Office of Hon Christopher Finlayson

23 AUG 2016

The Trustees
Ngāti Pāhauwera Development Trust
Gardiner Knobloch House
15 Shakespeare Road
Bluff Hill
NAPIER 4110

Tēnā koutou

Ngāti Pāhauwera determination of customary interests under the Marine and Coastal Area (Takutai Moana) Act 2011

This letter informs you of my decision in relation to the Ngāti Pāhauwera application for recognition of customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) in the area from Poututu Stream to Pōnui Stream and out to 12 nautical miles.

In December 2012 Ngāti Pāhauwera and the Crown signed terms of engagement for recognition of customary marine title (CMT), protected customary rights (PCRs) and wāhi tapu protection under the Act. In order to recognise these rights I must be satisfied, on the basis of the evidence provided, the legal tests in the Act are met.

Over the course of 2013 and 2014 evidence was collected by the parties and assessed against the tests in the Act. To provide an extra level of assurance I established the non-statutory position of Independent Assessor. The role of the Independent Assessor is to provide me an Independent, non-binding opinion on the extent to which the tests are met. I appointed the Hon John Priestley QC to this role.

I have now considered the evidence and the parties' assessments, together with Hon Priestley's report. My conclusions are as follows:

i. I am not satisfied on the basis of the evidence presented to me in support of the application that the tests for protected customary rights or wāhi tapu protection in the Marine and Coastal Area (Takutai Moana) Act 2011 are met in any part of Ngāti Pāhauwera's application area;

ii. I am satisfied that the test set out for customary marine title in section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 is met in the Ngāti Pāhauwera application area in:

    a. the common marine and costal area between mean high-water springs and mean low-water springs, and

Private Bag 18041, Parliament Buildings, Wellington 6160, New Zealand. Telephone 64 4 817 6808 Facsimile 64 4 817 6508

b. within the following points only:

   i. lat. 39.091811, long. 177.291402 (a point near the Waihua River mouth) and lat. 39.092867, long. 177.29197 (a point offshore from the Waihua River mouth), and

   ii. lat. 39.150189, long. 177.12798 (a point near the Pōnui Stream mouth) 39.151176, long. 177.128491°E (a point offshore from the Pōnui Stream mouth), but

c. excluding any part of the bed of the Mōhaka River that is in the common marine and coastal area.

The grounds for my conclusions regarding the tests in the Act, including relevant legal considerations and the reasons supporting my conclusions on the evidence, are set out in more detail at Appendices 1, 2 and 3 of this letter.

This letter is an offer to enter into negotiations for a recognition agreement with Ngāti Pāhauwera on behalf of the Crown. This offer is in accordance with s95 of the Act for the area of CMT I am satisfied meets the statutory test within the application area. I invite you to take time to consider my offer and to respond when ready.

In the event Ngāti Pāhauwera accept this offer, my officials will work with you to draft a recognition agreement. I intend to announce my decision publicly, in consultation with you, when the recognition agreement is initialled by the parties.

The Act does not remove jurisdiction over an application area once I have made a determination. Whether this offer is accepted or rejected Ngāti Pāhauwera retain the right to pursue their application in the High Court for a recognition order in relation to the parts of the application area for which I have determined the evidence does not sustain a finding of CMT, PCRs and wāhi tapu protection. Similarly Ngāti Pāhauwera retain the right to reapply to me before 3 April 2017 for those things.

Nāku noa, nā

Hon Christopher Finlayson
Minister for Treaty of Waitangi Negotiations

Appendix 1 – Basis for Customary Marine Title Decision

Ngāti Pāhauwera Application for Customary Marine Title

1. In making my decision on customary marine title (**CMT**) I have taken into consideration relevant New Zealand and overseas case law and the burden of proof requirements under the Marine and Coastal Area (Takutai Moana) Act 2011 (the **Act**) as well as the evidence against the test in s58(1) for CMT.

2. The test for customary marine title is set out in s58(1) of the Act, which states that CMT exists in a specified area of the common marine and coastal area (**CMCA**) if the applicant group:

    a. holds the specified area in accordance with tikanga; and

    b. has, in relation to the specified area,-

        i. exclusively used and occupied it from 1840 to the present day without substantial interruption; or

        ii. received it, at any time after 1840, through a customary transfer.

3. The Act provides in s95(4) that the Crown must not enter into an agreement unless the applicant group satisfies the Crown that the requirements for CMT in s58 are met. There is no presumption in the Act that the CMCA is subject to extant CMT until the contrary is proved.

Section 58(1)(a) – Holds in Accordance With Tikanga

The Section 58(1)(a)Test

4. The first requirement for customary marine title is that the applicant group "holds the specified area in accordance with tikanga".[1]

5. Hon John Priestley QC (the **Independent Assessor**) in his reading of the Act acknowledges Ngāti Pāhauwera's submission that there is force in the Māori Land Court dictum of Judge Spencer in the Da Silva case:

> *The important word here is "held". There is no connotation of ownership but rather that it is retained or kept in accordance with tikanga Maori.*

6. The Independent Assessor has interpreted the use of the word "hold" as falling well short of legal ownership on the grounds that no iwi is in a position to claim legal ownership of the CMCA. Instead, "hold" is equivalent to saying something is "held" in high regard.

7. I have considered the approach in the Da Silva case. I note that Blanchard J expressed a different view in the Faulkner case,[2] and I do not consider the obiter

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[1] Marine and Coastal Area (Takutai Moana) Act 2011 s58(1)(a)

[2] Faulkner v Tauranga District Council [1996] 1 NZLR 357 at [362]

in Da Silva should be given the weight ascribed to it by the Independent Assessor.

8. I note the use of the current tense "holds" in s58(1)(a).

9. The Act defines "tikanga" as "Māori customary values and practices".[3] I understand this definition stems from the definition of "Māori customary land" in Te Ture Whenua Māori Act 1993[4] and this definition, in turn, is a modern expression of statutory tests for granting Crown-derived title to customary land dating back to the Native Lands Act 1862.[5]

10. The Act's reference to "holds" indicates a concern with territorial interests. Under the Act, there may be areas where customary title is not established but where customary use is. The Act distinguishes between an area which is "held" in accordance with tikanga (s58) and an area over which protected customary rights are exercised in accordance with tikanga (s51). This distinction reflects the common law distinction between "territorial" rights, which are an interest in the land, and "non-territorial" rights, which are rights to carry out activities over a certain area, without holding an interest in the land on which the activity occurs.[6] The Act states that CMT is an interest in land.[7]

11. Interpreting s58(1)(a) as referring to tikanga that establishes a territorial interest is consistent with the Land Court's approach to customary land status above the mean high-water springs mark, as I understand it. I note the Native Appellate Court decision in Ngakororo Mudflats (1942).[8] That case concerned the status of land that had once been below high water mark but had accreted after the Native Land Court's adjudication of title to the adjoining land. The statutory test for customary land status at the time referred to land being "held by Natives ... under the customs and usages of the Māori people". The Court found that to prove title "under the customs and usages of the Māori people" required proof that the land was exclusively occupied from 1840 continuously until the date of investigation.[9]

