BEFORE INDEPENDENT HEARING COMMISSIONERS

AT NAPIER & WAIPAWA

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE

KI AHURIRI & WAIPAWA

IN THE MATTER	**of the Resource Management Act 1991**
AND	
IN THE MATTER	**of the hearing of submissions on applications for the take and use of water from the Ruataniwha Basin.**

OPENING SUBMISSIONS ON BEHALF OF THE TRANCHE 2 APPLICANTS

14 NOVEMBER 2022

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1. INTRODUCTION

1.1 Plan Change 6 (**PC6**) to the Hawke's Bay Regional Resource Management Plan became operative on 1 October 2015. It set groundwater allocation limits for the Ruataniwha Basin which is located within the Upper Tukituki River Catchment. Within those limits, and through Pol TT8(ca) and Rule TT4, there was an allocation of deep groundwater of up to 15M m^3 that was labelled "tranche 2" (**T2 Water**) through a discretionary activity consent pathway.

1.2 These submissions are presented on behalf of 8 landowners (collectively, **Applicants**) who are applying to take and use that T2 water.

1.3 Each of these properties plan to abstract water for agricultural production purposes. The proposed take for agricultural purposes is 8.4 million m^3/yr. In addition to this quantity, a significant part of their total take (4.5 million m^3/yr.) will be used for augmentation back into surface water bodies to support low flow periods. This leaves a residual quantity of about 2 million m^3/yr (**Residual Water**).

1.4 Because the Residual Water is the only remaining T2 water left, and because it appears unlikely (at this stage) that there will be any further allocation in the future, the Applicants are proposing to make this Residual Water available to be called upon by, and transferred to, Manawhenua. This is a novel approach that, to my knowledge, has not been adopted by consent holders before anywhere in New Zealand. To the extent there remains any jurisdictional concern about such an offer, then the conditions necessary to secure that outcome are offered by the Applicants on an *Augier* basis.

1.5 The use of the T2 water will increase the security of supply for some of the Applicants and for others it will enable a transition to a higher-value land use. Investment required by the Applicants is substantial and the economic returns to the region will be material:[1]

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[1] Section 42A Report, [204] – [208]

(a) $36M of capital invested in irrigation works;

(b) GDP outputs as a result of the irrigation of T2 Water is $5-7M per annum.

1.6 The use of the T2 Water will not lead to an increase in Nitrogen loss from the Applicants' farms, and in fact will result in a reduction of Nitrogen loss from 122 t/yr to 114 t/yr.

1.7 Finally, by way of context, the "tranche 1" water within the two Ruataniwha Basin Groundwater Allocation Zones is fully allocated, up to its maximum allocation of 28.5M m^3/yr. As noted in the s 42A Report, this amount has not, to date, been fully utilised even in very dry years.[2] The implications of this are discussed later in these submissions.

Structure of submissions

1.8 These submissions are structured as follows:

(a) Outline of Proposal

(b) Procedural history

(c) Section 42A Report, subsequent conferencing, and Supplementary s 42A Report

(d) Identification of key issues remaining in dispute

(e) Legal principles relevant to those key issues

(f) Legal and Planning Framework

(g) Assessment of Effects

(h) Assessment of Objectives and Policies

(i) Consent conditions

(j) Witnesses

[2] S 42A Report, para 46 and Fig 4.

2. OUTLINE OF PROPOSAL

2.1 Resource consents seek water permits to authorise the take and use of T2 Water from a series of deep wells (screened at a depth of greater than 50m). (Land use consents are required under the Hawke's Bay Regional Resource Management Plan for 7 of the Applicants, and these applications have been lodged separately and are being processed separately by HBRC.)

2.2 The volumes sought by the Applicants are summarised in Mr Willis' evidence.

2.3 The taking of T2 Water will be accompanied by the discharge of about 35% of that abstracted groundwater into surface water bodies (Augmentation Water).

2.4 The Applicants are proposing that there be two separate water permits issued – one for the take of the water, and the other for the use of that water. The reason for a split—consent approach is that the "take permit" to take the water will be jointly held (ie by all 8 of the Applicants), with each of the Applicants holding a "use" permit solely in their name.

2.5 Despite a maximum term of 35 years being available under the RMA, a 20 year term of consent is sought. This term is consistent with the policy framework discussed below.

3. PROCEDURAL HISTORY

3.1 These applications have been in process since November 2014, which was the time the first individual applications for T2 Water were received.[3] Subsequently, the Applicants agreed to work together and provide to the Council an updated AEE. The Applicants and the Council staff agreed that it would be far more efficient for all parties and submitters if the applications were progressed in an integrated manner.

3.2 That collective application and updated AEE was lodged (**Applications**) and were publicly notified (at the request of the Applicants) on 20 November

[3] The T2 Water only became available when PC6 became operative, on 1 October 2015, and accordingly some of the consents had been lodged prior to that date. See s 42A Report, Table 2, page 7, for a list of applications and the date they were received.

2021. Submissions closed on 17 December 2021, with 72 submissions being received.[4]

3.3 A Prehearing Meeting was held on 30 March 2022. This was a virtual meeting that was recorded, and was arranged by the Council at the Applicants' request. A summary of that meeting is at Appendix 4 of the s 42A Report.[5]

3.4 A hearing date was originally proposed for the week of 30 August 2022.

3.5 The Section 42A Report was issued on 8 August 2022. That report recommended that the Applications be declined. The s 42A Report attached detailed statements from experts appearing on behalf of the Council.

3.6 The Applicants then requested that the proposed hearing date be vacated until the week commencing 14 November 2022 so as to provide an opportunity to undertake a substantive response to those expert statements (ie this response required a longer period than the statutory period of 5 working days).

3.7 The Commissioners agreed, and also directed that further expert conferencing occur between the experts for the Council and the Applicants.

3.8 That further expert conferencing occurred on the following dates, with joint witness statements being prepared and filed on the dates shown:

(a) Groundwater modelling, dated 11 October 2022

(b) Freshwater ecology, dated 18 October 2022

(c) Well Interference, dated 20 October 2022

3.9 In accordance with the amended timetable, the Applicants' evidence was filed on 31 October 2022. Submitter expert evidence was received on 7 November 2022.

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[4] Section 42A Report, [108] - [110]
[5] Section 42A Report, [111]

4. SECTION 42A REPORT

4.1 The s 42A Report recommended that the Applications be declined.

4.2 The primary reasons for that recommendation included:[6]

(a) "adverse effects of the proposal could be significantly adverse, [and] that there is a high level of uncertainty over the scale and extent of effects";

(b) "the proposal is not consistent with the objective of the National Policy Statement for Freshwater Management 2020 to give effect to Te Mana o te Wai and other critical Regional Policy and Regional Plan provisions".

4.3 Since that report was released, further calibration of the groundwater model and further conferencing of experts has occurred. The Council's groundwater expert is now in agreement with the groundwater experts appearing for the Applicants, although there remains a difference of opinion in respect of ecology effects and well interference effects.

