BEFORE INDEPENDENT COMMISSIONERS

Under the Resource Management Act 1991

In the matter of Variation 1 to the Proposed Canterbury Land and Water Regional Plan

OPENING SUBMISSIONS FOR TE RŪNANGA O NGĀI TAHU AND TE TAUMUTU RUNUNGA SOCIETY INCORPORATED

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1. INTRODUCTION

1.1 Te Waihora is a taonga and is of immense tribal and cultural significance to Te Rūnanga O Ngāi Tahu and the iwi and hapū who claim descent from Ngāi Tahu in the South Island. There are six papatipu rūnanga who hold mana whenua over parts of the Selwyn Te Waihora catchment: Te Taumutu Rū Society Inc; Te Ngāi Tūāhuriri Rūnanga Inc; Te Hapū O Ngāti Whēke; Te Rūnanga o Koukourārata and Ōnuku Rūnanga Inc ("Ngāi Tahu"). This variation provides an opportunity to recognise the significance of Te Waihora to Ngāi Tahu and to begin a process of remediation to help return the lake to what it was between the 1940s and 1960s.

1.2 Ngāi Tahu has an interest in and is affected by proposed Variation 1 to the Proposed Canterbury Land and Water Regional Plan.

1.3 Ngāi Tahu is concerned to ensure that the mauri of Te Waihora/Lake Ellesmere is restored. Ngāi Tahu's long term goal is to restore the water quality of Te Waihora to what it was enjoyed during the 1940s and 1960s.

1.4 Ngāi Tahu supports the intent of Variation 1, but it does not go far enough to address water quality and water quantity issues to enable Ngāi Tahu's goal to be realised.

2. NGĀI TAHU CLAIMS SETTLEMENT ACT 1998 AND THE WAITANGI TRIBUNAL REPORTS

2.1 In 1848, Ngāi Tahu sold land to the Crown in the Canterbury region, encompassing Te Waihora/Lake Ellesmere. The terms of the deed of sale provided that the Crown would retain adequate reserves to meet the present and future needs of the people of Ngāi Tahu, including Ngāi Tahu's mahinga kai. After the deed was signed mahinga kai sites were restricted to areas then currently cultivated. The effect of the Crown's action was that Ngāi Tahu lost ownership and control of most of their mahinga kai within the Canterbury region including Te Waihora.

2.2 In 1986 the Ngāi Tahu Maori Trust Board lodged a claim with the Waitangi Tribunal concerning breaches of the Treaty of Waitangi by the Crown. A major component of Ngāi Tahu's claim was the loss of ownership and authority over Te Waihora and the degradation of the lake caused by deforestation, land reclamation and farming practices within its catchment.
2.3 The Waitangi Tribunal recommended the Crown return Te Waihora to Ngāi Tahu. The Tribunal also said there was a need for significant Crown action and commitment to restore Te Waihora as a site for mahinga kai.

2.4 Ngāi Tahu reached a settlement with the Crown resulting in the Ngai Tahu Claims Settlement Act 1998. The Ngāi Tahu Claims Settlement Act 1998 restored Ngāi Tahu’s ownership to several areas of tribal significance which were not deemed to be part of the Crown’s land purchase, including but not limited to, the bed of the Te Waihora.

2.5 The Ngāi Tahu Settlement Act laid the foundation for the development of documents to manage and/or protect Te Waihora including the Te Waihora Joint Management Plan.

2.6 The claim and settlement process is described in the evidence of Mr Norton and Sir Tipene O'Regan.

2.7 Against this background, Ngāi Tahu is seeking to amend the paragraph in the Variation beginning “Te Waihora/Lake Ellesmere is a tribal taonga” in the introduction to include the following sentence recognising Ngāi Tahu’s position as a major land owner:

This means that Te Rūnanga O Ngāi Tahu are one of the largest land owners within the catchment and have dual roles within the catchment one as Kaitiaki the other as land owner.

2.8 The inclusion of this sentence recognises the reality of Ngāi Tahu’s position as land owner and tangata whenua and is consistent with the Crown’s apology as well as the principle of kaitiakitanga recognised in section 7(a) of the Resource Management Act 1991.

3. **SIGNIFICANCE OF TE WAIHORA TO NGĀI TAHU**

3.1 Te Waihora is significant to the people of Ngāi Tahu who have lived on its shores for generations, harvesting fish, bird life and raw produce. The lake has cultural, social, recreational, economic and educational significance. Not only does Te Waihora represent a significant source of mahinga kai (traditional food gathering source), but it is also an important source of mana for Ngāi Tahu. Sir Tipene O'Regan’s evidence explains that the central role Te Waihora plays in Ngāi Tahu’s culture and wellbeing.
3.2 The extent of Ngāi Tahu’s relationship and the culture and traditions associated with Te Waihora are illustrated in the cultural evidence to be presented today. Ngāi Tahu’s cultural and physical connection to Te Waihora is detailed in the evidence of Mr Norton, while Mr Brown’s evidence discusses the relationship of Ngāi Tahu to the land and customary fishing rights.

