Wai 3278, #1.1.1
Wai 3325, #1.1.17

IN THE WAITANGI TRIBUNAL
KEI MUA I TE TARAIPIUNARA

WAI

UNDER **The Treaty of Waitangi Act 1975**

CONCERNING **Ngāti Ruapani ki Waikaremoana Climate Change Claim**

STATEMENT OF CLAIM
NGĀTI RUAPANI KI WAIKAREMOANA CLIMATE CHANGE CLAIM

Dated: 11 May 2023

Bryce Lyall and Hannah Swedlund
Barristers
PO Box 60649
Titirangi
Auckland 0642
Ph: (09) 889 1835
Bryce@brycelyall.com
Hannah@brycelyall.com

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THE CLAIMANTS SAY:

The claimants

1. This claim is brought by Vernon Winitana on behalf of Ngāti Ruapani ki Waikaremoana.

2. The claimant is Māori, and meets the jurisdictional requirements under section 6 of the Treaty of Waitangi Act 1975.

Summary

3. Avoiding the worst effects of climate change means urgently reducing greenhouse gas emissions and limiting global average temperature rise to 1.5°C above pre-industrial levels. Aotearoa New Zealand must make significant and urgent cuts in its greenhouse gas emissions and expand carbon sinks, so that it meets its domestic emissions reductions target.

4. However, the effects of climate change will not be borne equally. Māori particularly in rural areas will bear the some of the worst consequences of climate change due to the profile of their remaining whenua.

5. Māori will also bear the brunt of mitigation efforts for climate change. These breaches are exacerbarted by the Crown's treatment of Māori as just another stakeholder when it engages concerning climate change mitigation efforts.

6. In breach of the principles of Te Tiriti o Waitangi, the Crown has failed to take adequate and timely steps to protect the Ruapani people (both those currently alive and those, as yet unborn), and their whenua, wāhi tapu, and taonga from the effects of climate change.

Ngāti Ruapani ki Waikaremoana

7. Ngāti Ruapani ki Waikaremoana hold ahi kā in the area surrounding Lake Waikaremoana, to the Waiau River to the South, the Huiarau Ranges to the North and Titirangi to the East.[1]

[1] See the Brief of Evidence of Vernon Winitana dated 11 May 2023.

8. The Iwi and hapū are seeing and experiencing the prejudicial effects of climate change first-hand on their rohe, their taonga, and their wāhi tapu.

Climate Change

9. On 2 December 2020 the New Zealand Government declared a climate emergency, committing to urgent action on reducing emissions.[2] Climate change "is real, it is happening, and human beings are largely responsible for it".[3]

10. Measured global surface temperature between 2001-2020 was 0.99°C higher than 1850-1900, and has increased faster since 1970 than in any other 50-year period over at least the last 2000 years.[4]

11. The effects of climate change include extinction of species, irreversible loss of biodiversity, unavoidable sea level rises,[5] and adverse weather effects including droughts and storms.[6]

12. Remaining whenua Māori is of poorer quality than general land in New Zealand, as the best quality whenua was alienated or taken by raupatu from its Māori owners. Today, this whenua is disproportionately unstable, isolated, or economically limited based on current or potential use.[7]

13. Almost 80% of all Māori land is suited to non-arable use, ~46% is marginal land and needs to stay under vegetative cover to protect the soil, limit erosion, maintain water quality.[8]

14. Māori will suffer disproportionately from the effects of climate change, through effects including extinction of taonga species, damage to mahinga kai, loss of matauranga Māori, and culturally significant wāhi

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[2] Rt Hon Jacinda Ardern, Motions, Climate Change, Declaration of Emergency, sitting date: 2 Dec 2020.
[3] Daniel Bodansky, Jutta Brunnee and Lavanya Rajamani *International Climate Change Law* (1st ed, Oxford University Press, Oxford, 2017) at 1.
[4] IPCC *AR6 synthesis report* (20 March 2023) at 6.
[5] At 42.
[6] At 34.
[7] Tanira Kingi "Māori landownership and land management in New Zealand" in Making land work (volume 2) (Australian Agency for International Development, Canberra, June 2008) at 134.
[8] Ministry for Primary Industries *Climate change business opportunities for Māori* (November 2012) at 21.

tapu, taonga, and whenua being near the coasts, in catchment areas, or on flood plains.[9]

15. Māori face barriers to adaptation including lack of access to quality technical knowledge on which to make decisions, lack of participation opportunities in planning arrangements, lack of capital for infrastructure and design, and poor infrastructure and services in remote and isolated settlements.