4.4 The Regional Policy and Regional Plan provisions that are considered by the s 42A Report's author to be at odds with the Proposal are identified later in that report:

(a) NPSFM 2020 (**NPSFM**);[7]

(b) Hawke's Bay Regional Policy Statement (**RPS**);[8]

(c) Hawkes' Bay Regional Resource Management Plan (**RRMP**);[9]

(d) Plan Change 7 – Outstanding Water Bodies (**PC7**).[10]

4.5 No doubt the primary reason why the s 42A Report concluded that the Proposal was inconsistent with these instruments was because of his finding on the level of potential effects, which in turn depended on the

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[6] Paragraph [9], Summary
[7] Section 42A Report, para [222] – [230], Table 10
[8] Section 42A Report, para [246] – [261], Table 12
[9] Section 42A Report, para [262] – [278], Table 13
[10] Section 42A Repot, para [279] – [283]

Council's expert's opinion on the groundwater modelling that was undertaken. While the substantive groundwater modelling concerns have been addressed, there remains a difference of opinion in respect of potential ecology effects and well interference effects.

4.6 Mr Willis has responded to those planning matters identified by the s 42A Report in his evidence, with Mr Willis' evidence being informed by the most recent (updated) groundwater model and the outcome of the joint witness conferencing that has occurred. Mr Willis will comment on the Supplementary s 42A Report, and the conditions now proposed, as part of his presentation at the hearing.

Conditions of consent

4.7 Helpfully, despite that recommendation, in the event the Applications were granted by the Commissioners, a set of proposed consent conditions was attached to s 42A Report. This set has been the basis for the updated set of consent conditions that were filed with Mr Willis' planning evidence.

4.8 A further updated version – Hearing Version, dated 14 November 2022 – is filed with Mr Willis' supplementary planning evidence. It is this most recent version that the Commissioners should use for the purpose of the hearing. Key conditions of consent are highlighted later in these submissions.

4.9 The Applicants emphasise that the version of the conditions now offered are a critical part of the Applicants' response to the potential effects and to the policy framework.

4.10 The Commissioners will also be aware of the well-established caselaw that confirms that, when assessing a proposal, a consent authority must assume that any conditions of consent will be complied with: *Barry v Auckland City Corporation* [1975] 2 NZLR 646 (CA) at 651 (emphasis added):

> This agreement concerning the illegality of a possible change of use, which it rather seems the board thought would not be contrary to law, makes necessary a different approach to this question than that followed by the Chief Justice and the appeal board. **We are forced to agree with Mr Barker that neither the council nor the appeal board was entitled to rely on the possibility that the appellant or his successors in title might commit an illegal act as a ground for**

> **refusing the application. We prefer to think that the appellant was entitled to have it assumed that he and his successors would act legally.** Nor do we think that the difficulties in the path of a council seeking to prove a breach of the section can be good ground for refusing what is otherwise an acceptable application.

5. KEY ISSUES FOR THE HEARING

5.1 Based on my reading of the s 42A Report, the Supplementary s 42A Report, the JWSs, and the evidence, the key issues for hearing appear to be the following.

Expert evidence – Groundwater, Well Interference, Ecology & Nutrient Loss and Water Use Efficiency

5.2 Following receipt of the Supplementary s 42A Report, those matters agreed (at least as between the expert witnesses for HBRC and the Applicants) are:

(a) Groundwater modelling:

(i) Issues around model calibration and uncertainty;

(ii) Issues around model calibration to the stream flows within the Ruataniwha Basin;

(iii) Issues around using the model for drawdown interference effects and drawdown effects in shallow strata as well as stream flow effects;

(b) Well Interference:

(i) Accounting for a range of groundwater level drawdowns predicted by the model uncertainty analysis;

(ii) Use of March 2011 as a 'worst case scenario' for assessing effects.

(c) Ecology (wetlands):

(i) No outstanding issues. (One minor matter to be clarified at the hearing.)

5.3 The outstanding issues include:

(a) Groundwater modelling:

(i) None.

(b) Well Interference:

(i) *Assumptions about Tranche 1 water*: Whether the static water levels used in the Well Interference assessment accounts for the pumping of the Tranche 1 water. More information has been requested to demonstrate this.

(aa) Response: the Applicants' expert considers that the use of the Tranche 1 water has been assessed and on a conservative basis (ie the average of the lowest 10%, rather than the absolute lowest values). The difference in approach will be discussed at the hearing, and the Applicants' expert has approached Mr Thomas to ask what further information is required.

(ii) *Effects on registered drinking water suppliers*: Drawdown interference estimates and effects, including confirming effects on registered drinking water suppliers.

(aa) Response: a comprehensive response to the potential well interference effects is proposed to the included within the conditions. Particular attention has been given in those conditions to bores that are used for domestic supply. Ms Johansen has addressed the effects on registered drinking water supplies, at para [10.8] of her evidence. There is also one matter

relating to a relocated well that she will update the Commissioners about in her presentation.

(c) Ecology/Effects on small streams – see JWS, October 2022:

(i) *Effects upstream of augmentation*: Effects could occur to streams and rivers upstream of the augmentation sites, where flow augmentation is delayed through injection of groundwater (proposed at two sites), or where flow augmentation is upstream of dry reaches.[11]

(aa) Response: Only 2 properties – Buchanan (Ongaonga Stream) and Plantation Road Dairy (Kahakuri Stream) – are likely to discharge into or close to intermittent streams (the remainder are discharging directly into perennial streams or (potentially) into shallow wells directly connected to perennial streams). These two augmentation consents will be subject to a specific consent condition requiring that the discharge location be approved by Council, after receipt of a report from an ecologist confirming that the location will not cause adverse ecological effects (ie will not inappropriately change the intermittency of the receiving waters, which was the concern raised by Ms Drummond). This will be addressed in an Augmentation Discharge Management Plan.

(ii) *Limited data for assessments*: Averaged one-off data used for predicting effects to water levels in smaller streams and wetlands does not account for seasonal variability and worst-case scenarios, and could therefore underestimate adverse effects.

[11] Section 4, p3, Memorandum to HBRC from PDP, dated 4 November 2022

(aa) Response: one concern appears to be that the ecology assessment was undertaken in an abnormally wet year, and not over multiple years. The limited period of assessment cannot be remedied at this stage. However, it is worth noting that, in undertaking the assessment in a wet year, the potential effects are likely to be *over*-estimated rather than under-estimated. This is because a wet environment would be considered to lose water and become dry, with the effects associated with that. But, if the assessment had been undertaken in a dry year, then the streams may have had less water (or no water) and so the assessed effects caused by the drawdown would be less.

(bb) Response: the concern about the choice of the year used for Mr Weir's assessment appears to now be addressed (refer PDP Memorandum, 4 November 2022).

(iii) *Effects of Augmentation water discharge*: Effects could occur as a result of the discharge of deep groundwater to rivers, where groundwater quality has elevated levels of some contaminants.[12] (This is proposed to be addressed through an Augmentation Management Plan, but details of this plan have not been provided.)

(aa) Response: The updated consent conditions require the Augmentation Discharge Management Plan will specify particular parameters, and this will be discussed in more detail at the hearing. These limits will ensure, for example, that any discharge of

[12] Section 4, p4, Memorandum to HBRC from PDP, dated 4 November 2022

augmentation water does not create adverse effects in the receiving water bodies.

(iv) *Potential effects on a potential area of Inglis Bush*: This needs to be addressed through a further site visit to occur prior to the hearing. A request was made to see drawdown in deeper model layers because changes in deeper strata may impact on spring discharge. [13]

(aa) Response: Mr Weir has discussed this with Mr Thomas. Mr Weir's opinion is that the spring is fed by shallow rather than deep groundwater, but he has nonetheless made available the information requested by Mr Thomas.

