

BEFORE THE WAITANGI TRIBUNAL
TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI

WAI 1040
WAI 53

IN THE MATTER OF section 6 of the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the Te Paparahi o Te Raki Inquiry - Wai 1040

AND

IN THE MATTER OF a claim by Renata Tane on behalf of the
Pārahirahi C1 Trust and Ngā Hapū o Ngāwhā

OPENING SUBMISSIONS ON BEHALF OF WAI 53
Dated 4 November 2015

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LEGAL

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MAY IT PLEASE THE TRIBUNAL

Introduction

1. These opening submissions are filed on behalf of the trustees of Pārahirahi C1 (Ngāwhā Springs) Māori Reservation Trust ("**the Trust**") in relation to the Wai 53 claim.
2. The Trust acknowledges the extensive evidence and submissions already filed in this Inquiry on behalf of the hapū and claimants within the Waimate Taiamai ki Kaikohe Taiwhenua. The Trust does not seek to replicate this material in these submissions.
3. The purpose of these submissions therefore is to briefly introduce the Trust, the Wai 53 claim and claim issues, and to provide a framework for the claim issues raised by the evidence to be presented on the Trust's behalf.

Background

4. The Wai 53 claim was originally filed in 1989 on behalf of the Trust and Ngā Hapū o Ngāwhā by Mr Wiremu Tairua, a former chairperson of the Trust.
5. In its amended form, it was brought by the trustees of Pārahirahi C1 Māori Reservation Trust for those whānau and hapū with an interest in the Ngāwhā geothermal resource. More specifically it was brought for and on behalf of some ten hapū of the Ngāpuhi iwi. These hapū are Ngāti Hine, Te Hikutu, Te Uri Taniwha, Te Māhurehure, Te Uriohua, Ngāti Rehia, Ngai Tawake, Ngāti Hau, Ngāti Rangī and Ngāti Tautahi
6. Some, although not all, aspects of the Wai 53 claim, together certain other related claims, were initially heard and reported on under urgency by the Waitangi Tribunal in the *Ngāwhā Geothermal Resource Report 1993* ("**Ngāwhā Report**").



7. Wai 53 was consolidated in the list of claims to be heard in the Te Paparahi o Te Raki Inquiry in 2011.¹
8. By memorandum dated 21 December 2012 the Trust amended the Wai 53 claim by adding the then-chairperson of the Trust, Mr Renata Tane, as the named claimant for Wai 53 (Wai 53, doc. #1.1(a)). This amendment was confirmed by memorandum-directions of the Deputy Chairperson dated 21 May 2013 (Wai 53, doc. #2.4).

Pārahirahi C1 Trust

9. The Trust is the owner of the Pārahirahi C1 block, a one-acre area of land which contains part of the Ngāwhā Springs. The beneficiaries of the Trust are the descendants of the 11 original owners of the Pārahirahi C1 block.
10. The Trust is kaitiaki of the Ngāwhā Springs, and the significance of this role will be explained further in the Trust's evidence. This role has included continued active participation in Resource Management Act 1991 processes, including resource consent processes.

Claim Issues

11. The Wai 53 claim is concerned with the recognition of rangatiratanga, mana and kaitiakitanga of the Trust and hapū over ancestral resources and taonga which the Crown has either acquired or assumed control of in breach of te Tiriti o Waitangi. These lands and resources include the original 5,097 acre Pārahirahi block, the springs at Ngāwhā and the underlying geothermal resource in the Ngāwhā geothermal field, which is an area of some 25 to 50 square kilometres.²
12. As Mr Tane will describe, the Ngāwhā springs sit roughly in the centre of the east and west coast of Te Tai Tokerau, both in a genealogical and geographic sense.

¹ Wai 1040, #2.5.87, Appendix 1.

² A map of this area is included in Mr Paratene Tane's evidence (Wai 1040, #T3).

13. Crucially however, despite its focus on the Ngāwhā area, the Wai 53 claim must be considered in the context of the Crown's interaction with ngā hapū o Ngāpuhi throughout the 19th century, and especially in light of the Tribunal's recent Stage One finding that the rangatira who signed Te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain.³ This context is essential to understanding the primary "pou" of this claim, which is that ngā hapū o Ngāwhā have never ceded their rangatiratanga in respect of their lands and resources.

