CHAPTER 5

PUBLIC WORKS TAKINGS

5.1 PUBLIC WORKS TAKINGS OF MAORI LAND

Land in the Wairoa district was also alienated through public works takings. This chapter is based on a general report on public work takings of Maori land, not specific to Wairoa lands.[1]

The major issues arising from public works takings can be grouped according to the various processes involved. This includes the actual taking process, such as the decision making and motivations in deciding on the land to be taken, and the various interests taken into account; as well as the legislative measures and protections involved such as notification, entry of surveyors and opportunities for objections. Issues also arise from the process of compensation, including for example, how this was to be determined and distributed. Finally, issues arise from the disposal of land if it is never used for the purpose taken or is no longer required.

The Public Works Lands Act 1864 was the first to specifically enable the Government to take customary and Crown granted Maori land for public purposes. It was passed in wartime, when Maori were still excluded from parliamentary representation. It was also passed shortly after the New Zealand Settlements Act 1863. This Act provided the legislative basis for the confiscation of Maori land. It was intended as a punitive measure against those Maori who allegedly were resisting the imposition of British rule. The passing of these Acts in close formation helped forge a long-standing Maori view that public works takings and land confiscations were a closely related process.

The 1864 definition of 'public works' included those works considered to be nationally important at the time, particularly for a colony in a state of warfare. They included works associated with roads, bridges and ferries. Works associated with the electric telegraph were added in 1865.[2]

In later years, the authority to take Maori land for public purposes was progressively extended to include provincial councils and successor local authorities, as well as central government. The powers of local authorities were also extended to include customary as well as Crown granted Maori land.[3]

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1. Cathy Marr, 'Public Works Takings of Maori Land, 1840-1981', Report for the Treaty of Waitangi Policy Unit, 1994
2. Ibid, pp 48–49
3. The 1864 Act provided for central government to take Maori land whether customary or Crown-granted, for public work purposes, while provincial councils were still excluded from authority over customary land.

The definition of 'public work' also continued to be greatly extended to meet the needs of settlement. Public works came to include railways, river, harbour and other water works; irrigation and drainage works; and also land for the purposes of recreation, public domains, reserves and scenery preservation. Works also included those associated with land settlement, soldier settlement, noxious weeds, mining, quarries, hydro and geothermal works, forestry, aerodromes, defence, town planning, motorways, Government buildings, river and soil conservation, education, land development, and subdivision and housing programmes. A wide variety of local authority works were also included such as the provision of rubbish dumps, local roads and local domains.

As noted previously, by the 1870s the Government had decided to embark on a massive programme of immigration and public works, aimed largely at opening up the North Island for European settlement. The Immigration and Public Works Act 1870 was central to this programme of 'bloodless conquest'.[4] A major part of the Act was concerned with the construction of roads in the North Island. This was 'an essential elemen' in the pacification of the island. Another 'essential element in the restoration and maintenance of peace' would be:

> the employment of the Natives themselves for this purpose, as great power will thereby be given to restrain them from falling into evil habits or joining hostile tribes who may wish to attack the European. It will at the same time open up the country, and also enable the settlers to form settlements in the interior, and if, unfortunately, we should again fall into war, it will greatly facilitate our defensive or aggressive opearations, as the case may be.[5]

In 1874, the resident magistrate, Frederick Ormond, reported that the Public Works Department was furnishing employment for many of the Wairoa Maori. This had resulted in 'an excellent bridle' being rapidly formed inland to Poverty Bay, while a good road to Waikaremoana was established, making travelling throughout the district easy.[6]

A further Act in 1876 vested all roads being used by the public in the Crown. This meant that many routes that Maori had allowed Europeans to use on a regular basis, including those from pre-European times, were now declared to be public roads vested in the Crown. 'Road' was defined as a public highway, whether a carriage way, bridle path or footpath. In many cases no payment had ever been made for these and it seems clear that Maori had often thought they were only allowing rights of passage, not rights of land ownership. There is evidence that this section of the Act was used to simply take roads without compensation if it was clear that the public had been allowed to use them at all prior to its passage.

For example, in the Wairoa area, an ancient track lying between the Awatere block and the north bank of the Wairoa River was used for many years as a public road when the district was first being settled. At the time of the investigation of title for the Awatere block in 1867 this strip of land had been purposely excluded by the

4. Ibid, p 72
5. Marr, p 72; NZPD, 1870, vol 9, p 181
6. AJHR, 1874, G-2, no 14

applicants.[7] It was still customary land when it was taken in 1916 for railway purposes. There had been agreement that the old road would be incorporated into Maori land blocks and while this had happened in the adjoining Orangitirohia block, it had never been carried out for this block. When later action was taken to investigate the situation regarding compensation, the Ministry of Works refused compensation on the grounds that the taking merely tidied up the situation and the road was already Crown land. When the proclamation had been made, the then Public Works Department relied on sections 79 and 80 of the 1876 Act (as substituted by sections 101 and 102 of the 1908 Act) in an effort to have any application for compensation declared ultra vires and struck out. As the 1876 Act declared that all existing roads used by the public were vested in the Crown, the department held that this road was therefore already legally public land in 1916.[8]

