

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

**ENV-2018-CHC-000037  
ENV-2018-CHC-000050**

**IN THE MATTER**

**of the Resource Management Act 1991**

**AND**

**of appeals under Clause 14 of the First  
Schedule of the Act**

**BETWEEN**

**SOUTHLAND FISH AND GAME  
COUNCIL  
Appellant**

**BETWEEN**

**ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NEW  
ZEALAND INCORPORATED  
Appellant**

**AND**

**SOUTHLAND REGIONAL  
COUNCIL  
Respondent**

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**STATEMENT OF EVIDENCE OF BEN FARRELL ON BEHALF OF THE  
SOUTHLAND FISH AND GAME COUNCIL AND THE ROYAL FOREST  
AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

**Dated 27 April 2020**

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Rout Milner Fitchett Solicitors  
PO Box 580  
Nelson 7040

Counsel: Sally Gepp  
12 Harley Street  
Nelson 7010  
[sally@sallygepp.co.nz](mailto:sally@sallygepp.co.nz)  
021 558 241

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## **INTRODUCTION**

1. My full name is Ben Farrell. My qualifications and experience are set out in my evidence in chief, dated 17 February 2019. I have been engaged by Southland Fish & Game Council and the Royal Forest and Bird Protection Society of New Zealand Incorporated to prepare evidence for these proceedings.

### **Code of Conduct**

2. I confirm that I have read the Code of Conduct for expert witnesses as contained in the Environment Court Practice Note 2014. I have complied with the Code of Conduct when preparing my written statement of evidence and will do so when I give oral evidence. The data, information, facts and assumptions I have considered in forming my opinions are set out in my evidence. The reasons for the opinions expressed are also set out in my evidence. Other than where I state I am relying on the evidence of another person, my evidence is within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.
3. I advise that I am married to Ms Ailsa Cain who is providing evidence on behalf of Nga Runanga, but I do not consider that any conflict of interest arises out of this.

### **Scope**

4. This evidence is in response to the Court's direction at [347] of the Interim Decision dated 20 December 2019 ("Interim Decision"). I have also considered the Court's Minute dated 4 February 2020 and the Record of Pre-Hearing Conference dated 14 February 2020 which provided additional guidance on that direction. In summary, my evidence addresses:
  - a. Applying the principles of the Treaty of Waitangi in the PSWLP.
  - b. The Court's three key understandings and proposed wording of Objective 2.
  - c. Plan architecture, history and drafters' intentions.
  - d. Consideration of the incorporation of Te Mana o te Wai and ki uta ki tai in the Plan (particularly the Objectives), the implications of this, and any additional or different wording needed in the proposed Southland Water and Land Plan (the Plan or pSWLP)
5. My evidence draws on my experience as one of the early plan drafters<sup>1</sup> and the evidence on this matter by Mr McCallum-Clark, Ms Davidson and Ms Cain. I generally concur with and adopt the findings and conclusions set out in the evidence of Mr McCallum-Clark, Ms Davidson and Ms Cain, except as discussed in my evidence below.

## **APPLYING THE PRINCIPLES OF THE TREATY OF WAITANGI IN THE PSWLP**

6. This section of my evidence identifies relevant RMA documents relating to the implementation of Treaty Principles. I acknowledge there are numerous statutory and non-statutory documents relating to the implementation of Treaty Principles in respect

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<sup>1</sup> I led the preparation of the Draft Southland Water and Land Plan ("dSWLP") that was released for public comment in July 2015. In doing so I worked closely with Mr McCallum-Clarke, Ms Cain, and Mr Maw.

of the Crown, Environment Southland, and Ngāi Tahu ki Murihiku (as discussed in the evidence of Ms Cain<sup>2</sup> and Mr McCallum Clarke<sup>3</sup>).

### **Part 2 RMA**

7. I consider that sections 5, 6(e), 7(a) and 8 are the most relevant Part 2 RMA matters (although there are other Part 2 matters that concern protection of the environment that are also relevant to active protection of tangata whenua rights and interests).
8. I consider that it is appropriate for the Court to have regard to Part 2 in the pSWLP context because the National Policy Statement for Freshwater Management 2017 may be incomplete in respect to its implementation of section 8 RMA (as discussed in my evidence at paragraph 26 below).

### **National Policy Statement for Freshwater Management 2017**

9. The NPSFM 2017 provisions are discussed in my evidence in chief dated 17 February 2019<sup>4</sup>. My evidence acknowledges (but did not go into depth about) the NPSFM provisions relating to Te Mana o Te Wai and Integrated Management /ki uta ki ta. I do not propose to separately describe these provisions in any detail, firstly because I agree with the Court's assessment of them in the Interim Decision and secondly because I discuss them in the context of other instruments and the pSWLP below.

### **New Zealand Coastal Policy Statement**

10. The NZCPS is relevant because the pSWLP applies in part to the coastal environment, and controls land uses outside the coastal environment that impact on the coastal environment.
11. Objective 3 is to take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:
  - a. recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
  - b. promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
  - c. incorporating mātauranga Māori into sustainable management practices; and
  - d. recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.
12. Policy 2 sets out a list of matters that decision-makers must provide for or recognise in taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment.

### **Southland Regional Policy Statement (Section 3)**

13. I consider the direction set out in Section 3 of the RPS particularly relevant to the question of how the Treaty principles are properly taken into account in the Plan.<sup>5</sup> The

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<sup>2</sup> Evidence dated 17 April 2020 at paras 51-66.

<sup>3</sup> Evidence dated 17 April at para 48.

<sup>4</sup> Te Mana o te Wai at paras 8, 31, 34, 38, 47.1. Integrated Management / Ki uta ki tai at paras 5, 33-34, 47.4, 53, and 179.5.

