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

UNDER	the Resource Management Act 1991
IN THE MATTER	of appeals under Clause 14 of the First Schedule of the Act
BETWEEN	**TRANSPOWER NEW ZEALAND LIMITED** (ENV-2018-CHC-26)
	FONTERRA CO-OPERATIVE GROUP (ENV-2018-CHC-27)
	HORTICULTURE NEW ZEALAND (ENV-2018-CHC-28)
	ARATIATIA LIVESTOCK LIMITED (ENV-2018-CHC-29)
	WILKINS FARMING CO (ENV-2018-CHC-30)

(Continued next page)

STATEMENT OF EVIDENCE OF MATTHEW MCCALLUM-CLARK ON BEHALF OF THE SOUTHLAND REGIONAL COUNCIL
17 April 2020

Judicial Officer: Judge Borthwick

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WYNNWILLIAMS

GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT COUNCIL & INVERCARGILL DISTRICT COUNCIL
(ENV-2018-CHC-31)

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

H W RICHARDSON GROUP
(ENV-2018-CHC-33)

BEEF + LAMB NEW ZEALAND
(ENV-2018-CHC-34 & 35)

DIRECTOR-GENERAL OF CONSERVATION
(ENV-2018-CHC-36)

SOUTHLAND FISH AND GAME COUNCIL
(ENV-2018-CHC-37)

MERIDIAN ENERGY LIMITED
(ENV-2018-CHC-38)

ALLIANCE GROUP LIMITED
(ENV-2018-CHC-39)

FEDERATED FARMERS OF NEW ZEALAND
(ENV-2018-CHC-40)

HERITAGE NEW ZEALAND POUHERE TAONGA
(ENV-2018-CHC-41)

STONEY CREEK STATION LIMITED
(ENV-2018-CHC-42)

THE TERRACES LIMITED
(ENV-2018-CHC-43)

CAMPBELL'S BLOCK LIMITED
(ENV-2018-CHC-44)

ROBERT GRANT
(ENV-2018-CHC-45)

SOUTHWOOD EXPORT LIMITED, KODANSHA TREEFARM NEW ZEALAND LIMITED, SOUTHLAND PLANTATION FOREST COMPANY OF NEW ZEALAND
(ENV-2018-CHC-46)

TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA, WAIHOPAI RUNAKA, TE RUNANGA O AWARUA & TE RUNANGA O ORAKA APARIMA
(ENV-2018-CHC-47)

PETER CHARTRES
(ENV-2018-CHC-48)

RAYONIER NEW ZEALAND LIMITED
(ENV-2018-CHC-49)

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND
(ENV-2018-CHC-50)

Appellants

AND **SOUTHLAND REGIONAL COUNCIL**

Respondent

Introduction

1 My full name is Matthew Eaton Arthur McCallum-Clark.

2 My qualifications and experience are set out in my evidence in chief, dated 14 December 2018. The only addition is that I have now completed the process to re-certify as a hearings commissioner (with chair endorsement).

3 I have been engaged by the Southland Regional Council (Council) to prepare evidence for these proceedings.

Code of Conduct

4 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.

5 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.

6 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.

Scope

7 This evidence is in response to the request of the Court, set out in the Interim Decision dated 20 December 2019 (**Interim Decision**), the Minute dated 4 February 2020 and the Record of Pre-Hearing Conference dated 14 February 2020. This evidence addresses several questions that were refined through the Pre-Hearing Conference in Invercargill on 10 February 2020. In summary, the evidence addresses:

- the plan architecture and history, and the intent of the drafters;
- the overall nature of the change between the notified plan and the decisions version;

- 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 words needed in the proposed Southland Water and Land Plan (**the Plan** or **pSWLP**); and
- how the principles of the Treaty of Waitangi are taken into account in the Plan.

8 In formulating this evidence, I have discussed the issues and content of this evidence with Treena Davidson and Ailsa Cain, witnesses for Ngāi Tahu. Through the course of preparing this evidence and addressing the Court's questions we have met, had a number of phone conversations and exchanged views via email on the interpretation and implementation implications of Te Mana o te Wai and ki uta ki tai and the incorporation of the principles of the Treaty of Waitangi in the Plan.

Plan architecture/intent

9 **Attachment 1** to this evidence includes a timeline from the initial stages of recognising that Southland's existing Regional Water Plan was inadequate for managing diffuse discharges, through to the adoption by Council of the Hearing Panel's recommendations. The detail in this timeline is weighted towards the earlier stages, to help show the genesis of what was to become the Plan.

10 I was not involved in the very early stages of this process, with my involvement commencing during June 2014. At that stage I was engaged to assist with progressing some of what were known as "focus activity" plan changes. This transitioned into a wider involvement in diffuse discharge management and how the planning framework should respond.

11 In my opinion, it is important to realise that the development of the Plan commenced with a focus on how to "fix" the big issues facing Southland at the time. This included recognition that Plan Change 13, in relation to new dairy farming, was not necessarily delivering the intended outcomes, a recognition that intensive winter grazing was often poorly managed, and sedimentation and run-off were constant issues from development of hill country land.

12 At the same time, there was an understanding that the existing Southland Effluent Land Application Plan 1998 was out of date and causing issues with overlaps with both the Regional Water Plan and this emerging area of diffuse discharge management. Updating the Regional Water Plan and incorporating the relevant parts of the Southland Effluent Land Application Plan soon became part of the work stream.

13 The structure and content of the whole Plan, including the objectives, is based primarily on the existing Regional Water Plan, but with significant updating, editing and additions. Looking back through earlier versions of the objectives and policies in my electronic records, they began as a set of 'tracked changes' from the objectives of the Regional Water Plan, sometimes with the content of the objective being taken from the explanations included in that plan. The requirements of the National Policy Statement for Freshwater Management 2014 (**NPS-FM**) contributed to the most significant additions and changes. 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.

14 Through the various iterations of Plan drafts, deliberate decisions were made to produce a Plan that had narrative issues statements, short and focussed objectives, policies with considerable resource consent decision-making guidance and rules with a clear activity status cascade. Explanations of objectives, policies and rules are avoided, despite being a strong feature of the Regional Water Plan. Similarly, 'optional' plan content, such as anticipated environmental results or the recording of other methods are omitted, in the interests of simplicity and brevity. While the objectives are a simple list, the policies and rules are largely grouped into topics, such as water quantity or discharges.