Settler interests invariably took precedence over Maori rights. In terms of roading, it became a very common complaint, for example, that where local authorities had a choice they tended to take Maori land before European-owned land. In cases where European land adjoined Maori land, the road was often taken only from Maori land, the European's land remaining untouched. In 1888 this issue was freely acknowledged by the Minister of Works. The member for Western Maori thought that where roads were for the benefit of both races, the land 'should not be taken entirely at the expense of the Natives'.[9]

The Government's remedy appears to have been section 95(2) of the Public Works Act 1894 that when a road was laid off between lands owned by both Maori and European, the road was to be taken equally from both 'where practicable'. The Native Land Court Act 1894 included the same provision but added 'provided that the Governor shall have the right to lay off or take roads on or from the lands of both owners' (s 72). According to Marr, this seemed to acknowledge that the legislation itself encouraged discrimination against Maori land.[10]

For example, the construction of a road in the Ruakituri Valley to give access to settlers on Crown lands cut right through the middle of Hawea Tipuna's cropping paddock. In 1906 he wrote to James Carroll, the Native Minister, asking if the road could be altered a few chains as this was the only part of his grounds he could use for cropping purposes. As any alteration was likely to effect only one settler, a Mr McKenzie, Tipuna had obtained his consent to the proposal, who showed it by countersigning Tipuna's letter.

The letter was referred to the Department of Roads, which missed entirely whom the letter had come from. Because it had been countersigned by McKenzie, they assumed the letter had come from him. They referred the letter on to the district road engineer in Napier, who replied:

> Concerning Mr McKenzie's application I may say that I do not see any reason why a deviation should be made, as it cannot possibly affect the land he is occupying. The

7. Wairoa minute book 1
8. Marr, p 75; East Coast Main Trunk Railway, MA 1, 5/5/70
9. Marr, p 64; NZPD, 1888, vol 61, p 609
10. Marr, p 65

> road for practically its whole length passes through Native land, of a poor quality and certainly not suitable for cropping purposes.

Mr McKenzie was politely told that his request had been declined because 'the Native land adjoining is of poor quality and certainly not suitable for cropping purposes'.[11]

Public works legislation in the period of the 1880s to the 1920s largely reflected Government support in encouraging settlement and consequently the marginalisation of Maori. The works involved in breaking in the country had an enormous impact on Maori interests. Bush clearance, swamp drainage and river and harbour works helped destroy traditional sources of food and other resources, and roading access helped make new areas of Maori land desirable for settlement. Ballara and Scott cite a petition in 1915 regarding a roto tuna (eel lake) called Te Manga at the mouth of the Wairoa, where inanga (whitebait) and kokopu (a fresh water fish) and other eels and fish were caught.[12] The petitioners claimed that they had eel weirs near the beach called Tahuna-mai-Hawaiki (where Tapuwae was buried: see chapter 1) and where their parents had come for many years to collect driftwood, 'but now in our days the Pakehas come and turn us off, and say to us that the said beach and the said lake (lagoon) are now theirs'.[13] The Native Under-Secretary told the Native Affairs Committee that the area referred to was 'evidently a portion of the Lower Wairoa Block'. He recommended that the issue be referred to the Lands Department, 'as it is understood that Harbour works are progressing in the locality, which may necessitate reclamation of the lagoon referred to'.[14] The Native Affairs Committee made no recommendation on the petition.[15]

Local authorities and central government were involved in taking Maori land for public purposes. Although local authority takings generally tended to be individually smaller than the large takings involved in some central government projects, there were apparently a great many of them over the years for a variety of purposes. Local authorities took land for works such as rubbish dumps, secondary roads, sewerage services, local quarries, public domains, and various recreation reserves. Although the Crown is generally not regarded as including local authorities, this separation is often difficult with public works takings. In many cases, for example, Government departments such as the old Public Works Department took land on behalf of local bodies. In other cases the Public Works Department would construct a work such as an airport or road and then hand it over to a local authority to manage.

For example, when land in Tahora 2f2 was taken for a road to provide access for leasehold settlers in the Ruakituri Valley, the taking and formation was done by the Public Works Department who then handed the road over to the Wairoa County Council.[16] At the time, the land was administered by the East Coast commissioner,

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11. Ruakituri Valley, Wairoa County, W1, 36/47
12. Ballara and Scott, 'Wairoa', pp 17–18
13. Le 1/1919/9, petition no 142/1915, see Ballara and Scott document bank, pt 3
14. Ibid
15. Ballara and Scott, p 18
16. W1, 35/270

who was not formally approached about the proposed road until October 1926, over three years after the decision to form a road had been taken.[17] The trust, or for that matter, the Maori owners, had not been consulted about the department's plans, but to benefit the half a dozen settlers, they were expected to contribute to the cost of the road. The commissioner objected to the taking on the grounds that the trust would lose too large an area, have its paddocks interfered with, have to meet the expense of fencing, as well as being expected to contribute one-third of the cost of the road.[18] In the event that the road was to go ahead then he considered that compensation should be paid.[19] This drew forth an indignant response from the Permanent Head of the department who found it inconceivable that the trust commissioner should not only refuse to contribute to a road, which he had never asked for in the first place, but that he even wanted compensation for the land to be taken.[20]

