KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL

WAI 1750
WAI 864

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**The North-Eastern Bay of Plenty District Inquiry**
AND	
IN THE MATTER OF	**A claim by the late John Hata**, **Russell Hollis**, and **Len Brown**, and by **John Brown, Antoinette Hata** and **Te Ringahuia Hata** for and on behalf of the owners of Whakapaupākihi No. 2 block concerning the Crown's acquisition of the Moutohora Quarry (Wai 864)

FOURTH AMENDED STATEMENT OF CLAIM

I tēnei rā, te 24 o ngā rā o Hānuere 2024 | 24 January 2024

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MAY IT PLEASE THE TRIBUNAL:

Introduction

The claimants

1. This Fourth Amended Statement of Claim is filed by the claimants, Russell Hollis (deceased), John Hata (deceased), Len Brown (deceased), John Brown, Antoinette Hata and Te Ringahuia Hata, for and on behalf of the owners of Whakapaupākihi No. 2 block, Tairāwhiti District.

2. The following Statements of Claim have been filed:

    a. Statement of Claim dated 17 July 2000[1]

    b. Amended Statement of Claim dated 7 December 2000[2]

    c. Amended Statement of Claim dated 10 September 2001[3]

    d. Amended Statement of Claim dated 21 November 2013

3. The claimants are Māori.

Whakapaupākihi No 2 block

4. As of 12 January 2024, Te Kooti Whenua Māori (the Māori Land Court) records a total of 5,323 owners of Whakapaupākihi No 2 block.

5. A search of the record of Te Kooti Whenua Māori on 12 January 2024 records the following further details of the Whakapaupākihi No 2 block:

Total shares	495.375
Hectares	794.1634
Square metres	7,941,634
Acres	1,962
Roods	1

[1] Wai 864, 1.1

[2] Wai 864, 1.1(a)

[3] Wai 864, 1.1(b)

Perches	27.3126
Land status type	Māori Freehold Land
Land Administrator	Whakapaupākihi 2 Trust

6. The original title order for Whakapaupākihi No 2 block was made on 7 October **1895**. It was said to be 2,000 acres in size. (This equates to 809.3713 hectares.)

7. On 8 April **1909**, the Native Land Court issued an order in terms of the Native Land Court Act 1894 vesting the Whakapaupākihi No 2 Block in The Proprietors of Whakapaupākihi No 2 Incorporated.

8. On 27 November **1962**, Whakapaupākihi 2 Trust was established with the Māori Trustee appointed as responsible trustee for the land pursuant to sections 438(2) and 438(5) of the Māori Affairs Act 1953.

9. On 13 May **1968**, The Proprietors of Whakapaupākihi No 2 Incorporated (the body corporate) was wound up by an order of the Māori Land Court.

10. On 8 February **1996**, the section 438 Trust was reviewed and varied, pursuant to Te Ture Whenua Māori Act 1993, to an ahu whenua trust with the Māori Trustee remaining as responsible trustee, with three advisory trustees. This is the trust now known as the Whakapaupākihi No 2 Trust.

Whakapaupākihi 2 Trust

11. As noted in [8] above, when first created in 1962, the Whakapaupākihi No 2 Trust had the Māori Trustee appointed as responsible ahu whenua trustee.

12. In 1996 a Trust Order was made by the Māori Land Court pursuant to section 244 of Te Ture Whenua Māori Act 1993 making a new Trust Order in substitution for the (then) existing Trust Order.

13. By Order dated 19 July 1996, the following gentlemen were appointed as Advisory Trustees for Whakapaupākihi 2:

    13.1 Len Brown

    13.2 John Hata

13.3 Russell Hollis

14. The current registered trustees of the Whakapaupākihi 2 Trust are John Hata and John Patarana Brown. On 26 November 2022 an application was filed in Te Kooti Whenua Māori for appointment of Eileen Brown and Peter Selwyn as replacement trustees for John Hata and Russell Hollis, both of whom are deceased. As at 12 January 2024, Te Kooti Whenua Māori have yet to record this change of trustee.

Beneficiaries of Whakapaupākihi 2 Trust

15. As an ahu whenua trust, Whakapaupākihi 2 Trust was established to use, occupy and manage the land for the benefit of the equitable owners. The equitable owners are all of those people who descend from the original owners of the land block.

16. The full powers of the Trustees are set out in the Trust Order referred to in [12] above.

17. The "beneficiaries" of the Trust are those people beneficially entitled to the Whakapaupākihi No 2 block, that is, the currently registered 5,328 individuals recorded as having shares in the block.

18. The recognised iwi and hapū affiliations of those 5,323 individuals include:

Original owners at 1882

- Ngāti Patumoana
- Ngāti Ruatakenga
- Ngāti Irapuaia
- Ngāti Ngahere
- Ngāi Tamahaua

Owners by way of marriage or succession in 1909

- Ngāti Patumoana
- Ngāti Ruatakenga
- Ngāti Irapuaia

- Ngāti Ngahere
- Ngāi Tamahaua
- Te Upokorehe
- Te Waimana, Tūhoe
- Wahia and Ngariki hapū
- Ngā Ariki Kaipūtahi
- Te Aitanga-a-Māhaki

Current owners by way of purchases, succession or marriage as at 2024 [4]

- Ngāti Patumoana
- Ngāti Ruatakenga
- Ngāti Irapuaia
- Ngāti Ngahere
- Ngāi Tamahaua
- Te Upokorehe
- Ngā Ariki Kaipūtahi
- Te Aitanga-a-Māhaki
- Ngāti Porou
- Tūhoe
- Ngai Tai ki Tōrere

[4] Whakapapa research remains ongoing.

