

HOROWHENUA



# H O R O W H E N U A

## *The Muaūpoko Priority Report*

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Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi  
*Kia puta ki te whai ao, ki te mārama*

The Honourable Te Ururoa Flavell  
Minister for Māori Development  
The Honourable Christopher Finlayson QC  
Minister for Treaty Negotiations  
The Honourable Maggie Barry  
Minister of Conservation  
The Honourable Anne Tolley  
Minister of Local Government  
Parliament Buildings  
WELLINGTON

28 June 2017

Tēnā koutou e ngā Minita e noho mai nā i runga i ō tūnga tiketike. He tokomaha ngā rangatira o Muaūpoko iwi kua ngaro ki te pō ā, kua kore e kitea i te tirohanga kānohi. He kaupapa tēnei nā rātou i poipoi, i whiri-whiri, i wānanga. Nō reira ka aroha atu ki a rātou, tae atu ki te hunga nā rātou i tautoko te kaupapa i ngā tau kua hipa. Moe mai koutou. Ānei rā te pūrongo a Te Rōpū Whakamana i Te Tiriti o Waitangi, kua puta mai ki te awatea.

Please find enclosed the Waitangi Tribunal's report on the iwi of Muaūpoko and their historical claims. During our inquiry we traversed the history of an ancient, proud, and dignified people who once ranged over an area that reached into the northern end of Manawatū, across the Tararua Ranges, and down into the top of the South Island. The history of their relationship with the Crown is one that has been coloured by many narratives, including those of the tribes that migrated into the Porirua ki Manawatū area during the early nineteenth century, those of Muaūpoko who supported the Kingitanga, those of Muaūpoko who supported the

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Crown, and local Crown officials and settlers. This report presents a new understanding of Muaūpoko's colonial experience and the manner in which they have survived as a distinct entity from 1800–2015, as revealed by the evidence that we heard.

In this report we look at the complex historical matrix that underpins that experience and their focus on their lands, Lake Horowhenua, and the Hōkio Stream. In reviewing the evidence as outlined in chapters 4–11 and summarised in chapter 12, we have considered and applied the relevant principles of the Treaty of Waitangi. We have largely upheld the majority of their claims concerning their lands at Horowhenua and their most treasured taonga Lake Horowhenua and the Hōkio Stream. Muaūpoko also pressed their claims concerning the loss of Lake Papaitonga and the Waiwiri Stream before us but, given that there are other claimants to be heard on those subjects, it would be premature to consider findings or frame recommendations until we hear from those other claimant tribes. That is also the situation regarding their claims to various other land blocks in the district.

The Crown assisted the inquiry by making a number of significant concessions of Treaty breach. These included concessions that some legislation and Crown acts have prejudiced Muaūpoko, and that they were made virtually landless, in breach of the Treaty.

We accepted the Crown concessions and identified several other important Treaty breaches in respect of Muaūpoko's Horowhenua lands. We found that the Native Land Court and the individualisation of tribal land was imposed on Muaūpoko in the 1870s, and that the Crown purchased the Levin township site in the 1880s in a way which was significantly unfair to Muaūpoko. In the 1890s, Muaūpoko were subjected to a number of significant Treaty breaches which deprived them of their lands in a way that was fundamentally unfair. By the end of the twentieth century, they had been rendered landless.

We also found serious Treaty breaches in relation to Crown actions and omissions in respect of Lake Horowhenua and the Hōkio Stream. In the early 1900s, the Crown made Lake Horowhenua, the bed of which belonged to Muaūpoko, a public recreation reserve, giving control of it to a domain board. This was done without the full agreement of the Muaūpoko owners. A series of significant Treaty breaches followed in the way the lake has been controlled and administered. A 1956 attempt by the Crown to remedy these matters was inadequate. The Crown took an unusually active role in respect of both Lake Horowhenua and the Hōkio

Stream in the twentieth century, and was complicit in the pollution and environmental degradation of these taonga (tribal treasures).

Thus we have concluded that we should make the following primary recommendations at this stage of our inquiry. These are:

#### **Land claims**

As a result of our numerous findings of breaches of the principles of the Treaty with respect to the native land legislation of the nineteenth century, the imposition of that legislation and the Native Land Court on Muaūpoko, the Crown's land purchasing policies of that period, the Horowhenua partitions, the Horowhenua commission process, the Horowhenua Block Act 1896, and twentieth-century land issues, we recommend:

- ▶ that the Crown negotiates with Muaūpoko a Treaty settlement that will address the prejudice suffered by the iwi due to the breaches of the Treaty identified; and
- ▶ that the settlement includes a contemporary Muaūpoko governance structure with responsibility for the administration of the settlement.

#### **Lake Horowhenua and the Hōkio Stream**

Lake Horowhenua is now classified as hypertrophic and was ranked by the time of our hearings as the seventh worst out of 112 monitored lakes in New Zealand in 2010. The history of how the lake reached this state is reviewed in our report and it has led us to make numerous findings of breaches of the principles of the Treaty with respect to Lake Horowhenua and the Hōkio Stream. Thus, we further recommend:

- ▶ That the Crown legislate as soon as possible for a contemporary Muaūpoko governance structure to act as kaitiaki for the lake, the Hōkio Stream, associated waters, and fisheries following negotiations with the Lake Horowhenua Trustees, the lake bed owners, and all of Muaūpoko as to the detail. The legislation should at least be similar to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 but may also extend to something similar to that used for the Whanganui River. This would necessarily mean dismantling the current Lake Horowhenua Domain Board. Any recommendations in respect of Ngāti Raukawa are reserved until that iwi and affiliated groups have been heard, but we note that the Waikato-Tainui river settlement model allows for the representation of other iwi.

- ▶ That the Crown provide to the new Lake Horowhenua Muaūpoko governance structure annual appropriations to assist it meet its kai-tiaki obligations in accordance with its legislative obligations.

Nō reira, kua tukuna atu e mātou, a mātou whakaaro kia rere ki a koutou, otirā ki ngā Minita katoa o Te Whare Paremata ā, ki a Muaūpoko hoki. Tēnā koutou.



Deputy Chief Judge Caren Fox  
Presiding Officer  
Nā Te Rōpū Whakamana i te Tiriti o Waitangi

## PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Horowhenua: the Muaūpoko Priority Report*. As such, all parties should expect that in the published version, headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Maps, photographs, and additional illustrative material may be inserted. However, the Tribunal's findings and recommendations will not change. The published version will form a volume or volumes of the final report produced for the Porirua ki Manawatū inquiry. Matters noted in this pre-publication version but not fully reported on at this stage, due to lack of evidence and other reasons, may have further analysis, findings, and recommendations made in the published report.

## ABBREVIATIONS

AJHR	<i>Appendix to the Journal of the House of Representatives</i>
app	appendix
ATL	Alexander Turnbull Library
CA	Court of Appeal
ch	chapter
comp	compiler
doc	document
DOC	Department of Conservation
DSIR	Department of Scientific and Industrial Research
ed	edition, editor
fol	folio
HPA	Hokio Progressive Association
ltd	limited
MAF	Ministry of Agriculture and Fisheries
MCC	Muaūpoko Claimant Cluster
MTA	Muaūpoko Tribal Authority
NIWA	National Institute of Water and Atmospheric Research
NKTI	Nga Kōrero Tuku Iho
NZPD	<i>New Zealand Parliamentary Debates</i>
n	note
no	number
NZLR	<i>New Zealand Law Reports</i>
p, pp	page, pages
para	paragraph
pt	part
RMA	Resource Management Act 1991
ROI	record of inquiry
ROLD	Reserves and Other Lands Disposal Act 1956
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
vol	volume
Wai	Waitangi Tribunal claim

## ACKNOWLEDGEMENTS

### He Apakura

*Taku hei moki moki*

*Taku hei piri piri*

*Taku rau tawhiri*

*Taku kāti taramea*

*Taku Pūrehurehu*

*E rere i runga rā*

*Mā pāu koe e*

*Tuku ki Te Reinga<sup>1</sup>*

The Tribunal wishes to acknowledge the passing of several valued contributors during the process of our hearings for the Muaūpoko priority report.

Kay Kahumaori Pene, a named claimant for Wai 52 and Wai 2045, passed away in February 2015.

Kevin Te Hira Hill, of the Muaūpoko Tribal Authority, passed away in January 2016, shortly after giving evidence in our inquiry.

Kathy Ertel, counsel for Wai 52, Wai 2045, and Wai 2326, passed away in February 2016. Ms Ertel represented claimants in multiple Waitangi Tribunal inquiries over the past 25 years.

*Nō reira e koutou, haere atu rā ki te wāhi whakamutunga mō te tangata. Moe mai, moe mai.*

---

1. 'This apakura is ancient and therefore the original composer is unknown, however to my knowledge, it is from within the Horowhenua region. According to stories, these types of Apakura were delivered as a karanga in earlier days, however this particular apakura is sung as a waiata tangi nowadays. The first part of the waiata talks about the original perfumes of our mātua tīpuna, and the second part is a farewell to the deceased.' Sian Montgomery-Neutze, 'He Wānanga i ngā Waiata me ngā Kōrero Whakapapa o Muaūpoko', no date (doc A15(a)), p [24].





## CHAPTER 1

# INTRODUCTION

### 1.1 INTRODUCTION

The Muaūpoko people are an iwi of the lower North Island, whose historical experience of colonisation has left them in social and cultural disarray. Today they are virtually landless. Their Treaty claims against the Crown are significant, ranging from dispossession of land in the nineteenth century to the serious degradation of their tribal taonga, Lake Horowhenua. In particular, the Muaūpoko claims concern allegations that:

- ▶ the Crown accepted and acted upon a view that Muaūpoko were a conquered people with greatly reduced customary rights to land and resources;
- ▶ Crown purchasing and the Crown's native land laws resulted in excessive land loss and harm to the tribe, rendering Muaūpoko virtually landless;
- ▶ Crown protection mechanisms were weak and ineffective;
- ▶ in 1905, the 'Horowhenua Lake Agreement' and Horowhenua Lake Act usurped Muaūpoko's authority and many of their property rights in respect of Lake Horowhenua and the Hōkio Stream, and this usurpation has been maintained through to the present day; and
- ▶ the Crown has been complicit in the pollution and environmental degradation of Lake Horowhenua and the Hōkio Stream.

In 2013–14, a dispute arose within Muaūpoko as to the mandate for proposed settlement negotiations. As we explain in more detail below, an application for urgency was filed by members of the Muaūpoko tribe who wanted their claims heard prior to any settlement negotiations. In 2014, the Tribunal declined to grant an urgent hearing about the mandate. This was partly because there was still time for the applicants' historical claims to be heard in the Wai 2200 district inquiry. It would be necessary to accelerate the research programme so that hearings could take place in time, and it was thought that research and hearings might expose the roots of Muaūpoko disagreements in their historical experience of colonisation. As it turned out, all Muaūpoko claimants participated in our hearings in 2015, presenting evidence and submissions.

The other iwi and claimants in the Porirua ki Manawatū inquiry district agreed to the prioritisation and early hearing of Muaūpoko claims. In order to avoid any injustice to overlapping claimants, we decided to focus our findings on Muaūpoko

1.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

claims within their tribal heartland, Horowhenua. All other claims will be considered later in our inquiry. The result was an expedited research and hearing process in 2014–15, and an expedited report, some of which is preliminary in its findings. We have outlined crucial Crown acts and omissions which have breached Treaty principles, and which have left the Muaūpoko tribe in a parlous state. We have not, however, covered all issues exhaustively in this priority report. As will be seen in the following chapters, the impact of the Crown's actions on Muaūpoko has been serious indeed.

The Crown has made Treaty breach concessions in five areas in relation to Muaūpoko's claims, as well as several factual acknowledgements. The Crown's concessions and acknowledgements are discussed fully in subsequent chapters of this report. Here, we provide a brief summary to set the context for our inquiry. Crown counsel conceded that the following Crown acts and omissions breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles:

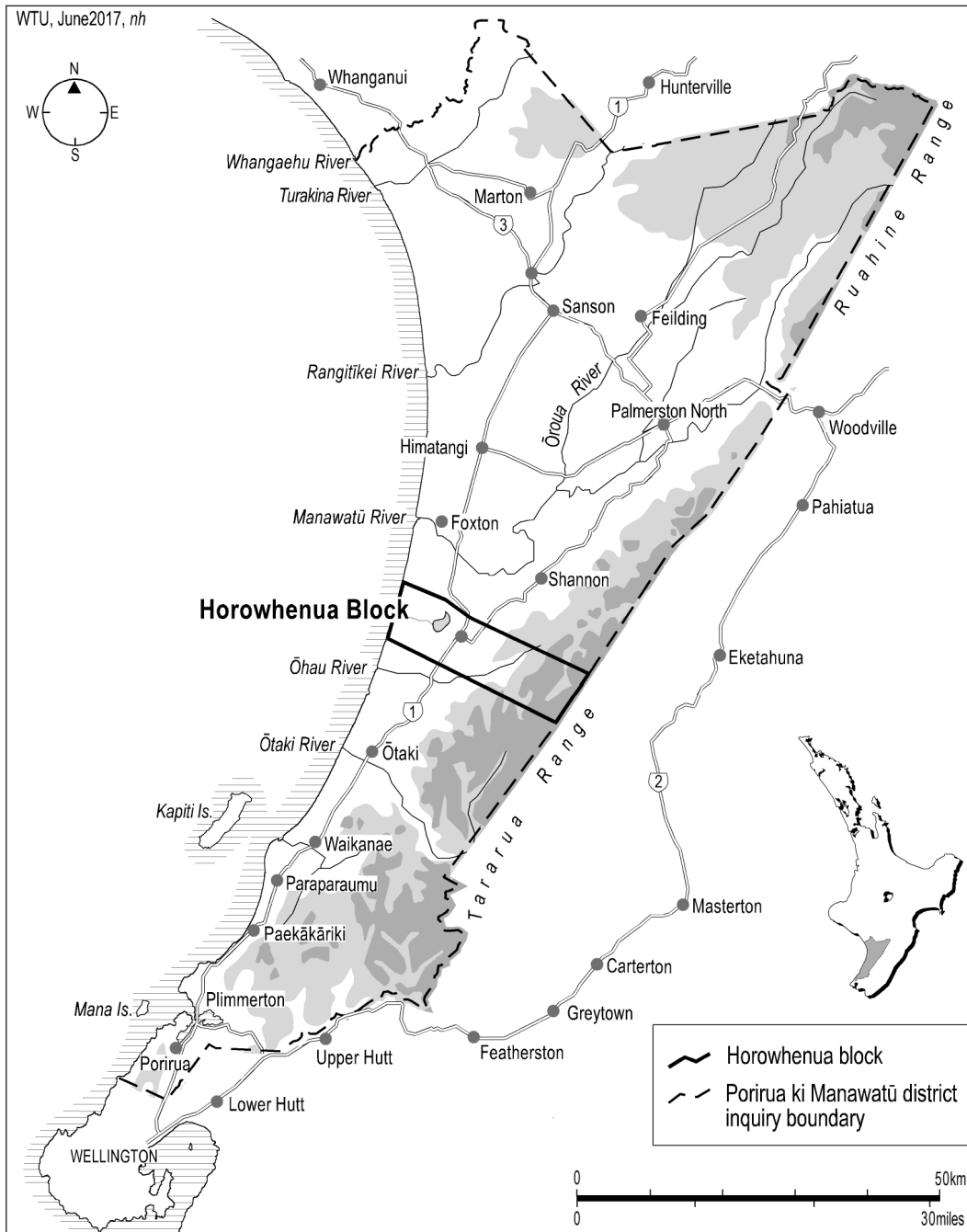
- ▶ Lake Horowhenua: that the 1905 legislation promoted by the Crown failed to give adequate effect to the 1905 'Horowhenua Lake Agreement'.
- ▶ Omission to provide a form of corporate title: that the Crown's native land laws failed to provide an effective form of corporate title until 1894, which undermined attempts by Muaūpoko to maintain tribal authority within the Horowhenua block.
- ▶ Horowhenua block: that the cumulative effect of the Crown's actions in acquiring land in Horowhenua blocks 11 and 12 meant that it failed to actively protect the interests of Muaūpoko in their lands.
- ▶ Impact of the native land laws: that the Crown failed to protect Muaūpoko's traditional tribal structures, which were in part undermined by the increased susceptibility of Muaūpoko lands to fragmentation, alienation, and partition as a result of the individualisation of Māori land tenure provided for by the native land laws.
- ▶ Landlessness: that the Crown failed to ensure that Muaūpoko retained sufficient land for their present and future needs.

The purpose of this chapter is to provide the reader with a basic understanding of the procedural background of the Muaūpoko prioritised inquiry, and of the Tribunal's Treaty jurisdiction. It introduces the 'main players' in the inquiry, the research commissioned, the scope of the issues addressed, details of the priority hearings, and the Treaty principles on which we rely in this report. At the end of the chapter, we address issues raised by the Crown about the appropriate standards for measuring its historical conduct.

**1.2 BACKGROUND TO THE INQUIRY**

**1.2.1 The Porirua ki Manawatū District Inquiry**

The Waitangi Tribunal hears historical claims on a district basis, enabling the claims of closely related kin groups to be heard simultaneously in respect of the



Map 1.1: Location of Horowhenua block

land and resources in a district. In 2009, after lengthy consultation with parties, the Tribunal established the Porirua ki Manawatū district inquiry (Wai 2200), severing it from the Taihape district. On 2 July 2010, Chief Judge W W Isaac, chairperson of the Waitangi Tribunal, appointed Deputy Chief Judge CL Fox presiding officer

1.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

of the Porirua ki Manawatū Tribunal.<sup>1</sup> Emeritus Professor Sir Tamati Reedy was appointed to the panel on 16 August 2010.<sup>2</sup> Dr Grant Phillipson was appointed on 16 March 2011,<sup>3</sup> followed by the Honourable Sir Douglas Kidd on 31 October 2012.<sup>4</sup> Tania Simpson was appointed to the panel on 12 February 2014, bringing the membership to five.<sup>5</sup>

Approximately 137 claims will be inquired into as part of the Porirua ki Manawatū district inquiry. In addition to Muaūpoko claims, the inquiry will focus on the claims of Ngāti Raukawa and affiliated groups, and Te Ātiawa/Ngāti Awa ki Kāpiti. The claims of Ngāti Toa, Rangitāne, and Ngāti Apa are not the subject of inquiry, these groups having each settled their historical Treaty claims with the Crown.

**1.2.2 Background to the Muaūpoko priority hearing**

**(1) Claimant submissions sought on the Porirua ki Manawatū inquiry**

On 7 October 2010, Deputy Chief Judge Fox circulated and sought feedback on an inquiry discussion paper explaining the various inquiry models.<sup>6</sup> The paper informed parties to the Wai 2200 inquiry about processes which had previously been adopted in district inquiries. It provided an overview of inquiries since the Tribunal adopted the ‘new approach’ to the conduct of inquiries into historical claims. It also included innovations introduced in subsequent district and regional inquiries, such as the Nga Kōrero Tuku Iho hui employed in the Te Rohe Pōtae inquiry, a process which allowed for oral and traditional evidence to be presented in advance of completing the research casebook and the interlocutory phase.<sup>7</sup> The Tribunal also circulated a research discussion paper on 7 October 2010,<sup>8</sup> which proposed a number of research projects for the Porirua ki Manawatū inquiry district.<sup>9</sup> The research casebook – the evidence prepared by technical witnesses – would have a particular focus on the concerns of claimants, set out in their statements of claim, but would also aim to disclose new issues not addressed.<sup>10</sup>

**(2) Muaūpoko claimant groups pursue different courses**

Muaūpoko claimants William Taueki (Wai 237) and Vivienne Taueki (Wai 1629) stated in their submissions of 5 November 2010 that they were committed to having their claims fully heard. They did not consider it appropriate for Muaūpoko to enter settlement negotiations before the completion of hearings.<sup>11</sup> On 15 November 2010, the Crown stated that it had recognised a mandate strategy submitted by the

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1. Waitangi Tribunal, memorandum–directions, 2 July 2010 (paper 2.5.10)  
2. Waitangi Tribunal, memorandum–directions, 16 August 2010 (paper 2.5.11)  
3. Waitangi Tribunal, memorandum–directions, 16 March 2011 (paper 2.5.26)  
4. Waitangi Tribunal, memorandum–directions, 31 October 2012 (paper 2.5.56)  
5. Waitangi Tribunal, memorandum–directions, 12 February 2014 (paper 2.5.72)  
6. Waitangi Tribunal, memorandum–directions, 7 October 2010 (paper 2.5.13); Waitangi Tribunal, discussion paper on inquiry process, October 2010 (paper 6.2.3)  
7. Waitangi Tribunal, discussion paper on inquiry process (paper 6.2.3), p 10  
8. Waitangi Tribunal, discussion paper on research, October 2010 (paper 6.2.4)  
9. Waitangi Tribunal, memorandum–directions, 7 October 2010 (paper 2.5.13)  
10. Waitangi Tribunal, discussion paper on inquiry process (paper 6.2.3), p 4  
11. Claimant counsel (Thornton), memorandum, 5 November 2010 (paper 3.1.105), p 6

**MUAŪPOKO SPEAKERS AT THE NGA KŌRERO TUKU IHO HEARING,  
KAWIU MARAE, 17–18 FEBRUARY 2014**

Day 1	Day 2
William (Bill) Taueki	Kevin Hill
Maria Lomax	Trevor Hill
Eugene Henare	Marokopa Wiremu Matakatea
Mark Stephens	Sian Montgomery Neutze
Henry Williams	Jonathan Procter
Kararaina Murray	Kerehi Wi Warena
Hingaparae Gardiner	Vera Sciascia
Edward Karaitiana	Sandra Williams
Peggy-Anne Gamble	Keri Hori Te Pa
Charles Rudd	Deanna Paki
Vivienne Taueki	Noa Nicholson
Philip Taueki	Uruorangi Paki
Bradley Taueki	

Muaūpoko Tribal Authority (MTA), which had indicated a tribal preference to enter into direct negotiations with the Crown.<sup>12</sup>

It was apparent that a collective of Muaūpoko registered claimants (the Muaūpoko Claimant Cluster) wanted to proceed with hearings, but a large section of Muaūpoko wished to pursue direct negotiations with the Crown. This was confirmed during a judicial conference for all non Raukawa-affiliated claimants, held on 13 July 2011 at Kawiu Marae, Levin. At the conference, the MTA suggested that the Tribunal take a ‘hybrid approach’, whereby their direct negotiations with the Crown continued while Tribunal hearings took place.<sup>13</sup> Claimants involved in the Muaūpoko Claimant Cluster (MCC) sought to have their claims heard *before* entering negotiations.<sup>14</sup> This difference of approach would remain an issue as plans for the hearing of claims in the Porirua ki Manawatū inquiry were refined.

**(3) *The Porirua ki Manawatū research casebook and Nga Kōrero Tuku Iho***

In December 2012, the Tribunal outlined a revised plan for the inquiry casebook, which set out a number of research projects, after consultation with the parties. These included:

- ▶ a Muaūpoko oral and traditional history project;

12. Crown counsel (Ward), memorandum, 15 November 2010 (paper 3.1.125), p 12

13. Waitangi Tribunal, memorandum–directions, 25 July 2011 (paper 2.5.32)

14. Claimant counsel (Ertel), memorandum, 22 July 2011 (paper 3.1.260), p 2

## 1.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

- ▶ a Muaūpoko historical issues project, covering all land claim issues and all political autonomy/political engagement issues; and
- ▶ a Muaūpoko local issues project.<sup>15</sup>

On 19 April 2013, the Tribunal set out the progress of the technical research programme and proposed holding Nga Kōrero Tuku Iho (NKTĪ) hui in advance of completing the research.<sup>16</sup> The purpose of these early hearings was to hear tangata whenua experts on their oral histories and traditions, one object being to capture this evidence early so as to inform the Tribunal and the technical research. We also called for submissions from Muaūpoko claimants on whether they would be willing to proceed with their NKTĪ hui before the end of 2013.<sup>17</sup> Muaūpoko claimants affiliated with both the MCC and the MTA indicated interest in participating in these hui.

Muaūpoko's NKTĪ hui was held at Kawiu Marae on 17–18 February 2014, assisted by a financial contribution from the Crown.<sup>18</sup> It was the first of five held throughout the district during 2014 and early 2015. The MCC organised its speakers for the first day of the hui, while the MTA organised the second.<sup>19</sup> Due to the number of speakers, site visits were not included.<sup>20</sup> Thirteen Muaūpoko witnesses spoke on 17 February, with a further 12 Muaūpoko witnesses on 18 February 2014. We heard much valuable evidence about tribal traditions, taonga (including Lake Horowhenua), and the early history of Muaūpoko's interactions with other iwi and the Crown.<sup>21</sup>

#### **(4) Urgency application filed: Muaūpoko Tribal Authority mandate**

The Crown recognised a deed of mandate submitted by the MTA on or about 24 September 2013.<sup>22</sup> On 28 November 2013, the Waitangi Tribunal received an application for an urgent hearing into the Crown's acceptance of the mandate, and its consequent intention to negotiate a settlement of all Muaūpoko claims with the MTA.<sup>23</sup> This application (Wai 2421) was filed by William Taueki, Vivienne Taueki, Sheryl Stanford, Edward Karaitiana, Peggy Anne Gamble, and Kay Kahumaori Pene, all of whom were part of the MCC. Submissions in support of the urgency application were also received from Tama Ruru, Leo Watson, Philip Taueki, Charles Rudd, David Stone, and Chelsea Terei.<sup>24</sup>

On 12 December 2013, the Chairperson delegated the task of determining the Wai 2421 urgency application to Deputy Chief Judge Fox.<sup>25</sup> On 7 March 2014, the Honourable Sir Douglas Kidd, Emeritus Professor Sir Tamati Reedy, and Tania

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15. Waitangi Tribunal, memorandum–directions, 24 December 2012 (paper 2.5.58)

16. Waitangi Tribunal, memorandum–directions, 19 April 2013 (paper 2.5.59)

17. Waitangi Tribunal, memorandum–directions, 1 July 2013 (paper 2.5.64)

18. Crown counsel (Groot), memorandum, 31 July 2013 (paper 3.1.496)

19. Waitangi Tribunal, memorandum–directions, 7 February 2014 (paper 2.5.71)

20. Waitangi Tribunal, memorandum–directions, 13 February 2014 (paper 2.5.73)

21. See transcript 4.1.6.

22. Waitangi Tribunal, decision on application for urgency, 10 June 2014 (paper 2.8.1), p 1

23. Claimant counsel (Ertel), statement of claim, 26 November 2013 (Wai 2421 ROI, SOC 1.1.1); claimant counsel, memorandum in support of application for urgency, 26 November 2013 (Wai 2421 ROI, paper 3.1.1)

24. Waitangi Tribunal, memorandum–directions, 25 February 2014 (Wai 2421 ROI, paper 2.5.3)

25. Waitangi Tribunal, memorandum–directions, 12 December 2013 (Wai 2421 ROI, paper 2.5.2)



Simpson were appointed to assist.<sup>26</sup> The application was heard at a judicial conference on 10–11 March 2014 at the Waitangi Tribunal office in Wellington.<sup>27</sup> The Tribunal found that the applicants' statutory right to have their claims heard was not at risk of being removed as negotiations between the Crown and the MTA were not far advanced. The Tribunal suggested that the Muaūpoko claimants should receive priority in the Porirua ki Manawatū District Inquiry, once the Muaūpoko research was finalised.<sup>28</sup> The application for an urgent hearing about the mandate was therefore declined on 10 June 2014. The question of priority hearings was referred to us for further consideration.<sup>29</sup>

#### **(5) Priority granted for Muaūpoko claims**

On 17 June 2014, we asked the parties in our inquiry for submissions as to whether Muaūpoko claims should be prioritised and proceed to hearings in advance of other iwi or claimant groups.<sup>30</sup> The submissions received in advance of our judicial conference either supported or did not oppose the early hearing of Muaūpoko's claims. We heard parties on this question at a judicial conference on 25 August 2014, including claimant representatives, claimant counsel, the Crown, and the Crown Forestry Rental Trust (CFRT).<sup>31</sup> After full ventilation of issues, the parties again either did not oppose or supported priority hearings for Muaūpoko.

After considering the submissions, we granted priority to Muaūpoko claims. We advised parties that, for the hearings to be of most use to Muaūpoko claimants, the Tribunal would need to produce a preliminary report and findings before any deed of settlement was finalised. Crown counsel confirmed that the Crown and the MTA were not likely to sign an agreement in principle (a crucial early step towards a deed of settlement) before the middle of 2015.<sup>32</sup> On 2 September 2014, the Tribunal set out a proposed process for a 12-month research phase for Muaūpoko-specific reports, a truncated interlocutory process of four weeks, and indicative timeframes for hearings and reporting.<sup>33</sup> The decision to grant priority to Muaūpoko claims was issued on 3 October 2014.<sup>34</sup> While the Crown did provide funding for Muaūpoko's NĀKTI hui, it is unfortunate that neither the Crown nor CFRT were able to assist financially with Muaūpoko hearings.

### **1.2.3 Completing Muaūpoko-specific research and preparation for hearings**

#### **(1) Muaūpoko-specific research commissioned by the Waitangi Tribunal**

Once the decision had been made to prioritise Muaūpoko claims, the Waitangi Tribunal commissioned Muaūpoko-specific research, on the understanding that the

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26. Waitangi Tribunal, memorandum–directions, 7 March 2014 (Wai 2421 RO1, paper 2.5.5)

27. Waitangi Tribunal, memorandum–directions (Wai 2421 RO1, paper 2.5.3)

28. Waitangi Tribunal, decision on application for urgency (paper 2.8.1), p 33

29. Waitangi Tribunal, decision on application for urgency (paper 2.8.1), p 33

30. Waitangi Tribunal, memorandum–directions, 17 June 2014 (paper 2.5.78), p 1

31. Waitangi Tribunal, memorandum–directions, 2 September 2014 (paper 2.5.87)

32. Waitangi Tribunal, memorandum–directions, 2 September 2014 (paper 2.5.87), p 2

33. Waitangi Tribunal, memorandum–directions, 2 September 2014 (paper 2.5.87), pp 2–3

34. Waitangi Tribunal, memorandum–directions, 3 October 2014 (paper 2.5.89)

1.2.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

CFRT-commissioned MTA research might not be made available to the Tribunal.<sup>35</sup> Three Muaūpoko-specific reports were commissioned, as recommended by Jane Luiten's 'Muaūpoko Land and Politics Scoping Report':<sup>36</sup>

- ▶ Jane Luiten (with Kesaia Walker) prepared an overview research report on Muaūpoko land issues and political engagement with the Crown.<sup>37</sup> Their final 'Muaupoko Land Alienation and Political Engagement' report was filed on 25 August 2015.<sup>38</sup>
- ▶ Paul Hamer prepared a research report on Muaūpoko claim issues relating to Lake Horowhenua.<sup>39</sup> His report, "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, was filed on 4 June 2015.<sup>40</sup>
- ▶ Louis Chase prepared a scoping report on Muaūpoko oral evidence and traditional history which was filed on 28 January 2015.<sup>41</sup> His substantive Muaūpoko oral evidence and traditional history report was commissioned on 14 May 2015 and filed on 11 August 2015.<sup>42</sup>

**(2) Research commissioned by the Muaūpoko Tribal Authority**

On 5 June 2015, the Crown advised the Tribunal that settlement negotiations with the MTA would take longer than originally planned, and that an Agreement in Principle with Muaūpoko would not be possible by the end of June 2015.<sup>43</sup> In order to avoid duplication of research, the Tribunal asked the MTA whether they would be willing to file drafts of the research they commissioned and any other research they had access to so as to prevent duplication of effort.<sup>44</sup> On 23 July 2014 the MTA confirmed that it was willing to provide the Tribunal with final reports of its commissioned research and any other research under its control.<sup>45</sup>

On 3 July 2015, we asked the MTA if the claimants it represented wished to participate in the expedited inquiry. They were also directed, if this was the case, to file a preliminary report prepared by David Armstrong in support of their negotiations along with an update on the nature of the research and expected completion dates for several other projects.<sup>46</sup> Counsel for the MTA filed the completed reports on 8

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35. Waitangi Tribunal, memorandum–directions, 21 October 2014 (paper 2.5.90)

36. Jane Luiten, 'Muaupoko Land and Politics Scoping Report', July 2014 (doc A55)

37. Waitangi Tribunal, memorandum–directions, 12 December 2014 (paper 2.3.6)

38. Waitangi Tribunal, memorandum–directions, 25 August 2015 (paper 2.3.15); Jane Luiten with Kesaia Walker, 'Muaupoko Land Alienation and Political Engagement Report', August 2015 (doc A163)

39. Waitangi Tribunal, memorandum–directions, 9 December 2014 (paper 2.3.5)

40. Waitangi Tribunal, memorandum–directions, 4 June 2015 (paper 2.3.11); Paul Hamer, "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, June 2015 (doc A150)

41. Waitangi Tribunal, memorandum–directions, 28 January 2015 (paper 2.3.8); Louis Chase, 'Muaupoko Oral Evidence and Traditional History Scoping Report', January 2015 (doc A124)

42. Waitangi Tribunal, memorandum–directions, 14 May 2015 (paper 2.3.10); Waitangi Tribunal, memorandum–directions, 11 August 2015 (paper 2.3.14); Louis Chase, 'Muaupoko Oral Evidence and Traditional History Report', August 2015 (doc A160)

43. Crown counsel (Cole and Chapple), memorandum, 5 June 2015 (paper 3.1.678)

44. Waitangi Tribunal, memorandum–directions, 17 June 2014 (paper 2.5.78)

45. Claimant counsel (Kapea), memorandum, 23 July 2014 (paper 3.1.599)

46. Waitangi Tribunal, memorandum–directions, 3 July 2015 (paper 2.5.107), p 3



July 2015<sup>47</sup> and, on 10 July 2015, confirmed that the claimants represented by the MTA wished to participate in the inquiry.<sup>48</sup> In total, nine reports were filed by the MTA.

### **(3) Crown evidence and other research**

On 3 July 2015, the Tribunal directed the Crown to file any evidence on which it intended to rely.<sup>49</sup> On 19 August 2015, Crown counsel advised that the Crown would not be filing any evidence for the Tribunal's hearings into Muaūpoko claims, but would file a number of relevant primary source materials.<sup>50</sup> The Crown's bundle of primary source materials was filed on 11 September 2015.<sup>51</sup>

### **(4) Interlocutory phase**

Under the standard inquiry approach the interlocutory phase of a Tribunal inquiry typically involves the particularisation and filing of final statements of claim, a casebook review to determine the sufficiency of the evidence to proceed to hearing, a claimant statement of issues, a Crown statement of position and concessions, and a Tribunal statement of issues. In this prioritised inquiry the Tribunal adopted a truncated interlocutory phase, the timetable for which was confirmed on 3 July 2015.<sup>52</sup>

First amended statements of claim were due on 12 August 2015.<sup>53</sup> Leave was granted to some claimants to file late.<sup>54</sup> The date for filing of second amended statements of claim was extended until 18 September 2015.<sup>55</sup> Crown counsel filed opening submissions and initial concessions on 1 October 2015.<sup>56</sup> The Crown's statement of position and further acknowledgements was filed on 23 October 2015.<sup>57</sup>

## **1.3 SCOPE OF THE ISSUES TO BE ADDRESSED**

When considering whether to accord priority to Muaūpoko, the Tribunal clarified that it would not be inquiring into Muaūpoko's generic or kaupapa claims, including mana wahine and Māori mental health, or other contemporary issues.<sup>58</sup> Such claims will be inquired into as part of the Tribunal's kaupapa inquiries.<sup>59</sup> The Tribunal added that it would not inquire into any of Muaūpoko's claims or claim

47. Claimant counsel (Bennion), memorandum, 8 July 2015 (paper 3.1.707)

48. Claimant counsel (Bennion), memorandum, 10 July 2015 (paper 3.1.710)

49. Waitangi Tribunal, memorandum–directions, 3 July 2015 (paper 2.5.107), p 5

50. Crown counsel (Cole and Chapple), memorandum, 19 August 2015 (paper 3.1.756)

51. Crown counsel (Cole and Tattersall), memorandum, 11 September 2015 (paper 3.1.767); Crown counsel, comps, indexed primary source material significant to Muaūpoko hearings, various dates (doc B3)

52. Waitangi Tribunal, memorandum–directions (paper 2.5.107), p 5

53. Waitangi Tribunal, memorandum–directions (paper 2.5.107), p 5

54. Waitangi Tribunal, memorandum–directions, 13 August 2015 (paper 2.5.113)

55. Waitangi Tribunal, memorandum–directions, 21 July 2015 (paper 2.5.112)

56. Crown counsel (Cole and Chapple), opening submissions and initial concessions, 1 October 2015 (paper 3.3.1)

57. Crown counsel (Cole and Chapple), statement of position, 23 October 2015 (paper 3.3.1(a))

58. Waitangi Tribunal, memorandum–directions, 1 August 2015 (paper 2.5.84), p 3

59. Waitangi Tribunal, memorandum–directions, 3 December 2010 (paper 2.5.18), p 13

1.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

issues covered by the CFRT-commissioned district-wide research reports on issues such as public works or local government unless they were covered in the Muaūpoko-specific research commissioned by the Tribunal. Those claims or claim issues will be heard later in the inquiry, once all research has been completed.<sup>60</sup> Claims concerning the Crown's Treaty settlement policies were also deemed to be outside the scope of this priority inquiry.<sup>61</sup>

In addition, to avoid prejudice to other iwi and claimant groups in our inquiry who have not yet been heard, we outlined prior to hearings that we would not be making findings on:

- a) Any historical acts or omissions of the Crown in respect of the relationships between Muaūpoko and Ngāti Raukawa, and between Muaūpoko and Te Ati Awa/ Ngāti Awa ki Kapiti; and
- b) Any historical acts or omissions of the Crown relating to the respective rights and interests of Muaūpoko, Ngāti Raukawa, and Te Ati Awa/ Ngāti Awa ki Kapiti.<sup>62</sup>

This approach will leave several important Muaūpoko claim issues for which findings cannot be made at present. Where appropriate, we will refer to some matters as context so that the full range of issues between Muaūpoko and the Crown will at least be foreshadowed in this report. For example, in chapter 3 we provide a brief discussion of Muaūpoko claims about the Crown's purchase of land outside Horowhenua, but without making any findings. To deal with such matters in a substantial way at this time or to make findings, without hearing the evidence of Ngāti Raukawa and other claimant groups (and any evidence the Crown chooses to present on their claims), would be unfair.<sup>63</sup>

This prioritised inquiry focused primarily on historical claims that were specific to Muaūpoko. Historical claims are defined as those relating to 'a policy or practice adopted or an act done or omitted by or on behalf of the Crown, before 21 September 1992.'<sup>64</sup> Where necessary, we have followed issues through to the present day (as, for example, in our discussion of outcomes for Lake Horowhenua in chapter 11). Claims specific to Muaūpoko include those about Crown acts or omissions relating to:

- ▶ rights and interests internal to Muaūpoko hapū;
- ▶ Muaūpoko and the Horowhenua lands;
- ▶ Muaūpoko and Lake Horowhenua; and
- ▶ any other historical acts or omissions of the Crown specific to Muaūpoko, for which there was evidence available to the Tribunal.<sup>65</sup>

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60. Waitangi Tribunal, memorandum–directions (paper 2.5.84), p 3

61. Waitangi Tribunal, memorandum–directions (paper 2.5.18), p 13

62. Waitangi Tribunal, memorandum–directions, 25 September 2015 (paper 2.5.121), p [1]

63. Waitangi Tribunal, memorandum–directions, 1 October 2015 (paper 2.5.124), p [3]

64. Treaty of Waitangi Act 1975, s 2

65. Waitangi Tribunal, memorandum–directions (paper 2.5.121), p 2

The issues addressed in this report are outlined further below when we describe the chapter contents (section 1.5).

#### 1.4 THE MUAŪPOKO PRIORITY HEARINGS

As stated above, all of the Muaūpoko claimants decided to participate in the prioritised inquiry. Broadly speaking, the claimants at our hearings consisted of two groups: those who supported the MTA and were represented by Bennion Law; and those who opposed the MTA's mandate. The latter group had a number of legal counsel from various law firms, representing particular claims. A few claimants represented themselves, and were provided with the opportunity to cross-examine witnesses and make submissions. We provide a full list of claims and claimant counsel in appendix I. The Crown was represented at the hearings by the Crown Law Office, and (for Lake Horowhenua issues) by counsel from the Department of Conservation. A list of counsel for the Crown is provided in appendix I.

The prioritised hearings took place over three weeks between October and December 2015. The first hearing was held at the Horowhenua Events Centre in Levin, 5–9 October 2015. Opening submissions followed the pōwhiri on day one. Philip Taueki, Vivienne Taueki, Robert Warrington, Peter Huria, Paul Huria, and Eugene Henare presented their briefs of evidence for Muaūpoko. Technical evidence was presented by Louis Chase and Dr Terry Hearn. Anne Hunt also presented several reports.<sup>66</sup>

The second hearing was held at the Horowhenua Events Centre in Levin, 23–27 November 2015. Te Hira Hill, Mathew Sword, Sian Montgomery-Neutze, Sandra Williams, Uruorangi Paki, Ana Montgomery-Neutze, Grant Huwyler, Robert Warrington, William Taueki, Charles Rudd, Fredrick Hill, Peter Huria, Tama Ruru, Henry Williams, Hingaparae Gardiner, Moana Kupa, Caroline (Kararaina) Kenrick, Mariana Williams, and Jillian Munro presented evidence for Muaūpoko. The technical witnesses in week two were Jane Luiten, Paul Hamer, and Bruce Stirling.<sup>67</sup>

The third hearing was held at the Waitangi Tribunal offices in Wellington, 14–16 December 2015. The three days consisted of presentations of technical research by Dr Garth Cant, David Armstrong, and Dr Grant Young.<sup>68</sup>

Claimant closing submissions were all received in writing by 19 February 2016. The majority of the Crown's closing submissions were received on 31 March 2016. Crown counsel, however, filed additional closing submissions on native townships (specifically the Hōkio Native Township), and the role of the district Māori land board on 29 April 2016.<sup>69</sup> A total of nine submissions in reply were received from Muaūpoko counsel and unrepresented claimants in April and May 2016.<sup>70</sup>

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66. See transcript 4.1.11.

67. See transcript 4.1.12.

68. See transcript 4.1.13.

69. Crown counsel (Cole), closing submissions, 29 April 2016 (paper 3.3.34)

70. See the select record of inquiry appended to this report.

### 1.5 THE STRUCTURE OF OUR REPORT

Our report is structured as follows:

- ▶ Chapter 2 describes Muaūpoko's evidence of their pre-1840 history and their relationships with the natural world, including the taonga Lake Horowhenua.
- ▶ Chapter 3 provides essential context for the Muaūpoko claims, dealing briefly with nineteenth-century Crown purchases outside the Horowhenua block.
- ▶ Chapter 4 begins the analysis of claims in respect of the Horowhenua lands. It addresses the question of whether the Native Land Court was imposed on Muaūpoko, and whether the form of title made available to Muaūpoko in 1873 by the Crown's native land laws was consistent with Treaty principles.
- ▶ Chapter 5 explores the consequences of the 1873 form of title, the Crown's pre-partition dealings in the Horowhenua block, the partition of Horowhenua into 14 blocks in 1886, and the completion of the pre-partition dealings – notably the Crown's purchase of the Levin township block.
- ▶ Chapter 6 assesses the consequences of the new form of title made available by the Crown in 1886, the nineteenth-century history of protest and litigation over the partitioned blocks, and the loss of almost two-thirds of the Horowhenua block by 1900.
- ▶ Chapter 7 focuses on twentieth-century land issues (including the alienation of land in Horowhenua 3, 6, and 11, the Hōkio Native Township, and the Crown's purchase of coastal land for a local farmer).
- ▶ Chapter 8 begins the discussion of historical claim issues in respect of Lake Horowhenua and the Hōkio Stream. It addresses the question of whether or not there was a Crown–Māori agreement in 1905 to provide free public access to the lake, the nature of any such agreement, the legislation which gave it effect, and the consequences between 1905 and 1934.
- ▶ Chapter 9 covers the controversial history of the ownership, management, and control of Lake Horowhenua and the Hōkio Stream from 1934 to 1989. Key issues include the 29-year negotiation of a settlement with Muaūpoko (from 1934 to 1953), the resultant legislation in 1956,<sup>71</sup> and the question of whether the 1956 Act provided either a full settlement of past grievances or an appropriate platform for future management of the lake.
- ▶ Chapter 10 addresses the environmental degradation of Lake Horowhenua and the Hōkio Stream from the 1950s to the 1980s, including the question of whether the Crown was complicit in the pollution of these tribal taonga.
- ▶ Chapter 11 considers the legacy of past administration of Lake Horowhenua and the Hōkio Stream, including post-1990 developments and the issue of cleaning up and restoring these taonga.
- ▶ Chapter 12 provides a summary of findings and our concluding comments.

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71. Reserves and Other Lands Disposal Act 1956, s 18

**1.6 THE TREATY OF WAITANGI AND ITS PRINCIPLES****1.6.1 The Waitangi Tribunal's jurisdiction**

As we discuss in chapter 2, Muaūpoko rangatira Taueki signed the Treaty of Waitangi in the Manawatū on 26 May 1840. Other Muaūpoko rangatira may also have signed on that date, but that is not clear (see section 2.5). The Treaty of Waitangi Act 1975 enables any Māori group or individual to file a claim that they have been prejudiced by acts or omissions of the Crown, which have breached the principles of the Treaty. The Tribunal's task is to determine whether such claims are well-founded, and, if so, the Tribunal may make recommendations to compensate for or remove the prejudice.<sup>72</sup> In exercising its functions, the Tribunal is to have regard to the two texts of the Treaty (Māori and English), and has 'exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them'.<sup>73</sup>

The Māori and English texts, as reproduced in schedule 1 of the Act, are as follows:

KO WIKITORIA, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

*Ko te Tuatahi*

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

*Ko te Tuarua*

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te

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72. Treaty of Waitangi Act 1975, s 6

73. Treaty of Waitangi Act 1975, s 5(2)

1.6.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

*Ko te Tuatoru*

Hei wakaritenga mai hoki tenei mo te wakaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) William Hobson,  
Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

The English text reads:

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

*Article the First*

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs



respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

*Article the Second*

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

*Article the Third*

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W HOBSON

Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc.]

As the Muriwhenua Land Tribunal found, the Treaty principles are broader than the terms of the Treaty, but the principles are to be understood as (at the very least) including the plain meaning of the Treaty's articles:

Although the Act refers to the principles of the Treaty for assessing State action, not the Treaty's terms, this does not mean that the terms can be negated or reduced. As Justice Somers held in the Court of Appeal, 'a breach of a Treaty provision . . . must be a breach of the principles of the Treaty'.<sup>74</sup>

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74. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 386

1.6.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The Waitangi Tribunal ‘evaluates claims in light of both the plain meaning of the terms of the Treaty and the overarching principles which arise from the Treaty relationship forged between the Crown and Maori in 1840.’<sup>75</sup> The Treaty principles have been explained in considerable detail in court judgments and Waitangi Tribunal reports over the past 30 years or so. We do not need to reinvent the wheel for the purposes of this expedited inquiry into Muaūpoko’s claims. Rather, we provide a brief description of the Treaty principles on which we rely in this report, drawing on previous definitions by the Tribunal in various reports.

**1.6.2 Treaty principles relied upon in this report**

**(1) Partnership**

The principle of partnership is a fundamental principle of the Treaty relationship established in 1840. In its recent report, *Whaia Te Mana Motuhake*, the Tribunal summarised the jurisprudence on partnership:

In its previous reports the Tribunal has provided extensive guidance on how the principle of partnership applies in a range of circumstances. At a fundamental level, the Treaty signifies a partnership between the Crown and the Māori people, and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other, and that in turn requires consultation. As is so often noted in this jurisdiction, it was a basic object of the Treaty that two peoples would live in one country and that their relationship should be founded on reasonableness, mutual cooperation, and trust. It is in the nature of the partnership forged by the Treaty that the Crown and Māori should seek arrangements which acknowledge the wider responsibility of the Crown while at the same time protecting Māori tino rangatiratanga.<sup>76</sup>

We also agree with the Central North Island Tribunal, which found:

In our view, the obligations of partnership included the duty to consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2. The Treaty partners were required to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlapped or affected each other.<sup>77</sup>

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75. Waitangi Tribunal, *Te Tau Ihu o Te Ika a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 2

76. Waitangi Tribunal, *Whaia Te Mana Motuhake, In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2014), p 28

77. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 173



**(2) Active protection**

The principle of active protection has often been referred to by the courts and the Waitangi Tribunal. We agree with the Te Tau Ihu Tribunal, which summarised active protection in this way:

The Crown's duty to protect Maori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity. The duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable', and the Crown's responsibilities are 'analogous to fiduciary duties'. Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.<sup>78</sup>

**(3) Options**

The principle of options arises from the fundamental basis of the Treaty bargain, in which Māori were to have free choices as to how their culture and society would evolve alongside, and benefit from, the colonisation facilitated by the Treaty. The Muriwhenua Fishing Tribunal defined the principle of options:

The Treaty envisaged the protection of tribal authority, culture and customs. It also conferred on individual Maori the same rights and privileges as British subjects.

Neither text prevents individual Maori from pursuing a direction of personal choice. The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced.<sup>79</sup>

An example given in the Muriwhenua Fishing Report is that Māori could continue to utilise their customary fishing rights by employing traditional methods or develop those rights by taking advantage of new technologies. But in either case their choices could not legitimately be constrained, and their rights were to be actively protected.<sup>80</sup>

**(4) Right of development**

Article 2 of the Treaty provided guarantees in respect of property, taonga, and tino rangatiratanga. This involved more than

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78. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 4

79. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 195

80. See Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, pp 194–195, 237–238.

1.6.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

acknowledging ownership or tenure. It means providing for Māori control because of the guarantee of rangatiratanga. The Tribunal has variously described rangatiratanga as the exercise by Māori of autonomy, authority, self-government, or self-regulation over their tribal domain, which includes lands, waters, and oceans, and, as an extension of that, it encapsulates their right to the development of their resources.<sup>81</sup>

The Central North Island Tribunal described various aspects of the Treaty development right, including the inherent right of property owners to develop their properties – which derives from both article 2 and article 3 of the Treaty. The Tribunal found that the right of development had ‘five key components’:

- ▶ the right as property owners for Maori to develop their properties in accordance with new technology and uses, and a right to equal access to opportunities to develop them;
- ▶ the right of Maori to develop resources in which they have a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised, or has no equivalent, in British law;
- ▶ the right of Maori to retain a sufficient land and resource base to develop in the post-1840 economy, and of their communities to decide how and when that base is to be developed;
- ▶ the opportunity for Maori to participate in the development of Crown-owned or Crown-controlled property or resources in their rohe, and to do so at all levels (including as entrepreneurs); and
- ▶ the right of Maori to develop as a people, in cultural, social, economic, and political senses.<sup>82</sup>

**(5) Equity**

The principle of equity required the Crown to act fairly as between Māori and settlers, and that the Crown would not unfairly prioritise the interests and welfare of settlers to the disadvantage of Māori.<sup>83</sup> This principle did not require that all laws or policies necessarily be ‘the same for settler and Maori, but rather that they be equal.’<sup>84</sup>

**(6) Redress**

The Mohaka ki Ahuriri Tribunal described the principle of redress as a ‘right to compensation’, although the requirements of redress depended on the circumstances and could be broader than simply compensation:

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81. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 64

82. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 890

83. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 5

84. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 384

Where the Crown has acted in breach of the principles of the Treaty and Maori have suffered prejudice as a result, we consider that the Crown has a clear duty to put matters to right. We refer to this principle – the principle of redress – later in the report when considering those instances where the Crown knew that it had acted improperly and should have taken appropriate steps at the time to provide proper compensation. One essential facet of the principle of redress is that, in seeking to make amends for its actions, the Crown is required at all times not to create further grievances.<sup>85</sup>

The Te Tau Ihu Tribunal noted the Privy Council’s view in respect of redress in the *Broadcasting Assets* case: ‘where the Crown’s own actions have contributed to the precarious state of a taonga, there is an even greater obligation for it (the Crown) to provide generous redress as circumstances permit.’<sup>86</sup>

### 1.6.3 The issue of sovereignty and the Te Raki Stage 1 Report

Two claimant closing submissions and one reply submission<sup>87</sup> referred to the recent findings of the Te Papanahi o Te Raki Tribunal about sovereignty in its stage 1 report, *He Whakaputanga me Te Tiriti: The Declaration and the Treaty*.<sup>88</sup> Counsel for Wai 52 and Wai 2139, for example, cited the following passage from the report: ‘The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.’<sup>89</sup> Claimant counsel submitted: ‘These conclusions are relevant here. It is clear that rangatira who signed the Treaty in this district also did not cede their mana or sovereignty.’<sup>90</sup> Crown counsel did not respond specifically to the submissions about the Te Raki Stage 1 report, but relied on past court decisions such as the *Whales* case which referred to Crown sovereignty.<sup>91</sup>

We discuss the circumstances in which Taueki signed the Treaty in section 2.5 of this report. As will become clear, very little is known about the signing which took place on 26 May 1840. In any case, all claimant counsel relied in their submissions on the Treaty principles which the Tribunal has articulated in earlier reports. Also, the circumstances in which the Treaty was signed by the tribal leaders in our inquiry district will not be fully known until other claimant groups have completed their research and been heard by the Tribunal. At that stage of our inquiry, it would be appropriate to hear from all parties (including the Crown) as to the applicability of the Te Raki Stage 1 findings in our inquiry district. We do not deal with that issue at this stage of our inquiry.

85. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 29

86. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 6

87. Claimant counsel (Bennion, Whiley, and Black), closing submissions, 12 February 2016 (paper 3.3.17), pp 35–37; claimant counsel (Watson), closing submissions, 15 February 2016 (paper 3.3.21), pp 9, 11; claimant counsel (Ertel and Zwaan), submissions by way of reply, 14 April 2016 (paper 3.3.25), p 10

88. Waitangi Tribunal, *He Whakaputanga me Te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Papanahi o Te Raki Inquiry*, 2 vols (Wellington: Legislation Direct, 2014)

89. Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, vol 2, p 529 (claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 35))

90. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 36

91. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), pp 33–34

1.6.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**1.6.4 Judging what is ‘reasonable in the circumstances’**

In closing submissions, Crown counsel submitted:

The Crown has a Treaty obligation to take reasonable steps to protect Māori interests. This means taking steps that are ‘reasonably practicable’ in all the circumstances of the time.

The assessment of conduct by the standards of the time is a basic tenet of historical inquiry. If the Tribunal assesses the past by the standards of the present, it risks anachronism and inaccuracy, and leaves its analysis open to criticism that may reduce the consensus needed to secure settlements.<sup>92</sup>

The Crown relied on the Central North Island Tribunal’s finding that ‘presentism ought to be avoided and the Crown’s “Treaty obligations have to be interpreted according to what was reasonable in the circumstances, as established by the Privy Council in the *Broadcasting Assets* case.”<sup>93</sup>

Crown counsel submitted that the Tribunal, when deciding whether acts or omissions of the Crown were in breach of Treaty principles, should have regard to the following questions:

- ▶ What options were reasonably open to the Crown at the time?
- ▶ What were the resources available to the state at the time? (This is closely related to the first matter).
- ▶ What was the legitimate role of the state in society at the time?
- ▶ What was the nature of the state infrastructure in the district under consideration at the time?
- ▶ What were the prevailing world views and philosophies of the critical decision-makers and their generation?
- ▶ To what extent were the medium and long-term consequences of decisions reasonably known to decision-makers of the day?
- ▶ What were the primary objectives of the Crown in carrying out a decision or adopting a policy now at issue?<sup>94</sup>

In the Crown’s view, the Tribunal must apply the Treaty principles in a practical manner, with due regard to the circumstances of the time, and the questions of what was practicable, foreseeable, and reasonable.<sup>95</sup>

The claimants considered that the Crown’s definition of what was ‘reasonable in the circumstances’ was an example of ‘circular reasoning[,] whereby it is assumed that the behaviour of the Crown necessarily reflects “*the standards of the time*” and

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92. Crown counsel, closing submissions (paper 3.3.24), p 11

93. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 178 (Crown counsel, closing submissions (paper 3.3.24), p 13)

94. Crown counsel, closing submissions (paper 3.3.24), pp 9–10

95. Crown counsel, closing submissions (paper 3.3.24), pp 6–15

is therefore unimpeachable.<sup>96</sup> Claimant counsel quoted the following passages from the Tribunal's report *He Maunga Rongo*:

We note, however, that what was 'reasonable in the circumstances' is not equivalent to an uncritical acceptance of the majority standards of the time. New Zealand was subject to a constant influx of newcomers in the nineteenth century. Governor Gordon, for example, did not doubt the 'honest conviction' of a majority 'mainly composed of settlers absolutely unacquainted with the history of the Colony which they have made their home'. He considered most of those who guided opinion, the country's legislators and press, 'not much better cognizant of past transactions than those whom they profess to instruct'. There was no shame, in such circumstances, in belonging to a 'minority' that included men such as Octavius Hadfield, Bishop Selwyn, Sir William Martin, William Swainson, James Edward FitzGerald, Edward Cardwell, and others.

The standards proposed by the Crown for 'reasonableness' . . . are a useful starting point. At their most extreme, they could be used to justify the Crown in only keeping the Treaty where it would not interfere with any of the Government's policies, or where the Crown decided by any criteria that it chose that doing so was affordable. *This would turn the Treaty guarantees on their head.* In particular, the Crown's point that the Treaty should not unduly restrict the ability of an elected government to carry out its policies must not be taken out of context and construed unreasonably. The Crown did not intend its arguments to be taken to this logical extreme, but the need for caution is clear. [Emphasis added by claimant counsel.]<sup>97</sup>

In the claimants' submission, the 'danger of presentism is more than matched by the danger of extreme and inappropriate caution in drawing conclusions as to the Crown's reasonable obligations to Māori in the context of te Tiriti'.<sup>98</sup> This was in part because, the claimants argued, the Treaty standards are also 'standards of the time'.<sup>99</sup>

Unrepresented claimant Philip Taueki submitted: 'It is not unreasonable to presume there was good reason at the time the Treaty was signed for the Crown to consider ways of protecting Maori property rights during the colonial era where settlers were arriving in this country with expectations of land to settle and farm'.<sup>100</sup> The Treaty, he argued, was a contract between two parties, and the Māori party to the Treaty expected the Crown to 'put in place measures to protect their ancestral lands etc from alienation should they not wish to sell'.<sup>101</sup> Claimant counsel emphasised that what Māori expected to derive from the Treaty partnership was one of

96. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply, 15 April 2016 (paper 3.3.29), pp 4-5

97. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 178 (claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 6-7))

98. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 7

99. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 5

100. Philip Taueki, submissions by way of reply, April 2016 (paper 3.3.31), para 208

101. Philip Taueki, submissions by way of reply (paper 3.3.31), paras 209-210

## 1.6.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

the ‘contemporary standards to be applied.’<sup>102</sup> In the claimants’ view, there were always Crown officials, such as Donald McLean and James Grindell (referred to in chapters 3 and 4), who were capable of understanding and explaining to their colleagues what Māori believed or wanted. The Crown could not excuse inaction on the grounds that it was ignorant of the ‘Māori world view and expectations.’<sup>103</sup>

The claimants also pointed to such early documents as the 1839 instructions of the Secretary of State for the Colonies, Lord Normanby, to the first Governor, and Justice Chapman’s decision in the 1847 case *R v Symonds*.<sup>104</sup> Such documents show that the Crown consciously made undertakings to Māori, ‘regardless of “the standards of the time” as conceived in popular consciousness – either then or now.’<sup>105</sup>

We agree with the claimants that the Treaty standards, and historical evidence as to what Māori leaders said to (and sought from) the Crown, are relevant ‘standards of the time.’ To say otherwise is to write Māori out of history. We also agree that the nineteenth-century standards of the settler majority are relevant but that they do not excuse the Crown from actions that were unfair or dishonourable. But we accept that (a) the choices which were known to be available to Ministers or officials, (b) the state of the Crown’s knowledge and finances at the time, and (c) the reasonably foreseeable consequences are all relevant factors for us to consider in evaluating Crown actions against the Treaty principles. We do so throughout this report, as the evidence allows. Where relevant, we also take into account the role considered appropriate for the State at the time, and other important matters of context. For example, the Waters Pollution Act 1953 sets out standards of the time and the role of the State in respect of pollution. It forms part of the context for the Minister of Lands’ statement to Muaūpoko in 1952 that sewage effluent would not enter Lake Horowhenua (see chapter 10).

We do not believe that a consideration of context prevents us from assessing whether Crown acts or omissions were consistent with Treaty principles. In coming to this conclusion, we are mindful that the protection of Māori interests was an acknowledged duty, which Ministers and Crown officials referred to often and publicly in the nineteenth and twentieth centuries.<sup>106</sup>

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102. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 5

103. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 5–6

104. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 5. For Lord Normanby’s instructions, see Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker and Friend Ltd, 1987), pp 193–206. For Justice Chapman’s decision, see *R v Symonds* (1847) NZPCC 387 (PC).

105. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 5

106. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 429. See also the whole of Waitangi Tribunal, *He Maunga Rongo*, vol 2, ch 8

PART I

**NGĀ TANGATA WHENUA: MUAŪPOKO**





CHAPTER 2

**MUAŪPOKO**

HE ORIORI MŌ TŪTEREMOANA

*Nau mai, e tama, kia mihi atu au;  
I haramai ra koe i te kunenga mai o te tangata  
I roto i te ahuru mowai, ka taka te pae o Huakipouri;  
Ko te whare hangahanga tena a Tanenuiarangi  
I te one i Kurawaka, i tataia ai te Puhiariki,*

*Te Hiringa matua, te Hiringa tipua, te Hiringa tawhitorangi;*

*Ka karapinepine te putoto ki roto te whare wahiawa  
Ka whakawhetu tama i a ia,  
Ka riro mai a Rua i te pukenga, a Rua i te horahora;  
Ka hokai tama i a ia, koia hokai Raurunui,  
Hokai Rauru whiwhia, hokai Rauru maruaitu,  
Ka maro tama i te ara namunamu ki te taiao;  
Ka kokiri tama i a ia ki te aoturoa,  
E tama, e i!*

*Haramai, e tama, whakaputa i a koe  
Ki runga te turanga matua;  
Marama te ata i Ururangi,  
Marama te ata i Taketakenui o rangi,  
Ka whakawhenua nga Hiringa i konei, e tama!  
Haramai, e mau to ringa ki te kete tuauri,  
Ki te kete tuatea, ki te kete aronui,  
I pikitia e Tanenuiarangi i te ara tauwhaiti,  
I te Pumotomoto o Tikitikiorangi,*

*I karangatia e Tanenuiarangi ki a Hurutearangi,  
i noho i a Tonganuikaea, nana ko Paraweranui;*

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*Ka noho i a Tawhirimatea, ka tukua mai tana whanau,  
Titiparauri, Titimatanginui, Titimatakaka;  
Ka tangi mai te hau mapu, ka tangi mai te rorohau,  
Ka eketia nga rangi ngahuru ma rua i konei,  
E tama, e i!*

*Haramai, e tama, i te ara ka takoto i a Tanematua;  
Kia whakangungua koe nga rakau matarua na Tumatauenga;  
Ko nga rakau tena i patua ai Tini o Whiro i te Paerangi;  
Ka heke i Tahekeroa, koia e kume nei ki te po tangotango,  
Ki te po whawha o Whakaruaumoko, e ngunguru ra i Rarohenga,  
Ka waiho nei hei hoariri mo Tini o Tanematua i te aoturoa.  
I konei, e tama, ka whakamau atu ki te Pitoururangi,  
Ki a Tumatakaka, ki a Tumatatawera,  
Ki a Tumatahuki, ki a Tumatarauwiri,  
Hei whakamau i te pona whakahoro kai na Hinetitama,  
Ka waiho hei tohu ki a Tanematua,  
Ka whakaoti te pu manawa a Tane i konei,  
E tama, e i!*

*Haramai, e tama, puritia i te aka matua,  
Kia whitirere ake ko te Kauwaerunga, ko te Kauwaeraro;  
Kia tawhia, kia tamaua, kia ita i roto a Ruaitepukenga,  
A Ruaitehorahora, a Ruaitewanawana,  
A Ruamatua taketake o Tane,  
Nau mai, e Tuteremoana! Kia areare o taringa ki te whakarongo;  
Ko nga taringa o Rongomaitahanui, o Rongomaitaharangi,  
O Tupai whakarongo wananga.  
Ka taketake i konei ki Tipuaki o rangi,  
Ka rere ki Poutu i te rangi,  
Ka whakaawhi i a Pukehauone;  
Ka haka Hinerauwharangi i konei i a ia,  
Kia taha mai Ahuahu, ahua te Pukenui, ahua te Pukewhakaki,  
Nau, e Rongomaraeroa! Koia te ngahuru tikotikoiere,  
Te Maruaroa o te matahi o te tau,  
Te putunga o te hinu,  
E tama, e i!*

*Whakarongo mai, e tama! Kotahi tonu te Hiringa  
I kake ai Tane ki Tikitikiorangi  
Ko te Hiringa i te mahara.  
Ka kitea i reira ko Iomatuatēkore anake, i a ia te Toiariki, te  
Toiurutapu,*

MUAŪPOKO

*Te Toiururangi, te Toioururoa;  
Ka whakaputa Tane i a ia ki te waitohi  
Na Puhaorangi, na Ohomairangi,  
Te wai whakaata na Hinekaurohia;  
Kaurohia nga Rangi tuhaha.  
Ka karangatia Tane ki te paepae tapu  
I a Rehua i te hiku mutu o rangi;  
Ka turuturu i konei te Tawhitorangi,  
Te Tawhito uenuku, te Tawhito atua;  
Ka rawe Tane i te Hiringa Matua,  
I te Hiringa taketake ki te ao marama;  
Ka waiho hei ara mo te tini e whakarauika nei,  
E tama, e i!*

*Haramai, e tama! Whakapau to mahara;  
Ko nga mahara o Tanematua,  
I tokona ai nga rangi ngahuru ma rua kia tuhaha,  
Kia tangi te piere, kia tangi te wanawana,  
Kia tangi te ihiihi i konei e tama!  
Ka toro te akaaka rangi, ka toro te akaaka whenua,  
Ka tupea ki te Wehenukurangi, ki te Wehenukuatea;  
Ka takoto te urunga tapu mowai  
Ka whakahoro ki roto i te whare Pukakanui,  
Ki a Rongomaitaha, ki a Rongomaituwaho,  
Ki a Rongomaiwhakateka,  
Ka hoaia e Tanematua ki te Ihotaketake  
Na Tuhaepawa, na lomatuategore;  
Koia a Poutakeke, koia a Poutakiki;  
Ka kapua te toiora i konei ki te wheuriuri o Hinetitama,  
E tama e i!*

*Haramai, e tama! E piki ki runga o Hikurangi, o Aorangi;  
He ingoa ia no Hikurangi mai i Tawhiti, na o kau i tapa.  
E huri to aroaro ki Paraweranui, ki Tahumakakanui;  
Ko te ara tena i whakaterea mai ai o tipuna  
E te kauika tangaroa, te urunga tapu o Paikea,  
Ka takoto i konei te ara moana ki Haruatai  
Ka tupea ki muri ko Taiwhakahuka,  
Ka takoto te ara o Kahukura ki uta,  
Ka tupatia ki a Hinemakohurangi.  
Ka patua i konei te iHINGA moana, te wharenga moana;  
Ka takiritia te takapau whakahaere,  
Ka takoto i runga i a Hinekorito,*

*I a Hinekotea, i a Hinemakehu.  
Ka whakapau te ngakau i konei ki te tuawhenua;  
Ka rawe i te ingoa ko Aotearoa,  
Ka tangi te mapu waiora i konei,  
E tama, e i!*

*Haramai, e tama! E huri to aroaro ki te Uranga mai o te ra,  
Ki Turanganui a Rua, ki Whangara;  
Ehara i konei, he ingoa whakahua no Hawaikinui a Ruamatua,  
Ka waiho nei hei papa mo te kakano korau a Iranui,  
Hei papa mo te kumara i maua mai e Tiungarangi, e  
Harongaarangi;  
Ka waiho nei hei mana mo Mahu ki marae atea.  
Tenei, e tama, te whakarongo ake nei  
Ki te hau mai o te korero,  
No Tuwahiawa te manu whakataua,  
I maua mai i runga i a Tokomaru.  
Parea ake ki muri i a koe, he atua korero ahiahi!  
Kotahi tonu, e tama, te tiaki whenua,  
Ko te Kuranui, te manu a Ruakapanga,  
I tahuna e to tipuna, e Tamatea  
Ki te ahi tawhito, ki te ahi tipua  
Ki te ahi na Mahuika.  
Na Maui i whakaputa ki te ao,  
Ka mate i Wharehuhi o Reporoa, ka rere te momo,  
E tama, e i!*

## 2.1 INTRODUCTION

In this chapter, we provide an overview of Muaūpoko's story as told by them, their history as a people within their traditional rohe, up to the signing of the Treaty of Waitangi. From the oral histories and perspectives of today's Muaūpoko claimants, the recorded kōrero of their nineteenth-century tipuna, and the commentary of commissioned technical researchers, we set out some of the relevant Muaūpoko narratives of their ancient history and the more recent 'musket wars' of the

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1. 'He oriori mō Tūteremoana is one of the most famous waiata of this motu and is well known by many iwi stretching from the east coast right down to Te Whanganui-ā-Tara. This oriori was composed by one of the most renowned tohunga of Kurahaupō, Tūhoto Ariki. Tūhoto Ariki was Tūteremoana's uncle, the Ngai Tara rangatira for whom this oriori was composed. This waiata contains teachings of the ancient whare wānanga, creation traditions regarding the universe and the atua and references many of our most famous ancestors. Following the settlement of Te Upoko o te Ika by Tara-ika and Rangitāne, Whātonga returned to the east coast to live and care for his grandchildren, Tūhoto Ariki being one of them. Tūteremoana is one of Ngai Tara's most legendary ancestors, which is why the highest point on Te Waewae Kapiti a Tara raua ko Rangitane was named for him': Sian Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko', no date (doc A15(a)), pp [9]–[12]

nineteenth century. Our intention is to provide a platform for understanding the Muaūpoko identity from their own perspective and to highlight their relationships with the land, resources, and peoples of the region.

In the 2013–14 urgency process (see section 1.2.2), one of the most controversial issues was the Muaūpoko Tribal Authority's 'claimant definition'; that is, its definition of the tipuna, hapū, and membership of Muaūpoko for Treaty settlement purposes.<sup>2</sup> In the 2014 urgency decision, the Wai 2421 Tribunal observed that further independent research was required,<sup>3</sup> and in this chapter we present some of the results of that research. Throughout the prioritised hearings process, we observed that there is much that Muaūpoko claimants have in common – including descent lines, shared geographies, and histories. Here we provide readers with an introduction to:

- ▶ Muaūpoko traditions of their origins, arrival, whakapapa, and kinship ties;
- ▶ geography and interactions of Muaūpoko with their environment over time; and
- ▶ key tribal events in Muaūpoko's history from 1819 to 1840.

In this chapter we lay out the various traditions that make up a Muaūpoko narrative, as presented to us, to use as a platform to inform later chapters. These traditional histories lay down the context for understanding the Treaty claims put before us, as many of these claims relate to the Crown's alleged failure, through acts or omissions, to protect Muaūpoko's traditional lands and waters.

It is important here to note that we have not yet heard all of the evidence in the inquiry district. In particular, we have not yet heard all of the evidence and submissions of Te Ātiawa/Ngāti Awa or Ngāti Raukawa and affiliated iwi, apart from the kōrero presented at Nga Kōrero Tuku Iho hearings. These groups may have a different view of some of the matters discussed. Thus, we provide this account of Muaūpoko's story with the awareness that further evidence from other parties in the inquiry district is yet to come. In doing so, we do not wish to pre-empt that evidence or attempt to provide an overview of all tribal narratives, but rather to explain how Muaūpoko see their history from the various sources available to us. This includes Muaūpoko evidence as presented to nineteenth-century courts and commissions, collected by technical witnesses, in addition to the oral evidence handed down to the Muaūpoko speakers who addressed us at hearings. As noted above, we were also assisted by the commentary of technical witnesses.

This range of evidence included:

- ▶ transcripts and briefs from the Nga Kōrero Tuku Iho oral history hearings;
- ▶ transcripts and briefs from the Muaūpoko priority hearings;
- ▶ Native Land Court minute books;

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2. Waitangi Tribunal, decision on application for urgency, 10 June 2014 (paper 2.8.1), pp 25–28

3. Waitangi Tribunal, decision on application for urgency (paper 2.8.1), p 28

2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

- ▶ the minutes of commission and court inquiries in the 1890s (the ‘G2s’);<sup>4</sup>
- ▶ early twentieth-century accounts based to a significant degree on Muaūpoko (as well as other Māori) informants (Rod McDonald’s *Te Hekenga* and Leslie Adkin’s *Horowhenua*);
- ▶ reports of commissioned researchers for the inquiry (especially Jane Luiten, Bruce Stirling, and Louis Chase); and
- ▶ published secondary sources (particularly Angela Ballara’s *Taua*).

We observed both areas of agreement and areas of contention in the traditional evidence and oral histories presented to us by the Muaūpoko claimants. We make no findings on matters where the claimants disagreed. That is not our role or jurisdiction.

In their reports, historians Jane Luiten and Bruce Stirling prioritised the testimony provided by Muaūpoko witnesses before the Native Land Court, Native Appellate Court, and Horowhenua commission hearings during the latter part of the nineteenth century. These forums provided Muaūpoko an opportunity to articulate their history and have it recorded. Our approach has been to treat these sources with some care, given the context within which evidence was given in these forums (in which people had to contest each others’ rights to obtain ownership).

**2.2 WHO ARE MUAŪPOKO?**

Muaūpoko say that they once exercised their tino rangatiratanga over an extensive rohe. In his evidence, claimant Philip Taueki told us that before Ngāti Toa’s campaign against them, ‘Muaūpoko was reputed to be one of the most powerful tribes in the region . . . they were strong, well trained and disciplined. . . . Muaūpoko was not a tribe to be trifled with.’<sup>5</sup> Claimant Eugene Henare also spoke with pride of Muaūpoko: ‘They were chiefs, who could care for and provide for our people. We were a proud and healthy people. We were sustained by our natural resources. Karakia and our tapu rituals were very important to us. Our language and our culture was our identity.’<sup>6</sup>

These evocative examples are just two of many which express the pride Muaūpoko feel for their tīpuna and their iwi as a whole. But what makes Muaūpoko who they are? This section will explore Muaūpoko identity, as told to us by Muaūpoko: their names, origin stories, whakapapa, tīpuna, hapū, and connections with neighbouring iwi.

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4. The most important of these are: AJHR, 1896, G-2 (the minutes and report of the Horowhenua commission); AJHR, 1897, G-2 (the minutes of the Native Appellate Court’s inquiry under the Horowhenua Block Act 1896); and AJHR, 1898 G-2A (a continuation of the Native Appellate Court’s inquiry). The Crown has provided copies of AJHR, 1896, G-2, and AJHR, 1897, G-2, in Crown counsel, comp, bundle of documents, September 2015 (doc B3).

5. Transcript 4.1.6, p 73

6. Eugene Henare, brief of evidence, 25 September 2015 (doc B6), p 2

### 2.2.1 The name 'Muaūpoko'

There was no single account presented to us by claimants as to the origin of the name 'Muaūpoko'. Many claimants translated Muaūpoko as 'the head of the fish'<sup>7</sup>, or 'the people of the head of the fish'<sup>8</sup> – the fish being Te Ika a Māui, and their name, as claimant Vivienne Taueki put it, providing 'a direct whakapapa to the fish'.<sup>9</sup> As Marokopa Matakatea put it, 'You've got Upoko o Te Ika [head of the fish]', a reference to the Wellington region. Mr Matakatea added 'but you've got to have mua [the front]'.<sup>10</sup> William (Bill) Taueki views the name 'Muaūpoko' as a reference to brains, or, more specifically, knowledge.<sup>11</sup>

Other claimants cited W K Te Aweawe's evidence given in the Native Land Court, suggesting 'Mau-upoko' or 'head carriers' is the original name of the iwi.<sup>12</sup> Kevin (Te Hira) Hill was of the view that the name Muaūpoko was derived from the battle of Ngāti Ira and Ngāi Tara with the descendants of Tūpatanui, when a Ngāi Tara ancestor's head was decapitated.<sup>13</sup>

Yet others claim that the original name was instead 'Muatetangata' or 'Mua-o-te-tangata'. This name refers to the people who were living in the area 'since time immemorial' and, according to some claimants, the present-day Muaūpoko are a mixture of the Muatetangata people and later arrivals.<sup>14</sup>

Pronunciation of the name 'Muaūpoko' is also debated and, as a result, renderings of the name include: Mu-au-poko;<sup>15</sup> Mau-poko;<sup>16</sup> Ma-u-poko;<sup>17</sup> Ma-au-poko;<sup>18</sup> Mo-poko;<sup>19</sup> and Mu-a-ūpoko.<sup>20</sup>

Of these six renderings of the pronunciation, Charles Rudd told us that it was the first two that he was raised with.<sup>21</sup> In his answers to post-hearing questions, Louis Chase (Waitangi Tribunal-commissioned technical witness) stated that from what he had been able to ascertain, Muaūpoko is the proper name, but the variations stem from mispronunciation over time.<sup>22</sup> In our report, we use the most common version of the tribal name, Muaūpoko.

### 2.2.2 Whakapapa, origins, and arrival

Who are Muaūpoko? Where did they come from? What is the Muaūpoko account of their origins and arrival in their rohe? How do Muaūpoko define themselves

7. Transcript 4.1.6, p 38

8. Transcript 4.1.6, pp 24–25

9. Transcript 4.1.6, p 64

10. Transcript 4.1.6, p 105

11. William James Taueki, brief of evidence, 11 November 2015 (doc C10), p 4

12. Louis Chase, 'Muaupoko Oral Evidence and Traditional History Report', August 2015 (doc A160), p 4

13. Transcript 4.1.6, p 93

14. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 3

15. Transcript 4.1.6, p 38 (Henry Williams); transcript 4.1.6, p 58 (Charles Rudd)

16. Transcript 4.1.6, p 58

17. Transcript 4.1.6, pp 19–20

18. Transcript 4.1.6, p 58

19. Transcript 4.1.6, p 58

20. Transcript 4.1.6, p 58

21. Transcript 4.1.6, p 58

22. Louis Chase, answers to post-hearing questions, 29 October 2015 (doc A160(e)), p 1



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according to tikanga? Which hapū are discussed in the evidence and sources? Which ancestral names are found on the landscape? These are some of the issues that claimants addressed at the Nga Kōrero Tuku Iho hearings, held at Kawiu Marae, Levin, in February 2014. This informed our understanding of Muaūpoko as a people before 1840, and in so doing, established a platform for understanding Muaūpoko's grievances against the Crown under the Treaty of Waitangi.

In this section, we discuss Muaūpoko's traditions, oral history, whakapapa, and origins. We will outline some of the key aspects of Muaūpoko's whakapapa by weaving it into the narrative we were told by Muaūpoko of their own stories of origin and arrival.

We heard evidence of a continuing interaction of older and newer traditions of Muaūpoko's origin and arrival. One tradition tells of a people, referred to as Muatetangata, who lived on, and originated from, the land itself; the other one speaks of the migrations of named waka (canoes) from Hawaiki: specifically that of Kupe on the *Matahourua*, and later Whātonga on the *Kurahaupō*.

**(1) *Mua-o-te-tangata***

According to some claimants' traditions, Muaūpoko are descended from tangata whenua who lived on the land prior to waka arrivals from the Pacific. These people were referred to as *Mua-o-te-tangata* or *Muatetangata*. Ada Tatana, Fredrick (Fred) Hill, and Ngā Haerenga o te Māngai (Noa) Nicholson all gave evidence of a people who were present in the wider rohe of Muaūpoko prior to the arrival of the waka. Ada Tatana stated that the Muaūpoko people today are a mixture of the *Muatetangata* people and later arrivals.<sup>23</sup> Noa Nicholson said the name for these people was 'Toiroa', while Henry Williams and Deanna Paki suggested these were the Waitaha people.<sup>24</sup> Such evidence is supported by GL Adkin's theory of Waitaha occupation, followed by Ngāti Māmoe and later by Māori who arrived on waka from the Pacific Ocean.<sup>25</sup>

In her brief of evidence, Ada Tatana explained more about these first people:

Muatetangata occupied this country before the migration of the seven canoes. Known today as Muaupoko, they occupied the territory from Turakina to Turakirae. The islands on Lake Horowhenua are said to be man-made. These islands were made by the *Muatetangata* people, not *Muaupoko*.<sup>26</sup>

Mrs Tatana's kōrero on the practices of the *Muatetangata* people, whose existence was based on karakia and wairua, was included in the technical report on oral and traditional evidence:

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23. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 3

24. Transcript 4.1.6, pp 38, 136

25. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 9

26. Fredrick Hill, closing submissions, 12 February 2016 (paper 3.3.14), p15. Mrs Tatana's paper was reproduced in the closing submissions of Fred Hill.



They were a spiritual people whose whole existence was based on karakia and wairua. Sometime later a group of unknown origin arrived and observed how these spiritual folk interacted with their surroundings. They called them Mua-te-tangata. The two parties displayed no aggressive tendencies towards each other and eventually there were intermarriages and, according to Ada Tatana, the Mua-te-tangata adopted the spiritual practices brought by the newcomers, to the point, she says, that the original Mua-te-tangata spirituality and traditions were diluted. According to Ada Tatana, the Muaupoko people today are a mixture of the Mua-te-tangata and the later arrivals.<sup>27</sup>

Mrs Tatana provided the following evidence to the Tribunal about some of the specific practices of the Muatetangata people:

Children were given names of certain birds, pools of water that [were] sweet and pools of water that had a bitter taste. They told stories of their homeland they left and the loved ones that were left behind. They continued the practices passed on to them by the ancient ones and their special rituals and prayers to the Sun, the one who guided them here. Sadly to say, as their numbers grew, and others came with their protocol and influence, their special reverence to their special beliefs began to fade.<sup>28</sup>

Noa Nicholson described the first people in this way, as told to her by her kuia:

He iwi anō e noho ana i konei i roto i te maunga. Engari i kite au i tētahi ingoa i roto i Tararua, ko Toiroa. Toiroa. He ingoa kotahi, engari kāore ngā Pākehā i te mōhio i puta mai tērā ingoa i a wai. Engari taku mōhio koirā te iwi i morimori i ngā moa birds. Kua wareware au te ingoa o te moa bird. Koretake. Ko rātou te iwi i morimori i ērā manu, i mua o te wā o te whawhai, o te Māori ki te Māori, mai i ērā takiwā huri noa. Kei te noho tonu tērā ingoa i roto i Tararua. Koinei ngā kōrero o taku kuia i a au e tupu ake ana, te iwi nāna tērā i morimori ngā moa bird i mua atu i a rātou i heke mai i runga i ō rātou waka, Kurahaupō. I konei rātou e noho ana i Tararua. Ka haere mai me ō rātou manu ki tēnei takiwā ā ka hoki atu anō, whakangaro i a rātou, ka hoki mai anō, ka haere.<sup>29</sup>

There were people before here, they were living in the mountains here, but I saw another name within Tararua for these people, Toiroa is that name. It was a single name, but the Pākehā experts had no idea where that name came from. But I understand these are the people who cared for the moa . . . They were the people who cared for the moa birds in those peaceful times before the beginning of the wars between Māori tribes, from other areas, from all over. That name remains within Tararua. These are the things my kuia told me while I was growing up, stories about this race of people who cared for the moa bird before the Māori people came here on their canoe, Kurahaupō. They lived here in the Tararua mountains. Sometimes they would come

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27. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p3

28. Fredrick Hill, closing submissions (paper 3.3.14), p16

29. Transcript 4.1.6, p149

2.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

out of the mountains down here, with their pet birds, and then disappear again, come back again and then disappear once more.<sup>30</sup>

For Philip Taueki, Muaūpoko have been in the rohe of Horowhenua, and, in particular, at Lake Horowhenua, since time immemorial:

Muaūpoko were here since . . . time began. There was no other world for us outside of the Horowhenua. There was no overseas, there was no other world apart from that world. . . . they were sovereign in their own territory, on their own whenua and had lived like that for centuries. They had their own culture, their own tikanga, their own values.<sup>31</sup>

Vivienne Taueki stated in her evidence that ‘Muaūpoko’s occupation here is recognised as being since time immemorial.’<sup>32</sup> In her view, ‘Muaūpoko are not a waka tribe . . . waka [people] married [in]to the tribe along the way’.<sup>33</sup>

**(2) Migrations from Hawaiki**

For many of the claimants, Muaūpoko’s story of origin and arrival began with Kupe’s migration from Hawaiki on the *Matahourua* waka and, more recently, Whātonga’s migration on the *Kurahaupō* waka.

Muaūpoko who spoke of a tradition of arrival on named waka from Hawaiki stated that they descend from Kupe, Toi-te-huatahi (Toi the explorer), and Whātonga (captain of the *Kurahaupō* waka).<sup>34</sup> Another important ancestor was Taraika, Whātonga’s son and the eponymous ancestor of Ngāi Tara. Because of this shared whakapapa, many Muaūpoko claimants consider themselves to be Ngāi Tara. Taraika’s half brother was Tautoki, the father of Rangitāne, who is the eponymous ancestor of Rangitāne.

Tradition has it that Kupe first arrived in Aotearoa in pursuit of Te Wheke a Muturangi, a giant octopus, whom he killed in Te Moana o Raukawakawa (Cook Strait). Kupe travelled on, naming places in Aotearoa along the way. The two islands in Te Whanganui-a-Tara (Wellington Harbour) were named for Kupe’s daughters or nieces, Matiu and Mākarō.<sup>35</sup>

The *Kurahaupō* waka (circa 1150 to 1300), captained by Whātonga, arrived on the west coast at Tongapōrutu. Whātonga found his grandfather Toi-te-huatahi at Whakatāne, and then travelled on to Heretaunga where he settled. Whātonga sent his sons Taraika and Tautoki to Te Ūpoko o te Ika to live. As noted above, these two sons were ancestors of Ngāi Tara and Rangitāne respectively.<sup>36</sup> Some of

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30. Transcript 4.1.6, pp 154–155

31. Transcript 4.1.11, p 170

32. Transcript 4.1.6, pp 65–66

33. Transcript 4.1.6, p 64

34. Transcript 4.1.6, pp 22, 55–56, 94, 105, 109, 112

35. Transcript 4.1.6, pp 108, 111–113

36. Montgomery-Neutze, ‘He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko’ (doc A15(a)), pp [4], [33]

Muaūpoko's whakapapa from Toi-te-huatahi and Kupe is set out on the next page. This is a construction of what we understand to be some of the lines of descent within Muaūpoko, based on the evidence of various witnesses who presented evidence during the course of our hearings. This chart has helped inform our discussion of the Muaūpoko hapū and whānau relevant to the issues before us.

Some claimants who traced Muaūpoko's origin to a tradition of migrations from Hawaiki gave a broad, open definition of the tribe that extends beyond Horowhenua to include parts of the Manawatū and Wairarapa, overlapping with, and including members of, neighbouring groups such as Rangitāne and Ngāti Apa.<sup>37</sup>

### 2.2.3 Hapū and marae

#### (1) Ngā hapū o Muaūpoko

The Muaūpoko Tribal Authority (MTA) acknowledged seven current Muaūpoko hapū, seven historical hapū, and three tīpuna in their mandate strategy. The definition used for the purpose of the mandate being sought by the MTA was as follows:

Muaūpoko is defined as the descendents of Tara, Tuteremoana and Tupatanui who also affiliate to one of the following hapū: Ngāi Te Ao, Ngārue, Ngāti Hine, Ngāti Pārini [*sic*], Ngāti Tamarangi, Ngāti Whanokirangi, and Punahau.

This mandate also covers the following historical hapū as they relate to Muaūpoko: Ngāti Tairatu, Ngāti Kuratuauru, Ngāti Rongopatahi, Ngāti Te Riunga, Ngāti Puri, Ngāti Akahu and Ngāti Rangi.<sup>38</sup>

One source of information for the MTA's definition of the historical hapū of Muaūpoko is Kāwana Hunia's 1852 letter to the Crown's native land purchase commissioner, Donald McLean.<sup>39</sup> This letter listed 269 Muaūpoko names organised into 18 hapū. The hapū were 'Ngati Hine, Ngati a Kahu, Ngati Waiorehua, Ngati Puri, Ngati Tairatu, Ngati Pariri, Atirangi, Ngati Whano, Ngati Kuratuauru, Ngati Pa, Hamua, Ngati Kaitangata, Ngati Manuhiri, Ngati Tumatakokiri, Ngati Korongaawhenua, Nga Potiki, Ngati Puta and Ngati Tamure'.<sup>40</sup> Jane Luiten suggested 'Atirangi' may be Ngāti Rangi.<sup>41</sup> It is important to note that the purpose of the 1852 letter was to seek payment for a Crown purchase of land in the northern South Island, and so the definition of Muaūpoko hapū and members was put as widely as possible. Bruce Stirling argued that the names listed on the letter appear to include names of people who are not principally associated with Muaūpoko, but

37. See, for example, transcript 4.1.6, pp 22, 24, 55–57.

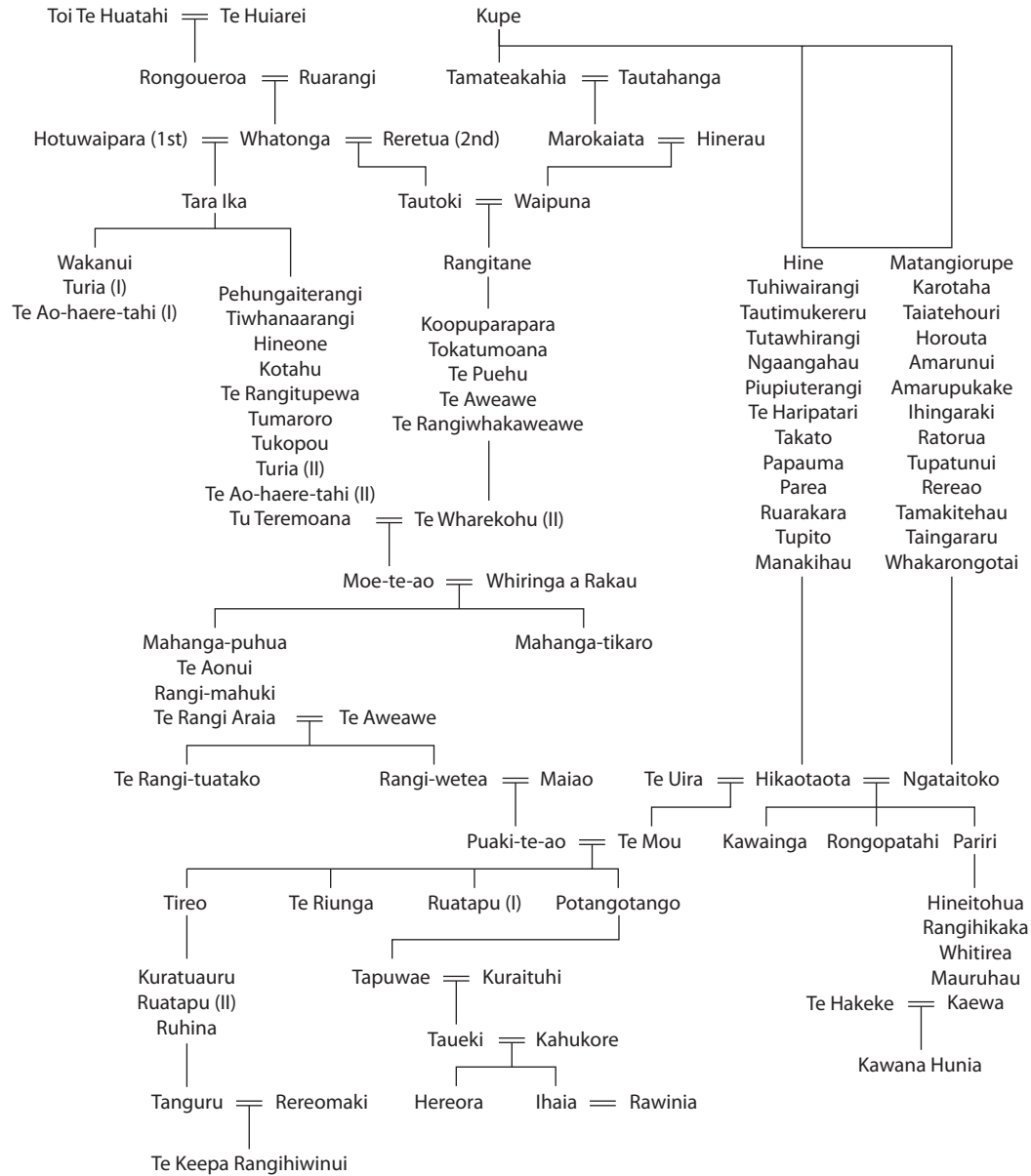
38. Waitangi Tribunal, decision on urgency, 10 June 2014 (paper 2.8.1), p 26

39. Kawana Hunia to Donald McLean, 'Proposal from Muaupoko to McLean', 24 May 1852, ms-Papers-0032-0676C, ATL [<http://www.natlib.govt.nz/records/22833759>]; Jane Luiten with Kesaia Walker, 'Muaupoko Land Alienation and Political Engagement Report', August 2015 (doc A163), p 51; Bruce Stirling, 'Muaupoko Customary Interests', September 2015 (doc A182), pp 123–124. For the full list of names, see Edward Karaitiana, comp, papers in support of brief of evidence, appendix C (doc C20(a)), pp 4–9.

40. Luiten, 'Political Engagement' (doc A163), p 51; Stirling, 'Muaupoko Customary Interests' (doc A182), p 123

41. Luiten, 'Political Engagement' (doc A163), p 51

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Sources: Trevor Hill, whakapapa notes, no date (doc A13), p[1]; Grant Huwyler, brief of evidence, 11 November 2015 (doc C14), p 13; Williant Taueki, brief of evidence, 11 November 2015 (doc C10), pp 3–4; Louis Chase, 'Muaupoko Oral Evidence and Traditional History Report', August 2015 (doc A160), p 12

are usually seen as part of a wider kin group.<sup>42</sup> The name of Rangitāne rangatira Peeti Te Aweawe, for example, was included.<sup>43</sup>

There are varying thoughts and opinions among the claimants as to the hapū of Muaūpoko. Some, including Mr Karaitiana of Ngāti Tūmatakōkiri, argued that the MTA's definition of Muaūpoko hapū is too narrow, while others argued

42. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 123–124

43. Stirling, 'Muaupoko Customary Interests' (doc A182), p 124

that the definition is too broad.<sup>44</sup> Vivienne Taueki stated in her Nga Kōrero Tuku Iho evidence that she had never heard of ‘Ngāti Tairatu, Ngāti Kuratuauru, Ngāti Rongopatahi, Ngāti Te Riunga, Ngāti Puri, Ngāti Akahu and Ngāti Rangi’ as being hapū of Muaūpoko.<sup>45</sup>

As noted previously, it is not for us to determine who is or is not Muaūpoko. That is a matter for those who identify as Muaūpoko to decide amongst themselves. In the following paragraphs, we outline some of the information we were given about the hapū of Muaūpoko.

- ▶ Ngāi Te Ao: said to be Puakiteao’s hapū, we were told that Ngāi Te Ao – from the Rangiarai line – stayed in the Horowhenua, while those of the Aoroa line left for Te Whanganui-a-Tara/the Wellington region. Ngāi Te Ao’s main Wellington settlements were at Whetū-kairangi, Te Aketarewa, and Uruhau, where they remained until around 1850.<sup>46</sup> Stirling’s research noted evidence that Ngāi Te Ao descended from Te Aonui (instead of Puakiteao), and were both a Wairarapa and a Horowhenua hapū.<sup>47</sup>
- ▶ Punahau: according to Muaūpoko rangatira Hoani Puihi, in evidence to the Native Appellate Court in 1897, Punahau was a large hapū which occupied the wider district.<sup>48</sup> Te Mou’s father, Te Uira, was said to be from this hapū.<sup>49</sup>
- ▶ Ngarue: both Vera Sciascia and Noa Nicholson spoke about Ngarue as a hapū of Muaūpoko.<sup>50</sup> Vera Sciascia told us that many of the eponymous ancestors of Muaūpoko hapū were women, including Pāriri, Whanokirangi, and Ngarue.<sup>51</sup> Jane Luiten recorded, from the 1897 evidence of Hoani Puihi, that Te Uira’s sister Haupō married Te Ngarue. Haupō was therefore said to have been married into the tangata whenua.<sup>52</sup>
- ▶ Ngāti Whanokirangi: we were told that the Ngāti Whanokirangi line came from the descendants of Pōtangotango and his first wife, Pirihongi, whose child was Whanokirangi, a tipuna wahine of Muaūpoko.<sup>53</sup> Tanguru, the father of Te Keepa Rangihiwini (who was a key player in Muaūpoko’s nineteenth century land dealings) was said to be closely affiliated with Ngāti Whanokirangi.<sup>54</sup>
- ▶ Ngāti Tamarangi: Pōtangotango and his second wife, Tokai, were said to have had six children, one of whom was Tapuwae (or Tapuae).<sup>55</sup> The Ngāti

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44. Waitangi Tribunal, decision on application for urgency (paper 2.8.1), p 27

45. Transcript 4.1.6, p 66

46. Wai 52 RO1, amended statement of claim, 18 December 1997 (claim 1.1(d)), pp 3–4; Vivienne Taueki, brief of evidence, 29 August 2015 (doc B2), p 7

47. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 103

48. Luiten, ‘Political Engagement’ (doc A163), pp 12–13

49. Luiten, ‘Political Engagement’ (doc A163), p 12

50. Transcript 4.1.6, pp 124–125, 144–145

51. Transcript 4.1.6, p 125

52. Luiten, ‘Political Engagement’ (doc A163), p 13

53. Transcript 4.1.6, pp 21, 133; Bryan Gilling, ‘Ihaia Taueki and Muaupoko Lands: Interim Report’, March 1994 (doc A172), p 55

54. Fredrick Hill, brief of evidence, 16 November 2015 (doc C21), p 1

55. Gilling, ‘Ihaia Taueki and Muaupoko Lands’ (doc A172), pp 5, 20

## 2.2.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Tamarangi (or Tama-i-rangi) line comes off Tapuwae's line.<sup>56</sup> Taueki, who signed the Treaty of Waitangi in 1840, was a tipuna of Ngāti Tamarangi.<sup>57</sup>

- ▶ Ngāti Hine: Maria Lomax (claimant for Wai 1490) told us that the land where Kawiu Marae now stands was gifted by her grandmother, Kahukore Tukapua Broughton, for 'her hapū Ngāti Hine and her people Muaūpoko'.<sup>58</sup> In court evidence in 1897, Ria Raikokiritia said that Ngāti Hine descended from Pōtangotango.<sup>59</sup>
- ▶ Ngāti Pāriri: the descendants of Pāriri, a tipuna wahine, were said to be Ngāti Pāriri. Pāriri was one of three daughters of Ngātaitoko and Te Hikaotaota (Te Rongopātahi and Kawainga were the other two daughters), all of whom chose husbands from Hāmua.<sup>60</sup> At the very least, the descendants of Pāriri are tied into Muaūpoko by intermarriage with the descendants of Puakiteao and Te Mou. The position of Ngāti Pāriri within Muaūpoko was challenged in the Native Land Court in 1897 and continues to be contested by some today. Luiten, however, noted the evidence of Makere Te Rou, Rawinia Ihaia, and Kerehi Mitiwaha, who held that Pāriri and Te Rongopātahi were Muaūpoko tipuna in their own right.<sup>61</sup> Ngāti Pāriri maintained a kāinga south of Lake Horowhenua from at least the 1850s onwards.<sup>62</sup> Vivienne Taueki claimed that Ngāti Pāriri only arrived at Lake Horowhenua after 1869, having resided in Waikanae prior to 1869.<sup>63</sup> Kāwana Hunia, a 'very visible person in Muaūpoko and Ngāti Apa history', was a descendant of Ngāti Pāriri through his mother Kaewa.<sup>64</sup>
- ▶ Tūmatakōkiri: Edward Karaitiana gave his hapū as Tūmatakōkiri, 'an old tribe . . . who got caught up in the warfare between Toa Rangatira and Muaūpoko and Ngāi Tahu'. He told us that they descend from Taraika, 'down to Tū-tere-moana and Whare-kohu, down Māhanga-pūhua, Tu-tehunga, Kahukuranui, Kau-wai, Kaipa-wai, Tūmatakōkiri'.<sup>65</sup> We were told that Retimana Te Korou's wife Hine-whaka-aea was the daughter of Tūmatakōkiri, and their son was Karaitiana Te Korou.<sup>66</sup> Tūmatakōkiri is listed as one of 18 Muaūpoko hapū in Hunia's 1852 letter to McLean.<sup>67</sup>

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56. Vivienne Taueki, brief of evidence (doc B2), p 2

57. Luiten, 'Political Engagement' (doc A163), p 29

58. Transcript 4.1.6, pp 19–20

59. Luiten, 'Political Engagement' (doc A163), p 12

60. Chase, answers to post-hearing questions (doc A160(e)), p 1; Luiten, 'Political Engagement' (doc A163), p 13

61. Luiten, 'Political Engagement' (doc A163), pp 13–14

62. Luiten, 'Political Engagement' (doc A163), pp 45, 281

63. Transcript 4.1.6, p 65

64. Huwylar, brief of evidence (doc C14), pp 3, 7

65. Transcript 4.1.6, p 47

66. Transcript 4.1.6, p 47; Edward Karaitiana, brief of evidence, 17 November 2015 (doc C20), p 11

67. Karaitiana, brief of evidence (doc C20), pp 18–19; Luiten, 'Political Engagement' (doc A163), p 51



- ▶ Ngāti Te Riunga: According to Ria Raikokiritia's evidence in 1897, Ngāti Te Riunga were descended from the Muaūpoko tipuna Te Riunga.<sup>68</sup> Te Riunga was a child of Puakiteao and Te Mou.<sup>69</sup>
- ▶ Ngāti Puri: According to Parinihia Riwai in 1897, this hapū descended from Puri, who himself was said to be of Ngāti Hine.<sup>70</sup>
- ▶ Ngāti Tairātū: Tairātū was the son of Ruatapu and the grandson of Puakiteao. Muaūpoko evidence from the 1890s is that Tairātū was the eponymous ancestor of Ngāti Tairātū. His son, Te Rātū (or Te Kōtuku), was an important Muaūpoko leader in the 1820s (see section 2.4.2(8)).<sup>71</sup>

## (2) *Ngā marae, pā, kāinga o Muaūpoko*

Bill Taueki spoke about Muaūpoko marae, urupā, and wāhi tapu. In addition to the present-day marae Kohuturoa and Kawiu in the Horowhenua, he also named Honoeka (or Hongoeka) in Porirua, Wairaka in Pukerua Bay, Whakarongotai in Waikanae, Katihiku in Ōtaki, and Kikopiri at Ōhau as marae to which Muaūpoko were affiliated.<sup>72</sup>

Dr Jonathan Procter listed historical pā sites which Muaūpoko occupied as Ōwairaka, Waimapihi, Waimea, Katihiku, and Wairarapa Pā (both on the southern bank of the Ōtaki River), Waitawa Pā (on Lake Waitawa), and Papaitonga and Papawharangi (both of which were pā situated on the two islets on Lake Waiwiri). He also listed Muaūpoko kāinga, including the Wainui kāinga at Paekākāriki and Haumiara (on the southern bank of the Manawatū River). There were many other clusters of pā and kāinga at Makahika (including part of the Tararua Range and its foothills), Ōkatia and Tikohanu (around the mouth of the Manawatū River), Tuwhakatupua (just south of the Ōroua River), and the 'principal Muaupoko population centre', Lake Horowhenua.<sup>73</sup>

Vera Sciascia told us that most of the Muaūpoko hapū lived together between Lake Horowhenua (or Punahau) and the coast, listing the main Muaūpoko papakāinga as Te Rae o Te Karaka, Pipiriki, Kupe, Ōtaewa, and Te Hau. '[I]n the 1800s', she said, 'they all lived together' at these papakāinga because 'the whakapapa put them so close together'.<sup>74</sup> Jonathan Procter stated that major kāinga and fortified pā located on or near the shore of Lake Horowhenua included Mangaroa, Te Rae-o-te-Karaka, Waitahi, Te Hou, Ōtaewa, Koutu-roa, Tawa, and Taheke, with Pipiriki being built as a fighting pā by Te Keepa Te Rangihiwini and Kāwana Hunia in the 1860s (see chapter 4). Procter also named the six pā built on man-made islands in Lake Horowhenua as Wai-kiekie, Roha-o-te-kawau, Waipata, Puke-ita, Namu-iti,

68. Luiten, 'Political Engagement' (doc A163), p 12, n

69. William Taueki, brief of evidence (doc C10), p 5

70. Luiten, 'Political Engagement' (doc A163), p 12, n

71. Stirling, 'Muaupoko Customary Interests' (doc A182), p 27; Luiten, 'Political Engagement' (doc A163), pp 12, 19

72. William Taueki, brief of evidence (doc C10), p 8

73. Jonathan Procter, summary to accompany Muaupoko sites of significance mapbook, November 2015 (doc A183(a)), pp [10]–[18]

74. Transcript 4.1.6, p 124

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and Karapu.<sup>75</sup> Adkin noted nine lakeside pā and kāinga and six island pā at Lake Horowhenua, as well as Katihiku Pā at the Ōtaki River mouth and Waimapihi Pā at Pukerua Bay.<sup>76</sup>

**2.2.4 Ngā whānau o Muaūpoko**

Although sharing a long genealogy with other related tribes, many claimants argue that the core of nineteenth-century Muaūpoko descended from the union of Te Mou and Puakiteao. Their eldest child was Tireo (or Te Reo o Te Rangī), the forefather of Tanguru and Te Keepa. Pōtangotango, the youngest, was the grandfather of Taueki. Other children of Puakiteao and Te Mou were Ruatapu and Te Riunga (the only daughter). Te Raraku Hunia, daughter of Kāwana Hunia and Hereora, spoke of a fifth sibling in the whakapapa, Te Koa, in her 1897 court evidence.<sup>77</sup> Te Raraku Hunia and others described how the children of Puakiteao and Te Mou were ‘all born and raised at Te Koropu pa at Otaewa on the shores of Lake Horowhenua.’<sup>78</sup> Luiten found that most Muaūpoko witnesses in nineteenth-century inquiries described the tribe as coming from all of the offspring of Te Mou and Puakiteao.<sup>79</sup>

In this section, we set out the evidence on several key Muaūpoko whānau. There has been much discussion about the relationships between these whānau and their relative mana, authority, and standing within Muaūpoko. We make no comment on those latter points, but as context we outline some key concepts of tikanga regarding tuakana/taina and ahi kā.

**(1) Tuakana/taina**

In his book *Tikanga Māori*, Sir Hirini Moko Mead explained how a person’s mana can be mediated by the value placed on their tuakana/taina standing:

Tuakana – older siblings, male or female – have a higher position socially than taina, younger siblings. In effect interpersonal relationships are not on a level playing field. They are much more complicated to manage because of other variables. Having skill and experience are advantages in maintaining balance in interpersonal and inter-group relationships. As a general rule mana must be respected and public events should enhance the mana of participants. Actions that diminish mana result in trouble.<sup>80</sup>

Sir Hirini explained that the tuakana/taina principle affects one’s birthright by granting more status to the elder sibling (tuakana) than to the younger (taina). He noted, however, that a person’s birthright can also be limited or increased according to other principles, such as: te moenga rangatira (being born from a chiefly line);

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75. Procter, summary (doc A183(a)), p [19]

76. Chase, ‘Muaupoko Oral Evidence and Traditional History Report’ (doc A160), p 24

77. Luiten, ‘Political Engagement’ (doc A163), p12; Tama Ruru, brief of evidence, 24 November 2015 (doc C25), p3

78. Luiten, ‘Political Engagement’ (doc A163), p12

79. Luiten, ‘Political Engagement’ (doc A163), p12

80. Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Wellington: Huia, 2003), p 30



being the *mātāmua* (priority given to the first born); *utu-ea* (compensation-state of balance); *toa* (personal achievement and service); *whakatika* (appealing to higher powers through *karakia* to correct a wrong); spiritual nurturing; and *ahi kā* (burning fire).<sup>81</sup>

Sir Hirini highlighted that one's *whakapapa* is especially affected by the order of birth and the concept of *ahi kā*:

The order of birth is important: the *mātāmua* is accorded more *mana* than others. It is also affected by the *tuakana/taina* principle which is also the order of birth. The older sibling has priority over the younger and this principle works its way down to the last born, known as the *pōtiki*. This person is often treated the same as a *mātāmua*. *Whakapapa* is also affected by the *ahi-kā* principle: one has to be located in the right place and be seen often in order to enjoy the full benefits of *whakapapa*.<sup>82</sup>

## (2) *Ahi kā*

The Muriwhenua Tribunal explained Māori relationships to land, and how rights arise from those relationships, as follows:

The Maori feeling for the land has often been remarked on, and should need no more elaboration than an outline of the philosophical underpinning of land related values. In terms of those values, it appears to us, Maori saw themselves as users of the land rather than its owners. While their use must equate with ownership for the purposes of English law, they saw themselves not as owning the land but as being owned by it. They were born out of it, for the land was *Papatuanuku*, the mother earth who conceived the ancestors of the Maori people. Similarly, *whenua*, or land, meant also the placenta, and the people were the *tangata whenua*, which term captured their view that they came from the earth's womb. As users of the earth's resources rather than its owners, they were required to propitiate the earth's protective deities. This, coincidentally, placed a constraint on greed.

Attachment to the land was reinforced by the stories of the land, and by a preoccupation with the accounts of ancestors, whose admonitions and examples provided the basis for law and a fertile field for its development. As demonstrated to us in numerous sayings, tribal pride and landmarks were connected and, as with other tribal societies, tribe and tribal lands were sources of self-esteem. In all, the essential Maori value of land, as we see it, was that lands were associated with particular communities and, save for violence, could not pass outside the descent group. That land descends from ancestors is pivotal to understanding the Maori land-tenure system. Such was the association between land and particular kin groups that to prove an interest in land, in Maori law, people had only to say who they were. While that is not the legal position today, the ethic is still remembered and upheld on *marae*.<sup>83</sup>

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81. Mead, *Tikanga Māori*, pp 40–41

82. Mead, *Tikanga Māori*, pp 42–43

83. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), pp 23–24

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The principle of ahi kā (burning fire) has traditionally signified a person or group's rights to land by occupation.<sup>84</sup> Sir Hirini Moko Mead described the principle of ahi kā as 'keeping one's claims warm by being seen . . . and by maintaining contact with the extended family and the hapū'.<sup>85</sup>

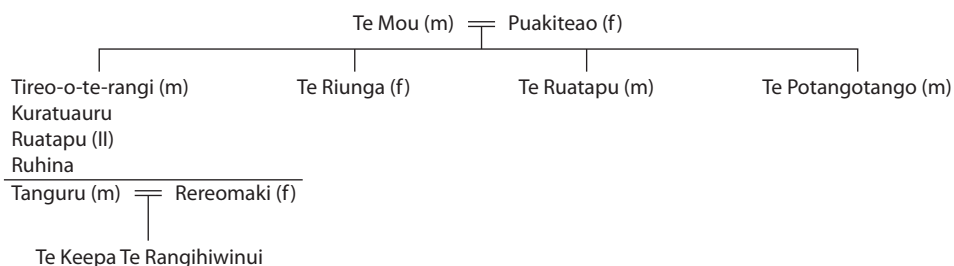
The bases of rights (take) to Māori land are take tipuna (ancestral rights), take kite hou (discovery), take tuku (gift) and take raupatu (conquest). Each one of these four take had to be accompanied by take ahi kā (occupation). The acts of cultivating and fishing, the construction and maintenance of eel weirs, and all forms of resource gathering or use, as well as more enduring signs of physical occupation (kāinga, pā, and urupā), could be emblems of ahi kā. Underlying all 'acts of occupation' were relationships: descent from the ancestors of a place; spiritual relationships with the land, sites, and ancestral taonga (such as Lake Horowhenua, which was a matua (parent)); and relationships within whānau and hapū as various members came and went. The term 'ahi kā' can also refer to people: the home people, those who keep the fires alight for absent hapū or whānau members.

Implicit in the concept of maintaining a hapū's fires burning was the possibility that fires could cool, or be extinguished by long abandonment. Customs differ between tribal groups as to what constitutes the extinguishment of ahi kā, and what length of absence is required for fires to cool beyond the possibility of reigniting them (by resuming occupation).

Susan Forbes noted that Native Land Court testimonies in our district regarding the meaning of 'ahi kā' varied and in some cases conflicted, and the court responded by 'making rigid the conditions and spirit of ahi kā'.<sup>86</sup> In our prioritised inquiry, the concept of ahi kā was a particularly contested one, arising from how the people defined ownership of the Horowhenua 11 block (and Lake Horowhenua) in the constrained circumstances of the late nineteenth century, a matter which is still controversial among Muaūpoko today. We address that issue in chapter 6.

### (3) *Descendants of Te Keepa Te Rangihwinui (Major Kemp)*

Te Keepa Te Rangihwinui (Major Kemp) was the son of Tanguru of Muaūpoko and his wife Rere-o-maki. Tama Ruru, a descendant of Te Keepa, gave Te Keepa's whakapapa as follows.<sup>87</sup>



84. Mead, *Tikanga Māori*, p 359

85. Mead, *Tikanga Māori*, p 41

86. Susan Forbes, 'Te Waipunahau: Archaeological Survey', 1996 (doc A160(j)), pp 27–28

87. Ruru, brief of evidence (doc C25), p 3

The evidence presented to us showed that Tanguru was viewed as a significant figure in Muaūpoko's history. Tanguru's full name was Mahuera Paki Tanguru-o-te-Rangi. We were told that Tanguru's hapū was Ngāti Whanokirangi.<sup>88</sup> His mana came through his whakapapa – he was a direct descendant of Tireo-o-te-rangi (or Te Reo o te Rangi), who was the mātāmua (eldest child) of Te Mou and Puakiteao. Tanguru's mana also came from his deeds. Tanguru was described as 'a man of magnificent physique.'<sup>89</sup> He is said to have been one of the Muaūpoko rangatira who led the party which 'fought . . . and drove [the Amiowhenua expedition] off, inflicting about 100 deaths on them.'<sup>90</sup> Based in Horowhenua for the first part of his life, we were told Tanguru lived for a time 'at Rangiuuru at the waha [mouth] of the Otaki River.'<sup>91</sup>

Tanguru lived with Rere-o-maki in Horowhenua until they left (with their son Te Keepa Te Rangihwinui) to seek safety with Rere-o-maki's family in Whanganui. Tanguru was said to have 'occupied lands north of the Manawatū River' and 'had rights to be on this land through descent from Tupatunui.'<sup>92</sup> Fredrick Hill stated that Hoani Puihi was adopted by Tanguru and was 'placed at Horowhenua [by Tanguru] to keep his "fires burning" in the Horowhenua, while Te Keepa was placed at Whanganui 'to learn the "ways" of the Pakeha, with his mother Rereomaki of Ngati Apa.'<sup>93</sup>

Although Tanguru spent many years in Whanganui, we were told that he returned to Te Rae o te Karaka for the months before his death in 1868.<sup>94</sup> He may also have returned to the Horowhenua district throughout his time in Whanganui: Jane Luiten explained that 'according to the evidence that was adduced in the 1890s, Tanguru was there at the time of the agreement with Te Whatanui and in that period of rebuilding . . . before the Treaty . . . and he was involved at [the battle of] Haowhenua.'<sup>95</sup> Others believe Tanguru never returned to the Horowhenua district.<sup>96</sup>

Tanguru is one of the last people known to be buried at the Muaūpoko burial site Komokorau.<sup>97</sup> We were also told that Tanguru is depicted on the New Zealand shilling in a defensive fighting stance, holding a taiaha.<sup>98</sup>

88. Fredrick Hill, brief of evidence (doc C21), p 1; transcript 4.1.11, p 77

89. E O'Donnell, *Te Hekenga: Early Days in Horowhenua, Being the Reminiscences of Mr Rod McDonald* (Palmerston North: G H Bennett & Co Ltd, 1929), p 9 (Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 17)

90. Gilling, 'Ihaia Taueki and Muaupoko Lands' (doc A172), p 8

91. Transcript 4.1.6, p 12

92. Huwyler, brief of evidence (doc C14), pp 13–14

93. Fredrick Hill, brief of evidence (doc C21), p 1

94. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 18; Ruth Wilkie, 'Rere-o-maki', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, <http://www.teara.govt.nz/en/biographies/1r4/rere-o-maki>, last modified 30 October 2012

95. Transcript 4.1.12, p 54

96. Anne Hunt, 'Legend of Taueki', not dated (doc A18), p [14]

97. Hunt, 'Legend of Taueki' (doc A18), p [14]; Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 18. Alternate spellings include: Komokarau/Komokorau (doc A160, p 18); Komokorau (doc A18, p [14]); Kōmakorau (transcript 4.1.6, pp 65, 165, V Taueki; Uruorangi Paki); Komakarau (doc C25, p 6; doc A76, p 5); Komakorau (paper 3.3.17(a), p 64).

98. Transcript 4.1.6, p 165; Ruru, brief of evidence (doc C25), p 6; Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), pp 17–18

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Tanguru's wife, Rere-o-maki, signed Te Tiriti at Whanganui on 23 May 1840.<sup>99</sup> Rere-o-maki's 'major tribal affiliations were Ngati Ruaka and Ngati Tupoho of Te Ati Haunui-a-Paparangi, and through her mother, Te Arawa.'<sup>100</sup> She also had 'kinship ties with Ngāti Apa' through her father.<sup>101</sup>

Te Keepa Te Rangihwinui (also referred to as Te Rangihwinui, Taitoko, Te Keepa, Major Kemp, and Meiha Keepa) was born around the early 1820s. He was 'raised during the time of fighting between Muaūpoko, Ngāti Toarangatira, Ngāti Raukawa and Te Ātiawa.'<sup>102</sup>

Various accounts were presented to us about where Te Keepa Te Rangihwinui was born. Grant Huwyler told us that Te Rangihwinui was born near to Taikorea, north of the Manawatū River.<sup>103</sup> Other accounts include that he was born 'at Tuwhakapua, on the Manawatū River',<sup>104</sup> 'at Opiki, a place north of the Lake [Horowhenua]',<sup>105</sup> and 'at Horowhenua'.<sup>106</sup> Rere-o-maki was said to have swum across Lake Horowhenua with a baby Te Rangihwinui on her back during the raids by Ngāti Toa (see section 2.4.2(6)). Following the raids, we were told that Tanguru and Rere-o-maki moved with their child, Te Rangihwinui, to Whanganui for safety. The child was 'possibly baptised at Putiki, taking the name Te Keepa (Kemp)' and 'educated at Putiki Church Missionary Society'.<sup>107</sup>

Te Keepa began his career within the constabulary in or around 1848, and was later elevated to the position of major. He served in the colonial forces for six years in support of the Government.<sup>108</sup> Te Keepa, according to some claimants, 'identified strongly as Muaūpoko'.<sup>109</sup> He died at Pūtiki on 15 April 1898.<sup>110</sup>

Key events are discussed more fully in the *Dictionary of New Zealand Biography* entry on Te Keepa's life<sup>111</sup> and the Tribunal's report on Whanganui lands,<sup>112</sup> and are documented further in chapters 4–6 of this report.

**(4) The Taueki whānau**

Based on the testimony of Muaūpoko witnesses to the Native Appellate Court in 1897, Te Mou and Puakitea's children were born and raised at Te Koropu Pā at

99. Wilkie, 'Rere-o-maki', *Dictionary of New Zealand Biography*

100. Anthony Dreaver, 'Te Keepa Te Rangihwinui', in *The Dictionary of New Zealand Biography*, <http://www.teara.govt.nz/en/biographies/1t64/te-rangihwinui-te-keepa>, last modified 30 October 2012

101. Wilkie, 'Rere-o-maki', *Dictionary of New Zealand Biography*

102. Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko' (doc A15(a)), p [22]

103. Huwyler, brief of evidence (doc C14), pp 13–14

104. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 18

105. Vivienne Taueki, brief of evidence (doc B2), p 9

106. Claimant counsel (Bennion, Whiley, and Black), closing submissions, 15 February 2016 (paper 3.3.17(a)), p 64

107. Dreaver, 'Te Rangihwinui, Te Keepa'; Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 18

108. Dreaver, 'Te Rangihwinui, Te Keepa'

109. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), p 65

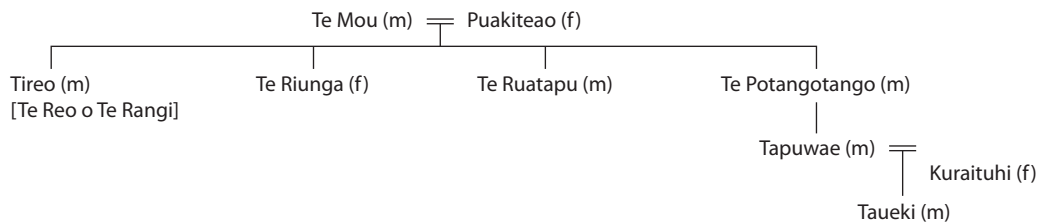
110. Dreaver, 'Te Rangihwinui, Te Keepa'

111. Dreaver, 'Te Rangihwinui, Te Keepa'

112. See Waitangi Tribunal, *He Whiritauonoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), chapters 2, 10–12.

Ōtaewa on the western shores of Lake Horowhenua.<sup>113</sup> Vivienne Taueki suggested that once the children grew up, only Pōtangotango remained at Lake Horowhenua: ‘Te Riunga was married to a Rangitane man and lived at Waiwiri (Lake Papaitonga). Tiroe lived elsewhere and Te Ruatapu died in battle on the South Island.’<sup>114</sup>

Bill Taueki emphasised Te Mou and Puakiteao’s descendants, and Pōtangotango’s grandson Taueki in particular, as the key elements of the Muaūpoko whakapapa:<sup>115</sup>



Bill Taueki referred to the whakapapa laid out above as ‘a whakapapa that was used to bring Muaūpoko together when Ngāti Toa attacked.’<sup>116</sup> For Mr Taueki, the people at Lake Horowhenua were descended from Pōtangotango, not Kupe.<sup>117</sup> He told us that although Pōtangotango’s brothers ‘originally had control over Lake Horowhenua and surrounds’ (along with Pōtangotango), it was only Taueki (Pōtangotango’s grandson) who ultimately remained at the lake.<sup>118</sup> Philip Taueki stated that Muaūpoko owed their survival to the wisdom and resolution of its ‘paramount chief’, Taueki. Taueki was able to elude his enemy using his knowledge of ‘secret clearings’ carved out of the thick bush surrounding Lake Horowhenua, thus ensuring the survival of his people. In so doing he also ‘preserved the *mana* of Mua-Upoko over their *whenua*’ (emphasis in original).<sup>119</sup>

Taueki and his wife Kahukore had two children: a daughter, Hereora, and a son, Ihaia. Descendants from both Hereora and Ihaia Taueki presented evidence at our hearings.<sup>120</sup> It is believed that Hereora was the *mātāmua* (eldest child).<sup>121</sup> Her marriage to Kāwana Hunia ‘probably’ took place in ‘the late 1860s.’<sup>122</sup> Ihaia Taueki’s tombstone states that he died in 1898, at 89 years of age.<sup>123</sup>

113. Luiten, ‘Political Engagement’ (doc A163), p 12

114. Vivienne Taueki, brief of evidence (doc B2), p 2

115. Transcript 4.1.6, p 8; William James Taueki, speaking notes for Nga Korero Tuko Iho hearing, 17 February 1914 (doc A76), p 1

116. Transcript 4.1.6, p 8

117. William Taueki, speaking notes (doc A76), p 1

118. William Taueki, speaking notes (doc A76), p 3

119. Hunt, ‘Legend of Taueki’ (doc A18), p [6]

120. See, for example, Henry Williams, brief of evidence, 11 November 2015 (doc C11), p 1; Hingaparae Gardiner, brief of evidence, 11 November 2015 (doc C8), p 2; transcript 4.1.12, pp 253, 545.

121. Transcript 4.1.6, p 97; transcript 4.1.11, pp 615, 734

122. Transcript 4.1.12, p 310 (Huwlyer)

123. Transcript 4.1.11, p 172

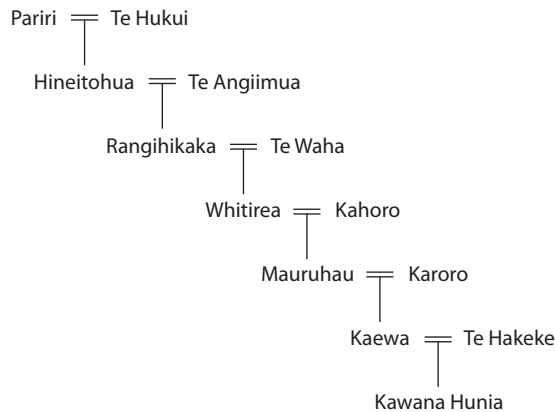
2.2.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

(5) *The Hunia whānau*

Grant Huwyler, a descendant of Kāwana Hunia, presented evidence at our hearings. He stated that one account of the Hunia whānau begins with the union of Kāwana Hunia’s parents, Kāwana Te Hakeke (or Te Hakeke) from Rangitīkei and Kaewa of Muaūpoko.<sup>124</sup> The whakapapa given to us showing the connection to the Muaūpoko hapū Ngāti Pāriri is as follows:<sup>125</sup>



From Pāriri, Grant Huwyler gave Kāwana Hunia’s whakapapa as follows:<sup>126</sup>



Huwyler told us that Te Hakeke (Kāwana Hunia’s father) primarily ‘subscribed to being Ngāti Apa’ and that his hapū was Ngāti Kauae (who descended from Tupatunui).<sup>127</sup> Te Hakeke was, according to Huwyler, ‘a leading figure in the successful Muaūpoko, Ngāti Apa and Ngāti Hamua assault on Ngāti Toa and the Taranaki people along the coast at Waikanae in the lead up to Waiorua’. He fought at the Waiorua battle (see section 2.4.2(9)), where his whāngai (adopted) father, Te

124. Huwyler, brief of evidence (doc C14), p 3  
 125. Trevor Hill, whakapapa notes, not dated (doc A13), p [1]  
 126. Huwyler, brief of evidence (doc C14), p 13  
 127. Note the Muaūpoko hapū Ngāti Pāriri also descended from Tupatunui; see Huwyler, brief of evidence (doc C14), pp 12, 14.



Ahuru o te Rangi, died. Huwyler said that Te Hakeke then rose to prominence as a leader at Rangitikei, living at an inland pā called Ongaonga, and then returning with his wife Kaewa to Te Oahura on the coast. From Huwyler's account, Te Hakeke was involved in: seeking to confront Ngāti Raukawa's first large migration led by Te Whatanui; leading the people of Rangitikei in the battle of Haowhenua in support of Ngāti Raukawa against the Taranaki people; playing an instrumental role in negotiating peaceful settlement of Ngāti Parewahawaha and Ngāti Kahoro in Rangitikei; and making the original offer to the Crown for Rangitikei lands. Te Hakeke died in 1848.<sup>128</sup>

Kaewa (Kāwana Hunia's mother) was of Muaūpoko descent. We were told that Kaewa was captured at Ōroua by Ngāti Raukawa and 'was said to have been held in captivity for several years before being released'.<sup>129</sup> She lived with Te Hakeke at Rangitikei, bearing at least four children.<sup>130</sup> Huwyler said that when Kaewa died, her head was returned for burial at Horowhenua.<sup>131</sup>

Huwyler told us that his whānau believe that the children from the union of Te Hakeke and Kaewa included Turikatuku, Kāwana Hunia Te Hakeke (or Kāwana Hunia), Wirihana Maihi, and Hare Rakena. According to Huwyler, 'the descendants of Turikatuku include the Stickles, Retter and Proctor whānau' and he personally acknowledged that branch of the whānau as 'the ahi kā of Kaewa within Muaūpoko'.<sup>132</sup>

Some evidence, including that of Sian Montgomery-Neutze, referred to an older son of Te Hakeke and Kaewa, Te Rarā o te Rangi, who died as a child.<sup>133</sup> Te Hakeke wrote an oriori for Te Rarā o te Rangi 'to encourage the boy to seek vengeance for the damage done to his people'. Because Te Rarā o te Rangi died young, 'the reign was passed down to his younger sibling, Kāwana Hunia'.<sup>134</sup> Huwyler had a different account: that Te Rarā o Te Rangi was Kāwana Hunia's birth name and that the oriori was written for him:

Te Hakeke is said to have taken his son and carried him from his birthplace on the Rangitikei River, over Whakaari, to Taikorea, to Manawatū, onto Horowhenua and even further to Pukehou, a hill overlooking Otaki, which is said to have taken its name from this event. There is a waiata oriori that was composed by Te Hakeke which commemorates this event, and dedicates Kawana Hunia's life to seeking revenge against the new arrivals on the coast.<sup>135</sup>

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128. Huwyler, brief of evidence (doc C14), pp 3–6

129. Hunt, 'Legend of Taueki' (doc A18), p 13; Huwyler, brief of evidence (doc C14), p 3

130. Huwyler, brief of evidence (doc C14), p 3

131. Huwyler, brief of evidence (doc C14), p 6

132. Huwyler, brief of evidence (doc C14), p 3

133. Hunt, 'Legend of Taueki' (doc A18), p 13; Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko' (doc A15(a)), p [21]

134. Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko' (doc A15(a)), p [21]

135. Huwyler, brief of evidence (doc C14), p 7

## 2.2.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Huwlyer stated that Kāwana Hunia was ‘likely born around the mid 1820s . . . at Ongaonga . . . near to where the Waitapu stream exits into the Rangitikei River.’<sup>136</sup> While still young, Kāwana Hunia was carried to safety when a party of Ngāti Raukawa found a pā where women and children were sheltering.<sup>137</sup> Kāwana Hunia first married Rutakau of Ngāi Te Upokoiri, with whom he had five children: Te Rina, Rakera, Wirihana, Hera, and Warena. Huwlyer discussed each of these children in turn in his evidence.<sup>138</sup> Kāwana Hunia had several other wives; his only other child was Te Raraku Hunia, to Hereora Taueki of Muaūpoko. After the death of his father in 1848, Kāwana Hunia became a prominent leader for his people. According to Huwlyer, he ‘worked alongside of elder chiefs in concluding the Rangitikei Turakina transaction in 1849, and busied himself at Rangitikei developing farms and managing land matters.’<sup>139</sup> Kāwana Hunia and his children will be discussed further in chapters 4–6 and 8 of this report.

**2.2.5 Ngā hononga whakapapa – connections with other iwi**

Muaūpoko had many customary relationships and whakapapa connections with other iwi prior to 1840. Angela Ballara stated that, by 1800, Muaūpoko were ‘much intermarried’ with *Ngāti Apa* and *Rangitāne*.<sup>140</sup>

We were told that many of the descendants of Muaūpoko are able to trace their whakapapa to *Ngāti Kahungunu*, stemming from intermarriage which occurred starting from perhaps the seventeenth century, when a group of Ngāti Kahungunu migrated to Te Ūpoko o te Ika.<sup>141</sup>

Based on the evidence of Paki Te Hunga, Riripeti Tamaki, and other Muaūpoko witnesses in 1897, Bruce Stirling gave an explanation about Muaūpoko’s connection with *Ngāti Hāmua*:

Ngati Pariri (a Muaupoko hapu) . . . had close connections to Hamua, including rangatira such as Tamati Maunu and Hanita Kowhai. Some of the Muaupoko who fell in fighting at Papaitonga after the arrival of Te Rauparaha were also said to be Hamua, including Toheriri, Takere, and Paipai. One Hamua descendant within Muaupoko considered that ‘Hamua was the former name of the hapu now known as Ngati Pariri,’ and that the latter had assumed Hamua’s lands in the district. Muaupoko not only have close links to those Hamua of Ngati Kahungunu but also to those of Hamua who later sought to be independent of the influence of both Ngati Kahungunu and Rangitane (particularly Rangitane of Manawatu, whose land-selling in Wairarapa and Tamaki aggravated resident Hamua as well as other tangata whenua groups).<sup>142</sup>

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136. Huwlyer, brief of evidence (doc C14), p 7

137. Huwlyer, brief of evidence (doc C14), p 4

138. Huwlyer, brief of evidence (doc C14), pp 7–8

139. Huwlyer, brief of evidence (doc C14), p 8

140. Angela Ballara, *Taua: ‘Musket wars’, ‘land wars’ or tikanga? Warfare in Māori Society in the Early Nineteenth Century* (Auckland: Penguin, 2003), p 317

141. Montgomery-Neutze, ‘He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko’ (doc A15(a)), p [45]

142. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 103



Charles Rudd told us that Muaūpoko would traverse over the Tararua Ranges to visit their Rangitāne, Ngāti Kahungunu, and Ngāti Hāmua kin in the Wairarapa, ‘and vice versa.’<sup>143</sup>

Intermarriage also occurred with members of *Ngāti Ira*, the descendants of Irakai-pūtahi of the *Horouta* waka, who migrated from the east coast around 1700 AD to settle in the Wairarapa, Te Ūpoko o te Ika, and Porirua.<sup>144</sup>

We were told that Muaūpoko traded with South Island iwi such as *Ngāi Tahu* on a regular basis, and therefore had access to pounamu (greenstone): ‘Getting and using pounamu was not a problem for us. Muaūpoko were greenstone carving people. Sandstone for use in carving greenstone would have been a valuable resource.’<sup>145</sup>

Henry Williams told us that ‘until Te Rauparaha came along [Muaūpoko] were living in good relationships with Ngāti Kahungunu and Ngāti Rangitāne . . . and also the Whanganui tribes.’<sup>146</sup> He also spoke of *Waitaha* and *Ngāti Māmoe*, who were living on the land prior to Muaūpoko:

what we know history says, we were the tangata whenua of this part for many years . . . before the coming of the canoes apparently. There was a tribe here, Waitaha, that we pushed out and they’re now down the South Island, that’s what I know, Ngāti Māmoe . . . history tells us that.<sup>147</sup>

Eugene Henare told us that Muaūpoko had an alliance with *Ngāi Tara* of Te Whanganui-a-Tara, referring to *Ngāi Tara* as the ‘principal group’ with whom Muaūpoko whakapapa and hapū aligned strongly.<sup>148</sup>

Eugene Henare described Muaūpoko as having been ‘all one big family’, a ‘people of many peoples’ including ‘Ngāti Apa, Rangitāne, Muaūpoko, Ngāi Tara, Ngāti Ira, even our South Island whanaunga Ngāti Kua’, all of whom descended from the *Kurahaupō* waka.<sup>149</sup> In addition to Ngāti Apa, and Rangitāne ki Manawatū, Charles Rudd listed Taranaki ‘and even Kahungunu’ as groups to whom Muaūpoko were aligned ‘in the old days.’<sup>150</sup>

Mr Henare and Mr Rudd both cited the Native Land Court (and the subsequent Horowhenua commission) as undermining Muaūpoko’s status as a broad and inclusive family. By defining membership in terms of 143 or 81 listed individuals, as happened in 1873 and 1898 respectively, the court excluded many who were ‘entitled by whakapapa, regardless of what [had] happened’, to belong to the tribe.<sup>151</sup>

143. Transcript 4.1.6, p 57

144. Montgomery-Neutze, ‘He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko’ (doc A15(a)), p [46]

145. William Taueki, speaking notes (doc A76), p 6

146. Transcript 4.1.6, p 38

147. Transcript 4.1.6, p 38

148. Transcript 4.1.6, p 24

149. Transcript 4.1.6, pp 23, 24, 27

150. Transcript 4.1.6, p 60

151. Transcript 4.1.6, pp 27, 60

## 2.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**2.3 MUAŪPOKO AND THE NATURAL ENVIRONMENT****2.3.1 Muaūpoko's claimed sphere of influence**

This section lays out the varying interpretations presented to us by Muaūpoko and the research so far as to where Muaūpoko's sphere of influence lay. We use the term 'sphere of influence' to describe Muaūpoko's view of their far-flung interests at the beginning of the nineteenth century. Many of the lands or districts referred to were also occupied by the closely related iwi described above (see section 2.2.5). This section discusses place names associated with Muaūpoko in the rohe and briefly explores outside factors which impacted on the Muaūpoko area in the early nineteenth century. The evidence of other iwi on these matters will be considered later in our inquiry.

**(1) The traditional Muaūpoko sphere of influence**

We were told by claimants that although Muaūpoko's interests in the Porirua ki Manawatū inquiry district are centred on the heartland of Horowhenua, Muaūpoko's traditional sphere of influence encompassed areas northwards to the Rangitikei River,<sup>152</sup> to the western or southern side of the Manawatū River,<sup>153</sup> to Ngā Toka o Tūteremoana<sup>154</sup> or even as far as Waitōtara in southern Taranaki.<sup>155</sup> The claimants also told us that their sphere of influence extended south to Te Whanganui-a-Tara (Wellington),<sup>156</sup> Rimurapa (Sinclair Head),<sup>157</sup> Turakirae (Palliser Bay),<sup>158</sup> Te Moana o Raukawakawa (Cook Strait) and to places in the South Island such as Arapawa (Arapāoa) Island, Te Aumiti a te Kawau-a-Toru (French Pass), and Hokitika.<sup>159</sup> Bill Taueki said that the southern boundary extends from Matau at the top of the west coast of the South Island and follows the coastline to Pā Kawau and Te Matau, and then across to the top of the east coast of the South Island to a place called 'Te Rae ō Te Kakara'.<sup>160</sup>

To the west, claimants told us that their sphere of influence extended to Te Tai o Rēhua (the Tasman Sea), including Kapiti Island.<sup>161</sup> To the east, Muaūpoko's sphere of influence was said to have reached the peaks of the Tararua Range, although some told us that the eastern boundary extended further, to Wairarapa, Waimārama,<sup>162</sup> or even Heretaunga (Hastings).<sup>163</sup>

There were, of course, differences in the evidence as presented to us, reflecting the various traditions held by members of the tribe. Jonathan Procter, for example,

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152. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 1: preliminary and pre-1873 issues, 12 February 2016 (paper 3.3.17), p 19

153. Transcript 4.1.6, pp 57, 165

154. Trevor Hill, whakapapa notes (doc A13), p [2]

155. Transcript 4.1.6, p 65; William Taueki, brief of evidence (doc C10), p 9

156. Transcript 4.1.12, p 860

157. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 22

158. Transcript 4.1.6, p 165

159. Transcript 4.1.6, pp 57, 106; Robert Warrington, brief of evidence, 2 October 2015 (doc B9), p 3

160. William Taueki, brief of evidence (doc C10), p 7

161. Trevor Hill, whakapapa notes (doc A13), p [2]; transcript 4.1.6, pp 99, 155

162. William Taueki, brief of evidence (doc C10), p 9

163. Transcript 4.1.6, p 65

doubted Muaūpoko's rights to land in Heretaunga, Wairarapa, and the top of the South Island, saying that these areas were not considered to be 'the Muaūpoko rohe proper'.<sup>164</sup> Bill Taueki, on the other hand, saw the Muaūpoko traditional rohe as including all land south of Waitōtara and Waimārama (representing the northern pou), down to the north of the South Island.<sup>165</sup> He told us that Puakiteao and Te Mou's children lived across the expanse of this area.<sup>166</sup> Edward Karaitiana said his tipuna gave kōrero of hunting, fishing, and occupying lands in the Wairarapa, Te Tau Ihu, Wellington, and Horowhenua.<sup>167</sup> Robert Warrington said the Muaūpoko rohe was the shape of a niho mango (shark's tooth), drawn between three landmarks which were all given the name 'Tūteremoana': a landmark in the Wellington Harbour, the highest point on Kapiti, and a cluster of rocks in Whanganui by Castlecliff.<sup>168</sup>

Technical witnesses also described boundaries for Muaūpoko's traditional sphere of influence, based on the oral traditions discussed in their research (some of those traditions having been recorded in the nineteenth century). Louis Chase cited Charles Rudd's kōrero that the Muaūpoko rohe is 'from the mountains to the sea'.<sup>169</sup> Mr Chase suggested that Muaūpoko shared the boundaries of all descendants of Taraika and Tautoki: 'from the Rangitikei River in the north to Rimurapa (Sinclair Head) in the south, and from the peak of Tararua maunga in the east to the coastline in the west inclusive of Kapiti Island'.<sup>170</sup> Jane Luiten noted that 'the ancestral lands of Ngai Tara/Muaupoko are said to be the Tararua Range, and all associated lands and rivers'. Further, she recorded the claimants' view that, as at 1839, 'Ngai Tara/Muaupoko remained in possession and occupation of their ancestral rohe from Te Whanganui a Tara to Horowhenua'.<sup>171</sup> In cross-examination, Ms Luiten acknowledged that Muaūpoko had whanaungatanga links extending to the northern South Island.<sup>172</sup>

Bruce Stirling stated in his report that 'Muaūpoko occupied an extensive rohe, extending from Te Whanganui-a-Tara (Wellington) in the south to the Manawatu in the north, and from the west coast across the Tararua range to Wairarapa'.<sup>173</sup> He noted from his research:

Parts of this large area were shared with other tribal groups with whom Muaupoko shared whakapapa and with whom they enjoyed peaceful relations, notably Ngati Apa, Rangitane, Ngati Ira, and Hamua as well as several other hapu among those of Ngati Kahungunu who had migrated to the Wairarapa district.<sup>174</sup>

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164. Transcript 4.1.12, p 860

165. William Taueki, brief of evidence (doc C10), pp 7–9

166. William Taueki, brief of evidence (doc C10), p 5

167. Karaitiana, brief of evidence (doc C20), p 10

168. Warrington, brief of evidence (doc B9), p 3

169. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 23

170. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 22

171. Luiten, 'Political Engagement' (doc A163), p 6

172. Transcript 4.1.12, p 66

173. Stirling, 'Muaupoko Customary Interests' (doc A182), p 5

174. Stirling, 'Muaupoko Customary Interests' (doc A182), p 5

2.3.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Louis Chase also recorded that the occupants of the Muaūpoko rohe were ‘not solely Muaupoko.’<sup>175</sup> As noted, he said that the occupants included other iwi who shared tīpuna (particularly Taraika and Tautoki).<sup>176</sup>

Angela Ballara summarised the nineteenth-century evidence by stating that, as at 1800,

Muaūpoko’s many hapū occupied territories along the coast from Horowhenua near modern Levin to Tītahi Bay, and on Kapiti and Mana islands. Their pā included four on artificial islands in the Horowhenua lake, others at Papaitonga [Waiwiri] and Ōhau, Ōtehape on Kapiti Island and a large pā at Pukerua Bay. They were much inter-married with Ngāti Apa, with whom they shared the islands [Kapiti and Mana], as well as with Rangitāne.<sup>177</sup>

Some claimants were not comfortable with the idea of delineating the exact boundaries of a Muaūpoko rohe. Jonathan Procter, for example, viewed defining boundaries as a European construct, and defining an ‘area of interest’ as a modern political construct.<sup>178</sup> Charles Rudd told us of the dynamic nature of traditional boundaries, which are ‘set by tohu, events, land marks, myths and legends.’<sup>179</sup> For example, he told us that a kōhatu taniwha resided in the gorge of the Manawatū River, which set the northern boundary of Ngāi Tara and others.<sup>180</sup>

Claimants also told us that Horowhenua is the heartland of the Muaūpoko rohe. Vivienne Taueki explained that as far as she was aware, ‘our people have always lived at Lake Horowhenua.’<sup>181</sup> Although her view was centred around those who had remained at Horowhenua, Ms Taueki acknowledged that ‘[o]f course Muaūpoko is much bigger.’<sup>182</sup> Bill Taueki told us that Muaūpoko’s mana whenua was exercised more widely than in just the Horowhenua: ‘We exercised our mana whenua all up the coast to the Rangitikei River and across the Tararuas, and that was never restricted.’<sup>183</sup>

This echoes the sentiment of Te Keepa, after the Native Land Court’s Horowhenua decision in 1873, who maintained that the Horowhenua block awarded to Muaūpoko was ‘but a small portion’ of ‘the lands which had been the possessions of his fathers, and from them inherited by himself and his people.’<sup>184</sup>

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175. Chase, ‘Muaupoko Oral Evidence and Traditional History Report’ (doc A160), p 22

176. Chase, ‘Muaupoko Oral Evidence and Traditional History Report’ (doc A160), p 22

177. Ballara, *Taua*, p 317

178. Transcript 4.1.12, pp 860–861

179. Transcript 4.1.6, p 57

180. Transcript 4.1.6, p 55

181. Vivienne Taueki, brief of evidence (doc B2), p 2

182. Transcript 4.1.11, p 330

183. William Taueki, brief of evidence (doc C10), p 72

184. *Wellington Independent*, 10 April 1873 (Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 275)

**(2) Place names**

Place names are significant in that they can provide associations with tīpuna (ancestors) who had strong connections with these places through whakapapa, history, and customary use, or with important events. Names can establish mana whenua, and the act of reciting, remembering, and using place names continues the connection. The place names on a landscape give indications of the links between the Muaūpoko people and their wide sphere of influence. Jonathan Procter put it this way: ‘Our cultural landscapes and our significant sites still retain our collective whakapapa connections in history, as well as our names across this region. . . . our names still remain in the landscape and have not been subsumed by any other iwi.’<sup>185</sup>

In her evidence, Sian Montgomery-Neutze gave examples of placenames found in Muaūpoko waiata, which originate from Kupe’s time, including Raukawakawa, Tūteremoana, Te Aumiti, Koau a Toru, Tuhirangi, and Tai-tāwaro.<sup>186</sup> She also referred to the placenames given by Haunui-a-Nanaia, great-grandson of Kupe, which are still used today. These included Whanganui, Whangaehu, Turakina, Rangitikei, Manawatū, Hōkio, Ōhau, Ōtaki, Waimeha, Waikanae, Wairaka, and Wairarapa.<sup>187</sup>

We were told that Te Moana o Raukawakawa was a Muaūpoko and Ngāi Tara name for Cook Strait which originated from Kupe’s pursuit of the octopus Te Wheke a Muturangi. Sian Montgomery-Neutze and Edward Karaitiana both gave evidence that Te Moana o Raukawakawa (Cook Strait) is so named because of the extremely tapu nature of the rocks at the entrance of Te Whanganui-a-Tara (Wellington Harbour) where Te Wheke a Muturangi died.<sup>188</sup> The names of the rocks were Whatu Kaiponu and Whatu Tipare, and people passing in waka were required to divert their eyes or cover their faces with kawakawa leaves to protect themselves from the tapu, lest they be struck by misfortune.<sup>189</sup> ‘Tuhirangi’ was the name of the taniwha that accompanied Kupe to Aotearoa.<sup>190</sup>

Several claimants told us of the origin of the name ‘Tararua’: according to one account, the mountain range was named after Hotuwaipara and Reretua, the two wives of Whātonga (captain of the *Kurahaupō*). These two women were the mothers of Taraika and Tautoki respectively.<sup>191</sup> Charles Rudd thought the ranges were named after Taraika himself, the eponymous ancestor of Ngāi Tara.<sup>192</sup> Louis Chase stated in his report that Taraika was ‘immortalised’ in some of the features of the land where he ‘established himself and his people’: the Tararua Range (Nga waewae e rua a Tara – the spanned legs of Tara), Te Whanganui-a-Tara (the great harbour

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185. Transcript 4.1.6, p 117

186. Sian Montgomery-Neutze, brief of evidence, 16 November 2015 (doc C16), pp 4–6

187. Montgomery-Neutze, brief of evidence (doc C16), pp 3–4

188. Montgomery-Neutze, ‘He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko’ (doc A15(a)), p [32]; Karaitiana, brief of evidence (doc C20), p 10

189. Montgomery-Neutze, ‘He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko’ (doc A15(a)), p [2]

190. Montgomery-Neutze, brief of evidence (doc C16), p 6

191. Montgomery-Neutze, brief of evidence (doc C16), p 5

192. Transcript 4.1.6, p 57



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of Tara), and Kapiti Island (Te Waewae Kapiti o Tara rāua ko Rangitāne – the boundary between Tara and Rangitāne).<sup>193</sup> Noting the ubiquity of ‘Tara’ as a place name, Eugene Henare told the Tribunal that it signified ‘a broad general relationship’ between inter-related groups that was ‘very old’, covering ‘hundreds and hundreds of years.’<sup>194</sup>

Tūteremoana is another significant place name to Muaūpoko. Tūteremoana was a Ngāi Tara tipuna who some claimants used to identify the Muaūpoko rohe. Uruorangi Paki gave Muaūpoko’s western boundary point as Tūteremoana – the highest point on Kapiti Island.<sup>195</sup> Robert Warrington gave evidence about three landmarks all named after Tūteremoana: the highest peak of Kapiti Island, a cluster of rocks in Wellington Harbour, and a cluster of rocks in Whanganui.<sup>196</sup> On a map, these three landmarks form the shape of a niho mango (shark’s tooth), which Mr Warrington told us was the Muaūpoko ‘traditional customary area.’<sup>197</sup> Names in Te Tau Ihu (the northern South Island) to which Muaūpoko have a connection included Te Aumiti (French Pass) and Koau a Toru (Te Kawau a Toru). The names Te Kawau-a-Toru and Te Aumiti originate from Kupe’s time. Charles Rudd and Vivienne Taueki both said that this kawau (cormorant or shag) had a connection with Lake Horowhenua.<sup>198</sup> Mr Rudd told us that the kawau would fly from Lake Horowhenua to the South Island and back. After the kawau broke its wing and became a kōhatu (stone), the kōtuku (white heron) took its place. Kōtuku now come to Lake Horowhenua from the South Island, situating themselves on the island by Pāriri Marae (Kohuturoa).<sup>199</sup>

The name ‘Horowhenua’ is associated with sliding land. Adkin translated the name ‘Horowhenua’ as ‘the great landslide.’<sup>200</sup> Jonathan Procter told us that the geology of Horowhenua is ‘a gravel plain which has slipped from the hills’ which borders ‘sand dunes which are constantly migrating inland.’<sup>201</sup>

Before the arrival of significant outside influences on Muaūpoko, the name ‘Horowhenua’ may have had a wider application than it does today. Noa Nicholson told us in her Nga Kōrero Tuku Iho evidence that when she was growing up, to her knowledge, the Horowhenua district was considered to span from Tararua to the Manawatū, to Kapiti and Pōneke:

Āe. Mai i te Tararua huri noa tae atu ki Manawatū, Kapiti, taku mōhio ko Horowhenua katoa ēnei takiwā, huri noa, tae atu ki Pōneke. Horowhenua. Nā, i timata mai a Horowhenua, i whānau mai i roto i a Muaūpoko.

193. Chase, ‘Muaupoko Oral Evidence and Traditional History Report’ (doc A160), p 15

194. Transcript 4.1.6, p 23

195. Transcript 4.1.6, p 165

196. Transcript 4.1.11, p 679

197. Transcript 4.1.11, p 680

198. Transcript 4.1.6, pp 57, 65

199. Transcript 4.1.6, p 57

200. G Leslie Adkin, *Horowhenua: Its Maori Place-names & their Topographic & Historical Background* (Wellington: Department of Internal Affairs, 1948), p 157 (Paul Hamer, “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, June 2015 (doc A150), p 8)

201. Transcript 4.1.6, p 119

From the Tararua Ranges to Manawatū, to Kapiti, for me Horowhenua is within that whole area, Horowhenua. Yes, and the Horowhenua is the district but I grew up in Muaūpoko.<sup>202</sup>

Even the name ‘Muaūpoko’ is an indication of rohe interests according to Vivienne Taueki, who sees ‘Muaūpoko’ as ‘a geographical area on the fish’ – the front of the head of Te Ika a Maui.<sup>203</sup> Charles Rudd told us that the original name for Lindale in the Paraparaumu area was also ‘Muaupoko’.<sup>204</sup>

### 2.3.2 Nga maunga ki te moana – mountains to sea

In this section we give a brief overview of the various landscape features in the Horowhenua region prior to 1840, such as the Tararua Range, Kapiti Island, Lake Horowhenua, and the network of rivers, streams, wetlands, and groundwater which were important to Muaūpoko. We provide information on physical geography before briefly discussing Muaūpoko customary use of these areas.

#### (1) Tararua maunga

The Tararua Range runs north-east to south-west between Palmerston North and the Hutt Valley for 100 kilometres. It consists of steep, parallel greywacke ranges and deep river valleys, covering 3,168 square kilometres from the Manawatū Gorge to the Rimutaka Range. The vegetation on the west side of the ranges includes podocarps, ferns, shrubs, and vines, while the eastern side has more open beech forest due to the drier nature of the climate.<sup>205</sup>

In the 1929 book of Rod McDonald’s reminiscences of early Horowhenua, *Te Hekenga*, McDonald told of a landscape vastly different from the landscape of Horowhenua today, but which Muaūpoko claimants also spoke of:

At the time I was born in my father’s accommodation house-homestead at the mouth of the Hokio stream, the Horowhenua district as it is now known did not exist. A narrow strip of grassed sandhill country, of an average of some two miles in width, followed the coast line from the Manawatu to Otaki, and lying between that and the mountain tops was an unbroken stretch of bush.<sup>206</sup>

#### (a) Muaūpoko customary use of the Tararua Range

The Tararua Range has always had spiritual and physical significance to Muaūpoko. For Muaūpoko, the connection with Tararua is clear: it is in their pepeha (‘Ko Tararua te pae maunga’), and provides a vivid background to their two present-day marae in the Horowhenua. In her report, Jane Luiten noted that the ancestral lands

202. Transcript 4.1.6, pp 155, 158

203. Vivienne Taueki, brief of evidence (doc B2), p 2; transcript 4.1.6, pp 24–25, 38, 64, 105

204. Transcript 4.1.6, p 57

205. Chris Maclean, ‘Wellington places – Tararua Range’, Ministry for Culture and Heritage, <http://www.teara.govt.nz/en/wellington-places/page-16>, last modified 13 July 2012

206. O’Donnell, *Te Hekenga*, p 3

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of Muaūpoko were said to be the Tararua Ranges and all associated lands and rivers.<sup>207</sup> Tararua plays an important role in the identity of Muaūpoko.

The dense ngāhere (forest cover) on the lower reaches of the Tararua Range was used by Muaūpoko for resources and as a defence system. Bill Taueki spoke of the defensive qualities of the dense forest cover, and Muaūpoko's role in developing clearings in the ngāhere.<sup>208</sup> Based on traditions recorded by Elsdon Best, Louis Chase described a Muaūpoko 'tree village or fort' at Whakahoro which they had constructed at the top of three tall kahikatea trees:

large beams laid from tree-fork to tree-fork to serve as a platform for houses some fifty feet from the ground. Provisions were stored aloft, also a stockpile of stones to hurl down at intruders. If an enemy approached, the Muaupoko retreated to their tree fort and could resist their enemy so long as their provisions lasted.<sup>209</sup>

Doug Tatana suggested to Louis Chase that there were more abundant resources closer to Lake Horowhena, making use of the mountain resources unnecessary.<sup>210</sup> But other claimants spoke of their ancestors' customary use of the Tararua Range for fishing, birding, gathering hua rākau (fruits), roots, shoots, and other kai. Those customary uses were important to the physical survival and spiritual identity of Muaūpoko, and some persisted well into the twentieth century. Charles Rudd explained that in his 'younger days . . . fishing, hunting, gathering and other was from the Tararua Maunga to the Moana and back'. He listed some of the plant species harvested from the ngāhere as 'kiekie, tawhara, karaka, titoko, miro, makomako, ti kouka, pikopiko, raureka'.<sup>211</sup> Other natural resources included bird species like the huia, kōkako, whio, toutouwai, and kiwi. There were also prized fish like the giant kōkopu, short-jaw kōkopu, long-finned eel, non-migratory dwarf galaxiid, and the brown mudfish.<sup>212</sup> Edward Karaitiana referred to his ancestor using the 'eel resources' in the ranges (on land which later became Horowhenua 4B).<sup>213</sup> In her evidence for Philip Taueki's claim, Anne Hunt also listed some of the natural resources of the ranges including the plant species tōtara, kahikatea, pukatea, nīkau, mataī, rātā, rimu, harakeke, and bird species including kererū and tūi.<sup>214</sup>

Plants such as kawakawa, harakeke, koromiko, ponga, and kōwhai were harvested for rongoā (medicinal purposes).<sup>215</sup> Peter Huria (claimant for Wai 624) named several rongoā species and their uses, such as pukatea for softening gums,

207. Luiten, 'Political Engagement' (doc A163), p 6

208. William Taueki, brief of evidence (doc C10), p 16

209. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 66; Elsdon Best, 'The tree-fort of the Muaupoko tribe of Maoris, at Whakahoro', *Journal of the Polynesian Society*, vol 2, no 2 (1893), pp 87–88. Best's informants were 'the old people of the Ngati-wehiwehi hapu of Ngati-raukawa', and 'the Muaupoko of Horowhenua and Poroutawhao' (p 88).

210. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 32

211. Charles Rudd, brief of evidence, 16 November 2015 (doc C23), p 8

212. Transcript 4.1.11, pp 80–81

213. Karaitiana, brief of evidence (doc C20), pp 10, 12

214. Hunt, 'Legend of Taueki' (doc A18), p [2]

215. Rudd, brief of evidence (doc C23), p 8



kōwhai for gout, and tutu for removing pus and sores.<sup>216</sup> Other rongoā included mamaku, kūmarahau, and bush lilac.<sup>217</sup> Kiekie and harakeke were also harvested for raranga (weaving). Other uses of the ngahere included providing clearings for cultivation, firewood collection, and wood for carving.

Muaūpoko frequently crossed over to their Wairarapa kin, using ancient trails in the Tararua ranges. As noted above, Mr Rudd told us: ‘On that maunga our people used to – our Muaupoko people used to traverse over to the Wairarapa and vice versa. The people over there were Rangitāne, Kahungunu and Ngāti Hāmua used to come over that maunga over to our people over this side.’<sup>218</sup>

Archaeologists and surveys have identified at least nine ara tawhito (traditional trails).<sup>219</sup> Deanna Paki spoke about the physical and spiritual aspects of these paths in her evidence.<sup>220</sup>

**(b) Hapuakorari: the spiritual lake**

Many of the claimants told us about the sacred or spiritual lake, Hapuakorari. Only ‘Muaūpoko tūturu’ or ‘Ngāi Tara tūturu’ could see this lake.<sup>221</sup> Claimants also mentioned another sacred lake in the Tararua Range: Tāwhirikohukohu, Tāwirikohukohu, or Kohukohu. Sian Montgomery-Neutze told us that Tāwhirikohukohu was another name for Hapuakorari, which is, to her knowledge, located in the Tararua ranges.<sup>222</sup> Marokopa Matakatea told us that Tāwirikohukohu and Te Hapu Kōrau (Hapuakorari) are two sacred lakes in the Tararua ranges, both being sacred to Muaūpoko.<sup>223</sup> Hapuakorari is sung about in one of Muaūpoko’s pātere.<sup>224</sup>

Peter Huria told us that the sacred lakes or springs were connected to underground aquifers which fed into the dune lakes, such as Lake Horowhenua and Waiwiri.<sup>225</sup> He told the Tribunal that ‘during the torrential rains in the winter it runs down through and feeds our aquifers [which feed into the dune lakes]’.<sup>226</sup>

According to Charles Rudd, the hōkioi – the largest eagle on earth – resided at the spiritual lake, which was directly above the area where the township of Levin now stands.<sup>227</sup> Charles Rudd also provided evidence about a taniwha named Waiopehu:

Waiopehu was a taniwha that lived up that maunga up here, and it became very sick and it knew it had to get to the moana for the medication it needed . . . so it slowly

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216. Transcript 4.1.12, p 648

217. Transcript 4.1.12, pp 255, 648

218. Transcript 4.1.6, p 57

219. Transcript 4.1.11, p 80; Chase, ‘Muaupoko Oral Evidence and Traditional History Report’ (doc A160), pp 31–32

220. Transcript 4.1.6, pp 136–138

221. Transcript 4.1.6, p 104

222. Montgomery-Neutze, brief of evidence (doc C16), p 6

223. Transcript 4.1.6, p 103

224. Montgomery-Neutze, brief of evidence (doc C16), p 6

225. Transcript 4.1.11, p 654

226. Transcript 4.1.12, p 647

227. Transcript 4.1.6, p 58

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travelled down there, down to this whenua down below, but it couldn't get to the moana [and eventually died]. If you know where to look you could see the trails of that taniwha today.<sup>228</sup>

**(2) Ngā awa me ngā repo – rivers, streams, and wetlands****(a) Physical landscape**

Streams running into Lake Horowhenua include Arawhata Stream (a spring-fed stream), Mangaroa Stream, Oero Creek (a side-stream to the Mangaroa Stream), Pātiki Stream, and Tūpāpakurau Stream. Many of the catchments for these waterways were originally wetlands, comprised of the Arawhata, Paenoa, Pakau Hōkio, Kōpuapangopango, and Kaihuka Swamps.<sup>229</sup> The wetlands were an important part of the hydrological system, carrying out valuable functions such as trapping sediment, filtering out nutrients, removing contamination, maintaining water tables, and returning nitrogen to the atmosphere. The Arawhata Swamp, for example, abutted on to the south-western edge of Lake Horowhenua and acted as 'a filter for the lake'. The Arawhata Swamp, like many other wetlands, has since been drained and so water is no longer filtered as it once was before reaching the lake.<sup>230</sup>

The catchment area for surface runoff into Lake Horowhenua is 43.6 square kilometres. Groundwater accounts for around half of the inputs to Lake Horowhenua, and is also the main water source for the Arawhata Stream, the lake's largest surface water input. The Hōkio Stream is Lake Horowhenua's only outlet.<sup>231</sup> Waiwiri Stream similarly drains Lake Waiwiri (known as Lake Papaitonga).<sup>232</sup>

**(b) Muaūpoko customary use of rivers, streams, and wetlands**

The various streams and wetlands surrounding Lake Horowhenua and Lake Waiwiri were significant to Muaūpoko people because of their cultural and spiritual importance, their food resources, and their role in transportation and recreation. The Hōkio Stream runs from Lake Horowhenua to the sea. The Pātiki and Arawhata Streams run into Lake Horowhenua. The Waiwiri Stream runs between Lake Waiwiri and the Kapiti Coast.

Kaitiakitanga of the waterways and wetlands was imperative in the Muaūpoko world view. Hingaparae Gardiner (claimant for Wai 2140) told us: 'Because we are tangata whenua we are the kaitiaki . . . Our mana is directly connected to our waterways and our ability to carry out our role as kaitiaki. As tangata whenua and as kaitiaki we are responsible for ensuring the health of these waterways.'<sup>233</sup>

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228. Transcript 4.1.6, p 55

229. Manawatu-Wanganui Regional Council, Horowhenua Lake Trustees, Horowhenua District Council, and the Department of Conservation, *Lake Horowhenua and Hokio Stream Catchment Management Strategy* (Palmerston North: Manawatu-Wanganui Regional Council, 1998) (Jonathan Procter, appendices to evidence, various dates (doc C22(a)), pp 16–17)

230. William Taueki, speaking notes (doc A76), p 5

231. Manawatu-Wanganui Regional Council et al, *Lake Horowhenua and Hokio Stream* (Procter, appendixes to evidence (doc C22(a)), pp 14–17)

232. Hamer, "A Tangled Skein" (doc A150), p 10

233. Gardiner, brief of evidence (doc C8), p 4

Muaūpoko's kaitiakitanga role for their waterways is, as Moana Kupa put it, 'part of who we are as a people,' informing the claimants' sense of identity, connectedness, and world view.<sup>234</sup>

Bill Taueki explained that the values of kaitiakitanga governed customary use of resources:

We have always been the kaitiaki of our rohe. Each generation of Muaūpoko has been taught the importance of protecting, nurturing and caring for the environment. We have been taught about the link between us as a people and the whenua. We have been taught that the whenua is our lifeblood. It provides for us and sustains us and without it we would cease to exist. . . . When we were young, my whānau and I regularly played down in the streams. The Patiki Stream was on our block and there were other streams in the area that belonged to whānau. We took from the stream whatever we wanted to eat. We didn't have to get permission from anyone. We considered that it was ours. We learned this from our Dad. He always took whatever kai he wanted from the awa. . . . But he was very careful with the amount that he took. He would never take more than what was needed for the whānau and for koha to the other whanau. If my Dad or one of us ended up picking too much kai for ourselves, we would always distribute this to the other whānau so that it wouldn't go to waste. We were always very careful with our kapata because we knew how precious it was to all of our people. . . . One particular thing that I can remember is that if we gathered any kai in the wrong way, we were told it would come back to bite us. If we did it wrong we understood that misfortune could follow. This was an example of the kaitiakitanga that I was taught.<sup>235</sup>

Fred Hill spoke of how the dune lakes, the streams, and the Tasman Sea were connected through the migration and breeding cycles of tuna (eels) and inanga (whitebait), which utilise all of these water bodies at different times of the year.<sup>236</sup> In addition to tuna and inanga, claimants also named kōkopu and kōaro (native trout), pātiki (freshwater flounder), kōura (freshwater crayfish), and kākahi (freshwater mussels) as some of the main species harvested for kai from the streams.<sup>237</sup> With 20 eel weirs located along the Hōkio Stream, Lake Horowhenua's outlet was 'a scene of industrious and joyful activity'.<sup>238</sup> Armstrong, quoting Adkin's observations, noted that at one time at least 24 pā tuna (eel weirs) were located along the four kilometre length of the Hōkio Stream from Lake Horowhenua's outlet to the sea.<sup>239</sup>

234. Gardiner, brief of evidence (doc c8), p 4; Jillian Munro, brief of evidence, 11 November 2015 (doc c12), p 13; Moana Kupa, brief of evidence, 11 November 2015 (doc c7), p 4; Fredrick Hill, closing submissions, (paper 3.3.14), p 7

235. William Taueki, brief of evidence (doc c10), p 49

236. Fredrick Hill, closing submissions (paper 3.3.14), p 7

237. Carol Murray, brief of evidence, 11 November 2015 (doc c4), p 3; Ngapera Moore, brief of evidence, 11 November 2015 (doc c5), p 2

238. Adkin, *Horowhenua*, p 23 (Anne Hunt, 'The Legend of Lake Horowhenua . . . as Told by Anne Hunt', no date (doc A17), p [5])

239. D A Armstrong, 'Lake Horowhenua and the Hokio Stream, 1905 – c1990', May 2015 (doc A162), pp 8–9

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Many of the claimants described the tikanga associated with mahinga kai, especially in relation to the tuna heke (eel run). Eeling is a tradition which has continued until the present day, and many of the claimants could recall a time when tuna were much more plentiful than they are today. Noa Nicholson described her memories of the tuna heke:

Ka rere ngā tuna i te wā, ka rere ia ki te moana. Ka haere māua ko taku cousin, tuakana, cousin, māua tahi, rite tonu ō māua tau, ki te waha o te rere o te wai. Ka homai e ngā kuia he ripi, pērā te ripi, kia pupuri ana, ka kite koe i ngā tuna e rere haere mai ana ki ō waewae, ripia, ripia, pangaia ki te taha. Ko rātou kei te hīkoi haere i te taha ki te kohikohi i ā māua tuna ki roto i te, hei tohatoha ki te whānau me ngā hui hei whanaungatanga i ngā hapū, ngā hui. Anā ka pāwheratia, ngā taiepa kī tonu i te tuna. Kāore i pēnei, rua tekau, kāo, kapi katoa ngā taiepa i te tuna pāwhara, me ngā wheua kei te iriiri kia maroke. Ka kainga katoatia e mātou. Tunungia ana mā mātou ngā mokopuna pai hoki te ngaungau haere i ngā tuna wheua, reka. Me ngā tuna pāwhara ka tunutunungia i roto, i runga i ngā kongā o te ahi kapekape huri huri huri kia maoa, anā ka kainga. Pēneitia e rātou i ēnei āhuetanga.

Tuna would make their great migration to the sea in the season. I remember a particular girl cousin of mine, we were of similar age and we used to go to the outlet in the lake, and you can hear the old people calling. They used to give us these sticks for killing eels called ripi, and you could actually see the tuna coming down the river and you would see them coming towards your legs and you would gaff them with your ripi and flick them to the bank. The kuia and koroua would be walking up and down and grab them and put them in baskets, to take to our relations and through to the hapū, for gatherings. We would hang them up, the lines would be draped with eels. It wouldn't just be twenty odd, no, they would be hanging there in their hundreds, split open to dry, and the frames (bones) all drying too. We'd eat the whole thing. They would roast up the eel bones for the mokopuna, and we would love them, gnawing away on our eel bones, so sweet. The split eels, they would barbeque them on the embers of the fire, put in there and handled using sticks, turned this way, turned again that way, until cooked.<sup>240</sup>

Some of the briefs presented to us described the recreational use of the streams and wetlands. Charles Rudd recalled wandering around Lake Horowhenua and the Hōkio Stream as a child 'hunting, fishing, collecting and gathering resources, as well as riding waaka'.<sup>241</sup> He told us that bodies were washed in the Arawhata Stream, while the Arawhata puna (spring, well, or pool) was a source of drinking water, washing water, and a place to ferment corn.<sup>242</sup>

Hapeta Taueki wrote in his diary, extracts of which were provided to the Tribunal, that he remembered '[s]wimming in the clear crystal stream of Hokio. . . . an ideal

240. Transcript 4.1.6, pp 146–147, 151

241. Rudd, brief of evidence (doc C23), p 16

242. Rudd, brief of evidence (doc C23), p 7

spot for swimming.<sup>243</sup> Moana Kupa also spoke of her own childhood, spending ‘a lot of time playing near the Patiki Stream, fishing in the Hokio Stream and playing at the beach.’<sup>244</sup> Henry Williams noted the changes in the landscape over time:

The Patiki stream flows into Lake Horowhenua. It is called the Patiki stream because it was full of freshwater flounder. You could also get little fresh water crayfish in the stream. . . . There is no more flounder in the stream. The water in the stream is so polluted I doubt anything can live in there. . . . Patiki stream used to be about three metres wide and about a metre deep. It was another place we swam. It is so small now . . . it is no longer as deep or as wide as it used to be.<sup>245</sup>

Surrounding Lake Horowhenua and Waiwiri was low-lying forest and wetlands which provided the materials Muaūpoko used to build whare.<sup>246</sup> Susan Forbes’ archaeological study noted that Waiwiri and Lake Horowhenua were connected by wetland. Accounts in Native Land Court minute books suggest the land was uninhabited until drained.<sup>247</sup> There was an abundant supply of harakeke (flax) around Lake Horowhenua, and the variety of harakeke found around the lake was, as Vivienne Taueki put it, ‘famous up and down the country’ for weaving.<sup>248</sup> Ngapera Bella Moore (claimant for Wai 2054) remembered gathering harakeke from around Lake Horowhenua and watching her nannies dye it to make piupiu.<sup>249</sup>

### **(3) Dune lakes: Lakes Horowhenua, Waiwiri, and others**

#### **(a) The water system**

We were told that the landscape between the mountains and the sea was connected by ‘a much larger system involving water’: the springs, rivers, wetlands, underground aquifers, and dune lakes.<sup>250</sup> Lake Horowhenua (also known as Roto Horowhenua, Waipunahau, Punahau, and Te Takere Tangata o Punahau) is a central feature within this landscape.<sup>251</sup> To avoid confusion, we refer to the lake as Lake Horowhenua, except where another name was used in the evidence cited. We have noted that some claimants use ‘Punahau’ and other variants, as described in this chapter, and we do not consider one name to be more correct than others. That is a matter for the tribe to decide.

The ecosystem inhabited by Muaūpoko included many lakes situated within the sand dunes. The author G L Adkin, a local anthropologist with many Māori informants, estimated that Māori knew of 72 such lakes between the Manawatū and Ōtaki

243. Jack Hapeta Taueki, diary, 1981 (doc C24), p 4

244. Kupa, brief of evidence (doc C7), p 3

245. Williams, brief of evidence (doc C11), pp 8–9

246. Transcript 4.1.6, p 66

247. Forbes, *Te Waipunahau* (doc A160(j)), p 6

248. Moore, brief of evidence (doc C5), p 2; transcript 4.1.6, p 65

249. Moore, brief of evidence (doc C5), p 2

250. Vivienne Taueki, brief of evidence (doc B2), p 14

251. Transcript 4.1.6, pp 57, 104, 132

**EELING ON THE HŌKIO STREAM : CLAIMANT RECOLLECTIONS**

'As soon as dusk begins after a downpour of rain, the eels come down from the lake into Hokio stream. The eels travel at a prolific pace. I have seen as many as a hundred people down the mouth of the stream, gaffing eels tossing them on the shore, hundreds and hundreds of eels. There were so many eels it was impossible to catch the majority of them.'

Jack Hapeta Taueki, diary, 1981 (doc C24), p 5

'When the eels ran in March there were so many eels you could literally hear them. There were thousands of eels. They would leap out of the water. . . . We would catch the eels using two hinaki. They were about a meter long a meter wide and a meter deep. One would be in the water and when it filled up we would pull it out of the water and drop the other one in. . . . The run would last for around four weeks. At the end of the run there was a second run called the tunaheke where big eels would come down the stream. The big eels would get stranded on the beach and you could gather them from there. . . . After we caught the eels we would pawhara them. This is a process of drying the eels. Our kuia taught us how to do that too. After they were ready we would send the eels everywhere in New Zealand.'

Carol Murray, brief of evidence, 11 November 2015 (doc C4), p 2

'The eels would run the Hokio stream every March. I have fond memories of the eel runs. If we weren't camping out at the eel pa on the stream we would spend time at Ngatokowaru Marae. . . . The Hokio stream was once full of eel and whitebait and was found in abundance there. Today there is still whitebait and apparently there is still eel but I don't think there is.'

Henry Williams, brief of evidence, 11 November 2015 (doc C11), p 9

'I also remember the tunaheke and puhi [silver-bellied eel] run. This would be in February and March each year in the night time. I would be in charge of scooping the hole for the men to throw the tuna into. I would have to watch out or get hit by the flying tuna. The next day we would bleed, salt and dry the tuna. I remember our catch of really good sized tuna, not like what you get today.'

Uruorangi Paki, brief of evidence, 11 November 2015 (doc C3), p 4



‘During the eel run we would stay out at Hokio stream with our nannies. We would put hinaki in the stream. When the hinaki were full, we would put the eels caught in boxes with holes. Then we would take the eels to tangis and other gatherings.’

Ngapera Moore, brief of evidence, 11 November 2015 (doc C5), p 2

‘I think it is your cultural right to gather kai from your lakes, streams and sea . . . One of my favourite memories was camping with my Nannies out near the Lake. We would go camping in a tent for about three weeks when the eels were running and we used two hinaki to catch eels during the run. The hinaki was made out of wire but the some of the older people made them from harakeke. In the morning we would wake up and pawhara the eels.’

Moana Kupa, brief of evidence, 11 November 2015 (doc C7), p 4

Rivers before European settlement.<sup>252</sup> In addition to Lake Horowhenua, the largest of these dune lakes were Waiwiri (now called Papaitonga), Waitawa, Kopureherehe, and Rotopotakataka.<sup>253</sup> Vivienne Taueki described how these dune lakes, along with the surrounding wetland, are ‘part of a water system that includes surface and subterranean water.’<sup>254</sup> Arawhata Swamp, which abutted the south-western edge of Lake Horowhenua, was also part of this system, acting as ‘a filter for the lake.’<sup>255</sup> As we noted above, the wetland has since been drained, leaving only a stream in its place.<sup>256</sup>

Lake Horowhenua is said to be the largest dune lake in Aotearoa with a surface area of around 2.9 square kilometres. Water flowing into the lake from the surrounding catchment (around 43.6 square kilometres) by way of surface streams accounts for about half of Lake Horowhenua’s water, while the other half is fed by groundwater sourced from the Tararua Range.<sup>257</sup>

The Levin Fault, situated on Lake Horowhenua’s western shore in a north-east to south-west orientation, pushes groundwater closer to the surface. As we stated above, the only outflow from Lake Horowhenua is the Hōkio Stream.<sup>258</sup>

The dune lakes were biodiverse. A 2011 assessment of Lake Horowhenua water quality issues listed the following fish and other aquatic species as ‘likely to have been in the lake in the past’:

252. Hamer, “A Tangled Skein” (doc A150), p 8

253. Hamer, “A Tangled Skein” (doc A150), p 8

254. Vivienne Taueki, brief of evidence (doc B2), p 14

255. William Taueki, speaking notes (doc A76), p 5; Fredrick Hill, closing submissions (paper 3.3.14), p 8

256. William Taueki, speaking notes (doc A76), p 5

257. Procter, appendixes to evidence (doc C22(a)), pp 14–20

258. Procter, appendixes to evidence (doc C22(a)), pp 18–20

## 2.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

- eel (tuna) both short-finned (*Anguilla australis*) and long-finned (*A dieffenbachia*)
- flounder (pātiki)
- mullet (*Mugil cephalus*)
- inanga (whitebait, *Galaxias maculatus*) and the other galaxiids, the banded kōkopu and giant kōkopu
- smelt (*Retropinna retropinna*)
- common bully (*Gobiomorphus cotidianus*)
- kōura (freshwater crayfish), and
- kākahi (freshwater mussel, *Hydridella menziesii*).<sup>259</sup>

**(b) Lake Horowhenua**

Lake Horowhenua was central to Muaūpoko's mana, mauri, and identity and was a vital source of physical, cultural, and spiritual sustenance. David Armstrong quoted kaumātua Marokopa Wiremu-Matakatea, who said that 'if the lake was to die Muaupoko would cease to exist . . . it's who we are, it's our life blood.'<sup>260</sup> As Muaūpoko's 'patakanui' (giant store house), Lake Horowhenua was the centre of their manaakitanga.<sup>261</sup> Providing an 'abundance' of food, it sustained the tribe's 'mana as generous hosts for visitors passing through their territory'.<sup>262</sup> Generations upon generations of Muaūpoko sustained themselves on the resources available to them for their physical needs, but their ancestral lake also had a 'spiritual value'.<sup>263</sup> As Hoani Puihi summarised it in 1897: 'It is our butcher's shop, and [it] is our parent.'<sup>264</sup>

Some claimants told us that Lake Horowhenua was viewed by Muaūpoko as 'the eye of the fish'.<sup>265</sup> We were told that the waters of Lake Horowhenua were kept 'pristine'<sup>266</sup> by the cleansing 'ebb and flow of subterranean waters (such as the Punahau [spring]) and the tidal Hokio Stream'.<sup>267</sup>

**(c) Mahinga kai/fishing rights in the Horowhenua dune lakes**

We were told that the Horowhenua dune lakes were once revered for their plentiful food resources. In his evidence, Robert Warrington quoted Te Keepa Te Rangihwinui as having said that '[Lake Horowhenua] has always been the food supply of the people, from the time of my ancestors till now, and is highly prized'.<sup>268</sup> Armstrong wrote of the dune lakes and their surrounding streams and wetlands as a 'prolific and unrivalled source of mahinga kai, including waterfowl, pigeons, eels,

259. M M Gibb, *Lake Horowhenua Review: Assessment of Opportunities to Address Water Quality Issues in Lake Horowhenua* (Hamilton: National Institute of Water and Atmospheric Research, 2011), p 58

260. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 5

261. William Taueki, speaking notes (doc A76), p 6

262. Hunt, 'Legend of Taueki' (doc A18), p [2]

263. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p ix

264. AJHR, 1898, G-2A, p 98 (Luiten, 'Political Engagement' (doc A163), p 288)

265. Transcript 4.1.6, p 65

266. Hunt, 'Legend of Lake Horowhenua' (doc A17), p [3]

267. Hunt, 'Legend of Taueki' (doc A18), p [2]

268. AJHR, 1898, G-2A, p 147 (Robert Warrington, brief of evidence, 16 December 2015 (doc C18), p 4)



patiki, koura, freshwater mussels, inanga and shell-fish.<sup>269</sup> He noted a 1907 meeting between a lake domain board representative and Muaūpoko kaumātua, including Wirihana Hunia, at which tribal leaders described their traditional fisheries:

from December to April they fish for eel – of which there are three kinds in the lake at different places – some are caught with hook, some with the bob, some are speared . . . some are caught when the water is smooth and calm – they lie on top of the water. Whitebait is caught at this season too. From April to August flounders are in season, and from August to December [inanga]. The Natives say that at one time there were a large number of mountain trout [kokopu] – a fish indigenous to the country . . .<sup>270</sup>

In our hearings, claimants referred to Lake Horowhenua as ‘a kai basket’ which Muaūpoko valued as a source of eels, flounder, kākahi, and other food (such as whitebait and kōura).<sup>271</sup> Bill Taueki said that the main species of tuna (eels) caught would be the silver bellied eels.<sup>272</sup> Kararaina Murray spoke about her early memories of fishing on Lake Horowhenua:

The first time I went eeling on the lake was in a canoe called the Hamaria. As the eels were being thrown into the canoe I kept moving further away from them because I was scared the eels were going to bite me. Eventually I ran out of space to move to because the canoe was so full with eels.<sup>273</sup>

Hamer, quoting from a Levin Borough Council report, stated that eels, watercress, and kōura were harvested from Lake Horowhenua for eating.<sup>274</sup> ‘He Ritenga Whakatikatika: Lake Horowhenua & Hokio Stream’ listed important fisheries ‘that sustained generations of Muaūpoko whānau’ as ‘kōura (freshwater crayfish), pātiki (flounder), tuna (eel), kākahi (freshwater mussel), inanga (adult whitebait), and ngaore (immature whitebait)’.<sup>275</sup>

**(d) Other important uses of the Horowhenua dune lakes and surrounding areas**

Muaūpoko once used Lake Horowhenua for swimming (for recreation, accessing kaimoana, and for healing purposes). Vivienne Taueki said that the waters of Lake Horowhenua were known for their ‘healing qualities’.<sup>276</sup> Kararaina Murray remembered Lake Horowhenua as a ‘puna waiora’ (a pool with health-restoring qualities)

269. Armstrong ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 8

270. ‘Notes on the question of allowing Europeans to fish in the Horowhenua Lake, [1907]’ (Armstrong ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 9). See also Paul Hamer for a discussion of who was present at this meeting: Hamer, ‘“A Tangled Skein”’ (doc A150), p 55.

271. Transcript 4.1.6, p 64; Hunt, ‘Legend of Taueki’ (doc A18), p [2]; William Taueki, brief of evidence (doc C10), pp 33, 45

272. William Taueki, brief of evidence (doc C10), p 33

273. Murray, brief of evidence (doc C4), p 1

274. Hamer, ‘“A Tangled Skein”’ (doc A150), p 249

275. Lake Horowhenua and Hōkio Stream Working Party, ‘He Ritenga Whakatikatika: Lake Horowhenua & Hokio Stream’, 2013 (doc B2(o)), pp 9–10

276. Transcript 4.1.6, p 65

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for adults and children alike, and recalled ‘countless hours’ spent swimming in the lake.<sup>277</sup> Uruorangi Paki recalled collecting materials for weaving and rongoā from the bush around Lake Waiwiri.<sup>278</sup> Jonathan Procter wrote that as many as 20 waka mooring sites were located around Lake Horowhenua, indicating how extensively it was used by the people.<sup>279</sup>

**(e) Islands**

Within Lake Horowhenua and surrounding lakes were a number of artificial islands (see map 2.3), which Muaūpoko utilised and maintained. The islands provided places of refuge ‘where their women and children could shelter in times of strife.’ The islands of Lake Horowhenua were considered all but impregnable to enemies.<sup>280</sup> Ada Tatana noted that no one lived permanently on the islands; it was instead a place where people camped to set their eel nets.<sup>281</sup> Bill Taueki also referred to the islands on Lake Horowhenua as ‘fishing islands’ which were later modified.<sup>282</sup>

The names of the artificial islands were:

- ▶ On Lake Horowhenua: Karapu, Namu-iti (also referred to by claimants as Ngamu-iti and Manu-iti), Waikiekie, Roha-a-te-Kawau, Waipata, Puke-iti, and Mangaroa.<sup>283</sup>
- ▶ On Waiwiri: Papawharangi (or Ngarangara).<sup>284</sup>

Most evidence refers to seven islands on Lake Horowhenua, whereas Armstrong listed only six. He excluded ‘Mangaroa’ which Marokopa Matakatea told us was ‘the oldest island’ originating from ‘the period of Māmoe.’<sup>285</sup> Adkin referred to the ‘pa at Mangaroa’ as a ‘pseudo-island’ which was built in swamp. The island had no name and was said to have pre-dated Muaūpoko occupation but its construction was a prototype for the other islands on Lake Horowhenua.<sup>286</sup>

Adkin described the construction and maintenance of the artificial islands, consisting of a foundation of tree trunks and branches, filled in with earth, fibrous vegetation, and stones, and then topped off with midden refuse: ashes, broken shells, and earth. Some of the later islands were guarded by underwater stakes.<sup>287</sup>

**(f) Clearings**

In addition to the islands on the lake, Muaūpoko also made use of clearings in the dense forest that surrounded the Horowhenua dune lakes. Some of these clearings were natural, others were artificial. Like the islands, the clearings could be

277. Murray, brief of evidence (doc C4), p 2

278. Uruorangi Paki, brief of evidence, 11 November 2015 (doc C3), p 4

279. Procter, summary (doc A183(a)), p [19]

280. Hunt, ‘Legend of Taueki’ (doc A18), p [2]

281. Fredrick Hill, closing submissions (paper 3.3.14), p 15

282. Transcript 4.1.6, p 9

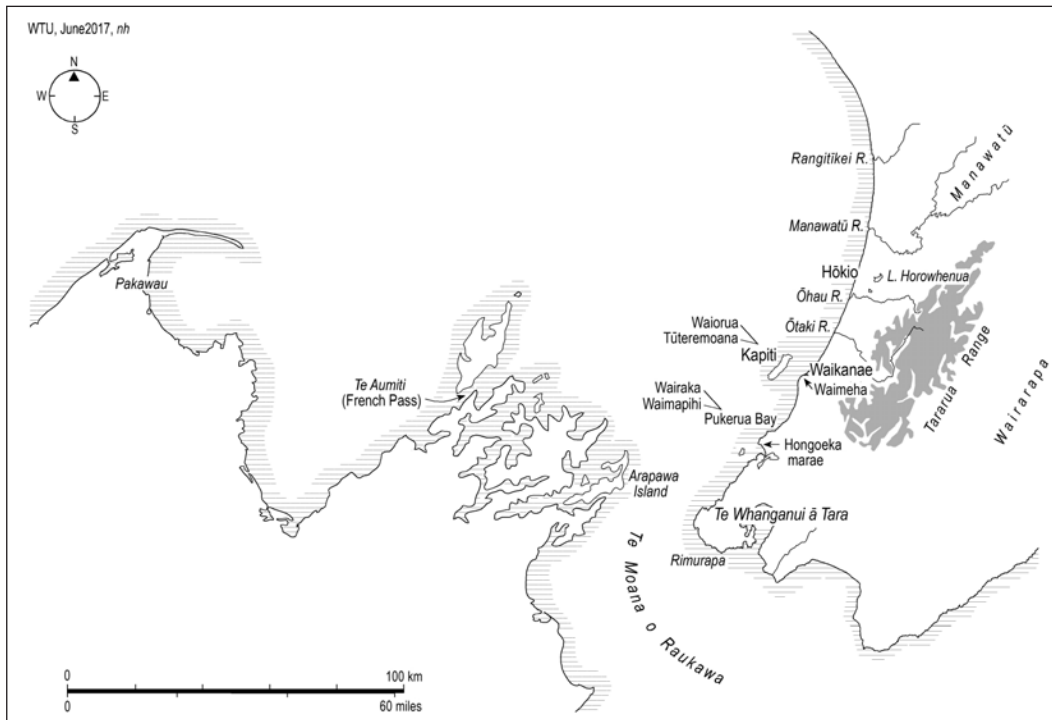
283. William Taueki, speaking notes (doc A76), pp 3–4; transcript 4.1.6, p 131

284. Note: A second, natural island by the name of Papaitonga was situated in Lake Waiwiri. See Adkin, *Horowhenua*, p 32; William Taueki, speaking notes (doc A76), p 1.

285. Transcript 4.1.6, p 131

286. Adkin, *Horowhenua*, pp 32–33

287. Adkin, *Horowhenua*, p 33



Map 2.1: Muaūpoko's claimed 'sphere of influence'

used as places of refuge in times of danger. Such was the case during the time of Te Rauparaha when the tribe was able to 'avoid annihilation' by taking shelter in their forest and its hidden clearings. Among the clearings used by Muaūpoko at this time were Weraroa, Kawiu, Makomako, and Te Kapa.<sup>288</sup> Bill Taueki was not aware of when they were made, but suspected the clearings would have taken time to become established: 'We suspect that it would have taken a long time for our people to make the clearings, by removing the entire bush in the area, and then allowing the bush to regrow to provide this camouflage system.'<sup>289</sup>

#### (g) Settlements

Muaūpoko had a number of settlements around Lake Horowhenua (see map 2.2). Taueki's pā, Te Pā o Pōtangotango, was situated right at the lakeside.<sup>290</sup> 'Across the lowlands from Te Pa Potangotango' was Te Kapa, where Ihaia Taueki (Taueki's son) had his kāinga.<sup>291</sup> 'Across the lake,' we were told, was the pā generally known as Te Rae o Te Karaka. Jonathan Procter gave evidence on Te Rae o te Karaka Pā:

The extensive and fully palisaded Rae-o-te-Karaka pa, on the western shore of the lake, was the main centre of Muaupoko occupation in the district, and probably the

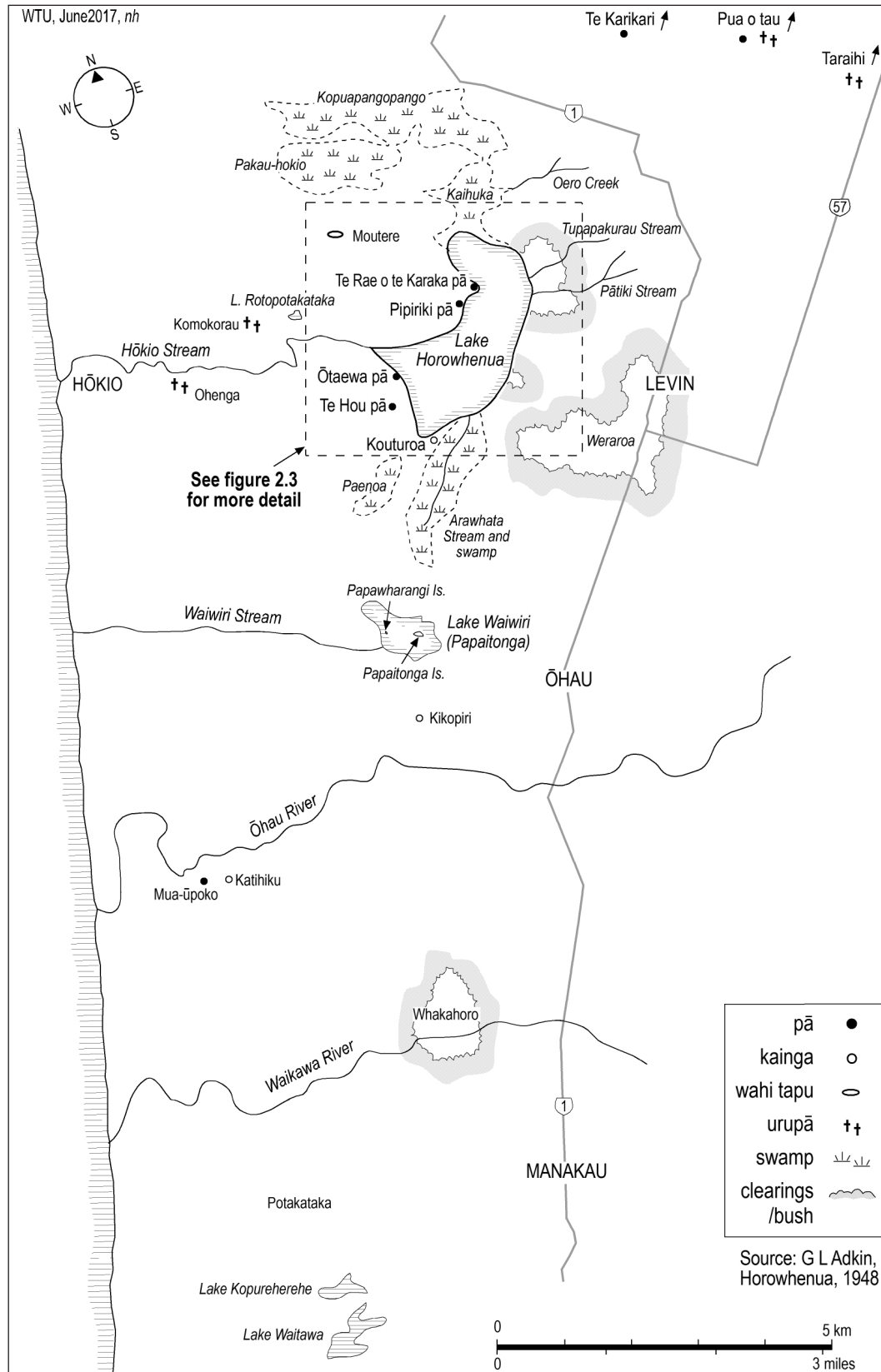
288. William Taueki, speaking notes (doc A76), p7; Vivienne Taueki, brief of evidence (doc B2), p5

289. Transcript 4.1.12, p531

290. Vivienne Taueki, brief of evidence (doc B2), p3

291. Vivienne Taueki, brief of evidence (doc B2), p3

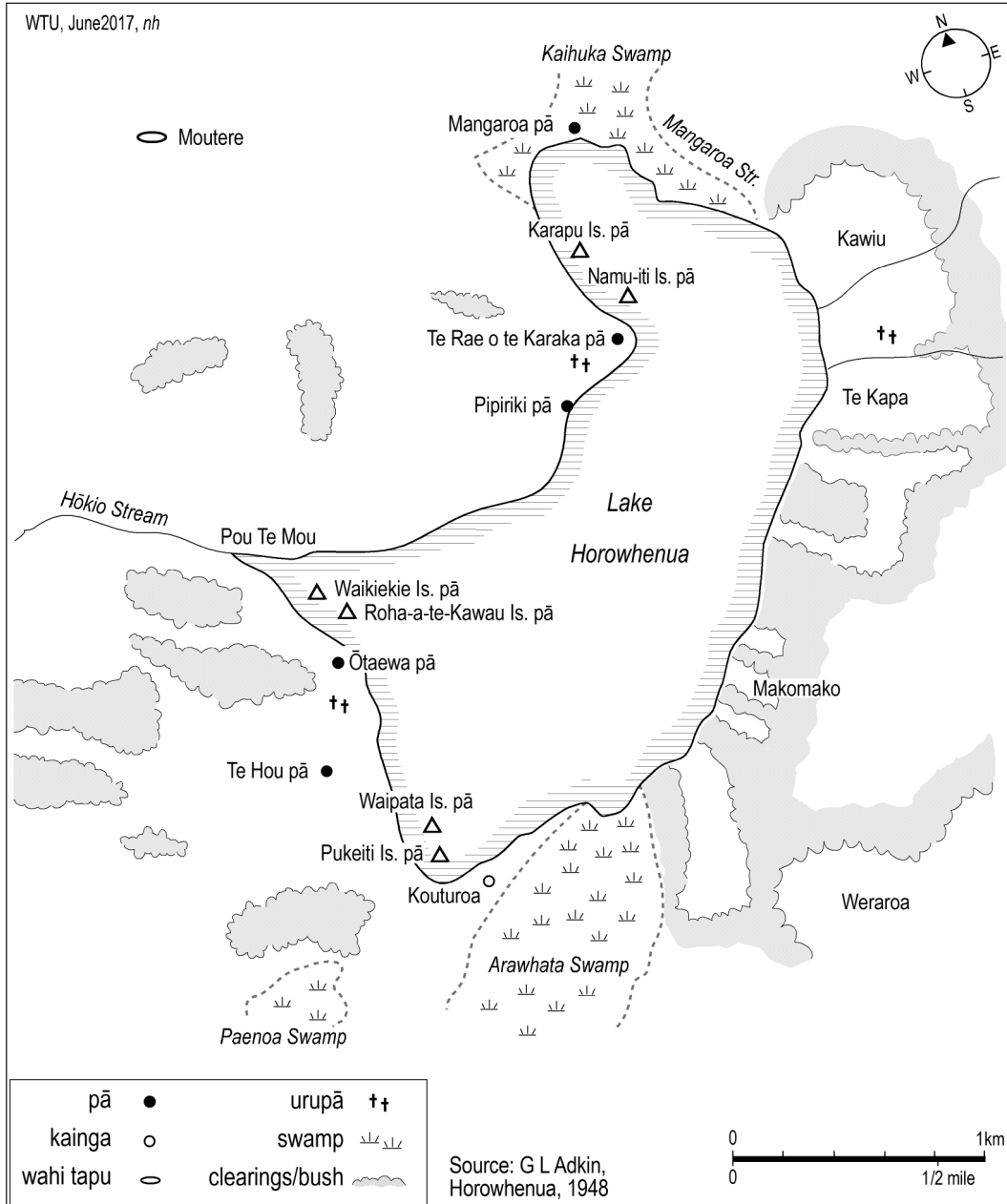
2.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT



Map 2.2: Some places of customary interest to Muaūpoko

MUAŪPOKO

2.3.2



Map 2.3: Figure showing detail from map 2.2

largest pā in the rohe. In the 1830s and 1840s around 200 people resided in 50 whare under the chiefs Taueki, Himiona, Te Hauo and Te Rangirurupuni. The pā contained a meeting house named Te Rongo-kahu and whare wananga named Te Apa-Tohunga. Palisading and fortifications associated with the pā were still visible in the 1870s.<sup>292</sup>

292. Procter, summary (doc A183(a)), p [19]

## 2.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Bill Taueki called this place ‘Te Rae o Te Kakara’ – a spiritual place of learning which, he said, had a connection with the Ngāti Maniapoto wānanga, Te Miringa Te Kakara.<sup>293</sup> Kohuturoa, another papakāinga of Muaūpoko, was situated at the far end of Lake Horowhenua from Te Pā o Pōtangotango.<sup>294</sup>

Based on interviews with Muaūpoko authorities in the 1990s, Susan Forbes stated that Muaūpoko have always understood ‘that their lake – Waipunahau – is fed by the mountain water Hapuakorari – and [Waipunahau] in turn nurtures and feeds its “daughter lake” – Waiwiri.’<sup>295</sup> Today, Waiwiri is referred to as Lake Papaitonga, but Bill Taueki informed us that the name ‘Papaitonga’ was originally the name of a whare located on one of the islands on Waiwiri: ‘Lake Papaitonga was originally called Waiwiri. It had an island that was called Ngarangara. On Ngarangara there was a whare and it was called Papaitonga. At some point, the lake was named after the whare and its original name no longer used.’<sup>296</sup>

**(4) Takutaimoana – the coast**

Before and after 1840, Muaūpoko hapū occupied the coastal areas of their rohe. The foreshore, seabed, and Tasman Sea were important to Muaūpoko for harvesting kaimoana (seafood), especially shellfish.<sup>297</sup>

We were told little about sites of occupation on the coast. Rod McDonald, in his book *Te Hekenga: Reminiscences of Early Horowhenua*, stated that Muaūpoko hapū had occupied the coastal areas until at least the battle of Waiorua, after which they ‘abandoned the open coastal country altogether.’<sup>298</sup> The coast would certainly have been used as a pathway between coastal settlements, as it was used later by successive migrations of Ngāti Raukawa.<sup>299</sup> Edward Karaitiana gave evidence about his ancestor Te Ua Te Awhā’s kāinga on the coast north of the Hōkio:

We connect to Ua Mai Rangi on the coast north of Hōkio, where it is said that our tipuna Te Ua Te Awhā had a kainga. He married Hine i Te Aro Rangi and they begat Te Hua Ariki of Ngati Hine, whose daughter Tapu, as said earlier is interred at Moutere, between Ua Mai Rangi and Rae o Te Karaka pā by the lake Punahau.<sup>300</sup>

Claimants told us that the moana was plentiful with kaimoana.<sup>301</sup> Muaūpoko harvested and ate shellfish from the beach such as pipi and two species of toheroa

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293. Transcript 4.1.12, p 560

294. Transcript 4.1.6, p 65

295. Forbes, *Te Waipunahau* (doc A160(j)), p 6

296. William Taueki, speaking notes (doc A76), pp 1–2

297. Emma Newcombe, Moira Poutama, Craig Allen, Huhana Smith, Dana Clark, Javier Atalah, Aroha Spinks, Joanne Ellis, and Jim Sinner, *Kaimoana on Beaches from Hōkio to Ōtaki, Horowhenua* (Palmerston North: Manaaki Taha Moana Research Team, Massey University, 2014)

298. O’Donnell, *Te Hekenga*, p 13

299. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 37

300. Karaitiana, brief of evidence (doc C20), p 21

301. Moore, brief of evidence (doc C5), p 2



(or tohemanga).<sup>302</sup> Fish species included kahawai, snapper, and mullet.<sup>303</sup> Middens behind the dunes have been found, containing the remains of kaimoana such as tuatua, pipi, toheroa, and various species of fish.<sup>304</sup> Uruorangi Paki spoke of travelling to Paekākāriki on the train to collect kina, paua, and kuku.<sup>305</sup> Kararaina Wiremu Murray (claimant for Wai 2173) could remember when it was easy to access these resources:

I think about how much we had back then – eels, whitebait, freshwater flounder, freshwater crayfish, pipi, toheroa, kakahi. It was all there and so easy to get. We had everything we needed. Today our moko don't eat that kai. Our fishery is gone. We depended on it for survival but today it is gone.<sup>306</sup>

Charles Rudd also provided evidence about gathering and drying out tuna, shark, pipi, and karengo for eating.<sup>307</sup> Uruorangi Paki recalled planting in the garden and collecting kaimoana according to the moon cycle.<sup>308</sup> She commented on the strong-smelling food which her nanny preserved: 'the dried sharks, the pawhara, tuna, karengo, dried pipi, karaka berry and fermented corn.'<sup>309</sup> Te Keepa told the Native Land Court in 1873 that the area round the mouth of the Hōkio Stream was called Tāwhitikurī, which was a place where pipi were gathered, and the beach was named Ōkatia.<sup>310</sup>

On its seaward side Lake Horowhenua was overlooked by the 'two hill guardians of Muaūpoko: Komakarau [or Komakorau] and Parikaranga.'<sup>311</sup> These two sand hills stood on either side of the Hōkio Stream. Bill Taueki told us that the sand hill guardians were able to determine whether people coming up the stream were friend or foe.<sup>312</sup> Uruorangi Paki told us that Moutere was another shifting sand dune which was used as an urupā; Charles Rudd and Edward Karaitiana also referred to Moutere in their evidence.<sup>313</sup> Peter Huria told us that all of the dunes were named by Muaūpoko.<sup>314</sup> Eugene Henare told us that Muaūpoko have been kaitiaki of the beach and the Hōkio dune systems for 'generations and generations.' The dune systems, he told us, were the site of 'native flora and fauna, including our toheroa and pingao.'<sup>315</sup>

The connection between these two species – the toheroa or tohemanga (clam) and the pīngao (native sand sedge) – was emphasised by several claimants. Vivienne

302. William Taueki, brief of evidence (doc C10), p 32

303. William Taueki, brief of evidence (doc C10), p 32

304. Peter Huria, brief of evidence, no date (doc B11), p 3

305. Paki, brief of evidence (doc C3), p 5

306. Murray, brief of evidence (doc C4), p 3

307. Rudd, brief of evidence (doc C23), p 8

308. Paki, brief of evidence (doc C3), p 4

309. Paki, brief of evidence (doc C3), p 4

310. D Armstrong, 'Hokio Native Township', no date (doc A154), p 1

311. William Taueki, speaking notes (doc A76), p 5

312. Transcript 4.1.6, p 10

313. Paki, brief of evidence (doc C3), pp 7–8; Rudd, brief of evidence (doc C23), p 6; Edward Karaitiana, presentation summary of brief of evidence, 27 November 2015 (doc C20(b)), p 4

314. Huria, brief of evidence (doc B11), p 4

315. Henare, brief of evidence (doc B6), p 5

## 2.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Taueki told us that toheroa spat relied on pīngao ‘as a place to rest while maturing.’<sup>316</sup> Uruorangi Paki recounted that her nan told her as a child that the eggs of the tohemanga would be ‘blown up onto the blades of the pīngao’ to mature before they were blown back down to the sea shore where their shells developed.<sup>317</sup>

Many claimants told us of the toheroa or tohemanga and its importance to Muaūpoko. Noa Nicholson told us that ‘tohemanga’ is the ‘ingoa tawhito [traditional name]’ for toheroa.<sup>318</sup> In Charles Rudd’s view, tohemanga and toheroa are different species: the tohemanga is identifiable because it has seven or eight stars on its shell.<sup>319</sup> Jillian Munro (claimant for Wai 2046) told us that toheroa were huge and were easier than pipi to dig for because of their size.<sup>320</sup> She described harvesting toheroa: ‘When we harvested the toheroa we had to be quiet. We would dig for toheroa with our feet, we loved doing that as kids, spotting their whereabouts and catching them before they retreated deeper into the sand.’<sup>321</sup>

The beach would have also been important as a route for travelling up and down the coast. In 1929, Rod McDonald reflected on a time before the railway. ‘[T]he beach,’ he said, ‘was the country’s “Main Trunk Line” down which . . . all the traffic between north and south flowed.’<sup>322</sup> Muaūpoko, no doubt, would have used the beach to travel the length of their traditional rohe.

**(5) Kapiti Island**

The island of Kapiti lies off the west coast of the lower North Island opposite Paraparaumu. It is a rectangular island of 2,000 hectares with sheer cliffs on its western side.<sup>323</sup>

Prior to Te Rauparaha’s arrival, Kapiti was a site of occupation, as well as a ‘stop-off point’ for Muaūpoko between the North and South Islands, with cultural, historical, and spiritual significance.<sup>324</sup> Kapiti was also abundant with food resources. Louis Chase described Kapiti like this:

The coastline of Kapiti abounded with seafood, and its bush provided a plentiful store of native birds. Natural springs and streams ensured an ample supply of fresh water, and the fertile soil had the capacity to produce good crops. The western side of the island had sheer cliffs which restricted waka landings, and made the monitoring of accessible shores easy for the defender who could utilise the high peaks to monitor the distance for any threats.<sup>325</sup>

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316. Vivienne Taueki, brief of evidence (doc B2), p 32

317. Transcript 4.1.12, p 265

318. Transcript 4.1.6, pp 147, 151

319. Rudd, brief of evidence (doc C23), p 8

320. Munro, brief of evidence (doc C12), p 2

321. Munro, brief of evidence (doc C12), p 2

322. O’Donnell, *Te Hekenga*, p 3

323. Chris Maclean, ‘Wellington Places – Kapiti and Mana Islands’, in *Te Ara – the Encyclopedia of New Zealand*, Ministry for Culture and Heritage, <http://www.teara.govt.nz/en/wellington-places/page-17>, last modified 1 March 2016

324. Transcript 4.1.6, p 47

325. Chase, ‘Muaupoko Oral Evidence and Traditional History Report’ (doc A160), p 63



Uruorangi Paki gave evidence of Muaūpoko's occupation of Kapiti prior to the invasion of Te Rauparaha, stating that 'we once had Kapiti (Te Waewae o Kapiti it was called), we lost that through . . . firearms'.<sup>326</sup> Jonathan Procter also gave evidence of Muaūpoko occupation on Kapiti Island by showing sites (such as urupā) mapped on Kapiti Island which, in his words, are 'quite distinct from the Ngāti Toa sites'.<sup>327</sup> Procter stated that Te Hakeke, father of Kāwana Hunia, later led an attack on Kapiti Island in order to reclaim it. He believed Te Hakeke's motivation for trying to reclaim Kapiti Island was 'to ensure Muaūpoko retained its rohe and its significant sites on Kapiti'.<sup>328</sup>

Edward Karaitiana gave the full name of Kapiti as 'Te Waewae Kapiti o Tara rāua ko Rangitāne' (where the boundaries of Tara and Rangitāne join).<sup>329</sup> However, many others argued that the proper name for Kapiti should be 'Te Waewae Kapiti o Tara rāua ko Tautoki' instead.<sup>330</sup> Marokopa Matakatea (claimant for Wai 52) reasoned that 'back in those days it's all about ranking and the nephew won't stand with a father, and it's an identity of those two half-brothers'.<sup>331</sup> The 'two half-brothers' Mr Matakatea is referring to here are Taraika and Tautoki, the sons of Whātonga, who, he said, are more appropriately placed by each other, being of the same generation, than Taraika and Rangitāne (Tautoki's son). Sian Montgomery-Neutze put it this way:

Te Waewae Kapiti o Tara rāua ko Tautoki. E ai ki ētahi atu ko Tara rāua ko Rangitāne, heoi ki a mātou ko Tara rāua ko Tautoki. Arā, te wāhi tērā, te wāhi ka āpiti rāua tahi, aua iwi e rua.<sup>332</sup>

Some say that name is 'Te Waewae Kapiti o Tara rāua ko Rangitāne', but to us it is 'the boundary where the feet of the half-brothers Tara and Tautoki meet'.<sup>333</sup>

The highest peak of Kapiti is named after the Ngāi Tara ancestor Tūteremoana.<sup>334</sup> Tūteremoana was a descendant of Taraika, several generations below on the whakapapa chart, and is described as 'the tino ariki of Ngāi Tara, Rangitāne and Ngāti Awanuiarangi'.<sup>335</sup> According to Chase,

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326. Transcript 4.1.6, p 165

327. Transcript 4.1.12, p 865

328. Jonathan Procter, brief of evidence, 12 November 2015 (doc c22), p 2

329. Karaitiana, brief of evidence (doc c20), p 9; Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 62

330. Transcript 4.1.6, pp 103, 110, 112

331. Transcript 4.1.6, p 103

332. Transcript 4.1.6, p 110

333. Transcript 4.1.6, pp 112–113

334. Transcript 4.1.6, pp 57, 110, 113

335. Karaitiana, brief of evidence (doc c20), p 9; Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 15

2.3.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

his domain ranged from the Hawkes Bay, Manawatu, Wairarapa, Kapiti and Wellington regions. Whilst living at Heretaunga (Hawkes Bay) intrusions from the Ngati Kahungunu forced Tūteremoana south towards Wellington and Kapiti.<sup>336</sup>

Tūteremoana resided on Kapiti Island for a period, and is believed to be buried at the northern end of Kapiti.<sup>337</sup>

Tūteremoana's wife, Wharekohu, was a descendant of Tautoki, Taraika's half brother. The burial cave at the southern side of Kapiti, 'Te Ana-o-Wharekohu', is where many Ngāi Tara and Muaūpoko ancestors are interred, including Wharekohu, after whom the southern side of the island is named.<sup>338</sup> The ancient urupā of Ngāi Tara and Rangitāne and kōiwi tipuna remain, and so, too, does the strong sense of connection. Bill Taueki, Edward Karaitiana, and Noa Nicholson all spoke of the resting place of their ancestors Wharekohu and Tūteremoana on Kapiti Island.<sup>339</sup>

In his oral and traditional history report for Muaūpoko, Louis Chase listed other important Ngāi Tara rangatira who were buried at Kapiti:

Whatonga and his wife Hotuwaipara and their son Tara-ika all died at Kapiti and are buried in the cave of Ngai Tara, with Turia the grandfather of Tuteremoana. Tuhoto-ariki (brother of Turia and great grandson of Whatonga) was appointed and designated to the whare-wananga, and was taught all traditional knowledge of the kauae-runga and the kauae-raro (knowledge relating to heaven and earth). Tuhoto-ariki was another important tohunga of Ngai Tara who is also buried on Kapiti.<sup>340</sup>

The spiritual significance of Kapiti to the iwi was stressed by many others who spoke at our hearings, including Deanna Paki and Eugene Henare.<sup>341</sup> Deanna Paki, for example, spoke about a spiritual pathway known as 'Arakōwhai' which starts at Tūteremoana on Kapiti Island.<sup>342</sup>

**2.3.3 Urupā and wāhi tapu**

Muaūpoko have many urupā and wāhi tapu. Vivenne Taueki explained that some of those wāhi tapu relate to individuals, whānau, and hapū, while others relate to the wider iwi.<sup>343</sup>

Over time, Muaūpoko's dead have been buried in various places; all are considered to be wāhi tapu. Urupā around Horowhenua included Otaewa, Tireo,

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336. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 15

337. Karaitiana, brief of evidence (doc c20), p 9

338. Karaitiana, brief of evidence (doc c20), p 9; transcript 4.1.6, p 57

339. Karaitiana, brief of evidence (doc c20), p 9; transcript 4.1.6, pp 10, 155, 158

340. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 63

341. Transcript 4.1.6, pp 28, 138

342. Transcript 4.1.6, p 138

343. Transcript 4.1.11, p 331

Pua-o-Tau, Taraihi, Kohuturoa, Komakorau (or Komokorau), Ohenga, Te Kapa, and Te Rae o Te Karaka.<sup>344</sup>

Several claimants described the importance of the Hōkio dune system as a wāhi tapu where Muaūpoko of Lake Horowhenua buried their dead prior to the advent of Christianity.<sup>345</sup> Komokorau (or Komakorau) was an ancient dune burial site,<sup>346</sup> which Stirling's research indicated was the main Muaūpoko urupā.<sup>347</sup> Dr Procter suggested that it was still being used 'until at least the 1920s',<sup>348</sup> although Uruorangi Paki told us that 'Tanguru was the last person known to have been buried at Komokorau.'<sup>349</sup> Inia Te Maraki told the Native Land Court in 1873 that Ohenga was on the south side of the Hōkio Stream, inland near Okotore (a place where ducks were snared).<sup>350</sup> This was only a 'short distance from the coast', and 'Te Hakeke and his wife Kaewa were buried there.'<sup>351</sup> Peter Huria told us that the 'continual protection of the dunes system' is important because 'the Hokio dune system inland is an ancient urupa . . . all the dunes have been named by our ancestors.'<sup>352</sup> The site Whanau-pani was, according to Peter Huria, a place 'where the dead were mourned prior to interment.'<sup>353</sup>

Vivienne Taueki told us of the interment of tūpāpaku (the bodies of the dead) in the dunes:

The dunes are a waahi tapu. Before Christianity and missionaries brought the concept of burial in European-type graveyards with marked graves and coffins, our dead were interred in the dunes. The dunes moved with an ebb and flow, and eventually our dead became part of the dunes. This is as it should be for the dunes have a whakapapa superior to ours—Papatuanuku, Tangaroa, Tawhirimatea. These elements operate upon the tupapaku to make it one with the dunes. Movement is an essential part of the process.<sup>354</sup>

Uruorangi Paki noted that much of the area between Lake Horowhenua and the sea, which was once shifting sand dunes, has now been planted with grass, manuka, and willow, stopping the movement of the dunes.<sup>355</sup> Vivienne Taueki said 'any effort

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344. J Procter, D Armstrong, M Moses, and R Warrington, 'Muaupoko Sites of Significance Map Book', 2015 (doc A183), pp 32–38

345. Vivienne Taueki, brief of evidence (doc B2), p 13; Huria, brief of evidence (doc B11), p 3

346. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), p 58; Paki, brief of evidence (doc C3), p 7

347. Stirling, 'Muaupoko Customary Interests' (doc A182), p 175

348. Procter, summary (doc A183(a)), p [20]

349. Paki, brief of evidence (doc C3), p 8

350. Stirling, 'Muaupoko Customary Interests' (doc A182), p 271. For further discussion of Ohenga (also spelled Ohenga), see section 5.4.5.

351. Procter, summary (doc A183(a)), p [20]

352. Huria, brief of evidence (doc B11), p 3

353. Chase, 'Muaupoko Oral Evidence and Traditional History Report' (doc A160), pp 58, 64

354. Vivienne Taueki, brief of evidence (doc B2), p 13

355. Paki, brief of evidence (doc C3), p 8

2.3.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

to stabilize or stop the movement of the dunes simply goes against the order of things and flies in the face of their function.<sup>356</sup>

Christian missionaries brought with them ‘the concept of burial in European-type graveyards with marked graves and coffins.’<sup>357</sup> A tradition developed in which tūpāpaku were rowed across the lake from Te Pā o Pōtangotango to ‘the old urupa’ at Te Rae o Te Karaka on the edge of Lake Horowhenua.<sup>358</sup> The *Hamaria* waka was used for this purpose. Some claimants could still recall the use of the *Hamaria* waka in their youth, which all the families on the lake shared.<sup>359</sup>

According to Bill Taueki, ‘the last tupapaku rowed across for burial at Te Rae was Te One Hopa Heremaia, and Ihaia Taueki is also buried there.’<sup>360</sup>

Te Kekeke would row tupapaku from Kohutoroa marae across to Te Rae o Te Kakara urupa. The waka that carried the dead was known as Hamaria. Up until the 1920s this urupa was used by our people here at the Lake.

Bill Taueki told us some of the old pā sites, such as Te Pā o Pōtangotango, are now used as urupā, while others, such as Pā Mangaroa, have ceased to exist.<sup>361</sup> He described a transition in Muaūpoko’s practice of burying their dead:

Now our dead are buried on this side of the Lake at Te Kapa. In the Maori Land Court records, the urupa is called the Taueki urupa. We hold our tangi for the dead at Kawiu. Part of the kawa of this house is that the dead are not brought inside.<sup>362</sup>

As well as transporting tūpāpaku across the lake, the *Hamaria* was used for recreation and for food gathering.<sup>363</sup> Vera Sciascia told us about the whakanoa process used by Muaūpoko after transporting tūpāpaku to the urupā at Ōtaewa:

they used to row, only the men. They put the waka back in Punahau and then turn it upside down, shake it around, karakia, do a haka on top of it and then turned it back over and then they would go and catch eels.<sup>364</sup>

Wāhi tapu listed in the MTA map-book include Ngā Whatu, Pōtangotango (a birth place), Te Pito o Torea, Te Uira Hikaotaota, Karikari (a peace-making site), Pou [o] Te Mou, and Tangiwai.<sup>365</sup>

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356. Vivienne Taueki, brief of evidence (doc B2), p 13

357. Vivienne Taueki, brief of evidence (doc B2), p 13

358. Transcript 4.1.12, p 528; William Taueki, brief of evidence (doc C10), pp 68–69

359. Transcript 4.1.12, pp 528, 698, 701, 723

360. William Taueki, brief of evidence (doc C10), pp 10, 69

361. William Taueki, brief of evidence (doc C10), pp 9–10

362. William Taueki, brief of evidence (doc C10), p 10

363. Transcript 4.1.11, p 662; transcript 4.1.12, p 701

364. Transcript 4.1.6, p 125

365. Procter et al, ‘Muaupoko Sites of Significance Mapbook’ (doc A183), pp 32–38

Wāhi tapu at Kapiti include the caves at Kapiti Island where Whātonga, Hotuwaipara, and their son Taraika are buried, alongside Turia (the grandfather of Tūteremoana).<sup>366</sup> As noted above, Jonathan Procter also gave evidence on the many Muaūpoko and Ngāi Tara wāhi tapu on Kapiti Island. These, Procter told us, ‘are quite distinct from Ngāti Toa sites’, and are mostly in the southern portion of the island, surrounding Wharekohu Bay.<sup>367</sup>

We turn next to the period from 1819 to 1840, when the traditional world of Muaūpoko and the other iwi of Te Ūpoko o Te Ika was shaken to its foundations by the arrival of migrating iwi from the north.

## 2.4 MUAŪPOKO HISTORIES, 1819–40

### 2.4.1 Introduction

The previous two sections of this chapter focused on who Muaūpoko told us they are, including their whakapapa, narratives of origin and arrival, and relationships with other iwi. We outlined Muaūpoko’s customary usage of resources in their rohe, places of significance to them, and their spiritual connection to these places. This section focuses primarily on the Muaūpoko narratives of their own history between 1819 and 1840: from their first encounters with muskets, to the signing of Te Tiriti/ the Treaty of Waitangi. We draw on the stories provided to us in casebook research, written and oral evidence, and other written sources.

As noted above, Muaūpoko oral histories and perspectives were presented to the Tribunal at Kawiū Marae in February 2014, at our first Nga Kōrero Tuku Iho hearing. We heard further oral histories and evidence from tangata whenua witnesses at our priority, expedited hearings in October and November 2015. In addition, we have had the benefit of the technical evidence prepared for Muaūpoko as part of those hearings, and which draws upon nineteenth-century written sources (including the recorded kōrero of Muaūpoko tipuna at Native Land Court and Horowhenua commission hearings). We have sufficient evidence, therefore, to provide a brief account of Muaūpoko’s history in the period 1819–40 as Muaūpoko told it.

We do not have the benefit of the research conducted by Ngāti Toa and Rangitāne for their Treaty claims, as that research was done for the direct negotiations process and has not been filed with the Tribunal. We do have two reports for Ngāti Apa, which were filed by the Crown.<sup>368</sup> For Ngāti Raukawa and affiliated groups, we have not received their full evidence or submissions at this point of our inquiry. Similarly, Te Ātiawa/Ngāti Awa have not yet completed their research for this inquiry. We have, however, heard oral histories from these groups at our Nga Kōrero Tuku

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366. Chase, ‘Muaupoko Oral Evidence and Traditional History Report’ (doc A160), p 63

367. Transcript 4.1.12, p 865

368. See especially Te Rōpu Rangahau o Ngāti Apa, ‘Ngāti Apa, Ngāti Toa, and Ngāti Raukawa Cross Claims: Discussion Document’, 2005 (doc A8).

2.4.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Iho hearings in May 2014 (Te Tikanga Marae),<sup>369</sup> June 2014 (Tukorehe Marae),<sup>370</sup> November 2014 (Raukawa Marae)<sup>371</sup>, and April 2015 (Whakarongotai Marae).<sup>372</sup>

The history of this period is particularly contested between the claimant groups who have appeared in our inquiry. That much is evident from our hearings so far, both from the oral histories and the technical research. Each iwi has their own narrative of events, and their distinct interpretations of the relationships and customary rights established by the migrant iwi and the ‘original occupants of the soil’.

Inevitably, those narratives and interpretations conflict at certain points. Their claims as to relationships and customary rights are sometimes mutually exclusive.

It is not the Tribunal’s task to choose between narratives or decide that one group’s version is right and another group’s version is wrong. Rather, our task is to examine the acts of the Crown to determine whether, by action or inaction, the Crown has breached the principles of the Treaty of Waitangi. In doing so, we need to consider the method by which the Crown decided which group or groups were entitled to sell land in the pre-1865 period of Crown purchasing. We have to assess whether the Crown’s process for investigating customary title and determining the correct ‘vendors’ was adequate in Treaty terms. We will also need to consider the institution established by the Crown in 1862 and 1865 for the investigation of customary rights, the Native Land Court, and the Treaty-consistency of the Crown’s purchasing in the Native Land Court era.

In order to assess Crown acts of commission or omission in subsequent chapters (and in later stages of our inquiry), it is necessary for us to set out each tribe’s view of their relationships and customary interests in the contested lands of our inquiry district. At this stage of our inquiry, it is only possible to do this for Muaūpoko. In doing so, it is not our role to provide a complete tribal history of Muaūpoko or a comprehensive narrative of all ancestors, whakapapa, and events. Rather, we have to summarise the relevant aspects of Muaūpoko narratives for the purposes of our inquiry.

In this section of our chapter, as noted above, we provide a brief account of *Muaūpoko’s* story as told by the tribe in oral histories today and in nineteenth-century records of their kōrero. It is not possible, however, to tell the story of Muaūpoko in the 1820s and 1830s without also adverting to *excerpts* from the stories of *other claimant iwi*, because the histories for this period are dominated by interactions (martial and peaceful) between the migrant iwi and Muaūpoko. Here, we have relied largely on Muaūpoko witnesses and technical research done for Muaūpoko, and on the published histories available to date.

Each iwi narrative will be told as it was presented to us, when the Tribunal reports fully at the end of our inquiry.

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369. Transcript 4.1.7

370. Transcript 4.1.8

371. Transcript 4.1.9

372. Transcript 4.1.10



**2.4.2 Muaūpoko histories: 1819–26****(1) *The Tūwhare tauā: Muaūpoko's first musket encounter, 1819***

Te Raraku Hunia and other Muaūpoko witnesses gave evidence at a Native Appellate Court hearing in 1897, at which they recalled the first tauā by the name of one of its Ngāpuhi leaders, Tūwhare.<sup>373</sup> It consisted of Ngāpuhi and Ngāti Whātua armed with muskets. The Tūwhare tauā was one of many large-scale, long-distance, multi-tribal tauā, which Jane Luiten described as having ‘no particular take in mind.’<sup>374</sup> It was joined at Kāwhia by a group of Ngāti Toa led by Te Rauparaha. After travelling through Kāwhia, the tauā travelled down through Taranaki, Whanganui, Rangitikei, Manawatū, and Horowhenua.

Luiten called these roving expeditions ‘amiowhenua’ generally.<sup>375</sup> Relying mainly on Kāwana Hunia’s evidence in 1872, she explained that the first tauā with muskets to travel through the Horowhenua district was led by the Hokianga rangatira Tāmami Wāka Nene and Patuone, and engaged with Muaūpoko at Pukerua, Kapiti, and Horowhenua.<sup>376</sup> Indeed, Rod McDonald said that ‘[i]t was when passing Waikanae on the homeward journey that Waka Nene pointed out to Te Rauparaha the advantages of settling on the land which had been raided’, suggesting that Tāmami Wāka Nene was leading the expedition in which Te Rauparaha first saw the district.<sup>377</sup>

Bruce Stirling recounted that, at the mouth of the Hōkio Stream, an encounter between the Tūwhare tauā and Muaūpoko occurred which is not referred to in most mainstream narratives.<sup>378</sup> Stirling relied on the 1872 account by Kāwana Hunia in the Native Land Court for the following narrative.<sup>379</sup> When the tauā reached the Hōkio Stream it saw tracks leading inland towards Horowhenua and turned to follow them. On the trail they captured ‘Puketararua’ (or Pikitararua), who convinced Tūwhare that he was a rangatira and could get mere pounamu (greenstone weapons) and whariki (mats) for them from Horowhenua. Tūwhare sent Puketararua to Waikiekie and other Lake Horowhenua pā, and then waited in expectation at Hōkio for Puketararua’s return.<sup>380</sup>

While the rest of the tauā waited at Hōkio, a small group of men, led by Te Rauparaha, journeyed inland. They met with Taheke who welcomed them to Papaitonga Pā at Waiwiri. After staying there peacefully for a night, the group travelled on to Lake Horowhenua, where they were welcomed by Te Rangihouhia and Ngarangiwhaotinga (or Ngarangiwhakaotia) at the island pā of Waipata. Organising to meet with the rest of the tauā at Horowhenua, Te Rauparaha planned to continue on towards Waikiekie, another island pā on the lake.<sup>381</sup>

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373. Luiten, ‘Political Engagement’ (doc A163), p 14

374. Luiten, ‘Political Engagement’ (doc A163), p 14

375. Luiten, ‘Political Engagement’ (doc A163), p 15

376. Luiten, ‘Political Engagement’ (doc A163), p 15

377. O’Donnell, *Te Hekenga*, p 7

378. Kāwana Hūnia’s story is reproduced in W Carkeek, *The Kapiti Coast* (doc A114), pp 7–10.

379. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 11

380. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 11

381. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 11



## 2.4.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

While Te Rauparaha and his men were still at Waipata, Te Rangihouhia became suspicious of the group when a Ngāti Apa man arrived at Horowhenua and warned Muaūpoko about the weapons carried by the Tūwhare tauā. Later, Kāwana Hunia said that the ‘fighting chiefs wanted to kill Te Rauparaha’ at this point, but Toheriri ‘was not a fighting chief’.<sup>382</sup> Toheriri managed to convince Te Rangihouhia to let Toheriri and Taheke take Te Rauparaha in a small waka to Waikiekie.<sup>383</sup>

Meanwhile, Tūwhare’s tauā had reached Waikiekie and had been told by Puketararua that the promised mere pounamu were on Kapiti. Stirling recounted the story of what happened next, based on both Kāwana Hunia’s 1872 account to the Native Land Court and Wirihana Hunia’s evidence to the Horowhenua commission in 1896:

As the waka from Waipata reached Waikiekie its occupants heard the first shots fired by Tuwhare’s men. Te Rauparaha told his hosts the attack was not his fault and they should paddle away before he jumped ashore and ran. The Muaupoko within the pa were in disarray due to the unfamiliar weapons being used in this surprise attack, and they rushed from one side of the pa to the other seeking to avoid the guns being fired at them from the roof-tops of the whare in the pa. Those hit by non-lethal shot were screaming in pain, before guns loaded with more lethal musket balls were brought into action. There were not enough guns in the enclosed space for the taua to kill many Muaupoko before the attackers were rushed and either driven back or wounded by spears. These counter-attacks gave the women and children time to flee in the waka coming from Waipata and Te Namuti (another island pa) to reinforce Waikiekie, although the attackers had to be repulsed several times before they abandoned the fight. The tikanga of battle, as Muaupoko understood it, was that the taua ‘could not stop where they took no dead,’ which led to fierce fighting with the taua over the bodies of those Muaupoko who had been killed and which Ngapuhi attempted to take on the waka they tried to take from Waikiekie. They were successfully prevented from taking the waka and the dead. In 1896 Wirihana Hunia claimed the taua suffered 100 dead, which is clearly a great exaggeration, but it did suffer some losses, as did Muaupoko. The taua, including those wounded by Muaupoko spears, ‘went away the same day,’ and Tuwhare ‘did not stop to light a fire there.’<sup>384</sup>

From there, the Tūwhare tauā continued on to Taepiro Pā at Kapiti, Waimapihi Pā at Pukerua, and later continued through to southern Wairarapa, where Muaūpoko were also involved in battle with this tauā. They then returned quietly back along the coast to Rangitikei, seeking peace along the way.<sup>385</sup>

Terry Hearn stated in his report that Te Rauparaha appears to have already made the decision at this stage to bring his people to Kapiti to settle:

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382. Ōtaki Native Land Court, minute book 1, 22 November 1872, fol 63 (Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 11)

383. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 11

384. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 12

385. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 12–14

Tamihana Te Rauparaha later recorded that his father had been impressed by the presence of Pakeha ships and thus a source of trade goods and especially weaponry, the proximity of Te Wai Pounamu and its much prized and coveted greenstone, and the abundance of food that the region offered. It was also a place where Ngāti Toa might establish new permanent settlements far removed from enemies, actual and potential.<sup>386</sup>

Kāwana Hunia also believed that ‘the departing Kawhia chiefs had future resettlement in mind at this time.’<sup>387</sup> A peaceful relationship with tangata whenua would be important if Ngāti Toa wanted to return to the district as welcome guests when they migrated there to live, as Te Rauparaha hoped and intended.<sup>388</sup> Mātene Te Whiwhi’s evidence in the Native Land Court in 1868 emphasised that, before returning home, Te Rauparaha ensured that he had established a peaceful relationship with tangata whenua including Muaūpoko.<sup>389</sup> Dr Hearn noted the importance of the arranged marriage between Te Pikinga of Ngāti Apa and Te Rangihaeata, which suggested, in Hearn’s words, ‘that Ngāti Apa hoped that it would save itself and its lands from devastation.’<sup>390</sup> Stirling’s research supported this idea of a ‘chiefly marriage’ between Te Rangihaeata and Te Pikinga, which ‘laid the foundations of future Maori occupation.’<sup>391</sup>

For Muaūpoko, the encounter with the Tūwhare tauā affirmed Muaūpoko’s confidence that they were indeed able to defend their pā at Horowhenua. Although many were left dead on both sides, there were not enough muskets to cause significant numbers of deaths. William Taueki explained Muaūpoko’s understanding that they still had the formidable prowess of a well-trained fighting tribe, and were able to drive off their attackers or retreat to hidden clearings in the bush as necessary.<sup>392</sup>

## **(2) *Muaūpoko’s encounter with the Amiowhenua, 1820–21***

Approximately one to two years after the Tūwhare tauā, the Amiowhenua tauā arrived in the Horowhenua district. This tauā arrived from the south, having travelled down the east coast to Wairarapa and Te Whanganui-a-Tara before heading back to the north via the west coast of the North Island.<sup>393</sup> It was made up of allied Waikato and Ngāti Raukawa iwi with only traditional weapons.<sup>394</sup> Luiten cited Te Keepa Te Rangihwinui’s evidence that this expedition was led by Te Pēhi Tūkōrehu

386. Terry Hearn, ‘One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century’, June 2015 (doc A152), p 19

387. Luiten, ‘Political Engagement’ (doc A163), p 16

388. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 16

389. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 16

390. Hearn, ‘One Past, Many Histories’ (doc A152), pp 19–20

391. Angela Ballara, ‘Te Pikinga’, in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, <http://www.teara.govt.nz/en/biographies/1156/te-pikinga>, last modified 30 October 2012 (Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 14–15)

392. William Taueki, brief of evidence (doc C10), pp 15–16

393. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 17

394. Luiten, ‘Political Engagement’ (doc A163), p 16

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and numbered ‘thousands’.<sup>395</sup> Bill Taueki, however, believed that this second attack was by Kahungunu.<sup>396</sup> He told Louis Chase that the Amiowhenua tauā attacked Horowhenua-based Muaūpoko at Te Rae o te Karaka, the pā site on the edge of Lake Horowhenua, killing Tapuae (or Tapuwae), Taueki’s father, and others.<sup>397</sup> Many others are said to have been captured.<sup>398</sup>

Based on Muaūpoko testimony at the 1897 Native Appellate Court hearings, women played a strong part in a Muaūpoko victory in the encounter:

Muaupoko women led by Taueki’s wife Kahukore were credited with saving the day: the strength of their ngeri and the beating of paddles against their canoes alarm[ed] the attackers into thinking reinforcements had arrived, causing them to flee without their captives. According to Muaupoko witnesses, the outcome was a resounding victory with 100 of the Waikato enemy killed.<sup>399</sup>

Drawing on Muaūpoko oral history, Louis Chase explained that the tribe’s encounter with the long-ranging amiowhenua expeditions meant that Muaūpoko were better prepared for later musket attacks. Although they still had no muskets of their own, they now knew the destructive nature of the new weapons and, as a result, were much better prepared.<sup>400</sup> Bill Taueki told us that after the first attack, Muaūpoko modified their fishing islands to become defensive pā.<sup>401</sup> Muaūpoko also had another advantage: an elaborate system of hidden clearings in the ngahere surrounding the lake that others could not find (see section 2.3.2(f)). It would be these clearings that many Muaūpoko would rely on for their survival on Te Rauparaha’s return to the rohe.<sup>402</sup>

### **(3) *The arrival of Te Rauparaha and Ngāti Toa***

The reasons for Ngāti Toa’s migration south were discussed at Nga Kōrero Tuku Iho hearings by Te Waari Carkeek and other witnesses of Ngāti Raukawa and Ngāti Toa descent. We will explain the reasons further when the histories of Ngāti Raukawa and affiliated groups, and of Te Ātiawa/Ngāti Awa, are under consideration. It was generally agreed that Ngāti Toa retreated from serious threats to their continued survival at Kāwhia. They sought a new home in a district with abundant food, access to pounamu, and, most importantly, access to trade with Pākehā and muskets.<sup>403</sup> The details of the series of heke (migrations) which took place will be set out

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395. Ōtaki Native Land Court, minute book 13, 10 March 1890, fol 158 (Luiten, ‘Political Engagement’ (doc A163), p16)

396. William Taueki, speaking notes (doc A76), p7

397. Chase, ‘Muaupoko Oral Evidence and Traditional History Report’ (doc A160), p16

398. Luiten, ‘Political Engagement’ (doc A163), p16

399. Luiten, ‘Political Engagement’ (doc A163), p16

400. Chase, ‘Muaupoko Oral Evidence and Traditional History’ (doc A160), p16

401. Transcript 4.1.6, p9

402. Transcript 4.1.12, pp 530–531

403. Ballara, *Taua*, pp 318–319

after we have heard fully from Ngāti Raukawa and affiliated groups, and from Te Ātiawa/Ngāti Awa. Here, we are interested in Muaūpoko's version of these events.

The Ngāti Toa/Te Ātiawa heke were met at Waipōtiki, just north of Rangitikei, by Ngāti Apa chiefs who escorted them to Te Awamate, a Ngāti Apa pā at Rangitikei.<sup>404</sup> We were told that the migrant group spent two or three summer months at Te Awamate with Ngāti Apa then set out southwards towards Kapiti, hoping to engage with Pākehā vessels for trading purposes.<sup>405</sup> The heke was then escorted into Rangitāne's rohe of Manawatū.<sup>406</sup> According to Kāwana Hunia's evidence to the Native Land Court in 1868, Ngāti Apa warned the migrant group: 'Be careful of Muaupoko, go quietly, if they molest you it can't be helped.'<sup>407</sup>

Stirling argued that opinion was divided amongst Muaūpoko and their allies on how they should respond to the arrival of Te Rauparaha and Ngāti Toa. This was based largely on the evidence of Kāwana Hunia and Mete Kīngi Te Rangi Paetahi<sup>408</sup> to the Native Land Court. Some rangatira, including Taueki and Tanguru, argued that if Te Rauparaha settled in the region, they would lose their land, and therefore Te Rauparaha 'would have to be killed to save the land'. Others wanted to uphold the 1819 peace agreements. A contingent of Ngāti Apa wanting to uphold peace travelled to Waitōtara to meet the migrant group (which included Ngāti Toa and Te Ātiawa/Ngāti Awa), welcoming them warmly and escorting them south.<sup>409</sup>

#### **(4) Killing of Waimai**

According to the evidence presented to us, the cause of fighting between Muaūpoko and the migrant group arose initially from the killing of Waimai (also spelled Waimahi or Waimaia in court minutes), a Muaūpoko and Ngāti Apa woman of rank. She was said to have been killed by Nohorua (Te Rauparaha's elder brother) and his men of Ngāti Toa.<sup>410</sup> Philip Taueki told us that 'her mutilated body was discovered and Muaūpoko were not able to tolerate her death.'<sup>411</sup> Te Keepa referred to Waimai in the Native Land Court as a 'great chieftainess of Muaupoko.'<sup>412</sup> Accounts differ as to whether the killing was in retaliation for the alleged theft of a canoe.<sup>413</sup>

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404. Ballara, *Taua*, p 327

405. Stirling, 'Muaupoko Customary Interests' (doc A182), p 20; claimant counsel (Lyall and Thornton), closing submissions, 15 February 2016 (paper 3.3.19), p 5; Luiten, 'Political Engagement' (doc A163), p 17

406. Luiten, 'Political Engagement' (doc A163), p 17

407. Ōtaki Native Land Court, minute book 1D, 6 April 1868, fol 514 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 20)

408. A chief of Whanganui (Ngā Poutama, Ngāti Tūmango, and other hapū) and Ngāti Apa: see Waitangi Tribunal, *He Whiritauonoka*, vol 1, p 132, and Te Rōpu Rangahau o Ngāti Apa, 'Ngāti Apa, Ngāti Toa, and Ngāti Raukawa Cross Claims' (doc A8), p 119; Te Rōpu Rangahau o Ngāti Apa, 'Ngāti Kauae and Ngāti Tauira: Ngāti Apa hapū of the Rangitikei Manawatū District', April 2004 (doc A7), pp 11, 15, 25.