(v) *Reversibility of effects*: In respect of future mitigation, it "is not considered feasible to "reverse the impacts" by altering the water take if adverse effects are observed. How this would be managed by the applicant is unclear."

(aa) Response: Neither Dr Keesing nor Mr Weir agree that the adverse effects of any dewatering are "irreversible" as suggested. If the water takes in the Ruataniwha Basin are reduced over time, eg in response to climate change or unanticipated effects, then the water levels in the streams will increase and aquatic fauna and flora will reinhabit those areas.

(d) Effects on rivers that discharge from the Ruataniwha Basin:

(i) *Augmentation outside of 1 in 10 year dry events*: There will be effects on rivers that discharge from the basin, and that with climate change this might occur more

[13] Section 4, p4, Memorandum to HBRC from PDP, dated 4 November 2022

frequently than the very infrequent nature of these events that have been modelled.[14]

(aa) Response: While the policy framework for allocation of water within the RRMP has been set on the basis that there will not be water available in 1 out of every 10 years, Policy TT8(1)(a) acknowledges that this will not be achievable in the Tukituki River catchment given the minimum flows set and the existing volumes of water being abstracted. It is not reasonable or appropriate to design and implement an augmentation scheme that is substantially more onerous than the current expectations of the RRMP or which addresses effects beyond those caused by the taking of the T2 Water (noting Policy TT8(1)(ca) which requires the augmentation to be commensurate to the scale of the effect of the T2 take). If the RRMP changes, eg because of climate change, then all water takes may need to be reviewed.

(ii) *Staging of augmentation*: There is a dispute about whether there could be an effect if development of the takes does not occur concurrently, and augmentation may not offset the effects at different stages of development.

(aa) Response: This seems a relatively minor issue and a relatively low risk, given the requirement to be ready to augment prior to taking any water for irrigation, and the economic driver on those holding consents to take T2 Water to

[14] Section 5, p5, Memorandum to HBRC from PDP, dated 4 November 2022

implement those consents as soon as practicable.

(iii) *Red Bridge flow trigger*: There is a dispute about whether there are impacts on stream flows downstream of Red Bridge that should be mitigated by the applicants. The proposed mitigation regime is to require augmentation when the Red Bridge minimum flow triggers are met – noting that this minimum flow trigger increases next year to 5,200 l/s, and this would require additional augmentation and updated modelling.[15]

(aa) Response: For the purposes of this hearing, the Applicants are proposing to add Red Bridge as a low-flow trigger. This is additional conservatism and will result in the Applicants augmenting takes below the Basin and above Red Bridge.

(iv) *Augmentation site effectiveness*: Some further information is required to assess the effectiveness of augmentation into shallow bores and into dry streams (noting the potential ecological effects of discharging into dry streams).[16]

(aa) Response: This will be addressed in the Augmentation Monitoring Plan (see comment above).

(v) *Augmentation availability*: There is a suggestion that during seasons when augmentation water is not available, drawdown of water levels will occur at all waterways that are hydraulically connected to groundwater (large and small). The magnitude of drawdown effects in larger streams has not been

[15] Section 5, p6, Memorandum to HBRC from PDP, dated 4 November 2022
[16] Section 5, p6, Memorandum to HBRC from PDP, dated 4 November 2022

modelled or assessed. There could be more than minor effects on these larger streams "where water levels or flow levels in fish migratory pathways or within spawning habitats is lowered significantly". [17]

(aa) Response: Dr Keesing's assessment does not rely on or consider any benefits of augmentation and, despite that, Dr Keesing considers that the aquatic ecology in the affected reaches will endure.

(e) Nutrient Loss and Water Use Efficiency:

(i) *The total proposed take is 15M m^3 but the nutrient modelling has used 13M m^3*: There is uncertainty over where and for what purposes this additional 2M m^3 would be used, and no nutrient losses have been included within the assessment.[18]

(aa) Response: this cannot be assessed now without knowing the purpose to which the water will be put (and noting that it might be simply left in the ground). It will be obligation of Manawhenua to apply for any necessary consents if they choose to use the water in a way that requires a consent. There is no basis to conclude that there will be additional nutrient effects from the additional 2M m^3 of water because the use of that water is not enabled by this consent. Furthermore, there is no reason to think that the 2M m^3 could not be used in a way that reduces existing Nitrogen loss (or as a minimum does not increase Nitrogen loss).

[17] Section 5, p6, Memorandum to HBRC from PDP, dated 4 November 2022
[18] Section 6, p7, Memorandum to HBRC from PDP, dated 4 November 2022

(ii) *The consented maximum area should be provided in the applications*: This is (apparently) because of a perceived risk that "if no maximum area is shown the applicants could decide to irrigate a large area than they have modelled".[19]

(aa) Response: Rather than specifying as a condition in the take consent, a condition is proposed that will require an area to be specified in the FEMP associated with the land use.

Planning – Effects & Policy Assessment

5.4 Consistent with the position of the expert witnesses for HBRC, the reporting officer's supplementary s 42A Report notes that the following effects remain, which could be "significantly adverse":

(a) Well Interference;

(b) Augmentation; and

(c) Adverse effects on small streams.

5.5 From a policy perspective, the reporting officer maintains his view that the proposal is "not consistent with" Te Mana o te Wai and "other critical Regional Policy and Regional Plan provisions."[20] No particular finding on cultural effects is made at this time.[21]

5.6 I address these matters below.

[19] Section 6, p7, Memorandum to HBRC from PDP, dated 4 November 2022
[20] Supplementary s 42A Report, 2.9
[21] Supplementary s 42A Report, 2.10

6. LEGAL PRINCIPLES RELEVANT TO THOSE ISSUES

Activity status

6.1 I agree that the proposal should be assessed overall as a discretionary activity.[22]

Cultural values

6.2 The importance of cultural values to the assessment of the Applications are acknowledged. In the context of water, they are "a given".

6.3 The primary statutory provisions are set out below. The wording of these provisions reflect the cascading degrees of importance within ss 6, 7 and 8, with the requirement (respectively) being "to recognise and provide for" (section 6), "to have particular regard to" (section 7), and "to take into account" (section 8).

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: …
>
> (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga:
>
> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) kaitiakitanga:
>
> **8 Treaty of Waitangi**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

6.4 Cultural effects are a category of effects on the environment and cultural effects can be tangible or intangible.[23]

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[22] Section 42A Report, para [27]-[29]
[23] At [51]-[53].

6.5 Tangible effects can include direct effects on the health and mauri (health force) and hauora (health) of water – with water being recognised as a living entity in its own right, on freshwater taonga (eg kakahi, īnanga and tuna), on native trees and terrestrial taonga (eg kauri), on the quality of air (hauora), on wāhi tapu (sites of significance to mana whenua), on the ability to collect and eat mahinga kai, and on cultural landscapes.

6.6 Other less tangible (but equally important) effects include effects on the relationship Māori have with their ancestral lands, waters, wāhi tapu and other taonga, their kaitiakitanga, and effects relating to loss of tikanga and mātauranga (knowledge) and limitation on rangatiratanga.