In the end the commissioner advised that if the department was to take a shorter, alternative road, resulting in less land being taken, the trust would do the fencing necessary on its farmed lands and make no claim for compensation for the area taken for a road.[21] This was done and the taking gazetted in the 1930 *New Zealand Gazette* at page 1123, under section 12 of the Land Act 1924. No consultation with the beneficial Maori owners appears to have taken place. One is left to wonder what the outcome might have been if it was only Maori the department had to negotiate with and not the trust commissioner, with all the weight of the trust behind him.

The same *Gazette* notice also proclaimed pieces of a road passing through subdivision 2 Tahora 2f2 and lot 23, DP 1952, as closed. A handwritten minute dated 17 November 1971 on a copy of the *Gazette* notice raised the possibility of vesting these areas in the Proprietors of Tahora 2f2.[22] It is not clear whether this was done.

A claim received by the Waitangi Tribunal, from Charles Cotter on behalf of the owners of the Tahora 2f2 Incorporation, claims that the road for which the land was taken has never been formed and they seek the return of the land.[23] In fact, it appears that the road was formed, if only to a width of 14 feet and unmetalled,[24] however there could be a case for returning the land if the purpose for which it was taken is no longer valid. The Tribunal may also have to consider if taking land for the benefit of the settlers at the expense of the Maori owners infringed their rights of rangatiratanga.

At other times the local authority took land itself, often with more regard for the local non-Maori community and for financial advantage, than for the concerns of Maori land owners.[25] For example, there is evidence that local bodies used land

17. C J McKenzie, Acting Engineer-in-Chief to the Registrar, East Coast Native Trust, Gisborne, 15 October 1926, W1, 35/270
18. W E Rawson, East Coast commissioner to Permanent Head, Public Works Department, 25 January 1927, W1, 35/270
19. District engineer Napier to Permanent Head, Wellington, 13 July 1927, W1, 35/270
20. Bennett to the Minister of Public Works, 19 July 1927, W1, 35/270
21. Ibid, 13 June 1928
22. W1, 35/270, pt 2
23. Wai 481
24. 18 June 1930, W1, 35/270, pt 2

taking powers for public purposes for a variety of reasons often quite different to those stated in the taking proclamations. This practice was not confined to Maori land and was frowned on by the courts. However there were no real legal restrictions on this and it seems to have been that much easier to get away with where Maori land was concerned. This was apparently because Maori were more likely to lack the means to pursue legal action and were less able to put political pressure on taking authorities. Fragmentation of title and notice problems also often meant owners could be unaware of the taking until it was safely made.

In 1963 for example, the Wairoa Borough Council issued a taking proclamation with the stated purpose being 'to execute a certain Public Work – namely a Borough Depot and yard'. Only two of the nine owners were advised as they were the only two whose addresses were known. And in the event the Maori Affairs department office in Gisborne was informed that:

> Although not officially stated by the Council . . . the probable intentions of the Council are to use this strip as a road to open up back land when this becomes necessary.[26]

As Marr has stated:

> Given their experiences with public works takings in the late nineteenth and early twentieth century it is not surprising that Maori often regarded the whole concept of public works land takings as little different than a continuation of land confiscations.[27]

5.2 FURTHER RESEARCH REQUIRED

The claimants have not provided much information on various public works takings in the Wairoa district. Much more research is likely to be required in this area. A general report may be necessary to provide an overall idea of the amount of land and takings involved and therefore the likely extent of this type of claim in the Wairoa district. This work could be extensive. However, specific examples fitted into the general overall report on public works takings maybe sufficient to sustantiate a general case or claim.

5.3 RELEVANT CLAIMS TO DATE

To date the following relevant claims have been lodged:

(a) Wai 278, which concerns land taken for harbour purposes at Waikokopu;
(b) Wai 427, which also concerns land taken at Waikokopu for harbour purposes, as well as roading and railway purposes;
(c) Wai 481, which concerns land taken for a road in Tahora 2f2; and

25. Marr, p 149
26. Memo to Head Office, 21 August 1963, MA 1, 54/19
27. Marr, p 114

(d) Wai 519, which includes land at Waikokopu taken for harbour purposes and a gifting for an aerodrome in the Mahanga block.

Although these claims may be small in terms of acres or hectares, they are important when viewed in the context of total land alienation and dispossession. As well, small pieces may be very significant to particular claimants and whanau. The Tribunal has pointed out, the 'smallness or insignificance in area is no impediment to consideration of underlying principles'.[28] The principles underlying the issue of compulsory acquisition, where kawanatanga overrides the guarantee of tino rangatiratanga, lies at the heart of questions about the Treaty relationship between Maori and the Crown.

28. Waitangi Tribunal, *Te Maunga Railways Land Report*, Wellington, Brookers Ltd, 1994, p 69