Wai 1040

**IN THE WAITANGI TRIBUNAL**

**CONCERNING** the Treaty of Waitangi Act 1975

**AND** the Te Paparahi o Te Raki Inquiry

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# MEMORANDUM-DIRECTIONS OF JUDGE C T COXHEAD

5 September 2017

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1. This memorandum-directions addresses the request to include the Ōpanake 1C South 6B block covered in the Wai 1521 claim in stage 2 of the Te Paparahi o Te Raki inquiry (Wai 1040) for reporting purposes.

**Request for Te Paparahi o Te Raki panel to make findings and recommendations in respect of the Ōpanake 1C South 6B block**

2. On 20 June 2017, in their closing submissions (#3.3.270) at the week 24 hearing, claimant counsel Tavake Afeaki and James Lewis submitted that the Wai 1521 claimants are prejudicially affected by the Wai 1040 boundary revision decision of 17 December 2014 (#2.6.101; #2.6.140). This decision excluded the claimant's allegations concerning the Ōpanake 1C South 6B land block from the Wai 1040 inquiry district, although the block had previously been included. On 17 December 2014, I directed that the Wai 1040 Tribunal was willing to hear evidence on Wai 1521 issues relating to the Ōpanake 1C South 6B block, but that it would not be able to make findings or recommendations in relation to them (#2.6.101).
3. At hearing, I said that counsel could make a formal submission seeking reconsideration of my decision to exclude issues relating to the Ōpanake IC South 6B block from the Wai 1040 inquiry for reporting purposes. In my directions of 2 August 2017, I directed counsel to file those submissions by 11 August 2017 (#2.6.271).
4. Counsel for Wai 1521 subsequently filed submissions seeking reconsideration on 3 August 2017 (#3.2.2520; #3.2.2520(a)).

**Counsel's submissions**

5. Counsel repeated their previous submissions on this issue as well as making further submissions. Counsel previously submitted the following (#3.2.802):
   (a) Pua Howearth, the original claimant, was from Pēwhairangi and owned land in Opanake. Te Roroa was never a name that he or his whānau were aware of growing up, despite that being the name of the inquiry district near Opanake.
   (b) Pua Howearth's land was directly taken from his mother under Public Works legislation. This was a breach of Te Tiriti that directly affected him and his whānau in their lifetime, and was therefore not a hapū claim.
   (c) The claimants have no alternative remedy as the claim was not heard in the Te Roroa Tribunal inquiry, and that the Wai 1040 is the only inquiry in which the Wai 1521 claim could have been heard.
   (d) The Hokianga Taiwhenua Rangatira availed time for the Wai 1521 claim to be heard in the week 13 Hokianga hearing.
6. Counsel further submit that I should make an exemption to allow for the Wai 1521 claim to be included in the Wai 1040 inquiry for reporting purposes on grounds that:
   (a) the inclusion of the Wai 1521 would be consistent with my previous decision to include Ngāti Torehina/Taita marae claimants, and any other decision would be contrary to the doctrine of precedent; and
   (b) the principles of redress and natural justice require that the Tribunal make findings and recommendations in this case.
7. Counsel submit that this situation is analogous to the request from Ngāti Torehina/Taita marae claimants to be included in the Wai 1040 inquiry despite their community sitting with the Te Roroa Treaty settlement area, which I granted in my directions of 29 May

2009 (#2.5.24). Counsel submit that there are significant similarities between the Wai 1521 claim and the Ngāti Torehina/Taita marae claimants, including:

(a) the claimants still occupy their own remaining lands within the area covered by the Te Roroa settlement;

(b) the claimants are not Te Roroa uri or beneficiaries of the Te Roroa settlement;

(c) the Wai 1521 claim is a discrete claim because it relates only to the Howearth whānau and their block of land;

(d) Taita Marae is within 6km of Opanake 1C South 6B and the Wai 1521 are related to whānau of Taita marae but not to Te Roroa;

(e) No other parties have expressed opposition to the inclusion of the Wai 1521 claim in the Wai 1040 inquiry and will not cause prejudice to any other party; and

(f) The Wai 1521 is the only other small discreet community claim in the original Wai 1040 district to have been lodged before the historical claims deadline of 1 September 2008.

