

Te Ika Whenua - Energy Assets Report 1993

1 Introduction

1.2 Their Original Claim

On 11 June 1991, the chairman of Te Runanganui o Te Ika Whenua, Hohepa Joseph Waiti (White) and the secretary, Kingi Porima lodged a claim with the Waitangi Tribunal for lands and waterways. In it they alleged that the Crown had been remiss in protecting their rights of tino rangatiratanga under Article 2 of the Treaty by permitting the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority to erect the Aniwhenua and Wheao dams on the Rangitaiki and Wheao Rivers. respectively. These rivers, they claimed, belonged to their people. The dams had been constructed and water rights for power generation authorised without any consultation with them. The dams had deprived them of their kaiawa (eels), an important food for which they were "nationally renown" by blocking the migratory routes lot the eels to and from the sea. Their flora and fauna had been damaged by the construction of the dams and the failure by the Crown to recognise their ownership of the rivers had caused loss of revenue through lack of opportunity to partake in joint ventures(1.1).

In consequence, they asked that the Crown:

Recognise our ownership of these rivers.

Compensate Te Runanganui o te Ikawhenua for the loss of income due to non -protection under the Treaty of Waitangi.

Liaise with the two authorities above to build appropriate channels for our eels to migrate up and down the rivers.

Make appropriate mechanisms so that we shall share in the income of the future operations of the two dams.(1. 1:3)

The claim was duly registered by Tribunal direction of 18 June 1991 and assigned Wai number 212.(For a location map of the original claim, see [figure 1](#).)

Waitangi Tribunal, Department of Justice, Wellington.

Te Ika Whenua - Energy Assets Report 1993

1 Introduction

1.3 Request for Urgent Hearing

On 30 November 1992, Te Ika Whenua through its solicitor, filed with the Waitangi Tribunal a memorandum requesting urgency in respect of that part of the original claim relating to the Aniwhenua and Wheao dams(1. 1(a)). Urgency was requested because of the government's energy sector reforms as enacted in the Energy Companies Act 1992 (passed 25 June 1992) and its possible effect on these dams. Background information was provided and issues for consideration and determination were set out. A further memorandum dated 16 December 1992 providing additional information was subsequently filed by counsel for the claimants(1.1(c)).

Another memorandum, also dated 30 November 1992 (1. 1(b)), requesting urgency on a different part of the Te Ika Whenua claim which related to the Murupara Logging Head, was filed with the tribunal. That claim was not included in this hearing and forms no part of this report, although, for completeness of the record there are references to documents filed in support of that claim in the Record of Proceedings and the Record of Documents (see Appendix 4).

In the memorandum relative to the dams, Te Ika Whenua reiterated and affirmed the assertions made in the original statement of claim filed with the tribunal on 11 June 1991. Paragraphs 11.1, 11.2 and 11.3 of that memorandum set out the basis for the urgency request and the issues for the tribunal's urgent consideration and recommendations as follows:

Te Ikawhenua assert tino rangatiratanga over both the Wheao and Rangitaiki Rivers. The unauthorised use of waters of those rivers for power generation is a subject of a claim before the Waitangi Tribunal. Te Ikawhenua believe that the transfer of the assets (including the Aniwhenua and Wheao Dams) of the BOPE and RAEA to private companies and the contemplated vesting of shares in those companies to consumers will prejudicially affect Te Ikawhenua's claim before the Waitangi Tribunal and position generally.

[BOPE and RAEA are references to Bay of Plenty Electric Power Board and Rotorua Area Electricity Authority respectively]

Te Ikawhenua consider that the transfer of these assets to Energy Companies will prevent them from asserting their tino rangatiratanga over both rivers and be an affront to their mana and Kaitiaki role.

