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 TREENA LEE DAVIDSON 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

Planning

17 April 2020

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MAY IT PLEASE THE COURT

INTRODUCTION

1. My name is Treena Lee Davidson. My experience and qualifications are set out in my evidence in chief dated 18 April 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. I note that whilst I am employed by Te Rūnanga o Ngāi Tahu, I am bound by the Code of Conduct and professional ethics of New Zealand Planning Institute (**NZPI**), and 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 2019[1] (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.

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

1 *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208.
2 At [347].
3 Record of Pre-hearing Conference pSWLP (Topic A) (10 February 2020) at [4] - [5].

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. More specifically, I will:

(a) Set out my agreement with the Court that Ki uta ki tai and Te Mana o te Wai should be seen as the korowai that sits across the Plan, and that Objectives 1 and 3 should be elevated above the other objectives to ensure there is no doubt that this is how the plan should be interpreted.

(b) Explain the factors I have considered in arriving at this position.

(c) Consider the Principles of the Treaty – rangatiratanga and active protection in the RMA context as it relates to the Plan.

8. In preparing my evidence I have reviewed:

(i) The Interim Decision;

(ii) The notified pSWLP;

(iii) The Section 32 Report and associated technical reports;

(iv) The Section 42A Report;

(v) Relevant notices of appeal;

(vi) The NPSFM 2014 (as amended 2017) and its 2011 predecessor;

(vii) The operative Southland Regional Policy Statement 2017;

(viii) Te Tangi a Tauira, Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan, 2008;

(ix) The submission and further submission and appeal by Te Rūnanga o Ngāi Tahu and Ngā Rūnanga on the notified proposals (Ngāi Tahu Submission and Further Submission);

(x) The Regional Water Plan for Southland (April 2010); and

(xi) Relevant statements of evidence.

9. In formulating this evidence, I have discussed the issues and its content with Ms Ailsa Kane and also with Mr Matthew McCallum-Clark, planning witness for Environment Southland. Throughout the course of preparing this evidence and addressing the Court's questions we all met and have exchanged drafts of our evidence.

10. I should also make it clear that I acknowledge at the outset that I am fully aware some of the drafting and relief that I have outlined in this statement is beyond the scope of appeals and would raise jurisdictional issues. I have discussed and confirmed this approach with legal counsel for Ngā Rūnanga. Our understanding is that the Court has sought evidence which addresses the substance of its questions about Te Mana o te Wai and Ki uta ki tai, rather than necessarily being constrained by questions of scope. I accept that the Court may dismiss parts of this evidence on the basis that it is beyond scope, and that is entirely a matter for it. This explains why I have gone further in my evidence than Mr McCallum-Clark and taken a different approach.

EXECUTIVE SUMMARY

11. I agree with the Court that Ki uta ki tai and Te Mana o Te Wai should be seen as the korowai that sits across the Plan, and that Objectives 1 and 3 should be elevated above the other Objectives to ensure there is no doubt that this is how the Plan should be interpreted and applied through policies and rules.

12. As I will go onto discuss and as is described in the evidence of Ms Cain, when the Plan was being developed, Nga Rūnanga were involved and understood that the whole Plan was intended to implement Te Mana o te Wai. The evidence is clear that Nga Rūnanga agreed with this approach.

13. In my previous evidence for Nga Rūnanga, I have referred to the Objectives as a suite that responded to Te Mana o te Wai, with no need for an explicit hierarchy to be developed. However, in reviewing evidence of other parties to the Council Hearing and also the Hearing Panel's decision, I have realised that at least some parties (and the Panel) have interpreted Objective 3 too narrowly as only being concerned with cultural values. This view has also been apparent in evidence presented to the Court for the Topic A hearing.

14. Elevating Objectives 1 and 3 to give them an overarching status would make it clear that: they should not be interpreted narrowly, they have priority, and that other objectives should therefore not be considered as having the same status.

15. The Principles of the Treaty, in the RMA context, relate to both RMA processes and to plan provisions, with some Principles (e.g. partnership), being more important in relation to processes.

16. I consider the Principles that have direct relevance in terms of plan provisions include Tino Rangatiratanga and active protection. I did not consider it was appropriate for me to comment on the extent to which rangatiratanga and active protection have been taken into account in the proposed Plan. However, I would suggest the extent to which the Plan provisions affect rights to exercise Tino Rangatiratanga goes beyond simply inserting Ngāi Tahu tikanga concepts or Māori words into the proposed Plan. Instead, the pSWLP should show intent that Ngāi Tahu concerns have been taken into account in the way that the policies and rules are structured.

17. From the appeal and evidence of Ngā Rūnanga, I would suggest that active protection has not been provided for. Much of the evidence before the Court has shown a decline in water quality water and an alienation from or diminished ability to undertake practices intended to be protected by the Ngāi Tahu Claims Settlement Act 1998, including those than have been historically undertaken.

