the Crown's position is that its *unilateral* imposition of English common law principles as they relate to awa and legislation such as the Coal Mines Act Amendment Act 1903 are a valid exercise of kāwanatanga, notwithstanding the fact that these measures cut across the rights guaranteed in Te Tiriti.

36. Counsel highlight the findings of the Tribunal in the *Te Urewera* report, which recorded:[18]

> *The situation just described, where the law governing the ownership of riverbeds in Te Urewera is both antithetical to Maori customary law and hopelessly confused, is a grave and ongoing breach of Treaty principle of which the Crown has long been apprised. It is far from consistent with the Crown's Treaty's promise actively to protect 'tino rangatiratanga o o ratou*

[18] Waitangi Tribunal *Te Urewera* (Wai 894, 2017) at 3458-3459.

> *wenua o ratou kainga me o ratou taonga katoa' ('the full exclusive and undisturbed possession of the Lands and Estates Forests Fisheries and other properties') for an English legal presumption about rivers, of which Maori had no knowledge and which runs counter to their own understandings, to have stripped them of their customary ownership of rivers when adjoining lands were acquired. It is far from consistent with that same Treaty promise for a statutory provision, about which Maori had no knowledge at the time or for years afterwards, to have expropriated, without compensation, the beds of their 'navigable' rivers. And that breach is compounded by the Crown's failure to remove the confusion and resulting unfairness that has long been recognised as surrounding the statutory provision. As we have seen, while the status quo serves the Crown's interests, it continues to prejudice those with legitimate Treaty claims to New Zealand rivers. And recent statements from our highest court suggest that a substantial part of the status quo may not even be lawful: the presumption ad medium filum aquae may not have been good law for land purchases from Maori, and the meaning of a 'navigable' river is more limited than the Crown and its delegates have sometimes relied on.*

37. Counsel encourage the Tribunal to make similar findings in relation to awa that have been affected by these laws in which Ngāti Kauwhata assert interests in the present inquiry district.

CAUSE OF ACTION: ENVIRONMENTAL ISSUES

Crown closing submissions

38. Due to significant overlap between the Crown's closing submissions in relation to land (#3.3.85) and water (#3.3.93), counsel deal with these together, with the exception of issues relating to matters of vested ownership addressed above.

39. In general, the Crown's submissions in relation to the environment appear to emphasise that it can legitimately make decisions in relation to the environment,[19] that its consultation duties are not absolute,[20] and that legislation relating to the environmental management is not inconsistent with Te Tiriti.[21] The Crown seeks to pin at least some of the blame on Māori for the state of the

[19] See for example #3.3.85 at [18], [52], [79], [216], #3.3.93 at [19], [123], [133]
[20] See for example #3.3.85 at [109], #3.3.93 at [18]
[21] See for example #3.3.85 at [61], [73], [75], [82], [83], [87], #3.3.93 at [21] and [115].

environment[22] and emphasises difficulties in establishing a causative link between acts and omissions of the Crown and prejudice alleged.[23]

40. The Crown insists in its closing submissions in relation to land that it "*continues to act in good faith to appropriately manage the environment and natural resources. The Crown has acted reasonably to balance the need for conservation and sustainability, and the need for economic development and land settlement. Further, the Crown has acted to adjust this balancing exercise as appropriate and necessary over time, amending and improving policies in response to changes in environmental knowledge and the views of the community, including Māori*" (paragraph 22). Similar statements are made in the closing submissions in relation to water at paragraphs 18 to 21.

41. Counsel refer to the following paragraphs from the Crown's submissions in relation to land by way of example:

> *4. This regulatory oversight of the environment is a legitimate aspect of the Crown's kāwanatanga function. In accordance with this function, the Crown has authority to develop regimes for the protection and management of the environment and natural resources, including waterways. In exercising its kāwanatanga function, the Crown seeks to balance its Tiriti o Waitangi/Treaty of Waitangi duties and the interests of various stakeholders in the environment.*
>
> *18. The Crown submits that management of the environment is a legitimate governance and regulatory function of the Crown. Kāwanatanga means it is appropriate for the Crown to develop nationally focused regimes for the protection and management of the environment and natural resources, including waterways.*
>
> *19.* […] *Māori and non-Māori share responsibility for the state of the New Zealand environment.* […]
>
> *89. The Crown notes that the available evidence on the record of inquiry does not always provide the background detail relating to the establishment or changing of environmental planning and decision making regimes within the inquiry area. However, the Crown considers that the absence of evidence of consultation or participation does not necessarily mean that it did not occur.*
>
> *59. The Crown is not responsible for the decisions of local authorities. As outlined earlier, local authorities are not part of the Crown but are separate bodies corporate pursuant to*

