

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

ENV-2018-CHC-26 to 50

IN THE MATTER of the Resource
Management Act 1991

AND

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

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

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

AND **SOUTHLAND
REGIONAL COUNCIL**

Respondent

STATEMENT OF EVIDENCE OF AILSA MARGARET CAIN

**ON BEHALF OF NGĀ RŪNANGA (WAIHOPAI RŪNAKA, TE RŪNANGA O AWARUA,
TE RŪNANGA O ŌRAKA APARIMA, AND HOKONUI RŪNAKA) AND TE RŪNANGA O
NGĀI TAHU**

Culture and Policy

17 April 2020

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MAY IT PLEASE THE COURT

INTRODUCTION

Ko Hananui tōku mauka tūpuna
Ko Te Ara a Kiwa tōku moana
Ko Mata-au tōku awa
Ko Ruapuke, Papatea, Taukihepa ōku motu
Ko Waitaha, Kāti Mamoe, Ngāi Tahu ōku iwi
Nō Murihiku ahau
Ko Ailsa Cain ahau

1. My name is Ailsa Margaret Cain. My experience and qualifications are set out in my evidence in chief dated 15 February 2019 on behalf of Ngā Rūnanga.
2. I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note 2014 and I agree to comply with it. I confirm that the issues addressed in this statement of evidence are within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.
3. My whānau have long associations with Murihiku and I whakapapa to Waitaha, Kāti Mamoe and Ngāi Tahu. My expertise is partially derived from those cultural associations. I note that whilst I am Ngāi Tahu, I am required to be impartial and unbiased in my professional opinions expressed.

SCOPE OF EVIDENCE

4. My evidence will address matters raised by the Environment Court in its Interim Decision of 20 December 2019¹ (the **Interim Decision**) and its *Record of Pre-Hearing Conference pSWLP (Topic A)* of 10 February 2020.
5. In the Interim Decision, the Court directed the following:²

Specifically, the parties are to address the interpretation and implementation of Te Mana o te Wai and ki uta ki tai in this plan and any other matter they consider relevant to the scheme of the plan in general. Secondly, the parties are to address how the plan is to take into account the principles of the Treaty.

¹ *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208.

² At [347].

6. Further, in its Record of Pre-Hearing Conference, the Court indicated that:³

Before [it] can make its final decision on [the higher order provisions of the pSWLP], it must reach a settled view on the interpretation of the plan's provisions. We have set out our interpretation of the National Policy Statement for Freshwater Management, and in particular Te Mana o te Wai and ki uta ki tai, in the pSWLP. If our interpretation is not available and/or the scheme of the plan does not implement the National Policy Statement-Freshwater Management in the manner we suggest, this has implications for the drafting of the higher order provisions which are in many respects weakly drawn.

In addition, we have asked the parties how the pSWLP takes into account the principles of the Treaty of Waitangi.

7. In this statement, I will:

- (a) Outline the wider context of the proposed Southland Water and Land Plan (**pSWLP**) from a Ngāi Tahu ki Murihiku perspective;
- (b) Describe the development of Te Mana o te Wai in Murihiku and its inclusion in the pSWLP;
- (c) Provide my understand of the factors that shaped the drafting of the pSWLP;
- (d) Assess the implication of Objectives 1 and 3 as Korowai Objectives; and
- (e) Set a context for the evaluation of how Treaty Principles were taken into account in both the pSWLP and the drafting process.

8. In formulating this evidence, I have discussed the issues and content with Treena Davidson and Mr Matthew McCallum-Clark, witness for Environment Southland. Through the course of preparing this evidence and addressing the Court's questions we have met and have since exchanged drafts of our evidence. I understand there has been additional dialogue between Ms Davidson and Mr McCallum-Clark on the effects of 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 pSWLP on the wording of Objectives 3 – 18.

3 Record of Pre-hearing Conference pSWLP (Topic A) (10 February 2020) at [4] - [5].

9. In preparing my evidence I have reviewed:
- (a) The Interim Decision;⁴
 - (b) National Policy Statement for Freshwater Management 2014 (as amended 2017) (**NPSFM**);
 - (c) The Cry of the People Te Tangi a Tauria (**Te Tangi**);
 - (d) Te Whakatau Kaupapa o Murihiku;
 - (e) The submission and further submission and appeal by Te Rūnanga o Ngāi Tahu and Ngā Rūnanga on the notified proposals;
 - (f) Memorandum of Counsel on behalf of Ngā Rūnanga regarding Cultural Indicators of Health, 29 November 2019;
 - (g) Te Puni Kōkiri (2002) 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;
 - (h) He Huarahi mō Ngā Uri Whakatupu The Charter of Understanding, 2016; and
 - (i) Te Rūnanga o Ngāi Tahu (2015) Summary Report: Te Waipounamu Te Mana o te Wai Case Study.

EXECUTIVE SUMMARY

10. Article 2 of Te Tiriti o Waitangi/Treaty of Waitangi recognises and protects both a management right and philosophy. This point, alongside the constitutional importance of Treaty documents signed by Ngāi Tahu and the Crown, is significant for considering how the Treaty Principles are taken into account in the pSWLP.
11. Also significant in responding to the three key understandings raised by the Court in its Interim Decision is the context for Ngāi Tahu cultural concepts, and how they should be reflected in the scheme of the proposed Plan. Ngāi Tahu ki Murihiku

4 *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208.

have a clear and implicit understanding of these concepts and had expectations on what their use in the proposed Plan would achieve. The Decisions version of the pSWLP has not met these expectations.