TE MANA O TE WAI AND KI UTA KI TAI IN THE INTERIM DECISION

18. I consider that the Interim Decision has addressed many of the matters that were central to the Ngā Rūnanga appeal and in particular its concerns with the amendments made to the Objectives in the Decisions version of the Plan.[4]

19. I consider that the Court has, in particular, viewed Te Mana o te Wai and Ki uta ki tai in the manner that Ngā Rūnanga consider appropriate. This is supported by the supplementary evidence of Ms Cain at paragraph [50].

20. I agree with the three key understandings set out by the Court, and have based my analysis of the Objectives and the intent of the Plan on these:

(a) As a matter of national significance, the NPSFM requires users of water to provide for hauora, and in doing, acknowledge and protect the mauri of the water.[5]

(b) The health and wellbeing of water are to be placed at the forefront of discussion and decision making. Only then can we provide for hauora by managing natural resources in accordance with Ki uta ki tai.[6]

(c) The NPSFM makes it clear that providing for the health and wellbeing of waterbodies is at the forefront of all discussions and decisions about freshwater.[7]

21. The Court posits (at paragraph [65] of the Interim Decision) that the Plan was drafted in a way that all objectives and policies were intended to express Te Mana o te Wai and Ki uta ki tai. I agree that this was intended to be the case, but that this intention has not been realised.

4 These matters are summarised in the Notice of Appeal of Ngā Rūnanga (17 May 2018) at [8].
5 Interim Decision at [17].
6 At [59].
7 At [62].

PLAN INTENT

Original drafting intent

22. I was employed by Ngāi Tahu just as the pre-notification consultative process required by the First Schedule of the Resource Management Act 1991 (**RMA**) was commencing for the Proposed Plan. I am aware of and have been engaged in the processes from that time to the current day.

23. As I was not engaged in the drafting of the Proposed Plan, I have not provided evidence on this part of the process. I would however refer to the points made at paragraph [110] of the Statement of Evidence of Mr Skerrett (15 February 2019):

> When we agreed for the pSWLP to be notified it was less than perfect from our perspective. While our policies were threaded throughout the pSWLP, they were not backed up by appropriate rules that will give effect to them. In agreeing for the pSWLP to be notified, it was our opinion that it could and should be strengthened through the submission and hearings process. This has not turned out to be the case; rather as a result of decisions on submissions, the pSWLP has been further compromised in my opinion.

24. My interpretation of the intent of the Objectives with regard to the use of Te Mana o te Wai in the Plan aligns with that of Ngā Rūnanga. I have been familiar with the concept of Te Mana o te Wai for some time as I had worked at Te Puni Kōkiri when the NPSFM 2014 was being drafted. So I knew Te Mana o te Wai to be a lens, or a different way of discussing water, that put the needs of the waterbody first.

25. However, while drafting this, I realised I did not extensively review Objectives 1 or 3 and their role in the Plan as a part of my evidence before the Hearings Panel. This was because Ngā Rūnanga had supported those Objectives as notified and because the Section 42A Report had recommended that changes to those Objectives be declined, including the relief sought by Federated Farmers which was to merge Objectives 3 – 5 into a single Ngāi Tahu Objective.[8] I had not realised at the time of the Council Hearing the extent to which it appears that Te Mana o te Wai in particular was viewed as applying exclusively to Māori.

8 Section 42A Report at paragraphs 5.37 – 5.44.

Decisions version of Plan

26. The evidence that was provided to the Court by Ngā Rūnanga, including my own, highlights where and how Ngā Rūnanga consider what was agreed when drafting the pSWLP has been diluted in intent and purpose through the Decisions versions which was considered by the Court.

27. In my opinion, the *Report and Recommendations of the Panel* (**Decision Report**) viewed Te Mana o te Wai and Ki uta ki tai as ways of expressing a Ngāi Tahu perspective or as Māori concepts, rather than a key environmental management objective (mandated by the NPSFM) underpinning the proposed Plan's approach. The following extracts from the Decision Report highlight this:

> The Introduction of the Plan states that the management of natural resources in the region is dealt with in a holistic way and that there is no specific or separate section that deals with tangata whenua matters. Further, that tangata whenua themes and issues have been integrated through the Plan provisions to reinforce the Ngāi Tahu philosophy of Ki uta ki tai.[9]
>
> […]
>
> AA1 is to consider and recognise Te Mana o te Wai in the management of fresh water. Policy AA1 directs the Council to consider and recognise Te Mana o te Wai in preparing the pSWLP. We address the values and interests of Ngāi Tahu in Chapter 4 of this report and we note Objective AA1 and Policy AA1 to be particularly relevant for pSWLP Objectives 3, 4, 5 and 15 and Policies 1, 2 and 3.[10]

28. The Decision Report was also reliant upon the Section 42A Report prepared by the Council. In that report, Objective 3 was considered to be an appropriate way to achieve the direction set out in sections 6(e) and 7(a) of the RMA, which includes provision for the exercise of kaitiakitanga in accordance with tikanga Māori.[11]

29. The Section 42A Report clearly indicates that the report author considered that the objectives should be read as a whole.[12] However, the Hearings Panel appeared to apply a very narrow focus towards Objective 3 and its role[13] – confining its

9 Decision Report at [93].
10 At [135].
11 Section 42A Report at [5.41].
12 At [5.6]
13 Decision Report at [5.41] – [5.43].

relevance and application to cultural values rather than viewing it as an overarching requirement of the NPSFW.

