BEFORE THE INDEPENDENT COMMISSIONERS

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of the proposed Canterbury Land and Water Regional Plan

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LEGAL SUBMISSIONS OF COUNSEL
ON BEHALF OF NGĀ RŪNANGA OF CANTERBURY,
TE RŪNANGA O NGĀI TAHU AND NGĀI TAHU PROPERTY LIMITED

25 March 2013

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1. *HE KUPU WHAKATAKI* – INTRODUCTION

1.1 We appear today on behalf of Ngā Rūnanga of Canterbury, Te Rūnanga o Ngāi Tahu and Ngāi Tahu Property Limited (for the purposes of hearing, collectively referred to at times as **Ngāi Tahu**).

Ngāi Tahu

1.2 Te Rūnanga o Ngāi Tahu is the governing tribal council established by statute and is recognised as the representative of Ngāi Tahu Whānui.[1]

1.3 Ngāi Tahu Property Limited is a wholly owned subsidiary of Ngāi Tahu Holding Corporation, which in turn holds and manages investments for the benefit of Te Rūnanga o Ngāi Tahu. The vision of Te Rūnanga o Ngāi Tahu and its commercial arms is driven by a set of core values that underpin every decision that is made on behalf of Ngāi Tahu Whānui.

1.4 Land and water resources are taonga to Ngāi Tahu. Ngāi Tahu are also active users of natural resources, both in a traditional and contemporary sense. You will hear from a number of witnesses who will explain the significance of these resources to the iwi, to the Holdings Corporation and its subsidiaries as a committed inter-generational investor, and relevance to the values of Ngāi Tahu Whānui in a governance sense.

1.5 Ngāi Tahu are dedicated to achieving sound environmental outcomes within Ngāi Tahu's takiwā.[2] As resource users, Ngāi Tahu adhere to a cultural and environmental code of ethics. This recognises that long-term economic, social and cultural wellbeing relies on the protection of the natural resource base for future generations – for Ngāi Tahu, that is the embodiment of kaitiakitanga.[3] The interconnectivity of natural resources is also recognised by the Ngāi Tahu philosophy of *Ki uta ki tai* ('from the mountains to the sea'). Such concepts are, in our submission, the essence of mainstream resource management.

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[1] Te Rūnanga o Ngāi Tahu Act 1996, s15(1).

[2] Solomon evidence, February 2013, para [3.6]; Te Rūnanga o Ngāi Tahu Act 1996, s5 (the geographical extent of Ngāi Tahu's takiwā is described in the legislation).

[3] Solomon evidence, February 2013, para [5.1].

Summary of case

1.6 Ngāi Tahu support the proposed Land and Water Regional Plan (**pLWRP**) as notified, except where amendments are requested. Ngāi Tahu have taken the opportunity to suggest a range of amendments to improve the pLWRP, so that it better gives effect to the (now operative) Canterbury Regional Policy Statement (**CRPS**), National Policy Statement for Freshwater Management (**NPS**) and, fundamentally, better achieves the purpose of the Resource Management Act 1991 (**RMA**).

1.7 Te Rūnanga has lodged a comprehensive primary submission on the pLWRP on behalf of Ngā Rūnanga of Canterbury (and further submissions on various points raised by other submitters). While covering a wide range of plan provisions, there are certain fundamental principles that lie behind the submission. The key principles are that land and water should be managed in an integrated way; kaitiakitanga should be exercised when managing resources; and a clear and consistent framework is needed to guide plan administrators and users.

1.8 As the panel is aware, Ngāi Tahu Property Limited has lodged a separate submission. The submission lodged by Ngāi Tahu Property Limited focusses, as you might expect, more narrowly on those aspects of the pLWRP that directly affect the assets that are managed by Ngāi Tahu. The two submissions are incorporated in the case being presented on behalf of Ngāi Tahu today on Group 1 & 2 topics, with the submission by Arowhenua Rūnanga on sub-regional topics proposed to be incorporated into the Ngāi Tahu case at that time.[4]

1.9 While some points have been accepted by Council reporting officers, many of the substantive amendments suggested by Ngāi Tahu have not been picked up on. As there are no technical officer reports formally produced under section 42A, Ngāi Tahu have commissioned their own independent technical assessments which are accompanied by a comprehensive planning evaluation. The pre-circulated evidence will be presented in summary form by the witnesses who are here today.

