

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

ENV-2015-AKL-000134
ENV-2015-AKL-000140
ENV-2015-AKL-000141

BETWEEN

**MOTITI ROHE MOANA TRUST
(ENV-2015-AKL-000134)**

**NGĀTI MAKINO HERITAGE TRUST
(ENV-2015-AKL-000140)**

**NGĀTI RANGINUI IWI SOCIETY
INCORPORATED
(ENV-2015-AKL-000141)**

Appellants

AND

**BAY OF PLENTY REGIONAL
COUNCIL**

Respondent

Hearing Commenced: 27 November 2017 held in Courtroom MERK w003

Court: Judge J Smith
Judge D Kirkpatrick
Commissioner K Prime
Commissioner M Pomare
Commissioner A Leijnen

Appearances: J Pou for Ngāti Makino Heritage Trust and Ngāti Ranginui
Iwi Society Incorporated
J Prebble and N Anderson for Attorney-General
K Jordan and V Hamm for Motiti Avocados Limited
R Enright and R Haazen for Motiti Rohe Moana Trust and
Royal Forest and Bird Protection Society of New Zealand
Inc
M Casey QC for Lowndes
M Hill for the Respondent

NOTES OF EVIDENCE TAKEN BEFORE THE ENVIRONMENT COURT

MR ENRIGHT MAKES OPENING SUBMISSIONS

THE COURT: JUDGE SMITH

We have a number of further briefs. It looks like we've got, well Ms Hill set out the Council's position I presume opposing Mr O'Connor's brief. Is that right?

MS HILL:

We've reached an updated position Sir in light of the proposal to file a very short brief from Sandra Barnes who's an economist in-house at the Council.

THE COURT: JUDGE SMITH

Can I – I understand everyone but Mr O'Connor was within the scope of... Are there any other briefs that are in dispute?

MS HILL:

No. It was just the other one.

THE COURT: JUDGE SMITH

So the ones that were in dispute was Mr O'Connor. This is the economy isn't it?

MS HILL:

Yes.

THE COURT: JUDGE SMITH

And Ms Barnes and the intent now is both briefs be allowed in?

MS HILL:

Yes and I've spoken to my friend about that and I understand he's comfortable with that.

THE COURT: JUDGE SMITH

Just checking. You're happy if they, if the reply goes in you're happy with the other one to go in as well?

MS HILL:

Yes.

THE COURT: JUDGE SMITH

Does anyone disagree with that course of action? So it looks like that's agreed.

I can take by consent.

1140

MR ENRIGHT CONTINUES READING OPENING SUBMISSIONS

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.17 PM

MR ENRIGHT CONTINUES READING OPENING SUBMISSIONS

COURT ADJOURNS: 3.27 PM

COURT RESUMES: 3.48 PM

MS HAAZEN CALLS

ROGER VERNON GRACE (SWORN)

- Q. Do you confirm that your full name is Roger Vernon Grace?
- A. Yes.
- Q. And that your expertise is as stated in the evidence?
- A. Yes.
- Q. And that your first evidence is dated 25th of October 2017?
- A. Yes.
- Q. And that you've contributed to the (inaudible 15:50:19) statement?
- A. That's right, yes.
- Q. And do you confirm that your evidence is true and correct?
- A. I do.
- Q. Thank you. If I could take you to the joint witness statement. I'm not sure if there is a copy there. The registrar will be able to provide.

WITNESS REFERRED TO JOINT WITNESS STATEMENT

- Q. And if you could go to page, Dr Grace? And if I could just take you to the middle of the page there, the comment of Dr De Luca's and he says, "I agree that actions should be taken due to the significant (inaudible 15:51:23) species, however, it is my opinion that there is time to determine the most effective way to enhance ecological values across the region in an integrated holistic manner." Are you able to comment on the immediacy of the need to act?
- A. Yes. We've been watching, "we" I mean the, you know, humans have been watching the decline of the, particularly kaimoana species for pretty well a generation and in my lifetime, it's really got a heck of a lot worse than it was when I first started diving and the impact of not leaving enough snapper and crayfish, in particular, in the sea has led to this terrible plague of kina barrens which we all know about know and believe is a sort of a bad side effect of fishing. How far you let that go is a matter of opinion and, in my opinion, we reached a point where we really need to

deal with it and if we leave it any longer, it's just going to get worse so I think, you know, working on it in the way we're discussing in this hearing is, although it may require some tweaking in the future, it's definitely a step in the right direction and should be actioned as soon as possible.

Q. Thank you. If you can go to the, turn to the next page and then the second to last paragraph there is in the fourth column and the second sentence of Dr De Luca's is, "My opinion is that the opening up of the wāhi taonga areas to fishing again after a period of no take risk undoing the enhancement within the wāhi taonga areas achieved in the period of no take." Would you be able to comment on that?

A. It very much depends on the nature of the fishing that's opened up again and I think if you just open it up to the regular sort of fishing regulations that we've had for years that's what caused the problem and opening up the areas around the wāhi tapu like that I think would have an adverse effect inside the wāhi tapu areas. We can talk about edge effects on marine reserves and things where fishing around the edge can influence what's going on in the protected area, but provided that we have enough information in monitoring in the wāhi taonga areas prior to opening them to fishing and then controlling that fishing in a pretty tight way, I think it can be managed so that the impact on the wāhi tapu areas are minimised and probably of little significance.

1555

Q. Thank you, and final question. An issue has arisen as to the adequacy of - advocacy of educational methods.

A. Right.

Q. Are you able to comment on methods in their advocacy generally?

A. Advocacy for marine protection has waxed and waned for years. In recent times, well it has been the responsibility of Department of Conservation for a number of years. They've effectively gone to sleep on it in recent years because they haven't had the funding and it doesn't look at the moment as if education on its own is enough and advocacy is enough and I would think we've got to put in place some real protection rather than just rely on education. It certainly hasn't worked up until now.

Q. Thank you Dr Grace. If you could now answer any questions from my learned friends and from the bench.

CROSS-EXAMINATION: MR POU – NIL

CROSS-EXAMINATION: MS JORDAN – NIL

CROSS-EXAMINATION: MR ANDERSON

Q. Good afternoon Dr Grace. Do you accept that there's been no formal monitoring of fish abundance at Motiti and that there remain information gaps?

A. Certainly. Yes.

Q. And that the monitoring that did occur particularly at focused on the impacts of the *Rena* rather than on the effects of fishing?

A. That's right. I think it was very disappointing that the, originally there was provision for following populations of particularly kaimoana species. That was taken out of the mix for some reason, I don't know why.

Q. So that's the, that's a gap in the (inaudible 15:57:05) –

A. That's a gap, yes.

Q. Would you accept that impacts of fishing intensity would need to be quantified for its ecological impact to be able to be determined?

A. Oh, to some extent it would help but I think it doesn't necessarily need to be fully quantified to assess how, how, you know, that there has been an impact. There's plenty of other examples.

Q. Are you aware of – I think you've worked with Dr Shears on trophic cascades and kina barren work?

A. Yes.

Q. So you'd agree that the particular effects or the relationship between predator urchins and kelp that's quite context specific. It does depend on the particular place?

A. Oh it does, yes and Otaiti itself for example hasn't got really bad kina barrens but if you come closer to Motiti Island itself there's some terrible ones there. So it's context dependent, partly underwater topography, partly wave action and exposure and that sort of thing.

- Q. Abiotic factors?
- A. It does vary but yes, from place to place.
- Q. Would you accept also that without a decent size protective area to compare against a non-protected area it's quite hard to attribute something to fishing purely in itself, the impact?
- A. It certainly helps. Bigger reserves are far more effective than small ones because of edge effects, so if you're going to compare a fished area with a non-fished area they've got to be a certain minimum size otherwise it doesn't make much sense and there's some pretty marine reserves have been set up in recent years around the place here they're far too small. But even, even with that there's plenty of examples around where it's very clear the difference between protected areas and non-protected areas.
- Q. Talking about that point, the difference in the contrast, would you accept that the contrast between reserves and non-reserves is it's not consistent in north-eastern New Zealand?
- A. Oh, it does vary, yes. But your marines reserves don't follow exactly the same track when they're created. Some of them take a lot longer to show some serious positive results. Others are quite quick, so it's, and it's hard to sort of explain that. It's again a context-type thing depending on current movements and recruitment and stuff like that, so –

1600

- Q. So Tuhua for example is reserve. It actually has, or at least on some recent studies have quite high levels of urchin barrens within it?
- A. Okay.
- Q. Is that –
- A. I'm not familiar with that particular one but –
- Q. – perhaps ask Dr Shearer –
- A. – it does happen, yes.
- Q. To attribute something to fishing would you accept scientifically you'd need to exclude other effects like sedimentation, pollution, climate change?
- A. I think we've got plenty of examples showing that fishing is the main influence. Particularly in the outer Hauraki Gulf for example Goat Island,

Tawharanui, Hahei. When you come into the inner Gulf like the Long Bay marine reserve for example, that hasn't really recovered as far as snapper and crayfish is concerned very much at all and that is probably related to sediment input. Whereas in the outer Gulf there's virtually no sediment in - input. So that does vary a lot depending on where you are and I used to think that kina barren didn't come right into the Hauraki Gulf for example but about three years ago I did a survey at Waiheke and found the worst kina barrens I've ever seen and there were no snapper and no crayfish.

Q. Would you accept Dr Grace that using a percentage of urchin barrens is a fairly raw indicator in terms of ecological health?

A. It is pretty raw. We're sort of inventing the wheel here if you like. It's, it's new stuff we're trying to, trying to make sense of what's going on there and come up with some sort of indication that will tell us when the reefs are recovering which will relate to how the, the marine life is recovering as well and it's, I think it's the best shot we've got at the moment to have a crack at it. It will evolve because it is a new technique. But there's ways of making it pretty efficient with things like drones and aerial photography.

Q. I think in your evidence also Dr Grace you talk about the, to deal with snapper effectively it would have to be in a much larger scale. Would you agree with that when you're talking about 40 square kilometres?

A. That's right. There was studies done at Leigh some years ago showing that if you wanted to get back to a natural population structure, a structure of snapper, and it will vary depending on what species you're talking of, for snapper it should be about 40 square kilometres of protected area. The marine reserve at Goat Island is only about five square kilometres. So to get back to a natural population you would need a lot bigger one. That doesn't mean that we should be aiming at getting back to natural population in all the marine reserves because smaller ones, they are effective and they'll be more effective for different species.

CROSS-EXAMINATION: MS HILL

Q. Good afternoon Dr Grace. Just dealing with an issue that you address in your primary evidence, which is really around I guess your ideal scenario or what you were proposing here and you do say that you're looking for a permanent regime and that it should be a no take area?

A. That's certainly the preference. The wāhi taonga areas have, as they've sort of outlined here, have a lot more flexibility in them and that's a bigger area than the total no take areas, but I believe there should be as many of those no take areas as permanent no take areas as possible. And marine reserves generally are far more effective if they're no take in perpetuity.

Q. So have you been involved in the particular design of the planning provisions for the, what we're calling the MNEMA?

A. Not here, no.

1605

Q. But you're familiar with how it's going to work?

A. Oh, pretty well, yes.

Q. So have you sat down with Graham Lawrence who designed it and worked through ...

A. I haven't sat down with Graham Lawrence about it. I have Te Atarangi Sayers and had, you know, discussions with him about it.

Q. So Te Atarangi Sayers briefed you on your evidence?

A. Not really. Most of the evidence I've presented here, anybody involved with the *Rena* case will see that it's virtually the same as I've presented to the *Rena* case and I make no particular excuse for that. I think, you know, the issues are the same so the evidence is somewhat similar. I don't deal in my evidence with the plans for the MNEMA as it stands.

Q. Okay, so that's why it wasn't issue to the council because it's going to have to be the party that's regulating that area?

A. Yes.

Q. So are you aware that within the wider, what we're calling the wāhi taonga area, that the way that the rules are proposed by Graham Lawrence, immediately any party can come to council to apply for, what we call a

fully discretionary resource consent, so if this went in the plan tomorrow, commercial fishers, recreational fishers, customary fishers could come to council straightaway and ask for consent, is that your understanding of how the rules operate?

A. Ask for what?

Q. A resource consent, so –

A. To go and fish in them?

Q. Yes.

A. I would've thought, I mean, the trigger points in there which indicate when it's appropriate to consider opening it to fishing and that wouldn't be tomorrow. It would be sometime down the track when things are recovering and council would be, to my mind, irresponsible to allow opening it up until it's ready.

Q. And that was what I thought your understanding was, so the way that the provisions are proposed, there's one avenue to go down which is called a restricted discretionary consent and that's when the trigger levels are met, but if those aren't met, anybody can come along at any time to apply for a, what we call a fully discretionary consent, so the reason I'm putting these questions to you is you've emphasised the importance of having these restrictions. So if the regime worked that you had your wāhi taonga areas and those were prohibited, so no fishing in those –

A. Tapu.

Q. Sorry, wāhi tapu, thank you, but within the wider wāhi taonga area that could immediately be opened up to fishing so essentially the status quo. In your view, would that be an effective regime for ...

A. Not really, no. I think – why would you allow opening up the wāhi taonga areas to fishing when they weren't ready and that's where monitoring comes in to see, you know, whether the kelp is starting to recover, whether the kina is disappearing, whether the snapper and crayfish are building up and until you've got information on that, it would be inappropriate to open that to any fishing.

Q. Thank you, so in your view, you're envisaging it would need to essentially be a total restriction until we had enough information for council consents

officers to make an assessment about whether it was appropriate to open that wider area to fishing?

A. That's how I see it at the moment, yes.

Q. And over what period of time would that information gathering and that monitoring need to occur? Is it just based on your kina barren count or do you think, my friend put some questions to you about baseline information and data, is that sort of information needed as well to help council make that assessment?

A. I think the main one and the easiest one to get is information on the extent of the kina barrens and assuming you've got snapper and crayfish building up and the kina numbers going down, we should get after, I don't know, three, five, 10 years or something the kelp coming back. That will be very obvious from aerial photographs and that's the key sort of indicator that things are improving again enough to start considering opening it up to fishing.

1610

Q. You've explained that it's not – the same conditions don't apply in all parts of the MNEMA, so Astrolabe or Otaiti I understand there isn't a major kina barren issue, is that your evidence?

A. In a brief opportunity I've had to look at it, yes. There are other people in this room who can probably answer that question a bit better than I can.

Q. I think Dr Ross' evidence –

A. Yes.

Q. – concurs with you so he doesn't, he described Otaiti as being in good health.

A. Mhm.

Q. So, in your view, your trigger, your kina count trigger, is that an appropriate measure to assess the impact of fishing on Otaiti given that the kina barren isn't an issue within that taonga area?

A. It's early days to tell. I think, as I said, we're sort of in a new area here trying to find a way of assessing how the recovery is going on. We know from other studies that an exposed reef system with steep sides like Otaiti has never been the right sort of habitat for kina barrens, so I would think

the aerial photograph type of arrangement is probably not appropriate in that case. Come close to Motiti, yes, definitely.

- Q. And I think in your evidence you described the issue at Otaiti as fostering the recovery of taonga species, so the reason for prohibition in that area would be to foster the recovery of those species that have been taken?
- A. Yes, mhm.
- Q. And you talk about what you've described as spill over, so if I understand it, correct me if I'm wrong, by having the prohibition within the wāhi tapu area, over time the species would be allowed to recover and when that occurs because fish don't stay still, they could then spill out into the wider MNEMA, is that a layperson's description of what you mean?
- A. Well that's fair enough. I think you've got two types of spill over to consider here. One is the movement of larger fish from the protected areas into the areas surrounding them, that's one sort, and the other sort has just been well illustrated in a paper that's come out from studies up at Leigh recently showing that it's all of larvae, in this case snapper, to the surrounding area, has made a significant difference to the population of snapper in the wider Hauraki Gulf. I think the figures are roughly something like within 40 kilometres of the Goat Island marine reserve something like 10% of the snapper recruitment has come from fish that live in that marine reserve and that marine reserve is only less than five square kilometres and we're talking of part of the Gulf that's something like 400 square kilometres, so a significant amount of young fish are coming from that marine reserve. If you multiply that by, you know, the other marine reserves we have around the place, it hasn't been studied in that way yet. It makes sense that larval export is going to be a major factor in the future that sort of comes as a benefit from the wāhi tapu areas.
- Q. If the wāhi tapu areas are confined by smaller areas and if, as we've established, potentially people could fish straightaway within the wider wāhi taonga area, isn't that just going to increase the pressure for fishing within that wāhi taonga area once the wāhi tapu area has allowed the fish populations to build back up and then spill over?

A. I don't understand why you're still saying that you could open up the wāhi taonga areas immediately to fishing. I thought –

1615

Q. Because that's what the proposed rules that the trust is proposing, that's what they allow for. It isn't essentially a total prohibition. It provides for a resource consenting process?

A. Well within that resource consenting process I would have thought there should be some pretty heavy restrictions and not just go straight back to the damaging amount of fishing we know has been going on and that will have an impact on the wāhi tapu areas if, if you maintain fishing right up to the edge of the wāhi tapu areas there's going to be an edge effect of fishing around the edge and that shouldn't happen.

Q. I just wanted to talk about periods of time and I think you in response to some questions from my friend you explained that this issue of fishing or perhaps unsustainable fishing has been occurring for many decades but you've noted it's increased significantly in your lifetime. Without wanting to suggest how old you might be we're talking a period of decades that you've noticed the increase?

A. Well, as I've been diving. I started diving in 1960 and definitely things have gone downhill dramatically since then. That's the sort of timeframe I'm thinking of.

Q. Dramatically over a period of a number of decades?

A. Oh, yes.

Q. It's not something that's - there hasn't been a substantial drop over a shorter period of time?

A. It varies a bit. Sometimes there's an acceleration and it'll level out for a bit but the real problem sort of started around about the mid 1960s when there was serious commercial fishing for snapper and crayfish in particular, they're the easiest ones to talk of, the ones people are interested in, and I've seen you know, particularly crayfish numbers go way, way down ever since that time.

- Q. Because there's no baseline data specific to Otaiti you're not going to be able to know with any precision over what period of time that has occurred. It's just in your anecdotal observations?
- A. It's anecdotal, yes. But there's a lot of it and there are places where there is actual data.
- Q. Well that's an interesting point because as I understand your evidence you're not suggesting that this issue is unique to the MENA –
- A. Oh, no.
- Q. – or indeed to the Bay of Plenty?
- A. No.
- Q. So it's happening throughout the country isn't it?
- A. Yep.
- Q. I just wanted to talk about – you refer to the basic principles of an MPA network, so the designing a marine protected area. Do you think those design principles are important to establishing what the appellant is seeking in this case?
- A. Oh, I think they certainly help but any, any marine reserves are better than nothing. The ones we've got so far scattered around the country haven't been part of a plan. They've been sort of ad hoc and this is one of the reasons why there's a new Marine Protected Areas Bill going through Parliament very, very slowly at the moment to address issues like that.
- Q. So you would accept that this is about taking advantage of an opportunity rather than actually designing it correctly from the outset?
- A. It's, it's got elements of design within it as it stands. I'm not particularly bothered that it's not part of an overall plan for the, the whole Bay of Plenty. I mean you could say there should be an overall plan for the whole of the country and we haven't got that, yet we still have marine reserves around the place which are shown to be very worthwhile and there's virtually nothing in the Bay of Plenty. Tiny little one at the Volkner Rocks and one at Tuhua and that's nothing like enough for being effective within the Bay of Plenty, so I, I would say that what's being proposed for Motiti and the reefs around there is, is entirely appropriate

and can be incorporated into a wider view of a network for the Bay of Plenty at a later stage. But I think it's important to get on with it and do it and not just let it languish and get worse and worse.

1620

- Q. Sure. But if the other alternative for the new legislation was happening, if that was underway and getting traction do you see that as the better outcome to have a, have proper MPA with, that is based on your design principles and, but has the support of a number of stakeholders who would be involved in the process?
- A. Yes. I think there's certainly merit in that but there is also merit in the new approach through the RMA which has a lot more community involvement and involving tangata whenua a lot more. I think there's different elements in this RMA approach from what's available in the Department of Conservation marine reserves or MPAs approach. They both have merits and even within fisheries legislation there's merits in there for protection but it hasn't happened and the Department of Conservation aspect of it all has been pretty well non-existent for the last sort of eight, 10 years or something and I think it's important that we have a look at the RMA alternative because it does offer different things. Not just exactly what would be in the, in the MPA new legislation.
- Q. So do I take it from that that you think the involvement of tangata whenua and other stakeholders is an important part of the process?
- A. Yes I do.
- Q. Turning to a completely different issue. The wāhi tapu areas, at the moment there's a one nautical proposed buffer if you like. Have you been involved in the design of that or is that a figure that you've come up?
- A. No it's not a figure I've come up with.
- Q. You say in your evidence that that would be the minimum representative support of the marine habitat. Can you just explain what you mean by that?
- A. Well one of the best examples we have which helps to illustrate this point is the Goat Island marine reserve the one up at Leigh which was created in 1975. Out of the blue, sort of no information at all. It was a big guess

as to how big it would be and it ended up five kilometres long and 800 metres wide. In the however many years it is, 40 odd years since 1975 when it was created we've learned a lot from that and we now know that the Goat Island marine reserve is too small to be effective for crayfish and snapper. They go outside the boundary and get caught and studies on crayfish have shown that they, you know, wander out onto the sand and dig up shellfish to eat and get caught out there. The one nautical mile radius around most of these wāhi tapu areas is quite a lot bigger in terms of distance from the central core sort of reef area than most of our marine reserves which are relatively small and I think it's a, I mean bigger would be better and the three nautical miles round Otaiti I think is great for a number of reasons I can explain a bit more, but the one nautical mile around most of those wāhi tapu areas I think is something good to start with and we can learn from it as we go.

Q. Thank you. I was just trying to test whether there was a minimum sort of viability size which is how you appeared to be describing the issue?

A. Well that depends on the species you are dealing with.

Q. Okay.

A. If you, if you're looking at crayfish a relatively small reserve does seem to work. If you're looking at snapper it should be bigger. If you're looking at kingfish or tuna it would have to be much, much bigger.

1625

Q. So has the one nautical mile radius been designed then with a particular species in mind that we're dealing with here for these particular areas or why are they all the same?

A. Probably not. Maybe – I don't know quite who actually designed that, but I presume that some of the thoughts would've been about snapper and crayfish and they're the ones that people are mostly interested in. The marine reserve around Volkner Rocks, for example, was one nautical mile radius, but when it was created, the fishermen managed to get a sort of a pie sector piece cut out of it so that if there were things like kingfish swimming round and round and round within the one nautical mile, every time they go passed this little gap in the reserve they can get caught.

That's sort of effectively made that reserve a lot smaller than it would've been if it was intact around the edges.

RE-EXAMINATION: MS HAAZEN

- Q. Dr Grace, in your opinion, is it better to control before quantify or control fishing and then to quantify so monitoring or monitoring after, is there a preference?
- A. Oh, definitely start monitoring before, yes, as soon as possible. That way, you know, you get a much better idea of changes that are going on. If you leave it all for five years and then try and guess what it was like before you protected it, difficult. You'd have to compare with outside somewhere similar.
- Q. And in response to questions from my learned friend, Mr Anderson, you discussed, well, he asked you about a decent size. In your opinion, what is a decent size in a marine reserve look like?
- A. It does depend to some extent on what you are trying to protect, but there's been papers written on this sort of thing in recent times and one of the relevant ones to New Zealand suggests that no take marine reserves should have a minimum of five kilometres of coastline. That may be difficult to achieve if you're close to a high population centre with a lot of fishermen, but the further you go from a populated area, the bigger marine reserves that you can probably establish, but it does depend on – it's influenced by edge effects of fishing and movement of the life you're trying to protect. A little tiny reserve the size of this room might protect one or two black (inaudible 16:28:48) or something, but it would be totally ineffective for crayfish or snapper or something like that, and bigger is generally better because you're not only taking in more habitats and more species, but you're also minimising that edge effect of fishing around the edge. So the only sort of figure we have at the moment is something like five kilometres of coastline and if you look at snapper, 40 square kilometres is by today's standards, it's a fairly big marine reserve. We've got a whole range of sizes of marine reserves, some that I think are ridiculously small. We've got some that a decent size like the one off

Gisborne, not too bad, but we need a whole range of them, whole range of sizes and the appropriate different sizes for different areas.

1630

QUESTIONS FROM THE COURT: COMMISSIONERS – NIL

QUESTIONS FROM THE COURT – JUDGE KIRKPATRICK NIL

QUESTIONS FROM THE COURT: JUDGE SMITH

- Q. I've got a couple of questions. Firstly do you know how large the MNEMA is?
- A. Oh, I couldn't tell you in square kilometres but it's –
- Q. It looks a lot more than a 40 doesn't it?
- A. Oh, it is, yes.
- Q. Looks like it's several hundred?
- A. Yes. Probably. But then, you know, that 40 we were talking about snapper. In the Bay of Plenty you used to have lots of schools of trevally and kahawai and kingfish and stuff like that. You'd need something of that sort of scale to get decent schools, of pelagic fish back.
- Q. And nevertheless it would be one of the largest marine reserves if there was a marine reserve?
- A. Oh, it would be one of the largest ones in New Zealand but not the largest. The Kermadecs are bigger.
- Q. Yes well I see that the fishing regulations apply to both the Motiti and Kermadec which we'll come onto in due course with other witnesses, unless you've got some experience with Kermadecs?
- A. Oh I've been there quite a lot, yes.
- Q. So that's got some particular controls about where you can take vessels, et cetera. Are you aware of that?
- A. Oh, to where you can take vessels, no. The Ker –
- Q. Okay. No, no. That's fine. I'll ask other people.
- A. I do know that, yeah.
- Q. So you know that it's got controls over the vessels?

- A. I'm pretty sure it doesn't, the Kermadecs. Unless there's some size restriction getting close to the island or something, size of ships.
- Q. Do you know how much coastline Motiti has?
- A. Not off hand. I'd have to work it out.
- Q. Do you agree with me it's more than five kilometres?
- A. Looks like about probably 12, roughly.
- Q. Twelve and a half kilometres of coastline?
- A. Oh, yes, yes, yes, yes.
- Q. And do you know within that area which area's a wāhi taonga? When you talk about that are you talking about the yellow areas that are shown on that map or are you talking about something else?
- A. Well one of Dianne Lucas' -
- Q. Sorry, wāhi tapu. I apologise. Is the wāhi tapu areas just those that are yellow, to your knowledge?
- A. No, no. There's more than that.
- Q. There's more than that?
- A. Yes.
- Q. And so there's the wāhi taonga, when you're talking about that is that the green area you're talking about? Or perhaps an even extended area but at least including that?
- A. Effectively the green area, yeah.
- Q. It might be slightly and I'm not trying to get into the issue Mr Enright raised about if it goes into the bigger in a couple of places, but that's what you're meaning when you're talking about those areas?
- A. Pretty well, yes.
- Q. No, that's fine. Thank you very much. Any questions arising?

QUESTIONS ARISING – NIL

MS HAAZEN:

Your Honour, just in terms of the last lot of questions. Sheet 9 of Ms Lucas' evidence is quite good for reference in terms of where the wāhi tapu and wāhi taonga areas are. In fact we might endeavour to (inaudible 16:33:15).

THE COURT: JUDGE SMITH

Perhaps you could do that and agree with Ms Hill so we could get that one nailed. What would be very helpful is to give us the areas because no – everyone talks about areas but I don't, I haven't seen any so they must be somewhere.

MS HILL:

We have a spreadsheet based on the GIS of the areas which I can email to -

THE COURT: JUDGE SMITH

Well if that could be attached to the map if you follow me, if we could get it all on one document it would be very useful to us. If you can agree, if you can't just give both calculations. That way we can work it out for ourselves. I mean I don't really think it makes a big difference to us whether it's 200 or 205. The issue is to get some idea of its overall size.

MS HILL:

The only other matter to raise which may provide some assistance is the, this map, exhibit A. the Court may not have observed but the red dotted circles relate to a navigation bylaw exclusion zone for large vessels, so those are big ships greater than 500 gross tons.

THE COURT: JUDGE SMITH

Yes. That might be based upon these regulations that we've got that are produced by somebody else. The Motiti Island in Auckland, then Kermadec commercial fishing regulations is it those ones or is that different again?

MS HILL:

No, these ones are purely under Council's own navigation bylaw, so –

THE COURT: JUDGE SMITH

Oh, I see.

UNIDENTIFIED MALE SPEAKER:

Purely navigation. Nothing to do with fishing.

MS HILL:

Correct Sir. Just the point is that they're not allowed in that area.

UNIDENTIFIED MALE SPEAKER

Just safety of vessels.

THE COURT: JUDGE SMITH

So it doesn't matter whether they're a commercial fishing vessel or any other vessels, if they're over the tonnage they can't go there.

MS HILL:

Correct. They're light.

THE COURT: JUDGE SMITH

Yes, well I'm sure that *Rena* was not supposed to be where it was but it doesn't (inaudible 16:34:43). Right. Thank you.

MR PREBLE:

I was going to say Your Honour, you've mentioned the Kermadecs and if it assists when Dr Freeman gives evidence she has looked at the minute that you referred to and those specific questions that you outlined so she is going to be –

THE COURT: JUDGE SMITH

Yes, that's why I was saying that this witness, it's probably a better question to ask of another witness I think. The MPI witnesses would be familiar with. But it's interesting. I don't know who produced this document ...

WITNESS EXCUSED

MS HAAZEN CALLS

DAVID GUCCIONE (AFFIRMED)

Q. Good afternoon, Dr Guccione, do you confirm that your full name is David Guccione?

A. Yes.

Q. And that your expertise is stated in your statement of evidence?

A. Yes.

Q. And that you produce your statement of evidence dated 23rd of October 2017?

A. Yes that's correct.

Q. And that statement of evidence is true and correct?

A. Yes.

Q. And that you also contributed to the joint witness statement of the (inaudible 16:37:21)?

A. Yes.

CROSS-EXAMINATION: MR POU – NIL

CROSS-EXAMINATION: MS JORDAN – NIL

CROSS-EXAMINATION: MR PREBBLE – NIL

CROSS-EXAMINATION: MS HILL

Q. Good afternoon, Mr Guccione. I just want to deal with the issue around the MNEMA and whether that is different to any other part of the Bay of Plenty. So I think you state in your evidence that those values are replicated elsewhere in the Bay, is that your ...

A. Which values are replicated elsewhere in the Bay?

Q. So the ecological habitats that you would find within the MNEMA are similar to other places in the Bay of Plenty?

A. Yes, similar. I think there are unique features of Motiti as there are unique features of any particular environment that they're not going to be exactly

the same. Motiti's interesting in that any recreational, keen recreational fisher will probably know that three of the four largest snapper that we ever caught were measured but caught at Motiti, so there are unique features of it in where it's located, in terms of the inputs from river sources close by at Maketu, and the hydrogeological nature of the tides and depth changes from inside to outside and the size of it relative to other places in the Bay there's nothing quite like it, yes. But then you will find similar features at some of the offshore reefs that would be analogues I s'pose to various parts of Motiti.

Q. Analogues?

A. Does that – is that helpful or not?

Q. So you said “analogue” I wasn't sure what you mean by that?

A. Analogues would be very similar but – yes.

Q. Right, thank you. And the issue that your evidence focusses on which is around the damage done by dredging and bottom trawling, again, that's not an issue that's going to be unique or special to this particular area that's happening throughout –

A. No that's a worldwide issue with fishery. New Zealand has some unique problems with trawling, but the type of damage is widely agreed on by the front of community that in terms of protecting the ecology, the overall ecology, you really can't have an intact ecology without limiting the benthic damage and the sediments, stirring up the sediment that you're going to get with these type of fishing methods.

1640

Q. In –

A. Well, I should qualify that. Intact, by intact ecology, I mean, you can have an intact ecology on a pile of mine tailings, but that's not what I mean by intact ecology. What I mean is a, more of a natural ecology, the type of ecology that has all of the resident native species in a ratio of sizes and an abundance that would be more like pre-anthropogenic effects or at least pre-industrial fishing effects.

Q. And I'm interested in that point because is the objective here to get us back into essentially a pre-fished state, a pre-man/woman situation?

- A. I don't really have an objective, I mean, personally I would love to see, you know, a greater abundance of fisheries in the ocean but, I mean, I guess I take the code of conduct pretty serious, code of conduct for witnesses pretty seriously and that I'm not an advocate for any particular role within this hearing. I'm here to comment on ecological relationships and so I'm not going to say that I have an objective of trying to get back to pre-industrial fishing methods, but I can comment on what those might be.
- Q. Sure. You talked about the goals of a no take area needing to be very specific and I think you discussed that in the context of the interrelationship with other areas so it's important not to consider a no take area in isolation from other areas?
- A. Yes, absolutely.
- Q. How will we know about the interrelationship or the effects, I guess, that this proposal will have if we don't have that kind of baseline information available to us?
- A. Well, we do. We have meta-analyses of marine protected areas from all around the world. Ninety-three/94% of those are not no take areas. We have level of protection of all different kinds and we have meta-analyses of how those respond to different levels of protection. We're never going to know exactly all of the relationships between what's happening outside of the marine reserve and inside the marine, or the marine protected area and inside the marine protected area, but we can – from what is known, we do know that even small, and this is corroborating Roger's evidence not detracting from it, but even small reserves do have impacts in terms of abundance and size of the average species within them. Now, what I mean by goal-specific is if you want to protect a certain species, a particular species or a particular group of species, yes, like a suite of species, then you may need to have, tailor the size or the protections within that reserve to that species, but we – I think it's pretty well agreed by marine ecologists that marine reserves do have a significant effect on abundance and size of certain species within those areas regardless of the outside effects, well, not completely regardless of the outside effects.

You still have to take into account sedimentation and, you know, pollute – and diffuse sources of pollution and the like, but we can use current literature to say that, to know what some of the effects will be in this area.

1645

Q. The question that I put to Dr Grace was around the way that the proposal is structured so you have the wāhi tapu areas which are the total prohibition?

A. Mhm.

Q. And then you have what has been termed the wāhi taonga area round the outside?

A. Mhm.

Q. And the proposal is that you could, Council could potentially have applications for – from commercial fishermen for example to come and fish in the area straight away so as soon as the rules are put into the plan?

A. Mhm.

Q. You've had a lot of experience with fishing and the fishing industry. In your view is that a likely scenario that they're going to want to fish within that area?

A. I suppose, well this is getting outside the, commenting on the role of the ecological issues at hand but from my experience with commercial fishing and the - their willingness to give up areas around aquaculture and other areas it seems that it is likely that commercial fishing interests will want to apply for those consents if it's not too expensive and if they feel like they have a reasonable chance of getting those consents. Now one of the things around wāhi tapu areas is that with that one nautical mile and a lot of them, you see that they actually protect all of the reef structure so the, so the, around some of the shoals and the offshore reefs. You can't see it as well on that one as the map that was referred to, that one there, but it protects all, it should do a pretty good job of protecting the resident populations around those reefs a little better than at least, depending on the fishing method, but it should protect the residents of those ones that don't widely wander. So there is some benefit to having those wāhi tapu areas even if there is fishing in the wāhi taonga areas.

Q. For some species but if they also allow a replenishment of species within those areas and then commercial fishing is allowed to come into the wider area that's essentially just generating more fish for the commercial fishers to take isn't it?

A. And recreational fishers and customary fishers. So any level of protection that allows for greater recruitment, greater larval outflow, greater export of adults is going to hopefully increase the take for fisheries once it's allowed. Now I've also said in my evidence that the level of fishing needs to be closely evidenced and closely regulated and there's a really nice precedent for that in terms of a, of one marine protected area in Italy where they have an area that is no take and an adjacent area that is partial take. And through buy in with the local community they've allowed - they've gotten to the point where they, the local fishers are - have agreed that when certain thresholds are reached they will curtail their fishing effort. And so what you have is a great response of abundance and size of the fish within a lot of different species within the marine reserve as no take and then because that fishing has been curtailed to an agreed limit within the community you still have a 50% higher return of fish, sorry, a 50% higher catch rate of fish in abundance within that limited take area than you do outside. So I think with community involvement there can be a much more, a much greater level of abundance and protection even within those wāhi taonga areas but it needs to be evidenced and it needs to be, yeah, managed properly.

Q. And critically it needs to have that community vibe doesn't it?

A. I believe so, yes.

Q. And in your view is it appropriate to impose a set of provisions without having had that consultation or discussion, or is the better approach to obtain that buy in, to have the consultation and discussion first and then gauge from it as to the process?

1650

A. Well, of course, it's always going to be better if you have full buy in, but you're probably never going to reach consensus on fisheries. I mean one of my lectures in fisheries management is how to please nobody all of the

time, so fisheries management is always contentious. There's not – there are still people caught poaching in the Leigh Marine Reserve which has 350,000 people visiting everywhere and eyes on it from everywhere, so there are always going to be issues around buy in, but to try to wait till you get full consensus means that you'll probably never do anything. I think there are times when you just have to look at the best scientific evidence in terms of the ecology and make a call that is in line with your goals.

Q. Sure and I understand the point about not getting complete buy in, but the community would expect to be consulted on the process wouldn't they?

A. I don't really have enough experience to comment on that. I mean as a recreational fisher, I would like to be consulted but, at the same time, I would like to think that the management structure has long-term goals of abundance and healthy populations as it's in the forefront.

Q. Thank you.

RE-EXAMINATION: MS HAAZEN – NIL

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN

Q. We've been – one measure has been proposed to provide a sort of threshold for when fishing might be appropriate or take might be appropriate and that's the kina barrens, are you, and you mentioned the Italian example, should there be other measures that, for instance, particular species that might be able to be monitored that would provide – so you get a broader range of ...

A. Yes, well look, as a scientist, I think that obviously the more information you have to paint a broader picture, the better you can make your – the more clarity and surety you can have around your management decisions. There are lots of different ways that marine reserves are monitored. You have video transects; you have diver transects; diver counts, some of the areas obviously too deep for that to be appropriate; baited underwater cameras, which are extensively used and I think that's a good portion of the evidence around Leigh and around the Tuhua

marine reserve, so I think a large compliment would give you a bigger picture and possibly my recommendations would be to have other kinds of monitoring in the long run, but I think that the kina barrens approach is not a bad start. I think that's a pretty good start.

QUESTIONS FROM THE COURT: COMMISSIONER POMARE

Q. Kia ora.

A. Kia ora.

Q. In response to questioning from Ms Hill and you mentioned early on that there are some unique features in relation to Motiti and just as there are other similar ecological characteristics with surrounding areas and offshore reefs, I'm just wondering whether you could elaborate a bit further on what those unique characteristics are?

A. Well, for the Bay of Plenty, okay, there are no other islets that are – you could go to, you can go out to, up to Slipper Island but that's, that is considered part of the Hauraki marine part. So you have some differences in terms of going from island to island, so with, let's start with Whale Island, okay, you have a slightly closer to shore area. It's slightly closer to shore at the shallow end. The water is more turbid. There's a greater volume of water coming down the river mouth at Whakatane and then it doesn't drop off to quite as deeper level on the outside as, on the ocean side as Motiti. Let's see, you have, then you go to Plate and the Rouse and they're smaller, much smaller. They're different in terms of their elevation. The use. Motiti is the only one that's, that's extensively inhabited so you have people using that, that as a food larder. It's well-visited by Tauranga fishers. It has like a longer, like I said, like was pointed out before a more extensive coastline than any of the other areas and, oh, yeah. In terms of just its protection from wind and currents and just variety in terms of the near shore environment I don't know. As a diver and, and somebody that visits it you see quite big differences from each place to the next, yeah.

1655

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK – NIL

QUESTIONS FROM THE COURT: JUDGE SMITH – NIL

WITNESS EXCUSED

MS HAAZEN CALLS

PHILLIP MAXWELL ROSS (AFFIRMED)

- Q. Dr Ross, do you confirm that your full name is Phillip Maxwell Ross?
- A. It is.
- Q. And that your expertise is as described in your statement of evidence?
- A. It is.
- Q. And that you produce a statement of evidence dated 26 October 2017?
- A. I did.
- Q. And that that statement of evidence is true and correct?
- A. It is.
- Q. Can you please answer any further questions from my learned friends and the bench thank you.

CROSS-EXAMINATION: MR POU – NIL

CROSS-EXAMINATION: MS JORDAN – NIL

CROSS-EXAMINATION: MR ANDERSON – NIL

CROSS-EXAMINATION: MS HILL

- Q. Good afternoon Dr Ross. The main area I just wanted to understand a little bit more was your description of Otaiti as being in good health or in reasonably good health I think are the words you used. So you're talking about the ecological functioning of the reef?
- A. Yes.
- Q. And in good health relative to what?
- A. So I guess the describing as being in good health is I guess really about the components of the ecosystem that are present there. Somewhere like, when I've spent time in the water around Motiti clearly it's modified through fishing. There's been a lot of discussion around urchin barrens so there's fewer fish, lots of urchins, lots of urchin barrens. Whereas the ecology of Otaiti is although there are clearly fewer large predatory fish the effect on the ecosystem has been much less and so the, I guess the

indigenous biodiversity is still present and that ecosystem is functioning as, it's a lot closer to intact than in other places.

Q. Thank you. Do I understand your evidence to be that it's important that this regime is a, is a no take regime?

A. Yes. To achieve the, you know, ecological gains then it's important that the area, that at least some of the area is no take.

Q. Right. So in your evidence you talk about no take areas but you've qualified that to be at least some of the areas?

A. So to achieve, you know, the ecological gains or require no take areas my understanding is the wāhi taonga areas are to achieve a range of other values and therefore that those values do not necessarily require a no take reserve.

1700

Q. I understand the rationale for not having a no take in the wider areas relates to other values, but from an ecological perspective, is it your opinion that it's a fair dissolution to have some areas of no take and some take?

A. I don't, from an ecological perspective, I think the size, the areas that we're talking about being the areas that are in the proposal as being wāhi tapu are quite extensive and I think there will be, ecological gains will be made regardless of what's happening in the wāhi taonga areas. Those wāhi taonga areas, depending on how they are managed, have the potential to enhance the benefits of the wāhi tapu areas.

Q. Thank you. In the joint witness statement, which I'm struggling to find at this point, but I'll say what I think you've said and if I'm wrong let me know. Is was around the question of whether we are at I guess a crisis point or I think tipping point was a word that some other experts have used, and your opinion on that, as I understand it, was that we are not in the sense that if we don't do something now, there will still be future opportunities to address the decline, is that a fair reflection of your evidence?

A. Yes it is. I guess it's a question of scale in whether we're talking, you know, I think we're seeing, you know, – if we don't do anything tomorrow or in the very near future, things will just sort of continue on as

they are potentially continue in declining, but if we don't do anything in the long-term, there is potential for significant degradation from where they are today.

Q. Are you willing to put a timeframe on what you mean by "the long-term"?

A. No I'm not.

Q. I think Dr Grace described when I asked him about time periods, talked about things fluctuating over time so that you might have periods of decline and then you might have some periods of resumption, might be the word, is that your view or is it sort of a static thing?

A. Could you –

Q. Sorry, it wasn't well put. So is it – are we talking about a slow decline over time or do we have fluctuations where they'll be periods of decline and then periods of the opposite of decline?

A. There's always going to be sort of natural variation where things will, abundances are different and also go up and down. I guess it's the long-term trends that we're interested in in terms of potentially arresting that decline through the implementation of this proposal.

Q. "Abundance" was the word I was looking for, thank you for that.

RE-EXAMINATION: MS HILL – NIL

QUESTIONS FROM THE COURT: – COMMISSIONERS – NIL

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

Q. Dr Ross, in your evidence at paragraph 14, you refer to some monitoring of fish populations at Tuhua, Mayor Island and I can't find anywhere that you go on to say what that monitoring might reveal. You've got a comment that DOC supported in the past but may no longer be doing so, do you have any knowledge of what that monitoring indicates?

A. Not a great deal of knowledge. I think Mr Guccione only probably knows more about that than I do.

Q. I'm sorry. He didn't refer to this monitoring. I should have asked him, should I?

- A. Probably, but – I'm not sure of the details but I know that in – so the works have been done by, I think it's been run by Keith Gregor who –
- Q. Well, that's what you say at paragraph 14.
- A. Yes, so I understand that inside the reserve at Tuhua, there are more crayfish, more snapper.
- Q. Alright, but you have no knowledge of the detail of what the monitoring might reveal.

UNIDENTIFIED MALE SPEAKER 17:04:38

Your Honour, I'd like to recall, Mr Guccione, if he's the better – when I'm reading the statements, I thought this witness knew more about Tuhua. We'll do that in a moment, all right.

1705

THE COURT: JUDGE SMITH

Well unless there's anything else you can tell me about that information other than that Mr Guccione might be the better witness.

UNIDENTIFIED MALE SPEAKER 17:04:58

That's all I can tell you.

- Q. I just want to, we've obviously come to grips with evidence in this file of late but looking at Ms Lucas' brief it seems to be really encapsulated in much of the evidence that Dr Nepia gave us. And are you familiar with, there's a ring essentially of (inaudible 17:05:26) around the western side of Motiti?
- A. Yes.
- Q. Can somebody give a copy of the map to the witness. It's volume 4. You'll find it there. Page 216. It's sheet 8 or sheet 9 is probably the best, 217 is it? No. 1217 sorry. You're on the right sheet so it's just the sheet 9 rather than 8. You'll see on that there's a - you'll see the named Mukutai, (inaudible 17:06:07) et cetera all round in a circle. Do you see that?

WITNESS REFERRED TO VOLUME 4

- A. Yes I see that.

- Q. Now those in themselves constitute a lot less physical area than the whole of the ASCV 25 or the whole of the area that's shown in that green map. Do you see that?
- A. Yes I do.
- Q. Given that each of those is one nautical mile as I understand it that's three nauti – well I'm not great on pi but over three nautical miles areas within each circle I assume?
- A. So I think it's about 12 square kilometres, so –
- Q. Yes. And that sounds about right. So, 12 square kilometres seems a bit much, but nevertheless, whatever the area is within each of those is, seems to be somewhere at or over five square kilometres?
- A. Yeah. I think, I just did a calculation before and I think a circle of one nautical mile radius is about 12 square kilometres.
- Q. Right. So if you added those one, two, three, four, five, six, seven, eight, nine, 10, that in itself isn't going to represent 120 because they overlap but nevertheless might represent something in the order of 80 square kilometres. Do you follow me?
- A. Yes.
- Q. Or 90. That's a lot of square kilometres compared with Goat Island at five isn't it?
- A. It is, and if you add in the, the three nautical miles around Otaiti –
- Q. Well that's right, and then you, that's when you get up into the hundreds?
- A. It's probably –
- Q. But the short point is every bit would, even five square kilometres as I understood it from your evidence would help?
- A. Yes.
- Q. So 10 or 20 or 30 if we were taking a gently approach to try and arrest the decline, you noted, the long-term decline you noted we might start to see some improvement?
- A. It'd be, probably each of those, each of those circles is probably... I'm not sure about the reserves in, down the East Cape but each of those is probably as big as any of the other reserves.

- Q. So even one of those we might start - we wouldn't know how much change we might see but one would expect given the Tuhua and other examples that have been mentioned by the witnesses today to see that there might be some seeding of the surrounding area and some improvement in the biodiversity?
- A. Yes. Each of those, each of those areas would contribute and would help and probably the, the, I guess the really cool thing about this proposal is that it's a network. You know, we've got a whole series of reefs –
- Q. Well yes we're getting to that. So there might be a synergistic effect but even just talking about area each additional area would flood and would imagine would help more?
- A. Yes it would.
- Q. And there may be a synergistic effect by interconnection creating what some of us would call ecotones on land but essentially environments where biota might travel, and I mean not only flora but fauna, might travel from one part of that ecotone through other parts?
- A. That's correct.
- Q. Crayfish for example have a habit of migrating I gather?
- A. Yes. They go for long walks.
- Q. Probably not much further than this but nevertheless there's the potential for an interconnected area to have some sort of synergistic value?
- A. Certainly is.
- Q. Okay. And the degree of that you can't say that one of those or two of those or three of those would necessarily arrest the current decline but each bit might help?
- A. That's correct. Within, within each of those areas if - the one thing we know is that catching fish and eating them kills them and therefore if you stop doing that in those areas there will be recovery within that area.
- Q. Yes and from the Goat Island example we understand now that it seeds outside its own area?
- A. It does.
- Q. So there's an effect beyond the boundary, even if fishing continues beyond the boundary there's still a beneficial effect?

A. Yes.

Q. Okay. Thank you for that. Any questions arising?

QUESTIONS ARISING – NIL

1710

THE COURT: JUDGE SMITH

Judge Kirkpatrick has asked, but I don't think he needs my permission, that we recall Mr Guccione to ask that question about Tuhua Island which is obviously of interest to us and would help complete that aspect of the picture.

DAVID GUCCIONE (ON FORMER AFFIRMATION)

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

Q. Thank you and I apologise, Mr Guccione, you had to be dragged back. I do see that I think you're at the same institution as Keith Gregor. It's just I read the evidence and Dr Ross' evidence, I couldn't find a reference in yours and that's why I didn't raise it with you. What do you know about the marine reserve population studies at Tuhua?

A. Okay, so no apology necessary, but I have been part of the survey group that has gone out for four years. I think I've been every other year for four years and done extensive survey diving within that reserve. Is there anything specific that you would like to know about the –

Q. I suppose the starting point in terms of a foundation is the extent to which you consider that the environment at Tuhua is relevant in any way to what we're talking about down here at Motiti and the surrounding ...

A. Yes, well, there are some very interesting effects of that marine reserve that are telling for the Bay of Plenty environment and I would say that Tuhua being slightly offshore is a little different in that it is, it doesn't respond as quickly because it's thought that the snapper population isn't as contiguous and maybe a little bit more resident. Snapper tend to migrate from the shallower water to slightly deeper water in the winter and when the water is colder. However, they don't necessarily migrate down

to the 200 metre depth that you find in between the mainland and Tuhua, so it is a little bit unique in terms of –

- Q. So Tuhua is bathymetrically separate compared to Motiti?
- A. It's a little bit – exactly. You've said that exactly right. So relative to Motiti, there's a little bit of difference in terms of the continuity of the population. So snapper though, in terms of what we saw as the time progressed within Tuhua is we saw that there were larger snapper but not much, not a greater abundance and larger crayfish but not a greater abundance for a while and then DOC put in a plan to more closely monitor poaching in that they were patrolling it with more physical patrols and also put a camera that could zoom in on and get both features and they prosecuted I think on the order of a dozen or so boats over a three year period, and those boats may have been regular offenders, we don't really know, but after that period, we saw a big increase in terms of the abundance of both of those species. So the size has already gone up, but then the abundance went up as well and I think there was a, at the same time, there was a bit of a decline in some of the prey species like two-spot demoiselles and some of the blue maumau and the like, so it's interesting that the larger predators did have an effect on – and often people will go and have a dive and think that they are in something that's magnificent because there are a lot of bait fish around, but that isn't necessarily the whole ecological picture unless you see the whole suite of species. Like, we think that there are many, many more jack mackerel than there used to be, yes.
- Q. So in terms of the fish hierarchy, it's similar to other ecosystems, it's actually the wellbeing of the top predators, the species at the higher part of the pyramid that is more indicative of overall health in the lower levels or is that an over generalisation?

1715

- A. Yes, that would probably be an over generalisation, but I would say that most compromised systems do have a lack of the top predator so you're

right in that sense, but as an ecologist what I would really like to see is something that's got the full complement, yes.

Q. Now, the marine reserve at Tuhua is only around part of the island, the northern part?

A. Yes.

Q. But as I understand it, there are fishing restrictions. There is some fishing allowed around the whole island, but there are some other restrictions. Does the overlap or the – do you observe anything from the two different sets of controls between the marine reserve and the other, and around the island generally?

A. Well, okay, given that they have very different qualities in terms of water clarity and the reef structure, there are inherent differences. What is limited at Tuhua is anything that's basically impacting except for the use of cray pots, so what we don't see is longlines and we also don't see dredging or trawling there, so those areas – so activities can still happen off of the one nautical mile limit at Tuhua. It's interesting, the crayfish have been, the population of crayfish or what you know when you're diving has gone way down over the last few years and that was in response to my understanding is that cray fishermen targeted that in response to a proposal of a mātaimai around the entire island and which would have limited cray fishing, so in order to build a catch history to make a stronger case to fight that mātaimai, they started targeting it a little more hard and with a little more effort, and noticed the crayfish population outside of the reserve declining over the last five to eight years.

Q. Is it the intention of you and your colleagues to continue monitoring around Tuhua?

A. Yes, with a large study published, unfortunately DOC has, and because of their funding is limited, so we are intending to keep monitoring it because we integrate it with one of our courses that the only issue is that it's getting more expensive, so we may have to limit it to an every two year study, but the intention right now is annual.

QUESTIONS ARISING: MS HILL

Q. Have you done the numbers in terms of what you envisage your annual or two-yearly cost would actually be to undertake that monitoring yourselves?

A. I don't know the full costs. I wouldn't feel comfortable commenting on what those costs are. In the tens of thousands of dollars.

Q. Tens of thousands?

A. Yes.

Q. Thank you.

A. Less than 20, I would say, but I'm not, I wouldn't want to give you anything like an exact figure.

QUESTIONS ARISING – REMAINING COUNSEL – NIL

WITNESS EXCUSED

THE COURT ADDRESSES COUNSEL – TIMING AND WITNESSES

COURT ADJOURNS: 5.20 PM

COURT RESUMES ON TUESDAY 28 NOVEMBER 2017 AT 10.06 AM**MR ENRIGHT CALLS****NICHOLAS TONY SHEARS (AFFIRMED)**

Q. Your full name is Nicholas Tony Shears?

A. Yes.

Q. And you have the qualifications and expertise stated in your brief of evidence?

A. Yes.

Q. And can you confirm it is true and correct?

A. Yes.

Q. Now, you've seen the joint witness statement, but I understand just because it was drafted in the last week, you haven't had opportunity to make adequate comment on it and I understand you'd like to make a few additional comments?

A. Yes.

Q. Could you please take the Court through your comments? So I understand you had a few additional comments to make because you didn't get a chance to look at the last (inaudible 10:46:06)?

A. Yes, that's right.

Q. Yes, please go ahead.

A. Okay, sorry, I was travelling back from overseas so hadn't commented. So the first comment is on number 2, which is around the area being significantly affected by fishing and the comment really is in regard to the kina barrens and that the kina barrens are a good indicator of overfishing where overfishing is occurring, but it isn't the only indicator and if an area isn't an urchin barren it doesn't mean that it's overfished, so reference here to the point about Otaiti being, remaining in a relatively healthy ecological state, I really just wanted to point out that just because a kina barren doesn't occur in a given area, it doesn't necessarily mean that that area isn't being heavily fished, so there's other components of the ecosystem and biodiversity that are missing from that system or missing

from what would be a more natural or healthy state. So that was just a comment on that one and that really to understand the sort of wider impacts, we need to also incorporate other, which has been proposed, but other indicators such as the biomass of the target species are important.

Q. Just on that, can you just – in terms of it being an initial trigger, if you like, or a way of prompting further monitoring or studies, what its level of effectiveness in that sense?

A. That the kina barrens are definitely an indicator of an area that has been overfished, but I guess it shouldn't be treated as the sole indicator and we've done a lot of research New Zealand that demonstrates that an area can be completely fished out of all of your target species, but it won't necessarily turn into an urchin barren or kina barren for a number of other physical processes such as wave exposure or sedimentation. It is a little bit complicated and an example here being Otaiti, it doesn't have a lot of shallow reef and these barrens typically occur in shallow reef, so ...

