IN THE WAITANGI TRIBUNAL **WAI 1040**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of Te Paparahi o Te Raki Inquiry (WAI 1040)

Responses of

Peter James McBurney

to

Statement of Issues

Relating to

Public Works and Other Takings[1]

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[1] Claimants' Combined Generic and Local Statement of Issues for Stage 2 Generic Hearings, Te Paparahi o Te Raki Regional Inquiry, Wai 1040, # 3.1.798 (a), pp. 27-29, Section 8, items a-s.

8. Public Works and Other Takings

Issues for Inquiry

What was the impact on Te Raki Māori of Crown policies and practices, legislation and regulations affecting land taken for public purposes?

RESPONSE:

The impact on Te Raki Māori of Crown policies and practices, legislation and regulations affecting land taken for public purposes has been something of a slow burner inasmuch as it did not have the same initial impact of many other forms of land alienation introduced by the Crown. By the end of the nineteenth century, Te Raki Māori had lost much of their estate through such mechanisms as the Crown's surplus lands policy, Crown purchasing, the Native Land Court process and other costs associated with tenure reform, and private purchasing. Public works became the means by which the Crown could continue to target what little land remained in Māori ownership from the end of the nineteenth and into the twentieth century. Compulsory acquisition was not always resorted to, as in a number of cases landowners were persuaded to sell land to the Crown, for scenic purposes for example. However, the existence of compulsory taking powers, allied to the broad range of purposes to which they could be applied, gave the Crown a fallback option if owners were reluctant to sell their land.

Compulsory taking powers need to be seen in the context of other legislation affecting Māori land and the events or policies that underpinned that legislation. In the nineteenth century, public works legislation was developed against a background of recent wars and/or Māori protest against Government land policies. Tensions between the Government and significant sections of the Māori population were reflected in the legislation, with discriminatory provisions applying to the taking of Māori land for public works purposes. Draconian public works legislation was applied throughout the country, affecting Māori from all districts equally, regardless of whether they were adjudged to have been 'in rebellion', or were simply living peacefully in pursuit of their own legitimate interests, as was the case in the North. Thus, one impact on Te Raki Māori of the Crown's imposition of public works legislation was that they were saddled with harsh taking regimes effectively used as a punishment for Māori in other districts.

Persistent European attitudes of cultural superiority have also influenced the manner in which public works policies have impacted Te Raki Māori. For much of the past 170-odd years, a wide cultural gap has existed between Māori and Pākehā perceptions of land tenure and the nature of land rights. The sacredness of Papatūānuku is not easily reconciled with the European mission to impose order on the New Zealand wilderness, which required it to be legally defined, made economically viable, and generally 'civilized' through European settlement. The Royal Charter issued to Governor Hobson in November 1840 authorised him to survey the whole of New Zealand and divide the land into districts and counties, setting aside sites for townships, churches and schools. The Governor was also instructed to make grants of 'Waste Land' to private persons for their use, or to corporate bodies in trust for public use. This Waste Land would come from land purchased from Māori, or from the surplus land appropriated from pre-Treaty purchases as determined by the Old Land Claims Commissions.

By the early 1840s, imperial lawmakers and those administering colonial policy were debating different approaches to land tenure and settlement in Aotearoa/New Zealand. In 1844, a House of Commons Select Committee reported in favour of submissions made to it by the New Zealand Company lobby. The committee condemned the Treaty of Waitangi 'as part of a series of injudicious proceedings' and passed 'a resolution urging that measures should be taken to obtain for the Crown a title to all land not actually occupied or enjoyed by the Māori'.[2] The Committee was of the opinion that Māori claims to all waste or wild lands had no basis in law. According to the prevailing European view, 'waste land' was any wild, uncultivated land not domesticated by human endeavour. The idea had driven the agricultural and economic reforms which took place in Britain during the eighteenth and early nineteenth centuries. British historian Norman Davis writes that the enclosure of communally held land gave farmers "control of large fields suitable for the production of cash crops and surpluses, whilst local peasants and humble tenants lost their means of subsistence. … General Enclosure Acts in 1801, 1836 and 1845 facilitated this process."[3]

Appointed Colonial Secretary in 1846, Earl Grey (Lord Howick) had been the primary author of the 1844 select committee report and was responsible for implementing the committee's recommendations in the Royal Instructions of 1846 to Governor Sir George Grey. In Chapter 13 of the Instructions, dealing with 'Waste Lands of the Crown', the Governor was instructed

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[2] Williams, David, V., *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, 1999, p. 108.

[3] Davis, N. 2000, *The Isles: A History*. London, Papermac, p. 637.

to draw up charters, listing lands over which 'the Aboriginal Natives' claimed valid titles of property or occupancy. Any land that did not conform to these criteria was to be considered as vested in the Crown.[4] Williams notes that the political economy of colonisation and tikanga Māori clashed most crucially in the clause which stated:

> … [N]o claim on behalf of the 'Aboriginal inhabitants' should be admitted unless the claimants had 'actually had the occupation of the Lands so claimed, and have been accustomed to use and enjoy the same, either as places of abode, or for tillage, or for the growth of crops, or for the depasturing of cattle, or otherwise for the convenience and sustenance of life, by means of labour expended thereon.[5]

In support of his arguments, Earl Grey acknowledged a debt to Dr Arnold of Rugby School, who in 1831 stated that "… rights to land derived exclusively from human labour being expended upon it and that 'uncivilized peoples' had no rights in land unless it had been 'tamed to their use'."[6] Arnold claimed divine support for his theory. The Colonial Secretary concluded:

> From the moment that British dominion was proclaimed in New Zealand, all lands not actually occupied in the sense in which alone occupation can give a right of possession ought to have been considered as the property of the Crown in its capacity as Trustee for the whole community….[7]

The only impediment to Arnold's colonisation theory was the fact that in New Zealand settlers remained a small minority "scattered…all over the Country in positions where the Government cannot protect them."[8] It was therefore not feasible for the Governor to implement a policy of freely appropriating uncultivated land in the face of powerful Māori opposition. Governor Grey was reported to be in 'such a fever of agitation' about the new policies that he could not sleep at night, so convinced was he that they would 'cause bloodshed and tumult from one end of the country to the other'. Chief Justice Sir William Martin and Bishop Selwyn echoed his fears, and 'Te Wherowhero and other Waikato chiefs signed a letter to the Queen seeking reassurance

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[4] Williams, David, V., *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, 1999, p. 109.

[5] Ibid.

[6] Ibid.

[7] Ibid, p. 110: citing: Earl Grey to Grey, 23 December 1846, GBPP/CNZ, Shannon, Irish University Press, 1969, vo. 5, pp. 523-5.

[8] Ward, Alan, 1973, *A Show of Justice*. p. 82.

that the terms of the Treaty of Waitangi would not be violated'.[9] Martin wrote a pamphlet vigorously attacking Earl Grey's Waste Lands policy, in which he stated that:

> Britain had not acquired any land in the country if the land had an owner according to native custom, whether the land was occupied or not. And it was clear, from Government reports, that 'there was not an acre of New Zealand which did not have an owner according to native custom'.[10]

Sir George Grey's position was dictated by expediency, rather than principle. He recognised the impracticality of the Crown assuming ownership of all the uncultivated land in the country, but he was far from convinced that Māori could legitimately claim ownership of it either.[11] The 'problem' that he and the Colonial Office faced was that, by the Treaty of Waitangi, Britain had recognised Māori rights to all the land in New Zealand, waste or occupied. David Williams quotes Paul Adams, who wrote:

> The solution, as it dawned on Earl Grey and Governor Grey, lay in the concession which the Crown had procured from the Maoris [*sic*] of a monopoly right to buy that land. If the pre-emption monopoly was used extensively and rigorously, it would effectively neutralise the wide recognition of Maori land rights. Thus, as Earl Grey recommended to his namesake, the purchase of land by the Crown should be carried forward 'as rapidly as possible', partly because the longer the delay the more costly it would be, but chiefly because it was of the 'utmost importance' with a view to the regular colonisation of New Zealand, that the control of all the waste lands should be as completely as possible in the hands of the Government'.[12]

Thus, all land not used by Māori for their subsistence was to be purchased as quickly and as cheaply as possible. When a purchase was completed, the land in question was proclaimed as 'Waste Lands of the Crown'. Once surveys were carried out and Crown titles issued, the land could be proclaimed for settlement.

The significance of Dr Arnold's theorising on land tenure in terms of the Crown's public works policies is that although his theories proved impractical to implement in the 1840s, they

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[9] Kawharu, (ed.), *Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi*, OUP, 1989, p. 104.

