

Under **the Resource Management Act 1991**

**Under Waitaki Catchment Water Allocation
Regional Plan**

In the matter of **Applications for resource consent by various
applicants to take and use water from the
Lower Waitaki River Catchment**

Synopsis of Legal Submissions for

TE RŪNANGA O NGĀI TAHU

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1. Te Rūnanga o Ngāi Tahu is a submitter in opposition. The relief sought is that the applications be declined.
2. The written submission lodged by Te Rūnanga o Ngāi Tahu in respect of the applications (dated 27 September 2007) contains the background and reasons for the submission in opposition. Essentially, Te Rūnanga o Ngāi Tahu consider that the applicants have failed to adequately assess either the cultural or ecological implications of granting the consents sought. There has been no consultation with Ngāi Tahu, no attempt to undertake a cultural impact assessment and a failure to carry out a comprehensive ecological assessment of either the localised or cumulative effects of granting the consents sought (cumulative effects being a gradual build up of effects over time).

Statutory Acknowledgements

3. Ngai Tahu Claims Settlement Act 1998. This places the Waitaki River and Hakataramea River in context as to their importance to all Ngāi Tahu whanui. This is also expressly recognised in the Waitaki Catchment Water Allocation Regional Plan.

Focus on Tributaries

4. For the North Bank Tunnel Concept and the Hunter Downs hearings, Te Rūnanga o Ngāi Tahu presented submissions and evidence, which sought to highlight the outstanding cultural values associated with the mainstem of the Lower Waitaki River itself. In this hearing, Te Rūnanga o Ngāi Tahu wants to draw to your attention the cultural significance of the tributaries flowing into the Lower Waitaki (particularly the Hakataramea), which are the subject of numerous consent applications. Ngāi Tahu will present evidence from Te Wera King and David Higgins about the whakapapa of the tributaries, the vital role that these waterways played in the gathering of mahinga kai and the concerning state of

their existing cultural health, especially the dewatering of side braids and wetlands, the loss of connectivity between tributaries and the main river and the decline in water quality including a concerning increase in the temperature of the Hakataramea.

5. It is intended that this evidence should also be viewed alongside the significant concern that Te Rūnanga o Ngāi Tahu expressed in the NBTC and HDI hearings about the possibility of reducing the minimum flow of the Lower Waitaki River from 150m³/s to 100m³/s. Ngāi Tahu remains opposed to such a dramatic reduction in the minimum flow and believes that the applicants in this hearing have not done sufficient to satisfy you that such a reduction is consistent with either the objectives and policies of the Waitaki Catchment Water Allocation Regional Plan (the WRP) or for that matter, the purpose and principles of the Resource Management Act 1991. In Ngāi Tahu's submission, there remain too many uncertainties surrounding the cultural and ecological effects of allowing such a dramatic change to the minimum flow.
6. In my submission, the extent of the change that is sought to be made to the minimum flow of the Lower Waitaki also raises issues as to public confidence in the integrity of the WRP. It is submitted that effectively reducing the minimum flow in the lower river by a third is an outcome that would lead to this type of concern. After all, the plan is barely off the presses and the applicants seek to alter a fundamental outcome of the plan.

Objectives and Policies

7. The WRP places considerable emphasis upon the unique relationship that exists between Ngāi Tahu and the Waitaki catchment. The plan begins by identifying (page 2) that a number of areas within the catchment are statutory acknowledgement sites, which requires that the special relationship of Ngāi Tahu

to these places must be recognised by councils. The plan then proceeds to provide a detailed description of the significance to Ngāi Tahu of the Waitaki (page 11). It is worth reading this description out in full.

