

IN THE WAITANGI TRIBUNAL

Wai 2358

CONCERNING

the Treaty of Waitangi Act 1975

AND

the National Freshwater and
Geothermal Resources Inquiry

**MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER FOLLOWING
8 JULY 2024 JUDICIAL CONFERENCE AND OTHER MATTERS ARISING**

17 July 2024

Purpose

1. This memorandum-directions addresses the following planning matters arising in relation to stage three of the National Freshwater and Geothermal Resources Inquiry (Wai 2358):
 - (a) matters discussed at the judicial conference held via audio-visual link (AVL) on 8 July 2024;
 - (b) other matters arising; and
 - (c) next steps for the stage three inquiry.
2. I also confirm that my decision in response to the request from Ngāti Tūwharetoa to participate as a claimant in the stage three inquiry will be addressed in subsequent memorandum-directions once further submissions are received.
3. An updated inquiry timetable is **attached at Appendix A**.

Matters discussed at the 8 July 2024 judicial conference

Background

4. On 25 March 2024, I issued a memorandum-directions that, among other things, responded to extensions sought for the filing of stage three claimant and interested party evidence from counsel representing several parties participating in the inquiry. Among the parties granted an extension was Te Kotahitanga o Ngāti Tūwharetoa, who were directed to file stage three evidence by 15 April 2024 (Wai 2358, #2.6.98 at [12]–[21]).
5. On 15 April 2024, the Tribunal received a memorandum from Karen Feint KC and Hansaka Ranaweera, seeking a further extension to file evidence on behalf of Te Kotahitanga o Ngāti Tūwharetoa by 15 May 2024. In doing so, counsel acknowledged that such a request would likely necessitate ‘adjustments’ to the current stage three inquiry timetable. They accordingly offered to liaise with inquiry participants in first instance to see whether agreement could be reached on a revised inquiry timetable for stage three (Wai 2358, #3.2.547 at [6]–[7]).
6. On 18 April 2024, I confirmed that counsel should confer with the inquiry parties on a proposed revised stage three inquiry timetable, and update the Tribunal by 26 April 2024 (Wai 2358, #2.6.100 at [13]).
7. On 29 April 2024, Ms Feint and Mr Ranaweera filed a memorandum proposing a revised stage three inquiry timetable. The timetable proposed revised filing milestones leading to hearing one, then scheduled for the week of 1 July 2024, and an additional hearing week that counsel considered was necessary to accommodate the volume of anticipated stage three evidence (Wai 2358, #3.2.550 at [3]–[6]).
8. On 29 April 2024, I instructed parties, via e-mail correspondence by the Waitangi Tribunal Registrar, to file any submissions in response to the revised stage three inquiry timetable submitted by counsel for Te Kotahitanga o Ngāti Tūwharetoa by 3 May 2024.
9. On 24 May 2024, having considered the submissions received, I issued memorandum-directions that (Wai 2358, #2.6.101 at [13]–[15]):
 - (a) granted Te Kotahitanga o Ngāti Tūwharetoa’s request for an additional claimant hearing;

- (b) confirmed that the stage three inquiry will proceed with four hearings (comprising two claimant and interested party hearings weeks, a Crown hearing week, and a week of closing submissions); and
- (c) approved Te Kotahitanga o Ngāti Tūwharetoa's proposed revised timetable, but with amendments made to allow for a more reasonable and structured timetable and to avoid the necessity for any extension requests.
10. In order to accommodate the revised filing timetable, I adjourned the existing date for hearing one (then scheduled for the week of 1 July 2024) and confirmed that the hearing would now be convened in the week of 9 September 2024. I noted that this adjustment would also enable the Tribunal to hold a judicial conference for inquiry planning purposes and confirmed that the judicial conference would be held via audio-visual link (AVL) on 4 July 2024 (Wai 2358, #2.6.101 at [14]–[15]).
11. On 14 June 2024, I issued a memorandum-directions that responded to several extension requests received for the filing of claimant and interested party opening submissions, which were then due on 11 June 2024. Having considered these requests, I granted a blanket extension to parties and confirmed that any remaining interested party and claimant opening submissions should be filed by 21 June 2024, with the Crown's opening submissions to now follow by 5 July 2024 (Wai 2358, #2.6.102 at [5]–[7]).
12. I also confirmed that any matters relating to Crown evidence, including any arrangements made in response to Crown filing (such as leave to file further submissions), would be addressed at the forthcoming judicial conference (Wai 2358, #2.6.102 at [9]).
13. On 20 June 2024, I informed parties, via e-mail correspondence from the Registrar, that the judicial conference could no longer be held on the above date and would instead be held on 8 July 2024.
14. I issued an agenda for the judicial conference which confirmed a number of inquiry planning matters for discussion with parties on 21 June 2024 (Wai 2358, #2.6.105 & #2.6.105(a)). Other matters arising were also discussed.
15. A list of appearances for those who participated in the 8 July 2024 judicial conference is **attached as Appendix B**.