[10] Ibid, p. 108.

[11] McLintock, A. H., *Crown Colony Government in New Zealand*, Wellington, Government Printer, 1958, p. 66. Writing to Earl Grey in 1848, Governor Grey stated that 'there were, even in the North Island, large tracts of land to which no tribe had legal claim'. GBPP, 1849 [Comd 1120], p. 24. Grey/Earl Grey, 15 May 1848.

[12] Williams, David, V., *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, 1999, p. 111; citing: Adams, P, 1977, *Fatal Necessity*, p. 209.

continued to inform colonial attitudes to so-called 'idle Māori land' well into the twentieth century. It can be seen in the attachment of Public Works officials to the five percent provisions prior to 1927, and their resolute defence of the right to take Māori land for public works free of compensation. By the turn of the twentieth century, the question of idle Māori land was uppermost in the minds of Crown officials, with provisions included in the Native Lands Act 1909 designed to bring such land into production. This 'use it, or lose it' attitude goes some way to explain the propensity of taking authorities to take more land from Māori than was required for various public works.[13] The most obvious examples of the latter discussed in the report are the takings for Kaikohe Aerodrome, Ranfurly Bay Scenic Reserve and the Punakitere Shale Pit.

Were alternatives to compulsory takings of Māori land seriously considered and, if so, with what outcomes?

RESPONSE:

This issue is virtually the same as issue (b), below. I suggest there are two issues here: did the Crown insist on acquiring full ownership rights to land taken for public works purposes, or did it consider alternatives such as leasing arrangements; and did the Crown sometimes use other methods apart from compulsory acquisition to acquire land for public works purposes?

In general, the evidence indicates that the Crown insisted on acquiring full title to land taken from Te Raki Māori for public works purposes. The report contains one example of the Crown opting for an alternative to compulsory acquisition when access to a quarry site on the Motatau 2 block near Waiomio was obtained through a variation of an existing lease and the granting of a quarrying license.[14] The Bay of Islands County Council initially sought the assistance of the Public Works Department in order to obtain the land (part of sections 27 & 28, Motatau 2) under the provisions of the Public Works Act. However, the area proved to be the site of a large burial ground that had been used by local Māori for many generations. The land in question was under the control of the Tokerau Māori Land Board, which initially objected to the quarry, but was persuaded to reconsider when the district engineer undertook to transfer any remains

[13] Marr, 'Public Works Takings of Maori Land: 1840-1981', p. 30; citing: Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin, 1990, p. 38.

[14] The Northland Public Works Report, pp. 401-404.

disinterred by the quarrying process to the nearest urupā. Once the considerable size of the burial area became apparent, the local MP for Northern Māori Tau Henare became involved and a meeting of interested owners was held. Mr Henare persuaded the owners to agree to the quarry provided they were paid a royalty for the rock taken and that they could undertake any reburials themselves. However, a subsequent telegram tersely stated "Natives require tapu to be left undisturbed for all times."

In the face of continuing Māori objections, the Minister refused to grant consent for the land to be taken for public works purposes and the parties were directed to seek an amicable arrangement for access to the portion of the land that did not contain any kōiwi. In due course, the Tokerau Māori Land Board granted the Bay of Islands County Council a license to take a limited quantity of limestone from the site.

In August 1928, the District Engineer published newspaper advertisements in Kawakawa, Whangarei, Dargaville and Auckland, inviting tenders for "stripping, quarrying, spawling, carting to crusher, crushing and stacking 4000 cubic yards of 2" broken limestone on Section 28, Matatau[*sic*] No. 2 Block, Waiomio."[15] The specifications schedule stated that the Public Works Department was to pay a royalty of 3d per cubic yard to the Tai Tokerau District Maori Land Board.[16] The schedule contained no reference to the possibility that quarrying operations might disturb human remains and no contingencies for dealing with such an eventuality.

In terms of whether the Crown used alternative methods to compulsory acquisition of land required for public works, it appears that in some cases the Crown chose to negotiate the purchase of the land from the Māori owners. There appears to have been a number of factors influencing whether purchase or compulsory taking was resorted to. If land was required urgently, say for railways or defence purposes, compulsory acquisition was generally used. If negotiations were already underway, as was the case when the Motukauri/Manginangina block was acquired for inclusion in Manginangina Scenic Reserve, or if there was no particular hurry to acquire the land, as was the case when the Matakaraka B3 blocks were added to the Ranfurly Bay Scenic Reserve in the 1950s, then purchase might be preferred over compulsory taking. Notwithstanding that in both the cases mentioned where the Crown obtained the land by

[15] Ibid, pp. 404-407; citing: "Tenders Closing" Advertisement, 18 August 1928. AATE A1003 107g, ANZA. Document Bank: pp 4857-4892.

[16] Ibid, p. 407; citing: Specifications Schedule, page 2, clause 3a. AATE A1003 107g, ANZA. Document Bank: pp 4857-4892.

purchase, considerable pressure was exerted on the owners to sell, and there was a sense that the Public Works Act was held in reserve and could have been brought to bear if necessary.

In the Matakaraka B case, the inclusion of these Māori-owned blocks in the Ranfurly Bay Scenic Reserve was instigated by the local County Council in 1949.[17] When a preliminary meeting in advance of a full meeting of assembled owners was called to discuss the proposal, it was unanimously rejected, the owners stating that they considered that all the land should be reserved for local Māori. Moreover, they stated that where land with riparian rights had not been sold, they had a right to the oyster beds. They considered they could use the land for fishing and as possible building sites. Undeterred the Crown proposed that the Court along with representatives of the owners as well as Mr Lane of the County Council should visit the land before making a final decision. After the owners visited the land with court, county and government officials, the latter held a long discussion with the elders of the owners, who it appears, were prevailed upon to withdraw their opposition to the sale.

The Matakaraka B3 blocks lie adjacent to a 'Māori oyster fishery' just offshore, which had been recognised by the passing of statutory regulations just three years prior to the local council initiating the acquisition of the land.[18] The elders managed to negotiate the creation of a small reserve in Waihi Bay for their continued use containing some 2½ acres, perhaps on account of this recent recognition of their ancestral fishing rights in the harbour. The minutes of the meetings of owners that considered whether to sell the land to the Crown reveal substantial divisions amongst them as to whether the sale should go ahead at all, with a number of comments that the price was too low and one owner in particular repeating that he did not want to sell at all and that it was 'bad to sell land'.[19] Despite this, after the Lands Department's representative agreed to double the purchase price to £1 per acre the proposal to sell the Matakaraka B block to the Crown was reported as carried unanimously. It is not known whether the payment for Matakaraka B3 was finally distributed to the owners, or if it was withheld for a community project. If it was distributed, few owners would have received more than £1, and some successors to original owners would have received as little as one shilling and sixpence.

[17] Ibid, p. 579.

[18] Ibid, p. 585. The reserve is designated Matakaraka B2A, as shown on NA Plan ML 13885; the land is described as very steep country covered in high manuka and regenerating bush.

[19] Ibid, p. 592.

At that rate, and given the degree of coercion involved, the difference between a sale and a compulsory taking seems negligible.

At a broader level matters still remain to be inquired into and in particular:

a) *Was there consultation with Te Raki Māori over the nature and effect of compulsory acquisition of land for public works at the time compulsory acquisition was introduced? Was this consultation adequate?*

RESPONSE:

1840 – 1862

Prior to 1862, a specific legislative mechanism for the taking of Maori land for public works did not exist. However, Māori did contribute land for public works purposes. Many Māori ara, or traditional pathways were adopted by for general use by 'the public', becoming bridle tracks, dray roads, and in some cases main roads, or in the case of the pathway between Kawakawa and Opua, a railway line. At the time, roads crossing Māori land were given legal status by Governor's Warrant.[20]

According to Cathy Marr, the Crown engaged in consultation with Māori about acquiring land for public works to some degree until about 1852. However, there is evidence to suggest that such consultation was woefully inadequate as the nature and effect of public works takings were in some cases clearly misunderstood by Maori. This can be seen in Maihi Parāone Kawiti's vociferous protests when he and his people were prohibited from using their ancestral pathway between Kawakawa and Opua following construction of a railway. He told Crown officials that he had allowed the road to be used by the public, but had not given permission for the railway and definitely not for the exclusive use of the Bay Coal Company. Marr argues that the Crown was in no hurry to clarify the question of the ownership of land under a public

[20] The Northland Public Works Report, pp. 175-180. For example, the road around Perunui Stream, cited in the section on Motukiore Road. The original road lines are described as "Public Roads – Governor's Warrant", rather than having the relevant *Gazette* reference annotated to the plan (Plan ML14321). Later road formations recorded on the same plan contain *Gazette* references.

work with Māori; part of what has been referred to as the Crown's "quiet approach" to the imposition of British law in the early years of the colony.[21]

1862 - 1867

Legislation authorising the compulsory taking of Māori land for public works purposes emerged in the 1860s.

