

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

ENV-2018-CHC-26 to 50

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of appeals under clause
14 of Schedule 1 to the
Act relating to the
proposed Southland
Water and Land Plan

BETWEEN **WAIHOPAI RŪNAKA,
HOKONUI RŪNAKA,
TE RŪNANGA O
AWARUA, TE
RŪNANGA O ORAKA
APARIMA, and TE
RŪNANGA O NGĀI
TAHU (collectively
NGĀ RŪNANGA)**

**Appellants in ENV-
2018-CHC-47**

AND **SOUTHLAND
REGIONAL COUNCIL**

Respondent

**STATEMENT OF EVIDENCE OF AILSA CAIN
ON BEHALF OF NGĀ RŪNANGA AS A SECTION 274 PARTY**

Culture and policy

4 February 2022

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INTRODUCTION

1. My name is Ailsa Margaret Cain.
2. My whakapapa, qualifications and experience are set out in my statement of evidence for the Proposed Southland Water and Land Plan (**pSWLP** or **Plan**) appeals (Topic A), dated 15 February 2019.

CODE OF CONDUCT

3. I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note 2014 and I agree to comply with it. I confirm that the issues addressed in this statement are within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.
4. My whānau have long associations with Murihiku and I whakapapa to Waitaha, Kāti Mamoe and Ngāi Tahu. My expertise is partially derived from those cultural associations. I note that whilst I am Ngāi Tahu, I am required to be impartial and unbiased in my professional opinions expressed.
5. For the avoidance of any perceived conflicts, I advise that my husband, Ben Farrell, is providing planning evidence for Fish and Game New Zealand, and the Royal Forest and Bird Protection Society of New Zealand.

SCOPE OF EVIDENCE

6. In this evidence, I respond to section 4 of Mr Willis' and Mr Wilson's statements regarding Treaty Principles and Te Mana o te Wai. Both planners have referred to section 8 of the Resource Management Act 1991 (**RMA**).
7. My evidence will provide context, definitions and clarity for Topic B, and consider the limitations or possible oversimplification by other parties in their analysis of Treaty Principles and Te Mana o te Wai and how that in turn may influence how they have applied these terms in their proposed amendments to policies and rules in the pSWLP.

TE TIRITI O WAITANGI / TREATY OF WAITANGI

8. My statement of evidence for Topic A, dated 17 April 2020, discusses Te Tiriti o Waitangi / Treaty of Waitangi and Te Mana o te Wai and I refer back to that.
9. Of relevance to Mr Willis' comments in paragraphs 4.5 and 4.5 of his evidence are paragraphs [52] to [55] of my earlier evidence. I agree with Mr Willis that *He Tirohanga o Kawa ki te Tiriti o Waitangi 2001* is a commonly referenced source on Treaty Principles.
10. However, on its own, *He Tirohanga o Kawa ki te Tiriti o Waitangi 2001* does not detail each of the historical Treaty Settlements, including the apologies and Deeds of Settlement, nor does it reference the positions held by Treaty Partners on the role and function of the Treaty. This information is critical in understanding how the Treaty Principles are applied in the takiwā/rohe of each iwi or hapū and how they flow through those higher-level documents into regional plans. In my opinion, these matters were covered in some detail in my evidence for Topic A.
11. I note that in *Ngāi Tahu Rangatiratanga over Freshwater Strategy (2019)*, it states that Ngāi Tahu regard the Deed of Settlement, Settlement Act and Te Tiriti o Waitangi/Treaty of Waitangi to be of fundamental constitutional importance and the basis of the contemporary relationship between the Crown and Ngāi Tahu.¹
12. In section 17 of my evidence,² I stated that Article 2 does not restrict the manner in which the possession or chieftainship is exercised, and for Ngāi Tahu ki Murihiku that exercise includes the environmental philosophy of ki uta ki tai. I now extend that point for clarification to include other matters such as rangatiratanga, manakitanga, kaitiakitanga, mātauranga, tikanga, kawa, utu, etc. I outline this matter again to provide context my opinions on paragraphs 4.7 to 4.15 of Mr Willis' evidence.
13. I disagree with Mr Willis that the Treaty Principles have been taken into account in the provisions he has proposed and I disagree that they should not be a 'determining factor in proposing [plan] provisions.'³ I think this highlights that

1 Te Runanga o Ngai Tahu (2019) *Ngāi Tahu Rangatiratanga over Freshwater Strategy*, p. 14.

2 Dated 17 April 2020.

3 Statement of evidence of Mt Willis (20 December 2021) at [4.7].

there is a degree of confusion in his position, and a misunderstanding or misinterpretation of my previous evidence and views I expressed during conferencing.