Moutuhora Quarry / Motuhora Quarry

19. Part of Whakapaupākihi No 2 block is known as the Moutuhora Quarry. This is on the western side of the Mōtū River, within the boundaries of the North-Eastern Bay of Plenty Inquiry District.

20. Moutuhora Quarry was taken by the Crown by proclamation under the Public Works Act 1928 in 1937 for the purposes of a quarry.

21. The claimants represent the beneficial owners of Whakapaupākihi No 2 block who claim continued and uninterrupted mana whenua over the entirety of the block including and not limited to that part of the block identified as the Moutuhora Quarry.

The Claim

22. The claimants record that the mana and rangatiratanga of the owners of Whakapaupākihi No 2 extends beyond the land taken by the Crown in 1937.

23. The claimants say that the owners of Whakapaupākihi No 2 including Moutuhora Quarry have been, and continue to be, prejudicially affected by the ordinances, Acts, regulations, proclamations, as well as acts and/or omissions of the Crown, the particulars of which are set out further in this Amended Statement of Claim.

24. The claimants further say that all of the Acts, regulations, orders, policies, practices and actions taken, omitted, or adopted by or on behalf of the Crown identified or referred to in this Amended Statement of Claim are, and remain inconsistent with, the terms and principles of te Tiriti o Waitangi / the Treaty of Waitangi.

25. As a consequence of the Crown's acts and omissions concerning Moutuhora Quarry and Whakapaupākihi No 2 block, the claimants and all of the beneficial owners of Whakapaupākihi No 2 have suffered enormous harm and loss, including but not limited to economic loss (including loss of economic opportunities as well as monetary loss) but also loss of mana, loss of rangatiratanga and an enforced inability to exercise kaitiakitanga over their whenua.

26. Despite the return of the Quarry to the ahu whenua trust in 2001, the Crown has not paid any compensation to the owners for the losses caused and suffered.

27. In the Spinks et al *Environmental Issues Final Draft Report* dated 12 December 2023 at page 58 there is discussion of a newspaper article from 26 September 1917 which:

> *shows the Moutoharā quarry negotiating with councils the Councillors moved that the 13s 6d offer for metal supplied by the company with the comment that 'should the metal prove what it was claimed, no doubt no other metal would be used in the Borough*.'

28. The Report writers comment that:[5]

> *This example of utilising gravel resources guaranteed under Te Tiriti o Waitangi to Māori shows the monetary worth of the quarry at that time. If claimants had the same gravel excavation opportunities as those the Crown afforded to European settlers their economic wellbeing would have been immensely higher. Along with economic wellbeing would have been others such as the physical, spiritual, and cultural health of descendants.*

Background[6]

1912-1919

29. In **1911**[7], The Proprietors of Whakapaupākihi No 2 Incorporated leased the entire 2,000 acre block to Mr & Mrs Quirk for 50 years. The lease was to commence from 1 August 1912 and expire on 31 July 1962.

30. In **1916** a separate agreement was negotiated granted the Quirks the right to quarry metal for the term of the lease. A royalty of 3 pence per cubic yard was to be paid to the owners, with royalties to be collected and distributed to the owners by the Tairawhiti District Māori Land Board.

31. In **1913**, representatives from Gisborne, Cook County and Waikohu County met at the quarry to discuss the districts' metal and gravel needs.

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5 *Environmental Issues Final Draft Report* dated 12 December 2023 commissioned by the Crown Forestry Rental Trust and prepared by Dr Vaughan Wood, Dr Aroha Spinks and others for the North-Eastern Bay of Plenty Inquiry District Wai 1750 at pages 58-59.

6 The information set out in this background section is discussed in full in the *Public Works Issues c. 1870s-2010 Report* commissioned by the Crown Forestry Rental Trust and prepared by Heather Bassett and Richard Kay for the North-Eastern Bay of Plenty Inquiry District Wai 1750): Wai 1750, #A029 at pp 254 to 282.

7 In the Bassett & Kay report, it says the lease was entered into in 1912: , Wai 1750, #A029 at [650].

32. In **1914** the Geological Survey Branch acknowledged the Moutohorā quarry site was needed for both road making and railway ballast material.

33. In **1915 – 1916**, Quirk, together with another farmer, Mr Orr, were approached by the councils to see if they would be prepared to start a quarry company. Orr offered to supply stone from Moutohorā quarry to the Gisborne Railway station. The Gisborne Borough Council agreed to enter into an agreement with Orr and Quirk to supply the council with stone for the next three years, and the price of the metal was to not exceed 12s 6d per cubic yard for first class greywacke stone.