The Native Lands Act 1862 and 1865 empowered the Governor to take five percent of land purchased from Māori for roading purposes, without consultation or compensation, and without any limitation on when the taking could occur.

At the same time, the Public Works Lands Act 1864 opened up all land for compulsory takings by the Crown. This included customary land, land that has passed through the Native Land Court, and land that had been purchased by Pakeha settlers.[22]

I found no evidence of the Crown consulting with Te Raki Māori over the nature and effect of compulsory acquisition of land for public works at the time the initial legislative provisions were introduced. With no Parliamentary representation, Māori played no part in the development or introduction of these new laws, which contrasts with the prominent role English land owners had played in developing the principles and protections associated with public works land takings in England.

1867 - 1928

Despite the introduction of four Māori parliamentary seats in 1867, the relative powerlessness of the Māori members saw a continuation of the status quo,[23] particularly at a time when local

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[21] Cathy Marr, 'Public Works Takings of Maori Land: 1840-1981', Waitangi Tribunal Rangihaua Whanui series (working paper: first release), May 1997, pp. 33-34; citing: Maori Land Court Judge N Smith, quoted in D V Williams, 'The Use of Law in the Process of Colonisation: An Historical and Comparative Study with particular reference to Tanzania (mainland) and New Zealand', PhD thesis, University of Dar es Salaam, 1983, p. 173. The Crown settled the matter of ownership of roads in public use irrespective of the status of the surrounding lands with the passing of the Public Works Act 1876, ss79 and 80 of which declared all existing roads used by the public to be vested in the Crown.

[22] The Public Works Lands Act 1864, 28 V. No 5, section 2.

[23] Alan Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Auckland, Oxford University Press, 1973, pp. 208-209, 270.

authorities played an increasing role in developing public works. The Public Works Act 1876 gave local authorities specific legislative authority to take all types of Maori land for public works purposes under general taking provisions.[24] This coincided with both the abolition of the provincial system of Government and the height of the public works boom.

While the Government did provide for Māori involvement in local administration within the Native Department system, Maori had almost nothing to do with the machinery of local settler administration, including such bodies as highways and harbour boards, provincial councils, and after 1876, county and borough councils.[25] Maori were therefore unable to deal adequately with these new forms of political machinery, at a time when the Government was extending its taking powers. With no Maori representation, local authorities remained unresponsive or even antagonistic to Maori concerns.[26]

1928 - 1993

The Public Works Act 1928 was the major piece of public works legislation of the twentieth century. This Act was repealed by the Public Works Act 1981 which continues to apply today albeit with amendments. By this time, Māori communities undoubtedly had a clearer understanding of the nature and effect of public works legislation. In terms of consultation, Māori were able to make submissions on proposed legislation along with non-Māori. However, no specific consultation process existed to consider those interests which were particular to Māori. In the 1970s, the Māori Affairs Department and the New Zealand Māori Council made submissions on behalf of Māori concerning the redrafting of the Public Works Act, including the recommendation that no Māori land should be taken for a public work without the consent of the Minister of Māori Affairs.

Whether this process of general consultation was adequate can perhaps be judged by its outcomes. In the case of the New Zealand Maori Council, their submissions were rejected on

[24] Marr, Public Works, pp. 86-89.

[25] Alan Ward, A Show of Justice, p. 269.

[26] Cleaver, Public Works Whanganui, p. 32.

the grounds that legislation such as the Town and Country Planning Act 1977 already provided ample opportunity for the lodgement of objections to public works takings.[27]

Overall the adequacy of consultation with Maori is summed up by Cleaver who comments, "It is not surprising that Maori communities expressed resentment at both the continued lack of legislative concern for protecting remaining areas of Maori land from public works requirements, and the continuing provisions that provided generally less protections for Maori land than for general land."[28]

In the face of unrelenting Māori discontent, and following significant protests such as the land march of 1975, the Crown's attitude toward consulting with Māori began to shift. Such changes are reflected in new initiatives such as those of the Town Planning Act 1977, which required local authorities and other planning agencies to take specific account of Māori concerns in the planning process. Section 3(1) of the Town Planning act 1977 considered that the "relationship of the Maori people and their culture and traditions with their ancestral land" was one of national importance and should be provided for in district schemes. The planning regime was replaced by the Resource Management Act 1991, which also required account to be taken of Māori concerns and values as a matter of national importance.

Today, Land Information New Zealand is managing a review of the Public Works Act 1981. One of the key drivers for the review is noted as being to "ensure that exercise of the 1981 powers, functions and duties is within a statutory framework that accords with Treaty of Waitangi principles."[29] Consultation has been undertaken as part of the review but legislative changes have yet to be introduced.

b) To what extent did the Crown consider alternatives to compulsory takings of Te Raki Māori land?

RESPONSE: The report contains a single example of the Crown leasing Te Raki Māori land for public purposes with the leasing of the quarry site on the Motatau 2 block. The land was leased rather than taken because it contained an urupā; it appears to have been an isolated case,

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[27] Marr, 'Public Works Takings of Maori Land: 1840-1981', pp. 148-150.

[28] Cleaver, 'Public Works Whanganui', p. 61.

[29] Land Information New Zealand, Review of the Public Works Act: Issues and Options Public Discussion Paper" 2001, chapter 2.1.

as no equivalent examples were found. There are a number of examples of the Crown 'purchasing' land for public purposes, rather than bringing its powers of compulsory acquisition to bear (for example, the Matakaraka blocks which were added to the Ranfurly Bay Scenic Reserve in the 1950s, when their purchase was arranged by the Tokerau Māori Land Court). The Motukauri/Manginangina block was also purchased for inclusion in Manginangina Scenic Reserve, but there was the distinct sense that the Public Works Act was held in reserve to be brought to bear if necessary.

c) *What was the extent of land taken for public works in the Te Raki region, including for defence purposes, scenery preservation, roads/railways and mineral extraction? What was the value of land taken?*

RESPONSE: The project brief required the extent of Māori land taken for public works in the Te Raki region to be ascertained and an attempt was made to achieve that. Research assistant Nick Tūroa was assigned the task of searching the *Gazette* database, which comprises digital scans of all published volumes of the *New Zealand Gazette* that supposedly records details of all proclamations relating to government activities, including land takings for public works purposes.[30] The list of Te Raki Māori land blocks provided by the Crown Forestry Rental Trust was used as our starting point for a key word search of the database.

However, as has been the case where the Tribunal has sought to quantify public works takings affecting Māori land in other inquiry districts, the incompleteness of the official records presented multiple challenges. An immediate problem we found was that notices of compulsory land takings for public works published in the *Gazette* do not differentiate between Māori-owned land and land in general ownership. Thus, land blocks that were subject to public works takings and were identified in the *Gazette* under Native Land Court designations, which might have been assumed to be in Māori ownership, proved to have been sold prior to the taking of the land for public works. Therefore, when the *Gazette* database search results were cross-

[30] The search of the *Gazette* database is covered in chapter 5.2 of the Northland Public Works Report, on pages 93-100. Nick Tūroa produced an excel spreadsheet of his results. In an appendix to Cathy Marr's Public Works report, Nita Zodgekar relates her experience of searching hard copies of the *New Zealand Gazette* for public works takings of Māori land. While she notes that there were periods where the *Gazette* notice was required to specify that the taking related to Māori land, this occurred only between 1883 and 1912, and then related only to Māori customary land. Land taken under the Native/Māori Lands Acts after 1912 was identifiable as 'Māori-owned' by virtue of the choice of taking legislation. However, Zodgekar also notes difficulties with the appellation systems applied by the Department of Lands and Survey to differentiate between Crown land, general land and Māori land. Nita Zodgekar, "Public Works Takings of Māori Land in the New Zealand Gazette", Appendix II in Marr, 'Public Works Takings of Maori Land: 1840-1981', pp. 237-240.

checked with the land block histories compiled by Paula Berghan for the Te Raki Research Project we found many discrepancies. On the other hand, the Berghan block histories recorded public works takings of Te Raki Māori land that the *Gazette* search had failed to identify.

