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## MINUTE (NO. 32) OF CHURCHMAN J

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[1] By memorandum dated 7 October 2020 on behalf of Ngāi Tai and Ririwhenua (CIV-2017-485-270 and CIV-2017-485-272), Ms Rongo indicated that the applicants in these two applications no longer wish to have any part of the two applications determined by the Court through these proceedings.

[2] The background to this memorandum is that initially, the original inland eastern boundary of the priority application (CIV-2011-485-817) extended as far the Motu River. This boundary would have completely overlapped the applications made by Ngāi Tai and Ririwhenua.

[3] Given the extent of the overlap, it is unsurprising that Ngāi Tai elected to have their application heard contemporaneously with the priority application, and the other overlapping non-priority Whakatōhea applications.

[4] There has been considerable uncertainty about the actual boundaries of the priority applicant's application. The amended application dated 18 May 2015 did not describe the application area as including the area around Whakaari, this was depicted in an amended map filed on 30 April 2020. A memorandum of counsel for the priority applicant, also filed on 30 April 2020, stated that the applicant was seeking protected customary rights around Whakaari and confirmed that the applicant was seeking orders in respect of the eastern part of the application area from Te Rangi to the Motu Awa.

[5] By minute dated 19 May 2020,<sup>1</sup> the Court directed that the priority applicant file an amended application addressing the uncertainties in relation to the boundary.

[6] By amended application filed on 2 June 2020, the applicant amended the eastern boundary of the application so that a customary marine title (CMT) now ceased at Tarakeha. This greatly reduced the overlap with Ngāi Tai and Ririwhenua.

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<sup>1</sup> Minute (No. 15) of Churchman J, 19 May 2020 re an application by Edwards, CIV-2011-485-817.

[7] Although the eastern boundary of the priority applicants application was now Tarakeha, some of the overlapping Whakatōhea applicants, whose applications have been heard with the priority applicant (Pakowhai CIV-2017-485-264; Muriwai CIV-2017-485-269; Flavell CIV-2017-485-375; Ngāti Patumoana CIV-2017-485-253; Mekomoko CIV-2017-485-355; and Ngai Tamahaua Hapū and Te Hapū Tiitoko CIV-2017-485-262 and 377) still sought an eastern boundary of Te Rangi or the nearby Haurere Point which is slightly to the east of Te Rangi. Te Rangi and Haurere Point are further to the east than Tarakeha and therefore further into the area claimed by Ngāi Tai and Ririwhenua.

[8] There was a discrepancy between the details in the third amended application and the latest map filed by the priority applicant. All of this meant that, at the commencement of the hearing, there was some uncertainty as to the actual boundaries of the priority application and those of the overlapping Whakatōhea applicants.

*Position of Ngāi Tai and Ririwhenua*

[9] Ngāi Tai and Ririwhenua have participated fully in the hearing, being represented by Ms Rongo who has led evidence and cross-examined. The case advanced by Ngāi Tai in support of their application for orders under the Act, has been based on the assertion that their customary marine area includes the area between Tirohanga eastward to Te Rangi. The area between Tirohanga and Tarakeha overlaps with the priority application and the area between Tirohanga and Te Rangi overlaps with the area claimed by several other overlapping Whakatōhea applicants. Ngai Tai did not wish the Court to determine any part of their application that was not overlapped by any of the Whakatōhea applications.

[10] It appears that at a hui iwi held on 3 October 2020, Ngāi Tai and Ririwhenua changed their minds about whether they wish the Court to determine that part of their application that covered the areas between Tirohanga and Te Rangi.

[11] The memorandum of counsel which conveyed this information also revealed that Ngāi Tai and Ririwhenua had engaged in direct negotiations with the Crown and wished now to continue to do that in preference to having the Court determine those parts of their

application that overlapped by the priority application and the other Whakatōhea applications.

[12] Up until this point, the Court was unaware that Ngāi Tai and Ririwhenua had been engaging with the Crown.

[13] As the Court made clear in its judgment in this matter in relation to the participation of Ngāti Rua in these proceedings,<sup>2</sup> an applicant who has sought direct engagement cannot, in respect of the same area also advance an identical claim in proceedings before the Court.

[14] Having elected to participate in these proceedings as an applicant rather than an interested party, in respect of that part of their claim between Tirohanga and Te Rangi, Ngāi Tai and Ririwhenua cannot, at this late stage in the Court hearing, seek to withdraw from these proceedings. The situation is different in relation to the balance of their claim from Te Rangi to the east. That claim does not overlap with any of the claims advanced either by the priority applicant or the other Whakatōhea applicants. The Court has not been asked to determine any issue in respect of it in these proceedings.

[15] A withdrawal of the claim by Ngāi Tai and Ririwhenua in respect of the area between Tirohanga and Te Rangi would have the result that, having elected to participate as an applicant in respect of that area in these proceedings, they would not be able to then resurrect such a claim by way of direct engagement.

[16] It seems that Ngāi Tai and Ririwhenua were unaware that this might be a possible outcome of the instructions they had given to Ms Rongo which produced her memorandum of 7 October 2020.

[17] Ms Rongo indicated that she thought it unlikely that her clients would wish to continue with their application to withdraw from these proceedings in respect of the area between Tirohanga and Te Rangi, and requested an opportunity to seek further instructions.

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<sup>2</sup> *Re an application by Edwards & Ors* [2020] NZHC 1905 at [17].

[18] Accordingly, the Court will allow Ms Rongo that opportunity. Should she, having obtained instructions, still wish to pursue an application for leave to discontinue that part of the application, such an application should be made in writing to be filed no later than 5 pm on 12 October 2020, with any submissions in opposition to be filed and served no later than 5 pm on 14 October 2020. I will then determine the matter on the papers.

**Churchman J**