

BEFORE THE WAITANGI TRIBUNAL

WAI 2358

IN THE MATTER

of the Treaty of Waitangi Act 1975

AND

IN THE MATTER

**the National Fresh Water and
Geothermal Resources Inquiry (Stage
Two)**

MEMORANDUM OF COUNSEL

Dated: 12 April 2013

RECEIVED

Waitangi Tribunal

12 April 2013

Ministry of Justice
WELLINGTON

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Counsel appearing: Kathy Ertel • Linda Thornton

MAY IT PLEASE THE TRIBUNAL

1. This memorandum is submitted on behalf of the following claimants:
 - a. Vernon Winitana and others on behalf of Panekiri Tribal Trust Board, Ngati Ruapani, Ruapani Lands claim, Wai 144;
 - b. Anaru Paine, Irene Williams, Sid Paine on behalf of Ngai Tuhoe Potiki, Tumatawhero – Waikaremoana claim, Wai 795;
 - c. Dr. Rangimarie Turuki Rose Pere or Kuini Te Awa Beattie on behalf of Ngati Rongo, Ngati Hineaanga, Ngati Hinekura, Te Whanau Pani and Ruapani-Tuhoe, Pere Kaitiakitanga claim, Wai 1013;
 - d. Nicky Kirikiri and another on behalf of the owners and beneficiaries of the Te Heiotakoka 2B To Kopani 36 and 37 Trust claim, Wai 1033;
 - e. Charles Aramoana and Sandra Jeanette Kari Kari Aramoana for themselves and Upokorehe hapū, Ngati Raumoana, Roimata Marae Trust and Upokorehe, Upokorehe claim, Wai 1092;
 - f. Hinehou Polly Leef, Mekita Te Whenua, Richard Wikotu, Rocky Ihe and Kahukore Baker for the Whakatohea hapū, Rongopopoia ki Upokorehe, Rongopopoia Hapū claim, Wai 1787;
 - g. Ani Taniwha for Ngati Hine, Ngati Kawau, Ngati Kawhiti and Nga Uri o Te Pona, etc claim, Wai 1666;
 - h. Christine Wallis and others; Wallis whanau claim, Wai 1908;
 - i. Julie Tamaia Taniwha for Nga Uri o Te Pona; Nga Uri o Te Pona claim, Wai 2149;
 - j. Justyne Te Tana on behalf of herself, Pera Tuporo, Henare Tuporo 1, Henare Tuporo 2, Wiremu Tuporo, Winiata Tuporo, Pera Tuporo Taniwha Taipari, Talia Taniwha Taipari, Cogan Taniwha Tuporo Parslow, Anahere Tuporo Taniwha, Zavier Tuporo Taniwha Te Tana. Taniwha and others claim, Wai 2010

- k. Te Rarua (Kui) McClutchie-Morrell for Te Rarua (Kui) McClutchie-Morrell, descendants of Uepohatu and Ngati Hau hapū whanau, East Coast Airing of Grievances claim, Wai 2340;
 - l. Rapata Kaa for the hapū Ruawaipu, Ruawaipu Active Protection claim, Wai 1272;
 - m. Vivienne Taueki for herself, the descendants of Taueki and Muaupoko ki Horowhenua, Muaupoko (the descendants of Taueki) claim, Wai 1629;
 - n. Ron Taueki and another for Muaupoko. Horowhenua Block Claim, Wai 237;
 - o. Te Runanga o Ngati Manawa
 - p. Sharon Barcello-Gemmell, Harvey Ruru and Jane duFeu on behalf of Te Ati Awa Te Tau Ihu Water Rights Claim, Wai 1454; and
 - q. Merehora and Peter Pokai Taurua on behalf of Ngati Rahiri, Ngati Kawa, Ngati Manu, Ngati Rangi, Ngati Rehia, Ngati Kuri, Ngati Manu, Uneoneone me Parawhau hapū ki Nga Puhi iwi, Wai 2244,
- collectively referred to as ‘claimants’. Individual references will be by letter and Wai number, if any, as listed above.

2. This memorandum responds to the directions in Memorandum-Directions of the Presiding Officer in this inquiry, #2.5.36.

Stage Two statement of issues

3. At paragraph 8, the parties were invited to make final submissions on whether the proposed issues (set forth in paragraph 6) adequately covered the issues.
4. We note that the issues posited at paragraph 6 (f) only address ongoing Treaty breaches “that have been identified in Waitangi Tribunal findings”. We act for some claims that have not had Treaty breaches concerning water, geothermal or other natural resources recognised in Waitangi Tribunal proceedings. This is because some have not yet been to hearing and some have been settled (in some cases involuntarily) before hearing.