15 During development of the Plan, there was a range of discussions with Councillors about the "limit setting" process required under the NPS-FM. As I understood it, Councillors were very clear that they wished to set the scene for this process to occur in the Plan, but considered it to be essentially a separate process to continue after the Plan was complete. In terms of the rules and any numeric limits or formulas, the Councillors initially described the approach as "hold the line", and later moved towards a more nuanced framework. Early in the process, the

Councillors and Te Ao Marama Incorporated (**TAMI**) representatives agreed an overall 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.*

The guiding principles as to how this is to be achieved in the Proposed Plan:

1. *Ki uta ki tai – from the mountains to the sea – integrated management;*
2. *Use physiographic work as a primary tool;*
3. *Utilise industry support and work in partnership where this is possible and beneficial; and*
4. *Encourage a mind-set change, recognising that current practices need to change to maintain water quality.*

16 At the same time, the Council put considerable emphasis on non-regulatory methods, education, and encouragement to improve on-farm practices and raise awareness of environmental issues[1]. As with many parts of the country, this involved working with a range of industry groups and co-ordinating the provision of education and advice from the Council and the industry groups. More specifically, the Council employed a number of land management advisors to visit farmers, advise of good farming practices and prepare, in conjunction with the farmers, farm environment plans. In my opinion, the Council appeared to have a more significant investment in this area than many other councils.

17 While ultimately the Council "held the pen" in terms of drafting the Plan, there were a range of different people involved, and in my opinion no single person could be identified as the author or principal drafter.

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[1] Further information on the advice and information provided by the Council's Land Sustainability team on a variety of land management issues can be found at https://www.es.govt.nz/environment/land-and-soil/land-management.

Although I cannot confirm who drafted the original "focus activity" plan changes, from the time of my involvement through to notification of the Plan, the substance of the Plan was developed iteratively through a large number of drafting workshops which, from time to time, lead to individual participants having "homework" to bring to the next drafting workshop.

18 These workshops typically involved one or two people from the Council's legal team, one or two people from the Council's planning team, Ailsa Cain from TAMI[2], a land management advisor from the Council, someone from the Council's science team, from time to time someone from the Council's consents team, as well as myself.

19 Throughout this drafting, a number of workshops were held with Councillors and TAMI representatives. A small number of Councillors actively involved themselves in the wording of the Plan, and gave us feedback on drafting, down to the level of literally red-pen marked-up drafts of Plan provisions.

20 As can be seen in the timeline in **Attachment 1** and the description above, TAMI, and particularly Ailsa Cain, were actively involved in Council workshops and in the drafting workshops. As has been identified by the Court, my understanding of concepts such as Te Mana o te Wai has evolved over time, and continues to do so. Within that limitation, it is my opinion that there was a high level of alignment between the drafters of the Plan and TAMI representatives throughout the development and drafting process. I cannot speculate on whether there was a full understanding of the implications of Te Mana o te Wai and ki uta ki tai on the part of others, such as the Councillors, stakeholders, and the Hearing Panel, and I suspect understanding varied greatly between different individuals. Councillors were given briefings, as identified in the timeline, but whether that was adequate to grasp a proper understanding of the concepts, I am unable to advise.

21 During the Pre-Hearing Conference on 10 February 2020, I understood one of the questions of the Court was whether the position reached in the Interim Decision is the Court's creation or is it better reflecting the drafters' intent? In my opinion the Interim Decision is rather at the edge

[2] Throughout much of this time, Ailsa Cain was employed jointly by the Council and TAMI.

of what I understood the drafters' intentions to be. While we had lengthy discussions and recognised the inherent importance of Te Mana o te Wai and ki uta ki tai throughout the process[3], and the intention of the drafting workshops was to recognise and incorporate those concepts seamlessly into the Plan, I do not recall that we, or others such as Councillors, clearly and unambiguously returned to Te Mana o te Wai and the mauri of water as the basis for discussion and drafting, as set out in the Interim Decision[4]. That said, I have come to appreciate, through the hearing process and the Interim Decision, the need for greater clarity and certainty about where Objectives 1 and 3 sit in relation to the remainder of the objectives.

Hearing process and decisions version

22 The notification of the Plan generated a substantial number of submissions[5], with the majority being from individual farmers, and farming industry and advocacy groups. Submitters, including in many presentations to the Hearing Panel, focused on what mattered to them, interpreted provisions through their own lens and the information provided to them by their support groups, and were often strident in their views. As Ailsa Cain put it in one of our meetings, "submitters focused on what was important to them, in a highly contentious environment".

23 As is identified in the attached Plan development timeline (**Attachment 1**), some 274 individuals and groups presented to the Hearing Panel. The majority of these were individual farmers. My impression, having sat through that hearings process, was that the vast majority of those farmers were opposed to the restrictions suggested in the notified Plan, with a significant number focusing on economic impacts and the benefits of voluntary adoption of best practice, rather than a regulatory approach.[6]

24 For example, after several days of the hearing in Gore, I began to understand that many of the farmers, when talking about "sustainability",

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[3] For example see Evidence in Chief of Matthew McCallum-Clark at Para [21].

[4] For example at Paras [18] to [21].

[5] Approximately 900 submissions and 56 further submissions were received.

[6] The Hearing Panel noted, in para [174] of their Report and Recommendations: "… *Submitters appearing before us often considered the provisions to be unfair, inequitable, having a detrimental effect on land and property values in the affected physiographic zones, or that they were not necessary given recent water quality trend information.*"

were meaning personal, financial, and family sustainability, such that they could develop land so as to provide each of their children with an economically viable farming unit.

25 As I was not privy to the deliberations of the Hearing Panel, I cannot speculate as to whether or not they were impacted by this consistent message.

26 I also noted through the hearing process and in the Report and Recommendations of the Hearing Panel, an increased emphasis on enabling infrastructure, at an objective, policy, and rule level, elevating economic activities where this was seen to be lacking in the notified version of the plan[7].

27 I agree with the overall view expressed by Ngāi Tahu[8] that the decisions version of the Plan has moved further away from concepts such as Te Mana o te Wai and ki uta ki tai than the notified Plan[9]. While this is a matter of degree, and the Hearing Panel did not think it had made the Plan more 'permissive'[10], it is my overall impression that it is now more so than the notified Plan.

Incorporation of concepts of Te Mana o te Wai and ki uta ki tai in the Plan

28 As was discussed in the evidence filed for the Topic A hearing, and responses to questions from the Court and cross examination during the Topic A hearing, the Plan sets out concepts such as ki uta ki tai and Te Mana o te Wai explicitly in the introductory sections and explicitly includes them in Objectives 1 and 3, then embeds these concepts through outcomes at a policy and rule level. In my opinion that is what was meant when these concepts were referred to as the "golden thread". While I still support the implicit recognition of those concepts, I recognise that implicit recognition is fragile, in that relatively minor and seemingly unrelated changes to those subsequent provisions can weaken the

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[7] For example: Para [141]

[8] Para [30] of the Interim Decision.

