BEFORE THE CANTERBURY REGIONAL COUNCIL

IN THE MATTER	of a proposed plan change under Schedule 1 to the Resource Management Act 1991
AND	
IN THE MATTER	of submissions by **TE NGĀI TŪĀHURIRI RŪNANGA** and **TE RŪNANGA O AROWHENUA AND TE RŪNANGA O NGĀI TAHU** and **TE RŪNANGA O NGĀI TAHU, TE RŪNANGA O KAIKŌURA, 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 (collectively NGĀ RŪNANGA)** on **PROPOSED PLAN CHANGE 7 ON THE CANTERBURY LAND AND WATER REGIONAL PLAN**

LEGAL SUBMISSIONS ON BEHALF OF TE NGĀI TŪĀHURIRI RŪNANGA, TE RŪNANGA O AROWHENUA AND TE RŪNANGA O NGĀI TAHU AND NGĀ RŪNANGA

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MAY IT PLEASE THE HEARINGS PANEL

Introduction

1. These legal submissions are made on behalf of Te Ngāi Tūāhuriri Rūnanga, Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu and Ngā Rūnanga (collectively referred to as **Ngā Rūnanga**).

2. For Ngā Rūnanga, the relationship with their takiwā is one of whakapapa and ahi kā with extensive occupation and use patterns. As kaitiaki, Ngā Rūnanga are bound to ensure the wairua and mauri of the land and water are maintained. Degradation of the waterways and land negatively impacts on the mana of individuals and their hapū and iwi, as well as their collective identity.

3. The reason for Ngā Rūnanga to be involved in resource management issues in Canterbury arises not only from the recognition of their interests in Part 2 of the Resource Management Act 1991 (**RMA**), but is inextricably linked to the settlement of Treaty of Waitangi claims, including *Te Kereme* that resulted in the Ngāi Tahu Claims Settlement Act 1998 (**Settlement Act**). Recognition of mahinga kai is a central and prominent feature of the Settlement Act, and the evidence of Mr King, Mr Henry, Dr Tau and Mr Reuben clearly identifies the critical importance of mahinga kai to Ngāi Tahu in Canterbury.

4. While the Settlement Act was intended to result in the recognition and protection of mahinga kai, the evidence shows this has not happened. The quality of the environment and hence the ability of the natural environment to sustain mahinga kai has been significantly adversely affected – and with it the identity of Ngā Rūnanga and their relationship with te whenua, te wai, taonga species, and wāhi tapu/wāhi tūpuna.

5. There are a number of reasons why this degradation has occurred, but foremost amongst them is insufficient regulation and protection of the environment. Unsustainable and inappropriate land use practices have occurred largely unregulated (i.e. for "free" in a regulatory sense), and both Ngā Rūnanga and the wider community have had to bear the substantial costs of reduction in water quality, along with all of the associated adverse impacts on things that are socially, culturally, and economically important to them.

6. It is submitted that the prevailing resource management paradigm in Canterbury is predicated on water being regarded as freely available for use and as a commodity, rather than being valued in its own right. This has resulted in abstraction and commoditisation being prioritised ahead of the health of the environment, the needs of waterbodies, and the health and wellbeing of the people. Despite the clear prioritisation of different uses in important policy documents such as the Canterbury Water Management Strategy,[1] this commoditisation paradigm has been reinforced through regional planning documents and resource management decision making.

7. The environmental and cultural outcomes which are clearly descried in the evidence for Ngā Rūnanga are quite clearly at odds with the Treaty of Waitangi, the Settlement Act, and relevant provisions of Part 2 of the RMA.

8. Ngā Rūnanga have consistently, and repeatedly expressed the following underlying concerns about water and land use management in Canterbury, and about Plan Change 7 (**PC7**):

(a) Water resources have been subject to ongoing degradation, in quality and flow conditions, that has had devastating effects on mahinga kai;

(b) PC7 will not be effective in reversing this degradation and decline in a timeframe that will enable mana whenua to pass on mahinga kai knowledge and practice to the next generation;

(c) Because of this, PC7 fails to appropriately recognise the rangatiratanga of Ngā Rūnanga and does not enable mana whenua to exercise their kaitiakitanga obligations with respect to the water resources in their takiwā.

9. To address this with regard to PC7, Ngā Rūnanga broadly sought:

(a) Surface water flow and allocation regimes that better align with the ecological and cultural recommendations made to the Zone Committees; and

1 See page 7 of the CWMS, for the priorities and principles that must be met, which make the environment, customary use, community supplies and stock water first order priorities.

(b) Additional measures to protect and enable enhancement of significant mahinga kai, mātaitai, waipuna, rock art sites, and taonga species.

10. Importantly, it is submitted that:

(a) The proposed PC7 surface water environmental flow and allocation regimes are not consistent with the requirements of Te Mana o te Wai, in either the National Policy Statement for Freshwater Management 2014 (as amended 2017) (**NPSFM 2017**) which was in force when PC7 was notified, or the National Policy Statement for Freshwater Management 2020 (**NSPFM 2020**), which came into effect on 3 September 2020. PC7 must give effect to the NPSFM 2020.

(b) The amendments are necessary to recognise and provide for the cultural significance of mahinga kai, to provide certainty that these values will be better provided for into the future and to enable Nga Rūnanga to exercise rangatiratanga and kaitiakitanga in relation to mahinga kai and related taonga.

(c) The relief sought by Ngā Rūnanga will better give effect to the RMA's sustainable management purpose, and the NPSFM 2020, than the aspects of PC7 that have been submitted on.

11. Environment Canterbury is to be commended for recognising that there were material deficiencies in PC7 in terms of its alignment with the NPSFMs. It is submitted to be apparent that Environment Canterbury did not clearly understand or grapple with the material change in thinking about freshwater that has been directed by the NPSFMs, and has only now begun to appreciate what is required of it. Regrettably however, this recognition has been belated and has resulted in an expectation for Ngā Rūnanga to "fill the gap".

