

BEFORE THE WAITANGI TRIBUNAL**WAI 2357
WAI 2358****IN THE MATTER OF****The Treaty of Waitangi Act 1975****AND****IN THE MATTER OF****The Sale of Power Generating State-Owned Enterprises (WAI 2357)****AND****IN THE MATTER OF****The National Freshwater and Geothermal Resources Claim (Wai 2358)**

MEMORANDUM OF COUNSEL IN SUPPORT OF APPLICATION FOR URGENCY**Dated the 9th day of March 2012**

RECEIVED Waitangi Tribunal
09 Mar 2012
Ministry of Justice WELLINGTON

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MAY IT PLEASE THE COURT:

1. This memorandum is filed on behalf of those claimants represented by counsel who have filed applications to be joined as interested parties to claims initiated by Sir Graham Latimer for and on behalf of the New Zealand Māori Council namely Wai 2357, the Sale of Power Generating State-Owned Enterprises Claim and Wai 2358, a National Freshwater and Geothermal Resources Claim. Specifically this memorandum is filed pursuant to s 6 of the Treaty of Waitangi Act for the below named claimant representatives :

- (a) Jordan Haines-Winiata on behalf of Ngāti Hinemanu me Ngāti Paki Trust (Wai 647, 662, 1835 and 1868);
- (b) Arapeta Hamilton on behalf of the descendants of Pōmare II, Ngāti Manu, Te Uri Karaka, Te Uri o Raewera and Ngāpuhi ki Taumarere tribes (Wai 354);
- (c) Barbara Marsh, Tohe Raupatu and Muiora Barry on behalf of all the descendants and original owners of Part Kaingapipi No. 9, Karu o te Whenua and Kinohaku East 4B1 Block (Wai 691 and 788);
- (d) Professor Patu Hohepa and Rudy Taylor on behalf of whānau and hapū of Hokianga (Wai 549 and 1526);
- (e) Lynnette Gloria Waitiahoaho Te Ruku and Gary Shane Te Ruki on behalf of Ngāti Kahu and Ngāti Unu (Wai 846); and
- (f) Te Hapai Robert Ashby and Gail Rika on behalf of Ngā Uri o Mangakahia (Wai 1467).

2. The claimants have followed the progress of this proceeding because of the implications for their hapū specifically and Māori generally that arise from Crown policy and practice which impact upon unsettled claims by:

- (a) denying proper recognition of undisturbed possession and the ability to exercise rangatiratanga over water; and/or

- (b) denying compensation with respect to the proposal to allocate rights derived from water and geothermal resources for power generation.
3. This Crown policy and practice essentially acts to extinguish extant claims to these resources in the absence of, and without properly engaging with, the claimants themselves or their communities.
 4. The claimants are lakes and rivers peoples with a historical affinity to waterways which are a central part of their expressions and ways of life. They and many of their predecessors have been advocates for these rights and obligations since the mid-18th century.
 5. As part of this advocacy the claimants have challenged the Crown's right to introduce new freshwater rights regimes which impact on their way of life and their ability to exercise tino rangatiratanga over their water sources and waterways. They have been vigorous in monitoring the effects of Crown policy and practice on the life force and sustaining potential of their ancestral waters.
 6. They have prosecuted and lead protests and petitions to uphold the promise contained within the Treaty of Waitangi which guaranteed that they would retain the ongoing ability to exercise tino rangatiratanga over resources that would remain undisturbed in their possession.
 7. Many have been parties in numerous challenges within the Native and Māori Land Courts and other general Courts on the nature and extent of Māori rights to water and other taonga, and other rights affected by Crown policy and practice.¹
 8. At times, these Courts have explicitly affirmed the proprietary rights of Māori to their waters in the face of strenuous and unreasonable Crown opposition.²
 9. The Claimants were only made aware through the media that the New Zealand Māori Council was making an application on behalf all Māori to intervene with respect to proposals by the Minister for State Owned Enterprises, Hon. Tony Ryall, on the basis that:
 - (a) the issues raised by the Crown's proposals included issues of substantial public policy;

¹ *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139.

² *In Re: Lake Omapere Bay of Islands Native Land Court* minute book, 5 March 1929.

- (b) there are matters of honour in which the Government itself had an interest in relation to the nature and extent of the water rights preserved by virtue of extant agreements; and/or those that are about to be entered into;
- (c) the proposed sale of shares in four power generating state owned enterprises, Mighty River Power, Solid Energy, Meridian Energy and Genesis Energy, created de facto interests in water for third party investors which prejudice the ability of Māori to:
 - i. have their claims to ongoing tino rangatiratanga over water and geothermal resources heard;
 - ii. negotiate redress over such claims; and
 - iii. acquire affirmation and recognition of their tino rangatiratanga in an environment free from adverse public perception.

