BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 16, Stages 3 & 3B Proposed District Plan

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LEGAL SUBMISSIONS FOR KĀ RŪNAKA

Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou, Hokonui Rūnanga, Te Rūnanga o Waihōpai, Te Rūnanga o Awarua, Te Rūnanga o Ōraka-Aparima

Dated 17th July 2020

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INTRODUCTION

1 Section 6(e) RMA is an important reference point when assessing the appropriateness of Chapter 39 under the relevant statutory tests.[1] As decision-makers, you must "recognise and provide for" the following as a matter of national importance, relevantly:

> "the relationship of [Kāi Tahu] and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga".

2 Section 6(e) has a relationship-focus. This reflects the whakapapa or kinship between Kāi Tahu as mana whenua, and the lands, waters, places and taonga identified by proposed Chapter 39 as wāhi tūpuna. Common ancestry or whakapapa with wāhi tūpuna is also the starting point identified by Edward Ellison, David Higgins and Dr Lynette Carter in their evidence.[2] Understanding whakapapa is key to understanding the methodology employed by Kā Rūnaka to identify wāhi tūpuna sites at a district-level and on a district spatial scale.

3 Whakapapa creates connection to both physical and spiritual worlds.[3] Features of the physical world are not just physical resources but entities in their own right, as ancestors, gods, whanau[4] that Kāi Tahu have an obligation to care for and protect (kaitiakitanga[5]). This is a monadic, not dualistic, viewpoint, with no rigid distinction between physical beings, tipuna (ancestors), atua and taniwha.[6] [7]

4 This metaphysical viewpoint has recently been affirmed by the Court of Appeal in a non-RMA case.[8] But it is orthodox law, confirmed by a number of RMA authorities, that the

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[1] It is not of course the only relevant provision in Pt 2 RMA, or the wider statutory framework, but has contextual relevance to intended outcomes in Chapter 39. The statutory framework is identified by Counsel for the Council in opening submissions.

[2] Starting with mihi, it is the constant thread for all three witnesses. Edward Ellison provides further particulars in his amended table 39.6.

[3] See generally Chapter 5-2 of the district plan, which identifies kinship, whakawhanaungatanga, the inter-connection between physical and spiritual realms.

[4] Discussed in David Higgins evidence (Whakapapa associations) at [12]-[20].

[5] Kaitiakitanga involves reciprocal responsibilities: Dr Lynette Carter evidence at [15]. It is a responsibility, not a choice, as noted by Edward Ellison in evidence.

[6] *Kemp v Queenstown Lakes District Council* [2000] NZRMA 289

[7] Kāi Tahu, Ngāi Tahu and (in some case) Kā Rūnaka are used interchangeably in these submissions; this reflects language used in the statutory and planning instruments, and the recognised role of Kā Rūnaka as Kāi Tahu representatives.

[8] *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 – an EEZ case, but that does not detract from the observations made, as follows:

> "[173] The inextricably linked concepts of whanaungatanga and Kāitiakitanga in relation to the natural environment and its resources were helpfully summarised by Williams J, writing extra-judicially, in *Lex Aotearoa: An Heroic Attempt to Map*
>
> " ... whanaungatanga might be said to be the fundamental law of the maintenance of properly tended relationships. The reach of this concept does not stop at the boundaries of what we

environment includes both physical and spiritual dimensions.[9] No necessary priority is given to one over the other, subject to relevant and probative evidence as to tikanga and cultural beliefs and practices.

5 Section 6(e) is often paraphrased as the relationship of iwi or hapū with ancestral lands, waters and taonga; but reference to "their culture and traditions" is equally relevant. As noted by the Environment Court, it is the tikanga and belief systems of the relevant iwi authority that are to be provided for, whether others agree with those belief systems or not:

> "[59]…But Mr Raikes' evidence rather misses the point of s 6(e) of the RMA. What is to be recognised and provided for, as a matter of national importance, is ... *the relationship of Maori and* their *culture and traditions with* their *... waahi tapu and other taonga* (emphasis added). What Maori regard as *waahi tapu and other taonga* is for them. What the law requires is the recognition of, and provision for, that relationship and neither this Court nor any other RMA decision-maker can dismiss s 6 factors, simply because they may not share the beliefs of Maori, and their traditions and lore…" [10]

6 The point is stated rather more positively by the partly operative RPS (**RPS**) and District Plan. Kāi Tahu are the identified Treaty partner for Otago. The Regional Council has an established relationship with Kāi Tahu, based on the Treaty partnership. [11] Kāi Tahu is mana whenua and the recognised Treaty partner for QLDC.[12] The Kāi Tahu Whānui

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> might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal) metaphor informing human relationships with the physical world — flora, fauna, and physical resources — and the spiritual world — the gods and ancestors.
> ...
> No right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource. No relationship; no right. The term that describes the legal obligation is Kāitiakitanga. This is the idea that any right over a human or resource carries with it a reciprocal obligation to care for his, her or its physical and spiritual welfare. Kāitiakitanga is then a natural (perhaps even inevitable) off-shoot of whanaungatanga."
>
> In this case the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and Kāitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right — as ancestors, gods, whanau — that iwi have an obligation to care for and protect."

[9] Examples are *Bleakley v Environment Risk Management Authority* [2001] 3 NZLR 213 at [80]-[86]: duty of active protection to reasonable extent; taonga embraces the metaphysical and tangible (non-RMA case); *Friends and Community of Ngawha Incorporated v Minister of Corrections* [2002] NZRMA 401 at [41]ff (adverse effect to taniwha, metaphysical beliefs require consideration not absolute protection); *TV3 Network Services Ltd v Waikato District Council* [1997] NZRMA 539 (HC) (priority given by fact-finder to metaphysical considerations, available outcome to Environment Court); *Ngāti Whātua Orākei Whai Maia Ltd v Auckland Council* [2019] NZEnvC 184 at [49]-53] (cultural effects may be intangible and no preference for physical over spiritual impacts; decision subject to appeal to High Court); *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZRMA 523 (HC) at [63]-[68] (mandatory quality of Pt2 where engaged by context).
[10] *Maungaharuru-Tangitu Trust v Hastings District Council* [2018] NZEnvC 79
[11] RPS, Part A Introduction, pp4
[12] Chapter 5, 5.1 Purpose, p5-1

relationship with the region spans centuries of occupation. Kāi Tahu are recognised as mana whenua for Otago, [13] and hold customary authority.