Q. What's your definition of shallow reef?

A. Less than 10 metres. Yes, so a lot of pinnacles, for example, like Otaiti aren't necessarily prone to becoming a kina barren, but it's obviously prone to fishing.

Q. Thank you, carry on.

A. The second point was around the need for an integrated, number 4, an integrated holistic approach to the establishments of marine-protected areas and the idea that that's really needed to be done rather than this area here, but I agree that, yes, across all of New Zealand we need to have an integrated approach and that's been agreed in New Zealand since the early 2000s when they developed the MPA policy. That's generally been implemented at very large scales like biogeographic region scales, but as yet there hasn't been any development in terms of networks going ahead. I would just like to point out that the proposed MPAs here would fit within any broader network initiative that was going on for the Bay of Plenty or for north eastern coast. It's – you know, what's being proposed doesn't, you know, overlap with existing MPAs. It's all

effectively designed according to the criteria that are set out in the MPA Guidelines from 2005 so, you know, based on existing guidelines that are available for developing networks of MPA, this would, you know, meet a lot of those criteria and therefore could easily be incorporated into a later larger scale process in developing a network for the region.

1050

Q. Just on that, what's your view on whether we need full baseline information before we establish what you're calling MPAs but what we're calling prohibited status?

A. Yes, so that's the, well, my next point number 5, yes. You know, it's whether we have enough understanding now to develop an, implement a network or a group of marine-protected areas and there are gaps and, you know, there are gaps in the science and there will also be gaps, but we've been studying marine reserves in New Zealand now for 40 years and we had some of the first marine reserves in the world, and we've probably been one of the leading countries in doing research in marine reserves and, so we have a very clear understanding of how they work. There's, you know, three long-term marine reserves in north eastern New Zealand where I've carried out my research at Hahei, Leigh and Tawharanui where we have developed, as well as Poor Knights, but where we've developed a good understanding of what happens when you protect an area, how predators recover and then that info – predators recover and then ultimately you get these shifts in recovery and the ecosystem state. I think based on this information that research that's been done in New Zealand has been important into playing into not just New Zealand, but global guidelines on designing networks of marine-protected areas. I'm familiar with the process having lived and worked in California that's gone on there where they developed scientific guidelines. They wanted to implement a network based on best available information. They recognised that you could spend years doing research trying to, you know, have predicative models for all different species to see where larvae were going to come up with a perfect design, but that's really not realistic and with very simple spacing, a size spacing

configuration guidelines, you can develop networks of MPAs with fairly, you know, not limited information just on basic understanding of what is out there and that's what's been used in California and the Great Barrier Reef and other places, and with plenty of success. Regarding the point about no take, I think, no, this might be the next point. Has that covered that question off?

Q. Yes, but, well, just the focus of my question was on do we need perfect information before we establish what you refer to as MPAs?

A. No. We've got a – there's clear guidelines in terms of developing MPAs around size and spacing boundary configuration. These – the tapu areas tick those off. They are very simple boundaries. A lot of the guidelines that have been used internationally, you think of California as a nice straight coastline generally, so when you have islands, some of your guidelines don't work right. They talk about a five to 10 kilometre stretch of coast whereas here you've got an island and the reason you're ending up with quite large overall areas is obviously 'cos of your, you know, it's a circle, it's a circumference so you, yes, so they've, you know, they're large enough. I think probably for the tapu areas, a mile circum – sorry, radius would be a minimum from our experience from other reserves throughout New Zealand. Poor Knights has been cited as it is really, you know, the jewel in the crown for New Zealand MPAs, but it was actually, you know, an amazing place beforehand, but following protection there's been huge recovery of snapper despite that boundary there is only half a nautical mile, but what's happened at the Poor Knights is they saw some initial occurrence of hāpuka but then people figured out what was going on and they kept fishing The Pinnacles around the Poor Knights because the boundary only went out to 800 metres. So the hāpuka hadn't recovered there. So in some of these examples and you've already mentioned the Otaiti that they were seeing hāpuka there. I mean that makes total sense when you've got a boundary that's three miles out including deep water, so, and I would expect similar things to happen –

1055

Q. So when you say “three miles” you mean three nautical miles?

- A. Nautical miles radius.
- Q. That's fine. Thank you. Do you have any other comments on the (inaudible 10:55:42) or?
- A. No. I've got - yes I have. But tell me when I have to stop. I obviously didn't get a chance to comment on this so I'm making the most of it now. So the whole – just the last point really is around the idea of no take versus, you know, the type of areas versus a taonga or other sort of marine-protected area and, you know, like the sort of design of the individual MPAs here this approach is very consistent with marine spatial planning initiatives worldwide basically following international best practice where you have your tapu areas nested or no take areas nested within a larger management area. So the example, one example is the Great Barrier Reef where there's about 30% no take areas and about 30% habitat protection zones, so those habitat protection zones prevent trawling, you know, dredging, things that are disturbing the substrate and your no take areas are nested within that. So that's consistent with, you know, international best practice in terms of nesting no take areas within larger management areas. So – and the management that's assigned to that area obviously, you know, depends on the goals and objectives for the area and what you're, you know, what impacts you're trying to protect against.
- Q. And if I could just you to refer, if you've finished your comments on the joint witness statement, if you could refer to exhibit E2? Or if you, perhaps you have any further comments or is that -
- A. I have, yeah, I've got one sorry.
- Q. Okay. Sure. One last comment.
- A. I guess the point, the final point is in response to number 9 in the table is around the urgency and whether we can just wait and see if current process that are - been in place for a long time are eventually going to kick in around the country and I can reflect on the Hauraki Gulf here where there's been large reviews of the information in the Hauraki Gulf that have shown continual declines in a lot of the key indicators. So there's an increase, increasing population, there's increase in people fishing, boats,

technology. There's more forms of fishing. Spear fishing for example has just exploded. There's more fish on the menu with cultural changes. So I don't think we can predict if there's going to be any tipping points or, you know, drastic sudden changes but in order to maintain the current status against this sort of increasing backdrop of human impact primarily through fishing here I think that there is some urgency and an example which I've worked on a lot in the marine reserves that I mentioned earlier is for the crayfish. I'm not sure if you're aware that the - so Leigh, Tawharanui, Hahei are all in the same cray management area, cray 2 and that's been undergoing declines in the catch per unit effort for the last 10 years. People have been complaining for it, about it for about five years. The current catch per unit effort is the lowest in the country, the lowest it's ever been in the fishery. The fishermen have shelved a quarter of their quota yet there hasn't been any management intervention yet. And what we're actually seeing in the marine-protected areas is that the numbers of crayfish in the marine-protected areas are also declining as a result of this wider fishery impact and fishing on the reserve boundaries. So there, you know, I think we are on this slope. I don't, you know, Bay of Plenty's part of the same area as far as the crayfish go and I'm sure you're exposed to the same pressures with increasing population, so, yeah, I think that is, you know, just – I can't say we're at crisis point, we're not at the tipping point, we don't know, but we're certainly, I don't know, the longer it takes to make changes, the longer it will take to then be able to recover. So that was, yes, that's my last point.

1100

Q. Thank you. So if I could ask you to look at exhibit E2 please which is the rule. And just seeking your comment on rule number 3, you'll see there refers to within MNEMA activities that disturb. It's the seabed and then there's a list of five. So the question is, because you talked in you earlier evidence about the buffering role that you have around the wāhi tapu areas so my question to you is to what extent would that rule 3 be effective in managing significant adverse effects with MNEMA?

WITNESS REFERRED TO EXHIBIT E2 – RULE

- A. Well, it would – well if it's eliminating them, then it's completely, you know, eliminating those adverse effects so I think that's a pretty straightforward answer isn't it?

THE COURT: JUDGE SMITH

- Q. Sorry, rule 3, is that the one about dredging, trawling ...
- A. Dredging, yes, that's right.
- Q. No, I don't think the answer is obvious to us. If you're saying what effects does it avoid?
- A. I'm sorry and –

EXAMINATION CONTINUES: MR ENRIGHT

- Q. Sorry, I'll re-put the question. What level effects do the listed activities, so dredging, trawling, seine netting, potting and gillnetting have on indigenous biodiversity within MNEMA area?
- A. Right. So what are the effects of those activities?
- Q. Yes.
- A. Right, okay. So –
- Q. On a scale from –

THE COURT: JUDGE SMITH

- Q. Well, do you know what activity is occurring within the area at the moment?
- A. I don't know which –
- Q. Because evidence has been given about that and we have the regulations as well of course.

MR ENRIGHT:

Yes, but the witness, Sir, can speak to the spectrum effect whether it's minor or –

THE COURT: JUDGE SMITH

- Q. Yes, so you don't know whether all of these are occurring at the moment?
- A. No I don't, no. I don't know that.

- Q. Let's assume that they are all, can you tell us what the effects of those are?
- A. Yeah, well, the impacts of dredging and trawling, you know, bottom fishing have been widely demonstrated. My research personally is focussed on rocky reefs where those things tend, well, tend not to occur, but my understanding is that the effects of dredging and trawling on soft sediment communities are fairly traumatic particularly where you have a lot of finely structured organisms on the bottom, so it simplifies the seafloor. It gets rid of that structure, barging structure. The general kind of changes are from a more long-lived macrofaunal communities to shorter, you know, more (inaudible 11:03:25) selective species like hermit crabs and worms and things like that, so there's general – the general effects of bottom fishing are widely known and –
- Q. I think we're particularly interested in your area of expertise given you're here about reefy, so given that you can't trawl the reef itself, I assume.
- A. Yes.
- Q. How close, I mean, do you have any understanding which would help us, how close are these rocky outcrops? Could you dredge or trawl if you're allowed to, assuming for the moment you could, there's other witnesses who talk what can and can't be done, but can you get within 10 metres or 100 metres, or a kilometre? How close can you get to these rocky pinnacles without damaging your ...
- A. Well, I know they have in the past dredged and trawled, well, they do fly trawl mats over deeper reefs and tend to keep, you know, tend to keep them off the bottom.
- Q. So they can do deeper reefs?
- A. Yes. It is really out of my area of expertise in terms of where they are exactly trawling in this area, but I would, you know, point out that the general effects of those methods from an ecological point of view have been widely studied.
- Q. Sorry, but we are interested. For example, one assumes if you tried to trawl, there's a good chance you could lose your net?
- A. Well, yes, I'm sure but –

Q. And are you aware of any effects of nets being caught and left or abandoned or are these things that happen or don't happen in New Zealand?

A. Well, I don't know.

Q. You don't know? No, that's fine.

1105

A. My, sort of pointed out, my research is on generally shallow kelp-dominated, you know, shallow reefs where there isn't a lot of this activity happening, so it would be in the deeper areas around the islands. Yes and I don't ...

MR ENRIGHT:

Sir, there's a Mr Hill produces a trawl line maps –

THE COURT: JUDGE SMITH

Yes, that's right, so we've got evidence on the whole thing. It's a question of how far you want to go.

MR ENRIGHT

– so it's more just the effects arising at the level of principle that I was trying to ...

THE COURT: JUDGE SMITH

Yes, that's right and he tells us that he can't help us except in relation to shallow reefs of which there are a number around the island, of course, and some of them are wāhi tapu areas. You'll notice a number of them there are ...

EXAMINATION CONTINUES: MR ENRIGHT

A. So, I mean, if the dredging and trawling activities are excluded from, obviously from the tapu areas, then the reefs and whatnot in that system will be well protected so you wouldn't expect any of the impacts to be occurring on those reefs, but they would be continuing on, you know, in the surrounding.

Q. And for clarify what's proposed in exhibit E2 is within the whole MNEMA the dredging, trawling is prohibited.

A. Yes.

Q. And in terms of whether you'd see that as a benefit for maintaining indigenous biodiversity, can you just comment, confirm your view on that?

THE COURT: JUDGE SMITH

Q. That's really what we're interested in two ways. Firstly, within the general area and secondly, does it have any flow-on benefits or effects in the wāhi tapu areas even though you can't trawl per se et cetera over those themselves?

A. Yes, well, just purely from a habitat protection effect, I mean, that's why they have these, you know, no trawl zones and, you know, I mentioned on the Great Barrier Reef the habitat protection zones to protect those biogenic habitats that are potentially used as nursery habitats for juvenile fish. The same, you know, scallops, for example, they settle onto fine structure on the bottom, so if you've got a heavily impacted dredged area, you lose that fine structure which is important for the scallop settlement, so having the whole area protected would, you know, obviously be value for the area itself, but also potentially for larvae of species that are spawning within the area flowing out.

EXAMINATION CONTINUES: MR ENRIGHT

Q. And you'd defer to Dr Stirnemann in relation to the effects these methods have of seabirds?

A. Yes.

Q. All right, so we just finally would like to have produced through you a list of marine reserves and their areas. Do you have a copy of that there?

A. No I don't.

THE COURT: JUDGE SMITH

Q. And we'd be interested to know which ones you have some personal, because you mentioned the number and there might be others you've had some involvement with.

THE COURT ADDRESSES MR ENRIGHT – LIST TO BE SHOWN TO OTHER COUNSEL (11:08:02)

THE COURT: JUDGE SMITH

Q. So of those, are you able to tell us which ones you've had particular involvement with?

A. Well, I've been to a lot of them. I've surveyed a lot of them including the Auckland Island, so the really large ones you'll see on the list are your offshore, well, Southern Antarctic Islands, the Kermadec Islands. So the total area of the ones, looks like the total area of the, the management area here would be larger than any of the other mainland ones.

1110

Q. We're particularly interested in the Kermadecs for reasons that will become obvious in due course through the hearing. If you've been there

–

A. I haven't unfortunately.

Q. Oh, you haven't been to the Kermadecs?

A. No.

Q. No.

A. Sorry.

Q. Because any comparative of the ecotones there would be quite useful?

A. Comparison with in what regard?

Q. Reef, ecologies et cetera. I don't - we don't know anything about the Kermadecs, if you could tell us anything we'd be – it would be helpful.

A. Well it's a very different, very, very different system. It's subtropical. It doesn't have kelp for example. It's a big island chain as well and the reserve extends out to 12 nautical miles all the way around it. Comparatively it's, oh, it's way bigger than Motiti and it would be a few Motitis kind of joined together I think but it's a much, so the... You did refer to the Poor Knights earlier being about 24 square kilometres.

Q. Where's that now? Oh, yes, I see. Yes.

A. So, yeah, that adds up. 2400 hectares –

Q. Yes, that's 24.

- A. – and I did mention in terms of how that would be a more, probably the most relevant comparison in terms of marine reserves in New Zealand to this purely on the basis that the whole island is included in the reserve. The boundary just is 800, or half a mile radius all the way round the island chain and you've got a similar kind of layout here except you're obviously extending out to a mile which is definitely preferred. So given what's happened at the Poor Knights and what was seen at Otaiti over three or four years I think you'd see fairly spectacular changes in the fish in particular, the crayfish and over time some of the other, you know, important habitats in this area.
- Q. What sort of depth is it at the outer edges of the Poor Knights Reserve?
- A. I think it's around 100 metres and there's some pinnacles that come up shallower but there's –
- Q. So that's a bit deeper than here?
- A. Yeah, but there's pinnacles right on the boundary. So I think if the Poor Knights if the boundary had been extended to one when they put it in it went to one nautical mile. It would have had quite a different effect on some of those, you know, particularly hāpuka. My understanding is it's, the reason it's half a mile is 'cos that was what it was at Goat Island, right, and the reason it was half a mile at Goat island was because the fishermen thought one mile was too much and Bill Ballantine said, "All right. We'll make it half." Roger could probably back me up on that. Yeah. So there wasn't any science behind it then, but what we now know about, you know, particularly movement of lobster and things like that out beyond the reserve boundary at Leigh, you'd be confident in a, a one mile boundary you'd have a lot more effect in terms of protecting species that are carrying out movement into deeper water.
- Q. To what extent in terms of your studies does depth matter compared to distance from shore?
- A. Yep. It's, it depends, right. Yeah. So if it's very, very deep you probably don't need as much. The example at Leigh, yeah, the example at Leigh the offshore boundary's only about 25 metres and it's 800 metres offshore, so the crayfish are actually moving out beyond there to feed on

bivalves and they're moving up to sort of three kilometres deep, three kilometres offshore and that's why they're getting caught on the offshore boundaries of that reserve. Going out with the sea change process that has gone on in the Hauraki Gulf they're looking at extending that to three kilometres and then the same for the Hahei Marine Reserve. So we definitely know enough about the movement of these things to, you know, to sort of be able to – that's why I said I'd say one nautical mile would be a minimum and you might expect some of these inshore ones, you might see species moving across those inshore boundaries more frequently than the deeper, offshore islands. But it becomes a balance right, because these reserves do get promoted as a way of promoting the surrounding fisheries through the movement of adults which through the spillover of adults which it's a fine line because you want to protect enough for the populations to be resilient to what's going on and that's what we're seeing in the surrounding waters and that's what we're seeing at Leigh, Hahei, Tawharanui at the moment where those reserves aren't quite, aren't big enough to withstand the wider effects of fishing going on in the area. Another – if you guys – keep going, I've got one more anecdote because the other part of the story, right, is not your adult movement but your larval spillover – your larval export and there's just a study finally come out from the Leigh reserve where the adult fish in the Leigh reserve were DNA-sampled and then they went and caught 3000 juveniles from the surrounding coast and that showed that despite the small size of that reserve and the fact that it only extends 800 metres offshore, they were actually able to pick up larvae, you know, the juveniles around the surrounding coast that had come from the marine reserve, so it sort of showed – it's proof of concept in a way that if you do have substantial, you know, even bigger areas like what's proposed here, that can actually make a real contribution to the surrounding fishery. I think they estimated 10% of the juveniles in the surrounding waters were from the reserve.

1115

MR ENRIGHT:

Sir, could we ask for an exhibit number for that?

THE COURT: JUDGE SMITH

Yes. I think we've got to G. I've already given it – yes, G.

MR ENRIGHT:

And as I said earlier, we accept that it's from Wikipedia so we're happy to be corrected on the ...

THE COURT: JUDGE SMITH

Well, if there are any corrections, people can either make corrections to that and give us a new one. I'm quite happy to substitute it if you can agree on it.

THE COURT: JUDGE KIRKPATRICK

Well, DOC has a list on its website. It's just not put in this format.

MR ENRIGHT:

Exactly Sir.

CROSS-EXAMINATION: MR POU

- Q. I represent iwi authorities that exist to the left, to the right and around this proposed protection area and these iwi authorities largely support the efforts of the Motiti islanders to achieve what it's seeking to achieve, but there is a concern, however, that if you protect that bit that it leaves the areas just to the outside it means there will be more intense harvesting in those areas and is that a concern given some of the things that you say in your research that this might restore the reefs and structures within the area to a greater extent and adjacent areas or will the adjacent areas get smashed?
- A. Yes, it's a good question and it's one of the early sort of questions that were sort of addressed or investigated in the sort of marine reserves and there's very little evidence of that happening in the literature. There's been reviews done in studies, the available studies that have information

before and after and as far as I know, there's very little evidence to that and the reality is and it's particular evident in the Hauraki Gulf, and I assume it's the same here, is those outside areas are already at a very low, they're already at that stage, right, they're already heavily fished so the example of the crayfish is, you know, the classic and most in your face one at the moment. The populations of crayfish outside the reserves that we monitor are very, very low numbers so I'm not sure if you're seeing similar things around here, but that would be one of my, you know, the fact that you're, yes, you're already at a low level. You're not likely to see much of a decline.

- Q. You've mentioned the halo effect that exists around these systems and you've mentioned that this halo effect might be influenced but more if the size of the reserve is increased and I guess it's the corollary of the question that I asked you. By protecting one area does the other bit get smashed but do I take from your evidence that the bigger the area the more benefits that they are, that will occur on the fringes for instance within the Te Arawa rohe, the Ngāti Ranginui rohe?

1120

- A. Theoretically yes. I mean that's the idea of a network, that they are protecting and if they're designed, the key thing is that they're designed to protect spawning biomass that can then contribute to the surrounding fishery. The example I mentioned from Leigh which demonstrates that's happening. There's an example from the Greater Barrier Reef an area where they've been working on coral trout where I think 30% of the area is protected and those populations in that reserve are contributing about 50% of the larvae to the surrounding area. So you, yeah, so there is this, you know, there is this as you say a corollary but - and there's evidence, you know, that shows that these reserves or protected areas can supplement the surrounding areas.
- Q. I just want to ask a blunt question. Is that big enough or is it too big?
- A. The whole area? I mean that's, if the whole area was a no take reserve as I said it would be, you know, it would be the biggest one on the mainland –

- Q. I'm talking about to achieve the purposes that you're talking about, the protection of those attributes of –
- A. It would be spectacular wouldn't it? I mean, you do get here the Bay of Plenty, I mean that's kind of not a scientific response but we wouldn't know what a reserve like this would do if that whole area was protected in terms of –
- Q. Does it need to be that big?
- A. Well the thing, I mean the tapu areas I think they actually cover a large area as has been pointed out themselves and combined they would still be probably the largest no take area but keep in mind that you've actually, it's not one no take area. It's 14 or, you know, somewhere between 10 and 14, 10 kilometres squared areas that, some of them butt together. So what you actually end up with is quite a complicated boundary, so don't just think about it in terms of this list as being the biggest number on the list and therefore it's too big. What you've got is a whole lot of, probably good size reserves, you know, relative to other -
- Q. Does it increase efficiency to have them connected?
- A. I think, yeah, I think it works more as a network. I – so a lot of thinking around design comes from sort of straight coasts where you can say, well we want to have a minimum, in California they set a minimum of between five and 10 kilometres for each reserve. But when you come to a system like that it's like, well how does that work? And what's why the circumference approach is really the best way of getting a simple boundary and there's benefits of having a simple boundary 'cos you reduce the edge effects. And there's also benefits from a policing point of view.
- Q. Thank you very much. Those are the questions. Nothing about Motiti is simple.

CROSS-EXAMINATION: MS JORDAN – NIL

CROSS-EXAMINATION: MS HILL

- Q. Good morning Dr Shears. I just had a couple of questions arising from answers to my friend Mr Pou. I had written down from a response to the

Court that you talked about the phenomenon which I've written down of promoting surrounding fishing through spillover, which I understand to be that where you do have this abundance that's increased through the no take area it spills over and then fishing is essentially promoted around the area and so it becomes popular, but I then understood your answer to Mr Pou to say that that isn't a phenomenon and that's not happening. So which is the correct?

- A. Well it's - he asked both, you know, it's a balance right, 'cos you want to be able to protect a population so it can spawn, produce larvae that can then flow onto, you know, a much a greater area. Most of these species that we're talking about, you know, have pelagic larvae that drift around for up to, you know, from a month up to a year so you get those values by protecting a spawning population, but you can get value as well from them spilling over and that's where you've got a - it would be intere - I can't really predict how that would happen and I don't know how this would happen in these reserves being a mild radius, but I do know if you reduce that radius, then the spillover ultimately prevents recovery, right, so that's what's happening with the crayfish at the moment is that at Leigh and Tawharanui, and Hahei is they are moving out of, out onto the sand where they feed on bivalves at certain times of the year and they get caught, so they are contributing to the fishery but what's actually happening in the reserve is they are declining. So I think first and foremost you want to protect the, you know, have them big enough to protect populations. I mean the whole idea is to protect the populations from fishing. It's generally what an MPA does.

1125

- Q. So it's generally accepted as a benefit though, is it, that you can have the spillover effects to then allow fishing in areas outside of the protected -
- A. I don't think - there are examples from around the world where catch per unit is higher, you know, near to these revenues but, yes, you can't - it can happen, whether it will, I don't know. I think you, you know, hope what you would hope for as a mix. You would hope that with this kind of array, you would have very healthy populations within the reserves and

there may be sort of benefits in terms of the spillover of adults as well as the larval export.

Q. Isn't there an issue around trading off? So you're saying, well, it will protect it in this area but then will allow this area next to it to be potentially fished or overfished? You're making a judgement around ...

A. Well, the area is all fished at the moment so it's, you know, those – that relates back to the previous question as well whether does reducing the access therefore put more pressure on the surrounding areas and it may do, but it, you know, there isn't a lot of evidence worldwide for that having any further adverse effects on what's already happening.

Q. Are those sorts of issues looked at when you're looking at MPA design and the networks of MPA?

A. No, not specifically. It's more about the sort of existing use and where that fishing activities are currently happening.

Q. And on that point, so you haven't been to the area, you say that in your evidence?

A. No I haven't been to the – no.

Q. No, but you talked about this being well designed and I think you mentioned size. You'll obviously be familiar with the other design principles for MPAs and two of those I did want to raise with you. The first is representation, so the idea that all marine habitats in the area should be represented in the network?

A. Yes.

Q. So you having not been to the area that's not a matter that you actually considered is it?

A. No, but I've dived on the, some of the other islands, quite a few of the other islands in the area including the reserves out at Volkner Rocks and Tuhua and some small coastal sites, and what I understand – and also I've looked at satellite imagery. We work a lot with satellite imagery where you can actually see a lot. I think I provided some examples in some of my evidence, but what you have here are very, is the range of habitats you would expect. It's on a sort of a continuum from, you know, coastal areas through to offshore so, you know, offshore pinnacles so you're

representing quite a variety of habitats in that area and so I, you know, I haven't been there but I've done a lot of diving all through northeast of New Zealand.

Q. Sorry, just so I can clarify what you're saying, you're saying you don't know but you would guess based on your wider knowledge that there would be that representation?

A. Yes and I've seen photos and the satellite imagery as well, so you can see in the satellite imagery the distribution of the main habitats and the habitats to the north, and sort of east in the Bay of Plenty are all very comparable, so I wouldn't expect Motiti being in the middle to be anything overly different.

1130

Q. And would you say the same for the second point about replication more than one example of each habitat. How could you possibly know that unless you've done that analysis?

A. Did I say something about just in general around the guidelines?

Q. No, but these are the principles in design and you said there well designed networks?

A. Yes, I didn't say it's a well-designed network because it's a, you know, you can't really talk about a network in a, well, it's a sort of couple of hundred square kilometre area.

Q. So you're saying it's not a network? Sorry, I've misunderstood your evidence. I thought your point was that those, the collection of those wāhi tapu areas effectively constituted a network?

A. Well, it's a very small scale network, right, that ideally we would be part of a larger network where you could have your replication or not. Within this area you could, I'm sure if people are more familiar with the area, we'd be able to say that some of these are replicas of each other, but I haven't ...

Q. No one has given that evidence but if you can't that's fine. So my other question just related to a comment you made about Otaiti and you've acknowledged that you haven't dived in that area. You said just because an area doesn't have kina barrens doesn't mean it's healthy and you

made that statement in relation to Otaiti, so I'm just wanting to clarify the evidence of Dr Ross, who has dived the reef on a number of occasions, is that it is in relatively good health, so I'm wanting to clarify. Are you saying that it isn't?

- A. No, I – it's healthy from the perspective that there's, well, there's plenty of kelp and there isn't kina barrens, but my point was that that is not, it shouldn't be used as a sole indicator of ecosystem health because we know that there's other aspects of Otaiti that aren't healthy like the fish assemblages, the lobster populations are, you know, based on anecdotes, they recovered a lot during or they recovered during the four year period and then subsequently they've been declined again so –

THE COURT ADDRESSES COUNSEL – RECORDING DEVICE GOING OFF IN COURT (11:33:40)

CROSS-EXAMINATION CONTINUES: MS HILL

Q. My last question is one of clarification and it relates to a paper which isn't one that you have authored and so feel free to say you don't know the answer, but I see that you took a photograph that's included so you may have some familiarity with it. It's the paper attached to Dr Kerr's evidence and it is entitled – do you have the bundle there of Dr Kerr's evidence? It is entitled "Estimated Extent of Urchin Barrens on the East Coast of Northland"?

A. Yes, I'm all familiar with it.

Q. You're familiar with that. I thought you would be. The question I have is at page 18. It might be helpful if you got the documents so that I don't have to read extensively from it.

A. Okay, is it in here?

Q. It should be in bundle 1 and it's at page 124 of volume 1.

A. Yeah.

1135

Q. And under the heading "Partial protection" there's a discussion around the differences between various reserves, some that have had full protection and some partial and I understand when we're talking about

partial protection here we're talking about open to recreational fishing or not. And there's a statement about a partially protected reserve, Mimiwhangata?

A. Yeah.

Q. And the urchin barren extent there is 21.23%. But then there's a statement that says that this poor result is also higher than the 17% figure estimated for the entire coast where there are no restrictions at all. So I'm trying to understand why it might be worse in an area that's partially protected than the entire coast which isn't protected at all?

A. So that, it sort of alludes to my point around Otaiti and that different areas are more prone to urchin barrens than others. And there are - it's relatively easy to predict in a way in terms of... So that variation, I mean there's no error bars or anything on that but that's not, it's not a big difference but you could, you would easily -

Q. So there's no margin of error?

A. Yeah, there's no margin of error sorry. But you - depending on the wave exposure of a coastline, exposure to other factors such as sediment runoff and things like that you would expect and my own research and Roger Grace's demonstrates how that percentage can actually vary relevant - relative to some of these other environmental factors and so, I know so it depend - and the Mimiwhangata coast is, you know, it's five kilometres of coastline where it's 21%, whereas when you average across the whole north-eastern coast it's 17, so... And the reason that if - that number 17's not particularly high I don't think is because it's actually including all the reef down to 30 metres. So most of your urchin barrens are constrict - restricted to the shallow depths. So this percentage if you just restricted it to say the top 15 metres which is, it would be a much higher percentage -

Q. Sure.

A. - you know, where the kelp occurs but down, this includes all available reef.

Q. Thank you.

COURT ADJOURNS: 11.37 AM
1137

COURT RESUMES: 11.58 AM

CROSS-EXAMINATION: MR ANDERSON

Q. Dr Shears, I just want to ask you a couple of sets of questions. The first ones are about trophic cascades which I understand is a particular area

–

THE COURT ADDRESSES COUNSEL – WAITS FOR SILENCE IN COURT TO PROCEED (11:59:03)

CROSS-EXAMINATION CONTINUES: MR ANDERSON

Q. Dr Shears, so my first set of questions relates to trophic cascades and, in particular, the relationship between health, sea urchins and the keystone predators. Now, do you accept that the importance of sea urchins on kelp productivity varies at regional and local scales?

A. The importance of urchin with – just say that one again?

Q. The importance of sea urchins on kelp productivity varies at regional and local scales?

A. Yes.

Q. And the relationship between kelp, kina and predators is highly context-specific?

A. Yes.

1200

Q. And the underlying causal mechanisms are not fully understood?

A. No.

Q. So think your 2008 paper in context, dependent trophic cascades talks about the underlying causal mechanisms not being fully understood in terms of – perhaps I'm misreading that.

A. I see. No that's – yes, there was some interesting differences there among some of the islands that we didn't – Mokohinau and the Poor Knights. The Poor Knights had less urchin barrens I think and there's potentially some important bottom processes there, but the

Mokohinau Islands which are, you know, are fished have extensive urchin barrens. I thought you were referring to the relationship between – the predators and the urchins are, you know, that's clearly understood but some of the inte – you know, why in some areas you don't get sea urchins increasing in abundance that's less well understood.

Q. I think you said abiotic effect has a relevance with exposure and water clarity?

A. Mhm.

Q. So given the highly context dependent nature of these relationships, is it fair to say that drawing broad conclusions from particular individual studies it's something you should be very cautious about?

A. No. With now there's an extensive amount of research has been done on reefs in north eastern New Zealand and how protection in marine-protected areas how that's sort of offset or reversed some of those trophic cascades. It's well demonstrated now in the three long-term reserves which are similar environmental conditions in northeast of New Zealand, so it's moderately exposed, open coast locations, so at Leigh, Tawharanui and Hahei and all of those areas since they've been protected, there's been a reversal in the amount of barrens and an increase in kelp which has followed on from the recovery of predators. The reason why the Poor Knights was sort of a bit of an anomaly was because there already seemed to be a difference when that reserve was established, well, shorter, sooner than we would have expected. So I don't think there's – it's not just drawing on one study. There's a lot of research now that's, you know, it's clearly been accepted for north eastern New Zealand. It has been pointed out that other places around the country, you know, the sort of trophic effects may not occur and that comes back to that same point that in some areas for whatever reason there's no predators there but the sea urchins don't proliferate and there's a number of potential mechanisms that prevent that.

Q. Do you accept though that there's the significant local variability within the north eastern bioregion which includes BPO and Northland?

A. Yes and that relates to what I said in terms of it varies. With wave exposure and generally more exposed reefs, urchin barrens will persist down much deeper, so the urchins are able to – related to the physical actions, so the urchins will move down deeper whereas as you reduce the exposure, the urchin barrens are shallower and you can actually see that around, in the imagery around Motiti, but on the exposed coast there's a lot more urchin barrens. They extend deeper whereas on the more sheltered side it's more of a narrow fringe, so that's, you know, consistent with what we see in the rest of north eastern New Zealand.

Q. I just want to ask you about the MPA process briefly. You were talking with my friend, Ms Hill, about that. You'll accept the principles in the policy and implementation plan are important for ensuring the right areas are selected?

A. Principles?

Q. In the policy, the MPA policy and implementation?

1205

A. Oh. I don't, yeah, I'm not really sure how they. They're not – it's about, it's not so much about defining the right area. It's, the guidelines are around representative areas, replication and then there's guidelines on sizes and boundary configuration. I wouldn't say –

Q. But you'd accept that only so many areas can realistically be designated as MPAs so you've got to make sure you're getting representation, replication?

A. Yeah. But I don't. Yep.

Q. Now some of those principles, one of them is consideration of the impacts on use and managing the practices, particularly customer use and management practices. Do you agree with that?

A. Yeah. But the flip – obviously we need to have awareness of that, but the flipside and there is a real trend in New Zealand to put them in areas where there is no impact or little impact on existing users. And so everything we've talked about in terms of these MPAs and the benefits it is true protection. So if you are - there is examples where they have been put in places that really offers no additional protection, so it is, again it is

a trade off between, you know, affecting existing users and protecting the ecosystems in imported species.

Q. One of the key things in those principles is that setting up an MPA should be done in a transparent and participatory and timely manner. You're familiar with that?

A. I haven't. I - is that a principle in there?

Q. It's principle 4.

A. Well I can't, I would say that the current processes haven't achieved that. Yeah, 'cos that's from 2005, right?

Q. Would you agree though that doing things in a transparent and participatory manner is important so that you get buy in from people?

A. If, if it's done right there are some examples worldwide where that has been successful, but I haven't, you know, we have had no evidence of that panning out in New Zealand.

Q. Where there's a choice of several sites and they can equally add a similar ecosystem or habitat to the network would you agree that sites should minimise impacts on existing users and treaty settlement obligations, other treaties?

A. I, yeah, I think that that's getting a bit, you know, far out of my kind of realm of expertise in terms of the usage of and treaty rights.

Q. You wouldn't disagree that's one of the planning principles?

A. Well that, that is - we're coming - sorry, but we have, you know, that's moved into planning principles and I'm, you know, not so much around the sort of, the ecological design -

THE COURT: JUDGE SMITH

Sorry, I'm not even sure what planning principles we're talking about. Is this under some other Act or something?

MR ANDERSON:

It's the marine-protected areas policy which he spoke about earlier and the planning principles that was talked about -

THE COURT: JUDGE SMITH

I didn't understand that so obviously he must have been talking about them without me knowing they were derived from there.

WITNESS:

So there's a range of different principles and guidelines in there, right.

THE COURT: JUDGE SMITH

That's fine. I just wanted to know where it was from.

RE-EXAMINATION: MR ENRIGHT

Q. You were asked about the representative principle and the question and proposition that was put to you was that well you don't know but you would guess and then the question, and there's obviously a difference between inference based on research and experience and guessing. So I'd just like to know which applied to your answer in relation to that topic?

A. Sorry, which one?

Q. The representative principle?

A. Oh, it's very, it's very hard to sep – I mean I've done, we did a biogeographic classification of reefs around the whole of New Zealand and north-eastern New Zealand was part of it so I have a very clear image in my head of reef ecosystems in north-eastern New Zealand but I haven't dived in this specific place. I've dived in islands all around so it's inference I guess.

Q. Thank you.

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN

Q. In order to understand a little bit more about the network issue and whether the – whether any interconnectedness of ecosystems in relation to the wāhi tapu areas that have been identified. Does one depend on another, their interconnectedness –

A. Just referring to the –

1210

Q. Just to the wāhi tapu.

- A. Generally when people talk about MPA networks, they are over a larger area and the spacing guidelines for a lot of MPA networks tend to be 50 kilometres to 100 kilometres but, again, we're generally thinking about linear coasts and so here you've got a small cluster of islands. The species will move between them so, you know, it is a little bit of a, it's hard to sort of predict exactly how things would move around between these different MPAs but they could, yes, quite possibly move between the MPAs, but in terms of adult movement and move from the MPAs into fished areas when population density is increased and that's the spillover thing, but I'm – I know a lot from most of the examples along our coast, we have heavy, high levels of fishing on the longshore, you know, the boundaries on the end of each reserve on the coast so you get spillover this way, but here you've got a different situation where they're going to have to be moving out beyond reef and across deep water so, you know, you don't want to promise people that you're going to have all of this spillover of adult individuals and you're going to get better fishing. I couldn't comment on that. I couldn't promise that, but I would be confident this area, you know, what's proposed would be effective in protecting a lot of these important target species in the area.
- Q. So what I'm really interested in is the biodiversity protection and the ecological protection rather than supply of fish per se and it's that linkage that I'm wondering about in terms of the various, if there is any, identified tapu areas. So are they all the same? They all have the same attributes at the end of the day or do they rely on each other?
- A. Well, again, I'm inferring from the sort of gradient among these, you know, from an inshore/offshore they're surrounded by, you know, your inshore tapu areas will be characterised by more coastal species and the offshore ones will be characterised by more offshore like it's been pointed out in terms of Otaiti being more influenced by the east Auckland current so there will be different, differences in the biodiversity, the ecosystems within these areas and there will also probably be differences in terms of how fishing is impacting on that biodiversity. In some of these areas there will be extensive urchin barrens, for example, and that is where, you know,

the removal of the predators has these cascading effects on, you know, so your effects of fishing aren't just effecting what you're taking, but the sort of wider, you know, the food chain and what lives on the reefs. It's hard to comment on the interconnectedness of them.

QUESTIONS FROM THE COURT: COMMISSIONER PRIME

Q. Can you tell me if there's or is there a difference between the, an ecological difference between a wāhi tapu and a wāhi taonga?

A. Well, I mean, at the moment they're just lines on a map at the moment and it will ultimately be, you know, this is probably not a question for me because I don't know what the final or exactly what is proposed for the taonga areas, but if I could, I could speculate I guess.

Q. Yes that's what I'm asking you to do.

A. Yes, well, if the – the taonga areas are primarily aimed at protecting against physical disturbance, then they will, through fishing gear, then they will have values for, you know, those ecosystems that have been disrupted by the physical fishing activity and they'll protect the, you know, biodiversity associated with those habitats, but presumably they will be open to fishing other, you know, other less damaging forms of fishing so there will be conversation, you know, biodiversity values in protecting against the more destructive and maintaining against the more destructive forms of fishing, whereas the tapu areas being no take allow the whole system to be maintained and recover from not just those benthic impacts, but the effects of removal of your target top level species and also the wider range of species that are taken from those areas, so it is more of a complete protection obviously, complete protection of the ecosystem rather than just the...

1215

Q. So would there be an ecological difference between a wāhi taonga and a marine reserve?

A. Well, it really seems, my understanding is that wāhi tapu is, being no take is effectively the same as a type 1 marine reserve or marine-protected area so, yes.

QUESTIONS FROM THE COURT – COMMISSIONER POMARE – NIL

QUESTIONS FROM THE COURT – JUDGE KIRKPATRICK – NIL

QUESTIONS FROM THE COURT: JUDGE SMITH

- Q. Now, when we say we don't quite know what will happen here, we have one example, don't we, which has been documented through monitoring and extensive evidence that was given to us in relation to the *Rena* and that's Otaiti reef because there was an exclusion there for four years and even though there has been, as you're probably aware, some significant impacts of the *Rena*, nevertheless least since the cleaning up which is only a portion of that four years, there's been well documented changes in abundance on the reef. So that gives us some indication that the values can be restored if vessels were excluded because all vessels were excluded. It didn't matter whether they were fishing or not unless they were to do with the salvage, isn't that correct-
- A. Yes and that's purely consistent with what we see in other marine-protected areas around –
- Q. The point I'm making is you keep talking about marine-protected areas in fishing. We do have an example where there was an exclusion zone and the exclusion zone achieved a change in abundance.
- A. Yes.
- Q. Now, perhaps coming back to that point then. The quest – you keep talking about a no take, but an exclusion zone would be, for the purposes of biodiversity, for example, that would achieve – we don't have to control fishing, we just simply have to exclude people in boats don't we?
- A. Okay, so total – yes, okay, so total exclusion –
- Q. An exclusion zone.
- A. – versus just exclusion of fishing.
- Q. Well, just an exclusion zone, yes.
- A. Yes.
- Q. And there are many examples on land, you'll be aware, with biodiversity along lakes and rivers where they exclude people because of the scientific biodiversity values.

A. Yes.

Q. Nothing exceptional about that approach and you're aware that Otaiti is zoned as indigenous biodiversity A area which is the highest zoning there is so it's outstanding?

A. Yes.

Q. And also, as I understand it, Motunau (Plate Island) is also an IBDA as far as I can tell from the maps. I could be wrong but I'm just relying on Ms Hill's maps. So those we've already had identified within the top level of biodiversity in terms of the New Zealand Coastal Policy Statement.

A. Right.

Q. Now, if you excluded people, vessels, whatever you want to call it, but let's call them people that would achieve an outcome, one assumes, really somewhat similar to that achieved at Otaiti with the exclusion of vessels for four years. In other words, that's a power that the harbour master currently has but hasn't exercised, but a similar power exercise would have the same result one assumes. Have you any reason to suspect a different outcome?

A. There may be benefits in doing that.

Q. Now, do you know what the exclusion zone was that the harbour master imposed over Otaiti?

A. How far it extended?

Q. Yes.

A. It was either a mile or three, I'm not 100%.

Q. Yes, I'm not 100% sure either so we can find that out, but even a one nautical mile around Otaiti is like, because it drops away, doesn't it, the bathymetry drops away quite rapidly off the reef.

A. Mhm.

Q. Is likely to have a similar impact to that of the exclusion from the harbour master?

1220

A. Yes, but I would question as to why wouldn't, you know, why just make it one, you know, ...

- Q. Well, the question is why make it three? It's got to serve some purpose. You know the bathymetry better than I and unfortunately the only person who has given it again is Ms Lucas in her evidence, but my recollection is that it drops off and then it's fairly uniformly sediment or sand and we were told there is little evidence of significant communities, diversity communities because that's the issue. Biodiversity communities of the sort that are recognised under indigenous A beyond the reef complex itself and you have other evidence?
- A. So was the previous exclusion 1 mild?
- Q. I've got no idea.
- A. Okay.
- Q. The point I'm making is where is the biodiversity? It's marked on the map actually on the reef. You're a reef ecologist, I assume you can tell us whether or not depth set, I think it was 40 and 50 metres, a likely to carry those communities.
- A. Well, the example that came up with the hāpuka before and, you know, that they were being seen were was showing that obviously what protection had been given, you know, whoever that extended out seemed to have been, being effective in allowing hāpuka to –
- Q. Do hāpuka use sediments and sand as part of their habitat?
- A. Patch reefs that are on, over, you know, so deep patch reefs and sort of pinnacles which would –
- Q. Are you aware if there are any deep patch reefs or pinnacles?
- A. I don't know around that area.
- Q. I don't recall in evidence that point, but we'll explore it further while we looking –
- A. I would assume there is, I mean, 'cos it's, the reef itself is effectively a big, you know, sort of series of pinnacles.
- Q. Okay, well, that's something we can look at and, clearly, we have these reefs to the south at, gee, golly gosh, it's hard to read, Te Papa Reef and these other, (inaudible 12:22:10) Shoal, et cetera, et cetera. Those are IBDBs which is the second grade of biodiversity. The other one that's an IBDA is Motunau Island (Plate Island) and that covers not only the island

itself and the reefs outside, but actually goes even a bit beyond that so that clearly shows some wider connectivity there. One assumes if whatever limit you set for Otaiti, I presume you'll argue a similar figure would be appropriate.

- A. Yes and that similar size actually to the Poor Knights.
- Q. The evidence seems to demonstrate that the kina barrens to the extent they've been observed already are not really in those areas, but are associable more closely with Motiti Island itself, is that your understanding?
- A. There's – so my evidence on that is based on satellite imagery and there's very good imagery from a few years ago of Motiti but not of the surrounding pinnacles.
- Q. I see.
- A. So I got an indication some of the surrounding pinnacles have got kina barren on them from the images I was able to look at, but –
- Q. So you think it goes further than just Motiti Island itself at the moment?
- A. Yes I'm sure.
- Q. If we were looking at a priority and I know that your position is that it would be nice to cover them all, but if we were looking at prioritising them, would you prioritise those areas that currently have kina barren or would you prioritise the areas that don't?
- A. No, I'd prioritise those areas.
- Q. Which areas?
- A. The ones with kina barrens.
- Q. Thank you. And you mentioned reefs – sorry, you were talking about reefs and that's your speciality. It is correct from what you were saying about Goat Island, for example, is it the reefs that are spawning areas or is it areas adjacent to the reefs, or is it the sediments and sands that are the spawning areas?
- A. It's the areas adjacent to the reefs, the snapper. It depends on the species. The snapper moving offshore a little way so there is concern currently that they're not where they're probably spawning. Potentially

they're vulnerable to fishing on the boundary with only that 800 metre boundary.

Q. So you think they would do it adjacent to it? I actually saw, interestingly enough, something on TV last night about snapper spawning because essentially the females spawn on the move and the males fertilise it on the move as well so essentially, they're spawned to the water immediately aren't they?

A. Yes and they're carrying out vertical movements up through the water column so they – the cases I know of it's generally over sandy bottoms in 20 or 30 metres of water, but I don't know –

Q. So protecting just the reefs wouldn't necessarily protect those spawning grounds –

A. No.

Q. – is that your concern?

1225

A. Yes and that's exactly the case for the crayfish as well that the, the crayfish actually have very complicated lifecycle in terms of when they're mating and spawning, but they do the mating in the shallow water, they release their eggs on the edge of the eggs and then at certain times of the year, at least, at these other reserves they're meaning, you know, up to a kilometre offshore to feed on bivalve populations so that's where the problem lies with these other reserves with the boundary only being 800 metres as they're not protected while they carry out those movements.

Q. I've certainly heard in other cases I've had that they can migrate quite long distances from place-to-place. Are you able to tell – is this part of a migration route or do you have any evidence about migration at all here? I think that's really a similar question that Commissioner Leijnen was asking whether they tend to migrate along the route of the reefs or do they tend to cross the sands?

A. A general sort of pattern is a lot of our understanding and theories around migration of targeted species are from fishing, you know, from where they're caught and it leads to all sorts of theories about things being on

the move, and there are examples of crayfish carrying out migration such as around the bottom of the South Island.

- Q. Yes, I think that's where I've heard the evidence, yes.
- A. But a lot of the tagging work that's been done in the fishery, you know, around the rest of the country, most of those lobster are caught within a kilometre of where they're originally tagged.
- Q. Do you think that it leads to reasonable prospect that these are, tend to be a fairly resident population?
- A. Absolutely, so that's what the – despite the fact that they move out of the reserve up at Leigh is where the tracking work is being done and we're actually just starting a big tracking study now. They do move back to the same dens on the reef so it's not –
- Q. So they'll go to feed on some molluscs and then when they've finished that they'll tend to go back to their habitat.
- A. Yes. And I would, you know, there's similar things that are likely to happen here, but just where they move in relation to those boundaries would be very interesting.
- Q. So I want to talk to you now about something that's a little more complex because the New Zealand Coastal Policy Statement talks about precautionary approach, but I don't want to go into a number of decisions and discuss that which essentially different to the UN approach to precautionary which is that a precautionary approach is one where you should still take action to try and prevent something occurring even though you don't scientifically know whether it's going to sure to result. Do you understand there could be any negative results from excluding people from these zones beyond cultural concerns that have been discussed? In terms of the ecology of the area, do you think there's any potential negative effects?
- A. No, not at all, I mean I mentioned earlier that the concern was that the surrounding waters would be even more heavily fished, but I don't see that as being a major, you know, a concern.

- Q. So from an ecological point of view, the exclusion of people from some of these areas, you don't see that as creating any inconsistency or imbalance within the ecology that wouldn't right itself?
- A. No, not at all. I think having –
- Q. Do you see having only positive effects or do you think it could be neutral?
- A. I think – are we talking about excluding people or excluding fishing?
- Q. No, excluding people, well, that excludes fishing as well, of course, but that's not the point I'm making.
- A. Yes. There are some – no, I think there's very limited sort of would be negative effects. You know, one of the things you mentioned was about excluding people altogether. There would be some value in that because quite often what happens in a marine reserve when you exclude fishing, you end up, people end up feeding the fish and things like that so you could argue there was some benefits of just excluding people altogether, but I don't think that's ...
- Q. Well, I'm thinking of other things which we'll talk to Ms (inaudible 12:28:59) like nesting birds, mating birds, et cetera, et cetera those sort of issues as well but they're outside your expertise aren't they?
- A. Yes, from a sort of underwater perspective I don't see any.
- Q. So from your perspective, even though the outcomes in terms of the current danger and from doing this aren't completely known, you haven't got a reason not to act to protect those areas?
- A. No and I'll just point out that I think what is unknown and hard to predict is how these areas would benefit the surrounding fishery that's what is hard, but I'm not –
- Q. Well, you can probably tell from my questions that the focus of us is on biodiversity rather than fishing?
- A. Yes and those within the boundaries, I think there is very little doubt in terms of what will happen in terms of for the recovery of species to initially been targeted and then the sort of potential flow-on effects.
- Q. Well, I'm talking about biodiversity as a whole, so obviously interested in fish, penguins, turtles, kelps, all the flora and fauna particularly those

identified in the lists. Have you seen the lists of identified values and attributes from these?

1230

A. Yes. But the –

Q. And you don't see any negative impact upon if people are excluded on those values?

A. I haven't – I can't recall exactly what's on that list to comment on.

Q. It's quite a long list.

A. Yes, so who knows, there might be something on there, but I just –

Q. Well, one of the values is, of course, on fishing so, of course, it would, it must impact on that value because you can't fish.

A. Yes, but the – so when you exclude fishing from an area, the initial response is obviously what's been targeted there prior, right, so the classic examples are the snapper and the crayfish. A lot of the biodiversity effects and the sort of ecosystem effects take longer to occur so that's kind of what I was, yes ...

Q. And this is I think another question that Commissioner Leijnen, so it's a 64,000, another question at the end, I mean, Dr Ross was of the view that anything would help, five square kilometres would help, you know, obviously 10, 20, 40 would be better. You said the odd thousand-odd, where 85,000 hectares we're talking here would be spectacular. We've got to do what's enough without overly, you know, I mean, we might all want to rule the world in a particular way and think the result might be better, but we have to look at what's appropriate in the circumstances and proportionate is another way of thinking that. Do you have a view you want to express from your expertise as to what would be an appropriate starting point, given there's nothing there at the moment, from which you could then measure the benefits or detriments that would continue to occur assuming monitoring occurred in the future?

A. I, you know, I said it's a large, you know, just the wāhi tapu areas, it is a large area but I'm not sure what percentage, you know, there's pros and cons with thinking about percentage of the whole area, but it is easy to communicate and the recent recommendations out, I don't have them but

I could find them and provide them, but I think there's a long time, there's long been debate over how much of an area should we protect and one way having the guidelines gets around that, but I think these new estimates are around 30% so, you know, that ...

Q. Thank you.

A. I would –

Q. No, thank you for that. I realise it's a hard question to answer that's why I left it to the end.

A. Yes, I mean, that's sort of the latest I think scientific kind of sort of information and I could find that if someone needs it.

Q. Well, it's your opinion. We can see if anyone disagrees.

QUESTIONS ARISING: MR ENRIGHT

Q. Just in the answer you gave to the Court, referred to recent recommendations, can you just clarify what study that is?

A. I haven't got that off the top of my head. I can follow –

Q. Well, in this case, is that something you could provide through to myself for the Court?

A. Yes.

Q. Is it a published study or?

A. Yes, it's a published, it's a, it might an IECN study.

Q. I see.

A. It – yes.

QUESTIONS ARISING – REMAINING COUNSEL – NIL

WITNESS EXCUSED

MR ENRIGHT ADDRESSES THE COURT – AFTERNOON WITNESS ORDER

(12:33:58)

MR ENRIGHT CONTINUES READING OPENING SUBMISSIONS

1247

MR ENRIGHT CALLS**UMUHURI MATEHAERE (SWORN)**

Q. Is your full name Umuhuri Matehaere?

A. Yes.

Q. And you've written a statement of evidence and rebuttal evidence. Can you confirm they're both true and correct?

A. Yes, it's true and correct.

Q. Now, you've sat through I think both days of hearing haven't you?

A. Yes I have.

Q. And you've heard today the proposal Mr Raeburn, sorry, Mr Lawrence has put forward that identifies nine wāhi tapu of the 15 in total?

A. Yes.

Q. As having prohibited status for damage, destruction, taking of flora or fauna. Can you comment on whether you think that's appropriate or whether you say that all 15 of the wāhi tapu should be, have the same restrictions applied?

A. I personally would prefer to have the 15 identified as wāhi tapu. How we manage that is something else.

Q. Right. So your concern is about firstly, the identification that all 15 identified –

A. Yes.

Q. – but, as you say, the management is a different issue, all right, thank you. And you've heard today the questions put or the suggestion put that rather than having prohibited status within the wāhi tapu areas that relates to damage destruction or taking of flora and fauna, the other proposal is to have an exclusion on people within the wāhi tapu areas, can you comment on that from your tikanga perspective?

A. I regard wāhi tapu as, if you look at my evidence, my affidavit I refer to (inaudible 12:49:21) moving to Motiti Island and lifting the tapu that was placed on Motiti and I consider Motiti including the reefs and the toka so, in that sense, I regard it as tapu and the exclusion, I'm not quite sure on the interpretation of exclusion to be honest.

Q. Well, the proposal would be if you're familiar with certain high value ecological areas people aren't allowed, for example, on some islands because there are birds nesting in there, they're excluded.

A. Yes.

1250

Q. So that's the sense of an exclusion and people will not be allowed within identified wāhi tapu.

A. Good, okay. Wāhi tapu is more cultural, I think that's the definition as opposed to excluding in terms of biodiversity, fishing or whatever. There is a big difference.

CROSS-EXAMINATION: MR POU

Q. Kia ora, Mr Matehaere.

A. Kia ora.

Q. I just was scanning through your evidence and you've mentioned a number of Waitangi Tribunal inquiry processes that you've been through, that's correct?

A. Yes.

Q. You refer to the WAI 2521 claim but you don't have any information about it. It's true, isn't it, that that enquiry has been granted urgency?

A. Yes it has.

Q. And a hearing to help determine the interests into Motiti is scheduled to be convened in the middle of next year?

A. I thought it was attached to my affidavit but, yes, it is.

CROSS-EXAMINATION: MS JORDAN – NIL

CROSS-EXAMINATION: MR PREBBLE

Q. Tēnā koe, Mr Matehaere.

A. Kia ora.

Q. Were you aware that under the fisheries legislation, tangata kaitiaki can apply for a Motiti reserve?

A. Yes.

Q. And to the best of your knowledge, has MRMT ever applied to become tangata kaitiaki under the kaimoana regs?

A. No.

Q. Are you aware that Ngai Te Hapū (inaudible 12:52:13) Motiti has applied under the kaimoana regs to become tangata kaitiaki?

