BEFORE THE WAITANGI TRIBUNAL **WAI 1040**
TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI **WAI 53**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of a claim to the Waitangi Tribunal by Renata Tane

AND

IN THE MATTER of the Te Paparahi o Raki Inquiry

BRIEF OF EVIDENCE OF NICOLE BUTLER

DATED 13 OCTOBER 2015

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Introduction

Putahi te maunga
Wairoro te awa
Omapere te roto
Takauere te taniwha
Ngatokimatawharua te waka
Te Uri o Hua te hapu
Ngapuhi te iwi

1. My full name is Nicole Jane Butler. I was born in Kaikohe on 26 February 1971. I live in Whangarei.

2. I am a direct descendant of Mikara Te Ripi, one of the original non-sellers of Parahirahi C. In that capacity, I am a trustee and the secretary of the Pārahirahi C1 Maori Reservation Trust ("**Trust**"). The Trust owns the land known as the Pārahirahi C1 block and, as explained below, manages the adjacent four acres of Crown-owned land known as the "Ngāwhā Domain" or more simply as the "**four acres**". I have been a trustee since 26 May 2007.

3. While I am employed as a Regional Commissioner Advisor at Ministry of Social Development I appear in my personal capacity on behalf of the Trust.

Background

4. In October 1992 I presented evidence to support Wai 53 and Wai 304 (Wai 304, doc. #A50, attached as "**A**"), known as the Ngāwhā Geothermal claim.

5. An urgent hearing had been convened by the Tribunal in 1992 in response to the Trust's concern that resource consents, under the Resource Management Act 1991, were being sought by a joint venture comprising the Bay of Islands Electric Power Board and the Taitokerau Maori Trust Board. The joint venture sought to exploit the Ngāwhā geothermal resource for the purpose of electricity generation. The Trust opposed such a development due to concerns that it would damage the taonga. The Trust argued, among other matters, (para 1.2.6 *Report*):

   (a) the Ngāwhā hot springs and pools (the Tribunal in the *Report* used the phrase "Ngāwhā geothermal resource") were a taonga owned by the hapū of Ngāpuhi;

   (b) ownership of this taonga was preserved by the Treaty of Waitangi and had not been relinquished;

   (c) exploitation of the Ngāwhā geothermal resource would harm the taonga.

6. It is now 25 years later and I am presenting evidence in support of that same claim. At the same time, we are again having to respond to applications for resource consents which have been lodged by Top Energy to further exploit the Ngāwhā geothermal resource through a proposed expansion of its Ngāwhā geothermal power generation capacity. The latest application for resource consent seeks to triple the electricity generation from the Ngāwhā reservoir. I address this further in my evidence.

7. The basis of my evidence is that the Trust continues to be prejudicially affected due to the Crown's inaction in response to the recommendations of the Waitangi Tribunal in 1993, both in relation to the failure to return the four acres, and the shortcomings of the

Resource Management Act. We believe that the lack of Crown action following the Tribunal's findings and recommendations constitutes a contemporary breach of the Treaty.

8. The Trust also seeks findings from the Tribunal in respect of a number of issues raised by the Wai 53 claim which were not the subject of findings in the 1993 Report. In particular, we seek findings from the Tribunal regarding the circumstances in which the wider Pārahirahi lands were acquired by the Crown. As I indicated above, I was involved in the initial hearing of this claim. Because it was heard under urgency, there was little time to prepare ourselves, and the issues were focused around the resource consent and four acres. The Te Paparahi o te Rahi Inquiry has had the benefit of hearing the history of Ngāpuhi's interaction and relationship with the Crown, and is well placed to look at the wider issues of land acquisition by the Crown.

Findings and recommendations

9. The Tribunal's findings and recommendations in 1993 are summarised below:

   (a) The Tribunal found that the hot springs of Ngāwhā and the underlying resource which fed these springs were a sacred taonga of Ngāpuhi (para 8.2.1, *Report*).