Hearing one arrangements

16. Hearing one is scheduled to be held at the Waitangi Tribunal's offices, in Wellington, from 9 to 13 September 2024 (Wai 2538, #2.6.98 & #2.6.101).
17. I commenced the judicial conference by seeking an update from counsel on hearing one preparations and related hearing one planning matters, including likely witness numbers.
18. Counsel for the New Zealand Māori Council (NZMC) claimants, Donna Hall, confirmed that her clients are ready to proceed to hearing. She advised that two-and-a-half hearing days will likely be required to hear the evidence for the NZMC, with the possibility of reducing this to two days if necessary.
19. I explored with counsel the extent to which parties have been canvassed on the remaining hearing time for hearing one and indicated that it would be useful to receive a confirmed list of witnesses.
20. Matthew Smith, counsel for the NZMC claimants, indicated that these conversations had yet to occur but indicated that the parties would work collaboratively together to ensure

the efficient use of available hearing time. Counsel for the sixth Wai 2358 claimants, Bryce Lyall, suggested that counsel might usefully confer and file an updating memorandum with the Tribunal by the end of the week.

21. I thank counsel for their collaborative efforts in planning for hearing one. As indicated at the judicial conference, it would be useful to receive a confirmed list of witnesses who will appear at hearing one, along with confirmation of who will act as co-ordinating counsel for the hearing.
22. I accordingly direct counsel for the NZMC to confer with parties and file a joint memorandum on the agreed approach to be taken to hearing one planning (inclusive of those matters indicated at [21] above) by no later than **5 pm, Monday 29 July 2024**.

Confirmed dates for hearing two

23. In memorandum-directions of 24 May 2024, I indicated I would confirm the revised dates for hearing two (originally scheduled for three days from 10 December 2024) and discuss venues and dates for subsequent hearings (Wai 2358, #2.6.101 at [15]).
24. Having assessed Tribunal availability, I now confirm that hearing two will be held from **9 to 13 December 2024**.

Location and venue arrangements for hearings two and three

Hearing locations

25. Parties were previously directed to provide feedback by 25 April 2024 on potential locations for hearings two and three (Wai 2358, #2.6.98 at [10]–[11]). Further submissions regarding hearing locations have been filed subsequently.
26. Summaries of these submissions are **attached** as **Appendix C**. Overall, there seemed to be a general consensus that:
 - (a) hearing two should be held in Taupō or Tūrangi (or possibly both – see below); and
 - (b) hearing three should be held in Rotorua.
27. Having heard further submissions at the judicial conference, I confirm the Tribunal is amenable to a revised proposal that would see:
 - (a) hearing two held in Tūrangi; and
 - (b) hearing three (which is currently scheduled to be the Crown hearing week) held at Wairakei.
28. Counsel for Te Kotahitanga o Ngāti Tūwharetoa Karen Feint KC indicated that she would need to seek further instructions on these matters in the first instance, and sought leave to file an updating memorandum on this basis.
29. I grant the leave sought and now confirm that Ms Feint should file an updating memorandum on the revised proposal for hearing two and three locations by no later than **5 pm, Monday 22 July 2024**.

Split venues and/or site visit

30. Various venue options were explored at the judicial conference in response to Ngāti Tūwharetoa's initial proposal to split hearing two between two venues (Wai 2358, #3.2.550 at [14]).
31. I advised during the judicial conference that, due to funding constraints, the Tribunal would not be able to accommodate such a request without the consequent loss of a hearing day. It is also the Tribunal's preference that hearings occur from a single venue for inquiry efficiency purposes.
32. One option explored was the possibility suggested by Ms Feint of undertaking a site visit while the venue transition occurred. Counsel noted that this would allow the Tribunal and parties an opportunity to observe various sites of geothermal and cultural interest in the area, with hearing proceedings resuming the next day from the second of the two venues.
33. I confirm that the Tribunal is open to attending site visits in the area, provided that suitable transport arrangements are made for Tribunal panel members and staff, and that unanticipated resourcing pressures do not arise as a consequence.
34. I also explored with Ms Feint whether Ngāti Tūwharetoa would be amenable to funding hearing two thereby negating the loss of a possible hearing day. Ms Feint indicated that she would need to seek instructions on this point and update the Tribunal thereafter.
35. I accordingly direct Ms Feint to provide an update on these matters in the updating memorandum referred to at [29] above.

