**IN THE WAITANGI TRIBUNAL** **WAI 2358**

**IN THE MATTER OF** The Treaty of Waitangi Act 1975

**AND** A claim by Sir Graham Stanley Latimer on behalf of himself, the New Zealand Māori Council and all Māori, Tom Kahiti Murray, Taipari Munro, Kereama Pene, Rangimahuta Easthope, Peter Clarke, Jocelyn Rameka, Eugene Henare, Nuki Aldridge, Ani Martin, Ron Wihongi, Eric Hodge in association with the Te Arawa geothermal cluster, Walter Rika, Emily Rameka, Maanu Cletus Paul, Charles Muriwai White, and Whatarangi Winiata.

**AND** The National Freshwater and Geothermal Resource Inquiry

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# Closing submissions for stage one of the Inquiry on behalf of the Claimants

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## Closing submissions for stage the Inquiry on behalf of the Claimants

### Introduction to these submissions

1. These closing submissions do not stand alone but need to be read, and will be addressed, together with the opening submissions. This split focus is not ideal but necessary given the time constraints. The purpose of this document is to address the matters that were highlighted as potentially significant during the course of the hearing.

### Nature of the rights

2. Māori do not associate their relationship with their water resources with the English concept of ownership. This was expressly stated in some of the oral evidence.[1] Such a claim would be offensive to some, overly simplistic and contrary to relevant tikanga. The water resources have mauri and as such cannot be "owned."

3. The Claimants do not bring this case out of a desire to see their name on a deed of title for their respective water resources. As Mark Busse explains, cases such as this are forced on indigenous peoples as a means of protecting their traditional relationships with property.[2] The choice is not between maintaining the traditional relationship or converting them into English title. It is between converting them into English title or losing them altogether.

4. That said, there is no doubt that the relationship between the hapū who have given evidence in these proceedings and their water resources is a relationship which is capable of being translated into full ownership in accordance with trite principles of New Zealand Treaty law. Repeatedly, the witnesses have spoken[3] and written[4]

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[1] Cf Transcription: T. Munro (*Poroti Springs*), p 18; N. Aldridge (*Lake Omapere*) p31; M. Wihapi (*Kaituna River*) pp 41 (talks of custodianship) and 45 ("...ownership of the riverbed was possible... but we didn't agree with that, within our thoughts or custom").

[2] #A69(k), pp 9-10.

[3] Cf Transcript: **Mana:** T. Munro, p 9; T. Waho, pp 249, 253, 258, 259, 263; T. Cairns p 299. **Rangatiratanga:** T. Munro, p 20; N. Aldridge, p 25; T. Wihapi (Kaituna), p34; H. Huata (Heretaunga), pp 77, 78, 81, 84; R. Minhinnick, pp 88, 84. **Kaitiakitanga:** T. Munro, p 20; T. Wihapi, p 41; R. Minhinnick, p 88; T. Waho, pp 259, 260, 282.

[4] **#A68(a)** (*Kaituna River*), p 3 and 8; **#A52(a)** (*Poroti Springs*), pp 1-3; **#A67(a)** (*Taniwha and Hamurana Springs*), p 1; **#A44(a)** (*Lake Rotokawau*), p 1; **#A56(a)** (*Lake Horowhenua*), pp 1-3; **#A59(a)** (*Upper Waikato River*), p 3; **#A57(a)** (*Lake*

of their mana, rangatiratanga and kaitiakitanga over the respective resources. The extensive whakapapa recounted by some witnesses[5] even demonstrates figurative, if not literal, ahi ka in relation to the resources.

5. If this were a case concerning land, there would be no questions that these matters demonstrate a relationship deserving of protection through recognition as full property ownership. This is true despite it being equally well recognised that māori did not regard themselves as "owning" land.[6]

6. Why then should water resources be any different? There is no doubt that the treatment of water resources under English law has developed in a way that is somewhat distinct from land.[7] However, that is not the issue. The question is what was the relationship between māori and their water resources in 1840 which was therefore protected under the Treaty. In that regard, there is no basis on the evidence for distinguishing water from land.

7. Indeed, several people have noted the absurdity of such distinction under tikanga.[8] For māori, the land and water that comprise a water resource formed an indivisible whole. No distinction was made between a lake bed and the lake water or between a river bed and the river water. As Judge Acheson remarked:[9]

> [Māori] would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain.

