

**BEFORE THE HEARINGS PANEL  
FOR THE CANTERBURY REGIONAL COUNCIL**

**IN THE MATTER** of the Resource Management Act 1991 and the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

**AND**

**IN THE MATTER** of Proposed Change 5 to the Canterbury Land and Water Regional Plan

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**LEGAL SUBMISSIONS ON BEHALF OF  
NGĀ RŪNANGA (TE RŪNANGA O KAIKŌURA, TE NGĀI TŪĀHURIRI RŪNANGA, TE HAPŪ  
O NGĀTI WHEKE, TE RŪNANGA O KOUKOURĀRATA, ŌNUKU RŪNANGA, WAIREWA  
RŪNANGA, TE TAUMUTU RŪNANGA, TE RŪNANGA O AROWHENUA, TE RŪNANGA O  
WAIHAO AND TE RŪNANGA O MOERAKI), NGĀI TAHU FARMING LIMITED, AND TE  
RŪNANGA O NGĀI TAHU (TE RŪNANGA)**

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## MAY IT PLEASE THE COMMISSIONERS

### 1. INTRODUCTION

- 1.1** Te Rūnanga o Ngāi Tahu (Te Rūnanga) is the iwi authority over most of Te Wai Pounamu (the South Island), including the Waitaki Catchment, as set out in the Te Rūnanga o Ngāi Tahu Act 1996.
- 1.2** Te Rūnanga is comprised of 18 papatipu rūnanga which represent those who hold mana whenua over various areas in the takiwā. Te Rūnanga o Kaikōura, Te Ngāi Tūāhuriri Rūnanga, Te Hapū o Ngāti Wheke, Te Rūnanga o Koukourārata, Ōnuku Rūnanga, Wairewa Rūnanga, Te Taumutu Rūnanga, Te Rūnanga o Arowhenua, Te Rūnanga o Waihao and Te Rūnanga o Moeraki (nga rūnanga) are papatipu rūnanga which have interests in Canterbury and some in relation to the Waitaki Catchment in particular.
- 1.3** Under the Te Rūnanga o Ngāi Tahu Act 1996, Te Rūnanga is obliged to consult with papatipu rūnanga in forming positions on various matters as the iwi authority.<sup>1</sup> In practice, Te Rūnanga encourages councils to consult directly with papatipu rūnanga over matters such as natural resource management planning; and Te Rūnanga considers the views of nga rūnanga in forming its position as the iwi authority.
- 1.4** Ngāi Tahu Farming Limited is also a party to the joint submission lodged by Te Rūnanga and papatipu rūnanga.
- 1.5** Both the Canterbury Region and the Waitaki Catchment are highly culturally significant to Ngāi Tahu. Evidence explaining the basis for the Ngāi Tahu relationship and the significance of the resources covered by Plan Change 5 (**PC5**) to the Canterbury Land and Water Regional Plan (**CLWRP**) is provided by Ngāi Tahu Kaiwhakahere, Tā Mark Solomon, as well as nga rūnanga cultural witnesses David Higgins and Mandy Waaka-Home.
- 1.6** For Ngāi Tahu, the relationship with the takiwā is not only one of kaitiakitanga over the natural resources of the catchment but, given the significant role these natural resources play in the New Zealand economy,<sup>2</sup> it is one of manākitanga.

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1 Through section 15.

2 Considering the role of water in, for example, energy generation, agriculture, and tourism.

- 1.7** Tā Mark Solomon speaks of the special relationship of Ngāi Tahu with water and the importance of water quality/mauri in his evidence. He explains how mahinga kai was the "ninth tall tree", alongside eight land purchases that formed the basis of the Ngāi Tahu claim, and that any decision on PC5 must be mindful of Treaty principles. He calls for staged reductions in on-farm nutrient losses, and sets the challenge against grandparenting and an insistence on hard limits, because the mana of Ngāi Tahu is at stake.<sup>3</sup> He asks the council, as Kawanatanga, to ensure that active protection is provided for in line with Treaty principles, which would enable Ngāi Tahu to aspire to having improved water quality, drinkable water and swimmable rivers across the takiwā.<sup>4</sup>
- 1.8** David Higgins describes the traditional and cultural relationships that Kāi Tahu Whānui holds for the Waitaki and Te Manahuna (the Mackenzie Basin). His evidence is clear that Ngāi Tahu Whānui has continued a physical presence in, and strong relationship with, the Waitaki right up until today.<sup>5</sup>
- 1.9** Mandy Waaka-Home speaks of Te Rūnaka o Arowhenua, Waihao and Moeraki's aspirations for the Waitaki, being to continue to preserve and grow their relationship with their ancestral river – Ko Waitaki te awa – and to enhance their use of that catchment.<sup>6</sup>
- 1.10** It is clear that the issue of environmental degradation is of huge concern to Ngāi Tahu, bearing in mind their expectations about the appropriate management of natural and physical resources of the region following the Ngāi Tahu Claims Settlement Act. Mandy Waaka-Home's evidence demonstrates that wetland drainage, water abstractions and declining water quality are reasons for the decline in tuna population in the Waitaki catchment.<sup>7</sup>
- 1.11** Ms Davidson has attached to her evidence a piece of work from Dr Jane Kitson (commissioned by Te Rūnanga), which is an overview of surface water quality changes in the Canterbury Region since the Ngāi Tahu Deed of Settlement in 1997. Even if taken conservatively, this work shows that water quality has declined in many of the freshwater bodies of significance to Ngāi

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3 Evidence in Chief of Tā Mark Solomon, at paragraph 4.11.