12. I consider there to be a distinction between Land Court cases about "dry" land and applications under the Act. In the Native Land Court, the Court's principal task was to determine owners according to custom. The focus was on who held the land, not whether it was held according to custom. In contrast, the Act does not presume that CMT will be recognised across all of the CMCA. Rather, CMT is one way in which the Act provides for rights to "give expression to customary interests" in the CMCA.[10]

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[3] Marine and Coastal Area (Takutai Moana) Act 2011, s9

[4] Te Ture Whenua Māori Act 1993, s129(2)(a): land "that is held by Māori in accordance with tikanga Māori" has the status of Māori customary land

[5] Native Lands Act 1862, s35; Native Lands Act 1865, s2; Native Land Act 1873, s3; Native Land Court Act 1880; Native Land Court Act 1886, s3; Native Land Court Act 1886 Amendment Act 1888, s58(1)(a); Native Land Court Act 1894, s2; Native Land Act 1909, s2; Native Land Act 1931, s2; Maori Affairs Act of 1953, s2

[6] Te Weehi v Regional Fisheries Officer [1986] 6 NZAR 114, [1986] 1 NZLR 680 at 690-693

[7] Marine and Coastal Area (Takutai Moana) Act 2011, s60

[8] Ngakororo Mudflats (Whakarapa Estuary, Hokianga) (1942) 12 Auckland NAC MB 137

[9] C.f. *John Da Silva – Certain islands and rock outcrops in the environs of Aotea* (1998) 25 Tai Tokerau MB 212 at 215, 217, where a different approach is suggested in *obiter dicta* and as noted by the Independent Assessor

[10] Marine and Coastal Area (Takutai Moana) Act 2011, s46

13. In assessing the extent Ngāti Pāhauwera holds the application area "in accordance with tikanga" I have focused on evidence that amounts to a territorial holding under custom. Of particular relevance are activities that show an intention to control space according to customary rules and interests, for example, boundaries between customary groups in the CMCA, knowledge that particular fishing grounds or rocks belong to a particular customary group by descent, the ability to place customary restrictions on access and taking of resources in an area, and acknowledgement of a groups customary authority in an area by other groups.

14. Absence of evidence of other parties' use and occupation of an area does not by itself, in my view, amount to an area being held in accordance with tikanga by default by an applicant group. Assertions that an area is held in accordance with tikanga are also insufficient to satisfy s58(1)(a).

15. There may well be evidence that is relevant to both s58(1)(a) and s58(1)(b)(i). However, such evidence ought to be considered in light of each limb of the s58 test. The type of evidence relevant to whether an area continues to be held "according to tikanga" requires consideration of Māori customary values and practices to appreciate its relevance and weight; such considerations may not apply in relation to s58(1)(b)(i).[11]

Does Ngāti Pāhauwera hold the application area in accordance with tikanga?

16. I think section 58(1)(a) requires something more than the operation of a system of tikanga in an area. In particular, s58(1)(a) requires evidence showing a proprietary or proprietary-like holding of the specified area of CMCA according to tikanga. Ngāti Pāhauwera have provided some (but not overwhelming) evidence of customary values and practices giving rise to such an interest, including evidence relating to ahi kā roa, rāhui, manaakitanga, and kaitiakitanga.[12] They have also provided evidence relating to wāhi tapu and the presence of kōiwi, though I question the weight that should be given to that part of the evidence given the lack of specificity in the evidence of where these sites are located.[13]

17. There is good evidence that Ngāti Pāhauwera's customary practices are linked to its occupation of the area landward of the CMCA and the foreshore. The evidence suggests resource collection and use (especially of driftwood,[14] hāngi

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[11] In *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 the Canadian Supreme Court found that weighing evidence required consideration of Aboriginal culture and practices, and comparing them in "a culturally sensitive way" with that which was required at common law to establish title based on occupation. The Court firmly cautioned against assessing occupation only in terms of English law traditions and indicia

[12] Affidavit of Kuki Green [1]; Affidavit of George Hawkins [10]; Affidavit of Wi Derek Huata King [12]; Affidavit of Marie Moses [3, 7-8]; Affidavit of Toro Waaka [66]; Affidavit of Toro Waaka on behalf of the Ngāti Pāhauwera Development and Tiaki Trusts [126, 128]

[13] Affidavit of Darren Botica [6]; Affidavit of Kuki Green [12]; Affidavit of Vilma Hape [8]; Affidavit of Toro Waaka [60-64, Appendix A 42.1]

[14] Affidvait of Gerlad Aranui [4, 17]; Affidvait of Maraea Aranui [28]; Affidvait of Gaye Hawkins [4, Appendix A 12-15]; Affidvait of Hazel Kinita [Appendix A 4]; Affidavit of Maire Moses [2]; Affidvait of Toro Waaka [Appendix A 39]; Affidavit of Charles Lambert [Appendix A 14-15]

stones[15] and fish/kaimoana[16]) is needed to sustain Ngāti Pāhauwera's marae and is essential to their way of life.

18. Ngāti Pāhauwera's evidence of tikanga and tikanga practices is concentrated on the foreshore but is not limited to it.[17] However, I have found it difficult to infer on the basis of statements in the evidence how far offshore any holding according to tikanga extends, bearing in mind the practical difficulty of enforcing elements of tikanga beyond the foreshore.

Section 58(1)(b)(i) – Exclusive Use and Occupation, Without Substantial Interruption

The section 58(1)(b)(i) test

19. Under s58(1)(b)(i) of the Act the second requirement for CMT is that the applicant group has "exclusively used and occupied" the area "from 1840 to the present day without substantial interruption".

20. Broadly speaking, the following may be relevant in assessing exclusive use and occupation:

    a. the nature and quality of uses and occupations by the applicant group as shown by the evidence. Considerations here include evidence of physical control or occupation of marine and coastal space, the intention and capacity to control the application area, acts of exclusion, and whether continuous occupation may be inferred across an area through occupation of several areas that are linked by regular use, cultural practice and geographical proximity. Consideration of both common law title and tikanga Māori may be relevant. I must also consider the nature of the coastal and marine environment in the application area when considering whether the evidence establishes exclusive use and occupation; and

    b. whether the evidence establishes continuous use and occupation by the applicant group or, if there are times during which that is not established, whether that constitutes a substantial interruption.