5. It is our concern that, as phrased, this inquiry may omit issues that have not received Tribunal recognition, even though they are the subject of pending claims. In addition, the Crown has been repeatedly been made aware of many claims by Maori of claims to water, geothermal and other natural resources based on pan-Maori claims of tino rangatiratanga and kaitiakitanga over all the resources within a specific tribal rohe. Thus, the Crown cannot properly claim that it has no awareness of claims simply because a specific claim has not been recognised by the Waitangi Tribunal. In other words, the issues to be addressed by this inquiry should not be limited only to those which are subject to previous Waitangi Tribunal findings or reports.
6. Counsel suggests that by striking the phrase “that have been identified in Waitangi Tribunal Findings” the issue could be expanded to avoid exclusion of those claims that have not yet been heard or decided by the Waitangi Tribunal.
7. On a more minor matter, it is our suggestion that because Stage One of this inquiry has been decided, the *proposed* issue at paragraph 6 e) be amended to delete “where” and create two sentences to read as follows:
 - e) The Tribunal has found in Stage One that Maori rights or interests in freshwater or geothermal resources were guaranteed and protected by the Treaty. Are these rights and interests adequately recognised and provided for today?

Research and evidence for Stage Two

8. It is counsel’s considered view that the existing evidence on the record is not adequate or sufficient as a basis for inquiring into Stage Two of this inquiry. The issues identified are different to Stage One and the evidence to properly address those issues will be different. Much of the evidence from Stage One addressed the traditional nature of the relationship of Maori to water and geothermal resources and the lands surrounding these taonga. It is likely that in light of the current nature of some aspects of the Stage two issues, additional evidence will be necessary to establish current conditions and the impacts of Crown policies and conduct.

9. Counsel proposes to provide tangata whenua evidence to provide facts concerning the relationship of the above claimant groups to the water, geothermal resources, and other related natural resources in their rohe. At this time, we are not prepared to specifically identify who will present that evidence.

Existing research and documentation

10. The following research and documentation will be filed very shortly after this memorandum has been filed:
 - a. Alexander, David; Land-Based Resources, Waterways, and Environmental Impacts, Wai 1040, A07. This evidence supports claimants g) Wai 1666; i) Wai 2149; j) Wai 2010; and q) Wai 2244;
 - b. S Doig, Waiapu River, Maori and the Crown, listed on Wai 900, #A005, page 5. This evidence supports claimants k) Wai 2340 and l) Wai 1272
 - c. Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims, Volume 1, 2008, chapter 11. This evidence supports claimants p) Wai 1454.
 - d. Te Ika Whenua Rivers Report, 1998. This evidence supports claimants o) Te Runanga o Ngati Manawa.
 - e. Reports from the Te Urewera inquiry (Wai 894). Documents #A35, #A37, #A50, #A52, #A73, #A75, #A85, #A113, #A117, #D1, #F6, #H1, #H5, #H13-21, #H25, #H27-28, #H30-35, #H50-60, #I1-2, #I15, #L11, #M14. This evidence supports claimants a) Wai 144, d) and Wai 1033.
 - f. Reports from the Te Urewera inquiry (Wai 894). Documents #A5, #A7, #A53, #A104, #A116, #B7, #M2. This evidence supports claimants e) Wai 1092 and f) 1787.
11. We believe that all these reports are relevant to the claims, but have not yet had a chance to review each in detail.

Technical research and other expert evidence bearing on Stage Two issues

12. At this time, counsel is unaware of any pending research that will be filed after completion that is pertinent to any of the above claims.



Proposed Targeted research

13. Counsel suggests at least two areas where targeted research would benefit the Tribunal and the parties.
 - a. Lake Horowhenua – Currently there are no definitive technical reports concerning Lake Horowhenua. The Rangahaua Whanui series (Lakes and Waterways) contains a chapter concerning Lake Horowhenua but it has a traditional history quality to it which does not address the existing conditions at Lake Horowhenua. For example, control of the Lake and its surrounds has been fragmented between the Lake Horowhenua Trustees, and the Lake Horowhenua Domain Board. The local and regional council have planning and regulatory responsibilities for the Lake and its surrounds. The Resource Management Act 1991 governs consents but there are instances where the local government implementation of the consent programme has resulted in raw sewage being dumped into the lake. Several versions of the Resources and Other Land Disposal Act have enacted protections of Muaupoko customary fisheries rights but without the right to control the water quality of the lake, thus undermining their exercise of their customary fisheries rights. Uncertain boundaries and overlapping areas of authority, coupled with the lack of will by local government to enforce customary rights have promoted continuing Treaty breaches and permanent environmental damage to a Muaupoko taonga. A clear research report with qualified reference to the legislative and regulatory authorities, all analysed in light of the Treaty of Waitangi, would be an important aid to the Tribunal. Research of this type would be an important addition to the generally anecdotal evidence from Stage one concerning Lake Horowhenua. This evidence related to our claimants, m) Wai 1629 and n) Wai 237.

b. Additionally, Richard Boast has done substantial research concerning water and water rights in the context of the Treaty. It is our submission that Mr. Boast be commissioned for targeted research, in part relying on his expertise and previous research to develop a report that would place the existing broad scope of knowledge of Treaty breaches related to water, geothermal and other land-based resources in the context of the current Crown policies concerning these resources and their Treaty-compliance status.

14. Counsel wishes to reserve the right to augment this bibliography as the inquiry progresses and the issues and proof of them evolves.

Dated this 12th day of April 2013

Claimant Counsel – Kathy Ertel ▪ Linda Thornton