

CHAPTER 16

THE POWER LINES ON THE TARAWERA AND TATARAAKINA BLOCKS

16.1 INTRODUCTION

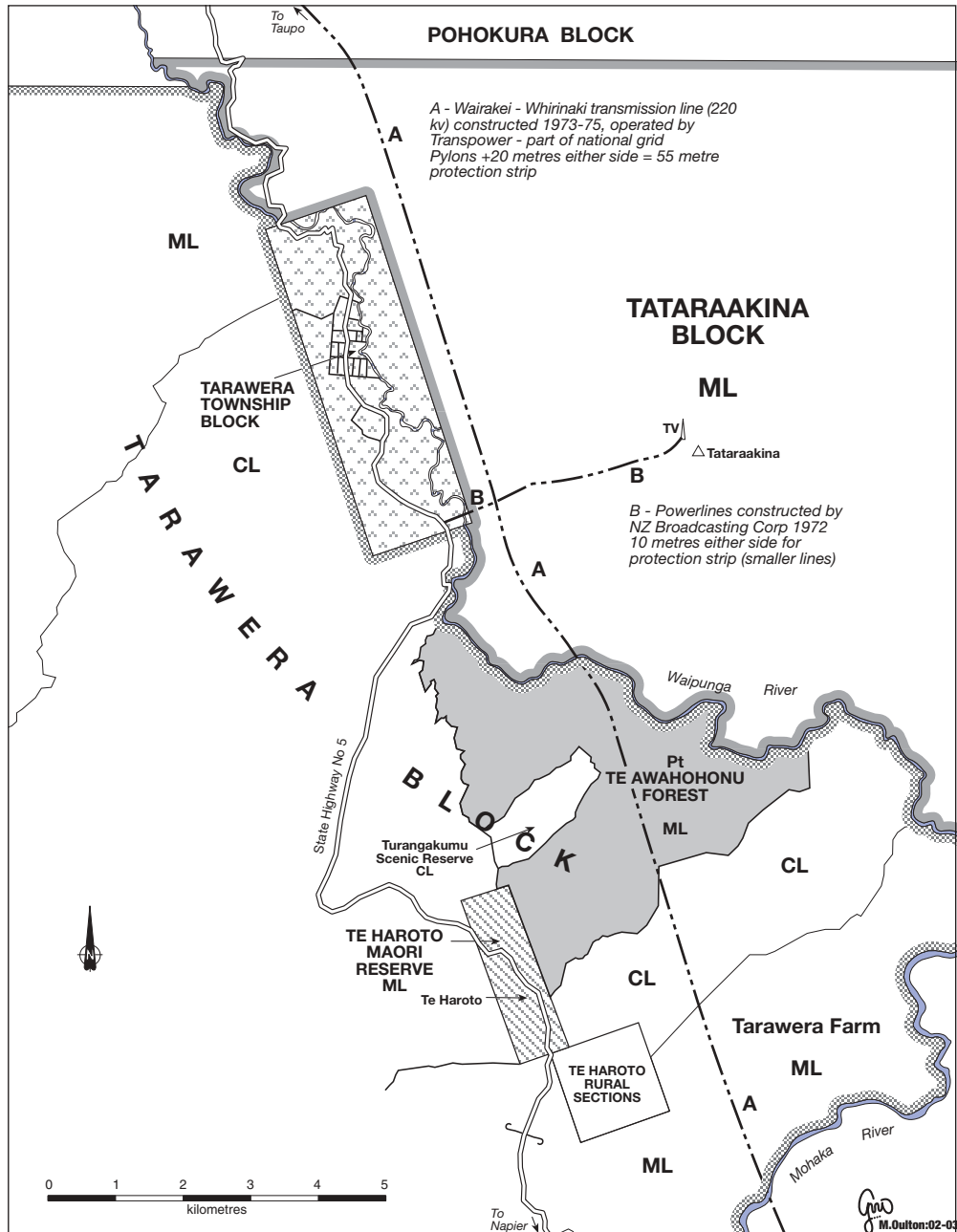
The failure of the Crown to pay compensation for the construction of a 220-kilovolt transmission line across Maori land in the Tarawera and Tataraaakina blocks (as well as in the Pohokura block, which lies to the north of our inquiry district) is an issue that arose in the Wai 299 claim and is reviewed separately in this chapter. There is also a smaller power line from the main highway east across the Tataraaakina block to a television transmitter and microwave tower near the summit of Tataraaakina Mountain. Both lines were constructed in the 1970s and are shown in map 56. Along the route of any power line, there are restrictions on land use and height of vegetation. The protection strip for the smaller New Zealand Broadcasting Corporation (NZBC) line on Tataraaakina is 10 metres either side of the line. For the larger pylons carrying the 220-kilovolt line, the protection strip is 55 metres wide (15 metres for the pylons plus 20 metres either side).

