

## CHAPTER 17

### PUBLIC WORKS ACQUISITIONS IN THE TARAWERA TOWNSHIP

#### 17.1 INTRODUCTION

The Wai 639 claim was filed in November 1996 by Nigel Baker on behalf of the descendants of Pane Te Kanga, an original owner of the Tarawera and Tataraka blocks under the 1870 Mohaka–Waikare agreement. It concerns the Ministry of Works’ acquisition of whanau lands in the Tarawera township on the Napier to Taupo highway in the 1970s. Prior to its hearing, the Crown objected to the inclusion of this claim in the Mohaka ki Ahuriri inquiry, arguing that it had in fact already been settled in 1995. Crown counsel invited the Tribunal to decline to inquire into the claim under section 7 of the Treaty of Waitangi Act 1975 on the basis that an adequate remedy already existed: namely, the 1995 settlement. We decided, however, to proceed to hear the claim and to issue our findings on its status in our report. In this chapter, we outline the historical subject matter of the grievance and the context of the Crown’s objection and comment on both.

#### 17.2 HISTORICAL BACKGROUND

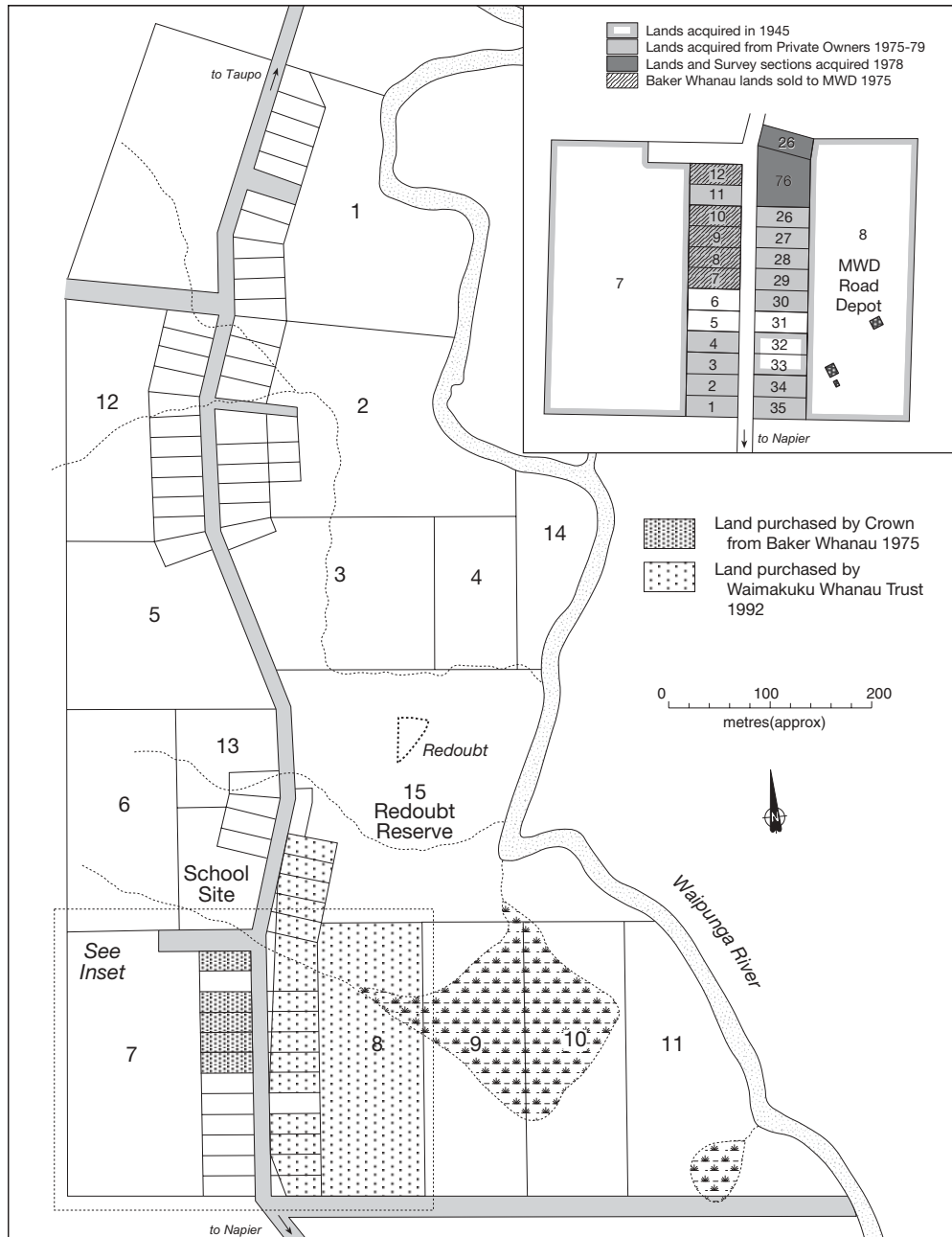
The Tribunal commissioned a research report into the matters raised in the Wai 639 claim from staff member Richard Moorsom. The result was ‘Raupatu and the Paper Township: Takings for the Tarawera Road Depot’, which we relied upon for the following narrative.<sup>1</sup>

The lands subject to the Wai 639 claim are located at Tarawera, a small locality inland of Te Haroto on the Napier to Taupo highway. Tarawera sits in the valley of the middle Waipunga River and was the site of Ngati Hineuru settlement and cultivation when the missionary Colenso visited it in the late 1840s. It lay along the track of a major communications route between the interior and the sea. After the land was confiscated in 1867, the Crown chose to keep 2000 acres of land along this ‘corridor’ to secure what became a key strategic communications route in the unsettled period of the late 1860s and early 1870s. In doing so, the Crown kept the majority of the low-lying land in the vicinity and, with it, the majority of Ngati Hineuru’s settlements and cultivations.<sup>2</sup>

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1. Document R10

2. Ibid, pp3–4



Map 57: The Tarawera township; inset, Ministry of Works and Development acquisitions

In the early 1870s, Tarawera was a 'hive of activity', and in 1873 the Crown laid out a small township with 69 town and 12 suburban sections (map 57). However, as Moorsom put it, the township was 'stillborn', with road construction work quickly completed and the resident garrison being reduced and then completely withdrawn in the years after the campaign against Te Kooti ended in 1872. Land within the Crown block was let for sheep farming, but this activity had all but ceased by 1920, leaving the area virtually devoid of permanent

occupants. The advent of native timber milling in the wider district from 1936 saw an influx of people to the township, but with the exhaustion of this resource in the early 1970s, a second rapid exodus occurred.<sup>3</sup>