10. The opposition to the New Zealand Māori Council that has been filed by counsel for the Crown obfuscates the claim. While seeking to halt any inquiry, it also seeks to limit the ambit of any inquiry granted within the rubric of a contemporary real politick which denies our claimants' extant claims.

11. If this path is adopted by the Tribunal, it is likely that it will fail to take into account the broader interests of Māori and the wider implications of such policies and practices. In this regard, the claimants say that they have a particular interest to bring to bear on the matters of public policy which arise separately from the self-interested approach that the Crown is adopting in the proceeding.

12. Accordingly, in support of the Wai 2357 and Wai 2358 claims, the claimants assert the following:

- (a) Freshwater and geothermal resources are a taonga over which hapū exercised tino rangatiratanga;
- (b) The Crown were aware of this exercise when it forged agreements with hapū that are encapsulated within Te Tiriti o Waitangi;
- (c) The Crown guaranteed that Māori would retain the ongoing possession of these taonga and the ability to exercise tino rangatiratanga in these regards;
- (d) The extension of Māori customary title to water sources and waterways has been subsequently recognised by the judiciary;

- (e) The Crown refuses to honour the Treaty and recognise the ongoing ownership of water sources and waterways, and denies hapū their ability to exercise tino rangatiratanga over these resources.
- (f) Particular development rights attach to the ongoing rights of possession of these resources and the ability to exercise tino rangatiratanga over them.
- (g) The Crown has ratified the Declaration on the Right to Development which provides that the right to development is inalienable.³
- (h) The Crown now intends to take steps that will significantly affect the rights and interests and the priorities of such rights and interests that can be asserted in freshwater and geothermal resources by:
 - i. Reviewing national water ownership and management regimes without addressing extant Treaty of Waitangi Claims; and
 - ii. Selling shares in power generating entities that have a prioritized de-facto right to access the resources themselves.
 - iii. Attributing the right to develop water sources and waterways into private ownership.
- (i) The entities that are to be sold, are potential Requiring Authorities, which pursuant to the Resource Management Act 1991 have the power to have areas of land designated for use as network utilities or large public works. Once this has occurred the Requiring Authority has broad reaching powers which enable it to:
 - i. Proceed with specific work as if it were permitted by the district plan.
 - ii. Control activities to prevent the landowner doing anything that would compromise the future work.
 - iii. Apply to the Crown for the compulsory acquisition of land under the Public Works Act 1981.
 - iv. Enter private land to undertake investigations.

³ Article 1, UN General Assembly, *Declaration on the Right to Development : resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

- (j) The proposal essentially places enormous authority in private hands without ensuring that obligations to hapū Māori will be met. This should not happen until the Tribunal has addressed:
 - i. How the promises regarding the undisturbed possession and ongoing exercise of rangatiratanga over these resources fit within the proposed ownership and management regimes which are significant facets of all of the claims represented herein;
 - ii. the extent and nature of the ongoing rights of hapū in respect of water and geothermal resources;
 - iii. the nature of redress that would be required to remedy past breaches and potential expropriations.
- (k) The recently introduced Mixed Ownership Model Bill is not Treaty compliant in that it fails to ensure that the new Mixed Partnership Ownership models are subject to the protective shield that s 9 of the State Owned Enterprise Act provides and does not take account of the schedule in the GATS agreement which preserves the right to New Zealand to accord 'more favourable treatment to any Māori person or organization in relation to the acquisition, establishment or operation of any commercial or industrial undertaking'.⁴
- (l) Taking the above into account, the Crown proposals are in breach of Te Tiriti o Waitangi in that they:
 - i. Arbitrarily extinguish extant claims to waterways, water sources and geothermal resources;
 - ii. Potentially delegate authority to private interests that have no relationship with the Treaty without ensuring that the responsibilities that arise from the Treaty will be met;
 - iii. Amount to a divestment of prioritized de-facto usufructuary rights in resources that exclude Māori in their efforts to exercise tino rangatiratanga.

⁴ See Statement of Professor Jane Kelsey filed herewith.

- iv. Breach an international instrument and alienate the right to develop natural resources from Māori whilst attributing them into private ownership.
- v. Fail to honour negotiated compacts between Rangatira Māori and Crown Representatives that ensure that Te Tiriti o Waitangi obligations are given force in the modern context.
- vi. Will create a new round of internecine conflict amongst Māori as they are forced into a battle over limitations imposed by the Crown.

