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TE ROHE POTAE RESEARCH PROGRAMME

**PUBLIC WORKS AND OTHER TAKINGS
IN TE ROHE POTAE DISTRICT**

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REPORT SUMMARY

A Report Commissioned by the Crown Forestry Rental Trust

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Introduction

My name is DAVID JAMES ALEXANDER. My qualifications and experience have been set out in the introduction to my report. Since completing the report I have continued to be involved in preparing research reports for Tribunal inquiries. I am currently working on a Tribunal commission to prepare an environmental overview report for Te Rohe Potae district inquiry.

This is a summary of:

- *Public works and other takings in Te Rohe Potae District*, December 2009, document #A63
- *Public works and other takings in Te Rohe Potae District database*, in Excel spreadsheet format, December 2009, document #A63(b)

The inequities of public works takings have been well-canvassed in published reports of the Waitangi Tribunal. It is not the intention of this summary to itemise the deficiencies in the Crown's legislation, policy and procedures, as that is already addressed in the Statement of Issues. The purpose of the research was to discover whether the failings identified elsewhere in New Zealand also occurred in Te Rohe Potae, and if so to what degree.

The types of Crown taking covered in the research are:

- Takings for road legislated for in the native land and public works statutes, whereby land was able to be taken compulsorily without consultation and without compensation being payable;
- Takings for public works under public works legislation, where compensation was generally payable;
- Giftings of land by Maori to the Crown, most commonly for native schools, which after 1900 was accomplished by use of public works taking procedures and prior agreement that no compensation was payable.

What was not included in the research or in the database were takings for railway purposes, as these were the subject of separate research by Philip Cleaver and

Jonathan Sarich (document #A20). The consequence of this exclusion was that the research concentrated on nineteenth and twentieth century takings for road without payment of compensation, and twentieth century public works takings.

The public works legislation was a relatively stable legal platform throughout the twentieth century. The Public Works Act 1894 set out the manner in which privately-owned lands could be compulsorily taken for the benefit of the wider community. Rewrites of the legislation in 1905, 1908 and 1928 (covering the period up to 1981) were largely compilations and restatements. While there were numerous amendments over the years, the main features of the legislation, including the administrative processes by which a taking lawfully occurred, largely remained unaltered.

Compulsory taking¹ is always an action of the Crown. Each compulsory taking Proclamation invoking the powers of the Public Works Act was signed by the Governor / Governor-General. Local government was allowed to initiate takings and carry out certain steps in the process, including survey, public notification, consideration of objections and the payment of compensation, with respect to compulsory acquisition to meet its own local needs. Once the Minister of Works in the case of a Government work, or a local authority in the case of a local work, was satisfied that a taking should proceed, a request would then be made to the Governor / Governor-General to sign the Proclamation. The Governor / Governor-General had the final power to decide on the taking application 'as he sees fit'. In practice this meant he took the advice of his Minister of Works, resulting in all requests from local authorities being lodged with the Ministry of Works and being channelled through the Ministry and the Minister. By these means, the Crown retained both constitutionally and practically the power to make every compulsory taking decision itself.

The database

The standardised and stable-over-time nature of the takings process that has been operated by the Crown suits a database. The database was compiled in a manner that

¹ The term 'compulsory taking' is used in this paragraph to cover all takings prior to 1962, and all takings since 1962 where the prior consent of the landowners was not obtained. Each of these types of taking required the issue of a Proclamation by the Governor or Governor-General. Takings with prior consent after 1962 could be achieved by the issue of a declaration by the Minister of Works or an official with a delegation of authority from the Minister.

recorded all takings first, regardless of the ownership of the land being taken, and then as a second step assessed whether the taken land was in Maori or in non-Maori ownership. While every effort was made to ensure that its coverage was as complete as possible, it is unlikely that every single compulsory acquisition has been recorded. This is because it relied heavily on identification of survey plans that had been prepared specifically for taking purposes, and there may have been takings where the land was already adequately surveyed and a new taking survey was not required. The database is also formatted around the official notification of a taking in the *New Zealand Gazette*, and it is known that some takings for roads relied solely on the issue of a Governor's Warrant, rather than on a combination of Warrant and *Gazette* notice. Despite those qualifications, my assessment is that the database was prepared with sufficient rigour to include at least 95% of all takings. To enable a more reliable comparison of the degree to which Maori-owned land, as compared to land in non-Maori ownership, was affected by compulsory acquisition, settings apart for roads under the Land Act were also included in the database.

The database records 5634 individual compulsory takings from different parcels of land in Te Rohe Potae, made up as follows:

- 461 takings for road where no compensation was payable (i.e. under the 5% and related provisions of the native land and public works legislation)
- 4124 takings under other provisions of the Public Works Acts
- 283 takings for public roads of roadlines and roadways laid out by the Native/Maori Land Court
- 766 settings apart for road under the Land Acts and successor provisions

Of the 4124 takings under the other provisions of the Public Works Acts:

- 810 (20%) were takings of Maori-owned land
- 2129 (52%) were takings of land owned by non-Maori
- 851 (20%) were takings or settings apart of land in Crown and local authority ownership
- 334 (8%) were takings where ownership was not identified

Of the takings of land known to be privately owned, 27% were in Maori ownership and 73% were owned by non-Maori.