12. The evidence for Ngā Rūnanga makes it clear however that they have been saying the same thing for many years. There is nothing new or different in the evidence for Ngā Rūnanga. Submitters who suggest that they do not understand what the consequence of adequate recognition and protection of the hauora, and hence the mana and mauri, of waterways might involve, have seemingly dismissed the concerns which have been consistently expressed by Ngā Rūnanga or otherwise not wanted to listen.

13. The evidence of Dr Tau, Mr Reuben, Mr Henry and Mr King is submitted to be striking in its clarity and consistency, and shows that the concerns of mana whenua are not new. Historical and ongoing degradation of their waterways, the mahinga kai expectations and practices of Ngā Rūnanga, and their special relationship with the environment that sustains them, is a consistent theme of the evidence – for both the OTOP and Waimakariri areas. A resource management framework based on what is allocated under existing consents is fundamentally misaligned with both Ngā Rūnanga expectations and the clear directions of the NPSFM 2020.

14. PC7 is required to give effect to the NPSFM 2020. Some submitters have suggested that, in order to give people more time to understand what a new regime might look like, the necessary and material environmental and cultural improvements that are required should be deferred to a later plan change. This is unacceptable to Ngā Rūnanga. Ngā Rūnanga cannot be responsible for the inability of submitters to understand, or the reluctance of Environment Canterbury to implement, the change in thinking that is required by the NPSFM 2020. Changes to the status quo need to go much further and happen much faster, and PC7 is the appropriate vehicle for this to occur in the relevant parts of the region that it relates to.

15. If there is a concern about "rights" that might be affected in terms of existing users of water and the cost of changes or improvements,[2] then this needs to be set against the context of the rights, expressed in legislation, that Ngā Rūnanga have been guaranteed and which have not been upheld. This has resulted in a loss of confidence in the resource management system to ensure that legal rights and interests in freshwater are appropriately recognised in Canterbury, and has necessitated other legal action to seek to recognise and protect the rights, responsibilities and obligations of Ngā Rūnanga over water.[3]

THE TREATY OF WAITANGI

16. The contemporary relationship between the Crown and Ngāi Tahu is defined by three core documents: Te Tiriti o Waitangi, the Ngāi Tahu Deed of Settlement 1997 and the Settlement Act.

2 As Mr Reuben states at [18] of his evidence: "I recognise there is a cost to that, but that cost should not be the only one actively addressed in decisions. As mana whenua, there are costs to us, given the declining health of waterways, to sustain our customary practices and our relationships to the waterways in this area."

3 For example, the recent rangatiratanga declaration proceedings lodged by Ngāi Tahu in the High Court.

17. Section 6(7) of the Settlement Act recognises Ngāi Tahu as the "tangata whenua of, and as holding rangatiratanga within, the takiwā of Ngāi Tahu Whānui". This is important as it specifically provides that the Crown recognises rangitiratanga, as its wishes to "fulfil its Treaty obligations". Furthermore, section 6(8) provides that the Crown wishes to "enter a new age of co-operation with Ngāi Tahu."

18. As rangatiratanga is central to the Treaty of Waitangi, section 8 of the RMA needs to be read in conjunction with the Settlement Act. This is important because the tribe defines its 'rangatiratanga' as including authority over waterways.

19. On this basis, sections 6(7)-(8) of the Settlement Act need to be considered when dealing with matters of resource management as these are 'Treaty obligations' confirmed by legislation specific to Ngāi Tahu. At the same time, 'rangatiratanga' as recognised by the Settlement Act pre-dates the Treaty of Waitangi.

20. Ngā Rūnanga are of the view that their rangatiratanga has been diminished through the steady deterioration of the environment, including water quantity and quality. The evidence clearly outlines the degradation that has occurred in the OTOP and Waimakariri catchments. The nature of degradation to the hauora of waterbodies that has occurred is remarkably similar, as is the depth and severity of the consequential cultural, environmental, social and economic impacts. In order to restore the hauora or the waterways, and provide for Te Mana o te Wai, urgent and significant changes to flow regimes and allocations are necessary.

TE MANA O TE WAI

21. Under the NPSFM 2017, which was in force when PC7 was being formulated and notified, the matter of national significance was that fresh water is managed through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management. Te Mana o te Wai and its inclusion in the NPSFM 2017 was intended to drive a paradigm shift in water management under the RMA.

22. The NPSFM and the concept of Te Mana o te Wai will not however resolve underlying issues regarding the regulation, governance and allocation of freshwater resources, nor provide for redress of Treaty breaches.

23. The Environment Court has held that upholding Te Mana o te Wai acknowledges and protects the mauri of water.[4] The mauri of water sustains hauora – the health of the environment, the health of the waterbody and the health of the people.

24. While the terminology uses Māori language, it is a concept which applies to management of freshwater for all people and from which all people benefit.[5] It is intended to involve a paradigm shift from regarding freshwater as an economic resource or commodity, to putting the needs of waterbodies first.

25. Te Mana o te Wai is a flexible concept. It will enable expressions of different values and preferences (for example, with regard to differing practices of mahinga kai or the different value placed on specific places or resources by Papatipu Rūnanga). In this sense, Te Mana o te Wai is a tool to support local expressions of what is important with respect to freshwater.

26. The Environment Court, in its Interim Decision on the Proposed Southland Water and Land Plan,[6] discusses Te Mana o te Wai, the paradigm shift that is mandated by the NPSFM 2017 and its practical implications. The most important conclusions of the Court are its three key understandings.

27. Whilst the Court's decision was given in the context of the NPSFM 2017, it is submitted that the NPSFM 2020 has not materially changed the Court's key understandings. If anything, the NPSFM 2020 gives greater support to these key understandings as it strengthens the prominence and application of Te Mana o te Wai.

28. The implications of the 2020 NPSFM will be addressed in further detail later in these submissions.

The first key understanding[7]

29. As noted earlier, Te Mana o te Wai refers to the integrated and holistic wellbeing of a freshwater body. Upholding Te Mana o te Wai acknowledges and protects the mauri of the water.