3.3 The importance of Te Waihora to Ngāi Tahu has been recognised through the settlement process and more recently in the National Water Conservation (Lake Ellesmere) Order 1990, as amended in 2011. The values which are recognised in that order as being outstanding on a national comparative basis are:

... habitat for wildlife, indigenous wetland vegetation and fish significance in accordance with tikanga Māori in respect of Ngāi Tahu history, mahinga kai and customary fisheries.¹

4. HEALTH OF TE WAIHORA

4.1 From Ngāi Tahu’s perspective the regional plan needs to reflect the importance of the Te Waihora not only by stating its cultural significance but by ensuring its outcomes deliver results consistent with the significance of Te Waihora. Despite Te Waihora’s importance to Ngāi Tahu the lake is in a continuing state of decline.

4.2 The health of Te Waihora was examined by the Environment Court in Lynton Dairy Limited v The Canterbury Regional Council, C108/05. The Environment Court expressed serious concern about the poor water quality of Te Waihora and described its state as follows:

The lake is eutrophic, green in colour and seems to be devoid of any riparian management.²

...there is no doubt that there is significant degradation of the lake and waterways in the lowland area in terms of water quality and the mauri of the waterways in the area.³

4.3 Public concern about the degradation of Te Waihora’s water quality is well documented. The Te Waihora Joint Management Plan 2005 notes that:⁴

¹ Clause 3 of the National Water Conservation (Lake Ellesmere) Order 1990, as amended in 2011.
² Lynton Dairy Limited v The Canterbury Regional Council, C108/05 at [101].
³ Lynton Dairy Limited v The Canterbury Regional Council, C108/05 at [104].
The Te Waihora user community, including tangata whenua, have observed a decline in lake water quality over time... The community has also known of the discharge of contaminants to the tributaries of Te Waihora, the discharge of human sewage effluent being of particular concern to Ngāi Tahu. These matters affect Ngāi Tahu as they impact on the mauri of Te Waihora and the fisheries, and some mahinga kai species are considered unfit for consumption. Water quality also affects recreational activity as people's use of Te Waihora and their sense of connection to its waters can decline with an observed or perceived decline in water quality.

4.4 Both Mr Brown and Ms Jones, who give cultural evidence, will discuss their personal experiences of the degradation of the lake and the effect that it has had on mahinga kai as well as other activities.

4.5 The degradation of the health of the lake has had a significant impact on Ngāi Tahu. Ngāi Tahu is concerned about the impacts of the lake's continuing decline on the resilience of the customary fishery and the potential depletion of this fishing resource which, in turn, will have an effect on customary fishing rights which are protected in the 1992 Fisheries Settlement, the Ngāi Tahu Deed of Settlement and the Customary Fisheries Regulations.

4.6 Ngāi Tahu’s view is that the location of Te Waihora, at the bottom of the catchment, is a significant contributing factor to the deterioration of the lake. It is in a sense the receiving environment for discharges much further upstream that are beyond Ngāi Tahu’s direct control. In that context this valuable resource is beyond Ngāi Tahu's ability to manage other than by ensuring adequate planning mechanisms are created that will control upstream users and what is discharged by them.

4.7 Ngāi Tahu seeks to amend section 11, in the paragraph commencing "In the last 20 years" to record the lake is at the bottom of the catchment. Ngāi Tahu has also sought in its submission to replace policies 11.4.6 to 11.4.17 to achieve outcomes that recognise Te Waihora is a taonga and to ensure that the mauri of the lake is restored. That is the context in which a policy is proposed to replace 11.4.6 in the Variation, to attempt to reach a Trophic Lake Index score of 4.8. This approach also explains why Ngāi Tahu is

4 Te Waihora Joint Management Plan 2005 at 54.
recommending a policy which, as a first step towards achieving acceptable water quality outcomes for the lake, proposes the total amount of nitrogen entering the catchment is limited within Table 11(i). The suite of other proposed policies are designed to also ensure that achieving an improvement in water quality in Te Waihora is a realistic goal. Prohibiting the discharge of treated waste water, liquid waste or sludge waste from community, industrial or trade processes or onsite domestic waste water systems directly to ground water or surface water from 2025 is part of ensuring improved water quality (identified as proposed replacement condition 2(b)). Similarly, excluding livestock from waterways, and providing setbacks from grazing and cultivation as well as requiring riparian planting are part of water quality improvement measures.

4.8 The need for action to address water quality in Te Waihora is widely accepted. In the Lynton Dairy decision the Environment Court commented that: 5

The lake water is in a serious ecological condition and is in urgent need of attention. Riparian management is required as an absolute minimum.

4.9 Ngāi Tahu have a responsibility as kaitiaki to protect freshwater quality. Ngāi Tahu's goal is to restore the health of Te Waihora and the amendments they are seeking to Variation 1 are designed to facilitate the implementation of measures to improve the water quality of the lake over time. Having made that point, abrupt change to effect improvements is not sought. Ngāi Tahu accepts change and improvement will be incremental and could be intergenerational given the lag times for contaminants described in the Variation.