8. Following an outline of the cultural context, the plan goes on to regularly refer in the objectives and policies to the need to provide for cultural values. The following provisions are relevant in this regard:

Objective 1

To sustain the qualities of the environment of the Waitaki River and associated beds, banks, margins, tributaries, islands, lakes, wetlands and aquifers by:

- a. Recognising the importance of maintaining the integrity of the mauri in meeting the specific spiritual and cultural needs of the tāngata whenua, and by recognising the interconnected nature of the river

Policy 4

By considering the following matters when setting environmental flow and level regimes:

- a. mauri and healthy ecosystems of indigenous species, including mahinga kai species;
- b. wāhi tapu sites or areas, and wāhi taonga;

Policy 9(1)

By discouraging further taking, use or diverting of water so that it mixes with water of another sub-catchment.

Policy 12

To establish an allocation to each of the activities listed in Objective 2 by:

- f. considering the relative environmental effects of the activities including effects on landscape, water quality, mauri, and the beds of lakes and rivers;

Policy 30

By preventing the taking, using, damming or diversion of water from Lakes Alexandrina, McGregor¹ and Middleton and their tributaries, other lakes² upstream of Lakes Tekapo, Pūkaki and Ōhau and wetlands, unless it is a wetland that is not a wetland with a moderate or higher significance, for the purpose of protecting their:

- b. ecosystems of indigenous species, including mahinga kai species;
- c. Ngāi Tahu relationships;

Policy 43

By setting an environmental flow regime in the Hakataramea River that:

- i recognises:
 - a. the need to provide for healthy ecosystems of indigenous species, including mahinga kai species;
 - b. the importance of maintaining flows through the wetlands at the confluence of the Hakataramea River with the Lower Waitaki River;

Policy 44

By setting environmental flow regimes in the tributaries of the lower Waitaki River (shown on Map 2) that:

recognise the natural and recreational values of the tributaries, in particular, the value of the Awakino and Maerewhenua Rivers for trout-spawning, and the Waikakahi Stream for healthy ecosystems of indigenous species, including mahinga kai species;

Policy 45

(1) By setting environmental flow regimes in the Lower Waitaki River that:
maintains

¹ Lake McGregor has a statutory acknowledgement in the Ngāi Tahu Claims Settlement Act 1998.

² Lakes, as defined by the RMA, includes tarns.

- e. support for cultural relationships (including those of Ngāi Tahu) with the river;
9. These frequent references to cultural values throughout the provisions of the WRP demonstrate a clear intention to ensure that Ngāi Tahu's relationship with the Waitaki catchment is given meaningful recognition by those charged with implementing the Plan. This is particularly so in respect of Objective 1 a., which has the effect of establishing the maintenance of the integrity of the mauri of the catchment as one of the environmental bottom lines that must be met before water can be taken and used.
10. In this context, Ngāi Tahu is particularly concerned that the combined effect of the grant, not only of these consents, but also of the NBTC and HDI applications will lead to a significant degradation of the mauri of the River and of its interconnected nature.
11. For the purposes of this hearing, Te Rūnanga o Ngāi Tahu wishes to highlight the adverse impact that the grant of the consents will have on the mauri of the tributaries of the Waitaki, especially the Hakataramea. Not only is it proposed to take significantly larger volumes of water from the tributaries, but as a result of the use of the water, there is also likely to be an increase in the rate of nutrients entering the tributaries. Compounding this is the fact that the tributaries from which it is sought to take and use this additional water are already in a significantly degraded condition. Mr Norton in his evidence presented on behalf of Meridian at this hearing confirms this when (at paragraph 18) he refers to a report that periphyton blooms in the Hakataramea already exceed the biomass threshold contained in WQL1 of the NRRP.
12. Policy 43 is directly relevant to the Hakataramea and requires that the ability of the River to provide for healthy ecosystems of indigenous species, including mahinga kai species, be recognised. Policy 43 also requires that the importance of maintaining flows through wetlands at the confluence of the Hakataramea River

with the Waitaki River be recognised. Rule 16 of the WRP states that policy 43 is to be had regard to when assessing applications for non-complying activities.

