

Te Ika Whenua - Energy Assets Report 1993

6 The Substantive Claim

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We must emphasise that we have not prejudged the substantive claim in any way. As commented earlier, this claim is not before us and remains to be determined by the tribunal at another date. We do however point to the tribunal decision on the Mohaka River Report (Wai 119) which involves a successful claim in respect of the Mohaka River. That the Mohaka claim was successful does not mean that the Te Ikawhenua claim must succeed. The determination of this claim can only be made on a full presentation of submissions and evidence to the tribunal.

It would seem important to the parties and particularly to the Crown that the substantive claim be heard as soon as possible. It may be, and we do not suggest that it should be, that after perusal of the Mohaka Report and investigation into the claim, the Crown might be prepared to concede that the claimants have tino rangatiratanga over the rivers. If this were the case, then it would appear that the substantive claim could be confined to the rather narrow issue between the claimants' rights of tino rangatiratanga against the Crown's claim of kawanatanga - right to govern and manage resources in the best interests of the people of New Zealand.

The substantive claim includes claims against the dams and associated water rights. It involves loss of developmental rights. The Crown submitted that it would be a substantial leap in logic to conclude that a proven claim to tino rangatiratanga over rivers would include a right to generating assets on the rivers. We are not in a position to comment on that submission which remains a matter for determination when the substantive claim is heard.

In hearing and considering this urgent claim, it is not surprising that there have arisen before this tribunal matters and questions which will need to be determined as part of the substantive claim. We draw attention to some of these in the hope that they may assist the parties in their further consideration of that claim. The questions which we postulate are not intended as an exhaustive list of issues to be determined in the substantive claim but are merely a few arguments which would seem to be relevant to those proceedings.

The legislation whereby control of water rights and power generation were reserved to the Crown could be said to be an attempt by government to regulate and control a valuable natural resource for the benefit of all New Zealanders. No doubt any claim that this was a breach of tino rangatiratanga would be met by the counter-claim that it was a just and lawful exercise of the Crown's right of kawanatanga under the Treaty.

If we accept as a premise (hypothetically, of course) that the claimants had tino rangatiratanga and that the Crown's legislation was a lawful exercise of its kawanatanga, the following questions might be asked:

- (i) Under the provisions of the Energy Companies Act 1992, the Crown seeks to dispose of assets originally acquired from its Treaty partner under the exercise of kawanatanga. Should it be required under the principles of the Treaty to consult with its Treaty partner over the further disposal of those assets and to take into account the factors surrounding their original acquisition and their intended use - not by government or by government agency but by companies whose primary objective is to operate as a successful business and presumably to make and distribute profits from those assets to shareholders?
- (ii) If the Crown acquired the water rights and permitted erection of the hydro schemes under reasonable exercise of kawanatanga, can it be said that the enactment of the Energy Companies Act to rearrange power distribution is a further reasonable exercise of kawanatanga?
- (iii) If the answer to (ii) is "yes", and the Crown is seeking to dispose of the power board assets on an equitable basis, should it also look at the claims of Te Ika Whenua in considering those equities?
- (iv) Evidence showed that the Crown had been a major financial contributor to the hydro schemes. Did that give the Crown the right to claim an equity in those assets and could that equity be retained and used to satisfy the claims of Te Ika Whenua?

Waitangi Tribunal, Department of Justice, Wellington.