16. As King, Penny and Severne note, another barrier may include the high spiritual value placed on coastal land and resources which can restrict, and may even rule out, conventional adaptation options being proposed by mainstream groups such as managed retreat and relocation.[10]

17. Current mitigation and adaptation actions and policies are not sufficient to prevent or mitigate the worst effects of climate change.[11]

Ngā Mātāpono o te Tiriti/ Principles and Obligations

Te mātāpono o te tino rangatiratanga

18. The Stage Two report from Te Paparahi o Te Raki was recently released, considering the implications of the Stage One Report conclusions on the principles of the Treaty.[12]

19. In Stage One, the Tribunal concluded that when Māori signed te Tiriti o Waitangi they did not cede their authority to make and enforce law over Māori or within their territories—they agreed to share power and authority. The Crown and Māori were to be equal, with different roles and different spheres of influence.[13]

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[9] Ministry for the Environment *Our Atmosphere and Climate 2020* (October 2020) generally and at 53–55.
[10] Darren N. King, Guy Penny and Charlotte Severne "The climate change matrix facing Māori society" in David Wratt and others (eds) *Climate change adaptation in New Zealand* (New Zealand Climate Change Centre, Wellington) 100 at 108.
[11] IPCC *AR6 synthesis report*, above n 4, at 6.
[12] Waitangi Tribunal *Tino Rangatira me te Kāwanatanga* (Wai 1040, 2022) at 21.
[13] Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014) at 527–528.

20. This understanding of equal authority was the origin of the principle of partnership.[14] Previous reports expressed the principle of partnership as meaning the Crown has the overarching authority to govern, make and enforce law, qualified by the requirement to give effect to Treaty guarantees.

21. However, the Stage Two Tribunal broke from this understanding and found that, as Te Raki rangatira made no cession of sovereignty, the authority that was granted to the Crown was not superior to that held by rangatira. The Crown's authority in Te Raki was expressly limited to its own sphere. Alongside it, and equal to it, was that of tino rangatiratanga.[15]

22. Therefore, the partnership requires both parties to co-operate in matters of governance. The scope and effect of these dual spheres of power, and how this is to be managed when such power overlaps, is for both the Crown and Māori to negotiate.[16]

23. Although the Tribunal articulated this principle as applying to Te Raki Māori, the claimants say it should be extended for all Māori to whom the Crown owes Te Tiriti duties.[17]

24. Tino rangatiratanga can include the freedom to be distinct peoples; the right of Māori to freely determine their destinies; and the right of Māori to exercise autonomy and self-government.[18]

Consultation

25. In a matter of particular significance to Māori, the Crown has a duty to act reasonably, to make informed decisions, and to turn its mind to the future needs of Māori. This cannot be done without consultation. Full discussion should take place with Māori before the Crown makes any

[14] Waitangi Tribunal *Tino Rangatiratanga,* above n 12, at 75.
[15] At 75–76.
[16] At 76.
[17] At 75–76.
[18] Waitangi Tribunal *Whaia te Mana Motuhake*, (Wai 2417, 2015)at 26.

decisions on matters that may impinge upon the rangatiratanga of a tribe or hapu in relation to its taonga.[19]

Te mātāpono o te mana taurite / Equity

26. The Crown is required to act fairly to both Māori and non-Māori, and to ensure that non-Māori interests are not prioritised to the disadvantage of Māori. Where disadvantage occurs, active intervention is required to restore the balance.[20]