409. Stirling, 'Muaupoko Customary Interests' (doc A182), p 20

410. Luiten, 'Political Engagement' (doc A163), p 17; Ballara, *Taua*, p 327

411. Transcript 4.1.6, p 73

412. Ōtaki Native Land Court, minute book 1, 19 November 1872, fol 25 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 21)

413. Hearn, 'One Past, Many Histories' (doc A152), p 22; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 21–22

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Ballara suggested that Waimai's death occurred on the same day as Ngāti Apa sent the heke off with a warning to 'be careful of Muaupoko':

On the same day a party under Nohorua had gone up the Manawatū River seeking karaka berries. They left their canoes and went into the bush, but when they returned Nohorua's canoe had been stolen. Angry about the canoe, they killed the first tangata whenua person they met; she was Waimai of Ngāti Apa and Muaūpoko, but said to be of Rangitāne by Nōpera te Ngiha and Mātene Te Whiwhi of Ngāti Toa. The heke moved on to land near the mouth of the Ōhau River and began to cultivate food for themselves.<sup>414</sup>

Accounts also differ as to how many people Nohorua and his men killed. According to Te Keepa, Nohorua and his men of Ngāti Toa attacked a kāinga on the banks of the Manawatū River, killing several women, including Waimai.<sup>415</sup> Other accounts only refer to Waimai being killed.<sup>416</sup> Mete Kīngi Te Rangi Paetahi, when giving evidence in the Native Land Court, said that Nohorua and his men attacked a Muaūpoko and Rangitāne kāinga where they 'caught a woman, Waimai, and the men ran away'.<sup>417</sup>

We were told that it was unlikely that Te Rauparaha knew of Waimai's killing.<sup>418</sup> Neither Te Rauparaha or his host Toheriri (of Muaūpoko) in Ōhau were expecting trouble: both men anticipated that Muaūpoko would assist Ngāti Toa to travel to Kapiti. This was based on the account of Wirihana Hunia to the appellate court in 1897.<sup>419</sup> Stirling, however, noted earlier Native Land Court evidence that it was Taheke or 'Tapeka' who hosted Te Rauparaha and his followers in Ōhau.<sup>420</sup>

Muaūpoko did not learn of Waimai's death directly. Rather, as recounted by Te Keepa in the Native Land Court in 1872, they only learnt of her death when they sought to address a request from Te Rauparaha for waka which could be used to travel to Kapiti Island. This request was made after Ngāti Toa were settled at Ōhau. Wharakihi, a Muaūpoko man, went to discuss this request with Te Rauparaha and saw Waimai's arm bone behind a Ngāti Toa house.<sup>421</sup> On hearing of her death, Muaūpoko decided to retaliate, saying 'Rauparaha has begun to kill'.<sup>422</sup> Kāwana Hunia recalled the killing in 1872 as 'the cause of the fighting between these tribes'.<sup>423</sup>

414. Ballara, *Taua*, p 327

415. Stirling, 'Muaupoko Customary Interests' (doc A182), p 21; Hearn, 'One Past, Many Histories' (doc A152), p 22

416. Luiten, 'Political Engagement' (doc A163), p 17

417. Ōtaki Native Land Court, minute book 1, 1 April 1868, fol 438 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 21)

418. Stirling, 'Muaupoko Customary Interests' (doc A182), p 22

419. Luiten, 'Political Engagement' (doc A163), p 17

420. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 22–24

421. Stirling, 'Muaupoko Customary Interests' (doc A182), p 22

422. Kāwana Hunia, Ōtaki Native Land Court, minute book 1D, 6 April 1868, fol 514 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 22)

423. Ōtaki Native Land Court, minute book 1, 23 November 1872, fol 70 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 21)



According to historian Angela Ballara, the death of Waimai seems to have been the immediate reason for why Muaūpoko decided to seek utu and kill Te Rauparaha, but other factors probably played a part in their decision. They were worried about losing their land, especially their share of Kapiti Island.<sup>424</sup> After all, Te Keepa told the Native Land Court that Muaūpoko had been warned of the migration by Te Pēhi Tūroa, a visiting Whanganui chief. Te Pēhi Tūroa had encouraged Muaūpoko to kill Te Rauparaha, but this proposition was not at first supported by the people.<sup>425</sup>

##### **(5) Death of Te Rauparaha's children**

In Muaūpoko histories, the killing of Waimai was the customary justification or take for what followed next: an attack on Te Rauparaha by stealth and the killing of his children.<sup>426</sup> Ngāti Apa also put great emphasis on this take.<sup>427</sup> Muaūpoko's view was that they had decided to take action to remove the threat Te Rauparaha posed. Accounts differ as to who set the plan in motion. According to Ballara, Tāpeka invited Te Rauparaha to stay with him at Papaitonga.<sup>428</sup> In his report for our inquiry, Stirling said it was Tāheke or 'Tapeka' (Te Rauparaha's host in Ōhau) who invited Te Rauparaha. In other accounts, Toheriri was responsible for inviting Te Rauparaha to Papaitonga, on the pretence of gifting Te Rauparaha a waka.<sup>429</sup> Ballara wrote that Toheriri was present but was not listed among those attacking Te Rauparaha, but was 'probably duped by other Muaūpoko'.<sup>430</sup> This was based on Muaūpoko accounts to the appellate court in 1897.<sup>431</sup> Stirling noted the evidence that both Tāheke and Toheriri had good relationships with Te Rauparaha at the time.<sup>432</sup>

Te Rangihaeata, who had been warned by his wife Te Pikinga's Ngāti Apa kin, tried to warn Te Rauparaha not to take up Toheriri's (or Tāheke's) invitation, fearing that Muaūpoko would kill Te Rauparaha.<sup>433</sup> Te Rauparaha ignored the warning; he took his adult children (two sons and two daughters) and only a 'handful' of his warriors, suggesting that he did not suspect Muaūpoko of an attack. He had a good relationship with the chief inviting him, and they had been welcomed as guests.<sup>434</sup> At our Nga Kōrero Tuku Iho hui, we received accounts of this pivotal event from Te Ahukaramū Royal, Hayden Turoa, Hēni Collins, and other Ngāti Raukawa

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424. Ballara, *Taua*, pp 327–328

425. Luiten, 'Political Engagement' (doc A163), p 17

426. See, for example, Te Keepa Te Rangihiwini's account to Travers in 1871: Hearn, 'One Past, Many Histories' (doc A152), p 576; Wirihana Hunia's account to the Native Appellate Court in 1897: AJHR, 1897, G-2A, p 71 (Louis Chase, papers in support of 'Muaupoko Oral Evidence and Traditional History Report' (doc A160(k) (ii))).

427. Te Rōpu Rangahau o Ngāti Apa, 'Ngāti Apa, Ngāti Toa, and Ngāti Raukawa Cross Claims: Discussion Document' (doc A8), pp 15–16

428. Ballara, *Taua*, p 328

429. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 22–24

430. Ballara, *Taua*, p 328

431. AJHR, 1898, G-2A, pp 49, 71

432. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 22–23

433. Transcript 4.1.6, p 73; Ballara, *Taua*, p 328

434. Stirling, 'Muaupoko Customary Interests' (doc A182), p 23

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witnesses.<sup>435</sup> Ngāti Raukawa accounts will be the subject of a future report, as we have noted above.

According to Kerei Te Panau (of Rangitāne and Muaūpoko) in the Native Appellate Court, the Muaūpoko rangatira involved were Tanguru, Ngārangi-whakaotia, Warakihi, Ngāwhakawā, Te Aweawe, and ‘many others.’ Also present were Te Rangihouhia, Te Rangihiwini, and Toheriri.<sup>436</sup> Wirihana Hunia told the court:

Toheriri and Rauparaha had gone back to Ohau to await Muaupoko. They had made friends, and Rauparaha wanted Muaupoko to assemble and prepare canoes to take him across to Kapiti. When Muaupoko assembled at Papaitonga they made an attack on Rauparaha at Te Wii. The Ngatitōa were defeated and Te Rauparaha’s children killed. Te Rauparaha and Te Rakaherea were the only persons who escaped. Te Rangihiwini, Tanguru, Ngāwhakawa, Tawhati-a-henga, Tawhati-a-Tumata, Te Rangihouhia, Warakihi, and Tamati Maunu were the principal people of Muaupoko who took part in that fight. I did not hear Kotuku’s name mentioned, or Paipai’s. Takare was with Muaupoko. Te Rangi Paetahi and Pehi Turoa had returned to Wanganui before the fight. The first man killed of Rauparaha’s party was Te Whata-a-Ti. Te Rangihouhia killed him. After Te Wii some of Muaupoko returned to Papaitonga, others to Horowhenua.<sup>437</sup>

Te Rauparaha and his party were attacked while sleeping. Angela Ballara summarised the account of Ngāti Toa chief Tāmihana Te Rauparaha:

Te Rauparaha and his family slept in Toheriri’s house. When he heard the attackers, before dawn, Toheriri rushed out of the house. Te Rauparaha saw him run out; he had woken abruptly because he dreamed that Toheriri was killing him. In the dark Te Rauparaha was able to follow Toheriri along the side wall and hide in dense brush outside as the Muaūpoko taua entered and began killing his children. Te Rangihoungariri, a formidable warrior, would have escaped, but he heard his sister Te Uira calling to him and turned back to help her. His only weapon was a broken paddle but he charged the 20- or 30-strong taua, killing four before he himself was struck down. In one account given to S. Percy Smith, Toheriri of Muaūpoko was angry at the attack on Te Rauparaha, and took his hapū away for two years to Wairarapa.<sup>438</sup>

There are varying accounts as to how many in Te Rauparaha’s party were killed and how many escaped. Stirling suggested that the most probable estimate was that Te Rauparaha’s party was 30-strong, 17 of whom were killed.<sup>439</sup> Several of Te

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435. See transcripts 4.1.8 and 4.1.9 for these accounts.

436. Ballara, *Taua*, p 328

437. AJHR, 1898, G-2A, p 71

438. Ballara, *Taua*, pp 328–329

439. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 23



Rauparaha's children were killed, but Te Rauparaha's daughter Te Hononga was spared by Tawhati-a-Tai and taken to the Wairarapa with another survivor.<sup>440</sup>

Rod McDonald recalled:

Te Rauparaha narrowly escaped with his life. His favourite son, a warrior of great promise, and his daughter were killed, and on the spot where they died Te Rauparaha swore his famous oath 'that he would slaughter the Muaupokos from the rise of the sun to its setting'.<sup>441</sup>

Tāmihana Te Rauparaha told the court that his father vowed to 'neither forgive nor forget the killing of his children' and that from then on he sought to exterminate Muaūpoko.<sup>442</sup> Luiten stated that: 'According to most accounts Te Rauparaha's campaign against Muaupoko was an unrelenting vengeance, exacted for more than a decade.'<sup>443</sup> Philip Taueki told us that this course of action 'was the custom at the time, that was exactly what would have been expected and we hold no grudge against Ngāti Toa for doing what they did'.<sup>444</sup>

#### **(6) Attack on Muaūpoko's island pā**

In 1823, Muaūpoko at Lake Horowhenua were attacked on their island pā.<sup>445</sup> A Muaūpoko version of events is that Ngāti Toa retreated from Ōhau to Waikanae, taking time to regroup before seeking their revenge.<sup>446</sup> We were told that after an initial attack on Lake Horowhenua without waka, Ngāti Toa called in reinforcements for a second attack.<sup>447</sup> Another version is that, after attacking him and his family at Papaitonga, Muaūpoko chased Te Rauparaha and his followers to Waikanae before Ngāti Toa retreated to Kapiti.<sup>448</sup> Stirling suggested that this version is improbable as Ngāti Toa had at that point not yet taken Kapiti.<sup>449</sup>

- ▶ Muaūpoko then retreated to the pā on their man-made islands on Lake Horowhenua.<sup>450</sup> There were six artificial islands on the lake.<sup>451</sup> Rod McDonald provided a description of the islands and stated that Muaūpoko 'felt reasonably safe' on the islands, having sunk or hidden their own waka and planted stakes just under the surface of the water to ensure waka would have a difficult

440. Stirling, 'Muaupoko Customary Interests' (doc A182), p 85

441. O'Donnell, *Te Hekenga*, pp 7–8

442. Ōtaki Native Land Court, minute book 2, 18 March 1874, fol 304 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 24)

443. Luiten, 'Political Engagement' (doc A163), p 18

444. Transcript 4.1.6, p 73

445. Transcript 4.1.12, p 539; Ballara, *Taua*, pp 331–333

446. Stirling, 'Muaupoko Customary Interests' (doc A182), p 25

447. Taueki, brief of evidence (doc C10), p 14; transcript 4.1.6, p 74; Stirling, 'Muaupoko Customary Interests' (doc A182), p 25

448. Stirling, 'Muaupoko Customary Interests' (doc A182), p 25

449. Stirling, 'Muaupoko Customary Interests' (doc A182), p 25

450. Transcript 4.1.6, p 74

451. Chase, 'Muaupoko Oral Evidence and Traditional History' (doc A160), pp 67–68

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time reaching them.<sup>452</sup> (We have described the construction of the man-made islands earlier in this chapter.)

Philip Taueki told us that Ngāti Toa's first attack was on the island of Waipata. The attackers swam out to the island, as they had no waka, and succeeded in taking the island, killing many of its defenders, although other accounts say that only one person was killed at Waipata.<sup>453</sup> Bill Taueki supported the notion that Ngāti Toa swam to the island pā carrying their weapons on their backs. He told us that the thick bush meant Te Rauparaha's men were unable to get their waka to Lake Horowhenua, and Muaūpoko's own waka were kept on the islands so that they could not be used by the raiders.<sup>454</sup> Bill Taueki also said that because of the water, traditional weapons had to be used instead of muskets, which put Ngāti Toa on the same footing as the defenders and meant that Ngāti Toa's first attack 'met with little success'. This put Muaūpoko 'on high alert' for further raids.<sup>455</sup> According to Philip Taueki's account, Ngāti Toa then called in reinforcements to attack the pā on the island of Waikiekie where many more Muaūpoko were killed.<sup>456</sup>

Other sources agree that Te Rauparaha's men dragged canoes to Horowhenua, either overland or up the Hōkio Stream.<sup>457</sup> At least two such sources were Muaūpoko:

- ▶ Te Rangirurupuni told Rod McDonald about Te Rauparaha's attack on the island pā using waka and muskets, with many killed;<sup>458</sup> and
- ▶ Wirihana Hunia told the Appellate Court in 1897 that, after his first unsuccessful attack, Te Rauparaha 'went back for his canoes, and brought them up the Hokio Stream to Raumatangi', then 'attack[ing] Waikiekie and Te Roha-o-te-kawau and Waipata'.<sup>459</sup>

The fighting between Muaūpoko and Ngāti Toa which ensued was described to us by Vivienne Taueki as 'a very important time in the history of our tribe': 'The attacks at the Lake were devastating – stone mere against muskets. The existence of our tribe was at stake'.<sup>460</sup>

Philip Taueki referred to this second attack as a 'slaughter': 'the waters of Lake Horowhenua ran red with blood, and even the seagulls drifted in from Hōkio to peck on the rotting carcasses, butchered due to the savagery of a man tormented by the death of his children'.<sup>461</sup>

Angela Ballara's account of the attacks drew on Native Land Court records and a history composed by Tāmihana Te Rauparaha:

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452. O'Donnell, *Te Hekenga*, p 10

453. Transcript 4.1.6, p 74; Stirling, 'Muaupoko Customary Interests' (doc A182), p 25

454. William Taueki, brief of evidence (doc C10), pp 14–15

455. William Taueki, brief of evidence (doc C10), p 14

456. Transcript 4.1.6, p 74

457. Luiten, 'Political Engagement' (doc A163), p 18

458. Chase, 'Muaupoko Oral Evidence and Traditional History' (doc A160), p 67; O'Donnell, *Te Hekenga*, pp 10–13

459. AJHR, 1898, G-2A, p 71; see also Wirihana Hunia's account to the Horowhenua commission, AJHR, 1896, G-2, p 47.

460. Vivienne Taueki, brief of evidence (doc B2), p 6

461. Transcript 4.1.6, p 74

The rising of clouds of ducks gave away their approach, and many Muaūpoko escaped in canoes, thinking that their enemy had none and that they would get away. . . . Two island pā were captured: Waipata, which was empty save for one person who was killed, and Waikiekie, taken with much loss. Wirihana Hūnia said that a third pā was taken, called Roha-o-te-kawau.<sup>462</sup>

Tanguru's wife, Rere-o-maki, was said to have been captured but later swam to safety, carrying her child (Te Keepa Te Rangihwinui) on her back. Ballara explained that Te Rauparaha had obtained satisfaction: 'Nōpera Te Ngiha said that Rauparaha was "koa" that his "mate" was "ea" (he was pleased that his deaths were paid for).' But many important Muaūpoko chiefs had escaped, including Tanguru and his son Te Rangihwinui.<sup>463</sup>

Stirling noted that accounts of the attack differ. In the Native Land Court, Ngāti Toa versions of the events tended (in Stirling's view) to exaggerate the attack while Te Keepa's evidence 'sought to downplay the losses suffered by Muaupoko'.<sup>464</sup> Ballara noted that Tāmihana Te Rauparaha estimated 170 killed, while Luiten pointed out that Muaūpoko witnesses said only 30 were killed.<sup>465</sup> McDonald's account stated that 'a few only of the 300 souls on the islands escaped'.<sup>466</sup> Stirling cautioned against what he considered to be exaggerations of the number of Muaūpoko killed:

The popularised, simplified version of events is that Te Rauparaha avenged the killing of his family by Muaupoko many times over. This supposed 'extirpation' of Muaupoko began with an overwhelming attack on them in their lake pa at Horowhenua, leading to what later grew in the telling to a 'great massacre' which, according to Te Rauparaha's early biographers, required Ngati Toa to remain at Horowhenua for two months in order to 'devour' the hundreds of Muaupoko dead, and the food stores taken in this victory.<sup>467</sup>

Stirling concluded that the defeat suffered by Muaūpoko 'was far less severe than it was later portrayed by others'. He went on to note, however, that the attack on the islands was 'merely the first battle in a protracted war that lasted until about 1829, during which time Ngati Toa and their Taranaki allies sought to establish a secure foothold in the district'.<sup>468</sup> As noted above, we will set out any accounts by other claimant iwi in our final report at the end of our inquiry.

Muaūpoko claimants spoke in vivid terms of the attack on the islands. Vivienne Taueki told us that the name of the Tūpāpakurau Stream, which runs through Kawiu clearing into Lake Horowhenua, relates to the large number of people killed during

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462. Ballara, *Taua*, p 329

463. Ballara, *Taua*, p 329

464. Stirling, 'Muaupoko Customary Interests' (doc A182), p 26

465. Ballara, *Taua*, p 329; Luiten, 'Political Engagement' (doc A163), p 18

466. O'Donnell, *Te Hekenga*, pp 10–13

467. Stirling, 'Muaupoko Customary Interests' (doc A182), p 24

468. Bruce Stirling, summary for hearing, 11 November 2015 (doc A182(b)), p 5

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Te Rauparaha's attack on the lake.<sup>469</sup> Hapeta Taueki described Lake Horowhenua as the 'historical home of Muaupoko' and the '[s]cene of many fierce battles with Te Rauparaha in the 19th century'.<sup>470</sup> Noa Nicholson acknowledged the weight of the past borne by Muaupoko descendants from that time:

Mōhio koutou i ērā kōrero. Me waiho pea tērā ki te taha, taumaha rawa atu te kōrero mō ēnei āhuatanga e pā ana ki a mātou, ki a rātou. Ko mātou ngā whakaheketanga o ērā raruraru.

You know that saga. I will leave that to one side and not go into it, those stories are too hard to hear, the things that happened to us, to those ancestors. We are the living descendants of those troubled times.<sup>471</sup>

Bill Taueki emphasised to us that none of the written accounts referred to anyone but 'Taueki and his Ngāti Tamarangi people' being present at Lake Horowhenua when Te Rauparaha attacked. In his view, it was Ngāti Tamarangi, rather than Muaupoko as a whole, that suffered as a result of the attack on the islands.<sup>472</sup>

Many of those who escaped the attack chose to withdraw from the area in search of safety. Hearn said that it was at this point that 'Many of the Muaupoko survivors fled, some to the east coast, some to the north to Rangitikei and beyond, and others south to Whanganui-a-Tara'.<sup>473</sup> We were told that, despite the dangers, at least some of the Muaupoko survivors remained at Lake Horowhenua.<sup>474</sup> Louis Chase recorded the oral history that

some Muaupoko survivors sought refuge in bush-clearings in the Tararua ranges; as Bill Taueki stated, these survivors scanned the area from these vantage points surviving as best they could and staying one step ahead of Ngāti Toa skirmishing parties bent on locating them; and through all this distress and upheaval, Taueki still remained on the land whilst Te Rauparaha occupied Kapiti.<sup>475</sup>

Vivienne Taueki told us that, although Te Rauparaha and his warriors killed many Muaupoko at Lake Horowhenua, the heke did not stay to occupy the area.<sup>476</sup> Instead, as Ballara recounted, Ngāti Toa and the rest of the heke then moved to settle at Waikanae, Porirua, and Pukerua Bay.<sup>477</sup> Many of their Te Ātiawa/Ngāti Awa allies returned to Taranaki.<sup>478</sup>

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469. Vivienne Taueki, brief of evidence (doc B2), p 6

470. Jack Hapeta Taueki, diary (doc C24), p 10

471. Transcript 4.1.6, pp 155–156, 158

472. Transcript 4.1.12, p 539

473. Hearn, 'One Past, Many Histories' (doc A152), p 22

474. Transcript 4.1.11, p 257

475. Chase, 'Muaupoko Oral Evidence and Traditional History' (doc A160), pp 16–17

476. Transcript 4.1.11, p 257

477. Ballara, *Taua*, p 330

478. Ballara, *Taua*, p 329

**(7) Ngāti Toa's taking of Kapiti**

According to Dr Ballara, tangata whenua had speculated that it had always been Ngāti Toa's intention to take Kapiti Island. Her source for this was Mete Kīngi Te Rangi Paetahi of Ngāti Apa and Whanganui. Nonetheless, Ballara could find no primary Māori accounts of the actual taking of the island.<sup>479</sup> Secondary accounts differ on the year in which Ngāti Toa took Kapiti.<sup>480</sup> Stirling suggested that 'the island appears to have been taken by Ngāti Toa in late 1822 or early 1823, some months after the fighting at Horowhenua'.<sup>481</sup> What is generally agreed is that the various Muaūpoko pā (and those Ngāti Apa) on Kapiti were taken by Te Pēhi Kupe of Ngāti Toa while Te Rauparaha was absent (perhaps creating a diversion).<sup>482</sup> In this way Kapiti was secured as a 'refuge' for Ngāti Toa.<sup>483</sup>

The evidence presented to us for the Muaūpoko claim suggested that the ongoing conflict between tangata whenua and migrant tribes motivated Ngāti Toa to use Kapiti as a secure base of operations. Bill Tauaki told us that Ngāti Toa lived on Kapiti for security: 'Following the Lake raid, Muaūpoko and their allies turned around and defeated Te Rauparaha at Waikanae. Ngāti Toa were forced to live on Kapiti Island.'<sup>484</sup>

Stirling also argued that Ngāti Toa withdrew to Kapiti for security, as it was too dangerous to remain for long on the mainland.<sup>485</sup> Yet, equally, Kapiti provided some advantages to those holding it. Jane Luiten stated that from 1826 onwards, at Kapiti, Te Rauparaha and his followers were in a good position to trade for muskets.<sup>486</sup>

**(8) Ngāti Toa raids and Muaūpoko response**

From 1823, Muaūpoko were subjected to punitive raids launched by Te Rauparaha and Ngāti Toa from their base on Kapiti Island.<sup>487</sup> In the same year, Rangitāne and Ngāti Apa were also attacked.<sup>488</sup> Luiten stated that all of the raids appear to have occurred before February 1824, when Te Pēhi of Ngāti Toa left for England to procure guns.<sup>489</sup> Muaūpoko histories record fatal attacks, such as an attack on Papaitonga at which Te Rauparaha captured Toheriri, who was taken back to Kapiti and killed.<sup>490</sup> The source for this was Wirihana Hunia's evidence to the court in 1897.<sup>491</sup>

An important story for Muaūpoko from this time was the account of how Te Keepa's father, Tanguru, escaped a raid in which his brother and several others

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479. Ballara, *Taua*, p 330

480. Ballara, *Taua*, pp 330–331

481. Stirling, 'Muaupoko Customary Interests' (doc A182), p 26

482. Stirling, 'Muaupoko Customary Interests' (doc A182), p 26

483. Stirling, 'Muaupoko Customary Interests' (doc A182), p 30

484. Transcript 4.1.12, p 531

485. Stirling, 'Muaupoko Customary Interests' (doc A182), p 26

486. Luiten, 'Political Engagement' (doc A163), p 390

487. Hearn, 'One Past, Many Histories' (doc A152), p 22

488. Ballara, *Taua*, pp 331–332

489. Luiten, 'Political Engagement' (doc A163), p 19

490. Ballara, *Taua*, p 332

491. Ballara, *Taua*, pp 332, 506; AJHR, 1898, G-2A, p 72

## 2.4.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

of Muaūpoko were captured.<sup>492</sup> Pursued by Ngāti Toa, Tanguru decided to fight, choosing his battle ground and adopting a fighting stance as he awaited the pursuers. Te Rangihaeata was the first to come upon Tanguru and was unwilling to fight him in single combat.<sup>493</sup> An image of Tanguru in his fighting stance was used on the shilling coin, as noted by a number of Muaūpoko claimants.<sup>494</sup>

According to Bruce Stirling, in his evidence for Muaūpoko, the Ngāti Toa raiding parties were food-gathering parties who were as much threatened by tangata whenua groups as they were a threat:

the island was not capable of supporting the many Ngati Toa and their allies taking refuge on it, so they were obliged to travel to the mainland to gather food, but securing food cost them dearly. Muaupoko and other tangata whenua groups harried and attacked these food-gathering parties, killing some at Waikanae on different occasions, several gathering mussels at Paekakariki, and about 20 at Pukerua. Following their retreat to Kapiti the future of Ngati Toa was unpromising. They were losing a slow war of attrition; secure on their island fortress, but also trapped on it by the tangata whenua awaiting them whenever they ventured to the mainland for desperately needed food.<sup>495</sup>

Luiten agreed with Stirling's broad point, writing that 'The bloodshed in this early period was by no means one-sided.'<sup>496</sup> She also indicated examples (taken from Native Land Court evidence) of significant loss of life suffered by Ngāti Toa in conflicts at Pukerua, Waimapihi, Waimea (near Waikanae), and Paekākāriki.<sup>497</sup>

Muaūpoko also appear to have joined in retaliatory attacks by closely related, allied iwi against Ngāti Toa. A tauā of Hāmua and Ngāti Apa, under Te Hakeke and Paora Tūrangapito, attacked a group of Ngāti Toa digging fern root by the Waimea (or Waimeha) Stream off the Waikanae River, killing many including Te Pēhi Kupē's four daughters.<sup>498</sup> Estimates of the number killed in the attack ranged from 20 to as many as 100.<sup>499</sup> According to Stirling, Muaūpoko and Rangitāne were part of the attacking force at Waimea.<sup>500</sup> He also noted that 'The guns of Te Pehi and Te Rauparaha (and possibly others) were taken in the battle, being the first guns acquired by the tangata whenua.'<sup>501</sup>

Thus, the Muaūpoko evidence presented to us suggests that the conflict following the attack on Muaūpoko at Lake Horowhenua was not one sided. Yet, the Muaūpoko claimants also accepted that it was a very difficult time for them, when

492. Stirling, 'Muaupoko Customary Interests' (doc A182), p 26

493. Stirling, 'Muaupoko Customary Interests' (doc A182), p 26; see also O'Donnell, *Te Hekenga*, p 9

494. Transcript 4.1.6, p 165; transcript 4.1.11, pp 171, 245; transcript 4.1.12, p 663

495. Stirling, 'Muaupoko Customary Interests' (doc A182), p 30

496. Luiten, 'Political Engagement' (doc A163), p 18

497. Luiten, 'Political Engagement' (doc A163), pp 18–19; Stirling, 'Muaupoko Customary Interests' (doc A182), p 28

498. Ballara, *Taua*, p 332; Hearn, 'One Past, Many Histories' (doc A152), p 22

499. Stirling, 'Muaupoko Customary Interests' (doc A182), p 28

500. Stirling, 'Muaupoko Customary Interests' (doc A182), p 28

501. Stirling, 'Muaupoko Customary Interests' (doc A182), p 28



many had been killed and the survival of the iwi was at stake. The claimants highlighted two survival strategies employed by Muaūpoko during the period of conflict. The first strategy saw many Muaūpoko people leave the district, withdrawing to shelter in Te Tau Ihu (the northern South Island), Whanganui, or Wairarapa to stay with Ngāti Apa or Rangitāne kin. For example, Tanguru and his family left for Whanganui to stay with Ngāti Apa, and Te Kōtuku led a large contingent of Muaūpoko to Arapawa Island in Te Tau Ihu. The second strategy was employed by those Muaūpoko who remained. They sought to maintain ahi kā by seeking refuge in their clearings within the dense bush that typified the landscape of the district.

On the first strategy, Philip Taueki noted that '[w]hen the battles with Te Rauparaha started, a lot of our people fled'.<sup>502</sup> Luiten agreed that many Muaūpoko felt 'compelled by the conflict to seek refuge among distant kin'.<sup>503</sup> The leader of one such exodus was Te Kōtuku (also known as Te Rātū, Te Rato, or Tairātū), who was the son of Tairātū (Puakiteao's grandson, and eponymous ancestor of Ngāti Tairātū) and Maewa (the daughter of Kopani, Pāiri's youngest child). He has also been described as 'a rangatira of Ngati Apa, Rangitāne, and Ngati Kuia' but Stirling stated that 'he can certainly be described as Muaupoko', noting that his younger brother was Taiweherua, another Muaūpoko rangatira.<sup>504</sup>

Te Kōtuku led 'Te Tira o Kotuku', an exodus of a 'relatively large' group (perhaps 200 people or more) to Arapawa, probably during 1824.<sup>505</sup> Te Keepa stated in 1891 that 200 people had followed Te Kōtuku – half of the Muaūpoko community. In 1897 court hearings, Muaūpoko witnesses referred to the exodus as the 'taitai nunui' and the people on it as 'koura mawhitiwhiti'.<sup>506</sup> Luiten noted: 'Some Muaupoko attributed the phrase to Taueki's farewell address, "*Haere e te koura mawhitiwhiti*" (emphasis in original).<sup>507</sup> From Arapawa, Te Kōtuku recruited and coordinated tangata whenua forces from Te Tau Ihu as well as the lower North Island for a massive attack on Kapiti in 1824 (known as the Battle of Waiorua).<sup>508</sup>

The decision to remain in the Horowhenua district, rather than take refuge elsewhere, was described by Luiten as 'just as deliberate' a strategy as the exodus known as Te Tira o Kōtuku.<sup>509</sup> In 1897, Te Raraku Hunia explained her grandfather Taueki's decision to stay:

Kotuku suggested to Taueki that they should go to Arapaoa when Rauparaha invaded this district, but Taueki declined. He remained here, and Kotuku went to the South Island with others of the Muaupoko. Taueki said he would take shelter among

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502. Transcript 4.1.6, p 76

503. Luiten, 'Political Engagement' (doc A163), p 19

504. Stirling, 'Muaupoko Customary Interests' (doc A182), p 27; Ballara, *Taua*, p 331

505. Luiten, 'Political Engagement' (doc A163), p 19

506. Luiten, 'Political Engagement' (doc A163), p 19

507. Luiten, 'Political Engagement' (doc A163), p 19 n

508. Luiten, 'Political Engagement' (doc A163), p 19; Stirling, 'Muaupoko Customary Interests' (doc A182), p 28

509. Luiten, 'Political Engagement' (doc A163), p 19



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the rata trees on his own land, and he did so until Whatanui came, and they made peace.<sup>510</sup>

Philip Taueki told us that Taueki and his whānau stayed to fight Te Rauparaha in order to maintain Muaūpoko ahi kā:

during this period of upheaval, massacres, there was very few amongst Muaūpoko who are willing to stand and fight. Many found reasons to leave. Many changed sides. There was one whānau though that never left and that whānau was the Taueki whānau. Taueki stayed to fight.<sup>511</sup>

Vivienne Taueki told us that the group that stayed and faced Te Rauparaha's invasions withdrew to the clearings 'because the islands in the lake were no longer safe'.<sup>512</sup> In cross-examination by claimant counsel, Jane Luiten accepted that 'the lake defences, and Muaūpoko's ability to conceal themselves in the bush, were effective at keeping Te Rauparaha at bay'.<sup>513</sup>

**(9) Waiorua**

The most pivotal battle of this early period was that of Waiorua, when Muaūpoko joined other tangata whenua to attack migrant iwi based at Waiorua Pā at the northern end of Kapiti Island. Terry Hearn described the battle as 'an effort to dislodge and eject the invaders'.<sup>514</sup> It was their last concerted attempt to do so, and it failed drastically. We did not hear much about this battle from Ngāti Raukawa and affiliated groups or from Te Ātiawa/Ngāti Awa during the Nga Kōrero Tuku Ihu hui. Their accounts will be the subject of later hearings, after the completion of their research.

Difficult to date accurately, Ballara suggested the battle of Waiorua took place in 1824.<sup>515</sup> Citing Tāmihana Te Rauparaha, she stated that the groups taking part in the attack included Muaūpoko, Whanganui, Ngāti Apa, Ngā Rauru (from Waitōtara), Rangitāne, and 'a people spelled 'Ngati-Kahuhurini' (probably Ngāti Kahungunu). From Te Tau Ihu, there were Rangitāne of Wairau, Ngāti Kuia, Ngāti Apa, and Ngāti Tūmatakōkiri.<sup>516</sup>

According to Jane Luiten, Te Kōtuku recruited these allied iwi in preparation for the attack. Their combined force has been estimated to have contained anywhere from 1,000 to 3,000 warriors.<sup>517</sup> Stirling gave the figure as '[p]erhaps as many as 2,000 warriors'.<sup>518</sup> Accounts differ as to who the defenders at Waiorua Pā

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510. AJHR, 1898, G-2A, p 36

511. Transcript 4.1.11, p 171

512. Transcript 4.1.6, p 65

513. Transcript 4.1.12, p 69

514. Hearn, 'One Past, Many Histories' (doc A152), p 23

515. Ballara, *Taua*, p 334

516. Ballara, *Taua*, p 335

517. Luiten, 'Political Engagement' (doc A163), p 19

518. Stirling, 'Muaupoko Customary Interests' (doc A182), p 30

were – Ngāti Toa, Ngāti Koata, Te Āti Awa, and Ngāti Hinetuhi of Ngāti Mutunga are all mentioned in various accounts. Ballara noted that Te Rauparaha's people were based at Wharekohu at the southern end of the island and likely took part in the battle only towards the end.<sup>519</sup> Wirihana Hunia attributed the victory to Te Rauparaha.<sup>520</sup>

The battle of Waiorua did not go well for Muaūpoko and the attacking party. They approached the island by waka at night, intending to surprise Ngāti Toa and their allies, but the result of the battle was a resounding defeat.<sup>521</sup> As Te Raraku Hunia put it in 1897: 'Muaupoko and Wanganui were beaten at Waiorua.'<sup>522</sup> Ballara ascribed their loss to the unfavourable weather conditions, a lack of concerted leadership, difficult terrain, difficulties in leaving the island, and the desperation, leadership, and experience of the defenders.<sup>523</sup> Many of the attackers were killed, including Te Rangimairehau, a Muaūpoko rangatira, while others were captured and held prisoner.<sup>524</sup>

Some Muaūpoko claimants denied that the battle of Waiorua could be considered as a loss for their people. Bill Taueki, for example, acknowledged that the battle of Waiorua was a defeat for the attacking party but denied any Muaūpoko involvement.<sup>525</sup>

#### **(10) Reciprocal feasting, reprisal raids**

Following the Battle of Waiorua, Ngāti Toa sought reinforcements from Ngāti Raukawa of Maungatautari. Hearn, for example, suggested that Ngāti Toa's victory at the Battle of Waiorua 'paved the way for the great heke that followed'.<sup>526</sup> In the meantime, tangata whenua and migrant groups sought to reach accommodations. For example, Ngāti Toa made an effort to make peace with many of the tangata whenua from the North and South Islands, though Ballara was of the view that raids against Muaūpoko did not cease.<sup>527</sup> Te Keepa claimed that 'Ngatitoa did not fight against Muaupoko again', but others (including Te Raraku Hunia) spoke of subsequent engagements.<sup>528</sup> This seems to have referred to a difference in scale of any fighting after Waiorua.

Drawing on Te Keepa's evidence to the court in 1872, Luiten and Stirling described a period of reciprocal feasting after Waiorua.<sup>529</sup> Stirling wrote that

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519. Ballara, *Taua*, pp 335–336

520. AJHR, 1896, G-2, p 47

521. Luiten, 'Political Engagement' (doc A163), p 19; Ballara, *Taua*, p 337

522. AJHR, 1898, G-2A, p 40

523. Ballara, *Taua*, p 337

524. Claimant counsel (Bennion and Whiley), attachment to opening submissions, 5 October 2015 (paper 3.3.7(a)), p 2

525. William Taueki, brief of evidence (doc C10), p 5

526. Hearn, 'One Past, Many Histories' (doc A152), p 23

527. Ballara, *Taua*, pp 337–338

528. AJHR, 1898, G-2A, p 40

529. Luiten, 'Political Engagement' (doc A163), p 20; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 30–31

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Te Ati Awa and Ngati Toa then freed some Muaupoko captives and sent them home with some baskets of fish. In return, Muaupoko sent them some eels from Horowhenua. Ngati Toa then prepared a larger feast for Muaupoko at Waikanae for, as Te Keepa observed, ‘there was peace at this time.’ In response, Muaupoko prepared a larger feast for Ngati Toa, Ngati Tama, and Te Ati Awa, erecting stages at Horowhenua on which to place large quantities of eels, birds, and other food. Their visitors partook of the feast, and took the surplus food with them to Ohau. They then sneaked back in the night and attacked Muaupoko in the morning, many of whom were, according to Te Keepa, ‘treacherously killed,’ adding ‘the defeats which I suffered were not fair ones, it was all through treachery.’<sup>530</sup>

According to Te Keepa, fighting in large parties ceased after this attack and ‘[g]enerally speaking Muaupoko lost their people singly.’<sup>531</sup>

**2.4.3 Muaūpoko histories: 1826–40****(1) Ngāti Raukawa heke/migrations**

Ngāti Raukawa from the Maungatautari region in Waikato migrated to the Horowhenua/Kapiti region in the mid- to late 1820s. We heard much evidence about these heke from Ngāti Raukawa witnesses at our Nga Kōrero Tuku Iho hearings. Kaumātua Iwikatea Nicholson and many others described the reasons for the heke, the routes they took, the names of the heke, and the places they settled.<sup>532</sup> We will not reproduce the Ngāti Raukawa accounts here, as those will be the subject of additional research and further hearings. Here, we focus on Muaūpoko’s narrative, which concentrated on the establishment of peace between the great Ngāti Raukawa leader Te Whatanui and Taueki of Muaūpoko.

**(2) A peaceful relationship between Ngāti Raukawa and Muaūpoko established**

Muaūpoko histories tell of two peacemakings with Te Whatanui of Ngāti Raukawa.

In the first of them, peace was made between Te Whatanui and a combined force of Ngāti Apa, Muaūpoko, and Rangitāne when Te Whatanui left Kapiti, looking to settle on the coast. Taueki and some other Muaūpoko leaders wanted peace but Tūrangapito of Ngāti Apa and Muaūpoko (Te Hakeke’s brother) carried the day with a proposal to attack. After Te Whatanui’s people released some captives, however, peace was arranged at Karikari. A number of chiefs were involved. On the Ngāti Apa and Muaūpoko side, the peacemaking was led by Taiweherua, younger brother of Muaūpoko chief Te Kōtuku, and by Te Hakeke. In 1897, Wirihana Hunia recounted:

530. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 31

531. Ōtaki Native Land Court, minute book 21A, 2 April 1891, fol 287 (Luiten, ‘Political Engagement’ (doc A163), p 20)

532. Manaaki Tibble, transcript 4.1.7, pp 12–13; Dr Ra Durie, Heeni Collins, Dobbie Martin, and Te Waari Carkeek, transcript 4.1.8, pp 75–84, 134–138, 148, 199–205, 231–238, 274–280; Te Waari Carkeek, Iwikatea Nicholson, Rupene Waaka, Te Ahukaramū Royal, and Janey Wilson, transcript 4.1.9, pp 88–89, 95–97, 110, 124–126, 139–141, 168–178, 341–344

When Whatanui arrived at Kapiti Te Rauparaha suggested that his enemies – the Muaupoko and Rangitane – should be killed, but Te Whatanui wished to spare them, and keep them ‘mana e atawhai hei iwi mana.’ Te Whatanui then went to Karekare and made peace. Ngatiapa were on their way to Otaki to attack Whatanui. Whatanui took some of Muaupoko prisoners at Karekare; none were killed; most of them were women. Te Whatanui asked where the men were, and was told that they had gone with a taua composed of Ngatiapa, Rangitane, and Muaupoko to Otaki. Te Whatanui sent Konihi and others after them. They overtook the taua, which returned to Karekare. Te Konihi told Te Hakeke that Whatanui wished to make peace. Peace was made. The principal man of Muaupoko was Taiweherua, younger brother of Kotuku. Tanguru was not there; he was at Wanganui. Te Rangihouhia was at Horowhenua. I have not heard that Taueki was there. Mahuri [of Rangitāne], I heard, was there.<sup>533</sup>

Other Muaūpoko sources for the history of this peacemaking included Kāwana Hunia’s evidence to the Native Land Court in the Himatangi and Manawatū-Kukutauaki cases, Te Keepa’s evidence to the court in 1872, Wirihana Hunia’s evidence to the Horowhenua commission in 1896, and the evidence of Muaūpoko witnesses to the appellate court in 1897.<sup>534</sup> Jane Luiten suggested that the history of this first peacemaking ‘was one of the central stories in the tangata whenua case of 1872, and its significance endured for Te Hakeke’s descendents till the 1897 hearing into relative interests at Horowhenua.’<sup>535</sup>

In 1872, Kāwana Hunia said that Te Whatanui acted

‘as an arai’ – a shield – for Muaupoko, observing that, ‘I was watching [Te Rauparaha] from behind Whatanui’s back. He was living between Muaupoko and Ngati Awa and Ngati Toa.’ Muaupoko considered Te Whatanui to be ‘a good man as he was living quietly with them. He entered into a solemn compact with the chiefs of Muaupoko.’<sup>536</sup>

In the second peacemaking at Horowhenua, Te Whatanui is said to have approached Taueki, who had remained at the lake, in order to secure an agreement allowing for Ngāti Raukawa to settle in the district.<sup>537</sup> Stirling described how this peace was made, quoting Te Keepa’s evidence to the Horowhenua commission in 1896:

When Te Whatanui arrived here at Horowhenua he came to Taueki and said: ‘I have come to live with you – to make peace.’

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533. AJHR, 1898, G-2A, p 72

534. Ballara, *Taua*, pp 343–344, 508; Luiten, ‘Political Engagement’ (doc A163), pp 24–25; Te Rōpu Rangahau o Ngāti Apa, ‘Ngāti Apa, Ngāti Toa, and Ngāti Raukawa Cross Claims’ (doc A8), pp 27–28; Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 38–40; Wirihana Hunia, AJHR, 1896, G-2, p 48; Kawana Hunia, Ōtaki Native Land Court, minute book 1D, 6 April 1868, pp 515–518

535. Luiten, ‘Political Engagement’ (doc A163), p 25

536. Ōtaki Native Land Court, minute book 1, 23 November 1872, p 72 (Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 44)

537. Stirling, summary for hearing (doc A182(b)), p [6]

## 2.4.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Taueki said: ‘Are you going to be a rata tree that will shade me?’

Whatanui said to Taueki: ‘All that you will see will be the stars that are shining in heaven above us; all that will descend on you will be the raindrops that fall from above.’<sup>538</sup>

Bill Taueki suggested that his tipuna may have been sceptical of Te Whatanui’s ability to be a ‘sheltering rata’ for Muaūpoko at the time: ‘he asks a rhetorical question at the time that he says it, this is Taueki, he asks him, you know, he asks him “Are you a safe rātā?” . . . at that time the question’s not answered, it’s a question to the statement.’<sup>539</sup>

According to Paki Te Hunga’s account in 1897, not all Muaūpoko supported the peace. Te Rangihouhia wanted to attack Te Whatanui, and had to be ‘restrained by Taueki from carrying out his intentions against Te Whatanui until he was taken away to Rangitikei to prevent trouble.’<sup>540</sup>

We were also told that Te Whatanui’s assurances of protection were undermined when Te Rangihaeata led an attack on Muaūpoko shortly after, killing two men. From the 1872 evidence of Kāwana Hunia and Te Keepa, Muaūpoko obtained utu for the deaths, after which Te Rangihaeata made peace with Muaūpoko, and Te Whatanui reaffirmed the agreement previously made.<sup>541</sup> Stirling suggested that it was around this time that Ngāti Raukawa moved from Kapiti to settle in Ōtaki.<sup>542</sup>

Muaūpoko claimants said that Ngāti Raukawa left Kapiti Island because of food shortages on the island.<sup>543</sup> Stirling noted the evidence of a Ngāti Raukawa chief,<sup>544</sup> who told the court in 1868 that Te Rauparaha encouraged Ngāti Raukawa to ‘destroy the Muaupoko and Rangitane who remained on their lands’. Te Whatanui, however, made it clear that his intention was to live peacefully alongside tangata whenua.<sup>545</sup> Bill Taueki told us that, before leaving Kapiti, Te Whatanui told Te Rauparaha ‘E kore e pikitia toku tuara (My backbone must not be climbed).’<sup>546</sup> As Stirling put it, as kin to Te Rauparaha, Te Whatanui was able to stand up to him in regards to Muaūpoko’s treatment by ‘personifying the protection he offered.’<sup>547</sup>

We note here that Ngāti Raukawa have a different history of these events. Kaumātua Iwikatea Nicholson, in his evidence for Ngāti Pareraukawa at our Nga Kōrero Tuku Iho hearings, gave oral history of the agreement between Te Whatanui

538. Te Keepa Te Rangihouhia, AJHR, 1896, G-2, p 26 (Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 44)

539. Transcript 4.1.6, p 15

540. AJHR, 1898, G-2A, p 67. Te Rangihouhia was the brother of Kaewa (Kawana Hunia’s mother), and Jane Luiten noted that he was ‘renowned for his resistance to Te Rauparaha’, compared to Rob Roy by Alexander McDonald in 1896: Luiten, ‘Political Engagement’ (doc A163), pp 61, 251.

541. Stirling, summary for hearing (doc A182(b)), p 7; Stirling, ‘Muaupoko Customary Interests’ (doc A182) pp 53–54

542. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 40–41

543. William Taueki, brief of evidence (doc C10), p 19

544. Parakaia Te Pouepa

545. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 43

546. William Taueki, brief of evidence (doc C10), p 20

547. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 45

and Taueki, and the meaning of it.<sup>548</sup> That Ngāti Raukawa history will, of course, be the subject of a future report after the completion of the next stage of hearings.

Some Muaūpoko claimants disputed any notion that the relationship between Te Whatanui and Taueki was based upon the protection that Te Whatanui afforded Muaūpoko. They viewed such a notion as based upon the flawed belief that Muaūpoko were unable to defend themselves. They also denied that there was any element of subjugation or control in the relationship. Muaūpoko, they said, were never slaves to, or otherwise subjugated by, Te Whatanui.<sup>549</sup> Jonathan Procter pointed to Kāwana Hunia's evidence in the Native Land Court in 1873:

Muaūpoko on occasion have been questioned on the matter of being slaves and Kāwana Hunia Te Hakeke during 1873 in Court hearings responded directly to the question with 'no, we have never been slaves' and qualified it with a preceding comment – 'I do not know whether the descendants of Whatanui have any right to the land here, his proper place of abode was Ōtaki. He had slaves living there, they were not of Muaūpoko. Whatanui came occasionally to live there and then went back to Ōtaki again.'<sup>550</sup>

Louis Chase quoted from an interview with Bill Taueki, stating: 'Bill Taueki believes that Te Rauparaha left Taueki and other survivors of Muaupoko unmolested at Horowhenua for several years from the 1828 peace-making with Te Whatanui.'<sup>551</sup>

However, another wave of migrants in the early 1830s, this time from Taranaki, threatened the peace as they moved south in search of security and resource-rich land.<sup>552</sup> Histories of the ancestors and events of this migration by Taranaki peoples, including Te Ātiawa/Ngāti Awa, were told to us by Hepa Potini, Paora Temara Rōpata Junior, and Miria Pōmare during the Nga Kōrero Tuku Iho hearing at Whakarongotai.<sup>553</sup> Those histories will be the subject of our later report, after the completion of research and hearings for Te Ātiawa/Ngāti Awa.

At this stage of our inquiry, as we have noted, we are concerned with the Muaūpoko narratives. Based on Te Keepa Te Rangihwinui and other nineteenth-century sources, the Muaūpoko history is that the migration of Taranaki peoples significantly weakened the position of Ngāti Toa and Ngāti Raukawa, especially after the Battle of Haowhenua in 1834. Conversely, Te Keepa told the Native Land Court, the Muaūpoko position was significantly strengthened.<sup>554</sup> But first there

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548. Transcript 4.1.9, pp 194–205

549. Claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), pp 21, 27–28

550. Transcript 4.1.6, p 110

551. Chase, 'Muaupoko Oral Evidence and Traditional History' (doc A160), p 17 n

552. Ballara, *Taua*, pp 345–347

553. See transcript 4.1.10.

554. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 69–71; Luiten, 'Political Engagement' (doc A163), pp 27–28



## 2.4.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

was a much-debated incident which impacted upon Muaūpoko: the ‘feast of the pumpkins’.

**(3) Feast of the Pumpkins**

The Feast of the Pumpkins, also known as the Battle of the Pumpkins, the Ōhāriu massacre, or Mahurangi murder or massacre, was, according to some narratives at least, a pivotal event in Muaūpoko’s history. There are variations on the story. Dr Angela Ballara said that, in 1834, the invitation to tangata whenua came from Te Pūoho to come as guests to Waikanae to try two new foods, pumpkin and corn. Ignoring a warning from Te Whatanui, Muaūpoko and Rangitāne chiefs travelled with their people to Waikanae. There was a surprise attack, during which ‘up to 400 were killed’. Ballara stated that ‘Muaūpoko sought utu from “Ngāti Awa”’. Her source for this account of the ‘feast of the pumpkins’ and the estimate of numbers killed was a Muaūpoko narrative: the evidence of Wirihana Hunia to the Native Appellate Court in 1897. Ballara argued that Te Pūoho may himself have been tricked into issuing this invitation.<sup>555</sup> Wirihana Hunia blamed Te Rauparaha in his 1896 account to the Horowhenua commission, saying that the Ngāti Toa chief was really behind the invitation for Rangitāne and Muaūpoko to try ‘a new food – “all red inside” – which was very nice.’<sup>556</sup>

Stirling attributed the incident to ‘some among the Taranaki people’ and noted that Tāmihana Te Rauparaha denied Te Rauparaha had any involvement in instigating the attacks. Most reliable sources, according to Stirling, place the attack at Waimeha in Waikanae (although some sources place it at Ōhāriu or Waikawa) and date it to late 1833 or early 1834, the attack taking place prior to the battle at Haowhenua which is reliably dated at 1834.<sup>557</sup>

Luiten argued that the invitation to Waikanae extended to tangata whenua ‘appears to have been genuine’ and was made ‘to reciprocate Rangitane’s feast of birds and eels Te Puoho and Ngati Tama had enjoyed, called Mahurangi’. Relying mostly on 1872 land court witnesses from both sides, including Peeti Te Aweawe of Rangitāne, Luiten concluded that

Although the details about who and why remain unclear, between 200 and 400 men women and children who partook in Te Puoho’s feast at Waikanae were then killed, including [Te Puoho’s brother-in-law] Mahuri, and among them Muaupoko chiefs Ngarangiwhakaotia and Taiweherua.<sup>558</sup>

In Rod McDonald’s version, he suggests that Te Ātiawa/Ngāti Awa, living at Waikanae, were ‘stirred up’ by Ngāti Toa to invite Muaūpoko to a feast of ‘a new food “all red inside and very good to eat, ‘this food being said to have been the pumpkin, but was more probably the watermelon’. McDonald said that Muaūpoko

555. Ballara, *Taua*, pp 347, 386, 508; Wirihana Hunia, AJHR, 1898, G-2A, p 72

556. AJHR, 1896, G-2, p 48

557. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 59–60

558. Luiten, ‘Political Engagement’ (doc A163), p 27



were then attacked, and that those who died amounted to ‘several hundreds’. He suggested that the Battle of the Pumpkins was one of the reasons Muaūpoko took the British side in the wars in Taranaki.<sup>559</sup>

During our hearings, Muaūpoko claimants downplayed the significance of the attack and the numbers of Muaūpoko killed.<sup>560</sup> In particular, two claimants disagreed with the statement that there were ‘no survivors’.<sup>561</sup> Bill Taueki, for example, said that Taueki was not present during the attack and he disputed that large numbers of Muaūpoko were killed ‘[e]ven if hapu members were killed’. He stated that Taiweherua was ‘more Rangitane than Muaupoko.’ He did not agree that Te Rauparaha had something to do with the events at Waikanae because Ngāti Toa and Te Ātiawa were ‘sworn enemies’ at the time.<sup>562</sup>

Jane Luiten suggested that the Horowhenua community ‘tended to minimise the impact of this tragedy’ on Muaūpoko, ‘claiming that most of those killed were Rangitane’. ‘[T]here seems little doubt’, she argued, ‘that the loss at the time was keenly felt’. Te Keepa, for example, told the court in 1872 that ‘our numbers were very much reduced’ by the Battle of the Pumpkins. Luiten added: ‘The massacre at Waikanae was said to have been a factor in Muaupoko’s decision to fight for Ngati Raukawa at Haowhenua shortly after.’<sup>563</sup>

#### **(4) Haowhenua**

The Battle of Haowhenua, a ‘protracted series of battles and sieges’, began in 1834 and lasted for over a year.<sup>564</sup> The fighting was caused by quarrelling between Ngāti Raukawa and Taranaki migrants for resources, but drew in Ngāti Toa and iwi from further afield such as Ngāti Tūwharetoa.<sup>565</sup> Muaūpoko claimants said that Muaūpoko allied with Ngāti Raukawa in the Haowhenua fighting. Ballara argued that the outcome of the battle was inconclusive, but that Ngāti Raukawa and their allies were worse off.<sup>566</sup>

Stirling, based in part on the evidence of Kāwana Hunia and Peeti Te Aweawe of Rangitāne,<sup>567</sup> summarised the aftermath of Haowhenua for Ngāti Raukawa, highlighting the role of Muaūpoko and others in supporting Ngāti Raukawa’s recovery:

Te Rauparaha and some among Ngati Raukawa were so demoralised by their defeat that they decided to return to their northern homes, but were eventually persuaded by Te Rangihaeata and others to remain. Ngati Raukawa faced starvation on their war-torn Otaki lands, their resources severely depleted by the prolonged fighting, so they were invited by Muaupoko and other tangata whenua to move north to Horowhenua,

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559. O’Donnell, *Te Hekenga*, p18

560. William Taueki, brief of evidence (doc C10), pp18–19

561. Warrington, brief of evidence (doc B9), p 4

562. William Taueki, brief of evidence (doc C10), p 19

563. Luiten, ‘Political Engagement’ (doc A163), p 27

564. Stirling, summary for hearing (doc A182(b)), p [7]

565. Stirling, summary for hearing (doc A182(b)), p [7]

566. Ballara, *Taua*, p 350

567. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 71–73, 163

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Manawatu, and Rangitikei for several years while they replanted and recovered on the lands of their hosts.<sup>568</sup>

Muaūpoko claimants argued that the support Muaūpoko gave Ngāti Raukawa at Haowhenua is proof that the peace arrangement between Taueki and Te Whatanui afforded *both* parties protection and security:

Muaūpoko were only ‘protected’ by the peace arrangement in the same sense that Te Whatanui was ‘protected’ by it: the arrangement forbade hostilities between the parties as well as representing a bloc alliance that offered security to both parties against hostile outsiders. Such outsiders might have included Ngāti Toa, but they also included Te Ati Awa and other migrant iwi, not to mention tangata whenua, against whom Ngāti Raukawa were pleased to be ‘protected’, as they were by Muaūpoko at Haowhenua.<sup>569</sup>

**(5) Tuku whenua at Raumatangi**

Muaūpoko claimants emphasised that after Haowhenua, a tuku whenua was given to Te Whatanui at Raumatangi on the shores of Lake Horowhenua to support the agreement between Te Whatanui and Taueki.<sup>570</sup> This proved very significant in later years when the Horowhenua block was partitioned (see section 5.4.5). We are aware that the ‘gift’ is a point of contention. As Dr Hearn observed, other sources say that after the massacre at the Feast of the Pumpkins ‘Te Whatanui is said to have set aside 20,000 acres for Muaupoko at Horowhenua.’<sup>571</sup>

There are a number of Muaūpoko narratives about the gift. Philip Taueki told us that his tipuna, Taueki, offered to share Lake Horowhenua and the surrounding land with the Ngāti Raukawa chief Te Whatanui.<sup>572</sup> The agreement has been described as being between the ‘wise paramount chiefs of Mua-Upoko and Ngati Raukawa to live in harmony with each other’:

Enough blood had been shed. There was room for both of them to share the bounty of this land. Perhaps they had grown weary with war, and the loss of vibrant young lives. Time to nurture a new generation of young men, and live in peace.<sup>573</sup>

The Muaūpoko history is that, in accordance with the terms of the agreement, Te Whatanui and his people settled ‘at Raumatangi, on the shores of Lake Horowhenua near the outlet to the Hokio Stream.’ This land, Vivienne Taueki maintained, was ‘freely given’ by Muaūpoko to Whatanui as a tuku whenua. It was not, she insisted, ‘forced after battle.’<sup>574</sup>

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568. Stirling, summary for hearing (doc A182(b)), p [7]

569. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 29

570. Vivienne Taueki, brief of evidence (doc B2), p 5

571. Hearn, ‘One Past, Many Histories’ (doc A152), pp 29, 50; transcript 4.1.9, p 198

572. Vivienne Taueki, brief of evidence (doc B2), p 5

573. Hunt, ‘Legend of Taueki’ (doc A18), p [9]

574. Vivienne Taueki, brief of evidence (doc B2), p 5; Hunt, ‘Legend of Taueki’ (doc A18), p [9]

There are different nineteenth-century Muaūpoko accounts of the extent and boundaries of the gift, partly because the boundaries were said to have changed as a result of the actions of various chiefs over time.<sup>575</sup> Bruce Stirling has summarised those accounts in his report, based on the evidence of Te Keepa and other Muaūpoko witnesses to the Horowhenua commission (1896) and Native Appellate Court (1897). Some said that the tuku was confined to a small piece of land at Raumatangi, others that it extended all the way along the Hōkio Stream to the sea.<sup>576</sup> Ngāti Raukawa evidence about this will be considered at future hearings.

The importance of the agreement between Taueki and Te Whatanui as a tuku from Muaūpoko was downplayed by some claimant witnesses. Dr Jonathan Procter denied that the tribe had ever entered into a formal, tuku whenua agreement with Te Whatanui. ‘In relation to take tuku’, he told the Tribunal, ‘there has been no gifting of lands or rights or mana by Muaūpoko to migrant iwi.’<sup>577</sup> Dr Procter said:

Our cultural landscapes and our significant sites still retain our collective whakapapa connections in history, as well as our names across this region. We have never handed over the mana or rights to any of our sites and subsequently our names still remain in the landscape and have not been subsumed by any other iwi.<sup>578</sup>

With regard to the alliance between Taueki and Te Whatanui, Procter told the Tribunal that Taueki’s agreement with Te Whatanui had not, in fact, been ‘widely accepted by the entire iwi.’<sup>579</sup> Dr Procter believed that Taueki had only recently returned from the Hawke’s Bay. According to Dr Procter, Taueki had taken refuge there to avoid ‘earlier conflict’, and thus ‘wanted to reassert interest in this area.’<sup>580</sup> Te Whatanui and his people had also just suffered ‘severe defeats in the Hawke’s Bay.’<sup>581</sup>

Dr Procter nevertheless highlighted the agreement between Taueki and Te Whatanui to underline his kōrero that Muaūpoko had never been enslaved. ‘In the context of slavery’, he suggested,

it is highly unlikely that a slave would own land that they would then trade. . . . No deal would have been made with the conquered people and those peoples would not have any rights or the ability to negotiate such an agreement let alone to have land to give.

Similarly why would a conquering people even consider sharing the land or accepting a smaller portion of the land to their conquered neighbours?<sup>582</sup>

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575. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 139

576. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 139–143

577. Transcript 4.1.6, p 117

578. Transcript 4.1.6, p 117

579. Transcript 4.1.6, p 117

580. Transcript 4.1.6, pp 117–118

581. Transcript 4.1.6, p 117

582. Transcript 4.1.6, p 118

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‘The concept of Muaūpoko or the entire iwi being subordinate or slaves to migrant iwi,’ Procter concluded, ‘does not fulfil either European or Māori definitions of slavery or conquered peoples.’<sup>583</sup>

Philip Taueki told us that Ngāti Raukawa had never fought Muaūpoko in battle, much less defeated them. In his estimation this showed that it was ‘absurd’ to assert that his ancestor, Taueki, would have needed to rely upon Te Whatanui for protection.<sup>584</sup> Far from an unequal relationship based upon defeat and slavery, Te Whatanui, Taueki, and their two tribes lived ‘alongside each other on the shores of Lake Horowhenua’ in harmony and mutual respect.<sup>585</sup> The areas occupied by Muaūpoko and Ngāti Raukawa were set out by mutual agreement by pou (posts or markers).<sup>586</sup> Philip Taueki suggested that

A large Ngāti Raukawa presence at Horowhenua does not seem to have endured much beyond 1843, and Te Whatanui himself shifted between his homes at Otaki and Horowhenua before his death in 1845. By then, their presence had dwindled to Te Whatanui’s immediate household.<sup>587</sup>

This harmonious or ‘common-sense’ relationship between Taueki and Te Whatanui was said to have brought a ‘period of relative peace’ to the Horowhenua lasting ‘from the 1830s till the 1870s.’<sup>588</sup>

As already noted, we will hear further from other claimant iwi on these matters in the later stages of our inquiry.

**(6) Late 1830s**

In the late 1830s, Muaūpoko were in a period of ‘rebuilding.’ Ngāti Raukawa had returned to Ōtaki but came into further conflict with the migrant Taranaki tribes. Stirling told us that

the weakening of the embattled migrant tribes through their prolonged fighting bolstered the relative position of Muaupoko. . . . Muaupoko were mingling freely with, and trading alongside, Te Rauparaha and Ngāti Toa at Kapiti and Ngāti Raukawa at Otaki.<sup>589</sup>

From Muaūpoko narratives in the Native Land Court, the tribe took no part in the 1839 fighting (Te Kūititanga) between Ngāti Raukawa and Te Ātiawa/Ngāti Awa.<sup>590</sup>

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583. Transcript 4.1.6, p 118

584. Transcript 4.1.6, pp 75–76

585. Philip Taueki, brief of evidence, August 2015 (doc B1), p 5; Hunt, ‘Legend of Taueki’ (doc A18), p 9; transcript 4.1.6, p 75

586. Philip Taueki, brief of evidence (doc B1), p 6; Taueki, speaking notes (doc A76), p 8

587. Philip Taueki, brief of evidence (doc B1), p 12

588. Transcript 4.1.6, p 72

589. Stirling, summary for hearing (doc A182(b)), p 8

590. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 87–89

When Christianity arrived in the district, it brought with it a range of new ideas which would change Muaūpoko significantly over time. Edward Karaitiana told us that sometimes whole families were baptised at the same time, as was the case with the Korou family.<sup>591</sup> Missionaries also introduced European practices, such as cemetery burials.<sup>592</sup> We were told, however, that Māori spirituality and cultural practices were ‘almost regarded as evil’.<sup>593</sup> It was a period of change, but changes came in different areas at different times, with new ideas and concepts being, as Angela Ballara put it, ‘the real harbingers of change’.<sup>594</sup>

In the late 1830s, coinciding with the introduction of Christianity and a renewed peace between iwi, those Muaūpoko who had left the district were returning to Horowhenua.<sup>595</sup> Luiten discussed the practice of ‘fetching’, which was almost certainly instigated by Christianity and by increased security after peacemaking. Individual members of Muaūpoko were ‘fetched’ back to Horowhenua, the first being Raniera Te Whata after the making of peace with Te Whatanui at Karikari.<sup>596</sup> According to nineteenth-century Muaūpoko narratives, some of those ‘fetched’ were being held as captives – though not, stated Hoani Puihi, as ‘mokai’ (slaves).<sup>597</sup> Te Raraku Hunia said of her grandfather Taueki: ‘He welcomed all those who returned during his lifetime, and never questioned their rights to the land.’<sup>598</sup>

Muaūpoko at Lake Horowhenua moved from their island pā to reside on the lakeshores.<sup>599</sup> Te Keepa dated the move to the area known as Toi (or Otoi), which surrounded Te Rae o Te Karaka, on the shore of Lake Horowhenua, to the arrival of Christianity (around 1838).<sup>600</sup> Te Whatanui built a home for the missionary Octavius Hadfield ‘and the native teachers’ when he arrived in November 1839.<sup>601</sup> Muaūpoko’s first church was erected in 1842, and their second church not long after, erected by Te Keepa and Tanguru.<sup>602</sup> Muaūpoko and Te Whatanui had a shared enthusiasm for Christianity. Luiten stated that it appears ‘Muaupoko participated in the major innovations of this period . . . reflecting many of the new ideas heralded by Christianity’.<sup>603</sup>

Another innovation in which Muaūpoko shared was the coming of the Crown and the Treaty of Waitangi, which Taueki signed in 1840. We turn to that significant event next.

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591. Karaitiana, brief of evidence (doc c20), p 6

592. Vivienne Taueki, brief of evidence (doc B2), p 13

593. Transcript 4.1.11, p 266

594. Ballara, *Taua*, p 412

595. Stirling, summary for hearing (doc A182(b)), p 8

596. Luiten, ‘Political Engagement’ (doc A163), p 31; transcript 4.1.12, p 48

597. Luiten, ‘Political Engagement’ (doc A163), pp 23, 31

598. Te Raraku Hunia, 10 May 1897, AJHR, 1898, G-2A, p 42 (Luiten, ‘Political Engagement’ (doc A163), p 31)

599. Luiten, ‘Political Engagement’ (doc A163), p 30

600. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 87

601. Luiten, ‘Political Engagement’ (doc A163), pp 30, 33

602. Luiten, ‘Political Engagement’ (doc A163), p 30

603. Luiten, ‘Political Engagement’ (doc A163), pp 33, 61

## 2.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**2.5 THE TREATY OF WAITANGI, MAY 1840**

Te Tiriti o Waitangi (the Treaty of Waitangi) was signed by over 40 northern chiefs at Waitangi on 6 February 1840. Further signatures were gathered in the days, weeks, and months that followed as both the original Treaty and a number of copies were presented to Māori around the country. The missionary Henry Williams was charged by William Hobson (then Lieutenant Governor of New Zealand) with the task of bringing a copy of the Treaty to the Cook Strait region. Accompanied by the local missionary, Octavius Hadfield, Williams travelled around the lower North Island and upper South Island to collect signatures. Signings occurred through April and May 1840 at Wellington, Queen Charlotte Sound, Waikanae, Kapiti, and Whanganui.<sup>604</sup> Te Hakeke Hunia signed the Treaty on 21 May at Tāwhirihoē on the Manawatū River.<sup>605</sup> Rere-o-maki (Tanguru's wife and Te Keepa's mother) signed at Whanganui on 23 May 1840.<sup>606</sup>

Muaūpoko's encounter with the Treaty of Waitangi occurred on 26 May 1840.<sup>607</sup> The Muaūpoko rangatira Tauheke (Taueki) signed the Treaty with six others in the 'Manawatu district'.<sup>608</sup> Because of the general nature of the place description, it is difficult to pinpoint the actual location of the signing.<sup>609</sup> In 1872, Hoani Meihana, when giving evidence in the Native Land Court, stated that 'Mr Williams did not go, or send a message to, Horowhenua and other places inland; he travelled straight along the coast'.<sup>610</sup> During our hearings, Vivienne Taueki stated that her tipuna, Taueki, signed the Treaty at the mouth of the Hōkio Stream.<sup>611</sup> Questions were raised as to whether Taueki was the sole Muaūpoko signatory.<sup>612</sup> It may be possible that two other Muaūpoko rangatira signed with Taueki on 26 May 1840: Luiten proposed that 'Pakau' and 'Witiopai' could be Muaūpoko; the former could be Matene Pakauwera, the latter could be Tawhati-a-Tai.<sup>613</sup> Stirling agreed that 'Pakau' was likely to be Pakauwera, but believed that 'Witiopai' was more likely to be of Ngāti Raukawa descent.<sup>614</sup>

Octavius Hadfield did not believe that any Muaūpoko rangatira signed the Treaty. He wrote that, on going to the Manawatū with Williams to collect signatures, 'Several chiefs were named, but no chief of the Muaupoko was mentioned to us

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604. Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 128

605. Stirling, 'Muaupoko Customary Interests' (doc A182), p 108

606. Wilkie, 'Rere-o-maki', *The Dictionary of New Zealand Biography*

607. Stirling, 'Muaupoko Customary Interests' (doc A182), p 108

608. Stirling, 'Muaupoko Customary Interests' (doc A182), p 108; Luiten, 'Political Engagement' (doc A163), p 29

609. Bruce Stirling, answers to questions of clarification regarding 'Muaupoko Customary Interests', 11 November 2015 (doc A182(c)), p 19

610. 'Hoani Meihana's Address to the Native Lands Court at Foxton', *Te Waka Maori*, 24 December 1872, p 159 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 108)

611. Vivienne Taueki, brief of evidence (doc B2), p 7

612. Stirling, answers to questions of clarification (doc A182(c)), p 17

613. Luiten, 'Political Engagement' (doc A163), p 29 n

614. Stirling, answers to questions of clarification (doc A182(c)), pp 17–19; claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 35



as being in existence.<sup>615</sup> Stirling told us that, ‘given the evidence about Taueki and Pakauwera, it is obvious that Octavius Hadfield is incorrect in his recollection of the Treaty signings.’<sup>616</sup>

Not all of the Muaūpoko claimants knew whether or not a Muaūpoko rangatira had signed the Treaty.<sup>617</sup> But for some, the signature of Taueki is of utmost importance. Philip Taueki prided himself as being ‘a direct great great grandson of Taueki who signed the Treaty of Waitangi.’<sup>618</sup> For the Taueki whānau, their tipuna’s signature is a ‘significant affirmation that, in spite of the English muskets he carried, Te Rauparaha failed to kill him.’<sup>619</sup> Some consider that it is evidence that Muaūpoko remained a significant iwi entity at the time. Taueki’s signing the Treaty at Manawatū expressed his ‘freedom of movement to exercise that political independence across a wider rohe than merely that represented by his residence at Horowhenua.’<sup>620</sup>

Stirling told us that local iwi referred to Te Tiriti as ‘the blanket treaty’ because rangatira were each given a red blanket on signing. Stirling quoted Te Keepa in support of the notion that the act of being given blankets was seen as more significant than the actual signing of the Treaty. The introduction of the Treaty was later referred to, to fix certain events in time in relation to it.<sup>621</sup>

We have no information as to what was said at the Manawatū Treaty-signing on 26 May 1840. There were no Government officials present, so the entire explanation and discussion of the Treaty was conducted by Henry Williams (assisted by Hadfield), who had been deputed by Governor Hobson. There is no direct evidence as to how Williams and Hadfield explained the Treaty and its clauses, or of any speeches made by Taueki and the other signatories to indicate what they understood the Treaty to mean. We do know that it was the Māori version, not the English version, which the rangatira signed at Manawatū. The texts of both versions have been reproduced in chapter 1.

In the Te Paparahi o Te Raki (Northland) inquiry, the Tribunal reproduced an 1847 account by Henry Williams for Bishop Selwyn, reporting how he had explained the Treaty:

Your Lordship has requested information in writing of what I explained to the natives, and how they understood it. I confined myself solely to the tenor of the treaty.  
That the Queen had kind wishes towards the chiefs and people of New Zealand,  
And was desirous to protect them in their rights as chiefs, and rights of property,  
And that the Queen was desirous that a lasting peace and good understanding should be preserved with them.

615. Octavius Hadfield, evidence to Native Affairs Committee, 21 August 1891, AJLC, 1896, no 5, p 36 (Stirling, answers to questions of clarification (doc A182(c)), p 19)

616. Stirling, answers to questions of clarification (doc A182(c)), p 19

617. Transcript 4.1.6, p 39

618. Philip Taueki, brief of evidence (doc B1), p [2]

619. Hunt, ‘Legend of Taueki’ (doc A18), p [10]

620. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 15, 72

621. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 108



2.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

That the Queen had thought it desirable to send a Chief as a regulator of affairs with the natives of New Zealand.

That the native chiefs should admit the Government of the Queen throughout the country, from the circumstance that numbers of her subjects are residing in the country, and are coming hither from Europe and New South Wales.

That the Queen is desirous to establish a settled government, to prevent evil occurring to the natives and Europeans who are now residing in New Zealand without law.

That the Queen therefore proposes to the chiefs these following articles:

Firstly, – The Chiefs shall surrender to the Queen for ever the Government of the country, for the preservation of order and peace.

Secondly, – the Queen of England confirms and guarantees to the chiefs and tribes, and to each individual native, their full rights as chiefs, their rights of possession of their lands, and all their other property of every kind and degree.

The chiefs wishing to sell any portion of their lands, shall give to the Queen the right of pre-emption of their lands.

Thirdly, – That the Queen, in consideration of the above, will protect the natives of New Zealand, and will impart to them all the rights and privileges of British subjects.<sup>622</sup>

It is likely that this or something similar is the explanation Williams gave the Muaūpoko chief or chiefs who signed the Treaty on 26 May 1840. It was an offer of protection in which the Government would secure order and peace, the ‘full rights’ of chiefs and the people’s lands and all possessions of whatever kind would be protected, and the Queen would not only protect Māori but give them the rights and privileges of British citizens.

Whatever the significance was seen to be at the time, the Treaty was to have a significant impact in the years to come, as we shall explain in subsequent chapters.

## 2.6 CONCLUSION

In this chapter, we have explored some of the common threads of the stories and traditions Muaūpoko claimants shared with us during the prioritised hearing of Muaūpoko claims – including descent lines, shared geographies, and histories.

The first section of this chapter addressed Muaūpoko tribal identity, as relayed to us by the claimants of this inquiry. We have laid out some of the evidence presented to us about Muaūpoko’s origin and arrival narratives, hapū, marae, whānau, and traditional kinship ties. Throughout this section, we gain an understanding of who Muaūpoko say they are in relation to whakapapa.

The second section of this chapter looked at Muaūpoko’s relationship to te taiao – the natural environment. We set out the varying interpretations presented to us about the traditional Muaūpoko sphere of influence, discussed significant

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<sup>622</sup> Waitangi Tribunal, *He Whakaputanga me te Tiriti, The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, 2 vols (Wellington: Legislation Direct, 2014), vol 2, p 356

Muaūpoko place names, and gave an overview of Muaūpoko's customary connection to features in the physical landscape of Horowhenua. This section offers another frame through which to understand Muaūpoko's identity and their relationship to the land and its resources.

Section 3 provided a discussion of the key tribal events in Muaūpoko's histories from 1819 to 1840, the period of muskets, migrations, and upheavals. From the oral histories and perspectives of today's Muaūpoko claimants, the recorded kōrero of nineteenth-century tīpuna, and the commentary of commissioned technical researchers, the Tribunal has set out some of the relevant Muaūpoko narratives of this crucial period. Muaūpoko histories are histories of survival in the face of very significant loss of life in the early encounters with migrant iwi, followed by a period of peace established with Te Whatanui of Ngāti Raukawa. Peace was established first at Karikari by Te Hakeke, Taiweherua, and other chiefs, and then a second time at Horowhenua between Te Whatanui and Taueki. The relationship was encapsulated in the exchange between them:

Taueki said: 'Are you going to be a rata tree that will shade me?'

Whatanui said to Taueki: 'All that you will see will be the stars that are shining in heaven above us; all that will descend on you will be the raindrops that fall from above.'<sup>623</sup>

Section 4 gave a very brief account of what is known about the signing of the Treaty of Waitangi by Muaūpoko rangatira Taueki on 26 May 1840, which brought the Crown and its Treaty promises to Muaūpoko and inaugurated a new partnership with the Queen. What followed soon after was a massive alienation of land outside of Horowhenua in which Muaūpoko claimed interests, which we discuss in the next chapter.

In summation, this chapter presents an account of Muaūpoko's story to use as a platform to inform later chapters in this report. It is not intended to be a full and final account, nor do we make findings on matters where the claimants disagreed. We have explained how Muaūpoko see their history from the various sources available to us.

We acknowledge that further evidence from other parties in the inquiry district, such as Te Ātiawa/Ngāti Awa, and Ngāti Raukawa and affiliated iwi, is yet to come. Yet, insofar as Muaūpoko claims are concerned, this chapter provides us with the necessary platform for understanding Muaūpoko's identity and traditional histories as we come to examining the Treaty claims put before us in relation to the Crown's alleged failure, through acts or omissions, to protect Muaūpoko's traditional lands and waters.

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623. Te Keepa Te Rangihiwini, AJHR, 1896, G-2, p 26 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 44)

HE TANGI NĀ TAMAIRANGI

*He aha rawa te hau e tokihi mai nei  
Ki toku kiri . . . e . . . i  
He hau taua pea no te whenua, . . . e . . . i  
Waiho me kake ake pea e au  
Ki runga o Te Whetu-kairangi  
Taumata materetanga ki roto o Te Whanga-nui-a-Tara  
Auo ki au! E koro ma . . . e . . . i  
Ko Matiu, ko Makara anake e kauhora noa mai ra  
Nga whakaruru hau taua i etahi rangi ra . . . e . . . i  
Naia koutou ka ngaro i au . . . e . . . i  
Kai aku mata ki nga ope  
Ka takoto ki Waitaha raia  
Ka ngaro whakaaitu ia koutou  
E koro ma ! E kui ma . . . e!  
Tera pea koutou kei o takanga  
I roto o Porirua ra  
Ko wai au ka kite atu i a koutou  
E koro ma . . . e . . . i.  
Aue . . . i!  
Me kai arohi noa e aku mata  
Ki o titahatanga i Arapaoa ra . . . e . . . i  
Te ata kitea atu koutou  
E koro ma! E kui ma . . . e . . . i!  
I te rehu moana e takoto mai ra . . . e . . . i  
Tena rawa pea koe kei tapua (?) tahi a Tuhirangi  
E taki ra i te ihu waka  
Koi he koe i te ara ki Te Aumiti  
Kei whea rawa koutou e ngaro nei i au  
E koro ma . . . e . . . i  
Tena rawa pea koutou ki roto o Tai-tawaro  
E ngaro nei . . . e . . . i  
Ko te waro hunanga tena a Tuhirangi  
Nana i taki mai te waka o Kupe,  
o Ngake, ki Aotearoa  
Ka mate Wheke a Muturangi i taupa a Raukawa  
Koia Whatu-kaiponu, whatu tipare  
Ka (hoe) atu ki Te Aumiti  
E whakaumu noa mai ra  
Tauranga matai o te Koau a Toru paihau tahi  
E kai mai ra ki te hau*

*Ka ngaro raia koutou i au, e koro ma e . . . i  
 Tena pea kei roto o Whare-rau i Waipuna  
 Kei roto o tiritiri te moana i roto Pukerua  
 Ka wehe nei koutou i au . . . e . . . i.<sup>624</sup>*

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624. ‘This lament was composed by a very famous woman named Tamairangi who lived at the time of Te Rauparaha. Her mother was of Ngai Te Ao descent, and her father was from Ngai Tara and Ngāti Ira. At the time that Ngāti Ira settled about Porirua, Tamairangi was living at Arapaoa with her parents. However in the early 1800’s, she married a well known man of Ngati Ira descent, Whanake, and they lived together in Porirua. At the time that Te Whanganui-ā-Tara was invaded by a party of Ngāti Mutunga, Tamairangi was there with her people. She was captured alongside her children and they were taken to be killed. However, before leaving Te Whanganui-ā-Tara, Tamairangi sang a lament for which she was famous, as it was so beautiful that Te Rangihaeata asked that she and her children go with him to live at Te Waewae Kapiti a Tara rāua ko Rangitāne. Whilst they were living there, Tamairangi’s son, Te Kekerengu committed adultery with one of Te Rangihaeata’s wives; it was because of this that Tamairangi fled with Te Kekerengu to Arapaoa, lest they be killed by Te Rangihaeata. When Ngāti Toarangatira arrived at Te Moana o Raukawa, Tamairangi and Te Kekerengu once again fled further south to Te Wai Pounamu where subsequently, they were killed by Ngāi Tahu. The place where they were killed was named ‘Te Kekerengu’ after this event. This is Tamairangi’s lament for Te Kekerengu.’: Montgomery-Neutze, ‘He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko’ (doc A15(a)), pp [18]–[19]



PART II

**WHENUA: LAND ISSUES**





CHAPTER 3

**CROWN PURCHASES OUTSIDE HOROWHENUA**

HE ORIORI MŌ WHARAURANGI

*Kimikimi noa ana au e hine i tō kunenga mai i Hawaiki  
I te whakaringaringa, i te whakawaewae, i te whakakanohitanga  
Ka manu e Hine te waka i a Ruatea, ko Kurahaupō  
Ka iri mai tāua i runga o Aotea, ko te waka i a Turi  
Ka ū mai tāua te ngutu whenuakura, ka huaina te whare ko  
Rangitāwhi  
Ka tiria mai te kūmara, ka ruia mai te karaka ki te taiao nei  
Kerea iho ko te punga tamawāhine, koa riro i ngā tūāhine i a  
Nonoko-uri, i a Nonoko-tea  
Ko te here i runga ko te Korohunga  
Kapua mai e Hau ko te one ki tona ringa  
Ko te Tokotoko-o-Turoa  
Ka whiti i te awa  
Ka nui ia, ko Whanganui  
Ka tiehua te wai, ko Whangaehu  
Ka hinga te rakau, ko Turakina  
Ka tikeitia te waewae, ko Rangitikei  
Ko tatu, e hine, ko Manawatu  
Ka rorowhio ngo taringa, ko Hokio  
Waiho te awa iti hei ingoa mona, ko Ōhau  
Tākina te Tokotoko, ko Ōtaki  
Ka mehameha, e hine, ko Waimaha  
Ka ngāhae ngā kanohi, ko Waikanae  
Ka tangi ko te mapu  
Ka tae hoki ki a Wairaka  
Matapoutia, poua ki runga, poua ki raro,  
Ka rarau e hine*

3.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

*Ka rarapa nga konohi, ko Wairarapa  
Te rarapatanga o tō tipuna e hine . . . !<sup>1</sup>*

**3.1 INTRODUCTION**

In this chapter, we provide a brief overview of what is known at present about an essential point of context for our inquiry: Muaūpoko involvement in the Crown's dealings in lands outside of the Horowhenua block. This is essential because Muaūpoko's claims of Treaty breach extended well beyond the core Horowhenua lands, but it is *contextual* because of the limits of our priority, expedited inquiry. We explain this point further in section 3.2 below.

As discussed in the previous chapter, Muaūpoko claimed customary interests over a wide area of the lower North Island in the early nineteenth century, at the time when the northern iwi arrived in the district. It is clear from the record that Muaūpoko continued to claim wide-ranging interests during the pre-1865 period, when the Crown transacted with various iwi to buy land across our inquiry district. There is also clear evidence that the Crown dealt with Muaūpoko in a number of blocks outside of the Horowhenua heartland. That is an established fact. In part, this was because of the way in which the Crown often purchased land at that time, dealing with multiple iwi and attempting to extinguish all interests of whatever nature.

The Muaūpoko claimants' view is that the degree of Crown recognition was too limited, falling far short of the true extent of their interests, but that it nonetheless shows the survival of Muaūpoko customary rights after the arrival of the northern iwi. On the other hand, Ngāti Raukawa and other northern iwi have claims about those blocks, including the question of whether the Crown dealt with the correct iwi in a Treaty-compliant manner. We have to be cautious, therefore, in how we address Muaūpoko claims in advance of hearing the evidence and submissions of other iwi.

We begin by considering the parties' submissions about the geographical limits of our expedited, priority inquiry into Muaūpoko claims. We conclude that it is appropriate to provide a brief analysis of Muaūpoko involvement in Crown dealings outside of Horowhenua, but that no findings should be made at this stage of our inquiry, for reasons set out in section 3.2.

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1. 'As the story has it, Wharaurangi was the daughter of Te Rangitākoru, of Ngāti Apa by whom this waiata was composed. This song is one which is well known throughout the iwi and hapū of Whanganui, Rangitikei, Manawatū right through to Te Whanganui-ā-Tara. This waiata contains an account of the legend of Haunui-ā-Nanaia, a renowned ancestor and tohunga of Aotea and Kurahaupō. It was Haunui-ā-Nanaia that named the many rivers and places throughout this part of the country while in search of his wife Wairaka. Pukerua Bay was the place where he finally caught up with her, turning her to stone. She still stands there today. The names that Haunui-ā-Nanaia gave to the many places on his journey have been preserved by the people living at Te Ūpoko o te Ika, and can be found within this waiata': Sian Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko', not dated (doc A15(a)), pp [43]–[44]

Our discussion of the relevant purchases is contained in section 3.3. In that section, we provide a very brief summary of information about each Crown purchase in which Muaūpoko were involved, and what is currently known about the nature and extent of Muaūpoko involvement, for the assistance of any negotiations and as context for the Horowhenua claims. The purchases are (see map 3.1):

- ▶ Te Awahou (section 3.3.2(1));
- ▶ Te Ahuaturanga (section 3.3.2(2));
- ▶ Muhunua (section 3.3.2(3));
- ▶ Rangitikei-Manawatū (section 3.3.2(4)); and
- ▶ Wainui (section 3.3.2(5)).

In section 3.3, we consider three blocks on which advances were paid in the 1870s, and which then passed through the Native Land Court (Aorangi, Tuwhakatupua, and Taonui).

Finally, we discuss some issues raised by the claimants about the Crown's purchase of the Tararua block in the Wairarapa inquiry district (see section 3.3.4) before drawing our limited conclusions (see section 3.3.5).

## 3.2 THE LIMITS OF THE PRIORITY, EXPEDITED INQUIRY

### 3.2.1 Introduction

On 3 October 2014, we granted the Muaūpoko claims priority within the Porirua ki Manawatū inquiry, agreeing to hear them in advance of other claimants and the completion of the research casebook.<sup>2</sup> This inevitably meant that some limits would need to be put on the inquiry, so that other claimants were not disadvantaged in any way, and so that the issues were confined to matters which had been fully researched. We note that we have also heard oral histories from Ngāti Raukawa and affiliated groups and from Te Ātiawa/Ngāti Awa during our Nga Kōrero Tuku Iho hearings, before considering the Muaūpoko claims.

On 25 September 2015, the Tribunal issued memorandum-directions to clarify the scope of the Muaūpoko priority hearings. We specified that we would not be making findings on 'any historical acts or omissions of the Crown in respect of the relationships between Muaūpoko and Ngāti Raukawa, and between Muaūpoko and Te Āti Awa/Ngāti Awa ki Kapiti'. We also stated that we would make no findings as to 'any historical acts or omissions of the Crown relating to the respective rights and interests of Muaūpoko, Ngāti Raukawa, and Te Āti Awa/Ngāti Awa ki Kapiti'.<sup>3</sup> Other claimant groups had agreed to the early hearing of Muaūpoko claims in advance of the completion of their own research and preparation for hearings. It was necessary to provide some protection for their interests, to ensure that we did not make findings which affected their claims without an opportunity for them to be heard. We noted, however, that we would not be able to avoid some limited consideration of issues and blocks where interests overlapped, as context for the Muaūpoko claims.

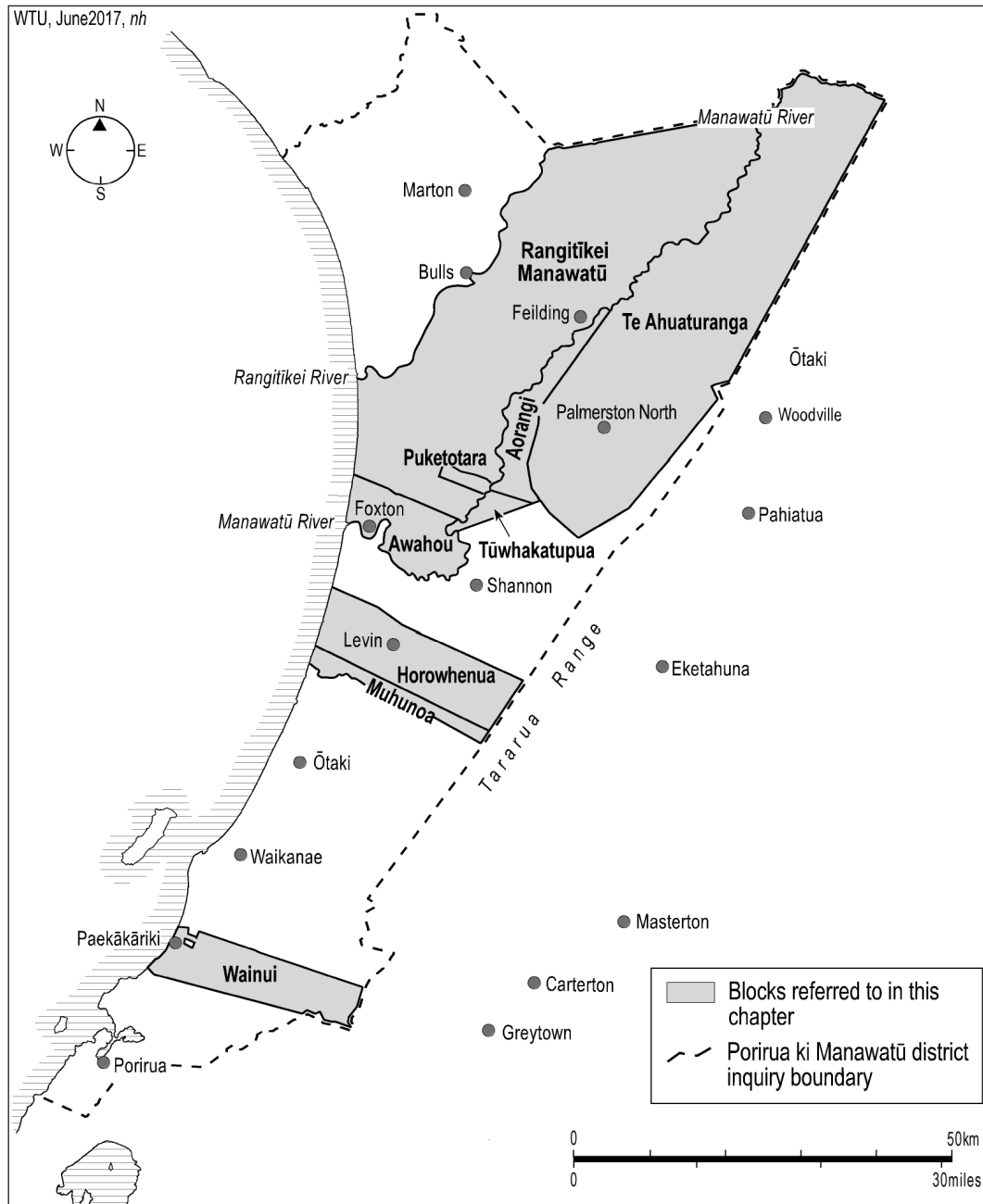
Otherwise, we defined the scope of the expedited, priority inquiry as covering:

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2. Waitangi Tribunal, memorandum-directions, 3 October 2014 (paper 2.5.89)

3. Waitangi Tribunal, memorandum-directions, 25 September 2015 (paper 2.5.121)

3.2.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT



Map 3.1: Blocks referred to in chapter 3

- ▶ Any historical acts or omissions of the Crown regarding respective rights and interests internal to Muaūpoko hapū;
- ▶ Any historical acts or omissions of the Crown relating to Muaūpoko and the Horowhenua lands (but not to Ngāti Raukawa and the Horowhenua lands);
- ▶ Any historical acts or omissions of the Crown relating to Muaūpoko and Lake Horowhenua; and

- ▶ Any other historical acts or omissions of the Crown specific to Muaūpoko, for which there is evidence available to the Tribunal.<sup>4</sup>

The Crown and the Muaūpoko claimants, however, have disagreed as to the scope of the inquiry. We turn next to a consideration of their submissions on this point.

### 3.2.2 The parties' arguments

#### (1) *The Crown's case*

The Crown submitted that the limits of the inquiry should be interpreted strictly. In the Crown's view, findings on the nature and extent of Muaūpoko interests outside of the Horowhenua block would be beyond the scope of the inquiry. Crown counsel further submitted that it would be difficult to make such findings without considering the interests of other iwi. It would also be premature, the Crown submitted, because the transactions in blocks outside of Horowhenua 'are likely to be significant topics in the broader Porirua ki Manawatū inquiry and to be the subject of extensive further research and submissions'. The Crown noted that it 'has not yet considered any concessions or acknowledgements for Muaūpoko in relation to land transactions outside of the Horowhenua block', and can only do so once they have been considered as part of the broader inquiry.<sup>5</sup> The Crown therefore urged the Tribunal to be 'cautious' in making any findings on these issues.<sup>6</sup>

#### (2) *The claimants' case*

The Muaūpoko claimants argued that the Tribunal can and should make findings concerning Crown actions in respect of Muaūpoko interests outside of the Horowhenua block. Claimant counsel submitted that such matters 'are not reliant on the relationships or respective rights and interests of other iwi', but rather concern occasions when the Crown directly engaged with Muaūpoko.<sup>7</sup> The claimants argued that the Crown's strict approach is inconsistent with both the district inquiry and settlement processes, neither of which require 'complex and overlapping land interests' to be resolved.<sup>8</sup> In the claimants' view, the focus of the inquiry must be on the Crown's actions and its relationship with Muaūpoko: 'The Tribunal should progress inquiry into issues outside of the Horowhenua while recognizing the overlapping interests of others but conducting inquiry into the specific Crown-Muaūpoko relationship of which there is ample evidence.'<sup>9</sup>

Claimant counsel submitted that leaving these matters until the wider inquiry 'would inflict major prejudice on our clients.'<sup>10</sup>

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4. Waitangi Tribunal, memorandum–directions (paper 2.5.121)

5. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), pp 197–198

6. Crown counsel, closing submissions (paper 3.3.24), pp 199–200

7. Claimant counsel (Bennion, Whiley, and Black), closing submissions, 12 February 2016 (paper 3.3.17), p 8; claimant counsel (Ertel and Zwaan), closing submissions, 12 February 2016 (paper 3.3.13), pp 38–39

8. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 10

9. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply, 21 April 2016 (paper 3.3.33), p 38

10. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 39

3.2.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**3.2.3 The Tribunal's decision**

The claimants have raised issues about Crown purchasing outside the Horowhenua block on two bases: first, in their own right as grievances against the Crown; and, secondly, as essential context to land loss in Horowhenua. In the claimants' view, Crown actions had made the Horowhenua block their 'last bastion' by the 1870s, and so further loss of land there was doubly prejudicial to Muaūpoko.

Claimant Robert Warrington explained the claim thus:

The Crown, from 1852 to 1872, purchased large areas of Muaūpoko lands. Our interests were not investigated in these areas. This meant that our interests were alienated without Court investigation. We lost large tracts of our lands in this way, contributing to landlessness.

Eventually those Muaūpoko seeking interests in their lands pursued the last Muaūpoko bastion – Horowhenua. This has contributed to internal disputes as those who lived within the wider rohe returned to seek interests at Horowhenua.

By 1873, Muaūpoko interests were confined to the Horowhenua block.<sup>11</sup>

As we noted before the priority Muaūpoko hearings began, any consideration of Crown dealings with Muaūpoko outside the Horowhenua block has to be strictly contextual in nature. This is because:

- ▶ the transactions involve the interests and claims of other iwi in a substantial way, and their claims have not yet been fully researched or heard;
- ▶ the research casebook has not been completed, and we do not have the evidence necessary to deal fully with the history of blocks outside of Horowhenua; and
- ▶ we do not have the benefit of Crown submissions about Muaūpoko claims in respect of other blocks.

Nonetheless, we have received Muaūpoko evidence in respect of blocks outside of Horowhenua, including tangata whenua evidence and the reports of Bruce Stirling and David Armstrong. Other relevant reports on the record include Jane Luiten's report (which mainly focused on Horowhenua), Dr Hearn's overview report, and the Rangahaua Whānui report authored by Dr Robyn Anderson and Dr Keith Pickens.

In respect of the evidence currently available, claimant counsel quoted David Armstrong's report:

The primary sources and the body of existing research reveals that Muaūpoko customary interests were recognised, to a greater or lesser extent, in a number of Crown purchases and Native Land Court title adjudications involving extensive lands between Waikanae and the Rangitikei River, and extending inland to the Tararua Range.<sup>12</sup>

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11. Robert Paul Warrington, brief of evidence, 16 November 2015 (doc C18), p 1

12. DA Armstrong, 'Muaupoko Interests outside the Horowhenua Block', September 2015 (doc A185), p 9 (claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 9); claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 41



Claimant counsel submitted:

This shows that primary evidence and existing research was used to demonstrate that Muaūpoko were recognized by the Crown, the Land Court and/or other iwi in a number of land transactions throughout the district. This is not a conclusion 'dependent on interpretation' as the Crown suggests, but is instead a conclusion based on significant corroborating evidence contained in primary documents including Land Court minute books but also Turton deeds and Land Purchase Department Correspondence as well as other significant historical records.<sup>13</sup>

We agree that there is sufficient evidence to show occasions in which Muaūpoko participated in, or their interests were recognised in, Crown purchase dealings across a number of blocks. We therefore provide a brief summary of those occasions as context for the Horowhenua claims, and for the assistance of any negotiations. We do not, however, assess the fairness of the Crown's dealings in respect of Muaūpoko or make any findings about the Crown's acquisitions of land from Māori in our inquiry district. That will need to await the full hearing of evidence and submissions later in our inquiry.

### **3.3 MUAŪPOKO'S INVOLVEMENT IN CROWN DEALINGS OUTSIDE THE HOROWHENUA BLOCK**

#### **3.3.1 Introduction**

From 1840 to 1865, the Crown had the power of pre-emption, as agreed to by Māori in article 2 of the Treaty of Waitangi. This meant that the Crown had the sole right to buy or lease land from Māori. From 1848 to 1866, the Crown used its pre-emptive powers to buy more than 800,000 acres of land in our inquiry district.<sup>14</sup> The great bulk of this land was purchased in less than a decade, between 1858 and 1866.

As is by now well established, the unfairness of the Crown's purchase tactics and the rapid loss of land created a groundswell of Māori opposition in the North Island by the late 1850s. One result was the election of a Māori King to preserve Māori authority and lands. Ultimately, war broke out in Taranaki in 1860 when the Crown forced through its purchase of Waitara from an individual chief in the face of strong tribal opposition.

In 1862, the Native Lands Act abolished pre-emption and created an independent Native Land Court to ascertain Māori customary titles, after which the court transformed them into Crown-derived, saleable titles. Crown pre-emption was set aside in favour of direct, private purchasing by settlers. For the Manawatū district, however, the Government provided in the 1862 Act (and its 1865 successor) for pre-emption to continue. A large part of our inquiry district was excepted from

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13. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 41

14. Jane Luiten with Kesaia Walker, 'Muaupoko Land Alienation and Political Engagement Report', August 2015 (doc A163), p 49



## 3.3.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

the operations of the Native Land Court and private purchasing (see map 3.2).<sup>15</sup> The Crown acquired half a million acres at the northern end of the inquiry district between 1864 and 1866 under this exception (the Ahuaturanga and Rangitikei-Manawatū blocks).

The Crown's pre-emption purchasing has been found in breach of Treaty principles in a number of the Waitangi Tribunal's district inquiries: Taranaki; Ngāi Tahu (southern South Island); Te Tau Ihu (northern South Island); Muriwhenua; Mohaka ki Ahuriri; Wairarapa ki Tararua; Hauraki; Kaipara; and Whanganui.<sup>16</sup> It is now well established that pre-emption was intended to be a protective measure. Nonetheless, the prioritisation of settler interests and the requirement for the Crown to buy cheap and sell dear (to fund colonisation) resulted in serious Treaty breaches. In other districts, the Tribunal has found that the Crown applied unfair pressure on individual chiefs or communities to sell lands. It did not ensure that boundaries were clearly identified and surveyed, or that customary title was properly investigated and ascertained. The Crown often made advance payments to selected groups or individual chiefs in order to compel others to sell. It often failed to make adequate reserves, omitted to deal properly with all right-holders, paid unfair prices, and essentially extorted millions of acres in unfair bargains – sometimes from a mix of willing and unwilling sellers. The question of whether or to what extent the Crown applied such tactics in our inquiry district will be considered in later hearings, once the casebook has been completed and all parties have been heard.

At this stage of our inquiry, we simply provide some very brief background material on each relevant purchase, followed by a summary of the claimants' submissions and a short analysis of the extent to which Muaūpoko were involved, or had their rights recognised, in each purchase.

Claimant Sandra Williams explained Muaūpoko's essential grievances as:

Muaupoko identified an interest to the Crown in 406,399 acres at the time the Crown purchased these lands from 1852 to 1872. Muaupoko interests were not investigated resulting in Muaupoko not receiving any land which contributed to landlessness, transiency and eventually these Muaupoko seeking interests in the last Muaupoko bastion – Horowhenua. This contributed to internal disputes.<sup>17</sup>

15. TJ Hearn, 'One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century', June 2015 (doc A152), pp 225–231, 286–288

16. See Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: Legislation Direct, 1996); Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Legislation Direct, 1991); Waitangi Tribunal, *Te Tau Ihu o Te Ika a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Waitangi Tribunal, 2008); Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: Legislation Direct, 1997); Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004); Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010); Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006); Waitangi Tribunal, *The Kaipara Report* (Wellington: Legislation Direct, 2006); Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015).

17. Sandra Williams, speaking notes, 4 April 2014 (doc A26), p 1

Ms Williams identified the crucial purchases outside of Horowhenua which ‘led to grievances’ for Muaūpoko as: Tararua; Taitapu (in the South Island); Wainui; Te Awahou; Rangitikei-Manawatū; Aorangi/Taonui; and Tuwhakatupua.<sup>18</sup> In particular, Muaūpoko were concerned that ‘the Crown had failed to adequately investigate or protect our interests resulting in us receiving no lands or reserves in these places.’<sup>19</sup>

The pre-emption purchases considered in this section of the chapter are: Te Awahou; Te Ahuaturanga; Muhunoa; Rangitikei-Manawatū; and Wainui. In addition, we make brief mention of three blocks for which purchase negotiations were opened by the Crown during the Native Land Court era in the 1870s (Aorangi, Tuwhakatupua, and Taonui). Finally, we discuss the Tararua block in the Wairarapa district, and the Hapuakorari reserve – which some claimants suggested was located in our inquiry district.

Although a number of claimant witnesses expressed distress at the denial of Muaūpoko rights in the Port Nicholson (Wellington) block,<sup>20</sup> that is outside of our jurisdiction and we cannot comment on it.<sup>21</sup>

### 3.3.2 Pre-emption purchases

#### (1) Te Awahou

##### (a) Background

The Awahou block (also referred to as Te Awahou) was a large block on the right bank of the lower Manawatū River, inland from the river mouth, around present-day Foxton.<sup>22</sup> Ihakara Tukumarū of Ngāti Raukawa offered the block for sale to the Crown in July 1858. James Grindell (the Native Land Purchase Department’s interpreter) reported at the time that Tukumarū had offered a block of 10,000 to 12,000 acres for sale.<sup>23</sup> Over the course of negotiations (1858–1859), the sale was disputed not only between Ngāti Apa and Ngāti Raukawa, but also between sellers and non-sellers within Ngāti Raukawa. This stalled the negotiations for 15 months.<sup>24</sup> Opposition to the sale was led by Nēpia Taratoa of Ngāti Apa and Ngāti Parewahawaha.<sup>25</sup>

The negotiations were initiated by Donald McLean, a land purchase officer and later commissioner, on behalf of the Crown. The transaction was completed by McLean’s colleague, William Searancke, another commissioner in the Native Land

18. Williams, speaking notes (doc A26), pp 1–2

19. Transcript 4.1.6, p 127 (Sandra Williams)

20. See, for example, Grant Huwyler, brief of evidence, 11 November 2015 (doc C14), pp 2–3; Ana Montgomery-Neutze, brief of evidence, 16 November 2015 (doc C15), pp 7–8.

21. The Port Nicholson block is the subject of another inquiry report: Waitangi Tribunal, *Te Whanganui a Tara me Ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003).

22. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 15; Bruce Stirling, ‘Muaupoko Customary Interests’, September 2015 (doc A182), p 154

23. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 154

24. T J Hearn, ‘One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century’, June 2015 (doc A152), pp 163–165

25. Hearn, ‘One Past, Many Histories’ (doc A152), p 167

## 3.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Purchase Department.<sup>26</sup> For the Crown, the Awahou block was an important piece of land to acquire as it was, according to Searancke, ‘the key to the whole of the fine timbered inland country; also to the rich and fertile district situated between the Oroua and Rangitikei rivers.’<sup>27</sup>

Initial agreement to the sale of the block was reached on 11 November 1858 and a first deed, referred to as ‘Awahou No 1 block’, was signed by Ihakara Tukumarū and 66 others on 12 November 1858.<sup>28</sup> A price of £2,500 was agreed for the Awahou block, by then estimated to be 37,000 acres.<sup>29</sup> The boundary was adjusted to exclude land that Nēpia Taratoa and his supporters claimed – about one-third of the block.<sup>30</sup> Searancke paid an early instalment of £400 to Ngāti Raukawa at that time, following which Ihakara made small payments to Ngāti Toa, Muaūpoko, and Ngāti Apa.<sup>31</sup> A further £50 was paid to Ngāti Apa in December 1858. Signatories to the deed included Kāwana Hunia of Ngāti Apa and Muaūpoko.<sup>32</sup> Evidence produced later in the court suggested that some of the purchase money was given to Rangitāne and Muaūpoko.<sup>33</sup>

The boundaries of the block were not finalised until May 1859, when Searancke returned to the district to pay the balance of the money to the sellers, finalise boundaries, and define a reserve.<sup>34</sup> A second deed, referred to as ‘Awahou No 2 block’ was signed, now including Nēpia Taratoa, and dated 14 May 1859. The total payment made to the sellers was £2,335, slightly less than the agreed price of £2,500.<sup>35</sup>

**(b) Claimant closing submissions**

Counsel for Wai 52 and Wai 2139 submitted that the Te Awahou transaction and deed did not adequately define those with interests in the land. Although 67 people, including Kāwana Hunia (whose mother was Muaūpoko), signed the deed, counsel submitted that the issue of reserves was left for future consideration:

no land was set-aside for Muaūpoko in connection with this transaction. There was insufficient investigation and survey of the lands in question prior to the negotiation and transaction of an ‘estimated 37,000 acres’ and the £400 instalment occurred before the boundaries had even been finalised.<sup>36</sup>

26. Hearn, ‘One Past, Many Histories’ (doc A152), pp 73, 149, 162–163

27. Searancke to McLean, 6 August 1861, AJHR, 1861, C-1, p 295 (Hearn, ‘One Past, Many Histories’ (doc A152), p 168)

28. Hearn, ‘One Past, Many Histories’ (doc A152), p 165

29. Hearn, ‘One Past, Many Histories’ (doc A152), p 164; Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 154

30. Hearn, ‘One Past, Many Histories’ (doc A152), p 164

31. Hearn, ‘One Past, Many Histories’ (doc A152), p 165

32. Hearn, ‘One Past, Many Histories’ (doc A152), p 168

33. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 15

34. Hearn, ‘One Past, Many Histories’ (doc A152), p 167; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 16

35. Hearn, ‘One Past, Many Histories’ (doc A152), p 168; Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 155

36. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), pp 51–52

Counsel for Wai 237 submitted that despite historical misreadings that have played down Muaūpoko's role, both the Crown and Ngāti Raukawa actually recognised '*unextinguished ancestral right*' (emphasis in original) in the Te Awahou purchase.<sup>37</sup>

**(c) What is known at present about Muaūpoko involvement**

According to David Armstrong, Muaūpoko were present at the Awahou sale in November 1858. Te Keepa's evidence in the Native Land Court was that Muaūpoko attended in order to ensure they received some of the payment.<sup>38</sup>

Bruce Stirling pointed out that Muaūpoko did not only attend the deed signing and distribution of payments, but also participated in the sale: Kāwana Hunia signed the deed, and Muaūpoko received a share of the payments, including a share of the £400 instalment in 1858.<sup>39</sup> Claimant Sandra Williams told us that Kāwana Hunia 'represented Muaūpoko in the Te Awahou sale in November 1858'.<sup>40</sup> Then, in May 1859, Ihakara Tukumarū invited Muaūpoko to share in the public distribution of payment for this block.<sup>41</sup> Armstrong similarly asserted that the evidence confirms that 'Muaupoko, Ngati Apa and other iwi received a substantial part of the £2,500 purchase price', though the exact amount given to Muaūpoko is not known.<sup>42</sup>

According to Stirling, Muaūpoko's participation in the Awahou sale shows that:

- ▶ Ihakara Tukumarū and others amongst Ngāti Raukawa acknowledged the right of Muaūpoko to participate in the Awahou purchase;<sup>43</sup>
- ▶ Muaūpoko successfully asserted their '*unextinguished ancestral right*';<sup>44</sup> and
- ▶ Muaūpoko's customary interests in the Awahou block were recognised by both the Crown and migrant iwi.<sup>45</sup>

Dr Hearn stressed that 'it is important to note that the Crown's acquisition of Te Awahou . . . took place in the absence of any formal title investigation'.<sup>46</sup> He cautioned against giving too much weight to the recognition accorded Muaūpoko by Ihakara Tukumarū, which was, he argued, contested among Ngāti Raukawa.<sup>47</sup>

**(d) Conclusion**

In sum, the sources cited by Stirling do suggest that Muaūpoko were involved in the purchase and receipt of payments, and that their rights were afforded a degree of recognition by some, at least, among Ngāti Raukawa.<sup>48</sup> Hearn's evidence broadly

37. Claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), p 16

38. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 15

39. Stirling, 'Muaupoko Customary Interests' (doc A182), p 155

40. Sandra Betty Williams, brief of evidence, 11 November 2015 (doc C13), p 3

41. Luiten, 'Political Engagement' (doc A163), p 52

42. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 15

43. Stirling, 'Muaupoko Customary Interests' (doc A182), p 155

44. Stirling, 'Muaupoko Customary Interests' (doc A182), p 155

45. Stirling, 'Muaupoko Customary Interests' (doc A182), p 156

46. T J Hearn, summary of 'One Past, Many Histories', September 2015 (doc A152(b)), p 10

47. Hearn, 'One Past, Many Histories' (doc A152), pp 134–169; Hearn, summary of 'One Past, Many Histories' (doc A152(b)), p 9

48. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 154–156

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supports this position but emphasises that, according to missionary Samuel Williams, non-sellers accused Ihakara Tukumarū of including ‘non-owners’ to strengthen the selling party.<sup>49</sup> More cannot be said in the absence of evidence and submissions from Ngāti Raukawa and the Crown.

**(2) Te Ahuaturanga****(a) Background**

The Ahuaturanga block (also known as Te Ahuaturanga or Upper Manawatū) was offered for sale in or around 1858, shortly after the Awahou no 1 deed was arranged.<sup>50</sup> The block comprised around 250,000 acres and was located to the west of the Manawatū Gorge (see map 3.1).<sup>51</sup> Te Hirawanu Kaimokopuna of Rangitāne made an offer and sought payment for the block on behalf of ‘several tangata whenua iwi’, including Muaūpoko.<sup>52</sup> Ngāti Raukawa are said to have agreed not to oppose Rangitāne’s desire to sell land at Te Ahuaturanga on the condition that the land between the Rangitikei and Manawatū Rivers not be sold ‘as it belonged to Ngatiraukawa.’<sup>53</sup> Ngāti Kauwhata opposed the proposed sale.<sup>54</sup>

While the Crown desired land in the Manawatū area for settlement, agriculture, and roading purposes, McLean and Searancke both apparently declined Te Hirawanu’s initial offer and his demands for a survey and a price per acre on the Ahuaturanga block.<sup>55</sup> Searancke did not make any advance payments on Ahuaturanga specifically, although he did advance £100 to Hoani Meihana Te Rangiotu and other Rangitāne for ‘Manawatu lands.’<sup>56</sup>

It was not until 1864 that the Government resumed its efforts to purchase the Ahuaturanga block. Isaac Featherston, superintendent of Wellington Province, had been appointed the central government’s agent and special land purchase commissioner.<sup>57</sup> He conducted the sale with the aid of Walter Buller, who was resident magistrate in the Manawatū at the time. Buller’s instructions came from the Native Minister. Buller negotiated with the sellers, dismissing their demand for £150,000 as ‘ridiculously high,’ and suggesting they instead offer a price of £12,000 which was ‘the maximum sum that, coincidentally, Featherston had been prepared to pay.’ Buller himself claimed to be impartial and to have not been aware of Featherston’s price. The sellers eventually agreed to the suggested price of £12,000.<sup>58</sup>

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49. Hearn, summary of ‘One Past, Many Histories’ (doc A152(b)), p 9

50. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 157

51. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 157

52. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 157; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 16

53. Victoria Fallas, ‘Rangitikei/Manawatu Block’, 17 November 1993 (Wai 52 ROI, doc A3), p 8 (Hearn, ‘One Past, Many Histories’ (doc A152), p 134)

54. Hearn, ‘One Past, Many Histories’ (doc A152), p 153

55. Hearn, ‘One Past, Many Histories’ (doc A152), pp 134, 148

56. Hearn, ‘One Past, Many Histories’ (doc A152), p 150

57. Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Waitangi Tribunal Rangahaua Whānui Series (Wellington: Waitangi Tribunal, 1996) (doc A165), p 89

58. Hearn, ‘One Past, Many Histories’ (doc A152), pp 156–157



Featherston signed the deed of cession for the Ahuaturanga block, dated 23 July 1864, on 18 August 1864. Te Hirawanu and Hoani Meihana signed the receipt for purchase money: one lump sum of £12,000.<sup>59</sup> Rangitāne received the payment and undertook to ‘apportion and distribute among the sellers the said purchase money.’<sup>60</sup> The sellers were listed as 143 members of Rangitāne, Ngāti Kauwhata, and Ngāi Tumokai (a hapū of Ngāti Apa).<sup>61</sup> Te Hirawanu is said to have voluntarily given Ngāti Raukawa a small portion of the purchase money.<sup>62</sup>

Hearn noted that Ngāti Raukawa and Rangitāne later disagreed about who had mana over the Ahuaturanga block, and particularly whether the consent of Ngāti Raukawa was necessary for the sale.<sup>63</sup> Stirling, meanwhile, stated that Ngāti Apa were unhappy that they themselves had not received a larger share of the proceeds from the sale of the Ahuaturanga block. This may have had implications for Rangitāne in terms of the apportionment of purchase money from the Rangitikei-Manawatū block purchase discussed below.<sup>64</sup>

### **(b) Claimant closing submissions**

Claimant counsel supported David Armstrong’s statement that, although not referred to in the evidence regarding Te Ahuaturanga, it is ‘almost certain’ that Muaūpoko took part under Rangitāne auspices.<sup>65</sup>

In their closing submissions about the Te Ahuaturanga block, the claimants highlighted the alienation of reserves, denial of a land survey, and the Crown’s inadequate investigation or recording of other tangata whenua interests. Counsel for Wai 52 and Wai 2139 submitted that, although reserves were made in connection with the Te Ahuaturanga sale, ‘these were subsequently subject to the Land Court process and alienated from Muaūpoko ownership’. Counsel also submitted that Searancke ‘denied the tangata whenua iwi their basic right to have their interests defined by survey and relative consideration paid’. Finally, counsel argued that the Te Ahuaturanga deed ‘did not adequately investigate or record other tangata whenua iwi interests in the land or oversee how these interests were purportedly permanently alienated from the approximately 250,000-acres in question.’<sup>66</sup>

Counsel for Wai 770 (the Karaitiana Te Korou claim) submitted that his clients also had interests in the Te Ahuaturanga block, derived through their ancestor Karaitiana Te Korou.<sup>67</sup>

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59. Hearn, ‘One Past, Many Histories’ (doc A152), p157

60. Ōtaki Native Land Court, minute book 1C, 15 March 1868, fols 248–249 (Hearn, ‘One Past, Many Histories’ (doc A152), p157)

61. Hearn, ‘One Past, Many Histories’ (doc A152), p157

62. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p16

63. Hearn, ‘One Past, Many Histories’ (doc A152), pp158–160

64. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp168–169

65. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), pp53–54; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p16

66. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p54

67. Claimant counsel (Afeaki, McCarthy, and Jordan), closing submissions, 12 February 2016 (paper 3.3.16), pp24–25

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**(c) What is known at present about Muaūpoko involvement**

In relation to the Ahuaturanga block, there appear to be no written sources which state that the Crown had any dealings with Muaūpoko directly. In his evidence, however, David Armstrong stated that ‘it is almost certain’ that Muaūpoko would have been involved in the sale because of their close relationship with Rangitāne, who were the primary negotiators for the sale of the Ahuaturanga block, and who represented Muaūpoko in the sale of the Rangitikei-Manawatū block.<sup>68</sup>

Stirling also asserted that ‘Muaupoko would have been included’, given their relationship with Rangitāne and that Muaūpoko’s extensive interests were subsequently recognised in the adjacent Rangitikei-Manawatū block (to the west).<sup>69</sup> Stirling supported this argument by pointing to the presence of Muaūpoko interests in the Aorangi reserve, which was created out of the Ahuaturanga purchase. This was evidence that the tribe had rights in the lands from which the reserve had been made. He stated:

The mix of Rangitane and Muaupoko interests in the [Aorangi] reserve (and thus in the deed from which it was made) was noted by a government land purchase agent who in 1873 advanced £200 to the owners of both tribes . . . these Muaupoko interests were recognised when title to the Aorangi reserve (19,449 acres) excluded from Te Ahuaturanga was subdivided in 1873 and in 1878 through the inclusion of Muaupoko in the title to Aorangi, although they are but little referred to in the minutes, leaving it to their whanaunga in Rangitane and Ngati Apa (such as Kerei Te Panau, Hamuera Raikokiritia, Hoani Meihana, Kawana Hunia, and Te Keepa) to look to their interests. Te Rangimairehau and Te Waitere Kakiwa of Muaupoko [were] included among the owners of Lower Aorangi. In addition, the leading Rangitane owner, Peeti Te Aweawe emphasised that the lists did not include all the owners but that those on the lists would take care of their relatives omitted from the title. Kawana Hunia referred to Muaupoko as being among the tangata whenua groups who cultivated along the Oroua river within the Te Ahuaturanga deed block. Hoani Meihana recalled Te Keepa’s Muaupoko father, Tanguru, as among the Muaupoko working the land beside the Oroua river within Aorangi block.<sup>70</sup>

Further research for the casebook may uncover additional details about the rights and interests involved in this massive, 250,000-acre purchase.

**(d) Conclusion**

In sum, there is no direct evidence at this stage that Muaūpoko were involved in the Te Ahuaturanga purchase, but their rights in the Aorangi reserve are noted. We deal further with Aorangi below (section 3.3.3).

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68. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p16

69. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p157

70. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp157–158



**(3) Muhunooa****(a) Background**

The negotiations over the Muhunooa block took place between 1860 and 1864, but were not concluded until a decade later, once the land had passed through the Native Land Court.<sup>71</sup> It was offered to Searancke for sale as the ‘Papaitonga’ block by Te Roera Te Hukiki of Ngāti Raukawa in the late 1850s.<sup>72</sup> The Muhunooa block was approximately 1,300 acres and was located south of what would later become the Horowhenua block. The proposed boundaries extended from the mouth of the Ōhau River in the south up to the eastern border of Lake Waiwiri (or Papaitonga) in the north.<sup>73</sup> The block was enlarged and its boundaries redefined when claims were heard by the Native Land Court (see map 3.1).

Initial agreement to the purchase of the Muhunooa block was made in 1860 between the Crown and Ngāti Raukawa. Jane Luiten stated that the first down payment on the Muhunooa block (of £50) was made to Ngāti Raukawa at the Kohimarama conference in Auckland. This was followed by a further £120 in two separate instalments. A formal written agreement between Ngāti Raukawa and the Crown for the Muhunooa block was made in Ōtaki on 5 February 1864, with the Crown paying another advance of £100. The agreement was signed on 29 March 1864.<sup>74</sup> A final price for the block had still not yet been agreed, although correspondence later that year commented that the total offered by the Crown for the Muhunooa block was £1,100.<sup>75</sup> In October 1864, Ngāti Raukawa asked Featherston to divide the money, with £300 held back as a disputed portion.<sup>76</sup>

By 1864, however, the Crown was aware of other claims in the Muhunooa block.<sup>77</sup> Not only was the sale contested within Ngāti Raukawa, Muaūpoko had informed the Government that they had interests in the block.<sup>78</sup> The sale was hindered until the following decade, after the land’s title had been determined by the Native Land Court in the Manawatū-Kukutauaki title investigation (1872–73). Stirling noted:

The completion of the purchase depended on a title being awarded by the Native Land Court, which occurred in March 1874. By that time, the boundaries had been altered a little, so that Muhunooa took in only a very small part of Waiwiri, with the

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71. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 158, 160; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14

72. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14; Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 158

73. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 159; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14

74. Luiten, ‘Political Engagement’ (doc A163), p 53

75. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 158–159; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14

76. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14; Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 160

77. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14

78. Luiten, ‘Political Engagement’ (doc A163), pp 53–55

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rest of the land beside the lake that was included in Muhunua/Papaitonga having been included in the Horowhenua block awarded to Muaupoko in 1873.<sup>79</sup>

By 1875, the enlarged Muhunua block had been cut into four. The Crown purchased Part Muhunua 3, of 460 acres, from Ngāti Raukawa for £140 in 1875.<sup>80</sup> It also purchased the whole of Muhunua 4 (3,600 acres) for £472 10s in the same year.<sup>81</sup>

**(b) Claimant closing submissions**

Counsel for Wai 52 and Wai 2139 submitted, in relation to the Muhunua block, that the Crown made advance payments to Ngāti Raukawa without any reference to or consultation with Muaūpoko, despite iwi other than Ngāti Raukawa having claims to the land.<sup>82</sup> Claimant counsel stated that this was only possible because the Muhunua block was subject to Crown pre-emption under the exemption of the ‘Manawatū block’ from the operation of the 1862 and 1865 Native Lands Acts. Counsel further submitted that the Native Land Court’s later investigation into the Muhunua lands ‘proved to be no haven for Muaūpoko’, with the whole block being awarded to Ngāti Raukawa without further reference to Muaūpoko.<sup>83</sup>

Counsel for Wai 237 submitted that despite the fact that the Crown had seemingly accepted Muaūpoko’s claim to have interests in the Muhunua block (with the initial sale falling into abeyance), the subsequent Native Land Court determination excluded Muaūpoko interests. Counsel submitted that this exclusion was ‘a consequence of the confinement of Muaūpoko to the Horowhenua block’ by the Native Land Court in 1872–1873, in which the Crown was implicated (see chapter 4).<sup>84</sup>

Counsel for Wai 2326, Wai 2045, and Wai 52 submitted that Muaūpoko had interests in the Muhunua block as proposed for sale by Ngāti Raukawa, but were not informed of the sale until after it was agreed with the Crown. Counsel stated that advance payments were made only to Ngāti Raukawa despite the northern boundary of the block being disputed.<sup>85</sup>

**(c) What is known at present about Muaūpoko involvement**

According to Armstrong, Muaūpoko chief Noa Te Whata met with Superintendent Isaac Featherston in Wellington at some point prior to June 1864. At this meeting, Featherston ‘apparently promised Te Whata that he (Featherston) would personally carry the money to Muhunua and ensure that Te Whata and other Muaūpoko received their share.’<sup>86</sup>

Stirling, Armstrong, and Luiten all provided evidence of two letters subsequently written by Muaūpoko leaders to Featherston in 1864:

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79. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 160

80. Luiten, ‘Political Engagement’ (doc A163), p 55

81. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 160

82. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 57

83. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), pp 58–59

84. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 14

85. Claimant counsel (Ertel and Zwaan), closing submissions (paper 3.3.13) p 6

86. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14

- ▶ The first letter, dated 16 June 1864, was from Noa Te Whata at Horowhenua, reminding Featherston of their earlier conversation about the purchase. Te Whata expressed annoyance that Ngāti Raukawa had ‘eaten the money’ from the advance purchase payment on the Muhunua block and from an existing lease. Te Whata wanted Featherston to inform Te Keepa when the money was being brought to Horowhenua, and asked for a £200 share of what he understood to be a total price of £1,100.<sup>87</sup>
- ▶ The second letter, dated August 1864, was from Paki Te Ngahunga (or Paki Te Hunga) at Turakina, to both Featherston and Buller. He asked for ‘the money of Muhunua that you set apart some of the thousand that now remains and for us and my elder brothers, for Te Keepa, Hunia and all the tribe.’<sup>88</sup> All three technical witnesses stated that ‘Paki Te Ngahunga’ appears to be the same person as Paki Te Hunga of Muaūpoko, who lived at Horowhenua, but was living with Ngāti Apa at Turakina at that time.<sup>89</sup>

The purchase did not proceed in the 1860s, partly as a result of Muaūpoko’s objections, and the lands were contested again in the early 1870s when surveys were carried out for Native Land Court hearings. As we discuss later in chapter 4, Ngāti Raukawa and Muaūpoko both sought to survey the lands between the mouth of the Ōhau River and Lake Waiwiri. Both sides claimed this piece of land in the Native Land Court in 1872 when the vast 350,000-acre Manawatū-Kukutauaki block was heard by the court.<sup>90</sup> In the Manawatū-Kukutauaki decision, the court decided that ‘sections’ (hapū) of Ngāti Raukawa had become the owners, ‘not . . . by conquest, but by occupation, with the acquiescence of the original owners.’<sup>91</sup> The court excepted Horowhenua, the exact boundaries of which were not defined until further hearings took place in 1873, and Tuwhakaturua.<sup>92</sup> It was not clear until 1873–74 how much of the old Muhunua block might be included in the boundaries of Horowhenua, which was awarded to 143 individuals of Muaūpoko and allied iwi.<sup>93</sup> The fixing of the southern boundary of Horowhenua resulted in conflict in 1873–74, which is discussed in chapter 4.

According to Armstrong, Muaūpoko did not appear at the Native Land Court and were not included in the ownership list for the Muhunua block because the court had already limited Muaūpoko rights in the area to the Horowhenua block.<sup>94</sup> Stirling stated that, as part of the resolution of Ngāti Raukawa’s dispute of the Horowhenua title in 1874, the Crown proposed setting aside part of the Muhunua lands for Muaūpoko as compensation for land set aside for Ngāti Raukawa within

87. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 159; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14; Luiten, ‘Political Engagement’ (doc A163), p 54

88. Noa Te Whata to Buller and Featherston, 25 August 1864 (Luiten, ‘Political Engagement’ (doc A163), p 54)

89. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 159; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 14; Noa Te Whata to Buller and Featherston, 25 August 1864 (Luiten, ‘Political Engagement’ (doc A163), p 54)

90. Hearn, summary of ‘One Past, Many Histories’ (doc A152(b)), p 10

91. Hearn, summary of ‘One Past, Many Histories’ (doc A152(b)), p 11

92. Luiten, ‘Political Engagement’ (doc A163), p 103

93. Luiten, ‘Political Engagement’ (doc A163), pp 90–104, 108

94. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), pp 14–15

## 3.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Horowhenua. This was apparently Te Keepa's understanding in 1874 of how the situation would be resolved, but it was not shared by the Crown and did not come to pass (see chapter 4).<sup>95</sup>

**(d) Conclusion**

In sum, Muaūpoko contested the Muhunua purchase and successfully prevented its completion until the boundaries were adjusted in the 1870s, and individual title awarded to a list of Ngāti Raukawa owners. Neither Ngāti Raukawa nor Muaūpoko were content with the result. The story of Muhunua is interconnected with that of Horowhenua, and the arrangement of a deal between the Crown, Muaūpoko, and Ngāti Raukawa in 1874 will be covered briefly in chapter 4. Final consideration of Muhunua will need to await the hearing of any relevant evidence and submissions from Ngāti Raukawa and the Crown.

**(4) Rangitikei-Manawatū****(a) Background**

According to David Armstrong, the sale of the approximately 250,000-acre Rangitikei–Manawatū block came about as the result of a dispute over how the money from leases would be distributed.<sup>96</sup> The Government's proposed arbitration turned into a purchase of the whole block as the preferred solution to resolving the dispute.<sup>97</sup> The purchase was one of the most controversial in our inquiry district, and the Crown's actions were heavily criticised at the time (and since).<sup>98</sup> Dr Hearn devoted five chapters (350 pages) of his report to the purchase. Our summary here is very brief, as this crucial transaction will be examined fully later in our inquiry.

Many different groups had interests in the Rangitikei-Manawatū block, which was situated at the northern end of our inquiry district, on the western boundary of the Te Ahuaturanga purchase (see map 3.1). Superintendent Featherston conducted the Rangitikei-Manawatū purchase as 'agent of the General Government' and special land purchase commissioner.<sup>99</sup> He dealt primarily with those he considered 'principal' claimants – Ngāti Raukawa, Rangitāne, and Ngāti Apa – in his negotiations. Featherston assigned other groups the status of 'secondary' (for example, Muaūpoko and the Whanganui tribes) and 'remote' (Ngāti Kahungunu and Te Ātiawa/Ngāti Awa).<sup>100</sup>

Featherston defined 'secondary claimants' (including Muaūpoko) as groups 'related to the resident owners by family or tribal ties but who have not till recently asserted any claims to the land'. 'Remote' claimants were groups whom Featherston considered had only 'a distant tribal connection with the sellers, whose share in the transaction is practically one of sufferance, and who are simply entitled to a present'

95. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 160, 307–308

96. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 4

97. Hearn, 'One Past, Many Histories' (doc A152), pp 260–262

98. See Hearn, 'One Past, Many Histories' (doc A152), chs 4–9

99. Hearn, 'One Past, Many Histories' (doc A152), pp 316–317, 520

100. Featherston to J C Richmond, 23 March 1867 (Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 22)

from the tribes who invited them to participate in the payment.<sup>101</sup> These categories were based on Featherston's examination of leases on the Rangitikei-Manawatū block.<sup>102</sup> Featherston, as the Crown's purchase agent, was able to make these decisions about the nature and extent of Māori rights unilaterally because the block had been excepted from the operations of the Native Land Court.<sup>103</sup>

On 5 April 1866, Featherston met with an estimated 700 Māori at Te Takapu to discuss the sale. Most of those present favoured an immediate sale, agreeing to a purchase price of £25,000 to be paid as a lump sum.<sup>104</sup> A letter from the Rangitāne rangatira Peeti Te Aweawe to the Crown expressed opposition to the sale. An additional 55 individuals signed Te Aweawe's letter, including several Muaūpoko.<sup>105</sup>

Two hundred principal claimants signed an agreement, dated 16 April 1866, setting out the broad terms of the sale.<sup>106</sup> On 13 December 1866, a total of 1,647 individuals, including 70 Muaūpoko, signed the deed of cession for the Rangitikei-Manawatū block, and the £25,000 payment was made.<sup>107</sup>

A significant history of protest and further negotiations followed, principally on the part of Ngāti Raukawa, which will be considered later in our inquiry.<sup>108</sup> The claims of Ngāti Raukawa non-sellers were eventually considered in the Native Land Court's Himatangi hearings, with the Crown opposing their claim.<sup>109</sup> In brief, the court found in 1868 that Himatangi (and Rangitikei-Manawatū) was in the 'joint ownership' of Ngāti Raukawa and the 'original occupiers of the soil' who had 'never ceased . . . to assert and exercise rights of ownership.'<sup>110</sup> The court's decision was confirmed and 'strengthened' upon rehearing in 1869.<sup>111</sup> This much-debated case will have to be considered further in the later stages of our inquiry.

For Muaūpoko, a crucial part of the purchase was the distribution of the December 1866 payment, which proved to be a divisive issue between the various claimants to the moneys. After much debate, Featherston gave Kāwana Hunia (acting in his capacity as a rangatira of Ngāti Apa) the responsibility of distributing the £15,000 portion of the purchase price set aside for non-Ngāti Raukawa claimants.<sup>112</sup> Hunia made assurances that he would divide the £15,000 fairly among Ngāti Apa, Rangitāne, the Whanganui tribes, Muaūpoko, Ngāti Kahungunu, and Ngāti

101. Featherston to M Richmond, 23 March 1867, AC1H 16046 MA13/111/7of, Archives New Zealand, Wellington

102. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 22

103. Hearn, 'One Past, Many Histories' (doc A152), pp 214–230, 316–317, 324

104. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 21; Stirling, 'Muaupoko Customary Interests' (doc A182), p 162

105. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), pp 21–22

106. Stirling, 'Muaupoko Customary Interests' (doc A182), p 164; AJHR, 1866, A-4, p 29

107. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), pp 5, 25; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 164–165

108. See Hearn, 'One Past, Many Histories' (doc A152), chapters 7–9.

109. Anderson and Pickens, *Wellington District* (doc A165), pp 113–122

110. Ōtaki Native Land Court, minute book 1E, 27 April 1868, fol 720 (Hearn, 'One Past, Many Histories' (doc A152), pp 426–428); Anderson and Pickens, *Wellington District* (doc A165), pp 122–123

111. Stirling, 'Muaupoko Customary Interests' (doc A182), p 209

112. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 166–169



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Upokoiri.<sup>113</sup> Of this amount, Rangitāne and Muaūpoko expected to receive £5,000.<sup>114</sup> According to Luiten, however, the amount they were to receive

had been whittled down to just £1400, apparently without their knowledge. To add insult to injury however, Kawana Hunia withheld even this reduced amount, paying over to Rangitane chiefs just £600 from the £15,000 received. Just what was passed on in turn to Muaupoko, if any, in the face of Rangitane's bitter disappointment at this sum, is not known.<sup>115</sup>

As David Armstrong observed, Featherston declined to step in to ensure that Rangitāne and Muaūpoko received a fairer portion of the purchase money.<sup>116</sup> Armstrong did note that Rangitāne and Muaūpoko shared the amount they had received equally between them.<sup>117</sup>

On the matter of reserves, Featherston had insisted that no reserves would be made in the sale, but that he would make 'suitable and ample' reserves for the 'principal claimants' (at his discretion) after the sale had been completed.<sup>118</sup> No Muaūpoko reserves were made within the Rangitikei-Manawatū block, though we were told that Muaūpoko likely shared in the 1,000-acre reserve at Puketōtara awarded to Rangitāne.<sup>119</sup>

**(b) Claimant closing submissions**

In the claimants' view, the Crown's lack of engagement with Muaūpoko in the acquisition of the Rangitikei-Manawatū block was not compliant with the Crown's Treaty obligations.<sup>120</sup>

Counsel for Wai 52 and Wai 2139 argued that the sale of the Rangitikei-Manawatū block was only possible because the block was located within the area which had been exempted from the Native Lands Act reforms of 1862 and 1865, both of which had brought an end to Crown pre-emption elsewhere.<sup>121</sup> Counsel submitted that Featherston's approach to determining the relative interests of various iwi in the block (that is, by examining leases in effect over the block) was insufficient. It failed to reflect the rights and interests of iwi other than Ngāti Raukawa, Rangitāne, and Ngāti Apa. Counsel submitted that Featherston subsequently used this 'superficial approach' to suggest what portion of the purchase price would go to each iwi.<sup>122</sup> In doing so, counsel submitted, Featherston failed to actively protect the land interests of Muaūpoko. Although Featherston assigned Muaūpoko the status of 'secondary'

113. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 25

114. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 5

115. Luiten, 'Political Engagement' (doc A163), p 57

116. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), pp 5, 27

117. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 26

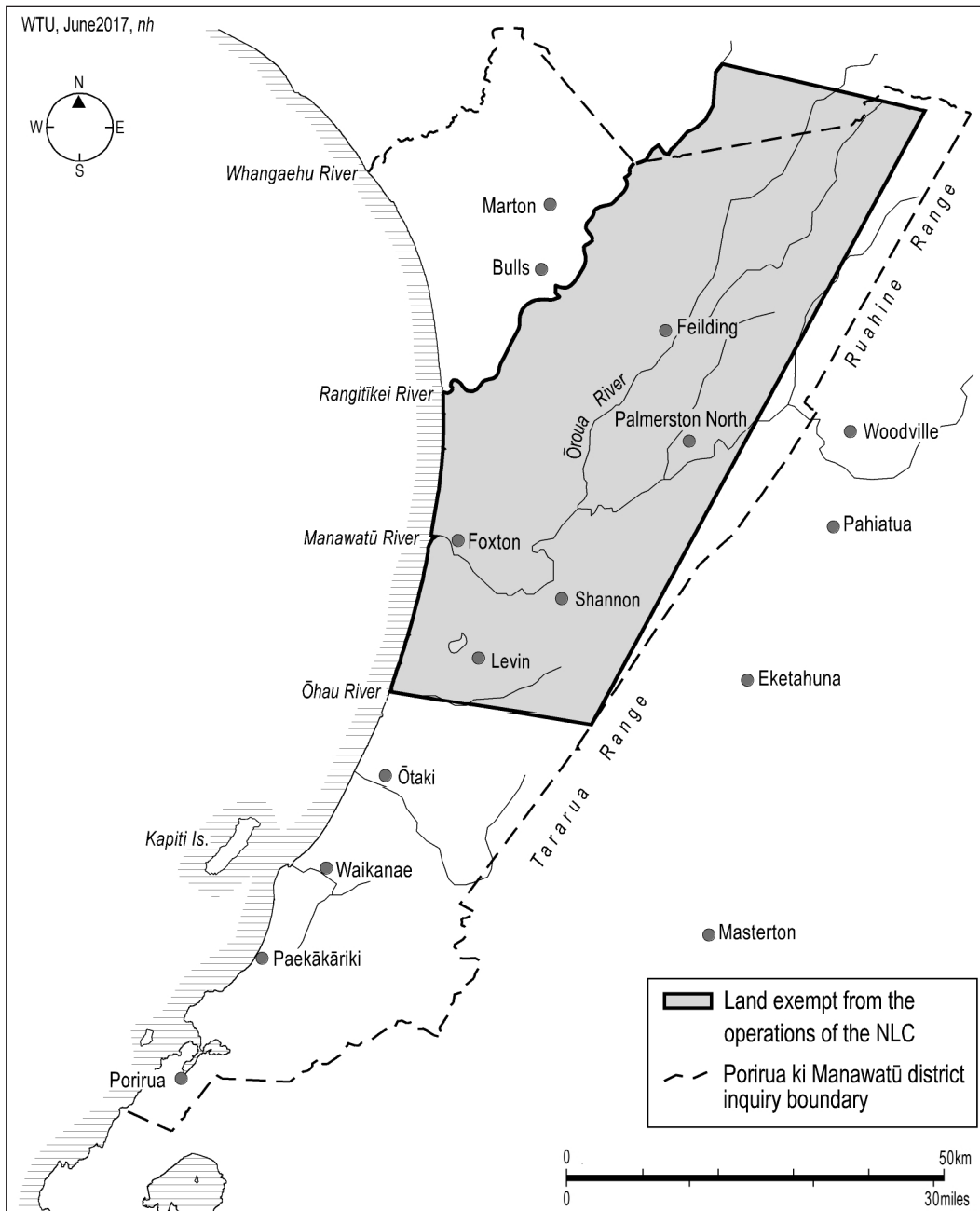
118. Stirling, 'Muaupoko Customary Interests' (doc A182), p 169

119. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 169–170; Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 8

120. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), pp 55–57, 59–61

121. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 55

122. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 55



Map 3.2: Land exempt from the operations of the Native Land Court and private purchasing

claimants, there is no evidence that he discussed this status with the iwi or whether they accepted it. Furthermore, counsel submitted, ‘Featherston failed to ensure that Muaūpoko received what they had been led to expect claiming that “secondary” claimants had no voice or control in the matter of payment.’<sup>123</sup>

123. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 56



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Counsel for Wai 237 also submitted that Muaūpoko were ‘downplayed as “secondary” claimants’ in the Rangitikei-Manawatū purchase, ‘despite that notion having no equivalent in custom.’<sup>124</sup> Counsel for Wai 2326, Wai 2045, and Wai 52 supported this submission, quoting from Hearn:

In turn, they [the Crown] relied largely on hearsay evidence and thus the iwi [Muaūpoko] emerged as one that had been savaged, routed, and dispossessed. Featherston’s description of the iwi, made in the context of the Rangitikei-Manawatū transaction, as ‘remote [sic: ‘secondary’]’<sup>125</sup> claimants’ neatly summarised, it seems, the official view.<sup>126</sup>

Counsel for Wai 237 submitted that Featherston chose to negotiate the Rangitikei-Manawatū purchase primarily with Ngāti Raukawa, Rangitāne, and Ngāti Apa, despite Muaūpoko interests in the block.<sup>127</sup> Counsel submitted that ‘in securing the purchase, Featherston was at pains to record Muaūpoko as “*unanimous*” (emphasis in original) in support of sale, citing 68 Muaūpoko signatures on the Deed of Cession.’ Counsel questioned Muaūpoko’s actual support for the purchase, stating that Muaūpoko names listed on the deed of cession marked only with an ‘X’ or not signed at all were ‘questionable.’ Counsel noted that Featherston nonetheless found it necessary for the official record to acknowledge Muaūpoko’s interests in the block.<sup>128</sup> In closing submissions, counsel for Wai 237 stated that:

Even Featherston’s bumptious inclination to railroad Māori into consenting to the Rangitikei-Manawatū purchase was tempered by his recognition that time had to be spent bringing about a semblance of unanimity among those in possession of the land. Still, Featherston did force the issue all too peremptorily, leading to significant dissent and difficult litigation.<sup>129</sup>

In relation to reserves, counsel for Wai 52 and Wai 2139 submitted that ‘the Crown failed to allocate sufficient land even though Featherston had promised iwi “large and ample” reserves from the purchase.’ Counsel submitted that Muaūpoko were disadvantaged as Featherston refused to discuss reserves until after the deed was concluded, at which point Featherston proposed to make reserves for the ‘principal’ claimants only.<sup>130</sup>

124. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 17

125. In his summary document, Dr Hearn incorrectly stated that Muaūpoko were classified as ‘remote’ claimants: Hearn, summary of ‘One Past, Many Histories’ (doc A152(b)), pp 9, 17. David Armstrong, however, correctly reported Featherston’s classification of Muaūpoko as ‘secondary claimants’: Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 22; Featherston to M Richmond, 23 March 1867, AC1H 16046 MA13/111/70f, Archives New Zealand, Wellington.

126. Transcript 4.1.11, p 355 (claimant counsel (Ertel and Zwaan), closing submissions (paper 3.3.13), p 28)

127. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 16

128. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 16–17

129. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 56

130. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 57

**(c) What is known at present about Muaūpoko involvement**

Claimant William (Bill) Taueki told us that Muaūpoko had ‘interests in the Rangitikei-Manawatu transaction’, and grievances in respect of it.<sup>131</sup> Jonathan Procter believed that the Crown still owes Muaūpoko money because it prevented the payment of rents, and ‘seized on disputes which could have been resolved by means short of a sale to eventually force the sale of the block and turn iwi against each other’.<sup>132</sup> Sandra Williams emphasised Muaūpoko’s involvement in this transaction, stating ‘68 Muaupoko were signatories and received £700, but no land. Muaupoko were not permitted to have their interests investigated by the Native land Court by legislation’.<sup>133</sup>

Bruce Stirling confirmed that Muaūpoko were ‘actively involved’ in the ‘prolonged controversy’ over the sale of the Rangitikei-Manawātū block.<sup>134</sup> In April 1865, Muaūpoko leaders (including Ihaia Taueki, Noa Te Whata, and Heta Te Whata) signed a petition from Ngāti Raukawa and Muaūpoko opposing the sale and requesting that the Crown remove the ‘prohibition on land-leasing’.<sup>135</sup>

Te Keepa Te Rangihwinui and Kāwana Hunia, both of Muaūpoko and Ngāti Apa, were actively involved in the negotiations but appear to have been acting in their capacity as Ngāti Apa chiefs.<sup>136</sup> Muaūpoko were certainly present at the hui at Te Takapu in April 1866.<sup>137</sup> They were reported at the time to have supported the sale of the Rangitikei-Manawātū block ‘unanimously’.<sup>138</sup> After the meeting at Te Takapu, several Rangitāne and Muaūpoko rangatira wrote to McLean to describe the boundaries of their interests in the Manawātū lands, and to Native Minister Russell, asserting that the land belonged to them.<sup>139</sup> Muaūpoko also wrote to Featherston in June 1866 to endorse the purchase.<sup>140</sup> At least 70 Muaūpoko signatures have been identified on the deed, and Muaūpoko’s assent to the transaction was listed in press reports of the time.<sup>141</sup>

Evidence differs as to how far the Crown was aware of or recognised Muaūpoko interests in the block. Luiten stated that McLean was aware that Muaūpoko had an association with the Manawātū area and that they still asserted claims there.<sup>142</sup> Stirling said Muaūpoko shared interests with Rangitāne at some places in the Manawātū, for example, at Puketōtara.<sup>143</sup> Dr Hearn advised caution about the suggestion that

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131. William Taueki, brief of evidence (doc C10), p 77

132. Jonathan Procter, brief of evidence, 12 November 2015 (doc C22), p 3

133. Williams, speaking notes (doc A26), p 2

134. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 160

135. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 161

136. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 161

137. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 162; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 21

138. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 164; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 21

139. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 163–164; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), pp 21–22

140. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 22

141. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 164

142. Luiten, ‘Political Engagement’ (doc A163), p 50

143. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 163

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the Crown recognised Muaūpoko's customary rights in the Rangitikei-Manawatū block. This was because, he suggested, 'Featherston and Buller set out to secure the signatures of all [those] willing to sell irrespective of whether they in fact possessed an interest in the block', and so Crown recognition of such interests 'should be treated with care'.<sup>144</sup> Bryan Gilling and Bruce Stirling placed considerable emphasis on the Himatangi decision of 1868, which appeared to confirm Featherston's decision to deal with the 'original occupiers of the soil'.<sup>145</sup> Others were critical of the Himatangi decision as, they argued, politically motivated (to protect the Crown's purchase).<sup>146</sup> We have not yet heard evidence or submissions from Ngāti Kauwhata, Ngāti Raukawa, and affiliated groups, or the Crown, on this matter.

In respect of the classification of Muaūpoko as 'secondary' claimants, David Armstrong suggested that Muaūpoko's interests were obscured, at least in part, because of Featherston's 'superficial inquiry' into leases to determine relative interests.<sup>147</sup> Stirling described Featherston's method as 'crude and simplistic' because it ignored that Muaūpoko 'lived on the land'.<sup>148</sup> Armstrong stated that 'There is no evidence that Featherston carried out any further detailed inquiry into the nature and extent of Muaūpoko rights in the block'.<sup>149</sup> The Crown promoted legislation which exempted the block from the operations of the Native Land Court, yet provided no alternative means of independent title-definition. This left Māori customary rights to be defined unilaterally by the Crown's purchase agent.<sup>150</sup> Also, we were told, Muaūpoko were represented by Rangitāne chiefs in negotiations. According to Armstrong, this 'likely reinforced Featherston's belief that [Muaūpoko] possessed a lower status'.<sup>151</sup>

The payment to Rangitāne and Muaūpoko was administered by Kāwana Hunia. According to Stirling, Featherston was not sympathetic to the situation Rangitāne and Muaūpoko found themselves in when Hunia gave a smaller apportionment of the payment money than they had expected.<sup>152</sup> David Armstrong commented:

During the negotiations Superintendent Featherston had insisted that he would not permit any inequitable or unfair distribution of sale proceeds, even if this was agreed by all the parties, but when Rangitane and Muaupoko asked for his assistance in obtaining the £4,600 balance they believed they were owed, he agreed that they had

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144. Hearn, summary of 'One Past, Many Histories' (doc A152(b)), pp 9–10

145. Ōtaki Native Land Court, minute book 1E, 27 April 1868, fol 720 (Stirling, 'Muaupoko Customary Interests' (doc A182), pp 209–211); Bryan Gilling, "A Land of Fighting and Trouble": the Rangitikei-Manawatu Purchase, 2000 (doc A9), pp 179–187

146. Hearn, 'One Past, Many Histories' (doc A152), pp 430–440, 458; Anderson and Pickens, *Wellington District* (doc A165), pp 122–124, 135–137, 200

147. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 21

148. Stirling, 'Muaupoko Customary Interests' (doc A182), p 165

149. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 21

150. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), pp 4, 8; Hearn, 'One Past, Many Histories' (doc A152), pp 225–230, 258–259, 338–339

151. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), pp 4–5

152. Stirling, 'Muaupoko Customary Interests' (doc A182), p 168

been short-changed but declined to do anything, insisting that the iwi had been the authors of their own misfortune.<sup>153</sup>

In terms of reserves, Stirling and Armstrong said that Featherston continued to focus on ‘principal’ claimants, resulting in no allocation of Muaūpoko-specific reserves.<sup>154</sup> Although the wider group of owners at Puketōtara reserve may have included Muaūpoko, all 10 trustees granted title to that reserve were of Rangitāne.<sup>155</sup>

#### **(d) Conclusion**

In sum, the evidence adduced so far shows that the Crown did recognise and deal with Muaūpoko as customary owners in the Rangitikei-Manawatū block, that Muaūpoko were not treated or negotiated with as ‘primary’ owners, that Muaūpoko signed the purchase deed (although they were not paid in full), and that the court’s Himatangi decision of 1868 found the ‘original occupiers of the soil’ to have been ‘joint owners’ with Ngāti Raukawa. Muaūpoko received no reserve from the 250,000-acre purchase.

These points are especially important as context for the contest over the Horowhenua lands, which began in earnest in 1869 (see chapter 4).

#### **(5) Waikanae and Wainui**

##### **(a) Background**

In 1858, when Land Purchase Commissioner Searancke set out to purchase the ‘Waikanae block’, he at first dealt with Ngāti Toa and Te Ātiawa/Ngāti Awa over an area of 60,000 acres (later revised to 95,000 acres and then back down to 76,000 acres).<sup>156</sup> Searancke paid a £140 deposit on the Waikanae lands on 20 April 1858 to Ngāti Toa and Te Ātiawa/Ngātiawa chiefs.<sup>157</sup>

In August 1858, Searancke reported that he had concluded the Waikanae deed, subject to Government approval. He believed that a payment of £3,200 (in addition to the deposit) would be necessary to purchase the block.<sup>158</sup> The Government rejected Searancke’s proposal as it exceeded the Crown’s guideline of a maximum price (sixpence per acre). The ‘Waikanae block’ was therefore abandoned.<sup>159</sup>

From November 1858 until June 1859, Searancke negotiated with Ngāti Toa chiefs over the southern part of the Waikanae lands, approximately 30,000 acres.<sup>160</sup> This second proposed purchase was referred to as the ‘Whareroa’ or ‘Matahuka’

153. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 5

154. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 169; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), pp 5, 8

155. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 169, 171

156. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 152

157. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 13; Hearn, ‘One Past, Many Histories’ (doc A152), p 170

158. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 152

159. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 152–153; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 13

160. Hearn, ‘One Past, Many Histories’ (doc A152), p 170; Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 13; Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 153

## 3.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

transaction, and later became known as the Wainui deed (see map 3.1).<sup>161</sup> A total price of £850 was agreed to, £50 of which was considered to have already been advanced as Ngāti Toa's share of the earlier advance payment on the Waikanae block.<sup>162</sup>

The Whareroa proposal was accepted by the Government, and the Wainui deed was signed on 9 June 1859 by Searancke and 98 vendors.<sup>163</sup> The vendors were referred to as Ngāti Toa. Stirling suggested that the signatories also included some Muaūpoko and Ngāti Raukawa individuals.<sup>164</sup> The balance of £800 was paid to Ngāti Toa.<sup>165</sup> 'Several modest reserves' were also included in the deed.<sup>166</sup>

**(b) Claimant closing submissions**

In closing submissions, counsel for Wai 52 and Wai 2139 argued that the Crown failed to record Muaūpoko interests and involvement in the Wainui transaction, despite the fact that several leading Muaūpoko rangatira signed the Wainui deed. Further, considerable uncertainty persisted until 1873 over exactly what land the Crown had purchased. Counsel also submitted that the Crown failed to make provision of any reserves for Muaūpoko.<sup>167</sup> The claimants argued that advance payments to other parties put pressure on Muaūpoko to sell their interests. Ultimately, claimant counsel stated that the £850 received for the estimated 34,000 acres as a whole (shared with other iwi) was an unfair price for such sought-after land.<sup>168</sup>

Counsel for Wai 237 maintained that Muaūpoko were not land sellers. They submitted that none of Muaūpoko's senior leadership was involved in the sale of the Wainui block. Counsel stated that there is no record that Muaūpoko were advanced any sums or that they were 'active sellers' of this block. The validity of several of the Muaūpoko signatures on the deed was questioned, as some signatories did not have names listed in full or had not signed an 'X' beside their names. Nor, counsel submitted, can evidence of individuals' involvement as sellers be used to fortify a claim that Muaūpoko, as an iwi, were land sellers at that time.<sup>169</sup> Counsel also submitted that although Featherston claimed to have paid 'instalments' on lands at Waikanae, there is no evidence on the record indicating to whom the payments were made.<sup>170</sup>

**(c) What is known at present about Muaūpoko involvement**

The Crown did not record Muaūpoko's interests in negotiations over Waikanae lands. David Armstrong noted that it was other iwi who showed a willingness to recognise Muaūpoko's interests in land such as Wainui in the late 1850s. That

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161. Stirling, 'Muaupoko Customary Interests' (doc A182), p 153

162. Stirling, 'Muaupoko Customary Interests' (doc A182), p 153

163. Hearn, 'One Past, Many Histories' (doc A152), p 170

164. Stirling, 'Muaupoko Customary Interests' (doc A182), p 153

165. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 13

166. Stirling, 'Muaupoko Customary Interests' (doc A182), p 153

167. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 53

168. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 60

169. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 83–84

170. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 94



position changed, he argued, when competition for land became more intense and divisive in the Native Land Court era.<sup>171</sup>

Bruce Stirling argued that early negotiations over what became the Wainui block included Muaūpoko, as did the signatories to the Wainui deed.<sup>172</sup> Armstrong listed Muaūpoko rangatira who signed the Wainui deed, and stated that these ‘signatories . . . were certain to have received a share’ of the payment, but that ‘how much is not known’. Armstrong identified those signatories as ‘Te Rangimairehu, Te Rangirurupuni, Hoani Amorangi (‘Morangi), and possibly Noa Te Whata.’<sup>173</sup> Stirling identified as Muaūpoko signatories ‘Te Rangimairehau, Te Rangirurupuni, “Noa” (Noa Te Whata), “Warena” (Hunia), and Hoani “Morangi” (Hoani Amorangi).’<sup>174</sup>

Hoani Amorangi was also known as Hoani Puihi.<sup>175</sup> Dr Procter pointed out that Hoani Puihi had ‘lived at the Wainui kainga at Paekakariki’ and ‘later signed the Wainui deed.’<sup>176</sup> While Wainui was part of the Muaūpoko rohe as defined by Te Keepa,<sup>177</sup> Jane Luiten noted that Hoani Puihi lived there as a captive – though not, he said, a ‘mokai’ (slave) – until he was ‘fetched’ back to Horowhenua by his brother Te Amorangi.<sup>178</sup> Te Rangimairehau had also been ‘fetched’ back from captivity at Waikanae.<sup>179</sup> Te Rangirurupuni, too, was living at Waikanae at the time of Te Kūititanga in 1839.<sup>180</sup> Noa Te Whata, however, had not been a captive.<sup>181</sup> So the reasons why these rangatira (who were all significant leaders in the mid- to late nineteenth century) were invited to sign the Wainui deed may have been complex.

Armstrong wrote that no Muaūpoko-specific reserves were created in the Wainui block.<sup>182</sup> Stirling added that Muaūpoko had connections with the reserves which were set aside as part of the Wainui block purchase, but ‘research into the title and fate of these reserves has yet to be done.’<sup>183</sup> According to claimant Robert Warrington’s research, Muaūpoko also wrote to the Crown in 1862, ‘complaining about not receiving any payment.’<sup>184</sup>

#### **(d) Conclusion**

In sum, the evidence available to date shows that a number of Muaūpoko rangatira did sign the Wainui deed, apparently admitted by the Ngāti Toa vendors, although the authenticity of some signatures has been queried by claimant counsel. This does not change the fact that some at least of Muaūpoko were recognised in this

171. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 7

172. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 153

173. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 13

174. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 153

175. Luiten, ‘Political Engagement’ (doc A163), p 120

176. Jonathan Procter, summary of ‘Sites of Significance Mapbook’, November 2015 (doc A183(a)), p [12]

177. Procter, summary of ‘Sites of Significance Mapbook’ (doc A183(a)), p [5]

178. Luiten, ‘Political Engagement’ (doc A163), pp 23, 31

179. Luiten, ‘Political Engagement’ (doc A163), pp 23, 31

180. Luiten, ‘Political Engagement’ (doc A163), p 31

181. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 52

182. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 13

183. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 153

184. Robert Warrington, brief of evidence, 2 October 2015 (doc B9), p 7

## 3.3.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

way in the Wainui purchase. Some (but not all) of the Muaūpoko signatories had been held as ‘captives’ at Waikanae before being ‘fetched’ back to Horowhenua. The Crown itself did not deal with Muaūpoko over the block. Research into the title and fate of reserves had not been completed at the time of our 2015 hearings.

**3.3.3 Aorangi, Tuwhakatupua, and Taonui****(1) Introduction**

Nationally, after a short hiatus following the Native Lands Act 1865, the Crown resumed an active purchase programme in the 1870s. According to Waitangi Tribunal reports in the Turanga, Hauraki, Central North Island, Whanganui, Wairarapa ki Tararua, and Te Urewera district inquiries, Crown purchasing in the 1870s was marked by the payment of advances before the court decided titles, and the circumvention of tribal authority by the purchase of individual interests. Both strategies promoted large-scale land alienation which Māori communities and their leaders were largely helpless to control or prevent. The Crown also reimposed a monopoly on blocks it wished to purchase, precluding competition and the need to pay market prices. Many of the Crown’s purchase practices in the 1870s were found to be in breach of Treaty principles.<sup>185</sup>

The extent to which such findings are applicable to our inquiry district will be the subject of future hearings. At this stage, we note briefly the involvement of Muaūpoko in Crown dealings for the Aorangi, Tuwhakatupua, and Taonui blocks in the 1870s.

**(2) What is known at present about Muaūpoko involvement**

The 19,449-acre Aorangi block was located between the Ahuaturanga and Rangitikei-Manawatū blocks.<sup>186</sup> ‘Taonui’ was located south of Aorangi, between the Ōroua and Manawatū Rivers, but was never actually created and may have become part of the Aorangi block.<sup>187</sup> Tuwhakatupua was located on the southern bank of the Manawatū River (see map 3.1 for these blocks).<sup>188</sup>

The Aorangi block was excluded as a reserve from the vast Te Ahuaturanga purchase in 1864. James Booth, a Crown purchase officer, made an advance of £200 to Rangitāne and Muaūpoko in 1872. Booth reported that Hamuera Te Raikokiritia, Kerei Te Panau, ‘and other Natives of the Rangitane and Muaupoko tribes’ had signed an agreement to complete the sale once title had been secured from the Native Land Court.<sup>189</sup> Around the same time, Booth paid a £200 deposit

185. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, chapter 10; Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, chapter 8; Waitangi Tribunal, *Te Urewera Part II*, pre-publication (Wellington: Waitangi Tribunal, 2010), chapter 10; Waitangi Tribunal, *The Hauraki Report*, vol 2, chapter 17; Waitangi Tribunal, *He Whiritauunoka*, vol 1, chapter 12; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, chapter 4

186. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 17

187. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 18

188. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 18

189. Armstrong, ‘Muaupoko Interests outside the Horowhenua Block’ (doc A185), p 17; Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 262; Hearn, ‘One Past, Many Histories’ (doc A152), p 644



to Rangitāne and Muaūpoko for the Taonui block, and a deposit of £200 to Ngāti Raukawa, Rangitāne, and Muaūpoko for the Tuwhakatupua block. These advances were made on the same condition that the owners would conclude the transaction upon gaining title.<sup>190</sup> Ngāti Raukawa were not happy that other iwi had received payment in regards to Tuwhakatupua.<sup>191</sup> At this time, the area and boundaries of Taonui and Tuwhakatupua were yet to be defined.<sup>192</sup>

In the event, Muaūpoko were not named as an iwi in the court's Aorangi decision in 1873. The block was partitioned into three: Aorangi 1 (Ngāti Kauwhata); Aorangi 2 (Ngāti Taura of Ngāti Apa); and Aorangi 3 (Rangitāne). Bruce Stirling's evidence showed, however, that two Muaūpoko individuals were included in the title to Aorangi 3, and there was an expectation that other Muaūpoko members would be taken care of by those who had been put in the title. One of the Muaūpoko individuals in the title was the chief Te Rangimarehau.<sup>193</sup>

Ngāti Apa were dissatisfied with the outcome and applied for a rehearing, which was held in 1878 but did not result in any significant changes to the title. At the 1878 rehearing, Hoani Meihana referred directly to Muaūpoko interests in the Aorangi block through occupation.<sup>194</sup> Other witnesses also confirmed that Muaūpoko had occupied and cultivated land at Aorangi 'until at least the mid-1830s and possibly later.'<sup>195</sup> But Muaūpoko had not applied for the rehearing and, despite the Crown having paid advances to unnamed Muaūpoko individuals in 1872, their presence on the eventual court title was relatively minimal.

As noted above, 'Taonui', for which Booth paid a deposit, may have become part of the Aorangi block. A separate Taonui block was not actually created.<sup>196</sup>

The Tuwhakatupua block, comprising 3,300 acres, was excluded from Manawatū-Kukutauaki in 1873 and awarded to Rangitāne 'and whomsoever else they wished to admit'. The Tuwhakatupua block was subsequently acquired by the Crown.<sup>197</sup> According to David Armstrong, it is not surprising that 'Muaūpoko were not involved in the title determination' for this block, as the court had already limited their interests in Manawatū-Kukutauaki to the Horowhenua block (see chapter 4).<sup>198</sup> The Manawatū-Kukutauaki block will be the subject of detailed consideration later in our inquiry, after the completion of the research casebook.

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190. Hearn, 'One Past, Many Histories' (doc A152), p 644

191. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), pp 18–19

192. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), pp 18–19; Hearn, 'One Past, Many Histories' (doc A152), p 644

193. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 157, 263; Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 18

194. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 263–264

195. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 17

196. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 18

197. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 19; Stirling, 'Muaupoko Customary Interests' (doc A182), p 224

198. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 19

## 3.3.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**(3) Conclusion**

In sum, the Crown's advances to Muaūpoko (among others) for Aorangi, 'Taonui', and Tuwhakatupua were not reflected by the eventual court awards of title for those blocks. It is unclear to what extent the inclusion of two Muaūpoko owners in the title for Aorangi 3 is significant.

**3.3.4 The Tararua block**

The Tararua block is located in the eastern Tararua ranges, and it lies outside of the Porirua ki Manawatū inquiry district. Claims about this 114,500-acre block have already been heard by the Wairarapa ki Tararua Tribunal. After mapping the block and the boundaries of the two district inquiries, the Crown estimated that 5 per cent of the block's area may actually be located inside our inquiry district.<sup>199</sup>

In our inquiry, Bruce Stirling and David Armstrong both stated that Muaūpoko were one of five groups participating in the Crown purchase of the Tararua block, and that the Crown included Muaūpoko in payment and the allocation of reserves.<sup>200</sup> The Wairarapa ki Tararua Tribunal accepted that there was a 'distinct and separate Muaūpoko interest' in the Tararua block.<sup>201</sup> Although we cannot consider claims about the Tararua block itself, claimant counsel argued that it is relevant because Muaūpoko were acknowledged by both the Crown and the Native Land Court as customary owners. In the claimants' view, it makes no sense for Muaūpoko to have been excluded by the Native Land Court from blocks adjacent to (and to the west of) the Tararua block, since Muaūpoko interests were recognised in the title, deed, and distribution of money for the sale of the Tararua block.<sup>202</sup> They also noted that Taueki and other Muaūpoko individuals were included as owners of the Mangatainoka 2B reserve, north of the Tararua block.<sup>203</sup>

Some claimants were particularly concerned about the fate of the Hapuakorari reserve, which was promised but never surveyed or properly set aside in the Tararua purchase. Its present whereabouts is unknown.<sup>204</sup> This issue was not reported upon by the Wairarapa ki Tararua Tribunal in 2010.<sup>205</sup> Fredrick Hill, in submissions for Wai 623, Wai 624, and Wai 1490, argued that the Tararua purchase of 1873 is incomplete as a result of not making the reserve, and that Muaūpoko's title has not been properly extinguished.<sup>206</sup> Mr Hill also suggested that the reserve was located inside our inquiry district boundary.<sup>207</sup> Counsel for Wai 52 and Wai 2139 submitted that the Crown purchase of the Tararua block, to which Muaūpoko were a party, was made

199. Crown counsel, closing submissions (paper 3.3.24), pp 224–225; 'Original Tararua Block', attachment 4 (Crown counsel, papers in support of closing submissions (paper 3.3.24), p vii)

200. Armstrong, 'Muaupoko Interests outside the Horowhenua Block' (doc A185), p 11; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 150–151

201. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 3, p 1073

202. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 18

203. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 17–18

204. Transcript 4.1.13, pp 347–356; David Armstrong, 'Hapuakorari', not dated (doc A153), pp 1–6; David Armstrong, summary of reports, November 2015 (doc A153(b)), p 5

205. See Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vols 1–3.

206. Fredrick Hill, closing submissions, 12 February 2016 (paper 3.3.14), pp 5–6

207. Fredrick Hill, closing submissions (paper 3.3.14), p 6

subject to Native Land Court confirmation of the vendors' title. Counsel submitted that the court's confirmation in 1881 was subject to the provision of the Hapuakorari reserve, which was never surveyed or allocated, and is therefore invalid.<sup>208</sup>

For our purposes, we simply note that Muaūpoko were recognised by the Crown in its purchase of the Tararua block. Their customary rights were similarly recognised by the court in the award of title to the Tararua block in 1881. This pointed to the web of relationships and shared or overlapping interests which united the iwi who, together with Muaūpoko, claimed Manawatū-Kukutauaki and Horowhenua in 1872 (see chapter 4).

In respect of the Hapuakorari reserve, which was made as part of the Tararua block purchase, the evidence is inconclusive as to whether it was intended to include the 'spiritual lake' of the same name. Many claimants believed the sacred lake to have been located on the western side of the Tararua Ranges (in Horowhenua 12), which was 'confiscated' by the Crown after the Horowhenua commission (see chapter 6).<sup>209</sup> This appeared to be confirmed by the sketch map contained in Jane Luiten's report, which shows a lake in Horowhenua 12 named 'Tawirikohukohu'.<sup>210</sup> Sian Montgomery-Neutze told us:

The sacred Lake Hapuakorari is commonly known as Tāwhirikohukohu. It is, to my knowledge, located in the Tararua ranges. We also sing about this lake in one of our patere, see below;

*Ka huri taku aro, ki Tawhirikohukohu, ki Tararua,  
Te maunga pūtaka o ngā puna ki raro!*<sup>211</sup>

Some among Muaūpoko believe that the lake could be viewed from Horowhenua 13, the square-foot block set aside in the partition of the Horowhenua block (see chapter 4).<sup>212</sup> But there is also evidence to suggest that it was located in the Tararua block.<sup>213</sup>

Certainly, the reserve named Hapuakorari was located in the Tararua block, and – it seems very likely – not inside our inquiry district. Equally certain, Muaūpoko were recognised as customary owners of that block alongside other iwi, and of the reserve. The Crown submitted that it will negotiate a substitute piece of land in the Tararua Ranges to be returned to iwi, as part of Treaty settlement negotiations with Ngāti Kahungunu, Rangitāne, and Muaūpoko.<sup>214</sup> The claimants did not make any

208. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 37

209. Procter, brief of evidence (doc c22), p 5; J Procter, D Armstrong, M Moses, and R Warrington, 'Muaupoko Sites of Significance Map Book', 2015 (doc A183), p 26; Charles Rudd, closing submissions, 9 February 2016 (paper 3.3.18), pp 11, 20–21

210. Luiten, 'Political Engagement' (doc A163), fig 10, p 155

211. Sian Montgomery-Neutze, brief of evidence, 16 November 2015 (doc c16), p 6

212. Transcript 4.1.11(a), p 2

213. Armstrong, 'Hapuakorari' (doc A153), pp 3–6; transcript 4.1.11(a), p 2; Fredrick Hill, submissions by way of reply, April 2016 (paper 3.3.30), p 33

214. Crown counsel, closing submissions (paper 3.3.24), p 227

3.3.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

reply submissions to the Crown on this point, apart from Mr Hill, who submitted that the descendants of the original owners would need to be involved.<sup>215</sup>

We are unable to take the issue of the Hapuakorari reserve any further but we do accept the Muaūpoko belief that the spiritual lake Hapuakorari is on Horowhenua block 12. We discuss this spiritual lake further in chapters 5 and 6.

**3.3.5 Conclusion**

As we stated in section 3.2.3, we are not making any findings in this chapter.

In previous inquiries, the Waitangi Tribunal has found significant Treaty breaches in the Crown's purchases of Māori land, both in the pre-1865 period and in the Native Land Court era. The Porirua ki Manawatū inquiry is not yet at the stage where all the evidence and submissions on Crown purchasing have been completed. What we are able to say at this stage is that the Muaūpoko claimants were involved in (and affected by) the pre-emption purchases discussed above: Te Awahou; Muhunoa; Rangitikei-Manawatū; and Wainui. This means that, to the extent any of those purchases are later found to have been in breach of Treaty principles, Muaūpoko were likely to have been prejudiced thereby.

For the large, 250,000-acre Te Ahuaturanga purchase, Muaūpoko involvement has not been demonstrated conclusively, and their interests in the Aorangi reserve were not formally recognised other than by the inclusion of two individuals in the title to Aorangi 3.

This underlines the further point that Muaūpoko were left with virtually no stake in any of the reserves that were made during the alienation of more than half a million acres of land. As a result, Muaūpoko either had to live with closely related iwi by the 1870s or became confined to their Horowhenua lands. The stage was set for an epic battle between tribal leaders and the Crown to retain ownership and control of those lands, which is the subject of the next three chapters.

We turn next to address Muaūpoko claims in respect of their tribal heartland, Horowhenua.

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215. Fredrick Hill, submissions by way of reply (paper 3.3.30), p 9

CHAPTER 4

**THE HOROWHENUA LANDS AND THE NATIVE  
LAND COURT, 1869–86**

HE TANGI NĀ TE RANGIHIWINUI

*E hara i au, e Raha!  
Nana koe i whaka-pako  
Na Ngarangi e! Na Hinohi.  
Kati nei ki a au  
Te kete korero a Turoa  
Ko te onetu a Paetahi  
Ki roto te kapakapa  
Pukei atu ai.  
E whakakaitoa mai ra  
E nga whenua kia tatou  
Kei tawhiti rawa e  
Nga tohu maipi  
Kei te ngaherehere rawa  
Nga toa patu e!  
Ata taria  
E hare mai.  
Te arero ki waho ra  
Tautau atu ai.<sup>1</sup>*

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1. 'This waiata was composed by an ancestor famous throughout the country, Te Rangihwinui or Major Kemp. His mother's name was Rere-o-maki, from Te Āti Haunui-ā-Paparangi and his father was Mahuera Paki Tanguru-o-te-Rangi, from Muaūpoko. Te Rangihwinui was raised during the time of fighting between Muaūpoko, Ngāti Toarangatira, Ngāti Raukawa and Te Ātiawa, at the beginning of the 1800s.' Sian Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko', not dated (doc A15(a)), pp [52]–[53]

4.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**4.1 INTRODUCTION**

**4.1.1 What this chapter is about**

In 1873, the Native Land Court awarded the 52,000-acre Horowhenua block to Muaūpoko. In this chapter, we consider the question of whether the Crown imposed the Native Land Court and individual titles on Muaūpoko. Secondly, after the court awarded the Horowhenua block, we examine whether the Crown kept its Treaty promises to protect (i) the tino rangatiratanga of Muaūpoko in respect of that land, and (ii) Muaūpoko ownership of the block for so long as they wished to retain it. These issues are particularly important to the claims before us, because Muaūpoko were almost entirely restricted to the Horowhenua block by the 1870s (see chapter 3). But they retained only a little over one-third of their Horowhenua block by the end of the nineteenth century.

Key issues include:

- ▶ Muaūpoko claimed that they wanted disputes about the customary title to Horowhenua arbitrated by tribal rūnanga, and that the Crown imposed the Native Land Court and its native title system on them. The Crown disagreed, arguing that its agents did nothing more than encourage iwi to take their disputes about Horowhenua to the court, which they did of their own free choice.
- ▶ In 1873, title was awarded to a list of 143 owners, with Te Keepa Te Rangihwinui's name on the front of the certificate of title, under section 17 of the Native Lands Act 1867. The claimants and the Crown disagreed over whether this form of title enabled Te Keepa to act as a trustee, and whether – as the Crown argued – '[s]ection 17 tenure proved to be a more durable form of tenure protection than other forms of title at the time'.<sup>2</sup>
- ▶ The parties also disputed the legitimacy and consequences of an 1878 proclamation which imposed a Crown purchase monopoly on the block.

Through the course of our inquiry, however, the Crown made some important concessions relevant to this chapter:

- ▶ The native land laws failed to provide a form of effective corporate title before 1894, which undermined Muaūpoko tribal authority in the Horowhenua block, in breach of Treaty principles.
- ▶ The individualisation of Māori land tenure made Muaūpoko lands more susceptible to fragmentation and alienation, and contributed to undermining Muaūpoko tribal structures, which was in breach of the Treaty. The cumulative effect of Crown acts and omissions, including Crown purchasing and the native land laws, resulted in landlessness. This was a breach of Treaty principles.

**4.1.2 Exclusions from the coverage of this chapter**

Due to the limited nature of our expedited, priority inquiry, a number of issues cannot be dealt with at this stage. We do not deal, for example, with some general issues about the native land laws and the establishment of the Native Land Court, which will need to await the completion of the casebook and the hearing of all

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2. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 151



parties. Rather, we have confined our focus to the particular issues which arise in respect of the Horowhenua block. These include the failure of the native land laws to provide an effective form of trusteeship or corporate, tribal title, a point which the Crown conceded.<sup>3</sup>

We are also aware that Ngāti Raukawa have claims in respect of the Horowhenua block, Lake Horowhenua, Lake Waiwiri, and the Hōkio Stream. Those claims will be dealt with later in our inquiry. In this chapter, we have not, for example, addressed Ngāti Raukawa's grievances about the award of the Horowhenua block to Muaūpoko in 1873, or Donald McLean's deal to purchase their Horowhenua interests in 1874.

Inevitably, there are overlaps where Ngāti Raukawa and Muaūpoko were both involved in the same events, often in contest with each other as well as with the Crown. Some such events, including the New Zealand Company Manawatū transaction and the court's 1872 Manawatū-Kukutauaki decision, have been left for consideration later in the inquiry. Others, such as the McLean deal in 1874, have been the subject of inquiry in terms of the Crown's actions with respect to Muaūpoko (see section 4.3.4 for this deal).

We begin the discussion in our chapter by considering a key issue for the Muaūpoko claims: was the Native Land Court and tenure conversion imposed on Muaūpoko?

## **4.2 WAS THE NATIVE LAND COURT AND TENURE CONVERSION IMPOSED ON MUAŪPOKO?**

### **4.2.1 Introduction**

From the late 1850s, the Horowhenua community leased land to Hector McDonald for pastoral farming. This lease required the people to agree on boundaries and division of rents, which precipitated conflict among Muaūpoko and their Ngāti Raukawa neighbours. This conflict was successfully resolved in the 1850s but was renewed in 1869 when Te Whatanui Tutaki died. By then, the Rangitikei-Manawatū purchase was considered complete (see chapter 3). The Crown had agreed in 1867 to remove the exemption of neighbouring lands, including Horowhenua, from the operations of the Native Land Court.<sup>4</sup> Ministers and officials of the Crown encouraged both Ngāti Raukawa and Muaūpoko to resolve their disputes in the Native Land Court, but this carried significant risks and aroused a great deal of suspicion among tribal leaders.

First, an application to the court required a survey, set boundaries, and the vesting of title in individuals. Secondly, the court and its titles seemed to be followed by significant land loss, and had caused a great scandal in the Hawke's Bay. The Haultain inquiry of 1871 had just demonstrated considerable Māori discontent with

3. According to the Crown, however, an effective form of corporate title was provided in the Native Land Court Act 1894, which included a provision for incorporations.

4. Native Lands Act 1867, s 41; T J Hearn, 'One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century', June 2015 (doc A152), pp 403–404

## 4.2.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

the court and individual titles.<sup>5</sup> Nonetheless, the Horowhenua lands were included in the vast Manawatū-Kukutauaki block, which came before the court in 1872.

In this section of our chapter, we consider the key question of whether the Native Land Court, and the tenure conversion that it entailed, was imposed on Muaūpoko. In doing so, we necessarily discuss matters of importance to the Ngāti Raukawa claims, and we note that our analysis is – as far as possible – restricted to whether the court was imposed on *Muaūpoko*. We are aware that Ngāti Raukawa will present their own histories and perspectives later in the inquiry when their claims are heard. Where matters overlap and the tribal stories may differ, we have treated those matters as briefly as possible to ascertain whether Muaūpoko voluntarily resorted to the Native Land Court in 1872. We have not entered into the substance of what happened at the 1872 court sittings, the award of title for Manawatū-Kukutauaki to Ngāti Raukawa, or claims about respective customary rights.

As noted above, we are not addressing general questions about the court and its establishment at this stage of our inquiry, but it is necessary to provide a brief introduction for readers unfamiliar with the court and the tenure conversion which the native land laws instituted. In part, the Crown created the Native Land Court in the 1860s in response to the Waitara dispute and the outbreak of war in Taranaki. The Government wanted an independent, impartial body to decide Māori land entitlements so that purchases or leases would be arranged with the correct people. In the early 1870s, the court consisted of a Pākehā judge and a Māori assessor. The judges were not lawyers (except for the chief judge) but men with some experience in Māori matters, including former Crown purchase agents. Both judge and assessor had to agree to the court's decision at that time (apart from a brief law change in 1873, too late to affect the Manawatū-Kukutauaki and Horowhenua decisions).<sup>6</sup> For the rest of the nineteenth century, Māori leaders struggled to persuade the Crown to replace this court with their own rūnanga as more appropriate mechanisms for deciding customary titles.

The Native Land Acts which established and perpetuated the court did not stop at a system for ascertaining Māori title. This body of oft-amended legislation, the native land laws, instituted a tenure revolution for the purpose, as it was said at the time, of ending tribalism. In a frequently quoted passage, former Premier and Minister of Justice Henry Sewell explained in 1870:

The object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern Island which belonged to the Maoris, and which before the passing of that Act, were extra commercium – except through the means of the old land purchase system, which had entirely broken down – within the reach of colonisation.

5. For the Haultain inquiry and the Hawke's Bay scandal, see Alan Ward, *National Overview*, 3 vols, Rangahaua Whānui series (Wellington: GP Publications, 1997), vol 2, pp 231–243; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, pp 419–421.

6. In 1873, the new Native Land Act 1873 provided that the judge alone should decide matters. This Act did not come into force until 1874. Legislation in 1874 reversed this law change so that the agreement of both judge and assessor was once again required. See David V Williams, *'Te Kooti tango whenua': The Native Land Court 1864–1909* (Wellington: Huia, 1999), pp 325–326.

The other great object was the detribalisation of the Maoris – to destroy, if it were possible, the principle of communism which runs through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way at attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualization of titles to the land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own.<sup>7</sup>

After the court decided the owners, the legislation required it to convert their customary, communal title into individual interests. This tenure conversion did not take the form of individual farms, divided out and located on the ground, but rather a list of undivided, saleable interests for each block. There was no provision for tribal communities to exercise any of the customary controls or sanctions in respect of land once it had passed the court.<sup>8</sup>

By 1872, when applications were being made to the court to determine title to the massive Manawatū-Kukutauaki block, Te Keepa and other Muaūpoko leaders were very aware that individualisation was crippling the ability of Māori communities to retain their land. Criticisms had also arisen by that time as to whether the court was the appropriate body to decide Māori customary entitlements. There was a move afoot in 1872 to obtain legislative sanction for elected native councils to replace the court in determining titles.<sup>9</sup>

It was in these broad circumstances that Muaūpoko had to decide whether to resolve conflict over the use of the Horowhenua lands in the colonial economy by applying to the Native Land Court for title determination.

#### 4.2.2 The parties' arguments

The Crown conceded that it failed to provide an effective form of corporate title in the native land laws. But it did not accept that the court was an inappropriate body to determine title, or that the court and its new titles were imposed on Muaūpoko against their wishes.

In the Crown's view, its agents 'encouraged Māori to secure the legal tenure of their lands through utilising the Native Land Court' so that they would have usable titles in the colonial economy, and so that inter-tribal disputes over Horowhenua lands could be settled peacefully. The Crown, we were told, 'often acted in good faith to assist in the resolution of disputes between Māori'.<sup>10</sup> On the other hand, the Crown acknowledged that 'the Native Land Court regime could require those who

7. NZPD, 1870, vol 9, p 361 (Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 669)

8. For the native land laws, the establishment of the court, and tenure conversion, see Waitangi Tribunal, *The Hauraki Report*, vol 2, chapters 15–16; Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, chapter 8; Waitangi Tribunal, *Te Urewera, Pre-publication, Part II* (Wellington: Waitangi Tribunal, 2010), chapter 10.

9. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, pp 309–312

10. Crown counsel, closing submissions (paper 3.3.24), p 110

## 4.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

otherwise did not want to participate in title determination to participate'. In the present case, however, Crown counsel pointed to an application from Te Keepa in 1872 as Muaūpoko's representative.<sup>11</sup>

The Crown submitted that its agents did nothing more than encourage parties to settle their disputes in the court that it had made available, although it also tried to mediate where appropriate.<sup>12</sup> This included 'significant efforts on the part of the Crown to enable parties to come to an agreement to resolve their inter-iwi dispute in the Horowhenua through arbitration by a mixed rūnanga'.<sup>13</sup> McLean tried to set up this arbitration as agreed by Muaūpoko and Ngāti Raukawa but it failed, partly because Māori refused to leave the disputed land. In the meantime, the Crown purchase officer, Grindell, did not try to force through a survey in the face of opposition but worked peacefully with communities and leaders to resolve their objections to the survey and the court.<sup>14</sup>

The Crown argued that the court was necessary to settle titles for use in the colonial economy,<sup>15</sup> but the claimants disagreed. Some argued that no tenure conversion was required or appropriate,<sup>16</sup> and others pointed to rūnanga as an available and realistic alternative to the court. In their view, the Crown failed to keep its promise to establish a 'Maori body to settle the dispute', making the Native Land Court unavoidable.<sup>17</sup>

Fundamentally, the claimants argued that Muaūpoko resisted the Native Land Court but finally succumbed to Crown pressure and the very real possibility that they would lose their land if they did not participate.<sup>18</sup> Further, the claimants submitted that the Crown's aggressive promotion of surveys and applications to the court was based on its ambition to purchase the district.<sup>19</sup> 'Muaūpoko', they said, 'consistently opposed the Court sitting in respect of their land interests and [so] were placed in the position of having to defend their lands as counterclaimants before the 1872 Manawatū-Kukutauaki Court'.<sup>20</sup> The claimants accepted that applications were made by Te Keepa (for the confederated tribes) and by a small minority of Muaūpoko individuals in mid-1872, but not, they said, by the majority.<sup>21</sup>

Finally, when the Native Land Court hearing was about to begin and Muaūpoko made a last-ditch attempt to keep their land out of the court, the claimants said

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11. Crown counsel, closing submissions (paper 3.3.24), p 112

12. Crown counsel, closing submissions (paper 3.3.24), pp 128–131

13. Crown counsel, closing submissions (paper 3.3.24), p 129

14. Crown counsel, closing submissions (paper 3.3.24), pp 129–131

15. Crown counsel, closing submissions (paper 3.3.24), pp 109–110

16. Claimant counsel (Lyll and Thornton), submissions by way of reply, 14 April 2016 (paper 3.3.27), pp 12–14

17. Claimant counsel (Ertel and Zwaan), closing submissions, 12 February 2016 (paper 3.3.13), p 7; claimant counsel (Bennion, Whiley, and Black), closing submissions, 12 February 2016 (paper 3.3.17), p 65

18. Claimant counsel (Afeake, McCarthy, and Jordan), closing submissions, 12 February 2016 (paper 3.3.16), pp 22–24; claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), pp 108–117

19. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), pp 65–66

20. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 65

21. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), pp 64–66

that the Crown colluded with the court to ensure that the hearing went ahead.<sup>22</sup> Claimant counsel submitted:

The Crown held a vested interest in seeing that the customary title to the lands in question were extinguished as quickly as possible so that it could commence its purchasing activities, having already made large advances on the land in question [the Manawatu-Kukutauaki block]. The reluctance of Muaūpoko to participate in the Court proceedings significantly threatened that outcome. On that issue, direct pressure was exerted on the judge by the Crown to use all means in his power to engage rangatira in the process and prevent them from walking away.<sup>23</sup>

Thus, the claimants' view is that the Native Land Court was imposed on Muaūpoko, to their great cost.<sup>24</sup>

#### 4.2.3 Conflict arises over use of the Horowhenua lands in the colonial economy

From the evidence available to us, there was no sustained conflict over use of the Horowhenua lands in the colonial economy until the late 1860s. Before that, a community of some 100–200 Muaūpoko residents lived peaceably side by side with Ngāti Raukawa communities – Te Whatanui Tutaki's 'immediate household' at Raumatangi, Ngāti Huia to the north at Poroutawhao, and Ngāti Pareraukawa based to the south at Muhunua.<sup>25</sup> The Muaūpoko community was based mainly at Te Rae o Te Karaka, although horticulture and resource-use was much more widespread.<sup>26</sup> Historian Jane Luiten commented:

In 1850 the community at Horowhenua was described as predominantly Anglican, with both a church and a school, producing pigs and flax for sale, and having 30 acres under cultivation in both introduced crops such as wheat, maize and potatoes, as well as kumara. Just under 40 per cent of the population had some degree of literacy.<sup>27</sup>

The Horowhenua community governed itself – the reach of the Governor and later the settler Parliament was 'scarcely felt beyond the enclaves of the Pakeha settlements at Wellington and Whanganui at each end of the district.'<sup>28</sup> Intra-tribal disputes were settled by traditional methods, including muru, and by rūnanga of chiefs. According to Ms Luiten, the main Crown–Māori interaction from the 1840s

22. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply, 21 April 2016 (paper 3.3.33), p 23

23. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 23

24. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17), p 67; claimant counsel (Afeake, McCarthy, and Jordan), closing submissions (paper 3.3.16), p 18

25. Bruce Stirling, 'Muaupoko Customary Interests', September 2015 (doc A182), pp 126–127; Jane Luiten with Kesaia Walker, 'Muaupoko Land Alienation and Political Engagement Report', August 2015 (doc A163), pp 29–30, 53, 65, 109

26. Luiten, 'Political Engagement' (doc A163), p 45; Grant Young, 'Muaūpoko Land Alienation Report', August 2015 (doc A161), p 14

27. Luiten, 'Political Engagement' (doc A163), pp 44–45

28. Luiten, 'Political Engagement' (doc A163), p 43



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to the 1860s was over land; the Crown's attempts to purchase land were principally at issue in the large district to the north of Horowhenua (see chapter 3). There was no immediate pressure for sales at Horowhenua itself before the 1860s. During the pre-Native Land Court era of Crown purchases, Native Land Purchase Commissioner Donald McLean considered that overlapping tribal claims made the Horowhenua district too difficult to purchase. The Wellington Provincial Government disagreed but was focused on other lands, especially the Rangitikei-Manawatū block.<sup>29</sup>

As described in chapter 3, Muaūpoko had significant involvement in the Crown's purchases of land in the wider inquiry district. This experience rendered some of them resistant to the whole process of selling land to the Government. They supported a resolution in 1860 that Governor Gore Browne, who was ultimately responsible for the disputed Waitara purchase in 1859 and the Taranaki war that followed, should be sent back to Britain.<sup>30</sup> They also supported the Kīngitanga, which resisted land sales and promoted Māori authority over their own lands and tribes (both symbolised by the king).<sup>31</sup> As William Taueki put it: 'The Kingitanga was created to hold on to our tino rangatiratanga. The Kingitanga also opposed land sales.'<sup>32</sup> The Kīngitanga has been discussed extensively in earlier Tribunal reports, and we refer the parties to those reports for further details.<sup>33</sup>

According to official sources, half the Horowhenua community were 'Kingites' by 1862, although they were 'moderate' ones.<sup>34</sup> Kāwana Hunia was also a 'King Native' at this time.<sup>35</sup> Grant Huwyler told us that Hunia supported the Kīngitanga at Rangitikei in conjunction with Ngāti Raukawa:

In the late 1850's or early 1860's Kawana Hunia differentiated himself from many of the Rangitikei people, and became a formal supporter of the Māori Kingitanga. He actively defied the Queen's law and operated from a base at Pakapakatea, in Rangitikei, where he worked with Ngāti Raukawa leaders to promote and uphold the King's law.<sup>36</sup>

Muaūpoko support for the Kīngitanga took a military form when the Crown invaded the Waikato in 1863, and 'more than half the men at Horowhenua went to help in the defence of Kingitanga.'<sup>37</sup> According to William Taueki, their close ties

29. Luiten, 'Political Engagement' (doc A163), pp 43, 49–53. See also Hearn, 'One Past, Many Histories' (doc A152) chapters 2–6.

30. Hearn, 'One Past, Many Histories' (doc A152), p 174

31. Luiten, 'Political Engagement' (doc A163), pp 45, 59; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 125–126, 171–172

32. William James Taueki, brief of evidence, 11 November 2015 (doc C10), p 13

33. See, for example, Waitangi Tribunal, *The Hauraki Report*, vol 1, pp 169, 194–206; Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 224–225, 232–235, 237–242, 251–254, 283, 334–337, 338–339, 341–342, 386–387; see also Evelyn Stokes, *Wiremu Tamihana: Rangatira* (Wellington: Huia, 2002); *Te Kīngitanga: The People of the Māori King Movement, Essays from the Dictionary of New Zealand Biography* (Auckland: Auckland University Press, 1996).

34. Luiten, 'Political Engagement' (doc A163), p 59; Stirling, 'Muaupoko Customary Interests' (doc A182), p 171

35. Hearn, 'One Past, Many Histories' (doc A152), p 177; Grant Denys Pahia Huwyler, brief of evidence, 11 November 2015 (doc C14), p 9

36. Huwyler, brief of evidence (doc C14), p 9

37. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 171–172



to Ngāti Maniapoto influenced this decision.<sup>38</sup> Their leaders included Ihaia Taueki, Heta Te Whata, and Te Rangirurupuni. After the fall of Ōrākau in March 1864, Ihaia Taueki and the other known 21 Muaūpoko fighters were forced to surrender (from April to June 1864) and returned home.<sup>39</sup>

Muaūpoko had not been unanimous in support for the Kīngitanga. Also, some rangatira supported land sales to the Crown (outside of Horowhenua) as a way of securing Crown recognition of their title and Crown support more generally. The most prominent of these were Kāwana Hunia, who was a key figure in the Rangitikei-Manawatū sale, and Te Keepa Te Rangihwinui. Te Keepa became a major in the colonial forces. He took a significant part in the wars from 1864 or 1865 onwards.<sup>40</sup> Kīngitanga support had waned at Horowhenua following the defeat at Ōrākau and subsequent surrender.<sup>41</sup> Local people now fought for the Crown under Te Keepa's command, including against Titokowaru in Taranaki in 1868–69 and Tūhoe in Te Urewera in 1870.<sup>42</sup> Leaders included Te Rangimairehau, Raniera Te Whata, and Hanita Kowhai. Te Paki Te Hunga was involved in Kāwana Hunia's 'small Ngati Apa contingent'.<sup>43</sup>

Details about the extent of Muaūpoko involvement are uncertain. According to Rod McDonald, the whole of the able-bodied fighting men at Horowhenua fought for the Crown under Te Keepa in the mid- to late 1860s.<sup>44</sup> We know that this is incorrect because at least some supported Pai Mārire, the religious movement which originated in Taranaki in response to the wars and which became synonymous with resistance to the Government.<sup>45</sup> McDonald had seen Pai Mārire services held at Te Rae o Te Karaka, and described Motai Taueki as Pai Mārire's 'local prophet', supported and guarded by 12 'apostles'.<sup>46</sup> Charles Rudd told us that Motai was 'one of the last tohunga of the Muaupoko tribe'.<sup>47</sup> Ada Tatana's tipuna, Rere Te Amo, was said to have been a Pai Mārire supporter.<sup>48</sup> Stirling argued that Pai Mārire had 'many' supporters at Horowhenua, despite the significant commitment of force to fight with Te Keepa against the 'Hauhau' in the late 1860s.<sup>49</sup> According to Louis Chase, a 'large contingent of Muaupoko Hauhau' caused consternation when they

38. William Taueki, brief of evidence (doc C10), p 22

39. Stirling, 'Muaupoko Customary Interests' (doc A182), p 172; Bruce Stirling, answers to questions in writing, December 2015 (doc A182(g)), pp 1–2. For the full list of Muaūpoko who surrendered after Ōrākau, see p 2.

40. There is some disagreement about whether Te Keepa was involved in any fighting in 1864: see Bruce Stirling, answers to questions of clarification, 11 November 2015 (doc A182(c)), pp 4–6.

41. Luiten, 'Political Engagement' (doc A163), p 59. Stirling doubted whether support for the Kīngitanga had necessarily been reduced in 1864, as the men who had surrendered may not have been present: see Stirling, answers to questions in writing (doc A182(g)), pp 1–2.

42. Stirling, 'Muaupoko Customary Interests' (doc A182), p 172

43. Luiten, 'Political Engagement' (doc A163), p 60

44. E O'Donnell, *Te Hekenga: Early Days in Horowhenua: Being the Early Reminiscences of Mr Rod McDonald* (Palmerston North: G H Bennett & Co, 1929), p 118; Luiten, 'Muaupoko Land Alienation' (doc A163), p 60

45. For Pai Mārire and the term 'Hauhau', see Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 63–67; Waitangi Tribunal, *The Ngāti Awa Raupatu Report* (Wellington: Legislation Direct, 1999), pp 38–39, 43, 47.

46. O'Donnell, *Te Hekenga*, pp 124–126

47. Charles Rudd, brief of evidence, 16 November 2015 (doc C23), p 5

48. Louis Chase, 'Muaupoko Oral Evidence and Traditional History', August 2015 (doc A160), p 75

49. Stirling, 'Muaupoko Customary Interests' (doc A182), p 173

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camped near Masterton in 1868, on their way home from a visit to the Wairarapa.<sup>50</sup> Also, at least some Muaūpoko continued to support the Kīngitanga, being the ‘only southern iwi’ which attended the great Kīngitanga hui at Whatiwhatihoe in 1882.<sup>51</sup>

In sum, the Muaūpoko community’s initial response to colonisation was to adopt new crops, new schools, and a new religion while living ‘relatively harmoniously’ with its Raukawa neighbours,<sup>52</sup> a considerable distance from settlers, government, and the first large Crown purchases. By the 1860s, however, Crown purchases were coming ever closer to Horowhenua, and Muaūpoko leaders were pursuing radically different paths. Some opposed land sales and supported the Kīngitanga and Pai Mārire, including militarily. Others pursued land sales outside of Horowhenua as the means of securing Crown support and recognition of their title, and fought for the Crown in the mid- to late 1860s. So strong was the division that one brother could say of another: ‘the first Hauhau he would shoot would be his brother.’<sup>53</sup> Yet there is no evidence that Muaūpoko ever fought against each other, and no suggestion that there was actual conflict or fighting at Horowhenua, despite ‘Hauhau’ and Native Contingent living there side by side. At stake in the choice between resistance (Kīngitanga and Pai Mārire) and alliance (land sales and the Native Contingent) was the future of Horowhenua. The aspiration of both sides was for the Muaūpoko community to retain its lands and its authority to govern itself, although they chose opposite means for achieving it.

This is the context for when, in 1868–69, the use of Horowhenua land in the colonial economy became strongly contested. Before we discuss this contest, we note that we have not yet heard Ngāti Raukawa’s evidence or submissions on the disputes which arose. As a result, many details will be left out of our discussion for later consideration. The burning of Te Watene’s houses by Kāwana Hunia’s party in 1871, for example, is alluded to only briefly, and a fuller account of all such matters will await the hearing of Ngāti Raukawa. Nonetheless, it has been possible to examine and make findings about the Crown’s dealings with Muaūpoko, acknowledging that some contested issues will need to be addressed in later hearings.

The earliest use of Horowhenua land in the economy took the form of a lease to Hector McDonald in 1857. Te Whatanui Tutaki had invited McDonald to settle and lease land south of the Hōkio Stream.<sup>54</sup> Te Keepa later stated that this was the first time that the resident groups had had to define boundaries, and that the process of demarcation caused disputes.<sup>55</sup> McDonald resolved an initial disagreement between Te Whatanui Tutaki and Muaūpoko by agreeing to lease land north of the Hōkio Stream as well, and to pay rent to all the groups. Rent for Muaūpoko was paid to Ihaia Taueki, Te Rangirurupuni, and other rangatira. But this extension of the lease northwards led to a fresh dispute between Muaūpoko and Ngāti Huia in 1858 as to where the northern boundary lay. A group of ‘outside’ chiefs arbitrated this

50. Chase, ‘Muaupoko Oral Evidence and Traditional History’ (doc A160), pp 74–75

51. William Taueki, brief of evidence (doc C10), p 26

52. Luiten, ‘Political Engagement’ (doc A163), p 47

53. Chase, ‘Muaupoko Oral Evidence and Traditional History’ (doc A160), p 75

54. Luiten, ‘Political Engagement’ (doc A163), p 48

55. Luiten, ‘Political Engagement’ (doc A163), pp 48–49

dispute. A rŭnanga consisting of Rangitāne chief Peeti Te Aweawe, Wairarapa chief Ngātuere, and others settled on a boundary running from Ngatokorua to Ngamana (see map 4.1), although Muaūpoko were not satisfied with the outcome. Essentially, however, the lease continued without any serious trouble throughout the period of war and division, until Te Whatanui Tutaki died in 1869.<sup>56</sup>

By this time, the legal circumstances governing the lease had changed. It is important to note that McDonald's lease was originally unlawful and there was no court to which he could appeal to enforce his rights as lessee or settle disputes. This was because the Native Land Purchase Ordinance 1846 had made all private leases of Māori land illegal, and this ordinance was in force until 1865.<sup>57</sup> The lease, therefore, was entirely governed by Māori law and the authority of the rangatira who entered into it. The Government did not, however, attempt to remove McDonald or threaten him with prosecution, as happened with 'informal' leases elsewhere when they interfered with Crown purchasing (in the Hawke's Bay and Wairarapa).<sup>58</sup>

In 1862, the Native Lands Act did not repeal the 1846 Ordinance. Rather, it provided that lessees would not be liable to prosecution under the Ordinance if the Māori lessors had obtained a certificate of title from the Native Land Court before entering into a lease. It also provided that any lease was 'void' if the owners did not have a certificate of title from the court.<sup>59</sup> The 1865 Act repealed the 1846 Ordinance but continued the provision that any 'conveyance transfer gift contract or promise affecting or relating to any Native Land' was void if the owners had not obtained a certificate of title.<sup>60</sup> Thus, McDonald's lease remained unenforceable in New Zealand courts and without legal protection, other than that provided by his Māori hosts as lessors. As far as we can tell, McDonald did not press his Horowhenua landlords to go to the new Native Land Court for a formal title, as happened with many other leases; the pressures came from elsewhere, as we discuss in the next section.

It is not clear what precipitated a renewal of conflict between Muaūpoko and Ngāti Huia over the northern boundary in 1868. In brief, both sides made moves towards surveying the boundary, which led to the erection of a pou by Ngāti Huia, its destruction by Muaūpoko, and an appointed day at which both sides assembled for fighting (but did not actually fight each other). Peeti Te Aweawe and Rangitāne once again tried to mediate without success, and there was talk on both sides of bringing in armed supporters from outside the district. Ms Luiten noted that local Muaūpoko leaders called upon Te Keepa for help.<sup>61</sup> He advised the Government

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56. Luiten, 'Political Engagement' (doc A163), pp 48–49, 63–65

57. Native Land Purchase Ordinance 1846; Native Lands Act 1865, s 3; Waitangi Tribunal, *The Wairarapa Report*, vol 1, pp 50–55, 86

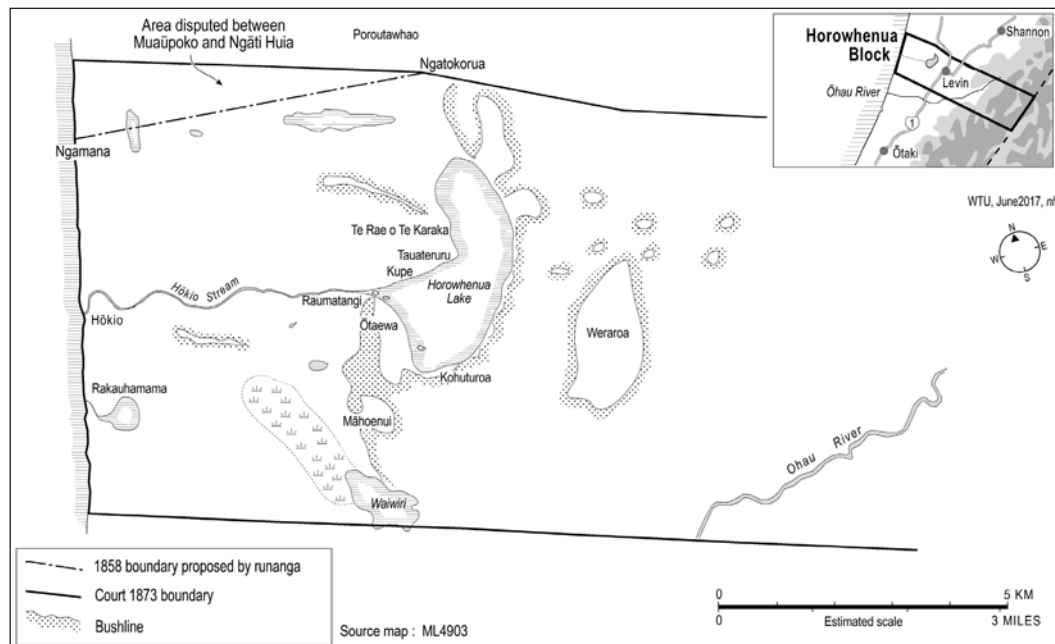
58. See, for example, Waitangi Tribunal, *The Wairarapa Report*, vol 1, pp 59–66, 79; Ward, *National Overview*, vol 2, pp 134, 150–151, 168, 258, 459.

59. Native Lands Act 1862, ss 29–30

60. Native Lands Act 1865, s 75

61. Luiten, 'Political Engagement' (doc A163), pp 63–65

## 4.2.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT



Map 4.1: Ngatokorua to Ngamana boundary as proposed by rūnanga, 1858

that he would move his troops to Horowhenua ‘and take care of the small tribe, Muaupoko, lest they be destroyed.’<sup>62</sup>

The Government’s response was to appeal to Hōri Kīngi of Whanganui and Parakaia of Ngāti Raukawa to ‘use their authority to prevent fighting, and to leave the intertribal dispute to the law.’<sup>63</sup> The Government also asked Te Keepa to do the same, promising that the Government would ensure that Muaūpoko were not ‘wronged.’<sup>64</sup> Te Keepa then advised Muaūpoko and Rangitāne to ‘leave the boundary question alone’ and remain at peace. He also urged the Government to take care of Muaūpoko and the other tribes, to protect them from violence and to take care of their lands, and to send an official to Horowhenua to provide this protection.<sup>65</sup> This was an important appeal to the Crown for the protection promised in the Treaty. The Crown’s response was that it would ‘watch over great and small’, and the matter should be left ‘in the hands of the Government and the law.’<sup>66</sup>

The northern boundary dispute remained in abeyance for the meantime but was followed by a more serious confrontation to the south, when Te Whatanui Tutaki died in 1869. According to Jane Luiten, Te Whatanui Tutaki’s nieces, Kararaina Nicholson and Ngawiki Tauteka, intervened after his death. They tried to end

62. Te Keepa Te Rangihwinui to the Governor and Ministers, 19 February 1868 (Luiten, ‘Political Engagement’ (doc A163), p 64)

63. Luiten, ‘Political Engagement’ (doc A163), p 64

64. W Rolleston to Te Keepa Te Rangihwinui, 24 February 1868 (Luiten, ‘Political Engagement’ (doc A163), p 64)

65. Te Keepa Te Rangihwinui to Native Minister Richmond, 25 February 1868 (Luiten, ‘Political Engagement’ (doc A163), pp 64–65)

66. W Rolleston to Te Keepa Te Rangihwinui, 2 March 1868 (Luiten, ‘Political Engagement’ (doc A163), p 65)

McDonald's lease and drive him off the land. They wanted Kararaina Nicholson's Pākehā husband to take up the lease instead. This dispute became protracted and eventually did result in significant conflict.<sup>67</sup> As noted above, many details of the dispute between Muaūpoko and various groups within Ngāti Raukawa are matters on which Ngāti Raukawa will need to be heard before we can be satisfied that all sides and arguments have been considered. What is certain is that this dispute resulted in the Horowhenua lands coming before the Native Land Court in 1872–73, and the question of the Crown's role in it is therefore crucial to the Muaūpoko claims before us. We turn to this question next.

#### **4.2.4 Did Muaūpoko apply for or consent to the Native Land Court hearings and were there alternative dispute resolution mechanisms?**

##### **(1) 1869–70: *rūnanga* or Native Land Court?**

In the late 1860s and early 1870s, Māori nationwide pressed for the Crown to recognise and accord legal powers to their *rūnanga*, including for deciding titles to land. They made enough headway with the Government for Native Minister Donald McLean to introduce Native Councils Bills in 1872 and 1873, but these Bills were not enacted. Despite Māori wishes as acknowledged by the Premier and Government of the day, Māori were left with an institution to which many Māori were opposed: the Native Land Court.<sup>68</sup> This had not, however, been a foregone conclusion in 1869–72. Muaūpoko tried to use *rūnanga* to settle disputed titles at Horowhenua as their preferred alternative to the Native Land Court.

As noted above, Te Whatanui Tutaki's death in 1869 was followed by a claim from his nieces, Wiki Tauteka (Mātene Te Whiwhi's wife) and Kararaina Nicholson, that they had authority to end McDonald's lease. Wiremu Pōmare of Ngāpuhi, son of Pōmare II and grandson of Te Whatanui, urged Wiki and Kararaina to maintain Ngāti Raukawa's claim at Horowhenua. But Wiremu Pōmare preferred to see McDonald's lease preserved. The whānau of Te Whatanui in residence at the lake also wanted McDonald's lease to continue, although Riria Te Whatanui (his widow) left the district soon after.<sup>69</sup> It should be noted that Riria was of both Ngāti Apa and Ngāti Raukawa descent.<sup>70</sup>

The Government's response was to immediately urge that claims to the land be put through the Native Land Court. Wiki Tauteka told the court in 1873 that it was the Government which first suggested resolving the dispute over McDonald's lease by having the land surveyed and taken through the court. This suggestion was apparently made by Native Minister Richmond at Ōtaki in January 1869, 'shortly after the first confrontation between the sisters and Hector McDonald'.<sup>71</sup> In February 1869, Wiki Tauteka wrote to Richmond to advise him of their intention to proceed with

67. Luiten, 'Political Engagement' (doc A163), pp 65–70

68. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 309–312; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 205–206

69. Luiten, 'Political Engagement' (doc A163), pp 66, 69; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 177–182

70. Stirling, 'Muaupoko Customary Interests' (doc A182), p 82

71. Luiten, 'Political Engagement' (doc A163), p 66



## 4.2.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

a survey, and asking him to let them know if he disapproved.<sup>72</sup> Richmond did not indicate disapproval but the survey was opposed by Muaūpoko and Te Whatanui Tutaki's 'household' at the lake, both of whom objected to Richmond about it. The Government's response to them was that they should agree to the survey and argue their claims in the Native Land Court. Muaūpoko rejected this advice and instead obstructed the survey in April 1869, which could not be completed.<sup>73</sup>

When Donald McLean took over as Minister in mid-1869, the Government's policy remained the same. McDonald had apparently been advising Muaūpoko to obstruct surveys. McLean warned him not to interfere, as 'the execution of a Survey is the only way in which the land can be brought into Court and the title of the opposing claimants settled.'<sup>74</sup> According to Jane Luiten, however, the Government backed off when Kāwana Hunia and Te Keepa attended a hui at Horowhenua in late 1869, at which Muaūpoko resolved to prevent any survey – at least until Wiremu Pōmare could come and discuss matters with them. The Government did an about-face and decided that 'it is scarcely worthwhile to pursue the subject [of a survey] any further.'<sup>75</sup> The Government's hope was that Wiremu Pōmare and his wife Te Atereti<sup>76</sup> would resolve the situation.<sup>77</sup>

In 1870, the ongoing dispute edged closer to armed confrontation. Some houses belonging to Te Whatanui were burned, McDonald was threatened and his sheep were impounded, and, more importantly, Muaūpoko erected the whareniui Kupe on the western shores of Lake Horowhenua, just north of the Hōkio outlet.<sup>78</sup> Jonathan Procter told us that

The erection of this whare, on the dune ridge named Panui-o-marama, on the western side of the lake, was a manifestation of Muaupoko's desire to reassert themselves in the district. It was one of the last whare of its type to be constructed using traditional building techniques.<sup>79</sup>

Kupe was intended not for war but as the venue for an intertribal rūnanga, which was Muaūpoko's chosen method of resolving the dispute. In April 1870 they invited Pōmare, Ngāti Raukawa, and rangatira from outside the district to come to Kupe

72. Luiten, 'Political Engagement' (doc A163), p 67; Tauteka Mātene to Richmond, 17 February 1869 (Jane Luiten, comp, papers in support of 'Muaupoko Land Alienation and Political Engagement' (doc A163(a)), p 20

73. Luiten, 'Political Engagement' (doc A163), pp 65, 67–68

74. G S Cooper, under-secretary, to Hector McDonald, 23 October 1869 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 438)

75. Note on Tāmihana Te Rauparaha to G S Cooper, 15 November 1869 (Luiten, 'Political Engagement' (doc A163), p 69)

76. Te Atereti Pōmare was the daughter of Te Whatanui Tutaki. As Jane Luiten noted, this was 'a marriage between first cousins': Luiten, 'Political Engagement' (doc A163), p 66 n.

77. Luiten, 'Political Engagement' (doc A163), p 70

78. Luiten, 'Political Engagement' (doc A163), p 70; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 184–186

79. Jonathan Procter, summary to accompany Muaupoko sites of significance map-book, November 2015 (doc A183(a)), p [20]



‘with a view to having the dispute arbitrated.’<sup>80</sup> Neither Wiremu Pōmare nor Te Keepa could attend (the latter was on campaign for the Crown in Te Urewera).<sup>81</sup>

The case for Muaūpoko was opened by Kāwana Hunia, Hoani Puihi, and Ihaia Taueki. A committee of 14 chiefs, including Ngāti Kahungunu, Te Ātiawa, and Ngāpuhi chiefs, investigated the Raukawa and Muaūpoko claims over a 10-day period. The committee eventually decided that it could not resolve matters in Pōmare’s absence.<sup>82</sup> Its decision was recorded as:

This investigation will be left open. Wiremu Pomare and Hinematiaro [Te Atereti] will be waited for; when they arrive the relatives of Whatanui and the Muaupoko will be assembled again, and then it will be clearly understood how to settle the question of your land. That is all. This word is by all the Committee.<sup>83</sup>

The committee asked Wiremu Pōmare to meet with the assembled Muaūpoko by February or March 1871, or ‘before these months’ if suitable. Pōmare was warned: ‘This is not a small evil which hangs over your tribes, Muaupoko and Ngati Raukawa, it is a great one.’<sup>84</sup>

Wiremu Pōmare arrived in June 1870 and met with Muaūpoko but was unable to reach agreement with them as to where the boundary between the iwi was located. Muaūpoko maintained that the boundary was at Māhoenui whereas Pōmare held that it was at Tauateruru (although he was willing to move it south to locate Kupe on the Muaūpoko side). In the meantime, Tauteka and Nicholson had filed a claim for the Horowhenua lands with the Native Land Court, and this came on for hearing in July 1870. Usually, such a claim would suffice to force all interested iwi and ‘counter-claimants’ into court and a court title would ensue whether wanted or not, but in this case there was no survey. Muaūpoko had stopped it the previous year. The Native Lands Acts of the 1860s did not allow cases to proceed in the absence of a survey, although that stipulation was not always observed. Pōmare appeared before the court and succeeded in stopping the hearing, on the grounds that the boundaries were disputed by Muaūpoko and (more importantly for the court) no survey had been carried out.<sup>85</sup>

Later in the year, in September 1870, a second rūnanga was convened by Wiremu Pōmare at Waikanae, assisted by Government Assessor Mitai Pene Tauī. This time, the intertribal rūnanga consisted of ‘Ngatiawa, Ngatitōa, and Tamatea [Ngati Kahungunu]’, and it proceeded without any Muaūpoko involvement – possibly even

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80. Luiten, ‘Political Engagement’ (doc A163), p70; Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp184–186

81. AJHR, 1898, G-2A, p72

82. Luiten, ‘Political Engagement’ (doc A163), pp70–71

83. Maihi Paraone Kawiti and 13 others to Wiremu Pōmare, 5 May 1870, ‘Papers Relative to Horowhenua’, AJHR, 1871, F-8, p10

84. Maihi Paraone Kawiti and 13 others to Wiremu Pōmare, 5 May 1870, ‘Papers Relative to Horowhenua’, AJHR, 1871, F-8, p10

85. Luiten, ‘Political Engagement’ (doc A163), pp71–72; Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp188–189

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without their knowledge. The rŭnanga settled the boundary as defined by Wiremu Pōmare at Tauateruru, which Muaūpoko had rejected in their June meeting with Pōmare. The rŭnanga also decided that the people entitled at Horowhenua were the descendants of Te Whatanui, namely Wiremu Pōmare, Wiki Tauteka, Kararaina Nicholson, and Te Watene, and the descendants of Taueki, namely 'Ihaia Taueki and Muaupoko'. The Government's representative, Pene Tauī, and three Te Ātiawa chiefs then went to Horowhenua and laid down the boundary on the ground. This act was witnessed by the descendants of Te Whatanui and six people of Muaūpoko. Regardless, Muaūpoko did not accept the decision of the rŭnanga – indeed, it is difficult to see how a consensus could have been arrived at in their absence.<sup>86</sup>

Te Keepa's intervention in 1869 had seen the Government back off, and the local Horowhenua leaders once again sought his assistance. The ongoing dispute over McDonald's lease had widened into a general dispute as to the boundaries between Muaūpoko and Raukawa, demarcation of which seemed necessary if lessees were to have secure titles (and iwi to have secure rents). By late 1870, the first intertribal rŭnanga had failed to adjust the question to the satisfaction of both sides, and it seemed as if Muaūpoko were excluded altogether from the second rŭnanga in October, which had decided against them. There was an ever-present threat that surveys and court titles might follow. Although the first claim had failed in the court due to lack of a survey, Government pressure to get the land surveyed and into court might resume now that Muaūpoko had rejected the second rŭnanga's decision. The Muaūpoko community at Horowhenua wrote to the Government in October 1870, stating clearly that they did not want their lands dealt with under 'the European law', and reminding the Government of the outcome at Waitara when it took sides in a dispute over Māori mana. Rather, they said, the mana at Horowhenua remained with Māori and should be settled by Māori alone.<sup>87</sup>

In these circumstances, the local Horowhenua leaders sent Ihaia Taueki to obtain Te Keepa's assistance in dealing with his great ally, the Government. Taueki left for Whanganui the day that Pene Tauī laid down the second rŭnanga's boundary at Horowhenua. Taueki told Te Keepa that the Horowhenua lands would be surveyed and 'handed over to the Government' unless something was done. Te Keepa immediately wrote to Native Minister McLean and Premier Fox that there must be no survey and no subdivision of the lands at Horowhenua; land disturbances must be confined to the Rangitikei-Manawatū block and peace must be made (including with the Kīngitanga).<sup>88</sup> Jane Luiten commented: 'Once again, Kemp's intervention had the desired effect.' McLean asked Ngāti Raukawa to 'call off the survey', and the Government agreed not to get further involved unless the dispute was 'escalated'.<sup>89</sup>

86. Luiten, 'Political Engagement' (doc A163), p72; Stirling, 'Muaupoko Customary Interests' (doc A182), pp188–189

87. 'Heta Whatamahoe, Ihaia Taueki, Hoani, Rewiri, na te iwi katoa o Muaupoko', 28 October 1870 (Luiten, 'Political Engagement' (doc A163), pp73–74)

88. Luiten, 'Political Engagement' (doc A163), pp72–73; Stirling, 'Muaupoko Customary Interests' (doc A182), p190

89. Luiten, 'Political Engagement' (doc A163), p73

It is from this date that we can see the beginning of a pattern of Muaūpoko support for and trust of Te Keepa to defend the tribe's interests; an ongoing support that largely persisted until his death in 1898. To explain this, we need to pause and look briefly at the internal dynamics of Muaūpoko at the time.

**(2) A shift in the internal dynamics of Muaūpoko leadership**

From the evidence available to us, a significant number of Muaūpoko were living outside the Horowhenua in the 1850s – possibly up to half of the iwi.<sup>90</sup> At the lake, there were a number of leaders who had influence in the tribe's affairs in the 1850s and 1860s.<sup>91</sup> One of the most important of these was Ihaia Taueki. His seniority and leadership seem to have been acknowledged in various nineteenth-century sources, and he was considered (in particular) the rangatira of Ngāti Tamarangi.<sup>92</sup> Living mostly outside the Horowhenua (although they visited from time to time) were other rangatira, especially Kāwana Hunia and Te Keepa.

It is generally accepted that Kāwana Hunia's father Te Hakeke was primarily a Ngāti Apa leader of the Rangitikei district.<sup>93</sup> Kāwana Hunia's mother Kaewa was Muaūpoko, and he acted with authority when at Horowhenua.<sup>94</sup> His principal support at Horowhenua came from Ngāti Pāriri. At the time, Ngāti Raukawa considered him to be bringing Ngāti Apa's struggle with them about Rangitikei-Manawatū south to Horowhenua.<sup>95</sup> Some of the claimants in our inquiry, including Philip Taueki, viewed Hunia largely as an outsider and a source of trouble. They were strongly critical of his actions (and those of his successors, Warena and Wirihana Hunia).<sup>96</sup> Hunia's descendant, Grant Huwlyer, maintained that Hunia sought both to strengthen his iwi through alliance with the Crown and land sales, and to assert his mother's people's mana over the land. Hunia was no 'trouble maker', Mr Huwlyer told us, but rather

he was an activist for the remaining rights of Muaūpoko which had already been greatly reduced by other Iwi encroaching on their land, and furthermore, Hunia had been left with an explicit message from this father, to fight for his land and his people. And looking at the situation, I believe he was right to be proactive and fight, or other Iwi would have slowly kept pushing in on the boundaries based on superior numbers until there was little left.<sup>97</sup>

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90. Luiten, 'Political Engagement' (doc A163), p 51

91. Luiten, 'Political Engagement' (doc A163), p 45

92. See Bryan Gilling, 'Ihaia Taueki and Muaupoko Lands: An Interim Report for the Ihaia Taueki Trust', 1994 (doc A172), pp 20–26; claimant counsel (Lyll and Thornton), closing submissions, 15 February 2016 (paper 3.3.19), pp 19–20.

93. Huwlyer, brief of evidence (doc C14), p 14

94. Huwlyer, brief of evidence (doc C14), pp 3–4, 10–14

95. Luiten, 'Political Engagement' (doc A163), pp 71, 123–129

96. Philip Taueki, brief of evidence, August 2015 (doc B1), paras 47–54, 111–114, 120–121, 167–191, 199–203, 214

97. Huwlyer, brief of evidence (doc C14), p 11

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We note these two points of view, but it is not necessary for us to decide between them for the purpose of reporting on claims against the Crown.

Te Keepa exercised mana and leadership in more than one iwi, but it is not clear that he did so in respect of Horowhenua until the late 1860s. Rangatira were hapū leaders, ‘weavers of people,’<sup>98</sup> and the title was – as Sir John Rangihau of Tūhoe put it – ‘people bestowed.’<sup>99</sup> While whakapapa and the status of chiefly lines was important, it was equally important for leaders to have the skills necessary to deal with the crucial matters of the day, and the confidence of the people in doing so.<sup>100</sup> As the Te Paparahi o Te Raki Tribunal observed: ‘Their authority to lead depended on how successful they were at advancing hapū interests.’<sup>101</sup>

For Muaūpoko, by the late 1860s and early 1870s, it seemed that what was needed were rangatira who had allied with the Crown and proven themselves successful in managing dealings with the Crown. By then, Ihaia Taueki and other leaders who lacked an established relationship with the Crown – and had in fact fought for the Kīngitanga or supported Pai Mārire – wanted Te Keepa to help them deal with the Crown and the threat to their interests at Horowhenua. This was understandable, and it must be remembered that many, perhaps most, of Muaūpoko’s fighting men were by then fighting for Te Keepa in the Native Contingent. But this did not mean that Te Keepa was elevated above other chiefs at Horowhenua or exercised any particular or exclusive authority over the community’s affairs. For land matters, however, he was clearly their chosen representative in dealing with the Crown and Te Ture (the law) by 1873.

This does not mean that the Tribunal accepts the so-called ‘strong man narrative’, that Muaūpoko were in a weak position and needed the military might of Te Keepa and Hunia to save them.<sup>102</sup> Rather, we accept the Crown’s submission: ‘The evidence suggests that the Crown engagement with Te Keepa was predicated on the iwi’s own agreement and that he retained strong (almost consensus) support to act on their behalf between 1860 through to the late 1880s.’<sup>103</sup> The accuracy of this submission will be demonstrated in forthcoming sections of this chapter as well as chapters 5 and 6.

We disagree, however, with the use of the starting date of 1860. The evidence suggests to us that Muaūpoko supported the Kīngitanga initially and only later relied on Te Keepa. Faced with a burgeoning dispute in the late 1860s, Muaūpoko turned first to intertribal rūnanga as the means of settling the problem. By 1870, a more successful interface with the Crown seemed essential, especially as the conflict at Horowhenua appeared set to escalate and all sides were appealing to the Crown for assistance. In that circumstance, the tribe turned to the Crown’s ally, Te Keepa.

98. Waitangi Tribunal, *He Whakaputanga me Te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), p 47

99. Waitangi Tribunal, *Te Urewera, Pre-publication, Part I* (Wellington: Waitangi Tribunal, 2009), pp 82–83

100. Waitangi Tribunal, *Te Urewera, Pre-publication, Part I*, p 96

101. Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, p 31

102. Luiten, ‘Political Engagement’ (doc A163), pp 110, 320

103. Crown counsel, closing submissions (paper 3.3.24), p 127

This does not mean that Muaūpoko gave up on the idea of resolving the dispute by rūnanga, as we shall see in the following section.

### **(3) 1871–72: rūnanga or Native Land Court?**

By the beginning of 1871, rumours and accusations were rife on both sides that each was about to start an armed conflict. When Kāwana Hunia and a small party of armed men confronted Te Watene and burned some houses on disputed land at Kohuturoa, the Native Minister and the local magistrate both inquired into the incident. The Government was not overly concerned, considering the burning of houses as an assertion of ownership, not a ‘declaration of war’. Te Keepa was building a ‘fighting pa’ called Pipiriki, just south of the boundary claimed by Ngāti Raukawa at Tauateruru. The resident magistrate proposed that the dispute be settled by taking all their claims to the Native Land Court, a proposal that Muaūpoko once again rejected.<sup>104</sup>

What was eventually agreed between Muaūpoko and Ngāti Raukawa in July 1871 was that another rūnanga would be convened to decide the boundary, this time with two Government appointees to preside over or assist it, and the disputed lands would be vacated in the meantime. This did not stop construction of Pipiriki, which Muaūpoko considered they needed to defend themselves, and Ngāti Huia built their own ‘fighting pa’ at Poroutawahao. Both sides were believed to be bringing in armed people from outside.<sup>105</sup> For his part, Te Keepa responded that ‘there are no people of Ngāti Apa or Whanganui here’, reminding McLean that he was ‘Major Kemp by Tanguru of Muaupoko’, and with him was ‘Kawana Hunia by Kaewa and we are both of Muaupoko.’<sup>106</sup>

A full explanation of the escalating dispute with Ngāti Raukawa must wait until we have heard the evidence and submissions of Ngāti Raukawa. In terms of the Crown’s approach towards Muaūpoko and its advocacy of surveys and the Native Land Court, we note that in 1871 the leaders on both sides were considered to be Government allies.

McLean invited Te Keepa and Hunia to Wellington to try to agree a way forward. In August 1871, Kāwana Hunia accepted the idea of a ‘court’ composed of chiefs (with Government assistance) to arbitrate the dispute. The proposal had already been approved by Ngāti Raukawa and Muaūpoko in Horowhenua in July 1871, and it was also supported more widely by iwi in the region. It was hoped that a joint Government–Māori rūnanga would arrive at a decision that would stick, without having to have recourse to ‘European law’ and the Native Land Court. The plan was for Muaūpoko and Ngāti Raukawa to nominate the chiefs who would sit on this rūnanga. Hunia proposed Dillon Bell, Judge Maning, the resident magistrate (Major Edwards), and Alexander McDonald, as well as Rēnata Kawepō and Te Hapuku of Ngāti Kahungunu. Ngāti Raukawa apparently proposed Marsden Clarke,

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104. Luiten, ‘Political Engagement’ (doc A163), pp75–77

105. Luiten, ‘Political Engagement’ (doc A163), pp77–78; Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp192–196

106. Te Keepa to McLean, 22 July 1871 (Luiten, ‘Political Engagement’ (doc A163), p78)



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Hone Peeti of Ngāpuhi, and Pairama (a Kaipara chief). Te Keepa agreed to return to Whanganui and to accept the decision of joint Government–Māori arbitration, but he wanted Te Watene removed from Horowhenua first before the rūnanga met. This did not occur and the situation remained tense. Ngāti Huia imposed an aukati and cattle went missing, but no actual fighting took place.<sup>107</sup>

In September 1871, Tāmihana Te Rauparaha petitioned Parliament about the presence of Māori with Government arms at Horowhenua and the Government's failure to resolve the situation or deal with the alleged arson. McLean persuaded the Native Affairs Committee not to investigate the petition, because, he said, all the leading people had agreed to a peaceable settlement via arbitration by rūnanga. In November 1871, he sent William Travers to take initial evidence for the inquiry.<sup>108</sup> In their evidence and submissions to us, the Muaūpoko claimants were scathing in their criticisms of the Travers report for its 'Crown perpetuation of the subjugation myth', which they considered biased and not truly founded on the evidence taken.<sup>109</sup> That is an issue which we cannot consider fully until hearing from Ngāti Raukawa. But the content of the Travers report is not strictly relevant here, as the crucial issue is the Crown's failure to conduct the agreed-upon arbitration for which Travers' collection of evidence and report was intended as a preliminary inquiry.

It is not entirely clear why the planned arbitration by rūnanga did not take place. Muaūpoko noted in 1872 that they had 'expended much money and labour in procuring food and accommodation for tribes convened to decide the matter.'<sup>110</sup> Crown counsel submitted that all the leaders involved had agreed to the arbitration but 'it appears it was difficult to get the different players to agree to leave the disputed land. McLean later stated that the attempt to appoint chiefs to settle the dispute had failed.'<sup>111</sup>

Te Keepa and Hunia had certainly left the area, although Te Watene remained in residence.<sup>112</sup> In February 1872, one of Ngāti Raukawa's arbitrators, Pairama of Te Uri o Hau, was unable to come, and definite word had not yet been received from Te Keepa as to Muaūpoko's proposed arbitrators. Ngāti Raukawa had a replacement arbitrator in mind for Pairama (Paora Tūhaere of Ngāti Whatua), and also reported that Muaūpoko wanted Hēnare Matua of Ngāti Kahungunu.<sup>113</sup>

We do not accept that it was impossible or even difficult to have arranged the appointment of arbitrators, since all parties (including Te Watene) had agreed to and supported the arbitration going ahead. According to historian Bruce Stirling, the likely explanation is that the Crown preferred to 'push the parties' into the

107. Luiten, 'Political Engagement' (doc A163), pp 77–85; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 196–200

108. Luiten, 'Political Engagement' (doc A163), pp 80–82

109. See, for example, claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 7, 54–59, 65–69.

110. Grindell to Wellington Superintendent, 29 April 1872 (Stirling, 'Muaupoko Customary Interests' (doc A182), p 205)

111. Crown counsel, closing submissions (paper 3.3.24), p 130

112. Luiten, 'Political Engagement' (doc A163), p 80

113. Luiten, 'Political Engagement' (doc A163), pp 84–85; Stirling, 'Muaupoko Customary Interests' (doc A182), p 205



Native Land Court and so allowed the ‘long-promised arbitration’ to ‘wither on the vine.’<sup>114</sup> Jane Luiten argued that the desire to obtain Māori land by purchase was likely ‘a large factor in McLean’s decision to resort instead to the Native Land Court.’<sup>115</sup>

The truth of this became apparent in March 1872. Native Department interpreter James Grindell had been, as Jane Luiten put it, ‘seconded to the Wellington Provincial Government to persuade communities within the remaining tract of customary land south of the Manawatu river to obtain a title for their lands from the court.’<sup>116</sup> The central and provincial governments were acting together, and Grindell seems to have worked to both and received orders from both. Officially, he reported to Superintendent Fitzherbert, who was the ‘Agent of the General Government for the Purchase of Native Land in the Province of Wellington.’<sup>117</sup> The Crown and claimants in our inquiry appear to agree that Grindell was a Crown agent, and have made their submissions accordingly.

At the direction of G S Cooper, Native Department under-secretary, Grindell was to tour the West Coast and ‘endeavour to make arrangements (as desired by the Minister for Public Works<sup>118</sup>) with the various hapus and tribes for sending applications to the Native Lands Court to have their title to all lands, of which they are desirous of disposing to the Government, investigated.’<sup>119</sup> McLean’s decision to abandon the Horowhenua arbitration was communicated to Grindell, which he passed on to Māori. It was very clear from Cooper’s instructions and from Grindell’s reports that Crown purchase of the ‘waste lands’ was the driving force behind his efforts to get Māori land into the court.<sup>120</sup>

Grindell toured the district in March and April 1872, trying to ‘obtain the agreement of Maori to the surveying of all their lands on the west coast “preparatory to submitting their claims to the Native Land Court”’.<sup>121</sup> In late February 1872, Te Watene had written to McLean to press for the rūnanga arbitration to be carried out. Two weeks later, however, he wrote again on 11 March to ascertain whether or not McLean still intended the arbitration to happen. Grindell had visited him early that month and advised that McLean wanted the dispute settled by the Native Land Court instead.<sup>122</sup> Officials advised Te Watene that the ‘Horowhenua land question is

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114. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 205

115. Luiten, ‘Political Engagement’ (doc A163), p 85

116. Luiten, ‘Political Engagement’ (doc A163), p 86

117. Grindell to Superintendent, 29 April 1872 (‘Research Aid to the Rangitikei-Manawatū Nineteenth Century Purchase (MA 13 files)’; various dates (doc A159(c)), p [5633]

118. At that time, the Minister of Public Works was ultimately responsible for Crown purchasing of Māori land, not the Native Minister: see Hearn, ‘One Past, Many Histories’ (doc A152), p 637 n

119. Grindell to Under-Secretary Cooper, 25 March 1872 (Hearn, ‘One Past, Many Histories’ (doc A152), p 578)

120. Hearn, ‘One Past, Many Histories’ (doc A152), pp 578–586; Luiten, ‘Political Engagement’ (doc A163), pp 86–95

121. Grindell to superintendent, Wellington, 29 April 1872 (Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 212)

122. Luiten, ‘Political Engagement’ (doc A163), p 86

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to be decided in NLC.<sup>123</sup> The intention to arbitrate by rūnanga had been abandoned by the Crown without consultation or consent.

Although McLean pulled the plug on the rūnanga, he was very aware that Māori nationally wanted to determine their own titles in their own rūnanga. So strong was the support for this idea that the Premier likened it to early support for the Kingitanga. Later in the year, in October 1872, the Government brought in a Bill to give elected Native Councils legal powers of title determination and local self-government, but the Bill was withdrawn without even putting it to a vote. It was clear from the debate that some members of Parliament feared that settlement would be retarded if the Native Land Court lost its monopoly on title determination, even though the Bill retained the court as the ultimate source of title and as an appellate authority from council decisions. Although the Government withdrew the Bill, its introduction shows the Crown's awareness of what the Māori Treaty partner wanted, and that title determination by rūnanga was something that could conceivably have been empowered by the colonial State. A second Bill was brought in the following year but that, too, was not passed by the settler Parliament.<sup>124</sup>

The result, as Bruce Stirling put it,

was a further nail in the coffin of arbitration of the issues by appropriately qualified experts in law and lore. There was no place in the government's apparatus for Maori local government or a full role for Maori in determining the title to their lands. From now on for Maori in general, as much as for Muaupoko in particular, it was the Native Land Court or nothing.<sup>125</sup>

The importance of these two options is clear in terms of our inquiry into Muaūpoko's claims. In the short term, the Crown could have facilitated and assisted the resolution of the Horowhenua dispute by an intertribal rūnanga, as had been agreed by all involved (including the Crown). In the longer term, the Crown could have empowered rūnanga more generally with authority for Māori to determine their own customary titles. McLean told Parliament:

They [Māori] were themselves the best judges of questions of dispute existing among them. No English lawyer or Judge could so fully understand those questions as the Natives themselves, and they believed that they could arrive at an adjustment of the differences connected with the land in their own Council or Committee, very much better than it would be possible for Europeans to do. He hoped honourable members would accord to the Native race this amount of local self-government which they desired. He believed it would result in much good, and whatever Government

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123. N Nelson to Cooper, 5 April 1872, note attached to Te Watene Tiwaewae to McLean, 11 March 1872 (Evald Subasic and James Taylor, comps, 'Research Assistance Project: Crown and Private Land Purchasing Records and Petitions Document Bank', various dates (doc A67(a)), p 4403)

124. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 309–312

125. Stirling, 'Muaupoko Customary Interests' (doc A182), p 205

might be in existence would find that such Committees, with Presidents at their head, would be a very great assistance in maintaining the peace of the country.<sup>126</sup>

The Government's rejection of an intertribal rŭnanga to settle the Horowhenua dispute, and its failure to empower rŭnanga through the Native Councils Bill, was accompanied by official pressure on the iwi of the Manawatŭ region to bring their claims to the Native Land Court. On 18 March 1872, without waiting for official confirmation from McLean, Te Watene proceeded to file an application to the court for the Horowhenua lands, as Grindell had proposed. The application was supported by Wiremu Pōmare, Mātene Te Whiwhi, Tāmihana Te Rauparaha, and members of Ngāti Parewahawaha and Ngāti Huia. Wiki Tauteka and her sisters had already made applications to the court in late February and early March 1872.<sup>127</sup>

Grindell also met with Muaūpoko at Horowhenua after meeting with Te Watene. According to Mr Stirling:

He [Grindell] reported that Muaupoko were willing to submit the Horowhenua land to the Native Land Court, but qualified this by adding that they must first get Te Keepa's view before making a final decision. As before, Grindell reminded them that only the court could award a legal title, and *warned them that Ngati Raukawa had already agreed to the court.* [Emphasis added.]<sup>128</sup>

The March 1872 applications to the court thus had the potential to render Muaūpoko's opinion irrelevant because, as Mr Stirling commented, 'the court required only one claimant in order to hear and determine title.'<sup>129</sup> On the other hand, the court could not proceed without a survey, which meant that Muaūpoko might still stop the court by preventing the Government-conducted survey which Grindell pushed forward over the next few months.

#### **(4) Government pressure on Muaūpoko to apply to the court and accept a survey**

Towards the end of March 1872, Te Keepa decided to support a Native Land Court investigation of all remaining customary lands in the region, including Horowhenua. A great hui was held at Whanganui 'at which it was decided that a general application for title to the whole district would be made on behalf of the confederated tribes of Whanganui, Ngati Apa, Ngati Kahungunu and Rangitane (and presumably Muaupoko, although they only learned of this development from Grindell two weeks later).'<sup>130</sup> We have no information about why the hui was called or why the decision was made to apply to the Native Land Court, although it was likely in response to the applications that had already been made by other iwi. We also have no information as to why Muaūpoko were not directly involved, although

126. NZPD, 1872, vol 13, p 895 (Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 190)

127. Luiten, 'Political Engagement' (doc A163), p 86; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 211–212

128. Stirling, 'Muaupoko Customary Interests' (doc A182), p 212

129. Stirling, 'Muaupoko Customary Interests' (doc A182), p 212

130. Luiten, 'Political Engagement' (doc A163), p 87

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Te Keepa played a leading role at the hui. Jane Luiten accepted that the leaders present at the hui had agreed on recourse to the land court.<sup>131</sup>

Grindell again toured the district in April 1872, trying to get support for a survey as the necessary preliminary for the court to determine title. Te Keepa told Grindell to take Kāwana Hunia, Huru, Te Peeti, and Hoani Meihana with him to assist in arranging the survey of the Horowhenua. Grindell was 'apprehensive' that only Hoani Meihana of Rangitane would be of genuine assistance in getting Muaūpoko approval of a survey.<sup>132</sup> In late April 1872, Grindell met with Muaūpoko at Horowhenua and found them resistant to the survey. He stressed in response that

Major Keepa and the representatives of the tribes (their allies) in confederation against the Ngatiraukawa had sent in a general application for the investigation of their title in respect of the whole district in opposition to those of Ngatiraukawa, and that before any investigation could take place the survey must of necessity be made. I said that the different hapus of Ngatiraukawa had sent in applications for their respective claims to be heard irrespective of their application for the whole coast as a tribal right, and that it would be necessary for them to send a similar application in respect of the particular position which they occupied. They absolutely refused to allow Te Ngatiraukawa [*sic*] to pass over their land to point out to the surveyor any boundaries other than those which they (the Muaupokos) assented to. I told them over and over again that the mere survey of the land would not fix the boundaries of either party; that that was a question to be decided afterwards in the Lands Court, where they and their supporters would have every opportunity afforded them of establishing their claims, but that before this could be done a map must be prepared for the guidance of the Court.<sup>133</sup>

Muaūpoko finally said that they would wait and discuss matters with absent friends (presumably a reference to Te Keepa) before agreeing to make an application to the court.<sup>134</sup>

By May 1872, still no application had been received. Grindell asked the Native Minister to use his influence with Te Keepa to get Muaūpoko to send in an application. Grindell also feared that Te Keepa and Hunia would in fact obstruct any survey of Horowhenua.<sup>135</sup> Nonetheless, there seemed to be a breakthrough at the end of the May.<sup>136</sup> Hoani Meihana claimed to have secured the agreement of Muaūpoko to file an application to the court, which he duly did on 8 June 1872.<sup>137</sup> The application was filled in and signed by T E Young of the Native Department, on behalf of the

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131. Luiten, 'Political Engagement' (doc A163), p 87

132. Luiten, 'Political Engagement' (doc A163), pp 87–88

133. Grindell to superintendent, 29 April 1872 (Luiten, 'Political Engagement' (doc A163), pp 87–88)

134. Luiten, 'Political Engagement' (doc A163), p 88

135. Luiten, 'Political Engagement' (doc A163), p 88

136. Grindell to Minister of Public Works, 31 May 1872 (Jane Luiten, answers to questions in writing, 5 January 2016 (doc A163(h)), p 2)

137. Luiten, 'Political Engagement' (doc A163), p 90

applicants.<sup>138</sup> It was supported by a letter dated 30 May 1872 from Te Rangirurupuni, a rangatira of Ngāi Te Ao,<sup>139</sup> and six others. Ihaia Taueki was not among these applicants.<sup>140</sup> In the same mail came a letter ‘purporting to be from the whole tribe [of Muaūpoko]’ declaring that they would physically obstruct any survey. Although Grindell concluded that the tribe was divided, he pushed on.<sup>141</sup> Te Rangirurupuni’s claim was one of many advertised in the *Gazette* for hearing in 1872, as part of the vast Manawatū-Kukutauaki block,<sup>142</sup> but the majority of Muaūpoko clearly remained opposed to surveys and the court.