34. In **1917** the Gisborne Borough Council agreed to sell quarry plant equipment as well as a tramline to the Moutohorā Quarry Company.

35. In **1918**, the Moutohorā quarry officially opened for business, operated by the "Motuhora Stone Quarries Company".

36. In **1919**, a coal shortage meant trains were unable to carry metal, and the quarry closed, although reopened later that year.

1920-1930

37. By **1920**, the Motuhora Stone Quarries Company was delivering metal by rail and by road.

38. In **1922** the quarry shut down again, this time because of lack of orders.

39. In **1926** local bodies again met to discuss taking over Moutohorā quarry but nothing came of those discussions.

1930-1940

40. In **1930** the Public Works Department was investigating the suitability of Moutohorā metal for repairs to the East Coast Road between Gisborne and Tolaga Bay.

41. From 1 November **1932**, Mrs Quirk (her husband having died) sublet the quarry to Goosman and Company for a term of 5 years with a right of renewal of 5 years.

42. Under the terms of the quarrying rights lease between The Proprietors of Whakapaupākihi No 2 Incorporated (the owners) and the Quirks, the royalty

payable was 3 pence per cubic yards. From June 1931 to June 1938 the owners received the sum of £514 royalties.

43. In **1936** the Public Works Department believed it was paying too high a price for royalties for metal from the quarry and decided instead to take the land and the lessee's (Mrs Quirk's) interests under the Public Works Act.

44. In December 1936 a notice of intention was issued to take Whakapaupākihi 2 and Section 23, Block II, Motu Survey District for the purpose of a quarry. Section 23, Block II (privately owned) was necessary for access to the quarry.

45. On 22 June **1937**, an area of 31 acres, 2 roods and 02 perches was taken by proclamation by the Crown for the purpose of a quarry, under Section 28 of the Public Works Act 1928 (*Gazette Notice 1937 page 1554).*

46. In April 1937, the Under Secretary for Public Works clearly stated to the quarry operator that the department's intention in taking the land was to cut the price it paid for the metal. A letter from the Chief Engineer and Under Secretary to Goosman and Company dated 20 April 1937 stated:

> *I wish to make it clear that the idea of taking the land is to avoid the payment of exorbitant royalty and it is proposed to leave your rights in the and [sic] undisturbed.*
>
> *The land will be taken subject to your Company's rights which will mean that the payments previously made to the owners and licensees will be payable to the Crown. It is anticipated, however, that the royalties can be eliminated or else very substantially reduced provided such saving is reflected in the prices for metal supplied to the Department.*

47. On 28 September **1938** the Native Land Court held a compensation hearing for Part Whakapaupākihi 2. The hearing took place in Gisborne. Judge Carr issued a decision in January 1939. It is reported that this decision reflects the following:[8]

> 671. The Judge considered whether the Māori-owners should receive compensation for the loss of future royalties they would otherwise have received for the 25 years remaining under the quarry rights lease to Quirk.

8 *Public Works Issues c. 1870s-2010 Report,* Bassett & Kaye, Wai 1750, #A029 at p261-262.

The Judge had been provided with a return of metal supplied between 1934 and 1937 which had 31,273yd^3 for 'Government use' and 5,342yd^3 for local body use and 1,570yd^3 for private use. The Judge said that while this indicated there was a private demand for metal, it was only approximately four percent of the total metal sold. The Judge then calculated the amount of lost royalty the owners might have received (at the rate of 3d per cubic yard):

> It is clear the land has no value other than that of a quarry it is also clear that, although small, there is a private market for this metal and the owners are entitled to compensation based on the average receipt from private services. The position thus revolves around the average quantities supplied. For the four years period 1934/37 the yearly average was approximately 392 cubic yards which at the rate provided for in the grant to Quirke [sic] and capitalized represents £98. This the Court fixes as the compensation to be paid.

672. The owners were also awarded £5 5s for solicitor's costs. It should be noted that the compensation awarded included nothing for the value of the land itself, on the grounds that its only value was as a quarry. Under Section 28 of the 1936 Act the 'special suitability' of land for the purposes for which it was taken did not need to be taken into account.

673. The Land Purchase Officer reported that the £98 compensation was 'a very satisfactory award indeed'. He said Works had paid £400 in royalties to Māori up to the date of the taking of the land, and that Works had taken a much greater quantity of metal since that date.

48. The award of £98 was significantly lower than the amount of £250 which the solicitor for the owners had suggested.

49. The claimants assert that the Crown knew full-well it had got the quarry at minimal cost and in doing so had purposely set out to undermine the owners and cause them economic loss and harm. In doing so, the Crown breached the principles of Te Tiriti o Waitangi.

50. Once it acquired the quarry, the Crown granted a quarry rights licence to Goosman. The contract between Goosman and Works, signed in September 1937, was for 21,000 cubic yards of ballast to be delivered by August 1938. Goosman also had a contract with Works to supply metal for the Gisborne to Te Araroa State Highway. The contract was for £32,114. The contract was completed in February 1939.