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[4] Commissioner Decision 5, dated 3 December 2012.

2. PRELIMINARY MATTERS

Scope of relief – jurisdiction to make specific amendments

2.1 In some instances, the wording of the specific relief sought differs between the submissions as lodged. This is discussed in more detail in evidence and reconciled where appropriate. As a consequence of the joint case, certain refinements have been made to the amendments set out in the original submissions. In other instances, amendments have been drafted to give effect to the reasons outlined in the submissions.

2.2 In our submission there is jurisdiction to consider all of the amendments that have been outlined in evidence, on the basis that these amendments come fairly and reasonably within what was raised in the submissions lodged by Ngāi Tahu and/or by other primary submissions on the pLWRP.

2.3 It is accepted that a planning authority cannot go beyond what is reasonable and fairly raised in submissions. However, this is a question of degree to be judged by the content of submissions and can enable the granting of relief based on the reasons contained in the submission.[5] Essentially, the process of deciding this is not to be bound by formality, but approached in a realistic workable fashion rather than from the viewpoint of legal nicety.[6] In this instance, we submit that the amendments sought are squarely within scope.

Scope of relief – plan structure

2.4 Ngāi Tahu endorse an approach that provides an opportunity to interweave Ngāi Tahu values throughout the objectives and policies of the pLWRP. The concepts raised in the objectives are generally supported, subject to key provisions being redrafted to ensure that the relationships between provisions are clear and the policy framework is consistently applied across the region.

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[5] *Campbell v Christchurch City Council* [2002] NZRMA 332, para [17].

[6] *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150; *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC).

2.5 The development of region-wide and catchment-specific provisions is also supported, provided that the boundaries between the sub-regional sections are based on actual catchments rather than the artificiality of Zone Committee/territorial boundaries.[7] However, Ngāi Tahu do not support the concept that the sub-regional sections only have to achieve the objectives of the pLWRP and can have their own policies and rules on any matters.[8] Ngāi Tahu have sought that pLWRP policies and rules apply to sub-regional chapters except where catchment-specific provisions are necessary or justified, for example specific allocation regimes and limits for water quality and quantity (and as further elaborated on in planning evidence[9]).

2.6 There are many fundamental resource management principles relating to land and freshwater management that, we submit, can readily apply in all catchments. We also submit that it would be inefficient and ineffective to repeat the process of establishing and justifying those fundamental principles as each sub-regional section is developed. In addition to this being inefficient, such an approach may lead to a complex and inconsistent regional plan and associated issues with the administration and enforcement of the provisions, the very situation that regional plans are designed to avoid.

2.7 With respect, we do not agree that there is an issue of natural justice at stake here.[10] The pLWRP is intended to provide a single, overarching resource management framework for the region as a whole (as opposed to having a series of separate catchment plans). The objectives, policies and rules in the pLWRP apply to the catchments now. Every person who considers themselves affected by these provisions has had the opportunity through this process to lodge a submission in relation to the provisions that they consider to be inappropriate.

2.8 It is important to clarify that Ngāi Tahu are not seeking to prevent the opportunity for parties to subsequently mount a case that supports a

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[7] McIntyre evidence, 4 February 2013, paras [3.8] – [3.14]; Murchison evidence, 4 February 2013, paras [3.13] – [3.14].

[8] Murchison evidence, paras [3.9] – [3.12].

[9] McIntyre evidence, paras [3.1] – [3.7].

[10] cf. Legal submissions of counsel for Fonterra presented on 11 March 2013, para [3.22].

catchment-specific response as being more efficient and effective than the region-wide provisions. Catchment-specific environmental limits can be established based on the particular circumstances of the catchment. We also readily acknowledge that the Council may of course change a plan (or part of a plan) at any time. There is no desire, nor indeed any ability, on the part of Ngāi Tahu to seek to fetter that discretion.

