In the matter of the WAI2357 and WAI2358 application for an Urgent hearing by Sir Graham Latimer, Tom Murray, Taipari Munro, Kereama Pene, Rangimahuta Easthope, Peter Clarke, Jocelyn Rameka, Eugene Henare, Nuki Aldridge, Ani Martin, Ron Wihongi, Eric Hodge, Walter Rika, Emily Rameka, Maanu Paul, Charles White and Whatarangi Winiata and the WAI2362 claim by Roimata Minhinnick

Claimants

Submissions of Counsel for Rudy Taylor and Patu Hohepa on behalf of Interested Parties in WAI2344

Dated this 12th day of July 2012

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May it please the Tribunal

I appear for Mr Rudy Taylor and Dr Patu Hohepa as interested parties in the Hokianga claim WAI2344 [1] on agency instructions through Jason Pou and Annette Sykes of Aurere Law. To avoid repetition I adopt my submission dated 26 June 2012 (document #3.3.2) on behalf of Mr Taylor and Dr Hohepa.[2]

Summary of Argument

1 The starting point is not ownership of water and geothermal resources. It is who has power and control over those resources. Power and control (rangatiratanga) is the logically prior evaluative issue.

2 English common law has conceptual difficulties in addressing ownership rights in water per se. In common law terms it is a public domain right.[3] However English common law, and NZ statute law, have no difficulty assigning property rights and quasi property rights over the use and control of water.

3 When ownership is viewed as a bundle of rights, the Crown has asserted the exclusive right to control who may "take, use, dam, divert" water or "take, use, dam, divert" the "heat or energy from the material surrounding geothermal water" (s21 Water & Soil Conservation Act; ss14 and 345 RMA) for up to 35 years.[4]

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[1] The Hokianga (Taylor and Hohepa) and Te Rarawa Deed of Settlement Claim

[2] Excluding the issue of relief (to be addressed in closing)

[3] Arguments as to native title are addressed by other Counsel for interested parties

[4] Since the passing of the WSCA all rights to take, use, dam and divert water and discharge contaminants to it, have been extinguished: s21. From that date, the Crown assumed sole control over allowing water to be used or interfered with. The power was continued

4 The assertion of exclusive control over the use of water and geothermal resources by the Crown is (subject to probative evidence tendered by the Claimants and Interested Parties and accepted by the Tribunal) inconsistent with Treaty principles.

5 This Tribunal has previously made findings that s21 Water and Soil Conservation Act and s14 RMA constitute breach of Treaty principles by negating ownership and control rights over waterways. These are outlined in the Brief of evidence of Taryn Tuari (#A79) and David Alexander (#A69(b)). Those findings are persuasive or highly persuasive in relation to the present Inquiry, particularly for purposes of Stage One.

6 The RMA is an effects based statute. It enables consideration of impacts on cultural wellbeing (s5), relationships between Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga (s6(e)), historic heritage (s6(f)), kaitiakitanga (s7(a)) and Treaty principles (s8). None of these provisions confer veto powers to Maori and development or use of resources many proceed despite adverse cultural impacts if that promotes sustainable management. There is no duty under s8 to take into account past wrongs or use that provision to restore the imbalance. The principle of redress is not the obligation of a local authority or its community: *Waikanae Christian Holiday Park v Kapiti Coast DC* (HC, CIV 2003 485 1764, 27/10/04).

7 ss124 RMA and 124A-C give priority (subject to conditions) to the holder of an existing water permit, when applying for a replacement permit.[5]

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under ss14 and 354 RMA (s354 being transitional provisions). The Crown has delegated control to Regional Councils under ss30(e) and (fa) of the RMA. With limited exceptions, all uses of water and geothermal resources require resource consent or must comply with a National Environmental Standard or regional plan rule.

[5] The regime in s124 - 124C is slightly convoluted. In summary: s124(3) entitles a water permit holder to continue operating under an expired resource consent provided it applies at least 6 months prior to the expiry date. S124B(2) gives "..priority over every other application described in subsection (1)(c).." provided that the existing consent holder meets criteria in s124B(4) (e.g industry good practice, efficiency). Priority only relates to the existing consent. Priority can be lost where a regional plan has not allocated resource or rules in a regional plan expressly exclude s124A-C (refer s124A(2)). Any change to a regional plan regime would be subject to a submission and appeals process and arguments as to legitimate expectations.

