IN THE WAITANGI TRIBUNAL **WAI 2180**
TAIHAPE - RANGITĪKEI KI RANGIPŌ INQUIRY DISTRICT **WAI 1482**

IN THE MATTER	of the Treaty of Waitangi Act 1975
AND	
IN THE MATTER	of Taihape - Rangitīkei ki Rangipō Inquiry (Wai 2180)
AND	
IN THE MATTER	of a claim by Ropata William Miratana, Patricia Ngatakutai Jacobs, the late Reverend Te Hopehuia Hakaraia and the late Richard Edward Orzecki on behalf of themselves and Te Kotahitanga o te Iwi o Ngāti Wehi Wehi (Wai 1482)

CLAIMANT SPECIFIC SUBMISSIONS IN REPLY FOR THE WAI 1482 NGĀTI WEHI WEHI CLAIM

Dated: this 27th day of September 2021

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These are the submissions in reply for the Wai 1482 Ngāti Wehi Wehi claim, by Ropata William Miratana, Patricia Ngatakutai Jacobs, the late Reverend Te Hopehuia Hakaraia and the late Richard Edward Orzecki on behalf of themselves and Te Kotahitanga o te Iwi o Ngāti Wehi Wehi ("**Wai 1482 Ngāti Wehi Wehi claim**").

2. As the Tribunal may recall, Ngāti Wehi Wehi's claim is a claim to re-establish, re-connect and rebuild from that which has been lost. It seeks to re-establish and re-connect Ngāti Wehi Wehi with their links in the Taihape district and seeks to rebuild the knowledge of their whenua, whakapapa and tribal knowledge.[1]

3. These submissions in reply should be read in conjunction with the final Amended Statement of Claim, the Opening Submissions and the Closing Submissions for the Wai 1482 Ngāti Wehi Wehi claim for the Taihape – Rangitīkei ki Rangipō inquiry district (the "inquiry district").[2]

4. 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.

5. Counsel confirm that the Wai 1482 Ngāti Wehi Wehi claimants continue to rely on the position set out in their Closing Submissions,[3] and addresses the Crown submissions where further analysis or submission appears necessary.

6. To the extent they complement and are relevant to the Wai 1482 Ngāti Wehi Wehi closing submissions, counsel anticipate that they will adopt relevant generic claimant submissions in reply as appropriate. Counsel will confirm this once these submissions have been received and considered.

[1] Closing submissions for the Wai 1482 Ngāti Wehi Wehi Claim (Wai 2180, #3.3.57) dated 20 October 2020 at [3].
[2] Closing submissions for the Wai 1482 Ngāti Wehi Wehi Claim (Wai 2180, #3.3.57) dated 20 October 2020 at [3]; Amended Statement of Claim for the Taihape – Rangitīkei ki Rangipō District Inquiry, dated 19 August 2016 (Wai 2180 #1.2.2); Opening Submissions for Wai 1482 Ngāti Wehi Wehi Claim, dated 3 September 2018 (Wai 2180 #3.3.23).
[3] Including the adoption of relevant Generic Claimant Closing Submissions.

CUSTOMARY INTERESTS

7. The Wai 1482 claim specific closing submissions have highlighted the evidence regarding the customary rights and interests of Ngāti Wehi Wehi in the whenua, awa and resources in this inquiry district. Those submissions set out the loss of their customary interests and the resulting loss of knowledge of their whenua, whakapapa and tribal knowledge within this inquiry district.

8. Following the receipt of the Crown's closing submissions it continues that Ngāti Wehi Wehi's assertion of their customary rights and interests has not been challenged by any other party.

FIRST CAUSE OF ACTION: NATIVE LAND COURT

Crown submissions

9. 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."*[4]

10. At paragraph 34, the Crown further submits that the "*attempt to accommodate customary ownership concepts within a new tenurial system*" was "*sincerely undertaken*". The Crown acknowledges that *"the statutory scheme was also largely structured around the antipodean preference for indefeasibility of title and estates in fee simple"* and the endeavour "*involved a significant cost to Māori tribal structures*".[5]

Reply

11. The negative effects of the Native Land Court, through its implementation and operation, on Māori have been traversed in both submissions and Tribunal findings for many years. It is disheartening for the Wai 1482 claimants that the Crown continues to make submissions against such

[4] Crown closing submissions in relation to Issue 3: Native Land Court (#3.3.104) dated 9 July 2021 at [29].
[5] Crown closing submissions in relation to Issue 3: Native Land Court (#3.3.104) dated 9 July 2021 at [34].

findings to this day. These include the intention in establishing the Native Land Court and the title that the Native Land Laws produced.