Te mātāpono o te matapopore moroki / Active protection

27. The Crown has a duty to actively protect its Tiriti partner, and Māori taonga.[21]

28. From the exchange of kawanatanga, the Crown has a fiduciary duty to protect Maori interests to the fullest extent practicable.[22]

Te Taiao / The Environment

29. In 2008 the Waitangi Tribunal confirmed that the Crown owes a duty of active protection towards waterways, fisheries, geothermal resources, lands, estates, and taonga. This duty is analogous to a fiduciary duty.[23]

30. The Tribunal stated:[24]

> *There is an underlying principle in the Treaty that the Crown has a duty actively to protect the exercise of tino rangatiratanga in environmental and resource management.*

31. Similarly there is no doubt is that the Crown owes Māori duties concerning the environment more generally. As stated most recently by the MV Rena Tribunal:[25]

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[19] Waitangi Tribunal *Ahu Moana The Aquaculture and Marine Farming Report* (Wai 953, 2002) at 70.
[20] Waitangi Tribunal *Tino Rangatiratanga,* above n 12, at 64.
[21] Waitangi Tribunal *Ko Aotearoa Tēnei : A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 24.
[22] Waitangi Tribunal *Ahu Moana* above n 19, at 67.
[23] Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) at 1235.
[24] At 1245.
[25] Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims* (Wai 2391 and Wai 2393, 2015) at 12.

The fundamental relationship created by the Treaty means that the Crown has a duty to protect the environment itself, as it affects the lands, estates, and taonga of Māori, and to protect Māori in their exercise of rangatiratanga over taonga.

32. The Waitangi Tribunal has also found that Māori have a unique relationship to the environment and environmental issues. As the Waitangi Tribunal found in its *Muriwhenua Fisheries Report*, these criteria govern Māori thinking:[26]

a. A reverence for the total creation as one whole;

b. A sense of kinship with fellow beings;

c. A sacred regard for the whole of nature and it's resources as being gifts from the gods;

d. A sense of responsibility for these gifts as the appointed stewards, guardians and rangatira;

e. A distinctive economic ethic of reciprocity; and

f. A sense of commitment to safeguard all of nature's resources (taonga) for the future generations.

33. Further, the Tribunal has found: [27]

Māori relationships with taonga in the environment – with landforms, waterways, flora, and fauna, and so on – are articulated using kinship concepts. indeed, the first step in understanding the Māori relationship with the landscape (for example) is to understand that descent from it is an essential Māori belief. Māori attitudes towards the environment make sense if that is grasped.

The second core value is kaitiakitanga. It is often translated as guardianship or stewardship. This is a fair approximation, although it lacks the core spiritual dimension that animates the concept. In Māori tradition the 'guardians' or 'stewards' are, as often as not, supernatural beings. Kaitiakitanga is really a product of whanaungatanga – that is, it is an intergenerational obligation that arises by virtue of the kin relationship. It is not possible to have kaitiakitanga

[26] Waitangi Tribunal *Muriwheua Fishing Report* (Wai 22, 1988) at 179.
[27] Waitangi Tribunal *Ko Aotearoa Tēnei,* above n 21, at 105.

without whanaungatanga. in the same way, whanaungatanga always creates kaitiakitanga obligations.

Future Generations

34. The Crown has a duty to actively protect Māori, and future generations.

United Nations Declaration on the Rights of Indigenous Peoples

35. UNDRIP was endorsed by New Zealand in 2010. It was described by the Wai 262 Tribunal as "(p)erhaps the most important international instrument ever for Māori people".[28] While not binding, it is of 'major and lasting importance where maximum compliance is expected'.[29]

36. The Tribunal has previously confirmed that interpretation and application of Tiriti principles are informed by UNDRIP.[30]

37. Articles relevant to interpretation and application of te Tiriti and its principles concerning climate change include:

> *Article 23*
>
> *Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.*
>
> *Article 29*
>
> *1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.*
>
> *2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.*

[28] Waitangi Tribunal *Ko Aotearoa Tēnei,* above n 21, at 233.
[29] Waitangi Tribunal *Whaia te Mana Motuhake*, above n 18, at 34.
[30] At 44.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Causes of Action

Climate Change Response Act 2002 – Emissions Reductions and ETS

38. New Zealand is a party to the Paris Agreement. Under Article 4.2 of the Paris Agreement each party shall prepare, communicate, and maintain successive nationally determined contributions ("**NDC**") that it intends to achieve.