16.2 THE NZBC POWER LINE

In 1970, the NZBC began negotiations to acquire the use of a site on Tataraaakina Mountain for a television transmitter and microwave tower. At the time, Robert Holt and Sons were logging the indigenous forest in the area in completion of the final part of a logging licence held by the Fletcher Timber Company (Fletchers), which was due to expire in 1971. Access was by logging road, and after some argument about the ownership of the bridge over the Waipunga River, the Maori Trust Office confirmed that the bridge belonged to the Maori owners of Tataraaakina, since the cost of it had been deducted from their royalties.¹

In June 1971, the NZBC applied to the Maori Land Court to arrange a meeting of owners of the Tataraaakina block to consider a resolution to lease a one-acre site for the tower and to allow access along the logging road. A meeting of owners was held in Napier on 27 October 1971. It was attended by 39 owners, plus 17 proxies, who together represented 32 per cent of the total shares in the block. There was little discussion and the lease and road access was agreed.

1. Document R9, pp 55–56



Map 56: Powerlines on the Tarawera and Tataraaikina blocks

However, when the matter came before the Maori Land Court in February 1972, the NZBC found that it had neglected two relevant factors. One was the need to provide for any other parties that used the road and might therefore generate a liability against the NZBC for maintenance costs. The other was the need for a power line to the transmitter. When the lease was confirmed, the court added a provision to give the Maori Trustee the power to apportion any

maintenance costs and an easement was granted to the NZBC to put up poles and a power line.²

The lease for the tower, the road access, and the power line are not at issue in this claim, although there are ongoing concerns, which we discuss later, regarding the use of, and responsibility for, the 20-metre protection strip along the route of the power line.

16.3 THE 220-KILOVOLT TRANSMISSION LINE

The 220-kilovolt transmission line that crosses the Tarawera, Tataraaakina, and Pohokura blocks is part of the national grid. It was built by the New Zealand Electricity Department between 1973 and 1975 in order to connect the Wairakei power station and the Whirinaki pulp mill north of Napier. The department, which later became the Electricity Division of the Ministry of Energy, operated the line until the mid-1980s, when the ownership of the national grid and the responsibility for operating it were transferred to a State-owned enterprise, Transpower New Zealand Limited.³

In the following sections, we outline the legal powers and obligations that the Minister of Electricity had to enter private land and construct a transmission line. Because the central issue in this claim is the Crown's failure to pay compensation for the construction of the line, we therefore consider the process for notifying the owners and their attempts in the 1980s to get some compensation.

16.3.1 The legal requirements

Under section 11(2)(a) of the Electricity Act 1968, the Minister of Electricity was authorised to:

- (a) Construct, provide, and use such works, appliances, and conveniences as may be necessary, directly or indirectly, for generating electricity from any source of energy, for operating the national electrical system, and for the transmission, use, supply, and sale of electricity when generated.

Under section 11(2)(d) and (e), the Minister could enter private land and construct certain works:

- (d) Construct tunnels under private land, or aqueducts and flumes over the same, erect towers, pylons, and poles thereon, and carry wires over or along any such land, without

2. Document R9, pp 56–57

3. Document T16, p 3

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being bound to acquire the same; and for these purposes the Minister shall have a right of way to and along all such works and erections:

- (e) Construct such electric lines and works, lay such lines and cables, and construct and erect such towers, pylons, and poles, as may be necessary for the exercise of his functions under this Part of this Act.

Under section 11(2)(j), the Minister could:

- (j) Hold, manage, purchase, exchange, take on lease, or hire, acquire, or otherwise obtain any property whatsoever which in the opinion of the Minister is necessary for the exercise of his functions under this Act:

Provided that, in the case of land or any estate or interest in land, acquisition shall be undertaken on behalf of the Minister of Electricity by the Minister of Works under the provisions of the Public Works Act 1928.

Section 14 set out the public notification procedure: a proclamation could be published in the *New Zealand Gazette* defining the 'middle line' and identifying all the lands over which the power line was to cross. In section 14(6) and (7):

- (6) As soon as may be after the public notification of a Proclamation under this section, the Minister shall notify the persons then owning and occupying the land affected by the Proclamation that it is intended to take any part of the land for the transmission line, or that it is intended to construct the transmission line over, upon, under, or close to the land, or that the land will not be affected, as the case may be.