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*Omapere*), pp 3, 4, and 7; **#A55(a)** (*Rangitaiki*), p 1; **#A62** (*Lake Rotongaio*), p 1; **#A60(a)** (*Waikato Rivermouth*), p 3; **#A54(a)** (*Ngati Raukawa*), pp 3, 6, 7, 9 and 15; **#A45(a)** (*Walzl CNI Report*), pp 1, 2, 7, 9, 10, 16, 17, 19 – 23, 26, 29, 30 and 32; **#A61(a)** (*Mare Geothermal Report*), pp 1-5, and 27; **#A69(e)** (*Jeffries & O'Leary*), pp 3- 6, and 8 - 10; **#A69(d)** (*Habib*), pp 2, and 6 – 13; **#A69(i)** (*Hohepa and Habib*), pp 5, 10, 23, 24, 27, 32, 39 and 43.

[5] For example: **#B12** (Presentation of J Winiata, Ngati Hinemanu / Ngati Paki); **#B16** (Presentation of Dr A Yates-Smith, Ngati Rangiwewehi); **#B19** (Presentation of H Huata, Heretaunga).

[6] Cf the process under the Native Land Act 1865 (and later iterations) where title was issued when it could be established that land was held "according to custom".

[7] *Halsbury*, see #3.3.9(a).

[8] Omapere Lake, decision on applications for investigation of title, 1 August 1929, Maori Land Court minute book 11 BI 253-278 cited in #A57(a) (*Lake Omapere case example*) pp 7-8 and 15; #A85 at 123; *Te Runanga o Te Ika Whenua v A-G* [1994] 2 NZLR 20, 26; #A59(a) at 3; #A69(a) at 24; #A69(d) at 1; #A69(i) at 28; #A72 at 4; #A74 at 69; #A75 at 240; #A85 at 123.

[9] Maori Land Court minute book 11 BI 253 at 259 cited in #A57(a) pp 7-8 (*Lake Omapere case example*).

**Was this relationship a taonga?**

8. In discussing the nature of the relationship, we have skipped over a required element for protection under Article 2, namely whether this relationship is a taonga. This can be dealt with very briefly. Virtually every claimant witness has described their water resource(s) expressly in these terms.[10]

9. It is clear on the evidence that the water resources were more than just a taonga. They were amongst the most precious taonga of all. This was true of every hapū that gave evidence. The water resources were more than once described as the lifeblood of the people.[11] Some said this was wrong, and went further. Water is not the lifeblood they said, water is the people and the people are the water.[12]

10. This may be the least surprising proposition of them all. Water has been of such vital importance to every civilisation that has ever existed on this Earth: from the "cradle of civilisation" in Mesopotamia between the Tigres and Euphrates rivers to modern civilisation albeit the pumps and the pipes may keep us from realising it. How long would Wellington survive if the water pipes all ran dry?

**Can this relationship be generalised to all māori?**

11. The Claimants say that the Tribunal can safely generalise these propositions to a statement about the relationship between every hapū in Aotearoa and their respective water resources. Such a finding is not necessary in order to justify the recommendation that the Claimants seek. However, such a finding from the Tribunal would, in and of itself, be a substantial step towards resolution of this issue.

12. To justify this, the Claimants point to:

    - the fact that the nature of the evidence itself did not rely on material peculiar to particular hapū;

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[10] Cf Transcript: R. Minhinnick, p 30; T. Waho, p 275; T. Walzl, pp 285 and 286; T. Cairns, p 303.

[11] Cf Transcript: **Lifeblood** T. Munro, p 15. **Life force** R. Minhinnick, p 96. **Mauri** A. Wihapi, p 35; R. Minhinnick, p 99; T. Walzl, pp 284 and 285.

[12] Cf Transcript:*"I am the water, the water is me"*: M. Paul, p 6; T. Munro, p 13; E. Henare, p 382.

- the central importance of the water resources to māori and to any civilisation generally;
- the broad range of water resources represented by the claimant evidence; and
- the lack of any evidence to the contrary;

13. On this last point, the Claimants submit it is relevant that the Tribunal has not heard any contrary evidence from the Crown or any other party. The fact that such generalisations were sought has been well signalled by the Claimants. If there were any contrary evidence in existence then this could and should have been brought to the Tribunal's attention. Nor has the Crown or any other party sought to examine the claimant witnesses to test the generalizability of their evidence. The sole questions of this type came from the Tribunal itself and the witnesses were of the view that their evidence could be generalised.[13]

**Inalienability**

14. During the evidence of Mr Michener, questions from the bench queried whether the rights sought by the Claimants could properly be described as amounting to property given that the did not conform with some of the classically recognised attributes of property.[14] In particular, these questions addressed issues of inalienability and exclusive possession.