[22] See for example #3.3.85 at [19], [176], #3.3.93 at [128].
[23] See for example #3.3.85 at [7], [50], [52], #3.3.93 at [32], [34], [36], [67], [134].

> *section 12(1) of the Local Government Act 2002. They do not act on behalf of the Crown for the purposes of the Treaty of Waitangi Act 1975.*
>
> *81. As noted earlier, there are multiple interests in the environment and natural resources of Taihape that the Crown must weigh up carefully in developing and pursuing its environmental policies. In that exercise, the Crown is entitled to seek to achieve a reasonable balance between its Tiriti/Treaty obligations and the wider national interest. This means that, at times, some interests may be outweighed by others; that is true for Māori and non-Māori alike. The Crown recognises that, at times, the practices of Māori in relation to the environment and its resources may have come into conflict with other interests under both statute and common law as part of that balancing exercise.*

42. Similar submissions are made in relation to water, for example at paragraphs 18 to 21 and 36.

Reply

43. The generic claimant closing submissions in relation to the environment dealt with issues arising in a comprehensive fashion.[24] Taken together with the Wai 784 claim-specific closing submissions, there appears little to add following Crown closing submissions; counsel thus make limited submissions below.

44. Once again, issues arising in relation to the environment stem in large part, from the Crown's erroneous assumption about the nature of the power afforded to it by Te Tiriti. This has led to it making decisions affecting the environment without engaging appropriately with Taihape Māori, including Ngāti Kauwhata, in the way demanded by Te Tiriti. This has not only negatively impacted the tino rangatiratanga of Ngāti Kauwhata, but has led to environmental degradation.

45. Counsel are not clear on how the Crown can in good faith insist that its approach to environmental and resource management has been Te Tiriti consistent, including due to its own admissions, which include the following:

> […] *Environmental management regimes prior to the RMA did not generally recognise or take into account Māori values or interests in a manner now regarded as important and necessary, and some Crown environmental management measures may not have been consistent with tikanga tuku iho.*[25]

[24] Wai 2180, #3.3.56, #3.3.72.
[25] #3.3.85 at [80].

> *A. Certainly, the Crown acknowledges that prior to the late 1980s, Māori interests weren't specifically provided for in any form of environmental legislation.*[26]

46. With respect to the Crown's submissions on the nature of its obligation to consult and the consistency of current environmental statutes and policies, counsel highlight the following findings of from *Te Mana Whatu Ahuru*:[27]

> *"Current environmental statutes and policies do not adequately meet appropriate Treaty standards and must be amended and the continued failure by the Crown to address these matters is a breach of the principle of good government. Ultimately, the Crown is responsible for the policy and legislation that was not put in place in partnership with Te Rohe Pōtae Māori, nor in adequate consultation with them".*
>
> [M]*ore than consultation under the RMA is needed to discharge the Crown's Treaty of Waitangi obligations. Iwi should be full participants as self-governing entities working in partnership with local and regional councils both in terms of planning and resource consents, including the appointment of hearing committees. The Crown has an obligation to make sure this is happening in all areas of land use decision making and heritage protection included under the RMA, and this must be done by legislative amendment and the allocation of resources for iwi and hapū".*
>
> *"*[The Crown] *has acted in a manner inconsistent with the principle of good government for its continued failure to adhere to previous Waitangi Tribunal reports requiring that section 8 of the RMA 1991 be amended".*

47. The Crown appears to suggest that environmental and resource management legislation has been in a state of ongoing improvement, with references to increasing understanding of kupu such as kaitiakitanga and increasing consistency with Te Tiriti.[28] The Crown's Te Tiriti duties are either met or they are not. Working in partnership with Taihape Māori about the management of the environment from the outset, including with Ngāti Kauwhata, would likely (among other positive effects) have significantly reduced the need for the Crown to engage in a process of trial and error at the expense of Taihape Māori.