- (7) If any land is to be taken, the time for claiming compensation shall run from the date of the Proclamation taking the land; and, if the transmission line is to pass over, upon, under, or close to the land without any part of the land being taken, the time for claiming compensation for any injurious effect thereto shall run as if the claim were a claim for damage under section 45 of the Public Works Act 1928.

Claims for compensation under section 45 of the Public Works Act 1928 had to be lodged within 12 months of the completion of the work, or the relevant portion of it. Section 63 of the Statutes Amendment Act 1939 amended this by authorising the Supreme Court to extend this period for up to five years in respect of land injuriously affected.⁴ In effect, this meant that claims could be lodged up to five years after the date of completion of the work. The Public Works Act 1981 extended this to six years.

Section 16(1) of the Electricity Act provided:

- (1) Every person having any right, title, estate, or interest in any land or property injuriously affected by the exercise from time to time of any powers conferred by this Act shall be entitled to full compensation for all loss, injury, or damage suffered by him.

4. See Waitangi Tribunal, *Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), pp 263–268

If no agreement was reached, claims were to be determined under the provisions of the Public Works Act, as far as they were applicable. Under section 19(2), items for which compensation was payable could include any tree (or part of a tree) removed at the time of construction, but only if the tree ‘was growing on the land before the erection of the electric line’.

Section 104 of the Public Works Act 1928, as substituted by section 6 of the Public Works Amendment Act 1962, obligated the Maori Trustee to negotiate compensation where any Maori land in multiple ownership was taken under the Public Works Act ‘for any public work’, or where any such land was ‘injuriously affected thereby’ or suffered ‘any damage from the exercise of the powers given by this Act’. Maori land vested in a single owner was excluded, unless that owner specifically requested the Maori Trustee to negotiate on their behalf. Maori lands in multiple ownership that were already vested in trustees or a Maori incorporation were also excluded, but the trustees or bodies corporate could ask the Maori Trustee to act as an agent for them.

The provisions we have outlined were those that applied in the 1970s when the Wairakei to Whirinaki 220-kilovolt transmission line was constructed. The transmission line was a public work, and compensation was payable for injurious affection to Maori owners of land over which it passed. The nub of the issue is that no one lodged a claim on behalf of the numerous owners of the Pohokura, Tarawera, and Tataraaakina blocks within five years of the completion of the line, as required by the Public Works Act 1928 (as it was framed then). Since 1992, TransPower, as a State-owned enterprise, has been required to operate under a different regime, following ‘international practice’. Now, ‘new lines on private land are only able to be built on easements purchased at a fair market price from each landowner.’⁵

16.3.2 Notification of owners

Under section 15 of the Electricity Act 1968, the Minister of Electricity had the right to enter any land at any time for the purpose of surveying, constructing, and repairing a transmission line, and the Electricity Department referred to a notice of intention to enter land for the purpose of surveying the route for a line as a ‘courtesy notice’.⁶ Moorsom noted that in January 1972 a letter from the Electricity Department was sent to the district officer of the Department of Maori Affairs in Palmerston North advising that the Wairakei to Whirinaki line would cross Maori land in the Tarawera and Tataraaakina blocks and requesting a list of owners to whom courtesy notices could be sent. On 7 March 1972, the department duly sent out notices to the affected landowners.⁷

In its January 1972 letter, the department also requested that the district officer obtain permission from the Board of Maori Affairs for the surveying and construction of the line over

5. TransPower NZ Ltd, *Information for Landowners and Occupiers: General Information for People Living, Working or Playing near Transmission Lines* (Wellington: TransPower NZ Ltd, 1996) (as quoted in doc T16, pp 6–7)

6. Document T16, p 10

7. The relevant Electricity Department files are now held by TransPower and were reviewed by Boast.

land in the Tarawera development scheme. Moorsom stated that he found no other records of the project in Maori Land Court files and nothing seems to have been recorded in Maori Affairs development files either.⁸ In 1963, the land in the Tarawera development scheme had been gazetted under part XXIV of the Maori Affairs Act 1953, but control of the actual development work had been handed over to the Department of Lands and Survey.

