

# APPENDIX A

## Document bundle

Mana Newton (#172) Wai 3444

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Waitangi Tribunal

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# Document 1

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

**Decision No. [2018] NZEnvC 093**

IN THE MATTER of the Resource Management Act 1991  
AND  
IN THE MATTER of an appeal under s 120 of the Act

BETWEEN TŪWHARETOA MĀORI TRUST  
BOARD  
(ENV-2016-AKL-000267)  
Appellant

AND WAIKATO REGIONAL COUNCIL  
Respondent

AND ROTOKAWA JOINT VENTURE  
LIMITED  
Applicant

AND NGĀTI TAHU – NGĀTI WHAOA  
RUNANGA TRUST  
Section 274 party

Court: Environment Judge D Kirkpatrick  
Environment Commissioner E von Dadelszen  
Environment Commissioner J Hodges

Hearing: at Taupo on 24 – 27 July 2017

Appearances: L Muldowney and S Thomas for Tūwharetoa Māori Trust Board  
S Plant for Waikato Regional Council  
J Campbell and J Wilson for Rotokawa Joint Venture Ltd  
E Forrest on behalf of Ngāti Tahu – Ngāti Whaoa Runanga  
Trust

Date of Decision: 20 June 2018

Date of Issue:

**20 JUN 2018**

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**DECISION OF THE ENVIRONMENT COURT**

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- A: The appeal by Tūwharetoa Māori Trust Board is granted to the extent of the amendments to the general conditions of consent shown in the schedule to this decision.
- B. There is no order as to costs.

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## REASONS

### Introduction

[1] Tūwharetoa Māori Trust Board (**Tūwharetoa** or **the Appellant**) seeks a kaitiaki role for itself in respect of the Rotokawa geothermal resource, particularly in relation to the resource consents granted by Waikato Regional Council (**Council** or **the Respondent**) to Rotokawa Joint Venture Limited (**RJVL** or **the Applicant**). Specifically, Tūwharetoa sought in its submission on RJVL's application, and continues to seek on appeal, amendments to the general conditions of those consents to include its representatives on the review committee which considers the monitoring data from the exercise of the consents and receives the comments of the peer review panel (**PRP**) on that data.

[2] The Council refused to provide for that kaitiaki role in the conditions. Both the Council and RJVL oppose the relief now sought in this Court.

[3] Ngāti Tahu – Ngāti Whaoa Runanga Trust (**Ngāti Tahu – Ngāti Whaoa**) hold mana whenua in respect of Lake Rotokawa and its associated resources, including the Rotokawa geothermal resource. They own (through the Tauhara North No. 2 Trust) the land on which RJVL operates two power stations and they are, through the same trust, one of the two parties in the unincorporated joint venture which owns RJVL, the other party being Mercury NZ Limited. They deny that Tūwharetoa holds any mana whenua at Rotokawa and oppose a kaitiaki role for Tūwharetoa in relation to these consents.

[4] The issues arising from the cases presented by the parties fall principally into two main areas:

- a) The holding of mana whenua and the exercise of kaitiakitanga; and
- b) The management of the geothermal resource under the Act.

We make the general observation that these two areas are not mutually exclusive and that there is a degree of overlap between them.



## Resource consents and applications

[5] RJVL is owned by the Rotokawa Joint Venture, an unincorporated joint venture between Mercury NZ Limited and the Tauhara North No.2 Trust (**the Trust**). RJVL operates and maintains geothermal electricity facilities at Rotokawa, including two power stations. In very broad terms, the activities comprise the taking of geothermal fluid, using the heat of that fluid to generate electricity at the Rotokawa A power station (commissioned in 1997 and capable of producing 34 MW of electricity) and the Nga Awa Purua power station (commissioned in 2010 and capable of 140 MW), reinjecting that fluid and associated works and monitoring programmes.

[6] All activities on the site are currently authorised by a comprehensive suite of 21 resource consents with a common expiry date of 2043. There has been a high level of compliance with the conditions of consent in the four years from 2011/12 to 2014/15, with only minor issues requiring follow up over the five years to September 2016. There have, however, been significant pressure drops in particular areas within the geothermal reservoir since the start-up of the Nga Awa Purua power station which have resulted in the need to source additional geothermal fluid for the stations in order to remain within their design operating parameters.<sup>1</sup>

[7] To address the need for additional geothermal fluid, RJVL applied in December 2015 for 11 resource consents, with three main components to the application:

- (a) Extending the current consented area for geothermal operation into a new area;
- (b) Increasing the total volume of geothermal fluid abstracted from the system by 10,000 tonnes per day (**t/d**) to 75,500 t/d, but with no change to the volume of net abstraction as no change in generation capacity is proposed, and the increase in volume taken will be matched by an equivalent volume injected back into the system; and
- (c) Rationalising the existing 19 regional consents by replacing them with 11 new consents with a common expiry date of 2051, meaning an additional eight years of operation is sought.

[8] Details of the applications and specifically the 11 authorisations sought are

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<sup>1</sup> Section 42A Report dated 5 September 2016, Hearing Exhibit G, at section 1.



summarised in the Council's s 42A report at section 2. The same section records that the applicant is no longer seeking to consolidate the existing consents numbered 116573 and 124483 and has withdrawn the application. The Report's author notes "... that there is no material impact on this application as the activities are already authorised via existing consents." The report also records that a 35-year duration consent is sought for all consents, and that a lapse period of 10 years is sought for all station operations related consents and that all well drilling and testing related consents lapse concurrently with the consent term.

[9] For the record, we note that as the applications relating to consents numbered 116573 and 124483 were withdrawn, the terms of those consents and their lapse periods cannot be changed by this appeal.

#### **Appeal by Tūwharetoa**

[10] Independent commissioners appointed by the Council heard RJVL's application and Tūwharetoa's submission in opposition, and granted the consents subject to conditions.

[11] Tūwharetoa appealed to this Court from the Council's decision, giving the following reasons for their appeal:

- (a) Ngāti Tūwharetoa holds mana whenua and kaitiakitanga over the Central North Island, including the Lake Taupo Catchment and parts of the Upper Waikato;
- (b) Ngāti Tūwharetoa are linked by whakapapa to their lands and taonga, which establishes their mana whenua, kaitiakitanga and rangātiratanga, with an intrinsic duty to ensure the mauri, and the physical and spiritual health of the environment in their rohe is maintained, protected and enhanced;
- (c) There had been a failure by the RJVL to properly consult with Ngāti Hinerau, Ngāti Hineure and the Tūwharetoa Hāpu Forum;
- (d) The Council failed to include Ngāti Hinerau, Ngāti Hineure and the Tūwharetoa Hāpu Forum as affected parties in the limited notification of the applications; and



- (e) As a consequence of the consultation and notification processes, the assessment of environmental effects (AEE) is deficient and the conditions of consent fail to avoid, remedy or mitigate adverse cultural effects to the extent necessary to meet the requirements of sections 5 and 6 (e) of the Act

[12] In a memorandum dated 5 April 2017, counsel for Tūwharetoa confirmed that Tūwharetoa was seeking changes to consent conditions to address cultural issues set out in the memorandum, and if the conditions could not be amended “in such a manner” the consents be declined. Counsel stated that “The Appellants challenge to the grant of consents is confined to this cultural issue, and does not seek to challenge the technical evidence which supports the grant of consent.”

[13] By the time of the hearing before the Court, Tūwharetoa’s position had narrowed to not opposing the grant of consent provided that the adverse cultural effects it identified were appropriately addressed by conditions.

[14] The key issues remaining at the time of the hearing were in relation to the adequacy of:

- (a) the recognition of and provision for relationships of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga under section 6(e) RMA
- (b) the particular regard to be had to kaitiakitanga under section 7(a) RMA;
- (c) the notification process;
- (d) consultation with iwi and hapū;
- (e) consideration of cultural effects generally; and
- (f) the conditions of consent.

#### **The Rotokawa geothermal resource**

[15] Notwithstanding the absence of any dispute about these matters, it is appropriate for the Court to review the existing natural and physical environment and the framework of the consents in order to understand the full background to this appeal. This section and the next are based on the uncontested expert evidence of: Mr S M Sewell, a geoscientist; Dr E K Mroczek, a chemist; and Dr M A Grant, a geothermal reservoir engineer; and on information in RJVL’s AEE.



[16] The Rotokawa geothermal system is one of approximately 15 known high-temperature geothermal systems within the Taupo Volcanic Zone. It is located approximately 10 km to the north-east of Taupo and straddles the Waikato River, as shown on the **attached** Figure 1 reproduced from the evidence of Mr Sewell.

[17] Active geothermal features of the Rotokawa geothermal system include acid sulphate fumaroles and hot springs, steaming ground and bicarbonate springs. The main concentration of surface activity at Rotokawa is an area of approximately 1 km<sup>2</sup> adjacent to the northeastern shore of Lake Rotokawa. Numerous hot springs also discharge into the Parariki Stream and into the Waikato River. Small patches of actively steaming ground are also found north of the Waikato River. The **attached** Figure 2 shows the location of the main thermal areas (areas containing the majority of hot springs and fumaroles) and the shallow groundwater hydrology in the Rotokawa area.

[18] Lake Rotokawa is a unique feature of the Rotokawa geothermal system. The lake covers an area of approximately 0.5 km<sup>2</sup> and is believed to have formed via hydrothermal eruptions around 5000 years ago. The lake is mostly recharged by rainwater, but numerous areas of geothermal input occur throughout the lake which significantly alter its chemistry and make it acidic. The main known area of geothermal input into Lake Rotokawa is referred to as the 'lagoon' which is on the northeastern shore of the lake.

[19] The Parariki Stream drains Lake Rotokawa from its eastern edge into the Waikato River. The stream also has numerous hot springs that discharge along its banks in a number of locations. Monitoring of the Parariki Stream and Lake Rotokawa has shown that variations in flow rate, temperature and chemistry of the stream are mostly controlled by the level of Lake Rotokawa which is in turn controlled mostly by the amount of rainfall.

[20] Two hydrologically separate aquifers containing mixed geothermal fluid and groundwater occur above the deep geothermal reservoir at Rotokawa. These are the 'surface aquifer', which is an unconfined aquifer between approximate depths of 30 to 100m below ground level, and the 'intermediate aquifer', which is a confined aquifer that occurs approximately between 300 to 900 m below ground level.

[21] The Waikato Regional Plan lists the area as a Significant Geothermal Feature,



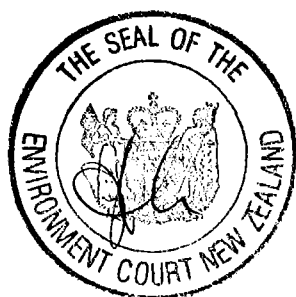
and the same area is listed as a Significant Natural Area in the Taupo District Plan. The environment surrounding the lake is rural and contains relatively few dwellings or farm buildings in close proximity. The predominant land uses within the area include rural grazing, cropping, forestry and power generation. Lake Rotokawa appears to be attractive to ducks and has been used for very many years by duck hunters.

[22] The resource potential of the geothermal field was first recognised in the early 1950s. Electricity generation of 24 MWe began on the field in 1997 with the installation of the binary Rotokawa A power plant. In 2000, the RJVL was formed and generation was subsequently expanded to 34 MWe. The Nga Awa Purua power plant was commissioned in 2010, with a capacity of 138 MWe. The RJVL was granted consent to increase production from the field to 65,500 t/d in 2011.

[23] The existing environment now includes the existing power plants and ancillary buildings (control room, staff facilities, storage), various wells and well pads for geothermal takes, reinjection and subsurface monitoring, and associated pipelines and a small facility for taking water from the Waikato River.

[24] Injection wells for the Nga Awa Purua plant were initially relatively shallow (500 to 1000 m depth) and tapped into an intermediate aquifer. Injection into the intermediate aquifer resulted in a build-up of pressure in this aquifer and in response injection was shifted to deep wells on the edge of the field. Injection was further shifted to a new area in the south of the field in 2008 following tracer testing which showed relatively fast return of injection fluid from the new deep injection location on the edge of the field back to production wells. Such a return is undesirable as it can, over time, result in cooling of the production fluid with subsequent loss of generation.

[25] Subsidence resulting from the geothermal operations to date has been monitored over the period from 1997 to 2015. The maximum recorded total net subsidence value is in the order of 220 mm. Subsidence rates, measured in mm/year, have varied over time, with the highest rates of up to approximately 46 mm/year occurring between 2004 and 2007, immediately following the cessation of injection into the intermediate aquifer. Since 2007, subsidence rates have slowed significantly. The most recent levelling surveys at Rotokawa conducted in 2013 and 2015 have shown maximum subsidence rates to be approximately 10 mm/year. Ground level changes have been relatively small at Rotokawa and structural damage due to subsidence has not been documented and is highly unlikely.