4 Evidence in Chief of Mr Solomon, at paragraph 4.14.

5 Evidence in Chief of David Higgins.

6 Evidence in Chief of Mandy Waaka-Home, section 3.

7 Evidence in Chief of Ms Waaka-Home, at section 4, in particular paragraph 4.16.

Tahu. This degradation does not enable Ngāi Tahu to carry out their kaitiaki role, nor realise their legitimate aspirations afforded to them under the Treaty settlement. The need for the degradation to be reversed and the environment to return to at least what it was at the time of Treaty settlement underpins the principled position of Ngāi Tahu on PC5.

**1.12** For the reasons set out in these legal submissions and the cultural and technical evidence for Ngāi Tahu, maintenance of the status quo is simply not an option and would not give effect to the National Policy Statement for Freshwater Management 2014 (**NPS**), or the Canterbury Regional Policy Statement (**CRPS**), and nor would it be the most appropriate way of achieving the objectives of the CLWRP.

**1.13** Through its submission and evidence filed, Ngāi Tahu is seeking to ensure that the Canterbury Regional Council in its decision making on PC5 to the CLWRP:

- (a) secures the Sinking Lid approach to nitrogen loss rates, in that:
  - (i) the use of the Farm Portal ensures continued nitrogen reduction, in particular through PC5 providing certainty that the Plan does not simply lock in farming activities to current nitrogen loss levels. It also needs to show continued improvement in nitrogen to below the Good Management Practice Loss Rate. This will provide direction that Good Management Practice is not static and those undertaking farming activities should consider and aim for continual improvement when it comes to reducing nitrogen loss; and
  - (ii) the concept is expressly recognised in any alternative consenting path (to the Farm Portal) that might be included in the Plan, if such a path could be justified as being appropriate;
- (b) retains specific reference to mahinga kai within the CLWRP;
- (c) provides greater clarity as to what mahinga kai is, and relate it more directly back to the management of water quality, while also accepting the concept of ki uta ki tai (from mountains to the sea), which recognises what happens on the land, affects what happens in the water;
- (d) formally recognises Ngā Rūnanga and their values within the process of preparation and auditing of Farm Environment Plans (**FEPs**),

through providing for mahinga kai in Schedule 7 for *all* Canterbury Zones (not just Part B, Waitaki). This includes the inclusion of a specific management area within Schedule 7 (Part A) titled "Management Area: Mahinga kai", and targets for mahinga kai;

- (e) provides for the identification of any wāhi tapu and wāhi taonga sites within properties be an additional requirement under Part B of clause 2 of the FEP, as this allows the land owners, farm certifier, farm auditor and the Regional Council to identify where the site is and help inform the development of management mechanisms appropriate for these sites;
- (f) makes amendments to the definition of 'Certified Farm Environment Plan Auditor' to include completion of a course that addresses cultural competencies approved by Te Rūnanga o Ngāi Tahu and with evidence of completing this course being supplied to the Regional Council;
- (g) accepts Council officers' recommendations relating to permitted winter grazing rules, but that the 5 metre setback proposed for the Red Nutrient Allocation Zone and the Orange Nutrient Allocation Zone, is also applied to the Green or Light Blue Nutrient Allocation Zone to protect the freshwater bodies within these zones in the same manner; and
- (h) makes specific changes to definitions, consistent with the above outcomes.

**1.14** In relation to Part B of PC5 Ngāi Tahu is seeking to ensure:

- (a) the discharge of nutrients from mahinga kai enhancement is expressly allowed for in Part B of PC5, through the inclusion of a new rule;<sup>8</sup> and
- (b) the notified rule structure for the Waitaki Zone rules be retained or, if the specific provisions are amended, that prohibited activity status remains for activities that do not comply with the requirement to operate at 90% of the GMP Loss Rate for Hakataramea River Zone, Hakatatamea Hill Zone and the Greater Waikākahi Zone.

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<sup>8</sup> PC3 to the Waitaki Catchment Water Allocation Regional Plan is of relevance. The Plan Change became operative on 10 July 2015, and approves the reservation of water for the purpose of enhancing mahinga kai and for augmenting flows into the Wainono lagoon. The Council's decision on PC3 is of relevance to PC5, as Ngā Rūnanga seeks an allocation of nutrient discharge as a part of its relief in relation to Part B of PC5. The new Rule sought is set out at Paragraph 7.3 of Ms Davidson's evidence.