Throughout this time, however, the Government employed workers to undertake routine maintenance of the Napier to Taupo road. These men lived in cottages placed along the highway, several of which were located at the Tarawera township. Owing to a period of major road reconstruction in the area in the 1960s, the Tarawera road camp was expanded, and, by 1964, it included three houses and 12 single men's huts. In the late 1960s, with the major road works completed, Ministry of Works officials favoured retaining a camp at Tarawera because of what they saw as the likely ongoing need for local road maintenance. Thus, the camp and its facilities continued to be gradually expanded and upgraded into the 1970s, and, by late 1974, the Ministry had made plans to utilise more of the flat land surrounding the camp for 'depot development'.<sup>4</sup>

In 1969, Ministry officials had come to realise that some of the Tarawera camp encroached on surrounding, privately owned sections. In fact, the ownership pattern in the township in 1974 was, according to Moorsom, a 'patchwork mix of public and private titles'. The encroachments did not overly concern officials at the time, but in late 1973 the private sale of a section adjoining the depot entrance bothered the resident engineer, who thought that it might stimulate people's interest in purchasing land in the area. 'If this trend continues,' he wrote, 'we may well be placed in an embarrassing situation by having to vacate part of our depot. Also we may have to pay considerably higher prices for land which had token value only.'<sup>5</sup> The engineer thus recommended that a purchasing programme be urgently commenced with the aim of expanding the land assigned to the depot from 16.7 to 28 acres, thus forming a rectangular block straddling the highway at the southern end of the paper township. Moorsom observed that the proposed expansion 'went well beyond the immediate need to secure the existing encroachments'.<sup>6</sup>

In the Ministry's purchase zone on the eastern and western sides of the highway, there were 22 town sections (designated 'T') divided amongst 13 separate private owners (map 57). The sections on the western side included five owned by Baker whanau members: sections T7 to T10 (owned by Thomas Henry Baker) and section T12 (owned by Winnie Baker). Together, they totalled 1.25 acres.<sup>7</sup> In September 1974, the Valuation Department assessed the land values of the 22 sections as low, taking no account, according to Moorsom, 'of the private buying interest in the land which had prompted Works to take the initiative'. After a lapse in momentum, the Ministry wrote to half a dozen landowners in March 1975 asking if they would be prepared to sell their sections, since 'the Crown is desirous of acquiring additional

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3. Document R10, pp 4-5

4. Ibid, pp 5-7

5. Resident engineer to district property officer, 22 July 1974 (as quoted in doc R10, p 11)

6. Document R10, pp 9-12

7. Ibid, p 9



Fig 33: The Tarawera Hotel and stockade, circa 1880. Photograph by Herbert Deveril.  
Reproduced courtesy of Alexander Turnbull Library, Wellington, New Zealand (F-2671-¼).

land for the Ministry's Depot at Tarawera'. Other owners were approached later – either in person or by letter – and the majority of the sections were sold, apparently willingly, by early 1976.<sup>8</sup>

The Baker whanau sections were all purchased by the end of 1975. Sections T7 to T10 were sold by Thomas Baker for \$400, plus \$20 towards his legal costs, which represented a slight increase on the valuation of \$380. Winnie Baker sold section T12 at roughly the same time for \$115, plus \$20 towards her legal costs (again, a slight improvement on the valuation of \$100). It seems that Thomas was not written to first and that the negotiation to sell sections T7 to T10 was carried out face-to-face. Winnie was sent a letter, but since no reply appears on file and since she signed the sale agreement in the presence of the land purchase officer five days after Thomas had, Moorsom concluded that the sale of T12 was also negotiated verbally.<sup>9</sup>

At this point, it is worth noting how long the sections had been in the possession of the Baker whanau. Thomas Baker had bought sections T7 to T10 privately in 1967, while Thomas Baker senior had purchased T11 and T12 in 1936. Winnie Baker had inherited these latter two sections in 1957, and while she kept T12, she sold T11 within two months.<sup>10</sup> As Moorsom observed, the 1936 purchase probably related to events described in chapter 10 of this report: 'The purchase may well have formed part of the Baker whanau's survival strategy.' The repartitioning of the Tarawera block in 1927 and 1928 'drastically reduced the whanau's stake'

8. Document R10, pp 13–16

9. Ibid, pp 16–17

10. Ibid

in Tarawera 5A, which lay to the south of the Tarawera township.<sup>11</sup> The Baker whanau's loss of Tarawera 5A was, inter alia, the subject of the 1995 settlement with the Crown that Crown counsel contended also settled the Wai 639 claim. We return to this in detail below.

In addition to the sales made with the agreement of the section owners, the Ministry of Works also pursued a couple of unwilling sellers for some time in the late 1970s before essentially giving up.<sup>12</sup> One further section was in fact taken by compulsory acquisition, but only because no current owner could be found.<sup>13</sup> Already by March 1976, however, some Ministry officials were questioning why such a large area was needed for the depot and overseer's house. A district planning staff member made the point that, while a full 20 acres had been acquired, only half of this area was in fact to be designated for the depot and housing. The district planning officer concurred and suggested that the land purchasing should stop, 'until we know what we are buying all this land for. I can't see any justification for this from the operational and planning points of view.' Despite this, the purchasing continued as before, with one of the aforementioned unwilling owners being pursued, even though the sections concerned (T5 and T6) were on the western side of the road and thus outside the designated depot area.<sup>14</sup>

### 17.3 THE NATURE OF THE CLAIM

The Wai 639 claimants listed a number of 'specific grievances' that they say constituted breaches of Treaty principles, namely:

- that the 1975 acquisitions were not 'essential' as claimed in that operations ceased just sixteen years later
- that the Baker whanau suffered discrimination in that its lands were taken and not others
- that on the cessation of Ministry of Works operations at Tarawera the sum sought as part of the offer back provisions (\$220,000) under s40 of the Public Works Act was grossly inflated
- that the Baker whanau has lost this land on three separate occasions; through confiscation in 1866 [*sic*], through the ratification of the Maori Land Claims and Maori Lands Adjustment Act 1929 [*sic*]; and through the 1975 Public Works acquisition.

The claimants explained that, when Works Consultancy Services advised them in 1991 that the now-closed depot site was available for repurchase, 'it was concurrently being marketed vigorously'. As a result, they stated that the property was bought by them (in the form of the

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11. Ibid, p 16, n 50

12. Ibid, pp 19–20

13. Ibid, pp 20–21

14. Ibid, pp 23–25

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Waimakuku Whanau Trust and with Te Puni Kokiri mortgage assistance) ‘under pressure’. In compensation, the claimants sought, among other things, the writing-off of the mortgage (which had since been transferred to the Housing Corporation of New Zealand).<sup>15</sup>

The Wai 639 statement of claim then went on to argue why the claim was unaffected by the 1995 settlement with the Crown. We return to this below.