### Physical effects of the applications on the environment

[26] The planning experts agreed that the “envelope of effects” to be considered in the appeal can be summarised as:

- (a) The additional and cumulative effects arising from the expansion into the area beneath the Rotokawa Conservation Area.
- (b) The additional and cumulative effects arising from the 10,000 tonnes per day increase in the geothermal fluid take.
- (c) The actual and potential effects associated with extending the consent expiry date from 2043 to 2051.

We accept that this is the envelope of physical effects we are required to consider.

[27] Geo-mechanical modelling of the system indicates that additional subsidence effects due to the proposed consent will be negligible. In all cases, the predicted level of subsidence is minor compared to subsidence observed in other developed geothermal areas within New Zealand and around the world. The level of subsidence is highly unlikely to cause any damage to the built environment in the area or impact on the surface hydrology of the area.

[28] The potential for subsidence to change the relative water levels between the lake and lagoon was modelled because of the potential for water to flow from the lake to the lagoon, thereby changing the geothermal environment in that area. However, predicted tilt values for the Lake Rotokawa area suggest that after 50 years the additional risk of inundation of the lagoon area from the proposal is negligible.

[29] An evaluation of the changes in the surface thermal feature waters and shallow groundwater composition and chemistry since the commencement of production in 1997 showed that these have been very small and were considered to be of no consequence. A further assessment, including mathematical modelling, of the likely effects of the proposed increases to the consents on the surface features and shallow wells composition and chemistry concluded that there would be no deleterious impact on the shallow groundwater and thermal features associated with the relatively small increased take from 65,500 t/d to 75,500 t/d.

[30] Dr Brian Maunder, an expert geothermal consultant, undertook a



comprehensive assessment of the proposal for the Council in light of the existing environment, which is summarized in the Council's s 42A Report. Based on Dr Maunder's conclusions the reporting officer concluded that the adverse effects of the proposal on the environment would be no more than minor.<sup>2</sup>

[31] The Applicant's expert evidence demonstrates that:

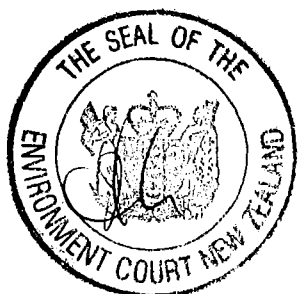
- (a) The most recent levelling surveys at Rotokawa conducted in 2013 and 2015 have shown maximum subsidence rates to be approximately 10 mm/year. Ground level changes have been relatively small at Rotokawa and structural damage due to subsidence has not been documented and is highly unlikely.
- (b) The effects of extensive geothermal development on the shallow groundwater and thermal features over 19 years of intensive monitoring are very small and will not be exacerbated by the proposed increases.

[32] The Appellant did not challenge any of the expert evidence presented by the Applicant on the physical effects on the geothermal resource and the geophysical environment. We accept that evidence and proceed on the uncontested basis that the resource consents have been appropriately assessed in relation to those physical aspects of the natural and physical resources at Rotokawa.

[33] We are satisfied, based on the above, that within the defined envelope of effects set out above at [26], the potential for physical changes to the geothermal resource as a result of the applications to give rise to significant cultural effects is at a very low level.

#### **Cultural and historical setting**

[34] We received evidence on the cultural and historical setting for the applications and this appeal from representatives of Ngāti Tūwharetoa being Mr David Rameka, Mr Chris Winitana and Mr Matiu Northcroft, and of Ngāti Tahu - Ngāti Whaoa being Ms Aroha Campbell, Ms Wikitoria Hepi - Te Huia and Mr Roger Pikia. We also received evidence on cultural and historical matters from expert witnesses, being Mr Buddy Mikaere, Mr Bruce Stirling and Mr David Armstrong. We also received



<sup>2</sup> Waikato regional Council s 42A Report dated 5 September 2016 at 8.1 and Appendix A.

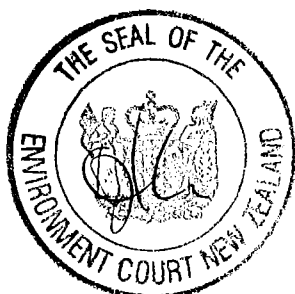
evidence from Ms Gina Rangī, the negotiation manager for Ngāti Tūwharetoa Hāpu Forum, summarising Ngāti Tūwharetoa's dealings with the Crown in relation to its claims under the Treaty of Waitangi Act 1975.

[35] We recite below very brief summaries of the evidence presented to the Court about the relationships of Ngāti Tūwharetoa and Ngāti Tahu - Ngāti Whaoa with the land and resources at Rotokawa. These are sufficient to indicate the basis for the reasoning in our decision but are not intended to limit the importance of all the evidence we received.

[36] The evidence presented from Ngāti Tūwharetoa is that they are the descendants of Ngātoroirangi, Tia and other tupuna and have occupied the central North Island since the arrival of the Te Arawa waka in Aotearoa. Their whakapapa to Ngātoroirangi includes their stories of how geothermal resources came to the central North Island through him. Their rohe encompasses the catchment of Lake Taupō and the upper Waikato, Whanganui, Rangitikei and Rangitaiki river catchments. Rotokawa is within this area. The hapū of Ngāti Tūwharetoa with connections to the Tauhara area, which includes Rotokawa, are Ngāti Hineure, Ngāti Hinerau, Ngāti Rauhoto, Ngāti Te Urunga, Ngāti Tūtemohuta and Ngāti Tutetawhā. They assert mana whenua over their rohe, including the Tauhara area, and they also acknowledge the presence of Ngāti Tahu in this area.

[37] The evidence presented from Ngāti Tahu - Ngāti Whaoa is that they are the descendants of Tahu Mahuta who arrived in Aotearoa prior to the seven main waka (including Te Arawa) and established himself at Orakei Korako when few other tribes were present in the central North Island. He drove out Ngāti Ruakōpiri and he and his descendants occupied and used the resources of the area from Lake Taupo to Lake Rotorua, moving from place to place according to seasonal resources. Ngāti Tahu - Ngāti Whaoa's rohe runs from Huka Falls east to the Kaingaroa plains, up to Kakaramea (Rainbow Mountain) and back across the Paeroa Range to Pohaturoa at Atiamuri, including the geothermal areas at Wai-o-tapu, Orakei Korako, Ohāki and Rotokawa. They assert mana whenua over their rohe and do not accept that Ngāti Tūwharetoa have mana whenua in or have exercised kaitiakitanga over this area.

[38] There is a great deal of detail in the evidence presented to us about both histories that differs depending on whose history is being recounted and who is doing the recounting. We note in passing that such differences occur in all forms of history,

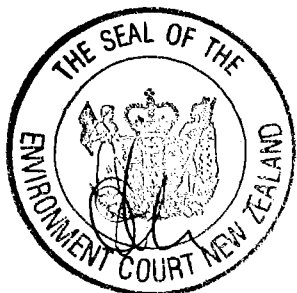


whether traditional, academic or popular, and whether oral or written. Mr Mikaere was called by RJVL to provide independent expert evidence about several cultural matters, including traditional history. He noted that the rohe of Te Arawa/Tūwharetoa is sometimes captured in the whakatauki *Ko te ihu o te waka kei Maketū, ko te kei o te waka kei Tongariro* (the prow of the waka Te Arawa is at Maketu, the stern is at Tongariro). This covers the Rotokawa area as well as a great deal more. In terms of specific detail about the Rotokawa area, however, we think from all we have heard that Mr Mikaere is right to describe the traditional history as “relatively thin.”

[39] There is also evidence that members of Ngāti Tūwharetoa and Ngāti Tahu - Ngāti Whaoa share many relationships through marriage and descent: some of the witnesses before us stated their whakapapa to include both iwi. That is not surprising but nor does it provide much assistance in resolving the issues on appeal given the positions taken by representatives of each iwi and by RJVL. For the reasons we give below, it is not necessary for us to dwell on either the connections or the differences between the two histories, because we have concluded that we do not need to resolve the conflicts arising from them in order to determine this appeal. Even so, a brief summary will assist in understanding the background to the issues that were argued before us.

[40] The arrival of European settlers in the central North Island in about 1845 led to significant changes for the people already there and the land they occupied. The context includes various land transfer processes between Māori and Europeans, as well as the rise of the Kingitanga movement and the wars related to it. For our purposes in this case, one of the more significant events was the action of the Native Land Court in 1869 awarding title to the Tauhara North Block, which includes the Rotokawa area, to Ngāti Tahu “by a general consensus” rather than to any of the Tauhara hapū of Ngāti Tūwharetoa. In 1897 there was an application by Tureiti Te Heuheu Tukino of Ngāti Tūwharetoa under the Native Equitable Owners Act 1886 to alter that outcome, but this was later withdrawn in favour of Ngāti Tahu.

[41] We heard detailed evidence from Mr Mikaere about events surrounding these actions which he recounted in support of his opinion that these events and the grant of title show that mana whenua over Rotokawa lies with Ngāti Tahu - Ngāti Whaoa. Mr Mikaere relied for his evidence principally on a lengthy extract from a report dated September 2004 titled *Central North Island Inquiry - Taupo-Kaingaroa Nineteenth Century Overview Volume 1*, by Bruce Stirling.



[42] In response, Tūwharetoa called the author of that report. Mr Stirling characterised Mr Mikaere's reading of his report as narrow and said his failure to consult primary sources had led to conclusions unsupported by the evidence. In particular, Mr Stirling explained that the award by the Native Land Court in 1869 was not determinative of customary interests, that current claims are supported by the historical record and that there is significant evidence of contested mana whenua at Tauhara North. He concluded that there is no doubt that mana whenua was asserted by Ngāti Tahu - Ngāti Whaoa at Rotokawa and acknowledged by several hapū of Ngāti Tūwharetoa in the 1860s and that there is equally no doubt that the mana whenua of several hapū of Ngāti Tūwharetoa was asserted by them in that period and was acknowledged by Ngāti Tahu - Ngāti Whaoa.

[43] In rebuttal, Mr Mikaere took issue with a number of Mr Stirling's points. In particular he opined that the question of who holds mana whenua is not determined by who has customary interests. He remained of the view that the award of title by the Native Land Court was determinative.

[44] RJVL also called Mr Armstrong, a colleague of Mr Stirling and the author of two reports relating to another extensive application in 1885-86 relating to the whole of Tauponuiatia. These reports were presented in support of the contention that Ngāti Tūwharetoa did not, at that stage, seek to challenge the 1869 award of title.

[45] All of this evidence is intrinsically of great interest to anyone concerned about the history of New Zealand and the impacts of colonisation on land tenure, but this is not a case about the title to land at Rotokawa. To the extent that matters of title were traversed in the cases presented to us, we do not understand such matters to be determinative of the requirement in s 6(e) of the Act that we recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as a matter of national importance.<sup>3</sup> On a similar basis, we do not think that ownership is determinative of how we must, under s 7(a), have particular regard to kaitiakitanga or, under s 8, take the principles of the Treaty of Waitangi into account. These statutory considerations turn on different kinds of relationships than matters of title. As we discuss below, we consider that the resolution of the issues arising in this appeal can best be achieved by resource

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<sup>3</sup> *Royal Forest & Bird Protection Society Inc v W.A. Habgood Ltd* (1987) 12 NZTPA 76 at 79-81 (HC).



management methods that do not depend on property rights.

[46] During the presentation of opening submissions by Ms Campbell, counsel for RJVL, the Court postulated that we were:

... not sure that there's a challenge to land ownership or possession and it's not apparent from the evidence that there's a challenge to rangātiratanga, but in terms of active protection surely within section 6(e) any Māori who do have an ancestral relationship are entitled to the protection under section 6 of that relationship.

[47] Ms Campbell replied:

Yes and I think the evidence for the Joint Venture accepts that Ngāti Tūwharetoa has an interest and has a relationship with this area. There's no disputing that, it's stated in the evidence. The question is what is the nature and the extent of that relationship ...

[48] Counsel for Tūwharetoa, Mr Muldowney, stated in closing:

Ngāti Tūwharetoa acknowledge the ancestral connection of Ngāti Tahu to Rotokawa and its asserted mana whenua status in respect of Rotokawa. Ngāti Tūwharetoa accepts that it holds mana whenua over Rotokawa jointly with Ngāti Tahu. Ngāti Tūwharetoa does not seek any finding from the Court on equivalence, parity or a ranking of this shared status.

[49] Counsel for the respondent Council, Mr Plant, stated in closing:

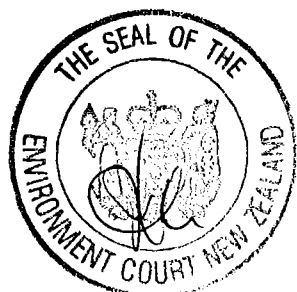
The application site falls within an area where the rohe of Ngāti Tūwharetoa and Ngāti Tahu-Whaoa overlap.

