

CHAPTER 1

INTRODUCTION

This report was commissioned to provide an overview of Crown legal and administrative policy in compulsorily taking Maori land for public works purposes from 1840 to 1981. The intention is to provide background information, in order to assist in the development of Crown policy in settling Treaty claims arising from public works takings. Where necessary, areas requiring further research are also highlighted. Due to time constraints, this report is only a preliminary introduction to the major policies and issues relevant to these claims. It does not attempt to cover every public works-related claim.

Although this report is concerned with public works takings of Maori land, it is recognised that there are often different understandings of what constitute compulsory ‘takings’ and in practice it is often difficult to separate out public works takings from other types of compulsory land loss. Claimants often refer to takings, for example, whenever land that was owned before 1840 has been lost through Crown action without having been willingly sold or gifted. This can involve issues such as compulsory vestings, punitive confiscations, compulsory perpetual leases, and disputed purchases.

For example, confiscations of Maori land following the New Zealand wars are excluded from this report as a separate research issue. However, they were originally very closely linked with the development of public works provisions, especially where Maori land was concerned. Public works provisions themselves were also commonly expected to play a major role for the ‘common good’ in civilising and pacifying Maori. The official terminology also often tends to blur distinctions with blanket terms such as Crown ‘acquisitions’ of Maori land or ‘alienations’ from Maori. As well as these types of losses, issues also arise of the Crown assumption of ownership of waterways, natural resources, and foreshores. In terms of rangatiratanga, there is also the question of the loss of control and management of land even if ownership remains.

However, while associated issues are briefly referred to as necessary, this report concentrates as much as possible on compulsory takings of Maori land under public works-related legislative authority. The public works principles in this legislation were originally developed in English law and then imported and developed further in New Zealand.

The whole area of public works land takings requires some care because public works legislation traditionally allowed purchase by willing agreement as well as ‘compulsory purchase’ or taking of land. This means that it cannot automatically be assumed that all public works land ‘takings’ were by definition ‘compulsory’. Compulsory taking provisions could also be used, even if an owner was involved in a willing agreement, simply to overcome any possible problems with the land title. On the other hand, it cannot always be automatically assumed either that where land was taken by agreement, the owner was truly ‘willing’, as the Crown had

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considerable powers to pressure an owner to ‘agree’ to a taking, including the threat of resorting to compulsory provisions if negotiations failed.

For the purposes of this report, ‘Maori land’ is taken to mean Maori land held by both customary and freehold title. It is recognised that at times there have been fine legislative distinctions about at precisely what point customary land became Maori freehold or Crown-granted land, and for that matter then became European or general land. However, for the purposes of this report, broad definitions are used simply to indicate the status of land for public works purposes. The terms used are customary Maori land, and Crown-granted or freehold Maori land. The definitions of these terms are based on common definitions such as those given by Asher and Naulls.¹

Customary Maori land is land held by Maori people in accordance with their traditional customs and usages. All land in New Zealand was originally Maori customary land. After 1840, the Crown not only pursued a policy of alienating land from Maori ownership, but also of converting land remaining in Maori hands from customary title into title derived from the Crown. This became known as Crown-granted or freehold Maori land. By the turn of the century most customary Maori land remaining in Maori ownership had been transferred into freehold title. By 1980, the amount of customary land left was regarded as ‘insignificant’ and thought to mostly consist of rocky barren islands and some tapu land excluded from Crown grants. Even by the turn of the century, Maori freehold land was only a little over 10 percent of the total area of New Zealand. This had dropped to 5 percent by 1980.²

Even land in freehold title might be effectively outside Maori control. For much of the time covered by this report, a significant amount of Maori land was also vested or reserved. Reserves could be made, for example, at the time land was sold, or may have been granted to prevent landlessness or as compensation for past injustice. A large amount of land ‘returned’ after the confiscations was also reserved and vested in the control of Crown agencies such as the Public or Maori Trustee on perpetual leases. The Crown eventually administered all reserved and vested lands in trust for Maori, with Maori excluded from management and control. Some of these lands were sold or used for public purposes such as universities. Others were leased in perpetuity. After the mid-1970s most reserved and vested land was converted into ordinary Maori freehold. A large amount was vested in Maori incorporations and trusts, although still subject to leasing. As a result, very little of this type of Maori land now remains.

It should be noted that the legal definition of ‘Native’ or Maori land changed according to various legislative purposes and to take account of different treatment of customary and Crown-granted or freehold Maori land. ‘Native’ land originally meant all Maori land and this was generally also customary land. Within a dozen years, by 1852, a distinction had been drawn between ‘Native’ land held by traditional customs and usage, and Maori land derived from Crown grant or Crown

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1. George Asher and David Naulls, *Maori Land*, New Zealand Planning Council, Planning Paper no 29, March 1987, pp 49–53
 2. Asher and Naulls, pp 46–51

title. Reserves made out of purchases for example were usually Crown-granted. The distinction was important because for some time customary land was protected from compulsory provisions such as rating and from local government authority to take land for public purposes. Public Works' definitions varied at different times as to whether 'Native land' meant customary land only or included Crown-granted Maori land as well. The prevailing definition, where relevant, will be noted in the report.