14. I also note that Mr Wilson, in paragraph 4.2 of his evidence, has also inappropriately implied that use of the term 'hauora' for Topic B amounts to taking the principles of the Treaty of Waitangi into account. For reasons outlined previously, and clarified below, I consider that this is incorrect.

15. Paragraph 62 of the First Interim Decision stated:

...in using water you must in addition **provide for the health of the environment, of the waterbody and of the people...this direction appears in line with the Treaty principle of active protection and would impose a positive obligation on all persons exercising functions and powers under the Act** to ensure that when using water people also provide for health...This direction juxtaposes with the usual line of inquiry as to how health will be impacted by a change in water quality (i.e. the effects of the activity on the environment). The NPS-FM makes clear that providing for the health and wellbeing of waterbodies is at the forefront of all discussions and decisions about fresh water. This is our third key understanding.

16. There was no disagreement by parties to this understanding of the Court. It is the **provision of health** that aligns Te Mana o te Wai with the Treaty principle of active protection; the provision of health is not distilled down to refer just to use of the word hauora in the pSWLP context. It also does not imply terms expressed in te reo Māori are just for Māori.

17. Paragraph 20 of the First Interim Decision clearly states that 'while expressed in te reo Māori, Te Mana o te Wai benefits all New Zealanders'. Paragraph 6 of the Second Interim Decision also states that 'Te Mana o te Wai is not a "Māori centric" but a "water centric" approach.'

TE MANA O TE WAI

18. Hauora is a key part of Te Mana o te Wai and its local expression in the pSWLP. This function has been detailed numerous times in the Court's previous interim decisions and in the Joint Witness Statements for Science, Farm Management, Ecology, and Planning (November-December 2021) that both Mr Willis and Mr Wilson signed. Dr Kitson has also clarified hauora and its use in a scientific context in her evidence date 4 February 2021.

19. Ngāi Tahu ki Murihiku and Environment Southland were early adopters of Te Mana o te Wai, and I have been involved since 2014 in developing its local expression. The concept of Te Mana o te Wai predates National Policy Statements for Freshwater Management (**NPSFM**). It has always been about protecting the mauri of the water and that was the key point for Ngāi Tahu ki Murihiku. Te Mana o te Wai is an expression with inherent reverence that stems from older mātauranga, and has been applied more recently in a national context as a modern freshwater policy.
20. I am unclear about the basis for the emphasis Mr Willis has used for the six principles of the NPSFM 2020 in paragraph 4.10(b) of his evidence. The word 'role' is not in italics in the NPSFM 2020, nor is 'and other New Zealanders' in closed brackets. I do not understand what he is trying to achieve or imply with this formatting.
21. I read section 1.3(4) of the NPSFM 2020 to split the principles into two groups that have similar pairings. For instance, mana whakahaere refers to decision making, as does governance.

Role / who holds the obligation	Tangata Whenua	All New Zealanders (incl. Tangata Whenua)
Principles	Mana whakahaere	Governance
	Kaitiakitanga	Stewardship
	Manaakitanga	Care and respect

22. My opinion on the management framework differs to that of Mr Willis in paragraph 4.12. I consider that the NPSFM seeks to take a hierarchical or "top down" approach, with long-term visioning being the crux of the regional council's task of applying and achieving Te Mana o te Wai.

23. Section 3.2(2) of the NPSFM states:

- (2) Every regional council must give effect to Te Mana o te Wai, and in doing so must:
- (a) actively involve tangata whenua in freshwater management (including decision-making processes), as required by clause 3.4; and
 - (b) engage with communities and tangata whenua to identify long-term visions, environmental outcomes, and other elements of the NOF; and
 - (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 NOF under subpart 2; and
 - (iii) when 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; and
 - (d) enable the application of a diversity of systems of values and knowledge, such as mātauranga Māori, to the management of freshwater; and
 - (e) adopt an integrated approach, ki uta ki tai, to the management of freshwater (see clause 3.5).

24. In Southland, I consider ki uta ki tai means what I have stated in paragraphs 40 and 41 of my statement of evidence, dated 15 February 2019. Ki uta ki tai is a Ngāi Tahu term that has been included in the NPSFM 2020 as well as the Southland Regional Policy Statement 2017, the pSWLP, and Murihiku Iwi Management Plan. While it is a term used in the NPSFM, I query whether it is appropriate for RMA practitioners to seek to retrospectively redefine a fundamental Ngāi Tahu philosophy, especially if done so on the premise the term has been used in a National Policy Statement. My understanding was that the Court understood and accepted the meaning of the term ki uta ki tai for the purposes of the pSWLP through its Topic A decisions, and I am not sure why Mr Willis appears to be seeking to revisit this through the lower order Topic B provisions.



Ailsa Cain

4 February 2022