

BEFORE THE WAITANGI TRIBUNAL

WAI 212

Concerning the Treaty of Waitangi Act 1975

AND

IN THE MATTER of an urgent claim by Te Runanganui o Te Ika Whenua relating to the effect of the Energy Companies Act 1992 on claims already lodged by it and yet to be heard by the Waitangi Tribunal concerning the Rangitaiki and Wheao rivers

TO:

The Minister of Maori Affairs
Parliament Buildings
WELLINGTON

AND TO:

The Minister of Energy
Parliament Buildings
WELLINGTON

INTERIM REPORT

THE CLAIM

This claim was heard as a matter of urgency by the Waitangi Tribunal sitting at Rotorua on the 8th to 10th March 1993. The claimants already have before the Tribunal and are waiting hearing on claims in respect of the ownership of the Rangitaiki and Wheao Rivers on which are situated the Aniwhenua and Wheao Dams. Part of the substance of their claim is that under Article 2 of the Treaty of Waitangi they were guaranteed full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they possess which would include these rivers and that these rights have been infringed. They point to the Electric Power Boards Act 1925 whereunder the Crown conferred upon itself the sole and exclusive right to use water for the generation of power and to the subsequent construction of the Wheao and Aniwhenua Dams. This they say was contrary to the provisions of the Treaty of Waitangi in that their ownership control and tino rangatiratanga over the rivers has been taken from them.

The previous paragraph is not intended as a full summary of the claimants' substantive claim. It is merely stated to give an illustration of what the claim is about and how it affects the present claim. The present claim as has been said concerns the impact of the Energy Companies Act 1992 upon the claimants' substantive claim. The hearing therefore focussed generally on that narrow issue although the claimants did bring evidence by way of background and explanatory material.

URGENCY

The present claim concerns the impact of the Energy Companies Act 1992 upon the claimants' substantive claim. The intention of that Act was as at the 1st April 1992 assets of Power Authorities would be transferred to energy companies formed under that Act. In the present claim the Wheao Dam and water rights attaching thereto currently owned by the Rotorua Area Electricity Authority would pass to the energy company created by it. The Aniwhenua Dam currently owned by the Bay of Plenty Electric Power Board and water rights attaching to it would pass to the energy company created by it pursuant to the Energy Companies Act. The claimants have claimed that these assets and the operation of them could be material in reaching a settlement with the Crown should their substantive claim be upheld and have sought recommendations to delay the transfer of these assets out of the control and direction of the Crown.

The Tribunal understands that there are some delays to the implementation of the proposals by the Minister of Energy under the Act due to legal challenges to some of the establishment plans that have been prepared. The Tribunal does appreciate however that this claim must be dealt with as expeditiously as possible.

In their presentation before the Tribunal the claimants produced evidence by Kaumatua and members of the local iwi as regards the significance and importance of the two rivers to them. The evidence showed that the rivers were of considerable ancestral, historical and spiritual significance to the members of the iwi. The importance of the river as a food source, particularly for eels which were noted for their type and flavour, and as a supply of water both for domestic and agricultural use was also emphasised. The evidence was presented as background evidence and was not regarded as material in the context of the narrow issue which was before the Tribunal. Quite properly it was not tested by the Crown by cross-examination or the bringing of any evidence to counter that which was presented. However from the Tribunal's point of view it does have one importance in that it appears to establish that the substantive claim is soundly based and cannot be regarded in any way as being frivolous or vexatious.

The evidence also aimed at illustrating the effect of the two dams upon the river. In the area of the Wheao Diversion the Rangitaiki was but a shadow of its former self with only a fraction of its water flow now present. Where the Aniwhenua Dam stands the rushing waters of the Rangitaiki were replaced by a dam and lake. The effect on

the eel population was said to be marked and whereas once they were plentiful now they are a rarity.

The substantive claim is not before us and this remains to be determined by the Tribunal at another date. The Tribunal decision on the *Mohaka River Report* (Wai 119) embodies a finding that Ngati Pahuwera were entitled to the bed of the Mohaka River. This does establish the possibility of a similar finding in the claims on the Rangitaiki and Wheao Rivers, subject of course to the claimants establishing their claim to the satisfaction of the Tribunal.

In the event of the substantive claim being successful, then the matters of the water rights for power generation and the two dams could be material in any settlement that may be proposed between the claimants and the Crown. If it is found that ownership, control and tino rangatiratanga have been denied to the claimants in breach of the principles of the Treaty of Waitangi, then we could envisage any settlement might involve payment for water rights, question of ownership of the dams, possible payment for electricity generated, reduced water use and construction of eel by-passes. The possibility of the claimants negotiating a settlement with the Crown in respect of these matters is only a possibility while these assets remain under control of the Crown.