By the beginning of July 1872, Grindell reported that Muaūpoko were ‘as obstinate and unreasonable as ever’.<sup>143</sup> Kāwana Hunia was said to have visited Horowhenua after Meihana and advised against allowing a survey. Certainly, Grindell blamed him for the fact that, at a hui on 17 June 1872, Muaūpoko were ‘strongly opposed’ to the survey and the court despite Te Rangirurupuni’s application. They sent a party south to Ōhau to try to stop the surveyors from coming north of there.<sup>144</sup>

Grindell hoped that Te Keepa would overcome the tribe’s opposition.<sup>145</sup> He told Muaūpoko on 17 June that he ‘would not proceed with the survey of the boundaries of Horowhenua until the return of Major Kemp from Auckland, and that in the meantime I would employ the surveyors in laying out the boundaries of Ngatiraukawa north & south of their district’. Te Rangirurupuni visited Grindell afterwards (at Hector McDonald’s house), advising to go on with surveying ‘Te Watene’s boundary’ (that is, the boundary which Muaūpoko understood was being surveyed by Te Watene’s people of Ngāti Pareraukawa). A Muaūpoko party would be sent to ‘protest’ this survey, Te Rangirurupuni reported, but would likely not ‘forcibly interfere’. Grindell replied: ‘I told him it was not the wish of the Government to force the survey in opposition to any tribe or section of a tribe, but to do it with the full and free consent of all parties concerned. I should adhere to my promise of waiting till Kemp’s return.’<sup>146</sup>

While the Crown was not prepared to force the survey, however, it was also not prepared to abandon it. As Grindell had requested, Donald McLean appealed to Te Keepa in July 1872 to intervene and secure Muaūpoko support for the survey and

138. TE Young (signed), application to the Native Land Court, ‘He pukapuka tono ki te Kooti Whakawa Whenua Maori kia whakawakia etahi take whenua’, 8 June 1872 (Luiten, supporting papers to ‘Political Engagement’ (doc A163(a)), p 662)

139. Ada Theresa Tatana, brief of evidence, not dated (Fredrick Hill, closing submissions, 12 February 2016 (paper 3.3.14), p 18). Mrs Tatana described Te Rangirurupuni as a chief of Ngāi Te Ao.

140. Luiten, ‘Political Engagement’ (doc A163), p 90; Te Rangirurupuni and others, 30 May 1872 (Luiten, supporting papers to ‘Political Engagement’ (doc A163(a)), p 661)

141. Grindell to Minister of Public Works, 31 May 1872 (Luiten, answers to questions in writing (doc A163(h)), p 2)

142. ‘Native Land Court: Notice of Times and Places for Investigating Claims’, 20 August 1872, *Wellington Provincial Gazette*, 1872 (Crown counsel, comp, document collection, September 2015 (doc B3), p 126)

143. Grindell to Wellington superintendent, 2 July 1872 (Luiten, ‘Political Engagement’ (doc A163), p 90)

144. Luiten, ‘Political Engagement’ (doc A163), pp 90–91; Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 216

145. Luiten, ‘Political Engagement’ (doc A163), p 91

146. Grindell to Wellington superintendent, 2 July 1872 (‘Research Aid to the Rangitikei-Manawatū Nineteenth Century Purchase (MA 13 files)’ (doc A159(c)), pp [5758]–[5759])



## 4.2.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

the court. According to Grindell, Te Keepa agreed to ‘talk Muaupoko and Ngati Apa around.’<sup>147</sup> A hui was held at Horowhenua in late July but Te Keepa was too unwell to attend. Hunia and others now withdrew their opposition to surveying the land for the court so long as they could have their own, separate survey. Grindell sought a compromise by taking some Muaūpoko leaders south to point out Muaūpoko tribal boundaries in the land that had already been surveyed. There was further arguing about who would control the survey north of Ōhau, and Grindell had not actually agreed to the request for separate surveys.

Nonetheless, the process continued with interruptions – Muaūpoko obstructed the survey again in August and September 1872 – until the vast Manawatū-Kukutauaki block (some 350,000 acres) was ready for hearing in the Native Land Court by November 1872.<sup>148</sup> The surveyed lands claimed by Muaūpoko amounted to ‘seven large areas stretching from Manawatu to Pukehou’, totalling 273,000 acres.<sup>149</sup>

**(5) *Muaūpoko’s last stand: final attempts to prevent the court from proceeding***

As noted above (section 4.1.2), we are not considering the Manawatū-Kukutauaki hearing or its outcomes at this stage of our inquiry. In this section, we continue our analysis of the question: was the Native Land Court and tenure conversion imposed on Muaūpoko? That requires us to consider Muaūpoko’s final attempt to resist the court, which happened at the opening of the November 1872 hearing. By then, despite the survey having been completed, it was apparent that Te Keepa’s decision to apply to the Native Land Court still lacked the support of his people. Accordingly, Te Keepa tried to stop the hearing from going ahead. He sent a letter to Grindell in early November 1872, stating that he would not disrupt the court but withdraw from it and appoint a day for fighting Ngāti Raukawa ‘if this hearing is not stayed.’<sup>150</sup> Although Te Keepa later denied that he had threatened armed force, the allied Whanganui, Muaūpoko, Ngāti Apa, and Wairarapa peoples sought an ‘indefinite adjournment’ of the court.<sup>151</sup> Grindell reported: ‘Kepa says it is [the] people who are opposing but I see he is with them.’<sup>152</sup> Hunia also led opposition to the court at this time.<sup>153</sup>

It appears to us that Muaūpoko’s opposition to the court had been steadfast, although some leaders had wavered or tried to persuade the people to change their minds at certain times. According to Mr Stirling, only Te Rangirurupuni had consistently supported Grindell’s plans for surveying and the court.<sup>154</sup>

Judges Rogan and Smith telegraphed the Government:

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147. Luiten, ‘Political Engagement’ (doc A163), p 91

148. Luiten, ‘Political Engagement’ (doc A163), pp 91–94; Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 217–225; Hearn, ‘One Past, Many Histories’ (doc A152), p 587

149. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 224

150. Young to Cooper, telegram, signed by Te Keepa, 13 November 1872 (Luiten, ‘Political Engagement’ (doc A163), p 96)

151. Luiten, ‘Political Engagement’ (doc A163), p 96; Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 232

152. Grindell to Cooper, 10 November 1872 (Luiten, ‘Political Engagement’ (doc A163), p 96)

153. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 228

154. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 226



Claimants principally Ngatiraukawa press for hearing, opponents Ngati[a]pa muaupoko rangitane Whanganui & Wairarapa who protest against submitting differences to NL Court ask for indefinite adjournment & announce intention of resort to arms if refused; consequences of either course cannot be foreseen by us – actual situation not known to court. Question of policy rests with government rather than with court; if opponents persist in course indicated orders made on *ex parte* statement not likely to be respected or have practical result – Court cannot refuse to proceed except on cause shewn.<sup>155</sup>

At this point, the Government's principal objective was to ensure that the court proceeded and title was awarded. The court and officials were reasonably certain that there was no threat of violence, and Te Keepa's application for permanent adjournment was delivered in an 'orderly and respectful' manner on 12 November. It was refused and he accordingly withdrew from court.<sup>156</sup>

The Government had advised the judges that it had confidence in their ability to proceed without creating serious complications by either 'precipitate action or too facile withdrawal of court in face of opposition'.<sup>157</sup> McLean wanted the judges to meet with all the leading chiefs and try to persuade them to proceed. He suggested that they tell the chiefs that 'the land is of minor importance as compared with the adjustment of their disputes', and that the real purpose of the court was 'to help and assist them . . . to remove present difficulties'. In the meantime, he suggested, the court should be adjourned from day to day until its judges had persuaded the chiefs to participate.<sup>158</sup> But the court had already heard and dismissed Te Keepa's application on 12 November, and the judges refused to meet privately with the chiefs or act on the Crown's wishes unless those wishes were presented and argued in open court.<sup>159</sup>

McLean was understandably concerned that all iwi claimants participate so that the Government would not have to enforce the court's decision by force of arms. He was prepared to see the court adjourned for a few months (not indefinitely) to achieve that end.<sup>160</sup> In the event, the court's decision not to grant Te Keepa an adjournment on 12 November relied on one crucial factor which almost always forced Māori to participate in its proceedings, even if seriously opposed to it. Any tribe which refused to participate did so at the risk of losing all legal rights in their lands. In this instance, the Government and the court both relied on that implicit threat to force the allied iwi into the court. The strategy was both divisive and successful.<sup>161</sup>

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155. Rogan and Smith to colonial secretary, 11 November 1872 (Luiten, 'Political Engagement' (doc A163), p96)

156. Luiten, 'Political Engagement' (doc A163), p 97

157. Colonial secretary to Rogan and Smith, 10 November 1872 (Luiten, 'Political Engagement' (doc A163), pp 97–98)

158. McLean to Rogan and Smith, 12 November 1872 (Luiten, 'Political Engagement' (doc A163), p 98)

159. Luiten, 'Political Engagement' (doc A163), pp 98–99

160. Stirling, 'Muaupoko Customary Interests' (doc A182), p 236

161. See, for example, Stirling, 'Muaupoko Customary Interests' (doc A182), p 228.

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The first to break was Rangitāne. They withdrew their opposition on 12 November, even before Te Keepa's application for adjournment was heard. According to Jane Luiten, it was this which encouraged the court to decline Te Keepa's application.<sup>162</sup> Rangitāne's defection was more serious than it seemed, as they had not only agreed to participate in the court but they had also realigned themselves with Ngāti Raukawa and now supported their claim. This made the situation doubly threatening for any other of the allied iwi who held out. On 14 November, the court adjourned to allow Ngāti Raukawa and Rangitāne to meet and come to an out-of-court arrangement about a joint claim. Karaitiana Te Korou, ancestor of claimant Edward Karaitiana, was not prepared to take the risk, and he appeared for Ngāti Kahungunu to continue in court and oppose the Ngāti Raukawa claimants.<sup>163</sup> As Ms Luiten commented, 'This left just Muaupoko, Ngati Apa and Whanganui outside the court.'<sup>164</sup>

At this point, Grindell claimed, Muaūpoko wanted to proceed but were prevented by two leaders, Kāwana Hunia and Te Keepa, who remained opposed. Both Grindell and T E Young from the Native Department thought that Muaūpoko were 'wavering', and that McLean would be able to persuade Te Keepa to give up his opposition. On 15 November 1872, the Crown sought an adjournment (reportedly so McLean could approach Te Keepa). At this point, Ngāti Apa made the difficult decision to participate rather than risk losing everything. Kāwana Hunia signalled to the court before it adjourned on 15 November that Ngāti Apa would proceed.<sup>165</sup> Mr Stirling considered that Hunia's letter (which was read out in court but has not been found) may actually have related to Muaūpoko.<sup>166</sup> We agree with Ms Luiten that it was more likely to have been Ngāti Apa.<sup>167</sup> In any case, McLean instructed Grindell to apply to the court for a three-month adjournment to allow the conflict to be resolved by negotiation, but only if Grindell thought that a breach of the peace was imminent.<sup>168</sup>

This proved unnecessary because Judge Rogan decided to meet privately with Te Keepa on the evening of 15 November 1872 and try to persuade him to give up his boycott of the court. We do not have any details about this meeting. McLean had telegraphed Rogan (a former land purchase officer) what he believed to be Te Keepa's main concern – that the Crown had already made advances to Ngāti Raukawa on land within the block. Despite the earlier protestation of court independence, Rogan seems to have resolved matters by meeting with Te Keepa privately as the Government had sought earlier, and which the Government clearly

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162. Luiten, 'Political Engagement' (doc A163), p 98

163. Luiten, 'Political Engagement' (doc A163), p 100; Stirling, 'Muaupoko Customary Interests' (doc A182), pp 232–237

164. Luiten, 'Political Engagement' (doc A163), p 100

165. Luiten, 'Political Engagement' (doc A163), p 100

166. Stirling, 'Muaupoko Customary Interests' (doc A182), p 237

167. Luiten, 'Political Engagement' (doc A163), p 100

168. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 237–238

approved.<sup>169</sup> McLean telegraphed Rogan on the morning of 16 November that ‘much good has resulted from your interview with Kemp’.<sup>170</sup> And, indeed, Te Keepa appeared in court on 16 November to formally announce that Muaūpoko, Rangitāne, Ngāti Apa, Ngāti Kahungunu, and Whanganui would together contest Ngāti Raukawa’s claims to the Manawatū-Kukutauaki lands.<sup>171</sup>

Thus, Muaūpoko’s last-ditch opposition to the court was finally overcome. Even if the Government had pushed through its second Native Councils Bill in 1873, it would have been too late for Muaūpoko.

#### 4.2.5 Conclusion and findings

Muaūpoko wanted to resolve conflict about the use of Horowhenua lands in the colonial economy by way of arbitration and consensus, through the use of intertribal rūnanga. From 1869 to 1871, they made it clear that they did not want the land surveyed or put through the Native Land Court.

From the beginning of the dispute over McDonald’s lease in 1869, the Crown tried to persuade Ngāti Raukawa and Muaūpoko to get the lands surveyed and into the court for adjudication and title conversion. Muaūpoko rejected this advice and succeeded in stopping the survey in April 1869. They also sought the intervention of Te Keepa, who managed to get the Government to back off for the time being. Against a backdrop of growing tension at Horowhenua in 1870, the first intertribal rūnanga at Kupe heard both sides but could not settle matters without the involvement of Wiremu Pōmare. When Pōmare arrived later in the year, he put a stop to the Native Land Court proceeding (in the absence of a survey) but could not negotiate agreement with Muaūpoko. A second intertribal rūnanga was held late in the year, apparently without any involvement from Muaūpoko, and with the assistance of a Government assessor, Pene Tauī. Muaūpoko again sought the intervention of Te Keepa, whose leading role represented a significant shift in the internal dynamics of Muaūpoko. Previously supporters of the Kingitanga, many were now fighting in Te Keepa’s regiment. Successful leadership in land matters depended, it seemed to Muaūpoko, on the ability of one of the Government’s leading allies to deal with and gain support or concessions from the Crown.

In 1871, all parties agreed that reference to an intertribal rūnanga should be the means of settling the dispute. The Crown agreed to facilitate the arbitration and to appoint two members to preside or assist the rūnanga, which otherwise would be made up of external chiefs appointed by each of the two sides. The Crown failed to do its part to set up the arbitration, without any clear justification other than its preference that claims to the land be settled by the Native Land Court instead. In 1872, Crown agent James Grindell worked assiduously to obtain court applications from all the groups involved in the wider Manawatū-Kukutauaki block, with the object of getting the land surveyed, into court, and then purchased by the Crown.

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169. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 238; Luiten, ‘Political Engagement’ (doc A163), p100

170. McLean to Rogan, 16 November 1872 (Luiten, ‘Political Engagement’ (doc A163), p100)

171. Luiten, ‘Political Engagement’ (doc A163), p 100

## 4.2.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Pressure from the Crown, including personal interventions by Native Minister McLean, succeeded in overcoming some Muaūpoko opposition to surveys and the court. In the wake of applications from Ngāti Raukawa, Te Keepa agreed to lead a pan-tribal application to the court, and Hoani Meihana persuaded some among Muaūpoko to make a claim. But the large majority of Muaūpoko remained opposed to the survey and the court. At the end, Te Keepa and the allied tribes tried to obtain an indefinite adjournment in 1872 so that the court would never hear the claims. This was overcome by the combined pressure of the Crown and the court – including the fact that the cost of a boycott would almost inevitably be loss of all legal rights to the land since the law allowed the court to proceed and award title in their absence.

This history reveals some fundamental deficiencies in the Crown's native land laws. At this early stage of our inquiry, we are not yet dealing with the broad issues in respect of those laws or the establishment of the court. Those matters will be dealt with after the completion of research and the hearing of all parties. Rather, we are considering the specific issue questions posed at the start of section 4.2.4: Did Muaūpoko apply for or consent to the Native Land Court hearings? Were there alternative dispute resolution mechanisms?

We find here that the Crown failed to provide an alternative mechanism for deciding titles and resolving disputes, despite its Treaty partner's clear preference for such an alternative. This failure was a breach of Treaty principles. The Native Councils Bills of 1872 and 1873 show that it was at least conceivable for the settler Government to have provided alternatives as sought by Māori. But the Crown did not push these Bills through Parliament, even though Māori leaders strongly requested it. Nor did the Crown assist effectively with iwi attempts to resolve the Horowhenua lease and title disputes by means of an intertribal rūnanga (with Government officers to preside). This was Muaūpoko's chosen and preferred alternative to the Native Land Court. No convincing explanation was advanced for the Crown's failure to arrange the arbitration, other than its preference for the court. The Crown's omissions were in breach of its Treaty obligation to act fairly and in partnership with Muaūpoko.

Further, the native land laws were structured in such a way that the court could decide entitlements despite the non-participation of Muaūpoko and their allies. This made it impossible for Muaūpoko to boycott the court and prevent it from (a) deciding their customary titles and (b) converting those titles to individual Crown-derived titles. The court was empowered to proceed so long as just one of the claimant groups appeared and prosecuted its claim. This deficiency in the native land laws was a breach of the Crown's obligation to actively protect Muaūpoko, their tino rangatiratanga, and their lands.

Further, the Crown applied undue pressure on Muaūpoko to agree to a survey, applications, and the sitting of the court. We accept that the Crown wanted to see title disputes resolved peacefully – but if that had been the Crown's sole or main motive, it would have been more diligent in providing the requested Crown–Māori

arbitration. The acquisition of Māori land was the Crown's principal motivation. It was this which led Ministers and officials to manipulate inter- and intra-tribal divisions, and to apply undue pressure, so as to get the lands surveyed and into court. While drawing short of the use of force, the Government would not accept 'no' for an answer. This was a breach of the Crown's duty to act in the utmost good faith towards its Treaty partner. It was also a breach of the principle of options.

According to the options principle, it was for Māori to decide whether or not to avail themselves of colonial institutions and opportunities (such as the court and its new titles), whether to maintain traditional social structures and ways of life, or whether to walk in both worlds. Māori choices were not to be constrained by the Crown. The fact that Muaūpoko eventually gave in to both the survey and the court hearing could not reasonably be construed as willing and informed consent.

Muaūpoko were prejudiced by these Treaty breaches. Their customary entitlements were decided by the Native Land Court and transformed into a Crown-derived title, ultimately to their detriment. As we shall see in the following sections of this chapter and in chapters 5–6, the detriment was twofold: the loss of a more fluid, inclusive, and appropriate land tenure for their cultural and social needs, and the loss of ownership of a great deal of their lands.

### 4.3 FORM OF TITLE AVAILABLE AND AWARDED IN 1873

#### 4.3.1 Introduction

As discussed above, Muaūpoko's long-standing opposition to the Native Land Court was not finally overcome until the first hearing of Manawatū-Kukutauaki was already underway in November 1872. The court then proceeded to make two momentous decisions: it awarded the great bulk of the Manawatū-Kukutauaki block to Ngāti Raukawa in 1872, and the 52,460-acre Horowhenua block to Muaūpoko in 1873. Several issues were argued before the Tribunal about these events, which we cannot address without first hearing the evidence and submissions of all parties:

- ▶ whether the Native Land Court (as created and maintained in its 1865 form by the Crown) was an appropriate body to determine customary rights and interests in Māori land;
- ▶ whether the court was unduly influenced by political considerations, perhaps even directly influenced by the Crown, in making these two awards in 1872 and 1873;
- ▶ whether Te Keepa attempted to overawe the court with a display of military power; and
- ▶ whether there was an appropriate system of appeals in place to correct any erroneous decisions of the court.

These issues will be further considered and reported on after we have heard the remaining evidence and submissions in our inquiry.

This leaves three crucial issues for the Tribunal to resolve after the expedited Muaūpoko priority hearings:



4.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

- ▶ whether the native land laws provided an appropriate form of title and a mechanism for communal control of lands for Muaūpoko as at 1873;
- ▶ how and why Te Keepa was empowered under the native land laws to become the sole legal authority in respect of the Horowhenua lands; and
- ▶ how and why the court endorsed a list of 143 owners containing many non-Muaūpoko names, and missing at least 44 entitled Muaūpoko individuals (the ‘rerewaho’).

We address these issues in this section of our chapter.

We also consider the results of the form of title granted in 1873, especially in respect of dealings in land which took place before the partition of the Horowhenua block in 1886:

- ▶ the Crown’s negotiation of a cession of 1,200 acres to Ngāti Raukawa in 1874;
- ▶ the Crown’s imposition of a monopoly in 1878 by its proclamation that the Horowhenua block was under Crown purchase;
- ▶ Te Keepa’s gift of land to the Wellington and Manawatu Railway Company for a railway line; and
- ▶ the early stages of the ‘Taitoko township’ purchase, and the Crown’s efforts to get Te Keepa to apply for a partition.

We begin by summarising the parties’ arguments on these issues.

**4.3.2 The parties’ arguments**

**(1) The Crown’s concessions**

The Crown did not make any specific concessions about the form of title granted in 1873, or the dealings in land which took place prior to partition in 1886. Its relevant general concessions were:

The Crown acknowledges that it failed to provide an effective form of corporate title until 1894, which undermined attempts by Muaūpoko to maintain tribal authority within the Horowhenua block and this was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

The Crown accepts that the individualisation of Māori land tenure provided for by the native land laws made the lands of Muaūpoko more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Muaūpoko. The Crown concedes that its failure to protect these structures was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.<sup>172</sup>

**(2) Title under section 17 of the Native Lands Act 1867**

Title to the Horowhenua block in 1873 was awarded under section 17 of the Native Lands Act 1867. Some claimants argued that section 17 created a trust, because only Te Keepa’s name was put on the front of the certificate of title when the law had

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172. Crown counsel, closing submissions (paper 3.3.24), pp 23–24



allowed up to 10 names, indicating an intention to establish a trust.<sup>173</sup> Others held that no ‘formal, effective trust’ was created nonetheless, and that the failure of the 1867 Act to provide a proper form of trust, corporate title, or tribal title was a breach of Treaty principles.<sup>174</sup> There was also some criticism of the choice of Te Keepa as the only rangatira to be named on the front of the certificate of title. The other 143 owners ‘were not given any enforceable rights in the Horowhenua block.’<sup>175</sup> Further, the claimants argued that section 17 ‘eroded Muaupoko sovereignty’ because it took away their right to deal with their lands as they saw fit, other than by way of a 21-year lease.<sup>176</sup>

The Crown’s view was that Muaūpoko came to an out-of-court agreement to use section 17, with Te Keepa’s name as the only one to go on the front of the title, and that the list of owners was similarly decided out of court. The court did add several names but this was not challenged. In the Crown’s submissions, it had no responsibility for these decisions by Muaūpoko and the court. Further, ‘[s]ection 17 tenure proved to be a more durable form of tenure protection than other forms of title at the time.’ As a result, the Crown ‘focussed its purchasing efforts elsewhere where there were more willing sellers.’<sup>177</sup>

### (3) *McLean’s deal with Te Keepa in 1874*

The first alienation of land in the Horowhenua block came in 1874 when Te Keepa gifted 1,200 acres to the descendants of Te Whatanui as a result of negotiations with the Native Minister, Donald McLean. The claimants accepted that this deal could not be given legal effect until the time of partition in 1886.<sup>178</sup> We received several submissions that the arrangement with McLean was not the subject of prior discussion or consent with the great majority of owners, and that the Crown’s failure to deal with these owners was a breach of Treaty principles. In the claimants’ view, the Crown should either have secured the owners’ consent in 1874 or intervened to protect their interests before they were presented with a fait accompli at the partition hearing.<sup>179</sup> The Crown’s choice to deal with Te Keepa alone was seen as an example of how the section 17 title disempowered all the other owners.<sup>180</sup>

The Crown’s position was that it simply arbitrated a dispute between Ngāti Raukawa and Muaūpoko in 1874. McLean secured a peaceful agreement, and the Crown ‘understood Te Keepa to be negotiating on behalf of Muaupoko.’<sup>181</sup> The

173. Claimant counsel (Bennion, Whiley, and Black), closing submissions, 15 February 2016 (paper 3.3.17(a)), pp 10–12

174. Claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p 17; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 126

175. Claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), pp 17–20

176. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions, 12 February 2016 (paper 3.3.11), p 7

177. Crown counsel, closing submissions (paper 3.3.24), pp 135–138, 151

178. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 149–150

179. Claimant counsel (Ertel and Zwaan), closing submissions (paper 3.3.13), pp 9–10; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 149–152; claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), pp 26, 28

180. Claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p 28

181. Crown counsel, closing submissions (paper 3.3.24), p 138

## 4.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Crown did accept, however, that its officials considered Te Keepa to be keeping the deal secret so as to avoid telling Muaūpoko what he had done.<sup>182</sup> Nonetheless, Crown counsel submitted: ‘It is not reasonable to have expected the Crown to go around Te Keepa to the broader iwi.’<sup>183</sup>

**(4) The 1878 Crown purchase proclamation**

In 1878, the Crown issued a proclamation under the Government Native Land Purchases Act 1877, granting itself ‘monopoly purchasing powers’ over the Horowhenua block.<sup>184</sup>

According to the claimants, the proclamation ‘created a monopoly for the Crown while simultaneously acting as a rein on Muaupoko’s ability to deal with their land as they saw fit.’<sup>185</sup> In particular, they could not lease their lands to obtain an income, or receive market value for them.<sup>186</sup> This was contrary to Muaūpoko’s best interests. It was also ‘not legitimate’ because of section 17, which precluded the owners from selling or alienating before partition. In addition, the claimants argued that the proclamation was not based on bona fide purchasing but on ‘the accounting system of McLean’s time, where Crown expenditure by way of voucher seems to have been charged back to the respective blocks of Maori land.’<sup>187</sup> Te Keepa, the certified owner, did not even know of the proclamation until 1884.<sup>188</sup> In the claimants’ view, the 1878 proclamation was in breach of the principles of partnership, active protection, and good faith. It was imposed unilaterally, not negotiated in partnership.<sup>189</sup>

The Crown’s view of the 1878 proclamation was very different. Crown counsel accepted that land under section 17 could not be sold or mortgaged until it had been partitioned. The 1867 Act ‘prohibited alienation other than by lease for a limited term.’<sup>190</sup> But, Crown counsel submitted, it was not unlawful or in bad faith to ‘negotiat[e] arrangements prior to an alienable form of title being granted’, including making advance payments. The Crown was simply running the risk that it might never recover any monies advanced.<sup>191</sup> Nor was a section 17 title an absolute bar on the owners negotiating – they could do so and then apply for partition. The proclamation did not force Muaūpoko to negotiate or sell.<sup>192</sup> In respect of the justification for the proclamation, the Crown argued that a legitimate advance payment was made to Te Rangirurupuni in 1877 (and possibly others). Crown counsel accepted that it was not necessarily ‘satisfactory’ to justify the proclamation on the basis of a single advance. Nonetheless, the Crown maintained that it was not technically incorrect or unlawful to do so. Further, the Crown argued that it never actu-

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182. Crown counsel, closing submissions (paper 3.3.24), p 140

183. Crown counsel, closing submissions (paper 3.3.24), p 142

184. Crown counsel, closing submissions (paper 3.3.24), p 143

185. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.11), p 8

186. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.11), pp 11, 14

187. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.11), p 9

188. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.11), p 10

189. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.11), pp 14, 23

190. Crown counsel, closing submissions (paper 3.3.24), p 144

191. Crown counsel, closing submissions (paper 3.3.24), pp 145–146

192. Crown counsel, closing submissions (paper 3.3.24), p 145

ally deducted any of the incidental expenses charged against the block from ‘the purchase price the Crown eventually paid for the land.’<sup>193</sup>

**(5) Internal and external pressures for partition**

The claimants argued that the 1878 proclamation was a crucial factor in bringing about the partition of 1886. The proclamation; Te Keepa’s debt to his former lawyer, Sievwright; the Manawatu and Wellington Railway Company ‘gift’; and a proposed township purchase; all were used by the Crown to manipulate Te Keepa (as sole decision maker) to apply for partition. Some claimants argued that the other 143 owners were not consulted and did not agree to the application.<sup>194</sup> The Crown, we were told, directly pressed both Te Keepa and the court to bring the partition about.<sup>195</sup>

Te Keepa’s gift of land for the railway line was controversial among the claimant community. Some claimants emphasised the arrangements between the Crown and the company in respect of Māori land.<sup>196</sup> Others argued that Te Keepa’s gift was made without Muaūpoko knowledge or involvement, and presented to them as a *fait accompli* at the partition hearing in 1886, after the line had already been built. Once again, these claimants submitted, section 17 had afforded them no real protection.<sup>197</sup> But all the claimants agreed that the Taitoko township proposal would have been beneficial for Muaūpoko if the Crown had not reneged on its pre-partition agreement with Te Keepa – a matter of particular grievance to the claimants, which will be addressed further in chapter 5.

Crown counsel argued that the pressures for partition came from Muaūpoko who wanted to develop their lands, Te Keepa’s creditors, and the railway company, not from the Crown. The proposal for the Crown to purchase the ‘Taitoko township’ lands also came from Te Keepa, not the Crown. Further, Crown counsel argued, there is no evidence the Crown agreed to the terms proposed by Te Keepa for the township deal.<sup>198</sup> With regard to the railway gift, the Crown disclaimed any responsibility for what it called a private transaction between Te Keepa and the company.<sup>199</sup> Crown counsel did accept that the company brought significant pressure to bear on Te Keepa for a partition, but again argued that the Crown was not responsible for the actions of a private company.<sup>200</sup>

We turn next to begin our analysis of the claims with a discussion of the form of title granted to the Muaūpoko owners of the Horowhenua block in 1873: section 17 of the Native Lands Act 1867.

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193. Crown counsel, closing submissions (paper 3.3.24), pp 147–148

194. Claimant counsel (Ertel and Zwaan), closing submissions (paper 3.3.13), pp 11–12; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 127, 138; claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), pp 22–23

195. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), p 26

196. Claimant counsel (Ertel and Zwaan), closing submissions (paper 3.3.13), p 11

197. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 138

198. Crown counsel, closing submissions (paper 3.3.24), pp 162–164

199. Crown counsel, closing submissions (paper 3.3.24), pp 157–162

200. Crown counsel, closing submissions (paper 3.3.24), p 152

**4.3.3 Use of section 17 of the 1867 Act****(1) Why was section 17 enacted?**

Title to the Horowhenua block in 1873 was awarded under section 17 of the Native Lands Act 1867. In brief, this section allowed up to 10 names to be recorded on the front of the certificate of title. These 10 owners had the power to lease the land for up to 21 years. The land could not be sold or otherwise alienated until it was partitioned. In the meantime, the names of all the other owners in the block were to be registered in the court and recorded on the back of the certificate of title (for the full text of section 17, see box). The introduction of this provision into the native land laws was a result of significant Māori discontent which arose because of the 1865 Act and the form of title the court could award under that Act. We pause here to discuss it briefly.

Under section 23 of the Native Lands Act 1865, blocks of land could be awarded either to a maximum of 10 individuals or to a tribe. Only blocks larger than 5,000 acres could be awarded in the name of a tribe.<sup>201</sup> This arrangement was known as the ‘10-owner rule’. In practice the court awarded almost all blocks to 10 or fewer individuals, regardless of their size or the number of people interested in them.<sup>202</sup> In 1891, former chief judge Fenton could recall only two blocks ever awarded in tribal title.<sup>203</sup> Māori at the time believed that the rangatira put into these titles would be trustees for their people, but in reality the law made the named persons absolute owners. Those who were left out of the titles were disinherited. When debts and other pressures forced the owners named in the certificates of title to sell their individual interests, they could do so legally without consulting or compensating other hapū members. Whole communities were dispossessed.<sup>204</sup>

By 1867, the Government was prepared to attempt a remedy, although it was not willing to repeal section 23 or to change the fundamental nature of the individualised title imposed by the Native Lands Act 1865. The Native Minister, J C Richmond, acknowledged the ‘[g]reat difficulty . . . from tacit and unrecorded trusts being placed in the power of a few Natives holding grants or certificates for large tracts of land. The evil that existed in that respect should not be continued.’<sup>205</sup> It was predictable, he said, that ‘hereafter persons holding those lands nominally in their own right, but really for large bodies of Natives, if they should find themselves pressed, as was not unlikely to be the case, for money, would desire to alienate from time to time, and the Government would have to sustain the irritation and discontent of those Natives for whom those persons held the property in unacknowledged trust.’<sup>206</sup> These words were entirely prophetic for what transpired at Horowhenua after the award of title in 1873 and the partitions of 1886.

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201. Native Lands Act 1865, s 23

202. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 697–701; Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 1, pp 158–161

203. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 1, p 159

204. Waitangi Tribunal, *The Hauraki Report*, pp 697–701

205. NZPD, 1867, vol 1, p 1136

206. NZPD, 1867, vol 1, p 1136

The Minister's proposed remedy was for the Act to 'require the named owners, where they were not the sole owners, to execute in court a declaration of trust'. But he was 'advised by the Attorney-General that this "would be attended with great inconvenience"', and so this remedy was abandoned.<sup>207</sup> It does not require hindsight, therefore, to see that such a provision in the native land laws would have prevented much of the trouble which later afflicted Muaūpoko at Horowhenua and resulted in significant, unwilling alienations of land.

Instead of amending the law to enable the creation of trusts, Richmond decided:

[W]here it appeared that a larger number of persons were really interested in the land, and desired that a few not exceeding ten persons should hold the land in trust, the interests of the [other] persons should be recorded by the court and the land held inalienable, and not subject to be leased for longer than twenty-one years without again coming to the court to have the title individualized further.<sup>208</sup>

The result was section 17 of the Native Lands Act 1867, which embodied this proposal. The Hauraki Tribunal described this as a 'second-best arrangement' because it did not provide for true trusteeship, the only genuine protection being the inalienability of the land.<sup>209</sup> We agree with the Mohaka ki Ahuriri and Hauraki Tribunals, which found that the section 17 title 'should not be mistaken for the effective granting of a form of tribal title . . . since that instead required the creation of a truly corporate title, with tribal leaders installed as trustees.'<sup>210</sup>

Section 17 titles were not intended for long-term use, but to provide a temporary cushion for Māori communities until they were ready to partition their land into smaller blocks with individual owners, hence the retention of section 23 of the Native Lands Act 1865. Chief Judge Fenton explained in 1880 that the concept of named owners being 'trustees or agents for a larger group' was antithetical to the native land laws:

The whole theory of the Native Lands Act, when the Court was created in 1862, was the putting to 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.<sup>211</sup>

Hence, the award of title to the Horowhenua block in 1873 was a rare occasion in which the court made an order under section 17 of the 1867 Act rather than continuing to use section 23, as happened in most cases.<sup>212</sup>

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207. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 699

208. NZPD, 1867, vol 1, p 1136

209. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 699

210. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, p 447; Waitangi Tribunal, *The Hauraki Report*, vol 2, p 699; see also claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 126

211. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 699

212. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 699–701



**SECTION 17 OF THE NATIVE LANDS ACT 1867**

Whereas by the twenty-third section of the said Act it is provided that at such sitting of the Native Lands Court as is therein referred to the court shall ascertain by such evidence as it shall think fit the right title estate or interest of the applicant and of all other claimants to or in the land respecting which any such notice as is therein mentioned shall have been given and that the court shall order a certificate of title to be made and issued which certificate [of title] shall specify the names of the person or of the tribe who according to Native custom own or are interested in the land describing the nature of such estate or interest and describing the land comprised in such certificate or that the court may in its discretion refuse to order a certificate to issue to the claimant or to any other person It is hereby enacted that at such sitting of the court as in the said twenty-third section of the said Act is referred to the court shall ascertain by such evidence as it shall think fit the right title estate or interest not only of the applicant and of all other claimants to or in the land . . . but also the right title estate or interest of every other person who and every tribe which according to Native custom owns or is interested in such land whether such person or tribe shall have put in or made a claim or not Provided that when it shall appear to the court upon such inquiry that any persons more than ten in number or that any tribe or hapu are interested in such land and that such persons tribe or hapu so interested consent that a certificate in favour of persons should be ordered to

**(2) Why was Te Keepa the only named owner in the section 17 title? How was the list of owners agreed to?**

Muaūpoko's original intention was to apply for a tribal title under section 23, not for the vesting of the block in a handful of named owners (as otherwise provided for under sections 23 (1865) and 17 (1867)).<sup>213</sup> Te Keepa applied for this in court on 8 April 1873.<sup>214</sup> He must have been advised that section 17 was the operative provision, however, and on 10 April he applied for a certificate of title to be in his name alone, 'the names of the other listed owners to be written "outside" the grant, providing the court with a list of names.'<sup>215</sup> The court made the order under section 17 on the same day.<sup>216</sup> This was six months before the enactment of the Native Land Act 1873, which repealed the 1865 and 1867 Acts and significantly changed the nature of a section 17 title, as we discuss in the next section.

213. David Armstrong, 'Muaupoko "Special Factors": Keepa's Trusteeship, the Levin Township Sale and the Cost of Litigation', [2015] (doc A155), p 6; Ōtaki Native Land Court, minute book 2, 8 April 1873, fol 55

214. Ōtaki Native Land Court, minute book 2, 8 April 1873, fol 55

215. Luiten, 'Political Engagement' (doc A163), p107

216. Ōtaki Native Land Court, minute book 2, 10 April 1873, fol 60



issue to certain of the persons interested therein not exceeding ten in number in such case a certificate may at the discretion of the court be ordered to be issued to such last-mentioned persons and the court shall cause to be registered in the court the names of all the persons interested in such land including those named in such certificate and the particulars of the interests of all such persons and in the certificate to be issued in such cases there shall be a recital that the certificate is issued under this section of this Act and no portion of the land comprised in such certificate shall until it shall have been subdivided as hereinafter provided be alienated by sale gift mortgage lease or otherwise except by lease for a term not exceeding twenty-one years and no such lease shall contain or be made subject to any proviso agreement or condition for renewal thereof Provided further that at any time after such certificate shall have been ordered to be issued it shall be lawful for the persons found by the court to be interested or for the majority of them to apply to the court in such manner and form as shall be provided by rules of court to subdivide the land comprised in such certificate and thereupon the court shall have such and the same power as it has in cases of subdivision of hereditaments under the fifteenth [sic: 50th] section of the said Act and proceedings may in such case be taken for such subdivision and a subdivision may be ordered notwithstanding that a lease or leases of such land or of some part thereof may have been made but in such case the order for subdivision shall not take effect until after the expiration or surrender of the lease.

There is almost no evidence as to how the decision was made to appoint Te Keepa as sole ‘caretaker’ (to use his word in English for it).<sup>217</sup> He took responsibility for it when questioned by the Horowhenua commission in 1896, explaining that the intention was to prevent the land loss which had swiftly followed individualisation of title, including by Crown purchase:

*When the title was put through in 1873, and 143 names were put in the certificate, who was made the caretaker at that time for the whole block? – It was my arrangement, because I knew what had happened in former dealings with land.*

*Knowing that, what did you propose? – I saw the Native Land Court appointed ten names, and those ten were put in to take care of the land; but afterwards it was found that they kept it for themselves. The Europeans said, ‘You are the ten names, and therefore the land is yours’; and the Natives suffered in consequence. The Government would put those names in, and the land was in their names, and made inalienable for the whole tribe. Then, some time after, the Government would release the land, and*

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217. AJHR, 1896, G-2, p 29

## 4.3.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

the Natives sold it, and the land was gone. I consented to my name being put in alone, lest others should deal with the land, and the names of the people to come below mine.

*Then you were put in as sole certificated owner, and 143 names were put in the certificate?* – That was done so that they could retain the land for themselves. Had it not been done, the land would have been sold and gone. That was the only piece of land left; that was the reason it was so arranged. [Emphasis added.]<sup>218</sup>

It would seem, therefore, that Te Keepa made this decision in order to protect the people from the injurious consequences of the 10-owner rule. We have no information as to how exactly the decision was made or how widely it was discussed among Muaūpoko, but certainly no one present at court objected to it. And nor, apart from Kāwana Hunia, did anyone object to it in the decade that followed.

There were two significant problems with the list at the time of its creation. First, a quarter of the people on the list belonged to the wider tribal alliance which had made a joint claim to Manawatū-Kukutauaki, rather than to (or mainly to) Muaūpoko. As we understand it, the joint claim is the main reason for their inclusion in the Horowhenua part of the wider block.<sup>219</sup> Secondly, Muaūpoko later said in 1886 that 44 of their own people had been wrongly left out of the title. These became known as the ‘rerewaho’.<sup>220</sup> It is not clear why these people were omitted in 1873. According to Wirihana Hunia’s 1890 testimony, a hui was held at Horowhenua shortly after the court’s decision, at which the omission of the rerewaho was discussed. Hoani Puihi, a Muaūpoko rangatira, tried to raise the issue of those who had been left out with the court at a Waikanae sitting but was referred back to Te Keepa.<sup>221</sup> In the event, a concerted effort was made in 1886, when Horowhenua was partitioned, to re-insert the 44 people left out of the title in 1873, and to locate the allied iwi members away from the core hapu lands (see chapter 5).<sup>222</sup>

Control of the 1873 list was in the hands of the chiefs assembled for the hearing, and not the court. It was compiled by Te Rangimairehau and Heta Te Whata, not by Te Keepa. These rangatira were assisted by ‘Kawana Hunia for Ngati Apa and Matiaha for Ngati Kahungunu’.<sup>223</sup> The first three names on the list were Te Keepa, Kāwana Hunia, and Ihaia Taueki. Te Keepa submitted the list on 10 April 1873, after which the court adjourned until 2 p.m. at Muaūpoko’s request to ‘enable the list of names in this matter to be completed’.<sup>224</sup> Twelve names were then added to the list, five of them by the court rather than by agreement among Muaūpoko. The five names added by the court were: Te Whatahoro (Jury); Peeti Te Aweawe; Hoani Meihana; Marakaia Tawaroa; and Karaitiana Te Korou.<sup>225</sup>

218. AJHR, 1896, G2, p 29

219. Luiten, ‘Political Engagement’ (doc A163), p 108

220. Luiten, ‘Political Engagement’ (doc A163), p 160

221. Luiten, ‘Political Engagement’ (doc A163), pp 123–124

222. Luiten, ‘Political Engagement’ (doc A163), p 149

223. Luiten, ‘Political Engagement’ (doc A163), p 108

224. Ōtaki Native Land Court, minute book 2, 10 April 1873 fol 59

225. Luiten, ‘Political Engagement’ (doc A163), p 108

Some of the claimants appearing before us, including Philip Taueki, were deeply concerned that only one rangatira was entrusted with the authority given by law to the persons named on the front of the certificate of title. After all, the law allowed for up to 10 names.<sup>226</sup> There is no evidence as to whether Ihaia Taueki was present at court when the list was revised and the orders passed uncontested. He was not among the witnesses who presented evidence for Muaūpoko in the April 1873 hearing, and may not have had the opportunity to be consulted. At the time, the law allowed a six-month period for Māori aggrieved with a decision of the court to obtain a rehearing.<sup>227</sup> As far as we know, no rehearing was sought within the statutory timeframe by any person of Muaūpoko. Ihaia Taueki, who had fought for the Kīngitanga and whose brother had been the local Pai Mārire leader, may well have hesitated to apply to the Government for a rehearing against a decision in favour of the Crown's ally, Te Keepa. Nonetheless, there is no nineteenth-century evidence that Ihaia Taueki objected to the decision.

The only Muaūpoko leader known for certain to have objected was Kāwana Hunia. Te Keepa later stated (in 1890) that 'he had refused Hunia's request at the time to have his name on the Certificate alongside that of his own', apparently telling Hunia to 'remain in the Rangitikei lands.'<sup>228</sup> Hunia did not apply for a rehearing in 1873, perhaps because this might have reopened the whole question of title to Horowhenua (at the time, applications for rehearing required the case to be heard *de novo*).<sup>229</sup> We accept the Crown's submission that 'there is little contemporaneous evidence of this dissent being made apparent to the Crown at the time of those [1873] proceedings'.<sup>230</sup> The only hint we have of Kāwana Hunia's dissatisfaction at the time is a letter to the Government in December 1873. Writing on behalf of 21 people of Ngāti Pāiri and other Muaūpoko hapū, Hunia wanted a surveyor sent to Horowhenua. The primary objective was to survey and finalise the southern boundary between Muaūpoko and Ngāti Raukawa, which was still disputed at the time, but there was also an intention to survey and partition out their own interests from the rest of the Horowhenua block.<sup>231</sup> Such an application did not meet the statutory requirement for partition (the support of all or a majority of the 143 owners).<sup>232</sup> In any case, the court minuted that a surveyor could not be sent without reference to the Native Minister, and that trouble had arisen about the land which

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226. Philip Taueki, brief of evidence (doc B1), paras 114–125; claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), pp 17–23

227. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 388

228. Luiten, 'Political Engagement' (doc A163), p 123

229. Native Lands Act 1865, s 81

230. Crown counsel, closing submissions (paper 3.3.24), p 127

231. Kāwana Hunia and 21 others to Judge Smith, 8 December 1873 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 671)

232. Native Lands Act 1867, s 17. The 1867 Act was still in force at the time Hunia wrote to the court in December 1873.

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the Government had in hand. A reply was sent in January 1874 that the court could not send a surveyor under the new Native Land Act 1873.<sup>233</sup>

The Tribunal has noted previously that the court's endorsement of out-of-court lists allowed hapū to manage these arrangements themselves, and thus left some room for the exercise of rangatiratanga in the determination of title. Judge Rogan in particular considered that Māori should settle as much as they could outside the court for it to rubber stamp.<sup>234</sup> Crown counsel submitted:

It ought not be an expectation that the presiding officers at the time ought to have 'looked behind' the list of names presented to the Court, in the face of no objection from any party nor that there be any legislative requirement that they do so. Proceedings of the Court in this era were both highly public and well attended. The level of attendance and absence of contest at the Court could generally be considered evidence of a degree of accuracy and consent to the dealings within the Court.<sup>235</sup>

But the Turanga Tribunal found that the opportunity for those present to object was not in itself a sufficient level of protection. Rather, the legislation lacked a 'proper and accessible system of checks.'<sup>236</sup> People could find themselves left off lists of owners because they were absent or because of hapū politics, and an automatic appeal right was therefore required to provide a 'guaranteed avenue for redress' for anyone who 'claimed to have been left off by their relatives'. Such an appeal right was not introduced until 1894.<sup>237</sup> As noted above, at least 44 'rerewaho' were in fact left out of the Horowhenua title in 1873.

We leave the discussion there for now. The events of 1886 (discussed in the next chapter) will show how far the situation could be redressed for the rerewaho under the native land laws of that time, and whether Te Keepa remained the tribe's choice to protect the land and deal with his ally, the Crown.

**(3) What effect did the repeal of the 1867 Act have on the section 17 title?**

Claimant counsel submitted that the section 17 title did not create a trust because '[n]ative land legislation could not recognise or give effect to such a trust.'<sup>238</sup> The 143 owners registered in the court were not beneficial owners but full owners, although the owner named on the front of the certificate (Te Keepa) was the only one who could enter into a lease. The land could not be sold by the owners prior to partition, including by Te Keepa. But the fact that only Te Keepa's name was put on the front of the certificate (when 10 names could have been) indicated to the superior courts

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233. Minutes, 15 and 19 January 1874, on Kāwana Hunia and 21 others to Judge Smith, 8 December 1873 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 671)

234. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 424–425, 450–452

235. Crown counsel, closing submissions (paper 3.3.24), p 138

236. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 451

237. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 451–452

238. Claimant counsel (Benion), closing submissions (paper 3.3.17(a)), p 5

that Muaūpoko had intended or wanted to make him their trustee.<sup>239</sup> Counsel submitted:

[Chief Justice] Prendergast said that that made Te Keepa ‘in effect’ trustee until subdivision. It was a strange trust – being both an ‘implied trust’ from conduct rather than an expressly created trust, and had an undefined term of trust – because at any time it could be terminated by owners seeking partition.

Indeed, Prendergast seems to have limited the trust aspect of the situation up to 1886 simply to fair distribution of the rents under any lease that Te Keepa might enter into (he seems to have accepted that Te Keepa could enter into a lease without regard to the supposed beneficiaries).<sup>240</sup>

Claimant counsel noted, however, that the court cases of the 1890s mostly focused on the situation from 1886 onwards, after the partition was made under the 1882 legislation, and not on the section 17 title.<sup>241</sup>

The Native Land Act 1873 had made changes to section 17 titles, and we need to note these here as they altered the respective powers of Te Keepa and the 143 owners registered in the court. The relevant sections of the 1873 Act were sections 97 and 98. These provided that, where land held under section 17 had not already been leased or transacted, the provisions of the 1873 Act would apply to it.<sup>242</sup> Under those provisions, the land could be dealt with ‘in the like manner as land held under Memorial of ownership under this Act.’<sup>243</sup> This meant that it could not be alienated before partitioning, whether by sale, gift, mortgage, or lease, except by a lease for up to 21 years.<sup>244</sup> The primary difference from the situation under the 1867 Act, therefore, was that Te Keepa’s power to lease land for up to 21 years was removed: no section 17 land could be leased before partition once the 1873 Act came into force, except for up to 21 years with the agreement of *all* owners.<sup>245</sup> In respect of a partition, however, section 97 stated that ‘it shall be lawful for the persons found by the Court to be interested, or for any of them, to apply to the Court to subdivide the land comprised in such [section 17] certificate’.

While the new legislation thus maintained a formal distinction between land held under section 17 and land held under the new memorial of ownership created by the 1873 Act, in fact the two forms of title were treated as virtually ‘equivalent.’<sup>246</sup> As the Turanga Tribunal and other Tribunals have noted, the titles under the 1873 Act were in effect tradable individual interests, over which hapū and rangatira could exercise no community controls. The Crown and private buyers tended to pick off these in-

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239. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), pp 4–12

240. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), p 8

241. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), p 8

242. Native Land Act 1873, ss 97–98

243. Native Land Act 1873, s 98

244. Native Land Act 1873, ss 97–98

245. Native Land Act 1873, ss 48, 97–98

246. Native Land Act 1873, ss 97–98; Grant Young, answers to questions in writing, 14 January 2016 (doc A161(d)), pp 1–6; Ward, *National Overview*, vol 2, p 235



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dividual interests one by one until they had enough signatures to force a partition.<sup>247</sup> Potentially, therefore, this fundamental flaw applied to the Horowhenua title after the 1873 Act came into force. Section 87 of the 1873 Act made such transactions ‘void’ until they were confirmed in court at the time of partition, but not illegal.<sup>248</sup> As the Hauraki Tribunal noted, Chief Judge Fenton’s suggestion that ‘purchase be illegal (not merely void) . . . was not adopted’ by the Crown or Parliament.<sup>249</sup>

In 1882, the Native Land Division Act – under which the court partitioned Horowhenua in 1886 – made a further change. For titles created by the 1865 and 1873 Acts, the 1882 Act enabled individuals to apply to have their interests partitioned out, and it also empowered a majority of owners to apply for a general partition of a block.<sup>250</sup> For section 17 titles, the same rights applied ‘but in these cases all the persons registered as owners, or their representatives as aforesaid if dead, shall be treated as owners in the division, though an application shall be sufficient if made by a majority of those named in the body of the certificate, or their representatives as aforesaid.’<sup>251</sup> Thus, Te Keepa, the only person ‘named in the body of the certificate’, could apply for a general partition of the whole block. A majority of the other owners could also apply for such a partition, or individuals could apply to have their particular interests divided out.

What this all means is that the protections envisaged by Muaūpoko in 1873, under which Te Keepa would hold the land, keep it intact from any alienations by sale, and arrange for leasing instead, were rendered nugatory. Professor Alan Ward observed that the ‘trustee’ powers of those named on the front of the section 17 certificates ceased to exist as a result of the 1873 Act, and any who had attempted to act as ‘responsible trustees’ and resist sale on behalf of their hapū ‘were now undermined.’<sup>252</sup>

**4.3.4 Dealings in Horowhenua lands under the section 17 title, 1873–86****(1) Introduction**

Despite the fact that Horowhenua was meant to have been inalienable under section 17, significant inroads were made on Muaūpoko’s ownership rights well in advance of the 1886 partition. These were:

- ▶ Donald McLean’s dealings with Te Keepa and Ngāti Raukawa in 1874;
- ▶ the Crown’s advances to individuals for purchase of their shares, and its proclamation in 1878 excluding private purchasers from the block because it was under purchase by the Crown;
- ▶ the catastrophic failure of Te Keepa’s land trust in Whanganui, and the efforts of his lawyer and agent, Sievwright, to obtain land at Horowhenua in settlement of debts;
- ▶ Te Keepa’s and the Crown’s deals with a private railway company for land running through the Horowhenua block; and

247. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 443–444

248. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 401–402

249. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 784

250. Young, answers to questions in writing (doc A161(d)), p 3

251. Native Land Division Act 1882, s 10; Young, answers to questions in writing (doc A161(d)), pp 3–4

252. Ward, *National Overview*, vol 2, p 235



- ▶ Te Keepa's deal with the Crown for a sale of land to establish a township. We consider each of these in turn.

## (2) *McLean's deal with Te Keepa in 1874*

The claimants have been very critical of the 1874 transactions by which Native Minister Donald McLean negotiated:

- ▶ an extinguishment of Ngāti Raukawa's interests between Māhoenui and Waiwiri (which he charged against Muaūpoko),<sup>253</sup> and
- ▶ a 'gift' from Te Keepa of 1,300 acres<sup>254</sup> of the Horowhenua block to Ngāti Raukawa.<sup>255</sup>

The Crown, on the other hand, maintains that it acted in good faith to arbitrate the dispute that arose in 1873–74 after the Native Land Court's decision on the Horowhenua block, and that it was entitled to deal with Te Keepa alone as Muaūpoko's representative.<sup>256</sup>

A full discussion of the 1874 transactions must await the hearing of Ngāti Raukawa's evidence and submissions, but it is possible to draw some conclusions about the Crown's actions *in respect of Muaūpoko*.

In brief, Ngāti Raukawa did not accept the Native Land Court's Horowhenua decision in 1873. At that point, the native land laws provided for the Governor in Council (not the chief judge or the court) to decide whether a rehearing should be granted.<sup>257</sup> In April 1873, Te Watene and others of Ngāti Raukawa sought a rehearing from the Government, which was denied by the Crown (partly on the advice of Judges Smith and Rogan).<sup>258</sup> There are varying accounts as to who was to blame for the nature and extent of the conflict that ensued at Horowhenua, but there were tense confrontations – including some destruction of houses and crops by both Kāwana Hunia and Ngāti Raukawa.<sup>259</sup> Muaūpoko claimed that the destruction of their property amounted to £400 worth of damage, mostly for the taking of cattle.<sup>260</sup>

Tribal leaders tried to resolve the conflict. Muaūpoko, Ngāti Apa, and Rangitāne invited McLean to meet them at Parewanui in December 1873 to discuss the situation. This invitation was made by Kāwana Hunia, Aperahama Tipae, and Mohi Mahu, but was not accepted.<sup>261</sup> Whanganui rangatira Mete Kīngi attempted to mediate the dispute in January 1874, apparently at the request of Te Keepa. McLean

253. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.11), pp 9–10

254. Te Keepa considered the 1,300 acres to be inclusive of the 100 acres at Raumatangi granted to Ngāti Raukawa persons by the court in 1873. Hence, the area of the gift is also referred to as 1,200 acres, and the court awarded 1,200 acres at the partition hearing in 1886: Hearn, 'One Past, Many Histories' (doc A152), p 617.

255. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 39–41

256. Crown counsel, closing submissions (paper 3.3.24), pp 126–128, 138–143, 169–171

257. Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, p 516

258. Hearn, 'One Past, Many Histories' (doc A152), pp 608–609, 612–615

259. Hearn, 'One Past, Many Histories' (doc A152), pp 610–612; Luiten, 'Political Engagement' (doc A163), pp 116–117

260. Luiten, 'Political Engagement' (doc A163), p 117

261. Hearn, 'One Past, Many Histories' (doc A152), p 610

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then intervened, meeting first with Ngāti Raukawa in a series of hui and then summoning Te Keepa and Ngāti Raukawa leaders to meet with him in Wellington.<sup>262</sup>

Earlier in 1869–72, the Crown had urged all the groups involved to take their claims to the Native Land Court and get them settled by ‘the law’. The Government also now invoked the law in respect of Kāwana Hunia, having him tried for arson in January 1874 but released without conviction.<sup>263</sup> The Crown prosecutor told the court that ‘the law had been sufficiently vindicated’ by the mere fact of a trial, and that Māori ‘had been shown that lawless deeds . . . could no longer and would no longer be tolerated’, hence there was no need to proceed to a conviction.<sup>264</sup> The magistrate agreed to this Crown request, stating that it would be ‘an extremely absurd thing if he were to set himself against the wishes of the Government in a matter of policy’ and that ‘he was extremely glad to be able to allow the withdrawal of a charge against a person of whom he heard so much good as he had of Hunia.’<sup>265</sup>

Appeals to the law and vindication of the law appear to have ended at that point. Native Minister McLean proceeded to arbitrate the dispute between Muaūpoko and Ngāti Raukawa. In doing so, he ignored the Native Land Court’s award of title to Muaūpoko in 1873 as though it had settled nothing. He negotiated with Ngāti Raukawa leaders and Te Keepa in Wellington, arranging for the signing of two deeds in February 1874.

According to Te Keepa’s recollection in 1896, the two negotiations were conducted entirely separately. McLean asked Te Keepa to ‘give me a piece of Horowhenua’. When the rangatira asked why he should agree to that, McLean apparently reminded him of a promise to Wiremu Pōmare made before the court sitting in 1872 that, if Muaūpoko won, Te Whatanui’s descendants would be looked after. This promise had been made to honour the agreement between Taueki and Te Whatanui:

I said [to Wiremu Pomare] ‘If I win my case at Horowhenua, I will consider the words spoken by my ancestor, Taueki. He was one of the big chiefs of the Muaupoko.’ I said, ‘If I do not succeed in winning, I still will do the best I can to keep my head above water, and swim till I get ashore.’ Pomare then said, ‘Well, if that is how it is to be, I will not be present at the Court when it sits; but do not cease to remember the words spoken by our old men.’<sup>266</sup>

Te Keepa told the Horowhenua commission that he eventually agreed with McLean to give 1,300 acres (inclusive of the 100 acres at Raumatangi awarded to

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262. Hearn, ‘One Past, Many Histories’ (doc A152), pp 612–618; Luiten, ‘Political Engagement’ (doc A163), pp 117–119; Anderson and Pickens, *Wellington District* (doc A165), pp 221–224

263. Luiten, ‘Political Engagement’ (doc A163), p 118

264. ‘Horowhenua Land Dispute, Together with Notes of Meetings’, 1874 (Luiten, ‘Political Engagement’ (doc A163), p 118)

265. ‘Horowhenua Land Dispute, Together with Notes of Meetings’, 1874 (Anderson and Pickens, *Wellington District* (doc A165), p 226)

266. AJHR, 1896, G-2, p 26

Ngāti Raukawa by the court). Apparently, the Minister said that he wanted more than that but was 'content to accept' 1,300 acres.<sup>267</sup>

After agreement had been reached, McLean had a deed drawn up and signed by Ngāti Raukawa leaders. Any Ngāti Raukawa claims about this deed will be considered later in our inquiry. The deed stated that it extinguished Ngāti Raukawa's claim to land between Māhoenui and Waiwiri for the sum of £1,050, 'excepting certain reserves hereafter to be surveyed between the Papaitonga and the sea[,] these reserves being made with the full consent of Keepa te Rangihwinui to whom the block in question being part of the Horowhenua block was awarded by the Native Land Court.'<sup>268</sup> Although Te Keepa was not told that this would happen, this sum of £1,050 was charged against the Horowhenua block as 'an advance on purchase' – the Government's intention was that Muaūpoko would ultimately pay instead of the Crown.<sup>269</sup>

The deed was a transaction between purchase officer James Booth for the Government and 11 Ngāti Raukawa rangatira. Te Keepa signed an addendum to the deed, which stated: 'I hereby agree to allow the reserves mentioned above to be made for the Ngatiraukawa hapus . . .'<sup>270</sup>

Two days later, on 11 February 1874, Te Keepa signed a deed stating:

I, Te Keepa Rangihwinui on behalf of myself and the Muaupoko tribe whose names are registered in the Native Land Court as being the persons interested in the Horowhenua block hereby agree to convey by way of gift to certain of the descendants of Te Whatanui to be hereafter nominated a piece of land within the said Horowhenua block near the Horowhenua lake containing one thousand three hundred (1300) acres the position and boundaries to be fixed by actual survey . . .<sup>271</sup>

Apparently, McLean offered Te Keepa two inducements to get him to sign. The first was that the Horowhenua block had not yet been properly surveyed. It had been cut out of the Manawatū-Kukutauaki block and awarded by the court without a full survey. McLean reportedly agreed that the Crown would pay for the necessary survey of Horowhenua as part of this deal. Secondly, McLean offered Te Keepa a piece of land and assistance with farming it – later claimed by Te Keepa to have been 'several thousands of acres.'<sup>272</sup> According to Bruce Stirling, Te Keepa understood that this land would be for Muaūpoko in the Muhunua block, just south of

267. AJHR, 1896, G-2, p 26

268. 'Deed Receipts – No 6: Horowhenua Block (Ngatiraukawa Claims), Manawatu District', HH Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1878), vol 2, p 435; see also AJHR, 1896, G-2, p 9

269. Luiten, 'Political Engagement' (doc A163), pp 119, 132

270. 'Deed Receipts – No 6: Horowhenua Block', Turton, *Maori Deeds of Land Purchases*, vol 2, p 435; see also AJHR, 1896, G-2, p 9.

271. 'Deed Receipts – No 6: Horowhenua Block', Turton, *Maori Deeds of Land Purchases*, vol 2, p 435; see also AJHR, 1896, G-2, p 9.

272. Luiten, 'Political Engagement' (doc A163), pp 119–120; Anderson and Pickens, *Wellington District* (doc A165), p 228

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the Horowhenua block (see chapter 3).<sup>273</sup> But Muaūpoko were not to be paid for relinquishing 1,200 acres of the Horowhenua lands awarded to them by the court, and – as noted above – the price paid to Ngāti Raukawa would also be charged to their account. Crown counsel doubts that the offer of land to Te Keepa was really made, since the only source for it is a memorandum from Booth,<sup>274</sup> but Booth was the Crown officer named in the deed and he must have known whether such an offer was made.

The evidence is very clear that the 143 owners registered in the court, as referred to in the deed, were not consulted and did not consent to the deed or sign it. Section 17 – both in its original form and as altered by the 1873 Act – did not allow Te Keepa to alienate land by way of gift. Any gift required all or a majority of the owners to agree to partition out and alienate that land. The evidence suggests that the agreement was kept secret for at least a time, which the Crown argues was Te Keepa's doing.<sup>275</sup> Eventually the Muaūpoko people discovered what had happened and were persuaded to agree to it – formally so at the 1886 partition, 12 years later, at which the 1874 deed was finally given effect by the partitioning of Horowhenua 9.<sup>276</sup>

Under what circumstances the tribe gave their belated consent is not known, but that they confirmed it 12 years later in 1886 is not in doubt.<sup>277</sup> On the one hand, they were presented with a *fait accompli*. On the other hand, they may have been genuinely willing to see the long-running dispute with Ngāti Raukawa finally resolved for the price of 1,200 acres. The gift was also accepted because this provision for Te Whatanui's descendants was to honour Taueki's 'oath' to Te Whatanui, by which was meant his *tuku* of land (see chapter 2).<sup>278</sup> When Te Rangimairehau was asked 'Was not that a very stupid arrangement of Kemp's, to give away your land when you were in the right?', Te Rangimairehau replied: 'We never gave the land in consequence of any trouble or disputes that had taken place. We gave it because of the promise that had been made by Taueki; it was not in consequence of the fighting.'<sup>279</sup>

Te Keepa later explained his own view of the tribe's involvement:

I made the agreement with Sir Donald McLean about the descendants of Whatanui without reference to the tribe. He came to me as the chief. I consulted with the tribe about it long before the Court of 1886, and also at the time the land was awarded by the Court. The Tribe were present. I had the 1,200 acres delineated on the plan and showed it to them. They consented to it.<sup>280</sup>

273. Stirling, 'Muaupoko Customary Interests' (doc A182), pp 160, 307–308

274. Crown counsel, closing submissions (paper 3.3.24), pp 139–140

275. Crown counsel, closing submissions (paper 3.3.24), p 142

276. Luiten, 'Political Engagement' (doc A163), pp 119–123, 160–161

277. Luiten, 'Political Engagement' (doc A163), p 161; AJHR, 1896, G-2, pp 9 (Horowhenua commission), 75 (Alexander McDonald), 96 (Te Rangimairehau), 103 (Raniera Te Whata), 107 (Makere Te Rangimairehau (Makere Te Rou)), 118, 120–121 (Kerehi Tomu), 231–233 (Te Rangimairehau), 234–235 (Hoani Puihi)

278. Luiten, 'Political Engagement' (doc A163), p 161 n; AJHR, 1896, G-2, pp 26 (Te Keepa), 96 (Te Rangimairehau), 118 (Kerehi Tomu), 188, 189 (Te Keepa)

279. AJHR, 1896, G-2, p 233

280. AJHR, 1897, G2, p 34 (Crown counsel, document collection (doc B3), p 647)

In the Crown's submission: 'It was reasonable for the Crown to understand that Te Keepa was interacting with the Crown on behalf of Muaūpoko in reaching this agreement . . . It is not reasonable to have expected the Crown to go around Te Keepa to the broader iwi.'<sup>281</sup>

We disagree with this submission for a number of reasons. We accept that Te Keepa understood himself to be acting 'as the chief'. We also accept that the Crown, having denied Ngāti Raukawa a rehearing, may well have been justified in compensating them for any rights that it considered they had lost in the Horowhenua block. That is a matter for us to deal with later in our inquiry, after hearing from Ngāti Raukawa. But for the Crown to make that compensation a charge on the Horowhenua block, in effect on Muaūpoko as the legal owners, was in defiance of the 1873 court decision which the Crown had urged all the iwi to obtain, and which the Crown was not prepared to have formally reopened. The Government had no legal right to impose this charge on Muaūpoko.

Then, the Native Minister also persuaded Te Keepa to 'gift' 1,300 acres to Ngāti Raukawa, even though it was not lawful for the chief to do so under section 17, and to sign a deed which the Crown knew was void even if Muaūpoko partitioned the Horowhenua block, since it had only been signed by one of the 143 owners.

If the Crown believed that Ngāti Raukawa's rights had not been properly or correctly recognised by the court, then its duty under the Act was to order a rehearing. Alternatively, after the six-month period for a rehearing had expired, it could have obtained special legislation to refer this long-running dispute back to the court or to an intertribal rūnanga, or even to a body like the 1873 Hawke's Bay Native Lands Alienation commission (which had a mix of Māori and Pākehā commissioners).

In the event, the Crown may as well not have enacted the 1867 or 1873 Acts since it chose to deal solely with Te Keepa, as if he were the absolute owner of the tribal patrimony. Both the 1867 and 1873 Acts had recognised that rangatira were not the sole and absolute owners of their communities' lands in custom, and that alienation required the consent of all right-holders. This standard had been clear by the 1850s, in fact, although often not observed in practice.<sup>282</sup> Instead, McLean acted as if the 1865 10-owner rule applied to the Horowhenua block, and Te Keepa had the power to sign away the tribal lands. It was Booth's responsibility, in whose name the deed was made with Te Keepa, to obtain the consent of the other Horowhenua owners so that the land could be partitioned out. While we agree that the Crown could reasonably initiate negotiations with Te Keepa and expect him to take a leading role, that did not justify treating those negotiations as if the 1867 and 1873 Acts had not been passed, and as if Te Keepa were the only owner whose consent was required.

As for the inducements that were offered, the Crown did pay for the external survey of Horowhenua but we have no certain information as to whether Te Keepa received the land or assistance with sheep farming that he was promised.<sup>283</sup> There is

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281. Crown counsel, closing submissions (paper 3.3.24), p 142

282. Waitangi Tribunal, *Mohaka ki Ahuriri*, vol 1, pp 28–29, 94–95, 120–121, 135–136, 142–143

283. Luiten, 'Political Engagement' (doc A163), pp 119–122, 126



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certainly no evidence on the record thus far to suggest that Muaūpoko received any land in the Muhunua block.

The Crown did not pay Muaūpoko for the 1,200 acres when the block was partitioned in 1886. (As noted above, the quantity was changed to 1,200 acres because the Raumatangi block of 100 acres, awarded to Ngāti Raukawa by the court, was counted as part of the 1,300 acres.<sup>284</sup>) There was no legal obligation for Muaūpoko to part with any of their court-awarded land at the Crown's behest, so that the Crown could get around its refusal to order a rehearing for Ngāti Raukawa. Nor were Muaūpoko legally bound by the deed of gift, which was void under the 1873 Act. They were within their rights to have refused to part with any land at the time of partitioning unless the Crown paid them for it. Ngāti Raukawa were paid for relinquishing their rights and Muaūpoko, in all fairness, should have been compensated for doing the same.

We note, however, that the charge of £1,050 was not actually enforced against Muaūpoko when the Horowhenua block was partitioned in 1886. As far as we are aware, no land was taken from Muaūpoko in satisfaction of that unfair and improper 'advance'.

As discussed earlier, our analysis of these matters in respect of Ngāti Raukawa's claims against the Crown will be carried out later in our inquiry.

### **(3) *The 1878 Crown purchase proclamation***

The claimants and the Crown had very different views of the 1878 proclamation and its effects. In brief, the Horowhenua block was proclaimed as under Crown purchase in 1878, under the terms of the Government Native Land Purchases Act 1877. This Act was the subject of inquiry by the Central North Island Tribunal, which summarised it as follows:

The Native Land Purchases Act 1877 enabled the Government to proclaim any Maori land block on which its agents had paid monies or entered negotiations, either before or after land had passed the Native Land Court, to be proclaimed, after which private parties were prevented from purchasing or acquiring any right, title, estate, or interest in the land or any part of it, or negotiating for this. This Act did not have a legislative time limit for the proclamations but the Government could revoke them as it chose, after which private dealing was possible. The Government continued to make use of this measure through most of the rest of the nineteenth century. The Government was able to apply the proclamations as they best suited purchasing, in some cases for many years. . . .

Crown agents were instructed to begin negotiations in as many blocks as possible in this region, even if these negotiations were with just a few claimed owners or involved just one small payment as a 'deposit'. The proclamations then bound all those with interests in the block and prevented them from dealing in lands or resources in any part of the block. The restrictions could also be continued as long as agents wanted, so

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<sup>284</sup>. Hearn, 'One Past, Many Histories' (doc A152), p 617



they could take as much time as they wished to either continue with negotiations or seek to complete them. There was no requirement to consider any matter other than what the Government needed in either applying or lifting the proclamations.<sup>285</sup>

Thus, the legal effect of the proclamation for Horowhenua was that no leasing or any other form of alienation was possible, other than to the Crown. This laid a second and contradictory set of legal requirements over the block. Under section 17, Te Keepa had been empowered to lease all or parts of the land for up to 21 years; otherwise the land was inalienable. After the 1873 Act came into force, Te Keepa's sole power to lease was taken away, and all owners had to agree to a lease of no more than 21 years. Otherwise, the land remained inalienable until it was partitioned. A second, contradictory overlay came with the 1878 proclamation, which held that the inalienable land was under negotiation for purchase by the Crown, and could not be leased privately (even for up to 21 years) or alienated in any way but to the Crown. This took away all options for the owners bar one: enter into sale arrangements with the Crown. Typically, Crown agents picked off individual interests in lands that had been proclaimed in this way, forcing a partition when enough signatures had been acquired. As we shall see, this did not actually happen in Horowhenua.

Crown counsel submitted that purchase negotiations and advance payments were not prohibited under section 17; what was prohibited was the completion of a purchase, any prior contracts being legally void until the time of partitioning. Hence, the Crown was 'running the risk that it would advance money without ever being able to perfect a title.'<sup>286</sup> In the Crown's view, the purpose of the proclamation was to shut out competition from speculators and ensure that – if the owners did collectively want to sell – the owners could only deal with the Crown.<sup>287</sup> Claimant counsel agreed that section 17 'did not prohibit negotiations or advances being paid.'<sup>288</sup> Nonetheless, the claimants' view is that the Crown was fully aware of Te Keepa's position under section 17, and of Muaūpoko's wish to deal with their lands collectively in accordance with tikanga: 'In such circumstances, making an individual advance or advances, and thereby justifying placing the block under the Crown's monopoly powers, was something that required, in good faith, extensive engagement with the owners and their rangatira.'<sup>289</sup>

By 1877, Crown purchase agent James Booth was at work in the Horowhenua block, trying to get individuals to sell their shares piecemeal to the Crown. He claimed to have acquired the interests of 10 owners, including a payment of £20 to rangatira Te Rangirurupuni. Te Keepa, however, refused to allow the block to be partitioned to cut out these interests.<sup>290</sup> Te Keepa took very seriously his role of holding the block for Muaūpoko, although perhaps unaware that his legal powers

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285. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 576–577

286. Crown counsel, closing submissions (paper 3.3.24), pp 144–145

287. Crown counsel, closing submissions (paper 3.3.24), p 145

288. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 27

289. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 28

290. Luiten, 'Political Engagement' (doc A163), pp 132–134, 136–137

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had been changed by the 1873 Act. In any case, Te Keepa did enter into new lease arrangements with McDonald in 1876. The rents were then paid to local rangatira Ihaia Taueki, who distributed them.<sup>291</sup>

It was presumably to prevent any further leasing of this kind, and to take away any alternatives other than selling individual shares to Booth, that the Crown imposed its proclamation in 1878. Booth himself had proposed giving up on attempts to purchase, advising the Government in 1877 that his advances of £64 against individual interests should now be recovered since the majority of Muaūpoko were opposed to sale.<sup>292</sup> The Crown still wanted to buy the block but, as Crown counsel pointed out in our inquiry, did not pursue purchasing very actively before the 1886 partition, despite having imposed the proclamation.<sup>293</sup>

The parties have disputed whether the proclamation was imposed in good faith; that is, had any genuine advance payments been made other than the £20 to Te Rangirurupuni? There is no record of any consultation with Te Keepa or other owners as to whether they wanted to sell their lands to the Crown, or would agree to the exclusion of private purchasing and leasing from their lands. While Crown counsel doubts the evidence that Te Keepa did not even find out about the proclamation until 1884, there is certainly no doubt that neither he nor his people had been consulted or had agreed to it. Indeed, the Crown never claimed to have consulted anyone or sought agreement to the proclamation.<sup>294</sup> Ultimately, however, no significant inroads were made at this point as a result of the proclamation, so we need not consider the question in any detail.

The evidence is not at all clear as to what payments or expenses were charged against the land as the basis for legitimating a proclamation that the Horowhenua block was genuinely under negotiation for purchase. By the same token, the Crown submits that no charges or advances were deducted from the Crown's purchase price for Horowhenua 2 when that purchase was completed in 1887.<sup>295</sup> As far as we can tell, this submission is correct. This means that any purchasing activity under the proclamation had no impact at all on the alienation or retention of the Horowhenua block, and therefore need not concern us further here. As we shall see in chapter 5, the crucial impact of the proclamation came *after* the partition, when the Crown's monopoly constrained Te Keepa's ability to negotiate during the township purchase.

**(4) *The failure of Te Keepa's Whanganui trust and its impact on Horowhenua***

After experience of the Native Land Court and Crown purchasing in the 1870s, Te Keepa tried to keep Crown purchasing and land loss at bay in Whanganui, as he did

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291. Luiten, 'Political Engagement' (doc A163), p 114

292. Hearn 'One Past, Many Histories' (doc A152), p 662

293. Crown counsel, closing submissions (paper 3.3.24), pp 145–146, 151

294. Luiten, 'Political Engagement' (doc A163), pp 131–134; Crown counsel, closing submissions (paper 3.3.24), pp 149–150

295. Crown counsel, closing submissions (paper 3.3.24), pp 147–148

in Horowhenua, by forming a trust.<sup>296</sup> The undermining of the Whanganui Trust by the Crown had a significant impact on the fate of the Horowhenua lands.

Te Keepa's Whanganui Trust was established in 1880. It covered 1.5 to 2 million acres, held in Te Keepa's name with a governing tribal council or councils to assist him.<sup>297</sup> It was designed to prevent the worst consequences of Crown purchase and individualised titles, which the Whanganui Tribunal referred to as 'land alienation at a frenetic pace; individuals dispersing or consuming the price paid; and the Māori communities that originally owned the lands benefiting not at all'.<sup>298</sup> A major change, however, was required in the native land laws to accommodate the Whanganui trust, a change which the Crown refused to make.<sup>299</sup> According to the Tribunal, the Crown undermined the trust and breached the Treaty in doing so.<sup>300</sup> The Tribunal found:

The Crown's intransigence undoubtedly prejudiced Whanganui Māori, because it denied tangata whenua the promising opportunity to manage their own land and affairs largely within the existing legal framework and through the English legal mechanism of a trust. The Trust's focus on ensuring Whanganui Māori prosperity in the new economy and into the future had no parallel elsewhere in the locality, and its potential was lost.<sup>301</sup>

The prejudicial effects of the Crown's undermining of Te Keepa's Trust were not confined to Whanganui. This is because Te Keepa's lawyer and agent, Sievwright, pressed for payment of his amassed legal fees of £2,800. These fees were mostly for work on the trust which Te Keepa could not satisfy out of the failed trust lands. In desperation, he turned to the Horowhenua lands as a potential means of payment, especially after Sievwright secured a Supreme Court ruling against him. By June 1886, Te Keepa had agreed to transfer 800 acres to Sievwright once the block was partitioned.<sup>302</sup>

We agree with the claimants that the pressure to pay this debt was enormous, and that it dovetailed with the Crown's strategy to purchase land at Horowhenua for a township.<sup>303</sup> We therefore consider the matter of Sievwright's debt further in the next chapter. We also agree with the Whanganui Tribunal's observation that the mechanism of a trust was a 'promising opportunity' for Māori to manage their own lands and affairs within the colonial legal framework. This observation is particularly apposite in our inquiry, as we discuss further in chapter 5.

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296. Waitangi Tribunal, *He Whiritaunoka*, vol 1, pp 405–413; see also Michael Macky, 'Kemp's Trust', 2005 (doc A177)

297. Macky, 'Kemp's Trust' (doc A177), pp 76–86

298. Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 415

299. Waitangi Tribunal, *He Whiritaunoka*, vol 1, pp 405–406, 413

300. Waitangi Tribunal, *He Whiritaunoka*, vol 1, pp 415–416

301. Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 416

302. Luiten, 'Political Engagement' (doc A163), pp 141–143, 149

303. Claimant counsel (Bennion, Whaley, and Black), closing submissions (paper 3.3.17(a)), pp 29–32

**(5) Internal and external pressures for partition, 1879–86****(a) Ngāti Pāiri and Ngāti Raukawa**

From 1879 onwards, Kāwana Hunia was applying significant pressure for partition, acting on behalf of about 30 people (described as Ngāti Pāiri). He maintained that the naming of Te Keepa alone in the certificate of title was wrong and that there should be a general partition of Horowhenua into four hapū blocks. Significantly, Hunia was – like many rangatira of the time – facing his own significant pressure in the form of mounting debts, and by the early 1880s he needed to sell land to pay debts incurred in securing his peoples' titles to land. He offered 10,000 acres of Horowhenua to the Crown in 1880. There was also pressure from Ngāti Raukawa, who wanted to obtain a legal title for the 1,300 acres promised in 1874. To both, the Crown responded that no land could be lawfully alienated under the section 17 title until Horowhenua was partitioned, and that only Te Keepa or the whole of the registered owners could apply for that partition.<sup>304</sup> The Government's responses in these years cast further doubt on the legitimacy of McLean's 1874 transactions, and also on the legitimacy of the 1878 proclamation.

Kāwana Hunia attempted to increase the pressure for partitioning by fencing off land at Horowhenua but was prevented by Muaūpoko women, who kept removing his timber. In one confrontation, Tiripa Taueki and another woman were injured, leading to court charges in 1879.<sup>305</sup>

**(b) The Wellington and Manawatu Railway Company**

There were also significant external pressures for partition. First, the Crown itself met approaches from Kāwana Hunia and Ngāti Raukawa by urging them to either apply for partition or get Te Keepa to do so. Perhaps the most important external pressure for partition, however, came from the Wellington and Manawatu Railway Company and the Crown in combination. The company was established to build a railway line from Wellington to Longburn in the Manawatū but it soon found itself in a serious predicament of the Crown's making. On the one hand, its contract with the Crown required it to complete the railway by 1887. On the other hand, the railway had to pass through the Horowhenua block. There was no other way for it to go. But the Crown had a monopoly over the block and was refusing to either buy land for the company or waive its rights so that the company could buy land itself.

How did this predicament come about? In 1878, the Crown had decided to build a railway line from Wellington to Foxton, but retrenchment (and a negative report from a royal commission) led to private enterprise taking up the task instead.<sup>306</sup> The Wellington and Manawatu Railway Company was established in 1881. Dr Grant Young noted that '[s]pecial legislation was required to authorise the company to construct the railway'.<sup>307</sup> The Railways Construction and Land Act 1881 authorised a Wellington and Manawatū line (among others) on the assumption that the profit

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304. Luiten, 'Political Engagement' (doc A163), pp 120–130

305. Luiten, 'Political Engagement' (doc A163), pp 127–129

306. Young, 'Muaūpoko Land Alienation' (doc A161), pp 17–18

307. Young, 'Muaūpoko Land Alienation' (doc A161), p 17

from the acquisition and on-sale of Māori land would ultimately pay for it. The Act provided for the Crown to subsidise the company with an endowment of Crown land to the value of 30 per cent of construction costs. Under this Act, the Crown and the company entered into a contract in 1882, that the company would build the line within five years and would receive £126,375 worth of Crown land. This agreement required the Crown to purchase additional Māori land to the value of £28,805 in order to meet its commitment.<sup>308</sup> This extra land was supposed to be purchased within the five-year period of the agreement, including from the Horowhenua block.<sup>309</sup>

The railway line had to cross nine miles of territory in the Horowhenua block, but without the Crown's cooperation the company could not obtain a legal title for that land.<sup>310</sup> The company's attempts began almost immediately in 1882.<sup>311</sup> By this time, the Government was pulling back from the system of advances which had been prolific in the 1870s,<sup>312</sup> and it took the position that the block must be partitioned *before* it could or would purchase land.<sup>313</sup> Booth was instructed to try to get Te Keepa and Hunia to agree together to a partition. Te Keepa refused. He wanted to hold the line against any sales of individual interests, and, as 'sole Grantee for the Block Horowhenua', to decide when and how surveys and partitions would take place. Booth reported back to the Government that purchasing from Te Keepa was impossible, but he nonetheless encouraged Hunia and others to apply to the court for partitions.<sup>314</sup>

The Crown's initial attempt in 1882 having thus failed, the company appointed Alexander McDonald to purchase land directly. The Crown agreed to waive its pre-emption proclamations over parts of the Manawatū-Kukutauaki block, but not Horowhenua. The Crown still refused to buy land at Horowhenua for the company, because it was not practical for the Government to purchase in a district in which the company was also purchasing – the company's prices created a market in which the Crown could not compete once it lost its monopoly advantage.<sup>315</sup>

Alexander McDonald became, as claimant counsel put it, a 'triple agent', eventually claiming to work simultaneously on behalf of the company, the Crown, and Muaūpoko.<sup>316</sup> He began by brokering a deal between Te Keepa and the company for the land on which the line would be built. Te Keepa welcomed the railway. His vision for the economic development of his people at Horowhenua involved a

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308. Young, 'Muaūpoko Land Alienation' (doc A161), pp 18–19

309. Luiten, 'Political Engagement' (doc A163), pp 135–136

310. Young, 'Muaūpoko Land Alienation' (doc A161), pp 19, 21

311. Luiten, 'Political Engagement' (doc A163), p 136

312. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 607–608

313. Luiten, 'Political Engagement' (doc A163), p 136

314. Luiten, 'Political Engagement' (doc A163), pp 136–137

315. Luiten, 'Political Engagement' (doc A163), pp 137–138

316. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), pp 19–20



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railway, a township, and settlers to provide the capital and conditions for development.<sup>317</sup> The company's 1884 prospectus quoted a letter from Te Keepa, in which he stated:

It is now my earnest desire to see railway stations and a township established on the Horowhenua Block – perhaps two stations; but that will be for you to consider. I am anxious by all means to improve the position of my tribe. I am filled with delight about the proposed railway and if I were a rich man I would construct this part myself, and hand it over after the manner of a chief.<sup>318</sup>

The nature of the agreement between Te Keepa and the company is tangled, and we will return to that question later when we consider the partition of Horowhenua 1 (the railway corridor) and its award to the company for little or no payment. Suffice to say here that an agreement was reached at some time before 1885, and the railway was constructed before the company had title to the land.<sup>319</sup> In 1886, the company began working with the Crown to secure a partition, partly to obtain legal ownership of the railway corridor but also to foster the purchase of additional land from Muaūpoko – land which the company believed the Crown would have to transfer to it after purchase.<sup>320</sup> We turn next to consider the cooperative action of the Crown and the company in 1886 to secure a partition.

**(c) The township negotiations**

As noted earlier, the Crown had tried to obtain a partition of Horowhenua back in 1881–82, but Te Keepa had refused. The Native Land Division Act 1882 changed the rules in respect of partitioning. It required that an application for a general partition of land under a section 17 title (as opposed to partitioning out individual interests) had to be made by either:

- ▶ the majority of owners; or
- ▶ 'a majority of those named in the body of the certificate', which in this case was Te Keepa.<sup>321</sup>

Obviously, the most practicable route to obtaining a partition was to persuade Te Keepa to apply.

From 1883 to 1885, the Crown took the position that the Horowhenua block was under proclamation and negotiations for purchase, but that it would also be 'illegal' for it to finalise any purchase before partition.<sup>322</sup> In May 1886, however, the company entered into discussions with the Crown which – it believed – would result in the

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317. Armstrong, 'Special Factors' (doc A155), pp 3, 8

318. GA Mills, 'O'er Swamp and Range: A History of the Wellington and Manawatu Railway Co Ltd, 1882–1909' (MA thesis, Victoria University College, 1928), p 71 (Young, 'Muaupoko Land Alienation' (doc A161), p 20)

319. Young, 'Muaūpoko Land Alienation' (doc A161), pp 19–20

320. Luiten, 'Political Engagement' (doc A163), p 144

321. Native Land Division Act 1882, ss 4, 10; Young, 'Muaūpoko Land Alienation' (doc A161), p 28

322. Luiten, 'Political Engagement' (doc A163), pp 131, 136–137. The word 'illegal' was used by Native Land Purchase Under-Secretary GS Gill: Gill, draft reply to Heni Wairangi, [November 1883] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1064).



Crown purchasing land at Horowhenua and transferring land to it after purchase, if only Te Keepa could be persuaded to apply for a partition.<sup>323</sup> The company therefore renewed its efforts to get Te Keepa to apply to the court.

From Te Keepa's perspective, a partition was desirable by this time because he wanted a township and settlers along with the railway so that the district (and his people) could benefit from economic development. He was also becoming increasingly desperate for assistance to settle his debt to Sievwright, and knew that money would be required to pay the costs of partitioning, including court and survey costs. For all these reasons, Te Keepa agreed to come to Wellington at the company's expense in June 1886, to negotiate a deal with the Crown.<sup>324</sup> The company hosted Te Keepa for a week. McDonald appears to have negotiated with the Government on his behalf at first, although he was not present at the crucial signing of an agreement on 29 June 1886.<sup>325</sup>

On 25 June, McDonald opened negotiations on Te Keepa's behalf by writing to Native Minister Ballance, setting out Te Keepa's terms for a township deal (see box). These included:

- ▶ naming the township 'Taitoko' for Te Keepa's daughter, Wiki Taitoko;<sup>326</sup>
- ▶ reservation of every tenth section for Muaūpoko;
- ▶ the reservation of Lakes Horowhenua and Papaitonga, the streams running from the lakes to the sea, and one chain of land around the lakes, all to be vested in Te Keepa as trustee;
- ▶ shared local authority and tribal trusteeship of certain town reserves;
- ▶ arbitration as to price if Te Keepa and the Minister could not agree on the value of the proposed 4,000 acres, with each side to appoint an arbitrator; and
- ▶ an application by Te Keepa to the Native Land Court for partition, so long as the Minister agreed to these terms.<sup>327</sup>

A 'memorandum of interview' was signed by Te Keepa and Native Department Under-Secretary Lewis on 29 June, four days later. It only included one of these crucial terms; that Te Keepa would immediately apply for partition. Otherwise, this memorandum stated that 'Major Kemp agrees that it will be better to defer arrangement with the Government as to whether block shall be purchased by the Crown or whether the Government shall act as agent for the Native owners until the Native Land Court has adjudicated upon the subdivision.'<sup>328</sup> The Government also agreed in the memorandum to an advance payment of £500.<sup>329</sup> The Government later tried to explain this as an advance against the whole Horowhenua block made under the

323. Luiten, 'Political Engagement' (doc A163), p 144

324. Armstrong, 'Special Factors' (doc A155), pp 8, 40; Luiten, 'Political Engagement' (doc A163), pp 141–145, 147–148, 157

325. AJHR, 1896, G-2, p 295; Luiten, 'Political Engagement' (doc A163), p 144

326. AJHR, 1896, G-2, p 296; transcript 4.1.12, p 272 (Te Uruorangi Paki). There is also a suggestion that the township was to be named for Te Keepa himself, Taitoko being 'an ancestral name by which Major Kemp was known to Maoris': AJHR, 1897, G-2, p 149.

327. AJHR, 1896, G-2, pp 296–297

328. AJHR, 1896, G-2, p 297

329. AJHR, 1896, G-2, p 297

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1878 proclamation,<sup>330</sup> but it was clearly recorded at the time as an advance against purchase of the 4,000-acre Taitoko block.<sup>331</sup> The Treasury vouchers for 30 June and 24 September 1886 stated that the payments were made by the Native Land Purchase Department to Te Keepa 'on account of purchase of the above-named block'. The 'above-named block' was recorded as 'Taitoko (part of Horowhenua) Block; 4000 acres; price unfixed'.<sup>332</sup>

As soon as the memorandum was signed on 29 June, Te Keepa also signed an application to the court for partition. Under-Secretary Lewis asked the chief judge to set down a hearing as soon as possible, in light of the importance of getting the block partitioned, and a hearing was duly scheduled for August 1886.<sup>333</sup>

The possibility of the Crown acting as agent for the owners in the sale of the township block was a reference to Ballance's Native Lands Administration Act 1886.<sup>334</sup> This Act was passed later in the year after significant consultation with Māori in 1885 and early 1886.<sup>335</sup> Professor Ward summarised the Act as follows:

Direct dealings in Maori land were suspended; the owners of a block of land were to elect committees which would decide what portions of the land would be sold or leased and on what terms; the land would then be handed over to a district commissioner, a Crown official, who would carry out the instructions of the block committee and distribute the proceeds, less costs.<sup>336</sup>

As we discuss further in chapter 5, the Crown refused to proceed with a purchase when the block was eventually partitioned in December 1886. It seems clear from the evidence that the Government did not want to purchase any Horowhenua land before its five-year agreement with the company had expired. Otherwise, it would have to transfer that land to the company.<sup>337</sup> Both Ballance and Lewis denied that a purchase was negotiated in 1886,<sup>338</sup> which the evidence supports. The memorandum signed by Lewis and Te Keepa on 29 June 1886 deferred the 'arrangement with the Government as to whether block shall be purchased by the Crown or whether the Government shall act as agent for the Native owners until the Native Land Court has adjudicated upon the subdivision'.<sup>339</sup>

But Ballance and Lewis also testified before a select committee in 1887–88 that there had been no purchase negotiations at all before the expiration of the Crown–company agreement in March 1887. Rather, Lewis said, there had been an agreement that Muaūpoko would be able to deal with their land freely,

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330. Luiten, 'Political Engagement' (doc A163), p 147

331. AJHR, 1896, G-2, pp 297–298

332. AJHR, 1896, G-2, pp 297–298

333. Luiten, 'Political Engagement' (doc A163), pp 145, 148; TW Lewis to chief judge, 8 July 1886, chief judge to Lewis, 9 July 1886 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1093)

334. AJHR, 1896, G-2, pp 293–296; Luiten, 'Political Engagement' (doc A163), pp 143–144, 146–147

335. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 349–354

336. Ward, *National Overview*, vol 2, p 369

337. Luiten, 'Political Engagement' (doc A163), pp 138–139, 158, 175

338. Luiten, 'Political Engagement' (doc A163), pp 146–147

339. AJHR, 1896, G-2, p 297

presumably involving revocation of the 1878 proclamation (although that did not happen either).<sup>340</sup> Ballance stated that when McDonald and Te Keepa approached him, he had positively refused to purchase the Taitoko block, and that any advance was made against Horowhenua as a whole. He further stated that Te Keepa had needed the money, and had accused the Government of allowing him to be ‘ruined’ by its refusal to lift the proclamation, hence the Government made an advance ‘but not with the intention of completing the purchase.’<sup>341</sup>

This testimony cannot be reconciled with the evidence from 1886, especially the signed memorandum of 29 June 1886 and the text of the receipts for advances.<sup>342</sup> It seems clear to us that the Crown had agreed to the establishment of a township, and to either (a) purchase Taitoko or (b) act as agent for alienation of the 4,000 acres under the forthcoming 1886 Act, but it had committed to *one* of these two options occurring. The decision as to which option, as well as finalising the agreement itself, would need to await partition since the land was still held under section 17 of the 1867 Act. Also, the Government was clearly anxious to permit of no delay in getting the partition application filed, even though it did not want the 4,000 acres to end up in the hands of the company, and so it delayed completing the purchase; the Crown had been trying to get Horowhenua partitioned for a number of years already.

For his part, Te Keepa appears to have believed that the Crown would accept all of his terms for the alienation of Taitoko at the time of partition. He was so convinced of this that he presented these terms to Muaūpoko as the basis for the township deal with the Crown, and it was on that basis that the people agreed to partition Horowhenua 2 (as we shall see in the next chapter). McDonald, who apparently was not present at the 29 June 1886 signing, also believed that the Government had agreed to Te Keepa’s terms, and told Muaūpoko so during the lead-up to partition.<sup>343</sup>

#### **4.3.5 Conclusion and findings: Did section 17 of the Native Lands Act 1867 provide an appropriate form of title and allow for communal control and management of the Horowhenua lands?**

The Crown has conceded that the native land laws did not provide a mechanism for community control of tribal lands, and that the individualisation of title made those tribal lands susceptible to alienation. Both concessions are entirely appropriate. The form of title awarded for the Horowhenua block in 1873 was not consistent with Treaty principles. As noted above, we agree with earlier Tribunal findings that the section 17 title ‘should not be mistaken for the effective granting of a form of tribal title . . . since that instead required the creation of a truly corporate title,

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340. Luiten, ‘Political Engagement’ (doc A163), pp 146–147

341. Ballance, 21 June 1888, AJHR, 1888, I-5B, p 12 (Luiten, ‘Political Engagement’ (doc A163), p 147). The committee took some evidence in 1887 and further evidence in 1888 before making its report in August 1888: see AJHR, 1887 I-5A and AJHR, 1888 I-5B.

342. AJHR, 1896, G-2, pp 297–298

343. AJHR, 1896, G-2, pp 73–74

## 4.3.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

with tribal leaders installed as trustees.<sup>344</sup> The Muaūpoko tribe had put Te Keepa in the Horowhenua title as their trustee, to hold the land for them and protect it from piecemeal alienation. The native land laws, however, did not actually make Te Keepa a trustee. His sole legal power was to enter into leases for up to 21 years, but that was taken away in 1874 when the Native Land Act 1873 came into force.

In 1878, the Crown issued a proclamation that it was negotiating to purchase the Horowhenua block, prohibiting the owners from doing anything with their land other than sell it to the Crown. In Treaty terms, this Crown action was deeply flawed:

- ▶ The Crown did not consult with or obtain the agreement of the Muaūpoko owners to the imposition of a Crown purchase monopoly on their land.
- ▶ The justification for the Crown's proclamation was the payment of an advance of £20 to a single owner. This owner was not Muaūpoko's chosen trustee, Te Keepa. Crown counsel submitted that this single advance was 'somewhat unsatisfying' but technically all that was required to justify a proclamation of this kind under the 1877 Act.<sup>345</sup> The only other certain charges used to justify the proclamation were 'expenses' of various kinds, not advance payments at all, until eight years later in 1886 (when payments were made against the Taitoko block).

We find that these were not the good faith actions of an honourable Treaty partner towards its Muaūpoko Treaty partner. This breach of the partnership principle, however, did not result in significant prejudice until December 1886 when the Horowhenua block was partitioned, and will be considered further in the next chapter.

On the other hand, as the Crown has submitted, Crown purchasing efforts were not very active in the Horowhenua block during this period, despite the 1878 proclamation. The Crown submitted that section 17 tenure 'proved to be a more durable form of tenure protection than other forms of title at the time. The Crown focussed its purchasing efforts elsewhere where there were more willing sellers.'<sup>346</sup> This was partly because Te Keepa and some other Muaūpoko owners proved staunch opponents of land selling, but also partly because of the Crown's deal with the Wellington and Manawatu Railway Company. From the early 1880s, officials concentrated their efforts on persuading Te Keepa (or other owners) to apply for a partition so that the land could be subdivided, its title fully individualised, and sales facilitated.

The various pre-partition agreements – the 1,200-acre gift to Ngāti Raukawa, the 4,000-acre township deal, the 'gift' of the railway corridor, and the 800 acres for Sievwright – all required the endorsement of the other 142 Muaūpoko owners upon partition before they could be given effect. So we make no findings on those particular transactions at this point. We turn in the next chapter to the partition hearings in 1886, the resolution of these various deals (all of them 'void' under the terms

344. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, p 447; Waitangi Tribunal, *The Hauraki Report*, vol 2, p 699; see also claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 126

345. Crown counsel, closing submissions (paper 3.3.24), pp 148–149

346. Crown counsel, closing submissions (paper 3.3.24), p 151

of the 1873 Act), and the form of title on which Muaūpoko secured ownership of their partitioned lands – the latter a key factor which was to result in the loss of much Muaūpoko land on inequitable terms and to little lasting benefit for the tribe.





CHAPTER 5

**THE 1886 PARTITION OF HOROWHENUA AND  
THE COMPLETION OF PRE-1886 DEALINGS**

E RERE RĀ

*E rere rā te motu nei ki roto koia o Parihaka  
Nā Tohu rā i whakahaere mai nga tikanga  
i tere paepae ai te motu nei  
tō pikitanga kei te Pūrepo  
tō heketanga kei Toroanui  
kia whakarongo koe ki te reka mai o te kōrero  
Hei, hei, hei*

*Mātou tonu au ki a koe e Tohu  
e te ngākau whakapuke tonu,  
me aha ia rā e mā uru e  
ko te hau ka wheru, whakamōmotu  
e whiuwhiu ana kei te uru e, kei te tonga  
ka haramai i roto,  
ka koharihari  
Hei, hei, hei<sup>1</sup>*

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1. 'Following the migrations of Ngāti Toarangatira, Ngāti Raukawa and Te Ātiawa to Te Ūpoko o te Ika, the largest section of Muaūpoko settled in Horowhenua. This was about the time that the land wars arose between Māori and Pākehā. It was from this that revolutionary groups rose to prevent further loss of land such as the Kingitanga, the Hauhau movement and so on. One which reached Horowhenua was the Passive Resistance Movement lead by Te Whiti o Rongomai and Tohu Kākahi. Because of the troubles between Muaūpoko and Te Ātiawa at the beginning of the 1800s, many Muaūpoko did not support the movement, however, there were many that did. These people travelled to Parihaka to listen and support the people there and the movement. This waiata 'E rere rā' was composed by Muaūpoko at the time that they were travelling to Parihaka in support of Te Whiti o Rongomai and Tohu Kākahi.' : Sian Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko', not dated (doc A15(a)), p 55

## 5.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**5.1 INTRODUCTION**

In the previous chapter, we explained the circumstances in which the Native Land Court awarded title to the Horowhenua block in 1873. The Muaūpoko tribe had sought to protect their lands by using section 17 of the Native Lands Act 1867, but the protection offered by section 17 proved illusory. This was largely because of changes in the Native Land Act 1873. Among other things, these changes removed crucial powers of the rangatira who had been placed on the front of the section 17 certificate of title – in this case, Te Keepa Te Rangihwinui. Nonetheless, as we saw in chapter 4, Crown purchase agents found it too difficult to purchase individual interests, despite the 1878 proclamation of a monopoly. Legislation in 1882 made an application from Te Keepa the most practicable route for the Crown to obtain a partition (and sales). The Crown, therefore, along with the Wellington and Manawatu Railway Company, pressed Te Keepa to apply for partition. He was eventually persuaded in 1886, motivated by the Taitoko township deal, and the desire to foster his people's development through having a railway, settlers, and a township. As noted in chapter 4, the pressure of Te Keepa's debt to the lawyer Sievwright was also important in bringing about the partition application. There was internal pressure from Ngāti Pāriri as well.

In the present chapter, we assess the immediate outcomes of Te Keepa's application for partition in 1886, in light of the form of title available at that time. Under section 50 of the Native Land Court Act 1880, the Muaūpoko owners negotiated an out-of-court 'voluntary arrangement', resulting in the partitioning of Horowhenua into 14 blocks for various purposes. The new blocks would not, however, be held under Native Land Court certificates of title (formerly memorials of ownership) according to the terms of the Native Land Act 1873 and the amending 1880 Act.<sup>2</sup> Rather, the court used the Native Land Division Act 1882. Under this Act, all partitions were to be dealt with by way of a court order, signed and sealed, with a survey plan attached, which would vest the land in the owners named in the order.<sup>3</sup> The Act specified that 'the new instruments of title shall be Crown grants, or certificates under the Land Transfer Acts'.<sup>4</sup> This use of the Land Transfer Acts was repeated in the new Native Land Court Acts of 1886 and 1894, but registration was not automatic. The Hauraki Tribunal suggested that actual registration in the land transfer system was 'sporadic' in the late nineteenth century,<sup>5</sup> and this grew to be a very significant problem for Māori land,<sup>6</sup> but the court orders for Horowhenua in 1886 certainly resulted in land transfer titles.

Table 5.1 sets out the partitions discussed in this and later chapters (see also map 5.1), and summarises the original size and purpose of each partition.

2. For the form of title established under the Native Land Act 1873 and the Native Land Court Act 1880, see Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, chapter 8.

3. Native Land Division Act 1882, s4(2)

4. Native Land Division Act 1882, s10

5. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 753

6. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 428–429, 743–744, 767–770

In this chapter, we discuss how these partitions were decided and the form of title in which they were awarded. These are crucial issues for the Muaūpoko claims because, as we set out in the next chapter, around two-thirds of the Horowhenua block was lost to the tribe within 14 years of the partition. The great majority of this land loss occurred because of the form of title available in 1886, particularly the ruinous litigation which arose over the titles to Horowhenua 11, 14, and 6. We also assess the outcome of the pre-partition dealings discussed in the previous chapter (section 4.3.4), including the 1874 deed with McLean and the Taitoko township negotiations. Despite the supposed protection of section 17, these pre-1886 dealings resulted in the loss of 6,076 acres.

Key issues in dispute between the parties include:

- ▶ The claimants argued that the Crown abused its monopoly powers to acquire the Horowhenua 2 township block, the site of Levin. They alleged that the Crown reneged on an important earlier deal with Muaūpoko, in breach of Treaty principles. The Crown disagreed, maintaining that no deal had been finalised before the partition of Horowhenua in 1886, and that its Ministers and officials acted in good faith.
- ▶ The claimants alleged that the Crown ought to have intervened to assist with Te Keepa's debt to Sievwright, so that 800 acres of land would not have been lost to satisfy this debt. The Crown denied that it had any obligation to intervene in this way, or any responsibility for the alienation of land to meet a private debt.
- ▶ Some claimants argued that the Crown had a Treaty duty to obtain the consent of all owners to the 1874 McLean deed at the time of partition in 1886, and to provide the necessary independent advice in respect of Te Keepa's arrangement with the railway company (described in chapter 4). The claimants argued further that the Muaūpoko owners would never have agreed to the whole 'voluntary arrangement' if they had received proper, independent advice. The Crown, however, submitted that the railway deal was a private agreement, and that the Crown was entitled to deal with Te Keepa as rangatira in respect of the 1874 deed, without reference to the main body of owners. Crown counsel emphasised that the partitions were decided by the owners themselves, virtually unanimously.
- ▶ In respect of blocks where the owners intended to establish a trust, the claimants and Crown disagreed about whether the native land laws protected the interests of owners in the case of voluntary arrangements. They also disagreed as to whether the Crown ought to have intervened at the partition hearing to prevent a miscarriage of justice. The parties were in broad agreement, however, that the native land laws of 1886 did not provide an effective corporate management structure, and undermined tribal structures and control, in breach of the Treaty.

The Crown conceded that the 'individualisation of Māori land tenure provided for by the native land laws made the lands of Muaūpoko more susceptible

## 5.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Block	Acres	Original purpose of partition
1	76	Strip of land for the Wellington-Manawatu railway line
2	4,000	Township block (Taitoko, later Levin), awarded to Te Keepa
3	11,130	106 Muaupoko to have shares of 105 acres each, for leasing
4	510	In the Tararua Ranges, for 30 Ngati Hamua individuals
5	4	In the Tararua Ranges, for two Rangitane individuals
6	4,620	44 rerewaho (left out in 1873) to have 105 acres each for leasing, awarded to Te Keepa to transfer to them
7	311	In the Tararua Ranges, for three Rangitane individuals
8	264	In the Tararua Ranges, for three individuals
9	1,200	At Raumatangi, for the descendants of Te Whatanui, awarded to Te Keepa to transfer to them (giving effect to the 1874 deed with Native Minister Donald McLean)
10	800	Next to Horowhenua 2, for Sievwright (to satisfy legal debts)
11	14,975	The tribal block west of the railway (with Lake Horowhenua), awarded to Te Keepa and Warena Hunia
12	13,000	The Tararua Ranges, awarded to Ihaia Taueki
13	0	One square foot in the Tararua Ranges, awarded to an individual whose name was supposedly duplicated in the 1873 list
14	1,200	East of the railway line, near Ohau, awarded to Te Keepa

Table 5.1: Partitions of the Horowhenua Block, 1886

to fragmentation, alienation, and partition, and contributed to undermining Muaūpoko tribal structures, which was in breach of the Treaty.<sup>7</sup> The Crown also conceded that the cumulative effect of its acts and omissions, including Crown purchasing and the native land laws, resulted in landlessness. This was a breach of Treaty principles.

We begin by setting out the parties' arguments on these and other issues in more detail (section 5.2), then proceed to analyse the partitions and the pre-partition dealings (sections 5.3–5.7) before making our findings (section 5.8).

As noted in chapter 4, we do not address any Ngāti Raukawa claims about the Horowhenua block at this point in our inquiry. Our discussion of the 1874 McLean deal and the partitioning of Horowhenua 9 is focused on Crown acts or omissions in respect of Muaūpoko. Ngāti Raukawa's claims will be addressed later in our inquiry.

## 5.2 THE PARTIES' ARGUMENTS

### 5.2.1 Did Muaūpoko owners agree to the 1886 partitions?

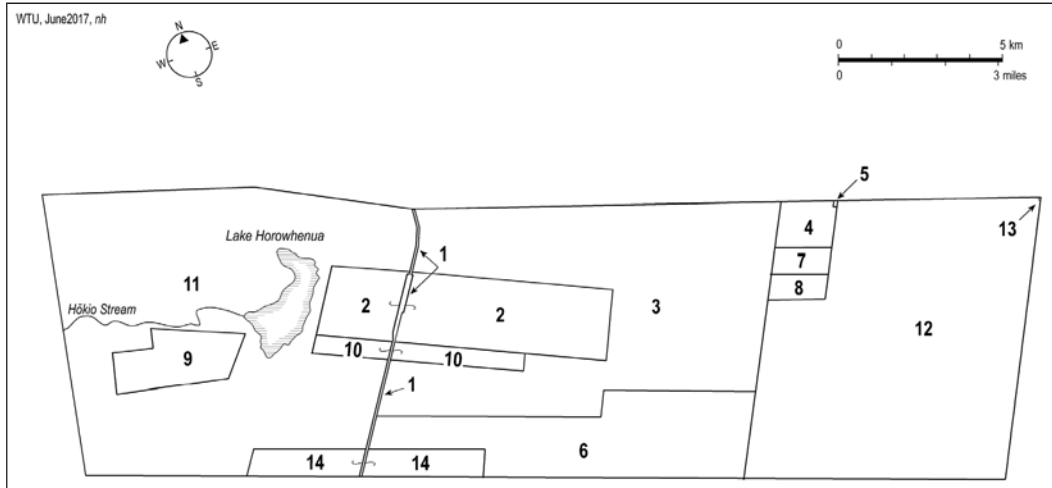
In the claimants' view, Muaūpoko agreed to the various partition arrangements in 1886 because of their strong support for the Taitoko township deal and its expected benefits. This included the proposal that the purchase money would pay for the

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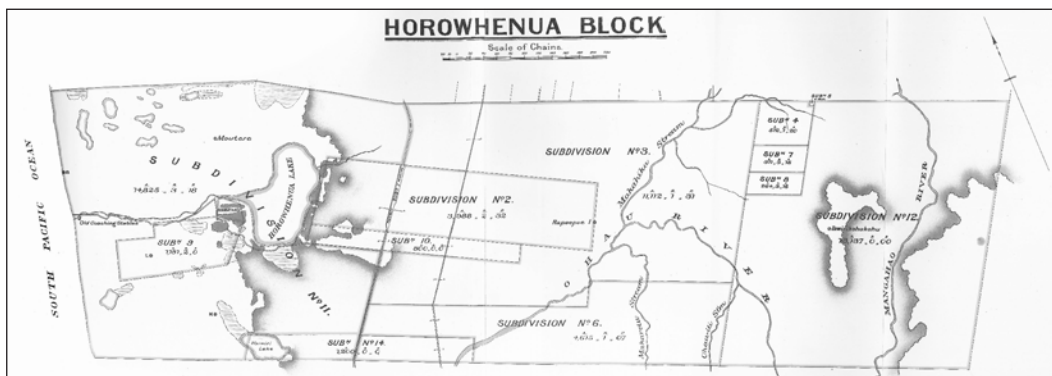
7. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 153

THE 1886 PARTITION OF HOROWHENUA

5.2.1



Map 5.1: The 14 partitions of the Horowhenua Block



Plan of the 1886 partitions, appended to the proceedings of the Horowhenua Commission, 1896

AJHR, 1896, G-2

partition surveys.<sup>8</sup> Claimant counsel submitted that ‘if Muaupoko were aware that the Crown would renege and not keep the township conditions the partition would not have happened.’<sup>9</sup> Some claimants criticised the fact that the court did not hold an inquiry into the merits of the various partitions. They argued that this enabled some owners to benefit at the cost of others – in particular Te Keepa and Warena Hunia in what was later treated as their private ownership of Horowhenua 11.<sup>10</sup>

While there was evidence of ‘consent and unanimity amongst Muaūpoko with respect to the partitions sought’, counsel submitted that “‘informed consent” was lacking.”<sup>11</sup> This was especially so because Muaūpoko were misled by the Crown

8. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions, 12 February 2016 (paper 3.3.11), pp14–16

9. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.11), p15

10. Claimant counsel (Lyall and Thornton), closing submissions, 15 February 2016 (paper 3.3.19), pp 21, 22–25

11. Claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), p128

## 5.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

(and, it was submitted, by the section 17 title-holder, Te Keepa) into accepting some partitions that were of ‘less benefit to the iwi’, due to the expected benefits from partitioning Horowhenua 2.<sup>12</sup> Claimant counsel submitted that Muaūpoko were also misled by Alexander McDonald, who had a serious conflict of interest and whose role casts doubt on whether a properly informed voluntary arrangement was made out of court. Most importantly, Muaūpoko were advised at the partition hearing by the under-secretary of the Native Department, T W Lewis, who also had a serious conflict of interest. Instead of these compromised advisers, we were told, the Crown ought to have ensured that Muaūpoko received independent advice and assistance. In the claimants’ view, this omission was a breach of the Crown’s Treaty duty of active protection.<sup>13</sup>

Crown counsel did not accept that there was any necessity for the court to have inquired into the merits of the partition when presented with a tribally agreed scheme.<sup>14</sup> Nor did Crown counsel accept that the Crown ought to have intervened in the partition process:

Notwithstanding some claims being made concerning whether the Native Land Court should have looked behind the agreement brought to it by Muaūpoko, the evidence is clear that the agreement was a voluntary one and had broad (if not consensus) support amongst Muaūpoko. The decisions of the Native Land Court are not decisions of the Crown. There was no reason, at the time of the partition proceeding, for the Crown to have intervened to prevent Muaūpoko putting forward their voluntary agreement to be formalised by the Court.<sup>15</sup>

In the Crown’s view, there is more merit in the claim that the form of title granted as a result of the partitions ‘made the lands of Muaūpoko more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Muaūpoko.’<sup>16</sup> But the Horowhenua situation was complicated by ‘the apparent aspirations (at least in relation to Horowhenua 11 and 12) for some form of trust arrangement to remain in place.’<sup>17</sup>

### 5.2.2 Completing the pre-partition deals while under the Crown’s monopoly proclamation

#### (1) Introduction

In chapter 4, we examined the following pre-partition deals:

- ▶ Te Keepa’s gift of land to the Wellington and Manawatu Railway Company for the railway line (section 4.3.4(5));
- ▶ Te Keepa’s negotiations with the Crown over the Taitoko township block in 1886, which led directly to the partition (section 4.3.4(5));

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12. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 128, 130–132

13. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 132–135

14. Crown counsel, closing submissions (paper 3.3.24), pp 152–155

15. Crown counsel, closing submissions (paper 3.3.24), p 152

16. Crown counsel, closing submissions (paper 3.3.24), p 153

17. Crown counsel, closing submissions (paper 3.3.24), p 153



- ▶ Te Keepa's debt to his lawyer, Sievwright, and the arrangement to give Sievwright 800 acres of the Horowhenua block (section 4.3.4(4)); and
- ▶ Native Minister Donald McLean's deed of 1874, by which Te Keepa agreed with the Crown to gift 1,300 (or 1,200) acres to Ngāti Raukawa (section 4.3.4(2)).

The claimants and the Crown differed significantly in their view of how these pre-partition deals were completed in 1886–87, and of whether this was done in a Treaty-compliant manner. Their submissions on this matter are summarised briefly in this section.

### **(2) *The railway corridor (Horowhenua 1)***

There was a difference of opinion among the claimants about Te Keepa's gift of land to the company for the railway line. According to some, the gift was necessary to obtain the anticipated benefit of the railway and township, and there was 'no evidence of any large, private benefit accruing to Te Keepa' from his arrangement with the company.<sup>18</sup> Other claimants submitted that the gift was presented to Muaūpoko as a 'fait accompli', that the tribe had little choice but to agree if they wanted the township, and that Muaūpoko were never paid for the loss of this land. These claimants also pointed out that no transaction under the 1873 title could be enforced in 1886 unless the other owners agreed to it, but that the Crown failed to provide them with access to the necessary independent advice at the time of the partition hearing.<sup>19</sup>

In the Crown's view, the evidence was unclear as to whether Te Keepa made a free gift or received something in return for his agreement with the company. But this was not the Crown's business: Te Keepa's gift was a private arrangement to which the Crown was not a party.<sup>20</sup> The transfer of the land then became part of a 'voluntary arrangement endorsed by Muaūpoko and brought to the Native Land Court in 1886'.<sup>21</sup>

### **(3) *The Crown's purchase of the township block (Horowhenua 2)***

The claimants in our inquiry were particularly critical of the Crown's actions in respect of the township purchase. This was a major grievance for all of Muaūpoko. They emphasised the role of the 1878 monopoly proclamation (see section 4.3.4(3)). The continued existence of this proclamation, they argued, forced Te Keepa to 'accept less than half the market value for the 4,000 acres of Horowhenua 2'.<sup>22</sup> In the claimants' view, the proclamation also enabled the Crown to exploit Te Keepa's financial difficulties and renege on its earlier agreement for every tenth section in the planned town to be for Māori owners, joint administration, and a school.<sup>23</sup>

Grievances in respect of the township purchase were summarised as:

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18. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2: Horowhenua issues 1873 to 1898, 15 February 2016 (paper 3.3.17(a)), p18

19. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp136–139

20. Crown counsel, closing submissions (paper 3.3.24), pp159–161

21. Crown counsel, closing submissions (paper 3.3.24), p162

22. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.11), p11

23. Claimant counsel (Ertel and Zwaan), closing submissions, 12 February 2016 (paper 3.3.13), p14

## 5.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

- ▶ The Crown illegally maintained a proclamation over the Horowhenua Block purporting to prevent private sales;
- ▶ The Crown entered into an agreement for a township on ‘Taitoko’ lines in order to secure Te Keepa’s agreement to seek subdivision and subsequent sales to the Crown in the Horowhenua block;
- ▶ The Crown advanced funding to commence the subdivision application and explained the Taitoko proposal both to owners and the Native Land Court to assist in obtaining the necessary subdivision orders to advance it;
- ▶ The Crown cynically used the issue of Te Keepa’s debts to delay the purchase (Te Keepa had placed himself under pressure, but the government manipulated the situation – Vogel’s intervention in particular was cynical);
- ▶ The Crown also relied on its illegal proclamation against private sales to help in forcing Te Keepa to accept its terms for the sale of the township land;
- ▶ Ballance approved a last minute provision in the sale and purchase agreement to rule out any argument that the Crown should follow through on any aspects of the ‘Taitoko’ proposal in its layout of the township;
- ▶ The Crown subsequently pretended that the ‘Taitoko’ proposal was an entirely private initiative between Te Keepa and the railway company, in order to avoid any legal requirement to hand the land over to the railway company or otherwise compensate it.<sup>24</sup>

Crown counsel did not accept any of these criticisms. The Crown maintained that there was no evidence that it had ever ‘actually agreed to, or accepted, all of the terms Te Keepa “brought to the table”’ back in June 1886.<sup>25</sup> Rather, it was ‘not clear exactly what, if any, agreement may have been reached concerning the Crown acquisition of the township lands in the lead up to the partition hearing.’<sup>26</sup> Crown counsel pointed to the evidence of Ballance and Lewis in 1887 that there had been no purchase negotiations before the partition, and also to the memorandum signed by the Crown and Te Keepa in July 1887.<sup>27</sup> In the Crown’s view, it was also ‘not clear whether advances paid to Te Keepa immediately prior to the partition hearing were paid in consideration for interests to be acquired by the Crown in Horowhenua block 2.’<sup>28</sup> While the Crown accepted that Lewis spoke of an ‘arrangement’ at the partition hearing, the contents of that arrangement were not stated, and Te Keepa may have misrepresented the position in claiming that the Crown had agreed to his terms.<sup>29</sup>

In respect of completing the purchase in 1887, the Crown argued that the proclamation had no effect and the price reflected a valuation made at the time by the chief surveyor. Crown counsel suggested that it was ‘unclear whether the forests

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24. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), pp 42–43

25. Crown counsel, closing submissions (paper 3.3.24), p 163

26. Crown counsel, closing submissions (paper 3.3.24), p 164

27. Crown counsel, closing submissions (paper 3.3.24), p 164

28. Crown counsel, closing submissions (paper 3.3.24), p 165

29. Crown counsel, closing submissions (paper 3.3.24), p 165

factored into this valuation.<sup>30</sup> Although Te Keepa was unable to sell the block on the open market (because of the proclamation), the Crown could not in any case have paid more than what the chief surveyor assessed as ‘the value of the property’.<sup>31</sup>

The Crown also argued that it had no knowledge at the time that Te Keepa’s final agreement to the sale was ‘on terms inconsistent with the wishes’ of many Muaūpoko.<sup>32</sup> In the Crown’s submission, it was reasonable for it to have dealt with Te Keepa as the leader and representative of his community. Further, Crown counsel suggested that it was *Te Keepa* who was ‘primarily responsible for departing from the earlier proposed terms held out to Muaūpoko’.<sup>33</sup>

#### **(4) *The transfer of Horowhenua 10 (the debt block) to Sievwright***

In the claimants’ view, the ‘lack of Crown support or assistance in dealing with the debts accrued by Te Keepa’ was a ‘major concern’.<sup>34</sup> The Crown had ‘options available to it to help alleviate the predicament that Te Keepa found himself in, but rather than doing so, the Crown refused to intervene’.<sup>35</sup> Te Keepa’s requests for cash or other assistance were in vain.<sup>36</sup> In particular, the claimants submitted that the Crown should not have encouraged Te Keepa to apply for partition before it was in a position to complete the township purchase, the proceeds of which could have been used (in part) to settle the debt. The loss of Horowhenua 10 was one price Muaūpoko paid for the Crown’s refusal to complete the township purchase or waive its proclamation so that the township block could be sold privately and at market prices. In the claimants’ view, the Crown prioritised its own interests and failed to actively protect those of Muaūpoko.<sup>37</sup> The Crown should not have used ‘the contract with the Company as a shield against its failure to act’.<sup>38</sup>

Some claimants were also critical of Te Keepa’s actions,<sup>39</sup> and argued that Muaūpoko were not fully informed when they consented to the alienation of Horowhenua 10.<sup>40</sup>

Crown counsel submitted that the Crown was not responsible for ‘Te Keepa’s decision to satisfy his debt incurred to Sievwright through the Whanganui dealings by dealing with a portion of the Horowhenua block’.<sup>41</sup> In the Crown’s view, it was also entirely reasonable for it not to risk losing the township land to the railway company simply to assist Te Keepa out of debts arising outside the inquiry district.<sup>42</sup>

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30. Crown counsel, closing submissions (paper 3.3.24), p 166

31. Crown counsel, closing submissions (paper 3.3.24), p 166

32. Crown counsel, closing submissions (paper 3.3.24), p 167

33. Crown counsel, closing submissions (paper 3.3.24), p 168

34. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 153

35. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 155

36. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), pp 31–33

37. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 155–158

38. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply, 15 April 2016 (paper 3.3.29), p 41

39. Claimant counsel (Lyall and Thornton), closing submissions (paper 3.3.19), p 22

40. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 153–155

41. Crown counsel, closing submissions (paper 3.3.24), pp 153–154

42. Crown counsel, closing submissions (paper 3.3.24), pp 171–172

Further, Crown counsel emphasised that Muaūpoko at the time had been united in their unconditional support of Te Keepa's decision to meet his private debts in this way. Thus, in the Crown's view, it bore no responsibility for the alienation of Horowhenua 10.<sup>43</sup>

**(5) *The 1874 transaction with McLean for 1,200 acres (Horowhenua 9)***

We have already summarised the parties' arguments in respect of the 1874 transaction in chapter 4 (section 4.3.2(3)). We add here that, in the view of some claimants, the Crown ought to have intervened at or before the partition hearing to ensure that it had obtained the consent of all Muaūpoko owners to the 1874 deed. This included a duty to do so at or before the partition hearing.<sup>44</sup> Crown counsel, on the other hand, maintained that the Crown was correct to deal with Te Keepa in 1874,<sup>45</sup> and pointed to Muaūpoko's 'unanimous support to Te Keepa's gift of lands being honoured as part of the 1886 partition.'<sup>46</sup>

We turn next to our analysis of Muaūpoko's claims about the partition and the completion of the pre-partition dealings.

**5.3 DID MUAŪPOKO OWNERS AGREE TO THE 1886 PARTITIONS?**

After Te Keepa's application at the end of June 1886, a hearing was scheduled for August 1886. Te Keepa was too ill to attend, however, so it was moved to November. By this time, the railway had opened. The Muaūpoko owners were brought by rail to Palmerston North, two weeks in advance of the hearing, and camped out in the barn at the property of Alexander McDonald's son-in-law, Palmerson. Te Keepa, who was still unwell, stayed in the house with McDonald. It is not known exactly who was present but it does appear to have been the majority of the Muaūpoko registered owners.<sup>47</sup>

According to both Te Keepa and Te Rangimairehau, Ihaia Taueki was present at Palmerson's place for the discussions that took place before the hearing.<sup>48</sup> Raniera Te Whata stated that Ihaia was present for the discussions but 'did not go into Court'.<sup>49</sup> Some Muaūpoko had become followers of the Taranaki prophets Te Whiti and Tohu, and were absent at Parihaka. At least one owner, Himiona Kowhai, is known to have refused to participate in the court because of the prophets' teachings.<sup>50</sup> According to Rod McDonald, Ihaia Taueki was extremely torn between

43. Crown counsel, closing submissions (paper 3.3.24), p172

44. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 147–152

45. Crown counsel, closing submissions (paper 3.3.24), pp 142, 169–170

46. Crown counsel, closing submissions (paper 3.3.24), p170

47. Jane Luiten with Kesaia Walker, 'Muaupoko Land Alienation and Political Engagement Report', August 2015 (doc A163), pp 148–153

48. AJHR, 1897 G-2, pp 16, 24

49. AJHR, 1896, G-2, p 102

50. AJHR, 1897, G-2, pp 15–16, 18, 24, 41, 68; Luiten, 'Political Engagement' (doc A163), pp 148–149 n

Parihaka and his loyalty to the Anglican Church.<sup>51</sup> Taueki whānau tradition holds that Ihaia Taueki was a supporter of the prophets, and was believed to have composed the waiata *E Rere Ra* (see the beginning of this chapter for the words of this waiata).<sup>52</sup> In 1986, the Victoria University Maori Studies Department noted: ‘*E rere ra te motu nei* is a waiata composed by the Muaupoko tribe of the Otaki coast. This tells of the highest regard that they and others of Aotearoa held for him [Tohu] his strength and doctrines.’<sup>53</sup>

In her evidence to the Tribunal, Sian Montgomery-Neutze said that *E Rere Ra* is a ‘waiata-a-iwi’, the composer of which is not necessarily known, but that it is a Muaupoko waiata. As she interpreted it, the waiata spoke of the Muaupoko plight as well as that of Parihaka, and its reference to ‘harsh’ southern winds referred to the Government’s actions towards Muaupoko as well as towards Parihaka.<sup>54</sup> In any case, it is quite possible that Ihaia Taueki’s belief in the teachings of Tohu and Te Whiti did not permit him to attend the 1886 court hearing, although he is known to have been present for discussions outside the court.

While some among Muaupoko supported Parihaka, Te Keepa made it clear that he was not a ‘Te Whitiite’.<sup>55</sup> This suggests a continuation of the long-running and powerful divergence of view within the iwi, with some having supported the Kingitanga, Pai Mārire, and now Parihaka, while others supported the Crown and sought to engage fully (with its assistance) in the colonial economy. There seems to have been broad agreement, however, that land should at least be leased, and Ihaia Taueki received and distributed some of the rental payments from McDonald’s lease in the 1880s.<sup>56</sup>

The key question for us to consider here is whether, apart from those absent at Parihaka, the Muaupoko owners discussed the proposed partitions among themselves and reached a consensus on how the land should be divided and in whose names it should be vested. From the evidence available, as presented at nineteenth-century inquiries and reported on to us by Jane Luiten and other historians, it seems clear that the partition arrangements were fully discussed and broadly agreed among the tribe. Consensus was reached on some things before the hearing began in November 1886, during the discussions the previous fortnight. For other matters, the court had to adjourn to allow the tribe to debate and decide matters that remained in dispute. But Ms Luiten’s evidence was clear that consensus

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51. E O’Donnell, *Te Hekenga: Early Days in Horowhenua: Being the Early Reminiscences of Mr Rod McDonald* (Palmerston North: GH Bennett & Co, 1929), p186. Although McDonald recalled that Ihaia Taueki’s mind gave way and he died within a year, that was clearly incorrect as Ihaia Taueki was still alive at the time of the Horowhenua commission in 1896, although elderly and infirm by then.

52. William James Taueki, brief of evidence, 11 November 2015 (doc c10), pp 24–26

53. Department of Maori Studies, Victoria University, *Te Whakatuwheratanga o Te Tumu Herenga Waka: 6 Tihema 1986, Poneke, Te Whare Wananga o Wikitoria*, 1986, p 31

54. Sian Montgomery-Neutze, brief of evidence, 16 November 2015 (doc c16), pp 9–10

55. AJHR, 1896, G-2, p 31

56. AJHR, 1898, G-2A, pp 17, 19



## 5.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

was eventually reached on all important matters.<sup>57</sup> Judge Wilson later recalled that he had not seen a more unanimous proceeding,<sup>58</sup> and the evidence supports this conclusion.

As noted above, however, some transactions were presented to the iwi as a *fait accompli* (see section 4.3.4(2)). The owners had little choice but to agree to these transactions after the event or risk damaging the standing of one of their principal leaders (and chosen trustee), Te Keepa. In the case of the Sievwright debt, there was even the possibility of imprisonment. We discuss the partition arrangements for those transactions in section 5.4. There was also clear agreement that the Ngāti Kahungunu, Ngāti Apa, and Rangitāne names in the list should be located ‘on to the mountains’ and not in the core, coastal lands. This decision was made by the Muaūpoko owners (the other iwi were not present) and put to Te Keepa for his agreement.<sup>59</sup> These partitions are discussed in section 5.5. Other blocks were to be held in trust by named rangatira, although there was some disagreement at the time about exactly which rangatira. This disagreement, again, was resolved by discussion outside the court. Those partitions are discussed in section 5.6. Finally, Muaūpoko ‘experiment[ed] with individualised title for economic gain’, as Ms Luiten put it.<sup>60</sup> A committee drew up a list of names for individual sections, and also a list of the ‘rerewaho’ to receive similar individual sections, arrangements with which Te Keepa agreed. Thus, one intention of the owners was to reinstate those who had been left out of the title by mistake in 1873.<sup>61</sup> These partitions are dealt with in section 5.7.

Thus, Muaūpoko exercised considerable control over the partitioning of Horowhenua, largely through out-of-court discussions which were in effect rubber stamped by the court as ‘voluntary arrangements’. We discuss the legislative provisions under which this occurred in section 5.6, and test the extent to which the Crown and the native land laws provided for what Muaūpoko sought to achieve. In particular, it soon emerged that lands supposedly vested in rangatira as trustees were actually their absolute property, with disastrous results for Muaūpoko.

## 5.4 COMPLETING THE PRE-PARTITION DEALS WHILE UNDER THE CROWN’S MONOPOLY PROCLAMATION

### 5.4.1 Introduction

As discussed earlier, two contradictory legal regimes governed the Horowhenua block. First, section 17 of the 1867 Act (as modified in 1873) made the block inalienable until it was partitioned, except for short-term leases. Any other pre-partition transactions were legally ‘void’. Secondly, the Crown proclaimed the Horowhenua block as under negotiation for purchase in 1878, despite its inalienability. The proclamation was made under the Government Native Land Purchases Act 1877, and it

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57. Luiten, ‘Political Engagement’ (doc A163), pp 148–173

58. AJHR, 1897, G-2, p 11

59. AJHR, 1897, G-2, p 16

60. Luiten, ‘Political Engagement’ (doc A163), p 149

61. Luiten, ‘Political Engagement’ (doc A163), pp 150–151, 160



forbade any dealings at all except alienation to the Crown. Prior to the proclamation, Te Keepa had signed a deed with the Crown to alienate 1,200 acres to Ngāti Raukawa. He had also renewed McDonald's lease. After the proclamation, Te Keepa entered into two deeds for the alienation of 876 acres, neither of which were transacted with the Crown. He also opened negotiations with the Crown for the sale of a further 4,000 acres. These pre-dealings were all dubious and technically 'void', since Te Keepa had no legal authority to enter into them on his own, and there was no legal authority for those kinds of transactions in any case. This created the kind of tangle that was not uncommon under the native land laws. What purchasers usually relied upon (including the Crown) was that any pre-partition dealings would be given legal effect *at the time of partitioning*. In this particular case, it was also hoped that the rest of the 143 registered owners would consent to the dealings post facto, and that the Crown could be persuaded to waive its proclamation to allow the private alienations to be given effect. We deal with each pre-partition deal in turn.

#### 5.4.2 The railway corridor (Horowhenua 1)

In 1897, Te Rangimairehau testified that Muaūpoko 'knew nothing of the Railway Company'.<sup>62</sup> Crown counsel pointed out that this could not have been literally so, since the line was under construction across the Horowhenua block and 'Muaupoko travelled by train to the hearing'.<sup>63</sup> But the point at which the tribe became aware of the nature of Te Keepa's arrangements with the company is not known. During the debate among the owners before the partition hearing, Muaūpoko apparently agreed to the transfer of 76 acres to the company, as negotiated by Te Keepa, but well after the event.<sup>64</sup>

Even now, the exact nature of the terms agreed between Te Keepa and the company is uncertain. Judge Wilson recalled in 1897: '[Horowhenua] No 1 was ordered in favour of Kemp for Manawatu Railway. I do not know what the consideration was to be, or who was to receive it. I do not think the tribe was to get anything out of it'.<sup>65</sup>

What this reveals is that no trust commissioner check was made of the transaction. The judge who approved it – and who ought to have performed these checks for a transaction completed or conducted at a hearing – did not know what the payment was or who was to receive it, and believed that the registered owners were not to 'get anything out of it'. T W Lewis, Native Department under-secretary, was present at court when Horowhenua 1 was ordered for Te Keepa on this basis, but took no action to protect the vendors' interests.

It emerged at the December 1886 hearing that Te Keepa had signed a deed and may or may not have received promised shares in the railway company. On the one hand, Te Keepa maintained that the land for the railway was a gift so that the

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62. AJHR, 1897, G-2, p 22 (Luiten, 'Political Engagement' (doc A163), p 156)

63. Crown counsel, closing submissions (paper 3.3.24), p 161

64. AJHR, 1897, G-2, p 18

65. AJHR, 1897, G-2, p 11

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district could be developed.<sup>66</sup> On the other hand, the 1886 court minutes show that Te Keepa was promised shares in the company as payment. This information emerged because, on 2 December 1886, McDonald sought a change to the previous order. He now wanted the railway block vested directly in the company instead of Te Keepa. Te Keepa asked for clarification as to what this new application meant. The court minutes originally stated: 'I did take Railway shares', but at some point they were altered to state: 'I was advised to take Railway shares'. Te Keepa wanted to know whether the proposed order meant that the company would 'retain my shares'. It was 'understood', he added, that he would receive '76 paid up shares' worth (he believed) £1 each, 'in consideration of their getting the land'.<sup>67</sup>

McDonald withdrew his application at that point.<sup>68</sup> Outside the court, McDonald called Te Keepa 'everything I could lay my tongue to'. Testifying later before the Horowhenua commission in 1896, McDonald said that Te Keepa had produced a deed in court on 2 December 1886, in which a promise of 15 shares had been fraudulently altered to 76, and this had forced him to withdraw his application. McDonald feared (he said) that Judge Wilson might think him guilty of forgery. McDonald understood that Te Keepa had been paid £1, and that the 15 shares could not be paid up at the time the deed was made. He wanted Te Keepa to give oral evidence in 1886 that he agreed to transfer the land to the company for 15 shares, but Te Keepa insisted on relying upon the 'tampered with' deed for 76 shares (one share per acre).<sup>69</sup> In the event, McDonald negotiated out of court with Te Keepa and produced a new deed on 3 December 1886, which was read out in court and signed by Te Keepa, after which the court awarded Horowhenua 1 to the railway company. Neither deed could be located by the researchers in our inquiry.<sup>70</sup>

As noted earlier, Judge Wilson did not know if any consideration was actually paid to Te Keepa, but believed that the other owners would receive nothing at all when he made the order. The Crown had no objections to make before the order was made. The question of whether Te Keepa actually received shares has been clarified, at Dr Young's suggestion, by checking the company's shareholder register at Archives New Zealand.<sup>71</sup> This showed that in 1889 and 1896, Te Keepa appeared on the shareholder list as the owner of 15 shares.<sup>72</sup>

The other Muaūpoko owners came out of the 1886 partition hearing uncertain as to what had finally transpired, but it is certain that they received no payment. Te Rangimairehau stated in 1897:

66. Grant Young, answers to written questions from the Tribunal, 14 January 2016 (doc A161(d)), pp 8–10

67. Ōtaki Native Land Court, minute book 7, 2 December 1886, fols 195–196 (Crown counsel, document collection (doc B3), pp 17–18)

68. Ōtaki Native Land Court, minute book 7, 2 December 1886, fol 196 (Crown counsel, document collection (doc B3), p 18)

69. AJHR, 1896, G-2, p 76

70. Luiten, 'Political Engagement' (doc A163), p 156

71. Young, answers to written questions from the Tribunal (doc A161(d)), pp 8–10

72. The Wellington and Manawatu Railway Company Ltd, 'Annual List and Summary made up to 28th February, 1889', ADSN 17631 CO-WW3445, box 5a, Archives New Zealand, Wellington; The Wellington and Manawatu Railway Company Ltd, 'Annual List and Summary made up to March 17th, 1896', ADSN 17631 CO-WW3445, box 5b, Archives New Zealand, Wellington

I do not know who the land on the railway was awarded to. We agreed outside the Court to give it to Taitoko (Kemp). We knew nothing of the Railway Company. McDonald was present when the matter was discussed and arranged. I understood that Kemp was to hold the land as a trustee; but it appears now that I was wrong. I have lately heard that the land has been conveyed to the Railway Company. I do not know who has the money for the land. This was the first division allotted to Kemp [in November 1886].<sup>73</sup>

Crown counsel submitted that the railway company was not a Crown agent, and that the Crown was not responsible for this private deal between Te Keepa and the company.<sup>74</sup> We agree. But the Crown was responsible for the native land laws which allowed a transaction to be approved in which only one of 143 owners received payment. The claimants rightly pointed out that a more effective collective title in 1873 would have ensured the involvement of all in such decisions and might have made the land much harder to alienate.<sup>75</sup> That being said, all sides admitted in 1896 that the land was intended as a gift to the company which would bring prosperity to the tribe and the district. Wirihana Hunia and Te Keepa both testified that Te Keepa gifted the land for the railway.<sup>76</sup> Hunia stated that Te Keepa, ‘not as payment for the land but as a complimentary return for his gift, got fifteen shares in the railway’.<sup>77</sup> That being the case, and the tribe having approved the gift in 1886, we do not think any Treaty issues arise from the Crown’s actions or inaction in respect of Horowhenua 1.

The claimants also pointed out that Muaūpoko did not actually benefit from the development brought by the railway, but that was not the fault of the gift but of Crown actions which followed it – in particular the terms on which the Crown purchased the township block and denied Muaūpoko a stake in its future, which we discuss next.

#### **5.4.3 The Crown’s purchase of the township block (Horowhenua 2)**

David Armstrong explained Te Keepa’s hopes for the township deal as the cornerstone of his partition application, together with legalising the railway and placing the core, coastal lands into a new trust:

Setting aside 4,000 acres for Levin Township was one of the primary reasons for Keepa’s 1886 subdivision application. He planned to use the sale proceeds to cover the cost of Muaupoko attendance at the Court, to pay survey charges and to pay off pressing debts. But more importantly he was eager to locate a township adjacent to the new railway line. Once the township was established the surrounding Muaupoko land (which would be held in trust) would significantly increase in value and a new

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73. AJHR, 1897, G-2, p 22

74. Crown counsel, closing submissions (paper 3.3.24), pp 153–154, 161–162

75. Claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p 23

76. AJHR, 1896, G-2, pp 56, 182

77. AJHR, 1896, G-2, p 56

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and potentially lucrative market for the iwi would be opened up. Keepa proposed that every tenth township section would be retained by iwi members. A further condition was that land would be set apart for a school for Muaupoko and settler children. The township would thus not only secure Muaupoko economic wellbeing, but also reflected Keepa's vision of a prosperous bi-cultural Horowhenua community, based on partnership, reciprocity and mutual advantage.<sup>78</sup>

According to the claimants, the Crown had a clear obligation to assist, given its knowledge of the importance and details of Te Keepa's township plan since June 1886:

The Crown had viewed a specific plan for settlement in the block. The 'Taitoko' proposal was drawn up with the assistance of Alexander McDonald. It was an innovative partnership proposal.

Given the unusual circumstances, that is, a tribe agreeing to a railway development and presenting a detailed plan for combined European and tribal settlement, it represented an important moment for the Crown to consider and fulfil its Treaty duties.

The Crown could and would legislate for such enterprises when it wanted. For example the Native Townships Act 1895 (even with all of its deficiencies). But the Muaupoko plan sought to utilise the existing legal tools available. There was no additional cost to the Crown. The prices sought were market prices. The tribe was well represented and cohesive.<sup>79</sup>

The Crown, however, faced a significant dilemma of its own making. On the one hand, it did not want the railway company to get the 4,000 acres and the profit of on-selling sections to settlers, so it needed to delay the purchase until after the expiry of its five-year contract in March 1887. On the other hand, if it *did* delay, Sievwright might steal a march on the Crown and establish his own township on his 800 acres. Thirdly, the Crown did not want to pay 'market prices', as sought by Te Keepa, and so needed to maintain its monopoly proclamation despite being unwilling to actually purchase land until the contract was up. These three factors governed the Crown's approach to the partition of Horowhenua 2, rather than any concern for the interests of Muaupoko. Its Ministers and officials tried to prevent Te Keepa from paying his debt to Sievwright in land while nonetheless refusing to assist him by lifting the proclamation, offering financial assistance, or completing the township purchase.<sup>80</sup>

Jane Luiten summarised the result: 'Once the subdivision was made, the Crown's continuing monopoly forced him [Te Keepa] to accept less than half his asking price for the 4,000 acres of Horowhenua 2 earmarked for a township, as well as to

78. D Armstrong, 'Muaupoko "Special Factors": Keepa's Trusteeship, the Levin Township Sale and the Cost of Litigation', not dated (doc A155), p 3

79. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), p 19

80. Luiten, 'Political Engagement' (doc A163), pp 158–159, 163–165, 176–178; Armstrong, 'Special Factors' (doc A155), pp 4–5, 8–10; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), pp 29–41

forfeit important conditions attached to the township proposal.<sup>81</sup> This was a bitter pill for Muaūpoko to swallow.

The township deal was fully discussed and agreed to by Muaūpoko before the first court sitting in November 1886. Alexander McDonald later explained that what Muaūpoko agreed to were the terms as first presented by Te Keepa to Ballance on 25 June 1886 (see section 4.3.4(5)). McDonald had explained the tenths to them not just as quarter-acre town sections but also as every tenth of all the sections, which included larger rural blocks. In addition, the people agreed that the purchase money would be used to survey all the other partitions; any left over would be divided among the tribe.<sup>82</sup> So enthused were the people at the prospect of a township and economic development that this deal ‘smoothed the way’ for the rest of the partitioning process.<sup>83</sup>

As noted earlier, the township deal and the railway corridor were dealt with at the first hearing in November 1886. After the first day, however, the assessor had to be replaced and so the partitions had to be reconfirmed when the court sat again at the beginning of December.<sup>84</sup> Native Department Under-Secretary Lewis appeared in court to support the township block partition (and the 1874 gift to Ngati Raukawa), and also acted as an adviser to Te Keepa. Lewis had the permission of the Premier and Native Minister to perform this dual role of representing the Crown in court and assisting Te Keepa ‘out of court & left to my discretion’.<sup>85</sup>

The application before the court was to vest Horowhenua 2 in Te Keepa for the purpose of the township sale. Lewis told the court on 25 November that an arrangement had been made to establish a town with suburban and farm sections as well as township sections, but that ‘the terms were not settled finally’ until the actual area was subdivided out. He added a crucial statement: ‘The terms were settled as far that the land would be dealt with in the best interests of all the owners. The Native Minister was satisfied of this.’ Mr Lewis then read a memorandum and explained the nature of the arrangement further – unfortunately, we do not know whether it was the 25 June or 29 June 1886 memorandum.<sup>86</sup>

The 25 June memorandum had contained Te Keepa’s terms for the township deal, which had included the naming of the town as ‘Taitoko’, the reservation of every tenth section and of the lakes and streams for Muaūpoko, and arbitration as to price if Te Keepa and the Crown did not agree.<sup>87</sup> The 29 June memorandum, on the other hand, contained only one of Te Keepa’s terms (that he would apply at once for partition), and stated rather that ‘Major Kemp agrees that it will be better to defer arrangement with the Government as to whether block shall be purchased by the

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81. Luiten, ‘Political Engagement’ (doc A163), p132

82. AJHR, 1897, G-2, p149

83. Luiten, ‘Political Engagement’ (doc A163), p157

84. Luiten, ‘Political Engagement’ (doc A163), pp152–153

85. Luiten, ‘Political Engagement’ (doc A163), p152; Lewis to Morpeth, 23 November 1886 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p459)

86. Ōtaki Native Land Court, minute book 7, 25 November 1886, fols 184–185 (Crown counsel, document collection (doc B3), pp6–7)

87. AJHR, 1896, G-2, pp296–297



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Crown or whether the Government shall act as agent for the Native owners until the Native Land Court has adjudicated upon the subdivision.<sup>88</sup>

The court questioned Lewis, explaining its concern that the land would not be held in trust, and that nothing might in fact be done for ‘the benefit of the other owners.’ Lewis’ response must have reassured the judge, as the order was made vesting the block in Te Keepa.<sup>89</sup> Ms Luiten noted Judge Wilson’s later testimony: ‘Mr Lewis said there was an agreement between Kemp and the Government relating to the town. It was not produced, but I understood that all the owners were to benefit by the township. I expressed a hope that they would benefit.’<sup>90</sup>

While the court was in recess and Muaūpoko continued to arrange the partitions out of court, Lewis returned to Wellington for further instructions. Ms Luiten explained that he returned on 1 December 1886 ‘without the necessary sanction from Ballance to go through with the purchase.’<sup>91</sup>

Of particular importance here was the debt to Sievwright, which Lewis had encouraged Te Keepa to pay off in cash rather than in land. But Te Keepa could only obtain the cash if the township block sale was completed or the Crown would pay a further advance. As noted in chapter 4, the Crown had paid advances of £500 on the ‘Taitoko block’ of 4,000 acres before the partition hearing, despite later claiming that these were advances against the whole of the Horowhenua block under the 1878 proclamation.<sup>92</sup> At the November 1886 hearing, however, McDonald wrote that a ‘most curious and intense triangular contest of wits or of stupidity I scarcely know which’ ensued between Te Keepa, Lewis, and Sievwright.<sup>93</sup> The result, as McDonald reported it, was that Lewis went back to Wellington: if he got instructions to complete the township sale at once, Sievwright’s debt would be paid in cash, otherwise it would have to be met by a transfer of land. In December 1886, Cabinet refused to continue with the township purchase.<sup>94</sup>

Lewis had assured the court on behalf of the Minister that the township block would be dealt with in the best interests of all the owners, who clearly expected Te Keepa’s terms to be honoured. The Crown seems to have had two main concerns at this point. The first was its contract with the railway company, and the Minister’s view that ‘any land purchased at present by the Govt . . . w[oul]d really be the property of the Manawatu Railway Co.’ The second was the matter of price – the land close to the railway line for Sievwright had been valued at £3 10s an acre, and the Crown was simply not prepared to pay that kind of price or accept the ‘high value’ that Muaūpoko put on their Horowhenua lands.<sup>95</sup>

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88. AJHR, 1896, G-2, p 297

89. Ōtaki Native Land Court, minute book 7, 25 November 1886, fols 184–185 (Crown counsel, document collection (doc B3), p 7)

90. Luiten, ‘Political Engagement’ (doc A163), p 157; AJHR, 1897, G-2, p 11

91. Luiten, ‘Political Engagement’ (doc A163), p 157

92. AJHR, 1896, G-2, pp 297–298; Luiten, ‘Political Engagement’ (doc A163), p 147

93. J Wallace to Ballance, 28 November 1886 (Luiten, ‘Political Engagement’ (doc A163), p 152)

94. Luiten, ‘Political Engagement’ (doc A163), pp 158–159

95. Lewis to Ballance, 24 December 1886; Ballance, minute on Lewis to Ballance, 29 December 1886 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 1117–1120)



Ms Luiten suggested that Te Keepa ‘was not unduly upset’ by the Crown’s decision not to purchase the township block immediately. He later testified that ‘Ballance had told him “Do not let us finish our conversation until the time of the agreement with the company is up, lest the company should take the land.”’<sup>96</sup> At this point, of course, Te Keepa was not aware that the Crown would reject every single one of his 1886 terms for the sale of the block. He was also under increasing pressure as to debts, even with the resolution of Sievwright’s claim in land, since he was now saddled with the expenses of the 1886 hearing and faced the prospect of new survey costs. In December 1886, having discovered that the Crown was not prepared to proceed with the sale at that time, Te Keepa sought another advance payment – this time of £3,000. The Government refused.<sup>97</sup>

According to Under-Secretary Lewis, however, negotiations resumed in January 1887, despite the Cabinet decision of December 1886. The Government made a purchase offer in January 1887 at its own price, and stuck to that offer until Te Keepa finally gave in six months later. In an unsigned affidavit to the Supreme Court in 1889, possibly a draft, Lewis stated:

In the month of Jan[ua]ry 1887 I being duly authorised offered the said Meiha Keepa Te R[angihwinui] to purchase the said block for a price at the rate of thirty shillings per acre. This offer the said Meiha Keepa Te R refused and continued to refuse till the month of July 1887.<sup>98</sup>

The Government’s contract with the company expired on 20 March 1887. In May, the Government sent the chief surveyor, Marchant, to value the block. He reported that most of the land was ‘flat to undulating’ with good soil, thickly forested. Because of its situation, climate, and access to the railway, Marchant thought that the land ‘should realise about £8000’, after deduction of 500 acres for roading and £1,500 for survey. As Ms Luiten noted, he did not attach a value to the ‘forest of tawa, pukaha, rimu, rewarewa and matai cloaking over 90 per cent of the block.’<sup>99</sup>

On 27 May 1897, Surveyor-General McKerrow suggested to Ballance that Marchant’s valuation was a purchase price ‘virtually at the rate of about 30 [shillings] an acre.’<sup>100</sup> The Minister doubted that that was the case. On 11 June 1887, Ballance minuted the surveyor’s report: ‘What am[oun]t sh[ould] Govt pay? That is not clear in Mr Marchant’s report.’<sup>101</sup> Crown counsel submitted that McKerrow’s note referred to an official valuation by Marchant of 30 shillings an acre, separate

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96. Luiten, ‘Political Engagement’ (doc A163), p 175; AJHR, 1896, G-2, p 184

97. Armstrong, ‘Special Factors’ (doc A155), p 42

98. T W Lewis, unsigned affidavit, 1889 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1194)

99. Luiten, ‘Political Engagement’ (doc A163), p 175; Marchant to surveyor-general, 25 May 1887 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 1136, 1138)

100. McKerrow to Ballance, 27 May 1887 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1137)

101. Ballance to Lewis, 11 June 1887 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1135)

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from his estimate of what the block would ‘raise’ when on-sold.<sup>102</sup> But McKerrow’s note in fact referred to exactly the same document, in which Marchant simply stated that the block would ‘realise’ £8,000 after a deduction for survey and roading. Hence the surveyor-general’s suggestion to Ballance was a gloss or estimate that the valuation was ‘*virtually* at the rate of *about* 30 [shillings] an acre’ (emphasis added). Marchant certainly did not give any such valuation in his report.

The usual approach in valuation around that time was to estimate what the land would be worth when developed for on-selling, and then deduct the estimated cost of development.<sup>103</sup> If that is, in fact, what Marchant’s report did, then on his reasoning the price paid to Muaūpoko (after deductions for roading and survey costs) ought to have been £8,000.

Lewis wrote an additional minute to P W Sheridan on Marchant’s report, stating: ‘At an interview with Hon Native Minister it was decided to offer Major Kemp 30/ an acre & I made that offer to him yesterday – *up to the present time he has declined it.*’ (Emphasis added.)<sup>104</sup>

This suggests to us that Marchant’s valuation of the land at £9,500, minus 500 acres for roading and the cost of surveying (but apparently attaching no value to the timber) was not the source of the price actually offered. Lewis’ minute suggests that the Government simply stuck with a price previously offered, which ‘up to the present’ Te Keepa had refused – Ms Luiten doubted whether such an offer was really made as early as January 1887,<sup>105</sup> but that is not a point we need to resolve.

Negotiations resumed in earnest in mid-June 1887. Te Keepa refused the offer at first, knowing that Sievwright’s block adjoining Horowhenua 2 had been valued at 70 shillings an acre. This is where the Crown’s monopoly proclamation had a crucial impact. Te Keepa needed to sell, and he had no choice but to sell to the Crown and at its own price. His counter-offer of £2 per acre was rejected by Ballance,<sup>106</sup> even though Marchant’s valuation would have matched that figure, if it was accepted that Muaūpoko should bear the cost of deductions for roading and surveying. At this point, Te Keepa was still relying on the advice of Alexander McDonald, who ‘strongly urges upon Government, & no doubt upon Kemp also that [the] block is worth much more than he is asking, and that if the law allowed him to deal with the land at once he could dispose of it at once on better terms.’<sup>107</sup>

The 1878 proclamation was having precisely the intended effect. Ballance responded that it was no use to ‘press for more’ because the valuation did not allow the Crown to go above 30 shillings.<sup>108</sup> This appears to us to be untrue. In the first place, Ballance himself had pointed out that the valuation did not propose a

102. Crown counsel, closing submissions (paper 3.3.24), pp165–166

103. See Waitangi Tribunal, *Te Urewera, Pre-publication, Part III* (Wellington: Waitangi Tribunal, 2015), p142, referring to the standard set by the first Government Valuation of Land Act in 1896.

104. Lewis to Sheridan, date obscured [mid-June 1887] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p1135)

105. Luiten, ‘Political Engagement’ (doc A163), p176

106. Luiten, ‘Political Engagement’ (doc A163), p176

107. Lewis to Ballance, 16 June 1887 (Luiten, ‘Political Engagement’ (doc A163), p176)

108. Ballance to Lewis, 17 June 1887 (Luiten, ‘Political Engagement’ (doc A163), p176)

purchase price. Secondly, the Government was in no way constrained to treat a valuation as a maximum price, especially since its monopoly put Te Keepa in the weaker negotiating position and prevented him from obtaining another offer.

Once Ballance's refusal to increase the price was received, Lewis reported:

Confidential: Your last telegram re Horowhenua arrived opportunely while Kemp was with me and quite confirmed what I had stated to him. He has just concluded a long speech blowing off considerable steam saying take the land you have left me nothing etc – This Mr Macdonald says means the acceptance of the offer, because he cannot help himself. He wishes however before finally closing to await your return.<sup>109</sup>

Thus, Lewis recorded that Te Keepa had to accept the Crown's offer 'because he cannot help himself'; the Crown had left him with no other option. Before the select committee in 1887, Lewis testified that the purchase was made because of Te Keepa's 'very pressing necessities, and the fact that the Proclamation over the land prevented him from raising money'. The under-secretary considered it 'a good bargain' and 'well worth the money', although admitting that the price of 30 shillings was higher than the Government usually paid and not one he would normally countenance.<sup>110</sup> Even so, noted Ms Luiten, Te Keepa refused to sign the memorandum of agreement until a month later, on 29 July 1887.<sup>111</sup>

Although the Crown's monopoly enabled it to set a lower than market price, the township deal might still have been redeemed if the conditions proposed by Te Keepa and endorsed by the tribe in 1886 had been accepted. As will be recalled, these included a reservation of every tenth section for Muaūpoko, other reserves (including the lakes and streams, and a chain around the lakes), a mixed Māori-settler school, and arbitration if a price could not be agreed. The name of this shared town was to be Taitoko. It is not clear at what point Te Keepa knew that the Crown had no intention of agreeing to any of the tribe's stipulations, but presumably he was aware by the time he signed the agreement in July 1887. Its final clause stated: 'This agreement cancels all former agreements and undertakings between Meiha Keepa and the Government respecting this block now transferred to the Crown.'<sup>112</sup>

There is no doubt as to the purpose of this clause. Lewis explicitly told Ballance that it was 'to get rid of conditions as to manner of laying out township etc.'<sup>113</sup> Lewis telegraphed the Minister for an urgent response, advising that he had added this

109. Lewis to Ballance, not dated [16 June 1887] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1150)

110. AJHR, 1887, 1-5A, p18 (claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), p37)

111. Luiten, 'Political Engagement' (doc A163), p176

112. Memorandum of agreement between Meiha Keepa Te Rangihwinui and the Crown, 19 July 1887, AJHR, 1896, G-2, p297; Lewis to Ballance [18-19 July 1887] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1148)

113. Lewis to Ballance [18-19 July 1887] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1148)

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clause to the agreement but it could still be ‘remitted if you think best.’<sup>114</sup> In other words, the Minister could still have chosen to keep what Lewis clearly saw as explicit agreements and undertakings, despite denying in formal inquiries that any agreements at all had been reached prior to July 1887. Ballance responded: ‘I approve of your suggestion re new clause.’<sup>115</sup>

We accept the claimants’ submission that ‘the Crown could also simply have lifted the proclamation at any time, but chose not to, and actively utilised its continued existence as a device to pressure Te Keepa into selling at a low price and agreeing to relinquish the Taitoko township proposal.’<sup>116</sup>

Why did Ballance adopt Lewis’ suggestion to cancel ‘all former agreements and undertakings’ and get ‘rid of conditions as to manner of laying out township etc’?<sup>117</sup> We have no direct explanation from Ministers or officials at the time. Crown counsel made no submissions on why the Government did not accept any of Te Keepa’s (and the tribe’s) terms, simply arguing that there had not actually been a firm agreement. Ms Luiten pointed to Te Keepa’s responses to questions from the Horowhenua commission:

Nine years later Kemp told the Horowhenua Commission that all the conditions attached with the township partition – the return of every tenth quarter-acre section to Muaupoko, the joint administration, the joint school – had been ‘thrown to one side’ by Ballance once negotiations were resumed after March 1887: ‘Mr Ballance afterwards saw it would not do for the Europeans and Maoris to live together, and therefore it was all swept away.’ According to Kemp, in addition to Ballance’s aversion to having ‘Natives mixed up in the town with Europeans,’ the Native Minister had also pointed out to him that ‘Native lands surrounded the town on all sides.’ Muaupoko, however, were not informed about the changed deal, by either Kemp or the government.<sup>118</sup>

This brings us to a further problem with the 1887 township sale, which was that the Muaūpoko people had no say in it, even though they had specifically endorsed terms as the basis for which they agreed to the partition and sale. Crown counsel argued in our inquiry that the Crown had no responsibility for that outcome:

The Crown understood Te Keepa to be representing Muaūpoko interests in this transaction, and proceeded on that basis. The Crown submits that it was reasonable for the Crown to deal with Te Keepa as leader and representative of his people. Te Keepa appears to be primarily responsible for departing from the earlier proposed

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114. Lewis to Ballance [18–19 July 1887] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1148)

115. Ballance to Lewis, 19 July 1887 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1147)

116. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), p 41

117. Lewis to Ballance [18–19 July 1887] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1148)

118. Luiten, ‘Political Engagement’ (doc A163), p 177. Ms Luiten’s quotations of Te Keepa were taken from his evidence to the Horowhenua commission: AJHR, 1896, G-2, pp 31, 176.

terms held out to Muaūpoko (by Te Keepa) and for the degree to which Muaūpoko were advised of his dealings on their behalf.<sup>119</sup>

Under the Native Land Division Act 1882, the land was vested in Te Keepa as sole owner. This was intended to facilitate the sale, and Under-Secretary Lewis had assured the court the terms were so far settled that the Native Minister was satisfied ‘the land would be dealt with in the best interests of all the owners.’<sup>120</sup> In reality, the Crown did nothing to ensure that this was the case, and the Minister explicitly abandoned previous undertakings – writing this into the deed. As a result of the Crown’s native land laws, which did not enable Horowhenua 2 to be held on trust for specific purposes on behalf of named beneficiaries, Te Keepa was empowered to sell the land as sole owner on whatever terms he could agree with the Crown. Te Keepa was clearly reluctant but, as the Government saw and took advantage of, ‘he cannot help himself’.<sup>121</sup>

Muaūpoko had also agreed to the sale on the basis that the purchase money would be used to pay for surveying the various 1886 partitions, with anything left over to be divided among the tribe. Ms Luiten’s evidence was that the entire £6,000 was consumed by the costs of litigation, most of it by the litigation over Horowhenua 11 from 1889 onwards.<sup>122</sup> Te Keepa testified in the Native Appellate Court in 1897 that ‘he had not intended to keep the proceeds of the sale, “but I was compelled to spend it in the expenses of the litigation that was forced upon me”’.<sup>123</sup> Again, the native land laws – and the inability to establish proper trusts – were to blame for the litigation over Horowhenua 11, as we will discuss further in section 5.6. Te Keepa’s words proved prophetic when he told Lewis in June 1887: ‘take the land you have left me nothing’.<sup>124</sup>

Thus, at the end of the sale of the 4,000-acre township block, Muaūpoko had no money, no reserves, no biracial school, no reservation of their streams, lakes, and lake frontages, and no stake at all in the new town of Levin – named for a settler politician and director of the Wellington and Manawatu Railway Company.

The key question now became whether they would still benefit from the town, railway, and settlers because their surrounding lands would rise in value, and farm development would now be possible. According to Te Keepa in 1896, this had been his reason for selling the township block.<sup>125</sup> The answer to this key question depended on the fate of the other partitioned blocks.

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119. Crown counsel, closing submissions (paper 3.3.24), p 168

120. Ōtaki Native Land Court, minute book 7, 25 November 1886, fol 185 (Crown counsel, document collection (doc B3), p 7)

121. Lewis to Ballance, not dated [16 June 1887] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1150)

122. Luiten, ‘Political Engagement’ (doc A163), pp 177–178

123. AJHR, 1897, G-2, p 31 (Luiten, ‘Political Engagement’ (doc A163), pp 177–178)

124. Lewis to Ballance, not dated [16 June 1887] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1150)

125. AJHR, 1896, G-2, p 175



## 5.4.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**5.4.4 The transfer of Horowhenua 10 (the debt block) to Sievwright**

The ‘debt block’ may be dealt with briefly. Back in June 1886, when Te Keepa was negotiating with the Government to sell the township block and apply for partition, Sievwright had presented three plans as to how his debts could be settled. The Government rejected all of them, including a plan for payment in the form of land, and at that time refused to waive its monopoly proclamation so this could occur.<sup>126</sup> Nonetheless, Te Keepa signed a deed with Sievwright for 800 acres in June 1886. Sievwright came to the November 1886 partition hearing with this deed, believing that the Government was now prepared to lift its proclamation. He had, Lewis reported to Ballance, a ‘[j]udgment of the Supreme Court, bearing interest, the total at present amounting (I believe) to £2,800.’<sup>127</sup>

According to Lewis, the June 1886 deed authorised Sievwright to sell the 800 acres on behalf of Te Keepa as owner, rather than transferring the land to Sievwright in full settlement of the debt. Lewis feared that selling the land in this way might not succeed in clearing the whole debt, on which interest continued to accrue. As Te Keepa’s adviser at the hearing, Lewis advised him to pay the debt in cash.<sup>128</sup> But, as we discussed above, the Crown refused to complete the township purchase or assist Te Keepa in any other way to meet this debt in cash. Lewis advised Ballance: ‘It is scarcely possible to exaggerate Kemp’s anxiety to get rid entirely of the burden of this debt.’<sup>129</sup> When Lewis returned from Wellington on 1 December 1886 with the news that the Crown would not proceed with the township sale, the 800-acre Horowhenua 10 block was vested in Te Keepa the same afternoon for transfer to Sievwright.<sup>130</sup> This required the Crown to lift its monopoly proclamation so that the transfer could take place.

Cabinet debated whether it should lift the proclamation. Julius Vogel was concerned that the use of tribal land to pay off one individual’s debts was a throwback to the worst kind of purchases (presumably under the discredited 10-owner system). He commented: ‘How is it clear that no other Natives have interests [in the 800 acres] who do not owe money to Sievwright and if so there is a reproduction of the worst feature of Native land purchases.’<sup>131</sup> A short inquiry as to the facts would have confirmed that other owners did indeed have interests in the 800 acres but owed no debt to Sievwright.

126. Vogel, minute, 21 December 1886 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1128)

127. Lewis to Ballance, 24 December 1886 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 1113, 1115–1116)

128. Lewis to Ballance, 24 December 1886 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 1116–1117); Alexander McDonald to Wallace, 26 November 1886, encl in Wallace to Ballance, 28 November 1886 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 1125–1126); Luiten, ‘Political Engagement’ (doc A163), pp 163–164

129. Lewis to Ballance, 24 December 1886 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1116)

130. Luiten, ‘Political Engagement’ (doc A163), pp 157–158, 164

131. Vogel, minute, 21 December 1886 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1128)



Despite this and other concerns, the Government agreed to waive the proclamation after seeking further advice from Lewis. This allowed Horowhenua 10 to be transferred to Sievwright.<sup>132</sup> As far as we can tell, that was the end of Te Keepa's debt to this particular law firm.

Lewis' report responded to Vogel's concern by implying that only Te Keepa individually would be affected by loss of the 800-acre block. He began by stating that it was at first believed that 'the Government had consented to lift the Proclamation from *such portion of the Block as was declared by the Court to belong to Kemp solely* for the purpose of enabling him to get rid of his growing liability' (emphasis added).<sup>133</sup> Lewis went on to say: 'The 800 acres referred to had passed the Court in his name only, so there was no question apart from the Proclamation as to his right to deal with it as he thought fit.'<sup>134</sup> Later in his report, Lewis explained, in respect of his June 1886 advice not to lift the proclamation,

I respectfully submit that while the proposition could not properly be entertained in the then state of the title; Kemp having recently received *an award to himself only*, it was only reasonable that the debt which was causing him very great anxiety should be liquidated in the manner he desired. [Emphasis added.]<sup>135</sup>

All of this implied that the court had awarded Horowhenua 10 to Te Keepa because he alone had rights to that land, and only he would suffer from its loss. As Lewis knew, however, there had been no inquiry as to respective rights in the different parts of the Horowhenua block. The minutes in this instance simply stated: 'Application from Major Kemp for Subdivision of 800 acres to be awarded to himself, as agreed upon, by himself and tribe . . . Objectors challenged: none appeared.'<sup>136</sup>

These 800 acres were not awarded to Te Keepa because he was the sole owner in custom but by agreement of the tribe so he could discharge his debts. Yet Lewis' report must have led Ministers to believe that only Te Keepa's land was being sold to pay his debts. This likely silenced Vogel's concern about this being one of the 'worst' kinds of transaction, and facilitated the Government's decision to waive the proclamation. Lewis appears to have deliberately misled Ministers here.

Ms Luiten summarised the evidence about Muaūpoko's view of this arrangement:

Muaupoko did not oppose the award at the time and nor did they resile from their gift to Kemp in later years. Te Rangimairehau told the Horowhenua Commission in

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132. Luiten, 'Political Engagement' (doc A163), pp 164–165

133. Lewis to Ballance, 24 December 1886 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1115–1116)

134. Lewis to Ballance, 24 December 1886 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1117)

135. Lewis to Ballance, 24 December 1886 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1118)

136. Ōtaki Native Land Court, minute book 7, 1 December 1886, fol 194 [typescript copy] (David Armstrong, comp, papers in support of 'Muaupoko "Special Factors": Keepa's Trusteeship, the Levin Township Sale and the Cost of Litigation', various dates (doc A155(a)), p 772)

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1896 and the Native Appellate Court in 1897 that in deliberating over Kemp's request for the block, the tribe was aware that the debt had been incurred elsewhere, and still unconditionally supported giving him the land for this purpose. Kemp too, told the Native Appellate Court that Muaupoko 'consented to take my burden upon their shoulders,' but his testimony that the amount of land required to do so was worked out by Palmerson on the spot was patently untrue, given the existence of a deed executed with Sievwright the preceding June. While his statement that 'None of the tribe dissented. There was not one who objected' may well have been true, it also seems clear that Muaupoko were not privy to the political manoeuvring surrounding the deal, which was tangled up with the township partition.<sup>137</sup>

Crown counsel noted this evidence of Muaupoko support at the time,<sup>138</sup> and also submitted that the Crown 'is not responsible for . . . Te Keepa's decision to satisfy his debt incurred to Sievwright through the Whanganui dealings by dealing with a portion of the Horowhenua block.'<sup>139</sup> We accept this submission up to a point, but we note that the Crown had left Te Keepa with no other option, and was far from blameless in the failure of the Whanganui trust which had led to the accumulation of debt (see section 4.3.4(4)). Despite Lewis' advice to Te Keepa that he should pay Sievwright in cash, the Crown refused to close the township deal for that purpose or to advance money to discharge the debt. The Crown then agreed to lift the proclamation later despite concerns, as Vogel put it, that the deal was unfair to the other owners and was therefore 'a reproduction of the worst feature of Native land purchases.'<sup>140</sup>

Our findings as to whether the Treaty was breached are set out later in section 5.8.

**5.4.5 The 1874 transaction with McLean for 1,200 acres (Horowhenua 9 and 14)**

The November 1886 hearing dealt with three of the pre-partition transactions: the railway corridor, the township block, and the 1,200-acre gift to Ngāti Raukawa.

We have already described the 1874 arrangement between Te Keepa and Native Minister McLean in chapter 4 (section 4.3.4(2)). Muaupoko had been consulted about the gift at some point before 1886, but it was now the subject of further discussion leading up to the hearing. McDonald's son-in-law, Palmerson, was a surveyor. He assisted by sketching each of these first three partitions on a map of the Horowhenua block, which was apparently displayed in 'the barn' where many Muaupoko owners were staying. After discussion among themselves and with Te Keepa, the people agreed that the 1874 gift should be upheld, and that it be located in the south-east of the block on the boundary line.<sup>141</sup> In front of the Horowhenua commission 10 years later, 'Alexander McDonald maintained that at the partition

137. Luiten, 'Political Engagement' (doc A163), pp 162–163

138. Crown counsel, closing submissions (paper 3.3.24), p 172

139. Crown counsel, closing submissions (paper 3.3.24), pp 153–154

140. Vogel, minute, 21 December 1886 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1128)

141. Luiten, 'Political Engagement' (doc A163), pp 148–149, 152, 153

hearing the tribe unanimously agreed to honour it [the gift]: “they had all known more or less about it and were satisfied to give effect to it”, a point that Muaupoko representatives concurred with.<sup>142</sup> Muaupoko at the time saw the gift as honouring the agreement between Taueki and Te Whatanui (see chapter 2).<sup>143</sup>

When the gift block came before the court on 25 November 1886, Lewis gave evidence in support of the application, but he had not brought the 1874 deed with him. He could not remember if it specified the location of the land, and had ‘sent an urgent wire for information on this point’. He also noted that the deed was for 1,300 acres. The court ordered the 1,200 acres be vested in Te Keepa, McDonald having stated that ‘Kemp was a Trustee for the tribe’. The minutes noted: ‘Order made in favour of Te Keepa Te Rangihwinui for 1,200 acres to be delineated on the plan as on the tracing shown.’<sup>144</sup> Palmerson’s tracing located this land ‘inland at Ohau on the southern boundary [of the Horowhenua block], east of the railway.’<sup>145</sup> This 1,200-acre block was eventually to become Horowhenua 14, although its exact location was moved westwards after the 1886 hearing. Te Aohau Nicholson objected that Ngāti Raukawa did not want their land in this location, but the court disregarded this because he had no standing; he was not one of the 143 registered owners of Horowhenua.<sup>146</sup> Judge Wilson later recalled that Lewis intervened at this point, and ‘took the 1,200-acre block out of the hands of the Court.’<sup>147</sup>

As noted earlier, the court was adjourned for some days as a result of the need to get a new assessor, and when it reconvened in December its initial orders had to be remade. In the interim, Lewis returned to Wellington. When he came back, he had the 1874 deed with him (a copy also arrived earlier by telegram).<sup>148</sup> In that deed, Te Keepa had agreed that the gift would be located ‘near the Horowhenua lake . . . the position and boundaries to be fixed by actual survey.’<sup>149</sup> According to Te Keepa’s evidence to the appellate court in 1897, he met with Ngāti Raukawa during the adjournment and had already agreed to their request to relocate the 1,200 acres near the lake before ‘Lewis came up and reminded me that the land was to be near the lake.’<sup>150</sup> This was not how Te Aohau Nicholson remembered it. Nicholson said that Te Keepa met with them but refused to change the location because it was against the wishes of Muaupoko, but that he later met with Lewis and ‘consented to what Lewis wanted.’<sup>151</sup> Others, such as Te Rangimairehau, also testified that Lewis

142. Luiten, ‘Political Engagement’ (doc A163), p 161; AJHR, 1896, G-2, p 75

143. Luiten, ‘Political Engagement’ (doc A163), p 161 n; AJHR, 1896, G-2, pp 26 (Te Keepa), 96 (Te Rangimairehau), 118 (Kerehi Tomu), 188, 189 (Te Keepa), 233 (Te Rangimairehau)

144. Ōtaki Native Land Court, minute book 7, 25 November 1886, fol 185 [typescript copy] (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), p 767)

145. Luiten, ‘Political Engagement’ (doc A163), p 161

146. Ōtaki Native Land Court, minute book 7, 25 November 1886, fol 186 [typescript copy] (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), p 768)

147. AJHR, 1897, G-2, p 5. This is discussed several times during Judge Wilson’s evidence: see pp 5–15.

148. Luiten, ‘Political Engagement’ (doc A163), p 161; AJHR, 1897, G-2, p 61

149. ‘Deed Receipts – No 6: Horowhenua Block’, HH Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, 1877, 2 vols (Wellington: Government Printer, 1878), vol 2, p 435; AJHR, 1896, G-2, p 9

150. AJHR, 1897, G-2, pp 32–33

151. AJHR, 1897, G-2, pp 61–62

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was responsible for the change of location,<sup>152</sup> and Ms Luiten concluded that Lewis was ‘prevailed upon to make Kemp change the location.’<sup>153</sup> In our view, the evidence is inconclusive on the question of whether Crown pressure was applied.

Te Keepa also wanted the land awarded to the Crown, not himself, so that it could make the transfer to Ngāti Raukawa, avoiding yet more legal fees. Lewis refused to assist in this way.<sup>154</sup>

On the morning of 1 December 1886, the court again ordered 1,200 acres in Te Keepa’s name ‘for the purpose of fulfilling an agreement between himself and the Government’ but this time the minutes stated: ‘This court does not propose to delineate upon the plan.’<sup>155</sup> Later evidence (in 1897) suggests that this was because Ngāti Raukawa disagreed with the boundaries of Horowhenua 9, considering that it was too close to the sea and too sandy.<sup>156</sup> Lewis then held a meeting with Te Keepa and Ngāti Raukawa representatives in the courthouse during an adjournment, and new boundaries were agreed. As part of a compromise, Ngāti Raukawa apparently accepted that the boundaries should be two chains distant from the banks of the Hōkio Stream – Te Keepa told the court that this was to preserve an exclusive fishery for Muaūpoko,<sup>157</sup> but Nicholson said that Lewis had promised the two-chain river frontage would be reserved ‘for all.’<sup>158</sup> A Muaūpoko urupā, Owhega, was also excluded from the boundaries.<sup>159</sup> Any Ngāti Raukawa claims about Horowhenua 9 will, of course, be addressed later in our inquiry. When the court resumed after the midday adjournment, it listed the agreed boundaries for Horowhenua 9, which would now be ‘delineated upon the map.’<sup>160</sup>

Alexander McDonald advanced a theory that there was no agreement, and that both Horowhenua 9 and Horowhenua 14 were vested in Te Keepa so that Ngāti Raukawa could choose between them later.<sup>161</sup> This is not supported by any of the other evidence. Neither is McDonald’s statement that it was the Ōhau section that was before the court on the morning of 1 December, and that the disputed boundaries of Horowhenua 9 were not settled in that day’s adjournment.<sup>162</sup> We will hear Ngāti Raukawa’s view of these matters later in our inquiry.

This brings us to the award of Horowhenua 14, the 1,200 acres originally ordered in Te Keepa’s name on 25 November 1886 (at that time called Horowhenua 3), but which Ngāti Raukawa had rejected. As discussed, the court considered the 25

152. AJHR, 1897, G-2, pp 17, 20, 22

153. Luiten, ‘Political Engagement’ (doc A163), p 161

154. AJHR, 1897, G-2, p 24

155. Ōtaki Native Land Court, minute book 7, 1 December 1886, fol 188 [typescript copy] (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), p 769)

156. See, for example, AJHR, 1897, G-2, p 7.

157. AJHR, 1897, G-2, p 15

158. AJHR, 1897, G-2, p 62

159. Luiten, ‘Political Engagement’ (doc A163), p 162

160. Ōtaki Native Land Court, minute book 7, 1 December 1886, fols 192–193 [typescript copy] (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), pp 771–772)

161. ‘A True History of the Horowhenua Block, by Alexander McDonald, Native Agent and Licensed Interpreter: Being a Reply to Sir Walter Buller’s Pamphlet’, 27 February 1896, AJHR, 1897, G-2, p 150

162. AJHR, 1897, G-2, pp 53–56

November orders invalid because of the change of assessor, and on 3 December a second application for this land was heard. The minutes stated:

*Subdiv 14.* Application from Major Keepa Te Rangihwinui for confirmation of that order for 1200 acres in his own name (as shown upon tracing before Court).

Objectors challenged; none appeared. The order is made as prayed to Keepa Te Rangihwinui.<sup>163</sup>

Judge Wilson testified in 1897 that he had been ‘shock[ed]’ because he thought that Te Keepa would keep part of Horowhenua 10 for himself, as his individual share of the Horowhenua block, not being aware that the extent of the debt to Sievwright would take all of Horowhenua 10.<sup>164</sup> Wilson stated:

The application [for Horowhenua 14] stood over till the last day of the Court. I did not hurry the matter. I gave plenty of time to the people to object, and challenged very carefully because Kemp applied for the land for himself. I made the usual challenge. In this case I would be most careful to challenge objectors, because a chief was asking us to excise a piece of land for himself. I am sure objectors were challenged on the first day No. 14 came before the Court. I repeat that the clerk was wrong in using the word confirmation; there was no order to confirm. I should have had no shock when Kemp asked for the 1,200 acres if I had not been under the impression that he was to have most of the 800 acres [Horowhenua 10], but I have since ascertained that all went to the lawyers. I felt almost inclined to query it, although I had no right to question any voluntary arrangement. . . . I think Kemp said in making the application that he was entitled to the 1,200 acres for what he had done, or something to that effect; I cannot recollect exactly. At any rate, he asked the Court to award it to him for himself, and objectors were challenged before the orders were made. Before I left Palmerston I knew that Kemp would get nothing out of the 800 acres, because the lawyers tried to grab it at once. I did not consider it my duty to explain to the people that Kemp was getting a very substantial interest in No. 14.<sup>165</sup>

As we shall see later, the question of whether the Muaūpoko owners had intended Horowhenua 14 to become Te Keepa’s personal property, or whether it was supposed to have been held in trust like other partitions, became a matter of extensive dispute and litigation in the 1890s. We therefore leave any further discussion of Horowhenua 14 till later in the chapter.

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163. Ōtaki Native Land Court, minute book 7, 3 December 1886, fol 200 [typescript copy] (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), p 775)

164. AJHR, 1897, G-2, pp 6, 12

165. AJHR, 1897, G-2, p 12



**5.5 THE 'PATAKA' PARTITIONS (HOROWHENUA 4, 5, 7, 8)**

As will be recalled from chapter 4, the Horowhenua block was originally part of the much larger Manawatū-Kukutauaki block. In the Manawatū-Kukutauaki hearings in 1872, Muaūpoko presented a joint case with allied Whanganui, Ngāti Apa, Rangitāne, and Wairarapa peoples. Some individuals from those tribes were put on the list of owners for Horowhenua in 1873. One of Muaūpoko's goals in the partition hearings was to ensure that their relations and allies in the claim for Manawatū-Kukutauaki were located outside of the core coastal lands.<sup>166</sup> Te Rangimairehau described in 1897 how Muaūpoko decided this with the agreement of Te Keepa, their trustee (as they saw it) under the 1867 Act:

Our discussions took place at Palmerson's place, Palmerston North – in a barn belonging to Mr Palmerson. All those who went to Palmerston were present at the discussions, including Ihaia Taueki. At times Kemp was present, sometimes he was not. Mr McDonald was also present at times, sometimes not. I was present at all the discussions. There were a great many of them. They began before the Court sat, and continued during the sitting of the Court. The first discussion was about those who were put up into the mountains. We wished Kemp to know our thoughts about these. Kemp consented to our proposal to put the Ngati-kahungunu up on the mountains. The names were selected from the certificate. It was proposed also to put the Ngatiapa up on the mountains. This was settled. Kemp agreed to it. Then the Rangitane were considered. They were also to be put into the mountains. Kemp was consulted about Rangitane. He agreed, and it was settled. Kemp was referred to with regard to all those objected to by Muaupoko. After this the matter was taken to the Court – I mean the arrangement for putting certain people on to the mountains. This was, I believe, the first question referred to the Court. It was one of the objects the Muaupoko had in view.<sup>167</sup>

On 1 December 1886, four 'pataka' (storehouse) blocks were created for this purpose:

- › Horowhenua 4, 510 acres for 30 people of Ngāti Hāmua;
- › Horowhenua 5, four acres for two individuals;
- › Horowhenua 7, 311 acres for three Rangitāne rangatira; and
- › Horowhenua 8, 264 acres for three other individuals.<sup>168</sup>

In our inquiry, Edward Karaitiana offered a different perspective on these partitions. He told us that his whānau had used resources on both sides of the Tararua Ranges, and that Karaitiana Te Korou's great-grandfather caught eels and had mahinga kai on the land that became Horowhenua 4. In other words, his view was that his ancestors had a direct connection with his share of the Horowhenua block, and that was the reason for partitioning their interests there.<sup>169</sup>

166. Luiten, 'Political Engagement' (doc A163), pp 159–160

167. AJHR, 1897, G-2, p 16

168. Luiten, 'Political Engagement' (doc A163), p 160

169. Edward Karaitiana, brief of evidence, 17 November 2015 (doc C20), pp 6, 10–12



There were no objections in court and these partitions were completed on 1 December 1886.

### 5.6 THE TRIBAL TRUSTS (HOROWHENUA 11, 12)

Although there was much dispute and litigation in the 1890s (as we discuss in chapter 6), there is no doubt whatsoever that Horowhenua 11 and Horowhenua 12 were vested in Muaūpoko rangatira to be held permanently for the Muaūpoko people. Horowhenua 11 contained Lake Horowhenua and the tribe's coastal lands, their primary residences and resource areas. Horowhenua 12 contained the western side of the Tararua Ranges. Muaūpoko traditions say that the spiritual lake, Hapuakorari, was also located on Horowhenua 12.

Ms Luiten stressed the 1897 evidence of Muaūpoko rangatira Te Rangimairehau and Hoani Puihi as summarising the situation for Horowhenua 11:

[Te Rangimairehau:] It was said at our meetings that No. 11 was for us, the people who are living on the land, not for those outside – I mean our relatives of Ngatikahungunu, Rangitane, and Ngatiapa. They were not to be in it. . . . The block was to be permanently reserved for us, the occupants. This was decided at our meetings. It was not proposed to divide it at that time. The tribe decided to keep it intact, and not subdivide it. It also decided to put Kemp's name in the certificate as trustee.<sup>170</sup>

[Hoani Puihi:] It was stated at the meetings that No 11 was for the permanent residents of the tribe. This was explained by Kemp at the time and understood by the people. All the iwi agreed; there were no dissentient voices. . . . The committee and Kemp agreed that No. 11 and its waters were for the people. It was agreed that the people should dwell round their lake.<sup>171</sup>

Other witnesses in the 1890s inquiries used the term 'ahi ka' to convey that block 11 was to be held for the 'permanent occupants'.<sup>172</sup>

Muaūpoko agreed that blocks 11 and 12 should be permanently reserved. For that reason, they did not want these blocks awarded to lists of individual owners, because they knew that that would inevitably lead to sales and the loss of their land and other taonga.<sup>173</sup> The selection of rangatira as trustees, however, resulted in significant disagreements. On 1 December 1886, the court minutes record that Te Keepa applied for Horowhenua 11 to be 'awarded to himself and others'. The judge challenged for objectors and 'none appeared', but the court nonetheless adjourned for 10 minutes. When the hearing resumed, the minutes note: 'Division made in name of Meiha Keepa Rangihwinui and Warena Te Hakeke as prayed'.<sup>174</sup>

170. AJHR, 1897, G-2, p 17 (Luiten, 'Political Engagement' (doc A163), p 166)

171. AJHR, 1898, G-2A, p 98 (Luiten, 'Political Engagement' (doc A163), p 166)

172. Luiten, 'Political Engagement' (doc A163), p 166

173. See, for example, AJHR, 1896, G-2, pp 102, 132, 135; Luiten, 'Political Engagement' (doc A163), pp 169–170.

174. Ōtaki Native Land Court, minute book 7, 1 December 1886, fol 193 [typescript copy] (Armstrong, papers in support of 'Special Factors' (doc A155(a)), p 772)

## 5.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

What had happened during the 10-minute adjournment? There are two versions of events. According to Alexander McDonald (in 1891) and Wirihana Hunia, Muaūpoko had agreed during the pre-hearing discussions to put both Te Keepa and Wirihana's younger brother, Warena, in the title for Horowhenua 11. But Te Keepa later instructed McDonald to apply for the block in his name alone. Wirihana then objected in court, and during the 10-minute adjournment it was agreed to put Warena's name back in the title.<sup>175</sup>

According to Te Keepa and many other Muaūpoko witnesses who gave evidence in the various inquiries, there had been no prior agreement to put Warena Hunia's name alongside that of Te Keepa. Rather, Wirihana proposed this for the first time during the adjournment that followed his objection in court. Te Keepa responded that it would be better to have Ihaia Taueki as his co-trustee. Some objected to this because they wanted Te Keepa as a single trustee.<sup>176</sup> Wirihana, however, threatened to withdraw his consent to everything that had been done, which would make it impossible to continue putting the remaining partitions through by 'voluntary agreement', and might lead to a rehearing. 'If Warena's name had not been put in No 11', he told the court in 1897, 'I would have applied for a rehearing of all the other parcels. I said this at the time.'<sup>177</sup> Te Keepa either 'capitulated' to Wirihana Hunia or was convinced that Warena should be added to the title as 'an exemplary young man.'<sup>178</sup>

In either case, an 1892 petition from Muaūpoko stated that they had been 'averse to this being done but ultimately gave their consent at the urgent request of Meiha Keepa himself who seemed anxious to propitiate the Hunia family, and who explained to your petitioners that the addition of a second Trustee could not in any way affect their rights as owners.'<sup>179</sup> Many of them withdrew angrily from the court, including the 'principal people', and Te Keepa later accepted full responsibility for the decision: 'It was my fault. I should have listened to the objection made by the tribe. I see now that I was wrong and the tribe were right. I should have been guided by the tribe, and had the land awarded to myself only.'<sup>180</sup>

Immediately afterwards, the application for Horowhenua 12 was considered, 'to be awarded to two owners, namely Keepa Te Rangihwinui and Warena Te Hakeke'. This time, the minutes recorded formal objections and the court was again adjourned so that Muaūpoko could resolve matters outside the courtroom.<sup>181</sup>

Over the next day, Muaūpoko debated who should hold Horowhenua 12 on their behalf. At first, it was proposed that various hapū leaders would be appointed but

175. Luiten, 'Political Engagement' (doc A163), pp 167–168; Alexander McDonald's evidence was different to the Horowhenua commission in 1896, where he stated that the majority of Muaūpoko had rejected the inclusion of Warena's name and so the application was made in the name of Te Keepa only: AJHR, 1896, G-2, pp 77–79.

176. Luiten, 'Political Engagement' (doc A163), pp 167–168; AJHR, 1897, G-2, pp 25, 41–42, AJHR; 1896, G-2, pp 99, 178–179

177. AJHR, 1898, G-2A, p 28

178. Luiten, 'Political Engagement' (doc A163), p 168; AJHR, 1897, G-2, p 25

179. Te Rangimairihau and 62 others, undated petition [1892] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 888)

180. AJHR, 1897, G-2, p 25; AJHR, 1898, G-2A, p 151 (Luiten, 'Political Engagement' (doc A163), p 168)

181. Ōtaki Native Land Court, minute book 7, 1 December 1886, fol 194 [typescript copy] (Armstrong, papers in support of 'Special Factors' (doc A155(a)), p 772)

ultimately the tribe agreed to have Ihaia Taueki as their sole 'kaitiaki', to hold the land for them and look after their interests.<sup>182</sup> Hoani Puihi explained:

Ihaia Taueki was put into No. 12 as trustee because he was trustworthy. We did not like to vest the land in a person who was unreliable, as he might keep the land for himself. That is why Ihaia was chosen. Kemp agreed to it. We knew that a dishonest person could have disposed of the land against our wishes, and that is why we selected a kaumatua that we could trust. Ihaia knew that the tribe were interested, and would not sell.<sup>183</sup>

On 3 December, Horowhenua 12 was awarded to Ihaia Taueki without any objections.<sup>184</sup>

Muaūpoko fully controlled these decisions. The court simply endorsed them, and adjourned as necessary to allow disputes to be resolved. The statutory authority for this was section 56 of the Native Land Court Act 1880.<sup>185</sup> It stated: 'It shall be lawful for the Court, in carrying into effect this Act, to record in its proceedings any arrangements voluntarily come to amongst the Natives themselves, and to give effect to such arrangements in the determination of any case between the same parties.'

As noted above, the Native Land Court Act 1886 had come into effect on 1 October 1886, before the partition hearing, and it had repealed the 1880 Act. But the new Act gave the court discretion to continue incomplete proceedings which had commenced under the repealed legislation (as the court chose to do in this case).<sup>186</sup> This meant that the court's orders were made under the Native Land Division Act 1882. This Act specified that court orders, signed and sealed (with a survey plan attached), vested the land in the owners named in the order.<sup>187</sup> Section 10 stated that 'the new instruments of title shall be Crown grants, or certificates under the Land Transfer Acts'.<sup>188</sup>

A court order for a 'Crown Grant Certificate of Title under the Land Transfer Acts' was duly made for Horowhenua 11 by Judge Wilson in favour of Te Keepa and Warena Hunia.<sup>189</sup> A similar order for a 'Crown Grant Certificate of Title under the

182. Luiten, 'Political Engagement' (doc A163), pp 169–170; AJHR, 1896, G-2, p 89. Wirihana Hunia's version of events was that, after the court adjourned and a number of names were suggested, he decided Ihaia Taueki should have Horowhenua 12 to become his own personal property, and Te Keepa had approved of this: AJHR, 1898, G-2A, pp 27–28.

183. AJHR, 1898, G-2A, p 27

184. Ōtaki Native Land Court, minute book 7, 3 December 1886, fol 200 [typescript copy] (Armstrong, papers in support of 'Special Factors' (doc A155(a)), p 775)

185. Grant Young, 'Muaūpoko Land Alienation Report', August 2015 (doc A161), p 28

186. Native Land Court Act 1886, s 115; *Warena Hunia v Meiha Keepa (Major Kemp)* (1895) 14 NZLR 71, 74–75 (SC and CA); Young, 'Muaūpoko Land Alienation' (doc A161), p 29

187. Native Land Division Act 1882, s 4(2)

188. Native Land Division Act 1882, s 10

189. Partition order for Horowhenua 11, not dated (Armstrong, papers in support of 'Special Factors' (doc A155(a)), p 744)

## 5.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Land Transfer Acts' was made in favour of Ihaia Taueki for Horowhenua 12.<sup>190</sup> Both orders directed that the certificate be issued 'free from any restriction upon alienation.' Crown counsel provided us with a copy of Te Keepa and Hunia's land transfer certificate for Horowhenua 11, dated 19 July 1888, which declared them the owners of an 'estate in fee simple', subject to a survey lien of £452 11s 1d.<sup>191</sup>

This was the form of title made available by the native land laws at the time Horowhenua was partitioned. It was very different from that which had been available under the 1867 Act. Crown counsel submitted: 'The stronger claims arising out of the 1886 partition concern the increased vulnerability of partitioned land, held under different forms of title than the 1873 section 17 title, to alienation.'<sup>192</sup> But Crown counsel also noted that '[t]he Horowhenua situation is further complicated by the apparent aspirations (at least in relation to Horowhenua 11 and 12) for some form of trust arrangement to remain in place.'<sup>193</sup>

Judge Wilson was in no doubt that a trust had been intended. He later testified that Te Keepa 'held No 11 in a fiduciary capacity', and that he had understood Muaūpoko's intention for block 11 'to be kept unbroken as a permanent dwelling-place.'<sup>194</sup> Yet the tragedy for Muaūpoko was that the native land laws did not allow this. Judge Wilson explained to the Horowhenua commission in 1896 that there was no practical difference between the award of Horowhenua 11 in 1886 and use of the outdated 10-owner rule. The very year that the Native Equitable Owners Act was passed to try to put dispossessed owners back into the 10-owner titles (1886), the court awarded Horowhenua 11 and 12 on virtually the same flawed system.<sup>195</sup> Those whose names were left out of the Horowhenua titles in 1886 had no legal protections, but they could see no other way to prevent the piecemeal alienation of individual interests. As Judge Wilson commented, the vesting of this land in a rangatira was 'a device the Natives made to keep the land so that the individuals should not be able to go and sell individually and slyly. I thought it was a very good expedient if they could only trust the man.'<sup>196</sup>

As will be recalled from section 4.3.3(1), the Crown had considered but rejected the idea of providing for trusts in the native land laws back in 1867. The failure to do so during the period from 1867 to 1886 had very serious consequences for Muaūpoko, as we discuss in the next chapter.

The Court of Appeal found in 1895:

On the whole, the conclusion we come to is that the land was confided to Kemp and Hunia on the understanding that they were to hold it for the benefit of all the

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190. Partition order for Horowhenua 12, not dated (Armstrong, papers in support of 'Special Factors' (doc A155(a)), p 745)

191. 'Certificate of Title under Land Transfer Act', 19 July 1888 (Crown counsel, comp, papers in support of closing submissions, various dates (paper 3.3.24(b)), p 67)

192. Crown counsel, closing submissions (paper 3.3.24), p 153

193. Crown counsel, closing submissions (paper 3.3.24), p 153

194. AJHR, 1897, G-2, p 7

195. AJHR, 1896, G-2, p 135

196. AJHR, 1896, G-2, p 135

members of the tribe, according to Maori custom, that the main object was to prevent alienation by any individual member, and that the land was to be administered very much on the principles on which the property of a tribe was held and dealt with before the introduction of English law.<sup>197</sup>

As Dr Young explained, the Native Land Court had no express power to give effect to a voluntary arrangement that took the form of a trust, because the native land laws did not provide for creating a trust with a specified purpose and defined beneficiaries.<sup>198</sup> The superior courts found that there *was* a trust but it ‘could not be “enforced or administered by a Court” . . . because it was “too vague and indefinite”’:

This trust was not created by the beneficial owners conveying their interests in land to the trustees but by the action of the Native Land Court in issuing a partition order at the request of the owners. That is, ‘it is an allotment or judicial conveyance of land in which they have an interest, at their request, to be held for their benefit upon a trust which is now held to be too indefinite for enforcement.’<sup>199</sup>

We understand why the claimants believe that the Crown should be held to account in Treaty terms for failing to facilitate appropriate trust mechanisms to be used for Māori land under the native land laws. Some counsel went so far as to say: ‘Trust law was widely used in England prior to the Treaty, and there is no reason it could not have been used in New Zealand to promote [give effect to] the Treaty and allow Maori tikanga to work in a Pakeha legal system.’<sup>200</sup>

We consider that while trust law as applied and interpreted in the ordinary courts could have provided some relief for Te Keepa and Muaūpoko, the failure of the Crown to provide appropriate trust mechanisms in the native land legislation disabled, rather than enabled, Māori land retention and use within the new economy.

The native land laws, however, did provide one mechanism that could have assisted in making Horowhenua 11 a permanent reserve (as Judge Wilson noted was intended).<sup>201</sup> Section 36 of the Native Land Court Act 1880 required the court ‘in every case to inquire into and, if it think fit, take evidence as to the propriety of placing any restriction on the alienability of the land or any part thereof, . . . and to direct that the certificate of title be issued subject thereto’. Ms Luiten confirmed that the court did not consider the issue of restrictions during the partition hearing, and no restrictions against alienation were placed on Horowhenua 11 or any of the other partitions.<sup>202</sup>

Judge Wilson was cross-examined on this point in front of the Horowhenua commission. He suggested that the law did not allow the court to add to or subtract

197. *Warena Hunia v Meiha Keepa (Major Kemp)* (1894) 14 NZLR 71 (SC), (1895) 14 NZLR 84, 94 (CA) (Young, ‘Muaūpoko Land Alienation’ (doc A161), p 30)

198. Young, ‘Muaūpoko Land Alienation’ (doc A161), p 30

199. Young, ‘Muaūpoko Land Alienation’ (doc A161), p 31

200. Claimant counsel (Ertel and Zwaan), submissions by way of reply (paper 3.3.25), pp 4–5

201. AJHR, 1897, G-2, p 7

202. Jane Luiten, answers to questions in writing, 5 January 2016 (doc A163(h)), p 6



5.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

from voluntary arrangements, which meant that section 36 did not apply, and also that it was too easy for the Governor to simply remove such restrictions in any case. The judge denied that he was influenced by the Crown's purchase proclamation over Horowhenua. Because of its importance, we reproduce this exchange in full:

*There is another section (36) [of the 1880 Act] which says 'it shall be the duty of the Court': that is mandatory? – Yes.*

*Did you proceed to inquire whether it was necessary to make restrictions on any one of these divisions? – No.*

*Although in section 36 you were instructed that it was the duty of the Court? – But that does not apply to voluntary arrangement.*

*Why do you say that? – In a matter of voluntary arrangement you have to follow the arrangement and not vary it.*

*Then the reason why you did not make inquiry was that it does not refer to voluntary arrangement? – Yes.*

*You say that Kemp intimated to the Court that he wished No 11 to be issued to himself and Warena to prevent it being sold? – Yes.*

*Did it occur to you to place any restrictions on the sale of No 11? – No. It would have been contrary to the spirit of the arrangement, because if any restriction had been placed on it, it could have been removed by the Governor and the land would be saleable. It was a question of honour among them.*

*Was it not for the reason that you knew the whole block was proclaimed that you did not place restrictions on the sale? – I do not know what that proclamation would be. I did not know there was one. To have put restrictions on the land would have formed no part of the voluntary arrangement.*

*You consider that you were barred by that arrangement? – The question never arose in my mind at all. It was a voluntary arrangement we were carrying out; it was not a case for restrictions; they would have defeated the voluntary arrangement and they could have been removed.*

*Do you consider you had power to put a restriction on any portion of the block? – I did not consider about it, but I should think I had not power to add to their arrangement or to take from it.<sup>203</sup>*

If Judge Wilson was correct in his reading of the Act, and the court's duty to inquire into placing restrictions on alienation did not apply to voluntary arrangements, then Muaūpoko would have had to apply for restrictions themselves – upon which the judge would presumably have granted whatever restrictions were sought. We note that Muaūpoko had no independent or legal advice at the 1886 hearing. Their advisers were Alexander McDonald and Under-Secretary Lewis. Te Keepa and McDonald had fallen out over the railway block by the time Horowhenua 11 was applied for, and Lewis was looking after the Crown's interests as well as advising Te Keepa. We have no information as to whether he provided advice on the

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203. AJHR, 1896, G-2, p 138



arrangements for reserving Horowhenua 11 or Horowhenua 12, arrangements which were comprehensively defeated by this fault (among others) in the native land laws: that there was no mandatory inquiry about restrictions on alienation in the case of voluntary arrangements.

## 5.7 INDIVIDUAL PARTITIONS FOR THE REGISTERED OWNERS AND THE 'REREWAO' (HOROWHENUA 3, 6, 13)

### 5.7.1 Introduction

In addition to the *fait accompli* partitions (the railway, the township block, the debt block, and the gift) and the communal reserves, Muaūpoko decided to cut up part of the block into individual sections for leasing. This area became Horowhenua 3. They also agreed to set aside individual sections for the 'rerewaho', the 44 people known to have been left out of the title in 1873 (Horowhenua 6). Thirdly, Muaūpoko leaders decided that one of the names on the 1873 list was a mistake, and a one-square-foot section was allocated to that name (Horowhenua 13).

### 5.7.2 Horowhenua 3

We note that the claimants have not expressed any concerns about the partitioning of the piece of land which became Horowhenua 3, but we provide a brief explanation of the partition as the claimants did have concerns about later land loss in this block (see section 6.2.1).

On 1 December 1886, Te Keepa applied for 11,130 acres to be awarded to 106 owners, with five acres of each owner's share to be used for roading so that all individual sections could have access. He told the court: 'We have discussed this (myself and my tribe, Muaupoko) fully. It is agreed to as a subdivision of Horowhenua. We have also agreed as to the names of the owners to whom this land shall be awarded.'<sup>204</sup>

Te Keepa handed in a list of names, each person to get a share of 105 acres, with the list headed by Ihaia Taueki. Te Keepa himself was not on the list,<sup>205</sup> and this is one of the reasons why Horowhenua 14 was later described as his individual share of the Horowhenua block.<sup>206</sup> The intention was for the land to be leased rather than farmed by the owners, at least in the first instance.<sup>207</sup> There was concern that individuals owners might sell (it was common knowledge by now how difficult it was for communities to control this). Te Keepa believed that his trusteeship of Horowhenua 11 could be used as a deterrent. Individual owners were told that if they sold their sections in Horowhenua 3, they would not be allowed to share in Horowhenua 11.<sup>208</sup> This was as much of a community sanction as the law would allow. As will be discussed in chapter 6, it was not an effective one since Te Keepa's

204. Ōtaki Native Land Court, minute book 7, 1 December 1886, fol 188 [typescript copy] (Armstrong, papers in support of 'Special Factors' (doc A155(a)), p 769)

205. Luiten, 'Political Engagement' (doc A163), p 159

206. AJHR, 1897, G-2, p 43

207. Luiten, 'Political Engagement' (doc A163), p 159

208. AJHR, 1897, G-2, p 29

5.7.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

trusteeship of Horowhenua 11 was soon undermined, and just over three-fifths of Horowhenua 3 had been sold by the end of 1900.

**5.7.3 Horowhenua 6**

On 1 December 1886, Te Keepa applied for 4,620 acres ‘to be awarded to himself, to be given by him to persons outside (not on the Certificate)’.<sup>209</sup> While living on Palmerson’s property before the hearing, Muaūpoko had agreed upon 44 names of people who had been wrongly left out of the 1873 list of owners. Their proposal was for each of the 44 to have 100-acre sections, with five acres for roading, on the same basis as the individual sections in Horowhenua 3.<sup>210</sup> Under the native land laws, the court could not add new owners during a partition process. Te Keepa, therefore, was to act as trustee and convey the land to its prospective owners later. This had still not been done by the time of the Horowhenua commission 10 years later, for reasons discussed below in section 6.4.<sup>211</sup> That was a matter of great grievance to the ‘rerewaho’. We discuss this in section 6.5.2(1).

**5.7.4 Horowhenua 13**

Just as the court could not add new owners in 1886 (other than successors), nor could it remove owners named on the 1873 list. On 2 December 1886, Te Keepa applied to ‘amend the list of names in the original Certificate, one name having been entered twice’. He explained to the court that ‘Wiremu Matakara and Wiremu Matakatea are the same person’, the name ‘Wiremu Matakara’ having been included by mistake. Judge Wilson advised that the court could not do this, but it could award a token amount of land. Te Keepa then applied for a square foot ‘in the extreme North-Eastern corner to be awarded to Wiremu Matakara’. There were no objectors and the application was granted.<sup>212</sup>

Jane Luiten commented:

The diminishment of Matakara’s interest by relegating him to a toehold in the remote Tararua ranges was not challenged by Muaupoko at the time, and nor was it ever raised as an issue in the lengthy and repeated litigation of the 1890s, including the hearing of relative interests. Incredibly, Matakara’s interests in this square foot have been succeeded to down the generations. Horowhenua 13 remains Maori freehold land today.<sup>213</sup>

The fact that there have been successions indicates that Horowhenua 13 was in fact awarded to a genuine owner. According to Robert Warrington, there was confusion between father and son, Wiremu Kīngi Matakatea senior and junior, with

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209. Ōtaki Native Land Court, minute book 7, 1 December 1886, fol 191 [typescript copy] (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), p 771)

210. Luiten, ‘Political Engagement’ (doc A163), p 160

211. Luiten, ‘Political Engagement’ (doc A163), pp 160, 191–194

212. Ōtaki Native Land Court, minute book 7, 2 December 1886, fols 194–195 [typescript copy] (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), pp 773–774)

213. Luiten, ‘Political Engagement’ (doc A163), p 170

the son having fought and been wounded in Te Keepa's regiment. Hence, Wiremu Kīngi Matakatea junior, Mr Warrington's great-great-great-grandfather, was not awarded land even though his siblings were among the rerewaho who received land in Horowhenua 6. In respect of the one-square foot, Mr Warrington told us: 'I guess as a family we sort of come to the result to not worry about it and have a bit of a chuckle I guess, but the part we don't laugh about is the fact that he missed out on other lands.'<sup>214</sup>

There is also a tradition within Muaūpoko that Horowhenua 13 marks the 'look-out at certain times' from which the spiritual lake, Hapuakorari, may be viewed.<sup>215</sup>

In the event, the decision that there was an error in the 1873 list, and that one square foot should be vested in 'Wiremu Matakara', was not the responsibility of the Crown. Had the error been identified in the 1890s, it likely could have been remedied at that time, although the Muaūpoko estate was rapidly dwindling.

### 5.8 CONCLUSIONS AND FINDINGS ABOUT THE PARTITION PROCESS AND THE FORM OF TITLE AVAILABLE AND AWARDED IN 1886

The evidence shows that the process of partitioning was controlled by Muaūpoko, working with and through their rangatira – most notably Te Keepa, but not him alone. In that respect, the law's provision for the court to rubber-stamp voluntary arrangements did provide for the exercise of tino rangatiratanga.

As noted, however, the people were presented with several *faits accomplis*, which they agreed to after the fact, and perhaps with little or no real choice. Also, the law did not actually provide for the fundamental action that they wanted to take. They wanted to exercise their tino rangatiratanga by vesting certain lands in their chiefs for certain purposes, which in English law translated to the holding of land on trust by trustees. This intention was defeated by the refusal of successive governments to include appropriate trust mechanisms or other similar corporate models in successive native land statutes. This meant that the great majority of Muaūpoko owners unknowingly divested themselves of their legal rights, even though the abolition of the 10-owner rule was supposed to have made it impossible for one or a few rangatira to obtain sole legal ownership of the tribal estate. Judge Wilson was fully aware of what was happening but took the view that a voluntary arrangement of that kind was the only 'device' available to Muaūpoko for preventing loss of land through attrition of individual interests – to vest land in trusted chiefs without any legal protections and hope for the best.

We summarise the outcomes by 1887 as follows:

- ▶ Horowhenua 1 was vested in the railway company – Te Keepa received 15 shares in the company and Muaūpoko received nothing for the loss of this land, although they would still have benefited significantly if their retained lands had prospered as a result of the railway. We accept the Crown's submission

<sup>214</sup>. Transcript 4.1.11, p 691

<sup>215</sup>. Fredrick Hill, corrections to transcript, and additional evidence as directed, 14 January 2015 (paper 4.1.11(a)), p 3

that this was a private deal in which it was not involved, and for which it bears no responsibility in Treaty terms.

- ▶ Horowhenua 2 was vested in Te Keepa to sell to the Crown for a township settlement, on terms already offered to the Crown by Te Keepa (and agreed to by the people as the basis of any sale). The Native Department under-secretary told the court that the terms were so far agreed that he and his Minister could affirm the deal would be in the best interests of all the owners. In order, however, to avoid having to give the land to the railway company, the Crown delayed completing the purchase until mid-1887, too late to save Horowhenua 10 from Sievwright. The Crown also refused all of Muaūpoko's terms for the sale, and insisted on a monopoly price that was well below market prices. Te Keepa had little choice but to sell on those terms, and his disenfranchised fellow owners had no say in the matter. The purchase money was supposed to pay for the internal surveys but instead was all spent on litigation, mostly over Horowhenua 11. Thus, Muaūpoko obtained nothing for the sale of this 4,000-acre block.

We find the Crown's actions in respect of the township purchase to have been in breach of the Treaty. The Crown obtained the block from a chief whose debts meant, as a Crown official noted, that he 'could not help himself'. This was not consistent with the Treaty partnership or the principle of active protection. The Crown abused its monopoly powers to pay a price that was too low, and to reject all of the provisions which might have provided long-term benefit for the tribe. At the very least, Ministers and officials implied in June 1886 that those terms would be accepted, hence the necessity for a clause in the final agreement cancelling any earlier agreements. Muaūpoko had agreed to sell on the original terms but were disempowered in the final sale because the law did not provide for proper trust arrangements. In all these ways, the Crown acted inconsistently with the principles of partnership and active protection. Muaūpoko were significantly prejudiced by these breaches.

- ▶ Horowhenua 3 was vested in 106 individuals for the purpose of leasing their individual shares, but the native land laws did not provide an effective (or any) form of community control, making this land extremely vulnerable to piecemeal alienation for no long-term benefits. That was a Treaty breach, which will be considered in more detail in chapter 6.
- ▶ Horowhenua 4, 5, 7, and 8 were vested in Ngāti Hāmua, Ngāti Apa, and Rangitāne individuals, to remove those owners from the Muaūpoko heartland and 'into the mountains'.
- ▶ Horowhenua 6 was vested in Te Keepa in trust to convey it to the rerewaho, those who had been wrongly left out in 1873, of whom a provisional list of 44 was compiled at the time. The law did not enable the direct vesting of the land in the new owners, hence Te Keepa faced the prospect of further expensive legal work to complete this arrangement. In the event, it was delayed by other

litigation and had not been undertaken by the time of the Horowhenua commission, 10 years later (see chapter 6).

- ▶ Horowhenua 9 was awarded to Te Keepa to transfer to Ngāti Raukawa, in satisfaction of an 1874 deed, which had been entered into at the request of Donald McLean. Muaūpoko were not consulted and did not consent at the time, nor did they receive any payment, although they seem to have agreed unanimously in 1886 that the gift should be given effect. Many saw it as honouring the arrangement between Taueki and Te Whatanui. We have already discussed the shortcomings of the Crown's 1874 actions in section 4.3.4(2).

We accept, however, that Muaūpoko did consent to the arrangement belatedly in 1886, and that some at least saw the gift as honouring the tuku arrangement between Taueki and Te Whatanui. Some claimants argued that Muaūpoko might have repudiated the gift in 1886 if they had had access to proper, independent advice, but we do not think that was likely in light of the evidence. On balance, we do not think that a Treaty breach occurred (in respect of Muaūpoko) for the gift that became Horowhenua 9. Ngāti Raukawa's claims will be heard later in our inquiry.

- ▶ Horowhenua 10 was lost to Sievwright to satisfy legal debts, mostly for work done on the Whanganui trust, an arrangement to which Muaūpoko agreed in order to save their rangatira from prison. Despite recognising in principle that the land of other owners should not be taken to pay this debt, the Crown did nothing to assist Te Keepa and so the land was lost.

In this instance, we noted the Crown's role in defeating the Whanganui trust arrangements (which helped generate the debt), and the Crown's refusal to assist Te Keepa with the consequences of the trust's failure (one of which was this debt). Vogel rightly suggested that the rights of other owners in the land would be lost, and Lewis was not forthright in his explanations on this point. Ultimately, however, Muaūpoko decided to rescue their chief, and did not resile from that choice a decade later in the Horowhenua commission. That was their choice, and it was made on an informed basis. On balance, we do not find that the Treaty was breached.

- ▶ Horowhenua 11 and Horowhenua 12 were to be held in trust for Muaūpoko by Te Keepa and Warena Hunia (11) and Ihaia Taueki (12) as permanent reserves. Although the court made the orders, the details of the intention of the applicants and the tribe were not recorded, and the Crown's native land laws did not in fact empower the court to make, recognise, or enforce such trusts. As claimant counsel pointed out, trusts had long been commonplace in English law and should have been made available in the native land laws as an arrangement which fitted better than many others in respect of tikanga and enabling tribal communities to exercise their tino rangatiratanga. The result of this deliberate omission in the native land laws was prejudicial to Muaūpoko, as we explain in the next chapter. We make our findings in chapter 6.

- ▶ Horowhenua 13 was mistakenly set aside as a single-square foot, disenfranchising Wiremu Kīngi Matakatea junior, but the responsibility was not that of the Crown.
- ▶ Horowhenua 14 was awarded to Te Keepa after Ngāti Raukawa refused to accept it – whether or not as an individual share of Horowhenua or in trust for all the Muaūpoko owners was the subject of ruinously expensive litigation in the 1890s, as we shall see in the next chapter.

The need to record the detail of voluntary arrangements, and to reduce them to writing for the signature of those concerned, was finally recognised by a law change four years later in 1890.<sup>216</sup> If such a practice had been followed in 1886, much future trouble would have been averted. As a court of record, the Native Land Court failed to properly record the voluntary arrangements, a fact for which the Crown is not directly responsible. But the Crown is responsible for the fact that the native land laws did not require voluntary arrangements to be reduced to writing and signed by all concerned. An amendment to this effect in 1890 came too late to avert harm from the Muaūpoko owners of Horowhenua, who had to spend most of the next decade trying to prove in various courts and commissions what their intentions had been.

We have already found the native land laws in breach of the Treaty for their failure to provide proper trust mechanisms or a corporate title. In this case, we also find that the native land laws were inconsistent with Treaty principles in two important respects:

- ▶ the provisions for voluntary arrangements in force at the time did not require the proper recording of those arrangements (including the terms on which Horowhenua 2 should be alienated, and the trustee arrangements for Horowhenua 11 and 12); and
- ▶ the provisions for voluntary arrangements did not require the court to ascertain whether restrictions on alienation should be placed on blocks the subject of voluntary arrangements.

These provisions were not consistent with the Treaty principle of active protection, and Muaūpoko suffered significant prejudice as a result.

We turn in the next chapter to consider the serious consequences for Muaūpoko of the form of title available and granted in 1886.

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216. Waitangi Tribunal, *Te Urewera, Pre-publication, Part II* (Wellington: Waitangi Tribunal), 2010), p 861



## CHAPTER 6

# CONSEQUENCES OF THE 1886 FORM OF TITLE: LITIGATION AND ALIENATION

### 6.1 INTRODUCTION

In the 1890s, Muaūpoko were plunged into a maelstrom of litigation and land sales, following a relatively stable period after obtaining their section 17 title in 1873 and the partition of Horowhenua in 1886. By the end of 1900, around two-thirds of the Horowhenua lands had been sold. The litigation of the 1890s was bitter and protracted, and it left Muaūpoko deeply divided. Those divisions still cast shadows over the tribe today, as we explain further below.

In this chapter, we address in particular the consequences of the form of title made available by the native land laws in 1886 when the Horowhenua block was partitioned (as described in the previous chapter).

By 1890, the consequences were beginning to come to light. Horowhenua 3 was supposed to have been a permanent endowment for the individual owners to lease and obtain a rental income. It was partitioned in 1890, four years after the original partition, and many individual interests were sold at that point. By the end of 1900, over three-fifths of the Horowhenua 3 block had been sold. Debt, especially arising from litigation, was a driver of these sales, as was the lack of any community controls. These matters are dealt with in section 6.3 of this chapter.

Even more ominously for Muaūpoko, Warena Hunia applied for the partition of Horowhenua 11 in 1890, claiming that he and Te Keepa were absolute owners of the tribal estate. The Native Land Court accepted Hunia's position and divided the block between the two chiefs. Te Keepa applied for a rehearing at once. Although the chief judge and the rehearing court were aware of the injustice, they confirmed in 1891 that the native land laws had made Te Keepa and Hunia the individual owners of Horowhenua 11. Each was free to dispose of their half of the block as they saw fit. Warena Hunia then sold part of his share to the Crown for a State farm in 1893, which brought the Government in on his side and intensified the crisis for Muaūpoko. For the remainder of the 1890s, the tribe was embroiled in ruinous litigation to regain ownership of their tribal trusts (Horowhenua 6, 11, and 12). In section 6.4, we address this litigation and the remedies sought repeatedly from the

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Crown by Muaūpoko. Our analysis focuses in particular on the key question: What was the Crown's response to Muaūpoko requests for a remedy?

One part of the protracted litigation was the 1896 Horowhenua commission, which was one of the most controversial issues in our inquiry. The commission, its recommendations, and the Crown's response are dealt with in section 6.5. Following the commission, Muaūpoko faced further litigation in 1897–98. They lost ownership of the State farm, their land in the Tararua Ranges (Horowhenua 12), the 'rerewaho' block (Horowhenua 6), and the block containing Lake Waiwiri (Horowhenua 14). These matters are addressed in sections 6.6–6.8. We then turn to the individualisation of title to the tribal heartland, Horowhenua 11, in 1898, ending forever the tribe's aspiration to reserve this land in trust for future generations (section 6.9), and the consequences of the litigation for a divided iwi (section 6.10).

Our conclusions and Treaty findings are made in section 6.11.

We begin with a brief summary of the parties' arguments.

## 6.2 THE PARTIES' ARGUMENTS

### 6.2.1 Individualisation and the loss of land in Horowhenua 3

The Crown conceded that individualisation of title made the Horowhenua lands more susceptible to partition, fragmentation, and alienation. It also conceded that individualisation undermined Muaūpoko's tribal structures, and that its failure to protect these structures was a breach of the Treaty.<sup>1</sup> The Crown further conceded that its actions, including the operation and impact of its native land laws, have left Muaūpoko virtually landless, which was also a Treaty breach. Crown counsel acknowledged that the claimants 'describe the alienation of Horowhenua 3 as flowing from individualisation of title.'<sup>2</sup> But, having made its concessions, the Crown also submitted that there is no 'direct causal link between individualisation and alienation'. In its view, the circumstances of each individual alienation must be assessed before findings can be made. 'To do otherwise,' Crown counsel submitted, 'is to ignore Māori agency in relation to their own lands and to reduce complex realities into inaccurately broad generalities.'<sup>3</sup> The Crown argued that there is insufficient evidence about the circumstances of alienations in Horowhenua 3, and that the Tribunal is not in a position to make findings specific to Horowhenua 3.<sup>4</sup>

The claimants, on the other hand, consider the loss of land in Horowhenua 3 to be a 'prime example' of the impact of the native land laws and individualised title. They argued that 32 of the 105 owners had already sold their interests before or by the end of the first partition in 1890. In the absence of any community controls, further rapid alienations occurred throughout the 1890s. The claimants also submitted that it was not simply the law's individualisation of title that was at fault. As in 1886, they said, problems in the law with respect to voluntary arrangements meant that

1. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 153

2. Crown counsel, closing submissions (paper 3.3.24), p 169

3. Crown counsel, closing submissions (paper 3.3.24), p 153

4. Crown counsel, closing submissions (paper 3.3.24), p 169

two of the Horowhenua 3 partitions were passed by the court without proper agreement. There was no legal mechanism for collective decision-making by the owners of Horowhenua 3, another failing in the native land laws. Also, the claimants submitted that the ‘rapid alienation of Horowhenua 3’ was ‘strongly linked’ to debts arising from litigation over Horowhenua 11.<sup>5</sup>

### 6.2.2 Horowhenua 11: the tribal heartland

The parties agreed on some points in respect of Horowhenua 11, largely because of some significant Crown concessions. Crown counsel argued that the Crown’s ‘direct involvement in Horowhenua 11’ began when it tried to buy the State farm block from Warena Hunia in 1893. This involvement ‘culminated in the establishment of the Horowhenua Commission and the later enactment of the Horowhenua Block Act 1896.’<sup>6</sup> The Crown conceded that it ‘purchased land in Horowhenua No 11 from a single individual knowing that title to the block was disputed, and despite giving an assurance that the interests of the wider beneficiaries would be protected’. The Crown then legislated to ‘permit the sale’ after it had been successfully challenged in the Supreme Court.<sup>7</sup> The cumulative effect of the Crown’s actions was that it failed to actively protect the interests of Muaūpoko in Horowhenua 11, in breach of the Treaty and its principles.<sup>8</sup>

In addition, the Crown conceded that its failure to provide ‘an effective form of corporate title’ was ‘especially relevant to Horowhenua block 11’, which Muaūpoko had wanted to vest in trustees. Crown counsel also noted that the general concession about individualisation – that it made land more susceptible to fragmentation, alienation, and partition, and ‘contributed to the undermining of the traditional tribal structures of Muaūpoko’ – was relevant to Horowhenua 11.<sup>9</sup> Presumably, this concession related to both the treating of ‘trustees’ as absolute owners and the inroads made to Horowhenua 11 after the title was fully individualised in 1898.

The claimants welcomed these concessions but argued that they did not go nearly far enough. They denied that the Crown’s first direct involvement in Horowhenua 11 came with the State farm purchase of 1893. Rather, the claimants contended that the Crown’s ‘refusal to take action to settle the trust issue at an early instance was a breach of active protection and good faith.’<sup>10</sup> They pointed to multiple petitions and appeals to the Crown for remedy from 1890 to 1894: ‘Each was a separate occasion where the Crown could have taken steps to properly protect Muaupoko and their interests.’<sup>11</sup> Similarly, in 1895–96, it was not too late for a more appropriate legislative

5. Claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), pp 139–143; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4: post-1898 issues, 17 February 2016 (paper 3.3.17(c)), pp 7–8

6. Crown counsel, closing submissions (paper 3.3.24), p 177

7. Crown counsel, closing submissions (paper 3.3.24), p 178

8. Crown counsel, closing submissions (paper 3.3.24), pp 178–179

9. Crown counsel, closing submissions (paper 3.3.24), p 179

10. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply, 15 April 2016 (paper 3.3.29), p 42

11. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 42–44; see also claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 168–180

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remedy than the Horowhenua commission.<sup>12</sup> Claimant counsel submitted that the Crown has taken no responsibility for its repeated failures to take action. Also, it was argued, the Crown's concessions took no responsibility for the fact that its omissions forced 'costly litigation' on Muaūpoko over many years, resulting in very significant prejudice to the tribe.<sup>13</sup>

Finally, the claimants noted that the outcome of the failure of the 1886 trust was the individualisation of title in 1898, involving fraught intra-tribal contests over entitlement and the meaning of ahi kā.<sup>14</sup> Some claimants held that too many of the tribe were left out,<sup>15</sup> others that ahi kā had not been interpreted strictly enough.<sup>16</sup> The result was alleged to be prejudicial:

The long-term impacts of the decision to base the ownership of Horowhenua 11 on ahi ka, was not realised by the tribe at the time. When it came to cutting out whanaunga and deciding who was and was not entitled it became clear that this process was dividing the Iwi and it seriously affected their ability to act and evolve as a tribe.<sup>17</sup>

### 6.2.3 The Horowhenua commission: was it really necessary and what did it achieve?

The question of whether the Horowhenua commission was really necessary was one of the most contested in our inquiry, and we have devoted considerable analysis to it for that reason (see sections 6.4.10 and 6.5).

In the claimants' view, the commission was unnecessary because Muaūpoko had already obtained a remedy for Horowhenua 11 from the courts at great expense,<sup>18</sup> and the remedy for Horowhenua 6 had been known since 1891.<sup>19</sup> The claimants submitted that the commission was really established so that the Crown could avoid the courts' ruling on the State farm purchase.<sup>20</sup> This was described as an 'unwarranted interference in Muaūpoko's constitutional rights' and a Treaty breach.<sup>21</sup> The claimants further argued that the Government established the commission to 'harass and embarrass opponents of Crown actions in the Horowhenua block.'<sup>22</sup> In particular, Horowhenua 14 was put in the commission's terms of reference despite no prior Muaūpoko complaints as a way of attacking Te Keepa and his lawyer, Sir Walter Buller.<sup>23</sup>

12. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply, 21 April 2016 (paper 3.3.33), p 36

13. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 44

14. Claimant counsel (Ertel and Zwaan), closing submissions, 12 February 2016 (paper 3.3.13), pp 19–23

15. Charles Rudd, closing submissions, 9 February 2016 (paper 3.3.18), p 9

16. Philip Taueki, submissions by way of reply, April 2016 (paper 3.3.31), paras 33, 95–96

17. Claimant counsel (Ertel and Zwaan), closing submissions (paper 3.3.13), pp 22–23

18. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2: Horowhenua issues 1873 to 1898, 15 February 2016 (paper 3.3.17(a)), pp 48–49

19. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 145–147

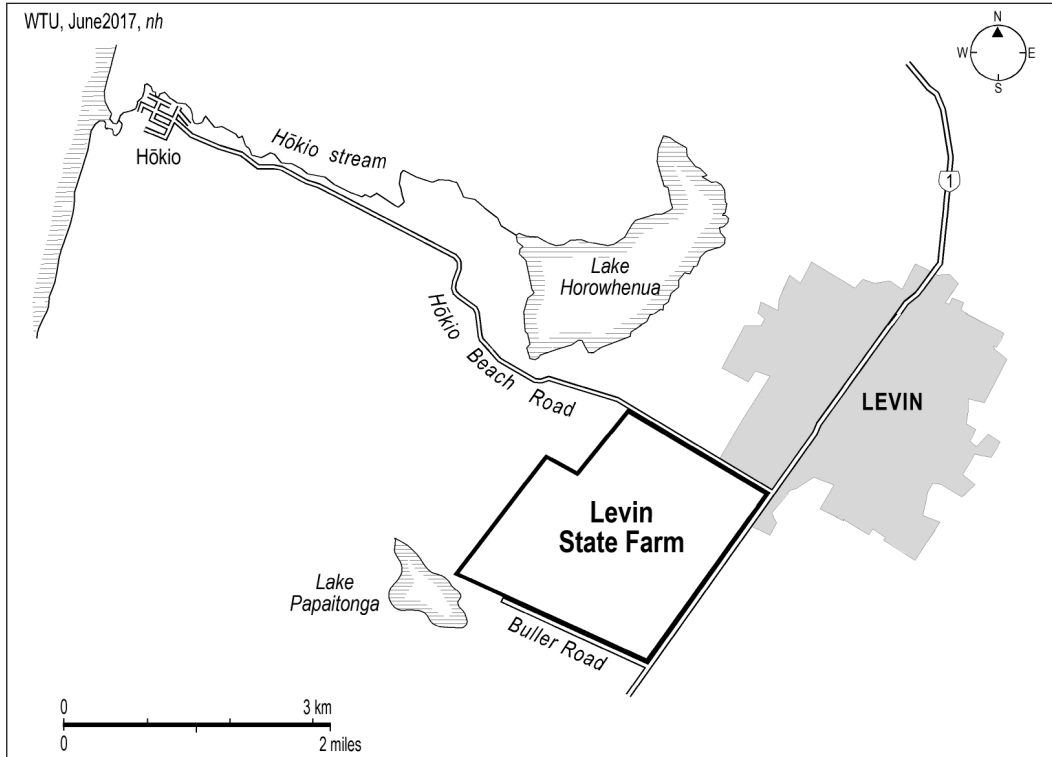
20. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), pp 48–49,

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21. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), p 51

22. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), p 49

23. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), p 49



Map 6.1: Levin State Farm block, 1,500 acres

The claimants also argued that the commission was not only unnecessary but biased in favour of the Crown and the interests of settlers. Muaūpoko were not consulted about the commission's establishment, its members, or the provision requiring Muaūpoko to pay for it in land. In the claimants' view, the Crown's control of the terms of reference and appointment of members enabled it to exercise some control over the commissioners, whose report and recommendations were highly criticised by Muaūpoko (both at the time and in the present inquiry).<sup>24</sup> Further, the claimants contended that the Crown's decision 'to instruct and pay Alexander McDonald to represent otherwise unrepresented members of the tribe before the royal commission was a gross breach of good faith and the duty of protection.'<sup>25</sup> McDonald, it was alleged, had been a 'triple agent' in the township purchase, and had even given evidence in the Supreme Court for Warena Hunia that no trust existed over Horowhenua 11.<sup>26</sup>

The Crown admitted that 'Muaūpoko were not consulted over the commission or the imposition of costs', but made no concessions of Treaty breach. In Crown counsel's submission, the Treaty was not breached until after the commission, when the

24. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), pp 51–60

25. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), p 55

26. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), pp 55–56

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Crown decided to carry out certain of its recommendations.<sup>27</sup> The establishment of the commission was held to be a

reasonable exercise of the Crown's kāwanatanga function to establish commissions of inquiry to inquire into matters of public importance. It is apparent that ownership and dealings with certain lands in the Horowhenua region had been contentious issues for some time prior to the establishment of the Horowhenua Commission and it was a reasonable decision for the Crown to take to establish the Commission so as to ensure the Crown acted in an informed way going forward.<sup>28</sup>

The Crown denied that the commission was unnecessary. In Crown counsel's submission, the outcome of the Horowhenua 11 litigation in the courts had been uncertain, and the commission's brief was necessarily much broader than Horowhenua 11 in any case. The Crown also denied that it exercised any form of control over the commission, which acted independently of the Crown and was not biased in favour of the Government or settlers' interests. Instead, the commission made 'a number of findings against the Crown'. Further, the Crown argued that the establishment of the commission was not politically motivated. Crown counsel accepted that issues about Horowhenua had become 'politically contentious', and that there is evidence the dispute between Buller and McKenzie, Minister of Lands, was a motive for the commission's establishment. Nonetheless, the Crown maintained that that evidence was *not conclusive*.<sup>29</sup>

**6.2.4 Loss of Horowhenua 12**

The parties agreed that the compulsory acquisition of Horowhenua 12 was a breach of the Treaty. The Crown conceded that it acquired 20 per cent of the Horowhenua block to pay for a royal commission about which Muaūpoko were not consulted (including no consultation as to whether they should bear its costs).<sup>30</sup> Crown counsel stated: 'The Crown has conceded that the manner in which it acquired Horowhenua No 12 to pay for the royal commission was a breach of the Treaty and its principles.'<sup>31</sup> Nonetheless, the Crown observed that – no matter how unfair it seems today – it *may* have been common practice to charge the costs of commissions of inquiry against the land concerned.<sup>32</sup> Crown counsel also suggested that block 12 was chosen because it was of little economic value to Muaūpoko.<sup>33</sup>

The claimants disagreed with the Crown on some points. Some argued that this land may have been targeted for confiscation because its trustee, Ihaia Taueki, had fought against the Crown in the Waikato.<sup>34</sup> Others argued that it was indeed a rau-

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27. Crown counsel, closing submissions (paper 3.3.24), pp 178, 195–196

28. Crown counsel, closing submissions (paper 3.3.24), p 178

29. Crown counsel, closing submissions (paper 3.3.24), pp 182–196

30. Crown counsel, closing submissions (paper 3.3.24), p 183

31. Crown counsel, closing submissions (paper 3.3.24), p 179

32. Crown counsel, closing submissions (paper 3.3.24), p 193

33. Crown counsel, closing submissions (paper 3.3.24), pp 193–195

34. Claimant counsel (Lyll and Thornton), closing submissions, 15 February 2016 (paper 3.3.19), pp 17–18, 25



patu to punish Muaūpoko for resisting the Government in more recent times and for causing it political embarrassment, noting that the clause requiring Muaūpoko to pay for the commission was inserted by McKenzie. The claimants also argued that the amount of land taken was excessive because the Crown was able to dictate the value and price for block 12 without any opportunity for Muaūpoko to negotiate.<sup>35</sup> The claimants also asserted that Horowhenua 12 was a valuable mahinga kai but, more importantly, the mountains are a cultural treasure and source of tribal identity. Loss of ownership and control, they said, was a cause of serious prejudice to Muaūpoko.<sup>36</sup>

Finally, the claimants disagreed that there is any significant evidence that this kind of taking land without consent was common practice for royal commissions. They also argued that it was unjustifiable for the Crown to charge Muaūpoko the whole cost of the commission when the Crown itself had a direct interest in the matters inquired into, and that the Crown had prevented Muaūpoko from obtaining costs awarded by the courts as part of the legislation establishing the commission.<sup>37</sup>

#### 6.2.5 Loss of Horowhenua 14

The Crown did not make any specific concessions about Horowhenua 14, observing that its submissions about alienation of Horowhenua lands ‘generally’ and ‘cost of litigation’ covered this block.<sup>38</sup> We have not, however, identified that the Crown did make general submissions about the cost of litigation in the 1890s. The claimants argued that Muaūpoko ownership of Horowhenua 14, which was vested in Te Keepa, was lost because of a ‘political vendetta’ against its lessee, Buller. The tribe, they said, had not complained about Horowhenua 14 prior to the commission, and the Crown was the one which maintained that the block was held in trust despite Muaūpoko’s evidence to the contrary. Horowhenua 14 had to be sold to pay the costs of prolonged litigation (unduly prolonged because of the Government’s vendetta). The Crown, we were told, utterly failed to protect Muaūpoko interests in Horowhenua 14 despite a protestation that it was doing so in its litigation against Te Keepa and Buller.<sup>39</sup>

#### 6.2.6 Loss of Horowhenua 6

Almost the whole of Horowhenua 6 was purchased by the Crown in 1898–99. Crown counsel conceded that the cumulative effect of the Crown’s actions, including its purchasing and the impact of its native land laws, has left Muaūpoko virtually landless. The Crown’s failure to ensure Muaūpoko retained sufficient land was in breach of the Treaty.<sup>40</sup> Crown counsel repeated these concessions in respect of

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35. Claimant counsel (Naden, Upton and Shankar), closing submissions (paper 3.3.23), pp 227–229

36. Claimant counsel (Naden, Upton and Shankar), closing submissions (paper 3.3.23), p 230

37. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 37

38. Crown counsel, closing submissions (paper 3.3.24), p 180

39. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), pp 62–63

40. Crown counsel, closing submissions (paper 3.3.24), p 169

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Horowhenua 6 but added that there was insufficient evidence about the alienation of Horowhenua 6 for the Tribunal to make any specific findings about that block.<sup>41</sup>

The claimants argued that Crown pre-emption and Muaūpoko indebtedness were the key factors in enabling the Crown to obtain virtually all of the individual interests in Horowhenua 6 almost immediately after title was individualised in 1898. The Crown's unilaterally imposed monopoly meant that Muaūpoko individuals had no choice but to sell to the Crown at its low price. They were not allowed by law to lease their land to private interests or do anything with it but sell to the Crown. The claimants argued that the Crown's payment of advances further weakened the owners' ability to negotiate a fair price.<sup>42</sup>

We turn next to begin our analysis of the consequences arising from the form of title available to Muaūpoko in 1886, starting with the alienation of individual interests in Horowhenua 3.

**6.3 INDIVIDUALISATION AND THE LOSS OF LAND IN HOROWHENUA 3**

Some of the Crown's concessions apply particularly to the Horowhenua 3 block. The Crown, for example, has conceded that the individualisation of title 'provided for by the native land laws made the lands of Muaūpoko more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Muaūpoko'.<sup>43</sup> The Crown has also conceded it failed to provide an effective form of corporate title, which 'undermined attempts by Muaūpoko to maintain tribal authority within the Horowhenua block'.<sup>44</sup> The Crown has further conceded that the cumulative effect of its actions and omissions, including the operation and impact of the native land laws, has left Muaūpoko virtually landless.<sup>45</sup> These concessions are very apposite in respect of Horowhenua 3.

As noted above, however, Crown counsel qualified these concessions by submitting that we would need to examine the circumstances of the alienation of each individual interest or interests before we could make findings about Horowhenua 3. We do not accept this submission. By the 1890s, the Crown had known for decades that individualisation of title resulted in the rapid, piecemeal alienation of land, subverting the traditional controls and sanctions of tribal communities. But it did nothing to correct this fundamental flaw in the native land laws.

Crown counsel argued:

There is no evidence that the Native land policies were conceived in bad faith. Good intentions at times had unintended negative consequences. In this context, the focus of the Tribunal must be on whether consequences were foreseeable, and on the adequacy of the Crown's response to such consequences once identified.

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41. Crown counsel, closing submissions (paper 3.3.24), p 169

42. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), pp 13–15

43. Crown counsel, closing submissions (paper 3.3.24), p 24

44. Crown counsel, closing submissions (paper 3.3.24), p 111

45. Crown counsel, closing submissions (paper 3.3.24), pp 24, 111

The Court was not established to separate Māori from their land. Such arguments conflate the consequence from the intention.<sup>46</sup>

The Crown further argued that the history of the native land laws was a ‘history of best endeavours’ in managing the engagement of ‘two different social, economic, and legal systems’.<sup>47</sup>

The evidence before us in this inquiry does not show a history of ‘best endeavours’, nor does it show a correction of ‘unintended negative consequences’ once identified. We agree with a recent Tribunal report, which summarised the findings of many Tribunal inquiries:

Broadly speaking, Parliament had two main purposes in passing the nineteenth-century native land laws. One was to give Māori land a form of title that gave purchasers, lessees, and lenders security, and thus made it usable in the colonial economy. The other was to give Māori land a form of title that facilitated its large-scale transfer to settlers or the Crown. While historians disagree as to whether individualised title was *designed* to achieve that second purpose, the *effects* were clear within at least 10 years of the passage of the first Act. As a Supreme Court judge put it in 1873, the legislation impacted on hapū like breaking the band holding a bundle of sticks together, enabling each individual stick to be snapped one by one. This effect of individualised title was observed again by commissions of inquiry in 1891 and 1907, but the Crown did not alter this fundamental purpose of the native land laws until the 1950s.<sup>48</sup>

Justice Richmond, chairman of the Hawke’s Bay Native Lands Alienation commission, reported in 1873 that ‘the procedure of the Court has snapped the faggot band [tying a bundle of sticks together], and has left the separate sticks to be broken one by one’.<sup>49</sup> The Native Land Laws commission in 1891 confirmed that nothing had really been done to fix this in the interim, finding that the ‘alienation of Native land under this law took its very worst form and its most disastrous tendency’. The ‘charmed circle’ of the tribe was broken by individualisation, and the ‘power of the natural leaders of the Maori people was undermined’. Thus, land was obtained from a ‘helpless people’ because the law took the ‘strength which lies in union . . . from them’.<sup>50</sup> In our view, this is the crucial circumstance which we need to consider for the loss of individual interests, which the Crown was aware of but had done nothing effective to correct since at least 1873. Although the possibility of incorporations was added to the law in 1894, that came too late for Horowhenua 3.

46. Crown counsel, closing submissions (paper 3.3.24), p 116

47. Crown counsel, closing submissions (paper 3.3.24), p 116

48. Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Te Ture Whenua Māori Act 1993* (Wellington: Legislation Direct, 2016), pp 13–14

49. Waitangi Tribunal, *Te Urewera, Pre-publication, Part II* (Wellington: Waitangi Tribunal, 2010), p 513

50. ‘Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws’, AJHR, 1891, G-1, p x (Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 625)

## 6.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The protection mechanism offered by the law was restrictions on alienation, which the court was obliged to consider in the case of all land passing before it. As we discussed in chapter 5, Judge Wilson did not carry out this duty in 1886 because he considered that it was overridden by the provision for voluntary arrangements (see section 5.6). His understanding of the Act was that if a voluntary arrangement did not seek any restrictions on titles, then the court would not inquire further despite its statutory obligation to do so.<sup>51</sup> This left Horowhenua 3 without any legal protections against piecemeal alienation. Te Keepa tried to rectify this at the time of partition in 1890, as we discuss below.