<sup>5</sup> Neither Mr McCallum-Clark nor Ms Davidson refer to these provisions.

provisions in Section 3 of the RPS must be implemented in the formation and outcomes of the pSWLP, and include:

- a. Taking into account the treaty principles in a systematic way through effective partnerships (Objective TW.1 Decision-making and partnerships with tangata whenua)
- b. **Ensuring mauri and wairua are sustained or improved where degraded**, and mahinga kai and customary resources are healthy, abundant and accessible to tangata whenua (Objective TW.3 - Tangata whenua spiritual values and customary resources)
- c. **Actively foster partnerships and relationship agreements** between local authorities and tangata whenua (Policy TW.2 – Partnerships and relationship agreements)
- d. Enhancing tangata whenua involvement in local authority resource management decision-making processes in a manner that is consistent with the principles of the Treaty of Waitangi/Te Tiriti o Waitangi (Policy TW. 1 – Treaty of Waitangi)
- e. Ensuring iwi management plans are taking into account in resource management decision making processes (Policy TW.3 – Iwi management plans)
- f. Ensuring resource management decisions are exercised in a manner that:
  - i. recognises and provides for: (i) traditional Māori uses and practices relating to natural resources (e.g. mātaimai, kaitiakitanga, manaakitanga, matauranga, rāhui, wāhi tapu, taonga raranga); (ii) the ahi kā (manawhenua) relationship of tangata whenua with and their role as kaitiaki of natural resources; (iii) mahinga kai and access to areas of natural resources used for customary purposes; (iv) mauri and wairua of natural resources; (v) places, sites and areas with significant spiritual or cultural historic heritage value to tangata whenua; (vi) Māori environmental health and cultural wellbeing.
  - ii. recognises that only tangata whenua can identify their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. (Policy TW.4 – Decision making)
- g. Establishing and maintaining provisions in regional plans that safeguard identified environmental and cultural values and resources of tangata whenua from inappropriate use or development. (Method TW.1 – Regional plans).
- h. The explanation to Policy TW.1 is particularly relevant. It signals that the Crown, exercising governance, has established a system of delegated authority with the functions delegated to regional councils and territorial authorities set out in Sections 30 and 31 of the Act. It also sets out that the ***Murihiku Ngāi Tahu Treaty principles include representation, partnership, building capacity, shared decision-making, active protection and shared initiatives.*** The explanation directs that local authorities should ensure that their functions and powers under the Act are exercised in a manner that:
  - a) is consistent with the principles of the Treaty of Waitangi/Te Tiriti o Waitangi;
  - b) recognises that tangata whenua, as indigenous people, have rights protected by the Treaty of Waitangi/Te Tiriti o Waitangi

and that consequently the Act accords iwi authorities a status distinct from that of interest groups and members of the public;

- c) promotes awareness and understanding of local authority obligations under the Act regarding the principles of the Treaty of Waitangi/Te Tiriti o Waitangi, tikanga Māori and Māori Kaupapa among Council decision-makers, staff and the community;
  - d) provides for the ongoing implementation of the Ngāi Tahu Claims Settlement Act 1998 (e.g. appending statutory acknowledgements to regional and district planning documents, regulations and relevant “cultural redress” provisions).
14. Mr McCallum-Clark has outlined how the pSWLP takes into account the Treaty principles of the treaty of Waitangi.<sup>6</sup> Mr McCallum-Clark relies on a case law review and legal advice of 10 March prepared by Mr Maw and Ms Langford. From a planning perspective it appears to me the case law referred to is primarily based on decisions in the North Island, and I am unclear how relevant that case law is to the particularities of this case (i.e. as the relate to Ngāi Tahu ki Murihiku).
15. The Murihiku Ngāi Tahu Treaty Principles described in the RPS (including representation, partnership, building capacity, shared decision-making, active protection and shared initiatives) do not appear to be the same as or entirely consistent with the Treaty principles considered in the evidence by Mr McCallum-Clarke.
16. I am not aware of any specific evidence or analysis (including the s.32 Report) assessing how the pSWLP gives effect to Section 3 of the RPS, including how the pSWLP is consistent with the Murihiku Ngāi Tahu Treaty principles of *representation, partnership, building capacity, shared decision-making, active protection and shared initiatives*.
17. The additional principles are relevant to decision-making and resourcing. Without evidence from Ngai Tahu as to how it considers those principles should be given voice in the pSWLP I cannot assist the Court to a great extent regarding the implications of those additional/different principles. However, I am confident in the absence of evidence to the contrary that the principles do not derogate from the opinions I express below regarding the pSWLP structure and wording.
18. Ms Davidson and Ms Cain appear to be saying that the pSWLP is not consistent with all the relevant principles, especially the principle of active protection, because given the ongoing decline in the quality of water throughout Southland, active protection requires more than maintenance of the status quo. I agree with their assessment.

### **Iwi Management Plan**

19. As discussed by Mr McCallum Clarke<sup>7</sup> and Ms Cain,<sup>8</sup> *Te Tangi a Tauira, Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan, 2008* is relevant to the implementation of the Treaty Principles. I am familiar with this Plan but have not analysed it in detail.

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<sup>6</sup> The principles he refers to are: (a) The two parties to the Treaty entered into a partnership, and therefore must act reasonably and honourably towards each other and in utmost good faith; (b) The Crown must make informed decisions (which will often require consultation); c. The Crown must not unreasonably impede its capacity to provide redress for proven grievances; and d. The Crown must actively protect Māori interests.

<sup>7</sup> At [58].

<sup>8</sup> Evidence dated 17 April at [19] and [24].

