

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a Board of Inquiry appointed under Section 149J of the Resource Management Act 1991 to determine an application for resource consents sought by Watercare Services Limited for its Waikato River Take and Discharge Proposal

Date of Hearing: 18 November 2021

Board Members:

Judge Kirkpatrick - Chair
Anthony Wilson
Nicholas Manukau

TRANSCRIPT OF PROCEEDINGS

I N D E X

	Page No.
Opening Statements	1058
Presentation on behalf of Nga Waihua Paerangi (Ngati Rangī) by Che Wilson, Hannah Rainforth and Keith Wood	1059
Presentation by Keith Wood	1062
Presentation by Hanna Rainforth	1068
QD by Board Members	1075
Submissions on behalf of Waikato River Authority by Mr Beverley	1080
Tipa Te Atawhai Mahuta XD by Mr Ferguson	1117
Robert Ray Penter XD by Mr Beverley	1122
XXD by Mr McNamara	1130
RXD by Mr Beverley	1146
Oral Closing Statement on behalf of Watercare Services Limited by Mr McNamara	1155

E X H I B I T S

Exhibit F Letter from Waikato River Authority to Watercare Services Limited	1139
Exhibit G Letter to Watercare to the WRA dated 25 September 2020	1141
Exhibit H Email dated 21 October 2020	1141

[Commenced at 9.05 a.m.]

OPENING STATEMENTS

5

JUDGE KIRKPATRICK: Tena koutou katoa, welcome everyone. Mr Manukau.

10

(Mihi Whakatau)

Thank you. Well, this morning, everyone, we have two further submitters to hear from and the first is Nga Waihua Paerangi of Ngati Rangi, Mr Wilson, Ms Rainforth, Mr Wood. Are the representatives of Ngati Rangi present?

15

HANNAH RAINFORTH: Yes, Sir.

20

JUDGE KIRKPATRICK: Good morning, Ms Rainforth. We have received three statements, I am just going to double check here, one from you, one from Mr Wilson and one from Mr Wood. The floor is yours to present as you wish.

25

There is also, I think a PowerPoint presentation that one or more of you will be speaking to; have I got that right.

CHE WILSON: Correct.

30

JUDGE KIRKPATRICK: Is there any other material that we should have in front of us for your presentation?

CHE WILSON: No.

JUDGE KIRKPATRICK: Thank you very much, the floor is yours.

**PRESENTATION ON BEHALF OF NGA WAIHUA PAERANGI
(NGATI RANGI) BY CHE WILSON, HANNAH RAINFORTH
AND KEITH WOOD**

5

CHE WILSON: (Speaks in Te Reo Maori). Morena koutou, good to be here this morning. My name is Che Wilson and I am here to represent, with Keith Wood and Hannah Rainforth, the position and views of Ngati Rangī.

10

I am mindful that you only got our statements yesterday, mine at least. Do you want me to take it as read or would you prefer that I -

JUDGE KIRKPATRICK: Well, I certainly have had a chance to read through the three documents and to look initially at the slides, so I don't think we require you to read them but obviously it is important that you use your time to present the main points and if you can do that by guiding us through the document, that could be helpful.

15

20

CHE WILSON: Ka pai. So, I suppose moving to point 7 of my brief, Ngati Rangī are very mindful that we don't have mana whenua in the area but the purpose of us presenting today is because of the fact that a significant amount of our water is diverted from our rohe into the Tongariro Power Scheme and then into the Waikato system.

25

I want to acknowledge Te Whakakitenga and our whanaunga of Waikato that reached out to us to encourage us to also put a submission in because we are mindful that we aren't mana whenua.

30

And, moving along, I think the most important points for us, if we look at the Tongariro Power Scheme, is that 26 waterways are diverted through 22 intake structures and then we're forgotten when it

35

comes to decision-making, planning and, as a result of that, people then assume that we don't exist. That has been an issue for Ngati Rangī for over a century since 1887, the establishment of the Tongariro National Park where we were made invisible with the establishment of that National Park.

And even though we recently signed a Treaty Settlement in 2019, we had our signing ceremony, still the system ignores us and so we are here today to make sure that we aren't ignored and that our water is - our waters, the diverted waters, are considered as the decision is being made.

And I say this because based on years of meetings, both by fighting in Court and trying to find solutions with Genesis Energy, they have always said that the outflow of the Waikato River at Taupo is approximately 20%, the diverted water is approximately 20% of the outflow at Taupo into the Waikato River and by the time it gets to Karapiro, it's still approximately 11%, which is a decent amount and I often get cheeky to our Waikato relations that the water they use to bless themselves with is probably ours.

But just mindful that this application is going to have major impact on the Waikato River and therefore if the diverted waterways aren't taken into account, will also have major impact on us.

I have provided a summary of some of our view of water and, more importantly, our role as we see it.

People see us as a mountain people, which is correct, we are a mountain people but many waterways start from the mountains and it's our responsibility to let those waters flow naturally to our neighbours and currently we are failing our neighbours downstream because of the acts of government and if decisions are made without considering the diverted waters, then we

will be impacting our relationships with other neighbours for generations to come.

5 So, we implore you, the Board, to consider the flight of the waters that are diverted through the Tongariro Power Scheme because at the end of the day we look forward to our water being returned back to us.

(Speaks in Te Reo Maori). I will leave the rest to be taken as read but those are my points, tena koutou, tena koutou, tena koutou, katoa.

10 **JUDGE KIRKPATRICK:** Thank you, Mr Wilson. Board members, I think we might hear from all three representatives before we deal with questions because it's possible that our questions might best be dealt with by one or other of you, rather
15 than just doing you one by one.

Is that all right, Mr Wilson?

CHE WILSON: Yes, that's fine. I just note that I have to be out of here by 10.00 a.m. at the latest because I have to go to a negotiation with
20 the Office of Treaty Settlements, sorry.

JUDGE KIRKPATRICK: All right, we will keep an eye on the time. Hopefully, we will get to our questioning after 10.00 a.m. but thank you for letting us know.

25 Which representative will go next?

KEITH WOOD: Kia ora.

JUDGE KIRKPATRICK: Thank you, Mr Wood.

PRESENTATION BY KEITH WOOD

KEITH WOOD: (Speaks in Te Reo Maori). I'm Keith
5 Wood, I'm from Ngati Rangī. My submission was
put through late last night, so I'm just going to
go through some of the key elements of it
starting with the section on Wai Mana, Wai Mouri,
Wai Ora, and just to try and articulate how those
10 things sit with us.

Mana - the Divine source of Creation.

Mouri - the Expression of the Divine source, the
energy in which all creation is held, suspended, and
connected, the energy that exists between each atom and
15 electron. The energy that manifests the structure of
Being.

Ora - where Mouri flows to sustain each life cycle
that nourishes life on our planet.

Wai (water) is the flow, the memory, the being
20 that connects these elements to allow life on our
planet to exist and flourish.

The importance of our relationship with our Wai is
embodied in this korero. Our waterways carry the Mana
and Mouri from our Mountains to the sea, empowering the
25 land, our forests, and our people. When our rivers are
well, our land is well, and our people are well.

Those are part of the embodiment of the kaupapa
that Che is speaking of.

So, we sit on the southern slopes of Ruapehu.
30 Ruapehu being Matua te Mana, the centre heartbeat of
the Kawa Mouri.

And so, we are part of holding onto and nourishing
the life force of what we belong to because we belong
to this mountain, we belong to these rivers, we belong
35 to the lands.

And so, upholding that mana and ensuring that mana flows is an important responsibility that we embrace, not only for ourselves but, as Che has mentioned, for all of those that are downstream of our awa.

5 We have always held that responsibility ahead of other things to try and ensure that our rivers, as they pass from our land, are in the best condition that they can be in.

10 The Tongariro Power Scheme ultimately impacts on that but before I go into that in a little bit more detail, I just wanted to acknowledge that through the claims process and the Waitangi Tribunal hearing processes and settlement, Te Waiu O Te Ika has been established as a mechanism for us to look after the
15 wellbeing and improve and enhance the wellbeing of our Awa Whangaehu which is the awa that's effectively impacted by the extraction of water for the Tongariro Power Scheme.

20 And so, that legislative mechanism isn't operable yet, it still sits there as a concept for us to build a greater relationship with all of the stakeholders and certainly with the Crown to ensure that our river from the mountains to the sea and all of its catchments and everything that is a part of that is held in good stead
25 as we work through things into the future.

 So, it's just really acknowledging that that's there and that there is a responsibility for us to be considered and engaged with in terms of any water allocations that are moving forward in the future.

30 So, moving on to the Tongariro Power Scheme in itself. Che mentioned 26 awa streams and waterways that are taken through 22 diversions in terms of the Tongariro Power Scheme. If I may, it may be an opportune time to bring up the PowerPoint and I can
35 just walk through that.

So, hopefully this won't gobble up too much time, I will speak to the slides, it is a series of photos describing some of the impacts.

5 Starting with the Waihianoa, an eastern diversion as part of the Tongariro Power Scheme that takes water through the Waihianoa aqueduct. So, these are the 26 streams, not covering all of them.

10 One of those key ones is the Waihianoa River, which is depicted there in that slide. That starts in the head waters of Raupio in this particular area that's pristine and placed in that mana we're talking about and the energy that flows down through that valley on into the exotic forest below.

15 And then ultimately, that's a shot of the river just above the intake.

And then we have the intakes on the Tongariro Power Scheme which are designed to capture every bit of water. In fact, they are designed to take 150-200% of the mean flow. So, when the rivers are in flood, they will take as much water as possible. That's been one of the main issues for us. That's what that river looks like below the intake, so it's a very painful experience for our people to witness that and even for visitors to see that as well.

25 Further downstream, that's 1.5 Ks further down before water starts to flow back into the stream again.

30 The Tokiahuru River, that is a photo in normal flow and then a photo as a result of the Tongariro Power Scheme. Again, starting in the head waters, the next door catchment. Pristine beautiful water that flows out which is untouched by human influence at the stages.

35 That's just above the intake, at intake 21. The intake itself, again as you can see, no water gets past that particular intake there.

Photo downstream, 5 kilometres further downstream, it's a dry riverbed for 6.5 kilometres.

I might just add at this stage, these photos are a little bit dated. We have been working with Genesis Energy since 2005 or 2006 and so, this river here now does have a restorative flow through it as a result of those ongoing korero negotiations. So, we are proactively working as best we can to re-establish life back in our waterways.

Moving on, the Makahikatoa Stream. That's water flowing in above the intake and the intake itself. On the left there, it takes all of the water and then downstream again there's no water getting past.

Further on, Tomowai, we're heading towards the Desert Road. There are a number of very large spring bed river waterway sources which the Tomowai is one of those.

The intake structure itself.

That's what the intake normally looks like when all the water has been diverted.

When the water isn't being diverted, that's what it looks like there.

So, we've been over many years, at least 15 years or so, working through the different decision-making mechanisms to try and get what I'd call restorative flows back in all of these awa, so we're currently working on four of them at the moment.

Some photos, all of that water goes through a tunnel under the Desert Road and goes into the Moawhango dam. So, these are some photos that kind of highlight the amount of water that is actually coming through. If you're there in presence, it's a little bit like a mini Huka Falls in terms of the amount of water that's been extracted and going.

It's been diverted to go north through a series of tunnels into Lake Rotowhero and then through the power station into Lake Taupo and then hence on into the Waikato system.

5 This is just the Moawhango dam where all of that water accumulates. There's no generation in the dam itself, it's effectively a storage dam and hopefully it's - I said I wouldn't need to use the laser pointer and hopefully not, technically speaking. The far end
10 of the northern end of the dam is where the tunnel that takes the water back through to the Tangariro Power Station is, whereas normally this water here, which is actually part of the head waters, this is the Moawhango dam, so the Moawhango River itself flows into that, as
15 well as a few others, and that would normally flow south into the Rangitiki.

 And just the dam structure itself.

 So, that's the end of the slides, if our technical team want to take that away now.

20 The important thing for us is we want to get water back to ensure that our waterways are healthy again and resilient and there's a balance of life in them.

 So, our concern with regards to this application, is that amount of water that is flowing currently
25 through and into the Waikato system, along with water from the Wanganui and the Rangitiki, is helping the life supporting capacity of the Waikato as we see that.

 And if it isn't accounted for accurately and appropriately, when our water does come back to us that
30 would leave the Waikato in a rather precarious position in terms of its own life supporting capacity.

 And that's real concern for us because our awa, our rivers, they should be ahead of what and seen in priority compared with ourselves. In the current
35 environment where humanity tends to have rather

explosive and extractive sort of philosophies in decision-making practice, we just want to work out how much water can we take before the river dies.

5 We don't want to get to that stage. We want to implore you as the Board and the decision-makers to ensure that the right balance is created so that our rivers are well and, therefore, our people will be well. That's not just our Maori people, that's our human people, and we hope that Aotearoa can potentially
10 be a leader in that space.

So, I think that's kind of pretty much summing up what I wanted to add into the korero and I can respond to any questions and things afterwards and I now put it over to Hannah to talk in more technical detail about
15 the aspects we're talking of. Kia ora katou.

JUDGE KIRKPATRICK: Kia ora, thank you, Mr Wood.
Ms Rainforth.

PRESENTATION BY HANNAH RAINFORTH

5 **HANNAH RAINFORTH:** Thank you, Sir. (Speaks in
Te Reo Maori).

I am appearing on behalf of Ngati Rangi, for
Nga Waihua o Paerangi Trust. I am a descendant of
Ruapehu and whakapapa to three of the rivers
10 impacted by the Eastern and Western Diversions of
the Tongariro Power Scheme (TPS) - the Whanganui,
the Whangaehu and the Rangitikei. This statement
covers the relevance of the water diverted
through the TPS to the Waikato River to water
15 allocation in the Waikato.

Ngati Rangi acknowledges your support as we
join this kaupapa, and acknowledge that we are
speaking as an iwi affected not because we have
mana whenua in the rohe, but because our waters
20 have been diverted and join with yours. (Speaks
in Te Reo Maori).

The Board has read my statement and there is
no need to repeat it verbatim. However, I do wish
to speak to key points today and to briefly reply
25 to rebuttal evidence, if I may.

As stated in our submission and described by my
whanaunga, Keith Wood and Che Wilson, Ngati Rangi is
significantly impacted by the diversion of our waters
through the Tongariro Power Scheme (TPS).

30 Ngati Rangi's goal is to see this water
returned. The current allocation framework in the
Waikato River catchment fails to account for the
additional water in the catchment that is sourced from
the TPS. Granting this consent will effectively

allocate water that is not guaranteed to be part of the catchment in the future.

5 In his evidence, Mr Bassett states that "of the 18.79 m³/s of water available for allocation ... between 11.05 m³/s (in July) and 15.56 m³/s (in February and March) has already been allocated ... Thus depending on the time of the year, between 3.24 m³/s and 7.74 m³/s remains available for allocation".

10 However, as noted, the calculations of flow availability fail to account for diverted flows that may not be present in the near future. From the best data I was able to source, the total mean flow of foreign water entering the Waikato catchment from the Eastern and Western Diversions of the Tongariro Power Scheme is 35.6 m³/s¹, although I note that flood flows are much greater than this.

15 If this amount is removed from the Q5 at the Waikato Coastal Marine Area Water Allocation Calculation catchment, the allocable flow drops by 3.57 m³/s to 15.23 m³/s.

20 This would mean for part of the year the Waikato may already be over-allocated if the input of the TPS is properly accounted for. For the remaining part of the year, only 4.17 m³/s may be available for allocation, of which Watercare are applying to take 1.74 m³/s. Clearly, the TPS impacts on the availability of water in the Waikato, and this influence needs to be removed before any further water is allocated. To do otherwise risks over-allocating (or further over-allocating) the Waikato River, failing the Vision and Strategy and the NPSFM.

30 I noted in my statement and will repeat it here that these figures are for illustrative purposes only, as I am no hydrologist.

Dr Mitchell correctly identified in his rebuttal evidence that the flows in the Waikato are impacted by numerous, complex and complicated factors. I am aware of these factors and aware that a simple 'x' amount in
5 from the Wahianoa Aqueduct (or indeed any of the diverted awa) does not equate to an 'x' amount arriving at the proposed take point some days later. It is indeed a highly complex scheme and is regulated by what is happening in the electricity generation sector at
10 any one time, as well as by flow conditions and consent requirements in the source awa. It will take some difficult calculations and models by skilled hydrologists to tease out the impacts.

None of that, however, alters the fact that that
15 additional water enters the Waikato Awa. Nor does it alter the fact that analysis of that additional water has not been done, and needs to be done.

Those calculations are beyond the resourcing available to Ngati Rangi, and it is a failing on the
20 part of the applicant to assess the impacts fully.

Just to sum planning considerations. The NPSFM requires both WRC and Horizons Regional Council (where the rivers diverted through the TPS are located) to change their plans to give effect to the NPSFM. This
25 future process is relevant to the consideration of this application because it:

- must occur before 31 December 20243 (likely within the lifetime of this consent, should it be granted), and
- 30 - is highly like to change the way allocation limits and minimum flows are set and used, for both the Waikato and the diverted rivers of the TPS.

All parts of the future, NPSFM-compliant water allocation regime, including minimum flows, take limits
35 and rule frameworks must achieve the environmental

outcomes for the waterbodies. These environmental outcomes must give effect to Te Mana o te Wai, provide for ecosystem health, indigenous species, mahinga kai and any Maori Values identified by tangata whenua.

5 Because of cultural effects, Te Mana o te Wai and values that will be identified by us as Ngati Rangi that must be provided for in the future regional plan, it is highly likely that the amount of water diverted from Ngati Rangi's rohe and therefore flowing in the
10 Waikato will reduce.

 Hence, the future plan change process to give effect to the NPSFM is likely to affect both the water physically present in the Waikato River (as less may be diverted) and the water available for allocation (if
15 allocation limits in the Waikato Regional Plan change).

 Policy 11 requires that future over-allocation is avoided. Because of the upcoming changes to regional plans and the high likelihood that flows and allocation amounts could be reduced, we see this application as a
20 future over-allocation that can, and should, be avoided.

 The NPSFM also states that: "Freshwater is managed in a way that gives effect to Te Mana o te Wai" and that "Te Mana o te Wai is relevant to all freshwater
25 management".

 This means that giving effect to Te Mana o te Wai is a responsibility of this BOI, and that obligation does not wait until WRC or Horizons have completed a freshwater plan change.

30 There will be less water in the Waikato available to allocate. Minimum flows will occur more often than they do today.

 Dr Mitchell, in para 4.7 of his rebuttal evidence, states that:

“If the flow in the Waikato River falls below the present Q5 flow because of a hypothetical permanent reduction in flows from the Tongariro Power Scheme, then the net effect would simply be that restrictions on exercising consents would apply more often.”

That may well be the case. Or, there may be unexamined ecological effects, such as a reduction in estuarine habitat through lowered water levels or greater contaminant concentrations due to lower flows. Our point is that such scenarios have not been adequately assessed, and that they need to be evaluated.

A resource consent granted now whose term extends beyond the meaningful life of the next NPSFM-compliant plan will frustrate whatever regime is in put in place to achieve Te Mana o te Wai.

Te Ture Whaimana o Te Awa o Waikato

Te Ture Whaimana o Te Awa o Waikato/The Vision and Strategy for the Waikato River sets the policy direction for the Waikato and Waipa Rivers. Of particular relevance to the concerns of Ngati Rangī, the Vision and Strategy requires:

(i) an integrated and holistic approach, which would require consideration of the foreign water in the Waikato River that comes from the TPS, and the impacts on not only on Ngati Rangī but also on Waikato River iwi and hapu, who have had the responsibility of protecting the mouri of our waters thrust upon them;

(ii) The adoption of a precautionary approach, which requires decisions on resource consents to be cautious about the potential future effects that may arise as a result of the reduction in the amount of water entering the Waikato River through the diversions of the TPS;

(iii) That decision-makers recognise and avoid adverse potential cumulative effects. Adverse cumulative effects could arise as a result of over-allocation resulting from a future reduction in the amount of water entering the Waikato River through the diversions of the TPS.

The RPS contains specific policies about the allocation and use of freshwater, and includes direction to avoid over-allocation and to phase it out.

As set out earlier in this statement, Ngati Rangī is concerned that allocating water to this or any other resource consent will result in future over-allocation if:

(i) the minimum flow and allocable limits are calculated without accounting for the water in the Waikato River that comes from the diversions of the TPS;

(ii) some or all of that water is subsequently retained in our natural rivers outside the Waikato in order to provide for the mana of our awa.

