Office of the
Minister in Charge of Treaty of Waitangi Negotiations

Te Tari o Te
Minita Nōna te Mana Whakarite Take e pā ana ki Te Tiriti o Waitangi

THE CROWN'S POLICY PROPOSALS ON TREATY CLAIMS INVOLVING PUBLIC WORKS ACQUISITIONS

The Government has recently concluded its policy proposals for Treaty Claims involving public works acquisitions. Attached is an outline of those proposals.

These policy proposals have been circulated to all claimants who have lodged claims with the Waitangi Tribunal. Comments on the policy proposals may be made in writing to:

The Director
Office of Treaty Settlements
P O Box 919
WELLINGTON

BY NO LATER THAN 28 FEBRUARY 1996.

The Crown will then consider those comments and decide whether or not any changes to the policy proposals are appropriate.

Parliament Buildings, Wellington, New Zealand.
Whare Pāremata, Te Whanga-nui-a-Tara, Aotearoa.

Telephone: 64 4 471 9950
Waea: 64 4 471 9950

Facsimile 64 4 471 2922
Waea whakaahua: 64 4 471 2922

"THE CROWN'S POLICY PROPOSALS ON TREATY CLAIMS INVOLVING PUBLIC WORKS ACQUISITIONS".

MINISTER IN CHARGE OF TREATY OF WAITANGI NEGOTIATIONS

INTRODUCTION

There are a range of Treaty of Waitangi claims that involve public works grievances. Compared with other Treaty claims, public works claims tend to involve small parcels of land of relatively modest value.

The Crown does not accept that public works takings, under various pieces of public works legislation since 1840, are Treaty breaches per se.

WELL-FOUNDED PUBLIC WORKS GRIEVANCES

Lack of Adequate Compensation

A well-founded public works grievance may exist where, pursuant to relevant legislation and/or administrative practices, and compared to non-Maori in similar situations, the Crown did not pay Maori landowners adequate (or any) compensation (based on current market value) for their land at the time it acquired it for a public work.

Lack of Adequate Consultation

A well-founded public works grievance may exist where the Crown acquired land for a public work without affording Maori landowners a level of consultation consistent with that afforded to non-Maori land owners namely by:

i not providing Maori with relevant information, such as information about the nature of the public work and the extent and timing of the acquisition;

ii not giving Maori adequate time and opportunity to fully discuss a public work proposal prior to any decision being made; and,

iii not genuinely and conscientiously considering points made by Maori prior to any decision being made, and willingly considering alternatives.

Lack of adequate consultation by itself may constitute a breach of the Treaty but will not establish any entitlement to fiscal redress. However, fiscal redress may be required where the Crown acquired land for a public work without adequately consulting with Maori landowners and, as a result:

i left Maori landless or without a sufficient endowment when there was not a high level of need for the public work and the negative impact of the acquisition was excessive or there was a reasonably practicable alternative which would have had substantially less negative impact; and/or,

ii removed, or significantly reduced, an iwi, hapu or whanau's land of special historical, cultural, or spiritual significance when there was not a high level of need for the public work and the negative impact of the acquisition was excessive or there was a

reasonably practicable alternative which would have had substantially less negative impact: and/or,

iii compulsorily acquired more land than was reasonably necessary for the intended public work; and/or,

iv never used the land for the original purpose for which it was acquired, nor for another legitimate public work purpose, and did not offer it back to the former Maori owners after a reasonable time; and/or

v discriminately acquired Maori land in preference to non-Maori land because it was more expedient to do so in terms of either cost or convenience.

FAILURE TO OFFER BACK SURPLUS LAND

No Treaty breach exists and good government issues do not arise where the Crown, pre-1981, failed to offer back land previously taken for a public work to former Maori or non Maori owners or their successors.

However, where post-1981 disposals were not offered back to the former Maori owners or their successors, for reasons other than the specified exemptions in sections 40(2) and 40(4) of the Public Works Act 1981, the question of whether a well-founded public works grievance exists will be further considered by the Crown (refer "Review of Public Works Act 1981" below).

ACTIONS OF LOCAL AUTHORITIES AND STATUTORY BODIES

The Crown is not responsible for the acts or omissions of local authorities or statutory bodies.

OFFER BACK AT CURRENT MARKET VALUE

Some Maori and non-Maori view offer back of surplus public works land to previous owners at "current market value" condition as unfair and question why the Crown should obtain the total benefit from increased market value, particularly if the land was compulsorily acquired.