30. The role of Te Mana o te Wai as a korowai may have also been overlooked by the Hearings Panel to the extent that it appeared to consider that the role of Te Mana o te Wai was confined to the Freshwater Management Unit (**FMU**) process: [14]

> …the Objectives are not freshwater objectives as defined in the NPSFM. NPSFM compliant objectives will be developed as a part of the Council's FMU process.

31. The narrow interpretation of Te Mana o te Wai is also reflected in the amended Section 32 Report which states: [15]

> This objective is an appropriate way of achieving the direction set out in section 6(e) and 7(a) of the RMA and also the concept of Te Mana o te Wai which is introduced through the Objective AA1 and policies of the NPSFM. This objective requires that resources within the region are managed to ensure that cultural resources found in the region's waterbodies are of a quality and abundance that is sufficient to support cultural, physical and social health and well-being.

32. That Objective 3 was considered to be a tangata whenua objective is further highlighted in Appendix B of the Updated Evaluation Report: Proposed Southland Water and Land Plan.[16] More specifically, the table highlights that Objective 1 clearly relates to all policies in the Plan whereas Objective 3 only relates to the Tangata Whenua Policies - 1, 2, 3 and 44. In terms of how Objective 3 was intended to relate to the Plan Rules, the table states that "tangata whenua themes and issues are integrated through the Plan provisions to reinforce the Ngāi Tahu philosophy of Ki uta ki tai."

33. Given the evidence of Ms Cain about the interaction of mana whenua with Environment Southland and key stakeholders, it is surprising that the foundation concept and management philosophy underpinning the pSWLP was characterised and understood in this way. This interpretation has meant that the pSWLP (particularly the Decisions version) took very much of a "business as usual" approach to plan drafting and environmental management.

14 Decision Report at paragraph [136].
15 At 33.
16 As prepared for the Environment Court (19 October 2018).

RECONSIDERING THE PLAN'S OBJECTIVES

The use of Korowai Objectives

34. I agree with the Court at paragraph [56] of the Interim Decision that "*the provisions of the Plan are to be interpreted and applied in a manner that gives effect to Te Mana o te Wai and implemented in accordance with Ki uta ki tai*".

35. In preparing my Statement of Evidence (18 April 2019), I did not consider elevating Objectives 1 and 3 to be strategic (or Korowai) objectives. Instead I had focused on the Objectives being a suite of objectives that were all to be read using a Te Mana o te Wai lens. My thinking was that the provisions of the Plan would respond in a manner that showed a clear hierarchy that put the needs of water first, then other uses. It would appear however that as discussed in paragraphs [27] to [32] above, Objective 3 has been considered in the Hearing Panel's decision as a tangata whenua objective, or just one of a suite of objectives rather than having applicability to all freshwater use and, as the Court has identified, this has implications for how the Objectives are read. This view was also reflected in the evidence of many parties to the Topic A hearing before the Court.

36. Having reflected on how this view may have been reached and in response to the Court's queries, I now consider there is considerable merit in having Objectives 1 and 3 identified as strategic or Korowai Objectives. This would ensure that Objectives 1 and 3 will drive the step changes in the philosophy and management approach for fresh water which the Plan states it is founded upon, and which are required by the NPSFM. It will also ensure that they are given priority over the other Objectives, which will in turn protect against Te Mana o te Wai being minimised in the same way it was by the Hearings Panel.

37. If Objectives 1 and 3 are not elevated to the role of strategic or Korowai Objectives, then in my opinion, significant redrafting of the Objectives would be necessary to ensure each of them individually gave effect to Te Mana o te Wai and applied the concept of Ki uta ki tai.

38. If the Korowai approach is adopted, some consequential changes will be needed in order to correctly reflect the hierarchy and approach – for example amending Objective 6. These suggested changes and the considerations for applying Korowai Objectives to the other Objectives are discussed in the next section.

Effect of Korowai Objectives on the Plan

39. If made Korowai Objectives, Objectives 1 and 3 will have a priority and the other Objectives should not be considered as having the same status. The elevation of Objectives 1 and 3 to Korowai Objectives will affect the other Objectives because, as a result, they will all need to "put the needs of the waterbody first".

40. Mr McCallum-Clark and I spent considerable time discussing the merits or otherwise of effectively re-opening matters, and I agree with Mr-Callum-Clark's statement that we:

> …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.