On 10 October 1973, a second notice, one termed a 'wayleave notice' by the Electricity Department, was sent from the department's Napier office to affected landowners after the surveys were completed. The notice was a standard form letter advising that, under sections 11 and 15 of the Electricity Act 1968, the department was authorised to 'build transmission lines and telephone lines on private land without being bound to buy the land, and give the Department right of way to and along those lines'. In a space provided, the details of the property affected were typed in, along with a statement that work would commence on or after 31 October 1973. There was also a note about the need for some bush and scrub to be cut, which work the department would do, unless the owner advised that he or she would arrange for it to be done. The next paragraph referred to compensation, and we quote it here in full:

Section 16 of the Electricity Act 1968 provides for the payment of compensation where any property is damaged or injuriously affected by carrying out any work authorised by the Act. Should you wish to make a claim for compensation will you please write to me giving particulars of the property, and the amount which you consider would be fair compensation for each item. I will, if necessary, arrange for an officer of the Department to discuss the matter with you, with a view to reaching a mutually satisfactory settlement. You will appreciate that an assessment of the compensation payable cannot normally be made until the work on the property affected has been completed, but any claim should be made no later than 12 months after the completion of the work.⁹

No date was given for the work's expected completion, although it was stated at the end of the notice that the date that power would begin to be transmitted would be 'notified by newspaper advertisement'. For a Maori owner, this notice would be advice of a fait accompli, and with no specific dates it would not carry any sense of urgency. There was no reference at all to the provisions in the Public Works Act 1928 and because no indication was given of the completion date of the work, a reader would not know when the 12-month period in which to make an application for compensation was to begin or end.

It is not certain how many Maori owners received these notices. The one quoted from above was addressed to Lyndhurst O'Donnell in Hastings and referred to the Tatarakaikina block. The Electricity Department file indicated that the notice was also sent to three other owners – P Sullivan of Napier, P Tahau of Te Haroto, and Mrs H Campbell of Pakipaki,

8. Document R9, p 57

9. JR Nixon, district manager, New Zealand Electricity Department, Napier, to L O'Donnell, 10 October 1973 (doc t16, app 3)

Hawke's Bay – as well as to the district officer of the Department of Maori Affairs in Palmerston North and to a Mr D Edmundson, care of Lee, Heaps, and Edmundson, Napier. With regard to the Tarawera c6 block, similar notices were sent to the same four owners and Maori Affairs officer, the commissioner of Crown lands in Napier, and a Mr T Nuku. Since the Tarawera and Tataraaikina blocks each had over 100 owners, these individuals were presumably seen as representatives or trustees.

The Department of Maori Affairs responded to the notice by advising the Electricity Department that, in respect of Tataraaikina, the land had been vested in trustees and therefore the Maori Trustee had no authority to act on behalf of the owners.¹⁰ Technically, in terms of the 1962 amendment to section 104 of the Public Works Act 1928, this was true, but there is no evidence that either the Maori Trustee or the Department of Maori Affairs was proactive in ensuring that the representatives of the Maori owners fully understood the owners' rights to compensation. We consider the status of these trusts later, but, at this stage, we note that no claims for damage or injurious affection were lodged on behalf of the owners of the Tarawera or Tataraaikina block before 1981.

16.3.3 The Tataraaikina 'agreement' of 1975

There is on the Electricity Department file a copy of an informal agreement in the form of a letter dated 18 June 1975 which was sent to the department's Hamilton office. The letter was signed by VJR Keen, P Sullivan, GM Campbell, LH O'Donnell, and one other person, whose signature is illegible. The agreement concerned only the timber cut on the 'Pylon route' through Tataraaikina, and it provided for the department to pay compensation for all the logs that were felled, but, owing to their inaccessibility, were unable to be extracted and taken to a mill. There is no information about how this 'agreement' was reached. Landowner Philip Sullivan told the Tribunal that, although he believed that the 'Line Supervisors and other workers' on the ground were sincere in their 'sympathetic concern', they had no authority, and the trustees had difficulties in dealing with two Electricity Department officers in Hamilton and Napier:

My recollection is that meetings that were held with NZED were at our instigation. I do not recall that the NZED made any active effort to fully consult with the Trusts.

The discussions to hear our concerns [were] not in my view taken seriously. An informal agreement signed by myself and other Tataraaikina Trustees was never completed. It was an attempt to try and address the tip of our concerns, beginning with compensation for millable native trees.¹¹

10. Document T16, p 12

11. Document T54, p 6

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Agreement had been reached with other landowners along the line. Boast recorded that Fletchers, which owned a 2898-acre block near Taupo, was paid \$2159. This was calculated on the basis of \$1159 for the loss of the trees and \$1000 for the loss of the land for timber. A farmer on 1190 acres at Te Pohue, 'after a great deal of correspondence, valuations etc', was paid \$8942. As Boast commented, it was a question of where and on what the onus was placed: on the landowner to make a claim or on the Crown to make an offer on costs. 'Those who went to the trouble and expense of fighting the issue out with NZED received compensation; those who did not missed out.'¹²

