IN THE WAITANGI TRIBUNAL **WAI 2358**

IN THE MATTER OF	The Treaty of Waitangi Act 1975
AND	A claim by Sir Graham Stanley Latimer on behalf of himself, the New Zealand Māori Council and all Māori, Tom Kahiti Murray, Taipari Munro, Kereama Pene, Rangimahuta Easthope, Peter Clarke, Jocelyn Rameka, Eugene Henare, Nuki Aldridge, Ani Martin, Ron Wihongi, Eric Hodge in association with the Te Arawa geothermal cluster, Walter Rika, Emily Rameka, Maanu Cletus Paul, Charles Muriwai White, and Whatarangi Winiata.
AND	The National Freshwater and Geothermal Resource Inquiry

Memorandum of counsel on behalf of the Claimants

Dated: 3 August 2012

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Memorandum of counsel on behalf of the Claimants

Introduction

1. This memorandum is in reply to the Crown's memorandum of 2 August 2012.

Nothing new

2. On the whole, the Claimants do not consider that the Crown's memorandum raises any new issues. Rather, it is attempt to relitigate matters that have already been argued before the Tribunal.

3. Claims that it needs points clarified have been repeatedly made by the Crown in these proceedings. As with past such requests, the Claimants submit that this request is not made genuinely here. The Claimants found the Tribunal's 30 July 2012 memorandum to be perfectly clear, as, it appears, did the rest of the Nation. What the Crown is seeking in the name of clarity is for the Tribunal to amend its decision.

4. The Claimants also note that it was the Crown who, in its closing submission, drew an analogy between the task facing the Tribunal and an interim injunction, including relying on interim injunction decisions from the High Court. The Crown cannot now be critical of the Tribunal for following this approach.

Timing of the stage one report

5. The Claimants do not, and could not, object to the Tribunal rendering its stage one report at any time. If the Tribunal is able to consider thoroughly the issues and the material placed before it, and give a fully reasoned decision by 24 August 2012 (or even earlier) then the Tribunal should do so. The national interest in this Inquiry is significant and all of the parties and the Country as a whole would be grateful to receive the Tribunal's report as soon as possible.

6. What concerns the Claimants is that a report that is delivered too soon may be something other than a fully reasoned decision based on thorough consideration. This, it is submitted, would not be in anyone's interest.

7. In making this submission, the Claimants are conscious that the Tribunal's resources are not unlimited. The Claimants are therefore

aware that the Tribunal is unable to simply devote more resources to this matter to enable it to render its decision more rapidly.

Accuracy of the Crown's memorandum

8. The Claimants are concerned at the accuracy, or lack of accuracy, of much of the Crown's memorandum.

9. The Crown now says that it needs to complete the MRP sale this year to enable it to complete its programme in the next two years (para 15). This is a change from the 1½ years from its closing submissions (para 125), but still much shorter than the 4 or 5 years given in evidence by Mr Crawford (transcript at 770). Both the timeframes of 18 months and two years are impossible on the two slots per year evidence of Mr Crawford (transcript at 770) which was repeated in the closing submissions from the Crown (para 115). It is difficult to believe that Mr Crawford, the man who was leading the MOM implementation, would get something this fundamental wrong.

10. The memorandum includes (in appendix one) a number of steps that the Crown claims it needs to take between the decision and the IPO. These appear roughly to be the final stages of the steps previously set out in the Crown's memorandum of 30 March 2012 (at para 6 as repeated in appendix two).

11. The Claimants submit that this shows that the Crown misled the Tribunal back in March. The Crown justified the need for the Inquiry's tight timetable on the grounds that these steps needed to be undertaken before the IPO. However, we now know that they proceeded with completing these steps without waiting for the Inquiry. In particular, it appears from the latest memorandum that, unsurprisingly, due diligence is mostly complete. We also learned from Mr Crawford during the hearing that the offer document was then already at iteration 12 of an expected 20 (transcripts at 728). Before the hearing began there were announcements from the Crown's "Financial Advisors" including promotional material for the impending sale.

12. The current list is equally misleading. The Crown has been willing to spend millions of dollars completing most of the work set out in the March memorandum without waiting for the Tribunal to complete its report. For many of the matters listed in appendix one

there appears to be little reason why the Crown would act differently now.

13. The reference to these millions of expenditure (at para 14) is therefore also misleading. The Crown has already put itself in this position by progressing with the sale while the Inquiry progressed. This cost will not result from a difference between a Tribunal decision in August or September. On a careful reading, the Crown does not even claim as much.

The date of 24 August 2012

14. As the Crown records in its appendix two, it has repeatedly told the Tribunal that a decision on whether or not the sale should be delayed was needed by the end of July, *at the latest*. It is for exactly this reason that the Tribunal issued its decision of 30 July 2012. The Crown now says that it needs the decision again, but now by 24 August 2012.

15. It appears therefore that the Crown has been telling the Tribunal that a decision was required by the end of July when that was not in fact the case.

16. The Crown's memorandum suggests the date of 24 August 2012 as this, it says, will give it one week to review the Tribunal's report before making the final decision on the IPO. The Claimants do not accept that one week would enable the Crown to give the Tribunal's report, and any recommendations it contains, "in-depth and considered examination."

17. Rather, the Claimants are concerned that this time scale has been chosen by a Government that has no intention of giving any consideration to the Tribunal's report, in the hope that it will be long enough to stave off a finding of Wednesbury unreasonableness as was made in the passage of Lord Cooke cited by the Tribunal at para 62 of its memorandum.

18. The other side to the issue of this new date is whether the Crown has shown that it needs the decision by this date at all. All the Tribunal currently has is an assertion of this from the Crown together with a vague list of tasks that need completing. It would not be unreasonable for the Tribunal to expect something more precise. The Crown has not actually explained how it has come to

the date of 1 September 2012 as a deadline for its decision or how long the listed steps actually take.

19. The only evidence that is before the Tribunal appears to undermine the Crown's claim for urgency. The 1999 Contact prospectus lists the key dates for that IPO on page 4 (#B13). The public offer closed 17 days after it opened and only one month after the prospectus was registered. We heard at the hearing that the registration process takes 5 days. Even if the Tribunal were to issues its report on the last day of September, these timings suggest that a mid-December IPO could be accommodated while leaving as much as 6 weeks for the Crown to complete those tasks that could not be done before the decision is issued. The Claimants accept that this might be a tight timeframe, but significantly less onerous than the one the Crown is asking of the Tribunal. The task is surely not impossible given that, the Crown say, it has many millions to spend on the project.

20. Lastly, the lack of any evidence or detail from the Crown on the timing issue means that the Crown is again asking the Tribunal to take its submissions on faith. The problem with this is that the Crown has repeatedly misled the Tribunal during the course of these proceedings.

21. The Claimants also note that if the Crown was concerned for the Tribunal to complete its considerations more rapidly then it would have been in the Crown's interests not to withhold the main bulk of its case until the last day of the hearing.

Conclusion

22. The inaccurate and misleading information contained in the Crown's memorandum to one side, the Claimants submit that the issue of timing is easily dealt with. A speedy report is highly desired by all. A thorough report is absolutely essential. The Tribunal ought therefore to complete its report as speedily as it can without sacrificing thoroughness.

3 August 2012

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