Municipal supplies

The RPS appears to provide for over-allocation for domestic or municipal supplies in Policy 8.6, however this is subsequently narrowed in method 8.6.1. The provision for 'over-allocation' only applies to allocable flow limits (not minimum flows) and the over-allocation must be of short duration - it must be phased out by 2030, a mere nine years away.

This ability to overshoot allocation limits may be inconsistent with the Vision and Strategy direction to provide for health of river, to take a precautionary approach, and to consider cumulative adverse effects. It is certainly inconsistent with Policy 11 of the NPSFM 2020. Policy 8.6 of the RPS should be given

little weight, and to the extent it is given weight, the short-term nature of that over-allocation should be front of mind in order to minimise any adverse effects on the river. The direction in the NPSFM and Regional plan to avoid over-allocation in the first place should be followed.

Relief sought

Ngati Rangī seeks that the application be declined until such time as:

(i) a full technical assessment of the impact of the additional water diverted through the Tongariro Power Scheme on natural flows has been conducted and that;

(ii) that assessment has been utilised to make changes to the water allocation framework of the Waikato Regional Plan.

However, should this consent be granted, Ngati Rangī requests that the Board:

(a) only allocate the amount of water that is actually available after the influence of the TPS is taken out;

(b) ensure the consent term is short and does not extend beyond 2030, so that any over-allocation can be addressed in a timely manner so that TMOTW can be given effect to; and

(c) includes review conditions that ensure the consent conditions, including volume, rate and timing of take, can be reduced if necessary when TPS takes are reconsidered.

JUDGE KIRKPATRICK: Thank you, Ms Rainforth. It looks as though we have a little bit of time before Mr Wilson has to leave, so that's all good.

**PRESENTATION ON BEHALF OF NGA WAIHUA PAERANGI
(NGATI RANGI) BY CHE WILSON, HANNAH RAINFORTH
AND KEITH WOOD
QUESTIONED BY BOARD MEMBERS**

5

JUDGE KIRKPATRICK: May I start with one question, and this really flows from something Mr Wood talked about in terms of Te Waiu O Te Ika under your Settlement Act. I have only had a quick
10 look at that and one of you may be able to help me.

To what extent is this subject, the subject of the TPS and the future of the diversion, being considered
15 under the Te Waiu O Te Ika framework?

CHE WILSON: Kia ora. As the negotiator for the settlement, the plan is for the TPS to be included and Te Waiu O Te Ika has been given the same privileges as Te Awa Tupua, so that when the
20 next hearing for the TPS is held, both settlement instruments will be considered as part of that.

JUDGE KIRKPATRICK: When is that anticipated? When is the review of the consents anticipated?

CHE WILSON: It is in about 15 years, between 10 and
25 15 years.

JUDGE KIRKPATRICK: Is there a programme to gather the information that you're talking about? Ms Rainforth in particular has spoken about to gather information well ahead of time to enable
30 the difficult analysis that she's also spoken of to be done?

CHE WILSON: There will be. However, Te Waiu O Te Ika is only just being established now.

JUDGE KIRKPATRICK: I understand that. That is the
35 plan?

CHE WILSON: That is the plan.

JUDGE KIRKPATRICK: All right, thank you. Other members of the Board, any questions? Mr Wilson, do you have any questions?

5 **MR WILSON:** Thank you, no. I just note that I am very familiar with the Tongariro Power Scheme, having spent a considerable amount of time in the Waiouru Training Area.

JUDGE KIRKPATRICK: And lived to tell the tale! All
10 right, thank you. Mr Manukau?

MR MANUKAU: Tena koutou, just a point of clarification. Over much of this week and previously in the first week of the hearing, there has been much talk about Te Ture Whaimana,
15 the Vision and Strategy. What is the equivalent within Te Awa Tupua and its applicability to the waters that are diverted into the awa Waikato?

CHE WILSON: Even though I am a trustee on Nga Tangata Tiaki, it's probably not appropriate for
20 us to talk about that because we are here representing Ngati Rangī. But the lawyer for Te Awa Tupua is on screen.

Again, Te Waiu O Te Ika is still being established, so still in its establishment stage as
25 well, so still working out all of that detail.

MR MANUKAU: Kia ora. The panel appreciates the position of Ngati Rangī, in particular we understand the diversions to the Waikato River and that is undisputed, so thank you.

30 **CHE WILSON:** Tena koe.

JUDGE KIRKPATRICK: Mr McNamara, you came up on screen. I am not sure if there's anything that you wish to raise through me, clarification from these submitters for Ngati Rangī?

MR BANGMA: Mr McNamara is having some audio difficulties.

JUDGE KIRKPATRICK: We are aware of that.

MR BANGMA: Watercare has no questions of clarification.

JUDGE KIRKPATRICK: All right. I wasn't sure what was happening.

MR BANGMA: Thank you, Sir.

JUDGE KIRKPATRICK: Thank you.

10 **KEITH WOOD:** Kia ora. Not wanting to cut you off, Sir, but I was just going to kind of close off, round off things.

JUDGE KIRKPATRICK: Well, I was just trying to work out if there was anything else I needed to ask
15 but I think that Mr Wilson's answers in relation to the application of the framework is all that I need to know. So, on that basis, it would appear that members of the Board have no further questions, so thank you, Mr Wood.

20 **KEITH WOOD:** Kia ora. So, I think in support of all of our korero, the key thing we are trying to put across is that our water, the water from the water base which is currently supporting the mauri of the Waikato and contributing to its
25 current wellbeing, taking all water would accentuate the current degradation and leverage the Waikato towards her tipping point, in our view.

30 So, we call upon the wisdom of the Board of Inquiry to demonstrate the necessary foresight to ensure that robust research is undertaken to ensure the effects of the TPS water diversions from the Whangaehu and Rangitiki Rivers are expertly calculated and defined to enable a
35 clear, I guess, calculation of what water

allocation and capacity remains in a way that's in favour of the Waikato River and its health.

And so, my other comments with regards to Mr Manukau's korero and yourself about Te Waiu O Te Ika and Te Awa Tupua, is they are mechanisms to help ensure
5 that our rivers are paramount in the whakapapa of the schedule of existence in our universe and our world.

And so, the clear things is we're looking for a time to shift and change to make sure that our rivers
10 are held in esteem above input and priority ahead of ourselves as humans and other users, so our belief is where our rivers are well, then we will well, so we're they're impacted, we're impacted and that's cross humanity.

I leave those things in that korero with
15 yourselves and hopefully the flow of our rivers will help support that and flourish that.

Morena (speaks in Te Reo Maori). Tena koutou, tena koutou, tena koutou, katoa.

JUDGE KIRKPATRICK: Kia ora, thank you Mr Wood,
20 thank you Ms Rainforth, thank you Mr Wilson very much for the care you have given to preparing and presenting before us today.

We now move to the last submitter, the Waikato
25 River Authority. Mr Beverley, are you present?

MR BEVERLEY: I am, thank you, Sir.

JUDGE KIRKPATRICK: Thank you. Are you ready to go
now or would it be useful for us to take a short
break and then proceed?

MR BEVERLEY: Whatever is most convenient to the
30 Board, Your Honour, I am happy to do either, I am ready to go or ready to take a short break.

JUDGE KIRKPATRICK: And your witnesses will be ready
to go once you've done your opening submissions?

MR BEVERLEY: They will, Sir, thank you.
35

JUDGE KIRKPATRICK: What we might do, Mr Beverley,
is invite you to open now and I am not sure
exactly how long that will take but possibly have
a break maybe in half an hour or three-quarters
5 of an hour; does that make sense?

MR BEVERLEY: That makes good sense, thank you,
Your Honour.

10

**SUBMISSIONS ON BEHALF OF WAIKATO RIVER AUTHORITY
BY MR BEVERLEY**

5

MR BEVERLEY: (Speaks in Te Reo Maori). Good morning, Your Honour and members of the Board. If I may just begin by acknowledging the tangata whenua of the river that we have heard from through this process, Te Taniwha o Waikato, Nga Hugh Trust, Te Whakakitenga, all of the Waikato-Tainui submitters and Ngati Rangi who we just heard from, all of those hapu, marae and the settlements and processes that they have referred to.

15

Your Honour, I do have written submissions that have been filed some time ago and I will be updating those where relevant to reflect matters that have unfolded through the hearing.

20

We have also filed a bundle of authorities, Sir, and I will refer the Board to some of those and, as referred to, we have two witnesses Mr Matua and Mr Penter.

25

I have opening comments to make which will mean I don't have to work through the detail of some of my submissions to the extent I may have otherwise, so I'll start with those.

30

What I would like to do is to refer the Board to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. There are some important provisions in that Act I would like to take the Board to. I just thought I'd make sure that the Board has that Act before it, just so it can follow me as I go?

JUDGE KIRKPATRICK: Yes, thank you.

MR BEVERLEY: Thank you. I should say, that is one of three Acts that establishes Waikato River arrangements but given the location and matters before this Board, I will refer to the Waikato Act.

5

So, the first point, if I may, is just to confirm what has been stated in evidence and in the submissions on behalf of the Authority, that the Authority acknowledges, respects and defers to the tangata whenua of the awa.

10

The Authority itself is a creation of Treaty settlements and, therefore, it only exists through the foresight and generosity of the iwi, of the river iwi. And of course the Authority is made up of half of appointees from the five river iwi and half from the Crown.

15

So, it's just very important to make that statement. Everything I will say, everything the witnesses for the Authority will say, is made in deference to the mana of the tangata whenua of the river.

20

In my submission, Your Honour, the history and the context, including the Treaty settlement statutory context within which the Board operates, is highly significant and the preamble to the Waikato River Act, if I could call it that, in my submission that is some text that is highly relevant and should be of some considerable assistance to the Board.

25

The preamble is of course only, and can only be, a brief summary of the very significant historical accounts that sit behind the settlement but it does, the preamble is a very useful summary over a few pages of what sits behind the settlement and I would commend that to the Board in terms of reading it, if that hasn't already been read.

30

35

The first point, I suppose, to note is at the start of the preamble the two underpinning principles as described by the witnesses, including Ms Flavel and Mr Morgan, of Te Mana o Te Awa and Mana Whakahaere.

5 Those are explained at the start of the preamble and I won't read those but Te Mana o Te Awa reflects that to Waikato-Tainui the Waikato River is a tupuna ancestor which has mana and in turn represents the mana and mauri of the tribe. Respect for Te Mana o Te Awa is at
10 the heart of the relationship between the tribe and the ancestral river. That is recorded not only through evidence but in the legislation.

And the second key principle is Mana Whakahaere embodies the Authority of Waikato-Tainui and other
15 river tribes have established in respect of the river over many generations to exercise control, access to and management of the river in accordance with tikanga.

I will come back to tikanga, Your Honour, but I wanted to draw the Court's attention to that.

20 And of course the statement for Waikato-Tainui, mana whakahaere has long been exercised in the mana of the Kingitanga.

I will come back to aspects of the preamble but, in my submission, the significance of the river is - of
25 the awa to the iwi is unquestionable and not that anyone is questioning that but section 8 of the Act sets out the statement of significance of the Waikato River to Waikato-Tainui and that has been referred to in evidence.

30 And importantly, in section 8(1), that is acknowledged by the Crown and recorded in statute.

And, again, I won't read that but that is a highly significant part of the settlement, is to start off with that statement of significance of the tupuna awa
35 with its own mana and mauri.

The preamble steps through again in summary form some very important history about the long and painful journey that River iwi have had to endure, including invasion, war, Raupatu confiscation, dispossession and disconnection from this taonga, which is the river.

If I just refer the Board to paragraphs 3 through to 16 of the preamble, that steps through Raupatu and the river, invasion, war, confiscation of Waikato lands. From (a), Waikato-Tainui experience in Raupatu and from 11, Waikato-Tainui commitment to the search for justice.

As I have said to the Board, Your Honour, I'm referencing Waikato-Tainui and its Acts but these sentiments and these principles are reflected in the legislation for the other river iwi as well. I don't mean to appear dismissive of those, not in any way, but it's convenient if I refer to one Act for the Board, so I want to reiterate that.

JUDGE KIRKPATRICK: Well, I think that the Crown in Parliament was acknowledging in the three Acts that you refer to at paragraph 24, the different people who were connected to the river and so it's done it that way.

As I understand it, Mr Beverley, the Authority is contemporaneously established by the two Waikato River Settlement Acts, both of which state that the Authority is constituted under that Act.

MR BEVERLEY: Yes.

JUDGE KIRKPATRICK: I have never seen any entity constituted twice at once.

MR BEVERLEY: No, no, you're absolutely correct, Your Honour. In fact, under the third Act, the Waipa, the Nga Maniapoto Act, the Authority has different functions under that Act. That's correct and it does reflect at the time the fact

that there were parallel negotiations with five iwi and that there are a number of parallel pieces of legislation but that enhances the mana of all, in my submission.

5 So, what the preamble confirms is a very long search for justice, the long journey, breach, grievance, claims and negotiations and settlement processes that iwi have been through and the Crown acknowledgments of those.

10 From paragraph 17, those Crown acknowledgments are important. If I may just take you back to 14, a part of the history and a part of the junior breach agreements for the iwi is the Resource Management Act. The Resource Management Act specifically referred to in
15 paragraph 14 of the preamble and it specifically said the Act did not however provide for the protection of Te Mana o Te Awa or Te Mana Whakahaere.

 I just again identify that as a matter of context because it's relevant to submissions I will make to the
20 Board subsequently.

 In my submission, the Waikato River Settlement arrangements, they are significant, they are the first, we've heard this, this was in the evidence of Ms Flavell, Mr Morgan and others, but they are the
25 first of their kind and they are a relatively unique, in fact they are a unique set of Treaty settlement arrangements centered around the principles of Te Mana o Te Awa and Te Mana Whakahaere. They provide a new frame and key new mechanisms for the awa, including
30 Te Ture Whaimana which I will come on to explain and have explained in submissions is the strongest document sitting within the RMA planning hierarchy in Aotearoa. And the Waikato River Authority, a co-governance authority setup through the settlement.

Through the generosity of iwi, there was \$220 million secured from the Crown, not to the iwi but to the river, as Ms Flavell explained. And there are significant changes made to the way in which the RMA statutory framework operates, and that is front and centre in terms of relevance to this Board's decision.

And so, in my submission, that history and context, Sir, must be significant to the decision that this Board must make and I will explain that in more detail.

Your Honour, to be as direct as I can, in light of that context, one must ask the question, what would be expected of an applicant that comes to this awa and to the people of the awa with an application of this size, scale and significance?

My submission is that the settlement sets a very high standard of normative behaviour that would be expected. For those that wish to interact with the awa and the people, the standards should be very high.

Against that submission, one must ask what is this Board faced with? This Board, in my submission, and I do not intend any disrespect to the applicant when I make these submissions but I must be directly clear given the significance of this matter, Your Honour, there are significant gaps in this application.

There is overwhelming opposition from the hapu, marae and Te Whakakitenga for Waikato-Tainui stated in the strongest terms, including the statement from Ms Flavell, for example, that this would fundamentally undermine the very intent of the settlement. And I mihi and acknowledge the evidence from the submitters yesterday that the Board heard. The opposition is expressed in the strongest terms and I must say, Your Honour, that evidence is uncontested.

Unsurprisingly so, there is no contest to that

evidence. Watercare has not filed any evidence to contest the evidence that was filed by the Waikato-Tainui and other submitters.

5 And taking a step back, that is a significant flaw, in my respectful submission, in this application; that an application is brought to this Board of Inquiry with such strong opposition from those that hold the mana whakahaere over this river.

10 There is no assessment of cultural effects. This Board is placed in a very difficult position, Your Honour, that it is required to make a decision where there has been no cultural impact assessment provided, as we heard from Mr Donald yesterday, and there has been - and there has been no engagement with
15 Te Taniwha or the other marae and hapu submitters that spoke yesterday.

So, those again are major gaps and, in my respectful submission, that opposition in the Treaty settlement context that I have just discussed must
20 weigh very heavily against the granting of consent.

There has been no real engagement by the applicant with Te Ture Whaimana. As Mr Morgan stated yesterday, three of those central planks; Te Mana O Te Awa, Mana Whakahaere and Te Ture Whaimana, the Vision and
25 Strategy. No real engagement with Te Ture Whaimana.

Respectfully, the assessment of Te Ture Whaimana and assessment of environmental effects which runs over 300 pages was 3 pages. It was superficial at best.

30 The evidence, I questioned Mr Mitchell on his evidence, he undertook no detailed assessment of Te Ture Whaimana and said with the Regional Policy Statement, Regional Plan and other planning documents, a brief generalised discussion of Te Ture Whaimana.

The applicant has, in my respectful submission,
35 fallen significantly short of what would be expected of

an applicant for the primary direction-setting document for the Waikato River.

5 There has been no meaningful engagement with the Waikato River Authority, the co-governance authority established to set the primary direction for this river. I will make more detailed submissions on that.

10 It is an entity that was a central feature of the settlement secured by the iwi to settle the historical grievances over this river. And Watercare has been highly dismissive of the Authority and I will talk you through that in more detail.

15 I think, as you helpfully yesterday cautioned my learned friend about questioning too much on the private arrangement in the form of the kawenata, the kawenata is what is it is; it is a document that was entered into. But what the Board, in my respectful submission, has got to address is the evidence before it and the evidence before it from Te Whakakitenga and the hapu and marae is that they strongly oppose this application.

20 The Board is also faced with the applicant relying on a trust it proposed to establish which is not supported by the people of the river and a payment which again, my friends, my learned friend Mr McNamara is, you know, he's trying to establish that that may bring some benefit to the river but it does not - that payment will not address the concerns, it does not pour water back into the river, it does not address the concerns, as the evidence and the witnesses have stated of the people of the river, and it sets in an arbitrary way which I will come back to.

30 Also, the Board is also faced with the very powerful submissions, in my submission, from Ngati Rangi that you have just heard about the interconnected

nature of water in this awa and throughout into the awa within Lake Taupo and the rohe of Ngati Rangi.

5 Finally, in terms of what the Board is faced with, it is faced with an application that, in my submission, is not demonstrably consistent with Te Ture Whaimana but demonstrably inconsistent with it. The central direction-setting document for the Waikato River is Te Ture Whaimana. If we take one objective, the relationship of Waikato-Tainui with that river, the
10 uncontested evidence before you is that this application is demonstrably inconsistent with it.

So, overall, Your Honour and the Board, this places the Board in a difficult position, in my submission. While there may be some indicators in the
15 Regional Plan that an application of this type may be contemplated in terms of allocation limits, there are five broader matters. This is a discretionary activity. There's no presumption of grant and there are significant matters weighing against the grant of
20 consent, in my respectful submission.

Again, I say respectfully to the applicant, it needed to do far better than it has done. The real question, in my submission, is whether Watercare should have paused and tried to remedy these matters but it
25 has not. It has progressed and put this case before the Board and it's asking the Board to grant consent in a manner that is contrary to the tikanga and views of those of mana whakahaere as recognised in the legislation and it is contrary, in my submission, to
30 the legislation.

Just to wrap up my opening statement, Your Honour, my respectful submission is that this consent should be declined. It is fundamentally contrary. The application in the way it has been presented and
35 supported by evidence is fundamentally contrary, in my

submission, to what one would expect in the contemporary statutory context of this Treaty settlement legislation and the changes that it was designed to achieve.

5 I say respectfully, this is an opportunity for the Board to make it clear that the Treaty settlement history context and legislation really means something and actually will make a difference. The history, as recorded, will not continue despite all of the work by
10 the iwi over the generations to bring a new framework into place in all of the settlements that have been in place.

It is acknowledged by the Authority that Auckland may need water but the mana of the awa and the mana
15 whakahaere of the people have had to take a back seat for generations so that development can take the front seat and, in my submission, if an application of this scale is to be brought forward, it needs to be brought forward in a way that respects the principles of that
20 legislation as supported by Part 2 of the RMA.

There's a strong burden on the applicant in this Treaty settlement context to establish its case and to demonstrate that this is a consent that should be granted. It needs to demonstrate it has engaged
25 respectfully with those that hold mana whakahaere, respectfully with the Treaty settlement mechanisms of the Waikato River Authority and this satisfies not only the purposes and principles of the RMA but the purposes and principles of the Treaty settlement legislation
30 and, in my respectful submission, that has simply not been the case.

