BEFORE THE WAITANGI TRIBUNAL

WAI 1040

WAI 1507
WAI 1666
WAI 1832
WAI 2010
WAI 2058
WAI 2149

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Te Paparahi o Te Raki Inquiry

MEMORANDUM OF COUNSEL
Dated: 09 September 2012

RECEIVED
Waitangi Tribunal
9 Sept 2012
Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL

1. This memorandum of counsel is filed on behalf of:

    a. Wai 1507, a claim by Pouri Te Wheoki Harris and others;

    b. Wai 1666, a claim by Ani Taniwha on behalf of herself and Te Uri o Te Pona, Ngati Haiti, Ngati Kawau, Ngati Kawhiti, Ngati Kahu o Roto Whangaroa, Ngāti Tupango, Te Uri o Tutehe, Te Uri Mahoe and Te Uri Tai of Ngapuhi iwi;

    c. Wai 1832, the Hapū o Te Rohe Pōtae o Whangaroa (Kingi) Claim;

    d. Wai 2010, a claim by Justyne Te Tana on behalf of Ngāi Te Whiu and Ngāti Tautahi, and Ngāi Te Wake o Waoku, Ngāi Te Wake Tua Whenua, and Ngāi Te Wake o Takutai Moana, of Ngapuhi iwi;

    e. Wai 2058, the Poroti Lands (Norris) Claim; and

    f. Wai 2149, A claim by Julie Taniwha on behalf of herself and Te Uri o Te Pona, Ngati Haiti, Ngati Kawau, Ngati Kawhiti, Ngati Kahu o Roto Whangaroa, Te Uri o Tutehe, Te Uri Mahoe, Te Uri Tai, and Ngai Tupango of Ngapuhi iwi.

2. For the purposes of this memorandum of counsel all of the above parties will be referred to as "**the claimants**".

3. This memorandum of counsel is filed in response to the memorandum of counsel filed by Woodward Law Offices dated 06 September 2012 ("**the Woodward memo**")[1].

4. The Woodward memo raises the issue of whether Te Paparahi o Te Raki inquiry should decline to consider issues that it claims are now

[1] Wai 1040 #3.1.800

before another inquiry, The National Freshwater and Geothermal Resources Inquiry, Wai 2058. The Woodward memo that:

> *No issue is taken with the elegance of the drafting of either of the Issues documents, but rather the more fundamental point of whether Proprietal interests in water, and how those rights should be given effect to, should be before this Tribunal. The Tribunal considering the National Claim under urgency is already seized of these questions.*[2]
>
> *Indeed the question is raised as to whether those issues (Proprietal rights) will in fact be res judicata by the time of this hearing.*[3]

5. It is our contention that the issues raised in claimants' claims are not necessarily best brought before the National Freshwater and Geothermal Resources. We consider that the thrust of each of respective inquiries is different. Issues to be determined in Wai 1040 are not necessarily identical to those issues raised in Wai 2358. The purposes of the two inquiries are very different. Lastly, the rules of re judicata (issue preclusion) will not apply to these proceedings.

Water Issues in the Wai 2358 Inquiry

6. In order to determine whether water-related claims in the Wai 1040 inquiry should rightly be heard in the Wai 2358 inquiry, it is important to consider the stated purpose of the Wai 2358 inquiry. The Wai 2358 inquiry's purpose is to inform the government about the Mixed Ownership Model and the Fresh Start for Fresh Water programme. These issues are outside of the scope of this Inquiry.

7. The presiding officer of the Wai 2358 Inquiry stated that stage one would consider the following issues:

[2] *Ibid*, at para 4
[3] *Ibid*, at para 5

a) What rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?

b) Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise these rights and remedy their breach, where such breach is proven?

i) Before its sale of shares, ought the Crown to disclose the possibility of Tribunal resumption orders for memorialised land owned by the mixed ownership model power companies?

ii) Ought the Crown to disclose the possibility that share values could drop if the Tribunal upheld Maori claims to property rights in the water used by the mixed ownership model power companies?

c) Is such a removal of recognition and/or remedy in breach of the Treaty?

d) If so, what recommendations should be made as to a Treaty-compliant approach?[4]

These questions have been heard and addressed in the Tribunal's Interim report on the national freshwater and geothermal resources claim.

8. Stage two will consider the following issues:

e) Where the Tribunal has found in stage one that Maori rights and interests if freshwater or geothermal resources were guaranteed and protected by the Treaty, are these rights and interests adequately recognised and provided for today?