2.9 The point being made is simply that, to the greatest extent practical, the objectives, policies and rules that are essential to the integrated management of land and water at a regional level should be set now. To ensure that the plan structure actually succeeds in achieving integrated management, the pLWRP should clearly identify those policies and rules which apply in all catchments and those which are intended as interim or 'default' provisions that apply unless and until catchment-specific provisions are developed. The sub-regional sections of the pLWRP will then only need to address issues that are relevant to that sub-region and are not adequately managed by the region-wide provisions. Following this approach, the catchment-specific provisions can be developed within a clear and consistent framework.[11]

Scope of relief – jurisdiction to request a variation

2.10 In some instances, the submission on behalf of Ngā Rūnanga of Canterbury seeks by way of specific relief that a variation be initiated to deal with certain matters.[12] This has been put forward as an option for relief, in the event that the panel determines that the relief sought in the submission in relation to these particular matters is either not specific enough or is beyond scope.

2.11 This raises the question whether the panel has the ability to formally direct or recommend that the Council take steps to initiate a variation to the pLWRP. We understand that the commissioners have been appointed by the Council under section 34A of the RMA, which

[11] McIntyre evidence, paras [3.1] – [3.7].

[12] Submission lodged on behalf of Ngā Rūnanga of Canterbury, page 8 (replacement of the Nutrient Zone Map) and page 16 (review of Schedule 17); Wilcock evidence, 4 February 2013, paras [2.1] - [2.15]; McIntyre evidence, paras [3.13] and [5.5] - [5.10].

empowers a local authority to delegate any functions, powers, or duties under the Act - other than the approval of a proposed plan under clause 17 of the First Schedule.[13] In this instance, the panel has been delegated the functions and duties of hearing submissions on the pLWRP and to make recommendations to the Council.[14]

2.12 Section 34A facilitates improved efficiencies by delegating these functions to hearing commissioners, while reserving the final endorsement of a plan to the elected authority itself (or in the Canterbury context, to the ECan Commissioners).[15] Given the delegation of power in this instance to hear submissions and make recommendations, we accept that the panel's delegated authority does not extend to itself initiating a variation to the pLWRP or even directing that this be done by the Council.

2.13 However, we submit that it is certainly within the panel's authority to include commentary in the recommendation that sends a strong signal to the Council on how certain matters might be resolved going forward. This extends in our submission to the making of a formal recommendation that a variation should be initiated to address concerns raised in submissions.

Preliminary procedural matter – consultation

2.14 The submission on behalf of Ngā Rūnanga of Canterbury raises a specific concern about the lack of adequate consultation in relation to certain flow and allocation regimes.[16]

2.15 First Schedule consultation with the tangata whenua of the area through iwi authorities is a requirement under the RMA - it is mandatory and unconditional.[17] Consultation must allow sufficient time and not just involve the presenting of information. It is implicit that the party being consulted with needs to be sufficiently informed so as to be able to make a useful response.

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[13] RMA, s34A(1)(a).

[14] Commissioner Minute 1, dated 25 October 2012.

[15] *Kapiti Environmental Action Inc v Kapiti Coast District Council* W085/07, paras [34] - [35].

[16] Submission lodged on behalf of Ngā Rūnanga of Canterbury, page 13.

[17] RMA, First Schedule Part 1, Clause 3(1); *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 (HC), para [90].

2.16 Ngāi Tahu raised this concern directly with the Council and we understand that the Council has advised Ngāi Tahu that this hearing is the appropriate forum to address the issue.[18]

2.17 While this concern relates to topics which will be the subject of Group 3 hearings, we have raised this today so that the panel has ample opportunity to consider the matter and, if appropriate, make the necessary directions and/or adjourn the proceedings prior to the commencement of that part of the hearing. In our submission, it is open to the panel to adjourn prior to hearing Group 3 topics so that the required consultation can be carried out. This will provide an opportunity to potentially resolve the concerns that Ngāi Tahu have with the particular flow and allocation regimes, or will at least enable Ngāi Tahu have a sufficient understanding as to how they have been developed to then be able to provide meaningful comment.

