

Te Ika Whenua - Energy Assets Report 1993

Appendix 1 The Claim

MEMORANDUM TO WAITANGI TRIBUNAL REQUESTING URGENT HEARING OF WAI 212 ANIWHENUA AND WHEAO DAMS

1. Background Information - General

1.1 WAI 212 was received by the Waitangi Tribunal on 11 June 1991. The claimant is an incorporated Society, Te Runanganui o Te Ikawhenua (Called "Te Ikawhenua") representing the constituent hapu of Murupara. Paragraph (d) of the claim states that the Wheao and Rangitaiki Rivers are of significance to Te Ikawhenua. Paragraph (d) states:

"We claim that these rivers are of significance to Te Runanganui o Te Ikawhenua and that they belong to our people being part of the lands we now make claim for.

We believe that the Crown has been remiss in protecting our interests in respect of our rights to the Treaty of Waitangi Article II, by permitting the Rotorua Electric Authority and the Bay of Plenty Electric Power Board the erection of power generation stations on the Wheao and Rangitaiki Rivers respectively. At no time were we ever consulted by the Crown prior to the erection or since the erection, neither has [sic] the two authorities contacted us. Specifically our kaiawa (eels) for which we are nationally renowned have been deprived of their natural routes to reproductive channels, (they get minced in the turbines) as the migrate down to the sea AND neither can their offspring navigate up the Aniwhenua Dam.

Secondly, we have been seriously affected by the damage to our flora and fauna caused by the constructions which have taken place without our permission.

Thirdly, we have lost revenue ever since these dams have existed. We believe that if we had been recognised as the owners of these rivers, then we would have been in a position to develop joint ventures AND this [sic] be now enjoying the fruits of such ventures.

We therefore ask 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 mechanism so that we shall share in the income of the future operations of the two dams."

2. Background Information - Aniwhenua

2.1 Then Aniwhenua Dam is located on the Rangitaiki River. Attached marked "A" is a map depicting the dam site.

2.2 The dam, power house and canal that form the electricity generation unit known as the Aniwhenua Dam are on the banks and straddling the Rangitaiki River. The land tenure is a mixture of Crown land (Matahina Block ML47052 and Waiohau Block ML42063) and the Kaingaroa State Forest.

2.3 Currently the Bay of Plenty Electric Power Board ("BOPE") operates the Aniwhenua Dam. The BOPE is a Board established pursuant to the Electric Power Boards Act 1925.

3. Wheao Dam - Background Information

3.1 The Wheao Dam is located on the Wheao River. Attached marked "B" is a map depicting its location.

3.2 The section of the Wheao River upon which the dam is located is within the Kaingaroa State Forest and is subject to the Flaxy Creek Crown Forest Licence.

3.3 The Wheao Dam is currently operated by the Rotorua Area Electricity Authority ("RAEA"). The RAEA was constituted pursuant to an Order in Council made on 9 August 1971. The empowering legislation being the Electricity Distributing Commission Act 1967.

4. Energy Sector Reform

4.1 The Energy Companies Act 1992 is the culmination of the energy sector reforms undertaken by the Commission. The Crown has stated that:

"The basic aim of the reforms is to introduce competition and contestable ownership by establishing ordinary companies under the Companies Act preferably with fully tradeable shares." (Media release from office of the Minister of Energy dated Tuesday 30 June 1992.)

4.2 Each Power Board including the BOPE and the RAEA must, not later than 31 December 1992, prepare and submit to the Minister of Energy, (for the Minister's approval) an establishment plan relating to the transfer, inter alia, of its energy generating assets (which include the Aniwhenua and Wheao Dams) to an energy company (section 18 Energy Companies Act). An energy company is a company form [sic] pursuant to section 32 of the Energy Companies Act. The BOPE and RAEA must not later than 1 April 1993 (or such later date if the Minister may allow) form and register under the Companies Act 1955 a Public Company Limited by shares.

4.3 The principle objective of an energy company shall be to operate as a successful business (section 36(1)). Its secondary objective is contained in section 36(2) and is,

to have regard, among other things, to the desirability of ensuring the efficient use of energy.

4.4 The establishment plan submitted to the Minister must set out the recommendations as to the person or persons, or the class or classes of persons, to whom shares (voting rights) in the relevant energy company shall be allocated (section 22(1)).

5. Bay of Plenty Electricity Draft Establishment Plan

5.1 The BOPE draft establishment plan is dated 8 October 1992. It is proposed:

(a) That BOPE will form an energy company called.

(b) That energy generation assets, including Aniwhenua Dam, will be transferred at book value to the Bay of Plenty Electricity Ltd.