21. Substantial interruption is not divorced from the requirement for exclusive use and occupation. The Act does not define 'substantial interruption'. Precisely what might amount to substantial interruption is, in my view, highly fact-sensitive just as what amounts to exclusive use and occupation needs to be assessed on the basis of particular facts. The term "substantial" could either refer to:

    a. a quantity of events over time that might have interrupted the maintenance of "exclusive use and occupation"; or

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[15] Affidvait of Gerlad Aranui [4, 17]; Affidvait of Maraea Aranui [27]; Affidavit of Charles Lambert [Appendix A 3-6]; Affidavit of Toro Waaka [Appendix A 39]

[16] Affidavit of Gerald Aranui [11]; Affidavit of Maraea Aranui [30-31]; Affidavit of Arthur Gemmell [9]; Affidavit of Gaye Hawkins [6-7]; Affidavit of Hazel Kinita [4-7, Appendix B 4-6]; Affidavit of Charles Lambert [Appendix A 12]; Affidavit of Marie Moses [3]; Affidavit of Toro Waaka [43-49]

[17] Affidavit of Tiwani Aranui [5]; Affidavit of William Culshaw [12,16-19]; Affidavit of Gaye Hawkins [6]; Affidavit of Wi Derek Huata King [6-7]; Affidavit of Hazel Kinita [Appendix 4]; Affidavit of Fred McRoberts [5]; Affidavit of Awhina Waaka [4-10]

b. a single event or characteristic that is of such a quality or intensity that it could be interpreted as having factually interrupted a group's claim to have exercised "exclusive use and occupation".

22. There is a need to balance s58(1)(b)(i) against s59(3) which provides that:

a. the use at any time, by persons who are not members of an applicant group, of a specified area of the CMCA for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.

23. In s 59(3), "of itself" means, in my view, "by itself, or without something more". The words mean that navigation or fishing by third parties does not necessarily preclude CMT, but that Parliament considers that navigation or fishing by a third party may be relevant in light of the surrounding circumstances and other evidence.

24. Interruption is not the same as extinguishment. Extinguishment is a consequence of legal events. Interruption is a consequence of the loss of the de facto operation of the rights of aboriginal life. Section 58 distinguishes between extinguishment and interruption. Section 58(1)(b)(i) requires exclusive use and occupation from 1840 to the present day without substantial interruption. Section 58(4) provides that CMT does not exist if it has been extinguished as a matter of law. Interruption does not, therefore, require proof of extinguishment.

Has Ngāti Pāhauwera exclusively used and occupied the application area since 1840 without substantial interruption?

25. A range of considerations and evidence may be relevant in making a determination on whether Ngāti Pāhauwera have exclusively used and occupied the application area without substantial interruption. I address below several factors in turn.

Impact of ownership of abutting land by the Applicant Group

26. Ownership of abutting land by the applicant group is a matter that may be taken into account in determining whether CMT exists.[18]

27. It appears to me that slightly less than half the land abutting the CMCA between Mōhaka and Waihua is owned by Ngāti Pāhauwera individuals or trusts associated with Ngāti Pāhauwera. I do not consider abutting land use and ownership to be an important consideration in this application because of the minimal impact of such ownership on the applicant group and third parties' access to, and use and occupation of, the CMCA, for the following reasons:

a. the nature of the abutting land – high, crumbling cliffs make access difficult;

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[18] Marine and Coastal Area (Takutai Moana) Act 2011, s59(1)(a) (i)

[18] Crown Summary Report [38]

b. there are three access points to the CMCA in this area – two of these are roads over land owned by Ngāti Pāhauwera individuals/families. The third road is the only public legal access point (McIvor Road);[19] and

c. all of the Ngāti Pāhauwera affidavits state that they continue to access, use and occupy the CMCA in this area.

28. I do not consider that evidence of third party leasing and ownership of some abutting land is sufficient to amount to substantial interruption of any exclusive use and occupation Ngāti Pāhauwera may be able to establish. Evidence of officials does not dispute that Ngāti Pāhauwera have remained in the general area around Mōhaka since 1840 and alienations of abutting land have not stopped Ngāti Pāhauwera from accessing and using the CMCA.[20]

Non-commercial customary fishing rights since 1840

29. There is evidence detailing Ngāti Pāhauwera use of the foreshore for fishing and surfcasting.[21] Fishing grounds, fishing spots, fishing rocks, shellfish beds, and eeling spots of Ngāti Pāhauwera in the CMCA are principally located at Pōnui, Mōhaka and Waihua but also some spots between these points including at Takapau/"Spooners Point".[22] It appears to me these spots are, with few exceptions, located in the intertidal area or very close to mean low-water springs. The evidence suggests these areas are abundant sources of fish and other kaimoana. Ngāti Pāhauwera's evidence of the management of the area and its fishing resources is relatively limited.[23] The evidence provided shows a knowledge of fish breeding grounds, mussel and kina beds.[24] One affidavit describes a method used as an attempt to encourage kina to grow larger and notes an attempt to seed a pipi bed.[25] The management of fishing resources, in my view, points to a level of exclusivity only in the intertidal area.

30. Ngāti Pāhauwera evidence cites examples where sanctions have been applied for those who do not observe tikanga in the application area[26] such as cutting fishing lines of people not acting in accordance with tikanga[27] and challenging

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[20] Crown Summary Report [111, 268, 280]

[21] Affidavit of James Adsett [4-5, 11]; Affidavit of Gerald Aranui [4, 16]; Affidavit of Tiwani Aranui [3, 5]; Affidavit of Colin Culshaw [4-5, 7]; Affidavit of William Culshaw [12, 17, 19, 21]; Affidavit of Bella Gadsby [2-4]; Affidavit of Arthur Gemmell [4, 7-8]; Affidavit of Angela Hawkins [2]; Affidavit of Gaye Hawkins [3, 5-8]; Affidavit of George Hawkins [3, 6-11, 13]; Affidavit of Wiremu Hodges [8, 45]; Affidavit of Janet Huata [5]; Affidavit of Wi Derek Huata King [7-11, 13]; Affidavit of Hazel Kinita [4, Appendix B 4-5, 10]; Affidavit of Jean McIvor [2]; Affidavit of Fred McRoberts [3, 6]; Affidavit of Marie Moses [3]; Affidavit of Nick Petkovich [2]; Affidavit of Maadi Te Aho [4]; Affidavit of Bruce Te Kahika [2]; Affidavit of Isobel Thompson [10, 15, 18]; Affidavit of Awhina Waaka [18]; Affidavit of Henare Wainohu [2-3]; Affidavit of Frances Whale [3]

[22] Affidavit of Gerald Aranui [11, 16]; Affidavit of William Culshaw [17-20]; Affidavit of Arthur Gemmell [4]; Affidavit of Gaye Hawkins [6]

[23] Affidavit of Wiremu Hodges [44-45]

[24] Affidavit of William Culshaw [21 – 23]

[25] Affidavit of William Culshaw [22]

[26] Affidavit of Colin Culshaw [14]; Affidavit of William Culshaw [24-25]

[27] Affidavit of Colin Culshaw [8]

non-Ngāti Pāhauwera use of fishing resources where use is not in accordance with tikanga.[28]

31. I note that the Ngāti Pāhauwera Development Group and Tiaki Trust are confirmed as the tangata whenua who appoint Tangata Kaitiaki for customary fishing purposes over a rohe moana that includes all of Ngāti Pāhauwera's application area pursuant to Regulation 10 of the Fisheries (Kaimoana Customary Fishing) Regulations 1998.[29] Although, the Minister for Primary Industries was satisfied that Ngāti Pāhauwera are the tangata whenua of the application area and have authority to regulate customary harvesting in the area, I do not consider that this status automatically equates with Ngāti Pāhauwera having a customary territorial right over the area. Tangata whenua status recognised in fisheries regulations does not necessarily equate to territorial property interests in the CMCA. The Minister for Primary Industries, in confirming tangata whenua, was required to be satisfied that other groups did not object to the confirmation rather than consider positive evidence of Ngāti Pāhauwera's customary authority across the area in question.[30] Nonetheless, I have taken the Trust's status into account.