3. LAW

3.1 The purpose of a regional plan is to assist the Council to carry out its functions in order to achieve the purpose of the RMA.[19] One of the primary intentions behind the pLWRP is to capitalise on Canterbury's agricultural potential by meeting water quality and quantity targets to ensure sustainable development around the region. It is meant to provide the framework and the tools to deliver the region's aspirations for water management.

3.2 The Council is required to prepare a regional plan in accordance with its functions under section 30, the provisions of Part 2 of the Act, its duty under section 32, and any regulations.[20] A regional plan must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies.[21]

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[18] Murchison evidence, paras [2.1] – [2.7] and Attachment 1 (letter to Council dated 12 July 2012).

[19] RMA, s63(1).

[20] RMA, s66(1).

[21] RMA, s67(1).

Section 30

3.3 The Council's function under section 30 includes the establishment and implementation of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region.[22]

3.4 Policy 7.3.9 of the CRPS requires regional plans to include integrated catchment-based management. The principle of integrated management is also incorporated into the Canterbury Water Management Strategy (**CWMS**), which is itself embodied into the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (**ECan Act**).

3.5 In our submission, the integrated management of effects is a key aspect of the Council's role in developing the pLWRP. This should inform the proposed plan structure.

3.6 As stated earlier, Ngāi Tahu generally support the concept of having region-wide and catchment-specific provisions within the pLWRP. However, the current plan structure is not supported by Ngāi Tahu where it effectively allows sub-regional provisions to usurp any of the regional policies or rules, rather than being confined to those matters which need to be managed at a catchment level.

3.7 In our submission, it is entirely proper to set objectives, policies and rules now that are found to be essential to the integrated management of land and water throughout the region.

Section 32

3.8 The panel will be familiar with section 32 of the RMA and, in particular, section 32(3) which requires an evaluation of:

> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
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> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

[22] RMA, s30(1)(a).

3.9 Section 32(4) provides that this evaluation must take into account the benefits and costs of policies, rules or other methods; and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.

3.10 The recent High Court decision of *Rational Transport Society Inc v New Zealand Transport Agency*[23] provides some guidance on the evaluation that is required under section 32. While involving a Board of Inquiry process, we submit that the general principles espoused in this case are relevant to this hearing.

3.11 The High Court confirmed the requirements of section 32 at paragraph [44]:

> Section 32 requires that, before adopting any proposed changes to policies, the Board must evaluate and examine whether, having regard to the efficiency and effectiveness, the changes are the most appropriate way of achieving the objectives…. In making the evaluation the Board had to take into account the benefits and costs of the proposed policies (i.e. "benefits and costs of any kind, whether monetary or non-monetary"); and the "risk of acting or not acting, if there is uncertain, or insufficient information" about the subject matter of the proposed policies.

3.12 The High Court then went on to state, at paragraph [45]:

> …Section 32 requires a value judgement as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and there is no need to place any gloss that word by incorporating that it be superior…

3.13 While it is incumbent on the hearing panel to examine each and every objective in its process of evaluation, that does not mean that objectives should be looked at in isolation. That is because the extent to which each provision is "appropriate" may depend on the inter-relationship with other relevant provisions and in achieving the purpose of the Act.[24]

3.14 Ngāi Tahu are concerned that the section 32 evaluation has not properly considered whether the provisions achieve the purpose of the RMA. This is one of the key reasons why Ngāi Tahu have taken the

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[23] [2012] NZRMA 298 (HC).

[24] Ibid., para [46].

time to undertake a comprehensive re-write of the objectives and policies of the pLWRP.

CRPS and NPS

3.15 The pLWRP must also give effect to the CRPS and NPS.[25] This requires a positive implementation of the superior planning instruments.[26]

3.16 The NPS recognises the relationship of Ngāi Tahu with water and requires regional policy statements to provide for integrated management of the effects of the use and development of land on freshwater.[27]

3.17 This theme is then followed through in the CRPS which, amongst other matters, requires that the interconnectivity of surface water and groundwater be considered as part of achieving integrated management of freshwater resources and includes provisions safeguarding the mauri of water bodies.[28]

3.18 It is Ngāi Tahu's position that the pLWRP in its current form fails to give effect to the CRPS and NPS. A number of amendments are suggested by Ngāi Tahu to address this - including provisions to protect natural wetlands and the natural character of the mainstem of braided rivers, and the strengthening of controls on the discharge of contaminants to water and cumulative effects of groundwater abstraction - all of which are designed to give better effect to the CRPS, and therefore, the NPS.[29]

Iwi Management Plans/Water Conservation Orders

3.19 It is necessary to take into account any relevant planning document recognised by an iwi authority, to the extent that the content of documents such as iwi management plans have a bearing on the resource management issues of the region.[30]

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[25] RMA, s67(3).

