WAITANGI TRIBUNAL Wai 2358

CONCERNING the Treaty of Waitangi Act 1975

AND the National Fresh Water and Geothermal Resources Inquiry

DECISION ON APPLICATION FOR ADJOURNMENT

Introduction

1. In March 2012, the Waitangi Tribunal granted urgency to the Wai 2358 claim in respect of two matters: the imminent conversion of State-owned power companies to mixed-ownership model companies; and the question of how Māori rights and interests in water would be provided for in the Crown's proposed freshwater and geothermal reforms. At that time, the Crown's partial privatisation of Mighty River Power was scheduled to begin in 2012, and Crown decisions on water reforms – including on the question of Māori proprietary rights – were expected in late 2012.

2. In order to progress the most urgent part of the inquiry, it was split into two stages. The Tribunal's report on Stage 1, dealing with the nature of Māori water rights as at 1840 and the impact of the Crown's proposed sale of shares in the power companies, was the subject of hearings in July 2012. The Tribunal's interim report on Stage 1 was released in August 2012, and its final report was published in December of that year.

3. There was some slippage in Stage 2 of the inquiry while Stage 1 issues were the subject first of consultation between Māori and the Crown, and then of litigation in the High Court and Supreme Court. Once that litigation was completed in 2013, attention focused on defining the issues for Stage 2 and timetabling the remainder of the inquiry. The Tribunal's draft Stage 2 issue questions were considered by the parties. By mid-2013, the Crown and claimants had agreed to work together to refine the focus of Stage 2. In November 2013, the Tribunal agreed to their request that Stage 2 of the inquiry should concentrate on the question: *What further reforms need to be implemented by the Crown in order to ensure that Māori rights and interest in specific water resources, as found by the Tribunal at Stage 1, are not limited to a greater extent than can be justified in terms of the Treaty?* Three subsidiary issues were also accepted by the Tribunal (see paragraph 43 for the details).

4. Once the issues had been refined and agreed in November 2013, the next step was for the Crown to indicate the substance of its proposed reforms, so that the inquiry could proceed to hearing. The Crown advised the Tribunal that it would be in a position to provide some material by the end of March 2014, and a full report on its proposed reforms by July 2014. The Crown then sought an extension until 9 September 2014, when it filed its report. The claimants' response was that the relatively brief report supplied by the Crown was insufficient as a basis to proceed to hearing.

5. A judicial teleconference was held in October 2014 to consider how to progress the Stage 2 inquiry. At that conference, Crown counsel advised that the September 2014 report

'constitutes what is currently known as to the proposed reforms, which are likely some years away from completion'.[1] Further information would not be available until after Ministers met with iwi leaders at the Iwi Chairs' Forum in Waitangi on 5 February 2015. Crown counsel also stated that no more Crown evidence would be filed until the claimants had filed their evidence.

6. After discussion at the October 2014 teleconference, the parties agreed to meet together to discuss amongst themselves the inquiry, its next steps, and the question of Māori proprietary rights in water. The Tribunal agreed to await the outcome of these discussions, and directed the Crown to file in March 2015 an update as to the proposed reforms and the results of the February meeting with the Iwi Chairs Forum.

7. On 20 March 2015, the Crown filed its update, which advised that the Crown and the Freshwater Iwi Leaders Group had agreed to develop policy options for the protection of Māori rights and interests in fresh water, which would be put out for wider consultation with Māori and the public in 2016. In the meantime, the Crown sought an adjournment of the Stage 2 inquiry until 22 February 2016. That application for adjournment is the subject of the present decision.

The Crown's application for adjournment

8. On 20 March 2015, the Crown filed its update on the outcome of the February 2015 meeting between iwi leaders and Ministers. As part of providing this update, Crown counsel also applied to adjourn the inquiry until 22 February 2016. The purpose of the adjournment would be to allow the Crown and the Freshwater Iwi Leaders Group to 'work together across 2015 to develop options for the recognition of iwi/hapū rights and interests in freshwater'.[2] The joint development of options would then 'inform' further consultation with iwi and with Māori generally, as well as with others, before the final shape of further freshwater reforms is decided.[3]

9. According to Crown counsel, the next set of reforms will relate to management of freshwater 'quantity and quality limits', and will 'therefore improve the regime for freshwater allocation and use'.[4] The Crown is 'committed to addressing iwi/hapū rights and interests in freshwater' as part of these reforms. Crown counsel submitted that the Iwi Leaders Group was similarly committed to working with the Government to develop agreed policy options, which would then be taken out for wider consultation.[5]

10. As part of this process, the Crown intends to provide regular updates to the Tribunal, claimants, and interested parties (on 30 June 2015, 30 September 2015, 30 November 2015, and 20 February 2016).[6] These updates would address progress in the proposed timetable for reaching agreement between the Crown and the Iwi Leaders Group and for the wider consultation that would follow. According to Crown counsel, the Government hopes to reach an agreement with the Iwi Leaders Group by October or November 2015, followed by a 6-8 week consultation process in January and February 2016.[7] Thus, if the application were granted, it appears that the Crown expects the Tribunal's inquiry could resume at the point at which the consultation process was concluded or nearing its end (22 February 2016), but before the Crown had made any decisions arising from the response of Māori and others to its policy options for reform. Crown counsel cautioned, however, that the

[1] Waitangi Tribunal, memorandum-directions, 20 October 2014 (paper 2.5.51), para 4
[2] Crown counsel, memorandum, 20 March 2015 (paper 3.1.237), p 1
[3] Ibid
[4] Ibid, p 3
[5] Ibid, pp 3-4
[6] Ibid, p 2
[7] Ibid, p 4