#### 17.4 LEGAL SUBMISSIONS ON THE PUBLIC WORKS ACQUISITIONS

##### 17.4.1 Claimant Submissions

In closing submissions, claimant counsel focused heavily on the issue of the 1995 settlement. Again, we address this below. But he also reiterated the concerns outlined above from the statement of claim, adding that the claimants:

should never have been put in the position of having to purchase land back firstly because the land should never have been taken in the first place and secondly because once the land was no longer used for the purpose for which it was taken it should have been returned at cost or even at no cost.

The claimants contend that they have been put to enormous expense due to Crown inaction and should be reimbursed.<sup>16</sup>

Counsel also made some more general submissions on the Public Works Act 1928, which was in force at the time that the Baker land was purchased in the 1970s. He argued that the purchases were ‘illegal in terms of the Public Works legislation as they were not required for an essential purpose’. He made this statement despite acknowledging that ‘the element of essentiality later purported [*sic*] into the Public Works Act 1981 was not present in the 1928 legislation’. However, he submitted that ‘that principle is the basis of the legislation’.<sup>17</sup>

##### 17.4.2 Crown submissions

In making its closing submissions on the Wai 639 claim, the Crown would only reiterate its view that the claim had already been settled.<sup>18</sup> Crown counsel did, however, make some more general comments on public works takings. Counsel submitted that five matters in particular needed to be considered by the Tribunal in assessing public works takings (see also sec 15.5.2):

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15. Claim 1.52, p 2

16. Document x37, p 9

17. Ibid, pp 10–11

18. Document x52, pp 7–8

- ▶ Was there compensation?
- ▶ Was there consultation?
- ▶ Were other sites considered?
- ▶ Were alternative forms of tenure considered?
- ▶ Were the owners left with sufficient lands for their present and reasonably foreseeable future needs?

Counsel conceded that Treaty breaches could occur if the Crown failed to offer surplus lands back to the former Maori owners or their descendants. However, he added that he had seen no convincing evidence before this Tribunal 'establishing that land has been improperly retained'. While counsel noted that some of the claimants had been critical that land had been offered back at its market value, he submitted that it was appropriate that the value of any improvements should be included in the offer-back price, since 'Improvements and added value to land held for public works have generally been created by the capital and energies of the whole community through public ownership.' He noted the Crown's discretion to offer land back at less than market value but added that 'there is insufficient evidence for the Tribunal to make findings that the claimants are unable in fact to respond to offer back opportunities'.<sup>19</sup> In conclusion, counsel endorsed the observation of the Tribunal in the *Ngai Tahu Ancillary Claims Report 1995* that 'the circumstances of each case need to be considered in order to come to any conclusions with regard to a breach of Treaty principles'.<sup>20</sup>

#### 17.4.3 Claimant submissions in reply

In reply, claimant counsel noted that the Crown had not made any submissions on the detail of the Wai 639 claim but had made general submissions on public works claims in the inquiry. Counsel argued that the relevant issues mentioned by Crown counsel, such as the consideration of alternative sites and the adequacy of compensation, were indeed key issues in the Wai 639 claim. Additionally – and in contradiction of the references to a section 40 offer back made in the Wai 639 statement of claim – counsel submitted that:

It . . . is clear that there was no offer back made of land taken in this case and indeed the evidence is that the former owners through their living representatives had to form a vehicle to purchase that land as it became available and entered into negotiation with the Crown's agencies to fix a purchase price just as any purchaser would have done. No favourite status or favoured purchase terms were offered to the purchasers who, the evidence shows, had to obtain mortgage finance to secure what they saw as their own land.<sup>21</sup>

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19. Ibid, pp 11, 14–15

20. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker's Ltd, 1995), p 363 (doc x52, p15)

21. Document v7, p 36

**17.5 TRIBUNAL COMMENT**

The following comment is offered for the sake of completeness and has no bearing on the findings we make below on the extent to which the Wai 639 claim has already been settled:

- (a) It is clear that the Ministry of Works purchased more land than it needed for its depot at Tarawera. Furthermore, its overall rationale for acquiring the land seems to have been muddled. Originally, it made the somewhat dubious assertion that it was tidying up its encroachments and keeping one step ahead of a potentially growing market interest in the area. Later, it said that it needed to buy land which officials soon pointed out was in excess of its requirements.
- (b) It is also correct that the true market value of the land may not have been considered by the Valuation Department at the time and that the valuations may therefore have been somewhat on the low side.
- (c) The charge that the ‘takings’ were not ‘essential’ has largely been covered in point (a) above, particularly as it relates to the Baker sections on the western side of the road. A wider issue here seems to be whether other forms of tenure – such as a lease – should have been considered, but this argument was not raised by the claimants. Certainly, the Tribunal elsewhere has expressed the view that alternative forms of tenure should have been contemplated before the land was permanently alienated.
- (d) Altogether, however, these matters should be weighed against a number of other considerations when assessing the scale of any breach. For a start, other Tribunals have stressed that Maori land should be acquired for public works only as a last resort, but here the sections were all general land. Maori title to the Tarawera sections ceased with their confiscation in 1867, when the whole township became Crown land. The Baker sections were purchased by whanau members privately in the twentieth century. We agree that it is likely that Thomas Baker senior’s purchase of sections T11 and T12 in 1936 possibly stemmed from the then-recent loss of the Baker whanau’s interests in Tarawera 5A, but it strikes us that this cannot be a consideration in Wai 639, since it was the very subject of the 1995 Baker whanau settlement (see below).
- (e) In that context, we should add that the statement of claim and the closing submissions of claimant counsel are indeed incorrect, as Crown counsel observed, in arguing that the land was ‘lost by the whanau on three separate occasions’ (namely, through the confiscation, through the Native Land Court, and through the public works acquisition).<sup>22</sup> After the confiscation, the Native Land Court (and, later, the Maori Land Court) never held jurisdiction over the land in the Tarawera township.
- (f) Our tentative conclusion, for the matter was not argued before us, is that an acquisition of general land owned by a Maori individual does not fall into a significantly different category from an acquisition of general land owned by a Pakeha, particularly when the two acquisitions occur alongside each other on the same terms. The

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22. Document x52, p 7, n 12; see also doc x37, p 7; claim 1.52, p 2

original Maori ownership of the township land had long since ended, and while a serious grievance over the confiscation exists (which we have discussed elsewhere), the loss of the land in the 1970s is quite another matter. The situation reminds us of the findings of the Tribunal in its *Report on the Mangonui Sewerage Claim* of 1988. There, Ngati Kahu objected to the siting of a sewage treatment plant on land which had originally been alienated from them long before but which they had recently reacquired from a Pakeha farmer. The works had been proposed for some time, however, and in this context the Tribunal observed:

The principles of the Treaty require that planning should have regard to the retention of lands in Maori ownership especially, as here, where insufficient land reserves were made. In this case however the Maori owned land affected by the scheme was acquired after the works were proposed and any contest on its compulsory acquisition should be judged on the law as it stands.<sup>23</sup>

Obviously, the Tarawera township context is quite different: the works had not been proposed when the sections were acquired and T12, in particular, had been with a member of the Baker whanau since 1936. However, we believe an important point emerges from the *Mangonui* example: namely, that the simple fact that land is owned by Maori is not the only matter that should be considered when assessing public works grievances. The fact that the land may have been reacquired by Maori and the circumstances of any such reacquisition also need to be borne in mind.