15. Exceptions to the principle of alienability have always been recognised by English law in relation to real property. The radical title held by the Crown from which all other title is derived is inalienable. Native/customary/aboriginal title is also regarded as inalienable except to the Crown.[15]

16. It is important in considering the nature of the property right to be clear as to whether one is considering the right that existed in 1840 and is being protected or the form of the right that will be recognised in 2012 (hopefully) to give effect to that protection. Mr

[13] Cf Transcript: Oral evidence of H. Huata (Heretaunga), pp 84-85; Oral evidence of T. Walzl, p 290.
[14] Cf Transcript, pp 353-360.
[15] Possibly not the best articulation of this principle, but one known to the Tribunal, is found in the President Cook's judgement in *Te Runanga o Te Ika Whenua v A-G* [1994] 2 NZLR 20, 24; this is also in line with the second clause in Article 2 of the treaty and is embodied in legislation in s 145 of Te Ture Whenua Maori Act 1993.

Michener's evidence was addressing what the right should look like today.

17. If the suggestion is that a requirement of inalienability should stand in the way of recognition as a "property right" then this proposition was dealt with directly in the lead judgement of Brennan J in *Mabo (No. 2)*:[16]

> It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of "property" which require alienability under the municipal laws of our society(101) See, for example, *National Provincial Bank Ltd v Ainsworth* [1965] UKHL 1; (1965) AC 1175, at pp 1247-1248, to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners. True it is that land in exclusive possession of an indigenous people is not, in any private law sense, alienable property for the laws and customs of an indigenous people do not generally contemplate the alienation of the people's traditional land. But the common law has asserted that, if the Crown should acquire sovereignty over that land, the new sovereign may extinguish the indigenous people's interest in the land and create proprietary rights in its place and it would be curious if, in place of interests that were classified as non-proprietary, proprietary rights could be created. Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory.

**Exclusive possession**

18. The second issue raised by the Tribunal was one of exclusivity. Mr Michener accepted that it wasn't exclusive in that multiple people claimed the right together. Notwithstanding that reply, the Claimants submit that the requirement of exclusive possession is amply satisfied. The ability to exclude others and to exert absolute control and authority over the water resource is central to mana, rangatiratanga and kaitiakitanga.

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[16] *Mabo v Queensland (No 2) ("Mabo case")* [1992] HCA 23; (1992) 175 CLR 1, 51.

19. The problem is therefore not one of exclusivity. Nor is it a problem that the exclusivity is spread around multiple people. The English common law has long recognised concepts of joint ownership or tenancy in common. The only problem is that the English common law does not respect a hapū as a legal entity.

20. This is not problem unique to the water issue. It is a problem that has plagued resolutions of land issues throughout New Zealand's history. It is a problem that is crying out for resolution, although it is one that may be beyond the scope of this Inquiry. It is not an issue that needs resolving stage one and is not an impediment to the recognition of property rights.

21. Going back to the same section from Mabo (No. 2) as cited above, Brennan J continued:[17]

> The fact that individual members of the community, like the individual plaintiff Aborigines in Milirrpum(102) (1971) 17 FLR, at p 272, enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.

**The Common law**

22. Rights to water under the common law have been much discussed by the Tribunal during this hearing. The Claimants submit that such analysis is of only a little relevance to the issues before the Tribunal.

23. The Government's position that no one owns water under the common law is overstated. As an outline of the English law position makes clear, the situation is no so clearly stated in

[17] at 51.

England.[18] There is also the questions of native title which is part of the common law and was set out in the Claimants' opening submissions.[19] As stated in those submissions, this is not a matter that it is within the Tribunal's jurisdiction to determine. It is only important in that it shows that the common law position is nowhere near as clear as the Crown wishes to make out.

24. The Tribunal has asked the Crown to produce New Zealand authority for its stance on the common law. The Claimants await the Crown response with interests.

25. In the end, the repeated claim by the Prime Minister and the Crown that under the common law no one owns the water, does not answer any issue in this case. Not only is it not an answer but, if it is true, it could even be seen as an articulation of the problem. If the Crown is imposing on māori a system of common law which refuses to recognise the māori rights to water then this is in and of itself a breach of Article 2.

