

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2011-485-817
CIV-2017-485-269
CIV-2017-485-292
[2022] NZHC 608**

UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER	of an application for an order recognising Customary Marine Title and Protected Customary Rights
BY	the late Claude Augustin Edwards (deceased), Adriana Edwards and others on behalf of Te Whakatōhea (CIV-2011-485-817)
BY	Christina Davis on behalf of Ngāti Muriwai Hapū (CIV-2017-485-269)
BY	Ngāti Ruatakenga (CIV-2017-485-292)

On the papers:

Counsel: M Sharp and M Sinclair for CIV-2017-485-269
K Feint QC and A Sykes for CIV-2017-485-292

Judgment: 29 March 2022

JUDGMENT (NO. 5) OF CHURCHMAN J

[1] At the Stage Two hearing in respect of the Edwards (Te Whakatōhea No. 2) application, I granted the request by counsel for Ngāti Muriwai to file further evidence in relation to the boundary of the protected customary rights (PCR) for whitebaiting at the Waiaua river mouth.

[2] At the Stage Two hearing, Mr Nepia Tipene had given evidence that he accepted that the Waiaua River mouth is a wāhi tapu and that no-one should fish there. In cross-examination he agreed that it would be inappropriate and a breach of tapu for anyone to fish in a wāhi tapu area, and confirmed that Ngāti Muriwai did not seek a PCR in relation to whitebaiting at the river mouth for that reason.

[3] By affidavit of 8 March 2022, Mr Tipene has deposed that feedback he received from members of the Ngāti Muriwai email list to who he had sent the proposed draft orders had produced a response that members did not agree to exclude the area at the Waiaua river mouth from the PCR order because:

...in tikanga Ngāti Muriwai consider that their connection is to the awa as a whole not just to parts of it.

[4] He sought to amend the draft order by reverting back to a prior draft so that the relevant passage said:

Fishing for whitebait:

- (a) in the Marine and Coastal Area from a straight line across the banks at the Waiaua river mouth and upstream of the river by the distance of the river mouth x5 (as marked 2 on the attached survey plan).

[5] By memorandum of 21 March 2022, Ms Feint QC, counsel for Ngāti Ruatakenga, sought leave to respond on the basis that Ngāti Rua was prejudiced by the proposed amendment. I grant such leave.

[6] The memorandum noted that the draft map produced on behalf of Ngāti Muriwai in closing submissions, which was said by counsel to be the area that Ngāti Muriwai whitebaited in, was a more limited area than the area now sought by Mr Tipene from the river mouth and upstream to a distance 5x the width of the river mouth.

[7] The basis of the objection to the amendment is that the river mouth is a wāhi tapu area and was specifically accepted by Mr Tipene as such in his evidence at the Stage Two hearing.

[8] It was submitted that a PCR order is to protect customary rights that continue to be carried out in a particular area but Mr Tipene's evidence was that, because of the wāhi tapu status, no-one whitebaited at the river mouth.

[9] It was also noted that in cross-examination, Mr Tipene had specifically agreed that he would not seek PCR in relation to the river mouth because of its wāhi tapu status.

Analysis

[10] Section 51 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) defines the meaning of PCR as being a right that:

- (a) has been exercised since 1840; and
- (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
- (c) is not extinguished as a matter of law.

[11] The evidence given by Mr Tipene at the Stage Two hearing confirmed that, because of the wāhi tapu status of the area, whitebaiting was not undertaken by Ngāti Muriwai at the Waiaua river mouth. It was specifically for that reason that he amended the map showing the revised area claimed.

[12] The only evidence in the Stage Two proceeding as to where whitebaiting took place in the Waiaua River came from Mr Tipene. Whether or not specified members on the Ngāti Muriwai mailing list agree with the amendment made by Mr Tipene in his evidence, and the amended map filed, is irrelevant.

[13] The Court obliged to decide the matter on the basis of the evidence tendered to it.

[14] The tohunga, Mr Te Ariki Amoamo, gave evidence explaining why the river mouth at Waiaua was a wāhi tapu, and therefore not a place where activities such as fishing should occur; Mr Tipene specifically accepted that evidence and amended the boundary of the PCR application as a consequence. He also confirmed that no whitebaiting had, in fact, taken place in that area. That means that, in relation to the area of the Waiaua river mouth, the applicant has not been able to meet the requirement for continuity which is a threshold requirement for the grant of a PCR.

Outcome

[15] The application by Ngāti Muriwai to further amend the boundaries of the PCR order in respect of whitebaiting at the mouth of the Waiaua River is declined, and the boundaries remain as set out in the amended map filed during the course of the Stage Two hearing.

Churchman J

Solicitors:

Te Haa Legal, Otaki for Ngāti Muriwai
Annette Sykes & Co, Rotorua for Ngāti Ruatakenga

Counsel:

K Feint QC