12. Counsel reaffirm support for the generic claimant closings and the specific closings for this claim. Counsel further 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 merit repeating:[6]

> *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)[7] and counsel urge the Tribunal to make similar findings to those reproduced above in the present inquiry.

[6] Waitangi Tribunal *Turanga Tangata Turanga Whenua* (Wai 814, 2004) at 526-527.

[7] See for example the words of retired Chief Judge Fenton cited in the Crown closings at [25] "*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".*

Crown submissions

13. In its closing submissions on cultural taonga at paragraphs 9 and 12, the Crown submits:[8]

> *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

14. Generic claimant closings[9] and claim specific closings for this claim have already addressed the lack of involvement that Taihape Māori had in the establishment of the Native Land Court. In addition counsel notes :

(a) That the Crown acknowledges that in establishing the Native Land Court it did not consult specifically with Taihape Māori (let alone seek their consent).[10] The lack of consultation indicates that the Crown could not have properly formed a view regarding the wishes of Taihape Māori.

(b) Counsel submits that the Crown cannot, in good faith, suggest that the Native Land Court system, a system which significantly impacted on the

[8] Crown closing submissions in Relation to Issue 19, Cultural Taonga (#3.3.94) dated 21 May 2021 at [9] and [12].
[9] See Generic Closing submissions in relation to Native Land Court (#3.3.76) and associated appendices.
[10] Crown Closing Submissions in relation to Issue 19: Cultural Taonga (#3.3.94) dated 21 May 2021 at [9] and [12].

rights guaranteed by Article II of Te Tiriti, could be introduced without the consent of Taihape Māori and still be Te Tiriti compliant.

(c) Counsel submit that the Crown is mistaken in characterising their kāwanatanga rights in a manner that enables it to unilaterally establish institutions that directly impact the tino rangatiratanga of Taihape Māori, including that of Ngāti Wehi Wehi. Counsel refer further to submissions made in relation to tino rangatiratanga for this claim which follows below.

SECOND CAUSE OF ACTION: VESTED OWNERSHIP OF RIVERBEDS

Crown submission

15. The Crown position on the ownership of riverbeds is encapsulated in the following paragraphs:[11]

> *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.*

16. The Crown position suggests that the unilateral imposition of the English common law principles in relation to awa and legislation such as the Coal Mines Amendment Act 1903 are valid exercises of kāwanatanga within Te Tiriti.

Reply

[11] Crown submissions in Relation to Issue 19B: Environment (Waterways) (#3.3.93) dated 21 May 2021 at [79] – [81].

17. With respect to the Crown closing submissions relating to the ownership of the Rangitīkei River bed counsel highlight the following.

18. The Crown submissions appear to be untenable particularly in light of the findings of *Te Urewera* report which has dealt with this issue, stating:[12]

> *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 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,1464 and the meaning of a 'navigable' river is more limited than the Crown and its delegates have sometimes relied on.*

19. The Tribunal in *Te Urewera* report is clear that the laws governing ownership of riverbeds are antithetical to Māori customary law and the confusion arising from the laws are a *"grave and ongoing breach of Treaty principle of which the Crown has long been apprised."* Counsel encourage the Tribunal to make similar findings in relation to the customary ownership of the Rangitīkei River and other awa affected by these laws in the present inquiry district.[13]

THIRD CAUSE OF ACTION: CROWN PURCHASING

Crown submissions

20. Crown closing submissions fail to engage with the closing submissions made for Wai 1482, but do address the Waitapu block, in which Ngāti Wehi Wehi

[12] Waitangi Tribunal *Te Urewera* Volume VII (Wai 894, 2017) at 3458 and 3459.
[13] See Wai 1482 claim specific closing submissions (#3.3.57) dated 20 October 2020 at [74] and [75].

