

IN THE WAITANGI TRIBUNAL

**Wai 2366
Wai 2364
Wai 2372
Wai 1699
Wai 1701**

IN THE MATTER OF

the Treaty of Waitangi Act
1975

AND

applications for an Urgent Inquiry into the Te Aupōuri, Te Rarawa and Ngai Takoto Deeds of Settlement by **VENERABLE TIMOTI FLAVELL** on behalf of himself and Te Rūnanga-ā-Iwi o Ngāti Kahu ("Ngāti Kahu")

AND

claims by **HAAMI PIRIPI** on behalf of himself and **TE RARAWA**

**TE RARAWA RESPONSE TO WAI 2366 AND WAI 2364 AND
WAI 2372 APPLICATIONS FOR URGENCY**

15 June 2012

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MAY IT PLEASE THE TRIBUNAL

1. This Memorandum is filed on behalf of Haami Piripi, Chairperson of Te Runanga o Te Rarawa ("Te Runanga"), and the Iwi of Te Rarawa ("Te Rarawa"). Mr. Piripi is also the claimant for Wai 1699 and Wai 1701.
2. On 30 May 2012, Ngati Kahu filed an application for an urgent hearing ("the Wai 2366 Application") into matters set out in the initialed Te Rarawa Deed of Settlement ("the Te Rarawa Deed").
3. This Memorandum is filed pursuant to the Memorandum Directions of the Tribunal dated 30 April 2012 and 7 June 2012.
4. Te Rarawa opposes the three applications for urgent hearings ("Ngāti Kahu Urgency Applications") filed pursuant to separate claims by the Venerable Timoti Flavell on behalf of himself and Ngati Kahu in relation to the settlements negotiated between Te Aupouri, Te Rarawa and Ngai Takoto respectively with the Crown ("the Te Hiku Settlements") as follows:

 - (a) The Deed of Settlement between the Crown and Te Rūnanga Nui o Te Aupōuri Trust ("Te Aupōuri") executed on 28 January 2012 ("Te Aupōuri Deed") (Wai 2364);
 - (b) The Deed of Settlement agreed between the Crown and Te Rūnanga o Te Rarawa and ratified by Te Rarawa ("Te Rarawa Deed") (Wai 2366); and
 - (c) The Deed of Settlement agreed between the Crown and Ngai Takoto and ratified by Ngai Takoto ("Ngai Takoto Deed") (Wai 2372).
5. Although filed as separate applications for urgency, many of the issues raised by Ngati Kahu are in relation to redress which is common to all of the Te Hiku Settlements ("the Common Redress"). Accordingly, Te Rarawa supports the submissions made in relation to the Common Redress that are set out in the Memorandum in Opposition filed today by Counsel for Te Aupōuri.

6. The submissions set out in this Memorandum:

- (a) address specific issues arising from the Wai 2366 Application; and
- (b) provide supplementary submissions in relation to the Common Redress.

EXECUTIVE SUMMARY

7. Te Rarawa opposes all three of the Ngāti Kahu Urgency Applications on the following basis:

- (a) there is no significant and irreversible prejudice to Ngāti Kahu arising from any of the issues identified in respect of the Te Hiku settlements; and
- (b) the Te Hiku settlements are the result of a long process that included Ngati Kahu and ought not to be tampered with because the prejudice to Te Aupouri, Te Rarawa and Ngati Takoto, if an urgent hearing is granted and settlement delayed further, will far outweigh any prejudice to Ngāti Kahu.

8. In particular, Te Rarawa opposes the Wai 2366 Application for the following reasons:

No Iwi Manawhenua

- (a) Ngati Kahu will not suffer any prejudice as it has no iwi manawhenua in the following properties:
 - (i) Aupouri State Forest Peninsula Block;
 - (ii) Hukatere site B;
 - (iii) Beach Site A;
 - (iv) Beach Site B;
 - (v) Beach Site C;
 - (vi) Kaitaia Nurses Home, Redan Road, Kaitaia;
 - (vii) Kaitaia- Awaroa Road, Kaitaia;
 - (viii) 227 Pukepoto Road, Kaitaia;