12. The Korowai Objectives would provide the clarity sought by Ngā Rūnanga and assist with shifting water and land management in Southland from focusing on degradation to hauora and active protection of the mauri of water. This approach is in keeping with Te Tangi a Tauira and ki uta ki tai.
13. The drafting process, the scheme of the proposed Plan and its content impact on the evaluation of how Treaty Principles have been taken into account. In my opinion, the way in which the Treaty Principles are taken into account in the Decisions version of the pSWLP is weak, particularly because the pSWLP does not protect tikanga Ngāi Tahu ki Murihiku rights, responsibilities and interests.

WIDER CONTEXT FOR THE PLAN ARCHITECTURE

14. From a Ngāi Tahu ki Murihiku perspective, the genesis for the pSWLP is complex. It covers natural, physical and metaphysical resources and includes its values, philosophies and definitions.
15. The pSWLP also stems from a regulatory framework that requires that the principles of Te Tiriti o Waitangi/Treaty of Waitangi be taken into account in achieving the purpose of the Resource Management Act 1991 (**RMA**), as set out in section 8. The latter point is discussed in further detail in paragraphs [51] – [66].
16. To assist in demonstrating the wider context of the pSWLP, I have focused on Article 2 of Te Tiriti o Waitangi/Treaty of Waitangi. As summarised by the Ministry for Culture and Heritage, the key differences in the text of Article 2 are:⁵

In the English text, Māori leaders and people, collectively and individually, were confirmed and guaranteed 'exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties'. Māori also agreed to the Crown's exclusive right to purchase their land. Some Māori (and British) later stated that they understood the Crown to have a first option rather than an exclusive right to buy.

In the Māori text, Māori were guaranteed 'te tino rangatiratanga' or the unqualified exercise of their chieftainship over their lands, villages, and all their property and

5 Ministry for Culture and Heritage "Differences between the texts" (updated 20 December 2012) <www.nzhistory.govt.nz/politics/treaty/read-the-Treaty/differences-between-the-texts>.

treasures. Māori also agreed to give the Crown the right to buy their land if they wished to sell it. It is not certain if the Maori text clearly conveyed the implications of exclusive Crown purchase.

17. Regardless of the differences between the texts, there is a management right and philosophy captured within both versions of Article 2. While the management right is the primary focus of this Article, it must also be recognised that those exercising the right do so in a manner pertinent to them. For Ngāi Tahu ki Murihiku, that includes the environmental philosophy of ki uta ki tai. Article 2 does not restrict the manner in which the possession or chieftainship is exercised.
18. Ki uta ki tai was not developed under the direction of Te Tiriti o Waitangi/Treaty of Waitangi; this was a philosophy being practised well before the Treaty was signed in 1840. Ki uta ki tai is founded on traditional values and understandings that have continued through to today with the application of modern tools.⁶
19. As Treaty Partners, Ngāi Tahu ki Murihiku and Environment Southland have recognised their environmental philosophies and management provisions in *He Huarahi mō Ngā Uri Whakatupu The Charter of Understanding* (see Mr Skerrett's Statement of Evidence (dated 15 February 2019), paragraphs [31]-[33] and Appendix B). Ki uta ki tai is also the basis of the Iwi Management Plan, Te Tangi.

6 Kaupapa Taiao *Ki Uta Ki Tai: Mountains to the Sea Natural Resource Management* (2003) at 9-10.

20. The role of environmental philosophies and management in the wider context of the pSWLP architecture, from a Ngāi Tahu ki Murihiku perspective, has been simplified below.

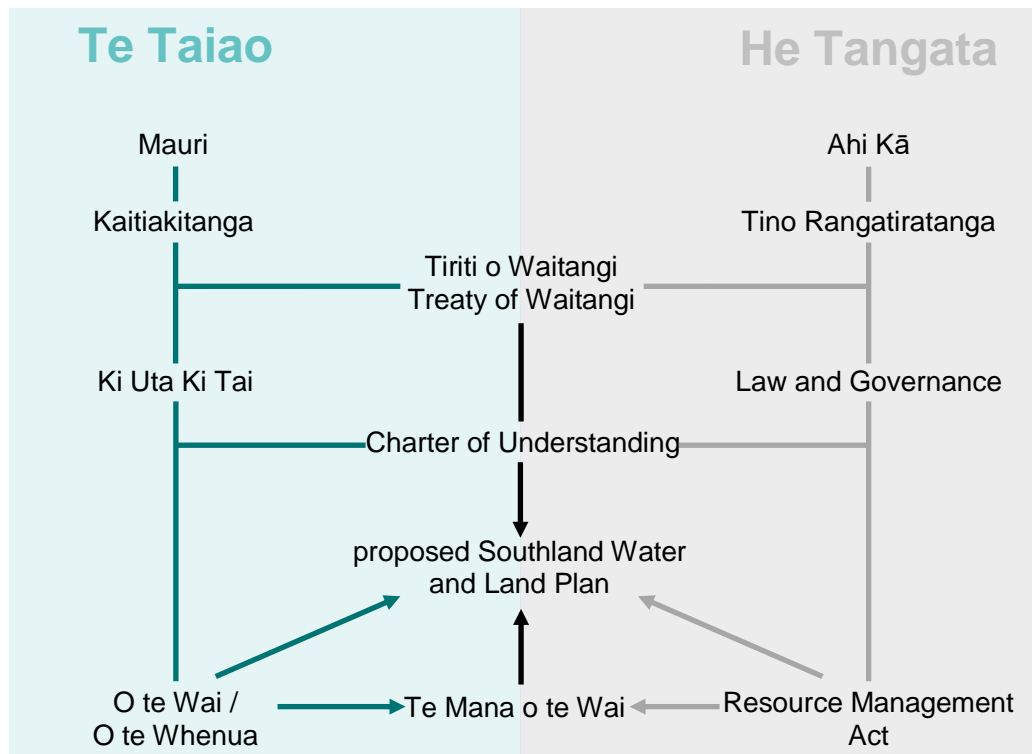


Figure 1: Ngāi Tahu ki Murihiku architecture for the pSWLP

21. This wider context is relevant to paragraph [22] of the Interim Decision. Te Mana o te Wai expresses Treaty Principles in that it is the whakapapa of Te Mana o te Wai in which the Treaty Principles are embedded and recognised. Te Mana o te Wai is most effective and authentic when it is connected to its whakapapa. The Murihiku whakapapa of Te Mana o te Wai is characterised by tikanga and cultural heritage unique to Murihiku. These matters were addressed in my evidence in chief and that of Mr Skerrett for the Topic A hearing.