4 At [17].
5 At [20].
6 *Aratiatia Livestock Limited and Ors v Southland Regional Council,* above n 3.
7 At [17].

30. As the matter of national significance, the NPSFM 2017 required users of water to provide for hauora and in so doing, acknowledge and protect the mauri of the water.

31. The implication of the Court's first key understanding is that water bodies themselves must be in a state of hauora before use can be considered.

Second key understanding[8]

32. As the matter of national significance under the NPSFM 2017, the health and wellbeing of water are to be placed at the forefront of discussions and decision-making. Only then can hauora be provided for by managing natural resources in accordance with ki uta ki tai.

Third key understanding[9]

33. The NPSFM 2017 made it clear that, in using water, the health of the environment, the waterbody and the people must also be provided for. This direction imposed a positive obligation on all persons exercising functions and powers under the RMA to ensure that when using water, people also provide for the health of the waterbody, the health of the environment and the health of the people.

34. The Court understood that this direction is at odds with the usual line of inquiry when it comes to water takes and discharges. The usual inquiry is how health will be impacted by a change in water quality (or quantity).

STATE OF THE ENVIRONMENT

35. For the purposes of PC7, the environmental (and cultural/hauora) baseline against which water quality and quantity is measured is critical. Without a baseline, it is difficult to enforce the changes and measure results.

36. It is apparent however, that different parties have adopted different baselines for their assessment of PC7 and its alignment with the NPSFM 2020. For many submitters, the starting point is the status quo and a framework which assumes abstraction and commoditisation based on the sum total of existing consents. It is

8 At [58]-[59].
9 At [61]-[62].

submitted that such an approach is fundamentally inconsistent with the NPSFM 2020 and the change in priorities for the management of freshwater that it intends to drive.

37. We also note that evidence has been presented to the Panel[10] which suggests that the settled objectives of the Canterbury Water and Land Plan should prevail over the objectives of the NPSFM 2020, and that the priorities in the NPSFM 2020 can be balanced to provide for social and economic uses of water. Aside from being an incorrect legal approach and interpretation, it is submitted that this approach reflects the status quo.

38. For Ngā Rūnanga, its baseline and starting point for freshwater is different and is based on kaitiakitanga, whakapapa, and the hauora o te Wai. Its view of the appropriate baseline and starting point is closely aligned with the concept of Te Mana o te Wai, the "fundamental concept" of the NPSFM 2020. To the extent that the current state of the environment does not provide for the hauora o te Wai and the hauora o te tangata, it is submitted that an approach which uses the current state of the environment as a starting point for assessing the health of a waterbody is inappropriate and does not achieve Te Mana o te Wai. If scientific evidence is based on the wrong policy approach and legal interpretation it is of very limited value[11].

39. When Ngā Rūnanga consider the state of the environment, and what is required to achieve te hauora o te Wai and alignment with Te Mana o te Wai, its evidence is very clear. This evidence is best encapsulated in two reports prepared by Tipa and Associates: *The Cultural Health of the Opihi Catchment* (last updated June, 2018) and *Cultural Health Assessments and Water Management for the Rakahuri Waimakariri Zone* (October 2016). These reports set out water quality and quantity limits based on what is required, at a minimum, to sustain indigenous species. For mana whenua, it is clear that in order for Te Mana o te Wai to be given meaning, this is a minimum standard.

40. These reports are supported by the evidence of witnesses such as Dr Tau, Mr Reuben, Mr Henry, and Mr King who attest to their experiences of degradation of the environment and what this means for them, their whānau, and the communities they represent.

10 Statement of evidence of Mr Tim Ensor for Opuha Water Limited and others, dated 27 October 2020.
11 An example is the Joint Witness Statement for Freshwater Quality/Ecology (18 August 2020).

Mahinga kai - swimming

41. Mahinga kai is often described as the gathering of foods and other resources, the places where they are gathered, and the practices used in doing so. Over many generations, Ngā Rūnanga developed complex practices and methods for mahinga kai based on the seasons and life cycles of various birds, animals and plants. For Ngā Rūnanga, freshwater eco-systems are fundamental to mahinga kai.[12]

42. The importance of kai for Ngā Rūnanga however, goes beyond providing a source of sustenance. The cultural institutions are the rivers, lakes, estuaries, and shorelines from which the food comes.[13] As stated in the evidence of Mr King for Ngā Rūnanga, mahinga kai is the basis of their culture, and as kaitiaki it is imperative to maintain these resources for the next generation.[14]

43. The evidence for Ngā Rūnanga is that to practice mahinga kai, people have to get into the water. Based on the current environment, there is understandable concern amongst mana whenua that due to the degradation of the environment it is not safe to do this.[15] Mr Reuben's evidence clearly identifies waterways, their hauora, and associated mahinga kai that have degraded in his lifetime.[16]

44. Many mahinga kai have been lost or diminished over the recent decades with land use change and intensification impacting many lowland streams across South Canterbury and in the Rakahuri/Waimakariri catchments.