**Extinguishment**

26. In questioning a witness for the Crown a member of the Tribunal expressed the importance of resolving the issue of whether māori rights to water had been extinguished. The Claimants submit that this is not correct. Whether the rights have been extinguished is of no more than academic interest in these proceedings.

27. The question of whether there has been an extinguishment of the rights would be necessary for a determination of the existence of native title. Such considerations are not within the jurisdiction of the Tribunal. The question for the Tribunal is whether the rights guaranteed by the Treaty are being respected.

28. There can be no doubt from the evidence that the rights māori had to water have either been extinguished or are being interfered with. If they have been extinguished, then this extinguishment is a breach and the rights need to be re-established. If the rights are merely being interfered with then that interference should stop.

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[18] Halsbury: #3.3.9(a).
[19] #3.3.1 at [64] – [73].

29. For completeness, the Claimants would say that the rights have not been extinguished. Going back to Cooke P's judgement in *Ika Whenua*, extinguishment in peacetime can only be with the free consent of the rights holders.[20] The evidence before this Tribunal makes it abundantly clear that, at least with respect to these claimants, there has been no such consent.

***Te Runanganui o Te Ika Whenua Inc Society v Attorney-General***

30. The Crown places great weight in these proceedings one part of the dicta of Cooke P (as he then was) in the case of *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 when His Lordship said that:[21]

> [H]owever liberally Māori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Māori chiefs and Governor Hobson in 1840.

31. The claimants endorse the submissions of Ms Ertel on behalf of Interested Parties when she said that this part of His Lordship's dicta is of little weight. Not only were Treaty rights not at issue in that case, Ms Ertel, who was one of the counsel for the appellant, points out that the issue was not argued before the Court.

32. In any case, that dicta, even if correct, is no answer to this claim. If Crown has wrongfully seized property and used it for power generation then it will need to compensate those from whom it was seized. It does not matter if the original owners had the right to generate electricity or merely to use that property to play Pooh Sticks.

33. This 1994 authority is also of little relevance to these 2012 proceedings. Lord Cooke is worthy of great respect, but the relevant legal landscape has moved on considerably since 1994. It is now trite law that central to indigenous rights is the right to use their property to develop both their culture and their economy in parallel and on an equal footing with others. An example of the articulation of these rights is embodied in the United Nation's

[20] At 24.

[21] At 24.

Declaration on the Rights of Indigenous Peoples which New Zealand affirmed in April 2012 with speeches before the General Assembly of the United Nations and before New Zealand's Parliament.

34. That Declaration expressly sets out the right to develop resources possess by reason of traditional ownership in article 26(2). That express right is further supported by the rights to self-determination set out in articles 3 and 4, the general right to development including economic development set out in article 5 and 20, amongst many other relevant rights for the determination of this claim – see in particular articles 25 and 28.

35. One may also legitimately wonder whether the Lord Cooke might have been persuaded of a different outcome had the issue been more fully argued at the time. David Alexander's research put forward in this case records the view of Hone Heke from 1903, that māori interested in and capable of exploiting "water-power" for themselves. Indeed, while electric power generation is a relatively recent development, a broader proposition that the exploitation of the potential of water falling over a change in altitude is somehow a modern concept inaccessible to māori would be questionable.

**Iwi leaders group**

36. It is hard to understand what the Crown is trying to establish with reference to the iwi leaders group. Indeed, in answer to questions Mr Beatson seemed to accept that his evidence as a whole was only relevant if the Tribunal were to reject the claim of proprietary interests to water.

37. The Claimants are before the Tribunal. The claim is a well-founded one. The requested findings are recommendations are justified and reasonable. That the Crown has chosen to talk to others and to try to persuade them, in essence, to give up the claims the claimants make in these proceedings, cannot possibly be seen as a fulfilment of the Crowns' obligations under the Treaty.

38. The iwi leaders forum is also the illogical extension of the Crown's much discredited "large natural groupings" policy.[22] The Crown seeks to resolve the water issue by consulting with only five iwi leaders. It does so despite those iwi leaders expressly stating that they do not and cannot speak for others.[23] It does so despite those iwi leaders themselves acknowledging that the issues exist at a local level and needs to be resolved at a hapū level.[24] It does so despite the fact that it is hapū and not iwi who were, and still are, the primary vehicles of Māori political organisation.[25]

39. By following this approach, the Claimants are concerned that the Crown may fall into the trap of recognising only the rights and claims of the iwi with whom it is friendly. It is important that the Crown be even handed as between all hapū.

