IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF Applications for resource consent by the Central Plains Water Trust and a notice of requirement for the designation of land by Central Plains Water Limited associated with the construction and operation of the Central Plains Water Scheme

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SYNOPSIS OF LEGAL SUBMISSIONS ON BEHALF OF TE RŪNANGA O NGĀI TAHU

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Introduction

1. Te Rūnanga o Ngāi Tahu is a submitter in opposition to:

    a. The joint applications by Central Plains Water Trust ("CPWT") and Ashburton Community water trust ("ACWT") to Environment Canterbury pursuant to a written submission dated 18 August 2006; and

    b. The applications by CPWT for land use consents and Central Plains Water Limited ("CPWL") in respect of the Notice of Requirement to Selwyn District Council pursuant to a written submission dated 29 January 2007.

2. Those submission documents are detailed and contain an extensive narrative of the issues of concern to Te Rūnanga o Ngāi Tahu. I will not repeat what is included in those submissions but ask the Panel to carefully consider all that is contained in those documents.

3. Pursuant to s.15 Te Rūnanga o Ngāi Tahu Act 1996, Te Rūnanga o Ngāi Tahu is the legal representative of Ngāi Tahu whanui within the Ngāi Tahu Takiwa.

Primary Concerns

4. Failure of the Applicants to have proper regard for Ngāi Tahu values and planning instruments. As a consequence there has been a failure to have any regard to the requirement to protect those values.

5. Adverse effects on known and unknown sites of cultural significance.

6. Adverse effects on Te Waihora/Lake Ellesmere and the Waimakariri and Rakaia Rivers.

7. Destruction of an important habitat for a taonga species- Kowaro/Canterbury mudfish.

8. Inappropriate uncertainty arising out of an over reliance on management plans.

Key Points

9. The proposal must be considered as one complete application, such that bundling is appropriate, so that the applications must be assessed as non-complying.

10. There are adverse effects that are more than minor. In respect of some adverse effects, such as the destruction of sites of cultural significance, there is no evidence before this panel to enable a proper decision to be made, and leaving this issue for another day under another process is not appropriate.

11. The proposal is contrary to key objectives and policies in relevant planning instruments.

12. To the extent that any one or more of the applications are non-complying the threshold test is not met, so that those applications must be declined without further consideration.

13. The Applicant has failed to prove that alternative sites that would, for example, not lead to the destruction of important cultural sites, have been considered.

Iwi Plans

14. **Ngāi Tahu Freshwater Policy (2000).** Sets out a number of objectives and policies relating to wahi tapu, mauri, mahinga kai and kaitiakitanga and has a specific policy dealing with irrigation.

15. **Te Taumuta Runanga Natural Resources Plan (2002).**

16. **Te Waihora Joint Management Plan.** This has been prepared in accordance with the requirement set out in the Ngāi Tahu Claims Settlement Act 1998. This management plan seeks to restore Te Waihora by **improving** (my emphasis) the water quality habitats.

    a. **Policy 2.3.3** "recognises the link between land and water and in particular the link between JMP (Joint Management Plan) Area and the water catchment".

    b. **Methods** Include "(d) advocating for the prevention of contaminants into water or into land that results in the contaminant entering water, and (f) restriction on the unnatural mixing of water sourced from different water bodies".

17. None of these plans have been referred to in the evidence of any witnesses for the Applicants, nor have they been referred to by any

Council officers. Certainly these instruments were not mentioned by Dr. Wylie QC in opening for the Applicants.

18. Clearly these instruments are relevant to this panel's assessment under s.104 RMA (to the extent that such assessment is available).

Statutes and Orders

19. **Ngai Tahu Claims Settlement Act 1998.**

a. S.168 The fee simple estate in the bed of Te Waihora is vested in Te Rūnanga o Ngāi Tahu.

b. Schedule 97 Kowaro (Canterbury Mudfish) are recognised as a taonga fish species.

20. **National Water Conservation (Lake Ellesmere) Order 1990.**

a. S.3 It is hereby declared that Lake Ellesmere provides an outstanding wildlife habitat.

b. S.4 Restrictions on Lake Openings

21. It is submitted that the Statute and Order provide a statutory context to some of the concerns of Ngāi Tahu, and of themselves provide proof of some of the values and issues that this panel must consider. It is submitted that there has been little if any recognition of many of these values and concerns by the Applicants, who seem to have relied upon the consultation that has occurred between the Applicants and Ngāi Tahu.

