

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 203

IN THE MATTER

of the Resource Management Act 1991

AND

of six appeals under s 120 and/or s 174 of
the Act for Mount Messenger Bypass
proposed State Highway 3 between Uruti
and Ahititi, North Taranaki

BETWEEN

DIRECTOR-GENERAL OF
CONSERVATION

(ENV-2019-WLG-000003)

(ENV-2019-WLG-000004)

AND

TE RŪNANGA O NGĀTI TAMA TRUST

(ENV-2019-WLG-000005)

AND

POUTAMA KAITIAKI CHARITABLE
TRUST AND D & T PASCOE

(ENV-2019-WLG-000006)

(ENV-2019-WLG-000010)

AND

TE KOROWAI TIAKI O TE HAUĀURU
INCORPORATED

(ENV-2019-WLG-000009)

Appellants

AND

TARANAKI REGIONAL COUNCIL

Respondent-Regional Authority

AND

NEW PLYMOUTH DISTRICT COUNCIL

Respondent/Section 274

AND

NEW ZEALAND TRANSPORT AGENCY

Respondent/Applicant



Court: Environment Judge BP Dwyer
Māori Land Court Judge M Doogan
Environment Judge MJL Dickey
Environment Commissioner DJ Bunting
Environment Commissioner RM Bartlett

Hearing: 15-19, 23 and 24 July 2019

Appearances: D Allan and A Brenstrum for New Zealand Transport Agency
SJ Ongley for Director-General of Conservation
V Morrison-Shaw for Te Runanga o Ngāti Tama
R Enright and RG Haazen for Te Korowai Tiaki o Te Hauāuru Incorporated
D and T Pascoe for themselves through R Gibbs and M Gibbs
R Gibbs and M Gibbs for Poutama Kaitiaki Charitable Trust
HP Harwood for New Plymouth District Council and Taranaki Regional Council

Date of Decision: 18 December 2019
Date of Issue: 19 December 2019

INTERIM DECISION OF THE ENVIRONMENT COURT



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Result

1. This is an interim decision of the Court because there is no certainty as to whether or not the Agency can acquire from Te Rūnanga the land necessary to implement the Project and finalise an Agreement for Further Mitigation.
2. In light of the Agency's assurance that it will not compulsorily acquire the Ngāti Tama land, the Court is not prepared to complete its consideration of the NOR and resource consents, absent advice from Te Rūnanga that it has agreed to the acquisition and further mitigation.
3. That is because we cannot determine that the effects of the Project will be appropriately addressed until we receive advice on that acquisition and further mitigation.
4. This proceeding is adjourned until 31 March 2020.
5. On that date we direct that the Agency is to file a memorandum advising the Court of the state of its negotiations with Te Rūnanga.

REASONS

A - Introduction

[1] The New Zealand Transport Agency (**the Agency**) is undertaking a programme of improvements on State Highway 3 (**SH3**) which connects the Taranaki and Waikato regions. It is a requiring authority under s 167 of the Resource Management Act 1991 (**RMA/Act**). It is a Crown entity, and its objective is set out in s 94 of the Land Transport Management Act 2003 (**LTMA**) to:

undertake its functions in a way that contributes to an effective, efficient, and safe land transport system in the public interest.

[2] Its functions under the LTMA include:¹

(a) to contribute to an effective, efficient, and safe land transport system in the public interest:

...

(c) to manage the State highway system, including planning, funding, design, supervision,

¹ LTMA, s 95.



construction, and maintenance and operations, in accordance with this Act and the Government Roadway Powers Act 1989...

[3] In meeting its objective and undertaking its functions under the LTMA the Agency must, among others, exhibit a sense of social and environmental responsibility.² The Agency must also use its revenue in a manner that seeks value for money.³

[4] As part of its improvement programme the Agency has identified that the existing 7.4km long Mount Messenger section of the state highway located some 58km north-east of New Plymouth has:⁴

- Steep grades, a tortuous alignment and restricted forward visibility;
- Significant lengths with no or only limited shoulders;
- A narrow tunnel at the summit;
- Vulnerability to interruption of service by breakdowns, crashes, landslips and rockfalls;
- Limited alternative route options when service is interrupted, with alternative route options being limited and involving significantly longer travel times (especially for freight).

[5] These constraints translate to problems with safety, route resilience (including road closures with no suitable alternatives), poor road geometry and low speeds which, when combined, mean the road is no longer fit for purpose.⁵

Notice of Requirement and resource consents

[6] In December 2017 the Agency lodged a Notice of Requirement (**NOR**) and applications for resource consents with the New Plymouth District Council and the Taranaki Regional Council for the alteration of the current designation for SH3 to enable the construction and operation of a new 6km section of highway to bypass the existing 7.4km section (**the Project**).

[7] These applications were heard by an independent Commissioner appointed by

² LTMA, s 96(1)(a).

³ LTMA, s 96(1)(b).

⁴ Common Bundle (CB), Volume (Vol) 2, page 318.

⁵ CB, Vol 2, page 318.



both councils in a hearing held in New Plymouth over a number of days in August and October 2018.

[8] The Commissioner's Recommendation to the requiring authority (the Agency) issued on 8 December 2018 was that the alteration to the designation be confirmed subject to the conditions attached to the decision. The Commissioner's Decision of the same date was that the resource consents applied for should also be granted subject to the conditions attached.⁶ (The recommendation and the decision are collectively referred to as the **Commissioner's Decision**.)

[9] The Agency accepted the Commissioner's Recommendation on the NOR (**NOR Decision**) subject to two changes:

- It did not accept the inclusion of a lapse period (condition 3);
- It decided to reinstate words relating to the use of mesh drape associated with cut barriers to condition 25(d).⁷

The appeals

[10] Appeals against the Commissioner's Decision and the NOR Decision were lodged by the Director-General of Conservation (**DOC**), Te Rūnanga O Ngāti Tama Trust (**Te Runanga**), Te Korowai Tiaki O Te Hauāuru Incorporated (**Te Korowai**) and Poutama Kaitiaki Charitable Trust and D and T Pascoe (**Poutama and the Pascoes**).

[11] The relief sought in each of these appeals is as follows:

DOC appeal

[12] DOC filed two appeals (against the decision on the applications for resource consent and against the NOR Decision). DOC's appeals challenged four conditions of consent relating to kiwi fencing, legal rights over land within a proposed Pest Management Area (**PMA**), freshwater ecological monitoring and fish passage. The primary relief sought was for the Agency to rectify what DOC considered to be an ambiguity in the conditions of consent relating to the legal agreements/authorisations for the land proposed to be incorporated in a Restoration Package for riparian and

⁶ CB, Vol 5, pages 2847 and 2848.

⁷ CB, Vol 5, Agency Decision on NOR, pages 2852-2946.



restoration planting and pest management (in perpetuity). Relief was sought also for the provision of kiwi fencing at identified locations along the road corridor, for amended conditions to provide for an independent freshwater ecologist to be appointed to an Ecological Review Panel, and for there to be a requirement for the monitoring of fish passage at two additional culverts.

Te Rūnanga o Ngāti Tama appeal

[13] Te Rūnanga appealed parts of the decisions made on the resource consent applications and the NOR. In its appeal Te Rūnanga noted that it had been in discussions with the Agency on reaching agreement on measures to address the adverse cultural effects of the Project but that final agreement had not yet been achieved. In order to preserve its position, Te Rūnanga sought provisions to address the adverse cultural effects of the Project.

[14] Te Rūnanga also opposed the way in which the conditions in the decisions provided for the direct involvement of Mr T Pascoe and Mrs D Pascoe in a Kaitiaki Forum Group (**Kaitiaki Forum Group/KFG**).

Te Korowai appeal

[15] Te Korowai appealed the NOR Decision. The primary relief it sought was for the NOR to be cancelled and as secondary relief that the proposed conditions be amended to address the issues identified in their appeal. The appeal alleged that the NOR Decision does not support sustainable management and is inconsistent with Part 2 RMA, is inconsistent with the statutory tests for designations and planning instruments, and results in significant adverse effects on the environment that are not avoided, remedied or mitigated. It acknowledged that while there was no duty for the Agency to consult, this was not precluded. While it had been consulted by the Agency, this had been inadequate. There had also been inadequate consideration in the NOR Decision of the matters to be addressed under s 6(e), s 7(a) and s 8 of the Act, and there had been a failure to provide for s 6(c) effects on biodiversity and taonga species. Finally, it alleged that the NOR Decision does not provide for s 8 Treaty principles. In its memorandum of 17 June 2019, Te Korowai advised that, while ecology effects per se were no longer in contention, the associated cultural effects on taonga species still were.



The Poutama and Pascoe appeals

[16] Notwithstanding that Poutama and Mr and Mrs Pascoe had different interests they lodged two joint appeals challenging the resource consent and the NOR Decisions. The appeals set out what they said were 52 errors in the Commissioner's Decision to grant the resource consents and the NOR Decision.

[17] In substance, despite being put in several different ways, the Appellants' case raised the following issues:

- Consultation/engagement was inadequate;
- Alternatives – the Agency's consideration of alternatives was inadequate; the 'online' option is a viable alternative ;
- The following effects of the Project on the Appellants, particularly the Pascoes, are such that the NOR should be cancelled and resource consents refused: construction, operational, ecological, amenity, social and landscape effects.
- Cultural – it is claimed that:
 - Poutama and Mrs Pascoe are tangata whenua;
 - The Pascoe land is within the rohe of Poutama;
 - Poutama are an iwi exercising mana whenua and kaitiakitanga over the Project area;
 - Mrs Pascoe has whakapapa to Poutama;
 - Mr and Mrs Pascoe are kaitiaki of their land;
 - The Agency did not recognise them as tangata whenua, which means that they have been deprived of the recognition given to Ngāti Tama and the recognition that the Act requires under s 6(e), 7(a) and 8.

[18] We will address a number of these issues in our analysis of the Project's effects on the environment.

[19] The primary relief sought was for both the resource consent and NOR Decisions to be revoked. The secondary relief sought was:



- For the Project to be put on hold to allow Poutama and the Pascoes to have meaningful input into sites, routes, and methods of undertaking the work;
- For the Project to be put on hold to allow time (at least one full year) to monitor the Mount Messenger long-tailed bat colony effectively to gain better understanding on the effect on the wider district that the potential extinction of that colony would have;
- If the Project was to proceed, for the conditions to be amended to provide to Poutama and the Pascoes compensation and mitigation for damage to cultural (including environmental and social) values on the Pascoes and Poutama properties;
- If the Project was to proceed, for the conditions to be amended to provide for the full and active participation of the Pascoes and Poutama across the entire Project, from a governance level through to work fronts.

[20] We explain later in this decision how Mr and Mrs Pascoe's interests came to be combined with those of Poutama.

B - Legal framework for the Decision

[21] First, the Agency has sought an alteration to an existing designation. s 181(2) relevantly provides that:

- (2) Subject to subsection (3), ss 168-179 ... shall, with all necessary modifications, apply to a requirement referred to in subsection (1) as if it were a requirement for a new designation.

[22] No party argued that s 181(3) applied to this alteration.

[23] As the NOR Decision has been appealed to the Environment Court, the Court's decision is to be made under s 174 RMA as follows:

- (4) In determining an appeal, the Environment Court must have regard to the matters set out in s 171(1) and comply with s 171(1A) as if it were a territorial authority, and may—
- (a) cancel a requirement; or
 - (b) confirm a requirement; or
 - (c) confirm a requirement but modify it or impose conditions on it as the Court thinks fit.

[24] In reaching its decision the Court must have regard to the same considerations as



does a territorial authority when making a recommendation under s 171 RMA which relevantly provides:

171 Recommendation by territorial authority

- ...
 (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
- (a) any relevant provisions of—
 - (i) a national policy statement;
 - (ii) a New Zealand coastal policy statement;
 - (iii) a regional policy statement or proposed regional policy statement;
 - (iv) a plan or proposed plan; and
 - (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
 - (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
 - (ii) it is likely that the work will have a significant adverse effect on the environment; and
 - (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
 - (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
- (1B) The effects to be considered under subsection (1) may include any positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from the activity enabled by the designation, as long as those effects result from measures proposed or agreed to by the requiring authority.

[25] We may also waive the requirement for an outline plan to be submitted under s 176A of the RMA.

[26] Secondly, the Agency has sought resource consents for certain aspects of the Project. All consent applications were assessed as a single bundle. The overall activity status is discretionary. We are obliged to consider the matters outlined in ss 104, 104B (discretionary activities) and 105 and 107, which relate to discharge permits.

[27] Our consideration under ss 171 and 104 is subject to Part 2 of the RMA.

[28] The relevance of Part 2 to the consideration of applications for resource consent has been considered by the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council (Davidson)*.⁸ The Court of Appeal determined that:

- The position of the words “subject to Part 2” near the outset and preceding the list of matters to which a consent authority must have regard to [in s 104], clearly show that it is necessary to have regard to Part 2, when it is appropriate



⁸ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 (*Davidson*).

to do so;⁹

- If it is clear that a plan has been prepared having regard to Part 2, and with a coherent set of policies designed to achieve clear environmental outcomes, reference to Part 2 is unlikely to add anything;¹⁰
- If a plan has been competently prepared under the Act, in many cases a consent authority will feel assured in taking the view that there is no need to refer to Part 2 because it will not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so.¹¹

[29] Counsel for the Agency submitted that the same approach can apply to designations, given the similarity of the statutory wording in ss 104 and 171. However, there is no judicial authority on this point.

[30] Counsel also submitted that while some of the relevant statutory planning documents are older, the planners who gave evidence to the hearing did not identify any circumstances whereby the relevant provisions do not provide a coherent set of environmental outcomes.¹²

[31] In any event we were advised that, out of caution, Mr Roan had provided a 'fulsome Part 2 assessment'.¹³ We agree with this approach.

[32] Part 2 matters engaged by the Project are s5, s6(a), 6(c)-(f) and 6(g), s 7(a)-(d), s 7(f) and s7(i), and s 8.

C - Principal issues for this hearing

[33] The principal issues which emerged from the parties' cases for determination were as follows:



⁹ *Davidson*, at paragraph 47.

¹⁰ *Davidson*, at paragraph 74.

¹¹ *Davidson*, at paragraph 75.

¹² Agency's opening submissions, paragraph 250.

¹³ Agency's opening submissions, paragraph 260.

Alternatives

[34] Was the Agency's consideration of alternatives adequate, particularly with regard to the 'online options' (alteration to the existing SH3 road)?

Consultation

[35] Was the Agency's consultation with Te Korowai, Poutama and the Pascoes adequate?

Cultural effects

[36] Given that Te Rūnanga has not consented to the acquisition of that part of its land that is necessary for the Project (**Ngāti Tama Land**), is it appropriate to grant consent to the Project, or should the outcome of this hearing await Te Rūnanga's decision?

[37] Is it appropriate that Te Rūnanga be the only body referred to in any conditions addressing cultural protocols?

[38] Are adverse cultural effects of such significance as to require that the NOR be cancelled and resource consents refused?

[39] Do the proposed conditions sufficiently avoid, remedy, mitigate, offset or compensate the significant adverse cultural effects of the Project?

[40] What role (if any) should Te Korowai have in any condition addressing cultural protocols?

[41] Is Poutama an iwi group exercising mana whenua and kaitiakitanga over land including the Project area? Are Mr and Mrs Pascoe kaitiaki of their land?

Ecology

[42] Generally, are the ecological effects of the Project appropriately addressed? Are the proposed conditions appropriate?

The Pascoes

[43] Are the construction, operational, ecological, amenity, social and landscape effects



on the Pascoes so significant that the NOR should be cancelled and resource consents refused?

Conditions

[44] Do the conditions proposed by the Agency appropriately address the effects of the Project?

[45] Some of these issues will be discussed as part of our wider consideration and we return to them at the conclusion of this decision.

D – Site and surrounding environment¹⁴

[46] Mr PA Roan, a planning consultant for the Agency, described the site and the surrounding environment. The existing SH3 corridor north and south of Mount Messenger follows relatively open rural valleys: the Mangapepeke valley in the north and the upper Mimi valley in the south. Pastoral farming/grazing is the predominant land use along the valley flats. These lowland areas are separated by very steep, topographically complex hill country, with indigenous forest contiguous to the east of SH3 and indigenous forest and farmland to the west.

[47] The wider area extends from the coastal terraces south of the Tongaporutu River, south to the pastoral flats of the Mimi valley, west to the coast and the Paraninihi/White cliffs and east to the Mount Messenger forest. In general terms, the wider area is predominantly steep to very steep hill country.

[48] Settlement patterns within the wider Project area are sparse and determined predominantly by the access afforded from SH3. A small number of dwellings are located at Ahititi (at the intersection of Mokau and Okau Roads) and occasional dwellings are present along the SH3 corridor itself.

[49] Landowners affected most significantly by the Project are the Pascoes and Te Rūnanga. They are major landowners on the designation route and each will lose land if the NOR is confirmed.

[50] The new highway route follows a roughly north-south alignment along the floor of

¹⁴ PA Roan Evidence-in-Chief (EIC) Statutory Assessment: Conditions and Management Plans (Roan EIC-Statutory), paragraphs 47-49.



the Mangapepeke valley over land owned by Te Rūnanga at the southern end and the Pascoes at the northern end.

[51] The Pascoes' farm comprises some 250 ha. Only a small portion of the overall 250 ha of farmland is farmed with the balance having been left in its natural state. Mr Pascoe said that he and his family had been able to live off the land to survive and made ends meet through pig hunting and possum trapping in the valley.¹⁵

[52] Te Rūnanga entered into a Deed of Settlement with the Crown in December 2001. That Deed and the Ngāti Tama Claims Settlement Act 2003 settled Ngāti Tama's historical Treaty of Waitangi claims. As part of the settlement, approximately 37 hectares of the Mount Messenger Scenic Reserve and approximately 227 hectares of the Mount Messenger Conservation Area were returned to Ngāti Tama as cultural redress.¹⁶ Of this land approximately 22 hectares is required for the road and another 15.9 hectares is required for the duration of the construction period.¹⁷

[53] The Mount Messenger area contains a number of cultural, ecological and landscape features that establish the environmental context. These features have been described in the Assessment of Environmental Effects (**AEE**) (Section 8), the Technical Reports, the Māori Values Assessment (**MVA**) provided to the Transport Agency by Te Rūnanga and in the evidence of Mr Roan.¹⁸ These features include:

- Cultural features: Ngāti Tama exercise mana whenua over the Mount Messenger area and the land associated with the Project. Ngāti Tama provided an MVA that highlights cultural values in relation to the wider area and the land affected by the Project. The Whitecliffs and Mount Messenger area is known to Ngāti Tama as Paraninihi and is referred to as 'Te Matua Kanohi o Ngāti Tama Whanui', 'The parent face of Ngāti Tama'. Paraninihi provides the base for Ngāti Tama's sustenance and connection to the whenua, awa and moana. The area affected by the Project has been and remains an area of major importance to Ngāti Tama as an important part of their rohe, traditions, customs and identity;
- A significant proportion of the land through which the Project traverses, along



¹⁵ T Pascoe EIC, paragraph 12.

¹⁶ Ngāti Tama Claims Settlement Act 2003, Schedule 1.

¹⁷ AS Gard, EIC, paragraph 11(f) (**Gard EIC**).

¹⁸ Roan, EIC - Statutory, paragraph 50.

with the Parininihi land immediately west and east of the Transport Agency's SH3 landholding, is vested in Te Rūnanga;¹⁹

- **Ecological features:** The Project footprint sits within a wider area of forested indigenous native vegetation running from the coastal margins inland to the lowland mountains. It includes the Parininihi and the Mount Messenger forest. The Parininihi land to the west of SH3, previously known as "Whitecliffs Conservation Area", is mainly primary forest of approximately 1,332 ha and centred on the Waipingao Stream catchment. Ngāti Tama have led the protection and restoration of biodiversity values and the removal of pests from the Parininihi land since the late 1990s. These areas will not be affected by the Project. The dominant forest on the Ngāti Tama block to the east of SH3, through which the Project alignment traverses, has not had consistent pest control and is in a poor condition, reflecting the effects of browsers and pests. Within the immediate Project area the Mimi Stream swamp forest is of greatest ecological significance;
- **Landscape features:** The Project alignment is contained within two valley systems, being the Mangapepeke valley in the north and the upper Mimi valley in the south. Their steeper upper slopes have higher naturalness characteristics, while the lower parts of the valleys occupy a modified pastoral rural landscape. This land is not subject to a significant landscape notation in the District Plan.²⁰ The Parininihi landscape to the west of SH3, away from the Project alignment, is scheduled in the District Plan as a regionally significant landscape.

[54] The land required by the NOR is zoned 'Rural Environment' in the New Plymouth Operative District Plan (**District Plan**). SH3, to the west of the proposed designation, is designated in the District Plan for 'Roading Purposes' (DP Ref N36).²¹

E - The Project

[55] The Project consists of:

¹⁹ This land is subject to two registered interests; a conservation covenant and a right of way easement. If the Project proceeds, the Transport Agency will need to acquire the necessary property rights over the relevant portion of the Ngāti Tama land, including to have the conservation covenant and right of way easement uplifted, and the easement then relocated and reinstated.

²⁰ Roan EIC– Statutory, paragraph 50.

²¹ CB, Vol 1, Tabs 1, 2 and 3.



- A NOR for an amended designation;
- Applications for resource consent.

NOR

[56] The NOR seeks to alter the existing SH3 designation within the District Plan in accordance with s181 of the RMA. The alteration is to add land required for the construction, operation and maintenance of the Project to the existing designation.

[57] The nature of the proposed public work, as set out in the NOR,²² is:

... the construction, operation and maintenance of a new section of SH3, north of New Plymouth, to bypass the existing steep, narrow and winding section of highway at Mount Messenger. The Project comprises a new section of two lane highway, approximately 6km in length (including tie-ins), located to the east of the existing SH3 alignment...

[58] The NOR directly affects 16 private properties totalling some 77.18ha and some 20.93ha of legal road within the existing SH3 designation.²³ It is our understanding that apart from the areas of land required from Te Rūnanga and the Pascoes, the areas of land required from other private properties are relatively minor.²⁴ The NOR summarises the Project footprint as follows:

The Project footprint is located generally to the east of SH3 between Uruti and Ahititi, and includes tie-ins to the existing SH3 at the northern and southern ends of the Project footprint...

[59] Details of the proposed alteration of designation and associated land requirement are shown on the following sets of plans:²⁵

- **Designation Drawings** (Attachment **B** to the NOR);
- **Schedule of Directly Affected Land** (Attachment **C** to the NOR).

[60] Below is an elevation model showing the Project area as provided in the Agency's AEE.²⁶



²² Notice of a Requirement for an Alteration to a Designation under ss 168(2) and 181 of the Resource Management Act 1991 – State Highway 3 Mount Messenger Bypass, NZTA, 14 December 2017, CB, page 239.

²³ CB, Vol 2, Assessment of Environmental Effects (AEE), page 334.

²⁴ CB, Vol 2, AEE, page 804.

²⁵ CB, Vol 1, pages 251 and following.

²⁶ CB, Vol 2, AEE, page 381.



Figure 4.2 – Elevation model looking from the south to the north along the alignment

Applications for resource consents

[61] As well as the NOR the Agency is seeking resource consents for the construction, operation and maintenance of the Project.

[62] A list of the resource consents sought, and the relevant Regional and District Plan rules are detailed in Table 2.2 of the AEE.²⁷ In summary, these include applications for a range of activities, including:²⁸

- Land use consent (s 9) for disturbance of contaminated soils;
- Water permits (s 13 and s 14) for temporary and permanent activities involving works in, on or under the bed of a watercourse, the damming and taking of water and the diversion of surface and ground water;
- Discharge permits (s 15) for the discharge of contaminants during earthworks to water (sediment) and to air (dust) associated with construction activities;
- Land use consent (s 9) for vegetation removal associated with construction activities.

²⁷ CB, Vol 2, AEE, pages 336-339.

²⁸ Roan EIC– Statutory, paragraph 37.



[63] The Project involves a small number of activities that are permitted under the relevant statutory plans. These activities are set out in Table 2.3 of the AEE.²⁹ The Agency's evidence is that operational stormwater runoff from the new road will meet the permitted activity standards in the Regional Fresh Water Plan for Taranaki.³⁰

Approvals required under other legislation

[64] In addition to the matters requiring consideration under the RMA, there are further statutory considerations relevant to the Project, including:

- Public Works Act 1981 in relation to the acquisition of land;³¹
- Archaeological Authority under s 44(a) of the Heritage New Zealand Pouhere Taonga Act 2014;
- Wildlife Act 1953 authority associated with protected species;
- Application under the Fisheries Regulations 1983 associated with the provision of fish passage in waterways affected by the Project.

[65] Where other approvals are required they are either being sought in parallel with the RMA applications or will be sought at a time that will permit construction to commence in accordance with the Project's construction programme.³²

Outline Plan

[66] Save for certain key elements of the Project where decisions are yet to be made on final design details, the Agency submitted that for the rest of the Project sufficient details of the works have been provided such that s 176A(2) is satisfied or that it is appropriate that a waiver be granted.

[67] The Agency accepts that it is appropriate (proposed Designation condition 7) that an Outline Plan be provided in respect of the following:

- The tunnel control building and emergency water supply tanks;

²⁹ CB, Vol 2, AEE, Table 2.3, pages 341-343.

³⁰ Roan EIC – Statutory, paragraph 38.

³¹ CB, Vol 2 Drawing Set: property designation plans sheet layout and property list, page 804.