As we explained in section 4.3.3, Muaūpoko had been aware of the dangers posed by individualised titles. Te Keepa had been put into the title for Horowhenua in 1873 because Muaūpoko leaders feared the land loss that followed individualisation. Similarly, in 1886, they had placed trustees into the titles for the tribal estate (Horowhenua 11 and 12). Horowhenua 3, however, was intended for each Muaūpoko owner to obtain an income from leasing, while the owners lived and farmed communally on Horowhenua 11 (see section 5.7). Te Keepa tried to prevent any individual owner from selling in Horowhenua 3 by giving them a ‘warning’,<sup>52</sup> referred to by several witnesses in the Horowhenua commission.<sup>53</sup> Wirihana Hunia, under cross-examination, said that he had heard Te Keepa give this warning in 1886

in front of the assembly at the place the Muaupoko were camped – in the middle of the committee that subdivided the land. He spoke to the assembled Natives, and said, ‘Listen to this; if any of you sell any of the land that has been awarded you – 105 acres – I will not give you any land in No 11. Now, that this land has been awarded to you, you had better go back on the land allotted to you and look after it.’<sup>54</sup>

Te Keepa told the Native Appellate Court in 1897:

When No 11 was set apart in 1886 I stood before Muaupoko and said: ‘Your heads have been in my hands, my feet have been upon your bodies; the reason I had my own name only put in [in 1873] is that I knew some of you would sell. You are my father’s tribe, and this is the only land you have. You have none elsewhere. Now, I am going to lift your heads up. Each of you will get something in the other divisions, and No 11 is the balance, which is for yourselves to keep. If you sell in the other portions of the block you will get nothing in this.’<sup>55</sup>

This warning proved futile because tribal leaders like Te Keepa were powerless to control the piecemeal alienation of individual interests once the title was individualised. As noted, the Crown conceded that it should have provided a form

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51. AJHR, 1896, G-2, p 138

52. AJHR, 1896, G-2, p 102

53. AJHR, 1896, G-2, pp 60, 78, 102

54. AJHR, 1896, G-2, p 60

55. AJHR, 1897, G-2, p 29

of title which accorded Māori owners corporate control of their lands. This was a demand that Māori had pressed repeatedly upon the Government from the 1870s to the 1890s. The Tribunal has reported on this issue in a number of inquiries.<sup>56</sup> The Turanga Tribunal commented:

Chiefs such as Wi Pere continued to push for a corporate form of title, experimenting with trusts and block committees . . . Petitions were lodged, letters sent and meetings held over a 30-year period – most complaining in some way of the inability of their communities to organise collectively under the legal regime in place. This level of activity, which continued well into the twentieth century, does not, it appears to us, signify a wholesale acceptance of individual tenure. On the contrary, it demonstrates a deep commitment to community title.<sup>57</sup>

There are obvious parallels in the historical experience of Muaūpoko at Horowhenua. Their attempt to maintain communal control had involved placing rangatira as unofficial trustees in some titles, but Horowhenua 3 had been intended for individuals. This does not mean that it was intended that each of 106 individuals would exercise untrammelled control over a separate section. Te Keepa expected that the land would still be dealt with collectively and under the control of community leaders, hence his initiative to lease 1,050 acres for timber cutting at the request of two kuia, Makere Te Rou and Ruta Te Kiri, after individual title had been awarded. It was hoped that the cleared land could then be developed for pastoral farming. He had no legal authority to do this, which meant that the lease would have to be confirmed by a partition. According to Te Keepa, the £500 received from the lease was mostly spent in paying off the Hunia brothers' debts.<sup>58</sup>

In 1890, an application was made to partition Horowhenua 3. This application was driven by Wirihana Hunia with the aim of obtaining the timber mill, which had been built on the leased land.<sup>59</sup> It was at this point that the vulnerability of individual interests was evident. Almost one-third of the interests in Horowhenua 3 had been alienated either before or by the end of this hearing.<sup>60</sup> The initial partition in 1890 was arranged out of court by Wirihana Hunia and Alexander McDonald, just as Muaūpoko had arranged the partition of 1886. Those Muaūpoko who were present in Palmerston North for the partition of Horowhenua 11 (see below) participated in these discussions. At a series of meetings, they divided the interests into four groups: 10 owners in 3A and 3B, which covered the leased land; 31 owners in

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56. See, for example, Waitangi Tribunal, *He Maunga Rongo*, vol 1, chapters 6–7.

57. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 445

58. Jane Luiten with Kesaia Walker, 'Muaupoko Land Alienation and Political Engagement Report', August 2015 (doc A163), pp 184–185

59. Luiten, 'Political Engagement' (doc A163), pp 186, 189

60. Luiten, 'Political Engagement' (doc A163), p 185



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3C; 26 owners in 3D; and 39 owners in 3E.<sup>61</sup> These sections were then further partitioned over the next few years.<sup>62</sup>

Supposedly, Te Keepa and Wirihana had agreed on the 10 owners to go into the titles for 3A and 3B, but they were all non-residents. Some Muaūpoko present in court objected. As a result, Ihaia Taueki and Makere Te Rou were put in Te Keepa's list for 3A, and Rangipō was added to Wirihana Hunia's list. Although there were no further objections in court, Te Keepa claimed not to have known about any of this – and the timber mill turned out to be on Wirihana's part, 3B. A rehearing was sought and granted, limited to 3A and 3B.<sup>63</sup> Jane Luiten explained that this contest was not solely about ownership of the mill but also because of the 'growing feud' between Wirihana and Te Keepa over Horowhenua 11.<sup>64</sup> In any case, Te Keepa did not succeed at the rehearing. The court held that a valid voluntary arrangement had been made in 1890.<sup>65</sup> As will be recalled from our discussion in section 5.8, the law was changed in 1890 to require voluntary arrangements to be reduced to writing and signed by those concerned, soon after this particular voluntary arrangement was made. This omission in the law had produced multiple problems,<sup>66</sup> including the contest in the 1890s over exactly what the arrangements had been in 1886 (see below).

Another point to note is that Te Keepa applied in 1890 for restrictions to be placed on all of the Horowhenua 3 partitions. This would have prevented sales, restricting alienation to 21-year leases. The only objections in court came from Wirihana Hunia and Hiroti Haimona. Apart from those interests, the court agreed to place restrictions on the titles. But this proved an ineffective protection. Jane Luiten explained that the court did not actually place restrictions on all the titles in 1890, and that when the whānau blocks were further partitioned the restrictions were removed in any case.<sup>67</sup>

Grant Young has quantified the continued sale of individual interests that followed the partition of Horowhenua 3. The whole of 3B was sold in 1892, after the rehearing confirmed the titles of Wirihana Hunia's five owners.<sup>68</sup> By the end of 1900, over three-fifths<sup>69</sup> of Horowhenua 3 had been sold, the great majority of it to private purchasers.<sup>70</sup> Jane Luiten noted:

Rod McDonald's recollections suggest that the owners of Horowhenua 3 succumbed quickly to the pressures associated with the expansion of European settlement (what O'Donnell described as the 'horde of land-hungry settlers'), the 105-acre

61. Luiten, 'Political Engagement' (doc A163), pp185–187

62. Grant Young, 'Muaūpoko Land Alienation Report', August 2015 (doc A161), pp 91–122

63. Luiten, 'Political Engagement' (doc A163), pp185–189

64. Luiten, 'Political Engagement' (doc A163), p189

65. Luiten, 'Political Engagement' (doc A163), p190

66. Lewis to Cadman, 14 May 1891 (Jane Luiten, comp, papers in support of 'Muaupoko Land Alienation and Political Engagement Report', various dates (doc A163(a)), p798)

67. Jane Luiten, answers to questions in writing, 5 January 2016 (doc A163(h)), p6

68. Young, 'Muaūpoko Land Alienation' (doc A161), pp93–94

69. Approximately 6,884 acres.

70. Young, 'Muaūpoko Land Alienation' (doc A161), pp 91–122



sections rapidly lost through either outright sales, or sales obtained first by way of grazing rights and advances.<sup>71</sup>

It proved very difficult for individual owners, struggling with debts, to prevent leases from turning into sales. The passage of the Native Land Court Act 1894 interrupted the plan for leasing, however, because that Act imposed Crown pre-emption on Māori. After the Act was passed, Māori could only enter into new leases with or sell to the Crown.<sup>72</sup> Despite this, a significant number of individual interests in Horowhenua 3 were purchased by settlers between 1895 and 1900.<sup>73</sup> Presumably, certain sections of Horowhenua 3 were exempted by the Crown so that these purchases could take place. Jane Luiten noted that two Horowhenua 3 purchases in 1896–97 could not be registered because they were in breach of the 1894 Act,<sup>74</sup> yet the piecemeal alienation of interests to settlers seems to have continued unabated.

In addition, the Crown purchased 835 acres (Horowhenua 3E5) on 29 June 1900.<sup>75</sup> We have no information about this purchase, but we note that it was carried out during the Crown's self-imposed, nationwide halt to all purchasing of Māori land. Due to the massive loss of Māori land to the Crown and the pressure from the Kotahitanga (Māori Parliament), the Crown had introduced a moratorium on all purchasing in 1899. The Government agreed that Māori would confine alienations to leasing alone, and that settlement could still continue (and both peoples prosper) on that basis.<sup>76</sup> It may be that the June 1900 purchase had commenced before the moratorium was introduced in 1899, which allowed it to be completed. But it certainly fell outside the spirit of what the Crown had agreed to in the face of strong Māori opposition nationwide to further purchasing.

As claimant counsel submitted, the rapid alienation of individual interests in Horowhenua 3 was 'an illuminating example of what Te Keepa had sought to avoid throughout his stewardship.'<sup>77</sup> Alienations continued in the twentieth century,<sup>78</sup> but we lack sufficient evidence to address these other than briefly in chapter 7.

The loss of interests in Horowhenua 3 from 1890 onwards made retention of the tribal heartland, Horowhenua 11, even more important to those who had sold and would otherwise be landless. As discussed in chapter 5, Muaūpoko had sought to prevent any alienations in Horowhenua 11 by vesting the land in two tribal trustees. In 1890 they discovered that the native land laws treated this as an extreme form of individualisation: the two 'trustees' had a certificate of title under the Land Transfer Act and were treated as absolute owners with the power to sell the tribal estate. We turn next to Muaūpoko's struggle in the 1890s to save Horowhenua 11 and regain title to it.

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71. Luiten, 'Political Engagement' (doc A163), p 185

72. Native Land Court Act 1894, ss 117–121

73. Young, 'Muaūpoko Land Alienation' (doc A161), pp 94–98, 102–109, 116, 119–121

74. Luiten, 'Political Engagement' (doc A163), p 190

75. Young, 'Muaūpoko Land Alienation' (doc A161), pp 34, 121–122

76. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 381

77. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), p 7

78. Young, 'Muaūpoko Land Alienation' (doc A161), pp 52–54, 63–64, 70, 92–93, 95–96, 98–106, 109–123

## 6.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**6.4 HOROWHENUA 11: THE TRIBAL HEARTLAND****6.4.1 The partition hearing, 1890**

At the time of the original partition in 1886, 10,000 acres of Horowhenua 11 was already leased to the McDonald family. That lease continued. In 1889, Te Keepa entered into a 12-year timber lease (1,000 acres) with Peter Bartholomew for an up-front payment of £500. He also arranged for Bartholomew to mill flax on the block, and to pay royalties to those local residents ‘who claimed the flax.’<sup>79</sup> At the same time, Te Keepa assisted the Hunia brothers with some of their debts, but by 1889 Warena Hunia had given Donald Fraser power of attorney to act in respect of Horowhenua 11.<sup>80</sup> Fraser was both neighbour and creditor to the Hunia brothers at Parewanui, and Warena Hunia was significantly indebted to Fraser.<sup>81</sup> Fraser instituted proceedings in the Supreme Court to make Te Keepa account to his co-owner for all money received on Horowhenua 11. Warena Hunia denied that there was any trust involved in this block. Given that Hunia and Te Keepa had a certificate of title under the Land Transfer Act, the Supreme Court agreed with him, and the matter was referred to the Native Land Court to determine the two co-owners’ relative interests. Fraser then applied to the Native Land Court for a partition of the block. The pressure of debt, including to Fraser, was crucial in Warena Hunia’s decision.<sup>82</sup>

The partition hearing took place in February–March 1890 under Judge Trimble and his assessor, Pēpene Eketone. Warena Hunia sought an equal division: half each. He argued that Horowhenua traditionally belonged to Ngāti Pāriri, with Ngāti Hine having lived south of the Ōtaki River. Ms Luiten commented that Hunia had support from key local whānau, identifying as Ngāti Pāriri, but that most of his supporters were not residents. Te Keepa denied that Warena Hunia had any ancestral claim to land at Horowhenua, and told the court that their two names were in the title purely as chiefs on behalf of the people and not in their own right. He was prepared to agree to a partition so long as Hunia agreed to execute a deed of trust beforehand, with both pieces to be held in trust for the tribe and to be made inalienable by the court. While Hunia was not prepared to do this, his lawyer undertook that Hunia would ‘look after the pas and the people living there.’<sup>83</sup>

Only four years previously, Muaūpoko had acted unanimously to divide their lands for various purposes, although there had been crucial disagreement as to whether Warena Hunia’s name should go into the title for Horowhenua 11 (see section 5.6). Now, however, the tribe was deeply divided and further ‘voluntary arrangement’ proved impossible. The court adjourned almost daily so that they could negotiate an agreement, but all attempts failed. For the first time in the public record, we see a strong divide between Ngāti Pāriri and other hapū, a contested narrative about who stayed in Horowhenua in the 1820s and who fled, and disagreement about their respective rights. One notable point, in Ms Luiten’s evidence,

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79. AJHR, 1896, G-2, p 62 (Luiten, ‘Political Engagement’ (doc A163), pp 194–195)

80. Luiten, ‘Political Engagement’ (doc A163), pp 194–196

81. Luiten, ‘Political Engagement’ (doc A163), pp 184–185, 195–196

82. Luiten, ‘Political Engagement’ (doc A163), p 196

83. Luiten, ‘Political Engagement’ (doc A163), pp 197–198

is that witnesses on both sides agreed that Te Keepa and Warena Hunia were trustees. Hoani Puihi, supporting Hunia, told the court that both rangatira were made trustees in 1886 and ‘this land was meant for the tribe’, although it had not been stated explicitly in court at that time.<sup>84</sup>

Te Keepa’s lawyer, A Southey Baker, applied to have the legal question of a trust referred to the Supreme Court, but Judge Trimble refused, stating: ‘This land is not held in Trust for a tribe or hapu. I think there is nothing that is not within the Jurisdiction of the present Court.’<sup>85</sup> Trimble ordered a valuation carried out, after which he issued his decision on 10 April 1890. He divided the block between Te Keepa and Hunia, cutting Lake Horowhenua in half in doing so. The northern partition, 11A, was awarded to Te Keepa (8,101 acres, valued at £13,392). The southern partition, 11B, was smaller – 6,724 acres, valued at £12,244 – and awarded to Warena Hunia as his personal share of the block.<sup>86</sup>

#### 6.4.2 First appeals to the Crown for a remedy

Te Keepa applied for a rehearing and had a caveat placed against any dealings in the block.<sup>87</sup> On behalf of the Native Minister, Lewis telegraphed Judge Wilson on 24 May 1890 to find out the truth from the judge who had made the original partition orders. Te Keepa ‘asserted’ that there was ‘an understanding on the part of the Natives when the block was before you for subdivision that the portion . . . awarded to Kemp and Hunia was to be held by them in trust for the Muaupoko’. The Government, said Lewis, was concerned that the matter was likely to end up in lawsuits and trouble for Muaūpoko, including a rehearing and possibly action in the Supreme Court. Hence, the Minister wanted to know from Judge Wilson ‘whether, so far as you are aware, there was any such understanding in the minds of the Natives when before your Court.’<sup>88</sup> Wilson replied on 27 May 1890 that Horowhenua 11 was ‘placed in the names of Major Kemp and Warena Hakeke, I believe, for the rest of the tribe.’<sup>89</sup>

As well as applying for a rehearing, Te Keepa appealed to the Crown for a remedy. The claimants argued that this was the first of many attempts in the 1890s to obtain a remedy, which the Crown repeatedly failed to provide.<sup>90</sup> Each of those attempts was ‘a separate occasion where the Crown could have taken steps to properly protect Muaūpoko and their interests.’<sup>91</sup> In the claimants’ view, the Crown’s ‘refusal to take action to settle the trust issue at an early instance was a breach of active protection and good faith.’<sup>92</sup> The result, they said, was a prolonged, ruinous process

84. Luiten, ‘Political Engagement’ (doc A163), pp 199–200

85. Ōtaki Native Land Court, minute book 13, 31 March 1890, fol 268 (Luiten, ‘Political Engagement’ (doc A163), p 201)

86. Luiten, ‘Political Engagement’ (doc A163), p 201

87. Luiten, ‘Political Engagement’ (doc A163), p 201

88. Lewis to Wilson, 24 May 1890, AJHR, 1898, G-2A, p 180

89. Wilson to Lewis, 27 May 1890, AJHR, 1898, G-2A, p 181

90. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 42–44; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 168–180

91. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 43–44

92. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 42

## 6.4.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

of petitions and litigation over several years which swallowed the tribe's resources and a significant part of their land.<sup>93</sup> In this and subsequent sections, we explore in detail Muaūpoko's repeated attempts to obtain a remedy from the Crown, and whether the Crown's responses were Treaty-consistent.

The first attempt was Te Keepa's petition to Parliament in 1890 with the support of 63 'members of the Muaupoko Tribe resident at Horowhenua'. Their petition recited the history of the 1873 certificate, the 1886 partition, and how Warena Hunia came to be appointed a 'joint trustee' with Te Keepa.<sup>94</sup> They pointed out that

Unless Parliament interferes this large block of land will be divided between Major Kemp and Warena Hunia alone in their own right. The Natives living on the land will be ejected from the holdings where they and their families have been settled for generations and a grievous wrong will be done . . . the petitioners submit that Parliament will never permit them to be turned out of their homes and lands upon the ground that they relied upon the honour of their chiefs and upon the safeguard of the Native Land Court and did not require a trust manifest to every native to be set out in writing.<sup>95</sup>

The petitioners asked Parliament to 'take such measures by legislation as will suffice to protect them and to establish the trust'.<sup>96</sup>

The Native Affairs Committee, after a 'lengthened hearing of witnesses', came to a decision the opposite of Judge Trimble's. It concluded that there had been a trust, and recommended legislation to authorise a rehearing by the Native Land Court for the purpose of 'subdivision among the several parties concerned'.<sup>97</sup>

Lewis advised the Minister, Edwin Mitchelson, to wait and see if the chief judge granted Te Keepa's application for a rehearing, in which case 'the object of this petition will be attained'.<sup>98</sup> This advice failed to appreciate that the committee recommended legislation which recognised the trust and ordered a rehearing for the specific purpose of dividing the land among the trust's beneficiaries. This was not something that the chief judge could order. In the meantime, Te Keepa also asked Native Minister Mitchelson to legislate for the prevention of any sales in Horowhenua 11. This, too, was put off while the application for rehearing remained unheard.<sup>99</sup>

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93. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 43–44; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 168–183

94. Te Keepa and 63 'members of the Muaupoko Tribe resident at Horowhenua', undated petition [1890] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 758–762)

95. Te Keepa and 63 'members of the Muaupoko Tribe resident at Horowhenua', undated petition [1890] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 761–762)

96. Te Keepa and 63 'members of the Muaupoko Tribe resident at Horowhenua', undated petition [1890] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 762)

97. Native Affairs Committee report, 21 August 1890 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 763–764)

98. Lewis to Mitchelson, 23 August 1890 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 766–767)

99. Luiten, 'Political Engagement' (doc A163), pp 201–202

Hoani Puihi and 11 supporters of Warena Hunia wrote to Mitchelson in August 1890, asking that there be no rehearing of Horowhenua 11. They wanted Te Keepa to negotiate with Hunia to ‘make some arrangements as to land for us the Muaupoko tribe’, and not to incur further expense. ‘If a further hearing is granted’, they wrote, ‘the whole of this block will go to pay the lawyers to be engaged by Meiha Keepa and Hunia and other expenses that are to be incurred under the law.’<sup>100</sup> Te Keepa’s lawyer at the time, HD Bell, agreed that arbitration might be in his client’s best interests. Bell feared that the trust might be ‘too vague for a court of law to establish’, and that Te Keepa would have difficulty accounting for his administration of trust moneys in front of an English law court.<sup>101</sup>

At this stage, the Government took the view that a rehearing could still be ordered by the chief judge, and that a negotiated or arbitrated settlement might also be possible, and so the Native Affairs Committee’s recommendation was not followed. The chief judge delayed hearing Te Keepa’s application, waiting to see if arbitration would settle the dispute.<sup>102</sup> We have no information as to whether negotiations or arbitration were actually attempted in 1890, but if so, nothing came of it.

#### 6.4.3 A rehearing is granted and held, 1890–91

Chief Judge Seth Smith heard the application for rehearing in September 1890. Te Keepa, represented by Bell and Baker, argued for a rehearing on the basis that Horowhenua 11 was held in trust. The chief judge and the assessor both accepted that ‘it was the intention that Muaupoko should retain some kind of interest in this land’, and that ‘the opinion of the Supreme Court should be taken as to what their interest is’. The chief judge suggested that the parties could agree on a case for him to state to the Supreme Court. Alternatively, he would order a rehearing ‘for the purpose of ascertaining all the facts’, so that the question of law could then be put to the Supreme Court.<sup>103</sup>

Presumably, the parties could not agree and so the rehearing took place in February and March 1891, before Judges Scannell and Mair. The rehearing court told the parties that it had no jurisdiction to decide ‘whether a trust was or was not intended.’<sup>104</sup> Warena Hunia’s evidence was that Muaupoko had knowingly agreed to give up their rights in Horowhenua 11 in favour of the two chiefs as absolute owners. The court continued to remind Te Keepa and his witnesses – who argued that the land was intended to be held in trust – that it was *not* going to decide that question, and that the rehearing was solely to consider whether the first court had been right in how it divided the relative interests of Hunia and Te Keepa. The evidence

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100. Hoani Amorangi, Peene Tikera, Kingi Hoani, Amorangi Rihara, Himiona Kowhai, Iritana Hanita, Hariata Tinotahi, Haana Rata, Wiki Nahona, Hiria Amorangi, Raraku Hunia, and Rawinia Matao to Native Minister Mitchelson, 10 August 1890 (Luiten, ‘Political Engagement’ (doc A163), p 202)

101. Luiten, ‘Political Engagement’ (doc A163), p 202

102. Luiten, ‘Political Engagement’ (doc A163), p 202

103. Chief judge’s decision, 15 September 1890 (Luiten, ‘Political Engagement’ (doc A163), pp 202–203)

104. Ōtaki Native Land Court, minute book 21A, 31 March 1891, fols 255 (Luiten, ‘Political Engagement’ (doc A163), p 203)



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then focused on whether Ngāti Pāriri had rights and status at Horowhenua.<sup>105</sup> The court's approach shows that the Government's decision not to legislate in 1890 was perhaps mistaken.

On 9 May 1891, the rehearing court confirmed the decision of the original court, but added its opinion that there had been a 'severe loss to the Muaupoko tribe'. The 1886 partition order, followed by a land transfer certificate, had made Te Keepa and Hunia sole owners of a piece of land that had been, the court said, the most important part of Muaūpoko's tribal estate. The court's jurisdiction was not to inquire how that had happened, but it nonetheless considered that it should lay these facts before the chief judge, 'in order that if any application is made on the subject he would be in a position to advise as to whether it would be desirable to institute further inquiry into the whole matter with a view to ultimate justice being done to all parties'.<sup>106</sup> Clearly, the rehearing judges anticipated appeals to the Government, on which the chief judge's advice would be sought as a matter of routine.

Immediately after the judges' decision, Muaūpoko held a hui at Pipiriki to see if they could resolve matters without further crippling litigation. According to one of Te Keepa's agents, JM Fraser, Muaūpoko agreed to give Hunia 3,000 acres of Horowhenua 11 if he would relinquish the remainder of his award to the tribe. The following day, however, Wirihana Hunia added that his whānau must also receive part of the lake, which Te Keepa rejected. There were angry exchanges, including about Te Keepa's role in respect of Horowhenua 6 and 14.<sup>107</sup> The Crown's native land laws had vested legal rights in Warena Hunia, which the tribe simply could not get around by agreement.

**6.4.4 Second appeal to the Crown for a remedy, 1891**

After the rehearing court's decision and the failed internal negotiations in May 1891, Te Keepa immediately appealed to the Native Minister. He asked for legislation to give effect to the trust, and also asked for Parliament to prevent the completion of the partition until any further legal action was taken.<sup>108</sup> Under-Secretary Lewis advised the new Native Minister, AJ Cadman, that the situation of Horowhenua 11 'was a notable example of the evils which arise from the Native Land Court giving effect to voluntary arrangements made by the Natives, instead of making orders declaring who in the judgments of the Court are the owners according to Maori custom . . .'.<sup>109</sup>

He blamed not just the law, for allowing voluntary arrangements, but also the court for giving effect to an arrangement that was 'palpably inequitable'.<sup>110</sup> Lewis did not note, as he should have done, that the crisis was also the result of a flaw in laws which individualised title and deliberately provided no means for trust arrange-

105. Luiten, 'Political Engagement' (doc A163), pp 203–206

106. Ōtaki Native Land Court, minute book 15, 9 May 1891, fols 123–124 (Luiten, 'Political Engagement' (doc A163), p 206)

107. Luiten, 'Political Engagement' (doc A163), p 212; AJHR, 1897, G-2, pp 45–46

108. Luiten, 'Political Engagement' (doc A163), p 206

109. Lewis to Cadman, 14 May 1891 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 798)

110. Lewis to Cadman, 15 May 1891 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 799)



ments or corporate management of tribal lands. Nor did he point out that he had been present when the court made this ‘palpably inequitable’ decision in 1886 and that the Government had done nothing, then or since, to put it right.

As Judges Scannell and Mair anticipated, the Government asked Chief Judge Seth Smith for his opinion on Te Keepa’s requests. The chief judge went so far as to draft a Bill for the Crown, and he recommended that Te Keepa’s lawyers should do the same.<sup>111</sup> Lewis agreed with the chief judge that a legislative remedy was necessary. Having been present at the partition hearing in 1886, however, he was aware that the problem was not just confined to Horowhenua 11. He advised Cadman:

I fear that confining legislative rehearing to Section 11 is only putting off the evil day as regards Section 12 & perhaps other sections & think that it would be better under the circumstances, although there are I am aware strong objections to unsettling titles where it can be avoided, to let the same Court decide whether there are equitable owners whose names should be inserted in the other sections . . .<sup>112</sup>

The final decision was made by Premier Ballance, author of the Native Equitable Owners Act back in 1886, which had been designed to re-insert disinherited hapū into the 10-owner-rule titles.<sup>113</sup> On 22 May 1891, Ballance instructed that the law officers should prepare a Bill on the same principles as the Equitable Owners Act. This was necessary, he said, in response to the ‘specific and clear’ statements and recommendations of the chief judge, whose own Bill was incomplete because it failed to include Horowhenua 12. Otherwise, the result would be a ‘gross abuse’ by which the ‘real owners’ would be ‘robbed of the property’.<sup>114</sup> In the meantime, the Premier thought there would be enough protection for the owners if the titles to Horowhenua 11A and 11B could not be completed, and so he instructed the surveyor-general not to authorise a survey of the partitioned blocks.<sup>115</sup>

The result was the Horowhenua Subdivision Lands Bill, which empowered the Native Land Court to determine the beneficial owners of Horowhenua 6 (the rere-waho) as well as Horowhenua 11 and 12. The preamble of the Bill explicitly stated that the owners of Horowhenua 11 had intended Te Keepa and Hunia to hold the land on their behalf, not knowing what the legal effect would be, and that the registration of the title under the Land Transfer Act had or was liable to defeat their intention. Te Keepa (Horowhenua 6) and Ihaia Taueki (Horowhenua 12) also held land for beneficiaries whose interests had to be protected. Hence, the court was to decide which members of the Muaūpoko tribe were entitled to a ‘beneficial interest’. The usual right to apply for a rehearing was provided. The Bill did not, however, provide for a new trust or a tribal mechanism to manage these lands; the titles would

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111. Luiten, ‘Political Engagement’ (doc A163), pp 206–207

112. Lewis to Cadman, 15 May 1891 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 800)

113. For the Native Equitable Owners Act 1886, see Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, pp 754–755.

114. Ballance, minute, 22 May 1891 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 801)

115. Ballance, minute, 22 May 1891 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 801)

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be fully individualised.<sup>116</sup> Nonetheless, if this Bill had been introduced and passed in 1891, it could have prevented much harm and loss to Muaūpoko in the short term. Ms Luiten explained that the Bill was not introduced because of counter-petitions from Warena Hunia and his supporters. Warena Hunia's petition was presented at the end of July 1891. It protested against Ballance's Bill, arguing that Parliament would thereby deprive Hunia of land 'to which he has a good and indefeasible title in law'. The main argument in Hunia's petition was that the trust *assumed* in the Bill had never been 'argued or proved in law', and it first had to be the subject of full inquiry by a commission. Such a commission, Hunia suggested, should also inquire into Te Keepa's dealings with other Horowhenua sections, where the existence of a trust *was* admitted.<sup>117</sup>

As Te Keepa pointed out later in the year, there had already been inquiries and recommendations from the Native Affairs Committee, Judges Scannell and Mair, and Chief Judge Seth Smith.<sup>118</sup> It must have been obvious to everyone, including the Ministers and officials of the Crown, that Muaūpoko had not intended to give away their tribal heartland to two individuals as their own personal property. Even Warena Hunia was now only seeking to keep a part of Horowhenua 11B. Nonetheless, the Government abandoned its Bill.<sup>119</sup>

The month before Hunia's petition, Donald Fraser had approached the Government with a proposal for a negotiated solution. Essentially, it was the same deal that had almost been accepted back in May: Warena Hunia would receive 3,500 acres (500 acres more than previously) and hand the rest of Horowhenua 11B back to those members of the tribe who 'by residence or otherwise have the best claim'. Hunia's share would not take any of the people's homes or cultivated areas but it would have railway frontage and include part of the lake.<sup>120</sup> Cadman's proposed mediator was WJ Butler, a Whanganui land purchase officer who refused to get involved because, he said, that would do nothing but arouse Te Keepa's suspicions as to the Crown's motives.<sup>121</sup> (Some suspicion was justified, as we explain in the next section.)

In July 1891, Cadman forwarded Hunia's 3,500-acre proposal to Te Keepa, who refused to entertain it. Te Keepa's view was that Hunia and his supporters wanted to 'cut the eyes out of this country', leaving the less valuable land for the tribe. We agree with Jane Luiten that Te Keepa likely rejected this offer because he hoped that the Crown would proceed with Ballance's original Bill, enabling a better solution for the whole block.<sup>122</sup>

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116. Horowhenua Subdivision Lands Bill, 1891 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 815–817)

117. Luiten, 'Political Engagement' (doc A163), p 209

118. Te Keepa and 19 others, petition 120, session 2, 1891 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 897–901)

119. Luiten, 'Political Engagement' (doc A163), p 208

120. Luiten, 'Political Engagement' (doc A163), p 208

121. Luiten, 'Political Engagement' (doc A163), pp 210–211

122. Luiten, 'Political Engagement' (doc A163), pp 208–209

The Government, however, had decided not to proceed with this Bill. Cadman still hoped that Muaūpoko would negotiate a settlement themselves. In September 1891, Donald Fraser instructed Hunia's lawyer to ask the Crown for authorisation to survey the 3,500-acre compromise block, so that it could be transacted. Ms Luiten explained the arguments that were put to the Crown:

This was justified on the basis that 'not the least attempt seems to have been made by Major Kemp to meet him in this direction fairly or in a spirit of compromise' and that Hunia had incurred 'very great expense (though unwillingly and of necessity) in defending and asserting his rights'. He could not pay these expenses, the Native Minister was told, unless he was able to deal with part of the land.<sup>123</sup>

The Government refused Warena Hunia's request. Instead, a clause was inserted in the Native Land Court Acts Amendment Act 1891, making Horowhenua 6, 11, and 12 inalienable, with a stay of all proceedings, until the end of the 1892 parliamentary session.<sup>124</sup> Cadman told one of Te Keepa's agents that this 12-month reprieve must be used to bring about a settlement of the dispute.<sup>125</sup>

A petition from Himiona Kowhai and 31 others must have reinforced this decision. This group, identified by Ms Luiten as the Hunia brothers' Ngāti Pāhiri supporters, asked that the Crown not bring in legislation to refer equitable ownership to the court. They supported a compromise deal (3,500 acres each for Te Keepa and Warena Hunia), so long as the parts of the block containing the pā, cultivations, and fisheries were returned to Muaūpoko. Only such a compromise, they said, could save them from 'endless trouble, delay and expense'.<sup>126</sup>

Te Keepa, however, did not believe that a negotiated settlement would be fair to the original owners, and he sent a further petition at the end of 1891. This petition pointed out that both the rehearing judges and the chief judge had recognised the existence of the trust and the inability of the court to deal with it (because of jurisdictional issues), and thus no further judicial inquiry was needed: Parliament should simply legislate to restore their rights.<sup>127</sup> This petition was received too late for the Native Affairs Committee to consider it in 1891, but Ms Luiten observed that further petitions in 1892 showed the majority of Muaūpoko supported this proposal for a legislative remedy.<sup>128</sup>

#### 6.4.5 Third appeal to the Crown for a remedy, 1892

The Government continued to prefer a negotiated or arbitrated settlement at the beginning of 1892. Te Keepa, however, rejected the idea of compromise because he believed the whole block must be returned to Muaūpoko, especially the whole of

123. Luiten, 'Political Engagement' (doc A163), p 209

124. Native Land Court Acts Amendment Act 1891, s 3

125. Luiten, 'Political Engagement' (doc A163), p 208; AJHR, 1897, G-2, p 45

126. Luiten, 'Political Engagement' (doc A163), pp 212–213

127. Te Keepa and 19 others, petition, sess 2, 1891 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 898–902)

128. Luiten, 'Political Engagement' (doc A163), p 213

Lake Horowhenua, and he had the support of most Muaūpoko in taking that position. In mid-July 1892, J M Fraser followed up on his understanding with Cadman by trying to set up arbitration, using the chief judge of the Native Land Court as arbitrator. Te Keepa refused to cooperate and he engaged Walter Buller to act for him.<sup>129</sup>

A fresh round of petitions began. Later in July 1892, Buller submitted a petition on behalf of Te Keepa and 68 others, asking for legislation to refer Horowhenua 11 back to the Native Land Court to inquire as to whether there was a trust. If so, the court should be empowered to ascertain the beneficial owners. This was supported by a second petition from Te Rangimairehau and 62 other signatories, and a third petition by Tamatea Tohu and three signatories.<sup>130</sup> Te Keepa's petition stressed that he would never in any circumstances agree to the deal proposed by Warena Hunia's agents (3,500 acres for each of them with the rest going to the tribe), because it 'would amount to a fraud on the Tribe to whom the land equitably belongs'. Nor would he ever agree to arbitration, because 'in his opinion there is nothing to arbitrate upon.'<sup>131</sup>

The Native Affairs Committee once again affirmed these petitions. It recommended 'early and serious consideration of the Government in order that effect may be given' to what the petitioners' sought, before the protection accorded by the 1891 Act expired.<sup>132</sup>

Soon after the committee's August 1892 report, counter-petitions were once again lodged by Warena Hunia and his supporters among Muaūpoko. Hoani Puihi's petition repeated the argument from the previous year that a negotiated settlement was more in the interests of Muaūpoko. This was because the tribe simply could not afford any more expensive litigation. In September 1892, Warena Hunia filed a petition. His main point was that the 1891 Act had been passed specifically to provide time to reach an 'amicable settlement', but Te Keepa had refused to negotiate with him.<sup>133</sup> Hunia wanted to appear before the committee to refute Te Keepa's allegations against him. These petitions were not endorsed by the committee but simply referred back to the Government for consideration.<sup>134</sup>

According to Walter Buller, Seddon and Cadman both agreed to the committee's recommendation, and allowed Buller to draft a Bill for the Native Land Court to reinvestigate Horowhenua 6 and 11. Because it was virtually the end of the session, however, a threat from the member for Ōtaki (J G Wilson) to stonewall the Bill prevented its introduction. Instead, Buller met with the ailing Premier, Ballance, at his home to work out a solution that did not require legislation. Ironically, Ballance's idea was to 'have the land proclaimed subject to Crown purchase in order

129. Luiten, 'Political Engagement' (doc A163), p 213

130. Luiten, 'Political Engagement' (doc A163), pp 213–214

131. Te Keepa, undated petition [July 1892] (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 843–844)

132. Luiten, 'Political Engagement' (doc A163), p 214

133. Warena Te Hakeke, petition, 13 September 1892 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 895)

134. Luiten, 'Political Engagement' (doc A163), p 214

to protect it.<sup>135</sup> On 10 October 1892, the last day of the session, Sheridan prepared a ‘token voucher’ and a proclamation under the Government’s brand new Native Land Purchases Act 1892. The proclamation, which had the effect of prohibiting any private dealings for two years, was gazetted that night in a special edition. On the same night, Sheridan met Te Keepa at his hotel and paid him a £5 deposit for the sale of his interests in Horowhenua 11.<sup>136</sup> The risk inherent in this form of protection, of course, was that it specifically empowered the Crown to purchase land in the Horowhenua 11 block on a monopoly basis.

Once again, the Crown had granted a ‘respite’ rather than the solution sought by Te Keepa. Also, Native Minister Cadman’s view was that this second respite should be used to negotiate a settlement so as to avoid more litigation. In October 1892, he asked Te Keepa and Warena Hunia to submit proposals to the Government for how to resolve their dispute. Hunia replied in November that he should receive 3,500 acres, plus 200 acres bordering the lake, as a fair settlement. Te Keepa, however, continued to maintain that the whole of Horowhenua 11 must be returned to Muaūpoko. Cadman responded to Te Keepa that before the Government could consider bringing in legislation to give effect to that, the chief would have to account for all money received as a trustee since 1873.<sup>137</sup>

Ms Luiten commented: ‘Having to account, Pakeha-style, for such monies was the Achilles’ heel in Kemp’s claim of trusteeship which was to beset him throughout the 1890s, coming to a head with the passage of the Horowhenua Block Acts of 1895–1896.’<sup>138</sup> Buller tried to get around Cadman’s question by having Muaūpoko sign a ‘deed of release’, stating that the tribe was satisfied with how Te Keepa had administered the trust money. The deed was signed by 60 people, including Ihaia Taueki, who were supporting the campaign to save the tribal estate.<sup>139</sup>

Any attempt at Government mediation seems to have ended there, because Cadman was too busy to attend to it. Nothing further had been done by February 1893, when Te Keepa wrote to Ballance, asking the Government to ensure that no sales, leases, or mortgages occurred ‘until the interests of the people had been protected.’<sup>140</sup> Ballance agreed to defer any further mediation while Buller was overseas,<sup>141</sup> after which any possible mediation was overtaken by the Crown’s attempt to purchase land from Hunia for a State farm (see below).

By the end of 1892, therefore, almost nothing had been achieved. The situation was exactly the same as it had been a year earlier, except that the method of freezing the title now allowed Crown purchases. This was to prove a crucial exception in 1893.

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135. Luiten, ‘Political Engagement’ (doc A163), p 215

136. Luiten, ‘Political Engagement’ (doc A163), pp 214–215

137. Luiten, ‘Political Engagement’ (doc A163), p 216

138. Luiten, ‘Political Engagement’ (doc A163), p 216

139. Luiten, ‘Political Engagement’ (doc A163), p 216

140. Luiten, ‘Political Engagement’ (doc A163), p 218; Buller to Cadman, 23 February 1893, Te Keepa to Ballance, 18 February 1893 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 918, 1263)

141. Luiten, ‘Political Engagement’ (doc A163), p 218; Buller to Cadman, 23 February 1893 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 918)



## 6.4.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**6.4.6 The Crown's other concern: land acquisition**

In April 1891, while the Horowhenua 11 partition rehearing was still in progress, local settlers approached the Minister of Lands, John (Jock) McKenzie, to press for the Crown to acquire more Horowhenua lands for settlement. McKenzie referred this to Cadman, who instructed Lewis to begin purchasing interests in Horowhenua 11 as soon as the titles were sorted out at the rehearing.<sup>142</sup> But the rehearing did not resolve matters, and it seemed as if it would take some time to do so.

**(1) Horowhenua 12**

As noted above, Cadman had made it clear that the legislation of 1891, which froze the titles until the end of the 1892 session, was to allow time for a negotiated settlement. Yet the Government acted as if the legislation did not apply to the Crown. In August 1891, Māori land agent JM Fraser offered Horowhenua 12 to the Crown for 8s 6d per acre, on behalf of Ihaia Taueki.<sup>143</sup> Later evidence suggests that Taueki may have been trying to sell enough land to pay off the survey lien, and Wirihana Hunia believed in 1896 that 600 acres had in fact been sold for that purpose. Ms Luiten, on the other hand, thought that Muaūpoko might have been trying to secure funds for upcoming legal battles over Horowhenua 11.<sup>144</sup> In either case, Cadman asked for a valuation, even though he knew Horowhenua 12 would be restricted from alienation for a year by the forthcoming Native Land Court Acts Amendment Act 1891. The valuation was ready by November 1891, by which point the Act had been passed. Sheridan said the purchase would have to wait because Horowhenua 12 was 'locked up' by the Act. Nonetheless, the Crown made an offer anyway in February 1892, in defiance of the Act. Ihaia Taueki turned down this offer of four shillings an acre as too low.<sup>145</sup>

**(2) The State farm**

While negotiations for Horowhenua 12 continued in a desultory manner,<sup>146</sup> the Crown's attention switched to Horowhenua 11 in mid-1892. The new Labour Department was attempting to establish State farms near towns, to house and train unemployed workers. The head of the department thought that Horowhenua 11 was a good site for a State farm near Levin,<sup>147</sup> but the Land Purchase Department's view was that there was 'very little prospect of any considerable portion' of land at Horowhenua 'being acquired during Kemp's lifetime'.<sup>148</sup>

In mid-1892, the Labour Department approached Warena Hunia's agent, Donald Fraser, to buy part of Horowhenua 11B. The exact timing is unclear. Ms Luiten noted evidence from 1896 that the Whanganui land purchase officer began negotiations

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142. Luiten, 'Political Engagement' (doc A163), p 210

143. Luiten, 'Political Engagement' (doc A163), p 211

144. Luiten, 'Political Engagement' (doc A163), p 237

145. Luiten, 'Political Engagement' (doc A163), p 211

146. Luiten, 'Political Engagement' (doc A163), p 237

147. Luiten, 'Political Engagement' (doc A163), p 217

148. Sheridan to Webbe, 26 July 1892 (Luiten, 'Political Engagement' (doc A163), p 211)



with Fraser in the autumn of 1892, even though the 1891 Act was still in force.<sup>149</sup> On 16 May 1893, Warena Hunia confirmed his intention to offer the Crown 1,000 acres at £5 an acre. He revised his offer a fortnight later to 1,500 acres fronting the railway for £4 5s per acre. In both offers, Hunia reassured the Government that he would keep his earlier promise to return land ‘to my tribe who are at present residing on it’; ‘my word which is that of a native chief will be permanent’.<sup>150</sup> The 29 May offer specified that 3,200 acres would be returned to 19 named individuals.<sup>151</sup> Although the Government was aware that the partition titles for Horowhenua 11A and 11B had not yet been completed, and Hunia had no legal right to sell, it nonetheless agreed in principle to go ahead with the purchase in June 1893. A valuation was then sought.<sup>152</sup>

So far, it seems that the negotiations had been kept secret. Not even Warena Hunia’s supporters knew about it. But Donald Fraser escorted McKenzie, James Carroll, Sheridan, Wilson (member for Ōtaki), and others on an inspection tour at the end of July 1893. This was reported in the press on 3 August, and the secret was out.<sup>153</sup>

On 4 August 1893, Wī Parata, member for Southern Maori, asked the Minister of Lands a question in the House. He asked if the Government was in negotiations for purchase of the Horowhenua block. If so, he said, ‘seeing that the registered owners are undoubtedly trustees, will the Government see that the beneficiaries agree to any sale before such is completed?’ Given that Parliament had already passed a ‘suspensory Act’ once to protect the beneficial owners, Parata considered it the Government’s role to make a ‘satisfactory arrangement’ between the two legal owners and the others with an interest.<sup>154</sup>

Jock McKenzie replied that overtures had been made and Ministers had inspected the land, but so far as his department knew, the land was vested in Te Keepa and Hunia. He added:

He did not know that the department had any right now to go beyond that title; but he could promise the honourable gentleman this: that if the Government did negotiate for the purchase of that block, they would take very good care, before a purchase was made, or before any money was paid over, that the interests of the beneficiaries should be protected, and that they should get the proper value for this land.<sup>155</sup>

A fresh round of petitions and appeals to the Crown ensued.

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149. Luiten, ‘Political Engagement’ (doc A163), p 217

150. Warena Hunia Te Hakeke to Cadman, 16 May 1893; Warena Hunia Te Hakeke to Cadman, 29 May 1893 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 1260, 1287); Luiten, ‘Political Engagement’ (doc A163), pp 218–219

151. Luiten, ‘Political Engagement’ (doc A163), p 219

152. Luiten, ‘Political Engagement’ (doc A163), p 219

153. Luiten, ‘Political Engagement’ (doc A163), pp 219, 221–222

154. NZPD, 1893, vol 80, p 461

155. NZPD, 1893, vol 80, p 461

## 6.4.7 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**6.4.7 Fourth appeal to the Crown for a remedy, 1893****(1) Petitions and caveats: the Hunia whānau**

Warena Hunia's own whānau was the first to act upon the discovery of what was going on. In mid-August 1893, Warena's sister, Te Raraku Hunia, lodged a caveat against the title. She appealed to the Native Minister that the whānau not be left out of the sale or its proceeds.<sup>156</sup> Hera Te Upokoiri, another of Warena's sisters, petitioned Parliament, reciting the long history of previous petitions and of acknowledgements that Te Keepa and Warena were intended as trustees.<sup>157</sup> She stated:

We know perfectly well that if the Government consents to the sale of this land that the whole of our father's property and estate will pass from us for ever.

I therefore humbly pray that your Hon House and the Government will protect me and my people the Muaupoko Tribe who are the rightful owners.

We pray that the Government will watch over us and our land and not on any account consent to the alienation of a single acre until some satisfactory arrangement has been made between our tribe and the two persons to whom the Court has wrongfully awarded the whole of the land for their absolute benefit notwithstanding the fact that they were only intended to act as Trustees.<sup>158</sup>

The Native Affairs Committee reported on this petition on 23 August 1893. It recommended that the Government should inquire into the alleged trust before purchasing any part of the Horowhenua block. If satisfied that a trust was implied, the Government should legislate to 'protect the interests of the tribe.'<sup>159</sup> Sheridan responded on 25 August that Warena Hunia admitted a trust, which he would provide for by transferring part of the land to the beneficiaries. So long as Te Keepa agreed to do the same, there was no need for legislation.<sup>160</sup>

Thus, land purchase officials took the position that what Hunia was willing to offer (and to whom) was a matter for him to decide, and that the Crown should simply continue dealing with him. On 5 September 1893, Sheridan advised McKenzie that Hunia's 'individual interest' in Horowhenua 11 could not be less than the 1,500 acres offered to the Crown, and that there would be no harm to the alleged beneficiaries in proceeding with the purchase.<sup>161</sup> Jane Luiten commented that there is no evidence as to why the Government was convinced that Hunia was entitled to at least 1,500 acres<sup>162</sup> – nor, we would add, any evidence as to why that 1,500 acres should be located on the best land in the block.

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156. Luiten, 'Political Engagement' (doc A163), p 222

157. Hera Te Upokoiri, petition, August 1893 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 926–927)

158. Hera Te Upokoiri, petition, August 1893 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 927)

159. Luiten, 'Political Engagement' (doc A163), p 223

160. Sheridan, minute, 25 August 1893 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 931)

161. Sheridan to McKenzie, 5 September 1893 (Luiten, papers in support of 'Political Engagement' (doc A163), p 1291)

162. Luiten, 'Political Engagement' (doc A163), p 223

Justice officials, on the other hand, revived Ballance's 1891 Bill and sent it to Seddon, asking whether it should be introduced into the House in response to the committee's report. Seddon declined this advice.<sup>163</sup> That Bill had specifically accepted the existence of a trust and empowered the court to find the beneficial owners of Horowhenua 6, 11, and 12.

### **(2) *Petitions and caveats: Ihaia Taueki***

After news of the impending purchase was out, Ihaia Taueki and four others lodged a further caveat against the title. With the support of 75 signatories, Taueki also petitioned Parliament towards the end of August or early September 1893, asking that the alienation of any part of the Horowhenua block should be stopped until disputes about the 'alleged Trust are settled'.<sup>164</sup> Muaūpoko also put a notice in the local newspaper that the Government and private parties were not allowed to deal with any part of Horowhenua 11. On 22 September 1893, the Native Affairs Committee reported on Taueki's petition, and 'pointed to its recommendation a month ago with respect to Hera Te Upokoiri's similar petition'.<sup>165</sup> Once again, the Government did not act on this recommendation or introduce remedial legislation.

### **(3) *Obstruction of the survey***

In August 1893, the Government had the 1,500 acres valued and a survey commenced. Muaūpoko obstructed the survey at once. This obstruction was carried out peacefully, mainly by women and children. Fraser complained to the Government and asked for the protestors to be prosecuted. As a result, Seddon agreed to meet with the chiefs (which did not occur until some months later), and the police were sent in to remove the obstructors. It is not clear how long the police maintained a presence, but there were two constables on-site in January 1894, when the Government began work on the State farm.<sup>166</sup>

### **(4) *Despite petitions, caveats, and obstruction of the survey, the Crown proceeds with the purchase***

In September 1893, an appeal came to the Crown from the other side of the dispute. Fraser appealed to Carroll that Warena Hunia was in great trouble due to his debts, contracted mostly 'in connection with Horowhenua cases'. Hunia's debts amounted to thousands of pounds, and he *needed* the sale to go ahead if he were to stay out of jail. Fraser inquired whether the Government would agree to pay £4 5s per acre.<sup>167</sup>

The Government's district surveyor had valued the block in August at £4 11s 1d per acre. As Ms Luiten noted, it 'took in the best of the land, economically speaking, of Horowhenua 11'.<sup>168</sup> A local sawmiller was also willing to pay £1 per acre for a timber lease, and there was strong local interest in purchasing at £5 per acre.

163. Luiten, 'Political Engagement' (doc A163), p 223

164. AJHR, 1893, I-3, p 19; Luiten, 'Political Engagement' (doc A163), p 223

165. Luiten, 'Political Engagement' (doc A163), p 224

166. Luiten, 'Political Engagement' (doc A163), p 224

167. Fraser to Carroll, 4 September 1893 (Luiten, 'Political Engagement' (doc A163), p 220)

168. Luiten, 'Political Engagement' (doc A163), p 220

## 6.4.7 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The surveyor-general, Percy Smith, recommended that the Crown pay £4 5s an acre. Sheridan, however, was not prepared to pay more than £3 5s, which he told McKenzie was a 'very fair price'.<sup>169</sup>

There the matter stalled until October 1893, when Fraser wrote again to ask the Government to lift its proclamation so that the land could be sold privately if the Crown would not buy it. The issue was finally resolved at a meeting that month between Fraser, McKenzie, and Sheridan.<sup>170</sup> The Minister wanted his State farm as a 'matter of public urgency', and was prepared to pay £4 an acre in the form of debentures. But the Government was very aware of all the caveats on the title. The money would only be payable 'on the completion of an indefeasible title'.<sup>171</sup> Hunia seems to have had little choice but to accept this price, which was not only significantly lower than what the market would have paid but also than the valuer and the Surveyor-General had recommended. Officials gave no reason for paying less than the valuation.

On 21 October 1893, Warena Hunia signed a deed selling 1,500 acres to the Crown in exchange for £6,000 in debentures. Ms Luiten pointed out that the Crown only needed half of this land for the State farm. The rest was prime land fronting the railway, which was cut into sections of five to 50 acres and offered to settlers on perpetual lease.<sup>172</sup>

**(5) Muaūpoko protest against the purchase, January 1894**

By January 1894, the farm manager had started work on the site, and (as noted) two constables were there to prevent any obstruction. It was feared that Muaūpoko would try to interfere with the work and prevent the Government from taking possession.<sup>173</sup> The Government, it should be recalled, had no title to the land as yet. Te Rangimairehau led a tribal delegation to Wellington to meet with Premier Seddon and 'protest about the government's occupation of tribal land'.<sup>174</sup> There was a lot of anger at this meeting, as Te Rangimairehau later explained to the Horowhenua commission:

When I arrived in the presence of the Premier, I stood up before him, and spoke to him about this bad law that was brought in amongst us: 'These two persons were appointed by us as *kaitiakis* of this land; one of them agrees he is a caretaker, the other says, I do not care, I am an owner. This land belongs to me and my tribe.' The Premier answered, 'You have no land; you are in the hands of the clouds.' 'Am I a spirit that I should live in the clouds?' I said to the Premier. 'Soften the law relating to this land.'

169. Luiten, 'Political Engagement' (doc A163), pp 220–221; Sheridan to McKenzie, 5 September 1893 (Luiten, papers in support of 'Political Engagement' (doc A163), p 1291)

170. Luiten, 'Political Engagement' (doc A163), p 221

171. Sheridan to Fraser, 4 October 1893 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1292); Luiten, 'Political Engagement' (doc A163), p 221

172. Luiten, 'Political Engagement' (doc A163), pp 217–218, 221

173. Luiten, 'Political Engagement' (doc A163), p 224

174. Luiten, 'Political Engagement' (doc A163), pp 224–225

The Premier said, 'Speak lower; I am not deaf.' Then I knew he was angry, and then I spoke louder than ever.<sup>175</sup>

At this important meeting, Seddon presented the Government as the defender of the law – both against anyone obstructing the workers, and in defence of Hunia's legal title. He also disclaimed any Government responsibility for their plight. The Premier told the Muaūpoko delegation that

[t]he trouble they have got into has not been brought on them by the Government. The land is legally vested in Kemp and Hunia; and, unfortunately, for the Natives now protesting, there is nothing in the title to show that Kemp and Hunia were trustees. They are declared absolute owners. If it were not for the Government, Kemp and Hunia could have sold the land to whoever they pleased and put the money in their pockets, and the Natives were powerless to do anything. But the Government stopped this by putting a Proclamation on the land. If the Government withdraw that tomorrow the Natives are powerless.<sup>176</sup>

Nonetheless, the Premier conceded that McKenzie had made a promise in Parliament in his August 1893 response to Wī Parata's question. Warena Hunia had since undertaken in writing to 'cede to the Natives who were located on the land some 3,000 acres; and it has been suggested that if Major Kemp would do the same they would have some six thousand or seven thousand acres.' Essentially, Seddon offered to 'see justice done' by helping them get back less than half of Horowhenua 11, and told the delegation to be satisfied with it. Otherwise, he said, it would be a 'very difficult process, as well as expensive, for those the deputation represent to go to law'. Also, the Premier warned them that they would probably lose: 'The title was in the names of these two Native chiefs – Hunia and Kemp. The Government bought the land, and gave a fair price for it; and the Government will remain in occupation and go on with the improvements.'<sup>177</sup>

The Muaūpoko delegation contested Seddon's view of matters. Their lawyer, W B Edwards, noted that Judges Mair and Scannell and Chief Judge Seth Smith had all reported a serious injustice to Muaūpoko. If those reports were accepted, then surely the Government would not 'dream of dealing with people as owners of this land who are not really entitled to it.'<sup>178</sup> The delegation also protested that Hunia had taken the best land and offered them only sand and swamp. Seddon's concession on that point was that he would look into the quality of the 3,000 acres offered to the tribe; otherwise there was scant comfort for Muaūpoko.<sup>179</sup>

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175. AJHR, 1896, G-2, pp 91–92 (Luiten, 'Political Engagement' (doc A163), p 225)

176. AJHR, 1896, G-2, p 313

177. AJHR, 1896, G-2, p 313

178. AJHR, 1896, G-2, p 312

179. AJHR, 1896, G-2, pp 313–314

6.4.8 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

This was the worst possible outcome for Muaūpoko. The State farm purchase had turned the Crown into a staunch defender of the 1886 titles. The following exchange underlines the point:

Mr Edwards: Their grievance is that you bought the land from Hunia, knowing it belonged to them.

The Premier: We say it belongs to Hunia. The title is perfect, and it cannot be upset.<sup>180</sup>

**(6) The Crown's concession in our inquiry**

Early in the course of our inquiry, the Crown conceded that 'it purchased land in Horowhenua No. 11 from a single individual knowing that title to the block was disputed, and despite giving an assurance that the interests of the wider beneficiaries would be protected.'<sup>181</sup> This was clearly an appropriate concession. The question of whether it goes far enough is one that we will consider later.

**6.4.8 Fifth appeal to the Crown for a remedy, 1894**

The question of legal action was taken out of the tribe's hands at the beginning of 1894 because Warena Hunia instituted proceedings to remove the caveats from the title. The Supreme Court adjourned those proceedings in February 1894 'to give Muaupoko an opportunity to take proceedings to enforce the trust.'<sup>182</sup> The tribe's lawyer sought documents from the Crown. He wanted the correspondence between the Government and Warena Hunia, in particular, the document in which Hunia had promised to return land (and the list of people to whom he had promised to return it).<sup>183</sup> Edwards stressed that he expected the Crown to cooperate and to ensure justice for his clients, and to 'prevent the property of the Tribe and their only means of subsistence from being wrongly diverted by the Trustee, Warena, to his own private purposes.'<sup>184</sup>

The Crown's concern, however, was to defend Warena Hunia's title. Sheridan refused to hand over any information which might be used to oppose Hunia's application for removal of the caveats.<sup>185</sup> Internally, Sheridan conceded that, 'in the end, Parliament would have to resolve the dispute by 'reopening the title of [Horowhenua] 11A and the *residue* of [Horowhenua] 11B to the adjudication of the NL Ct' (emphasis added). This was an important admission but he was not prepared to see this happen until after the Crown had obtained its title to the State farm block.<sup>186</sup> He advised Edwards that the land was 'urgently required for the purposes of settlement.'<sup>187</sup>

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180. AJHR, 1896, G-2, p 313

181. Crown counsel, closing submissions (paper 3.3.24), p 178

182. Luiten, 'Political Engagement' (doc A163), p 228

183. Luiten, 'Political Engagement' (doc A163), pp 227-229

184. Edwards to Haselden, 7 March 1894 (Luiten, 'Political Engagement' (doc A163), p 228)

185. Luiten, 'Political Engagement' (doc A163), pp 227-228

186. Sheridan, minute, 3 May 1894 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 960)

187. Luiten, 'Political Engagement' (doc A163), p 229



Edwards' response pointed out that the Native Affairs Committee had 'at least twice reported that the land in question is subject to the trust, which my clients are seeking to enforce'. In addition, 'the Native Land Court, after solemn inquiry, has reported that this land is "clearly the common property of the bulk of the people of Muaupoko", who are now seeking to enforce the trust'.<sup>188</sup> Yet the Government, with full knowledge of those facts,

and of the fact that several caveats have long been lodged against the land, for the protection of my clients' interests, have purchased from Warena Hunia, who (according to the reports of the Native Affairs' Committee, and of the Native Land Court) has no right whatever to sell the same, 1500 acres of the most valuable part of the block, for the not inconsiderable sum of £6000, and that proceedings have been taken by Warena Hunia (I presume with the knowledge and concurrence of the Government) to remove the caveats in order that a transfer of this land to the Crown may be registered.

That the Government, with the strong hand, has taken possession of this land, and that a serious disturbance has only been avoided because the Natives in possession, acting under my advice, have refrained from resisting this aggression, as they lawfully might have done, with force.<sup>189</sup>

Nonetheless, Edwards offered a crucial reassurance to the Government: Muaupoko would be prepared to consent to the State farm purchase and the registration of the Crown's title, so long as the Crown reserved payment 'for the benefit of those who may ultimately be found to be entitled to the land'. 'It does not appear to me,' he added, 'that any reasonable person could possibly ask more than this.'<sup>190</sup>

The Government was not persuaded by any of these arguments. Increasingly, the question of Horowhenua 11 became bound up with the need for Ministers and officials to defend not just the Crown's putative title but also the probity of their dealing with Warena Hunia.

Nonetheless, Muaupoko leaders wanted to avoid the expense of a Supreme Court case (and likely an appeal, whichever side won). When Buller returned in June 1894, he approached the Government on their behalf. As with Edwards, Buller assured the Crown that Muaupoko would support the State farm sale so long as the purchase money was paid to the correct owners. This reassurance was accompanied by yet another petition to Parliament, again asking for legislation to determine the beneficial owners and their relative shares. This was the fifth year in which Muaupoko had appealed to the Crown for a remedy. The tribe's hope was to avoid the pending litigation and secure the legislative remedy that they had been asking for since 1890.<sup>191</sup> Their petition was supported by a sworn statement from Judge

188. Edwards to Haselden, 7 May 1894 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 961)

189. Edwards to Haselden, 7 May 1894 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 963)

190. Edwards to Haselden, 7 May 1894 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 964)

191. Luiten, 'Political Engagement' (doc A163), p 230

Wilson. The judge confirmed that in 1886 the Horowhenua owners had put Te Keepa and Warena Hunia in the Horowhenua 11 title as trustees.<sup>192</sup> He had given the Government the same assurance back in 1890, as discussed above.

Sheridan drafted the Government's position on this petition, focused on the credentials of its State farm purchase rather than the harm to Muaūpoko. He stated that the Horowhenua 11 title did not disclose a trust or implied trust. Nonetheless, Sheridan admitted that the Crown had been aware of the 'alleged trust' when it purchased from Hunia. He explained that 'the view taken of the matter was that under any circumstances Warena's undivided interest in the land was at least equal to the area conveyed'.<sup>193</sup> From this point on, this became an entrenched justification for dealing with and paying Hunia.

Edwin Mitchelson had been Native Minister back in 1890, when the Native Affairs Committee first recommended a legislative remedy. He now presented the new petition of Te Keepa in Parliament in July 1894. He also asked a series of questions about the State farm purchase in the House, based on the petition and Judge Wilson's statement in support of it. Jock McKenzie responded, repeating his assurance given to Wī Parata the year before. He told the House that the purchase had been completed but that no money had been paid, and there would be a 'careful investigation . . . before the money was paid'. Mitchelson then asked the crucial question which had essentially been before Parliament since 1890: 'whether the Government would take into consideration the necessity of passing some legislation to settle the question of the trust this session'. McKenzie responded that 'he would take time to consider before giving a reply; but the matter would receive consideration'.<sup>194</sup> As we noted above, Sheridan had already admitted the necessity of legislation to readmit the dispossessed owners to the titles of Horowhenua 11A and 11B – but only after the Crown's title to the State farm block had been settled first.

On 10 August 1894, the Native Affairs Committee reported that it would not inquire further into the petition, 'as there is a suit pending in the Supreme Court affecting the matter'.<sup>195</sup> It was understandable that the committee would not want to substitute an inquiry of its own for an inquiry by the Supreme Court, but Muaūpoko did not give up. In September 1894, they tried again, this time asking the Premier directly for legislation instead of presenting another petition. Mitchelson wrote to Seddon on their behalf, urging him to 'introduce and carry' a Bill empowering the Native Land Court to deal with the 'various petitions that have so often been reported upon by the Native Affairs Committee and referred to the Government for consideration'. The 'questions involved are of considerable importance and

192. Wilson, 'In the matter of Major Kemp's petition re Horowhenua', 10 July 1894 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1277–1278)

193. Luiten, 'Political Engagement' (doc A163), p 231; Sheridan, 'Report on petition of Meiha Keepa Rangihwinui re Horowhenua Block', not dated (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 986)

194. NZPD, 1894, vol 83, pp 361–362 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 991)

195. AJHR, 1894, 1-3, p 4

should be settled as soon as possible . . . in justice to the large number of Natives interested.<sup>196</sup>

It was by now very clear that the State farm purchase had to be guaranteed if there was to be any hope of persuading the Crown. Mitchelson therefore presented Seddon with a draft Bill empowering the Native Land Court while also ‘protecting the rights of the Crown.’<sup>197</sup> Buller drafted this Bill, the Horowhenua Empowering Bill, for Muaūpoko.<sup>198</sup> It instituted a stay of all proceedings in respect of Horowhenua 11, and empowered the court to investigate the ‘nature of the title . . . and into the existence of any intended trust or trusts . . . notwithstanding that the nominal owners hold a Certificate of Title under the Land Transfer Act’. If the court found that a trust existed or was intended, it would determine the owners ‘in like manner as if their names had been inserted in the Certificate of Title.’<sup>199</sup> Buller’s 1894 Bill differed from Ballance’s earlier measure in key respects – the latter having simply stated the existence of the trust and empowered the court to apportion the land to the beneficial owners, and also having had a wider application to Horowhenua 6 and 12 as well as Horowhenua 11.

Before the Horowhenua Empowering Bill was even considered by the Government, however, Sheridan paid £2,000 to Warena Hunia. This was done despite McKenzie’s undertakings in the House. On 26 July 1894, Donald Fraser had asked for this advance. He denied the existence of a trust but stated that Hunia’s individual share in Horowhenua 11 must in any case be worth at least £2,000.<sup>200</sup> The Government was warned that if Hunia did not get this money, he might be declared bankrupt and his interest in Horowhenua 11 sold off by the official assignee. Again, the Government’s key concern was to protect its State farm purchase, and so Cabinet approved the payment, which was handed over to Hunia on 1 September 1894. By the time the Supreme Court case came on in October, this money had all been spent, including a £500 payment to Fraser.<sup>201</sup>

This payment created something of a crisis. First, on 16 October 1894, despite not having heard Te Keepa’s petition, the Native Affairs Committee recommended legislation to prevent the sale of ‘any more’ of Horowhenua 11A, 11B, or 6 until the end of the 1895 session. The committee suggested inserting clauses to this effect into the Native Land Claims and Boundaries Adjustment and Titles Empowering Bill 1894. The committee also recommended a clause requiring the Crown to retain part of the purchase money for the State farm, and to pay nothing ‘unless the Government is certain that there is sufficient land belonging to Warena Hunia which can be used, in case of judgment against him [in the Supreme Court], to satisfy the claims of the

196. Mitchelson to Seddon, 20 September 1894 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 997–998)

197. Mitchelson to Seddon, 20 September 1894 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 998)

198. Luiten, ‘Political Engagement’ (doc A163), p 232

199. Horowhenua Empowering Bill 1894 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 1273–1275)

200. Luiten, ‘Political Engagement’ (doc A163), pp 231–232

201. Luiten, ‘Political Engagement’ (doc A163), pp 231–233

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tribe.<sup>202</sup> The committee further recommended a royal commission to ‘investigate and ascertain who are the Maoris entitled to the disputed land in the Horowhenua Block.’<sup>203</sup> Anderson and Pickens suggested that this latter recommendation was also related to Ngāti Raukawa petitions,<sup>204</sup> a point we will consider later in the inquiry.

Edwin Mitchelson then drafted clauses for this Bill, which applied the provisions of the Native Equitable Owners Act 1886 to Horowhenua 6, 11A, and 11B so that Muaūpoko could be readmitted to the titles.<sup>205</sup> But this legislative remedy was rejected by the Government. Sheridan believed that Buller had been behind these clauses.<sup>206</sup>

Secondly, the payment to Hunia skewed the Government’s own proposed legislative remedy in October 1894. Seddon had not intended to legislate at all but he brought in a Bill in response to the Native Affairs Committee’s request.<sup>207</sup> Rather than using either Buller’s draft Bill or Mitchelson’s clauses, the Government prepared its own Horowhenua Block Bill. This Bill was designed to ensure that both Te Keepa and Hunia accounted for any and all moneys received,<sup>208</sup> while also ‘validating the payments to Hunia.’<sup>209</sup> It specifically authorised the Government to pay the whole of the State farm purchase price to Hunia.<sup>210</sup> At the same time, the Government’s Bill had no provisions for the Native Land Court to restore dispossessed tribal members to the titles, which had been a key remedy provided by Mitchelson’s clauses and Buller’s Bill.

The Horowhenua Block Bill 1894 applied to the whole Horowhenua block and to all sales and dispositions before or after 1886. The preamble stated that the Bill was to ‘protect the rights of all parties’ pending an investigation into petitions about ownership, sale, and dispositions, but it did not institute an actual inquiry.<sup>211</sup> All dealings in respect of Horowhenua 6, 11A, and 11B were declared void, except for the State farm sale of 1,500 acres and any timber leases.<sup>212</sup> The key provision was that the estates and lands of both Warena Hunia and Te Keepa (including any land owned outside the Horowhenua block) would ‘stand charged’ with whatever was owed after all questions of ownership had been resolved. The Native Land Court

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202. AJHR, 1894, I-3, p 14

203. AJHR, 1894, I-3, p 14

204. Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Waitangi Tribunal Rangahaua Whānui Series (Wellington: Waitangi Tribunal, 1996)(doc A165), pp 232–233

205. Native Land Claims and Boundaries Adjustment and Titles Empowering Bill 1894, cl 7A, sch 4, AJHR, 1896, G-2, pp 298–299

206. AJHR, 1896, G-2, p 150

207. NZPD, 1894, vol 86, p 1097

208. Horowhenua Block Bill 1894, AJHR, 1896, G-2, pp 331–332

209. Bryan Gilling, ‘The Ownership of Lake Horowhenua: Evidence of Dr Bryan Gilling to the Maori Land Court’, October 2005 (doc A173), p 49

210. Horowhenua Block Bill 1894, cl 2, AJHR, 1896, G-2, p 331

211. Horowhenua Block Bill 1894 as it passed the House, 23 October 1894, preamble (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1271)

212. Horowhenua Block Bill 1894 as it passed the House, 23 October 1894, cl 2 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1271)

was empowered to make charges against these lands.<sup>213</sup> But the sting in the tail was that the Act was not to apply to any land acquired by the Crown – this meant that it would not apply to the 1887 township purchase, the £2,000 payment to Hunia (or any future payments for the State farm), or indeed any future purchases by the Crown.<sup>214</sup>

On the other hand, the House voted to remove the specific clause about the State farm purchase, which had authorised the Native Minister to pay the whole or any part of the purchase money to Warena Hunia.<sup>215</sup> This was because the member for Ōtaki, J G Wilson, had opposed it strongly in committee, arguing that it would do a ‘very great injustice indeed to a large number of Natives.’<sup>216</sup> The Legislative Council went further and added ‘a provision which the Government could not accept’, and so Seddon abandoned this Bill altogether on 23 October 1894.<sup>217</sup> Bryan Gilling explained that

Buller’s lobbying in the Legislative Council changed the payments to Hunia to go into a trust fund for all Muaupoko, but Seddon refused to permit this tacit admission that the payments had been improper, too embarrassing for the Government, and instead saw to it that the Bill lapsed.<sup>218</sup>

Thus, the latest attempts by Muaūpoko to secure a remedy from the Crown had been utterly defeated. The Native Affairs Committee had declined to inquire into their petition. The Government had declined to pass their proposed Bill or Mitchelson’s clauses, and had abandoned its own Bill. Muaūpoko were left without recourse but to continue defending their rights in the Supreme Court.

### **6.4.9 Muaūpoko obtain a remedy from the Supreme Court, 1894–95**

#### **(1) *Meiha Keepa and others v Hunia, 1894***

The Supreme Court heard the case over five days in mid-October and two days in November 1894. The plaintiffs were Te Keepa, Ihaia Taueki, Noa Te Whatamahoe, Rawinia Taueki, Te Rangimairehau, Raniera Te Whata, Makere Te Rou, Kerehi Mitiwaha,<sup>219</sup> and Ngariki Te Raorao, ‘suing on behalf of themselves and all other persons in the same interest.’ The defendant was Warena Hunia. Petitioner Hera Te Upokoiri and others had been made third parties in July 1894.<sup>220</sup>

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213. Horowhenua Block Bill 1894 as it passed the House, 23 October 1894, cls 3–5 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1272)

214. Horowhenua Block Bill 1894 as it passed the House, 23 October 1894, cl 6 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1272)

215. Horowhenua Block Bill 1894, cl 2 (D Armstrong, comp, papers in support of ‘Muaupoko “Special Factors”’: Keepa’s Trusteeship, the Levin Township Sale and the Cost of Litigation’, various dates (doc A155(a)), p 69); AJHR, 1896, G-2, p 331

216. NZPD, 1894, vol 86, pp 1086, 1097

217. NZPD, 1894, vol 86, p 1129

218. Gilling, ‘The Ownership of Lake Horowhenua’ (doc A173), p 49

219. Also recorded at times as Kerehi Te Mitiwaha and Kerehi Te Mitiwaha.

220. AJHR, 1896, G-2, p 330



## 6.4.9 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The court made a declaration that Te Keepa and Warena Hunia held Horowhenua 11 in trust for the 143 registered owners of 1873 (or their successors), and that the 1890 partition orders were void. The court found there would need to be a reference to the Native Land Court for an inquiry to determine the owners, their successors or representatives of such, and their respective interests, by way of a case stated. It also ordered that caveats should be lodged preventing dealings with the land, and if already lodged, these must continue until further order of the Supreme Court. Finally, the court ordered Warena Hunia and Te Keepa to account for all moneys they may have received on the sale of any part of blocks 11A and 11B, or for any rents received, or any other proceeds otherwise received. This order included any money received by Hunia in respect of the State farm sale. Hunia was also ordered to pay costs.<sup>221</sup> This was a comprehensive victory for the plaintiffs.

In his judgment, Chief Justice Prendergast noted that the matter had ‘annually been the subject of petitions for redress at each sitting of the General Assembly.’<sup>222</sup> He accepted the evidence of Judge Wilson, Te Keepa, and others that a trust had been intended, and that the plaintiffs were entitled to the declaration that Te Keepa and Hunia were trustees. Warena Hunia’s evidence also supported this finding:

The defendant seems to admit that the persons interested under the original certificate, or some of them, have claims upon him and Major Kemp in respect of the allotments 11B and 11A, but contends that these claims are not such, and were not intended to be such, as could be enforced, but were intended to be only grounds of appeal to his and Kemp’s generosity, or, at any rate, were left to be dealt with according to their absolute discretion. Major Kemp has always taken, and still takes, the view that he and the defendant were simply nominees, as he himself had been when the original certificate for the 52,000 acres was ordered to be made to him. This is the conclusion at which I have arrived on all the evidence – a conclusion justified, as I think, by the absence of evidence leading to any other conclusion, as by the affirmative and positive evidence adduced by the plaintiffs.

The plaintiffs are, I think, entitled to the declaration they ask.<sup>223</sup>

At law, the chief justice held that a trust was one of the voluntary arrangements that could be accepted by the Native Land Court under section 56 of the Native Land Court Act 1880, and was accepted by that court for Horowhenua 11 in 1886.<sup>224</sup> In his evidence, Grant Young commented:

However, no trust or trusts were defined because, the Chief Justice also later observed, the Native Land Court had no power to do so (or indeed to somehow divide the land and distribute the assets of the trust to the beneficial owners). It was a trust based entirely on custom. In subdividing the land, and in exercising its power to give

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221. AJHR, 1896, G-2, pp 330–331

222. *Warena Hunia v Meiha Keepa (Major Kemp)* (1894) 14 NZLR 71, 80 (SC), (1895) 14 NZLR 84 (CA)

223. *Warena Hunia v Meiha Keepa (Major Kemp)* (1894) 14 NZLR 71, 80 (SC)

224. *Warena Hunia v Meiha Keepa (Major Kemp)* (1894) 14 NZLR 71, 74 (SC)



effect to voluntary arrangements, the Court established a trust. The land could be divided and vested in a particular person or persons on trust because that was in the nature of a voluntary arrangement among the owners. There was no way to define the terms of the trust or the powers of trustees over the land or their responsibilities to the beneficial owners of the land. The default position therefore was that the land would be managed by the trustees according to custom.

The Chief Justice accepted that a trust was established on Horowhenua 11 and that the beneficial owners did not give up their interests in the land. It would appear that the Chief Justice, while acknowledging there was no legal authority for the Native Land Court to define or determine the trust, considered the Court was empowered to determine the interests of the 143 owners and the matter was referred to the Native Land Court under s96 of the Native Land Court Act 1894 by way of a case stated by the Supreme Court.<sup>225</sup>

The chief justice noted that '[s]ome difficulty arises' as to whether the declaration of trust should be for the original 143 registered owners, or the more limited list of 106 Muaūpoko owners put into the title for Horowhenua 3. There was also the question of whether the rerewaho should be included. Ultimately, Prendergast ruled that the rerewaho were not entitled, but that the trust was for all 143 original owners. There was no evidence that any of them had consented to be excluded.<sup>226</sup>

## (2) *Warena Hunia v Meiha Keepa, 1895*

Warena Hunia appealed the Supreme Court's decision, which resulted in a further delay. The appeal was heard in April and May 1895. The Court of Appeal concurred 'without doubt or hesitation' in the chief justice's decision.<sup>227</sup> The court found:

On the whole, the conclusion we come to is that the land was confided to Kemp and Hunia on the understanding that they were to hold it for the benefit of all the members of the tribe, according to Maori custom; that the main object was to prevent alienation by any individual member, and that the land was to be administered very much on the principles on which the property of a tribe was held and dealt with before the introduction of English law. If that accurately, or even approximately, describes the position, then we think it follows that the trust is one which, in the event of disagreement either among the *cestuis que trust* and the trustees, or between the trustees themselves, could not be enforced or administered by a Court. It is too vague and indefinite.<sup>228</sup>

The judges added that a remedy would have existed in the Native Equitable Owners Act 1886, were it not restricted to lands granted under the 1865 legislation. The usual remedy in the Supreme Court, in cases where a trustee had acted

225. Young, 'Muaupoko Land Alienation' (doc A161), p 30

226. *Warena Hunia v Meiha Keepa (Major Kemp)* (1894) 14 NZLR 71, 83 (SC)

227. *Warena Hunia v Meiha Keepa (Major Kemp)* (1895) 14 NZLR 84, 90 (CA)

228. *Warena Hunia v Meiha Keepa (Major Kemp)* (1895) 14 NZLR 84, 94 (CA)

6.4.9 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

fraudulently, would have been for the court to remove him. But that was not possible in this case because the nature of the trust was ‘too indefinite for recognition or enforcement, and must be taken to have failed.’<sup>229</sup> The present trust was not

a grant from the plaintiffs directly, but, as pointed out by the Chief Justice, it is an allotment or judicial conveyance of land in which they have an interest, at their request, to be held for their benefit upon a trust which is now held to be too indefinite for enforcement. There is therefore a resulting trust in their favour. The trustees hold the land for the parties in whom, and to the extent to which, the property in the land was before the allotment – that is, for those Natives who, but for their consent to the allotment, would have had their rights ascertained and defined by the Land Court.<sup>230</sup>

The Court of Appeal confirmed the Supreme Court’s direction that the Native Land Court should determine the beneficial owners by way of a case stated under the Native Land Court Act 1894.<sup>231</sup> The order for Hunia to account for the proceeds of the sale of the State farm block was also confirmed.<sup>232</sup> The court did not at this stage say that the sale was of no legal effect.

No such requirement was made for Te Keepa, the court stating:

So far as relates to any claim to account for any moneys received by Kemp as rent or income from the land, these have been received in respect of a trust which the Court has held to be of a kind difficult, if not impossible, for a Court to deal with. It may be that the nature of the confidence reposed in him by such trust may make it, as he now alleges, impossible for him to account to the satisfaction of a Court; and it may be that the beneficiaries are satisfied with his administration. At all events he would be entitled to be heard on the question. It will therefore, we think, be unnecessary to make it part of the present decree for either party to account for such rent or income.<sup>233</sup>

Thus, Muaūpoko had a victory of sorts by the end of May 1895, insofar as the Supreme Court and Court of Appeal could grant one.

Matters were not, perhaps, entirely settled. Warena Hunia gave notice of his intention to appeal to the Privy Council.<sup>234</sup> This introduced a new uncertainty: quite apart from the costs involved, might an appeal succeed and overturn the Supreme Court and Court of Appeal? Whether or not Hunia would have persisted, his ‘plans to take the matter to the Privy Council’ were overtaken in October 1895 by the Government’s decision to establish a royal commission.<sup>235</sup> We turn to that issue next.

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229. *Warena Hunia v Meiha Keepa (Major Kemp)* (1895) 14 NZLR 84, 94 (CA)

230. *Warena Hunia v Meiha Keepa (Major Kemp)* (1895) 14 NZLR 84, 95 (CA)

231. *Warena Hunia v Meiha Keepa (Major Kemp)* (1895) 14 NZLR 84, 95–98 (CA)

232. *Warena Hunia v Meiha Keepa* (1895) 14 NZLR 71, 98 (SC, CA)

233. *Warena Hunia v Meiha Keepa* (1895) 14 NZLR 71, 98 (SC, CA)

234. Anderson and Pickens, *Wellington District* (doc A165), p 265; NZPD, 1895, vol 91, pp 698, 734

235. Anderson and Pickens, *Wellington District* (doc A165), p 265

**6.4.10 The Crown nullifies the Supreme Court's remedy, 1895****(1) The Crown introduces a Bill to stay court proceedings and empower the Native Land Court to provide a remedy**

Warena Hunia's defeat in court was also a defeat for the Crown. The Government had hoped that the Supreme Court would remove the caveats so that the transfer of the State farm block could be registered. It expected that the court would not go behind Hunia's land transfer title. Instead, both the Supreme Court and the Court of Appeal had found that Hunia's sale was based on his claim ('falsely and fraudulently') to hold the land as absolute owner.<sup>236</sup> The Government was seriously embarrassed, 'tied to a purchase it could not complete after paying £2000 to a man who could not sell.'<sup>237</sup> A number of newspaper articles (probably written by Buller) were strongly critical of the Government.<sup>238</sup>

One of the most important considerations in what happened next was the affront to the Minister of Lands and his reputation. As Ms Luiten noted, Jock McKenzie was extremely averse to having his name connected with any Māori land scandals, and his original intention had been to pay no part of the purchase money until the title was settled. Now, McKenzie moved to attack Buller, trying to focus attention on the way in which Te Keepa's lawyer had obtained leases and mortgages over Horowhenua 14.<sup>239</sup> We return to this issue in the next section.

Warena Hunia lost his appeal in May 1895. The following month, McKenzie 'intimated the government's intention to proceed with a full inquiry into Horowhenua.'<sup>240</sup> An Opposition member asked a question in the House on 5 July 1895, querying whether the Government would appoint a select committee or a royal commission to inquire into 'the whole of the circumstances and transactions which have occurred between private individuals and the Government in connection with the Horowhenua Block'. Such a committee or commission was necessary to 'settle once and forever' the 'damaging reports' in circulation about the Crown's purchase of the State farm. McKenzie responded that the Government would 'set up a Commission for the purpose of making full inquiry', but had been awaiting the outcome of the Supreme Court litigation.<sup>241</sup>

Then, on 30 September 1895, Wirihana Hunia wrote to Seddon, reminding him of a meeting in August in which Hunia 'asked you [Seddon] to be expeditious about making a special Act for Horowhenua'. Hunia appealed to Seddon: 'Be expeditious – Be expeditious – Be expeditious.'<sup>242</sup>

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236. *Warena Hunia v Meiha Keepa* (1894) 14 NZLR 71, 94 (SC, CA)

237. Ross Galbreath, *Walter Buller: The Reluctant Conservationist* (Wellington: GP Books, 1989), p 203 (Luiten, 'Political Engagement' (doc A163), p 234)

238. Luiten, 'Political Engagement' (doc A163), p 234

239. Luiten, 'Political Engagement' (doc A163), pp 234–236. See also Sheridan to McKenzie, 30 January 1895 (Armstrong, papers in support of 'Special Factors' (doc A155(a)), pp 466–469), and Sheridan's evidence to the Horowhenua commission, AJHR, 1896, G-2, p 153.

240. Luiten, 'Political Engagement' (doc A163), p 234

241. NZPD 1895, vol 87, p 381; Galbreath, *Walter Buller*, p 206

242. Wirihana Hunia to Seddon, 30 September 1895 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1316)

## 6.4.10 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The Government's Horowhenua Block Bill 1895 did not receive its first reading until 10 October.<sup>243</sup> One of its key goals was to prevent the Supreme Court's orders from being carried out. The Bill therefore provided for a stay of all court proceedings.<sup>244</sup> In the meantime, the Native Land Court would be empowered to inquire into all dealings in relation to Horowhenua (since 1873) and to determine what transactions had taken place, what money had been received, and to whom any money was now owed.<sup>245</sup> It would also be empowered to inquire into whether any trust existed or was implied in respect of Horowhenua 11, as if the superior courts had not already determined this question. The Native Land Court would make the same inquiry for Horowhenua 6, 12, and 14. At long last, however, the court would also be empowered to provide *a remedy* and to readmit any equitable owners into the title.

The sting in the tail, however, was that this part of the court's jurisdiction would be exercised under section 14(10) of the Native Land Court Act 1894.<sup>246</sup> Under that provision, if there had been a 'contract for sale', the court could only readmit owners to the title if 'the purchase-money has not been paid.'<sup>247</sup> Given the payment of £2,000 for the State farm, this meant the court would have no jurisdiction to readmit Muaūpoko to the 1,500 acres of Horowhenua 11B which had been sold to the Crown. In other words, the use of section 14(10) would not have allowed any of the other Muaūpoko owners to be put back into the title of a piece of land for which there was a sale contract and money had been paid (as in the case of the State farm block).

Finally, the Bill empowered the Native Land Court to inquire as to whether any purchaser, lessee, or mortgagee knew of a trust when transacting, and to declare any such transaction void (although nothing could impeach the title of a 'purchaser for value', that is, someone who had acquired land from the original purchaser).<sup>248</sup>

Thus, the Government had decided not to hold a royal commission (despite what McKenzie had said in Parliament in July) but to proceed with a Native Land Court inquiry. In any event, this 1895 Bill promised Muaūpoko at least a partial remedy: it provided for them to get back into the 'failed' trust titles, a remedy which they had been seeking since 1890. The Government's introduction of this legislation was the most promising development since Ballance's Bill of 1891. Perhaps a thorough accounting and resolution of all disputes and moneys was also required, and the court was to be empowered to resolve such matters. But the Bill also signalled the Government's determination to nullify the Supreme Court and Court of Appeal

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243. NZPD 1895, vol 91, p 247

244. Horowhenua Block Bill 1895, as reported from the Native Affairs Committee of the House, 25 October 1895, cl 3, AJHR, 1896, G-2, p 327

245. Horowhenua Block Bill 1895, as reported from the Native Affairs Committee of the House, 25 October 1895, cl 4, AJHR, 1896, G-2, pp 327-328

246. Horowhenua Block Bill 1895, as reported from the Native Affairs Committee of the House, 25 October 1895, cls 4, 6, AJHR, 1896, G-2, pp 327, 328

247. Native Land Court Act 1894, s14(10)

248. Horowhenua Block Bill 1895, as reported from the Native Affairs Committee of the House, 25 October 1895, cl 5, AJHR, 1896, G-2, p 328

decisions, to protect the State farm purchase, to deny Muaūpoko any rights in that purchase or its proceeds, and to put the tribe once more to the expense of an inquiry as to whether a trust existed – a trust that had now been declared by the Native Affairs Committee, the Native Land Court, the chief judge and his assessor in open court, the Supreme Court, and the Court of Appeal.

But even this much of a remedy was denied Muaūpoko in 1895. When the Bill came back to the House from the Native Affairs Committee on 25 October 1895, the preamble and almost all of its clauses had been struck out. What remained was a provision to make the blocks inalienable, and to institute a stay of all court proceedings until the end of the next session of Parliament.<sup>249</sup> When the House went into committee on this revised Bill, the remedy of a Native Land Court inquiry – which would at least have enabled Muaūpoko owners to get back into the titles – was replaced by a royal commission. Although a commission would inevitably cover much the same ground as had originally been intended for the court, it had no powers and could offer Muaūpoko no remedies, only further delay and costs. Further, any implementation of its recommendations would be at the discretion of the Crown.

**(2) Why was the Horowhenua commission substituted for the Native Land Court?**

The parliamentary session was almost over in late October 1895 when the select committee had to examine and report on the Horowhenua Block Bill. It decided not to hear any submissions. Nonetheless, Buller persuaded Seddon that he should be given a hearing, and he became the committee's only witness. Buller strongly objected to any inquiry into Horowhenua 14 which had never, he maintained, been held in trust on behalf of the tribe.<sup>250</sup> Jane Luiten credited Buller for the fact that the Horowhenua Block Bill returned to the House 'severely pruned'.<sup>251</sup> It no longer provided for a Native Land Court inquiry into the dealings in (or the equitable ownership of) the Horowhenua blocks, although Horowhenua 14 was still included in the blocks made inalienable for the next 12 months.<sup>252</sup> It is not clear what the select committee expected to happen in the interim. The committee does not appear to have suggested any alternative to a Native Land Court inquiry.<sup>253</sup>

The revised Bill was debated at 2 am on 26 October 1895.<sup>254</sup> McKenzie made a stinging attack on Buller's Horowhenua 14 dealings, and proposed inserting a royal commission into the Bill. Ms Luiten suggested that the McKenzie–Buller feud was responsible for this change: 'as a result of the wrangle between McKenzie and Buller . . . the form of the proposed inquiry into Horowhenua was amended to a full Royal

249. Horowhenua Block Bill 1895, as reported from the Native Affairs Committee of the House, 25 October 1895, AJHR, 1896, G-2, pp 327–328

250. Luiten, 'Political Engagement' (doc A163), p 235

251. Luiten, 'Political Engagement' (doc A163), p 235

252. Horowhenua Block Bill 1895, as reported from the Native Affairs Committee of the House, 25 October 1895, cl3, AJHR, 1896, G-2, p 327

253. Horowhenua Block Bill 1895, as reported from the Native Affairs Committee of the House, 25 October 1895, cl3, AJHR, 1896, G-2, pp 327–328; AJHR, 1895, I-3, p 25

254. NZPD, 1895, vol 91, p 684



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Commission'.<sup>255</sup> All that we can say for certain is that it was the Government which proposed substituting a royal commission for the Native Land Court, having first accepted the select committee's changes to the Bill. Without such a commission, of course, there would have been no inquiry at all. McKenzie moved the following clause:

The Governor in Council shall appoint a Royal Commission to inquire into the circumstances connected with the sales or dispositions by the Natives of any or the whole of the blocks contained in the Horowhenua Block . . . and as to the purchase-money paid for the same, and as to what trusts, if any, the same respectively were subject to.<sup>256</sup>

After this amendment was carried, McKenzie moved an additional amendment that proved very controversial in our inquiry. He moved to add: 'and the costs and expenses of such Commission shall be charged upon such of the lands as the Commission may determine'. This amendment was also carried.<sup>257</sup>

Francis Dillon Bell, a senior New Zealand lawyer and Opposition member, moved another amendment to omit Horowhenua 11 from the Bill. As he pointed out, the Supreme Court had already defined the equities and 'referred the matter to the Native Land Court for the determination of the individuals entitled to those rights'.<sup>258</sup> Bell made a speech of protest at the third reading, stating that Parliament was interfering with a judgment of the highest court in the land, without even an inquiry or investigation before doing so: 'He did not think that any such step as that had ever been taken in any Parliament in any civilised country before'.<sup>259</sup>

The Minister replied that the dealings in the Horowhenua block were 'the biggest scandal he had ever come across in his administration', and that Buller had mortgaged and leased Horowhenua lands to 'feed the legal profession', encouraging Māori to 'fight against themselves'. He also pointed out that the people of New Zealand needed to be satisfied as to the truth about the scandal and 'to see this grievance remedied'.<sup>260</sup>

In the Legislative Council, similar arguments were rehearsed but the majority agreed that a royal commission was necessary to provide full evidence and answers in respect to the Horowhenua dealings.<sup>261</sup> The Horowhenua Block Act became law on 31 October 1895.

In light of this debate in Parliament, the Supreme Court litigation, and the many previous attempts to obtain a remedy from the Crown, the question arises: was a royal commission really necessary to uncover the facts and identify a remedy at

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255. Luiten, 'Political Engagement' (doc A163), pp 235–236

256. *Journals of the House of Representatives*, 1895, p 496

257. *Journals of the House of Representatives*, 1895, p 496

258. NZPD, 1895, vol 91, p 683

259. NZPD, 1895, vol 91, p 683

260. NZPD, 1895, vol 91, p 684

261. NZPD, 1895, vol 91, pp 698–699, 732–738



this late stage? The claimants in our inquiry say ‘no’, the Crown says ‘yes’. We discuss that question next.

## **6.5 THE HOROWHENUA COMMISSION: WAS IT REALLY NECESSARY AND WHAT DID IT ACHIEVE?**

### **6.5.1 Had a remedy been identified for Horowhenua 11 before the commission sat?**

In 1886, Muaūpoko had intended for their tribal heartland to be held in trust as a permanent tribal reserve. Instead, the only form of title available under the native land laws had vested Horowhenua 11 in the absolute ownership of two individuals. This had been made known to the Crown through a series of petitions and investigations from 1890 onwards. An obvious remedy – legislation to empower the Native Land Court to restore the dispossessed owners to the title – had been identified by 1891. There was a very clear precedent in the Native Equitable Owners Act of 1886. As we set out above, attempts to obtain this remedy were defeated repeatedly, partly because of opposition from a minority within Muaupoko, but mostly because of the Crown’s vested interest in defending its State farm purchase from 1893 onwards. Both the Government and Muaūpoko leaders had noted the great risks posed to Muaūpoko by long, drawn-out, expensive litigation. Nonetheless, unable to obtain a remedy from the Crown, Te Keepa and Hunia resorted to the courts. By 1895, Muaūpoko were in the process of securing some relief from the Supreme Court. The court had recognised the existence of a trust (confirmed on appeal), although it was currently too indefinite to be enforced. The courts had also taken the first steps to give effect to the trust, ordering the Native Land Court to identify the beneficiaries and ordering Hunia to surrender any purchase moneys from his fraudulent sale of the State farm block. But Hunia had given notice of an appeal to the Privy Council, which might result in further delay and a contrary decision.

It was this legal remedy which the Crown nullified in 1895. At first, as noted above, the Government’s intention in the Horowhenua Block Bill was for the Native Land Court to inquire into the existence of a trust and – if found – to restore the equitable owners to the title. This alternative remedy, however, would have ended the trust, which had been Muaūpoko’s method for permanently reserving Horowhenua 11. Even this much remedy, however, was denied when the Crown established a royal commission instead with purely recommendatory powers. For Horowhenua 11, this had the effect of delaying the eventual Native Land Court process for another year and resulted in enormous expense to the tribe and the loss of Horowhenua 12.

We do not accept Crown counsel’s argument that the litigation in the Supreme Court was ‘inconclusive’, with ‘uncertain outcomes, in a practical sense’, and that a commission was necessary to reconsider matters.<sup>262</sup> The commission was not added to the 1895 Bill until the last minute, and the orders of the Supreme Court and Court of Appeal were leading to a result more in keeping with the intent of Muaūpoko

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262. Crown counsel, closing submissions (paper 3.3.24), pp 182, 189

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to create a trust. The only point of uncertainty was a possible appeal to the Privy Council, but it is difficult to see how that made the outcome more uncertain than having the entire matter reinvestigated in the Native Land Court (the Crown's original intention in the 1895 Bill) or by a royal commission.

We agree with claimant counsel, who pointed out that the Crown had a vested interest in the outcome:

The Crown submissions say that the Court of Appeal decision had given rise to 'uncertain outcomes, in a practical sense'.

But the Crown does not explain precisely how the Court of Appeal's orders were so deficient that 'to act in an informed way going forward' it needed to take the constitutionally extraordinary step of setting to one side proceedings that a tribe had before the courts and prefer its own discretion in judging Muaupoko interests. This is an acute issue given that the Crown had a strong political and financial interest in the outcome. Its plans to purchase Horowhenua 11 had been comprehensively overturned by the Court of Appeal.<sup>263</sup>

In any case, it is clear that the Horowhenua commission was redundant in respect of Horowhenua 11: the necessary remedy had been known to the Crown since at least 1891, when Ballance's Horowhenua Subdivision Lands Bill was prepared. Further, the Crown's legislative intervention annulled the relief that Muaūpoko had won through the courts in 1894–95.

**6.5.2 What redress had been identified for other Horowhenua blocks before the commission sat?**

In the previous sections, we have discussed Horowhenua 11 at length. Before we can decide whether a royal commission was necessary for any of the *other* Horowhenua blocks, we must first discuss what redress had already been identified for those blocks prior to the commission. Ngāti Raukawa had appealed to the Crown for assistance to obtain ownership of Horowhenua 9, and to reopen the title to the wider Horowhenua block. From Muaūpoko, the Crown had received petitions or complaints about Horowhenua 6 (the rerewaho block) and Horowhenua 2 (the township block). Officials had also raised concerns about the status of Horowhenua 12. There do not appear to have been complaints from Muaūpoko about the other subdivisions.

**(1) Horowhenua 6**

As discussed in section 4.4.7, Horowhenua 6 was vested in Te Keepa in 1886 to transfer to the rerewaho, the people who had been left out of the title in 1873. Muaūpoko set aside 4,620 acres for 44 individuals, each to receive a 105-acre section for leasing. This was meant to put the rerewaho on the same footing as their whanaunga who had made it into the 1873 title, each of whom had received 105 acres in Horowhenua

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263. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 35

3. The fact that Horowhenua 6 had still not been transferred to the rerewaho by 1895 was of serious concern to them.

This issue was raised at the partition hearing for Horowhenua 11 in 1890. Te Keepa admitted that he held block 6 in trust but said that the 1886 list of beneficiaries had gone missing. Alexander McDonald discovered this list ‘by chance’ the same day. Te Keepa refused to accept McDonald’s list as genuine, believing that it had been ‘fabricated’ by ‘Hunia’s party.’<sup>264</sup> It had 45 names instead of 44, which did not reassure as to its authenticity, although Eparaima Paki later confirmed that it was the list of names he had recorded in 1886.<sup>265</sup> Ms Luiten commented: ‘The list of rerewaho submitted by McDonald in 1890 included individuals from both sides of the dispute, although there appears to be a disproportionate number of Ngati Pariri residents, as well as non-resident Muaupoko.’<sup>266</sup> Immediately after the 1890 partition hearing for Horowhenua 11, Hema Henare of Ngāti Pāiri lodged a caveat on the title of Horowhenua 6. He was one of the rerewaho, and had the support of seven others. The caveat was registered in April 1890, and it was intended to prevent the sale of Horowhenua 6 by its ‘trustee.’<sup>267</sup>

Block 6 was discussed again at the Pipiriki hui in 1891. As we explained above, Muaūpoko debated giving Warena Hunia 3,000 acres of Horowhenua 11B if he would agree to return the rest to the tribe. According to one version of events, Te Keepa asked for Horowhenua 6 as a condition of his approval for this deal, to which the tribe refused to consent. Wirihana Hunia claimed that Te Keepa wanted to sell Horowhenua 6. His motive was supposedly a failed scheme to use the proceeds from the sale of Horowhenua 6 to buy out Warena’s claim to the tribal heartland block. Another version of events held that Te Keepa always acknowledged that he held Horowhenua 6 in trust, and never asked for it to be handed over to him at this hui. What seems certain is that the rerewaho pressed Te Keepa to transfer Horowhenua 6 to them, without success. Te Keepa’s overriding priority was to resolve the crisis over Horowhenua 11 first.<sup>268</sup>

Nonetheless, the Government included Horowhenua 6 in the Horowhenua Subdivision Lands Bill in 1891. This Bill was drawn up on the instructions of Premier Ballance, with the advice of T W Lewis. It included Horowhenua 6 among the lands to be investigated by the Native Land Court. The preamble stated that it was necessary to protect the interests of the beneficiaries of Horowhenua 6, and clause 2 empowered the court to determine which members of Muaūpoko were entitled to a ‘beneficial interest’ in the block. Under the Bill, the court’s orders would have the effect of transferring Horowhenua 6 from Te Keepa to the owners as found by the court.<sup>269</sup> This Bill would have provided the necessary remedy for the rerewaho, well

264. Luiten, ‘Political Engagement’ (doc A163), p 191

265. Petition of Hoani Nahona, not dated [1894] (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), p 57)

266. Luiten, ‘Political Engagement’ (doc A163), p 192

267. Luiten, ‘Political Engagement’ (doc A163), p 192

268. Luiten, ‘Political Engagement’ (doc A163), pp 192–193; AJHR, 1896, G-2, pp 273–276

269. Horowhenua Subdivision Lands Bill 1891 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 815–817)

in advance of the Horowhenua commission. We agree with the claimants that the remedy for Horowhenua 6 had been known to the Crown since 1891.<sup>270</sup>

But the 1891 Bill was abandoned after Warena Hunia and his supporters protested against its provisions for Horowhenua 11. What followed instead was a temporary protection: the Native Land Court Acts Amendment Act 1891 made Horowhenua 6 inalienable, with a stay of all proceedings, until the end of the 1892 parliamentary session.<sup>271</sup> While this meant that Horowhenua 6 could not be alienated, it also meant that no steps could be taken to obtain a legal remedy in the courts.

In 1892, there was a second attempt to introduce legislation. Again, this would have enabled the Native Land Court to provide a remedy in respect of Horowhenua 6 (and 11). It, too, was defeated – this time because it was too close to the end of the parliamentary session, and the member for Ōtaki threatened to stonewall it.<sup>272</sup> Horowhenua 11 then received the rather dubious protection of a proclamation under the Native Land Purchases Act 1892 (see above). Nothing was done to protect the interests of the rerewaho in Horowhenua 6.

Concern about block 6 subsided until the end of 1893, when Te Keepa signed a timber lease with Bartholomew. This resulted in two petitions from the rerewaho in 1894, filed by Hoani Nahona and Hana Rata. The petitioners recited the history of the arrangements in 1886, and quoted Te Keepa's statements in court in 1890 that he was a trustee for Horowhenua 6, and was 'willing to sign a trust deed assigning the 4,620 acres to the 44 persons.' The dispute about the authenticity of the list had prevented this from happening. The petitioners also pointed out that their caveat was preventing registration of Te Keepa's timber lease, which had been entered into 'without consulting your Petitioners or the other Natives entitled to Block No 6.' A stalemate had ensued. Hoani Nahona and his supporters therefore sought special legislation, empowering the court to inquire into the trust, settle the correct list of owners, and arrange successions.<sup>273</sup> In other words, they asked for legislation which had already been considered in 1891 and 1892.

By the time these 1894 petitions were filed, T W Lewis had died and there was a new chief judge, G B Davy. Chief Judge Davy was able to confirm the petition's accuracy as to its extracts from the court's minutes, but he had 'no information' as to its allegations. If the allegations were correct (that is, if the land was held in trust for 44 named owners), then the chief judge recommended special legislation to remedy the situation.<sup>274</sup> The Native Affairs Committee agreed. It reported to the Government that Te Keepa admitted the trust but did not admit the petitioners to be 'those properly entitled.' Hence, 'legislation should be passed to allow some

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270. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 145–147

271. Native Land Court Acts Amendment Act 1891, s 3

272. Luiten, 'Political Engagement' (doc A163), p 215

273. Petition of Hoani Nahona, not dated [1894] (Armstrong, papers in support of 'Special Factors' (doc A155(a)), pp 57–58)

274. Davy to under-secretary, Justice Department, 30 July 1894 (Armstrong, papers in support of 'Special Factors' (doc A155(a)), p 91)

Native Land Court to settle who are the persons entitled to the land'.<sup>275</sup> Te Keepa also supported this solution. Buller wrote on his behalf in July 1894, before the committee reported, advising the Government of Te Keepa's view and suggesting that Horowhenua 6 be added to his Horowhenua Empowering Bill for the court to determine its owners (see above).<sup>276</sup>

The Government received the Native Affairs Committee's recommendation in August 1894. In the same month, Te Keepa negotiated with Bartholomew and 21 'presumptive owners' to set up a trust to receive the timber royalties.<sup>277</sup> A second set of trustees was nominated in December 1894, but Bartholomew continued to pay royalties to those appointed in August and to mill the block, even though the lease remained unregistered.<sup>278</sup> In any case, witnesses agreed at the Horowhenua commission in 1896 that Te Keepa had not received any money for the lease, and the proceeds were being held in trust for the rerewaho (once everyone agreed as to who they were). The commission reported that there were 'no complaints as to the administration of this fund'.<sup>279</sup>

In response to the Native Affairs Committee's report in August 1894, the petitioners' lawyer drafted a Bill to give effect to its recommendation. The Government responded that 'a separate Act was unnecessary' because the Native Land Court Bill 1894 'made provision for the matter in question'.<sup>280</sup> After the Native Land Court Act had passed, the representatives of the rerewaho approached the Government again in November 1894. They asked the Crown for an order in council, authorising the court to determine the 'Natives beneficially entitled' to Horowhenua 6, under section 14(10) of the Native Land Court Act 1894.<sup>281</sup> We have already discussed this provision, which empowered the court to readmit owners to blocks intended to be held in trust, if authorised to do so by an order in council.

In the interim, the Native Affairs Committee had recommended in October 1894 that Horowhenua 6 be included in legislation to prevent any alienation, and for a royal commission to 'investigate and ascertain who are the Maoris entitled to the disputed land in the Horowhenua Block'.<sup>282</sup> As set out above, Edwin Mitchelson drafted clauses to go into the Native Land Claims and Boundaries Adjustment and Titles Empowering Bill 1894. These clauses provided for Horowhenua 6, among others, to be investigated by the court under the terms of the old Native Equitable

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275. Native Affairs Committee report, 14 August 1894 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 992)

276. Buller to Seddon, 19 July 1894, AJHR, 1896, G-2, p 331

277. AJHR, 1896, G-2, p 332 (Luiten, 'Political Engagement' (doc A163), p 193)

278. Luiten, 'Political Engagement' (doc A163), p 193

279. AJHR, 1896, G-2, p 8

280. Brown and Deane to Seddon, 7 November 1894 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1022)

281. Brown and Deane to Seddon, 7 November 1894 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1022)

282. AJHR, 1894, I-3, p 14



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Owners Act, which would have enabled the rerewaho to obtain legal title to the block.<sup>283</sup>

The Government, however, refused to:

- ▶ include Horowhenua 6 in Buller's Horowhenua Empowering Bill (or introduce that Bill), as suggested by Te Keepa and Buller in July 1894;
- ▶ pass special legislation for the court to investigate and give legal title to the rerewaho, as recommended by the Native Affairs Committee in August 1894;
- ▶ insert clauses into the Native Land Claims and Boundaries Adjustment and Titles Empowering Bill 1894, as drafted by Mitchelson in October 1894; or
- ▶ issue an order in council, authorising the court to deal with Horowhenua 6 under section 14(10) of the Native Land Court Act 1894, as requested by the representatives of the rerewaho in November 1894, and as previously signalled by the Government as the appropriate remedy.

This meant that by the end of 1894 the Crown had repeatedly failed to provide a remedy that had been known and sought since 1891.

In May 1895, the lawyers for the rerewaho wrote to the under-secretary for justice, stating that they had 'not heard whether anything has been done in the matter' of an order in council. They once again asked for such an order in council under section 14(10), pointing out that Te Keepa acknowledged the trust and that 'the Native Affairs Committee passed a unanimous resolution that legislation sh[ould] be passed authorising the NL Ct to deal with the matter'. The rerewaho sought action 'as soon as possible'.<sup>284</sup>

Ms Luiten observed that there was no Government response on file.<sup>285</sup> Presumably, the Crown had been awaiting the outcome of the Horowhenua 11 litigation in the Court of Appeal, which was delivered in the same month as the rerewaho's second approach to the Crown. Yet the Government had no doubts as to the existence of a trust for Horowhenua 6. When Bartholomew took action in the Supreme Court in 1895, the existence of a trust was one of the Crown's arguments for why he should not be able to register his timber lease over Horowhenua 6. Seddon and McKenzie specifically agreed that this argument should be put to the court. Ironically, the district land registrar had refused to register the lease not because of the caveats lodged by the rerewaho but because Bartholomew refused to pay the outstanding survey lien on the block.<sup>286</sup> Justice Richmond declined to award costs against Bartholomew, since the successful argument – the trust – had not been the reason for the registrar's refusal to register the lease.<sup>287</sup>

283. Native Land Claims and Boundaries Adjustment and Titles Empowering Bill 1894, cl7A, sch 4, AJHR, 1896, G-2, pp 298–299

284. Brown and Deane to under-secretary for justice, 9 May 1895 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1318)

285. Luiten, 'Political Engagement' (doc A163), p 193

286. Stafford to Sheridan, 9 July 1895 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1311); Sheridan to Seddon: 'Re Mr Bartholomew, and Horowhenua No 6 Block', not dated (Armstrong, papers in support of 'Special Factors' (doc A155(a)), pp 403–404)

287. 'Decision of Richmond J, delivered 8 July 1895' (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1314)



Later in the year, the Government introduced the Horowhenua Block Bill 1895 (discussed above). This Bill would have provided the remedy sought by the rerewaho in November 1894 and May 1895. It empowered the court to investigate Horowhenua 6 (among others) under section 14(10) of the 1894 Act, ‘as if an Order in Council had been issued expressly empowering the Court in that behalf’.<sup>288</sup> But, as we discussed above, the Native Affairs Committee stripped these clauses out of the Bill and a royal commission was substituted instead. This meant that by the end of 1895 the rerewaho had still failed to obtain their remedy.

In our view, it is indisputable that the remedy for the rerewaho in respect of Horowhenua 6 had been known since 1891. There was no question as to the existence of a trust, which had been accepted by all parties concerned. The royal commission of 1896 allowed out-of-court negotiations so that Muaūpoko could settle the list, just as the Native Land Court would have done, and adjudicated on a handful of disputed names – again, just as the Native Land Court would have done. After that expensive exercise, legislation in 1896 referred the matter to the court, which meant that it had to be done over again in 1897. But the royal commission had gone further than simply identifying the owners of Horowhenua 6 – it also recommended that the Crown buy Horowhenua 6 for settlers because its area was insufficient to support the rerewaho, but suitable for Pākehā settlement. We discuss this further in section 6.5.4.

## **(2) Horowhenua 12**

The Crown had received no complaints or petitions about Horowhenua 12. Officials, however, were aware that this block was held in trust for Muaūpoko by Ihaia Tauaki. T W Lewis, under-secretary for Justice, had been present at the 1886 partition hearings and had advised Te Keepa at those hearings. When the Native Minister contemplated a legislative remedy for Horowhenua 11 in 1891, Lewis advised him that ‘confining legislative rehearing to Section 11 is only putting off the evil day as regards Section 12 & perhaps other sections’. It would be better, he said, to empower the Native Land Court to ‘decide whether there are equitable owners whose names should be inserted in the other sections’ at the same time as it dealt with Horowhenua 11.<sup>289</sup> Ministers accepted this advice. The Horowhenua Subdivision Lands Bill of 1891 specifically acknowledged the trust over Horowhenua 12. Its clauses empowered the Native Land Court to determine the equitable owners.<sup>290</sup> But, as we discussed above, the Bill was abandoned in 1891 because of counter-petitions from Warena Hunia, and the very real concern of Hunia’s supporters that litigation would place the tribe under a serious burden of debt.

The Government’s preference therefore switched from a legislative remedy to a negotiated settlement, but very little was done to help bring this about. In the meantime, Parliament prohibited any alienation of Horowhenua 12 as well as

288. Horowhenua Block Bill 1895, cl 6, AJHR, 1896, G-2, p 325

289. Lewis to Cadman, 15 May 1891 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 800)

290. Horowhenua Subdivision Lands Bill 1891 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 816–817)

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Horowhenua 6 and 11.<sup>291</sup> This was done despite the Crown's attempt to purchase Horowhenua 12 in 1891 (see above).<sup>292</sup>

Fresh petitions in 1892 called once more for a legislative remedy for Horowhenua 11, and received strong support from the Native Affairs Committee. Attention was focused on the tribal heartland and then the State farm purchase, so little if any thought was given to the situation of the other tribal trust, block 12. In 1893, however, the Horowhenua Subdivision Lands Bill was reconsidered by the Justice Department. This Bill would have empowered the court to readmit the Muaūpoko owners to the title of Horowhenua 12, although it would not have provided for a revamped, properly defined trust. In any case, the Government did not proceed with the Bill, and a legislative remedy for Horowhenua 12 was not considered.<sup>293</sup> The block was not included in any of the abortive Bills of 1894. It was not until 1895 that the situation of Horowhenua 12 was addressed again. The Horowhenua Block Bill of that year empowered the Native Land Court to determine whether Horowhenua 12 was held in trust, and – if so – to readmit the original owners to the title. As discussed above, these clauses were stripped from the Bill and a royal commission was established instead, with Horowhenua 12 (among others) inalienable until the end of 1896.

As with block 6, our view is that the remedy for Horowhenua 12 was known to the Crown well in advance of the Horowhenua commission. What was necessary was an inquiry empowered to readmit the Muaūpoko owners back into the title of Horowhenua 12 and, if the tribe still wanted it, the legislative means to establish a properly defined tribal trust.

**(3) Horowhenua 9**

It may be that a royal commission was required to settle the ownership of Horowhenua 9 and to consider Ngāti Raukawa's promised reserves. As noted, any claim issues in respect of Ngāti Raukawa will be considered later in our inquiry.

**(4) Horowhenua 2**

Prior to the 1896 commission, Muaūpoko raised two major grievances with the Government in respect of Horowhenua 2:

- ▶ the Crown's failure to agree to Muaūpoko's 1886 terms for the township sale, specifically its refusal to reserve every tenth section for the tribe; and
- ▶ the Crown's failure to reserve the homes and cultivations of two whānau living on the block.

As discussed in chapter 5, Native Minister Ballance refused to accept Muaūpoko's conditions for the sale of the township block. Te Keepa held out for six months but in the end had virtually no choice but to accept the purchase on the Crown's terms and at its price (see section 5.4.3). Neither the Crown nor Te Keepa revealed this

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291. Native Land Court Acts Amendment Act 1891, s 3

292. Luiten, 'Political Engagement' (doc A163), p 211

293. Luiten, 'Political Engagement' (doc A163), p 223

fact to Muaūpoko in 1887.<sup>294</sup> In 1889, Wirihana Hunia approached Native Minister Mitchelson about the proposed reservation of one tenth of the township sections for Muaūpoko. On 18 March, following a Muaūpoko hui, he wrote to Mitchelson: 'on inspection of the plan of the township I found that the sections for the Natives were not marked.'<sup>295</sup> It was presumably at this point that Wirihana Hunia found out the Government's position on the tenths, which was that there were 'no sections for the Natives unless they purchase them at auction like any other person.'<sup>296</sup> Hoani Puihi wrote to the Government about the tenths in 1890, and was told that they had been 'swept away' when the whole of Horowhenua 2 was sold to the Crown by Te Keepa.<sup>297</sup> There would be 'no sections at Levin' for Muaūpoko.<sup>298</sup> According to Puihi's evidence to the Horowhenua commission, the Government responded to his inquiries by placing any blame on Te Keepa, to whom he was referred for explanation.<sup>299</sup>

Others also found out gradually – Te Rangimairehau when he went to Wellington to seek answers about the tenths from Te Keepa and Hunia. He was cross-examined about this in the Horowhenua commission:

*You agreed it [Horowhenua 2] should be put in Kemp's name, to effect a sale to the Government? – Yes.*

*I suppose all those considerations that Mr McDonald told us about were explained to you and accepted by you – the proposed arrangements as to one section out of every ten for the Natives, the school, the park, and the surveys: those were what you understood to be the nature of the arrangements? – Kemp and Palmerston [sic] arranged this, but we heard afterwards that it had not been carried into effect.*

*Whose fault was it that it was not carried into effect? – I went to Wellington to inquire into this matter. I saw there Kemp and Wirihana Hunia together, and spoke to them about my quarter-acre sections. It was Wirihana who answered me, "They have been done away with."*

*By whom – by the Government or anyone else? – It may have been Kemp; it may have been the Minister; I cannot say.*

*But you understood the thing was done away with, and you were not to get your quarter-acres and other advantages? – Yes; I understood so.*

*Have the Muaupoko at any time blamed Kemp for that? – No.<sup>300</sup>*

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294. Luiten, 'Political Engagement' (doc A163), pp 175–178

295. Wirihana Hunia to Mitchelson, 18 March 1889 (Luiten, papers in support of 'Political Engagement' (doc A163), p 183)

296. Sheridan, note on Wirihana Hunia to Mitchelson, 18 March 1889 (Luiten, 'Political Engagement' (doc A163), p 183)

297. AJHR, 1896, G-2, p 142 (Luiten, 'Political Engagement' (doc A163), p 184)

298. Sheridan to Lewis, 12 December 1890, on Morpeth note to Marchant, 9 December 1890 (Luiten, 'Political Engagement' (doc A163), pp 183–184)

299. Luiten, 'Political Engagement' (doc A163), p 184; AJHR, 1896, G-2, p 142

300. AJHR, 1896, G-2, p 88

The other concern raised with the Crown prior to the commission was the expulsion of two whānau from their homes and cultivations. Hoani Puihi and Winara Te Raorao believed that their kāinga at Tirotiro would be excluded from the township block, but the survey included their 200 acres on the north-western end of the block. Puihi and Te Raorao wrote to Lewis, explaining that their homes were supposed to have been excepted. Both Lewis and Sheridan, however, took the position that the land was legally Te Keepa's to sell, and he had sold it without reserves. Puihi appealed to Te Keepa, the Māori members of Parliament, and even disrupted the survey of township sections. Chief Surveyor Marchant raised the issue with the Native Department more than once. He called for a proper investigation of the claim, but the department persisted with its refusal.<sup>301</sup> Marchant then appealed to the surveyor-general: 'Are these Natives to be evicted & forfeit their house and cultivations?'<sup>302</sup>

The surveyor-general directed that Puihi and Te Raorao be paid the value of any improvements when the land was sold, and this was the course followed. The eviction of Hoani Puihi from his home, commented Ms Luiten, made him turn against Te Keepa and become Warena Hunia's supporter (at least until the State farm sale). The evictions resulted in 'sorrow and distress' among the Muaūpoko community. Wirihana Hunia protested to Native Minister Mitchelson without success.<sup>303</sup> Ms Luiten commented: '[T]he refusal of the Crown to consider the reservation of land for those tangata whenua in actual occupation can be contrasted with its provision of "ample reserves" for the future benefit of Levin residents', which included 'four sections for public buildings; 24 for municipal endowment; 12 for primary education; a large gravel reserve; a school site of 5.5 acres; recreation reserves of 11 acres, a 5-acre cemetery reserve, and a water supply reserve at Koputuroa'.<sup>304</sup>

In addition to complaints about the tenths and the failure to except Tirotiro, various allegations were made in respect of Te Keepa's trusteeship, in particular his failure to pass on any of the purchase money to pay for the partition surveys (as agreed among Muaūpoko in 1886). Ms Luiten characterised this as a 'smear campaign' by Warena Hunia's agent, Donald Fraser, and not necessarily an expression of concerns by the tribe.<sup>305</sup>

Hoani Puihi told the commission in 1896 that he wanted a reserve at Tirotiro, the return of the tenths to Muaūpoko, and the return of the township purchase money.<sup>306</sup> It remained to be seen what remedy the commission might identify for these matters, as the Crown had offered nothing before 1896 except to refuse all claims to the tenths and to refer aggrieved Muaūpoko leaders to Te Keepa. Thus, a royal commission did provide a potential path to a remedy for grievances in respect of Horowhenua 2.

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301. Luiten, 'Political Engagement' (doc A163), pp 180–182

302. Marchant, minute to surveyor-general, 8 January 1889 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1172)

303. Luiten, 'Political Engagement' (doc A163), pp 181–183

304. Luiten, 'Political Engagement' (doc A163), p 183

305. Luiten, 'Political Engagement' (doc A163), pp 244–245

306. AJHR, 1896, G-2, p 142

### 6.5.3 Were Muaūpoko consulted about the necessity for or composition of the commission?

From the evidence available to us, the Crown did not consult Muaūpoko about its 1895 Bill, in which it proposed to stay all current court proceedings, and empower the Native Land Court to hold a wide-ranging inquiry and to identify equitable owners where appropriate. Nor were Muaūpoko consulted about the amendment of the Bill, which replaced the Native Land Court inquiry with a royal commission. Similarly, the Crown did not consult Muaūpoko about the appropriate composition of the commission, the scope and nature of the commission's inquiry, or what role the tribe might play in decision-making once the commission had made its recommendations. The Crown certainly did not consult Muaūpoko or seek their agreement to its decision that the tribe would pay the commission's costs in land, and that the commission would choose which land would be taken from them for that purpose.

In our inquiry, the Crown accepts that 'Muaūpoko were not consulted over the commission or the imposition of costs'. Crown counsel qualified this point, however, by noting that its concessions 'should not be interpreted as acceptance by the Crown that the establishment of the Horowhenua Commission was unnecessary or was in breach of the Treaty or its principles'. Rather, the concession about failure to consult (and others) related solely to the *cumulative* effect of the Crown's actions in *acquiring land* in Horowhenua 11 and 12.<sup>307</sup>

One of the consequences of the Crown's failure to consult Muaūpoko leaders, and its sole power of appointing the commission, is that no Māori members were appointed at all (let alone appointed by Muaūpoko). Two stipendiary magistrates and a Wairarapa farmer, none of whom had any deep knowledge of Māori matters, were chosen by the Crown as commissioners. The chairman, JC Martin, was a Wellington magistrate who had previously served as a Crown solicitor in Christchurch.<sup>308</sup> Only one commissioner, RS Bush, had professional knowledge of Māori matters. Bush had worked for the Native Department in the 1870s and had been a resident magistrate in Māori districts.<sup>309</sup> JC McKerrow, a Wairarapa farmer who had originally farmed in Canterbury, was the third member.<sup>310</sup> (He should not be confused with the surveyor-general of the same name.)

The Horowhenua commission's domination by settlers and its lack of a Māori perspective or Māori expert members was evident in its report and recommendations. As Ms Luiten put it, 'Muaupoko's perspective appears to have gone over the commissioners' heads.'<sup>311</sup> This was the result of the way in which the Crown

307. Crown counsel, closing submissions (paper 3.3.24), p183

308. 'James Crosby Martin', in *A Dictionary of New Zealand Biography*, ed Guy H Scholefield, 2 vols (Wellington: Department of Internal Affairs, 1940), vol 2, p 59

309. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p102; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 248; Waitangi Tribunal, *Te Urewera, Pre-publication, Part I* (Wellington: Waitangi Tribunal, 2009), pp 443–444, *Part II*, pp 255, 284, 296, 306, 311, 325–327, 329–330, 335–336, 338, 346, 349, 377, 553, 558, 872–873, 875

310. AJHR, 1896, G-2, p 280; *Timaru Herald*, 27 March 1886, p 2; *Wairarapa Daily Times*, 14 August 1912, p 5

311. Luiten, 'Political Engagement' (doc A163), p 252



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exercised its sole power of appointment. We accept Crown counsel's argument that there is no evidence the commissioners were consciously biased in favour of the Crown.<sup>312</sup> Nonetheless, the absence of any Māori members or expertise created a fundamental imbalance. The question then became whether the imbalance could be corrected later by including Muaūpoko in the decisions made about what the commission recommended (or what it failed to recommend).

**6.5.4 What remedies did the Horowhenua commission recommend?**

**(1) *The commission's task***

The Horowhenua commission was charged with investigating:

- ▶ The existence and nature of any trust, express or implied, affecting Horowhenua lands in the hands of 'nominal owners' Keepa Te Rangihwinui and Warena Hunia;
- ▶ The alienation of land by the nominal owners, and what monies had they received;
- ▶ What monies (if any) so received were owing to the registered owners;
- ▶ What monies (if any) so received were owing to the Crown;
- ▶ Who were the beneficiaries of Horowhenua 9, as intended by the 1874 agreement between Kemp and McLean;
- ▶ Was Horowhenua 14 set aside for this purpose, and if so, should it have been returned to the registered owners when Horowhenua 9 was given instead;
- ▶ Whether any private dealings were transacted when the land was subject to proclamation under the Government Native Land Purchases Act 1877; and
- ▶ As to the bona fides on the part of any purchaser, lessee, mortgagor or mortgagee of trust land, and whether any person acquiring such land from the nominal owners had done so fraudulently, or with knowledge of any trust.
- ▶ To generally inquire into any connected matter that would inform 'a fair and just conclusion' in respect to any of the above issues; and
- ▶ To recommend what land should be charged with the costs of the Commission.<sup>313</sup>

The commission held hearings from March to May 1896, and considered oral testimony (including from Te Keepa and the Hunia brothers, but not Ihaia Taueki), and papers supplied by prominent witnesses and the Crown. By this time, Ngāti Pāhiri support for Wirihana and Warena had declined to just 14 tribal members, many of them belonging to the Hunia whānau. This group was represented by Donald Fraser's brother-in-law, John Stevens, the member for Rangitikei. Te Keepa and the majority of Muaūpoko were represented by Buller. A Mr Marshall (probably Whanganui lawyer Gifford Marshall) represented some members of Muaūpoko. Groups within Ngāti Raukawa had two lawyers. A L D Fraser appeared for the Crown.<sup>314</sup> And Jock McKenzie appointed Alexander McDonald to 'watch

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312. Crown counsel, closing submissions (paper 3.3.24), pp 190–191

313. Luiten, 'Political Engagement' (doc A163), pp 243–244

314. Luiten, 'Political Engagement' (doc A163), p 244; AJHR, 1896, G-2, pp 1–2



the interest of the Muaupoko Tribe generally, and especially of those members who were not represented by solicitor or agent.<sup>315</sup>

There were thus a significant number of lawyers or paid agents who appeared for parties but had to be called as witnesses as well, and some serious conflicts of interest. Buller had to defend both Muaupoko and his own dealings in Horowhenua 14, whether or not the latter were antithetical to Muaupoko's interests. Fraser's brother-in-law, Stevens, had family ties to the man who had been Warena Hunia's agent in selling the State farm block and who was also one of Hunia's principal creditors. McDonald had worked for the railway company and been instrumental in the township deal of 1886–87, and had been strongly opposed to Te Keepa since the 1886 partition hearings. He had also denied the existence of any trusts in the Supreme Court, appearing as a witness for Warena Hunia. The Crown's choice of McDonald to watch over Muaupoko's interests was flawed to say the least.<sup>316</sup>

### **(2) Horowhenua 11 and the State farm purchase**

As with all the inquiries which preceded it, the Horowhenua commission found that Te Keepa and Hunia were trustees for the tribe.<sup>317</sup> The commission found fault with the Native Land Court for not ascertaining 'the persons interested' and taking care that 'if a title [was] issued in the name of any one of such persons, the title was subject to such conditions and restrictions as would prevent a fraudulent holder of that title depriving those interested with him of their lands.'<sup>318</sup> On this point, we agree that the voluntary arrangements were not properly recorded by the court, but we do not consider that the court had power in 1886 to vest land in one individual subject to the kinds of conditions and restrictions identified by the commissioners; the native land laws (for which the Crown was responsible) were at fault because they did not provide for trusts or other appropriate governance structures.

Despite accepting the existence of a trust, the commissioners ignored the ruling of the superior courts that the State farm sale was fraudulent because Hunia had been a trustee. They noted that the Crown knew about the trust when it purchased from Hunia, but recommended that the purchase should still be completed because:

- ▶ it was 'impossible' to say what Kāwana Hunia's individual share of Horowhenua should have been, but it was 'generally admitted that Kawana Hunia and Kemp were each entitled to a much larger share of the land than any other individual members of the tribe, and we cannot ascertain that either Kemp or Kawana Hunia was entitled the one to more than the other';
- ▶ that being the case, Kāwana Hunia was entitled to a share worth £6,000, equal to the sum received by Te Keepa for the township block.

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315. AJHR, 1896, G-2, p 2

316. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), pp 55–56

317. AJHR, 1896, G-2, pp 5, 11–13

318. AJHR, 1896, G-2, p 5

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- ▶ it was ‘admitted on all sides that the purchase of the State farm was an excellent thing for the district’, the price of £6,000 was a fair one, and Muaūpoko did not object to the sale but to Hunia’s receipt of the proceeds; and
- ▶ the bush-covered land was ‘practically useless’ to Muaūpoko anyway, and its sale did not interfere with their pā or cultivations.<sup>319</sup>

For all these reasons, the commissioners thought that ‘the best thing for all persons interested would be to complete the purchase, treating the farm as Kawana Hunia’s share in the block.’<sup>320</sup> The commission recommended that the Crown pay the remaining £4,000 not to Warena Hunia but to ‘such of Kawana Hunia’s representatives as the Native Land Court may find entitled by law to be named as his successors’, and that the State farm block be vested in the Crown.<sup>321</sup>

In our view, this recommendation was very problematic. It was based on such slender reasoning that the claimants today consider the commissioners to have been biased in favour of the Crown. Muaūpoko had not consented to the State farm sale, nor had they consented to the particular 1,500 acres of Horowhenua 11 being treated as Kāwana Hunia’s individual share of the block, and nor had the tribe agreed that Kāwana Hunia had an individual share worth £6,000. We see no evidence that these things were ‘generally admitted’. Nor was it fair or even relevant to the issue of willing sellers/willing buyer to argue that the best commercial land in the block was ‘practically useless’ to the tribe.

In addition to dealing with the State farm purchase, the Horowhenua commissioners tried to meet Muaūpoko’s longstanding wish to hold their tribal heartland in trust as a permanent reserve. The commission recommended that the ‘tribal estate be vested in the Public Trustee, subject to a right of the owners of Horowhenua 9 to fish in the lake and Hōkio Stream.’<sup>322</sup> This was a crucial recommendation. The native land laws still did not provide for trusts by 1896.<sup>323</sup> The commissioners therefore turned to the Native Reserves Act 1882 for a solution (although the statute itself was not mentioned). Under that Act, Māori land could be permanently reserved for its owners by vesting it in the Public Trustee. The consequences, however, were such that few tribal leaders chose to take advantage of it. The owners lost all control over their lands, and the Trustee’s primary goal was to lease reserved land to settlers rather than hold it for Māori to live on and farm. Perpetual leases with fixed, low rentals eventually became commonplace.<sup>324</sup>

Nonetheless, the Horowhenua commissioners seem to have preferred this type of reserve to recommending special, statutory arrangements as had been proposed for

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319. AJHR, 1896, G-2, p 13

320. AJHR, 1896, G-2, p 13

321. AJHR, 1896, G-2, p 21

322. AJHR, 1896, G-2, p 21

323. It had been possible to establish an incorporation since the passage of the Native Land Court Act 1894.

324. See Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, pp 818–825, 859–863; Alan Ward, *National Overview*, Waitangi Tribunal Rangahaua Whānui Series, 3 vols (Wellington: GP Publications, 1997), vol 2, pp 425–429; Ralph Johnson, *The Trust Administration of Maori Reserves, 1840–1913*, Waitangi Tribunal Rangahaua Whānui Series (Wellington: Waitangi Tribunal, 1997), pp 111–116.

Te Urewera.<sup>325</sup> They specified that the part of the reserve south of the Hōkio Stream should be for Muaūpoko pastoral farming. The part of the reserve north of the stream, the commissioners recommended, should be leased by the Public Trustee. This would be so that 'the Native owners should have moneys regularly coming in, but excepting their pā and cultivations. The stream and the lake should be reserved as permanent tribal fishing grounds.'<sup>326</sup>

Although the commissioners thus recommended the reservation of the tribal estate (minus the State farm block), they also recommended that the Crown acquire an additional 1,500 acres of it. This part of Horowhenua 11, on the north-eastern corner of the block, was again considered not of much 'practical value' to the tribe but was suitable for Pākehā settlement.<sup>327</sup> This marks a key point about the commissioners' recommendations: they considered part of their role was to identify land suitable for settlement that the Crown should acquire, even though it was not part of their brief and they did not consult or hear from Muaūpoko on that issue.

Finally, the commission recommended that Te Keepa owed the other owners of Horowhenua 11 £1,500 in rents which could not be accounted for. This should be made a 'statutory charge . . . on any land he owns.'<sup>328</sup> In addition, the commissioners thought that Te Keepa owed £500 to the owners of Horowhenua 3 from a timber lease. Otherwise the commission understood that Te Keepa had received £12,000 in respect of Horowhenua lands, which had either been accounted for or could reasonably be explained as having been spent on costly litigation.<sup>329</sup>

In sum, the commissioners recommended:

- ▶ completing the State farm purchase by paying the remaining purchase money to the Hunia whānau;
- ▶ Crown purchase of a further 1,500 acres;
- ▶ vesting the remainder of the tribal estate in the Public Trustee, with part for Muaūpoko occupation and part for leasing, and the waterways reserved as fishing grounds; and
- ▶ a statutory charge against any of Te Keepa's remaining land for £2,000.<sup>330</sup>

### (3) *Horowhenua 6: the rerewaho*

The commission adjourned so that Muaūpoko could meet and agree upon a list of 44 names to be put into the title for Horowhenua 6. The commission accepted this out-of-court list of 44, but 13 additional people claimed entitlement as well. The commission then 'took evidence' and found that four of these had been left out in 1873 and recommended that they be added to the list for Horowhenua 6.<sup>331</sup> As noted

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325. The Urewera District Native Reserve Act 1896; see Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, chapter 9.

326. AJHR, 1896, G-2, p 20

327. AJHR, 1896, G-2, p 20

328. AJHR, 1896, G-2, p 21

329. AJHR, 1896, G-2, pp 16–17, 21

330. AJHR, 1896, G-2, p 21

331. AJHR, 1896, G-2, pp 8, 22

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earlier, the commissioners had no particular expertise to determine Māori customary entitlements.

The commissioners' decision had raised the number of rerewaho from 44 to 48, which threw out the original calculation in 1886 of 105 acres each for 44 people. They went on to recommend that the Crown buy Horowhenua 6, observing that the block could not be cut up to give each owner an equal share (due to the 'shape and position of the sections'). Since no one lived on block 6, and the commissioners thought it suitable for Pākehā settlement, they recommended that the Crown buy it.<sup>332</sup> Once again, neither tribal leaders nor the rerewaho were consulted or heard on this matter.

**(4) Horowhenua 12**

The commissioners accepted that Horowhenua 12 was vested in Ihaia Taueki 'as a trustee for the tribe',<sup>333</sup> a fact which the Crown had been aware of for a considerable period already (see section 6.4.2). But in the commissioners' view, this mountainous land was 'practically worthless' other than as a State forest reserve. Since it lay between two existing forest reserves, the commission recommended that the Crown buy it from Muaūpoko. It further recommended that Horowhenua 12 bear the 'costs and expenses' of the commission.<sup>334</sup> Quite apart from the statutory requirement that Muaūpoko pay for the commission in land, the commissioners judged the value of Horowhenua 12 solely in economic terms. Muaūpoko were not consulted or heard on the question of how they valued their forest and mountain taonga. Nor did Muaūpoko have a say in whether their land should be taken to pay for the commission and, if so, which land they would part with for that purpose.

**(5) Horowhenua 2**

The Horowhenua commission made no recommendations about the township purchase. It blamed Te Keepa for all of the flaws in the purchase, in particular for agreeing to terms other than those authorised by the tribe without consulting or obtaining further authority from the tribe. The commission found Te Keepa's actions to have been fraudulent because he was a trustee. The commission also criticised him for keeping the purchase money and not handing it over to pay for internal surveys, as originally agreed in Palmerson's barn in 1886. Even though the township sale was labeled as fraudulent, the Crown was specifically exonerated because it had no knowledge of the trust: 'we can find nothing in the papers, nor is there anything in the evidence, to suggest that the Crown or its officers had notice of any trust or matter which rendered its or their action other than *bonâ fide*'.<sup>335</sup>

From our own reading of the sources, this finding was factually incorrect. TW Lewis and Ballance were fully aware that Horowhenua 2 was not Te Keepa's personal property, and that he held it on trust for the purpose of conducting the sale.

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332. AJHR, 1896, G-2, pp 20, 21

333. AJHR, 1896, G-2, p 14

334. AJHR, 1896, G-2, pp 14, 20, 21

335. AJHR, 1896, G-2, pp 6-7

Lewis in particular had been present at the 1886 partition hearing and was fully aware of the facts. He had advised the court that, although the terms could not be settled finally until after the partition, the ‘terms were settled as far that the land would be dealt with in the best interests of all the owners’. Lewis added that ‘The Native Minister was satisfied of this.’<sup>336</sup> This was all recorded in the Native Land Court minutes in 1886, which were reviewed by the commission.

Not only was the Crown aware of the trust, it took advantage of its own monopoly and Te Keepa’s desperation to impose terms and a price of its own choosing. We agree that Te Keepa bore some responsibility for not consulting the tribe about the changed terms. But the Horowhenua commission’s inquiry did not uncover the reality of how the Crown’s monopoly powers enabled it to virtually dictate terms and price. The Stout–Ngata commission a decade later commented on how the Crown had exercised such powers in the King Country. Those commissioners in 1907 found that the idea of Maori willing sellers negotiating terms freely with the Crown was a fiction. In practice, the commission said, the Crown bought on its own terms and had ‘no competition to fear’, whereas the Maori owners ‘had been reduced by cost of litigation and surveys, by the lack of any other source of revenue, to accept any price at all for their lands’. The Government prioritised the interests of settlement and ‘rated too low the rights of the Maori owners and its responsibility in safeguarding their interests.’<sup>337</sup> These same facts were discoverable in 1896 about the township purchase if the Horowhenua commissioners had inquired more fully into how the Crown had exercised its monopoly powers.

In respect of the purchase money, the commissioners found that Te Keepa could not account for the £6,000. They suggested that ‘Kemp has spent this money in a manner which he knows is unjustifiable, and that he gives no explanation of his expenditure not because he cannot, but because he will not or dare not do so.’<sup>338</sup> The commissioners also condemned Te Keepa for not spending the money – as had been agreed in 1886 – on the partition surveys.<sup>339</sup> But, as we noted above, the commissioners did not proceed from these findings to make any recommendations about Horowhenua 2.

In the case of unaccounted-for money in Horowhenua 11 and Horowhenua 3, the commissioners recommended that the sum of £2,000 be made a statutory charge on Te Keepa’s other lands. But the £6,000 was not recommended as a statutory charge because the commissioners used it to justify recommendations about the State farm block:

Kemp has, by his misappropriation of moneys, received for the township section £6000 and interest, and we think this sum should be taken as in full settlement of his rights to share in the block. Kawana Hunia is entitled to receive a similar amount from

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336. Ōtaki Native Land Court, minute book 7, 25 November 1886, fols 184–185 (Crown counsel, document collection, various dates (doc B3), pp 6–7)

337. Robert Stout and Āpirana Ngata, ‘Native Lands in the Rohe-Potae (King Country) District (an interim report)’, 4 July 1907, AJHR, 1907, G-1B, p 4 (Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, pp 665–666)

338. AJHR, 1896, G-2, p 7

339. AJHR, 1896, G-2, p 7



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the tribal estate. . . . Under all the circumstances, we have no hesitation in expressing the opinion that the best thing for all persons interested would be to complete the purchase, treating the farm as Kawana Hunia's share in the block. . . . The total purchase-money, £6000, would belong to the representatives of Kawana . . .<sup>340</sup>

We find it difficult to understand the commissioners' logic that because Muaūpoko had been wrongly deprived of the £6,000 for the township block, they should also be deprived of the £6,000 for the State farm block. No compensation was recommended in either case. Nor did the commissioners recommend compensation for the loss of the township tenths or of Hoani Puihi's kāinga. Te Keepa was given the blame for everything, which was a disappointing outcome for Muaūpoko, and – in our view – an unfair result from the commission.

**(6) Horowhenua 14**

For the Government, one of the most important objects of the commission was to expose Buller's dealings in Horowhenua 14. This 1,200-acre block was located on the southern boundary of the Horowhenua block, east of the railway line. In 1887, the boundary of Horowhenua 14 was moved west when the block was surveyed, apparently to accommodate the area required for Horowhenua 6. This meant that Horowhenua 14 took part of Horowhenua 11, including the lake known as Waiwiri or Papaitonga. This change to the boundaries of Horowhenua 11 was approved by Te Keepa and Warena Hunia as its certificated owners (actually trustees), and then signed off by the court.<sup>341</sup>

As we discussed in section 5.4.5, there were two theories as to why Horowhenua 14 was established. The difference between these two theories was epitomised by the contrary evidence of Alexander McDonald and Judge Wilson.<sup>342</sup> McDonald's argument was that when Ngāti Raukawa rejected Horowhenua 14 at the partition hearing, both block 14 and block 9 were 'put in Keepa's name, and he was left to settle with Ngāti Raukawa later.'<sup>343</sup> McDonald claimed that Ngāti Raukawa 'refused to make choice of either section while the Native Land Court was still there, and there was therefore no alternative but to leave both sections, 14 and 9, in the name of Major Kemp'. After Ngāti Raukawa chose one of these sections, the understanding was that 'the other would be returned to be dealt with by the Muaupoko Tribe.'<sup>344</sup>

Judge Wilson, on the other hand, was adamant that it was definitely settled at the partition hearing in 1886: Horowhenua 9 was put in Te Keepa's name for the descendants of Te Whatanui (with a detailed statement of its boundaries). Horowhenua 14 was then vested in Te Keepa as his personal property and not in

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340. AJHR, 1896, G-2, p 13

341. Luiten, 'Political Engagement' (doc A163), pp 174, 238–239

342. Luiten, 'Political Engagement' (doc A163), pp 237–238

343. Galbreath, *Walter Buller*, p 196; 'A True History of the Horowhenua Block, by Alexander McDonald, Native Agent and Licensed Interpreter: being a reply to Sir Walter Buller's Pamphlet', 27 February 1896, AJHR, 1897, G-2, p 150

344. 'A True History of the Horowhenua Block', AJHR, 1897, G-2, p 150



trust, with no objectors.<sup>345</sup> Wilson advised that the court challenged for objectors very carefully, ‘because it was important that we should know that none of the tribe objected’. He added: ‘I suppose we challenged in all of them very carefully; but we should be particularly careful when a chief says, “I am to have that.”’<sup>346</sup>

Te Keepa had sold a small portion of Horowhenua 14 to his lawyer, Buller, and had mortgaged and leased the rest, mainly to finance litigation over Horowhenua 11.<sup>347</sup> The mortgage was condemned by the Horowhenua commission because it was open-ended: it started in 1894 with £500 as an advance to Edwards for his appearance in the Supreme Court but it also covered any outstanding debt between Te Keepa and Buller as well as any money which might be ‘advanced and owing’ in future. Interest on the mortgage was set at eight per cent.<sup>348</sup>

Te Keepa acknowledged that others had an interest in the land, and that he did plan to put some additional names in the title alongside his own.<sup>349</sup> Muaūpoko had not complained to the Crown about the Horowhenua 14 transactions or Te Keepa’s claim to absolute ownership of that block.<sup>350</sup> According to Wirihana Hunia’s evidence, he (Wirihana) had not raised the issue of Horowhenua 14 until after Warena lost his appeal in 1895.<sup>351</sup> Under questioning from his agent, Stevens, Wirihana acknowledged that his brother Warena had raised a grievance about Horowhenua 14 back in 1892.<sup>352</sup> In any case, the Government had seized upon the block as a stick to beat both Buller and Te Keepa, and to divert attention from the State farm purchase. While the House was in committee on the Bill, McKenzie reportedly claimed that the Horowhenua block was indeed ‘a scandal and a shame, but not upon the Government’. Buller, he said, ought to be in jail for his dealings with Te Keepa over Horowhenua 14.<sup>353</sup>

The Horowhenua commission was charged with answering three questions aimed at Horowhenua 14, the first of which tested McDonald’s theory about how the block ended up in Te Keepa’s name. The commissioners were to decide whether Horowhenua 14 was

in the first instance vested in the said Keepa Te Rangihwinui for the purpose of carrying out the said arrangement between himself and the late Sir Donald McLean, and, if so, should the said Keepa Te Rangihwinui have returned it to the registered owners

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345. AJHR, 1896, G-2, pp 131–140; AJHR, 1897, G-2, pp 5–7

346. AJHR, 1896, G-2, p 134

347. Galbreath, *Walter Buller*, pp 196–198, 201–202, 223–226; Luiten, ‘Political Engagement’ (doc A163), pp 240–241

348. AJHR, 1896, G-2, p 15

349. AJHR, 1896, G-2, p 32

350. AJHR, 1896, G-2, p 34

351. AJHR, 1896, G-2, pp 53–54

352. AJHR, 1896, G-2, p 60; ‘Statement of Warena Te Hakeke (sometimes called Warena Hunia), with reference to the Horowhenua Block, Subdivision No 11, Parewanui, September 1892, pp 3, 6 (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), pp 660, 662)

353. NZPD, 1895, vol 91, p 752. See also NZPD 1895, vol 91, p 684.

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when, at the request of the persons claiming to be interested under the said arrangement, division number nine was set apart in lieu of division number fourteen?<sup>354</sup>

The commissioners' answer to this question was 'yes'.<sup>355</sup> They found that Te Keepa held Horowhenua 14 in trust as 'part of the tribal estate'.<sup>356</sup>

The second question was whether private transactions were prevented by the old monopoly proclamation of 1878.<sup>357</sup> In other words, the Crown hoped that Buller's purchase, lease, and mortgage were unlawful because of that proclamation. The commissioners pointed to the large number of dealings in Horowhenua 3 since 1886 (discussed below). They found that the proclamation had been 'lost sight of' or treated as 'having lapsed and become obsolete', including by the Crown. Their recommendation was for the Crown to declare the proclamation revoked (back-dated to 1886).<sup>358</sup>

The third question was whether any person had knowingly transacted land held in trust. On this question, the commissioners found both the Crown and Buller at fault. The Crown, they said, had known of the trust over Horowhenua 11 when it purchased the State farm, and Buller had known of the trust in respect of Horowhenua 14 before any of his transactions.<sup>359</sup> But very different recommendations were made to remedy these two transgressions. As we discussed above, the superior courts had found the sale of the State farm area to be fraudulent as Hunia was a trustee and not the sole owner, but the commissioners recommended the Crown should get the benefit of it anyway, and the Hunia whānau should get the benefit of the purchase money.<sup>360</sup> For Horowhenua 14, however, the commission recommended that 'proceedings be initiated on behalf of the tribe to test the validity of the transfers and leases given by Kemp to Sir Walter Buller'.<sup>361</sup> The commissioners' view was that if Buller had known of the trust, any transfers, mortgages, or leases would not 'hold good against the tribe'.<sup>362</sup> But the commission was not intent on saving the land for the tribe. If the courts 'set aside' Buller's mortgage and lease, then the commission recommended that the Crown should buy Horowhenua 14.<sup>363</sup>

In sum, the commission had recommended that the Crown acquire Horowhenua 6, 12, 14, and part of Horowhenua 11, with the purchase of Horowhenua 12 to be compulsory: a total of 21,953 acres of the 33,928 still held in trust for Muaūpoko in 1896.<sup>364</sup> The commissioners made no inquiry as to what land Muaūpoko wished to

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354. 'Commission', 4 February 1896, AJHR, 1896, G-2, p 281

355. AJHR, 1896, G-2, p 17

356. AJHR, 1896, G-2, pp 14-15

357. 'Commission', 4 February 1896, AJHR, 1896, G-2, p 281

358. AJHR, 1896, G-2, pp 17-18

359. AJHR, 1896, G-2, pp 12-13, 18-19

360. AJHR, 1896, G-2, p 13

361. AJHR, 1896, G-2, p 21

362. AJHR, 1896, G-2, p 14

363. AJHR, 1896, G-2, p 21

364. The commission recommended the purchase of Horowhenua 6 (4,620 acres), Horowhenua 12 (13,137 acres), Horowhenua 14 (1,196 acres), and 3,000 acres of Horowhenua 11 (14,975 acres).

retain, what land they might be prepared to alienate, or whether they had sufficient land for their present and future needs.

As far as Sir Walter Buller's *dealings* were concerned, the commission was particularly scathing. As his biographer put it, 'the sharpest criticism was reserved for Buller'.<sup>365</sup> Not only had Buller known of the trust, but his lease was a 'grievous wrong' against the tribe because he had leased the land 'for such long periods at such a low rental'.<sup>366</sup> His open-ended mortgage was dubious (it had grown to £2,920 by 1896), and his relationship to Te Keepa as his lawyer had deprived Te Keepa of independent legal advice on these transactions. Also, Te Keepa had been placed in a position where he had no option but to agree to the mortgage.<sup>367</sup> In our view, it is a serious flaw in the commission's inquiry that it indentified these matters for Horowhenua 14 but ignored the Crown's shortcomings in its purchase of Horowhenua 2. The commissioners believed that Buller's arrangements would not stand up in court, but they did not question the fact that the Crown's trust commissioner (under the Native Lands Frauds Prevention Act) had certified the mortgage.<sup>368</sup>

#### **(7) Deciding entitlements to a dwindling tribal estate**

Although it had no expertise in matters of custom, the commission attempted to determine the beneficiaries of the trust blocks 6, 11, and 12 (but not Horowhenua 14). As Sheridan later noted, this was outside of the commissioners' brief – they had only been instructed to identify the descendants of Te Whatanui entitled to Horowhenua 9.<sup>369</sup>

The commissioners took this step because they were rightly concerned about the prospect of Muaūpoko being put to further expense in the Native Land Court. The chairman, JC Martin, wrote to the Minister of Lands on 20 March 1896. He asked for a change to the terms of the commission, which had stated that the Native Land Court would decide who was entitled to any money found owing by Te Keepa or Warena Hunia. The commission asked for the word 'commission' to be substituted for 'court'. Martin explained that the commissioners hoped their report would enable a final settlement of all questions relating to Horowhenua, with no further legal action whatsoever. Any further reference to the court, he said, would prevent a swift, final settlement and greatly add to Muaūpoko's expenses. Martin noted: 'The legal expenses in connection with this block have already been very large and the expenditure has, to a great extent, been apparently useless.'<sup>370</sup>

The Government refused to amend the terms of the commission. Sheridan advised that further reference to the court had always been anticipated and that the Court of Appeal's orders were also outstanding, but that the Government could in

365. Galbreath, *Walter Buller*, p 225

366. AJHR, 1896, G-2, p 15

367. Galbreath, *Walter Buller*, p 225

368. AJHR, 1896, G-2, p 15

369. Sheridan to McKenzie, 2 October 1896 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1344–1345)

370. JC Martin to Seddon, 20 March 1896 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1329)

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any case introduce legislation to provide finality if it chose on the basis of the commission's recommendations.<sup>371</sup>

As we discuss below, the Crown initially intended to accept the commissioners' lists of owners rather than referring to the court. This included the commission's decision as to who was entitled to money owed by Te Keepa, despite mention of the court in the terms of the commission.<sup>372</sup> But the Government changed its mind about this during the passage of the Horowhenua Block Act 1896 through Parliament. Thus, further litigation was required to repeat almost everything that the commission had done, and the expense of the commission was – as Martin had feared – simply added to the 'apparently useless' litigation that had preceded it.

In any case, the commission provided lists of owners for Horowhenua 6, 11, and 12 in schedules to its report.<sup>373</sup> Much of the work in preparing these lists was done 'out of court' by Muaūpoko. By 1896, the tribal estate had been significantly eroded and was about to be eroded further if the commission's recommendations for additional Crown purchases were carried out.<sup>374</sup> The pressure for land and for a share of the remaining tribal estate was intense. Ms Luiten summarised the debate which was forced on the tribe as a result: 'The issues centred on ahi ka: whether the fires of those who had moved away had grown cold, or whether their fires had been kept alight by their resident whanaunga; whether ancestry trumped residence; whether recent arrivals to Horowhenua qualified.'<sup>375</sup>

The Horowhenua commission accepted the out-of-court lists and heard evidence from those who objected to various names. For Horowhenua 6, the list submitted by Buller was accepted, and four names added to bring the number of rerewaho to 48. In respect of Horowhenua 11, the commissioners' crucial decision was that the rerewaho were entitled to share in the tribal reserve, alongside 90 individual owners of Horowhenua 3. This meant that 140 people (and their successors) would share ownership of the tribal heartland.<sup>376</sup> It is not clear why 16 owners of Horowhenua 3 were left out. As far as we can tell from the available evidence, Horowhenua 11 had been intended in 1886 for the individuals given 105-acre sections in block 3.<sup>377</sup> Ihaia Taueki's name headed the list of 140, and both Te Keepa and Kāwana Hunia's names were omitted (it being understood by the commission that they had had their share).<sup>378</sup> As Ms Luiten noted, the same list was used for the owners of the other tribal reserve, Horowhenua 12, with the addition of two of Warena Hunia's sisters: Hera Te Upokoiri and Te Rina Mete.<sup>379</sup>

371. Sheridan to Seddon, 20 March 1896 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1330)

372. NZPD 1896, vol 96, p 208

373. Schedules 1, 2, 4, 5, AJHR, 1896, G-2, pp 22–23

374. Luiten, 'Political Engagement' (doc A163), p 275

375. Luiten, 'Political Engagement' (doc A163), p 249

376. Luiten, 'Political Engagement' (doc A163), pp 249, 253

377. Luiten, 'Political Engagement' (doc A163), pp 166, 184, 273–274

378. AJHR, 1896, G-2, pp 22–23

379. Luiten, 'Political Engagement' (doc A163), p 253

Thus, if the Crown were to follow the Horowhenua commission's recommendation, there would be 140 owners with equal shares in Horowhenua 11 and 142 in Horowhenua 12, the relative interests having not been determined. The Native Appellate Court's decision in 1898 was very different (see section 6.9.3). The commission considered it 'impossible to fix accurately the shares of each person, the only solution to the difficulty is to declare them to be entitled to equal shares.'<sup>380</sup> The commissioners did not identify the equitable owners of Horowhenua 14, despite having found that a trust existed in respect of that block, although the chairman later tried to make a behind-the-scenes recommendation to the Government, as we discuss below.

### **(8) Summary of the commission's recommendations**

In sum, the commission's main recommendations were:

- ▶ Horowhenua 2: no recommendation;
- ▶ Horowhenua 6: the block was held in trust and should be vested in 44 names agreed by the tribe plus four additional names decided by the commission; the Crown should buy the block;
- ▶ Horowhenua 11: the block was held in trust and should be vested in the Public Trustee to hold for Muaūpoko, with the land south of the Hōkio Stream to be farmed by Muaūpoko, and the land north of the stream to be leased by the Trustee; the Hōkio Stream and lake should be reserved as a tribal fishing ground; the State farm purchase should be completed, with the remaining £4,000 paid to the Hunia whānau; and the Crown should purchase a further 1,500 acres;
- ▶ Horowhenua 12: the block should be purchased by the Crown, and it should bear the costs and expenses of the commission;
- ▶ Horowhenua 14: the Crown should take proceedings in the courts to test the validity of Sir Walter Buller's transactions, and – if those were set aside by the courts – the Crown should buy the block; and
- ▶ Te Keepa owed the owners of Horowhenua 11 £1,500 in unaccounted-for rents, and the owners of Horowhenua 3 £500, and these sums should be made a statutory charge on Te Keepa's other lands – otherwise, the commission made no recommendations about moneys received or spent by Te Keepa.

The commission's findings and recommendations in respect of Ngāti Raukawa and Horowhenua 9 will be considered later in our inquiry.

### **(9) How did the commission's remedies differ from those already identified before it sat?**

In sections 6.5.1 and 6.5.2, we set out the remedies already identified before the commission was appointed. We now consider whether or to what extent these differed from those recommended by the commission:

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380. AJHR, 1896, G-2, p 13



## 6.5.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

- ▶ Horowhenua 2: no remedies were identified for the serious failings in the Crown's township purchase, either before the commission sat or as a result of its inquiry and recommendations.
- ▶ Horowhenua 6: the remedy identified by the commission had already been identified between 1891 and 1895 – Horowhenua 6 needed to be transferred to the rerewaho. The key difference was that the commissioners also recommended that the Crown should purchase the land.
- ▶ Horowhenua 11: two remedies had been identified before the commission sat: first, a number of Bills were drafted to empower the Native Land Court to readmit tribal members to the title, but this remedy would have ended the trust by establishing a list of individual owners with the ability to sell their individual shares; and secondly, the superior courts had declared that a trust resulted from the tribe's decisions in 1873 and 1886, and had stated a case for the Native Land Court to determine all those interested in the land.
- ▶ The commission similarly recognised and tried to preserve a trust but went about it very differently. It recommended a formal reservation of the tribal estate by way of vesting it in the Public Trustee. As we noted above, this remedy carried with it a significant risk of disempowering the tribe, due to the nature of the Public Trustee's native reserves administration. Another key difference was that the Supreme Court had provided a remedy for the State farm purchase. It had ordered Warena Hunia to account for and (after 'all just allowances' had been made) pay into the court any money received for the sale. The court had also placed a caveat 'forbidding further dealings' with the land.<sup>381</sup> The commissioners, on the other hand, recommended that the purchase be completed with the payment of all the purchase money to the Hunia whānau. It further recommended that an additional 1,500 acres of the trust estate be purchased.
- ▶ Horowhenua 12: the remedy – readmitting tribal members to the title – had been known and advocated since 1891. The commissioners identified the same remedy but, rather than recommending the reservation of this part of the tribal estate as they had with Horowhenua 11, the commissioners suggested that the Crown should buy it (and that it should bear the commission's costs).
- ▶ Horowhenua 14: almost no complaints had been made by Muaūpoko to the Crown before the commission sat, but the Crown had identified an issue – inappropriate private alienations in a block that was supposed to be held in trust. The Crown tasked the commission with inquiring into it. The commissioners found that a 'grievous wrong' had been committed against Muaūpoko, and recommended court action to provide remedies. On the one hand, their recommendation might have spared Muaūpoko further ruinous expense, as the Crown was to take the case, but they also recommended that the Crown should purchase Horowhenua 14 once the title was sorted out.

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381. AJHR, 1896, G-2, p 331



- ▶ Recovery of trust moneys: the Court of Appeal ruled that Hunia was to account for any money received by him from the sale or disposal of any parts of the lands, including the State farm, which he had dealt with, and the proceeds of which he claimed to be the absolute owner. Te Keepa was not required to account for any money received as rent or income. The commission, however, recommended that the Hunia whānau receive the full £6,000 for the State farm block, since – in their view – Te Keepa had already had the township purchase price (£6,000) as his equivalent share of the Horowhenua block. The commissioners also considered that Te Keepa owed the tribe £2,000 from rentals for Horowhenua 11 and 3, and that a statutory charge be placed against his lands for the recovery of those sums.
- ▶ Entitlements: no previous inquiry had reached the point of identifying the individuals entitled to come back into the titles for Horowhenua 6, 11, and 12. The commission did so but was not able to go the further step of determining relative interests. Although the commissioners largely relied on lists drawn up by Muaūpoko ‘out of court’, they had no particular expertise to decide the disputes that arose over entitlements (including its decision to include the rerewaho in the title for Horowhenua 11).
- ▶ Since the commission could only make recommendations and had not identified relative interests, it was highly likely that there would have to be further court processes before tribal members could be readmitted to the titles.

Thus, our view is that the Horowhenua commission’s recommendations only really offered an opportunity for Muaūpoko to improve their circumstances (as opposed to previously identified remedies) if the commission was correct that Horowhenua 14 was held in trust. It was by no means certain, of course, which if any of the commission’s recommendations would be carried out.

Key issues then become: (a) what would the Crown do with the commission’s recommendations; (b) would the commission’s findings about Horowhenua 14 stand the test of further review in the courts; and (c) would the commission’s identification of interests have to be repeated or taken further before tribal members could be admitted to the titles, and at what further cost?

### **6.5.5 What did the Crown do with the Horowhenua commission’s recommendations?**

#### **(1) *The Crown’s failure to consult***

The first point for us to consider is that the Crown did not consult Muaūpoko, even though the commission made a number of unanticipated recommendations. One term of the commission had charged the commissioners

generally to make inquiry into any matter or thing arising out of or connected with the several subjects of inquiry hereinbefore mentioned, or which, in your opinion, may be of assistance in fully ascertaining, explaining, or assisting at arriving at a fair

## 6.5.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

and just conclusion in respect of the subjects of inquiry, or any of them, or any part thereof or in relation thereto . . .<sup>382</sup>

The commissioners had interpreted this to mean that they could recommend the Crown to acquire Horowhenua lands for colonisation.<sup>383</sup> As we discussed above, the commission did not inquire into what land Muaūpoko wished to part with, or what land they required for their present and future needs. At the very least, the Crown's duty was to consult the owners of the Horowhenua lands and seek their consent to any proposed alienations before carrying out such recommendations. But Muaūpoko were not consulted about any of the commission's findings or recommendations before the Crown introduced a Bill in late September 1896 to give effect to them.

Before the Bill was introduced, petitions were received from Te Keepa and Buller, protesting aspects of the commission's report.<sup>384</sup> Another Muaūpoko leader, Kerehi Mitiwaha, obtained what he called 'a good many' signatures for a tribal petition against the commission's report, especially its recommendations about Crown purchase. But Alexander McDonald advised him not to submit it to Parliament but to wait.<sup>385</sup> Although Mitiwaha told the Native Appellate Court in 1897 that this petition had been presented nonetheless,<sup>386</sup> we have seen no record of it in the supporting documents provided to the Tribunal.

**(2) *The Crown's initial Bill: draconian provisions to give effect to the commission's recommendations***

The Horowhenua Block Bill put forward by the Government differed very significantly from the Act as passed in late 1896. We have checked the Bill in its original form, and the details can also be gleaned from the Hansard debates, the official journals of the House and Council, and Ms Luiten's supporting documents.<sup>387</sup> Any matters relevant to Horowhenua 9 and Ngāti Raukawa will be dealt with later in our inquiry.

In brief, the Government decided to give statutory force to almost all of the commissioners' recommendations as they affected Muaūpoko. The titles for Horowhenua 6, 11, 12, and 14 would be cancelled (clause 3). The title for Horowhenua 6 was to be vested in the rerewaho as identified by the commission (clause 4(a)), and the Crown would purchase it in the ordinary way without needing a special statutory provision. The title for Horowhenua 11 was to be vested in

382. 'Commission', 4 February 1896, AJHR, 1896, G-2, p 281

383. AJHR, 1896, G-2, p 20

384. Ngāti Raukawa leaders Ru Rewiti and Kipa Te Whatanui also petitioned Parliament: see Anderson and Pickens, *Wellington District* (doc A165), p 233.

385. Luiten, 'Political Engagement' (doc A163), p 257

386. AJHR, 1898, G-2A, p 128

387. NZPD, 1896, vol 96, pp 200–234, 259–261, 395–409, 502–507, 649–660, 667, 676, 777, 821–824; *Journals of the House of Representatives*, 1896, pp 303–307; *Journals of the Legislative Council*, 1896, pp 213–216, 220–225, 250; Sheridan to McKenzie, 2 October 1896, Sheridan, 'Horowhenua Block Bill 1896', description of clauses in relation to commissioners' recommendations, undated (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1344–1345, 1346–1347)

the Public Trustee so that the tribal estate could still be held in trust as a native reserve (clauses 4(d), 9). The beneficiaries were the commission's list of 140 owners (schedule 5). The State farm was to be vested in the Queen, which would take effect once the remaining £4,000 had been paid to the Public Trustee. The Native Land Court would identify the descendants of Kāwana Hunia entitled to share in the purchase money (clause 4(c)). The additional 1,500 acres of Horowhenua 11 recommended for purchase would be covered in a clause authorising the Minister of Lands to buy it from the Public Trustee (Muaūpoko consent would not be required) (clause 9). The title for Horowhenua 12 was to be vested in the Queen, with any money left over from the commission's costs to be paid to the owners (identified by the commission) (clause 4(e)). Any dispute over the amount of money to be paid by the Crown was to be determined by the Native Land Court as if the land had been taken for a public work (clause 16).<sup>388</sup>

Horowhenua 14 was also to be vested in the Queen, and the money for this compulsory purchase would be paid to the Public Trustee (clause 4(f)). The Native Land Court would then decide who was entitled to receive this money (clause 4(f)), and the Māori owners of Horowhenua 11 (as decided by the commission) would have three months to test the validity of Buller's transactions in the Supreme Court (clause 6). This meant that the Government accepted the commission's finding that Horowhenua 14 was held by Te Keepa in trust for others and was not his personal property. But Ministers did not follow the commission's recommendation that *the Crown* should bear the expense of testing Buller's purchase, leases, and mortgage in the Supreme Court.<sup>389</sup>

In addition, the Bill made a statutory charge of £2,000 against Te Keepa's other lands, to be paid to the Muaūpoko owners of Horowhenua 11 (as identified by the commission) and Horowhenua 3 (clause 7).<sup>390</sup> It cancelled the 1878 monopoly proclamation retrospectively (dating back to 30 December 1886) (clause 10).<sup>391</sup> The Court of Appeal's reference to the Native Land Court to ascertain the equitable owners of Horowhenua 11 was 'deemed to have been superseded', and all orders in council and court judgments, decrees, or orders were voided if they 'conflict with the provisions of this Act' (clauses 12–13).<sup>392</sup>

After reviewing the Horowhenua Block Bill, the Public Trustee asked the Government to have it amended. The new Public Trustee was J C Martin, who had chaired the Horowhenua commission. Martin had reportedly received his appointment as Public Trustee as a reward for the commission's favourable report.<sup>393</sup> He

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388. Ibid; Horowhenua Block Bill 1896

389. Horowhenua Block Bill 1896; NZPD, 1896, vol 96, pp 201, 225, 227

390. Horowhenua Block Bill 1896, cl 7; Sheridan, 'Horowhenua Block Bill 1896', description of clauses in relation to commissioners' recommendations, undated (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1346–1347); NZPD 1896, vol 96, pp 204, 208

391. Horowhenua Block Bill 1896, cl 10; Sheridan, 'Horowhenua Block Bill 1896', description of clauses in relation to commissioners' recommendations, not dated (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1346–1347)

392. Horowhenua Block Bill 1896, cls 12–13

393. Luiten, 'Political Engagement' (doc A163), p 321

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wanted the Public Trustee to have more extensive powers to lease Horowhenua 11, arguing that the powers provided by the Native Reserves Act 1882 were insufficient.<sup>394</sup> Sheridan advised the Government against this, noting that this land was to be managed as a native reserve.<sup>395</sup> The Public Trustee also advised against giving the Native Land Court any role at all in identifying owners. The Horowhenua commission, he noted, had been ‘anxious to provide that no further expense should be incurred by having to apply to the Native Land Court.’<sup>396</sup> The purchase money for Horowhenua 14 should simply be paid to the owners of Horowhenua 11 as identified by the commission, since Horowhenua 14 had been cut out of the tribal estate.<sup>397</sup> The Government did not accept this suggestion either.

Thus, the Horowhenua Block Bill 1896 provided for the compulsory purchase of Horowhenua 12 and 14, the overturning of *Meiha Keepa v Hunia* and its ruling about the State farm purchase, and the compulsory vesting of Horowhenua 11 in the Public Trustee. Te Keepa was to be dispossessed of Horowhenua 14, which was not to be returned to the tribe but rather compulsorily purchased from them by the Crown. These were draconian provisions. The commission had not recommended *compulsory* purchase, other than to pay its costs out of Horowhenua 12.

As noted above, Te Keepa and Buller had petitioned Parliament about the commission’s findings and recommendations before the Bill was introduced. Te Keepa’s petition, which would have been drafted by Buller, was focused almost entirely on his own concerns and not those of the wider tribe. He strongly objected to what he saw as the confiscation of his title to Horowhenua 14 by a body biased in favour of the Crown. McKerrow, he argued, was a close friend of Jock McKenzie, and the two magistrates were paid civil servants. Te Keepa wanted his rights to Horowhenua 14 settled by the fully independent Supreme Court. He also noted that he had won his case there about Horowhenua 11 at a cost of £1,000 and now the tribe was to be deprived of their legal remedy for that block. He pointed out that no one in Muaūpoko had objected to how he spent the moneys derived from Horowhenua other than the Hunia brothers and their Ngāti Pāriri supporters, and reminded Parliament of the deed of release signed by the tribe in the early 1890s. If he were a thief, Te Keepa argued, he would simply have kept Horowhenua 11A for himself, rather than battling for so many years to see the whole of Horowhenua 11 returned to the tribe.<sup>398</sup>

Te Keepa also reminded Parliament that he had sent petition after petition, and had received favourable responses from the Native Affairs Committee and from

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394. J C Martin to McKenzie, 24 September 1896 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p1343)

395. McKenzie [?], minute, 29 September 1896 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p1342)

396. J C Martin to McKenzie, 26 September 1896 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp1340–1341)

397. J C Martin to McKenzie, 26 September 1896 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp1340–1341)

398. Petition no 161, Meiha Keepa Te Rangihiwini, not dated [1896] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp1348–1357)

Ballance – until the Government ‘began to traffic with Warena Hunia for this land’.<sup>399</sup> After that, and his victory in the Court of Appeal in 1895, ‘then I heard for the first time that they would attack my title to Block XIV’.<sup>400</sup> For 10 years, Te Keepa said, no one had challenged his title, sought to lodge a caveat, or asked for a share of the rents. He demanded that he be allowed to prove his title to block 14 in the Supreme Court, and also to prove that he had not misappropriated tribal funds.<sup>401</sup>

The Native Affairs Committee had not reported on the petitions of Te Keepa or Buller by the time the Horowhenua Block Bill was before the House, nor had it granted them a hearing.<sup>402</sup> When the committee did report on 9 October 1896, it simply referred the petitions to the Government ‘for consideration’.<sup>403</sup> Also, there was no select committee hearing on the Horowhenua Block Bill. The Government argued that there was too little time for it, and that members could rely on the printed evidence taken by the Horowhenua commission.<sup>404</sup>

As a result, some members pointed out that the Bill affected private rights and upset land transfer titles without having given those affected an opportunity to be heard. The Opposition argued variously that the Horowhenua commission had been biased, its report did not reflect the evidence, the matters at issue should be decided by the courts (not Parliament), and the reputations of Te Keepa and Buller should not be stained without a right of reply.<sup>405</sup> Some argued that the commission had not understood the customary roles and authority of rangatira when it expected English-style trustee accounting for funds.<sup>406</sup> This same argument had apparently been accepted by the Court of Appeal in 1895,<sup>407</sup> but had been made unsuccessfully to the commission.<sup>408</sup> It was also pointed out in the House that Hunia and the Crown were exonerated over the State farm for doing exactly what Te Keepa and Buller were vilified for in respect of Horowhenua 14.<sup>409</sup>

On the other hand, members welcomed the opportunity to progress settlement and obtain Horowhenua lands for that purpose, arguing that the long dispute had held up colonisation to the detriment of Levin. It was clear that the settlers’ representatives in Parliament shared the commissioners’ bias in favour of seeing Horowhenua lands transferred to settlers.<sup>410</sup> One member even urged the Crown to acquire Horowhenua 6 and the recommended 1,500 acres of Horowhenua 11

399. Petition no 161, Meiha Keepa Te Rangihwinui, not dated [1896] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1350)

400. Petition no 161, Meiha Keepa Te Rangihwinui, not dated [1896] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1353)

401. Petition no 161, Meiha Keepa Te Rangihwinui, not dated [1896] (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), pp 1354, 1356–1357)

402. NZPD, 1896, vol 96, p 205

403. Native Affairs Committee, report, 9 October 1896 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1364)

404. NZPD, 1896, vol 96, p 202

405. NZPD, 1896, vol 96, pp 205–209, 212, 214, 225–226, 398–400, 402–403, 404–405

406. NZPD, 1896, vol 96, pp 397–399

407. *Warena Hunia v Meiha Keepa* (1894) 14 NZLR 71, 98 (SC, CA)

408. AJHR, 1896, G-2, pp 2, 7, 16–17, 19, 122, 243–244

409. NZPD, 1896, vol 96, pp 219–220, 226, 654

410. NZPD, 1896, vol 96, pp 202–203, 220, 395–396



compulsorily, in addition to the compulsory purchase of Horowhenua 12 and 14.<sup>411</sup> Government supporters defended the commissioners' report. They argued that Parliament could cancel land transfer titles and convey the land to other owners on the authority of a royal commission, without need for further reference to the courts. They also argued the need for finality, to provide justice to Muaūpoko at last, and to avoid further expensive litigation.<sup>412</sup> In their view, it was Parliament's role to 'rectify an injustice.'<sup>413</sup> Both the Minister, Jock McKenzie, and Sir Robert Stout admitted in the House that Muaūpoko had been denied justice 'year after year', at significant cost to the tribe.<sup>414</sup>

McKenzie did make one concession to the Opposition: he agreed to include the commission's recommendation that the Crown should be the one to take legal action testing Buller's transactions (rather than leaving that expensive task to Muaūpoko).<sup>415</sup> The Bill was amended accordingly in committee.<sup>416</sup> The role of taking legal action on behalf of the owners was given to the Public Trustee.<sup>417</sup> The Government did not, however, try to introduce the amendments suggested by the Public Trustee, J C Martin, to extend his powers to lease the Horowhenua 11 reserve, and to remove the Native Land Court altogether from making the limited inquiries prescribed by the Bill. Thus, the Horowhenua Block Bill passed the House largely intact.

### **(3) *The Crown draws back: the Bill is drastically amended***

Even though McKenzie refused to allow significant amendments in the House, the debate convinced the Government that it would have to make major changes if the Bill were to pass the Legislative Council. Sheridan 'followed very attentively the debates on the second reading and committal of this Bill', and prepared a supplementary order paper to introduce amendments in the Council. He noted that there had been great resistance to cancelling land transfer titles, and also that the commissioners had gone outside their brief by 'attempting to determine the individual ownership' of blocks 6, 11, and 12. As a result of both of these points, officials proposed reviving the Native Equitable Owners Act of 1886 (which had ceased to be of any effect in 1891).<sup>418</sup> Three members had suggested this in the House.<sup>419</sup>

What this meant was that the question of whether trusts existed would once again be examined, this time in the Native Land Court. The difference was that this court would have the power to provide a remedy and determine the beneficial owners.<sup>420</sup> Reviving the 1886 Equitable Owners Act for this purpose brought matters full

411. NZPD, 1896, vol 96, pp 202–203

412. NZPD, 1896, vol 96, pp 200–201, 209–212, 221–223, 230–233, 404, 405, 407

413. NZPD, 1896, vol 96, p 405

414. NZPD, 1896, vol 96, pp 401, 407

415. NZPD, 1896, vol 96, p 233

416. *Journals of the House of Representatives*, 1896, p 306

417. Horowhenua Block Bill 1896, as proposed to be read a third time in the House, cl 6

418. Sheridan to McKenzie, 2 October 1896 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1344–1345)

419. NZPD, 1896, vol 96, pp 226, 397–398, 400

420. Luiten, answers to questions in writing (doc A163(h)), p 9



circle: this was the remedy that had been identified by Ballance and others in the early 1890s, and its use back then would have saved Muaūpoko from significant prejudice. We agree with the claimants that the Crown's 'failure to take action at an earlier point to settle the trust issue' caused Muaūpoko 'substantial prejudice'.<sup>421</sup>

Some compulsory purchase provisions were removed from the Bill. Sheridan 'struck out the clauses re sale to the Crown of all portions except the State Farm and Division 12, the latter being the block on which expenses are to be charged'.<sup>422</sup> The Crown still intended to purchase all the land recommended by the commissioners but now would initiate purchases 'in the ordinary way after the titles are put in order'.<sup>423</sup>

The proposed amendments meant that Horowhenua 11 would no longer be vested compulsorily in the Public Trustee. No alternative form of trust or reserve was recommended by Sheridan for inclusion in the Bill. In our view, this was a crucial omission. While Muaūpoko were very unlikely to have agreed to putting their tribal heartland under the control of the Public Trustee, other trust and reserve models were available. These included the Urewera District Native Reserve Act 1896. That Act established a statutory, inalienable, self-governing native reserve under an elected tribal committee;<sup>424</sup> this would have been a good model for reserving the Muaūpoko tribal heartland in trust for future generations, under the control of the people themselves.

Sheridan argued that his proposed changes to the Horowhenua Block Bill would 'materially assist the passing of the Bill in the Legislative Council', and would 'dispose of the principal objections without to any very great extent altering the intentions of the original'.<sup>425</sup> While the first point was true, the second certainly was not. Much of the commission's work and recommendations would become redundant if Sheridan's changes were accepted by the Council. The Native Land Court would have to consider all over again whether there had been trusts in Horowhenua 6, 11, 12, and 14, and determine lists of owners for any trust blocks, rendering the commission's work on these questions pointless. One important element was preserved: the 48 rerewaho found entitled by the commission were to be treated as included in the 1873 list of owners for the purposes of the court's inquiry.<sup>426</sup> Otherwise, this was the only one of the commissioners' lists of owners that survived Sheridan's revision of the Bill. The schedules listing the owners of Horowhenua 11 and 12 were struck out.<sup>427</sup>

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421. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 44

422. Sheridan to McKenzie, 2 October 1896 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1344)

423. Sheridan to McKenzie, 2 October 1896 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1344)

424. See Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, chapter 9, for a detailed discussion of the Act and its genesis.

425. Sheridan to McKenzie, 2 October 1896 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp1344-1345)

426. Horowhenua Block Act 1896, sch 2

427. Horowhenua Block Bill 1896, schs 5, 6

The Government's representative in the Council, WC Walker, advised councillors that the Government had prepared a supplementary order paper so that these amendments could be introduced. All of Sheridan's amendments were eventually adopted by the Council when the Bill was in committee.<sup>428</sup> The Council also made some additional changes of its own. After hearing Te Keepa speak at the bar of the Council, councillors amended the Bill to delete the clause charging £2,000 against his other lands.<sup>429</sup> Te Keepa's address was mostly a technical analysis written by Buller, but the rangatira also made a personal plea that the Council would not 'in this rough way behead your humble servant'.<sup>430</sup>

It was also noted in the Council that the costs of further litigation would once again have to be borne by Muaūpoko, so the Bill was amended to provide that the questions would be determined by the Native Appellate Court with no right of appeal. This was hotly debated. Some members felt that appeal rights were essential, regardless of expense.<sup>431</sup> In addition, a clause was introduced allowing the court to act on the evidence taken by the commission, which might help to reduce costs further.<sup>432</sup>

By the time the Horowhenua Block Act 1896 was passed, very few of the commissioners' recommendations had survived in statutory form. Setting aside any recommendations relating to Ngāti Raukawa, only four remained in the Act: the State farm was to be vested in the Queen, and the remaining purchase money paid to the Hunia whānau, not the tribe; the Public Trustee would test the validity of Buller's transactions in the Supreme Court; Horowhenua 12 would be taken to pay the £1,266 cost of the commission (with any money left over to be paid to the owners); and the 48 rerewaho would be treated as if they had been included in the 1873 list.<sup>433</sup>

As far as Muaūpoko were concerned, the Horowhenua commission had been a futile yet costly waste of time. Almost everything would have to be done all over again in the Native Appellate Court, putting the tribe to further expense. As we discussed above, appropriate remedies for Horowhenua 6, 11, and 12 had already been identified before 1896 but not carried out. Now, not even the remedies as found by the commission were to be actioned. The original Horowhenua Block Bill of 1895 had planned to refer matters to the Native Land Court and that is where they would now end up, almost as though nothing had happened in the interim.

This is not to say, however, that the commission had no consequences. The Crown obtained title to the State farm, even though the commission found that the Crown had known of the trust when it purchased from Warena Hunia.<sup>434</sup> Officials also accepted the commission's recommendation to buy Horowhenua 6, although it would now have to wait for title to be decided. Muaūpoko lost Horowhenua

428. NZPD 1896, vol 96, pp 504–505; *Journals of the Legislative Council*, 1896, pp 214–215, 220–223

429. NZPD, 1896, pp 504–505, 654–656, 776; *Journals of the Legislative Council*, 1896, p 215

430. *Horowhenua: Major Kemp at the Bar of the Legislative Council*, reprinted from NZPD, 1896 (Armstrong, papers in support of 'Special Factors' (doc A155(b)), p 8)

431. NZPD 1896, vol 96, pp 656–660; *Journals of the Legislative Council*, 1896, pp 220, 224

432. *Journals of the Legislative Council*, 1896, p 222

433. Horowhenua Block Act, ss 8(c), 8(e), 10, 19, and schedule 2

434. AJHR, 1896, G-2, pp 12–13

**SUMMARY OF THE HOROWHENUA BLOCK ACT 1896**

s 2: 'the Court' is the Native Appellate Court.

s 3: The Native Equitable Owners Act 1886 is 'revived and re-enacted' for the purposes of this Act only.

s 4: Blocks 6, 11 (minus the State farm), 12, and 14 will be investigated under the Equitable Owners Act. The claims of the 48 rerewaho will be dealt with as though they had been included in the 1873 list of owners. The court may limit the interest of or exclude altogether the name of any trustee who had prejudiced others by claiming to be an absolute owner.

s 5: any order under this Act will vest blocks 6, 11, and 14 in the owners in fee simple as tenants in common, and the owners (or their successors) will be entitled to a land transfer certificate. All existing certificates and registered dealings are null and void (dealings can be re-registered if found to be valid).

s 6: [relates to Horowhenua 9]

s 7: all dealings in blocks 6, 11 (minus the State farm), 12, and 14 are prohibited for the interim.

s 8: (a)–(b) [relates to Horowhenua 9]; (c): State farm to be vested in the Queen, after payment of £4,000 to successors of Kawana Hunia; (d) [relates to Ngati Raukawa]; (e) Horowhenua 12 is to be vested in the Queen, after payment of any purchase money to owners as found by the court; (f): any part of Horowhenua 14 that has been validly alienated is to be vested in the person who has acquired it, but no certificate will be issued until final judgment has been given in proceedings taken by the Public Trustee.

s 9: [relates to Ngati Raukawa]

s 10: Public Trustee is authorised to institute proceedings on behalf of the original owners of the Horowhenua block (as found in 1873) re Horowhenua 14 transactions within 6 months of the passing of the Act.

s 11: The 1878 monopoly proclamation is declared to have had no effect since 30 December 1886.

s 12: The name of Te Rangimairehau to be substituted for repetition of Te Rangirurupuni in title to Horowhenua 3.

s 13: Directions of Court of Appeal to the Native Land Court re Horowhenua 11 are 'superseded' by this Act, and no further action is to be taken.

s 14: All orders in council, court judgments etc that are inconsistent with this Act are to be void and of no effect.

s 15: For carrying out this Act, the court will have all the powers and jurisdiction of the court under the Native Land Court Act 1894 and its amendments.

s 16: Disputes about the amount of payment made by the Queen for any land vested in her by this Act will be determined by the court under the Public Works Act 1894 as if the land had been taken for a public work.

s 17: The court is to determine successors.

s18: No right of appeal from any decision of the court under this Act.

s19: The cost of the royal commission (£1,266) is to be deducted from the amount to be paid by the Queen for Horowhenua 12.

s20: All money held by the Public Trustee for disbursement under this Act will be paid to such persons in such relative proportions as ordered by the court.

s21: The court has discretion to receive, consider, and act on the evidence of the royal commission without calling or hearing the witnesses who gave that evidence.

12 without consent and mostly without compensation. Horowhenua 14 had been found to be held in trust by Te Keepa, and – although that finding would now be reconsidered by the Appellate Court – the Crown would fund litigation to test Buller’s purchase, leases, and mortgage. Apart from this possibility that Buller’s dealings in Horowhenua 14 would be set aside, Muaūpoko would now recover nothing from the dealings in their lands – nothing from the township purchase (including no tenths), nothing from the State farm purchase, and nothing from Te Keepa. Instead, they would face further expense to obtain titles to their lands. Thus, the tribe received none of the potential benefits of the commission – statutory titles and a tribal reserve held in trust – and all of its detriments.

Te Keepa, on the other hand, did win two post-commission victories in Parliament: his lands would not be charged with £2,000, and he would have another chance to prove his title to Horowhenua 14 before the Native Appellate Court.

There was very little time for protest because the Bill passed rapidly through Parliament. As noted, Te Keepa was heard at the bar of the Council in opposition to the commission’s report. Te Raraku Hunia wrote to the Legislative Council, appealing unsuccessfully that there not be yet another investigation of Horowhenua 6 since Te Keepa and Hunia had agreed to the list of owners compiled during the commission.<sup>435</sup> This appeal had no effect. Other than Te Keepa’s appeal to the Council, Muaūpoko had no say in the scope or contents of the Horowhenua Block Act 1896.

#### **(4) *The Crown’s concessions in respect of the State farm purchase and the Horowhenua Block Act 1896***

As noted above, the Crown conceded that it purchased the State farm block ‘from a single individual knowing that title to the block was disputed, and despite giving an assurance that the interests of the wider beneficiaries would be protected.’<sup>436</sup> The Crown also conceded that it passed legislation to permit the sale after Muaūpoko

435. NZPD, 1896, vol 96, pp 654–655

436. Crown counsel, closing submissions (paper 3.3.24), p 178

had ‘successfully challenged the purchase in the Supreme Court.’<sup>437</sup> The cumulative effect of these actions meant that the Crown had failed to actively protect the interests of Muaūpoko in Horowhenua 11, in breach of Treaty principles.<sup>438</sup>

The claimants argued that these concessions did not go far enough, and we agree.

First, the Crown’s concessions did not encompass the effects of the Crown’s four-year campaign to defend the integrity of its purchase, described above. That campaign was a principal contributor to the protracted, ruinously expensive litigation forced on Muaūpoko. The lengthy Horowhenua commission was but one example. Petitions were part of this costly litigation. Drawing up and submitting petitions, and defending them at Native Affairs Committee hearings, was an expensive business. One newspaper noted that Horowhenua petitions had been heard so many times by the Native Affairs Committee that it had ‘become almost as profitable to the lawyers as a chancery suit.’<sup>439</sup> As we saw in earlier sections of this chapter, the ruinous expense of the Horowhenua litigation had been predicted by Ministers, officials, the Public Trustee, and Muaūpoko themselves. It was brought upon the tribe by the Crown’s failure to provide a proper remedy for the trusts at any time before the end of 1896, and the Crown’s determined defence of its State farm purchase. This was highly prejudicial to Muaūpoko. Further, the Crown’s remedy at the end of 1896 entailed repeating the whole of the Horowhenua commission’s inquiry in the Appellate Court in 1897, which was a costly, entirely avoidable outcome of the Crown’s actions. The Crown’s determination to protect its State farm purchase had been an important factor in all of this. In other words, the impact of the 1893 purchase was wider than just the loss of the State farm block, important though that was to the tribe.

Secondly, not only did the Crown legislate to force through a purchase from someone who ‘fraudulently’ claimed to own the land, it also paid the entire purchase price to the Hunia whānau; the other beneficial owners of Horowhenua 11 never received a penny for the State farm block.

The Crown’s other concession about the Horowhenua Block Act 1896 related to the purchase of Horowhenua 12, which we discuss in the next section.

## 6.6 LOSS OF HOROWHENUA 12

The loss of Horowhenua 12 is a serious grievance for the claimants who appeared before us, not least because it contained Hapuakorari, the ‘spiritual hidden lake’. Charles Rudd explained Muaūpoko’s view that Horowhenua 12 was ‘deviously taken by the Crown.’<sup>440</sup> The Crown conceded that ‘the manner in which it acquired Horowhenua No 12 to pay for the royal commission was a breach of the Treaty

437. Crown counsel, closing submissions (paper 3.3.24), p 178

438. Crown counsel, closing submissions (paper 3.3.24), pp 178–179

439. *Wanganui Herald*, 5 October 1894, p 2 (TJ Hearn, ‘One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century’, June 2015 (doc A152), p 665). Chancery suits in England were infamously protracted and expensive, and were satirised in Charles Dickens’ *Bleak House*.

440. Charles Rudd, closing submissions (paper 3.3.18), p 11



## 6.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

and its principles.<sup>441</sup> More specifically, Crown counsel conceded that ‘the Crown acquired approximately 20 percent of the Horowhenua block (within Horowhenua No 12) to pay for a royal commission’ about which Muaūpoko were not consulted. Nor were Muaūpoko consulted about the imposition of costs.<sup>442</sup> The ‘cumulative effect’ of the Crown’s actions in acquiring the State farm and Horowhenua 12 ‘meant that it failed to actively protect the interests of Muaūpoko in these lands and this was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.’<sup>443</sup>

In 1897, Te Keepa made a final address to his people after the completion of his evidence in the Native Appellate Court. As David Armstrong pointed out, the rangatira was by this time elderly, unwell, and ‘particularly bitter about the cost of the Horowhenua Commission, which had achieved nothing and had swallowed Block 12.’<sup>444</sup> Te Keepa referred to the Horowhenua Block Act as the ‘Land Confiscating Bill’, and expressed his anger at how the commission had ‘absorbed a large portion of the land, inasmuch as the costs of the Commission have been made a charge upon Subdivision No 12, and amount to the full value of the section.’ Furthermore, he pointed out, ‘the Commissioners accomplished nothing.’<sup>445</sup> More than 100 years later, Muaūpoko still consider that Horowhenua 12 was confiscated from them. Bill Taueki called it a ‘raupatu.’<sup>446</sup> Jonathan Procter also used the word ‘confiscated’ to describe how the Crown acquired Horowhenua 12.<sup>447</sup> Historian David Armstrong agreed that the compulsory purchase ‘amounted to a confiscation.’<sup>448</sup>

The costs of the Horowhenua commission were calculated as £1,266 19s 5d, and the block was valued at £1,619 5s.<sup>449</sup> Any money left over after deducting the costs of the commission was to be paid to the Public Trustee, to distribute to the owners of Horowhenua 12 as identified by the Native Appellate Court. We asked Jane Luiten to check how much of the ‘purchase’ money was paid to the owners. She responded that the Public Trustee’s commission was £3 10s 10d, ‘leaving a balance of £348 for the 82 owners.’<sup>450</sup> Anderson and Pickens calculated that the owners would receive the miniscule amount of ‘a little more than £4 each.’<sup>451</sup> Anne Hunt suggested that the owners of Horowhenua 12 would have been disgusted to receive ‘£348 and a few measly coins’ in return for ‘their magnificent mountains, their forests, their pathway to the east coast.’<sup>452</sup>

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441. Crown counsel, closing submissions (paper 3.3.24), p 179

442. Crown counsel, closing submissions (paper 3.3.24), p 112

443. Crown counsel, closing submissions (paper 3.3.24), p 112

444. D Armstrong, ‘Muaupoko “Special Factors”: Keepa’s Trusteeship, the Levin Township Sale and the Cost of Litigation’, not dated (doc A155), p 36

445. AJHR, 1898, G-2A, p 152

446. William James Taueki, brief of evidence, 11 November 2015 (doc C10), p 24

447. Jonathan Procter, brief of evidence, 12 November 2015 (doc C22), p 5

448. Armstrong, ‘Special Factors’ (doc A155), p 35

449. Luiten, answers to questions in writing (doc A163(h)), p 9

450. Luiten, answers to questions in writing (doc A163(h)), p 9; J C Martin (Public Trustee) to Sheridan, 30 January 1899 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1437)

451. Anderson and Pickens, *Wellington District* (doc A165), p 268

452. Anne Hunt, ‘The Legend of Taueki’, not dated (doc A18), p [62]



We note, however, that the unpaid survey lien for Horowhenua 12 amounted to £397.<sup>453</sup> This amount exceeded the sum owing to the owners. Assuming that the costs of the survey lien were deducted from the purchase money, it appears that the owners of Horowhenua 12 would have received nothing at all – in fact, they would have owed the Crown £49. We do not have direct evidence on how exactly the survey lien was settled. The Crown may have forgiven this debt, but equally Muaūpoko may have received no compensation at all for the confiscation of their mountain ranges.

There is also an issue about the valuation. Claimant counsel pointed out that the Crown had tried to purchase Horowhenua 12 at four shillings an acre back in 1892 (see above, section 6.4.6). This would have amounted to a price of £2,600, which Muaūpoko rejected at the time as far too low. Five years later, the ‘public works level of value’ reduced the price to 2.5 shillings an acre. Claimant counsel submitted that ‘a taking under these circumstances ie a forced taking land from trustees, for an extraordinarily low fixed sum set by statute, was confiscation.’<sup>454</sup> We accept that this low valuation added to the unfairness of the compulsory purchase.

As noted above, Crown counsel conceded that ‘the Crown acquired approximately 20 percent of the Horowhenua block (within Horowhenua No 12) to pay for a royal commission’ about which Muaūpoko were not consulted. Nor were Muaūpoko consulted about the imposition of costs.<sup>455</sup> We observe, however, that the area of Horowhenua 12 made up 25 per cent of the Horowhenua block, and that the Crown acquired *the whole of* Horowhenua 12 compulsorily, without consultation or consent, even though Muaūpoko may have been paid for a small portion of it.

We do agree with the Crown that its ‘acquisition’ of Horowhenua 12 was in breach of the Treaty principle of active protection. It was also in breach of the plain meaning of article 2, which required Māori consent to the acquisition of their land. We agree with the claimants that the term ‘confiscation’ is appropriate for the Crown’s taking of Horowhenua 12. The forcible taking of 13,000 acres by statute was a serious Treaty breach. The taking of the land at a low value meant that a greater amount of land was confiscated, and for no (or virtually no) compensation, which compounded the breach.

Muaūpoko were prejudiced by this serious breach. The Horowhenua commission found that Horowhenua 12 was best used as a forest reserve under Crown ownership.<sup>456</sup> The confiscation of this land, however, deprived Muaūpoko of any economic benefit that they might have received from it. Further, the confiscation had significant cultural and spiritual impacts on the tribe. Bill Taueki explained:

The taking of Block 12 had another effect on us. It took away our maunga Tararua and with that our pepeha, our identity, was gone. We have no maunga anymore to anchor us in our rohe. Some iwi have their maunga back now and good on them.

453. Luiten, answers to questions in writing (doc A163(h)), p 7

454. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), pp 61–62

455. Crown counsel, closing submissions (paper 3.3.24), p 112

456. AJHR, 1896, G-2, p 20

6.7 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Some never lost their maunga. But not us. Muaupoko's presence on the whenua is slowly being wiped off it. We want Tararua back.<sup>457</sup>

Claimant witnesses also stressed the importance of the spiritual lake, Hapuakorari, which is located in the Tararua Ranges. Jonathan Procter told us that the Crown's confiscation of Horowhenua 12 cut Muaūpoko off from their sacred lake, and redefined their 'connection to our waterways as solely Lake Horowhenua and its one chain strip'.<sup>458</sup>

**6.7 FURTHER LITIGATION, 1897–98, AND THE LOSS OF HOROWHENUA 14**

**6.7.1 Punishing the trustees: section 4 of the Horowhenua Block Act**

Section 4 of the Horowhenua Block Act 1896 included a provision aimed at Te Keepa and Warena Hunia, punishing them for any misdeeds as trustees by reducing or depriving them altogether of their remaining interests in the Horowhenua lands:

[the court] may also limit the interest of, or wholly omit from any order made under the provisions of this Act the name of any person who, having been found to be a trustee, has, to the prejudice of the interests of the other owners, or any of them, assumed the position of an absolute owner in respect to any former sale or disposition of any portion or portions of the said block, or for any other sufficient reason.<sup>459</sup>

This wide brief included the township purchase money and any other moneys from Te Keepa's trusteeship, as well as his transactions in Horowhenua 14 if that block were found to be a trust. This provision could also have been used to punish Warena Hunia for the State farm purchase (but not any of his supporters, including his brother Wirihana). The Government had been baulked by the Legislative Council of its clause requiring Te Keepa to repay £2,000. Nonetheless, the Act required his trusteeship to be re-examined: it seemed as if this part of the Horowhenua commission's inquiry would have to be repeated, like so many other parts, putting Muaūpoko to yet further expense.

In the event, the Government was to be disappointed. Accounts were prepared and examined, and Muaūpoko expressed themselves as satisfied.<sup>460</sup> The evidence in court in 1897 showed that the

majority of Muaupoko were satisfied with Kemp's administration, Waata Muruahi expressing the consensus view that 'Kemp had authority to do as he chose, and spend what he thought necessary. . . . All the moneys spent in attending Parliament was on

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457. William Taueki, brief of evidence (doc c10), p 29

458. Jonathan Procter, brief of evidence (doc c22), p 5

459. Horowhenua Block Act 1896, s 4

460. Luiten, 'Political Engagement' (doc A163), pp 294–295

behalf of the people. Kemp was fighting to get back the land for the people, and they approved of what he did.<sup>461</sup>

The contents of Te Keepa's accounts were settled 'in the presence of tribal members'. Te Rangimairehau and Hoani Puihi testified that they were satisfied with the accuracy of the accounts.<sup>462</sup>

In any case, the court did not punish any of the trustees in the way it was authorised to do by section 4. All that this part of section 4 achieved, therefore, was to make the 1897 hearings longer and more expensive for the tribe. Jane Luiten noted that the inquiry into Te Keepa's trusteeship revealed the ruinous expense of the protracted litigation:

Kemp's administration of the trust estate was at issue in the 1897 Native Appellate Court hearing, where accounts of income and expenditure were prepared in conjunction with tribal members, indicating that the battle over title had cost £13,810, more than \$2.5 million in today's terms.<sup>463</sup>

As we found above, this was a consequence of both the form of title provided by the native land laws in 1886, and the Crown's failure to provide a timely remedy at the beginning of the 1890s. And the cost was about to get even higher as the Crown continued its battle with Muaūpoko over Horowhenua 14.

#### **6.7.2 Litigation and the loss of Horowhenua 14**

As we noted above, a key issue arising from the Horowhenua commission (and the McKenzie–Buller vendetta) was whether its findings about Horowhenua 14 would stand the test of further review in the courts. The commission was the first inquiry to find that Horowhenua 14 was held in trust by Te Keepa. It recommended that tribal members be re-admitted to the title, and that the validity of Buller's dealings in Horowhenua 14 be tried in the courts. *If* the commission's finding was correct, then it had identified a 'grievous wrong' to Muaūpoko in terms of how part of this land had been sold, and the remainder leased and mortgaged, without the consent of (or compensation to) the equitable owners.<sup>464</sup>

On the other hand, there was no denying that Te Keepa was using Horowhenua 14 as a source of funds on behalf of the tribe: the ever-growing mortgage to Buller had helped to pay the costs of defending the tribe's title to the other parts of the Horowhenua block. In other words, the money from Horowhenua 14 was used for tribal purposes, regardless of whether Te Keepa was seen as a sole owner, an English-style trustee, or a rangatira acting in the customary way. Much of this money was charged directly by Buller for his own legal services. His fee for defending Te Keepa and Muaūpoko in the Horowhenua commission alone amounted to

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461. AJHR, 1898, G-2A, p17 (Luiten, 'Political Engagement' (doc A163), p 294)

462. Luiten, 'Political Engagement' (doc A163), p 294

463. Luiten, 'Political Engagement' (doc A163), p 294

464. AJHR, 1896, G-2, pp 14–16, 18–19, 21

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£541 5s.<sup>465</sup> And now it had to be done all over again, both in the Native Appellate Court and the Supreme Court.

The Native Appellate Court litigation over Horowhenua 6, 9, 11, 12, and 14 took up about five months of hearing time in 1897 and further time in 1898.<sup>466</sup> Horowhenua 9 will be considered later in our inquiry, as will be the question of Ngāti Raukawa's additional 'reserves' in Horowhenua 11. In this section, we focus on the time-consuming, expensive, and politically motivated litigation over Horowhenua 14. There is no need for the purposes of our report to provide exhaustive details, but the fact remains that if Horowhenua 14 were indeed supposed to have been held in trust, then fairness required its return to the tribe, and Buller's dealings may well have been invalid if he had known of any such trust.

The Horowhenua commission's report was the authority for the existence of a trust, supported by Alexander McDonald's 'true history' of the Horowhenua block.<sup>467</sup> In August 1897, on the eve of the Supreme Court case, the Public Trustee asked Wellington lawyer Theodore Cooper to review the commission's report.<sup>468</sup> The Trustee – who was himself the former chairman of the commission – wanted an opinion as to whether the evidence taken by the commissioners 'reasonably justified the inferences which they drew and the recommendations which they made'.<sup>469</sup> Cooper's opinion was that the commissioners were wrong in their findings about whether Horowhenua 14 was held in trust, and whether Buller was justified in dealing with Te Keepa as legal owner. In particular, Cooper relied on Judge Wilson's evidence (which, he said, the commissioners had been wrong to dismiss), and he advised that the Supreme Court would 'arrive at the same conclusion'.<sup>470</sup> This advice did not bode well for the Crown's case in the Supreme Court.

The 1896 Act mandated two interlocking sets of proceedings: in the Native Appellate Court to determine whether a trust existed, and in the Supreme Court to determine whether Buller had known of a trust (which would mean that he was not a bona fide purchaser/lessee and was not protected by the Land Transfer Act). The Crown hoped that the Native Appellate Court would issue its decision before the Public Trustee had to take action in the Supreme Court, which was set by the Act at six months from its passage in October 1896. The appellate court heard evidence in respect of Horowhenua 14 for six weeks in February and March 1897 but it did not issue a decision at the end of it. Rather, the court posed questions to the Supreme Court on jurisdictional matters raised by the parties.<sup>471</sup> These included the questions of how much weight should be given to Judge Wilson's evidence of

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465. Armstrong, 'Special Factors' (doc A155), p 39

466. Luiten, 'Political Engagement' (doc A163), pp 262–263

467. AJHR, 1896, G-2, pp 3, 14–16; Alexander McDonald, 'A True History of the Horowhenua Block', 27 February 1896, AJHR, 1897, G-2, pp 149–150

468. Armstrong, 'Special Factors' (doc A155), p 37

469. Public Trustee to T Cooper, 11 August 1897 (Armstrong, 'Special Factors' (doc A155), p 37)

470. Armstrong, 'Special Factors' (doc A155), p 37

471. Luiten, 'Political Engagement' (doc A163), pp 263–267; Galbreath, *Walter Buller*, pp 228–230

the partition court's intention, and whether the appellate court had jurisdiction to determine the validity of the 1886 proceedings.<sup>472</sup>

Te Keepa claimed block 14 as its absolute owner. Te Rangimairehau appeared on behalf of the great majority of Muaūpoko, declaring that the tribe did not challenge Te Keepa's title. Individual counter-claims were made under the Native Equitable Owners Act by Himiona Kowhai, Te Paki Te Hunga, Rhipeti Nireaha, and Wirihana and Warena Hunia. Each of these claims had separate representation, including by Alexander McDonald and John Stevens.<sup>473</sup> The Public Trustee was told he had no standing in the appellate court case and so his lawyer, E Stafford, joined with Stevens in support of the Hunia brothers.<sup>474</sup> The Crown was represented separately by P E Baldwin.<sup>475</sup>

The Crown attempted to prove that Te Keepa held the land in trust, supporting the counter-claimants in face of the tribe's majority position. According to Baldwin, the Crown's role was to assist the Court to do justice in a case of public importance, and to protect Muaūpoko – from themselves if necessary. The Crown, he said, had a 'sacred duty' to do so. Its duty was to ensure that tribal members received their legal entitlements – *after* which they could convey Horowhenua 14 to Te Keepa if they chose, but *before* which they had been susceptible to 'mistaken loyalty', 'outside influence', pressure, or fear. Muaūpoko, Baldwin argued, were unable to insist for themselves on their lawful rights. He also argued that this had been the case since before the partition hearing of 1886, at which Te Keepa had dictated the outcomes and the tribe had not dared to gainsay him.<sup>476</sup>

We agree with Ms Luiten, who commented:

In repudiating Muaupoko's consensus about Horowhenua 14 in 1897 by setting up its own case in conjunction with the Hunia brothers, the Crown was in effect undermining the tribal position arrived at with regard to Horowhenua 14. The rationale for doing so, as expressed by Baldwin . . . was that Muaupoko were incapable of any kind of tribal autonomy, their disempowered state enduring since their pre-Treaty defeat. What is also striking is that the Crown's expressed regard for protecting the rights of Muaupoko land owners in Horowhenua 14 stands in stark contrast with its own demonstrated preference since 1873 to deal with Kemp (and with regard to Horowhenua 11 more recently, with Warena Hunia), and to ignore, and even deny in the case of the state farm purchase, any wider tribal interests in the land.<sup>477</sup>

We also agree, however, that – as Baldwin argued – the Crown had a 'sacred duty' to interfere where an individual in a position of influence in the tribe had obtained 'from his tribe a benefit to which he is not justly entitled', and to ensure 'that such

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472. AJHR, 1898, G-2A, pp 157–158

473. Luiten, 'Political Engagement' (doc A163), pp 263–264

474. Galbreath, *Walter Buller*, p 229

475. Luiten, 'Political Engagement' (doc A163), p 264

476. Luiten, 'Political Engagement' (doc A163), pp 265–266; AJHR, 1897, G-2, pp 114–115

477. Luiten, 'Political Engagement' (doc A163), p 266



benefit shall not be given until a legal title has been conferred upon the tribesmen.<sup>478</sup> The Crown was also ‘entitled to be well satisfied that its grants would be made to the rightful owners, where it is suggested, and there is a reasonable suspicion, that persons other than the rightful owners are making efforts to obtain titles for themselves.’<sup>479</sup> In our view, this duty especially arose because it was the Crown’s native land laws which had encouraged tribes to put individuals into titles, not knowing that they would become absolute owners rather than trustees. The Crown had recognised its general duty to provide a remedy in 1886 when it passed the Native Equitable Owners Act. The Crown’s duties, as described by Baldwin, equated broadly in the circumstances with the Crown’s Treaty duty of active protection and the Treaty principle that the Crown should redress past breaches.

The terrible irony of Baldwin’s submissions in 1897, however, was that the Crown had dealt with Te Keepa as the absolute owner of the township block and with Warena Hunia as the absolute owner of the State farm block, despite certain knowledge of the trusts in both cases. It had also failed repeatedly to provide a remedy for Horowhenua 6, 11, and 12 since 1891. To add insult to injury, the Crown only argued this ‘sacred duty’ in the case of Horowhenua 14, not appearing again before the appellate court in 1897 to help prove a trust in respect of Horowhenua 6, 11, or 12. Claimant counsel submitted that the Crown’s ‘protestations of a sacred duty were entirely in the service of a grubby political vendetta.’<sup>480</sup>

In any case, the appellate court had not delivered its judgment by the expiry of the statutory deadline for the Public Trustee to take action in the Supreme Court. The Public Trustee had no choice but to obey the statute and institute proceedings in April 1897. Cooper’s opinion, cited above, could not have enhanced his confidence in doing so.<sup>481</sup> The Supreme Court agreed to adjourn the case until August 1897. Cooper joined the team of Crown lawyers (Baldwin and Stafford), with this same team also representing Wirihana Hunia in this litigation. Te Keepa had to be involved because he had to defend his title in both courts – he was represented by Sir Robert Stout. Buller was represented by HD Bell and AP Buller.<sup>482</sup>

At the time of this hearing in August 1897, the Supreme Court had not yet dealt with the case stated to it by the appellate court, and so the appellate court’s decision on Horowhenua 14 had still not been issued. Stafford tried to get the Supreme Court to agree to wait for the appellate court’s decision as to whether a trust existed, but the chief justice refused.<sup>483</sup> That being the case, as Jane Luiten noted, the Public Trustee was

forced to concede at the outset that there was no evidence of notice on the part of Buller of any trust over the block, and therefore agreed that judgement should be given in favour of the defendant. In the resulting decree agreed to by the parties,

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478. AJHR, 1897, G-2, p 115

479. AJHR, 1897, G-2, p 114

480. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(a)), p 63

481. Armstrong, ‘Special Factors’ (doc A155), p 37; Galbreath, *Walter Buller*, pp 229–230

482. Luiten, ‘Political Engagement’ (doc A163), p 266

483. Galbreath, *Walter Buller*, p 230



Wirihana Hunia was dropped as co-plaintiff, and all charges against Buller withdrawn, all dealings regarding Horowhenua 14 deemed valid and entitled to be re-registered. The action against Kemp was similarly dismissed, without prejudice to the Native Appellate Court case. Both Buller and Kemp were awarded costs.<sup>484</sup>

The Minister refused to pay the costs or accept the Supreme Court's decision.<sup>485</sup> In McKenzie's view, Buller had 'escaped in a Court of law by a series of legal quibbles',<sup>486</sup> and the Public Trustee had let him down. McKenzie maintained that the Horowhenua commission's report was correct, and that Buller had robbed Muaūpoko of their land and 'induced the Natives to squander their land' through litigation.<sup>487</sup> His answer to this was yet more litigation:

Having regard to the report of the Royal Commission, and the fact that no evidence was attempted to be adduced in the Supreme Court, I am of opinion, and in this my colleagues concur, that a wrong has been done, and the matter should not be allowed to remain in its present unsatisfactory state. A Bill will therefore be introduced declaring Section 14 to be Native land, and providing for an investigation into the title, and the registration of all dealings therewith that have been made by the true owners and are in accordance with equity and good conscience.<sup>488</sup>

McKenzie's intention was not only to set aside the Supreme Court's decision but also to pre-empt the Appellate Court from deciding whether or not a trust existed. The Horowhenua Block Act Amendment Bill was introduced in December 1897, almost at the end of the session. According to Ross Galbreath, the Bill was

brief and direct. Firstly, it declared the previous decision of the Supreme Court to be void. The case of *Public Trustee v Buller* was to be instituted afresh. Previously the difficulty had been that no fraud could be proven against Buller because there was no conclusive evidence that the land he had bought and leased was trust property. The Bill proposed to avoid this difficulty by simply declaring Horowhenua 14 to be trust property.<sup>489</sup>

Thus, the Government's new Bill would confiscate Horowhenua 14 from Te Keepa but not from Buller without further court action. The Supreme Court was to be directed to consider whether:

- ▶ Buller's purchase money or rent was adequate;
- ▶ the mortgage and the 'other obligations and liabilities of the mortgagor were fully explained and understood by him [Te Keepa]'; and

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484. Luiten, 'Political Engagement' (doc A163), pp 266–267

485. Galbreath, *Walter Buller*, pp 232–233, 240

486. AJHR, 1897, G-2A, p 6

487. AJHR, 1897, G-2A, p 1

488. AJHR, 1897, G-2A, p 6

489. Galbreath, *Walter Buller*, p 235

## 6.7.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

- ▶ Buller's dealings were not only in accordance with the law but also 'in every respect in full accordance with equity and good conscience', regardless of anything in the Land Transfer Act or 'any other enactment or rule of law to the contrary'.<sup>490</sup>

Thus, the Government wanted to avoid a narrow inquiry based solely on whether Buller had known about a trust, since that ship had sailed. In our view, this was the correct approach, although the question of whether Horowhenua 14 was held in trust ought to have been decided first by impartial inquiry.

In any case, the 1897 Bill was ultimately abandoned by the Government. On 13 December 1897, the Native Affairs Committee supported the Bill, recommending that it be passed without amendment.<sup>491</sup> Ominously, Carroll had noted in the committee that the cost of the proposed litigation would eventually be charged against the land – that is, against Muaūpoko. The Crown would only pay for it in the meantime.<sup>492</sup> Once the Bill came back from committee, it received a heated response on much the same grounds as the 1896 Act: private property was to be confiscated without those affected having been given a hearing. McKenzie was ill and unable to influence the debate about his Bill in the House. Premier Seddon was defeated when the House voted narrowly (by one vote) to allow Te Keepa and Buller the right to appear at the bar of the House to defend themselves. Seddon had argued against this in vain.<sup>493</sup> By this time, the Premier was 'only pressing the issue out of loyalty to McKenzie and otherwise would gladly have buried the whole Horowhenua business'.<sup>494</sup> Galbreath noted that 'Seddon let the Horowhenua Block Amendment Bill lapse rather than allow Buller to be heard'.<sup>495</sup>

In the meantime, the Supreme Court had responded to the appellate court's questions in November 1897.<sup>496</sup> In essence, the decision was that the appellate court had simply to exercise the jurisdiction of the Native Equitable Owners Act. Its role was to determine whether, at the time title was granted in 1886, 'the person or persons who on its face are absolute owners were really intended to hold the land in trust for other persons'.<sup>497</sup> Questions about the legality of what happened in the Native Land Court in 1886 were not the appellate court's business. Judge Wilson's evidence deserved 'great weight' but was not conclusive.<sup>498</sup>

The appellate court eventually delivered its judgment on Horowhenua 14 in April 1898. The decision was detailed but its effect can be described briefly:

- ▶ the judges did not accept the theory that both Horowhenua 9 and Horowhenua 14 were vested in trust for Ngāti Raukawa to decide between later; and

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490. Horowhenua Block Act Amendment Bill 1897, cl 6

491. AJHR, 1897, I-3B, pp 1–2

492. AJHR, 1897, I-3B, p 7

493. Galbreath, *Walter Buller*, pp 236–237

494. Galbreath, *Walter Buller*, p 235

495. Galbreath, *Walter Buller*, p 237

496. AJHR, 1898, G-2A, pp 157–159

497. AJHR, 1898, G-2A, p 158

498. AJHR, 1898, G-2A, p 159

- ▶ Te Keepa had received Horowhenua 14 from the tribe in 1886 as his personal property.<sup>499</sup>

Since the decision could not be appealed, it could only be overridden by statute if the Government was prepared to go that far.

The day after the appellate court's decision confirmed Te Keepa's title, the elderly rangatira died. At Buller's persuasion he had made a will leaving all of his property except for his uniform, sword, and medals, to be sold to pay his debts to Buller. After the Horowhenua commission and the litigation that followed in 1897, Te Keepa's debt to Buller now amounted to £6,810. Of this sum, £4,500 was owed to Buller for his own legal services. This was exposed in the Public Petitions Committee, when Buller petitioned for the Crown to pay the costs ordered by the Supreme Court in 1897. PE Baldwin, once again the Crown's lawyer, argued before the committee that Buller had enriched himself to Te Keepa's ruin, charging Te Keepa to defend his own (Buller's) as well as his client's title to Horowhenua 14.<sup>500</sup>

Galbreath commented:

The Government was really in no position to take a high moral tone and accuse Buller of pursuing his own interests at Keepa's expense. After all, McKenzie had taken good care to ensure that the costs of the Horowhenua Commission were charged to Keepa and the Muaupoko, and took one more piece of Horowhenua land in settlement of that debt. Throughout the affair Muaupoko were the losers; ostensibly the issue was to save them from being defrauded of their land, but once Buller and then McKenzie entered the ring, the land went from them all the faster.<sup>501</sup>

Buller finally obtained ownership of Horowhenua 14 in May 1899, when it was sold by auction. He agreed to bid the amount owed under the mortgage, which had grown to £7,800, and to add £500 for Wiki Keepa, the chief's successor. McKenzie tried to persuade Cabinet to put in a higher bid of £9,600, which Jane Luiten characterised as a 'last ditch effort to shaft Buller'.<sup>502</sup> We note, however, that the Minister had agreed to a request from Levin residents that he purchase Lake Waiwiri for a public reserve, and that this was also a reason for his attempt to buy Horowhenua 14.<sup>503</sup> In any case, Cabinet refused and Buller obtained his title at last.<sup>504</sup> As claimant counsel pointed out, the Crown's sacred duty to protect Muaupoko rights in Horowhenua 14 did not extend to buying Buller out and saving the land for them in 1899.<sup>505</sup> McKenzie's initiative to buy Waiwiri was for settlers, not Muaupoko.

Although Buller was criticised for mixing up his client's interests with his own, and for allowing Te Keepa's debt to grow so large, Buller's lawyer pointed out that

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499. AJHR, 1898, G-2A, pp 156–184

500. Galbreath, *Walter Buller*, pp 238–241; Luiten, 'Political Engagement' (doc A163), pp 269–270

501. Galbreath, *Walter Buller*, p 241

502. Luiten, 'Political Engagement' (doc A173), p 270; Galbreath, *Walter Buller*, p 243

503. Luiten, 'Political Engagement' (doc A173), p 323; Luiten, answers to questions in writing (doc A163(h)), p 12

504. Galbreath, *Walter Buller*, p 243

505. Claimant counsel (Bennion, Whaley, and Black), closing submissions (paper 3.3.17(a)), p 63

if the chief had not employed Buller he would have had to employ someone else anyway.<sup>506</sup> Buller never foreclosed on Te Keepa, maintaining: ‘Since I took up his cause, six years ago, I have paid everything for him, and I shall continue to do so to the end; for his cause is a just one and must not suffer from lack of funds.’<sup>507</sup> This referred to Te Keepa’s campaign to save Horowhenua 11 for his people, and he had no choice but to sacrifice Horowhenua 14 for that purpose. Such a choice would not have been forced on him if the Crown had provided the remedies sought back in 1891, or even if the Supreme Court decision of 1894 had been allowed to stand. As Buller had written to Seddon in 1894, in the language of the day, the statutory remedy sought by Te Keepa was ‘a case for the intervention of a paternal Government, to see that right is done and wrong prevented.’<sup>508</sup> In our view, this equated to the Crown’s duty of active protection. If the Crown had instructed the Public Trustee to take Te Keepa’s case in 1894, or had assisted Muaūpoko with their costs so that problems created by its own native land laws could be fixed, Horowhenua 14 need not have been sacrificed. The Crown’s single-minded pursuit of Te Keepa and Buller shows what the Crown could have done to assist Muaūpoko in respect of Horowhenua 11 if sufficiently motivated.

Even the Public Trustee, JC Martin, was disenchanted by 1897. His response to the Horowhenua Block Act Amendment Bill of that year was to protest that ‘politically-motivated action of this kind was not something his office should be involved in.’<sup>509</sup>

In our view, the truth of whether Muaūpoko intended Te Keepa to hold Horowhenua 14 in trust will never be known for certain. We do not know what happened at Palmerson’s property on the night of 1 or 2 December 1886, after Horowhenua 9 was set aside near the lake for the descendants of Te Whatanui. It is likely that Muaūpoko agreed that the left-over 1,200-acre block should become Te Keepa’s, and then Horowhenua 14 was vested in the chief on 3 December 1886. In 1897, this was what Te Keepa and the majority of Muaūpoko said had happened, although Te Keepa also said that he intended to add other people to the title.

We have no hesitation in rejecting the scenario put forward by the other side, which was that both Horowhenua 9 and Horowhenua 14 were to be held in trust after the partition hearing until Ngāti Raukawa chose between them. This was simply not credible.

Importantly, however, Muaūpoko made whatever choice they made in 1886 on the basis that Horowhenua 14 was located east of the railway line. Upon survey, 589 acres was taken out of Horowhenua 11, west of the railway line, including the prized lake, Waiwiri. This change of boundaries was approved by Te Keepa and Warena Hunia, trustees in block 11, without consulting the people.<sup>510</sup> We find it difficult to accept that Muaūpoko had intended to divest themselves of this taonga. Even if

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506. Galbreath, *Walter Buller*, pp 241–242

507. Galbreath, *Walter Buller*, p 242

508. Buller to Seddon, 11 June 1894 (Armstrong, ‘Special Factors’ (doc A155), p 27)

509. Armstrong, ‘Special Factors’ (doc A155), p 38

510. Luiten, ‘Political Engagement’ (doc A163), pp 238–239

Muaūpoko had agreed that Horowhenua 14 was for Te Keepa alone, they had not agreed that Lake Waiwiri and the land west of the railway was to be part of it.

The Native Appellate Court dismissed the boundary alteration as the result of an ‘accident’ which, it said, had no bearing on the question of whether Horowhenua 14 was intended to be vested in Te Keepa alone.<sup>511</sup> The court relied on the Supreme Court’s answers to the case stated. The Supreme Court had ruled that the western part of Horowhenua 14 was not subject to the same trust as Horowhenua 11, even though it was originally part of Horowhenua 11.<sup>512</sup> The question of whether the trustees of Horowhenua 11 could transfer land to Horowhenua 14 without the consent of the beneficial owners was deemed a question that the appellate court did not need to answer.<sup>513</sup>

In our view, the Treaty required consent before land could be alienated, and Muaūpoko did not consent in 1886–87 to the inclusion of Waiwiri in Horowhenua 14. By the late 1890s, however, they had ‘come to terms with the new arrangement: in the Native Appellate Court case of 1897, most of the Muaupoko residents supported Kemp’s claim to Horowhenua 14 at Waiwiri for himself, regardless of what had or had not been agreed to in 1886.’<sup>514</sup> Its loss to the tribe because of litigation costs was a heavy blow. The loss in cultural terms may be measured by the fact that Waiwiri became known to Muaūpoko as ‘Buller’s lake’, a place where they had to ‘sneak . . . when we could’ to collect kai and resources.<sup>515</sup>

There remains the question: was the Crown acting in good faith? This is a difficult question to answer and we have weighed the evidence very carefully in considering it. Crown counsel’s submissions on this point were confined to the Horowhenua commission. In the Crown’s view, dealings in Horowhenua lands had become ‘politically contentious’ by 1895, but there is no evidence which ‘conclusively determines’ that the commission was established for political motives; that is, because of ‘the very public dispute’ between McKenzie and Buller.<sup>516</sup> The Crown made no submissions about the post-commission litigation in respect of Horowhenua 14.

We accept that McKenzie genuinely believed that Buller (and Te Keepa) were cheating Muaūpoko out of Horowhenua 14, and that the legal system’s technicalities allowed corrupt practices.<sup>517</sup> But almost all of the historians in our inquiry agreed that McKenzie’s vendetta against Buller was an important motivating factor for the Government.<sup>518</sup> In particular, Jane Luiten saw it as the primary factor in the

511. AJHR, 1898, G-2A, p 168

512. AJHR, 1898, G-2A, pp 168–169; AJHR, 1898, G-2, p 50 (question 11); Case stated to the Supreme Court: The Questions for the Opinion of the Court, pp 20–21 (question 11) (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), pp 731–732)

513. AJHR, 1898, G-2, p 50 (question 9); Case stated to the Supreme Court: The Questions for the Opinion of the Court, pp 19–20 (question 9) (Armstrong, papers in support of ‘Special Factors’ (doc A155(a)), pp 730–731)

514. Luiten, ‘Political Engagement’ (doc A163), p 239

515. Uruorangi Paki, brief of evidence, 11 November 2015 (doc C3), p 5

516. Crown counsel, closing submissions (paper 3.3.24), p 189

517. See, for example, Galbreath, *Walter Buller*, pp 232–233.

518. Luiten, ‘Political Engagement’ (doc A163), pp 260, 262; David Armstrong, summary of reports, November 2015 (doc A153(b)), p 13; Anderson and Pickens, *Wellington District* (doc A165), pp 265–266, 270–271; Gilling, ‘The Ownership of Lake Horowhenua’ (doc A173), p 64



Government's actions over Horowhenua 14, as did Drs Anderson and Pickens and Dr Gilling.<sup>519</sup> Even the Public Trustee, J C Martin, who had chaired the Horowhenua commission which found that Horowhenua 14 was held in trust, wanted nothing more to do with this 'politically-motivated' litigation by the end of 1897.<sup>520</sup> Dr Hearn, on the other hand, blamed the Government as a whole, pointing out that Seddon as well as McKenzie had been involved in pushing the State farm purchase down Muaūpoko's throats – threatening them with 'prison and the police'<sup>521</sup> – and that the findings of the Supreme Court in 1894 and 1897 were very politically embarrassing for the Seddon Government.<sup>522</sup>

But what if the Government had been right about Horowhenua 14 even so? After all, the tribe had never intended to give Te Keepa Waiwiri, yet a significant portion of Horowhenua 11 had been included in Horowhenua 14 without their knowledge or consent. They could hardly be said to have given that to Te Keepa, even if they later chose as a tribe to endorse it in 1897. And Buller's dealings in Horowhenua 14 were dubious; Galbreath said that the only difference between McKenzie and Buller was that Buller was prepared to *wait* for *his* land.<sup>523</sup>

We think the answer to this question lies in the extremes to which the Government tried to go to wrest Horowhenua 14 from Te Keepa and Buller, but not for Muaūpoko. This included (but was not limited to):

- ▶ trying to vest Horowhenua 14 in the Queen by compulsory purchase in 1896;
- ▶ trying to declare by statute in 1897 that Te Keepa held Horowhenua 14 in trust, against Muaūpoko's wishes and overturning the Supreme Court's decision on that point (the Crown said that it had a 'sacred duty' to protect Muaūpoko – in this case, it was argued, from themselves); and
- ▶ trying to buy Horowhenua 14 out from under Buller, not for Muaūpoko but at the request of local Pākehā residents for a public reserve, although Cabinet refused to back McKenzie and stump up with the price.

At Te Keepa's tangi in 1898, Te Rangimairehau said:

The present Government has persistently thrown every obstacle in the way to thwart Kemp's good intention [to save Horowhenua]. Your Government has persecuted Major Kemp and the Mua-Upoko people, whom you have reduced to absolute ruin; in fact our lands have been practically confiscated.<sup>524</sup>

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519. Luiten, 'Political Engagement' (doc A163), p 262; Anderson and Pickens, *Wellington District* (doc A165), pp 270–271; Gilling, 'The Ownership of Lake Horowhenua' (doc A173), p 64

520. Armstrong, 'Special Factors' (doc A155), p 38; Anderson and Pickens, *Wellington District* (doc A165), p 269

521. *Otago Daily Times*, 23 December 1894, p 2 (Hearn, 'One Past, Many Histories' (doc A152), p 667)

522. Hearn, 'One Past, Many Histories' (doc A152), pp 665–670

523. Galbreath, *Walter Buller*, p 223

524. Hunt, 'The Legend of Taueki' (doc A18), p [67]



Te Rangimairehau was Muaūpoko's principal spokesman in the 1897 hearings,<sup>525</sup> and his sentiments show whether Muaūpoko believed at the time that the Crown was acting in good faith towards them.

### 6.8 LOSS OF HOROWHENUA 6

There was no doubt in anyone's mind that Te Keepa held Horowhenua 6 in trust for the rerewaho. Muaūpoko had agreed on this point in their evidence to the Horowhenua commission, and had mostly agreed on who the rerewaho were – only a handful of names were disputed. The Horowhenua Block Act required the question of a trust to be considered again by the appellate court. Raraku Hunia had protested about having to prove this again,<sup>526</sup> but she and others duly applied under the Native Equitable Owners Act.<sup>527</sup> Alexander McDonald, representing Himiona Kowhai and the Hunia brothers, did not deny that there was a trust in respect of Horowhenua 6.<sup>528</sup> Wirihana Hunia also agreed that the land was held in trust for the rerewaho.<sup>529</sup> On 26 July 1897, the Native Appellate Court confirmed 'the existence of a trust'. This decision was based on the evidence of Te Keepa and others in court as well as that of 'Hoani Puihi and others before the Royal Commission'.<sup>530</sup> The court declared that the trust was in favour of the 48 people identified by the commission but did not determine relative interests at that point.<sup>531</sup> It appears that the court simply accepted the schedule of 48 names attached to the Horowhenua Block Act and did not actually inquire as to the equitable owners.

This decision gave the Crown a list of individuals from whom undivided interests could be purchased. The Crown did not, as it should have, wait for the Native Appellate Court to determine relative shares or issue final orders. Nor did the Crown respect Muaūpoko's original intention that this piece of land should provide the rerewaho with a rental income, while those who lived locally resided on the tribal block (Horowhenua 11). Instead, the Crown started purchasing undivided interests using monopoly powers to keep prices low. Its actions denied the rerewaho an opportunity to determine an overall price for the block or to negotiate collectively with the Crown.<sup>532</sup> The loss of Horowhenua 6 in these circumstances was a major concern to the claimants, who were especially critical of the Crown's use of its monopoly powers.<sup>533</sup> The Crown, however, argued that there was insufficient evidence about the alienation of interests in Horowhenua 6 for the Tribunal to make findings.<sup>534</sup>

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525. Luiten, 'Political Engagement' (doc A163), pp 274, 289

526. NZPD, 1896, vol 96, pp 654–655

527. AJHR, 1898, G-2A, p 141

528. AJHR, 1898, G-2A, p 26

529. AJHR, 1898, G-2A, p 28

530. AJHR, 1898, G-2A, p 141

531. AJHR, 1898, G-2A, p 142

532. Luiten, 'Political Engagement' (doc A163), pp 294–299

533. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), pp 13–15

534. Crown counsel, closing submissions (paper 3.3.24), p 169

As will be recalled, the Horowhenua commission had recommended that the Crown buy block 6 because not all of its owners could receive shares of equal value, and the land was suitable for settlers.<sup>535</sup> The first approaches to sell came in June 1898 from 10 of the 48 owners *and their creditors*, both sides asking the Crown to settle the debts. These debts amounted to almost £1,000.<sup>536</sup> Sheridan recommended advancing each of the 10 owners £20, so as to ‘facilitate the purchase when the Native Land Court has issued final orders.’<sup>537</sup> A significant component of the debt came from the expense of the five-month appellate court hearings in 1897. The principal creditor (BR Gardener, a Levin merchant) told Sheridan that he was owed £748. This had accumulated because there had been a delay over a number of years in settling the title.<sup>538</sup> The 1897 hearings had been ‘the means of increasing their debts to a very large extent as the natives & everybody else, thought that it would settle finally the whole of the Horowhenua Block. Consequently I allowed the natives to have what goods they required to keep them alive.’<sup>539</sup>

As Ms Luiten noted, the lease rentals and timber tithes had all gone to pay the costs of litigation and of representations to Parliament; there was no chance to accumulate money for land development, let alone the purchase of necessities. The long hearing time for the commission in 1896 and the appellate court in 1897 had exacerbated the situation and forced the owners more into debt.<sup>540</sup>

In July 1898, Gardener advised Sheridan that he would have to go to court to recover his money ‘unless something is done *at once*’ (emphasis in original).<sup>541</sup> Sheridan made advances to a number of owners in July and August 1898. They signed a deed agreeing to sell their individual interests once those interests had been fully defined by the court. Neither the price nor the exact land were specified; this underlines that the Crown was not purchasing land from a community or a corporate body but the undefined shares of a series of individuals so that they could pay off their most pressing debts.<sup>542</sup>

In August 1898, Wirihana Hunia protested against the Crown purchasing interests while the land was still before the court. Hunia’s protest led to a short delay in further advances, until he gave way in September because of the extent of debts and the imprisonment of his brother, Warena, for unpaid debts.<sup>543</sup> Wirihana sought an advance of £500 so that ‘[s]ome of my tribe’ could ‘give their part of share in number six to the Crown to pay for their debt.’<sup>544</sup> The Crown resumed paying advances to individuals, including to Warena Hunia’s niece so that she could get her uncle

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535. AJHR, 1896, G-2, p 20

536. Luiten, ‘Political Engagement’ (doc A163), pp 295–296

537. Sheridan to McKenzie, 25 July 1898 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1403)

538. Luiten, ‘Political Engagement’ (doc A163), p 296

539. BR Gardener to Sheridan, 2 July 1898 (Luiten, ‘Political Engagement’ (doc A163), p 296)

540. Luiten, ‘Political Engagement’ (doc A163), pp 294–296, 299

541. BR Gardener to Sheridan, 2 July 1898 (Luiten, ‘Political Engagement’ (doc A163), p 296)

542. Luiten, ‘Political Engagement’ (doc A163), pp 296–297; deed of sale signed by Raraku Hunia, 17 June 1898 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1392)

543. Luiten, ‘Political Engagement’ (doc A163), pp 296–297

544. Wirihana Hunia to McKenzie, 10 August 1898 (Luiten, ‘Political Engagement’ (doc A163), p 297)

out of prison.<sup>545</sup> Inexplicably, one individual was turned down twice on the grounds that the Crown could not advance money before the court made its final orders, but otherwise the advances continued.<sup>546</sup>

One vendor was Te Raraku Hunia, the daughter of Kāwana Hunia and Hereora (Taueki's daughter). She was advanced £270 on 17 June 1898. The sale of her share in Horowhenua 6 is an example of the worst features of Crown purchasing under its unilaterally imposed monopoly. Te Raraku was in 'great pecuniary straits'<sup>547</sup> and had no choice but to sell her land to pay off her debts (including £100 for assaulting Alexander McDonald). There had been no opportunity for Te Raraku or the community to accumulate money for pastoral farming, and she knew she would have to sell more treasured land for that purpose. Te Raraku had no control over the price or even what land she was selling – when the Crown later determined its price per acre for Horowhenua 6, she discovered that her share of that block did not (as she had believed) cover the Crown's advance, and so she had inadvertently sold 'shares and interests' in other blocks. Te Raraku Hunia was compelled to accept a price that was half what she understood Horowhenua 6 to be worth, and there was simply no ability in the circumstances to negotiate, although she did appeal to the Native Minister for redress.<sup>548</sup>

These features of the purchase of Te Raraku Hunia's undefined share in Horowhenua 6 were common to the other advances made to 20 individuals before shares were ascertained and the block was partitioned. In September 1898, Te Raraku Hunia applied for the partition of Horowhenua 6 between the sellers and non-sellers. Horowhenua 6A (2,005 acres) was vested in 20 sellers, and Horowhenua 6B (2,615 acres) was vested in 28 non-sellers.<sup>549</sup> The Crown did not seek a title for its share at that stage, hoping to purchase the other individual interests first. To that end, Sheridan urged McKenzie to finally set a price in December 1898. He advised the Minister that the negotiations were at 'a very advanced stage and in order that they may be brought to a close as soon as possible it is necessary that the price which the Government is prepared to offer should now be decided upon.'<sup>550</sup> Sheridan noted that the Horowhenua commission had obtained a valuation for Horowhenua 6. The western part (1,868 acres adjoining the State farm) had been valued at £4 5s per acre. The remainder (2,747 acres) was valued at £1 5s an acre. Sheridan recommended that the Crown set a lower price of £3 10s and £1 respectively, averaging at a price of £2 per acre. He offered no reason for paying lower than the valuation, and McKenzie approved it without query on 21 December 1898.<sup>551</sup>

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545. Luiten, 'Political Engagement' (doc A163), p 297

546. Luiten, 'Political Engagement' (doc A163), pp 296–297

547. Sheridan to McKenzie, 1 June 1898 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1390)

548. Luiten, 'Political Engagement' (doc A163), pp 297–300

549. Luiten, 'Political Engagement' (doc A163), p 297

550. Sheridan to McKenzie, 15 December 1898 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1440)

551. Sheridan to McKenzie, 15 December 1898; McKenzie, minute, 21 December 1898 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p1440)

## 6.9 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The Crown was thus able to ‘dictate’ a price without negotiation, and its monopoly ‘precluded Muaupoko from any “market value”’.<sup>552</sup> The Crown even paid less than the 1896 valuation, which had been prepared for the commission by a firm of valuers.<sup>553</sup> The Land Purchase Department succeeded in obtaining all but three of the remaining 28 individual interests at this low price over the next six months.<sup>554</sup> The court partitioned Horowhenua 6 again in June 1899 when the Crown was ready to cut out its interests. It vested Horowhenua 6A (a total of 4,363 acres) in the Crown.<sup>555</sup> The purchase of a further 100-acre interest from Taitoko Ki Te Uruotu (Horowhenua 6C) was completed in 1900.<sup>556</sup> The two non-sellers were left with 100 and 57 acres respectively.<sup>557</sup> Coupled with the court’s decision to exclude many of the rerewaho from ownership of Horowhenua 11, those left out of the title in 1873 had only briefly regained ownership in the Horowhenua lands.

We turn next to consider the fraught and divisive task faced by Muaūpoko in 1898: deciding legal entitlements to their dwindling tribal heartland in Horowhenua 11.

### 6.9 FAILURE TO RESERVE HOROWHENUA 11 IN TRUST: INDIVIDUALISATION OF TITLE

#### 6.9.1 Finding a trust

The Native Appellate Court hearings on Horowhenua 11 took three months, from May to July 1897.<sup>558</sup> The first issue was the oft-debated question of whether Horowhenua 11 was held in trust by Warena Hunia and Te Keepa. Alexander McDonald and Wirihana Hunia continued to argue that no trust had been created in 1886.<sup>559</sup> McDonald pointed out that the court in 1886 was ‘wrong in making any order if it had been informed that there was a trust’ because it only had legal power to award land in absolute, individual ownership. Nonetheless, McDonald observed that ‘Kemp and Warena would be scoundrels and robbers if they defrauded the people, although No 11 vested in them absolutely’.<sup>560</sup> Wirihana Hunia noted that his brother Warena always intended to give part of Horowhenua 11 to the people and secure them in their homes, arguing that Te Keepa’s litigation had therefore been a ruinously expensive waste of time.<sup>561</sup> On the other side, witnesses such as Waata Muruahi and Hoani Puihi pointed out that the ‘State Farm was taken from us without our being consulted’. Muaūpoko had always maintained that Te Keepa and Warena were trustees, and the Hunia brothers had taken no action to put the

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552. Luiten, ‘Political Engagement’ (doc A163), p 298

553. AJHR, 1896, G-2, pp 343–344

554. Luiten, ‘Political Engagement’ (doc A163), pp 298–299

555. Young, ‘Muaupoko Land Alienation’ (doc A161), p 124; Luiten, ‘Political Engagement’ (doc A163), pp 298–299

556. Jane Luiten, answers to questions of clarification, October 2015 (doc A163(b)), p 5

557. Luiten, ‘Political Engagement’ (doc A163), p 299

558. Luiten, ‘Political Engagement’ (doc A163), p 271

559. AJHR, 1897, G-2, pp 57, 77

560. AJHR, 1897, G-2, p 57

561. AJHR, 1898, G-2A, pp 15–16

people back in the title. There was hope that Te Keepa had 'at last succeeded in getting Horowhenua back for the people.'<sup>562</sup>

The Native Appellate Court's decision on the existence of a trust was delivered on 4 May 1897. The court found that a trust existed, and that Warena and Te Keepa were 'only entitled to a beneficial ownership in common with others.'<sup>563</sup> The court relied not just on the evidence before it but also on the evidence previously given in the 1890 partition hearing, the 1891 rehearing, the Supreme Court (1894), and the Horowhenua commission (1896).<sup>564</sup> This finding could hardly have come as a surprise but it brought 'a sense of relief to the tribe after almost a decade of uncertainty.'<sup>565</sup>

### 6.9.2 Ending the trust

Jane Luiten commented:

One of the most significant provisions was the referral of relative interests in Horowhenua 11 to the Native Appellate Court. Having side-stepped the individualisation of their tribal estate for the best part of the nineteenth century, Muaupoko were now faced with yet another lengthy, expensive court proceeding which would lead them inexorably towards the minute partition of their land.<sup>566</sup>

The purpose of the Native Equitable Owners Act was not only to define the beneficiaries of trusts but to end those trusts and fully individualise the title. There was no provision for the individuals who had originally been placed in titles as absolute owners to become regular trustees with a properly defined trust.<sup>567</sup> Neither the Horowhenua Block Act 1896 nor the Native Land Court Act 1894 provided for Muaupoko to hold land in trust or to permanently reserve a tribal estate. As will be recalled, the royal commission had recommended that Horowhenua 11 be vested in the Public Trustee (see section 4.5.5(4)). The Government at first planned to implement this recommendation, vesting the block by statute in the Public Trustee as a native reserve. This provision of the 1896 Bill, however, was abandoned when the Government decided to revive the Equitable Owners Act and have the titles reinvestigated. Muaupoko were very unlikely to have preferred that kind of reserve in any case, because it would have taken all control away from them, but no alternative form of trust or reserve was inserted in the 1896 Act (see section 6.5.5). This meant that title to the tribal heartland would inevitably become fully individualised, making it vulnerable to piecemeal alienation. We consider this to have been a very serious and completely avoidable failure on the part of the Crown.

