IN THE WAITANGI TRIBUNAL
KEI MUA I TE RŌPU WHAKAMANA I TE TIRITI O WAITANGI

WAI 1130

WAI 575

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

AND

IN THE MATTER OF **Tongariro National Park Inquiry**

AND

IN THE MATTER OF **The Ngāti Tūwharetoa Comprehensive Claim**, a claim filed by Te Ariki Tumu te Heuheu on behalf of Ngā Hapū o Ngāti Tūwharetoa

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JOINT MEMORANDUM OF COUNSEL CONCERNING THE TPD FINDINGS IN *TE KĀHUI MAUNGA*
Dated 27th March 2013

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MAY IT PLEASE THE TRIBUNAL

1. This joint memorandum of counsel is being filed on behalf of the following claimant groups:

    1.1. **Ngāti Tūwharetoa** (the Comprehensive Claim, Wai 575);

    1.2. **Ngāti Hikairo ki Tongariro** (Wai 1262);

    1.3. **Ngāti Manunui** (Wai 998);

    1.4. **Ngāti Rangi** (Wai 151, 277, 467, 554).

2. The claimants named above all made claims concerning the use of their taonga in the Tongariro Power Development Scheme (the "TPD claims"). Those claims are reflected in the Statement of Issues: "*did Māori benefit economically from the exploitation of their taonga in national development projects such as hydroelectricity generation*"?[1] Refer also to the statements of claim:

    2.1. **Ngāti Tūwharetoa - Wai 575** – 32nd and 35th causes of action (relating to the Tongariro Power Development generally, and Lake Rotoaira specifically). Refer in particular to paras 103.5-103.6 of the fourth amended Wai 575 statement of claim, which alleges that the Crown failed to provide an opportunity for Ngati Tuwharetoa to participate in the planning and procurement of benefits arising from the utilisation of taonga in their rohe, or to compensate Ngati Tuwharetoa for the use of their taonga and resources;

    2.2. **Ngāti Hikairo - Wai 1262** – Statement of Claim 5th day of August 2005: Section 67(a) –(k), Section 68 (a)-(d), Section 69(a)-(d) , Section 70 (a)-(f) , section 84 -88 inclusive, 91-94 inclusive and refer also to the prayer for relief as outlined in section 103 inclusive;

    2.3. **Ngāti Rangi - Wai 151, 277, 467, 554** – Consolidated Statement of Claim: 4th cause of action relating to the development of the Tongariro Power Development, 5th cause of action the Crown's failure to protect the tino rangatiratanga, control and management of Ngāti Rangi's land, resources and other taonga and 6th cause of action relating to the Crown's

[1] Statement of Issues, #1.4.2: issues 9.4.1, 9.4.16 and 12.4.12.

failure to protect Ngāti Rangi resources and to provide equal opportunities to benefit from and participate in the economy. Refer also to the prayers for relief which seek recommendations of compensation for the use, occupation and enjoyment of customary resources including water as well as restoration of the economic base of Ngāti Rangi.

3. The purpose of this memorandum is to ask the Tribunal to complete its inquiry into the TPD claims.

Tribunal has not made full findings on TPD claims

4. The Tribunal's pre-publication report of *Te Kāhui Maunga* records that claims were brought concerning the loss of economic opportunity through the failure to recognise Maori rights to waterways, but states:

> It is clear to us that the claimants have borne the brunt of the Tongariro power scheme's negative impacts, during its development and operation, without being able to share in its economic rewards. We have addressed the former in our report. **The wider issues of the ownership of water, the use of water for electricity generation, and the manner in which the benefits from such use are shared between iwi and Crown, are matters of national importance which are being addressed as a separate inquiry.**[2]

5. The separate inquiry referred to is the Wai 2357/ 2358 National Freshwater and Geothermal Resources inquiry.

6. In effect, the National Park Tribunal has not made full findings on the TPD claims brought by the iwi and hapū of Te Kāhui Maunga.

Duty to inquire includes the duty to make findings

7. Pursuant to s6(2) of the Treaty of Waitangi 1975 ("ToW Act"), the Tribunal has a duty to inquire into every claim submitted to it.

8. It is submitted that the duty to inquire necessarily includes making findings on the claims. That submission is supported by the Supreme Court's statement in *Haronga*, that the Tribunal's obligation to inquire into every claim involves "**determining whether the claim of Crown action inconsistent with the Treaty of Waitangi is well-founded**, and if so, whether the Tribunal should recommend to the Crown that action be taken to compensate for or remove the prejudice".[3]

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2 Emphasis added; refer pre-publication report of *Te Kāhui Maunga,* at p1395.

3 Emphasis added, *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53, at [80].

9. In its pre-publication report, the Tribunal has not foreshadowed making findings in relation to the TPD claims at some future point. Rather, it appears to contemplate that the issue is a generic one that will be covered through the National Freshwater and Geothermal Resources Inquiry (Wai 2357/ 2358).

10. With respect, this is entirely unsatisfactory from the point of view of the Te Kāhui Maunga claimants. The Freshwater Tribunal will not be in a position to make findings on the TPD claims in the specific context of the TPD scheme since:

    10.1. None of the claimants referred to above are active participants in that inquiry (apart from the presentation of a brief case study on the TPD in Stage One of that Inquiry by the Wai 151 and 1250 claimant, Mr Toni Waho);

    10.2. That Tribunal will therefore not have before it the extensive tangata whenua and historian evidence relating to the TPD that was filed in the National Park Inquiry, nor the legal submissions articulating the TPD claims;

    10.3. The Tribunal is a different panel from the National Park Tribunal, with the exception of the Chief Judge.

11. The importance of context was alluded to by the Supreme Court in its recent decision *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, at [132,] when it commented that the consequence of conducting that case at a generic level was that it was not easy to identify the prejudice alleged – the Court emphasised that what was required was a careful analysis of particular claims and the waters to which they relate.