**1.15** We record that Ngāi Tahu has, in the preparation of its evidence, placed considerable reliance on the Regional Council's assurances set out in Appendix C of the s42A report, that the use of the Portal as a central tool of PC5 will result in a reduction in nitrogen loss by July 2020. It was made clear by the section 42A report that this reduction in nitrogen loss, which is of critical concern to Ngāi Tahu, has always been part of the purpose and intended effect of PC5. For that reason, one of the key interests of Ngāi Tahu at this hearing is that PC5 operates as intended by the Regional Council, and that the Sinking Lid concept is recognised in any alternative consenting path that might be considered appropriate to include in the Plan.<sup>9</sup> Importantly in this context, Ngāi Tahu does not accept that the proposal by Fonterra to remove express recognition of the Sinking Lid concept is appropriate or justified.

**1.16** Central to the relief sought by Ngāi Tahu are Part 2 of the Resource Management Act 1991 (**RMA**) considerations, which are submitted to provide useful context and guidance as to whether the inclusion of the relief sought by Ngāi Tahu better achieves the RMA's purpose. The relief of Ngāi Tahu:

- (a) will better enable Ngāi Tahu to provide for their social, economic and cultural well-being;
- (b) will better sustain the potential of the resources associated with freshwater in the Region to meet the reasonably foreseeable needs of future generations;
- (c) will better safeguard the life-supporting capacity of water, soil and ecosystems (including in particular the potential enhancement of the mauri of water throughout the region);
- (d) will ensure that there will be no undue adverse environmental effects resulting from the implementation of the relief (and indeed there are likely to be significant positive effects in terms of provision for Ngāi Tahu values and broader environmental values);
- (e) will appropriately recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga; and
- (f) will result in the enablement of the meaningful exercise of kaitiakitanga by Ngāi Tahu (predominantly through the various paptipu rūnanga) over an important and highly valued resource, being the waters of the Region, and to provide for the important

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<sup>9</sup> Ngāi Tahu reserves its position on whether it is appropriate for an alternative consenting pathway to the Farm Portal to be provided.

cultural and historical relationships that Ngāi Tahu has had increasingly fewer opportunities to implement over the years.

**1.17** The evidence for Ngāi Tahu, which will be addressed in further detail in these submissions, provides a compelling basis for granting the relief sought. In particular it is submitted that the relief of Ngāi Tahu will:

- (a) ensure freshwater bodies support their customary uses and cultural values, including the gathering of mahinga kai;
- (b) safe-guard the life-supporting capacity of freshwater;
- (c) ensure Ngāi Tahu is better able to exercise kaitiakitanga; and
- (d) protect and restore the mauri of the lakes, rivers and springs of Canterbury.

## **2. OUTLINE OF LEGAL SUBMISSIONS**

**2.1** These legal submissions are structured as follows:

- (a) evidence for Ngāi Tahu;
- (b) the relevant statutory framework – recognition of Maori values in higher order planning documents including within Part 2 of the RMA, the NPS, the CRPS, the Ngāi Tahu Claims Settlement Act 1998 (**NTCSA**), Iwi Management Plans, and the CLWRP;
- (c) recognition of mahinga kai in good management practice and Farm Environment Plans;
- (d) ensure reducing nitrogen loss / the Sinking Lid concept is embedded in the Farm Portal;
- (e) nutrient allocation for exercise of mahinga kai; and
- (f) conclusion.

## **3. EVIDENCE FOR NGĀI TAHU**

**3.1** Evidence on behalf of Ngāi Tahu has been prepared by:

- (a) **Tā Mark Solomon.** Tā Mark is the kaiwhakahere of Te Rūnanga o Ngāi Tahu. His evidence identifies, describes and explains the tribal relationship and historical associations for Ngāi Tahu with the takiwā and the Waitaki River;



- (b) **Mr David Higgins.** Mr Higgins' evidence describes the traditional and cultural relationships between Ngāi Tahu and the Waitaki and Te Manahuna (the Mackenzie Basin). His evidence also covers matters relating to the meaning and application of various concepts such as mahinga kai, wāhi tapu, wāhi Taonga, and kaitiakitanga;
- (c) **Ms Mandy Waaka-Home,** cultural evidence on behalf of Ngati Huirapa represented by Te Rūnanga o Arowhenua. Ms Waaka-Home's evidence covers the concepts of mauri and kaitiakitanga, and the contemporary meaning of and provision for mahinga kai, as well as the environmental quality in the Waitaki catchment compared to the time of the Treaty settlement;
- (d) **Dr Gail Tipa.** Dr Tipa describes and explains a piece of her work that assessed the extent to which some, but not all, current Good Management Practice consider mahinga kai; and
- (e) **Ms Treena Davidson.** Ms Davidson is the planning expert for Ngāi Tahu. Her evidence sets out the details of the Ngāi Tahu regime, and discusses that regime in comparison to PC5, including in relation to higher order documents and the relevant provisions of the RMA. Ms Davidson has also provided rebuttal evidence, which responds to the evidence of Mr Willis, and relates more specifically to the alternative consenting pathway.