By 1897, Muaupoko seem to have accepted that individualisation could not be prevented. Te Keepa was ill, and he knew that the Government could not be relied

562. AJHR, 1898, G-2A, pp 13, 17

563. AJHR, 1898, G-2A, p 30

564. AJHR, 1898, G-2A, p 30

565. Luiten, 'Political Engagement' (doc A163), p 271

566. Luiten, 'Political Engagement' (doc A163), p 393

567. See the Native Equitable Owners Act 1886.



## 6.9.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

upon for ‘redressing the wrongs of my people.’<sup>568</sup> His final act in court was to bid farewell to the land and pass it ‘unreservedly to my people of Muaupoko’; he asked that his own name and that of his daughter, Wiki Keepa, should not be on the list. He told the court:

For six years I have been endeavouring to get justice for my people, and have only now succeeded. I and my legal adviser [Buller] tried many means, at great expense to myself, but this I do not regret, as my people are again on their land, and now they must protect themselves. I have to express my thanks to the Court for the pains it has taken to unravel these serious complications, and venture to hope that it will continue to do everything that is necessary to secure to each member of the tribe the portion of land to which he is entitled. If this is done no further trouble can arise.<sup>569</sup>

Te Keepa wanted ‘every resident member’ to have ‘his cultivations cut out and secured to him or her, and that the suburban part of the block should be divided equally as to area and value.’<sup>570</sup> But the tribe still hoped that communal title to their taonga, Lake Horowhenua and other waterways located in Horowhenua 11, could be preserved.<sup>571</sup> Te Keepa advised the court that the lake was ‘highly prized’. Muaupoko wanted Lake Horowhenua and three chains of land surrounding it to be reserved, vested in a trustee elected by the people. Te Keepa also hoped that ‘Ngakawau Lake’ could be similarly reserved, but that, he said, ‘is my own idea, not the people’s’. The Hōkio Stream and a chain on its north side were also to be reserved.<sup>572</sup>

Fortunately, by 1897 the native land laws did provide for pieces of land to be set aside as inalienable reserves for ‘religious, educational or other purposes of general or public utility.’<sup>573</sup> This provision had been available since the passage of the Native Trusts and Claims Definition and Registration Act in 1893, and it was mainly designed to provide for schools and churches. Claimant counsel submitted: ‘Who suggested using the 1893 Act is not known and Parliamentary debates on the legislation suggest that it was intended to be a means to sort out outstanding problems that had arisen in some land court orders, but not to be used to create new trusts in this way.’<sup>574</sup>

In any case, the 1893 Act served as a vehicle for reserving Lake Horowhenua and the Hōkio Stream, the ‘public utility’ being their use as tribal fishing grounds.<sup>575</sup> But the 1893 Act did not stretch to reserving the whole tribal heartland as intended by

568. AJHR, 1898, G-2A, p 152

569. AJHR, 1898, G-2A, p 152

570. AJHR, 1898, G-2A, p 146

571. AJHR, 1898, G-2A, pp 98, 100–101, 138, 146–147; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3: Lake Horowhenua issues, 19 February 2016 (paper 3.3.17(b)), pp 15–17

572. AJHR, 1898, G-2A, pp 146–147

573. Native Trusts and Claims Definition and Registration Act 1893, s7; claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(b)), p 19

574. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(b)), p 19

575. Luiten, ‘Political Engagement’ (doc A163), pp 287–288, 310; David Armstrong, ‘Lake Horowhenua and the Hōkio Stream, 1905–c1990’, May 2015, report commissioned by the Crown Forestry Rental Trust (doc A162), p 12



**A NOTE ON HEREORA AND HER CHILDREN**

As we discussed in chapter 1, the priority hearings of the Muaupoko claims showed the existence of tensions and divisions within the claimant community. The immediate cause of at least some of the division is the mandate process and the decision of a group within Muaupoko not to support the mandated Muaupoko Tribal Authority (MTA) in negotiations with the Crown. But, as will be evident from the material covered in this chapter, the ultimate cause of much tension and division may be traced back to the nineteenth century. In particular, the litigation of the 1890s, the loss of land, and the individualisation of title in the Horowhenua 11 block forced the tribe to define its membership in a way that was exclusive rather than inclusive. Ancestral and hapu rights were debated vigorously, then as now, but persons were excluded on the basis of whether they had 'ahi ka' as defined by Muaupoko at that time.

In our hearings, one consequence of this tension and the recent conflict over the mandate was for some witnesses and counsel to challenge the whakapapa of individuals supporting the MTA. In particular, Philip Taueki and witness Anne Hunt produced evidence claiming that Hereora, daughter of Taueki, was not the mother of Charles Broughton's children or of Te Raraku Hunia (by Hereora's marriage to Kawana Hunia). Counsel for the MTA then produced evidence in response. Some Muaupoko participating in our hearings and not supporting the MTA were also affected, such as Charles Rudd, who gave us his whakapapa from Hereora.

It is not the Tribunal's task to adjudicate on whakapapa, and nor is this Tribunal tasked with assessing Crown actions in respect of the MTA mandate, although both matters were traversed in evidence and submissions. We do not intend to assess the merits of this evidence produced about whakapapa, as no historical Crown actions are involved.

The reason we note it here is because, as historian witness Jane Luiten stated under cross-examination, there was never any question or doubt expressed in the multiple inquiries of the 1890s, from those who had personal knowledge of Hereora, Te Raraku Hunia, Te Ahuru Porotene (William Broughton), and the others involved, that these persons were the children of Hereora. We discuss Hereora and her children accordingly when discussing this historical material.<sup>1</sup>

1. Anne Hunt, 'The Missing Link: is Charles Broughton the brother in law of Ihaia Taueki', 22 April 2015 (doc B7); transcript 4.1.12, pp107–109; Philip Taueki, closing submissions, 12 February 2016 (paper 3.3.15) and submissions by way of reply, April 2016 (paper 3.3.31); Charles Rudd, brief of evidence, 16 November 2015 (doc C23); claimant counsel (Lyall and Thornton), closing submissions, 15 February 2016 (paper 3.3.19); claimant counsel (Bennion, Whiley, and Black), closing submissions, 15 February 2016 (paper 3.3.17(a)) and submissions by way of reply, 21 April 2016 (paper 3.3.33)

## 6.9.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Muaūpoko in 1886, and recommended by the Horowhenua commission in 1896. We do not intend to deal with the reservation of the lake and stream in detail here, as lake issues will be addressed in chapter 8. We simply note that the Crown had failed to provide for the reservation of the whole of Horowhenua 11 in trust for the tribe. The consequence of the Horowhenua Block Act 1896 was the vesting of the tribal heartland in 81 individual owners. As the Crown has conceded, individualisation made the land more susceptible to fragmentation and alienation, and undermined the tribal structures of Muaūpoko.<sup>576</sup>

We turn to the detail of that process next.

**6.9.3 Deciding entitlements to a dwindling tribal estate**

After the appellate court declared the existence of a trust on 4 May 1897, the next step was to determine the beneficial owners. The schedules of the 1896 Act had listed 191 potential owners: the 143 owners of the Horowhenua block as registered in 1873, and the 48 rerewaho found by the Horowhenua commission in 1896.<sup>577</sup> The court indicated that it would have to determine which of these 191 individuals could ‘satisfactorily establish that they are beneficially entitled.’<sup>578</sup> The judges asked for any objections to the names on the two lists rather than inquiring into every name. Even so, the result was three months of hearings to arrive at a final list of 81 names. As will be recalled, the Horowhenua commission decided that Horowhenua 11 belonged to 140 tribal members. This was a very different outcome from that arrived at in the appellate court in 1898.

According to Jane Luiten, most of the crucial decisions about entitlement to Horowhenua 11 were made out of court by Muaūpoko themselves. They held hui at Pipiriki in 1897 after the appellate court declared the existence of a trust. By this time, Ngāti Pāriri had rejoined the rest of the tribe and were no longer supporting the Hunia brothers.<sup>579</sup> Wirihana told the court in 1897: ‘I hear now that the reason the Ngatipariri left Warena and I was because we sold the State Farm and did not give them any of the proceeds.’<sup>580</sup> The group which did not participate in the hui was the children of Hereora, daughter of Taueki (see box).<sup>581</sup> Hoani Puihi explained to the court:

The main body of Muaupoko agree with me that all the permanent occupants of this land should share equally in it. If some get more than others there will be dissatisfaction. We came to this conclusion after we heard that the land was to go back to the people. The matter was discussed at the meeting-house, Pipiriki. Ihaia Taueki did not take part, nor did all the children of Hereora; they were disputing among themselves

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576. Crown counsel, closing submissions (paper 3.3.24), p 24

577. Horowhenua Block Act 1896, schs 2, 6

578. AJHR, 1898, G-2A, p 30

579. Luiten, ‘Political Engagement’ (doc A163), p 272

580. AJHR, 1898, G-2A, p 25

581. Luiten, ‘Political Engagement’ (doc A163), pp 271–275

as to whether they should set up a separate case or join the tribe. Some of them came to the meetings to listen.<sup>582</sup>

It is not surprising that Ihaia Taueki did not take part. He had been described in 1896 as too elderly and unwell to give evidence to the Horowhenua commission. He had become blind and deaf, and he died in February 1898.<sup>583</sup> The Taueki whānau (other than the children of Hereora) were represented in court by JM Fraser, as part of the tribal case.<sup>584</sup> The children of Hereora were represented by Rawiri Rota, who also claimed to include the wider Taueki whānau.<sup>585</sup>

The ‘combined hapu’ at Pipiriki resolved that entitlement to the tribal estate would be limited to the ‘ahi kā.’<sup>586</sup> Muaūpoko defined the ‘ahi kā’ as those of the 191 who were still alive at the time of partition in 1886 and living permanently on the Horowhenua 11 block. Each individual had to meet three criteria – they had to be:

- ▶ a registered owner or rerewaho in 1873 (191 names listed in the schedules of the Horowhenua Block Act 1896);
- ▶ still alive at the time of partition in 1886; and
- ▶ residing permanently on the Horowhenua 11 block.

Each of those individuals would receive an equal share.<sup>587</sup>

What this meant was that the successors of any registered owner or member of the rerewaho who had died by 1886 would be excluded. It also meant that whānau members could not keep the fires alight for siblings and other whānau members. Anyone who had married or moved away for other reasons was considered to have had their fires extinguished, even if they returned periodically.<sup>588</sup> The definition of ahi kā adopted in 1897–98 was extremely narrow. It was a distortion of tikanga, forced on Muaūpoko by the circumstances in which they found themselves, as we discuss further below.

Ms Luiten explained the impact of the criteria adopted by the tribe at their Pipiriki hui:

This criteria effectively halved the number of registered owners and rerewaho, excluding 99 of the 191 potential beneficial owners from Horowhenua 11. According to Kemp, the decision to restrict title to the living had emanated from him, ‘in order to prevent some of them obtaining too large a proportion of the land by succession to deceased owners.’ It also promised to debar those who Muaupoko objected to, on the grounds of no occupation, from gaining a stake in the tribal reserve through succession. Rhipeti Nireaha, for example, was a registered owner who, though born and raised at Horowhenua, had left the district when she married and therefore did not meet the tribe’s criteria of permanent occupation. The same criteria worked against

582. AJHR, 1898, G-2A, p108

583. Gilling, ‘Ihaia Taueki and Muaupoko Lands’ (doc A172), p 21

584. AJHR, 1898, G-2A, p153

585. AJHR, 1898, G-2A, p155

586. Luiten, ‘Political Engagement’ (doc A163), p272

587. Luiten, ‘Political Engagement’ (doc A163), pp 272–287

588. Luiten, ‘Political Engagement’ (doc A163), pp 272–287

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her two daughters, who had nonetheless formerly been included as rerewaho. The tribe's objection to Rhipeti Nireaha's inclusion, if upheld by the court, would have been undermined without the back-up stipulation about excluding the deceased, for in addition to her own status as registered owner in the 1873 title, Nireaha was also successor to four deceased Muaupoko residents.<sup>589</sup>

Te Raraku Hunia, on behalf of the descendants of Hereora, set up a separate case and proposed a new, much-debated criterion: that permanent residence included consideration of 'whether individual registered owners had fled or stayed in the conflict with Te Rauparaha'.<sup>590</sup>

Muaupoko's decision to limit rights to the tribal heartland in these ways, especially to such a tribal taonga as Lake Horowhenua, was controversial (now as well as then).<sup>591</sup> One advantage, however, was that – if successful – it would have enabled Muaupoko to avoid confronting issues of ancestral and hapu entitlement in the court. Disputes about the rights of Ngāti Pāriri and other such conflicts could be set to one side if an individual's entitlement was automatic upon inclusion in the list and residence at 1886. This is partly why Ngāti Pāriri and the other hapū were able to present a joint case to the court.

The great majority of Muaupoko supported the criteria agreed at Pipiriki and made common cause, represented in court by JM Fraser. Te Rangimairehau led the presentation of their case. Te Keepa supported the tribal case but was represented separately by Buller, perhaps mindful of the criticism made by the Horowhenua commission on that head. Hereora's children were also separately represented, presenting a different case to that of Te Keepa and the tribe.<sup>592</sup>

Five cases were presented by registered owners or their descendants who were to be excluded by the criteria agreed at Pipiriki:

- ▶ Wirihana Hunia and Himiona Kowhai, represented by Alexander McDonald, asserted ancestral rights through Pāriri. Hunia also asserted his own authority as rangatira. The main Muaupoko case held that Kāwana Hunia's successors had no rights in Horowhenua 11 because Kāwana Hunia had died in 1885, and his sons were not residents.<sup>593</sup>
- ▶ Rhipeti Nireaha, an 1873 registered owner who had been born and raised at Horowhenua but moved to the Wairarapa when she married Nireaha Tāmaki, was excluded by the tribe on that ground. She set up her own claim, joined by some of the owners of Horowhenua 4, 5, and 7. Those owners (from allied iwi) had been 'put on the hills'<sup>594</sup> in 1886 but now made a claim for inclusion in Horowhenua 11.<sup>595</sup> Others of Ngāti Hāmua, however, including Karaitiana Te Korou, indicated that they would not put in a claim because 'they were of

589. Luiten, 'Political Engagement' (doc A163), p 272

590. Luiten, 'Political Engagement' (doc A163), pp 273, 282–286

591. See, for example, Charles Rudd, brief of evidence, 16 November 2015 (doc C23), p 16.

592. Luiten, 'Political Engagement' (doc A163), pp 271–273; AJHR, 1898, G-2A, pp 153–154, 155

593. Luiten, 'Political Engagement' (doc A163), pp 274–275, 276–277, 281–282, 286

594. AJHR, 1898, G-2A, p 27; Luiten, 'Political Engagement' (doc A163), p 275

595. Luiten, 'Political Engagement' (doc A163), pp 272–274

opinion that the land belonged to Muaupoko Tuturu.<sup>596</sup> Hamuera Karaitiana represented this group, as well as 24 other registered owners. Many of these 24 owners had been 'provided for in 1886 as tribal members in Horowhenua 3, but . . . were now being excluded by Muaupoko, either because they had died prior to 1886, or because they did not live there.'<sup>597</sup>

- ▶ The successors of Peeti Te Aweawe (Horowhenua 7) and two other Rangitāne registered owners (one in Horowhenua 3 and one in Horowhenua 4) sought to have interests awarded in Horowhenua 11.<sup>598</sup>
- ▶ Nine registered owners excluded from Muaūpoko's list, mostly associated with Ngāti Apa, also claimed the right to be included in Horowhenua 11. They were joined by Manihera Te Rau of Ngāti Raukawa, who had married into Muaūpoko and been allotted a share of Horowhenua 3 in 1886. This group was represented by A Knocks.<sup>599</sup>
- ▶ Ria Raikokiritia, whose mother was of Muaūpoko, had lived with her parents at Horowhenua until 1851, when she married and moved to Parewanui. She set up her own case when the tribe rejected her claim. They maintained that her fires had grown cold despite frequent visits.<sup>600</sup>

Bryan Gilling described the court's process for determining entitlement:

There were then 10 different lists of names handed in to the court by the various parties, of those admitted and those disputed. These lists were read out in open court and there was extensive debate as to the relative rights of those named, generally on the basis of whether they had maintained *ahi kaa*.

The cases of those arguing over those lists then occupy most of the next 2 minute books.<sup>601</sup>

In our view, much of the tension and disputes evident in Muaūpoko today may be traced back to this divisive exercise. Jane Luiten explained that the tribe found it difficult to maintain the united front decided upon at Pipiriki:

In spite of their efforts, the debate over entitlement brought to the surface previously unspoken tensions surrounding ancestry and occupation. It also took place in the context of a fast-diminishing resource, the tribal estate of Horowhenua 11 having been whittled away since 1886 by the state farm sale, and the incursion of Block 14 west of the railway line.<sup>602</sup>

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596. AJHR, 1898, G-2A, pp 11, 29, 155. Karaitiana Te Korou and some others were represented by Hamuera Karaitiana. They did not make a claim and were in the list of 'persons objected to' by Hamuera Karaitiana's 'party'.

597. Luiten, 'Political Engagement' (doc A163), p 274

598. Luiten, 'Political Engagement' (doc A163), p 274

599. Luiten, 'Political Engagement' (doc A163), p 274

600. Luiten, 'Political Engagement' (doc A163), pp 274, 286

601. Gilling, 'The Ownership of Lake Horowhenua' (doc A173), pp 66-67

602. Luiten, 'Political Engagement' (doc A163), p 275

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As we noted above, the tribe tried to maximise the viability of individual shares by restricting entitlement to those who had been living there on a permanent basis since 1886. Each of those individuals would have an equal share of the land as well as rights in the lake. Tribal leaders at the time considered this the fairest way of dividing legal ownership of the Horowhenua block, but it excluded many who claimed rights in both the land and the tribal taonga, Lake Horowhenua. It was argued by some that those who had remained in unbroken occupation since the conflict of the 1820s were entitled to a greater share than those who had fled and then returned afterwards. Others argued that various ancestral rights should be given greater weight, and that the tribe's definition of 'ahi ka' or 'occupation' was not a customary one and was unfair. Nor did Muaūpoko's ahi kā strategy enable them to avoid disputes in court about ancestral and hapū rights. These arguments are still alive today and remain a point of division in the claimant community.

Te Hira Hill told us:

A lot of whānau reference the documents known as 'the G2s'. It is important to remember that our tūpuna who gave evidence at this time were doing so because they had to fight individually for their land in Court.

'The G2s' are a source of information for Muaūpoko but they also highlight how the Court made us fight each other for our lands. For this reason they can also be a really dangerous source of information that has caused a lot of the conflict between us to this day.<sup>603</sup>

In the end, the final decisions were made by the court, not by Muaūpoko. This is an important point to emphasise, as the court did not simply accept the majority Muaūpoko case. It delivered its decision in September 1898, more than a year after the case was closed in July 1897. The court did accept that 'restricting entitlement to the living permanent residents as of 1886' should be its 'guiding principle'.<sup>604</sup> These individuals were generally awarded 100 acres each, although there were some who received greater awards for various reasons. The court also agreed that the iwi who had been put up in the hills did not have rights in Horowhenua. The only exceptions were Peeti Te Aweawe and Waata Tohu (or Tamatea), who received 25 acres each.<sup>605</sup>

The court, however, refused to exclude all the Muaūpoko owners who had died between 1873 and 1886: 'many of the deceased were included, albeit with a smaller, 25-acre share'.<sup>606</sup> Some individuals were also included who had moved away from Horowhenua and had not returned on a full-time basis, such as Ria Raikokiritia, Rhipeti Nireaha, Paki Te Hunga, and Rora Korako (Te Keepa's sister). In part, this reflected a change of heart by Te Keepa. After hearing the evidence and pleas of various witnesses, he had moved away from the tribal position, 'advocating the

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603. Te Hira Hill, brief of evidence, 11 November 2015 (doc C2), p 4

604. Luiten, 'Political Engagement' (doc A163), p 290

605. Luiten, 'Political Engagement' (doc A163), pp 288, 289–290, 292–293

606. Luiten, 'Political Engagement' (doc A163), p 290



inclusion of all those who had been part of the early Muaupoko community, “whenever they are now”<sup>607</sup>.

The court also took the position that Muaupoko were defeated by Te Rauparaha and that three rangatira were entitled to a share or an enhanced share as a result, seemingly based on their roles in holding Horowhenua for Muaupoko:

- ▶ Taueki’s children, Ihaia and Hereora, were awarded 1,050 acres respectively, with Hereora’s children receiving 142 acres each when her share was divided (apart from one who received 50 acres and another (Te Raraku Hunia) who received 148 acres);
- ▶ Kāwana Hunia received 600 acres for his whānau (on top of the 1,500-acre State farm); and
- ▶ Te Keepa received 100 acres which would go to his daughter Wiki, even though she was not resident at Horowhenua and he had asked the court not to include them in the title.<sup>608</sup>

Thus, although the tribal case had given the court its ‘guiding principle’, many individuals who had been objected to during the hearings were included by the court. The resulting list of owners contained 81 individuals.<sup>609</sup> (For a list of the 81 owners, see appendix II.)

In all, only 79 of 156 Muaupoko owners of the wider Horowhenua block had ended up in the title for Horowhenua 11. This figure is slightly misleading, however, as not all family members’ shares were specified. Ihaia Taueki, for example, was awarded 1,050 acres for the ‘Ihaia Taueki family’. This included his sons, Hapeta and Haare, who were among the 191 owners of the Horowhenua block but not counted among the 81 named owners of Horowhenua 11. Similarly, Wirihana and Warena Hunia were among the 191 owners, but not named as two of the 81 (they would succeed to Kāwana Hunia’s share). Wiki Keepa was also in the list of 191 owners but not named separately from her father in the list of 81, to whose interest she would succeed.<sup>610</sup>

Some other whānau, however, had their members listed individually: Hereora’s eight children were listed separately in both the list of 81 and the list of 191 registered owners and rerewaho. It is not clear to us why the court’s approach varied.

The number of owners would also grow from 81, of course, when the court proceeded to identify successors to those among the 81 people who had died since 1886. But it is difficult to avoid the conclusion that a significant number of Muaupoko were disinherited in 1898, deprived of legal ownership of Horowhenua 11 and Lake Horowhenua itself, because of the pressure on the tribe’s surviving land base and its decision to restrict ownership accordingly.<sup>611</sup>

607. Luiten, ‘Political Engagement’ (doc A163), pp 286, 289–290; AJHR, 1898, G-2A, pp 147–152

608. Luiten, ‘Political Engagement’ (doc A163), pp 288–290

609. Luiten, ‘Political Engagement’ (doc A163), pp 291–293

610. See Luiten, ‘Political Engagement’ (doc A163), table 3, pp 291–293.

611. See Luiten, ‘Political Engagement’ (doc A163), table 3, pp 291–293.

## 6.9.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**6.9.4 The next step: partition**

Immediately after the individualisation of title, Horowhenua 11 was partitioned. We do not, however, propose to deal with it in this chapter. The partition process began in 1898 and was completed in 1901 with the Kawiu partition. By 1899, as we discussed above, the Crown had undertaken to stop purchasing Māori land. Private purchases were still banned. Instead, Māori would be given the opportunity to vest their land in Māori land councils, on which they were represented, for leasing to settlers. This was James Carroll's 'taihoa' policy. It seemed the dawn of a new era, in which Muaūpoko would have the opportunity to retain their ancestral land but still derive an income from it by leasing. The question of whether Muaūpoko would be able to engage successfully in the colonial economy in the twentieth century while retaining their partitioned land is addressed in the next chapter.

**6.10 THE 'STRONG MAN' NARRATIVE EMERGES**

The respective roles of three Muaūpoko leaders, Kāwana Hunia, Te Keepa Te Rangihwinui, and Ihaia Taueki, were hotly debated in our inquiry. From the evidence presented, three narratives emerged:

- ▶ Ihaia Taueki, as the son of Taueki, inherited the mana of the rangatira who had remained at Horowhenua when others fled, made the crucial agreement with Te Whatanui, and kept Muaūpoko fires alight in the Horowhenua lands, and hence was entitled to a primary leadership role;
- ▶ Kāwana Hunia, the firebrand who led Ngāti Apa and had sworn vengeance against Te Rauparaha's people, helped save Horowhenua when its ownership might have been awarded to Ngāti Raukawa in the 1870s, and hence was entitled to a primary leadership role; and
- ▶ Meiha Keepa Te Rangihwinui, staunch ally of the Crown and defender of his iwi, which included Muaūpoko, helped save Horowhenua when its ownership might have been awarded to Ngāti Raukawa in the 1870s, and on that basis – and empowered by the Native Land Court – played the primary leadership role in Horowhenua from 1873 until his death.

As a result of these narratives, the Native Appellate Court in 1897 agreed that Ihaia Taueki, Hereora, and Kāwana Hunia were entitled to a larger share than others of the tribal estate in Horowhenua 11. Also, despite claiming to disagree with the second and third of these narratives, the Horowhenua commission found that Hunia and Te Keepa were entitled to a much larger share in the Horowhenua lands than any other rangatira or individual of Muaūpoko. Hence, the Hunia whānau received the full purchase price of the State farm block, and Te Keepa of the township block (£6,000 each), endorsed by the Crown in both cases. Other important leaders, including Te Rangimairehau, kuia Makere Te Rou, and Hoani Puihi, have been overshadowed.

These narratives became entwined at the time and since with issues of ancestry, hapū, and ahi kā. For example, the Hunia whānau's claim to leadership of Ngāti

Pāiri encouraged Te Keepa and others to contest the rights of that hapū in the 1890s. Similarly, the ahi kā status of those with ancestral rights who visited periodically rather than lived at Horowhenua was challenged, and also the rights of those who left during the conflict of the 1820s and 1830s, returning – it was said – to fires kept alight by Taueki and the others who had stayed.

These same narratives were stated and contested in the inquiries of the 1890s and in our hearings in 2015. We hope that it will be clear from our analysis in this chapter that the divisions represented by these narratives arose mainly in the 1890s and not before. It seems to us that Te Keepa intervened in the 1870s on the invitation of Ihaia Taueki and resident chiefs because his alliance with (and experience in dealing with) the Crown was what the tribe needed, Ihaia Taueki having trod another path fighting for the Kīngitanga. And Muaūpoko all joined together in 1886 to decide the future of the Horowhenua lands, trusting themselves to three rangatira, Te Keepa, Warena Hunia, and Ihaia Taueki, to hold their lands as trustees. This was to prevent the bleeding of individual interests that crippled tribes elsewhere after their titles were individualised. Everyone was provided for in 1886, none were left out.

The story changed from the beginning of the 1890s when Muaūpoko faced the consequences of the Crown's subversion of their township dream and their development aspirations, and the native land laws' subversion of their tribal trusteeship. The Crown has accepted Treaty partner responsibilities for the latter point in our inquiry, but not the former. In any case, serious divisions and competing 'strong man' narratives emerged in the Native Land Court and the Horowhenua commission in the 1890s as Muaūpoko leaders fought each other and struggled to save their dwindling tribal estate. They also could no longer avoid assigning individual rights to it, as required by the law.

Even so, Muaūpoko came together in 1897 and found a way to sidestep the divisive narratives as sources of rights: each registered owner who was still alive in 1886 would simply receive an equal share of Horowhenua 11. This was problematic, of course, because it excluded a number of tribal members, but that was how Muaūpoko, exercising their tino rangatiratanga, chose to deal with the issue in 1897. If, as Māori had sought for decades, the Crown had provided legislation empowering tribal rūnanga, we are confident that Muaūpoko would have carried out this scheme which they had almost all agreed on. Internal divisions could have been controlled and their impacts minimised. Instead, the Native Land Court provided a forum in which the competing 'strong man' and ancestral narratives had to be fought out, and the court's decision only reflected the tribe's decision in part. The very narrow definition of ahi kā which Muaūpoko were forced to adopt in 1897 proved very divisive.

As we stated, we heard these same narratives in our inquiry, the mandate contest being the latest occasion for their revival. We have no comment to make about the mandate process and its effects, but we do wish to provide our comments on how the competing 'strong man' and ancestral narratives mostly took form in the 1890s.

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They reflected in large part the impact of the Crown's actions towards Muaūpoko and the fora it had provided for settling their entitlements. Muaūpoko could unite and rise above these divisions, as they showed in 1886 and 1897, but in customary fora and using out-of-court arrangements. The consequences of the Crown's refusal to allow Māori to hold their land collectively in trust or to decide their own entitlements have been lasting indeed.

**6.11 CONCLUSION AND FINDINGS**

The history recited in this chapter illustrates the harmful effects of the Crown's native land legislation, in combination with the Crown's unfair tactics for the purchase of land. In our view, many of the Crown's acts or omissions failed to meet Treaty standards.

**6.11.1 Horowhenua 3**

The Crown conceded that the individualisation of title made land more vulnerable to alienation, and harmed the tribal structures of Muaūpoko, but argued that no specific findings could be made about the alienation of individual interests in Horowhenua 3. Having reviewed the evidence relating to those alienations in the nineteenth century, we are satisfied that a finding of Treaty breach should be made.

The Crown's protection mechanism at the time was restrictions on alienation for lands which Māori owners and the court agreed should have such restrictions placed on the title. The tribe agreed in 1890 that almost all Horowhenua 3 sections should be restricted from alienation (other than for leasing), but the restrictions were too easily removed and proved a worthless form of protection. Three-fifths of the block had been sold piecemeal by 1900. It is important to note that some of these alienations took place after the Crown had reimposed pre-emption, and that the Crown itself purchased 835 acres in 1900, after it had imposed a nationwide ban on Crown purchases in the face of mass Māori opposition to excessive loss of land.

We find that the protection mechanism provided by the Crown was flawed and ineffective, and that the significant loss of land in Horowhenua 3 by 1900 was due in large part to the form of title available under the Crown's native land laws. These Crown acts and omissions were in breach of the principles of partnership and active protection. Muaūpoko were significantly prejudiced by the resultant loss of land in Horowhenua 3.

**6.11.2 The Crown's failure to provide an early remedy for the trust issues in Horowhenua 6, Horowhenua 11, and Horowhenua 12: 1890–95**

From as early as 1890, Judge Wilson confirmed for the Crown that Horowhenua 11 was supposed to have been held by Te Keepa and Warena Hunia for the rest of the tribe. Having been present at the partition hearing, the Native Department under-secretary (T W Lewis) knew that Horowhenua 6 and 12 were also supposed to have been held in trust, and advised Ministers accordingly. The Horowhenua

Subdivision Lands Bill 1891 would have provided an early remedy. But this Bill was not introduced to the House. Te Keepa, Ihaia Taueki, and other Muaūpoko leaders and tribal members made *repeated* appeals to the Crown for a remedy between 1890 and 1896. In sections 6.4 and 6.5.2, we have outlined the many petitions, draft Bills, Native Affairs Committee reports, and other opportunities for the Crown to have provided redress.

We agree with the claimants that each of their attempts to obtain redress was ‘a separate occasion where the Crown could have taken steps to properly protect Muaūpoko and their interests.’<sup>612</sup> In the claimants’ view, the Crown’s ‘refusal to take action to settle the trust issue at an early instance was a breach of active protection and good faith.’<sup>613</sup> We agree. The Crown repeatedly failed to institute remedies known to and contemplated by it during this period, in breach of the principles of active protection and partnership.

Muaūpoko were significantly prejudiced by this breach of Treaty principles. At the time, both Muaūpoko and officials observed that prolonged litigation would be expensive and damaging to the tribe, yet this was the inevitable outcome of the Crown’s failures to provide an early remedy.

One reason for these repeated failures was the Crown’s determination to protect its State farm purchase. We consider that next.

### 6.11.3 The State farm purchase

The Crown conceded that ‘it purchased land in Horowhenua No 11 from a single individual knowing that title to the block was disputed, and despite giving an assurance that the interests of the wider beneficiaries would be protected.’<sup>614</sup> This was an apt concession. McKenzie’s response to Wī Parata’s 1893 question in Parliament (section 6.4.6(2)) was an assurance ‘that if the Government did negotiate for the purchase of that block, they would take very good care, before a purchase was made, or before any money was paid over, that the interests of the beneficiaries should be protected, and that they should get the proper value for this land.’<sup>615</sup> The Minister’s undertaking was comprehensively broken in 1893–1896. In the end, the purchase had to be imposed on Muaūpoko by legislation, and all right-holders in Horowhenua 11 were deprived of the purchase money except for the Hunia whānau.

In our inquiry, the Crown conceded that it passed legislation in 1896 to permit the sale after Muaūpoko had ‘successfully challenged the purchase in the Supreme Court.’<sup>616</sup> Crown counsel also conceded that the cumulative effect of the Crown’s actions meant that the Crown had failed to actively protect the interests of Muaūpoko in Horowhenua 11, in breach of Treaty principles.<sup>617</sup>

We agree that the State farm purchase was a breach of the Treaty guarantees, and of the principles of partnership and active protection. Muaūpoko were prejudiced

612. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 43–44

613. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 42

614. Crown counsel, closing submissions (paper 3.3.24), p 178

615. NZPD, 1893, vol 80, p 461

616. Crown counsel, closing submissions (paper 3.3.24), p 178

617. Crown counsel, closing submissions (paper 3.3.24), pp 178–179



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by the loss of this land, which was – to all intents and purposes – taken from them by legislation. The prejudice was exacerbated by the fact that the land was considered some of the best arable land in the Horowhenua 11 block (which contained a lot of poor land), and that the Crown acquired far more land than was necessary for its State farm.

Further, the State farm purchase in 1893 had the effect of making the Crown a staunch defender of Warena Hunia's land transfer title, prolonging the expensive contest over Horowhenua 11. It also resulted in a feud between the Minister of Lands, Jock McKenzie, and Sir Walter Buller (and also Te Keepa). This, too, prolonged the expensive contest and had serious consequences for Muaūpoko in respect of Horowhenua 14.

**6.11.4 The Crown's nullification of legal remedies**

Expensive litigation was forced on Muaūpoko as a result of the Crown's failure to provide an early remedy in respect of the trust over Horowhenua 11. Yet, in 1895–96, the Crown intervened to nullify the outcomes of Muaūpoko's legal contest over Horowhenua 11 in the Supreme Court and Court of Appeal. The proceedings were stayed by the Horowhenua Block Act 1895 and then declared to be 'void and of no effect' by section 14 of the Horowhenua Block Act 1896.

This statutory interference in the tribe's legal remedies was criticised in Parliament at the time. We accept the point that the courts had only provided partial redress in respect of the State farm purchase, and that the courts' remedy only provided for Horowhenua 11 and not the other trust blocks (Horowhenua 6 and Horowhenua 12). Nonetheless, the Crown's intervention was motivated by its efforts to protect its State farm purchase and its recognition of (and payment to) Warena Hunia as vendor. In other words, the court had found the sale of the State farm block to have been made by a person who claimed 'falsely and fraudulently' to be the owner,<sup>618</sup> and so the Crown intervened to protect its interest in this purchase.

We find that the Crown deprived Muaūpoko of their right to enjoy the benefits of court orders in their favour, which was not consistent with their article 3 rights as citizens. We agree with the claimants that this 'unwarranted interference in Muaūpoko's constitutional rights was yet a further breach of Treaty principles of good faith and active protection.'<sup>619</sup>

**6.11.5 The establishment of the Horowhenua commission**

We agree with the claimants that the Horowhenua commission was not really necessary to identify appropriate remedies for Horowhenua 11, Horowhenua 6, and Horowhenua 12. As we set out in sections 6.5.1 and 6.5.2, remedies had already been identified for all three blocks, and the courts were in the process of providing a remedy for Horowhenua 11. Where Muaūpoko perhaps stood to benefit from a commission of inquiry, however, was in respect of Horowhenua 2, the township sale, about which unresolved grievances existed.

618. *Warena Hunia v Meiha Keepa* (1894) 14 NZLR 71, 94 (SC, CA)

619. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), p 51



Crown counsel accepted that Muaūpoko were not consulted about the commission or the charge of the commission's costs against their lands.<sup>620</sup> But the Crown did not accept that the commission and its establishment was a breach of the Treaty, or that its members were biased.

We agree that there is no evidence of conscious bias or political interference with the commission. But Muaūpoko were not consulted about the terms of reference; that decision was made by the Crown unilaterally. Settler interests did influence the Crown-appointed Pākehā commissioners, unchecked by the presence of any Māori members or Māori expertise. In our view, this lack of balance on the commission affected its findings and recommendations.

In Treaty terms, the principle of partnership required the Crown to consult Muaūpoko as to whether a commission of inquiry was an appropriate means of determining remedies. A good Treaty partner would also have consulted about the scope and powers of the commission, and ensured that Māori expertise was represented on the commission. As will be recalled from section 6.4.10, the decision to establish a commission (instead of empowering the Native Land Court to investigate the trusts and readmit owners to the titles) was only a very last-minute substitution. Muaūpoko may well have preferred the more immediate remedy offered by the Horowhenua Block Bill 1895 in its original form. We find the manner in which the Crown established the commission in breach of the principle of partnership.

Muaūpoko were prejudiced because a ready remedy was denied to them, and additional – costly and ultimately futile – litigation was forced upon them in the form of the commission's inquiry.

#### **6.11.6 Failure to consult Muaūpoko about the commissioners' recommendations**

As we discussed in section 6.5, the Horowhenua commission made its recommendations without hearing Muaūpoko on, for example, which lands they wished to retain. The Crown then decided unilaterally which of the commission's recommendations should be adopted, and inserted them in a Bill. The Crown's approach was extremely draconian:

- ▶ Horowhenua 12 was to be compulsorily purchased, with most of the proceeds to be kept by the Crown to pay for the commission;
- ▶ Horowhenua 14 was to be compulsorily purchased;
- ▶ the State farm purchase was to be completed, with the proceeds limited to the Hunia whānau; and
- ▶ Horowhenua 11 was to be compulsorily vested in the Public Trustee as a native reserve under the Native Reserves Act 1882, and the Trustee was to sell an additional 1,500 acres of Horowhenua 11 to the Crown.

Most of the commission's recommendations were eventually jettisoned, however, because the Government knew it could not get the Bill through the Council. In its final form, the Horowhenua Block Act 1896 still provided for the compulsory acquisition of Horowhenua 12 and the State farm block, but otherwise required

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620. Crown counsel, closing submissions (paper 3.3.24), p 183

6.11.7 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

the question of trusts and entitlements to be decided all over again in the Native Appellate Court.

Muaūpoko were not consulted about this outcome either, even though they would have to bear the costs of the resultant litigation. Much of the Horowhenua commission's inquiry would now have to be repeated. As a result, the 1896 inquiry (as far as Muaūpoko were concerned) had been almost entirely futile. Also, no form of trust or collective management mechanism was provided for in the final version of the Horowhenua Block Act 1896.

The Crown's failure to consult Muaūpoko or provide more effectively for their interests (by the inclusion of trust and reserve mechanisms) was in breach of the partnership principle and the Crown's duty to actively protect Muaūpoko and their lands.

**6.11.7 The Crown's acquisition of Horowhenua 12**

In our inquiry, the Crown conceded that it acquired 20 per cent of the Horowhenua block to pay for a commission about which Muaūpoko were not consulted (including no consultation as to whether they should bear its costs).<sup>621</sup> In our view, this submission should have referred to the whole of Horowhenua 12 (25 per cent of the block), as the entire block was purchased compulsorily. Crown counsel also stated: 'The Crown has conceded that the manner in which it acquired Horowhenua No 12 to pay for the royal commission was a breach of the Treaty and its principles.'<sup>622</sup>

Not only did the Horowhenua Block Act 1896 confiscate Horowhenua 12, the Crown set the price per acre unfairly low – the Crown had offered almost twice as much when it tried to buy the block in 1892 – and so the proportion of the purchase money retained by the Crown was maximised. We are not sure what happened to the survey lien or whether Muaūpoko were paid the small amount left over after the cost of the commission was deducted.

The Crown has conceded that its compulsory acquisition of Horowhenua 12 was in breach of Treaty principles, and we agree.

Muaūpoko were prejudiced by the loss of their mountain block, which was very important to their tribal identity, contained the spiritual lake Hapuakorari, and provided forest resources important to their physical and cultural survival.

**6.11.8 The Crown's acquisition of Horowhenua 6 from the rerewaho**

On the Horowhenua commission's recommendation, the Crown purchased individual interests in Horowhenua 6, acquiring almost the whole block within two years. Crown counsel conceded that the cumulative effect of the Crown's actions, including its purchasing and the impact of its native land laws, has left Muaūpoko virtually landless. On the other hand, the Crown argued that there was insufficient evidence about the alienation of Horowhenua 6 for the Tribunal to make any specific findings about that block.<sup>623</sup>

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621. Crown counsel, closing submissions (paper 3.3.24), p183

622. Crown counsel, closing submissions (paper 3.3.24), p179

623. Crown counsel, closing submissions (paper 3.3.24), p169

In our view, it is clear that the Crown's laws stacked the deck against the individual owners of Horowhenua 6, who had previously been denied the right to obtain any benefit from their lands for many years:

- ▶ The Native Land Court Act 1894 imposed a Crown monopoly on the Horowhenua 6 block, which meant that the owners could not lease it to settlers for an income (the purpose for which it was set aside). In other words, having finally obtained their land after a long delay, they could not obtain the intended benefit from it. The owners' only chance to raise money was to sell to the Crown.
- ▶ The Native Land Court Act 1894 imposed a Crown monopoly which meant that the Crown could dictate the price it paid, excluding any opportunity for a market price for the owners of Horowhenua 6.
- ▶ The Crown purchased individual interests piecemeal, and the owners of Horowhenua 6 had no legal mechanism enabling them to bargain collectively with the Crown to establish the terms of sale or a price for their lands.

Further, we note that the Crown completed this purchase in 1899, just as it was about to suspend Crown purchasing nationwide in the face of mass Māori opposition to the extent of land loss.

We find the Crown's purchase of Horowhenua 6 in all these circumstances to have been in breach of the principles of partnership and active protection. The rere-waho were significantly prejudiced by these Crown acts or omissions, as a result of which many of them lost their last connection with their tribal homeland.

#### **6.11.9 The loss of Horowhenua 14**

The issue of Horowhenua 14 was fraught politically at the time. It is difficult today to uncover the truth about whether or not this land was originally to have been held by Te Keepa in trust. What is clear is that the litigation pursued by the Crown in 1896–97 was politically motivated, as the Public Trustee stated in 1897.

We accept that Muaūpoko never consented in 1886 to the inclusion of Lake Waiwiri in Horowhenua 14. Also, Te Keepa admitted that others were interested in the land. Muaūpoko retained access to Waiwiri during his tenure. Ultimately, however, the block had to be sold to pay the costs of tribal litigation – litigation which would have been avoided entirely if the Crown had provided an appropriate remedy for Horowhenua 11 earlier. The Crown's 'sacred duty' to protect Muaūpoko interests in this block, as it was put at the time, did not extend to buying it in 1899 for the purpose of returning it to the tribe.

On balance, we accept that the actions of Buller and Te Keepa contributed to the loss of this block for Muaūpoko, but the primary responsibility rests with the Crown because of:

- ▶ the faults in its native land laws which failed to provide proper trust mechanisms;
- ▶ its failure to provide an early remedy for the disputed trusts despite repeated appeals from Muaūpoko; and

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- ▶ its pursuit of costly, pointless litigation over Horowhenua 14 *after* Muaūpoko's almost unanimous decision in 1896 that they had intended it for Te Keepa alone.

We find the Crown's actions to have breached the principles of partnership and active protection. Muaūpoko were prejudiced in particular by the loss of their taonga, Waiwiri, which became known as 'Buller's lake' after it passed out of their control.

**6.11.10 The individualisation of title in Horowhenua 11 and the divisive effects of the native land laws**

In 1873 and 1886, Muaūpoko exercised their rangatiratanga to settle their own entitlements in the Horowhenua block out of court. On both occasions, they took an inclusive rather than exclusive approach. The rerewaho, for example, had been mistakenly omitted in 1873 and were provided for in 1886. Any disputes about hapū or individual entitlements were resolved by the tribe before presenting their decisions to the court. But the success of this approach was undermined by the form of title that had been obtained. In particular, the dispute between Te Keepa and the Hunia brothers in the 1890s was cast as a dispute between Ngāti Pāhiri and other hapū. The petitions and litigation of the 1890s, starting with the partition hearings of 1890, saw the emergence of conflicting hapu narratives as to ancestral rights – narratives which had not figured in the consensus decisions of 1873 and 1886. By the time the title to Horowhenua 11 was fully individualised in 1898, with the court's selection of 81 owners, the divisions were very pronounced.

Even so, almost the whole tribe (including Ngāti Pāhiri) came together out of court in 1897 to agree a basis for entitlement to Horowhenua 11: ownership would be for those of the 1873 list of owners who were still alive in 1886, and who resided permanently on the land. This consensus was challenged in court by Hereora's children and others who felt this definition of 'ahi kaa' was unfairly narrow and had insufficient regard to ancestral rights. The outcome was very divisive, and remains so today. In particular, narratives about 'strong men' were advocated in the court and accepted as the basis for greater entitlements by the judge.

We accept that there was some Muaūpoko agency in these matters, but ultimately the responsibility lies with the Crown's native land laws, for failing to provide an effective trust mechanism or corporate form of title which – in the circumstances – would have assisted Muaūpoko with both resolving disputed entitlements and the retention and development of the land. A form of trust was by this time available for sites of significance, which Muaūpoko were able to take advantage of for Lake Horowhenua. But there was no broader trust mechanism, the mechanism which Muaūpoko collectively had favoured since 1873. Such a mechanism should have been included in the Horowhenua Block Act 1896. Alternatively, some way of reserving Horowhenua 11 for the tribe ought to have been inserted in that Act, as the Horowhenua commission recommended – but without any element of compulsion.

Instead, full individualisation of title occurred in 1897, soon followed by excessive partitioning. Here, we reiterate our finding that the native land laws, in particular the Horowhenua Block Act 1896, were not consistent with Treaty principles. Muaūpoko were significantly prejudiced thereby.

In the next chapter, we turn to the question of what happened to Muaūpoko's remaining Horowhenua lands in the twentieth century.





CHAPTER 7

**TWENTIETH-CENTURY LAND ISSUES**

**He Oriori mō Te Rara-o-te-Rangi**

*Kāti, e tama, te noho i tō whare,  
e puta ki waho rā, kia haere tāua,  
ngā parae i takoto i waho o Whakaari,  
kia uiui mai koe, ko wai tō ingoa?  
māu e kī atu, ko Te Rara-o-te-Rangi,  
kei kī mai te wareware,  
ka pau te whakanoa, e te tini, e te mano,*

*Nōku ia nei, nō te kahui pepe,  
te roa Wairerewa,  
kei whea tō tipuna?  
Hei whakawehe mai  
i muri anō Whakatau-potiki,  
nāna i tokotoko te rangi i runga nei,  
ka puta koe, ki te whaiao ki te ao mārāma.*

*Hikaka te haere, ki runga Taikorua,  
pūkana ō karu, ki roto o Manawatū,  
kei ō mātua e tū noa mai rā i te one o te riri, ka ngaro te tangata*

*Aronui te haere, ki roto o Horowhenua,  
kia pōwhiri mai koe i ō Whaea,  
e Rau a te Waka, ka paoa te rangi te rau a te huia, he noa te tinana,  
tērā tō piki, he hokioi i runga,  
ngā manu hunahuna,  
kāhore i kitea e te tini, e te mano  
Kia takaro koe, ngā takutai,  
e takoto i waho o Waiwiri, i roto o Waikawa,  
ka eke koe, ki runga o Pukehou,  
ka whakamau, e tama, ki waho o Raukawa,*

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*ko ngā moana rā i whakahana noa rā,  
ō Tīpuna, i te kakau o te hoe,  
ngaro rawa atu ki Hawaiki.<sup>1</sup>*

**7.1 INTRODUCTION**

In this chapter of our report, we consider Muaūpoko claims about twentieth-century land loss. By the end of 1900, tribal members only retained about one-third of the original Horowhenua block, held in individual interests. At the time of our hearings in 2015, Muaūpoko owners held some of their lands in trust but the sum total of Māori freehold land was only about 10 per cent of the original block.

In closing submissions, the Crown made the following relevant concession:

The Crown acknowledges that the cumulative effect of its actions and omissions, including Crown purchasing, public works takings and the operation and impact of the native land laws, has left Muaūpoko virtually landless. The Crown's failure to ensure that Muaūpoko retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.<sup>2</sup>

In section 7.2, we assess the statistical information underlying this concession, largely drawing on a report prepared for the claimants by Dr Grant Young.<sup>3</sup> We do not, however, examine the Treaty consistency of the various modes of alienation which resulted in Muaūpoko landlessness. By far the great majority of land was lost as a result of private purchases. We lacked sufficient evidence, however, to assess the effectiveness of the mechanisms and statutory protections enacted in legislation by the Crown to govern and administer such private purchases. Dr Young was not able to research the files relating to Horowhenua in depth on this matter, and his report was focused on a quantitative analysis of alienation data.<sup>4</sup> This chapter, therefore, discusses the *extent* of Muaūpoko land loss, and the Crown's general responsibility for Muaūpoko landlessness, in light of the Crown's concessions.

We also lacked sufficient evidence to assess broader twentieth-century land issues, such as the process of partition; the role of Māori land boards and land councils; leasing; support for Māori farming; public works takings; rating; and consolidation

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1. 'This oriori was composed by Te Hakeke, a famous ancestor of Ngāti Apa and Muaūpoko descent that lived during the time of Te Rauparaha. During the fighting between Ngāti Toarangatira and the tangata whenua of this region, Te Hakeke was taken captive by Ngāti Toarangatira and was carried off to Te Waewae Kāpiti ā Tara rāua ko Rangitāne to live under Te Rauparaha. However, in time, Te Hakeke was released and returned to Rangitikei to live. Despite his release, Te Hakeke maintained his anger at the loss of his peoples' land and at the birth of his son, composed this song to encourage the boy to seek vengeance for the damage done to his people. However, Te Rara o te Rangi died as a small child and the reign was passed down to his younger sibling, Kāwana Hunia': Sian Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko', not dated (doc A15(a)), pp [21]–[22]

2. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 24

3. Grant Young, 'Muaūpoko Land Alienation Report', August 2015 (doc A161)

4. Young, 'Muaūpoko Land Alienation' (doc A161), pp 6, 9–10, 45–50; transcript 4.1.13, pp 84–85; Grant Young, answers to questions in writing, 14 January 2016 (doc A161(d)), pp 6–7

schemes. For that reason, we leave these issues and the various modes of alienation to be considered later in our inquiry, when we examine twentieth-century land issues more generally.

There are two exceptions. There was sufficient evidence to deal more fully with two of Muaūpoko's specific grievances. In section 7.3, we examine claims about the creation and administration of a native township at Hōkio on 40 acres of Horowhenua 11B42. In section 7.4, we assess the Crown's last large land purchase at Horowhenua: the purchase of 1,088 acres of highly prized coastal land in 1928 (Horowhenua 11B42C1).

Finally, in section 7.5, we summarise our findings.

We turn first to our statistical analysis of twentieth-century Muaūpoko land loss.

## 7.2 MUAŪPOKO LAND LOSS IN THE TWENTIETH CENTURY

### 7.2.1 Introduction

As noted above, the Crown conceded that it did not ensure Muaūpoko retained sufficient land for their present and future needs, and that as a result of its actions and omissions Muaūpoko are now virtually landless, in breach of the Treaty and its principles.<sup>5</sup>

In order to assess the Crown's concessions, in this section we look at twentieth-century land loss in the three blocks where Muaūpoko still retained land: Horowhenua 3, 6, and 11. At the beginning of the century, three-quarters of Muaūpoko's remaining land interests were located in Horowhenua 11, the tribal homeland. The other quarter was made up of partitioned sections in Horowhenua 3, along with a very small portion of Horowhenua 6.

We have limited our discussion to a statistical analysis of Muaūpoko land loss in the twentieth century. After setting out the land retained by Muaūpoko at the end of 1900, our numerical analysis is organised by method of alienation. We discuss in turn the amounts of land lost by way of private purchasing, Crown purchasing, the vesting of land for non-payment of rates, public works takings, and the conversion of 'uneconomic interests'. We then examine the results of three processes which affected the status of Muaūpoko land, but did not necessarily lead to land loss: the vesting of land in Māori land councils and Māori land boards, 'Europeanisation' of Māori land titles, and the establishment of a native township. The Hōkio native township is further examined below in section 7.4. Finally, this section looks at the amount of land in Muaūpoko ownership in 2015, at the time of our hearings.

Our analysis is based primarily on the alienation data provided in Dr Young's research report,<sup>6</sup> with some additional information from the report prepared by Jane Luiten and Kesaia Walker.<sup>7</sup> The data is not without its limitations. Dr Young

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5. Crown counsel, closing submissions (paper 3.3.24), p 24

6. Young, 'Muaūpoko Land Alienation' (doc A161)

7. Jane Luiten with Kesaia Walker, 'Muaupoko Land Alienation and Political Engagement Report', August 2015 (doc A163), pp 324–389. Although in earlier chapters we attribute this report to Ms Luiten, here we refer to both authors, as Ms Walker was primarily responsible for coverage of twentieth century land issues.

## 7.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

said he found Native Land Court records prior to 1909 fragmented and inconsistent, and also had trouble locating district Māori land board alienation files. Nevertheless, Dr Young was able to collect data for 51,562 acres across a block of 52,460 acres, leaving a difference of 1.7 per cent or 898 acres, which he regarded as statistically insignificant.<sup>8</sup>

We begin our discussion with a brief summary of the parties' arguments.

**7.2.2 The parties' arguments****(1) The claimants' case**

The issue of twentieth-century land loss received limited attention from claimant counsel. Only counsel for Wai 52 and Wai 2139 discussed it in any detail.<sup>9</sup> The summary that follows is drawn from their closing submissions.

Claimant counsel accepted the Crown's concession that it failed to ensure that Muaūpoko retained enough land for their present and future needs, and that this was in breach of the Treaty.<sup>10</sup>

Counsel paid most attention to Horowhenua 11, which by the end of 1900 contained the bulk of Muaūpoko's remaining land base. This was Muaūpoko's 'tribal heartland', where their coastal lands, primary residences, and resource areas were located. Counsel cited with approval Luiten and Walker's description of the block's partitioning in 1898, which resulted in 'the close apportionment of the relatively small areas of arable land into 68 sections ranging from half an acre to 433 acres, and the fracturing of already modest individual shares over multiple locations.'<sup>11</sup>

Using alienation data sourced from Dr Young's research report, counsel argued that in the decade to 1910 Muaūpoko resisted the pressure to sell their Horowhenua 11 lands. However, counsel identified a 'rapid period of alienation' from 1910 to 1930, a time that coincided with further partitions of land within the block, and the introduction of rating liabilities on Māori landowners.<sup>12</sup>

On Horowhenua 3, counsel submitted that debt and economic uncertainty arising from nineteenth-century litigation over Muaūpoko's tribal trusts were major factors in the rapid alienation of land within the block after 1890. Private debt accumulated by individual Muaūpoko over this period was another key contributing factor. Counsel again supported this submission with data sourced from Dr Young's research report, showing that the vast majority of alienations in Horowhenua 3

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8. Dr Young attributed this gap to land used for roading, which was not included in his sources, and inaccuracies arising from the calculation of surveyed land areas: Young, 'Muaūpoko Land Alienation' (doc A161), pp 9–11.

9. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4, post-1898 issues, 17 February 2016 (paper 3.3.17(c)), pp 1–37

10. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), p 21

11. Luiten and Walker, 'Political Engagement' (doc A163), p 321 (claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), p 9)

12. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), p 10

occurred between 1890 and 1910, during and immediately after the conclusion of the Horowhenua block litigation.<sup>13</sup>

On Horowhenua 6, counsel noted that the vast majority of the block's acreage was lost by 1899 as a result of the Crown's aggressive purchasing of individual Muaūpoko interests. Counsel also claimed that this was a significant loss to Muaūpoko because of the block's value as a forestry resource.<sup>14</sup>

### **(2) *The Crown's case***

The Crown's submissions did not discuss twentieth-century land issues in any great detail. Although Crown counsel discussed a number of land tenure and alienation issues relating to Horowhenua 3, 6, and 11, they did so primarily in relation to the nineteenth century.<sup>15</sup>

However, the Crown did make a series of generic concessions about the effects on Muaūpoko of its nineteenth-century native land laws and other acts and omissions, which have a bearing on issues of twentieth-century land loss.

As noted in the introduction to this chapter, the Crown conceded that 'the cumulative effect of its actions and omissions, including Crown purchasing, public works takings, and the operation and impact of the native land laws, has left Muaūpoko virtually landless.'<sup>16</sup>

The Crown further conceded that its 'failure to ensure that Muaūpoko retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.'<sup>17</sup>

### **7.2.3 Muaūpoko landholdings by the end of 1900**

By the beginning of the twentieth century Muaūpoko retained possession of roughly 17,878 acres, or just over one-third of the original 52,460-acre Horowhenua block. Three-quarters of this land, around 13,475 acres, was concentrated within Horowhenua 11. The other quarter was comprised of approximately 4,246 acres in Horowhenua 3, and 154 acres in Horowhenua 6.<sup>18</sup>

Since we are concentrating on lands in Muaūpoko ownership within the Horowhenua block, we have differentiated between these and lands awarded or gifted to other iwi and hapū. This means that we have excluded from our analysis 2,293 acres located within Horowhenua blocks 4, 5, 7, 8, and 9.<sup>19</sup>

Horowhenua 4, 5, 7, and 8 together amounted to 1,093 acres. As we described in chapter 5, these blocks were referred to by Muaūpoko as 'pataka' ('storehouses' for

13. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), pp7–8; Young, 'Muaūpoko Land Alienation' (doc A161); Grant Young, indexed appendices to post-hearing evidence, 14 January 2016 (doc A161(d)(i)), app A

14. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), p 9

15. Crown counsel, closing submissions (paper 3.3.24), pp169, 172–179

16. Crown counsel, closing submissions (paper 3.3.24), p 24

17. Crown counsel, closing submissions (paper 3.3.24), p 24

18. Figures calculated from Young, 'Muaūpoko Land Alienation' (doc A161), pp 33–34, 52–59.

19. Young, 'Muaūpoko Land Alienation' (doc A161), pp122–125

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the removal of claims considered not part of the tribal title).<sup>20</sup> At the 1886 Native Land Court partition hearing, the four blocks were awarded to individuals of Ngāti Hāmua, Ngāti Kahungunu, Rangitāne, and Ngāti Apa who had been awarded undivided ownership interests in the Horowhenua block.<sup>21</sup> Muaūpoko sought to locate these individual interests ‘into the mountains’ east of Levin, distant from their own existing Horowhenua 11 tribal residence.<sup>22</sup>

At the same 1886 partition hearing, the 1,200 acres of Horowhenua 9 were awarded to Te Keepa for transfer to the descendants of Te Whatanui of Ngāti Raukawa.<sup>23</sup> As noted in earlier chapters, Ngāti Raukawa claims about Horowhenua 9 and the Horowhenua block more generally will be addressed later in our inquiry.

**(1) Horowhenua 11: the tribal heartland**

- ▶ Located to the west of the Wellington–Manawatū railway, Horowhenua 11 contained the ancient kāinga of Muaūpoko along with their cultivations, eel fisheries, and their prized remaining taonga: Lake Horowhenua.
- ▶ According to evidence given to the 1896 Horowhenua commission, the block was originally estimated at 16,407 acres, however the removal of land for various other Horowhenua partitions, together with the Crown’s 1896 State farm purchase, left some 13,475 acres in Muaūpoko ownership at the start of the twentieth century.<sup>24</sup>
- ▶ In 1898, the Native Appellate Court awarded Horowhenua 11 to 81 owners and defined the interest of each owner, as we discussed in section 6.9.3.<sup>25</sup>
- ▶ By 1903, the entire Horowhenua 11 block had been partitioned, and the resulting parts vested in multiple or single ownership. Effort had been made to ensure that land suitable for cultivation was divided into family-owned parcels, and that each owner had at least some fertile land. However, this meant that most owners now held lands in sections of varying sizes all over the original block.<sup>26</sup>

**(2) Horowhenua 3 and 6**

By 1900, Muaūpoko retained approximately 4,246 acres in Horowhenua 3 and 157 acres in Horowhenua 6.<sup>27</sup>

Both blocks were situated between the railway and the forested western ridgeline of the Tararua Ranges, remote from existing Muaūpoko settlement. The tribe had

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20. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 159–160, 273

21. Some claimants may identify Ngāti Hāmua individuals as Muaūpoko. As stated in chapter 2, it is not for the Tribunal to determine who is or is not Muaūpoko.

22. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 122–131; Luiten and Walker, ‘Political Engagement’ (doc A163), pp 159, 275

23. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 160–162

24. ‘Minutes of proceedings and evidence re division xiv of the Horowhenua block’, AJHR, 1897, G-2, pp 118–119, 138

25. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 288–294

26. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 300–319

27. Figures calculated from Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 33–34, 52–59.



envisioned these blocks as a means of leasehold income or ‘maintenance’, rather than for their own occupation.<sup>28</sup>

In 1886, Horowhenua 3 was set aside to provide 105-acre blocks for its 106 registered Muaūpoko owners, although it was not subdivided at that point. Horowhenua 6 was likewise set aside to allocate the same sized blocks for the 44 Muaūpoko ‘rere-waho’, who had been left out of previous lists of owners (see section 5.7).

By 1900 heavy debt had contributed to the transfer of over three-fifths (around 6,884 acres) of the 11,130-acre Horowhenua 3 block to the Crown and private purchasers, and 4,463 acres from Horowhenua 6 to the Crown (see sections 6.3 and 6.8).<sup>29</sup>

#### 7.2.4 Methods of land loss during the twentieth century

##### (1) Introduction

According to Dr Young’s figures, during the twentieth century Muaūpoko lost ownership of some 63 per cent of their 1900 landholdings (about 11,333 of 17,878 acres), mainly through private and Crown purchasing, with some public works takings and other statutory acquisitions.<sup>30</sup>

At the time of our hearings in 2015, 5,288 of the 17,878 acres retained by Muaūpoko in 1900 was still categorised as Māori freehold. By this measure, during the twentieth century 70 per cent of Muaūpoko’s land had been sold, transferred, or otherwise removed from Māori freehold status. As we discuss below, some of this land may still be general land owned by Muaūpoko landowners.

The methods of land loss for Horowhenua 3, 6, and 11 are summarised in table 7.1 below. The table displays land in Muaūpoko ownership in 1900, and each category of land alienation, including private purchasing, Crown purchasing, public works takings, vesting for non-payment of rates, conversion (of interests), vesting in Māori land councils/Māori land boards, Hōkio native township, Europeanisation, and the amount of Māori freehold land remaining in 2015. It lays out these categories by the number of blocks, the area affected in acres, the area lost from Muaūpoko ownership, and the date range of land loss.

For the purposes of this analysis we define ‘means of alienation’ as the category of land into which the block was transferred at the point it ceased to be Māori freehold land.

Some blocks were alienated by multiple methods. Several Horowhenua 11 blocks, for example, were vested in the Māori Trustee for non-payment of rates, and then sold by the Māori Trustee to private purchasers to clear rating debts. We have listed these according to the means by which the land was originally removed from Māori freehold.

28. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 159–160

29. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 160, 191–194, 295–299; figures calculated from Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 33–34, 52–54.

30. Figures calculated from Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 33–70.

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Likewise, some alienation processes, such as Europeanisation, changed the status of the land but did not always result in a change of ownership. For this reason, the table distinguishes between ‘area affected’ and ‘area lost’.

**(2) Means by which ownership was lost**

**(a) Private purchasing:** The main mode by which Muaūpoko lost their land in the twentieth century was sales to private individuals. Private sales accounted for 9,977 acres, or over 88 per cent of land lost by Muaūpoko after 1900, in 240 separate transactions.<sup>31</sup>

Dr Young noted that across the entire 52,460-acre Horowhenua block, private purchasing was at its highest in the 30 years between 1890 and 1920.<sup>32</sup> In the lands retained by Muaūpoko (Horowhenua 3, 6, and 11), 5,548 acres were sold privately from 1901–1919, some 55 per cent of the total land area purchased privately in the twentieth century. Another 1,380 acres were sold privately during the 1920s, mostly from Horowhenua 11; 69 per cent of twentieth-century private transactions in Horowhenua 3, 6, and 11 (by area) took place before 1930.

Private sales continued after the Second World War, but for smaller blocks of land, reflecting fractionation of land (as a result of partitioning) and the significant depletion of Muaūpoko’s land base by this time.

**(b) Crown purchasing:** In the twentieth century the Crown did not pursue the same aggressive land purchase policy it had previously followed in respect of Muaūpoko lands. Instead, the Crown largely preferred to leave private purchasers to negotiate directly with individual Māori owners or their representatives.<sup>33</sup>

The Crown nevertheless purchased more than 1,000 acres of Muaūpoko land, some through direct land purchases, and some by acquiring interests in land that had been previously alienated by other means.

One-tenth of the land lost by Muaūpoko after 1900 (around 1,100 acres) was sold directly to the Crown in three transactions, all from Horowhenua 11.<sup>34</sup> In 1907, the Crown purchased the 13-acre 11B38 block, adjacent to Lake Horowhenua, for a boatshed and other domain buildings.<sup>35</sup> We discuss this transaction in the next chapter. In 1928, the Crown finalised its purchase of undivided shares totalling some 1,088 acres of coastal land in Horowhenua 11B42C.<sup>36</sup> This was the Crown’s last major purchase of land in the Horowhenua block. We examine this transaction in more detail in section 7.4. Lastly, in 1951, the Crown purchased Horowhenua A2F, a half-acre section that was part of land set aside for housing in the 1940s under the Taueki consolidation scheme.<sup>37</sup>

31. Figures in this section are calculated from Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 52–59.

32. Young, ‘Muaūpoko Land Alienation’ (doc A161), p 50

33. Young, ‘Muaūpoko Land Alienation’ (doc A161), p 46; Luiten and Walker, ‘Political Engagement’ (doc A163), p 326

34. Figures calculated from Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 33–34.

35. Young, ‘Muaūpoko Land Alienation’ (doc A161), p 34

36. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 34–42

37. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 33–42

Category	Total number of blocks	Area affected (acres roods perches)	Area lost (acres roods perches)	Date range of land loss
Total in Muaūpoko ownership by the end of the year 1900		17,878:1:22.6		
Private purchasing	240	9,977:1:28.5	9,977:1:28.5	1901–1989
Crown purchasing	3	1,101:2:24	1,101:2:24	1907, 1928, 1951
Public works takings	4	99:3:22.8	99:3:22.8	1947, 1971–1972
Vesting for non-payment of rates	10	15:2:25.1	15:2:25.1	1963–1974
Conversion (of interests)	2	75:0:28.2	unknown	1959, 1983
Vesting in land councils / land boards	14	285:0:0	unknown	1902, 1904
Hōkio native township	1	39:3:1	35:2:1	1902–1961
Europeanisation	64	679:2:35.6	102:3:06	1929
Total	318		11,333:0:27.4	1902–1989
Māori freehold land still in Muaūpoko ownership in 2015	104	5,287:3:12.6		

Table 7.1: Means of alienation for Horowhenua 3, 6, and 11, after 1900

The Crown also acquired interests in land that had already been subjected to other means of alienation. For example, in 1918, Horowhenua 3A2 (103 acres) was declared ‘European land’ by order of the Native Land Court. The Crown acquired this block in two parts: three acres in 1924 and the remaining 100 acres in 1929.<sup>38</sup> Similarly, in 1972, a conversion order was issued over Horowhenua 3E2 subdivision 2B (31 acres), allowing ‘uneconomic interests’ to be compulsorily vested in the Māori Trustee; by 1983, the Crown had acquired 341.738 shares in the block.<sup>39</sup> These types of alienation are further discussed below.

**(c) Public works takings:** Dr Young’s report did not give a comprehensive account of public works takings. Due to time constraints, his report focused only on ‘significant’ public works takings, defined as ‘larger areas of land taken under the Public Works Act for public purposes’. Roads takings were not included within this definition.<sup>40</sup>

Of the land blocks identified by Dr Young as having been taken by the Crown under the Public Works Act, four were from Horowhenua 3 and 11, totalling just under 100 acres, or less than one per cent of Muaūpoko land loss after 1900.<sup>41</sup>

Two of these blocks were taken for agricultural purposes in 1972: Horowhenua 3E2 subdivision 1B (34 acres), taken for a horticultural research centre; and Horowhenua 3E2 subdivision 2A (29 acres).

Horowhenua 3E2 subdivision 2 (six acres) was taken for a gravel pit in 1947.

38. Young, ‘Muaūpoko Land Alienation’ (doc A161), p 67

39. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 63–64

40. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 8, 11

41. Information in this section is taken from Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 61–62.

## 7.2.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The Hōkio A block was adjacent to the Hōkio native township. In 1961, four of the township sections, totalling just under three acres, were taken under the Public Works Act for the purposes of a child welfare institute, as discussed further below in section 7.3.4(c). In 1971, Part Hōkio A (30 acres) was also taken from the Hōkio A block for the child welfare institute under the Public Works Act.<sup>42</sup> According to Crown research in the 1990s, \$2,584 in compensation was paid to the Māori Trustee in 1971 after the owners decided ‘to sell under the threat of a Notice of Intention to Take the Land’.<sup>43</sup>

**(d) Vesting for non-payment of rates:** During the 1960s and 1970s, 10 blocks from Horowhenua 3 and 11, totalling around 16 acres, were vested in the Māori Trustee for sale for non-payment of rates under section 109 of the Rating Act 1925.

Four of these sections (Horowhenua A3C, A3D, A3E, and A5E), totalling just over two acres, were part of lands set aside in the 1940s for housing under the Taueki consolidation scheme. They were vested and sold to clear accumulated rating levies in the 1960s.<sup>44</sup>

**(e) Conversion:** Between 1953 and 1975, the Māori Trustee was empowered to compulsorily acquire ‘uneconomic interests’ in Māori land, defined as shares worth less than £25, either at the time of succession or through a consolidated order for ‘conversion’ made by the Maori Land Court.<sup>45</sup> By this means, some Māori owners of small interests permanently lost their ownership rights in Māori land. The Māori Trustee could sell the interests thus acquired to any Māori person (it did not have to be an existing or former owner of the land concerned) or to the Crown, unless the land was held by a Māori incorporation.<sup>46</sup> A sale to the Crown was only supposed to be for the purposes of Māori housing or a land development scheme.<sup>47</sup>

We received evidence of two blocks from within Horowhenua 3 and 11, totalling 75 acres, which were subjected to the process of conversion. As described above, in one of the blocks, Horowhenua 3E2 subdivision 2B (31 acres), the compulsorily purchased shares were later transferred to the Crown. We have no information about what happened to the compulsorily purchased shares in the other block, Horowhenua 11B35 section 2L6 (44 acres).<sup>48</sup>

42. See also Eugene Henare, brief of evidence, 25 September 2015 (doc B6), p 6; Crown counsel, closing submissions (paper 3.3.24), p 218.

43. D Ian Gray, Office of Crown Lands, to director-general, Department of Social Welfare, not dated [1992] (Eugene Henare, papers in support of brief of evidence (doc B6(a)), p [3])

44. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 60–61

45. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 62–63

46. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 745–746, 761, 762–763, 773

47. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 746

48. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 63–64

**(3) Other ways the status of land was affected**

Muaūpoko's twentieth-century landholdings were also subjected to processes that changed the status of the land but did not always lead to land loss.

**(a) Vesting in Māori land councils / Māori land boards:** The Maori Lands Administration Act 1900 created district Māori land councils. Under the Act, Māori could vest their land in Māori land councils, which were reorganised into Māori land boards in 1905. The councils/boards would then lease the land out, deduct expenses, and distribute the money to the owners.<sup>49</sup>

Five blocks from Horowhenua 11B36 (an area known as Kawiu) were vested in Aotea District Maori Land Council. According to Dr Young, these lands totalled 285 acres and were first vested in November 1902. They were leased to Europeans for a total annual rental of £210 6d, or about 15 shillings an acre.<sup>50</sup>

In 1904, this Kawiu land appears to have been re-vested in the land council in order to pay off debts accumulated by Muaūpoko landowners. The land would be leased for 21 years, with a right of renewal, and the rent money used to pay off the debt. Indebted owners could fill out a form authorising the council to pay off the debt using rents from their land.<sup>51</sup>

We have elected to defer our consideration of the role of Māori land councils and land boards until later in our inquiry. Here, we simply note that the lands re-vested in 1904 were renewed for a further 21-year term in 1926, and the leases finally came to an end in 1937.<sup>52</sup> Although the evidence relating to these lands is incomplete, Dr Young's report suggested that some of the vested lands were sold by Māori land boards to private purchasers, some were included in the Taueki consolidation scheme of the 1940s, some were 'Europeanised' under Part I of the Maori Affairs Amendment Act 1967 (see below), and some was still Māori freehold at the time of our hearings.<sup>53</sup>

**(b) Europeanisation:** Some 64 blocks from Horowhenua 3 and 11, totalling around 670 acres, were 'Europeanised', a practice which enabled the status of Māori freehold land to be converted to that of 'European' (later 'general') land. This represents just under 4 per cent of the 17,878 acres retained by Muaūpoko at the end of 1900.<sup>54</sup>

Initially this was by application of the Māori owners. For example, the 103-acre Horowhenua 3A2 block was Europeanised by order of the Native Land Court in 1918, under legislation that required an application by the Māori owners. As described above, this block was later acquired by the Crown.<sup>55</sup>

Part I of the Maori Affairs Amendment Act 1967 gave the Maori Land Court power to compulsorily Europeanise land that had four or fewer owners and

49. Maori Lands Administration Act 1900 ss 6, 7(10), 8

50. Young, 'Muaūpoko Land Alienation' (doc A161), p 43

51. Luiten and Walker, 'Political Engagement' (doc A163), pp 348–350

52. Luiten and Walker, 'Political Engagement' (doc A163), p 379

53. Young, 'Muaūpoko Land Alienation' (doc A161), pp 43, 159–60, 162–163, 170–179

54. Figures calculated from Young, 'Muaūpoko Land Alienation' (doc A161), pp 67–70.

55. Young, 'Muaūpoko Land Alienation' (doc A161), p 67



## 7.2.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

met certain other conditions, in order to enable land to be sold and rates recovered.<sup>56</sup> Fifty-one parcels of land in Horowhenua 3 and 11, totalling 474 acres, were ‘Europeanised’ under this 1967 legislation.<sup>57</sup>

However, in the case of these blocks Europeanisation did not necessarily lead to alienation. Although no longer officially classified as Māori freehold land, we did not receive evidence that they were subsequently alienated from Māori ownership. They may therefore still be general land owned by Muaūpoko landowners.

**(c) Native township:** In 1902, the Crown assumed legal ownership of about 40 acres of the Hōkio 11B42 block for a native township, acting under the Native Townships Act 1895. This acquisition and its consequences are discussed fully below in section 7.3. Here, we simply note that the Crown acquired the absolute ownership of 17 acres of the township for roads and public reserves. Of the remaining land, the freehold title of the sections was sold off gradually until only about four acres remained by 1977. At that point, full ownership was returned to the Hōkio A Lands Trust. Thus, the Crown’s establishment of the Hōkio native township led to the loss of about 36 acres of valued coastal land from Māori ownership (as explained in section 7.3).

### 7.2.5 Land remaining in Muaūpoko ownership

At the time of our inquiry in 2015 just 5,288 acres, or 10 per cent of the original 52,460-acre Horowhenua block, still belonged to Muaūpoko as Māori freehold land.<sup>58</sup> As noted above, Muaūpoko may also have retained ownership of land that had been ‘Europeanised’ (converted from Māori freehold to general land).

Of this residual Māori freehold land, 4,637 acres (88 per cent) lay within Horowhenua 11, leaving 553 acres (10 per cent) in Horowhenua 3 and 98 acres (2 per cent) in Horowhenua 6.<sup>59</sup>

Overall, the amount of Māori freehold land retained by Muaūpoko fell from 17,878 acres in 1901 to 5,288 acres in 2015. By this measure, during the twentieth century 70 per cent of Muaūpoko’s remaining land was lost or otherwise removed from Māori freehold status.

### 7.2.6 Our findings on twentieth-century Muaūpoko land loss

By the time of our hearings in 2015, Muaūpoko were virtually landless. They had been granted legal ownership of the 52,460-acre Horowhenua block in 1873. By 2015 they retained only 5,288 acres of as Māori freehold land, of which the bed of Lake Horowhenua comprised nearly one-fifth (901 acres).<sup>60</sup>

In our inquiry, the Crown has conceded that its ‘failure to ensure that Muaūpoko retained sufficient land for their present and future needs was a breach of Te Tiriti

56. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 64–66

57. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 67–70

58. Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 70–71; Luiten and Walker, ‘Political Engagement’ (doc A163), p 385

59. Luiten and Walker, ‘Political Engagement’ (doc A163), p 385; Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 70–73

60. This figure does not include the acreage of the chain strip.



o Waitangi/the Treaty of Waitangi and its principles'. The Crown also conceded that the cumulative effect of its native land laws, and of its acts or omissions, was Muaūpoko landlessness.<sup>61</sup>

We agree that these Crown acts and omissions breached the Treaty.

### 7.3 HŌKIO NATIVE TOWNSHIP

#### 7.3.1 Introduction

The settlement of Hōkio Beach lies near the mouth of the Hōkio Stream, a few kilometres to the west of Levin. It was established in 1902–1903 on 40 acres of Muaūpoko land as the Hōkio native township. The 'native township' scheme was a Government initiative, authorised by statute, to further Pākehā settlement by establishing settler towns on Māori-owned land. Although the land involved remained in Māori ownership (initially, at least) the township sections were leased to Pākehā, thereby extending Pākehā settlement of a district while providing an income to Māori landowners. The townships were established and administered by the Crown and Crown-appointed bodies under the Native Townships Act 1895 and its amendments.<sup>62</sup>

The claimants in our inquiry submitted that the Crown failed to consult with Muaūpoko when establishing the township at Hōkio, a failure that continued throughout the period in which it was administered as a native township. The aspirations of Muaūpoko landowners were made subordinate to those of Pākehā lease holders. This subordination led ultimately to the sale of much of the land included within the township scheme. The Crown accepted that the township's establishment did not comply with some aspects of the native township legislation. It denied, however, that there was an absence of consultation with the landowners affected by the township. Regarding the administration of the township, the Crown denied responsibility for decisions made after the township was vested in the Ikaroa District Maori Land Board in 1910.

In this section we look at how and why the Hōkio native township was established and the impact that its establishment had on those Muaūpoko whose land was involved. In doing so we address two broad questions:

- ▶ How and why was the Hōkio native township established and what involvement did Muaūpoko landowners have in that process?
- ▶ How was the Hōkio native township administered and what influence did Muaūpoko landowners have on decisions concerning their land?

#### 7.3.2 The parties' arguments

##### (1) *The claimants' case*

Claimant counsel submitted that establishing the Hōkio native township constituted an abuse of Crown power. The Crown, they said, misused the Native Townships Act

61. Crown counsel, closing submissions (paper 3.3.24), p 24

62. Suzanne Woodley, *The Native Townships Act 1895*, Waitangi Tribunal Rangahaua Whānui Series (Wellington: Waitangi Tribunal, 1996), pp 7–8

## 7.3.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

to appropriate 40 acres of Horowhenua 11B42A block in order to establish a town for the benefit of Pākehā wanting holiday homes by the sea. The Crown breached the Treaty by using the native township legislation to compulsorily acquire the land, and by failing to consult with and gain the consent of owners when planning the township and reserves, when managing the township and, eventually, when it sold township land.<sup>63</sup>

Counsel for the Wai 237 claimants submitted that article 2 of the Treaty guaranteed Muaūpoko the right to retain and exercise their tino rangatiratanga over their lands as long as they wanted. This right imposed a duty on the Crown to obtain the consent of the landowners before their land was appropriated for the native township, consent that the Crown failed to obtain as it failed to consult Muaūpoko. The failure to consult extended to the planning of the township where Muaūpoko had no involvement in the design of the township or in setting aside reserves.<sup>64</sup> Claimant counsel also submitted that the Crown failed in its duty to ensure that Muaūpoko would benefit from the town by going ahead with the scheme when it knew it was unlikely to bring any benefit to the landowners. In their view, the township scheme was pursued purely for the benefit of local Pākehā settlers seeking land for holiday homes at the beach.<sup>65</sup>

Counsel for the Wai 2326, Wai 2045, and Wai 52 claimants noted that native townships were only supposed to be created when there was demand from potential settlers. The settlers would then pay rent, which would benefit the Māori landowners. Counsel submitted that the Crown failed this self-created test when establishing the Hōkio native township. No such demand existed for a native township at Hōkio, even though it was demand which was supposed to justify the taking of land. This absence of demand rendered the taking of land unjustifiable.<sup>66</sup>

These submissions were echoed by counsel for Wai 52 and Wai 2139 who submitted that the township was created without consultation with, or the consent of, the landowners. The Crown created the township for local Pākehā and managed it to maximise the benefit to lease holders. This approach to the township and a more general lack of demand for the township minimised any potential benefit for landowners.<sup>67</sup>

Counsel for Wai 237 also submitted that the Crown breached the Treaty by assuming ownership of all lands within the township that made up roads and public reserves. The landowners had no ability to protest these land takings or seek compensation. Counsel argued that the taking of land in this fashion was

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63. Claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), pp 231–232; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), pp 28–29; claimant counsel (Ertel and Zwaan), closing submissions, 12 February 2016 (paper 3.3.13), p 30; Philip Taueki, closing submissions, 12 February 2016 (paper 3.3.15), p [4]

64. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 236–243

65. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 234–236, 258–260

66. Claimant counsel (Ertel and Zwaan), closing submissions (paper 3.3.13), p 30. The submission here refers to the Crown's 'normal' practice regarding the extent of settler demand for a township, as opposed to what was legally required under native townships legislation.

67. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), pp 28–29

a flagrant breach of the Crown's duty of good faith and of the guarantee of tino rangatiratanga.<sup>68</sup>

Claimant counsel for Wai 237, Wai 52, and Wai 2139 argued that the Crown failed to ensure that the township was administered for the financial benefit of the landowners. Instead, it prioritised land alienation. Rental returns from the township were low, in part due to a lack of demand for the sections, and were split between all the owners of the block – some 81 owners when the township was established, and many hundreds of owners by the middle of the twentieth century. Rental returns diminished as the Māori land board sold off sections, and the returns from sales were minimal because the land was sold at its unimproved value.<sup>69</sup>

## **(2) *The Crown's case***

On 29 April 2016, the Crown made a separate closing submission on the issue of native townships.<sup>70</sup> Crown counsel denied allegations that the Crown had failed to adequately consult with Muaūpoko landowners when establishing the Hōkio township. While accepting that the Crown has an obligation to make informed decisions on matters affecting Māori and that this could require it to consult with those affected, Crown counsel denied that there is an absolute obligation to consult. Further, she argued that the adequacy of any consultation must be judged with regard to the circumstances of the period in question rather than those that apply at present. Crown counsel said that when establishing Hōkio native township the Crown had been concerned to acquire the landowners' consent, and that there was evidence of at least some consultation taking place. Evidence of consultation included sites of significance being reserved for the owners, Warena Hunia accompanying the surveyor on a visit to the township site, and the absence of protest from landowners about the township scheme.<sup>71</sup>

Crown counsel also rejected the allegation that it had failed to comply fully with the terms of the Native Townships Act 1895 when establishing reserves for the landowners within the township. That Act stipulated that sections within a township could be reserved for Māori, that such reserves were not to exceed 20 per cent of the total area of a township, and that those areas reserved should reflect, as far as practicable, the wishes of Māori landowners. Counsel submitted that criticism of the Crown having failed to reserve 20 per cent of the Hōkio township for Māori was misplaced as this was not a requirement of the Act. While she accepted that there was no evidence of the Crown having obtained the wishes of Muaūpoko landowners when reserving sections for them, counsel argued that this was not

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68. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.2.23), pp 245–247

69. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 260–261; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), pp 28–29

70. Crown counsel, closing submissions: Native Townships and District Māori Land Boards, 29 April 2016 (paper 3.3.34)

71. Crown counsel, closing submissions: Native Townships and District Māori Land Boards (paper 3.3.34), pp 2–5

conclusive proof that no consultation occurred. Significantly, in Crown counsel's view, there was no evidence of Muaūpoko objecting to the reserves that were made.<sup>72</sup>

On the administration of the town, Crown counsel considered that there were two distinct periods that must be considered. In the first (relatively brief) period, the township was administered by the Crown through the commissioner of Crown lands. Counsel accepted that the Crown was responsible for the administration of Hōkio native township in this period. During the second period (from 1908), the township was administered by the Ikaroa District Maori Land Board. Crown counsel submitted that district Māori land boards (and the district Māori land councils that preceded them) cannot be considered as part of the Crown or as Crown agents acting in the Crown's interest. Rather, they were established to act on behalf of their beneficiaries, those Māori whose land was vested in them. The Crown had no power to direct the boards as to how they should exercise their core functions. On that basis, counsel denied that the Crown could be held responsible for any actions taken by the Ikaroa District Maori Land Board in relation to the Hōkio native township.<sup>73</sup>

### **7.3.3 How and why was the Hōkio native township established and what involvement did Muaūpoko landowners have in that process?**

#### **(1) Native townships legislation, 1895–1910**

Native townships were towns built on Māori-owned land. The native townships regime emerged during the late nineteenth century when Māori faced increasing pressure to sell land. The Pākehā population was growing, and the Government responded by pushing its infrastructure into the interior of the country. Areas once isolated from the pressures of colonisation soon became targets for land purchasers. However, settlers often found it difficult to secure land from Māori in these isolated areas through either purchase or long-term lease. The Government, aware of problems dealing with Māori land, often stepped in to negotiate with Māori. From the 1880s such negotiations included securing land for the establishment of towns. The Government's experience in these town-site negotiations, for Pipiriki (on the Whanganui River) in particular, led to the passing of the Native Township Act 1895.<sup>74</sup>

The Act confirmed a Government commitment to opening Māori land in the interior of the North Island to settlement by Pākehā. This was reflected in the long title to the Act – 'An Act to promote the Settlement and Opening-up of the Interior of the North Island'. Similarly, the preamble stated that 'for the purposes of promoting the settlement and opening-up of the interior of the North Island, it is essential that townships should be established at various centres'. The preamble went on to state that 'in many cases the Native title cannot at present be extinguished in the ordinary way of purchase by the Crown, and other difficulties exist by reason

72. Crown counsel, closing submissions: Native Townships and District Māori Land Boards (paper 3.3.34), pp 6–7

73. Crown counsel, closing submissions: Native Townships and District Māori Land Boards (paper 3.3.34), pp 8, 11–13

74. Waitangi Tribunal, *He Whiritauonoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 2, pp 817–818

whereof the progress of settlement is impeded'. The Act was thus intended to overcome difficulties (including isolation and land title complexities) that hindered the settlement of some Māori-owned land.<sup>75</sup>

As the preamble emphasised, the Act's purpose was to promote Pākehā settlement in the interior of the North Island, but the mode of settlement was a departure from Crown pre-emption, which had been reintroduced the year before (see chapter 6). Rather than buying up individual interests, the Crown was proposing to act as trustee and agent for the Māori beneficial owners, who would benefit from rents and the development of their lands.<sup>76</sup> In that respect, the 1895 Act anticipated some of the reforms of 1900, when the Crown ceased purchasing land and introduced the Māori land councils to act as agents in leasing Māori land.<sup>77</sup> But the 1895 measure did not provide for Māori representation in the decision-making of the agent (unlike the Māori land councils); indeed, it contained a number of draconian elements. Historian Suzanne Woodley suggested that the Act was a 'compromise' between Liberal Cabinet Minister James Carroll<sup>78</sup> and the Minister of Lands, and she noted provisions for Māori reserves in the townships.<sup>79</sup> Māori would potentially obtain benefit from the establishment of such townships, and some were established at the request of Māori, but the 'major thrust for townships . . . came from the Crown and the settlers.'<sup>80</sup> That was certainly the case with Hōkio.

The provisions of the 1895 Act enabled the Government to declare up to 500 acres of Māori-owned land as the site for a township without the consent of owners, doing away with the need to negotiate with Māori prior to establishing a township. The Crown became the trustee for the landowners, taking over legal ownership of township sections and managing them via the commissioner of Crown lands. It also took on the tasks of planning the townships, surveying streets, town sections, and public reserves, as well as reserving native allotments for occupation and use by the Māori landowners.<sup>81</sup>

The Act vested all township lands in the Crown but the status of that vesting differed depending on whether it concerned roads, public reserves, native allotment reserves, or allotments for leasing to settlers. Roads were vested in the Crown absolutely, 'free from encumbrances'. Public reserves were vested in the Crown for the purposes designated on the plan, and were to be administered under the Public Reserves Act 1881.<sup>82</sup> These were permanent alienations for which no compensation was payable. According to the evidence of David Armstrong, 42.5 per cent of

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75. Native Townships Act 1895; see also Woodley, Native Townships Act 1895, pp 9–11

76. Woodley, Native Townships Act 1895, p 9

77. For the 1900 reforms as they applied to land issues, see Waitangi Tribunal, *He Maunga Rongo*, vol 2, chapter 11.

78. James Carroll was later appointed Native Minister in 1899. At this time, however, Carroll was the Member of the Executive Council representing the Native Race.

79. Woodley, Native Townships Act 1895, p 10

80. Woodley, Native Townships Act 1895, pp 13–14

81. Native Townships Act 1895; see also Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 819–820.

82. Native Townships Act 1895, s12(1)-(2)



the township lands were taken for roads and public reserves (17 acres of about 40 acres).<sup>83</sup>

Native allotments were to be vested in the Crown ‘in trust for the use and enjoyment of the Native owners.’<sup>84</sup> All other allotments were vested in the Crown in trust for the Māori owners.<sup>85</sup> These sections were for leasing to the public (for terms not exceeding 21 years) and the costs of surveying and administering the town were to be paid from the rents collected. Any money left over was paid to the landowners, divided amongst them in line with their relative ownership interests.<sup>86</sup>

As noted above, the Act allowed for the reservation of ‘Native allotments’ for the landowners, which would be vested in the Crown in trust for the owners. As the Crown noted in its submissions, these reserves could not together exceed 20 per cent of the total area of a township. That did not mean, as Luiten and Walker argued in their report, that reserves for the owners had to total 20 per cent of the township area.<sup>87</sup> The 20 per cent stipulation was the maximum area that could be reserved for the owners, not the minimum area. Landowners could be included in the process of selecting and setting aside their reserves by identifying their urupā, occupied dwellings, and other areas they wished reserved for them. The Act required the surveyor-general to ensure that every urupā within the township and every building occupied by Māori were included within these reserves. Further, the wishes of the landowners had to be complied with when selecting other areas to be reserved for them, insofar as such compliance did not interfere with the town’s survey or design. It was up to the surveyor-general to decide whether areas identified by Māori as potential reserves would interfere in this way.<sup>88</sup>

Completed native township plans had to be displayed for two months ‘in such manner as the Chief Judge of the Native Land Court shall direct.’<sup>89</sup> During this period Māori could object to the sufficiency, size, or situation of the native allotments set aside for them. Any objections would then be heard by the chief judge who could direct that changes be made. Upon the two-month period expiring, the surveyor-general would certify that the plan was correct and that a township had been constituted under the Act.<sup>90</sup> So, while Māori affected by a native township could seek changes to its plan, such changes were strictly circumscribed. Māori landowners could not protest against any aspect of the town other than what had been set aside for them. By any standards, to take private land in this way and for this purpose, without requiring the consent of its owners, was a draconian measure.

Sale of the township sections to lease holders was not contemplated by the original 1895 Act. Māori landowners could, if they chose to, sell their interest in a

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83. David Armstrong, ‘Hokio Native Township’, not dated (doc A154), p 4

84. Native Townships Act 1895, s12(3)

85. Native Townships Act 1895, s12(4)

86. Native Townships Act 1895, ss 14–15, 20; see also Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 819–820

87. Luiten and Walker, ‘Political Engagement’ (doc A163), p 344

88. Native Townships Act 1895, s 7; see also Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 820.

89. Native Townships Act 1895, s 8

90. Native Townships Act 1895, ss 9–10



township to the Crown on terms agreed between them. They could not, however, sell the particular native allotments reserved for Māori.<sup>91</sup>

Changes to laws governing Māori land administration in the early 1900s affected the native townships regime. Those changes provided an alternative model for establishing native townships, and are relevant in assessing the Crown's actions in 1902 when it established the Hōkio township. In 1901, the Aotea District Maori Land Council was established with four Crown-appointed members (two of them Māori) and three elected Māori members.<sup>92</sup> In the same year, the Māori land councils were given the ability to proclaim native townships on vested lands provided a majority of owners agreed to the township. This required land to first be vested voluntarily in the land councils by the owners. Land councils were also given the ability to set up and manage the townships as if they were townships created under the 1895 Act.<sup>93</sup> There is no indication in the evidence we received that Crown officials sought to take advantage of this provision in 1902 when Hōkio was established. The 1901 legislation would have required the consent of the Hōkio owners to vest their lands in the council, and then given the owners greater control and input over the creation and management of the Hōkio township. In our view, this was a very significant omission, since the legislation of 1901 allowed for the establishment of 'native townships' in a more Treaty-compliant manner than that adopted by the Crown for Hōkio in 1902.

The Government introduced more draconian provisions for council-established townships in 1902, but without repealing the 1901 legislation. The Native and Maori Land Laws Amendment Act 1902 empowered the Governor to proclaim any Māori land a township site, without the consent of landowners, and at the same time vest the land in the relevant district Māori land council, which took on the responsibilities similar to those ascribed to the Crown through the Native Townships Act 1895.<sup>94</sup> Townships that had been created by the Crown, like Hōkio in 1902, remained under Crown administration.<sup>95</sup>

This legislation produced a situation where three processes for the establishment and management of native townships ran in parallel:

- ▶ one process authorised land councils (on which Māori were represented) to proclaim townships with the consent of owners and then establish and manage them (under the 1901 amendment to section 29 of the 1900 Act);
- ▶ the second process allowed the Governor to proclaim a township without consent, while leaving the formation and management of the town to the land councils (under the 1902 Act); and
- ▶ the third process allowed the Governor to establish a township without consent and manage the town with no owner input (under the 1895 Act).

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91. Native Townships Act 1895, s 18

92. Donald Loveridge, *Maori Land Councils and Maori Land Boards: A Historical Overview, 1900 to 1952*, Waitangi Tribunal Rangahaua Whānui Series (Wellington: Waitangi Tribunal, 1996), pp 31–33

93. Maori Lands Administration Amendment Act 1901, s 8 (11)

94. Native and Maori Land Laws Amendment Act 1902, ss 8, 10; Woodley, *Native Townships Act 1895*, pp 7–8

95. Armstrong, 'Hokio Native Township' (doc A154), p 5. Hōkio township was gazetted in August 1902, whereas the Native and Maori Land Laws Amendment Act came into law in October 1902.

The second of these alternatives would have required a slight delay for Hōkio, as the 1902 legislation did not come into force until the beginning of October of that year, but otherwise would have provided a more Treaty-compliant model than the Crown administration mandated by the 1895 Act.

In 1903, the Government amended the 1901 Act to legislate that native townships were to be vested in and managed by district Māori land councils, and repealed the necessity for a majority of owners to consent to a township.<sup>96</sup> This amendment did not apply to townships established by the Governor under the 1902 Act; in any case, the distinction proved academic, as ultimately no townships were actually established by the land councils under the 1903 Act.<sup>97</sup>

As we noted above, in 1905 district Māori land councils were replaced by unelected boards, which had dramatically reduced Māori membership (a single member of each board). From 1908, these boards took over the administration of all native townships – both those created by the Crown and those created by the land councils. The land on which townships were established remained vested in the Crown.<sup>98</sup>

In 1910, a new Native Townships Act was introduced. Sections 19 and 20 of the Act preserved the ability of the Crown to acquire township lands. Section 23 of that Act allowed Māori owners and the boards to sell township lands to private individuals. The board was required to secure the consent of the landowners in writing or via a resolution of owners.<sup>99</sup> The Native Land Act 1909 gave private individuals the ability to purchase undivided shares in Māori land, but regulated these purchases through district Māori land boards and ‘meetings of assembled owners’. In short, land boards were able to call a meeting of owners on the application of ‘any person interested’. Five owners present in person or by proxy constituted a quorum, no matter how many owners there were in a block, and resolutions could be carried if those present and voting in favour owned a larger aggregate share of the land than those voting against. The land board concerned could confirm or disallow any resolution reached by the owners, taking into account the public interest and the interests of the owners. If that board confirmed a resolution to sell land it then became the agent for the owners to see the alienation through.<sup>100</sup>

### **(2) *The Crown responds to settler requests for a township***

As discussed above, native townships were intended as a means of extending Pākehā settlement into isolated inland districts of the North Island. It was also intended that native townships would be somewhat isolated from each other. The Act stipulated that sites of native townships could not be within 10 miles of each other.<sup>101</sup>

96. Maori Land Laws Amendment Act 1903, s17(2)

97. Maori Lands Administration Amendment Act 1901, s8(11); repealed by Maori Land Laws Amendment Act 1903, s17(2); Woodley, Native Townships Act 1895, pp7–8

98. Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 822–823, 824

99. Native Townships Act 1910, s23

100. Native Land Act 1909, ss 341(1), 342, 343, 348(1), and 349; see also Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 685–686

101. Native Townships Act 1895, s3(3)

While this requirement was repealed shortly thereafter,<sup>102</sup> counsel for the Wai 237 claimants noted that the rationale for this restriction was to ensure that the viability of any given native township was not compromised by it being in too close proximity to another native township.<sup>103</sup> There were no native townships close to Hōkio, but it was located just a few miles from Levin, a town only recently established following the Crown's purchase of Horowhenua 2 from Te Keepa in 1887 (see chapter 5).

Luiten and Walker advised that establishing a native township at Hōkio was first suggested by Levin residents in late 1900 during a visit by the Minister of Lands, Thomas Duncan. They wanted the Government to acquire 100 acres of land west of Lake Horowhenua that could be cut into quarter-acre sections for sale, with a provision that no person could acquire more than one section. Duncan expressed support for the proposal and promised that if there were no legal difficulties he would endeavour to see that it went ahead. The Crown moved quickly to assess the availability of land for the suggested township. In January 1901, Sheridan suggested that the Native Townships Act 1895 could be used to secure land. By the following month, officials were trying to locate the names and addresses of the landowners that would be affected. Although the file does not make it clear, the affected owners were those of the Horowhenua 11B42 block upon which the township would be established.<sup>104</sup>

The 11B42 block was created when the court partitioned Horowhenua 11 in 1898. This block encompassed the 'coastal strip of sand hills running the length of the Horowhenua block and comprising 2158 acres'. It had been vested in the original 81 owners of Horowhenua 11.<sup>105</sup> The intention was that all of the Horowhenua 11 owners would have a share in this coastal land, as well as the swamp and fern lands to the east of it and in Lake Horowhenua.<sup>106</sup> The coastal land was especially valued by Muaūpoko for access to toheroa and other resources. Claimant Robert Warrington commented about the acquisition of the township lands: 'The Crown never took into account the fact that these lands adjoined the sea fishery, and comprised part of the food basket of Muaūpoko which makes this land loss especially tragic.'<sup>107</sup>

The list of owners for Horowhenua 11B42 had not been located by April 1901 when the Government's acting surveyor-general, A Barron, directed his chief surveyor, John Marchant, to select the best site for a seaside township.<sup>108</sup> Marchant had not yet undertaken this task when, on 16 September 1901, Sheridan informed Barron that '[t]here are no difficulties as far as the Natives are concerned in the way of the carrying out of this proposal'.<sup>109</sup> It is not clear what Sheridan based this on, but it

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102. Native Townships Act 1898, s 2

103. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 258–259

104. Luiten and Walker, 'Political Engagement' (doc A163), pp 329–330

105. Luiten and Walker, 'Political Engagement' (doc A163), p 311

106. Luiten and Walker, 'Political Engagement' (doc A163), pp 300–313

107. Robert Warrington, brief of evidence, 16 November 2015 (doc C18), p 3

108. Luiten and Walker, 'Political Engagement' (doc A163), pp 329–330

109. Luiten and Walker, 'Political Engagement' (doc A163), p 330

could be that he or his department had been in contact with some of the Muaūpoko landowners affected by the proposal. If so, he did not say so, and there is no concrete evidence of it. Two days after being contacted by Sheridan, Barron wrote to Marchant asking whether he had selected the site for a township as requested. A pencilled note on this memorandum indicates that Warena Hunia wanted a surveyor to accompany him, presumably to the site of the proposed township, the following week.<sup>110</sup> Crown counsel rejected the suggestion by Luiten and Walker that this showed the limited extent of consultation, or that Hunia was the only person consulted.<sup>111</sup>

At this point it should be noted that Warena Hunia's name does not appear on the title order for 11B42, as he (along with others in his family) had not yet formally succeeded to the interests of his father, Kāwana Hunia.<sup>112</sup> Warena Hunia was, of course, a Muaūpoko rangatira but the Crown could not possibly have expected to deal with him alone, following the recent events of the 1890s (see chapter 6).

Marchant, who was also the commissioner of Crown lands for the Wellington region, visited the Hōkio area in October 1901. He met those local residents who were pushing the township proposal and ascertained from them that it was to be used as a seaside and health resort.<sup>113</sup> The use of the Native Townships Act to secure land for a seaside resort is problematic. Nothing in the Act prevented it from being used in this way. Some legislators had anticipated use of the Act to 'ensure that there was adequate accommodation' in tourist areas in the interior,<sup>114</sup> but that was not its official purpose. As mentioned, the Act was intended as a means of opening up the interior of the North Island by providing infrastructure for settlement in the form of towns.

Hōkio was sited just a few miles from Levin, within a district already opened to Pākehā settlement. Two factors are important to note here: Levin was not a native township, and the Native Townships Act 1898 had repealed the original requirement that townships could not be established within 10 miles of each other, which the Crown had justified with a complaint that the distance was 'not convenient'. Apparently, Māori sometimes wanted the towns closer together, when they were fully involved in planning the towns' establishment. According to the Minister of Lands, John McKenzie, the distance prescribed by statute had

prevented the Natives from getting townships established in the places where they desired them established. It was desirable to amend the law in the direction of

110. Assistant surveyor-general to chief surveyor, 18 September 1901 (Jane Luiten, comp, papers in support of 'Muaupoko Land Alienation and Political Engagement Report', various dates (doc A163(a)), p1690)

111. Crown counsel, closing submissions: Native Townships and District Maori Land Boards (paper 3.3.34), p5

112. Horowhenua 11B42 Title Order, MLIS. As will be recalled from chapter 4, the court vested all of the Hunia whānau interests in Horowhenua 11 in Kāwana Hunia's name in 1898, even though he had died.

113. Chief Surveyor Marchant to chief clerk, 1 October 1901 (DA Armstrong, comp, papers in support of 'Hokio Native Township', various dates (doc A154(a)), p8)

114. Woodley, Native Townships Act 1895, pp10–11

enabling sites for such townships to be selected where the Natives wished, and where they might be required.<sup>115</sup>

The Hōkio township, therefore, did not breach any regulations in this context. Nevertheless the intention of the original legislation was to prevent the development of townships being compromised by too close proximity to each other. It does not, moreover, appear that there was any need for a new town to further the settlement of the district. It could be argued that the scheme was intended as a means to develop the land involved, thereby securing economic benefit for the landowners. Yet, as we shall see below, Crown officials doubted that Hōkio would ever become a settlement of any scale or importance.

Accompanied by two members of the group pushing the township proposal, Marchant set out to view the proposed township site. He reported that '[a]long the southern banks of the stream are well sheltered areas which might be utilised for the erection of huts, cottages, a lodging house, store etc, as may be required for the convenience of holiday makers, persons seeking change of air, and desiring to enjoy sea-bathing.'<sup>116</sup> Marchant doubted that there would be much demand for township sites, however, due to the sparse population on the coast and the wide availability of seaside properties. Nevertheless, he also reported that a small area of land in the Horowhenua 11B42 block south of the Hōkio Stream could be subdivided and the sites leased with the owners' consent.<sup>117</sup>

Historian David Alexander pointed out that Marchant met with 'the Levin residents who had urged the township's establishment' and inspected the site, but made 'no effort to contact the Maori owners of the land he chose as a suitable township site, even though these owners had been determined by the Native Land Court just two and a half years earlier, and he was aware of their names.'<sup>118</sup> No owners were present at the time of his inspection but Marchant was aware of at least seasonal occupation.<sup>119</sup>

Barron responded enthusiastically to the Hōkio township proposal despite Marchant's doubt regarding its merits and his suggestion that the owners' consent would be needed. Barron immediately employed a surveyor to start work laying out a site for the township. George Richardson was selected as the surveyor on the recommendation of Sheridan, who advised that Richardson knew the area well and was on good terms with the owners of the land.<sup>120</sup> Richardson was initially given a free hand regarding the township, ultimately asked to lay off a total area that would be sufficient for future needs but to only 'cut up' enough township allotments to

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115. John McKenzie, 19 October 1898, NZPD, vol 105, p177

116. Chief Surveyor Marchant to chief clerk, 1 October 1901 (Armstrong, papers in support of 'Hokio Native Township' (doc A154(a)), p 8)

117. Luiten and Walker, 'Political Engagement' (doc A163), p 330

118. David Alexander, 'Application by Hokio A and Part Hokio Land Trusts', June 2008 (doc A12), p 19

119. Alexander, 'Application by Hokio A' (doc A12), pp 19–20; Armstrong, 'Hokio Native Township' (doc A154), p 4

120. Luiten and Walker, 'Political Engagement' (doc A163), p 330



meet the present demand.<sup>121</sup> Richardson recommended that 100 acres be taken for the native township site. This would be partitioned into 50 to 60 lots of up to six acres each. Reserves for the owners and for ‘plantation reserves’ would be made along that part of the block fronting the Hōkio Stream. Marchant opposed this plan, arguing that it was extravagant and risked burdening the landowners with high costs for surveying, administration, and advertising when there was little demand for the sites. He successfully argued that the survey should consist of laying out no more than 20 sites of a quarter acre along with reserves for the owners and for public use. Richardson completed a survey of the site in December 1901. Twenty township lots were created within a site of about 109 acres.<sup>122</sup>

Richardson’s survey was forwarded to the chief draughtsman who was to prepare a plan of the township for proclamation. However, the reserves required in the Act (those for owners and for public purposes, as well as town belt and esplanade reserves) were missing from the survey. Richardson had suggested both an esplanade reserve and a series of plantation reserves, the latter most likely to control sand drift. In March 1902 a road reserve was added to the plan. The following month, Marchant, now the surveyor-general, directed the addition of a native reserve and a public reserve. He also queried the delay in completing the plan and was advised that the Native Townships Act required that the whole site be subdivided, a course of action that Marchant had argued against due to the cost to the owners and lack of demand for sections. This defect was remedied in the survey office, with further sections added to the plan without any additional field work. In June 1902 a township plan was produced, which covered a little under 40 acres, including 59 sections, four reserves, and roads. The native allotment reserve would consist of about two acres. This area of the Horowhenua 11B42 block was proclaimed as a site for a native township on 7 August 1902.<sup>123</sup>

Historian David Armstrong noted that the area set aside as a native reserve may have included two pā tuna sites important to Muaūpoko, Tārere-Mangō (flying shark) and Pā Kōtuku. These sites were occupied seasonally for fishing.<sup>124</sup> As we discuss below, it is not clear how this area was selected as a native reserve.

### ***(3) Muaūpoko opposition emerges as the township plan is finalised***

Following the proclamation of the township, Government officials set about ensuring that all necessary elements of the plan were in place and that the requirements of the Native Townships Act had been complied with. The request from the Levin delegation to restrict any one person from acquiring more than one section was dismissed as not being provided for in the Act. As required by the Act, the township plan was displayed for two months at the Native Land Court at Levin from 1 November 1902. The Act also required that the rent payable for the lease of sections

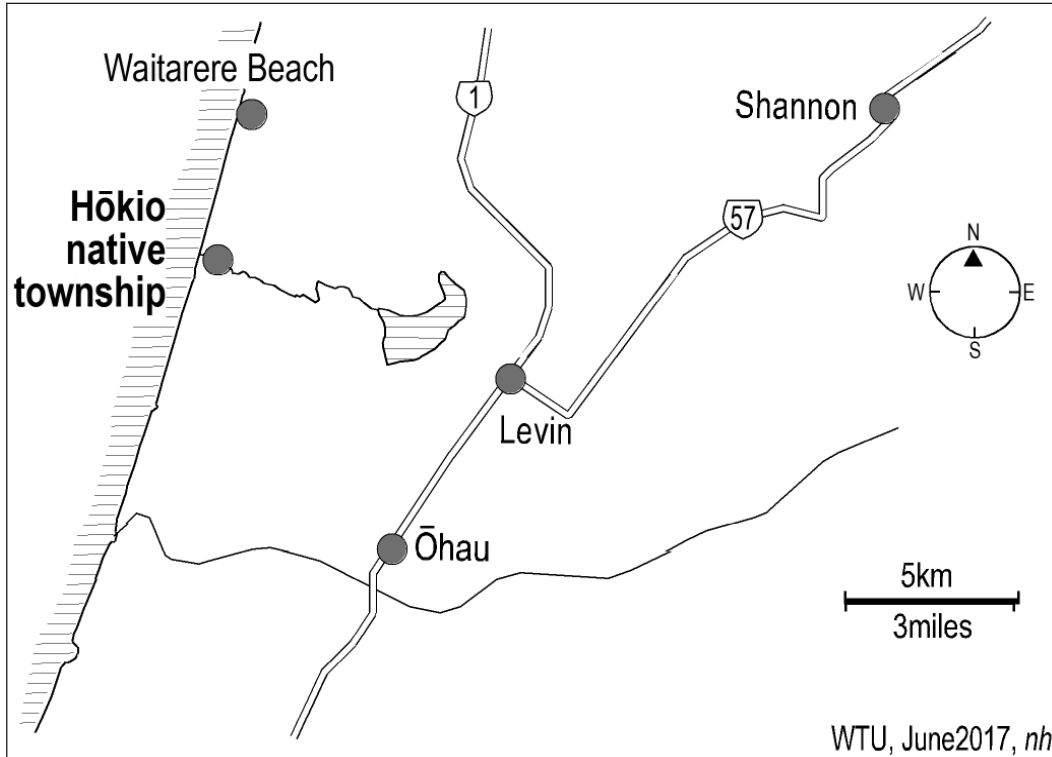
121. Luiten and Walker, ‘Political Engagement’ (doc A163), p 330; Alexander, ‘Application by Hokio A and Part Hokio Land Trusts’ (doc A12), pp 20–21

122. Luiten and Walker, ‘Political Engagement’ (doc A163), p 330; Alexander, ‘Application by Hokio A and Part Hokio Land Trusts’ (doc A12), pp 20–21

123. Luiten and Walker, ‘Political Engagement’ (doc A163), p 332

124. Armstrong, ‘Hokio Native Township’ (doc A154), p 6





Map 7.1: Location of Hōkio native township

be the best obtainable, which itself necessitated that accurate valuations of the sections were obtained. The job of valuing the sections fell to the Crown lands ranger at Whanganui, D Craig, who was also asked to determine whether public reserves were required and whether demand for sections was sufficient to warrant the public auction of sites for lease.<sup>125</sup>

It was only when Craig travelled to Hōkio to complete his task that officials became aware of opposition to the township from a Muaūpoko landowner residing on the land. Mr W Broughton was found to be living with his family on land which Craig considered to be some of the few sections with any value. Broughton informed Craig that he was a landowner and was not aware that the land he was living on had been designated the site of a native township. He also said that he would not move from the land and that if any of the sections were leased he would prevent the lessees from taking possession.<sup>126</sup> According to David Armstrong, other owners also complained about the planned township, and said they would object to aspects of it. He was unable to find any detail about the nature of their objections, or whether they were resolved.<sup>127</sup> It seems clear, though, that the township came as a surprise to local Māori residents after it had been proclaimed by the Crown.

125. Luiten and Walker, 'Political Engagement' (doc A163), p 333

126. Luiten and Walker, 'Political Engagement' (doc A163), p 333; Armstrong 'Hokio Native Township' (doc A154), pp 5-6

127. Armstrong, 'Hokio Native Township' (doc A154), p 6

Craig reported on the value of the township sections on 24 November 1902. He criticised the quality of many of the township sections as ‘almost worthless’, and pointed out that they consisted primarily of drifting sand dunes. Nor did he believe that the township would ever be of importance, as it was not well located. He did not believe that any public reserves were needed and advised against the lease of sites by public auction, the lack of demand making public tender a better option.<sup>128</sup>

Craig’s criticism of the township site did not dampen the enthusiasm of Crown officials. Armstrong’s report stated that by late November 1902 the chief draughtsman had verbally instructed Lands and Survey staff to begin finalising the township plan. An official named Brown wrote to the chief draughtsman explaining that the plan could not be finalised, as the terms of the Native Townships Act regarding the plan had not yet been complied with. In particular, the period for exhibiting the plan was not due to expire until 31 December 1902. Only then could the plan be approved by the surveyor-general and deposited with the district land registrar. Brown also advised that ‘[s]ome of the Natives already express their intention of objecting to Reserves etc’. If these objections were pursued in the Native Land Court and approved, Brown said, the township plan would have to be changed.<sup>129</sup> Armstrong was unable to find any further details regarding the nature of these planned objections.

The chief surveyor relayed Brown’s message to the surveyor-general on 29 November 1902. He stated that the plan of the township and sale schedule (showing all the township sections and their valuations) had been completed as far as possible but that both were subject to alteration by the chief judge of the Native Land Court, and that they already knew of one case of ‘strong Native opposition.’<sup>130</sup> This was likely a reference to Broughton’s opposition to the township. Noting the urgency with which the surveyor-general was treating the issue of Hōkio native township, the chief surveyor offered to send the plan and schedules despite the obvious impediments to their finalisation.<sup>131</sup> The surveyor-general did not act on that offer, waiting until January 1903 before requesting the plan and schedules.<sup>132</sup> The plan and the schedule of township sections were finally gazetted on 23 January 1903. The 59 sections of the Hōkio native township available for lease were offered to the public for lease by tender for a term of 21 years (with a right of renewal) from 11 March 1903.<sup>133</sup>

As explained above, under section 8 of the Native Townships Act the Māori owners had no right to object to the establishment of the township itself, only to

128. Luiten and Walker, ‘Political Engagement’ (doc A163), p 334; Armstrong ‘Hokio Native Township’ (doc A154), p 5

129. C Brown (Lands and Survey) to chief draftsman, 28 November 1902 (Armstrong, papers in support of ‘Hokio Native Township’ (doc A154(a)), p 22)

130. Chief surveyor to surveyor-general, 29 November 1902 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1619)

131. Chief surveyor to surveyor-general, 29 November 1902 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1619)

132. Surveyor-general to chief surveyor, 8 January 1903 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1610)

133. Luiten and Walker, ‘Political Engagement’ (doc A163), p 334

their reserves.<sup>134</sup> It is unclear from the evidence we received whether any of the landowners objected to the allocation of their reserves in the Native Land Court, but no change was made as a result of that very limited right of objection. Sections 3 and 4 in block V of the township, upon which Broughton had built a whare and erected fences, were not reserved in any way. The sites were offered for tender at a higher value than other sites, reflecting improvements Broughton had made to them.<sup>135</sup>

Section 6 of the Native Townships Act 1895 required the surveyor-general to reserve 'every building actually occupied by a Native' at the time that the site for the township was gazetted; in this instance, on 7 August 1902. It is not clear when Broughton began living at Hōkio. He and his family do not appear to have been there when Richardson surveyed the town in December 1901, but they clearly were by November 1902, when Craig undertook the valuation of the township. If they had arrived and settled in by the start of August, the surveyor-general was required to reserve their whare. Nothing in the evidence we received indicates whether the Crown investigated this, why the Broughton whare was not reserved, or what became of Broughton and his family. Nor is there any evidence as to what happened to the other objections of Māori owners – possibly because they objected to the township scheme itself rather than to the provision of native reserves, as was their limited statutory right.

#### **(4) A lack of Muaūpoko involvement in establishing the town**

The claimants submitted that the Crown secured land for the Hōkio native township without first obtaining the consent of most of its owners. In addition, while it failed to consult with most landowners, the Crown took advantage of an existing relationship with Warena Hunia in order to claim that it had obtained some level of consent. Crown counsel, however, argued that the Crown had been concerned to acquire the landowners' consent. They viewed the reservation of significant sites for Muaūpoko, and the involvement of Hunia in a visit with the surveyor to the township site, as evidence that consultation, at some level, did take place.

What, if any, consultation took place with Muaūpoko regarding the proposed native township at Hōkio? The mention of Warena Hunia and his desire for a surveyor to accompany him to the site of the proposed township is the only indication of Māori involvement in the plan to establish the township. As noted earlier, Hunia was not yet a legal owner in the land, not having succeeded (with others) to his father's interests. In their closing submissions, Crown counsel suggested that the inclusion of pā tuna (Tārere-Mangō and Pā Kōtuku) in the area reserved for the owners was evidence that Muaūpoko were probably consulted as they would likely have identified these sites.<sup>136</sup>

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134. Native Townships Act 1895, s9

135. Luiten and Walker, 'Political Engagement' (doc A163), p334; Armstrong, 'Hokio Native Township' (doc A154), p6

136. Crown counsel, closing submissions: Native Townships and District Maori Land Boards (paper 3.3.34), pp5-6

Yet, David Armstrong, who identified the possible inclusion of these places, could find no evidence of such consultation. In fact, he only knew about those sites because they appeared in a map produced by local amateur ethnologist and archaeologist G Leslie Adkin in 1948.<sup>137</sup> When cross-examined by the Crown, Armstrong suggested that the influencing factor in the decision to reserve the area for the landowners was a Crown official's observation that there were fishing sites in that area. He did not think that these sites were reserved as a result of consultation with Muaūpoko.<sup>138</sup> We could find no mention of the inclusion of these sites in the documents covering the establishment of the township site.

The experience of Broughton and his family suggests that at least some owners – perhaps most – were unaware of the township scheme. Broughton was living on, and developing, land involved in the township scheme, but knew nothing of it until Craig visited the site to value township sections. That was almost a year after the survey had been completed and months after the site was proclaimed a native township. Once Broughton was aware of the planned township he was able to make his opposition known and could have pursued that opposition through the Native Land Court, but he obviously played no part in the planning or surveying of the town. We do not know whether he took his opposition further.

Crown counsel drew our attention to the comment by Sheridan, the head of the Native Land Purchase Department, that '[t]here are no difficulties in as far as the Natives are concerned in the way of carrying out this proposal'.<sup>139</sup> It does not appear to us that this was a sound conclusion. It was made in September 1901, before Hunia's trip to Hōkio, before the survey, and well before Broughton had voiced his opposition. It is possible that some consultation had taken place, perhaps with Hunia, but we saw no evidence of this. If no objections were made, this might reflect the owners' lack of knowledge rather than their approval.

In summary, the evidence suggests that, at best, one or two owners of the Horowhenua 11B42 block had some involvement in its establishment. It is striking that wider consultation was not required, or considered particularly important. Officials indicated that the consent of the owners of Horowhenua 11B42 was desirable, but it does not seem to have been sought or obtained. Legally, this did not matter; the Native Townships Act 1895 allowed the Crown to establish townships without the consent of affected landowners. On the evidence available to us, we are satisfied that the Crown relied on this Act to establish the Hōkio native township without significant consultation and without the consent of the owners.

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137. Armstrong, 'Hokio Native Township' (doc A154), p 6; transcript 4.1.13, p 281. The map in question is on page 22 of G Leslie Adkin, *Horowhenua: Its Maori Place-names and their Topographic and Historical Background* (Wellington: Department of Internal Affairs, 1948).

138. Transcript 4.1.13, pp 281–282

139. Sheridan to acting surveyor-general, 16 September 1901 (Crown counsel, closing submissions: Native Townships and District Māori Land Boards (paper 3.3.34), pp 5–6)

### 7.3.4 How was the Hōkio native township administered and what influence did Muaūpoko landowners have on decisions concerning their land?

#### (1) 1903–10: Administration through the commissioner of Crown lands

For the first seven years of its existence, the Hōkio native township was administered by the Crown through the commissioner of Crown lands. The landowners played no role in decision-making regarding the town. Under the Native Townships Act 1895 the Crown took over the legal (as opposed to beneficial) ownership of the land, and the commissioner of Crown lands administered native townships as if they were Crown land. The Act also governed how the rental income from the leased sections could be used. In particular, the costs of establishing the town had to be paid from the rentals before the landowners could receive any income.

The total cost of establishing Hōkio native township was £51 10d. This included costs for the survey conducted by Richardson, the costs of preparing the township plan, advertising costs, and the cost of pegging out the sections which had been added to the plan in the survey office. By March 1904, some 24 allotments had been leased at a combined annual rental of £8 5s.<sup>140</sup> The establishment costs of the township would thus take a bit over six years to be repaid, assuming that there were no ongoing or additional costs. In the meantime, the owners of the Horowhenua 11B42 block received no income from the township scheme.<sup>141</sup>

Even once the costs were paid, it is doubtful that any owner would have benefited greatly from the township. Any income generated by the township had to be divided among all the owners of the land. When the town was established there were 81 owners of the block. The maximum projected income from leases of all the township sections was £28 10s per year in 1903.<sup>142</sup> This equates to about seven shillings per owner per year. By comparison, seven shillings was the average daily wage for a farm labourer in the Wellington region in 1903.<sup>143</sup> The actual rental income (£8 5s in total, as noted) was less than one-third of this estimate.

#### (2) The Ikaroa District Maori Land Board administration and sales of township sections

As mentioned earlier, the Native Townships Act 1910 transferred the legal ownership of land involved in native townships to the relevant district Māori land board. Significant sections of this new Act included:

- ▶ section 15, which allowed the boards to lease native allotments with the landowners' consent;
- ▶ section 13, which provided the board with authority to lease land under the Public Bodies Leases Act 1908, which included provision for perpetually

140. Luiten and Walker, 'Political Engagement' (doc A163), p334; File note – 'Hokio Township', not dated (David Alexander, comp, papers in support of 'Application by Hokio A', various dates (doc A12(b)), p147)

141. Luiten and Walker, 'Political Engagement' (doc A163), p335; Armstrong, 'Hokio Native Township' (doc A154), p7

142. Armstrong, 'Hokio Native Township' (doc A154), p7

143. New Zealand Official Year Book, 1904, available at [https://www3.stats.govt.nz/New\\_Zealand\\_Official\\_Yearbooks/1904/NZOYB\\_1904.html#idchapter\\_1\\_106709](https://www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1904/NZOYB_1904.html#idchapter_1_106709)



## 7.3.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

renewable leases, though the provision could only be applied to new (rather than existing) leases; and

- ▶ section 23, which allowed land boards to sell any land in a native township with the consent of the landowners.

The Ikaroa District Maori Land Board took control of the Hōkio native township. In 1912, some of the lessees approached the board about acquiring the freehold to their sections, arguing that security of tenure would encourage them to build good houses and improve their sections. The board did not act immediately, only organising a meeting of the Māori owners to consider the sale of township sections in September 1913. The meeting was held on 21 November 1913 and the brief minutes recorded the owners as agreeing that ‘Hokio Native Township be sold . . . under the provisions of s23 of the Native Townships Act 1910.’<sup>144</sup> It is not clear how many owners took part in this meeting of owners. Despite this resolution the board took no immediate action to sell any sections. In 1916 some lessees again approached the land board to request the ability to buy their sections. The board met in March 1916 and confirmed the resolution of owners from November 1913 but, again, no sales took place.<sup>145</sup>

In 1924, the 21-year term of the initial township leases came up for renewal and sales of the township sections followed soon after. Armstrong found few details about these sales, noting that the records of the Ikaroa District Maori Land Board are ‘incomplete and at times a little confusing’. What seems clear is that a flurry of sales followed the expiration of the 21-year leases. The board sold about 30 sections by the end of 1926. Ten further sales occurred between 1929 and 1934. Two more sections were sold in 1947. Almost all of these sections were sold at their ‘unimproved’ Government Valuation. Although new valuations were periodically obtained, there was no indication in the information we received as to whether the owners were satisfied to sell at those prices.<sup>146</sup>

The most striking feature of these sales is that they took place years after the board consulted owners about the sale of sections. The land board never sought the consent of owners to the proposed sale of township sections after the meeting of 1913. In 1944, the purchase of another section was proposed. At this point, the registrar (a member of the board) finally considered the possibility that the consent gained from owners 30 years previously was not sufficient authority for further sales. By this time there were approximately 500 owners in the remaining township sections, and the registrar noted that convening a meeting of owners would be difficult and expensive.<sup>147</sup> The matter was raised with the president of the land board, Judge Whitehead, who considered that in ‘the special circumstances of this case I

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144. ‘Notice of Meeting of Owners’, 5 November 1913, *New Zealand Gazette*, 1913, no 81, p 3391

145. Armstrong, ‘Hokio Native Township’ (doc A154), pp 8–9

146. Armstrong, ‘Hokio Native Township’ (doc A154), pp 10, 18–21; Armstrong, papers in support of ‘Hokio Native Township’ (doc A154(a)), pp 217, 232, 262, 283.

147. Registrar, Ikaroa District Maori Land Board, to president, Ikaroa District Maori Land Board, 21 February 1944 (Armstrong, papers in support of ‘Hokio Native Township’ (doc A154(a)), p 268)



think the consent of the owners obtained in 1913 can reasonably be considered as current.<sup>148</sup>

As Armstrong pointed out, it cannot even be assumed that the consent gained from owners in 1913 was valid 11 years later when the initial sales took place. We do not even know how many owners were at the 1913 meeting, but the quorum provisions of that time provided no safety that a representative number of owners was present. Even if the meeting was representative, the factors that led to the vote in favour of lands sales in 1913 may not have been current in 1924.<sup>149</sup> The fact that this same apparent consent was used again in 1929, 1934, and 1947 was remarkable, to say the least. The sales conducted in 1947 took place 34 years, or a generation, after consent was secured. By that time the number of owners had increased many times over as a new generation of owners succeeded to the interests of those consulted in 1913. Owners who had succeeded to interests after 1913, before the sales that took place in 1924, 1929, 1934, and 1947, were afforded no opportunity to support or reject the sale of their land.

We cannot be sure that, given the opportunity, the landowners would have rejected the option of selling township sections, but there is some evidence that this may have been the case. In 1920, some Levin residents suggested extending the township by securing a further 50 acres of Māori land bordering the township to the south – part of Horowhenua 11B42. Both the mayor of Levin and the local chamber of commerce supported the idea, believing that a recently completed road to Hōkio would increase the popularity of the township. But the plan was rejected because the Māori owners expressed a preference for leasing over the sale of land. According to Armstrong, these owners were the same as those who owned the township.<sup>150</sup> In 1923, the Horowhenua 11B42 block was partitioned into four new blocks. The land adjoining the Hōkio township to the south (Horowhenua 11B42A) was further partitioned into 13 lots a year later. Luiten and Walker suggested that the motivations for this partition included the desire of some owners to build their own homes at Hōkio, and a realisation that the lots might be of interest to others.<sup>151</sup>

The owners of Horowhenua 11B42 also turned down repeated offers of a local farmer, W Stewart Park, to buy their land. As we discuss further in the next section of this chapter, Park eventually requested that the Government compulsorily acquire the block, because the owners did not want to sell to him.<sup>152</sup>

What the above indicates is that, given an opportunity, the landowners may have rejected sales in favour of renewed leases or other options. The partition of Horowhenua 11B42A indicated some willingness amongst owners to consider the sale of sections and a desire amongst some to live on their land. But they were not given an opportunity to consider their options. The township sections had been

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148. Judge Whitehead to registrar, 22 February 1944 (Armstrong, papers in support of 'Hokio Native Township' (doc A154(a)), p 269)

149. Armstrong, 'Hokio Native Township' (doc A154), pp 10, 18–21

150. Armstrong, 'Hokio Native Township' (doc A154), pp 9, 11

151. Luiten and Walker, 'Political Engagement' (doc A163), pp 336, 337

152. Under-Secretary Jones to Native Minister, 1 October 1926 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1921); Luiten and Walker, 'Political Engagement' (doc A163), pp 362–363

vested in the Ikaroa District Maori Land Board, and it made the decision to sell land without any reference to the owners after 1913. The legislation which allowed this was clearly flawed. So, too, was a land title system which made it easier for the land to be sold than for the owners to be assembled and consulted.

Whether the Crown can be held responsible for the action of the Ikaroa District Maori Land Board was an issue of contention between the parties in our inquiry. The Crown submitted that Māori land boards (and the councils that preceded them) were not 'the Crown' or agents of the Crown. Drawing upon the findings of past Tribunal reports, the Crown argued that land boards were akin to the Public Trustee, Native Trustee, and Māori Trustee, bodies established to act on behalf of their beneficiaries – the owners of the land which the boards held in trust.<sup>153</sup> The Crown had no statutory power to alter or amend these trusts or direct the boards as to how they should exercise their functions.

The Crown accepted that, as it had established the legislative regime under which the boards operated, it had an ongoing duty to monitor the effectiveness of that regime and to promote change if necessary. Further, the Crown accepted that it could be held responsible for the actions that legislation obliged land boards to take. It argued, however, that the corollary of this was that the Crown could not be held responsible for the actions that the legislation merely provided boards with the discretion to take. Regarding the sale of township sections, the Crown noted that this was an action that boards were able but not obliged to take. Further, there was a lack of evidence indicating that the landowners opposed these sales. In the Crown's view, it could not be criticised for having failed to promote statutory change that may have halted land sales when there was no evidence that such change was desired.<sup>154</sup>

Counsel for the Wai 237 claimants did not dispute the view that land boards were akin to the Public Trustee or the Māori Trustee – they were not agents of the Crown and their actions were not actions of the Crown. They argued, however, that prior to transferring township lands to the board the Crown had itself held these lands in trust for the owners. As such it owed direct legal duties to the landowners in the form of fiduciary duties. When the Crown delegated its role as trustee to the board, the Crown remained responsible for monitoring outcomes regarding Muaūpoko land and for ensuring that the regime was working efficiently. A fiduciary would, they said, be in breach of its duties if it divested its obligations to another entity without ensuring that the obligations were being met.<sup>155</sup>

Drawing upon the findings of the Te Tau Ihu Tribunal, counsel also argued trustees (such as land boards) were effectively carrying out the obligations of the Crown. The Crown therefore had a duty to ensure that the trustees did not breach the principles of the Treaty in carrying out these responsibilities. Further, under article 2 of the Treaty, the Crown promised to ensure that Muaūpoko were able to

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153. Crown counsel, closing submissions: Native Townships and District Māori Land Boards (paper 3.3.34), pp 11–14

154. Crown counsel, closing submissions: Native Townships and District Māori Land Boards (paper 3.3.34), pp 11–14

155. Claimant counsel (Naden, Upton, and Shankar), closing submission (paper 3.3.23), pp 254–255

retain their land until they wished to divest themselves of ownership. In the claimants' view, the Crown breached the Treaty when it failed to ensure that Muaūpoko supported the sale of township sections.<sup>156</sup>

It can be seen that there was broad agreement between the parties on a number of points. The Ikaroa District Maori Land Board was not an agent of the Crown and its actions were not Crown actions. The Crown was, however, responsible for the legislative regime under which the board operated. It had an ongoing duty to monitor the effectiveness of that regime and to make changes when necessary. Where the parties fundamentally disagreed was the question of whether the Crown fulfilled that duty. The Crown argued that it could not be criticised for failing to promote legislative change to prevent land sales when there was no evidence that Muaūpoko protested these sales. The claimants argued that it was not enough for the Crown to wait for protests from Muaūpoko landowners before acting. The Crown had compulsorily assumed ownership and control of the land within the township scheme through the Native Townships Act and had then, without consulting the owners, transferred legal ownership and control of that land to the board. The Crown therefore had a duty to monitor the work of the land board and ensure that Muaūpoko supported any sale of their land.

On the role of the Crown in monitoring the work of Māori land boards, we are persuaded by the claimants' arguments. Through the Native Townships Act 1910, the Crown required land boards to take over the legal ownership and management of township lands, lands that had been taken by the Crown following no, or minimal, consultation with owners. In so transferring its responsibilities to manage the lands, the Crown also transferred the fiduciary duties it had held up to that point. The Crown had an obligation to ensure that the board did not breach the Treaty when it made decisions affecting the township lands.

We also note what was said when the Native Townships Bill was introduced to Parliament in 1910. Native Minister James Carroll said that the Bill contained safeguards to protect Māori interests in relation to the sale of township lands. The Whanganui Land Tribunal described this as a 'triple layer of safeguards'.<sup>157</sup> These were: (i) the owners' consent was required for sales; (ii) Māori land boards had to inquire into and approve every sale; and (iii) the Governor also had to consent to sales. According to Carroll, these safeguards added up to a pledge that every transaction would be closely scrutinised.<sup>158</sup> In other words, the Crown did have a role in ensuring that all sales were in the best interests of the landowners concerned.

What is clear from the sales of Hōkio township sections is that this first safeguard – the consent of owners – was dispensed with after 1913. No owners were asked to consent to sales which took place between 1924 and 1947. The land board avoided consulting owners after 1913, citing the difficulties in calling a meeting of multiple owners. Despite this, the Crown made no attempt to ensure that either the board or the Governor was inquiring into what, if any, mandate had been secured for each

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156. Claimant counsel (Naden, Upton, and Shankar), closing submission (paper 3.3.23), pp 255–256

157. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 825

158. James Carroll, 11 October 1910, NZPD, vol 152, p 347; Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 825

sale, or to intercede in the actions of the land board with regard to any of the sales. The Crown failed to protect the interests of the Muaūpoko owners, as it had explicitly promised would be done when it passed the legislation.

**(3) Administration by the Māori Trustee**

**(a) Transfer to the Māori Trustee:** By 1950 there were 17 township sections still administered by the land board. These sections were transferred to the Māori Trustee to administer in 1952, following the abolition of the Māori land boards. There is no evidence to say whether any consultation was undertaken or consent acquired from the owners for this transfer of authority.<sup>159</sup> We find it difficult to believe that, if the owners' consent had been sought and obtained, this would not have been specifically recorded in the official record.

**(b) The 'Native allotment':** In 1956, the Māori Trustee discovered that several Pākehā were illicitly occupying the native allotment or reserve, some having erected huts and other structures on the block. The Māori Trustee believed those occupying the land should be paying rent but this would have required the block to be subdivided and the new sections put up for tender. The Muaūpoko landowners were reluctant to pursue the proposed subdivision, as they believed it could result in a loss of access to the reserve which they used seasonally for eeling and whitebaiting. The Māori Trustee decided that the best option was to re-vest the site in the owners, who could then either collect rent from those using it or use it for their own purposes. Application was made to the Maori Land Court to re-vest the site. As the area was small (just under 2½ acres) and there were by now over 400 owners, the court agreed to re-vest the site in a group of owners as trustees for the beneficial owners. Seven trustees were appointed under section 438 of the Maori Affairs Act 1953 on 13 May 1957.<sup>160</sup>

The re-vesting of the site in those owners was short lived. In 1960 they expressed a desire to subdivide the section into building allotments that could be leased for a 21-year term with a perpetual right of renewal. They were prevented from doing this, however, as section 235 of the Maori Affairs Act 1953 had a protective mechanism which (rightly) protected the owners against the virtual permanent alienation of their land. This section of the Act required that leases of Māori land be confined to a maximum period of 50 years, which included any period covered by a right of renewal. At Hōkio Beach, however, no prospective lessees were willing to take a lease restricted to a 50-year term without a right of renewal. The trustees inquired as to whether the site could be vested in the Māori Trustee to be leased with perpetual rights of renewal or, alternatively, whether the legislation could be amended to allow them to offer a perpetual lease.<sup>161</sup>

159. Armstrong, 'Hokio Native Township' (doc A154), pp 11–12; Armstrong, papers in support of 'Hokio Native Township' (doc A154(a)), pp 493–512

160. Armstrong, 'Hokio Native Township' (doc A154), p 12; extracts from Ōtaki Maori Land Court, minute book 66, 5 April 1957, 13 May 1957, fols 393, 460–461 (Armstrong, papers in support of 'Hokio Native Township' (doc A154(a)), p 135)

161. Armstrong, 'Hokio Native Township' (doc A154), p 12

The site was re-vested in the Māori Trustee in 1963 to sell or lease. It was partitioned and sold off between 1967 and 1971 for a total of \$2,236. Although the evidence suggests that the reserve's trustees were aware that the Māori Trustee was empowered to alienate the land, we have no information on whether the landowners' approval was sought by the trustees for the re-vesting, or indeed by the Māori Trustee for the subsequent sales. We suspect it was not.<sup>162</sup>

**(c) *The child welfare institution:*** The land which was vested in the Māori Trustee from 1952 included sections 1, 2, 3, and 4 of township block V, which had been leased by the Education Department since 1928. A child welfare institution was built on the land, housing children in State care. The department also approved the purchase at Government Valuation of section 4 block III of the township to build a school to service the welfare home. Part of that section was also utilised as road access by those leasing other township blocks. To avoid delays in completing the school, the land board agreed that the department could build the school before ownership had officially been transferred, while the issue of access across the block was resolved.<sup>163</sup>

In 1944 it was found that the issue had not been dealt with, the section was still vested in the land board, and the department had been using the land for free for 15 years. No action was taken to remedy this situation until 1947, when the land board advised the department that it could purchase the block (minus the area used as a road) for £50 plus 4 per cent interest on the purchase price from 1 January 1929. This proposal does not appear to have gone anywhere. Then, in 1949, that area used as a road was compulsorily acquired by the Horowhenua County Council under the Public Works Act, with the Maori Land Court awarding £30 as compensation. One year later, the remainder of the section was compulsorily acquired by the Crown for education purposes. The Maori Land Court awarded £70 as compensation.<sup>164</sup>

The department continued to lease sections 1, 2, 3, and 4 of block V until 1961, when these sections were also compulsorily acquired. David Armstrong found nothing that explained the rationale for this compulsory acquisition or why the department opted against continuing to lease the land.<sup>165</sup> The Maori Land Court was tasked with assessing the compensation due to the landowners, and the Public Works Department offered to supply a valuation. The local Maori Affairs district officer was able to persuade the Māori Trustee to seek an independent valuation of the sections, believing that compensation should be assessed on the 'potentialities' of the township rather than upon the 'usual conservative Government valuation.'<sup>166</sup> The private valuer employed by the Māori Trustee, Blackburn, assessed the total freehold value of the sections at £770. In doing so he noted the presence of the child

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162. Armstrong, 'Hokio Native Township' (doc A154), pp 12–13; memorial schedule, 'Hokio MT Section 2 Block 1' (Crown Forestry Rental Trust, 'Maori Land Court Records Document Bank Project', vols 5–8 (doc A70(a)), vol 5, pp 441–442)

163. Armstrong, 'Hokio Native Township' (doc A154), p 13

164. Armstrong, 'Hokio Native Township' (doc A154), p 13

165. Armstrong, 'Hokio Native Township' (doc A154), p 13

166. District officer to head office, 28 April 1961 (Armstrong, 'Hokio Native Township' (doc A154), pp 13–14)



welfare institution had a depressing effect on values in the area. The Maori Land Court assessed the compensation due to the owners at £600, payable to the Māori Trustee.<sup>167</sup>

In 1996, the section of the block on which the child welfare institute was located, section 4 block III of the Hōkio A block, was returned to the Hokio A Lands Trust. This section was one of those in blocks II–V taken under public works legislation, all of which the Crown at that time returned for a total token purchase price of 10 cents. The current owners have made a claim to the Tribunal about the return of the land that was taken for the child welfare institute, which Eugene Henare called the return of ‘a lemon’.<sup>168</sup> They have alleged that the trust received ‘dilapidated and dangerous buildings’ and houses which were not habitable. In addition, Eugene Henare told us that the site lacked adequate sewerage facilities at the time of its return by the Crown. Vast sums would therefore, he said, have had to be spent on the building by the new owners from the time of handover, and in the meantime they ‘continue to be rated for land that we cannot utilise effectively’.<sup>169</sup>

As set out in the introduction to this chapter, we are not dealing with public works issues in the present expedited inquiry; we will consider these issues for the inquiry district as a whole in our wider Porirua ki Manawatū report. We received insufficient evidence about this particular issue of the child welfare institution, especially in relation to its return to the Hokio A Lands Trust, to make a finding on this specific claim issue.

**(d) *The re-vesting of remaining sections in the Hokio A Lands Trust:*** In 1971, sections that had been leased in 1950 came up for renewal. Officials in the Maori Affairs Department recommended that the Māori Trustee convert the leases into ‘prescribed’ leases under section 27 of the Maori Reserved Land Act 1955, with a perpetual right of renewal. This advice was based on officials’ view that it was unfair for lessees to receive no compensation for their improvements at the expiration of a lease. The Māori Trustee rejected this view. The lack of compensation for improvements was mitigated by the fact that the sections had been leased at very low rentals.<sup>170</sup> The Māori Trustee was also of the view that, after another round of leases, the land should be returned to the owners’ control, thereby ‘restoring to them the privilege of dealing with their lands as they choose’.<sup>171</sup> New leases were executed which covered a further 21-year period without any right of renewal.<sup>172</sup>

In 1973, the Hōkio township was considered by a commission of inquiry into Māori reserved land. By this time just 11 sections totalling a little over four acres remained in Māori ownership at Hōkio. The balance had been sold by the land

167. Armstrong, ‘Hokio Native Township’ (doc A154), pp 13–14. Armstrong did not note any reason for the discrepancy between Blackburn’s valuation and the Maori Land Court’s assessment.

168. Transcript 4.1.11, pp 531–532, 556, 559, 561, 569

169. Henare, brief of evidence (doc B6), pp 6–7

170. Armstrong, ‘Hokio Native Township’ (doc A154), pp 14–15

171. JH Dark to assistant Māori Trustee, 22 September 1971 (Armstrong, ‘Hokio Native Township’ (doc A154), pp 14–15)

172. Armstrong, ‘Hokio Native Township’ (doc A154), p 15



board or the Māori Trustee to private landowners or compulsorily acquired by the Crown. The Māori Trustee administered the remaining land on behalf of 520 owners holding 345,000.28 shares. The largest shareholder received \$27.72 per year while many small shareholders received nothing at all. The commission recommended that the Maori Land Court appoint an 'advisory trustee', selected by the owners, to work with the Māori Trustee to develop options for the future of the sections.<sup>173</sup> The commission's recommendation was not acted upon by the Māori Trustee.

In May 1975 a Maori Affairs district officer sought instructions on a proposed lease of a township section. The Māori Trustee requested that the Maori Affairs Department consult with the owners (or a representative group of owners) as to their wishes concerning the land. Only then would a decision on the lease be made. The district officer was opposed to a meeting of owners, noting cost in time and money of contacting such a large group but, in June 1975, Maori Affairs agreed to discuss the matter with some of the major owners. Whether this meeting actually took place is unclear.<sup>174</sup>

The following year the Māori Trustee decided that the best course was to return the remaining sections to the owners, viewing the administration of the sections as an onerous trust that brought the trustee no return.<sup>175</sup> One owner, Ada Tatana, stated at a meeting of owners that the Māori Trustee had by this time given up trying to distribute rentals to the landowners where their share amounted to 50 cents or less. This money was paid to the Maori Education Foundation instead.<sup>176</sup>

Returning the land to over 500 owners was not feasible and it was decided that the land should be returned to a trust set up under section 438 of the Maori Affairs Act 1953. The Hokio A Lands Trust had been established in 1963 to administer the Hōkio A block (905 acres) which was adjacent to the township. The Hōkio A block was made up of land from the former Horowhenua 11B42B, 11B42C, and 11B42A14 blocks. In August 1976, the Hōkio A trustees agreed to take on the remaining township sections but their application to do so was adjourned by the Maori Land Court to allow for the proposal to be discussed at a meeting of the landowners. This meeting was held in March 1977 and the owners considered both the vesting of the sections in the Hokio A Lands Trust and the possibility of creating a new trust. Armstrong noted that there was a general lack of unanimity and a lack of understanding of the implications of the options considered. Eventually, however, it was decided to vest the sections in the Hokio A Lands Trust. The Maori Land Court vested the sections on 27 April 1977.<sup>177</sup>

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173. Armstrong, 'Hokio Native Township' (doc A154), p 15

174. Armstrong, 'Hokio Native Township' (doc A154), p 16

175. Armstrong, 'Hokio Native Township' (doc A154), p 17

176. 'Minutes of meeting of Hokio Maori township', 21 March 1977 (Armstrong, papers in support of 'Hokio Native Township' (doc A154(a)), p 188)

177. Armstrong, 'Hokio Native Township' (doc A154), pp 17-18

In his evidence to the Tribunal, Tama Ruru advised that this small remnant of the Hōkio township lands had 1,779 owners in 2015, and only three out of 13 baches 'are left standing today'.<sup>178</sup>

### 7.3.5 Findings on the Hōkio native township

#### (1) *The findings of the Whanganui Land Tribunal on native townships*

The Whanganui Land Tribunal is as yet the only Tribunal to make extensive findings on the legislation which established native townships, and on specific case studies within its inquiry district. That Tribunal found that the Native Townships Act 1895 was drawn up and introduced without meaningful consultation with Māori, in breach of the Treaty's guarantee of rangatiratanga, and the principles of active protection and partnership.<sup>179</sup> Although the Crown did take some Māori objections into account, there was no discussion of the details with Māori and very limited debate in Parliament.<sup>180</sup> The Tribunal therefore concluded that Māori did not and would not have consented to the legislation, since it 'shut them out of owning and managing their own land'.<sup>181</sup>

When the Crown introduced the legislation it justified the lack of consent by claiming that development of the towns on their land benefited Māori; however, the legislation not only included very little in the Māori interest, it failed to incorporate procedures for objection or avenues of recourse for Māori. The Crown made all decisions and the Native Land Court had the final say on the limited matters for which appeals were allowed.<sup>182</sup> We agree with the Whanganui Land Tribunal that the Crown's native townships legislation was deficient and in breach of the Treaty and its principles.

In respect of the acquisition of Māori land for native townships, the Tribunal found that such takings had to meet the same test as compulsory purchases under the public works legislation; that is, the compulsory acquisition of Māori land was only justified 'in exceptional circumstances as a last resort in the national interest'.<sup>183</sup> In the case of native townships, the Tribunal found that there was no national exigency which necessitated the legislation or the compulsory taking of land.<sup>184</sup> Nor were Māori owners compensated for any compulsory Crown takings within the townships.

The Whanganui Land Tribunal also found that the safeguards in the original native township legislation were not sufficient to protect against alienation, while the changes to the legislation in 1910 were made for the benefit of Pākehā tenants, rather than the Māori owners, and actually contributed to further land loss.<sup>185</sup> The Tribunal noted that the Crown could have provided for Māori involvement

178. Tama Ruru, brief of evidence, 24 November 2015 (doc c25), pp [12], [15]

179. Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 883–884

180. Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 817–821, 826

181. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 883

182. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 826

183. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 884

184. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 884

185. Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 824–826, 885

in township administration in the legislation, since it knew that was what Māori preferred, but instead it denied Māori input at any stage of planning or administration of these townships.<sup>186</sup> The Crown's exclusion of Māori from such a role made it more responsible for ensuring the towns were administered to the owners' financial benefit. Rather than attempting to solve legislative problems as they emerged, the Crown 'contributed to the failure of the towns to provide a good rental income for owners.'<sup>187</sup>

## **(2) Our findings on the Hōkio native township**

At this stage of our inquiry, we note the findings of the Whanganui Land Tribunal on the passage of the Native Townships Act 1895 (described above), but we make no findings on that or other general issues in advance of hearing all the native township claims in our inquiry district. Our findings are confined to matters specific to the Hōkio native township.

In respect of Hōkio, the Crown used the Native Townships Act 1895 to assume the legal ownership and control of about 40 acres of the Horowhenua 11B42 block, upon which it established the Hōkio native township. It did so, not 'for the purposes of promoting the settlement and opening-up of the interior of the North Island', as the Act intended, or to aid in the profitable development of Māori land. Rather, the township was established to satisfy the desire of some Levin residents for holiday homes by the beach. The compulsory vesting of land for that purpose did not meet the test of an exceptional circumstance, essential in the national interest. Also, there was never any prospect, according to Crown officials at the time, that the town would be of great benefit to the landowners.

The Treaty guaranteed to Māori the right to retain their land and exercise tino rangatiratanga over it. As the Central North Island Tribunal noted, these guarantees obliged the Crown to 'consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything which altered their possession of the land.'<sup>188</sup> The vesting in the Crown of control and legal ownership of the land in the Hōkio native township should have been viewed by the Crown as a matter of great importance to Muaūpoko. Yet it made little effort to consult with the owners. It did not seek, and therefore did not obtain, the consent of those Muaūpoko landowners affected by the scheme. The Crown therefore acted inconsistently with the Treaty guarantee of tino rangatiratanga, and breached the principles of partnership and active protection.

We note that the Crown omitted to use the more Treaty-compliant model available for the establishment of a native township at that time: for the owners to decide voluntarily to vest their land in a district Māori land council (on which Māori of their district were represented), and then to agree to the establishment of a township on that land, to be managed by the council.

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186. Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 826, 884

187. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 883

188. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 173

Further, the Crown took absolute ownership of 42.5 per cent of the township lands for roads and public reserves, without consent or compensation. This, equally, was not necessary in the national interest, nor was it an exceptional case requiring a compulsory taking. The compulsory taking of this land in these circumstances was a breach of the principles of partnership and active protection.

The Native Townships Act 1910 made changes to the 1895 regime without any consultation with or consent from Māori. The Crown transferred legal ownership of the Hōkio township lands to the Ikaroa District Maori Land Board. That board was empowered to both lease and sell the land it controlled. Sales of land were supposed to be regulated by ‘a triple layer of safeguards’ – obtaining the consent of owners, the land board, and the Governor.<sup>189</sup> In the case of Hōkio native township the first of these safeguards, obtaining the consent of the landowners, was absent from the sales of township sections completed from 1924 to 1947. Owners were asked only once by the land board to consent to sales of township sections. This occurred in 1913, nine years before any sales took place, and by which time the ownership of the land had changed markedly. Many more people had acquired interests in the land as new owners succeeded to the interests of former owners. But these new owners, who numbered 500 or more by the mid-1940s, were never asked to consent to a sale. In fact, by the mid-1940s the sheer number of owners was used by the land board as a reason not to consult them over continued sales of their land.

We agree with the Whanganui Land Tribunal that the Crown continued to be responsible for ensuring the board administered the Māori owners’ lands in the beneficial owners’ best interests. This necessitated the Crown taking action to ensure that its safeguards worked, and that the actions of the board did not further attenuate the owners’ links with their ancestral lands, or further infringe their Treaty rights. The Crown therefore breached its Treaty guarantee of tino rangatiratanga by vesting legal ownership and control of the Hōkio township land in the land board without consent, and by not ensuring that there were sufficient safeguards against sales to which the owners had not explicitly agreed.

Though the Crown was not directly responsible for the actions of the Ikaroa District Maori Land Board, it had an obligation to ensure that Muaūpoko landowners were consulted and agreed to the sale of their lands, and that the empowering legislation ensured this happened. It was not enough for the Crown to wait for owners to complain about land sales before taking action. The Crown had a duty to actively protect the right of owners to retain their lands so long as they wished to do so. The Crown’s failure to ensure that the Muaūpoko owners’ consent was obtained to the sales of their land in the Hōkio native township further undermined their ability to maintain ownership and exercise rangatiratanga over their land, and was a breach of the principle of active protection.

In sum, Crown actions breached the Treaty because the Crown did not obtain the consent of the Muaūpoko owners to: the establishment of a township on their lands; the vesting of the legal ownership and control of their lands in the Crown;

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189. Waitangi Tribunal, *He Whiritāunoka*, vol 2, p 825

the reversioning of the legal ownership and control of their lands in the land board and then the Māori Trustee; and the many powers which could be exercised without consent over their township lands. It is not sufficient to say that the law did not require the owners' consent for any of these things; the legislation was clearly not consistent with Treaty principles, and was discriminatory. Further, the Crown breached Treaty principles by its failure to ensure that the safeguards promised by Carroll in 1910 actually worked, with the result that the Muaūpoko owners' consent was not sought for any of the sales of individual sections which took place between the 1920s and the 1940s. These breaches of the principles of partnership and active protection have prejudiced the Muaūpoko owners, who lost control of (and any real benefit from) their lands for many decades, only to have most of it gradually sold off without their consent.

## 7.4 THE CROWN'S LAST MAJOR PURCHASE OF LAND AT HOROWHENUA

### 7.4.1 Introduction

In the previous section, we assessed claims about the Crown's acquisition of 40 acres from the coastal block for a native township. In this section, we examine the Crown's purchase of a further 1,088 acres of the coastal lands. This was the Crown's last major purchase of Horowhenua land in the twentieth century. It acquired the majority of the 11B42C block in the 1920s, leaving 776 acres for the non-sellers.<sup>190</sup> The land purchased by the Crown now makes up part of the Waitarere Forest, a production pine forest located on coastal land between the Hōkio Stream in the south and the Manawatū River in the north.

The Crown began purchasing individual interests in the block from 1926 after being approached by a neighbouring Pākehā landowner who was intent on securing the land. The owners of the block had already rejected his offer to purchase the land from them. The enforcement of a charging order for the cost of surveying the block saw the Crown secure more land in the block. The land secured by the Crown was declared Crown land in 1928 and became part of the Waitarere State Forest in 1960. In examining the circumstances of the Crown's acquisition of land from Horowhenua 11B42C we address the following questions:

- ▶ Why did the Crown decide to acquire land in Horowhenua 11B42C?
- ▶ How did the Crown go about acquiring land in Horowhenua 11B42C?

### 7.4.2 The parties' arguments

#### (1) *The claimants' case*

Counsel for the Wai 52 and Wai 2139 claimants submitted that the Crown misused its authority under the Native Land Amendment Act 1913 to acquire undivided individual interests in the block. Further, the Crown did so on behalf of a private individual who offered the Crown more money for the land than the Crown was prepared to pay the owners for it. The Crown also enforced a charging order for survey

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190. Horowhenua 11B42C consisted of 1,871 acres. It was partitioned out of the 11B42 block in 1923.



## 7.4.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

costs in order to secure more land from the owners. As a result, the 71 per cent of owners who did not sell their interests were left with considerably less than half the block.<sup>191</sup> Counsel for the Wai 493 and 1629 claimants submitted that the Crown's conduct regarding the Horowhenua 11B42C block deprived Muaūpoko of land they had declined to sell.<sup>192</sup> Charles Rudd, an unrepresented claimant at the time of our hearings, stated that the land must be returned to Muaūpoko.<sup>193</sup>

**(2) Te Hono ki Raukawa's case**

Counsel for Te Hono ki Raukawa (a Ngāti Raukawa claimant collective) made closing submissions about the Waitarere Forest. Counsel noted that Ngāti Raukawa supported the priority hearing of Muaūpoko claims in advance of completing the research of other iwi, and that Ngāti Raukawa (among others) were not allowed to cross-examine witnesses during the Muaūpoko priority hearings. In these claimants' view, however, it was necessary to make submissions about this one point: the Waitarere Forest is one of the issues covered by the Tribunal's decision that it 'will not be making findings on Crown acts or omissions affecting the relationships between, and the respective rights and interests of, Muaūpoko, Ngati Raukawa and Te Atiawa in the inquiry district.'<sup>194</sup> Counsel for Te Hono submitted:

A particular concern for Te Hono is that both Muaūpoko and Ngāti Raukawa claimants have claims with respect to the Waitarere Forest. This forest is either entirely or predominantly outside the Horowhenua Block awarded to (mainly) Muaūpoko persons and on lands occupied by the Poroutawhao hapū of Ngāti Raukawa.<sup>195</sup>

Counsel for Te Hono also submitted that the Tribunal should 'caution the Crown on the basis that it would not be consistent with the Treaty of Waitangi for the Crown to dispose of the Waitarere Forest in any negotiated settlement until after the Ngāti Raukawa claims have been heard and the Tribunal has expressed its opinion.'<sup>196</sup>

**(3) The Crown's case**

Crown counsel argued that the purchase was 'apparently motivated by concern about sand drift'. The Crown noted evidence that the purchase took the form of acquiring individual interests, and involved the 'enforcement of a charging order for survey'.<sup>197</sup> Otherwise, the Crown's submissions focused on the Waitarere Forest, part of which is located on this block. Crown counsel noted two claimant memoranda (including from Te Hono ki Raukawa) asserting that other iwi have claims in

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191. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 4 (paper 3.3.17(c)), pp 17–18

192. Claimant counsel (Lyll and Thornton), closing submissions, 15 February 2016 (paper 3.3.19), p 28

193. Charles Rudd, closing submissions, 9 February 2016 (paper 3.3.18), pp 18–19

194. Counsel for Te Hono ki Raukawa (Hall and Green), closing submissions, 12 February 2016 (paper 3.3.22), p 1

195. Counsel for Te Hono ki Raukawa (Hall and Green), closing submissions (paper 3.3.22), pp 1–2

196. Counsel for Te Hono ki Raukawa (Hall and Green), closing submissions (paper 3.3.22), p 2

197. Crown counsel, closing submissions (paper 3.3.24), p 88



relation to the Waitarere Forest. It also noted that limited evidence was presented about the Waitarere Forest during the expedited hearings process. The Crown submitted that the interests asserted by other iwi in the forest and the lack of research relating to it meant that it would be premature for the Tribunal to make findings about Waitarere Forest. In the Crown's view, claims concerning the Waitarere Forest should be considered as part of the wider district inquiry, as most of the forest is located outside the Horowhenua block.<sup>198</sup>

### 7.4.3 The Waitarere Forest

Before we begin our substantive analysis, we address the Crown's contention that we should only consider issues concerning the Waitarere Forest as part of our broader district inquiry. To be clear, our focus is upon the Crown's acquisition of land in Horowhenua 11B42C in the late 1920s. That the land concerned became part of the Waitarere State Forest when it was established in 1960 is of no relevance to our discussion at this point in our inquiry, other than to demonstrate the economic potential of the land which the Crown purchased. Issues directly related to the creation of the forest (and those groups who may or may not have interests in the land underlying the rest of the forest) may be dealt with later in our inquiry.

We also note Te Hono o Raukawa's submission on the Waitarere Forest. In this prioritised report on Muaūpoko claims, it is not appropriate to 'caution' the Crown about the disposal of the forest in Treaty settlements. Parties may be heard on that matter later in the inquiry if necessary.

### 7.4.4 Why did the Crown decide to acquire land in the Horowhenua 11B42C block?

In this section, we consider the Crown's reasons for acquiring land in the Horowhenua 11B42C block and the method by which it achieved this end.

From about 1910, Pākehā in the wider Horowhenua lobbied the Crown to purchase coastal land in order to take action to arrest sand drift.<sup>199</sup> At the same time, there was significant pressure on the Government to acquire Māori lands for 'closer settlement', that is, small family farms.<sup>200</sup> In 1911, the Native Department sent an official, William Pitt, to 'put Crown purchase to the land owners'.<sup>201</sup> Pitt met with about 30 Muaūpoko owners at Levin in July of that year. We have no information as to how many (if any) were owners of the coastal block (11B42), as the Crown was actually intent on acquiring the lands between that block and Levin (11B41) for settlers.<sup>202</sup> Pitt informed the meeting that the Levin Chamber of Commerce and the local member of Parliament (William Field) wanted the Crown to buy the 'large area of Native land lying waste and adjacent to Levin'.<sup>203</sup> The Crown, he said, was

198. Crown counsel, closing submissions (paper 3.3.24), pp 88–89

199. Luiten and Walker, 'Political Engagement' (doc A163), p 362

200. Luiten and Walker, 'Political Engagement' (doc A163), pp 354–357

201. Luiten and Walker, 'Political Engagement' (doc A163), p 357

202. Luiten and Walker, 'Political Engagement' (doc A163), p 357

203. William Pitt to under-secretary, Native Department, 10 July 1911 (Luiten and Walker, 'Political Engagement' (doc A163), p 357)

## 7.4.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

willing to consider offers of sale. The Muaūpoko owners present were only willing to offer the land for lease, except for the sand hills block – 11B42 – which Pitt said they were unanimous in offering for sale.<sup>204</sup>

As noted, we have no information as to how many of the 30 people present were owners in 11B42C, or what proportion of shares they held. This could certainly not be considered a formal offer of sale by the owners, and no price was discussed – although Pitt advised at the meeting that the Crown would not offer less than Government valuation for purchases. On the strength of this ‘offer’, the Crown issued a proclamation in 1911 prohibiting any leasing or sales of land in the coastal block to private persons, but did not call a formal meeting of assembled owners or proceed to negotiate a sale.<sup>205</sup>

In 1916 some Levin residents again raised the matter of purchasing the coastal strip, but a Crown ranger advised against the purchase after inspecting the land.<sup>206</sup> He reported that it was ‘valueless for grazing’ and was made up predominantly of ‘drifting sand dunes which will always be a source of nuisance’ to the owners and to those owning land immediately to the east.<sup>207</sup> In 1923 the Horowhenua 11B42 block was partitioned into four new blocks including Horowhenua 11B42C, a block containing the bulk of the coastal sand dune country. This block was divided into Horowhenua 11B42C North (1,278 acres) and Horowhenua 11B42C South (598.5 acres).<sup>208</sup>

W Stewart Park, a Levin-based solicitor and farmer whose land adjoined the Horowhenua 11B42C (North) block, raised the issue of sand drift again in 1926. He wrote to the Minister of Lands twice in August of that year to request that the Crown compulsorily acquire a block he referred to as ‘XIB42’ – the Horowhenua 11B42C block that had been partitioned three years earlier. Park complained of sand drift from the block and also alleged that it was being put to no use, that no rates were being paid on it, and that it was a breeding place for ‘noxious vermin.’<sup>209</sup>

Park’s own efforts to purchase the land had been thwarted, he said, by the sheer number of owners, which had made it impossible to get the required resolution of assembled owners in favour of selling the land.<sup>210</sup> He was referring here to laws governing the alienation of Māori land at this time, specifically the ‘Powers of Assembled Native Owners’ set out in Part XVIII of the Native Land Act 1909. This Act reintroduced the ability for private individuals to purchase undivided shares in Māori land, through meetings of owners. Just five owners present or represented (regardless of the total number of owners) constituted a quorum, and resolutions

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204. Luiten and Walker, ‘Political Engagement’ (doc A163), p 357

205. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 357–358, 362

206. Luiten and Walker, ‘Political Engagement’ (doc A163), p 362; Armstrong, ‘Hokio Native Township’ (doc A154), p 9

207. Crown Lands Ranger Smith to commissioner of Crown lands, Wellington, 29 December 1916 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1945)

208. Luiten and Walker, ‘Political Engagement’ (doc A163), p 362

209. Luiten and Walker, ‘Political Engagement’ (doc A163), p 362

210. Park to Minister of Lands, 25 August 1926 (Luiten, papers in support of ‘Political Engagement’ (doc A163(a)), p 1938); see also Luiten and Walker, ‘Political Engagement’ (doc A163), pp 362–363.

could be carried if those voting in favour owned a larger aggregate share of the land than those voting against.<sup>211</sup> The owners had rejected an offer from Park to buy the land for 10 shillings per acre. It is not clear whether this decision was made at a meeting of owners with a quorum under the 1909 Act.<sup>212</sup>

Park then asked the Government to use its powers of compulsory acquisition to secure the land. He promised to repay in cash the cost of acquiring the land at Government Valuation (which Park estimated to be about £400) plus an additional 10 per cent.<sup>213</sup> His persistence on this issue saw it referred to the Native Department. The under-secretary, RN Jones, who was also chief judge of the Native Land Court at that time, investigated the history of Horowhenua 11B42C, stating that it had been deemed valueless for grazing and was unlikely to be a means of support to its 147 owners. Jones' investigation indicated that, back in 1911, 'the owners seemed anxious to sell to the Crown' but 'no steps were taken to acquire it'. However, he noted that the owners had recently rejected Park's offer, and had become 'averse to selling'. Despite this point, he concluded that '[p]robably the Crown could acquire this Block'.<sup>214</sup> The under-secretary did not comment on the use of this land to Muaūpoko for fishing and other coastal resources, nor did he note its cultural value or its potential for afforestation (the latter was identified by the Crown soon after in the early 1930s).

Under-Secretary Jones' report was forwarded to the Minister of Lands by RF Bollard, the Acting Native Minister. Bollard suggested that the block might be purchased by the Native Land Purchase Board and then sold to Park by the Ikaroa District Maori Land Board under section 150 of the Land Act 1924.<sup>215</sup> That section enabled the board to sell any Crown land composed chiefly of sand dunes or land otherwise deemed 'practically worthless' to the owners of contiguous lands.<sup>216</sup> Officials at the Lands Department concluded that there was no power for the Crown to acquire the block compulsorily for the purpose of on-selling the land to a private citizen. Instead, they opted to inspect the block to see if it could be purchased for on-selling to Park under the Land Act, as suggested by Bollard.<sup>217</sup> Astonishingly, therefore, the Crown agreed to become essentially the agent of a private citizen to purchase individual interests in Māori land (which a private citizen could not do),

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211. Native Land Act 1909, ss 341(1), 342(3), 343, 348(1), and 349; see also Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 685–686.

212. Under-Secretary Jones to Native Minister, 1 October 1926 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1921)

213. Park to Minister of Lands, McLeod, 25 August 1926 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1938–1939)

214. Under-Secretary Jones to Native Minister, 1 October 1926 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1921)

215. Luiten and Walker, 'Political Engagement' (doc A163), p 363. The Native Land Purchase Board purchased a Māori-owned block on behalf of the Crown, upon which it became general Crown land. The district Māori land board thus became responsible for the block, including its administration or arrangements for its sale.

216. Land Act 1924, s 150

217. Luiten and Walker, 'Political Engagement' (doc A163), p 363; Young, 'Muaūpoko Land Alienation' (doc A161), p 38

## 7.4.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

to get around the resistance of the Māori owners who were known to be ‘averse to selling’.

The deputy commissioner of Crown lands supported the acquisition of the block for on-sale to Park. He visited Park in February 1927 and reported the latter’s intention to arrest sand drift through replanting. The following month the assistant under-secretary for lands advised the Native Department that he had no objection to the acquisition of the block, provided that Park paid in cash both the purchase price and any associated costs. In April 1927, Park was asked to confirm what he was willing to pay for Horowhenua 11B42C, whether he was willing to deposit one-third of that amount as a down payment, and to confirm what interests he held in lands adjoining the block. Park at this time held leasehold interests in Horowhenua 11B41. He confirmed this and signalled his willingness to buy 640 acres of Horowhenua 11B42C North at 6s 6d per acre.<sup>218</sup> This was less than he had offered the owners (who had rejected it), and worked out at £208 for the 640 acres he wished to acquire.

**7.4.5 How did the Crown acquire land in Horowhenua 11B42C?**

The Crown now attempted to purchase land in Horowhenua 11B42C. This job was taken on by the Native Land Purchase Board, established by the Native Land Act 1909. Consisting of the Native Minister, under-secretary for Crown lands, under-secretary for the Native Department, and the valuer-general, the purchase board oversaw all purchase negotiations.<sup>219</sup> The Native Land Purchase Board approved the purchase of the northern part of Horowhenua 11B42C on 5 July 1927. A Government Valuation of the block was received the following month – the block, which was ‘described’ as 1,388 acres,<sup>220</sup> was valued at £345. On 20 October 1927 a meeting of owners considered an offer from the Crown to purchase 640 acres of the block for £213 6s 8d – or 6s 8d per acre. Those in attendance voted unanimously to reject the Crown’s offer.<sup>221</sup>

This decision should have ended Crown efforts to purchase land in Horowhenua 11B42C, as a similar decision had earlier stopped Park. Whatever appetite there may have been for selling the block back in 1911 had clearly gone. The Crown, however, did not give up on efforts to acquire the land. Instead, it attempted to bypass the collective resistance to sale through the acquisition of individual interests.

Section 109 of the Native Land Amendment Act 1913 empowered the Crown to purchase any undivided share in Māori land from an individual owner or trustee, and any owner to alienate their interest to the Crown. This meant that the Crown could purchase interests from individual owners without a meeting of owners being called, even if the owners collectively had refused to sell.<sup>222</sup> We agree with

218. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 363–364; Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 38–39

219. Native Land Act 1909, ss 361, 362

220. The correct acreage was 1,871 acres: see Luiten and Walker, ‘Political Engagement’ (doc A163), pp 337, 366; Young, ‘Muaūpoko Land Alienation’ (doc A161), pp 37, 239.

221. Luiten and Walker, ‘Political Engagement’ (doc A163), pp 364–365; Young, ‘Muaūpoko Land Alienation’ (doc A161), p 40

222. Native Land Amendment Act 1913, s 109

the Central North Island Tribunal's assessment of section 109 as a return to the land purchasing policies of the late nineteenth century. It allowed the Crown to choose how it dealt with the owners of land it wished to purchase – either through a meeting of owners or on an individual basis, according to whichever approach would obtain the desired results.<sup>223</sup> As the Whanganui Land Tribunal pointed out, the Crown at times preferred to utilise a meeting of owners, as the meetings could enable a single purchase of an entire block often with a bare minimum of owners present. In fact, as long as sufficient owner representatives were present it is not clear that any owners had to be present at all. For the Crown, such an approach was often seen as preferable to tracking down and negotiating with a dispersed group of owners.<sup>224</sup> Alternatively, as in the case of Horowhenua 11B42C, the Act allowed the Crown to try both methods. It sought to purchase from owners individually after they had collectively rejected the Crown's purchase offer. In other words, the Crown did not have to accept the rejection of a purchase from the collective meeting of owners as final.

Officials saw that some difficulties might arise from any attempt to purchase the block. In particular, they realised that they may not be able to buy sufficient interests to cover the area that Park wished to acquire. To address this issue, they secured an undertaking from Park that he would buy any interests acquired by the Crown. Meanwhile, Park also sought authority to obtain the signatures of owners who were willing to sell their shares. He was confident that he could secure sufficient interests to enable him to obtain 'the necessary amount of foreshore which I require for the purpose of effectually dealing with the sand breaks on my own country'.<sup>225</sup> In response, officials advised Park to arrange a meeting of those owners who were willing to sell their interests (this was not a meeting of assembled owners under the Act). The Native Department would send an official to attend the meeting.<sup>226</sup>

The department also prepared a schedule of owners, listing some 272 ownership shares. Some individuals owned more than one share. An initial meeting of some owners who were willing to sell their individual interests was held on 23 December 1927. A Native Department official, Shepherd, attended and secured seven ownership interests. He secured a further eight at a subsequent meeting one week later. Four more ownership shares were purchased by April 1928, for a total of 19 shares purchased in a little over four months. Purchase efforts continued through to June 1928.<sup>227</sup> By a process of attrition, the Crown spent £169 13s 4d and acquired 55 ownership interests from 38 individuals amounting to 714.5 shares, or about 36.5 per

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223. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 689

224. Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 710–711

225. Park to under-secretary for lands, 18 November 1927 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1866)

226. Luiten and Walker, 'Political Engagement' (doc A163), p 365

227. Luiten and Walker, 'Political Engagement' (doc A163), pp 365–366



cent of all the shares in the block.<sup>228</sup> As discussed further below, the Native Land Court determined that the shares acquired by the Crown equated to almost 682.75 acres of the block.<sup>229</sup>

The Crown, through the targeting of individual owners, thus succeeded in securing enough ownership shares to more than satisfy Park's stated desire to secure 640 acres of the block. It achieved this while paying those owners £43 (or 20 per cent) less than it had offered at the meeting of assembled owners. The total purchase monies paid to owners who sold their interest equate to a price per acre of 5 shillings, less than Park was prepared to pay (6s 6d) and than the Crown had initially offered (6s 8d), and which the owners collectively had rejected. The Crown's method of purchase meant that the owners could not collectively determine (or bargain for) a price.

On 17 May 1928, a native land purchase officer, Thomson, advised the under-secretary for the Native Department that he had secured 'sufficient interest to cover the area which the Lands Department intend to sell to Mr WS Park'. He suggested that the Crown apply to the Native Land Court to cut out its interests.<sup>230</sup>

The Crown's efforts to secure land in Horowhenua 11B42C did not end there. It chose to secure even more land in the block through the enforcement of a charging order (or lien) for survey costs which had been registered on the title to the block. The lien for £126 4s had been obtained by the Crown in October 1924 and presumably related to the cost of the survey conducted when Horowhenua 11B42 was partitioned the previous year.<sup>231</sup> Thomson suggested that the Crown apply to the Native Land Court to award an area of the block to satisfy the lien and interest owing.<sup>232</sup> Four days later, on 21 May 1928, the Native Minister applied to the Native Land Court for both a vesting order for land to satisfy the survey lien (plus interest) and for the court to partition out the interests the Crown had purchased in the block.<sup>233</sup> In the meantime Crown officials continued to purchase additional ownership shares.

The court determined the Crown's total interest in the block on 11 August 1928. Some effort had been made by the owners to reduce the amount owing on the survey lien. Three payments made in 1928 reduced the lien to £72 18s 6d, but interest

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228. Note on file, 'Application for partition dealt with by the Native Land Court at Levin', 11 August 1928 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1829); note on file, 'Horowhenua X142C: Schedule of sellers to the Crown', not dated (Luiten, papers in support of 'Political Engagement' (doc A163(a)), pp 1830–1831)

229. Luiten and Walker, 'Political Engagement' (doc A163), p 366; Young, 'Muaūpoko Land Alienation' (doc A161), pp 40–41

230. Native Land Purchase Officer to under-secretary, Native Department, 17 May 1928 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1853)

231. Luiten and Walker, 'Political Engagement' (doc A163), p 366

232. Native Land Purchase Officer to under-secretary, Native Department, 17 May 1928 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1853)

233. Native Minister, 'Application to the Native Land Court for vesting order', 21 May 1927 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1855); Native Minister, 'Application to the Native Land Court to partition interests', 21 May 1928 (Luiten, papers in support of 'Political Engagement' (doc A163(a)), p 1854)



charges increased the total amount owed to £100 17s 5d.<sup>234</sup> In addition to the 682.75 acres that the Crown secured through the purchase of individual shares, the Crown was awarded 405.75 acres in satisfaction of the survey lien. The total area awarded to the Crown was 1,088.5 acres which became Horowhenua 11B42C1 and was taken from the northern portion of the former block.<sup>235</sup> Horowhenua 11B42C1 was proclaimed Crown land on 26 October 1928.<sup>236</sup>

A schedule of 'non sellers' reveals that 138 individuals chose not to sell their interests. Their collective shareholding was 1243.47 shares, or 63.5 per cent of the total shareholding in the block. After the area sold and the area taken for survey costs was deducted from the block, these owners were left with 783 acres,<sup>237</sup> or 41 per cent of the original block, which became Horowhenua 11B42C2.<sup>238</sup>

The Department of Lands and Survey did not take action to dispose of the land to Park for almost three years. At a meeting held on 26 August 1931, the Māori land board considered the proposal to transfer the whole of Horowhenua 11B42C1 to Park. Minutes of the meeting and notes added subsequently show that the total cost to the Crown of obtaining the block was £308 19s 4d. This included the purchase price and purchase expenses totalling £175 18s 4d, the £100 17s 5d of the survey lien, and additional survey costs of £31 4s 1d for defining the new block.<sup>239</sup> From the information presented to us it is unclear whether the non-sellers also bore part of the cost of this new survey, even though they had chosen not to sell their interests.

On 1 September 1931 the commissioner of Crown lands wrote to Park to advise that he could purchase the whole of Horowhenua 11B42C1 for £308 19s 4d; that is, the amount that it had cost the Crown (including survey costs and the interest paid by the owners on those costs). Park, however, was unable to meet the obligation he had made to purchase the land.<sup>240</sup> Blaming the downturn in the dairy industry, unpaid loans made to others, and his other financial commitments, he explained that he could not finance the purchase. The department approached Park about the purchase periodically over the next three years, warning him that his continued failure to act on the purchase would result in him losing his right to acquire the

234. Note on file, 'Lien ledger: Horowhenua x1B No 42 C Block', 18 February 1929 (Grant Young, comp, papers in support of 'Muaūpoko Land Alienation Report', various dates (doc A161(a)), p 263); Thomson to under-secretary, Native Department, 31 August 1928 (Luiten and Walker, papers in support of 'Political Engagement' (doc A163(a)), p 1828); Young, 'Muaūpoko Land Alienation' (doc A161), p 41

235. Young, 'Muaūpoko Land Alienation' (doc A161), pp 40–41

236. 'Proclaiming Native Land to have become Crown Land', 26 October 1928, *New Zealand Gazette*, 1928, no 84, p 3235

237. The land left to the non-sellers was later found to amount to 776 acres 3 roods 12 perches. See Young, 'Muaūpoko Land Alienation' (doc A161), p 239.

238. Luiten and Walker, 'Political Engagement' (doc A163), p 366; Young, 'Muaūpoko Land Alienation' (doc A161), p 41

239. Under-secretary, Native Department, to under-secretary, Lands, 16 November 1928 (Young, papers in support of 'Muaūpoko Land Alienation' (doc A161(a)), p 265); 'Land Board Minute', 26 August 1931 (Young, papers in support of 'Muaūpoko Land Alienation' (doc A161(a)), p 247); commissioner of Crown lands to W Stewart Park, 1 September 1931 (Young, papers in support of 'Muaūpoko Land Alienation' (doc A161(a)), p 245); Lands and Survey memorandum to chief surveyor, 15 July 1931 (Young, papers in support of 'Muaūpoko Land Alienation' (doc A161(a)), p 253)

240. Commissioner of Crown lands to W Stewart Park, 1 September 1931 (Young, papers in support of 'Muaūpoko Land Alienation' (doc A161(a)), p 245)

## 7.4.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

land. Finally, in August 1934, Park was given one final chance to make good on his commitment to purchase the land. The Public Works Department had by this time expressed an interest in acquiring the block for afforestation purposes. Park was still unable to purchase the land and the block was transferred to the Public Works Department shortly thereafter.<sup>241</sup>

**7.4.6 Our findings on the Crown's purchase of this coastal land (Horowhenua 11B42C1)**

In our view, the Crown's last major purchase of land at Horowhenua involved a number of Treaty breaches, as we set out in this section.

The Native Land Amendment Act 1913 allowed the Crown to bypass the collective decision-making of the landowners through the purchase of undivided interests. The system of having proposed alienations considered by a meeting of owners had been introduced just four years previously through the Native Land Act 1909. This system was far from perfect – as we have already noted, a meeting of just five owners or their representatives constituted a quorum, no matter how large the number of owners, and decisions were carried based on the relative strength of ownership interest present at the meeting. In practice, this meant that blocks like Horowhenua 11B42C, which had more than 100 owners, could be alienated based upon a meeting of just a few individuals, at which just one owner with a relatively large share voted in favour of selling. Yet for all its obvious weaknesses, the requirement to take proposed purchases to a meeting of owners could prevent the alienation of land where enough owners wished to retain land. In the case of Horowhenua 11B42C, this requirement effectively stymied Park's efforts to purchase the block himself. It also saw the owners reject the Crown's initial attempt to secure 640 acres of the block.

One effect of the 1913 Act was to allow the Crown to undermine collective decision-making by owners if its purchase offer was rejected. While supporting and upholding resolutions to *sell* land, the Crown could actively subvert resolutions by owners to reject sales. Like the Whanganui Land Tribunal, we consider that this uneven treatment of the resolutions of Māori landowners was 'inconsistent and lacked integrity'.<sup>242</sup> The Crown's purchase of undivided interests in Horowhenua 11B42C occurred at a time when the owners of that block and others opposed land sales generally. The Crown knew the owners were averse to selling; RN Jones, the under-secretary for the Native Department, had said as much. Yet Jones was also a member of the Native Land Purchase Board which approved the purchase of the block, and pursued the purchase of individual interests after a meeting of owners rejected the Crown's initial purchase offer.

Another effect of the Act was to allow the Crown to negotiate with individual owners, which could have the effect of driving down the prices it paid for the land it acquired. In this case, the Crown was able to acquire more land than Park had sought, for a combined purchase price that was 20 per cent less than it had offered

241. Young, 'Muaūpoko Land Alienation' (doc A161), pp 41–42

242. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 730

at the meeting of owners. This was because the Crown's method of purchasing from individuals denied the owners any ability to determine collectively (or bargain collectively for) a price. It was patently unfair and a breach of the principle of active protection.

We note here that, though the Crown made no submission on the purchase of Horowhenua 11B42C, it did concede that 'it failed to provide an effective form of corporate title until 1894, which undermined attempts by Muaūpoko to maintain tribal authority within the Horowhenua block and this was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.'<sup>243</sup> In our view the effect of the 1913 Act also undermined the ability of Muaūpoko landowners to maintain their collective authority over their land. We find that the Crown breached the duty of active protection.

The specific circumstances surrounding the Crown's purchase of this block constitute a further breach. The Crown's representatives aggressively pursued the purchase in the full knowledge that the owners opposed the sale of this particular block, in order to help a private Pākehā citizen circumvent the owners' decision not to sell to him. Furthermore, the Crown achieved this end by using its power to buy individual interests, which private citizens like Park were not allowed to do, undermining the owners' collective authority. In doing so, the Crown betrayed the mutual good faith which comprises the basis of the relationship between the Treaty partners. We therefore find that the Crown breached the principle of partnership, which entails a duty to act in the utmost good faith towards its Treaty partner. We also find that the Crown breached the principle of equity, which required the Crown to act fairly as between Māori and non-Māori, and not to prioritise the interests of settlers to the disadvantage of Māori. The Muaūpoko owners of this piece of ancestral coastal land, which could have been a source of income through afforestation, were clearly prejudiced by these Treaty breaches.

## 7.5 CONCLUSION AND SUMMARY OF FINDINGS

In section 7.2 of this chapter, we analysed Muaūpoko land loss in Horowhenua 11, the tribal heartland, as well as the 'maintenance' lands in Horowhenua 3 and 6. Our focus was a statistical analysis, as we lacked the evidence to address major issues such as consolidation schemes (the Taueki consolidation scheme), protection mechanisms (as administered by land boards), and the process of serial partitioning. We did, however, have sufficient evidence to assess some particular grievances of the Muaūpoko claimants: the establishment of the Hōkio native township on their land (section 7.3); and the Crown's purchase of coastal land on the western edge of Horowhenua 11 (section 7.4). We now summarise our findings in respect of these matters.

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243. Crown counsel, opening submissions and initial concessions, 1 October 2015 (paper 3.3.1), p 5

**7.5.1 Muaūpoko land loss in the twentieth century**

By the time of our hearings in 2015, Muaupoko were virtually landless. Our analysis of land loss showed that they only retained 5,288 acres of the 52,460-acre Horowhenua block, 901 acres of which comprised the bed of Lake Horowhenua. Thus, only about 10 per cent of their original holdings remained as Māori freehold land. Crown counsel conceded that the Crown's 'failure to ensure that Muaūpoko retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles'. The Crown also conceded that the cumulative effect of its native land laws, and of its acts or omissions, was Muaūpoko landlessness.<sup>244</sup> We agree that these Crown acts and omissions breached the Treaty.

**7.5.2 Hōkio native township**

In our inquiry district, the legal ownership and control of the Hōkio native township was acquired compulsorily in 1902 so that Levin residents could have holiday homes by the sea. This was an abuse of the powers granted the Crown under the Native Townships Act 1895, which was intended to establish townships in the interior for the facilitation of settlement. Nor could such a compulsory taking be justified as essential in the national interest or as a last resort. By contrast, 1901 legislation allowed Māori owners to choose to vest their land in a Māori land council and to have (with their consent) a native township established on that land. In the case of Hōkio, the Crown also acquired absolute ownership of 42.5 per cent of the township lands for roads and public reserves, without consent or compensation. Further, according to the chief surveyor at the time, there was no prospect that the Hōkio township would ever be of real benefit to its Māori beneficial owners. The Crown's acquisition of the Hōkio township land in all these circumstances, and without the consent of its Muaūpoko owners, was a breach of the principles of partnership and active protection.

We agree with the Whanganui Land Tribunal that the Native townships regime established a system of management which denied the beneficial owners a meaningful role. In 1910, a new Native Townships Act transferred legal ownership and control of the Hōkio township from the Crown to the district Māori land board, without consulting or obtaining the consent of the Muaūpoko beneficial owners. This was a breach of the ownership and tino rangatiratanga guarantees in the Treaty. The 1910 legislation also allowed the board to sell township lands, but the Crown promised that there were safeguards to ensure that the beneficial owners' rights and interests were protected. The Crown did not in fact ensure that these safeguards were effective, and township lands were sold from the 1920s to the 1940s without the proper consent of the Muaūpoko beneficial owners. This was a breach of the article 2 guarantees and the principle of active protection. Finally, the Crown did not consult or obtain the agreement of the Muaūpoko owners to the vesting of legal

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244. Crown counsel, closing submissions (paper 3.3.24), p 24

ownership and control of their township lands in the Māori Trustee (transferred from the land board). This was a breach of Treaty principles.

Muaūpoko were prejudiced by losing legal ownership and control of their lands for a number of decades, and the absolute loss of land sold in the interim. The owners did receive some lease income, but the amounts were very small.

### **7.5.3 The Crown's last major land purchase (Horowhenua 11B42C1)**

The legislative framework governing Māori land at the time of the Horowhenua 11B42C1 purchase provided a system of meetings of assembled owners. The quorum requirements were very low, and Māori land could be sold on the vote of a majority of those present at a meeting (by share value). But this provision at least offered Māori owners the possibility of collective decision-making about Māori land (albeit one-off decisions only). In 1913, the Crown gave itself the power to circumvent meetings of owners and buy undivided, individual interests if a meeting resolved not to sell. These provisions of the native land legislation fell well short of providing for tino rangatiratanga in respect of land, and offered a relatively flawed means of group decision-making which the Crown could circumvent at will.

In this context, a private purchaser sought to obtain Horowhenua 11B42C but a meeting of assembled owners did not wish to sell. The Crown intervened at the request of this private citizen, but its purchase offer was also rejected by a meeting of owners. The Crown then used its powers to buy undivided, individual interests, a power not available to private citizens, in order to defeat the owners' collective decision not to sell, and to obtain their land for a local settler. This method of purchase enabled the Crown to pay a price that was 20 per cent lower than it had offered at the meeting, since its purchase of individual interests denied the owners any collective power to set or bargain over the price.

By its actions, the Crown betrayed the mutual trust which comprises the basis of the relationship between the Treaty partners, circumventing the collective will of the Māori owners in order to aid a private buyer, and lowering the price into the bargain. The Crown breached the principle of partnership, which entails a duty to act in the utmost good faith towards its Treaty partner. The Crown also breached the principle of equity, which required the Crown to act fairly as between Māori and non-Māori, and not to prioritise the interests of settlers to the disadvantage of Māori.

The Muaūpoko owners of this piece of ancestral coastal land, which could have been a source of income to them through afforestation, were clearly prejudiced by these Treaty breaches.





CHAPTER 8

**LAKE HOROWHENUA AND THE HŌKIO STREAM,  
1897–1934**

*He tangi nā Te Rangihwinui  
Haere e Kui!  
Koutou ko taokete, e!  
Me te taheke te tangi  
Ki muri ki to matua i*

*Iti ai au  
E mini ai au  
Ki a koe, i!  
Ou ringaringa wherawhera*

*Kia mau ai  
Te tatua, e!*

*I hoki mai taua  
Ma aku whakamahinga  
I Te Wi, i Ohau e!  
I te taupa  
Ki Whakamarama, i!  
Kia ripoi mai e!*

*Katahi kae, e kui  
Ka makere i a au e!<sup>1</sup>*

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1. These waiata were composed by an ancestor famous throughout the country, Te Rangihwinui or Major Kemp. His mother's name was Rere-o-maki, from Te Āti Haunui-ā-Paparangi and his father was Mahuera Paki Tanguru-o-te-Rangi, from Muaūpoko. Te Rangihwinui was raised during the time of fighting between Muaūpoko, Ngāti Toarangatira, Ngāti Raukawa, and Te Ātiawa, at the beginning of the 1800s: Sian Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko', not dated (doc A15(a)), pp [52]–[53]

8.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**8.1 INTRODUCTION**

**8.1.1 What this chapter is about**

Historical claims about Lake Horowhenua and the Hōkio Stream were of particular importance to the Muaūpoko claimants. The management and restoration of the lake has become one of the most pressing and divisive issues for the claimant community. Those tensions were evident during our hearings. But at the most fundamental level the Muaūpoko people agree that Lake Horowhenua is a taonga of enormous importance to the spiritual life, cultural identity, and economic survival of the tribe. It was highly prized for its fisheries, which formed the tribe's principal food source – right through to the 1940s and beyond. Yet Lake Horowhenua, as claimant Tama Ruru put it, has 'degenerated to a sewer that children cannot swim in and we cannot eat from.'<sup>2</sup>

The pollution and environmental degradation of Lake Horowhenua is mainly dealt with in chapters 10 and 11. In this chapter, we address the following claim issues:

- ▶ The alleged existence of an agreement in 1905 which resulted in the Horowhenua Lake Act of the same year. This Act, which made the lake a recreation reserve and established a domain board to manage it, was a source of major grievance to the Muaūpoko claimants. These issues are covered in section 8.2.
- ▶ The 'whittling away' of the Muaūpoko owners' rights to their lake, as found by a public committee of inquiry in 1934, which resulted from the 1905 Act and further legislation in the 1910s and 1920s. The drastic lowering of the lake by modification of the Hōkio Stream was one of the most controversial developments of this period. These matters are addressed in section 8.3.

The Crown conceded that it promoted legislation in 1905 (the Horowhenua Lake Act) which failed to adequately reflect the terms of the 1905 agreement, whereas the claimants argued that there was no agreement or only a very limited one. Despite making this concession, the Crown argued that any Muaūpoko grievances as a result of the 1905 Act were rectified in 1956 by the Reserves and Other Land Disposal (ROLD) Act of that year (discussed in chapter 9). The Crown also denied that it was responsible for (or complicit in) the pollution of the lake and stream, which the Crown ascribed to causes and local bodies outside its control.

**8.1.2 The taonga: Lake Horowhenua and the Hōkio Stream**

Lake Horowhenua is a shallow dune lake. It has a relatively contained catchment but receives a considerable amount of inflow – about half the annual intake of water – from groundwater.<sup>3</sup> Lake Horowhenua is a significant geological feature, and was once part of a system of dune lakes and lagoons in the west coast of the lower North Island.<sup>4</sup> Historian Paul Hamer, who prepared a report for the Tribunal, noted:

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2. Tama Ruru, closing submissions, 10 February 2016 (paper 3.3.10), p [61]

3. Paul Hamer, "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, June 2015 (doc A150), p 8

4. Hamer, "A Tangled Skein" (doc A150), p 8

Horowhenua geologist and local historian GL (Leslie) Adkin estimated that there were 72 such lagoons known to Māori between the Manawatū and Ōtaki rivers before Pākehā settlement, with a number lost since then to sand encroachment or drainage. The lakes and lagoons were formed – and continue to be shaped – by the movement of the sand, carried westward to the coast by rivers and pushed southward along the coast by the prevailing winds. Some are categorised as basin lakes and others as valley lakes, with Horowhenua being of the former variety. It is the largest of five dune lakes between the Manawatū and Ōtaki, the others being Papaitonga (or Waiwiri) and the three so-called ‘Forest Lakes’ of Waitawa, Kopureherehe, and Rotopotakataka. They all lie along the boundary between the dune belt that stretches north and south and the older geological formations to its east. Each lake has an ‘impounding barrier . . . [of] blown sand.’ The name ‘Horowhenua’ itself means ‘the great landslide.’<sup>5</sup>

Dr Jonathan Procter told us that Lake Horowhenua ‘is said to be the largest dune lake in the country’ – it has a surface area of around 3.9 square kilometres – ‘with the only outflow being down the Hokio Stream.’<sup>6</sup>

Before the arrival of Europeans, Lake Horowhenua was described as bountiful or teeming with birdlife and legendary fisheries, including eels, flounder, inanga, shellfish, and other species.<sup>7</sup> Significant kāinga and pā were situated around its banks. As we discussed in chapter 2, the people of the lake built seven island pā on the lake itself.<sup>8</sup> The largest, Waikiekie, was ‘100 yards’ long and ‘40 yards’ across.<sup>9</sup> Large eel weirs were situated at the outlet of the lake and downstream along the Hōkio Stream. There were similar eel weirs at Lake Papaitonga at its upper reaches.<sup>10</sup>

As we noted in chapter 2, at the beginning of the nineteenth century, Muaūpoko claim they held a sphere of influence which extended south to the top of the South Island, north to Manawatū, and from the west coast across the Tararua Ranges to Wairarapa.<sup>11</sup> Parts of this large area they shared with Ngāti Apa, Rangitāne, Ngāi Tara, Ngāti Ira, Ngāti Hāmua, several hapū of Ngāti Kahungunu, and others.<sup>12</sup> In the space of one century, and due to those matters we have discussed in chapters 3 and 4, by the end of the nineteenth century, their influence was reduced to the Horowhenua block.<sup>13</sup> Nestled in that block was their treasured lake, Lake Horowhenua with its outlet to Hōkio Stream down to Hōkio Beach. The stream and beach they shared with Ngāti Raukawa.

Lake Horowhenua, Arawhata Stream, the Pātiki Stream, the Mangaroa Stream, the Hōkio Stream, the Hōkio Beach, Lake Papaitonga (or Waiwiri), and the Waiwiri

5. Hamer, “A Tangled Skein” (doc A150), p 8

6. Jonathan Procter, brief of evidence, 12 November 2015 (doc C22), p 4

7. Hamer, “A Tangled Skein” (doc A150), pp 9–10

8. Hamer, “A Tangled Skein” (doc A150), p 11

9. Hamer, “A Tangled Skein” (doc A150), p 11

10. Hamer, “A Tangled Skein” (doc A150), p 10

11. Bruce Stirling, ‘Muaupoko Customary Interests’, September 2015 (doc A182), p 5

12. Stirling, ‘Muaupoko Customary Interests’ (doc A182), pp 5, 6

13. Stirling, ‘Muaupoko Customary Interests’ (doc A182), p 5

8.1.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Stream with their surrounds are part of who Muaūpoko are as a people.<sup>14</sup> They continue to claim to be kaitiaki for them.<sup>15</sup> William (Bill) Taueki referred to Lake Horowhenua as the source of mauri for his whānau and iwi for generations.<sup>16</sup> These waterways, Muaūpoko believe, were interconnected.<sup>17</sup>

The waterways and their surrounds were a food basket and major source of raw materials.<sup>18</sup> In 1897, Muaūpoko rangatira Hoani Puihi told the Native Appellate Court that Lake Horowhenua was both ‘our parent’ and ‘our butcher’s shop’:

The people attached great value to the lake as a source of food-supply. It is our butcher’s shop, and is our parent. Kemp [Te Keepa Te Rangihwinui] and the people wished the door of the butcher’s shop opened for the people. The people have always made use of the lake. We obtain food from it now.<sup>19</sup>

At least one witness in our inquiry referred to Lake Horowhenua as Te Pataka-nui o Muaūpoko.<sup>20</sup> Lake Horowhenua was once surrounded by forests that went right to the edge of the lake and streams.<sup>21</sup> Henry Williams, who was born in 1934, described the lake as ‘absolutely beautiful’ with ‘crystal clear’ waters.<sup>22</sup> It was, he told us, central to Muaūpoko’s existence as a tribe.<sup>23</sup>

Flax was gathered for weaving from around the lake edge.<sup>24</sup> Birds, firewood and rongoā, karaka berries and pikopiko were obtained from the forests, and food was obtained from the lakes, the streams, and the sea.<sup>25</sup> Trees such as kawakawa, harakeke, and mamaku were all harvested.<sup>26</sup>

Lake Horowhenua was also the ‘puna waiora’ or place where the people ‘went to be at peace and to rejuvenate.’<sup>27</sup> Bill Taueki remembers that his father saw the food from the lake and associated tikanga as a taonga tuku iho gifted by the ancestors.<sup>28</sup> Many claimants referred to the lake and the Hōkio Stream as taonga.<sup>29</sup>

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14. Moana Kupa, brief of evidence, 11 November 2015 (doc c7), p 4; Hingaparae Gardiner, brief of evidence, 11 November 2015 (doc c8), p 4

15. Gardiner, brief of evidence (doc c8), p 4; William Taueki, brief of evidence, 11 November 2015 (doc c10), p 49

16. William Taueki, brief of evidence (doc c10), p 29

17. William Taueki, brief of evidence (doc c10), p 30

18. William Taueki, brief of evidence (doc c10), p 31. For a description of the lake as a supermarket, see Kupa, brief of evidence (doc c7), p 3.

19. AJHR, 1898, G-2A, p 98

20. William Taueki, brief of evidence (doc c10), p 30

21. William Taueki, brief of evidence (doc c10), p 30

22. Henry Williams, brief of evidence, 11 November 2015 (doc c11), pp 3, 5

23. Williams, brief of evidence (doc c11), p 5

24. Bella Moore, brief of evidence, 11 November 2015 (doc c5), p 2

25. William Taueki, brief of evidence (doc c10), pp 31–32

26. Uruorangi Paki, brief of evidence, 11 November 2015 (doc c3), pp 4–5

27. Kupa, brief of evidence (doc c7), p 3

28. William Taueki, brief of evidence (doc c10), p 50

29. See, for example, Philip Taueki, brief of evidence, August 2015 (doc b1), para 41; Vivienne Taueki, brief of evidence, 29 August 2015 (doc b2), p 20; Moore, brief of evidence (doc c5), p 3; Gardiner, brief of evidence (doc c8), p 5; William Taueki, brief of evidence (doc c10), p 50; Procter, brief of evidence (doc c22), p 3.

This world that Muaūpoko and their neighbours once knew was described by Paul Hamer as ‘a landscape covered by thick bush interspersed with numerous watercourses ranging from rivers and lakes to swamps. As a people, they must have been as at home on land as on water.’<sup>30</sup> Mr Hamer noted that one historical writer referred to Muaūpoko as an ‘amphibious tribe relying on sea, river, lagoon, and swamp for eels, inanga, kakahi, and a great range of bird life.’<sup>31</sup>

In our inquiry, the Crown acknowledged the ‘importance to Muaūpoko of Lake Horowhenua and the Hokio Stream as part of their identity’ and as ‘fishing areas for cultural and physical sustainability’. The Crown also accepted that ‘Muaūpoko value Lake Horowhenua and its resources as taonga’, and it acknowledged ‘the importance of the Lake as a source of physical and spiritual sustenance to Muaūpoko.’<sup>32</sup> These were important acknowledgements, in our view.

### 8.1.3 Exclusions from this chapter and from chapters 9–10

#### (1) *Ngāti Raukawa claims and the fishing rights of the Horowhenua 9 owners*

We do not deal with any Ngāti Raukawa claims in respect of Lake Horowhenua or the Hōkio Stream in this or the following chapters. As we explained in chapter 1, those claims will be addressed later in our inquiry.

As we set out in chapters 4 and 5, the Horowhenua block was awarded to Muaūpoko in 1873, and partitioned by that tribe in 1886. Prior to the partition, Donald McLean negotiated a deal with Ngāti Raukawa chiefs and Te Keepa Te Rangihwinui in 1874, which included a gift of 1,300 acres to the descendants of Te Whatanui (see section 4.3.4). When the Horowhenua block was partitioned in 1886, the gifted land was set aside as Horowhenua 9, located south of the Hōkio Stream (see section 5.4.5). The beds of the Hōkio Stream and Lake Horowhenua were included in the adjacent Horowhenua 11, which was awarded to Te Keepa and Warena Hunia (in trust for the other Muaūpoko owners). There was a dispute about the correct persons to be placed on the title for block 9, which was eventually heard by the Horowhenua commission in 1896. Dr Robyn Anderson and Dr Keith Pickens have provided an account of the various Ngāti Raukawa issues and grievances addressed by the commission in 1896, the Horowhenua Block Act 1896, and by the Native Appellate Court in 1897–98.<sup>33</sup> Here, we are concerned with fishing rights. In its report, the Horowhenua commission recommended that the owners of Horowhenua 9 should ‘have the right to fish and erect eel-weirs’ in the Hōkio Stream.<sup>34</sup>

After the commission reported, the Horowhenua Block Act 1896 was passed, as we discussed in chapter 6. Section 9 of the Horowhenua Block Act 1896 Act made provision for the fishing rights of the Horowhenua 9 owners:

30. Hamer, “A Tangled Skein” (doc A150), p 11

31. Hamer, “A Tangled Skein” (doc A150), p 11

32. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 44

33. Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Waitangi Tribunal Rangahaua Whānui Series (Wellington: Waitangi Tribunal, 1996) (doc A165), pp 237–251

34. AJHR, 1896, G-2, p 11

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Any certificate of title to be issued for part of Division Eleven aforesaid shall be subject to the right of the Native owners for the time being of Division Nine aforesaid to fish in such portions of the Hōkio Stream and the Horowhenua Lake respectively as are included in the said certificate.

The Horowhenua Block Act 1896 was repealed in 1931 but these statutory fishing rights were preserved by section 18(6) of the ROLD Act 1956, which is still in force. Section 18(6) provided: ‘Nothing herein contained shall in any way affect the fishing rights granted pursuant to section nine of the Horowhenua Block Act 1896’. There was a move in the 1980s to repeal this saving clause but it was not successful.<sup>35</sup>

Thus, when we refer to the fishing rights of the Muaūpoko owners of Lake Horowhenua in this and the following chapters, the effects of these two legislative provisions must be kept in mind.

Otherwise, as noted, we will report on any Ngāti Raukawa claims about Lake Horowhenua and the Hōkio Stream later in our inquiry.

**(2) Muaūpoko claims about the ownership of water**

The ownership of water was a significant issue for the Muaūpoko claimants who appeared before us. In brief, the argument between the parties is as to whether (a) no one owns water (the Crown’s position) or (b) water is owned as an integral component of waterways which are taonga (the claimants’ position). In 2012, this issue was considered nationally as part of urgent hearings on the Crown’s proposal to sell shares in State-owned electricity companies. The Tribunal’s report, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, made findings on the ownership of water as at 1840, and the Māori water rights protected by the Treaty.<sup>36</sup> At present, stage 2 of the inquiry is addressing current issues in respect of freshwater inquiry resources: whether present laws and Crown policies in respect of water are Treaty-compliant, and possible reforms to laws and policies. The ownership of water remains a live issue in that inquiry.

**(a) The Crown’s position:** The Crown submitted that the question of water ownership is already before the national freshwater inquiry, and that it would be ‘inappropriate’ for us to ‘make findings as to water ownership claims when the specific inquiry on precisely such issues is yet to report’.<sup>37</sup> The Crown’s position is that

there is no property in flowing water, though it is possible to have property rights to use water, and/or regulatory (statutory or administrative) rights to use water. Property owners may have rights relating to space occupied by flowing water, but not have property in the water itself.<sup>38</sup>

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35. Hamer, “A Tangled Skein” (doc A150), pp 352–354

36. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012)

37. Crown counsel, closing submissions (paper 3.3.24), p 51

38. Crown counsel, closing submissions (paper 3.3.24), p 51



In the Crown's view, rights to use water in New Zealand 'are now almost entirely statutory and regulatory in nature, not proprietary'.<sup>39</sup> Crown counsel submitted, however, that if there are in fact 'extant customary property interests in the waters of the Lake, those interests (consistent with Crown policy) will not be extinguished by any Treaty settlement'.<sup>40</sup> If there are such interests, the Crown submitted, the appropriate form and extent of recognition is a contemporary issue, not an historical one for the present inquiry.<sup>41</sup>

**(b) *The claimants' position:*** The claimants did not accept the Crown's view that the ownership of water should be left to the national freshwater resources inquiry. In the claimants' view, this Tribunal can make findings on any issue before it, and it should not avoid 'making a finding on a specific matter that is more generically before another Tribunal'.<sup>42</sup> The claimants also submitted that the Crown's position in this inquiry simply ignores previous Tribunal findings, which the claimants argued were clear in respect of Māori ownership of fresh water. Also, the claimants submitted, the Crown's duty of active protection means that it should, 'for the time being, in all of its actions leave room for the possibility that the Lake waters are owned by Muaupoko'.<sup>43</sup>

In essence, the claimants' position is that Lake Horowhenua is an indivisible water body and a taonga.<sup>44</sup> The water of the lake 'cannot be divided and must also be considered a part of that taonga'. Because the claimants still have legal ownership of the lakebed and the chain strip, Muaupoko 'have continued to retain the exclusive right to control access to and use of the water within Lake Horowhenua'. This continued, exclusive control of access, we were told, is 'analogous with ownership' of the waters of the lake.<sup>45</sup> The claimants relied, in particular, on the stage 1 water report and the Tribunal's *Te Kāhui Maunga* (National Park) report<sup>46</sup> in support of their position.<sup>47</sup>

**(c) *The Tribunal's decision:*** After considering the submissions and evidence on this question, we note that there is some evidence specific to Lake Horowhenua but the issue of ownership of water affects all the claimants in our inquiry district. On balance, this issue would best be dealt with after the completion of their research and

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39. Crown counsel, closing submissions (paper 3.3.24), p 52

40. Crown counsel, closing submissions (paper 3.3.24), p 52

41. Crown counsel, closing submissions (paper 3.3.24), p 52

42. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply, 21 April 2016 (paper 3.3.33), p 4

43. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 5

44. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3: Lake Horowhenua issues, 19 February 2016 (paper 3.3.17(b)), pp 7–8; claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), pp 291–293

45. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 292

46. Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2013)

47. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 5–8; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 291–293

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the hearing of all parties. At that point in our inquiry, we may also be assisted by further findings from the national freshwater resources inquiry.

We turn next to begin our substantive analysis of Muaūpoko claims by addressing the question of whether there was a Crown–Muaūpoko agreement about the lake in 1905, and whether the Horowhenua Lake Act 1905 faithfully reflected such an agreement.

**8.2 WAS THERE A LAKE AGREEMENT IN 1905 AND, IF SO, DID THE 1905 ACT FAITHFULLY REFLECT IT?**

**8.2.1 The parties' arguments**

In this section, we briefly summarise the parties' closing submissions in respect of the 1905 'agreement' and the Horowhenua Lake Act 1905. For many claimants, their grievances about the agreement and the Act were the crux of their claims about the lake.

**(1) The Crown's concession**

At an early stage of our inquiry, the Crown made an important concession of Treaty breach in respect of the 1905 Act and agreement, which was repeated in closing submissions:

The Crown acknowledges that it promoted legislation in 1905 that failed to adequately reflect the terms of the Horowhenua Lake Agreement of 1905. The differences between the agreement and the Act prejudiced Māori with connections to the Lake, including by the Act not directly providing for protections against pollution of the Lake which contributed to damage of traditional food sources, and by impacting on the owners' fishing rights. The Crown concedes that the failure of the legislation to give adequate effect to the 1905 agreement breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.<sup>48</sup>

**(2) Why did the Crown decide to acquire Lake Horowhenua and its surrounds at the turn of the twentieth century?**

**(a) The claimants' case:** The claimants argued that the events from 1897 to 1905 were (i) crucial in determining why the Crown sought to negotiate an agreement with Muaūpoko, and (ii) demonstrate that the Crown was a party to the 1905 agreement. In their view, the settlers' interests in the lake – recreation and drainage to increase farmland – were not of a kind requiring the Crown's intervention. Yet the Crown sought to acquire the lake and its surrounds compulsorily, only compromising at the last minute to enter into a voluntary agreement with Muaūpoko instead. In

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48. Crown counsel, closing submissions (paper 3.3.24), pp 43–44

seeking an agreement in the way that it did, the Crown tried to bypass or subvert the trust which Muaūpoko had established to hold and control their lake.<sup>49</sup>

**(b) *The Crown's case:*** As a general submission, the Crown maintained that its duty in respect of natural resources and the environment was to strike a fair balance between interests in a resource such as Lake Horowhenua.<sup>50</sup> In respect of the period leading up to the agreement, the Crown submitted that ‘many Pakeha politicians, and some Crown officials, considered lakes should be treated as public spaces that were not capable of being privately owned.’<sup>51</sup> This approach, however, was not taken regarding Lake Horowhenua because a title had already been issued in 1896–98. Rather, Muaūpoko agreed to a ‘voluntary cession’ of ‘use rights.’<sup>52</sup>

**(3) *Was there a lake agreement in 1905?***

**(a) *The claimants' case:*** There were a variety of submissions from claimants in respect of the 1905 ‘agreement’. Some claimants argued that there was no agreement at all, because there was no meeting of minds, there was no signed deed, and the owners with authority to make an agreement were not (or not known to have been) involved.<sup>53</sup> Others accept evidence from close to the time that Muaūpoko agreed to share the surface of their lake for boating in return for crucial guarantees from the Crown (including that pollution would be prevented from entering the lake). They deny, however, that the Crown’s unsigned list of terms, prepared after the October 1905 meeting, is an accurate account of what Muaūpoko agreed to cede.<sup>54</sup> Those claimants who accepted that there *was* an agreement maintained that the Crown was a party to it and bound by the guarantees it gave.<sup>55</sup> The claimants also argued that the Crown’s list of terms was no more than a ‘shopping list’ of poorly defined items, requiring further negotiation with the proper authorities – the lake trustees – to obtain a sound, formal agreement.<sup>56</sup>

**(b) *The Crown's case:*** The Crown submitted that there was a “voluntary cession” by Muaūpoko of use rights in respect of the Lake and to the establishment of a board to manage and control the Lake’s uses. Rights were not simply taken by legislation.<sup>57</sup> The Crown relied on Paul Hamer’s evidence that Muaūpoko com-

49. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 8–11, 21–28; claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), pp 7–8

50. Crown counsel, closing submissions (paper 3.3.24), pp 36–37

51. Crown counsel, closing submissions (paper 3.3.24), p 48

52. Crown counsel, closing submissions (paper 3.3.24), pp 47, 52

53. Claimant counsel (Lyll and Thornton), closing submissions, 15 February 2016 (paper 3.3.19), pp 29–30; Philip Taueki, submissions by way of reply, April 2016 (paper 3.3.31), paras 104–119, 144–148

54. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 28–34; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 273–274, 277

55. Claimant counsel (Stone, Bagnic, and Hopkins), closing submissions, 10 February 2016 (paper 3.3.9), pp 6–9; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 29

56. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 29–32, 34, 44–45

57. Crown counsel, closing submissions (paper 3.3.24), p 52

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plaints after 1905 ‘were about the extent of rights given not whether they were or not.’<sup>58</sup> This was confirmed at the 1934 committee inquiry into the tribe’s grievances, where Muaūpoko – with the benefit of legal advice – said that there had been a ‘voluntary cession’ in 1905. Nonetheless, the Crown admitted, there ‘appears to have been some uncertainty about what was given up and retained’ in the agreement. The record is unclear as to ‘the nature or extent of use rights that owners regarded as having been granted (particularly in relation to fishing) and to the envisaged powers of the Board (particularly in relation to drainage).’<sup>59</sup>

**(4) Did the 1905 Act faithfully reflect any Crown and Māori understandings of the ‘agreement’?**

**(a) The claimants’ case:** Some claimants maintained that there had been no agreement, and that the 1905 Act ‘stole Lake Horowhenua’, as unrepresented claimant Philip Taueki submitted.<sup>60</sup> Those who recognised the existence of a limited agreement submitted that the Crown should have consulted and obtained the formal agreement of the lake trustees to more fully developed terms before legislating. In the event, the Act failed to give effect to the agreement as Muaūpoko understood it, and even as the official account had understood it. First, argued the claimants, the Act dramatically extended the agreement beyond what had even been discussed, let alone agreed, including:

- ▶ turning Muaūpoko’s privately owned lake into a public recreation reserve, and including the chain strip in that reserve;
- ▶ providing for a domain board with very extensive powers to control all activities except customary fishing, and only giving Muaūpoko a minority representation on that board; and
- ▶ subordinating Māori fishing and other rights to public recreational uses.<sup>61</sup>

Many claimants argued that some of their property rights (including development rights) and their authority over the lake were thereby confiscated without compensation or consent.<sup>62</sup>

In addition, the claimants argued that key guarantees made to Muaūpoko in the Crown’s list of terms, including protecting the lake from pollution and preserving the native vegetation around the lake, were wrongly omitted from the Act.<sup>63</sup>

**(b) The Crown’s case:** As quoted above, the Crown conceded that the 1905 Act failed to ‘adequately reflect’ the terms of the agreement, including failure to include the

58. Crown counsel, closing submissions (paper 3.3.24), p 52

59. Crown counsel, closing submissions (paper 3.3.24), p 52

60. Philip Taueki, closing submissions, 12 February 2016 (paper 3.3.15), p [3]

61. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 34–45; claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 8–9

62. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 34–45; claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), pp 6–8; claimant counsel (Ertel and Zwaan), submissions by way of reply, 14 April 2016 (paper 3.3.25), p 11; claimant counsel (Watson), closing submissions, 15 February 2016 (paper 3.3.21), p 17; Philip Taueki, submissions by way of reply (paper 3.3.31), paras 120–122

63. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 8–9

pollution clause, and that this breached Treaty principles.<sup>64</sup> The Crown qualified this concession, however, by arguing that the pollution clause and other matters left out of the Act were to be provided for by the domain board, and that this duly happened.<sup>65</sup>

The Crown disagreed with the claimants that there was any element of confiscation or *raupatu* in the Act. First, the Crown noted that the Māori owners' property rights under the Land Transfer Act were not extinguished, as the Act did not (and was not intended to) vest the bed in the Crown.<sup>66</sup> Secondly, the Crown argued that the Act introduced a 'significant degree of regulation of the owners' property rights', but that this did not 'constitute an expropriation or *raupatu*'.<sup>67</sup> In the Crown's view, the claimants' concerns were more the outcome of domain board decisions, but the domain board was not an agent of the Crown.<sup>68</sup>

Thirdly, the Crown argued that the intention of the 1905 Act was to 'create public rights of access and recreation "without unduly interfering with the fishing and other rights of the Native owners"'.<sup>69</sup> In the Crown's view, the Act properly balanced public and Māori rights, and correctly reflected the agreement in respect of the balance of public uses and Māori fishing rights.<sup>70</sup> *Muaūpoko* and public interests were to 'coexist in relation to the Lake', and the domain board was 'to exercise a form of joint management'.<sup>71</sup>

We turn next to analyse the evidence in light of the parties' arguments, and to make our findings on these matters.

### 8.2.2 Why did the Crown decide to acquire Lake Horowhenua and its surrounds at the turn of the twentieth century?

In November 1897, the member for Manawatū, John Stevens, asked a question of the Minister of Lands in the House:

If he will, so soon as the title thereto has been ascertained, acquire by purchase from the Native owners the whole of the Horowhenua Lake, together with a suitable area of land around its shores, for the purpose of a public park, reserving to the Native owners and their descendants the right to their eel and other fisheries, and dedicate the lake and land so to be acquired to the local body within whose boundaries they are situate?<sup>72</sup>

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64. Crown counsel, closing submissions (paper 3.3.24), pp 43–44

65. Crown counsel, closing submissions (paper 3.3.24), p 53

66. Crown counsel, closing submissions (paper 3.3.24), p 48

67. Crown counsel, closing submissions (paper 3.3.24), p 48

68. Crown counsel, closing submissions (paper 3.3.24), pp 26, 54

69. Crown counsel, closing submissions (paper 3.3.24), p 48

70. Crown counsel, closing submissions (paper 3.3.24), p 48

71. Crown counsel, closing submissions (paper 3.3.24), p 49

72. NZPD, 1897, vol 100, pp 143–144 (Hamer, "A Tangled Skein" (doc A150), p 25)



Stevens warned the Government that unless it took steps to acquire the lake soon, it could face the same situation as occurred with the Wairarapa lakes.<sup>73</sup> In the latter case, Premier Seddon had just ended a 20-year struggle to obtain ownership in 1896, acquiring the lakes by ‘gift’ from their Māori owners.<sup>74</sup>

The Minister, John (Jock) McKenzie, replied that the Crown had already been advised to acquire Lake Horowhenua and was ‘favourably disposed to the idea.’<sup>75</sup> Levin residents followed up on this promising response by holding a public meeting in December 1897 and petitioning the Crown. The meeting passed a series of resolutions, including an urgent request that the Crown ‘lose no time’ in buying Lakes Horowhenua, Waiwera, and Papaitonga (Waiwiri) as ‘pleasure resorts.’<sup>76</sup> A few days later, on Christmas Eve, McKenzie instructed the Native Lands Purchase Department to ‘take action to secure that [the] Lakes be purchased and reserved.’<sup>77</sup> On 27 December 1897, Muaūpoko also responded by stopping picnickers from a planned boating expedition on the lake, demonstrating their strong disagreement by ‘blockading the water.’<sup>78</sup>

It is essential to lay out some of the background to this decision by the Crown to purchase Lake Horowhenua, which led ultimately to the 1905 agreement.

First, Stevens – who made the initial request in Parliament – had represented the Hunia brothers in the Horowhenua commission the year before, and in the Native Appellate Court hearings of 1897. He was very aware of the long history of Muaūpoko’s attempts to reserve the lake and three chains of land around it, starting in 1886 with Te Keepa’s Taitoko township proposal, and concluding as recently as July 1897 in Te Keepa’s impassioned speech to the appellate court (see chapters 4 and 6). In that speech, the rangatira had told the court of the tribe’s plan to reserve the lake (and three chains of land around it), vesting control in an elected trustee.<sup>79</sup>

Secondly, the Minister who agreed to make the purchase was Jock McKenzie, long a political opponent of Te Keepa and the motive force behind the Horowhenua commission (see chapter 6). McKenzie was very aware that the commission had recommended the permanent reservation of the lake and the Hōkio Stream as fishing grounds for Muaūpoko and Ngāti Raukawa. Also, as we discussed in chapter 6, McKenzie’s enmity towards Sir Walter Buller was no doubt a factor in his decision to purchase Lake Waiwiri.

The claimants were very critical of the Crown’s decision to buy the lake, given both the Horowhenua commission’s recommendation and the Government’s knowledge of the importance of this taonga to Muaūpoko. Claimant counsel submitted

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73. Hamer, “A Tangled Skein” (doc A150), p 25

74. See Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, pp 649–676.

75. Hamer, “A Tangled Skein” (doc A150), p 25

76. Public meeting, Levin Town Hall, resolution, 21 December 1897 (Hamer, “A Tangled Skein” (doc A150), p 25)

77. J McKenzie, note on 21 December 1897 resolution, 24 December 1897 (Hamer, “A Tangled Skein” (doc A150), p 25)

78. *Evening Post*, 31 December 1897 (Hamer, “A Tangled Skein” (doc A150), p 26)

79. AJHR, 1898, G-2A, pp 146–147



that there was a degree of ‘callousness’ in ‘the Crown’s assurances to Pākehā settlers in November and December 1897 that it would purchase the lake.’<sup>80</sup> Having undermined Muaūpoko’s previous trusts by carrying out the State farm purchase and imposing individualised title, the Crown was now assuring settlers that it would negotiate to ‘take the main remaining tribal asset and food resource of Muaupoko.’<sup>81</sup> The Crown’s intention to thus deprive Muaūpoko of their taonga was ‘compounded’ by the tribe’s plan to re-vest the lake in trustees. Referring to Horowhenua 11 and the events of the 1890s, the claimants argued that the Crown was ‘effectively threatening, yet again, to circumvent a tribal trust.’<sup>82</sup>

In the face of the settler petition and the Minister’s assurances in Parliament, Muaūpoko did not give up on their plan to reserve Lake Horowhenua and vest it in trustees. This process was finalised in 1898. The Native Appellate Court made orders declaring the lake, the stream, and a chain strip inalienable, vesting these taonga in 14 trustees. The description of the lake in the court order was ‘the parcel of land covered with water and known as the Horowhenua lake together with the parcel of land around the said lake one chain wide.’<sup>83</sup> As set out in chapter 6, the court’s orders were made under an 1893 provision allowing reservations in trust for ‘purposes of public utility’, such as schools and churches. The official purpose of the new trust was a fishing easement, although a full title in fee simple was issued under the Land Transfer Act.<sup>84</sup> The key point for the claimants is that the court’s order was ‘further confirmation for the Crown that the iwi intended to hold this important resource and taonga in a form of tribal management and trust.’<sup>85</sup>

In 1898, the Government had to wait for the court to finalise the lake’s title, and may have been deterred when the court made Lake Horowhenua an inalienable reserve. In any case, as we discussed in chapter 6, pressure from Kotahitanga led the Crown to introduce legislation in 1899, banning itself from any new purchases of Māori land. This ban was introduced because Māori were deeply concerned at the speed and extent of Māori land loss. It was renewed in 1900 and remained in force until 1905, which meant that the Crown could not have attempted to buy the lake in that period without passing special legislation empowering it to do so.

In the meantime, Muaūpoko had already agreed to share their lake with settlers for the purpose of boating. Around 60 tribal members attended the first meeting of the Levin rowing club in December 1896. The following month, in January 1897, the tribe entered an ‘informal’ agreement that the lake could be used for boating.<sup>86</sup> A small amount of land would be leased for a jetty, slipway, and a boatshed. Te Rangimairehau seems to have signed a formal lease of this land for a small rental, although title to the lake and the chain strip was not actually decided until 1898.

80. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 14

81. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 14

82. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 14

83. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 17

84. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 16–20

85. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 20–21

86. Hamer, “A Tangled Skein” (doc A150), pp 23–24; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 10–11

## 8.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Other payments were made, including half the profits from a regatta held in 1901. But, as we have seen, Muaūpoko were not happy about the settlers' attempts to obtain greater rights to the lake and prevented access at the end of 1897.<sup>87</sup> This proved to be an aberration in an otherwise peaceful arrangement, in which settlers continued to pay what they considered in 1902 were 'exorbitant' amounts for boating.<sup>88</sup>

The peaceful arrangement was interrupted in 1902 by the Levin settlers' decision to construct a water race, bringing water to the town from the Ōhau River. The water race would discharge into Muaūpoko's privately owned lake, and – noted the Wellington sanitary commissioner – had the potential to pollute it. The water race 'comprised 50 miles of open channels and served 500 properties, eventually flowing into the lake through 13 separate outlets.'<sup>89</sup> Mr Hamer commented: 'It did not take the authorities long to realise that a high pressure pipeline system was needed to bring clean water instead, although the old races continued to serve as open drainage channels for many decades.'<sup>90</sup> The 'remnants of water race infrastructure' still form 'part of the drainage network for the sub-catchment', bringing water from the Ōhau catchment even though the water race system is no longer operated.<sup>91</sup>

Muaūpoko 'strenuously opposed' the scheme; they did not want water from the town entering the lake.<sup>92</sup> They were worried about pollution and the impact of raising the lake – which did in fact lead to the chain strip going under water. Rather than assisting Muaūpoko, the Crown acted as facilitator and partial funder of the water race scheme. Ministers wanted the State farm to be part of it, and provided £1,600 so that the water race could be constructed over the farm.<sup>93</sup> In the 1934 inquiry (discussed in chapter 9), Muaūpoko's lawyer called this 'the first interference with native rights without permission or compensation.'<sup>94</sup> Premier Seddon officially opened the scheme in February 1902, observing in his speech that it would be of great benefit to the district.<sup>95</sup>

Thus, by 1902, Muaūpoko retained legal ownership of their lake, had agreed to boating (for some recompense), and had experienced the first forcible interference with their lake – the water race. But some settlers were not satisfied with having to

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87. Hamer, "A Tangled Skein" (doc A150), pp 24–26

88. Hamer, "A Tangled Skein" (doc A150), pp 24–26; *Manawatu Standard*, 13 February 1902 (Hamer, "A Tangled Skein" (doc A150), p 26)

89. Hamer, "A Tangled Skein" (doc A150), p 45

90. Hamer, "A Tangled Skein" (doc A150), p 45

91. Jon Roygard, 'Presentation: Integrated Stormwater Management Plan for the Arawhata Subcatchment of Lake Horowhenua', 11 February 2015, Horizons Regional Council, [http://old.horizons.govt.nz/assets/Uploads/Events/Environment\\_Committee\\_Meeting/2015-02-11\\_090000/15-08-Presentation-Integrated-Stormwater-Management-Plan-Arawhata-Subcatchment-Lake-Horowhenua.pdf](http://old.horizons.govt.nz/assets/Uploads/Events/Environment_Committee_Meeting/2015-02-11_090000/15-08-Presentation-Integrated-Stormwater-Management-Plan-Arawhata-Subcatchment-Lake-Horowhenua.pdf)

92. Horowhenua Lake Domain: committee of inquiry, minutes, 11 July 1934 (Paul Hamer, comp, papers in support of "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(g)), p 1531)

93. Hamer, "A Tangled Skein" (doc A150), p 45; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 9

94. Morison, Horowhenua Lake Domain: committee of inquiry, 11 July 1934 (claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 10)

95. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 9

pay for the privilege of boating, and had not given up on their campaign to get the Crown to acquire the lake and its surrounds. In August 1903, the member for Ōtaki, William Field, asked a question in the House: when would the Government follow through on ‘the promised nationalisation of the Horowhenua Lake and the dedication of the same as a public park’? Field noted that the Premier, during a recent visit, had promised that the lake would be made a national park.<sup>96</sup> The new Minister of Lands, Thomas Duncan, replied that legislation would be introduced empowering the Government to acquire places like Lake Horowhenua for scenery preservation. As Paul Hamer noted, the promised legislation – the Scenery Preservation Act – was passed in November 1903.<sup>97</sup> This Act empowered the Crown to acquire land compulsorily for scenic or historic reserves, if recommended to do so by a Scenery Preservation Commission.<sup>98</sup>

Once this new Act was passed, the focus shifted from buying the lake bed (which the Crown could not do in 1903 because it was Māori land) to taking it compulsorily as if for a public work. The Department of Tourist and Health Resorts had already sent James Cowan to investigate and report on the area before the Scenery Preservation Bill had made it through Parliament. Cowan recognised the lake’s scenic qualities, and advised that Māori control of access to and use of the lake had caused friction with Pākehā for a number of years.<sup>99</sup> It was necessary, he recommended, that this ‘unsatisfactory state of affairs’ be ‘terminated’.<sup>100</sup> Cowan also took the view that Muaūpoko were likely to interfere with the beauty of the lake’s islands and the native flax and bush on its shores, recommending that these be reserved.<sup>101</sup> He blamed Māori use of flax for reducing vegetation and thus causing the islands to erode.<sup>102</sup> Cowan recommended circumventing any Māori opposition by simply taking the land under the forthcoming Scenery Preservation Act, *after* which the Crown could reassure Māori that their ‘ancestral rights will not be interfered with beyond forbidding them to destroy the bush or other vegetation.’<sup>103</sup> That would include guaranteeing their ‘present rights of fishing for eels, dredging with their rou-kakahi for the shellfish which abound on the bottom of the lake, and of snaring and shooting wild ducks, etc.’<sup>104</sup>

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96. NZPD, 1903, vol 124, p 477 (Hamer, “A Tangled Skein” (doc A150), p 26)

97. Hamer, “A Tangled Skein” (doc A150), pp 26–27

98. For a discussion of the Act and its impact on Maori, see Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 841–846; Waitangi Tribunal, *He Whiritauunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 2, pp 756–782.

99. Anderson and Pickens, *Wellington District* (doc A165), p 271

100. Cowan, ‘Report on Lake Horowhenua to Department of Tourist and Health Resorts’, 1 September 1903, AJHR, 1908, H-2A, p 1 (Hamer, “A Tangled Skein” (doc A150), p 27)

101. Hamer, “A Tangled Skein” (doc A150), p 27

102. Anderson and Pickens, *Wellington District* (doc A165), pp 271–272

103. James Cowan, ‘Report on Lake Horowhenua to Department of Tourist and Health Resorts’, 1 September 1903, AJHR, 1908, H-2A, pp 1–2 (claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 22)

104. Cowan, ‘Report on Lake Horowhenua’, AJHR, 1908, H-2A, p 2 (Hamer, “A Tangled Skein” (doc A150), p 28)

Muaūpoko were very concerned about the Crown's intentions, following the Minister's response to Field in August 1903. Cowan had spoken to Te Rangimairehau so they also knew about the purpose behind Cowan's visit.<sup>105</sup> Hoani Puihi headed a petition by 31 tribal members in late 1903, asking that their title to Lake Horowhenua not be disturbed.<sup>106</sup> Claimant counsel submitted that, 'just five years after obtaining title placing the lake in trust, the iwi felt sufficiently threatened by Crown statements of intention and new legislation that it publicly petitioned for its retention'.<sup>107</sup> A newspaper report about the petition noted that the 'produce of the lake has from time immemorial been the main food reserve of the tribe'. Te Keepa, as trustee from 1873 to 1897, had 'jealously conserved and guarded the lake and its produce exclusively for the use of the tribe'. The Muaūpoko petitioners had

heard with profound alarm that the House will be asked to pass legislation which may result in interference with the title to this food reserve and the waters of the lake. The petitioners rely upon the good feeling of the House to the Maori race, and to its sense of common justice, to prevent the passage of legislation which would have the effect of interfering with the tribal food supply, a legacy to them from their ancestors confirmed by a certificate under the Land Transfer Act in trust for an expressed specific purpose. They therefore ask that the lake and its produce may remain undisturbed under the present title.<sup>108</sup>

While this petition was under consideration, the Government pursued Cowan's recommendation to take the islands and part of the lake shores. It could do nothing, however, without a formal recommendation from the Scenery Preservation Commission. The Minister wrote to the commission in May 1904, suggesting that it consider the islands and the bush on the eastern shore as a desirable reserve. As requested, the commission investigated and in July 1904 recommended that the Crown acquire the islands and 150 acres around the lake.<sup>109</sup>

This scenery preservation process did not include the lake itself, so Field now asked a second question in Parliament (almost a year since he had first raised the matter). The *Evening Post* suggested that Field had been 'interesting himself' on behalf of the Wellington Regatta Association.<sup>110</sup> His question was directed at the Premier, asking when the lake and its shores would be made a national park. Seddon had received advice from officials that the Crown had no power to acquire the lake at present because the title made it 'incapable of alienation in any manner whatsoever', and that this was not the kind of restriction on alienation that could simply be removed by the Governor. 'Nothing short of an Act of Parliament', he was

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105. Anderson and Pickens, *Wellington District* (doc A165), p 272

106. Hamer, "A Tangled Skein" (doc A150), p 29

107. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 22

108. *Evening Post*, 18 November 1903 (Hamer, "A Tangled Skein" (doc A150), p 29)

109. Hamer, "A Tangled Skein" (doc A150), pp 29–30

110. Hamer, "A Tangled Skein" (doc A150), p 30

told, ‘can give effect to any proposal to Nationalize the Lake.’<sup>111</sup> The Premier therefore replied to Field that the Government had no power to take Māori land for the proposed purpose, and that he hoped legislation would soon be introduced granting the Crown such a power. Mr Hamer pointed out that the Scenery Preservation Act already appeared to give the Crown sufficient power,<sup>112</sup> but Seddon may have been thinking of a special Act like the Tongariro National Park Act 1894.<sup>113</sup>

The Native Affairs Committee considered Muaūpoko’s petition in August 1904. The Native Land Purchase Department informed the committee that the lake was inalienable and could not be acquired by the Crown without special legislation.<sup>114</sup> The select committee made no recommendation to the Government on the petition. It seemed that no account would be taken of Muaūpoko’s concerns, therefore, and in January 1905 Cabinet approved the scenery commission’s recommendations. The Government began to survey the land next to the lake shores which it proposed to take, and in doing so more than doubled the amount of land to be taken.<sup>115</sup>

Muaūpoko were thus confronted with a compulsory taking of their islands and a great deal of land surrounding part of their lake, as well as a mooted nationalisation of their lake.

In the meantime, however, the Native Minister, James Carroll, had become involved. He went to Levin in December 1904 to meet with Muaūpoko to see if he could negotiate a voluntary agreement for free public access to the lake. Tribal leaders agreed that the ‘local boating club would be allowed to use the lake and shores for its sports, free of charge, until some permanent arrangement between the Government and the natives has been made.’<sup>116</sup> Reporting on this meeting, the *Evening Post* stated that ‘both the Premier and the Native Minister have promised to use their best efforts to induce the native owners to place the control of the lake in the hands of the Government on certain conditions.’<sup>117</sup> The importance of this Crown–Māori meeting cannot be overstated, because it began a process which culminated in the October 1905 meeting and final ‘agreement’.

By early 1905 the Government had two initiatives underway: a process of negotiating free access and control with Muaūpoko, and a process to take land under the scenery legislation. Field did not relax the pressure on the Government in Parliament. He became vice-president of the Horowhenua Boating Club in February 1905.<sup>118</sup> In May of that year he addressed a meeting of his constituents, promising that he would try to arrange it that ‘the lake would be taken over for the benefit of one and all, at the same time retaining to the Maoris the “mana” which

111. Written response to Field’s question, 28 June 1904 (claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 24)

112. Hamer, “A Tangled Skein” (doc A150), pp 29–30

113. See Waitangi Tribunal, *Te Kāhui Maunga*, vol 2, pp 368, 373, 429, 431.

114. Hamer, “A Tangled Skein” (doc A150), p 29

115. Hamer, “A Tangled Skein” (doc A150), pp 29–31

116. *Evening Post*, 15 December 1904 (Hamer, “A Tangled Skein” (doc A150), p 30)

117. *Evening Post*, 15 December 1904 (Hamer, “A Tangled Skein” (doc A150), p 30)

118. Hamer, “A Tangled Skein” (doc A150), pp 32–33



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they set such great store by'.<sup>119</sup> This seemed to be a change of position on his part. In August 1905 he asked a third question in the House, this time as to whether

the Government intend to fulfil, or whether they decline to fulfil, their oft-repeated promises to take steps to secure the Horowhenua Lake to the use of the public, subject to the preservation of the Native rights therein, and to save from destruction the fast-disappearing native bush on the shores of the lake?<sup>120</sup>

Carroll replied, saying that the owners' consent was required, and that a meeting would be held with them at the first favourable opportunity.<sup>121</sup>

It seems that Carroll's approach had prevailed within the Government. Field reported 'a universal feeling in Levin that the Native Minister stands in the way, and that I am not strong enough to fight the battle.'<sup>122</sup> According to Drs Anderson and Pickens, the Native Department sought to 'head off' the Tourist Department's more extreme plans.<sup>123</sup> Those plans continued slowly for the time being because scenic reserves were a low priority for the Lands and Survey Department.<sup>124</sup> But the proposal of nationalising the lake by statute had apparently been abandoned. Claimant counsel submitted: 'There is no evidence that the Crown reflected on the origins of the lake trust and its historic significance as the last piece of land in a form of tribal title.'<sup>125</sup> While that is correct, the Crown had abandoned its intention to acquire the lake, whether compulsorily or not, and its change of stance was an important and commendable one.

We turn next to discuss the events of September–October 1905, and what – if any – agreement was negotiated with Muaūpoko.

**8.2.3 Was there a lake agreement in 1905?**

**(1) The Crown seeks an agreement**

On 4 September 1905, Field wrote to the Premier, warning him that if 'nothing is done of a definite character about the Horowhenua Lake, as promised by you, it will go hard with the Government candidate in Levin at next election.'<sup>126</sup> Field arranged a meeting between Seddon and representatives of the Levin Chamber of Commerce, which took place on 11 September 1905. These representatives asked the Premier to 'secure for the pakeha rights of access to the shores and surface of Lake Horowhenua.'<sup>127</sup> They also wanted the Government to prevent any clearance of

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119. *Evening Post*, 16 May 1905 (Hamer, "A Tangled Skein" (doc A150), pp 30–31)

120. NZPD, 1905, vol 133, pp 551–552 (Hamer, "A Tangled Skein" (doc A150), p 32)

121. Hamer, "A Tangled Skein" (doc A150), p 32

122. Field to Seddon, 4 September 1905 (Hamer, "A Tangled Skein" (doc A150), p 32)

123. Anderson and Pickens, *Wellington District* (doc A165), p 274

124. Hamer, "A Tangled Skein" (doc A150), p 31

125. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 26

126. Field to Seddon, 4 September 1905 (Hamer, "A Tangled Skein" (doc A150), p 32)

127. *Evening Post*, 12 September 1905 (Hamer, "A Tangled Skein" (doc A150), p 33)



native bush on the lake shores, while at the same time seeking ‘drainage of the lake to free up cultivatable land.’<sup>128</sup>

The Crown argued in our inquiry that its responsibility was to balance interests in the management of the environment.<sup>129</sup> This meeting between the Premier and the Levin Chamber of Commerce showed what the settlers’ interests were, at least as at 1905: access for sport, scenery preservation, and drainage for the benefit of farming. In the claimants’ view, these settler ‘interests’ in their private property were not of a kind with which the Crown needed to concern itself.<sup>130</sup> Muaūpoko had already agreed to Pākehā access for boating, and there was plenty of farmable land around Levin without needing to lower the lake. Nonetheless, in the claimants’ submission, the Crown became ‘an initiator of efforts to minimise Maori interests in the lake and allow Pākehā settler interests to predominate, and at other times a very engaged facilitator in the efforts of local government to achieve that same result.’<sup>131</sup>

Seddon’s response to the chamber of commerce shows how the Crown intended to protect settler interests, which led directly to the ‘agreement’ of 1905. First, he advised that the deputation should approach the Scenery Preservation Commission about the bush land around the lake, and added that he would ‘give notice to them to inspect the place forthwith, and report on the advisableness of acquiring it.’<sup>132</sup> As the claimants note, Seddon did not mention that Cabinet had already approved compulsory acquisition of the islands and some of the land on the lake’s shores for that purpose.<sup>133</sup> Secondly, and more importantly, the Premier ‘reiterated a previously-expressed opinion that the lake should be made a national property. He believed an agreement could be arrived at if a korero between the natives and Mr Carroll and himself were arranged, as was done in the case of the Wairarapa Lake.’<sup>134</sup>

Seddon told the delegates that he would try to get Muaūpoko leaders to come to Wellington so that ‘an agreement might be arrived at’. He was certain an agreement could be reached with the owners so long as the ‘mana of the natives over the lake’ was recognised by ‘the Europeans.’<sup>135</sup> We take it from this that, for its success, Seddon thought local settlers would need to be involved in any agreement and would need to recognise Muaūpoko mana over the lake.

This probably explains why the eventual meeting to secure agreement was ostensibly between Muaūpoko and local settlers, but with the Crown present and represented by the Premier, the Native Minister, and the Liberal member for Ōtaki, William Field. This is underlined by a letter from Seddon to Field on 10 October 1905, stating: ‘I am as you know endeavouring to obtain the Horowhenua Lake and negotiations are well advanced.’<sup>136</sup> This statement by Seddon referred to the crucial

128. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 27

129. Crown counsel, closing submissions (paper 3.3.24), p 40

130. Claimant counsel (Bennion), submissions by way of reply (paper 3.3.33), pp 7–8

131. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 8–9

132. *Evening Post*, 12 September 1905 (Hamer, “A Tangled Skein” (doc A150), p 33)

133. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 27

134. *Evening Post*, 12 September 1905 (Hamer, “A Tangled Skein” (doc A150), p 33)

135. *Evening Post*, 12 September 1905 (Hamer, “A Tangled Skein” (doc A150), p 33)

136. Seddon to Field, 10 October 1905 (Hamer, “A Tangled Skein” (doc A150), p 34)

meeting which occurred around this time, at which an agreement was purportedly negotiated between ‘the Muaupokos and the Levin pakehas’.<sup>137</sup>

There is almost no information about this October 1905 meeting. We do not know its exact date nor who exactly from Muaūpoko was present. The meeting took place at the boatshed by the lake, and we know that Seddon and Carroll were involved, as were Wiki Keepa, Wirihana Hunia, and a young man named Wī Reihana. As far as the researchers in our inquiry could discover, there were no minutes, no newspaper accounts, and no signed or witnessed record of the agreement.<sup>138</sup>

There are two extant accounts of what was agreed. We discuss each in turn.

**(2) *The Crown’s record of the terms of agreement***

The first account of the ‘agreement’ is a document which Mr Hamer called an ‘undated list of its terms’.<sup>139</sup> This list was prepared in English by officials at some point between the meeting and the introduction of a Bill a fortnight later. The document was entitled: ‘*Horowhenua Lake Agreement Between the Muaupokos and the Levin pakehas*’ (emphasis in original).<sup>140</sup> This title was followed by a note that stated: ‘The Maoris were represented by Wiki Kemp and others, and the Europeans by Mr Field, MHR.’<sup>141</sup> Next came nine itemised terms of the agreement:

1. All Native bush within Lake Reserve to be preserved.
2. 9 acres adjoining the Lake, – where the boat sheds are and a nice Titoki bush standing, – to be purchased as a public ground.
3. The mouth of the Lake to be opened when necessary, and a flood-gate constructed, in order to regulate the supply of water in the Lake.
4. All fishing rights to be conserved to the Native owners (Lake not suitable for trout).
5. No bottles, refuse, or pollutions to be thrown or caused to be discharged into the Lake.
6. No shooting to be allowed on the Lake. – The Lake to be made a sanctuary for birds.
7. Beyond the above reservations, the full use and enjoyment of the waters of the Lake for aquatic [*sic*] sports and other pleasure disportations, to be ceded absolutely to the public, free of charge.
8. In regard to the preceding paragraph, the control and management of the Lake to be vested in a Board to be appointed by the Governor – some Maori representation thereon to be recognised.
9. Subject to the foregoing, in all other respects, the Mana and rights of the Natives in association with the Lake to be assured to them.<sup>142</sup>

137. ‘Horowhenua Lake Agreement’, not dated (Hamer, “A Tangled Skein” (doc A150), p 34)

138. Hamer, “A Tangled Skein” (doc A150), pp 34–38; DA Armstrong, ‘Lake Horowhenua and the Hoki Stream, 1905–c1990’, May 2015 (doc A162), pp 15–17; transcript 4.1.12, pp 381–382; transcript 4.1.13, pp 130–132

139. Hamer, “A Tangled Skein” (doc A150), p 34

140. ‘Horowhenua Lake Agreement’, not dated (Hamer, “A Tangled Skein” (doc A150), p 34)

141. ‘Horowhenua Lake Agreement’, not dated (Hamer, “A Tangled Skein” (doc A150), p 34)

142. ‘Horowhenua Lake Agreement’, not dated (Hamer, “A Tangled Skein” (doc A150), pp 34–35)

Paul Hamer noted that these were essentially the terms of the ‘agreement’ which Attorney-General Pitt read out in Parliament on 28 October 1905,<sup>143</sup> except that Pitt stated item 9 as: ‘Subject to the foregoing, in all other respects the mana and rights, and ownership of the Natives to the Horowhenua Lake Reserve to be assured to them’ (emphasis added).<sup>144</sup>

The claimants were critical of most of these terms, and questioned whether Muaūpoko would have willingly or knowingly agreed to them.<sup>145</sup> Item 6, for example, banned the taking of birds, which was ‘either an expropriation or a cession of an important right.’<sup>146</sup> Ceding the ‘full use and enjoyment of the waters of the lake’ for sporting purposes, free of charge, apparently gave up exclusive rights and a source of income for no compensation. Muaūpoko also appeared to agree to construction of a flood-gate to ‘regulate the supply of water in the Lake,’ again conceding this point without payment or any stipulations as to control or limits. Control of public use of the lake for aquatic sports, however, was to be vested in a board – with ‘some Maori representation thereon to be recognised’ (item 8).