- (g) We feel bound to make the distinction between Maori land and general land because the 1995 settlement compensated the Baker whanau for the loss of their neighbouring Maori land. Furthermore, there seems to us to be no evidence that there was any discrimination against the Baker whanau in the Ministry of Works' acquisition programme. Maori and Pakeha owners of the general land purchased were treated without distinction, with the possible exception of the approaches to Pakeha landowners all being in writing (although Winnie Baker was initially approached by letter). Indeed, the owners who refused to sell were Pakeha, and, as Moorsom observed, ultimately the Ministry 'did not want the land badly enough to force through compulsory purchases'. Moorsom added that there was 'no evidence of soft-peddalling by officials on the grounds that the reluctant owners were probably Pakeha'.<sup>24</sup>
- (h) Although it is clear from the evidence, we feel obliged to reiterate that these were not compulsory acquisitions and that the claimants are technically wrong to characterise them as 'takings'. On the face of it, and without firm evidence to the contrary, it seems that the sales were willingly entered into. As we have seen, where two owners refused

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23. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 61

24. Document R10, p 27

to sell, the Ministry pursued them but ultimately gave up. Nigel Baker alleged that his family had been coerced into selling and had felt that they had no other option. We are not in a position to make a categorical finding on this allegation, and we agree with Moorsom that the lack of a written record of the negotiations with the Maori owners leaves a gap in our knowledge.

- (i) Some confusion exists about the section 40 offer-back provisions of the Public Works Act 1981. The claimants referred to an 'offer back' having taken place but counsel objected that it had not in fact occurred. On our understanding, the reality is that the offer-back provisions of the Act are activated only where works that were compulsorily acquired become surplus. The Crown is under no statutory obligation to offer back land acquired on a 'willing buyer, willing seller' basis. (To add further to the confusion, recital 7 of the 1995 deed of settlement referred to the depot site having been purchased by the claimants 'pursuant to the offer back provisions of the Public Works Act 1981'.<sup>25</sup>)
- (j) Furthermore, the claimants did not adequately explain which particular properties they had reacquired and how these related to the land that they had sold in the 1970s. We understand that the Waimakuku Whanau Trust, which represented Baker whanau interests, purchased the depot property in 1992 for \$220,000. This property comprised all the land east of the Napier to Taupo highway that the Ministry had acquired for the Crown and covered just under four hectares.<sup>26</sup> There were no Ministry structures on the western side of the road where the Baker whanau sections were located. We presume that the high price for the depot land on the eastern side reflected the quality of the Ministry's improvements. In those circumstances, it is not really open to the claimants to state that they paid \$220,000 reacquiring what they had lost in the 1970s. Clearly, the 1992 purchase would have included lands bought by the Crown from other private owners in the 1970s on the eastern side. We presume that these owners or their descendants were not 'offered back' the land either.
- (k) Nigel Baker said that 10 properties 'adjoining' the depot complex were repurchased by the Baker whanau in 1991 for 'an average of (\$500) Five hundred dollars each'. He added that they had originally been purchased from the family for \$135 each. Even if these properties included the sections on the western side of the highway that had been bought from the Baker whanau in the 1970s, no Baker land was included in the depot site on the eastern side of the highway, which had been bought for \$220,000 and was subject to the mortgage to HCNZ. Mr Baker added that in 1994, as well as the old Tatarakina mill site, his family had purchased township sections 1, 2, 3, and 4 from Landcorp, in each case purchasing the land as the Waimakuku Whanau Trust.<sup>27</sup>

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25. Paper 2.135(a)

26. Certificate of title, Hawke's Bay registry, P1/543

27. Document X37, p 8; doc R32, pp 5-6

(Counsel added that the land was bought for a total price of \$2810.). Again, it was not at all clear to us how these lands related to the original Baker whanau sections T7 to T10 and T12. Mr Baker asked for all these recent purchase expenses to be reimbursed (including the large mortgage for the depot purchase being written off), but the grounds for these requests were not made clear to us.

- (1) Finally, we need make mention of claimant counsel's assertion that the purchases in the 1970s were 'illegal' under the Public Works Act 1928 because the land acquired was not essential for the work in question (even though references to actual takings needing to be 'essential' did not enter the public works legislation until 1981). First, on the strict matter of legality, we think that counsel's concession that the concept of 'essentiality' did not enter the legislation until 1981 speaks for itself. Secondly, we think it rather odd that any sales by ostensibly willing agreement should be labelled 'illegal'.

In sum, therefore, we have identified a grievance with respect to:

- ▶ the excessive amount of land acquired by the Ministry of Works in the 1970s;
- ▶ the suggestion that the valuations in 1974 seem to have taken no account of the then-current market; and
- ▶ the failure of the Ministry to consider acquiring leasehold rather than freehold tenure.

It remains for us then to assess whether Wai 639 has in fact already been settled as part of the 1995 settlement.

#### 17.6 THE 1995 SETTLEMENT

The Wai 147 claim was filed with the Tribunal in May 1990 by Henry Baker and his son Nigel Baker. It alleged grievances with respect to the Baker whanau's loss of the Tarawera 5A block between 1929 and 1970 during the title disruption that we outlined in chapter 10. In 1992, the claimants sought to negotiate their claim directly with the Crown. Then, in October 1994, as the Waimakuku Whanau Trust, Nigel Baker and other Baker whanau members put in a further claim, Wai 491. This concerned Tatarakina 2A, which was lost at the same time as Tarawera 5A. The claimants described themselves as 'the descendants of Rihi Nene', who had been the owner of Tatarakina 2A and Tarawera 5A up until her death several years before the lands were lost.<sup>28</sup> The Wai 491 claimants sought compensation for the loss of Tatarakina 2A and the reinstatement of themselves to the title to the land. Presumably because of the subject matter of the Wai 147 claim, the claimants did not seek redress for the loss of Tarawera 5A.