#### 4. RELEVANT STATUTORY FRAMEWORK / LEGAL CONSIDERATIONS

4.1 Section 66 of the RMA sets out that a change to a regional plan must be in accordance with various factors. Those considered specific to the Council in PC5 are:

- (a) the Council's functions under section 30; and
- (b) the provisions of Part 2.

4.2 The water related functions available to the Council, and relevant to PC5, for the purposes of giving effect to the RMA as set out in section 30 are:

- (1) (e) *the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—*
  - (i) *the setting of any maximum or minimum levels or flows of water:*
  - (ii) *the control of the range, or rate of change, of levels or flows of water:*

(iii) *the control of the taking or use of geothermal energy:*

....

(fa) *if appropriate, the establishment of rules in a regional plan to allocate any of the following:*

(i) *the taking or use of water (other than open coastal water):*

(ii) *the taking or use of heat or energy from water (other than open coastal water):*

(iii) *the taking or use of heat or energy from the material surrounding geothermal water:*

(iv) *the capacity of air or water to assimilate a discharge of a contaminant:*

(4) *A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:*

(a) *the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and*

(b) *nothing in paragraph (a) affects section 68(7); and*

(c) *the rule may allocate the resource in anticipation of the expiry of existing consents; and*

(d) *in allocating the resource in anticipation of the expiry of existing consents, the rule may—*

(i) *allocate all of the resource used for an activity to the same type of activity; or*

(ii) *allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and*

(e) *the rule may allocate the resource among competing types of activities; and*

(f) *the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).*

**4.3** Further considerations required by the Council are set out in sections 66 and 67, in particular section 67(3):

(3) *A regional plan must give effect to—*

(a) *any national policy statement; and*

....

(c) *any regional policy statement.*

(4) *A regional plan must not be inconsistent with—*

...

(b) *any other regional plan for the region.*

**4.4** Of note, section 67(4) requires that a regional plan must not be inconsistent with any other regional plan for the region. Although within the same regional plan, decisions on Plan Change 1 (**PC1**) to the CLWRP inserted provisions relating to Selwyn Waihora,<sup>10</sup> which required farming activities to obtain land

use consents to address effects on cultural values, if they were located within the Lake Area of the Cultural Landscape Values Management Area (CLVMA).<sup>11</sup> Through PC1, additional requirements were inserted into Schedule 7 of the CLWRP, including that a map or aerial photograph must be included in a FEP, that clearly shows the location of any known mahinga kai, wāhi tapu or wāhi taonga within any property or farming enterprise located in the CLVMA, and that the FEP must include a description of how nutrient use efficiency will be maximised, while also minimising nutrient losses to water.

**4.5** It is submitted that it would be contrary to good resource management practice to allow inconsistencies within a regional plan, where this could not be justified based on the specific facts and circumstances. While it is accepted that PC5 is an over-arching plan change, it is submitted that there is no apparent reason why it should not recognise and provide for the same approach to FMPs in different parts of the region. The evidence for Ngāi Tahu is clear as to the importance of mahinga kai values throughout the region.

**4.6** As addressed in more detail in paragraph 5.4 below, Plan Change 3 (PC3) to the Waitaki Catchment Water Allocation Regional Plan now provides for a separate allocation of water (11 cumecs) for mahinga kai enhancement. Ngāi Tahu is seeking that Part B of PC5 to the CLWRP be consistent with that Regional Plan, by providing for a nutrient allocation.

## **Part 2 of the RMA**

**4.7** Part 2 of the RMA provides, amongst other matters, for the following in achieving its sustainable management purpose:

- (a) recognition and provision for the relationship of Ngāi Tahu and their culture and traditions with their ancestral lands, waters, wāhi tapu and other taonga<sup>12</sup> as a matter of national importance;
- (b) the ability for Ngāi Tahu to exercise their role as kaitiaki;<sup>13</sup> and
- (c) the principles of the Tiriti o Waitangi (the Treaty of Waitangi) in decision making.<sup>14</sup>

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11 The CLVMA is a special feature of the Selwyn Te Waihora catchment that recognises the significance of Te Waihora/Lake Ellesmere to Ngāi Tahu. The objective is to protect mahinga kai and manage waterways and drains recognising their cultural and ecological sensitivity to discharges of contaminants. Through PC1, one of the key resulting actions for the area is to require all farming activities to operate at Good Management Practice, then make further improvements over time in managing nitrogen.

12 RMA, section 6(e) Matters of National Importance - *the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga*:

13 RMA, section 7(a).

- 4.8 The sustainable management purpose of the RMA includes the management of natural and physical resources in a way or at a rate that provides for current and future generations.