In return for a number of concessions without recompense, Muaūpoko received a number of guarantees. These included:

- ▶ the native bush around the lake would be preserved (item 1);
- ▶ their fishing rights would be ‘conserved’ (item 4);
- ▶ representation on the board which was to control public use for aquatic sports (item 8);
- ▶ no litter or pollution would be thrown or *discharged into* their lake (item 5); and,
- ▶ subject to the matters conceded, their mana and rights ‘in association with the Lake’ would be ‘assured to them’ (item 9).

In David Armstrong’s evidence, the guarantees also included a guarantee of their ownership of the lake bed and the chain strip.<sup>147</sup> We agree, especially given the Attorney-General’s explicit statement in Parliament that their ‘ownership’ of the ‘Horowhenua Lake Reserve’ was included in item 9 (cited above).

We also agree with the claimants that the Crown’s list of terms ‘reads as a kind of “agreement in principle”’ or a ‘shopping list of items that some Muaūpoko may have tentatively agreed to.’<sup>148</sup> This is made clear by item 1, for example, which simply stated: ‘All Native bush within Lake Reserve to be preserved.’ As the claimants submitted, ‘it is left unclear who is promising that, and how it will be given effect.’<sup>149</sup>

143. Hamer, “A Tangled Skein” (doc A150), p 35

144. NZPD, 1905, vol 135, p 1206 (Hamer, “A Tangled Skein” (doc A150), p 35)

145. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 273–274; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 33–34

146. Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whānui Series (Wellington: Waitangi Tribunal, 1998) (doc A181), p 72 (claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 28)

147. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 5

148. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 29, 34

149. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 30

Much remained vague and unsettled. For item 3, it was unspecified who would decide that it was necessary to open ‘the mouth of the Lake’, who would build and control the ‘flood-gate’, whether there would be compensation for putting a structure on Māori land, and who would decide the appropriate level of the lake. None of these matters were explicit or even implicit in item 3. In respect of item 2, the ‘agreement’ that nine acres adjoining the lake would be purchased ‘as a public ground’, it is not clear how such an agreement could be made without the specific consent of the Māori landowners concerned. Item 8, involving a board to control Pākehā recreational uses, ‘recognised’ that there would be ‘some Maori representation’ on the board. That was clearly an initial agreement in principle. It did not specify the proportion of Māori representatives, how they would be selected, or who would decide those matters.

When the list of terms was examined by the Native Land Purchase Department, its head (Sheridan) immediately identified a crucial flaw. The ‘proposals’ seemed feasible, he said, but could only be given effect by legislation because the lake was ‘held by trustees . . . who are registered as proprietors under the Land Transfer Act.’<sup>150</sup> In other words, any formal or binding *agreement* about the matters covered in the list would need to be made with the trustees and the owners. Sheridan’s proposal was to bypass or circumvent the trustees through legislation.

This raises the question: had the lake trustees been present at the October 1905 meeting, and had they already agreed to its tentative arrangements? The answer to this question reveals another set of flaws about the so-called agreement. There was no record of who attended the meeting. There was no signed document prepared at or approved by those who attended the meeting. There was, in fact, nothing formal or regular about this meeting whatsoever. All we know for certain is that two tribal leaders were present. One was a lake trustee, Wirihana Hunia, the elder son of Kāwana Hunia.<sup>151</sup> As will be recalled from chapter 6, Wirihana Hunia was in some disfavour with the tribe as a result of the events of the 1890s, and his appointment as trustee had been controversial in 1898.<sup>152</sup> Apart from Wirihana Hunia, we know that Wiki Keepa was present. The official record simply stated that ‘the Maoris were represented by Wiki Kemp and others.’<sup>153</sup> As will be recalled from chapters 5–6, Wiki Keepa was the daughter and heir of Te Keepa Te Rangihwinui, and a leader of Muaūpoko after her father’s death in 1898. Wiki Keepa was not, however, a lake trustee and had no legal authority or responsibility to act for the lake’s owners.<sup>154</sup>

In the absence of any signed deed or any formal involvement of the lake’s owners, the list of terms was clearly a first step in the process of forging an agreement. It was the Crown which chose to immediately turn this initial ‘shopping list’ of tentative items into legislation, less than three weeks after the meeting. The claimants were

150. Patrick Sheridan, ‘Horowhenua Lake’, undated note re ‘Horowhenua Lake Agreement’ (Hamer, “A Tangled Skein” (doc A150), p 35)

151. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 27, 32–34

152. Jane Luiten with Kesaia Walker, ‘Muaupoko Land Alienation and Political Engagement Report’, August 2015 (doc A163), p 310

153. ‘Horowhenua Lake Agreement’, not dated (Hamer, “A Tangled Skein” (doc A150), p 34)

154. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 32

extremely critical that the Crown chose to subvert Muaūpoko's trustees and legal rights in this way, noting that an extremely important taonga was at stake, and the Liberals had a long history of subverting Muaūpoko's trustees.<sup>155</sup>

On the other hand, as Crown counsel pointed out, Muaūpoko never denied at the time that they had entered into some kind of agreement with the Crown.<sup>156</sup> We turn next to the Muaūpoko account of what was agreed.

### **(3) *The Muaūpoko account of what they agreed to 'cede'***

Muaūpoko's account of the meeting came from Wī Reihana, in evidence given to a 1934 inquiry about the lake. Reihana was the only person still alive who had been at the meeting. His firsthand testimony was recorded in the minutes as:

I was present at the meeting in 1905 when Seddon and Carroll were present. Carroll spoke in Maori at that meeting and said that the power of the European was over the top of the water only, not to go below. It was agreed by the elders present at the meeting. I do not know what was said afterwards by Carroll – he told us afterwards what I have already said. I do not know anything about the land around the Lake.<sup>157</sup>

Muaūpoko's lawyer at the 1934 inquiry, David Morison, summarised Reihana's evidence as:

He says there was much discussion and finally Mr Carroll translated to the Maoris the decision come to. Mr Carroll told the Maoris that they were agreeing to allow boating by the Europeans to continue but that the rights of the Europeans were not to extend beyond the edge of the water and the Maoris understand that that was the original protection at that time.<sup>158</sup>

In other words, the agreement 'never gave to anybody the right to the chain round the Lake.'<sup>159</sup> Claimant counsel noted: 'Morison characterised this as "a voluntary cession by the native owners to allow the Europeans to use the Lake for boating".'<sup>160</sup> The 1934 committee of inquiry accepted Reihana's evidence as correct, and believed that it 'fits very closely into the 1905 Act'.<sup>161</sup>

155. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 32, 34, 35

156. Crown counsel, closing submissions (paper 3.3.24), p 52

157. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1534)

158. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1531)

159. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1534)

160. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 33

161. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1566)



## 8.2.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The claimants also point to evidence closer to 1905 that this was the limit of what Muaūpoko – for their part – agreed to cede.<sup>162</sup> The first domain board chair, Major George Burlinson, told the Minister of Internal Affairs in 1915:

Wiki Kemp consented to give the town the use of all the water of the Lake, but said ‘we will keep the fish to ourselves’. It was understood that the Natives gave them the Lake to use the surface of the water. It was merely for the purpose of a boating ground and nothing was to be touched below or above the water.<sup>163</sup>

According to David Armstrong, Major Burlinson had been present at the 1905 meeting.<sup>164</sup> Hanita Henare, a Muaūpoko domain board member at that time, confirmed that Burlinson’s statement was correct.<sup>165</sup>

Paul Hamer cited other evidence close to 1905, including a 1907 letter from Eparaima Te Paki, who had not been present at the October 1905 meeting: ‘the only word I was told by some of the members of the Tribe that for me and Hunia not to admit to [agree to] put the fish [trout] in the lake because they only allowed the European [to] have a boat Race on the lake, no more.’<sup>166</sup> Te Paki was a member of the domain board, voicing the Muaūpoko view on the introduction of trout and Pākehā sport fishing to the lake. At a 1907 meeting on this matter, Te Paki and the other Muaūpoko board members again stated that the agreement was limited to use of the lake for ‘rowing, boating and sports generally – certainly not for fishing.’<sup>167</sup>

**(4) Was there an agreement in 1905 and, if so, between whom?**

The claimants in our inquiry expressed a range of views about the purported ‘agreement’ as recorded after the event by officials.

Some denied that there was any agreement at all.<sup>168</sup> Philip Taueki argued in his reply submissions:

Crown Law and researchers commissioned by the Waitangi Tribunal have failed to produce any document that purports to be an ‘agreement’ between the Crown and the Natives. All they have come up with is a memo recorded by somebody that was read out in Parliament by the Attorney-General at the time. Even in the unlikely event there was an agreement, neither Hunia nor Kemp had the authority to speak on behalf of the Muaupoko owners had been resoundingly established in the highest courts of the land in *Kemp v Hunia*.<sup>169</sup>

162. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 33

163. ‘Notes of a Deputation’, 9 April 1915 (Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), pp 16–17)

164. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 16

165. Hamer, “A Tangled Skein” (doc A150), p 70

166. Eparaima Te Paki to BR Gardener, domain board chairman, 23 September 1907 (Hamer, “A Tangled Skein” (doc A150), p 36)

167. ‘Notes on the question of allowing Europeans to fish in the Horowhenua Lake’, not dated [1907] (Hamer, “A Tangled Skein” (doc A150), pp 36–37)

168. Claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p 29

169. Philip Taueki, submissions by way of reply (paper 3.3.31), paras 118–119



For generations, the Maori owners had been led to believe there was an agreement between the Maori owners and the Crown before this law was passed. Due to their belief that such an agreement existed, the Maori owners respected this ‘right’ of public access, which led the public in turn to consider the lake and surround[ing] land to be a community asset owned by either central or local government. Despite references in the Crown’s submission to the Horowhenua Lake Agreement of 1905, the Crown has been unable to produce any evidence of the existence of such an agreement, and without proof, the Crown cannot substantiate any claim that Parliament had obtained the approval of the owners before passing this law. Under the terms of the Treaty, the Maori owners of Lake Horowhenua were guaranteed ‘full, exclusive and undisturbed’ possession of their property. Public access granted by Parliament without the approval of the owners disturbs this right of owners to full and exclusive possession of land they own in fee simple estate.<sup>170</sup>

Other claimants accepted that there was an agreement, but limited to permission for Pākehā to use the surface of the lake for boating, with a board to control that activity, while safeguarding Māori rights (especially their fishing rights and their mana).<sup>171</sup>

There was significant debate about whether the Crown was a party to the agreement. Some claimants argued that the Crown was a party, since Field was an agent of the Crown, the terms committed the Crown to do certain things, and Seddon and Carroll were present (and clearly agreed).<sup>172</sup> Others argued that the question was irrelevant because the Crown ‘sponsored the terms included [in] the Agreement through the 1905 Act’. In other words, the Crown chose to endorse the agreement and give it effect by legislation, which is the crucial action of the Crown.<sup>173</sup>

The Crown’s position in our inquiry was in broad agreement with those claimants who argued that there *was* an agreement, that the 1934 Muaūpoko evidence of a ‘voluntary cession’ is to be relied upon, and that the critical issue was the Crown’s translation of the agreement into legislation. Crown counsel made no submissions as to whether the Crown itself was a party to the agreement before it introduced legislation in October 1905.<sup>174</sup>

Thus, in the Crown’s view, Muaūpoko’s ‘voluntary cession’ consisted of ‘use rights in respect of the Lake’ and ‘the establishment of a board to manage and control the Lake’s uses.’<sup>175</sup> Crown counsel, however, did not go so far as to accept that Muaūpoko’s ‘cession’ was restricted to boating alone. The 1905 Act, we were told, was ‘intended to reflect an agreement, though there *appears to have been*

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170. Philip Taueki, submissions by way of reply (paper 3.3.31), paras 144–147

171. Claimant counsel, closing submissions (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 274, 277; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 33

172. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 6–7

173. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 274

174. Crown counsel, closing submissions (paper 3.3.24), pp 48, 52–53

175. Crown counsel, closing submissions (paper 3.3.24), p 52

## 8.2.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

*some uncertainty about what was given up and retained* (emphasis added).<sup>176</sup> The Crown submitted that the record is unclear as to ‘the nature or extent of use rights that owners regarded as having been granted (particularly in relation to fishing) and to the envisaged powers of the Board (particularly in relation to drainage).’<sup>177</sup> Nonetheless, the Crown pointed to Mr Hamer’s evidence that Muaūpoko complaints after 1905 ‘were about the extent of rights given not whether they were or not’. During the 1934 inquiry, the iwi had the benefit of legal advice and ‘confirmed that there had been “a voluntary cession”’.<sup>178</sup> For its own part, the Crown accepted that any commitments made to Muaūpoko, such as the item in respect of pollution, had to be faithfully translated into the legislation giving effect to the agreement.<sup>179</sup>

After examining all the evidence, Mr Hamer’s conclusion was basically the same as that of Morison in 1934:

It appears therefore that Muaūpoko essentially regarded (or came to regard, if they were not party to it at the time) the 1905 agreement as one by which they ceded the limited right to Pākehā to use the lake surface for boating, with a board tasked with controlling these activities and safeguarding Māori rights.<sup>180</sup>

The point that the board’s role was confined to ‘preserv[ing] their fishing and other rights and control[ling] the privileges conferred on Europeans under the Horowhenua Lake Act, 1905’ had been made by Muaūpoko to the board in 1931.<sup>181</sup>

We note that Muaūpoko were not opposed to sharing the lake with Pākehā for boating, and had in fact been doing so since 1897. In December 1904 they had agreed with Carroll that this use could be free of charge for the time being, until a final agreement was negotiated. From the evidence available to us, Muaūpoko agreed in October 1905 to Pākehā use of the surface of the lake for aquatic sports, free of charge, with that use to be controlled by a board on which they would be represented. This is what the tribe maintained in the decades immediately after the ‘agreement’, and they remained committed to it until – as we discuss in section 8.3 – Muaūpoko rights were ‘gradually . . . whittled away’.<sup>182</sup> The terms recorded in English by officials after the event, with no signatures or other proof of agreement to those terms, are at best *a record of what the Crown had committed to do*.

We accept the claimants’ position that the Crown was a party to the agreement. As we discussed in section 8.2.2, the Crown had made commitments to settlers that it would nationalise the lake, and adopted Carroll’s alternative strategy of obtaining Muaūpoko agreement to Pākehā access. The October 1905 meeting was a direct

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176. Crown counsel, closing submissions (paper 3.3.24), p 52

177. Crown counsel, closing submissions (paper 3.3.24), p 52

178. Crown counsel, closing submissions (paper 3.3.24), p 52

179. Crown counsel, closing submissions (paper 3.3.24), pp 43–44, 48

180. Hamer, “A Tangled Skein” (A150), p 37

181. Hudson, domain board secretary, to under-secretary for lands, 26 June 1931 (Hamer, “A Tangled Skein” (doc A150), p 37)

182. This phrase was used by Morison in his submissions to the 1934 committee of inquiry. See committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), p 1534).

sequel to and continuation of the preliminary agreement reached in December 1904. Further, the 1905 terms as recorded by officials committed the Crown in certain ways, including the purchase of nine acres for a boatshed and other amenities, and the appointment of a board by the Governor. With the Premier and Native Minister present, and the Native Minister as interpreter, this agreement could hardly have been made if they had not consented to it.

#### **8.2.4 Did the 1905 Act faithfully reflect any Crown and Māori understandings of the ‘agreement’?**

##### **(1) *The terms of the 1905 Act***

By 26 October 1905, about two weeks after the meeting, Carroll had a Bill ready for introduction to Parliament, which occurred on 28 October. Claimant counsel observed that ‘This was a fast turnaround and confirms the priority the Crown placed on giving Pākehā access to the lake.’<sup>183</sup> We note, however, that the parliamentary session was about to end on 31 October 1905,<sup>184</sup> which meant that legislation would otherwise have had to wait until 1906. The Bill had a speedy passage through both Houses, becoming law on 30 October 1905. In his evidence for the Tribunal, Paul Hamer argued that the Act was ‘a remarkably short piece of legislation for what became a complicated management and ownership regime, and its shortcomings and ambiguities were to provide ample scope for misinterpretation in the years to come.’<sup>185</sup> This was correct, although the Act was more substantial than it appeared because section 4 imported the provisions of the Public Domains Act 1881 and its amendments as they related to domain boards.

The long title of the Act was ‘An Act to make the Horowhenua Lake available as a Place of Public Resort.’ The short title was the Horowhenua Lake Act 1905 (section 1). The preamble stated: ‘Whereas it is expedient that the Horowhenua Lake should be made available as a place of resort for His Majesty’s subjects of both races, in as far as it is possible to do so without unduly interfering with the fishing and other rights of the Native owners thereof.’ The remainder of the Act stated:

2. The Horowhenua Lake, containing nine hundred and fifty-one acres, more or less, is hereby declared to be a public recreation reserve, to be under the control of a Board, one-third at least of the members of which shall be Maoris, to be appointed by the Governor, subject to the provisions following:—

- (a) The Native owners shall at all times have the free and unrestricted use of the lake and of their fishing rights over the lake, but so as not to interfere with the full and free use of the lake for aquatic sports and pleasures.
- (b) No person shall be allowed to shoot or destroy birds or game of any kind on the lake or within the area of the said lake reserve.

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183. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 35

184. Hamer, “A Tangled Skein” (doc A150), p 40

185. Hamer, “A Tangled Skein” (doc A150), p 40

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3. The Governor may acquire from the Native owners any area not exceeding ten acres adjacent to the lake as a site for boat-sheds and other buildings necessary to more effectually carry out the provisions of this Act.

4. The Board shall have and may exercise all the powers and functions of a Domain Board under ‘The Public Domains Act, 1881.’

Two key changes had been made to Carroll’s Bill as it passed through Parliament. First, the second clause, which made the lake a public recreation reserve, had had a proviso stating: ‘The Native owners shall at all times have the free and unrestricted use of the lake and of their fishing rights over the lake.’ It was Premier Seddon who moved that this proviso be qualified by adding the words: ‘but so as not to interfere with the full and free use of the lake for aquatic sports and pleasures.’ As Mr Hamer noted, this appeared to be contradictory. The guarantee to Muaūpoko of ‘the free and unrestricted use of the lake’ was now to be ‘qualified by the “full and free use” by the public.’<sup>186</sup> Secondly, the amount of land which the Crown could acquire for boat sheds and amenities was increased from nine to 10 acres. This change was moved by Field.<sup>187</sup> Otherwise, the Bill passed with few amendments.

**(2) Legal ownership is retained**

One positive aspect of the 1905 Act was that the Muaūpoko owners retained their legal ownership of the lakebed and chain strip.<sup>188</sup> As Crown counsel pointed out, this ran against the grain of official attitudes and policies at the time.<sup>189</sup> The findings of Ben White’s Rangahaua Whānui report on lakes, and the Tribunal’s reports on the central North Island, National Park, and Te Urewera districts, demonstrate the accuracy of that submission.<sup>190</sup> Also, neither the islands nor land around the lake were taken for scenery preservation. As will be recalled, a process to take the islands and some 300 acres of land was in train at the time (see section 8.2.2). According to Drs Anderson and Pickens, the Act seems to have caught the Tourist and Health Resorts Department ‘by surprise’, resulting in ‘the abandonment of their own plans for the lake.’<sup>191</sup>

**(3) Acquisition of significant rights without consent or compensation**

There was no real criticism of the Horowhenua Lake Bill during its passage through Parliament but two members did point out that the Crown was acquiring significant rights without any payment of compensation. Thomas Kelly argued that Muaūpoko’s generosity to the public should be compensated by a monetary

186. Hamer, “A Tangled Skein” (doc A150), pp 38, 39

187. Hamer, “A Tangled Skein” (doc A150), p 39

188. Crown counsel, closing submissions (paper 3.3.24), p 48

189. Crown counsel, closing submissions (paper 3.3.24), p 48

190. White, *Inland Waterways* (doc A181), p 86; Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1320–1333; Waitangi Tribunal, *Te Kāhui Maunga*, vol 3, pp 1002–1009, 1037–1039; Waitangi Tribunal, *Te Urewera, Pre-publication, Part 5* (Wellington: Waitangi Tribunal, 2014)

191. Anderson and Pickens, *Wellington District* (doc A165), p 274

payment or a gift of land. The Attorney-General agreed to raise this possibility with Carroll, but nothing came of it.<sup>192</sup> One member of the Legislative Council, John Rigg, suggested that the Act would virtually acquire ownership of the lake but without actually doing so or paying for it. This made a nonsense, he said, of any guarantee of the owners' mana:

There was no consideration provided for the great advantage given to the Europeans, and it practically meant that the Natives of Muaupoko Tribe were making a splendid and generous gift to the people of this colony. When the value of the property was considered it was really surprising that something more had not been said in recognition of the generosity of the Natives in this matter. He should have preferred that the Government had purchased the lake outright from the Natives and make it a public reserve. The mana of the Natives – whatever that might mean – they were told, was preserved. What is that mana worth when this Bill is passed and the control of the lake handed over to a Board? Nothing. They have, of course, their fishing rights in the lake, and under the Treaty of Waitangi those could not be taken from them. He did not, of course, oppose the Bill, but he marvelled at the generosity of the Natives in making such an arrangement for the benefit of the people of this colony.<sup>193</sup>

The following year, the member for Southern Maori, Tame Parata, asked the Government to repeal the Act, arguing that it 'appropriates a valuable estate without the concurrence of the Native owners.'<sup>194</sup> There is certainly no evidence that Muaūpoko were consulted about the Horowhenua Lake Bill.<sup>195</sup> This was a crucial omission on the part of the Crown. The Government had not sought the formal agreement of the lake trustees to the initial terms negotiated in October 1905, nor had it sought to clarify or finalise those terms with the trustees. This meant that when the Bill was introduced and passed in just three days, Muaūpoko had been given no opportunity to influence its contents, let alone consent to them. In the event, the 1905 Act did not properly or faithfully reflect either (i) the Crown's list of terms or (ii) Muaūpoko's understanding of what had been agreed. We turn to that point next.

#### ***(4) The Act's failure to give proper and faithful effect to Muaūpoko's cession or the Crown's guarantees***

As noted in section 8.2.1, the Crown conceded that the 1905 Act 'failed to adequately reflect the terms of the Horowhenua Lake Agreement of 1905'. The 'differences between the agreement and the Act prejudiced Māori with connections to the Lake, including by the Act not directly providing for protections against pollution of the Lake which contributed to damage of traditional food sources, and by impacting on the owners' fishing rights'. The Crown further conceded that 'the

192. Hamer, "A Tangled Skein" (doc A150), pp 39–40

193. NZPD, 1905, vol 135, p 1206 (Hamer, "A Tangled Skein" (doc A150), p 39)

194. NZPD, 1906, vol 137, p 508 (Hamer, "A Tangled Skein" (doc A150), p 41)

195. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 35



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failure of the legislation to give adequate effect to the 1905 agreement breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.<sup>196</sup>

There were crucial differences between what Muaūpoko understood that they had ceded (public use of the surface of the lake for aquatic sports, which would be managed by a part-Māori board), the tentative or incomplete arrangements recorded by officials as a list of terms, and the contents of the Act.

**(a) Features which altered or went beyond what had been agreed:** The 1905 Act had a number of features which had not been discussed or agreed, even on the Crown's own record of the agreement. Some such additions proved necessary because the list of terms had been so rudimentary or incomplete. Nonetheless, the Crown's additions 'extended the text of the alleged "arrangement" in several important respects'.<sup>197</sup> These additions included:

- ▶ the Act declaring the lake reserve to consist of 951 acres, thereby including the chain strip as well as the lake itself – this had never been one of the terms and later caused 'a considerable amount of confusion';<sup>198</sup>
- ▶ the Act empowering the Crown to obtain 10 acres instead of nine, a change which was made on the motion of Field (who had represented Levin settlers as well as the Crown at the meeting);<sup>199</sup>
- ▶ the Act declaring the lake reserve to be a public recreation reserve, and placing it under a domain board with all the powers and functions of such a board, which were extensive;<sup>200</sup> and
- ▶ the Act determining that Māori members would be a minority (one-third), appointed by the Crown and not by Muaūpoko, and not specifying that the Māori members had to be Muaūpoko.<sup>201</sup>

In 1905, domain boards had what the claimants called 'the widest possible powers to manage domain land'.<sup>202</sup> First, boards could build any structures or lay out the grounds of the domain in any way they wished, or set any part of the domain aside for a special recreation ground, garden, or similar purpose.<sup>203</sup> Secondly, boards could make or close roads, and stop up or alter watercourses, or do 'any other thing' required for the 'beneficial management and administration' of the domain.<sup>204</sup> Thirdly, boards had all the powers which a commissioner of Crown lands could exercise over Crown lands.<sup>205</sup> Fourthly, boards could make bylaws for the management of the domain, the control of all persons and modes of transport on the

196. Crown counsel, closing submissions (paper 3.3.24), pp 43–44

197. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 35

198. Hamer, "A Tangled Skein" (doc A150), p 38

199. Hamer, "A Tangled Skein" (doc A150), p 39

200. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 36, 37–39

201. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 36; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 275

202. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 37

203. Public Domains Act 1881, s 4; Domain Boards Act 1904, s 8

204. Public Domains Act 1881, s 4; Domain Boards Act 1904, s 8

205. Public Domains Act 1881, s 6; Domain Boards Act 1904, s 8



domain, the exclusion of any animals, and the prevention of any nuisance (which could have included forms of pollution).<sup>206</sup> In addition, the Public Domains Act 1881 made it an offence to light a fire, dig or cut the ground, take or damage any plants, and shoot any birds unless with the permission of the board.<sup>207</sup> This was a level of control far beyond what was envisaged at the October 1905 meeting. The Crown's record of the terms only gave the board power to control Pākehā use of the lake for aquatic sports (items 7 and 8).

The claimants were deeply concerned about the unauthorised extension of the agreement to include a domain board which would control all activities on the lake and chain strip, and about the effects of the Act on their mana, their control of the lake, their fishing rights, and ultimately their property rights and ownership of the lakebed and chain strip. Some called it the transformation of a 'sharing agreement' into 'pākehā local government control over this taonga'.<sup>208</sup> Others considered it an outright confiscation of the lake. Philip Taueki submitted that 'Title in fee simple, in effect became title in name only when Parliament passed the Horowhenua Lake Act in 1905, breaching the Treaty knowingly'.<sup>209</sup>

First, the claimants argued that the Act reversed the order of concessions and guarantees in the 1905 'agreement': rather than Muaūpoko conceding that settlers could use the lake for boating so long as this did not affect their fishing and other rights, the Act 'created a new priority of public use over Muaūpoko use of their food resource on their private lake'.<sup>210</sup> We agree with this submission. Section 2(a) explicitly said that Muaūpoko could not exercise their fishing rights in such a way as to interfere with the public use of the lake. This effectively negated or reversed what was *originally drafted as a proviso that public use would not interfere with that of Muaūpoko for fishing*. We also agree that the provisions granting the board the functions and powers of a domain board exacerbated the situation. The consequence of turning the lake into a public recreation reserve was that it basically prevented all non-recreational uses of the owners' property. In effect, the 1905 Act 'changed the default property ownership arrangements, from a default position of "use as required", to "use only where 1) an activity is not prohibited by the Board and 2) does not affect public use"'.<sup>211</sup> We agree that this represented a serious infringement of the owners' property rights, enacted in 1905 without consent or compensation.

Secondly, the claimants argued that this establishment of a public recreation right froze their development rights. Previously, they could have developed lakeside facilities and charged for uses of the lake as they chose, and also as new uses became possible – such as speedboat racing. They could have erected new structures as they pleased, including the possibility of constructing new islands, and they could have exploited the animal and bird life as they chose. They could have harvested plants (especially flax) from the lake and the chain strip. The lake owners could also

206. Public Domains Act 1881, s10; Domain Boards Act 1904, s8

207. Public Domains Act 1881, s17; Domain Boards Act 1904, s8

208. Claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p29

209. Philip Taueki, submissions by way of reply (paper 3.3.31), para 122

210. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p39

211. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p8

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have raised or lowered the lake at will. This would have enabled them to reduce or increase the watered area as suited their needs and as technology allowed – at least until later regulatory legislation affecting all waterways was passed. The Muaūpoko owners could also have developed the fisheries as they chose, using new technology as it became available.<sup>212</sup>

In the claimants' view, the 1905 Act had the effect of removing all these options, requiring instead

the Maori owners to ensure that the lake was thereafter maintained as a public recreation facility, with fishing rights retained so far as they did not interfere with that public recreation purpose. This essentially 'froze' the rights in their existing state. Any land or fishery development rights were gone. Their private lake was now a public lake with a residual ability to use it for fishing.<sup>213</sup>

Worse, in the claimants' view, was that all development rights now lay with the board, which could develop and regulate the domain for recreational purposes – including the previously mentioned example of allowing speedboating.<sup>214</sup>

In sum, the claimants argued that the Act interfered so extensively with their property and other rights that it amounted to a raupatu or confiscation of those rights, and of their authority over the lake.<sup>215</sup> Paul Hamer's evidence showed that there were key players at the time, such as Field and Native Minister Carroll himself, who did believe that the lake had effectively been nationalised.<sup>216</sup>

The Crown's position was that the Act simply introduced a regulatory regime, and that the real problem was not the statutory regime but the restrictive bylaws and other subsequent decisions of the domain board; the domain board, said Crown counsel, was not a Crown agent.<sup>217</sup> While the Act did provide for a 'significant degree of regulation of the owners' property rights', that did not 'constitute an expropriation or raupatu'.<sup>218</sup> Rather, Muaūpoko and public interests were to 'co-exist in relation to the Lake'; and the domain board was 'to exercise a form of joint management'.<sup>219</sup> If the Act did not work as Muaūpoko had expected, or if the board made decisions that 'failed to give proper weight and protection to Muaūpoko interests, that may constitute some form of wrong – but it is not confiscation or raupatu. Rights that are confiscated are gone for all time, in law and often in fact.' In other words, 'alleged bad decision making by the Domain Board' was to blame, and that did not constitute 'expropriation'.<sup>220</sup>

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212. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 39–41

213. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 41

214. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 7

215. Claimant counsel (Watson), closing submissions (paper 3.3.21), p 17; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 8, 39–40

216. Hamer, "A Tangled Skein" (doc A150), p 41

217. Crown counsel, closing submissions (paper 3.3.24), pp 26, 48–51, 54

218. Crown counsel, closing submissions (paper 3.3.24), p 48

219. Crown counsel, closing submissions (paper 3.3.24), p 49

220. Crown counsel, closing submissions (paper 3.3.24), p 54

Also, Crown counsel argued that the 1905 Act struck the right balance between public and Māori rights. It created ‘public rights of access and recreation “without unduly interfering with the fishing and other rights of the Native owners”’<sup>221</sup>

In their reply submissions, the claimants maintained that the 1905 Act ‘clearly did directly extinguish *some* of the owners’ property rights in the sense that they lost some of the key incidents of title, well before any decisions were made by the Board’ (emphasis in original).<sup>222</sup> In legal terms, they said, the 1905 agreement was really only

a licence to the public to carry out certain unspecified recreation activities on the surface of the water or parts of it, whether at all times, or for fixed times, or determinable at will is unclear. But on 30th of October 1905 when the Act came into force, all Muaūpoko property interests in the lake became subservient to its public reserve status. Their uses of their land and waters could never interfere with the ‘full and free’ use of the lake for ‘aquatic sports and pleasures.’ The phrase was not confined and was subsequently expanded by changing uses, for example, the use of speed boats. The Board was appointed to enforce a comprehensive scheme of public use, not to discover and mediate the extent to which Muaūpoko would allow limited public use. Killing birds and any game – ie the use of the lake for all animal food other than fish – was also illegal. Lighting fires and cutting flax (both activities undertaken by Muaupoko), had also become criminal acts, unless explicitly consented to by the Board, due to the operation of s 17 of the Public Domains Act 1881.<sup>223</sup>

As noted above, we agree with the Crown that legal ownership of the lakebed and chain strip was not confiscated by the Act. We also agree that there was potential for the domain board to have imposed less stringent rules or made better decisions, a matter that is discussed in the following section. We agree, too, that distinctions must be maintained between ‘public authority regulating property, and the existence of property rights.’<sup>224</sup> That seems unexceptionable.

But we accept the claimants’ position that in the instance of the Horowhenua Lake Act 1905, purportedly enacted to give effect to an agreement, some property rights, including the development rights inherent in those property rights, were negated or subordinated to public uses. This occurred without consent or compensation. No positive actions by the domain board could ever make up for the fact that the October 1905 ‘agreement’ had been an initial, incomplete agreement to some general propositions, and that the further consent of the owners and their trustees to more fully developed proposals was required before legislation was introduced. The Crown’s omission in that respect has already been noted above.

Specifically, our view is that the 1905 Act created a hierarchy of interests. Its wording subordinated the fishing and other rights of the Muaūpoko owners to public

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221. Crown counsel, closing submissions (paper 3.3.24), p 48

222. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 7

223. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 7

224. Crown counsel, closing submissions (paper 3.3.24), p 54 n

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use of the lake and of the chain strip for recreation. Further, the Act turned the owners' private property into a public reserve under the control of a domain board. It gave the board extensive powers to manage this reserve (and to restrict all of the owners' activities other than customary fishing) for that exclusive purpose of recreation. This was the work of legislators who valued and prioritised aquatic sports over the customary fishing rights of Māori. The Muaūpoko owners consented to none of these things, nor were they compensated for them.

There was, however, a potential mitigating factor. Muaūpoko were to be represented on the board which controlled all activities in the reserve. The extent to which this was a mitigating factor will be examined in section 8.3.

**(b) Omission of guarantees from the 1905 Act:** Some of the guarantees or undertakings made at the October 1905 meeting were missing from the Act:

- ▶ there was 'no reference to the guarantee of Muaupoko's mana over the lake – undoubtedly the key term of the agreement for them' (item 9);<sup>225</sup>
- ▶ the Act failed to address the regulation of lake levels or the establishment of a control gate (item 3);
- ▶ the Act failed to prohibit the throwing of rubbish or the discharge of pollution into the lake (item 5);
- ▶ the Crown failed to insert a clause that the lake was not suitable for trout and would not be stocked with this introduced species (item 4); and
- ▶ the Act failed to provide for preserving the native bush and vegetation around the lake, which was a particular concern to the claimants because of their important flax resource (item 1).<sup>226</sup>

While the Crown conceded that it had failed to 'adequately reflect' the terms of the agreement in the Act, it qualified this concession by pointing out that some of these matters were omitted from the Act because the domain board could deal with them.<sup>227</sup> Crown counsel cited Paul Hamer's agreement under cross-examination, that 'some of the things that were in the [1905] agreement were seen as matters that could be dealt with just by the board in the creation of its bylaws. So they didn't actually need to be put into legislation.'<sup>228</sup>

Mr Hamer had also agreed in cross-examination that the clause about pollution (item 5) may have been omitted from the 1905 Act for that very reason.<sup>229</sup>

We accept this submission up to a point, and we also note that such matters as control of lake levels actually required more negotiation and agreement from Muaūpoko before they could or should have been included in legislation. But, in our view, the crucial guarantee that pollution would not be discharged into the lake required statutory direction to ensure that it was carried out, rather than leaving such matters to the discretion of the domain board. We return to that question

225. Hamer, "A Tangled Skein" (doc A150), p 39

226. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 8–9

227. Crown counsel, closing submissions (paper 3.3.24), p 53

228. Transcript 4.1.12, p 396 (Crown counsel, closing submissions (paper 3.3.24), p 53)

229. Crown counsel, closing submissions (paper 3.3.24), p 53

when we discuss the question of the Crown's duties in respect of pollution and environmental degradation (see chapter 10).

### 8.2.5 Findings

Our conclusion in section 8.2.3 is that there was a tentative agreement in principle on some inchoate terms in October 1905, to which some Muaūpoko 'elders' (as Reihana said), some Levin settlers, and the Premier had agreed, with the Native Minister interpreting. This was clearly not an adequate or complete agreement, let alone a formal or signed deed of agreement, although Muaūpoko in later decades confirmed that they had consented to public use of the surface of the lake for boating. In our view, the Crown was very clearly a party to this 'agreement'. The next step for the Crown was either to seek the formal agreement of the lake trustees to a contract or deed (and the endorsement of the court to any variance of the trust), or – as Sheridan recommended – legislation. The choice to legislate without first seeking formal agreement on more fully developed terms was clearly a breach of Treaty principles. It was not consistent with the principle of partnership, nor was it consistent with the plain meaning of article 2 of the Treaty.

The English version of article 2 guaranteed that Māori would retain their lands and all other properties for so long as they wished. The Māori version guaranteed their tino rangatiratanga over their taonga. The 1905 Act, however, took control of Lake Horowhenua from its Muaūpoko owners and vested it in a board, turning their private property into a public recreation reserve and subordinating their use of their private property (a taonga) to that of the public. This was done without adequate consent or any compensation, in clear breach of article 2. In our view, this was a serious Treaty breach which left Muaūpoko essentially powerless to exercise tino rangatiratanga over their taonga, which will be evident in the next section of this chapter.

The enactment of the 1905 Act was not the result of a true or fair balancing of interests, as Crown counsel maintained. If the public possessed a legitimate 'interest' in this privately owned lake, it amounted to a desire to use it for boating and recreation, for which privilege the public could negotiate arrangements with the owners (including for payment, as they had prior to 1905). This public 'interest' in the lake was hardly of a kind which justified imposing the 1905 Act and the provisions of the Public Domains Act on the Māori owners, without their consent or any payment of compensation. Even if the 1905 'agreement' had contained final and fully agreed terms, the application of the Public Domains Act to Lake Horowhenua had never been one of them. For Muaūpoko the prejudice was enormous. This included an economic prejudice – if they had been able to continue charging settlers for use of their private lake, they would have benefited in a substantial way from the settlement and colonisation brought about by the Treaty.

We do not accept the Crown's position that the 1905 Act simply regulated rather than expropriated private property rights. We agree with the Crown that legal ownership of the lakebed was not taken. But Muaūpoko owners lost the right to develop



their lake, which was a right inherent in all properties under English law.<sup>230</sup> It was also a Treaty right, as the Waitangi Tribunal explained in its report *He Maunga Rongo*.<sup>231</sup> The 1905 Act transferred the development right in Lake Horowhenua to the public, which could then develop the lake as a pleasure resort, giving not only this right but also the exclusive control of all other private property rights to a public board. Our conclusions from this are as follows:

- ▶ First, under the 1905 Act, Muaūpoko fishing and other uses of their property were not to interfere in any way with public recreation and were therefore subordinated to it by statute.
- ▶ Secondly, under the Public Domains Act 1881, many of those uses were also prohibited in a public domain or required explicit domain board permission.
- ▶ Thirdly, the development right was transferred from the Muaūpoko owners to a public board.

In our view, this was as near to an expropriation as could occur without outright confiscation of the legal ownership. It was a breach of the Māori owners' article 2 rights, and of the principles of partnership and active protection.

We accept that the Māori owners were to be represented on the domain board, which potentially gave them a say in how their uses of their property were controlled and/or prohibited. But the Crown's omission to negotiate an appropriate level of representation and then guarantee it in the 1905 Act was a breach of the principle of partnership and the property guarantees in the Treaty.

There were further omissions in the 1905 Act. The Crown has conceded that it 'promoted legislation in 1905 that failed to adequately reflect the terms of the Horowhenua Lake Agreement of 1905'.<sup>232</sup> Crown counsel noted the failure to prohibit pollution from entering the lake, which was inconsistent with Treaty principles. This concession was qualified by reference to a bylaw which prohibited littering.<sup>233</sup> We find that the Crown's failure to include prohibitions against the discharge of pollution and the introduction of trout – which were recorded by the Crown in 1905 – was in breach of the principles of partnership and active protection. Similarly, the Crown failed to negotiate or include a mechanism by which the owners could agree on the control of lake levels. This was a breach of Treaty principles. These breaches were to have serious consequences, as we discuss in section 8.3.7 and also in later chapters.

By the end of 1905, the Muaūpoko owners of Lake Horowhenua faced an uncertain future. At the stroke of the legislative pen, they had lost the control and free use of their lake. Much would now depend on:

- ▶ the owners' level of representation on the domain board, which the Crown would decide (at least one-third of the members had to be Māori); and
- ▶ the question of whether Muaūpoko fishing and other lake uses interfered in practice with public uses of the lake, which took priority.

230. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 890–892

231. See Waitangi Tribunal, *He Maunga Rongo*, vol 3, chapter 13.

232. Crown counsel, closing submissions (paper 3.3.24), p 23

233. Crown counsel, closing submissions (paper 3.3.24), p 53



Thirty years later, a public committee of inquiry was appointed to look into Muaūpoko's claim that their rights had been 'whittled away' in the interim. We turn to that issue next.

### 8.3 WERE MUAŪPOKO RIGHTS 'WHITTLED AWAY' BETWEEN 1905 AND 1934?

#### 8.3.1 Morison's account of the 'whittling away' of Muaūpoko's rights

The 1905 Act was brief and its provisions were contradictory. It combined Māori ownership with a public recreation reserve. The Māori owners were to have 'at all times . . . the free and unrestricted use of the lake and of their fishing rights over the lake', but this was not to interfere with the 'full and free use of the lake for aquatic sports and pleasures'.<sup>234</sup> At the same time, the domain board was to have all the functions and powers of a domain board, which – as set out above – were extensive and potentially controlled virtually every activity on the lake and the chain strip. Māori membership of the board was presumably the way to resolve the conflicts and uncertainties that would arise from these overlapping rights and regimes. Crown counsel called the composition of the board 'a form of joint management'.<sup>235</sup>

As we shall see, the board was very confused about what it was and was not allowed to do vis-à-vis what the Māori owners were allowed to do, and the result was repeated requests to the Government for advice or answers. Several law changes followed, as did a succession of legal opinions from the Crown Law Office. Apart from the first one, each opinion read Māori rights down to the point where the final opinion in 1932 stated that the 1905 Act had taken ownership of the lakebed and chain strip, vesting them in the Crown.

In 1934, a public inquiry was held to determine the scope of Muaūpoko's rights, so that Levin authorities could start developing the lake reserve as a 'pleasure resort'. Muaūpoko were represented by DGB Morison. He told the committee of inquiry that Muaūpoko had been prejudiced and their rights had 'gradually been whittled away',<sup>236</sup> in particular by:

- ▶ construction of water races which discharged into the lake, without consent or compensation;
- ▶ violation of the 1905 agreement because 'the Europeans wanted to hold aquatic sports; now they want it [the lake reserve] for roading, scenery and other purposes';<sup>237</sup>
- ▶ inclusion of the Hōkio Stream and the chain strip in the domain by legislation, without consultation or consent, in violation of what was agreed with Seddon and Carroll in 1905;<sup>238</sup>

234. Horowhenua Lake Act 1905, s 2(a)

235. Crown counsel, closing submissions (paper 3.3.24), p 49

236. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1534)

237. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1531)

238. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), pp 1531–1532)

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- ▶ inclusion of 13 acres in the domain by legislation, when the 1905 Act had only authorised the Crown to acquire up to 10 acres; and
- ▶ modification of the Hōkio Stream for drainage, damage to eel weirs and the eel fishery, and significant lowering of the lake, all against the wishes of Muaūpoko, validated retrospectively by legislation – this was especially harmful because it left Muaūpoko with a reduced food supply during the Depression.<sup>239</sup>

In this section of our chapter, we address the question: were Muaūpoko rights ‘whittled away’ between 1905 and 1934, as Morison claimed? The parameters and findings of the 1934 inquiry itself will be addressed in the next chapter.

We begin by setting out the parties’ arguments.

**8.3.2 The parties’ arguments****(1) The claimants’ case**

In the claimants’ view, Morison’s arguments were substantiated by the evidence in our inquiry, but there were additional matters which had not arisen in the 1934 inquiry. First, the claimants submitted that the Pākehā-style domain board was an inappropriate structure for managing the lake, and Muaūpoko representation was set too low for them to wield appropriate influence on the board’s decisions.<sup>240</sup> This situation was made worse by the Crown’s control of appointments, and its failure to specify a process by which the owners or the tribe would nominate the board members. In 1916, the Crown legislated so that Muaūpoko could not have more than one-third membership of the board.<sup>241</sup> Secondly, the claimants argued that exclusive Māori fishing rights under the 1905 Act were compromised by the introduction of trout into the lake, and by the application of the ordinary fishing regime to the lake (in which settlers could fish after buying a licence).<sup>242</sup>

Otherwise, the claimants focused on matters which were the subject of the 1934 inquiry. They argued that the Crown’s interventions between 1905 and 1934 ‘adversely affected the iwi’<sup>243</sup>:

- ▶ The Minister of Internal Affairs, HD Bell, visited Levin in 1915, met with settlers, and agreed to promote legislation which favoured settlers’ interests. In the claimants’ view, the Minister paid little or no heed to Māori interests.<sup>244</sup>
- ▶ Bell’s 1916 legislation included the chain strip in the lake domain. This, submitted claimant counsel, was ‘simple confiscation’ but was ‘subsequently remedied to an extent following the 1934 inquiry’.<sup>245</sup> The 1916 legislation also gave the

239. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), pp 1532–1534)

240. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 9–10; claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p 30

241. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 275–276

242. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 10–13

243. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 45

244. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 275–276

245. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 45; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 276

domain board drainage powers in respect of the lake and the Hōkio Stream, despite strong Muaūpoko opposition.<sup>246</sup>

- ▶ Muaūpoko were also strongly opposed to the establishment of a drainage board in 1925. In the claimants' view, the board's works went far beyond the activities specified by the 1925 commission. Further, their view is that the Crown promoted drainage in the interests of settler farmers and legislated to force it upon Muaūpoko, violating a 1926 agreement in doing so. The impact was serious damage to Muaūpoko's fishing rights, their eel fishery, the lake-shore shellfish beds, the lake's margins, and the flax growing near the lake. Also, settlers were able to graze their stock on the chain strip and the newly dewatered area, and neither the board nor the Crown rectified that matter or protected Muaūpoko rights to their lands. The claimants argued that the damage to Muaūpoko taonga was seriously prejudicial to the tribe.<sup>247</sup>

### (2) *The Crown's case*

Crown counsel made few submissions about this period. In brief, the Crown's view of the domain board structure was that it provided Muaūpoko with a 'form of joint management' of the lake.<sup>248</sup> Otherwise, the Crown argued that, 'to the extent any prejudice might be said to flow from earlier legislation as to control and/or rights, that prejudice was remedied by the enactment of the 1956 Act'.<sup>249</sup> In other words, the Crown's view was that anything which went wrong between 1905 and 1956 was remedied by it in 1956.

The Crown did make more extensive submissions on one issue: drainage and control of the Hōkio Stream for that purpose. Crown counsel suggested that the Tribunal must ask whether:

- ▶ Māori had a variety of views and interests in respect of drainage (including as landowners who stood to benefit from it), and agreed on opposing a scheme;
- ▶ the opposition had merit;
- ▶ the Crown was aware of the opposition and took appropriate action in respect of valid concerns; and
- ▶ there were public interests which needed to be balanced against the Māori interest.<sup>250</sup>

In respect of the drainage activities of the 1920s, the Crown accepted that '[s]ome Muaūpoko members were involved in protests' about the drainage proposals, 'including the potential impact of altering the [Hokio] Stream on fishing rights'. Nonetheless, we were told, some Māori landowners 'appeared to support the drainage work that was proposed'.<sup>251</sup> In the case of the Hōkio Stream, the Crown had to balance economic development and private land interests against Māori fishing

246. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 13–14

247. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 14–15; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 276–277, 282

248. Crown counsel, closing submissions (paper 3.3.24), p 49

249. Crown counsel, closing submissions (paper 3.3.24), p 57

250. Crown counsel, closing submissions (paper 3.3.24), p 94

251. Crown counsel, closing submissions (paper 3.3.24), p 83

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rights. In the Crown's view, a 1925 public inquiry resulted in resolutions which tried to strike that balance.<sup>252</sup> This was part of 'good faith efforts by all parties to address concerns about the stream.'<sup>253</sup>

Crown counsel suggested that the extent to which the Crown was

responsible for subsequent actions by the [Hokio] Drainage Board is an issue for the Tribunal to consider further: including in relation to the agreement reached between representatives of 'the native interests' (including both Ngāti Raukawa and Muaūpoko) and the Hokio Drainage Board on 5 March 1926. That agreement included a clause that there was to be no further deepening of the Stream beyond the level of the present scheme without either: 'the consent of the Natives interested'; or if Māori consent was refused, the Minister of Internal Affairs authorising the work 'after he has investigated the point at issue and determined that further deepening should take place.'<sup>254</sup>

Crown counsel acknowledged that this 1926 agreement was not 'directly incorporate[d]' into section 53 of the Local Legislation Act 1926, which authorised the Hokio Drainage Board to undertake works in relation to the Hōkio Stream. Nonetheless, the legislation did 'record the need to protect Māori fishing rights and use of the Lake.'<sup>255</sup> The Crown accepted that Muaūpoko concerns about these drainage works persisted and contributed to the need for both the 1934 inquiry and the Reserves and Other Lands Disposal Act 1956.<sup>256</sup>

We turn next to discuss the various issues in light of the parties' arguments.

**8.3.3 Acquisition of 'up to ten acres'**

One point listed by Morison in 1934 was the Crown's acquisition of 13 rather than 10 acres for a boatshed and other domain buildings.<sup>257</sup> Levin settlers and the domain board wanted the Crown to obtain a much larger area, about 32 acres, possibly using the Scenery Preservation Act. Field pushed the Government to amend the 1905 Act so that a larger area could be acquired, but the Native Department under Carroll was not prepared to agree to it. One block sought by the board was the land leased by Te Rangimairehau for the boatshed, but the elderly rangatira was unwilling to sell and demanded £55 an acre. Faced with that, the Lands Department decided that the Public Works Act should be used to take his 13-acre block,<sup>258</sup> but Public Works officials were doubtful that their Act applied. The Solicitor-General confirmed that the construction of a boatshed was not a public work. Eventually, Te Rangimairehau agreed to sell for £21 5s an acre in August 1907. Three roods were also purchased from another Māori land block so that the domain board reserve would have access to Queen Street. Thus, the Crown purchased about three more

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252. Crown counsel, closing submissions (paper 3.3.24), pp 83–84

253. Crown counsel, closing submissions (paper 3.3.24), p 84

254. Crown counsel, closing submissions (paper 3.3.24), p 84

255. Crown counsel, closing submissions (paper 3.3.24), p 84

256. Crown counsel, closing submissions (paper 3.3.24), p 85

257. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 45

258. Horowhenua 11B38

acres than the Act allowed, but much less land than settlers and the board had requested.<sup>259</sup>

The claimants have not pursued any allegations about this purchase in their closing submissions, so we leave the matter without comment.

#### 8.3.4 Exclusive Māori fishing rights

In 1907, the Wellington Acclimatisation Society introduced trout to Lake Horowhenua,<sup>260</sup> and continued to make further releases in subsequent years. In respect of the Muaūpoko owners' fishing rights, as guaranteed by the 1905 Act, four issues arose:

- ▶ the question of who had authority to decide whether trout should be introduced and the lake kept stocked;
- ▶ the impact of trout on native species (and therefore on Muaūpoko fishing rights);
- ▶ whether Muaūpoko's fishing rights included a right to fish for introduced species without buying a licence; and
- ▶ whether Muaūpoko's fishing rights were exclusive or Pākehā could fish in the lake.

The Crown made an appropriate concession about the fourth point, acknowledging that 'the extension of public rights to include a right to fish was contrary to the intent of the 1905 Agreement and prejudicial to the owners of the Lake bed', who 'maintained they had the exclusive right to fish the Lake'.<sup>261</sup>

Having introduced the trout, the acclimatisation society applied to the domain board for permission to fish for it. The board was unsure of the legal position, and whether Muaūpoko would have to pay for licences (because introduced species were possibly not covered by the 1905 Act's guarantee of their fishing rights). The board consulted its Muaūpoko members.<sup>262</sup> Their response was that trout preyed on native species, and the tribe was dependent on the lake for their food supplies. They also pointed out that the 1905 agreement was to allow 'rowing, boating and sports generally – certainly not for fishing'. In Muaūpoko's view, settlers had no right to fish in the lake or to introduce trout.<sup>263</sup> In light of the strong response from Muaūpoko, the board declined the acclimatisation society's request. Field appealed to the Government, which resulted in a legal opinion from the Crown Law Office in January 1908.<sup>264</sup> Assistant Law Officer Leonard Reid advised that Pākehā could not fish in Lake Horowhenua without the consent of 'the Native owners', because the

259. Hamer, "A Tangled Skein" (doc A150), pp 44–52

260. Hamer, "A Tangled Skein" (doc A150), p 55; Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), pp 21–22

261. Crown counsel, closing submissions (paper 3.3.24), p 44

262. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 22

263. 'Notes on the Question of Allowing Europeans to Fish in the Horowhenua Lake', 16 September [1907] (DA Armstrong, comp, papers in support of 'Lake Horowhenua and the Hokio Stream', various dates (doc A162(d)), pp 1953–1954)

264. Hamer, "A Tangled Skein" (doc A150), pp 56–57



1905 Act ‘reserves to such owners “the free and unrestricted use of the Lake, and of their fishing rights over the lake”’.<sup>265</sup>

The domain board accepted this advice, resolving that anglers could pay fees to Muaūpoko for a right to fish if they wished. Muaūpoko declined to allow Pākehā fishing – citing, as one newspaper put it, ‘Te Treaty Waitangi’ – and so there was some agitation on the part of anglers to get the Government to intervene on their behalf. Field pressed Carroll to introduce a law change. Nothing was done, however, until the Reform Government took an interest in the matter in 1914, in response to representations from Levin settlers. The Minister of Lands, HD Bell, asked the Crown Law Office for an opinion as to (i) whether Pākehā fishing for trout would really interfere with Muaūpoko’s statutory fishing rights, and (ii) whether those fishing rights extended to introduced species.<sup>266</sup>

The legal opinion was delivered only a day after the request was made, and it was a remarkable (and remarkably incorrect) opinion from Assistant Law Officer HH Ostler. He maintained that the 1905 Act did not confer any rights ‘on Natives; its purpose is to take away all rights previously held by the Native owners, except those expressly reserved’. Ostler then guessed incorrectly that the lake ‘probably belonged to the owners of the adjoining land *ad medium filum*’, some of whom were Pākehā, and that ‘no Native owner of adjoining land could point to any defined portion of the Lake as owned or lawfully occupied by him’.<sup>267</sup> Ostler was clearly unaware that named Muaūpoko individuals had a land transfer title to the lakebed. Having reached this erroneous view, Ostler went on to say that the only right preserved to the owners by the Act was the free and unrestricted use of the lake and of fishing on it. Māori had no lawful right to fish for trout without a licence except on the basis that all landowners could do so from their own land (as provided for in the Fisheries Act 1908). Being unaware that the lakebed was Māori land, and arguing that ‘no Native is in lawful occupation of any part of the bed of the Lake now’, Ostler concluded: ‘no Native can fish for trout in the lake without a licence’. In addition, Ostler argued that Lake Horowhenua was now a public recreation ground, not ‘private waters’, and therefore the Fisheries Act applied to it.<sup>268</sup>

Further, Ostler suggested that the 1905 Act preserved a right for the ‘Native owners’ to fish for eels, flounders, and the like, but not introduced salmon or trout. ‘The fishing for trout there by Europeans will not interfere with that right’, he said, and was not ‘prohibited even impliedly by the Horowhenua Lake Act’.<sup>269</sup>

David Armstrong commented that a ‘good deal of misunderstanding and confusion remained’ in the wake of Ostler’s opinion, and there were fears of a violent

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265. Minister of Marine to Field, 24 January 1908 (Hamer, “A Tangled Skein” (doc A150), p 57)

266. Hamer, “A Tangled Skein” (doc A150), pp 57–58

267. HH Ostler, assistant law officer, to Minister of Internal Affairs, 15 January 1914 (Hamer, “A Tangled Skein” (doc A150), pp 58–59)

268. HH Ostler, assistant law officer, to Minister of Internal Affairs, 15 January 1914 (Hamer, “A Tangled Skein” (doc A150), p 59)

269. HH Ostler, assistant law officer, to Minister of Internal Affairs, 15 January 1914 (Hamer, “A Tangled Skein” (doc A150), p 59)



confrontation between Muaūpoko and anglers.<sup>270</sup> In June 1914, Solicitor-General Salmond confirmed Ostler's opinion, and specifically rejected Reid's 1908 opinion. Salmond added another reason for the contrary opinion: section 2 of the 1905 Act provided for the lake to be 'available to the public fully and freely for aquatic sports and pleasures. Fishing must be taken to be one of the aquatic sports and pleasures so indicated.' The 'saving clause' for Māori owners did not 'confer upon the Natives the exclusive right of fishing for trout' or preventing the public from 'enjoying this particular "aquatic sport and pleasure"'.<sup>271</sup> Mr Armstrong suggested that 'This outcome was wholly inconsistent with the Muaupoko understanding of the 1905 agreement.'<sup>272</sup>

The Minister of Internal Affairs advised the domain board that Salmond's opinion 'must be taken as a guide by the local authorities and by the public.'<sup>273</sup> If Muaūpoko wanted to challenge it, they would have to do so in court.<sup>274</sup> That, of course, was beyond the resources of the tribe at that time, but they did continue to order anglers off their lake. They also continued to fish for trout without a licence.<sup>275</sup> The Minister visited Levin in April 1915 and promised a deputation of settlers that the 1905 Act would be amended to put the Pākehā right of fishing beyond any doubt.<sup>276</sup> This did not happen, however, and Muaūpoko continued to both fish for trout and tried to prevent Pākehā from angling. In 1917, the Wellington Acclimatisation Society asked the Government to intervene, and – again – the Crown reaffirmed Salmond's position but took no action. The domain board, however, actively continued to stock the lake in conjunction with the acclimatisation society. The board checked with the Marine Department whether perch would harm native fish or plants, and the department advised that it was safe to keep releasing trout and perch (which the board continued to do).<sup>277</sup>

In our inquiry, the claimants argued that the lake was stocked with imported fish without their agreement, that their fishing rights were harmed because the introduced fish predated on native species, and that their exclusive fishing rights were breached by allowing others to fish on the lake.<sup>278</sup> As noted above, the Crown has conceded the latter point. In our view, the legal opinions of Salmond and Ostler were based on the application of strict statutory interpretation rules and the Crown was wrong, in Treaty terms, to have relied on them as the guide for what public

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270. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 24

271. Solicitor-General to Minister of Internal Affairs, 4 June 1914 (Hamer, "A Tangled Skein" (doc A150), p 61)

272. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 24

273. Minister of Internal Affairs to George Burlinson, 8 June 1914 (Hamer, "A Tangled Skein" (doc A150), p 61)

274. Hamer, "A Tangled Skein" (doc A150), p 61; Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 24

275. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 25

276. Hamer, "A Tangled Skein" (doc A150), p 70

277. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 25

278. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 10–13

## 8.3.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

authorities must permit. Also, as early as 1907, an impact was already evident in the reduction of kōkopu ('native trout') in the lake.<sup>279</sup>

The result was a significant whittling down of Muaūpoko fishing rights, including their rights to conserve and protect their fisheries, their rights to control fishing and exclude others as necessary, and their development right to fish for new species in their lake as opportunity allowed.

**8.3.5 Clarifying acquisition of the chain strip**

In 1907, Mayor Gardener, in his capacity as domain board chair, asked the Crown to clarify the status of the chain strip.<sup>280</sup> Muaūpoko were cutting and selling flax growing on the strip (making a significant income from flax around the lake), and the board wanted to know if it had the power to stop it.<sup>281</sup> The chief surveyor advised that the chain strip was included in the area of the public recreation reserve created by the 1905 Act, even though the Act did not mention the chain strip. 'The Act is defective,' he said, 'in not specifying it.'<sup>282</sup> Paul Hamer, however, commented that the Act was 'defective in implicitly including the 50-acre chain strip.'<sup>283</sup> We agree, as we noted above in section 8.2.4(3). The Lands Department advised the board that it was 'pretty certain' that Muaūpoko had no power to sell or cut the flax on the chain strip.<sup>284</sup> Muaūpoko continued to do so, however, and the board – presumably not satisfied by the words 'pretty certain' – approached the department again in 1911. Among a number of other questions, the board asked for a ruling as to '[w]hether the chain reserve showed on the map has been dedicated to the Government.'<sup>285</sup>

In response, the Solicitor-General relied on the language of the Act, not the area of land which the Act had included in the reserve. His opinion was that the chain strip was not referred to specifically in the Act, and so was not subject to the Act or under the control of the domain board.<sup>286</sup> The Pākehā board members were concerned because this meant that anyone wishing to access the lake from their new 13-acre reserve would have to cross private land, not domain land. In April 1915, this was one of three principal issues that they presented to the Minister of Internal Affairs when he visited Levin. Mayor Gardener again asked the Minister to 'look into the matter as to who had control' of the strip, and also asked for it to be surveyed.<sup>287</sup> As noted above, Hanita Henare was present at this meeting and confirmed Burlinson's account of the 1905 agreement: Pākehā use was to be for boating, and

279. 'Notes on the Question of Allowing Europeans to Fish in the Horowhenua Lake', 16 September [1907] (Armstrong, papers in support of 'Lake Horowhenua and the Hokio Stream' (doc A162(d)), p 1953)

280. Hamer, "A Tangled Skein" (doc A150), p 66

281. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 26

282. Chief surveyor to under-secretary for lands, 15 October 1907 (Hamer, "A Tangled Skein" (doc A150), p 66)

283. Hamer, "A Tangled Skein" (doc A150), p 66

284. Under-secretary for lands to Gardener, 18 October 1907 (Hamer, "A Tangled Skein" (doc A150), p 66)

285. Burlinson to under-secretary for lands, 28 June 1911 (Hamer, "A Tangled Skein" (doc A150), p 64)

286. Hamer, "A Tangled Skein" (doc A150), p 67

287. 'Notes of a deputation which waited upon the Hon HD Bell', 9 April 1915 (Hamer, "A Tangled Skein" (doc A150), pp 67–69)

was limited to the surface of the lake. Henare also said that he left it to the Minister to settle matters – a trust that was misplaced, commented Paul Hamer.<sup>288</sup>

The Minister, HD Bell, promised a legislative solution to the concerns of the board and Levin settlers. He took absolutely no account of the 1905 agreement, and very little account of Māori interests, which he considered to be a non-exclusive right of fishing.<sup>289</sup>

As a result of the meeting, Mayor Gardener was asked to suggest the contents of a Bill. He recommended that any law change should include, if possible, board control of the chain strip. At the same time, the chief surveyor prepared a map to go with the legislation, including the 50-acre strip as part of the 951 acres of the reserve. The eventual result was a clause in the Reserves and Other Lands Disposal and Public Bodies Empowering Bill 1916, which (among other important matters) specified the chain strip was part of the reserve. Muaūpoko appealed to their member, Māui Pōmare, for assistance, and also petitioned Parliament that this clause not be passed. The Bill was passed despite Muaūpoko's opposition. Section 97, subsection 10, of the 1916 Act defined the boundaries of the reserve as including the strip. Prime Minister Massey noted that the Māori members had not objected to the proposed legislation, ignoring Muaūpoko's petition. In 1917, the tribe sent another petition, asking that section 97 be repealed – again, without any success.<sup>290</sup>

Muaūpoko continued to assert their authority over the chain strip. In 1929, Te Tuku Matakatea and other tribal members wrote to the Native Minister, Āpirana Ngata. Neighbouring farmers were burning off the flax and using the strip for grazing their stock. Muaūpoko had surveyed part of the boundary and wanted to fence it off, or make the landowners do so. Ngata's advice was that the strip was under the control of the board, and that they had no authority to build a fence or require farmers to build one.<sup>291</sup> Their recourse, he said, was for 'the Native members of the Board' to 'bring the matter before the Board'.<sup>292</sup> Paul Hamer pointed out that Ngata used the word 'mana' to explain the board's authority: the mana that Muaūpoko had been guaranteed in 1905.<sup>293</sup>

The tribe did seek the intervention of the domain board. They asked permission to fence the strip and plant flax, sow grass, and cultivate. This approach from Muaūpoko forced the board to face up to the fact that farmers were grazing stock on the borders of the lake, free of charge, and damaging the lakeside vegetation. It asked the Lands Department to clarify its authority: could it compel neighbouring owners to fence their land; could it allow them to graze the strip; and could it allow anyone (that is, Muaūpoko) to fence off the strip and use the chain (either for free or by lease)? The department responded that the purpose of the strip was to allow

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288. Hamer, "A Tangled Skein" (doc A150), p 70

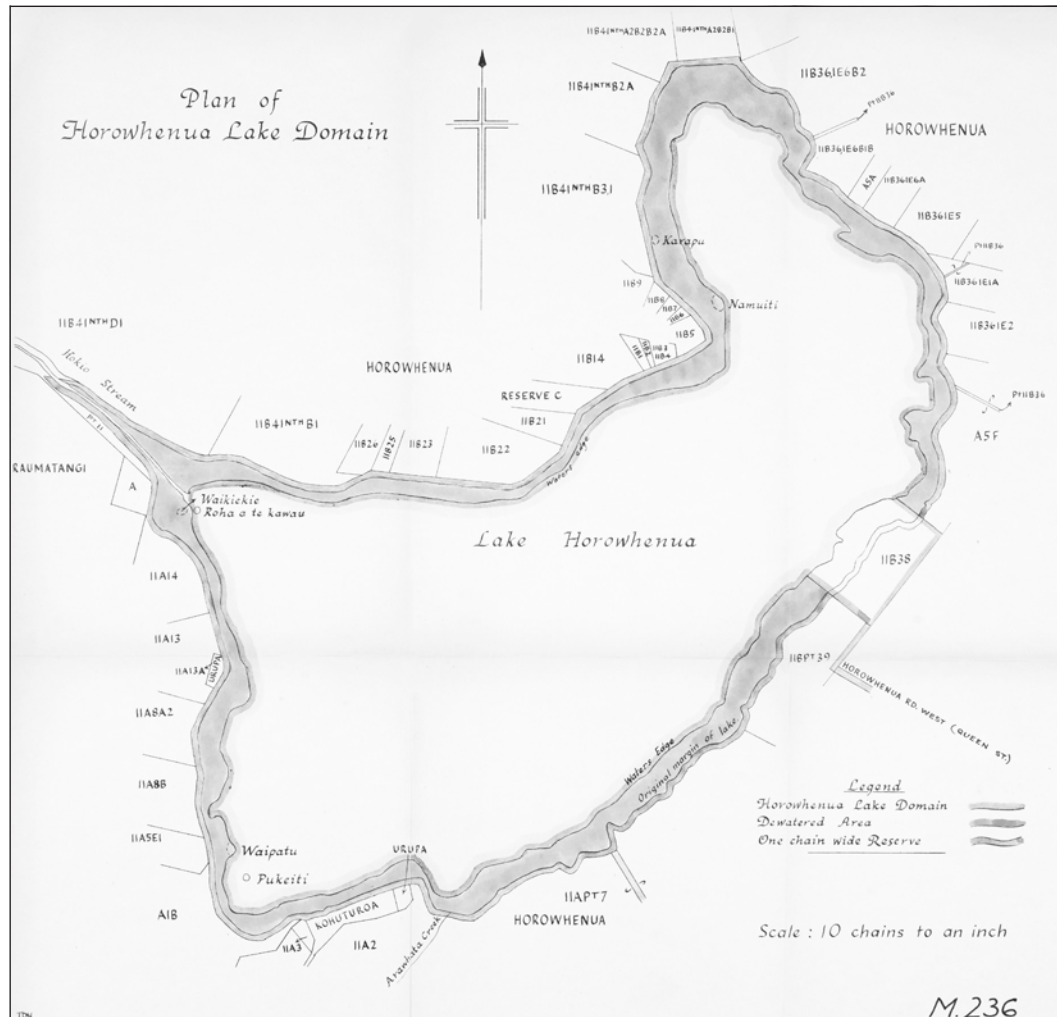
289. Hamer, "A Tangled Skein" (doc A150), pp 70–72

290. Hamer, "A Tangled Skein" (doc A150), pp 72–75

291. Hamer, "A Tangled Skein" (doc A150), pp 95–97

292. Ngata to Tuku Matakatea, 23 December 1929 (Hamer, "A Tangled Skein" (doc A150), pp 96–97)

293. Hamer, "A Tangled Skein" (doc A150), p 97



Lake Horowhenua, the chain strip, and the dewatered area

Department of Lands and Survey – Horowhenua Lake Domain Board (1960–63), R24338449

access to the lake at all times. The board had no authority to fence off the strip or allow it to be used by anyone, including Muaūpoko.<sup>294</sup>

Parawhenua Matakātea then appealed to the chief judge of the Native Land Court in 1930 and 1931. Chief Judge Jones, who was also under-secretary of the Native Department, replied that Muaūpoko should approach the board. Again, it was emphasised that they were represented on it. Ngata made the same response to the leader of the opposition, who inquired on behalf of Muaūpoko.<sup>295</sup> The tribe did indeed continue to press the board, which asked the Lands Department for help in 1931, as it was not sure where the exact boundary was and had no money to fence it in any case. The department sent the chief surveyor to investigate the situation. It seemed that at least some neighbouring farmers were prepared to fence their land if

294. Hamer, “A Tangled Skein” (doc A150), p 97

295. Hamer, “A Tangled Skein” (doc A150), pp 97–98

Muaūpoko or the board paid half the cost. But the surveyor recommended against it. He advised that it would be ‘tortuous’ to try to identify and fence such an irregular, curving boundary, and suspected that Muaūpoko’s wish to control and use this land would just be the start of their claims for compensation. The department accordingly told Muaūpoko that it would be too expensive to fence off the chain strip.<sup>296</sup>

In May 1931, Muaūpoko petitioned the Crown, objecting to the possibility of the domain board building a road on the chain strip. The board did want a road but had no immediate plans to construct one. It once again asked the Crown what it was allowed to do: could it impound stock found on the strip, were Māori allowed to cut flax, and did owners of land around the lake have riparian rights?<sup>297</sup> The department’s response was:

- ▶ it was unwise to impound cattle if the board could not fence the strip;
- ▶ it was ‘very doubtful’ whether Māori had the right to cut or remove flax, although Muaūpoko had been doing so ‘for very many years along the Lake’ and no doubt saw it as ‘one of their rights’;<sup>298</sup> and
- ▶ the existence of the intervening chain strip meant that landowners had no riparian rights.<sup>299</sup>

The board remained concerned, however, because Muaūpoko believed that they owned the lake and the chain strip, and that ‘all the board can do is to preserve their fishing and other rights and control the privileges conferred on Europeans under the Horowhenua Lake Act, 1905.’<sup>300</sup> The board therefore sent a new set of questions to the department, including whether the Horowhenua lake reserve was in fact still owned by ‘certain Natives’ or was the property of the Crown. If it still belonged to Muaūpoko, was the board’s role restricted to the ‘oversight of the privileges’ conferred on the public by the Act?<sup>301</sup>

In response, the Lands Department finally – and for the first time – asked the Native Department if there was ‘some record of the original agreement.’<sup>302</sup> Native Department officials could find nothing at all about the agreement, and it appears that no one thought to consult Muaūpoko or even to read the parliamentary debates (which had the Attorney-General’s summary of the agreement). Equipped with no information whatsoever about the 1905 agreement, the Lands Department asked the Solicitor-General for a legal opinion.

The result was another in a series of opinions which read down Muaūpoko’s rights. This time, the opinion came from Crown solicitor James Prendeville on 31 May 1932. Prendeville held that the legislation did not state in ‘express words that the ownership of the land has been resumed by the Crown,’ but that was nonetheless the effect of it. Apart from the fishing rights reserved in section 2(a) of the 1905 Act, ‘all other

296. Hamer, “A Tangled Skein” (doc A150), pp 98–99

297. Hamer, “A Tangled Skein” (doc A150), p 102

298. Under-secretary for lands to Hudson, 19 June 1931 (Hamer, “A Tangled Skein” (doc A150), p 102)

299. Hamer, “A Tangled Skein” (doc A150), p 102

300. Hudson to under-secretary for lands, 26 June 1931 (Hamer, “A Tangled Skein” (doc A150), p 103)

301. Hudson to under-secretary for lands, 26 June 1931 (Hamer, “A Tangled Skein” (doc A150), p 103)

302. Hamer, “A Tangled Skein” (doc A150), p 103)



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rights of ownership have by the Act been resumed by the Crown.<sup>303</sup> Prendeville's opinion relied on the Public Domains Act 1881 and its successors. Those Acts held that a reserve which was not expressly vested in a local authority or trustees was vested in the Crown. Prendeville also relied in part on the 1914 opinions of Ostler and Salmond. As for the chain strip, he said, that had been reserved in 1916, and adjacent owners had no right to use it (or land uncovered by lowering the lake) for grazing.<sup>304</sup> Prendeville's answer to the domain board's questions was:

- ▶ the Crown owned the land inside the reserve, subject to the reservation of the *previous* Maori owners' 'fishing rights and the use of the lake';
- ▶ the board had all the powers of a domain board under the Public Reserves, Domains, and National Parks Act 1928 (subject to the reservation of the *previous* owners' fishing and use rights); and
- ▶ the board could take down any fences and compel adjoining landowners to erect fences on the boundary, but would have to pay half the cost.<sup>305</sup>

Muaūpoko had wanted confirmation of their right to use the chain strip for its flax and other resources, and to stop incompatible uses which might destroy the vegetation, such as grazing or construction of a road. The answer was that they had no rights other than what the board would allow, that their only power came from representation on that board, and that they did not even own their lake or the chain strip any more. This was a very serious grievance for Muaūpoko. In respect of the chain strip, their rights had certainly been 'whittled away' by the time of the Harvey–Mackintosh inquiry of 1934 (discussed in chapter 9).

One member of the committee of inquiry, HWC Mackintosh, noted in December 1934 that the committee had gone 'most exhaustively' into the question of the chain strip:

The Maoris contend that it was never intended that the chain strip should be included in the Domain, that it was taken from them without their sanction, and that they want it back again.

This contention of the Maoris is supported by myself and Judge Harvey.<sup>306</sup>

### 8.3.6 Was the board structure an effective structure for the exercise of Muaūpoko authority in respect of the lake?

As discussed in the previous section, the Government's response to Muaūpoko petitions and complaints was to refer them back to the domain board, pointing out that they were represented on it. The claimants in our inquiry, however, denied

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303. Prendeville to under-secretary for lands, 31 May 1932 (Paul Hamer, comp, papers in support of "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(b)), p 281)

304. Prendeville to under-secretary for lands, 31 May 1932 (Hamer, papers in support of "A Tangled Skein" (doc A150(b)), pp 281–282)

305. Prendeville to under-secretary for lands, 31 May 1932 (Hamer, papers in support of "A Tangled Skein" (doc A150(b)), pp 281–283)

306. Mackintosh to under-secretary for lands, 6 December 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(b)), p 306)



that representation on this board was an effective means of exercising their *kaitiakitanga* and *tino rangatiratanga*. *Muaūpoko* at the time denied it too.

The Crown's list of terms for the 1905 agreement had referred to 'some' Māori representation on a board to govern public use of the lake for aquatic sports. Without further consultation or seeking agreement, the Crown had decided that the board would have a much wider remit (all the functions and powers of a domain board), and would govern all uses of the lake reserve – with the exception of *Muaūpoko* fishing. This made the degree of *Muaūpoko* representation on the board a crucial issue. Again, instead of consulting further or seeking agreement, the Crown made a decision which was given effect in the 1905 Act. Māori members would make up 'one-third at least' of the board. This was a minimum figure. Potentially, a majority of members could be Māori. That decision, too, was made by the Crown, which chose to appoint four *Muaūpoko* members in a 10-person board. The Crown's selection method was to call for nominations by the Native Minister (for Māori members) and the local member of Parliament (for Pākehā members). Although *Muaūpoko* were not consulted about the mode of selection, Carroll did consult them before recommending Wiki Keepa, Wirihana Hunia, Eparaima Te Paki, and Waata Muruahi. We have no way of knowing what process Carroll used to sound out *Muaūpoko* before selecting those persons.<sup>307</sup>

The structural deficiencies in *Muaūpoko* representation were thus brought about by Crown actions: the decision to limit Māori board members to a minority, and the decision to have parliamentarians nominate members without any guaranteed or set process for *Muaūpoko* involvement.

This situation was exacerbated by the frequent inability of the *Muaūpoko* members to attend meetings, and the board's difficulties in employing an interpreter.<sup>308</sup> Those were not Crown actions, of course, but they affected the degree to which *Muaūpoko* actually participated within the parameters set by the Crown.

The structural deficiencies were made significantly worse in the 1910s.

First, the Levin Borough Council lobbied the Government to take over the domain or at least the Pākehā membership of the board. The Pākehā members of the board were sympathetic to this because, as they found, the board had little influence with other local authorities and virtually no money of its own. The Minister of Internal Affairs, HD Bell, agreed in 1915 to only appoint borough councillors to the board, but this change was not institutionalised at that point. As noted above in respect of both fishing rights and the chain reserve, Bell made a crucial visit to Levin in April 1915. As a result of his meeting with Levin settlers and domain board representatives, Bell agreed to introduce legislation to change the composition of the board and have it financed by the borough council. As we mentioned earlier, Mayor Gardener proposed terms for the legislation. These included the provision of borough council finance for the domain alongside a domain board membership of six borough councillors and four Māori members.<sup>309</sup>

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307. Hamer, "A Tangled Skein" (doc A150), pp 40–44

308. Hamer, "A Tangled Skein" (doc A150), pp 42–44

309. Hamer, "A Tangled Skein" (doc A150), pp 67–72

Secondly, in introducing the 1916 legislation, the Crown decided to reduce Muaūpoko membership to three members of a nine-person board, all the other members to be nominated by the council. Thus, the 1905 requirement of a one-third minimum became a maximum in 1916. As will be recalled, Muaūpoko petitioned against this legislation, both before and after its enactment.<sup>310</sup> Hanita Henare pointed out in 1917: ‘as there were only three Native members against six Europeans they were always out-voted.’<sup>311</sup>

Thirdly, the 1916 provisions did not specify how the Māori members of the board were to be chosen, so this opportunity to consult Muaupoko and put their representation on a sounder footing was ignored. At first, the local Pākehā member (Field) was to nominate the Māori members, but Bell decided that the local Māori member (Western Maori), Māui Pōmare, would nominate them instead. The Crown thus retained control of both setting the number of representatives and how they would be selected. In practice, Māui Pōmare seems to have consulted Muaūpoko about appointments, but not for reappointments.<sup>312</sup> In doing so, he did not act in his capacity as Cabinet minister, so this could not be considered direct Crown control of the selection process itself.<sup>313</sup>

While Muaūpoko influence on the board was diluted further by the 1916 legislation, Māori members also continued to be hampered by the lack of an interpreter.<sup>314</sup> They now faced a fairly united front in the representatives of the borough council. In 1924, following the mass poisoning of eels in the lake in 1923 (reportedly by a wool scouring works), Muaūpoko petitioned the Crown to get rid of the board and return control of the lake to its Māori owners.<sup>315</sup>

In our inquiry, the claimants argued that arrangements for the domain board

established pākehā supremacy over the management of the lake, meetings being conducted in English, under a pākehā committee construct. Provisions for appointment of Maori members were never clearly established (by either pākehā decree or Maori self-determination) and this problem continues to plague the Domain Board today.<sup>316</sup>

Further, because of ‘the way the Domain Board has been established (pākehā-style board with majority representing local government bodies), it has resulted in local government dominance and control of the lake.’<sup>317</sup> In particular, the claimants were critical of their limitation by statute to a minority representation.<sup>318</sup> Hence, ‘Muaupoko authority was recognised in the Domain Board [but] it was limited and

310. Hamer, “A Tangled Skein” (doc A150), pp 72–75

311. *Horowhenua Chronicle*, 9 October 1917 (Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 33)

312. Hamer, “A Tangled Skein” (doc A150), pp 72–75, 79–80

313. Paul Hamer, summary of points of difference with David Armstrong’s report (#A162), December 2015 (doc A150(n)), p 4

314. Hamer, “A Tangled Skein” (doc A150), p 77

315. Hamer, “A Tangled Skein” (doc A150), p 82

316. Claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p 30

317. Claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p 30

318. Claimant counsel (Stone, Bagic, and Hopkins), closing submissions (paper 3.3.9), p 9

Muaupoko were always the minority.<sup>319</sup> Crown actions in establishing that minority, appointing Muaupoko members itself, and failing to specify an appropriate selection process, meant that the Crown's structural arrangements for the board 'diminished Muaupoko mana and rangatiratanga'.<sup>320</sup>

In the Crown's submission, the domain board was not a Crown agent, and its structure was designed to provide Muaupoko with a 'form of joint management' of the lake reserve.<sup>321</sup> The Crown also acknowledged some uncertainties in what Muaupoko agreed to in 1905, in respect of the board's role and authority. Crown counsel admitted that the ROLD Act 1956 'gave stronger representation rights and more clearly defined legal rights and status to Muaupoko than was the case under the 1905 and 1916 statutes'.<sup>322</sup> Otherwise, the Crown made no submissions about the structure of the board between 1905 and 1956.

We agree with the claimants that the structural limitations on Muaupoko's representation, in which they were always a minority and were eventually restricted to a maximum of one-third of members, was fatal to their ability to use their board membership as a means of exercising authority over the lake. It was simply a numbers game, and they did not have the numbers to make their membership count. Joint management, the purpose of the board in the Crown's submission, was not possible in those circumstances. Further, although there was *Māori* membership of the board, the members were selected by Māori members of Parliament, not the Muaupoko tribe or the lake trustees. Although Ministers such as Carroll and Māui Pōmare did consult on appointments, it is not clear who they consulted or whether the appointees were selected in any meaningful way by Muaupoko leaders or a Muaupoko majority.

### 8.3.7 Lowering the lake and controlling its level

Settler and Māori interests came into direct and sustained conflict over drainage works.<sup>323</sup> Levin settlers wanted to lower the lake so as to drain adjacent lands, prevent flooding, and make more dry land available for farming. The lake was abutted by a 'considerable area of swampy and waterlogged ground' which could be rendered 'fit for cultivation'.<sup>324</sup> Some individual Māori landowners stood to benefit (if they had the capital to develop their lands). But the tribal interest was the fishery, especially the eel fishery, which was still the tribe's principal food source.<sup>325</sup> Any form of drainage work would necessarily involve interfering with the Hōkio Stream and its crucial eel weirs. Boating interests such as the rowing club also opposed drainage, pointing out that the lake had been reserved for aquatic sports, and that

319. Claimant counsel (Stone, Bagic, and Hopkins), closing submissions (paper 3.3.9), p 10

320. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 275

321. Crown counsel, closing submissions (paper 3.3.24), pp 49, 93

322. Crown counsel, closing submissions (paper 3.3.24), p 56

323. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), pp 28–43

324. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 28

325. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 28; committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), pp 1532–1534)

## 8.3.7 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

that should be the domain board's focus.<sup>326</sup> The Crown's submission to us was that its task was to strike a fair balance between these competing interests.<sup>327</sup>

In evaluating its actions, the Crown also suggested that we assess (i) the value of the affected resource to Māori, (ii) the degree to which Māori might benefit from a drainage scheme, and whether they agreed upon opposition to the drainage scheme, (iii) the merit of any opposition, (iv) whether the Crown was aware of that opposition, (v) how the Crown responded and whether it took steps to mitigate any harm; and (vi) what public interests in the drainage scheme had to be balanced against the Māori interest.<sup>328</sup> We have had regard to each of these points in the discussion that follows.

Throughout the period, Muaūpoko remained strongly opposed to drainage works on the Hōkio Stream, and to any lowering of the lake. As noted above, the primary tribal interest at stake was the eel fishery, but Muaūpoko also opposed lowering the lake because it would damage their flax and other resources in the chain strip, aquatic plants near the lake shore, and the kākahi (shellfish) beds.<sup>329</sup> If there were Muaūpoko landowners who favoured drainage to assist their farming efforts, it is not apparent in the record. An argument was advanced that some Ngāti Raukawa owners of Horowhenua 9 blocks (on the south side of the stream) had an interest in drainage, but that is not a matter which we consider at this stage of our inquiry.<sup>330</sup> Here, we note that the Muaūpoko tribe fought a successful battle against drainage for almost 20 years before the Crown broke through their resistance with a mix of persuasion and legislation in the mid-1920s.<sup>331</sup>

Drainage was 'first mooted' by the domain board in 1907.<sup>332</sup> The battle began in earnest in 1911, when a deputation from the Levin Chamber of Commerce asked the board to lower the lake. Pākehā board members were sympathetic, and long-term settler John McDonald pointed out that Muaūpoko used to regularly clear the lake outlet into the Hōkio Stream before the main eeling season. The Muaūpoko members, however, had consulted the tribe and brought back a resounding 'no' to lowering the lake.<sup>333</sup> The board asked the Minister if it had any power to lower the lake, whether it would be 'liable in any way' if it did so, and whether – if the board had the power and no liability – it would be 'advisable on the information that it has before it, to lower the lake'.<sup>334</sup> In this same letter, the board had asked whether the chain strip was included in the reserve (see above). The Solicitor-General's

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326. Hamer, "A Tangled Skein" (doc A150), pp 66, 68–69; Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 30

327. Crown counsel, closing submissions (paper 3.3.24), pp 93–94

328. Crown counsel, closing submissions (paper 3.3.24), pp 93–94

329. Hamer, "A Tangled Skein" (doc A150), p 94

330. See Crown counsel, closing submissions (paper 3.3.24), pp 83–85; Hamer, "A Tangled Skein" (doc A150), pp 89–90.

331. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), pp 28–43; Hamer, "A Tangled Skein" (doc A150), pp 62–66, 68–78, 83–94, 100–102

332. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 28

333. Hamer, "A Tangled Skein" (doc A150), pp 62–64

334. Burlinson to under-secretary for lands, 28 June 1911 (Hamer, "A Tangled Skein" (doc A150), p 64)

response was that the board had no power to lower the lake or enter onto adjoining lands to carry out work on the lake outlet.<sup>335</sup>

It seemed to the Pākehā board members that drainage might be possible anyway if the Māori owners would agree to it. The board arranged a meeting with Muaūpoko in 1912. The tribe once again refused to allow any interference with the lake outlet or the Hōkio Stream. The domain board chairman reported in 1913 that the interests of Levin required the Crown to buy the bed.<sup>336</sup>

Settler interests won a victory in 1915, however, when the Minister of Internal Affairs, HD Bell, visited Levin. As will be recalled, Bell had agreed at this 1915 meeting to the settlers' request for legislation to ensure Pākehā fishing rights, add Levin councillors to the domain board, and to obtain the chain strip for the reserve. He also heard from the farming and boating interests as to whether the lake should be lowered. The boating interest argued against and the farmers (of course) argued in favour. Mayor Gardener called for the domain board to have jurisdiction over the Hōkio Stream, and argued that its Māori owners should have no right to let the vegetation grow and 'swamp' their neighbours. As discussed earlier, Burlinson (supported by the one Muaūpoko person present, Hanita Henare) referred to the 1905 agreement as limited to the surface of the lake for boating.<sup>337</sup> Muaūpoko fishing rights were dismissed by Minister Bell, who simply stated that '[t]he Maoris had no interest in this subject' (lowering the lake). He was prepared to compensate the boating club for any losses if the lake receded, and promised legislation to empower the domain board to control the Hōkio Stream and drain the lake. His proviso was 'the preservation of a real Lake', which 'must not be diminished except by an insignificant area.'<sup>338</sup>

Having only consulted Levin settlers and not Muaūpoko, Bell duly introduced the promised legislation in 1916. As discussed earlier, Muaūpoko petitioned against Bell's provisions becoming law, and petitioned again in 1917 for them to be repealed. Section 97 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1916 declared the domain board to be a public authority under the Land Drainage Act 1908 with respect to its reserve, the Hōkio Stream, and a chain strip on both sides of the stream. Control of the Hōkio Stream had never been part of the 1905 agreement, nor did Muaūpoko agree to it in 1916. In fact, the tribe opposed it, but the legislation gave the domain board control of the stream for drainage purposes.<sup>339</sup>

It was not, however, smooth sailing for the domain board's exercise of its new drainage powers. As a compromise, Muaūpoko board members agreed in 1916 that iwi members would clear the eel weirs of any obstructions for a small payment, and remove some of the debris, which would allow the water to flow more freely out of the lake. This reduced the risk of flooding but did not make more dry land available

335. Hamer, "A Tangled Skein" (doc A150), p 65

336. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), pp 29–30

337. Hamer, "A Tangled Skein" (doc A150), pp 68–71

338. 'Notes of a Deputation which waited upon the Hon HD Bell, Minister of Internal Affairs, at Levin on the 9th April, 1915, with reference to the Horowhenua Lake' (Hamer, "A Tangled Skein" (doc A150), pp 70–71)

339. Hamer, "A Tangled Skein" (doc A150), pp 72–75



### **A CHRONOLOGY OF LEGISLATION RELATING TO DRAINAGE POWERS**

For the assistance of readers, we provide a brief chronological overview here:

#### **1908**

The Land Drainage Act 1908 was passed as a consolidating measure, pulling together previous Acts in a single piece of legislation. Part I of the Act provided for the Governor to constitute drainage districts (managed by an elected drainage board) on the petition of a majority of the ratepayers in a district. Part III of the Act provided for other local authorities to exercise the powers of a drainage board in areas where a formal drainage district had not been constituted. In part III, section 64 empowered the Governor to issue a proclamation, which would direct that any watercourse and drainage works (past or future) should be under the control and management of a local authority. Section 65 empowered the Governor to appoint a commission to determine (among other things) whether drainage works or a watercourse should be placed under the control of a local authority.

#### **1916**

Section 97 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1916 was enacted. Section 97(7) constituted the lake domain board as a local authority under part III of the Land Drainage Act 1908, with respect to the domain, the Hōkio Stream, and a chain strip on each side of the stream. The domain board was authorised to exercise all the drainage powers conferred on a local authority by part III of the 1908 Act.

#### **1924**

Dissatisfied at the perceived inaction of the domain board, ratepayers petitioned for the establishment of a Hokio Drainage District and board under Part I of the Land Drainage Act 1908.

#### **1925**

The Department of Internal Affairs appointed a commission to hear any objections to the establishment of a Hokio Drainage District. The commission held a hearing in March 1925 and reported in April 1925. In June 1925, a proclamation was gazetted establishing a Hokio Drainage District under the 1908 Act. A Hokio Drainage Board was duly elected. But a legislative change was necessary before the Hōkio Stream could be included in this district, so the drainage board, the lake domain board, and the county council all requested the appointment of a second commission under section 65 of the Land Drainage Act 1908. At this commission's hearing in November 1925, a controversial agreement was



purportedly reached between the drainage board, the domain board, and local Māori that the Hokio Drainage Board could conduct works on the Hōkio Stream with certain conditions.

**1926**

After Muaūpoko obstruction of these works and a second controversial agreement in March 1926, section 53 of the Local Legislation Act 1926 was passed in September 1926.

Section 53 stated that it was proposed to issue a proclamation under section 64 of the Land Drainage Act 1908, empowering the Hokio Drainage Board to carry out works on the Hōkio Stream. Because it was necessary that Māori fishing rights and ‘certain rights of user’ as a recreation reserve should be ‘reasonably safeguarded and preserved’, section 53 required that conditions should be placed in any such proclamation. Otherwise, the proclamation could empower the Hokio Drainage Board to regulate the widening or deepening of the Hōkio Stream, regulate the removal and replacement of eel weirs, and regulate or restrict the carrying out of works to lower Lake Horowhenua. Section 53 also amended section 97(7) of the ROLD Act 1916 by taking away the powers of the domain board to act as a local authority for drainage works (while retaining the area specified in the 1916 Act as ‘the district of the Board’ for part III of the 1908 Act). Thus, rather than including the Hōkio Stream in the Hokio Drainage District, the 1926 legislation treated the stream and Lake Horowhenua as remaining under part III, with a local authority (now the drainage board instead of the domain board) empowered to carry out works by a proclamation under section 64 of the 1908 Act.

In December 1926, a proclamation was issued, conferring power on the Hokio Drainage Board to carry out works on the stream and at the lake outlet.

for farming, so settlers continued to press the domain board for more action.<sup>340</sup> Any plans for more extensive work, including deepening the stream or altering its course, provoked threats of legal action from Muaūpoko (which, as Morison later told the 1934 inquiry, the tribe could not really afford to take).<sup>341</sup> Muaūpoko board members continued to argue against such works but they were outnumbered on the board, as Hanita Henare pointed out in 1917.<sup>342</sup> They explained that anything

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340. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), pp 31–33

341. Hamer, “A Tangled Skein” (doc A150), pp 76–77, 111

342. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 33; Hamer, “A Tangled Skein” (doc A150), pp 76–77

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which prevented the eels from migrating would damage the fishery and cause the tribe significant harm.<sup>343</sup>

Threats of legal action caused the board some concern, as it was not sure that it actually had the power to undertake proposed works on the Hōkio Stream. In 1919, the board approached Bell, now Attorney-General, about the matter.<sup>344</sup> Bell agreed with the Pākehā delegation that he did not see how 'Native fishing rights would suffer at all by lowering the level of the lake.'<sup>345</sup> By this time, the Government had still not consulted Muaūpoko on this or any other point – having also refused their petition to repeal the 1916 legislation.

A stalemate ensued for several years, with Muaūpoko undertaking work to clear the outlet each year. According to David Armstrong, this work was enough to prevent flooding but not to create additional dry farmland.<sup>346</sup> No other action was taken, despite mounting settler pressure, until 1924. A ratepayers' petition called for the establishment of a separate Hōkio drainage board under the 1908 Act, because the domain board had utterly failed to take any effective action.<sup>347</sup> The Horowhenua county clerk told the Internal Affairs Department that the county council had

for many years recommended the settlers interested to petition for a Drainage Board as the position is a somewhat difficult one for the Council to handle in view of the lake being a reserve under the control of the Horowhenua Lake Domain Board. It is felt that if a Drainage District were formed the [Drainage] Board could deal exclusively with the needs of the ratepayers interested and remove a certain amount of complication which at present exists.<sup>348</sup>

The Internal Affairs Department set up a commission to hear objectors. The commissioners were the Public Works Department's district engineer, the district valuer, and a private sector civil engineer. There were no Māori members. Muaūpoko were unaware of the commission's hearing, which was held in March 1925.<sup>349</sup>

A Ngāti Raukawa objector, Rere Nicholson, was heard by the commission and pointed out that eels were the main food source of the local Māori people, and that they 'feel very sore at the thought of their rights to the creek being taken away'. On the other hand, if there was no interference with eel weirs, Nicholson suggested that Māori opposition would be mollified.<sup>350</sup> Aware of the absence of Muaūpoko, the commissioners called Hema Henare to appear. Henare agreed with Nicholson's

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343. Hamer, "A Tangled Skein" (doc A150), p 77

344. Hamer, "A Tangled Skein" (doc A150), pp 76–78

345. *Evening Post*, 9 May 1919 (Hamer, "A Tangled Skein" (doc A150), p 78)

346. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), pp 31, 35

347. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 35

348. Horowhenua county clerk to assistant under-secretary, Department of Internal Affairs, 15 July 1924 (Armstrong, papers in support of 'Lake Horowhenua and the Hokio Stream' (doc A162(b)), p 1138)

349. Hamer, "A Tangled Skein" (doc A150), pp 83–85

350. Minutes of the commission of inquiry, Levin, 26 March 1925 (Hamer, "A Tangled Skein" (doc A150), p 83)

statement, adding that Māori would not object to ‘clearing of the creek’ so long as it was not deepened and the banks were not damaged.<sup>351</sup>

The commissioners recommended that a drainage district should be established. Muaūpoko and Ngāti Raukawa responded by petitioning the Native Minister, Gordon Coates, in July 1925:

This is a great calamity which has fallen on us. From the days of our ancestors down to our parents they derived sustenance from this lake and the stream, and our eel weirs in consequence of such recommendation would be made to disappear . . .

We do not want our stream to suffer a similar fate to the Rangitaiki and Piako and as you are the guardian of the Maori race we humbly pray to you not to permit the recommendations of this report to become operative . . . We are poor people and hence we strongly urge you to grant us relief.<sup>352</sup>

Coates pointed out that the new drainage board had already been created but it would have no authority over the Hōkio Stream unless the law was changed (given the 1916 provision for the domain board to control the stream). He also noted that the Lands Department was opposed to making such a change.<sup>353</sup>

Apparently the Lands Department’s objection was that it wanted to be sure all local authorities were on board with the proposal, so a second commission was held in late 1925.<sup>354</sup> This time, the commission ‘brokered a deal whereby the drainage board would clear the stream but not alter the stream banks.’<sup>355</sup> Hema Henare had explained to the previous commission: ‘We build our eel-weirs from bank to bank, and by digging away the banks you will certainly affect them.’<sup>356</sup> It was now agreed that the drainage board would remove eel weirs until the work was done, and then their Māori owners would be paid to replace them. The agreement not to alter the stream banks was said to be ‘irrevocable’, in the best interests of local Māori. The commissioner also recommended that, considering Māori interests, it would not be wise to vest exclusive control of the stream in any local authority.<sup>357</sup>

It seemed that an amicable settlement had been reached, which Muaūpoko supported. But, as Mr Hamer summarised for us,

351. Hamer, “A Tangled Skein” (doc A150), p 84

352. Muaupoko petition to Gordon Coates, 9 July 1925 (Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 37; Armstrong, papers in support of ‘Lake Horowhenua and the Hokio Stream’ (doc A162(b)), pp 1179–1180)

353. Coates to Rere Nicholson, 15 July 1925 (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000”, various dates (doc A150(f)), p 1493). See also assistant under-secretary for internal affairs to Horowhenua County Council, 8 July 1925 (Armstrong, papers in support of ‘Lake Horowhenua and the Hokio Stream’ (doc A162(b)), p 1174).

354. Hamer, “A Tangled Skein” (doc A150), pp 86–87

355. Paul Hamer, summary of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000”, October 2015 (doc A150(k)), p 4

356. Minutes of the commission of inquiry, Levin, 26 March 1925 (Hamer, “A Tangled Skein” (doc A150), p 84)

357. Hamer, “A Tangled Skein” (doc A150), p 87

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the drainage work then carried out in February 1926 went much further than this, and two Muaūpoko men were arrested for obstructing the works. Another agreement was brokered [in March 1926], this time by the Native Minister's private secretary [Henare Balneavis], under which no further widening or deepening would happen without Māori agreement or Ministerial arbitration. But when the empowering legislation so long wanted by the advocates of drainage was finally passed in September 1926, this gave the drainage board the power to widen and deepen the stream so long as it 'reasonably' safeguarded Māori fishing rights. The two negotiated agreements of late 1925 and early 1926 were forgotten. Muaūpoko believed, moreover, that the damage had already been done.

The work on the Hōkio Stream lowered the lake by four feet, destroying lake edge habitat for eels and kakahi. The new channel at the upper reaches of the stream also made the use of eel weirs extremely difficult. Farmers rushed to make use of what they saw as their reclaimed land surrounding the lake, fencing to the water's new edge and burning or allowing their stock to destroy lakeside vegetation. Muaūpoko complained to both the domain board and the Native Minister without success, although the Marine Department did confirm that eel numbers had been reduced and raised the possibility of paying Muaūpoko compensation.<sup>358</sup>

The Crown's approach to Muaūpoko interests at this time was certainly more protective under Gordon Coates than it had been when the 1916 legislation was passed. Muaūpoko resistance to drainage also won them some apparent concessions, in the form of the agreements of late 1925 and early 1926. But, after Henare Balneavis had sponsored the March 1926 agreement, the Lands Department advocated the widening and deepening of the outlet and stream, so long as the domain board agreed. Internal Affairs accepted the Lands Department's position and prepared legislation, which became section 53 of the Local Legislation Act 1926 (see also the sidebar above).<sup>359</sup>

The preamble to this section stated that drainage operations were necessary, 'while "reasonably" safeguarding and preserving Māori fishing rights and rights of user of Lake Horowhenua, as conferred by the Horowhenua Block Act 1896 and the Horowhenua Lake Act 1905'.<sup>360</sup> Section 53 of the 1926 Act allowed the widening and deepening of the Hōkio Stream, the 'removal or replacement of eel weirs, the regulating of the lake level, and so on, provided provisions were made "to protect any existing Native fishing rights as aforesaid, and to secure to the public the use of Horowhenua Lake as a recreation reserve without undue interference with existing rights of user"'.<sup>361</sup> Thus, the Crown set aside the provisions of the March 1926 agreement, which had required Māori consent to any deepening of the stream (or, if consent was withheld, an investigation and decision by the Minister of Internal

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358. Hamer, summary of "A Tangled Skein" (doc A150(k)), p 4

359. Hamer, "A Tangled Skein" (doc A150), p 92

360. Hamer, "A Tangled Skein" (doc A150), p 92

361. Hamer, "A Tangled Skein" (doc A150), p 92

Affairs).<sup>362</sup> By proclamation on 16 December 1926, the Crown gave the drainage board authority to alter the lake outlet as well as the stream.<sup>363</sup> It remained to be seen how much real protection the requirement to ‘reasonably’ protect Māori fishing rights would provide, and how the Crown would respond if the board failed to take reasonable account of those rights.

The effect of the drainage board’s work was described by Muaūpoko’s lawyer in 1934. The board cut a channel that was narrow and deep, with ‘perpendicular sides’ and a rapid water flow. The result was that 11 of 13 eel weirs could no longer be used: ‘Part of the trouble is that originally the creek was wide with weirs on either side now these are high and dry and they cannot have weirs on each side of the channel as it is too narrow.’ The board had ‘ridden rough shod over the rights of the natives to benefit adjoining farmers.’<sup>364</sup> The stream near the outlet was made unsuitable for eel weirs, and the level of the lake was (as noted above) dropped by about four feet. Shellfish beds were destroyed and the overall numbers of shellfish reduced. Aquatic and lakeside plants, including flax, were damaged.<sup>365</sup> And, as Mr Hamer noted, farmers rushed in to fence the new lakeside and start using the dewatered land as well as the old chain strip.<sup>366</sup> This led to the 1929 complaints to Ngata that Pākehā were draining the water and burning off the flax on the chain strip and dewatered land, discussed earlier in section 8.3.5.

On 14 October 1930, a Muaūpoko deputation met with the Minister of Internal Affairs, Philip de la Perrelle. They had engaged a lawyer, DGB Morison, who was present to represent them. The former Prime Minister, Gordon Coates, attended with Henare Balneavis, who had signed the 1926 agreement. At the meeting, Muaūpoko claimed that their signatory to the agreement, Hurunui, had been misled into signing it, and that their fisheries had disappeared, their eel weirs had been left high and dry, and their flax had been destroyed by Pākehā. Their mana was greatly reduced when they could not take eels to the tangi for Sir Māui Pōmare. The Minister accepted that they should not have been deprived of their food supplies simply to clear a little ground, and acknowledged that an injustice had occurred.<sup>367</sup> This is very important, in our view, as it shows that a quite different balancing of interests was both possible and fairer than that which had taken place in 1926. Settler farming interests had been placed above Māori interests unjustly with devastating results. This was all for the recovery of ‘not . . . much ground,’<sup>368</sup> as the Minister had put it.

AG Harper of Internal Affairs, accompanied by the chief surveyor, was sent to investigate. In early 1931, the chief surveyor reported that the lake had receded by two chains, and that the fishery had been damaged. But *his* principal concern was

362. Hamer, “A Tangled Skein” (doc A150), pp 89–91

363. Hamer, “A Tangled Skein” (doc A150), p 93

364. Committee of inquiry, minutes, 11 July 1934 (Hamer, “A Tangled Skein” (doc A150), p 94)

365. Hamer, “A Tangled Skein” (doc A150), p 94

366. Hamer, summary of “A Tangled Skein” (doc A150(k)), p 4

367. Hamer, “A Tangled Skein” (doc A150), pp 98–99

368. ‘Hokio Stream’, minutes of a deputation to the Minister of Internal Affairs, 21 October 1930 (Hamer, papers in support of “A Tangled Skein” (doc A150(f)), p 1522)



the chain strip and the notion that if the Government admitted that Muaūpoko had incurred any loss, the tribe would want compensation. Harper's report was that the tribe wanted the original lake levels restored so that the eel habitat could recover, but the drainage board adamantly refused to install a control floodgate for that purpose.<sup>369</sup> Morison explained: 'The Drainage Board said the farmers wanted the land drained and consequently the Lake had to be lowered and that was the end of it.'<sup>370</sup>

Muaūpoko continued to raise their grievance with the Government, so Internal Affairs asked the Marine Department to investigate whether the eels in the lake had been depleted, and whether they could still migrate down the Hōkio Stream and be caught in the eel weirs.<sup>371</sup> In February 1931, the Marine Department's investigators confirmed that the lake had dropped by about four feet, and that the eel supply had been reduced. In addition to the lowering of the lake and siltation as a result of drains, the departmental investigators thought that acclimatised perch might also have contributed to the problem. The decline in shellfish could also be attributed to 'any or all' of those factors. There was an issue, however, as to how far the alteration of the stream itself had been responsible. A more detailed investigation would be required, it was held, before any compensation could be calculated.<sup>372</sup> As far as we know, this subsequent investigation never occurred. Certainly, compensation was not paid, and no action was taken to assist Muaūpoko.

After the Internal Affairs and Marine Department investigations of 1931 produced no action, Morison advised Muaūpoko to take their case to the Supreme Court. But this the tribe simply could not afford to do, especially during the Depression – after all, their poverty was part of the reason they were so dependent on their fisheries for survival.<sup>373</sup> They took full advantage of the 1934 inquiry to detail their grievances on this matter.

The 1934 committee of inquiry reported Muaūpoko's account of how their eel and shellfish supplies had been ruined, and the lakeside depleted of other resources such as flax on which they relied. But the committee was not tasked with dealing with drainage board matters, so it simply stated that the 'damages caused by these operations are possibly assessable and an action for recovery may lie'.<sup>374</sup> Muaūpoko, however, had no money with which to pursue such an action, as Morison had already told the committee.<sup>375</sup>

On the basis of the evidence available to us, we accept that Muaūpoko's fishing rights, as well as their authority over the lake outlet and the Hōkio Stream, were prejudiced by the establishment of a drainage board against their wishes (and on

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369. Hamer, "A Tangled Skein" (doc A150), pp 99–100

370. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p1533)

371. Hamer, "A Tangled Skein" (doc A150), p100

372. Hamer, "A Tangled Skein" (doc A150), pp100–101

373. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p1534)

374. Committee of inquiry, report, 10 October 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p1568)

375. Committee of inquiry, minutes, 11 July 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p1534)



which they were not represented), the 1926 legislation (which set aside the 1926 agreement), the consequent reduction of their lake's waters and fisheries, and the Crown's failure to protect their rights or provide recompense in the face of proven grievances.

### 8.3.8 Findings

Muaūpoko property rights, authority, and tino rangatiratanga were 'whittled away' between 1905 and 1934 by the following Crown acts or omissions, in breach of the Treaty principles of partnership and active protection, and of the property guarantees in article 2 of the Treaty:

- ▶ The Crown recognised Pākehā as having the right to fish in Lake Horowhenua, ending Muaūpoko's exclusive fishing rights without consent or compensation, after trout and other predatory species were introduced by acclimatisation societies and the domain board (also without the agreement of the Muaūpoko owners).
- ▶ Legislation placed the chain strip unequivocally under the control of the domain board in 1916. Muaūpoko then had no rights to cut flax, use the strip, or fence it off, yet the board could not actually stop farmers from burning off vegetation and grazing their stock on the chain strip at will. Muaūpoko did not agree to domain board control of the chain strip, and their protests were ignored.
- ▶ Levin borough councillors were given control of the domain board by legislation in 1916, while the minimum one-third representation for Muaūpoko was turned into a one-third maximum, sealing their minority status and relative powerlessness on the board. Again, Muaūpoko protests against the 1916 legislation proved futile. The Crown's failure to consult Muaūpoko, to obtain their agreement to a proportionate representation on the board, to set an appropriate proportion of members for joint management, and to establish a sound appointments procedure, was inconsistent with Treaty principles.
- ▶ Control of the Hōkio Stream and one chain on either side was given to the domain board by legislation in 1916, against the protests of the Muaūpoko owners of the bed and the chain strip on the northern bank. Legislation in 1926, in violation of the 1925 and March 1926 agreements, gave the Hōkio Drainage Board exclusive power to control and deepen the Hōkio Stream. The resultant drainage works lowered the lake by four feet and caused significant damage to the eel fishery, shellfish beds, and the lakeside vegetation. Vital eel weirs were removed and could not be replaced. Muaūpoko protests were investigated by the Crown in 1931 but no remedy eventuated.

Contrary to the Crown counsel's submission, the Crown did not balance interests in an appropriate or Treaty-compliant manner during this period. It prioritised even minor settler interests over those of Muaūpoko in all of the instances bulleted above. This was a breach of the principle of equity, which required the Crown to act fairly as between settler and Māori interests.

Muaūpoko were virtually landless. They were heavily dependent on the resources of the lake and the Hōkio Stream, and even the flax and other resources of the chain strip. In theory, recreational interests ought not to have been incompatible with exclusive Muaūpoko fishing rights or the tribe's use of resources on the chain strip. As noted earlier, Muaūpoko's understanding of the 1905 agreement was that settlers could access the lake for boating and aquatic sports, not that the owners would give up control of the lakeside strip or allow others to fish in their lake. At the very least, their consent should have been obtained to these infringements of their rights, or appropriate compensation offered. In respect of drainage, the Minister of Internal Affairs admitted in 1931 that Muaūpoko had suffered injustice for the sake of reclaiming an inconsiderable amount of land. That was patently unfair.

Thus, as demonstrated by our analysis in sections 8.3.4–8.3.7, there had been no fair or appropriate balancing of interests. Rather, the Crown prioritised even minor settler interests over those of Muaūpoko. Muaūpoko were only consulted in 1926 after they took the law into their own hands in protesting the drainage works. Otherwise, they were barely consulted and their interests almost always disregarded or minimised. This was not consistent with the Treaty principles of partnership, active protection, or equity (which required the Crown to act fairly as between Māori and settlers).

Nor was it consistent with the 1905 agreement. By the 1930s, however, officials could not locate the most basic of information about the agreement. Faced with that situation and an Act purporting to give effect to it, officials did not ask Muaūpoko for information about the agreement (nor even check the parliamentary debates about the 1905 Act). Muaūpoko rights were instead read down by the Crown Law Office, and this was translated into public policy. No fresh agreement was sought.

Muaūpoko were prejudiced by these Crown acts and omissions. The evidence shows that their property rights were compromised, their mana reduced, and their tino rangatiratanga violated. Their fisheries were harmed, their lake lowered four feet (damaging the lake shore habitat), and their ability to sustain themselves from their lake and stream was significantly reduced. The impact of Crown acts or omissions was especially severe during the Depression.

We turn in the next chapter to the parameters and findings of the 1934 committee of inquiry, and the long period of negotiations before arriving at a 'settlement' in the form of section 18 of the Reserves and Other Lands Disposal Act 1856.

PART III

**WAI: LAKE HOROWHENUA AND  
THE HŌKIO STREAM**



CHAPTER 9

**THE ROLD ACT 1956: ITS ORIGINS AND EFFECTS,  
1934–89**

**9.1 INTRODUCTION**

In the previous chapter, we addressed claims about the 1905 ‘agreement’ between Muaupoko, the ‘Levin pakehas,’<sup>1</sup> and the Crown, and the legislation which followed it at the end of October 1905. The Horowhenua Lake Act 1905 put in place a hierarchy of interests, in which free public access to the lake for aquatic sports was at the top. The Muaupoko owners’ interests were subordinated to the public interest, and controlled by a lake domain board under the terms of the Public Domains Act 1881. There were further legislative enactments in the 1910s, bringing the chain strip and the Hōkio Stream under the domain board, and giving Levin borough councillors a two-thirds majority on the board. There was a further ‘whittling away’ of the Muaupoko owners’ rights in the 1920s, when the stream and its banks were made subject to the control of the Hokio Drainage Board, and the lake was drastically lowered by four feet. In 1932, the Crown Law Office gave a legal opinion that the Crown owned the lakebed and chain strip as an outcome of the 1905 Act. As we discuss below, the Crown did not recognise Muaupoko ownership of the lakebed and the chain strip until the 1950s.

We noted in section 8.3 that a committee of inquiry considered these matters in 1934, and we begin this chapter with the parameters of the committee’s inquiry and its findings (section 9.2.3). We then explore the reasons why it took almost 19 years for the Crown to negotiate a new settlement with the lake owners, as well as the content of the agreement of 1953 (section 9.2.4).

The 1953 agreement was eventually given legislative form in section 18 of the Reserves and Other Lands Disposal (ROLD) Act 1956. In section 9.3, our discussion is structured around two key questions. The first of these questions is: did the 1956 legislation remedy Muaupoko’s grievances in respect of past legislation and Crown acts or omissions? The parties disagreed about the answer to this question.

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1. ‘*Horowhenua Lake Agreement* Between the Muaupokos and the Levin pakehas’, not dated [1905] (Paul Hamer, “A Tangled Skein”: Lake Horowhenua, Muaupoko, and the Crown, 1898–2000, June 2015 (doc A150), pp 34–35)

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The Crown submitted that, ‘to the extent any prejudice might be said to flow from earlier legislation as to control and/or rights, that prejudice was remedied by the enactment of the 1956 Act.’<sup>2</sup> The claimants, on the other hand, argued that the 1956 Act did not provide compensation or other redress for past grievances.

The second key question is: did the 1956 legislation provide a suitable platform for (a) future management of the lake and stream, and (b) protection of the Māori owners’ rights and interests? The parties also disagreed about the answer to this question. In the claimants’ view, the 1956 reforms to the management regime were inadequate and did not protect or give effect to their tino rangatiratanga. The Crown’s view was that the Act established a co-management regime which may not have always functioned as intended, but that the legislation and regime itself are consistent with Treaty principles.

We begin our discussion with the 1934 committee of inquiry and the question as to why it took almost 19 years for the Crown and the Muaūpoko owners to negotiate a new agreement.

**9.2 WHY DID IT TAKE SO LONG TO NEGOTIATE A NEW AGREEMENT?**

**9.2.1 Introduction**

In 1934, the Lands Department appointed a committee to inquire into the borough council’s plan to develop Lake Horowhenua as a pleasure resort. The committee was also tasked with investigating the nature of the Māori owners’ rights and how those rights might be affected by the council’s plan or by any other matters connected to the domain. This proved to be an important opportunity for Muaūpoko, with the aid of legal representation, to air their longstanding grievances about the lake and the Hōkio Stream.

In this section of our chapter, we examine the evidence presented to the committee, as well as its findings and recommendations. We also assess subsequent efforts by the Crown and the Māori owners to negotiate a new agreement about how the lake was to be managed and the owners’ rights protected. In the event, it took almost 19 years to reach an agreement (in 1953) and 22 years to give that agreement effect (in 1956). The claimants were highly critical of this long delay, during which, they argued, their rights were left in limbo and their interests unprotected. The Crown, on the other hand, argued that a fair settlement was reached in 1953, and that no Treaty breach arose from the length of time necessary to arrive at that fair settlement.

Having described the negotiations, we also examine the content of the agreement reached between the Crown and the Māori owners in 1953. The 1956 legislation, which gave effect to the agreement, is dealt with in section 9.3.

We begin by summarising the parties’ arguments about the 1934 inquiry and the long delay in reaching a new agreement.

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2. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 57



### 9.2.2 The parties' arguments

#### (1) *The claimants' case*

Broadly speaking,<sup>3</sup> the claimants accepted that the 1934 inquiry was a positive step on the part of the Crown, and demonstrated some care of their interests.<sup>4</sup> The inquiry also had a 'somewhat positive' outcome because the commission found that Muaūpoko had not alienated their title to the lake, or any other rights.<sup>5</sup> Furthermore, the inquiry found that if Muaūpoko *had* lost their ownership of the lakebed and chain strip as a result of legislation, this had been done without the owners' consent.<sup>6</sup> But the claimants also argued that the inquiry's outcome was unfairly constrained by parameters set for it by the Crown.<sup>7</sup> The main premise was that 'the Domain *must* be developed as a pleasure resort in so far as such development does not conflict with the lawful rights of the Natives' (emphasis added).<sup>8</sup> The Crown, we were told, 'did not allow itself the option of not developing a pleasure resort, and did not consult the owners about the Crown imperative to develop one. The issue was how far their rights might be retained alongside a pleasure resort.'<sup>9</sup> As a result, the claimants said, Muaūpoko's rights were treated as secondary to those of the public, and the committee of inquiry recommended a compromise rather than the definition and protection of Muaūpoko's rights at law.<sup>10</sup>

Nonetheless, the claimants' view is that the 1934 inquiry made the Crown aware in no uncertain terms of how it had harmed Muaūpoko and denigrated their mana and rangatiratanga.<sup>11</sup> 'Rather than make amends immediately,' they said, 'the Crown took the position that it would attempt to negotiate with Muaupoko to reach a compromise that would accord with Pakeha interests in the use of the Lake.'<sup>12</sup> Muaūpoko firmly resisted the Crown's unreasonable demands for almost 20 years, including its persistent attempts to buy part of the chain strip for the domain. This delay ultimately proved unnecessary because the Crown decided in 1953 that it did not need the additional land after all. Thus, in the claimants' view, the Crown caused an unfair and unnecessary delay before a settlement was finally reached in 1953–56.<sup>13</sup> Claimant counsel submitted: 'This represents two decades of Crown knowledge

3. Not all claimants made submissions about the 1934 inquiry or the long period in which it took to negotiate a settlement in response to the inquiry's report.

4. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions, 10 February 2016 (paper 3.3.9), p 15; claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3: Lake Horowhenua issues, 19 February 2016 (paper 3.3.17(b)), p 46

5. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 15–16

6. Claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), p 277

7. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 46

8. Under-secretary for lands to Minister of Lands, 15 November 1933 (Hamer, "A Tangled Skein" (doc A150), p 108 (claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 46))

9. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 46

10. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 46; claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 16

11. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 277

12. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 277

13. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 16–18

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that it had unjustly acquired Muaūpoko rights without any recompense. This was a breach of the Crown's duty of good faith and its duty of active protection.<sup>14</sup>

**(2) The Crown's case**

The Crown did not make any submissions about the parameters of the 1934 inquiry. In respect of the lengthy delay before a settlement was reached, the Crown accepted that 'ownership and other issues could have been resolved more quickly, particularly in light of the Report of the 1934 Commission of Inquiry. However, the Crown does not accept the length or course of the negotiations amounted to a breach of Treaty principles.<sup>15</sup> In particular, the Crown argued that its insistence on trying to buy part of the chain strip was in line with the 1934 inquiry's recommendations, and was therefore 'reasonable in the circumstances.'<sup>16</sup>

The Crown also submitted as relevant points:

- ▶ Muaūpoko appear to have had the benefit of legal advice throughout the negotiation process;<sup>17</sup>
- ▶ the Depression and the Second World War would have contributed to the delay; and
- ▶ the need to also reach agreement with the local authorities and the domain board contributed to the length of the negotiations.<sup>18</sup>

**9.2.3 What were the parameters and outcomes of the 1934 inquiry?**

The longer-term origins of the 1934 inquiry are set out in section 8.3. As we saw, the domain board made frequent queries to the Government as to its rights and powers vis-à-vis those of the Māori owners, and the Crown Law Office opinions became increasingly restrictive in terms of the owners' rights. Indeed, by 1932, the official advice was that the 1905 Act had established Crown ownership of the lakebed and chain strip. Nonetheless, there was another approach from the domain board in 1933, which resulted in the Harvey–Mackintosh inquiry a year later.

The borough council and the board wanted to develop the lake, especially its foreshore, as a pleasure resort.<sup>19</sup> The board was hesitant, recalling the petition and furore in 1931 when Muaūpoko believed a road was about to be constructed on the chain strip (see section 8.3.5).<sup>20</sup> While the legislation seemed to give the board wide powers to do so, it remained unsure how much (and what) it could develop in face of the "fishing and other rights" of the Native[s,] and until these rights are defined and the Native interests in the lake [are] cleared up the Board are reluctant to proceed upon any enterprise which is likely to provoke the resentment of the Natives.<sup>21</sup> The Lands Department favoured the proposed development, and advised

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14. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 278

15. Crown counsel, closing submissions (paper 3.3.24), p 56

16. Crown counsel, closing submissions (paper 3.3.24), p 56

17. Crown counsel, closing submissions (paper 3.3.24), p 56

18. Crown counsel, closing submissions (paper 3.3.24), p 56 n

19. Hamer, "A Tangled Skein" (doc A150), p 108

20. Hamer, "A Tangled Skein" (doc A150), p 109

21. Hudson to under-secretary for lands, 6 November 1933 (Hamer, "A Tangled Skein" (doc A150), p 108)

its Minister that ‘the Domain must be developed as a pleasure resort in so far as such development does not conflict with the lawful rights of the Natives.’<sup>22</sup>

As the claimants argued, this was the premise upon which the Crown instituted a committee of inquiry in 1934.<sup>23</sup> The terms of reference, which were prepared by the Native Department and Lands Department, focused on the proposed development:

- ▶ to hear and consider the representations of the domain board and the borough council ‘with respect to the possible development of the Horowhenua Lake Domain as a public pleasure resort’;
- ▶ to hear and consider the representations of ‘the Natives with respect to the rights they possess’ under the 1905 Act (as amended in 1916 and 1917), and to ‘consider the question as to whether such rights would be adversely affected by the carrying out of any proposed schemes of development’;
- ▶ to consider ‘any other matters *connected with the administration of the Domain* in relation to the legal or equitable rights of the Natives’ (emphasis added); and
- ▶ to report to the Minister of Lands.<sup>24</sup>

Thus, although the committee members heard evidence about the drainage board and the damage to Muaūpoko fisheries in 1925–26, they could not report on it.<sup>25</sup> The inquiry was not supposed to be a comprehensive inquiry into Muaūpoko’s grievances, although the tribe’s lawyer (Morison) treated it as such.

The committee members were Judge Harvey of the Native Land Court and a commissioner of Crown lands, HWC Mackintosh. In defining Māori rights, the committee’s report noted that in 1898 the court vested the lakebed and chain strip in trustees.<sup>26</sup> Up to that point, ‘the rights of the Natives appear clear.’<sup>27</sup> Next came the 1905 meeting with Seddon and Carroll, who sought a means to allow the local residents to use the lake for aquatic sports. The committee accepted Wī Reihana’s evidence that the 1905 agreement was for ‘the power of the European . . . to be over the top of the water only – not to go below’. It amounted to a ‘grant of user of the water surface by the Natives with fishing specially reserved’, and was not ‘an alienation of the land with a free right of fishing common to both European and Maori.’<sup>28</sup>

This ‘solution’ to the situation in 1905 ‘fits very closely into the 1905 Act’. The Act, the committee found, gave the public rights with the intention of not ‘unduly

22. Under-secretary for lands to Minister of Lands, 15 November 1933 (Hamer, “A Tangled Skein” (doc A150), p108)

23. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 46

24. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(g)), p1562)

25. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), pp1568, 1570)

26. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), pp1563–1565)

27. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), p1566)

28. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), p1566)

## 9.2.3 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

interfering with the fishing and *other rights* of the Native owners' (emphasis in original). Those 'other rights' were all the rights of a holder of a land transfer title. The committee therefore disagreed with the Crown Law Office opinion that ownership had passed to the Crown as a result of the 1905 Act. If it *had* passed to the Crown, the Māori owners were entitled to have had notice so they could object and seek compensation.<sup>29</sup> The committee also reported that Māori ownership was not taken away by the 1916 or 1917 legislation, unless it had been done in 'a subtle manner mystifying alike to Domain Board and Natives'.<sup>30</sup>

The committee then considered how these ownership rights might be affected by the proposed development of the reserve. The board's plan was to join Queen Street and Makomako Road with a drive on the lake's edge, and in future to put a road all the way around the lake. The board also wanted to develop a lakeside swimming pool, jetties, and a boat harbour. The committee agreed, however, that it was doubtful whether the board had the requisite powers to do so. Even when the board tried to develop its recreation ground (the 13 acres purchased from Te Rangimairehau and others), Muaūpoko had objected to any development on the chain strip in front of that land. The situation was further complicated by the lowering of the lake, which had created a dewatered area between the chain strip and the lake shore.<sup>31</sup>

The domain board's position in the inquiry was not summarised, but the committee did summarise Muaūpoko's position:

- ▶ the rights 'given to the Crown' and 'expressed by the 1905 Act' were 'rights over the surface of the water only', and the tribe had no objection to boating, yachting, and swimming;
- ▶ the owners had never 'handed over or agreed to handing over' the chain strip, and their freehold title meant that they should be able to cultivate the dewatered land and the chain strip, fencing it off against neighbouring farmers; and
- ▶ 'they consider every move since 1905 has been in the nature of a whittling away of their rights without reference to them or their problem[s]'.<sup>32</sup>

After considering the evidence, the committee said that the best solution was not actually to define the respective rights of the Māori owners and the domain board but to come up with a compromise between them. Both sides, it was held, wanted a fair solution and there was 'not as much between them as at first sight appears'. The committee therefore proposed a future definition of the owners' and board's respective rights (if the parties agreed), to be given effect by legislation.<sup>33</sup>

29. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1566)

30. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1567)

31. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), pp 1567–1568)

32. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1569)

33. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1569)

The committee recommended that the board have ‘absolute control’ of the surface but ‘so as not to interfere with natives who are on fishing pursuits’. The board was also to be ‘given’ extra land for its development proposals: the area of dewatered land and chain strip between Makomako Road and the north-east corner of the reserve.<sup>34</sup> This amounted to an area of 83.5 chains.<sup>35</sup> The Māori owners would retain ownership of the lakebed.<sup>36</sup> They would also retain the remainder of the dewatered land and chain strip, which would not be controlled by the board. The lake trustees would administer it to ensure Māori access to the lake for fishing, and for any other purposes ‘decreed for the benefit of the tribe.’<sup>37</sup> Thus, apart from the piece of land ‘given’ to the board, the recreation reserve would be limited to the surface of the lake.

This was a compromise which gave both sides some of what they wanted, although it left drainage matters and control of the Hōkio Stream unresolved. There was no mention of compensation for (i) previous infringements of the owners’ rights, (ii) the damage to their lake shore and fisheries by drainage works, or (iii) for the piece of their land to be ‘given’ to the board.

Was this a fair or appropriate basis for defining the respective rights of the domain board and the Māori owners? In our view, the committee’s report was a very positive step for the Māori owners because it endorsed their understanding of the 1905 agreement, and it clarified that they were still the legal owners of the lakebed, the dewatered land, and the chain strip. Prendeville accepted in November 1934 that his earlier opinion had been wrong, and that title remained with Māori.<sup>38</sup> But, as the claimants pointed out, the committee did not actually tackle the task of defining the parties’ rights under the legislation then in force. The committee of inquiry did not seem overly concerned with the pleasure resort proposal. The more likely explanation is that a reconciliation of the public reserves legislation and the 1905 Act was not possible, hence the recommendations for a clearer separation of authorities: Muaūpoko to control the dewatered area and chain strip; the board to control the lake surface (but not to interfere with fishing); the board to have an area of land in its ownership for a pleasure resort’s facilities; and all to be given effect by new legislation.

Ultimately, the question of whether this was a fair and appropriate basis for a future settlement was up to the three parties involved: the Māori owners, the Crown, and the domain board. We turn next to consider how the report was received by the parties, and the long, drawn-out process of negotiating a new agreement about the lake’s ownership and management.

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34. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), p 1569)

35. Paul Hamer, summary of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, October 2015 (doc A150(k)), p 5

36. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), pp 1569–1570)

37. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), p 1570)

38. Hamer, “A Tangled Skein” (doc A150), p 115



## 9.2.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**9.2.4 What caused the long delay in reaching a settlement?**

When Harvey and Mackintosh made their recommendations in October 1934, they could hardly have expected it would take 22 years to reach a settlement (the ROLD Act 1956). Historian Paul Hamer argued that the settlement was ‘unnecessarily delayed’. This was because of the Crown, he said, which ‘held out for two decades to extract a concession from Muaūpoko [the 83.5 chains] that it then abruptly decided was not needed.’<sup>39</sup> The claimants supported this view.<sup>40</sup> Crown counsel, on the other hand, argued that it was reasonable for the Crown to have sought the 83.5 chains because it had been recommended by a public inquiry. The Crown also submitted that the Depression, the Second World War, and the need to obtain local authority support all hindered progress.<sup>41</sup>

**(1) Stalemate, 1934–51**

The Government’s initial response to the report in 1934 was to see if the main recommendation favourable to Muaūpoko could be done away with; that is, the recommendation that they should control the chain strip and dewatered area. The Lands Department hoped to limit any recognition of their rights to ownership (but not control). Harvey and Mackintosh argued strongly against this, and Cabinet eventually approved a meeting to seek agreement of the domain board and Muaūpoko to the report’s original proposals.<sup>42</sup>

This meeting took place in Levin on 23 March 1935. The newspapers reported a ‘large attendance of Natives,’ while the Crown was represented by the under-secretary for lands. In brief, the under-secretary put forward the Harvey–Mackintosh proposals and asked the people to make a gift of the 83.5 chains, reassuring them that there would be ‘no further whittling of their privileges’ once the matter was ‘amicably settled’. In reality, Muaūpoko saw this request for a free cession of land as further ‘whittling down of their rights.’ As an alternative, however, they were prepared to offer a smaller area: ‘the piece from Queen Street to the other end of the reserve.’<sup>43</sup> The under-secretary responded that this was only half the area requested, and not the best part for bathing and sports. He refused to accept Muaūpoko’s counter-offer.<sup>44</sup>

Mrs Hurunui made clear what was at stake for Muaūpoko, telling the Government party that

An injustice has been suffered by us by the draining of the lake and we have been deprived of our food. During the lifetime of my forebears we have had an ample supply of eels, flounders and whitebait. Today, they are all gone. I was one of a deputation to the Ministers to request that my stream and lake be restored to the condition which God made it. Since the lake receded the farmers had the benefit and their dairy herds

39. Hamer, summary of “A Tangled Skein” (doc A150(k)), p 6

40. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 17

41. Crown counsel, closing submissions (paper 3.3.24), p 56

42. Hamer, “A Tangled Skein” (doc A150), pp 115–117

43. *Chronicle*, 26 March 1935 (Hamer, “A Tangled Skein” (doc A150), pp 117–118)

44. *Chronicle*, 26 March 1935 (Hamer, “A Tangled Skein” (doc A150), p 119)



consumed my flax. When the flax was on the lake I took £600 in three years. Today most of my people are on relief work. When my forefathers gave over the right to use the surface of the water that is all they gave. Today, I hear the Board has authority over the reserve. I resent this. Another injustice is that the farmers have fenced off their farms, fenced the chain strip and constructed drains. I have observed these actions and I specially ask that the activities of the Board be confined solely to that portion we are prepared to concede. Let the chain strip be restored to the 14 trustees appointed by Judge Mackay. Most of these are dead, but some remain and I can suggest others to take their place. Let the mana of the lake be returned to them.<sup>45</sup>

The Government rejected the Muaūpoko counter-offer. After the meeting, the under-secretary offered a sweetener: the Government would survey the chain strip and dewatered area for free if Muaūpoko would make the requested 'gift'.<sup>46</sup> There was no response to this suggestion so the Government decided to 'leave matters in abeyance for the present'.<sup>47</sup> When the Native Department asked about progress, the Lands Department replied: 'We are not doing anything & don't intend to. I have made offers to the Natives & it is now for them to move. I don't intend to take any action.'<sup>48</sup>

Muaūpoko rejected the Crown's offer to survey the chain strip in return for the free gift of what amounted to about 24 acres of land. They secured a meeting with Labour Prime Minister (and Native Minister) Joseph Savage in May 1936. Savage promised that justice would be done but said that compensation was not possible for 'the sins of previous Governments'. Muaūpoko pointed out that they had received no compensation, but also said that the tribe wanted their lake back 'the same as God had given it'.<sup>49</sup>

The outcome was that Savage urged the tribe to meet with officials without lawyers present and make a settlement. This meeting duly occurred on 9 December 1936 but it turned out that the Crown's position had not changed. Muaūpoko wanted the Crown to amend the 1916 legislation to exclude the whole chain strip and dewatered area from the recreation reserve. Officials, however, considered this unreasonable and persisted in the offer to survey the chain strip in return for the free gift of 83.5 chains.<sup>50</sup> When Muaūpoko refused this offer, officials said that they would 'report to the Prime Minister that you are not prepared to negotiate', and that nothing more would be done until the tribe returned with 'concrete proposals'.<sup>51</sup>

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45. *Chronicle*, 26 March 1935 (Hamer, "A Tangled Skein" (doc A150), p 119)

46. Hamer, "A Tangled Skein" (doc A150), p 119

47. Under-secretary for lands to under-secretary, Native Department, 15 August 1935 (Hamer, "A Tangled Skein" (doc A150), p 119)

48. Minute on under-secretary, Native Department, to under-secretary for lands, 10 July 1935 (Hamer, "A Tangled Skein" (doc A150), p 121)

49. Notes on meeting between Muaūpoko deputation and the Prime Minister, 29 May 1936 (Hamer, "A Tangled Skein" (doc A150), pp 122–123)

50. Hamer, "A Tangled Skein" (doc A150), pp 123–124

51. Judge Harvey, minutes of 9 December 1936 meeting (Hamer, "A Tangled Skein" (doc A150), p 124)

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Judge Harvey, who had chaired the meeting, now suggested that the Crown should revest the chain strip in Muaūpoko and then take the piece it wanted under the Public Works Act. The Government was not willing to take the land compulsorily, however, but nor was it prepared to settle for the smaller piece offered by Muaūpoko.<sup>52</sup>

In 1937, Toko Rātana (member for Western Maori) asked Savage to consider Lake Horowhenua at the same time as settling other Māori grievances.<sup>53</sup> The Prime Minister's response was:

the only matters that can now be discussed and considered are those concerning which some lawful tribunal has actually recommended an amount to be paid as compensation, and that consideration of claims, which have not yet been recommended by some tribunal, must necessarily be deferred for the present until some tribunal is set up to inquire into their merits and a recommendation is made.<sup>54</sup>

We consider this to have been a very important response. Other claims were being dealt with after full commissions of inquiry, whereas the Government clearly did not see the departmental inquiry of Harvey and Mackintosh as having the same status and effect. It would not have been unreasonable, therefore, for the Crown to have set aside the departmental inquiry's recommendations in favour of a full commission of inquiry or proper negotiations with the Muaūpoko people. Yet no such tribunal was established to hear Muaūpoko's claims, nor did negotiations resume.

By the beginning of the 1940s, Muaūpoko had withdrawn from membership of the domain board. The Native Department reported: 'Until the dispute is settled regarding the ownership of the lake and the chain strip, the Maoris will not be likely to accept representation on the Domain Bd.'<sup>55</sup> It must be recalled that, while Harvey and Mackintosh had recommended that the Crown recognise Māori ownership of the lakebed as well as the chain strip, this had still not happened.

Further encroachments on the chain strip by farmers led Muaūpoko to send another deputation to Wellington in 1943, this time to meet with the new Native Minister, Rex Mason. Morison told the Minister that Muaūpoko were not asking for money but restoration of their land. The matter had dragged on, he said, feelings were high between Māori and the townspeople, and Muaūpoko felt a 'deep sense of injustice.'<sup>56</sup> Chief Judge Shepherd reported on the issue, advising that '[t]he Maoris throughout appear to have been quite reasonable in their reactions to the Public's use of the Lake.'<sup>57</sup> In his view, the domain board ought to be compelled

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52. Hamer, "A Tangled Skein" (doc A150), p124

53. Hamer, "A Tangled Skein" (doc A150), p126

54. Frank Langstone to Rātana, 26 November 1937 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p1594)

55. Minute, 4 December 1940, on registrar to under-secretary, Native Department, 28 November 1940 (Hamer, "A Tangled Skein" (doc A150), p126)

56. Record of meeting, 8 June 1943 (Hamer, "A Tangled Skein" (doc A150), p127)

57. Shepherd to under-secretary for lands, 21 October 1943 (Hamer, "A Tangled Skein" (doc A150), p127)

to fence the chain strip off from farmers, but otherwise he reiterated the Harvey–Mackintosh report as the solution to the problem.<sup>58</sup>

In November 1943, therefore, Mason replied formally to Morison, seeking to ‘remove the sense of injustice under which the Natives are labouring’. His offer was similar to that made in 1935: the chain strip and dewatered area could be ‘made available for the full use of the Natives’, subject to the ‘retention of an area comprising the chain strip and dry land for a distance of 83½ chains northward from the Makomako Road.’<sup>59</sup> In other words, the Crown was no longer offering to recognise Muaūpoko ownership of the chain strip and return it to their control, subject to a gift of land. It now offered to allow them the ‘full use’ of the chain strip and dewatered area, except for the piece it planned to retain.

Muaūpoko rejected this offer. In April 1944, Morison replied that the people were disappointed that it was essentially the same as that rejected nine years earlier in 1935.<sup>60</sup> Why should Muaūpoko have to ‘pay a price for having restored to them the control and use of their land which has been taken from them without their consent, and unjustly’?<sup>61</sup> That was the nub of the matter. It is clear that the nine-year delay had not occurred because of the Second World War or any reason other than the Crown’s continued insistence on an unjust settlement. If the Crown wanted that land for the recreation reserve, it needed to negotiate and pay for it. The Crown’s stance was patently unfair. Also, we agree with claimant counsel that it was unreasonable for the Crown to insist on acquiring more Muaūpoko land when the tribe had already lost so much.<sup>62</sup>

The Crown’s refusal to arrive at a fair settlement left all parties in limbo for the next eight years. Muaūpoko claimed the chain strip but could not prevent farmers from using it for grazing. At the same time, they tried to stop the public from crossing the dewatered land to access the lake or from using speedboats on the lake.<sup>63</sup> In 1947, they set out a plan to beautify the lake and lease the chain strip to raise an income, but could make no progress while their rights were not recognised by anyone.<sup>64</sup> On the other hand, the domain board could not develop facilities at the lake because the question of its rights vis-à-vis the Māori owners had still not been resolved. As will be recalled, the board had asked for clarification in 1934 but had not received it. Muaūpoko continued to boycott the domain board, which seems to have gone out of existence. By 1946 the Government was not appointing Pākehā members either.<sup>65</sup>

In 1943, the Levin Borough Council asked the Government to transfer control of the lake to the council so that it could ‘develop the Domain and the lake for

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58. Hamer, “A Tangled Skein” (doc A150), p127

59. Mason to Morison, 17 November 1943 (Hamer, papers in support of “A Tangled Skein” (doc A150(g)), p1602)

60. Hamer, “A Tangled Skein” (doc A150), p128

61. Morison to Mason, 17 April 1944 (Hamer, “A Tangled Skein” (doc A150), p128)

62. Claimant counsel (Ertel and Zwaan), submissions by way of reply, 14 April 2016 (paper 3.3.25), p13

63. Hamer, “A Tangled Skein” (doc A150), pp130–133

64. D A Armstrong, ‘Lake Horowhenua and the Hokio Stream, 1905–c1990’, May 2015 (doc A162), p55

65. Hamer, “A Tangled Skein” (doc A150), pp130–133

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recreational purposes, especially power boat racing.<sup>66</sup> The Government refused because the 1905 Act required Muaūpoko representation, and the issue of Māori ownership rights was still under discussion.<sup>67</sup> In 1946, therefore, the council changed tack and asked the Government to revive the domain board, again without success. It made another approach in 1951, arguing that the Crown needed to *buy* the necessary land for the domain and re-establish the board. In particular, the council wanted to obtain the land separating its 13-acre park from the lakeshore. The mayor and the local member of Parliament met with the Minister of Lands and Maori Affairs, Ernest Corbett, in May 1951 and February 1952. This local initiative revived Crown interest in the situation.<sup>68</sup> The Government agreed to arrange a meeting with ‘representative Maoris in the District’ and try to settle the dispute, and to acquire the land which the council wanted for the domain.<sup>69</sup>

**(2) The Crown’s new offer and Muaūpoko’s refusal, 1952**

Corbett’s officials considered that the Crown owned the lakebed and chain strip as a result of the 1905 Act, with compensation owed to the former Māori owners. Further research, however, revealed that the Crown’s title was ‘doubtful’, as the owners’ rights had been recognised by the Attorney-General in the 1905 *Hansard* at the time the Horowhenua Lake Act was passed. They reported to Corbett that the main problem was the ‘predominantly European’ domain board, which ignored the Māori owners and had even asked for the Māori representatives to be removed from the board. Also, Māori had a ‘definite grievance’, especially over the chain strip. They recommended that the Crown buy the whole recreation reserve, a ‘solution’ which they had already discussed with Muaūpoko’s lawyer.<sup>70</sup> Thus, Muaūpoko having consistently rejected the Crown’s proposal that they give up 83.5 chains, the Crown’s new proposal was to purchase the entire lakebed and chain strip. As Paul Hamer commented, ‘their proposed solution was likely to be profoundly unacceptable to Muaūpoko’.<sup>71</sup>

The first meeting between officials and Muaūpoko took place on 13 June 1952. E McKenzie, the assistant commissioner of Crown lands, advised Muaūpoko that he would recommend the Minister to recognise Māori ownership of the lakebed and chain strip. He also conceded that their past representation on the domain board might not have worked well. The Government, he said, was willing to hear proposals for a better arrangement to control the lake. McKenzie’s proposal, however, was that they transfer ownership of the lake to the Crown for ‘compensation’, after which *the Crown* would administer it for the people of Levin.<sup>72</sup>

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66. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 55

67. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 55

68. Hamer, “A Tangled Skein” (doc A150), pp 130–131

69. Director-general of lands to town clerk, 25 March 1952 (Hamer, “A Tangled Skein” (doc A150), p 131)

70. E McKenzie, JA Mills, and JM McEwen, ‘Horowhenua Lake Domain: Brief History and Recommendation’, not dated (Hamer, “A Tangled Skein” (doc A150), pp 133–135)

71. Hamer, “A Tangled Skein” (doc A150), p 135

72. Minutes of meeting held at Kawiū Hall, Levin, 13 June 1952 (Hamer, “A Tangled Skein” (doc A150), p 136)

A number of Muaūpoko people responded, including Mr Hurunui, who was '[p]leased to hear you say the title to the lake [was] in the Maoris'. Pākehā, he said, had destroyed the bush and flax near the lake and had claimed the dewatered area. But Muaūpoko would not sell their lake, their food supply and '[o]nly source of food in slump'. Clearly, the memory of hardship during the Depression was strong. He called for a 6:3 Māori majority on a new domain board.<sup>73</sup>

The meeting was adjourned so Muaūpoko could discuss the Crown's proposals privately with their lawyer, Neville Simpson. Their final response to McKenzie was that they would never sell their heritage, the lake, under any circumstances. They were, however, willing to consider any reasonable request for the Crown to acquire 'further rights' so that the local people could 'use the lake in the way it should be used'. McKenzie responded that the Crown would wait to see if they changed their minds; Wiki Rikihana said that they would 'not agree to sell to the Pakeha'.<sup>74</sup>

Dan Rikihana wrote to Corbett a few days later on behalf of his wife (Wiki). He reminded the Minister of Muaūpoko's grievances about the 1916 Act and the draining of the lake. These injustices occurred, he argued, because Muaūpoko were a powerless minority on the domain board.<sup>75</sup> Nonetheless, it was clear from Rikihana's letter and the June 1952 meeting that Muaūpoko were concerned about the board's demise. There was no authority whatsoever in charge of the lake. They wanted the domain board re-established but this time under their own control with a Māori majority.

After the Crown's purchase offer was so firmly rejected, officials reconsidered their position. They accepted that the borough council's two-thirds majority on the board placed Muaūpoko in an 'impossible position'.<sup>76</sup> They also considered a possible compromise: the Crown could restrict its purchase to the chain strip, recognising Muaūpoko ownership of the lakebed. After all, the Māori owners would want a 'large sum' for the lake, especially if 'claims were sustained for compensation for damage allegedly suffered and infringement of their rights in the past'.<sup>77</sup>

Astonishingly, officials reverted to the position taken in 1935: control of the surface of the lake and acquisition of 83.5 chains, but this time by purchase rather than by 'gift'. They recommended to Corbett that the Crown buy the 83.5 chains, while confirming Māori ownership of the lakebed and the remainder of the chain strip by statute. Māori owners would have to agree that the lake's surface was subject to the Public Reserves, Domains and National Parks Act 1928, while retaining 'any reasonable rights of user'. The domain board would consist of one representative each from the borough council, the county council, and sporting groups, while

73. Minutes of meeting at Kawiu Hall, Levin, 13 June 1952 (Hamer, "A Tangled Skein" (doc A150), p137). For the dependence of Muaūpoko on the lake during the Depression, see also Ada Tatana to F Hill, 5 November 2015, attachment 'D' to Fredrick Piripi Kingi Hill, attachments to brief of evidence, various dates (doc C21(a)), p [118].

74. Minutes of meeting at Kawiu Hall, Levin, 13 June 1952 (Hamer, "A Tangled Skein" (doc A150), pp 137–138)

75. Hamer, "A Tangled Skein" (doc A150), pp 137–138

76. Commissioner of Crown lands to director-general of lands, 20 June 1952 (Hamer, "A Tangled Skein" (doc A150), p140)

77. 'Head Office Committee, Lake Horowhenua Case No 6621', not dated (Hamer, "A Tangled Skein" (doc A150), p142)



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three Māori members would be chosen by the Native Department after consulting Muaūpoko elders. The 3:3 board would have an independent Pākehā chair.<sup>78</sup>

Nonetheless, officials also advised Corbett that purchasing the whole reserve (including the lake) was still the simplest answer. They worried that conflicting Māori and public interests would make it difficult for the board to control the lake under the 1928 Act if Māori owners retained rights of user. But the likely cost of buying the lake (£20,000) was prohibitive.<sup>79</sup> We note that officials did not recommend a process for hearing and compensating the claims which they had identified (for damage and past infringements of rights). Muaūpoko grievances in that respect were simply ignored.

Corbett agreed that Cabinet was unlikely to approve purchase of the lake at £20,000. He therefore approved the other recommendations on 29 October 1952. His view was that Māori were entitled to the lakebed under the Treaty of Waitangi, and that there was no point trying to challenge their ownership.<sup>80</sup> This was a significant turn-around for the Government, which had been resisting Māori lake claims politically and in the courts since the 1910s.<sup>81</sup> In Corbett's view, the best solution for Horowhenua was to purchase the part of the chain strip that was needed for the recreation reserve, and re-establish the board on a better footing. The Minister put this solution to a meeting of local authorities in November 1952, adding that drainage activities would have to be made part of the new arrangements.<sup>82</sup> He did not, however, share any particulars about the proposed new structure of the domain board (see section 9.2.4(4)).

In the meantime, Muaūpoko had asked Simpson to meet with Morison, now chief judge, to seek his advice. Morison facilitated a meeting between Simpson and officials in December 1952. At that meeting, Simpson accepted the Crown's position as reasonable so long as the new domain board would have veto power over drainage work on the Hōkio Stream.<sup>83</sup>

**(3) The 1953 agreement**

The lake trustees became involved in mid-1953. New trustees had not been appointed since 1898, but the court finally approved a new set of 14 trustees in 1951. As a result of an attempt by the mayor to join the negotiations, Tau Ranginui (chair of the lake trustees) approached McKenzie in June 1953. The trustees' position was that negotiations must be between the Crown and the Muaūpoko people. Ranginui asked for a Muaūpoko majority on the board (4:3). The commissioner of Crown lands could then act as chair with a casting vote. Also, Ranginui advised that the trustees were not prepared to sell the 83.5 chains. They were willing to consider a lease in

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78. Hamer, "A Tangled Skein" (doc A150), pp 140–142

79. Hamer, "A Tangled Skein" (doc A150), p 143

80. Hamer, "A Tangled Skein" (doc A150), pp 143, 144

81. Waitangi Tribunal, *Te Urewera, Pre-publication, Part V* (Wellington: Waitangi Tribunal, 2014), pp 49–126

82. Hamer, "A Tangled Skein" (doc A150), pp 143–144

83. Hamer, "A Tangled Skein" (doc A150), p 145



perpetuity but pointed out that the land was swampy and of little use to the Crown, which should be satisfied with the 13 acres it had already obtained from the tribe.<sup>84</sup>

In July 1953, McKenzie and other officials finally inspected the 83.5 chains which the Crown had wanted to acquire since 1934. They discovered that it was, as Tau Ranginui had suggested, boggy and unsuitable for the recreation reserve. The 22 chains fronting the current parkland (the 13 acres) would in fact suffice for public access to the lake. That area was actually less than what Muaūpoko had been willing to part with in their counter-offer back in 1935.<sup>85</sup> Paul Hamer commented: ‘This shows that settlement could have been achieved the best part of two decades earlier.’<sup>86</sup> The claimants were very critical of this belated recognition on the part of the Crown that it did not need the 83.5 chains, since the Crown’s insistence on obtaining it had prevented any settlement before 1953.<sup>87</sup>

As we noted above, Muaūpoko wanted a settlement. They sought an end to the situation in which there was no authority which could enforce its control over the lake and the chain strip. It was not in anyone’s interests for that to continue. They also wanted to prevent any recurrence of drainage works which might cause further harm to the lake, the stream, and the fisheries. They had asked the Crown to establish a new domain board under their control. The Crown’s change of position in 1953 – from purchasing the entire lake and chain strip to purchasing 22 chains – proved decisive in winning agreement, alongside an offer of greater control over both drainage and the domain board.

This was demonstrated at a meeting on 5 July 1953, immediately after the inspection of the 83.5 chains. Muaūpoko’s response to the Crown’s new offer was:

- ▶ They would not sell but would grant a lease in perpetuity for the 22 chains.
- ▶ They agreed to have four members on the domain board, and asked for the commissioner of Crown lands to chair the board. Their goal was to have an independent person in whom they had confidence, and who did not live in Levin. They also ‘felt that if the Chairmanship was handled by a Crown Official there would be fairness on all sides’.
- ▶ They would be ‘quite satisfied’ in respect of control of the Hōkio Stream if the Manawatu Catchment Board could do nothing to the stream without the agreement of the reconstituted domain board.
- ▶ The agreement should be specified in legislation.<sup>88</sup>

The commissioner reported that this agreement would give the Crown ownership of the ‘waters of the Lake’ as well as its ownership of its 13-acre reserve.<sup>89</sup> But

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84. Hamer, “A Tangled Skein” (doc A150), pp 128–129, 146–147

85. Hamer, “A Tangled Skein” (doc A150), pp 147–148

86. Hamer, “A Tangled Skein” (doc A150), p 148

87. Claimant counsel (Stone, Bagic, and Hopkins), closing submissions (paper 3.3.9), p 17

88. Assistant commissioner of Crown lands, ‘Note for file: Horowhenua Lake’, 6 July 1953 (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000’, various dates (doc A150(c)), pp 400–401)

89. Assistant commissioner of Crown lands, ‘Note for file: Horowhenua Lake’, 6 July 1953 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 401)

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Crown ownership of water was not how Simpson recorded Muaūpoko's agreement in a letter of 9 July 1953, listing eight specific terms:

- ▶ for the 22-chain frontage of the 13-acre reserve, the public would have free access to the lake across the chain strip and dewatered land, and the board would control that area;
- ▶ the 'balance of the Chain strip', the dewatered land, the lakebed, the Hōkio Stream, and the one chain strip on the north bank of the stream, would be confirmed in Māori ownership, their title to be 'validated by legislation';
- ▶ the surface waters of the lake would be subject to the 1928 Act and controlled by the domain board;
- ▶ the reconstructed board would have four 'Maori representatives and three Pakeha representatives' from the borough council, the county council, and 'Sports Bodies', with the commissioner of Crown lands as 'independent Chairman' – the mode of selecting members was not specified;
- ▶ the Manawatu Catchment Board would control the Hōkio Stream, but legislation would specify that no works could be carried out without the consent of the domain board;
- ▶ the lake would 'remain a sanctuary' and no speedboats would be allowed on it;
- ▶ in 'the event that the waters might further recede', the lake would be controlled at its current level, either by the Crown or the catchment board, and the owners would agree to a 'spillway or weir' so long as it did not interfere with their fishing rights; and
- ▶ Māori fishing rights would be confirmed.<sup>90</sup>

Corbett approved these eight terms of the agreement on 12 August 1953.<sup>91</sup>

It thus took almost 19 years to obtain an agreement; it was only at this point that obtaining the agreement of the local authorities became a pressing issue. We turn to that question next.

#### **(4) Persuading the local authorities, 1953–55**

Obtaining the agreement of the drainage board, catchment board, and county council proved straightforward. A meeting was held on 1 December 1953, at which the drainage board agreed to hand over responsibility to the catchment board. Muaūpoko and the catchment board agreed to the lake being maintained at '30 feet above low water spring tides at Foxton Beach – that is, the level obtained after the drainage work of 1926'.<sup>92</sup> The catchment board also agreed that domain board consent would be necessary for any works on the Hōkio Stream. Muaūpoko wanted the mechanism which controlled the lake level to include facilities for eels and other species to be able to enter and exit the lake. The catchment board agreed to that stipulation.<sup>93</sup>

90. NF Simpson to commissioner of Crown lands, 9 July 1953 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), pp 402–403)

91. Hamer, "A Tangled Skein" (doc A150), p149

92. Hamer, "A Tangled Skein" (doc A150), p149

93. Hamer, "A Tangled Skein" (doc A150), p149

The borough council, however, put up stiff resistance to the 1953 agreement. In 1951, the Crown had agreed to buy the part of the chain strip and dewatered land that the council wanted. Since then, however, the Government had excluded the mayor from the negotiations. Officials met with council representatives before the June 1952 meeting with Muaūpoko, but were not much impressed with the council's position. The mayor, A W Parton, asked for the domain board to be re-established immediately (without waiting for an agreement with Muaūpoko). He also argued that power boats had been on the lake from early in the century. Parton maintained that the lake had risen back to its original, pre-drainage level. Officials disagreed on all three points, especially after inspecting the level of the lake.<sup>94</sup>

As noted above, the Crown changed its negotiating position after the June 1952 meeting with Muaūpoko. The Government did not reveal its new negotiating stance to the council. In particular, officials were worried about how the council would take the proposal that its representation on the board (a two-thirds majority) would drop to a single member. The Minister met with local body representatives in November 1952 and rebuked the mayor for not dealing with Māori over the lake and for allowing distrust between Māori and the council to fester. He also told them that the lakebed belonged to Māori under the Treaty, and their rights to it could not be contested. He announced that he would refuse to sponsor legislation taking the lakebed from the tribe. One of the local body representatives argued in reply that it was absurd that Pākehā had a statutory right to use the lake for aquatic sports but were not allowed to cross the dewatered land to get to it. Corbett pointed out that it was the local authorities who had 'exposed the lake bed' and thus created the dewatered strip.<sup>95</sup>

The council was deliberately excluded from the Crown's negotiations with Muaūpoko in 1953, hence the mayor's attempt to negotiate directly with the tribe which (as described above) led the lake trustees to approach the Government.<sup>96</sup> After the July 1953 meeting at which agreement was reached between the Crown and Muaūpoko, the borough council would not agree to accept one seat on the domain board instead of its previous six. Nor would it agree to a Māori majority on the board, especially if it had to provide the bulk of the finance for administering the lake reserve. The council asked for a nine-member board with four Māori members, four Pākehā members, and an independent chair. The Government refused to change its agreement with Muaūpoko, threatening to abandon the issue altogether and leave management of the lake unresolved if the council would not agree. This led to a two-year standoff between the Crown and the borough council.<sup>97</sup>

Eventually, a compromise was worked out near the end of 1955. By April 1956, the Crown and council had agreed that the borough would have two seats on the domain board instead of one (sacrificing the sporting representative), and that the

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94. Hamer, "A Tangled Skein" (doc A150), pp 136, 140

95. Hamer, "A Tangled Skein" (doc A150), pp 143–144

96. Hamer, "A Tangled Skein" (doc A150), pp 145–147

97. Hamer, "A Tangled Skein" (doc A150), pp 148–151

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question of speedboats would be left to the domain board to decide rather than these being banned by statute.<sup>98</sup>

Muaūpoko were not involved in those discussions but they presumably agreed to the changes when presented with the draft legislation in September 1956. We consider that issue and the enactment of section 18 of the ROLD Act 1956 in the next section of our chapter, where we also assess the adequacy of the 1953 agreement in Treaty terms, the degree to which it was reflected in the ROLD Act 1956, and the extent to which the legislation provided a fair and durable settlement of Muaūpoko's rights and grievances.

Here, we note that a very different balancing of interests occurred in 1952–56. Local interests in drainage (represented by the drainage board) and development of the lake for recreation (represented by the borough council) had not been prioritised over those of Muaūpoko. This was a significant departure from how Muaūpoko interests had been treated in the past.

**9.2.5 Findings**

The Harvey–Mackintosh report was a significant advance for Muaūpoko in that it recognised their ownership of the lakebed and chain strip, and recommended the return of most of the chain strip and dewatered area to their control. It failed, however, to define the respective rights of the domain board and the Māori owners under the two legislative regimes (the 1905 Act and amending Acts, and the Public Reserves, Domains and National Parks Act 1928). Its recommendations were partly favourable to Muaūpoko, but it also recommended that the domain board be 'given' 83.5 chains for its resort plans. For the next 19 years, the Crown insisted on the latter point, with a brief blip in 1952 when it tried to buy the whole lake and chain strip as well. Finally, in 1953, the Crown agreed to the free use (not purchase) of a much smaller area, and a more comprehensive settlement was then negotiated with Muaūpoko.

Why did it take so long to reach a settlement? The Crown argued that it was reasonable for it to follow the recommendation of the Harvey–Mackintosh report (to acquire the 83.5 chains), and that delays were also caused by the Depression, the Second World War, and the resistance of local authorities. The claimants, on the other hand, maintained that it was not reasonable for the Crown to insist on an alienation of yet more Muaūpoko land when the tribe had already lost so much. They also argued that the Crown did not really need the 83.5 chains in any case, and so the delay was not only unfair to Muaūpoko but entirely unnecessary.

Article 2 of the Treaty stipulated that Māori would retain their land for so long as they wished, but could alienate it if they chose. Treaty principles required that any alienation had to be made by the free and informed choice of the Māori owners. Under the Treaty, the Crown had no right to insist that Muaūpoko give it 83.5 chains for no consideration, or even for a payment, unless there was no other alternative and a pressing need in the national interest. Further, as demonstrated very clearly

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98. Hamer, "A Tangled Skein" (doc A150), pp 151–152

in 1953, a more timely site inspection would have shown that the Crown did not even need the land it insisted on acquiring free of charge.

The delay between 1935 and 1952 was entirely attributable to the Crown's refusal to deal with Muaūpoko on any other terms. We do not see how the Depression or the Second World War played any role in the delay. Negotiations were resumed in 1943–44 without regard to the war. The real stumbling block was the unfairness of the Crown's insistence that Muaūpoko give up 83.5 chains of their land. As Muaūpoko's lawyer asked at the time, why should Muaūpoko have to 'pay a price for having restored to them the control and use of their land which has been taken from them without their consent, and unjustly'? Nor did the local authorities play a role in delaying a Crown–Māori agreement – the Levin Borough Council delayed settlement from 1954–56, *after* the Crown and Muaūpoko had reached agreement.

We find that the Crown breached the Treaty principles of partnership and active protection, and the plain meaning of article 2 of the Treaty, when it refused to settle with Muaūpoko for 17 years unless they met its unreasonable demand for a free 'gift' of land. Muaūpoko were prejudiced because all of their rights (including to the lakebed and chain strip) remained uncertain during that time, and none of their grievances were rectified. Their mana and tino rangatiratanga were compromised. They could not prevent use of the chain strip or damage to its resources by neighbouring farmers.

In 1952 to 1953, however, the Crown compromised, negotiated with Muaūpoko in good faith, and obtained a voluntary agreement in July–August 1953. We accept that a delay from late 1953 to late 1955 was caused by a local authority, and was not the fault of the Crown. We consider the merits of the agreement and the legislation which followed it in the next section of our chapter. We also assess whether the agreement and legislation removed the prejudice. Here, we note that there was at least a fairer balancing of interests in 1953–56 than had occurred previously, and that a free and informed agreement was reached between Māori and the Crown in 1953.

### **9.3 WERE MUAŪPOKO GRIEVANCES RECTIFIED BY THE 1956 LEGISLATION?**

#### **9.3.1 Introduction**

In this section of our chapter, we address the passage of section 18 of the Reserves and Other Lands Disposal (ROLD) Act 1956. We assess the extent to which the legislation faithfully reflected the 1953 agreement, and we compare crucial provisions with those of the 1905 and 1916 legislation. In the Crown's view, the 1956 Act provided a fair settlement of past grievances, and an appropriate co-management regime for the lake. Crown counsel did not accept that any features of the 1956 Act were in breach of the Treaty, and submitted that the Act's regime is still Treaty-compliant today. The claimants, on the other hand, were critical of the 1956 Act, arguing that it failed to empower Muaūpoko on the domain board and it still retained some of the defects of the 1905 legislation. We examine the extent to which



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the ROLD Act 1956 could be said to have settled past grievances and provided a remedy to past Treaty breaches.

After examining the legislation itself, we then assess how it has worked in practice between 1956 and 1988. We focus on Muaūpoko's representation on the domain board, to assess whether the new management regime empowered the Māori owners in the management and control of their lake. We also assess how the reformed domain board dealt with Māori fishing and birding rights, catchment board works on the Hōkio Stream, and the vexed issues about boating (especially speedboats). Finally, we analyse Muaūpoko calls for radical reform of the Act in the 1980s, including their demand that the domain board be abolished, control of the lake be transferred to the lake trustees, and a veto over catchment works also be transferred to the trustees.

Our analysis in this section is structured around two key questions:

- ▶ Did the 1956 legislation remedy Muaūpoko's grievances in respect of past legislation and Crown acts or omissions?
- ▶ Did the 1956 legislation provide a suitable platform for (a) future management of the lake and stream, and (b) protection of the Māori owners' rights and interests?

We turn next to summarise the parties' arguments about the enactment of section 18, and the arrangements which it set in place for the following 60 years.

**9.3.2 The parties' arguments**

**(1) The claimants' case**

Claimant counsel noted that the Crown made concessions about the 1905 Act but not about the 1956 legislation, despite – in the claimants' view – the inconsistency of the ROLD Act 1956 with Treaty principles.<sup>99</sup>

Some claimants took an extremely negative view of the 1956 Act and its effects. Philip Taueki submitted:

Following further and ongoing protests from Mua-Upoko, a few meaningless and worthless changes to the legislation surrounding the Lake were included in the 1956 ROLD Act. The effect is that now the Crown and the public have total control of our land and buildings at the lake.<sup>100</sup>

Other claimants, however, considered that the ROLD Act did deliver some benefits to Muaūpoko. Counsel for Wai 1491 and Wai 1621 argued that the Act 'did contain important recognition of the legal ownership by Muaupoko of some aspects of the lake, and the inalienability of fishing rights'.<sup>101</sup> Nonetheless, the claimants as a whole agreed that the benefits of the 1956 reform were far outweighed by its defects.

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99. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 46

100. Philip Taueki, closing submissions, 12 February 2016 (paper 3.3.15), p [2]

101. Claimant counsel (Watson), closing submissions, 15 February 2015 (paper 3.3.21), p17; see also claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 46; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 278



The legislation ‘failed miserably to address the prejudice which had arisen from previous regimes. In many cases, the situation was compounded by the new Act.’<sup>102</sup> In particular, the claimants argued that the 1956 Act continued to prioritise public recreation over Muaūpoko rights and interests.<sup>103</sup> It also failed to deal with pollution at the very time the lake was being ‘polluted by Levin’s effluent’. ‘Despite having an opportunity to correct the mistakes of the past,’ we were told, ‘the Crown failed to do so and the 1956 Act continued to minimise Muaupoko’s position as tangata whenua and as the Crown’s Treaty partner.’<sup>104</sup> No compensation was paid (or settlement made) for past breaches, and so the Act did no more than ‘calm Muaupoko concerns for a short period’.<sup>105</sup>

In respect of the functioning of the Act’s management regime, the claimants argued that Muaūpoko were unable to exercise their kaitiakitanga over the lake. This crucial failing enabled the environmental degradation of the lake to take place under domain board management.<sup>106</sup> In particular, the claimants argued that the Crown’s poor chairmanship of the board was responsible for this outcome. Muaūpoko had expected the Crown chairman to be their

guarantee that the balance of Muaūpoko and public rights might be properly reached. Consequently, Crown actions after 1956, including the Health Department push to temporarily dump sewage in the lake, and the failure to provide resources and strong leadership on this issue to the board, at any time since 1956 and right through to the present day, have to be measured against the Muaūpoko understanding in 1956 that the Crown would remain guarantor of their interests over any local authority failures or backsliding.<sup>107</sup>

In the claimants’ view, conflict arose between Muaūpoko and local Pākehā interests (and within Muaūpoko over board membership) but the Crown failed to investigate or help mediate these problems.<sup>108</sup>

In 1958, the claimants submitted, the Crown supposedly endorsed the tribe’s blueprint for development of the lake and its surrounds. Instead of acting in partnership, however, the Crown then ‘began to actively undermine the basis of the 1953 and 1958 agreements, and even tried to resile from the ROLD Act itself’.<sup>109</sup> By 1982, the Muaūpoko walk-out from the domain board showed the extent of the tribe’s disillusionment with the 1956 Act. The tribe wanted to abolish the board and control the lake directly. Claimant counsel submitted that the Crown’s failure in the

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102. Claimant counsel (Watson), closing submissions (paper 3.3.21), p 17

103. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 47; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 280

104. Claimant counsel (Stone, Bagic, and Hopkins), closing submissions (paper 3.3.9), p 18

105. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply, 21 April 2016 (paper 3.3.33), p 11

106. Claimant counsel (Watson), closing submissions (paper 3.3.21), p 17

107. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 47

108. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 278–279

109. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 48

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1980s to enact promised reforms (in response to the tribe's wishes) was 'a breach of the Crown's duty to provide for the expression of Muaūpoko rangatiratanga.'<sup>110</sup>

**(2) *The Crown's case***

In the Crown's view, the ROLD Act 1956 was entirely consistent with Treaty principles. It reflected an informed agreement with Muaūpoko owners, which 'gave stronger representation rights and more clearly defined legal rights and status to Muaūpoko than was the case under the 1905 and 1916 statutes.'<sup>111</sup> The 1956 Act strikes

a reasonable balance between relevant interests, including both owner and broader iwi interests, in the Lake. Since 1956, the Lake has been subject to a co-management regime instituted in accordance with [the] owners' wishes at the time. As noted, that regime preserved the owners' fishing rights and ownership of the Lake Bed.<sup>112</sup>

The Crown accepted, however, that the management regime established by the Act 'has not always operated effectively in the past. Current and future discussions may offer real opportunities to reform the existing legislation to better reflect Crown-Māori best practice in the modern era, and in doing so give better effect to Treaty principles.'<sup>113</sup>

This admission did not constitute an admission of Treaty breach.<sup>114</sup> The Crown's view was that its role as chair of a 4:4 board was only a 'limited role' in which its casting vote had never had to be used.<sup>115</sup> Crown counsel acknowledged that 'there have been periods where the management regime has not functioned as intended'. Nonetheless, 'the Crown does not accept that it is directly responsible for these periods, which reflect a complex interplay of customary interests and competing personal and local aspirations and attitudes'. In the Crown's submission, it could not have compelled iwi representatives to attend board meetings if they chose not to do so, nor could it interfere directly in internal board and iwi matters.<sup>116</sup>

The Crown also acknowledged that Muaūpoko's 1958 plan for development did not proceed, but argued that this was because of 'prohibitive costs' and over-ambition despite some Government funding.<sup>117</sup>

Crown counsel did not make any specific submissions about the proposed legislative reforms of the 1980s.

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110. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 279–280

111. Crown counsel, closing submissions (paper 3.3.24), p 56

112. Crown counsel, closing submissions (paper 3.3.24), p 54

113. Crown counsel, closing submissions (paper 3.3.24), p 51

114. Crown counsel, closing submissions (paper 3.3.24), p 59

115. Crown counsel, closing submissions (paper 3.3.24), p 56

116. Crown counsel, closing submissions (paper 3.3.24), p 59

117. Crown counsel, closing submissions (paper 3.3.24), p 59

### 9.3.3 Did the 1956 legislation remedy Muaūpoko's grievances in respect of past legislation and Crown acts or omissions?

#### (1) *The terms of section 18 of the ROLD Act 1956*

Because of its importance to this chapter of our report, we reproduce here the preamble and relevant subsections of section 18 of the Reserves and Other Lands Disposal Act 1956:

**18. Special provisions relating to Lake Horowhenua**—Whereas under the authority of the Horowhenua Block Act 1896, the Maori Appellate Court on the twentieth day of September, eighteen hundred and ninety-eight, made an Order determining the owners and relative shares to an area of thirteen thousand one hundred and forty acres and one rood, being part of the Horowhenua XI Block: And whereas the said area includes the Horowhenua Lake (as shown on the plan lodged in the office of the Chief Surveyor at Wellington under Number 15699), a one chain strip around the lake, the Hokio Stream from the outlet of the lake to the sea, and surrounding land: And whereas certificate of title, Volume 121, folio 121, Wellington Registry, was issued in pursuance of the said Order: And whereas by Maori Land Court Partition Order dated the nineteenth day of October, eighteen hundred and ninety-eight, the lake was vested in trustees for the purposes of a fishing easement for all members of the Muaupoko Tribe who might then or thereafter own any part of the Horowhenua XI Block (in this section referred to as the 'Maori owners'): And whereas the minutes of the Maori Land Court relating to the said Partition Order recorded that it was also intended to similarly vest the one chain strip around the lake, the Hokio Stream from the outlet of the lake to the sea, and a one chain strip along a portion of the north bank of the said stream, but this was not formally done: And whereas the Horowhenua Lake Act 1905 declared the lake to be a public recreation reserve under the control of a Domain Board (in this section referred to as the 'Board') but preserved fishing and other rights of the Maori owners over the lake and the Hokio Stream: And whereas by section ninety-seven of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1916 the said one chain strip around the lake was made subject to the Horowhenua Lake Act 1905, and control was vested in the Board: And whereas subsequent legislation declared certain land adjoining the said one chain strip, and more particularly firstly described in subsection thirteen of this section, to form part of the recreation reserve and to be under the control of the Board: And whereas as a result of drainage operations undertaken some years ago on the said Hokio Stream the level of the lake was lowered, and a dewatered area was left between the margin of the lake after lowering and the original one chain strip around the original margin of the lake: And whereas this lowering of the lake level created certain difficulties in respect of the Board's administration and control of the lake, and in view of the previous legislation enacted relating to the lake, doubts were raised as to the actual ownership and rights over the lake and the one chain strip and the dewatered area: And whereas a Committee of Inquiry was appointed in 1934 to investigate these problems: And whereas the Committee recommended that the title to the land covered by the waters

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of the lake together with the one chain strip and the said dewatered area be confirmed by legislation in ownership of the trustees appointed in trust for the Maori owners: And whereas certain other recommendations made were unacceptable to the Maori owners, and confirmation of ownership and further appointment of a Domain Board lapsed pending final settlement of the problems affecting the lake: And whereas by Maori Land Court Order dated the eighth day of August, nineteen hundred and fifty-one, new trustees were appointed for the part of Horowhenua XI Block in the place of the original trustees, then all deceased, appointed under the said Maori Land Court Order dated the nineteenth day of October, eighteen hundred and ninety-eight: And whereas agreement has now been reached between the Maori owners and other interested bodies in respect of the ownership and control of the existing lake, the said one chain strip, the said dewatered area, the said Hokio Stream and the chain strip on a portion of the north bank of that stream, and certain ancillary matters, and it is desirable and expedient that provision be made to give effect to the various matters agreed upon: Be it therefore enacted as follows:

(1) For the purposes of the following subsections:

‘Lake’ means that area of water known as Lake Horowhenua enclosed within a margin fixed by a surface level of 30 feet above mean low water spring tides at Foxton Heads:

‘Dewatered area’ means that area of land between the original margin of the lake shown on the plan numbered SO 15699 (lodged in the office of the Chief Surveyor, at Wellington) and the margin of the lake as defined aforesaid:

‘Hokio Stream’ means that stream flowing from the outlet of the lake adjacent to a point marked as Waikiekie on plan numbered SO 23584 (lodged in the office of the Chief Surveyor, at Wellington) to the sea.

(2) Notwithstanding anything to the contrary in any Act or rule of law, the bed of the lake, the islands therein, the dewatered area, and the strip of land one chain in width around the original margin of the lake (as more particularly secondly described in subsection thirteen of this section) are hereby declared to be and to have always been owned by the Maori owners, and the said lake, islands, dewatered area, and strip of land are hereby vested in the trustees appointed by Order of the Maori Land Court dated the eighth day of August, nineteen hundred and fifty-one, in trust for the said Maori owners.

(3) Notwithstanding anything to the contrary in any Act or rule of law, the bed of the Hokio Stream and the strip of land one chain in width along a portion of the north bank of the said stream (being the land more particularly thirdly described in subsection thirteen of this section), excepting thereout such parts of the said bed of the stream as may have at any time been legally alienated or disposed of by the Maori owners or any of them, are hereby declared to be and to have always been owned by the Maori owners, and the said bed of the stream and the said strip of land are hereby vested in the trustees appointed by Order of the Maori Land Court dated the eighth day of August, nineteen hundred and fifty-one, in trust for the said Maori owners.

(4) Notwithstanding the declaration of any land as being in Maori ownership under this section, there is hereby reserved to the public at all times and from time to time the free right of access over and the use and enjoyment of the land fourthly described in subsection thirteen of this section.

(5) Notwithstanding anything to the contrary in any Act or rule of law, the surface waters of the lake together with the land firstly and fourthly described in subsection thirteen of this section, are hereby declared to be a public domain subject to the provisions of Part III of the Reserves and Domains Act 1953:

Provided that such declaration shall not affect the Maori title to the bed of the lake or the land fourthly described in subsection thirteen of this section:

Provided further that the Maori owners shall at all times and from time to time have the free and unrestricted use of the lake and the land fourthly described in subsection thirteen of this section and of their fishing rights over the lake and the Hokio Stream, but so as not to interfere with the reasonable rights of the public, as may be determined by the Domain Board constituted under this section, to use as a public domain the lake and the said land fourthly described.

(6) Nothing herein contained shall in any way affect the fishing rights granted pursuant to section nine of the Horowhenua Block Act 1896.

(7) Subject to the provisions of this section, the Minister of Lands shall appoint in accordance with the Reserves and Domains Act 1953 a Domain Board to control the said domain.

(8) Notwithstanding anything to the contrary in the Reserves and Domains Act 1953, the Board shall consist of—

- (a) Four persons appointed by the Minister on the recommendation of the Muaupoko Maori Tribe:
- (b) One person appointed by the Minister on the recommendation of the Horowhenua County Council:
- (c) Two persons appointed by the Minister on the recommendation of the Levin Borough Council:
- (d) The Commissioner of Crown Lands for the Land District of Wellington, *ex officio*, who shall be Chairman.

(9) Notwithstanding anything in the Land Drainage Act 1908, the Soil Conservation and Rivers Control Act 1941, or in any other Act or rule of law, the Hokio Drainage Board constituted pursuant to the said Land Drainage Act 1908 is hereby abolished, and all assets and liabilities of the said Board and all other rights and obligations of the said Board existing at the commencement of this Act shall vest in and be assumed by the Manawatu Catchment Board, and until the said Catchment Board shall have completed pursuant to the Soil Conservation and Rivers Control Act 1941 a classification of the lands previously rated by the said Drainage Board, the said Catchment Board may continue to levy and collect rates in the same manner as they have hitherto been levied and collected by the said Drainage Board.

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(10) The Manawatu Catchment Board shall control and improve the Hokio Stream and maintain the lake level under normal conditions at thirty feet above mean low water spring tides at Foxton Heads:

Provided that before any works affecting the lake or the Hokio Stream are undertaken by the said Catchment Board, the prior consent of the Domain Board constituted under this section shall be obtained:

Provided further that the said Catchment Board shall at all times and from time to time have the right of access along the banks of the Hokio Stream and to the lake for the purpose of undertaking any improvement or maintenance work on the said stream and lake.

(11) [*Authorises the District Land Registrar to register the documents and plans necessary to give effect to section 18*]

(12) [*Repeals the Horowhenua Lake Act 1905 and subsequent amending legislation*]

(13) [*Describes the land to which section 18 applies*]

Section 18 of the 1956 Act still governs the ownership and management of Lake Horowhenua today, although statutes such as the RMA 1991 have altered the obligations and powers of various bodies which administer the lake and Hōkio Stream.

**(2) What changes had been made to the 1953 agreement?**

In essence, the 1956 legislation reflected seven of the eight key points agreed between the Crown and Muaūpoko in 1953 (the points of agreement are listed in section 9.2.4(3)). The missing item was that the lake would remain a ‘sanctuary’, and that speedboats would not be permitted on it. After discussions with the borough council, the Crown agreed to leave the issue of speedboats for the domain board to resolve through its bylaws.<sup>118</sup>

In respect of a wildlife ‘sanctuary’, the Reserves and Domains Act 1953 would apply to the lake once the 1956 Act was passed. This Act would make it an offence to shoot any bird without the board’s permission.<sup>119</sup> In addition, the board passed a bylaw in 1963, stating:

No person shall within the limits of the Domain shoot, snare, destroy, or interfere with any bird, animal or fish, or destroy the nests or eggs of any birds, except with the written permission of the Board.

Provided that in the case of any bird or animal covered by the Wildlife Act 1953 no such permission shall be granted unless and until the provisions of that Act have been complied with.<sup>120</sup>

In mid-1956, the Government sent the draft legislation to Muaūpoko’s lawyers to obtain the tribe’s agreement to its terms. The Government also sought the

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118. Hamer, “A Tangled Skein” (doc A150), p 152

119. Hamer, “A Tangled Skein” (doc A150), p 178

120. Commissioner of Crown lands to director-general of lands, 6 April 1973 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 571)



agreement of the Levin Borough Council, the catchment board, and the Hokio Drainage Board. On 11 September 1956, the commissioner of Crown lands reported that the tribe's lawyers, Morison, Spratt, and Taylor, were 'in agreement' to the draft clause of the ROLD Bill. We have no information as to what process the lawyers followed to confirm the agreement of the Māori owners or of the tribe more generally. But Neville Simpson reported agreement to the Crown, which proceeded with the legislation accordingly.<sup>121</sup> In our hearings, Dr Procter argued that 'there was no approval from Muaūpoko unless you can tell me that there was a letter from the whole iwi saying, "Yes we accept this."<sup>122</sup>

When the ROLD Bill was introduced, Corbett argued that it 'meets fully the wishes of the Maori owners' and settled a 'subject of controversy for the last fifty years'. This was not disputed by the local Māori member, Eruera Tirikatene. Rather, he responded that Muaūpoko had been very generous in recognising the need for public recreation, and asked for a formal assurance that there would be 'no further encroachment on the rights of the Maoris to the bed of the lake and over the waters of the lake'. Tirikatene pointed to the matter of speedboats, which had been left out of the legislation: 'The Maori owners have felt that motor boat racing on the lake is detrimental to the waterfowl and other birdlife there, and that the lake should be retained as a bird sanctuary'. Tirikatene accepted, however, that the reconstituted domain board was a 'fairly genuine attempt to give the Maori a say in matters concerning the lake and the property around it'.<sup>123</sup>

On balance, we are satisfied that there was genuine, free, and informed consent on the part of the Muaūpoko owners to the 1956 legislation. They had the benefit of legal advice from Neville Simpson, who told the Crown in 1956 that his clients agreed to the draft legislation (see above). Further, Crown counsel pointed to Muaūpoko's clear and public support for the Act at a major hui in 1958.<sup>124</sup> Held at Kawiu Pa, this hui marked the tribe's ceremonial agreement to the 1956 legislation, and also the tribe's requirement that the Crown in return assist plans for economic development.<sup>125</sup>

The chair of the lake trustees, Tau Ranginui, proclaimed the hui 'a great day of gladness, humility and deep satisfaction. Our long-outstanding grievance has been settled – our lands restored to us – and we can now take an honoured place in the community'.<sup>126</sup> The hui was attended by Prime Minister Walter Nash, Mrs Iriaka Rātana (member for Western Maori), the chief judge of the Maori Land Court, local dignitaries, and a 'large number of Muaupoko' and neighbouring tribes.<sup>127</sup> Muaūpoko presented a development plan for the lake, which will be discussed in

121. Commissioner of Crown lands to director-general of lands, 11 September 1956 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), p 433); Hamer, "A Tangled Skein" (doc A150), pp 152–153

122. Transcript 4.1.12, p 898

123. NZPD, 1956, vol 310, pp 2712–2714 (Hamer, "A Tangled Skein" (doc A150), pp 154–155)

124. Crown counsel, closing submissions (paper 3.3.24), p 58

125. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), pp 72–74

126. Unidentified newspaper clipping, 1958 (Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 73)

127. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 72

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more detail later. Most important for our purposes here was a ‘Declaration’, which was part of the development plan, and which the trustees produced to be signed by the Prime Minister and other attendees. David Armstrong explained:

The ‘Declaration’ acknowledged the terms of the 1956 ROLD Act, which for Muaupoko represented the restoration and confirmation of their ‘lands, rights, privileges and prestige’. It further stated that the tribe was determined to work with its ‘Pakeha brethren’ to enhance, beautify and develop the lake and its resources for the benefit of all. According to the *Levin Chronicle* this event was ‘reminiscent of the signing of the Treaty of Waitangi’. Mr Ranginui stated that this was indeed a symbolic document: ‘it will be sacred to the tribe when signatures are on it’. The ‘Declaration’ was duly signed by Prime Minister Nash, local body politicians, Domain Board members and tribal representatives, including Mr Ranginui.<sup>128</sup>

Mr Hamer provided us with a copy of the ‘Declaration’ in his supporting papers (see sidebar).

We therefore accept the Crown’s submission to us that the 1956 legislation was ‘clearly in accordance with owners’ wishes and followed extensive negotiation.’<sup>129</sup> The question remains, however, as to what extent the legislation provided an effective remedy for Muaūpoko grievances. We turn to that question next.

**(3) Did the legislation provide an effective remedy for past legislation and Crown acts or omissions?**

**(a) The dispute as to whether the 1956 Act remedied grievances:** In our inquiry, the Crown argued that, ‘to the extent any prejudice might be said to flow from earlier legislation as to control and/or rights, that prejudice was remedied by the enactment of the 1956 Act.’<sup>130</sup> The Crown intended the Act to recognise Muaūpoko rights and in so doing to recalibrate the ‘balancing of rights and interests’ as implemented by earlier legislation. The new Act, Crown counsel submitted, would ‘better reflect Muaūpoko interests and rights than the previous regime. The agreement referred to in the Act, and the legislation itself, were good faith attempts to resolve Muaūpoko grievances regarding the Lake.’<sup>131</sup> The Crown also submitted that the Act ‘gave stronger representation rights and more clearly defined legal rights and status to Muaūpoko than was the case under the 1905 and 1916 statutes.’<sup>132</sup>

In the claimants’ view, however, the ROLD Act 1956

did contain important recognition of the legal ownership by Muaupoko of some aspects of the lake, and the inalienability of fishing rights, but the legislation failed

128. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 73

129. Crown counsel, closing submissions (paper 3.3.24), p 56

130. Crown counsel, closing submissions (paper 3.3.24), p 57

131. Crown counsel, closing submissions (paper 3.3.24), p 57

132. Crown counsel, closing submissions (paper 3.3.24), p 56

**DECLARATION**

The Trustees and members of the Muaupoko tribe gladly acknowledge the recent legislation whereby:

The bed of Lake Horowhenua

The islands in the Lake

The dewatered area

The chain strip around the Lake

The bed of the Hokio Stream, and

The chain strip on the northern bank of the Hokio Stream, are granted in ownership to its people.

In gratitude of the confirmation of its lands rights and privileges and the restoration of its prestige, the tribe is determined to work with its Pakeha Brethren on the Horowhenua Lake Domain Board to beautify and provide the amenities as illustrated in this document.<sup>1</sup>

1. Pāūl Hāmēr, cōmp, sūppōrtīng pāpērs fōr “Ā Tānglēd Skēīn”, vārīōūs dātēs (dōc A150(c)), p 449

miserably to address the prejudice which had arisen from previous regimes. In many cases, the situation was compounded by the new Act.<sup>133</sup>

The claimants highlighted what they saw as the continued prioritisation of public recreation rights over the fishing and other rights of the Māori owners. Claimant counsel quoted section 18(5) of the Act that the Māori owners' fishing and other rights were 'not to interfere with the reasonable rights of the public, as may be determined by the Domain Board.'<sup>134</sup> Hence, in the claimants' view, the 1956 Act

continued the substantial and unnecessary interference by the Crown in the owners' property rights. It cannot be consistent with the Treaty of Waitangi. In effect, ROLD56 largely continued the Treaty breach first brought about by the 1905 Act. It cannot be assessed on its own terms for compliance with Treaty principles, as it makes sense only in the context of the breach of 1905, and exists only for the purpose of continuing that breach.<sup>135</sup>

Claimant counsel accepted that the 1956 Act made public rights

133. Claimant counsel (Watson), closing submissions (paper 3.3.21), p 17

134. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 47; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 280

135. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 9

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subject to a caveat of being ‘reasonable’, which allows some space for argument that the public recreation priority is not intended to be as comprehensive as in the 1905 Act, but the effective ‘freezing’ of Muaūpoko’s development rights continues while public rights and uses under the Reserves Act 1977 are left free to develop in new ways.<sup>136</sup>

**(b) Key omissions from the 1956 Act:** We note first that there were a number of omissions in the legislation.

First, it provided no compensation for past acts or omissions of the Crown, which were described in the previous chapter. This included:

- ▶ no compensation for past use of the lake and chain strip in the domain, especially uses to which Muaūpoko had not agreed in 1905;
- ▶ no compensation for vesting control of their private property, the chain strip, in the domain board in 1916 against Muaūpoko’s wishes;
- ▶ no compensation for interference with Muaūpoko fishing rights by stocking the lake with new species (without consent) and by the grant of permission for non-Māori to fish in the lake; and
- ▶ no compensation for the damage done to their private property (the lake and stream beds), their fisheries, and their ability to exercise their fishing rights, by the activities of the Hokio Drainage Board in the 1920s.

The claimants pointed out that the 1956 legislation did not in fact ‘purport to settle all historic issues relating to the lake.’<sup>137</sup> We agree, and note too that no compensation was provided for past infringements of Muaūpoko rights.

Nor did the legislation include provisions controlling pollution or the entry of water-borne pollutants into the lake. The domain board was given no powers in this respect, yet pollution was known to be a problem before the 1956 Act was passed. This was a crucial omission for the claimants in our inquiry.<sup>138</sup> We return to this issue in chapter 10.

Other omissions included the failure to grant an annuity or rental or some such payment to the Māori owners for the future, ongoing use of their lake by the public. Muaūpoko’s ambitious plan to develop the lake as a resort in partnership with the local council in 1958 could not proceed without Crown assistance, which ended after an initial grant of £2,000.<sup>139</sup> Other iwi were paid annual sums for the use of their lakes, although that took the form of alienations (see, for example, the Rotorua lakes, Lake Taupō, and Lake Waikaremoana).<sup>140</sup>

136. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), p 47

137. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 11

138. Transcript 4.1.12, pp 898–899; claimant counsel (Watson), closing submissions (paper 3.3.21), p 17; claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 18

139. Hamer, “A Tangled Skein” (doc A150), p 163

140. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One, revised ed.*, 4 vols (Wellington: Legislation Direct, 2009), vol 4, pp 1262, 1317–1320; Waitangi Tribunal, *Te Urewera, Pre-publication, Part V*, pp 215–228, 268–271

In addition, the 1956 Act made no provision for how members of the domain board should be selected. This proved to be a source of great trouble and confusion in the future.<sup>141</sup>

Despite these important omissions, however, the ROLD Act 1956 was a credit to the Crown in certain respects because it provided a remedy or potential remedy for some key grievances of Muaūpoko. We outline those next.

**(c) Remedies or potential remedies of Muaūpoko grievances:** First, section 18 of the ROLD Act 1956 formally recognised Muaūpoko ownership of the lake bed, the chain strip, the Hōkio Stream bed, and the chain strip along the north bank of the stream. To the extent that Muaūpoko ownership had been placed in doubt – which was certainly the case from the 1920s to the early 1950s – the 1956 legislation provided a remedy. It also specified that the Māori owners’ title to the lakebed was not affected by the inclusion of the surface waters in a public domain, an issue which had previously called their ownership into question.

We note, however, that the intervention of Lands Department officials prevented the recognition of Māori ownership of the whole Hōkio Stream bed. In the mistaken belief that the *ad medium filum aquae* presumption applied, officials argued that some parts of the stream bed would have been sold with the sale of adjoining land on the southern banks.<sup>142</sup> The *ad medium filum* doctrine is a presumption that the adjoining landowner’s property goes to the centre of the stream bed, but it can be rebutted by evidence to the contrary. In this case, the orders of the Native Appellate Court in 1898 specifically awarded ownership of the stream bed to the present and future owners of Horowhenua 11 as an inalienable reserve.<sup>143</sup> Ownership of the *south* bank (which lay with the owners of Horowhenua 9) had not been a factor in the award of the whole stream bed to the owners of Horowhenua 11, and clearly the court was not acting on the *ad medium filum* presumption as the bed itself was specifically vested.

Secondly, section 18 restored control of the chain strip and dewatered land to Muaūpoko, reversing the effects of the 1916 legislation.

Thirdly, the constitution of the domain board was reformed. This rectified the imbalance created by legislation in 1905 and 1916, which restricted Muaūpoko to a one-third minority membership. The 1916 Act had also given the Levin Borough Council control of the board with a two-thirds majority. The new legislation remedied this situation by giving Muaūpoko a majority on the domain board. The borough council was restricted to two seats, with a third seat for the county council. The removal of representation for sporting interests meant that the new domain board would consist of four Māori representatives on one side, three local body representatives on the other, and a neutral Crown chair to provide a casting vote in the event of a tie. Muaūpoko thus had a 4:3 majority. As Ada Tatana explained it for

141. Hamer, “A Tangled Skein” (doc A150), pp 273–278, 300–303; claimant counsel (Lyll and Thornton), closing submissions (paper 3.3.19), p 30

142. Hamer, “A Tangled Skein” (doc A150), p 152

143. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 3 (paper 3.3.17(b)), pp 17–18



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the Minister in 1986, the ‘Chairman was confirmed by the owners but to have no voting powers except in a 50/50 situation. The seven members of the Board was also confirmed because the owners wish[ed] to retain the majority.’<sup>144</sup>

Some claimants have queried whether a ‘4/4 board’ did in fact give Muaūpoko a majority,<sup>145</sup> but Paul Hamer explained in his evidence that it did so.<sup>146</sup> Mr Hamer argued that the Pākehā members no longer controlled the board under the 1956 Act because the chairman only exercised a casting vote and not a deliberative vote:

McKenzie’s note of the 6 July 1953 meeting was that Muaūpoko wanted an ‘independent Chairman’. He explained that ‘By adopting this representation it is felt that the quality of representation would be equalised and that an official as chairman will have the casting vote should dispute arise and being a responsible official he would lean in whatever direction he felt was right and proper’ . . . As to how this worked in practice, the observation of Judge Smith in 1982 is instructive. As he put it: ‘theoretically the Muaupoko tribe can control the policy of the Domain Board, the practice of the Commissioner of Crown Lands apparently being to exercise only a casting vote, if necessary.’<sup>147</sup>

It was, however, a very narrow majority. Only one Muaūpoko member had to be absent or to disagree with the others for it to disappear. As James Broughton put it in 1982, ‘We feel as if we haven’t had enough say. If one of our (tribal) members goes against the wishes of the rest, we’ve lost our control.’<sup>148</sup>

Fourthly, local drainage bodies lost the power to carry out works on the Hōkio Stream without the consent of the domain board. This was designed to prevent a recurrence of the events of 1925–26. If the Muaūpoko majority could control the board’s veto, the new legislation would give significant protection to Muaūpoko’s rights and interests in the stream and its fisheries.

Included in this statutory provision was a requirement that the lake be held at ‘30 feet above mean low water spring tides at Foxton Heads.’<sup>149</sup> This proved controversial later, when the relatively shallow waters in summer were too warm for some species of fish life.<sup>150</sup>

Fifthly, Muaūpoko fishing rights (and those of the owners of Horowhenua 9) were given statutory recognition and protection. Muaūpoko witnesses in our

144. Ada Tatana to Koro Wetere, Minister of Lands, 16 February 1986 (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(e)), p1063)

145. Claimant counsel (Bennion, Whiley, and Black), closing submissions (paper 3.3.17(b)), p 47

146. Transcript 4.1.12, p 481

147. Paul Hamer, summary of points of difference with David Armstrong’s report (#A162), December 2015 (doc A150(n)), p 8

148. Hamer, “A Tangled Skein” (doc A150), pp 333, 360; ‘Lake Trustees to Get Together with Owners’, undated and unsourced newspaper clipping [ca November 1982] (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(d)), p747)

149. Reserves and Other Lands Disposal Act 1956, s18(1)

150. Hamer, “A Tangled Skein” (doc A150), pp 308–309



hearings pointed out that the legislation accorded a strong and unique form of protection which extended as far as the Hōkio beach.<sup>151</sup> As Eugene Henare put it:

Now, as you have been made aware, Muaūpoko have a very special unique legislative right and [it] is unrestricted fishing rights. No other people have this in the country. No other people. It's only the people who are here today that have the special unique legislative right.<sup>152</sup>

Robert Warrington told us: 'I'd love to see the ROLD Act sort of changed, but every time I've mentioned that there are some people [who] are saying, "Don't you get rid of our customary fishing rights," so . . .'<sup>153</sup>

Here, too, the question of the Muaūpoko majority on the domain board was crucial. As will be recalled from chapter 8, the 1905 Act and amending legislation had created a hierarchy of rights, giving priority to Pākehā recreational users over the fishing and all other rights of the Māori owners. The 1956 legislation recreated this hierarchy, to the extent that the 'unrestricted' rights of the Māori owners were not to interfere with the 'reasonable rights of the public' to use the lake as a domain. But this time the 'reasonable' use rights of the public were to be defined by the domain board.<sup>154</sup> This was certainly the view of the Lands Department's solicitor in 1973, who gave as his opinion:

It can be seen that the Maori owners are given the free and unrestricted use of the lake and of their fishing rights over the lake, but this use and these rights may be subordinated by the Domain Board if it determines that the exercise of this 'free and unrestricted use' interferes with the reasonable rights of the public to use the lake as a domain.<sup>155</sup>

So long as Muaūpoko did indeed have an effective majority on that board, the relative rights of the public and the Māori owners would be subject to a significant degree of Māori control.

Thus, many of the remedies provided by the 1956 Act depended on the very narrow majority on the domain board being an effective one, and with the cooperation of the Crown official who served as independent chair and tie-breaker. We turn next to the question of how the Act has worked since 1956, and whether or not its remedies were effective in practice.

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151. Transcript 4.1.11, pp 563–565

152. Transcript 4.1.11, p 536

153. Transcript 4.1.11, p 765

154. Reserves and Other Lands Disposal Act 1956, s18(5)

155. R J McIntosh, district solicitor, legal opinion, 3 April 1973 (Paul Hamer, comp, papers in support of "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(c)), p 575)

**9.3.4 Did the 1956 legislation provide a suitable platform for (a) future management of the lake and stream, and (b) protection of the Māori owners' rights and interests?**

**(1) Introduction**

According to the Crown, the 1956 Act created a 'co-management regime' for the lake, which correctly balanced Māori and non-Māori interests. Crown counsel submitted that the legislation was consistent with Treaty principles and is still so today.<sup>156</sup> Nonetheless, the Crown accepted that the regime established by the Act 'has not always operated effectively in the past. Current and future discussions may offer real opportunities to reform the existing legislation to better reflect Crown-Māori best practice in the modern era, and in doing so give better effect to Treaty principles.'<sup>157</sup>

The claimants, on the other hand, argued that the regime created by the ROLD Act was 'deficient' because it subordinated the owners' rights and interests to those of the general public.<sup>158</sup> Philip Taueki argued that the Act in fact gave the Crown and the public total control of the domain.<sup>159</sup> The claimants did not accept that the regime established by the 1956 Act was consistent with Treaty principles, or that it was an effective co-management regime which protected the rights and interests of the Māori owners.

**(2) 'Co-management': owners' rights vis-à-vis public rights**

**(a) Māori attendance rates and their impact on the numerical majority:** As discussed above, the recognition of Māori owners' rights under the 1956 Act often depended on the reformed domain board and Muaūpoko's ability to use their 4:3 majority to control it. The crucial problem in this respect was the failure of Muaūpoko board members to attend consistently and in sufficient numbers to make the most of their majority. Paul Hamer's analysis showed an 'overall attendance rate of 72.3 per cent' in the late 1950s. He commented: 'One can see how the nominal majority Muaūpoko enjoyed could be undone through absences.'<sup>160</sup>

From 1962 to 1965 there was a long-running dispute about whether the lake trustees or the Muaupoko Maori Committee should nominate members. The lake trustees represented the owners but the Muaupoko Maori Committee, elected under the Maori Welfare Act 1962,<sup>161</sup> claimed to represent the whole tribe. This dispute between the trustees and the committee delayed new appointments. After that, Muaūpoko members' attendance rate in the mid to late 1960s was only 50 per cent. At five out of 15 meetings, only one Māori member was present.<sup>162</sup> The Lands Department, which was responsible for secretarial services and the chair, asked the

156. Crown counsel, closing submissions (paper 3.3.24), pp 54–55

157. Crown counsel, closing submissions (paper 3.3.24), p 51

158. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 280

159. Philip Taueki, closing submissions (paper 3.3.15), p [3]

160. Hamer, "A Tangled Skein" (doc A150), p 164

161. In 1979, this Act was retrospectively renamed the Maori Community Development Act 1962.

162. Hamer, "A Tangled Skein" (doc A150), pp 273–277

lake trustees to ‘try and revive the interest’ of three non-attending members.<sup>163</sup> Paul Hamer suggested that a pattern was emerging of members alienated by ‘the style of a Pākehā-oriented board’, which ‘in later years . . . was how some members of Muaūpoko explained the tribe’s failure ever really to capitalise on its nominal board majority’.<sup>164</sup>

By contrast, the Māori members’ attendance between 1970 and 1975 was consistently high.<sup>165</sup> Disagreements between the lake trustees and the Muaupoko Maori Committee, and within the tribe more generally, made the appointments process difficult. The 1956 Act stated that the Minister would appoint the Māori members ‘on the recommendation of the Muaupoko Maori Tribe’.<sup>166</sup> This was disappointingly vague, and the Crown did not take steps to clarify the matter or negotiate an appointment process with either the lake owners or the wider tribe. For the most part, the Crown relied on the Muaupoko Maori Committee or the holding of a tribal hui, preferring not to restrict representation to the lake trustees. The lack of agreed representation rights generated significant conflict from time to time, exacerbating the level of non-attendance by Muaūpoko board members (because vacancies were sometimes of long duration).<sup>167</sup> As we discuss below, the Muaūpoko members and lake trustees decided to boycott the board altogether from 1982 to 1987.

In 1982, Kingi Hurinui argued that the Muaūpoko board members had simply ‘not used their power’: ‘It’s our own fault. It’s not that the pakehas have taken over.’ Joe Tukapua, on the other hand, told Minister Jonathan Elworthy:

the board did not provide for the owners to exercise control. The Māori members of the board had been ‘under pressure’ and it was ‘no good for us because of the local authorities’ representation’. This was perhaps an attempt to answer the obvious question of just why the Muaūpoko representatives would walk out on a board that they would in theory control when the Muaūpoko vacancy was filled. What Tukapua seemed to be saying was that the Muaūpoko representatives could not match the local body members in that forum – that they did not assert themselves or set the agenda. Possibly, Tukapua was also explaining why the Muaūpoko majority on the board had never been properly exploited, and why the attendance of Muaūpoko board members had often been so poor.<sup>168</sup>

The claimants argued that the ‘newly constituted Board did not live up to early promise’.<sup>169</sup> They blamed the Crown, which did not investigate the causes of non-attendance or help to mediate the conflict which arose between the Māori mem-

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163. Director-general of lands to Minister of Lands, 12 July 1968 (Hamer, “A Tangled Skein” (doc A150), p 277)

164. Hamer, “A Tangled Skein” (doc A150), p 278

165. Hamer, “A Tangled Skein” (doc A150), p 300

166. Reserves and Other Lands Disposal Act 1956, s18(8)(a)

167. Hamer, “A Tangled Skein” (doc A150), pp 273–278, 300–303

168. Paul Hamer, answers to post-hearing questions from Tribunal members, December 2015 (doc A150(o)), p7

169. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 278

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bers and the local authority representatives. Muaūpoko, they told us, were often silenced or out-manoeuvred in a local politics milieu in which they were not used to operating.<sup>170</sup> On the other hand, the claimants accepted that disagreements within Muaūpoko were sometimes to blame, and that the lake trustees or the Māori representatives on the domain board did not always properly represent the wishes of the tribe.<sup>171</sup>

Crown counsel acknowledged that since 1956, ‘there have been periods where the management regime has not functioned as intended’. The Crown, however, did not accept that it was ‘directly responsible for these periods, which reflect a complex interplay of customary interests and competing personal and local aspirations and attitudes’. The Crown, we were told, could not have compelled board members to attend, nor could it interfere directly in internal board and iwi matters.<sup>172</sup>

We agree that the Crown was not responsible for the low attendance of Muaūpoko board members. We also accept that tensions with local authorities and other issues made it difficult for the Muaūpoko members to operate effectively in a local politics milieu. But the tribe must bear its share of responsibility for the non-attendance of its board members.

From time to time, the chair of the board and other officials tried hard to ensure that there was at least a full complement of Muaūpoko representatives, despite difficulties and disagreements within the tribe about appointments. But the chairman (and the Government more generally) took no steps to consult Muaūpoko or arrange a permanent fix for the representation problems. One crucial necessity was a properly constituted and agreed process for appointments. This must have been obvious to successive governments from at least the early 1960s. The Crown’s failure to consult Muaūpoko about a new appointments process or negotiate a solution contributed to the tribe’s inability to make full use of its ‘nominal majority’.

The Crown, therefore, contributed to Muaūpoko’s under-representation in the board’s decision-making. We will next explore the extent to which the under-representation affected the balance between owners’ rights and public rights.

**(b) Birding rights:** In 1953, the Crown and Muaūpoko agreed that the lake would be a wildlife ‘sanctuary’, although this was not included as a specific term of the ROLD Act 1956. The default position of the other controlling statute, the Reserves and Domains Act 1953, was that no hunting or shooting could take place without the permission of a domain board.<sup>173</sup> Despite this ban, there was some illegal shooting from the late 1950s on, and notices were erected ‘explaining the ban on shooting.’<sup>174</sup> The Māori domain board members remained staunch in their opposition to any shooting, and the board attempted to get the lake (and an area extending 100 yards

170. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 278–279

171. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 279

172. Crown counsel, closing submissions (paper 3.3.24), p 59

173. Hamer, “A Tangled Skein” (doc A150), pp 290–291. This was a reference to section 84 of the Reserves and Domains Act 1953.

174. Commissioner of Crown lands to director-general of lands, 6 April 1973 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 571)

from the shore) made a wildlife refuge. In 1960, the board presented a petition signed by some of the Māori owners, asking the Internal Affairs Department to create a formal wildlife refuge. This petition was rejected because it was not supported by all the owners, and the department considered that the Reserves and Domains Act provided enough protection.<sup>175</sup>

In 1962, the lake trustees decided to open the lake for duck shooting. This was partly to reduce the excessive numbers of mallard ducks, which had become a nuisance to farmers. The domain board held a public consultation process in 1963 to decide whether to grant permission for duck shooting, but there were a number of objections.<sup>176</sup> In any case, the lake trustees reversed their decision in 1963, stating that they ‘do not now wish the Lake to be opened.’<sup>177</sup> The domain board reached the view that duck shooting would ‘interfere with the reasonable rights of the public’ to use the lake as a public domain.<sup>178</sup> As noted above, the board adopted a bylaw in 1963 which prohibited shooting in the domain without its written permission. There had been some disagreement within Muaūpoko on the matter, and the Māori members of the board were firmly in support of maintaining the lake as a sanctuary.<sup>179</sup> Indeed, the board’s resolution that no shooting be allowed was moved by a Muaūpoko member and passed unanimously.<sup>180</sup>

Those of the Māori owners who wished to shoot seem to have accepted the ruling of the lake trustees and the board, as there was little further activity on this issue for a decade after the respective decisions of the lake trustees and the board in 1963.<sup>181</sup> In March 1973, however, Hohepa Te Pae Taueki, chair of the lake trust, advertised in the local newspaper that Muaūpoko would be shooting on the lake during the forthcoming duck shooting season.<sup>182</sup> The claimants described this as ‘an assertion of iwi mana and rangatiratanga over the Lake.’<sup>183</sup> Hohepa Taueki explained to the *Evening Post*: ‘A lot of Maoris have been fined for shooting there, but I can’t see where it is illegal if you hold the title.’ The trustees therefore advertised their intention to ‘find out who objects and why.’<sup>184</sup>

The debate then became squarely centred on the hierarchy of rights referred to above in section 9.3.3(3). The Māori owners had the ‘free and unrestricted’ use of their property, the lake, *unless* this interfered with the reasonable rights of the public to use the lake and Muaupoko Park as a recreation reserve. The chair of the

175. Commissioner of Crown lands to director-general of lands, 6 April 1973 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), pp 571–572)

176. Hamer, “A Tangled Skein” (doc A150), pp 179–180

177. Domain board secretary to secretary for internal affairs, 19 March 1963 (Hamer, “A Tangled Skein” (doc A150), p 180)

178. Commissioner of Crown lands to director-general of lands, 6 April 1973 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 570)

179. Hamer, “A Tangled Skein” (doc A150), pp 178–181, 289–290

180. Commissioner of Crown lands to director-general of lands, 6 April 1973 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 573)

181. Commissioner of Crown lands to director-general of lands, 6 April 1973 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 573)

182. Hamer, “A Tangled Skein” (doc A150), pp 289–290

183. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 272

184. *Evening Post*, 30 March 1973 (Hamer, “A Tangled Skein” (doc A150), p 289)



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domain board, W A Harwood, obtained a legal opinion on this matter.<sup>185</sup> The Lands Department's district solicitor advised:

It can be seen that the Maori owners are given the free and unrestricted use of the lake and of their fishing rights over the lake, but this use and these rights may be subordinated by the Domain Board if it determines that the exercise of this 'free and unrestricted use' interferes with the reasonable rights of the public to use the lake as a domain. In other words the Domain Board may determine as a matter of policy that duck shooting will interfere with the public's rights ('rights' in the broadest sense) to use the lake as a domain (in the broadest sense once again).<sup>186</sup>

In any case, the domain bylaws required the board's permission to carry a firearm, erect a structure (including 'mai mais'), and shoot any bird. Also, 'dogs (eg retrievers) must be on a chain at all times whilst in the domain'. All of these requirements prevented duck shooting.<sup>187</sup>

Thus, the district solicitor considered (and the commissioner of Crown lands agreed) that shooting by the owners would interfere with the reasonable rights of the public. This invoked section 18(5) of the ROLD Act 1956. Harwood and his superior, Commissioner JS MacLean, proposed to prosecute anyone who defied the board's bylaw against shooting.<sup>188</sup> The Lands Department agreed that the board's 1963 decision to prohibit hunting had defined the 'reasonable rights of the public', with which Māori rights were not allowed to interfere. It was also noted that there had been no challenge to the board's 1963 decision, which was 'not surprising as 50% of the Board members represent the Maori owners'.<sup>189</sup> The Māori members of the domain board, apparently in response to a tribal hui on the matter, argued that the no-shooting rule should remain in place. The Minister of Maori Affairs, Matiu Rata, then intervened and persuaded the lake trustees to comply with the board's decision.<sup>190</sup> Thus, the 1956 Act allowed the board to use public rights 'in the broadest sense' to stop the owners from exercising a right like duck shooting. But there was still strong Māori support for a ban on shooting at this time, and it is not possible to say that the board imposed a ban against the tribe's wishes.

The matter was raised again in 1980, when the lake trustees asked the board's permission for shooting on the lake, exclusively for those who had fishing rights (that is, the Māori owners). The Māori board members were divided this time, with some

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185. Commissioner of Crown lands to director-general of lands, 6 April 1973 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), p 573); Hamer, "A Tangled Skein" (doc A150), pp 289–290

186. Opinion of RJ McIntosh, district solicitor, Lands Department, 3 April 1973 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), p 575)

187. District solicitor, 'Lake Horowhenua: Game Shooting', 3 April 1973 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), pp 575–576)

188. Hamer, "A Tangled Skein" (doc A150), p 290; commissioner of Crown lands to director-general of lands, 6 April 1973 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), pp 570–574). Assistant Commissioner Harwood, who was chairman of the domain board, signed this letter on the commissioner's behalf.

189. Opinion of RJ McIntosh, district solicitor, Lands Department, 3 April 1973 (Hamer, "A Tangled Skein" (doc A150), p 290)

190. Hamer, "A Tangled Skein" (doc A150), p 291



still opposed to any shooting. The board eventually passed a compromise resolution, refusing Muaūpoko's application for 'exclusive' shooting rights but authorising duck shooting in general. The proviso, however, was that firearms could not be carried in or across Muaupoko Park. This was deliberately framed so that only Muaūpoko owners would in fact be allowed to shoot unless the lake trustees granted access to others.<sup>191</sup>

As the commissioner of Crown lands explained, the lake was not a 'statutory sanctuary' and the acclimatisation society agreed that the mallard population should be 'cropped'. But the decision did not restrict shooting to Māori only because 'fishing right holders' might have 'Pakeha spouses':

Given the special nature of its power over the lake waters the Board decided that it should not refuse to allow shooting by the Maori owners but considers that all members of the public should have the same right. There will be no firearms or shooting permitted in the environs of Muaupoko Park. As this is the only public access to the lake the Board's decision in effect means that only those who can obtain the permission of the Maori owners will be able to shoot. This could include Pakeha spouses of the fishing right holders.<sup>192</sup>

Also, as the mayor of Levin noted, keen Pākehā duck shooters 'complete with their dinghies, dogs and guns' could be 'air-dropped on to the Lake' by helicopter if refused access across Māori land. This was, however, 'unlikely to happen, because of cost'.<sup>193</sup>

Permission for access was indeed refused – Hohepa Taueki once again placed an advertisement that Muaūpoko would be shooting during duck-hunting season, and 'Non Tribal members and Europeans caught shooting on the lake or trespassing over Maori Land surrounding the lake will be prosecuted'.<sup>194</sup> This led to protests from Pākehā domain board members, amid accusations of racial privilege, but the Māori owners insisted on exercising their exclusive property rights in 1980 and 1981.<sup>195</sup>

In 1982, as discussed below, the Muaūpoko domain board members walked out of the board and demanded its dissolution, and the transfer of its authority over the lake to the trustees. Paul Hamer was not able to research the issue of shooting beyond 1981, noting that '[i]t is not clear whether the matter of duck shooting arose again during the 1980s'.<sup>196</sup> In any case, as part of his proposed reforms in 1983, the Minister of Lands, Jonathan Elworthy, offered to amend the 1956 Act so that no domain board bylaw would be approved by the Minister unless it had been first

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191. Hamer, "A Tangled Skein" (doc A150), pp 291–293

192. Commissioner of Crown lands to director-general of lands, 14 March 1980 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), p 597)

193. Mayor of Levin to district commissioner of lands, 14 April 1980 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), p 610)

194. *Chronicle*, 12 April 1980 (Hamer, "A Tangled Skein" (doc A150), p 293)

195. Hamer, "A Tangled Skein" (doc A150), pp 292–295

196. Hamer, "A Tangled Skein" (doc A150), p 295

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approved by the lake trustees. Elworthy hoped that this would empower the Māori owners and ‘ensure there could be no further misunderstanding over such matters as power-boating, duck-shooting and fishing rights.’<sup>197</sup> In the mid-1980s, Koro Wetere also undertook to make this amendment but failed to do so (as we discuss below in sections 9.3.4(4)–(5)).

Between 1963 and 1980, therefore, the balance of public and Māori owners’ rights shifted in favour of the owners on this issue, despite a very ‘broad’ definition of the public’s rights in the first instance. Essentially, once the weight of Māori opinion shifted to support opening the lake for the owners to shoot, the board accepted this position. Promised reforms in the mid-1980s to ensure that the lake trustees would approve bylaws, and thus give them a veto over any domain board restrictions on shooting, did not eventuate.

**(c) Fishing rights:** In respect of fishing rights, the new domain board was much more aware of the need to give effect to Māori fishing rights than its predecessor had been. Two challenges arose in the late 1950s: the desire to introduce a new fish species that would prey on lake flies or their eggs, and public pressure to develop the lake for sport fishing. On the former matter, the Marine Department advised that tench should be introduced, and that the only permission necessary was that of the department and the local acclimatisation society. The board, however, resolved to obtain the ‘consent of the Muaupoko Tribe.’<sup>198</sup> The Māori board members consulted the tribe and voted in favour of releasing tench (which failed to become established despite multiple releases).<sup>199</sup> At the same time, local newspapers pressed for the release of bass, which predate on eel and other native species. Locals also wanted the ‘fish in the lake . . . thrown open to all.’<sup>200</sup> But the new board with its Māori majority decided that the Māori owners’ rights must remain exclusive. In 1958, the board protested to the Wellington Acclimatisation Society that its fishing licences included a right to fish in Lake Horowhenua. The society’s response was that it would not dispute ‘the contention that the waters of the lake could be fished only by the Maori’ because this particular lake had no worthwhile sport fishing. In 1959, the society agreed to remove Lake Horowhenua from its licences.<sup>201</sup>

The domain board, however, had no jurisdiction over the Hōkio Stream. In the late 1950s, disputes arose between Muaūpoko and local Pākehā over rights to fish in the stream, especially for whitebait.<sup>202</sup> In 1957, the Muaupoko Tribal Committee<sup>203</sup> ‘decided to invoke the Treaty of Waitangi and close the Hokio Stream to all European

197. Minister of Lands to RJ Barrie, 8 April 1983 (Hamer, papers in support of “A Tangled Skein” (doc A150(d)), p 779)

198. Domain board, minutes, 13 November 1958 (Hamer, “A Tangled Skein” (doc A150), p 167)

199. Hamer, “A Tangled Skein” (doc A150), pp 167–169

200. *Levin Weekly News*, 4 December 1958 (Hamer, “A Tangled Skein” (doc A150), p 168)

201. Hamer, “A Tangled Skein” (doc A150), pp 169–170

202. Hamer, “A Tangled Skein” (doc A150), pp 191–193

203. The Muaupoko Tribal Committee was the predecessor of the Muaupoko Maori Committee, operating under the earlier Maori Social and Economic Advancement Act 1945.

fishermen.<sup>204</sup> In 1959, a Levin fisheries officer reported: “The Maoris maintain their rights extend to low water mark and other ridiculous claims and, on account of this claim, throw European nets out, block the stream and cause endless trouble.”<sup>205</sup> In both instances, the Government’s response was that Māori had no exclusive fishing rights in the stream, and that all whitebaiters had to obey the fishing regulations. In 1961, the police became involved but the district inspector of fisheries could not clarify for the police whether Muaūpoko had exclusive fishing rights in the stream. In 1966, local fishermen again complained that they had been prevented from whitebaiting. The Government was accused of turning a blind eye to Māori violations of the Whitebait Regulations.<sup>206</sup> Ultimately, there was a test case prosecution in 1976, which we discuss below.

By the 1970s, the challenge to Māori fishing rights came not from public use rights in the lake, as covered by section 18(5) of the ROLD Act, but rather by attempts to apply New Zealand’s general fishing laws and regulations to the lake and the Hōkio Stream. The result was two important prosecutions.

In 1975, Joe Tukapua, a lake trustee at that time, was tried for assaulting a fisheries officer and preventing the officer from measuring his fishing net. The charges were laid under the Fisheries Act 1908 and the Fisheries (General) Regulations 1950. The Magistrate’s Court found in favour of Tukapua, essentially under the grounds that he was fishing in private waters (under section 88(d) and (e) of the Fisheries Act). The Crown appealed the decision, which was heard by Justice Cooke (later Lord Cooke) in May 1975.<sup>207</sup>

In an unreported decision, the Supreme Court found that the ROLD Act 1956 provided for the Māori owners to have ‘at all times’ the ‘free and unrestricted’ exercise of fishing rights. Subject to the rights preserved for the owners of Horowhenua 9, the Māori owners’ rights were exclusive – ‘the general public have no right to fish there’. The fishing rights arose because of Māori ownership of the lakebed, and had not been shared with the general public when the right was given to use the lake as a public domain.<sup>208</sup> The court held that these free and unrestricted fishing rights, as guaranteed by the 1956 Act, were ‘special statutory rights’ reserved to the Māori owners ‘because of the special history of this area, and ‘may be unique.’<sup>209</sup> Therefore, the requirements of the Fishing Act and Regulations as to ‘permissible equipment, close seasons, licences and so forth’ did not apply to the ‘special rights of the Maori owners to fish in Lake Horowhenua and the Hokio Stream.’<sup>210</sup> In addition, the court

204. Hokio Progressive Association to inspector of fisheries, 18 June 1957 (Hamer, “A Tangled Skein” (doc A150), p 193)

205. HF Webb to secretary for marine, 20 May 1959 (Hamer, “A Tangled Skein” (doc A150), p 193)

206. Hamer, “A Tangled Skein” (doc A150), pp 193–195

207. Hamer, “A Tangled Skein” (doc A150), p 296

208. *Regional Fisheries Officer v Tukapua* Supreme Court Palmerston North M33/75, 13 June 1975, pp 4, 7 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), pp 618, 621)

209. *Regional Fisheries Officer v Tukapua* Supreme Court Palmerston North M33/75, 13 June 1975, p 8 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 622)

210. *Regional Fisheries Officer v Tukapua* Supreme Court Palmerston North M33/75, 13 June 1975, p 8 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 622)

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found that ‘the same result can be reached by another route’, in that the lake and stream were private waters under the Fisheries Act.<sup>211</sup>

The second case involved another Muaūpoko fisherman, Ike Williams, who was charged in 1976 with whitebaiting in the Hōkio Stream during a closed season. This case was heard on appeal by Justice O’Regan in October 1978. The Supreme Court held that the 1956 Act did not create or grant fishing rights but rather preserved them, and section 18 of the ROLD Act 1956 preserved those rights ‘without express limitation to the metes and bounds’ of the land comprised in the title. The fishing rights were unique and ‘might well have existed prior to the coming of the Pakeha’, and had been asserted over generations until given statutory recognition. The definition of the Hōkio Stream in the statute was the ‘stream flowing from the outlet of the lake . . . to the sea’, and the Act provided that the Māori owners “shall at all times . . . have their fishing rights over such stream” – that is from the outlet of the lake to the sea. The Crown’s rights to the foreshore at the outlet of the Hōkio Stream were therefore subject to the fishing rights of the Māori owners in ‘that part of the stream, and where it forks, to those parts of the stream, which cross the foreshore to the sea.’<sup>212</sup> The sequel to this case was attempts in the 1980s to close the Hōkio Stream to whitebaiting by anyone other than the owners or those fishing by the owners’ permission.<sup>213</sup>

It seems, therefore, that enhanced representation on the domain board and the statutory recognition afforded Māori fishing rights in 1956 served Muaūpoko well from the 1950s to the 1980s. The claimants who appeared in our inquiry were staunch defenders of their ‘unique’ statutory rights. But the tribe’s fishing rights were strongly impacted by a critical aspect of post-1956 administration: the Manawatu Catchment Board’s efforts to maintain the lake at the level of ‘30 feet above mean low water spring tides at Foxton Heads.’ We turn to that question next.

**(d) Veto power over drainage works:** As noted earlier, section 18(10) of the ROLD Act 1956 required that ‘before any works affecting the lake or the Hōkio Stream are undertaken by the said [Manawatu] Catchment Board, the prior consent of the Domain Board constituted under this section shall be obtained.’ This made the Māori majority on the board crucial for protecting the tribe’s fishing rights and their taonga, the lake and the Hōkio Stream.

As soon as it came into existence, the new domain board faced pressure to allow further works on the Hōkio Stream to prevent flooding and hold the lake at the statutorily mandated level. The catchment board and some Hōkio residents had been waiting for a political settlement and the revival of the board. The Māori domain board members supported stabilisation of the lake at 30 feet, but insisted that Māori eel weirs must be protected and the stream kept viable for eeling.<sup>214</sup> It

211. *Regional Fisheries Officer v Tukapua* Supreme Court Palmerston North M33/75, 13 June 1975, pp 8–11 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), pp 622–625)

212. *Regional Fisheries Officer v Williams* Supreme Court Palmerston North M116/78, 12 December 1978 (Hamer, “A Tangled Skein” (doc A150), pp 298–300)

213. Hamer, “A Tangled Skein” (doc A150), p 300

214. Hamer, “A Tangled Skein” (doc A150), pp 181–185

had been one of the terms of the 1953 agreement that the Māori owners would be ‘willing to agree to the construction of a suitable spillway or weir so that there will be no interference with the fishing either in the stream or in the lake.’<sup>215</sup>

It is clear from the claimants’ evidence in our inquiry that the eel fishery had gradually recovered after the drastic impacts of works in the 1920s. Moana Kupa, who spoke of life with her Horowhenua whanaunga between 1949 and 1952, described the abundant food taken from the lake and the Hōkio Stream.<sup>216</sup> One of her

favourite memories was camping with my Nannies out near the Lake. We would go camping in a tent for about three weeks when the eels were running and we used two hinaki to catch eels during the run. The hinaki was made out of wire but some of the older people made them from harakeke. In the morning we would wake up and pawhera the eels.<sup>217</sup>

Kaumātua Henry Williams, who grew up at the lake in the 1940s, remembered that eels were so plentiful they could be speared around the edge of the lake, and were caught by their hundreds during the eel runs.<sup>218</sup> Henry Williams’ older sister, Carol Murray, told us that

When the eels ran in March there were so many eels you could literally hear them. There were thousands of eels. They would leap out of the water. Today you don’t see anything like that.

We would catch the eels using two hinaki. They were about a meter long a meter wide and a meter deep. One would be in the water and when it filled up we would pull it out of the water and drop the other one in.

The run would last for around four weeks. At the end of the run there was a second run called the tunaheke where big eels would come down the stream. The big eels would get stranded on the beach and you could gather them from there.

After we caught the eels we would pawhara them. This is a process of drying the eels. Our kuia taught us how to do that too. After they were ready we would send the eels everywhere in New Zealand. We always made sure our family in Paki Paki received their share.<sup>219</sup>

As well as eels there were pātiki (flounders), mullet, kōura (freshwater crayfish), and kākahi (freshwater mussels).<sup>220</sup> The shellfish beds had been significantly damaged when the lake was drastically lowered in the 1920s. It is not clear how far the shellfish had recovered by the 1950s. Carol Murray, who grew up at the lake in the 1930s and 1940s, recalled:

215. NF Simpson to commissioner of Crown lands, 9 July 1953 (Hamer, papers in support of “A Tangled Skein”) (doc A150(c)), pp 402–403)

216. Moana Kupa, brief of evidence, 11 November 2015 (doc C7), pp 2–4; transcript 4.1.12, pp 696–702

217. Kupa, brief of evidence (doc C7), p 4

218. Henry Williams, brief of evidence, 11 November 2015 (doc C11), pp 4–5

219. Carol Murray, brief of evidence, 11 November 2015 (doc C4), p 2; transcript 4.1.6, p 34

220. William James Taueki, brief of evidence, 11 November 2015 (doc C10), p 31



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I used to love eating kakahi soup. We would gather the kakahi, pick some watercress and put it in a pot with milk, it was my favourite.

As Muaupoko we were brought up on eels, toheroa and the kakahi but now we can't eat them because of paruparu in the lake and restrictions of the toheroa at the beach.<sup>221</sup>

A crucial aspect of some fish species in the lake, however, was that they were 'diadromus and have an essential part of their life cycle in the sea.'<sup>222</sup> These species included flounder, grey mullet, smelt, and whitebait. Their ability to travel up the Hōkio Stream to the lake was drastically interrupted in 1966 when the Manawatu Catchment Board constructed a concrete weir to control the level of the lake. This was one of the most crucial and damaging actions in respect of the Māori owners' fisheries.<sup>223</sup> A National Institute of Water and Atmospheric Research (NIWA) study concluded in May 2011 that 'After water quality, the single most important factor affecting the fishery in Lake Horowhenua is the weir on the Hokio Stream.'<sup>224</sup>

Before constructing the weir, the catchment board had to obtain the agreement of the domain board. As part of initial discussions in the late 1950s, the catchment board advised that a 'fish ladder' would be included on the weir to assist migrating fish.<sup>225</sup> It would also be necessary to remove some eel weirs, which the owners approved on the condition that the catchment board would replace them with modern, concrete weirs. The board submitted its plans for these weirs and the outlet weir to the Marine Department for inspection, noting that its experience with fish ladders was 'nil'.<sup>226</sup> The department advised that the design of the weir itself should have no 'projecting lip on the downstream side',<sup>227</sup> and should 'allow for only a small amount of water to flow over the weir at any time'. Elvers could climb a damp wall but not a 'rapid stream of water'.<sup>228</sup>

It seemed that a fish pass for elvers would not be necessary if the department's design suggestions were followed, but the final decision (according to the Fish Pass Regulations 1947) rested with the Minister of Marine.<sup>229</sup> Regulation 6 stated that 'any person desiring to construct a dam or weir should forward duplicate plans of

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221. Murray, brief of evidence (doc C4), p3

222. National Institute of Water and Atmospheric Research (NIWA), 'Lake Horowhenua Review: Assessment of Opportunities to Address Water Quality Issues in Lake Horowhenua', June 2011, p 60 (Jonathan Procter, comp, papers in support of brief of evidence, various dates (doc C22(b)(iii)))

223. NIWA, 'Lake Horowhenua Review: Assessment of Opportunities to Address Water Quality Issues in Lake Horowhenua', June 2011, pp 59–60; NIWA, 'Lake Horowhenua Review: Assessment of Opportunities to Address Water Quality Issues in Lake Horowhenua, Prepared for Horizons Regional Council', May 2011, p 10 (Procter, papers in support of brief of evidence (doc C22(b)(iii))); Hamer, "A Tangled Skein" (doc A150), p 189

224. NIWA, 'Lake Horowhenua Review', May 2011, p 10 (Procter, papers in support of brief of evidence (doc C22(b)(iii)))

225. Hamer, "A Tangled Skein" (doc A150), pp 185–186

226. Chief engineer, Manawatu Catchment Board, to secretary, Marine Department, 2 December 1958 (Hamer, "A Tangled Skein" (doc A150), pp 186–187)

227. Secretary, Marine Department, to chief engineer, Manawatu Catchment Board, 9 December 1958 (Hamer, "A Tangled Skein" (doc A150), p 187)

228. Hamer, "A Tangled Skein" (doc A150), p 187

229. Hamer, "A Tangled Skein" (doc A150), p 187



the proposed weir to enable the Minister of Marine to determine whether a fish pass is required.<sup>230</sup>

The lake trustees were not happy with the design of the proposed weir. Joe Tukapua, the trustees' secretary, wrote to the board in February 1966 that 'the flood gates of Hokio Stream must be built, to preserve fish life. Fish won't be able to come back up stream over the flood gates back into the lake. The type of fish we have in the lake are Eels, Carp, flounder, whitebait, fresh water Crayfish.'<sup>231</sup> The catchment board replied that it was 'aware of the necessity to preserve fishlife in the Hokio Stream and Lake Horowhenua.'<sup>232</sup> But the board was unsure of what to do. It appealed to the Marine Department, advising that the lake trustees were 'concerned that the weir would not allow the full range of fish species to pass'. It asked the department if it would need to make any changes to its design.<sup>233</sup>

We underline this point because the decision was essentially that of the Crown, under the Fish Pass Regulations cited above. The catchment board made the department fully aware of the existence of the Māori interest:

The question has, however, been raised by the Horowhenua Lake Trustees that the weir be such as will preserve fish life and enable fish to come upstream over the weir and back into the Lake. The types of fish are stated to be eels, carp, flounder, whitebait and fresh water crayfish. The Board has asked me to obtain your assurance that the proposed weir will be satisfactory and if there are any suggested modifications or the necessity to install a fish ladder would you please let me know as soon as possible.<sup>234</sup>

As far as we can tell from the record, the Marine Department made no inquiries of the Maori Affairs Department or of the lake trustees as to the significance of the fishing interests or the nature of any Māori fishing rights.<sup>235</sup> Rather, the secretary for marine reminded the catchment board that the only species previously mentioned had been eels, on the basis of which the department's earlier advice had been given. The design of the weir did indeed present 'an insurmountable obstacle' for all of the species identified by the lake trustees except for elvers.<sup>236</sup> The secretary's response is worth quoting in full:

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230. Secretary for marine to chief engineer, Manawatu Catchment Board, 23 February 1959 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p1669)

231. Joe Tukapua to secretary, Manawatu Catchment Board, 2 February 1966 (Hamer, "A Tangled Skein" (doc A150), p189)

232. Secretary, Manawatu Catchment Board, to secretary, Horowhenua Lake Trustees, 18 February 1966 (Hamer, "A Tangled Skein" (doc A150), p189)

233. Hamer, "A Tangled Skein" (doc A150), p190

234. Secretary, Manawatu Catchment Board, to secretary for marine, 18 February 1966 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p1670)

235. Secretary for marine to chief engineer, Manawatu Catchment Board, 23 February 1959; secretary, Manawatu Catchment Board, to secretary for marine, 18 February 1966; secretary for marine to secretary, Manawatu Catchment Board, 8 May 1966 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), pp1669–1670, 1673)

236. Hamer, "A Tangled Skein" (doc A150), p190

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I note that in the earlier correspondence the only species of fish mentioned was eels or elvers.

It is considered that the Weir at Lake Horowhenua would effectively block ingress to the lake for all the species of fish listed in the letter except elvers. Although a fish pass could be constructed it is doubtful whether flounders would or could use it and the same would apply to whitebait as to whether they could get over the pass itself would depend on current flow and height of steps. The stocks of carp and freshwater crayfish are probably self supporting within the Lake itself and there would be no need to worry about ingress of these species.<sup>237</sup>

Crucially, therefore, the Marine Department did not withhold its consent to the proposed design or insist on the construction of a fish pass. Nor did it institute any inquiries or conduct any research as to how flounders and other species might be enabled to continue migrating to and from the lake.

Having received the department's response, the catchment board decided to proceed as planned. No action, it resolved, would be taken 'to allow other fish to pass up the stream until the effects are full[y] known.'<sup>238</sup> As Paul Hamer commented, it does not appear that action ever followed to 'address the barrier to the ingress of certain native fish species into the lake.'<sup>239</sup> Evidence from NIWA suggested that flounders, grey mullet, whitebait, and other important species were significantly affected.<sup>240</sup> William Taueki told us: 'Our people also fished for mullet and patiki. I have not seen or been able to catch a mullet in the Lake or in any of the rivers in my time. I once caught a patiki in the Lake but this was only once.'<sup>241</sup> The Crown thus approved a concrete weir in 1966 which the Marine Department knew would have a harmful effect on Muaūpoko fishing rights. The domain board had already given its consent back in 1958, agreeing to the catchment board's proposal *on the basis that a fish pass would be included*, and the affected Māori owners' consent acquired to the removal and rebuilding of their eel weirs. In 1992, the regional council was reminded that 'a fish ladder had been a condition of the weir's original construction, and "if one was not present now, then it should be provided"'. The regional council's view was that it 'was not responsible for the provision of fish ladders.'<sup>242</sup> Mr Hamer commented: 'This response rather overlooked the fact that the Manawatu Catchment Board had assumed responsibility for the construction of a fish ladder in the 1960s.'<sup>243</sup>

237. Secretary for marine to secretary, Manawatu Catchment Board, 8 March 1966 (Hamer, papers in support of "A Tangled Skein" (doc A150(g)), p 1673)

238. Manawatu Catchment Board, Works and Machinery Committee, extract of report confirmed at board meeting on 19 April 1966 (Hamer, "A Tangled Skein" (doc A150), p 190)

239. Hamer, "A Tangled Skein" (doc A150), p 190

240. Jonathan Procter, brief of evidence, 12 November 2015 (doc C22), p 18; NIWA, 'Lake Horowhenua Review: Assessment of Opportunities to Address Water Quality Issues in Lake Horowhenua', June 2011, pp 59–60 (Procter, papers in support of brief of evidence (doc C22(b)(iii)))

241. William Taueki, brief of evidence (doc C10), p 48

242. Minutes of Lake Domain Board meeting, 16 November 1992 (Hamer, "A Tangled Skein" (doc A150), p 392)

243. Hamer, "A Tangled Skein" (doc A150), p 392

By 1968, another effect of the construction of the weir had become apparent. The low lake level was making the lake much warmer than usual in summer, and this resulted in ‘many of the fish dying through not being able to cope with these extreme conditions.’<sup>244</sup> The domain board asked the catchment board if the lake could be raised regularly during summer, to keep it cooler and also to help stop the spread of weed.<sup>245</sup> The problem was exacerbated because the weir acted as a ‘sediment trap’ as well as a ‘fish barrier.’<sup>246</sup> The claimants explained that ‘the Lake used to be able to cleanse itself through its natural inlets and outlets. The weir installed by the Hokio Stream means that Lake water cannot properly flow through its natural outlets, and so it is basically stagnant.’<sup>247</sup>

By 1981, the control weir and parts of the Hōkio Stream were in need of clearance, but the catchment board once again had to obtain the consent of the domain board before carrying out any works. The catchment board’s chair considered it ‘B . . . ridiculous’ that it had to get the agreement of a domain board.<sup>248</sup> The lake trustees, for their part, were concerned about the catchment board’s plans and sought an injunction in the High Court to prevent the work from proceeding.<sup>249</sup> By 1982, the lake trustees were demanding significant reform of the 1956 Act, including a law change to ‘make the Manawatu Catchment Board’s right of access to the lake and Hokio stream subject to obtaining our approval first.’<sup>250</sup>

We address this demand for reform in section 9.3.4(4). Here, we note that the domain board’s veto power under section 18(10) had not sufficed to prevent the most significant and damaging action of the catchment board: the construction of a concrete weir which blocked the migration of prized fish species.

The Crown was directly involved in the catchment board’s action by its approval of the weir’s design, despite its knowledge that the weir would block the migration of fish species (which had been raised by the Māori owners). We accept the Crown’s submission that the Manawatu Catchment Board was not ‘the Crown’ or a Crown agent, but we do not accept that the Crown’s only responsibility, therefore, was the legislative scheme under which the board operated.<sup>251</sup> The Marine Department had a direct and crucial role under the Fish Pass Regulations, which it failed to discharge in a manner consistent with the active protection of Māori fishing rights – a point to which we return when we make our findings below. Māori were clearly prejudiced by the control weir’s impact on their fisheries. Further, the weir played a significant part in the environmental degradation of the lake, which we discuss in the next chapter.

244. Secretary, Horowhenua Lake Domain Board, to secretary, Manawatu Catchment Board, 23 May 1968 (Hamer, “A Tangled Skein” (doc A150), pp 304–305)

245. Hamer, “A Tangled Skein” (doc A150), pp 304–305

246. Procter, brief of evidence (doc C22), p 8

247. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 283

248. Chairman to chief executive officer, Manawatu Catchment Board, 9 September 1981 (Hamer, “A Tangled Skein” (doc A150), p 316)

249. Hamer, “A Tangled Skein” (doc A150), pp 317–318

250. Horowhenua Lake Trustees to Minister of Lands, 16 February 1982 (Hamer, “A Tangled Skein” (doc A150), p 318)

251. Crown counsel, closing submissions (paper 3.3.24), pp 79–82

## 9.3.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

**(e) Non-motorised boating and the boating club lease:** According to Paul Hamer, Muaūpoko were ‘generally very accommodating towards Pākehā groups wanting to use the lake for (non-motorised) boating.’<sup>252</sup> The tribe and the domain board had agreed to a development plan for the lake by 1958, which was presented to Prime Minister Nash for his support at Kawiu Pā (as discussed above). The plan included proposed facilities for both yachting and rowing.<sup>253</sup> In 1959, the domain board and the boating club had reached agreement that it would lease part of the domain for boatsheds and launching boats. The catchment board’s plan to lower the lake to 30 feet, however, would require the boating club to use part of the lakebed itself. In 1960, the commissioner of Crown lands (who chaired the board) proposed that the Crown would lease the required area from the Māori owners, to which the director-general agreed.<sup>254</sup>

The Crown negotiated a lease with the lake trustees in 1961. At that time, new trustees had just been appointed by the Maori Land Court – without the beneficial owners’ knowledge, as it later turned out – and the trustees agreed to a lease in perpetuity for a token rent of £1 per annum. The lease covered an area of 32 perches of lakebed, dewatered area, and chain strip. It was duly approved by the Minister of Lands and Board of Maori Affairs.<sup>255</sup>

In the 1980s, the lake trustees were very critical of this lease. Apart from irregularities with the appointment of the trustees who agreed to it, the Maori Affairs Act in force at the time did not actually allow perpetual leases of Māori land. Further, the lease had been for the specific purpose of building a boatshed over the lake, whereas the building had been constructed ‘well away from the lake.’<sup>256</sup>

In our hearings, claimant Philip Taueki was especially critical of this arrangement. He was critical that no conditions were attached by the domain board to the club’s use of the land, and argued that the rent had never been paid. Further, Mr Taueki argued that the lease (licence) had expired in 2003 and the club had been in illegal occupation of Māori land.<sup>257</sup> We note that the lease to the Crown was in perpetuity, but that the domain board (which controls that piece of leased land) issued an occupation licence to the boating club which expired in 2003.<sup>258</sup>

The Treaty of Waitangi Act 1975 (section 7) states, among other things, that the Tribunal may in its discretion decide not to inquire into (or further inquire into) a claim if, in the Tribunal’s opinion, there is an adequate remedy or right of appeal which it would be reasonable for the person alleged to be aggrieved to exercise. The question of the licence, the expiry, and the current status of the leased land has been before the Maori Land Court and is a matter for which there are legal

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252. Hamer, “A Tangled Skein” (doc A150), p 172

253. Hamer, “A Tangled Skein” (doc A150), pp 159–162

254. Hamer, “A Tangled Skein” (doc A150), pp 173–174

255. Hamer, “A Tangled Skein” (doc A150), pp 173–175

256. Hamer, “A Tangled Skein” (doc A150), pp 174–176

257. Transcript 4.1.11, pp 181–182

258. Māori Land Court, oral judgment of Judge LR Harvey, 18 December 2012, paras 11(7)–11(8) (Philip Taueki, papers in support of brief of evidence (doc B1(b)), p [7])

remedies available.<sup>259</sup> For that reason, we do not consider the current situation of the boating club building as a Treaty issue. For our inquiry, what matters is whether the original negotiation of a lease with the Crown in 1961 was consistent with the principles of the Treaty of Waitangi.

