

OFFICIAL

Wai 1040 #3.1.36

THE WAITANGI TRIBUNAL

IN THE MATTER of the Treaty of Waitangi
Act 1975

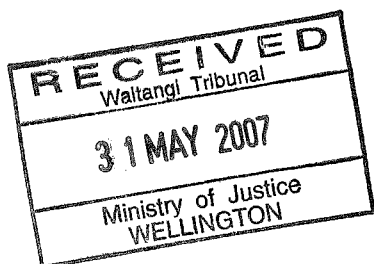
AND

IN THE MATTER of claims by the Treaty of
Waitangi Act 1075

AND Northland Claims

MEMORANDUM ON BEHALF OF THE CROWN

31 May 2007



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MAY IT PLEASE THE TRIBUNAL

Introduction

1. This memorandum sets out the oral submissions made on behalf of the Crown at the Tribunal's judicial conference at Waitangi on 27 April 2007. This memorandum also addresses certain matters raised during, and in memoranda filed after, that judicial conference.

Crown response to the Ngā Puhi Design Group's proposals

2. The Crown generally supports the Ngā Puhi Design Group's proposals as set out in its memorandum of 12 March 2007 (Wai 1040 #3.1.19). In particular:
 - 2.1 The Crown agrees that the hearings should strengthen and not disrupt the whānaungatanga of the groups concerned.
 - 2.2 In principle, the Crown agrees that there should be one district for the inquiry. (The Crown makes further submissions on this issue below at paragraphs 5-16).
 - 2.3 The Crown supports the first hearing week occurring at Te Tou Rangatira marae at Waitangi. Dates permitting, there will likely be a Ministerial presence together with senior officials.
 - 2.4 In terms of cross-examination of kaumātua, the Crown is content that questions be put in writing and suggests that any other form of questioning (eg clarification) only occur with the Tribunal's leave.
 - 2.5 The Crown agrees with the principle that whakapapa should not be used in hearings as a point of conflict between groups.
3. In relation to the overall design of the inquiry, the Crown's preference would be that the process retains for Ngā Puhi as a whole the capacity – if Ngā Puhi so decides – to enter into negotiations at various stages (or modules) of the inquiry. The Crown considers that this would be advantageous to Ngā Puhi because it would give them the flexibility to progress their claims through the

Tribunal as far as they wish and at the same time retain the potential to enter into settlement negotiations at distinct points throughout that process.

4. The Crown makes this suggestion because it is aware of the concerns expressed by various speakers at the 27 April 2007 judicial conference about the length of time it has taken to get this far towards a settlement of the Wai 1040 claims and also because the Crown wishes to settle claims in an expeditious manner. For clarity, the Crown is **not** suggesting that Ngā Puhī be required to enter negotiations earlier than they would want. The Crown is suggesting that the process be designed to provide Ngā Puhī with *the option* of entering into negotiations at various points.

Inquiry boundaries

5. As noted above, the Crown supports in principle the suggestion made by the Ngā Puhī Design Group that there be one inquiry district for the Wai 1040 claims.
6. Other submissions have been made concerning the boundary of the Wai 1040 inquiry:
 - 6.1 Mr Tau said at the judicial conference that – while not a part of the Ngā Puhī Design Group’s proposal – there had been a request by some kaumātua that all Ngā Puhī claims be investigated including those in the Te Roroa, Ngāti Whatua, Te Uri o Hau and Hokianga alliance areas.
 - 6.2 Counsel for the Taita Marae beneficiaries (Wai 1343) has submitted (by memorandum of 5 April 2007, Wai 1040 #3.1.21) that the Wai 1040 boundary area should be widened to include the Te Roroa inquiry area not inquired into by the Te Roroa tribunal and not the subject of the Te Roroa settlement.
 - 6.3 Counsel for Wai 568, 974 and 131 (part of the Tai Tokerau Maori District Council collective) submitted that the inquiry be defined demographically (that is, as the Crown understands it, in terms of groups’ interests) rather than geographical areas.

- 6.4 Counsel for Ngai Tai ki Tamaki (Wai 423) and Te Kawerau a Maki (Wai 470) has submitted that the proposed Mahurangi and Gulf Islands district be removed from the Wai 1040 inquiry (see counsel's memorandum dated 11 May 2007, Wai 1040 #3.1.33).

One inquiry district

7. If there is to be one inquiry district, given the breadth of groups within Wai 1040, the numbers of people represented by those groups, and the areas of interest of those groups, the Crown submits that the maximum extent of that district should be no larger than the five districts previously suggested by the Tribunal. To go beyond that would likely lead to an inquiry that is too large to be conducted effectively. It would also necessarily draw out the Tribunal's Wai 1040 inquiry, perhaps by a number of years.

Taita Marae beneficiaries' application

8. For the matters noted in the previous paragraph, there ought to be good reason why the application by the Taita Marae beneficiaries should be granted. The Crown is unaware of any such good reason. In addition to the matters noted above, the Crown opposes the Taita Marae beneficiaries' application because:
- 8.1 Strictly speaking there was no Te Roroa inquiry area (the Te Roroa inquiry was not an inquiry into all claims within a defined area) and the Te Roroa settlement likewise was not a settlement of claims defined as being within any defined area.
- 8.2 It is unknown how many additional claimant groups would be joined to a Wai 1040 inquiry if the Taita Marae application were granted.
- 8.3 As far as the Crown is aware, no other claimant group has requested any such widening of the inquiry area.
- 8.4 The views of claimant groups caught by any such widening would need to be heard before any such decision were made.

8.5 Aside from references to Maitahi Urupa and the Taita St Mary's Church (see paragraphs 7.5(a) and 11.4(c) of the Wai 1343 first amended statement of claim), neither the original nor the first amended statement of claims for Wai 1343 identifies with any particularity distinct areas for inquiry either inside or outside the five districts proposed by the Tribunal for the Wai 1040 inquiry.