³² Roan EIC – Statutory, paragraphs 40 and 41.



- The two bridges (over a tributary to the Mimi wetland and Bridge O in the Mangapepeke valley).

[68] We are satisfied that the detailed drawings, conditions and management plan processes for the other parts of the Project address the details set out in s 176A(3), such that, if the Project is consented, no outline plan is required for those parts of the Project.

F - Project objectives

[69] The Agency's Project Objectives for upgrading the existing route or constructing a new bypass route are:³³

To enhance safety of travel on State Highway 3.

To enhance resilience and journey time reliability of the state highway network

To contribute to enhanced local and regional economic growth and productivity for people and freight by improving connectivity and reducing journey times between the Taranaki and Waikato regions.

To manage the immediate and long term cultural, social, land use and other environmental effects of the Project by so far as practicable avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.

[70] We evaluate the Project against these objectives later under the heading *The Agency's objectives – reasonable necessity*.

G - Alternatives

Options evaluation

[71] Under s171 (1) (b) (i), given that the Agency does not have an interest in the land sufficient for undertaking the Project, it undertook a detailed evaluation of highway route options.

[72] This evaluation was undertaken in two stages, being a longlist stage followed by a shortlist stage, using a process known as Multi Criteria Analysis (**MCA**) which was described by Mr Roan in the following way:³⁴

MCA is essentially a decision support tool, enabling options to be scored in a transparent and independent fashion against predetermined assessment criteria. The process assists in assessing the relative merits of options, making explicit the key considerations and the values attributed to them. The process generates a score for an option, relative to other options (with



³³ CB, Vol 2, page 820.

³⁴ Roan EIC – Assessment of Alternative Options, paragraph 22 (Roan EIC– Alternatives).

sub-scoring for selected groupings of criteria also possible), from which it is possible to rank options in relation to each other. It is also possible to apply weightings to scores to factor their importance (or not) in the assessment process and undertake sensitivity testing of the scoring (using weightings) to establish how certain criteria might affect the overall scoring.

The Longlist

[73] The steps adopted in the MCA longlist evaluation process were as follows:³⁵

- The generation of corridor options by subject matter experts;
- The development of assessment criteria for the evaluation of the corridor options by subject matter experts;
- The development of a consistent scoring system under which all criteria would be assessed for both positive and negative effects;
- Specialist briefings on the options and scoring methodology, and subsequent expert scoring of the options;
- A workshop for the assessment and evaluation of the options against the scoring criteria adopted for the identified positive and adverse effects;
- Analysis of the options assessment, including weighting and sensitivity analyses;
- Reporting the MCA outcomes and the presentation of these to the Agency as the decision maker responsible for selecting the preferred option.

[74] The scoring system provided for a 'fatal flaw' or negative score where adverse effects were identified that could not be avoided, remedied or mitigated.³⁶

[75] The 11 corridors in the longlist were located west and east of the existing highway (the offline options) with two further corridors located on the line of the existing highway (these two being largely within the Agency's ownership and the existing designation (the online options)).³⁷

[76] Each of the offline corridor options involved two different design approaches, an



³⁵ Roan EIC – Alternatives, paragraph 27.

³⁶ CB, Vol 2, AEE, pages 447-448.

³⁷ Roan EIC – Alternatives, paragraph 29.

“earthworks” design based primarily on cuts and fills and a “structures” design involving a combination of bridges, tunnels and earthworks to better avoid or minimise the adverse effects of the earthworks design.

[77] The online options both involved a series of bridges and a tunnel.

[78] The designs for each of these longlist options were developed to a sufficient level to enable the potential effects of each to be assessed.

[79] Taking account of the relevant statutory matters, the Project Objectives and experience from other projects, nine assessment criteria were chosen for the assessment of the longlist options. These criteria were:

- Constructability;
- Performance of the route for transportation;
- Resilience (instability, seismic, liquefaction and lateral spread), flood and storm damage;
- Landscape;
- Historic and archaeological heritage;
- Community (including recreational activities and impacts on those directly affected);
- Property (extent and nature of land required);
- Ecology;
- Cultural heritage and values.³⁸

[80] Key findings from the longlist assessment were that:

- The two online options scored best;
- The earthworks options scored less than the structures options because these had higher levels of adverse effects;

³⁸ Roan EIC – Alternatives, paragraph 35.



- A mix of four offline options involving both west and east routes scored relatively well;
- Nine offline options received a “fatal score” under one or more of the criteria for ecology, cultural heritage and landscape including all four of the far western and coastal options.

The Shortlist

[81] The criteria adopted for the longlist assessment were also adopted for the shortlist assessment with ecology being split into terrestrial ecology and water (including erosion and sediment control inputs) and the community criterion being adjusted to include inputs from recreation, social, noise and vibration experts.³⁹

[82] Following further analysis of the findings from the longlist assessment including the consideration of cost estimates for each option (which had not formed part of the MCA process), a five-options shortlist was drawn up. This included four offline options, three to the west of the existing highway and one to the east, and one online option. Longlist options located further west and east of the shortlisted options had scored less and were excluded from the shortlist.

[83] The five shortlist options were assessed in an MCA workshop by a team involving multi-discipline experts and Te Rūnanga representatives for cultural heritage inputs.⁴⁰

[84] While the western-most shortlisted option received the best transport score, it scored relatively poorly on most other criteria including ecology and landscape reflecting its location in the sensitive Waipingo valley. It also crossed a significant landslide feature. Te Rūnanga identified this option as having very high/very significant adverse cultural effects. (We note that all five options considered at the shortlist stage had “very high/very significant” adverse effects).⁴¹

[85] The other two western options were on similar alignments closer to the existing highway, the difference between the two being that they diverged at the southern end. Both of these options scored poorly for adverse effects on terrestrial ecology and landscape with Te Rūnanga identifying both as having very high/very significant adverse

³⁹ Roan EIC – Alternatives, paragraph 36.

⁴⁰ Roan EIC – Alternatives, paragraph 68.

⁴¹ CB, Vol 2, AEE, pages 1096-1097.



cultural effects.

[86] The eastern option which follows the Mangapepeke valley ranked second of the five options. It was assessed as having high adverse effects on terrestrial ecology and very high/very significant adverse cultural effects by Te Rūnanga.

[87] The online option, a large portion of which is located on or adjacent to the existing highway ranked first under both RMA and environmental criteria but scored poorly for its high adverse effects on terrestrial ecology at the southern end. Te Rūnanga assessed this option as having very high/very significant adverse cultural effects. It also scored poorly for constructability because of the need to maintain traffic flows on the existing road during construction and would include building a very substantial retaining wall some 1.5km long to support the highway through a large landslide feature.

[88] While the shortlist report did not recommend a preferred option to the Agency it did recommend that the worst performing western-most shortlisted option should not be pursued. It also recommended that one of the other two western options with the worst adverse effects on terrestrial ecology and landscape should be discarded. This left three options for the Agency to consider when deciding on its preferred route, the remaining western option, the eastern option and the online option.

[89] Further work was undertaken on these three options in an endeavour to establish if design refinements or more cost-effective solutions might be available. This work found that it was not possible to refine the western option to address the adverse effects in the Waipingao valley. Likewise, despite endeavours to refine the alignment of the online option it was not possible to avoid the landslide or to meet the Agency's engineering requirements. For the eastern option, in the northern section of the Mangapepeke valley, the alignment was moved to the eastern valley flanks to avoid poorer soil conditions on the valley floor.

[90] Cost estimates including funding risk were then prepared for each of the five shortlisted options. These ranged from around \$219m for the eastern option to \$430m for the online option.⁴²



⁴² Roan EIC – Alternatives, Appendix 4. Note: In his EIC, paragraph 125(a), HJ Milliken identifies a difference in cost of \$180m. This does not tally with the difference of \$211m (\$430 less \$219m) in Mr Roan's evidence.

[91] The Agency's former Project Manager, Mr R C Napier, advised that while the outcomes of the MCA process were not intended to be used directly to select the Project option, in conjunction with subsequent refinement work and the consideration of the cost estimates they were central to the Agency's decision in selecting the eastern route as the preferred Project option.⁴³

[92] The principal components of this selected route are:⁴⁴

- Construction of 6km of new two-lane road with tie-ins to the existing highway at each end;
- A tunnel approximately 235m long through the ridgeline near the existing Mount Messenger rest area, with an associated tunnel control building and emergency water supply tanks;
- A 120m long bridge over a wetland on a tributary of the Mimi Stream;
- A 25m long bridge in a tributary valley of the Mangapepeke Stream;
- Ten rock cuttings up to 60m high with a combined length of around 2.6km (including the tunnel portals);
- Thirteen earth embankments up to 40m high (but typically less than 5m high), with a combined length of around 2.5km;
- Retaining walls and mechanically stabilised earth (MSE) embankments;
- Stormwater treatment and attenuation facilities (including stormwater retention ponds);
- Swales and a road drainage network;
- Fill disposal sites;
- The removal of up to 31.7 ha of predominant vegetation and the diversion of a total of 3.1 km of streams;
- A comprehensive package of measures identified as the Restoration Package



⁴³ RC Napier EIC, paragraphs 62 and 63 (**Napier EIC**).

⁴⁴ Agency's opening submissions, paragraphs 4-9 and HJ Milliken EIC, paragraph 8 (**Milliken EIC**).

to address the Project's adverse effects on ecological values.

Discount of online option (also known as option Z)

[93] In its s42A report⁴⁵ the District Council queried the merits of the Agency's selected route over the online option. As noted in the report, Mr Roan advised the Council that the Agency had decided against progressing the online option for reasons of cost, constructability and cultural values (due to the close proximity of the alignment to the maunga).⁴⁶

[94] With respect to the issue of cost and constructability Mr B Symmans, Design Manager for the Mount Messenger Alliance⁴⁷, explained that \$110m of the additional cost was for measures required to stabilise a large landslide feature (a feature not present on the selected route) at the northern end of the existing state highway. In particular:⁴⁸

- This landslide is deep seated with two boreholes having identified depths to the fault shear surface of 14.4m and 23m below ground level;
- Parts of the feature are still moving as evidenced by two measuring instruments which have sheared off through displacements of hundreds of millimetres over a period of several months;
- Stability analyses have identified that horizontal movements of up to 6m could occur at the landslide in a design earthquake with further movements also likely under extremely high rainfall;
- To mitigate these hazards to an acceptable level, it would be necessary to construct a 1.5km-long retaining wall at heights of up to 17m above ground level, depths below ground level to the shear surface of around 20m and embedment below this surface of about 3m. In addition, multiple ground anchors up to 65m long would be required to tie back the wall with this length being the edge of feasibility.⁴⁹

⁴⁵ RL McBeth EIC (**McBeth EIC**), Appendix A, s 42A Report.

⁴⁶ McBeth EIC, Appendix A, s42A Report, paragraph 107(b).

⁴⁷ The Alliance includes the Agency, Downer Construction, HEB Construction, Opus International Consultants and Tonkin and Taylor. Its purpose is to progress the design (including options assessment), consenting and construction of the Project.

⁴⁸ B Symmans EIC, paragraphs 50 – 71 (**Symmans EIC**).

⁴⁹ Transcript, page 119.



[95] Mr H J Milliken, Mount Messenger Alliance Manager, added that constructing the online option would also be highly disruptive for both the contractor undertaking the works and for road users during the multi-year construction period.⁵⁰

Discussion and finding on consideration of alternatives

[96] In determining whether adequate consideration has been given to alternatives, we have been guided by the following principles derived from the Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project:

- The focus is on the process, not the outcome; whether the requiring authority has made sufficient investigations of alternatives proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration;
- The question is not whether the best route, site or method has been chosen, nor whether there are more appropriate routes, sites or methods;
- That there may be routes sites or methods which may be considered by some (including submitters) to be more suitable is irrelevant;
- The Act does not entrust to the decision maker the policy function of deciding the most suitable route; the executive responsibility for selecting the site remains with the requiring authority;
- The Act does not require every alternative, however speculative, to have been fully considered; the requiring authority is not required to eliminate speculative alternatives or suppositious options.⁵¹

[97] We respectfully adopt that summary. We record also that the adequacy of the consideration of alternatives will be influenced to some degree by the extent of the consequences of the scenarios in s 171(1)(b), which permits, and may require, a more careful consideration of alternatives when there are more significant adverse effects.⁵² Further, the measure of adequacy will depend on the extent of the land affected by the

⁵⁰ Milliken EIC, paragraph 125.

⁵¹ Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project Ministry for the Environment, Board of Inquiry, 4 September 2009 at [177]; adopted by the Court in *Pukekohe East Community Society Incorporated v Auckland Council* [2017] NZEnvC 027 at [21] and [22].

⁵² *New Zealand Transport Agency v Architectural Centre*, [2015] NZRMA 375 at [140] and [142], citing *Queenstown Airport Corporation Limited v Queenstown Lakes District Council*, [2013] NZHC 2347.



designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.⁵³

[98] Poutama and Mr and Mrs Pascoe raised questions about the adequacy of the alternatives assessment, asserting:

- The online option had not been fully assessed and considered;⁵⁴
- The potential for “siting the haul road on the road alignment, therefore reducing damage to one side of the valley”.⁵⁵

[99] We acknowledge Poutama’s and Mr and Mrs Pascoe’s concerns with regard to the online option and note that as an option it has a certain appeal, given that it stays within the existing alignment and does not involve an intrusion into the Mangapepeke valley. However, we remind ourselves that our role is to determine the adequacy of the process followed to investigate alternatives, not to decide on what route may be more suitable. In any event we make the observation that there are substantial difficulties with the online option which would require that the existing state highway be kept open during major construction works and dealing with a significant landslip.

[100] In our view, the Agency as the requiring authority undertook a thorough and detailed evaluation of route options before deciding on its preferred route along the Mangapepeke valley.

[101] As to the adequacy of the assessment with regard to the location of the haul road, there was considerable focus at the hearing on the location of the haul road in relation to Mr and Mrs Pascoe’s home. Having reflected on the evidence and the issues canvassed at the hearing, in its closing legal submissions the Agency proposed a different approach to the way in which construction would be undertaken in the vicinity of the Pascoes’ home. This took the form of a new condition 5A, which addresses a number of matters, including relocation of the Pascoes’ home should that be their desire. We address that in more detail later in this decision in **section K - Conditions**.

[102] We find that the Agency has given adequate consideration to alternative sites,

⁵³ *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347 at [97] and [121].

⁵⁴ Poutama and Mr and Mrs Pascoe closing submissions, 22 July 2019, paragraphs 55-58 (Poutama/Pascoe Closing submissions).

⁵⁵ Poutama/Pascoe closing submissions, 22 July 2019, paragraph 74.



routes or methods for undertaking the work and has met its obligation under s171 (1) (b) of the Act.

H - Consultation

[103] Poutama and Mr and Mrs Pascoe expressed serious concerns about the adequacy of the consultation undertaken by the Agency. Concerns were also expressed by Te Korowai.

[104] Detailed evidence addressing this issue was provided by Mr R Gibbs for Poutama, Mr and Mrs Pascoe, and for Te Korowai by Mr N Baker. For the Agency we received evidence from Mr Napier and Mr AS Gard, the Mount Messenger Owner Interface Manager.

[105] We observe first that there is no statutory obligation on a requiring authority to consult about a resource consent application or a Notice of Requirement.⁵⁶ However, consultation is best practice.⁵⁷

[106] The Agency stated that it had carried out extensive and detailed consultation with key stakeholders and the general public dating back to early 2016.⁵⁸ Further, that it had consulted with Te Korowai “to the extent that Te Korowai itself has enabled this”.⁵⁹

[107] We have carefully considered all the evidence we received on this point and have concluded that the Agency’s consultation with Poutama, the Pascoes and Te Korowai was adequate.

[108] We do observe however that a Project such as this has many complexities, the extent of which have the potential to overwhelm those who might not be familiar with such works. For the Pascoes, those complexities combined with the fear and upset at losing a significant part of their land and home, made the process of engaging with the Agency extremely difficult.

[109] The evidence disclosed that the Pascoes did, for a time, have the benefit of legal counsel but that was primarily to assist with the Public Works Act (**PWA**) part of the

⁵⁶ s 36A RMA.

⁵⁷ *Watercare Services Ltd v Auckland Council* [2011] NZEnvC 155.

⁵⁸ Agency’s opening submissions, paragraph 63.

⁵⁹ Agency’s opening submissions, paragraph 114.



process, that is, the land acquisition.

[110] One of the Pascoes' major issues was the fact that the Agency did not resource them so that they 'could effectively participate'.⁶⁰ They felt that they should have been resourced for all aspects of the Project. They also considered that the Agency should have established a framework and process for their ongoing engagement. They drew comparisons with the resourcing that was provided to Te Rūnanga.

[111] Mr Napier for the Agency stated that the Agency does not pay for other parties to be engaged in consultation under the RMA. In response to questions from Ms M Gibbs he said that the Agency did resource Ngāti Tama for consultation as they are tangata whenua.⁶¹ He went on to say that the Agency had supported the Pascoes with resourcing for the Project. He referred to compensation that had been paid to the Pascoes for PWA negotiations, valuations, certain investigations and a new calf shed among other expenses.⁶²

[112] We acknowledge the Agency's approach to this issue. It was apparent to us, however, that Mr and Mrs Pascoe were overwhelmed by the process. Mr Pascoe agreed that there were "too many people, too many plans" in reference to the discussions he and Mrs Pascoe had with the Agency.⁶³ The Pascoes were vulnerable and lost their legal representation at an important time in the process, which intensified their feelings about the impact of the Project on them. Aside from those factors, for reasons we explain more fully later, their relationship with the Agency and their interests were adversely affected by advocacy on their behalf from Poutama, Mr R Gibbs and Ms Gibbs.

[113] Having said that, we are satisfied that the Agency's consultation was extensive and detailed. It may wish to consider in future the desirability of maintaining (as far as possible) consistent points of contact when consulting with individuals.

[114] For Te Korowai, Mr Enright advised that Te Korowai had elected not to pursue disputed facts on consultation, stating that the issues as to consultation are secondary to substantive cultural effects of the proposal.⁶⁴

⁶⁰ T Pascoe EIC, paragraph 23.

⁶¹ Transcript, page 36, lines 2-29.

⁶² Napier evidence in rebuttal (EIR), paragraphs 7-9.

⁶³ Notes taken at hearing – Transcript incomplete.

⁶⁴ Legal submissions for Te Korowai Tiaki o Te Hauāuru Inc, paragraph 49 (Te Korowai's submissions).



I - Effects on the environment

[115] There are a number of obvious effects of the Project which were not in dispute before us. The evidence provided by the Agency addressing traffic and transportation effects, economic effects, engineering and hydrology was essentially untested by the parties in the hearing.

[116] The Project will inevitably generate other effects including effects or potential effects on:

- Recreation;
- Heritage-archaeology and historic;
- Water from construction;
- Traffic from construction;
- Noise and vibration from construction;
- Air quality and dust from construction;
- Lighting from the road;
- Natural hazards;
- Soil contamination;
- Hazardous substances.

We rely on the findings of the Commissioner as to those effects being acceptable.

[117] The individuals most obviously affected by the Project are Mr and Mrs Pascoe. The NOR includes part of their land which will be permanently taken for the Project (road and associated works) and part of their land which will be used temporarily (storage, parking areas, construction yards, haul road etc). Neither the permanent nor the temporary areas



include the land on which the Pascoes' home is sited⁶⁵ but the house is situated within the designated area in close proximity to the proposed construction area at the northern end of the NOR.

[118] Our understanding is that the Agency has offered the Pascoes two options for relocating during construction:

- Under proposed designation condition 5A(e)(iv) the Agency has offered to purchase their home and surrounding land and to provide them with a new home at another location on their property;
- Under proposed designation condition 19b if the Agency does not complete this acquisition it has offered to provide the Pascoes with alternative accommodation for the duration of the works after which they would return to their existing home.

[119] By implication if they did not agree to either of these relocation options the remaining option would be for them to continue to live in their existing home, notwithstanding that the Agency in its closing legal submissions proffered the view that they would not wish to do so.⁶⁶ Our evaluation of construction effects has therefore considered what the effects would be if they were to continue to live in their home during the construction period.

[120] We address for the purposes of this decision the following effects, positive and adverse:

- Transportation effects;
- Economic effects;
- Construction effects;
- Social effects;
- Landscape and visual effects;
- Ecological effects;

⁶⁵ Agency closing legal submissions, paragraphs 55-66.

⁶⁶ Agency closing legal submissions, paragraphs 87-88.



- Cultural effects.

Transportation effects

[121] We heard from Mr PT McCombs (traffic and transport), and Mr B Symmans (project design) who addressed the traffic and transportation effects of the Project. Their conclusions on the transportation benefits of the Project are outlined in our analysis of the Agency's objectives in **section K**.

Economic effects

[122] Mr MC Copeland provided evidence on the economic effects of the Project. His conclusions on economic effects are outlined in our analysis of the Agency's objectives in **section K**.

Construction effects

[123] Evidence on construction of the Project, was provided Mr Milliken.

Management plans

[124] Mr Milliken advised that construction of the Project is expected to take 4 years and will be undertaken in accordance with a Construction Management Environmental Plan (**CEMP**) with the following appendices.⁶⁷

- Construction Noise Management Plan (**CNMP**);
- Construction Traffic Management Plan (**CTMP**);
- Ecology and Landscape Management Plan (**ELMP**);
- Contaminated Land Management Plan (**CLMP**);
- Construction Water Management Plan (**CWMP**);
- Specific Construction Water Management Plans (**SCWMP**);
- Construction Dust Management Plan (**CDMP**).

[125] In addition, appendices to the CEMP include an Accidental Discovery Protocol, a

⁶⁷ Proposed condition 8 (with Advice Note).



Control of Spill Procedure and a procedure for Incident Reporting and Investigation.

[126] Mr Milliken said that the objective of the CEMP is to avoid, remedy, mitigate or offset adverse environmental, cultural, and social effects associated with the construction of the Project, so far as is reasonably practicable.⁶⁸ Taken as a whole the plans provide the overarching principles, methodologies, and procedures for managing the effects of the construction of the Project to achieve the environmental outcomes and performance standards required by the designation and resource consent conditions.⁶⁹

[127] Apart from the SCWMPs⁷⁰ (each to be drafted and certified by the Council before the relevant works commence) the preparation of draft management plans was completed before the Council hearing with inputs from key stakeholders including DOC, the two councils and the design team's subject matter experts. These draft plans were carefully considered and tested at the Council hearing, with the final plans submitted to the Court being those agreed by the parties and approved by the Commissioner.⁷¹

Site access, construction yards and haul road

[128] Mr Napier advised that there will be 10 access points off the existing highway for the construction of the new highway, all to be managed in accordance with the CTMP. There will also be a 5,000m² construction yard located at the northern end of the new alignment adjacent to the Pascoes' house, with smaller yards at the bridge and tunnel work areas and at other remote areas along the new alignment.

[129] When asked by Ms Gibbs about flooding of the Pascoes' house if the construction yard was raised 1 or 2 metres, Mr Milliken said that the design of the yard had not yet been undertaken as there were a number of potential scenarios for this (we presume based on whether the Pascoes relocated or stayed in their home during construction). The fate of the sheds near to the house would also need to be considered under these scenarios.⁷²

[130] We note Mr Symmans' advice that while the currently identified construction yard

⁶⁸ Milliken EIC, paragraph 10.

⁶⁹ Proposed condition 9(a).

⁷⁰ Agency's closing submissions, at [186] notes that SCMPs have already been completed for the Fill Disposal Site, the Northern Construction Yard and Temporary Access Crossing and are "construction" ready.

⁷¹ Milliken EIC, paragraphs 98-99.

⁷² Transcript, pages 155,156.



site was preferred, there was some flexibility for its configuration to be changed or even relocated.⁷³

[131] Mr Milliken was asked a number of questions by Ms Gibbs about the proposed haul road in the Mangapepeke valley. He advised that this road would generally follow the line of an existing farm track, although depending on the conditions encountered along the route there may be localised variations to this. He said that the haul road would be constructed about 1m thick and that it would be desirable for it to be laid on fabric. The width would vary from about 9m at the surface to about 11m at the base.⁷⁴

[132] As the northern end of the haul road (and construction yard) would be located within a few metres of the Pascoes' house, the Agency was committed to providing alternative housing for the Pascoes.⁷⁵

[133] Mr Milliken said that the Project haul roads would be removed⁷⁶ and the ground reinstated once construction was complete.⁷⁷

[134] We return later to consider the effects on the Pascoes of the Project, including the location and construction of the main construction yard and the haul road and construction noise.

Earthworks

[135] Earthworks will extend over an area of around 36ha and involve some 1.05 million cubic metres of cut and about the same volume of bulk fill leaving about 95,000 cubic metres of surplus cut material to be placed in disposal sites, all located within the designation area.⁷⁸ These disposal sites and any temporary stockpiling areas will be contoured, landscaped and vegetated in accordance with the ELMP.

Stream diversions⁷⁹

[136] Some 3.1km of streams will be impacted by the new highway with the adverse

⁷³ Transcript, page 207.

⁷⁴ Transcript, pages 141, 142.

⁷⁵ Transcript, page 151.

⁷⁶ Transcript, page 144.

⁷⁷ CB, Vol 6, CEMP, page 2986.

⁷⁸ Milliken EIC, paragraph 65.