The 1958 development plan had intended to allocate the rowing club part of the northern end of the domain (Muaupoko Park) for its facilities.<sup>260</sup> Although there had been a rowing club in earlier decades, it seems to have gone out of existence – a Levin rowing club was not formed until 1964, some time after which it obtained land for its use on the lake shore.<sup>261</sup> It appears that the rowing club's building was erected soon after. According to the evidence of Philip and Vivienne Taueki, the rowing club building was constructed on Māori land and not the Crown's domain land (Muaupoko Park), and the domain board issued a licence which expired in 2007.<sup>262</sup> Unfortunately, Paul Hamer was not able to research 'the arrangements made with the rowing club for its lease and construction of its clubhouse.'<sup>263</sup> Mr Hamer referred to some files which had not been researched, but was not able to provide further assistance.<sup>264</sup> In the absence of evidence, we are not able to discuss the historical arrangements for the rowing club building any further. The matter of whether there is an historical Treaty breach cannot be dealt with at this stage of our inquiry. Again, the current situation with this land and building has been before the courts, and there are legal remedies available.

The Tribunal is, however, able to deal with the 1961 lease to the Crown (involving the boating club building), and whether this lease was entered into in a manner consistent with Treaty principles.

The available evidence suggests that the lake trustees operated on a good faith understanding that the Crown would act in partnership with them and the domain board to carry out the 1958 development plan. As well as facilities for boating and rowing, the plan involved the construction of other facilities at Muaupoko Park and the lake to develop a pleasure resort for locals and tourists. The late 1950s and early 1960s was a period of some optimism for Muaupoko, having achieved significant results with the 1956 Act and – it was believed – Crown commitment to the development plan. It was in those circumstances that the lake trustees agreed to a lease in perpetuity of Māori land for boating purposes as part of giving effect to the plan. It soon transpired, however, that the Crown had no intention of devoting significant funds after an initial payment of £2,000. Further, the Government attempted to extricate itself from any involvement in the domain, as we discuss in section 9.3.4(3). By the 1980s, the Māori owners were faced with multiple challenges to their authority and their kaitiakitanga of their taonga, the lake and its fisheries. There

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259. See, for example, Māori Land Court, oral judgment of Judge LR Harvey, 18 December 2012 (Philip Taueki, papers in support of brief of evidence (doc B1(b))).

260. Hamer, "A Tangled Skein" (doc A150), p 173

261. Hamer, "A Tangled Skein" (doc A150), p 176

262. Transcript 4.1.11, pp 182, 185 (Philip Taueki), 268 (Vivienne Taueki)

263. Paul Hamer, answers to questions of clarification, September 2015 (doc A150(j)), p 3

264. Hamer, answers to questions of clarification (doc A150(j)), p 3



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was growing discontent with what seemed by then to have been a sham, which left the lake trustees bound by a perpetual lease for a token rent.

This was a situation which the Maori Affairs Act 1953 was supposed to have prevented. Under section 235 of that Act, no lease of Māori land could be for a period longer than 50 years, *unless expressly provided in any [other] Act* (emphasis added). Section 18 of the ROLD Act 1956 certainly did not alter this protective measure by authorising perpetual leases for peppercorn rents. The Crown leased the land, however, under section 15 of the Reserves and Domains Act 1953.<sup>265</sup> This section related to any private land (or right of way over private land) which the Minister considered should be acquired for a public reserve or the ‘improvement or extension’ of an existing reserve. The definition of ‘private land’ included Māori land.<sup>266</sup> Section 15(1)(a) empowered the Minister to acquire any such land by purchase or lease, entering into ‘any contract he thinks fit’. The Minister could also take land under the Public Works Act for this purpose, but the consent of the Minister of Maori Affairs was required before any Māori land could be taken (section 15(1)(b)).

The Government also deliberately avoided the step of obtaining Maori Land Court confirmation of the lease, again bypassing a protective measure in the Maori Affairs Act 1953. Instead, the Government got the lease approved by the Board of Maori Affairs and registered directly by the district registrar without going through the court.<sup>267</sup> The chief surveyor reported:

Part Horowhenua 11 Block is held in trust for the Muaupoko Tribe by 14 trustees. As some of the original trustees are deceased it was first necessary to arrange a new trustee order. This has now been completed. It is desired to arrange the lease so that it may be signed by all the trustees and registered with the District Land Registrar without a further approach to the Maori Land Court. This will permit a lease in perpetuity in terms of the Maori Affairs Act 1953, which the District Land Registrar has agreed to register.

The negotiations have been based on a peppercorn rental of say £1 per annum being paid which the Domain Board has guaranteed to meet.<sup>268</sup>

The Board of Maori Affairs, which was made up of the Minister, five heads of Government departments, and three people appointed by the Governor,<sup>269</sup> approved the offer of a lease in perpetuity and peppercorn rental in April 1961.<sup>270</sup> The Maori Affairs Department also agreed to Lands and Survey dealing directly with the

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265. Commissioner of Crown lands to director-general of lands, 12 May 1960 (Hamer, supporting papers to “A Tangled Skein” (doc A150(c)), p 475)

266. Reserves and Domains Act 1953, s 2

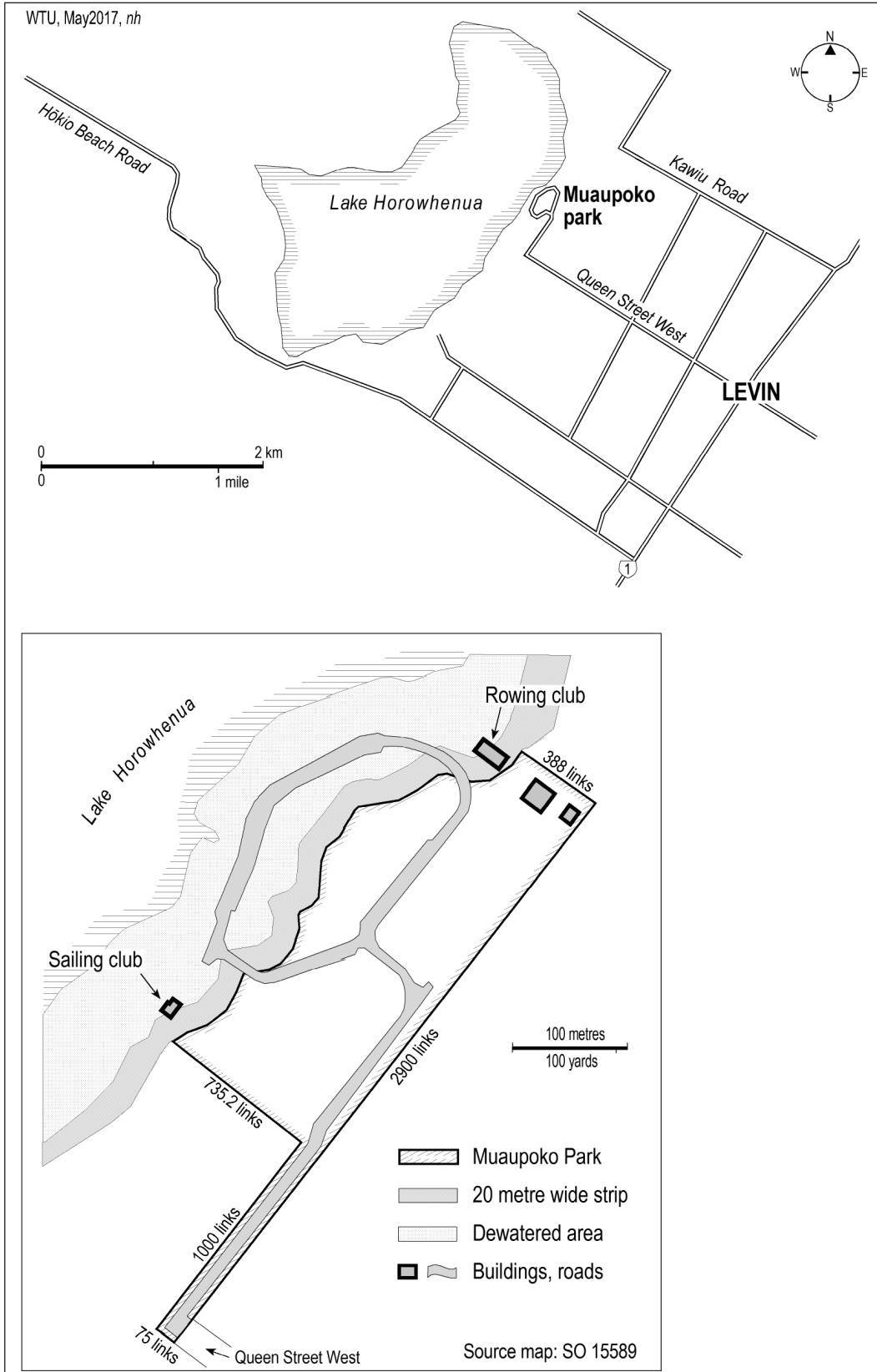
267. B Briffault for chief surveyor to director-general of lands, 9 February 1961 (Hamer, supporting papers to “A Tangled Skein” (doc A150(c)), p 478)

268. B Briffault for chief surveyor to director-general of lands, 9 February 1961 (Hamer, supporting papers to “A Tangled Skein” (doc A150(c)), p 478)

269. Maori Affairs Act 1953, s 6

270. Secretary for Maori Affairs to director-general of lands, 24 April 1961 (Hamer, supporting papers to “A Tangled Skein” (doc A150(c)), p 480)





Map 9.1: Location of Muaupoko Park and of the boating and rowing club buildings

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14 trustees. By 9 June 1961, B Briffault of the Lands and Survey Department had arranged ‘a lease for 999 years at a rental of £1 p.a.’ to be ‘signed by all 14 owners.’<sup>271</sup>

Paul Hamer described the sequel to these events in response to questions from unrepresented claimant Philip Taueki:

In the mid-1980s, . . . Crown officials accepted that a perpetual lease had been permitted by neither the Trustee Act 1956 nor the Maori Affairs Act 1953. Nor had the lease ever been registered against the land’s title, and the specific purpose of the lease had been contradicted by the position in which the clubhouse was actually built.

In other words, the authority for the construction of the boating club building came from various quarters, including Muaūpoko and the Crown. However, the irregularities in the lease and building’s position meant that the entire arrangement was flawed.<sup>272</sup>

These flaws became clear in the 1980s, after the Muaūpoko walk-out from the domain board (discussed below), when the lake trustees sought redress of a number of grievances from the Crown. Included in these grievances was the perpetual lease.<sup>273</sup> The complaint was that the lease had been signed by the lake trustees ‘in ignorance’. The boating club had not ‘built over the lakebed as proposed but instead on the dewatered area, and “the lease of maori [*sic*] land was a safety measure for the organisation to walk on the lake bed”’. The lake trustees argued that, since the land had not been used for the intended purpose, ‘the Crown has a duty to return the land to the owners.’<sup>274</sup> For the next few years, officials considered that a lease of the whole lakebed would solve this problem as well as others, but it never eventuated.<sup>275</sup>

**(f) Speedboats:** The issue of speedboats proved to be extremely divisive. As will be recalled, an absolute ban on speedboats had been part of the Crown–Māori agreement of 1953. After discussions with the borough council, however, the Crown had agreed to leave the issue to the new domain board to decide. The board adopted bylaws in 1957 which included a blanket prohibition of speedboats. Regattas, other sporting events, and the use of other kinds of motor boats could be approved by the board on a case-by-case basis. The bylaws were notified for public submissions and no objections were received.<sup>276</sup> At the time, Muaūpoko opposition to speedboats was based on the effects which the boats might have on eels. As Wiki Hanita told the *Chronicle* in 1957, ‘we still depend on the lake for eels, our natural food.’<sup>277</sup>

The tribe was united in opposition to speedboats in the late 1950s.<sup>278</sup> The local council and some sporting interests exerted minor pressure in the 1960s and 1970s,

271. Minute, 9 June 1961, on secretary for Maori Affairs to director-general of lands, 24 April 1961 (Hamer, supporting papers to “A Tangled Skein” (doc A150(c)), p 480)

272. Hamer, answers to questions of clarification (doc A150(j)), p 3

273. Hamer, “A Tangled Skein” (doc A150), pp 345–350

274. Ada Tatana to Minister of Lands, 19 December 1985 (Hamer, “A Tangled Skein” (doc A150), p 346)

275. Hamer, “A Tangled Skein” (doc A150), pp 346–350

276. Hamer, “A Tangled Skein” (doc A150), pp 170–172

277. *Chronicle*, 29 January 1957 (Hamer, “A Tangled Skein” (doc A150), p 171)

278. Hamer, “A Tangled Skein” (doc A150), pp 170–172

but the Muaūpoko majority on the domain board prevented any change of policy.<sup>279</sup> By 1980, however, the lake trustees had changed their mind, so long as any speedboat racing did not interfere with eel migration. In August 1980, the New Zealand Power Boat Association applied to the domain board to hold a regatta, and the Māori members agreed so long as the lake trustees approved. The trustees asked for speedboat trials to test the impact on eels. The outcome was ‘apparently positive’ and the trustees gave permission in writing in March 1981.<sup>280</sup> This decision split the Muaūpoko tribe. When the domain board notified its intention to change the bylaws, the Muaupoko Maori Committee objected. The board heard submissions in August 1981.<sup>281</sup> Joe Tukapua, now a board member, reminded his colleagues that the lake was sacred, and that ‘each move to widen the use of the lake was pushing the Maori people further out of their heritage.’<sup>282</sup>

The Māori board members were now divided so the board’s neutral chair, Wayne Devine, met with the lake trustees to try to resolve the matter. The trustees confirmed their support in writing. The board then dismissed the formal objections and unanimously approved the amended bylaw on the basis that the trustees would have a veto power over every application to race speedboats on the lake.<sup>283</sup> Bylaws had to be confirmed by the Minister of Lands, Venn Young. He had not yet approved the amendment when a petition was received from 184 members of Muaūpoko. The petitioners disagreed with the trustees’ decision, and were concerned about the impact on their fishing rights. They were also worried that the veto process might put undue pressure on the lake trustees to make compromises.<sup>284</sup> ‘We believe’, they said,

that the continuing goodwill of the Muaupoko Tribe toward the Levin Community has been demonstrated in our past gifts. We do not believe the Levin Community would expect a gift which would jeopardise our ancestral rights and our ancestral fishing grounds.<sup>285</sup>

The Minister’s response was not to meet with the tribe but rather with the member for Horowhenua (Geoff Thompson), the mayor of Levin, Levin’s town clerk, and the domain board chair. As a result of that meeting in October 1981, the Minister approved the amendment on the proviso that speedboats could not be used more than eight days a year, and each occasion required the specific consent of the lake trustees.<sup>286</sup> As Paul Hamer pointed out, this decision was made on the advice of ‘a

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279. Hamer, “A Tangled Skein” (doc A150), pp 309–310

280. Hamer, “A Tangled Skein” (doc A150), p 310

281. Hamer, “A Tangled Skein” (doc A150), pp 310–316

282. *Chronicle*, 21 August 1981 (Hamer, “A Tangled Skein” (doc A150), p 311)

283. Hamer, “A Tangled Skein” (doc A150), pp 311–312; director-general of lands to Minister of Lands, undated [ca 13 October 1981] (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(d)), p 645)

284. Hamer, “A Tangled Skein” (doc A150), pp 312–313

285. Petition, not dated [ca October 1981] (Hamer, “A Tangled Skein” (doc A150), p 313)

286. Hamer, “A Tangled Skein” (doc A150), pp 314–315

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group of vested local interests representing one side of the argument only', and no advice was sought from Maori Affairs or Muaūpoko themselves.<sup>287</sup>

The first speedboat regatta was duly held in January 1982. Hapeta Taueki warned the *Chronicle* that there would be resistance.<sup>288</sup> In his diary, made available to the Tribunal by his whānau, Hapeta Taueki recorded that speedboats must not be allowed to disturb the tranquility of Muaūpoko's sacred lake. He appealed to the protection promised in the Treaty of Waitangi, and viewed speedboating as desecration of an ancestral taonga.<sup>289</sup> As foreshadowed, the regatta was marked by protests. The protestors – seven young Muaūpoko people – were arrested. Joe Tukapua led a silent protest outside the court when their case was heard on 13 January 1982. There was a growing view, he explained, that Muaūpoko would have to 'take over the domain board if necessary' to protect their lake.<sup>290</sup> The degree of control that could be 'delivered by a simple majority of board members' was no longer enough.<sup>291</sup>

The ability of Muaūpoko to use their 4:3 majority on the board depended on (a) unanimity among all four Māori members on crucial issues (b) the regular attendance of all four Māori members so that they could vote en bloc, and (c) the development of experience in local body politics and political forums. Problems on all three fronts had significantly reduced the effectiveness of the 1956 'co-management' regime for Muaūpoko. The independence of the chair was supposed to be a further mechanism to ensure that the local bodies did not take control. By the beginning of the 1980s, however, Muaūpoko were seriously concerned that the 1956 arrangements did not serve their interests or enable them to protect their lake and stream. We have already seen that the Manawatu Catchment Board's proposed new works in 1981 and the domain board's agreement to speedboats had caused grave concerns within the tribe. Underlying those concerns was the growing realisation that their lake was becoming seriously polluted and its fisheries were compromised (see chapter 10). The result was a significant movement among Muaūpoko to reform the 1956 arrangements or get rid of them altogether.

### **(3) Demands for significant reform or an end to the 1956 arrangements: the Crown and local bodies**

The first attempt to undo the 1953 agreement and the 1956 Act came from the Crown and local bodies. The ink was barely dry on the 1958 declaration and development plan before the Lands Department was trying to extricate itself from the domain board. In 1966, senior officials went so far as to propose that the borough council should take over the domain, 'with of course the consent of the County and the Maori people.'<sup>292</sup> The assistant director-general noted: 'I said that there might be something in the legislation hindering the department from getting out but this

287. Hamer, "A Tangled Skein" (doc A150), p 315

288. Hamer, "A Tangled Skein" (doc A150), p 315

289. Jack Hapeta Taueki, diary, 1981 (doc C24), pp 7–10

290. *Chronicle*, 14 January 1982 (Hamer, "A Tangled Skein" (doc A150), p 316)

291. Hamer, "A Tangled Skein" (doc A150), pp 315–316

292. Assistant director-general of lands, file note, 6 May 1966 (Hamer, "A Tangled Skein" (doc A150), p 279)

would be looked at.<sup>293</sup> The director-general instructed the commissioner of Crown lands, *ex officio* chair of the board, to ‘sell the idea’ of ‘control by the local body’ to ‘all concerned’.<sup>294</sup> In the Government’s view, management of the domain required local funds and local control. The upkeep of Muaupoko Park was a particular concern. In 1967, the Government developed a proposed solution: the borough and county councils could lease the domain from the Māori owners, while the domain board remained in titular control. In 1968, the two councils accepted this proposal but on terms which would never be acceptable to Muaūpoko. They wanted to assume most of the authority of the board, they wanted agreement to speedboats and dredging, and they sought a Crown grant for capital works.<sup>295</sup> Officials rightly observed that ‘the local bodies are obviously trying to obtain the powers of the Domain Board without the Maori’s participation.’<sup>296</sup> Nonetheless, the head of the Lands Department asked his Minister to agree to legislation authorising the lease. The legislation would provide for the councils to lease the domain, carry out day-to-day administration, and fund its development and maintenance. The Lands Department actually preferred to transfer the whole of the domain board’s powers to the local bodies but knew that this would never be approved by Muaūpoko.<sup>297</sup>

The Minister agreed to the proposed legislation and lease, subject to the tribe’s consent. The issue was referred to the domain board in October 1968. The Māori members doubted that the tribe would agree to the proposed lease, especially in light of their fishing rights and the proposals for speedboats and dredging. It was recorded that all the board members themselves were happy with the proposals and would take them back to the people for discussion. It later emerged that the Māori domain board members were not pleased at all.<sup>298</sup> Paul Hamer suggested that this was one of several instances where Muaūpoko participation in the board was hampered because the Māori members ‘did not feel sufficiently comfortable to assert themselves forcefully in that environment.’<sup>299</sup> In any case, Muaūpoko opposition to the proposals found a powerful ally in Whetū Tirikatene-Sullivan, their member of Parliament. Mrs Tirikatene-Sullivan attended the large hui in November 1968 to discuss the lease proposal. She wrote to the Minister, Duncan MacIntyre, that the tribe was unanimously opposed (including its four domain board members) to the entirety of the proposals. She also pointed out that Muaūpoko had given up the opportunity to develop their property, the lake, as a commercial resort. Their contribution to the partnership was thus enormous, and no contributions to administration

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293. Assistant director-general of lands, file note, 6 May 1966 (Hamer, “A Tangled Skein” (doc A150), p 279)

294. Director-general of lands to the commissioner of Crown lands, 11 May 1966 (Hamer, “A Tangled Skein” (doc A150), p 280)

295. Hamer, “A Tangled Skein” (doc A150), pp 280–282

296. Johnston, reserves, to assistant director, National Parks and Reserves, 2 May 1968 (Hamer, “A Tangled Skein” (doc A150), p 282)

297. Hamer, “A Tangled Skein” (doc A150), pp 282–283

298. Hamer, “A Tangled Skein” (doc A150), pp 282–285

299. Hamer, “A Tangled Skein” (doc A150), p 285



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or upkeep by the councils could match it. The tribe was also anxious to protect their fishing rights, and feared the effects of dredging on their fisheries.<sup>300</sup>

In March 1969, the Māori members of the domain board confirmed that the tribe remained opposed to dredging or special legislation authorising a lease. By 1970 the Crown had given up on extricating itself from the board, at least for the time being, and the two local councils made an informal arrangement with the board to take responsibility for essential maintenance of the domain.<sup>301</sup>

During the attempts from 1967 to 1969 to transfer control to the local councils, Muaūpoko strongly defended the 1956 arrangements, the role of the domain board, and their rights as owners (including their fishing rights). The Crown backed off, partly as a result of Mrs Tirikatene-Sullivan's interventions. By 1980, the domain had officially been reclassified as a recreation reserve under the Reserves Act 1977, and the Crown was attempting to get rid of individual reserve boards in favour of regional bodies.<sup>302</sup> The Government was aware, however, that this would be difficult in the case of the Horowhenua domain board, because of its separate legislation and the statutory representation for Muaūpoko. Even so, domain board memberships were reduced to three years in the hope of getting rid of the board within that time frame.<sup>303</sup> Most unexpectedly, however, Muaūpoko themselves now united to demand the abolition of the board and the transfer of full control of the lake to its Māori owners. We turn to that development next.

**(4) Demands for significant reform or an end to the 1956 arrangements: Muaūpoko in the 1980s**

**(a) *Muaūpoko walk out of the domain board in 1982:*** Simmering Muaūpoko discontent with the domain board and arrangements about the lake came to a head in 1982. Particular triggers included the speedboat issue, catchment board works, and the ongoing pollution of the lake by Levin's sewerage scheme. The issue of sewerage and pollution will be addressed in chapter 10, but we note its importance here as a reason for Muaūpoko dissatisfaction with the domain board and borough council.

In February 1982, the lake trustees wrote to Jonathan Elworthy, Minister of Lands, asking him to dissolve the domain board and transfer its authority and property to the trustees. They also asked for the trustees to have a right of veto over catchment board access to the lake and the Hōkio Stream. The trustees' letter was supported by the Kawiu Marae trustees, the Pāriri Marae trustees, the Muaupoko Maori Committee, the Muaupoko Maori Women's Welfare League, and the Muaupoko Kokiri Management Committee.<sup>304</sup> On 24 April 1982, a hui of about 100 Muaūpoko

300. Hamer, "A Tangled Skein" (doc A150), pp 284–285

301. Hamer, "A Tangled Skein" (doc A150), pp 286–289

302. Hamer, "A Tangled Skein" (doc A150), pp 302–303

303. Hamer, "A Tangled Skein" (doc A150), pp 302–303

304. Hamer, "A Tangled Skein" (doc A150), pp 318–320. The lake trustees' letter was signed by Hohepa Taueki, Tau Ranginui, Joe Tukapua, Mario Hori-Te-Pa, Tamati Hetariki, R Simeon, James Broughton, S Wakefield, and JW Kerehi.



tribal members supported the trustees' call for 'complete Muaūpoko control of the lake'.<sup>305</sup> It seemed that the whole tribe had united behind this demand.

The trustees pointed out to the Minister that Muaūpoko's grievances went right back to the 1905 agreement and Act: the domain board, they said, was 'born out of a vile threat to Muaupoko in 1905'. The result of the board's incompetent administration was polluted waters and polluted, ruined shellfish beds and flax. Further, the board's failure to deal with pollution was due to the Levin Borough Council's 'vested interest' in 'putting its Borough Council sewerage into the lake' while 'giving its approval as a member of the Domain Board [and] ignoring the protests of the tribe'.<sup>306</sup>

In April 1982, Joe Tukapua read out the trustees' letter at the domain board meeting and then led a Muaūpoko 'walk out'.<sup>307</sup> For the next six years, Muaūpoko boycotted the board, refusing to attend its meetings. Matt McMillan, as 'tribal spokesman', explained that the tribe sought nothing less than 'self-determination', the 'right of anyone to run their own affairs'. The dispute, he said, could be 'worse than Bastion Point' because there was no doubt that Māori were the owners of Lake Horowhenua.<sup>308</sup>

**(b) *The Minister offers the lake trustees control of the lake and stream:*** The Lands Department was keen to get out of any responsibility for this 'regional' matter.<sup>309</sup> This made it 'much easier' for the department to contemplate a transfer of control to the trustees.<sup>310</sup> But officials immediately identified the local authorities as a bar to such a transfer. After all, the administration of Muaupoko Park was dependent on financial support from the two councils.<sup>311</sup> The Minister, on the other hand, 'realise[d] local authorities would not be happy' but considered that Muaūpoko had a case.<sup>312</sup>

On 28 May 1982, Elworthy met with the trustees at Pāriri Marae. The trustees repeated their request for abolition of the board, trustee control of the lake and stream, and a right of veto over the catchment board's right of entry (for the purpose of carrying out works). On the other hand, the trustees were happy to guarantee public access and any existing licences or leases.<sup>313</sup> The trustees blamed the presence of local authorities on the board for 'just why the Muaūpoko representatives would walk out on a board that they would in theory control'.<sup>314</sup> According to Paul Hamer, local authority representation was used to explain 'why the Muaūpoko

305. Hamer, "A Tangled Skein" (doc A150), p 324

306. Horowhenua Lake Trustees to Minister of Lands, 16 February 1982 (Hamer, "A Tangled Skein" (doc A150), p 319)

307. Hamer, "A Tangled Skein" (doc A150), pp 321–322

308. *Manawatu Evening Standard*, 21 April 1982 (Hamer, "A Tangled Skein" (doc A150), p 322)

309. Hamer, "A Tangled Skein" (doc A150), pp 320, 350

310. Hamer, "A Tangled Skein" (doc A150), p 326

311. Hamer, "A Tangled Skein" (doc A150), pp 320, 326

312. Director-general of lands, file note, 1 June 1982 (Hamer, "A Tangled Skein" (doc A150), p 326)

313. Hamer, "A Tangled Skein" (doc A150), p 324

314. Hamer, "A Tangled Skein" (doc A150), p 325

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majority on the board had never been properly exploited, and why the attendance of Muaūpoko board members had often been so poor.<sup>315</sup>

In June 1982, the Minister responded formally to the trustees. He told them that he was prepared to abolish the board and ‘return . . . Lake Horowhenua and the Hokio Stream to the Maori owners.’<sup>316</sup> First, however, he would need the trustees to guarantee public access and to put forward some proposals for how they would manage the lake. But Elworthy preferred Muaupoko Park to be controlled by the local authorities, not the trustees. The question of catchment board access was referred to the Minister of Works. Paul Hamer commented that this was a ‘mixed bag’, as the trustees would no longer have to deal with the council representatives over such issues as speedboats, but they would lose all financial support as well as any role in the control of Muaupoko Park.<sup>317</sup> Legislation was planned for the 1982 session of Parliament.<sup>318</sup>

As predicted, the local authorities were not happy when Elworthy’s decision was announced.<sup>319</sup> The local newspaper headline was: ‘Minister ready to bow to trustees’ demands.’<sup>320</sup> The trustees responded on 25 June 1982. They accepted the Minister’s offer but suggested that they should administer Muaupoko Park as well ‘so that there could be one body controlling lake, stream, and park.’<sup>321</sup>

It was at this point, however, that tribal divisions took centre stage. Back in April 1982, Hapeta Taueki had threatened to take the trustees to court over alleged wrongdoings. The local member of Parliament, Geoff Thompson, emphasised disagreements within Muaūpoko and problems with the trustees, but these had not prevented the Minister from making his offer.<sup>322</sup> Hapeta Taueki’s allegations against trustees Joe Tukapua and Hohepa Taueki were used in the press to justify local authority concern about handing over control of the lake. In October, some within the tribe suggested that the domain board should continue to operate, but that its tribal representatives should be appointed by the trustees (not the Muaupoko Maori Committee).<sup>323</sup> The public dispute within the tribe also led ‘officials [to join] the chorus suggesting that the Minister retract his offer to the trustees.’<sup>324</sup> The possibility of legislative amendments in 1982 became a ‘dead duck.’<sup>325</sup> Paul Hamer suggested that the Maori Land Court’s investigation into Hapeta Taueki’s allegations provided the Minister with a rationale to withdraw his June 1982 offer.<sup>326</sup>

Officials began to consider an alternative basis for a settlement. One issue that had emerged clearly from the trustees’ meeting with the Minister was that

315. Hamer, “A Tangled Skein” (doc A150), p 325

316. Minister of Lands to Robin Barrie, 10 June 1982 (Hamer, “A Tangled Skein” (doc A150), p 327)

317. Hamer, “A Tangled Skein” (doc A150), pp 327–328

318. Hamer, “A Tangled Skein” (doc A150), p 331

319. Hamer, “A Tangled Skein” (doc A150), pp 328–331

320. *Chronicle*, 17 June 1982 (Hamer, “A Tangled Skein” (doc A150), p 328)

321. Hamer, “A Tangled Skein” (doc A150), p 329

322. Hamer, “A Tangled Skein” (doc A150), pp 324–332

323. Hamer, “A Tangled Skein” (doc A150), pp 331–333

324. Hamer, “A Tangled Skein” (doc A150), p 332

325. Director-general of lands, file note, 25 August 1982 (Hamer, “A Tangled Skein” (doc A150), p 331 n)

326. Hamer, “A Tangled Skein” (doc A150), p 332

Muaūpoko members did not feel that they had an effective majority on the board. James Broughton also made this point in the Maori Land Court inquiry, which was reported in the press (and forwarded to the Minister), stating: ‘We feel as if we haven’t had enough say. If one of our (tribal) members goes against the wishes of the rest, we’ve lost our control.’<sup>327</sup> The commissioner of Crown lands suggested that Muaūpoko representation be increased to five seats, which would give them a stronger, more secure majority. Thompson was opposed but the Maori Land Court’s recommendations in December 1982 underlined the need for a change. Judge Smith observed

that, in theory, the four to three board majority (that is, with the chairman having only a casting vote) gave Muaūpoko control of the board. However, he noted the evidence that the nomination of board members by the Muaupoko Maori Committee rather than by the trustees had led to ‘dissension among the Maori members of the Board appointed following such recommendations, with the result that such Maori members do not effectively control Board policy.’<sup>328</sup>

The court recommended that ‘the trustees continue consultations with the Crown and local authorities with the object of promoting amending legislation which would confer upon the trustees complete control of the Lake, chain strip and dewatered area.’<sup>329</sup> As a result, officials returned to the idea of giving Muaūpoko an extra seat on the domain board, aware that “‘the question of control” would return “to the forefront”” because of the court’s recommendation.<sup>330</sup> But officials also stressed tribal disunity, evident in the court hearings, and the court’s finding that there were some significant problems with the trustees’ administration. The Minister agreed to reconsider his June 1982 offer to the trustees.<sup>331</sup>

**(c) Elworthy’s scaled-back offer to the trustees in April 1983:** A combination of official and local authority opposition, and evident disunity within Muaūpoko, led Jonathan Elworthy to retract his offer of full control. In April 1983, he offered the trustees:

- ▶ the right to nominate the four domain board members (but the number of Muaūpoko board members would not be increased);
- ▶ the right of approval for catchment board works and any bylaws; and

327. ‘Lake Trustees to Get Together with Owners’, unidentified newspaper clipping, not dated (Hamer, “A Tangled Skein” (doc A150), p 333)

328. Hamer, “A Tangled Skein” (doc A150), pp 333–334

329. Extract from Ōtaki Māori Land Court minute book 84, ‘Lake Horowhenua: Application by Hapeta Taueki for an order to enforce the obligations of their trust against the trustees of Lake Horowhenua and for an order under section 68 of the Trustee Act 1956: Findings and Recommendations’, 10 December 1982 (Hamer, papers in support of “A Tangled Skein” (doc A150(d)), p 746)

330. Hamer, “A Tangled Skein” (doc A150), p 335

331. Hamer, “A Tangled Skein” (doc A150), pp 332–336

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- ▶ legislative reform to remove the contradictions in the 1956 Act (between Muaūpoko and public rights, as identified by the Maori Land Court in December 1982 (see section 9.3.4(5)).<sup>332</sup>

Elworthy hoped that giving the lake's legal owners control of nominations would overcome disagreements within the tribe. The Maori Affairs Department, however, advised against introducing any legislation for at least another year, so as to give Muaūpoko time to resolve disagreements and make a decision.<sup>333</sup> On 23 May 1983, the trustees met and agreed to accept the Minister's new offer in principle, asking him to 'draft proposals for perusal and comment'.<sup>334</sup> It is not clear why the outgoing trustees agreed so readily to give up their earlier proposal for abolition of the board and complete control of the lake. The court had recommended that the owners appoint a new, smaller group of trustees, and there was something of a cloud over Joe Tukapua as a result of his informal sub-leasing of trust land. But a lengthy delay ensued before new trustees were appointed, and it was not at all clear that the owners would accept Elworthy's scaled-back offer.<sup>335</sup> New trustees had still not been appointed by July 1984, when Prime Minister Rob Muldoon called a snap election and the National Government lost office.<sup>336</sup>

**(d) A new Government, new trustees, and new proposals to resolve the impasse:** In 1982, Jonathan Elworthy suggested that the domain board go into recess for the time being, but the local government body representatives refused to do so. The board continued to meet and make decisions in the absence of the Muaūpoko members, which put some pressure on both the Government and the lake trustees to resolve the impasse.<sup>337</sup> Seven trustees (three reappointed and four new) were eventually appointed in November 1984.<sup>338</sup> They were chosen by the court from the 16 trustees nominated by the owners. For the next few years, the trustees' interaction with the Government was dominated by their secretary, Ada Tatana, and the new Minister, Koro Wetere.<sup>339</sup>

In December 1984, the commissioner of Crown lands advised his head of department that it was necessary to introduce legislation 'to improve the representative structure and future management of the lake'.<sup>340</sup> In May 1985, the trustees came up with their own alternative proposal: the Crown could enter into a perpetual lease for the lakebed, chain strip, and dewatered area in exchange for the transfer of 429 acres of local Crown land to the lake trust. The lessee (the Crown) would be

332. Hamer, "A Tangled Skein" (doc A150), p 336

333. Hamer, "A Tangled Skein" (doc A150), pp 337–338

334. Barrie to Minister of Lands, 1 July 1983 (Hamer, papers in support of "A Tangled Skein" (doc A150(d)), p 795)

335. Hamer, "A Tangled Skein" (doc A150), pp 332–339

336. Hamer, "A Tangled Skein" (doc A150), p 339

337. Hamer, "A Tangled Skein" (doc A150), pp 331, 353

338. The seven trustees were James Broughton, Hohepa Kerehi, Alex Maremare, Rangipō Metekingi, Kawaurukuroa Hanita-Paki, Rita Ranginui, and Ada Tatana: Hamer, "A Tangled Skein" (doc A150), p 340.

339. Hamer, "A Tangled Skein" (doc A150), pp 340–350

340. Commissioner of Crown lands to director-general, 10 December 1984 (Hamer, "A Tangled Skein" (doc A150), p 341)

responsible for beautifying and developing the reserve. The assistant commissioner of Crown lands advised strongly against this proposal, noting that the Crown land to be transferred was highly valuable, and the costs of developing and administering the enlarged domain would also be high. In fact, the proposal represented the opposite of the Crown's wish to leave such local reserves to local administration.<sup>341</sup>

Koro Weterere's response to the trustees in June 1985 was very much in keeping with Crown priorities: the Lake Horowhenua domain was not 'reserve land . . . of national importance', and improvements to it would only be of local benefit.<sup>342</sup> Hence, a significant Government outlay could not be justified. The trustees reminded the Minister that any member of the public who stepped on the lakebed was trespassing if the Government chose not to lease it from them. Further, the lake was polluted and the tribal fisheries had been damaged, while local bodies lacked the resources to compensate for the tribe's lost 'asset'. Again, a lease and exchange of land was considered appropriate.<sup>343</sup> There was also conflict over the lease to the boating club – if no peaceful solution could be found, the trustees would 'have to exercise our rights.'<sup>344</sup> In November 1985, the trustees went ahead and told the rowing club that there would be an annual fee for any users who walked on the lakebed.<sup>345</sup>

There was no meeting of minds in 1985–86. Mrs Tatana, on behalf of the trustees, continued to remind the Crown of Muaūpoko's grievances about the 1905 Act, which they saw as forcibly taking control of their lake, and other past injustices. The trustees saw a lease as both a means of developing the lake reserve and obtaining compensation from the Crown. The Government, on the other hand, considered that these grievances were not really relevant, and that the matter was essentially a local one. The trustees replied that if the Crown would not deal with their issues, they would take a claim to the Waitangi Tribunal.<sup>346</sup> Minister Weterere told them: 'I hope it will not come to this.'<sup>347</sup>

Nonetheless, the trustees' attempt to charge fees brought about a temporary shift in the Government's approach. Koro Weterere believed that the 1956 Act allowed boaters to walk on the lakebed when launching their craft, but his department's office solicitor took a different view. With legal advice that the trustees were 'quite within their rights to charge a fee for lake users to walk over the lakebed', officials decided that it would be essential for the Crown to lease the lakebed.<sup>348</sup>

How was this to be justified, given the Crown's approach that the reserve was a local matter? Essentially, officials took the view that a lease of the bed (as opposed to the surrounding land) was 'a matter for the Crown because of its involvement in the past with the arrangements for recreational use of the surface waters of

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341. Hamer, "A Tangled Skein" (doc A150), p 343

342. Minister of Lands to Ada Tatana, 26 June 1985 (Hamer, "A Tangled Skein" (doc A150), p 344)

343. Hamer, "A Tangled Skein" (doc A150), p 344

344. Tatana to Minister of Lands, 22 July 1985 (Hamer, "A Tangled Skein" (doc A150), p 345)

345. Hamer, "A Tangled Skein" (doc A150), p 345

346. Hamer, "A Tangled Skein" (doc A150), pp 344–351

347. Minister of Lands to Ada Tatana, 23 January 1986 (Hamer, "A Tangled Skein" (doc A150), p 346)

348. Hamer, "A Tangled Skein" (doc A150), pp 345–346



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the lake.<sup>349</sup> This was a part of the ‘Crown’s obligation to preserve the rights of the existing lessees & the public.’<sup>350</sup> In the department’s view, the Māori owners had agreed to public access in 1905, having asked the Crown to protect their fishery against uncontrolled boating, and there were ‘grounds to contest the claim of coercion by the Crown.’<sup>351</sup> The Minister wrote to the trustees: ‘As far as we know today, this agreement [in 1905] was freely entered into and was intended to open the lake to legal public use subject to some safeguards which the owners specified.’<sup>352</sup>

But the Government was not prepared to agree to the transfer of valuable Crown land in exchange for a lease. At first, officials contemplated an offer to make Muaupoko Park a Māori reservation (under the Maori Affairs Act 1953). Eventually they decided on a lease of ‘a sufficient area’ of the chain strip, dewatered land, and lakebed in front of Muaupoko Park to enable the launching of boats. Local authorities would be expected to pay most of the rent. In May 1986, the lake trustees rejected this offer completely. They were now prepared to accept a monetary rental, but insisted that the Crown must lease the whole lakebed and not just the small area required to safeguard its very specific goal of free public access.<sup>353</sup>

The lease proposal now fell over entirely:

- ▶ in November 1986, the commissioner of Crown lands suggested a lump sum payment of \$100,000 for a 25-year lease of the lakebed, but senior officials now decided (once again) that this was a purely local matter, despite the Crown’s involvement in the past, and that any such offer would be ‘unmerited generosity’;<sup>354</sup>
- ▶ the Lands and Survey Department ceased to have any responsibility for the matter in 1987, after the creation of the Department of Conservation (DOC), and the new department decided not to ‘follow up this Lands and Survey idea’ unless the Māori owners proposed it again;<sup>355</sup>
- ▶ DOC officials did contemplate the desirability of a lease in 1988 but the idea was ultimately ‘abandoned by both sides’ at that time.<sup>356</sup>

Paul Hamer concluded that the lease negotiations ‘seemed like a lost opportunity to making some headway on the interminable problems affecting the lake.’<sup>357</sup> We agree.

At first, it seemed as if the Crown’s approach – that this was a purely local matter – would facilitate its acceptance of the proposal to abolish the board and transfer its functions to the Muaupoko lake trustees. Ultimately, however, the Crown’s

349. Minister of Lands to Ada Tatana, 23 January 1986 (Hamer, papers in support of “A Tangled Skein” (doc A150(e)), p 1061)

350. Notes of meeting, 12 March 1986 (Hamer, “A Tangled Skein” (doc A150), p 348)

351. Devine for director-general of lands to commissioner of Crown lands, 27 March 1986 (Hamer, “A Tangled Skein” (doc A150), p 348)

352. Minister of Lands to Ada Tatana, 23 January 1986 (Hamer, papers in support of “A Tangled Skein” (doc A150(e)), p 1061)

353. Hamer, “A Tangled Skein” (doc A150), pp 347–349

354. Hamer, “A Tangled Skein” (doc A150), pp 349–350

355. Hamer, “A Tangled Skein” (doc A150), p 350

356. Hamer, “A Tangled Skein” (doc A150), p 350

357. Hamer, “A Tangled Skein” (doc A150), pp 350–351



obligation was seen as protecting free public access and defending the arrangements of 1905 and 1956 which guaranteed it. Astonishingly, neither Ministers nor officials considered that the Crown also had obligations of active protection towards Māori and their lands and waters. The result was that the Crown did nothing at all to assist the lake trustees or resolve Muaūpoko grievances. After Elworthy's initial offer was retracted in 1983, the Crown considered a number of options, including

- ▶ increasing Muaūpoko representation on the domain board;
- ▶ leasing the lakebed for a rental;
- ▶ making Muaupoko Park a Māori reservation; and
- ▶ giving the lake trustees the right to approve catchment board works and domain bylaws.

Any or all of these options would have assisted, especially according Muaūpoko an extra seat on the board. Yet the Crown did nothing at all.

**(e) *Muaūpoko rejoin the domain board:*** By 1988, Muaūpoko representatives had been absent from the domain board for six years. After the appointment of new trustees in November 1984, the trustees sought to attend the board meetings but they were not the legally appointed Muaūpoko representatives.<sup>358</sup> On 12 March 1985, Koro Wetere promised to amend the legislation so that the trustees (instead of the 'Muaupoko Maori Tribe') would nominate board members. It proved difficult to get any kind of priority for this kind of legislation in 1985–87, which increasingly frustrated the trustees. There was a further delay in 1987 when DOC took responsibility for the board. Eventually, the trustees nominated new domain board members in 1988, endorsed by a hui of Muaūpoko tribal members, without any law change at all. DOC took the view that this was consistent with the wording of the 1956 Act, and the Crown simply appointed these members.<sup>359</sup> It is important, however, that the legislative amendments promised by Elworthy and Wetere had also provided for the lake trustees to approve all catchment board works and domain bylaws.<sup>360</sup> We discuss the failure to enact this promised legislation in the next section. Here, we simply note that, after six years of negotiations, the only change was that the lake trustees would henceforth select the board members instead of the Muaupoko Maori Committee. The 'boycott' had accomplished virtually nothing, and left Muaūpoko further aggrieved.

##### **(5) *The Crown's failure to amend the 1956 Act in the 1980s***

In 1982, the Maori Land Court investigated the lake trust and made a number of findings and recommendations. Included in these was the court's investigation of the wording of the 1956 legislation in respect of Māori and public rights. As will be recalled from chapter 8, the Horowhenua Lake Bill 1905 had a clause which stated: 'The Native owners shall at all times have the free and unrestricted use of the lake and of their fishing rights over the lake.' The House then adopted an amendment

358. Hamer, "A Tangled Skein" (doc A150), p 341

359. Hamer, "A Tangled Skein" (doc A150), pp 351–354

360. Hamer, "A Tangled Skein" (doc A150), pp 336, 352

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on the motion of Premier Seddon, to add the words: ‘but so as not to interfere with the full and free use of the lake for aquatic sports and pleasures.’ In section 8.2.4, we found that this wording created a hierarchy of rights, in which priority was given to the full and free use of the lake for aquatic sports. This part of the 1905 Act – that the ‘free and unrestricted rights’ of the Māori owners were not to conflict with the ‘full and free use’ of the lake by the public – was largely replicated in the ROLD Act 1956. As we explained in section 9.3.3, section 18(5) of the Act stated:

Provided further that the Maori owners shall at all times and from time to time have the free and unrestricted use of the lake and the land fourthly described in subsection thirteen of this section and of their fishing rights over the lake and the Hokio Stream, but so as not to interfere with the reasonable rights of the public, as may be determined by the Domain Board constituted under this section, to use as a public domain the lake and the said land fourthly described.

In comparing these two sections in the Horowhenua Lake Act 1905 and the ROLD Act 1956, the court stated:

Neither s 2(a) of the 1905 Act nor the proviso in the 1956 Act can be described as models of law drafting. Both contain contradictions in terms, for how can persons be said to have free and unrestricted use at all times if their use is to be restricted by some other persons’ use? There is no doubt that these ambiguous provisions of the statutes have added to the trustees’ difficulties in carrying out their functions.<sup>361</sup>

In April 1983, the Minister of Lands, Jonathan Elworthy, wrote to the trustees that – if there was Māori and local authority support – he would ‘promote suitable provisions in the Reserves and Other Lands Disposal Bill’ to:

- (a) Provide for the Lake Trustees to nominate the Muaupoko representatives on the Reserve [Domain] Board.
- (b) Provide that the Minister will not approve any Reserve Board bylaw affecting the use of the surface waters of the Lake or the dewatered area or one chain strip fronting the Park without the consent of the Lake Trustees. This would ensure there could be no further misunderstanding over such matters as power-boating, duck-shooting and fishing rights.
- (c) In response to Judge Smith’s expression of concern, revise and improve the wording of the 1956 Act about fishing and public use rights.

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361. Extract from Ōtaki Māori Land Court minute book 84, ‘Lake Horowhenua: Application by Hapeta Taueki for an order to enforce the obligations of their trust against the trustees of Lake Horowhenua and for an order under section 68 of the Trustee Act 1956: Findings and Recommendations’, 10 December 1982 (Hamer, papers in support of “A Tangled Skein” (doc A150(d)), p 742)

(d) Give to the Lake Trustees (instead of the Board) the power to consent to any works affecting the Lake or the Hokio Stream undertaken by the Manawatu Catchment Board in accordance with the 1956 Act.<sup>362</sup>

Both the catchment board and the borough council objected to these proposals. To satisfy the catchment board, the Minister amended his proposal so that, if the trustees and the board disagreed over proposed works, the Minister would make the final decision. He was not prepared to back down, however, in the face of borough council opposition, reminding the mayor that the bylaws were to apply to Māori land.<sup>363</sup>

Elworthy was not able to introduce legislation before the National Government lost office in 1984. The new Minister, Koro Wetere, discussed Elworthy's law change proposals with the lake trustees at a meeting on 12 March 1985. These proposals were the original ones, and did not include Elworthy's modification (the Minister to have the final say on catchment board works). Wetere and the trustees agreed on points (b)–(d) as set out above, but it was acknowledged the change in appointing board members would be controversial. Wetere agreed to have the legislation drafted and sent to the trustees, the Muaupoko Maori Committee, and the local authorities for consultation.<sup>364</sup>

At this point, therefore, the Government and the lake trustees agreed that the 1956 Act should be amended on these four specific points. The trustees preferred that the legislation should provide for all seven lake trustees to become domain board members, with only four attending at any one time<sup>365</sup> – in our view, this would doubtless have helped facilitate full attendance, which Muaupoko representatives had struggled with in the past. But it proved to be a stumbling block with parliamentary counsel: 'Are notices of meeting to be sent to all trustees, and the first four through the door are the trust members for that meeting?' he inquired.<sup>366</sup> There was also a debate about whether the legislation should go further, including arrangements such as commercial fishing. This and other questions could have been resolved but the more serious stumbling block was that the legislation simply was not a priority for the Government.

In January 1986, Wetere apologised to the trustees for the delay, which he ascribed to Parliament's heavy legislative programme. By mid-1986, draft legislation was with the Parliamentary counsel to implement points (a)–(d) set out above, but it had still not progressed by March 1987. The Minister told the trustees that he was disappointed by the delay but that the ROLD Bill was on the legislative programme

362. Minister of Lands to Robin Barrie, 8 April 1983 (Hamer, papers in support of "A Tangled Skein" (doc A150(d)), p 779)

363. Hamer, "A Tangled Skein" (doc A150), pp 337–338

364. Deputy director-general of lands, notes of meeting, 13 March 1985 (Hamer, papers in support of "A Tangled Skein" (doc A150(d)), pp 822–824)

365. Hamer, "A Tangled Skein" (doc A150), pp 352–353

366. Parliamentary counsel to DOC, 27 April 1987 (Hamer, papers in support of "A Tangled Skein" (doc A150(e)), p 1111)

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for 1986/87.<sup>367</sup> This proved to be overly optimistic. By April 1987, DOC had assumed responsibility for the legislative change but the Bill was not on ‘the list of Bills essential or desirable for introduction this session.’ It was unlikely that there would be any draft legislation before the election in late 1987.<sup>368</sup> In the end, the legislation ‘failed to materialise’ at all. We have no way of knowing how it might have addressed the hierarchy of owner and public rights, but none of the legislative changes held out to the trustees in the 1980s were made. Paul Hamer suggested that the matter was simply a low priority for the Government and so it never happened.<sup>369</sup>

There were obvious advantages for the Māori owners in empowering their trustees to approve all bylaws and catchment board works. It was also important to address the question of the owners’ ‘unrestricted’ rights vis-à-vis those of the public. The Minister and the trustees had agreed to make these changes. The Crown’s failure in this respect was an important omission to amend the 1956 legislation.

We turn next to make our findings for this section of the chapter.

**9.3.5 Findings**

In this section, we structured our analysis around two key questions:

- ▶ Did the 1956 legislation remedy Muaūpoko’s grievances in respect of past legislation and Crown acts or omissions?
- ▶ Did the 1956 legislation provide a suitable platform for (a) future management of the lake and stream, and (b) protection of the Māori owners’ rights and interests?

We make our findings under these two headings. We then address the question of the 1961 lease.

**(1) Did the 1956 legislation remedy Muaūpoko’s grievances in respect of past legislation and Crown acts or omissions?**

In section 9.3.3(2), we found that there was genuine, free, and informed consent on the part of the Muaūpoko owners to the 1956 legislation. They had the benefit of independent legal advice, and gave their clear and public support for the Act at a major hui with the Prime Minister in 1958. This support was evident because the 1956 legislation did provide some remedies or potential remedies for past Crown acts and omissions:

- ▶ The ROLD Act 1956 formally recognised Māori ownership of the lakebed, chain strip, the bed of the Hōkio Stream, and one chain on the north bank of the stream. Māori ownership of these taonga had been placed in doubt from the 1920s to the 1950s.
- ▶ The ROLD Act 1956 returned control of the chain strip and dewatered land to its Muaūpoko owners, providing a remedy for the effects of the 1916 Act.

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367. Hamer, “A Tangled Skein” (doc A150), pp 351–353

368. Parliamentary counsel to DOC, 27 April 1987 (Hamer, papers in support of “A Tangled Skein” (doc A150(e)), p 1111)

369. Hamer, “A Tangled Skein” (doc A150), p 354

- ▶ These two features of the 1956 legislation provided a remedy and were consistent with the Crown's Treaty obligations.
- ▶ The ROLD Act 1956 reformed the membership of the Horowhenua Lake Domain Board. The Levin Borough Council lost its two-thirds majority (being reduced to two members of an eight-member board). The Māori members were increased to four, which – so long as the Crown chairman did not vote – gave them a narrow majority. If this proved to be a sufficiently secure or effective majority, the reform of the domain board had the potential to remedy the severe imbalance in the past, which had placed the board very firmly under borough council control. But the Crown did not go so far as to reverse that situation and give the Māori members a two-thirds majority on the reformed domain board.
- ▶ Drainage works could not be carried out on the Hōkio Stream without the agreement of the reformed domain board. Again, so long as the Muaūpoko board members had a secure and effective majority, this provided a potential remedy against a repeat of past grievances. In the 1980s, the Muaūpoko owners sought to have this right of veto transferred to the lake trustees.
- ▶ These two features of the 1956 Act provided a *potential* remedy for the Muaūpoko owners, but, before we can decide whether these features were consistent with Treaty principles, we must examine the question of whether the remedy was effective in practice (which was analysed above in section 9.3.4(2)).

In terms of the hierarchy of interests established by the 1905 Act, in which the fishing and other property rights of the Maori owners were subordinated to public uses (see section 8.2.4), the 1956 Act provided a potential remedy. We note first that the Act maintained the priority of public uses over the property rights of the Muaūpoko owners. But in 1905 this had been an unqualified priority, whereas the 1956 Act specified that the 'free and unrestricted' rights of the Māori owners were not to interfere with the '*reasonable* rights of the public . . . to use as a public domain the lake' (emphasis added).<sup>370</sup> The questions of whether the public rights were reasonable or not, and of which rights should prevail, fell in practical terms to the reformed domain board to decide. Again, this gave the Muaūpoko owners a potential remedy. We note of course that any legal argument concerning the term 'reasonable' would be subject to any court review.

We do not, however, accept the Crown's submission that, 'to the extent any prejudice might be said to flow from earlier legislation as to control and/or rights, that prejudice was remedied by the enactment of the 1956 Act'.<sup>371</sup> Rather, we agree with the claimants that the 1956 legislation did not 'purport to settle all historic issues relating to the lake',<sup>372</sup> and nor in fact did it do so. We find that the 1956 legislation breached the principles of active protection and partnership when it:

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370. Reserves and Other Lands Disposal Act 1956, s18(5)

371. Crown counsel, closing submissions (paper 3.3.24), p 57

372. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 11



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- ▶ failed to provide compensation for past acts and omissions (including the imposition of the 1905 arrangements on the Muaūpoko owners without consent, infringements of their property and Treaty rights, the omission to pay for or provide any return for public use of the lake, the harm to their lake, stream, and fisheries when the stream was modified to lower the lake, and the reduction of their fisheries by the introduction of trout and the granting to non-owners of the right to fish);
- ▶ failed to prohibit pollution (which will be dealt with in the next chapter);
- ▶ failed to grant an annuity or rental or some such payment for the future, ongoing use of the lake as a public recreation reserve; and
- ▶ failed to provide an appropriate, agreed mechanism for selecting Māori board members.

These omissions were a breach of the Treaty principles of partnership, active protection, and redress (the principle that the Crown must provide a proper remedy for acknowledged grievances). The prejudice to Muaūpoko continued (and still continues today).

***(2) Did the 1956 legislation provide a suitable platform for (a) future management of the lake and stream, and (b) protection of the Māori owners' rights and interests?***

As we have just noted, the 1956 legislation had the potential to provide a greater say to (and protection of) the Muaūpoko owners of Lake Horowhenua. Much depended on whether the Acts' arrangements really gave Muaūpoko a secure or effective majority on the domain board. As we explained in detail in section 9.3.4, it did not.

First, the Crown did not act as a genuinely neutral chair, nor did it – as the Muaūpoko owners had hoped in 1953 – provide sufficient support to the Muaūpoko members in the face of local body interests. In any case, we doubt that having the Crown as chair of the board (rather than Muaūpoko) was a Treaty-compliant arrangement in the circumstances of the Lake Horowhenua reserve.

Secondly, even though the Crown's continued refusal to vote gave Muaūpoko a one-person majority, this was not a safe or secure majority. Nor did it enable the Muaūpoko owners to exercise their full authority over their taonga, as guaranteed them in the Treaty. The Muaūpoko members felt disenfranchised on the reformed board and struggled to have all four present at meetings, and they were also divided at times. By the 1980s, Muaūpoko clearly identified the need for a more secure majority on the board, and in 1982 they sought to abolish the board altogether. The Minister of Lands at that time accepted in principle that the board could be dissolved and control of the lake handed back to its Muaūpoko owners, but this did not happen. No satisfactory reason was given.

We find that the 1956 reforms to the domain board were insufficient to provide a suitable platform for (a) future management of the lake and stream, and (b) protection of the Māori owners' rights and interests. We also find that the Crown failed to



take speedy (or any) action to rectify this situation as soon as it became apparent. In particular, the Crown omitted to amend the Act in the 1980s, even though Ministers responded favourably at first to the lake trustees' requests and accepted that amendment was required. We find, therefore, that the Crown has not actively protected the tino rangatiratanga of the Muaūpoko owners over their taonga, Lake Horowhenua and the Hōkio Stream.

The domain board provisions of the ROLD Act 1956 are in breach of the principles of partnership and active protection. The Crown has not provided Muaūpoko with timely redress despite acknowledging the need for reform back in the 1980s. Muaūpoko have been and continued to be prejudiced by this Treaty breach.

Other Treaty breaches have occurred as a result of the 1956 Act's failure to empower the Muaūpoko owners. By the 1980s, the lake trustees sought a law change so that the catchment board would require permission from them, not the domain board, before any works could be carried out. Although two Ministers of the Crown agreed to carry out this request, it has not been done. This was not consistent with the Crown's obligation to act as a fair and honourable Treaty partner. The most serious breach in terms of catchment board works, however, occurred in 1966. The Crown approved the catchment board's construction of a control weir without insisting on a fish pass, despite certain knowledge that the Muaūpoko owners objected and that customary fisheries would be harmed. This was a breach of the principles of partnership and active protection. NIWA has found that, apart from the poor water quality, the 1966 control weir has had the biggest effect in harming aquatic life in Lake Horowhenua.<sup>373</sup> The prejudice to the Muaūpoko owners continues today.

We note, however, that there were some improvements during the period of operation of the ROLD Act 1956. In section 9.3.4(2), we found that the balance of interests between public users and the Māori owners has shifted in favour of the owners in respect of birding and fishing rights. The Muaūpoko owners were able to use their trespass rights over the chain strip and dewatered area to prevent non-owners from shooting ducks on Lake Horowhenua (after the board agreed to open the lake for duck shooting). Also, the domain board protected the exclusivity of the owners' fishing rights during this period, refusing to allow new releases into the lake without the owners' consent, and refusing to agree that fishing licences gave the public a right to fish in Lake Horowhenua. In the 1970s, the courts also enforced the Māori owners' exclusive fishing rights in the Hōkio Stream. The downside, of course, was the effects of pollution and the control weir on the quality and quantity of the fishery.

The issue of speedboats divided the Muaūpoko people and their representatives on the domain board. Here, the breach in not providing an agreed, appropriate mechanism for selecting the Māori board members had an important consequence.

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373. NIWA, 'Lake Horowhenua Review: Assessment of Opportunities to Address Water Quality Issues in Lake Horowhenua, Prepared for Horizons Regional Council', May 2011, p 10 (Procter, papers in support of brief of evidence (doc C22(b)(iii)))

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Thus, although the ROLD Act 1956 has provided some improvements, we find it to be inconsistent with Treaty principles. The failure to reform it in the 1980s was a breach of the principle of redress, and has meant that the prejudice for Muaūpoko continues today.

**(3) *The 1961 lease to the Crown for the boating club***

We find that the Crown avoided the protection mechanisms in the Maori Affairs Act 1953, which required that no lease of Māori land (including renewals) could be for a longer term than 50 years, and which also required the Maori Land Court to investigate the merits and fairness of such transactions before confirming them.<sup>374</sup> The Crown evaded these safeguards by leasing land for the boat club under the Reserves and Domains Act 1953, thereby arranging a lease in perpetuity for a peppercorn rental, which was not put to the Maori Land Court for confirmation. These protective mechanisms in the Maori Affairs Act 1953 had resulted from a long history of unfair dealings, and the Crown's failure to abide by that Act's requirements for leases was in breach of the principle of active protection. We accept that the lake trustees agreed to the lease, but it was later claimed that they did so 'in ignorance'.<sup>375</sup> Because there was little documentation at the time and no court inquiry and confirmation, we have no way of knowing for sure if that was so.

The Māori owners of Lake Horowhenua were prejudiced by the alienation of this land on unfair terms, which was adjacent to Muaupoko Park and could have been the subject of a more beneficial arrangement, fairer to both parties.

We turn next to the issue of pollution and environmental degradation, which became an extremely pressing issue for Muaūpoko from the 1950s onwards.

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374. For the 1953 Act's protection mechanisms in respect of leases, see Waitangi Tribunal, *Te Urewera, Pre-publication, Part V*, pp 255–256.

375. Ada Tatana to Minister of Lands, 19 December 1985 (Hamer, "A Tangled Skein" (doc A150), p 346)

## CHAPTER 10

# POLLUTION AND ENVIRONMENTAL DEGRADATION

### 10.1 INTRODUCTION

In this chapter, we address Muaūpoko's claims about the pollution and environmental degradation of Lake Horowhenua. This was perhaps the strongest grievance of the Muaūpoko claimants who appeared before us. As kaitiaki of their taonga, the Muaūpoko tribe suffers from the lake's near-destruction as a viable water resource. Feelings ran high at our hearings and much anger was expressed.

The Crown accepted early in our inquiry that its failure to include provisions against pollution in the Horowhenua Lake Act 1905 was a breach of Treaty principles (see chapter 8). Crown counsel also accepted that the lake is in an 'ecologically compromised state'.<sup>1</sup> Legal arguments quickly focused on the degree of Crown responsibility for the causes of pollution, and the question of how far – if at all – local government bodies are agents of the Crown in this respect. Our analysis in this chapter is therefore structured around the key question: what was the Crown's responsibility in respect of pollution and environmental degradation?

Tangata whenua evidence focused on the degree of harm to their taonga: Lake Horowhenua, the Hōkio Stream, and the fisheries of these connected waterways. Again, the Crown accepted early in our inquiry that Muaūpoko had been prejudiced by the damage caused by pollution to their traditional food sources and their fishing rights.<sup>2</sup>

But the Crown's position was complex. In its closing submissions, it argued that there had in fact been no prejudicial effects from its 1905 Treaty breach, and that no other Crown act or omission in respect of pollution was a Treaty breach. The claimants, on the other hand, mostly blamed the Crown for the serious pollution and degradation of their taonga. Both sides made detailed submissions on this crucial issue, which we describe at some length in the next section.

In essence, the lake became seriously polluted as a result of a process which began in the 1950s, when Levin's sewage effluent began entering the lake. This occurred

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1. Crown counsel, opening submissions, 1 October 2015 (paper 3.3.1), p 8

2. Crown counsel, opening submissions (paper 3.3.1), p 8

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despite an alleged undertaking from the Minister at the time, Ernest Corbett, during the process for negotiating the ROLD Act 1956 (discussed in the previous chapter). Levin's effluent continued to enter the lake from the nearby sewerage plant until 1987, when the borough council finally established a land-based system of disposal. In this chapter, we focus on the period in which the Levin sewerage system was the primary source of pollution. The question of how far the lake has recovered since 1987, and of other sources of pollution, is addressed in the following chapter.

**10.2 THE PARTIES' ARGUMENTS**

**10.2.1 The claimants' case**

In our hearings, the claimants were angry and distressed at the degraded state of their taonga, Lake Horowhenua and the Hōkio Stream, for which they are responsible as kaitiaki. Their sense of outrage was evident in Philip Taueki's closing submissions:

The present polluted and poisonous state of Mua-Upoko's most precious taonga, Lake Horowhenua and the Hokio Stream, controlled by the Crown and used as the town of Levin's toilet, epitomises the Crown's appalling and disgusting treatment of Mua-Upoko ever since the day Tauheke signed the Treaty of Waitangi out at Hokio beach on the 26th of May 1840.<sup>3</sup>

For Muaūpoko, there is a very clear and direct connection between the degraded condition of their taonga and the Crown's Treaty promise to protect taonga. The Crown, we were told, has 'failed to actively protect this precious Taonga, and is now attempting to defer responsibility for this to other bodies.'<sup>4</sup> In addition to the Crown's Treaty responsibilities, the claimants argued that the Crown had a very specific obligation in respect of Lake Horowhenua.<sup>5</sup> This arose from its crucial act of omission in 1905, when the Crown failed to give proper effect to the 1905 agreement, and the Horowhenua Lake Act 1905 'failed to ban any form of pollution from entering the Lake'.<sup>6</sup>

In the claimants' view, the Crown may not have been responsible for all the causes of pollution, but it was *complicit* in the pollution:

The Crown was complicit in the environmental degradation the Lake has endured. The Crown's complicity derives from both its positive actions and its failure to take action to prevent damage to the Lake once it became aware of the pollution issues

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3. Philip Taueki, closing submissions, 12 February 2016 (paper 3.3.15), p [3]

4. Claimant counsel (Ertel and Zwaan), closing submissions, 12 February 2016 (paper 3.3.13), p 39

5. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions, 10 February 2016 (paper 3.3.9), pp 3-5, 8

6. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 8

through the protestations of the Muaūpoko people. The Crown's failure in this respect was a further breach of te Tiriti.<sup>7</sup>

Muaūpoko did their part by bringing the issue of the lake's pollution to the Crown's attention but the Crown did 'nothing to address the causes of pollution for many years'. As a result, 'the Lake was in an extremely vulnerable state for many years and continues to be'.<sup>8</sup> The claimants cited the Tribunal's *Hauraki Report*, in which the Tribunal found it was a Treaty breach for the Crown to ignore 'Māori concerns about environmental degradation' (when brought to its attention).<sup>9</sup>

In our inquiry, the claimants argued that the Crown has tried to avoid its responsibilities by blaming local government, urban development, and land use in the wider catchment.<sup>10</sup> Claimant counsel relied on the Tribunal's *Whanganui River Report*, which stated that the Crown 'cannot avoid its duty of active protection by delegating responsibilities to others, thus any delegation must be on terms that ensure that the duty of protection is fulfilled'.<sup>11</sup> Thus, in the claimants' submission, if the Crown's statutory frameworks allowed Levin local authorities to 'undertake activities that would otherwise fail for lack of Treaty compliance', the Crown 'must be held responsible – especially when the Crown is made plainly aware of the effects and consequences of such activities and does nothing for 18 years as the Crown did here'.<sup>12</sup> Also, in the claimants' submission, the Crown cannot distance itself from the actions of local government in this particular case because it was actively involved throughout the whole period through its position on the domain board. 'Muaupoko', we were told, have 'always tried to keep the Crown involved in matters relating to the Lake'.<sup>13</sup>

The claimants also denied that the Crown has carried out a Treaty-compliant balancing of interests in respect of the pollution of Lake Horowhenua. Any such balancing, we were told, needs to be 'weighed against the Crown's positive duties and obligations owed to Muaupoko under the Treaty'. If the Crown elects a course of action which will breach the Treaty in order to balance interests, it must refrain from doing so unless the circumstances are *exceptional*. Inconvenience to the Crown or 'impracticalities' do not meet the high bar set by the Treaty or justify departing from the Crown's Treaty duties and obligations. In sum, the claimants argued that a 'balancing act' did not excuse the Crown from taking necessary action in fulfilment of its Treaty duties.<sup>14</sup> Claimant counsel submitted that 'In respect of

7. Claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), p 269

8. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 28

9. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 286

10. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 28–29; claimant counsel (Naden, Upton, and Shankar), submissions by way of reply, 15 April 2016 (paper 3.3.29), p 10

11. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 265 (claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 29)

12. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 29

13. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 29

14. Claimant counsel (Stone and Bagsic), submissions by way of reply, 20 April 2016 (paper 3.3.32), p 4

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Lake Horowhenua, for many years, the Crown simply did nothing. Any “balancing act” argument in respect of Lake Horowhenua must be rejected by the Tribunal.<sup>15</sup>

The claimants summarised the Crown’s omissions as follows:

- ▶ Failing to ensure that local government actions in respect of the Lake were Treaty compliant.
- ▶ Failing to remedy the causes of pollution.
- ▶ Taking an unreasonable amount of time to respond to the causes of pollution entering the Lake.
- ▶ Failing to enact legislation that prevented or remedied the causes of pollution from entering the Lake.
- ▶ Failing to enact legislation that gave effect to and safe guarded Muaupoko’s mana, kaitiakitanga and tangata whenua status over the Lake.
- ▶ Omitting to include provisions in legislation that would have protected Muaupoko’s mana, kaitiakitanga and tangata whenua status over the Lake.<sup>16</sup>

In addition to these alleged omissions, the claimants argued that central government officials positively authorised the discharge of effluent into the lake from time to time.<sup>17</sup> They also pointed to a 1952 promise by the Minister of Lands, Ernest Corbett, that ‘the Lake is not to be used as a dumping ground for sewer effluent’.<sup>18</sup> This promise, they said, was breached by the Crown.<sup>19</sup>

Claimant counsel submitted that ‘The actions and omissions of the Crown in respect of the Lake must be viewed as the actions of a dishonourable Treaty partner, because they most certainly cannot be called the actions of an honourable one.’<sup>20</sup>

**10.2.2 The Crown’s case**

In closing submissions, the Crown accepted that it has ‘ongoing Treaty obligations to take steps to protect Muaūpoko taonga’. Nonetheless, the Crown submitted that it

does not accept the present state of the Lake and Stream is attributable directly and solely to any identifiable Treaty breach by the Crown. This does not absolve the Crown of Treaty obligations regarding the Lake, but it is relevant to the Tribunal’s findings and to the extent to which the Tribunal accepts the claimant tendency to attribute causality and responsibility to central government regardless of the legal, social and physical contexts in which the Lake has been damaged.<sup>21</sup>

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15. Claimant counsel (Stone and Bagsic), submissions by way of reply (paper 3.3.32), p 4

16. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 30–31

17. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 18–20; claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), pp 284–286

18. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 18

19. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 284

20. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 31

21. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 60



In support of this submission, the Crown made a number of arguments:

- ▶ Damage to the lake occurred as a ‘by-product of urban development (primarily Levin) and land use in the wider catchment area’. Environmental concerns per se were often not at the forefront of those planning urban development and land use before the 1970s. Even so, the geography and topography of the lake, which is naturally shallow, meant that population density and intensified agriculture would have an effect, no matter who the users were or how they were regulated. But land use and development were of benefit to the whole community, including Māori.<sup>22</sup>
- ▶ The Crown does not have an obligation, ‘Treaty or otherwise’, to ‘prevent all environmental effects that may be perceived by some as adverse’, especially where such effects are an ‘inevitable consequence of human development and progress’.<sup>23</sup> Nor can the Crown guarantee what outcomes might result from attempts to ‘prevent or mitigate environmental degradation’.<sup>24</sup>
- ▶ Causation is sometimes difficult to establish, including the causes of degradation. While the Crown has responsibility to implement ‘overarching environmental legislative and policy settings, it does not have the ability to control or influence all of those factors’. The Crown is not necessarily *able* to prevent degradation or reverse its effects in every instance.<sup>25</sup> One such instance was the ‘growth of a significant urban centre in close proximity to the Lake and the failure of the sewerage and stormwater infrastructure to cope, particularly it appears in times of extremely high rainfall’, which was ‘not a matter within Crown control’.<sup>26</sup> There is also little evidence about some important factors, such as the impact of deforestation on siltification in the inquiry district, which is a matter for consideration later in the inquiry.<sup>27</sup>
- ▶ In some cases the claimants do not identify particular Crown actions as *causes* of environmental degradation – in the Crown’s view, they have focused on outcomes rather than the ‘factors, or actors, that may have caused those outcomes’. This lack of specificity, we were told, ‘limits the Tribunal’s ability to identify the Crown’s responsibilities and distinguish between environmental impacts caused by Crown actions or omissions and those that have been the result of broader social, economic, and environmental changes beyond the Crown’s control’.<sup>28</sup> Also, the Crown’s view was that some alleged Crown actions were actually the responsibility of local government.<sup>29</sup>
- ▶ The Crown submitted that there is a wide range of interests in the environment, which it must consider and provide for, as well as Māori interests. The Crown must ‘strike a balance . . . that integrates Māori interests with the

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22. Crown counsel, closing submissions (paper 3.3.24), pp 42–43

23. Crown counsel, closing submissions (paper 3.3.24), p 34

24. Crown counsel, closing submissions (paper 3.3.24), p 34

25. Crown counsel, closing submissions (paper 3.3.24), p 35

26. Crown counsel, closing submissions (paper 3.3.24), p 60

27. Crown counsel, closing submissions (paper 3.3.24), pp 64, 85–88

28. Crown counsel, closing submissions (paper 3.3.24), p 34

29. Crown counsel, closing submissions (paper 3.3.24), p 35

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interests of other New Zealanders'. This is not easy as interests are sometimes in conflict. Inevitably, 'some interests may be outweighed by others'. In undertaking this balancing, the Crown argued that it takes a 'principled approach to environmental management'.<sup>30</sup> No one viewpoint can be 'determinative' when balancing interests. There is instead a range of views as to how the environment should be managed, and what kinds of compromises in terms of a 'level of degradation' may be tolerated to obtain a particular benefit. Agriculture is a clear example of impacts which are tolerated because of the benefits it brings.<sup>31</sup>

- ▶ Care must be taken not to 'ascribe today's standards of environmental management and reasonable expectations to the Crown actions and actors of the past; historical context and prevailing circumstances are fundamental, as is the question of what was reasonably foreseeable'.<sup>32</sup>

Further, the Crown responded to the claimants' argument that it 'should have taken more direct state action to alleviate Lake issues to the extent those issues became identifiable from the late 1960s'. In the Crown's view, this assumed that 'the Crown could and should have simply intervened in local decision making around the Lake so as to somehow fix the problem, ideally, it seems, through the provision of direct state funding for upgrading the sewerage system and other Lake works'.<sup>33</sup>

Crown counsel submitted that this was an unreasonable assumption. First, there was no clear and simple fix for the issues affecting the lake – even the upgrade in 1987 did not suffice to prevent effluent entering the lake as a result of weather events. Also, effluent discharge was only one of the causes of pollution – there was no obvious 'magic bullet' or fix for the Crown to have applied to the interacting effects of agriculture, horticulture, market gardening, and dairy farming. Secondly, the Crown only had limited resources and funds, and 'cannot be expected to be responsible for (or pay for) local government decisions (including infrastructure decisions, for example sewerage works) in the way the claimants suppose'.<sup>34</sup>

The Crown accepted, however, that Muaūpoko kept it informed of their 'long-standing grievances' in respect of Lake Horowhenua and the Hōkio Stream, 'expressed through petitions to the Government, through Domain Board meetings, through litigation and in Tribunal claims'.<sup>35</sup> In response, the Crown submitted that it did take 'reasonable steps (in the context of the time) to assist in resolving particular issues impacting the lake, including through the provision of state funding'.<sup>36</sup> These included extensive funding to the borough council in 1962 and 1964 to upgrade the sewerage system; a grant to the borough council of \$1.339 million in 1985 for another upgrade, together with a Health Department subsidy of \$44,370;

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30. Crown counsel, closing submissions (paper 3.3.24), p 36

31. Crown counsel, closing submissions (paper 3.3.24), p 37

32. Crown counsel, closing submissions (paper 3.3.24), p 38

33. Crown counsel, closing submissions (paper 3.3.24), p 61

34. Crown counsel, closing submissions (paper 3.3.24), p 62

35. Crown counsel, closing submissions (paper 3.3.24), p 44

36. Crown counsel, closing submissions (paper 3.3.24), p 62

and DOC technical expertise provided for the replanting/restoration efforts in the early 1990s.<sup>37</sup>

Finally, the Crown denied allegations that Government departments or officials contributed directly to the deterioration of the lake. In the Crown's submission, these officials made good-faith decisions in the interests of public health, according to the state of scientific knowledge at the time.<sup>38</sup> Allegations of bad faith have also been made in respect of a ministerial 'promise' in 1952 that 'the Lake would never receive sewage discharge while at (broadly) the same time a sewerage system and treatment plant were constructed which processed raw sewage before discharging it into the Lake'. In the Crown's submission, the Minister made a 'statement of the Crown's present expectations rather than a guarantee of future conduct'.<sup>39</sup> Also, the statement was consistent with the situation in 1952 – no one was aware, including the Minister, of the 'diffuse intrusion' of effluent by way of seepage into the lake.<sup>40</sup>

### 10.3 WHAT WAS THE CROWN'S RESPONSIBILITY IN RESPECT OF POLLUTION AND ENVIRONMENTAL DEGRADATION?

#### 10.3.1 The 1905 Treaty breach

As we set out in chapter 8, the Crown conceded

that it promoted legislation in 1905 that failed to adequately reflect the terms of the Horowhenua Lake Agreement of 1905. The differences between the agreement and the Act prejudiced Māori with connections to the lake, including by the Act not directly providing for protections against pollution of the lake which contributed to damage of traditional food sources, and by impacting on the owners' fishing rights. The Crown concedes that the failure of the legislation to give adequate effect to the 1905 agreement breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.<sup>41</sup>

In respect of pollution, however, the Crown qualified its concession quite significantly in its closing submissions. Crown counsel argued that item 5 of the 1905 agreement – 'No bottles, refuse, or pollutions to be thrown or caused to be discharged into the Lake' – was in fact provided for by the domain board's power to make bylaws. The Crown relied on Mr Hamer's evidence under cross-examination that some parts of the 1905 agreement 'were seen as matters that could be dealt with just by the board in the creation of its bylaws. So they didn't actually need to be put into legislation'.<sup>42</sup> Mr Hamer also agreed in cross-examination that the clause on pollution may have been omitted from the Horowhenua Lake Act 1905 Act for that very reason.<sup>43</sup> In the Crown's submission, the 1905 Act established a board with

37. Crown counsel, closing submissions (paper 3.3.24), pp 62–63

38. Crown counsel, closing submissions (paper 3.3.24), pp 61, 64–68

39. Crown counsel, closing submissions (paper 3.3.24), p 66

40. Crown counsel, closing submissions (paper 3.3.24), pp 66–67

41. Crown counsel, opening submissions (paper 3.3.1), p 5

42. Crown counsel, closing submissions (paper 3.3.24), p 53

43. Transcript 4.1.12, pp 477–478

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all the powers and functions of a domain board and left matters like pollution to it. The 1906 bylaws, we were told, closely reflected the text of the previous year's agreement: 'No person shall leave bottles, glass, crockery, paper, remnants of food, or other litter within the limits of the domain.'<sup>44</sup> The Crown submitted that the terms of the 1905 agreement were thus 'sufficiently provided for by the 1905 Act's provision for these relevant bylaws, though it accepts this was not done directly, and says the promulgation of the bylaw is relevant to any assessment of the extent of prejudice caused by the breach.'<sup>45</sup>

In our view, the crucial issue here is the water race constructed in 1902, against which Muaūpoko protested because of its potential to pollute the lake as a result of livestock contamination. Before it was built, the sanitary commissioner pondered an obvious question: '[H]ow are several miles of open water course to be protected from the droppings of cows, sheep, etc?'<sup>46</sup> It is very clear from the evidence recited in chapter 8 that water-borne pollution was a key factor in the 1905 agreement, and not merely the disposal of litter on the lake's shores (see section 8.2.2). Item 5 clearly referred to discharge of pollutants into the lake. Thus, we do not accept the Crown's argument that the 1905 agreement in respect of pollution was satisfied by a bylaw about rubbish disposal. Rather, the Crown's failure to include protections against pollution in the 1905 Act – which it had agreed to do – was a serious Treaty breach. Its prejudicial effects cannot be under-estimated. If the Crown had kept its 1905 promises to Muaūpoko, there would have been statutory obligations requiring the Crown to act as soon as pollution or potential pollution of the lake became an issue. In our view, the argument rehearsed in our inquiry about the Crown's responsibility for local government decisions is beside the point. In 1905, the Crown entered into a solemn agreement with Muaūpoko and, although the Crown's written terms did not properly reflect what Muaūpoko had agreed to, they were nonetheless binding on the Crown as a statement of what it had undertaken to do (see section 8.2).

### 10.3.2 The principal cause of pollution in the twentieth century: the construction of Levin's sewerage system

Studies of lake pollution in the 1970s established that 85 per cent of the phosphorus entering the lake at that time came from Levin's sewerage system.<sup>47</sup> In this section, we discuss how that system was first established and whether the Crown was aware of Muaūpoko's grave concerns about it. We also consider the Crown's response to those concerns in light of the 1905 agreement and the Crown's failure to establish the promised protections against pollution.

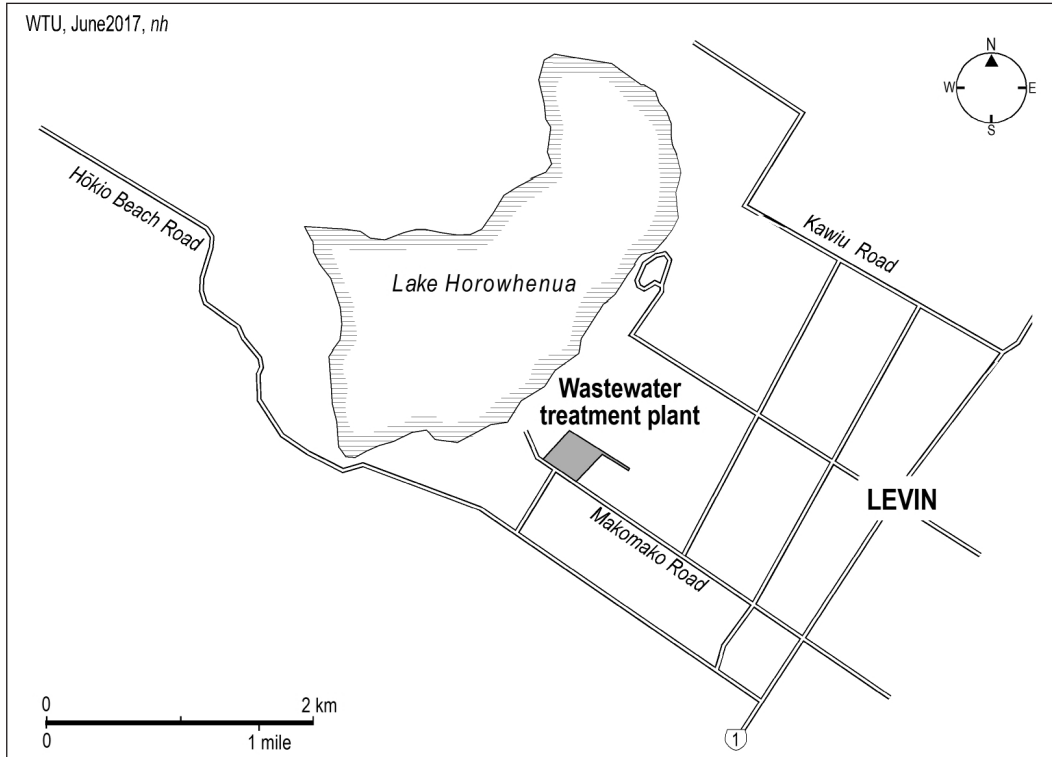
For decades after Levin's establishment, its citizens relied at first on long drop toilets and night soil collection for the disposal of human waste, and later on septic

44. Crown counsel, closing submissions (paper 3.3.24), p 53

45. Crown counsel, closing submissions (paper 3.3.24), p 53

46. Dr Kington Fyffe, sanitary commissioner, quotation arising from a visit in July 1900, before the scheme was constructed, not dated: A J Dreaver, *Horowhenua County and its People: A Centennial History* (The Dunmore Press: Levin, 1984), p 209

47. Paul Hamer, "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, June 2015 (doc A150), p 235



Map 10.1: Location of Levin Waste Water Treatment Plant

tanks. Large towns and cities developed sewerage systems by the early twentieth century, but by 1933 Levin was the only town of its size without such a system. From 1933 to 1943, the Health Department put increasing pressure on the borough council to install ‘modern drainage facilities.’<sup>48</sup> The council was reluctant, partly because of the expense for ratepayers (which is a prominent theme in this section of our chapter). The council was also concerned, however, because the Health Department expected it to use the nearest practicable body of water for the discharge of effluent. This was obviously Lake Horowhenua, which the council wanted to develop as a pleasure resort (discussed in chapter 9, section 9.2.3). But to do nothing was not feasible; seepage from septic tanks was already beginning to pollute the lake by the early 1940s.<sup>49</sup>

In 1943, the Health Department warned the local council that it would take formal action under the Health Act if a sewerage system was not constructed. The council employed an engineer to design a scheme, which immediately aroused opposition from Muaūpoko. The tribe appealed to the Native Minister in 1944. Native Department officials told the Health Department that Muaūpoko objected to ‘sewerage being drained into the lake, first, because it is their property, and secondly, because an important source of food supply will be polluted’. The tribe, they

48. Secretary, Board of Health, to town clerk, 7 August 1936, 17 August 1937 (Hamer, “A Tangled Skein” (doc A150), p198)

49. Hamer, “A Tangled Skein” (doc A150), pp197–199



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said, relied heavily on eels, flounder, tikiheimi, inanga, whitebait, carp, and freshwater shellfish.<sup>50</sup>

But the borough council already had the Health Department's approval to discharge treated effluent into the lake and had decided to do so. From 1945 to 1950, the council maintained that this effluent would be sufficiently purified to ensure a minimal impact on the lake's waters.<sup>51</sup> The Public Works Department supported the council, arguing that the lake had 'not been developed for recreational purposes and apparently is little frequented by local inhabitants'. The district engineer noted that if this situation changed and the lake did become a popular resort, 'the presence of effluent in the waters may present a serious obstacle to the popularising of the Lake generally'.<sup>52</sup> As Paul Hamer commented, the presence and concerns of Muaūpoko seemed to be invisible to Public Works officials.

The council shared the concern that the presence of effluent in the lake might be bad for future tourism. It therefore considered some alternatives to direct discharge into the lake. Those included disposing of effluent into the Hōkio Stream or 'out on to the sand hills'.<sup>53</sup> But engineers advised against these in 1948 because disposal to the lake was the easiest, cheapest option, and they thought objections to effluent were purely 'psychological'.<sup>54</sup>

Both the Health Department and the Native Department relayed Muaūpoko's concerns to the council.<sup>55</sup> In 1951 the tribe warned the council directly that the construction of a 'sewer drain through the chain strip for the purpose of emptying sewer effluent into the lake' would infringe their 'fishing and other rights in connection with the lake'.<sup>56</sup> In the meantime, however, the engineers had responded to council concerns by developing a new proposal for land-based disposal. Deep trenches called soak pits or sludge beds would be dug near the sewerage plant. These would allow the effluent to 'percolate away into the ground'.<sup>57</sup> In 1951–1952, the treatment plant and soak pits were constructed very close to Lake Horowhenua.

It thus took 18 years for the town to build a sewerage system after the Health Department first raised concerns in 1933. Although the idea of direct discharge into the lake had been abandoned in 1951, it soon turned out that effluent flowed constantly into the lake from the sludge pits – via the groundwater in summer and above ground in winter. Paul Hamer commented that this 'diffuse intrusion into the lake was [likely] neither understood nor, at the time, observed'.<sup>58</sup> But it had been established categorically by 1956, when the Public Works Department inspected

50. Native Department under-secretary to director-general of health, 15 December 1944 (Hamer, "A Tangled Skein" (doc A150), pp 199–200)

51. Hamer, "A Tangled Skein" (doc A150), pp 200, 204–205

52. District engineer to permanent head, Public Works Department, 11 June 1946 (Hamer, "A Tangled Skein" (doc A150), p 204)

53. *Chronicle*, 2 March 1948 (Hamer, "A Tangled Skein" (doc A150), pp 204–205)

54. *Chronicle*, 2 March 1948 (Hamer, "A Tangled Skein" (doc A150), p 205)

55. Hamer, "A Tangled Skein" (doc A150), pp 200–205

56. Herbert Taylor (Morison, Spratt, and Taylor) to town clerk, 11 June 1951 (Hamer, "A Tangled Skein" (doc A150), p 205)

57. Hamer, "A Tangled Skein" (doc A150), p 205

58. Hamer, "A Tangled Skein" (doc A150), p 207



the treatment plant. RH Thomas, who carried out the inspection, concluded that ‘The treated sewage is thus carried down towards Lake Horowhenua by the underground water in summer and above ground in winter.’<sup>59</sup>

From the very beginning, therefore, land-based disposal to the sand hills was technically feasible but rejected as a more difficult, expensive option than discharge into the lake. But Māori protest and the council’s own concerns about developing the lake as a pleasure resort resulted in an alternative form of land-based disposal. This method of ‘percolation’ via sludge pits was established very close to the lake. As the Crown has pointed out, there was no direct discharge of treated effluent into Lake Horowhenua until a new plant was constructed in the 1960s.<sup>60</sup> Nonetheless, the Government was aware that effluent was entering the lake by 1956. In the meantime, the Minister of Lands and of Maori Affairs, Ernest Corbett, had promised Muaūpoko that this would not happen. We turn next to the question of Corbett’s promise, and whether the 1905 omission was rectified by the 1956 legislation.

### 10.3.3 Was the 1905 omission rectified by the 1956 legislation?

We discussed the 1953 agreement and the resultant legislation (section 18 of the ROLD Act 1956) in chapter 9. In November 1952, as part of the discussions leading up to the 1953 agreement and 1956 Act, Ernest Corbett met with local body representatives about the need to settle lake issues with Muaūpoko. This meeting included representatives of the borough council, county council, catchment board, and the Hokio Drainage Board. As part of those discussions, one ‘point on which the Minister was most emphatic is that Horowhenua Lake is not to be used as a dumping place for sewer [e]ffluent.’<sup>61</sup> Later that year, Muaūpoko’s lawyer (Simpson) met with Maori Affairs Department and Lands Department officials, as discussed in section 9.2.4(2). This meeting was held on 22 December 1952. The commissioner of Crown lands confirmed the ministerial assurances made to Muaūpoko, which included:

The Maori owners can be assured that the Crown is opposed to speed boats being on the Lake and would like the original intention of wild life sanctuary adhered to as much as possible. Again, the Lake is not to be used as a dumping ground for sewer effluent. The Hon Minister of Lands and Maori Affairs has already made these two points clear.<sup>62</sup>

As Mr Hamer noted, these assurances were given to Muaūpoko after the council had already built a sewerage system in which effluent would not be discharged

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59. RH Thomas, report, 1956 (Hamer, “A Tangled Skein” (doc A150), p 205)

60. Crown counsel, closing submissions (paper 3.3.24), p 66

61. Director-general of lands to commissioner of Crown lands, 12 November 1952 (Hamer, “A Tangled Skein” (doc A150), p144)

62. Commissioner of Crown lands to Simpson, 22 December 1952 (Hamer, “A Tangled Skein” (doc A150), p145)

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directly into the lake. Yet ‘the consensus among secondary sources appears to be that treated sewage first entered Lake Horowhenua in 1952.’<sup>63</sup>

But we note here that the Minister’s assurance was not supposed to stand alone or be a transitory one; it was supposed to have been part of the 1953 agreement. This is a crucial point. It is all the more remarkable since the Waters Pollution Act of that year made the ‘discharge of any matter from a sewer or a sewage disposal works under the control of a local authority’ an exception to the general prohibition of pollution.<sup>64</sup>

In the early 1950s, Muaūpoko were not aware that effluent had started to seep into the lake. As noted above, Moana Kupa and other witnesses recalled the beauty and health of the lake and its fisheries at this time. When Assistant Commissioner of Crown Lands McKenzie met with Muaūpoko in June 1952 to discuss the Crown’s proposal to acquire the lake, he listed the ‘rights enjoyed by Maoris and Pakeha to this lake.’ Based on the 1905 agreement, these included ‘that the lake be not polluted.’<sup>65</sup> Himiona Warena responded: ‘Regarding pollution – Maoris do not want it.’ Warena complained about the effects of a wool scourer.<sup>66</sup> In his report to the director-general, the commissioner of Crown lands again mentioned item five of the Crown’s list of terms for the 1905 agreement, and noted the concerns about the wool scourer.<sup>67</sup>

McKenzie’s letter to Simpson in December 1952, cited above, included the Crown’s proposed terms for a new agreement. This included a prohibition on speedboats and the Minister’s assurance that no sewage effluent would enter the lake.<sup>68</sup> In other words, this was to be one of the terms of the 1953 agreement. This was confirmed in April 1953, when Muaūpoko’s lawyers told HD Bennett that ‘[n]o speed boats to be allowed and no sewage waste’ was to be a term of the agreement.<sup>69</sup> On 3 August 1953, Lands Department officials wrote a memorandum for their Minister recording the outcome of the 1953 meeting with Muaūpoko at which agreement was finalised. Again, ‘No speed boats to be allowed on the lake nor is it to be used as a dumping ground for sewer effluent’ was one of the terms proposed by the Crown.<sup>70</sup> Yet, crucially, Simpson’s formal record of what was agreed at the meeting only mentioned

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63. Hamer, “A Tangled Skein” (doc A150), p 206

64. Waters Pollution Act 1953, s15(3)(a)

65. ‘Horowhenua Lake: Minutes of meeting held at Kawiu Hall, Levin, 13th June, 1952’ (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000’, various dates (doc A150(c)), p 370)

66. ‘Horowhenua Lake: Minutes of meeting held at Kawiu Hall, Levin, 13th June, 1952’ (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 371)

67. Commissioner of Crown lands to director-general of lands, 20 June 1952 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 376)

68. Commissioner of Crown lands to Simpson, 22 December 1952 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 391)

69. HD Bennett to Tau Ranginui, chair of the lake trustees, 14 April 1953 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 395). HD Bennett of Te Arawa had been engaged by the Levin Borough Council to assist it in the discussions: see Hamer, “A Tangled Skein” (doc A150), p 146.

70. Director-general to Minister of Lands, 3 August 1953 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 404)

speedboats and not effluent.<sup>71</sup> In our view, Simpson's failure to include this point was clearly an oversight. We are confirmed in this view by the intervention of the Maori Affairs Department when a clause in respect of pollution was left out of section 18 of the draft ROLD Bill in 1956.

The June 1952 meeting with Muaūpoko (at which prevention of pollution was described by the Crown as one of the Māori owners' rights) was chaired by TTRōpiha, the secretary for Maori Affairs. Rōpiha was aware that the prohibition of pollution was supposed to be included in the Bill. When the draft clause for the ROLD Bill was under consideration in 1956, Rōpiha asked the Lands Department that 'section 84(1)(m) Reserves and Domains Act, 1953, might be examined to determine whether the provisions are wide enough to prevent pollution of the Lake.'<sup>72</sup> The Lands Department examined this section, which made it an offence for anyone to throw or deposit 'any substance or article of a dangerous or offensive nature' onto a reserve.<sup>73</sup> Officials concluded: 'It is thought that there are sufficient powers here.'<sup>74</sup> In response to the secretary of Maori Affairs' initiative, therefore, no provision was included in the 1956 Act to (as he said) 'prevent pollution of the Lake'. This was a crucial omission, which would have given statutory force to the Minister's assurance to the Māori owners that 'the Lake is not to be used as a dumping ground for sewer effluent'.

In our inquiry, the Crown argued that Corbett's promise was actually a 'statement of the Crown's present expectations rather than a guarantee of future conduct.'<sup>75</sup> The Crown also pointed out that Corbett's statement was factually correct as at 1952. The sewerage system at that time did not involve 'systematic or deliberate discharge into [the] Lake, but rather disposal through percolation in sludge pits, the oxidation pond system not being employed until 1967'. Hence the Minister, unaware that 'diffuse intrusion' would occur, honestly believed that effluent was not going to enter the lake. Further, in the Crown's submission, Muaūpoko do not appear to have relied on the Minister's statement in any way in the negotiations leading to the ROLD Act 1956.<sup>76</sup> As we have explained, there is very clear evidence that a clause on preventing pollution by effluent was in fact intended to be part of the 1953 agreement. The Minister's statements about effluent (made to local bodies as well as Muaūpoko) were not simply intended to reflect the current state of the sewerage system but to be a term of the agreement.

The claimants considered it axiomatic that the Minister's assurance would be for the future and not just the present, otherwise the assurance was worthless – as, indeed, it proved. In the claimants' submission, the 'risk to the Lake of sewerage

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71. Simpson to commissioner of Crown lands, 9 July 1953 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), p 402)

72. Commissioner of Crown lands to director-general of lands, 11 September 1956 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), p 434)

73. Hamer, "A Tangled Skein" (doc A150), p 153

74. Commissioner of Crown lands to director-general of lands, 11 September 1956 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), p 434)

75. Crown counsel, closing submissions (paper 3.3.24), p 66

76. Crown counsel, closing submissions (paper 3.3.24), p 67

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pollution was clearly a foreseeable one, and the Minister's actions were reckless in that regard.<sup>77</sup>

We note that the Maori Affairs Department had received protests from Muaūpoko in the 1940s about the possible pollution of the lake as a result of Levin's proposed sewerage system. The department was represented at the December 1952 meeting at which Corbett's assurance was conveyed to the Māori owners, and at which it was specified as one of the intended items for agreement with Muaūpoko. The department was also represented at the June 1952 meeting in which prevention of pollution to the lake was listed as one of the Māori owners' rights. It is not surprising, therefore, that the department wished to satisfy itself that the powers conferred by the Reserves and Domains Act were 'wide enough to prevent pollution of the Lake', since the draft clause for the ROLD Bill contained no such powers. Rōpiha's query of the Lands Department has to be understood in the context of the Minister's assurance in 1952, McKenzie's statements to the June 1952 meeting, and the Crown's intention to make the Minister's assurance part of the 1953 agreement. The Lands Department's response (that the powers conferred by the Reserves and Domains Act were sufficient) also has to be understood in that context, and was woefully inadequate.

We conclude, therefore, that a crucial opportunity to give statutory effect to the Minister's promise was lost. Clearly, the power to prevent throwing or disposal of a substance or article was not likely to cover water discharges (whether treated effluent or storm water). The domain board never tried to use this section of the Reserves and Domains Act to prevent discharges of effluent into Lake Horowhenua. As to the Crown's argument that the Minister's promise was not referred to again in the lead up to the 1956 Act, we expect that the Māori owners simply relied on the promise as given. It was clearly not forgotten by Maori Affairs or Lands Department officials at that time, as it was supposed to have been a term of the 1953 agreement.

Yet it was in 1956 that the Public Works Department reported: 'treated sewage is . . . carried down towards Lake Horowhenua by the underground water in summer and above ground in winter.'<sup>78</sup> Corbett was still Minister of Lands and Maori Affairs at the time. The Government was in the midst of finalising agreement with local bodies (having reached agreement with Muaūpoko in 1953) and enacting section 18 of the ROLD Act. But 'officials said nothing about the disposal of the effluent after Corbett had been so adamant on the matter in 1952.'<sup>79</sup> Mr Hamer suggested that 'By the time the entry of effluent into the lake was identified, it may well be that the Minister's promise was quietly shelved.'<sup>80</sup>

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77. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 12

78. R H Thomas, report, 1956 (Hamer, "A Tangled Skein" (doc A150), p 205)

79. Hamer, "A Tangled Skein" (doc A150), p 207

80. Hamer, "A Tangled Skein" (doc A150), p 207



Photograph of the concrete control weir at the outlet of Lake Horowhenua, 1977

Horowhenua Historical Society Inc; see <http://horowhenua.kete.net.nz/site/images/show/6500-concrete-control-weir-across-hokio-stream-1977>

#### 10.3.4 Seepage of effluent and discharges of raw sewage, 1957–69

In 1957, Muaūpoko became aware that effluent was entering the water which they used as a principal source of food.<sup>81</sup> For the next 30 years, sewage effluent continued to enter the lake. The claimants' evidence to us was that they could not take food from the lake during that period for three interrelated reasons:

- ▶ it was culturally prohibited to take food from water contaminated by human waste;
- ▶ there were health concerns about eating food taken from the lake, even if rinsed; and
- ▶ environmental degradation of the lake, including pollution and the effects of the 1966 control weir, significantly harmed or reduced fish populations.

During that period, Crown officials often focused on the second point, arguing over whether there was a health risk involved in eating food from Lake Horowhenua. Other concerns were either not perceived or frequently ignored.

In response to the situation in 1957, the tribe placed a warning in the *Chronicle* that eels and other fish should not be taken from the lake 'till further notice, owing to human waste being seen down the drain of lake and foreshore.'<sup>82</sup> They also protested to the domain board about it, and a 10-year battle ensued. The board asked the Health Department to investigate, resulting in advice that the lake was too high; lowering the ground water level would help, but wet weather also caused seepage

81. Hamer, "A Tangled Skein" (doc A150), pp 207–208

82. 'Public Notices', *Chronicle*, 5 December 1957 (Hamer, "A Tangled Skein" (doc A150), pp 208–209)



## 10.3.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

into the lake.<sup>83</sup> A second investigation in 1957 by a pollution biologist, A Hirsch, suggested that the ‘undiluted effluent’ entering the lake was of a ‘satisfactory’ nature for the survival of eels and fish.<sup>84</sup>

Mrs R Paki, a member of the tribal committee at Kawiu Pa, argued in response that the people had seen eels dying for ‘several months’, and that it was no longer possible for them to take freshwater shellfish or watercress from the lake. Crucially, Mrs Paki pointed out to the inspectors that tikanga prohibited the taking of food from polluted waters:

Mrs Paki’s strongest objection was that damage to fisheries or public health considerations aside, it was against tribal custom to eat fish from an area where human wastes were discharged. For this reason, more than any other, she was of the very decided opinion that the discharge of effluent to the lake was harmful to Maori interests and should be stopped. She said she would again recommend this to the tribal committee when they met in January, although she did not question the validity of our findings and would place these before the committee as well.<sup>85</sup>

The claimants pointed out that this kind of objection was the subject of the Wai 4 Kaituna River inquiry, one of the earliest claims upheld by the Waitangi Tribunal (1984).<sup>86</sup>

In 1958, the domain board accepted Hirsch’s report and concluded that it ‘completely exonerated the Levin Borough Council, and there was no doubt whatsoever that pollution was not entering the Lake.’<sup>87</sup> But wet weather conditions in 1962 and 1964 overwhelmed the sewerage system, and raw, untreated sewage entered the lake. It was diverted there to prevent a public health crisis in the town itself. These diversions were authorised by the Health Department.<sup>88</sup>

The lake trustees and the Muaūpoko tribal committee responded in 1962 by having a tapu placed on the lake, and by applying to the Supreme Court for an injunction to stop the council from discharging untreated sewage into Lake Horowhenua. The court refused the injunction because the alternative was the contamination of family homes in Levin, which ‘might be of more importance in the long run than fishing rights in the lake.’<sup>89</sup> The lake trustee taking the case, Hemi Warena Kerehi, accepted the adjournment for that reason. The court rebuked the council for not acting fast enough to solve the crisis: ‘the Maoris were entitled to insist on . . . immediate attention to the trouble’. The borough council assured the court that

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83. Hamer, “A Tangled Skein” (doc A150), p 209

84. Director, Division of Public Hygiene, to medical officer of health, Palmerston North, 30 December 1957 (Hamer, “A Tangled Skein” (doc A150), p 209)

85. Director, Division of Public Hygiene, to medical officer of health, Palmerston North, 30 December 1957 (Hamer, “A Tangled Skein” (doc A150), p 209)

86. Claimant counsel (Lyll and Thornton), submissions by way of reply, 14 April 2016 (paper 3.3.27), p 19

87. Horowhenua Lake Domain Board, minutes, 13 February 1958 (Hamer, “A Tangled Skein” (doc A150), p 209)

88. Hamer, “A Tangled Skein” (doc A150), pp 210–214

89. *Evening Post*, 5 September 1962 (Hamer, “A Tangled Skein” (doc A150), pp 210–211)



experts would investigate the situation, which would be ‘rectified at the earliest possible date.’<sup>90</sup>

The Government’s experts carried out this investigation in late 1962. Public Works officials again blamed the high level of the lake and advocated drainage works on the Hōkio Stream, noting that Māori opposition would be likely. The Health Department, however, decided that the whole sewerage system and treatment plant needed to be upgraded or expanded. Otherwise, further discharges of raw sewage into the lake were inevitable. The medical officer of health recommended an urgent loan to the council so that work could begin immediately. He also suggested that the Pollution Advisory Council classify the lake’s waters so that any new scheme would give a sufficient treatment of the effluent to enable recreational use of the lake. Muaūpoko fishing rights and other interests were not considered.<sup>91</sup>

In the event, nothing had been achieved by August 1964 when wet weather caused a further crisis. The council had obtained a Government loan of £35,000 in 1962 but it proved insufficient to undertake the necessary work. Joe Tukapua and JF Moses took reporters from a local newspaper to show them the sewage flowing into the lake. At first the mayor denied that it was happening, but the newspapers reported thousands of gallons discharging daily into the lake.<sup>92</sup> ‘Lake Horowhenua,’ it was said, ‘is fast becoming a massive oxidation pond for raw sewage.’<sup>93</sup>

The town was growing too quickly for its 1952 sewerage system to cope. The Health Department, however, was unconcerned about discharging raw sewage into the lake when necessary. Health officials argued that it was simply inevitable until the council upgraded its system. In the meantime, the wet weather was diluting the sewage, which entered the lake ‘well away’ from any houses or the domain’s public park. Nor, said the health officer, were sporting interests affected since the lake was no longer used for boating. Māori interests were at least noted this time, but with total disregard to obtaining even the slightest information about how they were being affected: ‘As to what effect the sewage would have on the eel life or its habits I do not know. . . . Also no-one seems to know to what extent the Maoris rely on the eels and how often they catch them.’<sup>94</sup>

Muaūpoko, on the other hand, knew very well the extent to which they relied on their fisheries, and once again applied to the Supreme Court for an injunction. This time the case was brought by Joe Tukapua on behalf of the lake trustees. As in 1962, Muaūpoko were trumped by the point that the only other recourse was to flood the town with sewage.<sup>95</sup> The mayor did agree that ‘what the council did probably caused considerable distress among the Maori people.’<sup>96</sup> He was, he said, ‘aware the lake

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90. *Evening Post*, 5 September 1962 (Hamer, “A Tangled Skein” (doc A150), p 211)

91. Hamer, “A Tangled Skein” (doc A150), pp 211–212

92. Hamer, “A Tangled Skein” (doc A150), pp 212–213

93. *Manawatu Evening Standard*, 27 August 1964 (Hamer, “A Tangled Skein” (doc A150), p 213)

94. Medical officer of health to director-general of health, 8 September 1964 (Hamer, “A Tangled Skein” (doc A150), p 213)

95. Hamer, “A Tangled Skein” (doc A150), pp 214–215

96. *Manawatu Evening Standard*, 13 October 1964 (Hamer, “A Tangled Skein” (doc A150), p 214)

## 10.3.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

had special significance to them.<sup>97</sup> This was an important admission. The Health Department's witness conceded that it was 'possibly unwise' to fish near the sewerage outlet into the lake but fishing was otherwise permissible. Summing up, counsel for the lake trustees argued that there had been an 'invasion of the plaintiff's private right to use and enjoy and take', and that 'the relief of private persons was not subservient to public welfare'.<sup>98</sup> The council, in reply, pointed out that the sewage had stopped entering the lake (for the time being), and did not accept that Māori fishing rights had been affected by it.<sup>99</sup>

In a replay of the events of 1962, the judge criticised the council for the length of time it was taking to fix the sewerage problems. There was a fear among both local and central government officials that a third application for an injunction (practically inevitable) might be granted by the courts. The council asked for another urgent loan to upgrade the system. Health officials cautioned that Māori fishing rights required a guaranteed level of treatment of the effluent from now on.<sup>100</sup> The council must ensure that there would be 'no noticeable solid matter, and the oxygen demand to be of a level that it would support fish life'.<sup>101</sup> The department also tried to progress a second loan to the council, which had applied for an extra £123,000.<sup>102</sup>

Three years later, in 1967, the upgrade was stalled due to insufficient funds. Treated effluent was still flowing into the lake above and below ground, but there had been no further extreme weather events and thus no discharge of raw sewage. It was not until 1969 that the council finally completed its upgrade to the treatment plant, which remained in the same location (and therefore dangerously close to the lake). The new system involved the use of oxidation ponds to treat the effluent before discharge into the lake. Despite Muaūpoko's known opposition, 'percolation' in sludge pits was to be replaced by direct discharge into the lake. This was highly problematic for the claimants, and it soon became apparent that even treated effluent was accelerating the eutrophication of the lake.<sup>103</sup>

**10.3.5 A crucial turning point in knowledge and approach, 1969–71**

In 1969, the Internal Affairs Department tested the quality of the water as a result of Muaūpoko opposition to a proposed deepening of the lake for boating.<sup>104</sup> Muaūpoko remained very concerned about their freshwater shellfish and fish in the lake, and the tests showed that 'fairly heavy pollution' was occurring as a result of *treated* effluent.<sup>105</sup> The head of the Internal Affairs Department wrote to the Health Department advising: '*With the increase of Nutrients entering the water it is obvious*

97. *Manawatu Evening Standard*, 13 October 1964 (Hamer, "A Tangled Skein" (doc A150), p 214)

98. *Manawatu Evening Standard*, 13 October 1964 (Hamer, "A Tangled Skein" (doc A150), p 214)

99. *Manawatu Evening Standard*, 13 October 1964 (Hamer, "A Tangled Skein" (doc A150), p 214)

100. Hamer, "A Tangled Skein" (doc A150), p 215

101. Acting medical officer of health to director-general of health, 18 November 1964 (Hamer, "A Tangled Skein" (doc A150), p 215)

102. Hamer, "A Tangled Skein" (doc A150), p 215

103. Hamer, "A Tangled Skein" (doc A150), pp 216–217, 219, 235

104. Hamer, "A Tangled Skein" (doc A150), p 216

105. Secretary for Internal Affairs to district officer of health, 15 April 1969 (Hamer, "A Tangled Skein" (doc A150), p 216)

**EUTROPHICATION**

Eutrophication is caused by high nutrient levels, and it results in the ‘excessive growth of algae and weeds and an accompanying depletion of oxygen in the water, which in turn causes the death of other organisms, including fish’. Eutrophication also causes increased sediment, which has the effect of gradually raising the bed of a lake. If it remains unchecked ‘eutrophication . . . would eventually result in it [a lake] becoming a swamp, and ultimately dry land’.<sup>1</sup>

1. David Armstrong, ‘Lake Horowhenua and the Hokio Stream, 1905–c 1990’, May 2015 (doc A162), p 89

*that if the Lake is to be retained for recreational purposes some method of bypassing the Lake with this effluent will have to be found (emphasis added).*<sup>106</sup> Māori fishing rights were also at stake. The secretary for Internal Affairs noted that ‘this matter requires serious investigation as the health risk to the Maoris who are known to take fish life from the lake for food is need for concern.’<sup>107</sup> The director of public hygiene agreed that ‘Perhaps consideration should be given to removal of the Levin Borough Council’s effluent from the Lake.’<sup>108</sup>

The claimants put great weight on the admissions of these senior officials in 1969, noting that effluent did not in fact cease entering the lake until 1987, almost 20 years later.<sup>109</sup>

The Health Department tested water quality in 1969 and found that there was also pollution from Levin’s stormwater system and farm effluent, in addition to the town’s sewage effluent. But the seriousness of the pollution depended on the standards against which it was measured. Health officials debated whether the lake had recreational uses and therefore needed to meet bathing standards, and admitted that there was no official standard against which to measure pollution for freshwater shellfish. Although this was necessary, since Muaūpoko owned the bed and took shellfish from it, officials though it might be ‘impractical’ to insist on a water quality standard fit for shellfish consumption.<sup>110</sup> In 1970, as noted above, the director of public hygiene suggested that Levin’s effluent might need to be removed from the lake altogether. Water quality did improve slightly in 1971 after the introduction

106. Secretary for Internal Affairs to district officer of health, 15 April 1969 (Hamer, “A Tangled Skein” (doc A150), p 217)

107. Secretary for Internal Affairs to district officer of health, 15 April 1969 (Hamer, “A Tangled Skein” (doc A150), p 217)

108. Director, Division of Public Health, to medical officer of health, 10 June 1970 (Hamer, “A Tangled Skein” (doc A150), p 217)

109. Claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 285; claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 20

110. Medical officer of health to director-general of health, 9 October 1969 (Hamer, “A Tangled Skein” (doc A150), p 217)

## 10.3.5 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

of the new treatment system, but large quantities of effluent were now being discharged directly into the lake.<sup>111</sup>

What did the domain board do? In the claimants' submission, the 1956 arrangement was made with the Crown, not the local authorities, and Muaūpoko looked to the Crown to assist them. They repeatedly made the situation known to the Crown in expectation of a remedy. Further, Muaūpoko reluctantly agreed in 1956 to a '4/4' board (that is, a reformed domain board with four Muaūpoko representatives, three local body representatives, and a Crown chair – see chapter 9). Muaūpoko agreed to this, they said, on the basis that the Crown would chair and would be 'an active protector on their behalf. Patently the Crown has not fulfilled that role in relation to contamination of the lake through sewage and from surrounding farmland.'<sup>112</sup>

In 1969, the domain board asked the Pollution Advisory Council for assistance but received the response that the council had not yet classified the waters of Lake Horowhenua. This would be done 'in due course.'<sup>113</sup> As will be recalled, the Health Department had suggested this back in 1963 but it had not been done.<sup>114</sup> In fact, it had still not been done by 1972, when the domain board was advised that the task of classifying waters had been transferred to the Water Resources Council. In the meantime, the Health Department had warned the board that 'it would be undesirable from the health point of view for the Lake to be used for swimming or the taking of shell-fish.' The board 'continued to press for action' from the Water Resources Council without success, but took no action itself until 1975, when it set up a technical advisory committee (discussed below). Thus, the domain board took no action at all until 1969, and then of only a minimal kind.<sup>115</sup> As we explained in chapter 9, Crown counsel submitted that the 1956 arrangements provided a 'co-management regime' for the lake,<sup>116</sup> but the unreliable protection afforded Muaūpoko was clearly evident here.

The Nature Conservation Council warned the domain board in 1971 that action was necessary to 'prevent further eutrophication of Lake Horowhenua.'<sup>117</sup> In the same year, the catchment board's chief engineer, A G Leenards, investigated the situation. He reported that the concrete weir was aggravating siltation, and that the lake could not be flushed as a result of it. The once-gravel bed was now made up of silt and sludge, which stored nutrients and exacerbated the effects of the effluent on the water. Leenards also noted that storm water and surrounding farmland were having an effect in terms of pollution. Most of the nutrients in the lake, how-

111. Hamer, "A Tangled Skein" (doc A150), pp 217–218

112. Claimant counsel (Bennion, Whiley, and Black), closing submissions, 19 February 2016 (paper 3.3.17(b)), p 50

113. A N McGowan for commissioner of Crown lands to director-general of lands, 'Report on Background to Horowhenua Lake Reserve', 8 April 1982 (Paul Hamer, comp, papers in support of "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(d)), p 643)

114. Hamer, "A Tangled Skein" (doc A150), pp 211–212

115. A N McGowan for commissioner of Crown lands to director-general of lands, 'Report on Background to Horowhenua Lake Reserve', 8 April 1982 (Hamer, papers in support of "A Tangled Skein" (doc A150(d)), p 643)

116. Crown counsel, closing submissions (paper 3.3.24), p 54

117. Secretary, Nature Conservation Council, to secretary, Horowhenua Lake Domain Board, 30 November 1971 (Hamer, "A Tangled Skein" (doc A150), p 219)

ever, came from sewage effluent. The lake was further discoloured and deprived of oxygen by algae, caused by a combination of the silt and nutrients. Aspects of the lake's life cycle had been 'destroyed or distorted'.<sup>118</sup> The Hōkio Stream, too, was in trouble.<sup>119</sup>

The solution, advised Leenards, was to move the concrete weir and remove the silt from both the stream and lakebed, inhibiting the algae and allowing the lake to be flushed. Leenards also recommended a 10-year project to clean up the lake. This included removing the silt and diverting all streams and drains which entered the lake into oxidation ponds before entry, so as to prevent the deposit of silt and farm effluent into Lake Horowhenua. The likely cost was \$404,000. The catchment board, however, had no money to carry out Leenards' proposals: the money had to come from the Crown or local rates.<sup>120</sup>

The claimants were very critical of the Crown's failure to act in 1971. In their view, the Crown rejected a crucial opportunity to 'remediate the Lake' at a point when less damage had been done, and rectification was both cheaper and much more practicable than it is today. The Crown cannot, they told us, complain that the cost is much higher today, when earlier action could and should have been taken.<sup>121</sup> The claimants asked the Tribunal to recommend that 'any settlement should specially factor suitable funds for the repair of pollution caused by Treaty breaches'.<sup>122</sup>

The Crown, on the other hand, denied that its state of knowledge was such as to justify the expense and difficulty of carrying out Leenards' plans. In the Crown's view, Department of Scientific and Industrial Research (DSIR) tests in 1971 showed an improvement since the new sewerage system had begun to operate in 1969. Also, Leenards' report argued that the lake was not only polluted by effluent, but also by storm water and streams discharging into the lake from 'surrounding farmland'. Also evident from his report was that solutions would be neither simple nor inexpensive. The Crown submitted that it was not reasonable to expect the Crown to have simply intervened and 'done (and paid for) whatever was required'.<sup>123</sup>

In our view, it was clear that Crown officials had recognised by 1971 that it was crucial to stop Levin's effluent from entering the lake, yet the council's upgrade of the treatment plant was based precisely on discharge into the lake. Central and local government officials agreed that Lake Horowhenua was polluted. Only the Crown could really afford to pay for and undertake a project of the scope suggested by Leenards to clean up the lake. It did not choose to do so, however, and thus no action was taken to prevent the situation from getting worse. As Leenards himself

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118. A G Leenards to chairman, Manawatu Catchment Board, 'Preliminary Report on the Conditions of Lake Horowhenua', 1 October 1971 (Hamer, "A Tangled Skein" (doc A150), p 219)

119. Hamer, "A Tangled Skein" (doc A150), pp 219–220

120. Hamer, "A Tangled Skein" (doc A150), pp 220–221

121. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply, 21 April 2016 (paper 3.3.33), p 13

122. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply (paper 3.3.33), p 13

123. Crown counsel, closing submissions (paper 3.3.24), pp 68–70



## 10.3.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

noted, the Crown might have been prepared to subsidise ratepayer efforts but pollution was seen as a local problem for local bodies to resolve.<sup>124</sup>

Another way of looking at this issue was: who had the power to stop the pollution from occurring? While it is correct to say that other sources of pollution were important, including the stormwater drains, the overwhelming source of phosphorus and nutrients in the lake at the time was the sewage effluent. As early as 1948, engineers had said that it was possible to discharge treated effluent to land in the sandhills, a considerable distance from the lake. Quite apart from Leenards' plan for remediation, the solution also depended on immediately halting the discharge of sewage effluent. This meant persuading or compelling the borough council to discharge to land instead. A significant subsidy from the Government would have been required, as in fact occurred in the 1980s. The key point the claimants made is that halting the discharge of sewage effluent could and should have happened earlier, and we agree that senior Government officials were aware of the necessity by 1969.

The key question then becomes: who had the authority to make the council stop discharging into Lake Horowhenua? In terms of central government authority, the answer is simple: what was needed was a classification of the lake's waters by the Pollution Advisory Council or the Water Resources Council. If the classification was high enough, the borough would not be able to discharge even treated effluent into Lake Horowhenua. Ironically, however, Government departments now decided that the better alternative was to discharge the effluent into the Hōkio Stream. Further, they decided that it would be necessary to take away any authority of the Māori owners before it could be done, or before nutrient-rich sediment could be removed from the bed of the lake. We turn to those developments next.

### 10.3.6 Persuading or compelling the council to stop discharging effluent: a long and tortuous process, 1969–87

As noted above, the domain board had done nothing very active since being alerted to the seriousness of the problem in 1969. It pressed for a classification of the lake's waters, which would bring the powers of the Water and Soil Conservation Act 1967 into play. But this had not happened by 1975 when, amid concerns that raw sewage was once again reaching the lake, the domain board asked the Commission for the Environment for help. The Māori members of the board also appealed to the New Zealand Maori Council to assist. As Paul Hamer noted, the whole board was by then 'concerned about the worsening state of the lake.'<sup>125</sup> The Health Department was also concerned, issuing warnings against eating fish from Lake Horowhenua. Despite the prohibition in tikanga and the health warnings, however, some Māori continued to take food from the lake – in their economic circumstances, they may have had little choice.<sup>126</sup>

A number of bodies got involved in 1975:

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124. Hamer, "A Tangled Skein" (doc A150), p 221

125. Hamer, "A Tangled Skein" (doc A150), pp 222–223

126. Hamer, "A Tangled Skein" (doc A150), pp 222, 224



- ▶ Commission for the Environment: an official from the commission, Alasdair Hutchison, argued that Māori ownership and fishing rights were an obstacle which must first be circumvented before the lake could be cleaned up. Works on the Hōkio Stream might interfere with fishing rights, and the Māori owners' permission would be needed before the silt and sludge on the lakebed could be removed. Further, neither the borough council nor the county council were willing to spend money on the lake 'until the Maoris relinquish some of their exclusive rights to it'. While accepting that Māori were 'unhappy' about the pollution of their lake and its effects on their food supply, Hutchison argued that they would have to lease their lakebed to the Crown before anything could be done about it.<sup>127</sup> The secretary of the domain board agreed that the bed, chain strip, and dewatered area as well as the surface would need to be brought under the board's control.<sup>128</sup>
- ▶ The Nature Conservation Council took the same view. Once control had been taken from Māori, the council thought that sewage and farm effluent could be diverted to the Hōkio Stream, and the beds of the stream and lake dredged. Any interference with Māori fishing rights would not matter as 'the water is now so polluted that nothing should be taken for food' anyway.<sup>129</sup>
- ▶ The DSIR also investigated the situation, finding that the lake was 'eutrophic and thus susceptible to toxic algal blooms, high sedimentation, "unsightly and unsavoury waters", and so on.'<sup>130</sup> A realistic aim was to restore the water to a point where aquatic animals could grow, algal blooms were rare, and it was fit for swimming. The DSIR advised the commissioner for the environment that stock must be kept out of all waterways in the catchment, swamps should be retained for 'coarser solids to settle in', control of fertilisers was imperative, and it was important to divert all effluent away from the lake. Helen Hughes of the DSIR pointed out that Horowhenua exceeded the pollution rates of other 'notoriously polluted lakes'. The borough council, however, seemed oblivious of any need to act on Lake Horowhenua. On advice from DSIR, the commissioner for the environment told the Public Works Department that any future expansion of Levin must be conditional upon stripping its water of nutrients or stopping all discharges into the lake.<sup>131</sup>
- ▶ The catchment board formulated a plan for hydrological, chemical, and biological testing of the lake's water quality, but DSIR argued against the need for it: the most important thing was simply to 'get the Effluent from Levin Borough out of the lake pronto.'<sup>132</sup> DSIR and the commissioner for the environment considered the use of central government authority via the water classification

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127. A Hutchison, file note, 30 May 1975 (Hamer, "A Tangled Skein" (doc A150), pp 222–223)

128. Hamer, "A Tangled Skein" (doc A150), p 223

129. Paper for Nature Conservation Council meeting of 17 September 1975 (Hamer, "A Tangled Skein" (doc A150), pp 223–224)

130. RHS McColl, DSIR Soil Bureau, to H Hughes, DSIR head office, 4 August 1975 (Hamer, "A Tangled Skein" (doc A150), pp 224–225)

131. Hamer, "A Tangled Skein" (doc A150), pp 224–225

132. A Hutchison, file note, 1 December 1975 (Hamer, "A Tangled Skein" (doc A150), p 226)

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system. If the lake could be classified as 'x' by the National Water and Soil Conservation Authority, the borough council would have to stop discharging effluent into it.<sup>133</sup>

In 1976, the domain board and Government departments worked on the three key strategies identified in 1975: (i) getting the lakebed and stream bed out of Māori control; (ii) getting the lake water classified 'x'; and (as a result) (iii) getting the borough council to develop an alternative method for disposing of its effluent. These strategies had an unintended effect; they contributed significantly to Muaūpoko's disillusionment with the domain board and the 1956 'co-management regime' by 1980.

In respect of point (i), Lands Department officials tried to get agreement from the lake trustees to give up control of the bed but were quietly ignored. The domain board also tried and was also ignored. The possibility was considered of bringing in the Minister of Maori Affairs and the local Māori member of Parliament to support the board's quest for control of the bed but the idea was eventually abandoned.<sup>134</sup>

On point (iii), the domain board established a technical committee which asked the borough engineer to come up with alternatives. He identified three: stripping all nutrients from the water before it entered the lake (too expensive and likely ineffective); spray irrigation of the effluent to land; and piping the effluent around or across the lake to the Hōkio Stream. But the council would not be prepared to do any of these things without financial support. Further DSIR research in 1976 identified that the great bulk of phosphorus in the lake came from sewage effluent (more than 85 per cent). The department strongly supported the option of discharge into the Hōkio Stream.<sup>135</sup> As Hamer noted, 'Again, the assumption was that the stream could simply receive the effluent instead [of the lake].'<sup>136</sup>

On 12 August 1976, the regional water board held a meeting in Levin with representatives from the catchment board, the borough and county councils, the domain board, and the lake trustees. It was now generally accepted that the lake was polluted, and that a (if not the) principal cause was discharge of the town's effluent into the lake. The mayor's response was that the problems could never be solved while there were three bodies controlling the lake, and also that the council would not commit itself to spending significant amounts of money unless all the groups cooperated.<sup>137</sup> Muaūpoko representatives explained that 'The Maoris were hurt because of what is being done to the lake.' Their fishing rights were 'gone because pollution is poisoning the fish.' In response to the idea that they would give up yet more authority over the lake, the trustees' view was that 'if the lake title was tampered with it would create a war'.<sup>138</sup>

Three resolutions were passed: to ask the national body, the Water Resources Council, the cost of removing all pollutants from the lake (as the regional board's

133. Hamer, "A Tangled Skein" (doc A150), p 226

134. Hamer, "A Tangled Skein" (doc A150), pp 227–228

135. Hamer, "A Tangled Skein" (doc A150), pp 227–229, 235

136. Hamer, "A Tangled Skein" (doc A150), p 228

137. Hamer, "A Tangled Skein" (doc A150), p 229

138. Minutes of 12 August 1976 meeting (Hamer, "A Tangled Skein" (doc A150), p 229)

expert recommended); to form a steering committee representing all the bodies at the meeting to examine the way forward; and to ask the Minister of Works (who chaired the national authority) to get legislation transferring authority over ‘aspects of the waters of the lake’ from the domain board to the catchment board (but ensuring that the Māori owners were protected in doing so).<sup>139</sup>

Mr Hamer commented that the tribe was not necessarily in support of these resolutions.<sup>140</sup> It seemed that the water board had agreed to work in concert with Muaūpoko but the lake trustees believed they should have the final say on what happened to their lake. Joe Tukapua was reported in the *Dominion* as saying that Pākehā-dominated authorities had controlled the lake for too long. The borough council was responsible for its ‘putrid state’, polluted and choked with weeds, yet did not even ‘consider that they have ruined what has been an important source of food to us for many years’.<sup>141</sup>

The trustees called a meeting of the owners to discuss the future of the lake. The Muaūpoko owners resolved that effluent must stop entering the lake, and offered a practical solution: they would be prepared to give a piece of land in the Hōkio area for land disposal of the borough’s effluent.<sup>142</sup> This offer was conveyed to the steering committee in December 1976. The borough council’s representative was worried about the cost of this solution – it would only be possible if the Government helped fund it.<sup>143</sup> In March 1977, the commissioner of Crown lands (chair of the domain board) thanked Tau Ranginui for the ‘willingness of your self and your co-owners to make the Hokio A Block available for land disposal of the Levin Borough’s effluent from the sewerage plant’.<sup>144</sup>

What was the Government’s reaction? Ministry of Works officials debated whether this was the best solution. The superintendent of wastewater treatment agreed that the sewage effluent had created a ‘heavy phosphorus load’ in the lake but was unconvinced that land disposal was the best option. It would require a large area of land, and be expensive to pump the effluent to the distant point of disposal. It would be cheaper and easier to divert the effluent to the Hōkio Stream, since the stream was receiving it anyway (though diluted by passage through the lake). Nor was the Health Department at all sympathetic to the Māori owners’ wish that the effluent be discharged on land and not to water. The Lands Department, on the other hand, saw no reason to change the law (as requested) since the domain board’s authority was no hindrance to the water board’s responsibility to improve water quality.<sup>145</sup>

In the meantime, the steering committee still pursued the strategy of getting an ‘x’ classification for the lake’s waters. In March 1978, the technical committee

139. Minutes of 12 August 1976 meeting (Hamer, “A Tangled Skein” (doc A150), p 229)

140. Hamer, “A Tangled Skein” (doc A150), p 229

141. *Dominion*, 25 August 1976 (Hamer, “A Tangled Skein” (doc A150), p 230)

142. Hamer, “A Tangled Skein” (doc A150), pp 230–231

143. Hamer, “A Tangled Skein” (doc A150), p 231

144. Commissioner of Crown lands to Tau Ranginui, 29 March 1977 (Hamer, “A Tangled Skein” (doc A150), p 231)

145. Hamer, “A Tangled Skein” (doc A150), pp 231–232

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reported that the lake was ‘very eutrophic as characterised by frequent blooms of blue-green algae, high nutrient concentrations, large fluctuations in dissolved oxygen concentrations (including severe oxygen depletion in the bottom waters), extensive macrophytic growth, etc.’<sup>146</sup> The great majority of nutrients in the lake was again measured as coming from sewage (9,140 of 10,600 kilograms of phosphorus), with the rest coming from cowshed effluent and rural and urban run-off. The committee rejected land-based disposal as too expensive and difficult, recommending discharge into the Hōkio Stream. But the committee was not sure what an ‘x’ classification would require so simply presented a plan for disposal in the stream.<sup>147</sup>

In June 1979, the Water Resources Council reclassified Lake Horowhenua as ‘cx’ on a preliminary basis and called for any objections.<sup>148</sup> A ‘c’ classification meant that the water needed to be suitable for ‘primary contact recreation’, including bathing and skiing. For effluent discharge, this required a ‘[h]igh standard complete biological treatment plus bacterial removal’. An ‘x’ classification meant that waters were ‘sensitive to enrichment’ and required a higher standard of effluent treatment, including nutrient removal.<sup>149</sup>

The borough council objected, as did the Hokio Progressive Association (HPA). The latter objected to the proposal to divert sewage into the Hōkio Stream rather than the reclassification per se, arguing that the water quality of both lake and stream should be treated as a single problem. The Nature Conservation Council refused to support the HPA, since it considered cleaning up the lake to be the more important goal.<sup>150</sup> The HPA also made an objection to the catchment board, pointing out that a direct discharge of effluent would make up nearly half the Hōkio Stream’s flow during summer, which would pollute the river and the ‘eel pas used by local people for food’. Direct discharge would make a bad situation worse.<sup>151</sup>

A Water Resources Council sub-committee heard the objections. The mayor of Levin explained how the 1952 treatment plant had been overwhelmed by population growth, with the result that raw sewage had been entering the lake. He accepted that the result – gross pollution – had distressed Māori. Eventually, a modern plant was built which *almost* completely purified the effluent before discharge. But the impact of nutrients entering the lake had been overlooked in the new system. The council was prepared to help restore the lake by diverting effluent to the Hōkio Stream but could only do so if subsidised by the Government. Hence, the council had made a *pro forma* objection to the ‘cx’ classification in order to put its case for assistance to the Water Resources Council and the Government. The HPA opposed reclassification because of what it would mean for the Hōkio Stream. Joe Tukapua

146. Lake Horowhenua Technical Committee, report, March 1978 (Hamer, “A Tangled Skein” (doc A150), p 233)

147. Hamer, “A Tangled Skein” (doc A150), pp 233–234

148. Hamer, “A Tangled Skein” (doc A150), p 234

149. Michael Roche, *Land and Water: Water and Soil Conservation and Central Government in New Zealand 1941–1988* (Wellington: Historical Branch, Department of Internal Affairs, 1994), p 127

150. Hamer, “A Tangled Skein” (doc A150), pp 234–235

151. Secretary/treasurer, HPA, to secretary, Manawatu Catchment Board, 27 September 1979 (Hamer, “A Tangled Skein” (doc A150), p 235)

appeared on behalf of the Māori owners, supporting immediate 'cx' reclassification because it was urgent to save the lake, even if this meant danger to the Hōkio Stream, but also advocating for land disposal instead of to the stream.<sup>152</sup>

For reasons unknown, the sub-committee did not make a report to the Water Resources Council. This may be because Ministry of Works' staff had intervened in opposition to it. Helen Hughes, who was a member of the sub-committee, was 'deeply concerned' about the staff's intervention and asked the Water Resources Council to reclassify Lake Horowhenua immediately.<sup>153</sup> It was, she said, the 'most eutrophic water body in New Zealand'.<sup>154</sup> In April 1980, she argued that failure to give the lake an 'x' classification would undermine public confidence in the whole water and soil conservation organisation and its aims, destroy the present cooperation of the borough, county, regional water board, and Māori trustees, would be inconsistent with the council's policy, and would not result in restoration of the lake to a state fit for recreational use. Further delay would greatly increase the eventual costs of restoring the lake. By this time, Ngāti Raukawa were also involved, supporting reclassification of the lake but appealing to the Water Resources Council and the Commission for the Environment that Levin's sewage not be diverted to the Hōkio Stream. Ngāti Pareraukawa, in particular, were opposed to discharge of effluent into the stream.<sup>155</sup>

In May 1980, the Water Resources Council reclassified the lake as 'cx'. From the point at which the domain board had first approached the Pollution Advisory Council in 1969, it had taken 11 years to achieve this result. The reclassification meant that the borough council would have to apply to the regional water board for a water right to discharge effluent. The Commission for the Environment noted that the Hōkio Stream was classified 'd', suitable for wildlife, fishing, and agriculture, and also noted that Māori had offered land near Hōkio for a land disposal scheme. It would cost \$750,000 to build a pipeline for land disposal.<sup>156</sup>

On 15 June 1980, local Māori groups (Muaūpoko and Ngāti Raukawa) held a hui which formed the Muaupoko-Pareraukawa Action Committee to Preserve Lake Horowhenua and the Hōkio Stream. This action committee was supported by the HPA and others. It is not clear who exactly from Muaūpoko attended the meeting. The action committee's stance was that the lake must be reclassified but not at the cost of the Hōkio Stream. The two water bodies were parts of a single water and food system (including for eels). The tribes expressed a particular concern that their waters not be polluted by human waste.<sup>157</sup>

In 1981, the borough council applied for a temporary water right to discharge into the lake for another five years. In response, the Muaūpoko-Pareraukawa action committee again pointed out that the lake and stream were part of a single water

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152. Hamer, "A Tangled Skein" (doc A150), pp 235–236

153. Hamer, "A Tangled Skein" (doc A150), p 237

154. 'Lake Horowhenua Reclassification', statement by Helen Hughes, April 1980 (Hamer, "A Tangled Skein" (doc A150), p 237)

155. Hamer, "A Tangled Skein" (doc A150), pp 237–238

156. Hamer, "A Tangled Skein" (doc A150), pp 238–239

157. Hamer, "A Tangled Skein" (doc A150), p 239



## 10.3.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

ecosystem, and that neither the local Māori people nor environmentalists wanted to see effluent discharged in the lake, the stream, or across the Hōkio beach to the ocean. Māori fishing rights and wishes were diametrically opposed to discharge of human waste into their treasured waters. The Ministry of Works responded to the action committee that the final decision would have to be based on cost effectiveness alone, which meant discharge into the stream. The ministry rejected the proposal to dispose of the effluent by land as too costly.<sup>158</sup> Thus, a solution which had been posited as early as 1948 remained out of reach. Lake Horowhenua and the Hōkio Stream continued to pay a price in environmental degradation as a result of the ministry's decision. Although it ultimately ended up having to pay a subsidy for land-based disposal, the Government resisted it strenuously. In doing so, it took little or no account of Māori interests. Nor did it take account of the commitments made to Muaūpoko by the Crown in 1905 and 1952–53, that there would be no discharge of pollution (or, in 1952–53, sewer effluent) into Lake Horowhenua.

In May 1981, a sub-committee of the regional water board heard objections to the borough council's application to continue discharging effluent into Lake Horowhenua for five years. The HPA, the action committee, the lake trustees, and the Muaupoko Maori Committee all objected. Ultimately, all of the objectors agreed that the council's application should be granted for five years with very strict conditions. The Water Resources Council approved the regional board's decision and the nine conditions, which included a guarantee that the council would develop an alternative disposal system within five years. At the expiry of the permit, all discharge into Lake Horowhenua had to cease.<sup>159</sup>

By mid-1982, works officials supported a council plan to discharge into the Hōkio Stream. They considered it to be the best available option, and recommended that the Government should provide both a loan and subsidy for it. The council applied for a water right to discharge into the stream, and also to discharge some effluent 'by rapid infiltration to the tip site on Hokio Beach Road'. This drew protests from the lake trustees, the action committee, and Ngāti Raukawa.<sup>160</sup> The lake trustees passed a resolution, which they sent to the steering committee: 'We unanimously object to any form of disposal of treated effluent into Lake Horowhenua or into the adjoining Hokio Stream.'<sup>161</sup>

A special tribunal was appointed to hear objections. The Ministry of Agriculture and Fisheries (MAF) objected, arguing in favour of preserving indigenous fisheries and their habitat.<sup>162</sup> The Māori owners also strongly objected:

For many years Levin has discharged its sewage effluent into Horowhenua Lake despite continued objections from the owners of the Lake, and despite the obvious

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158. Hamer, "A Tangled Skein" (doc A150), pp 239–242

159. Hamer, "A Tangled Skein" (doc A150), pp 241–242

160. Hamer, "A Tangled Skein" (doc A150), p 243

161. Lake trustees secretary to steering committee, 3 May 1982 (Hamer, "A Tangled Skein" (doc A150), p 243)

162. Senior fisheries management officer, Ministry of Agriculture and Fisheries, statement of evidence regarding application for water rights, not dated (D A Armstrong, comp, papers in support of 'Lake Horowhenua and the Hokio Stream, 1905–c1990', various dates (doc A162(e)), pp 2560–2561)



damage caused by such action. This . . . disposal option is no longer acceptable, and we submit that long term, environmentally and socially acceptable disposal . . . must be undertaken. Discharge of effluent into the Hokio Stream does not meet these criteria.

We submit that it is immoral for anybody, including a local authority, to discharge effluent onto somebody else's property when the owners of that property object. In this case, we contend that the Hokio Stream bed is largely privately owned, and the water in the stream is subject to private, exclusive, and unrestricted fishing rights, and the owners of these properties and rights object to the proposed effluent discharge . . .

The Hokio Stream is also an extremely important symbolic source of well-being for our tribes and is a source of Mana for both our people [Muaupoko and Raukawa]. Thus the reputation and standing of our tribes will be lowered if our rights in Hokio Stream are prejudiced . . . the abuse of such an important and historically significant waterway . . . is totally unacceptable to us.

Throughout New Zealand our area is famous . . . for the eels of Lake Horowhenua which are usually caught during their migration down the Hokio stream when they are of a superior size and condition in readiness for spawning. Eel delicacies such as tuna raureka are expected by people who visit our marae as guests, and our mana and standing is dependant on our ability to obtain, prepare, and serve these foods. This at least partially explains the importance of eels, fishing rights, eel weirs, and traditional food resources to us, and all these things are liable to be jeopardised if an effluent discharge right is granted.<sup>163</sup>

Counsel for the borough council argued that the Health Department simply required the most economic and effective scheme, that Māori ownership of the bed of the Hōkio Stream was irrelevant, and that the 1967 Act did not provide for cultural and spiritual values to be considered in such decisions. While the Treaty guaranteed full, exclusive, and undisturbed possession of fisheries, that was a matter for the Waitangi Tribunal and the Crown, not the present process. Put bluntly, he said, the difference was a cost of \$1 million or \$3 million, and the council could not justify spending an extra \$2 million 'to safeguard Maori interests only'.<sup>164</sup> On the other hand, if the Crown accepted a Treaty claim in respect of fishing rights, then it could pay the \$2 million and the council would be happy to take the more expensive option. The most the council was willing to do was consider discharge into the Waiwiri Stream instead, believing that there were no Māori interests in that stream.<sup>165</sup>

In March 1983, the deadlock was finally broken. The special tribunal granted the water rights sought by the council but with 'fairly stringent' conditions. The tribunal had accepted that the stream was an important fishing area for local people,

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163. 'Objections to Water Right Application 82/52' (DA Armstrong, 'Lake Horowhenua and the Hokio Stream, 1905–1990' (doc A162), pp 120–121)

164. Counsel for Levin Borough Council, outline of final submissions, 15 October 1982, pp 14–15 (Armstrong, papers in support of 'Lake Horowhenua and the Hokio Stream' (doc A162(e)), pp 2534–2535)

165. Hamer, "A Tangled Skein" (doc A150), pp 243–244

## 10.3.6 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

and that ‘the local Maori people place considerable importance on it.’<sup>166</sup> As David Armstrong explained:

In summary, the Tribunal found that tertiary treated effluent could be pumped along a pipeline to a ‘balancing pond’ near the rubbish tip site on Hokio Beach Road, and from there could be pumped on to sand dunes on Council-owned land above the rubbish tip site. Effluent might also be discharged into the Hokio stream, but only for a maximum of 26 weeks per year during the period between autumn and spring when it was at its maximum flow. The Tribunal further noted that sewage effluent was not the only source of pollution and nutrients, and it urged the Borough to take remedial action in respect of piggeries and other ‘animal contamination’, and effluent from the Hokio Township and the Hokio school.<sup>167</sup>

Given a maximum limit of 26 weeks a year, the council had little choice but to find an alternative disposal system. As will be recalled, Muaūpoko had offered land in the Hōkio district for spray irrigation of effluent. The council now identified ‘the Pot’, a ‘natural depression in the sandhills and surrounding lands’, as a suitable site.<sup>168</sup> Charles Rudd explained to us that it was called ‘the Lucky Pot’ because it was always possible to bag a deer there.<sup>169</sup> The lake trustees accepted that Māori land would have to be used to avoid further pollution of their taonga, the lake and stream, but the owners of Hōkio A asked for an audit to ensure that spray irrigation at the Pot was truly the best solution. In the meantime, the council sought subsidies from the National Water and Soil Conservation Authority and the Health Department. Health officials were adamant that there was no health issue justifying a subsidy, although – recognising that the situation was ‘sensitive’<sup>170</sup> and it was necessary to stop the discharge – they supported a 1:1 subsidy of \$1.5 million from the authority, which would cover half the projected cost.<sup>171</sup>

Finally, in February 1985, the council applied to the Local Authorities Loans Board for a \$1.5 million loan. The deadline of 15 September 1986 was only 18 months away. The council also applied formally to the Health Department, relying on the arguments of the Waitangi Tribunal in various reports. Food gathered from Lake Horowhenua included eels, watercress, and kōura. The Tribunal in the Kaituna River claim found that mixing waters that had been contaminated by human wastes with waters used for food gathering was deeply offensive to Māori on a spiritual level.<sup>172</sup> The council added that the taking of food from Lake Horowhenua would

166. Commissioner of works to district commissioner, 23 March 1983 (Hamer, “A Tangled Skein” (doc A150), p 245)

167. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 121

168. Hamer, “A Tangled Skein” (doc A150), p 245

169. Transcript 4.1.12, p 594

170. Acting medical officer of health to director-general of health, 23 April 1985 (Hamer, “A Tangled Skein” (doc A150), p 247)

171. Hamer, “A Tangled Skein” (doc A150), pp 246–247

172. See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 30–32.

be ‘foolish’<sup>173</sup> in any case because of the health risk.<sup>174</sup> The Ministry of Works and Development commented that health risks were minimal so long as ‘fish and food are rinsed prior to consumption.’<sup>175</sup> The Health Department eventually agreed to a subsidy of \$44,370.<sup>176</sup>

The council did, however, obtain a 1:1 subsidy from the National Water and Soil Conservation Authority. Cabinet approved the subsidy in December 1985, partly on the grounds that it would benefit the Māori community, their mana, and their cultural and spiritual values.<sup>177</sup> The director of water and soil conservation reported to the authority: ‘It is offensive to their cultural and spiritual values that sewage effluent although treated, is discharged into these waters’ (the idea that food should just be rinsed seems to have been forgotten).<sup>178</sup>

The director also recognised the importance of the lake and stream to the Muaūpoko owners and to Ngāti Pareraukawa, and that they had objected to the discharge for many years:

The lake and the stream are of particular significance to the Maori people of the Horowhenua area, especially the Ngati Pareraukawa and the Muaupoko. The waters have always been a source of food (eels, inanga, whitebait, koura, carp, flounders, kakahi, watercress, and other foods), a place for the preparation of traditional foods (such as kaanga, pirau, and karaka), a place for the storage of live eels, a source of washing and drinking water, and a place for recreation. It is offensive to their cultural and spiritual values that sewage effluent although treated, is discharged into these waters, and they have been objecting to the discharge for many years. An indication of the importance of the lake and stream to the Muaūpoko is that the lake-bed has been retained in their ownership.<sup>179</sup>

In May 1986, the Levin Borough Council finally started work on its new disposal system. In June 1986, knowing that it had run out of time to meet the looming deadline, the council applied for an extension to its water right. The lake trustees filed an objection in September 1986.<sup>180</sup> By now the writing was on the wall and we need not discuss the resultant litigation in detail. The lake trustees, now represented by Ada Tatana, argued that the borough council was trespassing on Māori land by

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173. Levin Borough Council, ‘Levin Effluent Disposal: Addendum to Design Report’, 8 May 1985 (Hamer, “A Tangled Skein” (doc A150), p 249)

174. Hamer, “A Tangled Skein” (doc A150), pp 248–249

175. E G Fox, file note, 4 June 1985 (Hamer, “A Tangled Skein” (doc A150), p 249)

176. Hamer, “A Tangled Skein” (doc A150), pp 250–251

177. Hamer, “A Tangled Skein” (doc A150), p 251

178. PF Prendergast for director of water and soil conservation, ‘Manawatu Catchment Board: Levin Borough Council, Horowhenua “CX” Classification, Effluent Disposal Scheme’, not dated (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1905–1990’, various dates (doc A150(f)), p 1453)

179. PF Prendergast for director of water and soil conservation, ‘Manawatu Catchment Board: Levin Borough Council, Horowhenua “CX” Classification, Effluent Disposal Scheme’, not dated (Hamer, papers in support of “A Tangled Skein” (doc A150(f)), p 1453)

180. Hamer, “A Tangled Skein” (doc A150), pp 251–252

10.3.7 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

discharging effluent on to it (through a pipe running over it). The result was the defiling of their taonga. In particular, the trustees complained of:

the build-up of sediment in the lake; the damage to water and aquatic life; the lack of an easement for the discharge; the discharge constituting a trespass; the grant of the earlier [water] right having been on the basis that the discharge would be finished by now; and the need for the grant of any further right to be conditional on the council removing the sediment from the lake.<sup>181</sup>

In her evidence to a special tribunal of the regional water board, Mrs Tatana explained that the people could no longer regard the lake as their major source of food because the fisheries were so diminished, and that a part of their mana and heritage had been lost. She also explained how the lake was a sacred treasure of great spiritual and cultural value to Muaūpoko. Some, such as Ron Taueki, refused to participate in the belief that the result was a foregone conclusion. That proved to be the case as there was nowhere else for the effluent to go except the town itself. The tribunal granted an extension to 30 June 1987.<sup>182</sup>

The new sewerage system was finally completed in 1987, and the borough council ceased discharging effluent into the lake. In the meantime, as all authorities from 1969 on recognised, Lake Horowhenua had become very seriously polluted.

**10.3.7 The role of storm water in the pollution of the lake**

In our inquiry, the claimants were especially concerned about the role of storm-water drains in polluting Lake Horowhenua (both before and after 1987). Philip Taueki showed us video evidence of the drains.<sup>183</sup> The Crown denied that it had any responsibility for stormwater drains, which were the province of local government, and also argued that insufficient evidence was available in any case.<sup>184</sup> Technical evidence from Mr Hamer pointed out that the National Water and Soil Conservation Authority granted a 'dispensation to the borough to discharge its stormwater' in 1969, on the proviso that the water did not contain pollutants.<sup>185</sup> In the same year, the domain board (the Crown's mechanism for co-management) complained to the town clerk about the effects of siltation on the lake as a result of storm water, and asked for a process to remove the silt before the water entered the lake. As will be recalled, Lenards also suggested in 1969 that the stormwater drains discharge into oxidation ponds before entry to the lake.<sup>186</sup>

The mayor considered it impracticable to remove the silt from storm water but found it necessary to conciliate Muaūpoko because the whole system needed upgrading – including fresh access across Māori land. The lake trustees signed an agreement in December 1971, allowing the council to lay pipes across the chain

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181. Hamer, "A Tangled Skein" (doc A150), p 253

182. Hamer, "A Tangled Skein" (doc A150), pp 253–257

183. Transcript 4.1.11, pp 185–195

184. Crown counsel, closing submissions (paper 3.3.24), pp 97–98, 105

185. Hamer, "A Tangled Skein" (doc A150), p 260

186. Hamer, "A Tangled Skein" (doc A150), pp 221, 260–262

strip and dewatered area in return for an assurance that no industrial waste would be discharged. A new mayor even told the trustees that he hoped to establish a system of preventing rubbish entering the lake through the stormwater drains. '[W]e will do all in our power', he said, 'to ensure noxious material does not enter the lake.'<sup>187</sup> There were issues about this agreement, and the failure to follow through with an effective filtering system, but we agree that these were not matters between the Crown and Muaūpoko.<sup>188</sup> We examine the more recent issues about storm water, which became possibly the largest source of pollution after sewage effluent ceased to be discharged, in the next chapter.

The crucial issue here is the Crown's failure to provide statutory protections against pollution in the 1905 and 1956 legislation, despite its agreements with Muaūpoko. Had such protections been in place, the National Water and Soil Conservation Authority's proviso in 1969 would have been much more powerful, and the borough council could have been compelled to establish an effective system to prevent rubbish, silt, and nutrients from entering the lake. Before 1987, storm water did not account for a great deal of the phosphorus in the lake, as compared to sewage effluent, but it did contribute to the sediment once the 1966 control weir prevented the natural flushing of the lake.

### 10.3.8 Findings

The claimants did not all agree as to whether the Crown was responsible for the *causes* of pollution, but there was common ground in their argument that the Crown was complicit in it.<sup>189</sup> The causes of pollution included agricultural run-off, the build-up of nutrient-rich sediment, and other factors related to farming and nearby urban development, but the key cause between 1952 and 1987 was the discharge of effluent into the lake (indirectly from 1952 to 1969, and directly from 1969 to 1987). We have therefore concentrated on that causal factor in this chapter. We return to some of the other causes of pollution, particularly in the post-1987 era, in chapter 11.

The Crown was complicit in the discharge of effluent from at least 1957, when Muaūpoko first objected and the Crown was aware that effluent was seeping into the lake. At first, Government departments were focused on physical health and 'safe' levels of treated effluent, but the alternative cultural perspective was presented by Mrs Paki in no uncertain terms in 1957. The correct solution, discharge to land distant from the lake, was known from at least 1948. Over the years from 1957, Muaūpoko objected to the cultural offence of contaminating waters used for food with human waste. They protested about the health risks of eating such food, and also about the harm which degradation of their lake had caused to their fisheries. They pleaded against the desecration of their taonga. The Crown was fully aware of their protests, as Crown counsel conceded, 'expressed through petitions

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187. *Chronicle*, 7 December 1971 (Hamer, "A Tangled Skein" (doc A150), p 265)

188. Hamer, "A Tangled Skein" (doc A150), pp 258–271

189. See, for example, claimant counsel (Naden, Upton, and Shankar), closing submissions (paper 3.3.23), p 269.



## 10.3.8 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

to the Government, through Domain Board meetings [a Crown official chaired it], through litigation and in Tribunal claims.<sup>190</sup>

We find that the Crown had an obligation under the Treaty to actively protect Muaūpoko's taonga: Lake Horowhenua, the Hōkio Stream, and the prized fisheries. We also find that questions about whether local government bodies were Crown agents, and whether the Crown was responsible for local government decisions, are not really relevant in this particular case. That is because in 1905, the Crown promised Muaūpoko to honour an agreement to prevent the pollution of Lake Horowhenua. As Crown counsel has rightly conceded, the Crown failed to give effect to this promise by legislating for it in the Horowhenua Lake Act 1905. We do not accept the Crown's argument that a 1906 bylaw about the disposal of rubbish was an adequate substitute for this statutory protection.

We also find that the Crown failed to include protection from pollution in section 18 of the ROLD Act 1956, even though:

- ▶ McKenzie told the people in June 1952 that it was one of their rights as owners (arising from the 1905 agreement);
- ▶ the Minister gave the Māori owners an assurance in December 1952, conveyed to the tribe's lawyer by his officials, that Levin's effluent would not enter the lake;
- ▶ the Crown intended that the prevention of sewage effluent entering the lake would be a term of the 1953 agreement; and,
- ▶ when the prevention of pollution was left out of the 1956 Bill, the Maori Affairs Department asked the Lands Department to ensure that the powers under the Reserves and Domains Act 1953 were wide enough to 'prevent pollution of the Lake' – to which the Lands Department wrongly responded in the affirmative.

The Crown thus failed to provide the necessary statutory protection in 1905 or 1956. The Crown accepted that its 1905 omission was a Treaty breach which prejudiced Muaūpoko. In our view, the second omission in 1956 is equally a Treaty breach and has prejudiced Muaūpoko.

It follows, then, that the Crown had a particular obligation to intervene from at least 1969, when its officials established that treated effluent was polluting Lake Horowhenua. We agree with the claimants that there was a significant opportunity to have done so in 1971, before the pollution of the lake assumed the very serious character it has today, and while the process of remediation was (relatively) less expensive. In the meantime, the nation had benefited from Muaūpoko's agreement to make the surface of the lake available for public use, free of charge. In our view, that is the crucial context in which Crown payment for a land-based disposal system must be evaluated.

We find that the Crown's failure to protect Muaūpoko and their taonga from 1969 to 1987, despite full knowledge of the situation, was a breach of its Treaty duty of active protection. We accept that the Crown did eventually provide subsidies for land-based disposal in the mid-1980s, but this belated assistance to the

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190. Crown counsel, closing submissions (paper 3.3.24), p 44



borough council did not remedy the effects of 30 years of effluent disposal in Lake Horowhenua. We explore further in chapter 11 the current state of the lake and the reasons why it remained so polluted after the sewage effluent discharge was halted in 1987.

The prejudice from the Crown's Treaty breaches is significant. It is clear to us from the evidence of the tangata whenua that Muaūpoko consider the mauri or life force of their lake has been damaged, and they as kaitiaki have been harmed. Their mana has been infringed: they can no longer (safely) serve traditional foods to manuhiri or take foods for which they were once renowned to tangi and other important occasions. Their taonga has become – as one claimant expressed it – a 'toilet bowl'.<sup>191</sup> They are no longer able to sustain themselves culturally or physically by their fisheries, once an integral part of the life and survival of the tribe. Muaūpoko have also lost ancestral knowledge because food can no longer be gathered from the lake – at least not safely, in terms of either spiritual or biological health. This means that the tikanga associated with the lake, its fish species, and the arts of fishing is no longer transmitted, or is transmitted only in part. We accept that some still fish and take food from the lake, but many do not, and the harm for both is significant.

The evidence is less certain as to how particular species in the lake have been affected by the pollution. We explore this issue further in chapter 11, where we examine the findings of a recent fish survey in 2013. There seems to be general agreement among tangata whenua and technical evidence that the 1966 control weir has materially harmed the species which migrate to and from the sea. We have already addressed that point in chapter 9. We are assisted here by the Crown, which accepted that pollution has been a 'source of distress and grievance to Muaūpoko', that 'damage to fishing and other resource gathering places has been a source of distress and grievance', and that pollution 'in combination with other factors, has affected the fishery resource of the Lake'.<sup>192</sup>

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191. Transcript 4.1.12, pp 541, 569

192. Crown counsel, closing submissions (paper 3.3.24), pp 44–45



CHAPTER 11

**LAKE HOROWHENUA CATCHMENT –  
THE HISTORIC LEGACY, 1990–2015**

**He Waiata nā Torino**

*Kōrero mai, e Hiwi, kia rongō atu au  
Ko wai te hikanga a Poataniwha  
Ko wai tōna putanga e ai?  
I rongō ai au ko Tiki-mata  
I whaoa iho i runga i te rangi nui e tū iho nei  
Ka kite i te hikanga a Tāne-nui-ā-Rangi  
I hopito ai a Punaweko  
Ka tipu te huruhuru  
I tū ki whea? I tū ki tō rae nā  
Ehara tēnā; he rerenga werawera mai ki waho  
I tū ki whea? I tū ki tō taringa  
Ehara tēnā; he rerenga taturi mai ki waho  
I tū ki whea? I tū ki tō kanohi  
Ehara tēnā; he rerenga roimata mai ki waho  
I tū ki whea? I tū ki tō ihu  
Ehara tēnā; he rerenga hupe mai ki waho  
I tū ki whea? I tū ki tō waha  
Ehara tēnā; he rerenga huare mai ki waho  
I tū ki whea? I tū ki tō kaki  
Ehara tēnā; he rerenga tōtā mai ki waho  
I tū ki whea? I tū ki tō pito nā  
Ehara tēnā; he rerenga tōtā mai ki waho  
I tū ki whea? I tū ki tō kumu  
Ehara tēnā; he rerenga tūtae mai ki waho  
I tū ki whea? I tū ki tō puta nā  
A kōia tēnā! He rerenga tangata mai ki waho, e.  
Ka takutaku a Tiki i tōna ure  
Ko Tikimura, ko Tiki-hanana*

## 11.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

*Ko Tiki-auaha-ki-roto  
 Ka whakaringaringa, ka whakawaewae  
 Ka whakatangata mai ai kia puta i tō kōrua reka  
 Te whānau a Ngei-Ariki, ko Hine-kau-ataata  
 Aroha tauroto tāwhia e Tiki hei wāhine māna  
 Hikaia atu puta ki waho ko Hine-haro-rangi  
 Aroha tauroto tāwhia e Tiki hei wāhine māna  
 Hikaia atu puta ki waho ko Hine-haro-nuku  
 Aroha tauroto tāwhia e Tiki hei wāhine māna  
 Hikaia atu ka puta ki waho ko Toi-te-Huatahi  
 Ko Manuwaeroroa ka ngāhaehae te takapu o Te Huiarei  
 Hikaia atu ka puta ki waho me Te Rongoueroa  
 Ka noho i a Ruārangi  
 Inā te putanga o te tanga i puta ki te ao nei.<sup>1</sup>*

**11.1 INTRODUCTION****11.1.1 The context for this chapter**

In previous chapters we considered twentieth-century issues concerning Lake Horowhenua. We discussed Levin's impact on the lake and other developments from 1900 to 1990. In terms of negative environmental effects on the lake we found the key cause between 1952 and 1987 was the discharge of effluent into the lake (indirectly from 1952 to 1969, and directly from 1969 to 1987). We also found that the Crown was complicit in the discharge of effluent from at least 1957, when Muaūpoko first objected and the Crown was aware that effluent was seeping into the lake. The environmentally preferable solution, being discharge to land, was known from at least 1948 and the Crown was aware of Muaūpoko concerns from 1957. It failed to protect the lake, a taonga, in breach of its duty of active protection. What assistance that was provided from the Crown, in terms of the subsidies provided for land-based disposal in the mid-1980s, did not remedy the effects of over 25 years of effluent disposal. Finally, we found the prejudice for Muaūpoko from the breaches of the duty of active protection is significant.

In this chapter we explore the current state of the lake and the reasons why it remained so polluted after the discharge of sewage effluent was halted in 1987. We note that during the post-1987 period, the context for environmental decision-making was transformed by the Conservation Act 1987 and the Resource Management Act 1991 (and their amendments). The Conservation Act established the Department of Conservation (DOC), the head of which replaced the commissioner of Crown lands as chair of the lake domain board. Recreation reserves such as the Lake Horowhenua domain now came under DOC instead of the Lands and

1. 'This song is a beautifully composed oriori about Tāne and the creation of Hineahuone. It appears to be very old and although the composer is not known, it is most certainly a Kurahaupō waiata, as this is evident in the whakapapa recited within': Sian Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko', not dated (doc A15(a)), pp [35]–[36]

Survey Department. DOC's legislation, the Conservation Act 1987, obliged DOC to give effect to Treaty principles. The Resource Management Act 1991 (RMA 1991) instituted a new legislative framework for local and central government decisions affecting the environment. As has been well established in previous Tribunal reports, the Act created a hierarchy of factors which decision makers had to recognise and provide for, have particular regard to, or take into account. Previous Tribunal reports have found that, in reality, Māori values and Treaty principles came at the lower end of that hierarchy.<sup>2</sup> But the legislative context had changed profoundly from the pre-1987 period, when decision makers (both central and local) routinely took no account of the Treaty.

### 11.1.2 Approach to the issues

The scope of this priority inquiry was defined as including any historical acts or omissions of the Crown regarding the respective rights and interests internal to Muaūpoko hapū, their lands, the lake, and any other specific matters relating to Muaūpoko.<sup>3</sup>

In this chapter we review what has occurred after 1990 to Lake Horowhenua and its catchment in order to analyse the claimants' case that the Crown has failed to address the ongoing historical issues that continue to plague Lake Horowhenua and the Hōkio Stream, the associated fisheries, and the Muaūpoko people. We do so to ascertain the extent to which governance and mitigation efforts have been successful in dealing with the historical environmental effects of the Crown's acts and omissions prior to 1990.

## 11.2 THE PARTIES' ARGUMENTS

### 11.2.1 The claimants' case

The general position adopted by the claimants was that the Crown is responsible for the legislative and regulatory regime that has been the basis for the management of the environment and natural resources. They submit the Crown has consistently failed to adequately protect Muaūpoko's taonga and the environment. As a result, they claim the Crown has failed to provide for their rangatiratanga or to adequately protect Lake Horowhenua and the Hōkio Stream and fisheries. For those reasons, they submit significant prejudice has resulted to Muaūpoko.

Several claimants also highlighted events that have impacted on Lake Horowhenua since 1991. These included sedimentation issues and sewage overflows from the Levin Waste Water Treatment Plant in 1991, 1998, and 2008.<sup>4</sup> Others, particularly Mr Taueki, also referred to the number of drains discharging storm water into the lake.<sup>5</sup> Mr Rudd identified 13 drains (not including farm drains).<sup>6</sup> Mr Procter

2. See, for example, Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 54–56.

3. Waitangi Tribunal, memorandum-directions, 25 September 2015 (paper 2.5.121), p 2

4. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions, 10 February 2016 (paper 3.3.9), p 21

5. Philip Taueki, closing submissions, 12 February 2016 (paper 3.3.15), p [4]

6. Charles Rudd, closing submissions, 9 February 2016 (paper 3.3.18), pp 13–14

## 11.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

raised important issues concerning the management of the fisheries of the lake and the Hōkio Stream, particularly eels.<sup>7</sup> Others were concerned about the impact of pollution on other species in the lake and the downstream impacts at the township of Hōkio.<sup>8</sup> Submissions were also made regarding the new landfill at Levin. At Hōkio, it was further alleged that the old landfill and the 'Pot' were leaching pollutants into the sand dunes and the ground water with resulting impacts on the Hōkio and Waiwiri Streams, the sea environment, and marine fisheries. The claimants alleged that the accumulation of pollution in the lake and its environs has affected their economy, tikanga, ancestral knowledge, wairua, mana, kaitiakitanga, and fisheries.<sup>9</sup>

They argued the Crown is culpable as by its actions and omissions it: (a) failed to ensure local government actions in respect of the lake were Treaty compliant, (b) failed to remedy the causes of pollution, (c) took an unreasonable amount of time to respond to the causes of pollution, (d) failed to enact legislation that prevented or remedied the causes of pollution, (e) failed to enact legislation that gave effect to and safeguarded Muaūpoko's mana, kaitiakitanga, and tangata whenua status over the lake, and (f) omitted to include provisions in legislation that would have protected Muaūpoko's mana, kaitiakitanga, and tangata whenua status over the lake.<sup>10</sup>

The claimants noted that while the Crown has accepted 'responsibility for the various legislative frameworks that have governed use of and access to the Lake and the overall environmental legislative framework', it will not accept responsibility for the decisions that have been made by local authorities, or that the legislation authorising particular powers and functions is a breach of the Treaty and its principles.<sup>11</sup> It was submitted the Crown is 'wholly responsible for the statutory framework [that] allow local authorities to undertake activities that would otherwise fail for lack of Treaty compliance'.<sup>12</sup>

It was further noted that the Crown continues to be involved in the Horowhenua Lake Domain Board through the Department of Conservation.<sup>13</sup> In fact, the director-general of conservation has been the chair of the board since 1987.

The claimants submitted that by all the above actions, the Crown has breached the principles of rangatiratanga, active protection, and various other principles of the Treaty of Waitangi leading to Muaūpoko suffering prejudice.

### 11.2.2 The Crown's case

The Crown's starting position was that the management of the environment was, and is, a legitimate governance and regulatory function of the Crown. The Crown's right of kāwanatanga entitles it to develop regimes for the protection and management of the environment and natural resources. The Crown submitted that the

7. Jonathan Procter, brief of evidence, 12 November 2015 (doc C22), pp 18–19

8. Rudd, closing submissions (paper 3.3.18), p 13

9. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 24–27

10. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 28–31

11. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), pp 28–29

12. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 29

13. Claimant counsel (Stone, Bagsic, and Hopkins), closing submissions (paper 3.3.9), p 29



rights and interests that others may have in the environment, including Māori, are subject to that overriding authority.<sup>14</sup> In addition, the Crown submitted it ‘does not have a general obligation, Treaty or otherwise, to prevent all environmental effects that may be perceived by some as adverse’ as such effects are ‘an inevitable consequence of human development and progress, and some environmental degradation will always occur’. Further, the Crown submitted it cannot guarantee outcomes, prevent or mitigate environmental degradation, or meet all expectations of all members of the community.<sup>15</sup>

In terms of the matters before us, the Crown submitted that some environmental claims lacked specificity, or they arose from matters that are the responsibility of local authorities.<sup>16</sup> It submitted, given the variables that constantly impact on and cause change and the vastness of the environment, there are many interrelated factors (both national and international) that impact on the health of the environment.<sup>17</sup> Further, while the Crown has responsibility for implementing overarching environmental legislative and policy settings, it does not have the ability to control or influence all those factors, or to meet every environmental challenge, for example, climate change.<sup>18</sup>

The Crown submitted it is important to recognise there is a wide range of views and interests in the environment, including those held by Māori and their conception of the environment, which requires balancing of those views and interests.<sup>19</sup> Equally, the wide range of economic benefits derived by Māori and other New Zealanders from certain forms of land use should be recognised and that use will lead to some environmental degradation, which ‘must’ be tolerated.<sup>20</sup>

It was further contended that the Tribunal should not ascribe today’s standards of environmental management and reasonable expectations to Crown actions and actors of the past. Rather, it should consider *inter alia* historical context, prevailing circumstances such as resources available and Crown priorities at the time, the state of scientific knowledge, the ability of the Crown to respond, prevailing attitudes in society, the range of interests to be balanced, and the fact that the effects of measures to protect the environment may not be seen for a number of years.<sup>21</sup>

The Crown responded to the specific claimant submissions concerning Lake Horowhenua and the Hōkio Stream by acknowledging that the history of Lake Horowhenua in the twentieth century is a distressing one. The Crown’s caveat on that was the picture is complex and involved a variety of parties and causal factors which were not all within the Crown’s control.<sup>22</sup>

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14. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 33

15. Crown counsel, closing submissions (paper 3.3.24), p 34

16. Crown counsel, closing submissions (paper 3.3.24), pp 34–35

17. Crown counsel, closing submissions (paper 3.3.24), p 35

18. Crown counsel, closing submissions (paper 3.3.24), pp 35–36

19. Crown counsel, closing submissions (paper 3.3.24), pp 36–37

20. Crown counsel, closing submissions (paper 3.3.24), p 37

21. Crown counsel, closing submissions (paper 3.3.24), pp 38–39

22. Crown counsel, closing submissions (paper 3.3.24), p 42

## 11.2.2 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

The Crown submitted the damage to the lake can be seen as a ‘by-product of urban development (primarily Levin) and land use in the wider catchment area’ and that ‘environmental concerns were often not at the forefront’ of urban planning and land use.<sup>23</sup> The Crown further contended ‘the Tribunal has no evidence before it from the current Councils, nor any expert evidence that properly contextualises the administrative and statutory context of planning law in various historical periods.’<sup>24</sup>

The Crown also contended that any consideration of fault or responsibility for damage to the lake and stream (whether the fault of the Crown or other parties) must take into account the following:

- › the location, geography, and topography of the lake (in particular, the fact that it is naturally shallow and is in close proximity to Levin), as these factors generate flooding risk and contribute to drainage patterns;
- › land use and development was to benefit the wider community;
- › there is ‘no single magic bullet solution’ to address the damage to the lake;
- › the Crown has contributed funding/assistance; and
- › addressing the full range of lake issues is ‘potentially extremely expensive.’<sup>25</sup>

The Crown made a number of concessions in terms of the lake, and these were that:

- › ‘The available evidence indicates pollution, in combination with other factors, has affected the fishery resource of the lake. The Crown says it is not responsible for all of the acts and omissions that caused the environmental damage to the lake.’<sup>26</sup>
- › The Crown ‘holds responsibility for the various legislative frameworks that have governed use of and access to the lake and the overall environmental legislative framework.’<sup>27</sup> However, the Crown’s caveat on that was ‘the complexity of land and environmental management and the difficulties involved with identifying causative factors and cumulative impacts.’ It also contended that there are ‘a number of entities that are legally distinct from the Crown who have had various roles and impacts in relation to Lake Horowhenua and the Hokio Stream.’ Further, it claimed that environmental damage was due to ‘a number of causes, and a number of actors, not all of which were part of the Crown or able to be controlled by the Crown.’<sup>28</sup>
- › Finally, the Crown acknowledged it ‘has ongoing Treaty of Waitangi obligations to take steps to protect Muaūpoko taonga.’ However, the Crown did not accept ‘the present state of the lake and stream can be attributed directly and solely to any identifiable Treaty breach by the Crown.’<sup>29</sup>

The Crown then made five general points in relation to environmental issues and the lake:

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23. Crown counsel, closing submissions (paper 3.3.24), p 42

24. Crown counsel, closing submissions (paper 3.3.24), p 42

25. Crown counsel, closing submissions (paper 3.3.24), pp 42–43

26. Crown counsel, closing submissions (paper 3.3.24), p 44

27. Crown counsel, closing submissions (paper 3.3.24), p 45

28. Crown counsel, closing submissions (paper 3.3.24), p 45

29. Crown counsel, closing submissions (paper 3.3.24), p 60

- ▶ Consideration should be given to ‘the more general question’ of how the lake could have ‘survived in a less impacted state in such close proximity to a major urban development (and agricultural land use).’ The Tribunal should consider the actions of the parties through that lens and also the actions of all parties in relation to the lake, not just the Crown.
- ▶ Many actions taken in relation to the lake were not undertaken by, or on behalf of, the Crown as there were other parties directly involved in the day-to-day decision-making concerning the lake. Although the Crown understands the claimants do not allege all actions ‘taken by local authorities, catchment boards and/or or the domain boards in relation to the lake and its environs over the past 100 years are acts or omissions of the Crown itself’, they do contend the Crown should have taken more direct action to alleviate lake issues. Where specific allegations of direct Crown actions are made, the Crown made specific submissions on those.
- ▶ There are a number of causes that have contributed to the health of the lake, including urban development in close proximity to the lake and associated issues such as storm water, sewage discharges, land use (for example, dairying), and siltification.
- ▶ The Crown could not easily intervene in local decision-making because (1) natural phenomena led to the sewage discharge, and effluent discharge was just one of many land-use issues afflicting the lake, and (2) the Crown only has limited resources and funds and cannot be responsible for (or pay for) local government decisions (including infrastructure decisions) in the way the claimants suppose.
- ▶ In fact, it was submitted, the Crown did take reasonable steps to assist (in the context of the time), including through the provision of State funding, providing for a major sewerage upgrade in 1985, and technical expertise from the Department of Conservation for replanting around the lake in the 1990s.<sup>30</sup>

After warning the Tribunal that there are limits to the evidence before the Tribunal, and that we should not review the impact of the Resource Management Act 1991 (RMA) in any detail, the Crown then dealt with the specific issues raised by the claimants, and these are analysed below.

### 11.2.3 Case for the claimants in reply

The claimants broadly refuted the position taken by the Crown in relation to the role of other actors, particularly local government, and the impact of their actions on Lake Horowhenua and its catchment.<sup>31</sup> They claimed the Crown was, and is, in a

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30. Crown counsel, closing submissions (paper 3.3.24), pp 60–63

31. See, for example, claimant counsel (Zwaan), submissions in reply, 14 April 2016 (paper 3.3.25), pp 6–7; claimant counsel (Lyall and Thornton), submissions in reply, 14 April 2016 (paper 3.3.27), pp 8–12; claimant counsel (Naden, Upton, and Shankar), submissions in reply, 15 April 2016 (paper 3.3.29), pp 7–10; claimant counsel (Stone and Bagic), submissions in reply, 20 April 2016 (paper 3.3.32), pp 5–6.

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position to intervene in the operations of such entities and they considered that the Tribunal can and should make findings on their claims accordingly.<sup>32</sup>

While they accepted there are a number of factors that impact on the environment and cause environmental degradation, they contended that does not negate the impact of Crown actions on the environment. They claimed the Crown has promoted policies such as urban development, agriculture, and horticulture and it has allowed continual run-off into the lake.<sup>33</sup> Ultimately, they submitted it is for the Crown to promote legislation that protects the environment.<sup>34</sup>

In terms of the argument that there must be a balancing of interests, the claimants contended that the Crown has a higher obligation to Māori.<sup>35</sup> Any balancing of interests, they argued, must be weighed against the Crown's duties and obligations owed to Muaūpoko under the Treaty of Waitangi and the gravity of any prejudice to them.<sup>36</sup>

In terms of differing Māori conceptions of the environment, it was contended that there has been no evidence led by the Crown on that issue.<sup>37</sup> In response to the point that Māori enjoy the benefits of industry and consequential environmental effects, this was denied.<sup>38</sup>

In terms of Lake Horowhenua and the Hōkio Stream, the claimants' view was that the Crown is responsible for specific actions and omissions that require rectification and remedial action.<sup>39</sup> While it is not responsible for all matters that have impacted on the lake and its catchment, it did contribute to its current state.<sup>40</sup> The claimants did not consider it necessary for the Tribunal to have heard from local authorities before making any findings on issues related to the RMA and the lake. They also contended that there is sufficient evidence to make findings on specific Crown actions.<sup>41</sup>

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32. See, for example, claimant counsel (Zwaan), submissions in reply (paper 3.3.25), pp 6–7; claimant counsel (Lyll and Thornton), submissions in reply (paper 3.3.27), pp 8–12; claimant counsel (Naden, Upton, and Shankar), submissions in reply (paper 3.3.29), pp 7–10; claimant counsel (Stone and Bagsic), submissions in reply (paper 3.3.32), pp 5–6.

33. See, for example, claimant counsel (Zwaan), submissions in reply (paper 3.3.25), p 8; claimant counsel (Lyll and Thornton), submissions in reply (paper 3.3.27), p 19.

34. See, for example, claimant counsel (Zwaan), submissions in reply (paper 3.3.25), p 8.

35. See, for example, claimant counsel (Zwaan), submissions in reply (paper 3.3.25), p 9.

36. Claimant counsel (Stone and Bagsic), submissions in reply (paper 3.3.32), p 4.

37. See, for example, claimant counsel (Zwaan), submissions in reply (paper 3.3.25), p 9.

38. See, for example, claimant counsel (Zwaan), submissions in reply (paper 3.3.25), p 9; claimant counsel (Lyll and Thornton), submissions in reply (paper 3.3.27), p 19; claimant counsel (Naden, Upton, and Shankar), submissions in reply (paper 3.3.29), p 11.

39. See, for example, claimant counsel (Zwaan), submissions in reply (paper 3.3.25), pp 10–11; claimant counsel (Lyll and Thornton), submissions in reply (paper 3.3.27), pp 18–19; claimant counsel (Naden, Upton, and Shankar), submissions in reply (paper 3.3.29), pp 11–12; claimant counsel (Stone and Bagsic), submissions in reply (paper 3.3.32), p 7.

40. See, for example, claimant counsel (Zwaan), submissions in reply (paper 3.3.25), p 10; claimant counsel (Naden, Upton, and Shankar), submissions in reply (paper 3.3.29), pp 11–12; claimant counsel (Stone and Bagsic), submissions in reply (paper 3.3.32), p 7.

41. See, for example, claimant counsel (Bennion, Whiley, and Black), submissions in reply, 21 April 2016 (paper 3.3.33), pp 12–13.

**11.3 MUAŪPOKO RESPONSES TO THE POLLUTION OF THE WATERWAYS**

The degraded state of the lake is one of the key reasons why there is so much tension within the Muaūpoko community. This is perhaps best epitomised by a statement given by Philip Taueki, who considered the lake is now so polluted that swimming and fishing ‘in the waters of their own Lake’ is ‘a clear and present health risk.’<sup>42</sup> He told us:

The present polluted and poisonous state of Mua-Upoko’s most precious taonga, Lake Horowhenua and the Hokio stream, controlled by the Crown and used as the town of Levin’s toilet, epitomizes the Crown’s appalling and disgusting treatment of Mua-Upoko . . .

Today the entire Hokio area is being used as the town of Levin’s (and Kapiti) rubbish dumping ground. The landfill and the ‘Pot’ are within a [kilometre] of the township and have leached poisonous toxins over the years that have poisoned the groundwater. The land and houses that the Hokio Trust owns are severely affected by the proximity of these sites to the township.<sup>43</sup>

These views are clearly shared with others from Muaūpoko, people like Charles Rudd who, during his teenage years, spent a lot of time wandering around the lake and Hōkio Stream hunting, fishing, collecting, gathering resources, and riding waka. He made several allegations concerning the lake, and the Hōkio Stream:

**Lake Horowhenua and the Hokio Stream**

Today the hurts and humiliations being impacted on the Muaupoko people, because of the sixty odd years of degrading leaching, contamination, and pollution of these areas. There is no real remedy and purposeful solutions in sight, by the territorial authorities in the catchment restoration.

The above is a breach of the Treaty, in regards to Muaupoko fishing, food and resource gathering rights in these areas. . . .

The Crown, through its agents, has polluted and continually contaminates Lake Horowhenua, the Hokio Stream, Hokio Beach and the waters that feed into them. . . .

Way back in the early 1950’s, it was a threat, health risk and a disaster for the Levin Borough Council to place their Sewerage Treatment Plant to where it is today, on a downward slope towards Lake Horowhenua.

I remember when the condoms, women’s pads, tutae and refuse were floating on top of the Lake’s water.

I remember when spearing for Carp, and seeing the thick hupe jelly like substance all over the fish, attached to its fish scales.

I remember, if we walked into the contaminated Lake waters, one could end up with doongas, hakihaki, Lake Sores or scabs on to your feet or legs, if you didn’t wear protection. So everyone used to keep out. So much for our fishing rights.

42. Philip Taueki, closing submissions (paper 3.3.15), pp [2], [3]

43. Philip Taueki, closing submissions (paper 3.3.15), pp [3], [4]

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I remember the fury of our people at the time . . .<sup>44</sup>

Hingaparae Gardiner spoke of the paru (pollution) damaging the waterways of Muaūpoko, making them ‘impure, not fit for sea life or humans.’<sup>45</sup> She talked about the lake smelling ‘absolutely revolting’ on certain days, and that the ‘smell makes it unpleasant to be near the lake.’<sup>46</sup> Her evidence concerning smell was affirmed by other witnesses, including William (Bill) Taueki.<sup>47</sup> She believed that pollution from meat works, farming, sewerage, and other activities have all contributed to the state of the lake.<sup>48</sup> She stated:

Because we are tangata whenua we are the kaitiaki over the lake. Our mana is directly connected to our waterways and our ability to carry out our role as kaitiaki. As tangata whenua and as kaitiaki we are responsible for ensuring the health of these waterways. We feel as though we have not only let down the environment but ourselves as the mana whenua and the kaitiaki. We also feel that we have let down our tipuna, our Nannies and Koroua.<sup>49</sup>

Peter Huria wrote that, as a result of the current state of the lake: ‘Our wairua has been damaged by the Crown. We are in the main a proud but destitute people of Muaupoko.’<sup>50</sup> This strength of feeling is consistent and Muaūpoko considered the mauri or life force of the lake has been damaged and that they as kaitiaki have been harmed.

**11.4 THE HISTORICAL LEGACY OF CROWN AND LOCAL GOVERNMENT MANAGEMENT**

**11.4.1 The decline in water quality**

By the year 1977 the once-prized taonga or treasure of the Muaūpoko people was described as

very eutrophic as characterised by frequent blooms of blue-green algae, high nutrient concentrations, large fluctuations in dissolved oxygen concentrations (including severe oxygen depletion in the bottom waters), extensive macrophytic growth, etc.<sup>51</sup>

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44. Rudd, closing submission (paper 3.3.18), pp 12, 13, 15

45. Hingaparae Gardiner, brief of evidence, 11 November 2015 (doc c8), p 3

46. Gardiner, brief of evidence (doc c8), p 3

47. William James Taueki, brief of evidence, 11 November 2015 (doc c10), p 34

48. Gardiner, brief of evidence (doc c8), p 4

49. Gardiner, brief of evidence (doc c8), p 4

50. Peter Huria, brief of evidence, not dated (doc B11), p 2

51. Lake Horowhenua Technical Committee, *Lake Horowhenua: Current Condition, Nutrient Budget and Future Management* (Palmerston North: Manawatu Catchment Board and Regional Water Board, 1978), p 3 (Paul Hamer, “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, June 2015 (doc A150), p 233)



The impacts of the effluent on the fishing rights and the cultural and traditional values of Muaūpoko were well known in Crown circles over the period 1940 to 1990. However, it took some time before the Crown would acknowledge these issues. Changes in attitude did start to prevail during the 1980s. By then the district commissioner of works commented that:

We . . . know that Maoris have strong cultural and traditional objections to mixing waters that have been contaminated by human waste with waters from which food is gathered. The continued discharge of the treated effluent to the lake is therefore putting the local Maori community (which is significant and owns the lake bottom) under some stress (clearly a public health matter) as they either have to forgo a traditional food source or go against cultural and traditional values.<sup>52</sup>

Following the opening of the new sewerage system in 1987, all were hopeful that the use of the lake for effluent disposal would cease and for a while there were indications that the lake could recover. Unfortunately challenges remained, as a DOC official reported in a discussion paper for the Horowhenua Lake Domain Board prepared in 1991. He advised the lake had

suffered considerably from human impacts. This has resulted in substantial diminution of the cultural and natural resource. It could be said that the health of the lake water and surrounding wetland is degrading to the point beyond recovery.<sup>53</sup>

The historical environmental effects adversely impacting the lake included high levels of sediment loading, agricultural and horticultural run-off, ongoing wetland drainage, high oxidation levels affecting the natural predation of lake flies, a decrease in the water level, lack of lake level fluctuation (which exacerbated sedimentation and pollution), damage to marginal vegetation, and the entry of stock into the lake.<sup>54</sup>

By 1997, while the lake's water quality had improved, the lake remained in an advanced state of 'eutrophication,' with 'massive algal growths and [a] strong green colour to the water.'<sup>55</sup> There had also been no progress made on removing the sediment from the lake or rectifying the impacts of the concrete flood control weir constructed in 1966 at the outlet to the lake.<sup>56</sup> Eutrophication denotes that the lake was enriched with nutrients (particularly nitrogen and phosphorus) causing plant growth and possible algae blooms.

By 2000–2008, the water quality had declined steadily again and the lake remained in a parlous state.

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52. District commissioner of works to commissioner of works, 10 June 1985 (Hamer, "A Tangled Skein" (doc A150), p 250)

53. Department of Conservation, 'Horowhenua: A Conservation Strategy', not dated (Hamer, "A Tangled Skein" (doc A150), p 382)

54. Hamer, "A Tangled Skein" (doc A150), p 382

55. *Evening Standard*, 20 June 1997, p 3 (Hamer, "A Tangled Skein" (doc A150), p 391)

56. Hamer, "A Tangled Skein" (doc A150), pp 391–392

## 11.4.1 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

By 2011, Max Gibbs, a limnologist (person who studies inland waters) and environmental chemist, released a report commissioned by the regional council stating ‘the water quality . . . is currently very poor and is declining due to increasing nutrient and sediment loads from the catchment.’<sup>57</sup> The lake, he reported, had become ‘hypertrophic.’<sup>58</sup> That term denotes that the lake was at this time enriched with nutrients, characterised by poor water clarity and subjected to devastating algae blooms. He also stated the fisheries were greatly diminished.<sup>59</sup> Also disturbing was that the Arawhata Stream, with the largest inflow of surface water into the lake, may be anoxic at night which could aggravate oxygen depletion in the lake.<sup>60</sup> Anoxic denotes that the stream was completely devoid of oxygen.

His findings remain the basis for restoration work planned for the lake. The *Lake Horowhenua Accord Action Plan 2014–2016* (which is consistent with his findings) described the lake in this manner:

Water quality of lakes monitored in New Zealand is classified by trophic level. The level is based on a combination of four key variables; nitrogen, phosphorus, chlorophyll and water clarity. Lake Horowhenua is highly degraded and classified as hypertrophic (Trophic Level Index 6.7) which means that it has high chlorophyll, phosphorus and nitrogen levels and low water clarity. Based on the trophic level, Lake Horowhenua was ranked the 7th worst out of 112 monitored lakes in New Zealand in 2010.<sup>61</sup>

The five foundation partners to the He Hokioi Rerenga Tahī/The Lake Horowhenua Accord are the Lake Horowhenua Trust, the Horowhenua Lake Domain Board, Horowhenua District Council, Horizons Regional Council (the trading name for the Manawatu-Wanganui Regional Council), and the Department of Conservation.<sup>62</sup> The Lake Horowhenua accord signals an attempt by the parties to work collaboratively to pursue common objectives and goals for the lake. It sets out the shared vision as follows:

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57. Max Gibbs, *Lake Horowhenua Review: Assessment of Opportunities to Address Water Quality Issues in Lake Horowhenua* (Palmerston North: Horizons Regional Council, 2011), pp 9–11 (Hamer, “A Tangled Skein” (doc A150), p 402)

58. Lake Horowhenua & Hōkio Stream Working Party, ‘He Ritenga Whakatikatika: Lake Horowhenua & Hokio Stream, Te Pātaka o Muaūpoko rāua ko Ngāti Pareraukawa’, June 2013, p 11 (Paul Hamer, comp, indexed bundle of cross-examination documents regarding “A Tangled Skein: Lake Horowhenua, Muaūpoko and the Crown, 1898–2000”, various dates (doc A150(l)), p 76)

59. Lake Horowhenua & Hōkio Stream Working Party, ‘He Ritenga Whakatikatika’, p 11 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 76)

60. Lake Horowhenua & Hōkio Stream Working Party, ‘He Ritenga Whakatikatika’, p 11 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 76)

61. Horizons Regional Council, *He Hokioi Rerenga Tahī/Lake Horowhenua Accord Action Plan, 2014–2016* (Palmerston North: Horizons Regional Council, 2014), p 8 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 35)

62. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 4 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 31)

Lake Horowhenua; he taonga tuku iho; he taonga mo te katoa (A treasure handed down from our ancestors for the enjoyment of all). *The whakatauki (proverb)*: He Hokioi Rerenga Tahī (An eagle's flight is seen but once) . . . The whakatauki best describes the overarching purpose of coming together to collaborate, progress and resolve, once and for all, the condition of Lake Horowhenua.<sup>63</sup>

The 'Lake Horowhenua Accord', signed in August 2013, was a source of contention between certain claimants. We discuss this further below.

#### 11.4.2 The sources and impacts of pollution and the decline in water quality

##### (1) Introduction

The historical role of the Crown and local government in the management of the Lake Horowhenua catchment and the Hōkio Stream has been an important feature of the claims before this Tribunal. The history of their management of the lake has been reviewed in previous chapters.

We turn now to examine how the environmental changes which occurred during the Crown's 1900–1990 management still affect the lake and what challenges the Crown, with Muaūpoko, have had to confront in the quest to find solutions to improving the state of the lake and the Hōkio Stream. We also consider what the Crown has done to ameliorate these adverse environmental effects, in order to ascertain whether, during the period 1990–2015, it acted in accordance with its rights and obligations under the Treaty of Waitangi.

We are not in a position to be able to make findings with respect to all the allegations made. What we do note is that resource management issues, land use planning, and consenting for water and land discharges and takes within the catchment are important and go to the issue of whether the current governance regime adequately addresses the guarantees of the Treaty for Muaūpoko.

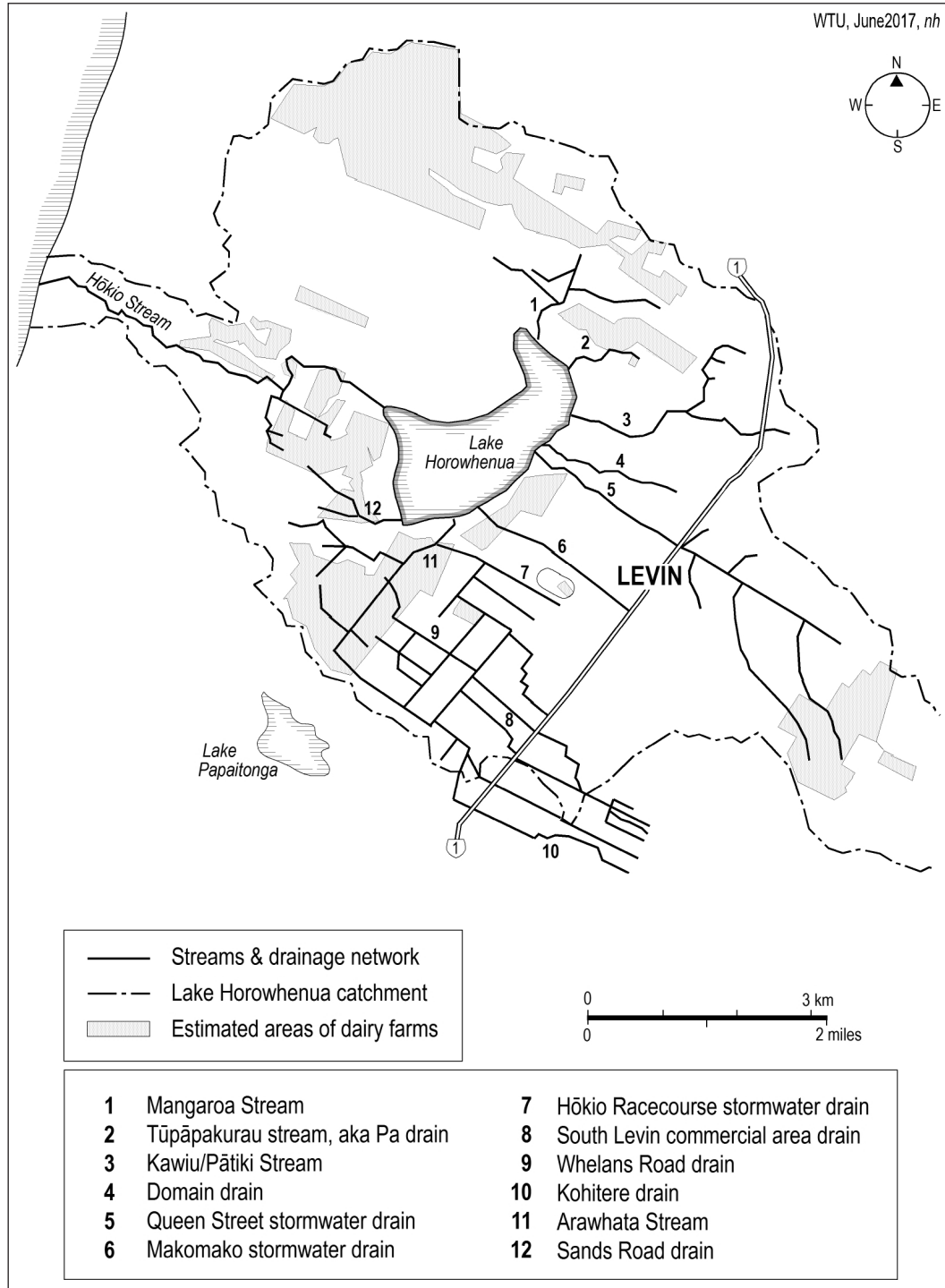
In any consideration of responsibility for the environmental damage to the lake and Hōkio Stream the Crown contended, and we agree, that we must consider the geography and location of the lake – its proximity to Levin, and the general topography. We consider that such features required management of any flooding risk posed by them and associated drainage patterns.

Thus we begin by noting the surface catchment area feeding Lake Horowhenua is now defined as approximately 43.6 square kilometres. Dr Jonathan Procter, a senior lecturer at Massey University specialising in volcanology and involved in a wide range of research projects encompassing geology, hazards, ecology, and agricultural practices, informed us that

Lake Horowhenua is often described simply as a shallow dune lake, but it is more complex than that. With a surface area of around 3.9 km<sup>2</sup>, it is too large to be a simple dune lake. It is said to be the largest dune lake in the country.

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63. 'He Hokioi Rerenga Tahī/The Lake Horowhenua Accord', August 2013, p 4 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 4)



Map 11.1: Lake Horowhenua catchment

Water flowing within the catchment feeds about 40% of the lake through surface streams, but 60% of the lake is believed to be fed by groundwater from a very large underground network sourced from the Tararua Ranges. Underneath the western shore of the lake is a well-defined fault line. This is one of the controls on the hydrology of the catchment, giving the lake its size, and inflow with the only outflow being down the Hokio stream . . .

The catchment area for surface runoff to the lake is 43.6 square kilometres (p5 Lake Horowhenua Strategy).<sup>64</sup> It is important to point out that the source areas for the Horowhenua catchment have been heavily modified through damming and diversion of water from the east to the west to feed the Mangahou Hydroelectric power generation plant.<sup>65</sup>

As can be seen, the groundwater of the lake catchment (which may be much larger in area than the surface catchment) accounts for much of the water that enters the lake. It enters mainly via a number of submerged springs along the eastern shore.<sup>66</sup> Groundwater is also a significant source of the Arawhata Stream (which is the lake's largest surface water supply), and several other small streams.<sup>67</sup> Inland aquifers fed by the Tararua Ranges also feed these features.<sup>68</sup> We understand from Jonathan Procter that the flow of groundwater into the lake is 'not well determined therefore the sustainability of groundwater use is difficult to determine'.<sup>69</sup>

Surface flows of water also account for a large percentage of the water intake into Lake Horowhenua.<sup>70</sup> Arawhata Stream supplies approximately 70 per cent of the surface inflow into the lake.<sup>71</sup> A further 15 per cent of the surface water to the lake is via the Queen Street drain.<sup>72</sup> The average annual rainfall is 1,095 millimetres. Half of the run-off caused by rainfall occurs in winter from June to August.<sup>73</sup>

The surface catchment topography is 'generally flat' and 'includes a mix of very flat, low-lying areas of peaty soils (formerly swamps), higher "sandstone uplands",

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64. See also Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy* (Palmerston North: Manawatu-Wanganui Regional Council, 1998), p 5 (Jonathan Procter, comp, appendices to brief of evidence, various dates (doc C22(a)), p 2014)

65. Procter, brief of evidence (doc C22), pp 4–5

66. See also Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 75).

67. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 75)

68. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 75)

69. Procter, brief of evidence (doc C22), p 9

70. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 75)

71. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 75)

72. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 75)

73. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 75)



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and gravel plains.<sup>74</sup> Thus the lake will not avoid environmental impacts from any excessive nutrient, phosphorus, and sediment loadings in the ground and surface water of the catchment.

It is common ground that public (including the domain board) and local authorities were responsible for managing this catchment during the period 1900 to 1990, either through various legislative regimes for which the Crown has accepted responsibility, or through direct cooperation with the Crown.<sup>75</sup>

We heard from witnesses for the claimants about the following issues, which we have augmented with some further background to ascertain the answer to the question of whether the Crown's actions or omissions or the current legislative regime for the management of the lake and Hōkio Stream have mitigated the breaches of the Treaty identified in previous chapters.

**(2) Sewage / effluent**

One of the most important aspects of the historical legacy of past management is the pollution of Lake Horowhenua and the Hōkio Stream by sewage effluent. We have previously described the respective roles of the Crown and the Levin Borough Council. Although there was some pollution from effluent before the 1950s, the crucial period was from 1952 to 1986, when Levin's sewage treatment plant caused effluent to enter the lake in significant quantities. From 1952 to 1969, treated effluent flowed above ground from the soakage pits into the lake during the winter months, and seeped into the groundwater (and into the lake) for the rest of the year. The Crown was aware of this by at least 1957. There were also flood events where raw sewage entered Lake Horowhenua. From 1969 to 1987, treated effluent was discharged directly into the lake. Pollution from this source was by far the largest cause of eutrophication in the period leading up to 1987, when ground-based disposal was finally introduced to replace the old sewerage system.<sup>76</sup>

As we discussed previously, the Crown made undertakings in 1952–53 that sewage effluent would not enter the lake, but failed to include the appropriate provision in the ROLD Act 1956 (relying instead on an ineffective legislative provision about rubbish and littering). From then on, the Crown was at the very least complicit in the pollution and degradation of the lake and stream as a result of sewage effluent, until ground-based disposal was finally instituted in 1987 (many decades after it had been technically feasible).

In 1981 the waters of Lake Horowhenua were reclassified by the Water Resources Council to a 'cx' level (see section 10.3.6). This grading meant the lake was "sensitive" to enrichment from phosphates and nitrates found in sewage.<sup>77</sup> As a result, the Levin Borough Council was required to apply to the Manawatu Catchment and

74. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p 11 (Hamer, indexed bundle of cross-examination documents (doc A150(1)), p 76)

75. Crown counsel, closing submissions (paper 3.3.24), pp 26, 45

76. See D A Armstrong, 'Lake Horowhenua and the Hōkio Stream, 1905–1990', May 2015 (doc A162), pp 6, 80, 88–89, 115–132.

77. D Armstrong, 'Muaupoko Special Factors: Lake Horowhenua and the Hōkio Stream, 1905–1980', not dated (doc A156), p 41



Regional Water Board for a water right to continue to discharge into the lake.<sup>78</sup> The following year, the Levin Borough Council was given a limited five-year water right to continue discharging into the lake.<sup>79</sup>

The Crown then provided State funding to assist with a major sewerage upgrade in 1985, and in 1987 the Levin Borough Council opened its new land-based effluent system. The plant now pumps effluent 7.3 kilometres to the ‘Pot’ for land-based disposal.<sup>80</sup> The ‘Pot’ is situated in sand country near Hōkio Beach.<sup>81</sup> We discuss the impacts concerning the ‘Pot’ below.

The legacy of discharging raw sewage into the lake has been profound. As David Armstrong explained, ‘[b]y the end of the 1980s the lake bed was covered with a thick layer of sewage-infused sludge which continued to release nutrients, especially during summer months.’<sup>82</sup>

The aspiration when the upgraded treatment plant opened was that the lake would be free of sewage. However, several heavy rainfall events over the years have demonstrated that there are still major challenges for the Horowhenua District Council. In August 1991, groundwater infiltrated the sewerage system. The treatment plant and the pumping station could not cope, and treated effluent was discharged into the lake.<sup>83</sup>

In July, August, and October 1998, groundwater again infiltrated the sewerage system and the oxidation ponds. Due to the higher than normal water table, the system did not cope, resulting in the discharge of treated effluent directly into the lake on three separate occasions. A total of 207,000 cubic metres was released during these events in 1998.<sup>84</sup> In addition, some seepage appears to have been occurring to groundwater, feeding to Lake Horowhenua.<sup>85</sup> The impact of these discharges on the people of the lake was captured so well by the words of Vivienne Taueki when she recalled the events of 1998:

This was a shocking and horrible event in so many ways, but to those of us Muaūpoko from the Lake, this was a terrible spiritual and cultural event. It is hard to describe how it feels, but it is terrible. We never wanted that to happen at all, let alone be repeated.<sup>86</sup>

Following the latter event, the council adopted a wastewater management strategy that included removal of the sewage plant from beside the lake.<sup>87</sup> Dr Procter

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78. Armstrong, ‘Muaupoko Special Factors’ (doc A156), p 41

79. Armstrong, ‘Muaupoko Special Factors’ (doc A156), p 41

80. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), p 122

81. Hamer, “A Tangled Skein” (doc A150), p 245

82. David Armstrong, summary of reports, November 2015 (doc A153(b)), p 10

83. Hamer, “A Tangled Skein” (doc A150), p 392

84. Hamer, “A Tangled Skein” (doc A150), p 394

85. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p 12 (Procter, appendices to brief of evidence (doc C22(a)), p 2021)

86. Vivienne Taueki, brief of evidence, 29 August 2015 (doc B2), p 26

87. Procter, brief of evidence (doc C22), p 10; Horowhenua District Council, ‘The Strategic Plan for the Upgrade of the Levin Sewerage System: Implementation Plan’, 2002 (Procter, appendices to brief of evidence (doc C22(a)), pp 4000–4006)

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Aerial view of the wastewater treatment plant in the mid-1980s

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**Overflow of effluent from the treatment plant, August 2008**

Used with the permission of Russel Norman

produced a letter from the Horowhenua District Council dated 27 January 2003 outlining the strategy, and the lake trustees were assured that ‘the problems of the past associated with the proximity of the plant to the Lake should be resolved in a relatively short period of time.’<sup>88</sup> He advised that some further work was to be done, and in December 2007 the council applied to renew consents for the sewage plant in its current location.<sup>89</sup>

Unfortunately, in 2008 the pumping station failed again and another overflow occurred into the surrounding paddocks.<sup>90</sup> Subsequent tests revealed it had leached into the lake.

While overflows of the kind discussed above mean that effluent has continued to enter the lake from time to time, one of the most important aspects of the historical legacy is that nutrients from the pre-1987 discharge of effluent continue to affect water quality. The 2014 Horizons Regional Council accord action plan states:

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88. Procter, brief of evidence (doc C22), p 10; chief executive, Horowhenua District Council, to chairperson, Lake Horowhenua Trustees, 23 January 2003 (Procter, appendices to brief of evidence (doc C22(a)), p 4007)

89. Procter, brief of evidence (doc C22), p 10

90. Hamer, “A Tangled Skein” (doc A150), pp 403–404

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*Nutrients from 25 years of sewage inputs accumulated in the sediment and new inputs of nutrient and sediment are key contributing causes of Lake Horowhenua's current poor water quality state. [Emphasis added.]*<sup>91</sup>

The local authorities were not, however, able to progress the resource consents applied for in 2007 to address matters further.<sup>92</sup> Dr Procter advised that by the date of our hearings in 2015, the issues relating to sewage affecting the lake were as follows:

Over the last 10 years, a lot of research has been undertaken to assess the condition of the lake and assess the best way forward. This means that we know quite a lot about the lake and the contaminants that are flowing into it. Some key parts of those reports are attached.

Briefly, the conclusions have been that:

- a) Seepage from the sewage plant has largely been removed – cutting down e coli bacteria counts;
- b) But the ability of the sewage plant to cope with known 'return event' storms remains an issue;
- c) Also, whether the sewage plant can cope with population growth is not certain;
- d) A big part of the issue is that there is an ongoing problem with large volumes of stormwater from streets and houses getting into the pipes for the sewage system during storm events, which results in very high volumes of diluted sewage that the plant struggles to cope with. Repairing the stormwater and sewage pipes and strictly enforcing rules to prevent people allowing stormwater to drain into sewage pipes is important.<sup>93</sup>

Dr Procter filed a further letter dated 10 February 2012 indicating that the local authorities were prioritising the progression of the proposed Shannon and Foxton waste water treatment plants and other large infrastructure applications over the Levin waste water strategy.<sup>94</sup>

The Crown's position on the allegations made in the claims before us was that Parliament has authorised local authorities to exercise powers and functions in respect of waste water (which includes stormwater drainage). As we have previously found, the Crown was complicit in the discharge of effluent from at least 1957, when Muaūpoko first objected and the Crown was aware that effluent was seeping into the lake. This was a breach of the Crown's duty of active protection and the guarantee of Muaūpoko's rangatiratanga.

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91. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 8 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 35)

92. Procter, brief of evidence (doc C22), p 10

93. Procter, brief of evidence (doc C22), pp 6–7

94. Procter, brief of evidence (doc C22), p 10; senior consents planner, Horizons Regional Council, to [obscured], 10 February 2012 (Procter, appendices to brief of evidence (doc C22(a)), p 4008)



Post-1990, the Crown argued that wastewater management continues as a responsibility of local authorities under the Local Government Act 2002.<sup>95</sup> It argued that wastewater management is a core service of local government under that legislation. As we consider this to be a general proposition affecting all claims complaining about local authority actions we deal with this argument below, but we note the ongoing issues concerning the Levin Waste Water Treatment Plant may now be dealt with as part of the plant upgrade.<sup>96</sup>

### **(3) Ground, surface, and storm water**

The lake's mean depth today is 1.3 metres, with a maximum depth of about 1.8 metres – a great reduction of the lake's water volume of a century ago.<sup>97</sup> These changes were occurring prior to 1952 due to sediment loading, local irrigation schemes, and drainage works (which resulted in the lowering of the lake level by four feet). After 1952, the decline in water quality of Lake Horowhenua can be directly attributed to over 25 years of sewage input, and historical nutrient and sediment loading from ground, surface, and stormwater outlets into the lake.<sup>98</sup> By far the greatest source of pollution before 1987 was sewage effluent. Studies in the 1970s showed that 85 per cent of the phosphorus entering the lake at that time came from Levin's sewerage system.<sup>99</sup> Since then, the stormwater system has become the main source of pollution.

A number of claimants addressed these matters with the Tribunal, including Philip Taueki, William (Bill) Taueki, and Charles Rudd. Mr Rudd and Mr Philip Taueki identified the following drains and streams that carry surface and storm water into Lake Horowhenua, the Hōkio Stream, and on to Hōkio Beach (see map 11.1):

- ▶ Mangaroa Stream, now monitored by the regional council, is a moderately small stream which enters the northern part of the lake. The development of the Pakau Hōkio, Kopuapangopango, and Kaihuka swamps for farming resulted in the construction of a number of drains that have impacted the stream.<sup>100</sup> Oero Creek feeds into the Mangaroa Stream.
- ▶ Pātiki Stream (or Kawiu Drain),<sup>101</sup> entering the northern end of the lake, now monitored by the regional council and passes through farmland.
- ▶ Pa Drain is a small stream, with similar features to Pātiki Stream.<sup>102</sup>

95. Crown counsel, closing submissions (paper 3.3.24), p 98

96. Horowhenua District Council, 'Community Connection', May and November 2016

97. Hamer, "A Tangled Skein" (doc A150), p 13

98. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 8 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 35)

99. Hamer, "A Tangled Skein" (doc A150), p 235

100. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p 8 (Procter, appendices to brief of evidence (doc c22(a)), p 2017)

101. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p 9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 74); Henry Williams, brief of evidence, 11 November 2015 (doc C11), pp 8–9

102. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p 8 (Procter, appendices to brief of evidence (doc c22(a)), p 2017)

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- ▶ Tūpāpakurau Stream is a small stream, with similar features to Pātiki Stream.<sup>103</sup>
- ▶ Domain drain – now monitored by the regional council. This drain ‘flows from flat rural land and the lakeshore domain on part of the gravel plain west of Levin’. This drain is impacted by the development of progressive residential subdivision.<sup>104</sup>
- ▶ Queen Street stormwater drain – the drain is a major source of phosphorus loading into the lake,<sup>105</sup> now monitored by the regional council. According to Mr Philip Taueki, it discharges all of Levin’s storm water into Lake Horowhenua.<sup>106</sup>
- ▶ Makomako stormwater drain, now monitored by the regional council. The Levin Waste Water Treatment Plant is situated within the vicinity of this drain.
- ▶ Arawhata Stream, now monitored by the regional council. Mr Philip Taueki told us that the Arawhata Stream collects most of the run-off from the market gardens and discharges directly into Lake Horowhenua.<sup>107</sup> This stream is spring-fed but its water quality is affected by nitrate that has leached into the groundwater from surrounding farmlands.<sup>108</sup> It is the largest surface input to the lake.<sup>109</sup>
- ▶ Hōkio drain.
- ▶ South Levin commercial area drain.
- ▶ Whelans Road drain.
- ▶ Kohitere drain.
- ▶ Hokio Sand Road drain, now monitored by the regional council.
- ▶ Other man-made drains, in times of heavy rain.<sup>110</sup>

As can be seen, the monitoring sites of the regional council do not cover all the inflows into the lake. That noted, the evidence was that surface water and storm water have been key sources of nutrients and sediment entering the lake since 1990. The *Horowhenua Lake Accord Action Plan 2014–2016*, for example, refers to the issue, noting that nutrients and sediment from the surrounding catchment have continued to be a key factor in driving the decline in water quality.<sup>111</sup> In its own commissioned report, Horizons Regional Council recently published results which demonstrate that in terms of *E. coli*, human health, and recreational values, ‘All of the inflows [into the lake] are worse than the national bottom line (band D) for 95th percentile *E coli* concentrations; the Makomako Road Drain and Sand Road Drains

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103. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p 8 (Procter, appendices to brief of evidence (doc c22(a)), p 2017)

104. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p 8 (Procter, appendices to brief of evidence (doc c22(a)), p 2017)

105. Procter, brief of evidence (doc c22), p 8

106. Transcript 4.1.11, p 187

107. Transcript 4.1.11, p 192

108. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p 7 (Procter, appendices to brief of evidence (doc c22(a)), p 2016)

109. Procter, brief of evidence (doc c22), p 8

110. Rudd, closing submissions (paper 3.3.18), pp 13–14

111. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 8 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 35)



are also below the national bottom line for median *E coli* concentrations.<sup>112</sup> Data for the lake was unable to be utilised for assessment but, strangely, a table was prepared indicating *E. coli* was not an issue within the lake.<sup>113</sup>

**(a) Nitrogen:** Of particular concern is the amount of nitrogen entering the lake in this manner:

Nitrogen levels within the Lake Horowhenua catchment are high with the highest concentration coming from the Arawhata Stream. The Arawhata Stream has previously been ranked as having the second highest median nitrogen concentration in the country and the Patiki Stream, valued for its population of rare native fish (the giant kokopu), was also ranked poorly, as having the fourth highest nitrogen concentration in the country.<sup>114</sup>

The inflowing total nitrogen at Horizon's monitored sites including the Hōkio Stream in 2015 indicates that the 'inflowing total nitrogen exceeded what was being exported down the Hokio Stream on all sampling occasions and the Arawhata Stream was the dominant source.'<sup>115</sup> However, the Mangaroa Stream was discharging higher levels of ammoniacal nitrogen into the lake.<sup>116</sup> At elevated levels this latter form of nitrogen can be toxic to many species, particularly fish and invertebrates. In the summer months it occurs in higher concentrations.<sup>117</sup>

Nitrogen can also enter the lake through groundwater.<sup>118</sup> It is thought that groundwater can enter the lake from 'almost anywhere in the catchment within one to two years.'<sup>119</sup> This means that, due to leaching and runoff, excess nutrients can reach the lake 'over relatively short time frames.'<sup>120</sup> Thus nitrogen from land-use adjoining the lake and streams is entering the lake, and that in turn is encouraging weed growth, leading to eutrophication.

The nitrogen is integrated into a process that leads to oxygen depletion in the lake and cyanobacteria (blue-green algae) blooms. These are smelly events which

112. Horizons Regional Council, *Water Quality of Lake Horowhenua and Tributaries* (Palmerston North: Horizons Regional Council, 2015), pp 25–26 (Procter, appendices to brief of evidence (doc c22(a)), pp 3129–3130)

113. Horizons Regional Council, *Water Quality of Lake Horowhenua and Tributaries*, p 25 (Procter, appendices to brief of evidence (doc c22(a)), p 3129)

114. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 36)

115. Horizons Regional Council, *Water Quality of Lake Horowhenua and Tributaries*, p [4] (Procter, appendices to brief of evidence (doc c22(a)), p 3108)

116. Horizons Regional Council, *Water Quality of Lake Horowhenua and Tributaries*, p [4] (Procter, appendices to brief of evidence (doc c22(a)), p 3108)

117. Horizons Regional Council, *Water Quality of Lake Horowhenua and Tributaries*, p 13 (Procter, appendices to brief of evidence (doc c22(a)), p 3117)

118. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 36)

119. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, pp 8–9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), pp 35–36)

120. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, pp 8–9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), pp 35–36)

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release toxins that can cause skin irritation and health issues.<sup>121</sup> As noted by the working party, the toxins can be lethal to dogs and in extreme conditions can be lethal to small children.<sup>122</sup> Such blooms regularly cause the lake to be closed to recreational users over the summer.<sup>123</sup> The blooms occur when there are low levels of oxygen, caused ‘when weed beds collapse and decompose in late summer.’<sup>124</sup> The decomposing material ‘forms a barrier to oxygen reaching lake bed sediments, resulting in a large release of phosphorus.’ It is the release of phosphorus through this process that fuels the cyanobacteria blooms.

Lake weed is now present in Lake Horowhenua on a massive scale. It is a key issue for the partners to the *Lake Horowhenua Accord Action Plan 2014–2016* due to its impact on sediment and its part in ‘driving cyanobacteria blooms.’<sup>125</sup> A comprehensive weed survey was completed in 2014 which found that *Elodea canadensis* is the most prolific weed, but there are other varieties as well.<sup>126</sup> The former covers 50 hectares of the approximately 300 hectares that is the lake. All the varieties of weed in the lake can contribute to slowing water movement, allowing more sediment to settle on the bed of the lake.<sup>127</sup> These weed varieties are easily spread by recreational boating either entering or exiting the lake.

On very hot, still days these plants may release ammonia, which is toxic to all fish life. As noted by Dr Procter,

Low oxygen from eutrophication and the possible release of ammonia are regarded as the number one threats to the lake at the moment, and is the reason for a proposal to cut weed from the lake just before it seeds. The aim of that project is to cut back the exotic species so that they will not re-seed and allow native water plants currently being smothered to re-establish themselves.

The experts tell us that we should expect to see results from this in 3–5 years.

The introduction of any further exotic water plant species would be devastating, and strict boat washing is required. A boat washing facility has been installed.<sup>128</sup>

**(b) Phosphorus:** In addition to nitrogen, phosphorus levels have a crucial impact on the lake. As discussed above, a study in 1976 showed that 85 per cent of the phosphorus entering the lake at that time came from sewage effluent. Of the remainder,

121. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p10 (Hamer, indexed bundle of cross-examination documents (doc A150(I)), p 37)

122. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p10 (Hamer, indexed bundle of cross-examination documents (doc A150(I)), p 37)

123. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p10 (Hamer, indexed bundle of cross-examination documents (doc A150(I)), p 37)

124. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p10 (Hamer, indexed bundle of cross-examination documents (doc A150(I)), p 37)

125. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p10 (Hamer, indexed bundle of cross-examination documents (doc A150(I)), p 37)

126. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p10 (Hamer, indexed bundle of cross-examination documents (doc A150(I)), p 37)

127. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p10 (Hamer, indexed bundle of cross-examination documents (doc A150(I)), p 37)

128. Procter, brief of evidence (doc C22), p 9

40 per cent came from storm water and 60 per cent from ‘the catchment board’s north drain, the Kawiu drain, and the Arawhata Stream.’<sup>129</sup> When the council ceased discharging effluent into the lake in 1987, storm water from the Queen Street drain became by far the largest source of phosphorus. In 1988–89, 80 per cent of the phosphorus entering the lake came via the Queen Street drain.<sup>130</sup> However, data from Horizons Regional Council in 2013–14 indicates that ‘the Queen Street drain is no longer the highest contributor of phosphorus to the lake.’ High levels are also entering from other streams and drains within the catchment.<sup>131</sup> Some phosphorus is also exiting the lake, and high levels are being transferred via the Hōkio Stream.<sup>132</sup>

In their report from their 2015 monitoring sites, Horizons Regional Council stated that ‘the load of total phosphorus was generally higher in the Hokio Stream’ than the combination of the other tributaries. Of the inflowing tributaries to the lake, the Arawhata Stream remained, more often than not, the dominant source.<sup>133</sup>

Several claimants gave evidence on other possible sources. Mr Rudd, for example, alleged that leaching was occurring into Lake Horowhenua, the Hōkio and Waiwiri Streams, and Hōkio Beach at the following locations:

- ▶ Tararua Road;
- ▶ Arapaepae Road, just south of Queen Street;
- ▶ Bartholomew Road;
- ▶ The Avenue;
- ▶ Kawiu Road, near the Pātiki Stream;
- ▶ Tirotiro Road, just south of Queen Street;
- ▶ Hokio Beach Road, near Hamaria Road;
- ▶ Main South Road, south of Hokio Beach Road; and
- ▶ Levin Landfill, Hokio Beach Road.<sup>134</sup>

Mr Bill Taueki noted that in recent times the Horowhenua District Council attempted to create a wetland to filter and divert the outflow at the Queen Street drain. His whānau, including his sister Vivienne and his cousin Peter Heremaia, protested as the area was a significant site for Muaūpoko. Artefacts, so he advised, were found on the land, which demonstrated that the area may have been a site of significance. He stated ‘[o]n this basis the council accepted that the site was important’ and stopped digging, but alleged this work has since recommenced.<sup>135</sup>

(c) **Sediment:** As we discussed in previous chapters, in 1966 a weir was installed at the outlet of the lake at the Hōkio Stream. Peter Huria claimed this weir was

129. Hamer, “A Tangled Skein” (doc A150), p 258

130. Hamer, “A Tangled Skein” (doc A150), p 269

131. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 36)

132. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 36)

133. Horizons Regional Council, *Water Quality of Lake Horowhenua and Tributaries*, p [4] (Procter, appendices to brief of evidence (doc C22(a)), p 3108)

134. Rudd, closing submissions (paper 3.3.18), p 14

135. William Taueki, brief of evidence (doc C10), p 41

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holding in all the sludge in the lake.<sup>136</sup> David Armstrong stated that ‘The weir hindered the lake’s natural flushing and cleansing process, and helped turn it into a sediment trap.’<sup>137</sup> The weir is still used to maintain the lake at the ROLD Act 1956 level of 30 feet above mean low water spring tides at Foxton Heads.<sup>138</sup> The use of the weir to hold the lake at a constant level has turned it into ‘a very large settling pond with about half of its original volume filled with sediment’.<sup>139</sup>

Sediment loading continues to be a major issue as identified in the *Lake Horowhenua Accord Action Plan 2014–2016*, where the authors repeated Max Gibbs’ findings in his 2011 report. Those findings were that large sediment loads entered Lake Horowhenua, ‘causing the lake to infill at a rate of 3.3 millimetres per year and up to 10 centimetres per year in the centre’. He argued that the weir installed in 1966 ‘played a part in reducing the lake’s natural flushing ability’.<sup>140</sup> By 2015, Horizons was reporting the Arawhata Stream contributed significantly larger portions of sediment to the lake as it was the dominant source.<sup>141</sup>

We note that ‘no comprehensive programme to trap sediment and remove nutrients from the storm water entering the lake was established’ over the period 1952–87 and little effective action by the Crown and local government was taken to deal with the problem.<sup>142</sup> Since then the lake trustees, the domain board, and local authorities with DOC have attempted various remedial programmes, a matter we discuss below.

In terms of post-1990, we know that stormwater drains are a discharge point for pollutants going into the lake, aggravating its current hypertrophic state. Furthermore, contaminants are still leaching or discharging into the lake through ground water.

Counsel for the Crown submitted these are matters for the local authorities. Under the Local Government Act 2002 they are required to assess the actual and potential consequences of stormwater discharges in their district,<sup>143</sup> the inference being that if they do not they are in breach of their obligations under the Act. Furthermore, local authorities, the Crown submitted, are not part of the Crown and nor do they act on behalf of the Crown.<sup>144</sup> Therefore, decisions they make cannot be attributed to the Crown. We consider this be a general proposition affecting all claims in respect of local authority actions.

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136. Huria, brief of evidence (doc B11), p 2

137. Armstrong, ‘Lake Horowhenua and the Hokio Stream’ (doc A162), pp 85, 92

138. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 12 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 39)

139. Gibbs, *Lake Horowhenua Review*, p 10 (doc C22(b)(iii)), p [75]

140. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 12 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 39)

141. Horizons Regional Council, *Water Quality of Lake Horowhenua and Tributaries*, p [4] (Procter, appendices to brief of evidence (doc C22(a)), p 3108)

142. Hamer, “A Tangled Skein” (doc A150), p 269

143. Local Government Act 2002, ss 125, 126(e)

144. Crown counsel, closing submissions (paper 3.3.24), p 98

**(4) Land use**

As we have previously described, during the late nineteenth century the Horowhenua landscape was transformed by colonial settlement. The once-thick bush was cleared at a rapid pace and drainage activities followed, including on the Hōkio Stream. These works resulted in lowering the level of the lake in the 1920s, which left a dewatered area between the lake's edge and the original chain strip.

The previous traditional life of Muaūpoko gave way to a new order where agriculture and horticulture became the fuel for the new economy. Lake Horowhenua and its catchment reduced in size as the system of dune lakes and swamps were drained. It now has a surface catchment limited to 43.6 square kilometres in area, and nearly 14 per cent of that is occupied by the Levin township. As the working party noted, 'Land use in the remainder of the catchment is rural, and includes pastoral, dairying, pig and poultry raising, and horticultural activities.'<sup>145</sup>

As Dr Procter stated,

Levin has grown to about 20,000 people and is reasonably prosperous. The industrial and urban development has flourished as a result of the ability to remove storm-water and wastewater efficiently and economically directly into the Lake. Large market gardens lie to the south and west of Levin. They keep Wellington and the Lower North Island in fresh vegetables.

All of that development has been dependent on the water and drainage basin resource that Muaupoko have mostly retained, but is now in a terribly degraded state.

Ironically, at the same time, Muaupoko land blocks do not have access to water and are of course subject to strict rules about water takes.<sup>146</sup>

Since 1990, intensive dairying, further agriculture, and horticulture have contributed additional nutrients and sediment loads into the lake.<sup>147</sup> As we discussed above, the nitrogen feeds weed growth and contributes with phosphorus to toxic blooms. Land use around the lake is contributing to the ongoing management issues for the lake and the Hōkio Stream. It is now the primary source of nutrient and phosphorus loading entering the lake and the stream. The Lake Horowhenua and Hōkio Stream working party noted in 2013 that 'Although there were signs that the water quality of the Lake improved following 1987, farming and market gardening activities intensified. A rise in the external nutrient and sediment loads on the Lake coincide with this increase in activity.'<sup>148</sup>

Several witnesses raised issues regarding the Alliance Freezing Works located near the lake. Mr Philip Taueki told us they opposed the resource consent for the

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145. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p 10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 75); Procter, brief of evidence (doc c22), p 5

146. Procter, brief of evidence (doc c22), p 14

147. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p 11 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 76)

148. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika' (doc B2(o)), p 11)



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water consent to take for the freezing works. He highlighted how the pure water drawn for this operation reduces the amount of pure water feeding the lake.<sup>149</sup>

It was claimed that the freezing works runs a bore directly into the ground some 75 metres deep extracting 40,000 litres of water a minute.<sup>150</sup> The allegation is that the Horowhenua District Council has allowed this land use without consultation with the domain board or the lake trustees.

We deal with the broader argument regarding decisions that local authorities make (and whether they may be attributed to the Crown) below. However, we note here that consenting for water takes within the catchment is important and goes to the issue of whether the current governance regime adequately addresses the guarantees of the Treaty for Muaūpoko.

**11.4.3 Hōkio Stream and Beach**

The Crown acknowledged the importance to Muaūpoko of the Hōkio Stream as a part of their identity.<sup>151</sup> The Hōkio Stream, like the lake, was heavily impacted during the years 1950–90.<sup>152</sup> In 1978, the Hokio Progressive Association wrote to the Health Department to inform it that the stream had been almost stagnant for a number of years.<sup>153</sup> In the same year, the Manawatu Catchment Board water resources officer acknowledged faecal coliform levels exceeded maximum levels on every occasion that tests had been performed.<sup>154</sup> Thus there were real concerns over the health of the stream. Those concerns have continued. Fortunately, however, the borough council's proposal to discharge sewage effluent directly into the Hōkio Stream instead of Lake Horowhenua was rejected in the 1980s (see chapter 10). Nonetheless, Peter Huria alleged that pollution was being discharged directly into the Hōkio Stream,<sup>155</sup> and one direct source of effluent was the Department of Social Welfare's Hokio Beach School.<sup>156</sup>

Other than noting the discharges of raw sewage into the lake after storm events in 1991, 1998, and 2008, we have insufficient evidence to make any findings in relation to the allegations made by Mr Huria.

**(1) *The continuing effects of the 1966 concrete weir***

The control weir at the lake outlet is an important legacy of past management and statutory powers to conduct drainage works. In 1916, the Crown brought in legislation which gave the lake domain board authority to conduct drainage works on the lake and the Hōkio Stream. Muaūpoko protested in vain against this legislation, but the domain board took little action in any case. From the 1920s, however, the power

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149. Transcript 4.1.11, pp 191–192

150. William Taueki, brief of evidence (doc C10), pp 39–40

151. Crown counsel, closing submissions (paper 3.3.24), p 99

152. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), pp 109–110; Hamer, "A Tangled Skein" (doc A150), pp 206–258

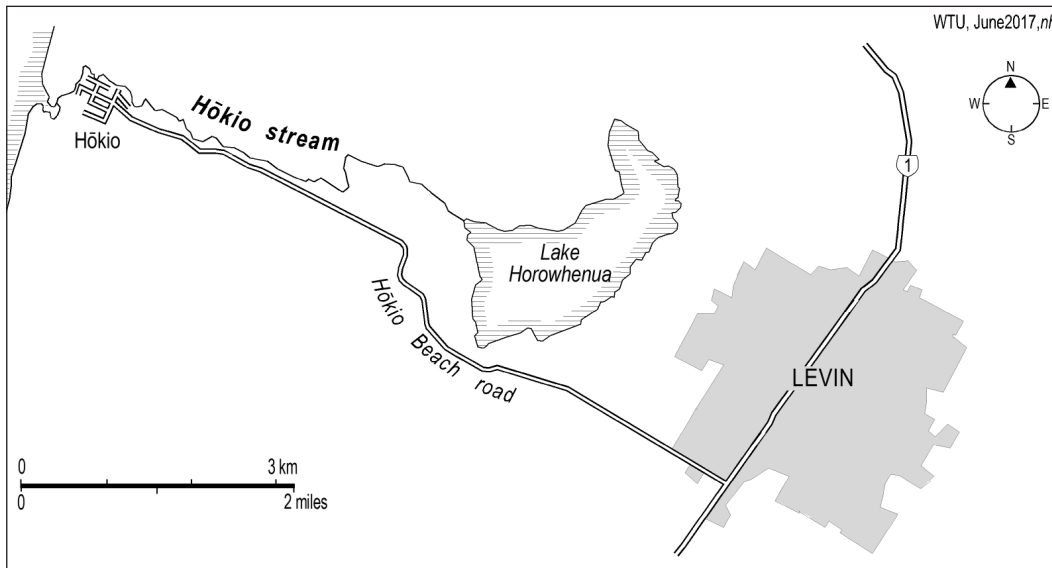
153. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 109

154. Armstrong, 'Lake Horowhenua and the Hokio Stream' (doc A162), p 109

155. Huria, brief of evidence (doc B11), p 2

156. Huria, brief of evidence (doc B11), p 12





Map 11.2: Hōkio Stream

to conduct drainage works was exercised by the Hokio Drainage Board. This board carried out significant modifications to the bed of the Hōkio Stream, narrowing and deepening it, destroying eel weirs in the process. These works were mainly for the purpose of draining lands for farming, and resulted in the lowering of Lake Horowhenua by four feet. These drainage works were a major source of grievance for the Muaūpoko people. The question of who would control and authorise such works became a point of contention between the Crown and Muaūpoko (see chapters 8 and 9).

In the 1950s, a settlement was reached whereby the Hokio Drainage Board would be disestablished, and the Manawatu Catchment Board would assume responsibility for drainage works – but any such works now required the consent of the reformed lake domain board. The parties also agreed in 1953 that the lake level should be set at 30 feet above mean low water spring tides at Foxton Heads (see section 9.3.3). This settlement was given legislative effect by the ROLD Act 1956. In theory, representatives of the Muaūpoko owners had a majority on the reformed domain board, but, as we explained in chapter 9, the majority was too narrow and the basis for board appointments was too uncertain and contested. The result was that drainage works could be carried out despite the strong disagreement of the lake trustees. In particular, the trustees strongly objected in 1966 to the construction of a concrete control weir without a fish pass to allow fish migration.

The catchment board wanted to install a control weir in order to maintain the lake at its statutory level, and to resolve complaints from people concerned about flooding and inundation at Hokio Beach Road. The weir was constructed at a height of 29 feet 9 inches, and it was installed at the outlet of the lake at Hōkio Stream. As

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a result the lake rarely fluctuated in level unless the wooden boards were slotted on the control weir to raise the lake for recreational boating.<sup>157</sup>

In section 11.4.2(3)(c) above, we have discussed the impact of the weir on the amount of sediment trapped in the lake. In addition, it may inhibit the ability to flush phosphorus from the lake as a result.<sup>158</sup>

The weir also had the effect of lowering the Hōkio Stream levels during summer by anything up to 25 per cent. In the 1980s there were reports that this resulted in the death of fish during droughts, and encouraged stock to wander the margins of the lake and damage the banks of the stream.<sup>159</sup> Also, at our hearings in 2015, Vivienne Taueki claimed willow trees were removed along the stream, reducing the riparian strip with resulting impacts on water temperature and eels.<sup>160</sup>

**(2) *The realignment of the Hōkio Stream mouth***

The Manawatu Catchment Board's control of works on the Hōkio Stream continued until 1989 when it was abolished and its functions were transferred under the local government legislation amendments of 1989. During the last few years of its existence, discussions were held to make a cut into the Hōkio Stream to shorten the distance to the sea. This occurred because the prevailing wind direction resulted in the mouth of the stream moving to the south.

Peter Huria gave evidence that he and his brothers have been acting as kaitiaki for the sand dunes at Hōkio Beach, renowned for their shape, form, and the location of ancient and sacred sites.<sup>161</sup> Those dunes, he believed, are being impacted by environmental issues at Hōkio Beach.

He also raised the issue of the cut to the sea. It seems as the years went by the Hōkio Stream was causing inundation issues during major weather events at Hōkio Beach.<sup>162</sup> Minor realignment of the mouth was made by the local authority in 1982 and 1983.<sup>163</sup> This was followed by an application for a water right in 1990 to cut a new path for the stream to the sea. The application was made by the Manawatu-Wanganui Regional Council and the Horowhenua District Council to cut a diversionary path between the Hōkio Stream and the sea. The application was made because, it was claimed,

the mouth of the stream has progressively migrated to the south, and the increased stream distance, together with high groundwater levels resulting from recent heavy rainfall, have combined to effect an elevated hydraulic gradient of the stream. The direct impact of this situation is that residential properties, particularly those bordering the

157. Hamer, "A Tangled Skein" (doc A150), pp185–187, 189, 304; Armstrong, 'Lake Horowhenua and the Hōkio Stream' (doc A162), pp 85–86

158. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika', p 12 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 77)

159. Armstrong, 'Lake Horowhenua and the Hōkio Stream' (doc A162), p 86

160. Vivienne Taueki, brief of evidence (doc B2), pp 24–25

161. Huria, brief of evidence (doc B11), p 3

162. Hamer, "A Tangled Skein" (doc A150), p 399

163. Hamer, "A Tangled Skein" (doc A150), p 398

stream, are experiencing some inundation, with detriment to safe operation of septic tank disposal systems.<sup>164</sup>

No objections were received to the application for a water right and it was granted.<sup>165</sup> The lake trustees, through Mrs Tatana, consented to the realignment.<sup>166</sup> The domain board also approved it.<sup>167</sup> The trustees of Hōkio A block, at that time, were in favour of the cut, mainly because they were attempting to stabilise the dunes to the south of Hōkio township and thereby protect their land.<sup>168</sup>

The matter subsequently became controversial when the implications for fisheries such as whitebait and eels that migrate from the lake to the sea were further understood.<sup>169</sup> Other lake trustees objected. In a split decision, the chairman of the domain board used his casting vote to make an interim objection to the application so as to enable the board to consult further with the lake trustees.<sup>170</sup>

This cut was never made but the mouth of the Hōkio Stream was realigned in 2014 when the local authorities used the emergency provision under section 330 of the RMA to cut a new course for the stream to the sea.

Mr Philip Taueki alleged that the impact of the stream diversion has prevented access to the beach, and has impacted on fisheries, birdlife, and native plants.<sup>171</sup> He stated:

Despite the Crown and council knowing we owned the land in question, the Hokio Trust, they went out there and dug a 200 metre long, five metre wide, three metre deep trench on our land and they had the support of the MTA and the Lake Trustees. Mr Sword appeared in the . . . newspaper alongside the Horizon's members saying what a great project this was and that they supported it, despite having no authority over the land in question. Now this lot happens continually Your Honour, despite us being the trust and I'm being the chair of the trust, despite that fact the council completely ignored us and went through the MTA and the Lake Trustees to get this cut put in. The police threatened to – we went down there to try to stop it. We parked our truck on the bridge which is on our land. The police threatened to arrest us if we didn't move it. No resource consents, no nothing. They used the emergency powers of the RMA to get this work done. . . .

So that Hokio cut and now we've got two resource – we've got two hearings due that we're now going to have to go through, find resources to argue in the Courts against what the council done. And they tried to say that the reason was because the toilets in

164. Director, operations, Horowhenua District Council, to director, planning and environment, Manawatu-Wanganui Regional Council, 5 September 1990 (Hamer, "A Tangled Skein" (doc A150), p 399)

165. Hamer, "A Tangled Skein" (doc A150), p 399

166. Hamer, "A Tangled Skein" (doc A150), p 399

167. Hamer, "A Tangled Skein" (doc A150), p 400

168. Hamer, "A Tangled Skein" (doc A150), p 400

169. Hamer, "A Tangled Skein" (doc A150), p 400

170. Hamer, "A Tangled Skein" (doc A150), p 400

171. Philip Taueki, amended statement of claim, 6 August 2015 (Wai 2306 ROI, statement of claim 1.1.1(b)), p 113

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the township were backing up. So why should the council be able to dig a 200 metre long trench on our land because a couple of the toilets in the township were being blocked up? And they don't have – yes, now they've done the work it hasn't alleviated the problem. They did no reports to prove it. They had no reports from the health department that people were complaining at the beach that their toilets were becoming unsanitary. It was all just a rushed bulldozed job, intimidated job, threatened us, had the newspapers support their little story with the Crown working genuinely to fix the problems of Muaūpoko.<sup>172</sup>

Philip Taueki claimed the stream is now 'meandering out of control[,] is cutting through sand-dunes where pingao had been established [and] causing a hazard for children due to collapsing sand dunes'.<sup>173</sup> Mr Eugene Henare made similar allegations and claimed that tonnes of sand were removed from the beach without permission, and that the realignment of the mouth affects Muaūpoko's fisheries.<sup>174</sup>

Philip Taueki also raised issues concerning the digging of drains on Hokio Trust lands to lay communication cables:

When the . . . cable was put through the beach without talking to us Donna Hall and Felix . . . took the case for us to the Māori Land Court arguing that they hadn't consulted us. The research taken, undertaken to support that case revealed that the . . . cable had come up property belonging to the trust and that a certain amount of accretion had occurred to that land. So now what they're going through Your Honour is they've applied to the High Court to get the title to that bay area created and then they have to go to the Māori Land Court to get the people who are entitled to be on that title put on it. Despite the Crown and council's lawyers all being part of those hearings with . . . knowing that that was private land looked after by the Hokio Trust they went ahead and dug this drain and used the MTA and Mr Sword in particular as their authority to do so.<sup>175</sup>

The Crown's response was that Parliament has authorised regional councils to exercise powers and functions in respect of water under the RMA. This includes granting local authorities 'the control of the taking, use, damming, and diversion of water' under section 30(1)(e) of that Act. Crown counsel submitted that 'local authorities are not part of the Crown, nor do they act on behalf of the Crown'.<sup>176</sup> The Crown also stated that rights claimed by Muaūpoko in relation to the foreshore and seabed are now covered by the Marine and Coastal Area (Takutai Moana) Act 2011.<sup>177</sup> We consider the generic aspect of these submissions further below. We note here that there is nothing in the Marine and Coastal Area (Takutai Moana) Act 2011

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172. Transcript 4.1.11, pp 195–196

173. Philip Taueki, amended statement of claim (Wai 2306 ROI, statement of claim 1.1.1(b)), p 113

174. Eugene Henare, brief of evidence, 25 September 2015 (doc B6), p 5

175. Transcript 4.1.11, p 198

176. Crown counsel, closing submissions (paper 3.3.24), p 100

177. Crown counsel, closing submissions (paper 3.3.24), pp 91–92

that prevents us making generic findings relating to the legislative regime concerning the management of the marine environment and natural resources.

### (3) Landfills

Two statements of claim referred to landfills.<sup>178</sup> They claimed that discharges were being made to the Hōkio Stream in breach of RMA consents. Limited information was provided by the claimants on these landfills. However, by reviewing a recent decision made concerning the landfills we were able to piece together some background.

Independent commissioners recently observed the Levin Landfill is located on Hokio Beach Road four kilometres west of Levin. We refer to this decision merely for background. According to the commissioners, a small landfill existed on the site from the 1950s, which served Levin and its immediate surrounds.<sup>179</sup> This original landfill reached capacity around 1975.<sup>180</sup> A second landfill was operated adjacent to the then-existing landfill when the original landfill was closed.<sup>181</sup> The commissioners stated that

In 1994 HDC [the Horowhenua District Council] made resource consent applications to Horizons for the second or new landfill. These resource consent applications attracted a high level of submitter interest and consequently a protracted resource consenting hearing process meant that a Council level decision was not available until 1997. That Council decision being a regional Council decision was appealed to the Environment Court and resolved by mediation with a resulting consent order issued in 2002. The consent order provided the following consents:

- i) discharge of solid waste to land (discharge permit 6009)
- ii) discharge of leachate to land (discharge permit 6010)
- iii) discharge of contaminants to air (discharge permit 6011)
- iv) divert stormwater run-off from land filling operations (water permit 6012)
- v) discharge liquid waste to land (discharge permit 7289)

To be complete a further consent namely discharge permit 102259 enabling discharge of stormwater to land that may enter groundwater was granted to HDC in May 2002 on a non-notified basis and consequently was not subject to any environment court appeal process.