asserts customary rights and interests.[14] Counsel highlight the following Crown submissions:[15]

> *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 submissions

21. Counsel repeat submissions made in closing and say further in respect of the particular points raised:

    (a) 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]

    (c) As set out in claim specific closings, the Crown failed to deal with Ngāti Wehi Wehi, failed to adequately investigate the Ngāti Wehi Wehi'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]

FOURTH CAUSE OF ACTION: ENVIRONMENTAL ISSUES

Crown closing submissions

22. 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

[14] Crown closing submissions in relation to Issue 4: Crown purchasing (#3.3.78) dated 7 May 2021 at [73] to [98].
[15] Crown closing submissions in relation to Issue 4: Crown purchasing (#3.3.78) dated 7 May 2021 at [93], [95].
[16] C Innes, *Māori Land Retention and Alienation within Taihape Inquiry District 1840 – 2013*, (Wai 2180, #A15) at 24.
[17] Closing submissions for the Wai 1482 Ngāti Wehi Wehi Claim (Wai 2180, #3.3.57) dated 20 October 2020 at [100].

together, with the exception of issues relating to matters of vested ownership addressed above.

23. In general, the Crown's submissions in relation to the environment appear to emphasise that:

    (a) It can legitimately make decisions in relation to the environment,[18]

    (b) That its consultation duties are not absolute,[19] and

    (c) That legislation relating to the environmental management is not inconsistent with Te Tiriti.[20]

24. Furthermore, the Crown seeks to pin at least some of the blame on Māori for the state of the environment[21] and emphasises difficulties in establishing a causative link between acts and omissions of the Crown and prejudice alleged.[22]

25. 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"*.[23]

26. Counsel refer to the following paragraphs from the Crown's submissions in relation to land by way of example:[24]

> *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*

[18] See for example Crown closing submissions in relation to Issue 16A: Environment (Land) (Wai 2180, #3.3.85) dated 7 May 2021 at [18], [52], [79], [216]; Crown closing submissions in relation to Issue 16B: Environment (Waterways) (Wai 2180, #3.3.93) at [19], [123] and [133].
[19] See for example Crown closing submissions in relation to Issue 16A: Environment (Land) (Wai 2180, #3.3.85) at [109]; Crown closing submissions in relation to Issue 16B: Environment (Waterways) (Wai 2180, #3.3.93) at [18].
[20] See for example Crown closing submissions in relation to Issue 16A: Environment (Land) (Wai 2180, #3.3.85) at [61], [73], [75], [82], [83] and [87]; Crown closing submissions in relation to Issue 16B: Environment (Waterways) (Wai 2180, #3.3.93) at [21] and [115].
[21] See for example Crown closing submissions in relation to Issue 16A: Environment (Land) (Wai 2180, #3.3.85) at [19], [176]; Crown closing submissions in relation to Issue 16B: Environment (Waterways) (Wai 2180, #3.3.93) at [128].
[22] See for example Crown closing submissions in relation to Issue 16A: Environment (Land) (Wai 2180, #3.3.85) at [7], [50], [52]; Crown closing submissions in relation to Issue 16B: Environment (Waterways) (Wai 2180, #3.3.93) at [32], [34], [36], [67] and [134].
[23] Crown closing submissions in relation to Issue 16A: Environment (Land) (Wai 2180, #3.3.85) at [22]. Similar statements are made in Crown closing submissions in relation to Issue 16B: Environment (Waterways) (Wai 2180, #3.3.93) at [18] to [21].
[24] Similar Crown closing submissions in relation to Issue 16B: Environment (Waterways) (Wai 2180, #3.3.93), for example at [18] to [21] and [36].

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 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.

Reply

27. The generic claimant closing submissions in relation to the environment taken together with the Wai 1482 claim-specific closing submissions have dealt with issues arising in a comprehensive fashion.[25] Therefore counsel make limited submissions below.