'challenges of policy development in this area mean that this timetable may change'.[8] In a later submission, counsel advised that the Crown may not be ready to begin consultation until February 2016.[9]

11. The Crown advised the Tribunal that, in the meantime, a Bill to reform the Resource Management Act 1991 will be introduced in mid-2015. In respect of this Bill, Crown counsel advised that no legislation has as yet been drafted, and Cabinet has not made final decisions as to its content. Māori interests will be affected because the Bill will 'include provisions intended to improve Māori participation under the RMA', and to ensure that local government has a consistent approach to 'including iwi in resource management processes'. These proposed reforms were signalled in 2013.[10]

12. In support of its application for an adjournment, the Crown submitted that because policy is still being developed (a process in which iwi leaders will be involved), and because full consultation with Māori is planned, the Tribunal may adjourn its inquiry without prejudice to the claimants' position. In the Crown's view, Crown and Māori resources should not be split between a parallel process of Tribunal hearings and collaborative policy development. At the same time, it would – in the Crown's submission – be a waste of Tribunal resources to hear the matter when policy is still so unformed and subject to development and change.[11]

The claimants' and interested parties' response to the Crown's application

13. On 14 April 2015, the claimants registered their opposition to the Crown's application for an adjournment. In the claimants' view, Stage 2 of this inquiry should continue as planned, working towards hearings in the final quarter of 2015.[12] Alternatively, the claimants sought an 'urgent half-day fixture to determine whether it is appropriate to make interim findings that the process the Crown proposes in its memorandum is inconsistent with the principles of the Treaty and with the UN Declaration on the Rights of Indigenous Peoples'.[13]

14. A number of interested parties also filed submissions in opposition to the Crown's application.[14]

15. Two interested parties, the Freshwater Iwi Leaders Group and Ngāi Tahu, made submissions in support of the Crown's proposal to adjourn the inquiry until February 2016.[15]

The Tribunal convenes a teleconference

16. On 23 April 2015, the Tribunal notified parties that a judicial conference would be convened to hear the parties on the Crown's application for adjournment. This conference was to take place at the Tribunal's offices in Wellington on 2 June 2015. In the interim, the Tribunal directed the Crown and claimants to discuss the way forward, in the hope that they would be able to resume the cooperative approach which had previously characterised Stage 2 of

[8] ibid
[9] Crown counsel, memorandum, 28 May 2015 (paper 3.1.245), p 9
[10] Crown counsel, memorandum, 20 March 2015 (paper 3.1.237), pp 4-6
[11] Ibid, pp 6-7
[12] Claimant counsel, memorandum, 14 April 2015 (paper 3.1.239)
[13] Ibid, p 1
[14] Counsel for interested parties (Ms Ertel), memorandum, 9 April 2015 (paper 3.1.238); counsel for interested parties (Ms Sykes), memorandum, 16 April 2015 (paper 3.1.240); counsel for interested parties (Ms Mason), memorandum, 20 April 2015 (paper 3.1.241); counsel for interested parties (Mr Naden), memorandum, 29 May 2015 (paper 3.1.248)
[15] Counsel for the Freshwater Iwi Leaders Group, memorandum, 28 May 2015 (paper 3.1.246); counsel for Te Rūnanga o Ngāi Tahu, memorandum, 28 May 2015 (paper 3.1.247)

this inquiry.[16] On 27 May 2015, the conference was changed to a judicial teleconference, scheduled to take place on 2 June 2015.[17]

The parties' pre-conference submissions

(1) The claimants' submissions

17. The claimants are deeply concerned about the long delay in the production of the Crown's proposed water reforms, which were supposed to be the trigger for the preparation of evidence and the commencement of Stage 2 hearings. The claimants submitted: 'That has simply not occurred. The result is to leave no choice but for the claimants to pursue Stage II as originally envisaged at the conclusion of Stage I'.[18] As a result, the claimants' view is that they should now proceed to 'develop their Stage II case on the basis of the Tribunal's Stage I findings and recommendations by proposing reform recommendations that are practical and workable, but of course Treaty consistent'.[19] This proposal would involve the claimants embarking immediately on a large research programme in order to begin Stage 2 hearings in the final quarter of 2015.[20]

18. In the claimants' view, the timely and full hearing of the original Stage 2 issue questions is necessary because:

    - First, the urgent inquiry will have been delayed for three years by January 2016, while the question of Māori proprietary rights and interests in water remains unresolved (and the rights remain unprotected). In the meantime, new rights to take or use water continue to be granted by consent authorities under the present, faulty regime, to the prejudice of Māori. Also, the strength of vested interests in maintaining the current regime grows with each new application that is granted. The RMA Reform Bill, due for mid-2015, may result in 'further process/participation and further substantive/outcome prejudice to Māori' because Māori proprietary rights remain undefined and unprotected. A full report on the original Stage 2 issues is required as soon as possible, to enable Māori to participate more effectively in 'existing water-related processes' and to 'most effectively protect their rights and interests in such processes'.[21]
    - Secondly, this 'ongoing prejudice' would be 'less troubling' if the claimants could be satisfied that the Crown's proposed process for developing policy options by January 2016 was consistent with Treaty principles and the UN Declaration on the Rights of Indigenous Peoples. In their view, however, it is not Treaty compliant because it will proceed before the Tribunal has defined the rights that are to be protected, and the results will not be 'robust'. Further, the Crown's plan to work with the Iwi Leaders Group will unfairly exclude urban Māori.[22]
    - Thirdly, the claimants consider that the proposed process to develop policy options will bypass them and give them no greater rights of input than the general public. The opportunity for input will be circumscribed (only 6-8 weeks), and it may be that the Crown will have made up its mind as to preferred options during the process of developing them with the Iwi Leaders Group. Bypassing the NZMC in this way is contrary to its statutory responsibilities under the Māori Community Development Act 1962, contrary to the Bill of Rights Act 1990, and contrary to the Tribunal's original urgency decision in 2012.[23]