[9] Ngāi Tahu prepared an "Assessment of Plan in meeting Ngāi Tahu aspirations to assist Environment Southland in informing its S32 Analysis", which was included as Attachment 1 to the original Section 32 Report. It noted that the notified Plan had a 'good' incorporation of Ngāi Tahu concepts in everyday usage, such as Te Mana o te Wai and ki uta ki tai.

[10] Para [109]

linkages back to those concepts. The extent to which the Topic B provisions need to be reconsidered in the light of the Topic A decision will no doubt be addressed thoroughly in the future. In my opinion, this golden thread is somewhat less obvious in the policies and now only weakly shown through the rule framework. Despite this, I remain of the view that this approach is preferable to the inclusion of a separate 'tangata whenua' section in the Plan, as is the case with many other regional and district plans, as in the implementation of a plan, these separate sections tend to be passed over, being considered less relevant than the material related to the specific topic at issue.

29 Concepts such as ki uta ki tai and Te Mana o te Wai are, as I understand it, deeply held beliefs, with a range of subtleties and local interpretations that are often lost in plain-English paraphrasing, such as the common "from the mountains to the sea". As I have identified earlier, with an example of different usage of a reasonably common RMA term such as "sustainability", I am doubtful that there will be a common understanding of terms such as Te Mana o te Wai, hauora and mauri by users of the Plan.

30 Therefore, I support greater use of explicit language to recognise the importance of these concepts, and the use of policies and rules to practically deliver these outcomes, rather than being reliant on discretionary implementation of the concepts themselves through the resource consent decision-making process. For example, it may be simpler to establish a policy framework with clear directives and an appropriate activity status, rather than relying on discretion and associated policies that require a high level of understanding of concepts such as Te Mana o te Wai. In the future, I hope that the situation will be different, but consider that in the interim a more explicit framework may be a more efficient and certain step towards considering and recognising Te Mana o te Wai.

31 Following discussions with Treena Davidson and Ailsa Cain, we were in agreement that wording ought to be included at the beginning of the objectives recognising Objectives 1 and 3 as "korowai objectives". We also suggest placing these two Objectives together (to become Objectives 1 and 2). The specific wording we suggest to precede these objectives is:

Korowai Objectives

Objectives 1 and 2 are a korowai, meaning they provide a cloak or overarching statement on the management of water resources.

32 This wording also includes an indication of what is meant by a korowai, as we are conscious that again the term korowai may have a different meaning to different people or not have a commonly understood meaning. I am aware that documents such as the National Planning Standards do not necessarily support the use of a phrase such as "korowai objectives", and would likely tend towards recognition of these as "strategic objectives". However, given the nature of the two objectives and the significant changes to the Plan that will be required in future to adjust it to the National Planning Standards framework, we preferred the use of the above phrase.

33 I am of the opinion that this statement contains a minimum level of clarity and certainty, but is adequate. That said, I would support greater clarity and certainty through even more explicit wording, by adding that "The korowai is always to be considered during resource consent decision-making and the development of future plan changes; and the subsequent objectives are to be interpreted in the context of this korowai."

34 I acknowledge that the Court has questioned whether the "planning language benefits us". In my opinion, in the absence of a re-write of the objectives and policies to be more fulsome and explicit as to outcomes, limitations and provisos, this explicit statement of the pervasive role of the objectives encapsulating ki uta ki tai and Te Mana o te Wai is a positive step forward in clarifying the outcomes to be achieved by the Plan and future limit setting processes, along with assisting interpretation of the remainder of the Plan provisions. In my recollection, the drafting style of the objectives was deliberately short and simple, with an expectation that the policies would elaborate further on the specifics of the outcomes, and the process by which this was to be achieved. This was in recognition that the Plan was drafted with a view to its role in resource consent processes – where in my experience the objectives and policies tend to be considered together as part of the

'relevant provisions' under s104(1)(b) or the 'relevant objectives, policies, or rules'[11] in the fourth schedule.

35 In the course of preparing this evidence Treena Davidson and I have considered the questions raised by the Court in the Interim Decision, the implications of having korowai objectives for the interpretation of the remainder of the objectives, and any unintended consequences that this may have. During discussions, we did identify a range of possible wording changes to the objectives. However, I recognise that a great deal of hearing time was spent on the wording of specific objectives, and the Court has largely arrived at wording that it considers most appropriate.

36 In considering the remainder of the objectives in light of the korowai objectives, one stands out as being interpreted differently (Objective 6), and another may be difficult to reconcile with Objectives 1 and 3 (Objective 10).

37 I recognise that the Court spent some considerable time hearing evidence on what "degraded" means, and that is also the basis of considerable expert witness caucusing. In discussions between Treena Davidson, Ailsa Cain and myself, we identified that Objective 3 would now clearly focus the desired long-term aim as being of hauora. In our discussion, we identified that this has implications for the interpretation of Objective 6, where degraded could be interpreted as being below / less than a state of hauora, rather than below / less than a national bottom line or other commonly accepted threshold of unacceptable water quality. This clearly has implications for the policy and rule framework[12], the administration of the Plan, and the Freshwater Management Unit limit setting processes currently underway.

38 In my opinion, with the specific recognition of Objectives 1 and 3 as korowai, it could be difficult to reconcile Objective 10[13] where the existence of the dam structure, and abstraction and diversion of a very high percentage of flow, may be inconsistent with the hauora of that

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[11] Clause 2(2)

[12] Particularly in relation to water quality and land use, but potentially for most elements of the Plan.

[13] *The national importance of the existing Manapōuri hydro-electric generation scheme on the Waiau catchment is provided for and recognised in any resulting flow and level regime.*

waterbody. That said, I am aware that the Interim Decision[14] has signalled that this is an unresolved issue.

Treaty of Waitangi

39 At the outset I wish to confirm that I am not an expert on interpretation of Treaty of Waitangi obligations, or of the nature of the wider relationship between Ngāi Tahu, local Rūnanga and the Council. I understand counsel for the Council will elaborate on these points in legal submissions in due course. Accordingly, the scope of my evidence here is to describe the principles of the Treaty of Waitangi as they relate to the planning context.

40 I have been provided with a memorandum prepared by Mr Maw, counsel for the Council, that sets out the principles of the Treaty of Waitangi and the Council's obligations in terms of Section 8 of the RMA. This memorandum is attached to my evidence as **Attachment 2**. I have relied on this memorandum to describe these obligations, and then proffer my own opinion as to how this has been taken into account in the Plan. I have also considered a range of material explaining Treaty of Waitangi obligations, including a Cabinet paper entitled "Treaty of Waitangi Guidance" and dated 22 October 2019. While that Cabinet paper is helpful, I am informed that the Council is not the Crown, which is again something that I understand will be elaborated on by counsel for the Council.[15] I have also read and considered the Charter of Understanding He Huarahi mō Ngā Uri Whakatupu between Southland's councils and TAMI.[16]

41 The memorandum in **Attachment 2** states that the applicable principles of the Treaty 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.