INTERIM REPORT

Given that the hearing was not completed until 10 March 1993 it has simply not been possible to complete a full report by the 1st April 1993. The members are however agreed on their basic findings and recommendation. They therefore release these by way of interim report so that they are available to the claimants and other parties and the Minister as early as possible. The full report giving reasons for the determination of the Tribunal will be issued at a later date.

SUMMARY OF FINDINGS

The following is a brief summary of the Tribunal's findings:—

1. The claimants have lodged specific claims against the Rangitaiki and Wheao Rivers on the 11th of July 1991. These are recorded as Wai 212 and are referred to as the substantive claim. Those claims allege that the ownership and tino rangatiratanga of the claimants over those rivers has been infringed, inter alia, by the Crown reserving unto itself the sole and exclusive right to use water for the generation of power and to the subsequent construction of the Wheao and Aniwhenua Dams.
2. They further claim that this was contrary to the provisions of the Treaty of Waitangi in that their ownership, control and tino rangatiratanga over the rivers has been taken from them.
3. They further say that the impact of the dams upon the river flow and availability as a food source has been marked and that their mana is affected.

4. They say that they have lost developmental rights in respect of the rivers.
5. The substantive claim has yet to be heard but if it is successful then the dams, the water rights and their operation could play a material part in any settlement as between the Crown and the claimants.
6. The proposed transfer of those assets from the two authorities mentioned to energy companies created under the Energy Companies Act 1992 will remove those assets from the control and direction of the Crown to independent companies whose capital will be vested in various shareholders.
7. The claimants are likely to be prejudicially affected in the terms of Section 6(1) of the Treaty of Waitangi Act 1975 in that should their substantive claim be successful their ability to negotiate with the Crown over these assets will have been negated.
8. That under the Treaty of Waitangi the Crown has a fiduciary responsibility to act fairly with regard to its treaty partner. We find it inconsistent with the principles of the Treaty of Waitangi that these particular assets should be placed into third party ownership under the provisions of the Energy Companies Act 1992 while they are affected by claims. The Tribunal does not believe that the Crown should arrange for the disposal of these dams and water rights that are the subject of claims and thereby risk prejudice to the claimants' position.

COMMENT ON RECOMMENDATION

In their particulars of urgent claim the claimants seek the following relief:

- (a) A recommendation to the Crown that the Energy Companies Act be amended to incorporate a mechanism that protects the claim of the claimants to the Rangitaiki and Wheao Rivers their lands flora and fauna (including fisheries); and
- (b) That the Minister of Energy decline to approve the establishment Plans of Bay Power and the RAEA pending the incorporation of the protection mechanism; and
- (c) That consultation with the claimants take place to establish an agreed method of protection to be employed by the Crown; and
- (d) That no transfer of any assets take place until the consultations referred to in subparagraph (c) have concluded.

The Tribunal has considered these recommendations and does not believe it is appropriate that the recommendation from the Tribunal should be made in such specific terms. The Tribunal believes that the recommendation should be made that these assets should be protected and retained in their present ownership or alternatively in the hands of the Crown until such time as the substantive claim has been heard and determined. In the event of the Crown accepting and acting on such recommendation it then becomes a matter for the Crown as to how it should implement the recommendation.

We might observe that a simple way of preserving the status quo would be for the Minister not to approve the establishment plan of those authorities. On the other

hand it may be more desirable for the plans to be approved and for the assets to be protected by legislation. That we believe is a matter for the Crown.

We also observe that we do not rule out the question of consultation and negotiation as between the Crown and the claimants through their counsel as to an agreed satisfactory method of protection pending the hearing of the substantive claim.

THE SUBSTANTIVE CLAIM

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. Such a determination can only be made on the facts and evidence before 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 may be prepared to concede that the claimants have tino rangatiratanga of 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.

OTHER INTERESTED PARTIES

This urgent claim was brought on for hearing following negotiation and consultation between the claimants and other interested river tribes. It is understood that they had similar concerns as the claimants over the operation of the Energy Companies Act 1992 and that were the claim successful they would proceed to negotiate with the Crown over their claims.

Those claims are not part of this claim. However it would seem appropriate that if the Crown were to adopt the recommendation made by this Tribunal it takes similar steps to protect the assets which are subject of claim or proposed claims by other river tribes.

RECOMMENDATION

The Tribunal recommends that the Wheao and Aniwhenua Dams and water rights associated therewith be retained in the ownership of the Rotorua Area Electricity Authority and the Bay of Plenty Electric Power Board respectively or alternatively held in the ownership of or under the control and direction of the Crown until such

time as the substantive claim of Te Runganui o Te Ika Whenua has been heard and determined and a Tribunal report thereon issued and considered.

Dated this first day of April 1993

Signed for and on behalf of the Members of the Waitangi Tribunal, Judge G D Carter, Presiding Officer, M A Bennett, Member, and M Boyd, Member, by:

[Signed G D Carter]

Judge G D Carter
Presiding Officer