DEVELOPMENT OF TE MANA O TE WAI

22. At a national level, Te Mana o te Wai was developed to help simplify and clearly articulate integrated Te Ao Māori concepts relating to freshwater management. It was also developed to provide an expression that all objectives can aspire to, not just those of tangata whenua. The concept was drafted by the Iwi Leaders Group - Freshwater by way of discussions with iwi, the Crown and through the Land and Water Forum.⁷

⁷ Personal communications with advisers to Iwi Leaders – Wai.

23. Te Mana o Te Wai was incorporated in the pSWLP early in the plan preparation process after being tested by Papatipu Rūnanga, Te Ao Marama Inc (**TAMI**) and Te Rūnanga o Ngāi Tahu staff, and considered against the 'O te Wai' policies in Te Tangi a Tauira.
24. While the name of the concept may have been different in Murihiku prior to the NPSFM, the description Te Mana o te Wai strongly aligned with water policies in Te Tangi a Tauira and its predecessor, Te Whakatau Kaupapa o Murihiku. Therefore, since 1997, Ngāi Tahu ki Murihiku has articulated in its Iwi Management Plans, water policies that sought the same outcomes as Te Mana o te Wai – active protection and prioritisation of the mauri of the water, halting of further degradation and improvement of the health of the water where degraded.
25. The encapsulation of three hauora – taiao, wai and tangata – within Te Mana o te Wai implicitly aligned with the culturally relevant and prominent measures of those outcomes.
26. In testing and applying Te Mana o te Wai, both prior to and during the drafting of the pSWLP, workshops/wananga were facilitated by TAMI with Papatipu Rūnanga, Te Rūnanga o Ngāi Tahu, Environment Southland, Southland District Council, Invercargill City Council and Gore District Council (see my Statement of Evidence (15 February 2019), paragraphs [86]-[87]). The inclusion of Te Mana o te Wai in the pSWLP was also discussed with parties during the Schedule 1 consultation. The section on Te Mana o te Wai in the pSWLP has not been edited since it was drafted in 2015.
27. Te Mana o te Wai has been part of the pSWLP throughout the consultation processes and attention was repeatedly drawn to it by TAMI – it was not hidden nor its importance understated by Ngāi Tahu ki Murihiku. However, my own views on the regard given by parties to both ki uta ki tai and Te Mana o te Wai in the pSWLP mirror the opinion of the Court (at paragraph [56] of the Interim Decision). Despite the importance of the concept and the intention that Te Mana o te Wai be 'fundamental to the integrated framework for freshwater management in Southland',⁸ the national significance of Te Mana o te Wai did not appear to be recognised nor prioritised in the evidence presented by most parties to the Court and Ki uta ki tai was not demonstrated in the assessments of most experts.

8 Proposed Southland Water and Land Plan, Decisions version at page 6.

- 28.** The approach to evidence and the cases presented by other parties is not a matter for me to comment on, although it is quite possible that many parties simply accepted and adopted the way that these matters were characterised in the Hearings Panel's recommendations and the Decisions version of the pSWLP. However, this situation did mean that Ngā Rūnanga was required to explain and justify an environmental philosophy that has:
- (a) existed (in one form or another) for centuries;
 - (b) been consistently expressed by Ngā Rūnanga for decades; and
 - (c) been mandated by the NSPFM.
- 29.** As I outlined in paragraph [17], Article 2 of Te Tiriti o Waitangi/Treaty of Waitangi provides Ngāi Tahu ki Murihiku the authority and right to make decisions over resources and taonga, and it does so using Ki uta ki tai.

DRAFTING THE PLAN

- 30.** It is my understanding that the proposed Southland Water and Land Plan has the primary purposes of:
- (a) combining provisions from the Regional Effluent Land Application Plan and Regional Water Plan into one document;
 - (b) implementing the NPSFM; and
 - (c) implementing a suite of plan changes related to the Water and Land 2020 work programme.
- 31.** In my role of Iwi Policy Officer at TAMI, I was involved at a staff level in the development of the pSWLP from 2014 to 2016. In my Statement of Evidence (15 February 2019), I have stated the three functions I had⁹ within the process and the values, aspirations and approaches TAMI sought to have included in the pSWLP.¹⁰
- 32.** For most of my involvement in the development of the pSWLP, it was intended to be a plan change (also discussed by Mr McCallum-Clark). The NPSFM was to be

⁹ At [33].

¹⁰ At [71]-[100].

implemented and this is how Te Mana o te Wai was included in the pSWLP. From an Environment Southland perspective, I understood that a risk management approach was being pursued of changing only those policies and rules that were considered necessary for the suite of plan changes and the Freshwater Management Unit process. I understood that, given the multitude of pressures on Environment Southland, this approach would 'protect' policies and rules from the risk of becoming more permissive.