> **"RPS Policy 2.1.2 Treaty principles**
> Ensure that local authorities exercise their functions and powers, by:
> a) Recognising Kāi Tahu's status as a Treaty partner; and
> b) Involving Kāi Tahu in resource management processes implementation;
> c) Taking into account Kāi Tahu values in resource management decision-making processes and implementation;
> d) Recognising and providing for the relationship of Kāi Tahu's culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka; […]"
>
> "Ngai Tahu have centuries long customary associations and rights and interests in the Queenstown Lakes District and its resources. These associations are both historical and contemporary and include whakapapa, place names, mahinga kai , tribal economic development and landholdings. Ngai Tahu has the customary authority to make decisions concerning the resources and places in their takiwa in accordance with Ngai Tahu resource management traditions." [QLDC District Plan, Chapter 5]

7 While Māori who are not Kāi Tahu may also express their relationship with natural and physical resources under s6(e), the planning instruments are explicit in identifying Kāi Tahu as the only iwi authority recognised by the RPS and District Plan. This can be contrasted with other regions, such as Auckland, where the RPS refers generically to "mana whenua", without identifying specific Iwi Authorities. Iwi Authorities are then required to identify their rohe in context of specific proposals.[14]

8 The duty to recognise and provide for wāhi tūpuna is not optional. It forms part of Council's statutory functions for integrated management in s31 RMA; and reflects the s75(3) RMA requirement to give effect to the RPS. Wāhi tūpuna are already part of the receiving and planning environment.[15]

9 There is substantial case law on the duty of the consent authority to address Part 2 RMA matters relevant to Māori interests and values, including sections 6(e), 6(f), 6(g); exercise of kaitiakitanga under s7(a) and Treaty principles under s8 RMA. In tandem, these are requirements that must be considered by the consent authority. They are "multi-dimensional Māori provisions"[16] that must be "..borne in mind at every stage of the planning process". [17] Of course, these are not the only relevant provisions in Pt 2

[13] RPS, Part A Introduction
[14] Overlapping interests and rohe seem to be the rule, not the exception, for most of NZ (excluding the rohe of Kāi Tahu Whānui). Mana whenua status, with overlapping rohe, is claimed by up to 19 iwi authorities in the Auckland region: discussed in *Ngati Whatua Orakei* (*supra*).
[15] It has existed for centuries; and Mr Devlin's competing view (that the ancestral lands, waters, places and taonga identified as wāhi tupuna are not part of the receiving environment) is incorrect.
[16] Justice Joseph Williams writing extra-judicially in "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 (*Lex Aotearoa*), p.18. Justice Williams refers to the Māori provisions in the RMA as "multi- dimensional".
[17] Lord Cooke in *McGuire v Hastings District Council* [2002] 2 NZLR 577, 594 paragraph [21]:

RMA, or the wider statutory framework, which includes consideration of the wider wellbeing of people and communities, and affected landowners, but they have contextual importance given the subject matter of Chapter 39.

10 As noted by Commissioners, in some ways the planning horse has bolted: vertical integration with the RPS and strategic provisions in Chapters 3 and 5 require identification and recognition of wāhi tūpuna in the District. This may reflect why many submitters accept "in principle" that wāhi tūpuna must be recognised and provided for. There is little or no agreement on the "how" question, partly stemming from concerns raised as to process followed for identification, uncertainty as to impacts, absence of quantification of costs by Council as part of its s32 RMA assessment, and drafting issues with proposed wording. Drafting and other issues are addressed below.

11 But at the level of principle, Kā Rūnaka submits that Chapter 39 is an appropriate means to recognise and provide for mana whenua's relationship with wāhi tūpuna, as a matter of national importance in the Queenstown Lakes District. Subject to identified amendments, Chapter 39 gives effect to Chapter 2 RPS and strategic requirements in Chapters 3 and 5 of the district plan. Further changes responding to the technical and planning evidence by submitters are appropriate (from Kā Rūnaka's perspective as a submitter). **Appendix 1** sets out recommended relief.

ISSUES

12 The following issues are discussed:

- Background
- Methodology and expertise of mana whenua
- Statutory acknowledgements
- Tenure review
- Statutory framework (RMA)
- Planning framework
- Reply points
- Witnesses for Kā Rūnaka
- Proposed relief
- Conclusion

BACKGROUND

13 These submissions are on behalf of the seven Rūnaka (**Kā Rūnaka**[18]) that are submitters and share an interest in the Queenstown Lakes District:

"These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi ... and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads.."

[18] Counsel is engaged by Aukaha on behalf of the 7 Rūnaka.

- Te Rūnanga o Moeraki
- Kāti Huirapa Rūnaka ki Puketeraki
- Te Rūnanga o Ōtākou
- Hokonui Rūnanga
- Te Rūnanga o Waihōpai
- Te Rūnanga o Awarua
- Te Rūnanga o Ōraka-Aparima

The takiwā of the seven Rūnaka that represent mana whenua interests in Queenstown Lakes District is set out in Te Rūnanga o Ngāi Tahu (Declaration of Membership) Order 2001.[19]

14 Te Runanga o Ngāi Tahu (TRONT) is identified by the RPS and Chapter 5 of the district plan as the relevant iwi authority for Otago. It is recognised by legislation as the representative (for all purposes) of Ngāi Tahu Whānui.[20] TRONT is made up of 18 papatipu rūnaka.[21] TRONT recognises the authority of Ka Rūnaka to address resource management issues of concern within their rohe. Relevant background is identified in the ss32 and 42A report, and the evidence of Kā Rūnaka's witnesses.

METHODOLOGY AND EXPERTISE OF MANA WHENUA

15 An issue that has received prominence during the hearing relates to the expertise of Kāi Tahu kaumatua in their identification of wāhi tūpuna, and the methodology followed for same. Sub-issues include:

- Alleged uncertainty in process for mapping wāhi tūpuna;
- Whether Council may rely on Kāi Tahu's recommended identification of wāhi tūpuna, or whether that involves absence of inquiry or invalid delegation of function;
- Whether Kāi Tahu kaumatua are expert in their tikanga and qualified to identify wāhi tūpuna, absent some notional standard of independence or certification under Code of Conduct;
- Whether Kāi Tahu wears two hats: as identifier of sites of significance; and as affected person that may be approached for approval by putative applicants under future consent processes;
- Whether it is reasonable to anticipate that several Rūnaka are potentially affected persons for purposes of consent applications, for example, that both Aukaha and

[19] Edward Ellison evidence at [8].