#### **National Policy Statement for Freshwater Management 2014**

- 4.9 The NPS sets out the objectives and policies for freshwater management under the RMA, which acts as the framework that the Council must give effect to when managing freshwater in the Canterbury Region.<sup>15</sup> Of particular relevance to Ngāi Tahu are Objective D1 and Policy D1, which specifically address tāngata whenua roles and interests in freshwater management:

##### **Objective D1**

*To provide for the involvement of iwi and hapū, and to ensure that tāngata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to.*

##### **Policy D1**

*Local authorities shall take reasonable steps to:*

- a) involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region;*
- b) work with iwi and hapū to identify tāngata whenua values and interests in fresh water and freshwater ecosystems in the region; and*
- c) reflect tāngata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region.*

(our emphasis)

- 4.10 Ngāi Tahu are tāngata whenua, and their interests and preferences are central to the implementation of this objective and policy. These NPS directions are submitted to be weighty and meaningful statements of policy. Given the strong and directive language in the objective and policy, it is submitted that not only should the words in lower-order planning documents clearly reflect and give effect to those higher-order provisions, but that the methods and implementation of the objective and policy must also tangibly and meaningfully give expression to those strong directives.

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14 RMA, section 8.

15 RMA, section 67(3)(a). The Preamble of the NPS, *National Significance Statement* and Part D *Tāngata whenua roles and interests* are also relevant for decision making. See Treena Davidson's evidence, paragraphs 4.4-4.7.

- 4.11** It is submitted that lip-service through use of vague language, or methods which leave significant discretion about recognition of Ngāi Tahu values and interests, will not suffice. The need for PC5 to strongly reflect the voice of Ngā Rūnanga and enable their interests to be given practical meaning is heightened by the clear evidence of environmental degradation throughout the region since the Treaty claim was settled, which has in turn degraded and diminished the ability of Ngā Rūnanga to perform their kaitiaki role and achieve the quality of the environment that they reasonably believed they were entitled to.
- 4.12** The Supreme Court's decision in *King Salmon*<sup>16</sup> is relevant to this Panel's recommendations, particularly when the meaning of the phrase "give effect to" in section 67(3) of the RMA is considered. While the Supreme Court held that to "give effect to" means to "implement", it was equally clear in stating that what is required to give effect to a higher-order objective or policy is dependent upon the nature of the directions.
- 4.13** Furthermore, the nature of the analytical exercise required to give effect to the NPS and RPS will depend upon an identification of the provisions which are most relevant to the issues being considered, and a reading of those objectives and policies in the round, rather than in a narrow and selective manner. Often there will be different areas of emphasis or potential inconsistencies between relevant provisions, and the exercise of determining their correct meaning will require them to be read together for an overall meaning to be derived.
- 4.14** It is submitted to be clear that preservation of the *status quo* in terms of the involvement of tangata whenua in management of water resources (and in terms of a continuing decline in water quality) is not enough. What is required is active recognition and proactive management of the sort proposed by PC5, in order to better enable recognition of tangata whenua interests and values, and in turn to restore the region's water resources to the condition where they can function for not just the benefit of Ngā Rūnanga, but for all of the stakeholders in the region.
- 4.15** Obviously, the PC5 process assists the Council in meeting these requirements, but this process alone is not enough – it needs to result in the

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16 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593.

right *outcome*. It is Ms Davidson's evidence that to give effect to the NPS, PC5 must achieve water quality outcomes that safeguard its life-supporting capacity, ecosystem processes, and indigenous species, and that reflect Ngāi Tahu values and interests.<sup>17</sup> It is submitted that the inclusion of recognition of mahinga kai values in both Farm Environment Plans and any alternative consenting pathway, is entirely consistent with and gives effect to these important national policy directions. Indeed, it is submitted that the absence of such explicit recognition would diminish Ngāi Tahu values and interests and make them implicit when they need to be clearly and explicitly stated. Such an outcome which would be discordant with the strong direction in the NPS.

### **Canterbury Regional Policy Statement**

**4.16** A regional plan must give effect to the CRPS.<sup>18</sup> Ms Davidson has provided a full list of relevant CRPS objectives and policies in Appendix 2 of her evidence. Of particular relevance are Objectives 7.2.1, 7.2.3 and 7.2.4 in that they:

- (a) recognise the intrinsic values of land and the health of freshwater ecosystems is maintained or improved at locations used for customary uses;
- (b) seek to better recognise and incorporate the cultural significance of freshwater into its management; and
- (c) increase opportunities for Ngāi Tahu to exercise stewardship and kaitiakitanga.

### **Ngāi Tahu Claims Settlement Act 1998**

**4.17** The NTCSA is a culmination of a claims process that unfolded over 140 years. The resulting NTCSA included, as cultural redress, a number of mechanisms to recognise and give practical effect to Ngāi Tahu mana over Taonga resources and wāhi tūpuna. These cultural redress mechanisms include Statutory Acknowledgements, Tōpuni and Nohoanga, which are the Statutory Acknowledgements for the Canterbury lakes and rivers.<sup>19</sup>

**4.18** Part 12 of the NTSCA is headed mahinga kai, which is where the Statutory Acknowledgement provisions are located. Along with other references in this Part of the Act, there is a strong indication that they are intended for use in the

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<sup>17</sup> Evidence in Chief of Treena Davidson, at paragraphs 4.4-4.7.