45. For example, Dr Tau describes his own experiences as a child whitebaiting and bobbing for eels, and swimming in the Rakahuri River, Rakahuri Lagoon and Waikuku Lagoon.[17] The food that was the basis of his diet growing up included whitebait, eels, crayfish, mutton birds, watercress, puha and seafood.[18]

46. Dr Tau also describes the change in the health of the Rakahuri River from the 1980s until today, with the most substantive decline in health coinciding with the expansion of dairy farming. In terms of the position that the environment is in

12 Statement of Evidence of Mr Tewera King dated 22 July 2020 at [57].
13 Statement of Evidence of Dr Te Maire Tau dated 22 July 2020 at [33]-[36].
14 At [57].
15 This is borne out by Environment Canterbury's own monitoring and reports, such as the Canterbury water quality monitoring for primary contact recreation, Annual Summary Report 2019/20, October 2020.
16 Statement of evidence of Mr Arapata Reuben, at [44]-[55], and [58]-[76]
17 Statement of evidence of Dr Te Maire Tau dated 22 July 2020 at [44]-[49] and [55]-[59].
18 [At 75].

today, watercress is too logged with effluent to be eaten and rivers are too toxic to be swum in.[19]

47. Mr Reuben also recalls childhood experiences of mahinga kai, and explains that the Rakahuri River no longer supports taonga species. He identifies that rivers do not hold the abundance of species they once did, that the rivers rarely reach their banks, there are shallower depths, slower flows and increased water temperature. It is clear that the agricultural and urban use of lands bordering the waterways has degraded the relationship people have with water.[20]

48. Mr Reuben also describes the change in tuna in the Tūtaepatu lagoon. As a child, he recalls throwing small tuna back in the lake so that they would mature. Today, there are very few juveniles due to increased catches through the 70s, 80s and 90s. He also discusses the change in availability and health of watercress.[21]

49. It is submitted that this widespread degradation does not describe a state of the environment which achieves Te Mana o te Wai. It is clear that the status quo is not the appropriate baseline.

Mahinga kai - taonga species

50. The importance of habitat is important to ensuring the health of taonga species. Taonga species are listed in schedule 97 of the Settlement Act, although some taonga, such as inaka tuna and kanakana are not included because of regulations and the quota system.

51. Mr Henry has witnessed the loss of habitat in the streams and rivers of significance to him and his whānau. Taonga species need to have a variety of habitats, including water that is deep enough for them (large tuna for example, require higher water levels), and places to burrow or hide.[22]

52. Mr Henry notes that whitebait and kanakana populations are declining, and that the Rūnanga have repeatedly voiced their concerns about the effects of fairway clearance and gravel takes on taonga species[23]. He also notes that because of the loss of wetland areas, which are key places for taonga species, rivers are

19 At [66].
20 Statement of Evidence of Mr Arapata Reuben at [47].
21 At [65]-[68].
22 Statement of Evidence of Mr John Henry at [57].
23 At [28].

particularly important now. For example, large tuna could once be found burrowing in wetland areas connected to rivers but, with the loss of those wetlands, tuna and other taonga species are now more reliant than ever on rivers.[24]

53. Mr Henry also notes that because of the loss of wetlands, it unlikely that taonga species will live their entire lifecycle.[25] Once again, it is submitted that an environmental framework which has resulted in this situation is at odds with te hauora o te Wai and cannot provide for Te Mana o te Wai.

THE ZONE IMPLEMENTATION PROGRAMME ADDENDUM PROCESS

54. There was significant community engagement which informed the Zone Implementation Programme Addendum (**ZIPA**) recommendations, some of which have been reflected in the PC7 OTOP sub-region provisions.

55. Rūnanga had ongoing involvement in and awareness of the community engagement. The evidence of Mr Henry[26] sets out the Rūnanga involvement with the OTOP Zone Committee. Mr Reuben's evidence similarly identifies the engagement that occurred with the Waimakariri Zone Committee.[27]

56. It is noted that there have been suggestions from some submitters that, because Rūnanga have been invited to and engaged in all processes to date, this justifies the substantive outcomes recommended by the OTOP Zone Committee (with the inference that Ngā Rūnanga should be bound by the recommendations). Engagement in a process is just that, but it is very clear that Rūnanga, and particularly Arowhenua, were deeply dissatisfied with both the process and the outcomes. Furthermore, simply because an exercise has gone through a process cannot mean that the recommended outcomes are appropriate in substance or law – and in this instance, they clearly are not. A similar outcome has occurred with regard to Ngāi Tūāhuriri involvement in the Rakahuri/Waimakariri Zone Committee.

57. The OTOP Zone Committee[28] led the community engagement process and hosted a large number of workshops and information events, with assistance from

24 At [57]-[58].
25 At [58].
26 Particularly at [18]-[24].
27 Statement of evidence of Mr Arapata Reuben at [15]-[21]
28 As set out in the Statement of Evidence of Mr Henry, Mr Henry was involved with the OTOP Zone Committee and had an ongoing awareness of PC7.

Environment Canterbury. These were in addition to monthly Zone Committee meetings, which are also open to the public to attend and participate in. This engagement assisted the Zone Committee in developing recommendations.

58. Community engagement occurred in different stages during the development of the ZIPA and Part B of PC7 between February 2016 and July 2019. This is detailed in the Section 32 Report. In summary, initial consultation was undertaken in 2016 to describe the Healthy Catchments Project and how different community groups and stakeholders could be involved. During the preparation of the draft ZIPA, numerous workshops were held with catchment groups, stakeholders, and Ngāi Tahu to share information and receive feedback on proposed actions to achieve the community outcomes.

59. Most importantly, Rūnanga did not support the solution package finalised by the Zone Committee, the OTOP ZIPA recommendations. OTOP ZIPA was accepted by Environment Canterbury and finalised in December 2019.

60. In the ZIPA, the Zone Committee delivered water quality and quantity limits broken down into the Pareora, Opihi, Orari, Te Umu Kaha/Temuka River and Timaru/Salt Water Creek. Arowhenua opposed the Zone Committee's recommendations for the Opihi River, Orari River and the Te Umu Kaha/Temuka River, for the reasons set out in Mr Henry's evidence, including that the limits set were decided by particular interest groups.

61. Put another way, the limits were informed by existing use. Given the degraded state of the environment that this has resulted in, this is the antithesis of a Te Mana o te Wai approach to freshwater management.

62. The record shows that discussions the Zone Committee had with Rūnanga in regard to environmental flows were ignored. The Section 42A Report accurately but rather blandly states "consensus was not reached on the ZIPA recommendation because concerns of Te Rūnanga o Arowhenua were not addressed".[29]

63. Arowhenua also raised concerns directly with Environment Canterbury about the Opihi, Te Umu Kaha/Temuka River and Orari through letters and the Schedule 1

29 Section 42A report [paragraph 101].

RMA process. Environment Canterbury was unwilling to address the issues about water quantity and quality in these rivers before notifying PC7.