The analysis above is of takings events as applied at the individual landholding level. It is not of areal extent. Many takings, especially for road realignments, which have been common in the last fifty years, are very small in area. Douglas, Innes and Mitchell in their quantitative area analysis (document #A21) have used the database to measure the extent of land loss due to public works takings, as compared to other mechanisms of land loss, and demonstrate that public works takings account for only a small percentage of the land area that has gone out of Maori ownership. However, the issue with public works takings is the degree to which the Crown used its compulsory acquisition powers in Te Rohe Potae. The frequency with which those powers were applied to individual landholdings (and by extension to hapu territories) is more important in an assessment of harm suffered under a process that has generally been found to be Treaty non-compliant. The sheer number of taking events affecting Maori-owned land demonstrates that hapu were continually having their ability to exercise their own control over their landholdings (their quiet enjoyment of their lands) interrupted by Crown interventions aimed at whittling away the remaining hapu estate.

Takings for road with no compensation payable

During the late nineteenth century and the early twentieth century (up until 1927), the Crown legislated for a variety of means whereby the line of public roads could be taken compulsorily and in a confiscatory manner from Maori owners. The main method was the application of the 5% rule, so-called because up to 5% of a Maori block the title for which had been investigated by the Native Land Court could be set aside for public roads, provided the survey of the line of road was authorised by a Governor's Warrant issued within 15 years of the Court's title order. If this timetable was adhered to, and no buildings, cultivations or urupa were affected, then no compensation was payable. The opportunity provided by the legislation was used to its full extent by the Crown, with the programme of survey work arranged around the time deadline, and the legislation relied upon as a first resort. The agreement of the Maori owners was not sought or obtained – the first that the owners knew of the provision was when the surveyor arrived to survey the line of road (after the Warrant had been issued), and the only consultation was narrowly focussed on determining a line on the ground that avoided buildings, cultivations and urupa.

The research has identified the Crown's thinking behind the road lines it surveyed. Many blocks were investigated by the Court as a prelude to purchase. When the Crown purchased land, it often acquired parcels that were separated one from another. While each Crown-owned parcel could be cut up by survey into a series of family farm sections, and Crown Grant roads could be provided over the Crown-owned parcel for access to each section, these roads were of little use if access from the sections to the main centres such as Otorohanga and Te Kuiti was prevented by an absence of legal roads across intervening land in Maori ownership. The use of the 5% rule was designed in the first instance to benefit the Crown's settlement programme and the settlers it had placed on Crown sections. Only secondarily was it intended to serve a district-wide purpose of filling in gaps in an emerging network of roads.

If the 5% rule was not adequate, the Crown had other options available that did not require the payment of compensation and were equally confiscatory. The report identifies seven other statutory mechanisms that it could call upon if need be. This summary does not go into a description of these other options, beyond noting that the report identifies examples where six of the seven mechanisms were made use of to acquire lines of road across Maori-owned land in Te Rohe Potae. All these mechanisms were available before use of the final option, which was to take land for road under the Public Works Act compulsorily but with the payment of compensation. The overwhelming statutory force that the Crown applied to ensure that there was a network of public roads, including the co-opting of the Native/Maori Land Court in some of the options available, exerted a heavy pressure on Rohe Potae Maori.

Taking under public works legislation, with compensation payable

The first identified instance of a taking under the Public Works Act in Te Rohe Potae, where compensation was payable, was in 1902. While this represents a later start to public works takings than in other parts of the country (and came some fifteen years after the first takings in the district for the Main Trunk Railway), it is consistent with the arrival of European settlement in Te Rohe Potae (outside the Raglan, Kawhia and Mokau districts). By then, following the construction of the railway, the Crown had acquired a substantial amount of land, and was able to locate many community requirements on its own land. However, there was a spillover effect from Crown-

owned land onto Maori-owned land, so far as takings for public works were concerned, occurring in a limited fashion at first and then increasing in frequency as the European population and European development increased in Te Rohe Potae during the first two decades of the twentieth century.

The Native Townships legislation allowed for the setting aside of reserves for community purposes in Otorohanga; these reserves became Crown lands without the payment of compensation. However, there was a spillover effect here as well, with the Maori freehold interest in other township lands being compulsorily acquired when additional lands were required for community needs.

The limited need to pay compensation for early roading, because of such heavy reliance on the legislative mechanisms under which no compensation was payable, is apparent from the database recording only four takings for road between 1902 and 1910 where compensation was payable (outside the Raglan district).

Some of the largest takings of land in the early twentieth century, for mental hospital, reformatory farm, and scenery preservation, are discussed below. They were made possible by an expansion over time in the range of purposes for which land could be compulsorily taken. In the Public Works Act 1894, the predominant purposes were transportation infrastructure of roads, railways and harbours. This was expanded in 1900 with the inclusion of Native schools and hospitals, and in 1903 with the inclusion of scenery preservation. These two legislative amendments are early examples of the additional purposes for which land could be taken. Other amendments broadening the scope of the legislation continued throughout the early twentieth century as the needs of European settlement were perceived to be becoming more complex. This meant that whenever the Crown identified a barrier to the use of compulsory acquisition powers, there was a willingness to remove the impediment and restore the freedom to make use of the legislation.

The taking at Tokanui in 1910-1911 for mental hospital and reformatory farm was the largest taking in Te Rohe Potae, covering a combined area of 6194 acres (2506 hectares). Part (43%) of the taken land had already been acquired by the Crown, and the purpose of the taking was to combine the Crown Land with additional land

compulsorily acquired from Maori owners to create two large holdings, one for a hospital (most of which would be farmed for self sufficiency and therapeutic benefit) and the other for a prison (which would also be farmed for self sufficiency and rehabilitative benefit). The taking of the Maori-owned land was in the face of Maori opposition, which was especially relevant as the portion of the land that had already been acquired by the Crown had passed into Crown ownership very recently (in 1907-1908), and the lands not purchased, but then taken compulsorily, were those that Maori had opted not to sell at that time. The combining of two purposes (both requiring an extensive area of land) on the one contiguous site represented a particularly heavy loss for the hapu of Tokanui. Neither purpose contained elements that made location at Tokanui, as compared to other locations in New Zealand, essential.