Te Ikawhenua therefore seek an urgent hearing before the Waitangi Tribunal so that the Tribunal may have the opportunity to consider and make recommendations to the Crown on the following issues:

- (a) Whether or not Te Ikawhenua have tino rangatiratanga over the Wheao and Rangitaiki Rivers including its bed and waters.
- (b) Whether or not the use of the waters or the river by the Crown for power generation is in accordance with the Treaty of Waitangi.
- (c) Whether or not the transfer pursuant to the Energy Companies Act 1992 of the Wheao and Aniwhenua Dams to energy companies and [sic] is in accordance with the Treaty.
- (d) Whether or not the Energy Companies Act 1992 is contrary to the Treaty of Waitangi in that it does [not] provide for mechanisms to protect Treaty claims or tino rangatiratanga of Maori over their taonga.
- (e) What protections should be put in place for the Maori interests before any further step[s] are taken.

Whether or not the transfer should be delayed, or the dams should be excluded from the transfer.(1. 1(a): 10, 11)

At page 2 of the supplementary memorandum dated 16 December 1992, Te Ika Whenua reaffirmed the position taken by them:

... the claimants consider that their concerns cannot be adequately addressed through the ownership of shares and the current Energy Companies Act regime. Section 36 of the Energy Companies Act specifies that the principal objective of any energy company shall be to operate as a successful business (section 36(1)). This raises the concern in the mind of the claimants that the holding of shares will not give them enough sway in the face of the principal objective stated above to address all of their grievances. For example, the relevant energy company may see the building of channels for eels to migrate up and down the rivers as not cost effective given their principal objective. Further, the claim of Te Ika Whenua relates to past losses because of the operation of the dams.

The transfer per se of the dams to a privately owned entity will restrict or negate the Crown's ability to use these dams in any settlement package which may be negotiated in the future by Te Ikawhenua upon the outcome of their claim.(1. 1(c):2)

What was understood to be the Crown's position, namely, that energy reforms had not directly affected or involved Maori claims which were seen as relating to the resources used to generate electricity, was discussed.

... these resources are involved because, among the assets operated by local power companies apparently being transferred are dams and/or the water rights associated with them.(1.1(c):3)

Ngati Manawa contended that the Crown's actions in the construction of the dams and use of the waters failed to protect and recognise their tino rangatiratanga over both rivers(1. 1(c):3).

Waitangi Tribunal, Department of Justice, Wellington.

Te Ika Whenua - Energy Assets Report 1993

1 Introduction

1.4 The Tribunal Response

The issues of urgency having been narrowed at a meeting of the chairperson, counsel and Crown in chambers 16 December 1992, the tribunal issued directions in response to the request for urgency 22 December 1992. Any tribunal urgently constituted to hear Te Ika Whenua's claim would consider only the matter of transfer of the Aniwhenua and Wheao dams contemplated under the Act. Ownership of or claims to the rivers, lands or other assets, as provided for in the original claim, would be considered at some later stage of the tribunal's inquiry(2.6).

At paragraph 4(a) of its memorandum giving directions, the chairperson stated:

The Tribunal is concerned:

(a) that a number of river claimants, and Waikato River claimants in particular, sought urgent hearings much earlier with regard to their river claims which included power generation assets, and were denied those hearings at the time. It was eventually agreed the Mohaka River claim should proceed as an inquiry on the question of river ownership. Issues involving generation assets and water abstraction arrangements were not involved. The Tribunal is concerned to provide the other river tribes with the opportunity to be heard on the Te Ika Whenua request for priority, such priority being based on the issue affecting the transfer of generation assets;(2.6).

The tribunal was also aware that negotiations between the New Zealand Maori Council, the National Maori Congress and the Crown were on foot and that a negotiated settlement on a national basis was a possibility. As well, there appeared to be a number of hapu with overlapping interests in the Rangitaiki catchment area.

Accordingly, the river tribes, the national Maori bodies and relevant local hapu were to be notified and called upon to provide a statement of their initial position on the possibility that urgency could be granted to Te Ika Whenua on the narrow basis outlined.

A conference was set by the tribunal to consider whether an agreed approach of the various Maori parties could be settled, for negotiation or hearing. The Maori parties were to meet in the morning and their representatives were to meet with the Crown at 2 p.m. on the same day to discuss the proposals which had been formulated(2.6).

The conference held on 18 January 1993 demonstrated overwhelming support of those Maori groups notified for Te Ika Whenua's urgent application on the narrow focus stated.