## Waitangi Tribunal Freshwater & Geothermal Resources Report 2019

20. I consider the discussion and findings in the *Waitangi Tribunal Freshwater & Geothermal Resources Report 2019*<sup>9</sup> relevant to the question of how the Treaty principles are properly taken into account in a freshwater context. Given the Tribunal's role was in assessing the NPS-FM as a mechanism for partnership and the exercise of tino rangatiratanga and kaitiakitanga in freshwater management<sup>10</sup>, those findings seem pertinent to the questions that the Court has asked.
21. The report includes an analysis of whether the RMA has failed to deliver sustainable management of freshwater. The report concludes<sup>11</sup>, among other things, that "the decline of water quality has profoundly affected the relationship of Māori and their culture and traditions with their ancestral waters, a matter of national importance that should have been recognised and provided for under section 6(e) in part 2 of the Act."
22. The report has a section on development of the NPSFM 2014 including consideration of Te Mana o te Wai<sup>12</sup> and similarly the NPSFM 2017. In relation to the NPSFM 2017 and the change in how Te Mana o Te Wai is incorporated, the Crown's position before the Tribunal was that the NPSFM 2017 "puts Te Mana o te Wai at the centre of freshwater planning"<sup>13</sup>, and the report identifies that "Officials also suggested that the strengthening of Te Mana o te Wai would address the Treaty principle of active protection 'by putting the river first'."<sup>14</sup>
23. In respect of the National Significance of Te Mana o te Wai, the report<sup>15</sup> identifies that this "reflected the Crown's view that Te Mana o te Wai was **not intended to be 'Māori-centric' but 'water-centric'**; in other words, Te Mana o te Wai was a vehicle for the whole community's value for healthy water bodies. It also underlined the Crown's view that Te Mana o te Wai had a crucial role to play in the setting of values, objectives, and limits in RMA plans; that was the core function of the NPS-FM".
24. The report also includes various extracts and observations by Te Rūnanga o Ngai Tahu on freshwater management.
25. Part of the Tribunal's conclusion on the next steps for freshwater management is quoted below:<sup>16</sup>

In our view, there is a particular strength in the way that the Crown and ILG [Iwi Leaders Group] have defined Te Mana o te Wai as a vehicle that can provide for both Māori and wider community values. The 2017 version has integrated it in the main body of the NPS-FM. Even though it is not mentioned explicitly in section D, Te Mana o te Wai clearly provides a platform for Māori values to be identified and reflected in freshwater planning. At the same time, it is – as officials noted – water-centric. At its most fundamental, it puts the health of the water first. As is stated in the 'National significance' statement, it relates to the 'integrated and holistic well-being of a freshwater body'. It will require 'the health and well-being of freshwater bodies' to be at the 'forefront of all discussions and decisions

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<sup>9</sup> *Waitangi Tribunal Report 2019: The Stage 2 Report on the National Freshwater and Geothermal Resources Claims WAI 2358*.

<sup>10</sup> Page 338.

<sup>11</sup> Page 137.

<sup>12</sup> Page 207.

<sup>13</sup> Page 240.

<sup>14</sup> Page 325.

<sup>15</sup> Page 330.

<sup>16</sup> Pages 337-338.

about fresh water’, mainly in the policy and planning stage. This shows the particular value of co-design by the Crown and Māori, which has provided for the values of both peoples in the NPS-FM while allowing for them to act together to achieve those values. Te Mana o te Wai was clearly intended by both parties to provide the vehicle for partnership in the essential task of deciding objectives and setting limits for freshwater bodies. There are, however, some weaknesses in the tools for giving effect to Te Mana o te Wai in the way in which the ‘National significance’ statement had envisaged (the 2017 version). The first is the relative weakness of section D. This section ought to have required a co-governance and co-management approach to identifying Māori values and setting freshwater objectives, as we set out in chapter 3. It ought also to have required councils to promote and explore opportunities to enter into section 33 transfers and Joint Management Agreements. Such an approach would have required from councils a level of dialogue and cooperation in the application of Te Mana o te Wai, which was more consistent with the Treaty partnership. The second is the relative weakness of section AA. We agree with the claimants that greater legal weighting was needed for this section, and that the requirement should have been for Te Mana o te Wai to be ‘recognised and provided for’ in regional policy statements and plans. It was also necessary to clarify that councils must recognise and provide for Te Mana o te Wai in the consenting as well as the planning process. The policies under objective AA1 only referred to the setting of objectives and limits in policy statements and plans, whereas the objective itself referred to ‘the management of fresh water’. Additional policies were clearly required. We also agree that the objective and policies in section AA would have been more effective if councils were required to explicitly record how they had provided for Te Mana o te Wai in their policies and plans. The third weakness comes from the successful attempt to sever Te Mana o te Wai in the main body of the NPS-FM from the national values of the NOF in appendix 1. We do not agree with the idea that the specific links included in the Clean Water proposals (and the 2014 version of the NPS-FM) created a hierarchy in the national values. Instead, those links provided a means for more integrated freshwater planning and a tool for tāngata whenua values to be better reflected in the setting of objectives and limits, which was one of the purposes of the NPS-FM. The removal of those links does weaken the effectiveness of the Te Mana o te Wai provisions in the NPS-FM, although we think that the revised text of some values in appendix 1 provides greater clarity and implicit connections between the national values and Te Mana o te Wai. The fourth weakness relates to the lack of tools provided in the NPS-FM for: ... using mātauranga Māori to monitor progress towards achieving the freshwater objectives set by plans (CB1); and cultural indicators for the national values in the NOF

...

In our view, the amendments have created an opportunity for greater partnership in freshwater plan-making and for Māori values, especially the mauri and health of water bodies, to be better reflected in freshwater plan making. This is an important and necessary opportunity, which demonstrates the value of codesigning such important instruments with high Treaty implications. But the 2017 amendments fall short of complying fully with the principles of the Treaty, for the following reasons :

- The relative weakness of section AA is a serious matter. The requirement to ‘consider and recognise’ is not strong enough, and Policy AA1 restricts the application of Te Mana o te Wai to freshwater plan making. This is not sufficient to provide for tino rangatiratanga and kaitiakitanga in freshwater management.



- The severing of Te Mana o te Wai from appendix 1 reduces its utility as an over-arching principle in freshwater plan making.
- The failure to include tools for cultural monitoring (CB1) or cultural indicators for the NOF is significant in Treaty terms, and again reduces the effectiveness of Te Mana o te Wai in freshwater plan making and freshwater management more generally.

...

