

IN THE WAITANGI TRIBUNAL

WAI 2357

WAI 2358

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND

A claim by Sir Graham Stanley Latimer of Kaitaia, retired farmer, on behalf of himself And the New Zealand Maori Council and All Maori and Mr Tom Kahiti Murray, Deputy Chairperson of the Tai Tokerau District Maori Council on behalf of himself and all Maori supported by the following claimants in regard to Maori proprietary interests and rights to access and use of water and geothermal resources in Aotearoa

First Claimants

Taipari Munro, Chairperson of Whatitiri Maori Reservation situate at Poroti Springs, Northland in the rohe of Ngapuhi nui Tonu

Second Claimant

Kereama Pene and Rangimahuta Easthope for themselves as owners in Lake Rotokawau, situate in the rohe of Ngati Rangiteaorere o Te Arawa

Third Claimants

Continued...

RECEIVED Waitangi Tribunal	Memorandum of counsel for the claimants as per the Tribunal's directions of 27 April 2012
10 May 2012	
Ministry of Justice WELLINGTON	

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Peter Clarke and Jocelyn Rameka for themselves as owners in Lake Rotongaio, situated at Waitahanui Settlement, Lake Taupo in the rohe of Nga Hapu o Tauhara

Fourth Claimants

Eugene Henare for himself and as an owner in Lake Horowhenua, situate at Hokio Township, Levin in the rohe of Muaupoko iwi

Fifth Claimant

Nuki Aldridge, Ani Martin and Ron Wihongi, Kaumatua of Ngapuhi on behalf of themselves and as owners in Lake Omapere, situate at Kaikohe, Northland

Sixth Claimants

Eric Hodge on behalf of himself and as an owner in Tikitere Geothermal Field in the rohe of Ngati Rangiteaorere at Tikitere

Seventh Claimant

Walter Rika, on behalf of himself and as an owner in Tahorakuri Maori Land Block situate at Ohaaki, Reporoa

Eighth Claimant

Peter Clarke and Emily Rameka as owners in Tauhara Mountain Reserve (4A2A), Taupo

Ninth Claimants

Maanu Cletus Paul and Charles Muriwai White as members of Ngai Moewhare, a marae located in the rohe of Ngati Manawa and a claimant in Te Ika Whenua inquiry

Tenth Claimants

Whatarangi Winiata, on behalf of himself and all Hapu of Ngati Raukawa who have an interest in the Horowhenua / Manawatu water systems.

Eleventh Claimant

**Memorandum of counsel for the claimants
as per the Tribunal's directions of 27 April 2012**

May it please the Tribunal:

Introduction

1. The Claimants file this memorandum in accordance with the Tribunal's directions of 27 April 2012.
2. The Tribunal has asked all parties to file submissions on the stage two issues. Additionally, the Tribunal has directed the Claimants to file a list of its case examples. The Claimants also volunteer additional information about the nature of the expert evidence they intend to present to the Tribunal.

Stage two issues

3. *The Tribunal's proposed issues*
4. The Tribunal's issue (a) in paragraph 17 of the 27 April 2012 directions is essentially the same as the first issue for stage one of the inquiry. The Claimants firmly believe that this issue will need to be resolved at stage one and therefore ought not to require further consideration at the second stage.
5. The Claimants accept that the Tribunal's proposed issues (b) and (d) will need to be resolved, either as primary issues in their own right or as part of other articulations of the primary issues.
6. It is unclear to the Claimants precisely what is meant by issue (c) and therefore its import in resolving the claim.
7. It is the Claimants' view that issue (e) will need to be resolved as part of one or other of the last three issues in stage one of the inquiry.

Fresh Start for Fresh Water and the geothermal resource reforms

8. The Tribunal has stated that the inquiry will focus on the SOE partial-sale programme, the Fresh Start for Fresh Water reforms and the geothermal resource reforms. The Claimants note that while the primary issues set out for the stage one are targeted at the SOE partial-sale programme, stage two does not seem similarly focused on the next two topics.
9. If it is the tribunal's intention to focus stage two on these topics, the Claimant's propose the following primary issues as a means of doing so.
 - a. Could implementation of the Government's proposals under the Fresh Start for Fresh Water and/or geothermal resource reforms, without full recognition of the rights

- and interests identified in issue a) in stage one of this inquiry, cause prejudice to Maori in breach of principles of the Treaty of Waitangi?
- b. Alternatively, is the failure to recognise fully the rights and interests identified in issue a) in stage one of this inquiry causing continuing prejudice to Maori in relation to matters to which the Fresh Start for Fresh Water and/or geothermal resource reforms relate but which those reforms fail to address, and is this failure to address such issues itself a breach of principles of the Treaty of Waitangi?
 - c. If either of these breaches has been established, what recommendations should be made to protect such rights and interests from such prejudice either by:
 - i. taking steps to fully recognise these rights and interests prior to the implementation of the reforms; or
 - ii. reworking the reforms so that the reforms themselves take cognisance of, and protect, those rights and interests.