Crown evidence

Revised filing dates for Crown evidence

36. The Crown previously signalled 2 August 2024, and in a later proposal 16 August 2024, as possible dates for the filing of its evidence for stage three (Wai 2358, #3.2.565 at [8] & Wai 2358, #3.2.581 at [5]).
37. During the judicial conference, counsel for the Crown Tim Stephens stated that the Crown now proposes to file the bulk of its evidence by 30 August 2024, with the possibility of supplementary evidence covering any further policy and legislative developments to be filed thereafter (likely in 2025). Counsel attributes the Crown's ongoing policy development, the need to take instruction (including the time taken to seek Cabinet approval), and the scope of evidence it must engage with, as the main reasons for why additional time is required.
38. A number of claimant and interested party counsel raised concerns about the revised timeframe for the Crown's evidence. Of particular concern to counsel was the possible prejudice to parties participating in hearing one who could not reasonably be expected to file reply evidence before the commencement of hearings.
39. To balance the need for counsel to brief their clients ahead of the hearing alongside the Crown's apparent evidential and administrative requirements, I proposed that the Crown should file some evidence on 16 August 2024, with the remainder to follow two weeks thereafter. Parties appeared to agree that this proposal was acceptable given the circumstances.

1

40. I now confirm that the Crown should file as much evidence as can be practically finalised by no later than **5 pm, Friday 16 August 2024**, with the remainder filed by no later than **5 pm, 30 Friday August 2024**. I will consider the need for any supplementary evidence in due course.

Crown to file further updates as needed

41. I note that several counsel participating in the judicial conference submitted there exists a heightened need for transparency from the Crown given the evolving nature of the policy programme and reform in this space, and that particular 'clarity and candour' are required regarding the Crown's position in respect of these proceedings.

42. Ms Feint suggested that a Crown Statement of Position might be helpful in this regard. In response, Mr Stephens indicated that a statement of position could be informative on some but not all aspects, and the Crown's opening submissions would be filed shortly.

43. I agree that the Crown's opening submissions are likely to be useful in regards to understanding the Crown's position in respect of the current law, but agree that it is essential that the Tribunal and the parties also remain well apprised of any key policy and legislative developments.

44. In keeping with similar directions given in stage two (Wai 2358, #2.6.22 at [51]), I accordingly direct the Crown to file a memorandum as soon as possible regarding any significant policy or legislative developments should or as they transpire, and to do so on an ongoing basis.

Claimant and interested party evidence in reply

45. Having addressed arrangements for the filing of Crown evidence, I explored with parties a prospective revised filing date for claimant and interested party evidence in reply.

46. Counsel for the NZMC and Tauhara North No.2 Trust had previously sought that claimant and interested party reply evidence be filed a minimum of four weeks from the filing of the Crown's evidence (Wai 2358, #3.2.563 & #3.2.564). Counsel participating at the judicial conference were generally of the view that such a timeframe was no longer appropriate and should be extended.

47. Following these discussions, I suggested that a two-month period may instead be preferable. Counsel appeared to be in agreement.

48. I accordingly confirm that any claimant and interested party evidence in reply is now to be filed by no later than **5 pm, Friday 25 October 2024**.

49. As noted at [38], the above revised filing dates may impact those participating in hearing one disproportionately.

50. With this in mind, I agree to Mr Smith's suggestion made during the judicial conference that counsel be allowed to lead oral supplementary evidence of witnesses at hearing one in light of the Crown's evidence filed in August 2024.

Future hearings and possible additional hearing requirements

51. I signalled to parties during the judicial conference that the Tribunal has confirmed funding for no more than two hearing weeks in the current financial year. It follows that, without additional resourcing, hearing three could only be convened from 1 July 2025 at the earliest.

52. It is my intention to seek additional resourcing as the financial year progresses. However, it remains to be seen whether additional funding can be made available in the current financial climate.
53. I also explored with parties at the judicial conference whether counsel considered four hearing weeks remained sufficient for the stage three inquiry, particularly for the purpose of hearing the anticipated volume of claimant and interested party evidence.
54. Counsel for the NZMC expressed the view that further hearing time 'could be helpful', but indicated that firm projections on overall hearing requirements remained difficult to predict. Counsel submitted this was particularly challenging without reference to the Crown's evidence and the likely volume of claimant and interested party reply evidence.
55. I agree that planning estimates remain difficult to fix at the current stage of these proceedings. I therefore direct counsel to confer and file, preferably jointly, a memorandum addressing any further hearing requirements for stage three by no later than **5 pm, Friday 22 November 2024**.