16.3.4 The status of the trusts

On the Tatarakaia block, the Maori Trustee had been administering Fletchers' timber licence referred to above (sec 16.2) in the vicinity of the NZBC power line. Fletchers also leased land at the north-eastern end of the block, but this was not affected by the 220-kilovolt line. At about this time, 'trustees' had been appointed by the Maori Land Court under section 438 of the Maori Affairs Act 1953. The nature of this trust and the terms of the trust order were not produced in evidence to the Tribunal. However, Mr Sullivan told the Tribunal that he was appointed 'one of the initial Trustees of Tatarakaia Land Trust' in 1972:

The [Maori Land] Court limited the Trust to two years and we were not given full powers. We only had powers to make arrangements for a commercial exotic forest. I later applied for a variation to the terms of the Trust and the time limit was removed.¹³

Given that the Maori Trustee had already been involved in timber licences on Tatarakaia, it is curious that he took no interest in the 220-kilovolt power lines issue, although he had been involved in the issue of access by logging road and the ownership of the bridge for the television transmitter and microwave tower on Tatarakaia. There was no trust on the Pohokura 3B and 7A blocks also affected by the 220-kilovolt line, but the Maori Trustee had no involvement there either.

On the Tarawera block, the situation was more complex. In 1963, part of the land affected by the 220-kilovolt line, now known as Tarawera Farm, had been gazetted under part xxiv of the Maori Affairs Act 1953 for a land development scheme. The rights of the land's owners were severely restricted in section 328(1) of that Act, which, while preserving the 'legal ownership' of the land, gave the Board of Maori Affairs 'exclusive occupation' of it. In effect, the Maori owners lost control of what was being done, and the administration of the development scheme was controlled by the board. At Tarawera, the responsibility for actual development work on the ground was transferred by the board to the Department of Lands and Survey.

12. Document T16, pp 13-14

13. Document T54, p 3

In 1970, after some debate about the extent of land to be developed for farming, it was agreed that the New Zealand Forest Service should take over the development of exotic forestry on some 20,000 acres of the block. In December that year, an ‘advisory committee’ was set up, and in 1971 it became a section 438 trust known as the Te Awahohonu Forest Trust.¹⁴ Mr Sullivan told the Tribunal that he was one of the trustees:

Initially, the Maori Land Court limited the powers of the Te Awahohonu Trust: the Trust was to negotiate a forestry lease with the Crown and there was a 12 month deadline imposed. Later the time limit was removed and the Trust had permanent status.¹⁵

In December 1971, the Forest Service was granted a forest licence to begin clearing the land in preparation for planting, pending the negotiation of an afforestation lease.

Mr Sullivan also commented generally on the difficulties of this transition period. The owners went from having no direct involvement in their lands while they were leased out to setting up trusts to administer those lands and, in the case of the Forest Service proposal, to negotiating a joint venture with the Crown. ‘Looking back now’, he reflected, ‘we were very “green” at the start’:

I have a business background, as did some of the other Trustees. We had an understanding of commercial matters but had no prior experience as Trustees. We had been to a lot of meetings with the Maori Affairs Department when they ran things, but we had no direct experience in managing our land.

We were acting under imposed powers. For the first time we had some degree of control over our lands, but it was limited control. This added to the situation of confusion of who had responsibilities and powers.

The biggest difficulty at the time was lack of resources. We worked for nothing and often had to put in our own funds. The Trusts took over the blocks of land just after the time of the great exploitation of the milling years. We all had other jobs and responsibilities . . .

Our major concern was to stop further fragmentation of land, and that was our main focus in the early stages.¹⁶

Mr Sullivan also commented on the wayleave notice sent in October 1973:

The letter was very unclear. There was a time delay before any compensation would be paid . . . The letter left it up to land owners to provide details of the compensation. We didn’t have the resources to go and hire the appropriate specialists. In any event, we didn’t have the money to pay a lawyer or other advisers for their views on compensation.

14. Document R9, pp 121–122

15. Ibid

16. Ibid, p 4

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The Crown portrayed the transmission line as a *fait accompli* over which we could do nothing. We believed the Crown had absolute rights and nothing could be done to stop the construction.¹⁷

Heitia Hiha told the Tribunal that, although trusts were set up in the 1970s, Maori had no ‘direct meaningful management or control’ over their lands until the 1980s. He added: ‘Trustees did not receive any training.’¹⁸

When the survey and wayleave notices were issued in 1972 and 1973, the trustees for the Tataraka and Tarawera blocks were new, were very inexperienced, lacked resources, and had limited powers. On Tarawera Farm, the land was controlled by the Department of Lands and Survey, which did nothing. The rest of Tarawera was controlled by the Forest Service, which likewise did nothing. Unlike the NZBC power line, the 220-kilovolt line was not a matter taken before the Maori Land Court. The Department of Maori Affairs took no interest. The Maori Trustee, who had powers under the Public Works Act 1928 to negotiate compensation, was not asked to get involved and did not take any initiative. The Electricity Department did not pursue the matter. The trustees were unaware of their rights and had limited powers anyway. The whole matter lapsed.