[50] In closing submissions for RJVL, Ms Campbell stated:

The parties to these proceedings ... are unanimous in recognising the customary authority of Ngāti Tahu-Ngāti Whaoa over the Rotokawa area and the geothermal resource. In contrast, the Tūwharetoa Māori Trust Board has claimed a customary authority that Ngāti Tahu-Ngāti Whaoa opposes and no other party has recognised.

[51] It may be that this last statement in [50] is to be reconciled with counsel's earlier answer quoted in [47] by recognising that customary authority may mean something more than an interest in land or a relationship with the land or area. Certainly, the concepts of customary authority (as understood by those whose customs are involved) and interests in land (as understood in terms of the general law of property) are different and it is unlikely to be constructive to attempt to deal them as if they were equivalent or even directly comparable.<sup>4</sup>

[52] In any event, this case is not about determining customary authority any more



<sup>4</sup> *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 at [46] – [48] per Elias CJ (CA).

than it is about title: it is about the most appropriate conditions of resource consent relating to the use and development of the Rotokawa geothermal field. We do note the following matters which are relevant in that regard:

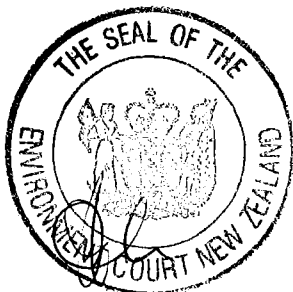
- (a) The operative Waikato Regional Plan identifies various iwi, including Ngāti Tūwharetoa and Ngāti Tahu, as having an interest in geothermal energy. More specifically, Section 2.2.5 of the Plan identifies the rohe of Ngāti Tūwharetoa as spanning the Taupo District encompassing Lake Taupo, the Waikato river and geothermal taonga.
- (b) Section 2.2.5.2 of the Waikato Regional Plan states:
 

Waikato Regional Council recognises and acknowledges that Ngāti Tūwharetoa are tangata whenua of their rohe. Waikato Regional Council also recognises and acknowledges the important physical, spiritual, cultural, social and economic values held by Ngāti Tūwharetoa in regard to the natural and physical resources in their rohe.
- (c) The Regional Council has acknowledged this by reference to information provided by the Crown through its Te Kahui Mangai website. This shows the application site falling within an area where the rohe of Ngāti Tūwharetoa and Ngāti Tahu-Whaoa overlap.

[53] In his closing legal submissions, counsel for the Council submitted that "... the Council does not make decisions on who has mana whenua and kaitiakitanga status and accordingly it is abiding the Court's decision in that regard." This approach by the Council presents the Court with difficulties for at least two reasons.

[54] The first difficulty is that the Council effectively did make such a decision by its Commissioners' rejection of Tūwharetoa's submission seeking a kaitiaki role on the Peer Review Panel, which is why this matter has come before the Court.

[55] The second difficulty is that a Council cannot abdicate its role as a decision-maker in respect of a matter that is an essential element of resource management in the application before it.<sup>5</sup> It may be that a Council would rather not make such a decision because of the risk of error, or perhaps in the hope of not causing offence to a person against whose interests the decision is made, but abdication is not an option available to it. A decision-maker is required to make decisions and so, for better or



<sup>5</sup> *Verstraete v FNDC* [2013] NZEnvC 108.

worse, it must address the issues before it, including those of status where they arise.

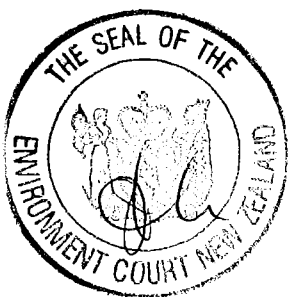
[56] We were also told that the rohe of Ngāti Tūwharetoa is as defined by the Area of Interest in the Deed of Settlement of Historical Claims between Ngāti Tūwharetoa and the Crown signed on 8 July 2017<sup>6</sup> and encompasses the site of the applications. The Deed also provides that legislation to implement the settlement will, on specified terms, provide the Crown's acknowledgement of the statements by Ngāti Tūwharetoa of their particular cultural, spiritual, historical and traditional association with Lake Rotokawa and the Rotokawa geothermal field, as shown on specified plans. While this is not an acknowledgement of exclusive interests in the defined areas, it will require the relevant consent authorities and the Environment Court to have regard to the statutory acknowledgement. This is not an obligation on the parties or the Court now, as the legislation has not been enacted and the Deed states that it remains conditional on the settlement legislation coming into force, but it does indicate that the Crown has recognised that Ngāti Tūwharetoa has an interest in the application site.

[57] There is however a particular difficulty in the Court considering this Deed as evidence. While this Deed was publicly announced at the time of its execution and is now the subject of a Bill before Parliament,<sup>7</sup> clause 10.7 of the Deed states that it is "without prejudice" until it becomes unconditional" and is not to be used as evidence in proceedings before any court. There was some discussion of this with counsel and certain witnesses. The most that may be able to be said in this setting is that the Deed certainly exists and contains a number of statements bearing on the issues before us, but is not to be used as primary evidence of what it contains until it is given effect by an Act of Parliament.

[58] Leaving the Deed to one side, it is clear to us from the primary evidence, and ultimately not disputed, that both Ngāti Tahu - Ngāti Whaoa and Ngāti Tūwharetoa have a range of interests in the Rotokawa area. While they have a number of interests in common, there have also been conflicts between them historically at times. It is not for this Court to pursue those matters further, and we have limited our considerations to matters that are relevant to our decision under the Act, as set out below.

<sup>6</sup> Attachment 10 to Ms Rangī's Statement of Evidence.

<sup>7</sup> Ngāti Tūwharetoa Claims Settlement Bill, introduced on 1 August 2017 and given its first reading on 19 December 2017.



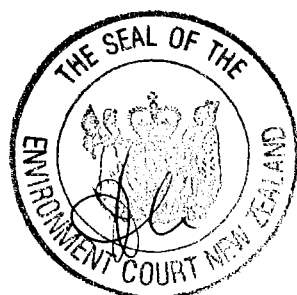
### Cultural effects of concern to Ngāti Tūwharetoa

[59] A key issue for Ngāti Tūwharetoa, both prior to and during the hearing, was that inadequate consideration had been given to cultural effects of concern to Ngāti Tūwharetoa arising from the applications. The hearing provided an opportunity for all parties and the Court to address this issue as they considered appropriate, and we are satisfied that there is now sufficient information before us to provide a proper understanding these effects.

[60] The Tūwharetoa Maori Trust Board identified Ngāti Hinerau and Ngāti Hineure as hāpu and as parties directly affected by the application.<sup>8</sup> No representative of either of those hāpu gave evidence before the Court. The commissioners' Decision Report<sup>9</sup> records that a Mr Ross gave evidence in support of Ngāti Tūwharetoa and was authorised to do so on behalf of the two hāpu at that hearing. Under questioning by the commissioners, Mr Ross identified the following potential cultural effects of the application:

- respect for the taonga as a whole, which Mr Ross confirmed equated to the sustainable management of the Rotokawa geothermal steamfield;
- ground subsidence;
- potential impacts on geothermal surface features;
- continued access to the Lake Rotokawa Conservation Area to gather certain materials and minerals for rongoa (medicinal) and other purposes; and
- involvement in the ongoing management of the geothermal resource and the Lake Rotokawa Conservation Area "at all levels in a meaningful role".

[61] Mr Northcroft gave evidence to highlight the adverse cultural effects on Ngāti Tutetawhā (one of the Rotokawa iwi identified by Tūwharetoa) said to have arisen as a result of the grant of the consents. The evidence also addressed numerous matters relating to mana whenua, mana tipuna, whakapapa tūturu, ancestral connections to Rotokawa, cultural redress through the Lake Rotokawa Conservation Area being returned to Ngāti Tūwharetoa, customary claims, the Ngāti Tūwharetoa Treaty of Waitangi settlement, lost ability to participate in the care of and mitigation of risk to the whenua and Lake Rotokawa and the need to regard and manage the surface and subsurface geothermal resource in an holistic manner.



<sup>8</sup> Notice of appeal at 8 (c) (i).

<sup>9</sup> At [030] and [031]

[62] We reviewed the September 2016 statement of evidence of Mr Ross which was attached to Mr Northcote's statement of evidence. In that statement Mr Ross addressed matters related to mana whenua, the significance of the resource to the Hāpu and what it was used for, the effects of expanding activities and the Hāpu's exercise of kaitiakitanga and sustainable development in the region and the treaty settlement

[63] Ms Rangi gave evidence on the treaty negotiations and Ngāti Tūwharetoa's overarching aspirations for rangātiratanga and kaitiakitanga to be restored and enhanced.

[64] Mr Rameka stated in evidence that:

... failed consultation and engagement with relevant affected parties ... has led to an incomplete assessment of cultural effects at the WRC hearing.

He noted that:

[t]here is no provision for Ngāti Tūwharetoa, or the Tauhara Hāpu, to perform their ongoing kaitiaki role ...

which he identified as a significant effect. Mr Rameka identified:

... the critical cultural effect which now arises is the disconnection, alienation, and disenfranchisement felt by Ngāti Tūwharetoa in respect of the Rotokawa Geothermal taonga, including Lake Rotokawa

and said:

[t]his effect arises because the consent has failed to recognise and provide for Ngāti Tūwharetoa's relationship to this taonga.

His evidence provided no further details of specific cultural effects of concern that were not identified by other witnesses and recorded in this part of our decision.

[65] Mr Winitana stated in evidence that:

WRC's failure to give proper weight to Tūwharetoa's ability for on-going meaningful engagement with its whakapapa lineage-defined geothermal resource has in itself produced the most insidious and profoundly negative of all cultural effects. And that is, broken lineage, the inability of a descendant to speak for their ancestor.

And also:

In its judgement, the WRC perceived that the cultural effects on the two tribes were ostensibly the same and could be mitigated or dealt with in the same way. This perception is wrong.

[66] Mr Stirling's evidence related to Ngāti Tūwharetoa's customary interests in the vicinity of Lake Rotokawa in the Tauhara North block.



[67] Matters relating to cultural redress under the Treaty of Waitangi are not matters this Court can address. Similarly, Mr Ross' concern about continued access to the Lake Rotokawa Conservation Area is not a matter this Court can address as it relates to land access rights. Further, Mr Ross' expectation that this Court can authorise involvement in the ongoing management of the geothermal resource and the Lake Rotokawa Conservation Area "at all levels in a meaningful role" cannot be met. These are matters for the RJVL as owner of the land and the physical works required to generate electricity, with responsibility for complying with the conditions of its resource consents. We put these matters to one side.

[68] We consider that the other matters of cultural concern summarised above fall into the following three main areas which, for the reasons we set out below, are within the scope of this Court's jurisdiction:

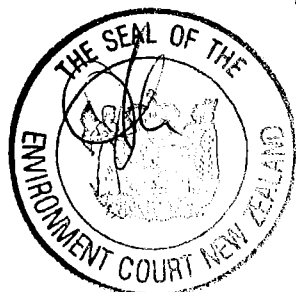
- (a) The associations of Ngāti Tūwharetoa with land affected by the applications, and the exercise of kaitiakitanga;
- (b) The importance of Lake Rotokawa and the Rotokawa geothermal resource as taonga of Ngāti Tūwharetoa; and
- (c) The potential for physical effects arising from the applications to result in adverse cultural effects.

### **The relevant statutory planning framework**

[69] We received expert evidence on planning and relevant plan provisions from Mr Collins, Dr Mitchell and Ms Roa. The three witnesses also produced two joint witness statements (**JWS**) in the field of planning dated 19 June 2017 and 21 July 2017.

[70] Paragraph 18 of the JWS dated 19 June 2017 records that the planners agreed that the Waikato Regional Policy Statement (**RPS**) and Waikato Regional Plan (**WRP**) comprehensively address Part 2 matters, including sections 6(c), 6(e), 7(a), 7(b), 7(f) and 7(j).

[71] Matters relating to sections 6(c), 7(b) and 7(j) are not in dispute in this case and we have not considered them further. In view of the significance of sections 6(e) and 7(a) to our decision, we set them out below:



## 6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: ...

- (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga: ...

## 7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

- (a) kaitiakitanga: ...

[72] In addressing *kaitiakitanga* it is necessary to set out the relevant statutory definition of that word and the definitions of its associated phrases from s 2 of the Act:

- a) *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;
- b) *mana whenua* means customary authority exercised by an iwi or hapu in an identified area;
- c) *tangata whenua*, in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area; and
- d) *tikanga Māori* means Māori customary values and practices.