On balance, the 2017 amendments have improved the NPS-FM in Treaty terms but the amendments have some significant weaknesses. We find that the NPS-FM is not compliant with Treaty principles, and Māori continue to be prejudiced by the weakness of mechanisms for the inclusion of their values and interests in freshwater management

26. The discussion above is the basis for my opinion that the NPSFM 2017:

- a. Provides, through Te Mana o Te Wai, for a “water-centric” rather than “Māori-centric” concept.
- b. That Te Mana o Te Wai should be at the centre of freshwater planning.
- c. That Te Mana o te Wai would help address the Treaty principle of active protection ‘by putting the river first’.
- d. Is probably incomplete or inadequate in its implementation of section 6(e) and section 8, which requires the Court to go beyond the NPSFM and look at Part 2 functions and duties.

27. The Tribunal’s analysis and conclusions also support the use of cultural indicators in addition to the NOF attributes and that Te Mana o Te Wai has a crucial role to play in setting values, objectives, and limits in RMA plans including the pSWLP.

## COURTS INTERIM DECISION

### The Court’s three key understandings

28. I concur with Ms Davidson<sup>17</sup> that the Court has appropriately set out Te Mana o Te Wai and ki uta ki tai (to the extent I understand them as discussed in my evidence to date), and I agree with the three key understandings addressed by the Court in paragraphs 17-63 of the Interim Decision.

29. I make the following observations:

- a. Putting water at the forefront of discussion and decisions is consistent with my understanding of the intent of the particularisation of Te Mana o te Wai in the Plan and NPSFM. Of relevance, from a plan drafting perspective, I recall Environment Southland Councillors and Ngāi Tahu Ki Murihiku leaders unanimously agreeing that protection of the water resource is to be prioritised above other resources (including the use of land)<sup>18</sup>.
- b. Ms Cain<sup>19</sup> summarises it this way:

The description of Te Mana o te Wai in the NPSFM resonated with Ngāi Tahu ki Murihiku, who regarded it as a korowai or overarching

<sup>17</sup> Evidence dated 17 April 2020 at [19] and [20].

<sup>18</sup> In an ES/TAMI workshop I facilitated in early 2015, held in the Murihiku Marae.

<sup>19</sup> Evidence in chief at [85].

principle for freshwater management and supported its development and application in Southland to meet expectations and aspirations for freshwater. In my opinion, Te Mana o te Wai disrupts the regulation of the status quo by RMA tools as it makes the mana of water, its health and status, the paramount priority. It gives reverence to water, rather than regarding it solely as a commodity to benefit land-based production, economic development, and land use change.

- c. In respect of the Courts reference to "golden thread"<sup>20</sup> should not be confused with the "korowai" references, as the two concepts are different (discussed below). I observe this difference does not appear to be explained in evidence.
- d. In respect of the discussion in paragraph 19 of the Interim Decision, I consider Te Mana o te Wai does not necessarily have to be considered and recognised in the RPS in order to achieve Te Mana o te Wai in Southland. While this would represent the orthodox approach where concepts filter down the hierarchy of policy instruments, Te Mana o te Wai must be implemented as directed by the NPSFM.

### **Court's proposed wording of Objective 2**

30. For the reasons set out in my evidence above I confirm I support the Courts wording for Objective 2 as follows:

The mauri of waterbodies will be acknowledged and protected so that it provides for te hauora o te taiao (health and mauri of the-environment) and te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).

## **PLAN ARCHITECTURE, HISTORY AND DRAFTERS' INTENTIONS**

### **My involvement**

31. I was one of the drafters (during the early stages) of what became the pSWLP, working closely with Mr McCallum-Clarke, Ms Cain, and Mr Maw. I led the preparation of the Draft Southland Water and Land Plan ("dSWLP") that was released for public comment in July 2015. However, I was not involved in making changes to the Draft Plan after July 2015, nor was I involved in the Council hearing process.

### **Plan Development History**

32. Mr McCallum-Clark (and to an extent Ms Cain) discuss the background to the pSWLP. I can reinforce Mr McCallum-Clarks point in paragraph 13 that "It was only immediately prior to the release of the draft Plan for consultation in July 2015 that the decision was made to remove all tracking and accept the reality that this was a new plan, rather than a comprehensive plan change". I recall the primary reason for this decision was purely to avoid the need to present the pSWLP as a series of track changes, which given the amount of proposed amendments had become too cumbersome for most people to follow (the dSWLP included a complete track changes version but this was never released to the public given its complexity).
33. I observe Mr McCallum-Clark<sup>21</sup> states that early in the plan drafting process, the Councillors and Te Ao Marama Incorporated (TAMI) representatives agreed an overall

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<sup>20</sup> Interim Decision at [58].

<sup>21</sup> Evidence dated 17 April at [15].

guidance framework for the development of the Plan: 1. Maintain water quality; 2. Make improvements to water quality through good management practices; and 3. Make further improvements where degraded through the Freshwater Management Unit processes.

34. My recollection, after reviewing some old emails, is slightly different. I recall that practically, the pSWLP was, and is, intended to be a change to the Operative Southland Regional Water Plan (“**RWP**”) to:
- a. Strengthen controls relating to land uses that discharge contaminants to water.
  - b. Introduce the physiographic unit framework to help manage sources of diffuse discharges.
  - c. Realign the document with the NPSFM 2014 and NZCPS and provide the foundation for the catchment limit setting process (this included cementing the FMU boundaries, **introducing Te Mana o te Wai**, incorporating the physiographic zone framework, and enhancing the recognition of the role and values of tangata whenua in the regional water planning framework).
  - d. Make the plan more user friendly, with a focus on making each provision fit for purpose (i.e. remove unnecessary/ambiguous provisions). This included:
    - i. Restructuring the document to make it more orthodox and include fewer sections
    - ii. Rewording the objectives and some policies to make them less ambiguous/provide clearer direction
    - iii. Deleting all non-essential text (for example explanations).
    - iv. Overhauling the regional discharge rules, including the amalgamation of the Regional Water and Effluent Land Application Plans and tightening of certain discharge requirements
    - v. Considering incorporation of some targeted rule amendments in respect of: indigenous vegetation clearance; wetland protection; water quantity; pump tests (bores); the application of 1080 and other animal pesticides; encouraging the uptake of Good Farm Environment Management Practices across the region; requiring the uptake of Good Farm Environment Management Practices in certain physiographic zones; and discouraging new high nutrient leaching activities in certain physiographic zones.