41. However, in considering how the Korowai Objectives impacted on the Objectives and how the Court's three key understandings could be reflected, I concluded that the Objectives needed to be revisited as a suite.

42. **Appendix A** therefore, contains suggested amendments which I consider will ensure the Objectives are consistent with the Ki uta ki tai and Te Mana o te Wai approach. I will discuss the rationale for each suggested amendment in turn.

43. To be clear, based on my understanding of the Court's queries and directions, I have considered the approach of using Korowai Objectives against all the Plan's Objectives, not just those that are subject to appeal.

Objective 2

44. While my Statement of Evidence (18 April 2019) (at paragraphs [52] – [60]) suggested that primary production could be included in Objective 2, this was my least preferred option. My concern being that specific reference to primary production provided for one type of land use over other values and uses of water[17] and that its inclusion implied water to be a commodity.[18] My evidence also noted that preferential treatment for farming was not provided for in the SRPS.[19] For

17 Statement of Evidence of Treena Davidson (18 April 2019) at [57].
18 At [55].
19 At [58].

these reasons I agree with the decision by the Court to exclude reference to primary production.

45. However, the intent of an objective is to state what is to be achieved.[20] As worded, this Objective still places a commodity focus on land and water. If the intent of elevating the status of Objectives 1 and 3 is to place the health and wellbeing of waterbodies at the forefront of discussions and decisions, as I consider it should be, then the intent of Objective 2 should be considered further.

46. I consider economic, social and cultural wellbeing are adequately addressed in the other Objectives and there is no need to repeat these matters in Objective 2. For example:

(a) Water enabling economic, social and cultural wellbeing is provided for in Objectives 4 – 12 and 17; and

(b) Enabling land use is provided for in Objectives 13 and 17 as proposed by the Court.

47. The current wording also does not indicate that the outcome is to be achieved at the expense of Objectives 1 and 3 (which I do not consider is appropriate). Given these points I question the necessity of Objective 2 and suggest that it could be deleted in its entirety.

Objectives 4 and 5

48. Although I recognise that Objectives 4 and 5 are not the subject of appeal, I have considered them in the context of applying Korowai Objectives. Objectives 4 and 5 relate specifically to tangata whenua and Ngāi Tahu and require consideration of their values being included in the management of freshwater and associated ecosystems. Objective 5 is essentially for Ngāi Tahu to have access to and sustainable customary commercial and non-commercial use of mahinga kai resources, nohoanga, mātaitai and taiāpure. I do not consider that these objectives require any amendment should there be Korowai Objectives.

20 Quality Planning Website

Objective 6

49. I consider that the main point for consideration of the suggested Korowai Objectives and Objective 6 is the use of the term "degradation" and how it relates to the state of hauora. In the Memorandum of Counsel on behalf of Ngā Rūnanga regarding Cultural Indicators of Health, it is stated that:[21]

> 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 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).

50. I agree with this approach and consider that in providing Korowai Objectives, Objective 6 should be redrafted to recognise that *"it is not seriously contested that many of [Southland's] waterbodies are likely degraded".*[22] I consider that the Plan is currently not acknowledging or protecting the mauri of the waterbody in a state of hauora and therefore, that many waterbodies require improvement. The measure of improvement would the extent to which the mauri of the waterbody is acknowledged and protected – or as described in the memorandum on behalf of Ngā Rūnanga, the extent to which the application provides interventions towards a state of hauora.[23]

51. Where a waterbody is not degraded, I would suggest it is addressed by Objective 3 as amended by the Court. Objective 3 would require the mauri of the waterbody to be protected in a state of hauora.

52. I therefore consider the wording of Objective 6 could be amended so that it only addresses degraded water quality. The extent to which interventions move towards achieving a state of hauora is then the benchmark by which water quality is assessed.[24] Clarification of how this is to be done would be provided through amendments to the policies and rules of the Plan.

53. I agree with the Court (at paragraphs [100] – [107] of the Interim Decision) and its rationale for removing the term "overall" and using "each freshwater body". These

21 Memorandum of Counsel on behalf of Ngā Rūnanga Regarding Cultural Indicators of Health at [14].
22 Interim Decision at [117].
23 Memorandum of Counsel for Ngā Rūnanga Regarding Cultural Indicators of Health at [14] – [16].
24 This addressing the query by the Court at [123] – [124] of the Interim Decision.

amendments better provide for Ki uta ki tai and address the risk of "trade-offs" of water quality.[25]

54. The Interim Decision (at paragraphs [125] – [129]) questions whether the omission of certain types of water bodies and whether or not it was intentional. I note that the suggested wording in the Closing Submissions on behalf of Ngā Rūnanga sought the inclusion of estuaries and coastal lagoons. This was to address its concerns around these being receiving waterbodies for many catchments and the resulting poor water quality in them, and the fact that these waterbodies are specifically provided for in the NPSFW. I consider that the addition of estuaries and coastal lagoons would also show a clear alignment with the Korowai Objective of Ki uta ki tai.