Evidence

14. Over and above the matters reported on by the Tribunal in its 1993 *Ngāwhā Report*, the Trust's evidence will focus on three areas of Crown action or omission:

- (a) the Crown's failure to honour its guarantee of tino rangatiratanga in respect of the lands and resources of ngā hapū o Ngāwhā, including its failure to:
 - (i) appropriately recognise and provide for the rangatiratanga, mana and kaitiakitanga of the hapū;
 - (ii) provide for collective interests in the land tenure system it introduced;
 - (iii) provide appropriately for hapū rights and roles in respect of the geothermal resource;
 - (iv) ensure that Crown actions were consistent with the terms and principles of the Treaty;
 - (v) ensure that the hapū retained sufficient lands and resources for their own sustenance, prosperity and development.

³ Stage One Report, Wai 1040, part 10.5.

- (b) the Crown's large scale acquisition of almost all of the original 5,097 acre Pārahirahi block in breach of the principles of the Treaty of Waitangi, including through:
 - (i) its undermining of hapū interests through the purchase of undivided share interests;
 - (ii) reliance on a deed of sale in 1894 which was, by all accounts, shonky and a "legal nullity"⁴, and excessive public works takings in the 20th century;
 - (iii) large acquisitions of land through public works legislation, such as an area of 134 acres for "scientific and industrial research purposes" as recently as 1981;
- (c) the prejudicial effects of the Crown's inaction in respect of the recommendations contained in the *Ngāwhā Report* in 1993, including the return of the four-acre Pārahirahi C block and the inadequacies of the Resource Management Act 1991, which continues to fail to fully recognise the kaitiakitanga of the Trust and the hapū.

15. The following witnesses will present evidence on behalf of the Trust and the Wai 53 claim:

- (a) Nicole Butler (#T14 and #T14(a)); and
- (b) Paratene Hirini Tane (#T3).

16. Ms Butler's evidence will address all three of the Trust's major claim issues. She will outline the Trust's position on the alienation of the Pārahirahi lands, and then focus on the Crown's failure to address the recommendations of the Tribunal in 1993. In particular, her evidence will discuss how the four acres that is a recreation reserve remains in Crown ownership, despite the Trust's efforts, and that the Trust continues to be marginalised during Resource Management Act 1991 processes.

⁴ See Ngāwhā Geothermal Resources Report, Waitangi Tribunal 1993, p.62.



17. Mr Tane's evidence will examine the alienation of the Pārahirahi lands and the impact of this alienation on claims in respect of the geothermal resources of Ngāwhā. His evidence is that the contemporary position must be examined in light of the Crown's untoward conduct in acquiring the bulk of the Pārahirahi lands in 1894, as well as later acquisitions such as those undertaken pursuant to public works legislation.
18. Both witnesses for the Trust will address the critical interplay between rangatiratanga, mana and kaitiakitanga, and the Crown's failure to appropriately provide for the same, whether through its land tenure system or through its natural resource management regimes.

Ngāwhā Geothermal Resources Report (1993)

19. Ms Butler's evidence will describe how the *Ngāwhā Geothermal Resources* claim was heard under urgency in 1993. At the time of the urgent hearing in 1993, the claimants were concerned that resource consents were being sought under the Resource Management Act 1991 to exploit the Ngāwhā geothermal resource for the purpose of electricity generation. The claimants were opposed to such a development and the Tribunal at that time agreed to the request for an urgent hearing.
20. At the hearing, the claimants argued that the original acquisition of the entire Pārahirahi block and the hot springs situated on the four acres of Pārahirahi C by the Crown were in breach of the principles of the Treaty of Waitangi. The claimants told the Tribunal that the Ngāwhā geothermal resource is a taonga and rejected the notion that the resource was in some way severable or divisible.

Summary of Findings and Recommendations

21. In the resulting *Ngāwhā Report*, the Waitangi Tribunal made a number of findings and recommendations, a summary of which is **attached** as **Appendix A**.

22. Significantly for the Wai 53 claimants, the Tribunal's findings and recommendations did not address one of the primary Wai 53 claim issues: the manner in which the original 5,097 acre Pārahirahi block was acquired by the Crown. This is an essential component of the Wai 53 claim which remains to be addressed in this Inquiry.

Jurisdiction and Scope – Ngāwhā Geothermal Resource Issues

23. Counsel understands that the Crown has raised the issue of jurisdiction and how the Tribunal proposes to deal with Ngāwhā geothermal issues in this Inquiry, in light of the 1993 *Ngāwhā Report*.⁵ Due to the significance of this issue Counsel will liaise with other claimant counsel within the Waimate ki Taiamai Taiwhenua to provide joint submissions on this issue.
24. For present purposes, it is enough to note that the Trust considers that this Inquiry provides the only opportunity for the Tribunal to consider the Crown's assumption of control of the Ngāwhā geothermal resource in its essential context, which is the enduring opposition of the hapū of Ngāwhā to Crown assumptions of control of land and resources, from 1840 to the present day. This is addressed in detail in the Trust's evidence.