In retrospect it is clear that a search of the *Gazette* database alone was not going to provide a comprehensive list of public works takings of Te Raki Māori land. As noted, the legalisation of early public roads was achieved by the issuing of a Governor's Warrant, and these were not gazetted. Moreover the purpose of the *Gazette* notices/proclamations was not to provide a record of land taken from Māori, but to complete the legal formalities required for takings to occur. All the gazettal process required was the legal description of the land to be taken; the identity of the owners from whom the land was taken was not at issue, so these details were not included.

The key point is that at no time has the Crown consistently and systematically maintained a register dedicated to lands taken for public works whether Māori or otherwise, either in the North, or elsewhere in the country.[31] Together with the fact that many public works records relating to railways were damaged or destroyed by fire, the fragmentary nature of the archival record means that it was not possible to ascertain the extent of public works takings in the five Northland inquiry districts, certainly within the limited time available and I would argue, even if considerably more time had been allocated.

On pages 99 and 100 of the Northland Public Works Report are two tables, one showing results relating to defence takings of Te Raki Māori land, and the other showing results relating to quarry and gravel pit takings of Te Raki Māori land. The data contained in the two lists represent only those examples which were substantiated by both the *Gazette* database search *and* those cross-checked with the Berghan block history narratives. The case study of the Punakitere 2B3 shale pit taking is not included in the list on page 100 because it did not show up in the *Gazette* search, highlighting the potential for slippage in the research process (the taking *was* gazetted, as indicated by *Gazette* references on the plans and in the Works Department files). Clearly, a more comprehensive cross-checking of multiple archival sources

[31] Records of Māori land taken for public works are found in many different government publications and archives, including the *New Zealand Gazette*, the *Appendices to the Journals of the House of Representatives*, Native Land Court records, and in the records of various government departments, including Works (formerly Public Works), Lands (aka LINZ and DOSLI), Roads, Railways and Māori Affairs (formerly the Native Department). Information on public works takings might also be found in the records of the Department of Conservation (originally Scenery Preservation and later the Department of Lands and Survey), the Marine Department, Defence, Civil Aviation, Education, etc.

was required in order to obtain something approaching an accurate representation of the extent of public works takings of Te Raki Māori Land, but this was not possible within the allocated timeframe, or with the resources available.

d) To what extent, if at all, did the implementation of public works policy and legislation disadvantage Māori land owners in the Inquiry District? In particular:

i. Were notice requirements tailored to the realities of multiple ownership of Māori land?

RESPONSE: The short answer is that notice requirements were *not* tailored to meet the realities of multiple ownership. The public works legislation introduced into New Zealand was based on a model developed in the United Kingdom/England, which was predicated around individual landholdings; for European/general land in New Zealand, giving notice of public works takings to landowners is relatively straightforward; the landowner is identified, notice is given by letter, or in some cases personally, and consultation/negotiation ensues. Māori land blocks with multiple owners posed a challenge in terms of identifying, notifying and consulting many owners, whose numbers increased with each generation, and who were invariably scattered around the country.

Part XVIII of the Native Land Act 1909 addressed the issue of multiple ownership in general terms by providing for meetings of 'assembled native owners', who were empowered to pass resolutions on a number of matters, including vesting land in the local Māori Land Board for leasing or sale, incorporating ownership, or for lease, sale or exchange to the Crown or privately. Thus, 'assembled owners' was reasonably successful mechanism for addressing the issue of multiple ownership when managing Māori land. The Crown might also have employed it for notification, consultation, or obtaining the consent of Māori owners with respect to public works takings. However, this did not occur until 1974, when provisions enabling the Māori Land Court to call a meeting of assembled owners to consider public works taking proposals were included in the Māori Affairs Amendment Act 1974 (Part IX ss69-72).

Prior to 1974, the Tokerau District Māori Land Board (until 1952 when the boards were abolished) and the Tokerau Māori Land Court stood in for Māori landowners, as evidenced by the Punakitere 2B3 Shale Pit taking, and the granting of a license to mine the Waiomio limestone from the Motatau 2 block. In these examples, efforts by the Board to contact Māori

owners or their representatives were either ineffective (in the Punakitere case) or, in the case of Motatau 2, the Board simply ignored the expressed wishes of the Māori owners to leave the wāhi tapu undisturbed forever.

ii. What was the impact of the five percent rule without compensation from 1865 to 1927?

RESPONSE: The report deals with the five percent rule in some detail with respect to the railway takings affecting the Kohewhata and Otuhi blocks at Ngāpuhi, and also railway takings affecting the Motatau 4I block. Those cases show that Public Works Department officials were prepared to go to extraordinary lengths to defend the Department's right to take five percent of Māori land free of charge for road and railway purposes. In the Te Rāwhiti Road case study, the five percent rule was invoked to exempt the Crown from having to compensate Māori land owners (or, indeed, Europeans who had purchased partitions of the block in the intervening period between title investigation and the gazetting of the road taking).[32]

iii. To what extent, if at all, did the Crown resort to the compulsory acquisition of land owned by Te Raki Māori in preference to other land in the region?

RESPONSE: Again, this question focuses on the *extent* to which land owned by Te Raki Māori was taken compulsorily in preference to other land, which presupposes readily available comprehensive data on both Māori and non-Māori takings. To answer the question as it is framed would require a more comprehensive study than this report was resourced to provide.

However, the report's findings do indicate that public works legislation relating to Māori land was framed in such a way as to enable taking authorities to take Māori land with fewer impediments in terms of notification and consultation than the equivalent legislation dealing with general land. Similarly, in all the cases studied, compensation awarded for Māori land was much lower than that awarded for neighbouring European-owned land. When the five percent rule was able to be invoked, Māori often received no compensation at all. These factors meant that taking authorities were incentivised to take Māori land in preference to general land.

[32] The Northland Public Works Report, pp. 121-131.

e) When taking Te Raki Māori land for public purposes, to what extent did the Crown consider the impact of such takings on the owners affected? Was any consideration given to whether Te Raki Māori would retain sufficient lands for their current and future needs?

RESPONSE: Sections 220 & 425 of the Native Land Act 1909 and its amendment, section 91 of the Native Land Amendment Act 1913 required taking authorities to make inquiries as to whether landowners would be rendered landless by a public works taking. This does not seem to be a requirement that was rigorously adhered to. For example, Land Purchase Officer R.J. Knight raised the question of sufficiency with respect to the proposed taking of the Taupo 24 block for scenery preservation purposes in 1914, annotating a memo with a minute to another official that he "presumed enquiries would be made to ensure that no Natives would be rendered landless within the meaning of the Act."[33] However, the land was not taken for another five years, and it appears that the question of sufficiency of other lands was not considered when the taking actually took place.

The question of sufficiency of land is a difficult one to answer in a general way, given the lack of data about land holdings, let alone questions of land quality and economic utility. Theoretically, the Native Land Court/Māori Land Board held relevant data on land ownership and was in the best position to answer the question, apart from the owners themselves. However, as some of the case studies indicate, block titles were not always up-to-date, either in terms of legalising partitions, or establishing succession to deceased owners. The patchy record suggests that sufficiency of remaining lands was not a high priority. Nonetheless, in some cases it has been possible to assess the impact of more recent public works takings on particular iwi groups. For example:

- Patuharakeke hapū of Takahiwai lost one third of their remaining land when the Takahiwai catchment was taken for the Marsden Point Oil Refinery Water Supply. Patuharakeke researchers have calculated that prior to the water supply taking they had already lost half of their ancestral lands to Old Land Claims, survey liens, and sales to private individuals. The catchment taking included several ancient pā sites of deep cultural significance. Because access to water catchments is restricted so as to ensure

[33] The Northland Public Works Report, pp. 561-562; citing: Land Purchase Officer R.J. Knight to Chief Clerk, 3 April 1914. Annotation to 'Under-Secretary to Commissioner of Crown Lands, 28 March 1914'. BAAZ 1109 802f, ANZA. See also: Commissioner of Crown Lands to Under-Secretary Lands, 8 April 1914. L-S 1/244, ANZW. Document Bank: p. 4913.

the purity of the water supply, Patuharakeke could no longer enter the forested area behind their marae to gather forest foods and medicines;

- The Crown's acquisition of Hauturu (Little Barrier Island) from the hapū of Rāhui Te Kiri and Tenetahi must have had a significant impact on their already diminished holdings;

- In the Kaikohe Aerodrome case, Judge Pritchard queried the necessity of taking three occupied dwellings at the northern end of the aerodrome, and prevailed upon the Works Department to partially revoke the takings. Even then, the area returned to former Māori owners was only a small proportion of the original section taken. The portions returned proved uneconomical and the Māori Land Court subsequently approved their alienation. Thus, the taken land was never used as part of the aerodrome, but leased or sold to European farmers.[34]

The question of sufficiency of land also needs to be seen in the context of whether or not the remaining land was suitable for development, whether it was accessible and the nature of the title. As Māori land titles became increasingly fragmented, even relatively small public works takings could have an impact, as they affected more and more people, whose holdings grew ever smaller and smaller.

f) Did legislative provisions and/or practices of taking agencies adequately provide for the protection of wahi tapu and sites of special value to Te Raki Māori?