For future offer backs, this issue may be addressed by a review of the Public Works Act 1981 and/or the discretionary operations of the Director General of the Department of Survey and Land Information under section 40(2)(d) of the Public Works Act 1981 (refer "Review of the Public Works Act 1981" below).

However, for historical Treaty claims the Crown takes the view that offer back of land under the Public Works Act 1981 is not unfair to former Maori or non-Maori owners, and accordingly cannot give rise to a well founded public works grievance for Maori or non-Maori, whatever the circumstances.

REDRESS

Any settlement should focus on an acknowledgment of the legitimacy of the grievance and the return where possible of as many property rights as are considered fair to the claimants and the Crown. Where the Crown accepts that this is not sufficient or there are no such property rights available, then the Crown may wish to offer a sum of cash and assets to claimants.

As a guide for determining the nature and level of redress, fiscal redress might be made available where the landowner incurred financial detriment. For example, where the Crown acquired land without paying compensation based on the current market value of the land. Alternatively, redress of a non-fiscal nature may be more appropriate where no financial detriment was incurred. For example, in some circumstances, the failure to consult, by itself, may warrant an apology but no other form of redress (unless the failure to consult caused the landowner to incur financial detriment).

Redress options include:

i return of land at nil cost, or below market value, where it is no longer required for a public work, taking account of the nature and severity of the breach relative to other settlements, any compensation previously paid, subsequent improvements, and any encumbrances;

ii where land is not surplus, return of land subject to lease back to the Crown on commercial terms having regard to the nature of any business being conducted on the land, or return of sites of special historical, cultural, or spiritual significance on that land, taking account of the nature and severity of the breach relative to other settlements, and any compensation previously paid;

iii transfer of alternative lands at nil cost, or below market value, taking account of the nature and severity of the breach relative to other settlements and any compensation previously paid;

iv offering monetary compensation taking account of the nature and severity of the breach relative to other settlements and any compensation previously paid; and,

v giving a formal apology to the claimants where that is appropriate.

REVIEW OF THE PUBLIC WORKS ACT 1981

The Waitangi Tribunal has recommended a review of the Public Works Act 1981. The Crown will consider what, if any, changes are required to the Act over the next 4-5 months. Any changes resulting from such a review will not affect historical issues but may impact on how the Crown deals with public works issues in the future.

CONSULTATION

These policy proposals have been circulated to all claimants who have lodged claims with the Waitangi Tribunal. Comments on the policy may be made in writing to:

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At least 155 public, private and local Acts have contained powers of compulsory acquisition of land for public purposes. These include various public works Acts and related Acts such as the Government Railways Act 1887, Native Lands Acts, and Scenery Preservation Acts.

Public works legislation developed along British lines with special limited Acts for specific purposes (eg: Auckland Waterworks Act 1860), followed later by various consolidating legislation. The first general consolidating Act was the Land Clauses Consolidation Act 1863 which was based on an 1845 British Act. These consolidating Acts contained many of the principles still contained in current public works legislation such as the right to compensation, to receive notice and to object. A trend also developed where the basic acquisition powers and procedures were contained in a main Act while special powers relating to particular work purposes were set out in special Acts.

From 1840 to the late 1850s, there was a virtual lack of legislation authorising compulsory public work acquisitions. This is especially true with Maori land which was protected from compulsory acquisition provisions at the British Colonial Office's insistence. Instead, it was Crown policy, for most of this time, to acquire Maori land by a process of purchase and negotiation and to make provisions for public works well ahead of settlement. Public works legislation at this time reflected this policy. However, from the early mid 1860s, during the main phase of the Anglo-Maori wars and as the settler government gained more control over Maori affairs, legislation began to reflect the view that Maori land should no longer be protected from compulsory acquisition and that such acquisition could be used as an effective means for "civilising" or "pacifying" Maori. For example, public work projects such as roads and electric telegraph networks were, in some cases, essential instruments of war policy ultimately designed to crush Maori resistance.

The Public Works Lands Act 1864 contained the first specific legislative authority for central government to compulsorily acquire Maori land, whether customary or Crown granted, for public works. This Act was closely linked with the New Zealand Settlements Act 1863 (confiscation legislation) which set out a procedure for determining compensation. The reference to the Settlements Act in the Public Works Lands Act 1864 meant that "rebel" Maori were not entitled to compensation. This has resulted in a legacy of bitterness and betrayal as many Maori have continued to associate public work takings with punitive confiscations.

The Native Land Act 1865 allowed up to 5% of Maori freehold land to be taken for roads but made no provision for compensation. This continued until 1927 when it was abolished by section 30 of the Native Land Amendment Act.