<sup>18</sup> RMA, section 67(3)(c).

<sup>19</sup> Evidence in Chief of Ms Davidson, at paragraphs 4.10-4.11.

RMA and related statutory processes.<sup>20</sup> The fact that Ngāi Tahu is seeking explicit recognition of mahinga kai in PC5, which was what Part 12 of the NTSCA is focused on, reflects the relationship between the NTSCA and RMA. It also reflects the importance of mahinga kai to Ngāi Tahu, as explained in Tā Mark Solomon's evidence.

**4.19** Tā Mark Solomon's evidence is that Ngāi Tahu has worked since the introduction of the RMA in 1991 and since the time of Settlement, to express tribal aspirations for freshwater management and mahinga kai. Ngāi Tahu expects weight to be given to those aspirations in RMA decision-making, which is commensurate with their standing as statements of a Treaty partner and their expectations of the special relationship with water that they understood to be granted to them under the NTSCA.<sup>21</sup>

**4.20** As noted earlier, the Ngāi Tahu relationship with a number of important areas and resources throughout the region is acknowledged in the NTSCA, which includes both Statutory Acknowledgement Areas and Nohoanga sites. Included within the PC5 area is Aoraki/Mount Cook, which was gifted back to the Tribe as part of the Ngāi Tahu Settlement. Aoraki/Mount Cook is set out in the list below as a Statutory Acknowledgment, but it is also the subject of a Deed of Recognition and Tōpuni under the NTSCA. The NTSCA also secured the dual naming of Aoraki/Mount Cook, with the Ngāi Tahu term appearing first.<sup>22</sup> Nine rivers and one Wetland (Punatarakao) within the Region are Statutory Acknowledgement areas.<sup>23</sup>

## **Iwi Management Plans**

**4.21** A council must take account any relevant planning document recognised by an iwi authority when preparing a plan or plan change under the RMA.<sup>24</sup> The Iwi Management Plans express Ngāi Tahu values, knowledge and perspectives on natural resource and environmental management issues. The plans are an expression of kaitiakitanga.

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20 Each Statutory Acknowledgment is in respect of a defined area and has a corresponding statement of the significance contained in a Schedule to the NTSCA. The cultural redress mechanisms for the Canterbury lakes and rivers are compiled within the Dr Jane Kitson report, attached to Ms Davidson's evidence.

21 Evidence in Chief of Mr Solomon, at paragraphs 4.1-4.2.

22 The evidence of Ms Waaka-Home describes the relationship of Aoraki/Mount Cook with the area covered by PC13.

23 These are listed in Table 1 of Dr Kitson's report, on pages 2-4.

24 RMA, section 66(2A)(a).

**4.22** Ms Davidson' evidence is that the overall theme of the relevant plans for the region (and those parts with a Waitaki specific focus), is that the quality and quantity of water in all waterways be maintained or improved to the point where it supports those fish and plant populations that were sourced from them in the past, and that these mahinga kai are fit for human consumption.

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**4.23** Although PC5 does not propose any changes to the objectives of the CLWRP, consideration of those objectives is still important as the amended policies must implement the objectives, and the provisions must achieve the objectives and policies. Of particular relevance are Objectives 3.1 and 3.2.<sup>25</sup> Objective 3.1 provides for the management of land and water to enable Ngāi Tahu culture, traditions, customary use and relationships with land and water. Objective 3.2 provides that water management applies the ethic of ki uta ki tai (from the mountains to the sea). Respectively these provide for the inclusion of mahinga kai enhancement, and reflects the relief sought by Ngāi Tahu, being the improvement of water quality across the Region.

**4.24** It is submitted that these objectives provide a strong foundation for the inclusion of mahinga kai enhancement. They appropriately recognise and provide for Ngāi Tahu values, and the PC5 policies and rules need to be both derived from and give effect to those objectives.

## **5. RELIEF: RECOGNITION OF MAHINGA KAI IN GOOD MANAGEMENT PRACTICE AND FARM ENVIRONMENT PLANS**

**5.1** The proposed changes sought by Ngāi Tahu seek to deal with the management of the effects of land uses, particularly farming activities, on water quality throughout the Canterbury region and the management of water quality in the Waitaki sub-region.

**5.1** The evidence of Tā Mark, David Higgins and Mandy Waaka-Home shows Ngā Rūnanga hold a deep concern about the state of freshwater quality within the Region and within the Waitaki Zone. Ms Davidson has attached to her evidence, a piece of work from Dr Jane Kitson (commissioned by Te

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25 Evidence in Chief of Ms Davidson, at paragraph 4.9.