[20] Section 15 of Te Rūnanga o Ngāi Tahu Act 1996. Kāi Tahu whānui is defined by s9 of the Ngāi Tahu Claims Settlement Act 1998 as:

> **"Ngāi Tahu** and **Ngāi Tahu Whānui** each means the collective of individuals who descend from the primary hapū of Waitaha, Ngāti Mamoe, and Ngāi Tahu, namely Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruahikihiki."

[21] Partly operative RPS at p5.

TAMI may be approached for comment on relevant consent proposals, depending on location.

16 It is orthodox to submit that only iwi may speak to the tikanga and traditions of iwi. In that sense, Kāi Tahu, by its recognised kaumatua and pukenga, is the sole expert of their relationships, beliefs and traditions relating to ancestral lands, waters, places and taonga. Mana whenua are specialists in their own tikanga. This is succinctly expressed in the Auckland Council's Unitary Plan RPS B6.2.2(1)(e) as:

> "(e)..recognises Mana Whenua as specialists in the tikanga of their hapū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, wāhi tapu and other taonga"

17 To similar effect is Policy 5.3.1.4. It is clear from context that the reference to "tangata whenua" is a reference to Kāi Tahu and the relevant Kāi Tahu Rūnaka:

> "5.3.1.4 Recognise that only tangata whenua can identify their relationship and that of their culture and traditions with their ancestral lands, water sites, wāhi tapu, tōpuni and other taonga."

18 That is not a 'free pass'. Commissioners are not obliged to accept kaumatua evidence at face value, or bare assertion, without testing. Rules of evidence apply. Cultural evidence is to be probative and relevant.[22] The *Ngāti Hokopu* decision identified the following as relevant indicia:

> "That "rule of reason" approach if applied by the Environment Court, to intrinsic and other values and traditions, means that the Court can decide issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):
> - whether the values correlate with physical features of the world (places, people);
> - people's explanations of their values and their traditions;
> - whether there is external evidence (eg Maori Land Court Minutes) or corroborating information (eg waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issues and (potentially) changed by the value-holders;
> - the internal consistency of people's explanations (whether there are contradictions);
> - the coherence of those values with others;
> - how widely the beliefs are expressed and held." [23] [Footnotes omitted]

19 Having acknowledged these rules of reason, Kā Rūnaka has provided probative and relevant evidence by recognised kaumatua with detailed knowledge of the tikanga, whakapapa, relationships, beliefs and traditions held by Kāi Tahu in relation to their wāhi tūpuna. That evidence, including the methodology for identification of wāhi tūpuna, relies to a great extent on oral tradition, whakapapa, and prior statutory and

[22] *Gock v Auckland Council* [2019] NZHC 276
[23] *Ngāti Hokopū ki Hokowhitu v Whākatane District Council* [2002] NZEnvC 421

planning processes that have identified Kāi Tahu as the exclusive iwi authority with mana whenua in Otago. Reliance on oral tradition, tikanga, whakapapa, is consistent with cultural praxis for most or all Māori. It is coherent and representative of the collective Kāi Tahu tikanga.

20 Submitters may disagree, but Kā Rūnaka has endeavoured to be pragmatic, bearing in mind that the entire district is ancestral lands for Kāi Tahu.[24] Pragmatism is reflected in Kā Rūnaka's recommended approach for urban areas (identified for their values but not subject to rules, and having the status of relevant consideration for discretionary and non complying activities); the 400MASL proposal; and further recommended changes to the policy framework (**Appendix 1**). In turn, some pragmatism is sought as to anomalies or obvious errors in mapping areas of Te Mata-Au (Clutha river) and Cardrona river.

21 Pragmatism aside, answers to the earlier questions are as follows:

(a) Alleged uncertainty in process for mapping wāhi tūpuna

Answer:

21.1 There is no relevant uncertainty. Kā Rūnaka has provided evidence of its methodology. Source material included kaumatua knowledge of ancestral use, occupation, mahika kai gathering, travel and cultural traditions; the knowledge base is also used for Kā Huru Manu, a cultural mapping project (the Ngāi Tahu Atlas).[25] Further descriptors are proposed for individual wāhi tūpuna.[26]

21.2 It is not the same methodology as might be employed by (e.g.) an archaeologist or landscape architect. Cultural values and beliefs, tikanga, are legitimate sources of matauraka Māori that inform the identification process. Contemporary measures, such as activity thresholds, treatment of urban areas, and the 400MASL reflecting relevant contours, have informed attempts to ensure a reasonable rule emerges in the district plan framework that meets RMA imperatives for certainty and enforceability.

(b) Whether Council may rely on Kā Rūnaka's recommended identification of wāhi tūpuna , or whether that involves absence of inquiry or invalid delegation of function.

[24] Edward Ellison evidence at [32]-[36] noting the treasured ancestral landscapes, Queenstown Lakes District "is our home, our whenua.. a source of identity.."
[25] Discussed in kaumatua evidence of Edward Ellison, David Higgins and Dr Lynette Carter.
[26] Appendix 1 to Edward Ellison evidence

Answer:

21.3 Council is entitled to rely on Kāi Tahu as the sole Iwi authority with customary authority in Otago, recognised (as noted) by the RPS.[27] It is commonplace for consent authorities to adopt, or rely upon, cultural evidence by recognised kaumatua that identifies the relevant tikanga of the Iwi Authority. Rhetorically, how else may Council identify the relevant wāhi tūpuna ? This does not discharge Council's independent duty as consent authority to consider all relevant facets of the statutory framework, including cost-benefit analysis, and the relevant interests of the wider community.

21.4 Another angle is that the RPS is explicit: it is Kāi Tahu's culture and traditions ("their") that are to be recognised and protected. This is the short answer to Commissioner questions as to whether Kāi Tahu are the sole experts in their own tikanga and beliefs. The answer is yes. But rules of evidence still apply, and Commissioners are entitled to test mana whenua evidence for coherence and relevance.[28]

(c) Whether Kāi Tahu kaumatua are expert in their tikanga and qualified to identify wāhi tūpuna, absent some notional standard of independence or certification under Code of Conduct.

Answer:

21.5 Kaumatua evidence is expert, but not strictly independent. The same applies to, say, Council employees, although there seem to be competing views on the latter. Certification under the Code is therefore redundant, but Counsel is open to direction on this point, should that be required for the Panel to place relevant weight on kaumatua evidence. Relevantly, there are no competing independent experts providing evidence on tikanga, relationships, whakapapa; so there is no need to resolve, by weight, competing expert evidence. The evidence establishes one coherent tribal view.