48. With respect to matters of causation:

    (a) The Tribunal in *He Whiritaunoka* concluded that the Treaty of Waitangi Act 1975 contemplated the Crown being found liable "*for all the consequences of its acts and omissions that breached the principles of*

[26] Hearing week 16 transcript (Wai 2180, #4.1.25) at 161.
[27] Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims* (Wai 898, 2019) Vol IV at 395, 497-498.
[28] Wai 2180, #4.1.25 at 167-169.

the Treaty and which we find, on the balance of probability, caused prejudicial effects to Māori. The Crown is liable whether or not the outcomes of its conduct were predicted or predictable".[29]

(b) The Crown, in introducing policies and legislation in relation to environmental management that were not implemented in partnership with Māori and did not provide for Māori interests "in any form" until the late 1980s, was clearly inconsistent with Te Tiriti and its principles. Ngāti Kauwhata have essentially been rendered invisible in decision-making affecting the environment, unable to exercise any meaningful authority or provide meaningful input into decisions in relation to the environment. The prejudice arising from this is apparent; the Crown has proceeded to make decisions without sufficient involvement of tangata whenua and the environment has suffered. These are matters the Crown should rightly be found to be liable for, whether or not the outcomes of its conduct, which included environmental degradation, were "*predicted or predictable*". It is difficult to see how Māori could "share" any material responsibility for the state of the environment, given the lack of input or control they had into policy and legislation and how it was managed.

(c) In general, the tenor of the submissions appears to try and minimise the Crown's purview over matters affecting the environment, but the Crown created the legislative framework and chose to devolve large aspects of its operation to local government. Tribunal jurisprudence is clear that the Crown is unable to avoid its Te Tiriti obligations by delegating functions non-Crown entities.[30] It must also ensure its agents are performing well and, where they are not, the Crown must make a reasonable effort to improve performance.[31]

(d) Counsel conclude by highlighting the kōrero of Mr Graham regarding ngā awa:[32]

> *We'd like to get involved in managing and cleaning up of our awa, but what we have at the moment is not kaitiakitanga. The councils know who to talk to if they*

[29] Waitangi Tribunal *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015) at 1453.
[30] Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at xxiv, Waitangi Tribunal *Tū Mai te Rangi: Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22.
[31] Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa* Inquiry (Wai 2575, 2019) at 32.
[32] #L4 at [84].

> *want meaningful conversation and consultation. Not having a part to play in what happens in the upper reaches of the awa has a negative impact on both Kauwhata and the awa we treasure.*

CAUSE OF ACTION: LOSS OF KNOWLEDGE AND TIKANGA

Crown closing submission

49. Counsel highlight two paragraphs from the Crown's closing submissions regarding cultural taonga (#3.3.94) at paragraphs 51 and 60:

> *In making that observation, the Crown recognises (as above) that its actions may have contributed to the loss of Taihape iwi identities. The Crown also accepts that loss of land has harmed the mauri of Taihape Māori and their identity through the loss or compromise of traditional ways of living, culture and identity, kaitiaki roles, access to natural resources and mahinga kai areas*.
>
> *In summary, the Crown accepts that it has duties to protect matters central to identity – te reo Māori, and the tribal structures of Taihape Māori, and this generally requires the Crown to respect, and not undermine, these structures. The Crown has conceded it did not do this, and that that breached te Tiriti o Waitangi/the Treaty of Waitangi*.

Reply

50. Counsel submit that this acknowledgement and concession, which are rightly made by the Crown, are highly relevant to the Wai 784 claim, a key aspect of which has been the disconnection of Ngāti Kauwhata from the kōrero of their tūpuna, from their knowledge and tikanga in relation to their customary rights and interests in the inquiry district, and from important parts of what it means to be Ngāti Kauwhata.[33]

Dated this 27th day of September 2021

P Johnston / E Martinez / D Chong
Counsel for the claimants

[33] For further detail, see the claim specific closing submissions at [57]-[58(b)].