Non-fisheries related activities

32. There is evidence of Ngāti Pāhauwera participation in non-fisheries related activities. These include collecting driftwood,[31] taking hāngi stones,[32] the use of the coast for travel[33] and the use of beaches for recreational gatherings and tribal events.[34] Such activities undoubtedly take place very close to the edge of the CMCA if not in it. However, the extraction and use of such resources as whitebait, sand, hāngi stones, gravel, pumice, wood, kokowai or wai tapu are clearly activities that Ngāti Pāhauwera also can undertake outside of the CMCA on beaches, on abutting land or in rivers. I have examined the evidence of these activities in the Ngāti Pāhauwera affidavits and cannot conclude with certainty that they take place in the CMCA in the application area beyond isolated incidents. Similarly, evidence of the use of beaches and the coast for travel and gatherings of sections of Ngāti Pāhauwera on beaches, lacks specific evidence that these things take place in the CMCA on any scale or frequency. I have considered these uses as relevant information in considering whether Ngāti Pāhauwera have used and occupied the application area. However I have given them limited weight relative to fishing activities because of the difficulty of being certain they have taken place in the CMCA with any intensity.

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[28] Affidavit of Colin Culshaw [Appendix A 32]

[29] Fisheries (Kaimoana Customary Fishing) Notice (No. 1) 2013 (Notice No. MPI 136); Affidavit of Toro Waaka [37]

[30] Fisheries (Kaimoana Customary Fishing) Regulations 1998, regulation 9(1)

[31] Affidavit of Gerald Aranui [17]; Affidavit of Maraea Aranui [29]; Affidavit of Arthur Gemmell [9]; Affidavit of Gaye Hawkins [4]; Affidavit of Hazel Kinita [Appendix A 4]; Affidavit of Marie Moses [2]

[32] Affidavit of Gerald Aranui [17]; Affidavit of Maraea Aranui [27]; Affidavit of Charles Lambert [Appendix A 3]; Affidavit of Marie Moses [2]

[33] Affidavit of Gaye Hawkins [10]; Affidavit of Wiremu Hodges [9]; Affidavit of Wi Derek Huata King [11]; Affidavit of Luis McDonnell [6]; Affidavit of Marie Moses [2]; Affidavit of Toro Waaka [65]; Affidavit of Henare Wainohu [7]

[34] Affidavit of Gerald Aranui [5]; Affidavit of Colin Culshaw [6]; Affidavit of Bella Gadsby [5]; Affidavit of Arthur Gemmel [3]; Affidavit of Wi Derek Huata King [14, Appendix A 9]; Affidavit of Jean McIver [6]; Affidavit of Maadi Te Aho [9]; Affidavit of Toro Waaka [Appendix A 42.2-42.5]

Wāhi tapu and urupā

33. The affidavits refer to a number of urupā in the land abutting the application area however the affidavits do not specify locations of urupā in the application area.

34. One affidavit mentions three battles, two at Mōhaka South and one at Waihua.[35] The affidavit of Toro Waaka states that kōiwi are still exposed on the side of the Te Awaawa stream but that most have been eroded into the sea. It is not clear whether this forms part of the CMCA. This affidavit also states, more generally, that erosion over time has washed the coastal sites of battles and burial grounds into the moana.[36]

35. From my reading of the affidavits, Ngāti Pāhauwera do not consistently name wāhi tapu locations in the CMCA. Ngāti Pāhauwera claim the entire area as wāhi tapu and are seeking wāhi tapu protection under s78 of the Act.

Sites of significance and boundaries

36. Two affidavits name "Mamangu's Pā" as a site of significance. Mamangu's Pā is a coastal pā overlooking the beach at Takapau (between Mōhaka and Waihua).[37] This pā is located outside of the application area.

37. Many of the affidavits assert that the traditional boundary of Ngāti Pāhauwera extends further along the coast than the application area. Poututu is mentioned as the northern boundary[38] and some go as far Wairoa.[39] Waikari is commonly offered as the southern boundary,[40] however, some go as far as Ahuriri[41] and Awatoto.[42]

38. There is no reference in the Ngāti Pāhauwera evidence to historically significant events taking place seaward of the mean low-water springs.

Third party presence in the Application Area

39. McIvor Road is the only legal public access node in the application area. The other two points of access cross Ngāti Pāhauwera-owned land.[43]

40. Six submissions in the public consultation process refer to use of the application area by third parties.[44] The submissions received do not demonstrate intensive third party use of the application area, and Ngāti Pāhauwera evidence asserts

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[35] Affidavit of Toro Waaka [62.2-62.6]

[36] Affidavit of Toro Waaka [63-4]

[37] Affidavit of Gaye Hawkins [Appendix A 18]; Affidavit of Toro Waaka [62.5]

[38] Affidavit of William Culshaw [3]; Affidavit of Janet Huata [2]; Affidavit of Wi Derek Huata King [Appendix A 12]; Affidavit of Toro Waaka [Appendix A 38]

[39] Affidavit of Tiwani Aranui [3]; Affidavit of Colin Culshaw [2]

[40] Affidavit of William Culshaw [3]; Affidavit of Janet Huata [2]; Affidavit of Toro Waaka [Appendix A 38]

[41] Affidavit of Wi Derek Huata King [19]

[42] Affidavit of Tiwani Aranui [3]

[43] Crown Summary Report [38]

[44] Submission of Jean Ide, dated 3 July 2013; Submission of Graham and Susan Mackintosh, dated 16 July 2013; Submissions of Gillies Mackay dated 4 July 2013; Submission of Inshore Finfishing Management Company, dated 3 July 2013; Submission of Tony Orman and Bill Benfield on behalf of the Council of Outdoor Recreation Associations of New Zealand, dated 11 July 2013

that third parties are not excluded provided they abide by Ngāti Pāhauwera tikanga.[45] Contemporary third party activities that take place in the CMCA in the Ngāti Pāhauwera application area include surfcasting, surfing and offshore fishing and recreational boating using boats launched outside of the application area. Historically, the CMCA has been used for commercial navigation including the landing of goods and people,[46] travel along the foreshore between Napier and Wairoa[47] and small scale gravel and shingle extraction.[48]

41. I am satisfied that the combined historical and contemporary third party activities are not of sufficient intensity and scale to amount to a substantial interruption of any exclusive use and occupation that Ngāti Pāhauwera are able to establish. These activities often take place in small, confined parts of the CMCA and do not, of themselves, interrupt use and occupation by the applicant group.