1940-1950

51. In **1943** the District Engineer recommended that McIntosh and Brooking take over the quarry licence from Goosman. From 1 December 1943 Moutohorā quarry was leased to McIntosh and Brooking for five years under 30 November 1948 with a royalty of 6 pence per cubic yard.

52. In **1949** the Highway Board agreed to renew the McIntosh and Brooking Moutohorā quarry lease for a period of 10 years from 1 September 1949, with a right of renewal for a further 10 years.

53. During 1949 there was flooding which damaged the railway track and halted production at the quarry.

1950s

54. In **1953** the Minister of Works informed McIntosh and Brooking that the quality of stone was no longer good enough for highway use. The Resident Engineer claimed Moutohorā quarry had exhausted its metal supply.

55. In **1954** McIntosh and Brooking enquired about purchasing Moutohorā quarry from the Ministry of Works. Despite having said the stone was not good enough, the Minister did not think it was sensible to sell the quarry, as the Crown would need supplies of metal in the future.

56. In **1955** the Public Works Department again considered selling Moutohorā quarry. The Commissioner of Works is reported to have pointed out that:

> *This quarry was taken compulsorily from Māori owners originally, and the possibility for repercussion if it is sold to a European must be considered.*

57. No sale eventuated at that time.

1970s

58. In **1977**, the Public Works Department decided that Moutohorā quarry should be further developed to increase production of the roading metal required in the area. It was estimated that the Ministry of Works would require 3,000 to 4,000 cubic metres of seal chip and 10,000 to 12,000 cubic metres of basecourse materials per annum for the district.

59. In January **1978**, Works instructed McIntosh and Sons to develop Moutohorā quarry. They were told that if they were unable to develop the quarry, the lease arrangement would be reviewed. In response, McIntosh and Sons formed a new company – Moutohorā Quarries Ltd - to obtain development capital so the quarry's production capacity could be increased to 40,000m^3 of metal per year.

1980s

60. In September **1980**, a lease agreement was signed by Works and Moutohorā Quarries Ltd for a period of 10 years at an annual rental of $300 and royalty of 10 cents per cubic metre. The lessee was to pay a minimum royalty of $3,000 per annum. It was envisaged at that time that there would be total annual extractions of at least 30,000 cubic metres – with all royalties being paid to the Crown.

61. In **1981**, Moutohorā Quarries Ltd went into receivership. It was sold to Rock Products Ltd., who took over the lease.

62. In **1983**, Rock Products Ltd made an application to the Ministry of Works to close Moutohorā quarry because it was uneconomic.

63. In June of **1984**, the Inspector of Mines instructed Rock Products Ltd to stop work on the main face of the quarry because of safety concerns.

64. In December of 1984, Rock Products Ltd applied to Works for a reduction of the minimum royalty from $3000 to $500 per annum. This was agreed to.

65. By **1988**, Works Consultancy Service's royalty for Moutohorā quarry was 10 cents per cubic metre while royalty rates for other quarries ranged from 20 to 80 cents per cubic metre.

1990s-2000s

66. On 21 December **1998** a Mining Permit under the Crown Minerals Act 1991 was issued to Eastworks Ltd for 40 years. The consequence of this is that the owners of Whakapaupākihi cannot operate the quarry on their own behalf until 2038, when this Mining Permit to Eastworks Ltd expires, and then only in terms of a further Permit issued by the Crown.

67. The owners of Whakapaupākihi No 2 block <u>are not</u> associated with Eastworks Ltd.

68. In **1999** the quarry lease (to Eastworks Ltd) was renewed for a further 10 years.

69. In December 1999 the Crown advised the Whakapaupākihi 2 trustees that the quarry was no longer required by the Crown and, in accordance with the Public Works Act 1981, the Trust was given the first option to purchase the quarry.

70. The Crown said the price to buy back the land would be $67,000. A letter from The Property Group advised a re-valuation had been prepared by Quotable Value New Zealand and assessed the land value at $14,000 and the mineral value at $53,000 (ie, $67,000 total).

71. On 11 May **2000** the Māori Trustee responded by letter advising that:

> *"... since the Crown had acquired the land for nothing and the metal for virtually a nominal consideration, the Māori Trustee considers that the land should be offered back to the owners at no cost. The public purpose has been served and to now seek payment for the land would seem to be a clear case of unjust enrichment."*

72. Following further negotiations and the filing of the Wai 864 claim, the quarry was, in April **2001**, transferred to the Māori Trustee in his capacity as trustee for Whakapaupākihi No 2. No payment was required and the transfer was made by the Crown on the understanding that the original owners could still, among other things:

    72.1 continue the Wai 864 claim to the Waitangi Tribunal (including on those parts of the claim relating to ownership of the minerals in the quarry and to the granting of the current Mining Licence and Mining Permit); and

    72.2 commence proceedings independently of the Wai 864 claim should the Tribunal decline to hear any part of the claim.

73. Original claimants on the Wai 864 claim (Messrs Hollis and Brown) paid $1 in consideration for the return of the land.

74. The title to the quarry land following the transfer to the Trustees is subject to certain provisions of the Crown Minerals Act 1991 (which provide that all petroleum, gold, silver, uranium or other mineral existing in its natural condition shall be the property of the Crown) and the Conservation Act 1987 (concerning marginal strips).

