WAITANGI TRIBUNAL

Wai 1040

CONCERNING the Treaty of Waitangi Act 1975

AND the Te Paparahi o Te Raki Inquiry

MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER RELEASING PRELIMINARY LIST OF SUB-ISSUES

1. By memorandum-directions of 16 September (Wai 1040, #2.5.94), the Tribunal proposed a preliminary top-level framework of generic issues and indicated we would be prepared to provide a preliminary second-order listing of generic issues if parties so desired. We sought a coordinated response from claimants in the event they wished us to provide such a list.

2. A coordinated response, representing a significant proportion of Te Raki claimants, was filed in the form of a joint memorandum of counsel of 27 September 2011 (Wai 1040, #3.1.638). I am encouraged by the coordinated approach from the Te Paparahi o Te Raki claimant community. This form of coordination amongst claimants and counsel will be vital in preparing a single joint claimant statement of generic issues and, beyond that, an effective stage 2 hearings programme.

3. The joint memorandum demonstrated support for the Tribunal issuing a preliminary second-order listing of generic issues. This list is **attached** as Annex A. The Tribunal has developed this list to reflect the key sub-issues that appear to arise from the claims and the research already completed for Te Paparahi o Te Raki.

4. In issuing this list of sub-issues under the 12 generic headings previously identified, we wish to underline their preliminary nature. Claimants and counsel are free to amend, alter or add to this framework list in submitting their joint statement of generic issues by 3 November 2011. Following that, the Crown will file its statement of position and concessions. The Tribunal will take all of this material into consideration before producing the draft of the statement of generic issues prior to the commencement of stage 2 hearings.

5. The final version of the statement of issues will of course define the scope and framework of the generic phase of stage 2. It will inform the evidence to be presented and the questions the Tribunal will seek to answer in its final report.

6. I look forward to Te Paparahi o Te Raki claimants and counsel, together with the Crown, continuing to make a coordinated and constructive contribution to defining the issues and progressing preparations for our stage 2 hearings.

DATED at Rotorua this 5th day of October 2011

Judge C T Coxhead
Presiding Officer
WAITANGI TRIBUNAL

"Annex A"

Te Paparahi o Te Raki Regional Inquiry

Preliminary List of Issues and Sub-Issues for Stage 2 Generic Hearings

1. Rangatiratanga, kāwanatanga and autonomy: political engagement between Māori and the Crown

The general issue concerns the extent to which the Crown recognised and provided for the exercise of tino rangatiratanga through institutions and entities established by Māori within the inquiry region, and whether the Crown, through the governance structures it established, recognised and provided for the exercise of tino rangatiratanga by Māori within the inquiry region. In particular:

a. How did Māori and the Crown express their understandings, obligations and expectations concerning the Treaty from 1840 onwards, and to what extent was there a meeting of minds on Treaty meanings and responsibilities?

b. What was the nature of any forms of institutional or legal autonomy sought by Te Raki Māori, such as rūnanga or the Kotahitanga movement? How did the Crown engage with any such proposals or entities?

c. To what extent have legislative and/or constitutional changes from 1840 onwards helped or hindered efforts by Māori to engage with the Crown at a political level?

d. What were the expectations of Māori concerning political engagement with the Crown? To what extent were any such expectations satisfied?

e. To what extent were land transactions a product of the developing relationship?

f. In what ways did Christianity and religious institutions influence Māori political expectations, whether as a mediating factor between Crown and Māori or as a formative influence on Crown-Māori political engagement?

2. Old land claims, scrip and surplus lands

The general issue concerns how the Crown investigated the validity of pre-1840 land transactions between Māori and Pākehā, and the effect of such Crown activity on Te Raki Māori. In particular:

a. What was the nature of pre-Treaty transactions involving land? To what extent were they characterised by ongoing mutual obligations or, alternatively, by outright alienation or 'sale' of the Māori interest?

b. What was the nature of the evidence heard by the Land Claims Commission, and was this sufficient for the Crown to gain an adequate understanding of the Māori context of the transactions?

c. To what extent did the pre-Treaty deeds accurately capture the nature of, and interests in, the transaction? How should the deeds themselves be interpreted? To what extent did the Crown or the Land Claims Commissioners rely on the deeds as proof of transfer or alienation of Māori interests?

d. What was the Protectorate's role, in particular with respect to the 1840s Land Claims Commission and, more generally, in protecting Te Raki Māori interests?

e. How did the Crown identify and take possession of 'scrip' lands, particularly in the Hokianga sub-region?

f. How much land did the Crown acquire through its claims to 'surplus' and 'scrip' land, and how much was granted to settlers?

g. By what actions or omissions did the Crown acquire the 'surplus' lands from pre-Treaty land transactions and lands which mission agencies and individuals may have held in trust for Māori prior to 1840? How did the Crown respond to later Māori claims to these 'surplus' and/or 'trust' lands during the nineteenth century?

h. How adequate was the 1947 Myers Commission investigation into the Crown's acquisition of 'surplus' land?

