

PĀNUI - JUNE 2020

Update on the Waitangi Tribunal report and next steps on our settlement journey

Kia ora e te whānau,

We know it has been a while since we provided you with an update on where things are sitting – there has been a lot to work through and the situation is still changing.

We appreciate this pānui contains a lot of information, but our aim is to provide you with as much clarity as possible on what the latest developments mean for our settlement.

We also acknowledge that the past few months has not been without broader challenges for our people, given the COVID-19 pandemic. We mihi you for your efforts in keeping safe and a separate pānui will be sent out in the coming weeks with information on ongoing support.

KEY UPDATES

- The Waitangi Tribunal preliminary report was released in March – this detailed its preliminary determinations in response to the resumption applications by Wairarapa Moana Incorporation (WMI), Ngāi Tūmapūhia-ā-Rangi and the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Settlement Trust heard in late 2018 and 2019.
 - The report said that given the level and nature of prejudice suffered by all of the people of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua at the hands of the Crown, leaving them virtually landless, **the Maraetai Power Station and Ngāumu Crown Forest lands should be returned to our iwi as a whole: “Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua nui tonu”.**
 - In stating so, the Tribunal rejected making resumption orders in favour of the WMI and Ngāi Tūmapūhia-ā-Rangi, but rather highlighted the suitability of the Settlement Trust to receive these lands on behalf of our people.
- Mercury Energy are challenging the Waitangi Tribunal decisions in the High Court. The Crown are set to decide by 30 June 2020 whether they will also challenge these decisions.
- The Settlement Trust intends to oppose these court proceedings, as they present a significant risk to the Waitangi Tribunal’s preliminary decisions and our current, or any enhanced, settlement package. We are committed to working in the best interests of our people – this is one of these examples.
- The court hearings will be held on 27–30 October 2020 – this timeframe is reflective of the Settlement Trust requesting that the timetable and resolutions in relation to Mercury’s claim are awarded priority.
- In parallel, we are committed to progressing a mediation process with the Crown, WMI and Ngāi Tūmapūhia-ā-Rangi to try to resolve issues and allow the Settlement to go ahead without further delay.

NEXT STEPS

The Settlement Trust is committed to engaging in further negotiations, and through two separate mediations, to try to resolve these issues and allow the settlement to proceed quickly:

1. **A new mediation with WMI and the Settlement Trust.**
2. **Resuming the previous mediation between the Crown, Ngāi Tūmapūhia-ā-Rangi and the Settlement Trust.**

This will not be easy given the number of interested parties (Mercury, the Crown, WMI, Ngāi Tūmapūhia-ā-Rangi and the Settlement Trust), the value of the Maraetai Power Station and Ngāumu Crown Forest lands (more than \$800 million) and the novel and complicated nature of the legal issues at play here. It is important to note too, that the Crown has indicated it only wishes to talk to the Settlement Trust.

The Crown will advise its position on the Mercury issue by 30 June.

We will provide an update by mid-July on what the Crown's intentions are, as well as an update on any progress we have had on any negotiations that have been held to try to resolve all of this.

We acknowledge that while both WMI and Ngāi Tūmapūhia-ā-Rangi have in effect had their resumption applications rejected, that they made them in the first place, while causing significant delays and costs to the Treaty settlement process, does help provide the potential for an enhanced outcome for our people.

We want to be inclusive and bring all of Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua together to overcome the tensions caused over the last three years of litigation, but ultimately, to overcome the mamae caused by the Crown's original breaches of the Treaty of Waitangi.

If a negotiated outcome is not possible, then it is likely the Mercury legal challenge, and any further Tribunal hearings, will take at least three more years to resolve and our settlement signing will be delayed further. We do not want this to happen.

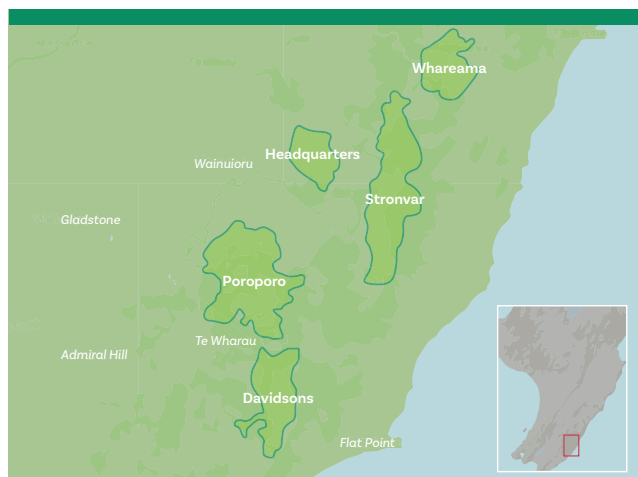
In the meantime, we have put together a comprehensive Q&A (pages 3-5) to explain why we have been unable to sign our Deed of Settlement yet, as well as to explain the Mercury issue further. The pānui also contains a timeline of our journey to date (page 5).