75. In **2010**, title to the land was transferred to John Hata and Henry Russell Hollis in their capacity as trustee of the Whakapaupākihi 2 Trust. Mr Hata passed away in 2020 and Mr Hollis passed away in June 2019.

Economic losses suffered

76. Owing to a dearth of available records of exactly the quantities of metals extracted from the Quarry site, the claimants have little way of knowing the quantum of economic loss suffered as a result of the Crown's acts and omissions concerning the Quarry.

77. Records held by the Te Tumu Paeroa, the Office of the Māori Trustee, evidence that in or about 2000 accounting exercises were undertaken to attempt to estimate the value of the loss suffered by the owners of Whakapaupākihi No 2 block.

78. Those investigations disclosed annual output from "Motuhora Quarry" reported to the Department of Labour from 1972 to 1997 to have been some 794,650 tonne.

79. A report prepared by Quarry Management Ltd recording the cubic metres of rock transported over access on Whakapaupākihi No 2 Block from June 1986 to July 2002 discusses royalties paid over that time, as well as compares royalty rates paid for similar product during the same period. The report indicates that while royalties paid for rock transported from Whakapaupākihi No 2 were between 25c and $1 per cubic metre, other quarry sites produced royalties on average of $2 per cubic metre.

80. Using a volume conversion register to convert tonnes to cubic metre, 795,650 tonne converts to approximately 2,253,030 cubic metres. At $2 per cubic metre, this equates to approximately $4,506,060.

81. That is only for the period 1972 to 1997, a period some 21 years after the Resident Engineer had claimed that Moutohorā quarry had exhausted its metal supply: see [54] above.

82. Owing to the lack of records of total metal extracted, the claimants have no way of knowing how much metal, and therefore how much in royalties, they had been deprived of prior to 1972 but one could safely assume it would be a significantly greater quantity than the 2.25million cubic metres extracted between 1972 and 1997.

83. Also in the records of Te Tumu Paeroa there is a "Sample Royalty Calculation" spreadsheet which makes certain assumptions in an attempt to calculate lost royalties from 1937 through until 2000. The following annual production estimates are used:

Period	Estimated annual production (m^3)
1937 – 1971	10,000
1972 – 1996	21,000
1997 – 2000	30,000

84. Extrapolating the calculations, this would amount to a total of 854,000 cubic metres,[9] being only 38% of the known quantities of metal extracted between 1972 and 1997: per [80] above.

85. Adopting a flat royalty rate of $2 per cubic metre, together with a 5% interest rate, the calculated loss of royalties is some $10,660,077.

86. Adopting a flat royalty rate of $1.50 per cubic metre, together with a 5% interest rate, the calculated loss of royalties is some $7,995,027.

Te Tiriti o Waitangi and its Principles

87. **Article I** of Te Tiriti recognises Māori sovereignty and guarantees the protection of Māori land, waterways and taonga.

88. **Article II** of Te Tiriti recognises tino rangatiratanga and guarantees to Māori the protection of te ao Māori, including whenua noho.

89. **Article III** of Te Tiriti guarantees to Māori the same rights and privileges of Pākehā.

9 35 years @ 10,000m^3 + 24 years @ 21,000m^3 + 5 years @ 30,000m^3 = 854,000m^3.

90. The Crown had, and continues to have, duties to recognise and actively protect Māori rights and interests under the Te Tiriti and its principles. This includes owners of land.

91. These principles include:

91.1 active protection (protection of Māori property and taonga and the preservation of Māori custom);

91.2 good government;

91.3 partnership (fiduciary duty and duty of good faith owed to Māori);

91.4 the duty of economic protection;

91.5 the duty to provide protection for individual Māori;

91.6 redress; and

91.7 the duty to remedy past breaches.

92. Without limiting Te Tiriti and its principles, the claimants assert that the following are principles of Te Tiriti relevant to the present claim.

Active Protection

93. Flowing from the principle of active protection are the following principles:

93.1 te tino rangatiratanga;

93.2 Māori property and taonga; and

93.3 customs and values.

Te Tino Rangatiratanga

94. The Article II guarantee of tino rangatiratanga over all taonga is a primary obligation. The guarantee of maintaining Māori rangatiratanga is of central importance to the assertions of mana motuhake in this claim.

95. The overarching principle of the Treaty acknowledges and protects Māori tino rangatiratanga and is a well-established principle in Treaty jurisprudence. It is

defined as the "unqualified exercise of chieftainship and confirms and guarantees to Māori their property and other rights".[10] This necessarily qualifies or limits the Crown's authority to govern[11] and obliges the Crown not only to recognise Māori interests specified in the Treaty but to actively protect them.[12]

96. This was of fundamental importance to Māori, for they would not have entered into the Treaty if their tino rangatiratanga was not guaranteed:[13]

> *... the principle that the cession by Māori of sovereignty to the Crown was in exchange for the protection by the Crown of Māori rangatiratanga is fundamental to the compact or accord embodied in the Treaty and is of paramount importance.*

97. The principle that the Crown should actively protect te tino rangatiratanga is paramount to the claimants. This protection is not merely a simple acknowledgement of autonomy and self-management, it also includes a requirement that the Crown actively protect and support the claimants in the exercise of their rangatiratanga as beneficial owners of Whakapaupākihi No 2 land block.