See also the evidence of David O'Connell about the adequacy of that consultation, and see the submission.

22. Such an approach fails to fulfil the obligations pursuant to s.6, s.7 and s.8 RMA, which require not only recognise the relationship of Tangata Whenua with natural and physical resources, but also requires proper consultation, and an active duty of protection. That was accepted by Mr. Murray for the Applicant when asked a question by Mr. Chairman, but it is submitted that until that question was put this requirement of protection had not formed part of the Applicant's consideration of the effects of its applications. This is consistent with Dr. Wylie QC in opening seeking to reserve a right of reply to how submitters might advance s.8 in opposition. Apparently the requirement of protection was simply not in the minds of the Applicants.

23. At paragraph 216 Dr. Wylie QC accepted only that arguably s.6(e)-*the relationship of Maori and their culture with their ancestral lands, water, sites, waahi tapu, and other taonga,* was relevant and stated that the evidence deals with this issue. In my submission the evidence of the Applicants certainly does not deal with this issue.

24. At paragraph 219 Dr. Wylie QC listed the s.7 matters on which he said the focus might be. Notably he failed to list s.7 (a)-Kaitiakitanga.

Classification

25. It is accepted by all that some of the applications for resource consent must be classified as non-complying. The Panel has heard submissions over whether the applications should be bundled together such that they

must all be considered as non-complying, or whether some severance of non-complying applications from those which are discretionary is appropriate.

26. Counsel adopts the submissions of Counsel for Fish & Game.

27. In addition it is submitted that the Applicants come to this hearing declaring that the "Water Enhancement Scheme" will benefit not only members of the scheme, but also the wider Canterbury and National community. It is submitted that the Applicants present their scheme as a unified whole for the purpose of extolling its claimed virtues, and that it is artificial for it to resile from that position when the legal test is applied to various of the applications to be considered.

28. In opening for the Applicants Dr. Wylie QC (from paragraph 116) deals with this issue. At 119 Dr. Wylie QC seeks to distinguish *Locke* on the basis that it was an oral decision on the 1953 Act. Obviously that it is an oral decision can have no bearing on its effect on this Panel, and that it is a decision in respect of the earlier Act is answered by its approval by both the Environment Court and the High Court as to its application to the RMA.

29. Dr. Wylie QC then argues that given the current status of the Proposed Natural Resources Regional Plan, much less weight must be given to that plan, whilst accepting (paragraph 119 (b)) that it must be taken into account by the Panel, because it is claimed to be at an early stage in the notification/hearing process. The Applicant submits it cannot be assumed that chapters 4 to 9 of the PNRRP will remain unchanged when they finally become operative. There is no evidence before this Panel (of which counsel is aware) as to what if any submissions have been lodged in respect of the relevant provisions of the PNRRP. In my submission it

would be wrong for this Panel to speculate as to what submissions there may be. If the Applicants ask you to effectively disregard the PNRRP on this basis then it was incumbent upon them to provide an evidential basis for that. They have failed to do so. This is not a matter for evidence in reply either, as there is (again as far as counsel is aware) no evidence on this point from any witness which would be replied to by witnesses for the Applicant.

30. In *LRG Investments Ltd v CCC,* EnvC C064/98 the Court (Judge Skelton, Commissioner Kerr) when deciding between emphasis on the transitional Plan and the proposed Plan said:

> *Because the outcome of the relevant submissions on the proposed Plan are unlikely to have any significant effect on the status of the proposal and the criteria by which it is to be assessed, the Court gave the proposed Plan more weight than the transitional Plan which had been made operative almost ten years before.*

31. The Applicants also argue that the non-complying applications are not closely linked with the discretionary applications and that they are largely short term effects which will occur during construction only. All of the consents for non-complying activities seek a 35 year term. Only some of the applications that are non-complying relate to construction activities (which beg the question as to duration). As counsel understands it the scheme could not be operated without the various non-complying discharge consents. Certainly it cannot be gainsaid that the discharge consents must be closely related to the consents to take water, and to the use of that water. On that basis the Regional Council consents must, it is submitted, be considered all together, such that they are all to be considered on a non-complying basis.