As Asher and Naulls have explained, Maori land also has a special significance to Maori and to New Zealand in a way that is quite separate from other general land that might be owned by either Maori or Pakeha. This special link transcends legal definitions and applies to land inherited from generation to generation that is the basis for *turangawaewae*, and traditional ownership rights in tribal lands. Maori land is the remaining remnant of Maori tribal lands, and as such it continues to play a central role in the development and maintenance of Maori tribal identity. Asher and Naulls describe Maori freehold lands as:

lands that the current owners' ancestors occupied, used and controlled for hundreds of years and numerous generations. Today's Maori owners of this land are the direct descendants of those ancestors, and their rights to ownership – and hence their connection with the life of the tribe, their *turangawaewae* – come from proving a continuous genealogical link. A piece of general land on the other hand, unless it provides ancestral connections, is just land – there may be pride of ownership, as there is for Pakeha, but that is all.³

The term 'Crown' does not generally include local authorities such as local councils or rivers or drainage boards. However, local authority powers and activities have been included in this report because in public works terms it does not make much sense to separate them. Any history of the development of public works takings in New Zealand must inevitably include local authorities, as they and their predecessor organisations such as provincial councils were thoroughly and inextricably involved in the history and evolution of public works takings. In later years the responsibilities and activities of central and local government were also often very closely linked. This report would present a very incomplete and misleading picture if some overview of the powers and activities of local authorities were not included.

The definition of 'public work' or 'public purpose' has traditionally been very broad in New Zealand, and many of the numerous public works-related Acts and amendments during the period covered have been concerned with extending the legislative definitions of these terms. As Government became increasingly involved in providing for public purposes, the definitions of public works for which land was required also widened and with it the concept of what was 'necessary', or in the national or community interest. Developments resulted in compulsory takings being possible for every type of public purpose no matter how vague or mundane, with very little effective restriction until attempts were made to introduce the concept of 'essential' works in 1981. Some restrictions also applied through town

3. Asher and Naulls, p 53

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planning processes in later years but these were often ineffective in protecting Maori interests until changes in legislation from the late 1970s.

Public works legislation in New Zealand has its origins in English public works principles and developments but these have also been modified and adapted and at times overturned to meet many of the different circumstances settlers found in New Zealand. In terms of land takings, the major concerns of public works provisions have traditionally been in the areas of powers and procedures related to land acquisition; compensation for land taken; and management, use, and disposal of land taken for public works purposes and no longer required.

There have been at least 20 major pieces of public works legislation passed in New Zealand, as well as numerous amendments that often contain important new or changed provisions. In addition, there have been a wide variety of literally hundreds of other Acts that include important land taking related provisions for public purposes. Public works takings provisions have traditionally been included in general legislation such as Maori land legislation, land Acts, finance Acts, and reserves and domains Acts; legislation empowering certain authorities such as roads boards and local councils, and legislation relating to particular types of works such as electricity, railways, scenic reserves, and roading. There have also been numerous special Acts relating to particular projects, or areas of land. Legislation such as the various town and country planning Acts have also had a significant influence on public works provisions. This report does not cover all legislation in detail but attempts to summarise the major legislative provisions and developments relating to public works provisions.

The historical background to legislative and administrative developments in the nineteenth century is generally based on the legislative research and the work of well-known New Zealand historians such as Peter Adams, Claudia Orange, M P K Sorrenson, Alan Ward, and Ian Wards. The preliminary report on public works takings by David Alexander and the Crown Forest Rental Trust Maori land legislation database have also proved to be invaluable starting points. Primary sources in official publications and archives have also been used.

Sources for twentieth-century developments have proved to be more problematic. Very little substantial material has been written on public works takings and even less on takings of Maori land for this period. Archival sources have therefore been used more heavily, but time constraints mean research in this area is very preliminary in nature. Unfortunately public works policy files obtained by National Archives were not made available for this research report. Research has therefore largely been based on Maori Affairs Department files for public works takings and on published sources for town planning developments.

A major problem in producing this report has been that statistical data related to takings of land for public works purposes is not readily available in a usable form. This is especially true for takings of Maori land. Data undoubtedly does exist in a very scattered and unprocessed form. It was a legal requirement, for example, that public works takings were recorded as evidence of legal ownership and the discharge of compensation requirements. Legal requirements changed over the years, but it appears as though district offices of organisations such as the Land Transfer Office were the most likely source, as well as the various Public Works

Department records, for Crown takings. The Maori Land Court is also likely to have records for at least the last 30 years. Published data also exists, for example, the taking proclamation notices were published in the *New Zealand Gazette*.

Tracking down and collating this data was beyond the research scope of this report. There is also likely to be some difficulty in distinguishing Maori land takings from general takings in some sources. However, it seems likely that it would be possible to at least obtain sufficient data to indicate overall quantities and significant trends. This kind of information is likely to be extremely useful in developing policy on public works land takings.

It would be useful, for example, to be able to estimate the total amount of Maori land taken for public works purposes between 1840 and 1981, and to be able to break this down by time period, district, type of work, and taking authority. It would also be useful to be able to compare the total amounts taken for public works against the total amount confiscated. The relative amounts of Maori and non-Maori land taken could also be compared and the impact estimated of various Government policies on the amounts of Maori land being taken. Takings could also be compared between the North and South Island and between Crown agencies and local authorities. The impact of public works takings could also be calculated in tribal areas where considerable land had already been lost by other means. Takings of Maori land for 'essential' public purposes could also be compared with takings for lesser purposes such as camping grounds. It would be extremely useful to have data that even indicated trends in such areas. Accordingly, it is recommended that at least the feasibility of such an exercise is investigated by the Policy Unit, for example as a university research project.