(c) That the authorised capital of the company will be 40 million shares each having a par value of \$1. The issued capital will be approximately 27.3 million \$1 shares. The shares will be split into 27 million class A rebatable shares and 300,000 class B ordinary shares. The balance of the shares will be retained as unissued capital for future expansion.

(d) The energy company will issue free of charge approximately 14 million class A shares (52% of the total) to residential customers on the basis of an equal number per connection address. This equates to approximately 800 shares per energy connection or domestic customer.

(e) The balance of 13 million class A shares (or 48% of the total) will be allocated free of charge to qualifying non-domestic customers.

(f) Class A shares will be rebatable. That means that a shareholder will receive an annual rebate on the electricity charge.

(g) 75,000 of the class B ordinary shares will be allocated free of charge to a shareholder's society. The balance of the class B ordinary shares will be available for purchase by the employees of the energy company.

(h) No single shareholder whether an individual or business will be allowed to hold more than 20% of the total number of allocated shares in any class.

(i) Generally, no class A shares will be tradeable within the first two years of allocation.

6. Rotorua Area Electricity Authority - Draft Establishment Plan

The RAEA is proposing to establish a joint energy company with the Tauranga Electric Power Board.

The proposal is as follows:

(a) RAEA and the Tauranga Electric Power Board will form an energy Company to be called Bay Energy.

(b) The energy generation assets, including the Wheao Dam, will be transferred at book value to Bay Energy.

(c) The company will have 100 million shares having a par value of 50 cents each and an asset backing of \$1.02 each.

(d) The company will allocate at no cost 74% of the capital to consumers on the basis of 1,000 shares per account holder.

(e) All consumers will be given the option of accepting shares or alternatively cash in lieu of shares.

(f) There will be two community trusts formed (one for the Rotorua area and one for the Tauranga area). 25% of the shares will be allocated to the community trusts (10% and 15% respectively). These community trusts will use their funds for energy related charitable and other community purposes.

(g) 1% of the shares will be allocated to an employee share purchase plan.

(h) 200,000 shares will be allocated to the share allocation or the committee which will be responsible for receiving and resolving complaints relating to the allocation of shares to account holders. No single shareholder shall be entitled to hold any more than 20% of the total shares unless a resolution of members passed by a majority of 60% of the votes cast is passed or the directors exercise their discretion to approve an increase in this percentage to 24.9%.

7. The Maori Interest

7.1 Te Ikawhenua claim tino rangatiratanga and other rights over both the Wheao and Rangatiratanga [sic] Rivers. These rights arise from the Treaty of Waitangi, customary and/or aboriginal title.

7.2 The construction and operation of these two dams have been and are undertaken without reference to or regard for Te Ikawhenua's rights and interests.

7.3 The use, diversion and polluting of the water of the Wheao and Rangitaiki Rivers by these dams is an affront to the mana and tino rangatiratanga of Te Ikawhenua.

7.4 The rights' obligations and interests of Te Ikawhenua in respect of these rivers have not been protected by the Crown.

8. Treaty of Waitangi Protection

8.1 The Energy Companies Act contains no reference to the Treaty of Waitangi or a scheme for protecting the assets which are going to be transferred to the energy companies formed [sic] pursuant to the Act. The privatisation of these public assets before the ownership and/or the claims of Te Ikawhenua have been settled is, it is submitted, contrary to the Treaty of Waitangi.

8.2 The Treaty of Waitangi places an obligation on the Crown to actively protect the Maori interest. It is submitted that the Energy Companies Act (particularly the contemplated transfer of assets to privately owned corporate entities) fails to meet the active protection requirement.

8.3 It is submitted that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other. The Energy Companies Act and the proposed transfer of these assets to a privately owned entity without protecting Te Ikawhenua's position is a breach of this fiduciary duty.

9. Timetable Summary - BOPE

9.1 Bay of Plenty electricity draft establishment plan: 8 October 1992.

9.2 Closing date for submissions on draft plan: Tuesday 10 November 1992.

9.3 Submission of draft plan to Minister for Approval: 31 December 1992.

9.4 Establishment of energy company and vesting of assets in energy company - six weeks after the date of the order in council but no later than 1 April 1993 (page 5 draft establishment BOPE).

10. Timetable Summary - RAEA

10.1 RAEA draft establishment plan - no date.

10.2 Submissions [sic] of draft establishment plan on or before 20 November 1992.

10.3 Submission to the Minister of draft [sic] establishment plan for approval 31 December 1992.

10.4 Formation and vesting of assets in energy company - not known from establishment plan, however, Energy Companies Act requires that energy companies incorporated on or before 1 April 1993. The vesting of assets is to take place on a date appointed by the Governor [sic] General by order in council (section 47 Energy Companies Act).