- (ix) Former Kaitaia Pound, Kaitaia- Awaroa Road, Kaitaia;
- (x) Off Gill Road, Kaitaia;
- (xi) Brass Road, Beach, Tangonge and Hospital Blocks;
- (xii) Dairy 1 and Dairy 2 South;
- (xiii) Dairy 2 North;
- (xiv) Sweetwater 20 hectare;
- (xv) Kaitaia Intermediate;
- (xvi) Kaitaia College;
- (xvii) Kaitaia Courthouse;
- (xviii) DSP Kaitaia College School House Site;
- (xix) Te Oneroa a Tohe Clark Road Site;
- (xx) Tangonge Site;
- (xxi) Lake Tangonge Site A;
- (xxii) Lake Tangonge Site B;
- (xxiii) Awanui River Site;
- (xxiv) Kaitaia Domain;
- (xxv) Beach Site D; and
- (xxvi) Te Oneroa-a-Tohe;

Customary Interests Not Amounting To Iwi Manawhenua

- (b) Ngati Kahu will not suffer any prejudice as it only has customary interests which do not amount to Iwi Manawhenua in the following properties:

- (i) Takahue Block;
- (ii) Corner Matthews Ave and Melba Street in Kaitaia;
- (iii) Former Metservice, Okahu Rd, Kaitaia;
- (iv) Kaitaia School;
- (v) 42 Church Road, Kaitaia; and
- (vi) Part Former Awanui (Kaitaia) Riverbed;

Fair Allocation of Redress Properties

- (c) Moreover, in those areas of Te Hiku which comprise the overlapping interests of Te Rarawa, Ngati Kahu, Ngai Takoto, the interests of all three Iwi have been properly considered and redress properties have been allocated in

a fair and just manner, taking into account all relevant information and having provided each iwi ample opportunity to comment. As a result of this process, adequate Redress Properties have been set aside for Ngati Kahu for when they are ready to enter into settlement negotiations with the Crown.

BACKGROUND

- 9.** In March 2002, the Crown recognised the mandate of Te Runanga to negotiate Te Rarawa's entire historical Te Tiriti o Waitangi/Treaty of Waitangi ("Te Tiriti/Treaty") claims. In December 2002 the Crown and Te Rarawa signed Terms of Negotiation.¹
- 10.** After more than five years of negotiations, an Agreement in Principle ("AIP") was finally signed between Te Rarawa and the Crown at Waipuna Marae in Panguru in September 2007.²
- 11.** Progress towards a Deed of Settlement was difficult with all neighbouring Iwi being at different stages in the process. In June 2008 all five Te Hiku Iwi, namely Ngati Kuri, Ngati Kahu, Te Aupouri, Ngai Takoto and Te Rarawa ("the Te Hiku Iwi"), were involved in the establishment of the Te Hui Tōpu o Te Hiku o Te Ika Forum ("the Forum") to progress shared and overlapping interests. Each Iwi appointed three negotiators to represent them on the Forum. The scope of the collective negotiations between the Forum and the Crown included settlement quantum and the return of the lands and properties held by the Crown in the Te Hiku area of interest and culminated in the signing of an AIP on 16 January 2010. Each Iwi continued to have their own separate negotiations in relation to their cultural redress.³
- 12.** While Te Rarawa is an active participant in the Forum, which has been negotiating a holistic regional settlement to settle the

¹ Clause 1.47 of Te Rarawa Deed.

² Clause 1.48 of Te Rarawa Deed.

³ Clause 1.49 of Te Rarawa Deed.

overlapping claims of Te Hiku Iwi, Te Rarawa – as with the other Te Hiku Iwi – continued to negotiate the individual aspects of their historical claims.