39. The Government communicated its NDC, setting a target out to 2030. The goal under that NDC is to reduce net emissions by 30% from 2005 levels by 2030.[31]

40. The United Nations Environment Programme's *Emissions Gap Report 2018* [32] concluded that "assuming that climate action continues consistently throughout the 21st century, implementing the unconditional NDCs would lead to a mean global temperature of around

[31] Ministry for the Environment "About New Zealand's Emissions Reduction Targets: 2030 Target" <http://www.mfe.govt.nz >.
[32] United Nations Environment Programme *Emissions Gap Report* (November 2018).

3.2°C".[33] This is well above the 1.5°C aspiration under the Paris Agreement.[34] The current NDCs will need to be enhanced if the target is to be reached.

41. The Climate Change Response Act ("**CCRA**") is the key plank in the Crown's efforts, with a 2050 target now set out at section 5Q. Under that section, net accounting emissions of greenhouse gases (other than biogenic methane) are zero by 2050; and emissions of biogenic methane are 10% less than 2017 emissions by 2030; and are at least 24% to 47% less than 2017 emissions by 2050.

42. The CCRA requires emissions budgets to be set for five year periods leading up to 2050, with at least three of these budgets in place at any time.[35]

43. Agriculture is currently the largest source of emissions (50% as at 2020) with the remainder from waste. Long lived gas comes predominantly from energy, industry and buildings, then transport.[36] Yet the only source of removals in Aotearoa New Zealand is establishing new forests, which absorb carbon as they grow.[37]

44. One of the key tools used by the Crown to reduce emissions to reach its international obligations and 2050 target and emissions budget is the Emissions Trading Scheme (ETS).[38] The core of the scheme is that certain businesses must surrender an 'emissions unit' to the Government, for each tonne of emissions they produce. In turn, emissions can be given to businesses that remove carbon, which, is most efficient and economic through pine forest. These emission units can be brought and sold, and are intended to both incentivise businesses to reduce emissions and forestry to be established.[39]

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[33] At 21.
[34] Paris Agreement Art 2(1)(a).
[35] At Section 5X(2).
[36] Climate Change Commission *Inaia tonu nei: a low emissions future for Aotearoa* (2023) at 88.
[37] Climate Change Commission 2023 *Draft advice to inform the strategic direction of the Government's second emissions reduction plan April 2023* at 46.
[38] Climate Change Response Act 2002 s 3(b).
[39] Ministry for the Environment "About the New Zealand Emissions Trading Scheme" <www.environment.govt.nz>.

45. Māori land will bear a disproportionate burden of the proposed transition due to an overreliance on particular high emissions industries – a dependency that was driven by Crown alienation of land in breach of Te Tiriti.

46. The Māori economy contributes 11.2% of New Zealand's total emissions profile, while contributing 6.4% towards the GDP. This disproportionality is because the Māori economy relies heavily on beef, sheep and dairy farming, which makes up over 70% of their total emissions profile.[40]

47. However, this must be looked in the context of New Zealand's total emissions, where beef, sheep and dairy farming make up over 50% of New Zealand's emissions profile.[41] Therefore, the Māori economy does not contribute excessively towards the total emission profile.

48. This reliance on primary industries of beef and sheep farming, and forestry, is due to the marginal quality of Māori land.[42] Such primary industries inherently requires large capital outlay and associated commitments, or long lifecycles that lock in Māori-collectives.[43] These inherent limitations must be considered in transition to lower emission land uses.

49. Forestry has a lower emissions profile than sheep or beef farming and it has been floated as a potential low-emission economic expansion. Forestry is already used to offset greenhouse gas emissions through the ETS.[44]

50. However, the use of whenua for forestry locks Māori into long term arrangements, and ultimately undermines rangatiratanga.