JUDGE KIRKPATRICK: Thank you, Mr Beverley. Could I just seek clarification on some of the particular matters referred to in your opening submissions?

MR BEVERLEY: Yes, Your Honour. Sorry, I meant to say I do intend to step through and deal with some specific matters in the submissions, so that's not the end of it, but that will mean that I don't have to read the whole thing.

JUDGE KIRKPATRICK: I thought, as I was following along, I thought you were covering the main points. Are there other things you wish to address before I ask questions?

MR FERGUSON: There are, Your Honour, if that is acceptable.

So, I'm really - I want to just speak a bit more, if I may, about - if I could take the Board to paragraph 37 of my submissions and delve a little more into some detail around a few matters.

The first is section 5 of the Waikato River Act and Your Honour and the Board will be aware that - Your Honour I did mention you haven't seen too many Acts of Parliament that setup an Authority under two Acts. Section 5 of the Act is quite unique as well in its drafting style because it's not that often that you see a statement of legislation where Parliament expressly says "this is our intention", normally that is something that needs to be read from the legislation.

Section 5 says, "Te Ture Whaimana Vision and Strategy is intended by Parliament to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato River."

That is a critical section, Your Honour. And then "this Act must be interpreted in a manner that best furthers that".

So, it's a very strong indication from Parliament about the front, the fact that the Te Ture Whaimana is front and centre to the interpretation of this statute.

5 And when Your Honour and the Board is required to exercise - discharge its responsibilities under section 17(3) to have particular regard to the Vision and Strategy, in my submission that connection needs to be made. It is an important and strong connection.

10 The other point just on that, is that the - well, actually, I will come back to that. I just want to touch briefly, I move on at 42 to the lack of engagement with the Waikato River Authority.

15 Of course, Sir, this is of significant concern to the Authority for a number of reasons. The first is, the approach Watercare has taken, I will talk about Mr Fisher's approach in particular, but it has been in the evidence of the Authority highly dismissive and disrespectful of the Authority. The Authority was a co-governance Authority setup through the settlement and secured by the iwi, it is redress secured by the river iwi to settle their grievances and claims.

20 So, the Authority raised its concerns in its submission. It was not engaged with on the detail on this application. The Authority is the holder of Te Ture Whaimana. It prepares, approves and reviews Te Ture Whaimana. So, that's a central direction-setting document for the river.

JUDGE KIRKPATRICK: The holder?

30 **MR BEVERLEY:** Sorry, when I say the holder, one of the -

JUDGE KIRKPATRICK: The Authority has a governance role in relation to Te Ture Whaimana and the power to review and amend it?

MR BEVERLEY: Yes.

JUDGE KIRKPATRICK: But it is a statutory matter, isn't it? I mean, ultimately, the force and effect of Te Ture Whaimana flows from the Settlement Act rather than from the Authority?

5 **MR BEVERLEY:** Absolutely, Your Honour, I accept that.

Probably if I put that in a better way. What I really mean to say, and I refer to section 22(2)(a) of the Act, is the purpose of the Authority, and this has
10 been made clear, Your Honour, is "to set the primary direction through the Vision and Strategy to achieve the restoration and protection of the health and wellbeing of the river for future generation". Holding is a colloquial way of saying that.

15 That is the purpose of the Authority, it sets that direction and particularly -

JUDGE KIRKPATRICK: That's fundamentally a legislative purpose, isn't it?

MR BEVERLEY: Sorry, Your Honour, I might need a bit
20 of clarity on that. It is a purpose set out in the legislation.

JUDGE KIRKPATRICK: No, but, I mean, as for any statutory entity that has the power to create, and I use this term carefully, the power to
25 create a subordinate legislative instrument, that is to say subordinate to an Act of Parliament?

MR BEVERLEY: Yes.

JUDGE KIRKPATRICK: As perhaps for a local Authority making a plan under the RMA, that is a
30 legislative function, isn't it?

MR BEVERLEY: It is, Your Honour. It's an exercise of statutory power.

JUDGE KIRKPATRICK: Yeah but it's a particular statutory power to make a form of law?

35 **MR BEVERLEY:** Yes, Your Honour, it is.

JUDGE KIRKPATRICK: (b) and (c), the purposes appear to be executive purposes?

MR BEVERLEY: That's correct, Your Honour.

JUDGE KIRKPATRICK: Is that right?

5 **MR BEVERLEY:** Well (b) in particular is an executive purpose. (c) is the appointment of a statutory trustee of the Clean-up Trust which is a form of, yes.

10 **JUDGE KIRKPATRICK:** Yes but it is the funder? The purpose is to fund the initiatives, so that's the executive funds things?

MR BEVERLEY: Yes.

JUDGE KIRKPATRICK: Not a legislative role?

MR BEVERLEY: Yes, thank you, Your Honour.

15 **JUDGE KIRKPATRICK:** I just think this is important, I mean because when we get to the issue of the role of the Authority which follows and then the role or the responsibilities or duties that others have in dealing with the Authority, I
20 think we have to look back, don't we, to what the purpose of the Authority itself is?

MR BEVERLEY: Yes, we do, Your Honour, yes.

JUDGE KIRKPATRICK: All right, thank you.

25 **MR BEVERLEY:** Thank you. So, look, without dwelling too much on this, it is important to state that the Authority raised some significant concerns in its submission, including in terms of not being engaged with, and Watercare has chosen one of two pathways really. It's chosen to continue its
30 position that the Authority did not need to be engaged with.

35 If I just work through that. I am around 48 of my submissions. Mr Fisher in his rebuttal evidence raised a number of rationalisation or justifications for why the Authority is not engaged with. Those include the

Authority does not have a statutory function to engage with Resource Consent applicants. I have a quote at my paragraph 48. He relied on that provision in the RMA, it says "the RMA does not impose an obligation to
5 consult". Mr Fisher stated that it would be inconsistent with the Authority's power to recommend a member to this Board of Inquiry. The Authority cannot expect the same level of engagement as mana whenua.

Then on the stand Mr Fisher stated that Watercare
10 did not consult with the Authority at a governance level but in fact then relies on the summit, which was a governance summit.

Mr Fisher says he did speak to Mr Penter.

Finally, where Mr Fisher got to, this is picked up
15 in questions from my learned friend, the Regional Council did not tell us to consult with the Authority.

And these are not matters that were brought to the Authority and discussed with the Authority how and can
20 we engage with you? They were just justifications in rebuttal evidence and on the stand that it was not necessary to engage or appropriate to engage with the Authority.

And, again, I just cover through my submissions
25 from 48 through to 51, the central nature of the Authority and, in my submission, that in fact it is the Authority with the purpose of setting the fundamental direction for the river.

Of course, an applicant, applicants regularly do
30 consult with the Authority, as Mr Penter states.

JUDGE KIRKPATRICK: Is it a relevant matter for our decisions whether or not this applicant did or did not consult with the Authority, as distinct from consulting with others who you acknowledge

are the ones who can advise of what the effects are and the extent to which they are affected?

MR BEVERLEY: So, yes, in my submission, work is absolutely required, Sir, to engage with the Authority. And I just repeat my acknowledgment of the iwi, hapu and marae of the river. Of course, those are the people that should be spoken to first.

But the iwi themselves, through their negotiations, have structured a very careful set of settlement arrangements that has related but distinct roles for the iwi, hapu, whanau and marae. The Authority has very important roles, remembering the Authority is half constituted by river iwi.

In my submission strongly, Sir, as the entity that sets the primary direction for the river, it needs to be engaged for a couple of reasons. One, because it's a Treaty settlement mechanism that needs to be respected. But, secondly, Watercare needs to be informed around Te Ture Whaimana and what the implications of Te Ture Whaimana are for this application.

And where applicants often come to the Authority, Mr Penter says in his evidence, to talk about Te Ture Whaimana and understand what is the meaning of that instrument for an application. That's something of course that iwi can speak to as well.

JUDGE KIRKPATRICK: I don't doubt that many people do approach the Authority for that purpose and I don't doubt Mr Penter's evidence that the Authority assists them.

You said there's a requirement and I'm trying to understand what the Authority is that it is a failure, a process failure or a substantive failure on the part of an applicant if they do not come to the Authority.

MR BEVERLEY: Well, I'll just - if I start at the provision of the RMA that says it has to consult.

JUDGE KIRKPATRICK: No, no, no, sorry, put that to one side. You said there's a requirement.

5 **MR BEVERLEY:** Yes.

JUDGE KIRKPATRICK: You have said in the context of the settlements the Authority is in a position where it needs to be consulted, albeit you now say it's consulted second after tangata whenua.

10 I'm just trying to say where do these things happen? If this is the king hit, if Watercare's application should be declined because the WRA was not consulted, then I'd like to know the basis on which that's the decision we have to make?

15 **MR BEVERLEY:** Thank you, Your Honour. So, the Authority's submission is not that this application needs to be declined solely because it is not consulted. I understand and acknowledge the position that often by the time
20 we get to a hearing those sorts of things can be remedied.

So, I will come back to your core question but, in my submission, the refusal of Watercare to acknowledge all the way through, including by Mr Fisher on the
25 stand, is highly problematic in terms of the role and place and mana of the Authority under the Treaty settlement.

So, there is no specific provision in the Act that says, "Resource Consent applicants, you must go and
30 consult with the Authority".

But I'll say two things, Your Honour. One is that it's what flowed from that lack of engagement that is really problematic. If Watercare had sat down, its technical team sat down with the Authority's technical
35 team and said "Do you think 3 pages is a viable

assessment of Te Ture Whaimana", the answer would have been pretty clear and the Authority could have helped and informed Watercare about Te Ture Whaimana and the relationships with the hapu, the marae and just brought that other perspective to make sure it was engaging properly.

So, as is often the case, a failure to consult in and of itself is not necessarily defective, although I do have real concerns about it in this case, and I particularly submit to you that the failure to engage with the hapu and marae is highly problematic. But it's often what flows from that that, is the problem with consultation. It is the second limb, the limb of informed decision-making. Watercare has not really put this Board into a position that it can make an informed decision because it's put the hapu and marae and the Authority in a position that has to come in and submit in opposition and fight for this application.

So, the other point I would make is the co-governance entities and Treaty settlement entities often do not have specific statutory functions that say, "You must consult with Resource Consent applicants or they must consult with you".

JUDGE KIRKPATRICK: No, I did note, look, I have no problem with the wider power of any statutory entity to do any ancillary thing that may facilitate its primary function. I am not questioning that. It is not a strict ultra vires question.

It is the other way round and you've answered it I think now in terms of whether or not it's a knockout, and you're saying it's not a knockout but it calls into question the position of Watercare having not consulted that widely.

Although I think you pray in aid, and I think again this comes back to your earlier submission, that lack of consultation with tangata whenua would be a more serious matter than a lack of consultation with the Authority. The Authority is not prior to tangata whenua in these matters, is it?

MR BEVERLEY: That's correct, Your Honour, that is the Authority's position.

I repeat my submission that the failure to engage with the Authority is highly significant because in and of itself that is insulting to the iwi itself because the iwi secure the Authority through its settlement.

So, my submission is both are highly problematic but the Authority will always refer to the iwi, hapu and marae of the river as it should.

JUDGE KIRKPATRICK: Thank you.

MR BEVERLEY: So, I have responded to Mr Fisher's various rationalisations, I won't take you through that.

JUDGE KIRKPATRICK: No, we have got that.

MR BEVERLEY: One thing I would note is that, of course, through the evidence of Mr Waiwai and Mr Bhamji, there is a - Mr Bhamji in particular, there is a long list of other people that were consulted, including the steel mill and waterskiing yacht clubs, there's a whole lot of other people that did merit consultation. I just make that comment in passing.

JUDGE KIRKPATRICK: I don't think that helps the Authority. I don't think that you should need to challenge the people who are. The issue is whether the Authority was consulted, not whether the Rowing Club was consulted.

MR BEVERLEY: Absolutely, Sir. I didn't mean to suggest that they shouldn't be consulted. What I meant to suggest, in the broader context of the engagement that was undertaken, as listed in
5 Mr Bhamji's evidence, that creates some further context, in my submission.

So, just moving on from, 58 and 59, I provide some case law for Your Honour and the Board to consider.

The Waikato-Tainui case in relation to the case at
10 Hamilton at 58, which was a case about the Schedule 1 planning process, it is a slightly different context but the reason I raise it, this and the next case both provide High Court Authority for the importance of mechanisms secured through Treaty settlements in RMA or
15 other statutory processes.

JUDGE KIRKPATRICK: In these two cases, the entities who weren't consulted were in fact property owners, weren't they?

MR BEVERLEY: Well -

JUDGE KIRKPATRICK: The Tupuna Maunga stands, as I think the trustee of the Tupuna Maunga?

MR BEVERLEY: Just to take them in turn,
Your Honour. The issue with the base case, the first one, while as I understand it Tainui Group
25 Holdings are a commercial arm that own land, it was decided there was no need to consult with Waikato-Tainui as a tribal body. That was the problem, so they were separate.

And the Tupuna Maunga context, Your Honour,
30 just to be clear, the Authority is not a landowner. The land is owned by the Tupuna Maunga trust which is the iwi and the Authority is a separate statutory Authority.

JUDGE KIRKPATRICK: But the Authority does
35 administer the reserves?

MR BEVERLEY: It does, Your Honour, that's correct. So, I don't seek to say that these are some sort of precedents or templates that can be applied to this situation but the principle I'm trying to
5 advance with the Board is they just reinforce the importance of Treaty settlement matters. And that's the only point I'm going to make.

So, if I just move forward through my submissions. One point Your Honour raised with my learned friend,
10 Mr Ferguson, was around the submission that Te Ture Whaimana is the strongest planning document in the country in terms of RMA hierarchy.

Your Honour did appropriately raise two other Acts, the Hauraki Gulf Marine Park Act and the
15 Waitakere Ranges Heritage Area 2008. In both those cases, those Acts do identify matters in those Acts as equivalent to National Policy Statements.

The one difference is for Te Ture Whaimana, and I am at 68 of my submissions, Te Ture Whaimana, this goes
20 back to my original submission about how the Treaty settlement has been given life through the RMA. The provisions sit in the Treaty settlement legislation, not the RMA. So, they sit, it's a -

JUDGE KIRKPATRICK: Yes. And, in particular, I
25 would have thought, and really it was just, and he acknowledged it, it was his use of the word "unique" which is a red rag to some people.

But the real issue is, Te Ture Whaimana stands above all other national policy statements.

30 **MR BEVERLEY:** It does, Your Honour.

JUDGE KIRKPATRICK: That is clearly set out in the legislation.

MR BEVERLEY: It is, yes.

JUDGE KIRKPATRICK: And "unique" or anything else like that, you know, an Act of Parliament must prevail.

So, I don't think you need to labour that.

5 **MR BEVERLEY:** I appreciate that guidance, Sir.

I am conscious of the time, Your Honour, it's just after 10.30, would this be convenient?

JUDGE KIRKPATRICK: Why don't we take a short break now then. In terms of the time, if we could
10 return at 10.50, thank you.

Hearing adjourned from 10.34 a.m. until 10.50 a.m.

JUDGE KIRKPATRICK: Welcome back, everyone.

Mr Beverley?

15 **MR BEVERLEY:** Thank you, Your Honour. So, I will continue that discussion with you about Te Ture Whaimana.

I just made some submissions at 68 on the statutory standard to be had particular regard
20 to. I won't go through that but if I could just note the last part of paragraph 69, where my learned friend for the applicant has stated that section 17(3) of the Settlement Act is a gloss on section 104. In my submission, it's not a gloss
25 at all. It is a separate substantive obligation or provision that sits under the Treaty Settlement legislation.

The other thing I have said at the end of the paragraph, one must also consider what is being had
30 particular regard to, and what is being had particular regard to is the primary setting document for the river. When one makes that connection and the connection back to section 5 which I drew the Board's attention to earlier, I just wanted to make sure that

those statutory connections are clear. This is not - it's some considerable distance from the gloss.

From 70, I refer briefly to the Regional Plan, accepting of course that the Board's consideration, you
5 know, under 104 must include the Regional Plan. I do repeat my submission that this is a bundled discretionary activity.

I note Your Honour's comment yesterday, I think, that the Regional Plan does not exclude other
10 considerations. So, I just really make that submission.

Dr Mitchell confirmed you have to look at the Vision and Strategy.

JUDGE KIRKPATRICK: And can I just say, and I mean I
15 don't know if I'm overly sensitive to your comment about no presumption for a restricted discretionary activity. Merely because the discretion is restricted does not alter the fact that consent can be declined. Too often I think
20 people say, "Oh, a restricted discretionary activity, that indicates consent will be granted" and that's simply not true.

Rule 3.3.4.21 has a great list of things to which the discretion is notionally restricted, including all
25 of policy 8.

So, no, I think that that's - we just need to be careful here not to make assumptions based on activity status in a plan.

MR BEVERLEY: Thank you, I appreciate that
30 indication, Your Honour, and absolutely support that view respectfully.

I just move on in my submissions to Part 2 of the RMA. The submissions on behalf of the applicant is there's no need to go back to Part 2. At 78 of my

submissions, I cross-refer to the opening submissions for the applicant.

5 The Authority's position is that it is necessary and appropriate for the Board to look at - consider Part 2 as part of its decision-making process.

10 I refer to the *Davidson* decision from the Court of Appeal, Your Honour, at paragraph 80. I just set out that well-known statement there from the Court of Appeal, that the considerations in *King Salmon*, which were about a Plan Change, the Court of Appeal made it quite clear in and around this passage that's quite different to the considerations for an application for Resource Consent.

15 It may well be in some cases a decision-maker considers that a planning instrument is so watertight and so comprehensive that there's no need to go beyond it. That may be the case but in the middle of the quote it says, "Absence sits assurance or if in doubt it would be appropriate and necessary to do so".

20 **JUDGE KIRKPATRICK:** The main point, in my understanding of both of those decisions, is that one ought not to do what the Americans call an end run around the planning documents, to try to use section 5 of the Act as an operative or
25 executive provision because section 5 of the Act is given its more detailed content through other documents.

30 In this case, my understanding is that your submission is that Te Ture Whaimana provides the detail or a great deal of the detail in order that decisions can be made promoting the purpose of the Resource Management Act.

MR BEVERLEY: That is my submission, Sir.

JUDGE KIRKPATRICK: Yes.

MR BEVERLEY: I may have not heard you correctly but my submission is also that the Board should also consider Part 2 of the Act, and particularly very strong directions that McGuire, the Privy Council
5 decision in McGuire that everyone is aware of, it must be borne in mind at every point in the planning process.

JUDGE KIRKPATRICK: Yes.

MR BEVERLEY: So, my submission, and particularly
10 when one considers section 6, 7A and 8 and the Treaty principle of redress which is brought into play by section 8 of the RMA, links back to my opening, the very significant Treaty settlement context at play here.

15 That's why there's a check. In *Davidson*, I'll find the paragraph, it does reinforce that point Your Honour has made, that you don't do the end run; it's all about the overall broad judgment under 5.

20 But the Court did say that what you can do under Part 2, is 6, 7 and 8 type considerations. That's why it's important not to stop short of Part 2 if there's any doubt and, in my submission, there is a need in this case just for the Board to check and ensure that any decision is consistent with Part 2. I won't take
25 that any further.

If I may, Your Honour, I'm not going to take too much of the Board's time but there are two decisions of some significance which I'd like to draw the Board's attention to.

30 One of which is issued post the filing of my legal submissions, and that is the decision of the Supreme Court in *Trans Tasman Resources* which Your Honour and the Board will be aware of.

I draw this to the Court's attention for two reasons. If I can just give you some paragraph references to save time, if that's of assistance.

5 Essentially, in *Trans Tasman Resources*, one of the arguments run was one that tried to diminish or reduce the attention paid to Treaty principles under the particular clause in the EEZ Act.

10 If I just refer Your Honour to paragraphs 149 and 151 of that decision. Essentially, what the Supreme Court there is saying is the fact that there is a certain type of what's called an indirect Treaty clause, which is the more modern configuration of section 8 which is a direct Treaty clause, this Board must take into account the principles of the Treaty.
15 An indirect Treaty clause is one that says in order to recognise the Crown's responsibility. So, That's explained, Sir.