35. I observe Mr McCallum-Clark<sup>22</sup> cannot confirm who drafted the original “focus activity” plan changes. I was responsible for pulling together the various focus activity workstreams and drafting the first suite of plan changes to capture all the focus activities (each workstream was at various stages some with considerable background work<sup>23</sup>, and some with very little<sup>24</sup>). I concur with Mr McCallum-Clark that there were many iterations resulting from engagement with various department staff within ES.

### **Ngāi Tahu philosophies in the operative planning framework**

36. In addition to Mr McCallum-Clarke’s discussion on the history of the pSWLP development I consider it is helpful to understand the extent to which Ngāi Tahu

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<sup>22</sup> Evidence dated 17 April 2020 at [17].

<sup>23</sup> For example the hill and high country focus activity.

<sup>24</sup> For example the intensification / diffuse discharge management focus activity.

philosophies applied within the operative plans which the pSWLP seeks to replace. Effectively Ngāi Tahu philosophies were “sewn” through the RWP and the Regional Effluent Land Application Plan (“RELAP”). The “golden thread” exists in the operative planning framework.

#### Operative Southland Regional Water Plan

37. The Introduction (section 1.4) of the Operative Regional Water Plan states:

...water, like all things in the natural world, is seen by Māori as having the spiritual qualities of mauri (life force) and wairua (spiritual dimension). The continued well-being of these qualities is dependent on the physical health of the water, which in turn affects the mana of the kaitiaki. These spiritual qualities may be adversely affected by activities such as the taking and use of water, discharges of contaminants to land and water and the diversion of water from one catchment to another.

These important elements are “sewn” into the framework of this Plan and builds on the guidance provided by Te Whakatau Kaupapa o Murihiku (1997) and Te Rūnanga O Ngāi Tahu Freshwater Policy Statement (1999).

38. There were no Ngāi Tahu topic objectives in the RWP. The Ngāi Tahu philosophies outlined in the introduction and Policy 1A of the RWP requires “Any assessment of an activity covered by this plan must take into account any relevant Iwi Management Plan”. The explanation to Policy 1A states:

Te Tangi a Taurira: The Cry of the People (2008) is an Iwi Management Plan recognised by Ngai Tahu which encompasses the Southland region. Te Tangi a Taurira is based around the Ngai Tahu philosophy of “ki uta ki tai” (mountains to the sea). Giving effect to this concept could include the imbedding of Iwi values and policies throughout Council decision making processes on activities covered by this plan, to ensure connections and the holistic view is achieved.

39. The other specific recognition of tangata whenua matters in the objectives, policies and methods is provided in the following parts of the RWP:

- a. Rules 26 (bridges), 27 (Cables, wires and pipes), 28 (Culverts), 32 (Moorings, navigational aids and signs), 33 (Temporary canoe gates and ski lane markers), 36 (Alteration and/or extension of structures), 37 (Demolition and/or removal of structures), 40 (Dry cuts), 41 (Gravel Extraction), where council has restricted its discretion to include any effects on the spiritual and cultural values and beliefs of the tangata whenua.
- b. Rule 46 (Weed and sediment removal for drainage maintenance) where the removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall is not a permitted activity if there are known archaeological sites or wahi tapu in the bed, at the site of the activity. In the event of the discovery of a site of potential historical or cultural importance (for example, archaeological site or wahi tapu), the activity must cease and the Council informed, and the activity can only recommence with the permission of the Council’s Director of Environmental Management.
- c. Financial Contribution considerations in section 2.4.2(3) (Circumstances, purpose and amount) where the Protection, maintenance or restoration of heritage values and of places, areas, or features of importance to Tangata whenua is a matter to be considered.

- d. The explanation to Objective 11 (historic heritage) refers to historic heritage sites that have particular significance to the tāngata whenua (e.g. wāhi tapu and other taonga).
- e. The explanation to Policy 13 (Discharge of untreated effluent).
- f. Policy 14 (Manage the taking, use, damming or diversion of surface water) to avoid where practicable, remedy or mitigate significant adverse effects on the spiritual and cultural values and beliefs of the tangata whenua.
- g. Policy 14A (Determining the term of a water permit) where consideration is to be given but not limited, to relevant tangata whenua values.
- h. Policy 15A (Water abstraction for community water supply) which recognises the need for, and assign priority to, the provision of water for community water supply when allocating water, provided that significant adverse effects on the spiritual and cultural values and beliefs of the tangata whenua are avoided.
- i. Policy 16 (Environmental flow and level regimes) which seeks to establish environmental flow and level regimes for surface water bodies taking into account mauri and healthy ecosystems of indigenous species, including mahinga kai species; and wāhi tapu sites or areas, and wāhi taonga.
- j. Policy 32 (Manage structures and bed disturbance activities in the beds of rivers (including streams and modified watercourses) and lakes) which manages structures and bed disturbance activities in the beds of rivers and lakes, to avoid, remedy or mitigate adverse effects on the spiritual and cultural values and beliefs of the tangata whenua.
- k. Policy 31C (Manage discharges of contaminants onto or into land) which seeks to manage discharges of contaminants onto or into land to avoid, remedy or mitigate adverse effects, including on historic heritage, cultural and traditional values.
- l. Section 7 Cross boundary issues.
- m. Provisions which cross reference to Appendix C. In this regard only Objective 11 (Historic Heritage) appears to explicitly cross reference to Appendix C. However, from a plan drafting perspective the content of Appendix C would be applicable to the implementation of all resource management decisions under the direction of Policy 1A.