RESPONSE: In Cathy Marr's assessment the Crown's public works legislation did not contain adequate provisions for the protection of wāhi tapu.[35] She states that only in recent years has

[34] Ralph Johnson, "Research Report Kaikohe Aerodrome", Waitangi Tribunal, (Wai 1040 # E4) 1996, p. 13. Johnson states: "It was not stated why only part of each block was returned and not the whole. In fact, only a small section of the overall land was required for continuing aerodrome operations, the majority remained leased to a European farmer. Because of the small size of the lands revoked, Maori land was further fragmented into what proved, in all but one case, uneconomic shares. After revocation, Tawapuku 3 was partitioned on 29 March 1957 into Residue 3A (2a 3r 0p) and Residue 3B (2a 1r 23p). 3B was further partitioned into 3B 1 (0a 1r 0p) and 3B2 (2a 0r 23p). Ultimately, each of these units proved uneconomic and passed out of direct Māori ownership. Tawapuku 3B2 was immediately vested in the Maori Trustee as an uneconomic interest. Tawapuku 4A and 3B 1 demonstrate more acutely the consequence of alienation as a result of fragmentation because both sections were sold to European farmers who were leaseholders of other blocks of land within the overall aerodrome area and able to operate the land on a viable basis. The only section to remain in Maori ownership after the revocation was 4B, renamed Otuhi Al (1 acre or 0.4046 hectares) on 29 September 1965."

[35] Marr, 'Public Works Takings of Maori Land: 1840-1981', pp. 55-56, 68, 84, and 89.

this trend begun to be addressed through taking authorities having greater regard for the importance of wāhi tapu and the need to preserve such sites whenever possible.[36]

The limestone on the Motatau 2 block at Waiomio, which the Works Department wanted to quarry, contained a large urupā, and once the Public Works Department became aware of this fact, the Minister followed the letter of the legislation and prohibited the taking of the land.[37] Instead, it was arranged through the Tokerau Māori Land Board that the department would lease the land *next* to the urupā, a solution brokered by local Member of Parliament Tau Henare (who was a landowner in the district, if not in the affected block). This occurred despite the owners telegraphing an instruction that the tapu be left in peace forever.

The Crown identified the historic significance of Ruapekapeka Pā in the early years of the twentieth century and set in motion plans to acquire it as a reserve.[38] The site was already being degraded by farmers, who filled in the defensive ditches to prevent their stock from falling in and getting injured. The departmental records indicate that for five years after the Crown acquired the site in 1914, very little was done in terms of general maintenance. The site was reportedly covered in fern and the trenches were full of rubbish when inspected in 1919.[39]

One of the reasons the area of land taken for Ranfurly Bay Scenic Reserve was increased from the originally agreed 10 acres (more or less) was the land purchase officer's observation that land just to the east of the area proposed to be taken contained 'some interesting caves'. In the event, the size of the taking was radically increased from 10 to 706 acres, apparently because a 'convenient' boundary could be drawn running north-south near the base of the peninsula. This brought numerous caves along the slopes of the 'sea face' of the block into the taking. In the course of my research I was informed by members of local Te Kaitangata hapū that these caves were wāhi tapu, having been used for burials for many generations. The purchase officer's comments suggest he was ignorant of their significance to local hapū and iwi and simply wanted to include them for their 'scenic value', describing them as "objects of

[36] Ibid, p. 165.

[37] The Act the Minister was relying on in making his decision is not stipulated in the correspondence. Presumably it was the version of the Public Works Act current at the time, which was the Public Works Act 1894 (58 Vict. 1894, No. 42). Section 93 stipulated that the consent of the Governor-in-Council was required before land containing a burial ground could be taken for a public work.

[38] The Northland Public Works Report, pp. 427-433.

[39] Ibid, pp. 437-438.

interest…[where]…the land is broken and otherwise of little value."[40] According to Te Kaitangata kaumātua, sometime in the 1930s these caves were desecrated by 'fossickers', who were apparently searching for taonga. This violation occurred more than a decade after the land was acquired by the Crown as a scenic reserve.

While such an incursion might have occurred whether the Crown was the legal owner of the land or not, the question asked is whether the Crown provided adequate protection to wāhi tapu and sites of special value to Te Raki Māori through legislation and the actions of taking agencies. The above examples suggest that although the legislation did provide some protections, these could be circumvented. Moreover, the Crown's (evident) conviction that it could better manage wilderness land than Māori whose ancestral ties span many generations is belied by its neglect of the Ruapekapeka Pā site, and the violation of the wāhi tapu on Whangaroa North Head.

g) *When compulsorily acquiring Māori land for public works, to what extent did the Crown balance the national interest against the obligation to protect Māori land? Is such a balancing exercise consistent with the principles and terms of Te Tiriti and/or the Treaty?*

RESPONSE: The overall findings of the report, based on an assessment of the provisions contained in the Public Works Acts together with the history of their implementation as illustrated by the case studies, are that the Crown's public works policy was designed to facilitate colonisation – that is, settlement by Europeans and economic development according to the European model for the benefit of Europeans. Any benefit accruing to Māori from the Crown's public works policy occurred indirectly, or after settler demands had been attended to. The legislation paid scant regard to the principles of Te Tiriti, as Marr points out: "In the area of public works land takings, Treaty guarantees of equality, respect for rangatiratanga, and protections for land, had been replaced by discriminatory legislative provisions that punished rather than protected Maori land, especially that held by customary traditional title."[41]

h) *Did tenure difficulties for Māori arising from the titles available under Native Land legislation facilitate the targeting and acquisition of Māori land for public works purposes?*

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[40] Ibid, p. 554; citing: Land Purchase Officer Maxwell to P. Sheridan, 11 April 1901. L-S 1/244, ANZW. Document Bank: pp. 4900-4901.

[41] Marr, 'Public Works Takings of Maori Land: 1840-1981', pp. 59-60.

Did Crown policies and practices discriminate against Māori in the Te Raki Inquiry region by taking their land in preference to non-Māori land?

RESPONSE: As already noted (question *d) iii*, above), public works legislation relating to Māori land was framed in such a way as to enable taking authorities to take Māori land with fewer impediments in terms of notification and consultation than the equivalent legislation dealing with general land. This was one of the Crown's solutions to problems posed in these areas by land in multiple-ownership. From early in the twentieth century, the merging of the Māori Land Court with the Māori Land Board allowed these bodies to effectively stand in for Māori owners in cases where land was required for public works purposes. Cut out of the taking process in this way, Māori protests or objections to public works takings were either muted or non-existent. The case studies indicate that where compensation was payable for public works takings affecting adjacent blocks of Māori and European-owned land, the Māori Land Court invariably awarded lower rates of compensation than European owners were able to negotiate with taking authorities. The case studies also indicate that the five percent rule's availability to taking authorities for longer periods with respect to Māori land than for general land incentivised taking authorities to take Māori land in preference to general land.

i) Did legislative provisions and/or the practices of taking agencies afford Te Raki Māori reasonable opportunity to make objections to the acquisition of Māori land and resources for public purposes? Were the same opportunities provided for Te Raki Māori to object to the taking of their lands for public works as were provided for non-Māori land owners?

RESPONSE: The only case study describing Te Raki Māori participating in a formal objection process is Te Rāwhiti Road. Other case studies indicate that Māori did object to various aspects of public works takings over many years, including:

- The route of a road not following block boundaries and cutting through cultivations;[42]
- The route of a railway cutting up blocks into uneconomical units;[43]
- The reservation of land that Māori wished to use for their own sustenance;[44]

[42] The Northland Public Works Report, pp. 107-108.

[43] Ibid, pp. 269-282.

[44] Ibid, pp. 475-500 & 517-542.