The Court said it just re-emphasises that Treaty clauses should not be narrowly construed. Rather, they
20 must be given a broad and generous construction, an intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be prescribed in Parliament unless that intention is quite clear, that's paragraph 151.

25 So, that is to support my submission about the importance of section 8 of the RMA and the support given to the Treaty principles, including the Treaty principles of redress, active protection and informed decision-making which have been referred to.

30 The second reason I draw this decision to the Board's attention, is in relation to the matter of tikanga. Tikanga is relevant, of course, to - it is highly relevant to this proceeding. As Your Honour is aware, in conducting this proceeding, under section
35 39(1) of the RMA, there is a reference to "where any

person is given Authority to conduct hearings, including under 149J", and that is of course where this Board of Inquiry is given its Authority, Sir.

5 Under section 39(2)(b) which Your Honour is well familiar with, "This Board of Inquiry shall recognise tikanga Maori where appropriate". That's what may be considered to be a procedural obligation, although I think - I'd like to address Your Honour on the substantive nature of it as well.

10 But what TTR does is reinforce the place of tikanga in a common law and under the statute. So, it reinforces previous decisions of the Supreme Court. There is a long line of Authority about the place and relevance of tikanga in law and under Acts like the
15 RMA.

And if I just refer you to 172, again acknowledging this was decided under a different but related piece of legislation, but at the end of 172, when discussing tikanga the Supreme Court, this is
20 Justice William, Young and France, although it was supported later in the judgment by His Honour Justice Williams.

"To give one illustration, the iwi parties in this case emphasised the mauri of the area. Considering the
25 proposed activity in terms of tikanga may indicate a material harm extends beyond the physical effects of a discharge or that pollution can be spiritual as well as physical. In any event, the relevant issues need to be considered under one head or another".

30 Of course, tikanga is referred to - is defined in the RMA.

There is just one other decision, if I may, under the RMA which I have also provided, which is the decision of His Honour Whata J in the Ngati Maru Trust
35 which Your Honour will be aware of.

Of course, there's one paragraph, if I could draw the Board's attention, at paragraph 68. As Your Honour is aware, this is against a history where consent authorities generally said it's not our job to look
5 into matters of tikanga or there was a reticence to do that.

What Whata J says at paragraph 28:

"Nevertheless, the Environment Court is necessarily engaged in a process of ascertainment of
10 tikanga Maori where necessary and relevant to the discharge of expressed statutory duties".

And at the end of that paragraph, that duty to meaningfully respond must apply when different iwis have views. That's not necessarily what we're dealing
15 with here.

"This may involve evidential findings in respect of the of the applicable tikanga and a choice as to which course of action best discharges the decision makers's statutory duties. To hold otherwise would
20 emasculate those directions of the literal normative potency in so far as concerns iwi".

So, Sir, I don't need to take that any further but that's the High Court and Supreme Court Authority and the High Court case specifically on the RMA. So, I
25 just provide those authorities to assist the Board.

Tikanga of course being front and centre to this hearing and being the subject of evidence over the last couple of days from the the iwi, marae and hapu submitters.

30 If I may move on, Sir, and I don't have too much more to do.

I have set out in my submissions the submission that the application from 87 is inconsistent with Te Ture Whaimana. That is a position that the
35 Authority takes.

I have noted that there has been no real assessment of Te Ture Whaimana. This Board has not been assisted in a detailed assessment of Te Ture Whaimana in the AEE or in the planning evidence filed on behalf of the applicant.

Mr Mitchell did concede in cross-examination questions from me, that perhaps it was an overstatement to assert that the application is demonstrably consistent with Te Ture Whaimana.

And so, just touching on, of course, Te Ture Whaimana contained in schedule 2 to the Settlement Act, Your Honour, of course states a vision which is set out there, "to a healthy Waikato River sustain abundant life and prosperous community who in turn are all responsible for restoring and protecting the health and wellbeing of the Waikato River".

At 3, it says, "In order to realise that vision there are certain objectives to be pursued". And if I could just focus on a few of those.

Firstly, (a), the case for the applicant is that the health and wellbeing of the Waikato River will be restored through the Trust and through the payment and through some other activities.

It's the submission of the Authority that the Board cannot have confidence that this - firstly, the evidence of the iwi submitters is that the activity itself will diminish and detract from the health and wellbeing of the river. The taking of the water will detract. That is the uncontested evidence of the iwi and hapu and marae.

Secondly, in my submission the Board cannot have any confidence that a trust and a payment, an annual payment, will restore and protect the health and wellbeing of the Waikato River in a proportionate manner to the activity.

Mr Bourne for Watercare admitted there was no science or methodology to his calculation of this figure.

5 Secondly, there has been no assessment of cultural effects, so we don't know whether it will restore the health and wellbeing of the river from a cultural perspective. In fact, the evidence is that it will not.

10 Secondly, and in my submission this is fatal, although of course the Board will have to work through all of the Vision and Strategy. But Objective b here in this context where we're talking about a take in the rohe of Waikato-Tainui, the restoration and protection of the relationships of Waikato-Tainui with the
15 Waikato River, including the economic, social, cultural and spiritual relationships, the uncontested evidence before this Board is that it has clearly not met that objective. Respectfully, that is a very high hurdle for the applicant to overcome and I say, in my
20 respectful submission, I struggle to see, and acknowledging there is a vision and range of objectives but that is a particularly important objective. This Vision and Strategy comes out of a Treaty Settlement that was negotiated and this legislation is a result of
25 that negotiation and that is a very powerful objective and the evidence is that this application is entirely inconsistent with it.

Ms Flavell, I have quoted, in evidence states that, I am at 98 of my submissions, "The very intent of
30 the Waikato River Settlement and Waikato-Tainui's goals in achieving Te Mana o Te Awa and Mana Whakahaere will be undermined".

Mr Papa's evidence, Mr Morgan's evidence, the evidence from Mr Shane Solomon, Mr Haydn Solomon, the

evidence from Te Taniwha, from Ngati Naho, all of that evidence is relevant.

And I also just point out there the other evidence.

5 So, Your Honour, that's the most important submissions that I needed to make to you and to this Board.

Just very quickly -

JUDGE KIRKPATRICK: How does this application differ
10 from other municipal takes from the river? If this is fatal, how do all the other municipal takes differ?

MR BEVERLEY: Well, I suppose the first thing I'd
15 say to that, Your Honour, is why this is fatal is because this is an additional take. I mean, there are other municipal takes that are consented of course. I am not saying all municipal takes are inconsistent with
20 Objective b. My submission to the Board is that this application and this take, the quantity of it, particularly in light of how allocated this river is and the other matters that have been raised, including by Ngati Rangī this morning, this take in the context of this significant
25 opposition from iwi, hapu, marae, does not meet Objective b.

JUDGE KIRKPATRICK: Well, tell me how?

MR BEVERLEY: I defer to the -

JUDGE KIRKPATRICK: No, you're relying on this, so
30 tell me, in terms of the evidence on which you rely, how does that evidence demonstrate the fatal inconsistency, compared to other municipal takes?

MR BEVERLEY: Well, Sir, the evidence of - I mean,
35 if we just step through the evidence yesterday.

The tikanga of the people of this river is that this take will further harm, take more water from an already degraded and depleted river through their eyes. So, the evidence I thought was clear
5 that, you know, again going back to the history and contents of the settlement, where the preamble confirms that the river is degraded and depleted, a further cumulative take now of this scale of the water by Watercare in a manner that
10 does not reflect the tikanga and views of the iwi, hapu and marae, it must be inconsistent because only those people can give evidence on their tikanga. Only the hapu, the marae and the iwi can give evidence on their relationships with
15 the river.

JUDGE KIRKPATRICK: I understand that and I don't really want to get into the veto debate about this.

Does this mean that the allocation rule in this stretch of the river of 10% of the q5 flow itself does not give effect to Te Ture Whaimana; is that your submission?
20

MR BEVERLEY: Yes, Sir, in two parts. Firstly, just to address the veto point, Your Honour, I
25 acknowledge the cases around veto.

I think veto is, with respect to my learned friend, Mr McNamara, and this is covered in submissions, that's accepted. There is no absolute veto. I think veto is the wrong way to look at it, with no disrespect intended. The way to look at it is
30 through the strength and weight to be given to the evidence of the iwi, hapu and marae.

JUDGE KIRKPATRICK: I accept the significance of that evidence.

35 **MR BEVERLEY:** Yes, yes.

JUDGE KIRKPATRICK: You make a number of submissions about the volume of the take and it's a lot of water, absolutely.

5 It is to be assessed for the purposes of the Regional Plan in terms of the allocation limits that have been set and acknowledging the timing issues for when the Settlement Act, the Raupatu Settlement Act was passed and all of Mr Brough's submissions about that, is there evidence that the allocation level for this stretch of the river does not give effect to Te Ture Whaimana? And if there is, what is that evidence?

10 I am not aware of anything that attempts to draw a connection between the hydrology and the cultural concerns.

15 **MR BEVERLEY:** Sir, my understanding of the evidence is there is not evidence to say - there are concerns expressed through evidence in relation to the Regional Plan and Mr Brough I think summarises those as well.

20 Mr Papa and others in their evidence comment on those limits and raise concerns about them.

25 There's also evidence that the plan, as Your Honour has traversed with other counsel and witnesses, the plan was developed at a point in time and the Court at the time concluded that it did give effect to Te Ture Whaimana in some respects.

30 There have been some reviews done since and there have been other processes run since Plan Change 1 which actually show through the evidence how a process can be run to really give effect to Te Ture Whaimana.

I think the key point though, Your Honour, is, as Your Honour has identified, the Regional Plan is one matter of assessment and there are others, including Te Ture Whaimana.

So, in addition to - one factor the Board will no doubt be considering is the limits in the Regional Plan but there are a range of other factors that the Board will consider, including the Vision and Strategy.

5 It is my submission that the Board has an additional obligation to consider the Vision and Strategy, Te Ture Whaimana, not just through the channel of the Regional Plan.

JUDGE KIRKPATRICK: I accept that completely but
10 that doesn't, with respect, answer my question.

It appears to me that although you're saying that there's a fatal flaw about this take, evidence volume, the Authority is not challenging the table of allocation levels that are in the plan per se in this
15 case? You're not saying that that rule is invalid or in any way to be discounted?

MR BEVERLEY: No, Sir, Your Honour, the Authority is not saying that, no, that's correct. And
Mr Penter in his evidence, as have a number of
20 other witnesses, raised some concerns. But, no, we have not directly challenged that rule or its application.

JUDGE KIRKPATRICK: What we have is an application to take that goes above 70% of the allocation
25 limits and therefore is a discretionary activity?

MR BEVERLEY: Yes, Sir.

JUDGE KIRKPATRICK: Notwithstanding the volume of the individual amount, you know, the question is if it weren't Watercare taking this amount and it
30 were, in the case of Wairakei Pastoral, one or two others, or if it were 100 others, how are we to differentiate amongst those takes for the purposes of Te Ture Whaimana?

MR BEVERLEY: Your Honour, Te Ture Whaimana
35 requires, as you would be aware, a working

through of that vision and those objectives and strategies. And a question to be asked is, to what extent does this application, irrespective of what the plan says, measure up against it? It
5 may be another applicant comes along and is able to satisfy the concerns of the iwi and hapu of the river and is supported and there is a genuine and meaningful proposal to ensure that the health and wellbeing of the river is restored and
10 protected. I mean, I'm speculating but it may be those applications do tick the - do better satisfy Te Ture Whaimana.

All I can really submit on is this application and my submission is that it falls well short of what
15 Te Ture Whaimana requires.

JUDGE KIRKPATRICK: All right.

MR BEVERLEY: Thank you, Sir.

JUDGE KIRKPATRICK: Thank you.

MR BEVERLEY: Sir, I have really come to the end.
20 If I could just check my notes?

There's one matter I thought I would confirm, which was in my questions of Mr Fisher, and I'm reading through at about 123-124 of my submissions, in my questions of Mr Fisher as I recall it I was talking to
25 him about the amount of the payment and, as I recall, I put to Mr Fisher "That's not supported by Waikato-Tainui, is it?" And his response was, well, as I recall it, they accepted 1.5, so presumably they would accept 2.

30 My learned friend, Mr Ferguson, has dealt with this point but it's very important to state that the \$1.5 million in paragraph 3.6(e) of the kawenata is a seed funding payment.

JUDGE KIRKPATRICK: Look, I don't know that the Board wants to arbitrate what appears to be haggling.

MR BEVERLEY: No, and I appreciate that indication, Your Honour. I was just a bit concerned that it was in the record that Waikato-Tainui had accepted a \$2 million payment over the tenure of the consent and I just wanted to correct that.

JUDGE KIRKPATRICK: You have already made a submission about this, relating to the kawenata. As I say, I don't think this - I mean, I think there are issues in relation to whether or not some things, the issue of a liaison group, a kaitiaki adviser, a monitoring plan, are entirely appropriate for tangata whenua to say, how does that help us? Maybe it would help Watercare, I don't know.

Whether the \$2 million, Ms Flavell was very firm on the basis that it's seen in the context of all of the water and the value of the business, as it were, in terms of what is charged to people who receive that water. You can ask whether the amount is appropriate or not.

I am not sure that the Board is well placed to engage in quantifying that sort of amount.

The one other thing I will ask you about though, if you are finishing off -

MR BEVERLEY: I am, thank you, Sir.

JUDGE KIRKPATRICK: - is that the relief sought by the Authority is only the decline of the application. Other parties, including Te Whakakitenga, have offered an alternative. What is the Authority's position on the alternative laid out by Te Whakakitenga?

MR BEVERLEY: Sir, the Authority's position is in two parts.

It supports the statement by Ms Flavell and through Ms Mahuta states in its view the application is so deficient that it should be declined.

What I can say is that the Authority will defer to Te Whakakitenga and to its submissions of my learned friend, Mr Ferguson, in relation to alternative relief. If that is where the Board goes, the Authority will refer to Te Whakakitenga.

JUDGE KIRKPATRICK: Thank you.

MR BEVERLEY: Unless I can assist Your Honour or the Board any further, those are my submissions.

JUDGE KIRKPATRICK: I have interrupted you a number of times on the way through but I won't do that again. I will see if my colleagues have any questions. Mr Manukau, do you have any questions for Mr Beverley before we move to the Authority's evidence?

MR MANUKAU: I do not, thank you.

JUDGE KIRKPATRICK: Mr Wilson, do you have any questions?

MR WILSON: Thank you but no.

JUDGE KIRKPATRICK: All right. I think we should move to the witnesses now, Mr Beverley.

MR BEVERLEY: Thank you, Your Honour, if the Authority pleases, I will call the first witness, Ms Mahuta. Ms Mahuta is present, Your Honour.

TIPA TE ATAWHAI MAHUTA - AFFIRMED
EXAMINED BY MR FERGUSON

5

JUDGE KIRKPATRICK: Ms Mahuta, if you could identify yourself, and you will come up on the screen, I think?

A. Kia ora.

10 **JUDGE KIRKPATRICK:** Tena koe. Please state your full name?

A. Tipa Te Atawhai Mahuta. (Witness affirmed).

JUDGE KIRKPATRICK: Do you wish to - sorry, Mr Beverley, were there any supplementary
15 questions that you had for Ms Mahuta?

MR BEVERLEY: No questions for Ms Mahuta, thank you, Sir.

JUDGE KIRKPATRICK: Ms Mahuta, if you've seen any earlier part of this hearing, you will be aware
20 that we offer the opportunity to a witness to address us generally, maybe a summary statement or an executive summary, if you wish to do that please go ahead.

A. (Speaks in Te Reo Maori). I wanted to acknowledge
25 Nicholas' welcome to all the submitters over the past few days who represent the many voices of the river from the mountains to the sea and acknowledge the passing of John Luxton, our first Chair of the Waikato River Authority in these first few days and our
30 condolences to him and his family.

On behalf of the Authority, I am here as one of the co-Chairs of the Authority, of the Waikato River Authority with my supporting evidence.

I'll take it as read by the Authority but would
35 highlight probably three main points.

From listening to the technical discussions in and around the application, I think those points are well covered in our evidence by Mr Beverley and Mr Penter but there are some things that I would like to bring to the fore.

5
10
15
Firstly, and to be clear, I submitted almost 30 years ago in the first Watercare application alongside my elders from Waikato, and 30 years later we would have hoped that this conversation around being good citizens to the river would be far beyond where it is today and I must express, as Chair of the Authority, my disappointment that we are still talking about engagement and giving appropriate attention to Te Ture Whaimana which has been well represented by all the iwi that fought hard for those conversations over those 30 years.

20
I would have expected that Watercare in its good citizenship of the river would have far advanced its relationships with all parties, notwithstanding us as representing Te Ture Whaimana but everybody else who has been in their midst for the whole 30 years and it disappoints me that we are still having that discussion.

25
But here particularly on behalf of the Authority and bringing forward Te Ture Whaimana and how it was going to collectivise and provide for that integrated planning and organising all the citizens of the river that we be good citizens for the health and wellbeing of the Waikato River.

30
And the fact that we have to be here today discussing that, means that we're not there yet almost a generation in.

35
Other parts of my evidence do refer, in particular, to the objectives of Te Ture Whaimana that have not been addressed. I have summed them up as

being good citizens but I take from your questions to Mr Beverley, what makes this different to other applications along our river, is that they are citizens of this region. Their benefits do flow back into this region and they are held accountable by constituents in this region. Watercare is not.

And from, I guess, notwithstanding their application and the manner in which they have dismissed the Waikato River Authority, to hold them to account, to hold them in good citizenship with the river, seems in my view a bit contentious and somewhat dismissive and I am really disappointed about that because we have had 30 years of opportunity to address some of that.

The other parts are with regards to Watercare offering a trust payment for betterment. Again, our other primary role is to, through the Waikato River Clean-up Trust, is to engage in restoration activities along the river. The sums arrived at and science arrived at for that contributor to the Clean-up Trust, was a matter of science, not a matter of this will do and this is enough.

And the fact that that whole calculation seems to be done by an accountant somewhere is very dismissive of those key beneficiaries of the river, being the river itself and the communities that have held it and its health and wellbeing for the whole community of the Waikato.

Some of the other matters I refer to for the Authority, we spoke at length about these with Regional Council, with the tribes. The loss to the region, again I bring up the fact of the loss of opportunity to the region. As you yourself noted, Judge, other water takes in the region are in the region and those benefits flow back towards people in the region. I am not saying that the Auckland region doesn't benefit us

but not as directly perhaps as Wairakei, pastoral and other members that you noted.

5 The other thing is, having been here 30 years ago, it was expected that a whole lot of good citizenship would occur. We can't actually take that for granted now, that once this water is lost it will be better
10 looked after, our concerns will be more taken into account and that Auckland will ever seek the opportunity to fully explore alternative water sources or alternative water remedies because it has been our
15 experience that that has not occurred.

So, without taking up too much of the Court's time because you have my evidence and I just wanted to highlight those matters to you, I again just want to
15 acknowledge the huge contribution of John Luxton to our river as a citizen of the river and his passing words to me is you've still got a lot of work to do because everybody isn't, I guess they aren't all well informed on Te Ture Whaimana and the benefit for all our
20 community. So, I will leave that note with you.
(Speaks in Te Reo Maori).

JUDGE KIRKPATRICK: Thank you very much.

Mr Ferguson, do you have any questions for Ms Mahuta?

25 **MR FERGUSON:** No, Sir. Thank you for your evidence, Ms Mahuta, kia ora.

JUDGE KIRKPATRICK: I will just double check whether Mr Muldowney or Ms Thomas is present for Hamilton City or Waipa District? No.

30 I believe Mr Milne may be present and whether the Regional Council has any questions for Ms Mahuta?

MR MILNE: I am indeed, Sir, and I have no questions.

JUDGE KIRKPATRICK: Thank you very much, Mr Milne.
Mr McNamara?

MR McNAMARA: Thank you, Sir, no questions.

5 However, on behalf of Watercare I would simply
like to acknowledge and offer condolences for the
passing of Mr Luxton, the Authority's first
co-Chair.

A. Tena koe.

JUDGE KIRKPATRICK: On behalf of the Board, I share
10 in that Ms Mahuta. It will be a matter of great
regret and sadness that our report to the
Minister will have to record that during the
course of the hearing Mr Luxton passed away and
that is a poignant matter in the whole framework
15 of this korero about this awa.