21.6 A secondary point is that, by giving evidence, kaumatua are of course confirming veracity.

21.7 The position is different for Dr Carter, who provides opinion evidence that goes beyond identification of Kāi Tahu tikanga and whakapapa. Dr Carter has certified compliance with the Code.

[27] And Kā Rūnaka is entitled to represent the views of Kāi Tahu, as discussed.
[28] Discussed further below.

(d) Whether Kāi Tahu wears two hats: as identifier of sites of significance; and as affected person that may be approached for approval by putative applicants under future consent processes.

Answer:

21.8 Yes, Kāi Tahu has two roles, but this is not wearing two hats (in the sense that usually applies to the metaphor, i.e conflict or competing roles). There is nothing untoward. The process for identification of affected persons for purposes of resource consent application or designation is a different process, governed by different statutory processes to the Chapter 39 plan review process. Kāi Tahu is not the decision-maker. Council must make its own assessment.

(e) Whether it is reasonable to anticipate that several Rūnaka are potentially affected persons for purposes of consent applications, for example, that both Aūkaha and Te Ao Marama Inc (TAMI) may be approached for comment on relevant consent proposals, depending on location.

Answer:

21.9 Yes, several Rūnaka may be potentially affected persons for purposes of consent applications, depending on location.[29] That is common RMA practice in other parts of NZ. Contrast with say Auckland. Decision-makers must engage with factual complexity, reflecting historical complexity and whakapapa, where relevant to the consent application.[30] Maree Kleinlangevelsloo has prepared a brief supplementary statement to provide more information on Aūkaha and TAMI charges and practices for AEE, CIA and CVA (**Appendix 2**). Leave is sought to produce that evidence on the basis that it is relevant and responds to issues raised during the course of the hearing.

STATUTORY ACKNOWLEDGEMENTS

22 The Ngāi Tahu Claims Settlement Act 1998 (**the Settlement Act**) sets out relevant background to acknowledged breaches by the Crown of te Tiriti o Waitangi; resulting in loss of rakatirataka, tribal authority and identity over ancestral lands, waters, places and taonga. This is recorded in the Crown's apology, forming part of the Settlement Act.[31]

[29] Common interests between Rūnaka are discussed in Edward Ellison evidence at [9].
[30] *Discussed in Ngāti Whātua Ōrākei (supra).*
[31] Section 4 of the Act (Apology) relevantly states:
"..2 The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngāi Tahu in the purchases of Ngāi Tahu land. The Crown further acknowledges that in relation to the deeds of purchase it has failed in most material respects to honour its obligations to Ngāi Tahu as its Treaty partner, while it also failed to set aside adequate lands for Ngāi Tahu's use, and to provide adequate economic and social resources for Ngāi Tahu. [..]
3 The Crown acknowledges that, in breach of Article Two of the Treaty, it failed to preserve and protect Ngāi Tahu's use and ownership of such of their land and valued possessions as they wished to retain. [..]

23 Statutory acknowledgements arise under the Settlement Act; and must be identified in the relevant regional and district planning instruments. "Statutory acknowledgement" means an acknowledgement by the Crown of the statement of values made by Ngāi Tahu for identified statutory areas (s205, s206); "statutory areas" are the areas, rivers, lakes, and wetlands identified in schedules to the Act. The schedules include statements of associations of Kāi Tahu with the statutory areas (cultural, spiritual, historic and traditional).[32]

24 Sections 207 to 211 create procedural rights under the RMA, such as affected party status for notification of resource consents.[33] S215 summarises the limited role of statutory acknowledgements in a plan review context as follows:

> **215 Purposes of statutory acknowledgements**
> Without limiting sections 216 to 219, the only purposes of the statutory acknowledgements are—
> (a) to require that consent authorities forward summaries of resource consent applications to Te Rūnanga o Ngāi Tahu, as required by regulations made pursuant to section 207; and
> (b) to require that consent authorities, Heritage New Zealand Pouhere Taonga, or the Environment Court, as the case may be, have regard to the statutory acknowledgements in relation to the statutory areas, as provided in sections 208 to 210; and
> (c) to empower the Minister of the Crown responsible for management of the statutory areas, or the Commissioner of Crown Lands, as the case may be, to enter into deeds of recognition, as provided in section 212; and

..7 The Crown apologises to Ngāi Tahu for its past failures to acknowledge Ngāi Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngāi Tahu as the tāngata whenua of, and as holding rangatiratanga within, the Takiwā of Ngāi Tahu Whānui.

[32] Appendix 2 is an explanatory overview of statutory acknowledgements, prepared by the Crown.

[33] Section 207 enables regulations to ensure that Kai Tahu receives notice of relevant resource consent proposals, but does not limit consent authority discretion as to notification. S208 requires that consent authorities have regard to statutory acknowledgements when assessing notification of resource consents for activities within, adjacent, or impacting directly on statutory areas. S209 requires the Environment Court to have regard to statutory acknowledgments when assessing standing under s274 RMA. Section 211 relevantly identifies that Te Runanga o Ngai Tahu, and any member of Ngai Tahui Whanui, may cite the statutory acknowledgement in relation to activities within, adjacent, or impacting directly on the statutory area. The content of the statutory acknowledgement "..is not by virtue of the statutory acknowledgement binding as deemed fact" on consent authorities; but may be considered as a relevant matter. Ngāi Tahu and its members may raise additional associations with statutory areas that are not described in the statutory acknowledgement. Section 220 requires local authorities to include information on statutory acknowledgements as part of any planning instrument. This is for public information only, unless otherwise adopted by the regional or district council. No further statutory acknowledgements are pending (Counsel is advised that the process for identification has expired, which seems to be reflected in the legislative scheme). Recognition of statutory areas remains a relevant resource management consideration, for the purposes identified in the Settlement Act, and any additional purposes stated in the regional and district planning instruments.

(d) to enable Te Rūnanga o Ngāi Tahu and any member of Ngāi Tahu Whānui to cite statutory acknowledgements as evidence of the association of Ngāi Tahu to the statutory areas, as provided in section 211.

25 Sections 217-219 repetitively confirm the limited procedural impact of statutory acknowledgements for RMA processes,[34] also confirmed by the Environment Court in *Kemp.* [35]

26 An issue raised by submitter evidence is whether recognition provided by statutory acknowledgements means that no additional rules are required for statutory areas, given scope for duplication.[36] A separate question relates to the general discretionary status of earthworks within statutory acknowledgement areas.