33. This drafting approach resulted in limitations on the structure of the pSWLP and the weaving of key concepts throughout. The limitations were problematic for Te Mana o te Wai. They were also problematic in regards to other matters driven by Ngāi Tahu ki Murihiku, such as the inclusion of taonga species and mātaimai in the rules.¹¹ However, this limitation did not remove the intent or aspirations of TAMI to have them embedded, recognised and protected in the pSWLP.
34. At the later stages of the plan drafting process, while the proposed scope of changes to the status quo was still reasonably discrete, Environment Southland decided that the process would become a plan review.
35. During the drafting of the pSWLP, at my request, Environment Southland provided a cross reference of how the objectives, policies and rules related to one another. This document is attached as **Appendix A** to this statement. I note that while changes have been made to the content and scheme of the pSWLP since June 2015, with regards to the ki uta ki tai and Te Mana o te Wai objectives, all policies and rules were considered by Environment Southland to relate to ki uta ki tai, and most policies and all rules to Te Mana o te Wai.
36. While I knew of the limitations of plan development process, including that not all policies and rules would be amended, the analysis provided by Environment Southland gave me confidence that the Ki uta ki tai and Te Mana o te Wai Objectives would carry significant weight and drive the application of the related policies and rules. It was not until the Council Hearing process and the Topic A hearing that I became fully aware of the scale of the perceived limitations by other experts, including the overall effect of the scheme of the pSWLP.
37. The position I had on Te Mana o te Wai during drafting of the pSWLP was in line with the recommendations of the Summary Report: Te Waipounamu Te Mana o

11 Statement of Evidence of Michael Skerrett (15 February 2019) at [56]-[64] and Appendix A.

te Wai Case Study (which I contributed to for Southland), notably recommendations 1 and 2:¹²

R1: Establish and recognise Te Mana o Te Wai as the overarching framework for water management, and by association land management as this directly impacts on water, particularly use and quality.

R2: Statutory and regulatory frameworks need to recognise and provide for Te Mana o Te Wai as an overarching korowai for environmental management. Currently this model is inverted – iwi rights, interests, values and aspirations are subsidiary to statutory and regulatory frameworks and there is limited scope for recognising and providing for identified rights, interests and values.

- 38.** It is my understanding that the Ki uta ki tai and Te Mana o te Wai Objectives were included in the pSWLP as a link between the Introduction and Te Mana o te Wai sections to ensure they were clearly embedded throughout the pSWLP. As I have previously advised the Court, I am not a planner so deferred to the expertise of Environment Southland to ensure that this intention was realised in the notified provisions of the pSWLP.
- 39.** I have reflected on whether more could have been done by Ngā Rūnanga to ensure that its views and understandings were properly reflected throughout the pSWLP. Te Mana o te Wai was one of the strongest messages TAMI put forward in the development of the pSWLP. I now consider that while Environment Southland implied that it fully understood the implications of Te Mana o te Wai, it did not. The inclusion of Te Mana o te Wai was at the request of TAMI and under the direction of the NPSFM. The primary focus of the pSWLP from an Environment Southland perspective, in my opinion, was to regulate existing practices using tools more familiar to the Council. It has been my critique of the Decisions version of the pSWLP that it seeks to maintain the status quo.
- 40.** I consider that TAMI was very clear and consistent in expressing the views and aspirations of Papatipu Rūnanga, as outlined in Appendix B of my Statement of Evidence (15 February 2019), and that they genuinely believed that the inclusions of Te Mana o te Wai in the pSWLP would change how freshwater was managed in Southland. It had to – the state of water quality is not culturally acceptable.

12 Te Rūnanga o Ngāi Tahu *Summary Report: Te Waipounamu Te Mana o te Wai Case Study* (2005) at 5.

KOROWAI OBJECTIVES

41. As I stated in my Statement of Evidence (15 February 2019) at paragraph [85], 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 principle for freshwater management and supported its development and application in Southland to meet expectations and aspirations for freshwater.
42. With regards to the Court's question as to whether the elevation of these Objectives was the intent of plan drafters, I speak only from my point of view. 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. A focus of both my Statement of Evidence (15 February 2019) and Mr Skerrett's Statement of Evidence (15 February 2019) was 'key Ngāi Tahu concepts and how they were intended to be incorporated into the introductory sections, Objectives and Policies of the pSWLP'.¹³
44. The statement in the pSWLP that "the Southland Regional Council...seeks to manage water and land resources in a way that encompasses the Ngāi Tahu philosophy of "ki uta ki tai" to me demonstrates a clear intent. The clarity of statements such as this give confidence that the pSWLP genuinely adopts a different environmental management approach. From my reading of this statement, Ki uta ki tai is the overarching management approach for the pSWLP. It is a continual point of frustration for Ngāi Tahu ki Murihiku that important statements like these are used as part of introductory text but not realised due to the scheme and/or implementation of the plan.
45. I consider that the suggestion of the Court to provide clarity about the role of Objectives 1 and 3, by making them Korowai Objectives, would provide the certainty and status intended by TAMI and Ngāi Tahu ki Murihiku.

13 Statement of Evidence of Ailsa Cain (15 February 2019) at [16] and [35].

- 46.** The effect of Objectives 1 and 3 becoming Korowai Objectives, as discussed by Ms. Davidson, would be positive for four reasons:¹⁴
- (a) it would clearly elevate and articulate the pSWLP management intent of Ki uta ki tai to consider holistic and cumulative effects;
 - (b) it would signify the active protection mechanisms of Te Mana o te Wai to the mauri of the waterbody;
 - (c) it would demonstrate that there is a deliberate change to the status quo of water and land management in Southland and a paradigm shift in the way water and land resources are managed; and
 - (d) it would provide a culturally acceptable baseline of 'hauora' to the subsequent objectives, policies and rules; moving the discussion from 'is the waterbody degraded or not?' to 'is it in a state of hauora?'
- 47.** An outstanding matter for Ngāi Tahu ki Murihiku in the scheme of the pSWLP has been a baseline for determining if water quality and quantity should be maintained or improved. Maintaining the state from when the pSWLP came into effect has never been acceptable to mana whenua and that has been articulated to Environment Southland numerous times. The date of 2010, when the 10% improvement target was included in the Southland Regional Water Plan, was seen as better but still not ideal.¹⁵
- 48.** Objective 3 as a Korowai Objective would have the consequence of 'hauora' being the state or trigger to determine if the management technique is to improve water quality/quantity or to maintain it.
- 49.** This approach aligns with the Memorandum of Counsel on behalf of Ngā Rūnanga regarding Cultural Indicators of Health (29 November 2019):¹⁶