Eligibility request from Ngāti Tūwharetoa

56. On 24 June 2024, the Tribunal received a statement of claim from Tā Tumu te Heuheu Tukino VIII on behalf of Ngāti Tūwharetoa, and Wiari Milton Rauhina on behalf of Ngā Hapū o Ngāti Tūwharetoa. The claim was subsequently registered as the Geothermal Resources (Ngāti Tūwharetoa and Ngā Hapū o Ngāti Tūwharetoa) (Wai 3381) claim (Wai 3381, #1.1.1 & #2.1.1).
57. In the accompanying memorandum, together with the opening submissions of Ngāti Tūwharetoa, counsel seek leave for the claim to be granted full claimant status in stage three inquiry (Wai 3381, #3.1.1 at [5] & Wai 2358, #3.3.103 at [6]–[7]).
58. The Tribunal has since received memoranda in opposition of the claim's consolidation and a memorandum in reply (Wai 2358, #3.2.597, #3.2.598 & #3.2.599).
59. While oral submissions were heard on this matter at the judicial conference, several counsel indicated that they would need additional time to take instructions on this matter.
60. I therefore directed parties to file any submissions on the proposed consolidation of Wai 3381 into this inquiry by no later than **5 pm, Friday 12 July 2024**, and further confirmed that Ms Feint should file any submissions in reply on behalf of the Geothermal Resources (Ngāti Tūwharetoa and Ngā Hapū o Ngāti Tūwharetoa) (Wai 3381) claim by **5 pm, Wednesday 17 July 2024**.
61. As indicated at the judicial conference and at [2] above, I will issue my decision on this matter following receipt of any further submissions in accordance with this direction.

Other matters arising

Participation of any further interested parties

62. Parties with interested party status in this inquiry who wished to participate in stage three were required to file submissions by 16 April 2021 confirming (Wai 2358, #2.7.9 at [28]):
- (a) their intention to participate in the stage three inquiry; and
 - (b) the nature of their interests in geothermal resources.

63. On 13 May 2021, I confirmed the list of parties granted interested party status for the stage three inquiry. I also noted that this list was subject to amendment following any further leave granted (Wai 2358, #2.6.75 & #2.6.75(a)).
64. Since that time, I have addressed further interested party requests on a case-by-case basis, and most recently on 9 July 2024 (Wai 2358, #2.6.106 & #2.6.106(a)).
65. Given the advanced progression of stage three inquiry planning and the number of filing deadlines that have now passed, further requests for interested party participation have an increasing likelihood to impact the inquiry timetable and result in prejudice to parties.
66. I therefore consider it necessary to direct that any requests for interested party status received **after 30 August 2024** will, if granted, receive watching brief status only.

Interested party attendance at hearings

67. I note that some parties at the judicial conference referred to issues experienced in obtaining funding from Legal Aid Services for interested parties to attend the forthcoming hearings of this inquiry. Ms Sykes, who is counsel for the Tai Tokerau Land (Wai 354) claim, expressly sought a direction from the Tribunal in the hopes that this matter can be promptly resolved.
68. I note that currently two of the four hearings to be held for stage three are allocated for both claimant and interested party participation, and that interested party participation has formed a critical component of our inquiry process at all stages of this inquiry.
69. I further advise that the Tribunal expects to hear all evidence timetabled for hearing in person and considers it essential that interested parties be properly assisted to attend hearings and participate in these proceedings.

Adjusted dates for stage three opening submissions

70. As noted at [11] above, any remaining stage three interested party or claimant opening submissions were due on 21 June 2024, with Crown opening submissions due by 5 July 2024 (Wai 2358, #2.6.102 at [5]–[7]).
71. On 3 July 2024, the Tribunal received a memorandum from Janet Mason, counsel for the the Water and Geothermal Bodies (Tai Tokerau) (Wai 2601) claimants and several interested parties, seeking an extension to file opening submissions on behalf of her clients by 12 July 2024 (Wai 2358, #3.2.591).
72. Counsel submitted such an extension was required due to (Wai 2358, #3.2.591 at [3]):
- (a) staff illness;
 - (b) capacity constraints arising from claimants who oppose the current government's Tiriti policies;
 - (c) additional time needed to seek instructions and complete submissions for the parties counsel represents in these proceedings; and
 - (d) urgent instructions counsel received during this period from the Speaker of the Parliament of Fiji.
73. On 5 July 2024, via e-mail correspondence from the Registrar, I granted a final blanket extension to parties and confirmed that any remaining claimant and interested party

opening submissions must be filed by **5 pm, Friday 12 July 2024**. Crown opening submissions are now to follow by **5 pm, Friday 26 July 2024**.

74. In respect of the former of the two milestones, I noted that the stage three inquiry timetable had been expressly revised to provide for a more reasonable and structured timetable, and to avoid the necessity for any extension requests (Wai 2358, #2.6.101 at [14]).
75. For this reason, I directed – and repeat here for confirmation – that there will no further extensions granted for the filing of claimant and interested party opening submissions.

The Registrar is to send this direction to all those on the notification list for Wai 2358, the National Freshwater and Geothermal Resources inquiry.

DATED at Gisborne this 17th day of July 2024

A handwritten signature in black ink, appearing to read 'W Isaac', with a small dot at the end.

Judge W W Isaac
Presiding Officer

WAITANGI TRIBUNAL