We should explain at this point that Rihi Nene, of Ngati Hineuru, was the second wife of Thomas Baker, who was of Ngati Raukawa. Nigel Baker and other whanau members descend from Thomas and his first wife, Parai Rotohiko, of Tuhoe. Thus, while they do not actually descend directly from Rihi Nene, their forebears nevertheless succeeded to her interests in

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28. According to the claimants, Rihi Nene died in 1923: see claim 1.54, p 2.



Tataraakina and Tarawera 5A.<sup>29</sup> Rihi was the daughter of Tamahou, the first cousin of Pane Te Kanga, whom the Wai 639 claimants say they are descended from (see fig 34).

In May 1995, Cabinet agreed to accept the Wai 147 claim for direct negotiation and authorised the Minister in Charge of Treaty of Waitangi Negotiations to conclude a settlement. As an aside, we presume that this was one of the last occasions when such an individual whanau claim was accepted for direct negotiation by the Crown. Crown policy for some years now has been to conclude settlements with 'large natural groupings' only, and the Baker whanau would currently not meet this requirement.

All that we know about the negotiated settlement is contained in the words of the deed of agreement itself, which was signed by representatives of the Crown and the Waimakuku Whanau Trust on 20 December 1995.<sup>30</sup> It was noted that the claimants had a grievance concerning the loss without compensation, for 41 years, of Tarawera 5A. The Crown expressed regret for this. It was further noted that 'The Trust also has an interest in Wai 491, a claim to Tataraakina Block (No 2).' (It is altogether unclear to us what was meant by the trust having an 'interest' in Wai 491, since trust members and the trust itself were the only named claimants.) In any event, the deed clarified just whom the trust represented:

The Trust confirms that it is the legitimate representative of the descendants of Thomas Baker (whose three children, Robert, Mary and William Baker inherited interests in the land from their step mother, Rihi Nene) and that it has the mandate from those people it represents to agree to this settlement on their behalf and enters into this Deed with their full authority, knowledge and blessing.

An important section of the deed contained the recitals relating to the HCNZ mortgage. It was noted that the trust had purchased the depot property in 1992 with a loan from the Iwi Transition Agency, and that the loan had been transferred to HCNZ in 1993. Because the trust's mortgage repayments were in arrears, the deed noted that HCNZ wished to call up the loan and have the large part of the settlement moneys deducted for this purpose. It was then noted that the trust had advised the Crown's negotiators that there was 'a dispute regarding the quantum to be paid to HCNZ' and that the trust had stated that 'a condition of settlement is that the settlement of [its] claim is kept separate from [its] dispute with HCNZ and the Crown agrees to this condition'.

As a result, under the principal agreement:

- ▶ the Crown would apologise for breaching the principles of the Treaty of Waitangi;
- ▶ the settlement would be kept separate from any issues relating to the HCNZ loan to the trust;
- ▶ no deductions would be made from the ex gratia sum; and
- ▶ the trust would be paid \$375,000.

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29. See doc R32; paper 2.135(a)

30. Paper 2.135(a)

17.7

Of vital importance to our current deliberations was also the following recital in the operative part of the agreement:

This Deed constitutes the entire agreement between the parties and will form the full and final settlement between the Crown and the Trust of all the Trust's Treaty of Waitangi claims, however arising, including settlement of Wai 147 and of the Trust's interests in Wai 491. The claimants agree that this settles all aspects of their claims including costs, legal or otherwise.

Shortly afterwards, in February 1996, Crown and claimant counsel filed a joint memorandum with the Tribunal briefly detailing the settlement and asking that the Tribunal's claim register be amended with respect to both Wai 147 and Wai 491 to record this.<sup>31</sup>

### 17.7 THE FILING OF WAI 639 ET AL AND THE CROWN'S OBJECTION

On the face of it, therefore, it would seem that the deed settled all of the Treaty claims of the Waimakuku Whanau Trust or, in other words, all of the grievances of the descendants of Thomas Baker. However, it does not seem that the Baker whanau viewed matters in this way. In 1996, whanau members filed a number of new claims with the Tribunal:

- (a) Wai 601 was filed on 16 May 1996 by Winifred Kupa and Edward, Thomas, and Marire Baker. The claim was made 'on behalf of the beneficiaries of Tataraaakina 2 & 5 blocks' and concerned the title disruption to those blocks in the 1920s. The claimants said that the basis for the claim was 'exactly the same as that for Wai 147', and they argued that, 'Because the Crown has already accepted a Treaty breach in respect of the circumstances surrounding Wai 147', the required research would be 'relatively straight-forward'.<sup>32</sup>
- (b) Wai 638 was filed on 18 October 1996 by Nigel Baker on behalf of the Tataraaakina c claimants in Wai 598, Wai 601,<sup>33</sup> Wai 602, and Wai 608. He explained that a meeting of the claimants had resolved to amalgamate the separate claims and proceed under one Wai number. He made the same comments as those appearing in the Wai 601 statement of claim about the precedent set by the Wai 147 settlement.<sup>34</sup>
- (c) Wai 639 was filed on 27 November 1996 by Nigel Baker on behalf of the descendants of Pane Te Kanga. Oddly, Mr Baker said that the claim 'replaces Wai 491 lodged by the Waimakuku Whanau Trust'. Claimant counsel in Wai 639 later submitted that this statement had in fact been made in error (see below). It seems to us that this statement

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31. Paper 2.135(a)

32. Claim 1.45

33. The old Tataraaakina 2 and 5 partitions are now part of what is known as Tataraaakina c.

34. Claim 1.51

should more logically have been inserted in the Wai 638 statement of claim, given that both Wai 491 and Wai 638 were concerned with lands contained in Tatarakina c.

- (d) Wai 640 was filed on 6 November 1996 by Nigel Baker on behalf of the descendants of Pane Te Kanga and concerned title disruption to Tarawera 10B, a block neighbouring Tarawera 5A and the Tarawera Crown block.

The Wai 639 statement of claim also included a section entitled ‘Wai 491 and settlement of the Wai 147 claim’. In this, Mr Baker referred to the Wai 491 claim as being ‘now withdrawn’. He said that, at the time of the settlement of Wai 147, he understood that attempts had also been made to settle Wai 491 but that these attempts had failed. He said that he and his co-claimants believed that ‘it would be of assistance to lodge this new claim rather than go to some considerable trouble to endeavour to correct the misunderstandings surrounding Wai 491’. One such misunderstanding, he said, was the section of the 1995 deed of agreement that referred to the settlement of the Waimakuku Whanau Trust’s ‘interests’ in Wai 491.<sup>35</sup> In other words, it seems that Mr Baker’s reaction to the ostensible settlement of Wai 491 in the 1995 agreement – to which he objected – was simply to file a new claim in its place. As we say, we believe that this claim was actually Wai 638, not Wai 639.