[14] Para [225]

[15] Para [17] of Mr Maw's memorandum.

[16] Dated March 2016 and downloaded from the Council's website.

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.

d. The Crown must actively protect Māori interests.

42 Section 8 of the RMA[17], requires these Treaty principles to be "taken into account" in the development of the Plan. As I understand it, "taken into account" means a requirement to weigh the principles of the Treaty with all other matters that are being considered and balance the various matters in coming to a decision. In this respect, the emphasis given to the Treaty principles may be less than other matters that the Council is required to "recognise and provide for" and would likely be outweighed by other matters that the Council is required to "give effect to".

43 I understand from the memorandum in **Attachment 2**, in order to "take into account" the principles of the Treaty, as required by section 8, caselaw suggests that councils should do the following:

a. enable active participation by tangata whenua in resource management decision-making;

b. engage with tangata whenua in good faith;

c. seek reciprocity and mutual benefit;

d. endeavour to protect resources of importance to tangata whenua from adverse effects; and

e. take positive action to protect tangata whenua interests.

44 Dealing with the first two of these matters together, it is my opinion that the involvement of TAMI representatives through the drafting process, joint Council and TAMI workshops[18] to consider Plan issues and Plan provisions, the close working relationship between the Council and local Rūnanga, and the engagement of a hearing commissioner with considerable cultural expertise and knowledge of Ngāi Tahu tikanga to

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[17] *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).*

[18] In particular, a joint Councillor/TAMI workshop in August 2013 specifically considered the meaning of 'active partnership' in terms of regional plan development.

sit on the Hearing Panel all demonstrate that these first two matters were appropriately taken into account.

45 In my opinion, the third principle, of reciprocity and mutual benefit, is reflected in the close working relationship of the Council and TAMI, and is at the core of the Charter of Understanding He Huarahi mō Ngā Uri Whakatupu. Section 1.4 of this document, setting out the "Common Goals and Objectives" is indicative, in my opinion, of this principle in action. In my opinion this principle is something that may not, of itself, be evident in a plan or supporting documents, as it is more oriented to processes and attitudes.

46 The fourth of these matters, to endeavour to protect resources of importance to tangata whenua from adverse effects, relies in part on the above active participation and engagement to identify those resources of importance and ascertain the appropriate levels of protection according to tangata whenua. It is my understanding that throughout this process, and particularly through the Council hearing process, those values and appropriate levels of protection were made clear. In my opinion this is described in some detail in the Report and Recommendations of the Hearing Commissioners in the section titled Ngai Tahu[19]. Again, I highlight that it is my opinion that those matters were taken into account in the Plan development and decision-making process, but they did not necessarily outweigh any other matter.

47 The fifth matter is in relation to active protection of interests guaranteed to Māori under Article 2 the Treaty. It is my understanding that much of this obligation rests with the Crown. The extent to which the principle of active protection can be taken into account in a regional plan, is in its management of natural and physical resources. In my opinion, this active protection is evident in the Plan, particularly at an objective and policy level, with specific recognition of concepts such as ki uta ki tai, Te Mana o te Wai, and cultural indicators of health; acknowledgement of the importance of a range of cultural practices such as mahinga kai; and recognition of particular resources such as taonga species. However, 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

[19] Chapter 4 of the Report and Recommendations of the Hearing Commissioners

processes. While I expect this will be a matter for further discussion and evaluation in resolving the Topic B appeal points, in my opinion, significant elements of this are appropriately considered at the time of settling freshwater objectives, attribute states, limits and targets.[20]

48 I note that the section 32 report included a specific section on the incorporation of Ngāi Tahu values, recording the process, options and considerations in relation to these values.[21] This section included a description of Te Mana o te Wai, the various RMA instruments, the Ngāi Tahu Claims Settlement Act, the Iwi Management Plan and the Charter of Understanding, and was, as mentioned earlier, supplemented by the assessment prepared by Ngāi Tahu.[22] The section 42A report and the Council decision do not set out the above obligations in detail or describe the manner in which they have been taken into account. That may, in part, be because, as far as I recall, submissions and evidence did not directly call these matters into question. However, in my opinion it is evident through either the process that has been followed to develop the Plan or the outcome in terms of Plan wording (subject to the qualification in the preceding paragraph) that the Council has taken into account the principles of the Treaty of Waitangi.

DATED this 17th day of April 2020

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Matthew McCallum-Clark

[20] From the limited involvement I have had with Council's "Regional Forum" material and the Council's process undertaken pursuant to Policy CA2 of the NPS-FM, I understand these factors are being taken into account.

[21] At section 6.4 (page 112) of the section 32 report.

[22] "Assessment of Plan in meeting Ngāi Tahu aspirations to assist Environment Southland in informing its S32 Analysis", Attachment 1 to the original Section 32 Report.

Attachment 1 – Timeline of Plan Development

2012/2013 Focus Activities – a gap analysis of the Regional Water Plan identified rural activities that had a cumulative adverse effect on water quality and where a change in policy framework and current practice was required to achieve water quality goals for Southland. Hill country development, nutrient management, intensive winter grazing, overland flow, and riparian management were five key areas identified as short to medium term 'quick fixes' – the 'Focus Activities'. The new dairy farming plan change (Plan Change 13) was notified in April 2012.

February 2013 Council meeting – a report set out the timeframes for notifying the 'Focus Activity' plan changes. Intensive winter grazing, nutrient management, overland flow and riparian management were to be notified by 30 June 2013, and hill and high country and wastewater schemes were to be notified by 31 December 2013.

June 2013 TAMI/Council workshop on the Focus Activities proposed a timeline for notification of a plan change by September 2013. Subsequently approved at a Council meeting.

August 2013 TAMI/Council workshop – brainstorming what the term 'active partnership' means in the context of a Water and Land 2020 & Beyond project. This workshop covered the statutory framework for the partnership and discussion on what involvement in policy decisions Ngāi Tahu should have prior to the notification of the plan changes.

September 2013 Council workshop (TAMI feedback had been sought prior to workshop) where it was agreed that the nutrient management focus activities would take a non-regulatory approach followed up with a rule framework at a later date, winter grazing would be through amendments to existing plan rules alongside a new rule for constructed feed facilities, and riparian management and overland flow would take a non-regulatory approach with potential future regulation.