A. Tena koe.

JUDGE KIRKPATRICK: There are no questions for you,
so thank you very much for your evidence, both
the prepared brief that we have already read and
20 your comments this morning.

A. Tena koe.

JUDGE KIRKPATRICK: You are excused, thank you.
(Witness excused).

Mr Beverley?

25 **MR BEVERLEY:** Thank you, Your Honour. The Authority
will now call Mr Penter, please.

ROBERT RAY PENTER - AFFIRMED
EXAMINED BY MR BEVERLEY

5

JUDGE KIRKPATRICK: I just ask you to identify yourself?

A. My name is Robert Rya Penter. (Witness affirmed).

10 **JUDGE KIRKPATRICK:** Any supplementary matters, Mr Beverley?

MR BEVERLEY: Just briefly, thank you, Your Honour.

Q. Tena koe, Mr Penter.

A. Kia ora.

15 Q. Were you present in the first week of the hearing when Mr Fisher was giving his evidence?

A. Yes, I was.

Q. And did you hear Mr Fisher describe conversations between him and you in relation to matters broadly
20 pertaining to this application?

A. Yes, correct.

Q. Are there any comments you would like to make on those comments made by Mr Fisher?

A. Yes, I would, thank you. I have read the evidence and
25 rebuttal evidence of Mr Fisher and heard him present evidence to the Board on 11 October, as you noted, Mr Beverley.

I would like to clarify a few matters, if I may.

30 I note throughout this process, Watercare has maintained its dismissive approach and refused to acknowledge the role and concerns of the WRA. That continued to be the case in the evidence given by Mr Fisher to this Board.

As I've said in my written evidence, there was correspondence between Watercare and the WRA in June 2020 in respect to the emergency water take.

5 WRA also attended two water summits held in July 2020. Contrary to statements made by Mr Fisher that there was no interaction at a governance level, these two water summits were well attended by relevant governors and indeed Crown Ministers.

10 However, the purpose of these water summits was to discuss Auckland's water shortage and explore short-term solutions. These water summits were not detailed or meaningful engagements in relation to this present application or the implications of Te Ture Whaimana to this application.

15 Mr Fisher also referred to phonecalls that we had during 2020. As I said in my written evidence, there were discussions between the WRA prior to Minister Parker's calling and we have spoken on a range of different matters, including the water summits and the Agreement which related to the short-term water takes. 20 Again, I wish to note this was not detailed or meaningful engagement in respect to this present application or Te Ture Whaimana.

Thank you, Mr Beverley.

25 **MR BEVERLEY:** Thank you, Your Honour, no further supplementary questions for me. I do understand Mr Penter has a summary to read.

JUDGE KIRKPATRICK: I was just going to ask, thank you. Mr Penter, just as I invited Ms Mahuta, I 30 invite you as well, if you would like to make a summary statement or highlight in particular aspects of your written brief which we have read in advance.

A. Thank you, Your Honour. I do have a summary. Can I 35 just begin by acknowledging the mihi by my co-Chair

Ms Mahuta to the various parties involved in this hearing and also her acknowledgment of the passing of The Honourable John Luxton.

If I may, I will turn to my summary.

5 I've been the Chief Executive of the WRA since I was appointed by the Crown in mid-2010 to establish the WRA.

I have prepared a summary of my evidence which of course I'll now speak to.

10 As Ms Mahuta outlined in her evidence, the Waikato River arrangements are a result of the significant Waikato River Treaty settlements and agreements.

The WRA acknowledges and respects the role and mana of Waikato-Tainui and the other River Iwi
15 Waikato-Tainui are tangata whenua of the area where the resource consent activity is sought to be undertaken. The WRA supports Waikato-Tainui and defers to them on matters appropriate to its mana whakahaere in relation to the water take location.

20 As part of the Treaty settlement negotiations, I was appointed as the Senior Crown Appointed Advisor to the Waikato River Guardians Establishment Committee tasked with preparing Te Ture Whaimana o Te Awa o Waikato Vision and Strategy (**Te Ture Whaimana**). I
25 therefore have a good understanding of the history and context to these arrangements and Te Ture Whaimana.

The WRA was established in November 2010 as an independent statutory authority.

The statutory purpose of the WRA is to:

30 (a) set the primary direction through Te Ture Whaimana to achieve the restoration and protection of the health and wellbeing of the Waikato River for future generations;

(b) promote an integrated, holistic, and co-ordinated approach to the implementation of Te Ture Whaimana and the management of the Waikato River; and

5 (c) fund rehabilitation initiatives for the Waikato River in its role as trustee for the Waikato River Clean-up Trust.

The principal function of the WRA is to achieve that purpose.

10 I provide more detailed evidence in my written brief on the ways in which the WRA carries out its functions to achieve its purpose and Resource Management policy, planning and consenting processes.

By way of summary, over the past 11 years the WRA has:

15 (a) made submissions on at least 16 different policy statements, standards and other policy and/or consultation documents.

20 (b) appointed 25 accredited Hearing Commissioners to other related hearing panels in consultation with river iwi.

25 (c) directly awarded, at this time, \$61 million of the Waikato River Clean-Up Trust fund to 393 projects that support the restoration and protection of the Waikato River, in the WRA's role as sole trustee of that Trust; and

(d) been heavily involved in the WRC's Proposed Plan Change PC1 to the Waikato Regional Plan.

30 The WRA also works with resource consent applicants to ensure they engage with relevant mana whenua and provide any assistance the consent applicants may need in understanding Te Ture Whaimana.

To date, there has not been a resource consent application for a water take of the scale of Watercare's application and therefore the WRA has not

been heavily involved in other similar resource consent application hearings.

The WRA plays an integral part in ensuring that the vision of Te Ture Whaimana is realised.

5 The WRA works closely with iwi in the community and has gained their confidence and trust and respect in undertaking this role.

10 While the Regional Plan may provide for water take such as the current take proposed by Watercare, the current version of the Regional Plan does not necessarily give effect to Te Ture Whaimana and further reviews will be required.

15 In my evidence, I discuss reports that conclude that the Regional Plan does not give thorough effect to Te Ture Whaimana, including objectives (b) and (c), the relationship between Waikato-Tainui and the other river iwi and the Waikato River.

20 That in turn reflects the fact that Variation 6 to the Regional Plan was largely developed before the Treaty Settlement arrangements and Te Ture Whaimana came into effect. It was not developed in a co-management framework with river iwi.

25 The nature and expense of the PC1 review process provides a recent and relevant example of the work that is required to fully give effect to Te Ture Whaimana.

30 In my view, to a significant extent, PC1 has respected and reflected its direction of Te Ture Whaimana and the collaborative approach taken by the Waikato Regional Council with river iwi and the WRA must be acknowledged, as it was respectful to the Treaty settlements, Te Ture Whaimana and the WRA.

I understand that there will be further reviews of the water allocation provisions in the Regional Plan. Ensuring that the plan gives effect to Te Ture

Whaimana, the primary direct setting document for the river will be central to that process.

5 There is also an upcoming review of Te Ture Whaimana itself that will influence the future planning framework for the river which will need to fully give effect to Te Ture Whaimana.

10 As Ms Mahuta has provided in her evidence, there has been a lack of meaningful engagement with the WRA and given the role and functions of the WRA, this is not what the WRA would have expected.

Watercare did not engage with the WRA in 2013 in respect to the original application or prior to the Minister's calling in 2020.

15 Since the WRA lodged its submission raising concerns with the application, Watercare met with WRA once on 15 May 2021. This meeting has not resulted in the concerns of the WRA being addressed.

20 The assessment of Te Ture Whaimana in Watercare's application is inadequate. Te Ture Whaimana should have been front and centre in the application given its status in the legislation and the Treaty Settlement history and context. It simply has not been the case with three pages of brief and high level comments being provided in the AEE and no detailed evidence, no
25 detailed assessment in the evidence provided on behalf of Watercare.

For the reasons explained in my evidence, the WRA considers that the application is inconsistent with Te Ture Whaimana.

30 One very clear example is the inconsistency with objectives B and C which concerned the relationship between Waikato-Tainui and the other River iwi with the Waikato River.

35 The application is also inconsistent with other objectives, including objective D, in that it does not

provide for the restoration and protection of the relationships of Waikato communities with the river and other objectives.

5 One aspect but not the only aspect of Te Ture Whaimana is the requirement to restore and protect, rather than avoid, remedy and mitigate as guided by the RMA.

It must be betterment in terms of the health and wellbeing of the river.

10 It is difficult to understand how Watercare can determine what betterment is proportionate to the proposed activity without enforcing assessment of Te Ture Whaimana informed by the river iwi and the WRA against the application.

15 For example, there has been no assessment of cultural effects provided by Watercare to inform the assessment of Te Ture Whaimana.

The WRA considers that reducing reliance on the Waikato River to service the Auckland communities is essential to achieve 'betterment', the objectives and strategies of Te Ture Whaimana and to realise the 'vision' to 'restore and protect' the Waikato River for future generations.

25 The Board of Inquiry, river iwi, the WRA and Waikato communities cannot have any confidence that the proposed trust arrangement will provide betterment to the Waikato River proportionate to the activity, which is a significant water take and transfer outside of the Waikato region.

30 It is not appropriate to simply identify an arbitrary payment in financial terms and assume that will comply with Te Ture Whaimana. That is not what is intended by the Waikato River arrangement.

The WRA is charged with custodianship of Te Ture Whaimana and funding projects that support the achievement of Te Ture Whaimana.

5 However, the WRA has not been involved in any meaningful discussions with Watercare in relation to the establishment and functioning the Trust that it is now proposing as part of its mitigation package and how this may restore and protect the health and wellbeing of the Waikato River.

10 As the sole trustee of the Clean-up Trust, the WRA would be highly unlikely to accept any funding if that was not supported by river iwi.

 As Ms Mahuta provided in her evidence, the WRA considers that Watercare's approach has been
15 presumptuous, dismissive and disrespectful of the Waikato River, Te Ture Whaimana and the WRA.

 Tena koutou, that concludes my summary.

JUDGE KIRKPATRICK: Thank you, Mr Penter. I will
 just see whether anyone has any questions for
20 you.

 Mr Ferguson, any questions for Mr Penter?

MR FERGUSON: No, thank you for your evidence,
 Mr Penter, kia ora.

JUDGE KIRKPATRICK: And, again, I don't think any
25 attendances for Hamilton or Waipa?

 Mr Milne any questions from the Regional Council's
 counsel?

MR MILNE: No, thank you, Your Honour.

JUDGE KIRKPATRICK: Mr McNamara, do you have any
30 questions for Mr Penter?

MR McNAMARA: Yes, thank you, Your Honour, I do.

ROBERT RAY PENTER
CROSS-EXAMINED BY MR MCNAMARA

5

Q. Tena koe, Mr Penter?

A. Tena koe, Mr McNamara.

Q. Could I just start with a matter of clarification? You mentioned in your opening remarks by way of summary now, that the WRA has made submissions, I think you mentioned 16 on statutory planning documents. To confirm, the WRA hasn't to this point made submissions on Resource Consent Applications; is that correct?

10 A. That is correct, Sir.

Q. And you make this point at paragraph 40 of your written brief, so if we perhaps just turn to that. You mention there, if you've managed to find that?

15 A. Yes.

Q. That there hasn't been a Resource Consent Application for a water take of this scale of Watercare's application and hence, WRA has not been heavily involved. Just to confirm, the WRA hasn't been involved in significant Resource Consenting for discharges to the river either; is that correct?

20 A. Not as a formal submitter, that is correct.

Q. And that included the publically notified Wastewater Discharge Consent Application lodged by Water Treatment Plant for the Pukekohe Wastewater Treatment Plant in 2016?

30 A. That is correct, we were not a submitter but we were working and consulting alongside Taniwha at that time as they dealt with that process.

Q. Could we pick up your evidence at paragraph 77 which is also a point that you spoke to in your summary remarks just now?

35

A. Yes.

Q. And you say there that Watercare did not engage appropriately with the WRA prior to the amended application being submitted in December 2020, although
5 you acknowledge in that paragraph as well that there were discussions between Watercare and the WRA prior to Minister Parker's calling on the 30th of June; right?

A. That is correct. We initially spoke to Watercare regarding the emergency water take that took place I
10 believe in June last year, and that we learnt of through media reporting of the emergency take. SO, at that time, I spoke to the then CE of Watercare and had a conversation with him which went along the lines OF it's not appropriate, given our past relationship, for
15 the River Authority to learn of these things through the media and that we should, I believe, be talking to one another on matters of such importance as an emergency water take from the Waikato River.

The CE apologised AT that point which was accepted
20 and from thereafter there was a series of discussions/engagements between Watercare and the WRA in relation to the emergency water take and the water shortage that was being experienced at that time for Auckland.

25 Q. Yes. Now, accepting the range of the summits, the proposed water take was one of the matters discussed at the summits, wasn't it? And I know there were others, so I'm not trying to diminish the range of those discussions.

30 A. It was noted that there was an existing application that was in a queue of applications to take water out of the Waikato River and that Auckland, through Watercare Services, was one such applicant in that queue.

Q. Indeed and shortly after those summits the queue changed, didn't it, because the matter was called in by the Minister for the Environment; do you recall that?

5 A. I do, yeah, there was a series of events. It was a particularly busy time. There was also the Covid fast track RMA proposed legislation that was taking place before the Minister called it in, in fact.

Q. Indeed. I guess, I'm just seeking to confirm my understanding that, in fact, we moved from a situation
10 whereby Watercare's application had been stalled?

A. I am happy with that.

Q. For sitting in a queue, to one whereby it was to be dealt with within statutory timeframes on account of having been called in by the Minister for the
15 Environment?

A. That is correct.

Q. Yep.

JUDGE KIRKPATRICK: Excuse me, Mr McNamara, I just want to clarify a procedural question.

20 **MR McNAMARA:** Yes.

JUDGE KIRKPATRICK: I am not sure that the witness would necessarily know.

My recollection is that the calling in of this matter did not alter its status in the queue?

25 A. That's correct, Your Honour.

MR McNAMARA: That is correct, Sir. It's quite a complicated point. I think my point is, and I think the witness has agreed with me, that we moved to a situation from being in a queue before
30 the WRC, to the WRC no longer being seized of it.

JUDGE KIRKPATRICK: I am just saying that I'm not sure that those were consequential, if you like, to each other. The queue changed?

MR McNAMARA: That's right.

JUDGE KIRKPATRICK: My recollection was the queue changed after the calling had occurred?

MR McNAMARA: Yes.

JUDGE KIRKPATRICK: Because a preliminary issue for
5 the Minister and potential members of the Board,
was whether or not there was a procedural
impediment, effectively a real problem with the
time bound system occurring when there appeared
to be no capacity to grant the consent at that
10 early stage?

MR McNAMARA: Indeed, Sir. I think I'm just
establishing that there was a renewed focus on
this application following the call in.

Q. That's fair to say, isn't it, Mr Penter?

15 A. That is correct and I was trying to answer your
question in full, Mr McNamara, by referencing the
attempt through submission by Watercare to have this
water take application introduced into the Covid fast
track consenting application at that time and we
20 submitted in opposition to that and it ultimately
didn't end up in that legislation. And thereafter, the
Minister called the application in and Your Honour is
quite correct, that at that time the priority remained
unchanged, to my understanding, and in fact remained
25 that way for some time before it was addressed.

JUDGE KIRKPATRICK: Yes, thank you. I'm glad if
there's a consensus on that.

MR McNAMARA:

Q. Just picking up on your paragraph 79, Mr Penter, where
30 you refer to discussions between various parties,
including Watercare, Te Whakakitenga, the WRA, the
Regional Council and Auckland Council.

An area of focus in those discussions was the
agreement to come out of the summits known as Te
35 Paiheretanga; is that correct?

A. That is correct.

Q. And one particular area of focus was Watercare's
commitment to establish a trust with seed funding of
\$1.5 million and whether that commitment would be
5 documented in Te Paiheretanga itself; do you recall
that?

A. I recall there was discussion regarding the formation
the Trust through the agreement that was sought to be
reached in Te Paiheretanga and there was comment
10 regarding the \$1.5 million seed funding that Watercare
suggested. That was in relation to the current crisis
at that time, in terms of the water-sharing and the
existing consents that Watercare held.

MR McNAMARA: Could I ask the EPA to bring up on the
15 share screen a pdf document that's a letter from
the WRA to Watercare of 20 August? (Letter
displayed). If you could just scroll up so that
the witness has an opportunity to refamiliarise
himself, I am sure, with this document.

20 Q. Mr Penter, maybe we can go to the next page so you can
see the full extent of it before I ask you a question
or two about it.

A. Yes.

25 Q. You can see there that this is a letter written to the
Chair of Watercare Services by the Authority's two
co-Chairs relating to Watercare's Waikato River takes.
You are familiar with this document?

A. Yes, it does look familiar, although it was a year ago.

Q. Sorry?

30 A. It does look familiar.

Q. You are aware of it having been written by the Chair or
co-Chair or at least signed?

A. Yes, correct.

35 Q. If we scroll up to the start of this document, we see
the immediate context for writing it in the first

paragraph and I will let you read that for yourself.
(Short pause). But, in summary, the concern being
expressed there is that the removal of the reference to
the new trust and seed funding from Te Paiheretanga at
the request of Waikato-Tainui, in the Authority's view
5 meant "there was no longer tangible commitment from
Watercare to support Te Ture Whaimana"; that's correct,
isn't it?

A. That is correct at that time it was a series of
10 discussions that were occurring with I think the final
position of the WRA being that it wasn't a signatory to
Te Paiheretanga. Although, as I reflected in my
evidence, we did seek to further this discussion
through holding what was agreed at the second water
15 summit to be a third water summit around the time of
this letter which unfortunately didn't proceed.

Q. Yes. But you can see there the difference of position,
I think, between Waikato-Tainui who were proposing that
the funding be removed from Te Paiheretanga and the
20 Authority who favoured it being included in Te Ture
Whaimana; you see that, don't you?

A. I see that we were concerned without the ongoing
inclusion and discussion of the portion of funding,
there was no tangible observation that we could have
25 that Watercare was going to seek to provide a
commitment to restore and protect the health and
wellbeing of the Waikato River.

Q. Yes, yes. If we just scroll down a little bit in that
first page, you can see in the third to last paragraph
30 there's the reference to the Authority's track record
in delivering contestable restoration funding? And
then in the next paragraph, a reference to the
Authority having consistently advised Auckland Council
and Watercare that there must be reciprocity for the

river aligned to the Vision and Strategy; you see that, don't you?

A. Yes and I think that reference, Mr McNamara, was a reference to the discussions regarding the emergency
5 take in the short-term arrangements arising through the water summits.

Q. Okay. If we go to the following paragraph, we see that the acknowledgment that Watercare is still considering the new trust, the Authority's view is expressed that
10 it doesn't make sense to create a duplicate funding entity, as proposed by Watercare, but you acknowledge it's for Watercare to determine that matter; do you see that?

A. Yes.

15 Q. And if we turn the page we have some discussions from the Authority as to - well, we see an expression of support for Watercare's funding for restoration but some suggestions as to the form that could take; do you see that there?

20 A. Yes.

Q. And I guess I'd just ask you to read carefully those three approaches because I will return to those shortly but if you just refamiliarise yourself with the three different approaches; the consolidated approach; the
25 discrete approach; and the non-duplication approach that is set out in that letter?

A. Yes.

Q. In the end, I think, as you mentioned, whilst Te
30 Paiheretanga was signed by Tainui and Watercare, it wasn't signed by the Authority, and that was on account of the removal of the references to funding of this type from Te Paiheretanga; correct?

A. No, I don't believe that is correct, Mr McNamara. We
35 were still engaged in discussions regarding Te Paiheretanga as it developed with that removal. At the

time, the Board sought some final, what I would describe as quite minor wording within the final version of Te Paiheretanga. There was an invitation from the River Authority to Watercare and to the parties to attend a third water summit which would have provided an opportunity to further those discussions. That indication went unresponded to, there wasn't a third water summit. There was not agreement on the minor wording changes that the Authority sought to the agreement and, therefore, the other parties signed the agreement and the Waikato River Authority did not.

5
10
15 Q. The third summit, I believe, at the risk of diverging too far from matters of relevance, it was not seen as necessary by a number of signatories to Te Paiheretanga; that's correct, isn't it.

A. I am not sure if that is correct or not because we still didn't get a response from the parties, other than Waikato-Tainui, that suggested we might develop a draft agenda for it.