98. The guarantee of rangatiratanga means it is for Māori to say what their interests are, and to determine how they might best be protected.[14] Upholding tino rangatiratanga includes the rights to protect economic and political self-determination.

Property

99. A fundamental principle of the Treaty is the protection and preservation of Māori property and taonga.[15]

100. The duty of active protection is also a significant aspect of the matters alleged because the Crown has a duty actively to protect Māori Treaty rights and interests to the fullest extent practicable.

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10 I. H. Kawharu, "Treaty of Waitangi - Kawharu Translation" (2011) Waitangi Tribunal – Te Rōpū Whakamana i te Tiriti o Waitangi. Retrieved from: http://www.waitangitribunal.govt.nz/treaty/kawharutranslation.asp%3E .

11 Waitangi Tribunal *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Wai 145, 2003) at 74.

12 Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985), at 69.

13 Waitangi Tribunal, *Turangi Township Report,* (Wai 84, 1995), p. 284.

14 Report of the Waitangi Tribunal Inquiry into the Department of Corrections; p 28.

15 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, PC, 517.

Custom

101. A fundamental principle of the Treaty is the preservation of Māori custom including an ongoing distinctive existence as a people albeit adapting as time passed and the combined society developed.[16] This protection is of key importance to the claimants and requires an analysis of what Māori possessed under Te Tiriti in terms of Māori custom rather than in terms of English Law.

102. The claimants were and are to be protected not only in the protection of their land, water and taonga but in their right to control such property in accordance with their tikanga, having regard to their own cultural preferences. The principle that the Crown should actively protect Māori custom is of key importance to the claimants.

Principle of Partnership

Fiduciary Duty

103. In the Court of Appeal decision, *New Zealand Māori Council v Attorney General,* it was held that the relationship between Treaty partners creates responsibilities analogous to fiduciary duties.[17] This was further supported by the Court of Appeal in *Te Runanga o Wharekauri Rekohu* that the "Treaty created an enduring relationship of a fiduciary nature akin to partnership"[18] and that the fiduciary duty of good faith to Māori is a fundamental and overarching principle of the Treaty.[19]

104. Such duty includes the obligations:

104.1 to use any right of pre-emption to protect Māori from excess purchases, and not to use it to stifle competition for Māori land so as to deprive Māori of a fair price;

104.2 the duty not to use other unfair means when dealing with Māori; and

104.3 the obligation to abide by the Christian and traditional Māori values the Treaty emphasised.

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16 *Taiaroa v Minister of Justice* (unreported HC Wgn CP 99/94, decision McGechan J, 29 August 1994 at p 69.

17 *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641, per Bisson J at 715.

18 *Te Runanga O Wharekauri Rekohu Inc. v Attorney-General* [1993] 2 NZLR 301, CA 305 – 306.

19 Ibid.

Duty of Economic Protection

105. Flowing from the general fiduciary duty is the fundamental principle that the Crown owes a duty to protect, preserve and promote the economic position of Māori. This includes:

105.1 a duty on the Crown to ensure that Māori were and are left with sufficient land and other resources for their maintenance and support and livelihood and that each hapū maintained sufficient endowment for its foreseen needs;[20]

105.2 such endowment is not just an endowment sufficient to survive but sufficient to profit and to prosper and includes the facility to fully exploit such land and resources;[21]

105.3 Māori have a right to develop and expand such resources using modern technologies and are not to be consigned to those technologies known at the time of the Treaty;[22] and

105.4 the Crown does not take advantage of the poverty of Māori, created at least in part by the Crown, to acquire land from Māori which Māori are selling just so the Māori can buy food to survive.

Principle of Equity

106. Article III of the Treaty of Waitangi guaranteed that Māori would enjoy the same rights and privileges as other citizens.

107. The principle of equity recognises that the Crown has an obligation to act fairly between Māori and non-Māori. This can require positive intervention to address disparities, so that there is "equity of outcomes, rather than equity of access to services, treatment or care".[23]

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20 Waitangi Tribunal, *Orakei Report*, (Wai 9, 1987), p. 147.

21 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* p. 194.

22 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* p. 220; see also Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, (Wai 27, 1992), pp 253 – 254.

23 Report of the Waitangi Tribunal into Napier Hospital: p 62.

108. The Tribunal in the Central North Island Report also stated that the principle of equity is crucial to twentieth-century land issues:[24]

> *That principle, it has been observed, derived from Article 3 of the Treaty guaranteeing Māori the rights of British citizens. In relation to property rights, it is axiomatic that Māori rights should be afforded no less protection than rights of other citizens.*

Consultation

109. The Tribunal, in the Central North Island Report, has echoed the conclusions of earlier Tribunals that the Crown has a Treaty obligation to consult with Māori about how their lands should be managed and administered, and to secure their consent to the introduction of any new tenure and title determination systems.