In directing that the Wai 639 claim be registered on 12 December 1996, the deputy chairperson of the Tribunal, Deputy Chief Judge Norman Smith, noted that ‘some disagreement’ existed between the Crown and the Waimakuku Whanau Trust over the extent to which the 1995 deed of agreement settled Wai 491. He observed that ‘any dispute regarding the interpretation or application of the deed is a matter for the parties to resolve themselves’. Judge Smith noted that the settlement had not been incorporated into legislation and he thus saw no reason why the claim should not be registered, being satisfied in his mind that the claim fell within the Tribunal’s jurisdiction and that there were no grounds under section 7 of the Treaty of Waitangi Act 1975 to disallow it.<sup>36</sup> At the same time, the judge also directed that Wai 638 and Wai 640 be registered, although he did not set out any details of the dispute about the 1995 settlement in making directions on those claims.<sup>37</sup> (Similarly, on 19 July 1996 the judge had directed that Wai 601 be registered without mentioning the 1995 settlement.<sup>38</sup>)

We do not believe that the registration of the claims was, by definition, a vindication of the Baker whanau’s arguments about the scope of the 1995 settlement. We do not think that Judge Smith had the full facts in front of him at the time. Also, it took some time for the Crown to put forward its considered response to the post-settlement Baker claims.<sup>39</sup> This, it did at the

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35. Claim 1.52, p 3

36. Paper 2.189

37. Papers 2.187, 2.191

38. Paper 2.154

39. The Crown’s first reaction to Wai 601 (and Wai 598, Wai 602, and Wai 608) was to undertake an analysis in order to verify whether the matters raised in the claims were indeed the same, as the claimants alleged, as those the Crown had conceded on in the 1995 settlement and could therefore proceed directly to settlement: paper 2.186.

26 February 1998 judicial conference, which was convened to discuss the arrangements for the forthcoming hearing of, inter alia, Wai 601, Wai 638, Wai 639, and Wai 640 at Te Haroto. In a memorandum tabled at that conference, Crown counsel submitted that the 1995 agreement settled 'all the Treaty claims of the descendants of Thomas Baker concerning the interests in land once held by Rihi Nene. This includes all later developments affecting those interests and their impact upon successors of Rihi Nene.' Crown counsel further invited the Tribunal to use its discretion under section 7(1)(c) of the 1975 Act to decline to hear the new Baker whanau claims. Under that provision, the Tribunal can choose not to inquire into a claim where 'an adequate remedy' exists, and counsel submitted that the 1995 settlement constituted just such a remedy. Counsel also made it clear that the Crown did not intend to 'conduct further negotiations with the Baker whanau'.<sup>40</sup>

Claimant counsel made verbal submissions at this conference. He contended that claims Wai 147 and Wai 491 were filed by the Waimakuku Whanau Trust for the descendants of Thomas Baker and that Wai 639 was filed for the descendants of Pane Te Kanga. He added that Wai 639 was a Tarawera township public works claim but that Wai 491 was brought 'only in respect of Tatarakina 2 Block'. Counsel alleged that an invitation had been given to the Baker whanau at the time of the 1995 settlement to 'lodge further claims in respect to any grievances they may have'. As a result of the submissions of Crown and claimant counsel, The presiding officer, Judge Wilson Isaac, directed that: 'To properly consider the above matters it is incumbent upon the Tribunal to inquire fully into these issues. In doing so, the Tribunal will be in a better position to determine whether or not the claim is well founded.'<sup>41</sup>

## 17.8 LEGAL SUBMISSIONS ON THE 1995 SETTLEMENT

### 17.8.1 Claimant submissions

The hearing of claims Wai 601, Wai 638, Wai 639, and Wai 640 took place during four days at Te Haroto from 14 to 17 April 1998. On 17 April, claimant counsel advised that the Wai 640 claim would be withdrawn, since he said that the matters it raised were covered by the other claims. The Tribunal was formally advised of this in writing on 23 April 1998.<sup>42</sup> By way of formal memorandum on 12 May 1998, Judge Isaac noted counsel's request for a withdrawal on the basis that 'a settlement of the grievance has been settled through other means'. He accordingly directed that 'no further inquiry will be held into Wai 640 unless the claimant advises that he wishes it to be revived'.<sup>43</sup> No such request was made.

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40. Paper 2.263

41. Paper 2.265

42. Paper 2.274

43. Paper 2.275

The claimants' case in Wai 639 was heard on 17 April 1998. Counsel's opening submissions focused solely on the Ministry of Works' acquisition of the lands rather than the 1995 settlement, and therefore need not be traversed here.<sup>44</sup> Moorsom's evidence was similarly confined to the substance of the claim and did not investigate the circumstances of the 1995 settlement. However, Nigel Baker did make reference to the settlement. He stated that:

The lodging of this claim will be of assistance in helping to clarify the relationship between the claim and Housing Corporation in regard to issues raised by the Housing Minister in the settlement of Wai 147. The Minister was actively seeking funds from the Tarawera 5A block compensation to settle the mortgage owing on the depot property.

The issue was actively contested by the Wai 147 claimants in explaining that the relevance of the settlement was to a separate claimant group within the Baker whanau and that the issues being compensated for, related to acts of legislation.<sup>45</sup>

By the time the Wai 639 closing submissions were heard in November 2000, claimant counsel had chosen to emphasise what he saw as the distinctions between Wai 147 and Wai 639. At that point, he mentioned that the reference in the Wai 639 statement of claim to it 'replacing' Wai 491 was in error (which is something we have tried to make sense of above). He argued that both Wai 147 and Wai 491 were claims made out on the basis of descent from Thomas Baker, but that claims Wai 601, Wai 638, Wai 639, and the withdrawn Wai 640 related to descent from Pane Te Kanga, which made them 'distinct and apart'. He also argued that references in the 1995 agreement to the HCNZ loan being a separate issue from the settlement meant that 'the Deed was not seen by the parties as settling disputes relating to that land'.<sup>46</sup>

#### 17.8.2 Crown submissions

As noted above, Crown counsel confined himself in his closing submissions to the issue of the 1995 settlement and did not address the Ministry of Works' acquisition of the Tarawera township lands. He said that no evidence had been produced to show that claiming through Pane Te Kanga was in any way different from claiming through Thomas Baker. The interests of the two in the Tarawera and Tatarakina lands, he submitted, were not distinct. The 1995 settlement, he contended:

made clear that the contemporary commercial dispute between the Housing Corporation of New Zealand and the Waimakuku Whanau Trust over mortgage repayments would not result in any money from the settlement being paid directly to the Housing Corporation in

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44. See doc R30

45. Document R32, p 5

46. Document X37, pp 3-5

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satisfaction of the debt. Rather the claimant group were free under the 1995 settlement to apply the settlement redress as they saw fit and the issue of the mortgage remained a matter between the Waimakuku Whanau Trust and the Housing Corporation.

