

**IN THE WAITANGI TRIBUNAL**

**Wai 2358**

**IN THE MATTER OF** the Treaty of Waitangi Act 1975

**AND**

**IN THE MATTER OF** the National Fresh Water and Geothermal Resources  
Inquiry

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**MEMORANDUM OF COUNSEL RESPONDING TO MEMORANDUM-  
DIRECTIONS REGARDING CROWN'S PROPOSED TIMETABLE  
CHANGES**

**20 January 2017**

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## MAY IT PLEASE THE TRIBUNAL

1. This Memorandum of Counsel (“MoC”):
  - a. is filed on behalf of the following claimants and interested parties:
    - i. Mr. Cletus Maanu Paul, on behalf of himself and the Mataatua District Maori Council (“DMC”);
    - ii. Mrs. Titewhai Harawira, on behalf of herself and the Tamaki Makaurau DMC;
    - iii. Mr. Des Ratima, on behalf of himself and the Takitimu DMC;
    - iv. Mr. William Jackson, on behalf of himself and the Tamaki ki te Tonga DMC;
    - v. Mr. Rihari Dargaville, on behalf of himself and Te Tai Tokerau DMC;
    - vi. Maanu Cletus Paul and Charles Muriwai White as members of Ngai Moewhare, a marae located in the rohe of Ngati Manawa and a claimant in Te Ika Whenua inquiry; and
    - vii. Mr. Pita Paul, on behalf of himself and various Marae throughout Aotearoa (together called “the Second Claimants and IPs”);
  - b. responds to His Honours directions in Memorandum-Directions dated 12 January 2017;<sup>1</sup> and
  - c. requests an extension for the filing of Expert Witness (“EW”) evidence.
2. The Crown has sought:
  - a. a decision that interested parties file a statement of position clarifying their separate case theory compared to that of the Principal Claimants; and

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<sup>1</sup> Wai 2358, #2.6.8.



claimants in regard to Maori proprietary interests and rights to access and use of water and geothermal resources in Aotearoa.

8. Counsel therefore submits that the Tai Tokerau DMC is actually one of the “First Claimants” in this Inquiry.
9. In the circumstances, it would appear that the most appropriate way to proceed would be for Counsel to apply for the Ninth Claimant, comprising both Mr. Paul and Mr. White, and the Taitokerau DMC, as part of the First Claimant, to sever their claim from the Principal Claimants. An amended Statement of Claim could therefore be filed clarifying the position of these Parties, including the remedies sought.
10. Counsel therefore seeks leave to file an **application for severance by the end of Thursday the 31<sup>st</sup> of January.**
11. Finally, Counsel notes that the Crown has suggested that the Tribunal intends to inquire into issues that are significantly broader than originally anticipated by the Crown.<sup>3</sup>
12. The Second Claimants and the IPs wish to make absolutely clear that the matters that they have called evidence on fall squarely within the scope of the issues in this Inquiry, and are focused on the proposals in the Next Steps for Fresh Water document and the Crown’s current legal regime. Essentially, the Second Claimants and the IPs case is that they possess full ownership, governance and management rights over water under Te Tiriti/Treaty, and that these rights were never ceded, and nor have they been in any way extinguished or relinquished, and therefore, they remain extant.

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<sup>3</sup> Memorandum of Counsel for the Crown, dated 21<sup>st</sup> December 2016, paragraphs 2 to 4.

## **Suggested Amendments To Timetable**

13. The Crown has sought leave to file further evidence. The Second Claimants and IPs do not object to the Crown's proposed amendments to the timetable.

## **Expert Witness Evidence Due Date**

14. Counsel sought leave, which was subsequently granted,<sup>4</sup> to file EW Briefs of Evidence ("BoEs") by the 20<sup>th</sup> of January 2017.

15. Evidence from the following EWs has been sought:

- a. Professor Patu Hohepa: evidence on the nature and extent of Maori customary ownership and management of water at, or before 1840, up until the current time, and, in particular, the governance and management of water, and Maori concepts of regulating, governing and managing resources in the public interest;
- b. Moana Jackson: evidence on Maori law and the basic elements of Maori law in managing and governing communally owned property;
- c. Dr. Alex Frame: evidence on the nature of property rights at common law, and some examples of the evolution of the common law in relation to the move from the management or resources of "the commons" to the creation of property rights in those resources;
- d. Professor Manuka Henare: Evidence on the customary criteria/indicia of ownership of water;
- e. Dr. Ganesh Nana: A valuation of what Maori have lost in the Crown's incorrect assumption of the management of, and the allocation of the rights to use and own water, including setting out a Treaty consistent valuation methodology;
- f. Greg Carlyon, a planner and RMA policy expert: evidence on the philosophy underpinning, and the practical operation of the Resource Management Act, and on the workability and feasibility,

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<sup>4</sup> Wai 2358, #2.6.4, paragraph 16.

in policy terms, of transferring and/or delegating all decisions (including at a local and national level) relating to the sustainable management of water resources to the hapu/iwi owners and/or their representatives; and

- g.** Professor Al Gillespie to provide evidence on the nature of the international law requirements relating to water.

**16.** Counsel respectfully seeks an extension for the filing of this evidence on the following grounds:

- a.** Legal aid has not yet been granted for many of the EWs. Counsel applied for Legal Aid on the 7<sup>th</sup> of December 2016, once leave had been granted from the Tribunal and once the relevant EWs had agreed to provide BoEs. An initial response was not received from Legal Aid Services (“LAS”) until the 23<sup>rd</sup> of December 2016, by which time most of the EWs had left for the holiday season. Further issues were raised by LAS, for which responses were provided. Counsel is still awaiting a response from LAS as to whether aid is approved for the other EWs;
- b.** Professor Patu Hohepa has recently fallen ill and we will require further time to ascertain if he is able to complete the draft BoE that he has already prepared; and
- c.** some of the EWs went overseas for their Christmas Holidays and have not been able to prepare or complete their BoEs in this time. One of the EWs has yet to return to New Zealand.

**17.** When Counsel initially sought leave to file the EW evidence, the date proposed of the 20<sup>th</sup> of January 2017 was set at 2 months prior to the March Hearing because that allowed the Crown a period of 1 month to file evidence in response. Now that the Crown has sought leave to file further evidence on the 21<sup>st</sup> of April, Counsel submits that further time is now available and the granting of an extension for EW evidence will not unduly prejudice any parties to this inquiry.

**18.** Counsel has had discussions with Counsel for the Crown in relation to the proposed extension. The Crown has objected to an extension of 4 weeks on the

basis that it would not allow the Crown enough time to brief its experts and prepare for cross-examination.

19. The Second Claimants and IPs therefore respectfully seek a three week extension until the 10<sup>th</sup> of February. Counsel will however, file the BoEs as they become available. Counsel can indicate now that the BoEs of Dr Alex Frame and Moana Jackson, and possibly Professor Alexander Gillespie can be filed by the end of next week.

**Dated 20 January 2017**



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Janet Mason  
Counsel Acting