[16] Waitangi Tribunal, memorandum-directions, 23 April 2015 (paper 2.5.53)
[17] Waitangi Tribunal, memorandum-directions, 27 May 2015 (paper 2.5.54)
[18] Claimant counsel, memorandum, 26 May 2015 (paper 3.1.243), p 1
[19] Ibid
[20] Ibid, pp 2-3
[21] Claimant counsel, memorandum, 14 April 2015 (paper 3.1.239), pp 2-3
[22] Ibid, pp 4-8
[23] Ibid, pp 8-10

- Fourthly, the claimants do not accept that a parallel process of hearings and consultation will split or waste resources. Rather, their view is that the development of policy in the absence of a Tribunal report which defines the rights to be protected will likely lead to duplication and waste.[24]

19. Alternatively, if the Tribunal is not prepared to begin Stage 2 hearings in the near future, the claimants seek an 'urgent, half-day fixture to determine whether it is appropriate to make interim findings that the process the Crown proposes in its memorandum of 20 March 2015 is inconsistent with the principles of the Treaty and with the Declaration on the Rights of Indigenous Peoples'.[25]

(2) Submissions of the interested parties in support of the claimants

20. A number of interested parties made submissions in support of the claimants. Collectively, these submissions were made on behalf of 35 claims that have been registered with the Waitangi Tribunal. The claims of these interested parties are listed in the appendix to this decision.

21. Counsel for these interested parties, Ms Ertel, Ms Sykes, Ms Mason, and Mr Naden, all supported the submissions made by the claimants (which have been summarised above).[26]

22. In addition to what is covered in the claimants' submissions, counsel for interested parties made the following points:

- Ms Ertel emphasised the extent of delay that has already occurred, and predicted that there would be yet more delays in the proposed timetable for policy development, while also arguing that the Iwi Leaders Group has no mandate to represent her clients – this, in her submission, means that consultation with her clients will end up being 'after-the-fact and inadequate'.[27]
- Ms Ertel criticised what she characterised as a 'closed doors' approach to policy development with the Iwi Leaders Group, and sought a more transparent and inclusive process, as well as a 'discovery order' to uncover 'what is actually being considered and debated with the ILG'.[28]
- Ms Mason submitted that, as the Crown has not yet decided what form or process will occur for consultation in 2016, Māori groups excluded from the policy development process have no way of knowing whether or how far their voices will be heard, but it is likely to amount to 'being consulted "down-the-track", on predetermined options'. In her clients' view, meaningful consultation must involve them 'throughout the policy development process', alongside the Iwi Leaders Group and others. This is because anything less than full consultation will mean that the particular circumstances of iwi and their rohe cannot be taken into account, and that they will be confined to options developed by (and suitable) to others. In particular, an option for full recognition of Māori proprietary rights may be put forward by the Iwi Leaders Group and rejected by the Crown, and then such an option would be taken off the table by the time iwi and hapū get their belated chance for input in 2016.[29]
- Mr Naden objected to the Crown's argument that the Wai 2358 inquiry should no longer be treated as an urgent inquiry (the Crown's argument on this point is set out in paragraph 26). In Mr Naden's submission, the inquiry was divided into two parts so as to accommodate the Crown's need for speedy resolution in the privatisation of

[24] Ibid, pp 10-11
[25] Ibid, pp 1-2
[26] Counsel for interested parties (Ms Sykes), memorandum, 16 April 2015 (paper 3.1.240); counsel for interested parties (Ms Mason), memorandum, 20 April 2015 (paper 3.1.241); counsel for interested parties (Ms Ertel), memorandum, 28 May 2015 (paper 3.1.244); counsel for interested parties (Mr Naden), memorandum, 29 May 2015 (paper 3.1.248)
[27] Counsel for interested parties (Ms Ertel), memorandum, 9 April 2015 (paper 3.1.238), p 5
[28] Ibid, p 6
[29] Counsel for interested parties (Ms Mason), memorandum, 20 April 2015 (paper 3.1.241), pp 9-13

the power companies. Any such submission on the part of the Crown should have been made back at the beginning of Stage 2; the only thing that has changed has been the Crown's long delay in producing its proposed reforms.[30]

- Mr Naden also emphasised the Crown's undertakings to the Supreme Court in *NZMC v Attorney-General* [2013],[31] and argued that a unilateral process with the Iwi Leaders Group (bypassing other Māori and the Tribunal) is insufficient to meet those undertakings.[32]

(3) The Crown's submissions

23. On 28 May 2015, Crown counsel filed pre-conference submissions, partly in response to the claimants' submissions (filed on 14 April and 26 May 2015). In its new submissions, the Crown sought to change the status of this urgent inquiry, as well as an adjournment until 22 February 2016. In the Crown's view, the proposed adjournment 'does not deny Māori claimants a hearing', it simply provides space for essential Crown–Māori engagement in the development of policy options for wider consultation. At the same time, the Crown proposes that the 'stage two inquiry should [now] proceed on the standard track'. This is because the inquiry no longer meets the Tribunal's criteria for an urgent hearing – there is no pending Crown action. In the Crown's view, the Wai 2358 claim could be transferred to the kaupapa inquiry programme for later inquiry.[33]