6.7 Any such effects of a more than minimal nature must be avoided, remedied or mitigated to achieve an acceptable level of effect.[24] But, there is no requirement for the Applicant to demonstrate that there are no effects on cultural values and, as discussed below, as important as the provisions in section 6(e), 7(a) and 8 are, they do not operate to confer a right of veto on any iwi or hapū in respect of any particular proposal.

Court's approach to sections 6(e), 7(a) and 8

6.8 While acknowledging the statutory distinction in the emphasis to be placed on each tier, the nature of cultural matters invariably mean that judicial discussion of sections 6(e), 7(a) and 8 invariably covers all three elements.

6.9 As expressed in *Marr v Bay of Plenty Regional Council* referring to *Ngāti Maru Iwi Authority Inc v Auckland City Council (footnotes omitted)*:[25]

> [193] Baragwanath J, noting that ss 6, 7 and 8 matters cannot trump other relevant considerations and values, saw all the provisions as a "seamless whole within the operation of this single statute that reconciles competing uses which our sophisticated society requires".

6.10 The following judicial guidance may assist the Commissioners in their deliberations on the issues raised in this hearing:

(a) First, the importance ascribed to these provisions, particularly section 6(e) is acknowledged. It is a matter of national

[24] *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 at [73].
[25] *Marr v Bay of Plenty Regional Council* [2011] NZEnvC 168.

importance and the importance of ss 6(e), 7(a) and 8 have been reflected in numerous cases at the highest level including the Supreme Court (*New Zealand King Salmon*), the Privy Council *(McQuire*). Those cases will be well known to the Commissioners.

(b) In making its decision, a consent authority is not to recognise and provide for the resources themselves, but rather to the relationship of iwi and hapū with their ancestral lands, water, sites, wāhi tapu and other taonga; and it not necessarily the relationship of individuals that is important, but - through the concept of whanaungatanga - the relationship with their hapū: *Ngāti Hokopu ki Hokowhitu,*[26] applied in *Waiheke Marinas Ltd* at [450]:[27]

> [450] A key word in s6(e) RMA, is "*relationship*" this was recognised in the following passage from the decision of the Environment Court in *Ngāti Hokopu ki Hokowhitu v Whakatane District Council,*[83] with which we agree:
>
> > ..section 6 (e) is not concerned with Māori's ancestral lands, water, sites, Waahi Tapu and Taonga in themselves, but with the relationship of Māori and their culture and traditions with those things. The Māori word for relationship is Whanaungatanga... of all the values of the Tikanga Māori, Whanaungatanga is the most pervasive. Denotes the fact that it in traditional Māori thinking relationships are everything — between people; between people and the physical worlds; and between people and the Atua (spiritual entities). The glue that holds the Māori world together as Whakapapa identifying the nature of relationships between all things.

(c) A decision maker must have particular regard to the matters in section 7, including in sub-paragraph (a) to "kaitiakitanga", defined by the RMA as:

> **kaitiakitanga** means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship

(d) To give effect to section 7(a), a decision maker must identify who are kaitiaki for any particular application. Consistent with the discussion above in respect to tangata whenua's relationship with

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[26] *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC).
[27] *Re Waiheke Marinas Ltd* [2015] NZEnvC 218.

land, water and other taonga, guardianship in Tikanga Māori "may involve degrees, and the exercise of stewardship at different levels".[28] Kaitiaki may be exercised by more than one hapū in any area.[29]

(e) Kaitiakitanga requires that tangata whenua be given an opportunity to exercise guardianship of an area's natural and physical resources in accordance with tikanga Māori.[30]

(f) If a proposal is expected to result in limited physical effects then that is an indication that the resource may already be being effectively safeguarded in accordance with the principles of kaitiakitanga:[31]

> [100] On the material plane, the very limited physical effects of the consented activities that are now occurring or are predicted to occur on the geothermal resource indicate that the resource is already being effectively safeguarded, protected and cared for in accordance with the principles of kaitiakitanga, the ethic of stewardship and the purpose of the Act as they relate to such physical considerations. But the Appellant's case is addressed to social or cultural effects, including the metaphysical aspects of those effects, and these are equally relevant in terms of the duty under s6(e) to recognise and provide for the relationship of Māori with this resource.

(g) To the extent that the taking and using of a resource can have adverse spiritual effects, then these can be assuaged by appropriate spiritual remedies: *Wakatu v Tasman District Council*:[32]

> [133] We have already discussed in connection with the water take application the effects of a water take of 16,000 m^3/day from the Central Plains zone aquifer. The appellants do not suggest the adverse effects would be materially different in a biophysical sense if the entire 20,000 m^3 water were to be extracted that the proposed reservation of water makes possible. Further, we have found that any "spiritual" effects can be assuaged by appropriate spiritual remedies. Under Part 2 transfer of water from its catchment would enable communities to provide for their health. We accept there might also be an adverse impact on the ability of iwi to exercise kaitiakitanga, but biophysical adverse impacts of the river and its ecosystem would be avoided. The effects of the activity on the environment do suggest that the plan should provide for reservation of water for out of catchment use.

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[28] *Friends and Community of Ngawha v Minister of Corrections* [2002] NZRMA 401 (HC) at [70].
[29] *Verstraete v Far North District Council* [2013] NZEnvC 108 at [18].
[30] *Minhinnick v Minister of Corrections,* A43/2004, 6 April 2004 (EnvC) at [132] – [133].
[31] *Tuwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 98 at [100]. See also *Beadle v Minister of Corrections,* WO18-02, 6 June 2002 (EnvC) at [524] – [525].
[32] *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75 at [133].

(h) Ownership – in the strict legal sense – is quite separate from kaitiakitanga, and there is no requirement for any iwi or hapū to have ownership in order to exercise kaitiakitanga. Likewise, however, the exercise of kaitiakitanga does not confer ownership. As expressed by the Environment Court in *Minhinnick v Minister of Corrections*:[33]

> [133] Mr Roimata Minhinnick asserted that kaitiakitanga extends beyond that to ownership, authority, control or aboriginal title over the area. However in the Resource Management Act, Parliament has used the term kaitiakitanga in the way it has defined. The meaning asserted by Mr Minhinnick is not supported by that definition. So for the purpose of these proceedings under the Resource Management Act we do not accept his submission in that respect, and do not give kaitiakitanga that extended meaning.

(i) As with section 6(e), the requirement to have particular regard to kaitiakitanga does not confer a right of veto by tangata whenua in respect of any proposed development. In *Minhinnick v Minister of Corrections*, the Environment Court confirmed:[34]

> [135] We accept the Minister's submission that the Resource Management Act does not confer on tangata whenua or kaitiaki a power of veto over use or development of natural and physical resources in their area. That was established in Mrs Nganeko Minhinnick's litigation over the construction of the South-west Interceptor across the Matukuturua Stonefields.

(j) Section 8 requires the principles of the Treaty "to be taken in account". In *Haddon*, the Environment Court considered that "take into account" meant:[35]

> It would appear that the duty "to take into account" indicates that a decision-maker must weigh the matter with other matters being considered and, in making a decision, effect a balance between the matter at issue and be able to show he or she has done so. In this case the concerns which seem to have been taken into account are the general social concerns of the community. The cultural concerns of the Māori community and its relationship with traditional resources do not seem to have been weighed and shown to be weighed (apart from in one small aspect).