32. This of course requires the threshold tests of s.104D to be met, and it is submitted that they are not met, as the adverse effects are more than minor, and the scheme is contrary to relevant objectives and policies of relevant plans.

Sites of cultural significance.

33. Dr. Jeremy Habberfield-Short. At paragraph 4.7 it is stated that "*this evidence does not represent an assessment of the archaeological values (known and unknown) in totality for the Central plains, nor does it represent an assessment of the impact of the scheme footprint on the totality of those values. Such a thing can only be derived from a survey of that land in which all archaeological sites are recorded systematically and holistically assessed for the values mentioned above.*"

34. At paragraphs 4.11 to 4.13 Dr. Habberfield-Short explains that some land owners withheld permission to enter land, and The Selwyn Plantation Board and Ecan were unavailable to give permission within the timeframe required for the survey. That timeframe is not mentioned in the evidence. I refer you to the top of page 25 of the submission by Te Rūnanga o Ngāi Tahu to Ecan, where after discussion of the perceived need for an archaeological survey to be undertaken it is stated;

> *Despite the fact that, since 2001, Te Rūnanga o Ngāi Tahu has repeatedly requested that such a survey be carried out CPW has so far failed to deliver. In this context, it is simply not possible for Te Rūnanga o Ngāi Tahu to properly or effectively assess the CPW proposal.*

35. The importance of this requirement is referred to in the evidence of David O'Connell at paragraph 41 where he states that the need for a comprehensive archaeological survey was noted in the 2001 Cultural impact assessment and again in the 2005 version. It is Mr. O'Connell's evidence that the lack of a comprehensive survey is due to budgetary constraints with CPW rather than the reasons expressed by Dr. Habberfield-Short.

36. In any event, as pointed out by Dr. Wylie in opening (paragraph 127 p 37) as a Requiring Authority CPWL has power to go on to private land to undertake investigations under the Public Works Act 1981. This is a reference to section 111A Public Works Act 1981.

37. It is submitted that the "excuses" put forward by the Applicant for its failure to conduct an appropriate archaeological survey have no basis. There must have been sufficient time since the matter was raised by Te Rūnanga o Ngāi Tahu in 2001, and there is a legal power to overcome the obstacles that have been claimed stood in the way.

38. Despite these shortcomings it is the evidence for the Applicant that sites will be destroyed or damaged. It is the evidence of Susan Robson for the Applicant that the recommendations of Dr. Habberfield-Short implicitly suggest that "the construction of the scheme provides an ideal opportunity to investigate, record and advance the understanding of the archaeological record". This most certainly is not an approach endorsed or accepted by Te Rūnanga o Ngāi Tahu. Hoanna Burgman will give evidence about how such an approach utterly fails to protect cultural values, and she will speak about the Pegasus Bay example which was held up by Dr. Habberfield-Short as a shining example of success. What

is seen as a success by a Dr. of archaeology is quite different from what is seen as appropriate by Tangata Whenua.

39. Refer the evidence of Susan Robson at paragraph 5.64 where she refers to objective 1 PSDP which requires **protection** of such sites. It is submitted that destruction later properly recorded cannot be protection.

40. Given this lack of detailed survey of the effects of siting the scheme where proposed, it is submitted that it must follow that the Applicant has failed to consider alternative routes that would not have this same destructive outcome. In my submission this cannot be adequate consideration of alternatives routes as required by s.171 (1) (b) RMA. In my submission the only evidence about consideration of alternative routes has been as to engineering issues.

Adverse Effects on Te Waihora/Lake Ellesmere

41. The evidence for the Applicants is that there will be an increase to nitrate loading into Te Waihora as a result of the CPW scheme, but it is claimed that this will not be an adverse effect.

42. As stated above the significance of Te Waihora is recognised in the Water Conservation Order, the Ngai Tahu Claims Settlement Act, and David O'Connell in his evidence brings some cultural perspective to that importance which is not immediately obvious from the statutory documents.

43. It is the evidence of Dr. David Hamilton (whose PH.D involved research into water quality of Te Waihora) that with the current projections of increases in nitrate concentrations in Te Waihora in simulations of effects

of CPWES inflows, there is a strong possibility that lake water quality will become further degraded.

44. Further, it is Dr. Hamilton's preliminary assessment that the CPWES inputs into Te Waihora impede the objective of Te Rūnanga o Ngāi Tahu to initiate restoration of the lake and improve mahinga kai resources. This objective is expressed in the Te Waihora Joint Management Plan (see above).