24. In support of its application for adjournment, the Crown submitted that the claimants' various fears are groundless. There is no intention to negotiate a settlement with the Iwi Leaders Group. No binding agreements will be made with that group. The Crown recognises that the Iwi Leaders Group does not speak for all Māori, and policy development work in conjunction with that group will not suffice to meet the Crown's Treaty obligations. Wider engagement with all Māori will be possible, the Crown says, once options have been developed for consultation. No Māori individual or group will be excluded from consultation. Rather, the Crown seeks to engage in a 'collaborative and good faith process' with iwi leaders early in the 'development of eventual government policy'. It is necessary to first develop a 'clear proposal' on which to consult, so that consultation is 'genuine and focused'. But the policy options will simply be *options*: they will not 'constitute government policy, and their development does not preclude other options being developed and debated in the course of the consultation process'. Nor, in the Crown's submission, do Māori need a Tribunal inquiry before being able to 'discuss their rights and interests with the Crown'. The Crown will take reasonable steps to inform itself, and those steps need not include the Stage 2 inquiry.[34]

25. Further, the Crown's view is that holding Stage 2 hearings in parallel with policy development would divert Crown and iwi resources 'away from work on how rights and interests may be recognised in any potential legal regime governing freshwater'. This is not an efficient use of Crown, Māori, or Tribunal resources.[35]

26. In support of its submission that the status of the Wai 2358 inquiry should be changed, Crown counsel suggested that the inquiry 'no longer meets the criteria for an urgent inquiry'. The Tribunal granted urgency to Stage 1 because of the imminent partial privatisation of Mighty River Power and other SOEs. Now that this issue has been dealt with, the Crown's ongoing process for freshwater law reform, 'which has taken longer than originally intended', is at a stage where further consultation with Māori is required. There is 'no imminent government decision or action regarding freshwater that requires stage two to proceed urgently'.[36] Further, direct engagement between the Crown and Māori is preferable

[30] Counsel for interested parties (Mr Naden), memorandum, 29 May 2015 (paper 3.1.248), pp 3-4
[31] *New Zealand Māori Council v Attorney-General* [2013] 3 NZLR 31 (SC)
[32] Counsel for interested parties (Mr Naden), memorandum, 29 May 2015 (paper 3.1.248), pp 4-6
[33] Crown counsel, memorandum, 28 May 2015 (paper 3.1.245), pp 1-2
[34] Ibid, pp 2-3, 10, 11
[35] Ibid, p 6
[36] Ibid, p 5

to litigation, and does not 'preclude a Tribunal inquiry at some future time'. In respect of when such a future inquiry might take place, the Crown suggests (as noted above) that Wai 2358 could be added to the Tribunal's kaupapa inquiry programme.[37]

27. In addition, Crown counsel opposed the claimants' 'alternative' application for an urgent fixture to inquire into and make interim findings about its proposed policy development process. In the Crown's view, its engagement in early policy development does not meet the criteria for an urgent hearing. In particular, Crown counsel submitted that there could be no significant or irreversible prejudice from this process, especially since the Crown plans to consult all Māori once options have been worked out.[38]

28. Finally, in respect of Ms Ertel's application for a discovery order, the Crown's position is that no such order should be made, and parties are free to 'seek disclosure under the Official Information Act 1982'.[39]

(4) Submissions of interested parties in support of the Crown

29. Counsel for the Freshwater Iwi Leaders Group and counsel for Ngāi Tahu made submissions in support of the Crown's application for adjournment.

30. In addition, the Iwi Leaders Group noted its wish to 'focus and commit its energy and resources to the programme of engagement with the Crown'. If, however, the Crown's commitment to the current work plan and milestones changed, then the Iwi Leaders Group would need to review its position. Since October 2014, the group – which was formed in 2007 at a national hui of iwi in order to 'engage with the Crown and advance issues concerning freshwater' – has held 60 hui, and plans more regional hui in 2015. The group has a mandate from the Iwi Chairs Forum to engage on fresh water but not on geothermal resources.[40]

31. Counsel for Te Rūnanga o Ngāi Tahu added that their support for the adjournment was also conditional on the Crown remaining committed to the current programme, and that neither the Iwi Leaders Group nor Ngāi Tahu was engaged in a process to settle water claims nationally.[41]

Oral submissions at the judicial teleconference on 2 June 2015

32. The Crown was represented at the teleconference by Dr Damen Ward and Mr Jason Gough. The claimants were represented by Mr Richard Fowler QC (with other counsel in attendance). The interested parties in support of the Crown were represented by Mr Jamie Ferguson (for the Iwi Leaders Group) and Ms Justine Inns (for Ngāi Tahu). Interested parties in support of the claimants were represented by Ms Kathy Ertel, Ms Annette Sykes, Ms Alice Shelton on behalf of Ms Janet Mason, and Mr Darrell Naden (with other counsel in attendance). The Raukawa Settlement Trust, represented by Baden Vertongen, maintained a watching brief. The Taheke 8C group was represented by Ms Loretta Lovell. Mr Nick Kennedy of the Legal Services Agency was also in attendance.

33. Parties' submissions were taken as read at the judicial teleconference on 2 June 2015, although counsel made some additional points orally, as well as in response to questions from the Tribunal.