When a waterbody is no longer in the state of hauora, then is it degraded. If a waterbody continues to degrade over time it may come to a place where remedial actions to a state of te hauora o te wai is no longer possible or irreversible. Between

14 Memorandum of Counsel on behalf of Ngā Rūnanga regarding Cultural Indicators of Health (29 November 2019) at [12].

15 Statement of Evidence of Michael Skerrett (15 February 2019) at [102]-[105].

16 Memorandum of Counsel on behalf of Ngā Rūnanga regarding Cultural Indicators of Health (29 November 2019) at [14] and [16].

the states of hauora and “terminal” is a continuum – degradation is both a state (i.e., it is either degraded or it’s not) and a process (i.e., a continuum of degradation).

[...]

The definition of hauora and its application in cultural thresholds for degradation is visualised in Figure 1. The visualisation describes that when a waterbody is no longer in the state of hauora (green box), then is it degraded (yellow box). If a waterbody continues to degrade over time it may come to a place where the state of the waterbody is “terminal” (red box). The continuum of degradation from one state to another considers cumulative and compounding impacts, and spatial and temporal factors.

50. In this regard, I agree with and support the second key understanding of the Court.

TREATY PRINCIPLES AND THE PLAN

51. Ngāi Tahu is a post-Settlement iwi having has its historical grievances heard in the 1980s and 1990s with the Deed of Settlement signed in 1997. Ngāi Tahu is the only iwi with mana whenua status in Southland. The Deed of Settlement, Ngāi Tahu Claims Settlement Act 1998 (**Settlement Act**) and Te Tiriti o Waitangi/Treaty of Waitangi should all be referenced when explaining how the Treaty Principles were taken into account in the pSWLP.¹⁷ The Deed of Settlement or related Settlement Act are not the sole drivers for Treaty Partnership as they have a narrow focus of remedying Treaty breaches and the Crown was clear that water was ‘not on the table’ during historical Treaty negotiations.
52. The Deed of Settlement, Settlement Act and Te Tiriti o Waitangi/Treaty of Waitangi create a binding legal relationship between the Crown and Ngāi Tahu, however, this is much broader than simply a contract and includes aspects of beneficial/fiduciary relationship. Ngāi Tahu regard these three documents to be of fundamental constitutional importance.¹⁸
53. The Waitangi Tribunal does not have a single set of Treaty Principles that are to be applied in assessing each claim to determine whether the Crown acted inconsistently with the Treaty. Over the years, however, some core principles

17 The three documents are also referred to as the ‘Ngāi Tahu Trinity’ in the *Ngāi Tahu Rangatiratanga over Freshwater Strategy* (2019) at 14. The three documents are the basis of the contemporary relationship between the Crown and Ngāi Tahu.

18 Te Rūnanga o Ngāi Tahu *Ngāi Tahu Rangatiratanga over Freshwater Strategy* (2019) at 18.

have emerged from Tribunal reports, which have been applied to the varying circumstances raised by the claims.¹⁹

54. Māori legal academics have summarised the findings of the Tribunal to include the follow Treaty Principles:²⁰

- (a) duty to act in good faith and in partnership;
- (b) protection of Māori interests, taonga and development – the duty of the Crown is not just passive but extended to active protection of Māori people in the use of their lands and waters ‘to the fullest extent practicable’;
- (c) the Government must be able to make informed decisions;
- (d) to remedy past Treaty of Waitangi grievances; and
- (e) the Government has the right to govern in exchange for the exercise of rangatiratanga over resources listed in Article 2 without unreasonable and undue ‘shackles’.

55. Dr Robert Joseph also notes that:²¹

The above Treaty of Waitangi principles as enunciated by the New Zealand Courts and the Waitangi Tribunal along with the specific Māori provisions within the RMA appear then to provide sufficient legal protection of tikanga Māori rights, responsibilities and interests as well as plenty of scope for Māori participation in environmental natural resource governance and management.

56. Many of the matters relevant to the character and assessment of the Treaty Principles in the pSWLP have been raised in the Statements of Evidence of both myself and Mr Skerrett. Additionally, it is my opinion that the application of Treaty Principles should inherently incorporate the environmental philosophies of those who have the authority and right to make decisions over resources and taonga. This point was raised earlier in my evidence.

19 Waitangi Tribunal “Principles of The Treaty” (11 April 2020) <www.waitangitribunal.govt.nz/treaty-of-waitangi/principles-of-the-treaty/>.

20 Joseph, R. et.al *The Treaty, Tikanga Māori and Ecosystem-based Management in Aotearoa New Zealand – Possible Ways Forward* (University of Waikato, 2018) at 35-36.