12. The same must be true of the Tribunal's assessment of prejudice in relation to the claims before it. Consider, for instance, the following context-specific factors that are of relevance:

    12.1. The acknowledged taonga status of the rivers and streams flowing from Te Kāhui Maunga;

    12.2. The legal history of the land in the district, including the fact that it is still Crown or Māori land, without the complication of extensive third party interests;

    12.3. The subsisting aboriginal title and customary rights in relation to waterways;

12.4. Ngāti Tūwharetoa's legal title to Lake Rotoaira and the Tongariro River, and the unique status of Rotoaira acknowledged by legislative enactments;

12.5. The nature in which the Crown acquired control over land blocks which contain the sources of rivers, such as the Tokiahuru and Wahianoa, and the Crown's failure to obtain consent for the alienation of these lands (and associated waterways);

12.6. The transformative nature of the TPD scheme, and the major and irreversible impact that had on taonga;

12.7. The lack of adequate consultation with tangata whenua on the scheme;

12.8. The importance of electricity generation as one of the few significant development opportunities in this region.

13. The short point is that findings at a generic level in relation to an entirely different inquiry are not an adequate substitute for actual findings for the TPD claims and the specific claimants involved.

14. Nor do the Te Kāhui Maunga claimants favour rectifying the problem by participating in the Freshwater Inquiry. For a start, they missed the deadline of 30 November 2012 for indicating an intention to participate in stage two of the inquiry. They had not anticipated that there was a need to, given that they were expecting a comprehensive report from the National Park Tribunal. Even if the deadline could be wavered, there must a serious question about whether it is a good use of the Tribunal's limited time and resources for the Te Kāhui Maunga claimants to participate in the Freshwater Inquiry when they would effectively be rerunning claims already heard. This would entail recalling not only the tangata whenua witnesses, but the technical witnesses such as Tony Walzl as well. Further, Ngāti Tūwharetoa and Ngāti Rangi are not inclined to participate, as Ngāti Tūwharetoa are currently otherwise engaged preparing to enter into settlement negotiations, whilst Ngāti Rangi has recently commenced a process to develop a Deed of Mandate.

Findings required on TPD claims

15. The Te Kāhui Maunga claimants therefore respectfully request that the Tribunal completes its inquiry by making findings on the TPD claims referred to in paragraph 2 before the report is published. (Recommendations in relation to remedies are not required at this stage.)

16. It is submitted that the Tribunal still has the ability to complete its report whilst the report remains in the pre-publication phase. The pre-publication report can best be characterised as a preliminary, but not formal, release of the report for the purposes of s6(5) of the ToW Act. The preface puts the parties on notice that the pre-publication version will not be identical to the published version. It is implicit that the published version is to be treated as the 'final' report.

17. Even if the Tribunal report is regarded as formally having been delivered and served, it is submitted that the Tribunal can 'recall' its report. As a commission of inquiry, the Tribunal has the powers of a District Court in relation to the conduct of its inquiry. The District Court has ability to recall judgments.[4] Recall of a judgment is permitted at any time after delivery of the judgment before a formal record of the judgment is drawn up and sealed. In the leading authority, it was said that a case may be recalled if there have been new developments (such as the release of a new judicial decision of relevance), an omission to address relevant law, or where for some other very special reason justice requires that the judgment be recalled.[5] In one recent case, the High Court recalled its judgment because the judge had wrongly apprehended the scope of the issues that it was required to decide.[6] The Court accepted that important issues that counsel wished to have addressed had not been addressed, and justice required that the judgment be recalled. It is submitted that that authority is apposite in this situation.

18. The Te Kāhui Maunga claimants consider that the Tribunal is in the position to make findings at this juncture. After all, as the Supreme Court observed in the recent Mixed Ownership Model case, findings on similar claims have been made already by other Tribunals, such as the findings in relation to the Waikato River Hydro Scheme in *He Maunga Rongo*.[7] The Te Kāhui Maunga claimants would much prefer not to have to entertain any further delay, particularly when they are entering into Treaty settlement negotiations.

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4 ToW Act 1975, Schedule 2, clause 8(1); Commissions of Inquiry Act 1908, s4 and District Court Rules 2009, r12.8.8, applying High Court Rule 11.9.

5 *Horowhenua County v Nash (No 2)* [1968] NZLR 632, at 633.

6 *Gough v RAM Custodian Ltd* [2012] NZHC 2926, at paras [8]-[9].

7 Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, Vol III, Chapter 16 findings, summarised at p1219. The Supreme Court commented that the "Tribunal's position is that claimants may be entitled to commercial redress for the use of rivers for electricity generation and that this might be in the form of both compensation for past losses and royalties for future use"; ibid, para [100], citing from the *Freshwater Report*, *Te Ika Whenua Rivers Report*, and *He Maunga Rongo*.

19. In the alternative, the Tribunal could adjourn its inquiry in relation to the TPD claims pursuant to s7(1A) of the ToW Act until it has the benefit of the Freshwater Tribunal's analysis and findings. That is not a desirable alternative, for the reasons referred to above, but would be preferable to having no findings at all.

Signed by:

Karen Feint
Counsel for Ngāti Tūwharetoa

And signing on behalf of:

- Te Kani Williams, Counsel for Ngāti Hikairo ki Tongariro (Wai 1262);
- Peter Johnston, Counsel for Ngāti Manunui (Wai 998)

Paranihia Walker
Counsel for Ngāti Rangi

Dated 27th March 2013