March 2014 National Policy Statement for Freshwater Management published in the *Gazette*.

March 2014 TAMI/Council workshop - Dr Snelder presented his report on Farm Mitigation Options and Land Use Change. Ailsa Cain presented on Murihiku aspirations for freshwater.

April 2014 Council meeting update following the progress from the TAMI workshop. Recommendation was made to Council to notify the four Focus Activities in June 2014 as a single plan change.

May 2014 Council meeting formally adopting Plan Change 13 (New Dairy Farming). At the same meeting the Council resolved to release a plan change for hill country development by 30 June 2014. The Hill Country plan change

was subsequently deferred at the June 2014 Council meeting to enable further community engagement.

September 2014 TAMI/Council workshop - Ailsa Cain presented a report on Te Mana o te Wai and its implementation in Water and Land 2020 & Beyond.

October 2014 TAMI/Council workshop – proposed at all plan changes being considered should be amalgamated into a new plan. Concern about delays expressed.

November 2014 Council meeting where agreement was made to include the hill country development Focus Activity work into a region-wide framework and would now be referred to as the Water and Land Plan. The Freshwater Management Units for the region were confirmed at this meeting.

June 2015 TAMI/Council workshop on draft Water and Land Plan included a presentation from Ailsa Cain on Te Mana o te Wai and the thought of it being a 'golden thread' in the Plan.

July 2015 Draft Southland Water and Land Plan released for public comment. 312 comments were received and considered by Council and TAMI at a workshop on 12 October 2015. Key themes were opposition to restrictions on intensive winter grazing and dairy conversions.

November 2015 Council meeting – Council approved its Progressive Implementation Plan in accordance with Policy E1 of the NPS-FM 2014. Council also approved a reviewed and revised Charter of Understanding with the combined councils and Ngā Rūnanga.

March 2016 Council meeting – Council approved the notification of the Water and Land Plan.

June 2016 – pSWLP notified along with supporting s32 Report. 964 submissions received by close of notification period on 12 September 2016.

April 2017 – A report by the Council Hearing Officers on the submissions received (s42A Report) is released.

May 2017 – October 2017 pSWLP Hearing was conducted and occupied a total of 26 hearing days. During the hearing 274 parties were heard by the Hearing Commissioners. Hearings were held in Invercargill and Gore.

August 2017 – Amendments to the National Policy Statement for Freshwater Management 2014 published in the *Gazette*.

November 2017 pSWLP Hearing reconvened for Council Hearing Officers to deliver their reply to the matters presented by submitters, and respond to questions posed by the Hearing Commissioners.

April 2018 pSWLP (decisions version) issued by the Hearing Commissioners. The Council accepted all recommendations made by the Hearing Commissioners.

WYNNWILLIAMS

MEMORANDUM

Date: 10 March 2020

To: Matthew McCallum-Clark

From: Philip Maw, Alyssa Langford

PRINCIPLES OF THE TREATY OF WAITANGI

1. You have asked us to provide advice setting out the principles of the Treaty of Waitangi (**Treaty**), and how the Court has previously applied those principles in a planning context.

Executive summary

2. The Resource Management Act (**RMA**), like a range of contemporary legislation, specifically incorporates the principles of the Treaty of Waitangi. Those "principles" have not been defined by any Act of Parliament. However, the Courts and the Waitangi Tribunal have identified a number of principles on a case-by-case basis. In cases under other legislation, the Courts have identified the following principles of the Treaty:[1]

    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.

    d. The Crown must actively protect Māori interests.

3. Section 8 of the RMA requires Environment Southland to "take into account" the principles of the Treaty of Waitangi – this requires recognition of the relationship of tangata whenua with natural and physical resources and encouraging active participation in resource management decision-making.

4. Although the application of section 8 is fact-specific, the Courts have identified specific obligations for local authorities to:

    a. enable active participation by Māori in resource management decision-making, including in respect of resource consent applications and plan making;

    b. engage with tangata whenua in good faith; and

    c. endeavour to protect resources of importance to Māori from adverse effects.

5. A detailed analysis of the principles of the Treaty and their application under section 8 of the RMA follows.

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[1] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (***Lands* (CA)**) and *New Zealand Maori Council v Attorney General* [1992] 2 NZLR 576 (CA).

Status of the Treaty

6. The Government recognises the Treaty as the basis for constitutional government in this country and the foundation for the relationship between Māori and the Crown.[2]

7. The orthodox position is that, unless given force of law by an Act of Parliament, the Treaty duties do not give rise to legal obligations on the Crown.[3] Notwithstanding this, the Treaty is a document of considerable moral force based on the honour of the Crown, and the Courts have moved towards recognition of the Treaty as a relevant consideration in administrative law.[4]

8. The Treaty does not limit the law-making capacity of Parliament, but imposes moral obligations on the Crown:[5]

> Neither the provisions of the Treaty of Waitangi nor its principles are, as a matter of law, a restraint on the legislative supremacy of Parliament.

9. However, Parliament can impose a legal obligation on the executive to act in accordance with the Treaty by including a section in the relevant legislation that refers to the Treaty (i.e. 'Treaty clauses').[6]

The Treaty and the Resource Management Act 1991

10. At a very general level, some 'Treaty clauses' direct more substantive outcomes (by directing that the principles of the Treaty are "given effect to") and others are intended to impose what are essentially process obligations (typically by requiring those exercising powers under the legislation to "have regard to" or "take into account" Treaty principles).[7]

11. Section 8 of the Resource Management Act 1991 (**RMA**) requires:[8]

> 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).
>
> (our emphasis)

12. Case law on section 8 is complex and generally fact specific, however in the context of the RMA, the principles of the Treaty have been summarised as recognising the relationship of tangata whenua with natural and physical resources and encouraging active participation of, and consultation with, tangata whenua in resource management decision-making.[9]

13. A local authority's duty under section 8 is to "take into account" the principles of the Treaty when exercising powers and functions under the RMA in relation to the use, development and protection of natural and physical resources. The obligation to "take into account" is a requirement to weigh the principles of the Treaty with all other

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2 Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri, Wellington, 2001) at 16; Department of the Prime Minister and Cabinet *Cabinet Manual* (Cabinet Office, Wellington, 2017) at 2.

3 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 at 324; Te Puni Kōkiri, above n 2, at 15 and at 17 citing Burrows *Statute Law in New Zealand* (1999) pp 300-301.

4 Te Puni Kōkiri, above n 2, at 16.

5 *Lands* (CA) per Somers J at 691.