Ngāi Tahu memorandum

10. The Claimants are grateful to have had the opportunity to review the Ngāi Tahu memorandum on the stage two issues filed on 8 May 2012 and wish to make the following reply.
11. As previously stated, the Claimants, and in particular the New Zealand Maori Council, while not purporting to speak on behalf of all Maori, are pursuing this claim for the benefit of all Maori. This claim is in relation to a national issue and the Claimants are necessarily seeking recommendations of national effect.
12. It will not be possible for the Tribunal to limit the findings in this enquiry to particular claimants. Indeed, also as previously stated, the Claimants are seeking no specific determination of the rights of any particular group to any particular resource. The case examples are presented only to illustrate general points. Indeed, it would be impractical to expect the Tribunal to make such findings in relation to so many cases in the context of an urgent inquiry.
13. However, the Claimants will not be asking the Tribunal to make any recommendations that will cause prejudice to Ngāi Tahu, nor interfere with Ngāi Tahu's right to pursue settlement of its own issues in its own way.

Case examples

14. Each of the co-claimants intends to produce a case example explaining the particular circumstances they face in relation to their respective water resources.
15. In addition, certain other groups have approached the Council and sought to have their circumstances presented to the Tribunal as case examples. Where those case examples were thought to further inform the Tribunal in relation to the primary issues, the Claimants have undertaken to assist in the preparation and presentation of the case example. In the case of the Lower Waikato (as set out below) the Claimants are assisting with the preparation of the written case example but the issue of oral presentation to the Tribunal is yet to be determined.
16. The following is a list of all of the case examples the Claimants intend to present to the Tribunal. In each case the type of water resources is given as well as a paragraph outlining the particular circumstances.
 - a. Poroti (springs)

Poroti are freshwater springs on a Maori reservation near Whangarei, set aside as a water supply for the local papakainga of Te Uriroroi, Te Parawhau and Mahurehure hapū. Despite the custodial relationship, almost all of the free water from the springs is taken for use by an agricultural water company, a water bottling company, and the District Council, the latter supplying up to 40% of Whangarei city's needs. All is taken under resource consents without return to the Maori owners.
 - b. Taniwha & Hamurana (springs)

Taniwha and Hamurana freshwater springs were used by Ngāti Rangiwewehi of Rotorua as water and food resources and, later, both were tourist attractions. However, the Crown acquired Hamurana. It did so by partitioning individual share acquisitions. Then the local authority acquired the water in Taniwha springs by a public works taking of part of the riparian title for a pump house, gaining a free town water supply at the expense of the tourist venture which then collapsed.
 - c. Heretaunga (aquifer)

Ngāti Rāhunga-i-te-rangi is one of several hapū of Ngāti Kahungunu who held mana over the large wetlands of the Heretaunga Plains beneath which lies the country's second largest aquifer. As Napier and Hastings grew, the rivers were diverted, the swamps drained and the

aquifer exploited until the Māori kainga on the shoreline of the former wetland lost access to all water, even from the bores. They became obliged to carry in water for home needs while irrigation abounded on the surrounding farmlands.

d. Ngati Raukawa (wetlands)

The vast wetlands of Horowhenua and Manawatu were the primary source of food for the Ngāti Raukawa and Ngāti Kauwhata who lived there. These wetlands were drained and the marae, once surrounded by water, now sees only dry land. A major aquifer remains in Manawatu. With limited funding, Ngāti Tukorehe is amongst the hapū endeavouring to re-establish wetlands on low-lying Māori lands and to ensure that their marae and papakainga can restore their own water supplies.

e. Rangitaiki (wetlands)

The 80,000 acre wetlands on the Rangitaiki plains was confiscated and subsequently drained. Further land was lost to drainage projects under the Public Works Act, and through damming of the Rangitaiki River. The people were relocated on reserves. This case example draws upon the Tribunal's Ngati Awa Report and papers filed in that inquiry. It then sets out the resulting issue of access to water which is continuing today.

f. Rotokawau (lake)

Lake Rotokawau of Ngāti Rangiteaorere, close to Rotorua city, exemplifies the oddity of a lake entirely surrounded by Maori land in which the water is by law deemed to be Crown owned. The lake was cut out by the Native Land Court to include the surrounding land to the rim of the crater in which it sits. The title was described by the judge as extending from the bowels of the lake to the skies above. It is famed for its beauty and crystal-clear waters, fed and drained through subterranean passages. The presumption of Crown ownership complicates the task of the Lake trustees in managing public access to prevent despoliation.