64. As noted earlier, it was only very late in the piece, in the Section 42A Report of Mr McCallum-Clark, that Environment Canterbury appeared to understand that its approach, based on the ZIPA recommendation, was likely problematic with regard to alignment with the NPSFM 2017 (and this remains so under the NPSFM 2020). There is no small irony that, at that point, Environment Canterbury effectively invited Ngā Rūnanga to fill in the gaps in Environment Canterbury's own policy work regarding the compliance of PC7 with the NPSFM 2020. It is submitted that this issue could have been resolved had Environment Canterbury more carefully managed and scrutinised the merits of the ZIPA recommendations rather than allowing process to triumph over substance.

65. Te Mana o te Wai requires councils to properly engage with individual Papatipu Rūnanga to understand their priorities for freshwater, what resources are valued, and how the fundamental concept and the hierarchy of obligations within Te Mana o te Wai can be given effect to.

Recommendation of the OTOP Zone Committee regarding water from other catchments

66. In addition to opposing the limits proposed by the OTOP Zone Committee, Arowhenua specifically did not support the recommendation to bring water into the catchment from other catchments. This is set out in more detail in the statement of evidence of Mr Henry.

67. Bringing in water from elsewhere was viewed as a simple solution by the Zone Committee to avoid reducing takes or changing farming practices. The position of Arowhenua is that the best way to provide more water is to keep it in the river in the first place. Such an approach values the water in its natural state and puts the needs of the waterbodies first.

68. Furthermore, the evidence of Mr Henry is clear that the mixing of water is abhorrent.[30] Waterbodies were used for different purposes and these purposes could not be mixed. Rūnanga also are concerned with alpine water from the braided river systems mixing with water sourced from the plains, considering that

30 At [103].

this affects the way the river flows into the sea. It is also considered that the mixing of waters from different rivers affects migratory species and their ability to return from the sea.

69. It is submitted that shifting water between catchments is not consistent with the integrated and holistic wellbeing of freshwater bodies.

70. Te Mana o te Wai acknowledges and protects the mauri of the water.[31] While mauri is not defined under the NPSFM 2017 or NPSFM 2020, the Environment Court has noted that all things (animate and inanimate) have mauri, a life force. Being interconnected, the mauri of water provides for the hauora and mauri of the environment, waterbodies and the people.[32] The mauri of water is, therefore, expressly linked with its use.[33]

71. Using water from one catchment to serve another results in a "trade-off". In this context, the Environment Court has drawn attention to why environmental trade-offs are not acceptable:[34]

> Echoing the words of the late Environment Judge J Bollard, there is an ever-present call for environmental compromises and trade-offs at the individual level and of changes that all too often belatedly disclose mediocre environmental qualities, if not irreversible degrading outcomes.

72. It is submitted that Te Mana o te Wai, as mandated by the NPSFM 2020, is a fundamental and intentional shift in perspective around management of water. Environmental compromises and trade-offs have resulted in the environmental degradation we see today, and Te Mana o te Wai is intended to shift the spotlight back to the wellbeing of the waterbody.

NPSFM 2020

73. The NPSFM 2020 came into effect on 3 September 2020, and replaces the NPSFM 2017.

31 At [17].
32 At [46].
33 At [60].
34 *Aratiatia Livestock Limited and Ors v Southland Regional Council*, above n 4, at [277].

Fundamental concept – Te Mana o te Wai

74. Environment Canterbury has accepted that one of the key changes in the NPSFM 2020 is the further elevation and articulation of the concept of Te Mana o te Wai.[35]

75. Underpinning the NPSFM 2020 is the "fundamental concept" of Te Mana o te Wai, which is reflected in the NPSFM 2020, as follows:

> (1) Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.
>
> […]
>
> (5) There is a hierarchy of obligations in Te Mana o te Wai that prioritises:
> (a) first, the health and well-being of water bodies and freshwater ecosystems
> (b) second, the health needs of people (such as drinking water)
> (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

76. Rather than being referred to as the "fundamental concept" in the NPSFM 2017, Te Mana o te Wai was referred to as the "matter of national significance". When comparing the references to Te Mana o te Wai in the two texts, the one significant difference is that the hierarchy of obligations is clarified. The NPSFM 2017 states that:

> Upholding Te Mana o te Wai acknowledges and protects the mauri of the water. This requires that in using water you must also provide for Te Hauora o te Taiao (the health of the environment),Te Hauora o te Wai (the health of the waterbody) and Te Hauora o te Tangata (the health of the people).

77. In the NPSFM 2020, this hierarchy of obligations is clarified, to ensure that the health and well-being of waterbodies and freshwater ecosystems is the **first priority**, to be considered **before** the health needs of people and the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future.

78. It is submitted that this difference is highly significant. Although this hierarchy was always implicitly fundamental to the concept of Te Mana o te Wai, the explicit inclusion of the hierarchy included in the NPSFM 2020 means that it is indisputable that the health and wellbeing of waterbodies and freshwater ecosystems is to be considered before any other factors, including human use.

35 Opening Legal Submissions of Counsel for the Canterbury Regional Council (dated 22 September 2020) at [27].

79. It is further submitted that both the objective and paragraph 3.2(2)(c) reinforce the application of the hierarchy:

(a) The single objective in the NPSFM 2020 is identical to matter (5) under the "fundamental concept" of Te Mana o te Wai (see above, paragraph [75), and embeds the same hierarchy of priorities.