Counsel added that, while ‘the fact of the mortgage dispute has been disclosed to the Tribunal no detailed evidence has been led by the claimants about the content of this dispute and the behaviour of both mortgagor and mortgagee’. He concluded by reiterating that the Crown would enter no further negotiations with the Baker whanau and that it remained open to the Tribunal to decline to inquire further into the claim under section 7 of the Treaty of Waitangi Act 1975. Counsel did offer a note of conciliation, however. He added, ‘This is not to say that members of the Baker whanau claimant group will not participate in or benefit from a settlement of all the claims of the hapu participating in this inquiry.’<sup>47</sup>

**17.8.3 Claimant submissions in reply**

In his right of reply for Wai 601, claimant counsel stressed his submission that those ‘showing descent from Rihi Nene . . . are different to the persons claiming as beneficiaries in Waimakuku Whanau Trust Board Incorporated’. He explained that Rihi Nene was Thomas Baker’s second wife and that she ‘claimed interest in Tatarakina and Tarawera blocks on a descent basis totally independent of Thomas Baker, claiming ultimately through Pane Te Kawanga [*sic*] who had no connection whatsoever with Thomas Baker’. With respect to Wai 639, counsel argued that:

- ▶ the 1995 settlement involved Tarawera 5A but the Wai 639 claim involved the Tarawera township;
- ▶ the settlement could not cover Wai 639 or Wai 601 because ‘neither of those claims were in existence at the time of the settlement of the Wai 147 claim and the research had not been undertaken or completed and the matters were not known to the parties at the time of settlement’.
- ▶ it was also clear that ‘neither the Tarawera Township claim nor the Tatarakina claim of the Baker whanau relate to descent from Thomas Baker’.<sup>48</sup>

**17.9 TRIBUNAL COMMENT**

We believe that Wai 639 and, for that matter, Wai 601 have indeed already been settled by the 1995 agreement, for the reasons we set out below. To some extent, however, the whole debate is something of a distraction. Even if Wai 639 and Wai 601 had not been settled, it is clear that

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47. Document x52, pp 7–8, including nn 13–14. In regard to Wai 601, Crown counsel submitted that the Crown considered this claim settled by negotiation; p 9.

48. Document v7, pp 34–35

they could not now be settled individually. The Crown's policy is to settle with large natural groupings, and we support this. Claimant counsel in Wai 638 et al even agreed, as we noted in chapter 1, that settlement should be made at the hapu rather than the whanau level. And, besides, Crown counsel made the point that there is no bar to the Baker whanau participating in what the Crown envisages will be an overall settlement. We may well differ with the Crown as to how many 'large natural groupings' exist in this inquiry, but our consistent position is that individual whanau claimants should not be treated separately from the entire class of persons who suffered the particular losses. A possible exception to this rule should be where matters are truly ancillary, and we agree that the Wai 639 claim fits that category. However, as we have detailed in the first part of this chapter, we do not believe that there is much substance to the claim and we also believe that the claim was settled in 1995 anyway.

In support of the latter statement, we make the following comments:

- (a) The key issue is really the claimants' arguments about lines of descent, but we could find nothing to convince us of their arguments. By their own evidence, the successors of Pane Te Kanga and Rihi Nene, on the one hand, and the descendants of Thomas Baker, on the other, are the same people. We make the distinction between 'successors' and 'descendants' because no details of any descent from Pane or Rihi were provided to us. Instead, it seems that Rihi was a first cousin (once removed) of Pane and succeeded to her interests by will.<sup>49</sup> Then, after Rihi's marriage to Thomas Baker and upon her own death, Thomas and his children inherited her interests. In other words, the Wai 639 claimants obtained their interests in the Tarawera and Tatarakaia lands through two wills rather than by direct descent. Rihi was stepmother to the part-Raukawa, part-Tuhoe children of Thomas Baker and his first wife, Parai Rotohiko. Rihi herself had no children, and the claimants have thus confused matters by making claims of descent from her or from Pane, or from both. Under questioning at Te Haroto from counsel for Wai 299, Nigel Baker admitted that, in strict whakapapa terms, he was not Ngati Hineuru himself.<sup>50</sup>
- (b) Thus, it seems clear enough that the claims of descent along different lines of whakapapa cannot be substantiated. The 1995 deed settled all the claims of the descendants of Thomas Baker, 'however arising', and that would seem to be as far as the matter goes.
- (c) The Crown is partly at fault for the ongoing confusion, however, for allowing such a loosely worded deed of agreement. For example, no geographic area was specified, and the reference to the Waimakuku Whanau Trust's 'interests' in Wai 491 being settled was also odd. The only explanation for this that we can think of is that it was

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49. See National Archives document AAFV997/H29 detailing Ngati Hineuru whakapapa for the Tarawera block investigation of title in 1925. No descendants of Pane Te Kanga are depicted on the whakapapa, although its cut-off date is unclear. If she had no issue, it would explain why Rihi succeeded to her interests. This was submitted to us, but it was not placed on the record in order to preserve the confidentiality of the whakapapa contained within it.

50. Cross-examination of Nigel Baker by Maui Solomon, seventh hearing, 15 April 1998, tape 4

believed that there were other claimants in Wai 491 apart from the trust. It also was not made clear in the deed why the HCNZ loan aspect was kept separate. We think it is clearly a case of the claimants having asked the Office of Treaty Settlements that they not be forced to apply their settlement moneys to paying their debts to HCNZ and the Crown having agreed. The claimants now say that this was because it was recognised that they could come back and make further claims about other matters. But this is fundamentally belied by the clause in the deed saying all their claims are settled, 'however arising'.<sup>51</sup>

- (d) As can be seen, confusion has existed about the status of Wai 491. The 1995 agreement purported to settle the trust's interests in it. The 1996 Wai 639 statement of claim described it as 'now withdrawn' and was said to replace it. Claimant counsel, in closing submissions in 1999, reiterated that Wai 491 was 'withdrawn' after the 1995 settlement but added that the reference to it being replaced by Wai 639 was incorrect. To avoid any lingering confusion, we can confirm our view that the clear intention of the 1995 agreement was to settle this claim and that any argument about its withdrawal and replacement is beside the point.
- (e) The best construction that can be placed on the history of the Wai 639 claim is that its prosecution resulted from a series of misunderstandings. For example, Mr Baker quoted in his statement of claim a letter from the Office of Treaty Settlements that he said invited him to make claims under the names of other ancestors. The statement of claim refers to the letter as attached, but it was in fact never included. We have now obtained a copy of the letter from the Office of Treaty Settlements and the proper context of the remarks can be assessed. In the letter, the writer advised Mr Baker that:

Our view remains the same as that expressed to you in previous correspondence on this matter. The settlement covers all the descendants of Thomas Baker and settles their Treaty of Waitangi claims comprehensively. Those members of the whanau not connected to Thomas Baker are not affected by this settlement.

