

IN THE WAITANGI TRIBUNAL

WAI 2358

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

An application for an urgent hearing by Sir Graham Latimer and others in regard to Maori proprietary interests in water and geothermal resources in Aotearoa

MEMORANDUM OF COUNSEL EVIDENCE FOR STAGE 2
Dated: 5 April 2013

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Waitangi Tribunal

5 Apr 2013

Ministry of Justice
WELLINGTON

Counsel Acting: Darrell Naden

MAY IT PLEASE THE TRIBUNAL

1. This Memorandum of Counsel is filed on behalf of:
 - a. Harry Kereopa and Evelyn Kereopa on behalf of Te Ihingarangi, a hapu of Ngati Maniapoto (Wai 762);
 - b. Marama Waddell on behalf of herself, her whanau and her hapu who are members of Te Whiu, Te Uri Taniwha and Nga Uri o Wiremu raua ko Maunga Tai (Wai 824);
 - c. Morehu McDonald, on behalf of Ngati Hinerangi and the Ngati Hinerangi Trust Board (Wai 1226);
 - d. Te Enga Harris on behalf of Wiremu Hemi Harris and Meri Otene whanau and on behalf of Ngati Rangi, Ngati Here, Ngati Tupoto, Ngati Hohaitoko, Ngati Kopuru, Te Rarawa and Ngati Uenuku (Wai 1531);
 - e. Rueben Taipari Mare Porter on behalf of himself, his whanau and members of Kaitangata, Nga Tahawai and Whanau Pani hapu of Northland (Wai 1968);
 - f. Piriwhariki Tahapeehi on behalf of Ngati Mahanga, Ngati Tamaoho and Ngati Apakura (Wai 1992);
 - g. The combined claim of Chappy Harrison on behalf of the Harihona whanau and Ngati Tara, and Robert Gable on behalf of the descendants of Ngati Tara, a hapu of Ngati Kahu (Wai 2000 incl Wai 1886);
 - h. Mona Thompson and Ron Wi Repa on behalf of themselves, Ngati Rakai, Ngati Waimauku, Ngati Waikorara, Ngati Mihi, Ngati Waiora, and Nga Uri o Pehira Keepa and Nga Uri o Wi Repa (Wai 1962)
 - i. Phillip Hiroki Ripia for and on behalf of Hohepa Joseph Ripia and Robert Reginald Ripia Eagle, children of Erana Pera Manene Ripia (nee Powhiri) and Manu Frederick Ripia (Wai 973)
 - j. Maggie Ryland, for and on behalf of Te Whanau a Te Aotawarangi, of Tokomaru Bay (Wai 1089)
 - k. Noeline Henare, for and on behalf of Ngati Pahere, a hapu of Ngati Maniapoto (Wai 1480)

("the Claimants")
2. By way of the Waitangi Tribunal's Memorandum-Directions dated 13 March 2013¹ (the "Directions"), claimant counsel were given the opportunity to provide submissions on:

¹ Wai 2358, # 2.5.36, paragraph 3

- a. The Statement of Issues for Stage 2; and
- b. The sufficiency and adequacy of existing evidence on the record of inquiry, further evidence to be produced and whether further research is required.

Research and Evidence for Stage Two

Claimant Evidence

3. It is submitted that the existing evidence on the record of inquiry is insufficient for the Claimants' purposes. For example, there is no evidence filed in relation to the fresh water interests of Te Aotawarangi (Wai 1089), an East Coast hapu whose traditional rohe and fresh water interests are situated in and around Tokomaru Bay. Likewise, Ngati Hinerangi (Wai 1226) of the Matamata-Piako district near the Kaimai ranges have little if any evidence on the record that pertains to their particular fresh water interests and geothermal resources.
4. By way of further example, we are not aware of any specific evidence on the record pertaining to the Mangamuka River and its tributaries. These waterways are the focus of the claim brought by Te Enga Harris on behalf of a number of Hokianga hapu and whanau (Wai 1531).
5. With regard to Te Ihingarangi (Wai 762), a Maniapoto hapu with fresh water interests in the Waimiha Valley just north of Taumarunui, there is some evidence on the record of inquiry in relation to the Waimiha River,² but that evidence was provided in the interests of Ngati Tutakamoana and it can be said to be fleeting.
6. Given that the focus of Stage Two is "on prospective changes to current arrangements around the management and allocation of Maori rights or interests in fresh water and geothermal resources"³ ("the prospective changes"), it is submitted that the Claimants should file evidence that describes the particular fresh water interests of theirs that are being or that may be affected by the prospective changes. Without such evidence, the Claimants cannot show that their particular fresh water interests are being or may be affected by the prospective changes. Accordingly, it is necessary for the Claimants to file evidence in support of their respective Treaty claims. The nature of that evidence is discussed below.

Indicia of Ownership

7. The Claimants will file evidence that satisfies the indicia of ownership including where they have relied on the waterways as a source of food, as a source of textiles and other materials and as a means for travel and trade, how the water resource has been used in rituals central to the spiritual life of the hapu, the identification of taniwha in respective waterways, how the Claimants have exercised kaitiakitanga over the water resource and tino rangatiratanga.
8. It is only with such evidence of ownership that the Tribunal can know that the water resources claimed by the Claimants are indeed theirs.

² See the brief of evidence of Hoane Titari John Wi (Wai 2357, #A72).

³ Wai 2358, #2.5.36, paragraph 2.