55. In light of these considerations I suggest that Objective 6 amended to read:

> The water quality in each freshwater body, estuary and or coastal lagoons in Southland degraded by human activities is improved.

Objective 7

56. The Court's amendment to Objective 7 relates to the FMU process to come. In my opinion, elevating Objectives 1 and 3 to Korowai Objectives will further highlight the importance of consideration of the Te Mana o te Wai in the limit setting process provided for in Policy 44 of the proposed Plan, and will ensure that the consideration of what is degraded for the purpose of that process is appropriately clear and calibrated. In particular, based on the evidence of the widespread degradation of water quality across Southland, an approach for FMUs that gave considerable weight to existing allocations or activities would be unlikely to appropriately reflect a management philosophy based on Te Mana o te Wai and Ki uta ki tai.

Objective 8

57. I consider this Objective seeks to maintain, at the least, te hauora o te tangata and sets a clear statement that the Drinking Water Standards for New Zealand 2005 (revised 2008) is the minimum that must be achieved for groundwater and so is consistent with the use of a Korowai Objectives approach.

25 Statement of Evidence of Treena Davidson (18 April 2019) at [63].

Objectives 9 and 9A

58. The Court has proposed wording for Objectives 9 and 9A that I generally agree with. The Court's wording aligns with the Ngā Rūnanga appeal which sought the reinstatement of an approach which managed the needs of the surface waterbody, ecosystem health, life supporting capacity, outstanding natural features and landscapes, and natural character. Only if those priorities were met then could instream and out-of-stream use be provided for. The amendments to these Objectives in the Decisions Version suggested that the needs of waterbodies could be balanced against the needs of people and communities. The wording proposed by the Court reinstates the prioritisation sought by Ngā Rūnanga and I consider it gives effect to Te Mana o te Wai.

59. I consider that under the Korowai structure, the question of the Court (at paragraph [157] of the Interim Decision) about "life-supporting capacity" could be looked at in light of hauora o te taiao. I agree with the consideration of the Court (at paragraph [139]) that with the Korowai Objectives, the use of the terms "life-supporting capacity" and "aquatic ecosystem health" may in fact be redundant. It could be that the term hauora o te taiao is used in place of both.

Objective 9B

60. The Court has proposed rewording this Objective so that it is to be interpreted and applied in a manner that gives effect to Te Mana o te Wai and can be implemented in accordance with Ki uta ki tai. I agree with the Court's proposed wording for the reasons the Court sets out at paragraphs [175] – [180] of the Interim Decision. If the Plan incorporates Korowai Objectives, I consider that "sustainable and effective" will mean that Mana o te Wai will need to be given effect to and that it is implemented in accordance with Ki uta ki tai.

61. I consider the wording proposed by the Court removes the concern that Ngā Rūnanga had about it being an enabling directive with the intent of securing the least restrictive activity status when seeking a resource consent.[26] Though I would caution that the activity status of the rules still needs to be considered.

26 Closing submissions on behalf of Ngā Rūnanga at [61]-[64].

62. I consider that the removal of reference to "critical infrastructure" from the Objective is appropriate as it is covered by the definition of *Regional Infrastructure*. This is in line with my Statement of Evidence (18 April 2019).[27]

Objective 10

63. I consider adoption of a korowai structure would change how Objective 10 reads. If the Korowai Objectives are applied, this Objective is no longer a "stand-alone" objective potentially prioritising operations associated with the Manapōuri hydro-electric generation scheme. I consider that adopting a korowai structure means that any consideration of limit and flow regime will also need to consider Ki uta ki tai and the mana of the Waiau River. I consider that this consequence would be appropriate.

64. I am aware that questions have been asked of Meridian Energy by the Court (at paragraph [225] of the Interim Decision). These questions may require further consideration of whether or not the intent of the Objective was to enable processes that did not result in water use being used more efficiently and effectively, or process that do not acknowledge and protect the mauri of the water.

65. Regardless of whatever the initial intent behind Objective 10 was, I consider that it is still possible to interpret and apply the Objective in a way that is consistent with Te Mana o te Wai and a Ki uta ki tai approach.

Objective 11

66. With the introduction of Korowai Objectives, I consider Objective 11 as worded provides a clear direction that any allocation of water should only be undertaken if it is "shown to be reasonable for its intended use" and the water is "allocated and used efficiently". This is because Objective 11 would also be subject to the Korowai Objectives meaning that Objective 11 can only be realised if/when Te Mana o te Wai is provided for.

Objective 12

67. I consider that Objective 12 aligns with the first and third key understandings of the Court. The Objective provides for the state of hauora of water by requiring that

27 Statement of Evidence of Treena Davidson (18 April 2019) at [85].

groundwater is sustainably managed. It further recognises the Ki uta ki tai concept in the role that groundwater has in providing for the life-supporting capacity and ecosystem processes in surface water.