The various takings for scenery preservation, at Waitomo Caves, Kawhia Harbour, Mokau River, Marokopa River and Mangaokewa Gorge, arose from recommendations by a Scenery Preservation Commission that existed between 1903 and 1906. Maori-owned land was regarded as being at particular risk, either because Europeans might purchase the land and destroy the native vegetation cover in scenically attractive locations in pursuit of grassland farming, or because Maori might undertake the same clearance activities themselves. That the Crown was equally intent on native vegetation removal on its own lands at this time was glossed over. Indeed, the Crown's record of establishing scenic reserves on its own lands in Te Rohe Potae was poor, with only a few reserves being set aside on Crown land during the period that it was expending a lot of effort on compulsorily acquiring Maori-owned land. The net result of the takings of Maori-owned land was that Rohe Potae hapu contributed involuntarily and disproportionately heavily to the beginnings of a scenic reserves network in the region, in much the same way as they had contributed to the initial development of the roading network. It was the ready availability of the public works legislation that skewed the Crown's efforts towards the compulsory acquisition of Maori-owned land for scenery preservation. There was no concept of shared Crown and Maori guardianship or stewardship of protected lands evident in the Crown's actions at that time.

A mental hospital and scenery preservation were just two of the purposes for which Maori-owned land was taken. The research shows the wide-ranging nature of the Crown's and local bodies' public works requirements, including housing, police stations, post offices, recreation grounds, flood protection works, the needs of the State Coal Mines branch of the Mines Department, and a site for a Tourist and Health Resorts Department accommodation house at Waitomo Caves.

Quarries and gravel pits were frequently taken, even though there were other provisions in the Public Works Act allowing a right of entry on to land containing stone and shingle, with provision for a royalty to be paid for any stone removed. Rock outcrops of interest to the Crown and local bodies were also of particular significance to Maori, especially where they had been used as sites for the interment of koiwi. In one instance near Aria an outcrop that was a burial site was taken in 1914, though the taking was annulled by special legislation the following year when it became known that it was a burial site. Another site on the same outcrop was later taken for a quarry, on the basis that it was outside the surveyed boundaries of an urupa block ordered by the Native Land Court. How valid the surveyed boundaries were as a guide was not investigated, and Maori complained about the proximity of the quarry to the surveyed urupa at the compensation hearing before the Native Land Court.

The research also shows the willingness of the Crown and local bodies to rely on the Public Works Act. A lease arrangement with a Maori landowner for part of the aerodrome at Te Kuiti was deemed to be unsatisfactory after public monies had been spent on the land, and the leased land was compulsorily taken. The full freehold interest in a Maori-owned catchment above a water supply intake on the slopes of Pirongia mountain was compulsorily and permanently taken out of Maori ownership in order to prevent the timber cover being logged, something that could have been accomplished by a less invasive approach such as arranging a lease or a covenant. Some Maori-owned land was acquired for Maori housing purposes using the Public Works Act. All these takings were made possible by the ease with which Maori-owned land could be acquired under the compulsory provisions of the Public Works Act, and the enthusiastic willingness of the Crown to make use of the provisions. The research identified instances where the Maori Affairs Department urged the use of the

taking legislation because of its simplicity in cutting through the impediments associated with acquiring interests in Maori land using other mechanisms.

Compensation was determined following the taking. In the case of Maori-owned land, only the Native/Maori Land Court could determine compensation, and then only on the application of the taking body responsible for the payment of compensation. This meant that the affected Maori owners, and the Court itself, could not hurry the compensation process along. If a taking body failed to apply for compensation the other parties' hands were tied. This was not usually an issue for takings where the Crown would be responsible for paying compensation, as it had adopted administrative procedures that included lodging an application as an immediate follow-up action once a taking Proclamation had been issued. However, when local bodies with less experience of the administrative steps that were required failed to lodge an application, and the research uncovered instances of Rohe Potae local bodies failing in this respect, the affected Maori owners became doubly harmed by a loss of land and an absence of compensation. The Crown's own administrative procedures did not extend to monitoring whether local bodies discharged their compensation obligations.

The Native/Maori Land Court's consideration of an appropriate compensation amount was confined by legislation and case law. Determining fair value relied on valuation evidence which was based on a market for land that, in rural areas, was exclusively focused on its development into grassland. Matters relevant to a Maori perspective about land did not receive any consideration. Court cases where the value of the taken land was an issue became dominated by competing evidence by European valuers, with the Maori landowners relegated to the role of bystanders. Frequently the Court chose a value for the land midway between the values presented to it by the opposing parties' valuers. The Crown approach at the Court hearings was to present a Government valuation and resolutely oppose any higher amount which might be promoted by valuers acting for the Maori owners. The research identified instances where the Crown argued for a value of grassland based on sheep farming rather than dairy farming, or argued for the value of limestone on a rock outcrop taken for quarrying on the basis of its use as road metal rather than for lime manufacture or

lime burning. Fairness to the taxpayer, and avoidance of precedents being set, was at least as much of a consideration to the Crown as fairness to the affected landowner.

The research contains one instance where an award of the Native Land Court was challenged on appeal to the Native Appellate Court. In that instance, concerning the Tokanui taking, the Appellate Court increased the award by 12.5%.

Prior to 1981, the Crown was slow to return land to its former owners, principally because it considered that, because compensation had been paid at the time of taking, any obligations it owed to former owners (whether Maori or non-Maori) had been discharged and the land could be dealt with by the Crown as it saw fit. The exception to this was land that had been gifted, such as Native school sites. Options the Crown considered were open to it included using the land for another public purpose, or selling it. Local bodies also had the same range of options, subject to Crown approval.