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[40] Berl *Climate change mitigation impact on the Māori economy* (2021) at 7.
[41] At 7.
[42] At 32.
[43] Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa*, above n 36, at 331.
[44] Berl *Climate change mitigation impact on the Māori economy,* above n 40, at20.

51. Māori-collectives in forestry often received such forested land through Te Tiriti o Waitangi/The Treaty of Waitangi settlements.[45] Overall, Māori own 40% of forestry industries.[46]

52. If the forests were established before 1990, they are encumbered with a deforestation liability. This means the land is ineligible for earning emissions trading units, and the land owner is also likely to be liable to pay carbon credits if deforestation occurs and the area is not replanted into forest.[47]

53. The composition of forest on Māori freehold land is:[48]

    a. 74 percent pre-1990 natural forest

    b. 20 percent pre-1990 plantation forest and;

    c. 6 percent post-1989 natural and plantation forestry.

54. Further, historic disruptions in whenua Māori ownership and management have meant some Iwi/Māori owners are only recently reinstated to their whenua and are waiting for encumbrances to be removed. Encumbrances include Crown imposed management that sold land, committed land in perpetual leases, or locked Māori into industries such as forestry or agriculture.[49]

55. Māori have obligations of kaitiakitanga in relation to their land, especially the ngāhere. However, current ETS policy settings and sector infrastructure heavily favour the planting of exotic Pinus Radiata over other species.[50]

56. Māori-collectives may have alternative aspirations for the use of their culturally significant land such as papakāinga development. The

[45] Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa*, above n 36, at159.
[46] At 157.
[47] Berl *Climate change mitigation impact on the Māori economy,* above n 40, at 4.
[48] At 22.
[49] Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa*, above n 36, at 329.
[50] At 162.

restriction of land under the ETS undermines the exercise of group's rangatiratanga and mana Motuhake.[51]

57. As owners in marginal whenua which is only suited to afforestation, and having had significant forestry assets returned through Tiriti settlements, the claimants say that the effect of the Crown's approach is that Māori are required to carry a disproportionate burden in seeking to mitigate the effects of climate change.

Threat to Whenua

58. Māori land is under particular threat from climate change due to its marginal quality and the socioeconomic context of the communities owning Māori land. Almost 80% of all Māori land is steep hill country. 46% is marginal land, which needs to stay under vegetative cover to protect soils, limit erosion, and maintain water quality.[52]

59. Climate change impacts will place further pressure on these areas and will worsen the already "marginal" quality of this land if nothing is done to maintain and improve its resilience.

60. This impact will be heightened by low investment in rural infrastructure in predominantly Māori communities, with vulnerable clean water resources, housing, roading and settlements and infrastructure built close to waterways, awa, floodplains and coastal areas.

61. Many Māori landowners also often have lower economic power and restricted access to finance due to land restrictions.

62. These factors contribute to an overall reduced capacity to cope. This situation will be worse in areas where communities have negligible or no insurance cover.[53]A significant area of this Maori land is in fragile natural environments such as wetlands and coastal areas, lakes and the like.[54]

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[51] At 159.
[52] Ministry for Primary Industries *Climate change business opportunities for Māori,* above n 8, at 21.
[53] Darren N. King, Guy Penny and Charlotte Severne "The climate change matrix facing Māori society" , above n 10, at 106.
[54] Tanira Kingi "Māori landownership and land management in New Zealand", above n 7, at 134.

Threat to Taonga Species

63. Ngāti Ruapani ki Waikaremoana have traditionally collected food products and species, from the interior hinterland to the coast, from lakes, puna and rivers, such as tuna, kōkopu, whitebait and pipi. These environments are threatened through changes to sea temperature and level, sedimentation and slash. Tuna in particular has been impacted in their rohe due to hydropower generation of Lake Waikaremoana and the management of the claimants' taonga tuku iho, wai.