[26] *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211, para [50].

[27] NPS, Objective D1 and Policy C2.

[28] CRPS, Objectives 7.2.1 and 7.2.4; Policy 7.3.4(c).

[29] Murchison evidence, para [3.8]; Lynch evidence, paras [3.24] and [3.37].

[30] RMA, s66(2A)(a).

3.20 We also note that the pLWRP must not be inconsistent with any National Water Conservation Order (**WCO**).[31] In the Canterbury context, the recently amended Te Waihora WCO expressly provides for the recognition of cultural values associated with this significant water body.[32] The recently amended Rakaia WCO is another relevant example, along with the Rangitata and Ahuriri WCOs. A submission on the pLWRP that will result in provisions that are inconsistent with any WCO is, we submit, ultra vires.[33]

Canterbury Water Management Strategy

3.21 Particular regard must be had to the Vision and Principles of the CWMS.[34]

3.22 The Vision of the CWMS is:

> To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework.

3.23 The CWMS contains a range of primary and supporting Principles which provide a framework for water management with Canterbury. It places a strong emphasis on the integration of land and water management. The primary Principles include environmental and customary uses as first order priority considerations. Ngāi Tahu support the incorporation of the CWMS Principles into the development of the pLWRP.

3.24 Recent case law suggests that regard can be had to documents that have no formal status under the RMA but which raise relevant issues as background material[35]. This is particularly to the extent that such documents assist in determining the most appropriate way of achieving the objectives of the pLWRP, and the purpose of the RMA.

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[31] RMA, s67(4)(a).

[32] National (Te Waihora/Lake Ellesmere) Water Conservation Order 1990, clause [3].

[33] Further submission on behalf of Ngā Rūnanga of Canterbury, page 4 (TrustPower submission point 250.75); McIntyre evidence, para [10.28].

[34] Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, s63.

[35] *West Coast Regional Council v Friends of Shearer Swamp* (2011) 16 ELRNZ 530, para [49].

3.25 While the remainder of the CWMS is arguably not a mandatory consideration in terms of the RMA, we submit that it can nonetheless be a relevant consideration in your discretion as a non-binding policy document.

Part 2

3.26 The carrying out of functions under the RMA is subject to Part 2. This includes the statutory purpose contained in section 5, along with sections 6, 7 and 8.

3.27 The purpose of the RMA, as expressed in Part 2, will be well known to the panel.

> **5 Purpose**
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> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
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> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

3.28 Section 5 guides the function of the Council in plan-making and policy decisions. As we have noted, the purpose of preparing, implementing and administering the regional plan is to assist the Council to carry out its functions in order to achieve the purpose of the RMA.[36] This is not a simple balancing exercise. In coming to a decision under the RMA, it is necessary to identify all relevant facts and factors, give weight to them under Part 2 and then assess the overall outcome under the RMA.[37]

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[36] RMA, s63(1).

[37] *Long Bay-Okura Great Park Society Inc v North Shore City Council* A078/08, para [276].

3.29 Section 6 of the RMA sets out matters of national importance which must be recognised and provided for:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers.

(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga.

(f) The protection of historic heritage from inappropriate subdivision, use, and development.

(g) the protection of protected customary rights.

3.30 The significance to Ngāi Tahu of wetlands (including hāpua) and cultural landscapes is discussed in evidence.[38] The term "cultural landscapes" was also the topic of some discussion during development of the CRPS. This is a relatively new construct in RMA planning instruments. In our submission, it includes Māori cultural landscapes which can be provided for in the pLWRP. Ngāi Tahu's relationship with land and water turns on their historical, spiritual and cultural values. These features form part of Ngāi Tahu historical heritage.[39]

3.31 The approach taken in the CRPS is also intended to enable water management to better consider the principle of *Ki uta ki tai*; and to recognise and provide for Ngāi Tahu's cultural relationship with taonga as required under s6(e) of the RMA.