34. Claimant counsel made the following additional submissions, in response to the Crown's submissions of 28 May 2015:

[37] Ibid, pp 4, 6
[38] Ibid, pp 6-11
[39] Ibid, p 13
[40] Counsel for the Freshwater Iwi Leaders Group, memorandum, 28 May 2015 (paper 3.1.246), pp 2-3
[41] Counsel for Te Rūnanga o Ngāi Tahu, memorandum, 28 May 2015 (paper 3.1.247)

- To date, the engagement between the Crown and the Iwi Leaders Group had been described as focused on management issues, not on the proprietary rights and interests that are of great concern to the claimants.
- The resolution of issues in Stage 1 (the partial privatisation of SOEs) does not remove the need for urgency in Stage 2. The assurances given by the Crown to the Supreme Court (when the Stage 1 issues went before that Court), to the effect that the issue of proprietary rights would be dealt with expeditiously, seems contrary to the Crown's present position that Stage 2 no longer requires an urgent hearing.
- The NZMC is prepared to engage with the Crown at any time, but does not accept that the hearing of Stage 2 matters would divert or split resources – this is simply a 'smokescreen'.
- The Crown contends that there is no case for significant and irreversible prejudice in respect of the urgent hearing of Stage 2, but the current statutory regime is not Treaty compliant. Water permits are still being granted or renewed under that regime, which is prejudicial to Māori. The prejudice is significant and possibly irreversible. Claimant groups faced this very situation in respect of significant water bodies at the time of the Stage 1 hearings: Poroti Springs; Lake Horowhenua; and Tikitere (geothermal).

35. Crown counsel, in response to concerns raised by the claimants and interested parties, reiterated the Crown's position that there is no intention to exclude the NZMC or any other group from consultation. The Crown has been open about its intention to engage with the Iwi Leaders Group, it has kept the Tribunal informed, and there will eventually be robust consultation with the NZMC and Māori communities so that the Crown is informed of their views. The exact form and structure of that consultation has not yet been decided, but the claimants can be assured that it will be 'extensive'. The Crown will have to consider a range of interests. Also, in respect of those concerned about particular iwi or rohe matters, there will be mechanisms to recognise a variety of situations in different water catchments.

36. Crown counsel clarified that the imminent introduction of a Bill to reform the RMA will deal with improvements to Māori participation generally under RMA processes. RMA reforms specific to Māori rights and interests in water would occur as a result of the proposed process in 2015-2016 to develop policy for the allocation and use of fresh water. Crown counsel also clarified that there are no reforms relevant to Māori rights and interests in geothermal water in contemplation at the present time.

37. Claimant counsel confirmed that the participatory reforms anticipated in the 2015 Bill were not a matter that the NZMC would 'die in a ditch over' if they happened prior to Stage 2 hearings, because 'proprietorship is the key issue that the Council is seeking to pursue'.

38. In respect of the Supreme Court issue raised by claimants and interested parties, Crown counsel submitted that the Court had accepted the long-term nature of the work the Crown would be required to do, in order to resolve issues relating to Māori rights and interests in water. The Crown is not trying to avoid the undertakings made to the Supreme Court, but it must first develop options to take out to Māori and all New Zealanders for consultation. This will not be easy and it will require time and engagement with the Iwi Leaders Group. Crown counsel emphasised that such engagement was not a substitute for the consultation that would eventually be needed with all Māori, once options were sufficiently developed for that purpose.

39. Counsel for the Freshwater Iwi Leaders Group added that, in seeking an adjournment, it would be a case of timing and a question of *what* should be inquired into, not *whether* there should be a hearing 'at some point'. The Iwi Leaders Group will hold further hui with iwi and hapū, and will report quarterly to the Iwi Chairs Forum on the progress of discussions with the Crown. Counsel for Te Rūnanga o Ngāi Tahu added that documentation for the hui would be published on the Iwi Chairs' website.

40. On the question of readiness to proceed with Stage 2, claimant counsel reiterated that a major research programme is required, and timetabling directions would assist in obtaining funding for that, but that the claimants expected to be ready to proceed in the final quarter of 2015.

41. Counsel for interested parties (Ms Sykes and Mr Naden) advised that some of their clients had raised funds and prepared research already, and would be ready to proceed to hearing.

42. Ms Ertel submitted, however, that there was an inequity in funding assistance if the Iwi Leaders Group is funded to participate in the Crown's process, and her clients are not. Ngāti Ruapani, she told the Tribunal, already know that they have proprietary rights in the water of Lake Waikaremoana, and want to sit down with the Crown as a Treaty partner and discuss how to protect those rights. In the absence of that engagement, Ms Ertel's submission is that it is necessary to proceed with the Stage 2 inquiry and provide the Crown with a Tribunal report as to how the rights should be recognised and protected. The Crown, in her submission, should welcome the Stage 2 inquiry, not oppose it, as an essential prerequisite to assist its policy development.

43. Ms Sykes stressed, too, that there is a risk of the Crown favouring iwi who can engage effectively because they have resources from Treaty settlements; many Māori, on the other hand, need the NZMC to assist them and work on their behalf. In Ms Sykes' oral submission, the best way to achieve this is a Council-led Stage 2 inquiry, and the Crown should take more account of the role of the NZMC, which is constitutionally fundamental to the protection of all Māori.

44. On the question of readiness to proceed, however, Crown counsel argued that it would be more sensible to adjourn the inquiry until the development of policy options and subsequent consultation (by January-February 2016). Since the claimants are not actually ready to proceed at present, he said, there would be little point in holding a full Stage 2 inquiry in the final quarter of 2015 (just before the Crown would be ready to consult Māori). Dr Ward did note, however, that the Crown's timetable may shift, due to the difficulty inherent in resolving these issues.