You can read the full Waitangi Tribunal preliminary report [here](#).

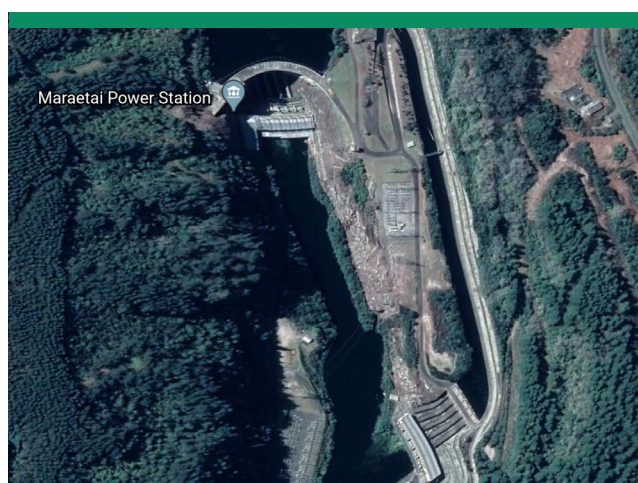
We know our settlement journey has been taking longer than we all anticipated. We remain committed to removing all the barriers to us reaching a final settlement for our people.

Thank you for your continued patience and support, whānau.

Nākū noa, nā
Robin Potangaroa
Chairman



Ngāumu Crown Forest lands



Maraetai Power Station

Your pātai answered

1. Why has the Deed of Settlement not been signed yet?

- The Crown refused to sign the Deed of Settlement because of the resumption applications lodged by WMI and Ngāi Tūmapūhia-ā-Rangi.
- The Crown said that as both these entities were part of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua, and that as both had put forward claims that were meant to be resolved in the comprehensive Deed of Settlement, it could no longer execute the Deed of Settlement.
- The Crown was worried about the financial risk if one of the resumption applications succeeded – it did not want to have to pay for the transfer of the Maraetai Power Station to WMI or the Ngāumu Crown Forest to Ngāi Tūmapūhia-ā-Rangi, as well as the \$93 million of commercial redress to the Settlement Trust. It considered it would be paying twice to settle the same historic claims.
- The Settlement Trust decided the best course was to participate in the Waitangi Tribunal resumption application process.

2. What is a resumption application?

A resumption application is a process under the Treaty of Waitangi Act where a claimant in the Waitangi Tribunal can ask for land held by the Crown or a state-owned enterprise to be returned (“resumed”) to the claimant. The claimant must show that:

- it has a valid claim for a breach of the Treaty of Waitangi;
- the claim relates to the land;
- the nature of the breach means the land should be returned to Māori ownership; and
- it is a suitable entity to receive the land.

3. Why haven’t other iwi been making resumption applications?

- While the power to make resumption applications has existed since 1987, it has only been used by the Waitangi Tribunal twice previously.
- This is because most Treaty settlements have occurred by voluntary and direct negotiation between the Crown and the iwi.

4. How do resumption applications relate to an already negotiated Treaty settlement?

- Between 2009 and 2016, there was a series of legal challenges to the Tribunal.
- These resulted in the Supreme Court and Court of Appeal stating that the resumption power could be used regardless of an iwi’s ability to enter into a negotiated Treaty settlement.

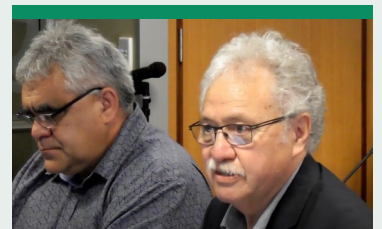


Photo caption: (Top right) Settlement Trust Chair and Negotiator, Robin Potangaroa; Trustee and Negotiator Haami Te Whaiti; and Settlement Trust Lawyer, Mike Colson (bottom) presenting to the Waitangi Tribunal at the Wai 863 Remedies Hearing held between 9-13 December 2019.