9. Attached as Appendix “A” is a list of the Claimants and their respective waterways.

Water Extraction

10. In addition to the provision of evidence that sets out the indicia of ownership, there should also be evidence from the Claimants about the historical mis-management of water extraction by both central and local government from the Claimants’ respective water resources. It is submitted that the inquiry would benefit from this kind of evidence. By highlighting past and even present maladministration, the evidence would inform with regard to the kinds of changes that should be made to the current arrangements around the management of water extraction from the Claimants water resources.
11. The evidence of the Te Aotawarangi claimants is that a puna on land that hapu members still own was tapped over a 100 years ago by the then local council to supply water to nearby Te Puia Springs. The evidence of mis-management would concern, inter alia, that no formal arrangement was entered into for the water supply and certainly no compensation has ever been paid by the local council for use of the water resource. The evidence of mis-management would also include the local council’s failure to provide water from the puna to hapu members free of charge.
12. Our Ngati Hinerangi claimants would state that a water bore has been sunk into the middle of one of their streams in breach of the resource consent that allows for a bore to be placed to the stream’s side. The local council’s failure to monitor the bore’s placement and/or remedy its placement has meant that much more water is being extracted from the stream than has been authorised.
13. Counsel seeks leave to add the reports listed in Appendix “B” to the record of inquiry regarding consents granted by various regional councils to extract water from waterways in the Claimants various rohe.
14. The reports identify the role that Maori have had with respect to their waterways, by identifying water extraction-related resource consents that have been granted by local council with or without the consent of Maori.
15. It is further submitted that targeted research should be commissioned to provide evidence pertaining to water extraction-related resource consents affecting the Claimants’ water resources that the research listed in Appendix “B” does not cover.

Water Quality

16. It is submitted that the Claimants should provide evidence in relation to low levels of water quality in some of their respective waterways. Evidence of past and present failure by local government officials to maintain water quality in the Claimants’ respective waterways would inform with regard to the kinds of changes that should be made to the current arrangements around the management of the Claimants water resources.
17. For instance, Ngati Hinerangi representatives would complain to the Tribunal that local dairy farmers continue to discharge toxic levels of dairy effluent into the iwi’s waterways and the local council has failed to effect a remedy. Their evidence would be that prior to the onset of intensive

dairying, their waterways were pristine and clean. A local council-generated research report would be relied on to establish the low level of water quality in the region nowadays.

18. The Ngati Hinerangi evidence would show how the iwi has been denied any ability to exercise their significant rights in their water resources to improve water quality. Evidence of the manner of their exclusion from managing their waterways in this respect should assist with how changes to the management of Ngati Hinerangi's water resources should be effected.
19. According to our Te Ihi Ngarangi claimants, the water quality of the Waimiha River has been compromised as a result of heavy siltation which, in turn, is a result of soil erosion. The Claimants evidence would be that riparian strips along the Waimiha River would reduce the amount of soil entering their waterways and thereby enhance water quality. The Claimants evidence would also be that the local council has failed to install riparian strips thereby committing an act of resource mismanagement.
20. In addition to evidence from the Claimants about reduced water quality, leave is sought to add the reports listed in Appendix "C" to the record of inquiry. The probative value of the reports lies in the information they contain with regard to the water quality in some of the Claimants' waterways.
21. It is further submitted that targeted research should be commissioned to provide evidence of water quality in those of the Claimants' waterways that the abovementioned water quality reports do not cover.

Evidence of Failure to Give Due Recognition to Proprietary Interest

22. Counsel submits that Maori rights or interests in freshwater or geothermal resources are not adequately recognised and provided for. In particular, the Fresh Start for Fresh Water reform fails to adequately recognise Maori proprietary interests in fresh water.
23. As an example of the Crown's failure, the Claimants refer to the Land and Water Forum. The Forum has been identified as an avenue for Maori to contribute to the management of New Zealand's fresh water.⁴ The Land and Water Forum conducts a stakeholder-led collaborative process to consider reform of New Zealand's freshwater management system ("the Process"). However the Process merely accords Maori the same level of standing as an industry representative or an environmental and recreational non-government organisation. The level of standing provided to Maori is not reflective of the proprietary interests of Maori in the waterways.
24. The standing afforded to Maori in the resource consent process is also debilitating for the Claimants. Any decision to grant resource consents is the sole domain of local councils.⁵ Although Maori have the opportunity to make submissions opposing or supporting applications for resource

⁴ <http://www.mfe.govt.nz/issues/water/freshwater/land-and-water-forum/> 4 April 2013

⁵ <http://www.mfe.govt.nz/publications/rma/everyday/consent-apply/> - 4 April 2013. Some resource consent applications must be decided by a Board of Inquiry or the Environment Court instead of the local council. See <http://www.mfe.govt.nz/publications/rma/everyday/guidance-and-processes/> - 4 April 2013

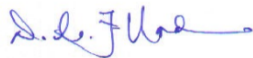
consent in relation to water resources, the role that Maori have in the resource consent process is not reflective or representative of Maori proprietary rights in the fresh water resource. The evidence will inform the Tribunal with regard to the manner in which the prospective changes should be made to reflect that proprietary interest.

25. To illustrate and to foment the kinds of resource management-related change sought by the Claimants, Ngati Hinerangi would provide evidence of their being treated as an interested party to a resource consent application, as opposed to their being involved as a party with a proprietary interest in the resource. The evidence would consist of the notice of opposition to a resource consent sought in relation to the Waiteariki Stream, the accompanying submissions in opposition and the local council's decision.

Other Reports

26. Counsel seeks leave to add the research reports listed in Appendix "D" to the record of inquiry. The reports include a series of environmental research reports from various inquiries by the Waitangi Tribunal into historical Treaty claims concerning, inter alia, the water resources of claimant Maori. The research reports provide well-researched evidence of maladministration by past governments of some of the Claimants' water resources. It is submitted that the research reports will assist the Tribunal with determining how best to effect the prospective changes to the management of water resources.

Dated at Auckland this 5th day of April 2013



Darrell Naden
Counsel Acting