3. The Northern War, 1844-1846

The general issue concerns the extent to which the Crown was responsible for the Northern War, and the effects this war had on Māori, including their relationships with the Crown. In particular:

a. What was the nature of the conflict that emerged between Te Raki Māori and the Crown in the early 1840s? What were the Crown's kāwanatanga policies towards Te Raki Māori and the inquiry region rohe and to what extent did these lead to the outbreak of war?

b. In assessing Crown and Māori involvement in the war, what weighting should be given to factors such as northern economic decline, the change of colonial capital, Crown attempts to impose its authority over land and people, and divided Māori responses to the exercise of Crown authority in the Te Raki inquiry region?

c. What was the immediate impact on Te Raki Māori of Crown actions during the war?

d. What were the social and economic consequences of the war for Te Raki Māori?

4. Crown protection and acquisition of Māori land, 1840-1865

The general issue concerns the extent to which the Crown's acquisition of land in this period, and the manner of its acquisition, may have compromised its protective role. In particular:

a. What key political and economic objectives underpinned Crown land purchase policy and activities from 1839?

b. How adequate were the processes and practices used by the Crown to identify the owners or those holding rights in Māori land or other resources? Did the Crown identify the correct right-holders? What was the impact on Māori rights to land?

c. Was the 1846 Native Land Purchase Ordinance (which prohibited leasing) applied in the north, and was leasing rather than Crown purchasing a preferred Māori option?

d. Were promises of collateral benefits a feature of the purchase negotiations? What was the nature of such promises, if any?

e. What were Māori expectations in terms of immediate payment and how adequate were these payments?

f. Did the Crown ascertain whether Māori retained sufficient land for present and future needs, and were Māori left with sufficient land and capital resources?

g. Were areas of Māori land reserved from Crown purchases made inalienable, and to what extent were they subsequently alienated?

h. To what extent were purchases accurately and sufficiently defined by survey, and were boundaries clearly understood by the parties?

i. What was the Māori understanding of the nature of these Crown purchase transactions?

j. How much land was alienated in the Te Raki inquiry region through Crown acquisitions before 1865?

k. How were Te Raki Māori affected by Crown acquisition of land and/or land alienation in this period?

5. The titling and alienation of Māori land and the Native Land Court regime, 1865-1900

The general issue concerns whether the Native land legislation provided adequate mechanisms for legally recognising and providing for Māori interests in land and resources, and the impact of the Native Land Court system on Te Raki Māori. In particular:

a. What degree of consultation took place with hapū/iwi leadership over the introduction of the Native Land Court, and how was agreement, if any, secured from Māori?

b. What was the nature of, and reasons for, Māori engagement with the Native Land Court process in the Te Raki inquiry region?

c. How did the implementation of Native Land legislation, the operation of the Native Land Court and the institution of a new land tenure system impact on the exercise of traditional leadership and community decision-making in respect of land?

d. Was the Native Land Court an appropriate body, with appropriate processes and mechanisms, to determine the customary 'owners' of Māori land?

e. Did the new tenure system provide for the recognition of a range of customary rights, including shared, overlapping and usufructuary rights?

f. On the basis of what rules or principles did the Native Land Court in Te Raki allocate title to Maori, for example, ahi kā or occupation, conquest, whakapapa or ancestral connection, and to what extent did such rules/principles and their application reflect the customary tenure system(s)?

g. What was the impact of participation in the Native Land Court process for Māori, including survey costs, attendance costs, medical costs, loss of income? In what ways, if at all, did the Crown seek to mitigate these costs?

h. To what extent was the Native Land Court system used by land purchase officers and government officials to promote land alienation? What other mechanisms were used by officials to acquire Māori land?

i. To what extent did Te Raki inquiry region land become fragmented into uneconomic parcels? To what extent did the processes of individualisation and fractionation of titles, succession and partition facilitate the alienation of land from Māori?

j. Were protective mechanisms, such as restrictions on alienation, available to Māori landowners, how were these mechanisms used, if at all, and what impact did they have?

k. What was the nature and extent of Crown and private land purchasing in the Te Raki inquiry region and what, if any, were the adverse effects of this process on Te Raki Māori?

l. Did the Crown provide recourse to remedies for Te Raki Māori aggrieved by the Native Land legislation and the Native Land Court deliberations and decisions? Were any such mechanisms suitable to Māori needs?

m. Did the title options available to Māori provide sufficiently for effective participation in the developing colonial economy?