Extent to Which the Section 58 Test is Met

Seaward extent

42. Any assessment of the seaward boundary of a CMT area will involve a degree of artificiality because it will represent customary interests by fixed boundary points. This tends to downplay the contextual nature of custom and attributes a fixed, inflexible, character to Māori interests. In my view this is, however, a necessary consequence of the recognition of rights and interests through the Act.

43. I think the evidence gives a very limited basis to quantify the seaward extent of any CMT here in terms of a uniform, straight-line at 250 from mean high-water springs (the Independent Assessor's view) or 100 metres from mean low-water springs (officials advice). In particular:

    a. the evidence for CMT outside the foreshore is primarily fishing evidence. There is little evidence of discrete fishing grounds being maintained as exclusive fishing grounds since 1840 beyond kaimoana grounds and some fishing areas that are described very inexactly, so that their location cannot be identified;[49]

    b. the evidence of non-fisheries use by Ngāti Pāhauwera is confined to areas above the CMCA or very close to mean high-water springs;

    c. the evidence of sites of significance, wāhi tapū and kōiwi are described inexactly making it difficult to conclude where, if at all, these are located in the CMCA;

    d. much of the evidence of use and occupation of the application area by Ngāti Pāhauwera relates to their ability to access and use the CMCA from

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[45] Affidavits of George Hawkins [17]; Affidavit of Hazel Kinita [5]; Affidavit of Fred McRoberts [5]; Affidavit of Maadi Te Aho [3]; Affidavit of Awhina Waaka [6]; Affidavit of Toro Waaka [57]

[46] See for example Crown Summary Report [182, 229, 312]

[47] See for example Crown Summary Report [293, 299, 302-303]

[48] See for example Crown Summary Report [198, 200]

[49] Affidavit of James Adsett [5]; Affidavit of Tiwani Aranui [3-8]; Affidavit of William Culshaw [14-16]; Affidavit George Hawkins [13]; Affidavit of Toro Waaka [45-49]

landward sites, activites taking place on abutting land or close to mean-high water springs, and ownership of abutting land; and

e. the coastline and seas are generally inhospitable and in places quite dangerous.[50] There is, in my view, little positive evidence of a strong presence[51] below mean low-water springs that would clearly indicate to a third party that the area below mean low water springs has been and continues to be exclusively used and occupied by Ngāti Pāhauwera.

44. I am instead satisfied that Ngāti Pāhauwera hold in accordance with tikanga and have exclusively used and occupied, from 1840 without substantial interruption, that part of the application area from mean high-water springs to mean low-water springs only.

Lateral extent

45. Assessing the extent to which CMT can then be inferred laterally across the application area, taking into account all the evidence, is difficult. I think the question is finely balanced given the practical difficulties accessing and using much of the area, including the steep cliff faces, the danger of eroding cliffs and an apparently narrow foreshore in much of the application area.

46. The strongest inferences of use, occupation and exercise of tikanga appear to relate to the inter-tidal area from the Waihua River to the Mōhaka River in the centre of the application area. On these grounds I think it is reasonable to infer exclusive use and occupation between mean high-water springs and mean low-water springs from the Waihua River to the Pōnui Stream (subject to extinguishment in the Mōhaka River bed discussed below), having regard to the broader statutory purpose and scheme of the Act. I am satisfied that Ngāti Pāhauwera meet the test across this part of the application area.

47. The application area from the Mōhaka River to the Pōnui Stream has few cliffs and is backed by grassed hills. Whilst the access is not as difficult, very few of the affidavits mention activities at Pōnui. Many of the affidavits do, however, reference use and occupation in the CMCA at Waikari and other places further south.[52]

48. I note the southern boundary is not disputed by neighbouring iwi, and indeed the original boundary of the Waikari River was pulled back to the left bank of the Pōnui Stream following the third party inquiry in 2013 and 2014.

49. By contrast the area from the Waihua River to the Poututu Stream lacks evidence of Ngāti Pāhauwera use and occupation. The area is difficult to access and the abutting land is owned by non-Ngāti Pāhauwera interests. The few references in the Ngāti Pāhauwera affidavits to use and occupation in the area from the Waihua River to the Poututu Stream[53] do not establish a pattern of use and

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[50] See for example Crown Summary Report, [17,19, 31,152, 230]

[51] *Tsilgot'in Nation* at [38]

[52] Affidavit of James William Adsett [9-10]; Affidavit of Gerald Aranui [13, 15-16]; Affidavit of William Culshaw [27-28]; Affidavit of Raymond Edwards [3-6]; Affidavit of Arthur Gemmell [3, 10, 14]; Affidavit of Wi Derek Huata King [9, 14-17, Appendix A 9, 11]; Affidavit of Luis McDonnell [15]; Affidavit of Maadi Te Aho [3]; Affidavit of Isobel Thompson [20]; Affidavit of Awhina Waaka [18-19]

[53] Affidavit of Darren Botica [3-5]; Affidavit of Marie Moses [3]; Affidavit of Bruce Te Kahika [1-5]

occupation that satisfies me the area is exclusively used and occupied by them. I do not think customary marine title can be inferred from the area of stronger presence (at Waihua) due to the almost complete lack of evidence of Ngāti Pāhauwera use and occupation beyond this point.

Extinguishment

50. Section 58(4) provides that CMT may be extinguished by law

51. Under s14 of the Coal Mines Act Amendment Act 1903 (**CMAAA**), the bed of navigable rivers was vested in the Crown.

52. The Crown considers that s14 of the CMAAA has the effect of extinguishing CMT in the beds of navigable rivers.

53. I consider the evidence demonstrates the section of the Mōhaka River that is in the common marine and coastal area was navigable within the meaning of s14 of the CMAAA. Consequently, I consider that the vesting declared by s14 of the CMAAA extinguishes CMT in that section of the Mōhaka River.[54]

54. I do not consider there is sufficient evidence to determine whether or not the Waihua River is navigable.

Conclusion

55. I am satisfied that the test set out for CMT in s58 of the Act is met in the Ngāti Pāhauwera application area in:

    a. the CMCA between mean high-water springs and mean low-water springs; and

    b. within the following points only:

        i. lat. 39.150189, long. 177.12798 (a point near the Pōnui Stream mouth) 39.151176, long. 177.128491°E (a point off shore from the Pōnui Stream mouth), and

        ii. lat. 39.091811, long. 177.291402 (a point near the Waihua River mouth) and lat. 39.092867, long. 177.29197 (a point offshore from the Waihua River mouth), but

    c. excluding any part of the bed of the Mōhaka River that is in the CMCA.