21 At 38.

57. I note in paragraphs [81]-[91] of Ms. Davidson's evidence, she details several Treaty Principles that are relevant to the pSWLP.
58. With regards to freshwater management in Southland, I would be remiss not to acknowledge Environment Southland again as an early adopter of Te Mana o te Wai, and an active signatory to the Charter of Understanding. Of all the signatories,²² the Charter was acknowledged only by Ngā Rūnanga and Environment Southland during Environment Court proceedings. There is daily engagement between Environment Southland and TAMI on many matters, including the Regional Forum for the Freshwater Management Unit process.
59. Treaty Principles apply to the process of developing the pSWLP as they do to its content and outcomes. I consider the Court's summary of the process in paragraph [30] of the Interim Decision to be fair. TAMI was involved in the drafting of the pSWLP and TAMI governors attended workshops with Environment Southland Councillors. This is a demonstration of the partnership Treaty Principle but it is not an evaluation of how the Treaty Principles are taken into account.
60. Mr McCallum-Clark makes reference to the "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. This document was prepared by Ngā Rūnanga at the request of Environment Southland with the purpose of mana whenua evaluating the cultural effects of the pSWLP. I think this is an excellent demonstration of Treaty Partnership and a practise I hope to see again. However, I am unclear as to how this document was taken into account by decision makers.
61. Looking just at the content of the pSWLP and the articulation of Article 2 of Te Tiriti o Waitangi/Treaty of Waitangi from a Ngāi Tahu ki Murihiku perspective, then using the lens of Dr Joseph's comments, I consider that the application of Treaty Principles in the pSWLP is weak. The pSWLP starts with good intentions but the recognition of the mauri of the water and the active protection of its mana has not been realised in the outcomes of the pSWLP.
62. Treaty Principles are not a "tick box" against the inclusion of key words, such as mechanisms from the Settlement Act. It is my opinion that to account for Treaty Principles is to protect the tikanga and iwi/hapū philosophies related to their

22 Includes Environment Southland, Southland District Council, Gore District Council and Invercargill City Council.

management practices and interests in the outcomes of RMA plans and provide equal opportunity for Ngāi Tahu ki Murihiku to express its tino rangatiratanga.

- 63.** As currently drafted, the pSWLP does not protect the tikanga Ngāi Tahu ki Murihiku rights, responsibilities and interests. A clear example of this failure is that Ngā Rūnanga has had to be an active party to Environment Court proceedings. This active role has been necessary to ensure that Environment Southland, through its planning documents and exercise of its statutory functions, actually improves water quality within Southland as the current state of receiving environments and waterbodies is unacceptable,²³ and there was no faith that the pSWLP Decisions version would lead to that improvement.²⁴
- 64.** Gail Thompson stated in the video evidence presented by Ngā Rūnanga during the Council Hearing that “unless we have got good clean water we just are going to continually lose all those connections we have with our past and we won’t have a future.”²⁵
- 65.** To drive the necessary change in the management of freshwater in Southland, a paradigm shift is required. TAMI proposed that change to be Te Mana o te Wai, and Environment Southland made it fundamental to the pSWLP’s integrated management approach. For the pSWLP to protect the tikanga of Ngāi Tahu ki Murihiku would be to truly deliver Te Mana o te Wai and, as stated by the Court at paragraph [62] of the Interim Decision, ensure the hauora of waterbodies is at the forefront of all discussions and decisions about freshwater.
- 66.** The onus for evaluating how the Treaty Principles have been taken into account in RMA planning tools is often unfairly left just to mana whenua which thankfully, is not the case here. My evidence and that of Ms Davidson does not provide that evaluation but hopefully assists the Court with a Ngāi Tahu ki Murihiku context in which to consider the evaluation undertaken by Environment Southland (a Treaty Partner and signatory to the Charter of Understanding) of its own plan.

Guidance on Considering Treaty Principles

- 67.** In October 2019, the Crown set out guidelines agreed by Cabinet for policy-makers to consider Te Tiriti o Waitangi/Treaty of Waitangi in policy development and implementation. The government last provided broad Treaty guidance to the

²³ Statement of Evidence of Dr Jane Kitson (15 February 2019) at [32] and [151].

²⁴ Statement of Evidence of Michael Skerrett (15 February 2019) at [14] - [19].

²⁵ Gail Thompson - Cultural Evidence (in video format) presented on behalf of Nāai Tahu at the Council Hearing.

public service in 1989. Since then, over 70 Treaty settlements have been negotiated between Māori and the Crown.²⁶

68. The Cabinet guidelines contain a series of questions that may be useful for Crown agencies and local authorities in their response to the question posed by the Court about how the Treaty Principles are taken into account in the pSWLP. It is also my expectation that signatories to the Charter of Understanding will refer to it in their response.

CONCLUSION

69. Cultural contexts are crucial to understanding the cultural concepts and their appropriate application in resource management.²⁷ As outlined in my evidence, Ngā Rūnanga had a clear and inherent understanding of Ki uta ki tai and Te Mana o te Wai, and the implications of their inclusion in the pSWLP. There was an expectation articulated by myself and Ngā Rūnanga that these concepts, when embedded into the pSWLP, should and would drive change in the way water and land is managed in Southland.
70. Ki uta ki tai and Te Mana o te Wai were included early on in the drafting process for the pSWLP. The drafting process itself was limited due to the way in which it was conducted and this has had implications for how well key concepts are embedded in the scheme of the pSWLP. The quality of drafting process is not a reflection of the intent of Ngāi Tahu ki Murihiku who sought improvements to water quality and quantity through the pSWLP.
71. How the Treaty Principles have been taken into account in achieving the purpose of the RMA has not been evaluated in my evidence as I think this is a process for Environment Southland to undertake as a Treaty Partner and the statutory authority responsible for the pSWLP. I have instead, focused on matters to be considered in that evaluation and a Ngāi Tahu ki Murihiku cultural context.
72. Te Mana o te Wai is a product of Te Tiriti o Waitangi/Treaty of Waitangi and the Treaty Principles are part of its whakapapa. In itself, Te Mana o te Wai is not the expression of Treaty Principles and therefore, for Te Mana o te Wai to be effective in changing freshwater management in Southland, it must be connected to the tikanga and cultural heritage of Murihiku. Those connections need to be clear in

²⁶ Cabinet Office (Oct 2019) Te Tiriti o Waitangi / Treaty of Waitangi Guidance [CO (19) 5]

²⁷ Joseph, R. et.al., above n 20, at 41.

the scheme of the pSWLP. At a high level, the Korowai Objectives provide, the clarity sought by Ngā Rūnanga, as does the focus on hauora.