[73] Counsel for RJVL advanced an argument that these definitions, in their terms, indicate that there is a singular relationship between an iwi or hapū as tangata whenua and their mana whenua in a particular area. This was the basis for her client's case that only Ngāti Tahu - Ngāti Whaoa could exercise kaitiakitanga in respect of Rotokawa.

[74] Paragraph 6 of the JWS records the key planning issue identified by these witnesses as follows:

Because the technical evidence is not in dispute, the planners agreed that the key planning issue is how cultural effects and the exercising of kaitiakitanga are to be addressed and reflected in the conditions in Schedule M. Subject to satisfactory resolution of this key planning issue, then granting of the consents sought would be consistent with the relevant planning provisions. The relevant planning provisions are agreed, as set out below.

[75] Paragraph 19 of the JWS records:

The planners disagreed with the extent of changes that may be needed to the conditions of consent to address the key planning issue as expressed in paragraph 6 above.



[76] We considered the RPS and WRP objectives and policies agreed by the planning experts as requiring specific consideration,<sup>10</sup> and which were relevant to the decision before us. We set these out below.

### **Waikato Regional Policy Statement**

#### **Objective 3.3 – Decision making**

Resource management decision making is holistic and consistent and: ...

- d. adopts a precautionary approach, including the use of adaptive management, where appropriate, towards any proposed activity whose effects may be significant or irreversible but are as yet uncertain, unknown or little understood;  
...
- f. has regard to the potential for cumulative effects from activities;
- g. is based on the best available information, including mātauranga Māori;
- i. recognises that time may be needed for change to occur;
- j. includes working with tāngata whenua;
- m. results in solutions which include processes to minimise conflicts

#### **Objective 3.9 – Relationship of tāngata whenua with the environment**

The relationship of tāngata whenua with the environment is recognised and provided for, including:

- a. the use and enjoyment of natural and physical resources in accordance with tikanga Māori, including mātauranga Māori; and
- b. the role of tāngata whenua as kaitiaki.

#### **Policy 4.3 – Tangata whenua**

Tāngata whenua are provided appropriate opportunities to express, maintain and enhance the relationship with their rohe through resource management and other local authority processes.

#### **Policy 9.8 – Geothermal characteristics valued by tāngata whenua**

Recognise and provide for the ahi kā (mana whenua) relationship of tāngata whenua and their role as kaitiaki with the characteristics of particular geothermal systems, fields and geothermal features. Ensure that tāngata whenua identify specific resource management matters of traditional and contemporary cultural significance.

#### **Explanation relating to Policy 9.8**

Māori have a special relationship with geothermal resources and consider them as taonga. This places an obligation on tāngata whenua as kaitiaki to ensure that geothermal resources are maintained and handed on to future generations in a healthy condition. Tāngata whenua with particular interest in geothermal resources include people from Waikato-Tainui, Ngāti Tūwharetoa, Raukawa, Te Arawa, and Hauraki.

#### **Relevant definitions from the Glossary to the Regional Policy Statement**



<sup>10</sup> JWS dated 19 June 2017, at 11 to 15.

**Ahi kā** – central to the concept of ahi kā is the notion of occupation, occupying a place with iwi, or hapū to maintain a representational presence on the part of whānau. This concept is linked with mana whenua, the idea of maintaining strong links to areas by occupation gives a sense of higher and senior priority over decision making.

**Kaitiaki** – those that safeguard taonga. They are usually people, but have also been known to be spiritual forces. It is not a role of ownership, but one of custodianship.

**Kaitiakitanga** – is exemplified through the practices used by kaitiaki in safeguarding, protecting and caring for resources.

**Mana whenua** – the priority given to people to make decisions about the use of resources over an area of land that they are responsible for.

**Mātauranga Māori** – traditional Māori knowledge - the body of knowledge originating from Māori ancestors, including the Māori world view and perspectives, Māori creativity and cultural practices.

**Rohe** – the geographical area closely linked to iwi or hapū. That iwi or hapū will exercise mana over that area and so has mana whenua over it.

**Tāngata whenua**, as defined in the Act – in relation to a particular area, means the iwi, or hapū, that hold mana whenua over that area.

## Waikato Regional Plan

### Section 2.2.5 Ngāti Tūwharetoa

... The rohe of Ngāti Tūwharetoa spans the Taupo District encompassing Lake Taupo, the Waikato River, geothermal taonga and the central North Island mountains Ruapehu, Ngauruhoe, Tauhara and Tongariro. ...

#### Section 2.2.5.2 Recognition

Waikato Regional Council recognises and acknowledges that Ngāti Tūwharetoa are tangata whenua of their rohe. Waikato Regional Council also recognises and acknowledges the important physical, spiritual, cultural, social and economic values held by Ngāti Tūwharetoa in regard to the natural and physical resources in their rohe.

#### Objective 2.3.2

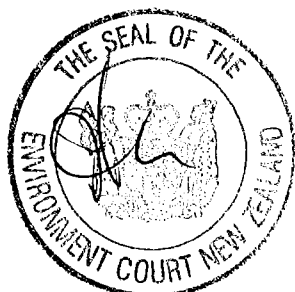
1. Uncertainty for all parties regarding the relationship between tangata whenua and resources for which they are Kaitiaki minimised.
2. Tangata whenua able to give effect to kaitiakitanga

[77] The planners agreed that the application should be assessed as a discretionary activity under Rule 7.6.1.4, which relevantly provides:

#### 7.6.1.4 Discretionary Activity Rule – Large and Other Takes of Geothermal Ground Water and Energy from Development Geothermal Systems

Except as permitted or regulated by Rules 7.6.1.1, 7.6.1.2, 7.6.1.3, 3.3.4.11, and Rules within sections 3.5.8 and 3.8, any take or use of geothermal ground water and energy, within a Development Geothermal System or from geothermal water that has been shown to be strongly hydrologically connected to a Development Geothermal System is a **discretionary activity** (requiring resource consent), subject to the following standard:

- a. For takes exceeding 6,000 tonnes per day, a draft System Management Plan being prepared and provided to Waikato Regional Council (Waikato Regional Council) as part of the documentation supporting a Resource Consent



application in accordance with the Policies and other Methods of this Geothermal Module.

[78] Rule 7.6.1.4 also sets out a range of additional assessment criteria for a discretionary activity. The following criterion is of particular relevance to this case:

- iv) The extent to which the cultural values of tangata whenua are recognised including their kaitiaki role with the geothermal resource;

[79] For completeness, we considered the requirements of the National Policy Statement for Renewable Electricity Generation. This is not a matter of dispute between the parties and is not relevant to the decision we are required to make in this case.<sup>11</sup>

### **The consultation process**

[80] The only consultation matter under appeal relates to consultation between the applicant and Ngāti Tūwharetoa and its associated iwi, hāpu and other entities. Accordingly, this is the only matter relating to consultation addressed in our decision.

[81] We received evidence on this aspect of consultation from Mr Jackson, Ms Campbell, and Mr Rameka.

[82] It is clear from the evidence before us that effective consultation was compromised because:

- (a) Tūwharetoa considered that consultation was required not only with the Trust Board itself, but with other entities of Ngāti Tūwharetoa, which the Trust Board identified differently at different times, and which were the subject of disagreement by the RJVL and the Council;
- (b) The consultation process associated with RJVL's application coincided with a Treaty of Waitangi settlement negotiation between Ngāti Tūwharetoa and the Crown. This became a major impediment to effective consultation on the application; and
- (c) There appears to have been an assumption by both the RJVL and the Council that cultural effects on Ngāti Tūwharetoa were adequately addressed by the RJVL, but with no effective input from Ngāti Tūwharetoa.



<sup>11</sup> JWS dated 19 June 2017, at 16.

[84] Attachment 4 to Mr Rameka's evidence set out a chronology of consultation undertaken between the RJVL and Tūwharetoa in relation to the consent applications. We have carefully reviewed the correspondence attached to the chronology and consider that up until the time the issue of actual or potential cultural effects on Ngāti Tūwharetoa was raised in Tūwharetoa's letter of 5 May 2016, the consultation process was proceeding in a constructive manner, consistent with normally accepted good practice, with goodwill on the part of those representing the RJVL and Tūwharetoa.

[85] The introduction of the cultural effects issue appears to have been pivotal in determining the progress of future consultation, and effectively resulting in no further meaningful progress being made.

[86] Due to the complexities and alternate viewpoints associated with the Tūwharetoa Agreement in Principle with the Crown (AIP), RJVL decided not to undertake a specific assessment of cultural effects on Tūwharetoa. RJVL instead relied on consultation with Tūwharetoa and advice from the Trust and Ngāti Tahu - Ngāti Whaoa regarding cultural matters, as it had done for earlier Rotokawa consent applications.

[87] As mentioned by Mrs Campbell, consultation with Tūwharetoa was complicated by Tūwharetoa's Treaty settlement process occurring at the same time. This was partly why RJVL did not initially pursue additional discussions with the Ngāti Tūwharetoa Hapū Forum. To do so would have compromised the Trust's submission in opposition to Tūwharetoa's AIP.

[88] By way of observation, we note the following additional matters that in our view were unhelpful in promoting effective consultation on the applications:

- (a) Both the RJVL and the Council appear to have placed considerable reliance on processes undertaken 20 years ago to guide the identification of potentially affected parties in today's environment. Many changes in circumstances are likely to have occurred in the intervening period, bringing into question the assumptions made.
- (b) The RPS identifies Ngāti Tūwharetoa as mana whenua of its rohe. In that light, we find it difficult to understand how the Council initially identified Ngāti Tūwharetoa as an interested party, not an affected party. In reviewing the overall guidance provided by the Council, we



found it to be in conflict with its own planning documents at times, and not conducive to effective consultation outcomes.

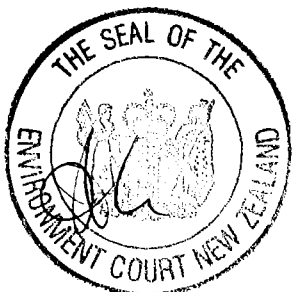
- (c) Tūwharetoa's consistent expectation that the RJVL should consult with the Ngāti Tūwharetoa Hāpu Forum, a collective group with no status of its own under the Act, was unrealistic and inappropriate.
- (d) The advice provided by Tūwharetoa on who was to be consulted lacked clarity and was inconsistent over time. Parties who Tūwharetoa variously requested should be consulted ranged from "Ngāti Tūwharetoa marae / Hāpu and economic authorities", to Ngāti Hinerau and Ngāti Hinuere in the Notice of Appeal to the "Tauhara Hāpu", a much wider group of Hāpu in the conditions proposed at the hearing.

[89] By way of a further observation, while acknowledging there is no requirement to consult under the Act, in the Court's experience effective consultation can assist greatly in ensuring effective and enduring resource management outcomes. This was effectively acknowledged by Mr Jackson, RJVL's Consents and Compliance Manager, in his evidence. Put simply, the way in which the overall consultation of relevance to the appeal was approached by the RJVL, Tūwharetoa and the Council fell well short of what we consider to be current good practice by all three parties.

### **Evaluation**

[90] While Tūwharetoa was clearly dissatisfied with the consultation process, this appeal provided the opportunity for Tūwharetoa and any of the entities it considered to be affected to participate to the extent they considered necessary to inform us of their concerns so that we can take them into account. We also consider that the difficulties around consultation that occurred were not the sole responsibility of any of the parties involved, but were contributed to in different ways by all of them.

[91] It is also clear to us that Tūwharetoa was dissatisfied with the notification process. We are satisfied that the Council used a process consistent with guidelines it had developed for the purpose when making its limited notification decision, and regardless of our view of the adequacy of that process, we do not consider any party to the process was disadvantaged. If Tūwharetoa considered that any of its entities should have had the opportunity to decide if they wished to participate in the process, there was no constraint on Tūwharetoa facilitating that opportunity.



[92] We note that the Council's commissioners queried RJVL about the notification process and the requirements of s 104(3)(d) of the Act, which requires that a resource consent authority must not grant a consent if the application should have been notified and was not. The commissioners accepted submissions from RJVL's counsel that the section did not apply as the applications had been notified on a limited basis.<sup>12</sup> As Tūwharetoa was notified and exercised its rights of submission and appeal, we leave to one side the issue of whether s 104(3)(d) is satisfied by limited notification, whatever the circumstances of the limitation.