A. You need to refer to Ngai Te Hapū Incorporated to my knowledge.

THE COURT: JUDGE SMITH

You need to be quite careful about who because Ngai Te Hapū doesn't get us very far. Who precisely do you say applied?

MR PREBBLE:

I understand it was by a person called Elaine Butler.

THE COURT: JUDGE SMITH

Yes, that's Ngai Te Hapū Incorporated. You need to go to the *Rena* decision to find out what that means, but for current purposes we all understand who that is and what that is, so that's Ngai Te Hapū Incorporated which is a – well, we won't go – it consists of some people who are kaitiaki and Ngai Te Hapū, of course, MRMT also represents another group.

MR PREBBLE:

Yes, Your Honour.

THE COURT: JUDGE SMITH

Is that fair? If anyone disagrees with that – and it's a very, very, succinct version of the *Rena* decision.

CROSS-EXAMINATION CONTINUES: MR PREBBLE

Q. I understand, and you can correct me if I have this wrong, that they have notified a rohe moana that, in essence, captures the same area of the current proposal that MRMT have for this particular proceeding, is that correct?

A. Sorry, I missed that, I'm not quite sure who you refer to as "they"?

Q. Sorry, when I talk about "they" I meant the Incorporation, the Ngai Te Hapū Motiti Inc which Elaine Butler, I understand, is part of, I understand that that group notified a rohe moana that exists over the same area as this current proposal, is that correct?

A. Are you referring to the trust or the rohe moana area?

Q. The rohe moana area.

A. I'm not sure.

Q. Okay, that's fine. There is a map at the back of Mr Hill's evidence that does outline the area that I understand has been notified at least. It might be worth just quickly going to that.

1255

THE COURT: JUDGE KIRKPATRICK

I have found it. It's page 50 within his statement and it doesn't appear to be paginated – 983.

CROSS-EXAMINATION CONTINUES: MR PREBBLE

Q. So the area I was asking you about, Mr Matehaere, was the area that is around Motiti and it has Ngai Te Hapū (inaudible 12:56:37) Motiti which I understood to be the area that has been notified under the kaimoana regs by Elaine Butler, is that correct?

A. You referring to the CMT application?

Q. No, I'm referring to the application which is to become tangata kaitiaki?

A. Sorry, I've not seen it.

Q. Okay, that's fine.

THE COURT: JUDGE SMITH

Sorry, you said some regulations?

MR PREBBLE:

Yes, under the Fisheries Act there are regulations which are the kaimoana regulations, which we will talk about a little bit further in our submissions, but they allow for the notification of a rohe moana area.

THE COURT: JUDGE SMITH

And it says here, "Rohe moana notified and under dispute."

MR PREBBLE:

And what I understand which I was about to put to this witness, but I think I won't because my understanding is it doesn't have knowledge of it, is that that has been disputed by MRMT because they don't agree with the tangata kaitiaki being proposed by the group there, which is Ngai Te Hapū (inaudible 12:57:41) Motiti, so what I underst –

THE COURT: JUDGE SMITH

Incorporated?

MR PREBBLE:

Incorporated, yes.

THE COURT: JUDGE SMITH

So it gives the impression that it's the hapū but it isn't and if you need more information on that you need to read the *Rena* decision. We had a lot of evidence about it and reached a decision on all of that. In short, it consists of some, some members of the incorporated society are kaitiaki others are not including Mr Mikaere and MRMT, as I recall, I think is almost all kaitiaki in the sense that they – no, I don't think everyone is ahi kā are they? I can't recall now. It turned on the ahi kā issue. Some ahi kā and some don't but then there are various bodies which we won't get into today because they're not relevant today, but it's complex with the simplest ...

MR PREBBLE:

I have a vague – I have some passing knowledge of intricacies but, yes, thank you Your Honour for that explanation.

THE COURT: JUDGE SMITH

Some are based in Tauranga and some are based at Maketu, and there are significant issues between those and those of ahi kā on the island and between those who are on the island. In summary, Mr Matehaere covers some of the issues when he talks about the various marae on the island, but it goes a lot deeper than that. I suppose the question is how's that relevant to today's hearing? We won't know because he can't tell you anything more so, yes, we'll have to wait for submissions.

MR PREBBLE:

It was really just to, that there is another process in place that enables ...

THE COURT: JUDGE SMITH

Well, there are several others because I think, didn't one of your briefs, Ngai Te Hapū Whakaue Maketu has notified a customary claim as well so there's – it would be fair to say that there are numerous claims around the name of this area. I think did you mention 18 or something, Ms Hill?

MS HILL:

Yes, that's right, Sir.

THE COURT: JUDGE SMITH

Yes, I think we all know that.

WITNESS:

Your Honour, I think what he's referring to or my understanding is in reference to the KRG.

THE COURT: JUDGE SMITH

- Q. The KRG? What's the KRG?
A. Kaitiaki Reference Group.

Q. Oh, we think it's about that?

THE COURT: COMMISSIONER POMARE

No, I don't think it is.

THE COURT: COMMISSIONER LEIJNEN

No, don't think it is.

THE COURT: JUDGE SMITH

Yes, KRG is processed under the *Rena* decision and there's a dispute about that as well.

MR PREBBLE:

It's really just a reference to the fact that under the Fisheries Act there are mechanisms in place which are being utilised over this area that –

THE COURT: JUDGE SMITH

Yes. I think unfortunately this witness can't say very much.

MR PREBBLE:

No, that's fine, Your Honour. Thank you.

1300

CROSS-EXAMINATION: MS HILL

Q. Just a question arising out of some questions that the Court has put.
Tēnā koe, Mr Matehaere?

A. Good afternoon.

Q. The Court had been exploring with some other witnesses the idea of what might be called an exclusion of people from an area rather than focussing on the idea of fishing, so I just want to be really clear regarding who the trust, Motiti Rohe Trust represent and in your evidence you explain that that is Ngai Hapū o Motiti?

A. Yes.

- Q. And you refer to Ngai Te Hapū and Te Patuwai but no reference to Te Whānau or (inaudible 13:01:04).
- A. That's right.
- Q. Is that hapū represented by the trust?
- A. No.
- Q. No. In the *Rena* decision, the Court does refer to Te Whānau o (inaudible 13:01:24) as having a kaitiaki relationship with Otaiti?
- A. Yes.
- Q. So I'm not asking whether you agree or not with that, but assuming that is the Court's decision, do you consider that Te Whānau o (inaudible 13:01:42) should be consulted regarding the exclusion of them from an area over which they have kaitiakitanga?
- A. I personally would say yes. They could be. They're welcome to, but they've not been participating.
- Q. So I'm not just talking about these proceedings, but if that was an outcome that was to be explored, in your view, ought they to be consulted regarding the issue given that they also have a kaitiaki tangata relationship with Otaiti?
- A. I'm not sure whether this is the right forum for me to say this, but my preference would be or my thinking would be, is that (inaudible 13:02:45) do have an interest on Motiti and that's how I see it.
- Q. Motiti but not Otaiti? Are you drawing a distinction?
- A. Yes.
- Q. Thank you and the *Rena* decision also, and I appreciate this is in the context of establishing the kaitiaki group so it was for a specific purpose, but the Court also considered that Te Iwi or Te Arawa have what it described as kaitiaki responsibilities for Otaiti?
- A. Yes.
- Q. So I'm going to ask you the same question. If there was to be an exclusion in relation to that area or at least parts of that area, do you consider that Te Arawa ought to be involved in that discussion?
- A. Are you referring to Otaiti in particular?
- Q. Yes.

A. No, I don't.

Q. That was –

THE COURT: JUDGE SMITH

I've got Te Whānau o (inaudible 13:03:50) but who was the latest one?

MS HILL:

Te Arawa.

THE COURT: JUDGE SMITH

Te Arawa, right and that's the (inaudible 13:03:54) Maketu I presume is it?

MS HILL:

No, so that's (inaudible 13:03:57) Maketu, a separate group again. So these –

THE COURT: JUDGE SMITH

Oh, there is the iwi, did you say Te Arawa iwi?

MS HILL:

Yes, it is an iwi, in my understanding, Sir, so I'm really I'm just working through the groups that the Court –

THE COURT: JUDGE SMITH

Yes, that's fine. I just couldn't recall and I just missed the name and by the time I got to it I couldn't remember exactly what. So Te Arawa iwi and the answer was, "No, I don't think so."

MS HILL:

The answer was "no". And just to clarify, my questions relate to Otaiti which is the only issue that the Court, as you would know, Sir, was addressing in *Rena*.

CROSS-EXAMINATION CONTINUES: MS HILL

Q. And then finally the Court held that Ngāti e Rangī, Ngāti Pukenga and Ngāti Ranginui had the right, it was described as the right to exercise

kaitiaki responsibilities but over the fishery so limited to the fishery around Otaiti so, again, in your opinion ought those parties be involved or consulted on a discussion to exclude people from having an activity in that area which would include fishing but potentially other things?

A. I think that's already in place because of what the Crown has agreed to settle with those particular iwi.

Q. Thank you.

A. I can't argue that.

MR ENRIGHT:

Sir, just to advise that some of the questions the Crown put to this witness, which he didn't have personal knowledge to answer, but Mr Sayers.

THE COURT: JUDGE SMITH

Well, that's fine. That helps Mr Prebble to know who to ask the questions of.

MR ENRIGHT

Yes, because Mr Sayers wasn't going to be called, but I'll now have to call him.

THE COURT: JUDGE SMITH

Well, could you liaise with Mr Prebble as to whether there's a way you can resolve the matter. It maybe that whatever the proposition is can be agreed and it means he doesn't have to ask questions Mr Sayers.

RE-EXAMINATION: MR ENRIGHT – NIL

QUESTIONS FROM THE COURT – COMMISSIONER LEIJNEN – NIL

QUESTIONS FROM THE COURT: COMMISSIONER PRIME

Q. I just wanted to ask you the same question that I'd asked Dr Shears earlier. Is there any ecological difference between a wāhi tapu and a wāhi taonga?

A. No.

QUESTIONS FROM THE COURT: COMMISSIONER POMARE

Q. Tēnā koe, Mr Matehaere.

A. Kia ora.

Q. Just one question for you and it's around this question of excluding people from wāhi tapu. If people were to be excluded from wāhi tapu in this case and presumably that would include the tangata whenua and how, if in any way, would this impact on the traditional relationship, ancestral relationship and culture and traditions, tikanga of the tangata whenua in relation to those particular wāhi tapu?

A. Good question. I think the only, if you're referring to Māori or tangata whenua and the wāhi tapu has been designated by Motiti, in particular, and I consider them to be the only ones allowed within that rohe or whatever you'd want to call it.

Q. So just to clarify that if there was an exclusion of people, from your perspective that would still need to include the identified tangata whenua?

A. Absolutely.

QUESTIONS FROM THE COURT – JUDGE KIRKPATRICK – NIL**QUESTIONS FROM THE COURT: JUDGE SMITH**

Q. I don't there's a basis on law in which we could enable tangata whenua to have access but nobody else and even Mr Enright conceded that point, so it would be if you had a choice between no control or excluding people to get the biodiversity benefits that you're obviously arguing would occur, do you, would you rather have no control or would you rather have the control even if it affected those who ahi kā to the island?

A. I would rather have control.

Q. Do you think that might be a basis upon which we might have more limited areas that are controlled? Perhaps as closest to your neck – if I could put it – part of the necklace that is near the top of the island which is the most directly related to you which you protected and then other areas around the island which you could then use for fishing, or would you rather have areas further away that were protected and the areas that are closest? You know the area I mean, around the top of your island, that you could

use for fishing, et cetera, what would you prefer if you had to have a choice and I'm not saying that this is the choice, but I'm trying to understand which you would rather protect first that furthest away or that closest to you?

A. I'm a practical person. In the past, I've preferred to be in the area closest to Motiti, so –

Q. For fishing and using it, so is that what you mean?

A. Yes, it is what I mean.

Q. So you'd rather protect, for example, perhaps the southern part of the island and those areas north and east in preference to excluding yourself from those islands that you could obviously use in good weather close to the island?

A. Yeah, I think the areas where we're identifying there are only some, Sir.

Q. I appreciate that and it's a question of trying to – if we're only going to protect some, which would be best to protect?

A. If we're looking at, yes, if we're looking at protecting the toka closer to the island, then we need to look at the others that aren't identified there 'cos the southern east toka aren't identified.

Q. Right, okay, thank you for that. And finally, I know it's a little unusual but I did want to thank you for your evidence. It's over a long period of time now, you've borne with the, what's been quite an exhaustive process over many plans and we do appreciate your assistance and perseverance over the time, and producing consistent evidence to us and I just want to acknowledge that, thank you, Mr Matehaere, kia ora.

QUESTIONS ARISING: MS HILL

Q. It was just in relation to the question that Your Honour just put and you explained that those toka haven't been identified, and my question is are they wāhi tapu and, if so, why have they not yet been identified?

A. Could I leave that for Mr Ranapia, but they do exist.

QUESTIONS ARISING – REMAINING COUNSEL – NIL

WITNESS EXCUSED

COURT ADJOURNS: 1.11 PM

COURT RESUMES: 2.25 PM

MR ENRIGHT CALLS

NEPIA RANAPIA (SWORN)

Q. Kia ora, Mr Ranapia, can you just confirm your full name is Nepia Ranapia?

A. Nepia Ranapia.

Q. And you've prepared a statement of evidence in this matter. Can you confirm it's true and correct?

A. Yes.

Q. Now, you've sat through I think all of the hearing so far haven't you?

A. That's correct.

Q. So you would've heard some questions put to Mr Matehaere about the possibility of having exclusion areas within the wāhi tapu and my first question to you is just if you could explain in terms of tikanga how levels of exclusion works in tikanga terms within wāhi tapu?

A. There are levels of exclusion as far as the wāhi tapu and there's also different status of tapu, and each rock in question, they have their own status.

Q. And another question that Mr Matehaere was asked, which we'll put to you now, is that if the Court were to impose exclusion areas within some but not all of the wāhi tapu, which ones would you see as most important or most preferable by name, so you may need Ms Lucas' plan just to help you answer. Do you have Ms Lucas' evidence?

A. No.

Q. Which sheet have you got there?

A. I've got this one here. Hang on, I haven't got that one.

Q. There's a sheet number on the left-hand side, we'll just make sure we're looking at the same diagram as you, so what's the sheet number on that

Q. –

A. No, I haven't got that diagram.

Q. Perhaps the registrar can give it. It's in volume 4. So the question was, it's the same question put to Mr Matehaere, if the Court was to decide to impose exclusion zones, meaning people cannot gain access to some of the wāhi tapu but not all of them and you had to put a priority on them, which ones would you select for exclusion?

WITNESS REFERRED TO VOLUME 4

A. I'd select Te Tau o Taiti, Otaiti because the status of that reef culturally traditionally is called a toka tipua. Motuhaku has the same status as toka tipua. Motunau and Tokoroa which is the area. Tokoroa is the area, Motunau is the reef and that has, the status is taonga tuku iho and wāhi tapu. The other area is down the south end at Matarehu and there's several reefs or reef in there that's significant toka tapu and that status of that toka is wāhi tapu.

Q. Thank you. And it's understood that MRMT's position is that ideally all wāhi tapu would have protection, but that is your answer in terms of exclusion areas.

A. That's right.

THE COURT: JUDGE SMITH

I think his answer in terms of what your question was, which would you prioritise as the highest priority and I think it was that answer about that not about whether or not they should all be covered or not.

MR ENRIGHT:

Yes, that's correct, Sir.

1430

EXAMINATION CONTINUES: MR ENRIGHT

Q. Can you just explain, if we're not talking about exclusion but we're talking about the prohibited status rules Mr Lawrence has put forward whether prohibitions on fishing, taking of – sorry, I'll just get the wording right, Mr Lawrence has put forward a proposal for prohibited status on damage, destruction or taking of indigenous flora or fauna and he has put forward nine wāhi tapu areas instead of the whole 15, and what's your position on

whether if the Court adopts prohibitive status rule which would apply to all 15 wāhi tapu or just all the nine that Mr Lawrence refers to?

- A. To prohibit in that particular areas, it goes back to the status of the reef, okay, and the status of reef as far as the ngau toko is concerned, we talked about south end, that one, ngau toko means is completely closed to any activity or any human entering that area at all because of the –

THE COURT: JUDGE SMITH

- Q. Sorry, you said something was closed to all use. What was the phrase you used?

- A. Ngau toko

MR ENRIGHT:

Can you spell that please?

THE COURT: JUDGE SMITH

- Q. It's just your voice is soft and I couldn't quite ...

- A. Ngau toko

- Q. Nau N-A-U

- A. Nau N-G-U

- Q. Oh right.

- A. Nau N-G-A-U I guess

- Q. Oh A-U, Ngau takatu?

- A. Toko T-O-K-O. And that traditionally is being a tapu placed on there and it is there to be closed forever for historical reasons and what happened in that particular area, and that is one down south end is the only one on Motiti that's –

- Q. That's Matarehu is it?

- A. Matarehu, yes, in that area there. It's in that area there.

- Q. Yes, because it did seem that that one covered some quite important historical sites involving I think one of the early tohunga didn't it?

- A. That's right. It's where our Te Arawa tohunga did all his rituals and sourced the power, spiritual power from that area.

- Q. Yes.

- A. And the other if we look at Motunau.
- Q. Yes.
- A. The Motunau status is, as I said the status is a taonga tuku iho, taonga tuku iho and a wāhi tapu. Taonga tuku iho means it's used for a purpose such as a marker and that links to other markers, for whatever cultural reason. And it's a toka tapu because the rituals performed there was that they sacrificed a creature and put the soul of a creature into that reef and it becomes a guardian. And to enter that from other people, other hapū iwi that will come there they would go there and lift the tapu and allow them to go in there for other purpose. In this case it was a place where they sourced the muttonbird. But when you enter those areas women weren't allowed to enter in there and you were never allowed to put anchors down or fishing lines with a sinker. You were never allowed to interfere with the area or the papa, the whenua because it's significant and same as the... So that's Motunau. And when they leave they close it and... The other one, the other two are very similar. Otaiti and Motuhaku, that's a toka tipua. A toka tipua is where they sacrifice a human and put the soul of a human into the reef and that becomes a guardian in the shape of a human. That too, you – they place the tapu on there and there's times that they go out there and source the resource, resources. They lift the tapu and have access to the resource and then then put back. That was the culture of that timeline.

EXAMINATION CONTINUES: MR ENRIGHT

- Q. Thank you. And you heard Mr Matehaere, he indicated there was some toka to the south of Motiti Island itself that might not be reflected in the diagrams of the wāhi tapu. Can you just explain that please? What's he referring to?
- A. There's other took there that's significant and we may not have put it there but it's is significant and cultural-wise and spiritual-wise to our people at the island you'll see and it's protected highly by us. Because you can get interference from other hapū iwi and as far as the significance and the wairua spiritually of those particular reefs.

- Q. Would those particular reefs be within the matarehu circle on the map, correct
- A. Yes.
- Q. And are you able to comment on whether, although they're not explicitly referred to in your evidence whether the Council has that information already in its closed files?
- A. Yes it has.

CROSS-EXAMINATION: MR POU

- Q. Just one question. Mr Enright's covered off many of the issues that I wanted to cover off. One of the questions that the Court has, it explored with Mr Matehaere was that if something is tapu it's tapu to everybody. Now you've talked about tapu different statuses and you've talked about different levels of access. That's correct?
- A. That's right.
- Q. And you've talked about in some cases women aren't permitted in some places as well?
- A. That's right.
- Q. So does the existence of tapu, is it sometimes selective and could you provide some comment on that as to who can go there and why you might want to go there? An exclusion to the exclusion that tapu provides for instance?
- A. Yes. So because the tapu that you place on connects to the people or the descendants of the ancestors that put it there. And remember it goes clear about that. Because of the event that happened and especially when you get those ones that they put a soul of a human in there. And we've experienced that with the *Rena*. And that's, and that's why you have to get permission if ever you wanted to go in there from those people. You couldn't just walk in there from an outside hapū iwi. Does that answer your question?
- Q. It does, but in terms of, for instance I give you an example of a urupa which is a wāhi tapu but for particular occasions particular people are

allowed to go and visit it or do particular things there. Is it the same for some of these toka that exist around or even for some of the wāhi taonga?

- A. You're right. You're right. Those values on a whenua is the same values that apply to the sea. You know, it's a - you're right. As I say when you just talk about women. Women aren't allowed to go in those areas because if they're pregnant the wairua will affect the baby and so the same thing applies on the land with the (Māori 14:39:56), so just for example.

1440

- Q. And you mentioned, it's probably a question that Ms Hill is going to ask later, but you mentioned in response to one of the questions from my friend Mr Enright that some of the reasons why you don't necessarily want to disclose these things about the sensitive nature of some of these places. Can you give any other reasons as to why Motiti for instance is – hasn't disclosed this information earlier through the planning process and within all of the inquiries and things that you've been –
- A. Right. Firstly is the event that happened in that particular areas, this was from – and the events that happened in that area really can't be brought to the forefront because of the nature of the event. And the other one because it opens the door to other hapū that may source that area and then when that happens your kaitiaki will then be affected and it affects you the tangata whenua.

CROSS-EXAMINATION: MS HAMM

- Q. Good afternoon Mr Ranapia.
- A. Kia ora.
- Q. So I just want to go back to the Motiti District Plan and you prepared the appendix 3 which has all the culturally significant sites listed in it didn't you, which over... So can you just answer for the record please?
- A. Yes.
- Q. And that runs to over 300 pages. Yes?
- A. Yes.
- Q. And matarehu is in that appendix isn't it?

- A. Yes.
- Q. So under the district plan there's a 10 metre buffer isn't there for those sites?
- A. (no audible answer 14:41:58).
- Q. So if we look at these wāhi tapu which are proposed under the Trust's proposal the buffer is essentially one nautical mile or 1.8 kilometres isn't it?
- A. Yes I believe so, yes. That'll be a minor trust, yes.
- Q. So I just want to understand the rationale for having such a much larger buffer for the marine sites compared to the sites which have been identified on land, particularly given that I think you just said the values are the same on land and in the sea?
- A. I can't really answer the question of the area that's been zoned by Rohe Moana Trust because I'm not a member of the trust. All I do is work on those cultural heritage sites and significance of those sites within that particular area which is, if you can remember offhand from the plan which is Te Haniroa and Toka Tapu and Matarehua actual islands. But the zoning around that I can only talk about from a cultural point of view, how we zone those areas. We zone those areas by visual and that's how Māori would do it. Visually. Let's take that area for an example. We go to Matarehua. We know that, where that area is so we have a visualisation of where toka tapu is. But I can't explain the one nautical mile.
- Q. Okay, but do you support some sort of buffer or is your role really to talk about the significance of the site itself?
- A. Well I'll talk about the significance of the site being generalised area or visualised area, culture.
- Q. So can I put questions to you about activities in the buffer zone or are you saying you really can't answer those?
- A. (no audible answer 14:44:18)
- Q. So just as an example –

THE COURT: JUDGE SMITH

- Q. I think you might be better to choose some examples. Matarehua is very interesting to me and I'm familiar with it so as I assure you I am this Motiti orchard so we have the spring area which is just beside the pā isn't it as you come –
- A. That's right.
- Q. – so I'm familiar with that and I think your landing is a little, several hun – I thought it was about 50 or 100 metres to the north.

MS HAMM;

Oh, yes, that's probably about right.

THE COURT: JUDGE SMITH

- Q. Would that be about right?
- A. Yes, there's two springs there. Are you talking the one by the ramp?
- Q. I was talking about the, there's one, I was thinking of that one very close to the pā. That's, there's a dip as it comes down and there's –

CROSS-EXAMINATION CONTINUES: MS HAMM

- Q. It might be useful to look at a map. If you go to Mr Matehaere's evidence which is in the folders. I believe his is in –
- A. What volume?
- Q. – I think his is in volume 2. So at the back of Mr Matehaere's rebuttal evidence are the plans from the district plan with those sites.
- A. 305?
- Q. It was page 43 of the statement of evidence itself. It's the last page of Mr Matehaere's rebuttal evidence. It's appendices E and F. So if we go to the southern end. If we just look at the southern part there Mr Ranapia, it's very hard to read but there's an "M" something on the southern part and then just to the north of that a "W21" I think it is which is the Waikaroro, the Spring I think?

THE COURT: JUDGE SMITH

I think the short point is where the M is looks like it's the, it's your access, onshore access isn't it?

MS HAMM:

Yes.

CROSS-EXAMINATION CONTINUES: MS HAMM

Q. So Mr Ranapia, you'd agree that the Motiti Avocados Limited's barge landing is in the general vicinity of those marks at the bottom of the island?

A. That's correct.

Q. And if I said to you the barge landing's roughly 50 metres from one of the springs you'd agree with that?

A. Yep.

Q. So under the Trust proposal the wāhi tapu for Matarehua would encircle the area with the barge landing and I just want to und from you within that circle what you consider would be appropriate activities or inappropriate activities having regard to the cultural significance of Matarehua. So, like if I can give you some examples. If I said to you search and rescue, presumably that activity would be appropriate?

A. Mhm.

Q. Would you agree with that?

A. I think the point I'm trying to get here from you, culturally is that we're talking Matarehua –

Q. Yes.

A. – and the area we're looking at over there is all Korora, a different area. So –

Q. So if I said to you on that basis we don't need to have the exclusion zone around the barge landing would you agree with that?

A. Well if you're talking about Matarehua it doesn't cover that area.

Q. So we could pull the circle back from the southern tip of the island –

THE COURT: JUDGE SMITH

I think you have to have sheet 9.

CROSS-EXAMINATION CONTINUES: MS HAMM

A. Well, there's two things. There's Matarehu area and Matarehua the pā –

Q. Yes.

A. - and Matarehu is the area.

1450

CROSS-EXAMINATION CONTINUES: MS HAMM

A. There's two things here. There's Matarehu, that area, and Matarehua, the pā.

Q. Yes.

A. And Matarehu is the area. But you're talking about Matarehua, the pā. That's a cultural heritage site –

Q. Yes.

A. – aren't we?

THE COURT: JUDGE SMITH

Q. That's covered by the District Plan. I think what Ms Hamm is trying to address is you need to go to back to sheet 9, 1217, Ms – she's addressing what Ms Lucas has shown us which is a circle about, around Matarehu, hua – Matarehu, actually, not hua.

WITNESS REFERRED TO 1217 – SHEET 9

A. Matarehu, yeah.

Q. So have a look at 1217 in that same volume you have there.

A. Okay.

Q. Turn back to 1217. It's about 50 pages, 60 pages earlier. It'll be back to that sheet 9 that we were looking at a minute ago – I think it's possibly that Mr Ranapia is not familiar with the way the lines are drawn on the page, so if we just take a moment to do that I think he'll understand your question – so if you have a look on that now and you can see Matarehu shown there. Can you see it?

A. Right.

- Q. And there's a circle, you can see that dotted red circle around it –
- A. Right.
- Q. – which is one nautical mile from the centre of Matarehu.
- A. Mhm.
- Q. And you can see that it intersects with the island itself, the bottom part of the island.
- A. Right.
- Q. And I think Ms Hamm is concerned about the sea, that's the seaward edge, as it strikes the island which would include, in particular, as you can see, because it goes quite a way up the coast there, I think both, or at least one of the landings if not both, or perhaps the other one has been abandoned. I don't know, but I thought there was more than one landing there but I could be wrong.

MS HAMM:

The other one is in the consent but not built, but yes, there it is, yes.

THE COURT: JUDGE SMITH

- Q. I see, yes. So you can see that her concern is that you'd suddenly not be able to land barges there if everyone was excluded, and her question is could you still protect Matarehu, as it's shown there, without having the line going that far into the island?
- A. That's my opinion, my opinion.
- Q. Your opinion on that from a cultural point of view?
- A. Okay. From a cultural point of view, no, I would say we still can protect Matarehua without going that far.

CROSS-EXAMINATION: MR PREBBLE – NIL

CROSS-EXAMINATION: MS HILL

- Q. The question I have relates to a question that Commissioner Pomare put to Mr Matehaere and that relates to the cultural relationships that tangata whenua might have with these areas, and I'm not necessarily talking about the wāhi tapu areas but the wider area of the, what we're calling

the MNEMA, which there is still a proposal to prohibit fishing or, rather, the act of taking species within that area. In your view, how would that prohibition affect the cultural relationships of tangata whenua with that area, and you mention in your evidence at least traditionally that those were or some of those areas were traditional fishing areas. So I guess the first question is, is there contemporary customary fishing occurring from tangata whenua within the MNEMA area or is that just a traditional practice, historical practice?

THE COURT: JUDGE SMITH

If you look behind you, Mr Ranapia, the green area, if I can just – subject to some ins and outs, is essentially the area that she is speaking about. So anywhere within that area with constraints upon fishing, I think that’s that general at this stage.

CROSS-EXAMINATION CONTINUES: MS HILL

- Q. Yes, the first question, I guess, was is there contemporary fishing or cultural fishing, so cultural practices, occurring within that general green area.
- A. Yes, there is.
- Q. And is that just from the tangata whenua that Motiti Rohe Moana Trust or is that other groups of tangata whenua?
- A. To my knowledge, it’s tangata whenua, just the area that we fish round.
- Q. Yes.
- A. You know, when we get, get the opportunity.

THE COURT: JUDGE SMITH

- Q. Now when you say “tangata whenua” in this case you’re talk –
- A. Sorry, people from the island, the tūrangawaewae people, or ahikā you call it.
- Q. Ahikā.

CROSS-EXAMINATION CONTINUES: MS HILL

- Q. Ahikā.

A. Tūrangawaewae.

Q. So ahikā, and one of the questions that I put to Mr Matehaere was that in the *Rena* decision the Court also recognised te whānau āpōpō as being ahikā. Is that – do you accept that proposition?

A. No.

Q. No, okay.

THE COURT: JUDGE SMITH

He may accept the proposition that some Tauwhao do ahikā to the island. I don't know.

WITNESS:

No, no, I don't, no.

1455

THE COURT: JUDGE SMITH

That's fine. I'm just check... Live in hope.

CROSS-EXAMINATION CONTINUES: MS HAMM

Q. Assuming that others hold a different view to you on that, assuming that the Court was correct in the Te Whānau-a-Tauwhao do ahikā to that area?

A. No.

Q. Would restricting their ability to fish in that area have an effect on their cultural relationship with the area?

A. Yes I guess I would.

Q. I just want to deal with the idea of tapu and the different kinds of tapu and you mentioned that sometimes it was appropriate to lift the tapu and I think your words were to access resources would those resources include taking of fish. And does that still happen to this day or was that just an historic practice?

A. Not many people take out those rituals. The only one that's holding firm for some of us is the island of Motunau. We still hold those values, well

some of the families are. We've had issues around going out there and taking women out there and as was always –

Q. Taking what sorry?

A. Taking women out to Motunau for muttonbirding.

Q. Yes.

A. There was always an issue around that and we thought that my father settled it in 1962 when they allowed women to go there and so they got the tohunga to lift the tapu, cleared it but there's still families that object to that, even to this very day. So I was called to Ngāti Whakahemo Marae and my other marae Pukehina because the issue came up again because DOC, John Heaphy wanted to take some of our girls over there to do a research on the tuatara and of course a lot of the elders objected to the girls going there. So I had to go to a meeting in Pukehina we had to try and find a common ground so that we can allow these girls to go there and do the research. So yes, there are still those practices there but not as much.

Q. So just to clarify. There are still the practices of respecting the tapu or there are still the practices of lifting the tapu in appropriate circumstances to access resources?

A. There's still the practice of lifting the tapu.

Q. Lifting the tapu to access.

A. Those ones to have, still have those values of kaitiaki then they use those practices.

Q. So if the Court grants the relief that the Trust is seeking which, and I understand they accept that it should be the same rules for everybody, so no one should be allowed to take resources from those areas. If that occurs is that likely to have an effect on the cultural relationship of people that want to exercise that practice of taking the resources?

A. Well naturally it does affect. Naturally it does because like what's happened from the time of our forefathers from my father, grandfather's day we didn't lose those practices and to be able to go there and do the appropriate rituals and we've lost that and again, you know, do, do we give that away as well if we are to go any further?

Q. I understand the predicament. Just a factual question around Motunau and it relates to the buffer and you may not be able to answer it but - so Motunau if we look at the big map there there's a circle around it and that is the IBDA plan called the high indigenous value area. And then there's a ring which is the buffer that goes around another toka or wāhi tapu area which is Tokoroa. Is that correct?

A. Tokoroa, yeah.

Q. So Tokoroa is not one of your priority recommended protection sites?

A. The area is called Tokoroa, okay? The actual site is actually Motunau.

1500

Q. Right. So the site is Motu, which is different to Motunau? They're separate?

A. Yeah, yeah, Motunau. Motunau is – that heritage site is Motunau.

Q. Right.

A. Tokoroa – to give you – it's got to go back to history to understand this.

Q. Yes.

A. That was part of one landmass and it was called Tokoroa because it rose out of the sea and became a reference point that connected to Motiti, at Purewa to Maketu and that was a equilateral triangle used for navigation purposes. That was part of one landmass, but then it was reduced through the powers of nature down to what you see today.

Q. So that is, I guess, culturally distinct from the Motunau site for wāhi tapu. Thank you.

RE-EXAMINATION: MR ENRIGHT

Q. I think we just need spatial definition of what you're referring to for Motunau. So if you look at sheet 9, Ms Lucas. Have you got that? Now, the way it's depicted on the map Mr Ranapia, the way it's depicted on the map above you, if you look to your right, if you could look at the council's version first.

A. Oh, right, sorry.

Q. If you see that that's shown as one red circle encompassing both Motunau and Tokoroa –

A. Mhm.

Q. – and on Ms Lucas' version you've got three intersecting circles. Do you see that?

A. Right.

Q. Which one – when you refer to Motunau, which are you referring to? Are you referring to the bigger three circles or just single circles?

A. I refer to that one there.

Q. When you say to that one there –

A. Tokoroa.

Q. For the transcript, the witness is pointing to the larger three circles, if I can put it that way. Correct?

A. Yes.

QUESTIONS FROM THE COURT – NIL

THE COURT: JUDGE SMITH

I don't have any questions, but I do want to thank you, Mr Ranapia, again. You're another stalwart of the hearings that we've had over various matters through the District Plan and I personally have learned a lot over the period of time and I thank you for sharing your knowledge with us over that time. We do appreciate your assistance, both in those cases and today. I wish you all the best.

MR RANAPIA:

Thank you. Kia ora.

WITNESS EXCUSED

MR ENRIGHT CALLS

DIANNE JEAN LUCAS (AFFIRMED)

Q. Your full name is Dianne Jean Lucas?

A. It is.

1505

Q. And you've prepared one statement of evidence in this proceeding?

A. I did.

Q. And you have the qualifications and expertise stated in that statement of evidence?

A. I do, yes.

Q. Can you confirm your evidence is true and correct, or do you have corrections?

A. Yes, there's some tiny edits.

Q. Where would you like to take us to?

A. Page 14, I didn't put a date on that excerpt in footnote 1. 2010.

Q. I see.

A. On paragraph 74, in the last sentence, I would, before that final comma, "And on natural features and natural landscapes". I've omitted to include that.

Q. Anything else?

A. No.

Q. Now, I wonder if you could be referred to exhibit F2, which is the calculation by council of areas and hectares of the combined areas of the wāhi tapu.

WITNESS REFERRED TO EXHIBIT F2

A. Yes.

Q. I understand you've done your own calculation of the areas.

A. Yes, well, one nautical mile is 1.852 kilometres, so a one nautical mile radius results in 10.775 square kilometres, and the total for the 15 wāhi tapu excluding the overlaps, is 141 square kilometres.

Q. So close but not exactly the same as these figures?

A. Yes.

Q. But quite close.

- A. Mhm. That's using Google Earth tool that we use.
- Q. They're within coo-ee of each other.
- A. Yes. It's very close.
- Q. Yes. What about including the overlaps? If you include the overlaps, have you done that calculation?
- A. If you include the overlaps, if you didn't - if you – immediate – each 15 it comes to 161.625.

THE COURT: JUDGE SMITH

- Q. So it looks like they have excluded the overlaps in this calculation?
- A. Yes.

EXAMINATION CONTINUES: MR ENRIGHT

- Q. Now, you've also, I think, prepared a plan just showing the relative size of the wāhi tapu compared to the coastal marine area itself.
- A. Yes.
- Q. Which one would you prefer to start with?
- A. I'm happy to start with the regional. That shows the terrestrial region and the marine region.
- Q. Yes.
- A. And within it the, in the marine, the pink dash circles which are the 15 wāhi tapu.

1510

- Q. Yes, and have you calculated as a percentage of the entire CMA what the wāhi tapu represents?
- A. I'm sure we did. It's only a one – it's a very small percentage, yes.

THE COURT: JUDGE SMITH

- Q. Do you know how many square kilometres the whole of the CMA is?
- A. We did. I'm sorry, I haven't got the figures. I can bring them back. Sorry, I haven't got them today.

EXAMINATION CONTINUES: MR ENRIGHT

- Q. Is it, just to lead you on this, because you have calculated it.

A. Yes. I did.

Q. Is it 1.25%?

A. Yes.

Q. Does that sound right?

A. Yes, that sounds right.

THE COURT: JUDGE SMITH

Q. That's of the wāhi tapu and bears as a relationship to the whole of the CMA?

A. Yes.

Q. In the region.

MR ENRIGHT:

And could we have an exhibit number for that, Sir?

THE COURT: JUDGE SMITH

Yes. Again, we'll be using the multiple lettering numbering system of which we are now so enamoured. H1 and 2. H1 for the big one, H2 for the smaller one.

THE COURT: JUDGE SMITH

Q. I'll just point out that although it might only represent for that one area 1.25%, it doesn't really establish anything unless we know all of the other areas that might be covered by other controls. We know some of them, of course, but we don't know what the total area under control is.

A. Yes.

Q. But I would have – did you exclude the Tauranga Harbour?

A. That's 1000 – that's quite big.

Q. Was that excluded or part of the CMA?

A. It's not part of this, no.

Q. No, I would have thought it would be unwise to include it because it's another special case.

A. Yes. No, it's not mapped in that area.

EXAMINATION CONTINUES: MR ENRIGHT

Q. Now the issue of having an activity outside an ONL or ONC but that has an impact on the outstanding values has come up.

A. Yes.

Q. What comments did you want to make on that?

A. Well, I've – I'm guided by *King Salmon* which was interesting because the salmon farm at Papatua in Port Gore was outside by quite some distance the ONL and ONC but people agreed, the parties agr – well, the landscape architects agreed it had adverse effects on the ONL in the, and the ONC, so it's located outside but adverse effects on it, yes.

Q. And the question has come up during this hearing about whether there's a nexus between the taking, damage or destruction of indigenous flora and fauna and impacts on outstanding natural character or outstanding natural landscape values.

A. Yes.

Q. Can you comment on that?

THE COURT: JUDGE SMITH

Nexus between that and what? I see, between the damage to the fauna and flora.

MR ENRIGHT:

Between taking and the outstanding values, why they – why is there an impact.

THE COURT: JUDGE SMITH

Why. So is this within the area or... So I thought the question you were taking us to is we have wāhi – we have IBDA's and our ONCs which cover them.

WITNESS:

Yes.

THE COURT: JUDGE SMITH

You can see a fairly small area.

WITNESS:

Yes.

THE COURT: JUDGE SMITH

And I think the question was are there effects of damage.

MR ENRIGHT:

Well, my question, Sir, wasn't that specific but I can make it that specific.

THE COURT: JUDGE SMITH

I see, sorry. No, no. Well, let's got back to your question then because I misunderstood where we were going.

EXAMINATION CONTINUES: MR ENRIGHT

Q. I'll start again. So dealing with natural character first, why do you say that the damage, destruction or taking of indigenous flora or fauna would have an effect on natural character?

A. Well, natural character involves abiotic, biotic and experiential dimensions and the taking of flora and fauna can damage, can have an adverse effect on any one or all of those in terms of – and especially in soft sediment systems, the benthic environment, physical disturbance. It can disrupt, you know, the horse-mussel beds and different biota of the sand system. The taking can disrupt the life cycle of the biotic directly and the food chain that it is part of and the taking also can disrupt the experience, whether it's the imposition of the taking, of the actual activity, or the removal of the – and disturbance of the abiotic and biotic, can just adversely affect the experiential.

1515

Q. And if I put the same question relating to landscape values, so why would if at all would damage, destruction or taking indigenous flora or fauna affect landscape values within the MNEMA?

A. Yes. The, within the MNEMA there's important natural science values. They're not, the marine natural science values aren't that well-articulated in the document yet but they are in terms particularly of the abiotic.

There's the, the reef clusters that we have here are a sort of microcosm or a collection that are important for the whole bay, so there's a concentration here around Motiti that is quite special in terms of the abiotic concentration and then there's a biotic that, that habitat has attracted. So we have important natural science values both in the marine and in the avifauna that's associated. So in actual science terms, yes and transient value's really, really important, you know. It's not only the current springing different fishes and you know, subtropical, I'm jealous from the south, but there's the bird activity, you know, there's the concentrations of the bait fish, you know, being pushed up by the big fish below and then the birds working, you know, the transient stuff, it's really, really important. And in terms of aesthetic the reef being both the, I mean reefs that emerge like Otaiti and sort of half of them that emerge through at least at low tide, they have important aesthetic value but also the sub-tidal ones and there's half a dozen sub-tidal ones that are identified. They also have an aesthetic value. The aesthetic isn't just the view above the water. The experience within the marine. There's the shared and recognised that's been recognised through the regional documents or about these. The MNEMA is mapped and identified and there's definitely important tangata whenua values. That's a very important contribution to this landscape. And so the relationship, so relationship to these, to the abiotic and the biotic is important for tangata whenua, as are the historic values. So it's, it kinda ticks boxes across the spectrum of – for landscape, yeah. They do.

CROSS-EXAMINATION: MR POU

Q. I only have a short set of questions and they relate to your evidence starting at around paragraph 62, where you're talking about cultural landscapes. Now you've said in your evidence that cultural landscapes aren't necessarily untouched or natural landscapes. You say, it's at the end, just before paragraph 63, "In providing an assessment of cultural landscapes and cultural landscape features to be assessed there should

not be a presumption of a landscape or feature meeting the naturalness threshold.” Do you see that?

A. Have I got the same.

Q. I might have some different paragraphs.

A. Oh, that might be an old appended evidence is it?

THE COURT: JUDGE SMITH

It might be the old evidence rather than new. I mean I don't mind you asking the question as long as we know which one we're talking about.

WITNESS:

Yeah, I appended it. Sorry.

THE COURT: JUDGE SMITH

Yes, 117 is the previous evidence and that I think is where you're picking it up from.

1520

DISCUSSION ABOUT DOCUMENTATION

CROSS-EXAMINATION CONTINUES: MR POU

Q. But cultural landscapes – and I'll take you to policy 14 of the coastal policy statement which is at tab 11 of the bundle, do you have a copy of the bundle?

A. Yes.

Q. You'll see there at roman numeral viii the restoration of cultural landscape features is a way of restoring and rehabilitating natural character as well?

A. Yes. That's right.

Q. And in your – in the evidence, the whole evidence that I've read out, you've referred to set 4 of the regional policy statement. Now, that talks about mauri, that talks about mana.

A. Yes.

Q. So is your evidence the restoration of those particular attributes and characteristics that connect tangata whenua to these wāhi tapu or wāhi taonga are ways of restoring natural character?

A. Yes, absolutely, yes.

CROSS-EXAMINATION: MS HAMM – NIL

CROSS-EXAMINATION: MR PREBBLE – NIL

CROSS-EXAMINATION: MS HILL

Q. Good afternoon, Ms Lucas. I would just like to understand your mapping. Some of your maps, you show an area which is described as Motiti rohe moana. What is that intended to show?

A. I worked with people to work through the mapping and I've tried to demonstrate the Motiti moana, rohe moana.

Q. I'm talking about the blue dotted line in the maps. A good example is sheet 10 on page 1218 of the bundle.

A. Yes.

Q. There's a sort of a piece of pie-shaped blue dotted line which is described as Motiti rohe moana.

A. Yes.

Q. What does that reflect or represent?

A. That refers to what tangata whenua have described to me as the rohe moana.

1525

Q. Okay. Does that have any particular relevance to your evidence in terms of what we're calling the MNEMA?

A. Yes, well you'll see there that the areas we're addressing are within that.

Q. Yes.

A. The wāhi taonga and wāhi tapu or, is in that.

Q. So other than being within it, is there any interrelationship between the two?

A. No.

Q. Do we need to worry about them?

- A. There's other features and so on within there, within the rohe moana that aren't identified as wāhi tapu or wāhi taonga.
- Q. Right, okay. The one nautical mile radius around the wāhi tapu.
- A. Yes.
- Q. You've mapped that?
- A. Yes.
- Q. What was that based on?
- A. On consultation with tangata whenua on the protecting the wāhi tapu and providing an adequate buffer and that's the dimension we work through to...
- Q. Was that based on your advice or on their recommendation?
- A. Working together, yes.
- Q. So Mr Ranapia doesn't know anything about that and he hasn't given any evidence on that. He said that wasn't a matter he was involved in?
- A. No, I was working with others.
- Q. Which tangata whenua assisted you in coming up with the ...
- A. With Te Atarangi Sayers. He was, we had meetings and communicated with others, yes.
- Q. Are you familiar with the revised relief that Mr Enright has produced this morning?
- A. Spatial or text?
- Q. Well, there's been a significant change based on my understanding and that is we no longer have an area that's going to be subject to a resource consent process.
- A. Mhm.
- Q. We now are just looking at essentially a prohibition but it relates to only some of the wāhi tapu. Are you familiar with that development?
- A. Not really. I think you should ask the planners, yes, Mr Reaburn and Mr Lawrence.
- Q. Well, it wasn't a planning question that I was going to ask you about. It's really about understanding. So the areas that have been identified as the – and I don't think it's priority areas, I think that the relief has been amended to just seeking prohibition in relation to certain of the wāhi tapu.

- A. Mhm.
- Q. Those areas all seem to now fall within the green line, which is the wāhi taonga area.
- A. Yes.
- Q. Is that your understanding?
- A. Yes. There's 10 of the 15 wāhi tapu are already recognised in some way through the statutory documents and those three that loop outside that green line are not in that, those lists.
- Q. That's my understanding. So the areas we're now focusing on are the areas that already have an indigenous biodiversity or a natural character or an OFL.
- A. Yes, and 10 of the 15 do that.
- Q. So the issue falls away. We've had a question around whether what we're calling the ASC, the 25 boundary, which is the area of cultural value, in your evidence you make a point that that doesn't align with what we're calling the wāhi taonga area. There was a suggestion that those areas should align, but that issue now falls away, doesn't it, if we're not seeking protection of those.
- A. I understand that that doesn't – they don't fall away. Those remain as – they're still identified important cultural sites. You're talking about methods and recognition.

1530

- Q. And that's an important point to make. So regardless of whether we have methods attaching to some of these areas or not it still would be important to spatially identify all of the wāhi tapu in the plan?
- A. I would consider so, yes. All 15 should be recognised in the plan.
- Q. The other area of questioning I had was just around some questions that Mr Enright put to you and they related to the effect that the taking of species –
- A. Mhm.
- Q. – would have on the natural character values and the outstanding natural feature in landscape values and you described what the values were but he didn't explore with you what particular effects would arise. So you

would accept would you that when we're looking at the avoidance of effects it's the particular effects on the particular attributes and values that are relevant?

- A. I – they are relevant but I understand it's not limited to the identified attributes and values. I understand that they are an indication and that because they're very broad some of them.
- Q. I think it's an important question because you at a very generic level appear to be saying that because something had been identified as an ONFL or as having natural character value it therefore followed the taking of fish must have an effect on those that needs to be avoided. Is that your evidence or not?
- A. Takin of the occasional fish mightn't but it's taking, it's – disturbance of the integrity of the ecosystem and the sustainability of that that is the potential adverse effect. So it's when there's removal of a species or several species it disrupts either the habitat or the ecosystem in terms of the food chain.
- Q. Well let's deal with outstanding natural features and landscapes. Well let's just talk about natural features and landscapes generally. Are you saying that the disturbance of an ecosystem has an effect on a natural feature and landscape?
- A. It certainly can and the – when we – the biota is an important part of the landscape or feature.
- Q. You talked about parts of the landscape that rose above the water. You're not saying that taking fish has an effect on that part of the landscape are you?
- A. I said taking biota. It might be taking birds' eggs. I mean it's not just about fish. I'm not talking just about fish.
- Q. So are you saying taking of birds' eggs is going to have an effect on the attributes of a landscape?
- A. Well putting a cat on something and, and... I mean there's different sorts of ecosystems here. Some of these wāhi tapu entirely sub-tidal. Some emerge at low tide and some emerge above the tide.

Q. And I was just asking about the bits that emerge and I think you've – we've heard your answer. So regarding the stuff that's under water then from a landscape perspective who's going to be look at those? Are you talking about people going diving?

A. There's beautiful clear water. You don't need to just dive to enjoy the marine biota of this place. It's superbly clear and you might have, like I've been, with a camera under a boat, and there's superb clarity without even getting wet, you know, so there's enjoyment of that, but there's also the relationship with knowing they're there, so – and that's important, both in our Eurocentric experiential thing but that adds a dimension to the landscape but also really important to tangata whenua. But you don't necessarily have to see each thing, knowing that there's a chain of events occurring, and natural events.

1535

Q. Just dealing with that sort of experiential element, in relation to natural character you talked about the taking of fish impacting upon people's experiences. Is the actual activity of taking a fish, as in fishing, that is also an important experiential part of natural character?

A. It is, it is.

Q. The whole of the MNEMA is a high natural character area, isn't it? It's derived from the Regional Policy Statement?

A. Yeah, and that's a default, yes, yes.

Q. So given that it's been defined as high natural character when fishing is already occurring within that area, how can you then say that the taking of fish is having an effect on values that have been defined as high notwithstanding that fishing is already occurring?

A. There's an awareness of reduced biota being present, both to tangata whenua and, and elsewhere the recreational community, so it's, it's – as on the terrestrial environment you can see a forest degrading, it doesn't mean it's not of high natural character even though it's, you know, it's not pristine, so it's not outstanding but it still meets that high threshold.

Q. Still meets a high threshold. Is this an area that landscape architects have studied, and I'm talking about the impact of fishing on outstanding,

well, natural features and landscapes and natural character, are there any studies that have been done on this issue?

A. I – not to spring to mind. I've done work in the marine. Well, we've done transects, marine transects as landscape architects for 15 years or more, you know, address the marine biota as part of the landscape. I've done that for a long time. But fishing, yes, sure, there's plenty of fishing, especially in freshwater activity studies.

Q. But is it a commonly held view that you seem to hold that the taking of fish has an effect on the attributes and values of outstanding landscapes and natural character?

A. When the take, and being informed by cultural and scientific information that the taking is reducing the sustainability of the ecosystem, yes.

Q. Because as we know fishing's occurring not only throughout the Bay of Plenty but everywhere in the country, so are you saying that this is different, this particular area, because of the cultural associations?

A. The cultural associations here are particularly important. It's an offshore island that is occupied and been long occupied, so there's been a long, ongoing relationship here, and that means that the connections are different than people, you know, casual acquaintance and short-term acquaintances. This – when people whakapapa to hundreds of years here, or more, you know.

1540

Q. They're different, but you gave the same evidence, did you not, in relation to Matakana and the long occupation and associations there and you argued and I think the Court accepted that there was a very special relationship between Matakana tangata whenua on that island.

A. There is, and there's important relationships between those hapū and these, you know. Between these islands there's important relationships and there long have been, yeah.

RE-EXAMINATION: MR ENRIGHT

Q. You were just asked about your methodology in terms of where you obtained the cultural inputs from.

A. Mhm.

Q. I just want to remind you of what you referred to in your written evidence. It was referred to Mr Te Atarangi Sayers, in paragraph 6 and 7 of your written evidence, if you just remind the Court or confirm to the Court what other sources.

A. I referred to Mr Te Atarangi Sayers when we were drawing the lines, yeah. For the other information, I've had more – a lot of – well, I've stayed on the island, I've been and had a lot of contact with people, yeah.

QUESTIONS FROM THE COURT – NIL

WITNESS EXCUSED

COURT ADJOURNS: 3.50 PM

COURT RESUMES: 4.15 PM

MR ENRIGHT CALLS

PETER DEAN REABURN (SWORN)

Q. Your full name is Peter Dean Reaburn?

A. Yes.

Q. And you've prepared a statement of evidence which was prepared in rebuttal?

A. Yes.

Q. Can you confirm that you have the qualifications and experience stated in your evidence?

A. Yes.

Q. Can you confirm the contents of your evidence as true and correct?

A. Yes.

Q. Now, just the first question relates to policy 14 of the NZCPS.

A. Sorry, carry on. I'm just trying to catch up.

Q. I'm just wondering if you could make a comment, Mr Reaburn, on its relevance to the relief being sought by MRMT and also how that policy in the CPS is followed through in the lower order instruments, so RPS and coastal planning?

1620

A. Well after the first question I think it is relevant because it's, there is a desire for restoration in this area, so, a basis for that is policy 14 of the NZCPS. The focus of my evidence is on the proposed coastal environment plan but I haven't ignored the NZCPS or the RPS. What I've done is I've tracked policies including this one through to the, through to plans just to see if they're adequately reflected. So the focus of my evidence is on this proposed plan. There are a couple of restoration references and the one that I think is of particular importance is, this is on page 10 of my evidence. It's paragraph 5.5.

THE COURT: JUDGE SMITH

- Q. Yes. So the iwi resource management objectives.
- A. Yes. So if you see objective 15 there?
- Q. Aha.
- A. So that's a restoration objective which in my interpretation is quite a directive one.
- Q. And does that have any relationship to the NZCPS or do you think it is –
- A. Well I see that as a flow through from policy 14.
- Q. Policy 14. Thank you. I didn't want to put words in your mouth, that was all. Thank you.

EXAMINATION CONTINUES: MR ENRIGHT

- A. At the top of that page, 5.4, there's an objective 4 and that is a, that's an enablement objective. Enablement one, and –

THE COURT: JUDGE SMITH

- Q. You were going to say something about its relation to the NZCPS?
- A. I think that's a flow through also from policy 14.
- Q. Thank you.
- A. And, there's another one which I don't actually record in my evidence but it is in the plan and it's policy NH18.
- Q. Given the arcane nature of this plan are you able to tell me where I'd find NH?
- A. It's page 34.
- Q. Well I've just got 1.1.2, how to remedy and mitigate. This is, natural heritage is NH so, and policy 18, oh, sorry it's a bit further on.
- A. It's at the foot of the page. So it's under the heading, "Promoting protection and management of existing high value areas." And you'll see policy NH18 there is about maintaining or enhancing natural heritage values and there's a number of things listed there including under C, "Maintain or improve aquatic and terrestrial indigenous biodiversity."
- Q. "Maintain or enhance cultural values?"
- A. "Maintain or enhance cultural values," yes D. So that would be relevant as well. Again I think it's relevant in terms of NZCPS policy 14.

Q. But all feed towards enhancing or rehabilitation over just avoiding adverse effects?

A. Yes.

Q. Which I think was what Mr Enright's getting to. Part of his submissions I think.

1625

EXAMINATION CONTINUES: MR ENRIGHT

Q. Different topic. I'd just like you to have opportunity to comment on exhibit E2, which is Mr Lawrence's latest version of the proposed rules, if the registrar could provide you with that, please.