- 73.** Hauora aligns culturally relevant and prominent measures with the outcomes Te Mana o te Wai seeks and shifts the management of water and land in Southland to one of active protection and the prioritisation of mauri.



Ailsa Margaret Cain

17 April 2020

Appendix A

Table illustrating links between Objectives, Policies and Rules in the proposed Plan

3 June 2015

Objective	Policy	Rule
Tangata Whenua		
Objective 1 – Ki Uta ki Tai: Integrated management	All policies within this document relate to this objective	All rules within this document relate to this policy
Objective 2 – Te Mana o te Wai	Policy 5 - Implementing Te Mana o te Wai Policy 8 - Ngāi Tahu ki Murihiku Taonga Species Numerous policies relate to this objective	All rules within this document relate to this policy Structure and bed disturbance rules consider cultural values.
Objective 3 – Tangata Whenua Roles and Interests	Policy 7 – Take into account Iwi Management Plans Numerous policies relate to this objective	Numerous rules within this document relate to this policy
Objective 4 – Customary Use	Policy 6 – Enable kaitiaki responsibilities	All rules within this document relate to this policy
Objective 13 – Taonga Species	Policy 8 – Ngāi Tahu ki Murihiku Taonga Species Policy 23 – Lowland	Rule 5 – Discharges to surface water bodies that meet water quality standards Rule 6 – Discharges to surface water bodies that do not meet water quality standards Rule 19 – Riparian areas Rule 15 – Discharge of stormwater Rule 22 – Intensive Farming Rules Rule 67 – Wetlands
Water Quality		
Objective 5 – Maintain water quality	Policy 1 – FMU Status	Rule 2
	Policy 2 – FMU Sections	FMU process policies
	Policy 3 – FMU Process Policy	
	Policy 4 – FMU Methods	
	Policy A4 of the National Policy Statement for Freshwater Management 2014	Numerous discharge rules within this document relate to this policy
	Policy 9 – Surface water body classes	References within the take and discharge rules relate to water body classes
	Policy 10 – Physiographic zones	Rule 19 – Riparian areas Rule 15 – Discharge of stormwater Rule 22 – Intensive Farming Rules Rule 23 – Incidental Discharges Rule 23 – Hill country cultivation
Policy 11 – Natural State Waters	References included within the take and discharge rules	

	Policy 12 – No reduction in water quality	<p>Rule 5 – Discharges to surface water bodies that meet water quality standards</p> <p>Rule 6 – Discharges to surface water bodies that do not meet water quality standards</p> <p>Rule 7 – Other discharges to water</p> <p>Rule 8 – Discharges of surface water</p> <p>Rule 9 – Discharge of agrichemicals onto or into surface water</p> <p>Rule 10 – Discharge of agrichemicals to land where they may enter water</p> <p>Rule 12 – Discharge of non-toxic dyes</p> <p>Rule 21 – Discharge of water associated with water treatment processes</p>
	Policy 17 – Prefer discharges to land	<p>Rule 5 – Discharges to surface water bodies that meet water quality standards</p> <p>Rule 6 – Discharges to surface water bodies that do not meet water quality standards</p> <p>Rule 7 – Other discharges to water</p> <p>Rule 24 – Discharges from on-site wastewater systems</p> <p>Rule 33 – Discharge of agricultural effluent to land</p>
	Policy 18 – Use of diffusers	<p>Rule 5 – Discharges to surface water bodies that meet water quality standards</p> <p>Rule 6 – Discharges to surface water bodies that do not meet water quality standards</p>
	Policy 19 – Wintering and intensive farming	<p>Rule 14 – Discharge of fertiliser</p> <p>Rule 22 – Intensive Farming Rules</p> <p>Rule 23 Incidental Discharges</p> <p>Rule 24 – Hill country cultivation</p> <p>Rule 23 – Land development and cultivation</p>
	Policy 51 – Adverse effects of agricultural effluent systems	Rule 32 – Agricultural effluent storage
	Policy 52 - Animal effluent to pasture	Rule 33 – Discharge of agricultural effluent to land
	Policy 54 – Silage storage facilities	Rule 36 – Silage
	Policy 53 – Animal effluent consent duration	<p>Rule 33 – Intensive Farming Rules</p> <p>Rule 33 – Discharge of agricultural effluent to land</p>

	Policy 13 – Surface water bodies other than in Natural State Waters	All rules within this document relate to this policy
	Policy 15 – Adverse effects arising from point source and non-point source discharges	Rule 25 – Discharges from pit toilets Rule 26 - Discharges of liquid from waterless composting toilet systems Rule 27 – Discharges of aerobically composted human excreta Rule 28 – Discharges from mobile toilets Rule 29 – Dump stations Rule 30 – Community sewerage schemes Rule 31 – Industrial and Trade Process Rule 34 – Horticulture wash-water Rule 36 – Other agricultural effluent disposal
	Policy 14 – Surface water bodies outside Natural State Waters	Rule 5 – Discharges to surface water bodies that meet water quality standards Effluent discharge rules protect natural state waters Rule 13 – Discharge from installed subsurface drainage systems Rule 15 – Discharge of stormwater Rule 16 - Discharge of stormwater into or onto land
	Policy 16 – Discharges to water in artificial watercourses	Rule 17 – Discharge of water from bores and wells
Objective 6 – Drinking Water Standard	Policy A4 of the National Policy Statement for Freshwater Management 2014	All rules within the plan
	Policy 24 – Water abstraction for community water supply	Rule 45 – Community water supply
Water Quantity		
Objective 7 – Sufficient water availability	Policy B7 of the National Policy Statement for Freshwater Management 2014	All rules within the plan
	Policy 22– Surface water takes, damming, diversion and use	Rule 44 – Abstraction, diversion and use of surface water
	Policy 23 – Lowland	Rule 44 – Abstraction, diversion and use of surface water
	Policy 25 – Water demand management strategy	Rule 44 – Abstraction, diversion and use of surface water
	Policy 28 – Fully allocated surface water bodies	Rule 44 – Abstraction, diversion and use of surface water