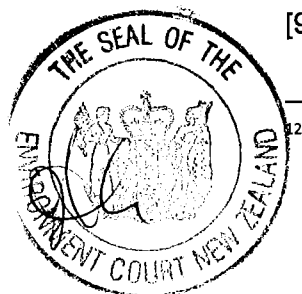
[93] With regard to the statutory definitions of kaitiakitanga and associated terms in te reo Māori, we start by observing that a rendering of a word or phrase in one language into words or phrases in another is not normally regarded as a definition. A definition in this context is the explanation of the meaning of a word or phrase using the same language. Rendering a word or phrase in one language into another language is normally regarded as a process of translation. There are important differences between a definition and a translation, not least being the degree to which the idiomatic usage of a particular language or other cultural factors may affect the meaning of the word or phrase, whether in the abstract or in some particular context. A primary difference in this case is that the normal purpose of a statutory definition is to set limits to or otherwise specify the meaning of the word or phrase being defined in the same language, while the purpose of translation is to carry the meaning of a word or words over from one language into another. Definitions are essential elements of legislation, but translation is not normally part of legislation.

[94] This issue assumed importance in this case given the arguments advanced strongly by RJVL that only one iwi or hapū can be the tangata whenua in a particular area, exercise mana whenua in that identified area and thus exercise kaitiakitanga in relation to natural and physical resources in that area. One of the arguments is that the definitions themselves are worded in a way that implies that only one iwi or hapū can be tangata whenua in a particular area. On a prosaic level, we could dismiss that argument simply on the basis that it takes no account of the requirement in s33 Interpretation Act 2009 that in interpreting New Zealand legislation, words in the singular include the plural and words in the plural include the singular.

[95] Other arguments turned on the nature of mana whenua and of the relationships

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<sup>12</sup> Decision Report at [012].



between iwi and hapū, as distinct from the relationships between people and resources. Because problems can arise where a word or phrase in te reo Māori is the subject of a definition in English, we are reluctant to apply these definitions strictly in a way that is based more on the parsing of the English than the customary understanding of the concepts expressed in te reo Māori.

[96] We observe that the Waitangi Tribunal has trenchantly criticised these definitions in its report on Rekohu.<sup>13</sup> The Tribunal's report questions whether they accurately convey the customary meanings of the concepts such as *tangata whenua* and *mana whenua* which they purport to define. The Tribunal also notes generally, among other things, that more than one group of people may have ancestral connections to a single area of land. We accept that these statements by the Waitangi Tribunal are not binding on us but we have found them helpful in gaining some understanding of these issues.

[97] This is not the first time that issues such as this have come before the Environment Court. There are previous decisions which indicate that there is no reason why there cannot be more than one tangata whenua in any given area.<sup>14</sup> We also note a comment by the Maori Appellate Court to the same effect.<sup>15</sup>

[98] Ultimately, we can avoid much of the complexity that otherwise arises from detailed consideration of these definitions by proceeding on the basis that the present dispute between Ngāti Tūwharetoa and Ngāti Tahu - Ngāti Whaoa can be assessed by this Court within its jurisdiction as much in terms of s 6(e) as of s 7(a). In particular, the meaning of "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" does not involve the problematic inter-related English definitions of Māori terms. In that context, the core issue raised in this appeal is primarily a matter of dealing with the monitoring and reporting conditions of the resource consents rather than attempting or purporting to deal with competing claims to status, title or power.

[99] A further argument advanced on behalf of RJVL is that the rights attaching to

<sup>13</sup> *Rekohu – A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands*, WAI 64, 2001, Section 2.6, pp. 24 - 29.

<sup>14</sup> *Ngāti Hokopu ki Hokowhitu v Whakatane DC C168/02*; (2002) 9 ELRNZ 111 at [44]; *Ngāti Rahiri Hapu o te Atiawa (Taranaki) Soc Inc v NZ Historic Places Trust (Pouhere Taonga)* [2013] NZEnvC 113 at [25] - [26].

<sup>15</sup> *Re an appeal by Rangitane o Tamaki Nui-a-rua Inc Soc*, Appeal 1995/15, p.9.



mana whenua are integral and cannot be divided or shared without diminishing what is due to whoever is tangata whenua. To the extent that this argument remains available after considering the rejection of it in customary terms by the Waitangi Tribunal, it appears also to be contrary to fundamental legal concepts of the common law correlating rights with duties and powers with liabilities.<sup>16</sup> According to these concepts, it is not correct to treat a right or power held by one person to be absolute when applied to another person: it is essential to consider any right or power one holds in relation to the corresponding duties or liabilities to others which correlate to that right or power and to recognise the limits or qualifications of each correlative in such relationships.

[100] On the material plane, the very limited physical effects of the consented activities that are now occurring or are predicted to occur on the geothermal resource indicate that the resource is already being effectively safeguarded, protected and cared for in accordance with the principles of kaitiakitanga, the ethic of stewardship and the purpose of the Act as they relate to such physical considerations. But the Appellant's case is addressed to social or cultural effects, including the metaphysical aspects of those effects, and these are equally relevant in terms of the duty under s6(e) to recognise and provide for the relationship of Māori with this resource.<sup>17</sup>

[101] As noted in paragraph [48] above, Mr Muldowney stated that Ngāti Tūwharetoa acknowledge the ancestral connection of Ngāti Tahu - Ngāti Whaoa to Rotokawa and its asserted mana whenua status in respect of Rotokawa. Accordingly, we do not understand Ngāti Tūwharetoa to be requiring the existing kaitiaki role(s) to be changed, but rather they are seeking the ability to exercise kaitiakitanga on their own behalf in addition to its exercise by Ngāti Tahu - Ngāti Whaoa.

[102] In considering this matter, we referred in the first instance to the relevant planning documents and the following provisions, in particular:

- (a) Waikato Regional Council recognises and acknowledges that Ngāti Tūwharetoa are tangata whenua of their rohe (WRP Section 2.2.5).



<sup>16</sup> *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W N Hohfeld, Yale University Press, 1919; see, e.g. *Lai v Chamberlains* [2005] 3 NZLR 291 at [163] – [166] per Hammond J.

<sup>17</sup> *Ngāti Hokopu ki Hokowhitu v Whakatane DC C168/02*; (2002) 9 ELRNZ 111 at [441] – [442].

- (b) The relationship of tangata whenua with the environment is recognised and provided for, including the role of tangata whenua as kaitiaki (RPS Objective 3.9 b.).
- (c) Tangata whenua are provided appropriate opportunities to express, maintain and enhance the relationship with their rohe through resource management and other local authority processes (RPS Policy 4.3).
- (d) Ensure that tangata whenua identify specific resource management matters of traditional and contemporary cultural significance (RPS Policy 9.8).
- (e) Tangata whenua able to give effect to kaitiakitanga (WRP Objective 2.3.2 (2))
- (f) Resource management decision making is holistic and consistent and is based on the best available information, including mātauranga Māori (RPS Objective 3.3 (g)).

[103] The same planning documents require that:

- (a) Resource management decision making is holistic and consistent and results in solutions which include processes to minimise conflicts (RPS Objective 3.3 (m)).
- (b) Uncertainty for all parties regarding the relationship between tangata whenua and resources for which they are Kaitiaki minimised (WRP Objective 2.3.2 (1)).

[104] Under the assessment criteria for discretionary activities in Rule 7.6.1.4 iv of the WRP, we are required to consider "The extent to which the cultural values of tangata whenua are recognised including their kaitiaki role with the geothermal resource."

[105] Having reviewed the relevant requirements of the applicable planning documents, we next consider what constitutes the rohe of Ngāti Tūwharetoa. Section 2.2.5 of the WRP states:

The rohe of Ngāti Tūwharetoa spans the Taupo District encompassing Lake Taupo, the Waikato River, geothermal taonga and the central North Island mountains Ruapehu, Ngauruhoe, Tauhara and Tongariro.

[106] As noted above, the Crown, on its Te Kahui Mangai website, shows the



application site falling within an area where the rohe of Ngāti Tūwharetoa and Ngāti Tahu - Ngāti Whaoa overlap.

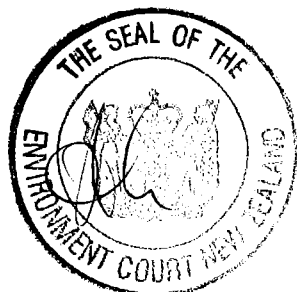
[107] It is clear to us from the evidence that the application site falls within the rohe of Ngāti Tūwharetoa. The Council followed the Schedule 1 process under the Act before including its acceptance in the planning documents, and challenges to Ngāti Tūwharetoa's rohe, if any, would have been fully considered as part of that process and reflected in the Council's decision. We see no basis to redefine the rohe as part of these applications and, as a consequence, the planning provisions quoted in [76] to [78] above apply. We note that Mr Muldowney recorded in his closing submissions that "at no stage has the Applicant sought to challenge these planning provisions."

[108] The relevant provisions require us to address the question of how a kaitiaki role for Ngāti Tūwharetoa should be included in conditions of consent, while satisfying the plan provisions set out in [76] to [78] above. However, the provisions provide no clear guidance on how that is most appropriately achieved in this case to achieve the purpose of the Act. In view of this lack of clear guidance we have considered the question by breaking it into the following:

- (a) Which is the appropriate Ngāti Tūwharetoa entity to be identified in conditions of consent?
- (b) What matters are not appropriate for inclusion in a kaitiaki role for Ngāti Tūwharetoa?
- (c) What matters are appropriate for inclusion in a kaitiaki role for Ngāti Tūwharetoa?
- (d) What are appropriate conditions?

[109] The Council views Tūwharetoa (the Trust Board) as the principal point of contact in respect to resource management issues and was the entity of the Ngāti Tūwharetoa Iwi that was served notice of the applications.<sup>18</sup> Tūwharetoa pressed hard for wider notification and for direct consultation with a number of different Ngāti Tūwharetoa entities. It is not conducive to effective resource management that the Trust Board provided inconsistent advice as to which entities should be consulted at different times through the process, and that the Hāpu to be consulted were initially identified as Ngāti Hinerau and Ngāti Hineure, but by the time of the hearing this had increased to

<sup>18</sup> Section 42A Report at 6.2.



the six "Tauhara Hāpu".

[110] The plan provisions identified earlier in our decision require uncertainty relating to the exercise of kaitiaki to be minimised. They also require the potential for conflict to be minimised. To achieve these outcomes, we consider it appropriate that Tūwharetoa should be the entity named in the conditions, with the provision for all relevant communications to be sent to two nominees of Tūwharetoa it considers to be appropriate. These nominees will be responsible for managing or undertaking all aspects of Ngāti Tūwharetoa inputs to the consent process in accordance with Tūwharetoa's requirements.

[111] For the avoidance of doubt, the kaitiaki role does not provide for directing management of the resource or the activity, or the way in which the activity is undertaken to ensure compliance with the conditions of consent. Those are matters for the RJVL with appropriate input from the Council.

[112] We consider the appropriate kaitiaki role in the context of these resource consents includes for Tūwharetoa to:

- (a) Receive a briefing from RJVL on the identified sites of cultural significance and the effects of the consented activities on those sites and the geothermal resource in general, with the opportunity for the two Tūwharetoa nominees and one representative of each Tauhara Hāpu (up to maximum of six Hāpu) to attend;
- (b) Identify values, sites, waahi tapu, and other taonga of significance to Ngāti Tūwharetoa in relation to the application sites that are not already identified as having cultural significance;
- (c) Identify any appropriate changes to the existing monitoring programme to incorporate monitoring of such values, sites, waahi tapu, and other taonga, if any, in consultation with the RJVL and the Council, with the Council's decision being binding;
- (d) Receive and comment on the Draft Annual Peer Review Panel Report and to have two representatives attend the Annual Peer Review Panel Meeting;
- (e) Contemporaneously receive copies of any notices or reports provided to the Council by RJVL relating to non-compliance with the conditions



of consent and any unforeseen circumstances that could affect future compliance or sustainability of the geothermal resource.

- (f) Provide responses to any such notices or reports received, where they affect the cultural interests of Ngāti Tūwharetoa, on the understanding that sole responsibility for addressing any matters arising will rest with the Council and the RJVL.

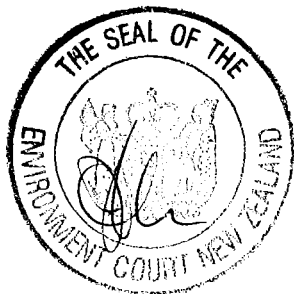
[113] On the foregoing basis, we have reviewed the conditions sought by the Appellant as they evolved during the hearing.

[114] The Appellant sought amendments to Schedule M to the resource consents, being the general conditions. These amendments may be summarised as follows:

- (a) Including Tūwharetoa, as the representative of the six Hāpu, as a participant in the Peer Review Panel process, including receiving information and being able to speak and ask questions in the same manner as Ngāti Tahu - Ngāti Whaoa;
- (b) Expanding the matters identified in the conditions relating to Kaitiakitanga to better relate to the concerns of Māori, including providing for Kaitiaki Advisors;
- (c) Requiring RJVL to hold an annual consultation meeting to address certain issues with iwi and Hāpu;
- (d) Making provision for consultation to enable changes to the Monitoring Programme required by Schedule Two to the conditions;
- (e) Inserting provisions for identifying cultural indicators and establishing a Cultural Indicators Monitoring Plan in a procedurally similar way as for the Monitoring Programme.