20 Q. So, you will be aware, and I am not asking you to be familiar with the kawenata, that what eventuated was the provision for the establishment of a trust and the seed funding in the kawenata; you are aware of that?

A. I wasn't aware of the kawenata, save for it being mentioned through this process.

25 Q. Right.

A. I don't have any knowledge of its content or the agreements that might have been reached or made between the parties.

30 Q. You are aware though that - well, I would expect you to be aware of a proposal - sorry, I'll rephrase that question.

The WRA was aware of Watercare's intention to setup a trust with trustees appointed by Te Whakakitenga and the Authority; is that correct?

35

A. That is correct, we were aware of that.

MR McNAMARA: Yep. And so, I'd like the Authority, the EPA if possible, to put up a second letter. Your Honour, I am in your hands as to whether you
5 feel it's necessary for these documents to be produced.

JUDGE KIRKPATRICK: Well, the question is the extent to which we need to have the documents produced to us to explain the evidence that the witness is
10 giving.

It may well be that the safest course is for them to be produced so that we have that context, although I don't see anything in the content of the letters that actually directly bears on the matters that we have to
15 consider.

MR McNAMARA: Thank you for that indication, Sir. There are really two points for this questioning.

One, and I acknowledge Your Honour's remarks about the obligations in relation to consultation. One is
20 simply a matter of fact but the second more important aspect to this questioning, Your Honour, relates to the question of certainty in relation to funding and the WRA's approach in relation to funding.

JUDGE KIRKPATRICK: It may be that in that context, in order that this witness' evidence in answer to your questions can be fully understood, you
25 should see whether he will produce this letter.

MR McNAMARA: Thank you, Sir.

Q. Mr Penter, having seen this document and identified it as a letter written by the Authority to Watercare and others, do you agree to produce this document as an
30 exhibit?

A. Mr McNamara, I think it's appropriate I take advice from our legal counsel, given we are represented here
35 today.

JUDGE KIRKPATRICK: Mr Beverley, is there any objection to the production of this document through this witness?

MR BEVERLEY: No objection, thank you, Sir.

5 **JUDGE KIRKPATRICK:** I think, Mr Penter, I'd ask you please to produce it in light of that?

A. Yes, happy to do so, Your Honour.

10 **Letter from Waikato River Authority to Watercare
Services Limited produced as Exhibit F**

MR McNAMARA: I think as a heads up, I think there's one other document that I think I need to take you to. If the Authority could share screen a
15 letter from Watercare to the WRA dated 25 September 2020?

Q. If you just take a moment to refamiliarise yourself with that letter, Mr Penter, before I ask you a couple of of questions, (short pause).

20 It is fair to say that that's really just documentary evidence of what you agreed with me on, which was that the Authority was given, I guess, an indication of Watercare's intention to establish a trust with that seed funding and for one of the
25 trustees to be appointed by the Authority; do you see that?

A. Yes.

Q. Subsequent to this correspondence, there was email correspondence between yourself and Mr Fisher in which
30 you noted Watercare's inclusive approach to the Clean-up Trust that it was forwarding; do you recall that?

A. No, sorry, I don't.

MR McNAMARA: All right. There is a further document
35 then which is an email of that date, if the

Authority can share screen that? Sorry, I may not have been clear, sorry Paula.

MS DUFFY: We are onto it, there's just a slight lag with the technician. Can you say the email and date?

MR McNAMARA: I think it may be headed "Letter WRA Watercare and others".

Q. You can see there that it's an email from you to the parties that were associated with the Te Paiheretanga Tainui Regional Council Watercare and Regional Council, you see that in the participants of the email that you wrote?

A. I do, I think that is what I was referencing in my earlier response.

Q. And you can see there, just in the first paragraph, the reference to the Board having met, the WRA board that is, and having received feedback on the minor variation that I think you mentioned in an answer to me earlier, Mr Penter? And then in that second sentence after resolving not to sign the agreement, nonetheless acknowledging Watercare's inclusive approach regarding the Clean-up Trust that it's forming?

A. Yes. Just to note by way of clarity, the Te Paiheretanga agreement in this discussion was not in relation to the present application.

Q. I've heard your comments on that, Mr Penter. My focus really is on the Trust because that's what ultimately makes its way into the consent conditions that are front and centre for the Board in this hearing.

So, if we just - that's the end of those documents and I think, given that that is an email that you wrote, I would ask that that email and that the previous letter also be produced through you?

A. Again, happy to if that's the advice from legal counsel to us.

JUDGE KIRKPATRICK: Any objection, Mr Beverley?

MR BEVERLEY: No objection, Your Honour. I just observe that it would probably be more helpful to the Board if this was put to the Board in its material but no objection to it being produced.

5

**Letter to Watercare to the WRA dated 25 September
2020 produced as Exhibit G**

10 **Email dated 21 October 2020 produced as Exhibit H**

MR McNAMARA:

Q. Mr Penter, if I return to your statement at paragraph 107, this is an important paragraph because it's one you emphasised in your summary this morning where you say that, "Although the WRA as trustee of the Clean-up Trust may accept other sources of funding it's not required to do so, would be unlikely to do so if it were opposed by other river iwi", do you see that there?

15
20

A. Yes, I see paragraph 107.

Q. And the river iwi you refer to in that paragraph are Waikato-Tainui, Te Awa, Maniapoto, Raukawa and Tuwharetoa; is that correct?

25 A. Yes, they are the five appointing iwi of the Waikato River Authority.

Q. And to confirm, it's Raukawa and Waikato-Tainui of the five river iwi that have expressed their opposition to this take before this consent Authority; that's correct, isn't it?

30

A. That's my understanding.

Q. Then in paragraph 107, you say that "the administrative costs and risks that would be borne by WRA in managing a separate amount of funding would require assessment".

So, just to confirm that I understand what you're saying there, you are expressing reservations then about what you described in the letter of 20 August as the discrete approach? So, that's whereby there's a
5 separate funding stream to be managed by the WRA? You have concerns as to the viability of that, that's correct?

A. Yes, I think it's fair to say that our thinking developed through this. The concern there is the
10 Authority as sole trustee of the Waikato River Clean-up Trust must follow statutory provisions in relation to the administration of that trust.

So, without having had discussions with Watercare regarding the Trust Deed or how any trust might operate
15 or how the funding might be tagged or otherwise, it was quite prudent we think to say that we need to be cautious if there's funding that may be made available to us or passed to us. I think, also a reference to not accepting funding in terms of if it was opposed by
20 river iwi. Obviously, if the river iwi was of a view that its relationship was going to be significantly affected by a proposal and the Authority was to receive funding as a result of that proposal, we would be in a very difficult position to accept the funding given the
25 makeup of the Authority and the fact that their appointors are drawn from the five river iwi as well as the Crown.

Q. I take it from your answer, I think you've now referring to the consolidated approach, if we revert to
30 the language of that 20 August letter which was the approach under which the Authority would receive, administer and award Watercare provided funding within existing Authority funding to the Clean-up Trust; that's right, isn't it?

- A. I'm responding to paragraph 107 but it's fair to say that the thinking of the Authority progressed. The Authority didn't hold a particular view as to whether the Authority should receive the funding, administer the funding or somebody else would do that role.
- 5
- Q. I think though, and I'm taking this from your answer, it's more a matter of sensitivity if two of the five river iwi oppose the granting of consent that any administrative cost and risk with that approach; that's
- 10 fair, isn't it?
- A. That's right, that is fair.
- Q. So, returning - and I appreciate you're not a planner but are you broadly familiar with the consent conditions that Watercare is proposing in relation to
- 15 the Trust, one of which involves or one of the three alternatives is provision of funding to the Clean-up Trust?
- A. Yes, I have read those, Mr McNamara.
- Q. Thank you.
- 20 **MR McNAMARA:** Could either the Authority or maybe Mr Conway just put those on the share screen?
- A. Thank you.
- MS DUFFY:** They are on their way, Mr McNamara.
- MR McNAMARA:** Thank you, Paula. Sorry, I think it's
- 25 21 from memory now but it's the common conditions at Schedule 1.
- Q. Now, it's possible that you didn't have these consent conditions in front of you or an earlier version when you wrote your evidence but in paragraph 105 of your
- 30 brief, if you reread that, you say there's no certainty that the Trust that Watercare is proposing will be established; that's the first part of that sentence, isn't it?
- A. That's the first part of the sentence, that's correct.

Q. And I'll ask you about the second part in a moment. Don't worry, I will give you a fair opportunity to address both parts of that sentence.

5 If you now look at condition C which states that, "Within 12 months of commencement Watercare must" do one of those three things; either establish one of two Trusts or provide the funding to the Clean-up Trust.

10 If you reflect back on your paragraph 105, you would agree that the only uncertainty in relation to the Trust is as to what trust administers the funding; would you agree with that?

A. Yes.

15 Q. And if the funding were to be provided to the Clean-up Trust under condition C(3), you'd be confident that the Clean-up Trust would be capable of applying that funding to a range of useful restoration projects, such as those identified in the Waikato and Waipa River Restoration Strategy that I've taken a number of witnesses to?

20 A. I think I can say that the Authority as sole trustee of the Clean-up Trust is able to award the funding for restoration projects. I am just not sure of the specifics of what this funding might actually look like if we were to receive it.

25 Q. Any funding that was received by the Clean-up Trust would need to be administered in accordance with the statutory object of the Clean-up Trust set out in the River Settlement Act; would you accept that?

A. Sorry, I didn't see that there on the page.

30 Q. Sorry, no, no, that's not on the page. You will be aware that the object of the Clean-up Trust is set out in the River Settlement Act itself; you are aware of that?

A. Yeah, absolutely.

Q. Yep. And so, any funding that was received by the Clean-up Trust would need to be administered in accordance with that object, wouldn't it?

A. Yes, we wouldn't be able to receive it if it wasn't.

5 Q. Indeed. Now, I promised you an opportunity to go to the second part of section 105, so let's do that, of paragraph 105 of your evidence.

10 There you refer to "a lack of certainty as to whether the Trust will provide betterment", and I'll just ask you to dwell carefully on the words "proportionate to the activity"?

A. Yes.

15 Q. Now, it may have just been shorthand but you will agree, I think, that betterment should be proportionate to the impact of the activity; am I right?

A. Yes, I'll accept that.

Q. And that flows from the *Puke Coal* decision that I think you mentioned earlier in your evidence?

A. Yes, the term betterment arises through that.

20 Q. And the guidance as to proportionality also derives from that case, doesn't it?

A. I believe so.

MR McNAMARA: Thank you, Your Honour, I have nothing further.

25 **JUDGE KIRKPATRICK:** Any re-examination, Mr Beverley?

MR BEVERLEY: Just very briefly, thank you, Your Honour.

30

ROBERT RAY PENTER
RE-EXAMINED BY MR BEVERLEY

5

Q. Mr Penter, my learned friend, Mr McNamara, just asked you a question about the first part of paragraph 105 of your evidence where you say there's no certainty that
10 this trust will be established.

Could you just explain to the Court your understanding of the proposal at the time that your evidence was written in relation to the need for agreement with Waikato-Tainui; do you recall that?

15 A. Sorry, can you say that again, please?

Q. I am just giving you an opportunity to explain why you said there's no certainty that the Trust will be established.

Are you familiar with the proposal at the time and is that why you've explained it in that way?
20

A. That's correct, yes. We simply weren't aware that the Trust, we had no basis of agreement or understanding that the Trust would be established and I think Mr McNamara properly pointed out that the evidence was
25 drafted ahead of the conditions being prepared for the application.

Q. Thank you. Now, my second question, my learned friend Mr McNamara put a number of questions and documents to you in relation to interactions between the Waikato
30 River Authority and Watercare.

Could you confirm and explain to the Court your understanding of the extent to which that addressed Te Ture Whaimana and this application?

A. The simple answer is it did not at all.

MR BEVERLEY: Thank you, Mr Penter. Your Honour, no further questions from me, thank you.

JUDGE KIRKPATRICK: Thank you. Mr Wilson, any questions for Mr Penter?

5 **MR WILSON:** Thank you, I have no questions.

JUDGE KIRKPATRICK: Thank you. Mr Manukau, any questions?

MR MANUKAU: Tena koe, Mr Penter, no questions from myself, Judge.

10 **JUDGE KIRKPATRICK:** And I have no questions either. Thank you very much for your evidence, Mr Penter, and you are excused.

I owe an apology to my colleagues on the Board. I am concerned that I may have excused Ms Mahuta from giving evidence before I invited either of you to ask any questions and I apologise for that. Without troubling her at this stage to come back, can I just inquire, do either of you have any questions for Ms Mahuta? Mr Manukau, do you have any?

15 **MR MANUKAU:** That's fine, that's fine, Judge, no questions.

JUDGE KIRKPATRICK: Mr Wilson?

MR WILSON: No questions.

JUDGE KIRKPATRICK: Again, my apologies. My apologies to Ms Mahuta as well for not dealing with that at the time.

25 Given that, Mr Beverley, is that the case for the River Authority?

MR BEVERLEY: That concludes the case for the River Authority, thank you, Your Honour.

30 **JUDGE KIRKPATRICK:** And that, I think, concludes the hearing of submitters on the application. Does anyone have any issue in terms of us reaching that point in the hearing?

MR FERGUSON: No issue in relation to that. There is one matter I do just want to raise with the Board and give my friend, Mr McNamara, some time to reflect on it. It's just arisen out of some
5 of the statements he's made in the course of questioning regarding the other river iwi and it's just a point of clarification as much as anything else, Sir, so just at an appropriate time.

10 **JUDGE KIRKPATRICK:** Well, now might be that time because I think procedurally all that we have left for the hearing process will be Mr McNamara's reply on behalf of Watercare.

MR BEVERLEY: Yes, thank you, Sir. I did want to
15 fairly raise it now in case my friend restates it in the course of his submissions and I didn't want to interrupt that flow in any way or raise something at the end of that.

It's really been the proposition that my friend
20 has been putting, and it may not be intended to come across that way, of referring to the five river iwi and saying that there are two that have opposed, being presumably Raukawa and Waikato-Tainui, and then the reference to no submission or no opposition from
25 Tuwharetoa and then the support as it's put by my friend I think from he says Maniapoto and Te Arawa River Iwi and Ngati Te Awa who he rightly says are part of the Te Arawa River Iwi Trust or represented by them as well.

30 I just wanted to clarify two things.

First, the opposition that's referred to as being
by Maniapoto isn't an opposition by the Maniapoto Maori Trust Board which has been appointed and party to the Waikato River arrangements but is by Maniapoto Regional
35 Management Committee, so I just wanted to make that

point because we seem to be talking repeatedly about reference to Maniapoto as the entire tribe.

5 And the second thing is, to my knowledge, and I stand to be corrected, Sir, but there is a submission, number 49, by Te Ao Pou Te Ao Taonga Ngati Tuwharetoa on the record of the Board that I understand is still live and hasn't been withdrawn, although they didn't seek to be heard, which is in opposition to the Consent Application. So, I think it's inaccurate to suggest there's no position from Tuwharetoa. It's 10 accepted, Sir, that the party that appoints to the Waikato River Authority and was the party at the time to the Waikato River arrangements is the Tuwharetoa Maori Trust Board. I would just note, Sir, that Te Ao Pou Te Ao Taonga Ngati Tuwharetoa, and and this is 15 clear from the settlement legislation, is the government entity for the comprehensive settlement for the Ngati Tuwharetoa claim and only came into existence when that claim was settled in the last few years, Sir.

20 I just wanted, just to not try and draw divisions here but just to clarify for the record that one needs to be a little careful when just referring generically to Tuwharetoa or to Maniapoto and any implications that might be suggested from that, Sir.

25 There is a Tuwharetoa Claim Settlement Act which has the post settlement governance entity under it, so it's a matter of public knowledge and legislative record, Sir.

30 That was the only point I wanted to make and in fairness raise it before my friend makes his submissions.

JUDGE KIRKPATRICK: Well, thank you, Mr Ferguson. Just before I invite Mr McNamara to respond, I think your point that everyone must take care not 35 to generally refer to an entity by some

connection without being very clear as to what or who the entity actually is. And, in particular, amongst various hapu and iwi, I think the experience that I have had in practice and on the Environment Court, is that care needs to be taken to be sure that identities are properly understood and referred to, notwithstanding the sometimes perhaps shorthand manner in which people might use a name without thinking about that.

So, thank you for that. Mr McNamara, in light of my comment, is there anything else you wish to respond?

MR McNAMARA: No, I think Mr Ferguson's point is very fairly made.

JUDGE KIRKPATRICK: Yes.

MR McNAMARA: I used the reference to Maniapoto in particular as a shorthand. I acknowledge it is the Regional Management Committees who have expressed that position, Sir, so I don't wish to - I fully accept my friend's comments and Your Honour's observations.

JUDGE KIRKPATRICK: Well, no, I just wanted to say that I think it's an appropriate reminder for everyone to take care and not to generalise too much in terms of how one refers to groups and entities where plainly, there are separate legal entities and, from the Board's point of view, we have to be aware of that.

All right. Now, Mr McNamara, the remaining item is a reply. The schedule indicates time for you to address us in reply but also to provide a written reply.

MR McNAMARA: Yes.

JUDGE KIRKPATRICK: Do you want to proceed now or would you like to take an early break for lunch and maybe return at, say, 1.30?

MR McNAMARA: I would prefer that, Sir. It will
5 allow me to reflect on the presentation of the WRA case, if I may.

Could I just deal with one very small matter of housekeeping? Your Honour did ask me to locate the references in the *Carter Holt* decision to the allocable
10 flow. The specific reference is to percentage of q5.

JUDGE KIRKPATRICK: Yes.

MR McNAMARA: And I directed you to one paragraph. I am grateful to my friend, Mr Milne, who's also pointed out to me the discussion that occurs from
15 paragraph 221 and ends at 225.

JUDGE KIRKPATRICK: Let me just check but I think that that was probably what I was asking for at the time. (Short pause). Yes, the paragraph in particular I was trying to recall was 225 but it
20 needs to be seen in the context of the preceding paragraphs, noting that the heading is, "Allocable flow above Karapiro".

MR McNAMARA: Indeed, and it only makes sense to see that the comments are made with respect to
25 particular stretches of the awa were at issue.

JUDGE KIRKPATRICK: That is of course what is now in the Waikato Regional Plan.

MR McNAMARA: Yes.

JUDGE KIRKPATRICK: This decision sets out the
30 reasons why the Environment Court considered that those were appropriate provisions but, in terms of what is currently operative, we have to read the plan itself and read those plan provisions in context.

So, no, thank you for helping me with that and that is fine. All right. Parties, is there anything else that anyone considers we need to deal with before the hearing closes at some stage this afternoon?

5 I should just say, just before anyone speaks, the Board presently intends, and is planning, to undertake a site visit, really a series of site visits, on Saturday. We will be starting with a visit to the Tuakau location of the take, the water treatment plant
10 there. We will then move on from that location and go on up the river and we're going to a series of locations. And if you'll just give me a moment, I will run quickly through those.

We will go up to Pioneer Road at Mercer to look at
15 the Maungatapere Stream.

We will go to Rangiriri Pa.

We will go to Waahi Marae.

We will go to Taupiri Maunga.

And we will probably have our lunch in close
20 proximity or in Taupiri.

So, we're anticipating that taking us from between 11.00 until about 2.00 or 3.00 in the afternoon.

I think that we've raised this previously. As the Environment Court normally does, we consider that we're
25 able to undertake this site visit and these inspections under our own steam and we don't require any person to assist us.

We will be out in the public arena and in people observe us there, that will be fine but, as is usually
30 the case, because the hearing will not be occurring during the site visit, we will not want anyone to approach us or inopportune us or raise anything with us while we are doing that. The reason for that is because that would be very difficult for us to deal

with while ensuring that every other party was aware of what had occurred.

So, if everyone who is presently listening could just bear that in mind.

5 We will be providing a summary of the site visit. The EPA will put that on the website, so that people will be able to see our report of what we've undertaken.

10 Are there any questions or issues that arise in relation to the proposed site visit? No.

MR FERGUSON: Sir, this isn't an issue, I understand perfectly what you've said, I am just not privy to any discussions that might have been had between EPA and I know some of those
15 representatives of marae from that area, that we're very keen on the site visit and related matters. So, I simply just note that they probably aren't on the stream and, therefore, I just observe that I presume that understanding
20 and any issues can be conveyed by them in an appropriate way to the EPA.

