

KEI MUA TE RŌPU WHAKAMANA I TE TIRITI WAI 2357 & 2358  
BEFORE THE WAITANGI TRIBUNAL Wai 129, 222, 619, 774, 964, 985, 1028 & 1455

I TE TAKE O

IN THE MATTER OF

ME  
AND

I TE TAKE O

IN THE MATTER OF

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I TE TAKE O

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AND

IN THE MATTER OF

TE TURE O TE TIRITI O WAITANGI

1975

THE TREATY OF WAITANGI ACT  
1975

NGĀ KEREME WHAKATERETERE E PĀ ANA  
KI NGĀ RAUEMI WHAKATŪ HIKO, NGĀ  
WAI MĀORI, ME NGĀ PUIA

APPLICATION FOR URGENT INQUIRY ON  
SALES OF POWER GENERATING STATE  
OWNED ENTERPRISES AND NATIONAL  
WATER AND GEOTHERMAL CLAIM

ĒTAHI KEREME O TĀ GRAEME LATIMER  
ME ĒTAHI ATU KAIKEREME

ĒTAHI KEREME O SUE TE HUINGA  
NĪKORA, WAIMARIE BRUCE, KINGI  
TAURUA, TAMATI OLSEN,  
MIRIAMA SOLOMON (NEE  
TŪORO), TIMOTHY WAITOKIA,  
HOANE TITARI JOHN WI, MO Ō  
RĀTOU HAPŪ

VARIOUS CLAIMS BY VARIOUS  
CLAIMANTS

RECEIVED

Waitangi Tribunal

**09 May 2012**

Ministry of Justice  
WELLINGTON

HE WHAKAPĀ TUHINGA MO NGA KAI-KEREME

MEMORANDUM OF CLAIMANT COUNSEL

Te Rā 9 o Haratūa, 2012

Dated this 9<sup>th</sup> Day of May, 2012

**TIKA CHAMBERS**

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**HE WHAKAPĀ TUHINGA MO NGA KAI-KEREME**  
**MEMORANDUM OF CLAIMANT COUNSEL**

**MĒNĀ KA PAI KI TE RŌPU WHAKAMANA I TE TIRITI**  
**MAY IT PLEASE THE TRIBUNAL**

1. This Memorandum of Counsel is filed on behalf of the following claimants:
    - (a) Wai 129 – Sue Te Huinga Nikora & Sonny Akuhata of Ruawaipū, Te Tai Rāwhiti and also Sue Te Huinga Nikora for the Wai 222 claim concerning Te Puia Springs, Te Tai Rāwhiti;
    - (b) Wai 619 – Waimarie Bruce of Ngāti Kahu o Torongare Te Parawhau, Ngāpuhi, Te Tai Tokerau;
    - (c) Wai 774 – Kingi Taurua of Ngāti Rāhiri, Ngāti Kawa o Ngāpuhi, Waitangi and environs, Te Tai Tokerau;
    - (d) Wai 964 – Tamati Olsen and others on behalf of Te Iwi o Rakaipāka o Nūhaka, Waikokopu, Te Māhia, Tahaenui and Morere *puia*, Te Tai Rāwhiti;
    - (e) Wai 985 – Miriama Solomon (nee Tuoro) and Graeme Prebble Jnr. of Te Honihoni, Te Ihutai, Te Māhuru o Hokianga, Ngāpuhi, Te Tai Tokerau;
    - (f) Wai 1028 – Timothy Waitokia, Tracey Waitokia, Bill Ranginui and others on behalf of Ngāti Hineoneone o Ātene, Whanganui, Te Tai Hauāuru; and
    - (g) Wai 1455 – Hoane Tītari John Wī and others of Ngāti Tūtakamoana, Ngati Rora o Ngāti Maniapoto, Te Rohe Potae.
- ( hereafter “the Claimants”)

2. This Memorandum is filed in response to the Tribunal's Directions<sup>1</sup> dated 27 April, following the Judicial Conference held in Wellington on Tuesday 24 April, 2012.
3. Counsel refers to his Memorandum filed on 23 April regarding the same and his inability to attend the 24 April Judicial Conference due to financial hardship arising from the Ministry of Justice failing to pay a large backlog of unpaid invoices, some dating back over two years, and the resultant extreme efforts to recover payments for the same, combined with a lack of funding for the present Urgent Inquiry.
4. Counsel confirms that in respect of Stage I of this Urgent Inquiry the Claimants are prejudiced and allege Crown breaches of their Tiriti interests as an interested party in their not being prejudiced by the proposed 49% share sales of State-Owned Enterprises or other assets which the Crown may yet seek to alienate prior to the proper, full investigation of or resolution of their claims.
5. Further, the Claimants confirm that regarding Stage II of the Inquiry, they have a range of relevant water and geothermal evidence to adduce in respect of the contemporary issues arising and legal submissions concerning the same.
6. Some of the Claimants' issues arise from Crown actions and omissions prior to and some have arisen since 21 September 1992.
7. Counsel is cognisant of the Tribunal's views contained in its latest Directions, namely that given the nature of this Inquiry, where those contemporary matters being raised have arisen as a result of acts and or omissions from before 21 September 1992, that these will be identified as those which give rise to an ongoing breach.
8. Given the Crown's artificial datelines and politically motivated restrictions imposed on the Tribunal's jurisdiction by the ongoing series of amendments to the Treaty of Waitangi Act 1975, Counsel will attempt to restrict the scope of the evidence to be adduced and the legal arguments thereto, within reasonable parameters of relevance and context.

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<sup>1</sup> Wai 2537, 2.5.19.

