WAITANGI TRIBUNAL

Wai 2898

CONCERNING	the Treaty of Waitangi Act 1975
AND	the Lake Horowhenua (Taueki) Claim

DECISION
ON APPLICATION FOR AN URGENT HEARING

[26 November 2019]

Introduction

1. This decision concerns an application for an urgent inquiry into Wai 2898, the Lake Horowhenua (Taueki) Claim. The claim concerns the alleged failure of the Crown in enacting an entity for the governance of Lake Horowhenua, as recommended by this Tribunal.

Background

2. The historical claims of Muaūpoko were inquired into and reported on in the *Horowhenua: The Muaūpoko Priority Report* of 2017. This report found the following (*Horowhenua: The Muaūpoko Priority Report 2017,* at 651):

> We consider that, as the Crown was and remains responsible for the legislative regime under which local government operates, it is time for it to recognise that the multi-layered management regime that exists under the RMA 1991 and the Local Government Act 2002 and the role played by Muaūpoko on the Horowhenua Lake Domain Board are not sufficient in Treaty terms. The present regime does not ensure that Muaūpoko rangatiratanga and kaitiakitanga in terms of Lake Horowhenua and the Hōkio Stream are sufficiently provided for.
>
> It is also time for the Crown to recognise that, having acknowledged it breached the Treaty when it omitted a provision to prevent pollution at the very beginning in the 1905 Act, it must take a lead in putting the situation right. Only the Crown has the resources to work with its Treaty partner to solve these problems. It has a Treaty duty to do so. As the Privy Council has noted, the Crown should not avoid or deny its Treaty obligation of active protection of a vulnerable taonga when it is responsible for the taonga's parlous state and when it has the resources. That is what the parties to the Treaty are entitled to expect from an honourable Crown.

3. The report had the following two recommendations in relation to Lake Horowhenua (*Horowhenua: The Muaūpoko Priority Report 2017,* at 708):

> That the Crown legislates as soon as possible for a contemporary Muaūpoko governance structure to act as katiaki for the lake, the Hōkio Stream, and associated waters and fisheries following negotiations with the Lake Horowhenua Trustees, the lake bed owners, and all of Muaūpoko as to the detail. The legislation should at least be similar to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 but may also extend to something similar to that used for the Whanganui River. This would necessarily mean dismantling the current Horowhenua Lake Domain Board. Any recommendations in respect of Ngati Raukawa are reserved until that iwi and affiliated groups have been heard, but we note that the Waikato-Tainui river settlement model allows for the representation of other iwi.
>
> That the Crown provide to the new Lake Horowhenua Muaūpoko governance structure annual appropriations to assist it meet its kaitiaki obligations in accordance with its legislative obligations.

Procedural History

4. On 8 August 2019, the Tribunal received a statement of claim and an application for an urgent inquiry from Phillip Dean Taueki (Wai 2898, #1.1.1 & #3.1.1). These submissions were also supported by two affidavits of Anne Hunt and the applicant, Mr Taueki (Wai 2898, #A1 & #A2).

5. On 19 August 2019, the claim was duly registered as Wai 2898, the Lake Horowhenua (Taueki) Claim (Wai 2898, #2.1.1).

6. On 30 August 2019, the Crown filed submissions opposing the application for urgent hearing (Wai 2898, #3.1.4). A number of interested parties filed supporting the application and sought leave to be included as interested parties to this urgency application (Wai 2898, #3.1.3 & #3.1.6):

    (a) Wai 2046, the Ngāti Mihiroa, Ngāti Ngarengare and Muaupoko (Kenrick) Lands Claim;

    (b) Wai 2050, the Muaūpoko Economic Development (Williams) Claim;

    (c) Wai 2053, the Muaūpoko Health (Kupa and Ferris) Claim;

    (d) Wai 2054, the Muaūpoko Ratings Policy (Moore) Claim;

    (e) Wai 2056, the Muaūpoko Knowledge and Education (Williams) Claim;

    (f) Wai 2140, the Muaūpoko Mana Wāhine (Gardiner) Claim;

    (g) Wai 2173, the Muaūpoko Health (Murray) Claim;

    (h) Wai 237, the Horowhenua Block Claim;

7. Claimant counsel for Wai 237 also filed a brief of evidence of William Taueki in support of the application (#A3 & #A3(a)).

8. On 30 August 2019, the Tribunal received further memoranda from a number of parties who sought interested party status but remain neutral on the application (Wai 2898, #3.1.5 & #3.1.7):

    (a) Wai 52, the Muaūpoko Land Claim;

    (b) Wai 2139, the Muaūpoko Lands and Resources (Greenland) Claim;

    (c) Wai 623, the Mua Te Tangata and Muaūpoko claim; and

    (d) Wai 624, the Kemp Hunia Trust Claim.

9. On 16 September 2019, counsel for the applicant filed submissions in reply to those of the Crown and interested parties (Wai 2898, #3.1.8).

Parties' Submissions

Applicants' Submissions

10. The applicant alleges that Lake Horowhenua and Maori associated with the lake are suffering or are likely to continue suffering significant and irreversible prejudice as a result of the Crown's continued failure to provide a governance scheme to actively protect the declining state of Lake Horowhenua and the flora and fauna around it.