(b) Clause 3.2(2)(c) sets out that every regional council must give effect to Te Mana o te Wai, and in doing so, must:

> **(c) apply the hierarchy of obligations, as set out in clause 1.3(5):**
> (i) when developing long-term visions under clause 3.3; and
> (ii) when implementing the NO under subpart 2' and
> (iii) **developing objectives, policies, methods, and criteria for any purpose under subpart 3 relating to natural inland wetlands, rivers, fish passage, primary contact sites, and water allocation;**
>
> **[…]**

80. It is submitted that the higher order provisions of the NPSFM 2020 are clearer and more directive than its predecessor about the hierarchy of priorities in giving effect to the fundamental concept of Te Mana o te Wai.

Policy 1

81. Policy 1 requires that "freshwater is managed in a way that gives effect to Te Mana o te Wai" (noting that Te Mana o te Wai has the meaning set out in clause 1.3 of the NPSFM 2020).

82. As accepted by Environment Canterbury, this necessarily involves consideration of the hierarchy of obligations which, at the forefront, requires the health and wellbeing of the waterbody and freshwater ecosystem to be put first, before any use is contemplated.[36] As the Environment Court accepted in the Southland context, this requires that the needs of the waterbody are put first.

Other interpretations of the NPSFM

83. It is submitted that not all parties have understood or correctly interpreted the implications of the NPSFM 2020, particularly the hierarchy of obligations.

36 Opening Legal Submissions of Counsel for the Canterbury Regional Council (dated 22 September 2020) at [42].

84. More specifically, it has been suggested that, while the health and well-being of waterbodies and freshwater ecosystems are the first priority, that there may still need to be a "trading off" or a balancing of the priorities in order to ensure any approach to managing freshwater provides for the health needs of the people, and the ability of communities to provide for their wellbeing.[37]

85. It is submitted that this interpretation is incorrect and not available. The premise of Te Mana o te Wai, as has been explained above, is that it protects the mauri and hauora of the water. It is only when the waterbody is in a state of hauora that it is able to provide for the environment, human health and human use.

86. It is submitted that the use and explanation of the hierarchy of obligations in the NPSFM 2020 removes any doubt there has been a definitive shift from the paradigm that allowed the "trading off" the wellbeing of waterbodies and freshwater ecosystems.

87. It has also been suggested by some witnesses that the policies and methods that are part of PC7 are required to achieve the settled objectives in the Canterbury Land and Water Regional Plan (**CLWRP**), notwithstanding that they may not give effect to the NPSFM (either 2017 or 2020).[38]

88. It is submitted that this interpretation is incorrect, because:

(a) section 67(3)(a) of the RMA provides that a regional plan must give effect to any national policy statement;

(b) the Regional Council is bound to give effect to the NPSFM 2020 as soon as reasonably practicable;[39] and

(c) as accepted by Environment Canterbury, a decision-maker is required to give effect to the NPSFM 2020, and where there is scope within submissions to make the necessary changes to the regional planning framework through the PC7 process, a decision-maker must reconcile any conflict in policy direction with the LWRP and WRRP in favour of the NPSFM 2020. This approach recognises that the NPSFM 2020 is the

37 Update of Evidence of Timothy Alastair Deans Ensor on behalf of The Adaptive Management Working Group and Ors at [2.14]-[2.15].
38 At [2.9].
39 The only constraint on this, as has been identified by the Regional Council at [18] of the Opening Legal Submissions of Counsel for the Canterbury Regional Council (dated 22 September 2020), as follows: the extent to which it is reasonably practicable for the provisions of PC7 and PC2 to give effect to the NPSFM 2020 is confined by the scope within submissions to make changes to PC7.

most recent articulation of the matters of national significance that are relevant to achieving the purpose of the RMA in the freshwater management space.[40]

The requirement to "give effect to"

89. The requirement to "give effect to" was discussed extensively by the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd and Ors* (**King Salmon)**,[41] specifically in the context of section 67(3) of the RMA.

90. The Court noted that up until August 2003, section 67 provided that such a regional plan should "not be inconsistent with" a national policy statement. Since then, section 67 has stated the regional council's obligation as being to "give effect to" any national policy statement. The Court considered that the change in language resulted in a strengthening of the regional council's obligation.[42]

91. The Court found that "give effect to" simply means "implement", and that it is a strong directive, creating a firm obligation on the part of those subject to it. Drawing on the Environment Court's words in *Clevedon Cares Inc v Manukau City Council*,[43] the Court also highlighted the reason for the strong direction: essentially, the hierarchy of plans means that it is important that the higher order documents are given effect to by the lower order documents.[44] To that extent, local authorities are responsible for "filling in the details" in their particular localities.

92. It is submitted therefore, that the obligations are not to be taken lightly – there is a firm obligation on both parties to ensure that the NPSFM 2020 is implemented as soon as reasonably practicable. It is submitted that this means that the NPSFM 2020 must be implemented within PC7 to the fullest extent possible, the only constraint on its implementation being the scope of submissions.

40 At [47].
41 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd and Ors* [2014] NZSC 38.
42 At [76].
43 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.
44 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd and* Ors, above, n 50 at [77].

ISSUES RAISED BY OTHER PARTIES AND WITNESSES

Mātaitai Protection Zone

93. A mātaitai identifies an area that is a place of importance for customary food gathering, and mātaitai are managed by the tangata whenua for those purposes. Under modern fisheries legislation, a mātaitai can be established over any area of New Zealand fisheries waters.[45]

94. Put another way, mātaitai reserves recognise the history and continuing relationship that Rūnanga have with an area, and its mahinga kai values and purpose.

95. A question has been raised over whether Environment Canterbury is able to include policies or rules to manage the potential impact of land use around mātaitai reserves.[46]

96. It has been suggested that Environment Canterbury is not able to include rules or policies that relate to mātaitai reserves for the following reasons:

(a) the legal existence and management of mātaitai, and the fisheries within them falls under the Fisheries Act 1996; and

(b) there is no case law about how regional councils should apply section 66 of the RMA in relation to these reserves.

97. Section 66(2)(c) of the RMA provides that, when changing a regional plan, the regional council shall have regard to any regulations relating to ensuring the sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiāpure, mahinga kai, mātaitai, or other non-commercial Māori customary fishing).