6. Twentieth century alienation, retention, titling and administration of Māori land

The general issue concerns the impact of twentieth century alienation policies and the extent to which Crown policies and legislation enabled Te Raki Māori to retain effective control and manage the lands and resources that they wished to retain. In particular:

a. What was the extent and pattern of Māori land alienation over the twentieth century? What factors explain any patterns?

b. What was the role of the Māori Land Court and other Crown agencies (in particular the Māori Land Boards and Native Department development schemes) in land administration? Did the intervention of these agencies assist Māori in developing land or obtaining other desired outcomes?

c. What was the Māori response to Crown land administration? What were the general effects of Crown land administration on Te Raki Māori?

d. What was the nature and extent of title consolidation schemes in the Te Raki inquiry region? What positive or adverse effects did they have on Te Raki Māori and their communities?

e. Regarding state-assisted land development schemes, what was the degree of consent that owners were able to exercise when the schemes were first instituted, and how were they consulted?

f. How effective were these land development schemes in practice for Māori? What were their original aims and to what extent were these aims achieved?

g. What degree of control were Māori able to exercise within the management and operation of land development schemes, including decisions on their ending and the resulting division of land?

h. To what extent did trusts and incorporations provide a solution to existing title difficulties and facilitate development by Māori of their lands?

i. What role did the Māori Trustee play in the Te Raki inquiry region and how did its operations, policies and practices and statutory rules affect Te Raki Māori?

7. Public works and other takings

The general issue concerns the impact on Te Raki Māori of Crown policies and practices, legislation and regulations affecting land taken for public purposes. In particular:

a. Was there consultation with Māori over the nature and effect of compulsory acquisition of land for public works at the time compulsory acquisition was introduced?

b. What was the extent of land taken for public works, including for defence purposes, scenery preservation, roads/railways and mineral extraction?

c. When taking Māori land for public purposes, to what extent did the Crown consider the impact of such takings on the owners affected?

d. Did tenure difficulties for Māori arising from the titles available under Native Land legislation facilitate the targeting and acquisition of Māori land for public works purposes? Did Crown policies and practices discriminate against Māori in the Te Raki inquiry region by taking their land in preference to non-Māori land?

e. Did legislative provisions and/or the practices of taking agencies afford Te Raki Māori reasonable opportunity to make objections to the acquisition of Māori land and resources for public purposes?

f. To what extent could and did Māori obtain the return of land taken for public purposes once it was no longer required? Did public works legislation make adequate provision for offering land back to the original owners or successors in title?

g. How was compensation assessed and awarded, and did legislative provisions lead to adequate, fair and timely compensation?

h. What was the impact on Te Raki Māori of land loss due to public works and other takings?

8. Local government and rating

The general issue concerns whether the Crown ensured that local government was empowered to meet the local political, social and economic needs of Māori and that Māori could effectively participate within the local structures. In particular:

a. How did participation and representation in Te Raki local government work for Māori? To what extent were Te Raki Māori able to effectively engage with local government institutions, processes and practices?

b. Did the legislation governing Māori land create title options that restricted the effective participation of Māori in local government?

c. What was the role of local bodies in developing transport, communications and other infrastructure, and to what extent did Māori land-owners benefit from the establishment of such infrastructure?

d. Were Māori able to benefit from local body administration more generally and to what extent?

e. What was the impact of district planning, zoning, and town planning on Te Raki Māori and their communities?

f. What was the nature of the rating regime imposed on Māori? How did they respond to it? What opportunities were Te Raki Māori afforded to engage in decision-making on the rating regime?

g. What role did local bodies play in taking Māori land in lieu of rates, and what was the legislative regime?

h. How much land was taken for rates? What was the impact on Māori? What was the Māori response?

i. Was the local government regime established by the Crown the only option for effective Māori engagement with the Crown at a local level? To what extent were Māori aspirations for tino rangatiratanga (or their own local self-government) recognised by the Crown and its regimes of local government in the Te Raki inquiry region?