11. The applicant submits there is no alternative remedy available as the Resource Management Act 1991 is not remedial and the Horowhenua Accord is not legally enforceable.

12. Counsel for the applicant submits they are ready to proceed to hearing urgently.

Crown's Submissions

13. The Crown submits this is not an exceptional case which warrants the diversion of Tribunal resources. The Crown acknowledges it has not enacted legislation creating a new governance scheme for Lake Horowhenua, however, it says that this is a complex task requiring consultation with many parties, some of which are still going through claims and litigation processes in the Māori Land Court and the Waitangi Tribunal.

14. The Crown submits the claimant has failed to demonstrate he is suffering or is likely to suffer significant and irreversible prejudice. Specifically, the Crown submits the lack of progress in setting up a governance entity has not caused irreversible prejudice to the state and condition of the Lake. The Crown submits the Tribunal found the significant environmental damage to the Lake occurred over an extremely long period and fixing such damage requires an approach beyond simply implementing a new governance structure and funding that entity.

15. The Crown submits the claimant has not demonstrated he is ready to proceed to urgent hearing as he has not provided expert evidence supporting his views on the imminent and irreversible risk to the Lake. The Crown submits most of the filed evidence pre-dates the Tribunal's hearing on the Lake for the Priority Report and evidence post-dating this hearing relates to other peripheral matters.

16. The Crown acknowledges the issues raised by the claimant and would be prepared to provide future updates to the Tribunal regarding the proposed governance entity for the Lake and any policies which may assist with the remediation of the state of the Lake. However, they maintain the current application does not meet the criteria for granting an urgent hearing.

Muaūpoko Tribal Authority (Wai 52 and Wai 2139) Submissions

17. Counsel for these parties raised a number of concerns on the significant number of allegations advanced against the Muaūpoko Tribal Authority and not upheld by the Tribunal which are again raised and filed on the public record under this urgency claim.

18. Counsel submits the Tribunal's report on the Lake did not recommend the new Lake governance entity was dependent on the outcome of the Ngāti Raukawa phase of the Wai 2200 – Porirua ki Manawatū Inquiry, as the Crown has submitted. Conversely, counsel submit the Tribunal recommended the governance entity be legislated for as soon as possible.

Applicants' Reply

19. The applicant submits the case is not only exceptional but is in the top tier of urgency claims. He states that the Tribunal has effectively endorsed this status of exceptional circumstances, within the *Horowhenua: the Muaūpoko Priority Report.*

20. The applicant disagrees entirely with the reasons the Crown gives for having no progress in creating a governance body as being well-reasoned. The applicant submits that these reasons apply to any drafting of legislation and therefore do not excuse the Crown's inaction, particularly when the Tribunal's report recommended action as soon as possible. The applicant submits that although the Crown laid out the many steps which are required for the implementation of a new governance scheme, they fail to evidence any progress in these steps over the last two years, or what progress is to come into effect in the future.

21. In relation to the Crown alleging they lack evidence of irreversible prejudice, the applicant submits that the findings of the Tribunal give ample evidence that the current state of Lake Horowhenua is in a phase of destruction as, even in the absence of no action by the Crown, the exponential decline of the Lake to a point of no return is more likely than not. They further submit that the issues relating to Lake Horowhenua which were covered in the Freshwater Inquiry Stage 2 report released on 28 August 2019 do not provide relief in terms of this urgency application.

22. The applicant further notes that the number of interested parties, and the prompt times which they filed in relation to this urgency (nine claimants in support and two claimants remaining neutral) demonstrate the relative magnitude of backing from an established claimant community.

23. The applicant reiterates that there is no alternative remedy, as the Resource Management Act is not remedial, and the Horowhenua Accord is not legally enforceable.

24. The applicant submits they meet all the criteria for an urgent hearing. The applicant states that an immediate remedy is required, as found by the Tribunal in the *Horowhenua: the Muaūpoko Priority Report.*

Urgency Criteria

25. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

> In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:

- 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;

- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and

- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;

- 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

- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

26. The Tribunal findings and recommendations referred to in paragraphs 2 and 3 of this decision are now more than two years old. It is disappointing that the Crown cannot point to material progress or give a timetable for further progress.

27. Be that as it may, it must be remembered that this Tribunal may make findings and recommendations but in the circumstances of this case, they are not binding.

28. A case could be imagined where the failure to act upon recommendation could be a breach but that would be most unusual circumstances.

29. In this case, the best result that the applicants could achieve would be a repetition in slightly stronger terms of matters referred to in paragraphs 2 and 3 of this decision.

30. The Tribunal would not therefore be making recommendations that the Crown has not already received. The fact remains that the Crown is not bound to accept or act upon such recommendations.

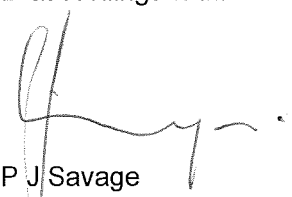
31. In those circumstances, I am not prepared to grant urgency in this matter and that is particularly so when the Tribunal is already fully extended to meet a large number of inquiries already in progress.

Decision

32. For the reasons given above, the application for urgency is declined.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel and those on the notification list for Wai 2898, the Lake Horowhenua (Taueki) Claim.

DATED at Wellington this 26th day of November 2019



Judge P J Savage
Deputy Chairperson
WAITANGI TRIBUNAL