28. The Crown continues to make the misguided assumption about the nature of the power afforded to it by Te Tiriti. This is reflected in their submissions in

[25] Closing submissions for the Wai 1482 Ngāti Wehi Wehi Claim (Wai 2180, #3.3.57) dated 20 October 2020; Generic closing submissions in relation to the environment (Wai 2180, #3.3.56) dated 14 October 2020.

relation to the environment. The Crown has continued to make decisions affecting the environment without engaging appropriately with Taihape Māori, including Ngāti Wehi Wehi, in the way required by Te Tiriti. Not only has this negatively impacted the tino rangatiratanga of Ngāti Wehi Wehi, but it has led to environmental degradation of the awa and the whenua.

29. Counsel submit that the Crown cannot insist, in good faith, that its approach to environmental and resource management has been Te Tiriti consistent, including due to its own admissions and acknowledgements, 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.*[26]
>
> *A. Certainly, the Crown acknowledges that prior to the late 1980s, Māori interests weren't specifically provided for in any form of environmental legislation.*[27]

30. In respect of 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 from the *Te Mana Whatu Ahuru* report:[28]

> *"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".*

[26] Crown closing submissions in relation to Issue 16A: Environment (Land) (Wai 2180, #3.3.85) at [80].
[27] Hearing week 16 transcript (Wai 2180, #4.1.25) at 161.
[28] Waitangi Tribunal *Te Mana Whatu Ahuru* Vol IV (Wai 898) at 497-498.

> *"*[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".*

31. The Crown appears to suggest that environmental and resource management legislation has been in a state of ongoing improvement.[29] Counsel submit that the 'ongoing improvement' referred to by the Crown falls well short of what is required for the Crown to meet its Te Tiriti duties. This requires the Crown to work in partnership with Taihape Māori (including Ngāti Wehi Wehi) about the management of the environment. Working in partnership with Taihape Māori (including Ngāti Wehi Wehi) from the outset, would likely have enabled environmental management to have taken place with the benefit of tikanga tuku iho.

32. 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 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"*.[30]

    (b) The Crown introduced 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.

    (c) Ngāti Wehi Wehi have been precluded from decision-making and been unable to exercise any meaningful authority or provide meaningful input into decisions in relation to the environment. Therefore, the Crown has proceeded to make decisions without sufficient involvement of tangata whenua and the environment has suffered.

    (d) These are matters that the Crown should rightly be found to be liable for, whether or not the outcomes of its conduct, including environmental

[29] Hearing week 16 transcript (Wai 2180, #4.1.25) at 167-169.
[30] He Whiritaunoka: The Whanganui Land Report vol. 3 (Wai 903, 2015) at 1453.

degradation, were "*predicted or predictable*". Counsel submit that Taihape Māori (including Ngāti Wehi Wehi) could not and cannot 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.

(e) In general, the submissions attempt to try and minimise the Crown's role over matters affecting the environment. However, the Crown had created the legislative framework and chose to devolve large aspects of its operation to local government. The Tribunal jurisprudence is clear that the Crown is unable to avoid its Te Tiriti obligations by delegating functions to non-Crown entities.[31] It must also ensure its agents are performing well and, where they are not, the Crown must make a reasonable effort to improve performance.[32]

SIXTH CAUSE OF ACTION: LOSS OF KNOWLEDGE AND TIKANGA

Crown closing submission

33. At paragraphs 51 and 60 of the Crown's closing submissions regarding cultural taonga, they submit:

> *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

34. Counsel submit that this acknowledgement and concession by the Crown are highly relevant to the Wai 1482 claim. A key aspect of the Wai 1482 claim has been that the failure by the Crown to recognise the customary interests of Ngāti Wehi Wehi has led to the disconnection of their current and future

[31] 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.
[32] Waitangi Tribunal Hauora: Report on Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575, 2019) at 32.

generations from the knowledge and tikanga in relation to their customary rights and interests in the inquiry district.[33]

SEVENTH CAUSE OF ACTION: TINO RANGATIRATANGA

35. Counsel have already addressed the position of Ngāti Wehi Wehi on the relationship between tino rangatiratanga and kāwanatanga in closing submissions for the claim and continue to rely on this position. Counsel only respond further to specific sections of the Crown's closing submissions (#3.3.89) set out below.

Crown closing submissions

36. 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".* The Crown also makes assertions regarding the obtaining of de jure sovereignty.

