

**BEFORE THE CANTERBURY REGIONAL COUNCIL**

**IN THE MATTER** of an application for  
resource consent under the  
Resource Management Act  
1991

**AND**

**IN THE MATTER** of a submission by **NGĀI  
TAHU** on the resource  
consent application by  
**RANGITATA DIVERSION  
RACE MANAGEMENT  
LIMITED** regarding the  
proposed Klondyke  
Storage Facility

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**LEGAL SUBMISSIONS ON BEHALF OF TE RŪNANGA O AROWHENUA AND TE  
RŪNANGA O NGĀI TAHU**

**3 May 2018**

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**Simpson Grierson**  
Barristers & Solicitors

Simpson Grierson  
J G A Winchester  
Telephone: +64-4-924 3503  
Facsimile: +64-4-472 6986  
Email: james.winchester@simpsongrierson.com  
DX SX11174 PO Box 2402  
SOLICITORS  
WELLINGTON 6140

## MAY IT PLEASE THE HEARINGS PANEL

### 1. INTRODUCTION

- 1.1 These legal submissions are made on behalf of Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu (collectively referred to as **Ngāi Tahu**).
- 1.2 Te Rūnanga o Ngāi Tahu is the iwi authority over most of Te Wai Pounamu, including the Canterbury region, as set out in the Te Rūnanga o Ngāi Tahu Act 1996. Te Rūnanga is comprised of 18 Papatipu Rūnanga which represent those who hold mana whenua over various areas in the takiwā. Te Rūnanga o Arowhenua is the Papatipu Rūnanga which holds mana whenua over the area and resources affected by the application by Rangitata Diversion Race Management Limited (**RDR**) for the proposed Klondyke Storage Facility (**the proposal**).
- 1.3 For Ngāi Tahu and Arowhenua, the relationship with the takiwā is one of kaitiakitanga over the resources of the region.
- 1.4 Ngāi Tahu and Arowhenua made a submission on 14 October 2016 which opposed the proposal and sought that consent be declined. Notwithstanding the passage of time since the submission was lodged and the modifications that have been made to the proposal by RDR, the position remains that the application is opposed and Ngāi Tahu seek that consent be declined.
- 1.5 At this point, it is appropriate to acknowledge and pay respect to Mandy Waaka-Home, whose recent passing is a source of huge sadness. Mandy has worked tirelessly for the interests of Papatipu Rūnanga, and her energy, integrity, depth of knowledge and expertise, and her mana will be irreplaceable. She took her kaitiaki responsibilities extremely seriously and this is clearly articulated in her evidence.
- 1.6 The evidence of Ms Waaka-Home, which was filed on 11 April 2018, remains the evidence on behalf of Arowhenua, and continues to be relied upon by those submitters. It was prepared and filed in accordance with the Hearings Panel's directions and there is no basis upon which it

should be excluded or given reduced weight due to Ms Waaka-Home's passing<sup>1</sup>. Rather, it is submitted that it should be given full weight and due consideration by the Hearings Panel as a valid statement of expert evidence. Arowhenua has confirmed that the statement continues to be a clear statement of the cultural concerns of Arowhenua about the proposal, and therefore continues to represent its position.

- 1.7** Arowhenua has given consideration to whether another representative could or should appear and adopt the evidence of Ms Waaka-Home. It has been determined that this is neither appropriate nor necessary. Instead a short statement of position has been prepared by Vania Pirini, the Chair of Te Rūnanga o Arowhenua to assist the Hearings Panel and representatives will be available to answer questions.

## **2. OUTSTANDING ISSUES**

- 2.1** Many of the issues identified in the Ngāi Tahu submission remain unresolved. These are addressed in Ms Waaka-Home's evidence.

- 2.2** They include:

- (a) the impacts on the mauri of the Rangitata River;
- (b) the uncertainty over the need for and ultimate use of the 10 cumecs of water sought;
- (c) the quality of the consultation by RDR;
- (d) uncertainty over the design of fish screens, particularly with regard to effects on whitebait and adequacy of monitoring;
- (e) the failure to have due regard to the kaitiaki responsibilities of Arowhenua and the inability of Arowhenua to properly exercise those responsibilities if consent is granted; and
- (f) uncertainty over potential benefits and mahinga kai opportunities for Arowhenua, and the ongoing involvement of Arowhenua regarding the use of the water resource.

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<sup>1</sup> The Evidence Act 2006 addresses admissibility of evidence of witnesses who are "unavailable" because they are now deceased (see section 16(2)). This applies to admissibility of hearsay evidence, and Ms Waaka-Home's evidence is not hearsay. Section 28 applies to exclusion of unreliable statements and does not appear to apply to the present circumstances, as there is no evidential basis to suggest unreliability.