13. In Ngāi Tahu's submission, the applicants have only had superficial regard to the requirements of objective 1 and policy 43. As far as Ngāi Tahu is aware, there has been no meaningful attempt by the applicants to measure the existing state of health of the tributaries or to assess the ecological effects of the proposed takes. Instead, the applicants have sought to rely on the ecological assessments presented on behalf of Meridian at the NBTC and HDI hearings.
14. The result of this failure to carry out a specific ecological assessment for these applications is that there are significant uncertainties surrounding the applicants' ability to satisfy the environmental bottom lines set out in objective 1. By way of example, Ngāi Tahu refers to the evidence of Ned Norton, presented on behalf of Meridian at this hearing. Mr Norton explains in his evidence that the applicants' attempts to quantify the in-river nutrient concentrations for the Hakataramea dismissed relevant and robust scientific assessments carried out by ECan, AgResearch, GNS and NIWA simply on the basis that they did not reflect what was happening in their catchment (refer to paragraph 36 of Mr Norton's evidence). Mr Norton also highlights a number of concerning weaknesses in the applicants' evidence about the relative contributions of nutrients to the river.
15. In these circumstances, and in the absence of a sub-catchment and catchment based ecological assessment, Ngāi Tahu submits that the applicants have simply not done enough to satisfy the ecological and cultural based objectives and policies of the WRP.

16. Section 9 of the WRP at p58 sets out the Anticipated environmental results of the Plan. I particularly draw your attention to:

1. There is a high level of awareness and recognition of the connectedness of the water bodies in the catchment-between the mountains and the sea, and between the components of the aquatic systems.
7. The mauri of the water bodies in the catchment is **enhanced** (my emphasis).
8. The opportunities for the relationship of Maori with water, sites, wahi tapu and other taonga are **enhanced** (my emphasis).
9. The effects of the mixing of waters are mitigated.

17. It is submitted that it is significant that with respect to the anticipated outcomes 7 and 8, there is an expectation of enhancement. The objectives, policies and rules of the Plan must in my submission be read with those anticipated outcomes (inter alia) in mind.

18. These objectives and policies demonstrate the significance of the values of importance to Ngāi Tahu. It is submitted that the significance of those values is not properly reflected in the evidence of the applicants, or in the officer's reports.

Section 104D RMA Threshold

19. It is acknowledged that when assessing whether a non-complying activity is contrary to the objectives and policies of a plan, a broad judgment must be made. This requires more than just isolating out one or two policies with which the activity is contrary. Where policies are general and have wide-ranging topics, the question is whether the activity is, in principle, contrary to the objectives and

- policies. If, in principle, it is opposed to the objectives and policies, it will be “contrary” for the purposes of the s.104D test: *Kuku Mara partnership (Forsyth bay) v Marlborough DC* EnvC W025/02.
20. Counsel for Waihao Downs Irrigation Limited accepts that the take and use applications *must necessarily be classified as non-complying ...by virtue of proposing a minimum flow condition of 100m³/s.*
 21. Likewise Mr. Boyes for MRNAG assesses the applications to take use water from the Waitaki as non-complying.
 22. It is submitted that the concept of bundling of various applications (by a common applicant) will also be relevant to certain of the applicants. As a general proposition there must not be any hybrid approach to a proposal, rather the more stringent classification of an activity must apply to the whole application: *Locke v Avon Motor Lodge Ltd* (1973) 4 NZPTA 17.
 23. The Court of Appeal has recognised limits on this principle: *Bayley v Manukau City Council* [1999] 1 NZLR 568. But where there is a direct connection between the activities, and consents overlap to such an extent that they could not be realistically or properly separated, then bundling is appropriate: *King v Auckland City Council* [2000] NZRMA 145, HC, Randerson J.
 24. For those applications made on the basis that they are non-complying, or to which bundling is appropriate, the applicants must pass the threshold tests of s.104D.
 25. It is submitted that the adverse effects on the environment of the activity the subject of this application are more than minor (hence notification). My clients’ evidence will also be that there would be significant adverse effects from the activities for which consent is sought, and that in many respects the evidence presented to this hearing for the applicants is too uncertain (certainly as to my

client's concerns) to enable any conclusion that the effects will not be adverse and will not be more than minor.