[115] The Respondent accepted that if the Court were to find that the Appellant has a kaitiaki interest in the Rotokawa resource then the conditions would need to be amended and presented submissions in reply which addressed particular issues in relation to the Appellant's proposals.

[116] The Applicant remained opposed to the amendments sought by the Appellant. As well as its opposition to the appeal, it also submitted that there is nothing in Part 2 of the Act that would drive any amendments. If there were to be new or amended



conditions, counsel reminded us that they must meet the standards for conditions of consent, that is:<sup>19</sup>

- a) they must be for a resource management purpose and not an ulterior one, which counsel submitted would exclude conditions requiring the investigation or remediation of past wrongs;<sup>20</sup>
- b) they must fairly and reasonably relate to the permitted development in the sense that the conditions are logically connected to the development; and
- c) they must be reasonable.<sup>21</sup>

[117] Counsel submitted that, in the present case, what the Appellant is really seeking is a remedy for the 1869 agreement as to the division and vesting of the Tauhara land. She also submitted that the consents would only result in relatively minor changes to an existing operation which would have no more than minor physical effects and that there is no evidential foundation for any additional conditions. She further submitted that the proposed amendments were uncertain and would not be enforceable because they lack specificity, clarity and accuracy of expression. Combining those problems, she submitted that the conditions were therefore unreasonable and said that they wrongly conflate all Maori rights and interests as being on an equal footing as Ngāti Tahu - Ngāti Whaoa without proper regard for the latter's position as tangata whenua, landowner and longstanding manager of the geothermal resource.

[118] We have already concluded that Tūwharetoa have an ancestral connection to this resource. This connection is, perhaps, largely metaphysical but that does not remove the requirement to recognize and provide for it under s 6(e) of the Act. We consider that this recognition and provision can be done in a way that closely follows the existing framework of the consents, essentially by including the Tūwharetoa Maori Trust Board in the same roles as the Ngāti Tahu - Ngāti Whaoa Runanga Trust. We conclude that this is clearly a resource management purpose to recognise and provide for a matter of national importance. It is also primarily a prospective measure to address the acknowledged connection of Tūwharetoa with the land and the

<sup>19</sup> *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149, [2007] NZRMA 137 at [20] and [61] – [68], adopting the approach in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (UKHL).

<sup>20</sup> *Chief Executive of Ministry of Agriculture and Forestry v Waikato Regional Council* Decision No A133/2006 (Env Ct).

<sup>21</sup> This is a reference to the standard of reasonableness in administrative law as articulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1, [1948] 1 K.B. 223.



geothermal resource rather than being a remedial one to address a grievance outside the scope of resource management. While it may incidentally serve the latter purpose as well, that additional result does not invalidate its primary purpose.

[119] We do not see a need to have conditions that go beyond the two trust entities because we consider that they can properly act as representatives of the Hāpu and sort out within themselves how best to ensure that particular interests are recognised and accommodated. We also see no need to create new positions such as Kaitiaki Advisors when more direct communication between leaders of the entities would be more likely to achieve the best outcomes in promoting sustainable management of this resource. For that reason, however, we do consider it appropriate to insert a condition requiring an annual consultation meeting.

[120] We have given careful thought to the inclusion of new conditions for cultural indicators. We have concluded that these are needed in order to directly address the metaphysical issues that are at the heart of the requirement in s 6(e) of the Act. Without more specific recording of the matters that are integral to cultural identity, there is a clear risk that they will be lost sight of in the midst of the physical indicators that are the foundation of the Monitoring Programme.

[121] We conclude that these metaphysical considerations are fairly and reasonably related to the exercise of the consents. It is abundantly clear that the purpose and principles in Part 2 of the Act encompass not only the physical elements of the natural and physical environment but also the metaphysical dimensions of the environment at least through express inclusion of references to abstract concepts such as:

- a) social and cultural well-being in s 5;
- b) ancestral relationships of Māori culture and traditions with resources in s 6(e);
- c) the protection of historic heritage (defined to include resources contributing to people's understanding of New Zealand's cultures, including sites of significance to Māori) in s 6(f);
- d) the maintenance and enhancement of amenity values (defined to include an area's contributions to people's appreciation of its cultural attributes) in s 7(c);
- e) the principles of the Treaty of Waitangi/Te Tiriti o Waitangi in s 8, which



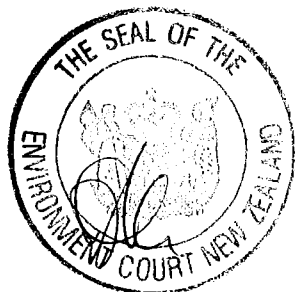
are to be found in the spirit of the Treaty rather than its particular words in either English or te reo Māori<sup>22</sup>; and

- f) the corresponding breadth of the definition of *environment* in s 2 to include communities of people, amenity values, and the social, aesthetic and cultural conditions which affect or are affected by those matters.

[122] The amended conditions that we have decided upon are logical consequences of our findings about the relationship of Tūwharetoa to the resource. We consider that they are also directly connected to adverse effects of the consented activity on the environment in terms of s 108AA(1)(b), although the commencement of this appeal preceded the commencement of that provision so that it does not apply to this appeal.<sup>23</sup> In our view, there can be either or both a logical or a direct connection between a condition and an activity where the effect is on cultural aspects of the environment and not on material resources, given the clear inclusion of cultural matters in the ambit of the Act.

[123] We also conclude that the conditions we have arrived at are reasonable. They do not greatly expand the matters to be complied with by RJVL beyond its existing obligations to Ngāti Tahu - Ngāti Whaoa. They are sufficiently certain, given the nature of the matters they deal with, to inform RJVL of what it must do and to inform the Council of what it must enforce. To the extent that one cannot necessarily predict the particular outcomes that are likely to result from the additional requirements for the Peer Review, consultation and monitoring processes, that is inherent in the nature of these things: what is important is that the processes occur with the inclusion of Tūwharetoa as well as Ngāti Tahu - Ngāti Whaoa.

[124] In reaching these conclusions we have not found anything that takes away from or otherwise diminishes the position of Ngāti Tahu - Ngāti Whaoa in relation to the land, the resource, or the consents and the conditions attached to them. As we have set out above, we do not doubt their position at Rotokawa. What we have found against is the proposition that their position means that Tūwharetoa cannot also enjoy a role in the operation and administration of these consents based on their own relationship to the land. We do not attempt to resolve the issues relating to whenua in terms of mātauranga Māori because that is not the role of this Court. We have made



<sup>22</sup>

*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 663, 672-3, 713-4 (CA).

<sup>23</sup>

Section 430 RMA.

our decision in terms of appropriate resource management practice and based on the Act's participatory framework, within the proper role of the Court.

### **Commissioners' decision**

[125] We have carefully reviewed the decision under appeal, being the decision of the respondent's commissioners dated 20 October 2016. The commissioners accepted the technical evidence and were satisfied that physical effects could be addressed by the conditions as attached to the Decisions Report. Consequently, and as the Appellant was not challenging the technical evidence before the Court, our consideration of the Decisions Report in accordance with s 290A of the Act addressed only the matters under appeal.

[126] For present purposes, the most relevant part of the Commissioners' decision is in section 5.1.1 on cultural effects, at paragraphs [025] – [040], and in particular the following (with footnotes omitted):

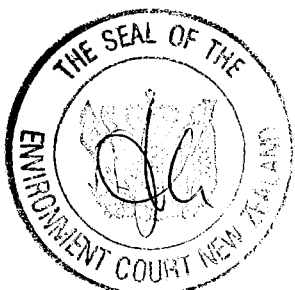
[026] Potentially adverse cultural effects were addressed by witnesses for the Tūwharetoa Māori Trust Board (TMTB). Before discussing those potential effects, we acknowledge that a primary concern of the TMTB was that in their view the RJVL had not consulted with Ngāti Hinerau and Ngāti Hineure (which we hereafter generally refer to as 'the two hapu') or the Tūwharetoa Hapu Forum (THF), despite the TMTB advising the RJVL that they should do so.

...

[030] In terms of the two hapu, one of the witnesses for the TMTB was Mark Ross. Mr Ross informed us that he was authorised to present his statement of evidence on behalf of both Ngāti Hinerau and Ngāti Hineure. Mr Ross asserted that the status of the land (Consent Area 4) and the applicant's intended use of it would give rise to cultural effects.

[031] We asked Mr Ross to explain what he meant by that which he very helpfully did. We then asked him to confirm that we had correctly listed the cultural effects that he verbally described to us and he did so. The potential effects described by Mr Ross were:

- respect for the taonga as a whole, which Mr Ross confirmed equated to the sustainable management of the Rotokawa geothermal steamfield;
- ground subsidence;
- potential impacts on geothermal surface features;
- continued access to the Lake Rotokawa Conservation Area to gather certain materials and minerals for rongoa (medicinal) and other purposes; and
- involvement in the ongoing management of the geothermal resource and the Lake Rotokawa Conservation Area "at all levels in a meaningful role".



[032] We discuss the first three of these potential effects in the sections of this decision report that follow.

[033] In terms of the fourth potential effect, namely ongoing access to the Lake Rotokawa Conservation Area, we find that to be a land ownership matter. The land is currently Crown owned and administered by the Department of Conservation. We understand that their permission is required to access the area. If the land ownership changes in the future, then permission will be required from the new owners. That is not a matter that we can address or influence and nor does it relate directly to the applications before us.

[034] In terms of the last potential effect we note that Ms J Campbell verbally advised us that the Tauhara North No. 2 Trust did not recognise the mana whenua of the two hapu over Consent Area 4 (the Lake Rotokawa Conservation Area) and so the Trust did not consider it necessary to consult with them regarding the applications. In her reply submissions, she further submitted on this issue:

"The Joint Venture does not accept that Ngāti Hinerau and Ngāti Hineure have mana whenua in relation to the Rotokawa geothermal resources. Even if they did, it would be inappropriate to involve them in the management of the resource. The Joint Venture does not accept that it is necessary or appropriate to directly involve these entities in the management of the field."

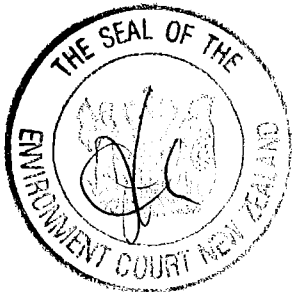
[035] We note that consultation was undertaken with the TMTB both prior to the application being lodged and post-lodgement. During the hearing Ms J Campbell advised, in response to our questions, that at a recent Tauhara kaumatua hapu hui, kaumatua had confirmed support for the application, insofar as that related to the interests of Ngāti Tahu. Resolving mana whenua status is certainly not a matter that we would presume to have any jurisdiction over. Consequently, the future involvement of the two hapu in the management of the geothermal resource and the Lake Rotokawa Conservation Area is not something that we consider to fall within our ambit.

[036] In summary then, notwithstanding the concerns expressed by the two hapu regarding the fact that they were not directly notified of the applications, we find that potential cultural effects of concern to them have been clearly described to us by Mr Ross and we find that we are able to address those that are relevant to the applications before us.

[037] In other words, while acknowledging and not wishing to undermine the concerns of the two hapu (and noting that we have no jurisdiction to revisit the WRC's section 95 notification decision) we find that, contrary to the submissions of Mr Muldowney, we do have sufficient information before us to both appreciate and assess potential cultural effects arising from the applications. We therefore reject Mr Muldowney's submission that we should decline consent on the basis of potential cultural effects.

[127] In relation to alternative relief of adding four further conditions to address cultural effects, the commissioners also rejected that with their reasons including the following:

- The issues of concern to the two hapu as identified by Mr Ross are very similar to those expressed by the trustees of the Tauhara North No 2 Trust and Ngāti Tahu - Ngāti Whaoa. As submitted by Ms J Campbell in reply, those issues were largely addressed through the drafting of the application and the



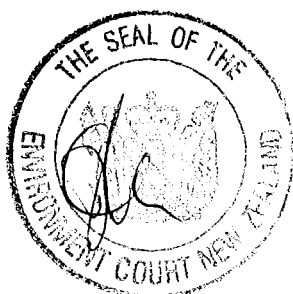
volunteering of specific conditions designed to ensure that those issues are appropriately managed and addressed;

- While mana whenua matters are clearly present we do not consider that the AEE fell short given the requirements of the Act. We also note that from their point of view the applicant considered that they were able to assess the potential cultural effects of the proposal. Mr Rameka did not dispute the integrity and expertise of the Tauhara North No 2 Trust to make that assessment and he acknowledged their experience and respect for the geothermal resource;

[128] We acknowledge the difficulties arising from disputes as to mana whenua. We agree that it was not the commissioners' task to resolve "mana whenua status" and nor is it ours. But we do not think that any such difficulties can be avoided by proceeding on the basis that the issues identified by one claimant are able to be addressed by hearing the case of another claimant. To do so mistakes the effect as being the same for whoever is so affected and treats the participatory framework of the Act as being satisfied by a sample of affected persons. While it may sometimes be possible to treat one submitter as representative of a community, especially in relation to physical effects, it is unlikely to be achievable where the effects are based on the identity of the affected person and on their metaphysical concerns.