⁷⁹ Symmans EIC, paragraphs 194-195.



effects of their construction to be addressed through riparian restoration offsetting. This will include the construction of some 1.8km of permanent stream diversions based on one of three typologies depending on whether the stream is in a lowland habitat, a steep stream habitat or a waterfall. The Agency has agreed with Te Rūnanga that the waterfall sections will have up to 5m high sub-vertical steps formed through excavations into the underlying bedrock.

[137] Temporary steam diversions with temporary culverts will be constructed for access to some construction areas. These diversions and stream works will be managed as provided for in the ELMP, the Landscape and Environmental Design Framework and the CWMP with SCWMPs to be developed and certified for each affected stream and culvert.

Culverts⁸⁰

[138] The 19 permanent culverts for the new section of highway have been designed to provide for fish passage based on the *"New Zealand Fish Passage Guidelines for Structures up to 4 Metres"*. The Project's fresh water ecologist Mr K D Hamill also provided specialist advice for the design.

[139] Prior to the hearing the parties to the appeals agreed to a condition for the post-construction monitoring of the effectiveness of identified culverts as fish passages. If, after two years, the recruitment of young fish is not occurring at these culverts then refinements to the culvert fish passage devices are to be made.⁸¹

Stormwater management⁸²

[140] Most of the stormwater run-off from the highway will be diverted to Mimi Stream and Mangapepeke Stream. The run-off will be collected in roadside channels and conveyed along the valley floors to one of three constructed wetlands which will be designed to manage peak flows and to contain and treat the stormwater prior to its discharge into the streams.

[141] At the tie-ins to the existing highway (which are both outside the catchments of the treatment ponds) swales will be constructed for treating the stormwater.



⁸⁰ Symmans EIC, paragraphs 199-200.

⁸¹ Parties memorandum dated 8 May 2019, page 14.

⁸² Symmans EIC, paragraph 187.

Bridges and tunnel

[142] No party raised any issues with us about the construction or operation of the two bridges and the tunnel. Neither, having read the evidence, did the Court identify any issues of its own.

Construction noise

[143] While construction noise was not raised as an issue by any of the parties during the hearing, it was raised by the Court which had noted that the Construction Noise Management Plan had been prepared on the basis that the Pascoes' house would be purchased and vacated and that therefore this house was not considered a sensitive receiver for the purposes of the management plan.⁸³ Mr Milliken confirmed that this was his understanding also adding that if the house was to be occupied during construction, specific noise mitigation would need to be provided in accordance with the construction noise standards.⁸⁴ Having said this, Mr Milliken did agree with the Court that the noise would be very difficult to mitigate and that this was why the offer had been made to relocate the Pascoes.⁸⁵

The Pascoes' concerns about Mangapepeke valley

[144] Mr and Mrs Pascoe raised concerns with the Agency about the effects of black ice, fog, flooding and groundwater/springs for a highway located in the Mangapepeke valley.⁸⁶

Black ice/frost/fog

[145] The Agency engaged NIWA⁸⁷ to assist them with specialist advice on black ice, frost and fog in the Project area.

[146] Light rain falling on a frozen road surface can form a thin layer of clear ice which appears black because it looks like the underlying road. For this to happen the wind must be light, the skies clear and the air very dry.

⁸³ CB, Vol 6, page 3369.

⁸⁴ Transcript, page 271.

⁸⁵ Transcript, page 275.

⁸⁶ Symmans EIC, paragraph 214.

⁸⁷ Dr M Revell, Principal Scientist – Meteorology, referred to in Symmans EIC, paragraphs 214-225.



[147] NIWA's estimate was that frost could be expected to occur in the Project area for about 60 days per year, with modelling showing that the new road should receive a few hours of sun in the afternoon even in winter. As the bypass is more or less on the same orientation as the existing route ice conditions on the two alignments could be expected to be similar.

[148] There could be around 30 days of fog a year in the Project area with the likelihood that the frequency of fog on the new alignment south of the northern tie-in could be higher than on the existing alignment but no higher than north of the bypass where the existing highway runs beside the Tongaporutu River.⁸⁸

[149] Mr Symmans' evidence was that the new road will be much safer in fog than the existing road as it will have much wider shoulders, more gentle curvature and be provided with side safety barriers.

Flooding

[150] In response to the flooding concerns raised by the Pascoes, Mr Symmans said that extensive hydrological and hydraulic modelling had been undertaken⁸⁹ and that retention wetlands had been designed to prevent significant spikes in peak flows and to reduce flow velocities. He said that the Agency's flood modelling was consistent with the Pascoes' advice that there is widespread flooding in the valley during storm events. The completed road would not be subject to flooding under the 1% AEP design storm as its alignment along the right bank of the valley is elevated above the valley floor.⁹⁰

[151] The modelling had also shown that, following the construction of the fill and the wetland upstream of the Pascoes' house, there would be a reduction in the flood levels at the house compared to those which occur now.

[152] Mr Pascoe was concerned that the proposed straightening of an existing stream in the valley could cause flood flows to move more rapidly down the valley and worsen the flooding downstream. In response Mr Symmans advised that any increase in flows from shortening the stream would be offset by a reduction in peak discharges as a result of

⁸⁸ Symmans EIC, paragraph 225.

⁸⁹ Mr Symmans confirmed that the data from the Pascoes' rainfall gauge had been very useful and had been analysed in great detail as part of the Agency's overall hydrological modelling. (Transcript at page 112).

⁹⁰ Symmans EIC, Figure 34.



extended detention times in the new wetland.⁹¹ His advice was that it was unlikely that there would be any measurable effect on flood behaviour at the stream or at the existing culvert on SH3.

Groundwater/springs

[153] In response to Mr Pascoe's concern about the effects of the new highway on groundwater and springs Mr Symmans stated that his investigations had identified groundwater in the low-lying valleys as typically extending from the ground surface to 2.0m below the surface. He said that piezometers had been installed for the ongoing monitoring of these levels.

[154] Where sandstone bedding layers are exposed on the valley sides, groundwater emerges as a slow seepage. Mr Symmans stated that these seepages were unlikely to present problems for the stability of the Project's cut and fill slopes. He said that the valley floors are typically infilled with significant depths of relatively homogenous silts with low permeability and that groundwater flows and pressures in these locations are relatively consistent, typically being fed by the overlying streams and/or seepage from the valley sides.

[155] Mr Symmans said that the Project earthworks have been designed to limit any adverse effects on groundwater conditions, with the earthworks unlikely to have any measurable effects on groundwater beyond about 5 to 10m above the cuts and fills. This is because:

- The fill embankments are to be constructed on high-permeability drainage blankets to allow existing groundwater flows to continue;
- Any significant intercepted spring flow is to be collected at cut faces and conveyed under the road formation through specially designed drainage conduits before discharging as close as possible to the original discharge channel.

[156] Overall, Mr Symmans' evidence was that the Project's design would have negligible effects on the existing groundwater and springs regime in the Mangapepeke valley.⁹²

⁹¹ Symmans EIC, paragraphs 236–239.

⁹² Symmans EIC, paragraph 255.



Findings on construction effects and the Pascoes' concerns

[157] Our findings on construction effects, including the Pascoes' concerns, are as follows:

- Proposed condition 5A in the designation condition set attached to counsel for the Agency's closing legal submissions provides extensive detail of the Agency's offer to relocate the Pascoes to a new home on their farm. In addition, proposed designation condition 19(b) offers the alternative of temporary accommodation at another location during construction;
- The Pascoes' decision on these alternatives is unknown;
- The Agency proposes to locate the proposed northern construction yard in the vicinity of the Pascoes' home. In the unlikely event that the Pascoes elect to remain in their home during construction, this yard will need to be designed to forestall the risk of increased flooding around their home. Resource consent condition 10655-1.0 prescribes an extensive set of conditions for the control of construction stormwater and sediment discharges, with an SCWMP to be prepared for the construction yard. As for all CMP this SCWMP is to be submitted to the Chief Executive of the Regional Council for certification that it complies with the conditions of consent. We accept that would be a suitable mechanism for ensuring that the construction yard is sited and designed to manage the risk of increased flooding around the Pascoes' home;
- Proposed designation condition 19 prescribes the noise limits that are to apply during the construction of the Project. This condition notes that there are exceptions to these limits as set out in proposed conditions 20 and 21. Condition 20 states that the CNMP identifies how the Agency will manage the effects of construction noise that exceeds the limits in condition 19. Condition 21 describes the content of the CNMP, which will include at 21(d) the details of any activities that may not comply with NZS6803: 1999 and measure to mitigate construction noise from those activities as far as practicable to ensure the effects are appropriate;
- Conversely, section 3.2 of the CNMP states that with the understanding the Pascoes' home would be purchased and vacant, this dwelling was not



considered as a sensitive receiver for the purposes of the CNMP.⁹³ We agree with Mr Milliken that this noise would be very difficult to mitigate. We go further and find that it would be untenable for the Pascoes to continue to live in their house during the construction period;

- We repeat our understanding that both the permanent and temporary areas required for the construction of the new highway do not include the land on which the Pascoes' home is sited although it is within the designation area.⁹⁴ We understand that for this reason the Pascoes home will be compulsorily acquired using the Public Works Act processes.
- We accept that the conditions proposed by the Agency are appropriate for the earthworks, stream diversions, culverts and stormwater management;
- We accept the evidence from the Agency that the frequency of black ice, fog and frost on the new highway should be about the same as for the existing highway, with the new road being safer in these conditions as it will have much wider shoulders, more gentle curves and be provided with side safety barriers;
- We find from the evidence of Mr Symmans that the Agency has properly investigated the concerns raised by the Pascoes about the effects of the new highway on flooding, groundwater and springs in the Mangapepeke valley, that the Project's design has addressed each of these concerns and that the resulting effects will be negligible.

Social effects – the Pascoes

[158] In her s 42A report the New Plymouth District Council's reporting officer Ms RL McBeth (who also gave evidence at the hearing) was initially of the view that there would be "significant social impacts on the Pascoes' amenity, way of life and wellbeing".⁹⁵ Ms McBeth did not consider that the effects on Mr and Mrs Pascoe could readily be mitigated or offset by way of conditions on the designation, stating that "the severity of these effects will need to be considered in evaluation of the overall merits of the proposal".⁹⁶ In her statement following the s 42A report,⁹⁷ Ms McBeth had formed the

⁹³ CB, Vol 6, page 3369.

⁹⁴ Agency's closing submissions, paragraphs 55-66 and Appendix 2.

⁹⁵ McBeth EIC, Appendix A, s 42A Report, paragraph 244.

⁹⁶ McBeth EIC, Appendix A, s 42A Report, paragraph 245

⁹⁷ McBeth EIC, Appendix C Supplementary s 42A report dated 9 October 2018, paragraph 73.



view that, while acknowledging the serious social impact on Mr and Mrs Pascoe, among other effects, on balance the NOR with suggested conditions is consistent with the purpose of sustainable management under s 5 of the RMA.⁹⁸

[159] Ms McBeth confirmed in her evidence to the Court that while the amenity effects on Mr and Mrs Pascoe had been addressed through the contents of the management plans, the effects on their way of life and wellbeing were still to be addressed.⁹⁹

[160] The social effects of the Project on Mr and Mrs Pascoe are significantly adverse. The part of the valley in which their house and farm is located will be split in two by the proposed road. We heard how important the valley is to them, and what value they place on it as a place of healing. Their part of the valley will be forever changed by the Project. We accept that there are serious adverse effects of the Project on the Pascoes.

Landscape and visual effects

[161] The Agency acknowledged that the Project will have adverse landscape, visual and natural character effects, but observed that outstanding natural features and landscapes are avoided.¹⁰⁰

[162] A detailed analysis of those effects was undertaken on behalf of the Agency by landscape architect Mr GC Lister, for the Council hearing. It was accepted by the Commissioner that landscape and visual effects will be appropriately addressed by the proposed conditions and the ELMP.

[163] For the Pascoes, the landscape, visual and character qualities of the valley are entwined with its ecological and spiritual qualities. Mr Pascoe described the effects of the Project on him and his wife in these terms:¹⁰¹

Loss of habitat, edge effects, loss of our significant trees, loss of our threatened species, effects on our hydrology, the pure air, the healing qualities of our valley should be protected...

[164] The ecological effects of the Project are addressed in a later section of this decision. With respect to the visual effects, Mr Lister acknowledged that two houses will



⁹⁸ McBeth EIC, Appendix C Supplementary s 42A Report, paragraph 73.

⁹⁹ Transcript, page 557.

¹⁰⁰ Agency's opening submissions, Appendix 4, paragraph 1.

¹⁰¹ T Pascoe EIC, paragraph 177.

be adversely affected by the Project, being the Pascoes' and another at 2750 Mokau Road. He recorded that the Pascoes' house currently has views to the existing highway at a distance of approximately 120m. The proposed alignment is closer (at approximately 100m distance), which will add to the visual effects of the highway. He noted, however, that the highway will be in a 160m-long box cutting extending from opposite the house to the north that will soften views, as will the proposed revegetation of the valley floor. He considered, taking those factors together, that the adverse visual effects following revegetation would be "moderate-low".¹⁰²

[165] Mr Lister accepted that there will be localised "high" adverse effects of the Project on the natural character of Mangapepeke Stream and its margins. However, he concluded that the proper context for assessing natural character is the valley as a whole along the length of the Project. From that perspective Mangapepeke Stream and its margins are considered to have moderate natural character and the adverse effects on the stream will likewise be moderate. These effects will be remedied by measures aimed at restoring the whole valley to a natural system.¹⁰³

[166] Mr Lister similarly accepted that there will be adverse effects within the Mimi valley from loss of natural landscape features (bush and stream) and the visual impact of the highway.¹⁰⁴ Various measures are proposed by way of mitigation and are outlined in the ELMP.

[167] We accept Mr Lister's evidence as set out above and the Commissioner's findings on landscape, visual and natural character effects.

Ecological effects

The evidence

[168] Expert evidence on ecology was provided by Mr RJ MacGibbon for the Agency and Dr LM Shapiro and Mr CT O'Carroll (on pest management) for Te Rūnanga. DOC did not provide evidence as its points of appeal had been resolved to its satisfaction prior to

¹⁰² CB, Vol 3, Lister SOE, page 2309 (paragraph 40(d)). With regard to the house at 2750 Mokau Road, he observed that it is located on land on top of the main ridge south of the Project. Parts of the Project, such as approach to the tunnel portal, are anticipated to be screened by the topography and bush. The highway will be at a lower elevation reasonably distant and part of a wider panorama. There will be 'low' adverse visual effects.

¹⁰³ CB, Vol 3, Lister SOE, page 2310 (paragraphs 41 and 42).

¹⁰⁴ CB, Vol 3, Lister SOE, pages 2510-2512 (paragraphs 43-46).



the commencement of the hearing.

[169] Mr MacGibbon's evidence addressed:

- The existing ecological values of the area;
- The methodology for the proposed restoration package;
- The proposed biodiversity offsetting and compensation and the monitoring of these;
- The pest management programme;
- The riparian restoration works;
- The replacement mitigation and significant tree planting;
- The long-tailed bat radio-tracking survey;
- Kiwi surveys;
- The freshwater baseline monitoring;
- Constraints mapping;
- Engagement with councils, DOC and Te Rūnanga.

[170] Mr MacGibbon also provided the following summary of the adverse ecological effects of the Project and the measures proposed to mitigate these effects:¹⁰⁵

10. The forest and natural habitat along and adjacent to the proposed Mt Messenger Bypass Project ("Project") footprint east of the existing State Highway 3 ("SH3") retains indigenous plant and animal communities that are considered to have high ecological value. However, the full ecological potential of the area has been significantly diminished over many decades by the largely uncontrolled impact of browsing, grazing and predatory animal pests and unfenced cattle.
11. The unmitigated ecological effects of the Project will be significant and are likely to include: removal of or damage to 31.28ha of predominantly indigenous vegetation; the removal of up to 17 significant trees from along the Project footprint; the loss or alteration of 3705 metres of stream; the loss or alteration of habitat occupied by indigenous bats, forest and wetland birds (including kiwi), lizards, aquatic fauna and invertebrates; increased fragmentation of habitat occupied by indigenous fauna; and the risk of indigenous fauna injury or mortality due to vehicle strikes.
12. Significant effort was directed during the route selection and design phases at avoiding and minimising the impact on ecological values. However, substantial residual ecological effects are expected and a comprehensive mitigation, offset and compensation package ("the Restoration Package") has been developed to address those effects.



¹⁰⁵ RJ MacGibbon EIC, paragraphs 10 -19 (MacGibbon EIC).

13. The principal components of the Restoration Package are to:
- (a) undertake intensive pest management over an area of 3650 ha surrounding the Project area in perpetuity (or until such time as pest control techniques as we currently know them are no longer required);
 - (b) remove all farm livestock from the upper Mangapepeke valley and the adjacent forest areas;
 - (c) establish 6 ha of ecologically significant kahikatea – swamp forest habitat in an area that would once have been swamp forest but has long since been cleared for farming;
 - (d) fence 8.455km of stream from livestock and plant 16.91ha of riparian margin with indigenous species (together referred to as “**riparian restoration**”);
 - (e) plant 200 seedlings of the same species for every significant tree removed. Currently, this is expected to amount to 3400 seedlings;
 - (f) plant 9ha of mitigation planting on areas that are currently predominantly pasture;
 - (g) salvage and relocate threatened plant species, lizards, peripatus and wood from the Project footprint;
 - (h) compensate for the residual ecological effects on lizards by the provision of \$200,000 to DOC to be directed to research that will benefit indigenous herpetofauna; and
 - (i) install kiwi roadside barrier fencing along areas of roadside margin that are considered to be locations where there is a risk of kiwi attempting to cross the road during construction and road operation.
14. In addition, vegetation removal protocols are proposed to ensure no trees are felled containing long tailed bats and no kiwi with territories over or adjacent to the Project footprint are harmed.
15. A further 120,000 native plants will be planted along the road margins and on the fill slopes.
16. The restoration and rehabilitation works are expected to result in a rapid and substantial recovery of palatable plant species and forest canopy condition and provide improved habitat and reduced predation that will enable many wetland and forest birds (including kiwi), aquatic organisms and long tailed bats to increase in abundance. For bats in particular, which within the wider area are in low numbers and continuing to decline in abundance due to predation, the Project will provide an environment suitable for significant population growth.
17. The substantial, intensive and enduring pest management programme, accompanied by sizeable areas of replanting, will increase the level of ecosystem function within the managed area. By definition, this means that the capacity of the ecosystem to provide goods and services that support natural life and satisfy human needs – both physical and cultural - will greatly improve. Many of the taonga and mahinga kai species identified by several of the submitters at the Council-level hearing will benefit and become more plentiful.
18. This is the largest and most comprehensive ecological package developed for a new road Project in New Zealand. It creates one of the largest intensively pest managed areas in New Zealand and, with the commitment to pest management in perpetuity, the ecological gains will be substantial and permanent.
19. A state of no net loss of biodiversity is likely to be achieved 10 years following construction and a net gain in biodiversity from 15 years after construction. The biodiversity gains will continue to accrue for decades beyond 15 years.



Pest management programme

[171] Mr O'Carroll explained that since 2012 he had been the project manager for pest control being undertaken on 1,400 hectares of iwi land in the Paraninihi that had been returned to Ngāti Tama as part of the Treaty settlement process. One of the main objectives of this programme, which is being undertaken by the Paraninihi Trust (set up for this purpose), was to re-introduce the Taranaki kokako to this area.

[172] The programme involves intensive rat and possum eradication with targets of less than 5% rat and possum presence (informed by tracking indices). Kokako were re-introduced in 2017 and again in 2018 with over 10 kokako from monitored pairs having been successfully fledged since then. Mr O'Carroll said that Ngāti Tama were very keen to expand their pest management area but so far this had been constrained by a lack of funding. He added that the Trust was very supportive of its 1,400 hectares being included within the 3,650 hectares which would become the responsibility of the Agency to manage and fund.

[173] Dr Shapiro advised that the location of the pest management area had been dependent on field surveys locating more than 10 long-tailed bat maternity roosts. This had been achieved, the bat monitoring programme undertaken between October 2018 and February 2019 having confirmed the presence of more than this number.¹⁰⁶

[174] He said it was important for Ngāti Tama to be involved in the expanded pest management programme. It was his understanding that this would be provided for in a proposed agreement between Te Rūnanga and the Agency.¹⁰⁷

[175] Dr Shapiro was unclear as to the details of the ecological concerns raised in the appeals of Te Korowai, Poutama and the Pascoes but his view was that the proposed Restoration Package and the consent conditions would adequately address all the ecological effects of the Project.¹⁰⁸

Area to be managed and additionality

[176] In answer to a question from the Court about how the final area of 3,650 hectares for the pest management programme had been determined, Mr MacGibbon said that

¹⁰⁶ Dr LM Shapiro EIC, paragraphs 27-28 (Shapiro EIC).

¹⁰⁷ Shapiro EIC, paragraph 29.

¹⁰⁸ Shapiro EIC, paragraphs 36-38.



following discussions with DOC this had been based entirely on the needs of the long-tailed bat population.¹⁰⁹ He said that the only piece of research undertaken to determine the area required of which he was aware had been in Fiordland, where population recovery had been achieved when the pest management area had exceeded 3,000 hectares. This had been the base area adopted for the Project with this being increased to 3,650 hectares to follow boundaries. He confirmed that the existing 1,400 hectares in the Ngāti Tama programme would be incorporated within the 3,650 hectares, all to be funded by the Agency.¹¹⁰

[177] Responding to comments that taking over the funding of the existing pest management regime in the Paraninihi may not provide an additional ecological benefit, as the predator control work being done under Mr O'Carroll's management was already providing good results, Mr MacGibbon considered that the principle of additionality would be met. The requirement for continuous and consistent funding in perpetuity, as well as a more intensive level of pest control designed to achieve a 5% residual rat tracking index, would, he said, provide significant additional benefit in the Paraninihi area¹¹¹.

[178] In closing submissions counsel for the Agency summarised other benefits of including the Paraninihi in the proposed pest management area (**PMA**), noting that the 3,650 ha footprint provides the smallest perimeter possible bordering unmanaged forest (minimising the length of border across which pests can invade the PMA), straddles the area affected by the Project and provides a continuous protected habitat area for birds that extends from the coastline to the ridges west of the Project area. Overall, it was submitted, this provides conservation benefits above and beyond the status quo.

Cost estimates

[179] At the request of the Court Mr MacGibbon provided a summary of the cost estimates for the pest management programme. The establishment phase was estimated to cost around \$228 per hectare including cutting the tracks and trapping lines (for an estimated 366 km), providing the traps, the bait stations and other capital items and a project management fee. This phase was expected to take two years to complete.¹¹²

¹⁰⁹ Transcript, page 195.

¹¹⁰ Transcript, page 564, lines 11-20.

¹¹¹ MacGibbon Rebuttal, paragraphs 10-15.

¹¹² Transcript, page 211.



[180] The annual operational costs would vary, with a 1080 aerial application to be undertaken every third year and the traps and devices replaced and the tracks recut every five to seven years. A proportion of this ongoing work would be undertaken each year, with the annualised costs on a per-hectare per-year basis estimated to be:

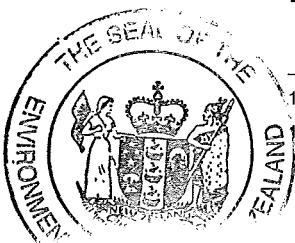
Item	Cost per hectare per year (\$)
Operational Costs	100
Project Management	40
Equipment Maintenance	40
Damage repairs, replacement traps and devices, re-cutting tracks, contingency	26
Total	206

[181] Mr MacGibbon said that the total figure was similar to Mr O'Carroll's estimate of \$220 per hectare per year (\$308,000 for the current 1,400m hectares). He added that in 2018 there had been a considerable shortfall in the funds available for Mr O'Carroll's project (only \$192,000 had been available).¹¹³

Logistics

[182] Asked about how the logistics of the pest management programme might work Mr MacGibbon said that the planning for this had relied heavily on the experience of the existing Ngāti Tama pest management programme being managed by Mr O'Carroll. The ecology team had worked closely with him in choosing the required intensity of gridlines, traplines and locations to achieve a 5% residual trap catch (or lower). For this, stations would need to be located every 150 metres (or closer) although it was acknowledged that because of the terrain, in some areas this would not be achievable. Mr MacGibbon said that Mr O'Carroll's team had not always been able to achieve a 5% trap catch with rats although they had been close to this. His understanding was that at times Mr O'Carroll's team had been under resourced.¹¹⁴

[183] Mr MacGibbon said that the control targets could not be achieved solely through a



¹¹³ CT O'Carroll EIC, paragraph 28 (O'Carroll EIC).

¹¹⁴ Transcript, page 197.

ground-based operation and it was essential to the programme's success to include the application of 1080 toxin through the canopy to provide three-dimensional cover of the landscape. He said that research had shown that these aerial drops needed to be undertaken at intervals of no less than three years to prevent rodents becoming resistant to the bait.¹¹⁵

Threats to the programme

[184] When asked about the threats to the success of the pest management programme, Mr MacGibbon replied that the most important requirement would be to have a project manager who was both competent in pest management and was given day to day managerial control over the diverse range of contractors who would be engaged to undertake the work. His understanding was that this was the approach that would be taken by the Agency.¹¹⁶

Term of programme

[185] In terms of the relationship between the requirement for the pest management programme to be undertaken in perpetuity and the 35-year Ngāti Tama review period provided for in proposed Designation condition 29A, Mr MacGibbon said that his understanding was that this review was to provide Ngāti Tama with the opportunity to decide at that time whether or not to continue with the programme on their land. If they decided not to continue, then the Agency would need to find an equivalent area on Crown land to make up the 3,650 hectares with this being located as close as possible to the existing area.