Over time the landfill activities appear to have expanded in that refuse and waste has been accepted not only from Levin but from further afield from the likes of Kapiti District. As we understood it based on what we were told the decision to accept

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178. Claimant counsel (Watson), first amended statement of claim, 12 August 2015 (Wai 1491 ROI, statement of claim 1.1.1(a)), pp 11, 13; Philip Taueki, amended statement of claim (Wai 2306 ROI, statement of claim 1.1.1(b)), pp 113–115, 133

179. 'Commissioners Decision on a Review of Resource Consent Conditions and an Application for Change of Resource Consent Conditions Both Relating to the Levin Landfill Operated by the Horowhenua District Council', 18 November 2016, PGR-124154-2-85-V1 paras 3.2, 4.2. The decision can be downloaded from the Horizons Regional council website.

180. Ibid, para 4.2

181. Ibid, para 4.2

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waste from outside of the HDC area was a decision made by HDC following a Local Government decision process. We understood there are no conditions of consent that prevent HDC from accepting waste from beyond the HDC District. Submitters we heard from certainly were dissatisfied with this circumstance.

So a key fact arising from this short history is the landfill activities are consented activities. This fact is particularly relevant to the scope and nature of the effects we can take into account when considering and determining the Review and the Application.

The next step in the landfill history was that the PCE [Parliamentary Commissioner for the Environment] initiated an investigation into the management and effects of the landfill. That investigation commenced in 2004 and resulted because complaints were made relating to the operation of the landfill. PCE produced a report in 2008. That report contained a number of recommendations for both HDC and Horizons.

Horizons acting in part on the PCE report publicly notified a review of conditions of all of the consents relating to the landfill in late 2008. Many prehearing meetings took place and an agreed outcome of all parties involved in that process resulted in an amended condition as contained in a decision report dated 31 May 2010.<sup>182</sup>

Mr Rudd before us claimed that the site is leaching heavy metal leachate into the Hōkio Stream via certain drains, and that the relevant local authorities are acting in breach of their resource consent.<sup>183</sup> Peter Huria was concerned that there were adverse effects from leachate seeping from the landfill occurring at Hōkio Beach. He expressed his view that the landfill was leaching arsenic into underground aquifers.<sup>184</sup>

Mr Philip Taueki claimed that

The council operates the landfill on Hokio, further along on the Hokio Beach Road. They capture leachate from the methane or something that gets discharged, 30,000 litres or something a day. They then pump the leachate from the landfill, which is just further towards the beach than this stream, back to the Levin Wastewater Treatment Plant located next to the Lake. Then they pump it from the wastewater treatment plant located next to the Lake out to the Pot which is located out at Hokio Beach. So it goes from the landfill in Hokio Beach Road, back to the Lake, then back to the site out at the beach which is probably a kilometre south of the landfill. So they take it from the landfill, extract it at enormous cost, pipe it to the waste water treatment plant, then they pipe it out to the Pot where it's just emptied in to the sand dunes. So they've moved it from the landfill located on Hokio Beach Road to the Pot some one kilometre south of the landfill via the Levin Wastewater Treatment Plant. And apparently, although we haven't been able to get any information from the council to confirm this, but the leachate disturbs the treatment process that the plant was originally designed for. It wasn't designed to handle leachate. But all of these matters can be outlined hopefully by engineers when we finally come to solving these problems. You won't have to take

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182. Ibid, paras 4.3–4.8

183. Charles Rudd, brief of evidence, 16 November 2015 (doc C23), p 21

184. Huria, brief of evidence (doc B11), p 2



my word for it . . . So we've gone from the Lake around to the Arawhata Stream which is Hokio Beach Road which is just south of the Lake. Then if you go further out to the beach about another half a kilometre you come across the landfill, the Levin Landfill, the Levin Dump, the Levin Refuse Centre.<sup>185</sup>

In reply the Crown stated waste management is a basic health and utility function which falls within the 'traditional functions' of local authorities. Waste collection and disposal is affirmed as a 'core service' of local government under the Local Government Act 2002.<sup>186</sup> The Crown submitted the Act gives clear powers to local government to manage waste, and local authorities have responsibility for the Hokio Beach Road landfill.<sup>187</sup> The Crown submitted again that these agencies are not part of the Crown and do not act on its behalf.<sup>188</sup> Nor is the Crown responsible for the day-to-day operations 'of the statutory framework within which local authorities operate', and the 'various decisions' they make, including where to situate a landfill.<sup>189</sup>

At the time of the hearing, the claimants had an alternative legal process within which to pursue the issues as to water quality. The more generic submissions made by the Crown we consider below.

#### **(4) The 'Pot'**

The Levin Waste Water Treatment Plant discharges to the 'Pot'. It includes land under lease from the Muaupoko Lands Trust, an ahu whenua trust administered under Te Ture Whenua Māori Act 1993.

Paul Hamer described the 'Pot' as a natural depression in sandhills at the end of Hokio Sand Road.<sup>190</sup> On 1 June 1986, a 30-year lease agreement was signed with the then-Levin Borough Council.<sup>191</sup> All the money owed for the first 30 years of the lease was paid out at commencement of the lease at \$62,700.<sup>192</sup> At the time of our hearings, the owners were considering whether that lease would be renewed. A review of the Māori Land Court records indicates the lease was renewed on 29 October 2016 in favour of the Horowhenua District Council for 40 years from 1 June 2016, expiring in 2056.

The 'Pot', as part of the land-based sewage disposal area for the Levin Waste Water Treatment Plant and located at the beach, is now, Mr Rudd claimed, at capacity and is draining into the Waiwiri Stream and then over the beach.<sup>193</sup> He produced

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185. Transcript 4.1.11, pp 192–193

186. Crown counsel, closing submissions (paper 3.3.24), p 102

187. Crown counsel, closing submissions (paper 3.3.24), p 102

188. Crown counsel, closing submissions (paper 3.3.24), p 102

189. Crown counsel, closing submissions (paper 3.3.24), p 102

190. Hamer, "A Tangled Skein" (doc A150), p 245

191. Horowhenua 11B41 South N1 and x1B41 South P, title notice 17348, deed of renewal of lease, 29 October 2016, Maori Land Information System

192. Procter, brief of evidence (doc C22), p 10

193. Huria, brief of evidence (doc B11), pp 2–3

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a photograph of one of at least two drain outlets discharging in this manner.<sup>194</sup> Ms Vivienne Taueki also produced a photograph of one of those drains. Mr Rudd claimed the run-off was contaminating both the Waiwiri Stream and the nearby coastal marine habitat of the tohemanga: *Longimactra elongata*.<sup>195</sup>

As discussed above, various claimants alleged that the ‘Pot’ is overflowing and discharging into the Waiwiri Stream during peak rainfall events.<sup>196</sup> The general view was that the effluent from the ‘Pot’ sprayed on trees in the area is also being absorbed into the groundwater and leaching into the sea.<sup>197</sup>

Counsel for the Crown argued that any objections from the claimants as to the use of this land were directed at the local council’s actions, for which the Crown is not responsible.<sup>198</sup> The Crown contended that there is no evidence that the lease was entered into contrary to the agreement of the owners,<sup>199</sup> the inference being that if they were not happy with the terms of the lease, there would have been evidence of that from 1984.

The Crown referred to the Environment Court and its jurisdiction to enforce environmental standards, and that this Tribunal should refrain from usurping its role.<sup>200</sup> It repeated its submission that Parliament has authorised local authorities to exercise powers and functions in respect of waste water (a core service), which includes the disposal of sewage.<sup>201</sup> Further, the Crown argued that ‘it is not responsible for the day-to-day operation of the statutory framework within which local authorities operate and the various decisions made under the legislation.’<sup>202</sup> Only the local authorities are responsible, it was claimed.<sup>203</sup> The Crown also noted the absence of evidence from local authorities in relation to the management of the ‘Pot’, and it claimed no evidence on the topic has been requested. We consider these submissions further below.

**11.4.4 Fisheries****(1) *The historical legacy of Muaūpoko fishing rights***

In ‘pre-European times, Lake Horowhenua was a clean water supply with an abundance of native fish that were a hugely valued fishery for the Muaūpoko iwi.’<sup>204</sup> As we found in chapters 2 and 8–9, Muaūpoko have had rights to fish Lake Horowhenua and the Hōkio Stream since their settlement of the region.

194. *Weekend Chronicle*, 2 December 2000 (Peter Huria, comp, papers in support of brief of evidence, various dates (doc B11(a)), p [6])

195. Rudd, closing submissions (paper 3.3.18), p 20

196. Transcript 4.1.11, pp 202, 273

197. Transcript 4.1.11, pp 202, 273

198. Crown counsel, closing submissions (paper 3.3.24), p 104

199. Crown counsel, closing submissions (paper 3.3.24), p 104

200. Crown counsel, closing submissions (paper 3.3.24), p 104

201. Crown counsel, closing submissions (paper 3.3.24), pp 104–105. The Local Government Act 2002 (section 124) defines wastewater services as meaning sewerage, treatment and disposal of sewage, and stormwater drainage.

202. Crown counsel, closing submissions (paper 3.3.24), p 105

203. Crown counsel, closing submissions (paper 3.3.24), p 105

204. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 13 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 40)

During the period 1900–56, fishing activity carried on at the lake and on the Hōkio Stream. Moana Kupa, for example, was taught the tikanga involved with the lake, namely those associated with food gathering, harvesting flax, burying the dead in their urupā, and respecting the mauri and wairua of the lake.<sup>205</sup>

Uruorangi Paki, born at Hōkio Beach in 1933, grew up on the Whakarongotai Reserve on the Hōkio A block across the Hōkio Stream from the native township.<sup>206</sup> She, like Moana, grew up with the knowledge of rongoā or Māori medicine and gathering kaimoana.<sup>207</sup> She stated that

Lake Punahau and Hokio were our food baskets. My job was to collect Tohemanga and pipi. Pingao tohemanga is the proper name as tohemanga (toheroa) cannot exist without pingao. We would collect the kai moana by horse and dray. The men would catch freshwater crayfish and tūna.<sup>208</sup>

This memory she shares with Carol Murray, whose kuia used a cart to go and gather flax and eels.<sup>209</sup> Ngapera or Bella Moore recalled that her kuia fished for whitebait at the Hōkio Stream.<sup>210</sup> Other species were in the stream as well.<sup>211</sup>

Mrs Paki remembered the tuna heke and puhi runs in February and March each year, when she accompanied the men of her family.<sup>212</sup> She remembers big tuna from that time, ‘not like what you get today. It has really gotten bad in the last 30 years.’<sup>213</sup>

Tuna were caught through the use of pā tuna or hīnaki.<sup>214</sup> This was normally done in the streams, including the Hōkio Stream, and spears were used as well, especially in the lake.<sup>215</sup>

Carol Murray told us about being on Lake Horowhenua in a canoe named *Hamaria*, filled with eels.<sup>216</sup> That same canoe was used by Moana Kupa who at 82 had clear memories of the years prior to the 1960s.<sup>217</sup> Carol also went eeling with her kuia on the Hōkio Stream.<sup>218</sup> She remembered the tuna runs in the month of March and she stated:

When the eels ran in March there were so many eels you could literally hear them. There were thousands of eels. They would leap out of the water. Today you don’t see anything like that.

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205. Moana Kupa, brief of evidence, 11 November 2015 (doc c7), p 3

206. Uruorangi Paki, brief of evidence, 11 November 2015 (doc c3), pp 1, 3

207. Paki, brief of evidence (doc c3), pp 4–5

208. Paki, brief of evidence (doc c3), p 5

209. Carol Murray, brief of evidence, 11 November 2015 (doc c4), p 1

210. Bella Moore, brief of evidence, 11 November 2015 (doc c5), p 2

211. Kupa, brief of evidence (doc c7), p 3

212. Paki, brief of evidence (doc c3), p 5

213. Paki, brief of evidence (doc c3), p 5

214. William Taueki, brief of evidence (doc c10), p 33

215. William Taueki, brief of evidence (doc c10), p 33

216. Murray, brief of evidence (doc c4), p 1

217. Kupa, brief of evidence (doc c7), p 3

218. Murray, brief of evidence (doc c4), pp 1–2

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We would catch the eels using two hinaki. They were about a meter long a meter wide and a meter deep. One would be in the water and when it filled up we would pull it out of the water and drop the other one in.

The run would last for around four weeks. At the end of the run there was a second run called the tunaheke where big eels would come down the stream. The big eels would get stranded on the beach and you could gather them from there.<sup>219</sup>

Ngapera or Bella Moore said that she would stay with her nannies at the Hōkio Stream during the runs.<sup>220</sup> They would fill boxes with eels and they would be taken to tangi and other gatherings.<sup>221</sup> Moana Kupa said they stayed in tents for weeks at the lake during the eel runs.<sup>222</sup> Henry James Williams remembered spearing eels around the edge of the lake, even when there was no eel run.<sup>223</sup>

The eels and other kaimoana would be dried for use by the families and their relations that lived afar.<sup>224</sup> The sharing of kai was a way of maintaining connections or relationships.<sup>225</sup> Included in the lake and streams available for harvest were delicacies such as kākahi, tohemanga or toheroa, freshwater flounder, whitebait, freshwater crayfish, pipi, cockabullies, mullet, shags, ducks, and duck eggs.<sup>226</sup> The evidence was that these species were an important feature of the way of life of the Muaūpoko people.<sup>227</sup> Ngapera remembered these species being present but, she stated, 'It isn't like that now.'<sup>228</sup> She noted the changes to the lake and the stream and how dirty these water bodies are.<sup>229</sup> In particular, she considered that the Hōkio Stream is unrecognisable and that it does not look like a stream any more.<sup>230</sup>

**(2) The nature and extent of Muaūpoko fishing rights**

Muaūpoko rights were preserved by their title to the lake bed ordered under the Horowhenua Block Act 1896. They were expressly recognised and provided for in the Horowhenua Lake Act 1905 and section 18 of the Reserves and Other Lands Disposal Act 1956 (the ROLD Act). Although hotly disputed during the early part of the twentieth century as to their interpretation, and the metes and bounds of Muaūpoko fishing rights therein recorded, the tribe was able to continue to fish relatively uninhibited until the mid-1920s. As they were virtually landless, they

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219. Murray, brief of evidence (doc c4), p 2

220. Moore, brief of evidence (doc c5), p 2

221. Moore, brief of evidence (doc c5), p 2

222. Kupa, brief of evidence (doc c7), p 4

223. Williams, brief of evidence (doc c11), p 5

224. Paki, brief of evidence (doc c3), p 5; Murray, brief of evidence (doc c4), p 2

225. Kupa, brief of evidence (doc c7), p 1

226. Kupa, brief of evidence (doc c7), p 1; Paki, brief of evidence (doc c3), p 5; Murray, brief of evidence (doc c4), p 3; Moore, brief of evidence (doc c5), p 2; William Taueki, brief of evidence (doc c10), p 31

227. See, for example, Jillian Munro's evidence on the collection of toheroa and use of species from the sea for family gatherings: Jillian Munro, brief of evidence, 11 November 2015 (doc c12), p 2.

228. Moore, brief of evidence (doc c5), p 2

229. Moore, brief of evidence (doc c5), p 3

230. Moore, brief of evidence (doc c5), p 3

became heavily dependent on the resources of the lake and the Hōkio Stream, the birds and the fish and the flax on the banks of these water bodies.

As we found in previous chapters, their fishing rights were gradually undermined over the period 1905–34. First, trout were introduced into the lake by the Wellington Acclimatisation Society in 1907, contrary to the wishes of Muaūpoko. The trout predated on native species, and people other than Muaūpoko were permitted to fish in the lake. This was a breach of those fishing rights guaranteed to the tribe under the above legislation. Numerous other breaches of the Treaty followed, impacting on Muaūpoko's fisheries, including the introduction of perch and the drainage works of the early twentieth century. Whilst the Crown recognised Pākehā as having a right to fish in Lake Horowhenua, ending Muaūpoko's exclusive fishing rights without consent or compensation, the Crown's treatment of Muaūpoko was less than fair and nor did it undertake any appropriate balancing of interests between settlers and Muaūpoko. That position was ameliorated somewhat by the findings and recommendations of the committee of inquiry headed by Judge Harvey of the Native Land Court and HWC Mackintosh, the commissioner of Crown lands, which was held in 1934. That commission recognised the exclusive rights of Muaūpoko to fish.

However, it took until 1953 to achieve a settlement because of the various demands made by the Crown for the free gifting of land by the tribe (see chapter 9). It exerted that pressure before it would confirm their fishing rights. Although the ROLD Act 1956 attempted to record that agreement, and the tribe agreed to its terms, it did not address historical issues, annuities, or rentals, nor is it compensation for any previous interference with Muaūpoko fishing rights. It also set the limit for maintaining the lake at '30 feet above mean low water spring tides at Foxton Heads'. As explained in chapter 9, it did lead to Muaūpoko having the numerical majority on the domain board.

The management of the fisheries of Lake Horowhenua and the Hōkio Stream has been a mixed bag since then. The domain board's powers were limited as it could not control the environmental effects impacting on the lake, stream, and fisheries so as to ensure the tribe's fishing rights remained viable. Muaūpoko and the domain board were not fully and transparently consulted about drainage works and the installation of the concrete weir on the outlet from the lake to the Hōkio Stream (see section 9.3.4(2)). This work was undertaken by the Manawatu Catchment Board and approved by the Marine Department in 1966. While the domain board gave consent, it was on the basis that a 'fish pass' be part of the development. As we discussed, the weir blocked, rather than facilitated, the ingress of native species into the lake and no fish pass was installed. The development of the weir would lead to water temperatures in the lake reaching high levels in the summer months and trapped sediment and sludge in the lake preventing natural flushing. This in turn impacted on the fisheries. We note, however, that the *Lake Horowhenua Accord Action Plan* records that the parties agreed in 2014 that a fish pass should finally be constructed, a matter we discuss further below.<sup>231</sup>

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231. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p13 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 40)



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The domain board had some control over fishing activity (but not the fish species themselves) in terms of the lake. It was considered that it had no authority in terms of the Hōkio Stream until the issue was clarified by the courts. We merely note that the Crown has always assumed unto itself the right to monitor the fishery in both the lake and the stream.<sup>232</sup> This was made clear in two prosecution cases brought under regulations promulgated under the Fisheries Act 1908, which went on appeal to the Supreme Court (now the High Court).<sup>233</sup> We have discussed those cases previously (see section 9.3.4(2)).

In 1992, however, the certainty they had in terms of the nature and extent of their rights was tested when the Crown and certain Māori negotiators settled all Māori claims to commercial fishing rights and altered the nature of how customary fishing rights could be enforced. In exchange, Māori received \$150 million for the purchase of Sealord Products Ltd and 20 per cent of all new fish species quota. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 gives effect to this settlement. The 1992 Act also amended the Treaty of Waitangi Act 1975, removing the Tribunal's jurisdiction for claims in respect of commercial fishing (but not customary fishing).<sup>234</sup>

As a result of further litigation pursued in 1997 by Te Rūnanga ki Muaūpoko, the nature of Muaūpoko fishing rights were arguably limited. That is because in *Te Runanga ki Muaupoko v The Treaty of Waitangi Fisheries Commission* (1997), Justice Ellis in the High Court ruled that Muaūpoko's fishing rights as defined in the ROLD Act 1956 did not extend beyond the mouth of the Hōkio Stream at Hōkio Beach.<sup>235</sup>

Muaūpoko argued before us their rights are subject only to the ROLD Act. They also want to control commercial and recreational fishing on the lake and the Hōkio Stream. However, commercial and recreational fishing on the lake is regulated by the fisheries legislation. The Fisheries (Central Area) Commercial Fishing Regulations 1986 (regulation 15) once protected the eel fishery from commercial use. But in 2006 those regulations were revoked. According to Jonathan Procter, the Crown 'made this decision unilaterally' and 'with no consultation with Muaūpoko'.<sup>236</sup>

There is now an eel quota covering the region and eels are managed as large stocks (although there is no quota specific to the lake itself managed by the Ministry of Primary Industries). An eel factory is situated in Levin which Aotearoa Fisheries Limited and Ngāti Raukawa have had or continue to have interests in. According to Dr Procter, since 2006 Muaūpoko were advised by the Crown 'that the only way to manage commercial fishing on the lake is to trespass anyone who accesses the land for fishing who is not Muaupoko'. Dr Procter alleged that the Ministry of Primary Industries does not recognise Muaūpoko fishing rights in current legislation and that they are 'still forced to navigate through a range of permitting procedures'. The Ministry, he advised, also does not 'recognise any special customary areas and will

232. Hamer, "A Tangled Skein" (doc A150), pp 191, 193, 296–297

233. Hamer, "A Tangled Skein" (doc A150), p 296

234. Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, preamble (1), ss 9–10, 40

235. *Runanga ki Muaupoko v The Treaty of Waitangi Fisheries Commission & Attorney-General* CP 162/97, High Court Wellington, 17 November 1997 Ellis J

236. Procter, brief of evidence (doc C22), pp 18–19



not support Muaūpoko to establish those already recognised areas under its current regime primarily for fear of the response of migrant iwi.<sup>237</sup>

Since the Sealord settlement, the Ministry for Primary Industries has managed the quota fisheries, DOC has responsibility for the management of freshwater fish populations, and regional councils have responsibility to manage water quality. The lake trustees may control access, but individual Muaūpoko people can still take fish for customary purposes, reasonably uninhibited save for the current state of the fisheries. The issue of whether they can take fish within the marine environment of the Hōkio Stream without compliance with the new customary fisheries regime under the Treaty of Waitangi (Fisheries Claims) Act 1992 and the Māori Customary Fisheries Regulations is a live one for future clarification by the courts.

### **(3) Impact of pollution on fisheries**

There has been a spate of events where certain fish populations in the lake appear to have wholly or partly collapsed, or individual fish kills were reported, but the scale of such events was never scientifically tracked or recorded. These events included eels in 1923,<sup>238</sup> shellfish after the introduction of effluent into the lake,<sup>239</sup> and fish in 1966<sup>240</sup> and 1987.<sup>241</sup> Due to the lack of monitoring and therefore minimal amounts of scientific data for this period, it is not possible to attribute those events or kills to pollution, effluent, or nutrient loading. What we can note is that Muaūpoko placed rāhui over the lake and stream in December 1957 and August 1962, and the Health Department periodically issued warnings against eating freshwater mussels (kākahi) from 1960 through the 1970s.<sup>242</sup> The feelings of Muaūpoko about the nature of their fisheries are perhaps summed up by Mrs Tatana who stated that

Compensation must be paid to the Muaupoko Owners for the damage and destruction of their rights to fish the lake undisturbed. The shell fish beds are covered with sewer sludge and not safe to eat. My brother Joseph thought it was safe, because he knew areas of the lake not covered with sludge – it wasn't too long after, he contracted hepatitis the serious one, and nearly lost his life.<sup>243</sup>

Moana Kupa lamented that the state of the lake and the Hōkio Stream meant what she learnt as a young person in terms of the tikanga involved with the lake, namely those associated with food gathering, harvesting flax, burying the dead in their urupā, and respecting the mauri and wairua of the lake, could not be passed on to her grandchildren.<sup>244</sup> She said ‘We used to get so much kai from those places, but now even if you could get any you wouldn't touch it because of the pollution.

237. Procter, brief of evidence (doc C22), pp 18–19

238. Hamer, “A Tangled Skein” (doc A150), pp 80–83

239. Hamer, “A Tangled Skein” (doc A150), pp 206–209

240. Hamer, “A Tangled Skein” (doc A150), p 308

241. Hamer, “A Tangled Skein” (doc A150), p 309

242. Hamer, “A Tangled Skein” (doc A150), pp 208–211, 224

243. Ada Tatana, closing submissions, 12 February 2016 (paper 3.3.14), p 20

244. Kupa, brief of evidence (doc C7), p 3

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We all know, if you want to get sick, swim in the lake. If you want to get really sick, eat something from it. It was never like that before.<sup>245</sup>

Jillian Munro also expressed her concern about the ability of Muaūpoko to teach tikanga and kaitiakitanga to the next generation due to the state of the lake and streams.<sup>246</sup> All they can do is reminisce, as William (Bill) Taueki does when he passes on the knowledge of the tuna heke to Muaūpoko children, whilst noting the eel runs have ceased and that they cannot catch tuna suitable for food.<sup>247</sup> That is because most of the eels in the lake are too small. He stated:

The main tuna that we would catch would be the silver belly eels. During the tuna heke we would get huge ones. We would also catch koura in the Patiki Stream. We would catch kakahi from the Lake, put them in the Patiki Stream to let them spit for a week before you took them out, so you got rid of that dirt taste. . . . We used to eat tuna about a couple of times a week but now it's like once or twice a year. We can't even put tuna on the table at hakari.<sup>248</sup>

He stated the lake does not 'support aquatic life to the level it used to' and he advised that both 'fish and eel depletion is extreme'.<sup>249</sup> Much of this decline, he noted, has occurred during his lifetime.<sup>250</sup> He has noticed that a decline in water quality has impacted on obtaining aquatic plants and food such as kōura, eels, kākahi, pātiki, and mullet.<sup>251</sup> He considered that Muaūpoko's traditional kaitiakitanga role had been usurped by the Crown delegating powers over the lake and its environs to local authorities.<sup>252</sup>

Henry Williams and Bill Taueki gave evidence that Muaūpoko people could still take some species from the lake, but that they were unclean. Kākahi, for example, were taken and cleaned through a filtering process in containers filled with fresh water. This was a means of expelling the pollution or paru that may have affected the ability to eat the shellfish.<sup>253</sup> Mr Williams told us that when he was young such a process was not needed and that you could take shellfish straight from the lake.<sup>254</sup>

The Pātiki Stream, we were told, was no longer filled with flounder and freshwater kōura.<sup>255</sup> The Hōkio Stream no longer sustains the same numbers of whitebait and eels.<sup>256</sup> At the beach there are restrictions on the taking of toheroa which did not apply to Muaūpoko when Henry Williams was young.<sup>257</sup> Even if these species were

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245. Kupa, brief of evidence (doc c7), p 4

246. Munro, brief of evidence (doc c12), p 6

247. William Taueki, brief of evidence (doc c10), p 33

248. William Taueki, brief of evidence (doc c10), p 33

249. William Taueki, brief of evidence (doc c10), p 34

250. William Taueki, brief of evidence (doc c10), pp 34, 45

251. William Taueki, brief of evidence (doc c10), pp 46–48

252. William Taueki, brief of evidence (doc c10), p 49

253. Williams, brief of evidence (doc c11), p 6

254. Williams, brief of evidence (doc c11), p 6

255. Williams, brief of evidence (doc c11), pp 8–9

256. Williams, brief of evidence (doc c11), pp 9–10

257. Williams, brief of evidence (doc c11), p 10

freely available, shellfish on the Horowhenua coast from Hōkio to Ōtaki appear to regularly have concentrations of *Escherichia coli* bacteria indicative of widespread faecal contamination.<sup>258</sup> Tuatua and pipi were particularly affected.<sup>259</sup>

It seems that the hypertrophic state of the lake is not preventing the random presence of certain native species of fish. Further research is needed, but a fish survey undertaken by the Horizons Regional Council in 2013 indicated that six native species were in the lake: common smelt, common bully, inanga, grey mullet, and short- and long-fin eels.<sup>260</sup>

However, black flounder and mullet were absent, and while there was an abundance of eel/tuna in the lake, eels greater than one kilogram were ‘nearly absent’.<sup>261</sup> It was noted that these findings may be a sign of overfishing of tuna, but further research at that time was needed.<sup>262</sup> Pātiki or flounder, eels, and inanga ingress into the lake from the Hōkio Stream has not been possible since the concrete weir was installed at the top of the Hōkio Stream in 1966.<sup>263</sup> While eels and inanga are still to be found, they are entering from alternative points. There are pest fish in the lake, namely perch, koi carp, and goldfish.<sup>264</sup> However, the populations of pest fish had not reached densities such as to pose a threat to the lake.<sup>265</sup> By this time, trout were not mentioned as present in any great numbers in the lake.

However, pest fish are an issue for lake management. According to Dr Procter:

[t]he fish in the lake at the moment are undersized due to overfishing and low recruitment. There is a general lack of native fish recruitment due to barriers on the Hōkio Stream such as the weir and toxic conditions at certain times of the year. Pest fish numbers are not critical but they are growing.<sup>266</sup>

Nearly all the claimant tangata whenua witnesses who live in Horowhenua were concerned for the state of the fisheries. Without exception, they described the distasteful appearance and smell associated with taking fish from the lake. At least one witness from Muaūpoko soaked kākahi in fresh water for days in order to remove impurities. Others say they cannot eat fish from the lake because of the pollution.

258. Manaaki Taha Moana Research Team, *Faecal Contamination of Shellfish on the Horowhenua Coast* (Palmerston North: Manaaki Taha Moana Research Team, 2014) (doc B11(b)), p 6. See the report generally.

259. Manaaki Taha Moana Research Team, *Faecal Contamination of Shellfish* (doc B11(b)), p 13

260. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 13 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 40)

261. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 13 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 40)

262. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 13 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 40)

263. Hamer, “A Tangled Skein” (doc A150), pp 190–191, 196

264. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 14 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 41)

265. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 14 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 41)

266. Procter, brief of evidence (doc C22), p 9

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**11.5 RESTORATION EFFORTS****11.5.1 Introduction**

During the period of the restoration work until 2000 and over the next decade, attempts to restore the lake were hampered by lack of finance. Prior to 1990, the Lake Horowhenua lake trustees and some of the owners' regularly expressed preference for restoration was the removal of sediment and sludge from the lake at an estimated cost of \$22 million.<sup>267</sup> Other owners opposed this view, for example, Vivienne Taueki, due to fears that this action would have significant effects on the fisheries of the lake.<sup>268</sup> Other measures that have created some controversy include removing weed from the lake before it seeds to cut back the exotic species and allow native plants to re-establish themselves.<sup>269</sup> According to Mr Bill Taueki, the Horowhenua District Council believed that this would help to fix the toxicity of the lake. He expressed concern that the combine harvester would catch eels or destroy habitats while it was carrying out this work.<sup>270</sup> Other suggestions have included spraying Roundup to kill certain species of weed. Again, Mr Bill Taueki and his whānau objected to this process although the work did proceed.<sup>271</sup> The process favoured by him was to flush the lake with fresh water by extracting the clean water from underground and using this to replace the polluted and toxic water that was in the lake.<sup>272</sup>

In part, the story behind restoration attempts and ideas is laced with the aspirations of a new generation of Muaūpoko. Some believe that they have priority rights because of their ancestry and others seek a more egalitarian approach to the leadership of the tribe. This tension between the two groups, who are also clearly aligned by whakapapa, whānau, and hapū affiliations, is reflected in the nature of the governance arrangements in place concerning the lake. Everywhere there is dissent, even among the lake trustees and the beneficial owners of the lake.<sup>273</sup> Local authorities and DOC have no way of knowing for sure whose view should prevail given that they are also obliged to consult with tangata whenua who are kaitiaki of the area and provide for and protect the relationship of all Muaūpoko with their ancestral lands and waters (as provided for in sections 6, 7, and 8 of the RMA 1991). In addition, as we discussed in chapter 9, the domain board and the representation of Muaūpoko is an issue. Consulting with the Muaūpoko Tribal Authority or with the Muaūpoko representatives on the domain board is not enough either, as neither group has a statutory mandate to manage all matters concerning the lake. What is clear is that no one, including DOC, the relevant local authorities, or Muaūpoko, has the magic bullet to answer the issues that need to be addressed concerning the lake. In this section we review whether this governance framework has hindered mitigation and restoration efforts for the lake to ascertain what more, if anything, can be done in Treaty terms.

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267. Hamer, "A Tangled Skein" (doc A150), pp 391–392

268. V Taueki, brief of evidence (doc B2), p 25

269. Procter, brief of evidence (doc C22), p 9

270. William Taueki, brief of evidence (doc C10), p 46

271. William Taueki, brief of evidence (doc C10), p 45

272. William Taueki, brief of evidence (doc C10), p 51

273. See, generally, *Taueki v McMillan & Ors* (2014) 324 Aotea MB 144–182 (doc B2(j)).

**11.5.2 Restoration efforts in the 1990s**

In 1991, the lake trustees authorised an environmental and economic study of the lake using money obtained through an academic grants programme.<sup>274</sup> The ensuing report, entitled ‘Revitalising Lake Horowhenua – An Environmental Assessment and Management Strategy’, proposed ‘discing or harrowing the bed of the lake to break up the sediment’ which would allow it to be flushed out of the lake.<sup>275</sup> A trial that went ahead without notification to DOC was halted at the latter’s behest pending further studies.<sup>276</sup>

DOC preferred a focus on improving water quality by working closely with local, regional, and central government.<sup>277</sup> This strategy commenced in the 1990s when it was considered that a combination of measures could assist in restoration of the lake.<sup>278</sup> It was also recommended that a technical working group be established to develop the conservation management strategy. This group would have representatives from the Horowhenua District Council, Manawatu-Wanganui Regional Council, the lake trustees, DOC, and Federated Farmers.<sup>279</sup>

A scientific report commissioned by DOC, entitled ‘Lake Horowhenua and its Restoration’, was prepared in 1991. Dr Hamer stated that it

concluded that the lake was releasing more phosphorus from the sediment than it was receiving from inflows, and so was ‘cleansing itself naturally’. They calculated it might take another 30 years before ‘a new equilibrium’ was achieved in this way, and considered several options for enhancing the restoration process. These included flushing the lake with water diverted from the Ōhau River, which would involve a ‘substantial cost’, as well as diverting groundwater or stripping the lakewater of phosphorus in a special plant, which were discounted as ‘inappropriate and inadequate respectively’. The phosphorus load entering the lake from Levin (presumably through the stormwater) appeared ‘to be very substantial’ and in need of further investigation. Other methods of reducing the nutrient load in the lake included ‘inactivation’ of the phosphorus in the lake sediment or even the sediment’s removal, although the latter would be ‘a very costly operation’. If cost were no barrier they recommended inactivation of the lake sediment through chemical treatment and reduction of phosphorus entering the lake from Levin, and if little could be spent then they recommended supplementing the ‘natural cleansing’ through reducing the phosphorus load from the town and seasonally flushing the lake by varying its level.<sup>280</sup>

An advisory group was then established with landowners around the lake in September 1991. Arising from this development, the domain board released its conservation management proposal, entitled ‘Revitalising Horowhenua: Conserving

274. Hamer, “A Tangled Skein” (doc A150), p 383

275. Hamer, “A Tangled Skein” (doc A150), p 383

276. Hamer, “A Tangled Skein” (doc A150), p 383

277. Hamer, “A Tangled Skein” (doc A150), p 382

278. Hamer, “A Tangled Skein” (doc A150), p 382

279. Hamer, “A Tangled Skein” (doc A150), p 382

280. Hamer, “A Tangled Skein” (doc A150), p 384



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the Lake Horowhenua and Hokio Stream Wetlands'. The proposal included destocking and planting round the entire lake and the length of the Hōkio Stream.<sup>281</sup>

Work then started on prioritising the restoration work. We were told that, without consulting Muaūpoko as a tribe, DOC decided to prioritise destocking and revegetating the lake surrounds over removing the sludge or weeds from the lake and the outlet weir. Within months there were allegations that the tribe (as opposed to the Muaūpoko representatives on the domain board) was not being consulted on the restoration work. It appears that those of the tribe who complained wanted more priority given to investigating removing the sludge on the lakebed.<sup>282</sup> They requested DOC convene a meeting with the tribe.

This resort to the tribe and then to the hapū, if the domain board's views conflict with the opinions of certain members of the tribe, is best illustrated by reference to the following evidence given by Mr Bill Taueki:

Originally, members of the Domain Board were elected. Elections used to take place along with the local body elections. The process was then changed. Muaūpoko decided amongst themselves who would be the Domain Board members for Muaūpoko. I became a member of the Domain Board in 1992 through this process. I was on the Board for one term, which was three years. While I was on the Board I was always a whanau, hapu and iwi representative. I never acted without first discussing any of my proposed actions with those I represented.

I was not re-appointed to the Board after this first term. This was because of internal politics. The Domain Board members that held the position prior to my term of service had decided to have the Mayor replace the DOC representative as the chair of the Domain Board. But when I was elected we asked that this resolution be reversed. We didn't want the transfer of the chairmanship to the Mayor of the Council. We actually wanted the chairmanship to go to Māori. Specifically we wanted Muaūpoko to be the chair of the Board. Given the importance of the Lake and its surroundings to our people, we thought that this was a fair request. . . .

The Board has 4 Māori members, all Muaūpoko. It has 3 Pākehā Council members. It was chaired by the Crown representative who was a member of the Department of Conservation. The chair has the casting vote for all decisions. This is why we argued that the chair should be Muaūpoko. We thought that Muaūpoko should have the casting vote for all contentious decisions. The way the Domain Board is set up now there is still a Pākehā majority that can override the Muaūpoko representatives. This is because the casting vote equals two votes in effect.

During my time on the Board, we were not paid to attend Board meetings. The Board was heavily underfunded. It was so underfunded that it was not able to properly manage and complete the Lake restoration. I believe that it should have been turned into an iwi Board. It should have operated in that manner. If this had been done, Muaūpoko would have been able to control and lead the Lake's restoration. Because of how much the Lake means to us, we would have made sure that the restoration was

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281. Hamer, "A Tangled Skein" (doc A150), pp 384-385

282. Hamer, "A Tangled Skein" (doc A150), p 386



completed properly and our relationship with the Levin community would have been strong. If it had worked, the community would have come over to us.

Muaūpoko was supposed to have the majority on the Domain Board. In this way we were supposed to have been able to express our mana over the Lake. The Domain Board process was supposed to have allowed Muaūpoko to make the important decisions about the use of the Lake. But the Domain Board is still dominated by the Council representatives. The Secretary of the Domain Board is one of the Council members. This means that they set the agenda of the meetings. They control the issues that are put to the Domain Board for voting. The Muaūpoko Domain Board members don't always get a proper say. We do not agree that the Domain Board in its current form allows Muaūpoko to properly express our mana over the Lake.

We know that business interests and people talk to the Council about how they would like to access and use the Lake before they talk to the Lake Trustees or even the Domain Board. These groups put their proposals to the Council regarding the Lake before they talk to Muaūpoko. In most cases the agreements for the use of the Lake are made through those private interactions. The Council comes to arrangements with these people in the first place and then puts it on the Domain Board agenda for the consideration of the Muaūpoko Domain Board members. This is how I have seen the process working. . . .

There is no legal right that I am aware of that requires the Domain Board to obtain the Lake Trustees' consent before it makes decisions regarding the use of the Lake and the surrounding areas. Considering that we are the Lake owners, you would think that the Domain Board would have to obtain our consent before it makes decisions. Especially when it comes to really hard decisions or decisions where there is the chance that the Lake will be further polluted. I am not aware of any legal requirement made by the Crown in the legislation that created the Domain Board that requires it to consult with the Lake Trustees before it makes its decisions. I do understand that there is other law which means that the Domain Board may have this duty to the Lake Trustees but I think that the Crown should have made it clear that the Domain Board owed this responsibility to the Lake Trustees. All of the legislation that relates to the Domain Board should make it clear that it has a strict requirement to meet regularly with the Lake Trustees and discuss any decisions with us before it makes those decisions. I also think that the Crown should monitor the Board to make sure that it properly consults with the Lake Trustees before making decisions regarding the use of the Lake and the other domain areas.

In general I think that the Domain Board is run very badly. The way in which the Domain Board is run on a monthly basis has never been an answer. The issues that the Domain Board deals with occur on a daily basis. You can't just deal with them all once a month.

They should have set up the Domain Board to have 2 members from the Council, and 2 from Muaupoko. But any Council member on the Domain Board is conflicted because the Council is illegally discharging waste into the Lake. Because of this kind of issue, I just can't see the Accord working. How will the Accord (which I will talk

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more on later) work when the Regional Council won't make the local Council comply with their rules or even comply with those rules itself? They are basically treating the Lake like a pond because the weir means there is no flow going out. It's stagnant.<sup>283</sup>

As we discussed in chapter 9, legislative reforms proposed in the 1980s would have transferred control of the lake from the domain board to the trustees, or increased Muaūpoko representation on the board, or required the lake trustees' agreement to any domain bylaws, but no reforms were enacted. We found the Crown's failure to reform the ROLD Act arrangements in the 1980s to have been a breach of Treaty principles (see section 9.3.5(2)). Here, we note that in response to the allegations of no consultation with the tribe, DOC Regional Conservator McKerchar advised the primary objective was to consult with land trusts around the lake before moving forward to consult the iwi or tribe as a whole.<sup>284</sup> He also warned that he would redirect staff to other work unless there was a 'clear indication of support from the lake owners and trustees.'<sup>285</sup> Finally, he expressed disappointment at the lack of cohesion within the iwi, the owners, and the trustees which had contributed to an 'impasse'.<sup>286</sup>

Mr McKerchar also advised his Minister that he was not prepared to arrange any further meetings with Muaūpoko as he did not want his staff to be 'subjected to the abuse and offensive behaviour which has been the norm for recent meetings with Muaupoko'.<sup>287</sup> He stated there were some Muaūpoko kaumātua working with DOC and the Levin District Council who approved of their restoration priorities.<sup>288</sup> He advised his Minister of the planning for the restoration project in the following terms:

Over the last eighteen months departmental staff have held frequent meetings with Muaupoko and the Levin District Council with a view to reaching agreement on a restoration and enhancement programme for the dewatered area, the one chain strip and some private land surrounding the lake. The objective is to establish artificial wetland and revegetate the pasture land surrounding the lake with a view to improving water quality. At the present time storm water run-off from the Levin Borough and agricultural run-off from the surrounding land is fed directly into the lake by man made drains. The department has offered technical expertise and supervision of the programme, and the local authority has offered to provide its plant nursery and a substantial amount of finance for the scheme. Despite this generous gesture, factions within the iwi are strongly opposed to this. Dialogue culminated in a meeting on Saturday 21 March where two departmental staff who supported the Council, were

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283. William Taueki, brief of evidence (doc C10), pp 58–61

284. Hamer, "A Tangled Skein" (doc A150), p 386

285. D McKerchar to KH Paki, chair, Lake Horowhenua Trustees, 3 April 1992 (Hamer, "A Tangled Skein" (doc A150), p 387)

286. D McKerchar to KH Paki, chair, Lake Horowhenua Trustees, 3 April 1992 (Hamer, "A Tangled Skein" (doc A150), p 387)

287. D McKerchar to director-general of conservation, 9 April 1992 (Hamer, "A Tangled Skein" (doc A150), p 387)

288. Hamer, "A Tangled Skein" (doc A150), p 387

subjected to what I consider to be totally unacceptable abuse and criticism. The dialogue over the last eighteen months has been carried out with people we consider to be the senior Kaumatua of Muaupoko. There is no clearly accepted rangatira for the iwi, and we have been dealing with various factions who enjoy Kaumatua status. There is however a young radical element within the iwi who no longer accept the status of the Kaumatua and seem to oppose everything the Kaumatua either suggest or agree to. . . . To accede to their request for a wider iwi meeting would be to give this element a status which they do not and should not enjoy.

While accepting the department's obligations under the Treaty of Waitangi, I think there is a limit to the situations one can reasonably expect public servants to be subjected to, and further abuse and insults from some elements within Muaupoko goes beyond the limit as far as I am concerned. . . . [T]here will certainly be ongoing dialogue but it will be with senior Kaumatua of the iwi. Should they wish to call a meeting of the whole iwi, then I would be quite relaxed, but it is certainly not something that I intend to initiate.<sup>289</sup>

The Minister turned down the request to meet.<sup>290</sup> All was not lost, however, as the appointment of new lake trustees in October 1992 and Muaupoko representatives for the domain board in March 1993 marked a turning point. A large number of Muaupoko became involved the restoration project.<sup>291</sup> The project was officially launched by the Minister of Tourism in April 1993.<sup>292</sup>

However, the ceremony was marked by the protesting of two of the lake trustees, Charles Rudd and Bill Taueki. Mr Taueki (who was replaced on the domain board) complained to the director-general of conservation that DOC should be fulfilling its duties under the RMA 1991 and Conservation Act 1987 by consulting with hapū, namely Ngāti Tama-i-Rangi.<sup>293</sup>

Mr Bill Taueki said of this time that:

DOC had its own plans more to do with establishing more wetlands in the area. DOC took complete control over the restoration. I am not criticising DOC for trying to get involved. I support the Crown taking steps to try and restore the Lake and the Horowhenua region to its previous, pre-settler state. However, by getting involved, DOC removed our direct involvement in any of the planning. From then on DOC had a plan, they initiated the plan and took all of the steps with respect to their plan. They brought in other people to do the work, liaison officers and people from other iwi and hapū. We were pushed to the side and had to watch as DOC, other iwi and other hapū controlled and made all of the decisions regarding the restoration of our Lake. . . .

I made it clear to DOC that I was unhappy about the way that they carried the restoration out. I did tell them that the steps that they were taking were beneficial to the

289. D McKerchar to director-general of conservation, 9 April 1992 (Hamer, "A Tangled Skein" (doc A150), p 387)

290. Hamer, "A Tangled Skein" (doc A150), p 388

291. Hamer, "A Tangled Skein" (doc A150), p 389

292. Hamer, "A Tangled Skein" (doc A150), p 389

293. Hamer, "A Tangled Skein" (doc A150), p 390

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Lake, especially the aspect of the plans that involved planting around the Lake. But I was unhappy about the lack of proper consultation with the right people. There was no consultation with my whānau and my hapū. My whānau and hapū has a very special relationship with the Lake as I have described above. It was my tupuna Taueki who ensured that Muaūpoko kept its ahi kaa on the Horowhenua lands and the Lake.<sup>294</sup>

Mr Rudd and Mr Bill Taueki's concerns did not stop the planting programme and the restoration project from continuing. The scale of the planting is impressive, and was described by one participant as 'the biggest replanting project being undertaken in the country'.<sup>295</sup>

Essentially, the shoreline was divided into seven separate ecosystems and 75 individual segments of around one hectare each, with every segment having its own planting plan.<sup>296</sup> It was conducted in stages to allow less hardy species to be planted behind natural windbreaks such as flax.<sup>297</sup> The lake trustees received funding and other support for the project from a variety of agencies, including the Lottery Grants Board, and local and central government agencies.<sup>298</sup> By the end of the year 2000, 122,000 flax plants and 2,000 trees had been planted. The project appears to have been a great success and the lake trustees were presented with a conservation award at Parliament in recognition of their work on the project.<sup>299</sup>

This planting programme was augmented by an agreement reached between DOC, the district and regional councils, and the lake trustees who agreed to a five-year conservation management strategy.<sup>300</sup> As Paul Hamer stated, under this agreement, the lake trustees 'would continue their planting programme, the district council would reduce the nutrient load entering the lake from its stormwater, and the regional council would monitor water quality'.<sup>301</sup>

With the restructuring of the local authorities in the 1980s and the introduction of the RMA 1991, the new Manawatu-Wanganui Regional Council, later Horizons, took over the management of the water in the lake and the stream. It worked with the lake trustees, DOC, and the Horowhenua District Council to eventually produce the *Lake Horowhenua and Hokio Stream Catchment Management Strategy* (1998) which contained their long-term goal to achieve within 20 years.<sup>302</sup> The ambitious kaupapa or vision of the strategy was that the

water quality [would be] improved to enhance tangata whenua and amenity values and the life supporting capacity of the water and its ecosystem; [that] the lake surrounds

294. William Taueki, brief of evidence (doc C10), pp 52–53

295. D Lucas, 'Ancient Lake to Live Again', *Forest & Bird*, no 288, May 1998, pp 20–21 (Hamer, "A Tangled Skein" (doc A150), pp 289–390)

296. Hamer, "A Tangled Skein" (doc A150), p 390

297. Hamer, "A Tangled Skein" (doc A150), p 390

298. Hamer, "A Tangled Skein" (doc A150), p 390

299. Hamer, "A Tangled Skein" (doc A150), p 390

300. Hamer, "A Tangled Skein" (doc A150), p 391

301. Hamer, "A Tangled Skein" (doc A150), p 391

302. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p i (Procter, appendices to brief of evidence (doc C22(a)), p 2002)

[would be] returned to their heavily vegetated state; [that the] streams draining the catchment [would] have riparian margins; and [that] people living in the catchment [would be] aware and focused on the protection of the lake and the stream.<sup>303</sup>

The problem was that the water quality in the lake continued to decline due to nitrogen, phosphorus, and sediment loading, and measures taken to this point had to be augmented by further work. The One Plan discussed below is now the latest regional plan under the RMA 1991 affecting the lake and the Hōkio Stream. We turn now to consider what impact that document has had on the governance of these taonga.

### 11.5.3 Horizons – the ‘One Plan’

Under the Resource Management Act 1991, the Manawatu-Wanganui Regional Council has produced a regional plan, the ‘One Plan’, which describes the lake with ‘targeted Water Management Sub-zones’. The Lake Horowhenua (Hoki\_1a) zone covers the whole lake catchment above the outlet into the Hōkio Stream, while Hōkio (Hoki\_1b) covers Hōkio Stream downstream of the outlet.<sup>304</sup>

In August 2012, the Environment Court rejected arguments made by the regional council against including Lake Horowhenua within the control regime of the One Plan. These arguments were made on the basis that there had been limited monitoring occurring prior to 2012 such that the cause of the state of the lake was not properly understood. In response the court stated:

That the problems of these lakes, with Lake Horowhenua as the worst case, are complex and remedies may extend beyond limitations of non-point source discharges, is absolutely not a reason to say . . . *it’s too hard* . . . and do nothing about something that unquestionably must be contributing to the problem. [Emphasis in original.]<sup>305</sup>

The Environment Court noted in relation to Lake Horowhenua (Hoki\_1a and Hoki\_1a) that all parties, including the Department of Conservation and the regional council, agreed that the current state of the lake was hypertrophic and required management action.<sup>306</sup> The court found that the case for bringing Lake Horowhenua and a number of other lakes and management zones ‘into a management regime so that their situation can be improved (even if not completely cured) [was] overwhelming’.<sup>307</sup> It concluded that ‘Lake Horowhenua, the coastal lakes, and their related subzones should all be brought within the rules regime’ of the One Plan.<sup>308</sup>

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303. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hoki Stream Catchment Management Strategy*, p 2 (Procter, appendices to brief of evidence (doc c22(a)), p 2011)

304. Procter, brief of evidence (doc c22), pp 10–11

305. *Andrew Day & Ors v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182, para 5–60

306. *Day & Ors v Manawatu-Whanganui Regional Council* [2012] NZEnvC 182, para 5–61

307. *Day & Ors v Manawatu-Whanganui Regional Council* [2012] NZEnvC 182, para 5–62

308. *Day & Ors v Manawatu-Whanganui Regional Council* [2012] NZEnvC 182, para 5–217



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The plan sets out, in a series of dense tables, the values that are to be aimed for in these catchments. The Horowhenua catchments are to be managed for their:

- a) Life-supporting Capacity: The water body and its bed support healthy aquatic life/ ecosystems.
- b) Aesthetics: The aesthetic values of the water body and its bed are maintained or enhanced.
- c) Contact Recreation: The water body and its bed are suitable for contact recreation (including swimming).
- d) Mauri: The mauri of the water body and its bed is maintained or enhanced.
- e) Industrial Abstraction: The water is suitable as a water source for industrial abstraction or use, including for hydroelectricity generation.
- f) Irrigation: The water is suitable as a water source for irrigation.
- g) Stockwater: The water is suitable as a supply of drinking water for livestock.
- h) Existing Infrastructure: The integrity of existing infrastructure is not compromised.
- i) Capacity to Assimilate Pollution: The capacity of a water body and its bed to assimilate pollution is not exceeded.<sup>309</sup>

Intensive farming in the catchment – both dairying and intensive vegetable growing – is subject to the nitrogen controls under the One Plan. According to Dr Procter:

[o]ne of the most important changes with the One Plan is that it requires all new and existing intensive agricultural land uses in the Hokio catchments to prepare nutrient management plans covering their ‘non-point source’ emissions of nitrogen and provide them annually to the regional council and seek a non-notified resource consent which sets out monitoring and review conditions. These management plans must show how the farmer/horticulturalist intends to keep within nitrogen leaching limits or otherwise obtain consents to exceed them. The nitrogen leaching limits vary depending on the land use capability classes and seek improvements generally over a 20 year period.<sup>310</sup>

Mr Bill Taueki remarked that the One Plan became operative on 1 July 2015 and iwi groups were supportive of it because it appeared to place strict regulations on discharges into the lake and the Hōkio Stream.<sup>311</sup> That, in his view, has not occurred because of rules 14-1, 14-2, and 14-4 in the One Plan, which describe consents for the release of agrichemicals as restricted discretionary consents.<sup>312</sup> Mr Taueki claimed these provisions are a breach of the Treaty.

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309. Procter, brief of evidence (doc c22), p 11

310. Procter, brief of evidence (doc c22), p 12

311. William Taueki, brief of evidence (doc c10), pp 35-36

312. The One Plan describes this as ‘Policy 14-1’. Mr Taueki said ‘Rule 14-1’. The summary of rules table classifies 14-1 as ‘controlled’ and 14-2 as ‘restricted discretionary’. See One Plan (available online), pp 11-4, 14-1, 14-2.



He referred the Tribunal to a Radio New Zealand article which detailed instances since the One Plan came into effect where the council has granted restricted discretionary consents. According to that article, even before the One Plan came into effect, in July 2014 the Manawatu-Wanganui Regional Council ‘agreed to remove certain data tables from the discretionary consents’ that were issued to Dairy NZ.<sup>313</sup> He then noted:

As recent as October 2015, the Manawatu-Whanganui Regional Council has said that the tighter controls on nitrate leaching under the One Plan are too hard to reach, and it is giving farmers more discretionary consents to allow them to pollute more. Of 61 consents that have been issued under the operative One Plan, only nine have met the standards.<sup>314</sup>

The issue for us is that this evidence relates to the entire Manawatū-Whanganui region and it is difficult to know how many of these discretionary consents were issued within the Lake Horowhenua catchment. What we do know is that in 1997 there was only one water consent to discharge dairy-shed waste into the lake. There were 11 land consents to discharge to land within the Lake Horowhenua area and 19 within the Hōkio Stream area.<sup>315</sup> We also know there were 22 consents for the abstraction of groundwater within the Lake Horowhenua and Hōkio Stream catchment.<sup>316</sup> We have no similar data concerning the nature of consents granted since the One Plan became operative, but a recent decision of the Environment Court stated that no applications for consents under Rules 14–2 and 14–4 had been declined by the regional council.<sup>317</sup> As the parties have not had a chance to comment on this decision, we merely note it as a point of interest.

Dr Procter also believed that under the One Plan regime ‘there is insufficient weight given to cleaning up the lake and stream’. He referred to the fact that the ‘Regional Council had told the Environment Court that it did not want the Lake to be in a “targeted Water Management Sub-zone” with the controls that the Environment Court ultimately imposed’.<sup>318</sup> The inference was that the regional council was not prioritising the lake and the stream.

The National Policy Statement for Fresh Water Management 2014 may or may not assist. Promulgated under the RMA 1991, the National Policy Statement sets out the objectives and policies for freshwater management under that Act. All regional plans and policies must comply with the National Policy Statement. As Dr Procter

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313. Radio New Zealand, ‘Questions Asked over Dairy Pollution Documents’, 8 October 2015, <http://www.radionz.co.nz/news/regional/286412/questions-asked-over-dairy-pollution-documents>

314. William Taueki, brief of evidence (doc c10), p 36

315. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p 6 (Procter, appendices to brief of evidence (doc c22(a)), p 2015)

316. Manawatu-Wanganui Regional Council, *Lake Horowhenua and Hokio Stream Catchment Management Strategy*, p 9 (Procter, appendices to brief of evidence (doc c22(a)), p 2018)

317. *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 (21 March 2017)

318. Procter, brief of evidence (doc c22), p 13

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stated, those standards may be lower than what is required under the One Plan.<sup>319</sup> Conversely, there has been Environment Court authority<sup>320</sup> to suggest that such plans and policy statements and the issuing of consents may need to be read or approved subject to the purpose of the Statement, which states:

This national policy statement is about recognising the national significance of fresh water for all New Zealanders and Te Mana o te Wai.

A range of community and tāngata whenua values, including those identified as appropriate from Appendix 1, may collectively recognise the national significance of fresh water and Te Mana o te Wai as a whole. The aggregation of community and tāngata whenua values and the ability of fresh water to provide for them over time recognises the national significance of fresh water and Te Mana o te Wai.<sup>321</sup>

The definition of Te Mana o Te Wai rests upon the values including tikanga of the tangata whenua who are the kaitiaki of the area. In this case, when coupled with the requirement in the National Policy Statement under objective D1 '[t]o provide for the involvement of iwi and hapū, and to ensure that tāngata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to',<sup>322</sup> there is some basis to argue for incorporating Muaūpoko more fully into the planning process and in decisions regarding discretionary activities. However, what has happened instead is the adoption of the following initiatives which have no legal force and which have caused further division among the iwi.

**11.5.4 The Horowhenua lake accord and action plan, 2014–16**

The fact that the One Plan takes an entire-district approach to the issues that concern the lake trustees, rather than specifically focusing on Lake Horowhenua, seems to have been the reason why the trustees have pursued 'He Hokioi Rerenga Tahī/The Lake Horowhenua Accord' and the *Lake Horowhenua Accord Action Plan 2014–2016*.<sup>323</sup> These initiatives, according to Mathew Sword, are

a collaborative exercise led by the Lake Trust calling all five parties with statutory connection to the Lake to take active responsibility and leadership for the current condition of the Lake. Its focus is on Lake restoration efforts. This is not a legally binding agreement nor does it affect the legal rights and interests of the Trust or beneficial owners. . . . progress is made through a collaborative effort that recognises the status of the Lake Trust as the proprietor of the Lake acting on behalf of all beneficial owners. This framework also recognises the need to pool resources in order to achieve

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319. Procter, brief of evidence (doc c22), p 13

320. *Sustainable Matata Inc v Bay of Plenty Regional Council Anor* [2015] NZEnvC 115

321. National Policy Statement for Freshwater Management 2014, p 6. Also see preamble.

322. National Policy Statement for Freshwater Management 2014, p 18

323. Mathew Sword, brief of evidence, 16 November 2015 (doc c17), p 5

the vision of the Lake Accord. In this regard the document itself is relatively innocuous. However this observation belies the real power of the Accord as a framework for active collaboration and leadership. We have made significant strides forward in the last 2 years on behalf of beneficial owners and Muaūpoko, however it is important to note that the Accord, and the Accord Action Plan, is merely a start on a long term journey for a 100 year impact.<sup>324</sup>

As chair of He Hokioi Rerenga Tahī/The Lake Horowhenua Accord and before the High Court, Mr Sword in previous litigation said that the accord

is not a legally binding agreement nor does it affect the legal rights and interests of beneficial owners. If future elected trustees wish to they can withdraw from it. In this regard the document itself is relatively innocuous. However this observation belies the real power of the Accord through collaboration, and the potentially significant value the Accord offers to owners, Muaupoko Iwi and the wider community.

Since signing the Lake Accord in 2013, the Accord partners have secured \$1.27 million in funding to support Lake clean-up activities. We have also developed a Lake Accord Action Plan to back up the words of the Lake Accord with real action in order to deliver tangible results over the next 12 months.<sup>325</sup>

Under the 'Lake Horowhenua Accord' (2013), the objectives of the parties are (1) returning Lake Horowhenua as a source of pride for people of Horowhenua, (2) enhancing the social, recreational, cultural, and environmental aspects of the lake but in a fiscally responsible manner acceptable to the community of Horowhenua, (3) pursuing the rehabilitation and protection of the health of the lake for future generations, and (4) considering how to respond to key issues, management goals, and the 15 guiding action points agreed to by the parties.<sup>326</sup> The key issues identified include poor water quality, sources of nutrients and contamination and other causes of adverse effects, cyanobacteria blooms, excessive lake weed, high turbidity and sediment inputs, declining fishery, pest fish, and confusing and overlapping responsibilities.<sup>327</sup> The parties are seeking to address these issues through seven key management goals, namely:

- ▶ To maintain or enhance the fishery in the Lake and its subsidiaries;
- ▶ To reduce or eliminate the occurrence of nuisance Cyanobacteria;
- ▶ To limit and manage nutrient input into the Lake from all sources;
- ▶ To improve the water quality of the Lake, for example from hypertrophic to super trophic or eutrophic;

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324. Sword, brief of evidence (doc C17), pp 1–2

325. Mathew Sword, memorandum for the court on behalf of Horowhenua 11 Part Reservation Trust (Lake Horowhenua Trust), 11 May 2015 (doc C17(a)), p 4

326. 'He Hokioi Rerenga Tahī/The Lake Horowhenua Accord', p 8 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 8)

327. 'He Hokioi Rerenga Tahī/The Lake Horowhenua Accord', p 10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 10)

11.5.4 HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

- ▶ To reduce abundance of aquatic macrophytes in the Lake;
- ▶ To consider more efficient and effective management/decision making processes around the Lake and to empower beneficial owners and Muaūpoko to more effectively participate in the management of the Lake; and
- ▶ To regularly communicate to beneficial owners the state of the Lake.<sup>328</sup>

The management actions they intended to take in 2013 included:

- ▶ enhancement of monitoring;
- ▶ public education, including lake report cards;
- ▶ development of farm environmental plans;
- ▶ boat treatment and weed containment;
- ▶ storm water diversion (treatment) – spill drain;
- ▶ removal of sediment inputs;
- ▶ riparian enhancement of the lake;
- ▶ riparian enhancement of streams;
- ▶ lake weed harvesting;
- ▶ pest fish management, including enhanced predation;
- ▶ work on a fish pass at the weir;
- ▶ lake level management;
- ▶ building the capacity of the Lake Horowhenua Trust to more effectively contribute to the management of the lake;
- ▶ developing a cultural monitoring programme based on Muaūpoko values and indicators; and
- ▶ building the capacity of beneficial owners and Muaūpoko to participate and engage in the management of the Lake.<sup>329</sup>

The accord and the right of the lake trustees and domain board to negotiate this arrangement are heavily contested by many of the claimants before the Tribunal. However, the substantive aims and goals of the parties are worth repeating to highlight the desire to reach common ground on lake issues.

The action plan identifies a number of measures that the partners may take to reduce nitrogen, phosphorus, and sediment contributions to the lake. These include:

- ▶ Riparian fencing and planting – acknowledging that much of this work had been undertaken including in excess of 250,000 plants being established in a fenced riparian buffer. Further planting of in-lake vegetation was to be undertaken, along with riparian buffers along streams.<sup>330</sup>
- ▶ Treating the storm water before release into the Queen Street drain.<sup>331</sup>

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328. 'He Hokioi Rerenga Tahi/The Lake Horowhenua Accord', p 12 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 12)

329. 'He Hokioi Rerenga Tahi/The Lake Horowhenua Accord', p 14 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 14)

330. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 36)

331. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 36)

- ▶ Collaboration with farmers and horticulturalists to complete farm plans to manage sediment and nutrient run-off to streams and the lake.<sup>332</sup>
- ▶ Harvesting of the weed as one option for the removal of nutrients from the lake and reducing cyanobacteria bloom events.<sup>333</sup>
- ▶ Creating a sediment trap and treatment wetland before the Arawhata Stream enters the lake.<sup>334</sup>

In addition, the action plan identifies measures that the partners may take in respect of native fisheries:

- ▶ Installing a fish pass at the concrete weir at the outlet of the lake on the Hōkio Stream.<sup>335</sup>
- ▶ Monitoring of native fish stocks and further research.<sup>336</sup>
- ▶ Monitoring introduced pest species to ensure that their populations do not reach densities likely to have an impact on the lake.<sup>337</sup>
- ▶ Monitoring to assess whether pest species that pose a threat to native species have reached the lake or if pest fish already in the lake are impacting on native fish populations.<sup>338</sup>

While the lake trustees have participated in the lake accord, there are some trustees and others of Muaūpoko who are very critical of it. Vivienne Taueki, for example, claimed the ‘tangata whenua’ were never consulted or invited to participate. Clearly, that is not correct as the trustees are tangata whenua, and they did initiate the accord. She pointed to the alternative strategy, ‘He Ritenga Whakatikatika’ (2013), that she has been involved in with Ngāti Raukawa.<sup>339</sup> She also claimed the terms of the accord were ‘inadequate and lacked efficacy’ and did not ‘represent Maori concerns.’<sup>340</sup> Equally clearly, other Muaūpoko considered that it does. Wherever the numbers lie as to who in Muaūpoko agrees with these initiatives or not, the fact is that the accord and action plan and ‘He Ritenga Whakatikatika’ are pragmatic attempts to deal with real and significant environmental issues within an environmental law and management framework that does not adequately prioritise

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332. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 9 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 36)

333. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 10 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 37)

334. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 12 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 39)

335. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 13 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 40)

336. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 8 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 40)

337. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 14 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 41)

338. Horizons Regional Council, *Lake Horowhenua Accord Action Plan*, p 14 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 41)

339. Lake Horowhenua & Hōkio Stream Working Party, ‘He Ritenga Whakatikatika’ (doc B2(o))

340. Vivienne Taueki, brief of evidence (doc B2), pp 31–32

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the need for focusing on Muaūpoko, Lake Horowhenua, and the Hōkio Stream given the importance of these as taonga – a matter we return to below.

In June 2015, a majority of the lake trustees resolved to grant to Horizons Regional Council the permissions it sought to build a fish pass and a sediment trap and to undertake weed harvesting activities.<sup>341</sup> Four trustees opposed these permissions being granted.<sup>342</sup> The construction of the boat-washing facility approximately 600 metres from the lake and opposite the Queen Street drain has also caused controversy, with Mr Philip Taueki noting that there was no way to monitor whether boaters, including rowers, were complying.<sup>343</sup> Thus some work has been completed in terms of the accord and action plan, but equally that has not been without significant opposition within the tribe.

Whilst arguing that the arrangements entered into were the best possible given the current legal framework for governance, the problem, as Mr Sword has noted, is that the accord and the action plan are not legally binding:

There needs to be a change in legislation so that Muaūpoko has a strong say in management of the entire catchment. This requires law changes to resolve overlapping lake governance issues and provide for a vision that restores and reconciles Muaūpoko's relationship with the Lake. Muaūpoko must have a statutorily recognised role in catchment vision development and all regulatory decision-making for the catchment; and Muaūpoko values must be incorporated into any framework or decision making regime.

The Waikato Tainui River Settlement allows the iwi to formulate an overarching vision that must be given effect to, and something equivalent is required here in order to make management of the Lake effective. This also means that the water sources in the Tararua Ranges are maintained and reserved and beach resources are protected. We would like Waiwiri and Horowhenua to be in the same title.

It is important that a holistic approach is achieved, which incorporates Muaūpoko's cultural values derived through our ancient connections from the 'Mountains to the Sea', Rere te toto me te mauri mai ta matou tupuna, te koroheke maunga ko Tararua, tae noa ki te manawa Ko Punahau, tae atu ki te takutai moana kei Hōkio.<sup>344</sup>

### 11.6 FINDINGS

The Crown argued that in making our findings we should give consideration to the more general question of how the lake and its environs could have survived in a less impacted state in such close proximity to a major urban development and agricultural land use. We have attempted to look at the issues through that lens.

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341. M Sword, chair, Lake Horowhenua Trust, to Dr Jon Roygard, Horizons Regional Council, 15 June 2015 (Procter, appendices to brief of evidence (doc c22(a)), p 3021)

342. Sword to Roygard, 15 June 2015 (Procter, appendices to brief of evidence (doc c22(a)), p 3021)

343. Transcript 4.1.11, pp 188–189

344. Sword, brief of evidence (doc c17), pp 1–2, 6–7



As we found previously, Lake Horowhenua is a taonga of immeasurable value to the people of Muaūpoko. As a taonga, the Crown was under a Treaty duty to actively protect the lake and the Hōkio Stream. We consider the evidence was clear that there were options open to the Crown to avoid the environmental degradation and damage to the lake prior to 1990. Through direct action or omission the Crown also became complicit in promoting its degradation, including by the Levin Waste Water Treatment Plant. In the case of the latter it fully understood the effluent disposal issues that the community of this region and Muaūpoko would face.

In this chapter we reviewed what has occurred after 1990 to Lake Horowhenua and its catchment in order to analyse the claimants' case that the Crown has failed to address the ongoing historical issues that continue to plague Lake Horowhenua and the Hōkio Stream, the associated fisheries, and the Muaūpoko people. We did so to ascertain the extent to which governance and mitigation efforts have been successful in dealing with the historical environmental effects of the Crown's acts and omissions prior to 1990.

We consider these issues are part of a continuum which cannot be severed from the manner in which the lake and the Hōkio Stream were controlled and managed prior to 1990. We also reviewed what was, and is, being done to ameliorate those impacts to ascertain whether more is needed in Treaty terms to discharge the obligations of the Crown, if any, under the Treaty of Waitangi.

In terms of the period 1990–2015 we consider the evidence is clear that the historical legacy of those environmental effects continues to impact the lake and the Hōkio Stream. Half of the original volume of the lake still remains filled with polluted sediment. Those impacts have been aggravated further by the continued loading of nutrients, phosphorus, and more sediment discharging into the lake due to urban and industrial development, intensive farming, and horticultural land use.

We also find that the Crown is responsible for the resource management and local government regime under which the bulk of decision-making concerning the lake has been and is being made.

The Crown was responsible for the primary cause of the lake's environmental degradation – namely effluent disposal into the lake. In breach of Treaty principles, the Crown failed to keep undertakings given to Muaūpoko in 1905 and 1952–53 that pollution and sewage effluent would not enter the lake. The omission of those undertakings from the Lake Horowhenua Act 1905 and the ROLD Act 1956 has significantly prejudiced Muaūpoko and the health of their taonga, the lake. We also accept that the Crown did not accommodate and provide for Muaūpoko mana whakahaere (control and management) to restore, control, and manage the lake as much as possible to a reasonable state of health, along with their relationship to their taonga.

The Crown, through the Ministry for Primary Industries, DOC, and local authorities, remains in charge of the management of the water in the lake, fisheries, and land use around the lake. The Crown, through DOC, chairs the Horowhenua Lake

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Domain Board. The director-general has a casting vote, which has been exercised.<sup>345</sup> This casting vote acts as a reminder to members that should they disagree, DOC can influence the outcome. We find that this is not a system of governance that is consistent with the guarantee of rangatiratanga under the Treaty, given the new environmental and resource management legal framework.

The complaints raised surrounding land use, the issues at Hōkio Beach, the realignment of the Hōkio Stream, the allegations concerning the landfills and the ‘Pot’, and the issues concerning storm water demonstrate that the iwi are divided when unity for the purposes of resource planning, use, and development within the Lake Horowhenua and Hōkio Stream catchment is needed. Some in the iwi feel marginalised, others do not, and there are clear divisions. These divisions are exacerbated because no sound contemporary governance structure that represents all views within the tribe (as opposed to whānau and hapū views) exists. Muaūpoko need a legislative solution to the conundrum of the current regime. More meaningful management rights over the Lake Horowhenua and Hōkio Stream catchment need to be devolved to them through a contemporary governance structure that can meet their needs within the current legislative resource management framework.

The Crown has argued that within its contemporary legislative framework there is ‘substantial potential for the views and concerns of Māori to be considered in decision-making processes regarding the environment, including under the Resource Management Act 1991, the Local Government Act 2002 and the Conservation Act 1987.’<sup>346</sup> The Crown submitted that ‘in authorising other bodies to exercise functions and responsibilities today’, the Crown considered that ‘Parliament seeks to do so consistently with Treaty principles.’<sup>347</sup> It pointed to statutory provisions in the Local Government Act 2002 and the establishment of the Environment Court as important. It noted the prolific litigation that Muaūpoko has engaged in under its contemporary legislative framework to hold local authorities to account.<sup>348</sup> The Crown argued that the fact that the ‘legislative regime allows for this is further evidence of the Treaty compliant nature of the regime.’<sup>349</sup> We consider that all it shows is that the system has cultivated dissent because it is unclear who has the right to represent Muaūpoko in terms of the Lake Horowhenua and the Hōkio Stream, and by default and omission the Crown has failed to rectify that issue.

We also reject the Crown’s approach regarding its responsibility for the day-to-day affairs of local authorities on the same basis that it was rejected in *Ko Aotearoa Tēnei* (the Wai 262 report). That report found that the environmental management regime on its own without reform was not sufficient in Treaty terms. The Wai 262 Tribunal stated that the Crown has an obligation to protect the kaitiaki relationship of Māori with their environment and that it cannot absolve itself of this obligation by statutory devolution of its environmental management powers and functions to

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345. Hamer, “A Tangled Skein” (doc A150), p 400

346. Crown counsel, closing submissions (paper 3.3.24), p 28

347. Crown counsel, closing submissions (paper 3.3.24), p 28

348. Crown counsel, closing submissions (paper 3.3.24), pp 28–29

349. Crown counsel, closing submissions (paper 3.3.24), p 29

local government.<sup>350</sup> Thus the Crown's Treaty duties remain and must be fulfilled and it must make statutory delegates accountable for fulfilling them too. The same duty to guarantee rangatiratanga, and to respect the other principles of the Treaty thus remains as an obligation on the Crown and it is not enough for the Crown to wash its hands of the matter and say that the day-to-day decision-making process is in the hands of local authorities.

We note further the Waitangi Tribunal has previously held in various reports that the RMA 1991 is not fully compliant with Treaty principles.<sup>351</sup> In the Wai 262 report, the Tribunal stated

the RMA has not delivered appropriate levels of control, partnership, and influence for kaitiaki in relation to taonga in the environment. Indeed, the only mechanisms through which control and partnership appear to have been achieved are historical Treaty and customary rights settlements . . .<sup>352</sup>

In context of the claims before us, we consider another important issue raised by the RMA 1991 is that it is not remedial in its purpose or effect as outlined in section 5. That provision merely provides that the purpose of the legislation is to 'promote the sustainable management of natural and physical resources.' Thus the RMA is not a statute that can be used to address or remedy the environmental degradation of Lake Horowhenua prior to 1990. Nor do the planning and mechanism reforms recommended in the Wai 262 report assist to progress the particular issues before us. Really, we consider the only way forward is a statutory settlement.

While the 'He Hokioi Rerenga Tahi/The Lake Horowhenua Accord' (2013) has created opportunities to work in partnership with local bodies, and that is to be applauded, under the RMA 1991 and the local government legislation Muaūpoko have no lawful rights to control or to enforce the commitments made in that accord. In other words, Muaūpoko mana whakahaere (control and management) over their taonga is not fully provided for under the current legislative regime.

Such a situation can be compared to the rights that the Waikato-Tainui river tribes have in terms of the Waikato River under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. The 2010 legislation states that the 'RMA 1991 gave regional and local authorities substantial functions and powers over natural resources, including the power to grant resource consents for river use'.<sup>353</sup> It is further recorded that the RMA does not provide for the protection of the mana of

350. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 269–270

351. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 143; Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), pp 27–28, 34; Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), pp 329–330; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, pp 1589–1590

352. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, pp 273, 280

353. Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, preamble

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the river or the mana whakahaere (ability to exercise control, access to, and management of the river) of Waikato.<sup>354</sup> It notes the number of resource consent proceedings that the tribe had been involved in, and then the Crown acknowledges, among other things, that it ‘failed to respect, provide for, and protect the special relationship of Waikato-Tainui’ with the river.<sup>355</sup>

This discussion on mana whakahaere indicates that not enough has been done between 1990 and 2015 in Treaty terms to provide for Muaūpoko tino rangatira-tanga. It is not a sufficient response to refer to the ROLD Act and the work of the Horowhenua Lake Domain Board, as the latter has no authority to intervene in matters lawfully determined by DOC, the Ministry for Primary Industries, Horizons Regional Council, or the Horowhenua District Council. The lake trustees can only deal with issues concerning the bed of the lake and have no jurisdiction over the water. In 2016, before closing submissions were finalised, the lake trustees and the domain board signed a memorandum of partnership setting out an agreed position and a set of shared values and aspirations each party has for the lake.<sup>356</sup> The document endorses the lake accord. However, the essential point made by Mr Sword remains. At any stage Horizons Regional Council and the Horowhenua District Council could withdraw their support for the Lake Horowhenua accord or they could reprioritise their activities. The domain board could choose to do the same. In other words, they are not legally obliged to complete the undertakings therein recorded.<sup>357</sup>

That said, these initiatives do signal a new round of collaborative effort, following various other previous collaborative efforts, and are to be applauded. However, there are serious questions as to whether this form of collaboration can be sustained, as it is clear that Muaūpoko are having difficulty finalising their preferred options for restoration, given the dissent groups within the tribe. Add to that the point that the lake trustees have had to seek consent before implementing plans for cleaning up the lake.<sup>358</sup>

Without addressing the primary issue of who should manage Muaūpoko affairs concerning the lake and the Hōkio Stream, it is unlikely that the accord will last beyond the activities outlined in the action plan. All the evidence in relation to the lake and the stream demonstrates that there will always be opposing views and what is needed is a management regime that cannot be challenged for lack of mandate. We note the partners to the accord have expressly addressed the conundrum and the need for ‘including best governance and management practice that may draw from recent experiences (for example the Waikato-Tainui River Settlement 2008 and the Manawatu Accord)’.<sup>359</sup>

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354. Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, preamble

355. Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, preamble

356. Crown counsel, closing submissions (paper 3.3.24), p 72

357. Sword, brief of evidence (doc C17), p 1

358. Sword, brief of evidence (doc C17), p 5

359. ‘He Hokioi Rerenga Tahi/The Lake Horowhenua Accord’, p 7 (Hamer, indexed bundle of cross-examination documents (doc A150(I)), p 7)

We further note that the Crown has said that it is open to promoting legislative reform in order to address governance and other issues regarding the lake.<sup>360</sup> However, it stated that it required the engagement of a range of stakeholders including other affected iwi and local authorities.<sup>361</sup> The Crown also welcomed any views we may have regarding how Muaūpoko may draw a consensus around remediation work.<sup>362</sup> In our view, the answer lies in the model offered by the Waikato-Tainui river settlement.

As the RMA 1991 is not remedial legislation and cannot be invoked in litigation to require restoration work be completed by local government, some further effort will be needed to fund a programme that reasonably mitigates the major issue concerning the lake – the impact of over 25 years of effluent in the sludge on the bed of the lake and the continued discharge of pollutants through storm water.

There are a number of entities that have had various roles in relation to Lake Horowhenua and the Hōkio Stream since 1990 and who are responsible for its control and management under the ROLD Act 1956, the RMA 1991, and the Local Government Act 2002. Alternatively, they have responsibility for its fisheries under the Conservation Act 1987 and under the Fisheries Act and associated regulations. It is the Crown that is responsible for the legislative regime under which all these agencies act. That same authority can be used to produce an outcome similar to that achieved for Waikato-Tainui. We note that this should not unsettle Muaūpoko's ownership of the bed of the lake and the stream.

Granted, there may be difficulties in determining who represents Muaūpoko or in obtaining a consensus, but efforts should be made to cement their plans once a proper governance body is in place which has the mandate of the Muaūpoko people behind it. The lake trustees will have to continue as the legal owners of the lake bed so that the beneficial owners' property rights remain intact. They should be represented on the mandated body.

A new legislative regime coupled with technical and financial assistance should move all parties to the desired result, namely the restoration of Lake Horowhenua and the Hōkio Stream, and of the mana and tino rangatiratanga of Muaūpoko.

We note here that Ngāti Raukawa claims in respect of the Hōkio Stream and Lake Horowhenua have not yet been heard, but the Waikato-Tainui river settlement model allows for the representation of other iwi.

### 11.7 CONCLUSION

We consider that, as the Crown was and remains responsible for the legislative regime under which local government operates, it is time for it to recognise that the multi-layered management regime that exists under the RMA 1991 and the Local Government Act 2002 and the role played by Muaūpoko on the Horowhenua Lake Domain Board are not sufficient in Treaty terms. The present regime does

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360. Crown counsel, closing submissions (paper 3.3.24), p 71

361. Crown counsel, closing submissions (paper 3.3.24), p 71

362. Crown counsel, closing submissions (paper 3.3.24), p 71

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not ensure that Muaūpoko rangatiratanga and kaitiakitanga in terms of Lake Horowhenua and the Hōkio Stream are sufficiently provided for.

It is also time for the Crown to recognise that, having acknowledged it breached the Treaty when it omitted a provision to prevent pollution at the very beginning in the 1905 Act, it must take a lead in putting the situation right. Only the Crown has the resources to work with its Treaty partner to solve these problems. It has a Treaty duty to do so. As the Privy Council has noted, the Crown should not avoid or deny its Treaty obligation of active protection of a vulnerable taonga when it is responsible for the taonga's parlous state and when it has the resources.<sup>363</sup> That is what the parties to the Treaty are entitled to expect from an honourable Crown.

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363. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517



PART IV

**WHAKAMUTUNGA: CONCLUSION**



## CHAPTER 12

# CONCLUSION

### Hei aha te heihei

*Heihei! Hei aha te heihei?  
Heihei! Hei aha te heihei?  
Te kaiwhakaohorere i te atapo  
te ngata, te puku ki te awhiawhi  
aue, aue, te hiahia!  
aue, aue, te hiahia!  
nekenekhia, nekenekhia!*<sup>1</sup>

#### 12.1 INTRODUCTION

In this chapter, we summarise the conclusions and findings made in previous chapters, and make recommendations for the removal of the significant prejudice suffered by Muaūpoko.

##### 12.1.1 Why were the Muaūpoko claims prioritised for early hearings?

In September 2013, the Crown recognised the mandate of the Muaūpoko Tribal Authority (MTA) to negotiate a settlement of Muaūpoko's Treaty claims. As described in chapter 1, this precipitated an urgent claim to the Waitangi Tribunal. The urgency application was heard in March 2014. This revealed significant disagreement among Muaūpoko as to the MTA's definition of the iwi, the rights of particular hapū and the primacy of certain leaders, and the MTA's decision to settle without having the claims first heard and reported upon by the Tribunal. As the negotiations were at a very early stage, the Tribunal hearing the application for urgency considered that there was still time to afford those claimants who wished it a hearing, so long as the research and hearing of their claims could be prioritised. The Tribunal also considered that more research would assist the claimant

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1. 'This waiata is a "harihari kai" that came about during the passive resistance movement also, during the time that Muaūpoko would travel to Parihaka in support of the people there. This waiata contains symbolism and metaphors relating to the kinds of activities Pākehā were engaging in at that time and the oppression of Māori throughout the motu. This song is a waiata-ā-iwi and is sung throughout Taranaki, Whanganui right through to Horowhenua.': Sian Montgomery-Neutze, 'He wānanga i ngā waiata me ngā kōrero whakapapa o Muaūpoko', not dated (doc A15(a)), p [56].

12.1.2 THE MUAŪPOKO REPORT – PRE-PUBLICATION VERSION

community to understand the historical roots of their current disagreements. In June 2014, therefore, the Tribunal referred the matter to the Porirua ki Manawatū Tribunal for consideration.

Accordingly, we consulted the Crown and claimants in this inquiry to determine whether Muaūpoko claims should be prioritised. There were no objections from other parties, and eventually the MTA (and the claimants it represents) also decided to participate in our hearings.

In 2015, the Tribunal and Crown Forestry Rental Trust research was completed. In addition to our hearing of Muaūpoko oral evidence at the Nga Kōrero Tuku Iho hui in February 2014, three hearings were held in October–December 2015. The filing of closing and reply submissions was completed in May 2016, and we decided to write a pre-publication version of our report for the early assistance of the parties.

**12.1.2 Exclusions from this prioritised report: Ngāti Raukawa and Te Ātiawa/ Ngāti Awa**

Before hearings began, we advised parties that we would be making findings on Muaūpoko claims about the Horowhenua block and Lake Horowhenua, but we would not make findings on:

- ▶ Any historical acts or omissions of the Crown in respect of the relationships between Muaūpoko and Ngāti Raukawa, and between Muaūpoko and Te Ati Awa/ Ngāti Awa ki Kapiti; and
- ▶ Any historical acts or omissions of the Crown relating to the respective rights and interests of Muaūpoko, Ngāti Raukawa, and Te Ati Awa/ Ngāti Awa ki Kapiti.<sup>2</sup>

This has left a number of issues important to Muaūpoko which could not be reported on fully at this stage of our inquiry (see, for example, chapter 3). At the same time, it was not possible to assess Muaūpoko's historical claims without any reference at all to Ngāti Raukawa in particular, but we have attempted to concentrate our attention and findings on Crown acts or omissions in respect of Muaūpoko. We have not, for example, discussed the Native Land Court hearing of the Manawatū-Kukutauaki claims except to consider Muaūpoko's attempted boycott at the beginning of the 1872 hearing (see chapter 4). Matters of importance to the Ngāti Raukawa claims, such as the 1874 agreement with McLean (chapter 4), the partition of Horowhenua 9 (chapter 5), the Horowhenua commission (chapter 6), the Horowhenua block more generally (chapters 4–7) and Lake Horowhenua and the Hōkio Stream (chapters 8–10) will all be addressed later in our inquiry.

In addition, we have not made findings where the evidence was insufficient at this point or the issues were general (rather than specific to Muaūpoko), such as the origins and establishment of the Native Land Court (chapter 4), and twentieth-century land alienation processes (chapter 7).

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2. Waitangi Tribunal, memorandum-directions, 25 September 2015 (paper 2.5.121), p [1]

Nonetheless, the evidence was sufficient to establish that the Muaūpoko claims are well-founded in terms of the particular issues summarised below.

### 12.1.3 Treaty principles

In chapter 1, we set out the text of the Treaty in Māori and English, and described the Treaty principles which apply in this case. The principles are more fully explained in section 1.6, and we only provide a brief summary here:

- ▶ *Partnership*: ‘the Treaty signifies a partnership between the Crown and the Māori people, and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other.’<sup>3</sup>
- ▶ *Active protection*: the Treaty requires the Crown to actively protect the rights and interests of the Māori Treaty partner, their lands and waters and other taonga, and their tino rangatiratanga, to the fullest extent practicable in the circumstances.
- ▶ *Options*: the principle of options arises from the Treaty bargain, in which Māori were to have free choice as to how they would benefit from the colonisation facilitated by the Treaty; whether to develop along customary lines, assimilate to a new way, or walk in both worlds.
- ▶ *Right of development*: the Treaty development right includes the inherent right of property owners to develop their properties (including resources in which they have a proprietary interest under Māori custom), the right to retain a sufficient resource base for development, and the right to develop as a people.
- ▶ *Equity*: the principle of equity requires the Crown to act fairly as between Māori and settlers, and not to unfairly prioritise the interests and welfare of settlers to the disadvantage of Māori.
- ▶ *Redress*: when Māori have suffered prejudice as a result of Treaty breaches, the Crown is required to provide redress. Where Crown actions have contributed to the precarious state of a taonga, there is an even greater obligation for the Crown to provide ‘generous redress as circumstances permit.’<sup>4</sup>

### 12.1.4 Judging what is ‘reasonable in the circumstances’

As discussed in section 1.6.4, Crown counsel submitted that the Tribunal needs to take into account historical context and the standards of the time (not the standards of the present) when applying Treaty principles. The Crown suggested a number of criteria for judging what was reasonable in the circumstances, including consideration of what was practicable, foreseeable, and reasonable at the time. The claimants, on the other hand, argued that the ‘danger of presentism is more than matched by the danger of extreme and inappropriate caution in drawing conclusions as to the Crown’s reasonable obligations to Māori in the context of te Tiriti.’<sup>5</sup>

3. Waitangi Tribunal, *Whaia Te Mana Motuhake, In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2014), p 28

4. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 6

5. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply, 15 April 2016 (paper 3.3.29), p 7

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In their view, the historical aspirations and wishes of Māori were also standards of the time, and the standards of the settler majority should not be used to excuse unfair Crown actions.

Having considered the parties' arguments, we agreed with the claimants that the Treaty standards, and historical evidence as to what Māori leaders said to (and sought from) the Crown, are relevant 'standards of the time'. We also agreed that the nineteenth-century standards of the settler majority are relevant but that they do not excuse the Crown from actions that were unfair or dishonourable. But we accepted the Crown's submission that (a) the choices which were known to be available to Ministers or officials, (b) the state of the Crown's knowledge and finances at the time, and (c) the reasonably foreseeable consequences are all relevant factors for us to consider in evaluating Crown actions against the Treaty principles. We do not believe that a consideration of context prevents us from assessing whether Crown acts or omissions were consistent with Treaty principles.

**12.2 MUAŪPOKO IDENTITY AND HISTORIES**

**12.2.1 The histories and identity of Muaūpoko**

In chapter 2, we provided an overview of Muaūpoko's story as told by them, their history as a people within their traditional rohe, up to the signing of the Treaty of Waitangi. From the oral histories and perspectives of today's Muaūpoko claimants, the recorded kōrero of their nineteenth-century tipuna, and the commentary of commissioned technical researchers, we set out some of the relevant Muaūpoko narratives of their ancient history and the more recent 'musket wars' of the nineteenth century. We do not attempt to summarise or truncate those narratives in this chapter; it is essential for all parties to read the full account in chapter 2.

In presenting Muaūpoko histories as told to us, we were mindful that the additional research conducted for the hearings may assist Muaūpoko with their internal disagreements.

**12.2.2 The histories of other iwi**

The histories of Ngāti Raukawa and affiliated groups, and of Te Ātiawa/Ngāti Awa, will be presented later in our inquiry. Each iwi has their own narrative of events, and their distinct interpretations of their relationships and customary rights. Inevitably, those narratives and interpretations conflict at certain points. It is not the Tribunal's task to choose between narratives or decide that one group's version is right and another group's version is wrong. Rather, our task is to examine the acts of the Crown to determine whether, by action or inaction, the Crown has breached the principles of the Treaty of Waitangi. In order to do so, it is necessary for us to set out each tribe's view of their relationships and customary interests in the contested lands of our inquiry district. At this stage of our inquiry, it is only possible to do this for Muaūpoko. For the detail of that, we refer readers to chapter 2. For the other iwi, it will be done later in our inquiry.



### 12.3 NINETEENTH-CENTURY LAND ISSUES: CROWN PURCHASING OUTSIDE HOROWHENUA

#### 12.3.1 The Muaūpoko claim about pre-emption purchasing

In 1840, article 2 of the Treaty conferred a right of pre-emption on the Crown. At the time, this was explained as a protective measure. The Crown assumed the sole power to purchase Māori land until this right of pre-emption was abolished by the Native Lands Acts of 1862 and 1865. In our inquiry district, the pre-1865 Crown pre-emption system continued to operate after the Native Land Court system was introduced. This was because the 1862 and 1865 Acts exempted the 'Manawatū block' (see map 3.2) from the court's operations.

In chapter 3, we addressed the Crown's pre-emption purchasing outside the Horowhenua block, which was a significant issue for the Muaūpoko claimants. They argued that the Crown did recognise Muaūpoko rights in some of its pre-emption purchases, thus confirming that their rights had survived the migrations and wars of the 1820s and 1830s. Nonetheless, in the claimants' view, the Crown failed to properly investigate customary rights before purchasing. As a result, the claimants argued, the Crown did not give full recognition to Muaūpoko rights in various purchases or make any reserves for Muaūpoko. The claimants also argued that they were confined to the Horowhenua lands by the 1870s, as a result of the Crown's pre-emption purchasing.

#### 12.3.2 The Tribunal's decision to consider pre-emption purchases as context

Due to the limits of our priority inquiry (explained in section 12.1.2), we decided to make no findings about these claimant allegations. Our discussion of Crown purchases in chapter 3 was contextual because the transactions involved the interests and claims of other iwi in a substantial way, and their claims have not yet been fully researched or heard. Also, the research casebook had not been completed, and we did not have the evidence necessary to deal fully with the history of blocks outside of Horowhenua. We therefore provided a brief overview of what is currently known about Muaūpoko involvement in the pre-emption purchasing, as context for Horowhenua claims and for the assistance of any negotiations. We made no findings about alleged Crown acts or omissions.

#### 12.3.3 The Tribunal's limited conclusions about pre-emption purchasing

Our limited conclusions are summarised as follows:

- ▶ *Te Awahou* (37,000 acres, 1858–59): Muaūpoko were involved in the purchase and payments because their rights were recognised by the Ngāti Raukawa vendors, but non-sellers accused some of those vendors of including 'non-owners' to strengthen the selling party.<sup>6</sup>
- ▶ *Te Ahuaturanga* (250,000 acres, 1858–64): There was no direct evidence of Muaūpoko involvement in this sale, which was said to have been conducted by Rangitāne on behalf of a number of iwi. The claimants pointed to the

6. TJ Hearn, summary of 'One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century', September 2015 (doc A152(b)), p 9

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recognition of Muaūpoko in the sale of the adjacent Rangitikei-Manawatū block, and the inclusion of Muaūpoko individuals in the ownership of the Aorangi reserve, as proof of their rights in Te Ahuaturanga.

- ▶ *Muhunua (1,300 acres, 1860–64), located immediately to the south of the Horowhenua block:* The Crown attempted to purchase Muhunua from Ngāti Raukawa in the early 1860s, but the purchase was successfully contested at that time by Muaūpoko leaders. Ultimately, however, the lands were not awarded to Muaūpoko by the Native Land Court and Muaūpoko were not involved in the post-court sales. The Crown did a deal with Te Keepa and Ngāti Raukawa about Horowhenua in 1874, which Te Keepa believed would secure the return of some land in the Muhunua block (see chapter 4).
- ▶ *Rangitikei-Manawatū (250,000 acres, 1865–68):* The Crown recognised and dealt with Muaūpoko in the Rangitikei-Manawatū purchase, but Superintendent Featherston classified them as ‘secondary’, not ‘primary’, right-holders. Muaūpoko signed the purchase deed but they were not paid the full amount owed to them, and they did not receive any reserves in this vast block. The claimants noted the court’s Himatangi decision of 1868, which found the ‘original occupiers of the soil’ to have been ‘joint owners’ with Ngāti Raukawa, as validating the Crown’s decision to deal with them (but not, they said, as ‘secondary’ owners).
- ▶ *Wainui (30,000 acres, 1858–59):* The Crown did not deal directly with Muaūpoko, but a number of Muaūpoko rangatira did sign the Wainui deed, admitted by the Ngāti Toa vendors. Some (but not all) of the Muaūpoko signatories had been held as ‘captives’ at Waikanae before being ‘fetched’ back to Horowhenua (see section 2.4.3(6) for the practice of ‘fetching’ people home in the 1830s). Research into the title and fate of reserves from the Wainui purchase had not been completed at the time of our 2015 hearings.

Thus, what we can say at this stage of our inquiry is that Muaūpoko were involved in and affected by the Te Awahou, Muhunua, Rangitikei-Manawatū, and Wainui purchases. To the extent that any of these purchases are later found to have been in breach of Treaty principles, Muaūpoko were likely to have been prejudiced thereby. For the vast Te Ahuaturanga purchase, Muaūpoko involvement has not been demonstrated conclusively.

It also seems clear from the evidence so far that Muaūpoko were left with virtually no stake in any of the reserves that were made during the alienation of more than half a million acres of land. As a result, Muaūpoko either had to live with closely related iwi by the 1870s or became confined to their Horowhenua lands. This is vital context for the internal Muaūpoko struggles over entitlements at Horowhenua, which took place in the 1890s, discussed below (and which still contribute to divisions within Muaūpoko today).

**12.3.4 Blocks in the Native Land Court era**

After the exemption from the court's jurisdiction had been lifted, the Crown made advance payments to Muaūpoko for the Aorangi, Tuwhakatupua, and 'Taonui'<sup>7</sup> blocks before title was investigated by the court. The court, however, awarded title of these blocks to other iwi, although two Muaūpoko owners were included in the title for Aorangi 3. More could not be said at this stage of our inquiry.

The claimants also raised issues about the Tararua block, which is located in the Wairarapa ki Tararua inquiry district,<sup>8</sup> and so cannot be the subject of inquiry by this Tribunal. We simply noted that both the Crown and the Native Land Court recognised Muaūpoko customary rights in the Tararua block. Some claimants raised concerns about the Hapuakorari Reserve, which was supposed to have been set aside from the Tararua purchase. The Crown submitted that it would offer an alternative piece of land, in recompense for its failure to create the Hapuakorari Reserve, as part of its negotiations to settle Wairarapa ki Tararua claims. We were unable to take the issue of the Hapuakorari reserve any further but we do accept the Muaūpoko belief that the spiritual lake, Hapuakorari, is located on the western side of the Tararua Ranges, on the Horowhenua block 12.

**12.4 NINETEENTH-CENTURY LAND ISSUES: THE HOROWHENUA BLOCK****12.4.1 The Crown's concessions in our inquiry**

Through the course of our inquiry, the Crown made some important concessions:

- ▶ The native land laws failed to provide a form of effective corporate title before 1894, which undermined Muaūpoko tribal authority in the Horowhenua block, in breach of Treaty principles.
- ▶ The individualisation of Māori land tenure provided for by the native land laws made Muaūpoko lands more susceptible to fragmentation and alienation, and contributed to undermining Muaūpoko tribal structures, which was in breach of the Treaty. The cumulative effect of Crown acts and omissions, including Crown purchasing and the native land laws, resulted in landlessness. The failure to ensure that Muaūpoko retained sufficient land for their present and future needs was a breach of Treaty principles.
- ▶ The Crown acquired part of Horowhenua 11 (known as the State farm block) and most of Horowhenua 12 (20 per cent of the Horowhenua block<sup>9</sup>) in circumstances which meant that the Crown 'failed to actively protect the interests of Muaūpoko in these lands', breaching Treaty principles.<sup>10</sup>

We have been mindful of these helpful concessions throughout the chapters of our report dealing with the Horowhenua block.

7. The Taonui block was not actually created and may have become part of the Aorangi block.

8. According to a Crown mapping exercise, 5 per cent of the Tararua block may fall inside our inquiry district: 'Original Tararua Block', attachment 4 (Crown counsel, comp, papers in support of closing submissions, various dates (paper 3.3.24(a)), p vii).

9. The entirety of the block was alienated as a result of the commission's recommendation, which amounted to 25 per cent of the Horowhenua block.

10. Crown counsel, closing submissions, 31 March 2016 (paper 3.3.24), p 24

**12.4.2 Was the Native Land Court and tenure conversion imposed on Muaūpoko?**

In the 1840s, approximately half of the Muaūpoko population lived outside of the Horowhenua heartland. By 1870, however, Crown purchasing and the lack of reserves for Muaūpoko had confined the whole tribe to Horowhenua. It was at this point that conflict over leasing resulted in Native Land Court hearings in 1872–73, sitting under the Native Lands Acts of 1865 and 1867. The court awarded the Horowhenua block to Muaūpoko (in the form of a list of 143 individuals), under section 17 of the 1867 Act.

The first question which this raised (addressed in chapter 4) was whether the Native Land Court and tenure conversion was imposed on Muaūpoko. More general questions about the native land laws and the establishment of the court will be addressed in future hearings. This question required us to consider events involving both Muaūpoko and Ngāti Raukawa. We focused as far as possible on Crown actions in respect of Muaūpoko; Crown actions in respect of Ngāti Raukawa will of course be addressed later in the inquiry.

As discussed in section 4.2, Muaūpoko largely co-existed peacefully with their Ngāti Raukawa neighbours from the 1840s to around 1869, when the death of Te Whatanui Tutaki precipitated conflict over leasing and boundaries. Muaūpoko's chosen way of settling this conflict was through tribal rūnanga – at first convened by the iwi themselves, and then by way of a joint Government–Māori arbitration. But the Crown failed to arrange the promised rūnanga, instead pressing for the matter to be resolved by the court – which would individualise titles and facilitate alienations. From 1869 to 1872, Muaūpoko for the most part resisted Crown pressure to obtain surveys and a court hearing, right up to the final moment, when they tried to stop the court from sitting in 1872 to determine and individualise titles. Muaūpoko's opposition was in vain, largely because the native land laws allowed the court to proceed on a single application, putting any iwi who refused to participate at risk of losing everything if the court went ahead in their absence.

In section 4.2.5, we made the following findings of Treaty breach:

- ▶ Despite the strong preference and wish of Muaūpoko (and of many Māori nationally) to resolve land disputes through alternative mechanisms such as rūnanga, the Crown failed to legislate for such mechanisms. The Native Councils Bills of 1872 and 1873 showed that the Crown could have provided for such mechanisms but failed to do so. This was a breach of Treaty principles. In the particular circumstances of Horowhenua, the Crown failed to arrange the promised mediation by rūnanga, without a convincing reason for its failure other than the Crown's preference for the Native Land Court, individualised titles, and the land sales which followed in their wake. The Crown's omissions were in breach of its Treaty obligation to act fairly and in partnership with Muaūpoko.
- ▶ The native land laws made it virtually impossible for Te Keepa, Muaūpoko, and the allied iwi to stop the court from sitting in 1872, because the court was empowered to proceed so long as just one of the claimant groups appeared and

prosecuted its claim. This deficiency in the native land laws was a breach of the Crown's obligation to actively protect Muaūpoko, their tino rangatiranga, and their lands.

- ▶ Finally, the Crown applied undue pressure on Muaūpoko to agree to a survey, applications, and the sitting of the court. We accept the Crown's argument that Ministers and officials wanted a peaceful resolution of the dispute, but, if that had been their only or principal motive, they would have been more diligent in providing the requested Crown–Māori arbitration. The acquisition of Māori land was the Crown's principal motivation. It was this which led Ministers and officials to manipulate inter- and intra-tribal divisions, and to apply undue pressure, so as to get the lands surveyed and into court. While drawing short of the use of force, the Government would not accept 'no' for an answer. This was a breach of the Crown's duty to act in the utmost good faith towards its Treaty partner. It was also a breach of the principle of options.

Muaūpoko were prejudiced by these Treaty breaches. Their customary interests were determined by the Native Land Court and transformed into a Crown-derived title, ultimately to their detriment. This detriment was twofold: the loss of a more fluid, inclusive, and appropriate land tenure for their cultural and social needs, and the eventual loss of ownership of a great deal of their lands.

#### **12.4.3 Did section 17 of the Native Lands Act 1867 provide an appropriate form of title and allow for communal control and management of the Horowhenua lands?**

##### **(1) *The form of title under which the block was awarded in 1873***

As we discussed in section 4.3.3, title to the Horowhenua block was awarded to 143 individuals. Under section 17 of the Native Lands Act 1867, their names were registered in the court (to go on the back of the certificate of title). The name of one person, Te Keepa Te Rangihwinui, was placed on the front of the Native Land Court certificate of title.

The 1867 reform was introduced because the Native Lands Act 1865 had provided for only 10 persons to go on the certificate of title (the '10-owner rule'), completely dispossessing all other customary right-holders. The Crown contemplated introducing a trust mechanism in 1867 but eventually decided instead on the section 17 title, which the Crown intended as a stop-gap until large blocks could be partitioned. The names of all owners would now be recorded, with up to 10 placed on the front of the certificate. The owners on the front of the certificate had power to lease the land for up to 21 years; the land was otherwise inalienable. Muaūpoko chose Te Keepa as the sole owner to go on the front of the section 17 certificate, seeing him as their trustee and their guarantee that land would not be sold.

The Native Land Act 1873, however, repealed the 1867 Act. The new legislation made some crucial changes to the alienability of land held under section 17. From the point at which the 1873 Act took effect (1 January 1874), Te Keepa lost his sole authority to lease the land. No alienations could *take effect* until the land was



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partitioned. The only exception was that land could be leased for up to 21 years with the agreement of *all* owners. The 1873 Act, however, did not make pre-partition dealings illegal. Rather, it made them ‘void’ until confirmed in court at the time of partitioning. Thus, despite the supposed protection of a section 17 title, the following pre-partition dealings occurred without the consent of the community of owners.

**(2) The pre-partition dealings**

As discussed in chapters 4 and 5, a number of pre-partition dealings took place:

- ▶ *Donald McLean’s deal with Te Keepa and Ngāti Raukawa in 1874*: Without any payment to Muaūpoko, the Crown arranged for Te Keepa to gift 1,200 acres to Ngāti Raukawa. The other 142 owners were not consulted and did not consent (prior to the partition 12 years later). The Crown argued that it was entitled to rely solely on Te Keepa’s agreement as rangatira, but that ignored the legal protections which the court title was supposed to have bestowed upon the other owners. In all fairness, the Crown ought to have sought the agreement of the body of owners.
- ▶ *The Crown’s advances to individuals for purchase of their shares, and its proclamation in 1878 excluding private purchasers or lessees from the block because it was under purchase by the Crown*: Based on the payment of £20 to one individual, and a number of other ‘charges’ against the block, the Crown issued a proclamation in 1878 that it was in negotiation to purchase the supposedly inalienable Horowhenua block. This proclamation laid bare the Crown’s motive of securing the Horowhenua block, or as much of it as possible, for settlement regardless of Māori wishes to retain it. The proclamation prevented the owners from entering into new leases (which they could do under the 1867 and 1873 Acts), thus depriving them of any other income than the sale of their individual interests piecemeal to the Crown. Nonetheless, the Crown did not very actively try to buy, mostly because of its deal with the Wellington and Manawatu Railway Company (see below), and it did not succeed in purchasing any shares.
- ▶ *The efforts of Te Keepa’s lawyer and agent, Sievwright, to obtain land at Horowhenua in settlement of debts*: The prejudicial effects of the Crown’s failure to provide for or assist Te Keepa’s Whanganui land trust (as found by the Whanganui Land Tribunal) included consequences for our inquiry district. By mid-1886, Te Keepa had agreed to transfer 800 acres of the Horowhenua block to Sievwright if the Crown provided no assistance.
- ▶ *Te Keepa’s and the Crown’s deals with a private railway company for land running through the Horowhenua block*: In order to establish a township and secure economic development for his people, Te Keepa gifted the land for the railway line to the company. The Crown made a deal with the company that any land purchased in the district prior to 1887 would become the property of the company.



- ▶ *Te Keepa's deal with the Crown for a sale of land to establish a township*: Perhaps the most important of the pre-partition deals, Te Keepa (and company agent Alexander McDonald) advised Muaūpoko in 1886 that the Crown had agreed to the purchase of land for a township, on terms sought by Te Keepa. The Crown dealt solely with Te Keepa and, on the basis of its implied agreement to his terms, succeeded in getting Te Keepa to apply for a partition. Those terms included naming the town 'Taitoko', reserving every tenth section for Muaūpoko, reserving lakes and streams for Muaūpoko (with a chain strip around the lakes), and arbitration if the Crown and Te Keepa could not agree on a price (each side to name an arbitrator).

### (3) Findings

Our findings on the pre-partition dealings are summarised later, when we deal with their outcomes at the 1886 partition hearing (see section 12.4.4(3)).

Our findings on the section 17 title and the 1878 proclamation were made in section 4.3.5, as follows:

- ▶ *The section 17 title*: The Crown conceded that the native land laws did not provide a mechanism for community control of tribal lands, and that the individualisation of title made those tribal lands susceptible to alienation, in breach of Treaty principles. Both concessions apply to the section 17 title, which was not consistent with Treaty principles. We agreed with the Hauraki Tribunal that section 17 was no substitute for the 'effective granting of a form of tribal title . . . since that instead required the creation of a truly corporate title, with tribal leaders installed as trustees.'<sup>11</sup> An effective trust mechanism, with accountability to the community of owners, would have made any pre-partition dealings more Treaty-compliant.
- ▶ *The 1878 monopoly proclamation*: The Crown breached the Treaty by failing to consult with or obtain the agreement of the Muaūpoko owners to the imposition of a Crown purchase monopoly on their lands. As far as the evidence shows, the only possible justification was a £20 advance to a single owner. These were not the good faith actions of an honourable Treaty partner towards the Muaūpoko Treaty partner, and significant prejudice followed during the partitioning of Horowhenua and the completion of the township deal (discussed below).

#### 12.4.4 The partition of Horowhenua in 1886 and the completion of pre-partition dealings

##### (1) Did Muaūpoko owners agree to the 1886 partitions?

Under the Native Land Division Act 1882, all owners had to apply for a general partition, or Te Keepa could do so (as the person named on the front of the certificate). Crown officials and the Wellington and Manawatu Railway Company tried

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<sup>11</sup>. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2006), vol 2, p 447; Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 699; see also claimant counsel (Naden, Upton, and Shankar), closing submissions, 16 February 2016 (paper 3.3.23), p 126.

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to persuade Te Keepa to apply for partition. There was also some internal pressure from Ngāti Pāhiri, as well as frequent requests from Ngāti Raukawa (who wanted the 1874 deed to be given effect). What finally led Te Keepa to apply in 1886, however, was his belief that the Taitoko township deal and the railway would bring settlers and prosperity to his people – and also the pressure of his debt to Sievwright (see section 4.3.4).

As discussed in chapter 5, the partition proceedings demonstrated a significant degree of unanimity among Muaūpoko (as, indeed, had the 1873 proceedings). In particular, the township deal won support for other, less palatable pre-partition deals – that is, the 1874 deal with McLean, the deal to repay the debt to Sievwright with land at Horowhenua, and the gift of land (with no payment to the tribe) for the railway). But there is strong evidence that Muaūpoko themselves decided the partitions out of court (which the court largely rubber stamped). There was significant disagreement about the addition of Warena Hunia’s name alongside Te Keepa’s in the title for Horowhenua 11 but this, too, was resolved out of court (see section 5.6). Thus, the chiefs and their people exercised tino rangatiratanga over the division of their lands amongst themselves (see section 5.3). The native land laws’ provision for the court to rubber stamp voluntary arrangements facilitated rangatiratanga in this respect.

The result of Muaūpoko’s arrangements was the partition of Horowhenua into 14 blocks (see table 12.1).

**(2) The form of title provided by the native land laws in 1886**

The Native Land Court used the voluntary arrangement provisions in the Native Land Court Act 1880 as the foundation for its orders. The form of title, however, was not that used in the 1880 Act (a certificate of title under the provisions of the 1873 and 1880 legislation), but rather the form of title specified for partitions in the Native Land Division Act 1882.

The Crown has conceded that it did not provide an effective form of corporate title at that time. It has also conceded that the native land laws’ individualisation of tenure made land more susceptible to fragmentation and alienation, and undermined Muaūpoko tribal structures, in breach of the Treaty. These concessions were particularly apposite for the form of title provided by the native land laws in 1886. The Native Land Division Act 1882 stated that the court’s partition orders, once signed and sealed, with a survey plan attached, would ‘vest such land according to the terms of the order in such person and for such estate, and subject to such restrictions, if any, as shall be expressed therein.’<sup>12</sup> The Act also specified that ‘the new instruments of title shall be Crown grants, or certificates under the Land Transfer Acts.’<sup>13</sup> In theory, once the new grantees obtained land transfer certificates, they had an indefeasible freehold title to all the blocks which Muaūpoko had intended would be held in trust.

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12. Native Land Division Act 1882, s 4(2)

13. Native Land Division Act 1882, s 10

## CONCLUSION

12.4.4

Block	Acres	Original purpose of partition
1	76	Strip of land for the Wellington-Manawatu railway line
2	4,000	Township block (Taitoko, later Levin), awarded to Te Keepa
3	11,130	106 Muaupoko to have shares of 105 acres each, for leasing
4	510	In the Tararua Ranges, for 30 Ngati Hamua individuals
5	4	In the Tararua Ranges, for two Rangitane individuals
6	4,620	44 rerewaho (left out in 1873) to have 105 acres each for leasing, awarded to Te Keepa to transfer to them
7	311	In the Tararua Ranges, for three Rangitane individuals
8	264	In the Tararua Ranges, for three individuals
9	1,200	At Raumatangi, for the descendants of Te Whatanui, awarded to Te Keepa to transfer to them (giving effect to the 1874 deed with Native Minister Donald McLean)
10	800	Next to Horowhenua 2, for Sievwright (to satisfy legal debts)
11	14,975	The tribal block west of the railway (with Lake Horowhenua), awarded to Te Keepa and Warena Hunia
12	13,000	The Tararua Ranges, awarded to Ihaia Taueki
13	0	One square foot in the Tararua Ranges, awarded to an individual whose name was supposedly duplicated in the 1873 list
14	1,200	East of the railway line, near Ohau, awarded to Te Keepa

Table 12.1: Partitions of the Horowhenua block, 1886

As noted, the failure to provide proper trust mechanisms or a form of corporate title was a breach of the Treaty. The deficiencies in the form of title provided by the native land laws in 1886 affected the following blocks:

- ▶ Horowhenua 3 was vested in 106 individuals for the purpose of leasing their individual shares, but the native land laws did not provide an effective (or any) form of community control, making this land extremely vulnerable to piecemeal alienation for no long-term benefits. That was a Treaty breach, which will be considered in more detail below (section 12.4.5(1)).
- ▶ Horowhenua 11 and 12, the tribal heartland and maunga, were to have been held in trust for Muaūpoko by Te Keepa and Warena Hunia (Horowhenua 11) and Ihaia Taueki (Horowhenua 12) as permanent reserves. This intention was defeated by the refusal of successive governments to include appropriate trust mechanisms or other similar corporate models in successive native land statutes. The intentions of the applicants and the tribe were not recorded, and the Crown's native land laws did not in fact empower the court to make, recognise, or enforce such trusts in any case. The court could only make the orders it was empowered to make under the 1882 Act. This meant that the great majority of Muaūpoko owners unknowingly divested themselves of their legal rights in Horowhenua 11 and 12, even though the abolition of the 10-owner rule was supposed to have made it impossible for one or a few rangatira to obtain sole legal ownership of the tribal estate.

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- ▶ As claimant counsel pointed out, trust mechanisms had long been commonplace in English law and should have been made available in the native land laws as an arrangement which fitted better than many others in respect of tikanga and enabling tribal communities to exercise their tino rangatiratanga. The result of this deliberate omission in the native land laws was prejudicial to Muaūpoko, as explained further below.
- ▶ Horowhenua 6 was meant to have been vested in Te Keepa in trust to convey to the rerewaho, those who had been wrongly left out in 1873, of whom a provisional list of 44 was compiled. The law did not enable the direct vesting of this land in the new owners at the partition hearing, hence Te Keepa faced the prospect of further expensive legal work to complete this arrangement. In the event, it was delayed by other litigation and had not been undertaken by the time of the Horowhenua commission, 10 years later. In this case, the land was eventually returned to the rerewaho in the late 1890s after statutory intervention.

**(3) The pre-partition dealings**

Our findings about the pre-partition dealings were made in section 5.8 as follows:

- ▶ *The railway corridor – there was no Treaty breach in respect of this arrangement:* The land for the railway line was vested in the railway company on partition in 1886. Te Keepa received 15 shares in the company but Muaūpoko received nothing for the loss of this land, although they would still have benefited significantly if their retained lands had prospered as a result of the railway. We accept the Crown's submission that this was a private deal in which it was not involved, and for which it bears no responsibility in Treaty terms.
- ▶ *The township deal – the Crown's actions breached Treaty principles:* Horowhenua 2 was vested in Te Keepa to sell to the Crown for a township settlement, on terms already offered to the Crown by Te Keepa (and agreed to by the people as the basis of any sale). The Native Department under-secretary told the court that the terms were so far agreed that he and his Minister could affirm the deal would be in the best interests of all the owners. In order, however, to avoid having to give the land to the railway company, the Crown delayed completing the purchase until mid-1887, too late to save Horowhenua 10 from Sievwright. The Crown also refused all of Muaūpoko's terms for the sale, and insisted on a monopoly price that was well below market prices. Te Keepa had little choice but to sell on those terms, and his disenfranchised fellow owners had no say in the matter. The purchase money was supposed to pay for the internal surveys but instead was all spent on litigation, mostly over Horowhenua 11. Thus, Muaūpoko obtained nothing for the sale of this 4,000-acre block.

The Crown's actions in respect of the township purchase were in breach of the Treaty. The Crown obtained the block from a chief whose debts meant, as a Crown official noted, that he 'could not help himself'. This was not consistent with the Treaty partnership or the principle of active protection. The Crown

abused its monopoly powers to pay a price that was too low, and to reject all of the provisions which might have provided long-term benefit for the tribe. At the very least, Ministers and officials implied in June 1886 that those terms would be accepted, hence the necessity for a clause in the final agreement cancelling any earlier agreements. Muaūpoko had agreed to sell on the original terms but were disempowered in the final sale because the law did not provide for proper trust arrangements. In all these ways, the Crown acted inconsistently with the principles of partnership and active protection. Muaūpoko were significantly prejudiced by these breaches.

- ▶ *Donald McLean's 1874 deal with Te Keepa to gift 1,300 acres to the descendants of Te Whatanui – no Treaty breach:* Horowhenua 9 (1,200 acres) was awarded to Te Keepa to transfer to Ngāti Raukawa, in satisfaction of the 1874 deed, which had been entered into at the request of Native Minister Donald McLean. Muaūpoko were not consulted and did not consent at the time, nor did they receive any payment, but they seem to have agreed unanimously in 1886 that the gift should be given effect. Many saw it as honouring the arrangement between Taueki and Te Whatanui. Some claimants argued that Muaūpoko might have repudiated the gift in 1886 if they had had access to proper, independent advice, but we do not think that was likely in light of the evidence. On balance, we did not think that a Treaty breach occurred (in respect of Muaūpoko) for the gift that became Horowhenua 9. Ngāti Raukawa's claims will be heard later in our inquiry.
- ▶ *The Sievwright debt block – no Treaty breach:* Horowhenua 10 (800 acres) was lost to Sievwright to satisfy legal debts, mostly for work done on the Whanganui trust, an arrangement to which Muaūpoko agreed in order to save their rangatira from prison. Despite recognising in principle that the land of other owners should not be taken to pay this debt, the Crown did nothing to assist Te Keepa and so the land was lost. Ultimately, however, Muaūpoko decided to rescue their chief, and did not resile from that choice a decade later in the Horowhenua commission (1896). That was their choice, and it was made on an informed basis. On balance, we did not find that the Treaty was breached.

#### **(4) Voluntary arrangements**

The Native Land Court Act 1880 provided for the court to give effect to voluntary arrangements made by the owners out of court. While this potentially allowed space for the exercise of rangatiratanga in the Native Land Court system, deficiencies in the provisions for voluntary arrangements at that time proved disastrous for Muaūpoko. A law change in 1890 required the details of voluntary arrangements to be recorded in writing. This much-needed reform came too late for Muaūpoko, who spent much of the 1890s in litigation trying to prove what their intentions had been – especially the question of whether they had intended to vest Horowhenua 11 and Horowhenua 14 in trust.



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The native land laws were thus in breach of the Treaty principle of active protection because there was no provision for the details of voluntary arrangements to be recorded. Additionally, the provisions for voluntary arrangements did not require the court to ascertain whether restrictions on alienation should be placed on blocks the subject of voluntary arrangements. This was also a breach of the principle of active protection. Muaūpoko suffered significant prejudice as a result of these Treaty breaches.

**12.4.5 The consequences of the 1886 form of title – litigation and alienation**

In chapter 6, we discussed the history of the Horowhenua block from 1886 to 1900. This period showed the harmful effects of the Crown's native land legislation, in combination with the Crown's unfair tactics for the purchase of land. The deficiencies of the 1886 partition – the lack of a provision for recording the details of the voluntary arrangement, the lack of trust mechanisms despite the purported vesting of lands in trustees, and the individualisation of title – resulted in extensive litigation and excessive land loss. By the end of 1900, Muaūpoko only retained about one-third of the Horowhenua block. In our view, many of the Crown's acts or omissions failed to meet Treaty standards during this period.

**(1) Horowhenua 3**

The Crown conceded that the individualisation of title made land more vulnerable to alienation, and harmed the tribal structures of Muaūpoko, but argued that no specific findings could be made about the alienation of individual interests in Horowhenua 3 after its further partition in 1890. Having reviewed the evidence relating to those alienations in the nineteenth century (see section 6.3), we were satisfied that a finding of Treaty breach should be made.

At the time, the Crown's protection mechanism against excessive land loss (leading to landlessness) was to place alienation restrictions on titles. The tribe agreed at the partition hearing in 1890 that almost all Horowhenua 3 sections should be restricted from alienation (other than for leasing), but the restrictions were too easily removed and proved a worthless form of protection. Three-fifths of the block had been sold piecemeal by 1900. It is important to note that some of these alienations took place after the Crown had reimposed pre-emption, and that the Crown itself purchased 835 acres in 1900, after it had imposed a nationwide ban on Crown purchases in the face of mass Māori opposition to excessive loss of land.

In section 6.11.1, we found that the protection mechanism provided by the Crown was flawed and ineffective, and that the significant loss of land in Horowhenua 3 by 1900 was due in large part to the form of title available under the Crown's native land laws. These Crown acts and omissions were in breach of the principles of partnership and active protection. Muaūpoko were significantly prejudiced by the resultant loss of land in Horowhenua 3.



**(2) *The Crown's failure to provide an early remedy for the trust issues in Horowhenua 6, Horowhenua 11, and Horowhenua 12: 1890–95***

As we discussed in section 6.4.1, the pressures of debt led Warena Hunia to apply for a partition of Horowhenua 11 in 1890. After the 1886 partition hearing, Hunia and Te Keepa had obtained a certificate of title under the Land Transfer Act, as provided for in the Native Land Division Act 1882 (see above). This appeared to make Warena Hunia and Te Keepa the absolute owners of Horowhenua 11, and the Native Land Court divided the block between them as their personal property – a decision confirmed upon rehearing in 1891. This partition hearing was the first time that a strong divide appeared in the record between Ngāti Pāriri (who supported Warena Hunia) and the other hapū of Muaūpoko. For the first time also there was a contested narrative about who stayed in Horowhenua in the 1820s and who fled, and disagreement about their respective rights. The unity of 1873 and 1886 was beginning to fracture under the pressure of a significant threat to the remaining land base. Worse was to come as litigation increasingly divided the tribe throughout the 1890s.

Judge Wilson, who presided over the Horowhenua partition in 1886, confirmed for the Crown that Horowhenua 11 was supposed to have been held by Te Keepa and Warena Hunia for the rest of the tribe. T W Lewis, under-secretary of the Native Department, had also been present at the 1886 partition hearing. He knew that Horowhenua 6 and 12 were supposed to have been held in trust as well, and advised Ministers accordingly. The Government's first attempt to restore the disenfranchised owners to these titles, the Horowhenua Subdivision Lands Bill 1891, would have provided an early remedy for the Muaūpoko owners of Horowhenua 11, 12, and 6. From as early as 1891, therefore, the Crown could have rectified the situation and prevented the lengthy, ruinously costly litigation that followed. But the 1891 Bill was not introduced to the House.

Te Keepa, Ihaia Taueki, and other Muaūpoko leaders and tribal members made appeals to the Crown annually for a remedy between 1890 and 1896. In sections 6.4 and 6.5.1–6.5.2, we outlined the detail of the many petitions, draft Bills, Native Affairs Committee reports, and other opportunities for the Crown to have provided redress during that period. Having analysed that material in depth, we agreed with the claimants that each of their attempts to obtain redress was 'a separate occasion where the Crown could have taken steps to properly protect Muaūpoko and their interests'.<sup>14</sup> In the claimants' view, the Crown's 'refusal to take action to settle the trust issue at an early instance was a breach of active protection and good faith'.<sup>15</sup> We agreed with this submission. The Crown repeatedly failed to institute remedies known to and contemplated by it during this period, in breach of the principles of active protection and partnership.

Muaūpoko were significantly prejudiced by this breach of Treaty principles. At the time, both Muaūpoko and officials observed that prolonged litigation would

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14. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), pp 43–44

15. Claimant counsel (Naden, Upton, and Shankar), submissions by way of reply (paper 3.3.29), p 42

be expensive and damaging to the tribe, yet this was the inevitable outcome of the Crown's failures to provide an early remedy.

One reason for these repeated failures was the Crown's determination to protect its 1893 State farm purchase, which is discussed in the next section.

### **(3) *The State farm purchase***

In chapter 6, we outlined the circumstances under which the Minister of Lands, John (Jock) McKenzie, agreed in 1893 to purchase 1,500 acres from Warena Hunia for a State farm. Although the Crown was aware that the partition titles for Horowhenua 11A and 11B had not been completed (caveats had been placed on the title), and that Hunia had no legal right to sell, it nonetheless agreed in principle to go ahead with the purchase in June 1893.

In our hearings, the Crown conceded that 'it purchased land in Horowhenua No. 11 from a single individual knowing that title to the block was disputed, and despite giving an assurance that the interests of the wider beneficiaries would be protected'.<sup>16</sup> This was an apt concession. In August 1893, Wī Parata asked the Minister in the House whether the Government would obtain the agreement of the beneficial owners of Horowhenua 11, since Te Keepa and Hunia were clearly trustees (see section 6.4.6). McKenzie's response was an assurance 'that if the Government did negotiate for the purchase of that block, they would take very good care, before a purchase was made, or before any money was paid over, that the interests of the beneficiaries should be protected, and that they should get the proper value for this land'.<sup>17</sup>

The Minister's undertaking was comprehensively broken in 1893–96. In the end, the purchase had to be imposed on Muaūpoko by legislation (the Horowhenua Block Act 1896), and all right-holders in Horowhenua 11 were deprived of the purchase money except for the Hunia whānau. In addition, the Crown took advantage of Warena Hunia's desperate, indebted state to pay a price that was significantly lower than market value – and, indeed, lower than the valuer and the surveyor-general had recommended.

The Crown conceded that it passed legislation in 1896 to permit the sale after Muaūpoko had 'successfully challenged the purchase in the Supreme Court'.<sup>18</sup> Crown counsel also conceded that the cumulative effect of the Crown's actions meant that the Crown had failed to actively protect the interests of Muaūpoko in Horowhenua 11, in breach of Treaty principles.

In section 6.11.3, we found that the State farm purchase was a breach of the Treaty guarantees, and of the principles of partnership and active protection.

Muaūpoko were prejudiced by the loss of this land, which was – to all intents and purposes – taken from them by legislation. The prejudice was exacerbated by the fact that the land was considered some of the best arable land in the Horowhenua 11

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16. Crown counsel, closing submissions (paper 3.3.24), p178

17. NZPD, 1893, vol 80, p 461

18. Crown counsel, closing submissions (paper 3.3.24), p178

block (which contained a lot of poor land), and that the Crown acquired far more land than was necessary for its State farm.

Further, the State farm purchase in 1893 had the effect of making the Crown a staunch defender of Warena Hunia's land transfer title, prolonging the expensive contest over Horowhenua 11. It also resulted in a feud between the Minister of Lands, Jock McKenzie, and Sir Walter Buller (and also Te Keepa). This, too, prolonged the expensive contest and had serious consequences for Muaūpoko in respect of Horowhenua 14 (discussed below in section 12.4.5(9)).

#### **(4) The Crown's nullification of legal remedies**

Expensive litigation was forced on Muaūpoko as a result of the Crown's failure to provide an early remedy in respect of the trust over Horowhenua 11. Yet, in 1895–96, the Crown intervened to nullify the outcomes of Muaūpoko's legal contest over Horowhenua 11 in the Supreme Court and Court of Appeal.

We described the case of *Warena Hunia v Meiha Keepa* in section 6.4.9, outlining how Te Keepa won his argument in the Supreme Court in 1894 that Horowhenua 11 was held in trust. Warena Hunia lost his appeal the following year. The Court of Appeal confirmed the Supreme Court's direction that the Native Land Court should determine the beneficial owners by way of a case stated under the Native Land Court Act 1894. The order for Hunia to account for the proceeds of the sale of the State farm block was also confirmed, and no more payments were to be made. This was a loss for the Crown as well as for Warena Hunia and his supporters. First, the Government intervened in 1895, bringing in legislation to stay the proceedings (the Horowhenua Block Act 1895). Secondly, after the Horowhenua commission (discussed below), all court proceedings were declared to be 'void and of no effect' by section 14 of the Horowhenua Block Act 1896.

This statutory interference in the tribe's legal remedies was criticised in Parliament at the time. In section 6.11.4, we accepted the point that the courts had only provided partial redress in respect of the State farm purchase, and that the courts' remedy only provided for Horowhenua 11 and not the other trust blocks (Horowhenua 6 and Horowhenua 12). Nonetheless, the Crown's intervention was motivated by its efforts to protect its State farm purchase and its recognition of (and payment to) Warena Hunia as vendor. In other words, the court had found the sale of the state farm block to have been made by a person who claimed 'falsely and fraudulently' to own the land,<sup>19</sup> and so the Crown intervened to protect its interest in this purchase.

We found that the Crown deprived Muaūpoko of their right to enjoy the benefits of court orders in their favour, which was not consistent with their article 3 rights as citizens. We agreed with the claimants that this 'unwarranted interference in Muaūpoko's constitutional rights was yet a further breach of Treaty principles of good faith and active protection.'<sup>20</sup>

19. *Warena Hunia v Meiha Keepa* (1894) 14 NZLR 71, 94 (SC and CA)

20. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2: Horowhenua Issues 1873 to 1898, 15 February 2016 (paper 3.3.17(a)), p 51

**(5) *The establishment of the Horowhenua commission***

The Horowhenua commission was one of the most contentious issues in our inquiry. The claimants argued that the commission was a very expensive waste of time, as the appropriate remedies were already known. The commission, in their view, was established to harass Muaūpoko and defend the State farm purchase; accordingly, Crown control of the appointment of members and terms of reference produced the desired result. The Crown, on the other hand, argued that the commission was completely independent and made findings against the Crown. It also argued that the commission was entirely necessary, as the outcome of litigation had been too uncertain, and the commission's brief necessarily extended beyond Horowhenua 11 (see section 6.2.3).

The Horowhenua commission held an intensive inquiry in 1896, after its establishment by legislation in 1895. The decision to have a commission of inquiry was a last-minute change. Originally, the Crown had intended to empower the Native Land Court to inquire into, and provide remedies at the same time for, the question of trusts (see section 6.4.10). The commission, on the other hand, could only make recommendations. One clearly punitive aspect of the legislation was that the costs of the commission were to be charged against whichever division of Horowhenua the commissioners chose. That had not been a part of the original plan for a Native Land Court remedy.

Because the issues about the commission were so contentious, we discussed them in significant detail in section 6.5 of chapter 6. Our findings were made in section 6.11.5.

We agreed with the claimants that the Horowhenua commission was not really necessary to identify appropriate remedies for Horowhenua 11, Horowhenua 6, and Horowhenua 12. As we set out in sections 6.5.1 and 6.5.2, remedies had already been identified for all three blocks, and the courts were in the process of providing a remedy for Horowhenua 11. Where Muaūpoko perhaps stood to benefit from a commission of inquiry, however, was in respect of Horowhenua 2, the township sale, about which unresolved grievances existed. In particular, some Muaūpoko were concerned that they had never received the proposed tenths, and had made representations about it.

Crown counsel accepted that Muaūpoko were not consulted about the establishment of the commission or the charge of the commission's costs against their lands (a crucial point). But the Crown did not accept that the commission and its establishment was a breach of the Treaty, or that its members were biased. We agreed that there was no evidence of conscious bias or political interference with the commission. But Muaūpoko were not consulted about the terms of reference; that decision was made by the Crown unilaterally. Settler interests clearly did influence the Crown-appointed Pākehā commissioners, unchecked by the presence of any Māori members or Māori expertise. In our view, the lack of balance on the commission affected its findings and recommendations.

In Treaty terms, the principle of partnership required the Crown to consult Muaūpoko as to whether a commission of inquiry was an appropriate means of determining remedies. A good Treaty partner would also have consulted about the scope and powers of the commission, and ensured that Māori expertise was represented on the commission. As noted above, the decision to establish a commission (instead of empowering the Native Land Court to investigate the trusts and readmit owners to the titles) was only a very last-minute substitution. Muaūpoko may well have preferred the more immediate remedy offered by the Horowhenua Block Bill 1895 in its original form. The manner in which the Crown established the commission was in breach of the principle of partnership.

Muaūpoko were prejudiced because a ready remedy was denied to them, and additional – costly and ultimately futile – litigation was forced upon them in the form of the commission's inquiry.

**(6) Failure to consult Muaūpoko about the commissioners' recommendations**

The Horowhenua commission recommended (among other things):

- ▶ Horowhenua 2: no remedies were identified for the serious failings in the Crown's township purchase.
- ▶ Horowhenua 6: should be returned to a list of 48 owners (the rerewaho) and then purchased by the Crown.
- ▶ Horowhenua 11: should be formally reserved for 140 owners by vesting it as a native reserve in the Public Trustee. The State farm purchase should be completed with the payment of all the purchase money to the Hunia whānau. An additional 1,500 acres of the trust estate should be acquired by the Crown for settlement.
- ▶ Horowhenua 12: should be vested in 142 owners and purchased by the Crown, and should bear the costs of the commission.
- ▶ Horowhenua 14: a 'grievous wrong' had been committed against Muaūpoko, and court action was necessary to provide remedies.

After comparing these recommendations to the remedies already identified prior to the commission, our view was that the commission's recommendations only really offered an opportunity for Muaūpoko to improve their circumstances (as opposed to previously identified remedies) if the commission was correct that Horowhenua 14 was held in trust.

The Horowhenua commission made its recommendations without hearing Muaūpoko on which lands they wished to retain. The Crown then decided unilaterally which of the commission's recommendations should be adopted, and inserted them in a Bill. The Crown's approach was extremely draconian, involving the compulsory purchase of Horowhenua 12 (to pay the costs) and 14, the compulsory purchase of the State farm block, and the compulsory vesting of Horowhenua 11 in the Public Trustee as a native reserve. Most of the commission's recommendations were eventually jettisoned, however, because the Government knew it could not get the Bill through the Legislative Council. In its final form, the Horowhenua Block Act



1896 still provided for the compulsory acquisition of Horowhenua 12 and the State farm block, but otherwise required the question of trusts and entitlements to be decided all over again in the Native Appellate Court.

Muaūpoko were not consulted about this outcome either, even though they would have to bear the costs of the resultant fresh litigation. Much of the Horowhenua commission's inquiry would now have to be repeated (just as it had covered ground already traversed in part by the superior courts and the Native Affairs Committee). As a result, the 1896 inquiry had been almost entirely futile as far as Muaūpoko were concerned. Also, no form of trust or collective management mechanism was provided for in the final version of the Horowhenua Block Act 1896.

The Crown's failure to consult Muaūpoko or provide more effectively for their interests (by the inclusion of trust and reserve mechanisms in the 1896 Act) was in breach of the partnership principle and the Crown's duty to actively protect Muaūpoko and their lands.

#### **(7) *The Crown's acquisition of Horowhenua 12***

In our inquiry, the Crown conceded that it acquired 20 per cent of the Horowhenua block to pay for a commission about which Muaūpoko were not consulted (including no consultation as to whether they should bear its costs).<sup>21</sup> Crown counsel stated: "The Crown has conceded that the manner in which it acquired Horowhenua No 12 to pay for the royal commission was a breach of the Treaty and its principles."<sup>22</sup> We noted in section 6.6 that the Crown actually acquired the whole of Horowhenua 12 (25 per cent of the Horowhenua block) compulsorily, without consultation or consent, even though Muaūpoko may have been paid for a small portion of it.

Not only did the Horowhenua Block Act 1896 confiscate Horowhenua 12, the Crown set the price per acre unfairly low – the Crown had offered almost twice as much when it tried to buy the block in 1892 – and so the proportion of the purchase money retained by the Crown was maximised. We are not sure what happened to the survey lien or whether Muaūpoko were paid the small amount left over after the cost of the commission was deducted.

The Crown has conceded that its compulsory acquisition of Horowhenua 12 was in breach of Treaty principles, and we agreed that this concession was appropriate.

Muaūpoko were prejudiced by the loss of their mountain block, which was very important to their tribal identity, contained the spiritual lake Hapuakorari, and provided forest resources important to their physical and cultural survival.

#### **(8) *The Crown's acquisition of Horowhenua 6 from the rerewaho***

On the Horowhenua commission's recommendation, the Crown purchased individual interests in Horowhenua 6, acquiring almost the whole block within two years. Crown counsel conceded that the cumulative effect of the Crown's actions, including its purchasing and the impact of its native land laws, has left Muaūpoko virtually landless. On the other hand, the Crown argued that there was insufficient

21. Crown counsel, closing submissions (paper 3.3.24), p183

22. Crown counsel, closing submissions (paper 3.3.24), p179



evidence about the alienation of Horowhenua 6 for the Tribunal to make any specific findings about that block.<sup>23</sup>

Our findings about the alienation of Horowhenua 6 were set out in section 6.11.8. In our view, it was clear that the Crown's laws stacked the deck against the individual owners of Horowhenua 6, who had been denied the right to obtain any benefit from their lands for 24 years (since they were first left out of the title back in 1873):

- ▶ The Native Land Court Act 1894 imposed a Crown monopoly, which meant that the owners could not lease it to settlers for an income (the purpose for which it was set aside in 1886). In other words, having finally obtained their land after a long delay, they could not obtain the intended benefit from it. The owners' only chance to raise money was to sell to the Crown.
- ▶ The Crown monopoly also meant that the Crown could dictate the price it paid, excluding any opportunity for a market price for the owners of Horowhenua 6.
- ▶ The Crown purchased individual interests piecemeal, and the owners of Horowhenua 6 had no legal mechanism enabling them to bargain collectively with the Crown to establish the terms of sale or a price for their lands.

Further, we noted that the Crown completed this purchase in 1899, just as it was about to suspend Crown purchasing nationwide in the face of mass Māori opposition to the extent of land loss.

The Crown's purchase of Horowhenua 6 in all these circumstances was in breach of the principles of partnership and active protection. The rerewaho were significantly prejudiced by these Crown acts or omissions, as a result of which many of them lost their last connection with their tribal homeland.

#### **(9) *The loss of Horowhenua 14***

The issue of Horowhenua 14 was politically fraught. The Minister of Lands, John McKenzie, claimed at the time that he was acting to protect Muaūpoko from themselves and from Te Keepa and his creditor, Sir Walter Buller. In the litigation of the late 1890s, Muaūpoko maintained that they had given Horowhenua 14 to Te Keepa at the 1886 partition as his own personal property. It is impossible today to uncover the truth about whether or not this land was originally intended to be held by Te Keepa in trust.

We discussed the fate of Horowhenua 14 in section 6.7, and made our findings in section 6.11.9. What was clear to us was that the litigation pursued by the Crown in 1896–97, following the Horowhenua commission, was politically motivated. The Public Trustee stated as much in 1897.

We accepted that Muaūpoko never consented in 1886 to the inclusion of Lake Waiwiri in Horowhenua 14. Also, Te Keepa admitted in the 1890s that other tribal members were interested in the land. Muaūpoko retained access to Waiwiri during his tenure. Ultimately, however, the block had to be sold to pay the costs of tribal litigation – litigation which would have been avoided entirely if the Crown had

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23. Crown counsel, closing submissions (paper 3.3.24), p 169

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provided an appropriate remedy for Horowhenua 11 earlier. The Crown's 'sacred duty' to protect Muaūpoko interests in this block, as it was put by the Crown at the time, did not extend to buying it in 1899 for the purpose of returning it to the tribe.

On balance, the actions of Buller and Te Keepa contributed to the loss of this block for Muaūpoko, but the primary responsibility rested with the Crown because of:

- ▶ the faults in its native land laws which failed to provide proper trust mechanisms;
- ▶ its failure to provide an early remedy for the disputed trusts despite repeated appeals from Muaūpoko; and
- ▶ its pursuit of costly, pointless litigation over Horowhenua 14 *after* Muaūpoko's almost unanimous declaration in 1896 that they had intended it for Te Keepa alone.

The Crown's actions breached the principles of partnership and active protection. Muaūpoko were prejudiced in particular by the loss of their taonga, Waiwiri, which became known as 'Buller's lake' after it passed out of their control.

**(10) *The individualisation of title in Horowhenua 11 and the divisive effects of the native land laws***

In 1897, the Native Appellate Court confirmed the existence of a trust in respect of Horowhenua 11 – a point which had been known to the Crown since 1890. The Horowhenua commission's list of persons entitled in Horowhenua 11 was set aside and the question was reinvestigated by the court (although the court did have regard to the evidence produced in the commission).

In 1873 and 1886, Muaūpoko exercised their rangatiratanga to settle their own entitlements in the Horowhenua block out of court. On both occasions, they took an inclusive rather than exclusive approach. The rerewaho, for example, had been mistakenly omitted in 1873 and were provided for in 1886 by the allocation of Horowhenua 6. Any disputes about hapū or individual entitlements were resolved by the tribe before presenting their decisions to the court. But the success of this approach was undermined by the form of title that had been obtained. In particular, the dispute between Te Keepa and the Hunia brothers in the 1890s was cast as a dispute between Ngāti Pāhiri and other hapū. The petitions and litigation of the 1890s, starting with the partition hearings of 1890, saw the emergence of conflicting hapū narratives as to ancestral rights – narratives which had not figured in the consensus decisions of 1873 and 1886. By the time the title to Horowhenua 11 was fully individualised in 1897, with the court's selection of 81 owners, the divisions were very pronounced.

Even so, after the Native Appellate Court confirmed the existence of a trust over Horowhenua 11, almost the whole tribe (including Ngāti Pāhiri) came together to agree on a basis for entitlement. They agreed out of court that the ownership of Horowhenua 11 would be for those persons named on the 1873 list of owners who were still alive at the original partition in 1886, and who resided permanently on

the land. This consensus was challenged in court by Hereora's children and others who felt this definition of 'ahi kaa' was unfairly narrow and had insufficient regard to ancestral rights. The outcome was very divisive, and remains so today. In particular, narratives about 'strong men' were advocated in the court and accepted as the basis for greater entitlements by the judge.

We accept that there was some Muaūpoko agency in these matters, but ultimately the responsibility lies with the Crown's native land laws, for failing to provide an effective trust mechanism or corporate form of title which – in the circumstances – would have assisted Muaūpoko with both resolving disputed entitlements and the retention and development of the land. A form of trust was by this time available for sites of significance, which Muaūpoko were able to take advantage of for Lake Horowhenua. But there was no broader trust mechanism, the mechanism which Muaūpoko collectively had favoured since 1873. Such a mechanism should have been included in the Horowhenua Block Act 1896. Alternatively, some way of reserving Horowhenua 11 for the tribe ought to have been inserted in that Act, as the Horowhenua commission recommended – but without any element of compulsion. Instead, full individualisation of title occurred in 1897.

The native land laws, in particular the Horowhenua Block Act 1896, were not consistent with Treaty principles. Muaūpoko were significantly prejudiced thereby.

#### **12.4.6 Summary of Treaty findings**

For nineteenth-century land issues in respect of the Horowhenua block, we summarise our Treaty findings as follows:

- ▶ The Crown's native land laws were inconsistent with Treaty principles because they provided no alternative to the Native Land Court for deciding customary entitlements. In particular, the Crown failed to provide the promised Crown–Māori arbitration by rūnanga for Horowhenua. Instead, in breach of Treaty principles, the Crown imposed the Native Land Court and tenure conversion on Muaūpoko despite sustained resistance from the majority of the tribe. The Crown's native land laws also allowed the court to sit so long as one group appeared and prosecuted a claim. This made it too risky for Muaūpoko and their allies to continue refusing to participate in the 1872 hearing. This aspect of the Crown's native land laws was also inconsistent with Treaty principles.
- ▶ The Crown conceded that the native land laws failed to provide for an effective means of corporate title, and that the individualisation of title made tribal lands susceptible to fragmentation and alienation, in breach of the Treaty. We agree. In our view, this included the failure to provide trust mechanisms, which proved particularly serious for Muaūpoko and the Horowhenua block from the 1870s to the 1890s. The section 17 title in 1873 (under the 1867 Act) did not provide a trust mechanism or a fair mode of conducting pre-partition dealings, in breach of Treaty principles. The form of title in 1886 (a certificate of title under the Land Transfer Acts) carried the individualisation further

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and had serious consequences for Muaūpoko in respect of Horowhenua 3, Horowhenua 6, Horowhenua 11, Horowhenua 12, and Horowhenua 14.

- ▶ The Crown breached the Treaty by failing to consult with or obtain the agreement of the Muaūpoko owners to the imposition of a Crown purchase monopoly on their lands in 1878, which had a crucial impact after the partition in 1886.
- ▶ The Crown's purchase of the township block (Horowhenua 2) breached the principles of partnership and active protection in the following manner. It obtained this block from a chief whose debts meant, as a Crown official noted, that he 'could not help himself'. The Crown also abused its monopoly powers to pay a price that was too low, and to reject all of the provisions which might have provided long-term benefit for the tribe. At the very least, Ministers and officials implied in June 1886 that Te Keepa's township terms would be accepted, hence the necessity for a clause in the 1887 agreement cancelling any earlier agreements. Muaūpoko had agreed to sell on the original terms but were disempowered in the final sale because the law did not provide for proper trust arrangements.
- ▶ The Crown's native land laws breached the Treaty principle of active protection because the Native Land Court Act 1889 did not require the details of voluntary arrangements to be recorded. Additionally, the provisions for voluntary arrangements did not require the court to ascertain whether restrictions on alienation should be placed on blocks the subject of voluntary arrangements.
- ▶ Horowhenua 3: the protection mechanism provided by the Crown (restrictions on alienation) was flawed and ineffective, and the loss of three-fifths of Horowhenua 3 by 1900 was due in large part to the form of title available under the Crown's native land laws. These Crown acts and omissions were in breach of the principles of partnership and active protection.
- ▶ The Crown failed to provide an early remedy for the intended trusts in respect of Horowhenua 6, 11, and 12, which resulted in ruinously expensive litigation and significant land loss. From as early as 1891, the Crown had the knowledge and means to rectify the situation. The Crown's failure to provide an early remedy breached the principle of active protection.
- ▶ The Crown conceded that it purchased the State farm block in breach of Treaty principles, including passing legislation to permit the sale after it had been challenged successfully in litigation, and that it failed to actively protect the interests of Muaūpoko. We agreed, and found that the State farm purchase was a breach of the Treaty guarantees, and of the principles of partnership and active protection.
- ▶ In respect of *Warena Hunia v Meiha Keepa*, the Crown deprived Muaūpoko of their right to enjoy the benefits of court orders in their favour, which was not consistent with their article 3 rights as citizens. We agreed with the claimants

that this ‘unwarranted interference in Muaūpoko’s constitutional rights was yet a further breach of Treaty principles of good faith and active protection.’<sup>24</sup>

- ▶ The Crown established the Horowhenua commission in a manner inconsistent with Treaty principles. It failed to consult the tribe about its decision to abandon a Native Land Court remedy, the necessity for a commission, or its terms of reference. The Crown also failed to provide for any Māori members or expertise, which skewed the commission’s results.
- ▶ The commission’s inquiry proved to be an expensive waste of time, and further expensive litigation proved necessary to provide a remedy. The Crown failed to consult Muaūpoko about the commission’s recommendations or about its Horowhenua Block Act 1896. The Act imposed the compulsory acquisition of Horowhenua 12 and the State farm block, but otherwise required the question of trusts and entitlements to be decided all over again in the Native Appellate Court. The Crown’s failure to consult Muaūpoko or provide more effectively for their interests (by the inclusion of trust and reserve mechanisms in the 1896 Act) was in breach of the partnership principle and the Crown’s duty to actively protect Muaūpoko and their lands.
- ▶ The Horowhenua Block Act 1896 confiscated Horowhenua 12 (one-quarter of the Horowhenua block) to pay the costs of the commission – with a little money left over which may or may not have been paid to Muaūpoko. This was in breach of the plain meaning of the Treaty and of its principles. The Crown conceded that its acquisition of Horowhenua 12 was inconsistent with the Treaty.
- ▶ The commission recommended that the Crown acquire Horowhenua 6 from the rerewaho, who had been denied any benefit from their lands since 1873. The Crown’s native land laws stacked the deck against the rerewaho, by imposing a monopoly which deprived them of any way to raise money on their lands except by selling to the Crown, precluded them from obtaining a market price, and prevented them from negotiating the price collectively. The Crown’s purchase of Horowhenua 6 in these circumstances was in breach of the principles of partnership and active protection.
- ▶ Muaūpoko also lost their remaining interest in Horowhenua 14, which (under Te Keepa’s ownership) still included access to Lake Waiwiri, largely because of the expensive litigation forced upon them by Crown actions in breach of the Treaty.
- ▶ Title was fully individualised in Horowhenua 11 as a result of the Horowhenua Block Act 1896, and Muaūpoko were forced into a divisive contest over their entitlements which still divides the tribe today. The Horowhenua Block Act 1896 was in breach of Treaty principles for this reason too. The commission had recommended a reserve held in trust but this did not eventuate.

Muaūpoko were significantly prejudiced by these Treaty breaches, as explained above and in chapters 4–6.

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24. Claimant counsel (Bennion, Whiley, and Black), closing submissions, part 2 (paper 3.3.17(a)), p 51



## 12.5 THE MUAŪPOKO REPORT – PRE-PUBLICATION VERSION

**12.5 TWENTIETH-CENTURY LAND ISSUES**

In chapter 7, we addressed Muaūpoko's claims about twentieth-century land loss.

As elsewhere in the report, we focused on matters that were distinct to Muaūpoko. The chapter examined the extent of land loss in those parts of the Horowhenua block in which Muaūpoko retained ownership interests after 1900, along with two of Muaūpoko's specific grievances: the creation and administration of a native township at Hōkio on 40 acres of Horowhenua 11B42; and the Crown's last major land purchase at Horowhenua, of 1,088 acres of coastal land in 1928 (Horowhenua 11B42C1).

We lacked sufficient evidence to assess broader twentieth-century land issues, such as the process of partition; the role of Māori land boards and land councils; leasing; support for Māori farming; public works takings; rating; and consolidation schemes. For that reason, we have left these issues and modes of alienation to be considered later in our inquiry, when we examine twentieth-century land issues more generally.

**12.5.1 Muaūpoko land loss in the twentieth century**

By the end of 1900, Muaūpoko tribal members only retained about one-third of the original Horowhenua block, held in individual interests. At the time of our hearings in 2015, Muaūpoko owners held some of their lands in trust but the sum total of Māori freehold land was only about 10 per cent of the original block.

The Crown in its closing submissions conceded 'the cumulative effect of its actions and omissions, including Crown purchasing, public works takings and the operation and impact of the native land laws, has left Muaūpoko virtually landless,' and that its 'failure to ensure that Muaūpoko retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles'.<sup>25</sup>

In section 7.2, we set out the statistical basis for our analysis of Muaūpoko's twentieth-century land loss. At the end of 1900, Muaūpoko retained interests in three partitions of the Horowhenua block: Horowhenua 3, 6, and 11. Of the land lost by Muaūpoko in these blocks during the twentieth century, by far the vast majority, over 88 per cent, was a result of private purchases. A further 10 per cent was lost through Crown purchasing, almost all of it in a single transaction, the Crown's purchase of 1,088 acres of coastal land in 1928 (see section 12.5.3).

Muaūpoko also lost many smaller parcels of land or land interests through public works takings, vesting for non-payment of rates, and the process of conversion of 'uneconomic interests'. In addition, their twentieth-century landholdings were subjected to processes that changed the status of the land but did not always lead to land loss. These included the vesting of land in Māori land councils and Māori land boards, 'Europeanisation' of Māori land titles, and the establishment of a native township at Hōkio (see section 12.5.2 for the latter).

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25. Crown counsel, closing submissions (paper 3.3.24), p 24



By the time of our hearings in 2015, Muaūpoko were virtually landless. In our estimation, tribal members retained only 5,288 acres, or roughly 10 per cent of the 52,460-acre Horowhenua block as Māori freehold land. Individual Muaūpoko may also have retained ownership of land that was 'Europeanised' (converted from Māori freehold to general land).

As we have noted, the Crown has conceded that it failed to ensure Muaūpoko retained sufficient land for their present and future needs, and that its actions and omissions have left Muaūpoko virtually landless, in breach of the Treaty and its principles. Based on our analysis of Muaūpoko's twentieth-century land loss, we agree that these Crown acts and omissions breached the Treaty.

### **12.5.2 Hōkio native township**

In section 7.3, we found that the Crown compulsorily acquired legal ownership and control of the Hōkio native township in 1902 on 40 acres of prized coastal land so that Levin residents could have holiday homes by the sea. This was an abuse of the powers granted the Crown under the Native Townships Act 1895, which was intended to establish townships in the interior for the facilitation of settlement. Nor could such a compulsory taking be justified as essential in the national interest or as a last resort. By contrast, 1901 legislation allowed Māori owners to choose to vest their land in a Māori land council and to have (with their consent) a native township established on that land. In the case of Hōkio, the Crown also acquired absolute ownership of 42.5 per cent of the township lands for roads and public reserves, without consent or compensation. Further, according to the chief surveyor at the time, there was no prospect that the Hōkio township would ever be of real benefit to its Māori beneficial owners. The Crown's acquisition of the Hōkio township land in all these circumstances, and without the consent of its Muaūpoko owners, was a breach of the Treaty principles of partnership and active protection.

We agreed with the Whanganui Land Tribunal that the native townships regime established a system of management which denied the beneficial owners a meaningful role. In 1910, a new Native Townships Act transferred legal ownership and control of the Hōkio township from the Crown to the district Māori land board, without consulting or obtaining the consent of the Muaūpoko beneficial owners. This was a breach of the ownership and tino rangatiratanga guarantees in the Treaty. The 1910 legislation also allowed the board to sell township lands, but the Crown promised that there were safeguards to ensure that the beneficial owners' rights and interests were protected. The Crown did not in fact ensure that these safeguards were effective, and township lands were sold from the 1920s to the 1940s without the proper consent of the Muaūpoko beneficial owners. This was a breach of the article 2 guarantees and the principle of active protection. Finally, we found that the Crown did not consult or obtain the agreement of the Muaūpoko owners to the vesting of legal ownership and control of their township lands in the Māori Trustee (transferred from the land board). This was a breach of Treaty principles.

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In respect of prejudice, we found that Muaūpoko were prejudiced by losing legal ownership and control of their Hōkio township lands for a number of decades, and the absolute loss of land sold in the interim. The owners did receive some lease income, but the amounts were very small.

**12.5.3 The Crown’s last major land purchase**

In section 7.4, we found that the Crown used its powers under Māori land legislation to circumvent the requirement for meetings of assembled owners, enabling it to buy undivided, individual interests in 1,088 acres of Muaūpoko’s highly prized coastal land in 1928, in order to defeat the owners’ collective decision not to sell and obtain their land for a local settler.

The legislative framework governing Māori land at the time of the Horowhenua 11B42C1 purchase provided a system of meetings of assembled owners. The quorum requirements were very low, and Māori land could be sold on the vote of a majority of those present at a meeting (by share value). But this provision at least offered Māori owners the possibility of collective decision-making about Māori land (albeit one-off decisions only). In 1913, the Crown gave itself the power to circumvent meetings of owners and buy undivided, individual interests if a meeting resolved not to sell. These provisions of the native land legislation fell well short of providing for tino rangatiratanga in respect of land, and offered a relatively flawed means of group decision-making which the Crown could circumvent at will.

In this context, a private purchaser sought to obtain Horowhenua 11B42C but a meeting of assembled owners did not wish to sell. The Crown intervened at the request of this private citizen, but its purchase offer was also rejected by a meeting of owners. The Crown then used its powers to buy undivided, individual interests, a power not available to private citizens, in order to defeat the owners’ collective decision not to sell, and to obtain their land for a local settler. This method of purchase enabled the Crown to pay a price that was 20 per cent lower than it had offered at the meeting, since its purchase of individual interests denied the owners any collective power to set or bargain over the price.

We found that the Crown, by its actions, betrayed the mutual trust which comprises the basis of the relationship between the Treaty partners, circumventing the collective will of the Māori owners in order to aid a private buyer, and lowering the price into the bargain. The Crown breached the principle of partnership, which entails a duty to act in the utmost good faith towards its Treaty partner. The Crown also breached the principle of equity, which required the Crown to act fairly as between Māori and non-Māori, and not to prioritise the interests of settlers to the disadvantage of Māori.

As to prejudice, we found that the Muaūpoko owners of this piece of ancestral coastal land, which could have been a source of income to them through afforestation, were clearly prejudiced by these Treaty breaches.

## 12.6 LAKE HOROWHENUA AND THE HŌKIO STREAM

### 12.6.1 Lake Horowhenua and the Hōkio Stream are taonga

As discussed in chapter 8, Lake Horowhenua and the Hōkio Stream are taonga for Muaūpoko. Many of the Muaūpoko witnesses who appeared before us described the great importance of Lake Horowhenua to their tribal identity. The lake and stream were (and are) highly valued for spiritual reasons, and also as sources of food and other materials. In our inquiry, the Crown acknowledged the ‘importance to Muaūpoko of Lake Horowhenua and the Hōkio Stream as part of their identity’ and as ‘fishing areas for cultural and physical sustainability’. The Crown also accepted that ‘Muaūpoko value Lake Horowhenua and its resources as taonga’, and it acknowledged ‘the importance of the Lake as a source of physical and spiritual sustenance to Muaūpoko.’<sup>26</sup> These were important acknowledgements, in our view.

### 12.6.2 The 1905 ‘agreement’ and Act

In the late 1890s, the growing Levin settlement was interested in the lake for boating and aquatic sports, and also as a prized scenic attraction. Settler groups lobbied the Crown to acquire the lake and its surrounds for the public. As set out in section 8.2.2, the Levin community negotiated access to the lake for picnics and other activities, paying Muaūpoko for access as necessary, while the Crown set in train a process to take the islands in the lake and surrounding lands under the Scenic Reserves Act 1903. There was also talk of nationalising the lake itself by Act of Parliament. Native Minister Carroll intervened and negotiated an interim agreement for public access in 1904, with a view to arranging a more permanent agreement in the near future. Carroll’s process trumped the scenic reserve taking, and – in the Crown’s view – an agreement was negotiated in 1905, which was given effect soon after by the Horowhenua Lake Act 1905.

The parties in our inquiry differed significantly over the 1905 ‘agreement’. According to the claimants, there was either no agreement at all, or there was a limited agreement to a set of high-level principles which needed to be further negotiated and formally agreed with the lake trustees. From the evidence at the time, Muaūpoko understood themselves as having agreed to free public access for aquatic sports. The Crown, however, understood the agreement to be the items recorded subsequently by a Crown official, as follows:

1. All Native bush within Lake Reserve to be preserved.
2. 9 acres adjoining the Lake, – where the boat sheds are and a nice Titoki bush standing, – to be purchased as a public ground.
3. The mouth of the Lake to be opened when necessary, and a flood-gate constructed, in order to regulate the supply of water in the Lake.
4. All fishing rights to be conserved to the Native owners (Lake not suitable for trout).
5. No bottles, refuse, or pollutions to be thrown or caused to be discharged into the Lake.

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26. Crown counsel, closing submissions (paper 3.3.24), p 44

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6. No shooting to be allowed on the Lake. – The Lake to be made a sanctuary for birds.
7. Beyond the above reservations, the full use and enjoyment of the waters of the Lake for aquatic [*sic*] sports and other pleasure disportations, to be ceded absolutely to the public, free of charge.
8. In regard to the preceding paragraph, the control and management of the Lake to be vested in a Board to be appointed by the Governor – some Māori representation thereon to be recognised.
9. Subject to the foregoing, in all other respects, the Mana and rights of the Natives in association with the Lake to be assured to them.<sup>27</sup>

The list of ‘items’ thus included points which the Crown recorded Muaūpoko as agreeing to, and items which must be understood as Crown assurances or undertakings. This list of terms was not signed by the Muaūpoko people present at the meeting, which included one lake trustee, and nor was it further negotiated before the Crown introduced the Lake Horowhenua Bill 1905 to Parliament a fortnight or so later. Nor were the Muaūpoko owners consulted about the Bill, which was enacted at the end of October 1905.

Our conclusion in section 8.2.3 was that there was a tentative agreement in principle on some inchoate terms in October 1905, to which some Muaūpoko ‘elders’ (as Wī Reihana said in 1934), some Levin settlers, and Premier Seddon had agreed, with the Native Minister interpreting. This was clearly not an adequate or complete agreement, let alone a formal or signed deed of agreement, although Muaūpoko in later decades confirmed that they had consented to public use of the surface of the lake for boating. In our view, the Crown was very clearly a party to this ‘agreement’. The next step for the Crown was either to seek the formal agreement of the lake trustees to a contract or deed (and the endorsement of the court to any variance of the trust), or – as Sheridan recommended – legislation. The choice to legislate without first seeking formal agreement on more fully developed terms was clearly a breach of Treaty principles. It was not consistent with the principle of partnership, nor was it consistent with the plain meaning of article 2 of the Treaty.

The Horowhenua Lake Act 1905 declared the lake to be a ‘public recreation reserve’, and brought it under the Public Domains Act 1881. It established a domain board to control all activities on the lake, of which at least one-third of the members were to be Māori. And the Act specified that the Māori owners’ use of the lake was not to interfere with the use of the public. This put in place an administrative regime, which – apart from the proportion of Māori board members – has controlled the lake ever since.

The English version of article 2 of the Treaty guaranteed that Māori would retain their lands and all other properties for so long as they wished. The Māori version guaranteed their tino rangatiratanga over their taonga. The 1905 Act, however, took control of Lake Horowhenua from its Muaūpoko owners and vested it in a board,

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<sup>27</sup> ‘Horowhenua Lake Agreement’, not dated [1905] (Paul Hamer, “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, June 2015 (doc A150), pp 34–35)

turning their private property into a public recreation reserve and subordinating their use of their private property (a taonga) to that of the public. This was done without adequate consent or any compensation, in clear breach of article 2. In our view, this was a serious Treaty breach which left Muaūpoko essentially powerless to exercise tino rangatiratanga over their taonga, which will be evident in the next section of this chapter.

The enactment of the 1905 Act was not the result of a true or fair balancing of interests, as Crown counsel argued in submissions (see section 8.2). If the public possessed a legitimate ‘interest’ in this privately owned lake, it amounted at that time to a desire to use it for boating and recreation, for which privilege the public could negotiate arrangements with the owners (including for payment, as they had prior to 1905). This public ‘interest’ in the lake was hardly of a kind which justified imposing the 1905 Act and the provisions of the Public Domains Act on the Māori owners, without their consent or any payment of compensation. Even if the 1905 ‘agreement’ had contained final and fully agreed terms, the application of the Public Domains Act to Lake Horowhenua had never been one of them. For Muaūpoko the prejudice was enormous. This included an economic prejudice – if they had been able to continue charging settlers for use of their private lake, they would have benefited in a substantial way from the settlement and colonisation brought about by the Treaty.

Crown counsel argued that the 1905 Act simply regulated rather than expropriated private property rights. As set out in our findings in section 8.2.5, we did not accept that position. We did agree with the Crown that legal ownership of the lakebed was not taken by the Horowhenua Lake Act 1905. But Muaūpoko owners lost the right to develop their lake, which was a right inherent in all properties under English law. It was also a Treaty right, as the Waitangi Tribunal explained in its report *He Maunga Rongo*.<sup>28</sup> The 1905 Act transferred the development right in Lake Horowhenua to the public, which could then develop the lake as a pleasure resort, giving not only this right but also the exclusive control of all other private property rights to a public board. Our conclusions from this were as follows:

- ▶ First, under the 1905 Act, Muaūpoko fishing and other uses of their property were not to interfere in any way with public recreation and were therefore subordinated to it by statute.
- ▶ Secondly, under the Public Domains Act 1881, many of those uses were also prohibited in a public domain or required explicit domain board permission.
- ▶ Thirdly, the development right was transferred from the Muaūpoko owners to a public board.

In our view, this was as near to an expropriation as could occur without outright confiscation of the legal ownership. It was a breach of the Māori owners’ article 2 rights, and of the principles of partnership and active protection.

The 1905 Act provided for the Māori owners to be represented on the domain board, which potentially gave them a say in how their uses of their property were

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<sup>28</sup>. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 3, chapter 13



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controlled and/or prohibited in the future. But the Crown's omission to negotiate an appropriate level of representation and then guarantee it in the 1905 Act was a breach of the principle of partnership and the property guarantees in the Treaty.

There were further omissions in the 1905 Act. Crown counsel made an important concession: the Crown 'promoted legislation in 1905 that failed to adequately reflect the terms of the Horowhenua Lake Agreement of 1905'.<sup>29</sup> Crown counsel noted the failure to prohibit pollution from entering the lake (item 5 of the Crown's record of the agreement), which was inconsistent with Treaty principles. The Crown qualified this concession, however, by reference to a domain board bylaw which prohibited littering. Crown counsel argued that items like pollution were left out of the legislation because they could be made the subject of bylaws.

In section 8.2.5, we found that the Crown's failure to include prohibitions against the discharge of pollution and the introduction of trout – which were recorded by the Crown in 1905 – was in breach of the principles of partnership and active protection. Similarly, the Crown failed to negotiate or include a mechanism by which the owners could agree on the control of lake levels (item 3). This was a breach of Treaty principles. These breaches were to have serious consequences, as we set out in chapters 8 and 9.

### 12.6.3 The 'whittling away' of Muaūpoko rights, 1905–34

Under the Horowhenua Lake Act 1905 and subsequent legislation, there was a 'whittling away' of the Muaūpoko owners' property rights, authority, and tino rangatira-tanga – as the tribe explained to a committee of inquiry in 1934. In section 8.3, we explained that significant inroads were made on the owners' rights, to the extent that a Crown Law Office opinion concluded in 1932 that the 1905 Act had transferred legal ownership of the lakebed and the chain strip of land around the lake from the Māori owners to the Crown.

In section 8.3.8, we found that the following Crown acts or omissions had breached the Treaty principles of partnership and active protection, and the property guarantees in article 2 of the Treaty:

- ▶ The Crown recognised Pākehā as having the right to fish in Lake Horowhenua, ending Muaūpoko's exclusive fishing rights without consent or compensation, after trout and other predatory species were introduced by acclimatisation societies and the domain board (also without the agreement of the Muaūpoko owners). Crown counsel acknowledged that 'the extension of public rights to include a right to fish was contrary to the intent of the 1905 Agreement and prejudicial to the owners of the Lake bed', who 'maintained they had the exclusive right to fish the Lake'.<sup>30</sup>
- ▶ Legislation placed the chain strip unequivocally under the control of the domain board in 1916. Muaūpoko then had no rights to cut flax, use the strip, or fence it off, yet the board could not actually stop farmers from burning off vegetation and grazing their stock on the chain strip at will. Muaūpoko did

29. Crown counsel, closing submissions (paper 3.3.24), p 23

30. Crown counsel, closing submissions (paper 3.3.24), p 44



not agree to domain board control of the chain strip, and their protests were ignored.

- ▶ Levin borough councillors were given control of the domain board by legislation in 1916, while the minimum one-third representation for Muaūpoko was turned into a one-third maximum, sealing their minority status and relative powerlessness on the board. Again, Muaūpoko protests against the 1916 legislation proved futile. The Crown's failure to consult Muaūpoko, to obtain their agreement to a proportionate representation on the board, to set an appropriate proportion of members for joint management, and to establish a sound appointments procedure was inconsistent with Treaty principles.

In addition to these Treaty breaches, significant inroads were made for the first time on the rights of the Muaūpoko owners of the Hōkio Stream. Local farmers wanted to control the stream and lower the level of the lake, so as to create more dry land for farming (see section 8.3.7). As a result, legislation in 1916 vested control of the stream (and one chain on either side) in the lake domain board, which was also placed under the control of Levin borough councillors with a two-thirds majority. As noted above, the Muaūpoko owners protested against the 1916 legislation without success. Nonetheless, the domain board proved unable to carry out any significant works on the stream, and there was agitation for it to be placed under a drainage board.

In 1925, a Government commission 'brokered a deal whereby the [Hōkio] drainage board would clear the stream but not alter the stream banks.'<sup>31</sup> Historian Paul Hamer summarised the outcome. It seemed that an amicable settlement had been reached, which Muaūpoko supported, but, as Mr Hamer pointed out,

the drainage work then carried out in February 1926 went much further than this, and two Muaūpoko men were arrested for obstructing the works. Another agreement was brokered [in March 1926], this time by the Native Minister's private secretary [Henare Balneavis], under which no further widening or deepening would happen without Māori agreement or Ministerial arbitration. But when the empowering legislation so long wanted by the advocates of drainage was finally passed in September 1926, this gave the drainage board the power to widen and deepen the stream so long as it 'reasonably' safeguarded Māori fishing rights. The two negotiated agreements of late 1925 and early 1926 were forgotten. Muaūpoko believed, moreover, that the damage had already been done.

The work on the Hōkio Stream lowered the lake by four feet, destroying lake edge habitat for eels and kakahi. The new channel at the upper reaches of the stream also made the use of eel weirs extremely difficult. Farmers rushed to make use of what they saw as their reclaimed land surrounding the lake, fencing to the water's new edge and burning or allowing their stock to destroy lakeside vegetation. Muaūpoko complained to both the domain board and the Native Minister without success, although

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31. Paul Hamer, summary of "A Tangled Skein": Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, October 2015 (doc A150(k)), p 4

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the Marine Department did confirm that eel numbers had been reduced and raised the possibility of paying Muaūpoko compensation.<sup>32</sup>

Our finding in section 8.3.8 was that legislation in 1926, in breach of Treaty principles and in violation of the 1925 and March 1926 agreements, gave the Hōkio Drainage Board exclusive power to control and deepen the Hōkio Stream. The resultant drainage works lowered the lake by four feet and caused significant damage to the eel fishery, shellfish beds, and the lakeside vegetation. Vital eel weirs were removed and could not be replaced. Muaūpoko protests were investigated by the Crown in 1931 but no remedy eventuated.

Contrary to the Crown counsel's submission, the Crown did not balance interests in an appropriate or Treaty-compliant manner during this period. It prioritised even minor settler interests over those of Muaūpoko in all of the instances noted above. This was a breach of the principle of equity, which required the Crown to act fairly as between settler and Māori interests.

Muaūpoko were heavily dependent on the resources of the lake and the Hōkio Stream, and even the flax and other resources of the chain strip. In theory, the recreational interests provided for in the 1905 Act ought not to have been incompatible with exclusive Muaūpoko fishing rights or the tribe's use of resources on the chain strip. As noted earlier, Muaūpoko's understanding of the 1905 agreement was that settlers could access the lake for boating and aquatic sports, not that the owners would give up control of the lakeside strip or allow others to fish in their lake. At the very least, their consent should have been obtained to these infringements of their rights, or appropriate compensation offered. In respect of drainage, the Minister of Internal Affairs admitted in 1931 that Muaūpoko had suffered injustice for the sake of reclaiming an inconsiderable amount of land. That was patently unfair.

Thus, as demonstrated by our analysis in sections 8.3.4–8.3.7, there had been no fair or appropriate balancing of interests. Rather, the Crown prioritised even minor settler interests over those of Muaūpoko. Muaūpoko were only consulted in 1926 after they took the law into their own hands in protesting the drainage works. Otherwise, they were barely consulted and their interests almost always disregarded or minimised. This was not consistent with the Treaty principles of partnership, active protection, or equity (which required the Crown to act fairly as between Māori and settlers).

Nor was it consistent with the 1905 agreement. By the 1930s, however, officials could not locate the most basic of information about the agreement. Faced with that situation and an Act purporting to give effect to it, officials did not ask Muaūpoko for information about the agreement (nor even check the parliamentary debates about the 1905 Act). Muaūpoko rights were instead read down by the Crown Law Office, and this was translated into public policy. No fresh agreement was sought.

Muaūpoko were prejudiced by these Crown acts and omissions. The evidence showed that their property rights were compromised, their mana reduced, and

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32. Hamer, summary of "A Tangled Skein" (doc A150(k)), p 4

their tino rangatiratanga violated. Their fisheries were harmed, their lake lowered four feet (damaging the lake shore habitat), and their ability to sustain themselves from their lake and stream was significantly reduced. The impact of Crown acts or omissions was especially severe during the Depression.

#### **12.6.4 The 1934 committee of inquiry and the negotiation of a new agreement, 1934–53**

In 1933, the Levin Borough Council wanted to develop the lake as a pleasure resort but sought clarification of the “fishing and other rights” of the Native[s]’ before trying to do so.<sup>33</sup> As discussed in section 9.2.3, the Government favoured the council’s plans. It appointed Judge Harvey (of the Native Land Court) and HWC Mackintosh (commissioner of Crown lands) to hold a public inquiry. The committee’s inquiry found that the 1905 agreement was intended to be a ‘grant of user of the water surface by the Natives with fishing specially reserved’, and was not ‘an alienation of the land with a free right of fishing common to both European and Māori.’<sup>34</sup>

The Harvey–Mackintosh report was a significant advance for Muaūpoko in that it recognised their ownership of the lakebed and chain strip, and recommended the return of most of the chain strip and dewatered area to their control. It failed, however, to define the respective rights of the domain board and the Māori owners under the two legislative regimes (the 1905 Act and amending Acts, and the Public Reserves, Domains and National Parks Act 1928). Nor could the committee make recommendations about drainage works, which were outside its terms of reference, even though the Muaūpoko evidence had showed burning grievances on that matter.

The committee’s recommendations were partly favourable to Muaūpoko, but it also recommended that the domain board be ‘given’ 83.5 chains for its resort plans. For the next 19 years, the Crown insisted on the latter point, with a brief blip in 1952 when it tried to buy the whole lake and chain strip as well. Finally, in 1953, the Crown agreed to the free use (not purchase) of a much smaller area of 22 chains, fronting the 13-acre reserve (later called Muaupoko Park). Once agreement was reached on this point, a more comprehensive settlement was negotiated with Muaūpoko (see below).

Why did it take so long to reach a settlement? The Crown argued that it was reasonable for it to follow the recommendation of the Harvey–Mackintosh report (to acquire the 83.5 chains), and that delays were also caused by the Depression, the Second World War, and the resistance of local authorities. The claimants, on the other hand, maintained that it was not reasonable for the Crown to insist on an alienation of yet more Muaūpoko land when the tribe had already lost so much.

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33. Hudson to under-secretary for lands, 6 November 1933 (Hamer, “A Tangled Skein” (doc A150), p 108)

34. Committee of inquiry, report to Minister of Lands, 10 October 1934 (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000, various dates (doc A150(g)), p 1566)

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They also argued that the Crown did not really need the 83.5 chains in any case, and so the delay was not only unfair to Muaūpoko but entirely unnecessary.

Article 2 of the Treaty stipulated that Māori would retain their land for so long as they wished, but could alienate it if they chose. Treaty principles required that any alienation had to be made by the free and informed choice of the Māori owners. Under the Treaty, the Crown had no right to insist that Muaūpoko give it 83.5 chains for no consideration, or even for a payment, unless there was no other alternative and a pressing need in the national interest. That was clearly not the case in this instance. Further, as demonstrated in 1953 by the first-ever site inspection, the land was boggy and unsuitable for inclusion in the recreation reserve. The Crown did not even need the land that it had insisted so long on acquiring free of charge. A more timely inspection would have revealed that fact earlier.

We found in section 9.2.5 that the delay between 1935 and 1952 was entirely attributable to the Crown's refusal to deal with Muaūpoko on any other terms. Neither the Depression nor the Second World War played any role in the delay. Negotiations were resumed in 1943–44 without regard to the war. The real stumbling block was the unfairness of the Crown's insistence that Muaūpoko give up 83.5 chains of their land. As Muaūpoko's lawyer asked at the time: why should Muaūpoko have to 'pay a price for having restored to them the control and use of their land which has been taken from them without their consent, and unjustly'? Nor did the local authorities play a role in delaying a Crown–Māori agreement – the Levin Borough Council delayed settlement from 1954 to 1956, *after* the Crown and Muaūpoko had reached agreement.

The Crown breached the Treaty principles of partnership and active protection, and the plain meaning of article 2 of the Treaty, when it refused to settle with Muaūpoko for 17 years unless they met its unreasonable demand for a free 'gift' of land. Muaūpoko were prejudiced because all of their rights (including to the lakebed and chain strip) remained uncertain during that time, and none of their grievances were rectified. Their mana and tino rangatiratanga were compromised. They could not prevent use of the chain strip or damage to its resources by neighbouring farmers.

In 1952 to 1953, however, the Crown compromised, negotiated with Muaūpoko in good faith, and obtained a voluntary agreement in July–August 1953. Legislation to give effect to the agreement was delayed from late 1953 to late 1955, but this was caused by the Levin Borough Council and was not the fault of the Crown. In reaching the agreement of 1953, the Crown balanced interests more fairly than had occurred previously, and the evidence shows that a free and informed agreement was reached between Māori and the Crown in 1953.

**12.6.5 The 1953 agreement and the ROLD Act 1956**

The issue of pollution entering the lake is dealt with later in this chapter. Otherwise, Muaūpoko and the Crown reached agreement on eight key points in 1953:

- ▶ For the 22-chain frontage of the 13-acre reserve, the public would have free access to the lake across the chain strip and dewatered land, and the lake domain board would control that area;
- ▶ The ‘balance of the Chain strip’, the dewatered land, the lakebed, the Hōkio Stream, and the one-chain strip on the north bank of the stream, would be confirmed in Māori ownership, their title to be ‘validated by legislation’;
- ▶ The surface waters of the lake would be subject to the Public Reserves, Domains and National Parks Act 1928 Act and controlled by the lake domain board;
- ▶ The domain board would be reconstituted along the lines requested by the lake trustees, with four ‘Māori representatives and three Pākehā representatives’ from the borough council, the county council, and ‘Sports Bodies’, and the commissioner of Crown lands as ‘independent Chairman’ – the mode of selecting members was not specified;
- ▶ The Manawatu Catchment Board would control the Hōkio Stream, but legislation would specify that no works could be carried out without the consent of the reformed domain board;
- ▶ The lake would ‘remain a sanctuary’ and no speedboats would be allowed on it;
- ▶ The lake would be controlled at its current level, either by the Crown or the catchment board, and the owners would agree to a ‘spillway or weir’ so long as it did not interfere with their fishing rights; and
- ▶ Māori fishing rights would be confirmed.<sup>35</sup>

As we discussed in section 9.2.4(4), the catchment board, county council, and Hokio Drainage Board agreed to a settlement on these terms, but the Levin Borough Council’s opposition caused a delay in legislation until 1956. In order to meet the council’s concerns, the item about the lake remaining a sanctuary (and banning speedboats) was omitted from the 1956 Act. These issues were left for the board to decide and deal with by way of bylaws. Also, the borough council was given two representatives instead of one on the reformed domain board (the sporting interests’ representative was dropped). Otherwise, section 18 of the Reserves and Other Land Disposal Act 1956 (‘the ROLD Act’) faithfully reflected the points agreed in 1953 (listed above). The draft clause of the ROLD Bill was sent to Muaūpoko’s lawyers, Morison, Spratt and Taylor, to obtain the tribe’s agreement to its terms. On 11 September 1956, the commissioner of Crown lands reported that the tribe’s lawyers had agreed to the draft legislation. There was no evidence as to what process the lawyers followed to confirm the agreement of the Māori owners or of the tribe more generally. Nonetheless, their agreement was confirmed by Muaūpoko in 1958 at a large hui with the Prime Minister, Walter Nash, at Kawiu Marae. The chairman of the lake trustees, Tau Ranginui, proclaimed the hui ‘a great day of gladness,

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35. NF Simpson to commissioner of Crown lands, 9 July 1953 (Paul Hamer, comp, papers in support of “A Tangled Skein”: Lake Horowhenua, Muaūpoko, and the Crown, 1898–2000; various dates (doc A150(c)), pp402–403)



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humility and deep satisfaction. Our long-outstanding grievance has been settled – our lands restored to us – and we can now take an honoured place in the community.<sup>36</sup>

On balance, we were satisfied that there was genuine, free, and informed consent on the part of the Muaūpoko owners to the 1956 legislation (see section 9.3.3(2)). Muaūpoko had the benefit of independent legal advice, their lawyers advised the Crown that they had agreed, and the tribe gave clear and public support at the 1958 hui. The question remained, however, as to what extent the legislation provided an effective remedy for Muaūpoko grievances, or a fair, Treaty-compliant basis for both the future management of the lake and the protection of the Māori owners' rights and interests.

### 12.6.6 Did the 1956 legislation remedy Muaūpoko's grievances in respect of past legislation and Crown acts or omissions?

In section 9.3.3(2), we found that there was genuine, free, and informed consent on the part of the Muaūpoko owners to the 1956 legislation. They had the benefit of independent legal advice, and gave their clear and public support for the Act at a major hui with the Prime Minister in 1958. This support was evident because the 1956 legislation did provide some remedies or potential remedies for past Crown acts and omissions. As we explained in chapter 9, there were two remedies:

- ▶ The ROLD Act 1956 formally recognised Māori ownership of the lakebed, chain strip, the bed of the Hōkio Stream, and one chain on the north bank of the stream. Māori ownership of these taonga had been placed in doubt from the 1920s to the 1950s (as explained in chapter 8).
- ▶ The ROLD Act 1956 returned control of the chain strip and dewatered land to its Muaūpoko owners, providing a remedy for the effects of the ROLD Act 1916.

These two features of the 1956 legislation provided a remedy and were consistent with the Crown's Treaty obligations.

There were also at least two potential remedies:

- ▶ The ROLD Act 1956 reformed the membership of the lake domain board. The Levin Borough Council lost its two-thirds majority (being reduced to two members of an eight-member board). The Māori members were increased to four, which – so long as the Crown chairman did not vote – gave them a narrow majority. The composition of a 4:3 board, with a Crown official to mediate disagreements as a neutral chair, had been proposed by Muaūpoko in 1953. If this new arrangement proved to be a sufficiently secure or effective majority, the reform of the domain board had the potential to remedy the severe imbalance in the past, which had placed the board very firmly under borough council control. But the Crown did not go so far as to reverse that situation and give the Māori members a two-thirds majority on the reformed domain board. There were official proposals in the 1980s to give Muaūpoko an extra seat or seats (and a larger majority) but these were not actioned (see section 9.3.4(4)).

36. Unidentified newspaper clipping, 1958 (D A Armstrong, 'Lake Horowhenua and the Hokio Stream, 1905–1990', May 2015 (doc A162), p 73)



- ▶ The ROLD Act 1956 provided that drainage works could not be carried out on the Hōkio Stream without the agreement of the reformed domain board. Again, so long as the Muaūpoko board members had a secure and effective majority, this provided a potential remedy against a repeat of past grievances. In the 1980s, the Muaūpoko owners sought to have this right of veto transferred to the lake trustees.

We found in chapter 9 that these two features of the 1956 Act provided a *potential* remedy for the Muaūpoko owners. In order to decide whether these features were consistent with Treaty principles, we examined the question of whether the remedies were effective in practice (which was analysed above in section 9.3.4(2)). Our findings were made in section 9.3.5.

In terms of the hierarchy of interests established by the 1905 Act, in which the fishing and other property rights of the Māori owners were subordinated to public uses (see section 8.2.4), the 1956 Act provided a potential remedy. First, the Act maintained the priority of public uses over the property rights of the Muaūpoko owners. But in 1905 this had been an unqualified priority, whereas the 1956 Act specified that the ‘free and unrestricted’ rights of the Māori owners were not to interfere with the ‘reasonable rights of the public . . . to use as a public domain the lake’ (emphasis added).<sup>37</sup> The questions of whether the public rights were reasonable or not, and of which rights should prevail, fell in practical terms to the reformed domain board to decide. Again, this gave the Muaūpoko owners a potential remedy. Any legal argument concerning the term ‘reasonable’ would, of course, be subject to any court review.

We did not, however, accept the Crown’s submission that, ‘to the extent any prejudice might be said to flow from earlier legislation as to control and/or rights, that prejudice was remedied by the enactment of the 1956 Act.’<sup>38</sup> Rather, we agreed with the claimants that the 1956 legislation did not ‘purport to settle all historic issues relating to the lake,’<sup>39</sup> and nor in fact did it do so. The 1956 legislation breached the principles of active protection and partnership when it:

- ▶ failed to provide compensation for past acts and omissions (including the imposition of the 1905 arrangements on the Muaūpoko owners without consent, infringements of their property and Treaty rights, the omission to pay for or provide any return for public use of the lake, the harm to their lake, stream, and fisheries when the stream was modified to lower the lake, and the reduction of their fisheries by the introduction of trout and the granting to non-owners of the right to fish);
- ▶ failed to prohibit pollution (discussed further below);
- ▶ failed to grant an annuity or rental or some such payment for the future, ongoing use of the lake as a public recreation reserve; and

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37. ROLD Act 1956, s18(5)

38. Crown counsel, closing submissions (paper 3.3.24), p 57

39. Claimant counsel (Bennion, Whiley, and Black), submissions by way of reply, 21 April 2016 (paper 3.3.33),

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- failed to provide an appropriate, agreed mechanism for selecting Māori board members.

These omissions were a breach of the Treaty principles of partnership, active protection, and redress (the principle that the Crown must provide a proper remedy for acknowledged grievances). The prejudice to Muaūpoko continued (and still continues today).

**12.6.7 Did the 1956 legislation provide a suitable platform for (a) future management of the lake and stream, and (b) protection of the Māori owners' rights and interests?**

As we have just noted, the 1956 legislation had the potential to provide a greater say to (and protection of) the Muaūpoko owners of Lake Horowhenua. Much depended on whether the Acts' arrangements really gave Muaūpoko a secure or effective majority on the domain board. As we explained in detail in section 9.3.4, it did not.

First, the Crown did not act as a genuinely neutral chair, nor did it – as the Muaūpoko owners had hoped in 1953 – provide sufficient support to the Muaūpoko members in the face of local body interests. In any case, we doubt that having the Crown as chair of the board (rather than Muaūpoko) was a Treaty-compliant arrangement in the circumstances of the Lake Horowhenua reserve. We made a further finding on this matter in chapter 11 (see section 12.6.10(1)).

Secondly, even though the Crown's continued refusal to vote gave Muaūpoko a one-person majority, this was not a safe or secure majority. Nor did it enable the Muaūpoko owners to exercise their full authority over their taonga, as guaranteed them in the Treaty. The Muaūpoko members felt disenfranchised on the reformed board and struggled to have all four present at meetings, and they were also divided at times. By the 1980s, Muaūpoko clearly identified the need for a more secure majority on the board, and in 1982 they sought to abolish the board altogether. The Minister of Lands at that time accepted in principle that the board could be dissolved and control of the lake handed back to its Muaūpoko owners, but this did not happen. No satisfactory reason was given (see section 9.3.4(4)–(5)).

The 1956 reforms to the domain board were insufficient to provide a suitable platform for (a) future management of the lake and stream, and (b) protection of the Māori owners' rights and interests. Further, the Crown failed to take speedy (or any) action to rectify this situation as soon as it became apparent. In particular, the Crown omitted to amend the Act in the 1980s, even though Ministers responded favourably at first to the lake trustees' requests and accepted that amendment was required. The Crown, therefore, has not actively protected the tino rangatiratanga of the Muaūpoko owners over their taonga, Lake Horowhenua and the Hōkio Stream.

The domain board provisions of the ROLD Act 1956 are in breach of the principles of partnership and active protection. The Crown has not provided Muaūpoko with timely redress despite acknowledging the need for reform back in the 1980s. Muaūpoko have been and continue to be prejudiced by this Treaty breach.

Other Treaty breaches have occurred as a result of the 1956 Act's failure to empower the Muaūpoko owners. By the 1980s, the lake trustees sought a law change so that the catchment board would require permission from them, rather than from the domain board, before any works could be carried out. Although two Ministers of the Crown agreed to carry out this request, it has not been done. This was not consistent with the Crown's obligation to act as a fair and honourable Treaty partner.

The most serious breach in terms of catchment board works occurred in 1966. The Crown approved the catchment board's construction of a control weir without insisting on a fish pass or a design that would allow fish migration, despite certain knowledge that the Muaūpoko owners objected and that customary fisheries would be harmed. This was a breach of the Treaty principles of partnership and active protection. The National Institute of Water and Atmospheric Research (NIWA) has found that, apart from the poor water quality, the 1966 control weir has had the biggest effect in harming aquatic life in Lake Horowhenua.<sup>40</sup> The prejudice to the Muaūpoko owners continues today.

In our discussion in chapter 9, we noted that there were some improvements during the period of operation of the ROLD Act 1956. The balance of interests between public users and the Māori owners has shifted in favour of the owners in respect of birding and fishing rights. The Muaūpoko owners were able to use their trespass rights over the chain strip and dewatered area to prevent non-owners from shooting ducks on Lake Horowhenua (after the board agreed to open the lake for duck shooting). Also, the domain board protected the exclusivity of the owners' fishing rights during this period, refusing to allow new releases into the lake without the owners' consent, and refusing to agree that fishing licences gave the public a right to fish in Lake Horowhenua. These were important improvements.

In the 1970s, the courts also enforced the Māori owners' exclusive fishing rights in the Hōkio Stream. In section 9.3.4(2), we explained that by the 1970s, the challenge to Māori fishing rights came not from public use rights in the lake, as covered by section 18(5) of the ROLD Act, but rather by attempts to apply New Zealand's general fishing laws and regulations to the lake and the Hōkio Stream. The result was two important prosecutions. The first was *Regional Fisheries Officer v Tukapua*, a prosecution of lake trustee Joe Tukapua in 1975.<sup>41</sup> In brief, the Supreme Court held that the free and unrestricted fishing rights referred to in the ROLD Act were special statutory rights, which meant that restrictions under the fisheries laws (such as seasons and licences) did not apply to the lake's owners. The second case involved Muaūpoko fisherman Ike Williams, who was whitebaiting in the Hōkio Stream during a closed season.<sup>42</sup> In this 1976 case, the Supreme Court held that the ROLD Act

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40. National Institute of Water and Atmospheric Research (NIWA), 'Lake Horowhenua Review: Assessment of Opportunities to Address Water Quality Issues in Lake Horowhenua', June 2011, p 10 (Jonathan Procter, comp, papers in support of brief of evidence, various dates (doc c22(b)(iii)))

41. *Regional Fisheries Officer v Tukapua* SC Palmerston North M33/75, 13 June 1975, pp 4, 7 (Hamer, papers in support of "A Tangled Skein" (doc A150(c)), pp 618–622)

42. *Regional Fisheries Officer v Williams* SC Palmerston North M116/78, 12 December 1978 (Hamer, "A Tangled Skein" (doc A150), pp 298–300)

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defined the stream as flowing from the lake to the sea, and that the owners could exercise their unique statutory fishing rights ‘at all times’ along the entire length of the stream.

The fishing rights protected by the 1956 Act, however, were not protected from the effects of pollution and the control weir on the quality and quantity of the fishery.

The issue of speedboats divided the Muaūpoko people and their representatives on the domain board. Here, the breach in not providing an agreed, appropriate mechanism for selecting the Māori board members had an important consequence.

Thus, although the ROLD Act 1956 has provided some improvements, we found it to be inconsistent with Treaty principles. The failure to reform it in the 1980s, when Muaūpoko withdrew from the domain board and successive governments promised reforms, was a breach of the principle of redress, and has meant that the prejudice for Muaūpoko continues today.

### 12.6.8 The 1961 lease to the Crown for the boating club

The land on which the boating club erected its building was the subject of a Treaty breach. As we discussed in sections 9.3.4(2) and 9.3.5, the Crown deliberately avoided the protection mechanisms in the Maori Affairs Act 1953 when entering into a lease of this land in 1961. The Maori Affairs Act at that time prevented any lease of Māori land (including renewals) for a longer term than 50 years. The Act also required the Maori Land Court to investigate the merits and fairness of leases before confirming them.<sup>43</sup> The Crown evaded these safeguards by leasing land for the boat club under the Reserves and Domains Act 1953, thereby arranging a lease in perpetuity for a peppercorn rental, which was not put to the Maori Land Court for confirmation. These protective mechanisms in the Maori Affairs Act 1953 had resulted from a long history of unfair dealings, and the Crown’s failure to abide by that Act’s requirements for leases was in breach of the Treaty principle of active protection.

The lake trustees agreed to the lease in 1961, but it was later claimed that they did so ‘in ignorance’.<sup>44</sup> Because there was little documentation at the time and no court inquiry and confirmation, we have no way of knowing for sure if that was so.

The Māori owners of Lake Horowhenua were prejudiced by the alienation of this land on unfair terms, which was adjacent to Muaupoko Park and could have been the subject of a more beneficial arrangement, fairer to both parties.

### 12.6.9 Pollution and environmental degradation

In chapter 10, we addressed Muaūpoko claims about the pollution and environmental degradation of their taonga, Lake Horowhenua and the Hōkio Stream. This was one of their most strongly felt grievances, and a great deal of anger and concern was expressed at our hearings.

43. For the 1953 Act’s protection mechanisms in respect of leases, see Waitangi Tribunal, *Te Urewera, Pre-publication, Part V* (Wellington: Waitangi Tribunal, 2014), pp 255–256.

44. Ada Tatana to Minister of Lands, 19 December 1985 (Hamer, “A Tangled Skein” (doc A150), p 346)

Historically, the issue first arose in the early twentieth century. A water race system was constructed in 1902, which could pollute the lake as a result of livestock contamination, and Muaūpoko objected to this scheme. Their objections influenced the 1905 agreement (discussed in chapter 8). Item 5 of the Crown's record of the agreement stated: 'No bottles, refuse, or pollutions to be thrown or caused to be discharged into the Lake.' We found in chapters 8 and 10 that the Crown entered into a solemn agreement with Muaūpoko in 1905. Although the Crown's written terms did not properly reflect what Muaūpoko had agreed to, they were nonetheless binding on the Crown as a statement of what it had undertaken to do. In our inquiry, the Crown conceded that its failure to properly reflect the agreement in the terms of the Horowhenua Lake Act 1905 was a Treaty breach. In respect of pollution, however, the Crown argued that the domain board's bylaw in respect of littering, and the settlement given effect in the ROLD Act 1956, removed any prejudice. We did not agree (see section 10.3.1). If the Crown had kept its 1905 promises to Muaūpoko, there would have been statutory obligations requiring the Crown to act as soon as pollution or potential pollution of the lake became an issue – which it did in the 1940s and 1950s.

In chapter 10, we focused on the period from the 1950s to the late 1980s, when Levin's sewage effluent was by far the most significant cause of pollution. Although there had already been some pollution, as a result of the water race system and livestock on the lake's margins, the most significant threat to the lake and the Hōkio Stream at that time was the possible discharge of sewage. In the 1940s, Muaūpoko objected to the proposal for Levin's new sewerage scheme to discharge effluent into the lake. A plan to dispose of treated effluent in the sandhills instead was rejected by the Government in 1948 as too expensive. The borough council then chose what was believed to be an alternative form of disposal to land: its new plant (built 1951–52) discharged effluent into soakage pits near the lake. By 1956, however, Government officials confirmed that sewage effluent entered the lake from these pits – above ground in the winter months and by seepage through groundwater for the rest of the year. In the early 1960s, extreme weather events also resulted in the discharge of raw sewage into Lake Horowhenua.

There was an opportunity to have prevented this, however, or to have insisted on an alternative form of disposal as soon as the effect of the soakage pits became known. This was the negotiation of the Crown–Muaūpoko agreement in 1952–53 and section 18 of the ROLD Act in 1956 (discussed in chapter 9). From the evidence available to us, it was very clear that the 1905 stipulation against the discharge of pollution into the lake was intended to have been a term of the 1953 agreement (and of the ROLD Act). The evidence for this was described in section 10.3.3:

- ▶ June 1952: at the beginning of the negotiations, the commissioner of Crown lands met with Muaūpoko and recited the 'rights enjoyed by Maoris and Pakehas to this lake' under the 1905 agreement, including 'that the lake be not polluted'. In his report to senior officials, the commissioner again stressed this point.



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- ▶ November 1952: The Minister of Lands and Maori Affairs, Ernest Corbett, discussed the negotiations with local bodies and told them that he was ‘most emphatic . . . that Horowhenua Lake is not to be used as a dumping place for sewer [e]ffluent’.<sup>45</sup>
- ▶ December 1952: As part of the negotiations, senior Lands and Māori Affairs officials met with Muaūpoko’s lawyer and gave Muaūpoko (through him) the Minister’s assurance that ‘the Lake is not to be used as a dumping ground for sewer effluent’, noting that the Minister had already made this point clear.
- ▶ December 1952: following the meeting between Muaūpoko’s lawyer and senior officials, the commissioner of Crown lands proposed the terms of the 1953 agreement to Muaūpoko in writing – these terms included the Minister’s assurance that the lake would not be the ‘dumping ground’ for sewage effluent.
- ▶ April 1953: the chairman of the lake trustees, Tau Ranginui, advised a representative of the borough council that ‘no sewage waste’ was to be a term of the agreement.
- ▶ July 1953: Muaūpoko’s lawyer wrote to the Crown to confirm the agreement reached at the final negotiation meeting that month, but did not mention sewage effluent. In our view, this was an oversight.
- ▶ August 1953: Lands Department officials advised their Minister of the outcome of the meeting with Muaūpoko in July 1953, noting that the exclusion of sewage effluent from the lake was one of the Crown’s proposed terms.
- ▶ Finally, in 1956 the draft ROLD Bill did not contain a provision relating to the pollution, and the secretary of Maori Affairs asked the Lands Department whether existing powers under the Reserves and Domains Act 1953 were ‘wide enough to prevent pollution of the Lake’.<sup>46</sup> The Lands Department responded in the affirmative (which was incorrect, in our view).

The failure to include a provision against pollution in the 1956 Act was a crucial omission, which would have given statutory force to the Minister’s assurance to the Māori owners that ‘the Lake is not to be used as a dumping ground for sewer effluent’, and would have given proper effect to the 1953 agreement. In section 10.3.8, we found that the Crown had an obligation under the Treaty to actively protect Muaūpoko’s taonga: Lake Horowhenua, the Hōkio Stream, and the prized fisheries. The Crown failed to provide the necessary statutory protection in both 1905 and 1956. Crown counsel accepted that the Crown’s 1905 omission was a Treaty breach which prejudiced Muaūpoko. In our view, the Crown’s second omission in 1956 was equally a Treaty breach and has prejudiced Muaūpoko. It followed from the Crown’s act of omission that the Crown had a particular obligation to intervene, once its officials established that treated effluent was polluting Lake Horowhenua. In respect of the historical claims, this Crown obligation makes it irrelevant (in this particular case) whether pollution was the responsibility of local government

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45. Director-general of lands to commissioner of Crown lands, 12 November 1952 (Hamer, “A Tangled Skein” (doc A150), p144)

46. Commissioner of Crown lands to director-general of lands, 11 September 1956 (Hamer, papers in support of “A Tangled Skein” (doc A150(c)), p 434)



bodies or the Crown; the Crown had given assurances in 1905 and in 1952–53, but failed to provide statutory protections.

The Crown was thus complicit in the pollution of Lake Horowhenua from at least 1957, when both Muaūpoko and officials became aware that effluent was seeping from the soakage pits into the lake. By that time, Government departments were focused on physical health and ‘safe’ levels of treated effluent, but the alternative cultural perspective was presented by Mrs R Paki in no uncertain terms in 1957 (see section 10.3.4). The correct solution, discharge to land distant from the lake, was known from at least 1948. Over the years from 1957, Muaūpoko objected to the cultural offence of contaminating waters used for food with human waste. They protested about the health risks of eating such food, and also about the harm which degradation of their lake had caused to their fisheries. They pleaded against the desecration of their taonga. The Crown was fully aware of their protests, as Crown counsel conceded, ‘expressed through petitions to the Government, through Domain Board meetings [a Crown official chaired it], through litigation and in Tribunal claims’.<sup>47</sup>

In 1967–69, upgrades to the Levin sewage plant resulted in the direct opposite of Muaūpoko’s wishes: the council began to discharge effluent directly into the lake and continued to do so until 1987. In 1969, water quality tests led senior officials to accept that the lake was heavily polluted as a result of treated effluent, and the head of the Internal Affairs Department advised that ‘some method of bypassing the Lake with this effluent will have to be found’.<sup>48</sup> We agreed with the claimants that there was a significant opportunity to have done so in 1971, as proposed by a scientist at that time, before the pollution of the lake assumed the very serious character it has today, and while the process of remediation was (relatively) less expensive. In the meantime, the nation had benefited from Muaūpoko’s agreement to make the surface of the lake available for public use, free of charge. In our view, that is the crucial context in which Crown payment for a land-based disposal system must be evaluated. In the event, the Crown did not provide funding for such a system until the mid-1980s, and even preferred discharge into the Hōkio Stream until opposition from Muaūpoko, Ngāti Raukawa, and a local action committee won support from a special tribunal in 1986.

The Crown’s failure to protect Muaūpoko and their taonga from 1969 to 1987, despite full knowledge of the situation, was a breach of its Treaty duty of active protection. We accept that the Crown did eventually provide subsidies for land-based disposal in the mid-1980s, but this belated assistance to the borough council did not remedy the prejudicial effects of 30 years’ of effluent disposal in Lake Horowhenua.

The prejudice from the Crown’s Treaty breaches is significant. It is clear to us from the evidence of the tangata whenua that Muaūpoko consider the mauri or life force of their lake has been damaged, and they as kaitiaki have been harmed. Their mana has been infringed: they can no longer (safely) serve traditional foods to manuhiri

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47. Crown counsel, closing submissions (paper 3.3.24), p 44

48. Secretary for internal affairs to district officer of health, 15 April 1969 (Hamer, “A Tangled Skein” (doc A150), p 217)

## 12.6.10 THE MUAŪPOKO REPORT – PRE-PUBLICATION VERSION

or take foods for which they were once renowned to tangi and other important occasions. Their taonga has become – as one claimant expressed it – a ‘toilet bowl’.<sup>49</sup> They are no longer able to sustain themselves culturally or physically by their fisheries, once an integral part of the life and survival of the tribe. Muaūpoko have also lost ancestral knowledge because food can no longer be gathered from the lake – at least not safely, in terms of either spiritual or biological health. This means that the tikanga associated with the lake, its fish species, and the arts of fishing is no longer transmitted, or is transmitted only in part. We accept that some still fish and take food from the lake, but many do not, and the harm for both is significant.

The evidence is less certain as to how particular species in the lake have been affected by the pollution. There seems to be general agreement among tangata whenua and technical evidence that the 1966 control weir has materially harmed the species which migrate to and from the sea. We were assisted here by the Crown, which accepted that pollution has been a ‘source of distress and grievance to Muaūpoko’, that ‘damage to fishing and other resource gathering places has been a source of distress and grievance’, and that pollution ‘in combination with other factors, has affected the fishery resource of the Lake’.<sup>50</sup>

**12.6.10 The historical legacy of past management, 1990–2015**

In chapter 11, we discussed how the legacy of past management impacted on the lake and the Hōkio Stream in the post-1990 period. Four key features were of special importance, which we address in turn below.

**(1) Governance and management regimes**

The Crown failed to reform the ROLD Act 1956 in the 1980s, so the same deficiencies plagued the domain board and its control of the lake from 1990 to the time of our hearings in 2015. The Resource Management Act 1991 (RMA) and the Conservation Act 1987 significantly altered the regime for decision-making about the environment. Nonetheless, Muaūpoko continued to have an insecure majority on the lake domain board, the Crown continued to provide the chair (and for the first time exercised its casting vote), and Muaūpoko remained largely excluded from the decision-making of other local bodies until the negotiation of the Horowhenua Lake accord and action plan (see section 11.5.4). Even then, the accord and action plan are not legally binding.

The powerlessness that Muaūpoko people feel in the resource management regime was evident in their claims about pollution leaching into the Hōkio Stream from landfills, alleged overflows from the Pot, and the realignment of the Hōkio Stream mouth. Although we were not in a position to make findings about those claims due to insufficient evidence, we noted that land-use planning and consenting for discharges within the catchment are important and go to the issue of whether the current governance regime adequately addresses the guarantees of the Treaty for Muaūpoko.

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49. Transcript 4.1.12, pp 541, 569

50. Crown counsel, closing submissions (paper 3.3.24), pp 44–45

We found that the RMA 1991, the local government regime, and the 1956 ROLD Act regime do not provide sufficiently for the tino rangatiratanga of Muaūpoko in respect of their lake and the Hōkio Stream. This Treaty breach required immediate remedy as a necessary precondition to the restoration of the lake and stream. Our view as to the appropriate way forward is summarised below.

In our finding on the ROLD Act, we relied on earlier findings about Crown acts and omissions (in chapters 8–10, summarised above), as well as the Crown's failure in 1990–2015 to promote the necessary reforms to the lake's management regime.

In coming to our finding in respect of the RMA, we agreed with the Wai 262 Tribunal that the Crown cannot absolve itself of its Treaty obligations in day-to-day decisions by devolving management functions to local government. The Crown must make its statutory delegates responsible for fulfilling its Treaty duties. Nor has the RMA delivered appropriate levels of control and partnership to Māori, and – crucially in this case – it is not remedial legislation which provides for restoring damaged taonga.

### **(2) Pollution: nutrients and sediment**

The discharge of Levin's sewage effluent into the lake for 35 years (indirectly from 1952 to 1969, and directly from 1969 to 1987) has continued to have serious effects on the lake. Half of the original volume of the lake still remains filled with polluted sediment. In part, this is because the 1966 control weir inhibits the natural flushing of the lake, and scientists have disagreed as to the correct solution to this problem posed by the weir. Since 1990, intensive dairying, further agriculture, and horticulture have contributed additional nutrients and sediment loads into the lake. The majority of this sediment and nutrients enters the lake through the stormwater drains and the Arawhata Stream, and some nitrogen through groundwater.

Thus, neither Lake Horowhenua nor the Hōkio Stream has recovered after the commencement of land-based disposal of sewage effluent in 1987. Indeed, the lake is now classified as hypertrophic and was ranked '7th worst out of 112 monitored lakes in New Zealand in 2010'.<sup>51</sup> We also noted that 'recent data suggests that the Arawhata Stream may become anoxic at night' which means that the flow into the lake at night has no oxygen.<sup>52</sup> That acts to lessen the lake's already deeply compromised ability to recover from its hypertrophic state. The devastating state of their taonga has angered and distressed its kaitiaki, who are significantly prejudiced by the degradation of Lake Horowhenua.

### **(3) Fishing rights**

Muaūpoko fishing rights have continued to be affected in the 1990–2015 period. As we discussed in section 11.4.4, the Muaūpoko people once relied heavily on their

51. Horizons Regional Council, *He Hokioi Rerenga Tahī/Lake Horowhenua Accord Action Plan, 2014–2016* (Palmerston North: Horizons Regional Council, 2014), p 8 (Paul Hamer, comp, indexed bundle of cross-examination documents, various dates (doc A150(l)), p 35)

52. Lake Horowhenua & Hōkio Stream Working Party, 'He Ritenga Whakatikatika: Lake Horowhenua & Hōkio Stream, Te Pātaka o Muaūpoko rāua ko Ngāti Pareraukawa', June 2013, p 11 (Hamer, indexed bundle of cross-examination documents (doc A150(l)), p 76)

customary fisheries for their survival (both physical and cultural), but are now limited in their ability to take their traditional foods from the lake and the Hōkio Stream. Although we heard evidence of some who ate well-rinsed eels, most tribal members no longer consume their traditional foods for health reasons (among others). Further, the 1966 control weir – which was established without a fish pass despite the opposition of the lake trustees, on the authority of the Minister – has significantly reduced populations of native fish which migrate up and down the Hōkio Stream. More research is required to establish exactly which species still survive in the lake and at what densities, to ascertain the detailed effect of both the control weir and the lake's hypertrophic state on customary fisheries. In addition, we noted that the unique fishing rights guaranteed by the ROLD Act 1956 may have been affected by recent legislation – at least in the marine environment of the Hōkio Stream, a point which awaits clarification by the courts.

#### **(4) Representation**

Muaūpoko emerged significantly divided from the pre-1990 period of external conflict (with the Crown, the domain board, and the borough council) and internal conflict (especially over who should appoint the Muaūpoko members of the domain board). In addition, as we explained in chapter 6, some of the division has its historical roots in the nineteenth century, and the battle over entitlements to Horowhenua 11 forced upon the iwi in the 1890s. Questions as to who has the authority to represent Muaūpoko regarding issues about Lake Horowhenua and the Hōkio Stream remain unresolved, and this is a very real difficulty for both government agencies and Muaūpoko.

We turn next to the question of restoration and our view of a way forward.

#### **(5) Restoration and our view of the way forward**

What is being done to put these matters right? We discussed the restoration efforts of the 1990s and 2000s, including riparian planting, in section 11.5. We also described the actions which the parties to the Horowhenua lake accord planned to take to remedy the dire situation of the lake and stream. These included constructing a fish pass, preventing sediment and nutrients entering the lake through the stormwater system, and other notable goals. The development of the accord was not without controversy, however, and again we noted the difficulty faced by Muaūpoko and agencies because Muaūpoko have no statutory body to represent the whole tribe on matters regarding the lake and the Hōkio Stream. The lake trustees must look after the property rights of the beneficial owners of the bed, but have no jurisdiction over the water.

Because the RMA is not remedial, and because the accord is not legally enforceable, a statutory settlement is the only way forward. Also, in respect of Muaūpoko, there will always be opposing views but what we consider necessary is a management regime that cannot be challenged for lack of mandate. In section 11.6, we agreed with the claimants that the Waikato-Tainui Raupatu Claims (Waikato River)

Settlement Act 2010 provides a relevant model, the equivalent of which should be available to Muaūpoko in respect of Lake Horowhenua and the Hōkio Stream. Any such legislation would need to provide for a Muaūpoko governance body for the lake and stream which has the mandate of the Muaūpoko people, and the lake trustees would necessarily be represented on it. Significant assistance will also be required from the Crown to fund a programme that reasonably mitigates the major issue concerning the lake – the impact of 35 years of effluent in the sludge on the bed of the lake and the continued discharge of pollutants through storm water and stream flows. We also noted that Ngāti Raukawa claims in respect of the Hōkio Stream and Lake Horowhenua have not yet been heard, but the Waikato-Tainui river settlement model allows for the representation of other iwi.

A new legislative regime coupled with technical and financial assistance should move all parties to the desired result, namely the restoration of Lake Horowhenua and the Hōkio Stream, and of the mana and tino rangatiratanga of Muaūpoko.

#### **12.6.11 Summary of Treaty findings**

In this inquiry, we were struck by the extent to which the Crown's legislative interventions, funding decisions, and other actions have dominated the management of (and outcomes for) Lake Horowhenua since 1905. However relevant the issue of the Crown vis-a-vis local government may be in other claims, the succession of direct Crown acts in respect of this lake put it in another category altogether. Our analysis in chapters 8–11 demonstrated this point. Many of those Crown acts or omissions have been in breach of Treaty principles. In respect of Lake Horowhenua and the Hōkio Stream, we would summarise our Treaty findings as follows:

- ▶ In 1905, Muaūpoko only agreed to free public access to the lake for boating. The Crown's choice to legislate without first seeking formal agreement on more fully developed terms was a breach of Treaty principles. It was not consistent with the principle of partnership, nor was it consistent with the plain meaning of article 2 of the Treaty.
- ▶ The Horowhenua Lake Act 1905 took control of the lake from its Muaūpoko owners and vested it in a board, turning their private property into a public recreation reserve and subordinating their use of their private property (a taonga) to that of the public. This was done without adequate consent or any compensation, in clear breach of article 2. In particular, Muaūpoko fishing and other rights were subordinated to public recreation, the exercise of many of their rights was prohibited in a public domain, and the development right in the lake was transferred to a public board, all in breach of Muaūpoko's article 2 rights and Treaty principles. The Crown's failure to negotiate an appropriate level of Muaūpoko representation on the board and guarantee it in the 1905 Act also breached the Treaty. The Crown's failure to include all its 1905 promises (such as a prohibition of pollution) in the Act was a further Treaty breach.
- ▶ Between 1905 and 1934, the Crown breached Treaty principles by granting Pākehā a right to fish in the lake, legislating to place the chain strip under the



## 12.6.11 THE MUAŪPOKO REPORT – PRE-PUBLICATION VERSION

control of the domain board, legislating to give the borough council a two-thirds majority on the board, and breaking agreements in respect of drainage works (resulting in the lowering of lake levels by four feet). Muaūpoko consent was not sought, and indeed the tribe opposed this ‘whittling away’ of their rights without success. Settler interests were unfairly prioritised, in breach of the principle of equity.

- ▶ The delay in reaching a new settlement after the Harvey–Mackintosh inquiry (1934–53) was caused primarily by the Crown’s insistence on acquiring a free gift of land from Muaūpoko for the domain – land which was not even useful because it was too waterlogged. The Crown’s refusal to settle with Muaūpoko for 17 years unless they met its unreasonable demand for land was a breach of the principles of partnership and active protection.
- ▶ The ROLD Act 1956 was inconsistent with the principles of partnership, active protection, and redress because it omitted to: (a) provide compensation for past acts and omissions; (b) prohibit pollution; (c) institute an annuity or rental for use of the lake as a public recreation reserve; and (d) establish an agreed mechanism for selecting Muaūpoko board members.
- ▶ The domain board provisions of the ROLD Act 1986 are inconsistent with the principle of partnership because they provided Muaūpoko an insecure majority which proved ineffective in practice, and because the Crown was made chair of the board with a casting vote.
- ▶ The ROLD Act 1956 continued to subordinate Muaūpoko rights and interests to public recreation, although Muaūpoko fishing and birding rights obtained greater protection under the 1956 regime.
- ▶ The establishment of the 1966 control weir, with the Minister of Marine granting permission to dispense with a fish pass despite the opposition of Muaūpoko, was in breach of Treaty principles. This weir has proved harmful to migratory native fish species and has inhibited the natural flushing of the lake.
- ▶ The failure to reform the ROLD Act 1956 in the 1980s, when Muaūpoko withdrew from the domain board and successive governments promised reforms, was a breach of the principle of redress. The continued failure to reform the board membership and other aspects of the 1956 regime from 1990–2015 is a breach of Treaty principles.
- ▶ The Crown’s lease in perpetuity of land for the boat club in 1961 (for a peppercorn rental) avoided statutory protections for Māori land and was in breach of Treaty principles.
- ▶ The Crown failed to include a prohibition of sewage effluent in the ROLD Act 1956, in breach of both the 1953 agreement and the Crown’s Treaty obligation to actively protect taonga. It follows from this omission that the Crown breached the Treaty when it failed to intervene once it was known that sewage effluent was entering Lake Horowhenua. In particular, the Crown’s failure to protect Muaūpoko and their taonga from 1969 to 1987, despite full knowledge that the lake had become heavily polluted as a result of effluent, was a breach of its



Treaty duty of active protection. We accept that the Crown did eventually provide subsidies for land-based disposal in the mid-1980s, but this belated assistance to the borough council did not remedy the prejudicial effects of 30 years of effluent disposal in Lake Horowhenua.

- ▶ The current regime for environmental decision-making, embodied in the RMA 1991, is in breach of Treaty principles. The Crown must make its statutory delegates responsible for fulfilling its Treaty duties. Nor has the RMA delivered appropriate levels of control and partnership to Māori, and – crucially in this case – it is not remedial legislation which provides for restoring damaged taonga.

Muaūpoko were (and continue to be) prejudiced by these acts and omissions of the Crown, in the manner specified in chapters 8–11. Restoring Lake Horowhenua and the Hōkio Stream requires a statutory settlement. In our view, that settlement should be equivalent to what is provided in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. It would need to provide for a Muaūpoko governance body for the lake and stream which has the mandate of the Muaūpoko people, and the lake trustees would necessarily be represented on it. Significant assistance will also be required from the Crown to fund a programme that reasonably mitigates the major issue concerning the lake – the impact of 35 years of effluent in the sludge on the bed of the lake and the continued discharge of pollutants through storm water and stream flows.

We turn next to make our recommendations.

## **12.7 RECOMMENDATIONS**

### **12.7.1 Land claims**

As a result of our numerous findings of breaches of the principles of the Treaty with respect to the native land legislation of the nineteenth century, the imposition of that legislation and the Native Land Court on Muaūpoko, the Crown's land purchasing policies of that period, the Horowhenua partitions, the Horowhenua commission process, the Horowhenua Block Act 1896, and the twentieth-century land issues which are detailed above, we recommend:

- ▶ that the Crown negotiates with Muaūpoko a Treaty settlement that will address the prejudice suffered by the iwi due to the breaches of the Treaty identified; and
- ▶ that the settlement includes a contemporary Muaūpoko governance structure with responsibility for the administration of the settlement.

### **12.7.2 Lake Horowhenua and the Hōkio Stream**

As a result of our numerous findings of breaches of the principles of the Treaty with respect to Lake Horowhenua and the Hōkio Stream, which are detailed above, we recommend:

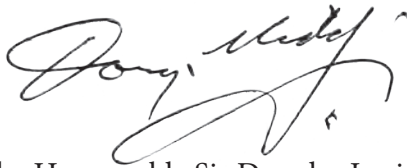
12.7.2 THE MUAŪPOKO REPORT – PRE-PUBLICATION VERSION

- ▶ That the Crown legislates as soon as possible for a contemporary Muaūpoko governance structure to act as kaitiaki for the lake, the Hōkio Stream, and associated waters and fisheries following negotiations with the Lake Horowhenua Trustees, the lake bed owners, and all of Muaūpoko as to the detail. The legislation should at least be similar to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 but may also extend to something similar to that used for the Whanganui River. This would necessarily mean dismantling the current Horowhenua Lake Domain Board. Any recommendations in respect of Ngāti Raukawa are reserved until that iwi and affiliated groups have been heard, but we note that the Waikato-Tainui river settlement model allows for the representation of other iwi.
- ▶ That the Crown provide to the new Lake Horowhenua Muaūpoko governance structure annual appropriations to assist it meet its kaitiaki obligations in accordance with its legislative obligations.

Dated at *Wellington* this *28<sup>th</sup>* day of *June* 2017



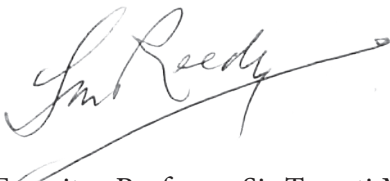
Deputy Chief Judge Caren Fox, presiding officer



The Honourable Sir Douglas Lorimer Kidd KNZM, member



Dr Grant Phillipson, member



Emeritus Professor Sir Tamati Muturangi Reedy, KNZM, PhD, member



Tania Te Rangiangana Simpson, member





## APPENDIX I

# MUAŪPOKO CLAIMS, NAMED CLAIMANTS, AND COUNSEL

### **The Muaūpoko Claimants and their Claims**

A total of 30 claims were considered to be part of the Muaūpoko priority inquiry. Twenty-six of them came under the Muaūpoko Claimant Cluster (MCC), two registered claims were represented by the Muaūpoko Tribal Authority (MTA), and three other claims were not affiliated with either the MCC or the MTA. Named claimants of the Wai 52 claim were represented by both the MCC and the MTA.

The following claims were included under the MCC:

Wai 52, Wai 108, Wai 237, Wai 493, Wai 770, Wai 1490, Wai 1491, Wai 1621, Wai 1622, Wai 1629, Wai 1631, Wai 2045, Wai 2046, Wai 2048, Wai 2050, Wai 2051, Wai 2052, Wai 2053, Wai 2054, Wai 2056, Wai 2093, Wai 2140, Wai 2173, Wai 2175, Wai 2306, and Wai 2326.

Three claims included under the MCC were not represented by legal counsel. In these instances the named claimants represented themselves. They were Tama-iuia (Tama) Ruru for Wai 108, Charles Rudd for Wai 1631, and Philip Taueki for Wai 2306.

Legal counsel for the rest of the claims included under the MCC were Kathy Ertel, Robyn Zwaan, Linda Thornton, Bryce Lyall, Darrell Naden, Creon Upton, Anmol Shankar, Leo Watson, Chelsea Terei, David Stone, Augencio Bagsic, and Keith Hopkins. By the time of hearings in 2015, the MCC was no longer a functioning collective.

In the early stages of the inquiry, the Muaūpoko Tribal Authority (MTA) was represented by Tuia Legal counsel Toko Kapea and Matthew Sword.<sup>1</sup> From mid-2015 the MTA was represented by Tom Bennion and Emma Whiley of Bennion Law. On 10 July 2015, the MTA advised that the claimants it represented wished to participate in the prioritised hearings.<sup>2</sup> The two claims under the MTA were Wai 2139 and Wai 52.

Claims that were not involved in either the MCC or the MTA included Wai 623, Wai 624, and later, Wai 1490. These claims were not represented by counsel but

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1. Claimant counsel (Kapea/Sword), memorandum, 11 March 2011 (paper 3.1.196)

2. Claimant counsel (Bennion), memorandum, 10 July 2015 (paper 3.1.710)

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were presented by Fredrick Hill at hearing. Hapeta Taueki's claim, which had been mistakenly filed under Wai 52, was assigned the Wai number Wai 2284.<sup>3</sup> Hapeta Taueki's claim was represented at hearings by Philip Taueki.<sup>4</sup>

### The Crown

The Crown was represented by Jacki Cole, Rachael Ennor, Ellen Chapple, and Damen Ward of the Crown Law Office. James Hardy represented the Department of Conservation in the second week of Muaūpoko hearings.<sup>5</sup> The Crown's final closing submissions, on native townships and Māori land boards, were made on 29 April 2016 by Jacki Cole.<sup>6</sup>

	Wai No	Claim name	Named claimant(s)	Representation (at time of hearing)
1	52	Muaūpoko Land claim	Tamihana Tukapua (now deceased), Jean Budd, Katie Lynch, Danny Hancock, Miller Waho (now deceased), Matthew Matamua, Marokopa Wiremu-Matakatea, James Broughton (now deceased), Beau Wiremu-Matakatea, Trevor Wilson, Kay Kahumaori Pene (now deceased), George Tukapua, James Tukapua (now deceased), Teresa Moses (now deceased), Timothy Tukapua On behalf of the whole of Muaūpoko	Kathy Ertel & Co: Kathy Ertel, Robyn Zwaan Bennion Law: Tom Bennion, Emma Whiley, Lisa Black
2	108	Muaūpoko Lands and Fisheries claim	Tama-i-uia Ruru On behalf of himself and Muaūpoko	Tama-i-uia Ruru represented claim in hearing
3	237	Horowhenua Block claim	William Taueki and Ron Taueki (deceased) On behalf of Muaūpoko ki Horowhenua by the descendants of Taueki and the Ngāti Tamarangi hapu	Tamaki Legal: Darrell Naden, Creon Upton, Anmol Shankar
4	493	Hokio Māori Native Township, Hokio Boys School and Waitarere Forest claim	Tom Waho (deceased) On behalf of the descendants of the original 81 owners (Hokio)	Lyall & Thornton: Bryce Lyall, Linda Thornton
5	623	Mua Te Tangata and Muaūpoko claim	John Hanita Paki, Ada Tatana, Perry Warren, and Mario Hori Te Pa On behalf of themselves and all the descendants of the Muaūpoko Tribe	Fredrick Hill (claims manager) represented claim in hearing

3. The original named claimant of the Wai 52 claim was Tamihana Tukapua. He filed the claim on behalf of himself and all of Muaūpoko in December 1988. According to the Registrar, Hapeta Taueki also filed a claim on behalf of Muaūpoko on 29 August 1989. At that time the claim was added to the Wai 52 Record of Inquiry, and recorded as an amended statement of claim. It has since been discovered that this should not have happened and that the claim that Hapeta Taueki filed should have been given its own claim number instead of being made an amendment to that which was filed originally by Tamihana Tukapua. See Waitangi Tribunal, memorandum-directions, 3 July 2015 (paper 2.5.107), pp 2–3.

4. Philip Taueki, memorandum, 17 February 2014 (paper 3.1.555)

5. Crown counsel, memorandum, 30 September 2015 (paper 3.1.787), p 1

6. Crown counsel, closing submissions: Native Townships and District Māori Land Boards, 29 April 2016 (paper 3.3.34)



MUAŪPOKO CLAIMS, NAMED CLAIMANTS, AND COUNSEL

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Wai No	Claim name	Named claimant(s)	Representation (at time of hearing)
6	624 Kemp Hunia Trust claim	John Hanita Paki, Ada Tatana, Mario Hori Te Pa, Brian Rose, Peter Huria, Perry Warren, Hinemoa Wright, Alfred MacDonald, and Lauren Menel (Trustees of the Kemp Hunia Trust) On behalf of Muaūpoko (Iwi) and Ngāti Ao, Pariri, Ngarue, and Whano ki Rangi (hapū)	Fredrick Hill (claims manager) represented claim in hearing
7	770 The Karaitiana Te Korou Whanau claim	Edward Francis Karaitiana and the Karaitiana Te Korou Whanau On behalf of Ngāi Tara of Muaūpoko	Afeaki Chambers: Tavake Afeaki, Winston McCarthy, Rebekah Jordan
8	1490 Ngāti Whanokirangi hapū lands and resources claim	Mario Hori Te Pa, Tanua Helen Rose, and Maria Rakapa Tukapua-Lomax On behalf of the descendants of Whanokirangi	Fredrick Hill (claims manager) represented claim in hearing
9	1491 Hokio A Land Block claim	Eugene Henare On behalf of Muaūpoko and the beneficial owners of Hokio A	Leo Watson
10	1621 Lake Horowhenua Trust claim	Mark Stevens On behalf of Muaūpoko ki Horowhenua and the Lake Horowhenua trust	Leo Watson
11	1622 Ngāti Toa and Muaūpoko (Taueki) claim	Mervyn Taueki-Ransom On behalf of themselves and the whole of Muaūpoko	Did not present at hearing
12	1629 Muaūpoko (the descendants of Taueki) claim	Vivienne Taueki On behalf of herself, and the descendants of Taueki, and of Muaūpoko ki Horowhenua	Lyall & Thornton: Bryce Lyall, Linda Thornton
13	1631 Lake Horowhenua, Hokio Stream and Hokio Beach claim	Charles Rudd On behalf of himself and the beneficial owners of the lake, stream and beach	Charles Rudd represented claim in hearing
14	2045 Muaūpoko (Pene) Lands claim	Kahumaori Kay Pene (now deceased) On behalf of Muaūpoko	Kathy Ertel & Co: Kathy Ertel, Robyn Zwaan
15	2046 Ngāti Mihiroa, Ngāti Ngarengare, and Muaūpoko (Kenrick) Lands claim	John Kenrick, Roimata Kenrick, and Jillian Munro On behalf of Ngāti Mihiroa, Ngāti Ngarengare and Muaūpoko	Te Mata a Maui Law: David Stone, Augencio Bagsic, Keith Hopkins
16	2048 Muaūpoko Lands (Te Rautangata Kenrick) claim	Te Rautangata Kenrick On behalf of her children and her mokopuna who are of Muaūpoko descent and Tamarangi hapū	Did not present at hearing
17	2050 Muaūpoko Economic Development (Williams) claim	Mariana Williams On behalf of Te Kapa Trust, the tupuna Ihaia Taueki and all the hapū of the Iwi Muaūpoko	Te Mata a Maui Law: David Stone, Augencio Bagsic, Keith Hopkins
18	2051 Kenrick Whānau claim	Whetu Kenrick On behalf of her whānau and her deceased brother Derek Kenrick	Did not present at hearing
19	2052 Muaūpoko Lands and Waters (Kenrick) claim	James Kenrick On behalf of Muaūpoko	Did not present at hearing
20	2053 Muaūpoko Health (Kupa and Ferris) claim	Mona Kupa and Hera Ferris On behalf of Muaūpoko	Te Mata a Maui Law: David Stone, Augencio Bagsic, Keith Hopkins

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Wai No	Claim name	Named claimant(s)	Representation (at time of hearing)	
21	2054	Muaūpoko Ratings Policy (Moore) claim	Bella Moore On behalf of herself and on behalf of the hapū of Muaūpoko	Te Mata a Maui Law: David Stone, Augencio Bagsic, Keith Hopkins
22	2056	Muaūpoko Knowledge and Education (Williams) claim	Henry Williams On behalf of Muaūpoko	Te Mata a Maui Law: David Stone, Augencio Bagsic, Keith Hopkins
23	2093	Muaūpoko Lands (Brownie) claim	Jean Brownie On behalf of Muaūpoko	Did not present at hearing
24	2139	Muaūpoko Lands and Resources (Greenland) claim	Dennis Greenland On behalf of Muaūpoko and the Muaūpoko Tribal Authority	Bennion Law: Tom Bennion, Emma Whiley, Lisa Black
25	2140	Muaūpoko (Gardiner) claim	Hingaparae Gardiner On behalf of Wāhine Māori of Muaūpoko	Te Mata a Maui Law: David Stone, Keith Hopkins
26	2173	Muaūpoko Health (Murray) claim	Carol Murray On behalf of Muaūpoko	Te Mata a Maui Law: David Stone, Augencio Bagsic, Keith Hopkins
27	2175	Muaūpoko Natural Resources (Brown) claim	Francis Brown On behalf of Muaūpoko	Did not present at hearing
28	2284	Muaūpoko Lands and Waterways (Taueki) claim	Hapeta Taueki On behalf of the Muaūpoko Tribe	Philip Taueki represented claim in hearing
29	2306	Arawhata Stream and Lake Horowhenua Urgency claim (Urgency)	Philip Taueki On behalf of himself and Muaūpoko	Philip Taueki represented claim in hearing
30	2326	Muaūpoko and Descendants of Hopa Heremaia Lands and Resources (Gamble) claim	Peggy Gamble (nee Heremaia) On behalf of herself, Loretta Mere and Muaūpoko	Kathy Ertel & Co: Kathy Ertel, Robyn Zwaan

APPENDIX II

**THE 81 OWNERS OF HOROWHENUA 11**

Persons entitled to Horowhenua 11 <sup>1</sup>	Court Order (No)	Court Order (name)	Area allotted (acres)		
			Already allotted	In No 11	Total area
Keepa Te Rangihwinui & daughter	1	Keepa Te Rangihwinui	1303	100	1403
Kawana Hunia family	2	Kawana Hunia Te Hakeke	2321	600	2921
Ihaia Taueki family	3	Ihaia Taueki	512	1050	1562
Rewiri Te Whiumairangi	4	Rewiri Te Whiumarangi	104	25	129
Te Rangirurupuni	5	Te Rangirurupuni	104	25	129
Noa Te Whata family			515	400	915
	6	Raniera Te Whata		225	
	7	Ngahuia Heta		225	
Motai Taueki	8	Motai Taueki	104	100	204
Wirihana Tarewa family	9	Te Wirihana Tarewa	610	500	1110
Inia Tamaraki	10	Inia Tamaraki	104	25	129
Te Paki	11	Te Paki (Te Hunga)	308	100	408
			412	400	812
	12	Hoani Puihi		200	
	13	Ripeka Winara		100	
Kerehi Te Mitiwaha family			404	500	904
	15	Kerehi Te Mitiwaha		250	
	16	Norenore Te Kerehi		125	
Tamati Maunu family	17	Warena Te Kerehi		125	
	18	Hariata Tinotahi	819	500	1319

1. Luiten, 'Political Engagement' (doc A163), pp Otaki MB 40, pp 291–293

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Persons entitled to Horowhenua 11 <sup>1</sup>	Court Order (No)	Court Order (name)	Area allotted (acres)		
			Already allotted	In No 11	Total area
	19	Ruka Hanuhanu		100	
	20	Hema Henare		100	
	21	Hanita Henare		100	
Ihaka Te Rangihouhia	22	Ihaka Te Rangihouhia	102	100	202
Matene Pakauwera	23	Matene Pakauwera	105	25	130
Tikara family			413	100	513
	24	Peene Tikara		50	
	25	Pero Tikara		25	
	26	Hana Rata		25	
Hopa Te Piki family			415	100	515
	27	Hopa Te Piki		50	
	28	Hone Tupou		50	
Himiona Taiweherua	29	Himiona Taiweherua	104	100	204
Karaitiana Tarawahi	30	Karaitiana Tarawahi	105	150	255
Winara Te Raorao family			315	150 + 50	515
	31	Ngariki Te Raorao		100	
	32	Anikanara Te Whata		100	
Ruta Kiri family			615	600	1215
	33	Ruta Kiri		600	
Matenga Tinotahi	34	Matenga Tinotahi	104	25	129
Waata Muruahi	35	Waata Muruahi	524	50	574
Hereora family			924	1050	1974
	36	Noa Tawhati		142	
	37	Unaiki Tawhati		142	
	38	Taare Matai		142	
	39	Taare Hereora		142	
	40	Te Kiri Hopa		142	
	41	Kahukore Hurinui		142	
	42	Te Ahuru Porotene		50	
	43	Te Raraku Hunia		148	
Ani Patene	44	Ani Patene	100	25	125
Rihipeti Tamaki and family	45	*Rihipeti Tamaki	829	50	879
Hopa Heremaia	46	Hopa Heremaia	104	50 + 50	204
Himiona Kowhai and sister	47	Himiona Kowhai	208	300	508

THE 81 OWNERS OF HOROWHENUA 11

AppII

Persons entitled to Horowhenua 11 <sup>1</sup>	Court Order (No)	Court Order (name)	Area allotted (acres)		
			Already allotted	In No 11	Total area
Manihera Te Rau	48	Manihera Te Rau	104	25	129
Waata Tamatea and sisters	49	Waata Tamatea	155	25	180
Hori Te Pa and brother	50	Hori Te Pa	210	50	260
Makere Te Rou family			1082	600	1682
	51	Makere Te Rou		100	
	52	Hera Tupou		84	
	53	Mohi Rakuraku		84	
	54	Kaiwhare Rakuraku		83	
	55	Wiremu Te Pae		83	
	56	Tapita Himiona		83	
	57	Parahi Reihana		83	
Merehira Te Marika family			515	500	1015
	58	Mereana Matao		150	
	59	Rawinia Ihaia		200	
	60	Rawinia Matao		100	
	61	Hetariki Matao		100	
Wiki Pua family			200	200	400
	62	Wiki Pua		100	
	63	Hoani Nahona		100	
Amorangi Rihara family			200	50	250
	64	Amorangi Rihara		25	
	65	Nati Amorangi		25	
Te Hapimana Tohu	66	Te Hapimana Tohu	105	50	155
Teoti Te Hou	67	Te Oti Te Hou	104	50	154
Mananui Tawhai and Maata Te Whango			525	50	575
	68	Te Mananui Tawhai		25	
	69	Maata Te Whango		25	
Te Rangimairehau	70	Te Rangimairehau	157	100	257
Te Peeti Te Aweawe	71	Te Peti Te Aweawe	104	25	129
Hiria Amorangi	72	Hiria Te Amorangi	104	50	154
Maata Huikirangi	73	Maata Huikirangi	105	100	205
Rahira Wirihana	74	Rahira Wirihana	117	100	
Pirihira Te Rau	75	Pirihira Te Rau	104	100	
Iritana	76	Iritana Hanita	104	100	

App11

HOROWHENUA: THE MUAŪPOKO PRIORITY REPORT

Persons entitled to Horowhenua 11 <sup>1</sup>	Court Order (No)	Court Order (name)	Area allotted (acres)		
			Already allotted	In No 11	Total area
Ria Te Raikokiritia	77	*Ria Te Raikokiritia	105	25	130
Paranihia Riwai	78	Paranihia Riwai	104	100	204
Peti Te Uku	79	Peti Te Uku	104	50	154
Pirihira Te Hau	80	Pirihira Te Hau	105	50	155
Rora Korako and children	81	Rora Korako	311	100	411



## GLOSSARY

- ahi kā* burning fire; continuous occupation; rights to land by occupation  
*Aotearoa* New Zealand  
*atua* the gods, spirit, supernatural being  
*aukati* border, boundary marking a prohibited area, roadblock, discrimination (justice)  
*awa* river or stream  
*hakihaki* skin disease  
*hapū* clan, section of a tribe  
*harakeke* New Zealand flax (*Phormium tenax* and *P. cookianum*)  
*hīnaki* eel trap  
*hui* meeting, gathering, assembly  
*hūpē* mucus, snot  
*inanga/inanga* whitebait  
*ingoa* name  
*iwi* tribe, people  
*kānga* corn  
*kai* food  
*kaimoana* seafood  
*kāinga* home, village, settlement  
*kaitiaki* guardian, protector; older usage referred to kaitiaki as a powerful protective force of being  
*kaitiakitanga* the obligation to nurture and care for the mauri of a taonga; ethic of guardianship, protection  
*kākahi* freshwater mussel, shellfish  
*kāpata* cupboard  
*karaka* a coastal tree cultivated by Māori for its orange berries, which contain seeds that are poisonous unless roasted (*Corynocarpus laevigatus*)  
*karakia* prayer, ritual chant, incantation  
*karengo* a red-coloured seaweed (*Porphyra*)  
*kauae raro* lower jaw  
*kauae runga* upper jaw  
*kaupapa* matter for discussion, subject, topic, agenda  
*kawa* marae protocol  
*kāwanatanga* government, governorship  
*koha* present, gift  
*kōhatu* stone, rock  
*kōiwi* human bone, human remains; person, self, spirit; descendants, line of issue  
*kokopu* native trout  
*kōrero* discussion, speech, to speak  
*koroua* male elder  
*kōura* freshwater crayfish (*Paranephrops planifrons* and *P. zealandicus*)  
*kuia* female elder  
*mahinga kai* food gathering places  
*mana* prestige, authority, reputation, spiritual power [a form of power]  
*mana whenua* customary rights and prestige and authority over land  
*manuhiri* visitor, guest  
*marae* courtyard before meeting house and associated buildings  
*maunga* mountain

GLOSSARY

- mauri* the life principle or living essence contained in all things, animate and inanimate
- moana* ocean, sea
- mokai* slave
- mokopuna, moko* grandchild, child of a son, daughter, nephew, niece etc
- ngāhere* bush, forest
- nga kōrero tuku iho* knowledge/stories/histories that have been passed down
- ngāore* immature whitebait
- oriori* chant, lullaby, song composed on the birth of a chiefly child about his/her ancestry and tribal history
- pā* fortified village, or more recently, any village
- Pākehā* New Zealander of European (mainly British) descent
- papakāinga* original home, home base, village, communal Māori land
- Papatūānuku* Earth, Earth mother and wife of Ranginui
- pataka* storehouse
- patakanui* giant store house
- pā tuna* weir for catching eels
- patere* chant
- pāwhara/pāwhera* dried fish
- pepeha* tribal saying
- pingao* golden sand sedge, traditionally used for weaving and rope-making (*Desmoschoenus spiralis*)
- pirau* to be extinguished, beaten or defeated; to be festering or infected
- piupiu* traditional flax skirt made from strips of prepared and dyed harakeke, now used mainly for kapa haka performances
- pounamu* greenstone
- puna* spring, well, or pool
- rāhui* temporary ban, closed season, or ritual prohibition placed on an area, body of water, or resource
- rangatira* chief, tribal leader
- rangatiratanga* authority of a chief, chieftainship, the right to exercise authority, self-determination
- raupatu* conquest, confiscation
- rerewaho* Muaūpoko used this term in the nineteenth century to refer to those tribal members who had been incorrectly left out of the title to the Horowhenua block in 1873
- rohe* territory, boundary, district, area, region
- rongoā* medicine, medicinal purposes
- roto* inside, lake, wetlands/swamp
- rou kakahi* to dredge for freshwater mussels
- taiaha* long club fighting staff
- taina/teina* junior relatives, of a junior line, younger brothers (of a male), younger sisters (of a female), cousins (same gender)
- Tangaroa* atua of the sea and fish
- tangata whenua* people of the land
- tangi* cry, weep, grieve (also the abbreviated form of tangihanga: funeral)
- taniwha* water monster, guardian spirits
- taonga* a treasured possession, including property, resources, and abstract concepts such as language, cultural knowledge, and relationships
- tapu* sacred, sacredness, separateness, forbidden, off limits
- Tāwhirimātea* atua of the weather
- Te Ika a Māui* North Island of New Zealand
- Te Ture* the Law
- tikanga* custom, method, rule, law, traditional rules for conducting life
- tikiheimi* half-grown smelt. Freshwater fish that spawn in rivers and wash to the sea. Some return with white-bait, while others return as adults (*Retropinna retropinna*).
- tino rangatiratanga* the greatest or highest chieftainship; self-determination, autonomy; control, full authority to make decisions
- tipuna/tupuna* ancestor, forebear

GLOSSARY

- tīpuna/tūpuna* ancestors, forebears  
*tohu* sign, portent  
*tohunga* priest, specialist, expert  
*tuakana* elder brother (of a male), elder sister (of a female), cousin (of the same gender from a more senior branch of the family)  
*tuna* eels  
*tuna heke* migrating eels  
*tuna puhi* type of eels caught in large numbers during tuna heke  
*tūpāpaku* bodies of the dead  
*tutae* faeces, excrement  
*tūturu* real, genuine, proper  
*urupā* burial grounds, burial site, cemetery, tomb  
*wahine* woman  
*wāhi tapu* sacred place, place of historical and cultural significance  
*waiora* health, soundness  
*wairua* soul, spirit, life force  
*waka* canoe  
*wānanga* tertiary institution; traditional school of higher learning  
*whakanoa* to remove tapu, to free things have the extensions of tapu, but it does not affect intrinsic tapu; also used in reference to extinguishing land titles  
*whakapapa* ancestry, lineage, family connections, genealogy; to layer  
*whakatauki* proverb  
*whānau* family, extended family  
*whanaunga* kin, family member  
*whare* house, building  
*whareniui* meeting house  
*whenua* land, ground, placenta, afterbirth

