

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHU ROHE**

NO. CIV-2021-409-

UNDER the Environment Canterbury (Temporary
Commissioners and Improved Water Management) Act
2010

IN THE MATTER OF an appeal under section 66 of the Act in relation to the
Proposed Canterbury Land and Water Regional Plan

BETWEEN **TE RŪNANGA O NGĀI TAHU**
TE RŪNANGA O AROWHENUA

Appellants

AND **CANTERBURY REGIONAL COUNCIL**

Respondent

NOTICE OF APPEAL

10 December 2021

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To the Registrar of the High Court at Christchurch

and

To Canterbury Regional Council

This document notifies you that –

Te Rūnanga o Ngāi Tahu and Te Rūnanga o Arowhenua (**the Appellants**) will appeal to the High Court against decisions of the Canterbury Regional Council (**the Respondent**) on Proposed Plan Change 7 (**PC7**) to the Canterbury Land and Water Regional Plan (**Plan**) dated 17 November 2021 (**Decisions**), upon the grounds that the Respondent made errors in law in parts of the Decisions.

The Appellants were submitters on PC7.

Parts of Decisions Appealed Against

1. PC7 has three major parts:
 - (a) Part A makes amendments to certain region-wide provisions of the Plan, and also to certain sub-region sections.
 - (b) Part B relates to the Orari–Temuka–Opihi–Pareora (**OTOP**) sub-region, and inserts new provisions for managing land use, managing freshwater quality and quantity (including abstractions and allocation of freshwater) and for protecting sites of cultural significance (including rock art sites and waipuna).
 - (c) Part C relates to the Waimakariri sub-region and makes amendments to the existing Plan, to manage effects on freshwater quality.
2. The Decisions were adopted by the Respondent on recommendations made by the Independent Commissioners appointed by the Respondent (**Commissioners**).
3. The Appellants appeal against parts of the Decisions in relation to PC7.

4. The parts of the Decisions appealed specifically relate to:
- (a) Allocation limits;
 - (b) Mahinga kai allocations; and
 - (c) Scope for provisions for protecting waipuna and rock art sites.

Errors of law

5. The Appellants allege that the Respondent made the following errors of law.

Allocation limits

6. The Respondent has set allocation limits for the Opihi Freshwater Management Unit (**FMU**), within PC7, based on the sum of existing authorised abstractions.¹ This amounts to an error of law because:
- (a) PC7 must give effect to the National Policy Statement for Freshwater Management (**NPSFM 2020**).²
 - (b) Underpinning the NPSFM 2020 is the “fundamental concept” of Te Mana o Te Wai. There is a hierarchy of obligations in Te Mana o Te Wai that prioritises first, the health and well-being of water bodies and freshwater ecosystems. The other priorities are second, the health needs of people, and third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.
 - (c) Abstractive allocations are clearly a “third” order priority under the NPSFM 2020 in that they primarily provide for social and economic well-being.
 - (d) The Decision incorrectly uses the current abstractive allocations and state of the environment as a starting point for assessing

¹ At [308] – [312].

² Resource Management Act 1991, section 67(3)(a). A regional plan must give effect to any national policy statement.

the health of a waterbody. This essentially preserves the environmental status quo by setting allocations based on the sum of the total consented takes.

- (e) This approach has been identified as legally incorrect by the Environment Court and the Respondent failed to consider this. The Environment Court has previously identified the inadequacy of setting allocation limits based on the sum of all existing water takes,³ which the Respondent has failed to consider.
- (f) This approach does not give effect to the NPSFM 2020. The NPSFM 2020 and the hierarchy of obligations in it require a fundamentally different approach. Where the amount of water currently consented for abstraction results in over-allocation, the Respondent is obliged to develop and implement a plan to reduce that over-allocation.

Mahinga kai allocations

- 7. Part B of PC7 proposed to reserve an allocation of surface water from the Temuka River for cultural purposes. The proposed allocation (of 100L/s) was for the enhancement of mahinga kai and associated tangata whenua values.⁴ Part C of PC7 also proposed to reserve an allocation of surface water for mahinga kai purposes. Allocations for three rivers were proposed – the Ashley River/Rakahuri, the Cam River/Ruataniwha and the Silverstream River.⁵
- 8. The Commissioners erred when they concluded that it would be inappropriate to recommend mahinga kai allocations for these rivers, on the basis that they are already over-allocated.⁶

3 *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166 at [3] and *Re Otago Regional Council* [2021] NZEnvC 164 at [138].