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[33] *Minhinnick v Minister of Corrections,* A43/2004, 6 April 2004 (EnvC) at [133].
[34] At [135].
[35] *Haddon v Auckland Regional Council* [1994] NZRMA 49 (PT) at p 61.

(k) Neither section 8, nor any other provisions of the RMA, requires persons exercising functions and powers under it to act in conformity with or give effect to the principles of the Treaty.[36]

(l) In respect of consultation with tangata whenua, while doing so is best practise, there is no strict obligation on individual or corporate citizens to consult under the Treaty.[37] This latter point is codified in s 36A of the RMA.

(m) However, important as the provisions in section 6(e), 7(a) and 8 are, the Courts have been equally clear to confirm that these provisions do not confer any form of veto on iwi or hapū in respect of the development of resources within their rohe. This has been confirmed by a long line of cases commencing with the Court of Appeal's decision in *Watercare Services Ltd v Minhinnick*,[38] *Beadle v Minister of Corrections*,[39] and most recently with *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council*.[40] See also *Re Waiheke Marinas Ltd*:[41]

> [455] As we have already indicated, certain provisions of Part 2 of the Act are strongly engaged. We should point out however, as the Court did in *Verstraete v Far North District Council* that none of those matters provide a right of veto or priority over other values pertinent to achieving the purpose of the Act where such matters require to be considered.

(n) And in *Gock v Auckland Council* (HC):[42]

> [177] Mr Webb takes particular issue with the Court's observation that, in relation to what Te Ākitai "decide they consider the mauri of the area requires … it is not for Auckland Council or this Court to contradict them (at least in the circumstances of this proceeding)". He refers to a settled line of authority including *Minhinnick v Minister of Corrections*, *Watercare Services Ltd v Minhinnick*, *Gavin H Wallace Ltd & Ors v Auckland Council*, which establishes that the RMA does

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[36] *Carter Holt Harvey v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 (HC) at [25]. See also *Tainui Hapū v Waikato Regional Council*, A063/2004, 10 May 2004 (EnvC) at [176].

[37] *Carter Holt Harvey v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 (HC) at [55]:
(c) The nature of the obligation to consult with tangata whenua interests is an obligation which springs from s 8 of the Act and the principles of the Treaty of Waitangi. The duty to consult is one which has been formulated as part of the obligation for Treaty partners to work in good faith in their dealings with each other. It would be wrong in principle to impose an obligation on individual or corporate citizens to consult with tangata whenua interests when there is no other obligation to do so.

[38] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA).

[39] *Beadle v Minister of Corrections*, WO18-02, 6 June 2002 (EnvC).

[40] *Maungaharuru-Tangitu Trust v Hawkes Bay Regional Council* [2016] NZEnvC 232.

[41] *Re Waiheke Marinas Ltd* [2015] NZEnvC 218.

[42] *Gock v Auckland Council* [2019] NZHC 276.

> not confer on Tangata Whenua or Kaitiaki a power of veto over use or development of natural and physical resources in their area. That is for the stated reason that the Court acts as arbiter for the community as a whole so that although Māori views are important they will not in every case prevail.
>
> [178] Neither Ms Ash nor Mr Enright take issue with that principal (which I consider demonstrably correct and appropriately reaffirmed). …

(o) Faced with a development that might be seen by some iwi/hapū as an anathema to their role as kaitiaki, it is understandable that those iwi/hapū could never "agree" to it occurring. Nonetheless, the development may still be able to proceed if those effects are appropriately managed. This was neatly summarised in the Environment Court's decision in the Port of Tauranga dredging decision (*Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council)*:[43]

> [298] On balance, taking into account those developments, we all conclude that the proposed conditions offered by the Port during the closing of its case and as varied in this decision, adequately avoid, mitigate or remedy all these cultural effects. We accept that the appellants' view of Mauao and Te Awanui as their tipuna or ancestors, and that they cannot as a matter of tikanga, ever agree to the Port's application. But, and as a number of cases including *Whangamata Māori Committee v Waikato Regional Council* indicate, the provisions of Part 2 of the Act dealing with Māori interests where well founded in the evidence, give no veto power over developments under the Act. Rather, these interests must be balanced against the other matters listed in Part 2 and the over-riding purpose of the Act under Section 5 to promote the sustainable management of natural and physical resources.

(p) This approach was subsequently endorsed on appeal to the High Court, noting "This analysis is exactly what the Act requires. There is no error".[44]

6.11 Finally in this section, as the Commissioners will be aware, the Environment Court has confirmed that it has no jurisdiction to remedy alleged wrongs or allocate any resources in connection with any obligation that the Crown might have as a Treaty partner (and therefore neither does any consent authority).[45]

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[43] *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 at [298].
[44] *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 at [75].
[45] *Freda Pene Reweti Whanau Trust v Auckland Council* (2004) ELRNZ 235 (EnvC) at [47]-[50], [59] and [68].

Separation of "take" and "use" consents

6.12 The ability of consent authorities to separately authorise "take" and "use" consents arose in *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325. At para [113] the Court of Appeal stated (emphasis added):

> But it does not necessarily follow from the drafting of ss 14 and 30 that the Council is able to grant a separate consent for a use and a separate consent for a take. **Whether or not that is possible will in our view depend on the terms of the regional plan and the controls it contains in relation to water.** In this case, the LWRP as has been seen refers variously to "taking or use" and "taking and use". We consider the different wording is important and must have been intended. Thus, where the expression used is "taking or use of water" the plan contemplates that there might be an activity involving one or the other or both. Where the expression used is "taking and use", the intent appears to be that the activity will involve both.

6.13 The RRMP contains:

(a) Water Quantity policies for the Tukituki Catchment are in Section 5.9.3, while Water Quality policies (including associated land use policies) is at Section 5.9.2.

(b) Within the Tukikituki catchment, the particular rule is TT4. The heading for the section is "6.9.2 Takes". This is compared to 6.7.1, which applies to other catchments, which is "6.7.1 Takes & Use of Water". Similarly, rule 54 and 55 are described as "Takes and uses of surface and groundwater", compared to rule TT4, which is described in the rule column as "Takes". (I acknowledge that the phraseology of rule TT4 is "the take and use of surface water and groundwater", which was the phrasing of the rule in the *Aotearoa Action Group* case, but this wording seems out of step with the earlier references discussed.)

6.14 In this case, because of the context of the provisions, in my submission there is no barrier to the granting of separate consents for the take and use of water, and separate consents again (if needed) for the discharge of augmentation water.

Competing expert evidence

6.15 In this case, as with many contentious processes under the RMA, there are disputes between expert witnesses for different parties.

6.16 While the weight to be given to any evidence, including expert evidence, is a matter for you, the following factors may helpfully guide that decision:[46]

(a) The extent of an expert's recent experience directly relevant to the specific matter in issue.

(b) The expert's independence in the present case.

(c) Evidence that the expert has reviewed all the relevant material or provisions, and that she or he has drawn attention to any relevant matters that have not been reviewed or any necessary research that has not been undertaken.

(d) The extent of independent analysis or research, to support any conclusions reached in any statement of evidence, including clearly setting out the basis for why she or he does not agree with another expert's position, and the overall clarity of the reasoning provided.