5. ROLE OF NGĀI TAHU IN DEVELOPING VARIATION 1

5.1 Ngāi Tahu have taken a role in developing Variation 1, and other planning instruments, to ensure they facilitate the restoration of the mauri of Te Waihora. The Te Waihora Joint Management Plan 2005 contains the framework for the development and implementation of Ngāi Tahu’s goal. 6

5.2 However, Ngāi Tahu’s role was constrained as Ms Lynda Murchison will describe.

5 Lynton Dairy Limited v The Canterbury Regional Council, C108/05 at [101].
6 Te Waihora Joint Management Plan 2005 at page 3.
5.3 The notified version of Variation 1 is entirely the product of decisions by ECAn.

6. LEGAL FRAMEWORK

6.1 Section 63 of the RMA provides that the purpose of the preparation, implementation and administration of regional plans is to assist ECAn to carry out its functions in order to achieve the purpose of the RMA.

6.2 In preparing a regional plan, councils must have regard to their functions under section 30, the provisions of Part 2, obligations to prepare an evaluation report in accordance with section 32 and have particular regard to that report and any relevant regulations.7

6.3 The RMA prescribes mandatory contents of a regional plan, being objectives, policies and rules,8 and discretionary matters which may be contained within the plan.9

6.4 The RMA establishes a hierarchy of documents which must be considered by a council in preparing a regional plan. A regional plan:

(a) must give effect to any national policy statement, any New Zealand coastal policy statement and any regional policy statement;10 and

(b) must not be inconsistent with a water conversation order and any other regional plan for the region.11

(c) take into account any relevant planning document recognised by an iwi authority.12

6.5 There is also a requirement for this regional Council to comply with the ECAn Act to have:

...particular regard to the vision and principles of the Canterbury Water Management Strategy in addition to the matters relevant under the RMA to its decisions made under clause 10(1) of Schedule 1 of that Act.13

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7 Section 66(1) of the RMA.
8 Sections 67(1), 67(3) and 68 of the RMA.
9 Sections 67(2) and 67(6) of the RMA.
10 Section 67(3) of the RMA.
11 Section 67(4) of the RMA.
12 Section 66(2A)(e) of the RMA.
13 Sections 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.
6.6 The relevant documents to be considered in preparing Variation 1 include the following:

(a) New Zealand Coastal Policy Statement ("NZCPS");
(b) National Policy Statement for Freshwater Management 2014 ("NPSFM 2014");
(c) Canterbury Regional Policy Statement ("CRPS");
(d) National Water Conservation (Lake Ellesmere) Order 1990, as amended in 2011 ("WCO");
(e) Canterbury Water Management Strategy ("CWMS");
(f) Te Waihora Joint Management Plan 2005; and
(g) Mahaanui Iwi Management Plan 2013.

Part 2 matters

Section 5 - purpose

6.7 The purpose of the Act is the key consideration in weighing and evaluating the evidence and exercising discretion.14

The proper application of section 5 involves a broad judgment whether or not the proposal promotes the sustainable management of natural and physical resources. Such a judgment allows for a comparison of conflicting considerations and the scale or degree of them, and their relative significance in the final outcome.

6.8 The statutory purpose is "to promote sustainable management of natural and physical resources"15. Section 5(2) Act defines "sustainable management" broadly and it includes managing resources in a way "which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety" while fulfilling the goals stated in (a), (b) and (c).

6.9 Consideration must also be given to the matters in sections 6 to 8 of the RMA which provide guidelines for achieving the purpose of the Act. The matters of specific concern to Ngāi Tahu are discussed below.

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14 Genesis Power Ltd v Franklin District Council (A148/2005).
Section 6 – matters of national importance

6.10 All persons exercising functions and powers under the RMA, in respect of the management of the use, development and protection of natural resources are required to recognise and provide for:

(a) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites and waahi tapu, and other taonga; and

(b) the protection of protected customary rights.

6.11 While these section 6 factors are subordinate to the overall purpose of sustainable management, they are values that have significant priority and cannot be merely part of an equal balancing exercise.

6.12 Given the significance of Te Waihora, these s6 matters must have considerable weight in influencing the overall broad judgment required under s5: the outcomes anticipated by the variation need to create an appropriate mechanism to ensure that these cultural matters are both recognised and provided for.

6.13 In Ngāi Tahu’s submission, Variation 1 does not give sufficient weight to these matters of national importance. Ngāi Tahu is concerned that failing to address degraded water quality of Te Waihora will impact on customary fishing rights.

Sections 7 and 8

6.14 Particular regard must also be had to kaitiakitanga—the exercise of guardianship of Te Waihora.

6.15 The principles of the Treaty of Waitangi (Te Tiriti o Waitangi) must be taken into account by all persons exercising powers and functions under the RMA. The key principles to be provided for include active participation in the consultative process, the avoidance of adverse effects and active protection.