The research examined the Raglan golf course return to Maori ownership. This land was part of a larger parcel of land that had been taken in 1941 for defence purposes and used as an aerodrome. The golf course return fitted into a larger pattern of changing Crown policy. In 1970 land taken compulsorily from Maori owners at Mangapehi was allowed to be sold to a private buyer. In 1976 land at Otorohanga taken from Maori owners for a waterworks was sold by the local Borough Council (under an exchange arrangement), with Crown approval. Both these sales of land were consistent with the policy applying up till then that there was no need to involve the former owners in any way once the decision had been made that land was no longer required for the purpose for which it had been taken.

In the case of the land at Raglan, the control and management of the aerodrome had been offered to Raglan County Council in 1968, and the offer was accepted by the Council on condition that it was allowed to lease part of the site as a golf course as a means of generating income for the operation of the aerodrome. There had been no discussion with the former owners when this change was made. It was only when an approach was made by descendants of the former owners in 1976 to have the land returned that the Crown addressed whether it was appropriate to do so. An offer back

of the golf course land was made, subject to conditions that the Crown was paid for the land, and the existing lease to the golf club was allowed to continue. This was in effect an offer to substitute Tainui Awhiro for the Crown as landlord. It was the conditions of offer back that proved problematic for both parties and elevated the return of the land into a major national dispute. The matter was not finally resolved until 1987, and even then the Court's reversioning order took another three years to complete.

There were some changes to the public works legislation in 1962, 1973 and 1981 that altered the taking procedures that had been followed up until then. Each of these changes sheds light on how the impact on Maori landowners could have been less severe if the legislation had been framed differently before then. In 1962 the taking procedures were simplified if the consent of affected landowners had been obtained prior to the taking. A consented taking could take effect with the signing of a declaration by the Minister of Works, rather than requiring the issue of a Proclamation by the Governor-General. Obtaining consent in advance thereafter became the preferred method of taking by the Crown, with compulsory taking requiring a Proclamation becoming less frequently relied upon. A second change in 1962 revoked the sole right of the Maori Land Court to determine compensation for the taking of Maori-owned land, and required it to be decided by direct negotiation. This was similar to the provisions for non-Maori land. However, negotiation would be undertaken by the Maori Trustee where Maori land had more than one owner. Owners of multiply-owned Maori land were therefore cast in the role of observers, without being given any direct involvement.

In 1973 the power for the Minister of Works and Development to decide on any objections to a taking was transferred to an independent judicial body, the Town and Country Planning Appeal Board.

In 1981 the Public Works Act was extensively rewritten. The range of public works for which land could be taken was considerably reduced, only being allowed for public works that complied with a new categorisation of 'essential works'. Negotiations to obtain prior consent to a taking became required in the first instance before land could be taken compulsorily, where up to then it had been one option

open to the Crown and local bodies. There was a presumption built into the legislation that all land no longer required for its taken purpose would be offered back to its original owners or their descendants. This had not previously formed part of the Crown's policy, except with respect to gifted lands such as Native school sites, and had developed as a concept during the 1970s. The flawed offer back of the Raglan aerodrome land in 1976 had been a major contributor to the national debate leading up to the new legislation's offer back provisions.

Gift of land for Native Schools

This rather specialised use of public works legislation was specifically included in the brief for the research. The legislation was not relied on during the nineteenth century because the ability to use the Public Works Act for the acquisition of land for Native schools did not become available until 1900. Before then, alternative mechanisms included a formal inquiry under the Native Schools Sites Act 1880, and partitioning out of a site by the Native Land Court followed by transfer to the Crown. In Te Rohe Potae there was one school site inquiry, and three instances of transfers to the Crown where a nominal payment was specified in the transfer document.

Use of the Public Works Act became the preferred method after 1900, with five instances of its use being identified in Te Rohe Potae. It allowed the Crown to acquire a site according to a timetable that suited the Crown, and avoided involvement of the Native Land Court in partitioning land. The gifting aspect was made possible by following the public works taking procedures for the determination of compensation. When the application was considered by the Native Land Court, it was told that the site had been gifted, and that a nil compensation order should be issued.

The consent of the Maori owners to the gifting of a site was arranged prior to taking. There were standard pre-conditions set by the Crown for the establishment of a Native school. These required a Maori community to make an approach to the Crown, to confirm that their children would attend in sufficient numbers, and to show their community support for a school by offering to gift at least three acres (later increased to five acres) of land for the school. The desire and commitment of a community to have schooling for their children had to be clearly demonstrated, often by frequent

applications over a number of years, and by a show of enthusiasm when a schools inspector visited to consider the application.

The nature of the pre-conditions that the Crown set for the establishment of a Native school meant that the gifting of the site was not a gifting by a free agent. There was an element of coercion at play behind the agreement to gift. When the Oparure school site was being offered, the Crown was told that the owners agreed to put the land under 'the mana of the Government'. While this can be interpreted as something less absolute than the acquisition by the Crown of the freehold of the site, such as a right of occupation like a lease, the Crown policy would not accept anything less than full ownership title.

Prior to 1962 Native schools were the only public work purpose for which the agreement of the landowners was obtained as a matter of course prior to the taking.

That sites for Native schools had been gifted made it easier for the Crown to develop a policy of returning a site to Maori ownership when it was no longer required for the purpose for which it had been taken. Three instances in Te Rohe Potae of a successful return to descendants of the former owners were identified. In a fourth instance, the Maori Land Court agreed to allow the sale of a site to a single Maori individual, with the proceeds of the sale of the land being paid to the Maori Trustee for distribution to descendants of the gifting owners.