- 2.3** It is noted that expert cultural evidence from Mr Buddy Mikaere has been filed by RDR, including a supplementary statement dated 23 April. Mr Mikaere correctly records that the caucusing which took place between him and Ms Waaka-Home did not result in resolution. There has been no change in that position since the filing of Ms Waaka-Home's evidence.
- 2.4** Mr Mikaere's supplementary statement implies some confidence that there is a prospect of resolution of some matters. Given the circumstances, further discussions have not been possible. It is possible that some further constructive discussions and engagement between RDR and Arowhenua might assist in addressing some issues of detail but, given the significance of some of the concerns, they are unlikely to result in a change of position by Arowhenua.
- 2.5** Some brief comment and response is made below to amplify the basis for the concerns and outstanding issues.

### **3. IMPACTS ON MAURI**

- 3.1** Ms Waaka-Home and Mr Mikaere have differing opinions on the impacts of the proposal on the mauri of the River.
- 3.2** However, it is not accepted that the view of Ms Waaka-Home about mauri can be characterised as only personal<sup>2</sup> and therefore implicitly devalued as a consequence. Ms Waaka-Home's evidence represents the view of Arowhenua and this is something that should not be diminished by the suggestion that it needs to be assessed personally and/or scientifically.
- 3.3** It is also submitted to be somewhat misleading and illogical to suggest that the mauri of the River is already affected in a number of ways<sup>3</sup>, and that as a consequence the mauri impacts of the present proposal are reduced or minor. Ms Waaka-Home's evidence is that there is significant concern about the impacts on mauri of *existing* activities, which explains why it is of vital importance to ensure that there is no

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<sup>2</sup> See for example paras 17 and 20 of Mr Mikaere's supplementary statement

further degradation of the river. Mr Mikaere may have advanced something akin to an “existing environment” view to support his position<sup>4</sup>, but it will be evident to the Hearings Panel from the evidence of Ms Waaka-Home that this is not consistent with the cultural view taken by Arowhenua about the mauri of the River<sup>5</sup> which is forward looking as well as considering historical and existing activities.

**3.4** Finally, Mr Mikaere suggests that the overall mauri impact will be neutral due to mauri-enhancing activities in and around the storage site<sup>6</sup>. That is not accepted, and it is submitted that nor is it valid. It is the abstraction itself from the river which has impacts on mauri. Water abstracted from the River does not “gain” mauri through use in association with storage, and this suggestion is submitted to be wrong and misleading in this instance. Arowhenua do not accept that something in the nature of environmental compensation through wetland creation is relevant to the mauri of the water within the river. Effects on mauri in this instance would be largely avoided by not consenting to the 10 cumec abstraction.

#### **4. UNCERTAINTY REGARDING ABSTRACTION AND SUBSEQUENT USE**

**4.1** This was a key issue identified in the submission, and it is submitted that it has still not been answered by RDR.

**4.2** Ms Waaka-Home poses three questions in her evidence<sup>7</sup> which are submitted to be highly relevant to this concern:

- (a) is it for further intensification of farming which potentially leads to more damage to our waterways?
- (b) is it to bring across the river to South Canterbury to top up a so-called “water poor area?”
- (c) or is it about water ownership?

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<sup>3</sup> Ibid, paras 18 and 19

<sup>4</sup> Adopting this type of approach, one might say that an already polluted river should receive more contaminants because the effect would be minor against that existing context.

<sup>5</sup> Evidence Mandy Waaka-Home, paras 3.1 – 3.8, 3.10 – 3.13

<sup>6</sup> Supplementary evidence Mr Mikaere, para 20.

**4.3** For RDR to separate the take from the use, and to then not answer the question of use, not only raises entirely understandable concerns, but also has a material impact on the ability of Arowhenua to exercise kaitiakitanga. It considers that it cannot exercise kaitiakitanga when it is dealing with abstraction and storage in the absence of knowing what the purpose of that abstraction and storage is. This is consistent with the *Ki Uta ki Tai* concept referred to in Ms Waaka-Home's evidence<sup>8</sup>.

**4.4** In that regard, the suggestion in Mr Mikaere's supplementary evidence that strenuous efforts have been made by RDR to address the exercise of kaitiakitanga<sup>9</sup> is difficult to accept. Mana whenua cannot give a view on whether they can exercise kaitiakitanga unless they know what it is they are dealing with (in a holistic sense) and then the manner in which they might be able to deal with it. This concern is amplified by the 15 year lapse period that is sought, which potentially "locks up" a resource for a period well in excess of the 10 year life cycle of planning documents under the RMA.