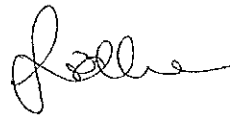
Conclusion

25. The Trust does not propose at this stage to make lengthy submissions on matters which are best addressed through closing submissions, once all relevant evidence has been produced in this Inquiry. However, the following remarks are appropriate at this early stage.
26. The Crown's commitment and undertaking to ngā hapū o Ngāwhā appears in Te Tiriti. By it, the Crown, guaranteed to the hapū their tino rangatiratanga. As this Tribunal has already found, it is inconceivable that those rangatira who signed Te Tiriti were giving up their mana – rather, they were exercising it.

⁵ At the beginning of the Waimate Taiamai hearing week at Kerikeri on Monday 2 November 2015.

27. Te Tiriti remains a living document to regulate the relationship between the parties. It was not to be cast aside, or modified at a later time, according to the wishes of only one of the parties to it. It assured ngā hapū o Ngāwhā that their laws and customs would survive and develop, both in the dealings they had with each other and with other iwi, and in their dealings with the Crown, as taonga in their own right, and for management of their other taonga and property.
28. Instead, the Trust's evidence will demonstrate that the Crown's actions and omissions have left the Trust and ngā hapū o Ngāwhā in a position where their mana motuhake, tino rangatiratanga and kaitiakitanga remain under attack.
29. The Trust urges the Tribunal to look closely at the Crown's conduct in respect of the issues raised by the Wai 53 claim, and as described in the evidence before this Inquiry, and to make findings that this conduct breached the principles of te Tiriti o Waitangi.

DATED at Kerikeri this 4th day of November 2015



P T Walker
Counsel for Parahirahi C1
Maori Reservation Trust

TO: The Registrar, Waitangi Tribunal, Wellington
AND TO: All Counsel - Wai 1040 Te Paparahi o Te Raki Inquiry District



Appendix A

Summary of Findings and Recommendations - Ngawha Geothermal Resource Report 1993 (Wai 304)

Findings

Summary	Finding	Paragraph
Ngawha hot springs a highly valued taonga	"The tribunal, while leaving for further consideration the question of whether at these times the taonga included the underground geothermal reservoir (4.5), finds that the Ngawha hot springs in what was to become Parahirahi block C were in 1840 and remained in 1885 and the ensuing years a highly valued taonga of the Maori owners."	3.14.2
Tribunal concludes it has not been established that owners willingly and knowingly alienated Parahirahi block or the hot springs located on the block	"The tribunal concludes that it has not been established that the owners willingly and knowingly alienated Parahirahi C block or the hot springs taonga located on the block, it not being clearly and unambiguously indicated in the deed of sale that this was intended. Applying the contra proferentem rule the owners ought not to be deprived of their taonga in the absence of such intention being clearly and unambiguously made known to them by the Crown. Accordingly, the acquisition of Parahirahi C block was in breach of article 2 of the Treaty which guarantees to Maori their tino rangatiratanga over their taonga for so long as they wish to retain the same in their possession. As Mr Justice Somers observed in the New Zealand Maori Council case "a breach of a Treaty provision must in my view be a breach of the principles of the Treaty". Given the extremely high value consistently placed on this five acre block by nga hapu o Ngawha the tribunal considers the four acres in the block acquired by the Crown in breach of the Treaty should be returned to Maori."	3.14.9
Crown acted in breach of Treaty principles in failing to ensure Geothermal Act and Resource Management Act contained adequate provisions to protect Treaty rights Claimants have been and are likely to continue to be prejudiced	"The tribunal finds that the Crown has acted in breach of Treaty principles in failing to ensure that the Geothermal Act 1953 and s354 of the Resource Management Act 1991, which preserves existing rights to geothermal resources under the 1953 Act, contain adequate provisions to ensure that the Treaty rights of the claimants, in their geothermal resource at Ngawha, are fully protected. As a consequence the claimants have been, and are likely to continue to be, prejudiced by such breach."	7.7.5
Resource Management Act 1991 is inconsistent with the principles of	"The tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the	7.7.11