A problematic issue, however, arose with school sites where a Native school had been established, but that school had later become a public school. The Crown took the view that the important principle was the continuing use for education, children from the gifting community would still be attending the public school, and it had no obligation to return the site when it ceased to be occupied by a Native school. Two instances of this situation prior to 1969 (when all Native schools throughout the country were incorporated into the public schooling system) were identified in Te Rohe Potae. In neither case was there any specific consultation with the donors of the site about the effect that the change from Native school to public school might have on the gifting of the site. The approach taken by the Crown, however, ignored the fact that there were instances in Te Rohe Potae where Maori-owned land had been

taken for a public school, and compensation had been paid. If the school had previously been a Native school, then the public school system had acquired the site without paying compensation.

The degree to which Rohe Potae Maori were affected

The research shows that Rohe Potae Maori were affected across the full spectrum of inequitable effects arising from the Crown's compulsory acquisition processes, as determined by the Waitangi Tribunal. It also shows that Rohe Potae Maori were more adversely affected than Maori in some other parts of New Zealand by compulsory acquisition activities of the Crown and local bodies. Being adversely affected to the extent that they were was primarily because of the manner in which land loss occurred, and because the opening up of the district to European settlement happened at a time that reliance on the public works legislation was nationally at or near its peak. This conclusion was arrived at in the research by a comparison of takings in Te Rohe Potae with similar databases of takings on the East Coast and in the Central North Island, and by a comparison with regions such as the South Island or Auckland where the land loss history covers a different era and a different manner of land acquisition by the Crown. The conclusion stands even without factoring in any takings in Te Rohe Potae for railway purposes.

Within Te Rohe Potae, different hapu were affected to different degrees, with the hapu owners of the Tokanui block perhaps the most severely affected. However, the cumulative impact of many minor encroachments by the Crown and local bodies on the lands that Rohe Potae Maori had chosen to hold onto magnified the effect that compulsory acquisition had on Maori landowners, and cannot be disregarded.

Responses to issues identified in the Statement of Issues

The matters addressed in the report enable responses to be provided for all issues set out in Section 17, except 17.5. Political involvement by Rohe Potae Maori in local body affairs, and any Maori involvement in contracted road construction, is not covered in the public works report.

17.1(a)

In acquiring Rohe Potae Maori land for public works, how extensively did the Crown apply the 5-percent rule in the inquiry district which, from 1865 to 1927, allowed the Crown to take up to five per cent of a block for roads without compensation? How much Rohe Potae Maori land was taken under the 5-percent rule compared with non-Maori land? Did the 5-percent rule affect Rohe Potae Maori differently from non-Maori in the district?

- The 5% rule was used almost as a matter of course once the Native Land Court had ordered a title to a block. While no analysis was carried out in the research of the number of initial Maori blocks from which land was taken for road under the 5% rule, it would be a high proportion of initial blocks in Te Rohe Potae.
- Since the 5% rule was provided in native land legislation, it was almost wholly directed at Maori. It would affect non-Maori only where a block had passed out of Maori ownership and into private hands within 15 years of the block title being ordered by the Native Land Court; an example of this was the very earliest 5% taking in Te Rohe Potae, from the Mohakatino-Parininihi 2 block.
- While there was a provision in the Land Act for lessees of Crown Land to give up land for roads if required, without compensation being payable, this was used to a far lesser extent by the Crown because it had already laid out lines of road to service farm sections before it had settled lessees on the sections. The Land Act provision was primarily used for small road realignments, and for occasional additional side roads not provided in the initial cutting up of Crown lands for settlement.

- As a result of the differing legal circumstances for Maori and non-Maori owners, Te Rohe Potae Maori were affected to a far greater extent than non-Maori residents of the inquiry district by a loss of land for public roads.
- For the report an estimate was made that application of the 5% rule contributed at least 650 kilometres of road to the roading network of Te Rohe Potae. However, this would be an under-estimate of the impact of the Crown's actions on Maori because some takings were not notified in the *New Zealand Gazette*, and because other compulsory takings of Maori-owned land for road without payment of compensation relied on other legislative provisions to take the land.

17.1(b)

In acquiring Rohe Potae Maori land for public works, to what extent did the Crown, local bodies or other bodies with the power to acquire land compulsorily, ensure that no other suitable land was available as an alternative?

There was no statutory requirement to examine whether other suitable land was available that would meet community needs. As a result, the availability of alternatives was not addressed in the documentation prepared as part of the taking procedures. Because it did not have to be addressed, it was not given consideration by the taking bodies. The evidence is that no effort was made by the Crown, when examining its own proposed takings and the takings recommended to it by local bodies, to assess whether alternatives were available that avoided the need to take Maori-owned land.

The circumstances of each taking would determine what range of alternatives might be available, ranging from multiple alternatives to no alternatives. Realignment of existing roads for faster and safer motoring would often offer few alternatives. Although quarries and metal pits needed to be close to the location where the stone or metal was required, there were probably a number of equally suitable sites. Scenery preservation would be limited to sites where the scenery was of a quality deserving protection. The Tokanui mental hospital and the reformatory farm, on the other hand, could, within reason, have been located anywhere in New Zealand.

The weighting of the legislation in favour of the taking body, and the manner in which the legislation was applied, made it easy for any land to be taken. Where a choice of sites might be available, the status of the land might be a minor consideration. Other matters such as cost, perceived absence of opposition, and minimising disturbance to existing economic uses of land, were likely to have had a greater influence.