	74. Policy 31 – Natural state water quantity	Rule 44 – Abstraction, diversion and use of surface water
Objective 8 – The Waiau catchment	75. Policy 29 – Existing hydroelectric generation facilities in the Waiau catchment	Rule 47 – Water abstraction, damming, diversion and use from the Waiau catchment
Objective 9 – Efficient water use	Policy 20 – Manage the taking, use, damming or diversion of surface water	Rule 46 – Minor diversions of water
	Policy 27 – Instigate appropriate water conservation procedures	Rule 44 – Abstraction, diversion and use of surface water Rule 45 – Community water supply
	Policy 30 – Renewable energy	
	Policy 32 – Transfer of water permits	
	Policy 33 – Reasonable use of water	Rule 44 – Abstraction, diversion and use of surface water
	Policy 35 – Priority takes	Rule 45 – Community water supply
Objective 10 – Sustainable abstraction	Policy 34 – Measurement and Reporting of Water Takes	
	Policy 21 – Determining the term of a resource consent	Rule 44 – Abstraction, diversion and use of surface water Rule 45 – Community water supply
	Policy 26 – Environmental flow and level regimes	Rule 44 – Abstraction, diversion and use of surface water Rule 45 – Community water supply Rule 47 – Water abstraction, damming, diversion and use from the Waiau catchment
	Policy 36 – Bore construction and management	Rule 20 – Discharge of water from purging of instruments at a water treatment plant Rule 48 - Bores and Wells
	Policy 37 - To manage groundwater abstraction	Rule 49 - Abstraction and use of groundwater
	Policy 38 - Stream depletion effects	Rule 49 - Abstraction and use of groundwater
	Policy 39 - Groundwater abstraction	Rule 48 - Bores and Wells
	Policy 40 - Interference Effects	Rule 48 - Bores and Wells
Land and Soil		
Objective 11 – Maintain soil quality	Policy 42 – Matching discharges onto or into land to risk	Rule 11 – Discharge of vertebrate pest control poisons Rule 18 – Discharge of raw sewage, contaminants from on-site wastewater systems and mobile toilets, or untreated animal effluent

	Policy 41 – Physiographic zones	Rule 18 – Riparian areas Rule 22 – Intensive Farming Rules Rule 23 Incidental Discharges Rule 24 – Hill country cultivation
	Policy 56 – Assess land contaminated by a hazardous substance	Rule 41 – Land Contaminated by a Hazardous Substance
	Policy 57 – Manage land contamination	Rule 35 – Agricultural dips Rule 39 – Dead holes (offal pits) Rule 40 – Landfills Rule 42 – Closed landfills Rule 43- Cemeteries
	Policy 55 – Discharge waste and cleanfill appropriately	Rule 37 – Cleanfill sites Rule 38 – Farm landfills
River Bed and Lake Bed Use and Development		
76. Objective 12 – Habitats and ecosystems	Policy 44 – Provide for the extraction of gravel	Rule 66 - Gravel extraction
	Policy 45 – Drainage maintenance	Rule 73 - Weed and sediment removal for drainage maintenance
	Policy 46 – Stock exclusion from access to surface water	Rule 18 – Riparian areas
	Policy 48 – Indigenous vegetation and significant habitats	Rule 68 – Indigenous vegetation Rule 69 – Significant indigenous vegetation
	Policy 49 – Adverse effects of activities	Rule 67 – Wetlands
	Policy 50 – Restoration of existing wetlands and the creation of wetlands	Rule 67 – Wetlands
Objective 13 – Taonga Species	Policy 8 – Ngāi Tahu ki Murihiku Taonga Species Policy 23 – Lowland	Rule 68 – Indigenous vegetation Rule 69 – Significant indigenous vegetation
Objective 14 – Public access	Policy 43 – Structures and bed disturbance activities of rivers and lakes	Rule 72 - Vehicles and machinery Rule 50 – Monitoring and sampling structures Rule 51 - Boat ramps, jetties and wharves Rule 52 – Bridges Rule 53 – Cables, wires and pipes
Objective 15 – Natural character and outstanding natural features	Policy 43 – Structures and bed disturbance activities of rivers and lakes	Rule 50 – Monitoring and sampling structures Rule 51 - Boat ramps, jetties and wharves Rule 52 – Bridges Rule 53 – Cables, wires and pipes Rule 54 – Culverts

		<p>Rule 55 - Dams and weirs Rule 56 - Erosion control structures Rule 57 – Fords Rule 58 - Moorings, navigational aids and signs Rule 60 - Maintenance of structures Rule 61 - Alteration and/or extension of structures Rule 62 - Demolition and/or removal of structures Rule 63 - Structures not covered by, or not complying with, rules Rule 64 - Channel realignment or deepening Rule 65 - Dry cuts Rule 70 - Vegetation flood debris removal Rule 71 - Vegetation planting Rule 74 - Bed disturbance activities not covered by, or not complying with, rules Rule 75 - Standard conditions</p>
	Policy 47 – Whitebait Stands	Rule 59 - Whitebait stands

Note: Rules 1, 3 and 4 relate to the process of the plan and are not included in the table.