110. The Central North Island Tribunal concluded that "the Crown did not adequately consult them or secure their consent; nor did it inform them about the purpose, functions and processes of the new court".[25]

111. The same can be said here, with Crown failing to consult or obtain the consent of the owners before taking their land by way of compulsory acquisition. To add to the injury, the Crown then failed to return the land once its officials had declared the quarry to have been exhausted, seemingly because it would have meant having to return the land to the Māori owners.[26]

Redress and the duty to remedy past breaches

112. Another overarching principle of the Treaty is that the Crown should remedy past breaches in all but very special circumstances.[27]

113. The Court of Appeal has acknowledged that it is a principle of partnership generally, and of the Treaty relationship in particular, that past wrongs give rise to a right of redress. This acknowledgment is in keeping with the fiduciary obligations inherent in the Treaty partnership. In the *Lands* case (1987), President Cooke accepted that the Treaty gave rise to an obligation on the Crown to remedy past breaches. He further observed that:[28]

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24 Waitangi Tribunal, *He Maunga Rongo Report on the Central North Island Claims*, (Wai 1200, 2008), Vol 2 at p. 428.

25 Waitangi Tribunal, *He Maunga Rongo Report on the Central North Island Claims*, (Wai 1200, 2008), Vol 2 at p. 536.

26 Refer paragraph [56] above.

27 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, CA, 664-665.

28 Ibid at p 666-667.

> *...if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal.*

114. Justice Somers, in the same case, considered that where breaches of the Treaty had occurred, then a fair and reasonable recognition of and recompense for the wrongdoing was required: [29]

> *The obligations of the parties to the Treaty to comply with its terms is implicit, just as the obligations of parties to a contract to keep their promises. So is the right of redress for a breach which may fairly be described as a principle and was in my view intended by Parliament to be embraced by the terms it used in s 9 [of the State-Owned Enterprises Act 1986]. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other – a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.*

Crown breaches

115. Through its acts and omissions set out and described in this Amended Statement of Claim, the Crown has breached the following principles of Te Tiriti o Waitangi:

115.1 The principle of active protection;

115.2 The principle of partnership

115.3 The principle of economic protection;

115.4 The principle of equity;

115.5 The principle of consultation; and

115.6 The principle of redress.

116. The Crown has failed to meet its duty to remedy past Treaty breaches.

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29 Ibid at p 670.

Prejudice

117. As a consequence of the Crown's breaches as set out in this Amended Statement of Claim, the claimants and all of those people they represent have suffered and continue to suffer serious prejudicial effects including:

117.1 loss of rangatiratanga, mana motuhake and kaitiakitanga of their whenua;

117.2 marginalisation of the claimants and those they represent within their own ancestral lands;

117.3 economic loss;

117.4 loss of economic opportunity;

117.5 enduring economic hardship.

Crown concession of Treaty breach

118. In the Deed of Settlement of Historical Claims entered into by Whakatōhea, Te Tāwharau o te Whakatōhea and the Crown in May 2023, the Crown makes the following acknowledgement that its acts and omissions concerning Moutuhora Quarry were a breach of te Tiriti o Waitangi and its principles:

PUBLIC WORKS - MOUTOHORĀ QUARRY: NGĀ MAHI TANGO WHENUA A TE KĀWANATANGA - TE RUA KŌHATU O MOUTOHORĀ

3.24. The Crown acknowledges that:

Ka whakaae te Karauna anā:

3.24.1. its compulsory acquisition of the Moutohorā quarry in 1937 deprived the Whakapaupākihi No. 2 owners and Whakatōhea of one of the few sources of income left to them in the aftermath of raupatu and Crown land purchasing;

nā tōnā mātua tango ā ture i te rua kōhatu o Moutohorā i te tau 1937, i aukatitia te whakawhiwhinga ā pūtea ki ngā kaipānga o Whakapaupākihi No. 2 me Te Whakatōhea tonu, mai i tētahi o ngā toenga rawa i a rātou whai muri iho i te raupatu me te hokotanga whenua a te Karauna;

3.24.2. the Crown did not adequately consult the owners before taking their land, and failed to consider alternatives to compulsory acquisition such as attempting to negotiate a lower price for metal from the quarry;

kīhai te Karauna i kōrero marikatia ki ngā kaipanga i mua i te tangohanga i wā ratou whenua, kīhai hoki i titiro ki ngā huarahi atu i te mātua tango ā ture pērā ki te whakarite, whakatau i tētahi utu mō ngā mētara mai i te rua kōhatu i tetahi utu iti iho;

3.24.3. while the Crown paid the compensation required under the relevant legislation, this did not properly compensate the owners for the taking, and the Crown did not pay any compensation for the land taken or for the loss of royalties on the quarry metal sold to Government or local bodies; and

hakoa i utua e te Karauna te kamapeihana e tika ana i raro i te ture, kīhai hoki tēnei i kamapeihanatia tikatia ngā kaipānga mō te tangohanga, a kīhai hoki te Karauna i utu kamapeihana mō ngā whenua i tangohia, rānei hoki ko te ngarohanga o nga utu roera mō ngā mētara mai i te rua kōhatu i hokona atu ki te Kāwanatanga, ki ngā kaunihera ā rohe rānei; ā

3.24.4. the taking was unnecessary, and it caused great prejudice to owners and Whakatōhea already enduring economic hardship, and was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

korekore rawa te tangohanga i tika, ā i whakahāwea nuitia ngā kaipānga me Te Whakatōhea kua rongo kētia te uauatanga o te taha ōhanga, ā he takahi tērā i te Tiriti o Waitangi me wōna mātāpono.