[129] That appears to us to be at the heart of this case concerning the differing views of Tūwharetoa and Ngāti Tahu - Ngāti Whaoa and therefore we respectfully think the commissioners were wrong in their approach to treating the cultural concerns of Tūwharetoa as able to be addressed by hearing from Ngāti Tahu - Ngāti Whaoa. This is especially so given that a significant effect raised by Tūwharetoa is that caused by disconnection, alienation and disenfranchisement. There is perhaps some irony in that Tūwharetoa and Ngāti Tahu - Ngāti Whaoa share a close whanaunanga connection, with many of the witnesses before us stating whakapapa that showed connections to both iwi, but nonetheless each retains its own identity. In recognising and providing for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga and in taking into account the principles of the Treaty of Waitangi, it is essential to do so in a way that recognises the separate and distinct identities of iwi and hapū rather than treating all Māori as one entity.

[130] We add that this issue might have required a different analysis, response and outcome had the decision under appeal related to the allocation of some finite resource where any reallocation would necessarily alter the original allocation. But that is not the case here: what is in issue, as argued before us, is a matter of



participation in monitoring the use of a resource.

[131] At the hearing before us Mr Muldowney's cross examination of Ms Roa showed that the suite of planning objectives and policies she considered in her s 42A report to the Council's commissioners did not include a number of relevant plan provisions agreed by the planning experts as needing to be considered in their JWS dated 19 June. Importantly, her analysis omitted to consider any of the provisions we identified in [76] – [78] s being relevant to our decision.

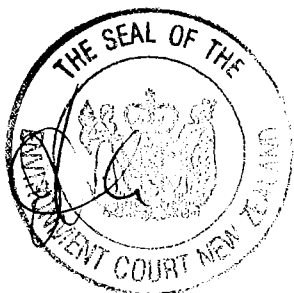
[132] Ms Roa also acknowledged under cross examination that following the Council hearing she was satisfied that all cultural effects were adequately addressed in the consent conditions issued. She went on to explain that she understands matters have now moved on significantly and agreed that Tūwharetoa "have an interest in the area." She accepted that changes to the conditions were now appropriate to provide for some involvement by Tūwharetoa, but did not agree with the conditions proposed by Dr Mitchell, not based on her assessment of the cultural relationship, but a concern about their practical implementation.

[133] We find that Ms Roa omitted to consider a number of relevant plan provisions relating to cultural issues at the time of preparing her Section 42A Report, many of which are material to our decision. As the commissioners relied on her report when evaluating the applications in accordance with s 104(1)(b), we do not consider their decision correctly reflects the requirements of the relevant planning documents in relation to the exercise of kaitiakitanga. We disagree with their decision for this reason.

### **Conclusion**

[134] The issue as contended between the parties tended to revolve around the question of who has mana whenua over Rotokawa and its associated resources. From this base, the competing arguments extended to address matters of whakapapa, rohe and dealings in land and reach conclusions about rights under the Act.

[135] Those matters are complex and this Court, the jurisdiction of which is confined, may not be well placed or even able to adjudicate on such arguments. In our view, a more direct route to resolving the appeal lies in considering whether the conditions of



the resource consents authorising the taking and use of Rotokawa's resources are sufficient to address the adverse effects of such taking and use, including the cultural concerns of people and communities who claim to be adversely affected.

[136] In this case, such effects have less to do with physical effects and are much more closely based on the matters identified as being of special importance in Part 2 of the Act, particularly ss 6(e), 7(a) and 8. While these matters may not be evidenced by physical effects, nonetheless the legislation requires that we address them.

[137] Seen in the context of how consent conditions may best deal with effects on the environment (including metaphysical effects), the arguments about rights may no longer have a binary character. Because this case is not concerned with the grant or refusal of consent or with the allocation of limited quantities of finite resources, there does not appear to be any basis for an "all or nothing" approach to the management of the geothermal resource. Rather, the central issue between the parties is whether, and if so to what extent, someone other than the consent holder and the consent authority should be able to participate in the monitoring and review of the exercise of the consents.

[138] This participation would involve the sharing of information and allowing attendance at and participation in meetings, being those of the Peer Review Group. We readily acknowledge that setting conditions which result in meetings where people are present who challenge each other's role may lead to tension and dispute. But if the alternative is exclusion which is also likely to result in tension and dispute, then that may very well be a much worse outcome. There is also the need to recognise that pursuing the sustainable management of a resource may well involve tensions and disputes. These are not necessarily adverse results: the process of participation at least provides a forum for civil dialogue and may enable better exchanges of information and analysis which could enhance the sustainable management of the resource. Of course, it may also not have that result, but the Court will not shy away from setting appropriate conditions on the basis that some people may not like having to deal with some others.

[139] Our decision does not determine who holds mana whenua in relation to Rotokawa and its resources. This decision does not allocate any of those resources, not does it affect the ownership of any land or of any rights in land. Our decision does not seek to influence in any way any claim or process for dealing with any claim that

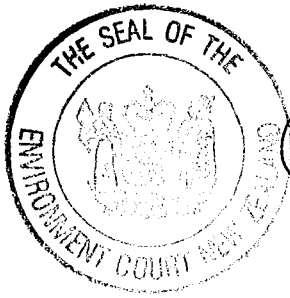


exists or may arise under any other Act or rule of law.

[140] For those reasons, we conclude that the appeal by the Tūwharetoa Maori Trust Board should be granted to the extent that the conditions of resource consent are to be amended as set out in the Schedule to this decision.

[141] There is no order as to costs. The issues raised on appeal involve a matter of national importance and the outcome yet depends on whether the amended conditions will foster collaboration in recognising and providing for that matter. It is therefore appropriate that costs lie where they fall.

For the Court:



A handwritten signature in black ink, appearing to read "D A Kirkpatrick".

D A Kirkpatrick  
Environment Judge

Figure 1

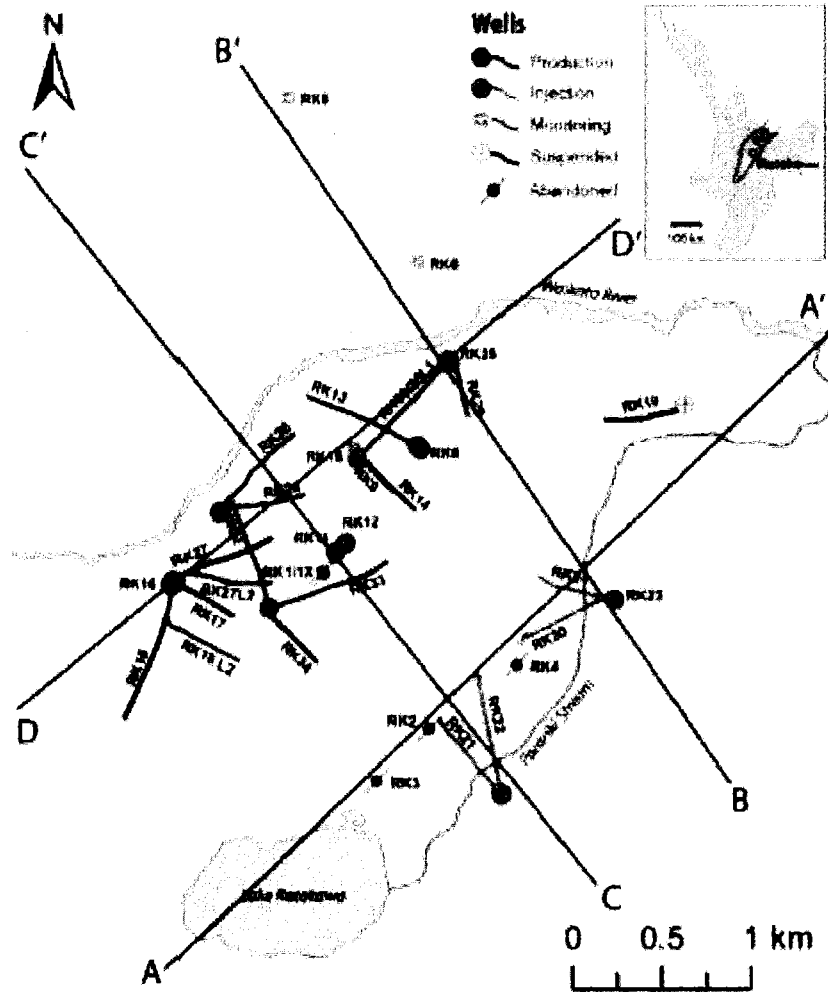
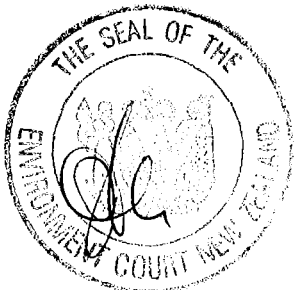
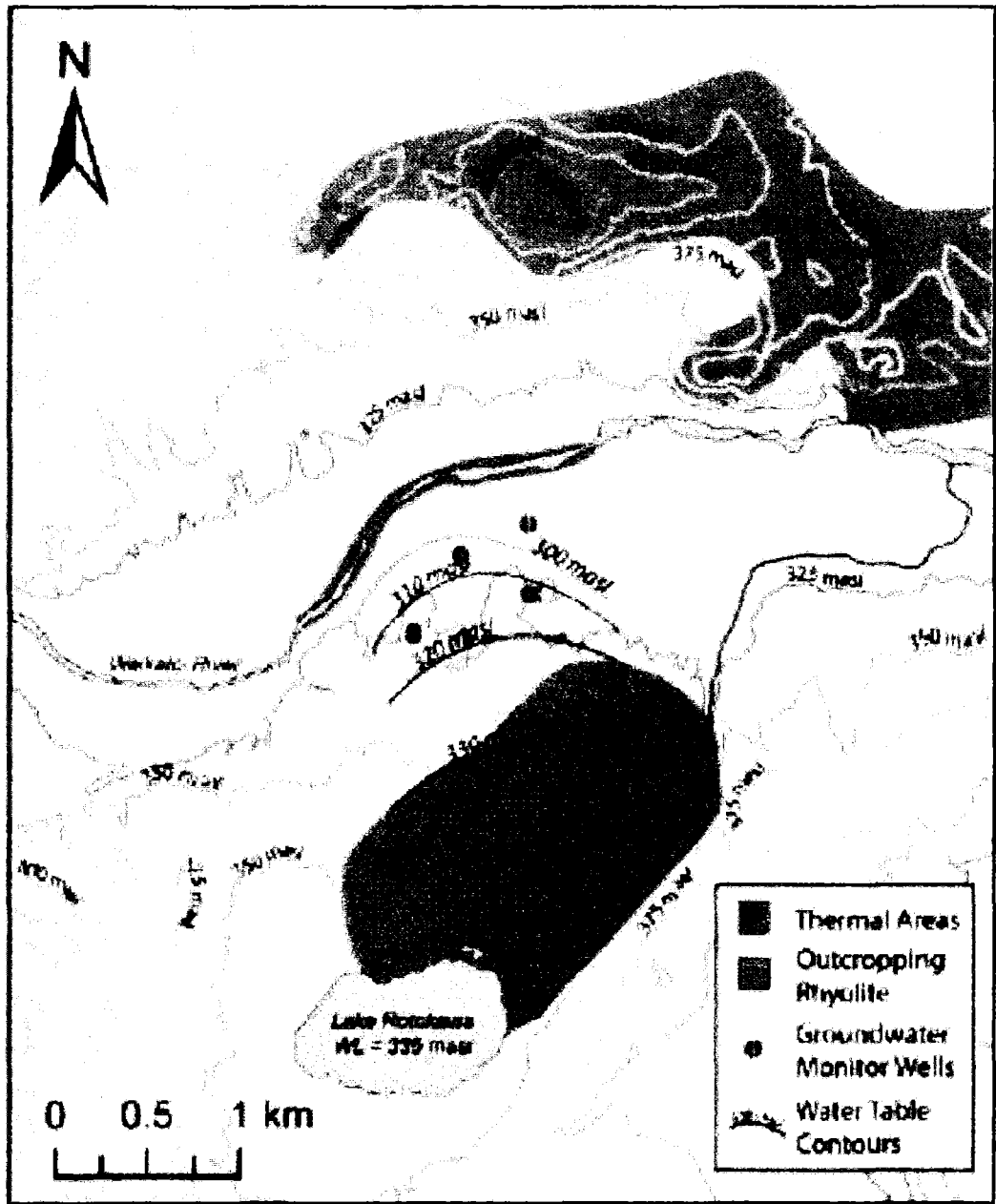


Figure 1 – Map of the Rotokawa field with production wells in red, injection wells in blue and monitoring wells in green. Black wells are abandoned wells. The location of conceptual model cross-sections A-A', B-B', C-C' and D-D' are also shown. The inset shows the location of Rotokawa in relation to the North Island and Taupo Volcanic Zone (TVZ).