- 13.** In February 2010, Ngati Kahu stopped participating in the Forum because Ngati Kahu wished to focus on drafting its own individual Deed of Settlement.
- 14.** On 3 November 2011, a Deed of Settlement to settle Te Rarawa's Te Tiriti/Treaty claims was initiated by Te Rarawa and the Crown.
- 15.** An application for an urgent hearing was filed by Ngati Kahu on 1 May 2012.
- 16.** Te Tiriti/Treaty breaches are alleged as a result of alleged prejudice caused to Ngati Kahu due to the following redress items contained in the Te Rarawa Deed:
 - (a) *Forests:*** Aupouri State Forest Peninsula Block; Takahue Block; and Emissions Trading Scheme New Zealand Units;
 - (b) *Cultural Forest Land Properties:*** Hukatere Site B; Beach Site A; Beach Site B; and Beach Site C;
 - (c) *Farms:*** Brass Road, Beach, Tangonge and Hospital Blocks; Dairy 1 and Dairy 2 South; Dairy 2 North; Sweetwater 20 hectare;
 - (d) *Other Commercial Redress Properties:*** Corner Matthews Ave and Melba Street in Kaitaia; Kaitaia Nurses Home, Redan Road, Kaitaia; Kaitaia- Awaroa Road, Kaitaia; Former Metservice, Okahu Rd, Kaitaia; 227 Pukepoto Road, Kaitaia; Former Kaitaia Pound, Kaitaia- Awaroa Road, Kaitaia; Off Gill Road, Kaitaia;
 - (e) *Deferred Selection Properties:*** Kaitaia Intermediate; Kaitaia School; Kaitaia College; 42 Church Road, Kaitaia; Kaitaia Courthouse; and DSP Kaitaia College School House Site;
 - (f) *Right of First Refusal Land;***
 - (g) *Cultural Redress Properties:*** Part Former Awanui (Kaitaia) Riverbed; Te Oneroa a Tohe Clark Road Site;

Tangonge Site; Lake Tangonge Site A; Lake Tangonge Site B; Awanui River Site; Kaitaia Domain; Beach Site D;

- (h) ***Te Oneroa-a-Tohe;***
- (i) ***Korowai Atawhai Mo Te Taiao;***
- (j) ***Removal of Resumptive Memorials.***

APPLICABLE LAW

- 17.** In relation to both Urgency Applications, the following sections of the Treaty of Waitangi Act 1975 ("the TOW Act") are relevant:

5 Functions of Tribunal

- (1) The functions of the Tribunal shall be–
 - (a) to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6...;
 - (ab) to make any recommendation or determination that the Tribunal is required or empowered to make under Schedule 1 to the Crown Forest Assets Act 1989;...

6 Jurisdiction of Tribunal to consider claims

- (1) Where any Maori claims that he or she, or any group of Maoris in which he or she is a member, is or is likely to be prejudicially affected– ...
- (d) by any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,–

and that ... the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

- (2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—
- (a) the claim is submitted contrary to section 6AA(1); or
- (b) section 7 applies.
- (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.
- (4) A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

...

7 Tribunal may refuse to inquire into claim

- (1) The Tribunal may in its discretion decide not to inquire into, or, as the case may require, not to inquire further into, any claim made under section 6 of this Act if in the opinion of the Tribunal—
- (a) the subject-matter of the claim is trivial; or
- (b) the claim is frivolous or vexatious or is not made in good faith; or
- (c) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to the Ombudsman, which it would be reasonable for the person alleged to be aggrieved to exercise.

- (1A) The Tribunal may, from time to time, for sufficient reason, defer, for such period or periods as it thinks fit, its inquiry into any claim made under section 6 of this Act.
- (2) In any case where the Tribunal decides not to inquire into or further inquire into a claim or to defer its inquiry into any claim, it shall cause the claimant to be informed of that decision, and shall state its reasons therefore.

Practice Note

- 18.** In relation to urgent inquiries, the Waitangi Tribunal Practice Note ("the Practice Note") states that claimants or the Crown may apply to the Tribunal for an urgent inquiry and report into a claim or a group of claims, or into an aspect of a claim or a group of claims. The Tribunal will grant urgency only in exceptional cases and only once it is satisfied that adequate grounds for according priority have been made out.⁴
- 19.** The Practice Note further states that, in deciding an application for urgency, the Tribunal has regard to a number of factors ("the Urgency Criteria"). Of particular importance is whether:
 - (a)** the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
 - (b)** there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
 - (c)** the claimants can demonstrate that they are ready to proceed urgently to a hearing.⁵
- 20.** Other factors that the Tribunal may consider include whether:

⁴ *Guide to the Practice and Procedure of the Waitangi Tribunal* (August 2009), para 2.5.

⁵ Ibid, para 2.5(1).