6 Te Puni Kōkiri, above n 2, at 17.

7 Te Puni Kōkiri, above n 2, at 21.

8 RMA, s 8.

9 *Winston Aggregates Ltd v Franklin District Council* EnvC A080/02.

matters being considered and, in coming to a decision, effect a balance between the principles and all other matters.[10] In other words, section 8 requires a local authority to turn its mind to the principles of the Treaty when exercising its functions and powers. However, the principles do not necessarily prevail over the other matters that local authorities must "recognise and provide for"[11] or "have regard to"[12] under the RMA.[13]

14. In the *Ngāwhā Geothermal Resources Report (1993)*, the Waitangi Tribunal considered the meaning of section 8 of the RMA, noting that the section does not compel compliance with the Treaty and so in the Tribunal's view does not go far enough to protect Māori interests. The Tribunal considered that:[14]

> Implicit in the requirement to 'take into account' Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources (to which "particular regard" must be given under s7). The role or significance of Treaty principles in the decision-making process under the Act is a comparatively modest one.
>
> It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.

15. The weight to be given to Treaty considerations is a decision left to those exercising the procedural functions.[15] According to the New Zealand Solicitor General:[16]

> A Court would not ordinarily interfere with a decision made in circumstances involving a clause like [section 8 of the RMA], unless there was a failure to consider the Treaty principles, or if the decision is one which a reasonable person would not make. Generally, the decisionmaker would be left to determine the priority to be given to Treaty principles in determining an outcome. The duty on decision-makers is to properly consider Māori perspectives before making a decision, and this may require some form of consultation.

16. Despite the above, the obligation under section 8 is not simply a "check box" exercise. In *McGuire v Hastings District Council*, the Privy Council found that sections 6, 7 and 8 of the RMA provide strong directions in relation to Māori interests, which are to be borne in mind at every stage of the planning process.[17] In *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, the Supreme Court found that:[18]

> …the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision makers must always have in mind…

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10 *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC CIV-2005-404-356.

11 RMA, s 6.

12 RMA, s 7.

13 *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC CIV-2005-404-356.

14 Waitangi Tribunal *Ngāwhā Geothermal Resources Report (1993)* at p 145.

15 Te Puni Kōkiri, above n 2, at 22.

16 *The Crown's Obligations Under the Treaty of Waitangi as at 1992*, Memorandum for Cabinet Strategy Committee, New Zealand Solicitor General, 8 May 1992, p 20.

17 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

18 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [88].

17. We note that while the Crown has given local authorities powers under the RMA to manage natural and physical resources, local authorities are not themselves parties to the Treaty of Waitangi. A local authority's obligation to take into account the principles of the Treaty must be considered in that context.[19] Section 8 does not impose the Crown's obligations under the Treaty on local authorities, nor does it empower local authorities to consider whether the Crown is in breach of its Treaty obligations or what redress may be appropriate.[20]

18. In seeking to take into account the principles of the Treaty in Southland, Environment Southland, Invercargill City Council, Southland District Council, Gore District Council, Queenstown Lakes District Council, Clutha District Council and Otago Regional Council entered into a Charter of Understanding with Te Ao Marama Incorporated.[21] The purpose of this Charter of Understanding is to develop a relationship of mutual benefit between the local authorities and the mana whenua of Murihiku and Te Rūnanga o Ngāi Tahu. The Charter seeks to establish and provide for a clear understanding of the basis and ongoing conduct of the relationship between local authorities and the tangata whenua in the context of the RMA and LGA.

19. The Charter sets out the principles of the Treaty considered relevant in the context of the Charter.[22] The principles included in the Charter are consistent with those set out in this Memorandum.

Specific obligations under section 8

20. The Courts have identified that the requirement in section 8 for local authorities to "take into account" Treaty principles manifests itself in a number of specific obligations. These include:

    a. An obligation for consent authorities to enable active participation of Māori when dealing with a resource of known or likely value to Māori.[23] This may require management of resources and other taonga according to Māori cultural preferences, without giving Māori a right of exclusionary veto. In the planning context, in undertaking consultation with tangata whenua as required under Schedule 1 of the RMA, active participation by Māori should be encouraged.

    b. An obligation to deal with tangata whenua in good faith.[24] While the Courts have not expressly recognised the principle of partnership in the context of the RMA, they have upheld the importance of dealing with tangata whenua in good faith. When engaging with tangata whenua, local authorities must act in good faith by, *inter alia*, endeavouring to understand tangata whenua perspectives and give genuine consideration to managing resources in accordance with Māori cultural preferences. Note that both parties are to act reasonably and in good faith, with the actions of parties reflecting an underlying fairness.

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19 *Hanton v Auckland City Council* [1994] NZRMA 289 (PT).

20 *Minhinnick v Minister of Corrections* EnvC A43/04.

21 The Charter of Understanding – He Huarahi mō Ngā Uri Whakatupu (A pathway for the Generations Coming Through) dated March 2016.

22 The Charter of Understanding, above n 21, at 1.5-1.6.

23 See for example *Mason-Riseborough v Matamata-Piako District Council* (1997) 4 ELRNZ 31.

24 See for example *Te Pairi v Gisborne District Council* EnvC W093/04.

c. The Courts have acknowledged that reciprocity and mutual benefit, although perhaps desirable, cannot be elevated to ensure a particular course of action must be chosen in order to satisfy section 8.[25]

d. An obligation to endeavour to protect resources of significance to Māori from adverse effects.[26] However, if tangible effects on a resource are avoided, the protection of intangible adverse effects on tangata whenua do not need to be given overriding weight where there are no discernible physical effects on the resource.

e. The principle of active protection requires positive action, which will at times oblige councils to initiate, facilitate, and monitor the consultation process.[27]

Principles of the Treaty

21. Given the differences between the Māori and English texts, and the need to apply the Treaty to contemporary circumstances, Parliament refers to the principles of the Treaty in legislation, rather than the texts of the Treaty. The principles of the Treaty, as interpreted by the Courts and the Waitangi Tribunal, are derived from the spirit, intent, circumstances and terms of the Treaty.[28] They are the underlying mutual obligations and responsibilities which the Treaty placed on the parties, and reflect the intention of the Treaty as a whole.[29] These principles are not set in stone. As President Cooke has said: "The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change".[30]

22. Accordingly, the Courts consider the principles when interpreting legislative references to the Treaty. However, the Waitangi Tribunal has a more general jurisdiction: to "determine the meaning and effect of the Treaty as embodied in the 2 texts"[31] when considering whether the Crown has acted in a manner "inconsistent with the principles of the Treaty".[32]

23. We note that, while the opinions of the Waitangi Tribunal are considered by the Court of Appeal to be of "great value" to the Court,[33] and are often given considerable weight in its judgments, Courts are nonetheless not obliged to give effect to Tribunal findings.[34] The recommendations of the Tribunal have no force in law unless accepted and acted on by a Court:[35]

> The crucial point is that the Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively. Under s 6 of the 1975 [Treaty of Waitangi] Act it may make findings and recommendations on

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25 *Waikanae Christian Holiday Park v Kapiti Coast District Council* Wellington CIV-2003-485-1764, 27 October 2004 (HC).