<p>the Treaty in that it omits a Treaty provision</p> <p>Claimants have been or likely to be prejudicially affected</p>	<p>Treaty of- Waitangi. The tribunal further finds that the claimants have been, or are likely to be, prejudicially affected by the foregoing omission, and in particular by the absence of any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty. In the absence of such a provision, a development such as that proposed by the joint venture to exploit the underlying Ngawha geothermal resource may be permitted and may result in interference with or damage to the claimants' hot springs at Ngawha."</p>	
<p>When Crown acquired ownership, Maori owners lost right of access to land and the hot springs, and consequently lost right of rangatiratanga over surface and sub-surface components of geothermal system on and under alienated land</p>	<p>"8.2.3 When in 1894, the Crown acquired ownership of that part of Parahirahi B block on which hot springs were situate, the Maori owners lost the right of access to the land and the hot springs on the land. As a consequence, the tribunal finds that they necessarily lost the right of management and control or rangatiratanga over the surface and sub-surface components of the geothermal system on and under the alienated land (4.6.5).</p> <p>8.2.4 Likewise, the tribunal has concluded that the final result of the two sale transactions whereby the owner Heta Te Haara disposed of all the land in the Tuwhakino block and surrendered the right of access to certain pools in the northern block, was that his interest and any interest of his hapu in the hot springs and pools on that block and the underlying resource was completely extinguished. Te Haara parted with the right of access to the land and the hot springs on the land. Consequently, Maori no longer had any right of management and control or rangatiratanga over the surface components of the geothermal system or the sub-surface components under the alienated land in the block (4.6.9).</p> <p>8.2.5 It follows from the findings recorded in the preceding two paragraphs that once ownership of a significant part of the geothermal component (the surface hot springs and pools and other manifestations) is severed from that of other surface components, as has occurred in the Ngawha region, no one owner of some only of the surface components can validly claim the right to use and control the whole of the resource in and under the geothermal field. The present day owners, whether private or public, of the alienated surface of the geothermal resources in Parahirahi B block and the Tuwhakino block must necessarily have the right to use and control at least the surface components on land owned by them (subject always to any statutory provisions affecting them) (4.6.14)."</p>	<p>8.2.3 – 8.2.5</p>
<p>Crown acquisition of interest in</p>	<p>8.3.1. This question involves the first of the two main heads of grievances of the claimants and has been fully</p>	<p>8.3.1 to 8.3.2</p>



<p>Parahirahi C Block in breach of Treaty in that failed to take adequate steps to protect owners' interests</p> <p>Not established that owners knowingly alienated Parahirahi C block or the hot springs located on the block</p>	<p>considered in chapter 3. The short answer is, yes. 8.3.1 The finding of the tribunal is that the Crown was under a duty to take adequate steps to protect the owners' interests in Parahirahi C block and that it failed in its obligation under the Treaty to do so. In particular the Crown failed to protect the owners by not fully ascertaining the nature and very special value of Parahirahi C and ensuring that they did in fact wish to alienate this sacred taonga (3.14.6).</p> <p>8.3.2 The tribunal has further found that it has not been established that the owners willingly and knowingly alienated Parahirahi C block or the hot springs taonga located on the block, it not being clearly and unambiguously indicated in the deed of sale that this was intended. Applying the contra proferentem rule, the owners ought not to be deprived of their taonga in the absence of such intention being clearly and unambiguously made known to them by the Crown. Accordingly, the acquisition of Parahirahi C block was in breach of article 2 of the Treaty which guarantees to Maori their tino rangatiratanga over their taonga for so long as they wish to retain the same in their possession. As Mr Justice Somers observed in the New Zealand Maori Council case "a breach of a Treaty provision must in my view be a breach of the principles of the Treaty". It follows that the claimants have been prejudicially affected and will continue to be so affected by the wrongful acquisition of the four acres now held by the Crown as a recreation reserve. Given the extremely high value consistently placed on the five acre block by the hapu of Ngawha the tribunal considers the four acres in the block acquired by the Crown in breach of the Treaty should be returned to Maori."</p>	
<p>Crown acted in breach of Treaty principles in failing to ensure Geothermal Act and Resource Management Act contained adequate provisions to protect Treaty rights</p>	<p>"...The Geothermal Energy Act 1953 gives the Crown the sole use rights of the energy component of geothermal resources. It does so without any recognition of any rights of Maori in the resource and makes no provision to ensure that any Treaty rights of Maori will be protected as required by article 2 of the Treaty. In short, the Act simply ignores any such Treaty rights. As a consequence, should the joint venture application prove successful, and the Crown bores be used to extract geothermal fluid, the claimants' taonga may be placed in jeopardy entirely against their will.</p> <p>8.4.4 Accordingly, the tribunal has found that the Crown has acted in breach of Treaty principles in failing to ensure that the Geothermal Act 1953 and s354 of the Resource Management Act 1991, which preserves existing rights of the Crown to geothermal resources under the 1953 Act, contain adequate provisions to ensure that the Treaty rights of the claimants in their geothermal resource at Ngawha are fully protected. As a consequence the claimants have been and are likely to continue to be prejudiced by such breach (7.7.5)."</p>	<p>8.4.3 and 8.4.4</p>
<p>In delegating extensive powers</p>	<p>8.45 ... "We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article</p>	<p>8.45 to 8.4.7</p>