8. Counsel submit that the doctrine of precedent requires that given the material similaries between the Ngāti Torehina/Taita marae claimants and the Wai 1521 both cases should be treated alike.

9. Counsel also submit that the principle of redress requires that the Crown restore mana and provide a sufficient remedy to the claimants' grievances where the Crown has breached Te Tiriti and the claimants have consequently suffered prejudice. Counsel contend that the claimants have the right to make a claim of Te Tiriti breach against the Crown, a right to receive findings of prejudice where it exists and a right to recommendations from the Tribunal that the Crown remove said prejudice. Counsel submits that the claimants have made out Crown breaches of Te Tiriti and resulting prejudice in this case.

10. Counsel further submit that, in accordance with s 27(1) of the New Zealand Bill of Rights Act 1990 and the Tribunal's *Guide to Practice and Procedure,* the Tribunal is required to observe the principles of natural justice. Counsel also cites s 5(1)(a) of the Treaty of Waitangi Act 1975, which states that one of the functions of the Tribunal is to inquire into and make recommendations on any claims submitted to it. Counsel submits that in this case, natural justice requires that the Wai 1040 Tribunal make findings and, if appropriate, recommendations in relation to the Wai 1521 allegations concerning the Ōpanake IC South 6B block. Counsel considers that there is a real possibility that recommendations could be made for the reversion to the claimant community of the alienated parts of Opanake 1C South 6B block, which remain Crown land. Counsel submits that where such an opportunity exists, natural justice requires the Tribunal to ensure a pathway exists for the opportunity to be realised.

11. Counsel finally provided a series of maps showing where the Opanake 1C South 6B block and Taita Marae are in relation to the old and revised Wai 1040 inquiry boundaries.

## Discussion

12. While this land block falls within the boundaries of the Tribunal's Te Roroa inquiry, that inquiry was not an inquiry into all claims within that area and the Te Roroa settlement was likewise not a settlement of all claims within a defined area but rather a settlement of historical claims deriving from Te Roroa whakapapa. The Wai 1521 claimants say that they are not Te Roroa, and the Tribunal's Te Roroa report does not make findings or recommendations into the Opanake 1C South 6B block or in relation to Opanake generally. If the allegations in this claim relating to Opanake are not reported on by this Tribunal, it will therefore be included in the Tribunal's remaining historical claims

programme, as outlined in the Chairperson memorandum-directions of 22 September 2015. This programme will provide an inquiry pathway for claims with historical grievances that have fallen outside the district inquiry programme, have not previously been fully heard, reported on or settled, and are not in negotiation for an historical Treaty settlement. This programme is currently only in its very early stages, and it is unknown when it will be able to facilitate inquiry into these remaining claims.

13. In contrast, this Tribunal, which has already heard submissions and evidence in relation to this land block, is close to entering into the report-writing phase. It is understandable that the Howearth whānau, who have now spent many years participating in the Wai 1040 district inquiry, would like this Tribunal to fully report on their claim. I also acknowledge counsel's submission that Mr Howearth identified as Ngāpuhi and not Te Roroa, and that he was not a beneficiary of the Te Roroa settlement. Given the Wai 1521 claimant's participation in the Wai 1040 inquiry, and the shared whakapapa with other Wai 1040 claimants, it may be that this Tribunal is well placed to consider the merits of all the allegations in the claim.

14. The Tribunal, as a commission of inquiry, is not bound by the doctrine of precedent, but I accept that the principles of natural justice are central to the Tribunal's operation. The maps provided by counsel and counsel's comparison between this claim and the Ngati Torehina ki Nga Puhi Ngati Whatua (Wai 1343) claim have been helpful. It is significant that the allegations in relation to the Opanake IC South 6B block are whānau-specific and therefore discrete. However, in the case of the request from the Wai 1343 claimants for me to include Taita Marae within this inquiry district, the Crown and other parties to this inquiry had the opportunity to present their views, which they have not in relation to this to include the Opanake 1C South 6B block.

**Decision**

15. Accordingly, the Crown and any other parties who wish to respond are to file submissions in response to this request by **midday, Tuesday 19 September 2017**.

The Registrar is to send this direction to all those on the notification list for Wai 1040, the Te Paparahi o Te Raki inquiry.

**DATED** at Wellington this 5th day of September 2017

Judge C T Coxhead
Presiding Officer
**WAITANGI TRIBUNAL**