#### Southland Regional Effluent Land Application Plan

40. The RELAP, operative in 1998, also has a “golden thread” approach as discussed in the Introduction Section 1.2:

In addition to the above issues, are the concerns of the takata whenua. Takata whenua believe in the holistic concept of the ecosystem, and therefore view any degradation in soil or water quality as a degradation to the ecosystem as an entity. To takata whenua any discharge of effluent and sludge into a water body is undesirable as it degrades the mauri, or life force, of the water body. Takata whenua are strong advocates for the discharge of effluent and sludge onto or into land rather than to water.

Consultation with the takata whenua of Southland has highlighted four main issues of concern to them with regard to the discharge of effluent and sludge. These are:

1. the discharge of human and animal waste into water.
2. the need to ensure that effluent and sludge discharges do not affect the amenity values of areas which are of cultural or historical significance to takata whenua.
3. the need to protect the coastal environment from adverse effects due to discharges of effluent and sludge onto or into land.
4. the need to protect the health of the ecosystem.

Consultation with takata whenua has led to their issues being incorporated throughout the Plan, rather than separated into a specific section. The Southland Regional Council considers this approach consistent with the holistic approach takata whenua take to resource management issues.

41. There are eleven specific resource management issues stated in s.1.2 of the plan, which are listed before the above reference to tangata whenua matters (an example if tangata whenua matters not being at the forefront of resource management). However, tangata whenua matters are explicitly recognised and provided for in the RELAP objectives and policies:

**Objective 4.1.5 - Takata whenua: To recognise and provide for the relationship of takata whenua with ancestral sites, wahi tapu and other taoka.** Explanation: ... The cultural and traditional spiritual values and relationships that have been developed over time by takata whenua are a combination of environmental and conservation ethics and history. These values need to be recognised and provided for. The discharge of effluent and sludge has the potential to adversely affect ancestral sites, wahi tapu sites and other taoka. Wahi tapu are sacred places, and for cultural reasons they need to be protected.

**Policy 4.2.8 - Takata whenua: Recognise and provide for takata whenua concerns related to the discharge of effluent and sludge onto or into land.** Explanation: Takata whenua have concerns relating to the discharge of human effluent. The primary concern is the discharge of effluent and sludge into the water ecosystem. There are also wider concerns relating to the effects on the cultural values of the land. These values include wahi tapu, ancestral sites and other taoka.

**Method 4.3.3 – Consultation: Consult, where appropriate, with interested parties, in particular the takata whenua, when considering matters relating to the discharge of effluent and sludge onto or into land.** Explanation In order to gain a balanced view and to avoid where practicable, remedy or mitigate adverse effects from discharges of effluent and sludge onto or into land it is necessary to consult with interested parties, such as neighbours and other stake holders. Where people are adversely affected, consultation will enable both parties to identify solutions that will avoid where practicable, remedy or mitigate adverse effects. Consultation with takata whenua is necessary to avoid where practicable, remedy or mitigate any adverse effects on wahi tapu sites, urupa and other sites of significance to takata whenua are not adversely affected by discharges of effluent and sludge onto or into land.

**Plan Outcomes: ... Protection of takata whenua values from discharges of effluent and sludge onto or into land.**

**Appendix A - Information to be submitted with resource consent applications: ...** An assessment of any actual or potential effects which the

activity may have on the environment, and the ways in which any adverse effects may be avoided, remedied or mitigated. This assessment shall be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment, and shall be prepared in accordance with the Fourth Schedule of the Resource Management Act 1991. In particular, the assessment of environmental effects will focus on: ... a. any adverse effects on: ... resources or values of significance to takata whenua.

## TE MANA O TE WAI AND KI UTA KI TAI IN THE PLAN

### Council's early intentions

42. Throughout my involvement in the plan drafting phase the Council's intention was always to introduce Te Mana o te Wai in order to give effect to the requirements of the NPSFM. Unlike Mr McCallum-Clark,<sup>25</sup> I recall Councillors and TAMI representatives clearly and unambiguously acknowledging Te Mana o te Wai and the mauri of water as the basis for discussion and drafting, although not to the extent as set out in the Interim Decision (for example the workshop held in the Murihiku Marae referred to above). As Ms Cain<sup>26</sup> recalls:

It was the intention of TAMI and Ngāi Tahu ki Murihiku that Te Mana o te Wai would significantly shift how water and land was managed in Southland to prioritise the mauri of water – water first, use second – and for that to be achieved and measured through the hauora of the taiao, wai and tangata. From 2014, TAMI held and expressed this opinion to Environment Southland and the drafting team.

43. The pSWLP intentionally applies a Korowai approach, as discussed in the introduction section:

For Ngāi Tahu, the management of the natural resources in the region is dealt with in a holistic way and the approach taken to the issues that are of significance to iwi (tribe) in this Plan reinforces that approach. There is no specific or separate section in this document that deals with taāngata whenua matters. Rather, taāngata whenua themes and issues have been integrated through this Plan to reinforce the Ngāi Tahu philosophy of ki uta ki tai (from mountains to sea). Water, and land, like all things in the natural world, are seen by Māori as having the spiritual qualities of mauri (life force) and wairua (spiritual dimension). The continued wellbeing of these qualities is dependent on the physical health of the water and land, which in turn affects the mana (integrity, respect, prestige, authority) of the kaitiaki (guardian). These spiritual qualities can both be adversely affected by activities such as taking and using water, discharges of contaminants to land and water, the diversion of water from one catchment to another, and the clearance of vegetation, wetlands and drains.

44. The inclusion of Te Mana o te Wai as a korowai in the architecture of the pSWLP is different to the architecture of RWP where the “golden thread” is “sewn” throughout the plan. There are similarities and differences between “golden thread” and “korowai”, which warrant a better understanding in order to better understand the plan architecture. I understand their similarities and differences as follows:

- a. The golden thread and korowai approaches are similar in that they are both sewn throughout the length of the plan document; and they are both intended to apply

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<sup>25</sup> Evidence dated 17 April 2020 at [15].