[54] Brent Parker, Brief of Evidence in the Māori Land Court in the Matter of an Application for a Customary Rights Order Made on Behalf of Ngāti Pāhauwera, dated 12 October 2007 [7-41]; Crown Summary Report [232-234]

Appendix 2: Basis for Protected Customary Rights Decision

Ngāti Pāhauwera Application for Protected Customary Rights

1. Ngāti Pāhauwera seek recognition of protected customary rights (**PCRs**) under the Marine and Coastal Area (Takutai Moana) Act 2011 (the **Act**) as set out in a draft recognition order as follows:

> "That Ngāti Pāhauwera may take, utilise, gather, manage and/or preserve all natural and physical resources (other than those resources listed in section 51(2) of the Marine and Coastal Area (Takutai Moana) Act 2011 or resources where such taking, utilising, gathering, managing or preserving is specifically prohibited under any legislation) within the Common Marine and Coastal area between Poututu Stream and Ponui Stream from the mean high water springs to the limits of the territorial sea including the mouths of rivers to the extent that they are part of the Common Marine and Coastal Area, including sand, stones, gravel, pumice, driftwood, kokowai, wai tapu, inanga, kokopu and tauranga waka, as and when such resources are required, for such purposes and to such extent as Ngāti Pāhauwera shall determine, subject to tikanga including their obligations as kaitiaki."

Have Ngāti Pāhauwera Met the Tests for Protected Customary Rights?

2. Ngāti Pāhauwera have not provided sufficient evidence to establish a PCR to "take, utilise, gather, manage and/or preserve all natural and physical resources".

3. It is not clear what, exactly, is meant by "manage" and "preserve" as this is not defined by Ngāti Pāhauwera. Examples of the exercise of these rights since 1840 have been difficult for me to identify in the evidence. The lack of particularity in both the application and the evidence, in effect, precludes me from being satisfied Ngāti Pāhauwera have "managed" and "preserved" resources since 1840 as required by s51 of the Act.

4. I do not consider that the evidence demonstrates that Ngāti Pāhauwera have taken, utilised, gathered, managed or preserved "all natural and physical resources within the Common Marine and Coastal area between Poututu Stream and Pōnui Stream from the mean high water springs to the limits of the territorial sea":

    a. since 1840; nor

    b. in accordance with tikanga.

5. Ngāti Pāhauwera's evidence, viewed as a whole, does not show that all of the identified activities are exercised in all parts of the application area. Therefore I consider that the evidence does not show that PCRs ought to be granted in the form sought by Ngāti Pāhauwera.

6. Whilst I am not satisfied the test is met for the catch-all "take, utilise, gather, manage and/or preserve all natural and physical resources" the specific examples cited, chiefly those relating to resource extraction, are discussed further below.

Are the specific examples cited in Ngāti Pāhauwera's application an "activity, use or practice"?

7. The first requirement in the Act for recognition of a PCR is that it is an "activity, use or practice" (s9). A PCR does not include an activity "that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource" [1]

8. The taking of sand, stones, gravel, pumice, driftwood, kokowai, wai tapu, īnanga, kokopū and use of tauranga waka in the application area are cited as examples of "activities, uses or practices" that Ngāti Pāhauwera undertake in the common marine and coastal area (the **CMCA)**. These specific examples are activities, uses or practices that could be recognised under s51 of the Act. I am satisfied that Ngāti Pāhauwera do take some minerals, driftwood, water for medicinal purposes and whitebait and it is possible these extractions of resources could take place in parts of the CMCA.[2]

Are the specific examples in Ngāti Pāhauwera's application rights that have "been exercised since 1840?"

9. The second requirement for recognition of a PCR is that the right "has been exercised since 1840; and continues to be exercised ... by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time".[3]

10. I consider it reasonable to infer from the Ngāti Pāhauwera evidence that some taking of minerals, driftwood, water for medicinal purposes and whitebait in the Mōhaka and Waihua Rivers and around their mouths has been exercised since 1840, in the same way or in a similar manner, or in a way that has evolved over time. The extraction of these resources in these two areas appears to have been undertaken by previous generations of Ngāti Pāhauwera and the extraction and uses of these resources are taught to the current generation.[4] I do not consider the evidence demonstrates that the launching of waka by Ngāti Pāhauwera has taken place continually since 1840 in the application area.[5]

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[1] Marine and Coastal Area (Takutai Moana) Act 2011, s51(2)(e)

[2] Affidavit of Gerald Aranui [17]; Affidavit of Maraea Aranui [27-29]; Affidavit of Colin Culshaw [6]; Affidavit of Gaye Hawkins [Appendix A 4,6,9,13]; Affidavit of Ani Keefi [Appendix A 4-8]; Affidavit of Charles Lambert [Appendix A, 3-15]; Affidavit of Marie Moses [2]; Affidavit of Toro Waaka [Appendix A 39]

[3] Marine and Coastal Area (Takutai Moana) Act 2011, s51(1)(a) and (b)

[4] Affidavit of Charles Lambert, [Appendix A 6]; Brief of evidence of Wayne Taylor in the Māori Land Court in the matter of an application for a customary rights order, dated 31 August 2007 [15-16, 24-26]; Brief of evidence of Wiremu Winiana in the Māori Land Court in the matter of an application for a customary rights order, dated 31 August 2007 [14-17]

[5] Affidavit of Gaye Hawkins, [Appendix A 16-18]

Are the specific examples in Ngāti Pāhauwera's application "exercised in accordance with tikanga?"

11. The third requirement is that the exercise of the right by the applicant group is "exercised ... in accordance with tikanga".[6] Tikanga is defined in the Act as "Māori customary values and practices".[7]

12. Some taking of minerals, driftwood, water for medicinal purposes and whitebait in the Mōhaka and Waihua Rivers and around their mouths is exercised in accordance with tikanga, firstly, because the evidence establishes the values and practices that are a basis for these examples of resource extraction. Secondly, the evidence demonstrates a coherent system of beliefs which is passed down between generations in relation to these extractions of resources.[8]

13. I consider that the evidence provided by Ngāti Pāhauwera is sufficient to infer that some extraction of the resources referred to in the previous paragraph is governed by tikanga and that tikanga is Ngāti Pāhauwera's.

14. There is sufficient connection between the observable behaviours and a system of beliefs to establish that these extraction of resources are exercised according to tikanga. Justice Finn, in *Akiba No 2*, stated "... "customs" are accepted and expected norms of behaviours, the departure from which attracts social sanction (often disapproval especially by elders)".[9] The affidavits reflect the understanding that there will be sanctions when tikanga is not followed.[10]

Are the specific examples in Ngāti Pāhauwera's application located "in the common marine and coastal area?"

15. The fourth requirement is that the activity, use or practice is exercised "in a particular part of the common marine and coastal area".[11] I consider this element will ordinarily require a reasonably precise description in a recognition agreement of where each activity, use or practice is exercised in the CMCA.

16. The examples of resource extraction cited in the Ngāti Pāhauwera evidence are clearly the taking of things, such as sand, gravel, stones, whitebait, and drift wood, that could take place in the CMCA in the foreshore and rivers. However these are all activities that also take place above mean high-water springs and outside of the CMCA. I have considered the evidence of Ngāti Pāhauwera use and do not consider that the evidence demonstrates that they take place in the CMCA. The evidence does not allow me to identify the location of the activities with sufficient certainty.