119. In this acknowledgement, the Crown differentiates between "owners" and "Whakatōhea", in recognition of the fact that not all owners of Whakapaupākihi No 2 block are Whakatōhea, as set out in paragraph [18] above.

Relief Sought

120. The claimants seek the following:

120.1 findings of fact that:

120.1.1 the Crown's compulsory acquisition of the Moutohorā quarry in 1937 deprived the Whakapaupākihi No. 2 owners and Whakatōhea of one of the few sources of income left to them in the aftermath of raupatu and Crown land purchasing;

120.1.2 the Crown did not adequately consult the owners before taking their land, and failed to consider alternatives to compulsory acquisition such as attempting to negotiate a lower price for metal from the quarry;

120.1.3 while the Crown paid the compensation required under the relevant legislation, this did not properly compensate the owners for the taking, and the Crown did not pay any compensation for the land taken or for the loss of royalties on the quarry metal sold to Government or local bodies;

120.1.4 the taking was unnecessary, and it caused great prejudice to owners and Whakatōhea already enduring economic hardship;

120.1.5 the extensive quarrying of the land has left the land with unknown quantities of metal or other valuable resource which the owners may be able to use to benefit themselves and their descendants by way of economic development, including through employment opportunities, upskilling of their people, and generally through the benefits of economic activity and commerce;

120.1.6 the extensive quarrying of the land has left the land with unknown environmental and other damage including but not limited to:

(a) the mauri of Whakapaupākihi maunga and other maunga surrounding the Quarry that are significant to hapū of Te Whakatōhea;

(b) the mauri of the Mōtū river that is adjacent to the land block;

(c) the health and wellbeing of traditional hunting and fishing areas;

(d) the ability to practice traditional customary practices and activities such as gathering and preparing rongoā; and

(e) many unknown environmental and ecological impacts of the surrounding area of the land block that have yet to be researched;

120.1.7 their claim is well-founded;

120.1.8 the claimants and those they represent have suffered prejudice as a result of the Crown's acts and omissions as set out in this Amended Statement of Claim;

and that all of these were in breach of Te Tiriti o Waitangi and its principles.

120.2 recommendations that:

120.2.1 the Crown properly and thoroughly investigate the economic losses caused to and suffered by the claimants and their antecedents by its compulsory acquisition of the Quarry;

120.2.2 the Crown properly and fully compensate the claimants (or the Whakapaupākihi No. 2 Trust) for the economic losses suffered by the claimants and their antecedents as a result of the compulsory taking of the Quarry and the consequential loss of income and loss of royalties;

120.2.3 the Crown properly and fully compensate the claimants (or the Whakapaupākihi No. 2 Trust) for the loss of mana and rangatiratanga suffered as a consequence of the compulsory taking of the land, and the damage to the land through the quarrying activities undertaken thereon;

120.2.4 the Crown fund the cost of investigations into whether the land retains valuable metals suitable for extraction and sale, including the estimated realisable value of any such metals;

120.2.5 the Crown fund the cost of investigations into what mahi is required to restore the Quarry to a working Quarry and then meet the costs of restoring the Quarry to a working Quarry, if that is an economically and practically viable option for the future use of the land;

120.2.6 if restoring the Quarry to a working Quarry is a viable option for future use of the land, the Crown to guarantee a minimum purchase of Quarry output by Crown agencies for the life of the Quarry;

120.2.7 the Crown facilitate the transfer to Whakapaupākihi No 2 Trust of the current mining permit issued in 1998 to Eastworks Limited and renewed for a further 10 years in 1999 (making the permit valid for a total of 50 years from 1998) at no cost to the claimants or Whakapaupākihi No 2 Trust; and

120.2.8 the name of the Quarry and the road leading to the Quarry be amended to be spelt, as it ought to be spelt: "Motuhora".

120.3 Any other recommendations that the Tribunal sees fit to make.

Amendments to this claim

121. The claimants reserve the right to make any amendments to this claim they perceive necessary throughout this District Inquiry.

DATED at Rotorua this 24th day of Hānuere | January 2024



Annette Sykes Jacki Cole Kalei Delamere-Ririnui

TO: The Registrar, Waitangi Tribunal

AND TO: Claimant Counsel

AND TO: Claimant Counsel

This **AMENDED STATEMENT OF CLAIM** is filed by **ANNETTE TE IMAIMA SYKES**, and **KALEI DELAMERE RIRINUI** Counsel for the Claimants, of the firm Annette Sykes & Co.

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Documents for service on the abovenamed Claimants may be left at the address for service or may be:- a) posted to the solicitor at Annette Sykes & Co., PO Box 734, Rotorua 3010; or b) transmitted to the solicitor by email on asykes@annettesykes.com and admin@annettesykes.com .