68. If however amendments are made to the use of the term "life-supporting capacity" in Objectives 9 and 9A, I would suggest that similar redrafting is necessary here.

Objective 13

69. I agree with the rewording that has been advanced by the Court. I agree with the Court (at paragraph [252] of the Interim Decision) that the rephrasing to focus the Objective on use and development of land and soils to enable wellbeing has greater resonance with Te Mana o te Wai than what was proposed in Decisions version.

Objective 14

70. Objective 14 aligns with the Court's third key understanding and also with Ki uta ki tai, by recognising that Southland contains a range and diversity of indigenous ecosystem types and habitats and that these must be maintained or enhanced.

Objective 15

71. I agree with the Court (at paragraph [32] of the Interim Decision) that Objective 15 as worded could be considered to not provide for the Treaty Principle of active protection. As the Court indicates, Objective 15 provides for taonga species that are included in the Ngāi Tahu Deed of Settlement and the Ngāi Tahu Claims Settlement Act 1998. A concern I have with any rewording, which I raised in my Statement of Evidence (18 April 2019) at paragraph [149], was that any rewording should not exclude Ngā Rūnanga from mahinga kai.

72. If a korowai approach is applied, while te hauora o te taiao is addressed, I consider it is still appropriate to have a provision that specifically refers to how taonga

species and their related habitats are provided for. I suggest that Objective 15 could be amended to read:

> Taonga species, as set out in Appendix M, and related habitats are recognised and protected.

The use of the term "protected" being consistent with Objective 3.

Objective 16

73. I consider that this Objective aligns with the Court's key understandings and in particular the third. While public access is maintained or enhanced, there is an exception for public health and safety and protection of significant indigenous biodiversity values.

Objective 17

74. I consider that this Objective aligns with the key understandings of the Court and recognises Ki uta ki tai in that it looks to protect the natural character of wetlands, rivers and lakes as well as their form, flow variability and the habitats within them from inappropriate subdivision and development.

Objective 18

75. I agree with the Court (at paragraph [290] of the Interim Decision) that if the goal of this Objective is to bring about behavioural change, whilst giving effect to Te Mana o te Wai and implementing Ki uta ki tai, it should be reworded to reflect that intent.

76. I am unsure however that the wording proposed by the Court indicates that a minimum standard of behaviour is required. As I read the suggested wording, a person undertaking poor land use and water management practice could make a minor improvement to these and achieve the Objective, without having any noticeable effect on the environmental outcomes. The original wording's intent appeared to be to at least obtain a minimum standard of behaviour whether that be industry approved best practicable option or for farming, Good Management Practice.

77. If the aim of the Objective is to give effect to Te Mana o te Wai, then it may be more appropriate to state wording to the effect of:

> All persons demonstrate land and water management practices that acknowledge Te Mana o te Wai.

78. However, on review of the Objective, if Objectives 1 and 3 become Korowai Objectives then I am not persuaded that this Objective is necessary at all and that it could be deleted.

Policies and Rules in Plan

79. The Ngā Rūnanga appeal was based largely on concerns about how the Hearing Panel's decisions on the pSWLP significantly weakened the Plan. I agree with the Court in that I consider that the effectiveness of the pSWLP in providing for Te Mana o te Wai and taking into account the Principles of the Treaty of Waitangi will only occur though having policies and rules that are cognisant of the Objectives but are also checked back against the "Golden Thread" that puts the state of hauora of the water, environment and people at its centre.

PRINCIPLES OF THE TREATY OF WAITANGI

80. The Court has asked parties to address how the Plan is to take into account the Principles of the Treaty of Waitangi.

81. I have derived my summary of the Principles primarily from *He Tirohanga o 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*.[28]

82. I consider the Principles of the Treaty, in the RMA context, relate to both RMA processes and to plan provisions, with some Principles (e.g. partnership), being more important in relation to processes. The role of Ngā Rūnanga in the process has been clearly set out in the evidence of Mr Skerrett and Ms Cain. I consider

28 Te Puni Kōkiri & Gover, K, *He Tirohanga o 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).

the Principle of partnership to be important in the process used to develop the Plan. I also believe these Principles of the Treaty are important with regard to:

(a) the FMU process to come;

(b) ensuring monitoring of the effectiveness of the Plan includes incorporation of Matauranga Māori and Ngāi Tahu indicators of health; and

(c) processing of any resource consents required by this Plan.

83. I consider those Principles that have direct relevance in terms of plan provisions include rangatiratanga and active protection. I will discuss these in more detail.