Rūnanga), which as mentioned earlier, shows that water quality has declined in many of the freshwater bodies of significance to Ngāi Tahu.<sup>26</sup>

**5.2** It is clear from the cultural evidence of Ngāi Tahu that there is a strong relationship between Ngāi Tahu and the rivers within the Region. The Waitaki (in terms of Part B of PC5) was, and is, important to Ngāi Tahu in terms of both mahinga kai and travel routes. The relationship extends beyond the Waitaki River itself to Aoraki and the inland lakes (Tekapo, Pukaki, and Ohau).<sup>27</sup> As discussed earlier it is also evident that Ngāi Tahu had a reasonable expectation of active protection in line with Treaty principles. Based on the NTSCA, Ngāi Tahu hold a reasonable expectation of improved water quality, drinkable water and swimmable rivers.

**5.3** The evidence from Ngāi Tahu cultural witnesses is that mahinga kai is a dynamic and flexible concept, and that many "traditional" practices are simply no longer possible given the substantial changes to the environment that have occurred since European settlement. The concept of mahinga kai has had to move with the times, and the associated loss of much of the traditional mahinga kai of the region. It is the ability for the current expression of the term to be realised, that Ngāi Tahu seeks to be appropriately recognised in this Plan.

**5.4** The Regional Council, in its decision on PC3 to the Waitaki Catchment Water Allocation Regional Plan, concluded that enhancement of mahinga kai is an activity, and that where appropriate that activity may be provided for in a regional plan.<sup>28</sup> Through that hearing (and as accepted by the Regional Council in its decision), Ngāi Tahu sought to have a separate allocation of water with high reliability reserved for mahinga kai enhancement so that it is not at risk of allocation to any other activity. The evidence for Ngāi Tahu which was accepted at the Waitaki PC3 hearing, was that such an allocation would support the meaningful exercise of kaitiakitanga and recognise important cultural and historical relationships they hold with the waters of the Waitaki River.<sup>29</sup>

**5.5** Mr Higgins has provided evidence that explains the traditional means of mahinga kai in practice. The evidence of Ms Waaka-Home explains how that

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26 Evidence in Chief of Ms Davidson, at paragraph 3.5.

27 Evidence in Chief of Mr Higgins, at section 6 - 10.

28 At paragraph 502.

29 Decision, at paragraphs 440, 483, 526-537.

practice of mahinga kai has needed to evolve to adapt to the ever changing environment. Given the evolving practice of mahinga kai, it is submitted that it is not appropriate to limit the allocation of mahinga kai to an externally-imposed construct of what are asserted to be "traditional" or "customary" ways. Attempting to apply a customary definition of a tradition to a modified (or modernised) catchment is not always possible.

**5.6** Ngāi Tahu seeks that the concept of mahinga kai be clearly and explicitly recognised for in the policies and provisions of PC5. In terms of section 67(4) of the RMA, it is submitted that it would be appropriate that the PC5 approach to mahinga kai was entirely consistent with that adopted in the Waitaki PC3 decision.

## **6. RELIEF: ENSURE REDUCING NITROGEN LOSS / THE SINKING LID CONCEPT IS EMBEDDED IN THE FARM PORTAL**

**6.1** Ngāi Tahu holds significant concerns that the Sinking Lid concept that was inherent in PC5's purpose (as notified) could be removed from any alternative consenting pathway to the Portal. The submission of Ngāi Tahu focused on the *outcomes* that any mechanism in PC5 delivered. Ms Davidson in her rebuttal evidence helpfully summarises these as:

- (a) water quality is at the least maintained;
- (b) mahinga kai is effectively provided for in Farm Environment Plans and the effects of farming activities on mahinga kai are audited appropriately;
- (c) an overall cumulative reduction in nutrient loss, particularly within over-allocated catchments;
- (d) nitrogen loss should be based on what is an acceptable rate of nitrogen loss given the state of the receiving environment, not what people are doing now;
- (e) continuous improvement in Good Management Practice;
- (f) the approach introduced in PC5 does not undermine the approaches developed in Plan Changes 1 – 3 to the CLWRP or future plan changes; and
- (g) Farm Management Plans and management plans are fully implemented with records of how these have been implemented.

**6.2** Effectively, the outcomes that Ngā Rūnanga seek are submitted to be consistent with a "sinking lid" approach to nutrient losses across the region, being a clear pathway that showed a percentage reduction over time of nutrient losses across the Region, as well as clear policy recognition underpinning this approach. Ms Davidson has proposed changes to the policies, which are attached to her evidence in chief at Appendix 4 and her rebuttal in Appendix 1 (the latter in response to Fonterra's evidence), to ensure that PC5 is sufficiently clear and recognises the interests of Ngāi Tahu.

## **7. ALTERNATIVE CONSENTING PATHWAY / FONTERRA'S RELIEF**

**7.1** Fonterra, in seeking an alternative consenting pathway (because of concerns about using the Portal), correctly submits that there should be a policy that supports the alternative pathway. This "structural" position is not disputed in terms of RMA requirements and appropriate plan-drafting, but it is submitted that there is no justification to dispense with any policy that says that nutrient losses need to be reduced over time. Indeed, the removal of such a policy, or the inclusion of a policy which enables an alternative consenting pathway which enables a broad "opt out" option from adhering to Good Management Practice loss rates, would run the risk of undermining the entire direction and intention of PC5 in one fell swoop.