<sup>26</sup> Evidence dated 17 April 2020 at [42].

to the implementation of the Plan (i.e. they apply to all rules and resource consent decision making processes).

- b. However, a “golden thread” approach does not ensure every single provision takes into account tangata whenua matters (or treaty principles). For example, there is no specific recognition of tangata whenua matters in the objectives of RWP or RELAP, meaning there is no obvious mechanism for decision-makers in plan development processes to implement tangata whenua matters. Consequently, the recognition and protection of the high priority status of water, as mauri, does not need to be provided for in the golden thread approach.
  - c. A Korowai approach literally brings the high priority status of the water to the forefront of the planning framework. It is overarching in that it explicitly applies to every provision, including each objective and, consequently, every provision in the plan. Consequently, a Korowai approach is intended to provide a more obvious protective shield over the mauri of the water in every plan development and plan implementation decision-making process.
45. In hindsight, it would appear this difference is more fundamental than the majority of people involved in the preparation of the Plan understood.

### **Korowai Objectives**

#### Reordering the objectives

46. The Court’s Interim Decision elevates objectives 1 and 3 to the top of the Plans hierarchy of provisions. I support this approach. During cross examination in the Topic A hearing I discussed the idea of listing objectives 1 and 3 first to reflect the overarching/strategic intent of the Te Mana o te Wai and ki uta ki tai.
47. The intention of the Plan was for each objective to be read alongside each other with no primacy given to any objective. I stated this in my evidence in chief and maintained this opinion during cross examination in Topic A. However, having reflected on this matter further, in particular the findings of the interim decision, evidence of Mr McCallum-Clark and Ngā Rūnunga, and findings of the Waitangi Tribunal Report 2019, realistically I think the Korowai Objectives probably must have some form of primacy. Simply put if the mauri of the water is to be put first (in order for water to provide for hauora) then it follows the protection of the mauri of water (as an outcome) should have primacy over other outcomes of the plan.
48. While not explicit in her evidence Ms Davidson appears to opine that the Korowai Objectives should have primacy<sup>27</sup> (because Ms Davidson uses the words “*give effect to*”). Mr McCallum-Clark does not appear to express an opinion on whether or not the Korowai Objectives have or should have primacy.
49. Ms Cain<sup>28</sup> identifies four reasons why Objectives 1 and 2 becoming Korowai Objectives would be beneficial. There is no evidence identifying actual or potential disbenefits/costs of giving primacy to objectives 1 and 3. I consider giving primacy to the Korowai Objectives is likely to have some disbenefits, for example:
- a. It will derogate from the intent or effectiveness of some existing objectives (for example Mr McCallum-Clark discusses the implications on Objectives 6 and 10). I am unclear on the actual costs/disbenefits but I assume they could be

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<sup>27</sup> By “primacy” I mean Objectives 1 and 2 do not need to be “given effect” or “implemented” by other objectives in The Plan.

<sup>28</sup> Evidence dated 17 April 2020 at [46].



significant (I assume other parties will aid in identifying the costs of giving the Korowai Objectives primacy).

- b. It will result in some costs and inefficiencies associated with redrafting the plan (e.g. if the objectives have to be relitigated). I consider this cost to be insignificant and appropriate given the decades of failure of the planning framework to properly recognise and protect the mauri of waterbodies.
50. This brings me to consider the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.<sup>29</sup> I consider that there is a risk that the clear national direction for a water-centric approach to freshwater planning that puts the river first will not be achieved if the korowai objectives are not prioritised. I share Mr McCallum-Clarke's view that "there remains a question in my mind as to whether the principle of active protection is clearly linked through to the rules of the Plan at this point in time, particularly in terms of the likely outcomes from consenting processes."<sup>30</sup> I consider that prioritising the Korowai Objectives will provide the framework for the provisions to follow, and is the best method to address the risk of Te Mana o Te Wai being undermined by a planning framework that results in consenting outcomes that do not achieve hauora..
51. I acknowledge I have not considered all the costs and implications of making objectives 1 and 3 Korowai Objectives. However, for the reasons set out above I am of the opinion that it is more appropriate than not to express objectives 1 and 3 as korowai objectives.

#### Implementation Guidance

52. In respect of plan drafting it is helpful to understand that both ki uta ki tai and Te Mana o Te Wai may require resolution of competing issues. However, as discussed in my evidence below I do not go as far as supporting Ms Davidson's opinion<sup>31</sup> that significant redrafting of the Objectives would be necessary to ensure each of them individually gives effect to the concepts of ki uta ki tai and Te Mana o Te Wai if Objectives 1 and 3 are not elevated to the role of strategic or Korowai Objectives. In my opinion a simple expression of the outcome to be achieved by implementing Objectives 1 and 3 is as follows:
- a. Ki uta ki tai requires integrated management and the ethic of holistic thinking. When applying ki uta ki tai it is necessary to have regard to the Ngāi Tahu understanding of the natural world and the belief that all things are connected. Consequently, it is also necessary to consider all potential adverse effects on the environment when assessing the effects of activities.
  - b. Te Mana o Te Wai requires active protection of the mauri of water in order to provide for the health of people and the environment. All other plan objectives are subordinate to this outcome.
53. Whether or not the Korowai Objectives have primacy, I agree with Mr McCallum-Clark that greater clarity and certainty could be provided through more explicit wording in the plan. However, the wording suggested by Mr McCallum-Clark implies that objectives 2 and 4-18 are not subordinate to the Korowai objectives.
54. In my opinion it would be appropriate to flesh out the intended meanings and some implications of "ki uta ki tai", "Te Mana o Te Wai", and the "Korowai", including on the relationship between the Korowai objectives and the other objectives. Below I provide

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<sup>29</sup> Section 32(2)(c).

<sup>30</sup> Evidence dated 17 April 2020 at [47].