## **5. QUALITY OF CONSULTATION**

**5.1** This issue is addressed in the supplementary evidence of Mr Mikaere<sup>10</sup>. Suffice to say that while Mr Mikaere correctly acknowledges some problems with this process, his assessment is submitted to be generous. Failure to correctly and openly consult is related to and manifested in a number of the outstanding concerns of Arowhenua, including those regarding mauri and kaitiakitanga, as addressed above.

## **6. UNCERTAINTY OVER THE DESIGN OF FISH SCREENS**

**6.1** It is correct that significant progress has been made on the issue of design and use of suitable fish screens, and RDR has appropriately expended considerable resources on this issue.

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<sup>7</sup> Evidence Mandy Waaka-Home, para 3.14

<sup>8</sup> Ibid, para 3.9

<sup>9</sup> Supplementary evidence Mr Mikaere, para 12

<sup>10</sup> Ibid, paras 9 – 10 and 23

**6.2** While the proposed design is considered to be a material improvement and is largely supported should consent be granted, there remains uncertainty over whether the rollers of the screen might damage whitebait entrained in the system. If the Hearings Panel was inclined to grant consent, Arowhenua would want to see this uncertainty resolved in terms of the final design and, at a minimum, a specific monitoring requirement would need to be imposed to ascertain the effectiveness of the screens in this regard.

**6.3** This is however a discrete issue which does not detract from the underlying position that consent should be declined.

## **7. FAILURE TO HAVE REGARD TO KAITIAKI RESPONSIBILITIES**

**7.1** This has already been addressed above to a large extent, but specific response is required with regard to a suggestion made in Mr Mikaere's supplementary evidence.

**7.2** The suggestion is made that the kaitiaki concerns of Ngāi Tahu and Arowhenua appear to be related to a desire for a much larger role in the policy setting, administration and management of water resources across the region<sup>11</sup>. That concern goes without saying. More importantly however, it is submitted to be a misunderstanding of the kaitiaki concerns expressed by Arowhenua in this instance, as stated plainly in Ms Waaka-Home's evidence.

**7.3** It also overlooks the concern expressed in the original submission<sup>12</sup> that the application is being pursued in advance of an appropriate participatory planning process whereby issues such as the appropriate allocation and use of water resources in the catchment are not being considered holistically or by taking into account the needs of all members of the community.

**7.4** As such, the consent, if granted, would prevent or nullify the effective participation of Arowhenua and other members of the community in such a participatory RMA process, because the "horse would have already

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<sup>11</sup> Ibid, para 12

bolted". All of this in circumstances where RDR's own evidence appears to be that there is no pressing need for either the facility or for the use of water stored. As such, it would effectively result in a *de facto* allocation of a highly valued cultural resource in circumstances where it has not been tested against other uses or values, and in circumstances where the end use is not known (and therefore has not itself been justified).

**7.5** Such an approach is submitted to be entirely inconsistent with the ability of Arowhenua to exercise its kaitiaki responsibilities. There is no reasonable basis for Mr Mikaere to conclude that the impact on kaitiakitanga is "at worst minor"<sup>13</sup>, when in reality the ability to exercise kaitiakitanga in a meaningful sense is largely precluded because the end use of the abstracted water cannot even be identified.

## **8. UNCERTAINTY OVER POTENTIAL BENEFITS AND MAHINGA KAI OPPORTUNITIES**

**8.1** It is accepted that there is the potential for some opportunities for mana whenua to work more closely with RDR in the event that consent is granted. It is also accepted that RDR has given evidence of a willingness to consider mahinga kai opportunities in terms of use of the storage facility for aquaculture or other traditional mahinga kai resources, and for the creation of wetlands which might also have mahinga kai benefits.

**8.2** There is however no certainty about those matters, and little weight can be given to them. It is possible that there are issues about which further discussion and engagement between RDR and Arowhenua might be constructive, provided it was carried out in an appropriate manner. But at this point in time they remain mere possibilities.

## **9. CONCLUSION**

**9.1** Ngāi Tahu is guided at all times by the tribal whakataukī: *mō tātou, ā, mō kā uri, ā muri aki nei* (for all of us and our children after us). That applies equally to Arowhenua.

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<sup>12</sup> Para 4.6 Ngāi Tahu and Arowhenua submission



**9.2** Arowhenua cannot state with any confidence that the present proposal would allow that whakataukī to be realised. As such, it seeks that consent be declined.

**DATED** this 3rd day of May 2018



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James Winchester  
Counsel for Arowhenua and Ngāi Tahu

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<sup>13</sup> Supplementary evidence Mr Mikaere, para 12