13. The positions adopted herein are in addition to those that have been set out for and on behalf of the New Zealand Māori Council and other parties in support.

Representation

14. It should be noted some '*settled iwi*' have sought to oppose urgency being granted to the principal claimant Sir Graham Latimer for and on behalf of the New Zealand Māori Council on the basis that:

- (a) Te Runanga o Ngai Tahu does not see a role for the New Zealand Māori Council on these issues;⁵
- (b) Dialogue between the Crown and Māori needs to take place directly with iwi and primarily those iwi within whose rohe the assets of Power Generating State Owned Enterprises are located;⁶ and
- (c) To the extent that the principal claimants purport to speak for the interests of others, and in particular Ngai Tahu interests then such action is not supported.⁷

15. The position, which we are instructed is spiteful and ungracious, put on behalf of those '*settled iwi*' is not shared by our clients.

16. We ask the Tribunal to note in particular the history that followed the Muriwhenua fisheries claim where those Rangatira who led the claims opened the door to others so that Māori could all advance together. The efforts of statesmen and women like the late Honourable Matiu Rata and the late Dame Mira Szaszy who together with Sir Graham Latimer battled long

⁵ see para 20 Wai 2357 & 2358 Doc 3.1.21.

⁶ see para 19 Wai 2357 & 2358 Doc 3.1.21.

and hard for the well being of all Māori are significant markers in the history of Treaty of Waitangi jurisprudence, where the interests of all were protected by the significant efforts of a few who sought no particular gain other than to protect the guarantees of this founding document in the workings of the modern Aotearoa New Zealand constitution.

17. Our claimants seek to avoid the side deals and betrayals that resulted in the wake of such generosity where those '*settled iwi*' advanced their own lot at the expense of those that catalysed the argument in the first place.

18. In any event, it should be clear that those who have achieved comprehensive claims should have limited standing in this application except in so far as the matters remain reserved in their Deeds of Settlement.

Conclusion

19. The claimants support remedies that are being sought in the Wai 2357 and Wai 2358 and the applications for Urgency that have been made.

20. The claimants seek to be represented at the Judicial Conference on the 13 March 2012 and the right to make submissions.

21. The claimants seek leave to file the statement of Professor Jane Kelsey as part of the relevant material to be assessed on whether urgency is to be granted in these matters. The statement by Professor Kelsey is very pertinent to the kinds of irreversible prejudice which may flow for the claimants and deals with how the international context is part of the public rubric which impacts on the claimants' rights and interests.

22. We close our submissions with an extract from an Affidavit by the late Sir James Henare which was given as part of the lands case and reminds that the source of Māori Mana or Authority lay in their pre-existing status as tangata whenua and is crucial to understanding the historical Māori position on these issues today:

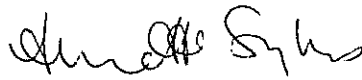
Because of the Treaty the Māori believe, right to this day, that they are equal partners and they know from experience that it's not so. But right to this day, and those Chiefs that I have had the great privilege of being associated with, Runanga o te Tiriti o Waitangi, and they always said that, that they had equal rights. That is why they signed the Treaty. And lots of people and including some historians... seem to infer that those Chiefs didn't know what they were signing. They knew what they were

⁷ para 17 Wai 2357 & 2358 Doc 3.1.21.

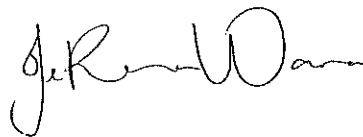
signing, reading the Māori version. But when it came to sovereignty in the English version what in fact they did sign was giving away all their mana and everything else to the Queen of England which they never believed and never intended to do so and that's plain from signing the Māori version, that it was the Government and the governments of their land, not sovereignty .⁸

23. It was on that basis that the denial of sovereignty and the privatization by stealth was vigorously challenged by Sir Graham Latimer in the late 1980's. It no doubt is the raison d'etre that motivates these important claims and matters of constitutional principle today. This moment in the history of our nation must not pass without a full and proper inquiry if only out of respect for these great leaders many of whom have fought and died for the principles of Te Tiriti.

DATED this 9th day of March 2012.



Annette Sykes



Terena Wara



Jason Pou

⁸ Affidavit of Sir James Clendon Henare, 1 May 1987 New Zealand Maori Council v Attorney General [1987] 1 NZLR 641;

TO: The Registrar of the Waitangi Tribunal

AND TO: The Solicitor for the Applicant

AND TO: The Solicitor for the Crown

AND TO: The Solicitor for Interested Parties