Letters of support were received from the Tainui Maori Trust Board, Whanganui River Maori Trust Board and Te Runanga o Ngati Apa(2.9,2.10,2.11)

Further support was voiced at the conference by representatives of Te Arawa Federation of Maori Authorities, the National Maori Congress, the New Zealand Maori Council, Titiraupenga Trust, Ngati Ranginui and Ngati Raukawa hapu, Ngati Tahu, Ngati Pahauwera, Ngati Kahungunu and Ngati Awa(2.12).

Representatives of the Crown, Electricorp, the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority joined the conference in the second session.

The Crown stated that it did not regard negotiation appropriate given that the Act was in force. Further, the Crown had heard the concerns, such as those expressed by Te Ika Whenua, before the legislation was enacted and there had been some iwi support for the proposed transfer of assets. Any urgent hearing of the matter should consider only whether the legislation had incorporated Treaty protection of Maori interests.

As a result of the matters raised and discussed at the conference, urgency was granted by tribunal direction dated 3 February 1993 and a hearing set down for 8-10 March 1993. The claimants were requested to file a reformulation of the issues upon which their claim was based in terms of the narrow focus identified at the conference(2.13).

Waitangi Tribunal, Department of Justice, Wellington.

Te Ika Whenua - Energy Assets Report 1993

1 Introduction

1.5 The Urgent Claim

The urgent claim as settled and agreed to was filed in a document dated 23 February 1993, the germane parts of which were:

- That the Act did not provide a mechanism to protect Te Ika Whenua's claim.
- That the Crown's failure to protect their interests is in breach of the Treaty of Waitangi and fiduciary duty of the Crown to the claimants.
- That the transfer of the Aniwhenua and Wheao dams would compound and aggravate the original breaches of the Treaty of Waitangi through the construction of the dams.
- That the policy behind and the provisions of the Act that would enable the transfer of the Aniwhenua and Wheao dams was a further breach of the Treaty of Waitangi.
- That Te Ika Whenua will be prejudiced by the transfer of the Aniwhenua and Wheao dams to privately owned legal entities(1.1(d)).

Te Ika Whenua reserved their rights in respect of their original claim, 11 June 1991.

Waitangi Tribunal, Department of Justice, Wellington.

Te Ika Whenua - Energy Assets Report 1993

1 Introduction

1.6 Waitangi Tribunal Hearing

The Te Ika Whenua urgent claim was heard in Rotorua 8-10 March 1993. The claimants were represented by Kathy Ertel. Peter Andrew appeared for the Crown.

The claimants' case lasted into the third day. During that time the tribunal heard counsel's submissions in support of the claim and received written and oral evidence from 19 members of hapu represented by Te Runanganui o Te Ika Whenua. In addition Dr Ivo Geoffrey Bertram presented evidence of an expert nature as to the establishment and operation of the Aniwhenua and Wheao hydro schemes and the effect of the Energy Companies Act 1992. Submissions in support of the Te Ika Whenua claim were received from the Whanganui River Maori Trust Board, the New Zealand Maori Council, Ngati Tahu, Ngai Tuhoe and Titiraupenga Trust.

Counsel for the Crown called no witnesses, contending that the matter before the tribunal was essentially a legal issue requiring legal argument. He was therefore content to rely on his submissions although he did produce some documentary evidence to support the Crown's claim of consultation with Maori.

Waitangi Tribunal, Department of Justice, Wellington.

Te Ika Whenua - Energy Assets Report 1993

1 Introduction

1.7 The Interim Report

The claim was given urgency because of the pending implementation by government of the establishment of and transfer of assets to energy companies under the provisions of the Energy Companies Act 1992. It was represented to the tribunal that the Minister of Energy might act at any time after 31 March 1993 so that if the tribunal was of a mind to make a recommendation it should do so as quickly as possible. Within that time frame it was just not possible to issue a full report so the tribunal issued an interim report and recommendation, a copy of which is annexed as Appendix 2.

{FNTXT:0-86472-117-X:1:1}1 We have adopted the spelling for Te Ika Whenua as used in the common seal.

Waitangi Tribunal, Department of Justice, Wellington.