

October 1989

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Minister of Energy

WAITANGI TRIBUNAL: NGAI TAHU CLAIM: ARAHURA POUNAMU
TRIBUNAL RECOMMENDATION ON ADMISSION OF LIABILITYIntroduction

1. It has been brought to your attention in the attached letter from the Waitangi Tribunal, that the Crown has made significant admissions as to its liabilities in respect of the treaty claim for greenstone resources in the Arahura valley. Paragraph 52, page 113 of the final submission states:

"52. The Crown accepts that it would be proper for the Tribunal to recommend that Poutini Ngai Tahu should have the exclusive right to control the taking of pounamu but that, in accordance with the views expressed by the tribe, pounamu should not be commercially exploited by any person and thus the Poutini Ngai Tahu right to take it should be for non commercial purposes."

2. The letter draws your attention to the fact that the Tribunal will be making a recommendation to you in due course which will be directed towards restricting rights to take and use pounamu, and dealing with ownership rights.

Background

3. The Ministry of Energy has not been directly involved with the Ngai Tahu claim but has been watching progress carefully. The Crown is represented by Mrs Shonagh Kenderdine of the Crown Law Office. Mrs Kenderdine must present final submissions to the Tribunal on Monday 9 October, as to the form of this recommendation and has met with Ministry staff to discuss possible wording. Your guidance on this is sought prior to Mrs Kenderdine's submission.

4. The Ministry is concerned at the Crown's admission as it now stands. The first concern is with the blanket nature of the admission affecting as it may, your statutory discretion to grant licences and regulate the taking of greenstone in terms of the Mining Act 1971. The second concern is with the limitation on the tribe's use of the resource which does not seem a relevant matter for the Crown.

5. On the first matter, Mrs Kenderdine is adamant that the Crown has no possible case against this outcome and must agree to it. She has offered to brief you if necessary. The Ministry accepts the legal position under the Treaty of Waitangi Act, but would encourage any recommendation of the Tribunal to be specific in its terms in order that practical effect can be given to it under the Mining Act 1971 and future minerals legislation.

6. Many of the past recommendations of the Waitangi Tribunal have been unable to be given effect because of their failure (rightly or wrongly) to take into account the reality of ministerial discretion under existing statutes. The Ministry considers that providing the recommendation takes this existing discretion into account, we will be able to show immediate implementation. We are fortunate in that the general tenor of the recommendation is also to be given effect through RMLR.

7. Even assuming that the case applies only to the Arahura catchment, the recommendation should be drafted in such a way as will:

- i enable your statutory discretion under the Mining Act to continue to be exercised,
- ii give effect to the admission (and thereby the Crown's duty under the Treaty), and
- iii limit its application to the facts of any particular case.

8. We have advised Mrs Kenderdine of the need to obtain your approval, and possibly that of Cabinet, to general admissions of liability, particularly those with broader ramifications. It is also highly desirable to obtain your approval to any mechanisms devised to reflect the admission. These mechanisms should be designed to overcome the procedural problems which the admission may cause for the exercise of your residual discretion in granting any licences over this Crown land. This includes licences to Poutini Ngai Tahu, whose extraction activities, the Crown may still need to regulate.

Proposals

9. There are three situations for which procedural solutions must be found. These are; existing greenstone privileges, applications in process, and future applications.

Existing Privileges

10. There are currently 8 existing privileges in the area all of which are mining licences. Of the 8 licences only 4 are specifically for greenstone, the other licences are for gold and greenstone. The majority of these licences (6 in total) were granted between 1982 and 1986 and run for ten years. The other two licences were granted this year for gold and greenstone and run until 2009.

11. Any change to existing privileges would require the Crown to compensate the holders for any loss arising from the diminution of rights or loss of legitimate expectations as to future rights.

withheld pursuant to s9(2)(g)(i)

It is recommended;

- i that no change be made to the terms or conditions of the existing greenstone privileges within the Arahura catchment,
- ii that royalty payments from existing privileges be paid to Poutini Ngai Tahu and that renegotiation at the statutory five year intervals be conducted by the Crown in association with Poutini Ngai Tahu.
- iii that negotiations be entered into for the return of royalties arising from past greenstone extraction.

Applications in Process

12. As at the 4th of September 1989 there were 5 applications being processed for the Arahura area involving greenstone. One of these applications is for an exploration licence and does not specify the minerals sought but it is highly probable that this is for gold. The other applications consist of 3 mining licence applications for greenstone and 1 application for a prospecting licence for gold and greenstone.

13. Crown Law recommend that no further licenses be granted for Greenstone in the Arahura (presumably to anyone other than Ngai Tahu).

14. Several of these applications are at an early stage and could be rejected. There is one however, (Bok) that is to go to the Planning Tribunal in November.

15. There is a question as to whether we should let this application go to the Tribunal.

Future Applications

16. The treatment of future applications may be able to be guided by the outcome of the Bok objection and recommendation above.

withheld pursuant to s 9(2)(g)(i)

withheld pursuant to s 9(2)(g)

17. It is recommended that future applications be dealt with in terms of the draft Waitangi Tribunal recommendation as set out below.

Wording of the Waitangi Tribunal Recommendation

18. The wording of the Tribunal recommendation should be compatible with the above outcomes. The following is suggested:

19. That in considering applications for mining privileges in the Arahura catchment under the Mining Act 1971, and in administering any future resource management legislation relating to minerals, the Crown, through the applicable Minister, give due weight to the Crown's obligation under the Treaty of Waitangi, to preserve for the Poutini Ngai Tahu, the exclusive right to take and use the Pounamu in the Arahura catchment.

20. It is recommended that you agree to the presentation of the recommendation suggested above to the Waitangi Tribunal on Monday 9 October 1989.

B T Chapman
for Acting Secretary of Energy.