5. What was the outcome of the preliminary Waitangi Tribunal report?

The outcome of the report was very positive for the Settlement Trust:

- Taking into account the evidence and findings of its district enquiry, the Tribunal decided that the harm caused to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua by the Crown's breaches of Te Tiriti o Waitangi, is proportionate to the value of the land in the Ngāumu Crown Forest and at the Maraetai Power Station. So, the Tribunal considered that it should make binding recommendations for the return of all this land (more than \$800m in value), to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.
- The report notes the Settlement Trust has attributes that make it an appropriate recipient entity for the resumption orders because:
 - It is whakapapa-based and organised along hapū and marae lines.
 - It keeps a register of uri and its structure received widespread approval when it was created for the purposes of resolving historical treaty claims through guiding principles focused on mana, identity, promoting and protecting cultural norms and recognising the role of kaumatua.
- On the other hand, the Tribunal found that the prejudice suffered by WMI's shareholders by the Public Works Takings in 1949 is not proportionate to, and far outweighs, the current value of the land at Maraetai. Furthermore, the varying number of shares held by the shareholders (i.e., some very large ones and some very, very small ones) means it would be unjust for the shareholders to benefit from the return of land in proportion to the number of shares they now held, rather than in proportion to the prejudice they suffered.
- The Tribunal observed that there are no hapū in the Wairarapa who do not have close links with the Ngāumu Crown Forest. The Ngāumu Crown Forest had already been divided as part of the previous Rangitāne Settlement, with the balance preserved for the Settlement Trust settlement. The Tribunal concluded that giving the Ngāumu Crown Forest to Ngāi Tūmapūhia-ā-Rangi would cause unfairness to others.
- The Waitangi Tribunal did note however, that before making a resumption order in favour of the Settlement Trust, it considered that a process was required to allow all of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua to determine that the Settlement Trust was the endorsed entity. This is because it was established to enter into a negotiated settlement with the Crown, not to receive land as a result of resumption orders – although its legal powers allow it to do so. If mediation and negotiations fail, and after the Mercury proceedings, we will need to come back to this process.



The Maraetai Power Station

6. Why did the Settlement Trust oppose the WMI resumption order on the Maraetai Power Station?

- We opposed the WMI resumption order on the Maraetai Power Station because of our tikanga, which doesn't allow us to settle grievances under Te Tiriti o Waitangi by laying claim to land in someone else's rohe. Despite Wairarapa Māori owning lands at Pouākani, it is not within our customary rohe, and therefore this would transgress our tikanga.
- Therefore, restoring our land base in Wairarapa and Tāmaki nui-ā-Rua has been our primary goal and we sought to resolve our Pouākani grievances through an increased quantum in our negotiated settlement with the Crown.

7. Why did the Settlement Trust then end up making its own resumption applications? What process was followed to do this?

- The Settlement Trust's first position was that the Waitangi Tribunal should not grant either of the WMI or Ngāi Tūmapūhia-ā-Rangi resumption applications and, instead, allow the Deed of Settlement to be signed and the agreed settlement to proceed. Our view was also that we had a very good settlement on the table, that the majority of our claimant community voted in support of.
- However, as the Crown refused to sign the Deed of Settlement, the Trustees then decided, following legal advice, that it would be prudent for the Settlement Trust to make its own resumption application:
 - We are committed to protecting the Settlement that we have negotiated with the Crown, and that you, our people, approved in 2018.
 - We want to protect the position of all of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua whether or not the Waitangi Tribunal decide it is necessary to order the return of either the Maraetai Power Station or the Ngāumu Crown Forest lands in order to remedy the Crown's historic breaches of the Treaty of Waitangi.
 - We want to ensure that, if that happened, all of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua will benefit – and not just WMI shareholders or Ngāi Tūmapūhia-ā-Rangi hapū members. Based on their initial determination, the Waitangi Tribunal has agreed with this.
 - We want to ensure that any return of the Maraetai Power Station is conducted in accordance with tikanga and by involving mana whenua.

8. Has the Settlement Trust tried to resolve all of this, stop the legal process, and allow the settlement to proceed?

- Yes – the Settlement Trust has had considerable negotiations with the Crown, as well as four days of mediation with Ngāi Tūmapūhia ā-Rangi to try to reach an agreed position with the Crown. It has also had discussions with WMI, who initially declined the opportunity of mediation.
 - We want to resolve all of this by kōrero – not through a drawn-out legal process. We want to ensure a lasting settlement that is reached by agreement for the benefit all of Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua (including WMI shareholders and Ngāi Tūmapūhia-ā-Rangi hapū). This process will be challenging.
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9. Why is Mercury now interfering with our settlement process?

- Mercury owns the Maraetai Power Station. If the Tribunal's interim report is made final, that land and power station would be transferred to Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua.
 - Mercury is concerned about the loss of the power station on its future operations.
 - The Settlement Trust has indicated to the Waitangi Tribunal that if an order is made returning the land to the Settlement Trust, then it would offer to sell it back to Mercury at 90 per cent of market value (with the transfer of land to be effected through Raukawa and/or Ngāti Tūwharetoa to recognise their mana whenua interests).
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10. Can the Settlement Trust or the Crown stop Mercury from issuing these proceedings? What is the Crown's position on this?