If that makes sense, Sir. Sorry, I'm not trying to be difficult.

JUDGE KIRKPATRICK: Well, the Board members will
25 double check with Ms Thomas-Hall and Mr Apiata in relation to that. My understanding is that that korero has occurred and that all of this is happening in a way that is transparent. I'll double check that with the EPA.

30 **MR FERGUSON:** Thank you, Sir. It is just that I'm not personally aware and therefore thought I should just double check.

JUDGE KIRKPATRICK: Thank you for raising it.
Anything else?

MR McNAMARA: Your Honour, I apologise for asking
but as we are approaching 12.45 -

JUDGE KIRKPATRICK: I was going to push it out a
little further. 1.45, will that be sufficient
5 time for you, Mr McNamara?

MR McNAMARA: Thank you, Sir.

JUDGE KIRKPATRICK: We will adjourn for an hour now
for lunch. We will return at 1.45 to hear the
oral reply of counsel for Watercare Services.
10 There will also be an opportunity for Watercare
to provide reply submissions in writing and we
will hear from you, Mr McNamara, as to an
appropriate time by which we can expect those
reply submissions.

15 **MR McNAMARA:** Thank you, Your Honour.

JUDGE KIRKPATRICK: All right, we are adjourned.

Hearing adjourned from 12.42 p.m. until 12.45 p.m.

20

**ORAL CLOSING STATEMENT ON BEHALF OF WATERCARE
SERVICES LIMITED BY MR MCNAMARA**

5

JUDGE KIRKPATRICK: Good afternoon, everyone, we now move to the oral submissions in reply on behalf of Watercare Services Limited. Mr McNamara?

MR McNAMARA: Thank you, Your Honour. In these oral
10 reply submissions, I will be addressing the following matters.

First, the need for water sought under this application to provide for growth in Auckland and the North Waikato.

15 Secondly, Watercare's consideration of alternative water sources.

Thirdly, the actual and potential effects on the environment of allowing the activities for which consent is sought relevant under section 104(1)(a) of
20 the Act, which will include what I can label for convenience "cultural effects".

Fourth, the relevant planning provisions in section 104(1)(b) of the Act, including Te Ture Whaimana.

25 Fifth, the term of the consent and the positions taken by Hamilton City and Waipa District Councils into Te Whakakitenga that a term less than 35 years would be appropriate recognising that this is an alternative position for Te Whakakitenga.

30 And finally, the proposed consent conditions.

A fuller response on each of these matters will of course be provided in written closing.

As stated, Your Honour, in section 9 of the Waikato-Tainui Raupatu Claims (Waikato River)
35 Settlement Act, the river and its contribution to

New Zealand's social, cultural, environmental and economic wellbeing are of national importance.

5 Alongside its own evidence as to the importance of these Consent Applications to Auckland, North Waikato townships of Pokeno and Tuakau and their water supply needs, Watercare acknowledges the evidence of all submitters to the Board, including, in particular, the evidence presented during this hearing as to the significance of the Waikato River to Waikato-Tainui and
10 its hapu and other river iwi for whom the river is a single and divisible being and a tupuna.

With Watercare's case having been presented over a month ago, I think it's important to recall key aspects of the case for the granting of consent and the
15 evidence that was presented and indeed tested during the first hearing week.

Notwithstanding that the opposition to the granting of consent has been expressed by some submitters during the past three days, in my submission
20 the evidence as a whole overwhelmingly supports the granting of all the consents sought by Watercare on the terms sought and, in particular, a 35 year term for the Water Permit.

Just as a preliminary matter, I would like to
25 touch on the wetland.

As indicated in Watercare's opening legal submissions, the Key Issues Report prepared by the Waikato Regional Council flagged that the Board may wish to consider whether it had sufficient information
30 to determine if what it described as a small section of tributary near the pumpstation on the Water Treatment Plant site is a "natural wetland" in terms of the National Policy Statement Freshwater Management and the National Environmental Statement in relation to
35 freshwater. Watercare, as the Board notes, has not

applied for any consents under the NES-Freshwater and its position has been no consents are required because although there is a wetland on-site, it's not a natural wetland as defined.

5 In Watercare's submission, there is sufficient evidence for the Board to conclude that the wetland was constructed by artificial means and hence, is not a natural wetland based on:

10 First, the information that was provided by Watercare to the Board in response to the Board's section 92 request.

15 And secondly, Ms Conn's evidence to this hearing in response in particular to questions from the Board which indicated consistent with the section 92 response that while there is a wetland present, the geomorphology suggests that until recently it has been a stream.

20 Having walked the site and the length of what we now call the Wairiri Stream, Ms Conn's evidence was that the stream channel has been extensively modified by stock access. The establishment of *Glyceria maxima* has restricted the stream channel from operating. However, shaded area where *Glyceria* are not present indicate a stream channel.

25 Overall, therefore, while parts of the site meet the definition of wetland due to the presence of *Glyceria*, the system would benefit from the removal of that *Glyceria* which is an invasive pest species.

30 In light of this, counsel for the Regional Council, Mr Milne, indicated in his legal submissions to the Board that he accepted it was open to the Board to find there is sufficient evidence to conclude that it is not a natural wetland under the NES-Freshwater.

35 So, that is a technical matter. I will return to it in the written closing, Your Honour, but that

summarises the position of Watercare on that preliminary issue.

Turning now to what is being consented before the Board. I start with the proposition that more water is
5 needed to provide for growth in Auckland and North Waikato.

Either in evidence or during the course of this hearing, no party has disputed that the water sought under this consent, 150 MLD, I will use the MLD
10 shorthand, is required by Watercare to provide for growth in Auckland and the North Waikato.

During the first hearing week last month, Ms Charlotte Reed presented evidence on forecast growth in water demand in Watercare's Metropolitan supply
15 system over the next 35 years and an accompanying supply demand balance.

Her undisputed evidence is that first, over the next 35 years there will be an estimated 700,000 additional residents connected to Watercare's
20 Metropolitan network and over 10,000 more residents in the townships of Pokeno and Tuakau in the Waikato District that are serviced by Watercare.

Secondly, the annual average demand in a dry year will increase from 446 MLD in 2020 to 650 MLD by 2055.

Watercare plans to meet a reasonable allowance for risk and uncertainty, which she referred to as headroom, which requires a supply volume up to 690 MLD
25 by 2055.

Third, a new water source is required by 2022-2023 to meet peak demand, plus a reasonable allowance for risk and uncertainty.
30

And by 2026-2027, to meet annual average demand plus headroom during a drought.

Fourthly, all of the 150 MLD sought under this Consent Application is required within the 35 year term
35

of consent. Ms Reed's base supply demand balance predicts that by 2055 there will be a supply demand deficit of 250 MLD for the peak day and 200 MLD in a drought year.

5 Aucklanders are already very efficient users of water. Auckland's PCC, per capita consumption, of 163 litres per person per day is significantly lower than the New Zealand average of 294 litres per person per day, and lower than all other cities in New Zealand.

10 As explained by Mr Bourne in his evidence, Watercare is committed to further reducing water demand and per capita consumption through the Auckland Water Efficiency Plan and the measures it sets out.

15 Since Ms Charlotte Reed completed her baseline demand forecast in December 2020, Watercare has agreed to additional water efficiency measures as part of the Auckland Water Strategy, including Smart metering, rainwater tanks and leakage detection.

20 I would now like to turn to the issue of consideration of alternative water sources.

 There is no statutory requirement on Watercare to assess alternative water sources in connection with its water take application.

25 The evidence of Mr Perera addressed the requirement under section 105 of the Resource Management Act to consider alternative receiving environments for the Water Treatment Plant Discharge Consent that is sought and no party has taken issue with that evidence.

30 During my opening submissions, Your Honour noted the TV3 Network Services decision of the High Court relating to assessment of alternatives, where a section 6 matter of national significance was engaged.

35 I will address in the written closing the extent to which that Authority applies but, in any event, the

evidence of Mr Jonathan Reed was first, that the assessment process followed by Watercare followed international best practice and considered at the start 156 options, which then were whittled down through a
5 five stage assessment process.

It was concluded that no single option is able to address the supply demand deficit to 2055. Watercare will need to implement a combination of options over this planning period.

10 Mr Reed's evidence was that of the four large shortlisted options, only the Waikato River option allows Watercare to maintain its agreed levels of service in the short to medium-term. The timeframes associated with the other large shortlisted options
15 relating to reuse and desalination are 15 plus years and these were well canvassed during the first hearing week.

Mr Reed's evidence was also that the new extraction from the Waikato River proposed in this
20 consent is preferred as it best meets the project principles, can be implemented quickly, is the lowest cost and significantly also, has the lowest carbon impact.

Mr Piper's peer review of Watercare's Water
25 Sources Option Assessment confirms that best practice had been followed.

I now wish to turn to the section 104(1) matters that are a focal point for the Board's decision.

30 By way of overview, the actual and potential effects of the application on the environment have been comprehensively assessed by independent experts and overall, are rated as low or very low.

No evidence challenges the assessment by Watercare of the positive effects of the proposal or the experts'

assessment of the effects of the proposal on aquatic ecology, hydrology, asymmetry or sedimentation.

The evidence from Mr Cameron King from the Waikato Regional Council, Mr Tom Bassett on behalf of
5 Watercare, is that the granting of the Water Permit sought will not prevent any other application currently before the Waikato Regional Council, whether lodged before or after Watercare's application was lodged in 2013 from being granted within the allocable flow under
10 the Waikato Regional Plan.

Accordingly, disputed adverse effects in terms of section 104(1)(a) are limited to first, whether the granting of consent will have an adverse effect on the environment due to the potential impact granting may
15 have on Hamilton City Council, Waipa District Council and its residents in light of those Councils having consents that expire in the 2040s.

And secondly, the cultural effects of the proposed take and application as a whole.

20 We need to start the section 104(1)(a) analysis, however, with positive effects.

As explained by Mr Fisher, the proposal is critical to Watercare meeting its obligations under the Local Government Act 2002 and the local government
25 Auckland Council Act 2009 and achieving its mission under its Statement of Intent with its shareholder Auckland Council of providing a reliable, safe and efficient water service.

Contrary to the view expressed by Ms Flavell
30 yesterday in answers to questions from myself, Watercare is not a profit making entity and it is expressly precluded by legislation, namely section 57 of the local government Auckland Council Act, from making a profit or returning a dividend to its
35 shareholder, Auckland Council.

The granting of consent will result in significant positive effects by ensuring there is sufficient long-term water supply available to provide for Auckland's forecast population growth and provide the necessary resilience during periods of drought.

As outlined by Dr Wheeler, in 2019 Auckland contributed 38% of New Zealand's GDP. This means that from a national perspective, a premium attaches to the proficient provision of water in terms of quantity, reliability and quality to Auckland.

Dr Wheeler has quantified in his evidence the effects of not granting the application by quantifying for GDP and employment.

The evidence of Dr Martin, the Auckland Council economist, is that while alternatives to taking additional water from the Waikato exist and would be found if this proposal was declined consent given the serious consequences that would entail. These would be at a higher cost and this would ultimately mean higher costs for households and businesses, dampening growth and leading to higher living costs.

Both Dr Wheeler and Dr Fairgrave who gave evidence for Hamilton City and Waipa District Council, agree on the close linkages between the Auckland and Waikato economies, and these linkages have been in place for over 100 years, as Mr Papa emphasised in his evidence.

As Your Honour has recognised, the prosperity of the Waikato communities and the prosperity of Auckland communities are related. It is submitted that in economic terms, what is good for Auckland is good for Waikato, especially where, as here and as I discuss below, there is no evidence that the granting of water to Watercare comes at the expense of those who seek it in the Waikato, including both Hamilton City Council and Waipa District Council.

Significantly, the Waikato Regional Plan does not distinguish between municipal takes for use within or outside the Waikato region and neither does Te Ture Whaimana.

5 Irrespective of what happens between now and when Hamilton City comes to apply for its next water take consent, especially with more efficient water use and the availability of alternatives to the Waikato River that would provide resilience benefits to Hamilton
10 City, there is a pathway for that Council to be granted a consent by virtue of the fact that municipal takes under the Waikato Regional Plan are not deemed to be over-allocation, even if they would cause the allocable flow to be exceeded.

15 In terms of positive effects in the Waikato catchment itself, if the proposal is granted, it will result in positive effects through Watercare's establishment of a trust, with the charitable purpose of restoring the Waikato River and its tributaries or
20 the funding of the Clean-up Trust.

While it will be for the trustees the Trust to determine the projects that are funded, the 2018 Waikato and Waipa River Restoration Strategy identifies priority projects by catchment that are prime
25 candidates for the application of this funding.

And Mr Penter this morning accepted that the Waikato Regional Authority could administer such funding.

JUDGE KIRKPATRICK: The River Authority, I think.

30 **MR McNAMARA:** Sorry, Sir, I meant the River Authority.

The proposed annual funding of \$2 million per year for the duration of the Water Permit, potentially up to 35 years, is significant compared to any other
35 established funds undertaking restoration work and far

larger than any other funding scheme that is in the public arena provided by the holder of a Resource Consent to take water from the river.

Turning to the topic of effects on other users.
5 Mr Bassett's evidence to the Board was that the effect of the proposed take on downstream users is expected to be negligible, as the proposed take will cause only a very small reduction in water levels.

10 In terms of the effect on other potential water users, in other words those with applications in the queue before the Waikato Regional Council, at the hearing Mr Bassett updated his evidence so as to be consistent with updated allocation information provided by Mr Cameron King of the Waikato Regional Council.

15 Mr Bassett's updated evidence was that in the CMA catchment there would be approximately 11 MLD available for allocation to future applications in the summer months and up to 430 MLD available in the winter months.

20 Turning specifically to potential future effects on Hamilton City Council and Waipa District Council.

The case for these two Councils that was put to the Board as stated in the submissions of Mr Muldowney, was that they have sufficient water allocation to meet
25 short to medium-term growth but in the long-term they will require additional water from the Waikato River to meet increased population and hence increased demand for water.

The Councils assert that there is a strong
30 correlation between what is allocated now and what will be allocated in the medium to long-term because, in their view, there are low rates of surrender and high rates of renewal of existing allocations.

It was then suggested as part of the case for
35 those Councils, that if the allocation pattern in

Mr Bassett's evidence continues until 2044, there will likely be insufficient allocable flow to grant the applications for them - applications from them for the additional water they need.

5 In fact, the evidence suggests these fears are not well-founded, in my submission.

 In oral answers, Mr King from the Regional Council emphasised the ongoing scrutiny of both existing resource consents, particularly through the exercise of review conditions, and applications for consent,
10 whether those be renewal applications or new applications.

 Further, email correspondence from Mr Sinclair of the Regional Council attached to the evidence of
15 Mr Parsons for Hamilton City Council attests to the significant freeing up of allocable flow that Waikato Regional Council, working with consent holders applicants, has been able to achieve. And, in that context, I refer also to the press release from the
20 Waikato Regional Council from March this year attached to Mr Board's primary evidence.

 Watercare accepts the submission for Hamilton City that the Board can take into account as an effect on the future environment any effect on Hamilton City
25 Council, Waipa District Council and the residents of their district resulting from the grant of this consent sought from the Board, to the extent that granting consent would adversely effect the availability of water to be allocated, that could be allocated to
30 Hamilton City or Waipa. However, it is submitted that such an effect is no more than a potential effect with a very low probability of occurrence.

 In particular, Hamilton City Council's demand for water can reasonably be expected to be less than set
35 out in the Council's evidence for a number of reasons.

First, as outlined by Ms Charlotte Reed, the introduction of universal water metering and volumetric charging has been shown to result in reductions in per capita consumption of 15-25%.

5 Mr Parsons who are Hamilton City Council's indicated in response to questioning that he supported the introduction of universal water metering and charges in Hamilton City. This is anticipated to occur from 2029 according to Hamilton City Council's
10 2021-2051 water strategy.

Thirdly, Mr Parsons and Mr Harper both indicated that a reduction per capita consumption of 15-20% as a result of metering was not an unreasonable assumption.

15 However, these percentage reductions are not reflected in Hamilton City Council's forecasts of future demand in the 2040s and beyond, presented in their evidence.

Accordingly, if efficiency measures, including universal measuring, are introduced by Hamilton City as
20 anticipated, Hamilton City's per capita consumption would reduce and its current consented take of 146 MLD should, on the evidence of Ms Charlotte Reed, provide for growth until 2065. And it may be noted that Ms Reed was not cross-examined in relation to her
25 evidence on that matter.

In short, the evidence shows that the likelihood of Watercare's take, if granted, having any adverse effects whatsoever on Hamilton City Council, Waipa District Council or their residents, is very low.

30 Moving to effects on ecology. The expert witnesses who have presented to this hearing have assessed ecological effects of all aspects of the proposal and concluded they are low or very low. This evidence is not disputed.

In particular, Mr Miller, using the ECIAG assessment process has reached the following conclusions.

5 Construction of the proposed intake would have only temporary and overall low effects.

Secondly, once the Water Treatment Plant is operational, predicted changes to water quality as a result of the discharge of off-spec water from the Water Treatment Plant will be - the effects of that
10 will be very low, beyond the zone of reasonable mixing and any changes will be largely undetectable.

Third, Mr Miller stated that the existing and proposed intake streams would minimise effects on fish migration.

15 Fourth, the effects on wetland and Inanga supporting habitat would be negligible, both in themselves and by comparison to inferences from the tide and climate change.

Fifth, the new intake structure would have a low
20 rate of fish impingement or entrainment, and again that's based on data as to the effects of the existing intake structures which are being replicated under the proposal.

I guess I should say for clarification, that there
25 are of course those two options of a barging or brush screen which is a matter still to be determined.

And finally, the proposed extraction of 150 MLD from the Waikato River would have an overall low level of effect on fish, fish eggs and fish larvae.

30 Turning to hydrology. Mr Bassett provided evidence that he considers the effects of the proposal on the hydrological values of the Waikato River from the construction and operation of the proposed intake structure and extraction of water will be very low.

In particular, the impact of the installation of the coffer dam during construction on water levels in the river, which was I think a matter brought to the Board's attention by Stantec for further consideration, that impact will be minimal.

Secondly, the reduction in the flow rate in water levels as a result of the proposed take of 150 MLD is negligible and not significant when compared to total water depth, mean velocity in the river and daily tidal fluctuations.

And thirdly, the proposed take will result in a negligible shift in the extent of the saline wedge.

Turning to asymmetry and sedimentation. Dr Keller's evidence was the impact on the symmetry of the proposed take at the Watercare site is negligible in the context of both individual and cumulative development changes that occurred and will continue into the future.

Ms Conn's evidence was that the sedimentation effects in terms of transport and bed form processes, due to predicted changes in flow depth and velocity in the river from the proposed take of 150 MLD, are minimal.

I now turn to the topic of cultural effects, if I can use that heading.

The evidence and representations from mana whenua submitters this week has underlined that a key concern for iwi and hapu opposing the application is that the current legal framework for decision-making on this application does not sufficiently give effect to Maori rights and interests, and in particular rights and interests secured through the Treaty Settlement process.

I refer in particular to the submission of Ms Hodge for Raukawa yesterday and Ms Flavell for

Te Whakakitenga, both in answers to oral questions and in paragraphs 80 and 81 in particular of her written evidence.

5 However, Watercare's application must be decided under the planning framework as it stands, that is the planning documents required to be considered by the Board under section 104(1)(b) in their current form.

10 Your Honour indicated the Board's reluctance to reopen the findings of the Environment Court under Judge Whiting in the *Carter Holt* decision which concerned appeals against RPV6, that being the variation which introduced chapter 3 into the Waikato Regional Plan.

15 These findings included the finding expressed from paragraph 423 of the decision that RPV6 gives effect to Te Ture Whaimana and more specific findings in relation to allocable flows that had been set as a percentage of q5.

20 As Your Honour indicated, in the context of an Environment Court decision that has as a heading "Does Variation 6 give effect to the Vision and Strategy?", it's not fair to suggest, as some parties have, that the Court did not consider that question.

25 The decision itself sets out the Waikato Regional Council's basis for determining allocable flows and Mr Milne has helpfully guided the Board to the relevant paragraphs in the *Carter Holt* decision that set out the Regional Council's thinking and approach.