17. In considering whether Ngāti Pāhauwera met the CMT tests I have taken evidence of non-fishing use by Ngāti Pāhauwera into consideration. I have

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[6] Marine and Coastal Area (Takutai Moana) Act 2011, s51(1)(b)
[7] Marine and Coastal Area (Takutai Moana) Act 2011, s9
[8] Affidavit of Gerald Aranui [17-18]; Affidavit of Maraea Aranui [29]; Affidavit of Gaye Hawkins [Appendix A 9]; Affidavit of Ani Keefi [Appendix A 6]; Affidavit of of Hazel Kinitia [Appendix A 2]; Affidavit of Charles Lambert [Appendix A 2-4, 9]
[9] Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2), (2010), FCA 643 at [173]
[10] Affidavit of Colin Culshaw [14]; Affidavit of William Culshaw [25]
[11] Marine and Coastal Area (Takutai Moana) Act 2011, s51(1)(b)

considered this evidence along with other evidence including fishing,[12] ability to place rāhui and other controls in accordance with tikanga,[13] existence of customary boundaries[14] and sites of significance.[15] I am satisfied that this evidence in its totality can be relied on to make an inference of the existence of CMT in the application area. However I do not consider that the evidence of non-fishing use in any part of the application area is sufficient to infer the existence of PCRs in the application area.

Conclusion

18. For the reasons stated above Ngāti Pāhauwera's application for PCRs does not meet the s51 test.

[12] Affidavit of James Adsett [4-5, 11]; Affidavit of Gerald Aranui [4, 16]; Affidavit of Tiwani Aranui [3, 5]; Affidavit of Colin Culshaw [4-5, 7]; Affidavit of William Culshaw [12, 17, 19, 21]; Affidavit of Bella Gadsby [2-4]; Affidavit of Arthur Gemmell [4, 7-8]; Affidavit of Angela Hawkins [2]; Affidavit of Gaye Hawkins [3, 5-8]; Affidavit of George Hawkins [3, 6-11, 13]; Affidavit of Wiremu Hodges [8, 45]; Affidavit of Janet Huata [5]; Affidavit of Wi Derek Huata King [7-11, 13]; Affidavit of Hazel Kinita [4, Appendix B 4-5, 10]; Affidavit of Jean McIvor [2]; Affidavit of Fred McRoberts [3, 6]; Affidavit of Marie Moses [3]; Affidavit of Nick Petkovich [2]; Affidavit of Maadi Te Aho [4]; Affidavit of Bruce Te Kahika [2]; Affidavit of Isobel Thompson [10, 15, 18]; Affidavit of Awhina Waaka [18]; Affidavit of Henare Wainohu [2-3]; Affidavit of Frances Whale [3]

[13] Affidavit of Kuki Green [7]; Affidavit of George Hawkins [10]; Affidavit of Wi Derek Huata King [12]; Affidavit of Marie Moses [3, 7-8]; Affidavit of Toro Waaka [66]; Affidavit of Toro Waaka on behalf of the Ngāti Pāhauwera Development and Tiaki Trusts [126, 128]

[14] Affidavit of Tiwani Aranui [3]; Affidavit of Colin Culshaw [2]; Affidavit of William Culshaw [3]; Affidavit of Janet Huata [2]; Affidavit of Wi Derek Huata King [19, Appendix A 12]; Affidavit of Toro Waaka [Appendix A 38];

[15] Affidavit of Gaye Hawkins [19]; Affidavit of Toro Waaka [62.5]

Appendix 3: Basis for Wāhi Tapu Decision

Wāhi Tapu Application

1. Ngāti Pāhauwera's application seeks recognition of the entire application area as a wāhi tapu or wāhi tapu area and request (under s79 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the **Act**)) wāhi tapu conditions to apply to their whole application area. The conditions applied for include the request for people not to pollute, litter, gut fish or over exploit resources, not to access an area where kōiwi has been found and where a drowning has occurred, and not to use the river mouths as a toilet.

Wāhi Tapu Tests

2. The potential to prohibit certain activities and restrict public access to protect wāhi tapu is an important exception to one of the primary principles of the Act ensuring public access to the CMCA as set out in ss4(2)(e) and 26. The various references to access indicate that ensuring rights of public access to the common marine and coastal area (**CMCA**) was a primary consideration of legislators.

3. Sections 78 – 81 of the Act provide for the protection of wāhi tapu for iwi, hapū or whānau whose customary marine title (CMT) has been recognised.

4. Section 78(2) of the Act provides that a wāhi tapu protection right may be recognised if there is evidence to establish the connection of the group with the wāhi tapu or wāhi tapu area in accordance with tikanga and that the group requires the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area.

5. The Act gives a definition of 'wāhi tapu' that ought to be read in light of the purpose of the legislation and with reference to related case law on similar legislative provisions.

6. The approach taken by courts to assessing how a particular group defines wāhi tapu according to its tikanga, and the courts' approach to evidence on wāhi tapu, is also relevant to my decision here.

7. 'Wāhi tapu' and 'wāhi tapu area' are defined in the Act in reference to section 6 of the Heritage New Zealand Pouhere Taonga Act 2014:

    a. **wāhi tapu** means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense; and

    b. **wāhi tapu area** means an area of land that contains 1 or more wāhi tapu.

8. It is unlikely that the purpose of the Act would support wāhi tapu conditions that impose extensive prohibitions on activities or restrictions to the CMCA in the absence of compelling evidence why such restrictions are required.

9. The nature of wāhi tapu suggests that extensive and long-term restrictions on access or use are confined to places that have a high state of tapu.

Does Ngāti Pāhauwera's Evidence Satisfy the s78 Requirements?

Are there wāhi tapu or wāhi tapu areas in accordance with section 78 in the Ngāti Pāhauwera application area?

10. Based on the collected evidence, the definitions of 'wāhi tapu' and 'wāhi tapu area' as per the Act do not apply to the entirety of Ngāti Pāhauwera's application area. There is no evidence that demonstrates the connection of the group with the wāhi tapu or wāhi tapu area in accordance with tikanga as s78(2) of the Act requires.

11. Ngāti Pāhauwera have not identified discrete wāhi tapu locations within the application area.

12. The evidence does not sufficiently demonstrate that the whole area for which protection is sought is either a wāhi tapu or a wāhi tapu area. The evidence does not demonstrate a 'widely held belief' that the whole application area is a wāhi tapu, or that the application area is a wāhi tapu area.

13. For example, there is significant evidence of various *noa*, or everyday, activities in or near the application area, such as gathering kaimoana, fishing and collecting resources.[1] This is corroborated across the evidence. Evidence of such *noa* activities tends to suggest the area is not a wāhi tapu. The evidence provided by Ngāti Pāhauwera in support of the whole area being wāhi tapu is of a generic nature and is insufficiently precise to conclude that the s78 test is met.[2]

Are the restrictions sought by Ngāti Pāhauwera available under section 78?