26. It is also submitted that the applications are for activities that will be contrary to the objectives and policies of the relevant plan.
27. It has been held that it is not necessary for an activity to actually cut across or contradict objectives or policies before it can be said to be contrary to such objectives and policies (*Shell Oil NZ Ltd v Wellington CC (1992) 2 NZRMA 80 (PT)*) In any event what must be determined is whether the application is for an activity that will be “opposed to in nature; different; or opposite to” the objectives and policies of the Plan
28. Objective 1a and Policy 4a. Evidence will be presented that the activities sought to be consented will be contrary to Objective 1a and Policy 4a, and as I understand it there is no evidence presented that might challenge that.
29. In my submission the evidence is also that the activities would be contrary to Policies 30, 43, 44 and 45. As a general proposition it is submitted that the activities will be opposed in nature to the objectives and policies that are intended to safeguard, and in some cases enhance, the values of importance to Ngāi Tahu.
30. Policy 46 WRP. Focussing on policy 46(i) “By maintaining a flow of water into the Lower Waitaki River downstream of the Waitaki dam that is sufficient to maintain the minimum flow and flushing flows of the environmental flow regime for the Lower Waitaki River.
31. It is submitted that this policy requires the maintenance of a flow of water into the Lower Waitaki River sufficient to maintain a minimum flow of 150 cumecs. In my submission allowing an activity that will reduce that minimum flow below that level (by one third) must be contrary to that policy. How can a flow of water

into the Lower Waitaki be maintained that is sufficient to maintain a minimum flow of 150 cumecs in the Lower Waitaki if the river can be reduced to 100 cumecs by the applicant's activity?

32. Policy 9 as to discouraging further taking, use or diverting of water so that it mixes with water of another catchment or sub-catchment. This is of course a matter of strong interest to Ngāi Tahu. In *Ngati Rangī Trust v Manawatu-Wanganui Regional Council* EnvC A067/04 the Environment Court gave weight to the fact that although there was there no perceptible physical effect from the practice of mixing the waters of catchments, the practice had an adverse impact on the metaphysical and spiritual perceptions of Tangata Whenua.
33. It is therefore submitted that the threshold test of s.104D is not met by the applicants and that accordingly there is no jurisdiction to grant the applications.

Prohibited activities?

34. The evidence for MRNAG is that *all of the proposed applications exceed the rate and volume of water provided for by Rule 1-paragraph18 Begley.*
35. Rule 4 Waitaki Catchment Water Allocation Regional Plan:

Rule 4 *No person shall take, use, dam or divert water from a wetland that:*

- a. *Has not yet been classified according to the criteria for classifying wetlands in Chapter 7 of the Natural Resources Regional Plan: or*
- b. *Has been so classified as a wetland with a moderate or higher significance.*

36. **Rule 11** *Any activity that does not contravene Rule 1 is not subject to Rules 12 to 20.* This must mean that any activity that **does** contravene Rule 1 **is** subject to Rules 12 to 20.
37. **Rule 13** *Any activity that does not comply with Rule 4 is a prohibited activity.*
38. Therefore any activity that contravenes Rule 1 is subject to Rule 13, such that if that activity does not comply with Rule 4 it is a **prohibited activity**.
39. If there is evidence before this panel that the activity for which the applicants seek consent will lead to the diversion of water from a wetland in contravention of Rule 4 then the activity is a prohibited activity pursuant to Rule 13.
40. In my submission there must be a difference in meaning between diversion of water and a take of water, so that it is not necessary that water be taken (abstracted) from such a wetland, but rather if any activity results in water being diverted from entering or reaching such a wetland, then the water has been diverted from the wetland, and that would be in contravention of Rule 4, and therefore a prohibited activity.
41. Refer the following evidence:
- a. Nicholas Boyes for MRNAG. At paragraph 78 Mr. Boyes refers to the evidence of Ian Fraser (for Meridian) *that reducing the minimum flow in the Waitaki River has the potential to lower the water level in the shallow groundwater alongside the river, and in springs and wetlands adjacent to the river.* This conclusion seems to be accepted by Mr. Boyes, who then goes on to note that Boyes *did not expect this difference to result in any significant effect on the groundwater resources of the lower Waitaki, or its associated features such as*