(e) Whether the evidence is presented in an objective impartial manner, appropriately making any necessary concessions or qualifications relative to the opinions reached by other experts, and drawing appropriate attention to aspects of the Proposal that might ameliorate issues about which they are concerned;

(f) The consistency of the evidence, both during the course of the hearing, as well as between evidence given for the Applications and evidence given or not given (as the case may be) for other projects or planning processes raising similar issues.

[46]See generally *Briggs v Christchurch City Council,* C45/2008, 24 April 2008 (EnvC), Environment Court Practice Note 2014, and *The Warehouse Limited v Dunedin City Council*, C101/2001, 22 June 2001 (EnvC), about the role of experts and expectations of conduct/objectivity etc.

(g) The absence of any unsupported assertions, and the absence of any flavour of advocacy in the language used.

(h) Whether the expert has read and confirmed that they have read and agree that they have complied with the Environment Court's code of conduct in preparing their evidence, and that they will continue to do so when presenting their evidence. This includes making any necessary qualifications around the scope of their independence and the extent to which they have assessed and considered all relevant matters.

Assessment of expert and lay evidence

6.17 Many of the submissions filed, much of the evidence filed by lay submitters, and, I suspect, a great deal of the evidence to be presented by lay submitters in the hearing to follow, will address relatively technical matters that by their nature fall within the realm of expert evidence.

6.18 As with conflicting expert evidence, the weight to be given to lay evidence, in particularly where that lay evidence conflicts with expert evidence, is a matter for the Commissioners.

6.19 I acknowledge immediately that factual evidence from submitters, especially those living within the locality of potential effects, can provide the Commissioners with helpful evidence of their experience. Lay evidence can also be helpful in explaining to the Court what components of amenity might be important in any particular location.[47] I refer you also to the comments from the High Court in *Harewood Gravels v Christchurch City Council* [2018] NZHC 3118 at [226] where the Court noted that there was a:

> …need for an understanding of the experience and concerns about amenity including rural character of those affected, and for those elements to be objectively brought to account, recognising their inherent subjectivity. What better evidence in the first place is there than that of those who experience and live with the effects, provided their evidence is objectively assessed against the provisions of the District Plan and other expert evidence? The Court was not in error in observing the need for this fundamental step. A querulous and unreasonable stance taken by a resident will never prevail, but their living experience, not overstated, must be prime evidence. It is easy to dismiss or minimise the views of affected

[47] *Panuku Development Auckland v Auckland Council* [2020] NZEnvC 024 at [90].

> persons as subjective, yet theirs are the experiences of the very effects and amenity with which the Court is concerned.

6.20 Evidence from Manawhenua will also be very important in understanding the nature and extent of effects on Manawhenua, when viewed through the lens of Te Ao Māori.

6.21 All evidence, including lay evidence, must ultimately be objectively weighed against the criteria in the RRMP and RMA. Considerable care should also be taken to accord due weight to independent expert evidence, when faced with conflicting evidence from well-intentioned but unqualified lay submitters who stray into matters of technical expert opinion.

6.22 With respect, the following guidance from the Environment Court in *Meridian Energy Ltd v Hurunui District Council* is apposite and encapsulates neatly the issues for the Commissioners (footnotes omitted):[48]

> **What weight should be afforded to expert and lay witnesses?**
>
> [60] Under s 276 of the RMA, the Environment Court may receive any evidence it considers appropriate, but that does not mean that "anything goes". A considerable amount of latitude was permitted to the submitters representing themselves to admit otherwise inadmissible evidence on the basis that the Court would be able to effectively sift the wheat from the chaff and determine what weight should be given to the evidence in contention on a particular topic.
>
> [61] In this case, as is typical of many cases in this field, there was a significant amount of expert evidence. There was also a considerable amount of lay evidence. Bearing in mind that a large number of those who read this decision will be lay people, it is important to set out briefly the well-known principle now enshrined in the Evidence Act 2006 that a statement of opinion is not admissible in a proceeding unless it comes within the exceptions provided for in ss 24 and 25 of the Evidence Act.[36] Section 25 is most relevant to this case and provides[37] that an opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding, or ascertaining any fact that is of consequence to the determination of the proceedings.[38]
>
> [62] In the Evidence Act, an "expert" is defined as a person who has specialist knowledge or skill based on training or experience in a particular field of endeavour or study, and "expert evidence" means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence

[48] *Meridian Energy Ltd v Hurunui District Council* [2013] NZ EnvC 59 at [60]. This case followed a series of cases to the same effect, including *Warburton v South Wairarapa District Council,* W079/2009, 15 October 2009 (EnvC) and *Scholes v Canterbury Regional Council* [2010] NZEnvC 29.

given in the form of an opinion. An "opinion" in relation to a statement offered in evidence, means a statement of opinion that tends to prove or disprove a fact.[39]

[63] We accept that s 276 in the RMA allows wider scope than the Evidence Act for the admission of evidence. However, we see no reason why the provisions regarding expert evidence, and in particular the definition we have referred to, should not apply.

[64] Some of the parties (not represented by the Society) sought to minimise aspects of the opinions of the experts on the basis that they were theoretical, and not practical or experiential. As already outlined, many of the matters with which the Environment Court must grapple (and this case is no exception), are those that are helped by expert opinion evidence. Over the years a great number of rules have developed to ensure that the opinions expressed have a factual basis, and are not speculative, but are reasoned and sound, and can therefore be relied upon even though they are expressions of opinion.

[65] Some of these submitters also sought to present to the Court their own opinions or the opinions of others expressed in articles they had obtained off the internet, on the contested topics. There seemed to be a view that providing these articles were sourced and a copy provided, that constituted "evidence". The weight that should be attached to these documents is, however, a question for the Court. Many of them were arguably inadmissible in a strict sense, because they were simply expressions of a particular perspective (eg newspaper articles), the factual source of which was certainly able to be challenged.

[66] In *Rangitaiki Gardens Society Ltd v Manawatu-Wanganui Regional Council*,[40] Judge Dwyer said the following in the context of that case:

> The evidence of lay witnesses identifying those aspects of the environment which are appreciated by them, the reasons for that appreciation, and expressing their views as to how their appreciation might be reduced by a particular proposal, are legitimate subjects of lay evidence. We have had due regard to such evidence. That consideration does not extend to information sourced from the internet that went into areas such as technical noise issues and health effects.

[67] We will deal specifically with the more significant articles that were relied on by some of the witnesses under the technical topics to which they refer, but generally we agree with and adopt Judge Dwyer's approach. This is not to say, however, that the end decision is determined solely by expert evidence. Where there is a need for risk assessments to be made about future effects on the environment, both expert and lay evidence can often assist the Court to predict how likely it is that these effects might eventuate, and if they are likely, what the nature and impact of them is likely to be, but the weight to be given to expert and lay evidence depends on the issue in contention.

6.23 It may be necessary to return to these matters again in closing.

7. LEGAL AND PLANNING FRAMEWORK

7.1 The legal and planning framework for a discretionary activity will be well known to the Commissioners.

7.2 In summary, you must, subject to Part 2, have regard to the following matters (noting that all of these matters are on an "equal footing")[49]":

(a) Any actual or potential effects of allowing the activity (including cumulative effects, and including positive effects[50]);

(b) Specifically, any measure proposed by an applicant to achieve positive effects to offset or compensate from any adverse effects;

(c) Any relevant provisions of any national environmental standards, national policy statements, regional policy statements, or plans; and

(d) Any other matter "relevant and reasonably necessary to determine the application'.