Ecological review panel

[186] It is proposed that an ecological review panel be established as part of the consent to consider the ecological effects of the Project periodically. Mr MacGibbon advised that the membership of the ecological review panel would include a range of experts, representatives of DOC and representatives of Ngāti Tama. The panel would need to have the necessary experience and capability to evaluate multiple monitoring reports during each year of the programme, to recognise any unexpected outcomes and to recommend adaptations to the programme and its resourcing if it was deemed necessary



¹¹⁵ Transcript, page 197.

¹¹⁶ Transcript, page 199.

to respond to these outcomes.¹¹⁷

[187] We note that full details of the establishment, make up and responsibilities of the review panel are set out in proposed designation condition 33.

Questions from Mr and Mrs Pascoe and Poutama

[188] Mr MacGibbon was subjected to extensive questioning from Ms Gibbs about the potential for adverse ecological effects from the Project on the Pascoes' land.

[189] He was asked about the dislocation effect of the new highway on a pair of kiwi living on opposite sides of the Mangapēpeke valley, which the Pascoes said called to each other at night.¹¹⁸ He agreed that this pair would be dislocated – and most likely others – and that this had been the subject of considerable discussion with DOC. As a result, agreement had been reached on mitigation measures including designing culverts under the new highway to be kiwi-friendly and erecting “kiwi fencing” along the full length of the highway to guide kiwi to the culverts. These measures were based on experience from other highway projects where, even though culverts were dark and sometimes flowing half-full of water, kiwi had been observed to use them to maintain contact with their traditional territories.

[190] He said that so far six kiwi had been located in areas which overlapped with the proposed alignment, and that these kiwi had been fitted with radio trackers. Before construction started, these six and any others found would be moved to another location within their territories.

[191] He was asked also about the effectiveness of the bat trapping that had been undertaken, with a suggestion from Ms Gibbs that there had been trapping at full moon when the light from the moon would have made the traps more visible and therefore avoided by the bats.¹¹⁹ His response was that all of the bat experts involved operated to a standard protocol which excluded trapping within two days of full moon. He said that he was unaware whether trapping had been undertaken at full moon but if it had been it was not standard practice, adding that in the most recent summer which involved radio tracking no bats had been trapped.



¹¹⁷ Transcript, page 200.

¹¹⁸ Transcript, page 169.

¹¹⁹ Transcript, page 171.

[192] In response to a question about the breadth and detail of his ecological expertise, Mr MacGibbon advised that at the Council hearing there had been evidence from a range of experts on avifauna, bats, herpetofauna (lizards and frogs), terrestrial ecology, freshwater ecology and botany.¹²⁰ While he had been the only expert called by the Agency to give ecological evidence at the Court hearing, this was because there were no outstanding areas of disagreement between Agency and DOC on ecology.

[193] In response to a suggestion from Ms Gibbs that pest control has already been undertaken on the Pascoes' land by Mr Pascoe shooting possums, Mr MacGibbon pointed out that it was not just possums that damaged native forests but other animals as well such as feral pigs and grazing animals. He said that pest control in its widest sense was being directed at controlling the negative impact of all problematic animals.¹²¹

[194] Ms Gibbs also asked Mr MacGibbon some questions about the "offset" and "compensation" terminology used in relation to the Restoration Package. She was concerned¹²² that the "compensation" proposed for long tailed bats was offered on the expectation that the bats would not survive when trees were felled in the Mangapepeke valley based on her understanding of advice from DOC, and that the "compensation" was a financial contribution rather than a measure to reduce damage or remedy it.

[195] Mr MacGibbon explained that a tree removal protocol, used nationally in such cases, will be followed to minimise harm to the bats and that the mitigation proposed, including pest control, should see an increase in the number of bats in the wider PMA area.¹²³ He explained that use of the term "compensation" is by definition only, and the Restoration Package cannot be called an "offset" as it is not possible to quantify the number of long tailed bats in the Project area before and after the works are done. But it is an ecological package, he said, and it is like an offset or mitigation. He said there had been discussion with DOC about whether it could be called an offset and that it was eventually agreed that, from a terminology perspective, it had to be called compensation.

[196] He advised Ms Gibbs that if the Pascoes agreed his preference would be for pest management and restoration planting to extend over the full length of the Mangapēpeke

¹²⁰ Transcript, page 177 and MacGibbon EIC, paragraph 30.

¹²¹ Transcript, page 182.

¹²² Transcript, page 185 in 11-14.

¹²³ Transcript, pages 185-186.



valley including the valley flats of the Pascoes' land.¹²⁴

[197] We note that the Agency has offered the Pascoes an additional \$55,000 on an *Augier* basis for planting in a fenced area on other land they own.¹²⁵

The DOC appeal

[198] DOC's appeal related specifically to the following District Council conditions:¹²⁶

- Condition 29(d) and Schedule 1 clause 4(a): requirements for kiwi fencing along the road corridor;
- Condition 29A: evidence of legal agreements/authorisations for ecological mitigation and biodiversity offsets/compensation measures, required to be provided to the Planning Lead (here, NPDC) prior to Project works commencing;

and to the following Regional Council conditions:

- General conditions:
 - GEN 24A (legal arrangements and authorisations to enter onto land to carry out, continue and maintain all the measures set out in the ELMP);
 - Schedule 1, including clauses 6(j) (fish passage) and 6(k) and (l) (sedimentation); and
- Condition SED 11 on consent number 10655-1.0 (discharge stormwater and sediment).

[199] In their joint memorandum of 22 May 2019 the parties to the appeals (except for the Pascoes and Poutama and Te Korowai) advised their agreement (subject to the Court's approval) for the two DOC appeals to be disposed of by consent based on the amendments to the conditions attached to the memorandum.¹²⁷

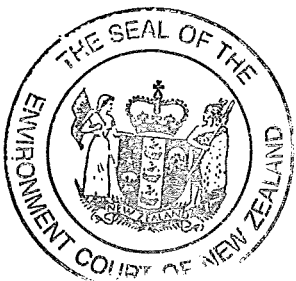
[200] The parties who signed the joint memorandum agreed that these amendments

¹²⁴ Transcript, page 188.

¹²⁵ Agency's closing submissions, paragraph 101, proposed condition 5A.

¹²⁶ Joint memorandum in support of Draft Consent Order Dated 22 May 2019.

¹²⁷ We have referred to these as the Agency's proposed ecological conditions.



were within the scope of the relief sought in the Appellants' notices of appeal.

[201] Te Korowai advised later that if the Court grants approval for the NOR it accepts that the Agency's conditions are appropriate.¹²⁸

Discussion and finding on ecology

Ecological Project management

[202] An important point raised by Mr MacGibbon in questioning was the need for highly skilled management in the implementation of the ecological Restoration Package. This strikes us as critical to its success. We have not seen a condition that requires a dedicated environmental overview role for this work. There are various roles mentioned in management plans, for example: an "Environmental Manager" appears in a table relating to long tailed bat surveys (nominated as Ed Breese); and in the "Fish Recovery and Rescue Protocols" (Appendix E (July 2018) to the Ecology and Landscape Management Plan) a "managing ecologist" will work with "the contractor's Environmental Manager" in relation to fish recovery works (section 3.1.1); a "Project Freshwater Ecologist" is involved (3.1.4 bullet point 6); a "Project Ecologist" and the "Environmental Team" are also mentioned (3.2 bullet point 5). It would be useful for the Council to ensure that the content of the management plans provides clarity around the management structure for the implementation, monitoring and reporting phases.

Additionality

[203] We are satisfied that the inclusion of the Paraninihi area into the PMA will provide additional benefits both within that area as a result of the additional pest control infrastructure, on-going funding consistent with pest management requirements that vary over time, and measurable outcomes locked in by conditions and also within the rest of the PMA as it will benefit from its geographical connection through to the coast as well as other factors described above. Ngāti Tama's experience in management of the pest control programme in the Paraninihi area can be expected to provide benefits to the programme over the wider area.

[204] Having said that, some of those benefits described above, and particularly those relating to the coast-to-mountains continuity enabled by the inclusion of the Paraninihi

¹²⁸ Te Korowai Memorandum of Counsel dated 17 June 2019 paragraph [2], second bullet point.



(embodied in the name Te Ara o te Ata), the compact boundary length to area ratio and the single big PMA straddling the Project area, may be undermined if Ngāti Tama was to decide, after 35 years, that it no longer wished to have the Paraninihi land included in the PMA. We understand that the purpose of the review clause in proposed condition 29A is to enable future generations of Ngāti Tama to have a say in determining the destiny of the area. While the Paraninihi may well never be withdrawn from the PMA, the clause introduces an element of uncertainty into the “in perpetuity” claim in relation to its benefits for the PMA.

[205] If such a decision (to withdraw their land) was made by Te Runanga, a new equivalent area would need to be agreed (presumably between the Agency, DOC and the two Councils) and the required level of pest control implemented, potentially from scratch.

[206] We understand from Mr MacGibbon’s evidence (para 170 of this decision) that if any such decision was made and new land was to be brought into the PMA, it would be an equivalent area of Crown land, such that the new land (and thus the entire PMA) could then be protected in perpetuity. There would again be a delay of 15 years or more years following construction to reach the point of no-net-loss of biodiversity and begin achieving a biodiversity gain in the new area (following from Mr MacGibbon’s estimate).¹²⁹

[207] Putting such a delay into the context of “perpetuity”, it seems to us that this “lost time” is not significant. That is, it seems to us likely that the long-term outcome for a pest management programme, should a new area be necessary, would still be to achieve the benefits intended, even if there was an interruption after 35 years while a replacement area was set up. If the new area was then to be in protected in perpetuity we do not see the potential for the withdrawal of the Ngāti Tama land as a significant impediment to a successful biodiversity outcome for the Project overall. But we know of no commitment from the Crown to make such land available in perpetuity as Mr MacGibbon indicated would occur (and to require that would be *ultra vires*), and neither do we know if appropriate replacement land is available adjacent to or in the near vicinity of the Project area, whether Crown owned or privately owned. If pest control in perpetuity on a single package of land cannot be guaranteed after one, two or even more periods of 35 years the in perpetuity commitment seems somewhat hollow. We would hear further from the parties on this proposal prior to concluding our final decision. At the least we expect that



¹²⁹ Paragraph [170], point 19 of this Decision.

proposed condition 29A(f) may need to be amended.

The Restoration Package

[208] We are satisfied that the Restoration Package includes a range of mitigation, offset and compensation that together are sufficient to provide for on-site/near-site ecological benefits in the short term and ecological benefits over the whole PMA (and potentially beyond it) in the longer term.

[209] We consider the in-perpetuity provision of the Restoration Package to be extremely generous, but this is what the parties have agreed and we have no basis on which to convert this to a shorter term. We note, however, that we do not consider the inclusion of an in-perpetuity condition to be precedent-setting in terms of future projects, as the Restoration Package results from the peculiar circumstances of this Project and is volunteered. Should the need for predator control of the type now required no longer be necessary in future (for example, should a national pest management strategy overtake the requirement for local pest/predator control initiatives) the usual recourse to a review of the consent conditions is available.

Costs

[210] In relation to the costs of the pest management programme there was some variance between the costs estimated per hectare by Mr MacGibbon and Mr O'Carroll, but as Mr MacGibbon explained there are various factors that may change on an annual and/or multi-year basis that need to be considered when calculating costs. He considered their estimates to be generally similar. In any event, regardless of the quantum estimated now for a successful outcome from the programme to be achieved, the specificity of the Ecology and Landscape Management plan, and the conditions, place strong imperatives on the Agency to make the Project work as intended. The methods, monitoring and reporting requirements are set out in detail and the outcomes are measurable.

Ecological Review Panel

[211] We are satisfied that proposed condition 33, requiring appointment of three suitably qualified experts to the Ecological Review Panel (and the opportunity to seek additional expert assistance as needed) and the tasks set out therein provide appropriate opportunities for the review of relevant information, monitoring reports, methodologies



and changes to the Ecology and Landscape Monitoring Plan.

Summary and findings

[212] We have summarised Mr MacGibbon's responses to Ms Gibbs' questions about the consideration given to the potential for adverse effects of the Project on the ecology of the Pascoes' land, the Agency's invitation for the Pascoes to have their Mangapēpeke valley land included in the pest management programme and its financial offer to them for additional planting on their land.

[213] We have noted that all of the matters raised in DOC's appeal have been resolved to the satisfaction of DOC, the Agency, Royal Forest and Bird Protection Society and the two Councils through agreed amendments to the conditions of consent. In addition, if the Court approves the NOR, Te Korowai has advised that it would accept the Agency's conditions on ecology.

[214] Having carefully evaluated all this evidence and on the basis that the Project is constructed and operated in accordance with the Agency's proposed conditions of consent for ecology (although not agreed to by the Pascoes and Poutama), we make an interim finding that following mitigation, the immediate and long-term ecological effects of the Project will be appropriately addressed. However, our finding cannot be finalised until we know whether or not the Agency has reached agreement with Te Rūnanga to acquire the Ngāti Tama Land.

Cultural effects

[215] In this section we address the cultural issues raised by the appeals.

Overview – the main issues

Te Rūnanga

[216] A defining feature of the Project is that the NOR includes land recently returned to Ngāti Tama as cultural redress in its Treaty settlement.¹³⁰

[217] Counsel for Te Rūnanga said in opening submissions.¹³¹

¹³⁰ Approximately 22ha of Ngati Tama land is required for the road and a further 15.9ha is required on a temporary basis for the construction period.

¹³¹ Te Rūnanga opening submissions, paragraph 20.



It is land that was wrongly confiscated from Ngāti Tama in the nineteenth century... The statutory acknowledgement for Mount Messenger notes that it is "an important area containing Ngāti Tama Pā sites and mahinga kai sources of birds and fish". For a people that were rendered virtually landless as a result of the Crown confiscations the cultural significance of the land cannot be over stated.

[218] Te Rūnanga prepared a "Maori Values Assessment in relation to the Paraninihi Te Ara o Te Ata Project" (**MVA**) dated December 2017.¹³² The Project name 'Te Ara o Te Ata' is a name provided by Ngāti Tama. Te Ata is a local taniwha which manifests on the coast of Paraninihi (Whitecliffs) and is of major significance to Ngāti Tama.¹³³

[219] The Ngāti Tama Deed of Settlement cultural redress included the transfer of parcels of Conservation land, including (relevant to the Project) the Whitecliffs site and the Mount Messenger sites. Te Rūnanga refers to these areas as 'Paraninihi'.

[220] Of these land parcels Te Rūnanga states:¹³⁴

These land parcels are of great significance to Ngāti Tama, and are regarded as the 'jewel in the Crown' of the Ngāti Tama historical settlement. The Paraninihi Protection Project Strategic plan records this point, noting:

"Paraninihi was returned to Ngāti Tama by the Crown in 2003 and has a rich history of pre European occupations shown by the numerous kainga and pa sites. Ngāti Tama wish to protect this land and ensure that it remains a jewel in the Crown of Taranaki for all to enjoy"

[221] On cultural values, it said:¹³⁵

There are significant cultural values associated with Paraninihi. These include the following:

- (a) Firstly, the value of Paraninihi as the jewel in the crown of the Ngāti Tama settlement, representing return of Ngāti Tama collectively held lands within our ancestral rohe;
- (b) Strong kaitiakitanga associations;
- (c) Paraninihi is referred to and considered a tāonga;
- (d) The important flora and fauna of Paraninihi is a tāonga;
- (e) The importance of Paraninihi and a cultural, spiritual and resourceful sustenance to our iwi.

[222] The Agency has (correctly in our view) proceeded on the basis that it would be wrong to once again use the Crown's coercive powers against Ngāti Tama in order to re-



¹³² W Simpson EIC, Appendix C MVA.

¹³³ MVA above n132, at paragraph 2.

¹³⁴ MVA above n132, at paragraph 25.

¹³⁵ MVA above n132, at paragraph 53.

acquire their land. It has instead proceeded on the basis that the Project will only go ahead if it were able to gain the consent of Te Rūnanga for the Ngāti Tama Land. Extensive mitigation and compensation proposals have been negotiated, and the iwi will decide whether or not to accept them. However, for the purposes of this hearing Te Rūnanga, save for the appeal against the Kaitiaki Forum Group conditions, supported the conditions proposed for the NOR and the resource consent applications. We return to this point later.

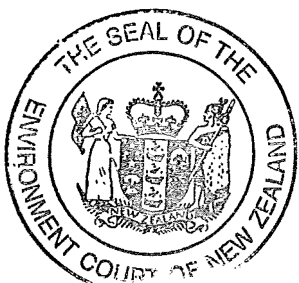
Pascoes/Poutama

[223] The land owners most affected by the Project, aside from Ngāti Tama, are Mr and Mrs Pascoe. They own land in the Mangapepeke valley adjacent to the north of the affected Ngāti Tama Land.¹³⁶

[224] Mrs Pascoe's great grandmother (Mrs H Stockman) has whakapapa to a Taranaki hapū whose rohe lies to the south of the Ngāti Tama rohe, outside the area affected by the Project. Nonetheless, the Pascoes' effectively contend that they should receive cultural recognition equivalent to that shown to Ngāti Tama.

[225] This is because it is said that through Mrs Pascoe's whakapapa they are also part of a collective known as Ngā Hapū o Poutama (Poutama) within whose rohe their land is located.

[226] Te Rūnanga disagrees. They argue that Mr and Mrs Pascoe are not tangata whenua or kaitiaki in the sense those terms are used in the Act. They question the alleged link to Poutama as one of very recent origin that is not supported by the evidence. They also deny that Poutama is a hapū collective exercising mana whenua and kaitiakitanga over a rohe equivalent to or greater than that of Ngāti Tama. Poutama, they say, is a largely non-Māori group who own land on the coastal fringes. The few Māori who support the group calling themselves Poutama are either from outside the rohe altogether (for example, Ngāi Tūhoe) or have whakapapa to Ngāti Tama or Ngāti Maniapoto.



¹³⁶ Approximately 11.15 hectares of Pascoe land is required for the road and a further 13.5ha is required on a temporary basis for the construction period.

Te Korowai

[227] There is also an appeal by a collective of Ngāti Tama known as Te Korowai.

[228] Te Korowai were formed as an incorporated society in early 2018 as a vehicle to oppose the approach taken by Te Rūnanga to the Project. That appeal is more straightforward and we will address it after consideration of Te Rūnanga's and the Pascoe and Poutama appeals.

[229] Te Rūnanga's and the Pascoe and Poutama appeals raise a number of issues concerning the proper interpretation and application of the relevant provisions in Part 2 of the RMA. We therefore start with an outline of those provisions and our approach to them before turning to the appeals themselves.

Part 2 requirements

[230] There are three relevant requirements. First, in order to achieve the sustainable management purpose of the Act it is deemed a matter of national importance that the Court recognise and provide for:¹³⁷

The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

Second, the Court is required to have "particular regard to":¹³⁸

a) Kaitiakitanga...

Thirdly, the Court must "take into account" the principles of the Treaty of Waitangi.¹³⁹

[231] There is a hierarchy of obligation. At the high end, the requirement is to "recognise and provide for" (s 6) then to have "particular regard" (s 7), and finally to "take into account" in s 8.

[232] The terms "tangata whenua", "mana whenua", "kaitiakitanga" and "tikanga Māori" are defined in the Act as follows:¹⁴⁰

¹³⁷ s 6(e), RMA.

¹³⁸ s 7(a)(aa), RMA.

¹³⁹ s 8, RMA.

¹⁴⁰ Section 2, RMA.



"Tangata whenua" in relation to a particular area, means the iwi, or hapū, that holds mana whenua over that area."

"Mana whenua" means customary authority exercised by an iwi or hapū in an identified area."

"Kaitiakitanga" means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources: and includes the ethic of stewardship."

"Tikanga Māori" means Māori customary values and practices."

[233] We are aware of the criticisms made by the Waitangi Tribunal of the use of the term "mana whenua" in statutes such as the RMA. The Tribunal's central concern is that the term can cut across customary concepts and protocols, particularly those that emphasise the interconnectedness between groups and their associations with a place and its resources.¹⁴¹ The Tribunal cautioned against the assumption that in any particular area only one tribal group could be involved.¹⁴²

What must be watched closely is the tendency to use Māori terms without an appreciation of the associated cultural ethic.

[234] Case law from this Court and the Māori Appellate Court on similar issues indicates that there is no reason in principle why there could not be more than one tangata whenua in a given area.¹⁴³ There is also High Court authority upholding a distinction drawn by the Environment Court between a group holding kaitiakitanga in a place and a second group with a weaker kaitiaki relationship.¹⁴⁴

[235] In 2012 the High Court made the following observations in relation to a dispute between Taranaki Whānui and Ngāti Toa over redress being offered to Ngāti Toa within what Taranaki Whānui considered to be its exclusive area of interest:¹⁴⁵

The problem with statutory acknowledgments and deeds of recognition in the modern era is that they do not reflect the sophisticated hierarchy of interests provided for by Māori custom. They have the effect of flattening out interests as if all are equal, just as the Native Land Court did 150 years ago. In short, modern RMA based acknowledgments dumb down tikanga Māori.

...

Taranaki Whānui fears, understandably, that its dominant interests will be devalued by a modern system of recognitions that lacks the sophistication of the ancient one. In the Māori world, customary rights that have long since been extinguished in law, continue to be of transcendent importance to modern iwi.

¹⁴¹ Waitangi Tribunal *Rekohu a report on Moriori and Ngāti Mutunga claims in the Chatham Islands* (Wai 64, 2001) at 13.2.4 (Tribunal Report).

¹⁴² Tribunal Report above n 157, at 2.6.1.

¹⁴³ *Ngāti Tuwharetoa v Waikato Regional Council* [2018] NZEnvC 093 at [97], footnotes 14 and 15.

¹⁴⁴ *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401.

¹⁴⁵ *Port Nicholson Block Settlement Trust v Attorney General* [2012] NZHC 3181 at 95–96.



[236] We concur with the approach of this Court in the *Ngāti Hokopū* case, which considered s 6(e). Decision makers must not only recognise but also provide for the relationship of Māori with their ancestral lands, water, wāhi tapu and other taonga. Section 6(e) is not concerned with the ancestral land, water, sites, wāhi tapu and other taonga in themselves, but with the relationship of Māori with those things and the culture and tradition surrounding them. In that case, the Court noted that the Māori word for 'relationship' is 'whanaungatanga', and then cited the following from the Law Commission's 'Māori Custom and Values' paper:¹⁴⁶

Of all the values of tikanga Māori, whanaungatanga is the most pervasive. It denotes the fact that in traditional Māori thinking relationships are everything – between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Māori world together is whakapapa identifying the nature of relationships between all things.

[237] In practical terms the way the Court characterised the s 6(e) requirement in that case was to express it as reflecting an obligation on decision makers to recognise and provide for the whanaungatanga between hapū and other tribal groupings, and their land, water, sites, wāhi tapu and other taonga. This is because the term whanaungatanga incorporates cultural and traditional dimensions and emphasises that it is not the relationship of individual Māori to their taonga that is important but those of their hapū (or other relevant collective). It was also noted that although s 6 suggests that these relationships must be provided for, it is inherent in the concept that the weaker the relationship, the less it needs to be provided for.¹⁴⁷

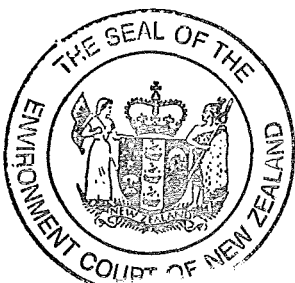
[238] In that case the Court adopted a "rule of reason" approach. It held that the Court can and should decide issues arising from disputes over intrinsic values and traditions by listening to, reading and examining (amongst other things):¹⁴⁸

- 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 (e.g Māori Land Court Minutes) or corroborating information (e.g waiata, or whakatauki) about the values. By 'external' we mean before they became important for a particular issue and (potentially) changed by the value-holders;
- the internal consistency of peoples' explanations (whether there are contradictions);
- the coherence of those values with others;

¹⁴⁶ *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 at paragraph 39 at footnote 34; *Māori Custom and Values in New Zealand Law* NZ Law Commission at [130] citing an unpublished paper written for the Commission by Joseph Williams ("He Aha Te Tikanga Māori") (*Ngāti Hokopu*).

¹⁴⁷ *Ngāti Hokopu* above n 146, paragraph 45.

¹⁴⁸ *Ngāti Hokopu* above n 146, paragraph 53.



- how widely the beliefs are expressed and held.

In a Court of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are 'rules' as to how to weigh or assess evidence.

In broad terms, this is the approach we now take to the issues before us.

Te Runanga o Ngāti Tama Trust's appeal

[239] As set out earlier Te Rūnanga appealed parts of the decisions:

- As an agreement had still not been reached with the Agency on measures to address the adverse cultural effects of the proposal, and to preserve its position, it sought to address those effects; and
- It appealed the way in which the conditions proposed the involvement of Mr and Mrs Pascoe in the KFG.

