

**IN THE WAITANGI TRIBUNAL****WAI 2358****IN THE MATTER**

of the Treaty of Waitangi Act 1975

**AND IN THE MATTER**

of the National Freshwater and Geothermal Resources Inquiry

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**OPENING SUBMISSIONS FOR THE CLAIMANTS****Dated:** 21 October 2016

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**Presiding Officer:** Chief Judge Isaac**Next Event Date:** 7-11 November 2016 (Stage 2, hearing week 1)

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## **MAY IT PLEASE THE TRIBUNAL:**

### **A. Overview of the Claimants' Case**

1. The claimants' case is that the existing regime in respect of freshwater in New Zealand is non-compliant with the Treaty and its principles.<sup>1</sup> Taking as the starting point the Stage 1 report, the evidence will show:
  - 1.1 There are a number of deficiencies in the status quo legal/ policy regime in respect of freshwater in New Zealand, and as a result the current law in respect of freshwater and freshwater bodies is not consistent with the Treaty and its principles.<sup>2</sup>
  - 1.2 There is a resulting need for urgent and bold reforms.<sup>3</sup>
  - 1.3 The reforms proposed by the Crown, including in its *Next Steps for Fresh Water (NSFW)* process, and the timing for implementing any reforms, are not consistent with the Treaty and its principles.<sup>4</sup>
2. As well as proving the above, the evidence will identify a core of minimum necessary reforms that the Crown must implement if it is to make the current legal/policy regime for freshwater Treaty-compliant.<sup>5</sup>

### **B. The Claimants' Analytical Framework**

3. The evidence that the claimants will present to the Tribunal can be understood in terms of the following analytical framework, which encapsulates the theory of the claimants' case for Stage 2 of this Inquiry.

#### **B1. The Starting Point is the Stage 1 Findings**

4. The Tribunal in Stage 1 made findings that Māori have rights and interests in freshwater, extending to customary rights in some water bodies that

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<sup>1</sup> Being issue 1 set by the Tribunal for Stage 2; refer to #2.5.62, para [3].

<sup>2</sup> Being issue 1 and 2(a) set by the Tribunal for Stage 2; refer to #2.5.62, para [3].

<sup>3</sup> Being issues 2(a)-(d) set by the Tribunal for Stage 2; refer to #2.5.62, para [3].

<sup>4</sup> Being issues 2(b)-(d) set by the Tribunal for Stage 2; refer to #2.5.62, para [3].

<sup>5</sup> Being issues 2(c)-(d) set by the Tribunal for Stage 2; refer to #2.5.62, para [3].

could equate to ‘full blown’ ownership of property in the English sense.<sup>6</sup> These findings provide the foundation for Stage 2, and a critical lens through which to assess, first, the status quo legal/policy regime in respect of freshwater and, second, the NSFW reform proposals of the Crown.

## **B2. Significant Deficiencies in the Status Quo**

5. Against the background of the Stage 1 report and its findings, the evidence in Stage 2 will show that there are a number of deficiencies in the status quo legal/policy regime in respect of freshwater. Broadly these deficiencies fall into the following three categories:

5.1 Freshwater degradation: The current regime has allowed, and continues to allow, freshwater bodies to significantly degrade, inconsistently with Māori rights and interests in those bodies. This has resulted, amongst other things, in ecological tipping points being reached, with implications for Māori rangatiratanga and kaitiakitanga rights to and responsibilities for freshwater bodies;

5.2 Participatory rights: As the Tribunal has found in other inquiries, the provisions for Māori participation in freshwater resources decision-making under the current regime are ineffective, and in practice they pay lip service to Māori rights – both in terms of the influence they allow a Māori voice to have on decisions, and in the lack of funding available for effective exercise of Māori rights; and

5.3 Property rights: The current regime has allowed for the creation and exercise of property rights adverse to the existence and exercise of Māori rights and interests in freshwater. The application of the first come/first served principle in particular, leading to over-allocation in many freshwater catchments, is a source of ongoing prejudice to Māori, including in the difficulties it presents for Māori seeking to exercise rights of the kind that the Tribunal found they have in its Stage 1 report.

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<sup>6</sup> See pp75-76 of the Tribunal’s Stage 1 report.

6. The evidence will show that these deficiencies, which exist on a national scale, are also harming Māori at local and regional levels.

### **B3. Need for Urgent and Bold Reforms**

7. The evidence will show that, in light of the deficiencies in the status quo, there is a need for urgent and bold freshwater reforms. This evidence will set the scene, in turn, for the evidence on the shortcomings of the Crown's NSFW reform process and proposals.