7.3 In terms of the Part 2 assessment, the Hearing Commissioners will be aware of the overall purpose in s 5, and the relevant provisions of ss 6, 7 and 8. Specific comments in respect of s 6(e), 7(a) and 8 are addressed above. Other aspects that may require consideration are:

(a) Section 6(a) – preservation of the natural character of rivers, streams and wetlands, the protection of them from inappropriate use.

(b) Section 7(aa) stewardship, (b) efficient use[51] and development of natural resources, (c) maintenance and enhancement of amenity values, (d) intrinsic values of ecosystems, (g) finite characteristics of natural resources, and (i) effects of climate change.

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[49] *Dye v Auckland RC* [1999] NZRMA 439 (CA).
[50] Both positive and adverse effects should be considered together avoid a distorted or incomplete assessment: *Affco NZ Ltd v Far North DC* [1994] NZRMA 224.
[51] A listed discretionary activity is an 'efficient use': *Swindley v Waipa DC* A075/94; there is no requirement for a consent authority to ensure that the most efficient use is being made of a resource: *Cullen v Kaipara DC* A015/99.

7.4 I turn now to the first two limbs of the assessment, namely the assessment of effects (positive and adverse, and offsetting and compensation), and the assessment of policies and plans.

8. ASSESSMENT OF EFFECTS

8.1 I have responded to the effects assessment using the same framework as the s 42A Report and the Supplementary s 42A Report.[52]

8.2 In respect of many of these effects, I make the following submissions:

(a) Express provision has been made in the RRMP for an additional allocation of up to 15M m^3 per year.

(b) There is no obligation under the policy that provided that allocation, or under accepted resource management law, for a resource user to be required to remedy *all effects* of their activities. That outcome would be neither reasonable nor achievable.

(c) There is no obligation on a resource user to mitigate or remedy either existing effects, or effects by matters beyond that resource users' reasonable control (ie climate change). It would be unreasonable to require the Tranche 2 Applicants to remedy those effects – in terms of the *Newbury* principles, such conditions would be unrelated to the adverse effects of the proposal.

Summary of effects

8.3 The reporting officer "still concludes that significant adverse effects could occur" (at para [5.50]).

8.4 In my submission, no assessment of effects can resolve all uncertainty, given the inherent uncertainty in any prediction undertaken under the RMA. But in response to the particular matters raised by the reporting officer, the Applicants say:

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[52] Supplementary s 42A Report, at [5.18]

(a) The degree of modelling of the proposed take and augmentation regime has been incredibly intensive and has been reviewed by an international expert in groundwater modelling. The policy framework requires an augmentation approach, and, to my knowledge, this is a novel approach within New Zealand's freshwater regime. It would be unfair to place an unachievable level of certainty on these Applicants.

(b) Further information on the well interference assessment will be provided at the hearing. As noted earlier, I do not accept that the Applicants are required to mitigate all effects such that there are "no adverse effects" on all existing efficient wells. That would be an unreasonable threshold for the Applicants to be required to meet.

(c) There will inevitably be some effects on smaller un-augmented streams. It is not possible, given the volumes involved, to augment all streams. If the threshold is to have no adverse effects at all on any stream, then the allocation of T2 Water would be illusory.

(d) The Applicants acknowledge that the taking of water will have effects on cultural values. The Applicants are proposing to mitigate those through a range of measures, in particular through making a specific allocation available to Manawhenua.

9. ASSESSMENT OF OBJECTIVES AND POLICIES

Supplementary s 42A Report

9.1 The Supplementary s 42A Report makes the following comments on objectives and policies, noting where the reporting officer's opinion has changed as a result of new information or where he comments on Mr Willis' evidence.

9.2 In respect of those comments at section 6 of the Supplementary s 42A Report, the Applicants say:

(a) The difference in opinion on Te Mana o te Wai is whether or not the proposal will compromise the health and well-being of the water. The reporting officer concludes that the health and well-being of the water "could" be compromised, and so he considers that the first priority of Te Mana o te Wai is not met. The Applicants' evidence is to the contrary.

(b) The Applicants acknowledge the reporting officer's agreement that the effects regarding Inglis Bush are resolved, such that the proposal is now consistent with NPSFM's Policy 6, and the wetland related objectives and policies of the RPS and RRMP.

(c) Policy 28 of the RPS requires applicants to avoid, remedy or mitigate any *significant* interference effects on lawfully established groundwater takes. The Applicants say that they are avoiding, remedying or mitigating those *significant* effects. There is no requirement under this policy, in my opinion, for *all* effects to be avoided, remedied or mitigated.

(d) Policy 77 of the RRMP (and Table 11) is reported to say that new takes should not adversely affect existing efficient takes unless the affected person provides approval. In response (emphasis added):

(i) The wording of policy 77 is "(c) To manage the groundwater resource in such a manner that existing efficient groundwater takes are not **disadvantaged** by new takes."

(ii) Table 11 then sets out "**guidelines** to achieve this policy [77]". Table 11 then says "The take should **not adversely impact** on existing efficient groundwater or surface water takes unless written approval from affected persons is obtained."

(iii) The explanation and reasons at 5.7.2 draws attention to the need for there to be "**a degree of protection** for

existing resource consent holders and permitted users whose takes are efficient, from adverse effects of new or proposed takes"

(e) The Applicants' amended consent conditions have proposed a transparent and robust process to assess and respond to potential well interference effects.

Section 42A Report

9.3 These matters are primarily addressed by Mr Willis' planning evidence, but from a legal perspective I make the following comments:

(a) Based on my understanding of the principles of Te Mana o te Wai, the proposed reservation of 2M m^3 of T2 Water to Manawhenua would directly address several of those (including Mana whakahaere, Kaitiakitanga, and Manaakitanga) (cf s 42A Report, [218]). (Noting that this reservation of water post-dated the submission relied on by the s 42A Report's author at this paragraph.)

(b) A number of the matters in Table 10, which is the assessment of the NPSFM's objectives and policies, would now appear to be superseded by subsequent assessment and agreement between the experts.

(c) As an overall point, there are a number of references to the proposal being inconsistent with the objectives and policies of NPSFM 2020 and other policy statements and plans. As the Commissioners will appreciate, in the context of a discretionary activity, there is no requirement to be consistent with those provisions; you are simply required to have regard to them. In doing so, the degree of consistency or otherwise will of course be a part of your consideration, but it is no more than that.

(d) The reporting officer's discussion on PC7 does not contain a clear conclusion as to whether the proposal is expected to affect the associated values of the Tukituki River (s 42A Report, [283]). The

Applicants' position is that these values will be protected, particularly with the addition of the Red Bridge low flow augmentation trigger.

(e) Likewise the reporting officer's conclusions about the Kahungunu Ki Uta, Kahungunu ki Tai Marine and Freshwater Fisheries Strategic Plan 71 is also unclear (s 42A Report, [286]). The Applicants' ecologists' position is that the proposed taking will not prevent, or change the pattern of, the migration of culturally important species such as tuna. At present those tuna may need to wait a period of time in any one year before migrating through certain sections of the upper headwaters, and that will continue to be case with the T2 Water being taken. (This is because new reaches do not dry out as a result of taking the T2 Water; those takes will simply extend the duration of those dry periods by a week or less.)