- The appropriation of traditional pathways for a railway (Kawakawa-Opua) without proper notification, consultation or compensation and then prohibiting Māori from using it;[45]

- The owners of Motatau 2 indicated they wished the urupā on the block to remain undisturbed 'forever', but this was ignored after MP for Northern Māori gave permission for mining to take place immediately adjacent to the urupa. The question remains as to what degree this amounted to a disturbance of the urupā;[46]

- The owners of Punakitere 2B3 appear not to have been notified or consulted and therefore had no opportunity to object to the taking of the shale pit on their land. Nor were they able to object when the Works Department unilaterally decided to take an additional 16 acres because it was cheaper than paying for the fencing of a right of way to the shale pit.[47]

j) To what extent could and did Te Raki Māori obtain the return of land taken for public purposes once it was no longer required? Did public works legislation make adequate provision for offering land back to the original owners or successors in title?

RESPONSE: For the same reasons given above, it was not possible from the available data to positively ascertain how much Māori land was offered back to Te Raki Māori once it was no longer required for the purpose for which it was taken.

There was no provision for the offer back of surplus lands taken under the Public Works Act 1882. Crown-granted Māori land could be offered back under the general provisions of the Public Works Act 1894, but not customary land. Section 35 of the Public Works Act 1928 allowed surplus Crown-granted Māori land taken for public works to be offered back, but the Governor (the Crown) had the option to make it available for a school or declare it otherwise required as Crown land. Once again, Māori customary land was not subject to offer back provisions. A 1948 amendment provided for such land to be set aside for reserves; similarly, a 1952 amendment enabled the Crown to change the purpose for which land was used from that for which it was originally acquired. A general reluctance by taking authorities to return land

[45] Ibid, pp. 206-223.

[46] Ibid, pp. 401-408.

[47] Ibid, pp. 380-390.

to Maori was exacerbated by the fact that procedures for actually re-vesting land in Maori ownership were difficult to implement (possibly on account of practical difficulties associated with multiple ownership and succession to interests of deceased former owners).[48] Under a 1954 amendment, the taking authority was required to provide the Governor-General with a map of the surplus land and the reasons it was being disposed of. The land could then be sold to an owner of adjoining land, or be disposed of by public auction or public tender. Although adjoining owners were to be notified, they were not given priority to repurchase such land. The lack of regard for original ownership in these developments became the subject of considerable controversy. The offer back principle was eventually revived in the Public Works Act 1981.[49]

The most glaring example of the Crown's failure to honour the spirit of the offer back provisions is the Kaikohe Aerodrome case. In August 1993, rather than follow the recommendations of a specially commissioned report and offer the surplus land back to the original Māori owners, the Crown opted to sell the airstrip portion of the Kaikohe Aerodrome lands to the Far North District Council.[50]

k) How was compensation assessed and awarded, and did legislative provisions lead to adequate, fair and timely compensation? Did such provisions place Māori at a disadvantage compared to non-Māori land owners?

RESPONSE: One of the main differences between the assessment of compensation for public works takings of Māori land as opposed to general land was that until 1962, Māori-owned land was assessed by the Native or Māori Land Court, which acted as a Compensation Court, while compensation for takings affecting general land was assessed by a Compensation Court, or through negotiations with officials of the taking authority. Another key point is that owners of general land could apply for compensation directly, while for many years owners of Māori land had to rely on the Minister of Public Works to make application for compensation on their behalf. The following is a brief summary of the evolution of legislative provisions relating to compensation, based on Cathy Marr's analysis.

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[48] Marr, 'Public Works Takings of Maori Land: 1840-1981', pp. 145-146.

[49] Ibid, p. 149.

[50] The Northland Public Works Report, pp. 364-367.

During the nineteenth century, public works legislation, as it was applied to Māori land, tended to mirror prevailing relations between the Crown and Māori. Thus, the public works provisions included in the Native Lands Acts of the 1860s operated alongside the draconian confiscation legislation of the same period.[51] The five percent provision enabled Māori land to be taken for roads without compensation at a time when road building was part of the Crown's pacification policy in the central North Island.[52] During the 1870s, Māori concerns were largely ignored, as for example in the Immigration and Public Works Act 1870 and its amendments, when the Crown's focus was on large scale infrastructure development. However, Māori passive resistance at Parihaka and the Crown's reaction to it led to a further deterioration in Crown-Māori relations, which was duly reflected in new general public works legislation enacted in 1882.[53]

Under the Public Works Act 1882, when customary Māori land was taken the Minister *might* make application to the Native Land Court to ascertain what compensation should be paid and to whom. The Court was to have all the powers of the Compensation Court when making such assessments, and compensation was to be paid to the owners as soon as possible after an order was made. Interest not exceeding seven percent was allowed from the date of the order (s 26). In contrast, for Crown-granted Maori land or where title was derived from the Crown, compensation was payable as for European owned land. Presumably this meant that compensation for such land was to be determined in the ordinary Compensation Court. The Public Works Acts Amendment Act 1887 made all takings of Māori land, whether customary or Crown-granted, subject to the Native Land Court for determination of compensation. It remained the responsibility of the Minister to apply to the Court to determine owners entitled and the compensation to be awarded (s 14).[54]

In terms of compensation, the 1894 Act provided that all types of Māori land were subject to different compensation provisions than for other land. Part IV of the 1894 Act provided that, for a central government work, the Minister 'may' at any time apply to the Native Land Court for compensation to be determined. In the case of local takings, the local authority was to make an application to the Court 'not later than six months' after the date of the first Order in Council

[51] Marr, 'Public Works Takings of Maori Land: 1840-1981', pp. 57-61.

[52] Ibid, pp. 63-68.

[53] Ibid, pp. 105-107.

[54] Ibid, pp. 108-110.

or proclamation taking the land. The Native Land Court was to determine the amount of the compensation award and the owners to which it was to be paid.[55] This meant that the responsibility for applying for compensation lay with the taking authority, rather than the owners, as was normally the case. Presumably, customary owners would also have to have their land taken before the Court (and therefore investigated and the customary status lost) if they wanted compensation to be awarded.

Cathy Marr reports that in the twentieth century the assessment of compensation became very complicated and quickly became subject to a large volume of case law. The Public Works Act 1928 provisions regarding the assessment of compensation required the Compensation Court and the Māori Land Court to take into account the value of the land or interests in the land taken, including riparian rights and any injurious affection either by severance or the nature of the works. The courts were also required to deduct from compensation any increase in value or 'betterment' as a result of the works (s 79), and the value of the land was to be assessed for compensation as at the time it was first entered (s 80).[56] Marr further states:

> The 1928 provisions for assessing compensation were repealed and replaced in 1936 in section 28 of the Finance Act 1936 (no 2) and again in 1944 by way of section 20 of the Finance Act 1944 (no 3). The rules laid down in 1944 lasted in essence for many years. These required the Compensation Court (later the Land Valuation Court) and the Maori Land Court to take into account the following considerations when assessing compensation:
>
> a) no allowance was to be made on account of the taking of any land being compulsory (prior to this the court could add up to 10 percent because the taking was compulsory);
>
> b) in general, the value of land was to be taken as the amount that a willing seller might be expected to realise if the land was sold on the open market on the specified date;
>
> c) the special suitability or adaptability of the land for any purpose was not to be taken into account if that purpose was one that only applied in the pursuit of statutory powers, or for which there was no market apart from the special needs of a particular purchaser or the requirements of the Crown or any local or public authority;
>
> d) where the value of the land taken had on or before the specified date, been increased or reduced by the work or the prospect of the work, the

[55] Ibid, pp. 113-114.

[56] Ibid, p. 143.

amount of the increase or reduction was not to be taken into account; and

e) where the work or prospect of the work increased the value of the land or any other land in which the claimant had an interest or the land injuriously affected, this increase was to be deducted from the amount of compensation awarded. In other words, a deduction had to be made for any betterment caused to remaining land by the public work.

The definition of 'specified date' was exhaustively defined and, in general, it was either the date on which the land by proclamation became vested in the taking authority or the date on which the land was first entered for construction purposes or injuriously affected, whichever was the earliest. The taking authority had to have publicly notified details of the work before the assessment rules regarding compensation applied.[57]

After 1962, the Māori Land Court was no longer responsible for assessing compensation for Māori land taken for public works; thereafter compensation was assessed by a Compensation Court as it was for general land. However, between 1962 and 1974, in cases where there were four or more owners, compensation was negotiated with the Māori Trustee rather than the owners themselves, which again divorced the owners from the process. Payment of compensation monies either to the Māori Land Board, the Public Trustee or the Māori Trustee, also gave Māori one more bureaucratic hurdle to jump and could result in them not getting compensated at all. Moreover, the Māori Trustee took a five percent commission for handling the compensation monies.