16.3.5 Efforts to claim compensation in the 1980s

By the early 1980s, the trustees were more experienced, and as exotic forests were developed, the restriction on planting under the 220-kilovolt line became an issue. On 21 June 1982, Lyndhurst O’Donnell wrote to the Minister of Energy, William Birch, seeking compensation for the loss of production in the protection strip along the power line on the Pohokura 3B, Pohokura 7A, and Tataraka blocks. The Minister’s response was that the claim was outside the six-year statutory limit in the Public Works Act 1928 and therefore could not be considered. An Electricity Department file note in 1982 explained:

We have considered the possibility of an ‘*ex gratia*’ payment in another case, some years ago. That case was similar, except that there had been some difficulty in establishing the legal owners, and the District Maori Trustee had not helped enough.

As it turned out, although we agreed to do this, and the Crown Law Office had raised the suggestion in the first place, the fact that the Crown Law Office had confirmed that the claim was ‘statute-barred and no legal liability on the Crown’ caused Treasury to not allow the payment.

There have been other cases of claims not being made within the time limit, and, in each case, we have had to refuse payment.

17. Document R9, p 5

18. Document T53, p 2

We are attempting to avoid these in future by ensuring that districts follow up all line construction and nudge owners into making a claim. If there is still no claim made, we at least ensure that there is documentary evidence of having tried.¹⁹

The Pohokura trustees enlisted the aid of their member of Parliament, Dr Peter Tapsell, who wrote to Birch in December 1983 asking for further consideration of this ‘extremely important matter’ and commenting:

I would have expected the Electricity Department to not only be fair, but to quite clearly be seen to be fair in matters such as this, for if [Maori] are to be denied their fair compensation by virtue of a technicality in the law, then clearly the confidence of Maori land owning groups will be undermined and in fact severely damaged by what can only seem as a grave injustice. You are aware I am sure that many of the trustees of blocks of Maori land are unskilled in the legal technicalities of making submissions, objections etc and it would certainly seem to me as grossly unjust if their inexperience is to be used against the trustees in such a way as to be a detriment to the beneficiaries.²⁰

A response was drafted by what was then the Electricity Division of the Ministry of Energy and sent to Tapsell by the Acting Minister of Energy, Hugh Templeton. This explained the six-year limitation under the Public Works Act 1981 and added a further comment:

Discussions were held with the trustees on the effect of the line on the land and land to be excluded from future planting was identified and marked out. Compensation was paid for the loss of trees felled at the time but not recoverable because of inaccessibility to transport. Compensation was not requested for loss of land for forestry and this was considered normal as most owners regarded the line clearings to be useful as fire-breaks and did not claim for this loss.²¹

Apart from being a piece of retrospective rationalisation, this statement was inaccurate. First, the letter was written in response to one from the Pohokura trustees, but in 1973 there was no trust in place on the Pohokura blocks. Secondly, the Tataraaakina ‘agreement’ is cited, but this was in respect of Tataraaakina only, not Pohokura. Thirdly, it is not clear who regarded the lack of a request for compensation as ‘normal’. Fletchers, for example, sought compensation where its forests were involved, as did farmers. Mr Sullivan told the Tribunal: ‘The felling of millable native trees and leaving a “swathe” of exposed clearing along the pylon path only exacerbated infestation of noxious plants like gorse, pampas, blackberry and created an unwanted fire risk path.’²²

19. B E Thomas, filenote, 20 July 1982 (doc T16, app 3)

20. Tapsell to Birch, 1 December 1983 (doc T16, app 3)

21. Templeton to Tapsell, 17 January 1984 (doc T16, app 3)

22. Document T54, p 4

The failure of the Electricity Department to pay compensation for the 220-kilovolt line is a festering grievance which has been inherited by TransPower. In 1993, when representatives of Powermark New Zealand Limited, the company contracted to do maintenance work on the line, requested permission to enter the block, this was refused by the Tataraaikina trustees. Although, as the secretary of the Tataraaikina Incorporation explained, TransPower and its agents did have the power to enter the land, 'recent requests . . . to consent to entry have been declined/ignored', because the 'current Trustees' did not wish to be seen to be supporting what they considered to be an 'unfair situation'.²³