### **B4. NSFW Reform Proposals Are Inadequate**

8. The evidence will show that the Crown's NSFW reform process and proposals have the following four over-arching deficiencies:

- 8.1 Exclusion: The Crown's NSFW reform process has been internally developed and implemented to date, and the Crown intends that it will continue to be developed and implemented, in a way which deliberately excludes the New Zealand Māori Council (**the Council**) from playing any role over and above that which any member of the public could play, notwithstanding the statutory role functions of the Council, and its status as claimant in this inquiry;

- 8.2 Omissions: The Crown's NSFW reform proposals are silent on the fundamental issue of Māori property rights in freshwater (including Māori property rights in geothermal waters). They also fail to address the current and ongoing degradation of freshwater. The claimants' case is that these must be meaningfully addressed;

- 8.3 Sequencing: Relatedly, the Crown's overall proposal to address Māori property rights after dealing with water quality and quantity issues (ie, last) will not result in Treaty-compliant reforms;

- 8.4 Inadequacies: The Crown's NSFW reform proposals do not adequately address the need for Māori to be able to participate in freshwater resources decision-making processes effectively and in a manner which is commensurate with the rights Māori have; and

- 8.5 Timing: The lack of urgency with which the Crown is proposing to act is causing ongoing prejudice to Māori both in terms of further freshwater degradation and further allocation of property rights.
9. It will be the claimants case that the Tribunal should make findings that recognise these deficiencies, and associated recommendations to ensure that the freshwater reform process is refocused in a way which will address the deficiencies and guarantee Treaty-compliant reform outcomes.

#### **B5. Minimum Necessary Freshwater Reforms**

10. The recommendations the claimants will ultimately seek from the Tribunal in its Stage 2 report will be predicated on the evidence identifying the following core of minimum necessary freshwaters reforms the Crown must implement in order to ensure Treaty-compliant outcomes:
- 10.1 Inclusion: The Council needs to be given a meaningful role in the process for developing freshwater reform options that has to date excluded the Council and involved only the Crown and Iwi Leaders Group/Iwi Advisory Groups.
- 10.2 Rebalancing: The principles and framework for making decisions on the allocation and use of freshwater (ie, Part 2 of the Resource Management Act 1991) need to be rebalanced to ensure practically effective recognition and protection of the rights that Māori have in freshwater.
- 10.3 Bottom-lines: The bottom-lines, or thresholds, affecting water quality and water quantity issues also need to be adjusted to ensure appropriate recognition of the rights that Māori have in freshwater.
- 10.4 Participation: New and possibly variable models are needed to ensure that Māori have an effective, and appropriate, voice in freshwater resources decision-making. Māori also need to be adequately resourced to be able to exercise participation rights.

10.5 Allocation: Māori property rights in freshwater need to be recognised and provided for through initiatives that allocate to Māori take and use rights in respect of freshwater, both in a direct sense (transfers of existing use rights to Māori) and an indirect sense (distribution to Māori of rentals paid by commercial users).

10.6 Compensation: Māori property rights in freshwater also need to be provided for by way of compensatory payments in recognition of the past expropriation of Māori property rights in freshwater.

11. The evidence will identify a new body, designated as a Water Commission, which might serve as a practical ‘vehicle’ through which to implement a range of the minimum necessary reforms identified above.

### C. The Claimants’ Witnesses

12. The claimants, consistently with the analytical framework that has just been summarised, intend to lead evidence from the following witnesses:

Witness name		Summary of subject-matter of evidence
<i>Tangata whenua witnesses</i>		
1.	Hira Huata	Ruataniwha Dam/adjoining area
2.	Jenny Mauger	Ruataniwha Dam/adjoining area
3.	Kereama Pene	Tikitere Geothermal Fields
4.	Rudy Taylor	Lake Omapere / Taitokerau waterways – custom use
5.	Taipari Munro	Poroti Springs
6.	Millan Ruka	Poroti Springs
7.	Meryl Carter	Poroti Springs
8.	Pia Callaghan	Kaituna River
9.	Dennis Emery	Oroua River
10.	Peter Clarke	Tauhara Geothermal Field
11.	Toro Bidois	Taniwha Springs, Hamurana Springs
12.	Robert MacDonald	Ruataniwha Dam/adjoining area
13.	Hugh Sayers	Motiti Island

14.	Umuhuri Matehaere	Motiti Island
15.	Tamati Cairns	Lake Waikaremoana / Pouakani
<i>Technical witnesses</i>		
16.	Dr Mike Joy	Environmental state of waterways in NZ
17.	Martyn Craven	Valuation of water as a commodity in NZ
18.	Geoff Kaine	Economic models to recognise Māori water rights
19.	Sue Jackson	Overseas recognition of indigenous rights in water
20.	David Percy QC	Canadian recognition of indigenous rights in water
21.	Dr Kepa Morgan	Mauri model decision-making framework
22.	Brian Cox	Māori rights and interests in geothermal water
23.	Bryan Jenkins	Deficiencies in RMA water provisions/practices
24.	David Alexander	Poroti Springs / Lake Waikaremoana case study
25.	Paul Hamer	Poroti Springs case study

13. The claimants' proposed order for their witnesses to give evidence is the subject of the hearing timetable provided earlier today to the Tribunal.

**DATED** at Wellington this 21<sup>st</sup> day of October 2016




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