Figure 2



## Schedule

### AMENDMENTS TO SCHEDULE M

(relevant text only shown here – amendments shown as additions underlined and deletions ~~struck through~~)

## Resource Consent

### Schedule M

#### General Conditions

All General Conditions apply to consents AUTH136402.01.01- AUTH136402.03.01, AUTH136402.05.01, AUTH136402.08.01 to AUTH136402.12.01 – “the Consents”

General Conditions 7, 9, 10 and 11 apply to resource consents AUTH136402.04.01

#### DEVELOPMENT OPERATIONS – ROTOKAWA I AND NGA AWA PURUA POWER STATIONS AND ASSOCIATED STEAMFIELD

#### 1. PEER REVIEW PANEL

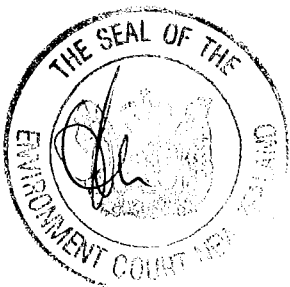
...

- 1.8 The Peer Review Panel shall review the draft Annual Report to be provided in October each year by the Consent Holder under General Condition 3.12 and, within two months of receipt of the draft Annual Report, shall hold an Annual Peer Review Panel Meeting with the Consent Holder and the Waikato Regional Council. An invitation to attend the Annual Peer Review Panel Meeting shall also be provided to two representatives each from Ngati Tahu- Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board.

#### Advice Note:

The Tūwharetoa Maori Trust Board will be representing the interests of and consulting with the following Hapū:

- Ngati Hineure.
- Ngati Hinerau.
- Ngati Te Urunga.
- Ngati Tutemohuta.
- Ngati Rauhoto, and
- Ngati Tutetawha.



## 2. KAITIAKITANGA AND COMMUNITY

### Advice Note:

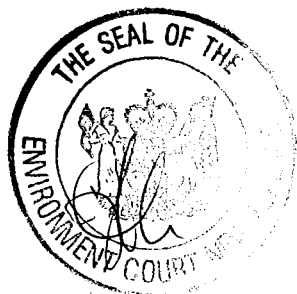
2.A The consent holder shall provide and/or facilitate opportunities for Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board to exercise kaitiakitanga by participating in the processes relating to the Annual Report and the Annual Peer Review Panel Meeting, including opportunities to:

- a) investigate and understand the cultural effects of the activities authorised by the Consents;
- b) exercise kaitiakitanga with respect to the Rotokawa geothermal resource;
- c) review the draft Annual Report;
- d) attend Annual Peer Review Panel Meetings;
- e) pose questions and seek clarification on aspects of the draft Annual Report, either prior to or during Annual Peer Review Panel Meetings; and
- f) listen to, and participate in, Annual Peer Review Panel Meeting discussion regarding:
  - any concerns or questions Ngati Tahu-Ngati Whaoa Runanga Trust or Tūwharetoa Hapū has raised (or raises);
  - the sustainability of the Rotokawa geothermal resource; and
  - the Consent Holder's compliance with The Consents.

### Tangata Whenua Consultation

2.B The Consent Holder shall invite Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board to participate in an annual consultation meeting.

- a) The purpose of the annual consultation meeting shall be to facilitate consultation about, and provide a coordinated approach to:
  - i) the design of the monitoring programmes, including the incorporation of appropriate matters of importance to Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust



Board;

- ii) identifying and implementing methods to involve Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board in the ongoing monitoring programme and the receipt of information, especially, but not limited to, any non-compliance with the conditions of this consent;
  - iii) discussing the results of monitoring programmes; and
  - iv) making recommendations to the Consent Holder and/or the Consent Authority on appropriate changes to the physical and biological monitoring framework in order to address cultural aspects of resource utilisation and any ecological monitoring required.
- c) At the annual consultation meeting the Consent Holder shall provide information on matters relating to the exercise and monitoring of this consent and the proposed work programme for the following 12 months.
- d) The Consent Holder shall keep minutes of the annual consultation meetings and shall forward them to all attendees and the Consent Authority within ten working days.

2.C The Consent Holder shall provide copies of the final Annual Report and the Annual Peer Review Panel Report to Ngati Tahu -Ngati Whaoa Runanga Trust and to Tūwharetoa Maori Trust Board at the same time the Consent Holder provides those reports to the Consent Authority.

## **2A. Community**

2A.1 The Consent Holder shall provide copies of the final Annual Report and the Annual Peer Review Panel Report to;

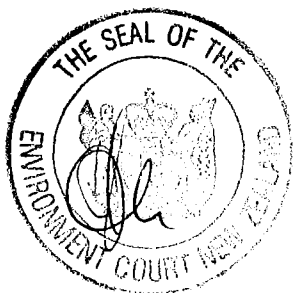
(a) ~~Ngati Tahu – Ngati Whaoa Runanga Trust~~

(a) Taupo District Council;

(b) Department of Conservation; and

(c) Wairakei Pastoral Limited or its successor in title to land in the vicinity of Rotokawa.

The final Annual Report and the Annual Peer Review Report shall be



provided at the same time the Consent Holder provides them to the Waikato Regional Council.

...

### **3. SYSTEM MANAGEMENT PLAN, MODELLING AND ANNUAL REPORTING**

3.12 The Consent Holder shall produce an draft Annual Report by the end of October each year that describes the state of the Rotokawa Geothermal System using new resource and monitoring information collected during the course of the preceding financial year (i.e. from July to June). The report shall be provided to the Waikato Regional Council, and Ngati Tahu-Ngati Whaoa Runanga Trust, and Tūwharetoa Maori Trust Board. The report shall be to the satisfaction of the Waikato Regional Council and shall contain at least the following information:

...

(m) Planned changes to the monitoring programme.

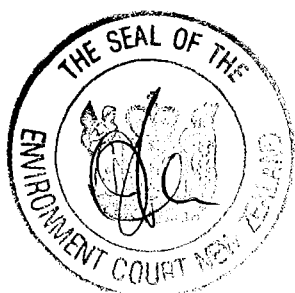
3.13 The Annual Report required by Condition 3.12 shall be provided to Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board in draft form not less than four weeks prior to it being submitted to the Waikato Regional Council. The final Annual Report submitted to the Council under Condition 3.12 shall incorporate any feedback received from Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board (including identifying and explaining any matters of disagreement).

...

### **5. RESOURCE MONITORING**

...

5.4A The Consent Holder shall prepare a Cultural Indicators Monitoring Plan to monitor specified indicators of the cultural effects of the activities authorised by the Consents. The purpose of the Cultural Indicators Monitoring Plan is to assist the Consent Holder and the Council to understand those cultural effects, including how any such effects may change over time. The Cultural Indicators Monitoring Plan is in addition to the Monitoring Programme described in Schedule TWO of the Consents, and is intended to supplement (without unnecessary duplication) the scientific information



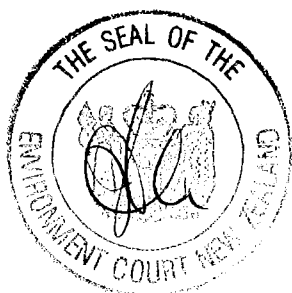
collected pursuant to Schedule TWO.

5.4B The Cultural Indicators referred to in conditions 5.4A – 5.4D shall be specified in terms that are capable of being clearly defined and assessed. They may include, but are not limited to, assessing changes in the characteristics of surface vegetation or surface manifestations of the Rotokawa geothermal resource, the health of culturally significant flora and/or fauna, and the health of waterways in the vicinity of the Rotokawa geothermal resource.

5.4C The Consent Holder shall:

- (a) Within six months of the commencement of this consent, and following consultation with and having regard to the advice of Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board, submit to the Council for approval a Cultural Indicators Monitoring Plan prepared in accordance with this condition. The Consent Holder shall include any comments from Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board in its submission of the Cultural Indicators Monitoring Plan to the Council, along with an explanation of where and why any comments have not been incorporated into the Plan;
- (b) Invite Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board to assist in the implementation of the Cultural Indicators Monitoring Plan and, provided that invitation is accepted, involve Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board in its implementation to the extent practicable; and
- (c) Implement the Cultural Indicators Monitoring Plan developed in accordance with this condition. Pipeline construction or well drilling activities in or under Consent Area 4 or an increase in the volume of fluid abstracted pursuant to the Consents shall not commence until such time as the Cultural Indicators Monitoring Plan has been approved;

5.4D The reporting associated with the Cultural Indicators Monitoring Plan (including provision of the Plan to the Council in accordance with Condition 5.4A(a)) shall be provided to Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board in draft form not less than four weeks prior



to it being submitted to the Council. Final reporting to the Council shall incorporate any feedback received from Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board (including identifying and explaining any matters of disagreement) and be provided to the Council at the same time as the Annual Report is provided in accordance with Condition 3.12.

5.5 The Consent Holder may, at any time, propose to the Waikato Regional Council changes to the Monitoring Programme or the Cultural Indicators Monitoring Plan.

(a) A change to the Monitoring Programme described in Schedule TWO may be approved by the Waikato Regional Council if, after taking advice from the Peer Review Panel and Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board, in its view the Monitoring Programme is no longer appropriate or necessary but requires an increase or decrease in the type, frequency and location of any part of the Monitoring Programme. Any proposal to change the Monitoring Programme shall incorporate any feedback received from Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board regarding the changes (including identifying and explaining any matters of disagreement).

(b) A change to the Cultural Indicators Monitoring Plan may be approved by the Waikato Regional Council if, after taking advice from the Peer Review Panel and Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board, in its view the Cultural Indicators Monitoring Plan is no longer appropriate or necessary but requires an increase or decrease in the type, frequency and location of any part of the monitoring. Any proposal to change the Cultural Indicators Monitoring Plan shall incorporate any feedback received from Ngati Tahu-Ngati Whaoa Runanga Trust and Tūwharetoa Maori Trust Board regarding the changes (including identifying and explaining any matters of disagreement).



# Document 2

## ***Evidence of Desterney Mana Newton (Wai 2358, #172)***

**In his brief of evidence, Mr Newton refers to costs incurred through an Environmental Court appeal process (Wai 2358, #172 at [40]). Counsel are to file a copy of a document that articulates the grounds of opposition.**

The primary grounds of opposition in *Tūwharetoa Maori Trust Board v Waikato Regional Council and Others* [2018] NZEnvC 093 (20 June 2018) were as follows:

- Ngāti Tūwharetoa asserted that they hold mana whenua and kaitiakitanga over the Central North Island, including the Lake Taupo Catchment and parts of the Upper Waikato;
- Ngāti Tūwharetoa asserted there had been a failure by Rotokawa Joint Venture Limited to properly consult with Ngāti Hinerau, Ngāti Hineure and the Tūwharetoa Hapu Forum;
- Ngāti Tūwharetoa asserted the Council failed to include Ngāti Hinerau, Ngāti Hineure and the Tūwharetoa Hapu Forum as affected parties in the limited notification of the applications; and
- Ngāti Tūwharetoa asserted as a consequence of the consultation and notification processes, the assessment of environmental effects (AEE) is deficient and the conditions of consent fail to avoid, remedy or mitigate adverse cultural effects to the extent necessary to meet the requirements of sections 5 and 6 (e) of the Act.

Block Name: Tauhara North No 2A

<b>Block ID:</b>	36666	<b>Plan No:</b>	ML 22331
<b>District:</b>	Waiariki	<b>LINZ title reference:</b>	413519
<b>Title Order Type:</b>	Title Order	<b>Total Area(ha):</b>	2.895
<b>Title Order Reference:</b>	67 TPO 215, 66 TPO 115-125&67 TPO 215, 67 TPO 215	<b>Total Shares:</b>	34
<b>Date Of Title Order:</b>	27/02/1996	<b>Allocated owners:</b>	738
<b>Land Status:</b>	Māori Freehold Land		

Map:

Parcel ID(s): 4370171