3.32 Section 6 therefore gives considerable protection from the tangible and intangible effects of proposed activities and, in our submission, establishes the mandate to express this relationship through mainstream resource management.

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[38] See for example: Lenihan evidence, paras [12.1] – [12.3] and [14.1] - [14.3]; McIntyre evidence, paras [7.3] – [7.11]; and Gerbeaux evidence (for the Department of Conservation) in relation to the values ascribed to wetlands.

[39] *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402, para [237].

3.33 Section 7(a) requires that particular regard must be had to kaitiakitanga. This imposes a duty to be on enquiry.[40] Kaitiakitanga has been described as a system of cultural practices, customs and rules which have been developed in order to protect and enhance the mauri of a place or resource for the benefit of present and future generations.[41] It is therefore concerned with both resource management processes and outcomes.

3.34 Kaitiakitanga is identified in the CRPS (Objective 7.2.4) as playing a key role in the implementation of an integrated management system of freshwater resources. The principle reasons and explanation to Objective 7.2.4 state that the aspirations of the collaborative management approach in the CWMS are to be realised through a water management regime which facilitates the community stewardship of water resources and enables Ngāi Tahu, as tangata whenua, to exercise kaitiaki. It is clear that kaitiakitanga has been recognised in higher planning documents as forming part of the basis of freshwater management. For that reason, Ngāi Tahu have suggested extensive amendments to the objectives and strategic policies of the pLWRP in order to better incorporate the language and concepts of kaitiakitanga.

3.35 Section 8 requires you to take into account the principles of the Treaty of Waitangi. In our submission, this is an overarching clause which provides for the basic protection of Māori interests in achieving the purpose of the Act. The Privy Council in *McGuire v Hastings District Council* confirmed that the RMA is a comprehensive code for planning issues and requires that special regard be had to Māori interests and values in policy decisions, noting that:[42]

> …The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Māori issues.

3.36 We submit that the amendments to the pLWRP suggested by Ngāi Tahu will better achieve the purpose of the RMA.

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[40] *Gill v Rotorua District Council* (1993) 1A ELRNZ, 374, page 380.

[41] Lenihan evidence, 4 February 2013, para [10].

[42] (2002) 8 ELRNZ 14 (PC), para [21].

Water permit transfer

3.37 The issue of the transfer of water permits is complex. Ngāi Tahu are not opposed to the transfer of water permits per se. The ability to transfer water permits to other resource users when the water is not required is acknowledged as a sensible way to proceed in appropriate circumstances.

3.38 Ngāi Tahu are however opposed to the provisions that encourage development of a market in water and wish to ensure that transfers are clearly directed towards improving efficiency of use and reducing the extent of over-allocation.[43] The position being taken by Ngāi Tahu reflects Policy 7.3.4(2) of the CRPS, which seeks to prevent the transfer of allocated but unused water in fully allocated or over-allocated water bodies.

3.39 Questions have been asked about the legality of requiring partial surrender of a water permit during transfer and also whether it is possible to make water transfer a prohibited activity in certain circumstances. The administrative law doctrines of ultra vires and repugnancy provide that a regulation cannot prohibit that which a statute expressly permits, nor permit that which a statute expressly prohibits.[44] In the RMA context, section 136 provides for applications to be made for transfer of water permits, with such applications to be considered according to the activity status that is prescribed by the regional plan.

3.40 We therefore doubt whether it is lawful to ascribe prohibited activity status to the transfer of water. However, we submit that a rule could validly include a standard which requires partial surrender of the water permit in certain circumstances.

Mixing of waters

3.41 Ngāi Tahu concerns about mixing of waters between catchments have been discussed in evidence. The submission lodged on behalf of Ngā Rūnanga of Canterbury identifies that there is no universal Ngāi Tahu position on this issue. The acceptability of transferring water between

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[43] McIntyre evidence, para [6.8]; Murchison evidence, paras [3.32] – [3.35].