springs, spring fed stream, terrace wetlands. However with respect to Rule 4 the issue is not whether there is a *significant effect*, but rather it is submitted that the Rule is an absolute prohibition on diversion of water from the qualifying wetlands.

- b. The Ian Fraser evidence is also relied upon by Mr. Peter Ravenscroft for DoC. Having referred to the Fraser evidence Mr. Ravenscroft concludes at paragraph 2.2 (p3) *that the higher the flow in the active surface channels, the greater the flow throughout the gravel bed as groundwater and the greater the flow into any connected wetlands and/or springs. Likewise the lower the flow in the active surface channels, the lower the groundwater flow.* This is further developed by Ravenscroft at paragraphs 4.12 to 4.14 (pp7 & 8). At paragraph 4.13 Ravenscroft refers to Welcome Stream and its likely link with the Waitaki River. It is assumed that Mr. Ravenscroft is in fact referring to welcome Creek, which has been added to Schedule 9 of the Otago Regional Water Plan as a wetland of significance. Mr. Ravenscrofts conclusions as to the connectivity between Welcome Creek and the Waitaki are expressly recorded in that Plan. Ravenscroft concludes *the proposed reduction of in-stream flows in the Waitaki and the subsequent lowering of the groundwater will potentially shrink or remove numerous wetland habitats along the south bank of the lower Waitaki, including the areas which this sub-population (of mudfish) occupies.*
- c. Ian Fraser statement of evidence 25 October 2007 paragraph 14 *Groundwater levels in the alluvial deposits of the present day floodplain show a strong relationship to the levels in the river. The stage height relationship calculated following the Low Flow Trial on the lower Waitaki River in 2001 indicates that water levels in the river fall/rise by approximately 0.185m with every 100m³/s change in flow. Groundwater levels and water levels in springs and wetlands adjacent to*

the river have the potential to experience the same water level to flow relationship.

d. Diana Robertson statement of evidence November 2007

- i. Paragraph 4.13 p23: *Water levels in riparian wetlands are affected by the flow in the Waitaki River and to varying extents from springs, terrace seepages, irrigation and tributary rivers and streams.*
- ii. Paragraph 4.16 p24: *The flow in the river and the connectivity or riparian wetlands is not however a direct relationship as the wetlands and groundwater system is also influenced by the springs, terrace seepages, irrigation and tributary rivers and streams. The water level in a particular wetland in the riparian area is therefore determined by a complex relationship between the underlying contour of the substrate, the flow in the Waitaki River and to a lesser extent the relative contribution of other sources of water.*
- iii. Paragraph 4.28: *Consequently the connectedness of different terrace wetlands, with adjacent wetlands and the river, also responds differently to changes in river flows. Those wetlands with direct relationships to the river respond as generally described for riparian wetlands where a decrease in river flow will decrease connectivity with different wetlands, and different parts of the same wetlands will lose surface water connection at different river flows. Other wetlands' connectivity is driven by irrigation supply or takes, terrace seepages or a combination of these and the river levels.*