11. Urgent Hearing Required to Determine Certain Vital Issues

11.1 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.

11.2 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.

11.3 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 [sic] 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 [sic] are taken.

Whether or not the transfer should be delayed, or the dams should be excluded from the transfer.

Relief Sought

- (i) A recommendation to the Crown that the transfer of the dams should be delayed, or that the dams should be excluded from the transfer.
- (ii) The costs of bringing this claim.
- (iii) Compensation for loss arising from the unauthorised use of Iwi resources.

Dated at Wellington this 30th day of November 1992
Kathy Ertel

Counsel for Claimants

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Appendix 1 The Claim

MEMORANDUM FOR TRIBUNAL PROVIDING FURTHER INFORMATION IN RESPECT OF APPLICATION FOR URGENT HEARING

Te Ika Whenua

The Runanganui o Te Ikawhenua was formed pursuant to the Runanga-A-Iwi Act 1989. When this Act was repealed by the National government Te Ikawhenua became an incorporated society and continued with the same objects and aims as it had when it was being formed pursuant to the Runanga-A-Iwi Act. Attached as Schedule I is section 2 "Aims and Objectives" of Te Runanganui o Te Ikawhenua Incorporated.

Membership of Te Ikawhenua is open to all persons who claim descent from the following Iwi:

- Ngati Whare
- Ngati Manawa
- Ngati Patuheuheu
- Ngai Te Huinga Waka (section 3)(c)) Rules of Te Ikawhenua

While each Iwi has their own rohe and no other Iwi would contemplate speaking for another in a rohe matter the constituent Iwi are able to use the legal entity of Te Ikawhenua Incorporated to further their claims and dealings with the Crown so long as to do so would not harm or disadvantage another constituent to Iwi.

The neighbouring Iwi who are not members of Te Ikawhenua have been informed of the claim before the Waitangi Tribunal and this application for an urgent hearing. They are Te Arawa, Ngati Awa and Tuhoe. These neighbouring Iwi have no objection to the seeking of this urgent hearing.

Maori Congress Negotiations with the Crown

We understand that Congress have made submissions to the Crown seeking that the Crown transfer 20% of the shares in each Energy Company to a Trust until outstanding Treaty grievances in respect of the assets transferred can be resolved. Te Ikawhenua does not wish to prejudice these negotiations with the Crown, however, 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 Ikawhenua 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.

Crown's Conduct in Breach of Treaty

Ngati Manawa claim tino rangatiratanga over both rivers, the actions of the Crown in the construction of these Dams and use of the water fails to protect and recognise this tino rangatiratanga.

Proposed Solutions

It is understood that to date the Crown's position on energy reform is that the reforms have not directly affected or involved Maori claims - which are seen as relating to the resources used to generate electricity.

However, 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.

The claimants suggest that either of the following two methods could be employed to safeguard their interests:

1. That the transfer take place but only use rights are transferred to energy companies, the fee simple being retained in Crown ownership. A clawback provision in respect of the use rights could also be included in the transfer arrangements. This would enable the energy company to operate but also protect Te Ikawhenua because the fee simple ownership still vests with the Crown; or
2. The transfer of the fee simple take place but the title have a memorial on it in similar terms to section 27D of the State Owned Enterprises Amendment Act.

Dated at Wellington this 16th day of December 1992

Kathy Ertel

Counsel for Claimants

Waitangi Tribunal, Department of Justice, Wellington.

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Appendix 1 The Claim

PARTICULARS OF URGENT CLAIM

WHEREAS:

A. In 1840 the claimants had tino rangatiratanga over inter alia all the land, flora and fauna, (including fisheries), Rangitaiki River, Wheao River and other resources within their rohe (tribal area).

B. The claimants are the tangata whenua over portions of the Rangitaiki River {FNREF:0-86472-117-X:Appndx:2} and all of the Wheao River.

C. The claimants claim that the Wheao and Rangitaiki Rivers are their taonga and subject to their tino rangatiratanga. The exercise of tino rangatiratanga, for the purposes of this hearing, requires them to protect their rights pursuant to the Treaty of Waitangi.

D. The claimants claim that they have never relinquished their tino rangatiratanga over their taonga, the Rangitaiki and Wheao Rivers, guaranteed to them by the Treaty of Waitangi.

E. The Aniwhenua Dam is located on the Rangitaiki River over which tino rangatiratanga is claimed by the claimants. Currently the Bay of Plenty Electric Power Board ("Bay Power") operates the Aniwhenua Dam.

F. The Wheao Dam is located on the Wheao River over which tino rangatiratanga is claimed by the claimants. Currently the Rotorua Area Electricity Authority ("RAEA") operates the Wheao Dam.