- The Settlement Trust cannot stop Mercury from issuing these proceedings and taking them to a hearing.
 - However, we have obtained priority for this hearing given the delays that have already taken place in our settlement process. The High Court has therefore set the proceeding down to be heard at a trial on 27-30 October 2020.
 - Our lawyers are working with WMI's lawyers to oppose Mercury's challenge.
 - The Crown has indicated that it is also considering challenging the Waitangi Tribunal's decision. It may do this because of the impact on the settlement process and Treaty settlements to date, if the Tribunal's interim report is made final. The Crown has to advise the High Court of its position by 30 June 2020.
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11. What is the Settlement Trust's current strategy? How can we stop the settlement delays and legal fees?

- The Settlement Trust had previously offered to sign the Deed of Settlement, but the Crown declined to do so.
- The Settlement Trust's strong preference is to achieve an outcome through kōrero, rather than legal action. We are continuing to work on negotiations with all the interested parties (WMI, Ngāi Tūmapūhia-ā-Rangi, and the Crown) to try to reach an agreed outcome.
- This is a complex situation and there are numerous things to consider – the amount of the land at stake (\$800m), the potential impact on historic and future Treaty settlements and Crown policy, and the novel nature of resumption orders means that negotiations are difficult. The breadth of the Tribunal's power to order resumption is also not completely clear and the claimant parties, the Crown and Mercury have different views on how likely the Waitangi Tribunal's initial report is to be upheld by the Courts. The Crown is also concerned about the impact of the potential resumption orders on proportionality with other historical settlements.
- The Crown's Treaty breaches date back to the 1840s. Our first Waitangi Tribunal claims were lodged in 1988. A delay of up to three more years needs to be seen in this context, given the potential enhancement over the existing agreed, but not signed, settlement.
- While legal costs have been high, and the delays frustrating, the Trustees are focussed on delivering the best possible settlement for the benefit of all of Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua now, and the generations to come.

Key events: 2016–2020

- 7 MAY 2016**
 - The Settlement Trust reached an Agreement in Principle (AIP) with the Crown for a comprehensive Treaty settlement. The agreed quantum amount with the Crown is \$93m (but with a current commercial value of over \$100m), and significant cultural redress which includes the return of Wairarapa Moana.
 - A key component of the AIP was that all Waitangi Tribunal claims brought on behalf of Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua hapū or related entities would be ended.
- 10 FEBRUARY 2017**

Wairarapa Moana Incorporation (WMI) lodged a resumption application in the Waitangi Tribunal seeking the return of the Maraetai Power Station at Pouākani, for the benefit of its shareholders. The Power Station's value is greater than \$600m.
- 22 MARCH 2018**

The Crown and the Settlement Trust initialled the Deed of Settlement.
- 22 MARCH 2018**

The Crown and the Settlement Trust agreed the terms of the Deed of Settlement and initialled it.
- 30 JULY 2018**

Ngāi Tūmapūhia-ā-Rangi lodged a resumption application seeking the return of the Ngāumu Crown Forest to it, for the benefit of the hapū members. The Forest's value under a resumption order is up to \$200 million.
- SEPTEMBER – NOVEMBER 2018**

The Deed of Settlement Ratification process took place. Voting results confirm approval from 71.7 % of the claimant community who voted, for the Deed of Settlement to progress.
- OCTOBER 2018**

The Crown advised it would not sign the Deed of Settlement because of the resumption applications made by WMI and Ngāi Tūmapūhia-ā-Rangi.
- 19 NOVEMBER 2018**

The Settlement Trust made its own resumption application for the Ngāumu Forest to protect the settlement for the benefit of all members of Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua.
- 18 FEBRUARY 2019**

The Settlement Trust received notification from the Crown that the Minister for Treaty of Waitangi Negotiations, Hon Andrew Little, and Te Minita Whanaketanga Māori, Hon Nanaia Mahuta, had reviewed the ratification results for our Deed of Settlement and advised we had sufficient support to sign the Deed.
- 23 AUGUST 2019**

The Settlement Trust made its own resumption application for the Maraetai Power Station to protect the settlement for the benefit of all members of Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua.
- 2018–2019**

The Waitangi Tribunal held hearings on the resumption applications.
- 23 MARCH 2020**

Mercury Energy failed in a High Court bid to block the release of the Waitangi Tribunal's preliminary report.
- 24 MARCH 2020**
 - The Waitangi Tribunal issued its preliminary report and said it is intending to return the Maraetai Power Station and the Ngāumu Crown Forest to all of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.
 - This report accepted the Settlement Trust is a suitable entity to receive the land subject to a further confirmation process.
 - The report rejected WMI and Ngāi Tūmapūhia-ā-Rangi as suitable entities to receive the land.
- 29 MAY 2020**

Mercury issued a new statement of claim in the High Court challenging the Waitangi Tribunal's preliminary report.
- 27-30 OCTOBER 2020**

Mercury's legal challenge is to be heard in the High Court.



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