45. It is the evidence of Paul White that nitrate-nitrogen concentrations in groundwater in the Te Waihora catchment will increase within CPWES area, because average nitrogen concentrations in land surface drainage will increase with CPWES, and 'low nitrogen' sources of water will not be mixed evenly across the Te Waihora catchment. And, that Nitrogen loading to Te Waihora from groundwater-fed streams will be larger with CPWES than present day. Mr. White's evidence is that increased nutrient discharge and increased water flows to Te Waihora with CPWES is accepted by the witnesses for the Applicant, so that the real difference between them is as to degree. However Mr. White's evidence is that the extent of that degree of difference is large.

46. In my submission the evidence for the Applicants establishes that there will be adverse effects on Te Waihora, because their evidence does indicate that there will be an increase in nitrate loading to the lake. The evidence of Dr. Hamilton is that this will impede restoration of the lake.

47. It is submitted that it is clear that granting the consents would be contrary to Policy 10 of Chapter 9 of the RPS which refers to the progressive improvement of such degraded waters as Te Waihora (which is entirely consistent with the provisions of the Joint Management Plan).

Mitigation of effects on Te Waihora/Lake Ellesmere

48. One of the mitigation solutions suggested by witnesses for the Applicant in respect of effects on Te Waihora is additional openings of the lake. This is also stated to be a likely requirement given increased flows to the lake in any event.

49. The National Water Conservation (Lake Ellesmere) Order 1990 contains provisions restricting the grant of rights to allow the lake to be artificially opened. Only if the prerequisites set out in clause 4(2) of the Order are met, will a consent be granted to open the lake.

Discharge to Bed of Lake

50. It is submitted that on the evidence it is arguable that the Applicant (or perhaps the irrigators who would do so pursuant to the consents granted to the Applicant) would, if granted consent, deposit a substance onto the bed of Te Waihora/Lake Ellesmere. If that is so this would require a resource consent pursuant to s.13 RMA:

> *No person may, in relation to the bed of any lake or river,-*
> *(d) Deposit any substance in, on, or under the bed*
> *Unless expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent.*

51. In *Re an Application by Contact Energy Ltd* EnvC C116/04 the Environment Court held that to deposit means "reasonably directly and actively to place or empty a substance (not being a contaminant) onto a lake or river bed or into the water above the bed". The question of how direct and active the action must be is a question of fact and degree to be

resolved on the facts of each case. In that case the Court held that the settling of alluvium in the lakes did not require a resource consent because the activity was too indirect and passive. This on the basis that the facts were that the dam slowed the flow of water causing sediment to settle on the lake bed.

52. In my submission it is at least arguable that there is evidence before this Panel that the actions of the Applicants in exercising the consents would be reasonably directly and actively placing a substance on the bed of Te Waihora.

53. Here, there is the additional point that Te Rūnanga o Ngāi Tahu owns the lake bed, so that their consent would be required to allow such deposit of a substance on the lake bed.

54. Of course were such discharges to occur then there is the spectre of common law actions in nuisance or *Rylands v Fletcher*.

Over reliance on Management Plans

55. Te Rūnanga o Ngāi Tahu is concerned at the heavy reliance by the Applicants upon the use of management plans as a mechanism not only to manage the effects of the scheme, but also to identify the effects in the first place.

56. It would seem that part at least of the answer by the Applicants to this criticism, is "Trust us, we are a Community Trust for the benefit of the community as a whole". At first blush this refrain seems to have some attraction. I understand Mr. Chairman has commented that it seems that the Court of Appeal thought it was relevant.

57. However it is submitted that the devil is in the detail. This detail (as I understand it, although I was not involved) was not before the Court of Appeal.

58. It is important to here note that the 2 trustees (Ms Claire Williams and Mr. Viv Smart) who have been portrayed as representatives of Te Rūnanga o Ngāi Tahu on the Trust Board, do not represent Te Rūnanga o Ngāi Tahu on that board. The purpose of their role was to provide advice to the Trust about the values and issues pertaining to Ngāi Tahu.