The rules of the game are therefore tipped in favour of existing SOEs because they receive "priority". Once SOEs become Mixed Ownership entities, the Crown's ability to remedy the breach by conferring control of the use and allocation of water resources will be further restricted. MOMA's will have priority rights to renew water permits to control water for purposes of electricity generation over the long term.

8 The ability to review consent conditions under s128 RMA is limited to environmental effects and does not address ownership rights. Equally any review under s128 of consents cannot negate the activity for which consent was originally granted. The ability to review consent conditions in the Waikato River consents produced by Lee Wilson (refer his evidence at [39]) for consistency with Treaty settlements is limited to the statutory purpose and powers in s128 RMA. It does not extend to compensation for Treaty breaches. "Avoidance, remediation and mitigation" are limited to environmental effects (s5). Payment of compensation for Treaty breaches, vesting of control in the River in iwi or hapu, and remedies such as payment of royalties for continued use would be *ultra vires* the powers of the consent authority under s128.

9 The power generating SOEs hold valuable property rights under water permits granted under the RMA. They have exclusionary rights to use water and geothermal resources for lengthy time frames (up to 35 years from date of grant) with priority rights for renewal of those permits under ss124-124C RMA.[6] Those rights were conferred in accordance with statutory authority (s14 RMA) but in breach of Treaty principles. The ongoing use of those resources without remedy or payment of compensation is in breach of fiduciary or partnership principles and

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creates a nexus to the relief sought by the claimants and interested parties.

10 Pre-emptive sale of 49% of the SOEs constitutes (a) lost opportunity to remedy the breach; (b) limits Crown options for remedial action; (c) the Crown has failed to established a vetting system or framework to consider the extent of claims by iwi and hapu to water and geothermal resource controlled by SOEs prior to the transfer of 49% shares. It should be required to do so prior to any material change in shareholding. Failure to do so is in breach of fiduciary principles and arguably natural justice principles.

Conclusion

11 The Crown case has evolved during evidence exchange, submissions and questioning. The Crown's core premise now appears to be that stated by Prime Minister John Key: no one owns water. A rhetorical slogan can mask underlying complexity. There are several bases on which Maori can establish ownership and control of water:

(a) Under Treaty principles, iwi and hapu own water and geothermal resources and have not ceded ownership. The fact that water may not be owned under UK common law[7] as falling within the public domain is therefore irrelevant.

(b) English common law as to water ownership does not necessarily apply in NZ. Subject to probative evidence, native title in NZ may confer different rights to those which apply in the UK. For reasons explored by other legal counsel, Maori have established ownership rights to water and geothermal activity via native title.

(c) The right to own includes the ability to control use of the resource - control and allocative rights.

(d) Allocative rights (right to exclusive use or control of a resource) are guaranteed by Treaty principles. They are property rights analogous to a profit a prendre: Aoraki at [26]-[31], [35] and [46].

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[7] Halsburys (attached 2004 edition)

12 In summary:

A There are two Treaty rights that have been breached by the Crown: a right to ownership of water (ownership right) and a right to control use of water (use and allocative rights). Both are rights guaranteed under Treaty principles. Both are rights associated with rangatiratanga / power and control over natural resources and taonga. The High Court in *Aoraki Water Trust v Meridian Energy Ltd* (**Aoraki**) has already decided that the right to take and use water under an RMA water permit is a property right or quasi property right. Therefore it is legally permissible to create property rights in relation to water. It also reflects reality - the de facto matches the de jure position (he/she who controls water owns water) because of the ability to exclude access.

B Subject to probative evidence, the Crown has breached Treaty principles by asserting exclusive control over access to water under s21 Water & Soil Conservation Act and ss14 and 345 RMA. That breach requires remedy or compensation under orthodox principles.

C Power generating SOEs have property rights or quasi property rights to use water and geothermal activity under water permits for terms of up to 35 years. They exercise, via resource consent, rights over water resource where control of that resource was usurped by the Crown in breach of treaty principles. This reinforces the nexus for the relief sought in Stage One.

D For purposes of the Stage One hearing, in addition to ownership Maori have a guaranteed right to control the use of water. Denial of both ownership and the right to control access to water constitute a breach of treaty principles and trigger an entitlement to restoration of the resource or compensation. In the absence of a remedy, as noted in evidence given earlier this week in relation to Poroti Springs, iwi and hapu remain observers, outside the goldfish bowl, without control over water and geothermal resources.

Dated this 12th day of July 2012

Robert Enright
Counsel for Rudy Taylor and Dr Patu Hohepa as interested parties