9. Of course, if the Wai 1040 inquiry is not widened as requested by the Taita Marae beneficiaries, nothing would prevent the Wai 1343 group from pursuing its claims within the Wai 1040 boundaries.

Demographically based inquiry

10. A demographically based inquiry would be a marked departure from the Tribunal's existing approach of grouping claims for concurrent inquiry within geographical areas: see *Guide to the Practice and Procedure of the Waitangi Tribunal*, October 2000, paragraph 2.3. There would be problems arising as a result of a demographically based inquiry. For instance:

10.1 If the Wai 1040 boundary were defined by the claimed rohe of all claimant groups currently in Wai 1040, the inquiry would likely traverse issues and areas wider than the existing proposed five districts. That would likely be too large to be conducted effectively.

10.2 There would also be uncertainty as to whether and how the claims of groups outside Wai 1040 that overlapped with the fringes of Wai 1040 groups' rohe would be addressed.

11. While it is not necessarily perfect, the Crown's view is that geographically based inquiry districts have the advantage of clarity for all participating in the inquiry as to the inquiry's scope.

Mahurangi and Gulf Islands district

12. Having reviewed the papers filed on the issue of separating the proposed Mahurangi and Gulf Islands district from the Wai 1040 inquiry, the Crown wishes to remain neutral on this issue.

13. For the benefit of the Tribunal, the relevant papers are:
 - 13.1 The memorandum of counsel for Ngai Tai ki Tamaki (Wai 423) and Te Kawerau a Maki (Wai 470) dated 11 May 2007 (Wai 1040 #3.1.33) which seeks a separate inquiry for the proposed Mahurangi and Gulf Islands district, possibly together with a broader Auckland/Tamaki Makaurau inquiry.
 - 13.2 The memorandum of counsel for the Marutūāhu claimants (Wai 454 and 812) dated 11 May 2007 (Wai 1040, #3.1.32) which is expressly in support of the proposal.
 - 13.3 The memorandum of counsel for the Mahurangi Collective¹ dated 10 May 2007 (Wai 1040 #3.1.34) which is expressly opposed to the proposal. (Note that Wai 454 appears to be represented by both the Marutūāhu claimants and the Mahurangi Collective).

14. In addition, it is relevant to note that:
 - 14.1 The proposal would appear to be inconsistent with the Nga Puhi Design Group's preference for one inquiry district comprising the five districts proposed by the Tribunal (see the memorandum of the Nga Puhi Design Group dated 12 March 2007 paragraph 8.2, Wai 1040 #3.1.19).
 - 14.2 Counsel for the Ngati Wai claimants (Wai 244, 280, 487, 567, 678, 1384) filed a memorandum dated 27 April 2007 (Wai 1040, #3.1.25) that did not address the proposal to separate the Mahurangi and Gulf Islands district. That memorandum did, however, indicate that the Ngati Wai claimants would like all their claims heard in one inquiry (see paragraph 9 of that memorandum).

15. To determine the issue, the relevant matters for the Tribunal to consider would include:

¹ Wai 74, 121, 186, 312, 354, 454, 468, 487, 532, 568, 654, 721, 733, 752, 798, 808, 854, 884, 887, 914, 985, 974, 981, 1055, 1127, 1129, 1146, 1313, 1314, 1385.

- 15.1 the views of claimant groups who may be affected by any decision on the issue;
 - 15.2 the Tribunal's ability to resource any separate inquiry; and
 - 15.3 what the boundaries of any separate inquiry might be.
16. If the Tribunal does seek further views from the parties on the proposal, the Crown wishes to reserve its position on the proposal.

CFRT reports

17. The Crown has not been served copies of the following CFRT reports set out in CFRT's *Northland Research Programme – Project Briefs, Project Milestones, Draft Overview Maps* (May 2005):

Northland Tribal Landscape Overview - DRAFT
 Northland: The Nature and extent of Contact and Adaptation
 Northland Pre-1840 Purchases: Old Land Claims, Surplus Land Scrip Land
 Northland: The Treaty and its Context
 The Northern War, 1845-1846
 Northland Pre-1865 Crown Purchases
 Northland Purchases Under the Native Land Acts, 1865-1909
 Northland Twentieth Century Overview Part 1, 1909-c.1945
 Northland Twentieth Century Overview Part 2, 1945-c.2004
 Northland Public Works and Other Takings, c.1871-1993
 Northland Land Development Schemes
 Northland Land-Based Resources, Waterways and Environmental Impacts
 Northland Te Reo Culture and Education
 Northland Local Government and Rating – DRAFT
 Northland: Gifting of Lands – DRAFT


18. The Crown understands that some of these reports have been completed and that all should be completed by August 2007. The Crown also understands that CFRT is unable to release these reports and file them with the Tribunal until claimants consent to that release and filing.
19. The Crown strongly encourages CFRT and claimants to work together to allow for the earliest release and filing of these reports as possible.
20. Providing these reports to the Crown will allow the Crown to understand better the claims against it, to engage properly with those claims, to plan its

own research and to consider what, if any, concessions the Crown might make. The later the Crown is given access to these reports, the later the Crown is able to respond to the claims, including the filing of any statement of response to the claims.

Way forward

21. The Crown respectfully submits that decisions need to be made about how the inquiry will progress from this point through to the beginning of hearings. The Tribunal may wish to seek submissions from parties on that progression. Alternatively, the Tribunal may wish to propose a timetable and seek views on that.

Dated at Wellington this 31st day of May 2007



A K Irwin
Associate Crown Counsel

TO: The Registrar of the Waitangi Tribunal
AND TO: Representatives of claimants consolidated within the Wai 1040 claims