27 In reply, the statutory acknowledgements operate under different legislation and for different purposes. In general terms, there is no functional or regulatory duplication creating inefficiency, or that renders Chapter 39 provisions inappropriate. At best, the

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[34] **217 Exercise of powers, duties, and functions**

Except as expressly provided in sections 208 to 211, 213, 215, and 216,—

(a) neither a statutory acknowledgement nor a deed of recognition affects, or may be taken into account in, the exercise of any power, duty, or function by any person or entity under any statute, regulation, or bylaw; and

(b) without limiting paragraph (a), no person or entity, in considering any matter or making any decision or recommendation under any statute, regulation, or bylaw, may give any greater or lesser weight to Ngāi Tahu's association to a statutory area (as described in the relevant statutory acknowledgement) than that person or entity would give under the relevant statute, regulation, or bylaw, if no statutory acknowledgement or deed of recognition existed in respect of that statutory area.

218 Rights not affected

Except as expressly provided in sections 206 to 220, neither a statutory acknowledgement nor a deed of recognition affects the lawful rights or interests of any person who is not a party to the deed of settlement.

219 Limitation of rights

Except as expressly provided in sections 206 to 220, neither a statutory acknowledgement, nor a deed of recognition has of itself the effect of granting, creating, or providing evidence of any estate or interest in, or any rights of any kind whatsoever relating to, a statutory area.

[35] *Kemp (supra)* which states at [58]-[59]:

"[58] While recognising the real psychological and cultural importance of these statutory acknowledgments their main legal purpose seems to be procedural and/or consultative because s215 of the NTCSA states:

[..]

[59] The obligation of various authorities, including the Environment Court, to have regard to statutory acknowledgments has to be read together with s 217 of the NTCSA. That states:

[..]

So the statutory acknowledgments are expressly stated to have no substantive effect under the RMA. Parliament intended that their effect was to be procedural: to ensure that TRoNT was always an interested person and should be consulted whenever land referred to in one of the relevant schedules of the NTCSA was the subject of an application. Section 274 RMA was amended to provide TRoNT with special status, but its substantive interests (and those of other iwi) are protected by Part II of the Act – ss 6, 7 and 8 in particular." [Footnotes omitted]

[36] A contention by some submitters.

statutory areas create a rebuttable presumption as to the interests of Kāi Tahu in statutory areas, and some RMA process rights where the values of those areas are at risk, including from adjacent sites. These process rights do not appear to duplicate the policy and rules framework for wāhi tūpuna in Chapter 39.

28 That analysis is reflected in Chapter 5 district plan which relevantly notes that effects on Kāi Tahu "values, rights and interests" are to be addressed by the district plan framework. Statutory acknowledgements are non-limiting as to the scope of relief that may be granted in chapter 39:

> "Ngāi Tahu's rights and interests in the Queenstown Lakes District extend beyond the areas and resources identified as statutory redress. The effects on Ngāi Tahu values, rights and interests are addressed through the mechanisms below and the related provisions in the District Plan."[37]

29 By contrast, an element of duplication may arise from the general discretionary status for earthworks in statutory acknowledgements areas.[38] To the extent that this rule may duplicate Chapter 39 provisions, it is a limited exception that does not affect private land.

TENURE REVIEW

30 Tenure review has been raised by some submitters as potentially relevant to the process of identification of wāhi tūpuna through Chapter 39. It is argued that the position taken by Ngāi Tahu kaumatua on identification of key sites through an earlier tenure review process may be inconsistent with, or have a bearing on, subsequent identification of wahi tūpuna through the wider spatial scale enabled by the plan review process for Chapter 39. Site-specific reports were not provided in submitter evidence exchanged prior to the hearing. Tenure review processes have been ongoing for a number of years, in some cases prior to enactment of the RMA.

31 In response, Counsel submits that similar considerations apply to tenure review, as applied to the statutory acknowledgement issue. Tenure review is for a different statutory purpose, under a different legislative code and governed by different statutory imperatives.[39]

32 Kāi Tahu is not estopped or prevented from seeking a wider scale of protection now (plan review) than sought at an earlier stage and for a different purpose (tenure

[37] Chapter 5-2, p5-4
[38] District Plan, Rule 25.4.6
[39] At time of drafting these submissions, Counsel has not had opportunity to fully review the statutory framework, such as the Crown Pastoral Land Act 1998. Section 25 of that Act requires consideration of the principles of the Treaty of Waitangi; but the range of relevant considerations appears to be quite different to the RMA. To the extent relevant, this may be addressed further at the hearing. Kaumatua will also speak to their experiences of the land tenure process.

review). The extent to which Māori interests and values are now recognised has evolved significantly since the RMA was first introduced in 1991, and under 1st generation plans.[40] Mana whenua are entitled to evolve in their response to RMA methods that recognise, maintain, protect and enhance their valued lands, places, waters and taonga.

33 As with Treaty principles, tikanga may evolve over time, and in response to wider opportunity for recognition. This point is recognised in wider jurisprudence relating to Treaty principles, such as active protection of taonga.[41] As noted by Edward Ellison, wāhi tūpuna are identified on a landscape scale that includes discrete sites. Kāi Tahu are a Treaty partner, not a stakeholder.[42]

STATUTORY FRAMEWORK (RMA)

34 The relevant framework was identified in opening submissions by Counsel for the Council. That summary is adopted.

PLANNING FRAMEWORK

35 The relevant planning instruments are discussed in the s42A report and evidence by Maree Kleinlangevelsloo and Michael Bathgate. Both are experienced planning experts.

36 As noted by Ms Kleinlangevelsloo, reference to "ancestral lands" in s6(e) and similar terminology in the planning instruments gives rise to landscape-scale considerations, not discrete sites or wāhi tapu, which are separately listed.[43] The relevant planning instruments include:

- NPS Urban Development Capacity
- NPS Electricity Transmission
- Partially operative RPS (RPS)
- Relevant Chapters in the operative and proposed district plan
- Relevant provisions in the Iwi Management plan, Kāi Tahu ki Otago Ltd Natural Resources Management Plan 2005
- Relevant provisions in the Iwi Management Plan, Te Tangi a Tauira (the cry of the people), Ngāi Tahu ki Murihiku (2008).

[40] Limitations of 1st generation RMA plans are discussed in Maree Kleinlangevelsloo's evidence at [33]
[41] Examples are *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA) (Lands case); *New Zealand Māori Council v Attorney-General [1994] 1 NZLR 513 (PC) (te Reo)*; *New Zealand Māori Council v Attorney-General* [2012] NZSC 115 (Mighty River).
[42] Edward Ellison evidence at [15]
[43] Evidence at [17]

NPS Urban Development Capacity

37 The district plan must give effect to relevant NPS. The NPS is limited to urban environments[44] and does not apply to the rural environment (including Rural-Residential and Rural Lifestyle zones). Cultural wellbeing is identified as a relevant objective and policy, and must be addressed as a site constraint in the same way that other constraints apply (such as landscape overlays, site specific constraints). Accordingly there is no issue of consistency. In any event, the issue is academic if the Panel accepts Kā Rūnaka's proposed amendments to remove rules from urban environment zones in Wānaka, Tāhuna (Queenstown) and Frankton.