45. Finally, counsel for one of the interested parties (Taheke 8C) noted that they were relaxed about the adjournment, neither supporting nor opposed, because their freshwater and geothermal rights would not be affected.

The Tribunal's decision to grant an adjournment

46. Having considered the submissions summarised above, the Tribunal notes its concern that, if the claimants' request to proceed to full Stage 2 hearings this year were granted, then the claimants would have to research and develop their own set of proposed water reforms. As explained by the claimants in their memorandum of 26 May 2015, this would require a very substantial exercise to prepare technical evidence. This exercise would not be complete until the final quarter of 2015, when the claimants expect to need three hearing weeks to present their evidence. As we understand it, this proposal would put the claimants to a large and significant expense, and – as submitted – requires a full hearing of the original Stage 2 inquiry issues.

47. If the claimants' request is granted, not only would it put the claimants to unnecessary trouble and expense, but it would also require the Tribunal to reverse its decision, as notified to parties inthe memorandum-directions of 6 November 2013, to narrow the focus of Stage 2.[42] At the joint request of the claimants and the Crown, the Tribunal agreed that its Stage 2 inquiry would concentrate on the following issue question:

[42] Waitangi Tribunal, memorandum-directions, 6 November 2013 (paper 2.5.45)

What further reforms need to be implemented by the Crown in order to ensure that Māori rights and interest in specific water resources as found by the Tribunal at Stage One are not limited to a greater extent than can be justified in terms of the Treaty?

48. In addition, the Tribunal agreed that three subsidiary issues would need to be considered:

    - *The scope of the current reforms and in particular the extent to which the reforms address Māori rights and interests, and the extent to which Māori rights and interest remain unaddressed;*
    - *To the extent that Māori rights and interests are addressed by the current reforms, whether the resultant recognition of those rights is consistent with the Treaty; and*
    - *To the extent that Māori rights and interests are not addressed by the current reforms or are inadequately addressed, what further reforms are required?*

49. Further, the Tribunal decided in November 2013 that:

> the exact wording of the issue question will need to be reconsidered and confirmed following receipt of the Crown's proposed reform programme. The next step is for the Crown to set out in detail its reform programme.[43]

50. The Crown was then to advise by what date the details of its proposed reforms for both freshwater and geothermal resources could be filed with the Tribunal.[44]

51. What has followed has been a lengthy delay. The Crown is only now ready to begin actually developing policy options for freshwater reforms that relate specifically to Māori rights and interests in water. The claimants' position is that they do not wish to wait any longer. Instead of a focused inquiry, on the basis of the issues agreed in 2013, the claimants now wish to proceed to a hearing of the original Stage 2 issues. The Crown, on the other hand, wants the Tribunal to adjourn its inquiry until late February 2016, to allow it to develop policy options in 'collaboration' with the Iwi Leaders Group, and then to have those options put out to consultation with Māori and the general public in January–February 2016. Due to the need to develop reform proposals of their own (instead of responding to the Crown's), the claimants must carry out a major exercise and would not be ready for hearing until shortly before the Crown says that it will be ready to consult.

52. Understandably, the claimants and interested parties are somewhat sceptical that the Crown will be ready by January 2016. Crown counsel stated that the timetable may slip. Nonetheless, the claimants have not been able to satisfy the Tribunal that it makes sense to hold a full inquiry into the original Stage 2 issues, just before the Crown will have developed policy options that could, instead, be the subject of inquiry. Water permits will continue to be granted or renewed in either case, since the claimants will not be ready to proceed to hearing much in advance of the Crown.

53. The Tribunal was concerned, however, that the Bill to reform the Resource Management Act would be introduced before Stage 2 hearings could be held (on either the claimants' or the Crown's timetable). However, given the claimants' view, expressed during the teleconference on 2 June 2015, that the participatory reforms envisaged in this Bill are not central to the matters they wish to have heard, the Tribunal is satisfied that the 2015 Bill is not a factor in whether or not the inquiry should be adjourned.

54. It seems to the Tribunal that the most sensible option available, and which will best serve the interests of all parties, is for the adjournment to be granted. The adjournment will allow the Crown time to develop policy options by collaborative agreement with relevant informed Māori entities, and consultation will then take place more generally between the Crown and Māori. The claimants and interested parties, along with all Māori, would have the important

[43] ibid
[44] Ibid

opportunity to study the policy options, participate in consultation, and make their views known to the Crown through that mechanism.

55. If the Crown meets its projected timetable, the Tribunal's inquiry would resume at the end of February 2016.

56. Once a good faith consultation process has been conducted, and the feedback is available, then the Tribunal will proceed to hear the parties on the primary and subsidiary issues as outlined above in paragraphs 42-43 (the wording will likely require some slight adjustment). In essence, the Tribunal's hearing would focus on an adapted issue question:

    Which reform options need to be implemented and/or adjusted by the Crown in order to ensure that Māori rights and interests in specific water resources, as found by the Tribunal at Stage 1, are not limited to a greater extent than can be justified in terms of the Treaty?

    The claimants, Crown, and interested parties would be free to propose new or additional options, and the hearing process should ensure that the claimants and interested parties would not – as feared – be 'on the back foot'.

57. In the Tribunal's view, hearings with such a focus in 2016 will enable all parties' needs to be met. As sought by the claimants and some interested parties, hearings at that stage (shortly after the consultation in 2016 and before "final" Crown decisions) should enable the Crown's decisions to be informed by a Tribunal report on the Treaty compliance of the various options. At the same time, the Crown will have had time and scope to conduct its chosen policy development process in cooperation with iwi leaders, and will have consulted extensively (as Crown counsel indicated) with Māori and New Zealanders generally.

