KEI MUA TE RŌPU WHAKAMANA I TE TIRITI
BEFORE THE WAITANGI TRIBUNAL

WAI 2357 & 2358
Wai 1028

I TE TAKE O	**TE TURE O TE TIRITI O WAITANGI 1975**
IN THE MATTER OF	**THE TREATY OF WAITANGI ACT 1975**
ME	
AND	
I TE TAKE O	**NGĀ KEREME WHAKATERETERE E PĀ ANA KI NGĀ RAUEMI WHAKATŪ HIKO, NGĀ WAI MĀORI, ME NGĀ PUIA**
IN THE MATTER OF	**APPLICATION FOR URGENT INQUIRY ON SALES OF POWER GENERATING STATE OWNED ENTERPRISES AND NATIONAL WATER AND GEOTHERMAL CLAIM**
ME	
AND	
I TE TAKE O	**ĒTAHI KEREME O TĀ GRAEME LATIMER ME ĒTAHI ATU KAIKEREME**
ME	
AND	**ĒTAHI KEREME O Timothy Waitokia, Tracey Waitokia, Bill Ranginui**
IN THE MATTER OF	**Timothy Waitokia, Tracey Waitokia, Bill Ranginui and others**

Claimant Case Example for Ngati Hineoneone, Whanganui
Dated this 18th Day of May, 2012

RECEIVED
Waitangi Tribunal
18 May 2012
Ministry of Justice
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1. This claimant submission is filed on behalf of Timothy Waitokia, Tracey Waitokia, Bill Ranginui and others, who are the claimants for Wai 1028 ('the claimants').

2. The claim is made on behalf of Ngāti Hineoneone o Ātene, Whanganui, Te Tai Hauāuru.

3. The purpose of this submission is to outline the particular circumstances of the claimants for Wai 1028 in regards to their water resources.

4. The water rights and interests of the claimants are complex and long-standing and involve their mana awa over several waterways within their rohe in Whanganui, including the Whanganui River and its river tributaries and streams, including the Taupiri stream, Pitangi stream, Ahu Ahu stream, and the Upokongaro stream.

5. Under the Treaty of Waitangi, Ngati Hineoneone were guaranteed the full exclusive and undisturbed possession of their properties – this includes the waterways, as well as the property right of access to the water.[1]

The claimants

6. The claimants are Ngati Hineoneone, an ancient hapu of the Whanganui River.

7. The Whanganui River is the second largest river in the North Island, and is approximately 320 kilometers long, draining a catchment of approximately 7000 square kilometers. The river finds its source at Mount Tongariro, entering the sea at the city of Whanganui.[2]

8. The hapu of the Whanganui have traditionally controlled the area from the upper to the lower Whanganui River, at times under the confederation known as Te Atihaunua a Paparangi.[3] Ngati Hineoneone's rohe is situated within the lower-mid reaches of the Whanganui River.

[1] See Waitangi Tribunal, *Whanganui River Report 1999*
[2] Manawatu-Wanganui Regional Council, Whanganui Catchment Strategy, 1997
[3] Tui Gilling, Whanganui Waterways Scoping Report, November 2001. P8.

9. The rohe boundaries of Ngāti Hineoneone flow from the lands that are encompassed to the west of Pitangi Road, east of the Kauarapaoa Stream, south of the Ahuahu Valley Road and north of Ongaonga Stream and more particularly the blocks known as Blocks II and III in the Waipakura Survey District encompassing the Kauarapaoa block and Te Tuhi block to the south of the Ahuahu Valley Road encompassing Te Tuhi block 4, down to the Mangaiti Stream up to Ongaonga Stream and across the Whanganui River to the Tauakira block to the eastern side of Pitangi Road.

The nature and extent of Ngati Hineoneone's customary water rights: Life on the Whanganui river

10. For Ngati Hineoneone life has always entailed the close proximity to the Whanganui River and its tributary streams. These waterways are an inextricable part of their identity, traditions, and their physical and spiritual well-being. The land surrounding the water over which their ancestors had mana whenua and where they lived at 1840, and the water surrounding it have always been regarded as parts of a whole, not separated or separable.