NPS Electricity Transmission

38 This NPS is limited to Transpower's infrastructure. In contrast with the NPS Urban Development, the NPS Electricity Transmission does not refer to cultural wellbeing. A range of benefits derive from the electricity transmission network. NPS Policy 8 requires that transmission infrastructure should "seek to avoid" impacts on ONLs and areas of high natural character. Cultural landscapes form part of the ONLs and high natural character areas; and there is an obvious overlap with wāhi tūpuna valued for their natural qualities. Recognising and providing for wāhi tūpuna, as part of s6(e) RMA, is a matter of national importance. It is not inappropriate or onerous to require that national transmission address its impacts on wāhi tūpuna, through consenting requirements, in circumstances where land use rules are relevant to an activity that may rely on a designation process.

RPS

39 Key provisions identified by Ms Kleinlangevelsloo and Mr Bathgate include Objectives 2.1 and 2.2 and Policies 2.1.2, 2.2.2, and Method 4.1.1. The objective/policy sets relate to Treaty principles, and recognising and providing for Kāi Tahu values and interests.

40 The RPS uses directive language for the Settlement Act in Policy 2.1.2.[45] This is permissible under s220(2) of that Act. Regional and district plans must give effect to the

[44] Defined in the NPS as:

Urban environment means an area of land containing, or intended to contain, a concentrated settlement of 10,000 people or more and any associated business land, irrespective of local authority or statistical boundaries.

[45] Policy 2.1.2 Treaty principles

Ensure that local authorities exercise their functions and powers, by :

[..]

d) Recognising and providing for the relationship of Kāi Tahu's culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka;

e) Ensuring Kāi Tahu have the ability to:

i. Identify their relationship with their ancestral lands, water, sites, wāhi tapu, and other taoka;

ii. Determine how best to express that relationship;

f) Having particular regard to the exercise of kaitiakitaka;

g) Ensuring that district and regional plans:

Settlement Act; statutory acknowledgement areas must be recognised and provided for, and other areas in Otago must be provided for, where recognised as significant by Kāi Tahu.

41 Policy 2.2.2 uses directive language for identified wāhi tūpuna (protect, avoid).[46] This policy is not given effect to by deletion of Chapter 39; or exclusion of substantial rural and peri-urban areas from identification and controls. The Policy anticipates that wāhi tūpuna are identified so that they may be protected and managed. This supports recommended changes by Mr Bathgate to require that significant adverse effects are avoided on identified wāhi tūpuna (**Appendix 1**).

42 Method 4.1.1 is directive and, as Ms Kleinlangevelsloo notes:

> "[29] In my opinion, the PORPS provides very clear direction for councils to include wāhi tūpuna maps, values and provisions to protect these in their plans."

Operative District Plan: Chapters 3 & 5 [47]

43 Chapter 3 (Strategic Direction) relevantly identifies that:

a. The chapter sets out the over-arching strategic direction for sustainable management. This includes distinctive Ngāi Tahu values, rights and interests.[48] "Over-arching" conveys a guidance function for the balance of the plan. The explanatory statement (purpose) confirms that the principal role of Chapters 3-6 collectively is to provide direction and guidance for the balance chapters in the plan, confirming a hierarchy in approach.[49]

b. Issue 6 "tangata whenua status and values require recognition in the District Plan".[50]

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i. Give effect to the Ngāi Tahu Claims Settlement Act 1998;
ii. Recognise and provide for statutory acknowledgement areas in Schedule 2;
iii. Provide for other areas in Otago that are recognised as significant to Kāi Tahu;

h) Taking into account iwi management plans.

[46] Directive language discussed in *EDS v New Zealand King Salmon Company Ltd* [2014] NZSC 38 (**King Salmon**)

Policy 2.2.2 Recognising sites of cultural significance

Recognise and provide for the protection of wāhi tūpuna, as described in Schedule 1C by all of the following:

a) Avoiding significant adverse effects on those values which that contribute to the identified wāhi tūpuna being significant;
b) Avoiding, remedying, or mitigating other adverse effects on the identified wāhi tūpuna;
c) Managing those landscapes and the identified wāhi tūpuna sites in a culturally appropriate manner.

[47] Counsel has focused on provisions relevant to Kāi Tahu, acknowledging there are a range of wider provisions relevant to community wellbeing including submitter interests.

[48] Chapter 3.1(i) Purpose, p3-14

[49] Chapter 3.1, p3-15

[50] Chapter 3.1, Issue 6, p3-15

c. Strategic Objective 6 is specific to Ngāi Tahu, and is directive (Ngāi Tahu values, interests and customary resources are protected). This includes protection of wāhi tūpuna (Objective 3.2.7.1).

d. A point noted by Commissioners during questions is the directive language for strategic policies relating to the cultural environment, Policies 3.3.33 to 3.3.35. The double-barrelled approach of avoid significant adverse effects and avoid, remedy, mitigate "other" adverse effects is reminiscent of the language used in NZCPS Policies 11, 13 and 15. Policy 3.3.35 is important as it requires management of the cultural environment in a "culturally appropriate manner" which includes consideration of the tikanga beliefs and practices of Kāi Tahu (as the relevant iwi, which of course includes the relevant Rūnaka).

e. Chapter 5 (Tangata whenua) anticipates that Council will collaborate with Kāi Tahu, including "seeking formal and informal advice"[51] from Kāi Tahu. Council's request for, and reliance on, probative and relevant mapping information provided by Kāi Tahu, as the sole repository of the relevant cultural information as to wāhi tūpuna, is anticipated by Chapter 5 as appropriate.

f. As noted, the district plan identifies Kāi Tahu as the iwi that holds mana whenua for the Queenstown Lakes District.[52] This may be contrasted with other district or unitary plans, that do not identify a particular iwi or hapū as the mana whenua entity for a district (or region). The plan acknowledges the "special relationship Ngāi Tahu has with the District through the Treaty partnership." This reflects the constitutional importance of the Treaty to NZ's communal wellbeing. As noted by the Supreme Court in *King Salmon*, the Treaty has both procedural and substantive importance to resource management practice.[53]

g. The seven Rūnaka with a shared interest in the Queenstown Lakes District are identified by the plan.[54] By identifying their shared interest, the plan contemplates that some or all Rūnaka may be involved with any relevant resource management process.

h. Consistent with the strategic chapter, Chapter 5 identifies that wāhi tūpuna are to be identified and protected. See for example Chapter 5.3 Issues and outcomes; Objective 5.3.5 and the related policy set. Chapter 5.4 Methods are (as noted) at a landscape scale.