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18 Section 6(e) of the RMA.
17 Section 6(g) of the RMA.
16 NZ Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC).
15 Bleakley v Environmental Risk Management Authority [2001] 3 NZLR 213 (HC).
19 In respect of the requirement to take into account other cultural effects, see for example Te Rūnanga O Ngāi Te Rangi iwi Trust v Bay of Plenty RC [2011] NZEnvC 402; Ngati Raukawa v Bay of Plenty RC [2012] NZHC 2407, [2012] NZRMA 523.
20 Section 7(a) of the RMA.
22 Section 8 of the RMA.
6.16 Together sections 6(e), 7(a) and 8 of the RMA provide a basis for the protection of Maori rights and matters of cultural and significant value under the Act.

6.17 The Supreme Court in *Environmental Defence Society v The New Zealand King Salmon Company Limited* 23 ("King Salmon") decided that sections 6, 7 and 8 supplement section 5 by further elaborating on particular obligations on those administering the RMA. While the matters identified in sections 6(e), 7(a) and 8 of the RMA are subordinate to the purpose of sustainable management, they must be identified and weighed so that a balanced judgment can be made about whether Variation 1 achieves the statutory purpose 24.

6.18 The importance of Te Waihora to Ngāi Tahu is not disputed. The issue is what are the most appropriate mechanisms to:

(a) recognise and provide for this importance as anticipated by section 6(e) of the RMA; and

(b) involve Ngāi Tahu in the management of freshwater and Te Waihora more generally, as anticipated by sections 7(a) and 8 of the RMA and Objective D1 and Policy D1 of the NPS for Freshwater 2014.

7. NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT

7.1 Section 67(3) of the RMA requires Variation 1 to give effect to a number of superior planning instruments, including the National Policy Statement for Freshwater Management 2014, the NZCPS and the RPS. The leading authority about the way in which these superior instruments are applied is the Supreme Court decision in *King Salmon*.

*King Salmon*

7.2 The Supreme Court concluded that careful attention is required to be given to the wording of higher order planning documents, and if the policies they contain are directive they carry greater weight. The wording of the superior planning instrument could mean there is no overall broad judgment or balancing exercise. Subordinate plans must implement directive objectives and policies of, at least, the NZCPS and an NPS. Reference should not be made to Part 2, nor should a "balancing" interpretation be undertaken unless

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24 See for example, *Minister of Conservation v Southland DC EnvC A003/01; Prada Peine Reweti Whanau Trust v Auckland RC 9/12/05, Courtney J, High Court, Auckland CIV-2005-4040356.*
the policy statement does not "cover the field" in relation to the issues being address, or the wording is uncertain or conflicting.

Application of King Salmon

7.3 The board of enquiry into the Tukituki Catchment Proposal applied *King Salmon* in the context of the NPSFM 2011. The Board recognised that to the extent the policies within the NPSFM are directive a plan change must give effect to them unless there is a conflict between those policies, in which case reference can be made to Part 2 of the Act. In the event of such a conflict, the board found the governing purpose of Part 2 of the RMA informs the analysis as to which policy should prevail. In that case the board concluded there were no conflicts in the NPS for Freshwater Management 2011.

7.4 While this decision is by a board of inquiry (and is subject to appeal to the High Court on a point of law) the reasoning adopted is persuasive. The combined effect of *King Salmon* and *Tukituki* is that ECan must not only consider the National Policy Statement for Freshwater Management but must implement it. To implement this NPS requires not only the adoption of objectives and policies but methods.

Obligation to give effect to the NPSFM

7.5 Ms Begley’s planning evidence is that Variation 1 fails to give effect to the NPS for Freshwater. Ms Begley concludes Objective B2 and Policy B6 are not given effect to, because Variation 1 does not address over-allocation within the Selwyn-Waihora catchment it relies on the projected benefits and efficiencies of the Central Plains Water Scheme.

7.6 Objective B2 and Policy B6 provide a clear direction when over-allocation exists. Ngāi Tahu also considers Variation 1 does not go far enough in seeking to improve the quality of fresh water in the over-allocated catchments as required by Objective A2 of the NPS for Freshwater.

8. CULTURAL LANDSCAPES / VALUE MANAGEMENT AREA

8.1 The variation proposes a Cultural Landscape / Value Management Area including not only Te Waihora but the lake margins and associated

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28 See paragraphs 42 to 43.
tributaries. The identification of this area gives recognition to the cultural significance of Te Waihora to Ngāi Tahu.

8.2 While Ngāi Tahu’s association and connection with Te Waihora extends beyond the proposed Cultural Landscape / Values Management Area, this area was identified and agreed through the ZIP addendum consultation process. Essentially, Ngāi Tahu has taken a pragmatic decision in accepting this proposal.