98. It is respectfully submitted that the fact that there is no case law on section 66(2) of the RMA that relates to mātaitai does not mean that a regional council lacks the jurisdiction to control activities, particularly land and water use activities, that effect the management and sustainability of a mātaitai.

45 Statement of evidence of Ms Kylie Hall dated 22 July 2020 at [87].
46 Statement of Evidence of Lionel John Hume and Jason Aaron Grant on behalf of the Combined Canterbury Provinces of Federated Farmers of New Zealand dated 14 October 2020 at [15]-[21].

99. More specifically, just because mātaitai reserves are established under fisheries legislation does not preclude a regional council from regulating activities surrounding or affecting mātaitai. It is submitted that section 66(2)(c) supports the contrary conclusion – that regional councils *should* be considering mātaitai when preparing or changing a regional plan. Ms Davidson will address the relief sought by Ngā Rūnanga with regard to mātaitai in her summary of evidence.

SCOPE ISSUES

100. In preparing the summary of decisions requested and the Section 42A Report, the planning officers identified a number of submission points as potentially outside the scope PC7. As stated in the Section 42A Report:

> 3.2 A number of scope issues have been raised. A common issue is submitters seeking to change plan provisions which are not altered, or only altered in a very minor way, by PC7. Submissions of this type are subject to a high level of risk that affected parties may not have received fair and adequate notice of the nature of changes proposed. To the extent that submitters wish to pursue relief of this type, it is submitted that they should be required to demonstrate how the changes sought are within the jurisdiction of the CRC.
>
> […]
>
> 3.6 PC7 raises the following jurisdictional issues:
>
> a. Potentially invalid submissions because they are either not in the prescribed form or they are not "on" PC7; and
> b. Submissions which do not request specific relief.

101. A number of submission points from Ngāi Tahu and Ngā Rūnanga have been identified as potentially out of scope.[47]

102. In summary:

(a) Ngāi Tahu and Arowhenua have sought the inclusion of references to Rock Art Management Areas (**RAMAs**) and Mātaitai Protection Zones (**MPZs**) within Rules. Not all of these Rules have been specifically amended by PC7.

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47 A full list of these points is included in the document entitled "Plan Change 7 – Submission Points Potentially Beyond the Scope of Plan Change 7". Also see paragraph [4.66] of the Section 42A Report, which states:

> PC7 proposes the new matter of discretion (Any adverse effects on Ngāi Tahu values or on sites of significance to Ngāi Tahu, including wāhi tapu and wāhi taonga) into seven of the region-wide rules listed by Arowhenua and Te Rūnanga. We consider that this new PC7 matter would provide for consideration of mātaitai reserves and rock art sites in a resource consent process without specifically stating MPZs and RAMAs. The six other regional rules listed by the submitter are not amended by PC7 and therefore not considered to be in scope. If the submitter does consider them to be in scope, it would be useful to understand how the activities managed by those rules could affect MPZs and RAMAs, so that evidence is before the Hearing Panel to enable a section 32AA assessment.

(b) In addition, in its submission, Ngāi Tahu requested additional matters of discretion for several rules, to apply to the OTOP sub-region rules, to provide for the assessment of adverse effects on the RAMAs and MPZs mapped within the OTOP zone.

103. A vast majority of the identified submission points relate to Part B of PC7. Part B introduces a new layer in the planning maps that identifies MPZs and RAMAs.

Relief regarding RAMAs

104. Broadly, the amendments sought in relation to RAMAs propose that consent is needed for discharges or activities within 200 metres of a rock art site.

105. The relief sought is supported by the evidence of Ms Symon.[48] Unlike many other archaeological site types, rock art can be indirectly impacted by activities that occur at a significant distance from the sites themselves. Activities that can damage rock art sites in this way include the following:

(a) changes in the wider hydrology of the sites (irrigation, abstraction, damming, conveyance of water);

(b) changes in the microclimate around the sites (changes in humidity, exposure to sunlight, shade or wind, vegetation growth);

(c) emissions (lowering of the pH of atmospheric water, or 'acid rain');

(d) dust (surface collection, support for the growth of moss and algae, mechanical abrasion);

(e) vibration (vehicle movements, quarrying, compaction); and

(f) subsidence and destabilisation (relocation of sediment deposits from mining or quarrying, waterlogging of limestone outcrops).

106. As set out in Ms Symon's evidence, changes in the wider hydrology of the sites are of the greatest concern, due to the location of the majority rock art sites on

48 Statement of Evidence of Ms Amanda Symon dated 22 July 2020 at [15]-[16].

farm land, the increased use of irrigation to support intensive dairy farming, and the significant damage that changes in hydrology can have on the sites.

Legal principles on scope

107. Under Schedule 1, clause 6 of the RMA, a person may make a submission on a proposed policy statement or plan to the relevant local authority. There are two lines of case law that relate to the scope of submissions that can be made under Schedule 1, clause 6:

(a) The scope of a submission on a plan change or variation; and

(b) The scope of a submission on a full review of planning documents.

108. In the Section 42A Report, the officers have identified that there are potentially invalid submissions because they are not "on" PC7.[49]

Submissions "on" a plan change

109. A submission must be "on" a plan change. The meaning of "on" was considered in *Palmerston North City Council v Motor Machinists Ltd,*[50] where the High Court firmly endorsed the two-limb approach from *Clearwater Resort Limited v Christchurch City Council.*[51] The two questions that must be asked are:

(a) whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and

(b) whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

110. The High Court in *Motor Machinists* stated that the first limb of the *Clearwater* test requires that the submission address the alteration entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change.