g. Rotongaio (lake)

This lake is included within a Māori land title. It is also a Māori reservation for Ngāti Tutemohuta and others. It is near Waitahanui on Lake Taupo. However water access from Lake Taupo is available. Since the water is Crown owned, public access is provided into the core of the

reservation including to the surrounding cliffs with its myriad of burial caves.

h. Omapere (lake)

Lake Omapere is almost entirely surrounded by Crown land as a result of progressive Crown purchases to 1882. However, after a protracted dispute, the Māori Land Court vested the Lake in Māori, of Ngāti Korohue, Te Popoto, and Te Uriohau, in 1955. In this instance, the Court order vested both the lake bed and the waters. It is the largest freshwater lake in Northland, and a significant eel fishery.

i. Horowhenua (lake)

The bed of Lake Horowhenua, the islands therein, a strip of dewatered area created by a lowering of the water level in the 1920s, and a one chain strip around the original margin of the lake are, and have always been, owned by the Muaupoko people (as recognized by the Reserves and Other Lands Disposal Act 1956). Despite this, the failure to recognise Maori ownership of the Lake itself and the establishment of Domain Board on which Muaupoko are merely represented, has enabled the local council of nearby Levin, to use the Lake for effluent disposal and as an outlet for untreated storm-water. This has resulted in the environmental destruction of the Lake to the point that a NIWA scientist has recently commented that a mouthful of lake water could kill a small child. This has made the Lake unusable by the local Maori, for example as a source of kaimoana, without compensation. Abuses of the lake continue to the present day.

j. Kaituna (river)

The Kaituna cascades down a steep fall from the Rotorua Lakes to the coastal plains near Te Puke, proceeding throughout through Te Arawa territory over a short distance of 45 km. The Tribunal's Kaituna River Report looked at the river in terms of a threatened pollution. The impact of failing to provide for the proprietary interests of hapū include the despoliation of the amenities of Maketu, the birthplace of the Te Arawa hapū, through the mechanical alteration of river flows, and its formerly proposed use for effluent disposal. Other issues relate to its potential for tourism, irrigation and hydro-electrical works.

k. Lower Waikato (river)

This case example concerns the customary Ngāti te Ata control of the entrance to the Waikato River, and of the Awaroa-Waiuku portage between Waikato and Manukau harbour. The iwi stands outside the Tainui settlement, but is affected by the alteration to river flows caused by the upstream hydro dams. Ngāti te Ata is particularly concerned about the adequacy of the provisions for Māori in the regulatory regime.

l. Upper Waikato (river)

The primary hapū of the northern section of Tuwharetoa seek to demonstrate the Māori interest in water bodies by reference to the intensive use of the Waikato River. Historically, from its release from Lake Taupo at Nukuhau to Aratiatia, no less than eighty kainga lined the banks. They also examine the use of the river in modern times and the impact of that use, including control gates, dams and abstractions.

m. Upper Whanganui (river)

Ngāti Rangī assert that no private owners are affected by the water take from their customary territory for hydro electrical purposes. Therefore, if private ownership is an impediment to the recognition of Māori interests in water resources elsewhere, it is not an impediment for Ngāti Rangī.

n. Te Arawa Central (geothermal fields)

The Te Arawa hapū describe their associations with their customary geothermal fields. They assert ownership rights and management rights in furtherance of their own right of development.

o. Ohaaki (geothermal field)

The hapū of Ngāti Tahu and Ngāti Whaoa explain the consequences of the failure to recognise their customary interests, as they see them. These include the imposition of Crown development, the loss of opportunity to be stakeholders in a developmental enterprise, the loss of their bathing pools, the collapse of their marae and the exposure of their urupa.

Further details on expert evidence

Additional members of the expert group

17. The following additional members have joined the expert group since the list of members was distributed on 16 April 2012:

q. David James Alexander

David is an environmental and planning consultant, and historical researcher. He holds a BA (Honours) degree in Geography, and a MSc degree in Conservation. From 1975 to 1987, David worked as a planner in the Department of Lands and Survey. In 1987, he established his own consultancy. Since 1998, David has completed a number of briefs of evidence for the Waitangi Tribunal including for Ngai Tahu, Ngati Rangiteaorere, Pouakani, Te Roroa, Whanganui-a-Orotu, Ngati Awa, Mohaka River, Ika Whenua Rivers, Turangi Township, Ngati Pahauwera, Hauraki, Muriwhenua, Rongowhakaata, Te Tau Ihu, Tuhoe, Central North Island, Tauranga, Northland, East Coast, Whanganui and Te Rohe Potae claims. Several of these claims have addressed waterways issues including Crown activities associated with the Tongariro Power Development scheme. David will be providing the expert group with his expertise in relation to these waterways and specifically in relation to the Tongariro Power Development scheme.