8.3 Ngāi Tahu supports the adoption of the Cultural Landscape / Values Management Area and the requirements imposed on properties located in the area by Variation 1. The identification of the Cultural Landscape / Values Management Area is the most appropriate mechanism for recognising the importance of Te Waihora to Ngāi Tahu and involving Ngāi Tahu in the management of the lake as contemplated by sections 6(e), 7(a) and 8 of the RMA and the NPS for Freshwater.28

8.4 However, it is submitted that amendments are required to Rules 11.5.7 and 11.5.8 and that additional rules are required to control farming activities within the Cultural Landscape / Values Management Area to provide greater clarity within the rule framework. These amendments are discussed by Ms Begley.29 What has been requested in Ngāi Tahu’s submission is an amendment to Rule 11.5.7, so that the Rule does not apply to farming activities within the Cultural Landscape / Values Management Area where they receive water from an irrigation scheme. An amendment is sought to Rule 11.5.8 so that the activities become restricted discretionary activities from 1 January 2017, subject to the amendments being suggested in the submission. As Ms Begley describes in her evidence, the use of a farm environmental plan as a tool for addressing water quality issues is supported. However, using farm environment plans raises an issue about the quality of those plans and how the effectiveness of them is assessed. The point being made is that the appropriate mechanism for assessment of this effectiveness is through a consenting regime. What has prompted the submission from Ngāi Tahu, and Ms Begley’s evidence, is that general Rules 5.1 and 5.2 operate to ensure that where the same subject matter that would otherwise be addressed by general rules is dealt with in a sub-regional zone then the sub-regional zone rules prevail (with two exceptions referred to in 5.2(a) and (b)). Ngāi Tahu understands that the Council reporting officers have

28 Objective D1 and Policy D1.
29 See paragraphs 30 to 37.
accepted that using farm environment plans may give rise to issues about the certainty of the permitted activity rule. As a result, the officers recommended that activities which require the preparation and auditing of farm environment plans should be classified as restricted discretionary activities. By requiring consent for those activities which need a farm environment plan issues about certainty are addressed (refer to Council legal submissions 1 August 2013 at paragraph 128).

8.5 The point being made by Ms Begley in her evidence is that the same issue materialises in the sub-regional rule. In the report and recommendations adopted by the Council on 5 December 2013, Rule 5.45 and Rule 5.49 respond by creating restricted discretionary activity or controlled activity status.

8.6 As a result what is proposed by Ngāi Tahu is to amend the activity status to a restricted discretionary activity. Ngāi Tahu's point is a principled way of addressing any uncertainties that remain from the fact that the content of farm environment plans is still to be determined.

9. CATCHMENT SPECIFIC OBJECTIVE

9.1 Ngāi Tahu has submitted that Variation 1 needs to contain a catchment-specific objective. The objective Ngāi Tahu is proposing reflects the vision statement currently included in Variation 1:

The mauri of Te Waihora and its tributaries is restored while maintaining a prosperous land-based economy and thriving communities in Selwyn Te Waihora Catchment.\(^{30}\)

9.2 Expressed as a vision statement this sentiment is consistent with the cultural, social and educational importance of Te Waihora to Ngāi Tahu.

9.3 It is appropriate to express the vision statement as an objective. It is apparent from the context in which this vision statement appears that, for all intents and purposes, it is intended to have the effect of an objective. For example, Variation 1 records that "a package of actions to achieve the vision for Selwyn Waihora catchment has been identified through a … collaborative planning process". In that respect, the vision has the hallmark of an objective in that it expresses a goal to be reached and has framed policies and rules.

\(^{30}\) Proposed Variation 1 to the pCLWRP at page 4 – 3.
9.4 The vision statement, in and of itself, does not have any weight under the RMA. It is not mentioned in sections 30 or 67. Expressed as a vision statement the goal remains uncertain; how is it to be enforced or achieved? If an objective is not included to recognise the vision, there is nothing to guide decision-makers in interpreting and applying in the Selwyn-Waihora chapter.

9.5 It is apparent from the section 42A report that an opinion has been reached that Policy 4.10 of the pCLWRP prohibits the inclusion of a catchment specific objective (possibly as being beyond the scope of this variation). Policy 4.10 provides:

4.10 Reviews of sub-regional section will not make any changes to the Objectives or Policies 4.1 – 4.10 of this Plan, except that catchment specific outcomes and limits may be developed to implement the objectives and policies of this Plan.

9.6 However Policy 4.10 is not an impediment to including an objective in the Selwyn-Waihora chapter. First, Policy 4.10 does not prevent the inclusion of an objective which is catchment-specific and seeks to implement, and is not inconsistent with regional objectives and policies. What is proposed by Ngāi Tahu is not inconsistent with other objectives and policies.

9.7 Second, Policy 4.10 seeks to exclude "changes to" the objectives and policies. That is not the relief sought by Ngāi Tahu. Rather, Ngāi Tahu is seeking the introduction of a new objective which is separate from and does not conflict with those in regional objectives and policies.

9.8 Ms Begley will give evidence that the proposed objective does not conflict with any of the regional objectives in Section 5 of the pCLWRP.\(^{31}\)

9.9 The inclusion of a catchment specific objective for the Selwyn-Waihora zone would assist ECan in carrying out its functions under the RMA and would give effect to the purpose of the Act.