The Tribunal's decision to give the Wai 2358 inquiry 'priority'

58. After consideration of the parties' submissions, as to whether this inquiry is still an urgent inquiry, the Tribunal agrees with the Crown that there is no longer an imminent Crown action justifying a continued status of 'urgency' for the present inquiry. At the time the Tribunal granted urgency (to both stages of the inquiry), the Crown's decisions as to freshwater reforms were expected in 2012.[45] Clearly, while some reforms have progressed, the matters specific to the resolution of Māori rights and interests in water have been significantly delayed and policy development is still in its early stages.

59. Nonetheless, with consultation projected to finish in February 2016, Crown decisions may well be expected within 12 months (by mid-2016). In that case, and given the original grant of urgency and the great importance of these issues to Māori and the nation, and the prospect of significant and irreversible prejudice if Māori rights and interests are not given their due weight and protection, the Tribunal considers that this inquiry should remain one of priority. (A similar change from urgency to priority was made for the Wai 262 inquiry.)

60. This leaves the question of proposed Crown reforms for geothermal resources, and the recognition of Māori rights and interests in those resources, up in the air. When urgency was granted in March 2012, the Government's intention was to begin work on geothermal reforms towards the end of that year.[46] Crown counsel advised in oral submissions at the teleconference that 'there is no intention to reform or develop policy in relation to geothermal at present'. The issue of rights and interests in geothermal resources will therefore be raised with parties again when the inquiry resumes in February 2016, in order to determine how this matter should be progressed.

[45] Waitangi Tribunal, Decision on application for urgent hearing, 28 March 2012 (paper 2.5.13), pp 23, 24, 30
[46] Ibid, p 24

61. Stage 2 of the Wai 2358 inquiry will proceed to hearing and report on freshwater issues as swiftly as possible after February 2016, in light of the already significant time that has elapsed since the Tribunal's interim report on Stage 1 in August 2012.

62. In coming to this decision to maintain the priority of this inquiry, the Tribunal has been mindful of the Crown's assurances in the Supreme Court, which were raised by a number of parties. Crown counsel accepted at the teleconference that undertakings had been made, but pointed out that the Court did not expect any particular timeframe – in particular, necessarily, a fast one – for dealing with Māori proprietary claims in water.

63. In *New Zealand Māori Council v Attorney-General* [2013], the Court found:

> The changes in the social and legislative context since the *SOE case* was decided have already been described. They are reinforced by the explanations given by Ministers in the course of these proceedings and are further evolving under the initiatives to address freshwater more generally and the recognition of Māori interests specifically.
>
> The Waitangi Tribunal will, in due course, conclude its *Freshwater* inquiry and the Crown will be required to respond to its recommendations. It is, of course, uncertain what the ultimate outcome will be, but the trend since the *SOE case* should provide reassurance that Māori claims are not being ignored. Sustainable settlements need time to work out, as the Deputy Prime Minister has pointed out. This means that taking advantage of what the Waitangi Tribunal saw as a "here and now" opportunity for providing commercial redress under pressure of the present dispute [the sale of shares in SOEs without first settling Māori water claims] would be unlikely to produce a durable solution. This is not to say that the water claims should be parked. The Waitangi Tribunal has emphasised the need for urgency in addressing proprietary claims. It appears from the policy initiatives and from the assurances given in the litigation that the message that there is need for action on these claims has been accepted.[47]

64. There is a need to maintain priority for hearing and reporting on the Wai 2358 claim.

The claimants' 'alternative' application for an urgent fixture to make interim findings

65. If their request to proceed to Stage 2 hearings in 2015 were to be denied, the claimants sought an 'urgent half-day fixture to determine whether it is appropriate to make interim findings' about the Crown's proposed process (to work with the Iwi Leaders Group and develop policy options for consultation).

66. We do not consider that the urgent status of the Wai 2358 inquiry, even if it were not changed to one of priority, would automatically justify the diversion of Tribunal resources to inquire into the Crown's policy development process. None of the Stage 2 issues, either as originally proposed or as agreed in November 2013, concerned the process of how the Crown would develop reforms for Māori to consider.

67. In the Tribunal's view, if claimants thought it necessary, a fresh application for an urgent hearing could be made, setting out why such a fixture meets the Tribunal's criteria for urgency.

Next Steps

68. The Crown is directed to provide the updates that it has signalled in its application for adjournment. After the update on 30 November 2015, the Tribunal will schedule a teleconference to assess progress and consider the timetabling of hearings in 2016.

[47] *New Zealand Māori Council v Attorney-General* [2013] 3 NZLR 31 (SC), 81

69. Ms Ertel's application for a discovery order is adjourned in the meantime. The Tribunal expects that the Crown's regular updates will provide sufficient detail of the discussions, the options under consideration, and other material points. If not, the discovery application can be further considered.

70. The claimants are also directed to begin the preparation of whatever evidence they consider will be necessary for Stage 2 hearings. While this may not be the full programme as outlined in their memorandum of 26 May 2015, which ought not to be necessary, some of the proposed evidence will be essential for the evaluation of whichever policy options are put out for consultation in 2016.

The Registrar is directed to send a copy of this decision to counsel for the claimants, Crown counsel and all those on the distribution list for Wai 2358, the National Fresh Water and Geothermal Resources Inquiry.