<p>to local and regional authorities under the Act, Crown failed to ensure its Treaty duty of protection of Maori interests was implemented</p> <p>RMA inconsistent with principles of the Treaty</p>	<p>2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled.</p> <p>8.4.6 Our consideration of the provisions of the Resource Management and in particular Part II, which sets out the purpose and principles of the Act, leaves us with no option but to conclude that the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed (7.7.9)."</p> <p>"8.4.7 We repeat here our finding that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi."</p>	
<p>Claimants prejudicially affected by absence of provision in RMA giving priority to their taonga and confirming their Treaty rights. Inconsistent with Treaty duty of Crown in delegating to ensure it does so in terms which guarantee rangatiratanga of claimants over their taonga is recognised</p>	<p>"The tribunal has further found that the claimants have been or are likely to be prejudicially affected by the foregoing omission and in particular by the absence of any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights, in the exercise of their rangatiratanga and kaitiakitanga, to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty. In the absence of such a provision a development such as that proposed by the joint venture to exploit the underlying Ngawha geothermal resource may be permitted and may result in interference with or damage to the claimants' hot springs at Ngawha (7.7.11)."</p>	<p>8.4.8</p>

Recommendations

Summary	Recommendation	Paragraph
<p>Portion of former Parahirahi C block acquired by Crown be returned to Maori</p>	<p>"3.19.1 For reasons which it has given in preceding paragraphs 3.14.6 and 3.14.9 the tribunal has found that the Crown acted in breach of its Treaty duty to protect the owners' interests in Parahirahi C block and</p>	<p>3.19.1 and 3.19.2</p>

ownership	<p>that it also acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi C block and the hot springs taonga located on the block. The tribunal accordingly recommends that the portion of the former Parahirahi C block acquired by the Crown and now vested in Her Majesty the Queen as a reserve for reservation purposes pursuant to the Reserves Act 1977 comprising 4a 2r 8p (1.8413 hectares) be returned to Maori ownership.</p> <p>3.19.2 The tribunal thinks it likely that it would be the wish of the trustees of the Parahirahi C1 Maori reservation and the whanau and hapu whose interests they represent that, should such land be returned by the Crown, it be vested in the trustees (commonly known as the "Waiariki Trustees"). The tribunal however makes no recommendation as to whom the four acre block should be returned as this is essentially a matter to be determined by the Maori people concerned."</p>	
Recommends amendment to RMA which provides persons exercising functions and powers shall act in a manner consistent with the principles of the Treaty	<p>"The tribunal recommends that an appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi."</p>	7.7.12
Same recommendations as above	<p>"8.5 Recommendations Pursuant to s6(3) of the Treaty of Waitangi Act 1975</p> <p>8.5.1 Our recommendations fall under two heads. The first concerns our findings that the Crown acted in breach of its Treaty duty to protect the owners' interests in Parahirahi C block and that it also acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi C block and the hot springs taonga located on the block. We recommend that the portion of the former Parahirahi C block acquired by the Crown and now vested in Her Majesty the Queen as a reserve for recreation purposes pursuant to the Reserves Act 1977, comprising 4 acres 2 roods 8 perches (1.8413 hectares), be returned to Maori ownership.</p> <p>As indicated in 3.19.2 the tribunal thinks it likely that it would be the wish of the trustees of the Parahirahi C1 Maori reservation and the whanau and hapu whose interests they represent that, should such land be returned by the Crown, it be vested in the trustees (commonly known as the 'Waiariki trustees'). The tribunal however makes no recommendation as to whom the four acre block should be returned as this is essentially a matter to be determined by the Maori people concerned.</p>	8.5.1 and 8.5.2

	<p>8.5.2 Our second recommendation relates to our findings concerning the Geothermal Energy Act 1953 and the Resource Management Act 1991 recorded in 8.4.3 and 8.4.4 above. We recommend that an appropriate amendment be made to the Resource Management Act 1991 providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.</p>	
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