[44] *Powell v May* [1946] 1 KB 330 per Goddard CJ, para [335].

catchments will depend on each specific proposal and the position of the respective Rūnanga.

3.42 Additional policy wording is suggested to describe the concern more clearly and provide further guidance to plan users and administrators.

4. CONCLUSION

4.1 Ngāi Tahu have lodged comprehensive submissions that provide for improvements in the policy direction of the pLWRP and secure better consistency with the CRPS, NPS and the purpose of the RMA. It is Ngāi Tahu's case that the fundamental principles of land and water management can and should be settled now; and then followed through as appropriate in the sub-regional sections of the pLWRP.

4.2 Ngāi Tahu support the move towards integrated management of land and water resources in Canterbury. The interconnectivity of natural resources is recognised by the Ngāi Tahu philosophy of *Ki uta ki tai*. This is a system of natural resource management which, we submit, ought to lie at the heart of any successful community.

4.3 Such a system must be simple, certain and able to be readily enforced. Just because issues may appear difficult, this does not warrant complexity in planning or putting matters off for another day. Nor does protection necessarily preclude progress. Ngāi Tahu do not believe that it has to be a choice between a highly valued natural environment or a high performing economy.

4.4 Now is the time for the community to take the first steps on what may be a long but successful journey towards effective, integrated and sustainable management of Canterbury's land and water resources.

5. EVIDENCE

5.1 A number of witnesses have prepared evidence on behalf of Ngāi Tahu in support of the changes being sought to the pLWRP.

5.2 We appreciate that the assessment of all the evidence before you at this hearing will be based on an evaluation of the totality of the evidence. While the RMA does not provide specific guidance as to the

weight to be afforded to a section 42A report, we note however that the panel has a discretion whether or not to accept any or all of the recommendations contained in that report.[45] The basic principles of evidence provide a valuable guide to fact-finding in the RMA setting.[46] Essentially there needs to be material of probative value which tends to logically show the existence of facts consistent with the finding. Speculative evidence is not sufficient.

5.3 You will hear today about the Ngāi Tahu perspective on the role of tangata whenua in governance, management and decision-making frameworks. This context is important when understanding the basis upon which the pLWRP has been developed and how it might be implemented going forward.

5.4 Evidence from cultural witnesses explains the significance of land and water resources as taonga. This evidence identifies the value that is placed on the historic, spiritual and cultural associations that exist in Canterbury.

5.5 Expert technical witnesses have also produced evidence that addresses the key issues of water quality and quantity, land use and associated matters that are relevant to the case for Ngāi Tahu. This evidence is then evaluated in a comprehensive planning assessment of the merits of the Ngāi Tahu case.

5.6 The following witnesses have provided evidence in support of the case for Ngāi Tahu:

a. **Tā Mark Solomon** is Kaiwhakahaere of Te Rūnanga o Ngāi Tahu. His evidence has been pre-circulated and provides an overview of Ngāi Tahu Whānui, outlines the resource management vision held by Ngāi Tahu and describe the tribal significance of the land and water resources of Canterbury. Ms Arihia Bennett, Chief Executive of Te Rūnanga o Ngāi Tahu, is present on behalf of the Kaiwhakahaere who is unfortunately unable to be here today.

b. **Mr Tony Sewell** is Chief Executive of Ngāi Tahu Property Limited. Ngāi Tahu are supportive of sustainable development and

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[45] RMA, s42A(2).

[46] *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84, page 105.

represent a major investor in the Canterbury region. Mr Sewell outlines the importance of developing appropriate policies in the urban and rural setting. His message is simple – progress need not occur at the expense of the environment, but this must be supported by a sound economy. That requires delivering regimes for environmental management that are certain and achievable.

c. **Mr Te Marino Lenihan** is a senior environmental advisor employed by Te Rūnanga o Ngāi Tahu. Mr Lenihan works with the rural division of the tribe's commercial arm and also alongside flax-roots Ngāi Tahu engaged in the CWMS to ensure that cultural values are reflected in the regulatory regime. His evidence describes Ngāi Tahu values in land and water, particularly the significance of wai Māori. Mr Lenihan explains key concepts and outlines the essential relationship between Ngāi Tahu, natural resources and cultural landscapes.