DATED at Wellington this 10th day of June 2015

Chief Judge W W Isaac
Presiding Officer

Professor Pou Temara
Member

Mr Tim Castle
Member

Mr Ronald Crosby
Member

Dr Grant Phillipson
Member

Dr Robyn Anderson
Member

APPENDIX

Wai 2358: National Freshwater and Geothermal Resources Inquiry

2 June 2015 Teleconference

Counsel for interested parties in support of claimants

Counsel	*Submission #*	*Representing*
Kathy Ertel and Linda Thornton	#3.1.238 and #3.1.244	Vernon Winitana and others on behalf of Panekiri Tribal Trust Board, Ngāti Ruapani and the Ngāti Ruapani Lands Claim (Wai 144) Anaru Paine, Irene Williams, Sid Paine on behalf of Ngāi Tuhoe Potiki and Tumatawhero – Waikaremoana (Wai 795) Dr Rangimarie Turuki Rose Pere or Kuini Te Awa Beattie on behalf of Ngāti Rongo, Ngāti Hineaanga, Ngāti Hinekura, Te Whānau Pani, Ruapani-Tuhow and Pere Kaitiakitanga (Wai 1013) Nicky Kirikiri and another on behalf of the owners and beneficiaries of Te Heiotakoka 2B To Kopani 36 and 37 Trust (Wai 1033) Charles Aramoana and Sandra Jeanette Kari Kari Aramoana on behalf of themselves, Upokorehe hapū, Ngāti Raumoa and Roimata Marae Trust (Wai 1092) Hinehou Polly Leef, Mekita Te Whenua, Richard Wikotu, Rocky Ihe and Kahukore Baker on behalf of Whakatohea hapū, Rongopopoia ki Upokorehe and Rongopopoia Hapū (Wai 1787) Ani Taniwha on behalf of Ngāti Hine, Ngāti Kawau, Ngāti Kawhiti and Nga Uri o Te Pona (Wai 1666) Christine Wallis on behalf of the Wallis Whānau (Wai 1908) Julie Tamaia Taniwha for Nga Uri o Te Pona (Wai 2149) Justyne Te Tana on behalf of herself, Pera Tuporo, Henare Tuporo I, Henare Tuporo II, Wiremu Tuporo, Winiata Tuporo, Pera Tuporo, Taniwha Taipari, Talia Taniwha Taipari, Cogan Taniwha Tuporo Parslow, Anahere Tuporo Taniwha and Zavier Tuporo Taniwha Te Tana (Wai 2010) Te Rarua (Kui) McClutchie-Morrell on behalf of herself and the descendants of Uepohatu and the Ngāti Hau

		hapū whānau (Wai 2340) Rapata Kaa on behalf of hapū Ruawaipu (Wai 1272) Vivienne Taueki on behalf of herself, the descendants of Taueki and Muaupoko ki Horowhenua (Wai 1629) Ron Taueki on behalf of Muaupoko (Wai 237) Te Runanga o Ngāti Manawa Sharon Barcello-Gemmell, Harvey Ruru and Jane duFeu on behalf of Te Ati Awa Te Tau Ihu (Wai 1454) Merehora and Peter Pokai Taurua on behalf of Ngāti Rahiri, Ngāti Kawa, Ngāti Manu, Ngāti Rangi, Ngāti Rehia, Ngāti Kuri, Uneoneone me Parawhau hapū ki Nga Puhi (Wai 2244)
Annette Sykes	#3.1.240	Arapeta Hamilton on behalf of Ngāti Manu, Te Uri Karaka, Te Uri o Raewaera and Ngapuhi ki Taumarere (Wai 354) Muiora Barry, June McTanish, Barabara Marsh (dec), Lenny Turner (dec) and Tohe Raupatu (dec) (Wai 691 and 788) Ngāti Hinemanu me Ngāti Paki Heritage Trust (Wai 662, 1835 and 1868)
Janet Mason and Alice Shelton	#3.1.241	Haami Piripi on behalf of himself and the iwi of Te Rarawa (Wai 1699 and 1701) David Potter and Andre Patterson (Wai 996) Cletus Maanu Paul and Charles Muriwai White as members of Ngāi Moewhare (Wai 212) Fredrick Charles Allen on behalf of himself and members on behalf Te Atiawa (Wai 740) Michelle Marino and Errol Churton on behalf of themselves and the descendants of Taringa Kuri (Wai 377)
Darrell Naden and Creon Upton	#3.1.248	Evelyn Kereopa on behalf of Te Ihingarangi, hapū of Ngāti Maniapoto (Wai 762) Marama Waddell on behalf of herself, her whānau and her hapū, Te Whiu, Te Uri Taniwha and Nga Uri o Wiremu raua ko Maunga Tai (Wai 824) Morehu McDonald on behalf of Ngāti Hinerangi and the Ngāti Hinerangi Trust Board (Wai 1226) Te Enga Harris on behalf of Wiremu Hemi Harris, Meri Otene Whānau, Ngāti Rangi, Ngāti Here, Ngāti Tupoto, Ngāti Hohaitoko, Ngāti Kopuru, Te Rarawa and Ngāti Uenuku (Wai 1531) Robert Gable on behalf of the descendants of Ngāti Tara (Wai 1886) and Chappy Harrison on behalf of the Harihona Whānau and Ngāti Tara (Wai 2000)

	Reuben Taipari Mare Porter on behalf of himself, his whānau and members of Kaitangata, Nga Tahawai and Whānau Pani hapū (Wai 1968) Piriwhariki Tahapeehi on behalf of Ngāti Mahanga, Ngāti Tamaoho and Ngāti Apakura (Wai 1992)