9. Ownership and management of environmental, water and other non-land resources

The general issue concerns the impact of the Crown's regulation and management of the natural environment, water and resources within the Te Raki inquiry region. In particular:

a. In establishing or changing environmental planning and decision-making regimes within the Te Raki inquiry region, has the Crown adequately consulted with Māori in the Te Raki inquiry region and adequately provided for their participation in the regimes?

b. In delegating powers and functions to regional and local authorities, such as catchment boards, river boards and councils, did the Crown adequately require these agencies to take account of Te Raki Māori concerns and provide for their adequate participation in the decision-making processes of these regulatory agencies?

c. In what ways has the Crown's regulation of the natural environment, including lakes and waterways, affected the exercise by Te Raki Māori of tino rangatiratanga, kaitiakitanga and the cultural use and enjoyment of their environment?

d. To what extent has environmental pollution and degradation affected Māori and Māori communities within the Te Raki inquiry region?

e. What responsibility did the Crown assume for the introduction and management of exotic flora and fauna into the Te Raki inquiry region? Did the Crown adequately provide for Māori participation in the management of exotic flora and fauna (including commercial production forests), and for the continued customary management of, access to and use of indigenous resources by Te Raki Māori?

f. Has the Crown adequately ensured the continuation of Māori tino rangatiratanga and kaitiakitanga with respect to indigenous flora and fauna (and its associated mātauranga Māori) located on DOC estate, National Parks and Crown land in the Te Raki inquiry region?

g. Has the Crown adequately provided for Māori involvement in the regimes regulating the extraction of gravel, sand and minerals in the inquiry district?

h. What is the current state of the relationship between the Crown and Māori with respect to the protection and management of the environment?

10. Wāhi tapu, taonga and te reo Māori

The general issue concerns the extent to which the Crown has recognised and protected wāhi tapu, taonga and te reo Māori, and has provided for active Māori engagement in their recognition and protection. In particular:

a. What has been Crown policy and practice towards wāhi tapu, taonga and te reo Māori in the Te Raki inquiry region over time?

b. To what extent have Māori concerns about wāhi tapu, taonga and te reo Māori been taken into account by the Crown or its delegated authorities?

c. What impacts have Crown policies and practices had on Te Raki Māori, their wāhi tapu and taonga, and the retention and use of Te Raki dialects of te reo Māori?

11. Economic development and capability

The general issue concerns the extent to which the Crown has facilitated the economic development of Māori in the Te Raki inquiry region through legislation, policies and practices that have assisted Māori to participate effectively in emerging economic opportunities. In particular:

a. What economic opportunities have been available in the Te Raki inquiry region, for example in the sectors of shipping, farming, forestry, gum digging, horticulture, fishing, tourism, mining, or mineral extraction? What entities evolved to take advantage of the economic opportunities that existed? What has been the Crown's role in the development of these economic opportunities and/or entities?

b. Have Te Raki Māori sought to participate in, or influence, developing sectors of economic activity? If so, what roles have they played and how have those roles changed over time?

c. Did Māori benefit from participation in economic development and in what ways? To develop the economic opportunities on offer, what economic capabilities were necessary for effective engagement, and to what extent did Māori possess these capabilities?

d. What obstacles prevented Te Raki Māori participating in economic development that non-Māori did not encounter, if any?

e. Were any potential obstacles to their own economic development that Māori faced the result of Crown policies, actions or omissions? Were steps taken by the Crown to remove or mitigate obstacles to Māori participation or influence?

f. Did the Crown provide Te Raki Māori with any special assistance with the aim of enabling them to participate in economic development? If so, what was the outcome of any such assistance?

12. Socio-economic services and impacts

The general issue concerns whether the Crown provided adequate and effective social services, whether it appropriately recognised Māori needs and concerns, and the impact on Māori of what was in fact delivered. In particular:

a. How might Te Raki Māori social and economic conditions, including health, education, employment and housing, be described generally over time? What were the major factors contributing to those conditions?

b. Did the Crown take adequate steps to inform itself in its social and economic decision-making and policies toward Māori?

c. In the establishment and management of education and health (including mental health) services, what role, if any, did the Crown enable Māori to play within the institutions and processes it established?

d. What role did Te Raki Māori expect to play in the organisation and management of social service delivery? To what extent were these expectations satisfied?

e. Did Māori have particular concerns or preferences concerning social service delivery that the Crown failed or was reluctant to recognise? If so, what were these concerns or preferences, and to what extent has the situation changed over time?

f. What was the nature of the Crown's policies and practices towards Te Raki Māori tohunga or experts in rongoā Māori or medicinal practices? To what extent did the Tohunga Suppression Act 1907 in particular affect Te Raki Māori or tohunga still practising in Māori communities?

g. What was the nature and extent of Te Raki Māori urbanisation in the twentieth century? To what extent was this related to Crown actions or omissions with respect to other issues? To what extent were Māori communities in the Te Raki region prejudiced through this urban migration or through cultural dislocation and separation?