16.3.6 Use of the protection strips

There are ongoing issues for any owner of land over which power lines have been constructed, whether compensation has been received or not. These issues include the restrictions placed on the use of the land and the height of any vegetation within the protection strip along the route of the line. These restrictions are particularly onerous for owners of land planted in indigenous exotic forest. There are also ongoing issues around the allowing of regular access for maintenance, and they in turn raise questions about contributing to the maintenance of Maori roads used by maintenance workers, and the landowners' responsibilities in maintaining the height of vegetation at a safe distance from power lines in such a rugged and remote landscape as the Tarawera, Tataraaikina, and Pohokura blocks.

The economic losses to landowners in an area of potential exotic forestry development can be significant. The secretary of Opepe Administration Services calculated that the 220-kilovolt line traversed approximately 20 kilometres of the large Tataraaikina block and that most of the land along this route was 'suitable for pine forestry'. Allowing for the 55.5-metre protection strip, this means that about 111 hectares cannot be used for forestry. The secretary estimated that, on a 30-year rotation and a net return of \$40,000 per hectare, this represented a loss of some \$4.44 million per rotation. (The smaller NZBC line, for which the protection strip along four kilometres amounted to about 9.2 hectares, was not included in this calculation.) The secretary concluded with the comment that, while much of Tataraaikina was 'unsuitable for economic development', it was 'unfortunate that the power transmission lines on the property cross over what can be termed as the developable land on the block'.²⁴ We are in no position to assess these figures, but we agree with Heitia Hiha, one of the trustees of Tataraaikina, who noted: 'The economic loss from not being able to plant exotic forest is significant.'²⁵

There are also ongoing issues concerning the landowners' obligations, responsibilities, and liabilities with regard to preventing trees growing into power lines and causing damage

23. Secretary, Tataraaikina Incorporation, to TransPower New Zealand Ltd, 16 August 1994 (doc T16, app 3(8))

24. Document T53(a)

25. Document T53, p3

(including the damage caused by ‘flashovers’ where the trees concerned were not touching the lines). Boast commented that it may seem strange that landowners should have any duties or responsibilities for the maintenance of power pylons and lines on or over their property:

The transmission line is a kind of easement and generally in law the possessors of a servient tenement are not expected to maintain the easement in any manner for the benefit of the owners of the easement, although obviously they may not intentionally or negligently cause damage to it.²⁶

So far as we know, the relative liabilities and responsibilities of TransPower and landowners toward the maintenance of power lines over their land have not been resolved or clarified. Mr Hiha summed up the response of the Maori landowners of the Tataraaikina and Tarawera blocks:

Now, there are moves to make land owners responsible for keeping the transmission line paths clear and to make them responsible for any damage to the towers and lines. The land for the transmission lines has been virtually confiscated from them anew but now they are to become responsible for their safety. Is this justice?²⁷

16.4 LEGAL SUBMISSIONS

16.4.1 Claimant submissions

Counsel for Wai 299 noted that, at the time that the wayleave notice was delivered to the five representatives of the Tarawera and Tataraaikina owners, much of the forest land was in the control of the Forest Service, and the farm area was controlled by the Departments of Maori Affairs and Lands and Survey. ‘The Trusts believe that the Crown agencies did not act in the best interests of the Trusts and their land owners.’ Counsel also submitted that the wayleave notice was ‘insufficiently clear’ and did not adequately inform the landowners of their rights:

The procedure used for notifying land owners and dealing with compensation was minimalist, and more suited to the convenience of the Electricity Department than to land owners. Land owners were not told that if they failed to claim compensation within the time limits specified in the Public Works Act they would miss out.²⁸

Counsel also noted that the Crown had not challenged the evidence submitted, nor had it produced any other relevant evidence. Counsel concluded that the Crown had ‘failed in its duty under the Treaty’ by acquiring an effective easement over Maori land without obtaining

26. Document T16, p 22

27. Document T53, p 3

28. Document X39, p 109

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the consent of, or consulting with, the owners, had failed to advise those owners fully on their rights to compensation, and had imposed obligations and conditions which restricted their use of, and potential income from, the land affected.²⁹