Provisions to address adverse cultural effects

[240] We record that the Agency has stated that it "does not rely on the agreement with Te Rūnanga to demonstrate that it has appropriately addressed the adverse cultural effects of the Project; there are extensive provisions in respect of cultural effects set out in conditions".¹⁴⁹ Having said that, counsel for the Agency reminded us that the Agency "has committed not to seek compulsory acquisition of Ngāti Tama Treaty Settlement land".¹⁵⁰

[241] In considering the cultural effects of the Project we do not think the proposed conditions can be separated from the fact that the Agency has not yet acquired the Ngāti Tama Land. The two are inextricably intertwined. The proposed conditions provide the means by which certain effects of the Project can be appropriately addressed. On their own, they do not, however, appropriately address the significant cultural effects of the Project. We can only be satisfied on that point if Te Rūnanga advises us that an agreement has been reached with the Agency as to sale of the Ngāti Tama Land and on other key elements it seeks by way of mitigation and offset/compensation.

[242] Te Rūnanga has made it clear in this hearing that appropriate recognition of and



¹⁴⁹ Agency's closing submissions, paragraph 150.

¹⁵⁰ Agency's closing submissions, paragraph 151.

protection for, Ngāti Tama's interests relies on:¹⁵¹

- The proposed conditions of consent which include provision for Ngāti Tama feedback in terms of route selection and design; an ongoing role in the Project through the KFG and cultural monitoring; and recognition and provision for cultural uses (such as of significant trees), an ecological restoration package;
- Agreement to sell their land; and
- An agreement (if reached) containing key elements intended to further mitigate and offset/compensate the effects (**Agreement for Further Mitigation**).

[243] We were advised by Mr MPJ Dreaver who gave evidence on this subject for the Agency that elements of the Agreement for Further Mitigation discussed to date include:¹⁵²

- Recognition by the Agency of the cultural association of Ngāti Tama with the Project area;
- A land exchange involving property in Gilbert Road;
- A payment to help address the cultural impact of the Project on Ngāti Tama interests;
- An environmental mitigation package, including the opportunity for Ngāti Tama to control and manage the mitigation on their ancestral lands;
- A process to help enhance the relationship between Ngāti Tama and the Department of Conservation;
- Commitments to maximise housing, work and business opportunities for Ngāti Tama members arising from the Project;
- Cultural input by Ngāti Tama into the design and implementation of the Project;
- Cultural monitoring by Ngāti Tama of works associated with the Project; and
- Establishment of a Trust Fund to be held in trust for Ngāti Tama cultural purposes.



¹⁵¹ Te Rūnanga opening submissions, paragraphs 69-71.

¹⁵² MPJ Dreaver EIC, paragraphs 88 and 89 (**Dreaver EIC**).

Kaitiaki Forum Membership

[244] The Agency recognised from the outset that the Project would affect land recently returned to Ngāti Tama as cultural redress through its Treaty settlement. In May 2016 the Agency appointed Mr Dreaver to advise and lead engagement with mana whenua and Māori more generally in relation to the Project. Mr Dreaver has over 20 years' experience in the negotiation of historical Treaty settlements and the provision of advice to various parties around engagement with Māori interests. Of particular relevance in this case is his previous experience as a manager at the Office of Treaty Settlements responsible for negotiations with iwi of Taranaki, including Ngāti Tama and Ngāti Mutunga. This included engagement with Ngāti Maniapoto representatives over aspects of the Ngāti Tama settlement. We place some weight on Mr Dreaver's evidence.¹⁵³

[245] From the outset Mr Dreaver discussed the particular challenge posed by the fact that all of the likely options for the Mount Messenger bypass would require use of some Ngāti Tama cultural redress land. Mr Dreaver said that even at an early stage of his engagement, it was clear that the Agency understood and accepted that compulsory acquisition of the Treaty settlement land would not be appropriate or feasible.¹⁵⁴

[246] Mr Dreaver described the development of an engagement and negotiation strategy that:¹⁵⁵

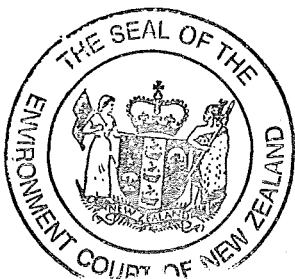
- a) Gave appropriate status to the position of Ngāti Tama as land owners and the Rūnanga as its authorised representative.
- b) Stressed the importance of the NZTA exhibiting utmost good faith in its dealings with Ngāti Tama.
- c) Noted the need for inclusivity and the importance of maintaining contact with other iwi and Māori groups who wished to have their views heard (including Poutama).

[247] Mr Dreaver noted that the Project sits entirely within the Ngāti Tama rohe recognised by other iwi, the Waitangi Tribunal and its Treaty settlement. He noted that Ngāti Mutunga (another of the generally recognised iwi of northern Taranaki) also have interests in Mimi Stream which flows through the Project area and part of the Mount Messenger Conservation Area (although not any part affected by the Project itself). Consequently, the Agency engaged with Ngāti Mutunga at an early stage. The consistent feedback from Ngāti Mutunga has been that the Agency should continue its primary

¹⁵³ Dreaver EIC, paragraphs 3–6.

¹⁵⁴ Dreaver EIC, paragraphs 51–52.

¹⁵⁵ Dreaver EIC, paragraph 54.



engagement with Te Rūnanga.¹⁵⁶

[248] Mr Dreaver also noted that Ngāti Maniapoto has historically expressed an interest in land as far south as the Wahanui line, which includes the entire Project area. Accordingly, the Agency also approached Ngāti Maniapoto at an early stage. Ngāti Maniapoto informed the Agency that although they claim an interest in the area, they are willing to defer to Ngāti Tama in respect of the impacts of the Project.¹⁵⁷

[249] Mr Dreaver acknowledged that Poutama is another group that asserts interests in the Project area although these interests and their status are disputed by recognised iwi. Mr Dreaver stated that during the overlapping claims hearings in relation to Ngāti Tama's historical Treaty settlement, the claimants who described themselves as descendants of Poutama identified with Ngāti Maniapoto (Wai577).¹⁵⁸ In Mr Dreaver's view it was not necessary for the Agency to take a stance on the status of Poutama in order to engage with them, what mattered was that Poutama was the entity that some Māori individuals (albeit a very small number) with an ancestral association to the land in the Project area had chosen to represent them.¹⁵⁹

[250] As a result of engagement with Poutama the Agency agreed to the commissioning of a cultural values assessment. This took the form of a report by historian Mr B Stirling. His report was provided at the commencement of the Council hearing.

[251] Mr Dreaver was not initially aware of any whakapapa relationship between Mrs Pascoe and Ngāti Tama, Poutama, or the area Poutama claims an interest in. The first time he was made aware of such a relationship was at the start of the Council hearing. He said that nonetheless Mr and Mrs Pascoe would be offered the opportunity to provide any cultural input into the construction process in relation to their land.¹⁶⁰

[252] One of the outcomes of the engagement with Ngāti Tama was the establishment of a cultural monitoring framework. An interim Kaitiaki Forum Group had been established by Te Rūnanga. One of its functions was to develop a cultural monitoring plan (**CMP**). A draft of that plan is appended to the evidence of Mr Roan.¹⁶¹

¹⁵⁶ Dreaver EIC, paragraphs 96-99.

¹⁵⁷ Dreaver EIC, paragraph 100.

¹⁵⁸ Dreaver EIC, paragraphs 101-103.

¹⁵⁹ Dreaver EIC, paragraph 104.

¹⁶⁰ Dreaver EIC, paragraphs 105-111.

¹⁶¹ Roan EIC - Statutory, Appendix 2.



[253] The draft CMP records it has been prepared in alignment with the establishment and operation of the Kaitiaki Forum Group and:¹⁶²

Using matauranga Māori as a framework, the CMP sets out the following:

- The historic and living cultural values of the area to Ngāti Tama;
- Measures to be implemented during construction activities;
- Ways to minimise potential adverse effects on Ngāti Tama values;
- Cultural monitoring requirements.

[254] The Commissioner's decision noted the contested claims between Te Rūnanga, Poutama, the Pascoes and Te Korowai. He found:¹⁶³

As a decision maker under the RMA it is not my role to make any determination as to Māori historical events and rights when there are competing histories, nor is it to acknowledge or recognise one Māori person or a group of Māori people who claim to have a s 6(e) relationship with an area over and above another person or group. Instead my role is to ensure that in exercising my decision-making powers I recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and to have particular regard to Kaitiakitanga. I am also required to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) under s 8 of the RMA.

[255] The Commissioner went on to note that while the Agency engaged with Poutama and funded a cultural impact assessment (**CIA**) it had not recognised Māori who identify with Poutama in any kaitiakitanga sense through the Kaitiaki Forum Group. The Commissioner noted that a position on the Kaitiaki Forum Group carried with it responsibility and recognition.

[256] The Commissioner then found:¹⁶⁴

I consider that it is right and appropriate for Mr and Mrs Pascoe who both identify with Poutama and whose land is the most affected of any private landowner to, as specified individuals, be provided the opportunity to be members of the KFG. Having listened carefully to Mr and Mrs Pascoe during the hearing and having walked some of their land in the Mangapepeke valley, I have no doubt they are kaitiaki for that land. If Mrs Pascoe accepts the role on the KFG, this would provide her the opportunity to represent Poutama as a kaitiaki in relation to the wider Project on behalf of tangata whenua who she relates to. Listening to their evidence, I also consider the Pascoe's interests extend to the ethic of stewardship (Section 7(aa)), in relation to their own land.

[257] On appeal, Te Rūnanga argued that it was neither right nor appropriate for the Commissioner to add Mrs Pascoe to the Kaitiaki Forum Group because:¹⁶⁵

¹⁶² Draft CMP May 2019 at page 1 (Appendix 2 of Roan EIC-Statutory).

¹⁶³ Recommendations and decisions report of Hearing commissioner at [140], CB, Vol 5 at 2838 (Commissioner's Report).

¹⁶⁴ CB, Vol 5, Commissioner's Report, page 2840.

¹⁶⁵ Te Rūnanga opening submissions, paragraph 28.



- Mr and Mrs Pascoe are not mana whenua;
- Only mana whenua are kaitiaki and can exercise kaitiakitanga;
- Stewardship and kaitiakitanga are different things;
- Non-mana whenua may constrain/inhibit Ngāti Tama in their kaitiaki role;
- There is an alternative avenue for Mr and Mrs Pascoe to provide input.

[258] Te Rūnanga argued that the appeal by Poutama and the Pascoes confounds the interests of long-standing land owners (the Pascoes) with tangata whenua interests. Te Rūnanga opposed the relief sought by Poutama and the Pascoes *in toto*.¹⁶⁶

[259] The Agency submitted that the Kaitiaki Forum Group as originally conceived was to provide for Ngāti Tama's cultural and kaitiaki input into the Project via Te Rūnanga. It supported Te Rūnanga's appeal and proposed that Mr and Mrs Pascoe should instead be provided for by way of an updated condition (clause 5A) which it argued would better provide for their stewardship. This was said to properly reflect the kaitiaki role of Ngāti Tama with due regard to the distinction between kaitiakitanga and stewardship.¹⁶⁷ The Taranaki Regional Council and the New Plymouth District Council supported this approach.¹⁶⁸

[260] The Agency noted that Mr and Mrs Pascoe did not refer to cultural effects or to Poutama when they first made a submission on the Project.¹⁶⁹ Nor did Poutama mention Mr and Mrs Pascoe or the Pascoe whānau when they first made a submission on the Project.¹⁷⁰

[261] The Agency argued that in relation to the resource consents Mr and Mrs Pascoe could not raise cultural issues and Poutama could not rely on a linkage to Mr and Mrs Pascoe and the Pascoe whānau.¹⁷¹

[262] The Agency also submitted that there is no statutory or purposive justification for a

¹⁶⁶ Te Rūnanga opening submissions, paragraphs 9-12.

¹⁶⁷ Agency's closing submissions, paragraphs 41-47.

¹⁶⁸ Taranaki Regional Council's opening submissions, paragraphs 7-9.

¹⁶⁹ Napier EIC, Appendix 2; McBeth EIC, paragraph 30; Agency's opening submissions, paragraphs 139-143.

¹⁷⁰ Napier EIC, Appendix 2.

¹⁷¹ s 120(1B), RMA.



separate approach with respect to the designation and the same restriction should apply.

Poutama and the Pascoe appeals

[263] The appeals assert that the inclusion of Mrs Pascoe on the Kaitiaki Forum Group is not sufficient recognition of her status as tangata whenua and the fact that she and her husband are kaitiaki over the land they own in the Mangapepeke valley.

[264] In her written evidence, Mrs Pascoe said:¹⁷²

My great grandmother was Hera Stockman. She was also known as Sara Stockman. I whakapapa to Ngāti Rāhiri and Poutama through her. My cultural identity not only comes through her and Poutama Iwi but from Mangapepeke itself, which is in the Poutama tribal area.

[265] As the Pascoe land is said by Poutama to be within its rohe it was argued that the Commissioner was wrong to decide that the Pascoes and Poutama would be represented on the Kaitiaki Forum Group under the mana and influence of Ngāti Tama. Among other things, it was contended that the Commissioner created new rights for Ngāti Tama and gave undue weight to their Treaty settlement.¹⁷³ It was argued the Pascoes and Poutama are entitled to equivalent treatment.

[266] More specifically, as detailed in the notice of appeal filed on behalf of the Pascoes by Mr R Gibbs:¹⁷⁴

Poutama is tangata whenua. Poutama is tuturu iwi. Ngā hapū o Poutama is an iwi authority. Poutama have mana whenua.

The Project falls within the rohe of Poutama. Te Whakapuakitanga o Poutama (the Poutama Iwi plan) applies to the entire Project area.

Mrs Pascoe has whakapapa to Poutama through her grandmother Hera (Sarah Stockman). Mr and Mrs Pascoe own and are kaitiaki for their land, including Mangapepeke valley, within the Poutama rohe.

...

NZTA throughout their planning and application processes, determined that Ngāti Tama hold mana whenua, and therefore by default Pascoes and Poutama do not hold mana whenua.

As a result, NZTA have refused and denied Pascoes and Poutama full and active participation as kaitiaki in the planning process. NZTA has refused and failed to recognise and provide for the relationship of Pascoes and Poutama in their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

[267] The notice of appeal alleged a range of errors on the part of the Commissioner. In

¹⁷² D Pascoe EIC, paragraph 3.

¹⁷³ Notice of appeal, 22 January 2019.

¹⁷⁴ Notice of appeal, 22 January 2019.



essence the complaint (from a cultural perspective) is that simply by providing for the Pascoes to join the Kaitiaki Forum Group the Commissioner has erred in concluding that this would recognise the Pascoes' and Poutama's cultural values. They believe those values are separate and distinct from Ngāti Tama cultural values. The Commissioner was therefore wrong to find that the relationship of the Pascoes and Poutama and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga including kaitiakitanga should be subservient to the mana and influence of those who affiliate with Te Rūnanga.

Some preliminary comments

[268] Mr Pascoe has no Māori ancestry. The Pascoe farm was purchased in the 1950s by Mr Pascoe's parents. It is not Māori land. Mr Pascoe has lived there all his life. Mrs Pascoe has lived there since she married him about 30 years ago.

[269] Both Mr and Mrs Pascoe were honest and straightforward in their evidence. We were fortunate to have the opportunity to carry out a site inspection on their land. As it was to the Commissioner, it is clear to us that both Mr and Mrs Pascoe care deeply about their land and its natural values and that they had been greatly affected by the designation and the resulting process.

[270] One of the unusual aspects of this appeal is the fact that it is based upon a claim that there is whakapapa linking Mrs Pascoe to Poutama, something that Mrs Pascoe herself was not aware of when this process began. The "Pascoe" appeal was prepared as a joint appeal with Poutama and argued by representatives of Poutama, Mr R Gibbs and Ms Gibbs in particular. There are factors arising from this advocacy which require some initial comment.

[271] The first is the fact that none of the Poutama representatives are legally trained. We endeavoured to allow for this during the hearing but problems of focus, relevance and scope did arise. In this decision we confine ourselves to the issues and the evidence necessary to resolve the appeals.¹⁷⁵

[272] A second factor is more troubling and raises the possibility of divided loyalties and collateral objectives. This appeal appears to be part of an ongoing campaign by Poutama

¹⁷⁵ We record that at the pre-hearing conference on 6 March 2019 we recommended to Mr and Mrs Pascoe that they take appropriate legal advice.



for recognition and status. The Poutama representatives who appeared before us own and farm land on the coast to the west of the Project area. Their initial focus with the Agency was directed towards ensuring that the western options closer to their land were not selected. At a meeting in February 2018 Mr R Gibbs is recorded as saying that Poutama were pleased the Agency had chosen the route through the Pascoe farm, as this was their second most favoured option after improving the existing route. The three western options were the worst from the Poutama perspective.¹⁷⁶

[273] Our overall concern is that the intervention of Poutama on the Pascoes' behalf has made the task of addressing the Pascoes' rights and interests more complex than it needed to be. Claims to cultural right have been made on behalf of the Pascoes that go well beyond what the evidence supports.

[274] To place these concerns in context, it is first necessary to consider, the nature of the relationship between the Pascoes and Poutama, and how that link came about.

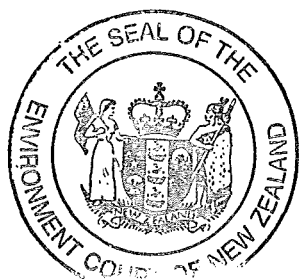
[275] We then address the claims that Mrs Pascoe is tangata whenua and that together with her husband and whānau they are kaitiaki over the Pascoe family land.

[276] Finally, we will consider the claims made on behalf of Poutama that they are an iwi exercising mana whenua and kaitiakitanga over the Project area, including the Pascoe family land. In order to provide necessary context, and avoid repetition we outline in general terms how Poutama characterise themselves and who their representatives are in the following section.

How and when did Poutama become advocates for the Pascoes?

[277] In April or May 2016 the Agency began engaging with Poutama's representative, Mr R Gibbs.

[278] The Poutama representatives who appeared before us were Mr H White, Mr R Gibbs, Mr D Gibbs and Ms Gibbs. The latter three are siblings. They are not Māori. Mr H White is Māori. He has whakapapa links to Ngāti Tama (he is closely related to several Ngāti Tama witnesses including Mr G White whose evidence we refer to). He has previously aligned himself with and worked on behalf of Ngāti Tama and at the time of the hearing he was still a registered member of Te Runanga. For some years now, he



¹⁷⁶ Napier EIC, Appendix 4, pages 45-46.

has identified with the group calling itself Ngā Hapū o Poutama.

[279] In his written evidence Mr H White stated that he lives at Te Kawau within the Poutama rohe. He went on to say:¹⁷⁷

Poutama does not seek and has never sought recognition from the Crown, local or central Government, its agents or departments. Poutama is mandated by Poutama. It is not for any of the Crown departments or its agents and representatives to recognise who is and who isn't. We the Poutama people are still on Poutama lands today. I am kaitiaki for the iwi. We hold and exercise kaitiakitanga within our rohe regularly. ...the Pascoe whānau are part of Poutama iwi, through Debbie's whakapapa. We support their position to retain their whenua and cultural assets on behalf of the wider iwi.

[280] Mr H White farms land on the coast around Te Kawau and the Gibbs family farm land on the coast south of Mokau. Mr R Gibbs' wife is Māori, of Ngāi Tūhoe descent.

[281] Poutama have prepared what they describe as an iwi plan entitled Te Whakapuakitanga o Poutama (2010). Section one records Poutama as a first nation iwi and says¹⁷⁸:

Poutama is one of the tūturu Tangata Whenua (1st Nation Iwi) from the time before the great fleet arrived in Aotearoa. As the generations have passed, Poutama is recognised as a man, an Atua, the land, and the iwi who are still on the land and carry his name to this day.

Poutama are the collective hapū who descend from Poutama and Panirau through Rakeiora, who have chosen to remain on the land mass known as the Poutama land block, or remain connected to the same lands or those who are whāngai (adopted) according to Poutama Kawa and Tikanga, Whakapumau ngā uri o Hoturoa rāua ko Rakeiora ki runga a Poutama.

[282] The second clause lists Ngā Hapū o Poutama as 14 named hapū and concludes with the words "and others". The two affiliated marae listed are Te Kawau Pā (Wharenuī o Waioapa) and Tongaporutu Pā (Wharenuī o Te Ahuru).

[283] We understand that Te Kawau Pā is located on land owned and farmed by Mr H White and Tongaporutu Pā and the associated wharenuī are located on land owned and farmed by the Gibbs family.¹⁷⁹

[284] In November 2016 a charitable trust was also registered in the name "Ngā Hapū o Poutama, Poutama Kaitiaki Charitable Trust" (and that is the entity named in the Poutama/Pascoe joint appeal). The trust deed records the Taumata Paepae o Poutama as the tribal council of Poutama the iwi. Ka Rū o Poutama is the representative of the



¹⁷⁷ White EIC, paragraphs 1, 6-7 (H White EIC).

¹⁷⁸ Poutama Bundle, Vol 1, Doc 1, page 6.

¹⁷⁹ Poutama Bundle, Vol 1, Doc 1.

Taumata Paepae. There are three trustees, appointed for life or until unable or unwilling to fulfil the role. The trustees are Mr H White, Mr R Gibbs and Mr S Hunt. The functions of the Taumata and the trustees are to advocate for the rights and interests of the hapū, to represent the hapū in negotiations or discussions with third parties, and to exercise kaitiakitanga over the tribal rohe in conjunction with the hapū.¹⁸⁰

The Pascoes

[285] The Agency began engaging with the Pascoes in about April 2016. Initial meetings and discussions between July 2016 and June 2017 covered high level options and discussion around land entry agreements.

[286] In June 2017 Ms M Hill, a solicitor with expertise in the Public Works Act process was retained to advise the Pascoes. Her instructions were to advise the Pascoes in relation to the land acquisition process including negotiation of the land acquisition and compensation agreement. Her costs were met by the Agency.¹⁸¹

[287] On 30 August 2017, Agency representatives met with Mr and Mrs Pascoe to give them advance notice that their land had become part of the preferred route ahead of the Ministerial announcement scheduled for the following day.

[288] Mr Napier, who was the Mount Messenger Project Manager between March 2016 and the end of June 2018, gave evidence of his contact with the Pascoes commencing in April 2016. This included approximately twenty visits to the property. Mr Napier noted that the appeal of the Pascoes and Poutama raised cultural and tangata whenua interests but said that during his time as Project Manager neither Mr nor Mrs Pascoe expressed those sentiments to him. He said:¹⁸²

At no time during my meetings and conversations with Mr and Mrs Pascoe did they raise Māori cultural issues, or state they had an affiliation with Poutama. Nor, during my extensive discussions and emails with Mr Gibbs (see the section on Poutama below) did Poutama claim the same.

[289] The Agency agreed to fund Poutama for the preparation of a cultural values assessment up to the value of \$30,000 (but not to the extent of the \$60-\$80,000 requested). Mr B Stirling was commissioned by Poutama in May 2018 and his report



¹⁸⁰ Poutama Bundle, Vol 1, Doc 2 and Greg White EIC, Appendix 3.

¹⁸¹ Poutama Bundle, Volume 6, Doc 86.

¹⁸² Napier EIC, paragraph 85.

was released at the commencement of the hearings before the Commissioner in August 2018. The report does not refer to Mr and Mrs Pascoe or any link they are said to have to Poutama.

[290] Mrs Pascoe lodged a submission on the Project with the New Plymouth District Council and the Taranaki Regional Council on 27 February 2018. She indicated that she wished to be heard and opposed the granting of the NOR and associated resource consents. She noted concern over the effects on the environment, the ecology and effects on wildlife in the valley. She noted that the valley had been her home for 29 years and it was a wonderful place to bring up children with the native birds, trees and fish. She said that there is a call for native bush to be preserved and that the option proposed takes out more native bush than any other option. She also registered concern about potential flooding and the increased risk with global warming.

[291] There was no reference in the submission to her whakapapa or Māori cultural values and neither was there any reference to Poutama or any Poutama hapū or representative organisation of Poutama.

[292] Mr Pascoe also lodged a submission with the local authorities on 27 February 2018. He registered a range of concerns similar to those recorded by his wife. He made no reference to his wife's whakapapa nor to Māori cultural values and neither was there any reference to Poutama or any Poutama hapū or representative organisation of Poutama.

[293] The evidence of Mr H White, Mr R Gibbs and Mrs Pascoe was that non-Māori members of the local community who were concerned about the impact the Project was having on the Pascoes had approached Poutama to see if they could assist. It is unclear exactly when this approach was made and at what point the Pascoes themselves agreed to the offer of assistance from Poutama.

[294] We infer that the Pascoes agreed to the assistance offered by Mr R Gibbs and Mr H White well after they lodged their original submissions on 27 February 2018 and most likely shortly before the hearing before the Commissioner in August 2018.

[295] It appears that Poutama representatives began actively advocating on behalf of the Pascoes in or around July 2018. On 14 August 2018, Mr H White wrote by email to Agency representative Mr Hopkirk referring to a meeting at the Pascoe home on 12 July 2018. Mr H White and Mr R Gibbs were in attendance along with Mr and Mrs Pascoe



and various Agency representatives. The following extracts from that email are illustrative:¹⁸³

Poutama is one of the tuturu Tangata Whenua Iwi from the time before the great fleet arrived in Aotearoa. As the generations have passed, Poutama is recognised an Atua, as a man, the land, and the iwi who are still on the land carry this name to this day. Debbie Pascoe and all her descendant's through their kuia Tomairangi Kakati have an undeniable whakapapa to Poutama.

The kaitiakitanga on that land rests with Debbie and her whānau, including her husband Tony. The physical values including the ecological values are a fundamental part of those cultural values.

...