11. The traditional Ngati Hineoneone settlements were located along the river and the streams, where life revolved around the water and the many different purposes that the rivers and streams had, including the access to the aquatic and other food sources, rongoa, and the communication and transport routes for travelling and trading.

12. In his Brief of Evidence for Wai 1028, for the Whanganui Inquiry hearings, Kris Tapa of Ngati Hineoneone states that "*the river is our life force and our spiritual waters. When we were sick we went to the water, the awa, and our prayers were down there, our karakia was down there and if we didn't go we went to the creek near our house at Atene. That's were we used to do all our karakia and we swam and washed in it. […]It provided us with kai. It was our main highway before the roads were opened*"[4]

13. Ngati Hineoneone's traditions of fishing and gathering kai were based on an extensive knowledge of the aquatic species and their

[4] Brief of Evidence, Kris Tapa, Wai 903 #

lifecycles. Species within their rohe included tuna (eel), inanga and kokupu (whitebait species), koura (freshwater crayfish), kakahi (freshwater mussels), mawhitiwhiti (shrimp), toitoi (bully), pariri (freshwater fish), paneroro (grayling),piharau (lamprey).[5]

14. Other practices of procuring kai involved the hunting of waterfowl, such as whio, and the cultivating of crops along the waterways.

15. The sheltered and fertile river flats and gorges along the main river and the streams were a place where Ngati Hineoneone grew crops such as kumara, taro and gourds.

16. As kaitiaki of their rohe Ngati Hineoneone managed and sustained their water environment with traditional conservational practices, including the designations of rahui and tapu, and the weaving of all the waterways to their own whakapapa and hapu history.

17. Bill Ranginui, in his Brief of Evidence for the Whanganui Inquiry hearings described this relationship of Ngati Hineoneone and the waterways in regards to the Pitangi, Taupiri and AhuAhu streams:

16.1 *Pitangi stream is the rohe taupa (southern boundary) of Ngāti Hineoneone.*

16.2 *The name Pitangi tells of the cry of the Koekoea the long tail cuckoo, a migratory bird. Koekoea migrates to a bush block at Pitangi Stream. This cuckoo then flies to Te Tuhi and Tauakira in February to nest around Atene.*

16.3 *The traditional kōrero describes how the Koekoea, Ka puta tana āhua he mokomoko. The Koekoea enters a rotten tree and metamorphoses into a lizard upon leaving.*

16.4 *The Koekoea tail feathers are a highly prized taonga by Whanganui iwi and Ngā Rauru. Whanganui Māori signed the Treaty of Waitangi with Koekoea feather quills.*

16.5 *Pitangi Stream is taputapu, no food is gathered from this stream. A Hineoneone pā site is located upstream. This is also a place ravaged by sickness epidemics.*

[5] Kathy Marr, *Crown Impacts on Customary Maori Authority over the Coast, Inland Waterways (other than the Whanganui River) and Associated Mahinga Kai in the Whanganui Inquiry District*, June 2003.

16.6 *Taupiri Stream is where our burial caves and other taonga coexist. The spirits of our ancestors dwell at Taupiri maunga.*

16.7 *Near Taupiri Stream adjacent to the wool shed at Atene is a small muddy coloured lake which is tapu and where all the worldly possessions were placed from those of us who had passed on.*

16.8 *Our rohe taupā, the northern boundary for Ngāti Hineoneone, is the Ahuahu Stream. The taniwha kaitiaki here is Manga-puera.*

16.9 *There are many kāinga and urupā located here. Ngāti Pamoana iwi intermarried and settled at Ahuahu and Te Tuhi.*

18. Ngati Hineoneone's relationship and life with the river has been integral therefore to the hapu identity, but also to their trans-generational transmission of knowledge and belief systems, as well as their part among the other hapu and iwi of the Whanganui region.

19. In the Waitangi Tribunal's *Whanganui River report (1999)* the Tribunal commented on the importance and strength of the relationship between Whanganui hapu and their waterways:

"The River was central to Atihaunui lives, their source of food, their single highway, and their spiritual mentor. It was the aortic artery of the Atihaunui heart. Shrouded in history and tradition, the river remains symbolic of Atihaunui identity."[6]

Alienation of the water and the land

20. At 1839 Ngati Hineoneone exercised undisputed rangatiratanga over their rohe and their waterways. By 1860, with the advent of colonization into the Whanganui area, Ngati Hineoneone's water rights – and, in fact the water rights of all Whanganui hapu – came to be challenged by the Crown.