17.1(c)

In acquiring Rohe Potae Maori land for public works, to what extent did the Crown, local bodies or other bodies with the power to acquire land compulsorily, consult with land owners? To what extent did land owners object or agree to particular takings?

Statutorily-mandated consultation took place within narrow confines. For takings for road without payment of compensation, consultation was limited to the time that a surveyor arrived and advised that he was about to survey a line of road. For conversion of Maori roadways to public roads, consultation was effectively a chance to object in an open session of the Native/Maori Land Court. For takings under the Public Works Act, there was public notification in a newspaper and at the local post office, and the ability to then lodge a written objection. The obligation to personally notify Maori landowners of an intended taking was strictly limited by statute, and was not as broad as the requirements to personally notify non-Maori landowners. None of these measures amounted to consultation in the legally accepted meaning of the word as understood today.

Agreement or consent of affected landowners was not sought as a matter of course until after 1962, when the procedures were altered to favour takings where consent had been given. Written objections were rare, in large part because of the difficulties that Maori landowners faced in becoming aware of the taking body's intentions, and also perhaps because of an appreciation by Maori landowners of the power imbalance between the taking body and themselves.

When a proposed taking was initiated by a local body, it had delegated authority from the Crown to call for and consider the merits of objections. If it did not sustain an

objection, or it thought that a financial payment could compensate a private landowner for any loss suffered, the local body would prepare a memorial document and a signed statutory declaration to that effect, which then formed part of the paperwork sent to central Government in support of its request that the land be taken. The Crown as a matter of principle and a matter of course did not question the veracity of a local body's statutory declaration, and became wilfully ignorant of any views about the proposed taking that were contrary to the local body's views. Who objected to a local body initiated taking, and the nature of their objection, was not recorded in Crown records.

As the research relied on Crown records, and therefore did not consider instances where objections were made to local bodies and rejected by them in advance of the local body forwarding a taking request to central Government, the number of objections identified will underestimate the total number of objections. However, sufficient objections by Maori were discovered during the research to demonstrate that, despite the ability for the procedures to favour the taking body, this did not prevent objections being lodged.

17.1(d)

In acquiring Rohe Potae Maori land for public works, was compulsory acquisition only limited to exceptional circumstances or as a last resort?

The ease with which the Crown or a local body could follow the taking procedures and acquire land under the public works legislation made that method of acquisition a common, even preferred, method. Alternative methods of acquisition required obtaining the consent of every owner, or calling a meeting of owners and having that meeting pass a resolution in favour of acquisition (which then required confirmation by the Native/Maori Land Court). The multiple nature of ownership, the existence of deceased owners on an ownership list, and the scattered distribution of owners around the country, all made such alternative acquisition methods more complex, and therefore less favoured, than compulsory acquisition.

These circumstances, which applied nationally, were no different in Te Rohe Potae. Both the Crown and Rohe Potae local bodies viewed compulsory acquisition as

simple, certain in its outcome, and well suited to their needs. It was used as a first resort.

17.1(e)

In acquiring Rohe Potae Maori land for public works, did the Crown, local bodies or other bodies with the power to acquire land compulsorily, explore the taking of lesser interests such as leasehold interests or easements and so forth?

From the start of European settlement in New Zealand, there was no consideration of alternative public access rights other than sole public ownership of the land estate underlying a public road. This pattern was established long before compulsory acquisition legislation was introduced. Crown grant roads were laid out across the lands purchased at Raglan and Kawhia in the 1850s. Acquisition of an interest less than a full freehold interest was never a consideration with respect to takings for roads, which constituted four-fifths of all public works taking events in Te Rohe Potae affecting Maori landowners.

With takings for other purposes, the concept of treating a public work as a temporary land requirement (albeit possibly multi-generational in terms of length of use), and thereby capable of being established on land under a less-than-freehold interest, was never adopted in New Zealand, even though the legislation did allow for lesser interests to be acquired compulsorily. When it was as easy to acquire a full freehold interest as it was to acquire a lesser interest, and knowing that acquiring a lesser interest would increase the complexity of ongoing land administration following a taking, the taking of a full interest in land became the accepted norm.

The only takings of a leasehold interest recorded in the database are where both a leasehold interest and an underlying lessor interest already existed, and it was necessary to take each interest separately.

There are instances in the database where an easement right was taken compulsorily. These instances were mostly in connection with rights to pipe water, lay drains, or lay a natural gas pipeline. There have been a limited number of instances where a right of

way across Maori-owned land has been taken to provide access to telecommunications towers on high ground.

17.1(f)

In acquiring Rohe Potae Maori land for public works, did the Crown, local bodies or other bodies with the power to acquire land compulsorily, use or take advantage of public works takings as a means to enable the alienation of other Maori land?

With one glaring exception, discussed below, the research did not uncover instances where a public works taking was a part of a wider suite of associated measures specifically aimed at acquiring Maori land on a wider-ranging basis. Takings were for defined and specific public purposes, usually working to their own needs and timetable, and the Crown records reflect that singular focus. For multiple purposes to operate together implies a whole-of-Government approach being taken by the Crown, which generally was not the case.

The sole exception in Te Rohe Potae was when the whole of Mangoira block on the north side of the Mokau River was deliberately taken for scenic purposes, even though it was known beforehand that not all of the block was suitable for that purpose. After the taking only 12% of the block by area was retained for scenic reserve, with the other 88% becoming lands of the Crown which were made available for farm settlement. This was made possible by a specific section of the Scenery Preservation Act 1903, which was not available for takings for any other purpose.

Although not a taking for a public work (as defined at that time), the research identified an 1889 reference by the Native Minister to the establishment of a Native school on gifted land at Otorohanga being likely to be helpful in furthering land purchase negotiations that were underway at that time.