**The Crown accepts that māori have interests and rights to water**

40. The Crown has stated that it accepts that māori have rights and interests in water. This also appears to have been recorded in a letter from the prime Minister to the iwi leaders forum in 2009.[26] However, it is important to follow the concession in detail and not to read too much into it.

41. The concession is qualified. The Crown do not accept that there are any "ownership rights."[27] Payment of royalties is not on the table for discussion.[28] The Crown believes that these rights and

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[22] See, for example, Dr Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPIL 259; and Waitangi Tribunal *Te Arawa Mandate Report (No 2) Wai 1150* (June 2005) Mäori Law Review 2.

[23] Brief of evidence of G. Beatson, #A93 at [28].

[24] Cf Wai 2358 oral evidence of H. Piripi (awaiting transcript).

[25] Birdling at 266-267 citing: Angela Ballara Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945 (Victoria University Press, Wellington, 1998); Steven C Bourossa and Ann Louise Strong "Restitution of Land to New Zealand Maori: The Role of Social Structure" (2002) 75 Pacific Affairs 162; Steven Webster "Maori Retribalisation and Treaty Rights to New Zealand Fisheries" (2002) 14 The Contemporary Pacific 341; Richard Hill and Vincent O'Malley *The Maori Quest for Rangatiratanga / Autonomy 1840-2000* (Treaty of Waitangi Research Unit, Wellington, 2000) 1–2; the Treaty of Waitangi itself, where the word "tribes" in the English text was translated as "hapu" in the Maori version; Waitangi Tribunal *Ngati Awa Raupatu Report: Wai 46* (GP Publications, Wellington, 1999) 132; Waitangi Tribunal *The Fisheries Settlement Report: Wai 307* (Brooker and Friend, Wellington, 1992) 12; Waitangi Tribunal *Ngati Awa Settlement Cross-Claims Report: Wai 958* (Legislation Direct, Wellington, 2002) 72; Stephen Webster "Maori Hapuu and their History" (1997) 8 Australian Journal of Anthropology 307; and Alan Ward "Historical Claims under the Treaty of Waitangi" (1993) 28 Journal of Pacific History 181.

[26] [Doc number? Attachment to beatson's urgency brief.] Brief of Evidence of Guy Beatson, #A93 at [29].

[27] Cf Wai 2358 oral evidence of G. Beatson, T. Ott and J. Crawford (awaiting transcript).

[28] Cf Wai 2358 oral evidence of T. Ott (awaiting transcript).

interests can and are being fully explored in the iwi leaders forum where the discussion is limited to matters of management.[29]

42. In essence therefore, the Crown is accepting this and no more – that māori have a right to be consulted on matters relating to the use of New Zealand's water resources.

**FSM exemption**

43. The Crown's submissions on the FSM exemption contained in its memorandum of 16 July 2012 do not answer the objection to that notice. The fact is that this exemption can be used to condition or "prepp" the market. The other fact is that this is actually happening. First, in the form of the Prime Minister's public statements. Secondly, in investment advertising produced by Craigs Investment Partners Limited.[30] Dr Ridings said that an investor would be unwise to rely on the latter without reading the official government information.[31] However, the treasury has announced that Craigs Investment Partners Limited are their official "investment partners".[32]

**The prospectus**

44. The Crown's evidence coming into the hearing was that the disclosure issue could be fully answered by a disclosure such as the one made for the 1999 Contact Energy IPO.[33] This claim was even put to Claimant witnesses in cross-examination.[34] A related claim was that this disclosure had not affected the sale price significantly and the same would be true.

45. The first of these propositions, and the relevance of the second, has been undermined by the production and examination of what was actually disclosed in 1999, which was essentially nothing on this issue at all.[35] Mr Crawford tried to say that this might be different since the disclosures rules changed in 2009,[36] but this is equally

[29] Cf Wai 2358 oral evidence of G. Beatson (awaiting transcript)
[30] #B22.
[31] Cf Wai 2358 oral evidence of Dr. P. Ridings (awaiting transcript).
[32] Handed up on day 6.
[33] Brief of Evidence of L. Wilson #A96 at [56].
[34] Cross examination of P. Galloway, pp 213 - 214
[35] #B13
[36] Cf Wai 2358 cross-examination of J. Crawford (awaiting transcript).

well debunked by consideration of the 2011 prospectus for the same company.[37]

46. Ultimately, the Crown was unable to say what would be in the prospectus this time and asked the Tribunal to take the this issue on faith. The problem is that the Crown is coming from this issue from the question of what are its legal requirements. The Crown cannot emphasise risk any more than it has to because that would driver down the sale price. However, ultimately the issue for these proceedings is likely to be a political one not a legal one. The question will not be whether the Crown satisfied the legal disclosure test, but whether the share buyers feel aggrieved at any loss.