10. CROSS BOUNDARY ISSUES

10.1 Ngāi Tahu sees the following cross boundary (meaning cross zone boundary) issues affecting Te Waihora:

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\(^{31}\) See paragraphs 28 and 29.
(a) The location of the boundary for the Selwyn Te Waihora zone which excludes the surrounding hill and high country; and

(b) The influence of upstream land uses and activities on Selwyn Te Waihora.

Boundary of the Selwyn Te Waihora zone

10.2 Ngāi Tahu is concerned that the boundary for the Selwyn Te Waihora Zone stops at the foot hills. Ngāi Tahu's explains that this concern arises because of the classification of the hill and high country in the pLWRP. That land is classified as having 'green' nutrient status which allows for intensification within these zones to occur relatively unchecked.

10.3 The intensification of land uses upstream of Te Waihora has the potential to severely impact upon the ability of the community to achieve the water quality outcomes expressed in Variation 1.

Upstream land uses and activities

10.4 In Ngāi Tahu's submission, Variation 1 does not go far enough to control the effects of upstream land uses and activities on downstream users and resources. In particular, Variation 1 provides no incentive or encouragement to reduce and internalise effects.

10.5 As landowner of the bed Te Waihora, Ngāi Tahu is concerned that their resource and property rights are being degraded by upstream users. This degradation erodes the rights given to Ngāi Tahu under the settlement legislation and the Crown's apology. Ngāi Tahu's suggested amendments to the variation are designed to ensure the mechanisms for controlling discharges are more robust than was originally proposed.

10.6 In Ngāi Tahu's submission, Variation 1 needs to do more to control the effects of upstream users on the lake with respect to water quality, water quantity and Ngāi Tahu's property rights.

11. WATER QUANTITY ISSUES

11.1 Ngāi Tahu supports the management of both ground and surface water as a single resource through the catchment wide allocation for three ground and surface water catchments (as provided for in Table 11(e)). This approach is supported as it embodies Ngāi Tahu's ethic of ki uta ki tai (mountains to sea and everything is connected) and is anticipated by objective 3.2 of the
pCLWRP. Ms Begley's evidence is that this approach is consistent with Policy 1 of the NPS for Freshwater and the Freshwater Management Units to be established under that NPS.

11.2 Ngāi Tahu generally supports the approach proposed in Variation 1 with respect to the transfer of water within in the catchment. However, amendments have been suggested to strengthen the provisions around the transfer of water.

11.3 Ngāi Tahu also supports the intention of Variation 1 to raise the minimum flows in the low land streams. However, Ngāi Tahu has concerns about the specific minimum flows that have been decided on as part of Variation 1.

11.4 In Ms Begley's opinion, the values in table 11 (c) are inconsistent with Objective B1 and D1 of the NPS for Freshwater. The Variation contains unexplained departures from the recommendations for cultural flows. Ngāi Tahu is therefore seeking to increase the minimum flows on the Hanmer Road drain, Hororata River, Kaituna River, Ll and Selwyn River (as provided for in Table 11 (c)).

11.5 Of greater significance is the way in which Variation 1 deals with over-allocation in the Selwyn Waikora zone. The mechanisms by which Variation 1 addresses allocation relies on an assumption that the benefits from the Central Plains Water project will materialise. In Ngāi Tahu's submission, Variation 1 should be based on the existing environment rather than relying on a future activity - the impacts of which are not known.

11.6 In light of this concern, Ngāi Tahu's submission proposes policies which seek to address over allocation. Ngāi Tahu has proposed an alternative mechanism, which is a new Policy 12 for water quantity. Ms Begley's evidence is that this approach better provides for what is anticipated by the NPS for Freshwater.

11.7 Ngāi Tahu is seeking other amendments to ensure that Variation 1 recognises and provides for Ngāi Tahu's kaitiaki responsibilities and cultural beliefs, including:

(a) Amendments to Policy 11.4.20 which are intended to reflect Ngāi Tahu's kaitiaki responsibilities and to ensure waters containing high silt loads are not be discharged directly into spring-fed streams. While Ngāi Tahu is not opposed to the targeted recharge of surface and
ground water, they are concerned with ensuring that it is undertaken in a culturally and environmentally appropriate fashion.

(b) The grouping of Policy 11.4.5 within the Water Allocation policies. That is because Ngāi Tahu is concerned about the taking and use of water directly from some waterways, particularly Waiekekawai Creek and Tumutu Creek, which are wahi taonga and of immense cultural significance to Taumutu Rūnanga and Ngāi Tahu as a whole.

(c) Amending rules 11.5.3.2 and 11.5.3.3 to add a new discretion, being "The effects of the proposed take and use on Ngāi Tahu cultural values". The inclusion of a new discretion gives effect to section 6(e) of the RMA and the NPS for Freshwater. Ms Begley's evidence is that there are planning documents available to applicants to assess activities against Ngāi Tahu cultural values including the Mahaanui Iwi Management Plan which provides clear guidance for such purposes.