The Public Works Act 1876 contained acquisition provisions which applied equally to Maori and non-Maori land (ie: compensation, notification). However, after the invasion of Parihaka by the Crown, the Public Works Act 1882 removed provisions for direct notice of takings to be given to Maori, and the right for Maori to object to takings by the government. These protections were restored for Maori freehold land in 1894, but not for Maori customary land until 1974.

In the 1870s, public works projects were a prime means of stimulating economic growth by encouraging European immigration and settlement, the development of a basic infrastructure, and the establishment of a communications network. The scope of public works increased as society became more complex and the concept of public purposes broadened. Activities additional to early railway, harbour and road purposes, included

electric telegraph, tramways, irrigation and gold field works (from 1860s); national parks and scenery preservation (from 1890s); hydro works (from 1910); highways (increasingly dominant from 1920s); town planning, and airports (from 1930s); housing, thermal power and consolidated river and soil conservation (from 1940s) and natural gas (from 1950s).

Definitions of "public works" have always been very broad. In later years, for example, it included the definition of "better utilisation" and allowed Maori land to be taken for other works which, in the context of Treaty claims, can be considered mundane. These included such things as the construction of depots and departmental buildings. In 1981, the definition of public works was restricted to "essential works", but in 1987, this was repealed and replaced with the definition "government works". This definition concentrates on whether the Crown controls the work, rather than on the type of work planned, in order to determine whether it can be a public work.

Local authorities and statutory bodies also inherited many public works functions from provincial councils including, for example, drainage, sewerage, and river control. Under the Public Works Act 1981 a public work is also defined as a "local work" which essentially is a work under the control of a local authority. Unlike "government works", where land must be used for "any public purpose", there is no stated purpose requirement for "local works".

Public works legislation has evolved over the years, culminating in the Public Works Act 1981. This Act has departed somewhat from previous legislation in that it allows a greater degree of agreement to be reached on what land should be taken and when. It has strengthened the offer back provisions and also improved the compensation provisions by providing for compensation to be payable under three specific heads, namely, where land is acquired for any public work, where any land suffers any "injurious affection" resulting from the acquisition, or where the land suffers any damage from the exercise of any power under, or relating to, this Act (eg: section 60).

Public Access New Zealand

INCORPORATED

R D 1 Omakau 9182 Central Otago New Zealand Phone & Fax: 64 - 3 - 447 3554

15 February 1996

Hon Douglas Graham
Minister of Treaty Settlements
Wellington

Fax (04) 471 2922

Dear Sir

Please supply a copy of Government's draft policy for dealing with Treaty of Waitangi claims involving land taken for roading, schools and hospitals.

Yours faithfully

BJ Mason

Bruce Mason
Researcher

received 26/2/96

Office of the
Minister in Charge of Treaty of Waitangi Negotiations

Te Tari o Te
Minita Nōna te Mana Whakarite Take e pā ana ki Te Tiriti o Waitangi

21 February 1996

Mr Bruce Mason
Researcher
Public Access New Zealand
[redacted]

Dear Mr Mason

On behalf of the Hon Douglas Graham, Minister in Charge of Treaty of Waitangi Negotiations, I acknowledge receipt of your letter dated 15 February 1996 requesting a copy of the recently published discussion paper relating to the Crown's policy proposed on Treaty claims involving Public Works acquistions.

I enclose a copy of the discussion paper for your information.

Yours sincerely

Michael Craig
Private Secretary

0115

Parliament Buildings, Wellington, New Zealand.
Whare Pāremata, Te Whanga-nui-a-Tara, Aotearoa.
Telephone: 64 4 471 9950
Waea: 64 4 471 9950
Facsimile: 64 4 471 2922
Waea whakaahua: 64 4 471 2922

Hugh Barr

Office of the
Minister in Charge of Treaty of Waitangi Negotiations

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Not to anyone else?

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Turongi Tce.

Should be public consultation - reserves etc

Kapiti Is Waiorua B Block.

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ie Surplus

Public Consultation for Crs Land.

ii where land is not surplus, return of land subject to lease back to the Crown or commercial terms having regard to the nature of any business being conducted on the land, or return of sites of special historical, cultural, or spiritual significance on that land, taking account of the nature and severity of the breach relative to other settlements, and any compensation previously paid;

iii → transfer of alternative lands at nil cost, or below market value taking account of the nature and severity of the breach relative to other settlements and any compensation previously paid;

Not Conservation Lands

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