To the extent that beneficiaries can whakapapa back to Thomas Baker, their claims are settled. However, where they can whakapapa back to a separate ancestor, there is nothing to prevent them being part of a claimant group originating from these separate ancestral links.<sup>52</sup>

It seems that Mr Baker took from this that he could change the name of the ancestor from whom he claimed descent and file additional claims, but we do not see how

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51. While we are clarifying matters, we might also observe that claimant counsel's statement in his reply that the Tarawera township had nothing to do with descent from Thomas Baker is rather odd, because Thomas senior bought sections T11 and T12 in 1936.

52. Simpson to Baker, 2 August 1996

the context of the letter possibly suggests this.<sup>53</sup> We believe that what the Office of Treaty Settlements had in mind was the usual occurrence of claimants having claims in unconnected districts. For example, we can think of a claimant in Gisborne who is also a claimant in Whanganui through her whakapapa connections. We do not believe the reference in the letter was to identical people pursuing additional settlements over neighbouring blocks by claiming descent from ancestors hardly removed from each other in the web of whakapapa. Moreover, as we have seen, it is misleading for the claimants to claim descent from Pane Te Kanga and Rihi Nene because their whanau succeeded to the interests of those people by marriage and will.

- (f) We do not know what legal advice was available to Mr Baker and his fellow signatories to the 1995 settlement as to the effect of that agreement. However, a settlement was reached and a sum of \$375,000 was paid. (Invested wisely, that sum would today have compounded to a significant amount.) Furthermore, the Crown has recently expressed its support for members of the Baker whanau participating and sharing in the eventual settlement with the wider claimant community. In short, and taking a view of matters as a whole, we do not think that the legal advice received at the time or any ambiguity in the settlement deed's wording is a mitigating factor that would allow the Wai 639 claimants to argue that they had not received fair treatment.
- (g) This brings us to the matter of the depot property subject to the HCNZ mortgage. It seems that Mr Baker has not serviced the mortgage in the hope that a settlement of the Tarawera township issue would see him reimbursed for his expense in taking out a mortgage to purchase the property. The Minister of Housing had agitated for the 1995 settlement moneys to be applied to servicing the debt, but as we have seen, the claimants objected, and the Office of Treaty Settlements agreed to the deed being worded in such a way that the claimants could apply the moneys as they wished. Housing officials sought money from the Bakers directly, but in one 1996 letter forwarded to the Tribunal, Mr Baker told HCNZ that the 1995 settlement moneys had been 'frozen by the beneficiaries of wai 147, on the grounds that the crown should settle the MOW property issue with the rightful claimants and not from compensation entitled to other persons'.<sup>54</sup> In other words, the Bakers refused to pay the mortgage, despite having the money to do so from the 1995 settlement, on the grounds, now well traversed in this section of our report, of separate claims and lines of descent.

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53. For example, a note left by a Tribunal staff member in November 1997 reveals the confusion Mr Baker may have been under. At that time, Mr Baker advised that he had formed the Henry Baker Trust to act as the claimant body for Wai 639, since he felt that 'making a claim under a different tipuna and with a different trust should solve the complications with the Wai 147 settlement': Dean Cowie, filenote, 24 November 1997, Waitangi Tribunal file Wai 639/0, vol 1.

54. Baker to general manager, HCNZ, 16 June 1996, Waitangi Tribunal file Wai 639/0, vol 2

- (h) Advice to the Tribunal from HCNZ officials has been that the non-servicing of the mortgage has led to the debt being substantially greater than the value of the property.<sup>55</sup> HCNZ has refrained from calling in the mortgage until the publication of this report. We acknowledge HCNZ's forbearance in this matter, given the inevitable delays in issuing such a comprehensive report, and we can only say that we would have severed the Wai 639 claim from the rest of the inquiry and dealt with it much earlier if it had been at all practical to do so.
- (i) Another reason that HCNZ did not call in the mortgage was undoubtedly because there was a section 27B memorial on the title to the land. (Under section 27B of the State-Owned Enterprises Act 1986, the Tribunal can order the return to Maori claimants of certain land held by a State enterprise.) HCNZ officials have expressed a concern that, if the mortgage were called in and the property sold on the open market, uncertainties caused by the memorial would make it difficult for them to attract a fair price.<sup>56</sup> HCNZ would thus undoubtedly like us to direct that the memorial on the former depot property now be lifted. However, such a course would mean the property could not be sought by the wider body of claimants in settlement of the overarching claim. In the circumstances, therefore, it would be inappropriate for us to make such an order at this time.
- (j) Mr Baker himself has continued to make representations to the Tribunal on the matter and has sought an urgent report on Wai 639 so that he and his fellow claimants can maximise their 'economic opportunities'. Mr Baker made this request in a letter he wrote to the Tribunal's director on 25 May 2001, in which he also noted that:

Certain claimant members are confused over recitals contained in a previously settled claim (wai 147) which refers to issues associated with Tarawera 5a Block.

The recitals referred to, state that the agreement is full and final of all issues pursuant to one, Thomas Baker. The problem is that the issues actually settled under the agreement referred to, had nothing to do with Thomas Baker. Reference to Thomas Bakers interests lie within the Tarawera Township claim (wai 639) and are pursuant to Public Works requisitions.<sup>57</sup>

What this shows us is that there is, amongst the Baker whanau, either an ongoing misapprehension about the effect of the settlement they freely signed up to in 1995 or a simple unwillingness to be bound by its terms. The matter is inevitably academic, however, because our assessment is that the claim lacks substance, and we believe that,

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55. For example, John Cooper, senior recovery specialist, HCNZ, to registrar, Tribunal, 18 August 1997 (Waitangi Tribunal file Wai 639/0, vol 1)

56. Dean Cowie, filenote of conversation with John Cooper, HCNZ, 12 November 1997, Waitangi Tribunal file Wai 639/0, vol 1

57. Paper 2.412

even if the claimants were able to secure a further settlement of the Wai 639 claim, it would not be of the order needed for them to pay off their mortgage.

- (k) We are also mindful that the land was not Maori land, having become Crown land in the Mohaka–Waikare confiscation of 1867. We repeat that the Ministry of Works depot land subject to the HCNZ mortgage lies to the east of the Napier to Taupo highway and comprises all the Crown's acquisitions on that side. The sections owned by members of the Baker whanau and acquired by the Crown in 1975 were all general land on the other side of the road (map 57).

#### 17.10 FINDINGS

In light of our conclusion that the Wai 639 claim has already been settled, we accordingly have no findings to make on breaches of the Treaty.