Adequacy of Mitigation

42. Te Rūnanga o Ngāi Tahu is concerned at the reliance by the Applicants upon the use of management plans as a mechanism to manage the effects of the use of the takes.
43. It is submitted that this Panel must consider the management plans proposed for each applicant in respect of the use intended by that applicant. Where there are applicants who do not propose to adhere to what might be seen to be the “best practice” then an inference could be drawn against those applicants in that respect. This is particularly so where as here there is a necessarily disparate group of applicants, so that there will not be unanimity as to what are the appropriate practices to be adhered to so as to achieve the environmental outcomes intended by such management plans.
44. It is natural for individual applicants to focus upon the mitigation measures that might seem to be applicable only to their application, but of course this is not consistent with the catchment wide approach generally required by the Plan, and it is submitted must limit the effectiveness of the mitigation to be achieved as compared to where there is unanimity between a group of applicants, or a single applicant.
45. It is submitted that it also important to ensure a legally enforceable link between water take and use consents, and the management plans which are intended to mitigate the effects of the use to which that water is put on land. Otherwise there must be potential for a legal disconnect between the water take and use consents, and conditions of say land use consents which at this time are intended to be held in common ownership with the water consents. There being no guarantee that such common “ownership” of those consents will always remain.

Onus on Applicants-Should this be a Plan Change?

46. It is submitted that the Applicants should not be allowed to proceed with these applications for resource consent which in some instances are in effect a plan change.
47. On an application for resource consent the applicant bears at least an evidential onus to establish that the purpose of the Act will be achieved by granting the resource consent (*Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433). In my submission that evidential onus extends to proof as to adverse effects being minor or otherwise.
48. In this context in *Baker Boys* the Court drew a distinction between an application for resource consent and a plan change (citing *Hibbit v Auckland City Council* [1996] NZRMA 529).
49. It would be easy to treat these applications as tantamount to a plan change and thereby lose sight of the fact it is not, and in the process overlook the onus that the applicant bears.
50. The test as to whether public confidence in the administration of the plan will be affected was stated by the Planning Tribunal in *Monad Leisuretime Ltd v Queenstown-Lakes DC* W116/95 to be only if the a council ignores its policies and objectives and allows an activity with major effect which is clearly contrary to those policies and objectives. It is submitted that lowering the minimum to 100 cumecs is such a major effect, and that this test is met.
51. In my submission the environmental flow regime and the minimum flow therein is a clear, readily understandable and workable regime, such that it would undermine public confidence to allow this significantly non-complying activity

(see *Todd v Queenstown lakes DC* (1992) 2 NZRMA 182 where the Planning Tribunal used those words to describe rural subdivision ordinances such that the non-complying subdivision if allowed would represent a major change of policy calling for a publicly scrutinised change to the plan.

52. It is argued for the applicants by Ms. Dawson and Ms. Begley that because *the WAP appears to anticipate applications will be made for non-complying activities and as such sets out a planning framework to assess such applications*, that this is a different approach from other planning documents, and this militates against any concern over plan integrity as applications for non-complying activities have been expressly anticipated.
53. My first comment in respect of this argument is that the example held up by its proponents as support is Rule 16 which states that *in considering an application to which this rule applies the consent authority will have regard, amongst other matters, to all policies of this Plan*. With respect this has no effect on the approach to be taken by the consent authority from that which would otherwise be required, and is not support for the proposition that non-complying activity applications are any more anticipated under this plan than any other. What can be said is that if an activity is non-complying there will likely be no support for the activity within the plan, and that this is of itself not enough to say that the activity is inconsistent with the objectives and policies of the plan.
54. In any event the outcome must be considered when determining whether there might be any loss of confidence in the plan. In my submission where it is clear that the very environmental outcomes anticipated by the plan will be not be achieved, this must call into question the integrity of the plan if such offending activities are granted consent.

Section 6(e)

55. In *Worldwide Leisue Limited v Symphony Group Ltd* [1995] NZAR 177 the High Court held that because ancestral sites, water and taonga are categorised as matters of national importance, consultation with Tangata Whenua was imperative.

56. In *Tainui Hapu v Waikato DC A75/96* the Planning Tribunal held that because recognition of an ancestral relationship was a matter of national importance, if an alternative translator site resulted in less than optimum signals, that was the price for giving proper effect to that relationship.