[4] Wai 2358 #2.7.2

f) If not, why not?

i) In particular, is the current situation an ongoing or continuing consequence of past Treaty breaches that have already been identified in Waitangi Tribunal findings in relation to water resources, geothermal resources, or other natural resources (including Crown acquisitions of land in breach of the Treaty)?

ii) In particular, has the Crown asserted rights amounting to de facto or de jure ownership of water and/or geothermal resources? What is the basis of any such assertion, and is it consistent with Treaty principles?

g) If, having considered issues (e) and (f), we find there is a failure to recognise fully the rights and interests identified in issue (a) in stage one of this inquiry, is it 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? If so, is this failure to address such issues itself a breach of principles of the Treaty of Waitangi?

h) Alternatively, could implementation of the Government's proposals under the Fresh Start for Fresh Water and/or geothermal resource reforms, without ascertaining and providing appropriate 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?

i) If either of these breaches and/or other breaches have been established, what recommendations should be made to protect such rights and interests from such prejudice either by:

i) taking steps to fully recognise those rights and interests prior to the design or implementation of the reforms; or

ii) reworking the reforms so that the reforms themselves take cognisance of, and protect, those rights and interests in such a manner that they are reconciled with other legitimate interests in a fair, practicable, and Treaty-compliant manner.

The Issues for this Inquiry

9. Claimants' claims allege historical Treaty breach that relate to water and are raised to establish the threshold issues concerning claimants' traditional associations with, and use of, waters and waterways: These matters are taonga, they were entitled to protection under Te Tiriti or The Treaty and in breach of either or both of these instruments, their water and waterways historically did not receive protection.

10. The Statements of Claim, along with the Tribunal's statement of issues will define the scope and purpose of the Wai 1040 inquiry, While considering what should properly be within the scope of this inquiry it is helpful to examine exactly what the presiding officer of the Wai 2358 Inquiry considers are issues which will be addressed.

11. It is evident from the issues cited at paragraph 8 above, that the Wai 2358 inquiry centres on a contemporary claim involving government policy in its Fresh Start for Fresh Water and how the Crown has responded to previous findings of Treaty breach involving water and geothermal resources. Although sharing one important commonality—water—the Wai 2358 is not a substitute for hearing the individual claims of Treaty breach (whether brought by hapū, whanau or even individuals).

12. We also note that many of the participants in the Wai 2358 inquiry have already had an inquiry into their claims and are seeking to address the ways that the Crown has failed to engage with them on the basis of the findings of their own inquiries. The claimants have not had the benefit of their claims being heard.

The Rohe Potae Example

13. It is important to note how another inquiry now advancing to hearing is treating the issue. In his memorandum of directions dated 06 September 2012, the presiding officer of the Rohe Potae (Wai 898) Inquiry addressed this point in detail. The presiding officer stated that:

> *"claims to water are closely linked to claims to waterways and associated resources, and Maori have clearly had significant traditional associations with, and use of, water... in that respect, I do not see how claims to water can be properly separated from claims to waterways. Therefore, these claims will remain within this district inquiry. However, as per the example of Petroleum claims, this Tribunal does not expect to relitigate matters that have been or are to be addressed by the Tribunal inquiring into the Wai 2358 claim. Exactly how duplication can be avoided is not clear at this point in time given that the Wai 2358 inquiry is ongoing. That will need to be addressed when hearings are being planned."*

14. The situation in the Rohe Potae inquiry is on all fours with the situation facing the claimants. Their claims to water cannot be properly separated from claims to waterways, and as such must be heard.

The Rule of Res Judicata

15. The Court of Appeal addressed the issue of res judicata in *Shiels v Blakeley* [1986] 2 NZLR 262. Somers J, giving judgment for the Court, said at 266 line 24:

> *.... that where a final judicial decision has been pronounced by a New Zealand Judicial Tribunal of competent jurisdiction over the parties to, and the subject matter of the litigation, party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent*

litigation from disputing or questioning the decision on the merits.

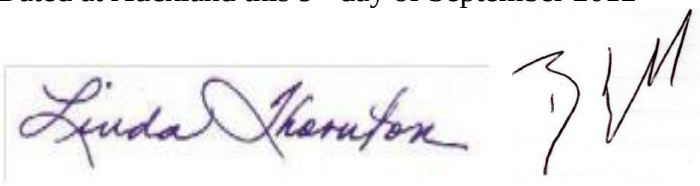
16. The claimants are not seeking to dispute or question any decisions that the Wai 2358 Tribunal may reach. Res judicata or issue preclusion cannot operate to bar claimants claims in the Wai 1040 inquiry because the subject matter -- historical claims v. contemporary recognitions and treatment of water rights -- is not identical to the two inquiries. Further, many of the claimants are not parties to the Wai 2358 Inquiry. They have yet to be heard. The rule of res judicata does not apply in these circumstances.

Conclusion

17. The Wai 2358 inquiry is not meant to supplant all water claims. Certainly the presiding officer would have listed this in the objectives of the inquiry, or issued a direction stating that this was the case, had this been so.

18. In addition, the Rohe Potae Inquiry will include claim issues closely linked to claims to waterways and associated resources. It would be irrational should claimants in that inquiry be afforded the opportunity to air their grievances while claimants in this inquiry are not.

Dated at Auckland this 9th day of September 2012



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