9. To that end, the evidence on issues to be adduced will not necessarily accede to Learned Crown Counsel's stated submission that Claimants should not raise "lost historical interests" (Wai 2357/2358 #3.1.71). It is not accepted that the Claimants' historical interests which are the subject matter of this Inquiry have been 'lost', nor as a corollary, that such interests are only either historical or contemporary. They are guaranteed under Te Tiriti o Waitangi.
10. Counsel submits that at its core, this Inquiry is about property rights, the nature of those, whether or not the Crown's acts/omissions in respect of them measure up to its constitutional undertakings under Te Tiriti o Waitangi.
11. It is in this context that Counsel welcomes the opportunity to engage and proceed to evidence in what Counsel anticipates the Crown will ensure is a defended hearing.

#### **Replies to Tribunal's Directions**

12. In the 27 April 2012 Directions Wai 2357 & Wai 2358 #2.5.19, the Tribunal has directed the Claimants and counsel to:
  1. File Submissions on stage two primary issues and any sub issue matters; and
  2. File a List of case examples.

#### **Submissions on Stage II primary issues and any sub issue matters**

13. Counsel refers to the Tribunal's Directions, paragraph 17 which lists the proposed issue questions for the stage 2 inquiry as follows:
  - (a) *What rights and interests (if any) in freshwater and geothermal resources were guaranteed and protected by the Treaty of Waitangi?*
  - (b) *Are any such rights and interests adequately recognised or provided for today?*
  - (c) *If not, why not? In particular, is the current situation a consequence of past Treaty breaches that have already been identified in Waitangi Tribunal findings in relation to water*

*resources, geothermal resources and natural resources more generally?*

*(d) How should any such Maori rights and interests now be accommodated in a Treaty-compliant manner within contemporary law, policy, and practice?*

*(e) In particular, having had regard to the full range of issues before the Tribunal, would a Maori stake in the mixed ownership model power companies be an appropriate for m of redress or of rights recognition or of rights reconciliation?*

14. Counsel submits that the Tribunal's proposed issues are a good starting point for commencement and focus of this Inquiry.
15. Counsel believes that issue (e) properly ties Stage II to the Stage I issues and provides a link by which the related relevant issues can be focused on by the parties in adducing evidence and legal arguments.

#### **International Law Context Issue**

16. The only other proposed issue which Counsel would submit to be added to the above issues would be:

*(f) At international law and given Aotearoa/New Zealand's entry into and ratification of, for example but without restriction:*

- a. The Universal Declaration of Human Rights 1948;*
- b. the Convention on the Elimination of Racial Discrimination; and*
- c. the United Nations' Declaration on the Rights of Indigenous Peoples,*

*what rights and interests do Maori have (if any) in freshwater and geothermal resources and what are the Crown's duties and obligations to recognize, protect and those interests.*

17. It is submitted that this issue is not beyond the scope of the Waitangi Tribunal's role as a Commission of Inquiry to enquire into all relevant matters impacting upon the rights, privileges and duties of the parties to this Inquiry.

18. Such international instruments firmly committed to by our modern nation and their origins in the same *res gentium* which recognised He Whakaputanga 1835 and then Te Tiriti o Waitangi 1840 remain a relevant and live issue for consideration today in respect of property rights and relationships to water, geothermal and other resources. They become a prism through which the actions of our government may be seen and interpreted.
19. Further, Counsel note that sub-issues will inevitably become clear from the particular evidence to be adduced and debates of the legal issues which will arise during the Inquiry.
20. Counsel also welcomes further input into these issues and any sub-issues from the originating Claimants' expert group and other Learned Counsel.

#### **List of Case Examples**

21. Counsel was unable to afford to travel to attend the 24 April Judicial Conference due to unavailability of funding and was thus did not have the benefit of the full discussions concerning "case examples".
22. However, Counsel can confirm that in terms of a list of case examples about which evidence is intended to be adduced for the Claimants represented, Counsel can provide the following list of case examples for the respective Claimants:
  - d. Waiapu river and Te Puia Geothermal Springs, Te Tai Rawhiti for the Wai 129 & 222 Claimants ;
  - e. Whangarei waters, springs, swamps and rivers for the Wai 619 Claimants, Te Tai Tokerau;
  - f. Waitangi and Oromahoe rivers for the Wai 774 Claimants, Te Tai Tokerau;
  - g. Waitirohia, Nuhaka River and Morere Geothermal Springs, Waikokopu stream, Nuhaka, Te Mahia, for the Wai 964 Claimants, Te Tai Rawhiti;

- h. Utakura river and tributaries, Hokianga, for the Wai 985 Claimants, Te Tai Tokerau;
- i. Ongarue river and tributaries, for the Wai 1455 Claimants, Te Rohe Potae; and
- j. the long-standing and complex issues about the Whanganui river, for the Wai 1028 Claimants of te Awa Tipua o Whanganui.

23. Counsel and Claimants look forward to the Tribunal's further Directions in due course.

*No reira, anei aku mihi ki nga Rangatira Kaitiaki o nga wai, nga rauemi tuku iho me te Tino Rangatiratanga o nga Hapu katoa, huri noa i nga motu. Tena koutou katoa.*

Kei Tamaki-Makau-Rau, tenei te Ra 9 o Haratūa, 2012

Dated at Auckland this 9<sup>th</sup> Day of May, 2012



**Tu'inukuTavake Barron Afeaki/Te Atairehia Thompson**

Counsel for the Claimants

To: The Registrar of the Waitangi Tribunal

To: Counsel for the Crown & Other Claimants – SOE/Water & Geothermal