14. The restrictions sought by Ngāti Pāhauwera in respect of littering, polluting and gutting fish on the beach or into the water, and using parts of the river in the application area as a toilet, are legitimate concerns relating to their role as kaitiaki.

15. Prohibitions or restrictions made under wāhi tapu agreements must be "required" to "protect" the wāhi tapu or wāhi tapu area.[3] I do not consider the whole application area is a wāhi tapu or wāhi tapu area. Nor do I think the wāhi tapu conditions sought by Ngāti Pāhauwera are required for the protection of a wāhi tapu or wāhi tapu area.[4]

16. I do not think that wāhi tapu provisions of the Act are intended to regulate the actions of the public in the way proposed by Ngāti Pāhauwera.

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[1] Affidavit of Gerald Aranui [4, 17]; Affidavit of Maraea Aranui [27-29]; Affidavit of Tiwani Aranui [3, 5]; Affidavit of Colin Culshaw [5]; Affidavit of William Culshaw [5, 12, 17, 19, 21]; Affidavit of Bella Gadsby [2]; Affidavit of Arthur Gemmel [4, 7-9]; Affidavit of Gaye Hawkins [Appendix A 3-8, 13]; Affidavit of George Hawkins [3, 6, 8-11, 13]; Affidavit of Wiremu Hodges [6, 8, 45]; Affidavit of Janet Huata [5]; Affidavit of Wi Derek Huata King [7, 9-11, 13]; Affidavit of Ani Keefe [Appendix A 6]; Affidavit of Hazel Kinita [4]; Affidavit of Jean McIver [2]; Affidavit of Fred McRoberts [3, 6]; Affidavit of Marie Moses [2, 3]; Affidavit of Nick Petkovich [2]; Affidavit of Bruce Te Kahika [2]; Affidavit of Awhina Waaka [15, 18]; Affidavit of Toro Waaka [44-45, 47, 49]; Affidavit of Henare Wainohu [2-3]; Affidavit of Frances Whale [3]

[2] Affidavit of Toro Waaka on behalf of the Trustees of the Ngāti Pāhauwera Development and Tiaki Trusts [117-127] which refers, among other things, to the importance of water to Ngāti Pāhauwera, both in sustaining life and in giving meaning to the identity of tangata whenua, the restrictions Ngāti Pāhauwera place on those who wish to use the moana, and Ngāti Pāhauwera's desire that the moana be treated as a whole and not be separated into different parts

[3] Marine and Coastal Area (Takutai Moana) Act 2011, s78(2)(b)

[4] As required by Marine and Coastal Area (Takutai Moana) Act 2011, s78(2)(b)

17. The control of littering and polluting in the application area is controlled by the relevant local authority. The Hawke's Bay Regional Council regulates activities in the coastal marine area under the Resource Management Act 1991 (the **RMA**).[5] The restrictions in place for the Hawke's Bay coastal marine area are found in the Hawke's Bay Regional Council's Regional Coastal Environment Plan (November 2014). The disposal of litter[6] in the coastal marine area is a prohibited activity under that Plan.[7] The Resource Management (Marine Pollution) Regulations 1998 are likely to apply to discharge and dumping of litter or garbage from ships or offshore installations.

18. Ngāti Pāhauwera have not defined what is meant by the terms 'over-exploiting' and 'wasting' or referenced this to evidence about sustainable resource levels and utilisation. It is also unclear what 'resources' would fall within the ambit of the restriction. I consider it is important that wāhi tapu conditions are precise and readily comprehensible to the public and to those persons (such as wāhi tapu wardens, fisheries officers and honorary fisheries officers) who are involved in enforcing them.

19. Similar issues arise with this proposed restriction as those for littering and polluting. Ngāti Pāhauwera have not established that the whole area is wāhi tapu. In any case restrictions under the Act are not needed to protect the application area from litter and pollution.

20. Conservation of fisheries resources in the Ngāti Pāhauwera application area is dealt with by fisheries legislation. Section 186A of the Fisheries Act 1996 provides for the temporary closure of fishing areas or restrictions on fishing methods. Such closures, restrictions or prohibitions may be imposed if they "will recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing".[8]

21. Further, s186(1) of the Fisheries Act 1996 authorises regulations "recognising and providing for customary food gathering by Māori and the special relationship between tangata whenua and places of importance for customary food gathering ...". The Fisheries (Kaimoana Customary Fishing) Regulations 1998, made under s186(1), allow for the establishment of mātaitai reserves, which prohibit commercial fishing[9] and allow tangata kaitiaki to manage customary and recreational fishing activity in the reserve through bylaws.[10] The option of applying for a mātaitai reserve is open to Ngāti Pāhauwera.

22. There is no evidence that Ngāti Pāhauwera tikanga requires the permanent restriction of access to its members or members of the public to any particular part of the application area because of the present existence of kōiwi, and indeed this has not been sought by Ngāti Pāhauwera. Instead Ngāti Pāhauwera have given evidence that kōiwi are periodically discovered in the application area without identifying where they have been found and that, when kōiwi are found, a temporary rāhui is put in place and the kōiwi are removed. Ngāti Pāhauwera

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[5] Resource Management Act 1991, s30(1) (e)
[6] Litter is defined to exclude fresh fish or the parts thereof
[7] Hawke's Bay Regional Council: Regional Coastal Environment Plan, rule 166
[8] Fisheries Act 1996, s186A(2)
[9] Fisheries (Kaimoana Customary Fishing) Regulations 1998, regulation 27(2)
[10] Fisheries (Kaimoana Customary Fishing) Regulations 1998, regulation 28

appear to seek to restrict access to places where kōiwi may be found in the future for an undefined period of time if and when kōiwi are located.

23. Ngāti Pāhauwera have also given evidence of drownings in the application area, although such instances are relatively rare in the modern era.[11] Ngāti Pāhauwera seek to restrict access, when a drowning or death occurs, to those parts of the application area where such events have not occurred.

24. I consider that the wāhi tapu provisions in the Act are intended to protect places that are already known to the CMT group and not future wāhi tapu that might arise through subsequent events. Wāhi tapu conditions are consequently intended for presently known and identifiable wāhi tapu. An area with no known wāhi tapu should not be considered a wāhi tapu or wāhi tapu area on the basis that temporary restrictions may be required in the future. This is consistent with the requirement that a CMT order or recognition agreement specifies the location of the boundaries of the relevant wāhi tapu or wāhi tapu area.

25. I do not think wāhi tapu conditions are available under the Act to impose rāhui after events such as drowning or discovery of kōiwi. This would be extending the definition of wāhi tapu from present, enduring places of importance to temporary, future ones.

Conclusion

26. For the reasons noted above I am not satisfied Ngāti Pāhauwera's application meets the requirement for wāhi tapu protection under s78 of the Act.

[11] See for example the Affidavit of Toro Edward Waaka on behalf of the Trustees of the Ngāti Pāhauwera Development and Tiaki Trusts [128]