17.1(g)

In acquiring Rohe Potae Maori land for public works, was fair compensation paid? Was the Native Land Court properly equipped to assess fair compensation? Was a different value for compensation purposes applied to Maori land as compared to general land?

Compensation for Maori land that was taken was required to be determined by the Native/Maori Land Court up until 1962; there was no statutory provision allowing a Maori owner to negotiate compensation directly with the taking body. Compensation for non-Maori land that was taken was a matter for negotiation between the landowner and the taking body, with recourse if required to the Compensation Court (later reconstituted as the Land Valuation Tribunal) as an arbitrator. Both the Native/Maori Land Court and the Compensation Court relied on expert evidence from valuer witnesses.

In both cases, compensation was considered in monetary terms only. Cash rather than the offer of alternative land was the principal method. In reducing the worth of land to a monetary figure, land was being treated as a tradable commodity that could be substituted by cash. Although it was also argued by the Crown, for instance in the case of the Te Kuiti aerodrome taking, that a cash compensation payment could be used to buy other land if the recipients wished to do so, this option was regularly made impossible by the compensation payment being made to the Maori Trustee, whose procedures meant it was immediately divided up and distributed among individual owners. Ancestral links to land were described dismissively in Crown records as ‘sentiment’, and were not a factor in determining the value of land.

The Native/Maori Land Court did not have as much of a land valuation workload as the Compensation Court, so the judges of the Maori Court were not as experienced in that matter. Nevertheless, both Courts relied on contestable expert testimony, and both operated within parameters set by case law, including having regard for Government valuations. The Court’s judgements can probably be regarded as lying within the range of results that could be considered to be ‘fair’, in the context of the legislation’s parameters.

17.1(h)

In acquiring Rohe Potae Maori land for public works, to what extent did the Crown, local bodies or other bodies with the power to acquire land compulsorily, ensure that Maori landowners were left with sufficient amounts of land to sustain themselves following public works takings?

Land sufficiency after a taking was not mentioned in the public works legislation as a relevant consideration, and as a result was not taken into account. This is notwithstanding the proximity in time of the Public Works Acts of 1905 and 1908, and native land legislation such as the Maori Land Settlement Act 1905 and the Native Land Act 1909, both of which did include sufficiency provisions. Both the Public Works Acts of 1905 and 1908 were compilations of 1894 legislation, rather than reviews and rewrites.

When land sufficiency was specifically argued at the inquiry into the takings for mental hospital and reformatory farm at Tokanui, the Crown actively opposed it becoming a matter for consideration with respect to compulsory acquisitions.

17.1(i)

In acquiring Rohe Potae Maori land for public works, did the Crown, local bodies or other bodies with the power to acquire land compulsorily, use an equivalent process for acquiring Maori land for public works as it applied to general land?

There were differences in the processes, with those for the acquisition of Maori-owned land being less stringent than those for acquiring land owned by non-Maori. The main difference, besides the difference in whether compensation could be negotiated (see response to issue 17.1(h) above), was in personal service of a notice of intention to take land. Non-Maori landowners were personally served as a matter of course, while Maori owners were personally served only if their names were recorded on the Land Transfer title for the land. If there was no such title in existence (as was normally the case for Maori-owned land), there was no requirement to serve the notice of intention. This lesser standard for owner awareness prior to taking severely compromised the ability for Maori owners to object to a proposed taking of their land.

17.2

How did the Crown respond to Rohe Potae Maori opposition to public works takings?

The first issue was whether any objection met the threshold set in legislation, that it could not be resolved by the payment of monetary compensation. If in the opinion of

the Crown, or the local body initiating the proposed taking, a monetary payment could adequately satisfy an affected owner's objection, then it was disallowed. A disallowal of objection by a local body was not reviewed by the Crown to test the validity or otherwise of its reasoning.

Only if an objection passed this first test would it be decided upon by the Minister of Works. The Minister had the option of referring an objection for an inquiry and report prior to making a decision; this option was used for the Tokanui mental hospital and reformatory farm takings in 1910, for a public school taking at Oparau in 1917, and for a flood control taking at Otorohanga in 1971. However, in deciding on an objection the Minister was not always truly independent, as many proposed central Government takings were initiated by his own ministry. It was not until 1973 that a legislative amendment required all objections to be referred for a decision to the Town and Country Planning Appeal Board, a judicial rather than a ministerial body.

17.3

Did the Crown, local bodies or other bodies with the power to acquire land compulsorily, acquire more land than required for particular public works?

This matter was not examined with any particular rigour by the Crown when considering whether or not to compulsorily acquire land. There was no penalty imposed on taking bodies (other than additional land cost) if more land was taken than was actually required.

Initiators of proposed takings were naturally keen that they obtain enough land for the public purpose, including foreseeable future needs, so that they would not be required to repeat the taking process at some later date in order to obtain additional land.

It was always possible that any foreseeable future needs that had been provided for would not eventuate. When the mental hospital taking at Tokanui was being developed, there were ambitions in the mind of the initiating official that this would be the site for a suite of mental health facilities aimed at treating a variety of mental illnesses. This rather grand plan did not eventuate, and much of the 5000-acre mental hospital site ended up being farmed by the Department of Lands and Survey. The

problem in this instance was not that too much land was taken, but that there was no correction and return of unrequired land when the plans for use of the site were altered subsequently.

17.4

To what extent did the Crown monitor the acquisition of Te Rohe Potae Maori land by local bodies or other bodies with the power to acquire land compulsorily, for public works? What action, if any, did the Crown take as a result of its monitoring?