The Kohewhata-Otuhi compensation case is significant because of the outrage exhibited by Pākehā landowners when they found themselves affected by legislation that usually only applied to Māori. It also indicates that, fifty years after the five percent rule was first imposed, the Crown's own legal expert, the Solicitor-General, viewed the provision as so difficult and obscure as to be virtually unworkable. It was only due to Edwin Bold's persistence that a decision in favour of the Public Works Department was finally reached. In the end, the crucial point was that a decision in favour of the claimants had the potential to throw into question the compensation awards affecting every Māori block in Northland, which could be very expensive for the Crown.[58]

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[57] Ibid, p. 144.

[58] The Northland Public Works Report, pp. 255-268. After 1927, when the five percent provisions were repealed, the Māori Land Court had the power to make road orders, which could be compensated or not, depending on the discretion of the Court. More often than not, the betterment principle was invoked and Māori received no compensation for their losses.

The report highlights the fact that compensation rates paid to Maori were significantly less than those paid to Pākehā in almost every case. This may be a reflection of the lack of direct involvement by Māori in the taking process. The responsibility for applying for compensation for takings affecting Māori land rested with the taking authority itself, usually the Minister of Public Works. Compensation for takings of Māori land was assessed by the Māori Land Court, which became a Compensation Court for the purpose. The evidence suggests that Māori did not always attend compensation hearings, nor were they always represented by counsel, let alone able to access appropriate expertise (such as valuers) to bolster their case.

The Works Department obtained its own valuation, usually from a member of its own staff, which was sometimes offset by an estimate by a staff member of the Native, or Māori Affairs Department, usually a Field Inspector. While these officials may have had some experience with land values in a given district, they were not qualified land valuers. In the case of Works officials, it cannot be said that they were without vested interests in the outcome of the case. Once again, the process could be followed through to its conclusion without any direct Māori involvement at all, and thus, without any true consideration of their interests or concerns.

At other times, the current Government Valuation was used to assess compensation. In the case of the first compensation hearing for the Kaikohe Aerodrome takings, the Māori Land Court simply rubber-stamped the compensation amount, set at the Government Valuation. In that case, lawyers representing the Māori owners challenged the award and tried to get it increased at a new hearing. New Judge, Ivor Pritchard, did indeed increase the award, but it still came in at £10 per acre less than the amount the neighbouring Pākehā received for the loss of similar land. This differential did not necessarily reflect any lesser quality to the Māori land. The Land Purchase Officer admitted in an internal memo that the land taken from Māori was 'cleaner' than that taken from their Pākehā neighbour.[59]

Officials stated that the reason for the high compensation for the defence site on Matakaraka B in Whangaroa Harbour was because it possessed areas suitable for bach sites. Criteria for assessing value were quite narrowly focussed on economic considerations, generally of a Euro-centric character. Land was accorded higher value if it was suitable for farming, or if it contained timber with a predictable market value. If remoteness, or the steepness of the terrain mitigated against the possibility of extracting timber, then the value of the land was

[59] Ibid, pp. 346-359.

correspondingly lessened. Prior to World War II, remote stands of timber were disregarded as having any monetary value at all and lessees of Maori blocks were encouraged by the terms of their leases to burn off bush in order to bring the land into production. The Matakaraka blocks on the western side of Whangaroa Harbour were highly valued by local Maori because of the offshore oyster beds and other fisheries. Under its own criteria the Crown arrived at a minimum value of £300 on the basis of six potential bach sites, without including the remaining land. However, citing the remoteness of the blocks and lack of good timber, the Crown offered Maori a mere £155 for the three parts of Matakaraka B. When Māori protested that the price was too low, the Crown raised its price to £325, or £1 an acre, a figure that the Minister had approved prior to negotiations commencing.[60]

l) Was it appropriate for the Crown to delegate to local authorities or other taking agencies, the power to compulsorily acquire Māori land? Did the Crown sufficiently monitor and address any problems that arose from this delegation? Were Te Raki Māori prejudiced by the delegation and its consequences?

RESPONSE: Local bodies had a direct line to Government to get Māori land taken for public works. This was not always successful, as witness the Kaikohe Town Board's requests to get land taken for Kaikohe Aerodrome in the 1930s, which were dismissed by Government as an inappropriate use of compulsory taking powers. That said, after the war Kaikohe aerodrome was immediately converted to civilian use, with correspondence indicating that this change was anticipated well before the war ended.

Also, the Whangaroa County Chairman's attempts to get the Manginangina block taken compulsorily were unsuccessful, although the Government clearly wanted to obtain the land for scenic purposes and subsequently found a way to do so.

The taking of land at Ranfurly Bay for scenic purposes was heavily influenced by the Whangaroa County Council, whose members were keenly interested in the camping grounds along the foreshore of the Taupo 24 block. These councillors ultimately gained control over the camping grounds as a result of the taking. Again, in the late 1940s, it was noticed that the Matakaraka B blocks had suffered damage from wild fires, so the County Council approached the Government with a view to getting them added to the scenic reserve.

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[60] Ibid, pp. 595-598.

The Bay of Islands County Council engineer, Tony Plom, determined the route of the extension of the Te Rāwhiti Road, dismissing Māori concerns that the design contained technical flaws and ignoring their objections to the road's violation of the tapu of the Marae Ātea.

In the late nineteenth and early twentieth centuries local authorities campaigned vigorously to have the North Auckland Main Trunk railway extended to their districts, with varying degrees of success. Local authorities also worked hand in hand with central government on roading projects, in terms of identifying routes, planning construction schedules and legalising land takings. The evidence indicates that Māori communities were afforded a low priority by government, local or central, when access to railways or funding for 'backblocks roading was considered'.

m) To what extent, if at all, did planning regimes concerning reserves assist in, or inhibit, the retention and use of Te Raki Māori lands (including lakes, waterways and foreshores)? Were Te Raki Māori able to participate adequately, and have their concerns about reserves met, in these regimes? What has been the impact of these regimes on Te Raki Māori and on their ways of life?

RESPONSE: The issues relating to planning regimes were not addressed directly in the Northland Public Works report. With regard to the management of reserves, section 10.2.4 describes the management regime set up for Ruapekapeka Pā, which was carried out for many years by a Scenery Board made up of prominent local settlers.[61]

For five years following the Ruapekapeka Pā site's acquisition by the Crown in 1914 nothing was done in terms of management, despite some of the former Māori owners writing to the Government in 1917 asking that Ruapekapeka Pā be fenced off because of the damage being done by grazing cattle.[62] It was not until after the First World War that the Department of Lands resolved to appoint a local settler, (a Pākehā) "take control of the Pa on behalf of the Dept."[63] The local Kawakawa Domain Board was then delegated to manage the site, but only after it had appointed a Scenery Board from amongst its members. The Scenery Board obtained one hundred pounds from the government for a comprehensive cleaning operation at the pā in 1920,

[61] The Northland Public Works Report, pp. 437-442.

[62] The Northland Public Works Report, p. 437-438; citing: Pers. Comm. Marie Tautari, email, 18 February 2007.

[63] Ibid; citing: Under-Secretary, Lands, to District Commissioner Crown Lands, 28 April 1919. BAAZ 1109/805b 13/82 1, ANZA. Document Bank: p. 2852.

but within two years the site had reverted to heavy fern, which posed a fire risk. Because of this, the Board managed to obtain a further two hundred pounds to clear the fern and erect a fence to keep out cattle. However, the absence of the latter meant the fern grew more vigorously than before and the site was soon engulfed again.