d. **Mr Roderick Henderson** is a hydrologist employed by NIWA and has considered the inter-connectedness of surface water and groundwater resources, and the effects on river flows on these connections. He outlines in his evidence the various Canterbury river types and describes the interactions that influence flow variability and which he considers need to be accounted for in water management.[47] In preparing his evidence, Mr Henderson has critically evaluated the classification of river types and the proposed management zones that are presently included in the pLWRP.

e. **Mr Maurice Duncan** is a hydrologist employed by NIWA. His evidence considers water quantity issues and the significance of Canterbury's braided rivers. This involves a discussion on allocation regimes - the setting of minimum flows and allocation blocks (including gaps), the need for flow variability, the value of partial restrictions as a practical way of managing residual flows, and the importance of managing surface water and stream depleting groundwater in an integrated way.[48] Mr Duncan's

[47] Henderson evidence, 4 February 2013, para [3.1] – [3.9].

[48] Duncan evidence, 4 February 2013, para [9.1] – [9.4].

evidence informs the overall policy direction that is being sought by Ngāi Tahu.

f. **Dr Robert Wilcock** is a water quality scientist employed by NIWA and has prepared evidence on the water quality management aspects of the pLWRP. He will discuss the value of catchment-specific water quality targets and management through nutrient allocation zones, the role of contaminant limits in managing water quality and the efficacy of good on-farm practices in addressing effects on water quality. Dr Wilcock's evidence informs the position being taken by Ngāi Tahu on the definitions and plan structure.

g. **Dr Brent Cowie** has 30 years experience in resource management in New Zealand and consults to a number of parties in the region, including Ngāi Tahu Property Limited. Dr Cowie also chaired the panel and wrote the decisions on Chapters 4-8 of the NRRP. He prepared the submission by Ngāi Tahu Property Limited on the pLWRP. Dr Cowie outlines in his evidence Ngāi Tahu's interests in forestry, farming and hydro-electric power in the Canterbury region and describes how these interests are affected by the pLWRP.

h. **Ms Lynda Murchison** is the Programme Leader Environmental Policy and Planning at Te Rūnanga o Ngāi Tahu. Ms Murchison records Te Rūnanga's involvement generally in consultation during preparation of the pLWRP. As Ms Murchison was involved in some preliminary drafting of the pLWRP during her time as the Principal Planning and Consents Advisor for the Council, she has confined her evidence to providing background information on the reasons behind the submission that has been lodged on behalf of Ngā Rūnanga of Canterbury.

i. **Ms Cathy Begley** is a senior environmental advisor employed by Te Rūnanga o Ngāi Tahu. She outlines Te Rūnanga's involvement in consultation and Ngāi Tahu's position on the management of land uses that affect water quality.

j. **Ms Philippa Lynch** is a qualified planner who is employed by Te Rūnanga o Ngāi Tahu as an environmental advisor. She has prepared planning evidence that articulates the reasons for the submission made on behalf of Ngā Rūnanga of Canterbury and

specifically addresses the proposed changes to rules in the pLWRP.

k. **Ms Sandra McIntyre** is a planning, policy and project management consultant with Schema Limited. Ms McIntyre has undertaken an independent planning analysis of the merits of the Ngāi Tahu submissions. This involves an evaluation of the provisions in the pLWRP as notified, with a focus on the strategic policy framework. Ms McIntyre provides detailed comment on the amendments sought by Ngāi Tahu, relying where appropriate on the technical evidence or information supplied by other witnesses.

l. Ngāi Tahu also adopt in part the evidence of **Dr Philippe Gerbeaux** (Director-General of Conservation), in relation to the definition of wetlands and the values ascribed to wetlands.[49]

DATED this 25th day of March 2013

J M Crawford/B McAuley
Counsel for Nga Rūnanga of Canterbury, Te Rūnanga o Ngāi Tahu and Ngāi Tahu Property Limited.

[49] Gerbeaux evidence, 4 February 2013, paras [20] – [32] and [33] - [42].