(d) Amending rule 4.5.34 to include further conditions. In Ngāi Tahu’s submission, the amendments give effect to the NPS for Freshwater which are intended to deal with over allocation.

(e) A new condition to rule 11.5.4 prevents discharges being directly into water. While Ngāi Tahu are supportive of increased flows and ground water levels augmented through the use of alpine water, amendments are sought because Ngāi Tahu do not support the mixing of waters (being direct discharges of water to water).

11.8 Ngāi Tahu have also proposed changes to the rules which control the taking and use of surface water and hydraulically connected ground water. In summary, the amendments are sought to ensure:

(a) the continuity of adaptive management;

(b) that water permits and land use consents are adequately linked; and

(c) that the rules give effect to Policy 11.4.3 in that they are to respond to actual need for the allocation of water (on a successful resource consent application) rather than being based on Schedule 10 and a reasonable use test.

11.9 Ngāi Tahu suggested amendments to Variation 1 seek to improve the planning framework and consequently the outcomes of Variation 1.
Water Quality

11.10 Ngāi Tahu has a number of concerns about the provisions in Variation 1 which seek to address water quality issues.

11.11 Ngāi Tahu is seeking amendments to Variation 1 to impose limits for discharges to the environment for community sewerage systems and industrial trade processes. The concern is that there is no justification identified in Variation 1 for treating community sewerage systems and industrial trade processes differently from rural activities such as farming. Given that the RMA controls the effects of an activity, as opposed to the activity itself, no principal reason is apparent to justify the distinction being made in the variation.

11.12 All activities which contribute nitrogen to the environment should be subject to a nitrogen load and comparative provisions. In essence, Ngāi Tahu's position is that all activities which contribute towards the nutrient enrichment of the catchment should be subject to regulation under Variation 1. Accordingly, Ngāi Tahu has also proposed policies which:

(a) prohibit the direct discharge of untreated waste to waterways;

(b) prohibit, from 2025, the direct discharge of treated wastewater to waterways; and

(c) to enable discharge of treated wastewater from community, industrial trade processes or on site domestic wastewater services to land provided that the systems meet New Zealand standards.

Consequent amendments are also sought to the rules which relate to these policies.

11.13 Ngāi Tahu is also seeking amendments to the conditions to Rule 5.7 to require older onsite sewage systems to be upgraded within a certain timeframe. In Ngāi Tahu's submission, the Plan should provide for continuous improvement. Ms Begley's evidence is that an aim of the variation is to reduce the amount of nutrients entering the catchment. Consequently, this condition is reasonable.

11.14 A new rule has also been proposed which would prohibit the discharge of untreated sewage sludge and bio-soils, from either a community system or an onsite domestic system, directly into ground. Ngāi Tahu's view is that as
all of the above activities are equally offensive and the rules should be consistent.

12. DIFFUSE DISCHARGES

12.1 In principle, Ngāi Tahu support having identified catchment loads. As discussed by Dr Wilcox, catchment loads are critical to addressing water quality within Te Waihora. The mechanisms provided by Variation 1 to implement nutrient reductions however are only supported in part.

12.2 The use of the threshold is supported, but a different method is proposed for achieving the nutrient reductions. Ngāi Tahu’s method results in low level leachers and/or small property holders being permitted activities.

12.3 The intention of the proposed amendment is to encourage activities discharging to the environment to be low leaching. In Ngāi Tahu’s submission, regulatory incentives are an effective planning tool which should be implemented where available. The amendments sought by Ngāi Tahu in respect of properties over the threshold are intended to assist the activity in achieving a nitrogen loss of no more than 15kg/ha/year. An approach which encourages the continuing reduction of nitrogen loss is the best mechanism for restoring the water quality of Te Waihora to that experienced in the 1940s to 1960s. Ngāi Tahu’s submission is that Variation 1 does not require continuous improvement that is necessary to restore the mauri of the lake.

13. CONSISTENCY AND CERTAINTY

13.1 Ngāi Tahu is also concerned that some of the policies and rules in the variation are based on insufficient or incomplete information. Accordingly, amendments have been sought to a number of policies and rules where insufficient information exists.

13.2 For example, amendments are sought to Schedules 7 and 24 of Variation 1 and the inclusion of a new schedule. The new schedule contains the information needed to run OVERSEER in retrospect.

13.3 A common theme in Ngāi Tahu’s submission is the lack of consistency between the provisions. In this respect, Variation 1 does not give effect to the "effects based" regime under the RMA. In Ngāi Tahu’s submission, all activities which have similar effects should be managed consistently, such an approach being both equitable and environmentally sound.
13.4 By way of example, Ngāi Tahu seeks to have Rules 11.5.32 and Rules 11.5.33 treated equally so the activities status contemplated under these rules are treated the same. In Ngāi Tahu's submission, the rules should be redrafted to ensure consistency.