59. It is important to emphasise that, although Clare Williams and Viv Smart were there to add a Ngāi Tahu voice to the CPW Trust process, they were not in fact official representatives of Ngāi Tahu or of ngā rūnanga. Rather, they were appointed to the Trust as individuals who possessed cultural expertise. At no stage, did Clare Williams or Viv Smart ever receive instructions from Ngāi Tahu about what to say or how to vote, or report back to Ngāi Tahu about their actions (see evidence of David O'Connell, no evidence from Ms. Williams or Mr. Smart has been called to date by the Trust). Decisions of the Trustees simply do not have the imprimatur of the blessing of Te Rūnanga o Ngāi Tahu.

60. Refer Memorandum of Agreement dated 5 November 2004 (annexure to evidence D J O'Rourke). I note here that this document is entitled a "Memorandum of Agreement", not a contract, and not a deed.

61. At clause 1.1 the ownership and exclusive use of the resource consents is recorded.

62. At clause 2.3 it is recorded that while not finally agreed it is envisaged that after stage 1(prior to issue of resource consents) the functions of CPWL may be split:

> (a)*Into one or more operational entities responsible amongst other things for the establishment of the Scheme and for delivery of Scheme water to users; and*
> (b)*Into one or more infrastructure owning entities.*

63. It is therefore expressly contemplated by the Applicant that an already complicated structure may be further complicated with a number of different legal entities involved.

64. Clause 4 sets out the role of the Trust after the issue of the resource consents (stage 2). In particular I refer you clause 4.1(j) whereby the Trust will in consultation with CPWL *Allow CPWL to manage and administer the Resource Consents.*

65. Clause 7 sets out the role of CPWL after the issue of the resource consents. Clause 7.2 states:

> *Provided potential water users within the Scheme Area have been given the first right to use that water, CPWL may allocate water in the best interests of CPWL. CPWL may allocate water to users outside the Scheme Area after prior consultation with the Water Trust.*

66. "In the best interests of CPWL" clearly indicates a purely commercial decision to allocate to users outside of the Scheme Area. Those users would not be shareholders in CPWL. Commercially this may be sound but the effects of allocating water to be used outside of the Scheme Area have not been assessed before this Panel.

67. Such commercial realities for CPWL are expressly recorded at clause 9.2 where the Water Trust acknowledges that CPWL's directors:

> *Owe their primary duties to CPWL and that as a general principle their duties to CPWL (and/or any other fiduciary and statutory duties which they may owe) will take precedence over any obligations to the Water Trust and that they may require to consider any direction received by CPWL from the Water Trust in that light.*

68. Clause 9.2 is an acknowledgement that the directors of CPWL may be required not to comply with a direction from the Trustees of the Water Trust, if to do so would be in conflict with their primary duty to the members of CPWL.

69. Clause 13 contemplates reviews of the terms of the relationship between CPWT and CPWL, which review may address:

> (a) *The continuing role of the Water Trust;*
>
> *(b) The ownership of the Resource Consents but not the exclusive right to use the Resource Consents held by CPWL.*

70. Remedies for breach are set out in clause 15, and this has been held out by the Trustees as their means of ensuring compliance with the terms of the consents without having to involve heavy handed intervention by Ecan or SDC (see subsequent agreement) It is important though, that the withdrawal of permission to use the resource consents can only be effected for a "material breach", defined as:

a. *Has jeopardised or is likely to jeopardise the continuity of the Resource Consents; and*

b. *In the case of breaches that are capable of remedy only, the breach or breaches are not remedied within 90 days, or such shorter period as may be required to comply with any statutory or regulatory requirement, of the date on which the Water Trust gives CPWL written notice of the breach.*

71. Those clauses must now be read in light of a further agreement between CPWT and CPWL, which states that the functions of the Trust will (inter alia):

> *Ensure that the Resource Consent will always be available to CPWL to allow the continuation of the operation of the scheme uninterrupted, notwithstanding any unresolved dispute between CPWT and CPWL.*

72. In my submission the legal effect of that clause is that CPWT is restrained from withdrawing the right to use the consent until resolution of any dispute between the company and the trust over e.g. whether there has been a material breach is resolved. That would extend to an obligation on the Trust (enforceable by the company) not to inform Ecan or SDC of any such alleged breach.

73. The schedule to the 5 November 2004 memorandum sets out what is required by way of best practice environmental standards. At first blush the statements about protecting and enhancing set out there look commendable. However that schedule is stated to be subject to clauses 14.2(a)(i) to 14.2(a)(iv).