The response to this issue is in two parts, monitoring of the taking of Maori-owned land, and monitoring of the actions of local bodies.

In the records examined for this research, there was no discernable monitoring by the Crown of the extent to which Maori-owned land was being taken. The only monitoring was to check that the administrative procedures set out in the legislation had been properly complied with by the taking initiator. The attitude adopted was that taking was a targeted form of acquisition, and that it was irrelevant (other than with respect to the correct following of taking procedures) whether the land that happened to be targeted was owned by Maori or non-Maori.

As already explained in response to an earlier issue, the Crown relied on the statutory declaration and the memorial document supplied by local authorities that those local authorities had discharged their statutory obligations. It did not look behind the paperwork that it was supplied with. Once the Crown had issued the taking proclamation it did not check, or require confirmation, that a local authority had completed the taking task by paying compensation. The research uncovered instances where a local authority had failed to apply to the Native Land Court to have it determine the amount of compensation. Often this only came to the attention of central Government when the Maori owners petitioned Parliament. The response was then to remind the local authority of its obligations, rather than to obtain confirmation that compensation had been applied for and paid.

17.6

What, if any, are the examples of public works contravening tikanga or interfering with wahi tapu, urupa and other taonga sites? What was the extent of the prejudice to Rohe Potae Maori? Were Rohe Potae Maori offered kaitiaki roles?

Because of a statutory provision requiring an additional consent for any taking that affected buildings, cultivations or burial grounds, it is possible to determine how frequently takings affected land occupied in this manner. The database records 31 instances of takings where the additional consent was issued, 21 of which were in relation to Maori-owned land.

However, this provision was only activated when the Crown was aware of these types of occupation. There would have been instances where wahi tapu, urupa, or other places of taonga significance existed, but the Crown did not know this.

Two burial places were brought to the Crown's attention during the Native Land Court judge's inquiry into the proposed takings for mental hospital and reformatory farm at Tokanui in 1910. While their existence did not prevent the land on which they were located being taken, the taking was allowed on the basis that the public work would not interfere with the burial places. The proposed aerodrome at Raglan was the site of a living community, with a meeting house, a number of occupied houses, burial places and cultivations all on the site. In seeking the consent of the Tainui Awhiro owners, the Crown offered to relocate the meeting house to an alternative location and ensure that the burial places would not be disturbed by the public work. Both these instances, at Tokanui and Raglan, amount to a promise by the Crown that it would assume the kaitiaki responsibility. In both cases, subsequent events show that the Crown failed to fulfil its obligations with respect to the wahi tapu. In the case of Raglan the Crown reneged on its practical assistance and substituted the payment of monetary compensation for its promises of rebuilding an alternative papakainga.

17.7(a)

In terms of surplus land, did the Crown on-sell surplus land without offering it back to Rohe Potae Maori?

In general the Crown attitude up until the 1970s was that, once taken and compensation had been paid, the land had become fully owned by the Crown, and it could then do with the land as it wished. The Crown did not consider that it had any residual obligations to former owners. Prior to 1981, there was no legal obligation to offer back land that had been compulsorily taken.

Road realignments, especially in the last fifty years, have often involved exchanges of taken land for public land with legal road status no longer required for that purpose. The offer back of that surplus land by way of exchange is made to the owner from whom new land for road is being taken. Therefore it is possible for the legal road to have been land compulsorily acquired from Maori, for the land alongside the road to have since been purchased by non-Maori, and for the exchange offer to be made to non-Maori rather than to descendants of the original Maori owners. The land areas involved are usually small, irregularly shaped, and not suitable for economic use on their own.

Putting that scenario to one side, a feature of other takings in Te Rohe Potae was how infrequently land was declared to be surplus. There were two principal reasons for this. First, there was no culture in Government departments of reviewing landholdings on a regular basis, and assessing whether any had become surplus to requirements. Second, from the 1960s (and less formally before then) Government policy was that other Government departments were to be given a right of first refusal on land declared to be surplus to the requirements of the department that was responsible for it. There are a number of examples in the database of taken land being set apart at a later date for another public purpose. Only after these two matters had been addressed might taken land be declared to be no longer required, and be declared to be Crown Land, which meant it was transferred to the Government's principal land disposal agency, the Department of Lands and Survey. At that stage, it could be sold.

There was also a provision in the Public Works Act allowing direct sale of taken land, in the first instance to an adjoining owner, and after that more widely. The provision was used in five instances of sale of Tokanui lands taken for mental hospital between 1927 and 1940. One of the five sales was to the Auckland Education Board, with no

money changing hands. Because the legislation did not require the effects of sale on former owners to be considered, there was no consideration given.

Prior to the 1970s there was no notification to or consultation with former owners when land was determined to be surplus to Crown requirements. The research did not as a general rule track the fate of taken land that had been declared to be Crown Land, apart from the Raglan aerodrome case.

17.7(b)

In terms of surplus land, did the Crown offer surplus land to the original owners? Did the owners take up the offers? If not, why not?

Offer back was standard in the case of native school sites no longer required for education purposes, because the land had originally been gifted. The research identified two instances in Te Rohe Potae where return to descendants of the original owners was successfully achieved, and a third instance where the Maori Land Court agreed to vest the site in a single Maori owner, with that owner purchasing the site at market value from descendants of the original owners.

The offer back of that part of the aerodrome land occupied by the Raglan golf course was made in 1976 and represented a new approach in Government policy. It was the conditions attached to return of the land that was the stumbling block and made the return such a lengthy and contentious affair.

One of the greatest difficulties experienced with offer back has been that the surplus land is often in a different state from its state when taken. For instance it may have buildings on it. The Crown has taken the view that any 'improvements' to the land should be purchased.