4 Report and Recommendations of the Hearing Commissioners at [169].

5 At [170].

6 At [180].

9. The failure to allocate surface water for mahinga kai allocations is in error because it involves an incorrect interpretation and application of the NPSFM 2020, in that:
- (a) In the Decisions, it is stated that "allocating water for mahinga kai purposes would be a 'third' order priority under Objective 2.1(1) of the NPSFM 2020".⁷
 - (b) The fundamental fabric of mahinga kai is sustaining the health of the resources upon which people depend for survival: by its very nature mahinga kai must sustain the hauora – health of the water body. Therefore, allocation of water for mahinga kai purposes is a 'first' order priority.
 - (c) In some cases, a mahinga kai allocation will remain in-stream. In other times, when the water body is in a state of hauora, it may mean shifting water to other areas or allowing abstractive use. In this sense, the NPSFM 2020 challenges the traditional commoditisation paradigm of managing freshwater as a trade-off between 'in-stream' environmental allocations (first priority) and 'out of stream' allocations for abstraction (generally a third priority).
 - (d) In the Decisions, through the setting of allocation limits based on the summation of existing abstractive consents, the Respondent has essentially preserved, or prioritised, the existing consumptive allocations (for agriculture and irrigation) over mahinga kai allocations.⁸ This erroneously involves the elevation of a third-order priority over a first-order priority, and represents a failure to give effect to the NPSFM 2020 and achieve the purpose of the Resource Management Act 1991.
10. The Respondent also erred when it concluded that it would be inappropriate to include new mahinga kai allocations for rivers that are not fully allocated.⁹ This decision was justified on the basis that to do so

7 At [180].

8 At [308]-[312].

9 At [180]-[181].

would not prioritise the health and well-being of waterbodies and fresh water ecosystems, as required by Objective 2.1(a) of the NPSFM 2020.

11. The failure to include new mahinga kai allocations for rivers that are not fully allocated (but are “some distance” from the recommended ecological limits) is in error because:
 - (a) Mahinga kai allocations are a “first” order priority under the NPSFM 2020.
 - (b) This decision is inconsistent with the decision not to recommend mahinga kai allocations for rivers that are over-allocated. More specifically, the Respondent concluded it was inappropriate to recommend new mahinga kai allocations for some rivers, on the basis that the rivers were over-allocated. However, in instances where rivers were not over-allocated, the Respondent also concluded that mahinga kai allocations were inappropriate.

Scope for provisions protecting waipuna and rock art

12. PC7 proposed to make provision for the protection of waipuna and rock art sites within the OTOP sub-region. In their submissions, the Appellants sought to include provisions for protecting waipuna and rock art sites beyond the OTOP sub-region. The Respondent declined to consider the changes sought by the Appellants, on the basis that the changes were beyond the scope of its jurisdiction.
13. Throughout the statutory consultation process prior to notification of PC7, the Appellants sought to expand protection for waipuna and rock art sites beyond the OTOP sub-region. In the notified PC7, the Respondent chose not to make provision for the protection of rock art and waipuna beyond that sub-region. This issue was subsequently raised in the submissions of the Appellants.
14. In the circumstances, this issue could not be said to involve a request for relief from “left field” – the matter was plainly “in play”.

15. PC7 relates to management of freshwater resources in discrete areas of Canterbury, and issues of how waipuna and rock art sites are managed in these areas plainly involve freshwater management. This is demonstrated by the fact that PC7 recognised and made provision for waipuna and rock art sites in some areas. It was clearly an issue relating to freshwater management that was contemplated by the Respondent (and a matter directly related to the Respondent's statutory role and functions) and would have been evident to any submitters.
16. Therefore, the Respondent erred when it deemed the submissions of the Appellants to be "out of scope", on account of its decision not to regulate protection for waipuna and rock art in the notified PC7. In addition, the Commissioners erred in that they:
- (a) Incorrectly applied the proper test and/or took into account an irrelevant consideration, specifically the Commissioners' view that there would be disadvantage to other people who might have submitted.¹⁰
 - (b) Failed to consider the ki uta ki tai approach to management, mandated by the NPSFM 2020. Under clause 3.5, the Respondent must recognise the interconnectedness of the whole environment, recognise interactions between freshwater, land, water bodies, ecosystems and receiving environments, and manage freshwater in an integrated and sustainable way.

Questions of law

17. The Appellants allege the errors set out give rise to the following questions of law.

¹⁰ On the basis that PC7 provisions do not apply to a discrete issue in a discrete geographical area, *Motor Machinists* can therefore be distinguished. Rather, the tests that are relevant to full plan reviews, such as the test that is applied by the High Court in *Countdown Properties*, are relevant.

Mahinga kai allocations

18. Did the Respondent's failure to provide for mahinga kai allocations in respect of rivers that have been over-allocated, amount to a failure to correctly interpret and apply the NPSFM 2020?

Allocation limits

19. Did the Respondent's approach to setting allocation limits, based on the summation of existing authorised allocations for abstraction of water, amount to a failure to correctly interpret and apply the NPSFM 2020?

Scope for provisions protecting waipuna and rock art

20. Did the Respondent incorrectly deem that the relief sought in the Appellants' submissions, in respect of protection of waipuna and rock art sites, was out of scope?

Relief sought

21. The Appellants seek:
- (a) That the appeal be allowed;
 - (b) That the matter be referred back to the Respondent for reconsideration in light of the findings of this Honourable Court;
 - (c) Such further or other relief, including consequential relief, as may be appropriate;
 - (d) The costs of and incidental to these proceedings.

DATED this 10th day of December 2021



James Winchester/Sal Lennon
Counsel for Te Rūnanga
o Ngāi Tahu and Te
Rūnanga o Arowhenua

This notice is filed by James Winchester, counsel for the Appellants, of the firm Simpson Grierson. The address for service of the Appellants is 15 Show Place, Christchurch.

Documents for service on the Appellant may be left at that address for service or may be:

- (a) Posted to PO Box 13 046, Christchurch 8042; or
- (b) Transmitted to by email to Jessica.Riddell@ngaitahu.iwi.nz.