74. Clause 14.2(a) states that such standards

> (ii)*Must be financially viable,*

(iii)Must not affect the financial viability of water users' use of water from the Scheme;
(iv)Will apply across the Scheme Area unless otherwise agreed.

75. It is submitted that little comfort can be derived from these clauses.

76. These issues must be taken into account if the Panel accepts that reliance on the Management Plans in the way proposed by the Applicants is appropriate.

Overall benefits-Reliance on economic evidence

77. As I understood an answer from Ms. Robson to a question from Mr. Nixon, Ms. Robson said that the economic evidence as to positive effects of the scheme was fundamental to the overall balancing exercise of positive effects vs. adverse effects. This was particularly so (said Ms. Robson) because the positive economic effects would be region wide whereas the adverse effects were more limited in effect.

78. In my submission it must follow from that proposition that if the economic assessment put forward by the Applicants is not accepted by this Panel, then the effect of Ms. Robson's evidence is that the adverse effects outweigh the overall positive effects of the scheme when conducting an overall balancing exercise of positive effects vs. adverse effects.

79. It will be the evidence of Michael Copeland that:

   a. Mr. Donnelly's assessment of the economic effects of the proposed scheme substantially overstates its potential contribution to

community economic wellbeing and the efficient use of resources; and

b. Relatively small changes to key assumptions of the cost benefit analysis for the scheme result in negative net present values and low economic internal rates of return; and

c. Mr. Donnelly's analysis does not make a compelling case that net economic benefits from the scheme will be sufficient to outweigh any significant non-economic costs.

80. It is submitted that it follows that if Mr. Copeland's evidence is preferred (or that of the other economic witnesses who disagree with Mr. Donnelly) then Ms. Robson's answer to Mr. Nixon's question assumes significant importance when considering the overall balancing of positive vs. adverse effects.

Rakaia NWCO

81. Counsel respectfully adopts the submissions of counsel for the Director General of Conservation at paragraph 5.1 and the reference to the judgment of the Environment Court on the Rangitata, that the minimum standards set in a WCO are not necessarily the same as might be set on a resource consent application especially if there was further evidence. This approach is required by s.199 which commences with the words "notwithstanding anything in Part II". This must mean that there has been no Part II assessment in respect of the protections afforded by the WCO. And of course that Order only protects those features that are outstanding on a national scale, so that if there are amenity values that do not reach that standard those amenity values must still be assessed under Part II, and the provisions of the WCO may or may not afford those values any protection at all.

Claimed benefits to groundwater

82. There is a general claim by the Applicants that a grant of the consents will lead to a benefit to the groundwater, as more irrigation from surface water/stored water will increase the groundwater.

83. As a matter of logic this must, to an extent at least, be dependent on whether those now taking groundwater stop doing so and convert to scheme water (as I understand that is accepted).

84. There is no requirement for scheme members who currently have groundwater consents to give those up.

85. Mr. Donkers (a Director of CPWL) at paragraph 49 of his statement of evidence expressly acknowledged that once he ceased taking from groundwater *"This will leave more water in the groundwater system,* ***which might provide an opportunity for other farmers to irrigate*** *(my emphasis). Alternatively this water may remain in the system to enhance the flow of springfed streams and rivers lower down the Plains".*

Conclusion

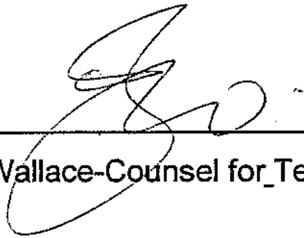
86. The proposed Central Plains scheme has many significant effects that this Panel must consider, including significant adverse effects on values important to Te Rūnanga o Ngāi Tahu. The Applicants became aware of those concerns during the consultation process, but rather surprisingly have chosen to look for rather lame excuses for their failure to conduct such important steps as an archaeological survey, which was within their power to complete.

87. The Applicants have apparently had not regard to Iwi planning instruments.

88. It is submitted that the Applicants leave this Panel with far too many uncertainties that cannot be left for another day under another, less inclusive, process.

89. The consents must be declined and the notice of requirement withdrawn.

Dated this 23rd day of May 2008



Malcolm Wallace-Counsel for_Te Rūnanga o Ngāi Tahu