WITNESS REFERRED TO EXHIBIT E2 – VERSION OF PROPOSED RULES

Q. And just to pick up a small correction, Mr Reaburn, and for the Court's notice, the prohibited activity where it says, "IBDA," the first line, "Within the wāhi tapu areas containing ONC or ONFL or IBDA," there should be another "A" after that because that's the high level natural areas, as a correction.

A. Yes.

Q. So the question for you is, or what comment do you wish to make in terms of its appropriateness to address the values within the NMEMA?

A. Yes, I've got a copy of this today and my understanding of it is that it's a refinement of the previous versions which related to a wider area essentially, so, I mean, my response to this is – and I've been thinking about this, Sir, during the day as comments have been made but my starting point was the RPS identification of the Motiti natural environment area, which is essentially the green area on the plan, which is part of the Operative Plan. It has a schedule of attributes attached to it, and it has objectives and policies that are relevant to that schedule including avoidance policies which are then reflected in this proposed plan which in some areas cross-references the Regional Policy Statement. So my evidence is essentially based on that area and my understanding of the evidence that the area has experienced, is experiencing and will continue to experience significant adverse effects, and the response, and I've

indicated my opinion in terms of the response that's, that's appropriate with that existing framework. Now I've acknowledged in my evidence, and I think it has been acknowledged in other evidence, that there may be some variation in terms of the application of those attributes across this very large area, and there's limited information available on that. So what Mr Lawrence has done in this revision is he's concentrated on the areas that have outstanding status or IBDA status and identified those that the rules would relate to. So my interpretation of that is that it gives a – it's a greater comfort area in terms of confidence that the attributes that may be of concern will exist at least in these areas, so from that point of view I think it's an appropriate iteration.

Q. And you're aware that the one nautical mile circles around most of the wāhi tapu, goes beyond the mapped extent in the coastal plan of outstanding values but is supported in the ecological evidence?

A. Yes.

1630

Q. So finally, we have – there are essentially two potential regimes that have come up in evidence today and one is to adopt the prohibited rule approach that Mr Lawrence has put forward in his evidence and the other is a proposal to look at an exclusion approach, essentially excluding people from certain wāhi tapu. I'd just like you to discuss the benefits and disbenefits of each of those approaches.

A. Well, the – as I've understood this case and the evidence, the adverse effects that are of concern are being generated in the main by fishing activity, and so my response to that has been that if the issue is fishing activity then that's the activity that needs control, and the benefits of that control are maintenance of biodiversity and cultural values at least at the existing level and of restoration, achievement of restoration as well. Exclusion would achieve the same result on the assumption that if people are excluded from the areas and they're not fishing but I suppose my – and it might capture some other adverse effects as well, but I don't know what the evidence is on what the other adverse effects might be that that would be capturing and I've had concern that a total exclusion would have

other costs, including people not being able to experience the area, just simply that, that it's not accessible, and then it can't be experienced. So I've got some concerns about it. An exclusion would be probably be a simpler method to administer. You wouldn't have to check if someone's fishing or not. They just couldn't be there. But yes, that's probably about as far –

THE COURT: JUDGE SMITH

Q. Just before we move on, because there's a supplementary twist to that and I want to ask now so everyone has a chance to cross-examine on it, because I don't know that my comment to counsel and the parties before Judge Kirkpatrick suggested that he doesn't know that there's actually any principle in the RMA that says that it's not possible to have classifications of persons who are allowed, in other words who are not subject to an exclusion, perhaps conditional or otherwise, and he cited several examples which is monitoring regimes which allow people to undertake monitoring and suggested that some of the various provisions in the RPS and policy, and the plan we've just discussed, may form grounds for cultural associations to be maintained for cultural purposes, and I would really appreciate Mr Reaburn's comment on that and whether or not some more refined exclusionary scheme and, of course, the concern always is that will be interpreted as a cultural dispensation and it seems to me that that's why I'm so concerned about a linkage with fishing because it would be seen as a quasi quota type of arrangement that would obviously defeat the very purpose of the Fisheries Act, but if it was an exclusionary zone, I would really appreciate any comments. As far as I'm aware it's an entirely novel proposition which I think was why I was so reluctant to go down that road but I think on reflection that Judge Kirkpatrick has a point and I'm not aware of any law on it but any comments you can make would be very helpful – is that a fair summary, a fair representation of that point? – so any comments you could make will be very helpful.

A. Your Honour, I think that's a very good point, and my understanding it's a legal issue but my understanding is there are difficulties in controlling fishing from the point of view of under the RMA from the point of view of separating out different sectors.

Q. I suppose putting it another way, do you think it would permit either kaumatua or persons authorised by kaumatua to have access to the exclusionary zone for cultural purposes? Because it seemed to us to stop, for example, the performance of rites that would be completely appropriate in terms of the Act but I don't know if you have any views on it.

1635

A. In expressing my concerns here I wasn't thinking about the possibility of allowing access for particular purposes so that could deal with customary fishing, for instance, which might otherwise be a constraint. But I think that would certainly allay some of the concerns I have about that approach. As I've said, per se if it's an exclusion then it achieves – it's one method of achieving, addressing the adverse effects.

Q. We have to be careful we don't go so far as to say about controlled fishing and that's the issue.

A. Yes, it's a matter of thinking that through.

THE COURT: JUDGE SMITH

Q. Just to follow up on that, Mr Reaburn, if there was another category of person not excluded, it might have to be authorised by the regional council for the purposes of scientific monitoring. How would that be seen in terms of appropriateness?

A. I mean, I think you'd probably need to carefully think through, you know, the categories of activity that may be appropriate or, indeed, should be provided for.

CROSS-EXAMINATION: MR POU

Q. Just one question after that. In terms of different people who might be permitted to enter an exclusion zone, even if there are particular activities

within a zone that are being excluded, if for instance it's the removal of biodiversity that's causing the issue that you talked about, that somebody was like a dive club going in to take photos and those sorts of things, that could also be a rather sensible exclusion as well, couldn't it?

A. Yes. The example I gave when I said I had some concerns was people who simply might want to experience the area.

Q. Yes.

A. So that would be one group that could come into that category, yes.

CROSS-EXAMINATION: MS HAMM

Q. Let's stick with the exclusionary zone for a moment. I took it from paragraph 4.2 of your evidence that you had some sympathy with the issue that Motiti Avocados Limited around the barge landing and providing for that. So do I take it from that that you consider it appropriate to provide for a barge landing and the activities around that?

A. I'd need to be a little bit careful about responding to that because my evidence is at quite a high level. Basically in terms of comparing methods, I express those reservations because I'm not familiar with what the issues might be with the barge landing and how they might relate to adverse effects that are relevant to this case. When I made these comments I guess my reaction was that that might be an activity that doesn't relate to adverse effects that are relevant to this case and again my understanding from Mr Collins' evidence was that there might have been an unintended consequence of the provisions that have been indicated that constrained activities that weren't really relevant to the issue. That's how it appeared to me.

1640

Q. Are you aware that there's an existing barge landing?

A. I'm aware, yes.

Q. And are you aware that that is the method by which Motiti Avocados Limited removes the harvested avocados from the island to the mainland?

A. Yes, yes.

Q. So do you consider that it would be appropriate to provide for that activity on an ongoing basis?

A. And, and, I –

Q. It's surely a yes or no?

A. – I guess the third step in that is I understand but someone could confirm for me that it's a consented landing or provided for landing.

Q. Yes, you can assume that it has a resource consent.

THE COURT: JUDGE SMITH

In fact I think there's a consent for another one as well as we discussed and it sounds like it wasn't built. In the end they managed to repair the old one.

MS HAMML:

That's right and I could have someone more familiar with it produce that.

THE COURT: JUDGE SMITH

But there are consents about barge landings and there are difficulties with access to the island which we don't need to go into here but they're acknowledged in other cases.

WITNESS:

Well if that's part of the existing environment and as I said, and without having look at the matter in detail myself if it's not strictly related to an adverse effect it's relevant to this proceeding I think it's appropriate that it's provided for.

CROSS-EXAMINATION CONTINUES: MS HAMM

Q. Okay. So just continuing with that and I'll come back to the exclusion area regime, it seems to me there's a couple of ways we could deal with that and I want to test those with you and also see if you think there are any other ways to deal with that. So one of those ways obviously is to amend the identification of the southernmost wāhi tapu circle so that it doesn't overlap with the barge landing. Would you agree that that's one way to deal with that?

A. Yes.

- Q. And then another way to deal with it is to take Mr Lawrence's prohibited activity rule and add another carve out to that so that the ability to reconseal to the barge landing remains. If I just ask you to look at point 2 of that prohibited activities rule?
- A. Yes.
- Q. You'll see that it prohibits reconstruction, alteration or extension unless it's provided for as a permitted activity?
- A. Yes.
- Q. So if a reconseal is needed, and I'll just ask you to assume that, obviously there would have to be another carve out to that rule. That would be another method of addressing it?
- A. Yes.
- Q. Are there any other options that could be used to address it?
- A. Not that I can think of. Either the map or the words.
- Q. Are you aware that schedule 15 of the regional coastal environment plan indicates appropriate use and development on the island within ONFL in areas of high natural character and that includes the access points and the barge landings?
- A. I may have read that. I don't recall it, but I accept it.
- Q. So of the two options I've mentioned being amend the maps or amend the rules you'd agree wouldn't you that amending the maps would be a clearer way to deal with the issue, than having a carve out to the prohibition which requires you to track through the rules and find out whether you can apply for a consent or not?
- A. I don't have a strong preference there though to be honest. You can start simply having the, not having chunks out of the map and dealing with it in the words. That would be a simpler way. But I don't –
- Q. You don't have a strong view?
- A. – I don't have a strong view either way.
- Q. Okay. So just coming back to the exclusion area regime and if it was going to be excluding people and then possibly some people could come in and others couldn't. Looking at the situation of Motiti Avocados Limited it has a subdivision consent for 11 lots. I'm not sure if you're aware of

that but you can assume that for the purposes of this question. So those lots will be sold to people who will buy the lots and want to come to the island. Do you consider it would be appropriate for those people to be able to enter the exclusion zones?

A. Well I'd probably broaden it out and say islanders generally. So, they'd be islanders.

Q. Yes. So that's a yes. Now just looking at the question of marine spatial planning you've had a look at the, I think it was the environment foundation, environment guide on that and you've summarised that at 6.1. Have you had any other involvement with marine spatial planning? And specifically I was wondering if you'd been involved with the Hauraki marine spatial plan?

A. No, not directly. I've been an interested observer of that very long process.

1645

Q. If I said to you, though, that typically with marine spatial planning it would approach things in an integrated way and really look at all the pressures on a particular area, would you agree with that?

A. Yes.

Q. And if I said to you that marine spatial planning would typically have involved quite an extensive process of public consultation or stakeholder involvement, would you agree with that?

A. Yes.

Q. Would you agree that none of those are really evident in this proposal? It looks at fishing, but it doesn't go wider than that. Although it's been a public process of sorts, there hasn't been extensive stakeholder consultation.

A. I guess spatial planning is flagged as a possibility in the plan.

Q. Spatial planning, but thinking specifically about the concept of marine spatial planning, which is what you've summarised from the environmental foundation environment guide.

A. Yeah. My difficulty in answering that question is that I've only been involved in this exercise quite recently and I don't know what the

background is in terms of the development to this stage and what consultation there has been. I've flagged in my evidence in relation to this method that I think it could benefit – whatever the final result could benefit from a greater involvement than one party.

Q. Yes. You say that at 7.10.

A. Yes.

CROSS-EXAMINATION: MR PREBBLE – NIL

CROSS-EXAMINATION: MS HILL

Q. Good afternoon, Mr Reaburn.

A. Good afternoon.

Q. I appreciate you haven't been involved in the process to date. There was just a matter in your evidence that I wanted to clarify through you. It relates to method 19AA and you refer to that at 6.8 of your evidence, which is page 1401 of the bundle. Are you aware that these proceedings also involve appeals by Ngāti Mākino and Ngāti Ranginui, or have you been asked to look only at Motiti Rohe Moana Trust's appeal?

A. The latter.

Q. So Ngāti Ranginui and Ngāti Makino are seeking what's been described as development zones and so what they have in mind there is zones which would enable them to carry out development enabling things, rather than protecting things. So method 19AA is about that process. There are two new policies, IR1 and IR2, which link to that and they talk about recognising the benefits of development in the coastal environment. The reason that Ms Noble was recommending future – a first scheduled process in relation to that method is because we don't yet know what those development aspirations and objectives are. In your evidence you say you disagree with Ms Noble that a first scheduled process is required. Is that because you thought that that method was about these particular proceedings?

A. I'm talking simply about this case and as I've understood Ms Noble's evidence, she's saying that the framework is there and this is a matter

that can be dealt with at a later time. So I'm responding to that and saying I don't see any reason why it can't be dealt with now.

Q. All right. Her evidence in relation to method 19AA was about that future process for development zones, so you would accept that if we don't yet know what the development aspirations are for tangata whenua that we can't put those zones in the plan now, can we, in the meantime?

A. No. If it's a – if Ms Noble was talking about something different than this case, then I accept that.

1650

Q. And that's what that method 19AA has been specifically put in there to deal with. That's fine. So the other area that I just wanted to question you on relates to the idea, if I understand your evidence you're saying that in order for Council to meet its function of maintaining indigenous biodiversity it must use rules. Is that your approach? Do you think there needs to be rules in a plan in order for Council to fulfil that function of maintenance of an indigenous biodiversity?

A. That's my opinion in response to the evidence, yes, that there are provisions in the Plan that require the avoidance of adverse effects, or significant adverse effects, depending on what area is being talked about. We have an activity that's creating an adverse effect and there's been no other method that has been indicated that is addressing that issue, and from that point of view I think a rules response is appropriate. So I do extend that out a bit. I don't want to talk about other methods too much but it's rules with a little "R" so as I – I have acknowledged that if there was another mechanism in place, or to be put in place achieving the same result, then the – this Plan could deal with that by way of cross-reference so it's not necessarily Plan rules but that's what's on the table.

Q. That's quite important because the key distinction between the approaches here is that the appellant says there must be rules prohibiting fishing, and Council says we don't have to have rules, we can have other methods because the Act talks about other methods. So you accept by rules with a little "R" you're just saying they don't necessarily need to be controlled directly in this Plan? There can be other regulations that might

apply or there might be other kinds of methods, for example, advocacy, education?

A. No, they're not rules. So I am talking about rules.

Q. Okay, so you're saying you –

A. If it's a marine reserve, it's a rule. I mean, it's a – you know, there's activities that are managed through a marine reserve. But –

Q. So that there is a distinction. So there's regulations under other legislation.

A. Yes.

Q. And there's Plan rules. And what I'm trying to understand is it your view that in order for Council to maintain indigenous biodiversity, which is the function that it has on there, that it can only do that to rules in its own Plan?

A. In the absence of other certain methods, yes.

Q. The policy 11 of the Coastal Policy Statement doesn't require rules, does it? In fact, it doesn't refer to any plan provisions. Have you got a copy of the Policy?

A. Yes.

Q. There's no reference in there to how Council has to go about doing the avoidance, is there?

THE COURT: JUDGE SMITH TO MS HILL:

Q. With respect, I think there is. I've just highlighted and I was going to leave it till I got to my questions. Policy 13D.

A. No, I'm talking about 11, Sir, which relates to indigenous biodiversity.

Q. I see. You're saying –

A. That's the very point I wanted to make.

Q. I'm sorry, you said there was nothing in the policy statement, so are you saying there's nothing in policy 11?

A. That's right. So that's the one that relates to indigenous biodiversity which is the function that I am discussing that's relevant, particularly relevant.

- Q. I'm sorry, I hadn't understood that you were only limiting it to individual. You're only talking about biological diversity in all these questions? When did you start only talking about biological diversity?
- A. Well, back when I started asking about Council's function of maintenance in indigenous biodiversity.
- Q. Well, I've got a heading, "Must be rules," and I didn't – is that all about biological diversity?
- A. Yes, and I understood that I had made that clear when I referred to function of (inaudible 16:55:03) –

THE COURT: JUDGE SMITH TO WITNESS

- Q. Were you clear on that? As long as you are I'm happy to amend my –

UNIDENTIFIED MALE SPEAKER: 16:55:05

I think so, Sir, yes.

CROSS-EXAMINATION CONTINUES: MS HILL

- Q. So there's nothing in policy 11 that talks about how councils have to go about doing this at all, is there?
- A. No.
- Q. Whereas in policy 13, for example, which is the natural character policy 13(1)(d), there's quite a clear directive there that ensuring that regional policy statements and plans identify areas where preserving natural character requires objectives, policies and rules –
- A. Yes.
- Q. – and include those provisions. There's a difference there, isn't there, between that policy and policy 11?
- A. Yes.
- Q. And then policy 14 relating to restoration of natural character, 14(b) again talks about providing policies, rules and other methods directed at restoration. Do you accept that there's a distinction there?
- A. Yes.
- Q. And then policy 11, which is the natural features and landscapes policy at (d).

- A. 15?
- Q. Sorry, 15(d) talks about, again, the same provisions, ensuring that policy statements and plans identify areas where objectives, policies and rules are required.
- A. Yes.
- Q. So what I'd like to put to you is that there's a reason for the distinction and that is because the maintenance of indigenous biodiversity, remembering that it's terrestrial as well as fresh water as well as coastal, very broad function requiring the involvement of a lot of agencies, for example, Department of Conservation, territorial authorities, regional councils, so it's reasonable, it's a reasonable proposition, isn't it, that something broad is contemplated in relation to the management of that function which may involve other agencies?
- A. I wouldn't exclude that possibility, but in the end whatever method is adopted needs to be expressed in the plan.
- Q. So –
- A. And it needs to provide sufficient certainty to achieve the provisions of that plan in the high order documents, so – and I've acknowledged in my evidence that, you know, that the, the possibility that there could be other ways of doing that, but the issue is that certainty to my mind.
- Q. Certainty, okay. So you've referred to one of the methods that Council has in the plan which is the way, A, part of the way that it's proposing to address the issue, and that's method 3A, and that's the one that talks about supporting research in the region to identify where ecosystems and biodiversity values are being adversely affected by fishing, and it talks about investigating options. So that is a method that Council is proposing to learn more about this issue of fishing and then look at options to address it. So your issue with that as a method is simply that you think we should be doing it now and you don't think it's appropriate to defer it to another process. Is that your complaint about that?
- A. What – I mean, the – what is the consequence of method 3A? You do the research, you find there's a problem and then what are you going to do? So I guess the point that I'm making in my evidence is that, and this

is a matter for the Court to determine, but is there sufficient basis in this case to go that next step?

Q. Yes, so your evidence is heavily reliant on the Court's findings of the expert evidence that there is a significant issue to be addressed?

A. I think to enact the provisions that refer to adverse effect or significant adverse effect, and I've referred to restoration as well, you need to be confident that those adverse effects exist so that's a matter of assessing evidence, yes. I accept that.

1700

Q. There are a couple of other methods I'd just like to refer you to that you haven't, I don't think you've referred to in your evidence. Sorry, I believe you did update the Court referring to method 13, is that right, involved in the community groups and the restoration of natural heritage? Is that something you referred to?

A. No.

Q. Okay. So method – do you have a copy of the –

A. I do.

Q. So the best document to look at is the attachment to s Noble's evidence which is Council's proposal. So method 13 is not a new provision. It's an existing operative provision as well. Can be deemed to be operative in a proposed plan because it hasn't been challenged. And that talks about facilitating and supporting the involvement of community groups in the sustainable management and restoration of natural heritage, historic heritage and water quality in the coastal marine area. That is a method of advocacy, engagement and involving community groups, so in your view is that relevant to these proceedings?

A. I haven't seen evidence that that is contributing to the issue in this area. There may have been evidence but I, I can't recall seeing it.

Q. But remembering that this is a proposed plan, so these are provisions that Council has put into its plan as a means of addressing a submission being made by the trust?

A. Yes. When I talk about evidence it's that there is a, there is a prospective programme which is in train which follows up on that method.

- Q. And Ms Noble will confirm. So the next one 14 is also relevant potentially isn't it, which is facilitating and supporting tangata whenua to exercise kaitiakitanga and apply mātauranga Māori in the sustainable management and restoration of natural historic and cultural heritage and water quality in the CMA?
- A. Yes that's clearly relevant.
- Q. And then method 15, and this is in conjunction with other agencies including DOC support and administer community-based programmes and kaupapa Māori- based initiatives that seek to educate people about natural coastal ecosystems. Increase community involvement including kaitiaki and whānau and amenity of the coastal environment, protect and enhance the natural character and so on. So that is another community engagement initiative specific to tangata whenua that's relevant to these proceedings. Method 18A was that - did you refer the Court to that one? That's work with tangata whenua to identify the grave and cultural sites in the coastal environment which tangata whenua wish to restore for natural heritage and cultural reasons. That's also relevant?
- A. Yes.
- Q. So all of these provisions are provisions that are already in the proposed plan and are unchallenged. So did you consider that as part of your options analysis about an appropriate approach for Council to take to issues such as this?
- A. I'm familiar with these methods and they exist in most plans. My experience of them is that they – in situations where, such as this where there are serious issues in relation to section 6 matters that those methods tend to back up rules.
- Q. This issue you will be aware is a novel one and the High Court has only just clarified that councils have this function. So given that and given your view, sounds to be, I tested you on it and you seem to be sticking to it that you really need rules in a plan, that is essentially going to mean that every coastal plan that has fishing occurring is going to have to put rules in the plan. Is that something that you considered - is that a relevant consideration in your view?

1705

- A. I guess I just – I look at this in a pure sense. If the RMA is seeking the achievement of an environmental outcome, and imposes an obligation, in this case on a regional council, to do that, then you need to follow that through to its conclusion if – it is novel, this one, and if it's something that hasn't been done to date then we're all learning something, I suppose, but that's the way I'm looking at this. It's quite a simple follow-through exercise. But in saying that, I certainly do recognise, and I understand from the evidence, that, you know, the implications of that pure approach, if you like, to the whole of the bay, and obviously then in other parts of the country. But this isn't – and this is in response to Mr Enright's questions about the proposed provisions here, this isn't that simple situation. There are a number of overlays that apply in this area, including the, significantly, the wāhi tapu, and so they build up layers, if you like, to a potential outcome which narrows the applicability in other areas.
- Q. Okay, well, that's interesting. So are you saying that it's just the addition of the cultural overlay that tips this into a rules situation and that – you see, the issue Council has if this is upheld then it's actually going to have to do – its plan is going to be defective and it's going to have to do this everywhere in areas where there's high fishing pressure and some cultural overlay, and that is a large part of the coastal marine area.
- A. Yeah, I – and I understand that and which is the reason for my, the answer I've given, is that if, if – this is the only area that I'm pretty sure it's the only area that's a natural environment area in the RPS, the Motiti natural environment area. It's the only one. So it is separately identified.
- Q. As a natural character area though.
- A. That's – well, I've –
- Q. That's what the RPS designation relates to.
- A. It does and I've commented in my evidence about the relationship between that and the attributes, the expressed attributes of that area and how they then relate to this plan, and I've – but yes, it is – but, you know, the simple point I'm making is that it's not a general area that raises

general issues. It's a – it's an already indicated separately identified area in the Operative Regional Policy Statement.

Q. Is what you're articulating sort of a precedent argument which you can apply in a consenting scenario where you might come up with exceptional circumstances to distinguish this area? Is that what you're saying the Court would really need to find, that this area was something exceptional to go there?

A. (no audible answer 17:09:07).

Q. You don't understand my question?

A. No.

Q. You looked puzzled.

A. I don't follow your question.

Q. Is there a precedent concern that arises in a planning context or do you think that concept just relates to the resource consent situation? Are you familiar with the concept in a resource consent situation of precedent?

A. No, you'll need to explain the question a bit more.

THE COURT: JUDGE SMITH TO MS HILL

Q. Yes, I think it's a legal issue.

A. What was that, sorry?

Q. I think it's a legal issue.

A. A non-issue, did you say?

Q. A legal issue.

A. Sorry, okay.

Q. So you can submit on the subject, I think.

A. I thought you said a non-issue.

Q. No, no, it's – I think the witness quite wisely would be venturing into legal matters out of his depth, I suspect, so –

A. There's a planning element to it, Sir, but if he doesn't understand the concept I don't need to pursue it.

Q. Yes, I think it's – I don't think – you've tried – you've pressed it several times and didn't stop, but given his reluctance to go there I can see the reasons why.

1710

CROSS-EXAMINATION CONTINUES: MS HILL

Q. So my final question really is, is there a temporal element to this? Is it because there's a sense of urgency that you think council needs to do something now and if so, what – how urgent does it need to be for council to act?

A. I don't think I'm qualified to comment on that in terms of, you know, there's a whole tipping point question and so on in terms of the environmental factors. I'd simply see this – the matter's been raised as part of a planned process. Is there a sufficient basis to deal with it? Now would be the time.

RE-EXAMINATION: MR ENRIGHT

Q. The last question you were asked about whether there's an urgency or temporal element, if council is under a statutory duty to maintain indigenous biodiversity, to what extent does there need to be a tipping point under urgency issue?

THE COURT: JUDGE SMITH

I think it's a legal point again. We seem to be trying to get to matters of law through this witness. Although he's tried his best I think he's probably in an area none of us we like to be put on the spot on really.

QUESTIONS FROM THE COURT: JUDGE SMITH

Q. I want to start with some relatively straightforward principles and they're based around the policy statements, so you may need that in front of you. You'll see it's the document at the top right you can see, you can see the national policy statement, set out. And I'm going to start with natural character, okay? So the first question is, does the RPS – and we're talking about this RPS – identify an ONC in relation to the area at or around Motiti, either within or including the whole of the green area?

A. Sir, not the island itself but there are ONCs around the area. So it's a –

- Q. Right, so those are areas that have outstanding natural character, is that correct?
- A. Mhm. Yes.
- Q. And therefore in terms of the obligations under the MTS the policy statement has to include objectives and policies. Does it do so? I think I'm asking an obvious question because it seems to me you cite a number of objectives and policies in the RPS about outstanding natural character.
- A. Yes, yes, it does.
- Q. And you would agree with me that rules aren't required in a policy statement?
- A. No.
- Q. And in fact you can have provisions that are merely mandatory. You're familiar with the Court of Appeal decision. They take effect as though they are mandatory –
- A. Yes you go way back with me to these earlier days.
- Q. Can you take it from me that there is a decision of this Court where this very issue was addressed and the parties were arguing for mandatory provisions within the policy statement and the Court said the appropriate place for that was in the coastal plan as a rule. I don't think I'm mistaking the decision. It was the Ngāti Makino decision as I recall. So if that's correct and nobody's disagreeing with that, it was envisaged therefore that the outstanding natural character would be picked up in the coastal plan and would you agree with me that that would require objectives, policies and rules within the coastal plan in terms of policy 13 for outstanding natural character? I suggest to you it's beyond doubt because it explicitly said so.
- A. Well, areas need to be identified where rules –
- Q. The area was identified.
- A. Yes, it was identified, yes.
- Q. So what I'm saying is therefore the coastal plan – the consequences of the plan would need to reflect that identification. The objectives and policies in the policy statement would include rules. It's mandatory that they must be included, isn't it?

A. Yes.

Q. Now, as I understand it, your evidence says that the coastal policy statement includes objectives and policies relating to the outstanding natural character areas identified earlier and reflected now in the plan, but in a slightly different way. Is that your understanding?

A. Yes.

Q. So rather than being called outstanding natural character areas, they're now called what?

A. Oh, no, no, sorry, that's not –

Q. What does the RCEP call those areas, then?

1715

A. I think there's a cross-reference to the RPS.

Q. Yes, and what are they called now?

A. They're still outstanding –

Q. They're still outstanding natural character areas. And in addition to that, many of the same sites are identified as outstanding natural features, outstanding natural landscapes, and in fact several of them are all identified as IBDA, which is the highest biodiversity classification possible.

A. Yes.

Q. Do you agree with all of that?

A. Yes.

Q. Just continuing on, as I understand your evidence it was that the objectives and policies are within the coastal plan but there were no rules to avoid adverse effects as required under policy 13.

A. That's right.

Q. Did I misunderstand you? I just want to be clear as to whether that's your evidence or not.

A. No, you haven't misunderstood me. That's what I'm saying.

Q. And so that's true in respect of outstanding natural character but you agree that almost exactly the same words relate to features and landscapes, outstanding natural features and landscapes.

A. Yeah, yeah.

- Q. So to that extent there must be objectives, policies and rules which you say are in both the RPS and in the coastal plan but there are no rules achieving the outcomes required in terms of the objectives and policies.
- A. Correct.
- Q. So a proper reading of those documents you say would militate that there must be rules to achieve those objectives and policies.
- A. There are rules that referred to those overlays. But none that address the particular issue that's raised.
- Q. Which, in your view, is avoiding the adverse effects.
- A. Yes. That's right.
- Q. Now, although indigenous biological diversity doesn't have the same requirement, it's nevertheless quite clear from other policy statements that you could have provisions that might be referenced by methods including rules. Is that your understanding?
- A. In defined areas?
- Q. In respect of indigenous biological diversity areas there are objectives and policies and you're saying there can be methods – including rules – in the RCEP.
- A. Yes.
- Q. But it's not mandatory as it is for the others.
- A. No.
- Q. But given the reference to other things such as 14, I take it you say that that clearly envisages an enabling of such provisions.
- A. It does, Sir.
- Q. And not only in respect of indigenous biological diversity, but also potentially in respect of natural character and ONFLs, both of which apply in this case.
- A. Yes, Sir.
- Q. Okay. In your view, does a method such as education or advocacy, is that a rule?
- A. No.
- Q. Now, the rules that you're talking about are other more general rules that seem to apply in a wide range of areas. Is that right? I'm not sure – can

you tell me what rules you had in mind which actually address adverse effects? I think you say none of them address adverse effects. Are there others that address ONCs generally?

- A. Yes, there are and I'd need to track through it.
- Q. We'll go through your evidence again because you do track those through in your evidence, don't you?
- A. I do refer to rules that touch on the issues raised in this case, yes.
- Q. But in your view, they don't address the question of avoiding adverse effects and Ms Hill put to you – and you accepted – that if there are no adverse effects then you don't need a rule.
- A. That's right.
- Q. But you actually said "significant adverse effects" but you agree with me in respect of ONCs you need only an adverse effect. It's a relatively stringent and low threshold.
- A. Yes.
- Q. It would be applied only to the de minimis rule. It doesn't apply to whether they're minor or not.
- A. And with the rider, Sir, that you already indicated that it's adverse effects on the attributes and values that give rise to that.
- Q. Yes, and some argument as to how far that goes. But I accept all of those caveats. So I just want to clarify that. I thought we drifted away from that.

QUESTIONS FROM THE COURT – REMAINING PANEL – NIL

QUESTIONS ARISING: MS HILL

- Q. The plan obviously contains a suite of rules generally requiring discretionary activity consents or non-complying for all activities in all of those overlays. The only area it doesn't have a rule is fishing, so I just want to be – I don't want the Court to be under the misapprehension that the plan doesn't have rules.
- A. No, no. I think I said we accepted there were rules and the question was we had to accept there was an adverse effect that wasn't addressed by those rules. That was the question.
- Q. Just the fishing?

- A. The question is, I don't think from the Court's point of view – we have to be satisfied that it addresses adverse effects.
- Q. I want to be clear. I didn't want the Court to misunderstand and think that the plan doesn't have a suite of rules requiring consents for activities within the overlay areas.

THE COURT: JUDGE SMITH

I accept that question and that's the issue that is before us now.

MS HILL:

I didn't want the Court thinking that the plan just has soft methods in relation to the overlay areas generally.

THE COURT: JUDGE SMITH

No, no. I think he goes through the rules that apply, doesn't he? Others do. Ms Noble does.

MS HILL:

He really only talks about the fishing issue, Sir, which is, I think, what may have given rise to some cross-purposes in questioning.

THE COURT: JUDGE SMITH

We can explore what the rules arise.

COURT ADJOURNS: 5.22 PM

COURT RESUMES ON WEDNESDAY 29 NOVEMBER AT 9.31 AM

THE COURT: JUDGE KIRKPATRICK ADDRESSES COUNSEL (09:31:11)

MR ENRIGHT CALLS

REBECCA LIV STIRNEMANN (SWORN)

- Q. Can you please confirm that your full name is Rebecca Liv Stirnemann?
- A. Yep.
- Q. And you have prepared a statement of primary and rebuttal evidence?
- A. Yes.
- Q. And can you confirm the have the qualifications and expertise set out in your evidence?
- A. Yes.
- Q. Now your evidence is specifically relating to sea birds but can you confirm that you also have qualifications in the area of ecology (inaudible 09:32:30)?
- A. Yep, I undertook a PhD.
- Q. Okay, and do you confirm your evidence is true and correct?
- A. Yes.
- Q. Now one of the issues – you’ve been attending Court for the last couple of days, correct?
- A. Yes.
- Q. And so one of the issues that you will have heard has arisen is whether there should be a rule excluding people within certain wāhi tapu. Now which wāhi tapu hasn’t been confirmed yet but in terms of the proposition how would the exclusion of people within wāhi tapu impact the maintenance of biodiversity either beneficially or negatively?
- A. I suppose it depends what the people are doing more than the presence of people but if the people – yep, so it depends on the activity of the people but if there’s no people then there’s likely to be a positive effect because then they can’t do anything, if that’s what you mean.
- Q. Depends what people are doing?

A. Yep, yep.

Q. So the question just before, can you confirm where the nesting sites are within the Motiti MNEMA?

A. Yes, so as – there was nesting occurring on some of these islands and –

THE COURT: JUDGE KIRKPATRICK

If you could just, for the transcript, if there are names there use those and if you need some assistance with that I think a copy of exhibit...

MR ENRIGHT:

Okay, because it won't get recorded, Sir, will it, if we don't...

THE COURT: JUDGE KIRKPATRICK

That's what I'm saying.

WITNESS:

Okay, sorry.

THE COURT: JUDGE KIRKPATRICK

Dr Stirnemann does need to give whatever name or other words to describe the areas you're –

WITNESS:

Okay, (inaudible 09:34:21) now.

EXAMINATION CONTINUES: MR ENRIGHT

A. I'm not too sure about this. Schooner probably has some as well. And then the – I can't remember. There was a few areas here.

Q. Perhaps you might – it might be easier for you if you look at Di Lucas' attachment 9, just because it's got all the names individually and we'll start again.

WITNESS REFERRED TO EVIDENCE OF DIANNE LUCAS

0935

EXAMINATION CONTINUES: MR ENRIGHT

Q. Which circle would they fall in, the little islands you refer to? Which of the circles in sheet 9?

A. The Schooner Rocks one.

Q. You can see the little red dots on the map that might be those rocks just off the coast.

A. Yes.

Q. I don't know if they're named. Well, they will be named but I don't know what they are. Look on the map more closely and you might see some names.

A. Well, I wasn't allowed on the little one because there were DOC restrictions because of the nesting.

Q. Yes.

A. I had to be an observer at night.

Q. Right. If you look at sheet 11, two pages over, does that assist you in terms of your reference to the small islands on the eastern side?

A. Yes, yep.

Q. Are they nesting sites?

A. Yeah, yeah.

Q. Okay, thank you.

A. There was one which – well, it looked like it. It's hard to say because we didn't have the breeding surveys and we did a brief trip. The birds were using them even if they weren't breeding on them yet, and of course it's seasonal.

Q. Right. This is terms of your site visit that you've described in terms of your evidence.

A. Yep.

Q. If we could take you to exhibit C2, the registrar will supply that to you.

WITNESS REFERRED TO C2

0940

Q. And this is Ms Lawrence's sort of latest operation. There will be another one this morning but it doesn't affect the question I was going to ask you. In terms of rule 3 you'll see there it refers to five particular activities which

have prohibited status throughout the MNEMA, and I just wanted your comment on whether that list is sufficient to address more intensive forms of fishing that affect seabird life.

A. It should include long-lining as well.

Q. And could you just explain why you say that?

A. Can I refer to this? So we got data from MPI last Friday after six.

Q. Can I just pause you there? If you're going to refer to the data, I think we'll hand that up now because it would be easier to deal with it that way.

A. Would that be okay?

MR ENRIGHT:

And just for explanation, Your Honour, the witness' supplementary evidence referred to still wait – she was still waiting on further data from the – in terms of by-catch effects of, essentially, by-catches in the MNEMA, and that information was only received I think on the weekend. So yes, it's been provided to my learned friends but if we could hand it up.

THE COURT: JUDGE KIRKPATRICK

So you're seeking for this to be produced?

MR ENRIGHT:

Yes, Sir, I am.

THE COURT: JUDGE KIRKPATRICK

Any issue about this? No? So exhibit I1. I think the three-page sheet, bigger one, is that exhibit I1. And then the longer document, which appears to be calendar years 2010, I see, 2017 and are these by-catch numbers, exhibit I2.

WITNESS:

So this data covers areas also outside the MNEMA.

THE COURT: JUDGE KIRKPATRICK

Q. How far outside?

- A. It's the fishing boundaries that MPI haven't provided me with a map of the exact percentages of data. They're still doing that.
- Q. So it's their statistical area, is it?
- A. Mhm, yeah, it's the fishing area.
- Q. Which is the central – yes, alright. No, we'll follow up on that.
- A. But it's a good indication of what's occurring around this area, and on figure 3 you can see what –

EXAMINATION CONTINUES: MR ENRIGHT

- Q. No, that's exhibit I1 you're referring to, the short document.
- A. Yep, I1, figure 3. You can see this is the total captures of different species by the impacting fishing type and, yeah, you can see in there that there's long-lining is included, both surface and long-lining, as having an impact.

THE COURT: JUDGE KIRKPATRICK

- Q. Do you mind me asking, when you say "captures" I'd assume they all died or do some of them survive?
- A. So MPI divided their data into three ways. They said dead, injured and alive at departure, but having talked to a number of people and from my personal observations as well, alive at departure does not mean, and especially if they're injured, quite often it will be high mortality, and furthermore it's quite well known that it's a significant underestimate of what's actually occurring, and that's why they put observers on the boards and want to put cameras on the boats as well. But yeah, so it's – and the – so this is a summary dataset but the bigger document has the data by event, so if you flick through, if I can flick you through that till – which is – what would this one be for?

EXAMINATION CONTINUES: MR ENRIGHT

- Q. Sorry?
- A. What – this document?
- Q. I2.

A. I2, sorry. If you go through I2 till 2016 you can see that like there's purse seine events for, like, for different sea birds which are 65 or 104 individuals taken in one go and –

0945

Q. Sorry, they're not numbered so go towards half way through.

A. It's done by year, so if you go down by year to 2016 and then there's two which have little asterisks on them. Those two individual events have full mortality, as they put it, but things like the leatherback turtles in this area, they will – once they're caught in longlines, even if they say that they are released alive, they will die most likely because they don't take being a little bit drowned very well and being stuck on something.

Q. You've already identified in your evidence in terms of the bird species which are rare and threatened under the relevant classification.

A. Yep. There are a few more in here because the ones where we're reliant a little bit on information from DOC and their monitoring hasn't been that extensive and they haven't had automatic sound recorders out on the islands which would pick up your rarer species and picking up rare species is always a bit of a difficult thing but I suppose MPI has done quite a good survey of what the rare species in the area has with longlines and other techniques. So it gives you an idea of what's there, but things like black petrel and steep and declining species.

Q. What's the likely that black petrel or other rare or threatened species are present within Motiti, in your view?

A. They're likely to be using that area but it is a bit dependent on food resources. Especially since I've been to see the area I can also see how diverse the habitats for feeding birds is.

Q. Just on the topic of large workups, I think you've referred in your evidence to sustainable biomass from a seabird perspective, how does the size of individual wāhi tapu affect the availability of the workups and the size of them.

A. Different species need different areas. Research by others – not me – have shown that the workups around some of the other areas have been too small, currently. Poor Knights is too small to maintain decent size

workups. We haven't been able to maintain the workups we need and it's a commonly-accepted thing amongst seabird experts that that's one of the reasons that seabirds are likely to be declining with research showing that the foraging time for individuals is getting longer and longer and that survival is being impacted and also that there's been a change of what they're feeding on over time, which you can monitor. A lot of the seabird species are struggling and we're linking it now to the fact that the workups are getting smaller but also disappearing.

Q. Can you just comment on the effectiveness of a proposal for one nautical mile wāhi tapu circles?

A. I personally think one nautical mile is too small because our evidence said that it wasn't sufficient to maintain workups but yeah, what – the limit that you need, it's hard to determine. But it needs to be big enough that you can maintain large schools. They have to stay within a safe boundary to increase them to a level where they're maintaining that ecosystem.

0950

Q. In terms of the radius around Motiti, the effectiveness of that size?

A. I think three nautical miles would be safer. One is too small and we've tried too small. Maybe we should try larger and then make sure that we actually capture what we're trying to capture.

CROSS-EXAMINATION: MR POU

Q. The issues I want to take you to are, you've been in the Court listening to some of the interchanges that have happened. You will have heard some of the discussion that's occurred between whether or not activities or access should be restricted. Now, in paragraph 37 of your primary evidence you talk about the need for monitoring. Now, that's an important part of the research, isn't it?

A. Yep.

Q. You've talked about putting devices in particular places but that would require access for particular people as well, wouldn't it?

A. Yep.

- Q. It would flow that – I know you're not an expert on it but that monitoring and that information could be a way in which Māori could maintain their connection with the resource and understand what's happening.
- A. I'd say it's very important and the key to maintaining that connection.
- Q. In terms of those restorative functions, there is a genuine reason relating to the management of the resource, if we can call it a resource, for access for particular classes of people, for instance, to have access within there.
- A. Yep. I think that occurs currently. It's only certain people who have access onto the land anyway.
- Q. I've talked about monitoring and a range of things but are there any other reasons why access might need to be provided – I don't know, for instance, to maintain rats off an island, those sorts of things, I'm talking about active engagement in the restorative functions. Are there any other reasons why we'd need to provide that to achieve what you're suggesting here?
- A. Monitoring for invasive species and then preventing or reducing impacts of invasive species is pretty critical for ecological functioning in New Zealand to be maintained. Unfortunately, humans bring a lot of things with us.
- Q. For this restorative functioning, you've talked about the activity restrictions but for the restorative functions to be truly efficient it does require some sort of access in some way by some people. You'd agree?
- A. Yep.

CROSS-EXAMINATION: MS HAMM – NIL

CROSS-EXAMINATION: MR PREBBLE

- Q. In relation to the report from MPI, is it your understanding that it refers to the statistical areas 989 and 10 in the evidence of Dr Hill?
- A. They're the fishing zones.
- Q. Statistical areas.
- A. Yep.

Q. And broadly speaking without going to that map, is it your understanding that that area roughly equates to all of the regional council boundary that goes out, obviously, into the EEZ area?

A. (no audible answer 09:55:07).

Q. Are you familiar with those statistical areas?

A. I've seen them on – yep, I'm not exactly sure where the mine ends in terms of the EEZ but yep. It does cover this whole Bay of Plenty area so it's not only this area as I said in my map.

THE COURT: JUDGE KIRKPATRICK TO MR PREBBLE

Q. Counsel, are you putting it to the witness that these go into the – beyond the territorial sea and into the exclusive economic zone?

A. Yes, it might help to put the actual area.

Q. Yes, and I wonder, I mean, I'm not – it would appear that the witness isn't familiar. This presumably is something that can be stated by counsel. This presumably is primary fact that no one is going to argue with? I'm getting some nods, so if you can just tell the witness what area you're talking about.

A. Would it help to also see the area on the map? It's attached to Mr Hill's evidence.

Q. Is that pages 985 and 986?

A. I'm very sorry, Your Honour. We didn't get a copy of that.

Q. Okay, is it these shaded maps?

A. No. It's, if you can come back –

Q. Something else?

A. If you come back a few maps from that.

Q. All right. Let's – so we're in volume 2, I think, aren't we, or 3, is it, for Mr Hill? Yes, volume 3.

UNIDENTIFIED SPEAKER:

It's 934.

UNIDENTIFIED SPEAKER:

It's map 19. Appendix C.

THE COURT: JUDGE KIRKPATRICK TO MR PREBBLE

- Q. Are you saying it's before – is this the one you referred to earlier, Mr Prebble, that showed the...
- A. No, it's –
- Q. It's before that? At page 982, BOP Regional Council – I don't know. I mean, I'm just looking in here. This system doesn't work properly but that's all right. 49 of 76, yes. 977, getting close. And so what this...
- A. What it shows, Your Honour, and Dr Stirnemann, is the areas, statistical areas, as well as the fisheries management areas, and you'll see there that there's 9H, which is in the heart of the Tauranga Harbour there's 9 and there's 10, and I'm informed that this material, and the data on by-catch, relates to those three areas, so 9H, 9 and 10.
- Q. All right. So it goes some distance into the EEZ beyond the territorial sea which is marked there with the black line.

CROSS-EXAMINATION CONTINUES: MR PREBBLE

- Q. So in terms of the actual impacts that are occurring within the MNENA area, we heard yesterday that within the Bay of Plenty regional boundaries it was approximately one to 1.2%. That area, in terms of the statistical areas, would be a proportion smaller again, roughly perhaps around 0.5 in percentage.
- A. Yep.
- Q. And in order to determine therefore the extent of any effects in terms of these by-catch figures would you agree that you'd need to have an approximation of the number of birds that are actually using the MNEMA area, first, as one of the parameters you'd want to understand?
- A. Well, some of these species are quite rare so – right, no, can you repeat your question?
- Q. I guess in terms of actually just understanding the extent of the effects so we've got numbers here which equate to that larger area, and if we were wanting to drill down into what extent are these effects actually occurring within the MNEMA, we'd want to understand a few things and I guess I'm just putting to you one of the things you'd want to know is what proportion

of the population of the relevant birds that are being impacted upon are using, are residing in the MNEMA area.

A. Well, the birds which are breeding in those areas, because they are required to come back to their chicks and eggs, they will be prioritising areas which are closer by. So anything that's breeding there is, you know, is using, utilising those areas. Is that what you were meaning?

Q. Yes, and in terms of those birds you'd also want to know what proportion of those birds are actually the ones that are therefore being impacted upon or being caught in the actual fishing techniques. Is that also correct?

A. Yes, but we know that a certain amount of long-lining and a certain amount of purse seining is resulting in by-catch.

1000

Q. We don't know where in that area these effects are occurring, I guess that's the point.

A. No, but purse seining is known to take a large proportion of sea birds and so is longlining.

THE COURT: JUDGE KIRKPATRICK

Q. Would purse seining occur throughout areas 009 and 10 in these statistical areas?

A. That I'm not too sure of. I don't –

Q. No.

A. Like...

UNIDENTIFIED SPEAKER:

And we've got these maps would show restrictions throughout the areas, haven't we? You must know the answers to all these questions. I'm struggling really.

THE COURT: JUDGE KIRKPATRICK TO MR PREBBLE

Q. I'm just wondering if this is the best way of going about it because it would appear that this witness is not familiar with the fishing side of it. I mean, I know we've got the detail of what's been taken. You have the point which is this is the total set of statistics for two statistical areas which go

well beyond the area that we're focused on right now, and so I think we've got that.

A. Yes. Yes, Your Honour.

Q. I don't know that we can pursue it much further because nobody, it would appear, has a way of breaking down either the fishing activities on the one hand or the by-catch numbers on the other.

A. That's fine, Your Honour.

UNIDENTIFIED SPEAKER:

Or where the population resides.

THE COURT: JUDGE KIRKPATRICK

That's what I mean. Well, it's not even where they reside, I suppose, because I think Dr Stirnemann is saying with some of them, albatrosses and so on, some of them presumably are travelling long distances. They might travel all the way across these statistical areas and who knows where they are going to get caught.

WITNESS:

Yes, like the leatherback turtles, for example, are – they're utilising this whole area but they will be – there will be areas where they prefer where there's higher, for instance, work-ups.

THE COURT: JUDGE KIRKPATRICK TO MR PREBBLE

So I think there's a general point which you have made, and you are welcome to pursue that. I just feel that you're drilling into detail that the witness can't really help you analyse.

CROSS-EXAMINATION CONTINUES: MR PREBBLE

Q. In terms of litigation and measures to address some of these, are you familiar with some of the controls that are in place under the Fisheries Act to address some of the impacts from longlining, trawling and bottom longlines?

- A. Yes. I know that they're trying to – they're working on new ways to reduce impacts but impacts are still. In fact, I believe too high.
- Q. And are you aware that there are also, working in combination with that, mechanisms in place to provide for reporting, such that if there are by-catch there's reporting, for example, over the quantity and what method was the cause of that by-catch?
- A. Yes, however, having talked to people on the boats I also know that that doesn't always occur and that's why they're, they're pushing at the moment for there to be cameras on boats and observe – like – and I think MPI, I think, has said even that, you know, that there's differences between boats with observers and not. So – yep.
- Q. So in terms of under-reporting or that issue that's being addressed in terms of the observer programme and the cameras that are going to be placed on both, so there is a move to address some of those issues such that we have a better understanding of what the actual effects are?
- A. Yes, but we already know that purse seining, for instance, is having a massive impact on sea birds and pretty much any sea bird expert you talk to will tell you that. It's – and they're having an impact not only through by-catch, and the same with longlining, but also by removing food source, so.

CROSS-EXAMINATION: MS HILL

- Q. Good morning, Dr Stirnemann. Just starting with the issue of size, was I correct that you said that three nautical miles would not be enough or you're saying that that's the minimum?
- A. I was saying that we already know that one is too small and I would recommend that we go for a number where we're likely to get to work-ups still occurring rather than going for something which we know – like, at the moment, this is just, this is my opinion, but at the moment it seems like we're going for the smallest amount that we can possibly get away with so that – with the hope that it will maintain, but we really need to have an area where we can say w – is three big enough to maintain that? So currently we don't even have an example where we've got a marine

reserve or a marine protection area which has a big enough area to support the ecological requirements that – if we're, after maintaining sea birds, we haven't managed to maintain work-ups yet, like not to a large level, to anything which is really – we're seeing declines in a lot of the sea birds, even common things like red-billed gulls which, you know...

1005

Q. So the area is to deal with the work-up issue rather than the breeding or both. So the three-nautical mile is that around particular around breeding sites or you're talking about the open sea in relation to that work-up issue?

A. Both. So, of course it's different species and some species which are breeding, like red-billed gulls, will require work-ups closer, but other species, like, for instance – can I point at the map again? – like this area here, like when we were out there this is the area where we saw work-ups still occurring around Motunau, but it was amazing how little work-ups remained and how small they were, and, like, you need a large enough surface area in order for the – of the work-up, like, I don't know, have you – you need a large enough area on the surface for the birds actually to be able to feed.

Q. At the moment the area that is three nautical miles is around Astrolabe reef. There aren't any breed – there isn't breeding occurring in the reef, is there, because that's submerged?

A. No. Yep.

Q. So you do refer to Astrolabe in your evidence and that, I think, relates to that upwelling issue. Is that why you've referred to Astrolabe in your evidence?

A. No, because birds travel quite far and at the moment we don't have work-up protection but that would be us work-up protection which would allow the Motunau birds and – because they – work-ups, you know, there's quite a few sea birds and they need to move between them and it would just mean that there was more feeding resources, but there's also some species which prefer further areas which are further out, like your shearwaters and things like that, so it provides different habitats, basically. Sorry, that was a long (inaudible 10:06:54).

- Q. The relationship between over-fishing, or unsustainable fishing, and bird feeding or – that relationship isn't one that's yet – there's not a lot known about that yet, is there?
- A. About the importance of work-ups?
- Q. So the relationship between the fish and it being the food for birds and the impact of over-fishing on that.
- A. Well, Chris Gaskin just produced a quite good report for DOC and there's current research occurring. There's a PhD student on it. So yeah, there's gaps but we also know the importance of work-ups based on that research.
- Q. So the Gaskin report is the one I want to talk about. So I've had a look at it and I don't have the full report here but I've got a summary of it. You're familiar with the Gaskin report?
- A. Yep, I've got it here.
- Q. Okay, right, if you could just have it in front of you. So this is just a PowerPoint summary. I couldn't find the report but this is what came up when I looked online and in relation to data gaps he says, "There is an almost total lack of accurate, up-to-date population and trend data for Procellariiformes –
- A. Yep.
- Q. – in the region, including those breeding at several globally important sites." Would you agree with that proposition?
- A. That there's a lack of data? There's, there are data holes, yep.
- Q. And –
- A. But not complete. You said "complete". Did you say "complete"?
- Q. Well, he said, "There's an almost total lack of accurate, up-to-date population and trend data," so I'm asking whether you agree with his statement given he's undertaken the research.
- A. I think that there's, there isn't – yep, there is a lack of understanding but there's also been some really good studies which he actually puts in his report on what's occurring.

Q. He also says the contribution this feeding association with the fish schools has for the diet of key species at critical stages of their life cycles is unknown. Do you agree with that?

A. No, 'cos there's a study by – let me find it – there's a study which – there's a couple of studies which he refers to in the report as well where he's talking – like, certain species like shearwaters and Buller's shearwater and fluttering shearwaters where they've looked at foraging times and that impact and also like that the birds are taking longer to be able to forage and then bring the food back to their chicks and also impacts on reproductive success and that – the thing is it's a hard thing to study, like, you're working on a very large system, but yeah, there is data and studies occurring.

1010

Q. There's data and I think he raises that in relation to those two particular species, Buller's shearwater and fluttering shearwater. But my question is do you as an expert have a comprehensive understanding about that relationship between the species that are relevant here to the MNEMA?

A. Yeah. I'd say, yeah.

Q. You do? So in your evidence you say that further research is required and you say large protected areas are required for further study. So my question for you is that really what you're seeking here, a large area so that you can carry out more study in in relation to those interrelationships?

A. Not personally, no. I think that there should be more study because if we want to maintain ecosystem relationships we need to actually have an example where we have managed to maintain ecological relationships and if we're going with minimums and we don't even know where minimum is in order to maintain that we, well we, actually we do. We know that one didn't work, so we know it has to be bigger in one in order to maintain work ups but I don't, like three, it could be, like I'd say... Nobody knows what the actual size is but we know what hasn't worked. You see what I mean? Is that what you mean?

Q. Well my question for you is that... I'll put it to you this way. Were you involved in Forest and Bird's submission in relation to this appeal?

- A. What do you mean submission? I wrote the evidence.
- Q. No. So Forest, the reason that Forest and Bird's a party to this appeal is because it made a submission on the appeal?
- A. No. I've only worked with, for them for six months.
- Q. And sorry, I used the wrong words. It made a submission on the plan. So that submission on the plan doesn't refer at all to this issue. It's focused on mangroves, other issues around sedimentation and it doesn't refer at all to the issue of overfishing having an impact on birds. Does that surprise you?
- A. No. I was brought in as an expert witness for the seabirds and ecological angle, so it was, in order to be impartial I didn't look into other angles that Forest and Bird was pursuing for that –
- Q. And I understand that, but, and you said in your evidence that we're at a crisis point here and that this is a real issue that needs to be addressed. My question is simply does it surprise you that Forest and Bird's comprehensive submission on the coastal plan didn't actually refer to the (inaudible 10:12:44) area?
- A. I didn't work for Forest and Bird at that time but, and there was a gap where someone wasn't working for Forest and Bird in that area, so I could see why something wasn't submitted on this. But also not everybody has expertise in this area and like – so not all people know what it is a big issue. But like, it's quite detailed, yeah.
- Q. Not all people within Forest and Bird would know that this is an issue?
- A. No. No. Not everyone's an expert in birds there. Like there's planners and other things.
- Q. And then Forest and Bird's appeal, Forest and Bird's notice to join this appeal said that it needed supported more opposed that a leaflet was being sought. So in simple terms Forest and Bird didn't actually take a position on this issue when it joined the appeal. Is that something that you were involved in?
- A. No.
- Q. Okay. So the other question that I did want to discuss with you that you raise in your evidence relates to marine spatial planning and you talk

about designation of rules and methods within regional planning frameworks being important and I wanted to talk about the idea of methods. So what's your understanding of that concept as you've referred to it in your evidence?