10. SPECIFIC RESPONSE TO MATTERS RAISED IN SUBMITTER EXPERT EVIDENCE

Te Taiwhenua o Heretaunga

10.1 In respect of Mr Black's evidence, I note the following:

(a) There is no suggestion that these applications will adversely affect the water quality of the groundwater (eg, Mr Black, para [31] – [38]). The opposite is in fact the case – there will be a likely decrease in the discharge of nitrate-nitrogen to groundwater.

(b) I agree that the NPSFM 2020 and the concept of Te Mana o te Wai is a relevant matter for this hearing, despite the RRMP not yet being updated (eg, Mr Black, para [24]). However, they are to be "had regard to"; there is no obligation for a consent authority to implement or give effect to that instrument or that concept in the context of a decision on a resource consent application.

(c) The relevance of PC7 is acknowledged, as is the importance of the Tukituki River (eg, Mr Black, para [46], [49]-[52]). The proposed

approach, including the augmentation regime, and especially with the addition of the Red Bridge trigger, will protect the life-supporting capacity of that ecosystem (cf Mr Black, para [48]).

(d) The modelling by Aqualinc does take into account the full use of the Tranche 1 water (cf Mr Black, para [60], [98]). The Well Interference assessment has not assumed 100% usage of Tranche 1 water, for the reasons explained by Ms Rabbitte.

(e) The Tranche 2 takes will exacerbate irrigation bans for Tranche 1 water – ie make them longer than currently occurs – and nor will it affect surface water takes in the middle and lower reaches of the Tukituki catchment (cf Mr Black, para [61], [70], [90]). As Mr Weir says, the proposal will, overall, improve the reliability of those lower takes.

(f) The Applicants say that the safe yield for RPAS is not already being exceeded (cf Mr Black, para [67]).

(g) The modelled decrease in groundwater levels is within the scale of natural variations, and accordingly stygofauna should not be affected by the reduced new equilibrium groundwater level (cf Mr Black, para [81] – [82]; Weir 2022, Section 3.15). That fauna will simply need to move down slightly further or earlier than currently occurs.

(h) All new wells for T2 Water will be from greater than 50m in depth (cf Mr Black, para [87]). The quality of the water taken and used for augmentation is subject to testing and, if necessary, treatment prior to discharge and Augmentation Discharge Management Plan). This will address the concerns raised by Mr Black (eg, Black, [88] – [91], [131]).

(i) Augmentation is not proposed for the "main rivers only" (cf Black, para [118]). Augmentation to dry streams does contribute to improved flows down-gradient (cf Black, para [126]).

(j) Riparian planting is not required by the 2020 Stock Exclusion regulations; they only require fencing (cf Black, para [159])

G & L Williams

10.2 In respect of Mr Williams' evidence:

(a) Conditions are proposed to test and assess local scale effects (cf Williams, para [16(b)].

(b) There is less data to the far north and west. The proposed conditions will require testing that will assess local effects in these areas, and provide further data to calibrate the model (noting too the 7-yearly review of the model proposed) (cf Williams, para [16(d)].

(c) Mr Weir does not agree with the assertion that conclusions about uncertainty do not apply to the uncalibrated margins of the model (cf Williams, para [16(e)].

(d) There are differences between modelled and measured results (which is inevitable for any model), however the model is robust and fit for purpose (cf Williams, para [16(g)].

Ngati Kahungungu Iwi Incorporated

10.3 In respect of Mr Shade Smith's evidence:

(a) The taking of the T2 Water will cause a decline in groundwater levels across the basin. The extent (area) and depth (mm) is described by Mr Weir, including in his presentation that you will see soon. The key point is that the T2 Water takes will *not* cause a continuing decline in groundwater (Smith, para [27]).

(b) The proposed taking and use of the T2 Water will improve, rather than worsen, nitrate-nitrogen leaching from the farms

concerned, and will therefore contribute to an improvement in groundwater quality (cf Smith, [58] – [62]).

(c) The concern about the mixing of waters from a cultural perspective is acknowledged (Smith, para [54]), however the RRMP specifically contemplates the use of groundwater being discharged into surface water in the manner proposed.

(d) There is a specific stream enhancement package proposed, and detailed long term monitoring of key indicator streams (cf Smith, para [65]).

John Barry Smith

10.4 have also read Mr John Barry Smith's evidence, and I acknowledge the points he has made but do not wish to respond to those directly at this time.

11. CONSENT CONDITIONS

11.1 The Supplementary s 42A Report comments on the proposed conditions recommended by Mr Willis at section 7 of that report.

11.2 In respect of the particular matters raised, the Applicant says:

(a) "I do have a concern about relying too heavily on plans for future approval and implementation. For this to work the key requirements that determine whether something is acceptable or not should be clearly defined. This would be particularly important for the well inference testing and mitigation requirement and the shallow well testing and assessment."

(i) Response: The Applicant agrees and these have been further elaborated upon in the conditions proposed for this hearing.

(b) "As noted above, I consider that key testing for augmentation such as on groundwater quality and shallow well connection to surface water should occur first, before irrigation is commenced.

Similarly, the well interference testing, assessment and implementation of mitigation measures should occur before irrigation under Tranche 2 commences."

(i) Response: This is agreed and changes have been made accordingly.

(c) "I note Ms Drummond's comments ad [sic] agree that it will be difficult after the scheme is in operation to use the small stream monitoring plan to require amendments to the take and augmentation regime through the review of the consents under s128-132 of the RMA."

(i) Response: From a legal perspective, I do not agree. The ability to review consent conditions is a fundamental part of a regional council's responsibility, and, where appropriate, a regional council should exercise that role. The form of the condition proposed the Applicants (ie the requirement to prepare a full report at intervals throughout the consent term) will "do all the work" for HBRC, such that the ability to commence a review is straightforward.

(d) "The Augmentation Discharge Management Plan is on the use consent which is to be held by each individual. It covers augmentation location, connection with shallow bores (where applicable) and augmentation water quality. It may be more useful if this Plan was on the take consent and applied to the group and also included management of staging, non-development or temporary cessation of some members, for example if they are significantly delayed due to issues with finding suitable groundwater yield or quality, or if a side agreement to manage well interference results in a temporary reduction or stoppage in augmentation."

(i) Response: The Augmentation Discharge Management Plan is deliberately linked to the use consent, because

the augmentation well location, procedures, and responses, will all be unique to each of the Applicants.

12. WITNESSES

12.1 The Applicants will call the following witnesses:

(a) Robert Cottrell, TAFT Farming Ltd, "Gwavas";

(b) Helen Ellis, "Papawai";

(c) Julian Weir, groundwater modelling;

(d) Dr Nick Dudley Ward, groundwater modelling – peer review (attendance at the hearing has been excused);

(e) Susan Rabbitte, hydrogeology;

(f) Alexandra Johansen, well interference;

(g) Dr Vaughan Keesing, ecology;

(h) James Allen, land use and diffuse discharges;

(i) Gerard Willis, planning.

B J Matheson

Counsel for Tranche 2 Applicants