Funding was a perennial issue for the maintenance of the Ruapekapeka Pā site. The Kawakawa Board also exhibited an enthusiasm for reconstructing the palisades, although this never eventuated because it was deemed too costly and would be always vulnerable to fire. The Kawakawa Board did not involve local Māori in the management of the site, nor in its plans for re-development. In 1926, the site was swept by fire, providing an opportunity to sow 'English grasses', which would sustain a flock of sheep, too keep the fern down without doing too much damage to the remaining features of the pā.[64]

Kirihi Te Riri Maihi Kawiti, grandson of the Pā's architect, was appointed to the Board in 1931 as the only Māori member. Despite his presence, myths promulgated in the aftermath of the battle were perpetuated under the Board's regime, such as the notion that the Pā was under the control of Hone Heke and that the battle constituted the last stand of Northern Māori and resulted in their ultimate defeat. Kawiti, not Hone Heke, was the architect and defender of Ruapekapeka Pa, and the reasons for this being the final battle of the Northern War are rather more complex than the oft-repeated, but erroneous version would suggest.[65]

In 1914, the Māori owners of the site had made its continued maintenance a condition of its acquisition by the Crown. However, funding shortages meant that fencing was not completed for many years and despite its being cleared of scrub whenever money was found for the work, re-growth and the associated fire risk was a perennial problem. Every so often, the Scenic Board became enthusiastic about rebuilding the Pā as a replica of Kawiti's original fortress. This occurred in the lead-up to the 1940 National Centenary and was raised again in the late 1960s. A lack of funds in the first instance and better judgment in the second saw such plans shelved. After the disbanding of the Scenic Boards, Ruapekapeka came under the administration of the Historic Places Trust for a time. Today it is administered by the Department of Conservation in partnership with the Ruapekapeka Pā Management Trust, a special body set up in 2000 and comprising representatives of the descendants of many of the

[64] Ibid, p. 441.

[65] Once again, Ralph Johnson's report on the Northern War for the Northland Research Project analyses these issues in detail.

original combatants. Six Northland iwi/hapū, namely Ngāti Manu, Ngāti Kahukuri, Ngāti Hau, Ngāti Hine, Te Kapotai and Ngāpuhi Nui Tonu, are represented on the Trust, which holds regular meetings and takes an active part in the management and maintenance of the site.

n) Where reclamation works took place within harbours, what effect did the reclamation have on the people and on the environment there?

RESPONSE: This issue is dealt with in David Alexander's report, "Land-based Resources, Waterways and Environmental Impacts", CFRT November 2006. I did not examine these issues in my report.

o) What was the extent of gifted lands in the Te Raki Inquiry region?

RESPONSE: Again, the report did not attempt to quantify this.

p) Who gifted the lands? What was the intent behind the gifts?

RESPONSE: This topic may have been addressed by Mary Gillingham and Suzanne Woodley's report on Te Raki Gifted Lands. My impression when carrying out a separate research project indexing the Education Department files on Te Raki Native Schools held at Archives New Zealand (Auckland) was that it was generally leaders of local hapū (kaumātua) and heads of families who gifted land for schools. I do not know, but might assume, that this was also the case when land was gifted for churches. Again, Gillingham and Woodley may be the best source for this information.

q) How did the Crown treat land that had been gifted for schools, churches and other public facilities?

RESPONSE: It appears that the Crown had no legal mechanism for accepting a gift of property. In some cases (possibly most cases), the gift was legally acquired by the Crown through the application of the Crown's compulsory land taking powers as set out in whichever Public Works Act was current at the time. The use of compulsory taking powers to legalise gifted lands had the potential to cloud perceptions as to what had occurred and what obligations (if any) the two parties to the gift still had towards one another. Marr comments:

> Maori clearly had different expectations arising from gifting. While Europeans expected compensation [for public works takings] they also accepted that they no longer had an interest in the land, whereas for Maori gifting seemed to imply a continued interest in the land should the need for the public work cease. The expectation of eventual return may also have been a reason why Maori chose to gift land so often and forgo short-term compensation. However these differences in expectation were rarely acknowledged by Europeans. Sometimes the gifts themselves were acknowledged but at other times Maori appear to have been left thinking they had gifted land while local authorities acted as though the right to take land had been exercised. Maori also appeared to use gifting to emphasise the importance they attached to the process of consultation, often gifting land if genuine efforts at consultation were made. These initiatives were also often ignored by settlers once the objective of obtaining land as cheaply as possible had been achieved.[66]

r) What was the impact on Te Raki Māori of land loss due to public works and other takings?

RESPONSE: It is important to bear in mind that public works takings affected the tiny remnant of ancestral land still in Māori ownership. Thus, the impact of each taking is magnified as a result of larger prior land losses that occurred as a result of Crown mechanisms such as Old Land Claims, the Crown's appropriation of surplus lands, Crown purchases, the Native Land Court process and private sales during the nineteenth and early-twentieth centuries.

The point has been made that public works were fundamental to the colonial enterprise; that is, to the conversion of 'wild Aotearoa' into domesticated and economically productive New Zealand. Thus, during the period of colonial expansion (say, between 1870 and 1914), public works were almost exclusively aimed at serving the needs of Pākehā settlement. The main roles for Māori at this time were: a) to provide land for whatever public work was required, and b) where necessary, to provide labour for the construction of the public work. For the most part, public works such as roads, railways and telegraphs were not *for* Māori, other than incidentally. On the other hand, in the eyes of legislators and Crown officials, the fact that Māori could obtain a benefit from these works justified not paying compensation for the loss of their land, unless kainga, buildings, gardens or burial grounds were particularly affected.

During this period the Public Works Department's powers to compulsorily take land were exercised with casual certitude by officials and defended grimly when challenged, as the Kohewhata-Otuhi and Motatau 4 cases illustrate. Some older Māori remember the awe in

[66] Marr, 'Public Works Takings of Maori Land: 1840-1981', p. 97.

which those compulsory land taking powers were held by their whanau; as one kaumātua said at an early hui for this research project: "The Public Works Act? We thought it was the Treaty of Waitangi!"[67]

The application of the betterment principle denied Māori compensation for land taken for roading throughout much of the 20th century, justified by the widespread Pākehā belief that Māori did not pay rates. In 1937, at Waiomio Marae, Tau Henare pointed out the fallacy of this line of reasoning, as Māori had already given up the vast majority of their lands to Pākehā settlement, effectively subsidising the whole colonial enterprise.

The evidence shows that attempts by Māori to forge agreements on public works issues were initially encouraged by officials, until the objective of acquiring the land had been achieved. Officials could then repudiate such agreements with impunity, as the Kawakawa-Opua railway and the Manginangina Scenic Reserve cases attest.

During the 20th century, following the introduction of Māori Land Boards to manage and administer leases and other dealings affecting Māori land, Māori owners became almost completely divorced from the public works land-taking process. The Board stood in for landowners at every stage of the process, including notification, consultation and the making of objections. Compensation was also paid to the Board, which could distribute the money amongst the owners after first paying off any debts held against the land. In this way, Māori may have suffered land losses without being aware that they had happened, perhaps for years afterwards.

This divorcing of Māori landowners from the taking process stands in marked contrast to the very active part played by affected Pākehā landowners in every aspect of the taking process, from notification, to consultation, to the hearing of objections, and to negotiations for compensation. On the latter point, Pākehā landowners and even leaseholders of Māori land were often able to realise considerable profits on recent investments when their land was subject to public works takings.

While Māori Land Board control was one factor in facilitating the taking of Māori land, it appears that Māori-owned land was also targeted because it was frequently the less developed land in the district and was therefore cheaper to acquire; the ownership complications also

[67] Hone Kopa at Northland Research Project Hui, Copthorne Hotel, Paihia, 31 May 2005.

made the use of the compulsory acquisition legislation more attractive than direct willing buyer/willing seller negotiation with owners.

s) Is the current public works legislation consistent with Crown obligations pursuant to Te Tiriti and/or the Treaty?

RESPONSE: With the passing of the Public Works Act 1981, the Crown has softened its approach to compulsory acquisition, preferring instead to obtain the consent of affected owners through negotiation. The report has not studied any post-1981 takings affecting Te Raki Māori land to ascertain whether this policy has worked in practice.

The 1981 Act also saw the introduction of provisions to allow land to be returned to the descendants of the original owners when it is no longer required for the purpose for which it was taken. It appears that this provision has not worked in practice, as many redundant public works takings have instead been transferred to one local body or another, such as the disposal to the Far North District Council (or its subsidiary) of the Kaikohe Aerodrome lands, and the disposal of the bulk of the land taken for Cape Brett Lighthouse to the Bay of Islands Maritime and Historic Park. Other offerback issues, such as the Takahiwai catchment, remain alive and are in negotiation. The only shining light in the Crown's offerback record discovered by this research project is the return of the Naval Mine Station at Matakaraka B by the Labour Government in 1989.

Public works takings have been the principle means by which Māori have suffered non-consensual land loss during the 20th century, which have occurred on the back of the wholesale land losses of the 19th century. Combined with an historical reluctance by various authorities to provide vital transport infrastructure into predominantly Māori-owned districts, such takings have contributed to the under-development of Māori communities in the North over the past 140-odd years.