A. You'd have to show me where, where I refer to methods as to how I might be defining it.

Q. Paragraph 34 at page 764 of the bundle. That will be volume 4. If you look at the top right corner, they're paginated. Almost right near the end I think where the last one. Right near the end, I think. Yes, at paragraph 34 you talk about marine spatial planning and designation of rules and methods, which regional planning frameworks should apply.

A. Yep, yep.

1015

Q. What are you referring to there when you talk about rules and methods?

A. Fishing methods.

Q. What do you mean?

A. That certain methods are impacting seabirds and therefore – can you ask the question again? Sorry.

Q. I'm asking what you meant by what you wrote there.

A. Oh, yeah, okay. So if particular fishing methods were removed from an area, then it can have impacts for the seabirds in terms of we should see population increases and high reproductive success.

Q. Can I talk to you about what we might call as lawyers and planners other methods? We're talking about things that don't sit within a plan itself, so strategies, advocacy, forums of parties such as Forest and Bird and other stakeholders. Is Forest and Bird involved in anything locally in relation to the seabird and fishing issue?

A. There's a lady called Karen Baird who does a lot of the seabird work, especially internationally.

Q. But you don't have any familiarity with that?

A. No, that's not – yeah.

- Q. That's fine. Are you familiar with the national plan of action to reduce incidental catch of seabirds in New Zealand? That's an MPI strategy document, 2013.
- A. I've heard of it. I haven't read it.
- Q. That's fine. This is a multi-agency strategy group which involves MPI, commercial fishing – I don't know whether Forest and Bird is directly involved but –
- A. Maybe Karen Baird will know.
- Q. It really sets a number of goals and strategies around dealing with the way that those objectives are implemented. MPI includes those methods in its annual and five-yearly planning.
- A. Mhm.
- Q. So in your view, are strategies like that useful tools to address the issues in your evidence?
- A. You're still removing the food source 'cos there's multiple impacts from particular types of fishing techniques.
- Q. The idea around this is that you have the commercial fishing who is a party to this. It's not a binding document but it's a memorandum of arrangement between the parties where they make commitments and undertakings over time to investigate issues and take steps towards the reduction of fishing and addressing those kind of issues, so do you think that this kind of thing is worthwhile to assist with dealing with these issues you've been discussing?
- A. Yes, I think it's really, really important because a lot of these seabirds are travelling around large areas but you still need to have areas where workups are maintained. People will go for profit over environmental impact. Just going out there, the amount of fishing, like, you can maybe limit how many you can catch but are you limiting or are you preventing workups from being maintained by not having protection, if that's what you're meaning.
- Q. That has answered my question, thank you. So the last couple of things I just wanted to talk about were the penguins. Sorry if I missed it, but did

you explain whereabouts the penguins have been sighted within the MNEMA?

A. Rocky coast areas. We saw them – and they're in the water all around just bobbing around.

1020

Q. So you saw them when you were out there?

A. Yes.

Q. So they tend to just move around the waters generally or do they have particular –

A. No, they have burrows along the coast in the rocky areas.

Q. Of Motiti or of what –

A. Motiti and probably any – I imagine Motunau. I didn't go close to Schooner so I don't know what, like, I don't know what the habitat, edge and if it'd be likely to support little blues but, yes, definitely Motiti. In fact I was saying that we should have pest control to increase the populations at the same time as having some sort of fishing protec – like food protection for them.

Q. And the – you refer to the common dolphin. Is that – do you have expertise in dolphins?

A. Only in that – well, so work ups are also, can be also driven not only by a fish species but also through whale and dolphins so their presence effects links again to the seabirds so, yes, they're important and that there was, there is high, was high mortality of dolphins through some activities like purse seining, but if – yeah, so only a bit – not, it's not my, I have a little bit of knowledge on (inaudible 10:21:42).

Q. That's fine.

RE-EXAMINATION: MR ENRIGHT

Q. Unfortunately, I don't have the pagination number either and where I'd like to take the witness is appendix C of Mr Hill's evidence and if you can start with that?

WITNESS REFERRED TO APPENDIX C

A. Okay.

Q. So if you could please start on, because I don't have the page number, can you just click back to the start of appendix C. We're looking for the bottom trawl, bottom long lining, Mr Hill, Appendix C, 960. So this one's headed "Commercial fishing event bottom trawl" and below that bottom, the next one is "bottom long lining", 973. So you were asked questions just about the area within which the by-catch occurs. Now, the information we've been given by MPI does identify trawling events on page 973. Below that long lining events within the MNEMA and if you turn over to 975, you have the purse seining and then 977 is set net and below that bottom contact methods, and then overleaf non-bottom contact methods. Do you see all of those diagrams?

A. Yes.

Q. So given we now – that's data relating to April 2016 to March 2017, correct?

A. Yes.

1025

Q. So given we now – that's data relating to April 2016 to March 2017, correct?

A. Yep.

Q. So given we know these events are occurring within the MNEMA, how does that affect the probability of there being bycatch within the MNEMA if those activities are taking place there?

A. Extremely likely, especially long-lining. I would add that trawling itself is also impacting the bottom coral probably around this area and coral hasn't been very well researched but that is like only in the deep areas and there'll probably be black coral around some of these areas and the age of this coral which could be being destroyed, the tips of them have been aged at 50 to 100 years and the base to, like, 500 years to 800. They're really, really old. One trawl event and you'll be having impacts as well.

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN

- Q. I've probably got the evidence somewhere, I think, that the fishing method is in Mr Hill's – it's the Danish seine compared to the purse seine. What is the difference between the two methods?
- A. I'm not too sure. I know that they're both impacting the seabirds but not how they're different.

QUESTIONS FROM THE COURT: JUDGE SMITH

- Q. I notice paragraph 33 and 34 which shows the fishing effort from 1999 to 2004 appears to show a focus of attention of fishing effort, I think they call it, you've got a small box on it showing that they're even more intensively focused around Motiti.
- A. Oh, yeah.
- Q. That's older data. Of course, the data that we now have from Mr Hill only includes a smaller area but it does appear to support the thesis that there's probably more fishing effort put into that area around the islands and along that five to 15 k out than is further out to sea, where there is almost no effort.
- A. Yeah.
- Q. This is 2004, well before. It does seem to me that around the islands, along that ridge, probably in that water, you know, 20 to 50 metres, 70 metres, seems to be where fishing effort was put. What it does tend to indicate that the big workups, if I can put it that way, if you go to purse seining, which is shown here, even in 2016, Danish and purse seine, there was a fair bit of effort around this area, not just in this area but that does seem to indicate that that's where the larger groups of fish are congregating. Is there a reason why they're attracted to the rock or reef?
- A. Just their biology and breeding activity.
- Q. Some will be involved in the *Rena* case and we did a site visit there which was very interesting because we actually saw a workout while we were there. A dolphin joined us later.
- A. Yeah, it's exciting.

Q. Yes, it's interesting for reasons that aren't relevant here but there were a lot of seabirds taking the opportunity for the work up. It was a boil.

A. Yeah, yeah, yeah.

1030

Q. So that shows that clearly there was sufficient volume, probably what, 30 or 40 metre circle which is a reasonable size work up I think isn't it?

A. They used to be much, much bigger and –

Q. But even 30 to 40 metres circle is quite a big area of fish with - that's them coming through to surface, so I would have thought that's a reasonable sized one?

A. Yeah, it's –

Q. No? Smaller?

A. Well I suppose it depends if there's, if you've taken everything out. Like it depends what else is out there I suppose.

Q. I'm just saying as a work up that's a reasonable sized work up?

A. Yeah.

Q. There are a lot of birds there. Probably several hundred?

A. But work ups quite often have loads of birds. Like look at this picture.

Q. Yes.

A. Yeah. So they tend to be, have hundreds and hundreds, yeah.

Q. And that's what you're talking about when you're talking about a work up. And of that size or even larger and the larger the better I think is your basic thesis?

A. Yeah. The larger the better, and there's just not that many big ones left.

Q. So that was occurring pretty much on the reef at Astrolabe which is quite deep, very close to the reef. When we look at this area you can see there's a necklace they call it, starting from south of the Astrolabe and it goes round the western side of Motiti. Do you see that? Where all the circles are joined?

A. Yep.

Q. Now you say one nautical mile isn't sufficient but you do appreciate that in this case it's actually got a depth that crosses two kilometres and if those ones were all joined together it would be something in the order of

- 10 kilometres long and two kilometres wide. That's of an order of magnitude larger than any of the other one nautical mile ones isn't it?
- A. Yeah, yeah, yeah.
- Q. And because it's around an island essentially and some of those are just pinnacles or rocks it's essentially two kilometres across which is double the size of Tuhua for example –
- A. Yeah.
- Q. – and much larger than the one at Schooner Rocks which I think is even, might even only be 500 metres or something. So does that give you a bit more confidence that you're likely to get more work up capacity than the one nautical mile set off, off the shore?
- A. It sounds good as long as the surface area, like as long as the, you know, like if there's as much, as long as the edge effect isn't having a big impact, like, because as soon as you have your shape alter –
- Q. Well you'll love one that we have which has a, it has a circle round the island and then they've cut it, a pie slice out, so that's where the boats catch the fish according to one of the witnesses, so... But this would give a more contiguous lengthwise at least even if there was, I mean the fish don't know where the barrier is of course so if they go outside the –
- A. I think sometimes they learn, like, yeah.
- Q. Well we'll do fish psychology another day I think. But nevertheless you would agree that this actually gives much more area even on a 1 NM circle than Tuhua?
- A. Yeah, yeah, yeah.
- Q. And more than Poor Knights?
- A. Yeah.
- Q. And probably more similar to, sorry, more than Poor Knights, yes. And obviously as somebody else said you agree with the thesis the larger the better?
- A. Yeah. Oh, and, I just, I just thought of in answer to your question before. It's mackerel do need, certain species will need closer edges and then of course they're all driven by the upwelling, position of the upwelling as well, so –

Q. Right. Yes. Okay. That's interesting.

QUESTIONS ARISING – NIL

WITNESS EXCUSED

MR ENRIGHT CALLS**GRAHAM JAMES LAWRENCE (SWORN)**

Q. Mr Lawrence, you've prepared a – sorry, your full name is Graham James Lawrence?

A. It is.

Q. You've prepared a primary and supplementary statement of evidence?

A. I did.

Q. And you have the qualifications and experience stated in your evidence?

A. I do.

Q. Do you confirm both briefs are true and correct?

A. I do.

Q. Now you were the – you obviously prepared iteration 2 which is called exhibit E2, which was just the rules themselves, correct?

A. Yes, that's correct.

Q. Now I understand you've prepared a further iteration that you'd like to explain to the Court.

MR ENRIGHT ADDRESSES THE COURT – EXHIBIT E3 (10:35:44)**EXAMINATION CONTINUES: MR ENRIGHT**

Q. So can you just take the Court, Mr Lawrence, just through any changes you've made to objectives, policies or methods?

A. Certainly.

Q. And I presume any changes are in marked-up format there.

A. Yes, all my ch – have you got, has the Court got my marked-up version, the tracked changes version?

Q. Yes.

A. Perhaps if I, rather than go through it step by step, what I've focused on is this iteration is trying to simplify the provisions around two methods, one is identif – within MEMA, managing the adverse effects on the more invasive industrialised forms of a take of flora or fauna from that area, and what I've done is I've listed them for the purposes of the rule as examples of the kind of activities that disturb the seabed and –

- Q. Mr Lawrence, just to interrupt, unfortunately, exhibit E3 is not in marked-up format so you'll have to take us through the relevant changes.
- A. Right. The – at the beginning is an explanation and background which is on the first two pages. That is not going to the plan. It's explanation of what's sought. So I'll move to the amendments sought and the structure of what follows, follows the structure of the proposed coastal environment plan, so it systematically goes through section by section through the plan. So in part 1 there are no changes and that proposal there is just to introduce the idea of management areas that goes with the techniques of zoning and overlays and this is the addition of a management area. So that's introducing the management area. Part 2 is – I really haven't changed, except to fix up some syntax and typographical matters. The major changes that I make are to dealing with the techniques of wāhi tapu and wāhi taonga. In there I've identified that the, that, I've noted that the ASCV 25 and ASC which is the Motiti area and ASCV 9 which is Motunau haven't been mapped, so the first part of the amendment sought is one that the wāhi tapu get mapped within the management area and any that are not mapped in the management area are mapped in the schedule which contains ASCV 25 or ASCV 9. The schedule 6 at the moment has descriptive. It's all words but there's nothing to indicate where these wāhi tapu and wāhi taonga areas are in the schedule. It's not necessary, in my view, to map them all in the schedule if it's a management area that has them mapped. All they need to do in the schedule is state that the wāhi tapu described in the schedule is contained within the map of MNEMA within the management area. If it's not in the management area, it will be in the schedule. So that's the first thing and the second thing is to recognise that wāhi taonga and the ASCV 25 and MNEMA are all linked, so this description here is linking those matters. It's saying that the – and it goes back to its origin and source of being the Motiti Island native hapū management plan which is, if you like, the depository of the written culture values that Mr Nepia has addressed. It's largely his work. So having set that scene, if you like, in the issue, a new issue, we then move to the natural environment area which is mapped and here is where

introduced MNEMA as a management area. And then I've added to what was previously circulated, I've added an objective 53. That was in one of my earlier iterations, if you like, just recognising that the objectives cover the key points of heritage values and Treaty obligations, the relationship of Māori with this MNEMA and the natural character and indigenous biodiversity values of that area and its focus on restoration and restoring the integrity, and functioning and resilience of the coastal ecosystems within that area. So that's that change. The next change I did was, again, focussing on avoiding in policy 2 was just a kind of a rewording to keep the emphasis in B on the biodiversity values and recognising that, if you like, the biodiversity values are not only important to natural character and natural landscapes, but they are also an essential part of the cultural values, so they sit well under each of those headings. Then what I did with the rules is I – taking account of the concerns about the cost of monitoring and the impact that may be had in wāhi taonga of having a stay on all forms of fishing until there was a level of recovery and then an opportunity for application. It seemed to me to be over-elaborate at this stage when the focus in my view having considered further more evidence should be on where the full protection should be – and that's in the identified wāhi tapu – and where the more invasive techniques, the more industrialised take methods were in the wāhi taonga area. So I removed those rules relating to discretionary and controlled and moved, really, to the core of in or out approach of protection or availability, and that's reflected in the prohibited activity rule and its various parts.

1045

THE COURT: JUDGE KIRKPATRICK

Mr Enright, and I'll expect there'll be some questions about this, there's obviously a bit of a problem in this moving during the course of the hearing and so we need to fix on one of these that is going to be what the Court focuses on and what we ask the parties to focus on. So is that going to be E3 now?

MR ENRIGHT:

Yes, except that we haven't produced for you an alternative wording which would be the exclusion approach.

THE COURT: JUDGE KIRKPATRICK

Well, I'm not sure, again, if we should spend time coming up in the middle of the hearing with wording around that. That might be a wasted effort. It also creates issues for other parties in terms of what they need to respond to, and with all of your witnesses now essentially having presented how they could address that through cross-examination. It may be that we can keep in our minds the concepts and talk about those rather than tweaking the words on an ongoing basis.

MR ENRIGHT:

This is the final iteration. I will be cross-examining the relevant aspects on the alternative hypothesis, if you like, which is the exclusion approach.

THE COURT: JUDGE SMITH

I wanted to raise the exclusion approach and having discussed it with my colleagues and heard some fairly cogent answers on the topic, I think it would be fair to say that it was simply a hypothesis which I think is shown to have more problems than the approach you've suggested, so at the end of the day whether there's a – I don't think we should see it as an alternative approach. It's simply looking at another wave of the same issue. But in fact I think we've largely thought at this stage if we're looking at something, something along your lines seems to be more focused than a sort of general band, if I can put it that way.

MR ENRIGHT:

Yes. I've been raising it in examination as it is of interest to the Court and I want there to be evidence on it.

THE COURT: JUDGE KIRKPATRICK

Well, we're testing out various things and I think the issue is, well, to some extent we have an inquisitorial approach to certain things. We have to be on guard about that because this is set up as a hearing with evidence prepared in advance rather than just a general inquiry.

MR ENRIGHT:

That's right, Sir. But on the other hand, this is a novel issue for the Court.

THE COURT: JUDGE KIRKPATRICK

I appreciate that, but again I think we just need to be – you've said that you're going to settle on exhibit E3. We'll no doubt see what other parties have to say in relation to that. I think that given what Mr Lawrence has just gone through in doing a comparison of the various versions I think we can generally keep pace, but I do think we have to say, "Okay, there's a ring around this now."

MR ENRIGHT:

No, I accept that and given I'm closing my case post Mr Lawrence then this is the right time, in my submission.

THE COURT: JUDGE KIRKPATRICK

All right.

1050

EXAMINATION CONTINUES: MR ENRIGHT

Q. There's just one typo for correction, Mr Lawrence, rule 1 prohibited activity, the first line, the first two IBDA but there should be another A there.

A. The indigenous biodiversity area A, yes.

Q. So it should insert area A.

A. IBDAA.

Q. Thank you. And just for clarity –

THE COURT: JUDGE SMITH

So this is now exhibit E4.

EXAMINATION CONTINUES: MR ENRIGHT

Q. Just for clarity, Mr Lawrence, although you refer to objective 53 as newly inserted and, in fact, it was in your earlier versions as well wasn't it?

A. Right, yes.

Q. Thank you. Can you just explain in terms of exhibit E3 the position that now applies to the landing area at Motiti Avocados Limited in terms of the, which is the southern tip of Motiti Island?

A. That's correct and I've taken the carve out by text rather than map approach and under the prohibited activity is provided unless specifically provided for in rule 2 cases where other parts of the plan would apply in other activities and under 2A I had already in an earlier version carved out the existing lawful activities. That's where the barge marine under its current consent, but as a result of further discussions with Motiti Avocados, of course, there's the expiry of a lawful activity and the case where they'd want to seek a renewal, so I've provided a B which as a discretionary activity which is provided for SO. There's 10 and 11. There are two rules there. I think 11 is the appropriate one in the case of renewal which would be a discretionary activity.

Q. So in summary, in terms of Motiti Avocados Limited, it's a discretionary so it's not prohibited?

A. It's not prohibited. It's either lawfully established and permitted or when it comes to renewal be a discretionary activity.

Q. Thank you.

CROSS-EXAMINATION: MR POU

Q. I just really want to question you on exhibit D which is the marked up version which highlights the current position of parties in relation to this topic.

1055

CROSS-EXAMINATION CONTINUES: MR POU

Q. Now just to provide some clarification, in terms of the orange highlight which is the Ngāti Makino or Ngāti Ranginui material, that – the support work for that was performed by yourself as well, wasn't it?

A. That's correct.

Q. And really when we – we have the blue for Motiti and the orange for Ngāti Ranginui and Ngāti Makino but really when we look through it all together those provisions are consistent with each other, aren't they?

A. They are.

Q. And really, and I guess just by way of, again, by way of clarification, the orange bits relate largely to the architecture provisions and the bolt-on bits and the blue bits which relate to the MNEMA, the MNEMA, those are the particular mechanisms that relate to the creation of this particular spatial area, aren't they?

A. Yes, to clarify, it – there are two parts. There's the structure of how spatial plans get put in for the different Māori groups and the brown bits are, if you like, placeholders for first schedule processes –

Q. Yes.

A. – whereas the blue bits are the bits that are proposed and have been overtaken by my E3 for insertion for the spatial plan for Motiti, for the Motiti Natural Environment Management Area.

Q. And I guess another issue to raise is that all of the Māori groups in this proceeding support the orange.

A. Yes.

Q. And none of the Māori groups at least oppose what the Motiti people want to do within their own area in the blue.

A. That's correct, yes.

Q. Now – and I guess the analogy I think was used in an earlier proceeding by His Honour, Judge Smith, was the orange is essentially the Lego blocks that we can provide to bolt the future spatial planning mechanisms are suitable at a later stage but for Motiti that was already here.

A. Yes, that's correct.

Q. Now when I work through the orange bits, without going through all of them, they're drafted in a way that sees the development of spatial areas and spatial zones or management areas in a collaborative sense with, between tangata whenua and the Council.

A. That's correct.

Q. It's correct? And actually reflecting on the way in which this Council in particular has worked collaboratively with tangata whenua groups within the region.

THE COURT: JUDGE KIRKPATRICK

Sorry, was that a question to the witness, Mr Pou, before you dealt to your phone?

CROSS-EXAMINATION CONTINUES: MR POU

Q. Well, in a sense it's a reflection of some of the cases which, as His Honour, Judge Smith, has reflected and Mr Enright and myself have been a part of within this area and that you have been a part of within this area, and it recognises that to a large extent this Council has got a history of working collaboratively to a certain extent with tangata whenua on particular issues.

A. Well, I wouldn't use the word "collaboratively" but I would say working together, but I would hope more collaboratively or (inaudible 10:59:37) –

Q. And the bits in orange around the framework are about developing those bolt-on bits, the architecture, in a way that envisages the development of future marine spatial plans in that more collaborative way?

A. Yes.

Q. And I just want to take you, let's see if we can cut to the chase, to paragraph – to page 58.

THE COURT: JUDGE KIRKPATRICK TO MR POU

Q. This is his main statement?

1100

CROSS-EXAMINATION CONTINUES: MR POU

- Q. And that's the new method 19AA.
- A. Yes.
- Q. Now, that's the method, the mechanism, that the council has proposed to provide space for those future discussions.
- A. It has, yes.
- Q. Now, that doesn't propose a collaborative approach and I guess that's the difference between what's being sought by Ngāti Makino and Ngāti Ranginui and what's being proposed by the council, doesn't it?
- A. That was why I paused when you used the word "collaborative", because having written that I would think that – I think in order to make the spatial plans work well it needs a collaborative approach and it needs participation on both sides because a first scheduled process, of course, at the end of the day involves the council notifying something and maybe adopting something, adopting it as a council initiative for change or it becomes a privately-initiated change and I guess the question is, to what degree would a council be willing to commit to working collaboratively with the view of adopting a first schedule plan change and I hope that would be the preferred path.
- Q. In fact, if you look at that new method, 19AA, while it ostensibly on its face looks like a willingness to work towards that, it actually provides nothing more than what's already in the Resource Management Act at the moment where all of those matters would necessarily need to be considered by any group that was wanting to go through that private effort application for plan change, wouldn't it?
- A. I read that as the council's checklist and some of them are fairly difficult tasks, particularly the one about the degree to which if supported by, you know, the degree to which it's supported by other parties up at the front. I'm bearing in mind some of the comments about if the spatial planning was being initiated for Tauranga Harbour, for instance, it might be extremely difficult to get that degree of consensus before it started.

Q. And I guess that's the issue. If the council is working in partnership with the tangata whenua groups to achieve that, it could potentially increase the ability to obtain that higher level of consensus.

A. That's correct.

CROSS-EXAMINATION: MS HAMM

Q. Good morning, Mr Lawrence. I want to talk to you about the rules so we can get a clear picture of what's proposed. So as I understand it, we've now boiled it down to the one prohibited activity rule. Is that fair?

A. Yes. Well, there's one for wāhi tapu and one for taonga.

Q. Yes. I'll go into them in more detail.

A. Okay.

Q. But if I can put it this way, there was previously a consenting regime within the wāhi taonga.

A. That's correct.

Q. And that's been removed.

A. It's removed, yes.

Q. So we go just to the prohibited activity rule. So point one of that relates to the wāhi tapu areas. Now it talks about nuku tai wāhi tapu. Can you explain what those are?

A. I've been rereading it, I've been multitasking and other change I'd make to rule one in addition to adding "A" is delete the words "and for nuku-tai wāhi tapu." Delete those words, because I've included it in the list.

Q. So it relates to the listed wāhi tapu?

A. It relates to the listed wāhi tapu and you'll notice nuku-tai is in one of the bullet points, so...

1105

Q. So points 1 and 2 of the rule relate to the wāhi tapu areas, but point 3 relates to the whole MNEMA so would also bring in the wāhi taonga is that how you read that?

A. Yes.

Q. So I'll come back to two, but does that mean that within the wāhi taonga, recreational fishing can now continue?

- A. Is not managed by rule.
- Q. It's not managed. So it's not prohibited and it's not managed.
- A. It's certainly not prohibited.
- Q. So just coming back to part 2 of the rule, I see firstly within two renewals been added into the text as well as having the carve out for renewals at point B of that rule.
- A. Yes.
- Q. So can I ask is it your intention to not provide for some structures to be renewed or is that just ...
- A. The intention here is that the prohibition does not apply to renewal of existing structures under SO11 and I may be corrected by Ms Noble and I'm certainly open to that if I've chosen SO11 instead of SO10 and it's my intention that it's the appropriate rule applies for your client's case.
- Q. So you're aware that Motiti Avocados has a consent for two barge landings and only one has been implemented under its consent, so it has consent for two but only one is currently existing?
- A. I'm not aware of the second one. I'm aware of the one that's been acted on.
- Q. If I can just ask you to assume that it has a consent which provides for two barge landings and one of which has been constructed and one is authorised but not constructed. It's not your intention to preclude the giving effect to of that consent is it?
- A. My understanding of what I've written in A is SO6A is the use of a lawfully authorised structure is SO6A, but in writing it I wasn't aware that there was an unacted on consent. Are you referring to the one in – where is it located?
- Q. It's in Wairere Bay.
- A. Right.
- Q. So I suppose it will be answered just with your view as to whether you were intending to provide for that or not?
- A. No it wasn't.
- Q. No.
- A. The intention was to provide for the use of a lawfully authorised structure.

THE COURT: JUDGE SMITH

Well, it's authorised, not established. So your client is one that's established and one that's yet to be authorised.

MS HAMM:

One that's authorised but –

THE COURT: JUDGE SMITH

Sorry, it is authorised but, I mean, in the general approach, a new rule can't take away an existing consent. You can't do that, so I think the use of the word "authorised" must mean that any existing consents continue in effect as a matter of law. Sorry, I'm saying that to you, Ms Hamm, so I mean proceed with questioning this witness, but certainly by using the wording of the rule, he's not altering that.

CROSS-EXAMINATION CONTINUES: MS HAMM

Q. So just sticking with the barge landings generally, you're aware that schedule 15 of the coastal plan indicates that it is appropriate for those barge landings to be provided for at Motiti Island?

A. The schedule and I think somewhere there's a policy relating to, saying that the ones, the landing areas in the Motiti environment plan are appropriate use, but I read that as applying to the coastal environment and not specifically to the coastal marine area and in the case of Wairere Bay, I was not aware that any structures were provided for below mean high water spring and therefore would fit into that category. I saw that that was a policy that provided for the landward side of mean high water spring, which had been established, and in the case of the south western side where it's established, it's established lawfully, but I saw that a consent process would need to take into account the relative values when it came to putting new structures into the environment, into the coastal marine area.

1110

Q. Okay, so let's just stick with that new structures in the coastal marine area. So around Motiti Island it's encircled by an ONFL, isn't it?

- A. Yes.
- Q. So in this post-King Salmon world with an ONFL there anyone who wants to put a new structure there is going to have their work cut out for them, aren't they?
- A. That's correct, and it was my understanding that the wāhi tapu area would make it even more difficult than it already was.
- Q. So beyond barge landings or landing areas, what structures are you concerned about?
- A. It's the activity of disturbing the bed of the – the sea bed, and the activity that would be – the – any occupation of space...
- Q. So I understand that in general terms.
- A. Yep.
- Q. But what are you concerned that there are particular structures that somebody might propose beyond the landing areas that necessitate a prohibited activity rule?
- A. No, the prohibited activity rule is around safeguarding and providing for the restoration of biodiversity values in that area, and on Wairere Bay it's a very shallow area, reef structures, and identified within a wāhi tapu area, well within it, and part of the area that Dr Stirnemann's recently referred to in that south-east side of Motiti, I've considered a very sensitive area that warrants protection. It doesn't prevent, and that's why – it doesn't prevent boats passing through and landing on the beach.
- Q. But given that you accept that anyone is going to have their work cut out for them to try and get consent for a structure in the ONFL which encircles Motiti Island, is there really any need for a prohibited activity rule around structures?
- A. It only applies within the two wāhi tapu areas. That rule applies – is there to reinforce the values that are to be protected and the rest of the capability within Mukutai and Matarehu, Mukutai at the northern end and Matarehu at the southern end.
- Q. Perhaps if we look at that prohibited activity rule in another way, it seems to me that point 1 and point 3 of your proposed rule address the bulk of the Trust's case. Is that not the case?

- A. Yes, it is.
- Q. Most of the evidence is about fishing, industrial fishing techniques. Points 1 and 3 are really the key aspects of that rule, aren't they?
- A. Yes, they are.
- Q. So I just want to check in with you, were you involved in the Hauraki marine spatial planning process?
- A. I dipped in and out of it, yes. It's a very long process.
- Q. Now that has a range of agencies involved in it, doesn't it?
- A. Yep.
- Q. The councils but also the Department of Conservation.
- A. Yes.
- Q. And MPI, and it covers the full range of pressures on the Hauraki Gulf, including fishing.
- A. Yes.
- Q. Tourism.
- A. A wide range.
- Q. A wide range. So it's a very integrated approach to marine spatial planning, isn't it?
- A. I'd use the word "inclusive".
- Q. Inclusive?
- A. Yes.
- 1115
- Q. And in fact it was also very inclusive in terms of its wide-ranging stakeholder involvement, wasn't it?
- A. Yes.
- Q. You had a stakeholder working group?
- A. Yeah.
- Q. And extensive community consultation?
- A. Yes.
- Q. So if I said to you that's really New Zealand's first marine spatial plan, isn't it?
- A. No. I was doing marine spatial planning out of the Town and Country Planning Act.

- Q. Someone's reinvented it.
- A. Okay.
- Q. Well, in recent times, would you accept that that's really the blueprint for marine spatial planning?
- A. Not necessarily. The Hauraki Gulf is a case all of its own and I've had a long involvement with even trying to set up the Hauraki Gulf Marine Park prior to 2000 when it was enacted. It was special because of the extremely intense range of interests and activities and conflicts and contests that warranted something special just to grapple with, and the growth rates. There are elements here with the intensity and extent of issues.
- Q. The trust proposal isn't really anywhere near as integrated or extensive or inclusive, indeed, of stakeholder and community consultation, is it? You'd have to agree with that.
- A. This process?
- Q. Yes.
- A. It's not in the same ballpark.

THE COURT: JUDGE SMITH

The fundamental problem as I understand it – and sorry to interrupt – is that it actually has no status. It is a consultative document which then has to be incorporated in some way within something and nobody at this stage has said what that is going to be. I'm not aware of any RMA process or any MPI process at this stage, but obviously it's anticipated that something will happen to it and I have been harping on about collaboration for as long as I can remember in the day and Mr Pou has just made that very point. The problem in Auckland is that they keep coming up with consultant documents and that's what got Rodney into such deep problems because of the functions they required under the Act. So I don't know the consultative document would be an answer to failing to provide for effective policies and rules and planning. The only other one I'm aware of that I think might be relevant is Marlborough and I think MPI has objected to that one as well, but that's only a proposed plan so that's the only other one we're aware of. I'm just making the point. Although it's called a

plan – I know everyone calls it a plan all the time – it's not in fact an RMA document at all.

CROSS-EXAMINATION: MR ANDERSON

Q. Good morning, Mr Lawrence. I want to take you to exhibit E3 and in particular rule 1. Just help me understand this. Each of the wāhi tapu areas claims an overlay of at least an ONC, an ONFL, or an IBDA. Is that right?

A. That's correct.

Q. So some of them may have more than one, but at least all of them had at least one of those things.

A. One or the other or more.

Q. So it's fair to say that in all of those areas you were addressing different values?

A. Yes, and in different ways but core to them all is when you're looking at natural character, the component of attributes and values that come from biodiversity and ecosystems or when looking at natural landscape and features, again, it's those biotic, if you like, or the biotic that you would expect to be associated with the abiotic – in other words, the landform, the appropriate biodiversity, the appropriate ecosystem and the appropriate landform. So the common element – and of course IBDA needs no further elaboration 'cos that's clearly threatened biotic values so the common element of all those and in the context of wāhi tapu is recognising the cultural value of those in addition or as well as. So the common element is biodiversity and ecosystem health.

1120

Q. But you've accepted already haven't you that the IBDA areas are, I think two of them in the areas, is that Motunau and Otaiti, is that right?

A. And there's one within the ONFL. If you see the red dot to the northeast of Motiti Island, right in close there's an IBDA and I think there's Motiti, there's four of them, but I'll need to –

Q. There might be a very little one at the bottom on Matarehu. I'm just struggling to quite see.

- A. They're clearly marked in Ms Lucas' evidence in her maps. I think there are four.
- Q. Now, you were here when Mr Ranapia gave evidence?
- A. I was.
- Q. And so you've heard and, of course, through the consultation you're aware of the cultural significance of the particular areas to tangata whenua.
- A. Yes.
- Q. And you're aware also that in many cases that's because of the historical association through fishing activities?
- A. (no audible answer 11:21:56).
- Q. Mr Ranapia talked about these areas are special because there were resources taken, kaimoana resources taken from them. Not all of them but some of them?
- A. Yes, but I think what Mr Ranapia is also talking about are deeply spiritual values that go to the heart of a sort of spiritual relationship of Māori with these wāhi tapu areas that need to be handled in a very sensitive way, so I think it's more than seeing it as a resource.
- Q. It's perhaps a – I accept that, but the relationship at least in part is, you know, went to these areas and kaimoana was, you know, provided sustenance to the island in some cases.
- A. But that's one of the things that I need to be, as a planner, I need to be aware that – what I'm aware of is the whole of that MNEMA was a wāhi tapu and over time it's being reduced by one way or another, so what we're looking at is those very precious remnants that are dotted around and the kōrero, the context that I'm constantly reminded of is it was all wāhi tapu, but that was in a time when activities there were managed and according with tikanga and there were no outside influences. What I was trying to do is trying to reconcile that with, in today within the framework of RMA –
- Q. Industrialisation.
- A. – and saying what ingredients of that are relevant and how do we manage effects given that the influence of pūkenga and kaumātua who were the

sole arbiters under the time when it was, the tikanga and the wāhi tapu apply. That doesn't exist so how do we deal with it today and this is the proposal is a way to do it.

- Q. Are you aware, Mr Lawrence of the, that there's a notified rohe moana under the Fisheries Act that goes up slightly to the left part way through the island belonging to Tauranga Moana iwi. There's some kaitiaki appointed under that?

THE COURT: JUDGE KIRKPATRICK TO MR ANDERSON

- Q. Sorry, what's it called?

A. It's the Tauranga Moana Rohe Moana. It's a – it's in map 21 of the Andrew Hill's evidence. It's been notified under the Fisheries Act and some kaitiaki –

- Q. So let's find the document. Is that volume 3, is it? Yes.

A. Sorry, I might have described it wrongly. It's Ngāti Rangi, Ngāti Ranginui and Ngāti Pukenga who have an appointed –

THE COURT: JUDGE SMITH

Sorry, we're trying to find the document. Have you found it?

THE COURT: JUDGE KIRKPATRICK

Is this the one at – well, you don't have the page numbers. Waihi to Cape Runaway proposed in legislative customary areas?

UNIDENTIFIED SPEAKER:

Yes, yes.

UNIDENTIFIED SPEAKER:

7, sorry, something 83, 983?

UNIDENTIFIED SPEAKER:

983, yes, that's it.

THE COURT: JUDGE KIRKPATRICK TO MR ANDERSON

- Q. The one we've looked at before.
- A. Yes, we looked at it about the, the dispute issue around the island.
- Q. The proposed – yes.
- A. The one in grey on the right that's not under dispute. That's been notified and in fact was referred to by His Honour, Judge Smith, in the – earlier in the proceedings.
- Q. That was the hapū management plan that I referred to, but what's the Fisheries, sorry, what did you say it was, a Moana?
- A. Notified Rohe Moana under the Kaimoana Regulations.
- Q. Notified Rohe Moana? Kaimoana?
- A. It's the Rohe Moana.
- Q. Rohe Moana under the...
- A. It's under what's called the Fisheries Kaimoana Regulations.
- Q. Kaimoana Regulations. Are you going to tell us what that means? I have no idea what that means at all.
- A. It's a non-exclusive thing, so it's not – so where kaitiaki are appointed, Your Honour, so I appreciate, so I'm just saying this, where kaitiaki are appointed they can authorise fishing for cultural purposes, for tangi and hui in particular, and within that area it's those particular appointed persons under the Fisheries Act that have that authority to do that within that grey area.

THE COURT: COMMISSIONER LEIJNEN TO MR ANDERSON

- Q. Can they prevent commercial fishing?
- A. Not without – if there was a mātaimai applied for then in that case the general position is of no commercial fishing unless asked for, so a mātaimai's a more restrictive environment.

THE COURT: JUDGE KIRKPATRICK

So is it a taiāpure or mātaimai that's around the mount itself?

MR POU:

It's a mātaimai.

MR ANDERSON:

It's a mātaimai, yes.

THE COURT: JUDGE KIRKPATRICK

Yes, so –

MR POU:

The only taiāpure is around Maketu, Sir.

THE COURT: JUDGE KIRKPATRICK TO MR ANDERSON

Q. Right, yes, so there's one around the mount at the moment. Beyond that it's a non-exclusive...

A. It doesn't affect other people's ability to fish. It's just if you are...

Q. Well, when it's not exclusive can it – does it prevent other hapū from applying for the zone as well?

A. No, it doesn't. All I'm getting at here, I was asking Mr Lawrence whether he was aware of the existence (inaudible 11:28:14) –

Q. So can you tell us when that was registered? Was it the same time that the hapū management plan was registered or at another time?

A. It was quite a way – 2005.

MR POU:

2005, I think, Sir.

THE COURT: JUDGE KIRKPATRICK

That's quite a lot earlier because I think, Ms Hill will correct me, I think the hapū management plan was registered in 2015, I think, about October, as I recall.

MS HILL:

I couldn't tell, Sir. You've got a better memory than I do, Sir.

THE COURT: JUDGE KIRKPATRICK

Well, it's because it came up on that methyl bromide case. That's why I remember it, because that's where we first learnt about the...

MS HILL:

That was the iwi management plan.

THE COURT: JUDGE KIRKPATRICK

The iwi management plan, sorry.

MS HILL:

And that was very recent –

THE COURT: JUDGE KIRKPATRICK

But that's where – it shows the same area.

MR POU:

There's the Awanui plan. That has a second iteration or something.

THE COURT: JUDGE KIRKPATRICK

Interestingly, it includes the land as well between the two which yours doesn't, so that's interesting.

CROSS-EXAMINATION CONTINUES: MR ANDERSON

Q. You're aware of that. So I guess turning back to your, to the proposed rules and the wāhi tapu, so this proposal in those areas would include all kinds of fishing, wouldn't it, so it has to be customary, recreational and commercial (inaudible 11:29:15) within wāhi tapu?

A. Yes. So the essential bit about the wāhi tapu is it applies to everybody. It's not an exclusive area that is to reserve an opportunity for Māori to use some customary fishery approach. It's an identification of areas for full protection of biodiversity and ecosystem recovery. It doesn't prevent – and that's one of the reasons why I've removed the rule over wāhi taonga is to provide the opportunity for fishing methods other than those invasive, more invasive industrialised to be able to be applied for within those areas. In terms of referring to other legislation and other techniques that you're referring to, I mean, I've acted for the customary group that managed the Motiti here in Tauranga and I'm familiar with the way they

work and what their purpose is. In a way, I look at it as a planner – not as a lawyer – that it's a bit like getting a licence to take a tour out in a native forest. An entitlement or an obligation or a process which people can go through in order to be able to take or remove or harvest some aspects, some of those resources within the ecosystem. Whereas in terms of the planning approach it's about protecting those, not allocating.

THE COURT ADDRESSES COUNSEL – TIMING

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.53 AM**CROSS-EXAMINATION CONTINUES: MR ANDERSON**

Q. I was asking you, Mr Lawrence, to compare rules 1 and 3. 1 is the complete prohibition of all kinds of fishing and 3 is the focus on the more invasive types of fishing.

A. Yes.

Q. I'll ask you to elaborate on why an approach like rule 3 wouldn't work for the wāhi tapu areas.

A. All right. I have to preface my answer saying that tikanga and cultural values would suggest that all wāhi tapu should be treated the same. I am recommending the ones for the full protection treatment on the basis of the overlays. So my recommendation is that it's the list in one are there with the full protection in order to observe the special wāhi tapu quality that exists within those areas and I'm not degrading, taking away the fact that there are some wāhi tapu areas are not in that list that my cultural advisors would say should be. But I'm recommending the shorter list because of the special cultural values in addition to their values as natural character, landscapes and biodiversity.

Q. Would you accept, though, Mr Lawrence, that once you go for a prohibition approach it's quite a blunt tool that you're using? Because you're covering everything, you're not dealing with particular methods that are identified as having particular adverse effects?

A. Yeah, I considered what the effect might be of a rod and reel, for instance, in the wāhi tapu area to take up. But if it's the –

Q. Well perhaps within the buffer zone is what, I mean there's the wāhi tapu itself and then obviously the area the one nautical mile around it is, I mean I think everyone's agreed that that's a fairly what's the word, just a chosen number rather than any particular – you know, one nautical mile has been chosen because it's convenient.

A. Well, it's chosen for a number of reasons. It's chosen to bring into – bring the knowledge that we have around the effectiveness of protection,

marine-protected areas and distances and you've heard a lot of evidence from experts in that field about that one nautical mile might be enough, you know. Rather than getting into that, the question was trying to bring a science perspective to a cultural perspective and putting the two together so that they actually had dual meaning. It was recognising within that area there are wāhi tapu values and those wāhi tapu values have to do with restoration of mana, mauri, tapu and that has, if you like, Western scientific meaning in terms of sustainability and biodiversity terms.

Q. I guess what I'm trying to explore with you, Mr Lawrence, is once you get into that prohibition space you take out all forms of fishing which may be less invasive so cultural fishing, for example, could well be done in accordance with tikanga and have a lesser impact.

A. Well, in terms of tikanga I defer to tangata whenua and they're saying wāhi tapu. We can do our cultural take in wāhi taonga areas.

Q. Once you get into a prohibition you're aware, Mr Lawrence, that you can't prefer one sector over another, can you? You have to – otherwise it would be unenforceable.

A. That's partly to recognise the fact that while the recreation of fishermen might be – have less invasive techniques it's a fast-growing – as more and more people get access to boats that go further, discretionary income gives them an opportunity to refuel them more often, these are very accessible locations and it's very important, I think, that while the techniques mightn't be as invasive as the ones that are listed in rule 3, it's that potential impact of a growing sector of recreational fishing that would have an impact on the quality of the ecosystem.

Q. So you accept under the RMA you can't just carve out recreational customary and commercial.

A. I agree, yes.

Q. Would you accept also that under the Fisheries Act you can do that, you can carve out particular sectors, or are you aware of that capability?

A. Yes, I'm aware of that.

Q. The point I'm making is that because of those constraints, the constraint around what would be enforceable, it does mean that the prohibition has

to be quite blunt. It has to cover everyone. It can't be targeted to what you actually see as the type of fishing that's the harm.

- A. Yes, and I understand the question and the point you're making. What I say is, these wāhi tapu areas have been identified on the basis that there's no reason to include a form of take to a particular group because it's the restoration that's paramount and there are other locations to provide for different groups.

1200

CROSS-EXAMINATION: MS HILL

- Q. Good afternoon Mr Lawrence. I just want to begin with a topic that my friend Mr Pou was exploring with you that hasn't loomed large in the hearing to date and that is the tangata whenua development zones and that is the particular interest of Mr Pou's clients?
- A. Yes.
- Q. Now as I understand that you were originally an expert that gave evidence on behalf of his clients Ngāti Mākinō and Ngāti Ranginui in the iwi resource management hearing?
- A. I was, yes.
- Q. So the provisions that his client now supports are the provisions that you prepared and advised on?
- A. That's correct, yes.
- Q. He took you to method 19AA which is Council's proposal for dealing with these tangata whenua development zones. So you accept that Council has endeavoured to come up with a method that would allow for future development zones for tangata whenua within the plan?
- A. Yes. I see that it's done that. I think that, and yes looking at particularly that method 19AA I've said that it's already said that I think it's a checklist that the Council says it wants to go through and I think it's a very high ask in the form that it currently is.

THE COURT: JUDGE SMITH TO MS HILL

- Q. Can I ask one question about that, because this is where we're getting into this, the overlap of the various cases. We're having the iwi

management, I think there's at least a callover, I can't remember exactly what it is next week, it's coming up –

A. It is a hearing, just a submissions only Sir.

Q. Is it? yes. Is 19AA agreed or is it still at - is that it coming out under that or is it, is 19A a subject of this hearing or the subject of the iwi management hearing?

A. It's the subject of this hearing. So remembering that this hearing involves not only MRMT's appeal but the marine spatial planning elements of Makino and Ranginui's appeal.

Q. But in the iwi management case this issue came up too and there's a crossover between the two isn't there?

A. The sets of proceedings are interrelated in many ways Sir. This particular provision –

Q. Well I'm – maybe I think Mr Pou will say next week to us in relation to the iwi management that he's not very happy with 19AA or have the parties agreed on it? That's really what I'm asking.

A. Yeah. Well it's an interesting question because that – you may recall Sir that it was agreed between the parties that... Okay. So what happened was that the parties agreed that the marine spatial planning aspects of that appeal, so of that, those proceedings would be heard in these proceedings and the tangata whenua development zone appeal points of Makino and Ranginui fall to be heard and considered by this Court in these proceedings and the parties went to mediation and Council's proposal to address the development zone part of it which is talking about enabling stuff that tangata whenua want to do, that is Council's proposal to address that –

Q. But it isn't settled at this stage?

A. No. That's right, and so that's why I'm exploring it with the witness.

Q. I'm not criticising. I'm just trying to get us all on the same page. So there is a crossover with iwi management and it must be said that that provision in particular, I don't think anyone ever turned their mind to whether it fitted within this one or the other one. Seemed to have elements in both I agree. I have no problem. I'm not suggesting it for a moment that you

shouldn't ask questions about it, actually very helpful. What I was just trying to understand is that it isn't settled between the parties and that's still at large.

A. No it isn't Sir and I appreciate – I will be taking the Court through all of those things in my submissions so you have the big picture, but for now I need to put the questions to Mr Lawrence. So –

Q. Thank you for that. It just brings everyone else up to speed because not everyone's involved in that hearing of course.

A. Thank you. That's helpful.

CROSS-EXAMINATION CONTINUES: MS HILL

Q. So this new method 19AA is just clarified is Council's proposal to deal with the development aspirations of tangata whenua as opposed to what MRMT is focused on which is the restoration aspect. So you appreciate they're slightly different things?

A. I think they're different things and I'd state it this way. I'd say the Motiti one is around a spatial plan to do restoration. The – this method here is for a spatial plan. It is not yet determined the mix of development protection elements and I suspect it will be a multi-purpose not just –

1205

THE COURT: JUDGE SMITH

Q. So that addresses how future spatial planning might be approached?

A. How it might be approached.

CROSS-EXAMINATION CONTINUES: MS HILL

Q. And that's really where I'm getting to just as a starting proposition to check that we're on the same page that we appreciate that the aspirations are not yet sufficiently developed at this point to allow – they're not in an MRMT position where –

A. No.

Q. – they've given thought to it and are wanting to put something specific in, so what we're trying to do, and I think to use your words, is put some architectural framework into the plan now so that when they are in a

position and have crystallised those ideas and aspirations that we can then go through a first schedule process –

A. Yes.

Q. – is that you're understanding?

A. Correct.

Q. So you accept that we would need a future first schedule planning process to develop?

A. I do, yes.

THE COURT: JUDGE SMITH

Can I just check because I thought that was agreed also in the iwi management matter, Mr Pou?

MR POU:

Yes Sir.

THE COURT: JUDGE SMITH

So there is a – that's where the crossover is. The parties have agreed that we're trying to establish for those matters a process and, yes, it does relate to marine spatial planning but it's an architecture not a provision?

MR POU:

That's right. Ms Hill's reading from my submissions, Sir.

CROSS-EXAMINATION CONTINUES: MS HILL

Q. It's a fundamental point to clarify and I'm glad that we've done that, so now that we've done that I would like to test with you – the next question to check is have any of the appellants put forward alternative provision for this? How do you envisage that it would work? If you're not happy with council's arrangement, what is your proposal to deal with that future process?

A. Well, firstly I didn't prepare evidence on that. I don't have instructions from either of the interested parties in respect to that, so your question to me now as I'm looking at it –

- Q. Your opinion as a planner.
- A. Well, yes, I'm looking at it now but I'm having to make up an answer while I read it and, to get familiar with it because I put it to one side.
- Q. Okay, well, that's quite important because the – so perhaps I could break it down there. There's two parts to it. The first part is about establishing or getting what the proposal is and I put it to you that council isn't in a position to come up with that. That part of it needs to be provided by tangata whenua?
- A. Well, the difficulty I have with it is that often – any group likes to sit down with council and scope out a framework of how things would be approached and to that extent and if the collaborative approach was being taken, I would see it as an incremental growth of a project that would fit the kaupapa of council and the kaupapa of the tangata whenua group and so I think lists are helpful and in terms of it being a check list, I think it's fair enough to say that that's council's check list, but I would – I think it's a – if that's a starting point and there's a discussion about what's relevant in particular context of a particular proposal, I'm reasonably comfortable with that, but if that's an end-point of what has to be done before council will sit down with a tangata whenua group, I think it's a big ask.
- Q. So your concern is that the language is not so prescriptive that there's a restricted number of considerations that those are the only ones that can be taken into account, is that your point?
- A. Well, I think the first part of it is, I don't have a lot of problems with the first part. The second part is getting into the kind of wor – things that would be done in order to advance an understanding of what the proposal is and where it's going to go, but I recognise this is not a rule. It's council's check list. It's not something I'd make a big issue of and I'm not speaking for the client.

1210

- Q. Okay. Moving on to the topic that's been occupying us for the past couple of days, my learned friends have asked a number of questions around it. I have a couple of questions that weren't covered off. So your first part

is, I appreciate, just in explanation so you're not envisioning that that text would go into the plan?

A. No.

Q. On the second page, I see one of the changes that you've made is to refer to tangata whenua and you've deleted having those mana whenua over the rohe containing the management area.

A. Yes.

Q. What was your reason for making that change?

A. I sometimes forget which jurisdiction I'm in. If I'm in Auckland, I'll be talking about mana whenua. In this context, I'll be talking about iwi but in the context of Motiti I'm talking about tangata whenua.

Q. It's using a term that's more acceptable or more relevant rather than intending to say that you're not referring – the question is, do you consider that only tangata whenua that had mana moana over the rohe are the people that would be covered by this proposal, or do you accept that it's going to apply in the same way to all tangata whenua?

A. I don't really see the difference. I mean, to me tangata whenua are people who whakapapa to the area and it's a term that tangata whenua would be established by whakapapa.

Q. Okay. I'll give you an example of why it could potentially be relevant and you will have heard Mr Ranapia provide his evidence yesterday.

A. Yes.

Q. He explained that there are different kinds of tapu that apply to these wāhi tapu.

A. Mhm.

Q. And he gave an example in relation to Motunau, I believe, and said that sometimes the tapu is lifted to allow access to the resorts.

A. Yes.

Q. So doesn't this proposal by prohibiting anybody from accessing the wāhi tapu areas potentially restrict groups of tangata whenua – whoever they may be – from having a cultural relationship with that area through customary collection of resources or using the resources, fishing, for an example.

- A. I don't think my answer is any different from that than the question I was asked previously. The traditional form of wāhi tapu was where all the people affected, generally, were able to seek a consent in accordance with tikanga and there was a process or procedure to go through to deal with those issues. Now in the 21st century and under the RMA framework what we're trying to do is marry a traditional approach to a sustainable resource management framework and the method of providing access or not in terms of Māori values and culture of the tangata whenua are saying these areas should be closed for certain forms of activity in order to encourage the recovery of biodiversity and restore the health of that environment. Now, what they may do in 10 years' time when this plan is reviewed is a decision for future generations to make, but what they're saying now is these areas should be closed and when we put it together with the science background we're saying if these areas are closed we would expect some recovery and restoration of ecological health and future generations can make decisions through the plan as to whether the prohibitions carry on or whether they're not. So to me it's not a question, the question of accessibility is not in the hands of the pūkenga any longer and that's what... I don't know whether I can take that any further but the background to this is the parties that I've provided planning advice to started by not wanting to even participate in the planning process because they didn't think it was relevant. The fact that they are here and participating is, will see the relevance of that within the context of the RMA.

1215

- Q. Do you understand that one of the concerns that the Council has is that the, all of the various groups of tangata whenua who might have a relationship with that area and you would have heard me put the Court's findings in the *Rena* decision to some of the witnesses, they're not all represented by Motiti Rohe Moana Trust are they?
- A. No but they have – my understanding in terms of the planning process is it's always been very clear what the scope of what Motiti Rohe Moana Trust was seeking and parties, all the parties that I've

had contact with know what is being sought and they are choosing to not participate or to participate in the case of Makino and Ranginui.

Q. Well I'm going to make submissions around the scope point and I don't expect you to form a legal opinion about it. I'd like to put it to you as a planner, do you consider that it is appropriate for a prohibition to be put in a plan that may affect the parties who haven't been consulted?

A. Put a prohibition in respect to parties who have not been consulted.

Q. Well you're stopping completely access to those areas and I appreciate the reasons for it –

A. No, my understanding is it's not about access. It's about restricting one particular form of activity or forms of activity but the very important reason for maintaining access is to encourage the relationship not onl - of all parties regardless of whether they're other Māori groups or not to in fact enjoy the benefits of the recovery. So it's a way of tangata whenua in terms of reciprocity sharing the opportunities with others. So it's not an exclusive proposal.

Q. So access was the wrong word to use and you'll forgive me because I am struggling to keep up with the various iterations of the rules. But do you consider that it's appropriate to restrict access to a resource, and in this case we're talking about the ability to take fish. So you accept that the rules prohibit, your proposal prohibits that within one nautical mile radii of a number of areas and three nautical miles around Otaiti?

A. Yes.

Q. You accept that? You acknowledge that those are areas that, well do you accept Mr Ranapia's evidence that some of those areas are areas where customary fishing has occurred?

A. Yes.

Q. So your proposal would prevent that happening?

A. It's a, it's something that is a reflection of the current view as to what's necessary in order to maintain a recovery, to safeguard the recovery of the ecosystem.

1220

Q. But that's the current view of your client isn't it?

- A. Absolutely and shared by some groups positively –
- Q. Some, but not all of the groups and we've already heard, for example, that Te Whānau-a-Tauwhao are not represented here and that Mr Ranapia and Mr Matehaere do not consider that they should be, so what about that hapū or that group, people that is affiliated or associated with that area?
- A. Well, Mr Ranapia and Dr Kahotea and myself have had long and ongoing relationship with Tauwhao and, in fact, I think it was as recently as two years ago 2015, Dr Kahotea and Mr Ranapia actually took some people from Tauwhao on an undertaking that I'd made with them around some of the sites that had been protected on Motiti Island and for their whānau it was the first time they'd been on the island in a 150 years, so it was a very special occasion and they're not excluded and I don't think they feel left out, but I don't think we need to read too much into them not being there.
- Q. You don't refer at all in your evidence to the absence of consultation. Did you not consider that that was a relevant consideration? You're just relying on this scope proceeding that's already occurred?
- A. Well, I was reassured by the Court's finding in respect to scope. I'm also, as a planner, reassured by the number of parties that participated in first workshops and then mediations in the process of looking at the provisions of the district plan and it was always before all –

THE COURT: JUDGE SMITH

- Q. This is the Motiti District Plan you mean?
- A. This is this coastal plan?
- Q. The RCEP, yes, that's a regional plan not a –
- A. Sorry, the regional plan, the regional coast plan process involved workshops and a number of mediation groups and while the detail was not discussed, the concept of using methods to manage the effects of fishing were constantly before people and people in all of those decided whether or not they were going to engage in the process or not.