Rangatiratanga

84. I understand Tino Rangatiratanga in its broadest sense to be about self-determination and statehood by mana whenua. For Ngāi Tahu, rangatiratanga goes well beyond the RMA and its requirements under section 8 and is fundamental in its engagement with and expectations of the Crown. Ngāi Tahu references the Waitangi Tribunal findings about rangatiratanga being "more than ownership: it encompassed the autonomy of the hapū to arrange and manage their own affairs in partnership with the Crown." (Wai 2358, S2.8.3 (1)).

85. I also direct the Court to the expectations of rangatiratanga in 2019. Ngāi Tahu has prepared its strategy *Ngāi Tahu Rangatiratanga over Freshwater* that has the objectives of: establishing Ngāi Tahu title over freshwater in the takiwā; establishing a regulatory authority; and securing Ngāi Tahu fiscal authority over freshwater in the takiwā.

86. I do not consider it appropriate for me to comment on the extent to which Ngā Rūnanga consider that rangatiratanga has been taken into account in the planning process. I would however refer to Mr Skerrett's evidence for guidance on how Ngā Rūnanga anticipated the proposed Plan would assist in Ngā Rūnanga exercising Rangatiratanga in Southland:[29]

29 Statement of Evidence of Michael Skerrett (15 February 2019) at [95].

> These impacts result in frustrations and implications for Papatipu Rūnanga. They feel compromised in exercising their Rangatiratanga and Kaitiakitanga responsibilities – the unfulfilled promises of Te Tiriti and an inability to safely harvest mahinga kai.

87. The extent to which Tino Rangatiratanga can be incorporated into the Plan itself is a factor of the extent to which the Plan provisions affect rights to exercise Tino Rangatiratanga. I consider this goes beyond simply inserting Ngāi Tahu tikanga concepts or Māori words into the Plan and instead should show intent that Ngāi Tahu concerns have been taken into account in the way that the policies and rules are structured, and that these matters are also directly relevant when consent applications are considered. I would suggest that for Ngā Rūnanga, the rationale for entering into this process was to ensure that, where possible, Tino Rangatiratanga was not diminished.

Active protection

88. I understand active protection, in the context of the RMA, to require vigorous action where a taonga is threatened, especially where its vulnerability can be traced to earlier breaches of the Treaty.[30] In terms of the pSWLP, I consider that this would encompass the land, water and the taonga species that depend on these. However, in the Southland context it is wider and encompasses tikanga Māori and Ngā Rūnanga being able to, for example, practice mahinga kai. While not negating the importance of other values, taonga and sites, I would observe that the Ngāi Tahu Claims Settlement Act 1998 has shone a specific light on Statutory Acknowledgement Areas, Nohoanga sites and Taonga species. For that reason, I consider the management of these matters in the Plan should be clear.

89. From the evidence of Mr Skerrett and Ms Cain I would suggest that Ngā Rūnanga do not consider active protection of these matters has been provided for. Much of the evidence has shown a decline in water quality from a state of hauora, and an alienation from or diminished ability to undertake practices which have historically been undertaken, including those which were intended to be protected by the Ngāi Tahu Claims Settlement Act 1998.

90. With regard to the ability for the Objectives to address these matters as with partnership and active protection, I consider that the amendments in **Appendix A**

30 Te Puni Kōkiri *He Tirohanga o 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* at 95.

provide additional clarity around how rangatiratanga and active protection could be taken into account in the pSWLP.

CONCLUSION

91. I agree with the Court that Ki uta ki tai and Te Mana o Te Wai should be seen as the korowai that sits across the Plan, and that Objectives 1 and 3 should be elevated above the other objectives to ensure there is no doubt that this is how the Plan should be interpreted. This aligns with what Ngā Rūnanga understood and agreed with when the Plan was being developed- that the whole Plan was intended to implement Te Mana o te Wai and Ki uta ki tai.

92. Ngā Rūnanga saw the Objectives as a suite, responding to Te Mana o te Wai, with no need for an explicit hierarchy to be developed. However, in reviewing evidence of other parties to the Council Hearing and also the Hearing Panel's decision, I have realised that at least some parties (and the Panel) have interpreted Objective 3 too narrowly as only being concerned with cultural values

93. Elevating Objectives 1 and 3 to give them an overarching status would make it clear that they should not be interpreted narrowly, and that all the other Objectives have to be read in relationship to them. This aligns with the three key understandings of the Court and better takes into account the Principles of the Treaty of Waitangi.

Treena Davidson

Senior Environmental Advisor

17 April 2020

Appendix A

Southland Water and Land Plan – Initial thinking on Objectives

Suggested changes shown in **bold ~~strike through~~** or **<u>underlined text.</u>**

New Wording - Suggest as well as elevating Objectives 1 and 3 to Korowai Objectives add the following new wording:

<u>KOROWAI OBJECTIVES</u>

<u>These objectives are a korowai, meaning they provide a cloak or overarching statement on the management of land and water that must be considered when considering the Objectives of this Plan.</u>

Objective 1 – suggest move to Korowai Objective and add title Ki uta ki tai.