Major issues arising are;

1. That the Pascoe whānau are part of Poutama.

To make progress we agreed;

NZTA accepted the kaitiakitanga of the Pascoe whānau, and as such the Pascoe whānau need to be treated differently. Cultural values and effects need to be provided for. Involvement with planning will happen.

The Poutama Iwi Taumata will be supporting the whānau through the process. Cost of time spent engaging in the process including monitoring, by the Pascoe whānau and Poutama will be reimbursed through the Poutama Iwi Trust.

Mitigation for cultural damage to lands, including Kaitiakitanga, can and must be made, including costs of rehousing, support buildings and infrastructure.

When did Mrs Pascoe become aware of a whakapapa connection to Poutama?

[296] Mrs Pascoe said she was told that she had a whakapapa connection to Poutama by Mr H White. During re-examination by Ms Gibbs the following exchange took place:¹⁸⁴

Q. What have you learnt about your ancestry since you found out through Haumoana about your connection to Poutama?

A. I am still trying to come to terms with it. Yeah, it's just not something that I've had to deal with until now.

[297] In oral evidence Mr H White said that when he became aware that Mrs Pascoe was related to Mrs Stockman, he phoned a cousin in Australia (Mr J Stockman) and on the basis of that discussion was satisfied that there was a link to Poutama. He said this was through the union of Tomairangi and Kakati.¹⁸⁵

[298] In response to questions Mr H White said that his cousin Mr Stockman had told him

¹⁸³ Poutama Bundle, Vol 6, Doc 86, pages 29-30.

¹⁸⁴ Transcript, page 465, lines 10-13.

¹⁸⁵ We note this differs from the reference to "their kuia Tomairangi Kakati" contained in Mr White's email (see [297] above). Mr White was clear in his oral evidence that there were two tipuna, not one.



that Kakati and Tomairangi were born at Mokau. They had whakapapa links to Ngāti Rāhiri, to Mokau and to Whanganui.¹⁸⁶

[299] Mrs Pascoe was asked in cross examination as to when she first learned of connection to Poutama. She said it was not through her grandmother or her grandfather, it was through Mr H White and Mr R Gibbs.¹⁸⁷

Because as I said to you, I have never looked into my ancestry.

[300] In other answers under cross examination Mrs Pascoe said she thought that the connection to Poutama was through Mr R Gibbs' grandchildren as they had a whakapapa to Mrs Stockman as well. When asked about the reference to Tomairangi Mrs Pascoe said.¹⁸⁸

I do not know those facts. I have never looked into the history. I am only just starting to try to trace back past my grandmother.

[301] When asked about her position on the Poutama Taumata Mrs Pascoe responded.¹⁸⁹

I must explain. I am not converse in Te Reo. My grandfather died at 97 when I was around about 17 and until about three weeks before he died I never even knew he could speak Māori, and Māori was not spoken. My dad could not speak Māori and I am only just starting to try to come to grips with Māori terms. That doesn't mean we weren't taught growing up about the love of the land or all the things that are on the land, in the land and that we treasure.

[302] Mrs Pascoe was asked whether she had an interest in the Project area prior to her marriage to Mr Pascoe. She said that she used to visit the area frequently as she had friends who lived down the road from where he lived. She described it as an interest in visiting the area.¹⁹⁰

[303] While Mrs Pascoe was aware of her whakapapa connection to Ngāti Rāhiri, it was common ground that this hapū identifies with land to the south of the Project area. It is not claimed that Ngāti Rāhiri was part of the Poutama Hapū Collective. When asked, Mrs Pascoe was not able to identify which hapū of Poutama she affiliated to.¹⁹¹

¹⁸⁶ Transcript, pages 444-445, lines 25-30.

¹⁸⁷ Transcript, page 462, line 21.

¹⁸⁸ Transcript, page 461, lines 5-10.

¹⁸⁹ Transcript, pages 456-457, lines 30-35, 1-3.

¹⁹⁰ Transcript, page 459, lines 1-15.

¹⁹¹ Transcript, pages 463-464, lines 20-30, 1-4.



[304] At the conclusion of her oral evidence the presiding Judge asked Mrs Pascoe why she had not included any reference to a cultural connection to the property in the original submission she filed with the local authorities. The following exchange then took place:¹⁹²

- The Court:** ...I would've thought if that was a genuine issue of concern, some aspect of it would've been touched on in the submission. Now, was it not touched on because you weren't aware of this particular connection to this particular property or – the connection that's now been claimed?
- A.** It's – as I said, we did not have any help, we did not know anything about it and it was just not thought about to put in there
- The Court:** Well was it not put in because you didn't know about until you were subsequently told?
- A.** I knew my Ngāti Rāhiri side and that, but I didn't realise that grandma, Great Grandmother Stockman went back to Poutama.
- The Court:** But the connections that's been claimed is sort of a direct one to the property, as I understand it in the cultural sense. And were you not aware of that, that you had a sort of – you were aware of your, obviously, your ancestry in a general sense, but you weren't aware of this cultural connection to the property where you now live that's now being asserted, is that – would that be a fair assessment?
- A.** Yes.

[305] We find that Mrs Pascoe (and Mr Pascoe) made no reference to cultural factors in their original submission because they were not aware of any such connection at the time they lodged the submission. In her evidence before us Mrs Pascoe does not profess personal knowledge of such a link but relies upon Mr H White and Mr R Gibbs for her present belief that there is such a connection.

[306] The increasing reliance of Mr and Mrs Pascoe on the support of the Poutama representatives caused difficulty for their solicitor, Ms Hill. Ms Hill wrote to the Pascoes seeking clarification of her role and raising concerns about the role Mr R Gibbs was playing in the negotiations with Agency in relation to land acquisition. After setting out the background to her original retainer, she said:¹⁹³

My main concern about using Russell as your negotiator in relation to the land acquisition is that your legal rights and interests may not be best protected or advanced. I consider that Russell's direct involvement in the negotiations (as opposed to being a support person and advisor) could disadvantage you.

Ultimately, I am not in a position to continue acting for you on the land acquisition if I am removed as your negotiator and my role is limited to the provision as legal advisor. This would significantly inhibit my ability to properly advise you and put me at risk of negligent advice.

¹⁹² Transcript, page 476, lines 16-33.

¹⁹³ Poutama Bundle, Vol 6, Doc 86 at 37-38, letter to Pascoes dated 15 February 2019.



[307] An email response was sent to Ms Hill on 25 February 2019 from Nga Hapū o Poutama under the names of Mr and Mrs Pascoe, and Mr R Gibbs and Ms Gibbs informing her that Mr Pascoe, Mr R Gibbs and Ms Gibbs were to be the negotiators for all aspects of the Project. In light of that, Ms Hill advised the Pascoes by email dated 28 February 2019 that she was no longer able to act for them as the change in negotiators put her at serious risk of offering negligent advice.

Scope of appeal: Can the Pascoes raise cultural arguments on appeal?

[308] Counsel for the Agency and counsel for Te Rūnanga argued that the failure of the Pascoes to refer to a cultural association to their land or Poutama in their original submissions means that it cannot now be raised on appeal.

[309] Section 120(1)(B) of the RMA provides that a person may appeal only in respect of a matter raised in that person's submission on the application.

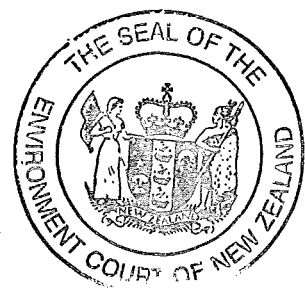
[310] Mr Allan noted that this provision restricts the scope of the appeal with respect to the resource consents, but no similar restriction applies with respect to the designation.

[311] While we think there is force in Mr Allen's submission that there is no statutory or purposive justification for a different approach with respect to the designation, we doubt that it is open to us to apply a jurisdictional barrier such as this by implication. For the purposes of resolving the appeal it is not a question we need to answer definitively.

[312] Ms Morrison-Shaw argued that while a joint appeal may include any matter raised in those parties' respective submissions, such an appeal cannot extend beyond the scope of matters if they are not directly raised. Counsel argued that the following matters appeared to be outside scope:¹⁹⁴

- (a) Mrs Pascoe is Poutama;
- (b) Mr and Mrs Pascoe are kaitiaki for their land and their kaitiaki interests need to be provided for;
- (c) Consultation with the Pascoes was insufficient to understand and recognise the key relationships under s 6(e) of the RMA;
- (d) The Kaitiaki Forum Group did not appropriately provide for Mr and Mrs Pascoes' cultural interests;
- (e) There has been a failure to recognise and provide for the Pascoes' s 6(e),

¹⁹⁴ Te Rūnanga opening submissions, paragraph 77.



7(a), and 8 RMA interests;

- (f) Mitigation and compensation for cultural effects on the Pascoes has been denied; and
- (g) An agreement to not compulsorily acquire land in recognition of cultural interests was denied to Mr and Mrs Pascoe.

[313] Ms Morrison-Shaw submitted that to the extent the Court considers there is any uncertainty as to whether any of these issues are within scope it would be useful for the Court to record that as well as its substantive findings on the issues raised.¹⁹⁵

[314] We accept there is a good argument that all the matters identified by counsel for Te Rūnanga are out of scope on appeal. However, by the time hearings commenced before the Commissioner in August 2018, the Pascoes believed, on the basis of what they were told, that Mrs Pascoe had a whakapapa link to Poutama. That is the way matters were argued before the Commissioner. His resulting findings with respect to the composition of the Kaitiaki Forum Group and associated kaitiaki responsibilities are matters that we need to address in order to dispose of the Te Rūnanga appeal. They are an inescapable live issue enmeshed in the cultural matters before us. In the circumstances of this case we therefore decline to rule out the cultural issues raised by the Pascoes and Poutama on the basis of s 120(1)(B).

[315] The failure on the part of both the Pascoes and Poutama to refer to a whakapapa link between them in their original submissions is however a matter that goes to the weight we give to these recent claims.

[316] We will first address what the evidence shows about the nature of Mrs Pascoe's ancestral relationships to the Pascoe land. Our focus is on the s 6(e) duty to recognise and provide for that relationship.

[317] Because the s 6(e) duty is directed towards the hapū and iwi collectives that individual Māori whakapapa to, we also need to address the question of whether Mrs Pascoe is part of a hapū/iwi collective known as Poutama, and if so, what is the nature of the ancestral relationship of that group to the Project area?



¹⁹⁵ Te Rūnanga opening submissions, paragraph 78.

Mrs Pascoe: tangata whenua living on ancestral land?

[318] It is clear that:

- Mrs Pascoe understands that through her great-grandmother she has a whakapapa connection to Ngāti Rāhiri and she also understands that Ngāti Rāhiri is not a hapū associated with the Pascoe family land in the Project area;
- Mrs Pascoe has a limited understanding of her Māori ancestry. It is not something that has been passed down to her. It is something she is only now trying to understand;
- Mrs Pascoe has no personal knowledge of a whakapapa connection to Poutama;
- Mrs Pascoe does not know which Poutama hapū she is said to affiliate to and which Poutama hapū is said to have links to the Pascoe family land and Mount Messenger area;
- While Mrs Pascoe had visited the area prior to her marriage to Mr Pascoe, she described it simply as an interest in visiting the area. She did not offer any evidence of an understanding of a traditional Māori relationship with that area;
- While Mrs Pascoe gave compelling evidence of her strong association with the valley and its natural features, the values and traditions that she (and her husband) described lacked the whakapapa or whanaungatanga foundation intrinsic to a Māori connection with the land. It is not knowledge that Mr and Mrs Pascoe hold.

[319] While we acknowledge and respect the fact that Mrs Pascoe has Māori ancestry, reliable evidence linking that ancestry to the Pascoe land is simply not before us. Reliable evidence linking Mrs Pascoe to Poutama is simply not there either. As we have already noted, although the s 6(e) requirement is to recognise and provide for an ancestral relationship, it follows that the weaker the relationship, the less it needs to be provided for.

[320] There was no corroborating evidence before us that might validate the claims being made. Mr Stirling's report makes no reference to the Pascoes and the Poutama witnesses did not refer us to waiata or whakatauki that would corroborate the relationship



between Mrs Pascoe and Poutama and the land. There was very little evidence of a whakapapa connection and even that was subject to countervailing evidence showing the tipuna Tomairangi as having a Te Atiawa – Ngāti Rahiri whakapapa.¹⁹⁶ There is no relevant corroboration in various reports of the Waitangi Tribunal either which instead confirm recognition of Ngāti Tama and Ngāti Maniapoto in this area. There is no recognition of Poutama as a hapū collective by neighbouring iwi or hapū. It was not even clear from the evidence from Mr H White and Mr R Gibbs which hapū of Poutama they considered had historical association with or mana whenua over the Mangapepeke valley.

[321] Te Rūnanga commissioned their own historical report in response to Mr Stirling's report. They commissioned Mr PR Thomas, a historian who has worked extensively researching Treaty of Waitangi issues. In 2011 Mr Thomas wrote a report for the Waitangi Tribunal's Te Rohe Potae Inquiry entitled "The Crown and Māori in Mokau 1840-1911".

[322] Mr Thomas' brief of evidence outlined what the historical record reveals about tribal land rights in the Mokau/Poutama area in the nineteenth century. He also responded to the claim made by Mr Stirling that the historical record suggests that a tribal group known as "Nga Hapū o Poutama or Ka Rū o Poutama" historically held mana whenua over this area and that their rights were recognised by government institutions and officials in the mid to late nineteenth century.¹⁹⁷

[323] Mr Thomas summarised his evidence as follows:¹⁹⁸

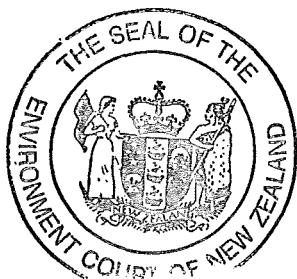
The crux of my evidence is that land rights in the Mokau-Poutama area during the nineteenth century were complex, disputed and subject to change. But one constant was that there are no historical records, at least as far as I am aware, that refer to a tribal group known as Nga Hapu o Poutama. Instead a wide range of individuals, hapū, iwi, and pan tribal groups asserted rights in the area. Particularly important amongst these various groups were Ngāti Tama and Ngāti Maniapoto. They were at the forefront of the struggle for land rights. It would seem, from the evidence that is available that local people and hapū were tied, in a complex but powerful way, to one or both of these iwi.

[324] We have not found it necessary to refer in depth to the points of difference between Mr Stirling and Mr Thomas, as we consider that the appeal can be resolved primarily on the basis of the findings we have made in relation to Mrs Pascoe's connection to the land and to Poutama. We would observe, however, that Mr Thomas' conclusions are more in

¹⁹⁶ Exhibit 15 "Whakapapa of Sarah (Hera) Stockman".

¹⁹⁷ PR Thomas EIC, paragraphs 1-8 (Thomas EIC).

¹⁹⁸ Thomas EIC, paragraph 11.



alignment with what the Waitangi Tribunal has found in its Taranaki and Ngāti Tama/Ngāti Maniapoto cross-claim report. The way in which the Ngāti Tama settlement progressed and the lack of any record of protest by representatives of the collective now calling itself Poutama also lend support to Mr Thomas' conclusions that the hapū/iwi with primary affiliation to the area affected by the Project are Ngāti Tama and Ngāti Maniapoto.

[325] We prefer Mr Thomas' evidence on this central issue. His findings also lend weight to Mr Dreaver's conclusion that those small number of Māori with ancestral links to the Project area who choose to be represented by the Poutama Trust are most likely to have whakapapa connections to either Ngāti Maniapoto or Ngāti Tama. This is certainly true of Mr H White, the only person of Māori ancestry who appeared before us as a witness for Poutama. His whakapapa links to Ngāti Tama are clear and not contested.

[326] We wish to emphasise that in making our findings we do not mean to be critical of Mrs Pascoe nor to disrespect her whakapapa. Neither do we intend to diminish or downplay the fact that she and her husband and family have a very strong attachment to their land. The salient point is that Mrs Pascoe and her family simply do not carry the knowledge, and consequently are not able to demonstrate the whanaungatanga relationships or exercise the associated tikanga, that would require recognition in accordance with Part 2 of the Act.

[327] The evidence for Te Rūnanga in relation to cultural issues was given by Mr G White. He addressed the distinction between kaitiakitanga and stewardship and we find the following points drawn from his evidence persuasive:¹⁹⁹

68. Kaitiakitanga and stewardship stem from two completely different cultures and belief/value systems and while both may endorse the ethos of caring for the environment, that on its own does not mean they both can be conflated together;
69. The fundamental component of kaitiakitanga is whakapapa. It is whakapapa that links individual kin to each other, to a specific location, resources, nga Atua, as well as the dearly departed;
70. Kaitiakitanga is not a birth right but a birth obligation that is inherited from generations past and passed down in perpetuity. The obligation can be impacted (but not extinguished) by land loss, whether by confiscation or sale. It can also be restored by acquisition of more land within the kin group rohe. It is not transient and cannot be imposed outside the rohe;
71. Another aspect of kaitiakitanga is that it incorporates communication between the ever present dead, the environment, the living, and usually the relevant

¹⁹⁹ GL White EIC, paragraphs 68-74 (White EIC).



matter/s at hand;

74. My understanding of stewardship is that it is mobile, not confined to any particular place, space, family or community. A person can be a steward of a piece of land anywhere in the country, provided they have some rights (ownership, lease etc) over it. However, kaitiaki can only exercise kaitiakitanga in their own rohe. Kaitiaki are part of the whenua with tupuna descending from the whenua itself;

[328] Mr G White said that stewardship has none of these characteristics and is fundamentally different to kaitiakitanga. Simply calling someone a kaitiaki or them carrying out some activities similar to a kaitiaki does not change that.

[329] Mr G White also said that it is culturally offensive to have persons who are not kaitiaki referred to as such and to be provided with a kaitiaki role within the Kaitiaki Forum Group. We would add that it would also be unfair to Mrs Pascoe to place her in a role for which she is not equipped.

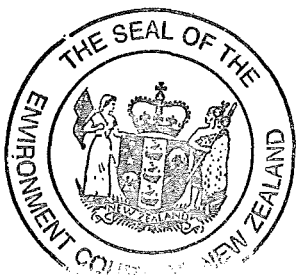
[330] There is insufficient (if any) probative evidence to support the nature of the ancestral connection now claimed on Mrs Pascoe's behalf and we conclude that the Commissioner erred in deciding that it was necessary to add the Pascoes to the Kaitiaki Forum Group to provide for that relationship. We believe the Commissioner also erred in characterising the Pascoes as kaitiaki for the land they own in the Mangapepeke valley. We agree with counsel for the Agency and counsel for Te Rūnanga that the relationship the Pascoes have with their land is better characterised as one of stewardship. In our view that relationship is appropriately provided for under the terms of the proposed Condition 5A.

[331] It follows that Te Rūnanga's appeal must succeed on that point, but there remain a number of matters we need to address and it is to those that we now turn.

Ngāti Tama and Poutama

[332] In this section we address, to the extent we consider we are required to, some remaining issues that arise from the claims made on behalf of Poutama that they, as a collective, are tangata whenua exercising mana whenua and kaitiakitanga over the Project area.

[333] First, we accept as incontrovertible the fact that Ngāti Tama are tangata whenua exercising mana whenua and kaitiakitanga over the land affected by the designation. We



do not accept the submission made by Poutama that Ngāti Tama derive authority from their Treaty settlement. The Treaty settlement is not the source of Ngāti Tama's mana whenua and kaitiakitanga but it is a form of legal and political recognition of their mana whenua and kaitiakitanga that carries considerable weight.

[334] Mr G White noted that it is generally understood within Māori society that hapū or collectives of hapū are the product of prior history of whānau, events, and interaction with others. Hapū always have a common whakapapa and descend from eponymous ancestors that are, in turn, acknowledged by surrounding hapū. Mr White said that Poutama has none of the hallmarks of Māori identity and sits outside the normal cultural context. He pointed to the fact that the rules of its trust deed show that Poutama is at odds with accepted kin genealogy in that Poutama is able to adopt new members at its sole discretion, to self-select individuals who have no whakapapa connection to the land and to appoint these people as kaitiaki for the life of the trust.²⁰⁰

[335] Mr R Gibbs is one of the trustees of the Poutama Charitable Trust. In his evidence he said, "I am a kaitiaki for Poutama". He went on to say that he is part of the Taumata Paepae o Poutama, "by way of being from Te Ahuru Hapū"²⁰¹.

[336] Mr R Gibbs has no Māori ancestry. His evidence concerning how he and his family came to be regarded as part of Te Ahuru Hapū was not entirely clear. As we understand it, it is based on a combination of occupation of their family farm over several generations and what is said to be Poutama tikanga which allows for whāngai or customary adoption into Poutama of those who may not whakapapa to the area. As we understand his evidence, this is the basis upon which he, along with his wife and his father-in-law (who are of Ngāi Tūhoe descent) are now said to be part of Te Ahuru Hapū.

[337] Mr R Gibbs and his siblings are clearly committed to the incorporation of Māori cultural values into the way they live. Unquestionably it is their right to do so and can be seen as a constructive and positive force, not only for them, but for their children and those yet to come. The problem, however, is that cultural rights are being asserted that intrude upon and usurp rights recognised at law and under tikanga as those of the tangata whenua.

[338] Counsel for Te Rūnanga was right to point out:

²⁰⁰ G White EIC, paragraphs 100-101.

²⁰¹ R Gibbs EIC, paragraphs 1-2.



102. Tangata whenua and mana whenua are accorded special recognition and rights under the RMA. As the Privy Council has noted, these rights are “strong directions to be borne in mind at every stage of the decision-making process”. These rights are hard won and reflect the culmination of over 150 years of protest and advocacy on behalf of Māori. It is therefore extremely important that such rights are reserved for tangata whenua/mana whenua alone. Extending such rights to non tangata whenua/mana whenua interests, is inconsistent with the RMA, and diminishes both the value and meaning of such rights, and the mana of the iwi or hapū that holds mana whenua.²⁰²

[339] We do not accept that Poutama and Mr and Mrs Pascoe are tangata whenua exercising mana whenua over the Project area as those terms are used in the Act. Those terms as used in the Act interrelate so that tangata whenua means the iwi or hapu that holds mana whenua over a particular area and mana whenua in turn means the exercise of customary authority by an iwi or hapu in a particular area. While Mrs Pascoe has whakapapa it is to a hapu that makes no claim to exercise mana whenua over the Project area. We are not persuaded that Poutama is an iwi or hapu that has customary authority over the Project area (mana whenua) and there is insufficient probative evidence linking Mrs Pascoe to Poutama in any event. It also follows from these findings that Poutama does not exercise kaitiakitanga over the wider Project area. Once again, as that term is used in the Act it links to the iwi or hapu who are tangata whenua over the area. It would therefore also be incorrect to characterise Mrs Pascoe or Mr R Gibbs as kaitiaki in the sense the term “kaitiakitanga” is used in the Act.

[340] Earlier in this decision we registered a concern that aspects of this appeal appeared to be part of an ongoing campaign by Poutama for recognition and status. Poutama witnesses placed before us a good deal of documentary evidence designed to demonstrate that they had been recognised previously by the Crown and public authorities as tangata whenua exercising mana whenua. In terms of recognition by the Crown, they pointed to inclusion on Te Puni Kōkiri’s “Te Kāhui Māngai” website.

[341] Counsel for Te Rūnanga referred us to a 2011 decision of the Māori Land Court which is of particular relevance to a number of the arguments now made on behalf of Poutama.²⁰³

[342] That decision concerned an application by Mr R Gibbs and his wife to establish a Māori reservation over the Gibbs family farm. The farm consists of approximately 227 hectares of general land. The Gibbs made an application as they were attempting to live



²⁰² Te Rūnanga opening submissions, paragraph 102.

²⁰³ *Gibbs v Te Rūnanga o Ngāti Tama and ors* (2011) 274 Aotea MB 47 (274 AOT 47) (*Gibbs*).

in “Te Ao Māori” and wanted to operate their farm as a unified whole according to tikanga Māori.

[343] The application was opposed by Te Rūnanga on the basis that, if granted, an unintended precedent would be set permitting non-tangata whenua to create large Māori reservations in areas traditionally within the domain of another iwi, in this instance Ngāti Tama. Judge Harvey made the following findings and observations which are of relevance:²⁰⁴

Connection back to the pre-migration tribes does not give Mrs Gibbs any particular status over and above that of tangata whenua of the district, Ngāti Tama and the Ngāti Maniapoto and Tainui aligned hapū. ... there is no generally accepted claim or recognition of a claim of tangata whenua status by Ngāi Tūhoe Iwi to the land covered by the present applications.

...

Ngāti Tama and hapū affiliating with Ngāti Maniapoto have been tangata whenua of the area in question for generations over several hundred years.

...

The applicants cannot rely on the traditions and history of either of the tribes who are traditional tangata whenua to this area in order to create a Māori reservation of such size and for such purposes exclusively in their own favour when they do not whakapapa to those tribes.

...

This underscores the importance of the customary association and link to land through whakapapa in accordance with tikanga Māori.

...

That Mr Gibbs family have owned the land for generations is acknowledged. But that fact does not then make that non-Māori family – Mr Gibbs and his siblings, their parents and grandparents – “tangata whenua” as that phrase is commonly understood and applied.

[344] We were informed by Mr R Gibbs that he had lodged an appeal against that decision. As we understand the position, the appeal was adjourned and no steps have been taken since 2012.