49 Paragraphs [3.9] and [3.12].
50 [2014] NZRMA 519.
51 HC Christchurch AP34/02, 14 March 2003.

111. The Court suggested the following ways of analysing whether a submission falls within the ambit of a plan change:

(a) Ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report; or

(b) Ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

112. The second limb of the test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

Turners and Growers

113. The test from *Motor Machinists* and *Clearwater* was applied in *Turners and Growers Horticulture Ltd v Far North District Council*.[52]

114. In *Turners and Growers*, the High Court held that the changes to the district plan sought by Turners and Growers (in its submission on a plan change) would affect a much wider class of persons than the change as notified. That would effectively cut that wider class out of the submission process. That is, those parties could well have chosen not to make a submission on the plan change having concluded it would not affect them. On that basis, the submission was held not to be "on" the plan change.

52 [2017] NZHC 764, (2017) 20 ELRNZ 203

Submissions on a full review of planning documents

115. In the context of a full review of a plan, the High Court has departed from the *Motor Machinists* approach.[53] In *Albany North Landowners v Auckland Council*, the High Court endorsed the "reasonably and fairly raised" test set out in *Countdown Properties (Northlands) Ltd v Dunedin C*:[54]

> A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. … **The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety.** The "workable" approach requires the local authority to **take into account the whole relief package** detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. **It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.**
>
> [our **emphasis**]

116. In applying the *Countdown* test, the High Court highlighted a distinction between submissions on a plan change and submissions on a full plan review. In the case of a full plan review, the issue is whether the scope of a submission is broad enough to include a particular form of relief, whereas in the context of a plan change (such as in *Motor Machinists* and the related line of case law), the issue is whether the submission is "on" the variation or plan change at all.

Application of legal principles to PC7

117. Broadly, the reason cited by the planning officers for some submission points being out of scope is that the submissions are not "on" the plan change. More specifically, the officers provide:

> Submission point may not be in scope due to being on provisions that are not altered by PC7 or are altered, but not in the manner sought by the submitter. However, an assessment of the merits of the point is provided within the s42A report.
>
> Submission point on a rule not altered by PC7.

118. These reasons indicate that the officers have reached a view whether or not submission points are "on" the plan change based on whether or not those particular provisions are altered by PC7. It is submitted, however, that:

53 *Albany North Landowners v Auckland Council* [2017] NZHC 138.
54 [1994] NZRMA 145 at 41, as set out in *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

(a) PC7 is not a geographically discrete plan change. Some provisions are geographically discrete (in that they apply to sub-regions), but some are region-wide.

(b) As such, a rigid application of *Motor Machinists* is not appropriate and the legal principles and case law related to full plan reviews are relevant.

119. It is submitted in any event that, in all instances, the submission of Ngā Rūnanga addresses the substance of the change to the pre-existing status quo advanced by the proposed plan. It is entirely "on" and related to the proposed changes to the framework both to the resources of interest, and the geographical areas.

120. The *Countdown* test (above) provides that a council must consider whether any amendment made to a proposed plan or plan change goes beyond what is "reasonably and fairly raised in submissions".

121. It is submitted that the history and context of the involvement of Ngā Rūnanga in PC7 is particularly relevant when considering scope issues, and the issue of fairness, namely whether the relief sought would affect a much wider class of persons than the change as notified (as was held in *Turners and Growers*).

History and context

122. Throughout the Zone Committee process, Ngā Rūnanga sought to expand the Mātaitai Protection Zone, to incorporate waipuna so as to protect waipuna but also the mātaitai reserve areas from land and water use activities.[55]

123. Further, a regulatory approach similar to that put forward by Ngāi Tahu in its submission was recommended by the OTOP Zone Committee in the ZIPA. Section 4.3.2 of the Addendum states:

> The Regional Council work with Papatipu Rūnanga to develop provisions in statutory plans that identify and manage actual and potential effects on tuhituhi neherā (rock art) sites from the taking, use, damming, diversion or discharge of water, the discharge of contaminants, and land use activities.

124. However, Environment Canterbury did not accept the recommendation for regulation of these matters, and as a consequence, Ngā Rūnanga have submitted

55 The expansion of the Protection Zone is seen by Ngāi Tahu as a management tool to assist in protecting the mātaitai from water and land-based activities that negatively impact on the quality and quantity water and waipuna within the Te Umu Kaha/Temuka River catchment.

on these matters through the plan change. Ironically, Environment Canterbury's decision to not accept the Zone Committee's recommendations on this issue has resulted in scope issues for Ngā Rūnanga.

125. When the history and context is considered, the submissions of Ngā Rūnanga cannot result in any unfairness to other parties or submitters, particularly the unfairness the High Court was concerned with in *Turners and* Growers (detailed above). This is because:

(a) The concerns of Ngā Rūnanga have been clear from the beginning of the public Zone Committee process; and

(b) Parties have had the opportunity to directly respond to the Ngā Rūnanga submissions through further submissions; and

(c) It was and is clear that PC7 included provisions to protect sites of cultural significance throughout the sub-region, including rock art (tuhituhi neherā) sites and waipuna (springs).

126. Conversely, a rigid application of the scope test (as set out in *Motor Machinists*) would result in material unfairness to Ngā Rūnanga. As noted earlier however, it is submitted that the submission of Ngā Rūnanga addresses the substance of the changes to the pre-existing status quo advanced by PC7. It does not seek to introduce new issues or new resources, nor does it seek to trespass into new geographical areas.

CONCLUSION

127. As outlined in the evidence for Ngā Rūnanga, there is no question that the ability of the natural environment to sustain mahinga kai has been significantly adversely affected.

128. As kaitiaki, Ngā Rūnanga are bound to ensure the wairua and mauri of the land and water are maintained. Degradation of the waterways and land negatively impacts on the mana of individuals and their hapū and iwi, as well as their collective identity.

129. Given the history outlined in the evidence for Ngā Rūnanga, and the very real concerns that are held, there is a considerable burden and duty felt by the current

generation to restore the environment, their mana and their identity. Despite the shortcomings of the Zone Committee process and the Plan Change as notified, it is submitted that the relief sought by Ngā Rūnanga on the provisions of Plan Change 7 will contribute towards this outcome.

DATED this 25th day of November 2020

James Winchester/Sal Lennon
Counsel for Ngā Rūnanga