

Te Ika Whenua - Energy Assets Report 1993

7 Summary of Findings and Recommendations

7.1 Findings

This urgent claim is based upon the possible effect of the Energy Companies Act 1992 and its amendments upon the claimants' substantive claim against the Wheao and Rangitaiki rivers. This tribunal has found that the action of the Crown in arranging for disposal of dams and water rights affected by this claim to third parties under the above Act is inconsistent with the principles of the Treaty of Waitangi.

The present urgent claim has a very narrow focus and in consequence it is possible for this tribunal to set out in brief form a summary of the facts it has found established and its findings.

(i) The claimants have lodged specific claims against the Rangitaiki and Wheao rivers on 11 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 permitting the subsequent construction of the Wheao and Aniwhenua dams.

(ii) 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.

(iii) 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. In addition through a variety of causes the purity of the water has been affected.

(iv) They say that they have lost developmental rights in respect of the rivers.

(v) 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.

(vi) The proposed transfer of those assets from the two authorities mentioned to energy companies established in accordance with 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.

(vii) 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.

(viii) 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 think that the Crown should arrange for the disposal of these dams and water rights while they are the subject of claims and thereby prejudice the claimants' position.

Waitangi Tribunal, Department of Justice, Wellington.

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7.2 Relief Sought in Particulars of Urgent Claim

In their particulars of urgent claim the claimants sought 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.(1.1(c):14)

Waitangi Tribunal, Department of Justice, Wellington.

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7.3 Relief Sought in Claimants' Closing Submissions

In the claimants' closing submissions the recommendations were restated to some extent with perhaps greater emphasis on negotiation between Te Ika Whenua and the Crown as to a system for the protection of their substantive claim. Those submissions state:

The relief able to be sought by Te Ika Whenua in the circumstances of this urgent hearing prompted by the imminent transfer is necessarily limited.

What is sought is first a recommendation that the interests of Te Ika Whenua are to be protected from non Crown interests. What Te Ika Whenua seek, in the long term, will be the recognition of their tino rangatiratanga in the Rangitaiki and Wheao rivers.

This recognition, if the substantive claim is made out, may involve the vesting of the beds of the rivers in Te Ika Whenua or the relevant hapu, and a system of recognition which assures and gives effect to the authority of the tangata whenua in relation to the rivers as a whole i.e. waters and beds.

What is suggested is that the Tribunal recommend that the Crown negotiate with Te Ika Whenua to devise a system for the protection of their claim to te tino rangatiratanga over the Rangitaiki and Wheao rivers. This recommendation would also require the Tribunal to recommend that the transfer not take place until such a system had been agreed.

The Tribunal should reserve leave to the Crown or to Te Ika Whenua to return with their detailed proposals for a leave should agreement not be reached within six weeks.(A14:21)

Dr Bertram concluded his brief of evidence with a discussion of the possibility that the assets of electric supply authorities might be "unbundled" so as to deal separately with specific assets such as dams, power houses and the rights to use water.

Section 2 of the Energy Companies Act 1992, defining the undertakings to be transferred as including "all the assets" of existing undertakings, seemed to rule out the retention of specific assets. But the possibility clearly existed for blocks of shares

(corresponding to specific assets subject to Treaty or other claims) to be set aside or allocated to claimants provided this was acceptable to the Minister(A6:10).

Supply authorities could retain specific assets to be used to satisfy meritorious Treaty or other claims. Alternatively, the Crown could take over such assets or allocate shares to meet such claims(A6:11).

The latter option would reduce the value of remaining shares allocated to consumers and community trusts, however, given that the "share recipients have had no clearly-established claim to ownership prior to the establishment plan itself... [this]... would mean not an actual loss to them, but merely a smaller gain from their share allocation."(ibid)

Waitangi Tribunal, Department of Justice, Wellington.

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7.4 Recommendation

The tribunal has considered the various proposed recommendations and does not believe it should make its recommendation in such specific terms as are suggested.

The tribunal recommends:

That the assets in question, namely the Wheao and Aniwhenua power schemes and water rights attaching thereto, 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 be implemented. We observe that a simple way of preserving the status quo would be for the Minister not to approve the establishment plans of the Rotorua Area Electricity Authority and the Bay of Plenty Electric Power Board. 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.

It must be remembered that Te Ika Whenua do not seek to stop the transfer of interim use rights of the generation assets to energy companies. They see the vesting of the fee simple ownership as representing the main source of prejudice to them.(see above chapter 5, page 27)

DATED at Wellington this 20th day of May 1993

(Signatures)

Judge G Carter, presiding officer

M A Bennett, member

M B Boyd, member

Waitangi Tribunal, Department of Justice, Wellington.