**Prejudice to compensation caused by the asset sale**

47. Each of the relevant Crown witnesses accepted that their claim that the sale would not prejudice settlement was predicated on the non-existence of ownership rights, even Mr Crawford. Ultimate, all of the crown's evidence is unable to assist the Tribunal if the Tribunal finds that there are ownership rights.

48. However, this is not the only flaw in the Crown's case. The Crown relies on the legal niceties of corporation law to say that the shareholders have no control over the company and the company has only an indirect interest in the water resources. Nothing, says Mr Crawford, will change after the sale. This is not even correct as far as it goes, but it doesn't go very far.

49. After the sale there will be minority shareholders and minority shareholders have rights, and minority shareholders have political power, and minority shareholders have friends and families with political power.

50. The Crown says that a shareholding would not give māori a connection to their water. However, this claim ignores the potential for shareholder agreements.

51. The Crown says that the private shareholders would not have any ownership of the water resources. However, this ignores the fact

[37] Filed electronically with the Waitangi Tribunal. Awaiting document number.

that those shareholders would be benefitting from the exploitation of the water resources.

52. The Crown says that the companies do not own the water. Well, they may not own the resources outright but they undeniably have a right to exploit it.

53. The Crown says that it is sovereign and can change any law or buy back any share if needs to do so to resolve the water issue. However, this is a statement based on legal possibility which ignores political reality. As a matter of fact the Crown does not agree Treaty settlements that would devalue private property. Nor does it renationalise private property for the purposes of Treaty settlements.

54. The claim by the Crown in this case that it could interfere with private property rights after an asset sale in order to achieve a settlement to the water issues does not right true when considering the Crown's general stance to the use of private property in Treaty settlement. See, for example, the following statement from Crown's "guide to treaty negotiations":[38]

> On rare occasions the Crown has been willing to purchase a private property for use in a Treaty settlement. This has occurred only if the claimant group has sought a particular property that the owner wishes to sell. In general, however, private property is not available for use in Treaty settlements.

55. This policy is communicated during negotiations in unequivocal terms. Page 20 of the negotiations powerpoint prepared for the Ngapuhi negotiations in 2011 contains the heading "Key issues for the Crown" followed by the first such key issue: "Crown land and resources only (not private property)".[39]

56. The Tribunal is even forbidden from recommending the acquisition by the Crown of any private land (Treaty of Waitangi Act 1975, s 6(4A)).

**The scope of the compensation**

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[38] http://www.cfrt.org.nz/doclibrary/public/thestorehouse/companiondocs/negotiations.pdf (retrieved at 22:52 on 18 July 2012) at 6.16.

[39] http://www.tuhoronuku.com/store/doc/Aug11_Final_DoMHuiPowerpointFinal11Aug.pdf (retrieved 22:53 on 18 July 2012) p 20.

57. Much thought has been given during the hearing to whether the sale should go ahead before the scope of the rights has been fully determined. Another issue of importance before any sale is to determine the scope of the compensation needed to remedy all of the various breaches. The Crown is blasé about its ability to fund compensation, but it does not appear to have given this much thought.

58. Consider one issue. Lake Horowhenua filled with effluent and storm water. The Lake needs to be cleaned and before that, the storm water and effluent needs to be treated and disposed of in a way that does not pollute the Lake. This could cost a considerable amount of money. This is one issue from amongst the 11 co-claimants. There are also over 100 interested parties with their own issues. There are also many, many more potential claimants who were not even represented. Not only does the Crown have no idea what the rights are, it has no idea how difficult and costly this problem is going to be to fix.

**Non-commercial issues**

59. The Crown also ignores non-commercial impacts of its sale process.

60. In oral evidence, Mr Anthony Wihapi made a generous concession. Certainly, his position was more generous to the Crown than that of many other claimants. For his own part, while he did not accept that he had relinquished rangatiratanga over the Kaituna river, he said that while the power generation activities taking place on it were done for the public good he did not object to them. However, this forbearance did not extend to their use for the benefit of private interest.