37. 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.[34]

Reply

38. Counsel submit that the Tribunal's findings in Te Rohe Pōtae are particularly significant 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.*

39. The Tribunal's approach in *Te Mana Whatu Ahuru* is especially important to interpreting the understandings and agreement arising from Te Tiriti. In summary, the Tribunal took a different approach to several earlier Tribunal determinations. The Tribunal placed western law and tikanga side by side, 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 considered that taking the former approach led to the potential for "*Māori sources and understandings of law*

[33] For further detail, see the closing submissions for the Wai 1482 Ngāti Wehi Wehi Claim (Wai 2180, #3.3.57) dated 20 October 2020 at [132].
[34] See for example at Crown Closing Submissions in relation to Issue 1: Tino Rangatiratanga (Wai 2180, #3.3.89) dated 21 May 2021 at [58], [69].

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 that the time of signing Te Tiriti.[35]

40. Counsel highlight the following findings of the Tribunal in *Te Mana Whatu Ahuru*, which considered the arguments for both claimants and the Crown. The Tribunal in *Te Mana Whatu Ahuru* did not appear to accept Crown arguments made regarding the nature of the power it obtained in 1840, nor how it was obtained:[36]

> *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-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*

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

> *derived the principles of kāwanatanga and rangatiratanga, including Māori autonomy or self-government* [underline added].

41. Counsel submit that a similar approach should be adopted in this inquiry district.

42. As highlighted 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. This has been aided 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.

43. The wealth of evidence and Tribunal findings that are now available indicate that the level of autonomy and the extent of the control and authority that Māori intended to retain is more significant than what has been accepted or provided for by the Crown to date.

44. The Crown's misguided assumption that it had obtained "*supreme and unfettered governing and lawmaking power*" has had devastating and wide-reaching consequences for Ngāti Wehi Wehi. They have been left with little option other than sitting as spectators while the Crown 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.

45. This issue persists to the present day and can be seen in 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

46. 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)".[37]

47. At paragraph 32 the Crown submits that *"there is little evidence (if any) of Taihape Māori explicitly rejecting the Crown having assumed sovereignty"*.[38]

Reply

48. Counsel refer to submissions made regarding the nature of the relationship between Māori and the Crown brought about by Te Tiriti, and state that they are not aware of, and neither has the Crown pointed to, any evidence in this inquiry district to suggest Ngāti Wehi Wehi accepted the sovereignty of the Crown.

49. Counsel further observe that it is extremely dangerous to conflate silence with consent and, therefore, submit that silence on the part of Ngāti Wehi Wehi should not be interpreted as consent. Similarly, counsel submit that any indication of acceptance should only be interpreted as such when it can truly be said to be free, prior informed consent.[39]

Crown closing submission

50. 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".*[40]

51. At paragraph 34, the Crown submits:[41]

> "*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*".

[37] Crown Closing Submissions in relation to Issue 1: Tino Rangatiratanga (Wai 2180, #3.3.89) dated 21 May 2021 at [12].
[38] Crown Closing Submissions in relation to Issue 1: Tino Rangatiratanga (Wai 2180, #3.3.89) dated 21 May 2021 at [32].
[39] A parameter used in the United Nations Declaration on the Rights of Indigenous Peoples (2007) 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. Endorsed in Waitangi Tribunal Horowhenua: The Muaūpoko Priority Report (Wai 2200, 2017) at 16.
[40] Crown Closing Submissions in relation to Issue 1: Tino Rangatiratanga (Wai 2180, #3.3.89) dated 21 May 2021 at [15].
[41] Crown Closing Submissions in relation to Issue 1: Tino Rangatiratanga (Wai 2180, #3.3.89) dated 21 May 2021 at [34].

Reply

52. In respect of the case of those who did not sign Te Tiriti, Tribunal jurisprudence is clear that the Crown's Te Tiriti obligations arose at the time of the signing of Te Tiriti to all Māori, irrespective of whether or not they signed.[42]

53. The question of if and when reciprocal obligations arose for those Māori who did not sign seems more nuanced. 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.[43]

(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, but 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*".[44] 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:[45]

> *"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*

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

> *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".*

54. Counsel respectfully submit 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.

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

Dated this 27th day of September 2021

P Johnston / D Chong / E Martinez