- (a) the claim or claims challenge an important current or pending Crown action or policy;
- (b) an injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- (c) any other grounds justifying urgency have been made out.⁶

21. The factors set out in the Waitangi Tribunal’s Practice Note must now be read in light of the Supreme Court’s recent decision in *Haronga v Waitangi Tribunal*⁷.

DOES THE WAI 2366 URGENCY APPLICATION MEET THE TRIBUNAL’S URGENCY CRITERIA?

- 22.** Te Rarawa respectfully submits that the Wai 2366 Application does not meet the Tribunal’s urgency criteria because Ngati Kahu cannot demonstrate that it is suffering significant and irreversible prejudice as a result of the Te Rarawa Deed.
- 23.** Moreover, as significant and irreversible prejudice cannot be demonstrated, there is no need to enquire into the remaining criteria set out in the Practice Note.
- 24.** Paragraphs 25 to 36 of this Memorandum sets out Te Rarawa’s responses to the alleged prejudice identified in the Wai 2366 Application.

Submission One: No Manawhenua In Certain Properties

- 25.** Te Rarawa submits that Ngati Kahu will not suffer any prejudice as it has no manawhenua in the following properties (“the Non Ngati Kahu Properties”):

⁶ Ibid.

⁷ *Haronga v Waitangi Tribunal* [2011] NZSC 53.

- (a) Aupouri State Forest Peninsula Block;
- (b) Hukatere Site B;
- (c) Beach Site A;
- (d) Beach Site B;
- (e) Beach Site C;
- (f) Kaitaia Nurses Home, Redan Road, Kaitaia;
- (g) Kaitaia- Awaroa Road, Kaitaia;
- (h) 227 Pukepoto Road, Kaitaia;
- (i) Former Kaitaia Pound, Kaitaia- Awaroa Road, Kaitaia;
- (j) Off Gill Road, Kaitaia;
- (k) Brass Road, Beach, Tangonge and Hospital Blocks;
- (l) Dairy 1 and Dairy 2 South;
- (m) Dairy 2 North;
- (n) Sweetwater 20 hectare;
- (o) Kaitaia Intermediate;
- (p) Kaitaia College;
- (q) Kaitaia Courthouse;
- (r) DSP Kaitaia College School House Site;
- (s) Te Oneroa a Tohe Clark Road Site;
- (t) Tangonge Site;
- (u) Lake Tangonge Site A;
- (v) Lake Tangonge Site B;
- (w) Awanui River Site;
- (x) Kaitaia Domain;
- (y) Beach Site D; and
- (z) Te Oneroa-a-Tohe.

26. The attached Affidavit of Mr. Haami Piripi sets out a detailed account of the basis for which Te Rarawa disputes completely that Ngati Kahu has any manawhenua in the Non Ngati Kahu Properties.

Submission Two: Customary Interests Not Amounting To Iwi Manawhenua

27. Te Rarawa submits that Ngati Kahu will not suffer any prejudice as it only has customary interests which do not amount to Iwi Manawhenua in the following properties ("the Te Rarawa Overlapping Interest Properties"):

- (a) Takahue Block;
- (b) Corner Matthews Ave and Melba Street in Kaitaia;
- (c) Former Metservice, Okahu Rd, Kaitaia;
- (d) Kaitaia School;
- (e) 42 Church Road, Kaitaia; and
- (f) Part Former Awanui (Kaitaia) Riverbed.

28. Te Rarawa respectfully submits that Ngati Kahu does not have iwi manawhenua over the Te Rarawa Overlapping Interest Properties. There may be individual Ngati Kahu hapu or whanau interests in the vicinity of these properties but not iwi manawhenua. Counsel refers to the evidence on this point contained in the Affidavit of Mr. Haami Piripi.

Submission Three: Fair Allocation of Redress Properties

29. In those areas of Te Hiku which comprise the overlapping interests of Te Rarawa, Ngati Kahu and Ngai Takoto, the interests of all three Iwi have been properly considered. Redress properties have been allocated on this basis.

30. The allocation of the Te Rarawa Overlapping Interest Properties was undertaken as part of a process which involved the relevant Te Hiku Iwi and the Crown and which was fair, open and transparent, as more particularly described below.