61. If Mr Wihapi's rangatiratanga in Kaituna river is something the Crown is obliged to protect under Article 2, then the sale in and of itself is a breach.

62. During the hearing there was a discussion of how the Crown might properly exercise kawanataga to use an Article 2 protected taonga for the public good. Mr Williams provided the answer:[40]

> In exercising its kawanatanga rights, the Crown was required to consult with Māori, to acquire their property rights with their free, full and informed consent, to infringe their tino rangatiratanga as little as possible, and to compensate for all such infringements.

This process is itself a Treaty obligation. It cannot be carried out retrospectively after the sale.

**Peppercorn leases**

63. The Claimants have found a number of peppercorn leases set up by the Crown entities on memorialised land. Two example leases have been filed.

64. These leases are significant in two ways. First, they are yet another example of the bad faith being exercised by the Crown in relation to these matters. The memorials were an agreed protection following the 1986 Land's litigation intended to protect the rights of the māori owners despite any transfer of the lands into SOE hands. The Crown has, it appears, circumvented this protection be binding the titles with encumbrances that protect the use of the land the Crown desires and prevents the māori owners from ever having their land returned unencumbered.

65. Secondly, while the Crown holds both ends of the string with respect to these leases, it retains the ability to undo them. Once one end is sold (or even 49% of one end) this will no longer be the case.

**Wai 262**

66. The Crown also places a great deal of significance on the Wai 262 Report. That report into 'Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity' is an elegant statement of the huge importance of taonga - treasured works,

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[40] David Alexander *Historical analysis of the relationship between Crown and iwi regarding the control of water,* **#A69(b)** at 28, citing from Waitangi Tribunal, *He Maunga Rongo: report on Central North Island claims, stage 1,* 4 volumes, 2008, and again in answer to questions from the bench during oral evidence.

language, cultural expressions and traditional resources - for the indigenous Māori of Aotearoa New Zealand. It also contains a strong critique of the failure of government departments in recent decades to properly implement the consultation arrangements that already exist in a number of New Zealand laws.

67. However, it is a report very much dependent on its subject matter and the subject matter could not be further from the facts of this Inquiry. It would be wrong to try to transpose the recommendations made in that Inquiry in relation to intellectual property into this case about real property.

68. In any case, that report does not lend as much support to the Crown as the Crown pretends.

69. Wai 262 recognised a sliding scale of relationships between kaitiaki and their taonga requiring a sliding scale of degrees of protection. The report distinguishes these relationships based on the nature of the kaitiaki relationship to the particular taonga, the nature of the taonga and potential threat to the relationship.

70. Were this claim to be (the Claimants would say inappropriately) analysed in these terms, the significance of the water resources as taonga, the strength of the relationship between the water resources and the respective hapū, and the way in which the absence of recognition of that relationship has resulted in significant damage to those relationships, would put these relationships and the absolute highest end of that scale. At that highest end, even under the 262 regime, there would be a right of veto, something the Crown in this case refuses to accept.[41]

**The Crown's bad faith in these proceedings**

71. It is not intended that these written submissions or the oral closing will dwell on the bad faith which the Crown has demonstrated throughout these proceedings. Ultimately, consideration of this will not resolve the issues before the Tribunal. However, it has some relevance and is worth another brief mention.

[41] Waitangi Tribunal *Ko Aotearoa Tenei* at 87.

72. Crown counsel protests in the 16 July 2012 memorandum, as they have in previous memoranda, that the Crown is participating in this process in good faith. It is important to read these protestations carefully, both for what they say and what they do not say. Crown counsel's claim of good faith is based, as is the Prime Minister's similar public claims, on a misleading reinterpretation of some of the Prime Minister's statements while altogether ignoring other of his statements and the main thrust of the Claimant and Interested Party's allegations.

73. The Prime Minister states that the Tribunal's recommendations are not binding. They are not and there would be nothing wrong with the Prime Minister pointing this out if that were all he had said. However, the Prime Minister went on to say that the Government would not delay its asset sale programme irrespective of the Tribunal's findings.

74. Crown counsel assure the Tribunal that the Crown will consider the findings and recommendations in good faith. The Prime Minister has publicly stated the same. This is a meaning of good faith hitherto unknown to the Claimants. The whole purpose of stage one of the Inquiry, the very reason that it has been held under extreme urgency in a time frame to suit the Crown, is so that the question of whether or not the asset sale programme should be delayed can be considered. The Crown is saying that will review the Tribunal's findings but it will only implement recommendations if the Tribunal makes the ones the Crown wants it to make.