21. As a result of native land court legislation and practice, scenic reserves, public works acquisitions and Crown purchasing, Ngati Hineoneone experienced the alienation of the majority of their traditional lands, in particular within the blocks Kauarapaoa,

[6] Waitangi Tribunal, *Whanganui River Report*, p xiii

Tauakira 2O & N, Te Tuhi No 4; as well as the incremental alienation of their water rights within their traditional rohe.

22. Crown policies and assumptions about Ngati Hineoneone authority and mahinga kai came to a position where the Crown sought to dominate the traditional relationship of the hapu to the river and its tributaries; indeed seeking to dominate the experience of all hapu along the Whanganui.

23. The issue of ownership of the water began in Whanganui with the purchase of the Whanganui block in 1848. Usage of the river pre-1860 by Pakeha had been as "guests of the Maori owners."[7]

24. Subsequent investigations from 1866 into the land purchases began to highlight the Crown/Pakeha assumption that the sale of land by the river included the sale of the riverbed to the center line, the '*ad medium filum aqua'* concept, and that from that part of the sea to the end of the tidal reach was to be owned by the Crown.

25. Whanganui hapu, including Ngati Hineoneone, were not aware of these meanings of English Common Law, and did not consent to any alienation of ownership of the Whanganui waterways.

26. From the 1860s Whanganui hapu found themselves in opposition to the Crown and their encroachment on the waterways of Whanganui. The struggle over the river and its tributaries has been well-documented in the research for the Whanganui Inquiry District hearings, and by the Waitangi Tribunal's *Whanganui River Report* (1993).

27. In 1880 the Crown began to clear eel weirs and natural snags from the Whanganui River, and undertaking river deepening and clearing work with the aim of enabling steam boats to traverse the river; by 1882 the Whanganui County Council had started taking gravel from the river for road construction. [8]

28. In his Brief of Evidence for the Whanganui Inquiry hearings, Terence Te Tua Ranginui commented on the impact that these Crown actions had on Ngati Hineoneone:

[7] Suzanne Cross & Brian Bargh, *The Whanganui District*, Rangahaua Whanui Series - District 9, April 1996. P 125.
[8] Ibid. P 126

27.1 *Under a Public Works regime in conjunction with the Whanganui River Trust to enable riverboat access to the upper reaches of the Whanganui River, the river's channels were deepened and rock walls placed in rapids narrowing the channels. As a consequence the velocity of the flow of water increased, in turn scouring the river bed and increasing its depth. These river works changed and redirected the river's natural flows.*

27.2 *A number of our eel weirs were also destroyed to enable this river boat access. Eel weirs and the tuna caught in them provided our hapū with kai and were a taonga to whānau members. Our family had an eel weir at Upokopoito (Omaka) which was buried by a slip 15 years later.*

29. A regular steamer service had been established on the Whanganui River by 1890, and the 'Wanganui River Trust Board' was established by 1891 under the River Boards Act 1884.[9] The Wanganui River Trust Amendment Act 1893 bestowed the Board with the legal power to authorize the removal of gravel and sand from the river, despite continuing Whanganui hapu opposition.

Atene Dam Power Project & Tongariro Power Scheme

30. During 1918 the possibility of the Whanganui River to create hydropower was raised, and the Board was asked to authorize the commencement of feasibility studies, an interest that has continued into current days. The Whanganui River finally became part of the Tongariro power scheme during the 1960s, whereby part of the upper Whanganui River flow became diverted into Lake Rotoaira.

31. Another Crown action involving the waterways which heavily impacted on Ngati Hineoneone was the Atene Hydro Dam project.

32. The Crown initiated the project during the late 1950s, and the proposed dam area to be flooded for the creation of hydro-electricity was from Atene, the center of Ngati Hineoneone's rohe, to eight kilometers south of Taumarunui.

[9] Ibid.