r. Rev Dr David Williams

David is a highly qualified academic and researcher. He holds a personal chair as Professor of Law at The University of Auckland. He was a Rhodes Scholar at Oxford University and has tertiary qualifications in history, law and theology. He has been a law teacher at the University of Dar es Salaam in East Africa and the University of Auckland. He was an independent researcher and barrister (1991-2000) specialising in legal history research relevant to Treaty of Waitangi claims. For many years he was an activist in the Citizens Association for Racial Equality (CARE). He has worked with many iwi, but especially with Ngati Whatua o Orakei from the days of the Bastion Point/Takaparawhau occupation in the 1970s through to the current Treaty settlement negotiations. His publications include the Māori Land Legislation Manual (& database)(CFRT, 1994/1995); "Te Kooti tango whenua": The Native Land Court 1864-1909 (Huia, 1999); Crown Policy Affecting Māori Knowledge Systems and Cultural Practices (Waitangi Tribunal, 2001) and Matauranga Māori and Taonga (Waitangi Tribunal,

2001); and joint editor and contributor to *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (OUP, 2005). *A simple nullity?: The Wi Parata case in New Zealand Law and History* will be published by AUP in 2011. David will contribute his expertise by reporting on the implications of the Wai 262 report jurisprudence.

s. Dr Marian Mare

Marian is a highly qualified scientist having worked at various industrial research laboratories. She has acted as an expert witness in the Environment Court, researched and documented the history and phenomenology of subterranean and surface/spring water supply from perspectives of Maori lessors and New Zealand European lessees. She is working with Arab and Jewish women leaders in Israel, in the Beyond Words Programme, a programme designed to provide empowerment and peace-building training for women leaders (Muslim, Jewish, Christian, Druze, Bedouin). Marian will contribute her expertise in the areas of Maori connections with the water bodies, particularly geothermal fields.

Past Tribunal reports

18. At an early judicial conference, the Tribunal drew attention to the quantity of relevant material that had already been considered by the Tribunal during past inquiries. The Tribunal suggested a survey and analysis of existing reports. In furtherance of that suggestion the expert group intends to prepare and file the following reviews as part of its report:
 - a. Rivers, Ika Whenua
A review of the Tribunal's Ika Whenua Rivers Report 1998, on the Wheao, Whirinaki and Rangitaiki rivers of the Rangitaiki Plains.
 - b. Rivers, Whanganui
A review of the relevant aspects of Tribunal's Whanganui River Report 1999.
 - c. Rivers, Overview
A review and update of Professor Alan Ward's research report on rivers completed for the Waitangi Tribunal as part of the Rangahaua Whanui project.
 - d. Lakes, Overview
A review and amplification of Ben White's report on lakes, commissioned by the Tribunal for Rangahaua Whanui. The review will amplify the original report in the context of the current proceeding, and covering Lakes

Horowhenua, Waikaremoana, Taupo, Rotoiti and Wairarapa.

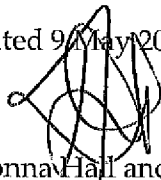
e. Geothermal, Ngawha and the Central North Island

A review of the Ngawha Geothermal Resource Report 1993, the Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993 and the general references to geothermal resources in He Maunga Rongo: The Report on the Central North Island Claims, Stage 1. This will also provide an update in respect of Tauhara and Lake Rotokawa of Taupo. The Te Arawa Report was preliminary only and He Maunga Rongo was general so that other updates are provided by way of case examples.

Expert reports

19. The expert group also intends to include the following nine expert reports as part of its report:
- a. An examination of the existing law under the doctrine of native title by Jacinta Ruru;
 - b. A comparative analysis of international experience by Professor Brad Morse;
 - c. Implications of the Wai 262 report by Rev Dr David Williams;
 - d. Maori terminology and water by Drs Patu Hohepa and George Habib;
 - e. Comparative international claims to water and water management by indigenous peoples by Professor Veronica Strang;
 - f. Comparative property regime studies by Dr Mark Busse;
 - g. Developmental uses of water by Brian Cox;
 - h. Resource, restructuring, shareholding by Philip Galloway; and
 - i. Alternative framework impacts by Steven Michener.

Dated 9 May 2012



Donna Hall and Felix Geiringer
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