30 With respect, the Board's reluctance to second guess the *Carter Holt* decision is correct. The appropriateness of the Regional Plan's allocation framework is beyond the scope of this hearing. Frustration with the allocation framework is clearly not an adverse effect to be considered within the scope
35 of section 104(1)(a) of the Resource Management Act,

nor are desired or potential changes to that allocation framework able to be considered under section 104(1)(b).

5 Mr Milne for the Regional Council indicated during the first hearing week that when the current allocation limits were set as part of RPV6 in 2011, the Settlement Acts, Te Ture Whaimana, and whether RPV6 gave effect to Te Ture Whaimana, was at the heart of legal argument.

10 The Court's conclusion was that RPV6 did give effect to Te Ture Whaimana. No party including Waikato-Tainui sought a reduction in allocable flows below the 10% allocable flow in the main stem that is at issue before the Court here.

15 And indeed, Waikato-Tainui supported RPV6, seeking only minor amendments at the hearing.

I have to qualify, sorry, Sir, just the statement about specific reductions sought in sections of the river that I've taken you to earlier in relation to the 5 and 3.6%. I'll make that point clear in the written closing, Sir, by reference to paragraph numbers.

20 **JUDGE KIRKPATRICK:** Thank you.

MR McNAMARA: Mr Milne also indicated that a purpose of the allocable flow regime is in a conversational phrase "to take cultural effects off the table" because they were taken into account in the setting of the allocable flows.

25 The Key Issues Report prepared by the Waikato Regional Council before this hearing at paragraph 91 is to much the same effect, insofar as it concludes that cultural effects are not of concern from the Regional Council's perspective because the application is within the allocable flow set under the Regional Plan.

30 Mr Beverley today confirmed that the Waikato River Authority is not challenging the allocation framework under the Waikato Regional Plan and could not point to

35

any evidence that demonstrates that the allocation framework, as it applies to the Waikato River main stem, does not meet Te Ture Whaimana.

5 All of this suggests that the Waikato River Authority's review of Te Ture Whaimana due now under section 19 of the River Settlement is in fact overdue from the perspective of some iwi submitters but that cannot affect the consideration of this application.

10 The Waikato Regional Plan will need to be reviewed by the Waikato Regional Council within one year of the review of Te Ture Whaimana, section 13 of the River Settlement Act dictates this. But, again, we cannot second-guess what changes to the Regional Plan might look like following the Authority's review of Te Ture
15 Whaimana.

Opposition from mana whenua to an application for Resource Consent can take many forms. However, accepting the obligations on decision-makers under Part 2 of the Act and the statements of superior Courts
20 in cases such as McGuire upon which my learned friend Mr Beverley relied this morning, the evidence of mana whenua, like that of any other party, needs to be assessed and weighed within the framework of section 104.

25 The case law is clear, that mana whenua do not have a right of veto over a Resource Consent Application, and subsequent authorities stand for that proposition.

Watercare does not suggest that the evidence has
30 been presented in this way or that iwi and hapu are seeking to exercise a right of veto. Yet, this morning, despite acknowledging that there is no right of veto, Mr Beverley for the Waikato River Authority still appeared to suggest that mana whenua opposition
35 to the application was fatal, with particular reference

to only one objective of Te Ture Whaimana, namely Objective b.

5 The evidence for Te Whakakitenga and Te Taniwha o Waikato indicates that their opposition to the granting of consent is founded on, and this is by reference to paragraph 80 of Ms Flavell's evidence, concerns that the application does not adversely affect the rights and interests of Tainui, including under its Treaty Settlement and the Settlement Act. Secondly, concerns that the application does not marginalise the ability of Waikato-Tainui and its marae to exercise mana whakahaere.

10 And thirdly, concerns that Treaty obligations and Treaty principles are upheld.

15 Ms Flavell is right to acknowledge in paragraph 81 of her evidence that some of these conversations and discussions can only be had between iwi and the Crown. These concerns can be acknowledged by the Board but are self-evidently not an effect of the activities for which consent is sought in terms of section 104(1)(a) of the Resource Management Act.

20 What the Board must consider and weigh under section 104 is evidence as to the effects of the application on the mauri of the awa which extends beyond biophysical effects. Watercare accepts this effect, whether it is described in European terms somewhat inadequately as a spiritual or metaphysical effect, or more appropriately in terms of relationships or values from Te Ao Maori, such as mana or mauri of the awa.

30 The evidence for Mr Papa described significant cultural activities occurring on the river, for example, Poukai, and that's at paragraphs 48-49 of his evidence. Watercare respects that evidence and did not contest it.

35

Significantly, however, there is no evidence from Mr Papa or anyone else that culturally significant activities, such as the gathering of kai from the awa, are adversely affected by the proposal.

5 This is where a linkage or overlap between "western" biophysical effects and Maori cultural effects exists, with no biophysical effects being relevant to the level of cultural effects.

10 Ms Flavell in her oral presentation in answers to questions emphasised the investment needed to restore the health and wellbeing of the awa. However, she was unaware of the level of investment being proposed by Watercare through its consent conditions.

15 Under questioning, both Ms Flavell and Ms Colliar were reluctant to accept that the application of up to \$70 million to river restoration and enhancement projects under the consent conditions proposed by Watercare would be valuable.

20 The \$2 million per annum Watercare is proposing by way of funding is to be spent on the health and wellbeing of the river. The degradation of the river has been covered extensively in evidence for mana whenua and orally, for example in the statement by Ms Flavell yesterday that we are "at the toilet end of the river and that the river is degraded by the time it gets to us".

30 The activities that Watercare seek consent for do not degrade the river. Rather, those activities occur downstream of those activities creating that degradation.

The betterment proposed by Watercare is to address the degradation to the river caused by other users.

35 Watercare acknowledges mana whenua's confirmation or statement that the river and the people are inextricably linked.

However, it is endeavouring through its betterment proposal to benefit the river and through that, benefit the people.

5 Another aspect of mana whenua opposition and the evidence of the Waikato River Authority appears to be based on Auckland's use of the water to be abstracted, notwithstanding that there are some 30,000 Waikato-Tainui residents in Auckland, as was recognised in questioning between Commissioner Manukau and
10 Ms Flavell.

Indeed, section 9 of the Settlement Act itself refers to the river's contribution to New Zealand's cultural, social, environmental and economic wellbeing being of national importance.

15 Ms Flavell, in response to questions, accepted that if this proposal is declined consent there is a risk that applications will be made and granted to other entities that don't desire a long-term relationship with Waikato-Tainui and are not prepared
20 to make the same level of investment in the river as Watercare has done historically and proposes under this consent.

Given the demand for water from the Waikato River as evidenced by the queue of applications by the
25 Waikato Regional Council, under the current allocation framework the only way in which water not allocated to Watercare, if consent is declined, could stay in the river, would be if consent were granted to an applicant such as Waikato-Tainui who then chose not to exercise
30 that consent.

In my submission, this merely underscores that it is the allocation framework, rather than this application, that lies at the heart of much of the opposition and frustration that has been expressed
35 during this hearing week.

As I noted in opening submissions, it must be recognised in relation to cultural effects, and acknowledging that the awa is a single indivisible entity, that not all mana whenua oppose the application. Maniapoto Regional Management Committees have filed submissions supporting Watercare's application.

Ngati Tahu, Ngati Whatua, in withdrawing its submission commended Watercare's approach to the application.

The Te Arawa River Iwi Trust has withdrawn its opposition.

Te Kotahitanga o Ngati Tuwharetoa has filed a submission but has taken no active part in this hearing.

I turn now to section 104(1)(b) which relates to the relevant planning provisions.

The status of Te Ture Whaimana is clear from Part 2 of the River Settlement Act and there is no dispute between the parties on that or as to the primacy of Te Ture Whaimana within the planning framework.

As I emphasised in opening, section 17 of the Settlement Act dictates the role or what role, I'm sorry, Te Ture Whaimana has in the Board's decision-making.

The Board, acting as a consent Authority under the Resource Management Act, must have particular regard to the Vision and Strategy.

This is clearly stronger than the obligation to have regard to other statutory planning document. I guess, if my wording in the opening submission of places a gloss was inapt, I apologise to that, in response to the comments from my friend Mr Beverley this morning but an obligation to have particular

regard to the Vision and Strategy is not the same as an obligation to give effect to it.

It is the Regional Plan that must, and indeed does, give effect to Te Ture Whaimana.

5 The obligation of the Board to have particular regard to Te Ture Whaimana does not require applicants for resource consents, such as Watercare, to show that the application being considered passes or fails when assessed against individual objectives within the
10 Vision and Strategy.

If this is what Your Honour was suggesting when you said to my learned friend, Mr Ferguson, that the Vision and Strategy requires a substantive rather than a textual assessment, then I respectfully agree.

15 Regrettably, much of the questioning of Watercare's witnesses, in particular Dr Mitchell, and indeed the legal submissions for parties opposing the application, has tended to cherry pick particular objectives which are considered to be less supportive
20 of the application.

Mr Beverley's submissions this morning illustrated this point when he asserted that a single objective in the Vision and Strategy, Objective b not being met, was fatal to this application.

25 Notably, this approach finds no support in the case law and the Environment Court decision in *Puke Coal* in particular.

As stated in opening submissions, Watercare's approach to the application has been guided by the
30 Vision and Strategy and the restoration and proportionality principles that emerge from the *Puke Coal* case and are outlined in opening legal submissions.

Whether the level of betterment offered by
35 Watercare is adequate is a matter for the Board to

determine having regard to the effects or impact of the activities for which consent is sought on the one hand and, on the other hand, the nature and level of restoration and enhancement being offered by Watercare and secured through consent conditions.

5 It is respectfully submitted that Watercare's proposal clearly meets the obligation on a consent holder to contribute to the restoration and health - restoration of the health and wellbeing of the river.

10 Watercare has a long track record of contributing to the betterment of the river, as outlined in Mr Borne's evidence, and the proposed conditions are a continuation of and substantial extension of that commitment.

15 In terms of the Regional Plan itself, as I have previously outlined, it's submitted that plan does clearly give effect to Te Ture Whaimana and Dr Mitchell's evidence addresses that point.

20 It is not the case that Te Ture Whaimana was a last minute consideration in the Environment Court process that accompanied RPV6 and that, therefore, you should ignore that plan and focus on Te Ture Whaimana.

25 Even if you did, however, this application should not be regarded as somehow contrary to Te Ture Whaimana. There is a strong correlation between what is in Te Ture Whaimana and what is in the Regional Plan. That, presumably, is what led to Waikato-Tainui and other River iwi being able to express support for the allocation regime as it passed through the Environment Court appeal process in respect of Variation 6.

30 Turning now, and you will be pleased to know I am nearing the end, to section 104(1)(c) which relates to

other matters and here I wish to address the relevance of the kawenata.

Your Honour rightly observed that it is not the Board's role to determine private issues between
5 parties. As Mr Fisher said when producing the kawenata on the opening day of this hearing, Watercare is not asking the Board to make findings as to its interpretation or to adjudicate on the differences of interpretation between Watercare and Te Whakakitenga.

10 The relevance of the kawenata in this hearing is twofold. First, it represents a highly significant milestone in the 25 year relationship between Watercare and Waikato-Tainui whose purpose was recorded in recital Q which I quote:

15 "The purpose of this agreement is to reaffirm and strengthen the parties' existing relationships as referred to in paragraph B and to record:

1. Te Whakakitenga's position in relation to the proposed Consent Application and the renewal of the
20 primary consent; and

2. Watercare's commitment to work together in good faith and further Te Whakakitenga's desired outcomes."

As Mr Fisher explained, Watercare's hope and
25 expectation was that Waikato-Tainui would, as a result of the engagement that had occurred since 2012 in respect of this application and earlier in respect of the existing consent, support this application before the Board, and that was reflected in Clause 3.1 of the
30 kawenata which I also quote:

"Watercare and Te Whakakitenga undertake to work together in a collaborative, co-operative and proactive manner and in good faith with a view to:

(a) The proposed Consent Application, when
35 publically notified as part of the Board of Inquiry

process noted in paragraph K above expected to be within 6 months of the signing of this agreement; one, being for a maximum take of 150 MLD; two providing for 25,000 MLD to be supplied to Waikato-Tainui; and three, having the support of Te Whakakitenga."

In short, the kawenata is a manifestation of Watercare's extensive and ongoing engagement with Waikato-Tainui.

Secondly, and perhaps more importantly or at least more directly relevant to the Board's task under section 104 of the Resource Management Act, Watercare's commitments made in the kawenata are carried over and locked in through Watercare's proposed consent conditions.

The kawenata should not be used as a platform for arguments by submitters in this hearing that Watercare should be required to reduce reliance on the river by reducing the volume of its consented takes within the term of this consent, namely up to 35 years if consent is granted.

The kawenata itself defines the reduced reliance outcome. Clause 3.4(b) of the kawenata commits Watercare and Te Whakakitenga to a process of agreeing milestones for reducing the percentage contribution the river makes to meeting Auckland's municipal supply needs.

Watercare has taken this commitment to reduced reliance into Condition 19 of the Water Permit, which requires Watercare to report every 5 years, starting in 2026, on progress on investigating and implementing water source options for Auckland, including groundwater, wastewater reuse and desalination.

Watercare does not resile from the volumetric aspect of the reduced reliance outcome but clause 2.1 of the kawenata expressly recognises that a reduction

in volume is only, and I quote, "attainable through the availability of other significant and sustainable sources of supply".

5 Watercare's evidence to this hearing has been clear as to both Watercare's need for 150 MLD sought under this consent and secondly, the obstacles to implementation of significant and sustainable sources of supply, such as desalination or reuse, which will require at least 15 years to overcome.

10 **JUDGE KIRKPATRICK:** I am not sure if you're moving away from the issues about the kawenata.

As came up earlier, of course, that exhibit, although received as an exhibit, it's still confidential.

15 **MR McNAMARA:** Yes.

JUDGE KIRKPATRICK: So, I am not sure whether - I mean, certainly we can address whether or not, if consent is granted, a condition such as Condition 19 is appropriate and sufficient.

20 I'm not sure at the moment that we could do that by reference to the kawenata, as opposed to the intrinsic quality of that proposed condition.

MR McNAMARA: Indeed. Your Honour, as I said, the kawenata's relevance is twofold. As a milestone, not the destination as has been suggested but a milestone in Watercare's engagement with Tainui which it hopes and expects will be ongoing through the duration of this consent if it's granted.

30 But secondly, because it translates and explains what has been - it translates into consent conditions, and those conditions are of course public and to be considered.

So, I think there's no need, Your Honour, to delve into the detail of the kawenata in the Board's decision.

JUDGE KIRKPATRICK: No.

5 **MR McNAMARA:** And placing the confidentiality of that document at risk.

JUDGE KIRKPATRICK: I understand, thank you.

MR McNAMARA: That's all I have on the kawenata, Sir.

10 I only have two topics more.

One is the term of consent. Watercare, as the Board appreciates, is seeking a 35 year term for those consents that are not of unlimited duration, notably the Water Permit.

15 It needs that 35 year term to provide it with the security of supply it needs to meet its obligations to Auckland Council under its Statement of Intent, its statutory obligations referred to earlier in this oral closing submission and to justify capital expenditure
20 of approximately \$1.1 billion.

It is common for municipal water suppliers to seek a term of consent of 35 years. In this respect, I note, first, that Mr Parsons of Hamilton City Council in response to questioning acknowledged that he,
25 himself, would, on behalf of Hamilton City Council, seek a term of 35 years, indeed longer if the Act allowed it.

And secondly, of course, Policy 15 of the Waikato-Tainui Regional Plan which, despite setting a
30 default consent term of 15 years, expressly recognises the need for consents relating to municipal supply to have a longer term.

Hamilton City Council and Waipa District Council seek a 20 year consent to provide Watercare with
35 short-term security of supply, allow Watercare enough

time to investigate alternatives and to bring the expiry of Watercare's consent in line with the expiry of Hamilton City Council's consent which is in 2043.

5 In Watercare's submission, a 20 year consent term is not justified for three reasons.

10 First, Hamilton City's argument that it's necessary to align the expiry of Hamilton City Council's consent and Watercare's consent is premised on this being necessary to address a perceived adverse effect on Hamilton City Council, that being that the river may be fully allocated by the time Hamilton City comes to needing a further consent.

15 However, the evidence before the Board, as I've summarised earlier, is that such an effect is unlikely to eventuate. Apart from the likely reductions in per capita consumption in Hamilton for the reasons outlined earlier, the allocation status of any application to be lodged by Hamilton City Council on the expiry of its consent in 2043 is uncertain.

20 Further, while Watercare is committed to investigating alternatives and ultimately if attainable reducing the volume of water taken from the Waikato River, Mr Fisher's evidence was that it was unlikely Watercare could relinquish its consent to take water from the Waikato River in the 2040s as this would mean it would be required both to replace the consent relinquished and extend the volumes required through an additional source, such as reuse or desalination.

30 For Te Whakakitenga, Mr Brough expressed his support for a term of consent of 15-25 years duration because there could be plan changes that amend the allocable flow regime for the Waikato River over a 35 year term and this created a risk that Watercare's allocation could not be clawed back to address
35 over-allocation.

In my submission, this fear is not well-founded and that changes in the allocation regime can be responded to within the 35 year consent term sought by Watercare. I refer, in particular, to review
5 conditions 20 and 21 proposed by Watercare for the Water Permit.

Turning then to the topic of conditions. Updated conditions have not been provided today with the oral closing. It is intended to provide a final set of
10 conditions that includes the amendments suggested by Dr Mitchell when he gave evidence during the first hearing week at the time of filing the closing submissions.

And all I wish to say in respect of the conditions
15 themselves, is that while a particular focus during this hearing has been on the adequacy of the review conditions proposed by Watercare, in particular conditions 19 and 20, it is submitted that these have real teeth and should allay any concerns that parties
20 may have arising out of the granting of a long-term consent, by which I mean 35 years, to Watercare.

In conclusion, therefore, Your Honour and members
of the Board, it's my submission that the case
presented by Watercare, both through its corporate
25 witnesses and the independent experts that it has engaged in favour of the granting of consent, is overwhelming and that consents should be granted on the terms sought by Watercare through its conditions.

Unless there are questions, those are the legal
30 submissions for Watercare Services Limited.

JUDGE KIRKPATRICK: Thank you, Mr McNamara.

Mr Manukau, Mr Wilson, do you have any questions that you would like to ask Mr McNamara at this stage?

35 **MR WILSON:** I have no questions, thank you.

MR MANUKAU: Thank you, Mr McNamara, I have no questions.

JUDGE KIRKPATRICK: And that overview is very helpful, thank you, Mr McNamara, I have no
5 questions either.

You have left one matter out, which is the time when we can expect to receive your written submissions.

MR McNAMARA: Yes, I have. My suggestion, Sir, and I am in the Board's hands, is next Friday, which
10 by my account is the 26th of November, Sir, but I appreciate the Board is working to a statutory deadline.

JUDGE KIRKPATRICK: Well, I don't know that we could ask them to be much earlier than that.

15 We are not holding off, given the deadline that we have, we won't obviously issue a decision before we get your closing but certainly a week, I think, is a reasonable time for you to prepare that.

If the conditions were in a form ready to be filed
20 and served prior to that, then you're welcome to file those in advance.

MR McNAMARA: Thank you, Your Honour. I can indicate that they will be. As I have foreshadowed, the changes from those circulated
25 in opening are minor, they include those of Dr Mitchell, but they will be provided several days before the closing, Sir.

JUDGE KIRKPATRICK: That would be very helpful to us, thank you.

30 All right, well, thank you very much, Mr McNamara, and I'd like to thank all participants in this hearing. It is a significant case in a number of different ways and it affects matters of great concern. That of course is the reason why the Minister directed that

this be called in and given to a Board of Inquiry because it is a matter of national importance.

5 We have a deadline of the 7th of January at the moment for the presentation of our report to the Minister. We will be doing our utmost to meet that time. The difficulties presented by the pandemic have affected the process that we've been under and it is still possible that we may need to ask the Minister for some extra time but we'll see how we go.

10 But, again, I would like to thank the parties for the care and attention that they have brought to this matter, to the helpful presentation of submissions. We have heard evidence from a number of people who have obviously given great thought to this matter and that
15 evidence will also assist us.

So, other than for a closing to occur, and I will be handing over to Mr Manukau in relation to that in just a moment, on behalf of us all, thank you, stay safe, go with our best wishes.

20 Mr Manukau?

(Karakia whakamutunga)

25

Hearing adjourned at 3.20 p.m.