33. In his Brief of Evidence for the Whanganui Inquiry hearings, Tim Paki[10] described Ngati Hineoneone's experience of the proposed Atene Hydro Dam:

32.1 *If Ngāti Hineoneone had expected, as guaranteed under the Treaty of Waitangi, to live undisturbed on what was left of our land adjacent to the Whanganui River we soon realised this was under real threat, when from 1958 major investigations were undertaken in New Zealand for coal, oil, gas, geothermal and hydro-electric power production. The proposed dam at Atene was part of the national plan.*

32.2 *At the least Ngāti Hineoneone should have expected meaningful consultation as the Crown's Treaty partner. This did not occur; instead Māori were told that they would have to move over to accommodate the Crown's plans.*

32.3 *Thirty-one marae would be flooded or affected if the dam was built. The Minister of Electricity had said that 'the Māori problem was the biggest human problem in the government's deliberations on the dam'. This comment, however, had no bearing on the Crown's plans for its dam. In its 1963 report regarding the proposed dam the Ministry of Works expected compensation payments to be 'not high but its concern lay in the railway and roads rather than the people.'*

32.4 *It was anticipated that the expected rise of four inches on the flood levels could cause serious drainage problems along the river's lower reaches. Stage one would involve diversion of water from a number of rivers including the Whanganui by means of some ten miles of tunnels. To make quite sure that the floor of the lake would be strong enough to carry the vast weight of water, engineers had tunneled under the river bed to test the resistant qualities of the earth below.*

32.5 *The Ministry of Works in Whanganui reported that the testing chamber being built at Atene would determine the composition of the country through which the diversion tunnel would go if the Whanganui River dam project was approved. It would be built at the*

[10] Brief of Evidence of Tim Paki, August 2007, Wai 1028 Ngati Hineoneone, Wai 903

end of a 900-feet long tunnel. Three test tunnels would be constructed. The tests were to give a guide to the stability of the surrounding country and would be valuable for arriving at a suitable lining for the diversion tunnel.

32.6 *By the end of the decade the possibility of the proposed Atene dam collapsing and wiping Whanganui into the sea had resulted in the proposal being scrapped. The Ministry of Works had found that the land of the river valley was not rock in the ordinary sense.*

32.7 *It seems extraordinary that it took 10 years to discover this. The Crown was previously put on notice that the lands surrounding Atene were unstable. In 1912 there was a massive landslip at Murumuru, just opposite Ohui (just south of Atene). The hillside slipped and the earth spread across the river blocking it. As a consequence, the surveyed roads on the Ohui side were abandoned by the Crown, because of the apparent instability.*

32.8*Ngāti Hineoneone have been left with land that could experience the same problems as have occurred at Waihi on the Coromandel, given the size of the tunnels and testing chamber underground. The massive cavern and tunnels under Atene that have been tunneled through land that has been described by the Crown as 'soft weak sandstone' is a desecration of Papatuanuku and apparently for no purpose as the reasons ultimately given for scrapping the project could have been discovered without this work.*

34. The issue of who had the rights over waterways within Ngati Hineoneone's rohe, just as in the rest of Whanganui, had been raised from the middle of the 19th Century. The protest by Whanganui hapu against Crown assumption of ownership of water is evident from this time onwards, and makes a strong statement on the fact that the hapu never considered that they had given their water rights to the Crown (or to private purchasers) at any time.

35. From the 1880s the hapu organized opposition to Crown encroachment on the Whanganui River and streams, including the building of barriers and other obstructions preventing passages up

the river; the 1880 declaration by Te Rangihiwinui that the river was closed to Pakeha and could only be used with signed permission; and from 1886 the ongoing petitioning of Parliament against the destructive actions of the Crown on the river, and against the invasion of Maori river rights, and, later on in the early 20th Century, petitions seeking compensation for the loss of Maori water rights.[11]

36. Against this backdrop of protest the Crown passed the Coal-Mines Amendment Act 1903, section 14 of which bestowed ownership of navigable rivers to the Crown.

37. In 1938 Te Tihu, on behalf of Whanganui hapu, initiated court proceedings over the ownership of the river, during which Judge Brown ruled in 1939 that under Maori custom and usage Whanganui hapu were the owners of the river at 1840, and that hapu who owned land now along the river banks had exclusive right to construct eel weirs along those parts.[12]

38. The Crown promptly lodged an appeal with the Appellate Court against the 1939 Native Land Court decision, who upheld Judge Browne's decision in 1944.