CROSS-EXAMINATION CONTINUES: MS HILL

Q. But hang on a minute, because until recently nobody was actually aware that the legal position was that these kind of provisions that you're now proposing would be included?

THE COURT: JUDGE SMITH

Well, let's be clear on this. What do you mean by "recently"? You've applied for strike out in 2015 didn't you?

MS HILL:

Well, until the High Court's decision, Sir, the matter hadn't been determined.

THE COURT: JUDGE SMITH

Well, there was a strike out application prior to that because it was argued that those matters weren't raised there as I recall. I think Mr Cooney ran it but no doubt – I think that was 2015 wasn't it?

MS HILL:

I'm aware of the strike out which I've already raised that matter with the witness. My point –

THE COURT: JUDGE SMITH

That's right and then there was an application for declaration about fishing issues which I required just about everybody I could conceivably think of in New Zealand to be notified. I think it required all iwis to be advised, local Government New Zealand, that's how the Minister became involved, as I recall, and the question then is that that seems to have noticed to the world that fishing restrictions were at large in this case.

MS HILL:

Yes, I will put the question differently because I don't want to get into scope –

THE COURT: JUDGE SMITH

Because I've got to say my concern is there's a suggestion that the Court has acted in a cupboard on this without being very clear and I think that that cannot be correct quite truthfully when you look at all of the documents the Court's issued and numerous minutes requiring notification, clarification of the issues, mediation and all of these issues also came up at *Rena* as I recall. There was huge mediations.

MS HILL:

That's not my suggestion at all, Sir, and I will address the point in submissions. My questions around consultation which is a different point.

CROSS-EXAMINATION CONTINUES: MS HILL

Q. So do you accept that the purpose of consultation and plan proceeding, so council's required to consult with parties prior to the notification of a plan so through the development of a plan, you acknowledge that?

A. Yes.

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Q. And the purpose of that is to get as much input from as many parties as possible into the development of the planned provisions.

A. Correct.

Q. To test scenarios and to ensure that people's rights are adequately taken into account.

A. Yes.

Q. So you would acknowledge, then, that that process hasn't occurred here, has it? We as recently as this morning have received an iteration of a very detailed set of provisions that are going to have significant implication that only a very limited number of parties have had input into. Do you accept that?

A. I accept part of it. The process has –

THE COURT: JUDGE SMITH

I must say I'm confused now because we were just discussing what consultation we were talking about. Schedule 1 consultation is a duty on the council. It's not a duty on the party to make a submission to the council.

MS HILL:

No, I wasn't suggesting that at all, Sir.

THE COURT: JUDGE SMITH

I don't really follow the point, then.

MS HILL:

Well, the point is it's a process that is undertaken prior to the notification of a plan to develop and test concepts and ensure people have participation. It's a fundamental proposition of the Act which is to involve the public and the development.

THE COURT: JUDGE SMITH

Well, with respect, I've got the section in front of me and it requires the Minister for the Environment and other Ministers of the Crown, local authorities and tangata whenua and any customary groups. A very limited number of groups have to be consulted.

MS HILL:

But persons that are highly relevant to these proceedings.

THE COURT: JUDGE SMITH

You may consult anyone else if you wish. It's up to the council. The point I'm making is that the issue about controls within the plan, the rules within the plan to achieve customary – was the subject of the RPS hearing that Mr Pou was involved in and a decision of this Court saying it would be contained within rules within the plan. No surprises. That's why I'm getting a little bit defensive,

because it appears to me that it's an attack on a whole series of decisions this Court made and the suggestion that this was all done in secret.

MS HILL:

I'm not sure how you can take that from what I put to the witness, Sir. The point is that these are provisions in a plan that are going to have a significant effect on people. I don't think anyone can deny that. It's a prohibited activity which is the highest standard that you can possibly put.

THE COURT: JUDGE SMITH

Well, it can't be suggested that a party can't seek in submission for such an activity. That was the subject of a hearing before this Court which we made a ruling on. So it's clearly possible to make a submission and if you're saying that a duty arises at that point on the submitter to undertake consultation or the council that's certainly novel.

MS HILL:

That's not at all what I'm saying. The point I am making is that there's a purpose for consultation which is to ensure that you get the best set of provisions into a plan, particularly when they're going to have effects on people. My point simply is that that process – I'm not saying there's any – I'm not judging why it hasn't come about. I'm just saying do you appreciate that that process has not occurred in this case.

WITNESS:

I think it has occurred and what's occurred is that people fall away – in any planning process – as topics become more and more focused until those that are left at the end of the process are the ones that want to engage in the fine print. That's my understanding of the way the planning process works and when we got to the point – I mean, I rely on the fact this Court made a decision in terms of scope and the parties that have been identified.

THE COURT: JUDGE SMITH TO MS HILL

Q. We seem to be straying well away from the facts because my recollection is that the issue was raised explicitly before we got to the plan stage, explicitly by MRMT and I think others about spatial planning. The council made a decision – my understanding from Ms Noble’s evidence is that the council made a decision that it couldn’t do anything about that, this is about fishing issues, because it had no jurisdiction. So it was raised and they put it to one side, but they didn’t go on to consider marine spatial planning. Now, obviously we’ve got to hear from Ms Noble as to why that was the case. It’s still unclear why it wasn’t given it was, apparently, from everything I’ve done and I’ve been involved, what, in at least a dozen cases, it’s been on the cards not only in respect of the water but in respect of rivers, et cetera, for a considerable period of time and was in the regional plan that they would address, look into finding methods I think or, you know, trying to find a way forward on it and that’s what Ms Noble says is that we still want to undertake that process . But I’ve got to say I find it difficult to come to grips with an assertion that this was done in a cupboard.

1230

A. Sir, it’s easy if you address, put those questions to me in submission. What I’m doing is putting an element of my client’s case to the witness and a fundamental concern of the Council’s –

Q. That there’s been no consultation -

A. – is that this, and I’m not saying, and this is why it’s easier to address it in submissions, but the point is that Council has a high level of discomfort with provisions being put in the plan that haven’t been tested with the communities and the relevant people that are going to be affected.

Q. So that’s not as I understand the evidence of Ms Noble who indicated these issues were raised at the consultation phase. Is that not correct? Have we misunderstood?

A. What do you mean by “these issues?”

Q. Well issues about tangata whenua iwi management controls, issues about marine spatial planning and issues in particular about real concerns

about the impact of fishing on the rohe moana raised not only by this party but I understand by a whole series of parties.

A. No, that's not the evidence Sir.

Q. Okay. Well that'll be interesting to see because it's certainly not as I read the evidence. I didn't think there was actually a factual dispute about those issues.

A. Well there certainly is in relation to fishing because as we know no one until very recently was aware that this was a function of the Council's.

Q. Well that's a different issue to whether it was raised.

A. Well it also wasn't.

Q. Okay. Well come to it because I thought Ms Noble acknowledged that the Council decided it couldn't proceed with those because it had no jurisdiction.

A. It was raised by one submitter which was Dr Grace. So it wasn't an issue that was widely raised and Council responded to it along the lines Your Honour's just pointed out.

Q. So the discussions we had in the RPS about the fishery and all of the attributes and values we had days and days of arguments there was no discussion about fisheries. This is what I'm finding difficult. I don't want this Court to have to trawl through almost thousands of pages of decisions to show where this tracks through this proceedings and I thought everyone accepted that this issue has been live for a long time. If you're saying it's not, that means I'm going to have to go back to those decisions on the RPS and in fact earlier because there's other decisions around the issue but it's going to be complicated for the Court to go right back –

A. The point - it isn't that the issue of marine spatial planning wasn't raised and it isn't that concerns about fishing weren't raised. The point is that Council understood that the intention was to have a marine spatial planning exercise. It didn't understand that we were talking about prohibition on fishing in the plan and so they're quite different propositions.

- Q. Okay. Well I can't take it any further. Unfortunately not everyone on the - I don't think anyone in the Court has been involved in all the decisions so it's complex for the Court to come to grips with a lot of those things.
- A. And I've put questions on that topic to the witness and he's answered but it was important that I put them to him because it is an element of Council's case –
- Q. I have no – my concern is an assertion that it's essentially come out of nowhere. That's my concern and I retain the concern. We've discussed it. I can't take it any further.

CROSS-EXAMINATION CONTINUES: MS HILL

- Q. So the next element of attached exhibit E4 that I wanted to discuss relates to policy 2. And firstly it's a point of clarification. So 2A, "Avoid adverse effects on Te Tau o Taiti and within the wāhi tapu areas." So Te Tau o Taiti, that area you're referring to there in that policy is that the three nautical mile area or is that literally just the reef?
- A. In policy terms it's to do with the feature and the ecological values related to it. It's the feature and associated waters and that becomes more specific in the rules set of a map in terms of the three nautical miles. So the policy terms it's not specific. The how to meet that policy is through defining the three nautical miles and having a prohibition within it.

1235

- Q. But that avoidance of adverse effects that doesn't just relate to fishing? That policy would apply and detach the other activities that exist in the coastal plan as well so that avoidance of adverse effects were required in relation to those activities?
- A. Yes and the main thrust of that is to enable the rejuvenation of natural and cultural heritage and to restore indigenous biodiversity to protect Māori, tapu and mana and to safeguard taonga species. So that's the thrust of it.
- Q. So it's not just limited to the indigenous biodiversity A area though is it because you're seeking –
- A. No.

- Q. – an avoidance policy which would have operative effect through the attachment of rules requiring avoidance, is that how you understand it?
- A. Yes, my understanding is the IBDA areas are difficult to identify spatially and what MNEMA with the nautical mile radius around different runs of them is a way of defining – encapsulating a way of getting, identifying them in a way that the ecologist can support and it's not overstating the case because the one nautical mile seems to be at the margin of maybe underdoing it, not going far enough, so it's a cautious and in my terms by advancing one nautical mile, I'm trying, I'm working at the minimum end of the scale not trying to reach out further that some ecologists perhaps would like to.
- Q. But hang on a minute because the indigo biodiversity A areas has already been spatially defined in the plan hasn't it? You can see on Otaiti the area where it's shown?
- A. Well, if it is then it's all the more important to have these wider areas that safeguard the ecosystem within which those species require, that support some of the important species that warrant that identification, so I don't think the ecological evidence in my mind, and it's for the Court to decide, supports the idea that it's a spot or a very limited area. There's a network that needs to be taken account of.
- Q. You'd accept that that's the way the plan has dealt with that area and it's defined that, and that is now operative, it deemed an operative area in the plan because no one has challenged it, the definition of that.
- A. Well, yes, and I'm not taking it any further than MNEMA and the wāhi tapu.
- Q. So that was what I was trying to establish so that's in addition to the identified IBDA area so you are really seeking a similar hierarchy as IBDA which is an avoidance hierarchy for that much wider area that you've shown, is that what you're aiming at there?
- A. Yes it is. It's saying in order to achieve those values within the space.
- Q. And a similar question then to be, an at the end there you've got, "Avoid adverse effects on biodiversity values." Are you referring to any values

there or are you just referring to the values that have already been identified as the IBDA high or outstanding values?

- A. All the values, all the biodiversity values that are necessary to make, to safeguard the life supporting system for those threatened species and in that regard I refer to, there's a regional policy statement provision around safeguarding the life supporting system of ecosystems and so on. I just can't remember offhand what number it is. But there's a directive around safeguarding. This goes further than the current plan, relying on what's there but going further in this space.

1240

- Q. You would appreciate that the way that the plan deals with biodiversity values and it does it very clearly is to identify areas which meet the policy 11 A criteria.

A. Yes.

- Q. So you then have a reference point to understand what the particular values are that are sought to be avoided.

A. Yes.

- Q. Because you'd appreciate that avoidance of effects is a high standard.

A. Yes.

- Q. Potentially very high. So what your proposal does is extend that out to a generic description of biodiversity values, so how is somebody going to know what the values are that need to be avoided based on your wording?

- A. Well, the avoidance is directed towards in the wāhi tapu areas is very specific in this context around removing or taking any indigenous flora and fauna because of the very important and significant contribution they make in the context of an ecosystem as they are and if there's no take there's an opportunity for natural restoration and that in fact the biodiversity values would change over time and the expectation is they will improve and therefore achieve the restoration of mauri, mana and tapu.

- Q. But you'd accept that none of the taonga fish species that have been listed in your schedule are actually IBDA policy 11A species, are they?

- A. Well, they are taonga.
- Q. With the exception of the birds, I'm talking about the fish. None of the fish are, are they?
- A. I guess my response in terms of the threatened species in the IBDA is they survive and become less threatened if appropriate steps are taken to safeguard the ecosystems on which their future viability depends and it's, we've heard, very complex and quite an extensive network of things, of natural processes, that need to be in place so that there's a, those threatened species have an ongoing, sustainable ecosystem for their survival. So the protections are around not necessarily stopping the birds' necks being wrung but the viability of their, the life supporting system for them is left in place. That's the important emphasis there. So it's not necessarily about directly dealing with the threatened species but making sure that the life supporting systems for their survival are protected.
- Q. So you accept that your regime proposes something higher than what the coastal policy statement requires, that you're saying that it's necessary in this case?
- A. Well, no I'm... My response is that when you read New Zealand coastal policies together, and I'm referring to 11, 13, 14 and 15, when you read them together it's not just about the indigenous taxa. I'm using that IBDA as an indicator of a need, of a further rationale for the wāhi tapu and by giving it a one nautical mile protection for taonga, for Māori, for the life force of the area and for the biodiversity that's necessary to support it, it's meeting these obligations and if it's not in terms of, if it's not adequately proven in terms of western science, there is the whole element of the concept of mātauranga and the element of Māori tapu and the best example I can use is go back to *Rena* and say that certainly for – if the Māori is destroyed by foreign objects being abandoned within a wāhi tapu, Māori, as Mr Ranapia said, can be restored by other measures and what I saw was a bountiful recovery, I saw with my own eyes, a bountiful recovery of biodiversity around Otaiti as a result of the closure to fishing. It was so, and I'm a layperson when it comes to ecology, but it was very clear and transparent to a layperson that there was a bountiful recovery.

Now that is also considered the restoration of Māori and it's replicating that that is an opportunity to restore Māori.

Q. I'm not sure that directly answered the question but, anyway, the last question I have relates to enforcement. So the new regime no longer proposes a prohibition within the green, the wāhi taonga, correct, so the only areas that will, there will be a need for enforcement apart from the invasive forms of fishing, right, are the – how many of them are there, 11 circles, the new wāhi tapu areas we've identified.

A. Mhm.

Q. I think some of the ecologists propose that they intended this would be largely self-policing, is that your opinion or your design as well?

A. Yes. My approach – it tends to become self-policing and with modern age like marineMate and cellphones and GPS fixes and Apps and things, it's not hard for someone to be out on a boat and to have the right App to know that whether they, how close they are to a boundary of a wāhi tapu. I don't see it a problem in enforcement as to knowing where they are. I think the problem of enforcement is people's attitudes.

Q. But given that you're now going to have a large number of recreational fishing occurring within the wider area, it has to be like that, doesn't it, because it's going to be very difficult for council to ascertain whether someone's in or out and whether they're actually taking a fish or not on which side of the line they are, so really the regime is going to have to rely on the self-policing concept that you just described?

A. Yes it is.

THE COURT: JUDGE SMITH

And I assume complaints as well just as other regional council rules, yes.

MS HILL:

That's my next question, yes.

CROSS-EXAMINATION CONTINUES: MS HILL

Q. Because councils generally address enforcement in large areas like this based on complaints. They can't constantly be having someone out in

the water. So given the way that this has come about, and I'm not going to get back into that again in terms of how, but given the way that it has come about, which is that there could potentially be prohibited rules in a plan, and they're going to stop recreational fishing in still a reasonably large area, particularly around Otaiti and we know that fishing occurs there, Council's going to get a lot of complaints, isn't it, because it's going to have people either deliberately flouting it because they feel that they were cut out of the process or they're not going to be aware of it, so how do you envisage Council should deal with those complaints?

1250

- A. Right. Well, I think every Council – there are very few councils I know that deal with it any other way than by responding to complaints and that's about any form of enforcement or policing, and I've run regimes and I have a management protocol that's different from some of my colleagues but it was always having a first response was information and assistance and education, and then a cascading approach to – or ranking up the methodology, and I would see that it may – people would have to expect it would take a time to bed, bed in, like anything new, and there would be a whole level of – the Council's own approach of education and advocacy is a real opportunity to bring that into play within the context of regulation, and my feeling is in the end that most of these places peoples adapt their fishing methods and they'll fish at the edges, and that's what this whole edge effect that all the ecologists have talked about is the pattern of change that occurs in what happens.
- Q. But in your – given that we're talking about wāhi tapu areas, in recognition of that, isn't Council going to be expected by your client to take strong action against people that are going into these areas, that – you said deal with complaint, what are you envisaging that it would do?
- A. Well, they've heard my response to you and I would say the same to them is there's a bedding in process, there's an area of education, and I know there's a willingness to make it work from, on behalf of my clients.
- Q. So you're saying that you don't expect that they would have an expectation that Council would take enforcement?

- A. I'm not saying that there might be people that might take that attitude but at the end of the day a Council and a willing player could bed this in and make it work over time.

THE COURT: JUDGE SMITH TO MS HILL

- Q. Walking round the mount when somebody was taking seafood out of the mātaimai reserve and somebody said something to them and unspeakable words were said in response. It seems to be one of the problems. I think Mr Prebble in questions raised the issue that there are some people who just don't want to know and I suppose there's going to be a stage where prosecution comes to the fore which is, I suppose, why an integrated system with MPI would make a lot more sense, so I take on board the point you're making because a council can only respond to complaints. Nobody could afford to have men out there on boats all time. It's just not....
- A. Well, unless it sees someone actually taking a fish, it's not going to have sufficient evidence.
- Q. Well, even if you do, you've got to prove where it was that they took it, and so we accept that – but that's the same difficulty. The Fisheries now have, of course, as was pointed out, cameras are a wonderful thing because they can actually, you know, a camera in a couple of places here might pick up some very interesting examples of this, and the cameras are getting better and better as far as resolution is going.

CROSS-EXAMINATION CONTINUES: MS HILL

- Q. Sorry, and I know I've been with this witness a long time, there was just one final matter which won't take long but I think I should raise just to get a better understanding of your concept of a management area. So – and this is one area where you and Ms Noble disagree about this idea of a management area. As I understand it you are proposing that where there's two or more overlays in the plan that that should generate a management area, and you're proposing provisions that go into the plan that describe that concept. I'm sorry if I – I haven't had time to look at it carefully, but are you envisaging that this is a generic concept in the plan

that Council should be adopting for any areas in the region where there is multiple overlays or are you just proposing this for the MNEMA?

1255

- A. No. I'm putting it up as perhaps a model that could be used, that's not mandatory. It's a way of moving forward, dealing with multiple issues within the context of one piece, one space and it's just a method and it's not intended to be - it's an opportunity for people to get together and work collaboratively in putting together an appropriate set of methods to address a particular set of issues in a particular place.
- Q. Because you'd appreciate that there are a large number of areas in the region where there are lots of overlapping and natural heritage overlays. Tauranga Harbour for example?
- A. Absolutely. And just because they're overlapping doesn't mean to say you need to rush in and do a spatial plan. It's really a question of what are the issues and will a spatial plan be an effective means of achieving, resolving some of those issues. That's all I'm saying.
- Q. All right. So all of the suggested wording at the start around describing management areas and multiple overlays that's not something you hang your hat on, it's not crucial?
- A. Well I was suggesting, no I don't hang my hat on it and, but what I was trying to do in that explanation was different people were carrying in their heads different ideas of what a spatial plan was and I found that, that it would be helpful if I tried to provide a framework of what I meant by a spatial plan and what my clients were working towards and then go into it and say this management area is that we mean by a spatial plan. But they take different forms and shapes and different places for different circumstances.

RE-EXAMINATION: MR ENRIGHT – NIL

COURT ADJOURNS: 12.57 PM

COURT RESUMES: 2.15 PM**QUESTIONS FROM THE COURT: JUDGE SMITH**

Q. I think I'll come back to the plan wording a little later. If I can just say that one of the issues I'm struggling with looking at your wording and perhaps even the evidence is the intellectual leap between protecting ONC, you know, outstanding natural character, outstanding natural landscapes and features policy 11, 13 and 15 to wāhi tapu and it seems to me that that might be serving some wider purpose but for the purposes of this hearing your argument seems to really hinge upon first the protection of the values and attributes of the ONCs, ONFLs, IBDAAs, and in fact also covered by ASCV 25.

A. Yes.

Q. So in fact there's a concatenation of values all overlain on each of the sites that you describe as wāhi tapu but are also identified as ONCs, I think, in most cases or other features, and not every feature I agree with you – is identified that way but now, as I understand it, the scope of this appeal is now reduced to those that do display one or more of those – in fact most of them display most of them. They all have the IBDAAs as well but the others are at least ONCs and ONFs and ONLs.

A. Yes.

Q. So if we go back, as Mr Reaburn did, to the RPS, all of them are the parts of the features that were identified as outstanding natural character of that (inaudible 14:18:06) aren't they?

A. Yes.

Q. Now, it does seem to me that the NZCPS requires that those must be addressed by objectives and policies and rules. Now the Court said in the RPS that it wasn't appropriate for rules at the RPS level but the appropriate level was the regional plans. I presume you agree with that.

A. I agree.

Q. I don't like to ask you if you agree with the Court, but there we are. So the question it seems to me in this case is if these are ONCs and ONFLs, it doesn't really matter because the policies, if avoid, remedy, if you avoid

adverse effects as required under both, there must be objectives, policies and rules as I understand it.

A. Yes.

Q. Now, is a method a rule?

A. Yes.

Q. So, what, education is a rule or –

A. No.

Q. So it can include a rule, can't it?

A. It can include a rule.

Q. But methods might include ones that aren't rules.

A. Exactly, yes.

Q. And as I understand it, if the NZCPS is operative we have to have a rule.

A. Yes.

Q. It says must have objectives, policies and rules?

A. Yes.

Q. So we'll come back to it when we talk about here but it seems to me that it's the pieces of your evidence and Mr Reaburn's that there aren't rules in this plan that achieve the objectives and policies.

A. Yes.

Q. In relation to ONCs, ONFLs, cultural values et cetera, especially where those are overlaying.

A. Yes, and especially where the common theme is biodiversity and ecosystem health.

Q. And that's recognised in part by the IBDAAs as well, which are also recognised in part in this area.

A. Yes, yes.

Q. So it seems to me that a lot of the background argument that often occurs as to whether this has natural character values et cetera, that argument was resolved some time ago, wasn't it?

A. Yes.

1420

Q. So the question really is does this plan meet the NZCPS as far as imposing rules which avoid or protect, depending which word, avoid

adverse effects or protect those features, or valuable attributes (inaudible 14:20:23) –

- A. Well my focus is on the values and attributes.
- Q. Right. Okay. So if we avoid adverse effects then the question is what the rules are and you remember this question was asked of Mr Reaburn. He points only to two possible rules, DD, I think it's DD15 and 15A –
- A. Yes.
- Q. – but he says that they're too general really to be a great deal of assistance. Is that your view or –
- A. That's correct. Its general disturbance, deposition or extraction, yeah.
- Q. But wouldn't the, so the real change in this rule is to include flora and fauna within that isn't it?
- A. Yes.
- Q. You've included, so all flora and fauna is now out?
- A. Indigenous flora and fauna.
- Q. Sorry, indigenous. We were asking about what immigration policies they had for fish but we'll worry about that later. But – so that, we are looking for a rule that protects those values and attributes and you, are you the same as Mr Reaburn and you don't believe there are such rules?
- A. I – that's correct, yes.
- Q. Because you think that those two rules 15 and 15A don't go far enough to protect the flora and fauna?
- A. That's correct.
- Q. Right. I'm just making it clear that I understand you. Now in relation to the areas that are ONCs, ONL, ONF and IBDA's they are a smaller area but at the core of each of the areas you're seeking to have special control over. Is that right?
- A. That's correct.
- Q. So you're suggesting that to protect and avoid adverse effects on those core areas you need to protect the wider area. Is that right?
- A. Yes.
- Q. So as to protect those value, those core values?
- A. Those core values.

- Q. Can I ask you a question about context and I know it's a land based concept but I'm sure you've come across it before, where you protect an item and this Court discussed this in the *Historic Places Trust* case for the Tauranga pā, swamp pā and Bluehaven. That to understand an area that's protected you often need a context. So for curtilage or context -
- A. Yes.
- Q. Now that's a land based concept –
- A. Yes.
- Q. – You seem to be utilising a similar concept if I can say it in relation to these high values areas at C?
- A. That's correct and I rely in a good part on two strings. One ecological and the other cultural. But dealing with the ecological, the kind of context is around the space that the flora and fauna need in order to –
- Q. So you're saying essentially as I understood it before in answer to Ms Hill, I just want to be clear I've got it in my head, that to support those core values there are these supporting values that are often of similar type but perhaps not exactly the same standard –
- A. That's correct.
- Q. – around them? And that the flora and fauna rely on that wider context for the values that are recognised? Is that the point or have I missed the point?
- A. That's the point and instead of just trying to protect the cow you've got to look after the grass field that it's in.
- Q. That's the context argument yes. Okay. I'm with you. I just wanted to check that. So the buffer area you talk about at the beginning that you don't mention in the plan provisions itself is essentially, probably not the right word but it's a context or supporting values that support the core values?
- A. That's correct and that's built – I don't use the buffer because I've created it in the one nautical mile or the three nautical miles.
- Q. Well we'll come to that in a minute, what you do in the plan as opposed to what you might want to do. And so it's – that covers that issue and I'll come back to it when we come to the plan. My next question is about

authorising cultural access. I suppose I have a real concern about limiting sometimes quite precious and curtailed cultural access into these areas. And a good example on the face of it you could argue well sooty shearwaters are not going to do too well from the muttonbird harvesting that occurs in Motunau but it is a matter that's been managed by DOC for many years. There's clear cultural constraints around it –

A. Yes.

Q. – and I think the Court, at least myself would have a real reluctance to start interfering in wider cultural rights by not allowing people to take that fauna if DOC and kaumātua, et cetera and the... One way of avoiding those problems entirely would be to make this rule only apply within the CMA?

A. Yes that from the outset that was my assumption all the way along the line.

1425

Q. Yes.

A. But you've chosen Motunau as you will recall when we were dealing with Motiti was where was the CMA and where was the land and for the purposes of the island plan we included –

Q. I appreciate that. I'm just a bit concerned that the effect of the rule you're now proposing would prevent mutton bird harvesting even if DOC and the relevant kaumātua agree because it's included within the area, for good reason, I'm not arguing about that.

A. Yes and you've pointed out that there might be an unintended outcome of what I'm suggesting.

Q. Well, one solution might be to make this rule because it wouldn't affect the area because the area is already defined, but the rule itself might only apply within the CMA. Is that a possible outcome?

A. That is a possible outcome, yes. And the other alternative is the one that I've used except, you know, unless and then put a, like a proviso but the more elegant way for this particular problem to do it in terms of the CMA.

Q. Now, I think there was no doubt in my mind that a collaborative process would've been preferred and I think I've suggested it many times in this

matter and I think you yourself have suggested a collaborative process would be helpful, and I think the issue is not whether that would be a better process, but whether we should await that collaborative process given we've got to this point. Now, I just want to put that to you because I thought we'd discussed it earlier in other cases, but I may have been wrong. Do you think that we should put things on hold here to allow collaborative process to occur?

A. In this case, no, and the reason being is many attempts have been made over a period of time to engage in that and the – put in a wider context, the 2003 regional coastal environment plan undertook to do some measures in respect to managing the effects of fishing on various resources and that plan has gone through its full cycle and none of that to my knowledge has been even attempted within MNEMA and if you want to be familiar it that's at attachment to Mr Sayers' evidence is that those provisions –

Q. And it would be fair to say that it's been the subject of a number of decisions and I think some of which you've been involved in before the Court where the concern has been expressed that notwithstanding the provisions in the earlier plan were little if anything was done?

A. That's correct.

Q. So I just want to move down to another thing and I don't think we need to address here today. It doesn't seem to me that there's anything – even if the Court included a rule, as you've suggested, there wouldn't be anything to prevent a co-operative process with MPA and all of the stakeholders and looking a plan change in the future anyway would there?

A. There's nothing to prevent that at all and it's just a question of what's appropriate now for the Court.

Q. I think you would agree with me that even if we included the spatial provisions you're seeking now, it's clearly contemplated that we know that there are a number of other iwi and hapū have aspirations in spatial plans as well?

A. Yes.

Q. You're acting or were acting for some of them, that's correct, isn't it?

- A. Yes, that's correct.
- Q. And accordingly this is likely to be a subject of a review and probably a broader plan change in the future anyway?
- A. Yes, although those things are not so well defined. They're quite different place in terms of feelings of urgency.
- Q. So it might take a whole cycle for those matters to be resolved?
- A. Yes and the corollary to that I've given a lot of thought about it is, you know, a 10 year time cycle is what the ecologists were talking about measurable effects. Now, if in 10 years there are no measure of – that benefits but there are dis-benefits. The next review of the plan can review the rules.
- Q. Yes, but I'm suggesting if the Court put in place rules in the meantime, it wouldn't prevent them being reviewed as part of the collaborative process, for example, MPI agreed to impose various types of – they have options and the harbourmaster has options, a whole range of people have different options so it doesn't prevent that range of options still being available does it –

1430

- A. It doesn't, and if those methods are put in place on the basis that these ones are not necessary, in the interim they could be taken out by change.
- Q. Or there could be an integrated plan.
- A. Or an integrated plan.
- Q. Now moving to E3, the 5.2 zoning, page 3, it picks up on the point I just made to you that although methods can include rules, it does appear to me that your management area is in part triggered by the requirement for rules.
- A. Yes.
- Q. So you could either say specific policy rules and methods but it does seem to me that if we accept that premise from you that there should be rules we should mention that the management area triggers those.
- A. Yes. In fact, the management area itself is a rule.
- Q. Yes, but there are other rules so I'm wondering whether you would agree if that would be sensible.

- A. Yes.
- Q. It seems to me that when you talk about issue 1B, part of the issue is, as I say, we've moved on from the core of the concern and it does seem to me that in B, for example, what you're wanting the restoration and protection of outstanding natural character and outstanding natural features and landscapes and areas of cultural significance, then you should explicitly say that because that links you back into those various policy provisions, doesn't it?
- A. That's correct.
- Q. I've forgotten the indigenous vegetation, biodiversity. There's a whole range of reasons in the issues.
- A. That's correct.
- Q. Then if we move over to page 5 where you're talking about wāhi tapu and we've agreed on the macron so I won't go into that, but at the bottom of that, it seems that there needs to be a linkage back. Some, but not all, are identified as ONC, ONFL and IBDA areas in the regional plan. Just to make it clear, it has its basis in that.
- A. Yes.
- Q. Although your wāhi tapu goes a little wider than that for the reason we discussed, does that make sense?
- A. That makes sense, yes. What we've done between the regional policy statement and now is both the regional council and I have got to grips a bit more with the Motiti native plan and the wāhi tapu areas that are identified in that and Ms Noble and myself are in agreement that we need to at least identify all those in the schedule, so the question is what comes across in specific rules.
- Q. Looking over the page at page 6 at objective 53, I'm concerned with the generality of it because what you're actually intending as a management area that there is a general rule within the management area but then you'd have subzones on which the special rules –
- A. Yes.
- Q. – which you're calling the wāhi tapu – and objective 53 in my view needs to be tightened up to create those linkages back to the various policy

areas et cetera and the fact that you're actually creating subzones within it.

A. Yes.

Q. Otherwise it intends that the biodiversity of the whole of that area is restored whereas it seems to me that the rehabilitation and restoration and enhancement is intended within the wāhi tapu areas whereas you're just seeking to give better protection in the other areas, if I can put it that way, that currently exists.

A. Yes, yes.

Q. Whether it's sufficient to maintain the area is another question which you've conceded.

A. Yes.

Q. So again, when we come to policy, it seems to me it follows that the ONC and ONFL et cetera all need to be identified before we get to natural and cultural, because they're all linked together, aren't they?

A. That's correct.

Q. This is picking up on Ms Lucas' evidence that there's an integrated linkage between each of those elements that make up this cultural value as well.

A. Yes, yes.

Q. Okay. We'd need a qualification to that rule to make it clear that it applied only to the RMA itself or there might be another form of a high tide mark or something of that sort to make it clear that it wasn't covering the part of the island that's above that water.

A. That's correct.

Q. Okay.

A. One of the things we're aware of is in the case of Motuhaku and Motunau the area above the mean high water spring I don't think is in any land plan.

1435

Q. No, and that's why it would still be covered by the provisions. It's just that the rule wouldn't apply to it.

A. I'm comfortable with that.

Q. Yes, that's the intent, isn't it?

A. Yes.

Q. The rule, it's only a question of the rule, not that it's excluded from that, because everyone has agreed it's already within the ONCs and ONFLs, et cetera.

A. Yes.

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK – NIL

QUESTIONS ARISING – NIL

WITNESS EXCUSED

THE COURT: JUDGE KIRKPATRICK TO MR ENRIGHT

Q. That's your case?

A. No questions arising, Sir. Just before I close, I'm just wondering if we should, given the witness has now agreed to make further changes, whether we should give you a further iteration or shall we just leave it in terms of we're all clear on what those suggested changes...

Q. Well, perhaps with your closing submissions if you want to tidy that up. Obviously, though –

A. That's the only changes.

Q. It would be the only changes?

A. Except for one, Sir, which is that if you look at rule 3, look at rule 3 –

Q. This is the point that Dr Stirnemann made?

A. Yes, the long-line –

Q. You'd add long-line in?

A. If we could, please, and of course that arose as a result of evidence this morning.

Q. Well, I expect that that will come up in at least the Court's questions of other witnesses.

A. Yes, thank you, Sir.

Q. That's the case for the appellant?

A. That is the case for MRT and Forest and Bird.

Q. Thank you very much, Mr Enright.

APPELLANT CASE CONCLUDES (MOTITI ROHE MOANA TRUST AND FOREST AND BIRD)

**APPELLANTS: NGĀTI MAKINO HERITAGE TRUST AND NGĀTI RANGINUI
IWI SOCIETY INCORPORATED**

THE COURT: JUDGE KIRKPATRICK

This time, Mr Pou.

MR POU READS OPENING SUBMISSIONS

1440

COURT ADJOURNS: 3.32 PM

COURT RESUMES: 3.49 PM

RESPONDENT:

MS HILL READS OPENING SUBMISSIONS

COURT ADJOURNS: 4.59 PM

COURT RESUMES ON THURSDAY 30 NOVEMBER 2017 AT 10.00 AM**MS HILL CALLS****SANDRA ALISON BARNES (AFFIRMED)**

Q. If you can confirm your full name is Sandra Alison Barnes, and you've prepared a statement of evidence dated 26 November 2017?

A. That's correct.

Q. And if you could confirm that that document is true and accurate to the best of your knowledge.

A. That's correct.

Q. There's been some revisions to the appellant's proposal since your evidence. Do you understand what those are?

A. Yes, I do.

Q. Was there anything about those changes relevant to your evidence that you wish to comment on?

A. I think in spite of the changes my evidence would remain the same in terms of the section 32 analysis and that the benefits and costs would be required to be looked at. The efficiency of the change relative to other possibilities.

CROSS-EXAMINATION: MR PREBBLE AND MS JORDAN – NIL**CROSS-EXAMINATION: MS HAAZEN**

Q. Good morning, Ms Barnes. If I could take you to 10.1 of your evidence. Am I correct in reading that you interpret Mr O'Connor as disputing the appropriateness of the section 32 analysis?

A. No, I do not. I think that Mr O'Connor thinks that the section 32 analysis is a cost benefit analysis, whereas cost benefit analysis is not the section 32 analysis. The section 32 analysis is much broader. Cost benefit analysis typically has a lot of – well, it typically converts everything into monetary units. Section 32 analysis doesn't do that. It should quantify costs and benefits where possible but it doesn't have to be in monetary units. So in that sense, a section 32 analysis, the costs and benefits of that can be much broader than a CBA.

Q. Do you accept that in Mr O'Connor's evidence he has carried out a section 32 analysis?

A. No, I simply wouldn't.

Q. Can we go to part 8 of Professor O'Connor's evidence?

A. Certainly, yes.

Q. That's titled "Comparative evaluation of three MPA scenarios", correct?

A. Yes.

Q. That being a comparison of do nothing, the Bay of Plenty regional council proposal and MRMT's proposal?

A. Yes.

Q. Then if you go to 9.7 of Professor O'Connor's evidence, it says "conclusions" and then states, "There are always risks of failure but in RMA section 32 terms, the major benefit of Motiti Rohe Moana Trust option 2 OVL options provides a clear enough framework." Do you accept in part that Professor O'Connor has done a section 32 analysis within his evidence?

A. No, I do not. Mr O'Connor doesn't appear to have looked at the costs involved in terms of who might be affected by that particular proposal. There's nothing in the evidence that identifies the parties affected or the extent to which they might be affected. There's no clear benefits or – well, there's not what I would describe as clear benefits associated with that particular proposal. There's one academic paper that was presented as a conference, but it's not clear from that paper that that particular proposal would work at Motiti Island, in fact, the benefits of that particular proposal seemed to be tenuous at best.

1005

Q. So if you go to section 8.2 and 8.3 of Professor O'Connor's evidence.

A. Yes.

Q. And I'll just give you some time to look at that. Is it not correct that Professor O'Connor has gone through the framework of section 32, but it's simply that you disagree with his outcome?

A. I can't actually see any evidence in there. Perhaps you could point it out.

- Q. Well, in these two parts I'm looking at the framework that he's applied in terms of looking at section 32 and then goes onto apply that and relying on the evidence provided by Motiti Rohe Moana Trust in terms of the ecology and tangata whenua values.
- A. The section 32 is much broader than that. It is the economic, environmental, social and cultural values and some quantification around that, which I have already said, is not monetisation but certainly some qualification about the area affected, the number of people affected and in what way they'll be affected, and how large those affects would be.
- Q. Thank you, Ms Barnes. Are you aware that, well, Ms Hill just raised with you that the proposal of MRMT has changed during the course of these proceedings. Do you agree that the reduced proposal of MRMT will reduce the cost to council?
- A. It seems as though it would reduce the costs overall not just for council, but in terms of the people affected.
- Q. In large measure you seem agree with Professor O'Connor's view that a cost benefit analysis is not necessarily monetary and can address intrinsic qualities?
- A. My reading of Professor O'Connor's evidence was that he didn't consider that a cost benefit analysis, which economists understand in a very specific way, wasn't a good tool for looking at this particular proposal and what I said was a section 32 analysis. Review of costs and benefits is not the same.
- Q. So many ecologists have raised the issue that the longer you leave something and decline or declining, the more costs, the more it costs to restore it. Do you agree that this is a form of opportunity costs if not acting in relation to maintenance of indigenous biodiversity within the MNEMA?
- A. Potentially, but I can't comment at all on the ecology of that or the affects in that respect. I would rely on an ecologist to make, to feed into that sort of decision.
- Q. And where that is accepted, do you agree that that is a cost that should be taken into account in a section 32?
- A. I would think so.

Q. In your evidence, you claim there is no halo affect and I assume you know what I'm referring to as halo or benefit from a spillover.

A. Can you refer me to where in my evidence I say that?

Q. Yes, paragraph 17. And you then go on to refer to the research of Le Porte?

A. Yes, now I don't say that there is no halo effect.

1010

Q. Well, do you accept that whether or not there is a halo or a benefit or arising in this case is outside your expertise?

A. Yes.

Q. And it's a matter for the ecologists to comment on?

A. Yes, I would, but I would like to make a comment about this paper that Professor O'Connor refers to.

Q. Well, if I can stop you there because what we've heard in these proceedings is the ecologists talking about a spillover –

A. Yes.

Q. – and which may be a more accurate description of a benefit.

A. Sure.

Q. And if you could reply to that in terms of benefits taken into account in section 32, would you agree that that as a benefit should be taken into account?

A. Well, in terms of this paper that I would like to refer to, if I was writing a section 32 and writing about the spillover effects, I would like to refer you to parts of this document because they are relevant to writing a section 32, you're absolutely correct, and the halo effects are – but what is the statistical part of this document as opposed to the ecological part of this document refers to the, the genetic material was collected from a thousand snapper in the MPA area. The population of snapper in that MPA area is expected to be about – estimated to be about 11,000, and what was done here – and I can't speak about the methodology and I can speak about the statistical part of it that I would consider in the section 32 is that when the larva, larval, or the larvae were collected from outside the MPA, 14 of approximately 1000 larvae were proven to come from the

MPA area and so it seems like a very small number. What the ecologists did was then extrapolate and say, "Well, we've got 11,000 snapper in this area and so, because we don't have the genetic material on 11,000, we will basically extrapolate for the population and say that percentage will be 10.4% of the larvae coming from MPA," and so as an economist looking at that I'd say that there's quite a lot of uncertainty here and this is one paper which admittedly shows a lot of promise but doesn't prove that it's the best way forward.

- Q. In this hearing though that, the author of that paper is not giving evidence, are they?
- A. No, no, but the statistics are very clear in it and they say exactly that, and so what you've asked me, I think, is – I've forgotten what you've asked me actually.
- Q. I was asking you about whether or not a benefit from a proposal like MRT's should be taken in account in a section 32 analysis.
- A. Okay. So this was a supposed benefit that Mr O'Connor talked about in his evidence and I will take into account that benefit but there is also a lot of uncertainty about it which would also have to be taken into account, and I've described the uncertainty.
- Q. So would you rely on the evidence given in that paper over the evidence that's heard and has been presented in this hearing for determining whether or not there's an ecological benefit?
- A. I haven't heard the evidence given by the ecologists. I certainly wouldn't presume to know more than them, but in terms of the statistics we can't afford to ignore it when we're looking at the costs and benefits in section 32.
- Q. Do you agree that the uncertainty around a halo effect is actually outside of your expertise as an economist?
- A. I think the statistical information in this paper is relevant to the section 32.
- Q. Do you agree that the evidence of the ecologists in this proceeding is also relevant?
- A. Absolutely.

CROSS-EXAMINATION: MR POU

Q. Kia ora. Is it Miss Barnes, Dr Barnes?

A. No. Ms Barnes.

Q. I was just making sure because I got a growling from an earlier person for not calling them a doctor. I'm not meaning a slight in any way, of course. Now I want to ask you some questions around this section 32 analysis.

A. Sure.

1015

Q. And basically I'm going to ask you questions in three stages. There's a beginning, a middle and an end and I'll start in the middle. But you've got inputs coming in which you've been discussing, you've got a process of evaluation and you've got outputs that come out. That's true, isn't it?

A. Yes.

Q. An evaluation report is essentially a feasibility report. It's whether or not it's feasible or appropriate to include particular mechanisms. Would that be a fair characterisation?

A. I think you're talking about part of the section 32 analysis there, which is possibly the efficiency and effectiveness of it. It's much broader than that.

Q. That's an important part of the discussion because we can get locked in on these words around cost benefit analysis, risk analysis, evaluation of things, but essentially it's a balancing exercise, isn't it, to determine what's an appropriate way forward?

A. I guess it is a – to me it's a story of the policy journey and it ultimately comes out with a section 32 evaluation that anyone should be able to look at, not necessarily agree with but understand how the decision-makers came to the decision they did.

Q. And analyse how that decision is a feasible one in terms of it being the most appropriate one. That's the ultimate endpoint?

A. Feasible, most efficient.

Q. And importantly, we talk about what the inputs are, what needs to be considered in those evaluation reports. That's correct?

A. Mhm.

- Q. I guess what strikes me – and it’s at paragraph 16 of your evidence – you say that the role of the economist is to provide analysis which informs judgment about fairness, and the key difference is with my understanding, sort of looking back, taking an holistic approach and view of Professor O’Connor’s work, you say it informs fairness and he seems to say that an input is fairness. Is that a difference? You’re seeing fairness as an evaluation outcome and he’s seeing fairness as an input.
- A. I see fairness as something decision-makers have to decide, which might be councillors, and I see economists’ role as providing information to help those people make those decisions.
- Q. Well, how do you inform yourself? How does the economist deal with those other qualitative aspects of the evaluation process like what are the principles of the Treaty? What are the impacts on cultural evaluation? How is the mauri going to be impacted upon if it’s not an input, if it’s an output?
- A. Economists are only part of that question around benefits and costs and the planner also has a role in providing that information to decision-makers.
- Q. But it’s important in that section 32 part, that middle bit, that those aspects of perceptions, experience, fairness, and subjectivity as to what’s actually being analysed are also extremely relevant, aren’t they?
- A. Yes, they are extremely relevant.
- Q. So they drive the process. They’re not necessarily just outcomes of the process.
- A. The section 32 is a story of the policy journey and so all that is contained within it and the costs and benefits are part of that.
- Q. And my suggestion to you is that these issues of fairness are part of the preface as well as part of the conclusion. So these issues of fairness around how they’re balanced off against, for instance, the impact on Forest and Bird versus the impact on the Motiti islanders versus the impact on Ngāti Ranginui and those sorts of things, those are part of the evaluation, not necessarily the outcome of the decision.
- A. Mhm.

Q. Am I right there?

A. I would think so.

Q. And that's in terms of cost benefit or benefits, risks, and those sorts of things. Those are also part of the funnelling that it seems that Professor O'Connor is saying don't factor into the decision that's been made. Would you agree? I mean, he refers to the mauri model, the evidence of Kepa Morgan, which doesn't seem to have factored into any section 32 analysis done at the start, notwithstanding method 44, I think it is, of the regional policy statement to develop mauri models.

A. Yes. Now you're getting back to the original section 32 analysis which I was not involved with, so my evidence is about Professor O'Connor's evidence and section 32 analysis in general.

1020

Q. But then the section 32 analysis at this point, given that Dr Morgan – his assessment in his evidence doesn't seem to be an input into the discussions that are emanating from the council's side. If Motiti Rohe Moana have been deficit in not considering the impacts on the Mount Maunganui Diving Club, have not the council been deficit in not considering the impact of mauri in accordance with method 44 of the regional policy statement in their section 32 analysis?

A. I think you're going outside my area of expertise.

Q. Well, I'm actually talking about what are the inputs that have formed the section 32 analysis which are your expertise, which you say is your expertise.

A. No, I wasn't involved in this particular section 32 analysis so I can't comment on what's happened in the process up to date.

Q. So you can't comment on when Professor O'Connor is saying that the inclusion of the mauri assessments would improve a section 32 analysis, you can't actually give evidence against that?

A. What are you commenting on? Which paragraph?

Q. It's actually footnote 38 and it refers to paragraph 9.6. He talks about monitoring frameworks that are put forward in the evidence of Dr De Luca, structured, collaborative monitoring processes. I guess in terms of your

responses back to Ms Haazen in saying that there seems to be an absence of particular factors that were considered, if this was considered to be a full section 32 analysis, well, then, you necessarily need to accept the same criticism back on you that there are particular mechanisms really important for Māori in this region which have been advocated about for the past decade or so that don't seem to factor into even this section 32 analysis.

A. As in?

Q. As in the section 32 analysis relating to this proposal.

A. Is there a section 32 analysis relating to this proposal?

Q. Well, in terms of the assessment of benefits, of what Motiti are seeking.

A. Which is what Mr O'Connor refers to in his paper?

Q. Yes, as carried out in Ms Noble's evidence. I guess my issue is that you're criticising Professor O'Connor for shortcomings without necessarily dealing with shortcomings or deficiencies within the council's own assessment. You're criticising his assessment and it doesn't seem that you've considered the council's assessment and that seems –

THE COURT: JUDGE KIRKPATRICK

This is the evidence of a witness who's already said she wasn't involved earlier and if you wish to criticise what the council has done then you can do that.

MR POU:

It probably would have been better if this had come after and it might have been but I think the point that I wanted to make is made, Sir.

RE-EXAMINATION: MS HILL – NIL

QUESTIONS FROM THE COURT: COMMISSIONER POMARE

Q. I did not, when I read your evidence, understand it to be undertaking a section 32AA analysis under the Act.

A. No.

Q. You're aware that in respect of any change that occurs section 32AA requires you to do a proportionate re-evaluation?

A. Yes.

Q. You didn't do that? I didn't understand you to do that.

A. No, I didn't do that.

1025

Q. No, and furthermore, as I understand it, you're aware that the do-nothing option is not on the table as I understand it because the Regional Council itself is suggesting a change.

A. Yes.

Q. So it's a question of a better or the most appropriate of two options which requires an evaluation under 32AA.

A. Yes. Yes.

Q. And that does include economic factors but it includes a whole range of other factors which are quite properly noted.

A. Yes.

Q. So I didn't really understand you really to disagree with Professor O'Connor. I actually thought in fact he didn't suggest a CBA either, but that doesn't really matter. It's not really relevant at the moment. That was really the issue you took with them, that CBA is not appropriate. To that extent you're preaching to the choir with me because there's a number of decisions where I say exactly that.

A. Yes.

Q. Nevertheless, it can be helpful but he does a qualitative analysis rather than a quantitative, and I don't know whether – you don't really do an analysis yourself. So in respect of the economic valuation, the question I'm really trying to understand is you don't actually give any evidence of economic costs or benefits that I could see.

A. No, I don't.

Q. No, so there's no evidence from you on those points.

A. No, there isn't.

Q. So it won't assist us under section 32 – when we go back to subsections (1) and (2) of section 32, will it?

A. No, I wouldn't think so.

Q. No. We've got other evidence that we need to rely on that.

- A. Yep.
- Q. I just wanted to talk about this. I don't know why we got into the Goat Island study but I presume that's what you're talking about, is it?
- A. Yes, it is.
- Q. Now you said, and it was an odd thing you said, you said there was 14 out of a thousand. I thought it was 140 out of a thousand, and they just extrapolated that over the entire population to get the 10.4.
- A. Do you mind if I just have a look at that?
- Q. No, that's fine. Well, while you're looking, can you tell me what the total area was? We've been told that Goat Island is five square kilometres. So what's the total area within which they calculated the total number of fish?
- A. They – the total number of fish was calculated within the total area of the MPA.
- Q. Yes, so what were those figures, given that you've talked about it, what's the total area? It'll be in the study.
- A. It will be in the study, yes.
- Q. Can you tell me what it is?
- A. So I haven't read it carefully. I can't tell you offhand without reading through again.
- Q. Because my recollection it was far less than a percent.
- A. I thought it was. Yes, I know what you're saying.
- Q. So statistical variability becomes irrelevant if we're talking orders of magnitude, doesn't it?
- A. Well, the question I had was that they took a thousand fish. They looked at – they took the genetic material. They then went outside and collected fish. Now I can find the numbers here.
- Q. Yes, it would be quite useful.
- A. It wasn't –

THE COURT: JUDGE KIRKPATRICK

It's a single sample.

THE COURT: JUDGE SMITH

- Q. Yes, I'm just wondering what...
- A. It was a small sample.

THE COURT: JUDGE KIRKPATRICK

- Q. And a single sample.
- A. And a single sample.
- Q. So it's that horror of statistics, a snapshot.
- A. I think I highlighted it in here.

THE COURT: JUDGE SMITH

- Q. It's okay, we can find the figures ourselves. It's just my recollection was they are slightly different to what you gave us.
- A. Yes, sorry. Page 4, conservative DNA parentage analysis assigned 14 juveniles, 1.6% of the 892 juveniles genotype. So that's under 3, results, on page 4.
- Q. 1.6 of the juveniles.
- A. Of the total juveniles. And I don't have a problem with the – the extrapolation seems to be questionable statistically.
- Q. The Court –

THE COURT: JUDGE KIRKPATRICK

- Q. Partly because it's a single sample and you have nothing else to –
- A. It's a single sample. If you kept doing it then it would become more...
- Q. Yes, you get more data points and you might then be able to establish trend lines.

THE COURT: JUDGE SMITH

- Q. And in fact we do have such data from Otaiti because of the fact it was closed off for four years and there are, is, there's significant evidence given to us in the *Rena* case, some of which has been repeated here, about abundance as a result.
- A. My understanding was this is a fairly, I guess, innovative way of looking at that –

Q. I just wondered. That's why I was going, actually going to drive back to that because when Professor O'Connor discusses this I thought he discussed it in 8.5 to 8.8, which may not have been drawn to your attention, but he actually goes into what I thought was his section 32AA analysis given – having regard to obviously the scale of the matter, and his conclusion, as I understood it, was that a, a qualitative rather than quantitative analysis, and because of the difficulties in establishing many of the elements of the economic – because the question was what was the better, a more limited change that's suggested by the council or one that was more precautionary, but I don't understand you really addressed that in your evidence?

1030

A. I was looking that the leap that he made between the economic theory, which he describes in quite some detail, and then the, he makes a statement I think that, "It's better to act and not act and so let's do this."

Q. So that's the discussion at 8.5. He takes out what he can from the CBA 8.6, major net benefit over the – seeks tangible and operational ways to implement an appropriate territorial scale, a triple set of sustainability options; 8.7 and he discusses there evidence given in relation to adaptive management in *Dusky Dolphins* which is another decision of the Court, not me, and then, of course, is the precautionary principle which overcomes this bias that we can't prove something.

A. Mhm, sure.

Q. So do you disagree with what he's saying there?

A. If I was looking at it in terms of a section 32 analysis, I would probably look at a range options perhaps for achieving the same thing. The benefits of this seem to be –

Q. Okay, well, I don't think you discuss any other options because that's one of the things we have to look at is what are the alternatives.

A. Mhm.

Q. His simple point at 8.8 is in the absence of proof of harm is not the same as the proof of absence of harm so the question, of course, that that's what is properly called the precautionary principle as opposed to what the

NZCPS uses which is that are you suggesting that there are potentials for irreparable harm if the changes now proposed were put in place by MRMT? What's the risk of irreversible harm from that? You don't seem to have discussed it in your evidence.

A. No, I don't discuss it in my evidence, you're right.

Q. Now, you're aware that we've got evidence before of potential, and I say it's potential, it's a risk of irreversible harm if it isn't put in place?

A. Mhm, well, if this isn't put in place in terms of an MPA or something isn't put in place.

Q. Well, I want to get onto that because it depends what your instructions were. I appreciate that this is an area that's covered by outstanding natural character overlays, outstanding natural feature overlays, outstanding natural landscape overlays and cultural overlays all of which occur in the same area. It's unique in that respect as I understand it apart from mao within the regional waters, are you aware of that?

A. Yes.

Q. So that requires under the CPS that you must have avoid adverse effects on those features, so the risk of irreversible harm must have a much higher value in the equation wouldn't it?

A. I would think so.

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

Q. Ms Barnes, you note that your role within the council is to assist with section 32 analysis and you do those in accordance with the MFE Guidelines.

A. That's correct.

Q. Do you for the purposes of undertaking a cost benefit analysis where you undertake that view adhere to the Treasury guidelines or is there another standard approach that you'd use?