**7.2** The position of Ngāi Tahu is that the Sinking Lid approach needs to be locked in at policy level. This is particularly important given that it is understood that the Regional Council intends to roll out subsequent plan changes for other catchments across Canterbury, and that those plan changes will be strongly guided by the policy position in PC5. It is submitted that Fonterra has not been able to provide any compelling justification for the deletion of the Sinking Lid approach, when considering an alternative consenting pathway to the Farm Portal.

**7.3** Wider concerns from other submitters seem to be for PC5 to enable use of an alternative consenting pathway because they hold concerns about the operational effect of the Farm Portal on individual farms. This appears to be the primary concern from these submitters, and has as such been used as a rationale to dispute the underlying intention of PC5.

**7.4** Overall, the position of Ngāi Tahu is that there remains an inappropriate level of certainty as to what an alternative consenting pathway would look like, with

the potential breadth of discretion that might be involved in the availability of the pathway, and a concerning lack of clarity about what 'exceptional circumstances' might be. Further, it is submitted that insufficient evidence has been provided that addresses the appropriateness of an alternative consenting pathway in terms of section 32 of the RMA.

**7.5** In short, based on the evidence before this Panel, Ngāi Tahu is not confident that its interests and values could be met through an alternative pathway. Its position is therefore that all Farm Environment Plans should be assessed through and entered into the Portal, as there is not an RMA justification to be regulating for unusual circumstances (i.e. totally unforeseen events or for bad practice). Ngāi Tahu holds a residual concern that this will be used to lock in bad practice, or simply to avoid the inconvenience of using the Farm Portal. If there is to be an alternative pathway provided for, it should behave in exactly the same manner as the Portal (ie. require preparation and auditing of Farm Environment Plans, have a sinking lid, and require the Regional Council to be made aware of non-compliance).

**7.6** It is worth reiterating that Ngāi Tahu, in the preparation of its evidence, placed reliance on the Regional Council's assurances set out in Appendix C of the s42A, that the Portal will result in a reduction akin to a 35% nitrogen loss by January 2035. While it was not possible in the time available for Ngāi Tahu to commission suitable expert advice to determine whether or how that reduction was achievable, it considers that the mechanisms and policies which are the result of PC5 should ensure this outcome.

**7.7** In summary, it is submitted that the relief of Ngāi Tahu will appropriately give effect to the NPS, achieve settled objectives of the CLWRP, and result in a suitably balanced outcome in terms of an analysis of costs and benefits.

## **8. RELIEF: NUTRIENT ALLOCATION FOR EXERCISE OF MAHINGA KAI**

**8.1** Ms Davidson has proposed a new rule in her evidence in chief<sup>30</sup> for Part B, that would satisfy Ngāi Tahu that the discharge of nutrients resulting from mahinga kai enhancement is expressly allowed. This relief appropriately aligns with the outcomes of PC3 to the Waitaki Catchment Water Allocation Regional Plan where an allocation of flows was provided for mahinga kai purposes.

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30 At paragraph 7.3.

## 9. CONCLUSION

9.1 It is submitted that the Ngāi Tahu relief:

- (a) Is consistent with and would achieve key aspects of Part 2 of the RMA through:
  - (i) recognising and providing for the matter of national importance 6(e): *the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other Taonga*. The inclusion of a specific management area and targets for mahinga kai into Schedule 7 would round out a suite of Good Management Practice provisions that could then address mahinga kai values; and
  - (ii) having particular regard to kaitiakitanga, by allowing an opportunity for the improvement of water quality and recognition for mahinga kai.
  
- (b) gives effect to the NPS:
  - (i) by providing for a higher level of engagement by Ngā Rūnanga (ie. by providing for more than consultation), consistent with Objective D1 and Policy D1;
  - (ii) by giving active recognition to and providing for proactive management of mahinga kai, in order to restore the region's water resources to the condition where they can function for not just the benefit of Ngā Rūnanga, but for all of the stakeholders in the region; and
  - (iii) by enhancing mahinga kai through the recognition of the Sinking Lid concept, whether through the Farm Portal or any alternative consenting regime.
  
- (c) gives effect to the RPS:
  - (i) by recognising the intrinsic values of land and the health of freshwater ecosystems through maintaining or improving it at locations used for customary uses;

- (ii) seeking to better recognise and incorporate the cultural significance of freshwater into its management; and
  - (iii) increasing opportunities for Ngāi Tahu to exercise stewardship and kaitiakitanga;
- (d) provides the most appropriate policies and rules for achieving the Objectives of the CLWRP:
- (i) Objective 3.1 – through the inclusion of mahinga kai enhancement providing for the management of land and water to enable Ngāi Tahu culture, traditions, customary use and relationships with land and water; and
  - (ii) Objective 3.2 – the relief of Ngāi Tahu seeking the improvement of water quality across the Region provides that water management applies the ethic of ki uta ki tai (from the mountains to the sea).

**DATED** this 6<sup>th</sup> day of October 2016



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