13.5 Ngāi Tahu is also seeking to continue to have a limit on urban and industrial discharges as well as rural ones. Ms Begley's evidence is that there is no planning reason why this is not appropriate for urban and/or industrial discharges when it is adequate to project nitrogen losses for rural activities.

14. GRANDFATHERING OF EXISTING ACTIVITIES

14.1 Using a modified "grandparenting" approach to leaching rates based on existing leaching rates provided for in Variation 1 is opposed.

14.2 Grandfathering does not incentivise those with higher nitrogen losses to make reductions and penalises those with low nutrient losses.

14.3 Ngāi Tahu's position is supported by the Tukituki decision in which the board of inquiry considered grandfathering. The board rejected the approach acknowledging that:

... such an approach could reward existing high leaching land users. It also lacks any incentive to improve land use practices so that leaching is reduced. As the Board sees it, those features of POL TT4 are the opposite of what the policy is seeking to achieve. They are also inconsistent with the NPSFM.\textsuperscript{32}

14.4 The proposed Plan for the Tukituki Catchment provided that "more than minor" increases in leaching rate would trigger the need to obtain a land use consent.

14.5 In the Tukituki decision, the board preferred an approach where nitrogen is limited by land use capability because such an approach was well established and takes into account the particular characteristics of the land on which the activity is occurring, including soil types, contour and slope.

14.6 Ms Begley's evidence addresses the issue of "grandparenting" and illustrates, by way of example under the pCLWRP, some of the negative effects of the proposed approach.

\textsuperscript{32} Tukituki Catchment Proposal Board of Inquiry Final Report and Decisions dated 18 June 2014 at page 137, [427].
14.7 In Ngāi Tahu’s submission, Variation 1 should not facilitate or encourage inefficient uses in a manner which is inequitable and is also inconsistent with NPS for Freshwater.

15. LIMITS FOR PHOSPHOROUS – DUAL NUTRIENT APPROACH

15.1 In Ngāi Tahu’s submission, environmental limits should also be provided for phosphorous as well as nitrogen.

15.2 This issue was also considered by the board of inquiry in Tukituki and the conclusion reached was that a dual nutrient approach is required. One of the reasons for this conclusion was that “if nutrients were not properly managed upstream an adverse effect downstream is virtually inevitable”33.

15.3 The reasoning in Tukituki is persuasive. Te Waihora’s location at the bottom of the Selwyn Waihora catchment, means there is a real risk to this environment if the effects of upstream activities are not adequately managed.

15.4 Ngāi Tahu considers that, given the potential for long term effects if phosphorous is not adequately managed and controlled, environmental controls on phosphorous levels should be implemented by Variation 1.

15.5 A dual nutrient management approach is necessary to give effect to the NZCPS, the NPS for Freshwater and the CRPS. This approach has been required as part of other regional plans implemented by ECan such as the Hurunui Waiau Regional Plan. In Ngāi Tahu’s submission, there is no reason why this approach should not also be followed for the Selwyn Waihora zone.

16. EVIDENCE

16.1 The following witnesses have prepared evidence on behalf of Ngāi Tahu:

(a) Sir Tipene O'Regan – the tribal relationship, historical associations, place-names and sites of significance to Ngāi Tahu associated with Te Waihora;

(b) Takerei Norton - Ngāi Tahu place names and cultural values in the Te Waihora catchment;

(c) Margaret Jones – cultural evidence;

(d) Donald Brown – customary fishing rights; current state of Te Waihora;

33 Tukituki Catchment Proposal Board of Inquiry Final Report and Decisions dated 18 June 2014 at page 120, [563].
(e) **Elizabeth Brown** – the relationship between the health of the Te Waihora catchment and the health of our people in terms of knowledge, culture and identity;

(f) **Robert Wilcock** – water quality management;

(g) **Alistair McKerchar** – groundwater levels and low flows in the catchment of the Selwyn River and Waikerikeri and Lake Ellesmere / Te Waihora;

(h) **Lynda Murchison** – the role which Ngāi Tahu has had in the development of Variation 1 to the proposed CLWRP; and

(i) **Cathy Begley** – planning.

16.2 Unfortunately, Sir Tipene is unable to attend the hearing to present his evidence in person. However, the other witnesses who will give evidence about cultural matters will be able to answer questions that might arise from his evidence. Ngāi Tahu intends to use the concept of the paepae throughout this hearing to deliver their evidence and respond to questions.

17. **CONCLUSION**

17.1 While Ngāi Tahu supports the intent of Variation 1, they are concerned it does not go far enough in addressing the existing water quality and quantity issues within Te Waihora or in improving the health of the lake.

17.2 Variation 1 in its present form will not adequately facilitate the restoration of the mauri of Te Waihora to the levels experienced in the 1940s to 1906s. Ngāi Tahu recognise that their aspiration is intergenerational but they see Variation 1 as the first important step towards the realisation of this goal.

17.3 Ngāi Tahu respectfully requests that their submission be allowed.

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**Kerry Smith / Jenna Silcock**
Counsel for Te Rūnanga o Ngāi Tahu