26 See for example *Mahuta v Waikato Regional Council* EnvC A091/98.

27 *Sea-Tow Ltd v Auckland Regional Council* [1994] NZRMA 204 (PT).

28 Te Puni Kōkiri, above n 2, at 74.

29 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (***Broadcasting Assets* (PC)**) per Lord Woolf at 513.

30 *Te Rūnanga o Muriwhenua v Attorney-General* (CA) [1990] per Cooke P at 656.

31 Treaty of Waitangi Act 1975, s 5.

32 Treaty of Waitangi Act 1975, s 6.

33 *Lands* (CA), per Cooke P at 661

34 *Lands* (CA), per Cooke P at 662. See also *Te Rūnanga o Muriwhenua v Attorney-General* (CA) [1990] at 651 on this point and for a more general discussion on the weight to be given to Tribunal findings as evidence in the Court of Appeal.

35 *Te Rūnanga o Muriwhenua v Attorney-General* (CA) [1990] per Cooke P at 651, 652.

> claims, but these findings and recommendations are not binding on the Crown of their own force.

24. The principles of the Treaty, as recognised by the Courts and the Waitangi Tribunal, are set out below.

The principle of partnership

25. The Court of Appeal has referred to the Treaty relationship as "akin to a partnership" and emphasises a duty on the parties to act reasonably, honourably, and in good faith. The Waitangi Tribunal concurs with the duty to act reasonably, honourably, and in good faith, however it derives these duties from the principle of reciprocity and the principle of mutual benefit.

26. The principle of partnership has been regarded as an overarching tenet, from which other key principles have been derived,[36] such as the duty to act reasonably, honourably, and in good faith, the principle of mutual benefit, and the duty to make informed decisions.

27. Integral to the Tribunal's understanding of the principle of partnership are the following concepts: the status and accountability of the Treaty partners, the need for compromise and a balancing of interests, the Crown's fiduciary duty, and the duty to make informed decisions.[37]

The duty to act reasonably, honourably, and in good faith

28. This duty is recognised by both the Courts and the Tribunal.

Duty according to the Courts

29. The Treaty established an enduring relationship of a fiduciary nature akin to a partnership, which imposes on the partners the duty to act reasonably, fairly, honourably, and in good faith towards the other.[38] The Court of Appeal has unanimously held that:[39]

> The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found … In this context the issue becomes what steps should have been taken by the Crown, as a partner acting towards the Māori partner with the utmost good faith which is the characteristic obligation of partnership ...

30. The Courts have drawn on the principles of good faith inherent in partnerships in civil law to aid in its interpretation of the Treaty principles.[40]

31. The Privy Council, agreeing with the Court of Appeal, considered that the relationship envisaged in the Treaty was one "founded on reasonableness, mutual cooperation, and trust". This requires the Crown in carrying out its Treaty obligations to take "such action as is reasonable in prevailing circumstances".[41] The "test is reasonableness, not perfection".[42]

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36 Te Puni Kōkiri, above n 2, at 77.

37 Te Puni Kōkiri, above n 2, at 80.

38 Te Rūnanga o Wharekauri Rekohu v Attorney General [1993] 2 NZLR 301 (***Sealords* (CA)**) at 304.

39 *Lands* (CA) per Cooke P at 664; see also per Richardson J at 682, per Somers J at 692-693, and per Casey J at 702.

40 Te Puni Kōkiri, above n 2, at 78.

41 *Broadcasting Assets* (PC) at 517.

42 *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (***Māori Electoral Option* (CA)**) at 411.

32. The Court has emphasised the reciprocal nature of the Treaty obligations, requiring both partners to act reasonably and in good faith.[43]

Duty according to the Tribunal

33. The Tribunal has found that acting reasonably, honourably, and in good faith requires both Treaty partners to acknowledge each other's respective interests and authority over natural resources. The obligation to act reasonably, honourably, and in good faith also demands that the Treaty partners accord each other respect in their interactions with each other.[44]

The principle of reciprocity

34. This principle is recognised by the Tribunal, and therefore does not have any force in law unless accepted and acted on by a Court.

35. This principle is derived from Articles I and II of the Treaty, in that it is thought to capture the "essential bargain" or "solemn exchange" agreed to in the Treaty by Māori and the Crown. For the Tribunal, this exchange lies at the core of the concept of partnership.[45]

36. The Tribunal considers the following concepts integral to the principle of reciprocity: the equal status of the Treaty partners, the Crown's obligation to actively protect Maori Treaty rights, including the right of tribal self-regulation or self-management, the duty to provide redress for past breaches, and the duty to consult.[46]

The principle of mutual benefit

37. This principle is recognised by the Tribunal, and therefore does not have any force in law unless accepted and acted on by a Court.

38. The Tribunal considers the principle of mutual benefit or mutual advantage to be a cornerstone of the Treaty partnership. The principle requires that "the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective".[47]

The duty to make informed decisions

39. This duty is recognised by both the Courts and the Tribunal.

Duty according to the Courts

40. The Courts have found that it is inherent in the Crown's obligations to act in good faith that it is obliged to make informed decisions on matters affecting the interests of Māori. In some circumstances this will require consultation with Māori, depending on the importance of the issue.[48]

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43 Te Puni Kōkiri, above n 2, at 80.

44 Te Puni Kōkiri, above n 2, at 84.

45 Te Puni Kōkiri, above n 2, at 81.

46 Te Puni Kōkiri, above n 2, at 81; Waitangi Tribunal *Māori Development Corporation Report* (1993) pp 33, 113 ff.

47 Te Puni Kōkiri, above n 2, at 82; Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (1993) at p 137.

48 Te Puni Kōkiri, above n 2, at 85.

41. The duty to make informed decisions is a legal obligation on the Crown, where the Crown is exercising a discretion under legislation containing an appropriately worded Treaty clause.[49] Justice Richardson stated that:[50]

> The responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it had proper regard to the impact of the principles of the Treaty.

42. This does not extend to an absolute duty to consult,[51] however it is an obvious way for the Crown to demonstrate good faith as a Treaty partner.[52]

43. In some cases, the fulfilment of the obligation of good faith may require extensive consultation, and in others the Crown may argue that it is already in possession of sufficient information "for it to act consistently with the principles of the Treaty without any specific consultation".[53]

44. The Courts have found that, where the Crown is to give effect to the principles of the Treaty under relevant legislation, consultation alone cannot satisfy its obligation to actively protect the interests of Māori.[54] Note that section 8 of the RMA does not require that the principles of the Treaty are given effect to, only that they are taken into account.