16.4.2 Crown submissions

Crown counsel did not dispute the evidence presented, but he submitted that the Tribunal had before it only a 'comparatively small body of evidence of what occurred'. Therefore, the claimants relied on legal submissions concerning both the effect of the legislation in force at the time of the construction of the transmission line and 'what the principles of the Treaty of Waitangi require of the Crown in setting out to make use of any land for public purposes'.³⁰ Counsel submitted: 'The law governing the activities of NZED in relation to construction of this transmission line appears to have been complied with.' Compensation was available, but it was not claimed within the period stipulated and was in any case limited; it did not cover the 'consequential economic loss asserted on behalf of [the] claimants'.³¹ However, counsel conceded that no evidence had been put before the Tribunal to show that Crown officials had explained the limitation period to the owners or had assisted them in making a claim for compensation. Counsel concluded: 'the form of tenure used amounts to a statutory easement. Ownership of the land was retained by Maori.'³²

16.4.3 Claimant submissions in reply

Counsel for Wai 299 made no submissions in reply relating to the transmission line grievance.

16.5 TRIBUNAL COMMENT

In other inquiries, the Tribunal has commented at some length on the use of public works legislation to take Maori land, with the consent of or in consultation with the owners.³³ However, all these reports were concerned with land that was taken and with title that was transferred to the Crown. The construction of a transmission line under the Electricity Act 1968 was, in effect, a compulsory taking of a statutory easement, and it also imposed certain

29. Document x39, p111

30. Document x52, pp15-16

31. Ibid, pp18-19

32. Ibid, p19

33. See Waitangi Tribunal, *Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995); Waitangi Tribunal, *Te Maunga Railways Land Report* (Wellington: Brooker's Ltd, 1994); and Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker's Ltd, 1995)

obligations and responsibilities on the landowner who retained the underlying title. We note that TransPower has operated under a different regime since 1992, but there are still ongoing restrictions on the use that owners can make of the protection strip. The effect is similar to a taking of the land but with an additional burden on the landowner.

It is not just Maori landowners who have felt unfairly imposed upon by the construction of transmission lines. For Maori owners of the Tarawera and Tataraaakina blocks, however, this further ‘confiscation’ of their ancestral land has created an ongoing grievance and has exacerbated the Crown’s failure to consult with them or to pay any compensation. The several Tribunals referred to above concluded that for the Crown to take Maori land for public works without obtaining the consent of the owners was a breach of its fiduciary obligation to act on the guarantees of protection in articles 2 and 3 of the Treaty. The Tribunals similarly criticised the Crown’s failure to consult with the landowners about alternatives to the takings and its failure to preserve an economic base for those Maori by preserving adequate land resources.

16.6 FINDINGS

We find that the Crown, in its construction of the 220-kilovolt transmission line over the Tarawera and Tataraaakina blocks (and over Pohokura, which, although it lies outside our inquiry district, has some of the same owners), breached the principles of the Treaty of Waitangi. We find that the Maori owners of those blocks were prejudiced thereby.

More specifically, we find that:

- (a) The provisions of the Electricity Act 1968 in respect of the construction of transmission lines were draconian. The Crown, in effect, could and did enter the Tarawera and Tataraaakina blocks for the purpose of surveying and constructing a transmission line without the consent of the owners. Furthermore, it had no obligation to consult with them. This breached the principles of reciprocity and partnership and the duty of consultation.
- (b) At the time of entry, there was no effective Maori governance of the blocks, and no effort appears to have been made by Electricity Department officials to ensure that the new and inexperienced trustees were aware of their rights to compensation. By so doing, the Crown breached its duty of active protection.
- (c) Several Government departments – Maori Affairs, Lands and Survey, and the Forest Service – were specifically involved with these lands, but no evidence has been found to indicate that they made any effort to ensure that the owners submitted claims for compensation. The public works legislation in force at the time did not require the Maori Trustee to act to protect owners’ interests where land was multiply owned and vested in trustees or in a Maori incorporation. It should have. Once again, this breached the Crown’s protective obligations towards Maori.

- (d) Even when the Electricity Department was prepared to offer the Maori owners an ex gratia payment, their plea for compensation in 1982 being by then statute-barred, the Treasury opposed such a payment. This was a very narrow, legalistic interpretation of draconian legislation and it failed totally to appreciate the dimensions of this Maori grievance. It was out of keeping with the partnership inherent in the Treaty and represented a failure by the Crown to act reasonably and in good faith.
- (e) The failure of Electricity Department officials to consult with the Maori owners when planning the route of the 220-kilovolt transmission line meant that there was no consideration given to the protection of wahi tapu along the route. This further breached the Crown's duties of active protection and consultation.
- (f) The restrictions on tree height in the protection strip along the transmission line effectively removed a substantial area from actual and potential commercial forestry production in a rugged district where there is little land for viable economic development. In this regard, the Crown has been in breach of the principle of mutual benefit and the Maori right to development.