75. That this remains the case despite the recent semi-reconciliatory statements of the Prime Minister was confirmed in a press conference he held on 17 July 2012 which was broadcast on all the major news channels and reported in all the major papers. When discussing the proceedings he was asked what was the chance the sale process would be delayed. He replied, "there's a chance a meteorite will hit the Earth this afternoon, but I don't think it's likely." The meaning was clear. He may as well have said "it'll be a cold day in hell." Although, the Prime Minister may need an astronomy lesson. Meteorites strike the Earth approximately once every 13 minutes.

76. It has always been the of nub Claimants' complaint of bad faith that the Crown has no intention of following the recommendations of the Tribunal if they go against the Crown. If one reads the various memoranda issued by Crown Counsel carefully, one will note that this proposition is never expressly denied. Indeed, it cannot be denied given the many and repeated public statements of the Prime Minister.

77. What this means is that the Crown has been actively misleading this Tribunal. The Crown repeatedly justified the need for the extremely compressed timetable by referencing the its programme and the number of things that needed to occur before the sale could go ahead. The obvious inference, which the Crown clearly intended the Tribunal to draw, was that the recommendations needed to be issues in a certain time frame so that the Crown could, if necessary, act on them. The requirement of a decision in July makes no sense if, as we now know to be the case, the Crown had no intention of acting on any recommendations adverse to its existing plans.

78. While the Crown's bad faith does not directly assist in the resolution of any of the four issues, it is relevant in two ways:

A. It ought to be the subject of comment from the Tribunal. The Waitangi Tribunal is necessary for the recognition and thereby resolution of Treaty breaches. Without a functional Tribunal the Crown cannot fulfil its obligations as a good faith partner under the Treaty. The existence of the Waitangi Tribunal is also now something to which the Crown has committed through ratification of the United Nations Declaration on the Rights of Indigenous Peoples (and in particular art 27 of that Declaration). The Crown's attitude to these proceedings and its attempts to undermine the processes of the Tribunal are therefore themselves breaches of the Treaty.

B. There have been places in these proceedings where the Crown has, in effect, asked the Tribunal to take on faith assurances from the Crown. The Crown's behaviour

towards these proceedings can properly influence the Tribunal's view as to whether it is willing to do so.

**Relevance of material from other inquiries**

79. It is necessary to respond to the Crown submissions contained in its 5 July 2012 memorandum suggesting that the Tribunal was not prevented from referring to the evidence of previous Inquiries for the purpose of going behind the findings made in those Inquiries. However, as the Claimants stated in their memorandum of [date], the Tribunal can legitimately make use of that material and the Claimants have no reason to believe that the Tribunal has any intention of going behind the findings of past Tribunals.

80. Nevertheless, the Crown has misstated the law in its memorandum. Its reliance on *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 is out of context. The issue in that case was different from the one the Claimants make here. The issue in that case was whether the findings of the Tribunal could be binding on the parties before the High Court on the grounds of issue estopple. It is easy to understand why the non-binding nature of the Tribunal's recommendations was seen as a basis for answering this issue in the negative. However, this a fundamentally different issue to the one raised by the Claimants.

81. At issue here is whether the Tribunal should go behind the findings of past Tribunals. If it did so in the present case it would be in the context of an urgent inquiry where the present Tribunal will have had less time to consider the material, will have only seen a subset of the evidence produced at the previous hearings and where the parties to those previous hearings may not have had an opportunity to address the issues. The Claimants doubt that this Tribunal would consider it appropriate to do such a thing and stand by their submission that it would be a legal error to do so.

**Conclusion**

82. As the Claimants set out in their memorandum of 5 July 2012[, the Crown have, figuratively speaking, not turned up to this Inquiry. The Crown have not brought any evidence on issue a) and have

not challenged any of the Claimant evidence on that issue. Meanwhile, all of the witnesses the Crown has produced have predicated their evidence on the Claimant's evidence on issue a) being rejected.

83. The Claimants have nevertheless attempted to engage with the Crown witnesses. In doing so, significant flaws have been exposed at every level of the Crown's case. Its case is built on battles with straw men and on deliberately making unstated and unsupportable assumptions. Ultimately, it is generally wrong in law, irrelevant and misses the entire point of the claim.

18 July 2012

Felix Geiringer