64. The Tribunal has already acknowledged the population of tuna is being affected by climate change: "global climate change is one factor that is considered significant in different parts of the world, because it has reduced the number of elvers coming into a catchment area from the sea".[55]

65. Tuna are a traditional food source for Māori peoples, and are considered sacred.[56] Climate change is therefore having, and will continue to have, a prejudicial impact on the ability of Ngāti Ruapani ki Waikaremoana, and future generations, to access their traditional fisheries and therefore their ability to enjoy their culture.

Ngāti Ruapani ki Waikaremoana Future Generations

66. The Crown's acts and omissions are placing Ngāti Ruapani ki Waikaremoana members (current and future) at risk, and undermining their ability to exercise kaitkitanga over their rohe, their resources, and their taonga. Ngāti Ruapani ki Waikaremoana manākitanga and mana is also undermined as a result.

Prejudice

67. The Crown's acts and omissions concerning climate change are resulting in the following prejudice:

    a. Loss of ability to pass on cultural knowledge and matauranga;

[55] Waitangi Tribunal *Te Urewera Part VI* (2015, Wai 894) at 338.
[56] NIWA "Tuna" <www.niwa.co.nz >.

b. Loss of ability to practice kaitiakitanga and therefore whakawhanaungatanga over our taonga;

c. Undermining of water quality; fisheries and the health of the Ngāti Ruapani ki Waikaremoana ecosystem;

d. Negative impacts on the health of Ngāti Ruapani ki Waikaremoana members;

e. Economic prejudice to Ngāti Ruapani;

f. Prejudice to all future generations of Ngāti Ruapani.

Remedies Sought

68. The claimant asks that this claim be heard with urgency.

69. The claimants first ask that this Tribunal make a determination on which principles, with regard to UNDRIP and previous decisions and Tribunal reports, are appropriate for this inquiry and on issues concerning climate change for future inquiry.

70. The claimants seek findings that the principle of active protection applies to whakapapa, protection of future generations, and in all situations where issues of intergenerational equity arise.

71. The claimant seek a finding that this claim is well founded.

72. The claimants seek recommendations that:

a. The Crown work with Ngāti Ruapani ki Waikaremoana to mitigate the disproportionate impacts of climate change mitigation on Māori.

b. The Crown work with Ngāti Ruapani ki Waikaremoana to ensure that information and resources are provided to allow Ngāti Ruapani ki Waikaremoana to exercise their rangatiratanga in their rohe.

c. The Crown amend the purpose of the CCRA to align with an intergenerational approach to addressing climate change which recognises the role of Māori iwi, hapū, and whānau.

d. That the Crown codesign with Ngāti Ruapani ki Waikaremoana enforcement mechanisms and allow iwi, hapū, and whānau to exercise their rangatiratanga and act as enforcement officers under the CCRA.

e. The Crown codesign with the claimants a Māori taumata or expert body, supported by funding and a secretariat / support staff, that can, through a Te Ao Māori lens, conduct Tiriti o Waitangi audits on proposed reforms concerning climate change, and provide independent, expert advice to the Government on mitigating climate change, adapting to the effects of climate change, and monitor and review the Government's progress towards its emissions reduction and adaptation goals.

f. That the Crown establish a fund for ahi kā iwi, hapū or whānau to access and carry out data collection, research, education, or practical tasks that align with protection of the environment for future generations, and to allow for information to be provided to local and central government for policy direction.

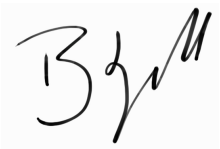
g. The Crown cover the costs of Ngāti Ruapani ki Waikaremoana to have this claim heard.

h. Any other recommendations that the Tribunal deems fit.

Conclusion

73. The claimants respectfully reserve the right to amend this statement of claim as further information becomes available.

Dated: 11 May 2023



Bryce Lyall
Counsel for Ngāti Ruapani

Hannah Swedlund

This statement of claim is filed on direct instructions by Bryce Lyall, Barrister.

The address for service of the claimants is Lopdell House, Room 2B Level 2, 418 Titirangi Road, Auckland.

Documents for service on the claimants may be left at the address for service or:

(a) Posted to PO Box 60649, Titirangi, Auckland.

or

(b) Emailed to Bryce@brycelyall.com.