[51] Chapter 5.1, Purpose, p5-1
[52] Chapter 5.2, Ngāi Tahu, p5-1
[53] *King Salmon* at [88]
[54] Chapter 5.2, p5-2

REPLY POINTS

44 The following reply points arise from issues raised by submitters during the hearing or Q & A by Commissioners[55] :

- *Whether NPS is relevant; if so, then whether wahi tūpuna are a constraint similar to other planning constraints such landscape overlays. That the rules should not apply to urban or developed/developable land.*

Reply

44.1 The two relevant NPS are discussed above. It is appropriate to treat wāhi tūpuna as a relevant constraint. Kā Rūnaka has agreed that urban areas should not have rules imposed; but it is appropriate to recognise the relationship of Kāi Tahu with urban areas as a relevant consideration for D and NC applications.

- *Whether the rules are inefficient and onerous, especially for earthworks.*

Reply

44.2 Earthworks have potential to impact wāhi tūpuna, including by direct physical destruction. Thresholds for rules are addressed by the amended relief in Appendix 1. It is not sufficient to rely on the approvals process required by the Heritage New Zealand Pouhere Taonga Act, enacted for different purposes.

- *Whether s32 assessment by Council failed to assess relevant costs that may practicably be quantified.*

Reply

44.3 Many or most of the values identified by Chapter 39 are intangible or not practicably quantified. To the extent that some costs may be quantified, such as consenting costs and restrictions on land use, the criticism may be valid; but consenting costs, and the opportunity costs imposed by land use restrictions (absent resource consent) are well understood and submitters have to some extent "filled the gap", by providing relevant evidence as to consenting costs. Costs and benefits are to be revisited as part of the s32AA assessment. It is not a reason to deny or defer protections for the intangible values and relationships protected by wāhi tūpuna.

- *Whether scope to map urban areas, on basis that rules do not apply, if mapping is to clarify what objectives and policies relate to.*

[55] The listed issues and response are not intended to be comprehensive; Mr Bathgate has recommended amended relief (**Appendix 1**) in response to relevant submitter evidence.

Reply

44.4 The 3 urban (CBD) areas were identified in Schedule 39.6 as notified, but not mapped. Best practice suggests they should be mapped to give certainty to landowners, including applicants, when relevant to discretionary or non-complying applications. It is trite law that scope is available as an intermediary position (between the notified version and deletion of the provisions).[56] Removing the rules framework, and identifying the urban areas by lines on a plan, is intermediary relief. These wāhi tupuna remain significant to Kāi Tahu, even if Chapter 39 rules are not triggered.[57]

- *Whether threats and values listed in Schedule 39.6 are identified too broadly, with no associated scale of effects to guide when an activity will be appropriate within a wāhi tūpuna area.*

Reply

44.5 The criticism overstates the need for guideline or greater detail. Whether an activity results in adverse effects, and the scale of those effects, will be site and context-specific, as it is for landscape and other relevant effects. Context is required to assess relevant effects that may arise for individual consent applications.

44.6 The *Upper Clutha* (interim) decision confirmed, at the level of principle, that identification of values for specific ONLs is appropriate and should be attempted on a staged basis.[58] Kaumatua evidence by Kā Rūnaka has identified values specific to each wāhi tūpuna, but bearing in mind that the relationship of Kāi Tahu with each wāhi tūpuna has an additional intrinsic value. This reflects the holistic and relational approach in s6(e) RMA.

44.7 Criticism of the methodology used for identification of wāhi tūpuna should not be disproportionate to the methodology used to identify and recognise other s6 RMA values in the District, such as ONLs. Mapping of wāhi tūpuna should not be held to a higher standard or onus of proof compared to evidence required in support of blanket ONL overlays that apply to approximately 97% of the district, where the Environment Court has accepted identification of ONLs, with values to "come later" on a staged (prioritised) basis.

- *Whether the requirement for consultation is unclear or onerous. That section 87BB RMA may provide guidance where impacts are trivial or marginal.*

[56] *Re Vivid Holdings* [1999] NZRMA 467
[57] Discussed by Edward Ellison in evidence.
[58] C.f. *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 205

Reply

44.8 Consultation is encouraged but not required. That reflects best practice. Section 87BB applies on an individual application basis. Reference to s87BB could be included as a default advice note in the plan; but query if needed as it is simply declarative of the law. Suggested amendments in Appendix 1 have downgraded several policies to methods, which answers the issue.

- *Whether the evidential onus for identification of wāhi tūpuna has not been discharged by production of sufficient probative evidence, citing Heybridge and related authority.*

Reply

44.9 The answer lies in the Panel's assessment of the evidence and methodology followed by Kāi Tahu, and the appropriateness of Council considering and adopting information provided by Kāi Tahu as the specialists in their own tikanga and beliefs. Council was entitled (and arguably required by the planning framework) to accept Kāi Tahu information as to identification and values of wāhi tūpuna within the District. This was not unlawful delegation. Council has provided its own independent planning assessment of the appropriateness under the wider statutory and planning framework.

44.10 The RPS and Chapters 3 and 5 of the district plan confirm that it is permissible or mandatory to have regard to the relationships (including whakapapa) and culture and traditions (including tikanga) of Kāi Tahu in relation to their ancestral lands, waters, sites and taonga. That evidence, provided by kaumatua, is or should be sufficient to satisfy the Panel as to evidential onus. The criticism (that it is necessary to have "direct probative evidence" from kaumatua[59]) is otherwise circular. The Panel does have direct probative evidence. The hearings process is transparent, allowing for testing or evaluation of the identification process.

44.11 Some Counsel seem to apply a quantitative or near-quantitative approach to evaluation of the cultural evidence.[60] The criticism misses the point. Kaumatua evidence is necessarily qualitative. Their evidence relies on intrinsic values, and relationships with ancestral wāhi tupuna, derived from whakapapa. It is given in accordance with customary tikanga by recognised Kāi Tahu kaumatua.