Section 7(a) RMA

57. The High Court considered the requirements of s.7(a) in relation to a requirement for a designation for a link road in *Takamore Trustees v Kapiti District Council* [2003] 3 NZLR 496. It had been submitted to the High Court that in reaching its decision it was enough for the Environment Court to have been satisfied about the consultative process that took place. The High Court stated at page 517:

However, s.7(a) creates not just an obligation to hear and understand what is said, but also to bring what is said into the mix of decision making. Thus, in terms of s.7 the territorial authority, and in turn the Environment Court, had to understand (presumably through consultation) and then have particular regard to, in achieving the purpose of sustainable of the natural and physical resources of the area, the view of the trustees that this development compromised the exercise of guardianship of this land. And once the trustees concluded that there were taonga and koiwi in the area of the proposed road, they could hardly do anything other than oppose the road if they were to be true to their obligations of guardianship of the land.

I reject the submission, therefore, that consultation is all that could or should have been done here with Maori. Consultation by itself without allowing the view of Maori to influence decision making is no more than window dressing. Section 7 requires the decision maker to have particular regard to Maori views about the way in which the land is to be used. The Court appears to have limited its consideration of this issue to consultation. This was less than required by law. This does not mean that in terms of s.7(a) Maori exercising guardianship have a right of veto. Section 7 does not say this. But their view (those exercising guardianship) must be paid particular regard to in the balance of factors in deciding whether the NOR should be confirmed. That is what s.7(a) explicitly requires.

58. In *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau* (HC, Rotorua AP42/02) Heath J acknowledged that long term consents for discharge to a river tend to alienate Maori from a river and impede and might prevent the ability to perform the functions of kaitiaki. In that case this justified a condition requiring the consent holder to consult with Iwi during the period of the consent.

Section 8 RMA

59. The Crown's Treaty duty was held by the Court of Appeal to extend to active protection in the use of lands and waters to the fullest extent practicable. In *New Zealand Maori Council v A-G* [1987] 1 NZLR 641, the Court of Appeal was considering s.9 of the State Owned Enterprises Act which required the Crown to act in a way not "inconsistent with the principles of the Treaty of Waitangi". At page 664 Cooke P stated:

The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty on the Crown is not merely passive but extends to

active protection of Maori people in the use of their lands and waters to the fullest extent possible.

60. His Honour as a member of the Judicial Committee of the Privy Council again made pronouncement on the significance of sections 6(e), 7(a) and 8 in *McGuire v Hastings District Council* [2002] 2 NZLR 577 stating:

These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Maori the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it 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.

61. In my submission the evidence for the applicants and the officer's reports fail to recognise the significance of the matters of concern to Ngāi Tahu. Examples include:

- a. Report of Tim Ensor CRC041004 Maerawhenua District Water Resource Company Limited at paragraph 79 *Given that there is a submission to be heard which identifies cultural values and the proposed activity is within a statutory acknowledgement area, I will not comment on the actual and potential effects on the cultural values of the area.*
- b. Hakataramea Station Application paragraph 108 of s.42a report *Given that there are a number of submitters who wish to be heard who identify cultural values as a concern, I cannot conclude whether the actual and potential effects on the cultural values will be minor.*

62. In my submission this level of analysis certainly cannot meet the requirements of consultation that fall upon the consent authority. Curiously this approach seems to acknowledge that only Ngāi Tahu witnesses can give cogent evidence on these issues. In my submission this ignores the evidential onus that applicants must satisfy. It cannot be the position that unless Ngāi Tahu witnesses give evidence of adverse effects, that will be the end of the matter. Once such matters are raised, by submission or otherwise, an applicant must deal with them, as must the officers. After all they are raised by the very provisions of the WRP.

63. This requirement extends in my submission to a requirement that Ecan should have called for a cultural impact assessment, particularly in relation to activities having an effect on the Hakataramea River, which effects have not previously been dealt with in evidence from Meridian.

Witnesses

64. Te Wera Edwin King and David Thomas Higgins.

Dated this 4th day of September 2008

M J Wallace