31. Ngati Kahu alleges that there has been a failure by the Crown to engage properly and meaningfully. As such, the action is not against Te Rarawa, although, if the Wai 2366 Application is granted, there will be substantial prejudicial effects on Te Rarawa.

- 32.** Counsel submits that these allegations are without substance. Ample opportunity was given to Ngati Kahu to be engaged in relation to the process. For instance, in the Agreement in Principle dated 16th January 2010, between the Crown and Ngati Kuri, Te Aupouri, Ngai Takoto, Ngati Kahu and Te Rarawa ("the Te Hiku AIP"), Ngati Kahu agreed to the allocation of the Sweetwater Farms to Te Rarawa and Ngai Takoto (see clause 6.6 of the Te Hiku AIP). They are therefore estopped at this late stage from saying that they are prejudiced by the proposed transfer of the Sweetwater Farms to Te Rarawa and Ngai Takoto in the Te Rarawa Deed.
- 33.** Notwithstanding the extent of consultation undertaken, Te Rarawa submits that rights of engagement and consultation do not amount to a right of veto.
- 34.** The level of engagement between Te Rarawa, Ngai Takoto and Ngati Kahu is, in the circumstances and taking into account the consultation also undertaken by the Crown, more than adequate.
- 35.** Consequently, Counsel respectfully submits that the Tribunal, taking into account the consultation undertaken by the Crown, Te Rarawa, Ngai Takoto and the Te Hiku Iwi collectively, ought to reject submissions to find that there were any procedural improprieties.
- 36.** Moreover, sufficient properties have been reserved by the Crown to offer Ngati Kahu when it is ready to settle. The ability of the Crown remains to provide an equitable settlement to Ngati Kahu in the future, when they are at the point of settlement. Ngati Kahu is therefore not prejudiced.

PREJUDICE TO TE RARAWA

37. Te Rarawa respectfully submits that there will be prejudice to Te Rarawa if urgent inquiries in relation to Wai 2366, Wai 2364 and Wai 2372 are to proceed. In particular:

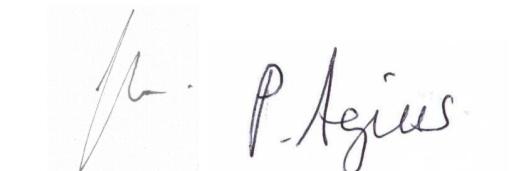
- (a) An urgent inquiry into these claims is likely to halt the Te Rarawa settlement for an indefinite period – such measures need to be considered against the overall prejudice that might be suffered.
- (b) An urgent inquiry is likely to have significant prejudicial financial effects, including postponing the receipt of substantive commercial assets, resulting in commercial losses and opportunity costs.

38. Te Rarawa submit that they have for over 10 years now been in negotiations with the Crown, and at different times, involving each of the Te Hiku Iwi. These negotiations have occurred in the context of the interested Te Hiku Iwi trying to work out a fair allocation of the available redress amongst themselves. On those occasions when this was not able to be done, the Crown initiated a process of calling for submissions from each Te Hiku Iwi and then considering all of these submissions before making a decision. Te Rarawa did not entirely like all of those decisions, but accepted that they had had their opportunity to participate and a decision needed to be made and that there had to be a pragmatic solution found or else all of the Te Hiku Iwi would be prejudiced.

39. Ngati Kahu has recently walked away from the negotiations process and its attendant allocation process in favour of a Remedies Hearing in the Tribunal. Te Rarawa accepts Ngati Kahu's right to choose what level of redress is acceptable to it and the means by which it will pursue redress. What Te Rarawa does not accept however, are the prejudicial effects and consequences of those actions on Te Rarawa's settlement.

- 40.** Te Hiku Iwi have necessarily now been dragged into that Remedies Hearing, in particular in relation to the Resumable Properties.
- 41.** Te Rarawa respectfully submits that the very fact that the Remedies Hearing is proceeding is sufficient to protect Ngati Kahu's interests. There is no need for the Te Hiku Settlements to be held up via urgent enquiries and in fact such a course of action would severally prejudice the Te Hiku Iwi who have chosen to settle.

Dated 15 June 2012



Janet Mason/Priscilla Agius
Counsel for the Claimant