   (b) The hapū of Ngāwhā, with possibly some other hapū of Ngāpuhi, were the occupiers of and held rangatiratanga over the Ngāwhā geothermal field, including all surface geothermal springs within the field. In particular, "the various hapū, by virtue of their occupation and possession of the land above the sub-surface geothermal system, had rangatiratanga over the sub-surface and whatever it contained" (para 8.2.1, *Report*).

(c) The claimants retained ownership and rangatiratanga over the Ngāwhā hot springs on the one acre of Pārahirahi C1 currently vested in the trustees of Pārahirahi C1 Maori reservation.

(d) The Tribunal accepted that the four acres land is an integral part of the Ngāwhā springs. It found that the Crown acquired its interest in the Pārahirahi C block (the four acres) in breach of the principles of the Treaty, as the owners did not willingly and knowingly alienate the Pārahirahi C block or the hot springs taonga located within that block. It recommended that the claimants were therefore entitled to the return and reinstatement of ownership and rangatiratanga over the four acres of Pārahirahi C currently vested in the Crown as a recreation reserve. [1] (Chapter 3, and para 8.3.2, *Report*).

(e) The Tribunal found that the question as to whom the four acres should be returned is "essentially a matter to be determined by the Maori people concerned". (para 8.5.1, *Report*).

(f) The Tribunal did not accept that the hapū retained ownership and rangatiratanga over the entire geothermal resource. It found that, when in 1894, the Crown acquired ownership of the parts of Pārahirahi B and Tuwhakino blocks on which hot springs were situate, the Maori owners lost the right of access to the land and therefore the hot springs on the land. As a consequence, it was the Tribunal's view that the Maori owners lost the right of management and control or rangatiratanga over the surface and

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[1] "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."

sub-surface components of the geothermal system on and under the alienated land (paras 4.6.5 and 4.6.9, *Report*).

(g) The Tribunal found 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 Ngāwhā region, no one owner of some only of the surface components could validly claim the right to use and control the whole of the resource in and under the geothermal field. It followed, according to the Tribunal, that the present day owners, whether private or public, of the alienated surface of the geothermal resources in Pārahirahi 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).

(h) As a consequence of the above, the Tribunal found that no one such owner or group of owners can validly claim the exclusive right to manage and control the underground fluid or, in all circumstances, to exercise a veto over its extraction and use (paras 4.6.14 and 4.6.15, *Report*).

(i) The Tribunal also found that the Crown 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 Ngāwhā are fully protected (7.7.5, 8.4.4, *Report*).

(j) The Tribunal recommended an amendment 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 (8.4.7, 8.5.2 *Report*).

Crown inaction in relation to the return of the four acres

10. To this day, and despite the Tribunal's recommendation and the willingness (at times) of the Far North District Council (**FNDC**) to divest itself of its responsibilities as administering body of the land under the Reserves Act 1977, the four acres remains in Crown ownership. The **attached** schedule (marked "**B**") summarises the Trust's efforts to advance the return of the four acres.
11. In 1996, the FNDC agreed to the Trust taking interim management of the four acres, in anticipation of the land being returned to Maori in accordance with the Tribunal's recommendation. These arrangements were set out in a letter from FNDC to the Trust dated 23 April 1996. After years of Crown inaction, the Trust's management of the four acres was finally formalised through a lease signed in February 2015.
12. Since 1993 the Trust has made repeated attempts to secure the return of the four acres into Maori ownership. In particular, the Trust has written to successive Crown Ministers, including in 2002, 2008, 2009, 2012, and 2013, seeking the implementation of the Tribunal's 1993 recommendations for the return of the four acres land.
13. The most recent responses from the Office of Treaty Settlements (**OTS**) emphasise the Crown's policy of comprehensive Treaty settlement negotiations and the need to incorporate the issue of the four acres into the wider settlement of the Ngāpuhi claims. Helpfully, OTS provided some support to the Trust to facilitate the lease negotiations with the FNDC. As

mentioned, that lease was finally concluded and signed in February 2015 (with effect from August 2014). The lease is for a term of 33 years with a nominal rental. Notwithstanding this lease, the fact remains that the four acres remains in Crown ownership, and the Trust did not have any tenure interest in the four acres until 2015 – twenty two years after the Tribunal's 1993 report. I discuss the consequences of this delay below.