<u>Korowai - Ki uta ki tai</u>

Land and water and associated ecosystems are sustainably managed as integrated natural resources, recognising the connectivity between surface water and groundwater, and between freshwater, land and the coast.

Objective 3 – retain wording as amended by Court but suggest move to Korowai Objective and add title Te Mana o te Wai.

<u>Korowai - Te Mana o te Wai</u>

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

OBJECTIVES

Objective 2 – Delete objective entirely.

~~Water and land are recognised as enablers of the economic, social and cultural wellbeing of the region.~~

Objective 4 – no changes suggested.

Tangata whenua values and interests are identified and reflected in the management of freshwater and associated ecosystems.

Objective 5 – no changes suggested.

Ngāi Tahu have access to and sustainable customary use of, both commercial and non-commercial, mahinga kai resources, nohoanga, mātaitai and taiāpure.

Objective 6 – suggest amend wording proposed in Court's interim decision as follows:

<u>The water quality in each freshwater body, estuary and or coastal lagoons in Southland degraded by human activities is improved</u>

~~Water quality in each freshwater body will be:~~

~~(a) maintained where the water quality is not degraded; and~~

~~(b) improved where the water quality is degraded by human activities.~~

Objective 7 - Retain as proposed in Court's interim decision.

Following the establishment of freshwater objectives, limits, and targets (water quality and quantity) in accordance with the Freshwater Management Unit processes:

(a) where water quality objectives and limits are met, water quality shall be maintained or improved;

(b) any further over-allocation of freshwater is avoided; and

(c) any existing over-allocation is phased out in accordance with freshwater objectives, targets, limits and timeframes.

Objective 8 – Suggest amend to read:

The quality of groundwater:

(a) ~~The quality of groundwater~~ **is maintained where it** ~~that~~ meets both the Drinking Water Standards for New Zealand 2005 (revised 2008) and any freshwater objectives, including for connected surface waterbodies, established under Freshwater Management Unit processes ~~is maintained~~; and

(b) ~~The quality of groundwater~~ **where it** ~~**that**~~ does not meet Objective 8(a) because of the effects of land use or discharge activities is progressively improved so that:

(1) groundwater (excluding aquifers where the ambient water quality is naturally less than the Drinking Water Standards for New Zealand 2005 (revised 2008)) meets the Drinking Water Standards for New Zealand 2005 (revised 2008); and

(2) groundwater meets any freshwater objectives and freshwater quality limits established under Freshwater Management Unit processes.

Objectives 9 and 9A - is proposed to be amended

The quantity of water in surface waterbodies is managed so that:

(a) the **hauora o te taiao** ~~**aquatic ecosystem health, life-supporting capacity**~~, the values of outstanding natural features and landscapes, the natural character and historic heritage values of waterbodies and their margins are safeguarded;

(b) there is integration with the freshwater quality objectives and values (including the safeguarding of human health for recreation): and

(c) provided that (a) and (b) are met, surface water is sustainably managed, in accordance with Appendix K to support the reasonable needs of people and communities to provide for their economic, social and cultural wellbeing.

Objective 9B – retain as proposed by Court's interim decision:

The importance of Southland's regionally and nationally significant infrastructure is recognised and its sustainable and effective development, operation, maintenance and upgrading enabled.

Objective 10 – retain as proposed by Court's interim decision.

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

Objective 11 – retain as worded by Hearings decision.

The amount of water abstracted is shown to be reasonable for its intended use and water is allocated and used efficiently.

Objective 12 – retain as worded by Hearings decision.

Groundwater quantity is sustainably managed, including safeguarding the life-supporting capacity, ecosystem processes and indigenous species of surface water bodies where their flow is, at least in part, derived from groundwater.

Objective 13 is proposed to be amended

Provided that

(a) the quantity, quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land; and

(b) the health of people and communities is safeguarded from the adverse effects of discharges of contaminants to land and water; and

(c) ecosystems (including indigenous biological diversity and integrity of habitats), are safeguarded:

then land and soils are used and developed to enable the economic, social and cultural wellbeing of the region.

Objective 14 – retain as confirmed by Court's Interim Decision

The range and diversity of indigenous ecosystem types and habitats within rivers, estuaries, wetlands and lakes, including their margins, and their life-supporting capacity are maintained or enhanced.

Objective 15 – suggest amend as follows:

Taonga species, as set out in Appendix M, and related habitats, are recognised and **protected** ~~**provided for**~~.

Objective 16 – No changes suggested.

Public access to, and along, river (excluding ephemeral rivers) and lake beds is maintained and enhanced, except in circumstances where public health and safety or significant indigenous biodiversity values are at risk.

Objective 17 – retain as proposed in Court's Interim Decision

Preserve the natural character values of wetlands, rivers and lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats that are of significance to the region, and protect them from inappropriate use and development.

Objective 18 – Delete Objective entirely.

~~**All persons will demonstrate improved land use and water management practice**~~.