<sup>31</sup> Evidence dated 17 April 2020 at [37].

an example of alternative wording that fleshes out the intended meaning of the Korowai approach and relationship with other provisions:

~~“Objectives 1 and 2 are a korowai, meaning they provide a protective cloak or overarching philosophy that statement on the management of water resources. The korowai is always to be considered places ki uta ki tai and the protection of the mauri of the water at the forefront of all plan development and during resource consent decision-making processes relating to water resources, and the development of future plan changes; and the subsequent objectives are to be interpreted in the context of this korowai. In this plan all provisions are to give effect to, or not be inconsistent with the Korowai Objectives 1 and 2”.~~

### **Wording of other Objectives**

55. I have commented below on the implications of the Plan structure/Korowai Objectives on other objectives. I reserve my view on whether additional changes may be necessary to address other issues raised by the Court in the interim decision which I understand are to be the subject of a future process.

#### Objective 2

56. Ms Davidson appears to suggest the commodity focus on land and water in Objective 2 is at odds with placing the health and wellbeing of waterbodies at the forefront of freshwater management<sup>32</sup>. In my opinion Te Mana o Te Wai supports the use of water for commodity reasons (on the basis the health of the people includes economic health, not just physical health). However, I tend to agree with Ms Davidson<sup>33</sup> that Objective 2 is superfluous given consider economic wellbeing is addressed in the other Objectives and there is no need to repeat these matters in Objective 2. Further, I observe Objective 2 was inserted into the Proposed Plan upon feedback on the Draft Plan (in the Draft Plan Objective 3 was objective 2). As I was not involved in the preparation of the proposed Plan version and do not know the rationale for including Objective 2. I observe the s.32 Report<sup>34</sup> does not identify or discuss the overlap with Objectives 4-13 and 17.

#### Objective 6

57. An issue arising from Ms Davidsons recommended Objective 6 is that it does not seek a management outcome for water which is not degraded. In my opinion there should be clear outcome in Objective 6 to maintain the quality (or hauora) of water where it is not degraded.
58. For the reasons set out in my evidence in chief, I maintain my opinion that it would be appropriate to have explicitly linked policies and methods that include numeric outcomes to implement Objective 6. That will require consideration of the numeric outcomes discussed in the JWS dated 22 November 2019 and the Ngā Rūnanga cultural indicators of health dated 29 November 2019.

#### Objective 18

59. I do not agree Objective 18 needs to be amended to refer specifically to Te Mana o Te Wai, nor do I support deleting Objective 18 entirely. The objective serves a good purpose in promoting behavioural change to be demonstrated by all persons. This outcome is consistent with the discussions around the need for a paradigm shift and active protection.

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<sup>32</sup> Evidence dated 17 April 2020 at [45].

<sup>33</sup> Evidence dated 17 April 2020 at [46].

<sup>34</sup> Prepared for the notified version of the pSWLP, dated 3 June 2016.

### **Other provisions**

#### Ngā Rūnanga Cultural Indicators of Health (Methods)

60. It occurs to me that embedding the Ngā Rūnanga Cultural Indicators of Health into the plan framework, for example as measure of appropriateness of proposed new provisions (in plan development) and new activities, takes or discharges (in resource consent applications) could potentially be an appropriate method for implementing Te Mana o Te Wai and ki uta ki tai. This would be consistent with the Tribunal's finding that Te Mana o Te Wai should be at the centre of value and limit setting in the freshwater planning process.

### **CONCLUSION**

61. For the reasons set out in my evidence above (including referencing to the matters previously before the Court in respect of the Topic A hearing), I conclude as follows.

#### **Treaty of Waitangi**

62. The RPS provides relevant directions identifying Ngāi Tahu ki Murihiku treaty principles and how to implement them, including a direction under Policy TW.1 for the regional plan to reflect "consistency with" the treaty principles, not just taking them into account.
63. The Waitangi Tribunal Freshwater Report is also a relevant background document that could be taken into account. That Report concludes, among other things, that Te Mana o te Wai assists in implanting the Treaty principle of active protection by putting water first, but also that the NPSFM 2017 is incomplete or inadequate in its implementation of section 6(e) and section 8. The latter finding implies that the Court should go beyond the NPSFM and look at Part 2 functions and duties.

#### **Interim Decision**

64. I agree with the Court's key findings and support the Court's proposed wording for Objective 2.

#### **Plan architecture and korowai objectives**

65. The pSWLP was always intended to implement ki uta ki tai and Te Mana o Te Wai. The original plan drafters new this meant the mauri of the water was to be placed at the forefront of the planning framework and the plan drafters new Te Mana o Te Wai was to be implemented as a Korowai. However, these philosophies do not appear to be well understood and, in hindsight, warrant further expression and articulation in the planning framework. This can be achieved by making Objectives 1 and 2 Korowai Objectives as determined in the interim decision.
66. The Korowai objectives should have primacy over all other objectives. If the Korowai objectives do not have primacy then it is difficult to see how the mauri of waterbodies will be actively protected. The benefits of making objectives 1 and 3 Korowai Objectives have been identified by Ms Cain and Ms Davidson. However, costs have yet to be identified or examined.
67. Whether or not the Korowai objectives have primacy, the plan should include specific guidance to clarify their intended purpose. Mr McCallum-Clark, Ms Davidson, and Ms Cain have made a start but I consider this should be fleshed out to provide the meaning of Korowai; and whether or not Objectives 1 and 2 have primacy and how they are to be implemented in determining the most appropriate provisions in plan development processes (including the Topic B hearing), and resource consent decision-making.

### **Plan Amendments & Ngā Rūnanga Cultural Indicators of Health**

68. I agree with Mr McCallum-Clarke and Ms Davidson that some amendments to the Objectives may be required if the Korowai Objectives have primacy. I do not agree with the full extent of amendments suggested by Ms Davidson.
69. Drawing on all the above, embedding the Ngā Rūnanga Cultural Indicators of Health into the plan framework could potentially be an appropriate method for implementing ki uta ki tai and Te Mana o te Wai, and thus part of the means of ensuring consistency with the principles of the Treaty of Waitangi.



Signed Ben Farrell

27 April 2020