44.12 While each case turns on its facts, the Environment Court accepted traditional evidence from Mr Ellison, based on tikanga beliefs and whakapapa, in the *Kemp* decision. This included creation stories, identification of named sites, and reverence of the deeds of gods.[61]

[59] Ashton, Legal Submissions, at [2.10]
[60] For example, see generally Ashton, Legal Submissions.
[61] *Kemp v Queenstown Lakes District Council* [2000] NZRMA 289 at [13]:

44.12 Mr Ellison and Mr Higgins have identified Kāi Tahu's relationships, culture and traditions for all wāhi tūpuna identified in Schedule 39.6. That evidence should be given determinative or substantial weight as to the position of Kā Rūnaka, speaking for Kāi Tahu, on the merits of the wāhi tūpuna.[62]

44.13 Both the RPS and Chapters 3 & 5 of the district plan anticipate that substantial weight will be given to Kāi Tahu's tikanga, relationships and beliefs, in evaluating the appropriateness of Chapter 39 provisions. That is not of course determinative of the outcome for Chapter 39, which requires an evaluation of all relevant sustainable management factors, including directive policies in the partly operative RPS. Deletion of Chapter 39 would not give effect to the RPS.[63]

"[13] Mr E W Ellison, a farmer of Otakou (Otago) and Deputy Chairperson of TRoNT was sworn and gave evidence on behalf of TRoNT and the local runanga Kati Huirapa Runanga Ki Puketeraki and outlined the importance of Te Awa Whakatipu (the Dart River). To them the river is a taoka (taonga). Mr Ellison stated the whole region, and in particular Te Awa Whakatipu, is of spiritual importance to Kai Tahu based on these reasons:

- Reverence of the deeds of Gods and the creation stories as relayed from generation to generation;
- Whakapapa which places us in an equal context within the natural world;
- Mana of our ancestors who were prodigious explorers as they searched for resources or new trails;
- Waahi tapu and other taonga;
- Names on the landscape.

He stated that the name Te Wai Pounamu, the traditional name for the South Island, originates from this catchment. That is because of the important pounamu source located here. The mountain Te Koroka (the Cosmos Peaks) is the source of the pounamu. The actual slip after which Slipstream is named was called Te Horo. Te Horo is tapu to Kai Tahu. The waters of Te Awa Whakatipu are also imbued with spiritual qualities to Kai Tahu. He described the mauri of Te Awa Whakatipu as being of "high note"." [Footnotes omitted]

[62] Weighting is discussed in the *Ngāti Hokopu* decision:

"[55] Against that, we have to bear in mind that Ngati Awa, and Maori generally, have a culture in which oral statements are the accepted method of discourse on serious issues, and statements of whakapapa are very important as connecting individuals to their land. In the absence of other evidence from experts on tikanga Maori, the evidence of tangata whenua must be given some weight (and in appropriate cases considerable, perhaps even determinative, weight). In the end the weight to be given to the evidence in any case is unique to that case."

[63] Reaching a value judgment on behalf of the community as a whole, as described in *Watercare* decision, must also reflect directive language and bottom-lines identified in the RPS, as the superior instrument. This avoids difficulties with the overall broad judgment approach identified in *King Salmon* (in circumstances where the superior planning instruments are directive on policy choices). Part 2 RMA remains relevant given that the QLDC planning framework is not operative or complete. *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 at 305 (CA). See generally *King Salmon* (as to directive planning instruments and consideration of Pt 2 RMA for plan change processes); and *Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 (as to consent processes).

- *Absent written approval by mana whenua, whether there is an almost certain expectation of (limited) notification.[64] Whether proposed provisions give "power" (or "veto power") to mana whenua.*

Reply

44.14 As drafted, Chapter 39 does not fetter Council's discretion. Assessment of notification will be applied case by case. Where there are relevant, and minor or greater effects on wāhi tūpuna or other values, then notification is likely. That is a function of the notification process, and reflects natural justice expectations for non-trivial effects. Chapter 39 recognises and provides for the relationship of Kāi Tahu with its ancestral lands, waters, sites and taonga. This does not confer unlawful "power" on mana whenua.

- *Whether Chapter 39 is susceptible to challenge by judicial review; whether Council has failed to apply independent assessment supporting review.*

Reply

44.15 Addressed earlier, but the submission is extreme,[65] and therefore memorable, so it merits response. Council has undertaken an independent assessment under the statutory framework, but has appropriately relied on the expertise of Kā Rūnaka witnesses qualified to address Kāi Tahu whakapapa and tikanga. No party has called relevant competing kaumatua and cultural evidence. Judicial review is precluded at this time, because the Panel hearing is a merits hearing, and appeal rights provide a sufficient remedy: s296 RMA.

WITNESSES FOR KĀ RŪNAKA

45 These are:

- Edward Ellison
- David Higgins
- Dr Lynette Carter
- Maree Kleinlangevelsloo
- Michael Bathgate

PROPOSED RELIEF

46 Representatives for Kā Rūnaka have attended the entire hearing and have carefully listened to the evidence and presentations of other submitters. **Appendix 1** responds to that evidence.

[64] Gardner-Hopkins, Legal Submissions, at [14]
[65] Discussed in Gardner-Hopkins, Legal Submissions.

CONCLUSION

47 Recognition by the district plan of identified wāhi tūpuna of Kāi Tahu is long overdue. Deleting Chapter 39 would not respond to the statutory imperatives, including the RPS, and would reflect a major failing by Council in its ongoing partnership with Kāi Tahu for management of the District. It would also fail the requirement for sustainable management, including the wellbeing of the wider community.

48 It is time for the District to respond to the statutory and planning imperatives that anticipate recognition of wāhi tūpuna valued by Kāi Tahu. It is submitted that the changes recommended by Mr Bathgate (**Appendix 1**) are the most appropriate and meet the relevant statutory and planning requirements.

Dated this 17th day of July 2020

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Rob Enright
Counsel for Kā Rūnaka

Appendices:

(1) Amended relief recommended by Michael Bathgate on behalf of Kā Rūnaka
(2) Explanatory overview by Maree Kleinlangevelsloo on AEE, CIA, CVA processes. Leave is sought to produce this in response to issues raised during the hearing.
(3) Discussion paper on Ngāi Tahu statutory acknowledgements
(4) *Kemp v QLDC* [2000] NZRMA 289
(5) *Ngāti Hokopū ki Hokowhitu v Whākatane District Council* [2002] NZEnvC 421
(6) *Ngāti Whātua Ōrākei Whai Maia Limited v Auckland Council* [2019] NZEnvC 184
(7) *TV3 Network Services Ltd v Waikato District Council* [1997] NZRMA 539 (HC)