A. We don't typically do cost benefit analysis which Treasury do give guidelines for.

Q. Because of the nature of section 32?

- A. Yes and because of the limited – a cost benefit analysis requires things like social benefits to be put into a monetary framework. It's not that useful for decision makers and it's not very transparent.
- Q. Within the council, all right, but if you were to, for any reason, if the council were to consider that a cost benefit analysis in those terms was appropriate when you consider the Treasury guidelines appropriate or in your view as an economist would you adopt some other approach?
- A. I would probably follow the Treasury guidelines.
- Q. On several occasions in answer to Mr Pou's questions, you referred to a policy journey?
- A. Mhm.
- Q. I think one of the issues that can arise under the Resource Management Act is whether there is an A to B journey, beginning and then an end and in other circumstances, people will refer to a policy cycle and so that there is a requirement once a policy has been adopted then to observe it, monitor it, see whether or not it's working and then revisit it. In a situation like this do you think that perhaps policy cycle might be more appropriate for pursuing issues rather than – journey to me suggests that you do it and it's done.

1035

- A. Mhm. I suppose when I refer to a policy journey I see this as a discrete part of that cycle and so what you say about observing what happens and then responding to it after is, I would think, essential. In my experience, it's not always done.
- Q. Well, indeed and that's interesting because that's also something that Professor O'Connor refers to, is the need – if you're going to swim, you have to get in the water.
- A. Mhm.
- Q. At times you just have to do it and see how you go, and if you don't know how to swim maybe then you should go off and do something else to do that. Sometimes the political framework means that the answer is a set it and forget it approach, and that's not necessarily a good policy approach, is it?

A. No.

QUESTIONS FROM THE COURT – NIL

WITNESS EXCUSED

MS HILL CONTINUES OPENING SUBMISSIONS

1445

MS HILL CALLS**SHARON BETTY DE LUCA (AFFIRMED)**

Q. Good afternoon, Dr De Luca. Could you please confirm your full name is Sharon Betty De Luca, you've prepared a statement of evidence dated 7 November 2017, and you confirm that it is true and correct to the best of your knowledge?

A. Correct, yes.

Q. The Court has picked up on an issue or a potential issue with what appears to be an agreed position amongst the ecologists that the reef systems in the MNEMA are very similar to systems that may appear elsewhere in the region. Do you have any comments to make about that?

A. Yes. That has been – the identification of the values at Motunau Island in the rift, both Dr Ross and I have made a mistake. That ecological feature is not replicated elsewhere in the region.

THE COURT:

Q. So that's that one example beyond that which is recorded in the plan, do you feel that the other elements of the reefs and shoals around the islands are similar to other systems in the region?

A. Yes, I do. Motunau is – that rift is quite special, given that it has deep water species occurring in quite shallow waters, as the plan states.

1450

EXAMINATION CONTINUES: MS HILL

Q. Just a general question around the new proposal, so do you have any comments to make on that that relate to your area of expertise?

A. Any marine protected area will have ecological benefit, so these wāhi tapu areas and the one nautical and three nautical miles around them will have ecological benefits. However, it's my opinion that planning of no-take areas should be undertaken at a regional scale in order to get maximum benefits. You need to take into consideration what are the key species

you're trying to restore, what different habitats do they use at different life stages, and ensure that you've got replication of all those important habitat types which we don't have with this example. But it is a step in the right direction. We don't have mangroves or seagrass which are important for some of the key predators.

CROSS-EXAMINATION: MESSRS PREBBLE AND POU AND MS HAMM-NIL

CROSS-EXAMINATION: MR ENRIGHT

Q. Let's start with Motunau Island. Did you say it's regionally significant or nationally significant in terms of ecology?

A. I said it's the only example of a rift where deep water species are found in shallow water in the region. The plan states that the feature is nationally significant, but my comment was around that that is the only example of that habitat or feature within the Bay of Plenty region.

Q. Thank you. Do you have the regional plan, the coastal plan?

A. I do.

Q. It's pages 256 and 257 are the development characteristics. So if we start at 256, if we have that, you'll agree, won't you, that essentially in terms of coastal policy statement 11A, the characteristics identified for Motiti Island, the avifauna. Starting with Motiti Island, you'll agree that the relevant characteristics identified that meet the coastal policy statement, policy 11A category, are listed there, aren't they, so you've got flora and avifauna.

A. Yes. That's correct.

1455

Q. That's 11A(1) and identified as 11AV, regionally significant, correct? So that's the threshold there. And do you agree that the flora, the presence of the flora is related to the avifauna because they provide the fertiliser basically for the flora?

A. I'm not an avifauna expert so I can't really comment on that.

Q. Okay, that's fine. I did want to ask you that. Given you're not an avifauna expert, do you defer to Dr Stirnemann in relation to avifauna issues?

- A. I don't defer or not defer. I don't know whether, what Dr Stirnemann has said is correct or not.
- Q. Okay, but you accept you're not an expert in avifauna?
- A. That's correct. I have some knowledge of seabirds but that's not my key area of expertise.
- Q. Okay. And if we look at the next entry of Astrolabe Reef, it's a category 11A3 and refers to ecosystem uncommon in New Zealand as has both tropical fish and a strong pelagic school fish component, correct?
- A. Yes that's what it states.
- Q. So that's the high diversity value there and regionally significant, do you accept that?
- A. Yes that's what's stated.

THE COURT: JUDGE KIRKPATRICK

- Q. Well, no, hang on, Dr DeLuca, that is what is stated, I mean, from your knowledge and within your expertise, you concur with the plan's rating?
- A. I do.
- Q. Thank you.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

- Q. You've referred to Motunau earlier and you'd accept that in terms of the avifauna policy 11A1 that they are as listed and I think you've already agreed the level of national significance is appropriate, correct?
- A. Yes.
- Q. And then we have the Motunau marine area also refers to the shearwater and white-fronted tern as being in the nationally significant category, is that something you agree with?
- A. I am sure those classifications are correct, yes.
- Q. And what about the column, fourth column or fifth column, 11A3, do you accept the values are as stated there in relation to regionally threatened ecosystem and that then lists various species of fish and refers to the rift.
- A. Yes, those values, my understanding is those values are correct. I did just want to highlight that it is the, in my opinion, it's the rift that makes that feature nationally significant.

Q. Thank you. So having dealt with that issue, it seems as if your study put at your evidence is that only a network of marine-protected reserves can restore marine values in the Bay of Plenty to a pre-fished state?

A. My evidence is that a regional approach would maximise the benefits to marine-protected areas. As I stated before looking at all of the habitats that the key a depleted species use, a regional approach would give you maximum benefit. I'm not for one moment saying that what is proposed would not provide benefits to the marine environment.

Q. In particular you say, for example, at paragraph 9, first sentence, "In order to move to an objective of restoration of the value to pre-fish levels requires a holistic approach to a well-designed network," so that's your ultimate objective, is that what you're referring to?

A. What I've stated there is that to restore the species to pre-fished levels, one or two MPAs or marine reserves or no take areas dotted through the region is not going to achieve that. Probably a national approach needs to be taken, but a regional approach would be better than just smaller no take areas within the region.

Q. You make the same observation, don't you, in your first sentence, para 29?

A. That's correct.

Q. And at 51, you refer to establishments of a network or fully protected MPAs which would maximum the benefits compared to MRMT's proposal, correct?

1500

A. That's correct, and one of the other concerns that I have with MRMT's proposal is that in 10 years' time things could be changed whereas I think pretty much all of the marine experts agreed that MPAs or no-take areas are required in perpetuity to stand a chance of restoring fish stocks to previous levels.

Q. Yes, we'll come back to that point, thank you, but it seems to me your criticism of MRMT's proposal is based on the apples versus oranges comparison.

A. I'm not sure what you mean.

- Q. Well, your evidence relates to an entire network for the Bay of Plenty but in contrast what's proposed here solely relates to the MNEMA, correct?
- A. My evidence states that what is proposed would have benefits but I think that a broader regional approach would maximise those benefits.
- Q. Yes, but there's no proposal before the Court for a network of marine reserves throughout the Bay of Plenty, is there?
- A. Other – no, other than my evidence recommending that Regional Council could drive such a process along with other Government agencies.
- Q. So it's a hypothetical proposition you've put forward?
- A. It has – yep, it hasn't been accepted or declined by Council and sounds like a sensible approach to me.
- Q. So no agency or party is offering to do a network of reserves through the Bay of Plenty, are they?
- A. No, I understand that MFE would like to see a national approach taken to marine protected areas and they would like to see 10% of our marine environment put into marine protected areas, and I think perhaps through this process and highlighting the issues perhaps MFE and MPI and Regional Councils could work together on achieving that.
- Q. You say in the last sentence of your paragraph 34 that you're not aware of any Government department, Ministry, agency or regional council carrying out such a body of work anywhere in New Zealand to inform the design of marine, regional marine reserve networks. That's your evidence, isn't it?
- A. So the body of work that I'm talking about in that paragraph is in response to my paragraph 33 which talks about all of the things that you really need to know about to be able to effectively design marine protected areas to have maximum benefit. So I was talking about a hydrodynamic environment, identifying your key restoration species, their distribution and abundance throughout the area that you're looking to restore, larval behaviour, interrelationships between habitats, habitats used by those species at different life stages and a spatial arrangement of habitats for settlement of larvae. I'm not aware of any agency undertaking all of those

things with a view to establishing marine protected areas throughout the country.

Q. And so there's no funding and no research available to establish a network of marine reserves within the Bay of Plenty, is there?

A. I have no idea whether there is the funding available or not. I would have expected that if a Ministry or agency or regional council wished to do that work they could prioritise it and fund it.

Q. But to your knowledge that's not happening and so the scenario you put forward of a network within the Bay of Plenty is purely hypothetical?

A. I think that undertaking that body of work, it could be undertaken and I have a go at estimating the cost of that at paragraph 36, and I imagine that that body of work could be undertaken within, say, one to two years.

Q. Now you've read Ms Noble's evidence, haven't you, in relation to what their budgetary constraints are for research for CMA?

A. I have read Ms Noble's evidence. That's quite long and I don't remember every single part of it.

Q. Well, there's nothing like that in the budget, is there, for the Regional Council?

A. I'm not sure. That would be a question for Ms Noble.

Q. Can we just go back to your para 9? Again, it's the first sentence I'm interested in. You refer to this objective of restoration to pre-fished levels. Now I just want to ask you where in evidence has MRMT asked for restoration to pre-fished levels for the MNEMA?

A. I'm not sure whether that has been part of the proposal but in my opinion returning to pre-fished levels would be a worthy objective and, again, it's my evidence that a holistic approach to doing that throughout the region would be the best way to achieve it.

Q. So that would be your ideal state?

A. Yes. I think that would be the best way to restore marine ecological values within the region.

Q. Do you agree that the proposal before the Court relates to the protection of the values of the wāhi tapu?

A. Yes.

- Q. If we go to your paragraph 50, I just want to suggest to you on your logic we would never establish one-off marine protected areas because we'd always need to establish a network all at the same time. How do you respond to that?
- A. It's my opinion that establishing a network is the best way to achieve restoration of the marine ecological values. As I stated before, any no-take area such as the proposal in front of us here would have benefits to the marine environment, but in order to restore the values across the region and to maximise the success then a regional approach should be taken.
- Q. Do you agree that if Auckland had waited for a comprehensive network and the robust baseline data that goes with it, then we wouldn't have the marine reserve? It wouldn't have been established?
- A. No. That's correct.
- Q. Do you agree the same applies to Tuhua?
- A. Yes, yes. However, in order to get the best outcome it's better to take an integrated approach and I believe that we have the time to do that currently. It's my opinion that the marine environment values are not at a crisis point or tipping point. I do believe that we have the time to do the research and look at this in an integrated manner across the region.
- Q. Do you agree that if the standard is to maintain indigenous biodiversity we don't need a tipping point to have a rules framework?
- A. Yes, yes, I would agree that's true.
- Q. So in a sense, what you're saying is that it's in an optimal sense, ideally we would set up a network of marine reserves within the Bay of Plenty, but on the other hand you'd accept that if the Court approves the MNEMA as proposed that could form the beginning part of that network.
- A. Yes, it could. Once that research has been undertaken or the data collated, because I imagine there's data sitting in a number of different institutions, once that's been done and once a region-wide approach has been taken to developing marine protected areas, it's highly likely that some of these areas – maybe not all of them – would form part of that network.

Q. But if we stick with the proposition that it could be a starting point, we could add in the network later and whether that's under the RMA or under the Fisheries Act or marine protection legislation, that's a reasonably proposition, isn't it?

A. Yes, it is.

Q. Just in terms of your reference to tipping point, can you just explain your view of what that is in terms of the indigenous biodiversity?

A. My understanding of a tipping point is when a number of factors combine together to cause such an effect on an ecosystem that it takes an entirely different trajectory.

Q. You accept, don't you, that in terms of the rare and threatened species present within the MNEMA were already in a state of decline both as to avifauna and in terms of other marine species, both flora and fauna?

A. I believe there are threatened and at-risk avifauna, vegetation, and lizards present in the MNEMAa area. I'm not aware of any marine organisms that are at-risk or threatened.

1510

Q. Are you able to comment in terms of the presence of the hāpuka?

A. It's not a threatened or at-risk species.

Q. But from the perspective of the Bay of Plenty it's functionally extinct?

A. I don't know whether it's functionally extinct but it has undertaken – has – sorry – it has significantly declined in the Bay of Plenty in abundance.

Q. Do you accept the proposition that where a rare or threatened species is in decline, it takes longer to recover in terms of the maintenance of biodiversity?

A. Sorry, where a rare or threatened species is in decline?

Q. It takes longer for that species to recover to a viable level or a sustainable level.

A. I expect that's true, yes.

Q. Now you're now familiar, aren't you, with the proposed rules framework put forward by MRMT?

A. Mostly.

- Q. Well, it may assist then just to have in front of you exhibit E3. And it's only rules I'd like you to look at, please, which is page 8. So just to make sure your copy includes – there's a correction on the first line where it says, "Within the wāhi tapu areas containing ONC, ONFL or IBDA," there should be another "A" inserted, just so you're clear on that?

WITNESS REFERRED TO EXHIBIT E3

- A. No, okay.
- Q. Thank you. Now so essentially it's prohibited status, prohibited activity, to damage, destroy, disturb, take or remove indigenous flora or fauna within the wāhi tapu areas that he's listed, correct?
- A. Yes.
- Q. So do you agree if this rules framework were implemented it would help maintain indigenous biodiversity within the MNEMA?
- A. Yes.
- Q. And do you agree that the proposals put forward by the Council in terms of methods which are not rules will not maintain indigenous biodiversity within the MNEMA?
- A. I'm not sure. So the Council is proposing policies and education and advocacy.
- Q. Yes.
- A. Those things can definitely help maintain indigenous biodiversity.
- Q. But the contrast here is between a prohibition on taking of indigenous flora and fauna, on the one hand, and the other the educative, non-interventionist methods. Which one is more likely to maintain indigenous biodiversity within the MNEMA?
- A. The not taking of flora and fauna will most – will definitely have greater benefit to the marine ecological values and will enhance within those areas to some extent.
- Q. Just taking you back to your paragraph 10, please, of your evidence, and it's the last sentence I'm interested in where you refer to established mechanisms through the Fisheries Act and the Marines Reserves policy and legislation are likely to be better set up to facilitate, manage and enforce no-take areas. Now are you venturing an opinion on the efficacy

of the Fisheries Act and Marine Reserves legislation as against the RMA and which is better?

1515

- A. No, my point there was that enforcement and monitoring of protected areas occurs under the Fisheries Act and in the Marine Reserves Act and that the people who do that work are set up to do that effectively.
- Q. But do you accept that if the High Court is agreed, the council has a duty under section 30GA to maintain indigenous biodiversity through the rules framework that can be an effective regime as well?
- A. That's probably outside my area.
- Q. So it's outside your area to comment on the RMA, but it's within your expertise to comment on the Fisheries Act and the Marine Reserves Legislation?
- A. My comment on the Fisheries Act and the Marine Reserves Act was around Fisheries officers and the like and how they are experienced at managing such things not the legislation or the policy or rules or anything else.
- Q. Now, a comment you made in answer to questions from your counsel was that in your view having a permanent marine reserve in place is better than having a refresh every 10 years which is effectively what would happen if there was a rule in the Regional Coast Plan, that's your evidence isn't it?
- A. My concern is that after 10 years and the plan's reviewed again that fishing could be opened up into the no take areas and undo whatever the benefits have accrued in that time.
- Q. Now that is a fair point in terms of the possible consequence, but do you also agree allowing for a refresh every 10 years might allow for an adaptive regime so after 10 years we can monitor what the benefits or dis-benefits are and make the changes accordingly to the rules framework?
- A. Yes, I agree that that is possible but I believe that a lower risk approach would be to establish no take areas in perpetuity.

- Q. I'm just going back to the exhibit E3 and its rule 3 I'd like you to look at please. Now, just so you're clear, the proposal is that anywhere within the MNEMA which is essentially the green amoeba shape on the map behind you, the list of activities and bullet points would be prohibited activities, you're clear on that?
- A. Yes.
- Q. Do you agree that if the Court were to approve that rule, it will assist in maintaining indigenous biodiversity within the MNEMA?
- A. Yes, trawling and dredging in particular do damage to the marine benthic habitat.
- Q. Do you agree that those activities, the extent they occur within the MNEMA result in significant adverse effects to indigenous biodiversity?
- A. I'm not clear on that. I understand that there is some dredging, trawling and seine netting and potting within that area. I don't have the information to know whether those activities are having a significant effect within that area.
- Q. Well, let's assume because Mr Hill can confirm, you know, the spatial extent of those activities, but assuming they do take place within the MNEMA, I'd suggest to you that they will result in significant adverse effects to indigenous biodiversity?
- A. Dredging and trawling definitely result in adverse effects whether they're significant within that area or not I'm not sure.
- Q. And what is your comment for the other three, seine netting, potting, gill netting?
- A. My opinion is that they have a lesser effect compared to dredging and trawling which is why I was focussing on those top two. Again, I can't comment as to whether they would have a significant adverse effect, but my opinion is that they would have a lower effect than dredging and trawling.
- Q. And it's not on the list but long-lining, would you agree that has, is probable, is likely to cause significant adverse effects within MNEMA in terms of indigenous biodiversity?

A. Again, I can't comment on that. I know that long-lining can have adverse effects whether they are significant or not within that area I'm not sure.

1520

Q. Okay. I just want to be clear then in terms of the answer you've just given me about whether they're significant or not, you're saying that you're unclear about the scale and extent. You agree they're adverse but you're unclear whether they're significant or not. Is that a summary of your answer?

A. Yes. I believe that those activities can have adverse effects on marine ecological values. Whether or not they're significant in the MNEMA area or not I'm – I don't have that data.

Q. Okay. Now I'd just like to ask if you've reviewed the exhibit produced by Dr Stirnemann which is the by-catch data. Exhibit I1?

A. No I haven't. And I don't have it in front of me.

Q. Okay. We will obtain that for you. Now for clarity, it's unclear from the information provided exactly where the by-catches took place. Sorry, I won't read that. I just want to be clear with you that this is information provided to Dr Stirnemann by MPI and we're unsure as to where the events took place within the area. So with that caveat, would you agree that as you can see there the type of event is identified in terms of by-catch and what it's caused by. For example albatrosses we have surface long-line or trawling as an example?

A. What area was this data collected within? Is it national? Is it regional? Is it –

THE COURT: JUDGE KIRKPATRICK

Q. I think it's MPI areas 9 and 10 and whatever, I think it's 9H is the harbour. It's within two areas off the Bay of Plenty coast?

A. Okay. Thank you.

Q. From coastline out. It's not the deep sea sections further out.

A. Thank you.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

Q. And the simple question to you is having looked at that exhibit do you agree that in terms of by-catch these are significant adverse effects of those activities? So for example the activity of surface long-line result in the by-catch of albatrosses at seven just as one of the many examples?

A. Because I'm not a seabird expert I don't know whether the loss of seven albatross to long-line would have a significant adverse effect on the albatross population, so I can't really comment further.

Q. In relation to, on the first page there if you go back to figure 1, trawling resulting in the loss of bamboo pole and black pole in kgs. That's a significant effect of trawling isn't it?

A. I would have to understand the distribution of those two species throughout the region to know whether the loss of those kilos is a significant adverse effect on the population of those corals.

Q. Just a final question relating to the joint witness statement. And it's the first issue on that. The, representing this issue basically. And you've referred there to the second sentence under your name, you agree with Dr Ross just because the habitats and ecological values are represented elsewhere does not negate their values potential no take areas. Now, I think you accept now that your statements in the joint witness statement about representatives have to be seen in the light of the national and regional significant values identified by the regional coastal plan.

1525

A. Yes, this is point 1, that the full range of the habitats and ecological values within the area are represented elsewhere in the bay, as I stated, Dr Ross and I failed to identify the rift in Motunau Island, which is the exception to this.

Q. Yes. Page 5, you've acknowledged there that you agreed with Dr Ross that at the scale of the marine the proposed no-take areas form a network. Correct?

A. Yes. I say that I agree with Dr Ross that at that stage the proposed no-take areas form a network. I don't think that they form a regional network and I note that the MFE in their recent consultation document on

the proposed Marine Protected Areas Act, they state that a well-designed and managed MPA network will provide a greater contribution to a healthy marine environment than a collection of individually-identified marine protected areas. So that's the point that I'm making there. A broader scale with research or data backing it up and an understanding of the species and distributions and their habitat needs would maximise the benefits.

Q. You're aware, aren't you, that what's now proposed – and it's shown on the map – there's an intersecting network of nine wāhi tapu referred to as the necklace which does, would you accept, forms a network in terms of its function?

A. It forms a network within that area but if you zoom out to the whole region it's quite a small component and it would be better to have marine protected areas throughout the region across all habitat types to benefit all species.

Q. But as you've acknowledged, that offer isn't on the table currently, is it?

A. No, but it could be undertaken, in my opinion.

THE COURT ADDRESSES COUNSEL – TIMING

COURT ADJOURNS: 3.28 PM

COURT RESUMES: 3.47 PM
 (AUDIO RESUMES: 15:47:50)

CROSS-EXAMINATION: MR POU

- Q. ...since, because I mentioned before, there is a significant degree of overlap. I mean, the first issue I have is this, in response to some of the questions of my friend, Mr Enright, you talked about the need for a permanent sort of a regime and having something that sits there only for 10 years isn't necessarily efficient? That was your evidence?
- A. My evidence is that a no take area in perpetuity would have far greater benefits than no take area established only for 10 years.
- Q. But in terms of what's been sought, isn't the opposite also true, that if we don't do something now, we blink, open our eyes in 10 years and there's still nothing happening?
- A. That's a possibility if no one drives the process, if no one drives the collaboration between Government agencies and the councils and everyone sits back on their laurels then yes, that could be the case.
- Q. And you talked about the need for research but my understanding of the evidence of Mr Sayers is that they initiated an MPI process in 2010 and it seems that since that time the only people that have commissioned any expert evidence into the decline of biodiversity in the area has been the Motiti Rohe Moana Trust in their effort to see this occur. So your evidence is that they should continue wait?
- A. No, my evidence is that it would be better to act now on a regional scale.
- Q. The issue, because you said you need somebody to drive it. There have been people trying to drive this since 2010 and nothing's happening.
- A. I think through this process the Regional Council have recognised that they can indeed drive such a process and it would be my hope that they would drive and facilitate a working group to establish marine protected areas through their region.
- Q. But seven years later the Regional Council's evidence is that, "We're not ready to do it yet." Is that the evidence?

A. It's not my evidence.

Q. So you're suggesting something needs to be done now?

1550

A. My evidence is that the marine ecological values are not at a crisis point that we need to do something now, today. My evidence is that we have time to collate the science together to max –

Q. When is that crisis point going to happen?

A. – to maximise ...

THE COURT: JUDGE SMITH

Q. Sorry, you got to, "It's not at a crisis point yet," and I missed the rest of your answer, sorry?

A. There's time to collate the science to work out the best location, the best size, the best connectivity in order to achieve even better ecological outcomes.

CROSS-EXAMINATION CONTINUES: MR POU

Q. In one of your responses to Mr Enright was that there's been a significant decline in species such as hāpuka so in terms of the significant declines that have already happened, when is that crisis point going to happen or can we say that with any certainty?

A. Tipping points are inherently sneaky. You don't know that you're at one until you've had one typically is my understanding from the literature. The only marine tipping point that I can think of was a cod fishery overseas. I don't believe we've had a tipping point in a marine system in New Zealand but there has been significant decline in the top predators.

Q. Wouldn't the requirement to adopt the precautionary approach suggest that you need to, if we're talking about crisis points, that you need to do something now rather than wait until we're at that crisis point?

A. With respect to the precautionary approach, my understanding is that that's normally taken when there is a lack of data and a lack of certainty, but I think that we have enough information to know that marine-protected areas are a good idea. We just need to take the time to work out where

best to position them and what size they should be, and I believe that we have the time to do that.

Q. Just in terms of, I just want to go back to your answer, in terms of the cod fishery that you talked about just before and is that a United States example?

A. I can't recall exactly where it was. I think it is in the States but I'm not, I don't have it in front of me, but effectively that fishery collapsed.

Q. Now, have you been here for the entire hearing and listened to some of the questions and responses?

A. No, I have not.

Q. Did you hear some of the questioning of some of the other ecologists where they were talking about whether or not the size of this protection area or the MNEMA and questions to them about or not this is perhaps too large, did you hear any of those questions?

A. I recall some questions on size of reserves but I don't recall that particular question.

Q. Because in terms of that it seems that your evidence is that we can't start there because we need to know where the whole network is and that seems to kind of go across the brain of everything else that we need something bigger so that we know that it's effective.

A. It's not necessarily that we need something bigger, it's just that we need to make sure we've got all the habitats that we need for the keys species protected and connected.

Q. But don't we have to start somewhere?

A. I've already said that this is a good start, but I believe that a regional approach would maximise the benefits.

Q. Because my clients sit around the sides of this proposal. They're watching and they see it as a good start, but it seems to be that your evidence is, "Well, we might not be at crisis but ecological systems are in decline."

A. The top predators have declined significantly, yes.

Q. And if the council, one of the functions of the council is to maintain biodiversity, then that function therefore is not being fulfilled but that it actually is in decline, it's not being maintained?

A. It's probably a question for the Crown more on how those key fisheries are being managed and how the quota system is working and the recreational take. I know that they do adjust those take levels and sizes of species as more information comes to light.

1555

Q. So it's not about the management regime. If there's a function to maintain biodiversity, and biodiversity is declining, then the function is not being maintained, regardless of what anybody else is doing.

A. And my evidence says that fishing has had, and continues to have, an effect on marine ecological values in the region, but I consider that to best deal with that a regional approach based on key habitat types is more likely to achieve restoration.

Q. So, I'm not actually talking about restoration here. I'm talking about the decline of biodiversity and the decline of the ecological system, which you've accepted.

A. Again, a regional approach would be better to attack that, to maintain indigenous biodiversity.

Q. And – no, no, again, so – but you accept that it's been – it's in decline?

A. Yes, my evidence says that.

Q. And if they have a function, and I want to be really clear, because if the function is to maintain then that function is not being achieved because it's in decline, isn't it?

A. Abundance is declining, has declined and I expect is continuing to decline. I don't think we're at a point of losing species.

Q. Just the abundance of species.

A. Abundance of the key fished species, yes.

Q. And because we're not at a tipping point we don't really – we don't have to do anything more than research at the moment.

- A. No, that's not what I'm saying. My evidence is that we've got the time. I keep saying this, it's probably annoying for everybody, that we've got the time to pull the sides together and to have a better outcome.

RE-EXAMINATION: MS HILL

- Q. Really just around the size of the proposed areas, so you talked a bit about the design and the size and at the moment there's been, you'll be aware, a one-nautical mile proposal suggested, and I understand that's come out more around the cultural elements. Do you have any comments to make from an indigenous biodiversity perspective around the size of those buffers?
- A. The size needs to – you need to understand the larval movement of the species that you're trying to protect and restore and if the larvae of those species move outside of the one nautical mile then you're not going to get self-recruitment into that area and that's what's happening at Leigh. The snapper within the reserve, they're not self-recruiting. The larvae are zipping off down the coast and helping the fishery. So you need to understand the larvae, the hydrodynamics, all of these things, to be able to make sure that the size and the location of where you're putting these no-take areas is appropriate to achieve the objectives that you wish.

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

- Q. Before I ask others to speak about that, I mean a point was made about your evidence, and I forget the paragraph number but you note the arbitrary nature of the ones – it might be Ms Noble who comments on that as well – but there's been comment about the arbitrary nature of it. I suppose one of the things about legal systems is that there are an awful lot of arbitrary limits that are imposed. So acknowledging what you've just said in answer to your counsel, well, it would seem to me that the likelihood will be that for different species there'll be – could be different distances. They'll all have different approaches to larval behaviour and feeding habits and spawning and so on. Is that right?
- A. That's correct, and that's why it's important to understand what your key species are, and it's presumably the top predators, and I understand –

Q. On the basis that they, if they can survive then presumably the pyramid underneath them has survived?

A. Yep, it'll put the balance back in place.

Q. Well, I mean, acknowledging that there is no single figure, I suppose I'm asking you if there is a figure that you might propose.

A. It would take some going through the science and literature to pull that information together. I don't have that figure to hand, but because –

Q. Is it of the order of a nautical mile or is it likely to be substantially greater or lesser than that?

1600

A. Depends on the species but we know from that lean snapper example that most of the larvae disperse more than 10 kilometres away from the reserve.

Q. Other than the far ocean marine reserves, Kermadecs, Antipodes, Bounty, Campbell, Auckland, et cetera, I suppose the likelihood is that we're not going to get large-scale marine reserves of, say, 10s of kilometres, are we?

A. No, and I think that the location is more important than the size. You need to make sure you've got the settlement and the recruitment habitats all covered off more than one single large reserve.

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN

Q. This particular – if this regime was adopted here it still would not preclude the regional approach that you're suggesting.

A. No, no. That's correct. Yep.

QUESTIONS FROM THE COURT: JUDGE SMITH

Q. If you go to volume 4, you should be able to find copies of a certain map that Ms Hill gave us. These are fisheries maps. Ignore the shading for the moment.

A. Okay.

Q. I want to talk firstly about the existing network and its positioning and coverage of the islands and you'll see that that attaches the current marine reserves. I think this is another form as well, the exclusion zone,

I think. It doesn't list Mount Maunganui but you know that that one is there as well.

A. No, not really.

Q. Oh, sorry. Okay. Well, you can see that there's been criticisms of the size of the nautical mile standoff, so although it may not be big enough it's no doubt because we've already been told that there's a number of prosecutions in relation to it. I think it's very close to the drop-off there.

A. Yes.

Q. So on the northern side in particular, you'll agree with me that that's a habitat of some importance?

A. Yes.

Q. That's worldwide, isn't it, those type of habitats?

A. Yes, very important.

Q. Although we might have criticisms of the size of the reserve, there is one there.

A. Yep.

Q. Then we have one at Mount Maunganui, which I think we'd all agree is an urban one and is a relatively difficult and very narrow one, basically constrained by the port. Its effectiveness is difficult to measure because of – well, I've seen people taking things and I'm sure others have too.

A. Yes.

Q. Then we have to go to Maketu, and you'll see that there is a longshore one. I don't know if you've been involved in those cases but you'll be aware that that links into an inshore area which the council has just now vesting considerable sums and upgrading and reintroducing freshwater into the estuary.

A. Yes.

Q. So that has some particular ecotone features of value. I don't think I need to ask you that. I think it's pretty clear.

A. Yes.

Q. And then if you move down we can see there's another one which I don't know much about but you'll see that that has some very interesting

features in that we go from 500 metres down to 14 metres. If you look at the top, the middle, it shows the depth of water there.

A. Oh, yes, yep.

Q. So that's clearly right next to a very steep drop-off there.

A. Mhm.

Q. Again, it has small – people have criticised the pie chop in it. Can you see that at the bottom?

A. Yep.

1605

Q. So you can sit a boat in there and get the fish circulating round, but nevertheless is it there. And then we go down further and we can see there's another one down which is the mātaimai reserve as I understand it further down the coast, I think above Ōpōtiki. Is that right? Somewhat up the, yes, Kokohi, see that one there? So we already have various forms of protection –

A. Mhm.

Q. – but given, looking at those areas I think I can confidently say it represents far less than 1% of even the Regional Council area, never mind the areas 9 and 10 of the MAF fishing areas?

A. The two marine reserves are 0.1%.

Q. Oh, are they? Okay. Yes. So we can confidently say they're no, they're less than 1%?

A. Yeah.

Q. So even if we added the 2% that is suggested if all of these were put in place as requested we'd still be well short of anything that you were suggesting is a reasonable network of 10% wouldn't we?

A. Yes and you need all habitats, all important habitats and replication of those habitats.

Q. Yes. Now I haven't dealt with the harbour but we know the (inaudible 16:06:06) harbour habitat's protected as well. You'd be aware of that. So it seems to me there's some diversity in those habitats already isn't there?

A. There is some, yes.

- Q. And we have a couple of deep water drop offs. Motiti is more of a – it doesn't have a very steep drop off but it has some other features which were of interest. Now I think you were involved in the *Rena* so you know about Otaiti, so I'm going to start with that. Because that's probably had the most work done on it in recent years –
- A. It has.
- Q. – and we know a fair bit about it and there was no dispute at the hearing that the closure of that area for the period of the salvage work had led to a significant increase in the ecotone and I mean by that the whole habitat?
- A. There wasn't any quantitative research on that. It was only anecdotal that the divers and Dr Ross in particular noted the abundance of crayfish and then –
- Q. We heard evidence about stingrays, eagle rays and there was even evidence about hāpuka which was accepted by the Court. No? Oh, well. Okay. We can read the decision again but that's fine. The evidence in that regard was obviously canvassed in some detail in the *Rena* decision wasn't it?
- A. Yep.
- Q. And the, what we know from that is that at that stage the migration of noxious materials et cetera had been relatively limited from the reef –
- A. Mhm.
- Q. – but monitoring was intended to take place some distance off the reef as a check?
- A. Yes, that's correct.
- Q. Now you'll see that the MRMT are suggesting something around the monitoring edges of the three nautical miles there but we didn't have a lot of evidence in the hearing about the life cycle of the various biota on the reef –
- A. No.
- Q. Did you hear the evidence that was given to us by one of the experts that there is a tendency for both crayfish and fish to utilise the sandy bottoms off the reef from time to time, particularly during spawning and crayfish

- seem to go off for a bit of a holiday into the sand to eat molluscs or something?
- A. They do, yeah. Yes. I didn't hear that but I am aware of that, yes.
- Q. So there are times they move away from the reef –
- A. Some species yes.
- Q. And it's difficult to know which species, when and where exactly they'll go as I understand it at this point?
- A. There is variability, yes.
- Q. So do you have anything you would say about the three nautical miles for Otaiti which you had the most involvement with?
- A. I think it'd be great to have that protected. It'd be great to have Otaiti protected and we were all bitterly disappointed when the exclusion zone was removed and the commercial fishers came in and –
- Q. That's fine. I'll just... So I've dealt with all those other areas. Do you think and I'm just looking at this in terms of that plan we've just discussed, that the addition in the middle of the Motiti area would assist in providing connections within, to and from existing reserves and along the long shore coast if I can put it that way?
- A. Yes it would assist but we just need to understand the larvae movement of those key species and to know whether it's needed.
- Q. We know about lateral drift because we've had - I've had unfortunately too many cases on that topic also, so we know it does change from time to time –
- A. Mhm.
- Q. – but we know that it tends to be long shore one way or the other don't we? Which would –
- A. Yes.
- Q. – which would be supported by the fact if you look at the fishing effort it has tended to be within the drop off area?
- A. Yeah, that's right.
- Q. So shore would have drop off. So I want to talk about biomass now –
- A. Mhm.

Q. The argument as I understand it, and we'll find out from Mr Prebble tomorrow, and I think Mr Hill said the target was 40% biomass but I don't know compared to what, but I presume compared with some spe - some time, do you know what the MPI target is for biomass?

A. No.

1610

Q. This Court deals with residual populations far too often not only the sea base but land base.

A. Yes.

Q. And there is a concern when you get biomass down below 20%, certainly below 10% which often regarded as survival mode.

A. Yes, I think snapper in the region is sitting at about 13.

Q. Yes, but you would agree with me that once you get below, because in one of the hearings, we had somebody tell us it was 6% but let's assume there's variability and you've mentioned 10 to 13% being estimated?

A. Yes.

Q. But you would agree with me once you get to lower levels below 10, you're getting to what you might call residual survival populations?

A. It becomes harder and harder, yes.

Q. And the best example we've ever had that is on Kiawah Island once they got below 10% for the wallabies, they're still 10 years later trying to kill off the last wallabies because it becomes har – because it becomes scarcer, et cetera.

A. Yes.

Q. And therefore, individual kills become more critically important don't they?

A. Yes.

Q. And you can take out an entire population if you pick off all of those to the extent that it does collapse entirely, do you agree?

A. Mhm, yes.

Q. Now, if we're talking 10% or 13% of snapper or 10%, you would agree with me we're getting to a stage which is getting very close to worrying if not critical. I'm not going to use a word like "critical" because it has special

meaning, but you would agree with me that that's a percentage of biomass which is becoming worrying?

A. It's a significant depletion and probably best to talk to Mr Hill on how MPI are managing that.

Q. Well, he does tell us about that but, quite right, that's a subje – I just want to check with you and we're told that hāpuka have been extirpated which I think means, again, we're down to that survival mode and where there's obviously individuals around but they're very hard to find. Ms Stirnemann told us that black petrel was now down to, I can't remember whether she said it was critically endangered or, so there are such low levels that an individual death is of some importance.

A. Yes, a bit like the fairy terns at Mangawhai, yes.

Q. Exactly. These type of things, okay. So we seem to all agree on that. Now, having regard we've been through and I don't want to go through them again, but the proposed coastal plan 256/257 describing Otaiti and Motunau in particular and the values of that which are habitat values.

A. Yes.

Q. You understand the distinction between habitat and species?

A. Yes.

Q. Are you satisfied that the plan provisions now suggested by the regional council will avoid adverse effects on those habitats?

A. (no audible answer 16:13:06)

Q. Not – and I don't want to be – it's not significant adverse effects –

A. Not species, it's the adverse effects.

Q. – it's the adverse effects.

A. That's tricky. On the habitats so you'd need to have an effect on the species significant enough to then have a flow on effect to the habitat or for the mechanism of fishing to be doing damage.

Q. Well, it doesn't matter what – the question is whether or not it would do that. If that's too hard, if you don't, rather not offer an opinion on that, would it maintain those habitats?

A. Those habitats have maintained and they are both in good condition.

Q. But I thought you answered Mr Pou to say they were declining?

A. Fisheries overall. Fish – top predators are declining but it does – Otaiti is in good ecological health. Motunau I'm a little bit less familiar with.

Q. Are you familiar with the Operative Regional Coastal Plan?

A. Yes, but not all the rules and policy rule.

Q. Well, the main thing was I think there's a suggestion by certain witnesses at least that there were very similar provisions to those now proposed in the last Regional Coastal Plan.

A. I'm not aware of that.

Q. No, I'll have to hunt it up so that's – I just wondered if you knew. Now, I think you accepted that Mr Pou's question to you was that, and it's really the same question I asked you before, that the MRMT provision would better protect and maintain the habitats than that of the regional council?

A. A no-take area would – is, is better.

1615

Q. And I think you went a step further and said it would also have some rehabilitation or, I think, positive benefits in the sense of rehabilitation, restoration, as well. Is that fair?

A. Yep. For some species. Again, we don't need to know the larval distribution but there would be some benefits.

Q. Now if that's the case, we've – I've asked you about the buffer area for Otoiti – Otaiti and I think Judge Kirkpatrick asked you about the one nautical mile and I don't think there's anything further, unless there's something further you wanted to add on that.

A. (no audible answer 16:15:33).

QUESTIONS ARISING – NIL

WITNESS EXCUSED

MS HILL CALLS**REUBEN FRANCIS FRASER (AFFIRMED)**

Q. Could you confirm that your full name is Reuben Francis Fraser and you have prepared a statement of evidence dated 7 November 2017?

A. Yes.

Q. And also please confirm that that statement is true and correct to the best of your knowledge or otherwise advise any corrections that you wish to make?

A. I do have one correction to make. My apologies, I got a little bit mixed up with some of the areas so, Your Honours, paragraph 11, I think the simplest way to solve it would be to cross out the words, "Resulting in a total area for the MNEMA of 87,496.5 hectares," and just to clarify that's the area of the Rohe Moana rather than the MNEMA.

Q. The first thing I wanted you to address is the revised proposal, so since you've prepared your evidence there have been changes made to the proposal. Are you familiar with those?

A. Yes.

Q. And do you have any comments that you wish to make in light of those in relation to the matters addressed in your evidence?

A. Yeah, I think two. I had talked about issues that I saw with the consenting regime and so those obviously fall away without consent requirements in there. I had also raised concerns in my evidence about the ability of the Council to enforce no-go areas or activities that couldn't happen, and I think those concerns are still largely the same.

Q. There's been some discussion in the evidence regarding the marine reserve at Tuhua and some poaching which has become an issue out there. Do you have any knowledge of that?

A. I do have some knowledge of it. One of our maritime officers at the Council was an enforcement officer for the Department of Conservation for that marine reserve and so I have discussed the issue with him. The summary of that conversation is that the marine reserve without enforcement was not being effective and that the Department of

Conservation didn't – the monitoring didn't show up any sort of benefits to the reserve until they stepped that enforcement up.

Q. And do you have any comments to make in relation to this particular matter arising out of that?

A. I think the similarity obviously is that any sort of rules would need to be enforced for there to be enhancement benefits recognised.

Q. There's also been some suggestions made in the evidence, I think, of Mr Lawrence that the current proposal is anticipated to be largely self-policing. Do you have any comments that you wish to make in response to that?

1620

A. I think two comments to make in relation to that. The first is following on from those previous comments, I don't think that the provisions would be very effective if they just relied on self-policing. I also think that the community would have a justified expectation that the council would enforce any rules in a regional plan.

Q. And how would council propose to enforce the type of rules that are proposed by the trust?

A. I think council's general approach to enforcement would be to undertake education as a first step and I've outlined in my evidence a campaign that council would likely undertake if rules like this were in the coastal plan. Stepping up from that, and listening to some of the evidence given to the Court about complaint response, I think that complaints would be very difficult to respond to, both in terms of catching people in the act, so to speak, but also in terms of demonstrating effects, even if people were caught, and I think back to my experience in enforcing the exclusion zone around the *Rena* where even though there were salvers out at the site for much of the time there were still lots of issues with boats, both recreational and commercial boats, entering that area and it was quite a difficult thing to enforce as well, and I think that that sort of blanket exclusion of vessels would be easier to enforce, but there were still issues with it.

CROSS-EXAMINATION: MR PREBBLE – NIL**CROSS-EXAMINATION: MS HAMM**

Q. Afternoon, Mr Fraser. I just want to check, have you got there a copy of the regional coastal environment plan? Exhibit E3.

WITNESS REFERRED TO EXHIBIT E3

Q. If I just ask you firstly to have a look at the prohibited activity rule which Mr Lawrence proposed, rule 1, and it's got three parts to it. Just looking at part 2 in relation to structures, Mr Lawrence has provided there as a carve-out to the prohibited activity rule permitted activities for navigational aids under rule SO3. But you'd be aware – and if not, I'll ask you to check the plan – that that relates to navigational aids erected by certain parties, being the regional council or the Port of Tauranga or Maritime New Zealand.

A. Yes. That's right. Or their agents.

Q. In the situation at Motiti Island, where Motiti Avocados needs to erect a new navigational aid, do you think that that rule would enable that to occur?

A. The only way for that rule to apply would be if one of those agencies were willing for Motiti Avocados to act as their agent, and without that happening they would require a consent.

Q. Well, would they require a consent or would they in fact be able to get a consent is the question.

A. They would require a consent under the current operative plan and the proposed plan. If I understand correctly this proposal, then that would be prohibited.

Q. Right. If I gave you another example, perhaps, in signage, would that be – is there a consent pathway for signage under this rule?

A. No, I don't think so.

Q. Did you hear Mr Lawrence agree with me yesterday that other than re-consenting existing structures, given that there's ONFL around the entire island, someone looking to put a new structure there is going to have their work cut out for them anyway?

A. Yes, I did.

Q. Do you agree with that?

A. Yes.

1625

Q. But a navigational aid is the sort of structure where a consent pathway might well be appropriate, is it not?

A. Yes, yes, I think so.

Q. Now just sticking with the barge landing area, in the event that the prohibited activity will – fell away, but the one-nautical mile circle remained, and the Council was faced with a discretionary resource consent application to re-consent the barge landing, now that comes in, it's got a circle over the top of it and it says, "Wāhi tapu." Wāhi tapu is a defined term in the coastal plan so, as a consent planner, how does the Council feel with the application of that overlay?

A. I think the wāhi tapu overlay is a flag to a consent planner to understand what the values of that wāhi tapu are, and I think our current consenting approach would be to engage, either through the applicant or through the Council, with the tangata whenua in that area to understand whether the proposed activity would have effects on that wāhi tapu area and whether those could be addressed in any way.

Q. Now the policy framework which is proposed by the trust has a high focus on restoration and protection, would you agree with that?

A. Yes.

Q. So how would you – so, as a consent planner, how would you deal with the re-consenting of a structure in an overlay that has a high focus on a restoration and protection? Do you think there's alignment there or does that...

A. I think that would – I think that would make the consenting of that sort of proposal quite difficult. That – my mind goes immediately to some sort of mitigation that would make up for any sorts of impacts that a structure like that might have, and I think Your Honour, Judge Smith, was involved in Mr Wills' track on the eastern side where the applicant in that case had to go I think reasonably far to mitigate the impacts of some earthworks, and

so I guess in summary it would – these provisions would make that quite a difficult thing to consent.

Q. As a consent planner, it would be simpler, assuming there was no basis for it, for the spatial identification not to overlay those barge landings, wouldn't it?

A. Yes.

THE COURT ADDRESSES MR POU (16:27:54)

CROSS-EXAMINATION: MR POU

Q. The main issue – well, I've got two issues that I want to traverse with you. The first one is around the cost of patrolling that you discussed with Ms Hill and the other one is about the fishing. But in terms of the cost of patrolling, you've given a figure of \$4.5 million to do that. Now it strikes me that, and we were both involved in the *Rena* case, that everybody that went out to the *Rena* to dive or do other things, they had a camera. Were you aware of that? That the number of videos that came –

A. Yep, lots of videos, yep.

Q. Yes, they were quite high quality cameras when you watched the videos that were coming through. That's true?

A. Yep.

Q. Now, and I know this isn't on the evidence, but I saw on the TV last night a car doing donuts at Karioitahi Bridge – at Karioitahi Beach, hitting somebody and that was being filmed and the police were after that person as well. Did you see that?

A. No.

Q. The issue was in the state of smartphones, cameras, portable digital media devices. I put it to you that the cost of enforcement and the need to, to, for the Council to actually have a presence there, given that these things have GPSs in them that mark, and can do that, isn't necessarily as large as you suggest it is?

A. Yeah, I think that's fair, and I – when I think back to the *Rena* exclusion zone, there was a period of time where the Council patrolled that during

sort of high-use type periods, and I think that would probably be a reasonable sort of thing to do in this case too.

1630

Q. And, in particular, those divers that are going out there and wanting to protect the abundance of fish out there within that area, they probably be a bit overzealous about taking photos of all these people that they think that are infringing upon what could be a reserve, you'd accept that be a corollary?

A. Yes, I expect that if people were fishing in there, council would get lots of reports of it.

Q. Yes and you'd have those high quality videos like we saw in the *Rena*, those sorts of things?

A. Maybe, yes.

Q. Now, in terms of the fishing because the other issue is around this – and you've put in the evidence that Otaiti was a fishing hotspot and you've referred to that in your evidence?

A. Yes.

Q. Now, the ecologists that have given evidence, they've talked about a haloing that will occur around potential reserve areas, if we want to call them something, or MNEMA areas or whatever we want to call them, but if that would have the impact, and I'm not going to say, I'm not going to ask you to confirm that it would have the impact, but if that would have the impact of increasing the size of the hotspot, then your ability to fish on the fringes of the three nautical mile zone if that was going to happen would be the same as you fishing within that zone right now wouldn't it?

A. In terms of your ability to catch fish, yes, I think any of the marine reserves that you go to around New Zealand will often have a string of boats around the edge. I think, you know, you might lose some of that sort of the diving-type stuff because, you know, obviously people are hunting for things that live on the reef itself.

Q. Well, what I noted in the evidence that you had attached is one of the concerns for the divers was the trawling across where divers are, so if you have the fishermen outside the area but allow the divers who are not

taking within the area, it kind of serves a better purpose as well wouldn't it?

- A. Certainly for those divers who are there for spectating, yes.
- Q. Mhm. So in terms of – and I want to put it to you it does seem that the council are making these excuses and kind of exaggerating them and making them, I don't want to use the word “exaggerating” but making these issues bigger than they are in an effort to not have to do anything. You've accepted that it probably wouldn't cost four and a half million if you've got all these people taking photos everywhere that if the fishing spot is going to move off and you can fish in other places, and it will create, it will increase the abundance within the area which would be better for the fishermen – I'm trying to find in my head a different word for “excuses” but justifications that you're giving for not doing this kind of fall away?
- A. I've certainly not tried to give excuses for not doing anything in my evidence.
- Q. But those points, those issues that you raise around the cost, or maybe it's not that much, around the fishing, maybe it will be better, those justifications for not putting this in. They fall by the wayside when considered in the round in the context of what is seeking to be achieved here.
- A. I think my concerns really under Mr Lawrence's proposal are around the enforcement and I'm trying to think back. I think I've heard of cases where councils have used the sorts of videos that you've spoken about and run into issues with those. I'm not an expert in that area so probably can't go any further. I think those sorts of issues remain, but it's fair to say that those sorts of issues would be for any of these sorts of areas around. I think when I look at, for example, the two who are a reserve, the enforcement around that seems much simpler if people are out there because if people are in that area fishing, then straightaway that's an offence.
- Q. I guess that's where we balance that what we need to enforce around locking people out, and that might be easier because then you can just

take photos, or allowing different people to do different things so the enforcement might be a little bit more difficult, but you've still got these people taking photos, high quality photos, I understand there's MFE funding for enforcement, Mr Enright, and you've actually got a dedicated driving force in the Motiti Rohe Moana Trust who will actually probably go around and do these sorts of things. So essentially what you're talking about is the hurdles that you'd face in Court rather than the enforcement, the practical issues around gathering information to substantiate an enforcement?

1635

- A. I think it's a little bit more than just the issues that you'd face in Court. It seems to be that if the desired outcome is modifying people's behaviour and how they act out there, and I think that that's the thing that I have some concerns about.
- Q. And our concern is that in terms of the education and the use of education over the past iteration of the plan, it doesn't seem to be modifying people's behaviour. Would you accept that?
- A. I can understand that, yep.

CROSS-EXAMINATION: MR ENRIGHT

- Q. Mr Fraser, you've helpfully acknowledged that the rules have moved on this week, so I just want to clarify. Would you agree that your paragraph 17 through 22 basically are no longer relevant?
- A. Some of those paragraphs are no longer relevant. The comments that I make about rules of any kind need to be carefully considered and tested. I think that still applies.
- Q. Sure. You accept that the concerns you raised about the resource consent regime, the wāhi taonga areas, are no longer relevant?
- A. Yes.
- Q. That's fine. Now, in paragraph 15.1, you talk about community engagement and you refer to the need for a successful plan change process is one in which provisions are tested. Would you accept that the provisions being put forward by MRMT are being thoroughly tested by

way of this hearing and in terms of the participation of both council and the Crown?

A. I think I have similar concerns to what I understood Ms Barns to express in her evidence about the consideration of the parties who would be affected by this proposal and their involvement in it. It's probably a sort of a fairness or a justice concern rather than anything.

Q. Yes, but do you accept the point made that provisions are being thoroughly tested by way of this hearing and the participation of parties here?

A. They are being tested.

Q. Now, in 15.3, the same issue you've raised about consultation, correct? Over the MRMT proposed provisions.

A. Yes.

Q. Do you agree that the coastal plan process we're going through here is a first schedule process?

A. Yes.

Q. And the public have had full opportunity to be involved to the extent they wished to be in MRMT's proposals?

A. The public have certainly had that opportunity to be involved in the coastal plan process. I think my concern would be that a lot of those parties wouldn't have had an expectation that it could result in this sort of proposal.

Q. Once again, you accept we are in a first schedule process here in terms of a public process?

A. Yes, of course.

Q. And in 16.4, you've raised the issue about whether indigenous flora or fauna – basically whether it occurred within a wāhi tapu or wāhi taonga area. Now, you've already acknowledged you don't need to worry about wāhi taonga areas. Correct?

A. Well, with the exception of the commercial more invasive type fishing.

Q. Yes. The point I'm putting to you is, it's quite a simple thing to use GPS, isn't it, to plot whether somebody's within the wāhi tapu area or within the MNEMA itself. Do you accept that?

A. Yes.

Q. So in terms of enforcement, that's not a problem from the council's perspective?

A. If you have GPS information available, then that's useful.

1640

Q. And, as a matter of course, Council would have that GPS facility and indeed most fishing boats do nowadays?

A. If a Council vessel was at the site –

Q. Yes.

A. – they would have it.

Q. Now I just wanted to test with you, and my friend, Mr Pou, has already asked you about it, but the figure of 4.5 million you came up with, I think you've already acknowledged that might – or do you acknowledge that's an overstatement of what the enforcement costs would be likely?

A. So the 4.5 million was having a patrol out there every day.

Q. Yes. So would you accept that in reality that would never happen, not just for the MNEMA but any rules Council has to enforce are generally enforced by way of complaints?

A. Yes.

RE-EXAMINATION: MS HILL – NIL

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN

Q. Mr Fraser, I just wonder what tools are available to the Council for active monitoring? I mean, I seem to recall that the Council, and it was a by-law matter, could appoint wardens in the instance of dogs on beaches and there'd be somebody locally that could, if somebody with a dog, would say, you know, "You're not allowed to have your dog on the beach," and they'd send them away. Is that the sort of things available in this arena?

A. I don't think that there is such flexibility under the RMA to have those honorary enforcement officers. It would need to be – so Council can delegate those enforcement powers to employees of either the Council or of other Government agencies, but I don't – my understanding is that we couldn't have an honorary warden system similar to the by-law.

- Q. So it has to be another agency, does it?
- A. An – yeah, or somebody that Council employs.