[345] Section 35A RMA imposes a duty on local authorities to maintain a register of the iwi and hapū within its region or district. Section 35A(2) imposes an obligation on the Crown to provide each local authority with information on the iwi authorities within the region or district and the areas over which one or more iwi exercise kaitiakitanga.



²⁰⁴ Gibbs above n 202, paragraphs 110, 132, 135, 137, 148.

[346] We called for submissions on the implications of s 35A(5), a provision which addresses how conflicts in records of iwi and hapū are to be resolved. Te Kāhui Māngai is a directory of iwi and Māori organisations managed by Te Puni Kōkiri. It records information on iwi identified in the Māori Fisheries Act 2004, iwi and hapū that have been recognised by the Government for Treaty settlement purposes and iwi authorities and groups that represent hapū for the purposes of the RMA.

[347] Te Kāhui Māngai lists Ka Rū o Poutama as an “other iwi authority”. Te Kāhui Māngai directory notes that entry as an “other” iwi authority does not imply formal Crown recognition of that group as an iwi or formal recognition by the Crown of that group as having authority to act on behalf of the iwi. Poutama relies on this listing as evidence that Ka Rū o Poutama is a recognised iwi authority under the RMA.

[348] In 2012 Te Puni Kōkiri wrote to Mr R Gibbs, noting that:²⁰⁵

Te Kāhui Māngai is a passive record of Crown/iwi relationships. The Crown records your assertion of iwi authority status, but in doing so neither affirms nor rejects that status.

[349] We conclude that counsel for Te Rūnanga were right to submit that at best, inclusion of the Te Kāhui Māngai registry is neutral, it neither confirms that a group is an iwi authority, nor does it disprove it.²⁰⁶

[350] We accept the submission of counsel for Te Rūnanga that inclusion of Ka Rū o Poutama on Te Kāhui Māngai as an “other iwi authority” does not and cannot create iwi authority or mana whenua status where no such status otherwise exists. We have found there is no reliable evidence before us that the Poutama collective is in fact an iwi or an iwi authority exercising mana whenua in the Project area. As counsel argued:²⁰⁷

Poutama is not an “iwi” or “hapū” as those terms are used in the RMA context and nor is it “tangata whenua” or “mana whenua”. Consequently, Ka Rū o Poutama cannot be an “iwi authority”.

[351] Counsel for Te Rūnanga noted that prior to the introduction of s 35A in 2005 there was no obligation on the Crown or local authorities to maintain records of iwi and hapū. The onus fell on applicants to identify appropriate iwi and hapū groups for consultation as best they could. This led to difficulties and delays and s 35A was introduced to

²⁰⁵ Poutama Bundle, Doc 4, page 2.

²⁰⁶ Submission on behalf of Te Rūnanga in relation to s 35A RMA, 6 August 2019 (Te Rūnanga s 35A submissions), paragraph 17.

²⁰⁷ Te Rūnanga s 35A submissions, paragraphs 1-3.



address those issues and provide greater certainty for iwi consultation purposes. We agree that this is relevant context to the interpretation of s 35A.²⁰⁸

[352] As to the requirements of s 35A, we adopt the following summary of the key components from the submissions of counsel for Te Rūnanga:²⁰⁹

10. There are four key components in this section relevant to the issues. These are that:
 - (a) a local authority is required to keep and maintain records of iwi and hapū within its district or region;
 - (b) the Crown must provide information on iwi and hapū to local authorities;
 - (c) the local authority must include in its record any information provided to it by the Crown; and
 - (d) where information in the local authority record conflicts with the provisions of another enactment, or advice or determinations made under another enactment, those other provisions, advice or determinations prevail.

[353] Iwi authority is defined in s2 of the RMA as meaning “the authority which represents an iwi and which is recognised by that iwi as having authority to do so.”

[354] Counsel for Te Rūnanga argued that the Trust has not provided any credible evidence that Poutama is an iwi or that Ka Rū o Poutama is an iwi authority. She pointed to the following factors as countering any such claim:²¹⁰

18. To the contrary, evidence given at the hearing by the Trust’s witnesses confirmed that:
 - (a) to be part of Poutama iwi:
 - i. you do not need to be Māori;
 - ii. you can be from another iwi or hapū such as Ngāi Tūhoe but join through marriage;
 - (b) Poutama does not have a register of members;
 - (c) while Poutama has a register of hapū (being the list of hapū names contained in the Poutama iwi management plan):
 - i. the majority of hapū listed in the Poutama iwi management plan are not active;
 - ii. not all hapū were contacted and asked whether they consented to their inclusion in the list and/or to being represented by Poutama;
 - (d) the Taumata Paepae o Poutama, being the tribal council of Poutama iwi, includes pākeha members;



²⁰⁸ Te Rūnanga s 35A submissions, paragraphs 7-8.

²⁰⁹ Te Rūnanga s 35A submissions, paragraph 10.

²¹⁰ Te Rūnanga opening submissions, paragraph 18.

- (e) long-standing ownership of land by a pākeha family is sufficient to constitute a customary or kaitiaki interest; and
- (f) it is a person's choice to be kaitiaki or not for their land – no Māori or ancestral connection is required.

[355] Counsel also referred to evidence that Poutama is not recognised as an iwi or iwi authority by Ngāti Tama or other neighbouring iwi, and neither the Taranaki Regional Council nor the New Plymouth District Council recognise Poutama as such on their respective websites.

[356] Section 35A(5) provides that the provisions and advice of other determinations or enactments must prevail over the Crown and local authority iwi and hapū records if there is a conflict.

[357] In this case, while there is no direct conflict there are a range of provisions and determinations that are clearly inconsistent with such recognition. They have already been referred to. Of particular relevance is the Ngāti Tama Treaty settlement and the Settlement Act, the Ngāti Maniapoto Agreement in Principle and the decision of Judge Harvey in the *Gibbs* case.

[358] It follows therefore that we see no relevant error in the approach taken by the Agency and the local authorities in terms of their engagement with Māori over the Project. While we conclude that the Commissioner did err in finding that Mrs Pascoe should be added to the Kaitiaki Forum Group, we do not see error in his refusal to accord Poutama status within the Kaitiaki Forum Group or separate and distinct engagement with the Agency equivalent to that shown to Ngāti Tama.

Te Korowai's appeal

[359] Te Korowai is a collective of Ngāti Tama members formed as an incorporated society named Te Korowai Tiaki o Te Hauauru Inc (Te Korowai). The society was formed in early 2018 as a vehicle to oppose the approach taken by Te Rūnanga to the Project. We have already outlined the grounds of appeal and relief sought.

[360] In their opening submissions counsel for Te Korowai set out in detail nine issues. We have endeavoured to encapsulate Te Korowai's concerns with reference to counsel's statement of issues.



Issue 1 – The Proposal results in significant adverse cultural effects

[361] Counsel noted that all parties agree that the settlement lands have high cultural values and that the use of settlement lands has high (or significant) adverse cultural effects, both metaphysical and physical, on the relationship of Ngāti Tama to ancestral lands and taonga. Reference was made to the MVA prepared by Te Rūnanga.

[362] A key difference between Te Rūnanga and Te Korowai relates to outcome – Te Korowai seeks that the NOR be cancelled and that no reliance be placed on Te Rūnanga's power to veto the Project. It was submitted that the relationship of Māori to Treaty Settlement lands is harmed by diverting those lands to the Crown for state highways.

Issue 2 – Part 2 RMA applies to Designations

[363] Counsel submitted that Part 2 is relevant to the Court's consideration of the NOR, relying on *New Zealand Transport Agency v Architectural Centre Inc.*²¹¹

Issue 3 – Cultural bottom line

[364] Counsel submitted that s 8 RMA sets a cultural bottom line within Part 2 of the RMA and that this includes an active duty to protect taonga.²¹² Where alternatives exist for a public work involving Treaty settlement land, the least impact option should be preferred even if it is not ideal.²¹³ Reasonable alternatives existed they said, citing Mr Roan's evidence that "It would have been reasonable for the Transport Agency to select Options Z, P or E if a decision was based solely on the results of the shortlist MCA assessment".²¹⁴ Further, some cultural values are so important that they merit protection through avoidance and not remedial or trade-off options, such as mitigation, offset and compensation.

Issue 4 – Mandatory to consider layers of interest under s6(e) RMA

[365] Section 6(e) RMA requires that all layers of relationship between Maori and their ancestral land must be considered. Counsel submitted that it is not limited to "iwi

²¹¹ *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, at paragraph [118].

²¹² *Attorney General v Trustees of Motiti Rohe Moana Trust* [2017] NZHC 1429.

²¹³ Te Korowai submissions, paragraph 21, referring to *McGuire v Hastings District Council* [2002] 2 NZLR 577.

²¹⁴ Roan EIC – Alternatives, paragraph 88.



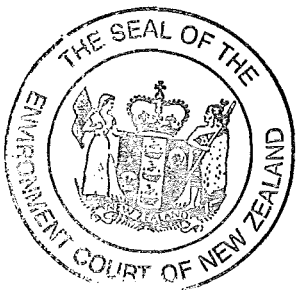
authorities” or “mana whenua” but relates to all Maori. Te Korowai are not represented by Te Rūnanga but have their own view on the Project. They said their kaumatua who gave evidence are kaitiakitanga by whakapapa and customary connection and their status was not challenged. Counsel submitted that an exclusionary approach had been taken to Te Korowai in favour of Te Rūnanga which failed to recognize the s 6(e) layering of interests which they submitted must be “recognized and provided for”.

[366] While Te Korowai agreed that a requiring authority should engage with the iwi authority that should not be to the exclusion of other kaumatua where there is disagreement with Te Rūnanga. Citing the RPS and District Plan counsel submitted that the objectives, policies and methods refer variously to Maori, tangata whenua, iwi and iwi authority; that the views of tangata whenua are identified as relevant by both the RPS and District Plan and that they are not excluded where not consonant with iwi authority views.

Issue 5 – Court must satisfy itself that RMA conditions render significant cultural effects appropriate

[367] Counsel submitted that significant adverse cultural effects must be avoided or, if not avoided, then remedied, mitigated, offset and compensated. Offsetting and compensation to address residual effects under the RMA should not override the protective bottom lines in Part 2 of the RMA. Counsel raised a concern about the “sterilisation” of the land once the designation has been approved, which would affect Ngāti Tama and the Pascoes. They questioned whether Condition 29A is legally effective or in fact *ultra vires*; and submitted that the ability of Ngāti Tama to “veto” the designation is unorthodox.

[368] Because the side agreement between Te Rūnanga and the Agency has not been made available to Te Korowai they could not explore in the hearing how it may address relevant significant cultural effects; as it is not complete it cannot be relied on to conclude that the adverse cultural effects are acceptable (noting that after the trustee elections it may be endorsed, amended or rejected). If the Court disregards the intended side agreement as the Agency asserted it should, the NOR conditions are inadequate to address significant cultural effects of a physical and metaphysical nature (setting aside ecological effects, as these are addressed separately in the NOR conditions). The land swap that is part of the side agreement is a necessary component for land lost. Counsel submitted that the side deal forms part of the RMA consents package.



Issue 6 – Conditions if approved

[369] Te Korowai sought a position on the Kaitiaki Forum Group should the designation be approved. They raised the question as to whether the land underlying the soil can be retained in some form of title. They accepted that the “lease” option is not available legally for a state highway. However Mr Enright submitted that it is possible to retain some title, that this requires approval by the Trustees and is “legally available”.

Issue 7: Who is Te Korowai

[370] The kaumatua who have filed evidence in support of Te Korowai all whakapapa to Ngāti Tama and are qualified to express views on Ngāti Tama tikanga. Te Korowai noted that the Agency’s questioning of the status of the Te Korowai to raise s6(e) issues did not recognize or provide for Te Korowai’s layer of interest.

Issue 8 - Matters not disputed

[371] Te Korowai did not pursue disputed facts on consultation, stating that these are secondary to the substantive cultural effects of the proposal. In relation to ecology, Te Korowai accepted that the proposed conditions relating to ecological values are appropriate, as adopted by their witness Mr Carlyon. They also accepted the positive ecological effects of the NOR as identified by Mr Carlyon in evidence, with their case focusing on the relevant cultural effects.

Issue 9 – Outcome

[372] Besides considering the effects on Te Rūnanga, counsel submitted that the Court must consider effects on tangata whenua and their ancestral and contemporary relationships with the lands, waters and taonga affected by the NOR. Priority status is not necessarily given to the iwi authority over the other representative groups but should depend on the weighting given to the evidence, much of which in relation to high cultural values and significant effects, is common ground. The NOR should be cancelled to avoid adverse effects on settlement lands and effects on high cultural values and relationships that are matters of national importance under s6(e) RMA.

Consideration of Issues

[373] There is no argument between Te Korowai and Te Rūnanga in terms of Te Korowai’s first issue that the effects of the Project will be culturally significant. We too



accept the Project will have effects that are culturally significant. In terms of Issue 3, Te Korowai say that the cultural values should be protected through avoidance of effects on them. However Te Rūnanga has agreed to negotiate an agreement for acquisition of its land that may result in it agreeing to the NOR and resource consents, and to that extent its approach diverges from Te Korowai who seek that the NOR be declined.

[374] Te Korowai stated that significant adverse cultural effects must be avoided or remedied, mitigated, offset and compensated (Issue 5). To that end, concern was expressed about the validity of proposed Condition 29A and Te Rūnanga's ability to veto the designation.

[375] Counsel for Te Rūnanga submitted that the Te Korowai cultural values assessment is to a large degree, confirmatory of the assessment provided by Te Rūnanga. That was acknowledged by Mr Carlyon who gave planning evidence for Te Korowai.²¹⁵

[376] The primary differences between Te Rūnanga and Te Korowai are whether the cultural effects can be appropriately mitigated and the extent to which Te Korowai should be involved in the Project. We have heard from Te Rūnanga that the Agency's proposed conditions addressing cultural values, the Agency's undertaking not to exercise its Public Works Act powers to acquire their land and the potential Agreement for Further Mitigation should provide appropriate recognition of, and protection for, Ngāti Tama's interests.²¹⁶ We have set out further detail at paragraphs 242 and 243.

[377] However Te Korowai is not satisfied that the terms being negotiated between Te Rūnanga and the Agency through the side agreement and the conditions will result in those effects being avoided, having had no opportunity for input to those matters.

[378] We infer from the general tenor of Te Korowai's evidence and submissions that their concerns arise in part from a lack of confidence in the present Te Rūnanga leadership and its advisors. Mr N Baker a kaumatua who gave evidence for Te Korowai said as much and also said that Te Korowai could not rule out the possibility they might ultimately support a side agreement with the Agency, provided it was on suitable terms.²¹⁷

[379] Should the Court decline to cancel the NOR, Te Korowai sought inclusion in the



²¹⁵ Carlyon EIC, paragraph 33.

²¹⁶ Te Rūnanga opening submissions, paragraphs 69-71.

²¹⁷ Transcript, page 386, line 4 – page 387, line 7.

Kaitiaki Forum Group through proposed condition 4, and that the subsoil of the highway be retained in Ngāti Tama ownership. That brings to the fore its Issues 4 (layers of interest), 6 (position on the KFG) and 7 (who is Te Korowai).

[380] Te Runanga and the Agency opposed the inclusion of Te Korowai in the Kaitiaki Forum Group. As all members of Te Korowai whakapapa to Ngāti Tama, the other parties considered that Te Korowai's interests are appropriately recognised and represented through Te Rūnanga.

[381] The local authorities also said that such an approach would be unprecedented and administratively inefficient. They argued that as a matter of administrative necessity the Agency, local authorities and other bodies that wish to engage with Ngāti Tama must be able to rely on Te Rūnanga as the voice for Ngāti Tama. To the extent there may be internal dissatisfaction with the leadership or direction of Ngāti Tama, they are matters that should be left to Ngāti Tama to resolve through its own processes.²¹⁸

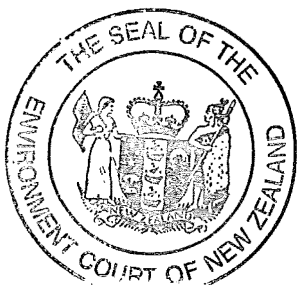
[382] We think there is considerable force in that submission.

[383] The first and obvious point that arises is that Te Korowai supporters have had opportunity to register their concerns and to influence the ultimate decision about the Project by actively participating in the debate within Te Rūnanga. It was common ground that Te Korowai supporters whakapapa to Ngāti Tama and to the extent that some of their members or supporters may not yet be registered members of Te Rūnanga, we were not made aware of any relevant barriers to registration.

[384] Te Rūnanga pointed out that two of the founding members of Te Korowai (Mr A and Ms L White) were at that time trustees of Te Rūnanga. They have since resigned from Te Korowai and returned to active governance on the Rūnanga from late September 2018. Counsel for Te Rūnanga pointed out that they have been required to go through a comprehensive mandating process to achieve recognition for Treaty settlement and other representative purposes. While Te Korowai supporters are entitled to be heard they have not been through any such process and accordingly, to the extent their view is relevant to the issues on appeal, it becomes one of weight.²¹⁹

²¹⁸ Agency closing submissions, paragraphs 55-173; Taranaki Regional Council's Opening submissions, paragraphs 10-13.

²¹⁹ Te Rūnanga opening submissions, paragraphs 53-54.



[385] Counsel for Te Rūnanga also pointed out that a number of Te Korowai members or supporters intended to stand for elected positions on the Rūnanga at elections scheduled to take place at an AGM in September 2019.

[386] We understand that the negotiations between the Agency and Te Runanga over the compensation and mitigation package are well advanced, but they are not yet complete. Once complete, they will be taken to the Ngāti Tama beneficiaries for consideration at the AGM. New trustees elected at that meeting would then ultimately have the responsibility of deciding how to proceed.

[387] The issues raised by Te Korowai can and should be pursued within the processes of Te Rūnanga, a course which we understand a number of Te Korowai members and supporters are actively pursuing.

[388] We place considerable weight on the fact that the Agency and other public authorities are entitled to rely on the fact that Ngāti Tama have an established representative entity in their Rūnanga.

[389] We made it clear to the parties during the course of the hearing that we would issue this decision as an interim decision, pending clarification of what Te Rūnanga's ultimate position on the Project will be. We see no basis in the Te Korowai appeal to intervene and grant relief that would cut across the opportunity for Ngāti Tama to come together and consider and decide upon the proposals put forward by the Agency.

[390] Finally, counsel for Te Korowai submitted that Part 2 is relevant to our assessment of the NOR (Issue 2). We have determined for the purposes of this decision that we will have regard to Part 2. The remaining issue raised by Te Korowai, including alternate relief (that the subsoil of the highway be retained in Ngāti Tama ownership) is opposed by the Agency. We do not understand Te Rūnanga to support this. We put this issue to one side pending Te Rūnanga's decision on acquisition of their property.

J - The planning instruments

[391] Under ss 104(1)(b) and 171(1)(a) we are required to consider²²⁰ any relevant provisions of:

²²⁰ For resource consent applications we are required to "have regard to" the instruments, and for the NOR we are required to "have particular regard to" them.



- A national environmental standard;
- Other regulations;
- A national policy statement;
- A New Zealand coastal policy statement;
- A regional policy statement or proposed regional policy statement;
- A plan or proposed plan.

Statutory instruments

[392] The following RMA statutory instruments are relevant to the Project:²²¹

- National Policy Statement for Freshwater Management 2014 (**NPS Freshwater**);
- New Zealand Coastal Policy Statement 2010 (**NZCPS**);
- Regional Policy Statement for Taranaki 2010 (**RPS**);
- Regional Fresh Water Plan for Taranaki 2001 (**Fresh Water Plan**);
- Regional Soil Plan for Taranaki 2001 (**Soil Plan**);
- Regional Air Quality Plan for Taranaki 2011 (**Air Quality Plan**);
- New Plymouth Operative District Plan 2005 (**District Plan**).

[393] Mr Roan's evidence²²² set out the key statutory planning documents and identified key issues/themes that are particularly relevant to the Project. No party raised an issue with regard to the relevant provisions that had been identified, save that counsel for Te Korowai referred us to 'Issue' statements from the RPS and the District Plan. We have had regard to those matters.

[394] Mr Roan identified themes arising from the planning documents and relevant to the Project. We accept them and set them out in the following paragraphs.

²²¹ Roan EIC – Statutory, paragraph 109.

²²² Roan EIC – Statutory, paragraphs 109-160.



Resource use and development to support people and communities

[395] In the RPS, UDR Objective 1 recognises "the role of resource use and development in the Taranaki region and its contribution to enabling people and communities to provide for their social, economic and cultural wellbeing", while 'UDR' Policy 1 directs further that "Recognition will be given in resource management processes to the role of resource use and development".²²³

[396] Evidence from the Agency which was not challenged, highlighted the strategic importance of SH3 and that the Project will have transportation, economic and social benefits (at a regional and local level).²²⁴

[397] We accept the strategic importance of SH3 and that the Project will have those benefits but record that, at a local level, there will be costs. There will be social costs, particularly on the Pascoes who face losing their home and part of their land and their remaining land will be forever changed. There will be cultural costs to the Ngati Tama people who will lose part of their settlement land. There will also be significant ecological effects.

Regionally significant infrastructure

[398] Section 15.2 of the RPS, *Providing for Regionally Significant Infrastructure* is relevant. It identifies the importance of transport route security and reliability to Taranaki's growth and development, particularly in relation to SH3 north (and south), along with network efficiency, capacity and safety.

[399] INF Objective 1 and Policy 1 of the RPS relate to the safe and efficient establishment, operation and maintenance of regionally significant infrastructure, while avoiding, remedying and mitigating adverse environmental effects. Similarly, the District Plan Objective 20, recognises the safe and efficient operation of the road transport network.²²⁵

[400] We acknowledge the importance of ensuring the security of SH3 as a transport route and have received evidence addressing the environmental effects of the Project.

²²³ RPS, Part B, s 4, "Use and development of resources".

²²⁴ Roan EIC – Statutory, paragraphs 112, 113, referring to EIC from PT McCombs, JD Hickman and MC Copeland.

²²⁵ Roan EIC– Statutory, paragraphs 115 and 116, RPS, Part B, s 15.2.



While the Project will have significant ecological effects, we accept that the proposed conditions will address those effects.

Natural hazards-avoiding and mitigating effects

[401] Section 11 of the RPS contains provisions concerning the reduction of risk to the community from natural hazards, including HAZ Objective 1 and Policies 2 and 6. CCH Objective 1 and Policy 1 address climate change affects.²²⁶

[402] Unchallenged evidence from the Agency described how the existing SH3 road at Mount Messenger is prone to natural hazards which can affect road safety, result in traffic restrictions and delay or cause road closures that can affect road users and surrounding communities. It was the Agency's case that the Project will result in a significant improvement in the resilience of SH3 to natural hazards.²²⁷

[403] We accept the Agency's evidence on these matters.

Treaty of Waitangi, tangata whenua values and cultural heritage

[404] The effect of the Project on cultural values was a significant issue in the hearing.

[405] Planning documents of particular relevance to cultural values are the NPS Freshwater, RPS and District Plan.

[406] In the NPS Freshwater the following provisions are relevant:

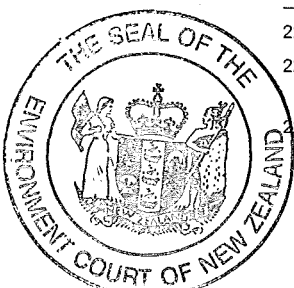
Objective AA1 To consider and recognise Te Mana o te Wai in the management of fresh water.

Objective D1 To provide for the involvement of iwi and hapū, and to ensure that tangata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning...

[407] The relevant RPS objectives are:²²⁸

TOW OBJECTIVE 1 To take into account the principles of the Treaty of Waitangi in the exercise of functions and powers under the Resource Management Act.

KTA OBJECTIVE 1 To have particular regard to the concept of kaitiakitanga in relation to managing the use, development and protection of natural and physical resources in the



²²⁶ Roan EIC – Statutory, paragraph 120.

²²⁷ EIC from PT McCombs, JD Hickman and B Symmans, summarised in Roan EIC – Statutory, paragraphs 121-126.

²²⁸ RPS, Part C, s 16 “Statement of resource management issues of significance to iwi authorities”.

Taranaki region, in a way that accommodates the views of individual iwi and hapu.

REL OBJECTIVE 1 To recognise and provide for the cultural and traditional relationship of Māori with their ancestral lands, water, air, coastal environment, wāhi tapu and other sites and taonga within the Taranaki region.

CSV OBJECTIVE 1 Management of natural and physical resources in the Taranaki region will be carried out in a manner that takes into account the cultural and spiritual values of Iwi o Taranaki and in a manner which respects and accommodates tikanga Māori.

[These include provisions relating to the Treaty of Waitangi, recognising kaitiakitanga, recognising and providing for the relationship of Māori with ancestral lands, water, sites, wāhi tapu and other taonga, and recognising cultural and spiritual values of tangata whenua in resource management processes.]

[408] Key policy elements that give effect to the above objectives include.²²⁹

TOW POLICY 1 Act cooperatively and in good faith ...

TOW POLICY 2 Management of natural and physical resources...in a manner that takes into account the principles of the Treaty of Waitangi ...

KTA POLICY 1 Iwi and hapu will be consulted with on an individual basis to determine how kaitiakitanga can be recognised and integrated ...

REL POLICY 1 The development, use or protection of iwi and hapu land will be supported in a manner consistent with the purpose of the Act. ...

REL POLICY 3: Wāhi tapu and other sites or features of historical or cultural significance to iwi, and hapu and the cultural and spiritual values associated with ancestral lands, fresh water, air and the coast will be protected from the adverse effects of activities, as far as is practicable.