G. The claimants claim that the authorisation, construction and operation of the Wheao and Aniwhenua Dams on the Rangitaiki and Wheao Rivers were and is in breach of the Treaty of Waitangi in that the construction and operation (which includes large scale water use) was unauthorised by them and represented a failure by the Crown to acknowledge, protect and give effect to their tino rangatiratanga over their taonga.

H. The claimants claim that the construction of the Wheao and Aniwhenua Dams contravenes their full exclusive and undisturbed possession of their fisheries in the rivers.

I. The claimants claim that the breaches of the Treaty of Waitangi alleged above have not been remedied.

J. Hohepa Joseph Waiti and Kingi Porima on behalf of themselves and on behalf of the constituent hapu of Ngati Manawa, Ngati Whare, Ngati Patuheuheu and Ngati Huinga Waka all represented by Te Runanganui o Te Ika Whenua ("the claimants") registered a claim with the Waitangi Tribunal (WAI 212) on 11 June 1991.

K. The Government developed policies affecting the claimants claim and their taonga.

L. Parliament enacted the Energy Companies Act 1992 ("the Act"). the Governor-General assented to the Act on 25 June 1992.

M. The Act compels the Bay Power and RAEA to prepare and submit to the Minister, for the Ministers approval, an establishment plan relating to the transfer of their "energy undertaking" to privately owned legal entities.

N. For the purposes of the Act the Aniwhenua Dam is part of the energy undertaking of the Bay Power and the Wheao Dam is part of the RAEA's energy undertaking.

O. Both Bay Power and RAEA's establishment plans contemplate the transfer of the relevant Dam to a Public Company whose shares will be owned in varying proportions by, consumers of electricity, a shareholders society, community trusts and/or employees.

P. The Act does not provide a mechanism to protect the claimants claim

Q. The claimants claim that the Crown's failure to protect their interests is in breach of the Treaty of Waitangi and the fiduciary duty of the Crown to the claimants.

R. The claimants claim that the transfer of the Aniwhenua and Wheao Dams will compound and aggravate the original breaches of the Treaty of Waitangi referred to in paragraphs G and H.

S. The claimants claim that the policy behind and the provisions of the Act that enable the transfer of the Dams is a further breach of the Treaty of Waitangi.

T. The claimants claim that they will be prejudiced by the transfer of the Aniwhenua and Wheao Dams to privately owned legal entities. {FNTXT:0-86472-117-X:Appndx:2}2 where, in this document, the term Rangitaiki River is used it means, for present purposes, the portion within the claimant's rohe

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Appendix 1 The Claim

URGENT CLAIM

9 Particulars

9.1 The claimants are or likely to be prejudicially effected by the following enactments, omissions, policies and practices of the Crown that are inconsistent with the principles of the Treaty of Waitangi. The enactments, omissions, policies and practices are:

(a) The omission of the Crown to institute and employ a process of consultation with the claimants when the Crown is purporting to develop policy or legislation or any other exercise of Article I powers that will impact upon the Article II guarantees made by the Crown to the claimants and affecting their claim before the Waitangi Tribunal; and

(b) The omission of the Crown to maintain the status quo in respect of the assets within the claimants rohe pending the hearing and settlement of their claims; and

(c) The omission of the Crown to include a mechanism in the Energy Companies Act 1992 or the policies it reflects that protect the claim of the claimants to the Rangitaiki and Wheao Rivers; and

(d) The omission of the Crown to include a mechanism in the Energy Companies Act and the policies it reflects to protect the actual and foreseeable Treaty claim of the claimants to the assets that it is contemplated will be transferred to Energy Companies via the Energy Companies Act 1992; and

(e) The threatened transfer of the Aniwhenua and Wheao Dams, (including lands, waters upon which the Dams are situated and the water rights which have been granted to enable the operation of these two Dams) to Energy Companies pursuant to the Act.

9.2 The said enactments, omissions, policies and practices will prejudicially affect the claimants by:

(a) Creating third party rights and interests which will prevent or inhibit the Crown in meeting its Treaty obligations.

(b) Further inhibiting this Tribunal in the recommendations it can practically make as to remedy following the substantive hearing.

(c) Inhibiting the claimants in pursuing their claims where rights have been created in other New Zealanders, and acted upon.

(d) further attacking the mana and rangatiratanga of the claimants before their claims are resolved.

10 Remedies

10.1 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; and

(e) Any other relief the Waitangi Tribunal deems fit.

Dated at Wellington this day of February 1993

Kathy Ertel

Counsel for Claimants

Waitangi Tribunal, Department of Justice, Wellington.