45. The Court of Appeal held that:[55]

> s 8 [of the RMA] in its reference to the principles of the Treaty did not give any individual the right to veto any proposal … It is an argument which serves only to reduce the effectiveness of the principles of the Treaty rather than to enhance them.

46. The Environment Court has confirmed that the duty to consult requires a decision maker be fully informed. Where this standard has been met, the decision maker's decision has been supported by the Court as an appropriate exercise of their role.[56] Further, it has rejected the proposition that the duty to consult under section eight of the RMA "is no more than procedural or deliberative".[57]

47. Consultation does not need to result in consensus:[58]

> The council is not bound to consult [local hapū] for however long it takes to reach a consensus. It must consult for a reasonable time in a spirit of goodwill and open-mindedness, so that all reasonable (as distinct from fanciful) planning options are carefully considered and explored. If after this process the parties are in a position of ultimate disagreement, this must be accepted as the outcome. If consensus is reached, the council can provide no guarantee of inalterability.

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49 Te Puni Kōkiri, above n 2, at 85.

50 *Lands* (CA) per Richardson J at 682.

51 *Lands* (CA) per Richardson J at 682-683, per Cooke P at 665.

52 *Lands* (CA) per Somers J at 693.

53 *Lands* (CA) per Richardson J at 683.

54 *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 per Cooke P at 560.

55 *Watercare Services v Minhinnick* [1998] 1 NZLR 294 (CA) at 307.

56 See *Quarantine Waste (NZ) Ltd v Waste Resources Ltd [1994] NZRMA 529 (HC)* at 542.

57 *Wellington Rugby Football Union Incorporated v Wellington City Council* W84/93, 30 September 1993 (PT) per Judge Kenderdine at 22-23.

58 *Ngāti Kahu v Tauranga District Council* [1994] NZRMA 481 (EnvC) at 510.

Duty according to the Tribunal

48. The Tribunal also places emphasis on informed decision-making, particularly the value and utility of consultation.

49. The Tribunal considered in the *Muriwhenua Fishing Claim Report* (1988) that in circumstances where the rights of Māori might be compromised, the Crown is obliged not only to consult with Māori, but to negotiate with them to ensure they retain sufficient resources for their survival and well-being.[59]

50. In the *Ngai Tahu Report* (1991) the Tribunal outlined areas where it considered consultation was required to uphold Treaty obligations. These include:[60]

> Environmental matters, especially as they may affect Māori access to traditional food resources – mahinga kai – also require consultation with the Māori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Māori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may … vary depending on the extent of consultation necessary for the Crown to make an informed decision.

51. In its *Ngāwhā Geothermal Resources Report* (1993), the Tribunal concluded that if the obligation of active protection of Māori Treaty rights is to be fulfilled, then:[61]

> Before any decisions are made by the Crown or those exercising statutory authority on matters which may impinge upon the rangatiratanga of a tribe or hapū over their taonga, it is essential that full discussion with Māori take place.

The principle of active protection

52. This duty is recognised by both the Courts and the Tribunal.

Principle according to the Courts

53. The Crown's duty of active protection is a central Treaty principle. The principle encompasses:[62]

> the Crown's obligation to take positive steps to ensure that Māori interests are protected. The Courts have considered the principle primarily in association with the property interests guaranteed to Māori in Article II of the Treaty. The Waitangi Tribunal has also emphasised the Crown's stated aims in the preamble of the Treaty and Article III.

54. The Court of Appeal in the *Lands* case accepted earlier Tribunal findings that the Crown had a positive duty to protect Māori property interests. It stated that:[63]

> … the duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent pacticable.

55. The Privy Council's *Broadcasting Assets* decision contains an important and detailed analysis of the scope of the Crown's duty of active protection under the Treaty. It advised that the Crown's duty was not an absolute one, but was an obligation which could change in accordance with the extent of the Crown's other responsibilities and

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59 Waitangi Tribunal *Muriwhenua Fishing Claim Report* (1988) p 217.

60 Waitangi Tribunal *Ngāi Tahu Report* (1991) p 245.

61 Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (1993) at p 101-102.

62 Te Puni Kōkiri, above n 2, at 93.

63 *Lands* (CA) per Cooke P at 664.

the vulnerability of the taonga in question. The Privy Council linked the duty to actively protect Māori interests with the concept of reasonableness.[64] The Privy Council also noted that the duty of active protection requires vigorous action where a taonga is threatened, especially where its vulnerability can be traced to earlier breaches of the Treaty.[65]

Principle according to the Tribunal

56. The Tribunal attributes the principle of protection to the fundamental exchange recorded in the Treaty – the cessation of sovereignty in return for the guarantee of tino rangatiratanga. The Tribunal's conception of the interests to be protected goes beyond property to include tribal authority, Māori cultural practices and Māori themselves, as grounds and individuals.[66]

57. In the *Ngāwhā Geothermal Resources Report* (1993), the Tribunal analysed the component parts of the Crown's duty of protection:[67]

> The duty of active protection applies to all interests guaranteed to Māori under article 2 of the Treaty. While not confined to natural and cultural resources, these interests are of primary importance. There are several important elements including the need to ensure:
>
> - that Māori are not unnecessarily inhibited by legislative or administrative constraint from using their resources according to their cultural preferences;
> - that Māori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued used or enjoyment of their resources whether in spiritual or physical terms;
> - that the degree of protection to be given to Māori resources will depend upon the nature and value of the resources. In the case of a very highly valued rare and irreplaceable taonga of great spiritual and physical importance to Māori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Māori wish it to be protected ... The value to be attached to such a taonga is a matter for Māori to determine.
> - that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.

The principle of redress

58. This duty is recognised by both the Courts and the Tribunal.

59. The Court of Appeal has acknowledged that it is a principle of partnership generally, and of the Treaty relationship in particular, that past wrongs give rise to a right of redress.[68] The Waitangi Tribunal also accepts that the Crown has this obligation,

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64 *Broadcasting Assets* (PC) at 517.

65 *Broadcasting Assets* (PC) at 517.

66 Te Puni Kōkiri, above n 2, at 95.

67 Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (1993) at p 100-102.

68 Te Puni Kōkiri, above n 2, at 100.

and considers it arises from its duty to act reasonably and in good faith as a Treaty partner.[69]

Wynn Williams

69 Te Puni Kōkiri, above n 2, at 103.