REL POLICY 4: The protection and enhancement of mahinga kai within the region's waterbodies will be provided for ...

[409] A key objective from the District Plan includes:²³⁰

Objective 19 To recognise and provide for the cultural and spiritual values of tangata whenua in all aspects of resource management in the district in a manner which respects and accommodates Tikanga Māori.

[410] Policies 19.2 – 19.4 are relevant, in particular Policy 19.2, which states:

Subdivision, land use or development should not adversely affect the relationship, culture or traditions that tangata whenua have with Waahi Taonga/Sites of Significance to Maori.

[411] Mr Roan was of the opinion that:²³¹

...the Transport Agency's process of engagement with tangata whenua, the Project development process, and the measures incorporated into the Project are consistent with and respond to the provisions of the RPS and the other statutory documents as they relate to the Treaty of Waitangi and tangata whenua cultural values, traditions and heritage.



²²⁹ RPS, Part C, s 16.

²³⁰ District Plan, s 2: Management Strategy, "Tangata Whenua".

²³¹ Roan EIC – Statutory, paragraph 141.

[412] Te Rūnanga accepted that the conditions proposed will address the adverse effects of the Project provided that the Kaitiaki Forum Group condition is limited in scope to kaitiaki and does not include reference to Mr and Mrs Pascoe. While they focused on that point at the hearing, we record that Te Rūnanga has not yet consented to the Agency's use and acquisition of its land for this Project or finalised an Agreement for Further Mitigation (despite recording their support for the Project in their opening submission).

[413] Our evaluation and findings on the cultural effects of the Project are set out under the heading ***Cultural effects*** in **Section I**.

Biodiversity and freshwater ecosystems

[414] The policy framework for these matters is contained in the NPS Freshwater, RPS, Fresh Water Plan and the District Plan.

[415] The following RPS provisions are relevant²³²:

BIO OBJECTIVE 1 To maintain and enhance the indigenous biodiversity values of the Taranaki region...

BIO POLICY 1 The maintenance, enhancement and restoration of indigenous biodiversity will be promoted throughout the Taranaki region and at different scales within the region and will include ecological landscapes, ecosystems, and ecological processes, habitats, communities, species and populations.

BIO POLICY 2 Adverse effects on indigenous biodiversity in the Taranaki region arising from the use and development of natural and physical resources will be avoided, remedied or mitigated as far as is practicable.

BIO POLICY 3 Priority will be given to the protection, enhancement or restoration of terrestrial, freshwater and marine ecosystems, habitats and areas that have significant indigenous biodiversity values.

BIO POLICY 4 When identifying ecosystems, habitats and areas with significant indigenous biodiversity values, matters to be considered will include:

- (a) the presence of rare or distinctive indigenous flora and fauna species; or
- (b) the representativeness of an area; or
- (c) the ecological context of an area.

Once identified as significant, consideration should be given to the sustainability of the area to continue to be significant in future when deciding on what action (if any) should reasonably and practicably be taken to protect the values of the area.

[416] In the District Plan, Objective 16 and Policy 16.1 address indigenous vegetation

²³² Roan EIC – Statutory, paragraphs 144-147.



and habitats and significant natural areas (**SNAs**).²³³

[417] Policy direction for freshwater ecosystems is provided in the NPS Freshwater, RPS, Fresh Water Plan and the District Plan. Key provisions include: safeguarding and restoring the life supporting capacity, ecosystem process and indigenous species of water bodies; protecting the significant values of wetlands; maintaining or enhancing water quality; and avoiding, remedying or mitigating the effects of river bed disturbance. The RPS identifies that the Mimi Stream and Tongaporutu River (which the Mangapepeke Stream discharges to) as being "river and stream catchments of high quality or high value for their natural, ecological and amenity values".²³⁴

[418] The RPS policy framework supports the maintenance, enhancement and restoration of indigenous biodiversity. The Project will result in adverse effects on the biodiversity values of habitats affected by the roading alignment. Many of the habitats affected would meet the criteria for significance contained in RPS BIO Policy 4, including habitats located on the Ngāti Tama and Pascoe lands.

[419] We have addressed these effects and those on freshwater ecosystems in our decision under the heading ***Ecological effects*** in **Section I**.

Natural features, landscapes and amenity

[420] The RPS provisions, including NFL Objective 1, and Policies 2 and 3, recognise the protection of outstanding natural features and landscapes of the Taranaki region from inappropriate use and development, and the appropriate management of other natural areas, features and landscapes and natural character of value to the region.²³⁵

[421] There are no outstanding natural features or landscapes within the Project area listed as such in the District Plan. However Mr Lister acknowledged that there are other natural areas, features and landscapes of value within the Project area.²³⁶

[422] We have addressed effects on these areas in this decision under the heading ***Landscape and visual effects*** in **Section I**.



²³³ District Plan, s 2 Management Strategy, "Natural Values".

²³⁴ Roan EIC – Statutory, paragraph 149.

²³⁵ Roan EIC – Statutory, paragraph 155.

²³⁶ CB, Vol 3, GC Lister Statement of Evidence, pages 2296 and following (**Lister SOE**).

Non-statutory instruments

[423] The non-statutory instruments to which we were referred are:²³⁷

- The Government Policy Statement on Land Transport 2018;
- The Regional Land Transport Plan for Taranaki 2015/16 – 2020/21 which identifies the efficiency, safety and reliability of SH3 north over Mount Messenger (and through to Awakino Gorge) as a priority inter-regional issue for Taranaki;
- The Road Ahead, Economic Development Study on State Highway 3 North (Venture Taranaki 2012) which describes SH3's current state and makes a case for improvement;
- "Tapuae Roa: Make Way for Taranaki." Taranaki Regional Economic Development Strategy (August 2017) which identifies improvement of the northern highway as part of the infrastructure required to underpin a modern growing economy;
- Civil Defence Emergency Management Group Plan for Taranaki: 2018-2023, identifies SH3 as a lifeline utility and the primary route for the delivery of fast-moving consumer goods and petrol movements for the region, as well as being the primary road evacuation route;
- The TRC Long Term Plan 2015-2025;
- The NPDC Long Term Plan 2015-2025.

[424] As nothing turns on the significance of these documents, we do no more than record their relevance to the Project.

K - The Agency's objectives – reasonable necessity

[425] When considering the NOR, we are required to have particular regard to:

s171 (1) (c)...whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought



²³⁷ Agency's opening submissions, paragraphs 206-209.

[426] Evidence about how the Project will meet the Agency's objectives was provided by Mr Symmans (project design), Mr P McCombs (traffic and transport) and Mr M Copeland (economics). We note that none of the parties sought to question Mr McCombs or Mr Copeland and both were excused from attending the hearing with their evidence being taken as read.

[427] Starting with the first objective: *To enhance safety of travel on State Highway 3*, Mr McCombs said that the new section of highway will enhance safety by providing:²³⁸

- An improved Safety Star Rating of 3²³⁹ which matches the higher safety operating standards now sought across all of the Agency's rural state highway network;
- Improved forward visibility with 100km/h operating speed throughout;
- Increased passing opportunities over the full length of the Project;
- A reduced route length from 7.4km to 6km;
- Improved geometry with eased curves, widened lanes, flatter grades, full standard shoulders and side barriers throughout;
- Reduced driver frustration through a fully dependable no surprises environment.

[428] Based on this evidence, which was not disputed, we are satisfied that once completed and in operation there can be little disagreement that the new section of highway will provide and enhance the safety of travel for all road users.

[429] For the second objective: *To enhance resilience and journey time reliability of the state highway network*, as noted earlier in this decision the existing Mount Messenger section of SH3:²⁴⁰

- Is highly vulnerable to disruptions from rockfalls, landslips, vehicle breakdowns and crashes;

²³⁸ McCombs EIC, paragraph 118.

²³⁹ Exhibit 1 *KiwiRAP New Zealand Road Assessment Programme* provided by Mr Symmans states that Star Ratings are determined through an evaluation of each of a road's design elements. These vary from a high of 5 stars to a low of 1 star. The existing road is rated Star 2.

²⁴⁰ McCombs EIC, paragraphs 16-17 and 135.



- Has steep grades, narrow widths, a winding alignment with tight curves, restricted forward visibility, limited overtaking opportunities and a tunnel which physically constrains maximum load sizes;
- Is used by an average of 460 heavy trucks per day, some carrying hazardous goods such as LPG.

[430] With respect to delays for traffic using the existing route Mr Symmans advised that.²⁴¹

- The last modest landslip in May 2018 required a closure of almost 4 hours with lane closures for 12 ½ days resulting in long queues with wait times of up to 1 hour;
- During resealing work in summer 2018, there were queues over 1 km in length with wait times of over 1 hour (unlike the new route which will have sufficient width to maintain two-way traffic).

[431] With respect to travel times for the new route, Mr McCombs said that:²⁴²

- If trucks are not encountered light vehicle travel times on the existing route average around 8 minutes whereas on the Project route this will reduce to half or 3.9 minutes which is a significant saving for travellers;
- For heavy vehicles travel times between the existing route and the Project route will reduce from about 13 minutes to about 6.5 minutes;
- The designation for the new route will also provide sufficient width for a full passing lane to be introduced to meet future increase in traffic volumes.²⁴³

[432] With respect to resilience, Mr Symmans outlined the following design features of the Project:²⁴⁴

- It avoids deep seated landslide features;
- Its embankments have been designed to minimise displacements in 1-in-1000-



²⁴¹ Symmans EIC, paragraph 35.

²⁴² McCombs EIC, paragraphs 120-129.

²⁴³ McCombs EIC, paragraph 129.

²⁴⁴ Symmans EIC, paragraph 35.

year seismic events (large embankments) and 1-in-500-year events (small embankments);

- Its tunnel, bridges and large culverts have been designed for 1-in-2,500-year seismic and flood events;
- Its carriageways have been designed for a 1-in-500-year flood event with no accumulation of standing water on active lanes in 1-in-10-year events;
- Its slopes, swale/verge barrier and shoulder configurations have been designed to minimise debris entering the carriageway.

[433] We are satisfied that by replacing the poor alignment and geologically unstable section of the existing route this new section of State Highway 3 will provide enhanced resilience and journey time reliability for users of the state highway network.

[434] The third objective is: *To contribute to enhanced local and regional economic growth and productivity for people and freight by improving connectivity and reducing journey times between the Taranaki and Waikato regions.*

[435] Mr Copeland's evidence was that:²⁴⁵

- In present value terms, over its life the Project is expected to result in savings of \$44.8m in travel times, \$19.9m in vehicle operating costs, \$11.3m in accident costs and \$13.7m in road resilience benefits, with carbon dioxide emission reduction benefits of \$1m and reduced maintenance costs of \$1.4m;
- These benefits are expected to transfer to the local economy as most traffic will have an origin or destination in the Taranaki region;
- There will also be economic benefits from improved trip reliability, the potential for the Project to generate additional traffic, for trucks to be able to complete New Plymouth to Auckland return journeys in a day without having to provide a replacement driver and for the Project route to accommodate over-sized loads which currently need to use the much longer SH1 route.

[436] We accept the evidence of Mr Copeland that this local and regional economic

²⁴⁵ Copeland EIC, paragraphs 52-53, 69 on pages 16 and 19.



growth and productivity Objective will be satisfied through the improved connectivity and reduced travel times which will be afforded to users of the new route.

[437] The fourth Objective is: *To manage the immediate and long term cultural, social, land use and other environmental effects of the Project by so far as practicable avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.*

[438] A significant part of the Agency's ability to avoid, remedy and mitigate the effects of the Project rests on compliance with the proposed conditions addressing cultural and ecological effects. At present there is a major obstacle, namely that the Agency has not acquired the Ngāti Tama Land which is needed for the Project and the ecological enhancement. It has assured Ngāti Tama and the Court that it will not compulsorily acquire that land. As at the date of this interim decision the land has not been acquired, and agreement on other 'key elements' referred to in Te Runanga's opening submissions has not been reached.

[439] Until that land has been acquired and agreement reached, the Project is to all intents and purposes 'incomplete'. In the normal course, we would not concern ourselves with acquisition of land for a particular work because the Public Works Act 1981 sets out powers for that acquisition to occur – be it by agreement or by compulsory acquisition.

[440] In this case however, the Agency cannot proceed with the Project without agreement from Te Rūnanga. We cannot presently be certain that the Agency's final objective can be fulfilled.

[441] For those reasons we are unable to make a final determination as to whether the work and designation are reasonably necessary for achieving the Agency's objectives, but we record that the Project does achieve the first three objectives as we have identified. Whether or not the fourth objective can be achieved is dependent on the Agency reaching agreement with Te Rūnanga.

L - Conditions

[442] The Agency submitted its final condition set of proposed conditions with its closing legal submissions on 13 August 2019 comprising Designation Conditions and Resource Consent Conditions. These include a number of amendments to the version which was



current at the time of the hearing.

[443] Counsel told us that these conditions have been agreed to by all parties to the DOC appeal (other than Poutama and Mr and Mrs Pascoe).²⁴⁶ While we are not aware of any disagreements from the two Councils this needs to be confirmed.

[444] Other than the matter of proposed condition 5A relating to the Pascoes, we make no further observations on the conditions at this time.

[445] One condition that has been substantially amended in the final condition set is proposed condition 5A (replicated in condition GEN.6A.) which sets out the Agency's proposals for responding to the Project's effects on the Pascoes. The Advice Note to this condition notes that this condition has been offered on an *Augier* basis. We note that condition 19(b) may need to be amended for consistency with the provisions in the amended conditions 5A and GEN.6A.

[446] The consequences of the Agency being unable to reach agreement with the Pascoes on the matters provided for in proposed condition 5A have been discussed in section I of this decision. Also, as advised to us during the hearing, the Pascoes have been removed from participation in the Kaitiaki Forum Group (Condition 4) and instead offered on-going participation with the Agency through the extensive provisions provided for under conditions 5A and GEN.6A.

[447] The area of Pascoes' land which the Agency proposes to be permanently acquired for the new highway is a little over 11 ha with a further 13.5 ha required for temporary occupation during its construction.

[448] In addition to these areas, on a willing buyer/willing seller basis the Agency would like to acquire:²⁴⁷

- The Pascoes' dwelling and outbuildings so that the underlying land can be used for construction storage and related activities;
- A number of tongues of land extending up the side valleys off the new alignment to provide for core ecological mitigation/offset compensation



²⁴⁶ Agency's closing submissions, paragraph 182.

²⁴⁷ Agency's closing submissions, paragraphs 60-62.

activities, the PMA and restoration and mitigation planting;

- The largest of these tongues which would be used for temporary storage during construction.

[449] The Agency has proposed an extensive package of measures to address the potential effects of the Project on the Pascoes. This has been structured under three phases; pre-construction; during construction; and operations/on-going.²⁴⁸

[450] In the first of these phases, the Pascoes would be invited to attend a design workshop, a site visit to another active Agency project, offered health and safety training and be provided with protective equipment for their use during construction.

[451] In the construction phase they would be invited to fortnightly meetings to discuss construction effects and mitigation, to undertake site walk-overs, to identify any features on their land to be protected, to ensure that access to their land is maintained, to have inputs for ecological mitigation on their land and at the completion of construction, for all temporary construction areas on their land to be reinstated as far as possible to their original condition.

[452] Long term measures would be dependent on whether the Pascoes elected to sell the land required for the new highway including their existing home. If they elected to sell, then the Agency has offered to build them a new home incorporating material salvaged from their existing home and to provide them with temporary accommodation while the new home was being built. In addition, there are offers to install fencing to prevent stock accessing the PMA, \$15,000 for landscaping at the new home and \$55,000 of additional planting at a location to be agreed on their land. A new walking track would also be established on the floor of the Mangapepeke valley.

[453] If the Pascoes decide against selling all of their property, the Agency has offered to work with them to develop a plan for visual planting adjacent to their home to screen views of the new highway. The \$55,000 additional planting offer would also remain.

[454] As noted at [143], the CNMP has been prepared on the basis that the Pascoes will relocate at least during construction and therefore have not been identified as noise sensitive receivers. We will proceed with our final decision on the basis that the Pascoes



²⁴⁸ Agency's closing submissions, paragraph 71.

will relocate (as they indicated they would) should the Project proceed. If necessary, we would hear from the Pascoes on that matter as part of any final determination.

M - Commissioner's Decision

[455] Section 290A of the RMA requires us to have regard to the Commissioner's Decision.

[456] We have had regard to the Commissioner's Decision and referred to it as necessary throughout this decision. We have reached a different view to the Commissioner on the membership of the Kaitiaki Forum Group, Mrs Pascoe's claim to be tangata whenua, the social effects of the Project on the Pascoes and the cultural effects in terms of how they can be addressed in the context of the timing of the possible acquisition of Te Runanga's land and confirming or otherwise the NOR.

N - Summary of Findings

[457] We summarise our findings on the core central Issues which emerged from the parties cases and which we outlined in **Section C**.

Alternatives

[458] We have determined that the Agency's consideration of alternative sites, routes or methods of undertaking the Project was adequate.

[459] We observe that the online option (staying within the existing SH3 alignment) was considered and not chosen, primarily for reasons of cost, constructability and cultural values.

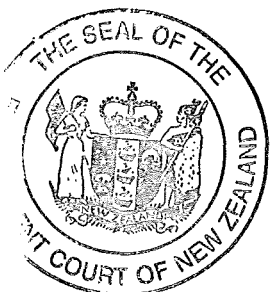
Consultation

[460] The Agency's consultation was detailed and extensive.

Cultural effects

[461] There are significant adverse cultural effects from the Project on Ngāti Tama which are yet to be resolved.

[462] We have found that Ngāti Tama has mana whenua over the Project area and it is



appropriate that it be the only body referred to in conditions addressing cultural matters.

[463] Mrs Pascoe and her family have not established on the evidence that they have and are able to maintain the whanaungatanga relationships or exercise the associated tikanga that would require recognition under Part 2 of the Act.

[464] We have found that Mrs Pascoe is not kaitiaki in the sense the term 'kaitiakitanga' is used in the Act. The relationship the Pascoes have with their land is one of stewardship.

Te Korowai

[465] We do not consider it is appropriate for Te Korowai to be included in the Kaitiaki Forum Group.

[466] As we have already observed, the primary difference between Te Rūnanga and Te Korowai is whether the cultural effects can be appropriately mitigated. Te Korowai is not satisfied that the terms of the agreement being negotiated between Te Rūnanga and the Agency, together with the proposed conditions, will result in cultural effects being appropriately avoided. We will not determine that issue until we receive advice from Te Rūnanga as to what has been decided with regard to its land.

Poutama

[467] We have found that Poutama are not tangata whenua exercising mana whenua over the Project area. It follows, therefore, that it is not appropriate that it be recognised in any consent conditions addressing kaitiakitanga that may issue.

Mr and Mrs Pascoe

[468] There is no doubt that the Project will have significant adverse effects on the Pascoes and their land. The adverse social impact of the Project on the Pascoes is severe. We consider, however, that proposed condition 5A will mitigate those effects to the extent possible if the Project is approved and proceeds and the Pascoes accept the Agency's offer to buy their house, the land on which it sits, and the other land that is required for the Project.



Ecology

[469] We consider that the Project will have significant adverse effects on the area that it affects, but that those effects will be appropriately addressed through the proposed conditions in the event that Te Rūnanga agree to transfer the Ngāti Tama Land to the Agency.

Conditions

[470] Except for those proposed conditions we have addressed in this decision, we are presently unable to find that the proposed conditions, on their own, appropriately avoid, remedy or mitigate the effects of the Project. It may be that those effects can only be adequately addressed through the proposed conditions, the acquisition of the Ngāti Tama Land, and the Agreement for Further Mitigation. Until we know whether or not the acquisition has been agreed, the related agreement entered into (and whether any further amendments to conditions are required as a consequence of such agreements) we cannot finally determine these appeals.

Outcome

[471] For the reasons previously expressed, we are not prepared to finally determine these appeals at this time. When we do finally determine these appeals, we will have regard to the above findings.

[472] In their closing submissions counsel for the Agency endeavored to address our concerns about the prospect of confirming the NOR absent an agreement from Te Rūnanga to sell their land. We remain concerned however with the effects of the Project. Our consideration of the effects cannot be completed until we receive advice on whether or not agreement has been reached between Te Rūnanga and the Agency.

[473] Counsel for the Agency filed a memorandum dated 1 November 2019 updating the Court on the status of the Te Rūnanga agreement. Counsel advised that Te Rūnanga and the Agency have continued work to finalise the agreement and the documentation is now substantially complete. Elections for Te Rūnanga o Ngāti Tama Trust took place in September 2019 and the results were certified by Election NZ. Five of the seven previous trustees were re-elected and two new trustees were elected. The Agency understands that the previous trustees had formerly recommended that the new trustees accept and agree to the package negotiated between the Agency and Te Rūnanga.



[474] Counsel also noted that the day before the election Te Korowai applied to the Māori Land Court for orders including an urgent interim injunction to suspend the elections and prohibiting the trustees from undertaking trust business, including finalising their agreement with the Agency. Te Korowai also asked that the election be re-run. In a decision dated 23 October 2019 the Māori Land Court declined to issue an injunction requiring the newly elected trustees to hold fresh elections or to restrain their decision making. The Court has directed that a written report be provided by Te Rūnanga on matters relating to eligibility to be a beneficiary of the trust.²⁴⁹

Video

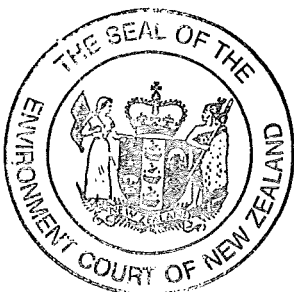
[475] As part of the submissions filed for Poutama and Mr and Mrs Pascoe we were supplied with a video. That video provided names and pictures of certain staff from the Agency and repeated allegations made in the hearing as to the way in which the Agency interacted with Poutama and the Pascoes. Further, impropriety was alleged in respect of which no evidence was called. The Agency informed us that the video had been published on the internet.

[476] We record that we have not had regard to that video because it was not put before us in evidence. Other parties, therefore, had no opportunity to test its contents in the hearing. We consider that it was inappropriate to 'target' witnesses and individuals in the manner it did. Further to that we refer to the finding that we have previously made that the Agency's consultation was detailed and extensive. The evidence we heard did not establish any bad faith on the Agency's behalf.

Memoranda

[477] In addition to closing submissions from the parties on a number of issues we also received two memoranda filed on behalf of Poutama and Mr and Mrs Pascoe. The first memorandum was dated 31 July 2019 and referred to an August 2017 letter from DOC to the Agency setting out its view of the 'shortlist' options. The memorandum raised an issue with Mr Napier's evidence which was to the effect that DOC confirmed its preference for the eastern alignment options, compared to all other options. The memorandum claimed that was not what the advice from DOC said; that it qualified its advice with regard to the options it had considered.

²⁴⁹ *Te Korowai Tiaki v Te Runanga o Ngāti Tama Trust* [2019] 407 Aotea MB 47 (407 AOT 47).



[478] In response, the Agency stated that the potential effects of each of the shortlisted options on ecological values was fundamental to the assessment of the options. It noted that DOC had not challenged the selection of the eastern alignment option.²⁵⁰ We have no concerns with Mr Napier's evidence on this point.

[479] The second memorandum dated 5 November 2019 asserted that Mr Dreaver, who gave evidence for the Agency, did not disclose that in addition to being related through his wife and daughter to Ngāti Mutunga he is also related to Ngāti Tama. It was alleged that the omission is material to the Court's consideration of the evidence given by Mr Dreaver.

[480] We sought a response from the Agency which advised that it is well known that there are connections between Ngāti Mutunga and Ngāti Tama as with many iwi and Māori groups. That said, Mr Dreaver had advised the Agency that neither his wife nor daughter are registered members of Ngāti Tama. Further, Mr Dreaver provided evidence relating to his role as a negotiator for the Agency and Te Rūnanga and detail of his engagement with other iwi and Māori groups.²⁵¹

[481] We accept the Agency's advice on this point. We have no concerns with the evidence provided by Mr Dreaver.

Determination

[482] This is an interim decision of the Court because there is no certainty as to whether or not the Agency can acquire from Te Rūnanga the land necessary to implement the Project and finalise an Agreement for Further Mitigation.

[483] In light of the Agency's assurance that it will not compulsorily acquire the Ngāti Tama land, the Court is not prepared to complete its consideration of the NOR and resource consents absent advice from Te Rūnanga that it has agreed to the acquisition and further mitigation.

[484] That is because we cannot determine that the effects of the NOR and the Project will be appropriately addressed until we receive advice on that acquisition and further

²⁵⁰ Agency's closing submissions, paragraphs 200-201 and Memorandum of counsel for the Agency dated 19 November 2019, paragraphs 3-5.

²⁵¹ Memorandum of counsel for the Agency dated 19 November 2019, paragraphs 6-11.



mitigation.

[485] This proceeding is adjourned until 31 March 2020.

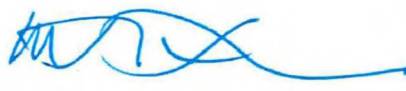
[486] On that date we direct that the Agency is to file a memorandum advising the Court of the state of its negotiations with Te Rūnanga.

For the Court:


BP Dwyer
Environment Judge




M Doogan
Māori Land Court Judge


MJL Dickey
Environment Judge


RM Bartlett
Environment Commissioner


DJ Bunting
Environment Commissioner