39. The Crown appealed further, and the Supreme Court case held in 1949 ruled that the *ad medium filum* doctrine applied, meaning that with the sale of the land Whanganui hapu had lost the rights to the adjacent river bed.

40. Continued pressure by Whanganui hapu resulted in the 1950s royal commission of inquiry into the ownership of the riverbed, which found that: Whanganui hapu did own the river at 1840; the claim to the river was not dependent on the *ad medium filum* rule; the Crown did not own all navigable river waters – only tidal waters; and that Maori were entitled to compensation for the gravel removed from their riverbed.[13]

41. Through s36 of the Maori Purposes Act the Crown legislated to have the matter once more referred to the Appellate Court in 1958, and the Court of Appeal which reinforced the 1949 Supreme Court decision against Maori, that "there had never been separate rights

[11] Suzanne Cross & Brian Bargh, *The Whanganui District*
[12] Ibid. P 129.
[13] AJHR, 1950, G2, P 1-20.

under Maori custom to the whole length of the Whanganui riverbed and each land block carried with it the rights to the adjacent riverbed to the centre of the river."[14]

42. The protest by Whanganui hapu against Crown abrogation of their water rights has continued up to this present day, resulting in Wai 167, the Whanganui River claim.

43. The rights of the hapu of Whanganui to the River were strongly emphasized by the Waitangi Tribunal's 1999 report, which found that under the Treaty of Waitangi the hapu of Whanganui had full, exclusive and undisturbed rights to their water, and that "*the Acts of the Crown in removing from Atihaunui the possession and control of the Whanganui River and its tributaries, and its omission to protect the Atihaunui rangatiratanga in and over the river, were and are contrary to the Principles of the Treaty of Waitangi, and Atihaunui have been and continue to be prejudiced as a result."*[15]

44. The case example of the customary water rights and water uses of Ngati Hineoneone, and the abrogation of those rights by the Crown is one of the multitudes of hapu and iwi experiences around Aotearoa, where the Crown has ignored their duty under the Treaty of Waitangi, as well as their duty under wider principles of law and human rights; or as the Waitangi Tribunal states:

" The Maori right to retain their properties that they possess is founded on universally accepted principles from the doctrine of native title, as recognized in law, to the Treaty of Waitangi, which contains the promises of the Crown, to the emerging principles of international human rights."[16]

45. Ngati Hineoneone have had their customary rights of the Whanganui River and their river tributaries abrogated by the Crown since the 1860s, yet Ngati Hineoneone have never conceded to the alienation of their streams and river, and still consider themselves the rightful owners of these areas.

46. They have experienced the spoiling and mismanagement of the waterways by the Crown, and have experienced the subsequent

[14] Suzanne Cross & Brian Bargh, The Whanganui District
[15] Waitangi Tribunal, Whanganui River Report. P 338-339
[16] Ibid. P 340.

impact on their whānau and hapu lives in terms of the usurpation of their rangatiratanga and kaitiakitanga, their depletion of natural food sources, sources for healing and their modes of economic existence as it relied on trade and travel using the river ways.

47. As it stands, Ngati Hineoneone are still fighting to have their water rights recognized and reinstated by the Crown. This is a process that has not been resolved, despite the history of process and litigation. This is a dispute that has not been settled or remedied, and within the context of the Treaty of Waitangi, this constitutes an on-going breach by the Crown of their agreement made with Maori throughout Aotearoa.

48. Within the current context of the Crown proposed sale of up to 49 percent of shares of power-generating SOE companies, this breach is exacerbated, as the Crown is intending to sell something that they, simply put, do not own, and that the Crown will not be able to remedy once it passes into private ownership.

49. The question of water-ownership is inextricable to this issue, as the control and management of water directly relates to power generation, in this case being the Tongariro Power Scheme.

50. A Treaty compliant approach by the Crown would not be able to support any such sales, but would focus on establishing processes to reinstate the rangatiratanga and kaitiakitanga of Ngati Hineoneone over their waterways.

Dated at Auckland this 18th Day of May, 2012

Tu'inuku<u>Tavake</u> Barron Afeaki

Counsel for the Claimants

To: The Registrar of the Waitangi Tribunal

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