Crown inaction on the Resource Management Act-related issues

14. After the Waitangi Tribunal hearings and subsequent report the Trust continued to oppose, through the Resource Management Act 1991 processes, Top Energy's applications for resource consents to exploit the Ngāwhā geothermal resource for the purpose of electricity generation. This has been a costly process for the Trust, given its meagre financial resources. A hastily-agreed MOU was reached with Top Energy in the mid-2000s which resulted in the Trust withdrawing its opposition to Top Energy's first expansion of its generation plant.
15. At the time, the Trust lacked the capacity to continue with the Resource Management Act processes, and accepted the MOU as the best outcome in the circumstances. However, the Trust remains deeply unsatisfied with this outcome. The Trust is frustrated by the lack of proper recognition of its mana and kaitiaki role in relation to the Ngāwhā geothermal resource, and by its inability to carry out kaitiakitanga responsibilities in a meaningful way.
16. As I mentioned earlier, the Trust is again responding to applications for resource consents which have been lodged by Top Energy. The application proposes to triple the electricity generation from the Ngāwhā reservoir.

17. On March 18 2015, the Trust filed a submission in opposition to those consent applications (attached as "**C**"). Then, on 13 August 2015, the Trust participated in the hearing before a Hearings Committee constituted under the Resource Management Act and made legal, cultural and scientific submissions at that hearing objecting to Top Energy's proposals (attached as "**D**"). Consents were granted on 15 September 2015. The Trust lodged an appeal against the granting of those consents on 6 October 2015.
18. Participation in the Resource Management Act process places a significant burden on the Trust. The Trust has received legal assistance on a pro bono basis. Nonetheless, it has still incurred costs through its participation in the consenting process, and the trustees all have full time employment and other whanau, hapū and iwi responsibilities to attend to.
19. The current proposal has been likened by our kaumatua to spearing the taniwha at Ngāwhā. Kaumatua have also said on many occasions and in different contexts that diminishing the wairua of Takauere will weaken the wairua of Ngāpuhi; we would be less as a people, regardless of whatever economic or other opportunities might come in the future through the current extraction proposal or otherwise.
20. The issues with the Resource Management Act that were identified by the Tribunal and included in its 1993 recommendations have not been acted on by the Crown. Instead, we are legislatively no better off than we were when we first took the claim to the Tribunal under urgency.
21. As a result, we, the Trust, feel that we are left on "the outer" when it comes to the future and ongoing sustainable management and preservation of our geothermal taonga. In addition, the consenting process continues to focus on the physical effects of consent applications and remains unable to deal with intangible cultural effects.

Lost opportunity

22. The facilities at Ngāwhā Springs are in need of redevelopment and ongoing maintenance. The lack of tenure until the lease with FNDC was signed in February 2015 meant that the Trust was unable to plan for any such redevelopment itself. At the same time, in anticipation of the eventual hand-over of the land, for its part FNDC was unwilling to invest in the facilities or even maintain them to a reasonable standard. This situation prevented the Ngāwhā springs complex from being utilised to its full potential; instead, the condition of the facilities has worsened over the years. For these reasons, the Trust has only been able to offer its visitors a very basic level of facilities. Furthermore, the period since the Tribunal's findings and recommendations represents a significant lost opportunity.

Conclusion

23. Notwithstanding the loss of so much land, our view is that we retain rangatiratanga over Ngāwhā and remain the kaitiaki of this taonga. To the extent that the Crown has acquired our lands, it is our view that these acquisitions have been in breach of what was agreed in Te Tiriti. In this respect, it is also our position that the Crown continues to fail to recognise our rangatiratanga over Ngāwhā, particularly in relation to decision making with respect to the geothermal resources therein.

DATED at Whangarei this 13th day of October 2015

N Butler