QUESTIONS FROM THE COURT: COMMISSIONER POMARE – NIL

QUESTIONS FROM THE COURT: COMMISSIONER PRIME – NIL

QUESTIONS FROM THE COURT: JUDGE SMITH

- Q. My questions were firstly to assist the Court because you're a person who's been involved in the *Rena* and you, I think, have some knowledge about this whole area. Now I can't remember the name of the wreck but at the southern end of Motiti there's another wreck.
- A. *Taioma*.
- Q. *Taioma*, and that was placed there as a diving reef, wasn't it?
- A. Yes, Sir.
- Q. Can you on the map there just point to it and describe it to us so it comes into the evidence?
- A. So it's probably just off the southern end of Motiti. So...
- Q. So it's within the circle of Matarehu, isn't it, that one nautical mile?
- A. Yes, Sir.
- Q. It's off Wairere Bay, I think, isn't it?
- A. Off Wairere Bay, Sir, correct.
- Q. Yes. So assuming at the moment, and I'm only making the assumption, that the Court is convinced by Ms Hamm's submissions that we shouldn't include the southern, anything north of the southern tip of Motiti, it would still fall within that area if the circle was truncated?
- A. Yes, Sir.
- Q. Yes, or something other arrangement, but I'm just checking. Now it would be fair to say that both of those – you were involved – you, I think, sat through the whole of the *Rena* hearing.
- A. Yes, I did.
- Q. And so I don't want to repeat that you were there, so just to assist everyone here, that in fact we had quite extensive evidence from diving interests, didn't we –

- A. Yes.
- Q. – about the value of creating another diving resource in the Bay of Plenty? What you might call a, I think it was – what did they call it? Tourist diving or destination diving or something?
- A. Yes, yes.
- Q. And it appeared that there is actually quite a world market for interesting diving sites worldwide. That evidence was given and you'll recall by more than one witness, as I recall.
- A. Yes, Sir, and I think people spoke about people coming from all over the world already to dive off the *Rena*.
- Q. Yes, and it would be fair to say that if we're looking at tourism generally, one of the things that the Bay of Plenty has lacked has been, effectively, things to do, if I can put it that way, compared with – you don't want to comment?
- A. I won't debate that with you, Sir, no.
- Q. No, no, well, I explained it because it was raised by several of the witnesses at the hearing that this would actually add another feather to the range of things that people would come to Tauranga to do. Obviously, they come for sport, we can hear, and to rake the beaches flat and – but this was another matter that was shown as being a potential, significant benefit to the region. You recall that evidence?
- A. Yes, Sir, I –
- Q. I think we had some economic evidence on the point too.
- A. Yes, I do, I do, Sir.
- Q. Now one of the problems with Otaiti, as you know, is it's very weather-dependent, isn't it?
- A. Yes.
- Q. And there are places around Motiti which tend to be okay in whatever the weather set is unless it's very bad. Do you remember that evidence –
- A. Yes.
- Q. – about if it's bad on one side you can normally go to the other side, if it's bad at the north you can go to the south and vice versa?
- A. And I do have some experience of that myself as well, Sir.

Q. And so often you can find – so people will often, if they can't get to the Otaiti on one day they might be able to go to the *Taioma*, for example, or if it's a really nice day you go to both.

A. Yep.

1645

Q. And the evidence was that there was great potential for this to expand as a tourist operation.

A. Yes.

Q. You would agree with me worldwide there's a real interest in diving in abundant fish waters?

A. Yes.

Q. Especially where there might be a mix of tropical fish, for example, like Otaiti. There's evidence given on that.

A. Yep, yep.

Q. Now, we've also heard about a rift, a very interesting vertical habitat with things from interesting sponges and fish right through the species list.

A. Yes.

Q. So these type of areas with sufficient abundance would be a tourist attraction.

A. Yes.

Q. And if that could increase, that would increase their value, wouldn't it, in terms of a tourist attraction?

A. Yes.

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

Q. Mr Fraser, I want to take you to your paragraphs 15.3 and 15.4. We're talking there about the reaction to people finding out that the regional plan might contain provisions controlling fishing. You're really talking about the people who know something about fishing and are used to the existing regime and their reaction to the change, aren't you?

A. Yes. I think back to the exclusion zone around the *Rena* and the level of interest from particularly, I think, charter fishing businesses about when

the area was going to change or when that was going to be lifted and council was subjected to quite a bit of pressure around that.

Q. Well, there are two things going on, aren't there? One would have been that the fact of the wreck and the presence of the wreck would have been an attraction all on its own. The type that His Honour Judge Smith is talking about. Perhaps the region might attract more wrecks to it. We'll leave that to one side. I was thinking more – have there not been other occasions where you and your enforcement team, there's been a change in policy or a change in rules and you've had to go out and say to people, "Well, the rules have changed and you are now no longer allowed to do this," or, "You need a consent to do this," or, "These areas, the status of them has changed." You've dealt with that before, haven't you?

A. Yes.

Q. And Mr Pou asked you about getting cameras and all of that sort of stuff, but you have a wide range of lower level less, perhaps, confrontational methods that you might employ in enforcing the provisions of the plan, haven't you?

A. Yes. An immediate example, we'll have plan change 10 going on around land use activities around Lake Rotorua at the moment, and I think there's been a significant level of engagement with the community and through my team, specifically, looking at what a consent might look like and we've had a working party together to craft up what a consent document might look like and how that would impact on people's ability to farm, for example.

Q. But even when you do that, aren't there still an awful lot of people who aren't aware of these plan processes going on until they come up hard against it?

A. Yes, there are.

Q. And you still have to deal with that, don't you?

A. We do.

Q. And sometimes you may deal with that by explanation or a warning, possibly an abatement notice, long before you consider that you're going to prosecute someone.

A. Oh, absolutely.

Q. Have you been involved in marine prosecutions for any breaches of marine provisions in the regional plan?

A. The Mobil oil spill.

Q. That's quite a different scale.

A. It's quite a different scale, yes.

Q. So nothing at a lower level?

A. I can't think of anything of a lower level that's led to a prosecution.

Q. Have there been cases where people have deposited material or dredged material.

A. Mango clearance is one immediate thing I should have thought of earlier – I apologise – where council did prosecute somebody for clearing mangroves in an area identified as having high diversity value.

Q. How did the council learn of that?

A. Through a complaint.

Q. Anything else of that kind?

A. No, I don't think so.

QUESTIONS ARISING – NIL

WITNESS EXCUSED

THE COURT ADDRESSES COUNSEL – TIMING

COURT ADJOURNS: 4.51 PM

COURT RESUMES ON FRIDAY 1 DECEMBER 2017 AT 10.00 AM

THE COURT ADDRESSES PARTIES – NEXT WITNESS

MS HILL CALLS

JOANNA BARBARA NOBLE (AFFIRMED)

Q. Morning, Ms Noble. Your full name is Joanna Barbara Noble and you have prepared a statement of evidence dated 7 November 2017. Is that correct?

A. That's correct.

Q. Can you please confirm that your statement of evidence is true and correct to the best of your knowledge?

A. It is.

Q. Could you please make some comments on the revised proposal, essentially, in relation to if we start with rule 1, which is the proposal to prohibit. Do you have exhibit E3 in front of you?

A. I do. I think it's the latest version. It's dated the 28th of November.

WITNESS REFERRED TO EXHIBIT E3

Q. So in relation to what's been called rule 1, which is the prohibited activity rule, could you make some comments on each of the proposed wāhi tapu areas that this rule would apply to, and particularly in relation to the values and attributes within each area and the New Zealand coastal policy statement requirements in that regard?

A. Yes, I can. It might be easier if I point to the map. The different wāhi tapu that are left in the rule have different layers and different numbers of layers within them. So one of the most obvious overlaps is Motunau, so this circle here where we have an indigenous biodiversity area A, both on the island and the surrounding marina area. We have part of ONFL 44 and we also have an outstanding natural character area. Obviously the direction from NZCPS policies 11, 13 and 15 to avoid adverse effects on the various attributes and values applies in that area. They're both between the regional policy statement and the proposed coastal plan. We do have descriptions of the attributes and values. I might get to that

later once I've just briefly gone through the circles because some of those overlap because, for example, ONFL 44 appears in many circles and that has a description that applies to all of them. When we move to the other Motunau south circle and the other circle here, Tokoroa, they slightly intersect the IBDA but that would be the only other overlay that those particular circles are intersecting. Moving up to Motuhaku Island, sometimes referred to as Schooner Rocks, you'll see we have part of ONFL 44 again and also the area of outstanding natural character. So those are essentially picking up the reef structures. There's no IBDA or B in that particular wāhi tapu. Moving to the top, we have Otaiti or Astrolabe Reef. Obviously there's an IBDA there, which has been discussed. It's part of ONFL 44 and there's an area of outstanding natural character. The area to the north of Motiti – apologies, I don't have the names.

1015

Q. Nuku tai.

A. Nuku tai. So that intersects an area of the ONFL 44 around Motiti Island. Possibly some of the fringing IBDA around Motiti, although it's a bit hard to tell from the size of the lines. There's a fringe around Motiti of biodiversity value. It's mainly based on the land. Then moving around again we have Te Papa reefs. There's an area of outstanding natural character in there, which reflects the reef itself. Moving further around again –

Q. And there's no IBDA there?

A. No. Then moving around again we get to two circles that intersect, so I might deal with those together. They both have areas of outstanding natural character and also an area of ONFL 44 which, again, is likely reflecting the reef systems and there's no IBDA or B in either of those circles. Then the last one, I believe, is Matarehu. That's an IBDA, not A. There is some IBDA around Motiti itself. The landing areas are here, as far as I know, and that doesn't have an IBDA on it. Then to the north we enter this vegetative area. Of course, the whole area is high natural character, as is the rest of the open ocean. As I describe, there are

various attributes and values as the Court was discussing yesterday, I believe, contained both within the regional policy statement and the proposed coastal plan, so in terms of natural character those are found in appendix J and I believe at least some, if not all, of the Court had a chance to look at those policy statements. If you have the official copy, the relevant pages start at 294. There are several entries that apply depending on whereabouts you're located within the marina. So that first relevant entry there, Motiti Island margin, high natural character. I don't think we've got that mapped particularly well. It's map 21 in appendix I, page 256. You'll see that that high natural character area which is the green horizontal lines is very similar to the ONFL, if not the same as the ONFL 44 as it sits around Motiti. It is largely describing, as you can see, what's actually happening on the island itself in terms of the fringe and the vegetation. It does note that there's been modification for access. It also describes what's happening in the middle of the island which is agricultural and horticulture residential activities. As it's describing largely the terrestrial, it doesn't say much about the marine area, although it does say the coastal intertidal zone displays dominant natural processes. So that's maybe not particularly relevant to what we have been discussing so far. Moving on to the next relevant entry, that's Motuhaku Island, which is this pale yellow area here. It's an area of outstanding natural character, so this is where those directions applies. It describes the offshore island, the vertical rocky cliffs, so we're on page 295. Motiti Island itself is high. These yellow areas are the outstanding ones, so it's the reefs and shoals. Moving on, we have also a description of Motunau, this yellow area in here. Then a couple of pages on we get to Astrolabe Reef, which is what it's called in the RPS on page 301. In the general description it does note that the reef is renowned for its abundant marine life and a regular haul-out for fur seals, that it has regional significance for seal use and fish communities with high abundance and diversity. It also describes the abiotic systems and landform and some perceptual values. Then moving on again to page 305, this is where we get the general description of that high natural character area, so the green, which we can come back to,

then on page 307 we get the description for the other areas of outstanding natural character that don't have separate entries. It also refers to the more general high natural character description that's given in the row above. The descriptions become particularly relevant when you're looking at effects and avoiding adverse effects and reading the description and trying to determine whether or not an adverse effect is occurring or likely to occur. The descriptions do recognise that there are fishing spots and food resources utilised for the people of Motiti, for example, and the reefs are perceived as a food storehouse. Perceptions are of a natural marine area that have been impacted to some degree by *Rena*. Highly dynamic coastal waters with reefs supporting a variety of commercial fishing species. Even again in the general description it notes that fish congregate to feed on the relevant abundance of marine life supported by the diverse and rich reef habitats. So it would appear at the time that these areas were identified and the marine life was seen to be abundant and diverse. In terms of effects, the coastal plan currently has rules controlling activities like structures, dredging, removal of vegetation, reclamation, discharges, aquaculture, noise, taking water. It doesn't control the taking of seabirds as they're protected under the Wildlife Act, as are certain corals. Fish species generally are not, apart from two very specific species of grouper that I believe are quite rare. Some shark species are protected under the Wildlife Act as well, so their taking is prohibited. The plan also doesn't control the taking of marine mammals. Again, that's the Marine Mammal Protection Act that covers and protects marine mammals. So we do seem to be left with the fish. The coastal plan doesn't currently have rules controlling the taking of fish or, indeed, other activities such as disturbance of the seabed and foreshore associated with the harvest of those species. So in terms of the outstanding natural character areas, if the Court found that there is likely or there could be fishing activity occurring within those outstanding natural character areas that could either damage the reef structures, so the features themselves, so I think we're really talking about bottom-disturbing techniques there, then that would be an adverse effect

that the plan doesn't currently control. So if the Court was concerned about a potential legal gap, if it found it could control that activity jurisdictionally then that could possibly be one. Having said that, I'm not sure of the extent of fishing that does occur on those reefs at the moment. Obviously when the RPS description was written those reef systems seem to be in a relatively or in a very healthy state. It became operative in 2014 and those RPS, the descriptions of natural character were decided through an appeal process and those appeals were heard in 2014. It may have become operative in 2015. I will check. Yes, change 1, which was the coastal policy change that introduced natural character became operative on 3 June 2015. So it is a fairly recent assessment in terms of those outstanding natural character areas. Moving on to the ONFL 44, as in the coastal plan, schedule 3. To refresh your memories, this ONFL covers a number of areas around Motiti, Motunau, Otaiti. It describes Motiti Island and the current uses of the island and also the surrounding reef shoals and rocky outcrops as being widely used for commercial and recreational fishing and diving. It describes – focusing on the reefs and islands – rarity under natural science factors, the small islands along with the associated reefs and shoals, supporting marina coastal habitats are not common within the region but not rare or threatened in the New Zealand context. It talks about the vegetation patterns, which are not so relevant to what we've been discussing in this case. Vividness, Motiti Island and Astrolabe Reef are highly vivid landscapes due to visual connection and more recent media coverage of the reef as a result of the grounding of the cargo ship. Moving on to naturalness, I will skip over the bits about Motiti. Apart from the coastal support a range of seabirds, shorebirds and other natural species, Motuhaku and Motunau are unmodified and have natural significance. An excellent example of natural processes with no modifications to the coastal processes. Intactness, the island margins remain largely intact. The remaining islands are highly intact, and the majority of the reefs and shoals are intact with some wrecks. The outer islands, the Motiti margins, reefs and shoals are highly expressive of the natural processes that

formed them. There are transient values such as marine wildlife, dynamic character of open water, fish and seabird migration, and shared and recognised values, so the area is highly recognised and valued. Widely recognised for natural science and recreational values, particularly as places to dive and fish and there are strong tangata whenua-associated values with these features. There's more description of the mauri values, which also then refers to ASCB25. Motiti has a rich history and I think that's evident to the Court already. Obviously there are historical associations as well that go alongside that. So again, in terms of the activities that are not currently covered by the plan, I think we are really left with fishing. I'm aware that I'm not a landscape quantitate, so I'm saying this from a planner's perspective. Again, the effect that would most concern me would be the potential for bottom-disturbing techniques to damage the actual features of the reefs and the shoals themselves. That leads us to biodiversity. The biodiversity areas are in schedule 2 of the plan, page 255. The first relevant entry is Motiti Island, A75. There's a reference to carpark in the second column, 11A2. I believe it's there in error and I don't think it affects what we're discussing today. The island is a very thin strip along the edges of Motiti, apart from the very sudden point, describing some of the rare and threatened flora and avifauna. In terms of threatened or rare ecosystems, it's described as being regionally significant and not protected by other legislation. That's what the protected/unprotected refers to. The area that's protected is largely on land on Motiti itself, so the district plan rules will apply. There is a protective zone around the outer edge of Motiti that has some quite restrictive rules within it to protect those ecological values. It will include some of the intertidal area as well as the land-based area. In my view, the rules in the plan around structures, disturbance and deposition, use of vehicles, discharges, reclamations, would cover those activities likely to occur within that marginal area. They require a resource consent, as a discretionary activity. You may recall from previous hearings that there is a specific schedule in the plan called schedule 15 relating to offshore islands that was added to the plan to recognise that mostly these offshore

islands do have very high natural character values, but also people need to access the islands and there is some limited use in development. Obviously Motiti is the most developed. It has gone through a very lengthy process to establish what was appropriate use in development on Motiti and we didn't want to unpick that carefully-constructed plan. So landing areas in the areas designated in the district plan are provided for as discretionary activities.

1040

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

Q. Ms Noble, is there separate identification on map 43B of the IBDA's as numbered compared to the ASCB?

A. The ASCB should be shown on the B series of maps.

Q. What I'm looking for in the reference, I've got various VX references.

A. Yes.

Q. But what I don't see is any IBDA or A75, A76, A77 or A78.

A. On the map itself?

Q. No.

A. I think they're shown by name, not number. I don't have it in front of me. The VX refers to sites of particular cultural significance.

Q. They're printed in a red outline. I do seem them now. Thank you.

A. For clarify, those VX refer to areas identified in the description of ASCB 25, so there are a number of sites.

Q. It's the red lines. Motiti is outlined in red, or parts of it are.

A. Yes, yes.

Q. And then there's a circle at Astrolabe Reef and a circle, possibly two superimposed circles, A78, A77, at Motunau.

A. Yes. There'll be a marine area and then the island itself.

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN

Q. Just to clarify in relation to Motiti Island, were you saying that the red line that's shown on that map is actually beyond the land boundary?

A. I would have to look at it more closely, but I wouldn't be surprised if it goes into, say, the intertidal area.

- Q. It's very small.
- A. It would be very small, yes. It's described as the highest quality offshore rock stack in the Motiti ecological district.
- Q. A larger map so we can see the little dots would be helpful.
- A. Yes, I can provide that.

EXAMINATION CONTINUES: MS HILL

- Q. Yes, thank you.
- A. The next relevant entry relates to Astrolabe Reef, as it's called in the plan. I think the Court looked at this yesterday. It's an ecosystem uncommon in New Zealand, as it has both tropical fish component and a coastal rock stack ecosystem, so the pinnacles rising out are a naturally rare ecosystem in New Zealand. Motunau is next, and as we discussed it has two entries, one that focused on the terrestrial and one that relates to the marine area surrounding the island. So the island itself including the intertidal area is protected under the Wildlife Act. It's a wildlife sanctuary, so access is restricted, as well as a number of other activities. In the marine area, there's a regionally-threatened ecosystem and that's containing surface schooling fish, trevally, kahawai, and blue maomao are mentioned there. There's a rift in the middle of the island that's very unusual that contains deep sea species in shallow waters. As I understand it, access to that rift by boat is not practicable. Maybe while we're on Motunau, aside from the effects that I'd already talked about in terms of damaging the reef systems themselves, or the rocky shoals around the island, the description contained within that IBDA78 does talk about schooling fish and these are accompanied by bird species, some of which may be rare and threatened. So the taking of those fish, for example, by purse seining, which is the activity where there's a big net and it sort of scoops up a whole school of fish at once and purse seining is towards the surface rather than being lower down, so that could be an activity that would have an adverse effect on the rare and threatened bird species that are known to inhabit Motunau. We have heard about the various mechanisms in place under the Fisheries Act in terms of bycatch

to protect those species, but if the Court found that those mechanisms were inadequate and couldn't protect the rare and threatened bird species and it was satisfied that the evidence showed that this was happening and occurring around Motunau, then that may be another potential area where the current plan doesn't avoid adverse effects. From the evidence I've heard, I don't know the actual level of purse seining around Motunau or the level of bycatch.

THE COURT: JUDGE KIRKPATRICK

Q. Well, we have another witness who has quite detailed evidence about fishing methods in different locations and we have the bycatch data, although it's quite generalised in its present form.

A. Yes, which is where I was struggling in terms of figuring out where the impact is currently occurring because it does cover such a wide area.

Q. Yes. But it may be that whatever the data is, if there are these areas specifically identified as being valuable because there are avifauna species and fish, the issue here, obviously, Ms Noble, is the extent to which in a biodiversity exercise one can divide up an ecosystem.

A. Mhm.

Q. Whether that serves to protect biodiversity in the way that the Resource Management Act contemplates, recognising that the Fisheries Act also contemplates it. But if it's a silo-type approach, are there species that have been lost to a degree that would affect biodiversity, as it were, between the two schools of legislation.

A. Yes, I agree.

Q. Thank you.

A. We've already briefly described the rock stack that has the rare grass present on it.

Q. Oh, yes.

A. In terms of the IBDAAs, at the end of the relevant entries there is a B entry. It's my page 279.

Q. Yes, I think we're on 281.

A. Yes. It's a B area and has predominantly indigenous vegetation and that's described there as pohutukawa and coastal herb fields. The pohutukawa and coastal herb fields in particular have been identified as vulnerable, which is another reason for identifying an area under NZCPS, policy 11B. Again, that's largely a terrestrial-based identification.

Q. Thank you.

A. Now, I think I've traversed all the scheduled areas in terms of those NZCPS policies 11, 13 and 15.

1050

EXAMINATION CONTINUES: MS HILL

Q. The other potentially relevant policy, of course, is policy 2, relating to cultural matters. Do you have any comments to make on that policy in relation to the wāhi tapu buffer areas that have been proposed?

A. Policy 2, it's not a directive policy along the lines of policies 11, 13 and 15. In my view, it's all about recognising relationships and associations with places. It doesn't strongly direct us to sort of map every culturally significant area. I'm not sure it assists us much in determining what type of buffer would be appropriate for a wāhi tapu. I absolutely accept that wāhi tapu are of importance and need protection. I don't personally have a clear understanding yet of where exactly the wāhi tapu are and what it is about the wāhi tapu that needs protection apart from the more general relationship. I'm making that point in terms of the buffer areas and not really being able to comment on whether they are the right buffer or the wrong buffer or whether we need a buffer. The Court has referred to this idea about a combination of values.

Q. Mhm.

A. What's your understanding of that concept?

Q. It's an area or place where you have a number of different overlays all coming together and overlapping. Tauranga Harbour would be an example but there's many places.

A. Do you have a view as to how the plan should respond to that sort of concept?

- Q. The way that the plan is structured at the moment, it's focused on activities so wherever an activity is occurring such as, for example, a new jetty, it allows all those different values and attributes to be taken into account during the consenting process. In some circumstances for some activities, an overlay being present will change the activity status to make it more restrictive, or to remove you from a permitted activity rule, for example. I can see that for certain areas where you have a very close coming together of values, for example, at Motunau, there may be a justification for putting a ring around it if you thought you needed something different to protect those values, or some kind of buffer area.

THE COURT: JUDGE KIRKPATRICK

- Q. Sometimes the definition of the areas is practically impossible and if they factor, at least, to have a buffer to cut into the area itself.
- A. That may be an example.

EXAMINATION CONTINUES: MS HILL

- Q. I'm going to move on to another topic now. The next area that I'm interested in the reports on are the dredging and deposition rules, so could you just explain how those rules work in the plan and the potential application to the issues in this case?
- A. Yes. So the rules in the plan, the DD rules, as they refer to, relate to section 12(1) of the RMA. I will find you the reference. So it's 12(1)(c) which relates to disturbing the foreshore and seabed. It does specifically exclude other than for the purpose of lawfully harvesting any plant or animal. And then at (e) there's also destroy, damage or disturb any foreshore and seabed, but that also excludes, well, includes the exclusion of other than for the purpose of lawfully harvesting any plant or animal and then the same again at (g) which relates to destroy, damage or disturb any foreshore or seabed other than for the purpose of lawfully harvesting any plant or animal. So at the moment the DD rules, they apply to disturbance, destruction, damage and, in general, there are a few permitted activity rules at the start of the section none of which I think are particularly relevant to Motiti except for maybe planting indigenous

plant species on the island itself for example. In all likelihood, most activities are going to fall under the discretionary activities rules, rule DD14 or DD15, but we do have that exemption for the activities that are part of the lawful harvest of a plant or animal. And you will note removal, damage, modification or destruction of indigenous vegetation that is growing in the foreshore seabed is captured by the rules.

1055

Q. And do you have a view – do you have any thoughts on the meaning of natural material? It was discussed yesterday in relation to section 30D(2).

A. Yes. So there's also section 12(4) which describes what removing any sand, shingle, shell or other natural material means and it's to take any of that – sorry, that material in such quantities or in such circumstances, but for the rule in the coastal plan or the holding of a resource consent, a licence or (inaudible 10:57:29) to do so would be necessary. And then the other place where that same phrase is mentioned within the RMA is section 360 which relates to the regulations that can be set by the Governor-General and that includes at C(3) it's prescribing the amount methods for calculating the amount and circumstances and manner in which holders of resource consents are liable to pay for and at three it refers to the extraction of any sand, shingle, shell and other natural materials and that's from the coastal marine area. As you are probably aware there have been regulations prescribed by the Governor-General covering this very aspect and there is a royalty of \$1.70 payable to the Crown for every cubic metre of sand, shingle, shell and other natural material moved from the CMA. So looking at all of that together, I, in my opinion, it isn't intended to apply to fish or fauna.

THE COURT: JUDGE KIRKPATRICK

Q. What about coral?

A. Potentially coral.

Q. Well, isn't coral taken in quantities that would trigger the royalty?

A. Yes, that's what I – I think it would be something that you remove from the seabed and it could be coral, yes.

Q. Well, I have no doubt that the people taking it would say it's by-catch, it's listed as by-catch so it's incidental, but in terms of the quantities that are reported, they're reported in kilograms, maybe they wouldn't actually, 236 and I suppose depends on the density of the coral.

A. Yes and whether you crush it up I imagine.

CROSS-EXAMINATION CONTINUES: MS HILL

A. But just reading the words, it doesn't appear like it, the RMA, intended that phrase to capture fauna. I would stick to fauna.

Q. The next matter was just to ask you to produce the document that is exhibit J1, which is the table showing MRMT's submission points.

A. I don't have a copy of that to hand.

1100

THE COURT: JUDGE SMITH

There's a definition of natural and physical resources, so natural is defined and it includes any plant or animal. Then the question is natural materials, and actually the word "material" isn't defined. Is material a resource or not? I would have thought the answer to that is pretty obvious. But it's really a matter of submission rather than evidence because the witness can't tell us what the law is.

EXHIBIT J1 PRODUCED – TABLE

THE COURT: JUDGE SMITH

Q. Just to be clear, it's your evidence rather than counsel's submissions. I need to hear from you, not from the lawyers.

A. That's right. Yes.

EXAMINATION CONTINUES: MS HILL

Q. Can you confirm that you prepared this document?

A. Yes, I prepared this document. As I was preparing for the hearing, just to set out – going back to the original submissions and the relief is set out at the submission point reference, then the relief is set out where, in my

opinion, it's addressed either in the decisions version of the plan or the proposal contained within my evidence and then some comment from my perspective on why I have recommended the changes I have made and where I think the proposed plan addresses the relief sought.

Q. The council did respond to that submission. Could you just explain what council's response was to the submission?

A. In terms of the changes made by the council in their plan, the submission made to the hearing panel was largely related to the effects of fishing on the marina area.

THE COURT: JUDGE SMITH

We're still trying to get our heads around 12. I don't necessarily want to ask the witness about that topic because it's not really fair. We're trying to come to grips with it. It's not clear to me, I must say.

MS HILL:

In light of that, Sir, do you think it's a matter you think needs to be traversed?

THE COURT: JUDGE SMITH

Well, others may have different views. Let's move on.

EXAMINATION CONTINUES: MS HILL

Q. Could you explain what council's response was to MRMT's original submission?

A. Yes. So there were a couple of – some changes made in terms of how some of the issues were expressed that were contained in the original section 40A report and were adopted by the Council. In response to the oral submissions made in the Council hearing, MRMT did appear and they appeared with Roger Grace for the Friends of the Bay and made a strong submissions about marine reserves and the effects of fishing on the Motiti Rohe Moana. The Council added an additional, or amended an existing issue to refer to the effects of fishing activity as being a potential contributor to biodiversity decline. They amended objective 1 which is the

integrated management objective to also refer to promoting sustainable management of fishing, and they also added a new method 3A which is to support further research into the effects of fishing in the region and also looking at options to manage those effects if they're shown to be unsustainable or to be having an adverse effect.

1105

Q. And other than the submission of Dr Grace and MRMT, did other people raise similar issues?

A. No, they didn't. They were mainly submissions that raised the importance of kaimoana and having access to kaimoana and protecting the health of kaimoana from activities like wastewater discharges and stormwater discharges and – but no one else raised the effects of fishing activities on the biodiversity and the cultural values of the coastal marine area in our region.

Q. You've explained about method 3A which is part of Council's response to the submission. Could you just explain how you or what you envisaged might arise out of that method, how that's anticipated to work and what might be involved?

A. Yes, I have been looking at that. Now we're getting to the end of this coastal plan appeal process we're starting to look towards implementation of the plan, so I have been starting to look at the methods and what work streams that might involve. So in terms of method 3A, there are some very good learnings that we can take from work that's been occurring both in Marlborough and in the Hawke's Bay. In particular, in the Hawke's Bay they've done quite a comprehensive review and stocktake of all the existing information available on the effects of fishing, not just the effects of fishing although the report does largely focus on that, the effects of fishing in the coastal marine area and also the information that they actually have on the subtidal areas which is identified in our plan as one of our knowledge gaps, and then leading on from that they've also undertaken interviews, surveys, workshops with stakeholders, the community, tangata whenua, to learn more about people's views and understandings and perceptions of, in particular,

fishing and the effects that fishing is having, and that's all then led into a big collation of information, a really strong information base. They can – they've identified information gaps and they've now formed a collaborative group between DoC and MPI and tangata whenua, fishers and the Council to look at the issues that have been thrown up from this research review report and work out a strategy moving forward. That report was published last year. They now have the working collaboration group and their next challenge for the New Year is to set some firm actions and timeframes for those to occur over. Marlborough undertook a similar sort of desk-top review looking at anecdotal evidence of the effects of fishing and effects on habitats in their coastal marine area and they did that in the lead-up to developing their new natural resources management plan. So there's a couple of sort of good examples of how we can obtain some really useful information without having to initiate a multi-million dollar research project in the first instance.

Q. And have you given any thought to how much that might cost and whether there is money available to undertake the (inaudible 11:09:35) exercise?

A. I have. A ballpark figure seems to be within the order of 20 to \$30,000 at least for the first initial year. I imagine there may be some additional complexities in our region just because of the sheer number of tangata whenua groups that we need to engage with. Having said that, there is currently money within year 1 of the long-term plan, bearing in mind that it is open to consultation next year and may alter before implementation of the plan, and there is money within there that is not currently allocated to any particular project and it's more than enough to fund the type of work I've just described.

1110

Q. Thank you. And then just finally on a related topic around advocacy, there was reference in Mr Sayers' evidence to old plan provisions which had a similar approach around advocacy. Could you just explain what, if anything, counsel has done in that regard?

A. In terms of advocacy, we make submissions on national policy and processes, so a couple of recent relevant submissions that spring to mind

are a submission on the marine-protected areas policy and also a submission to DOC on their review of the threatened and endangered species, their threat ranking system, and part of that submission was saying you need to pay more attention to the marine species. We also have supported applications for marine reserves. In terms of support along the lines of mapping work and technical advice. Mataitai reserve applications. We undertake works that look at restoration and rehabilitation of spawning areas, ensuring fish passage, restoration works, for example, within the estuary areas. Some of them have been aimed very closely at particularly fish nursery grounds, spawning grounds. We have a collaborate group that involves tangata whenua, the district council, DOC, and ourselves, and we have advocated with MPI, for example, on the takes that are within the harbour. We're looking very closely with our partners at the status of the mussels within the harbour, which are declining, and what can be done to improve that. The pipi beds have been suffering contamination so there's a big collaborative project working there to look at sources of contamination and address those. That's a very important kaimoana source. They're some of the examples that spring to mind.

CROSS-EXAMINATION: MR PREBBLE – NIL

CROSS-EXAMINATION: MS HAMM

- Q. Morning, Ms Noble. I just wanted to talk to you a little bit about the rules which are now proposed by the trust. So with the consenting framework gone, it's the case, isn't it, that we're really looking for fishing and a choice between permitted or prohibited.
- A. Yes, in terms of the RMA, yep.
- Q. So in terms of the regional coastal environment plan as it's framed at the moment, what are the sorts of activities that are prohibited?
- A. I will just go to the summary. There's a nice summary of rules within the coastal plan so I'm just flicking to that and then I can easily pick out. My page number is 182. For example, in terms of structures, structures in an IBDAA – and that should also include areas of outstanding natural

character – where they don't meet one of the specific purposes listed in rule 10 and they don't have a functional need to be in the CMA are prohibited. SO14. The rules generally go, start with permitted and become more restrictive as you go down the table.

THE COURT: COMMISSIONER LEIJNEN

Q. Did you say that was also applied to ONC?

A. Yes.

Q. ONFL?

A. Not to ONFL.

1115

Q. Okay.

A. There was a lot of debate about that. It's not included. And then moving over the page to the DD rules, we have fracking. I'm just looking at prohibited and there are specified activities in DD17, in IBDA so things like mining, vehicle use, disposal of soil from land-based activities. You can read the list.

THE COURT: JUDGE SMITH

Q. Yes, dredging was the one that interested me. There's no particular definition in the plan of dredging?

A. I don't think so, but I will just check. No there isn't. Moving on.

THE COURT: JUDGE KIRKPATRICK

Q. Little parcel and discharges?

A. Your discharges, past those.

Q. CD10A and to 410.

THE COURT: JUDGE SMITH

Q. The CD, was it?

A. Yes. Reclamation and outstanding natural character areas or IBDA is prohibited and then also reclamation for specified purposes which includes things like rubbish disposal or carparks are the primary purpose for the reclamation.

THE COURT: JUDGE KIRKPATRICK

Q. Oh, that's reclamation RN4 and RN5 and then –

THE COURT: JUDGE SMITH

I see, sorry, yes, I missed, I'm just a bit slow.

THE COURT: JUDGE KIRKPATRICK

Q. – So it's AQ6.

A. Yes, aquaculture in high value or high use areas is prohibited so that includes your IBDAAs, areas of outstanding natural character and shipping lanes, river mouths and certain other areas. There's some prohibited rules under the biosecurity provisions including introduction of exotic plant species into an IBDAAs or area of outstanding natural character.

Q. I think that's it.

CROSS-EXAMINATION CONTINUES: MS HAMM

Q. So if I said to you, Ms Noble, that it's types of activities that are prohibited things like fracking and activities in IBDAAs and ONCs are activities which are clearly inappropriate, would you agree with that?

A. I would agree with that, yes.

Q. Do you think that fishing in the wāhi tapu as proposed or the industrial fishing activities in the wider area meets that sort of threshold?

A. In terms of, looking first at the wāhi tapu, so as I understand it, this rule captures any type of fishing or other activity that involves the taking of flora and fauna. Some of those activities could have a very limited impact, so it does seem to be a very blunt tool if we're looking at managing effects on biodiversity, so I don't – some activities may meet the test but not all types of fishing for all species in a wāhi tapu, I mean, as I described earlier the wāhi tapu circles vary quite a lot in terms of what's inside them and what's mapped and identified in the plan and RPS.

Q. And what about the other scenario which is the proposed prohibition on the more industrial-type fishing activities?

A. Again, my understanding of the evidence that we've heard is that the impacts of fishing these types of activities could vary quite a lot depending

on where you were within the broader MNEMA and what habits were actually present so, again, it does seem quite a blunt tool to move to prohibition.

Q. And do you have a view, if you don't that's fine, but do you have a view as to whether one of those prohibitions, do you have a greater degree of comfort with one than you do with the other, if I can put it that way?

A. I think both raise different issues. In terms of rule 1, I can certainly understand the reasoning for wanting a protective regime particularly in some of the wāhi tapu where we have ONC and IBDA and ONFL all coming together. The concern I have with a prohibition is that it may prevent particularly other tangata whenua, who aren't represented here being able to exercise their relationship with areas is my particular concern and, particularly given the extent of some of the buffers around the features as are identified within the existing planning maps and RPS. And then moving to rule 3, because it's a broad brush over a wide area that's my concern there and because we don't really know the effects that these activities are having within different bits of the MNEMA. And also I, I'm not sure the extent that potting for example will be having a significant adverse effect on natural character within the MNEMA. I just - I'm not convinced that the evidence is there to support it currently. Putting aside though the consultation issues and whether we have enough information to do a section 32 assessment.

1120

Q. And just lastly looking at the one nautical mile circles if the thrust of those is to support, maintain, protect indigenous biological diversity do you think the name wāhi tapu is a bit of a misnomer? Would you stick with that name or would you call it something else if the Court were to impose them?

A. It doesn't capture everything that's sought to be protected. But on the flip side it I would say that most New Zealanders probably have a fairly good understanding that a wāhi tapu is something that needs to be protected. It may lead to misunderstanding about all the reasons why an area is

being important and protected. I don't think people would necessarily realise that it was about maintaining biodiversity for example.

Q. So it could be called an indigenous biological diversity maintenance area or regeneration area?

A. There are many things it could be called.

Q. We've got IBDAAs and Bs. We can add on SAs.

COURT ADJOURNS: 11.22 AM

COURT RESUMES: 11.42 AM**CROSS-EXAMINATION: MR ENRIGHT**

- Q. Ms Noble, I just want to deal with the two points that my learned friend Ms Hamm raised with you first, just while it's fresh in our minds. She put to you the proposition correctly that really the choice based on the rules is either permitted or prohibited, and that arises from the proposed rules framework Mr Lawrence put forward in exhibit E3. Correct?
- A. That's correct.
- Q. Do you agree that prohibited status would be effective in maintaining indigenous biodiversity within the identified wāhi tapu areas for the marina?
- A. I think if the rule can be implemented effectively, then it will be effective at maintaining biodiversity. But I guess there's two different questions there. First, whether the rule in itself will be effective at achieving what it seeks to achieve.
- Q. Yes. But assuming it's implemented, it would be effective in maintaining indigenous biodiversity within the wāhi tapu, correct?
- A. Yes, if taking of all flora and fauna – damage, destruction, disturbance, taking or removal of indigenous flora or fauna is prevented within those wāhi tapu areas.
- Q. Yes, and the same proposition as to rule 3. If the rule is implemented, it would be effective in maintaining indigenous biodiversity.
- A. In terms of those particular activities and the effects those particular activities have, then yes, if the rule can be implemented and is implemented then those effects on biodiversity would be removed.
- Q. Yes.
- A. Yep.
- Q. And you'd have to accept that Mr Lawrence's rules 1 and 3 will be more effective in maintaining indigenous biodiversity than council's proposed methods.

- A. I think that's when the question about the ability to actually enforce and the actual effectiveness of the rules comes into play as raised in the evidence of Mr Fraser and myself, although the proposal has moved on somewhat from that evidence. I think there's been discussion about these wāhi tapu being self-policing. I do have some concerns about that approach and about how effective it will be in reality implementing the rules and protecting biodiversity. There is a quote from Cardinal Richelieu that our compliance officers often repeat back to me. If we pass a law and not have it enforce, then you're in effect authorising the very thing that you're seeking to prohibit.

THE COURT: JUDGE KIRKPATRICK

We wouldn't necessary want to adopt the Cardinal's methods, of course.

WITNESS:

No. I did worry about mentioning the Cardinal.

THE COURT: JUDGE KIRKPATRICK

No one expects the Spanish Inquisition!

1145

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

- Q. Now, obviously, council enforces the rules, doesn't it?
- A. The rules of its plan, yes.
- Q. Yes. So assuming enforcement is carried out, do you accept that MRMT's proposed rules will be more effective in maintaining indigenous biodiversity than council's proposed methods?
- A. If we are able to monitor and enforce those rules and if they are complied with, then they will be more effective because it is a prohibition on those activities within that area.
- Q. As Ms Hamm put it, the choice here is between permitted and prohibited. Now, in terms of within that spectrum, obviously you could go between

controlled through to non-compliant, but it's council's own evidence, isn't it, that having a resource consent regime is not effective and efficient.

- A. In terms of the taking of fish, yes, that is our evidence.
- Q. So although it's slightly unusual, the only choices we've got here is between permitted and prohibited, isn't it?
- A. If you're looking at a rule structure, yes, I would agree with you there.
- Q. Now, it's a bit of a side point but Ms Hamm suggested a renaming of the wāhi tapu areas and I just wanted to put to you that the relationship of Māori with biodiversity is inherent in the concept of wāhi tapu, isn't it?
- A. Yes. I would agree with you there. The relationship is important and biodiversity is part of that relationship.
- Q. So that's dealt with those points. You've already dealt with or referred to section 12(3) of the RMA. It was referred to in your evidence, in fact. So just for clarity, though, you agree that the rules proposed by Mr Lawrence in exhibit E3 fit within section 12(3) of the RMA from a planning perspective?
- A. From a planning perspective, yes. Some of it may fall under 12(1) and is probably already covered by the discretionary rules of the plan, but they would definitely fall under 12(3).
- Q. Thank you. Your counsel in opening referred to the tenuous link between the removal of fish and landscaping natural character values. Do you recall that?
- A. I do recall that, yes.
- Q. Can I suggest to you it's not tenuous because the presence of both fish and seabird species is part of the outstanding natural character and high natural character attributes for the marina?
- A. That's an interesting one because fishing is already occurring and is part of the associated values or the perceptual values, depending on which schedule you're looking at. The areas were described and identified as having either outstanding or high natural character areas with the impacts of fishing in place. In terms of the tenuous or otherwise link between the removal of fish and the areas of outstanding natural character, in particular, those areas of outstanding natural character, as I read them

and looked at the maps, again, seemed very much to be describing and delineating reef systems and features, if you like, so there does seem to be a more tenuous link there between the removal of fish and protecting those features and reef systems.

Q. Well, you've already quite helpfully gone through the relevant provisions in the RPS and RPC except, I think, you may have omitted the Astrolabe entry at page 301. The starting point is in terms of general description of the area, you'll see, "The reef is renowned for its abundant marine life."

A. Yes, yep.

Q. Under "attributes – water", "The reef has regional significance for seal use and fish communities with high abundance and diversity." Correct?

A. Yes, I remember reading that.

Q. Do you agree that that confirms the presence of fish communities as part of the outstanding natural character values identified by the RPS?

A. Yes, I would agree with you.

Q. Okay. What's interesting is the table of attributes refers to elements that enhance or diminish natural character. Do you see that?

A. Yes, it does.

1150

Q. And under the perceptual one in fact it, number 1, refers to, "Some level of activity as a popular dive and fishing location, otherwise a high level of remoteness..." Now what that says, and I seek your interpretation or agreement –

A. Okay.

Q. – is that fishing actually diminishes from the natural character in terms of remoteness.

A. In terms of remoteness I would agree that it could diminish natural character but in terms of people's perception of natural character in the broader sense it could be seen as enhancing natural character.

Q. Yes, so –

A. It sort of flips both ways.

Q. Yes, but – so the activity of fishing itself is recognised by the RPS as potentially diminishing natural character values, do you agree?

- A. I agree that it says that it may diminish the remoteness when you read that whole sentence.
- Q. Yes, which as an element of natural character, correct?
- A. Yes, but I – you’re taking the step of saying, “And therefore it must diminish all parts of natural character,” and I don’t think the RPS goes that far and indeed it still identifies the area as outstanding despite it being a popular dive and fishing location, or because. I’m not sure what the correct word is.
- Q. But I think we agree on the central point, that it does diminish at least one aspect of natural character.
- A. The remoteness, yes.
- Q. Yes, and if you flick over to page 305, this is the MNEMA.
- A. Yes.
- Q. And the same point applies. If you look in column 4, “Elements that describe natural character,” the RPS recognises there, where it says, “Some wreckage and debris as a result of the result of the grounding of the *Rena*,” and then goes onto say, “The *Taioma* wreck and fishing pressure modify natural character,” so again the RPS itself says that fishing can modify natural character. Do you accept that?
- A. I accept that, yes, although again the area has still been identified or accepted as having high natural character with that impact in place.
- Q. And if we turn over to page 307, under “Marine biotic process,” number 4 –
- A. Yes, yep.
- Q. – it’s the same point, isn’t it, that, 4, on the one hand the populations and biomass are part of the natural character values, do you agree with that, because they’re referred to in the same column at 3.
- A. Yep, it refers to an abundance of biological life.
- Q. So on the one hand the fish species and other forms of indigenous flora and fauna are part of the natural character values.
- A. Yes.
- Q. But on the other hand they are severely impacted and threatened by commercial fishing and increasing recreational and charter fishing.

- A. Yep, that's recognised there, so it's high natural character even though these activities are already occurring.
- Q. Yes.
- A. And I guess, sort of going on from there, if those activities increased then maybe that high natural character status would change, but to the extent those activities would need to increase, I don't know.
- Q. Well, aren't you misreading it because the RPS is recognising the, as it says, "Severely impacted and threatened," so those high natural character values are in fact threatened by the activity of fishing.
- A. I read the RPS as identifying an area of high natural character which the default is that the open ocean is high natural character but this area has been specifically considered, and the RPS identifies it as having high natural character. It also notes that there is fishing occurring and it still has high natural character with that fishing occurring.
- Q. Yes, but it –
- A. That's not to say that maybe it couldn't have a higher natural character if the fishing was removed or reduced.
- Q. Yes, but it's identified explicitly by the RPS as a risk factor or a – that threatens high natural character, as worded there.
- A. I don't know that it says it threatens high natural character. It says – let me read it again – that populations and biomass are impacted and threatened by fishing.
- Q. Yes.
- A. And they are a component of natural character. It's still been identified as having high natural character with those activities occurring, so I would look at that more as an identification of if you wanted to restore natural character these would be the kind of activities you would be seeking to manage.
- Q. I see, that's interesting. So it depends on your reading of, "Are severely impacted and threatened by," doesn't it, whether that means adverse effects on natural character values?
- A. I think it, it depends whether you accept that the RPS has identified the area as having high natural character or not.

Q. So your answer earlier about policy 14 is quite helpful. I think the point you just made there was that if you're seeking to restore under policy 14 you would need to control the taking of indigenous flora and fauna within the MNEMA.

1155

A. Yeah, I think I refer that to being an activity you'd look at managing. Which may include control.

Q. That's right. So to give effect to policy 14 you accept that?

A. That would be one means of doing it.

Q. And because there's this overlap as between the presence of indigenous flora and fauna it fits into policy 11 –

A. Mmm.

Q. – of the CPS but it also fits into policies 13 and 15, do you agree?

A. I don't think - depending where you are different things will apply.

Q. Well do you agree that da

A. Flora and fauna are natural, naturalness and biodiversity are part of natural features and landscape and part of biodiversity and part of natural character if that's what you're asking me.

Q. Yes. You agree? So do you agree that if you are maintaining indigenous biodiversity you are giving effect to not only policy 11 but also policies 13, 14 and 15 of the CPS?

A. I read 13 and 14 and 15 about being protection which in my mind may be something slightly different to maintenance. Maintenance is a very broad obligation or function under section 30 that applies to the whole of the coastal environment, indeed the whole of the region and maintaining it sounds like keeping, at a reasonable level keeping biodiversity at the status quo.

Q. Okay, so putting that semantic issue to one side about the difference between maintain and protect, I'll pose the question in another way. Do you agree that if you protect indigenous biodiversity that you are giving effect to policies 11 within the MNEMA, policies 11, 13, 14 and 15?

A. If you are protecting the aspects of indigenous biodiversity listed in those policies then yes you are giving effect to the policies.

- Q. And do you agree that the MNEMA is unique in the region in terms of the overlapping outstanding and high natural, sorry, overlapping outstanding and high values?
- A. No I don't. I think there are many other parts of the region that exhibit the same concatenation, to use the Court's word, of values and I think I've mentioned some of them, Tauranga Harbour, Ohiwa Harbour. There's the area along Thornton, Coastlands region and out to the Rurimas. The Kuri Point, Maketu, Waihi estuary area and there will be others.
- Q. But it's unique in the, in terms of the detailed level of description of each of those different attributes, correct?
- A. Probably the biggest difference for this particular area is the detail that we have on the high natural character area. So the open ocean in general has a sort of default high natural character status but this is the only area where we have the detailed, any detail really on those attributes and values for that high natural character.
- Q. And I think you agree the central issue in this case is the question of methods. Whether we use rules or other methods to recognise and protect the relevant values within the MNEMA, correct?
- A. I think there's probably another issue is as to where, where that protection is already protected by other mechanisms, whether those mechanisms are working and then what's left available under the RMA and what we should and shouldn't use and then in turn what will work and not work and be effective. So there's a number of issues.
- Q. Okay. Well you've already outlined for the Court helpful today what the values are so we don't need to go through that, in terms of what's identified by the RPS and RPC. You agree that policies 11, 13 and 15 of the CPS adopt a two-tier approach to avoidance?
- A. Yes.
- Q. And as you know that's the avoid or the avoid significant adverse effects?
- A. That's correct.
- Q. And do you agree that policy 14 is not just about avoidance but instead it's a restorative approach?

A. Yes, so that's a promote restoration and rehabilitation so it's not about avoidance. Although avoiding some effects could be a part of restoration.

Q. Would you agree that if you give effect to policy 14 in addition to policies 11, 13 and 15 within the MNEMA the focus of any rules framework should be not on, not only on maintaining indigenous biodiversity but in fact improving it?

A. If you were giving effect to policy 14 and the improving natural character of which biodiversity is a component would be a part of it, yes.

Q. And your counsel's pointed out that policies 13 and 15 of the coastal policy statement require rules in the coastal plan to protect the outstanding values, is that a position you agree with?

A. Yes. The policies refer to the plans identifying areas where preserving natural character requires objectives, policies and rules, so if you identify an area where a rule is needed, then you should have a rule in the plan.

1200

Q. And you accept, and it's in your written evidence, that the proposed plan was drafted well before the High Court declaration in terms of –

A. Yes, absolutely.

Q. – the impacts of taking flora and fauna on those outstanding high values in the MNEMA, correct?

A. It was indeed.

Q. So, and I think you've accepted earlier in answer to questions from your counsel, there are no rules. There's a gap in terms of the proposed plan relating to the taking of indigenous flora and fauna within the MNEMA?

A. Yes, I think we talked about the F word and the potential gap being fish.

Q. Well, indigenous flora and fauna obviously will include seabirds and kelp, other forms of ...

A. Yes, so we have other pieces of legislation that protects seabirds and ...

Q. So it's a gap though? I'm talking about the coastal plan has a gap in terms of rules framework for seabirds?

A. But if there's already another piece of legislation, which there is, that prohibits the taking of seabirds, I don't think that it's a gap that the coastal plan doesn't have another rule addressing that particular activity.

- Q. Sorry, I was distracted. Sorry, could I ask for that answer again, I missed it?
- A. There's another piece of legislation in place, the Wildlife Act that prohibits the taking of seabirds –
- Q. Yes.
- A. – therefore, I don't think it's a gap that the coastal plan doesn't replicate or have an alternative type of rule regarding the take of seabirds.
- Q. But if it's necessary in order to give effect to policies 13 and 15 of the coastal policy statement to have a rule, surely we do need a rule in relation to seabirds?
- A. It's only, as I read it, you have to identify areas where you need that rule and I'm saying that we don't need that rule because there's an alternative piece of legislation that prohibits the taking of seabirds.
- Q. So your response to the extent that seabirds form part of natural character or landscape attributes, your response is to say, well, we don't need a rule in our coastal plan. We can just rely on other legislation?
- A. In terms of the taking of seabirds. There would be other issues around habitat protection, for example, for which there will be rules in the relevant district plans and where that habitat extends into the coastal marine area in the coastal plan about disturbance of the foreshore and seabed for example.
- Q. Just sort of focussing on policy 11 and in contrast to policies 13 and 15 there's no reference to the requirements include rules, correct?
- A. That's correct.
- Q. But my question is how do we protect our most important biodiversity sites such as the IBDA's or rare and threatening species without a rules framework in the coastal plan?
- A. But there is a rules framework in the coastal plan as I have gone through in some detail with the Court. What the coastal plan doesn't currently have a rules framework around is the taking of fish and there are other mechanisms in legislation that do manage the taking of fish.

- Q. So, again, you're relying on your assertion that the only gap in the rules framework is fish themselves and not other indigenous flora and fauna within the MNEMA?
- A. That is the key gap that I have observed from listening to the evidence about the effects that are occurring and reading the attributes and values about what is known to be there.
- Q. Can we extend it to include molluscs other forms of indigenous fauna or are you just going to stick with fish is the only gap?
- A. Fish can include shellfish.
- Q. Okay.
- A. And, again, the Fisheries Act controls the taking of crayfish and the like.
- Q. So to the extent that fish form part of natural character under policy 13 or landscape values in the policy 15 or biodiversity in the policy 11, they are not being protected by current rules framework in a coastal plan?

1205

- A. I wouldn't say that they're not being protected. There are various policies and rules that protect, for example, their habitat, that protect those habitats and those species from the effects of other activities apart from fishing on, on fisheries resources and biodiversity that's associated with important habitats for fishing – for fish, not fishing, sorry. As I think I've said before, the gap is the taking of the fish.
- Q. I think you may have answered this earlier but do you accept in principle that a reduction in indigenous biodiversity has adverse effects on natural character values?
- A. I think it's likely but it would depend on the given area, an example.
- Q. And again, the same proposition for landscape, a reduction in indigenous biodiversity would have, has adverse effects on landscape values.
- A. The landscape's probably a less obvious correlation because landscape can, and I'm not a landscape architect, but it includes a wide variety of components, but if the effects on biodiversity are such that that the landscape is no longer natural then obviously that would be an effect.
- Q. Well, just looking at policy 15 of the CPS, it includes, under (viii), "Cultural and spiritual values for tangata whenua," so the relationship of Māori or

taonga species. That would be detracted from, wouldn't it, if you cannot maintain indigenous biodiversity within the MNEMA?

- A. If one of their cultural and spiritual values was associated with species that then disappeared or I think became functionally extinct, would have been one phrase that's used, then that would be an adverse effect.
- Q. And one example referred to in the cultural evidence by MRMT is, of course, the hāpuka, correct?
- A. Correct, yes, I refer to.
- Q. And you accept you're not an expert in cultural matters?
- A. I do.
- Q. Do you accept Mr Matehaere and Mr Ranapia are kaumātua and pūkenga and therefore qualified to identify adverse cultural impacts, sorry, adverse impacts on cultural relationships for biodiversity under section 6(e)?
- A. It's a big question. Cultural impact. If it relates to cultural impacts then yes, they will be the experts.
- Q. And do you also accept Mr Te Atarangi Sayers is qualified by his whakapapa to address section (e) relationships?
- A. He will be qualified to address the relationship. I'm not sure whether he's a kaumātua or a pūkenga. That wouldn't be for me to make that judgement.
- Q. Yes, I'm talking about his whakapapa, not his – just moving to a different topic, the issue of methods put forward by Council. Just at a high level, it seems as if Council's response to the High Court decisions of Justice Whata is to sort of kick for touch and have a – the essential approach adopted is, is it, is that it's going to be a future work stream for Council how, how we implement rules relating to taking of flora and fauna, is that fair?
- A. I don't think it's a kick for touch. I don't think that's fair. Council and I have looked at our responsibilities under section 32 to assess this alternative proposal, and whilst the RMA and the appeal process does allow for the involvement of others, I do know that there are people who would be impacted by the MRMT proposal who are not here and who

we've not heard evidence from, and that does make undertaking and performing that section 32 analysis in any meaningful way very difficult. I am aware that there are other tangata whenua groups with an interest and a relationship with the area who we've not heard from. In fact, I had an email from Te Patuwai Tribal Committee last night saying, "Oh, we hear there's this hearing on. Why aren't we represented and why aren't Ngāti Awa represented and why are Tauranga Moana there and not us?" and that's just simply a reflection that they don't quite understand the processes necessarily and how to get involved and when they need to be involved.

Q. Well, it's common ground that you're not proposing any rules to prevent the taking of indigenous flora or fauna within the NEMA, correct?

A. We already have rules about the removal of indigenous vegetation but we're not proposing any additional rules, for example, about the taking of fish or sea birds, yep, that's right.

Q. I just want to get the list right. What you're essentially offering is three or four things. We've got monitoring, advocacy, education and a process for future engagement or for a scheduled process. Is that a fair summary?

A. Yes, and then we've also got additional identification of the values of the area and also the aspiration for restoration of the area with specific reference to fishing as being one of those activities that needs to be considered and there's a new policy, as well, that would apply to other consent processes and also support our advocacy role.

1210

Q. Okay, that's fair. So your last point relates to proposed new wording for policies, I think. But working through the other points in terms of monitoring, you've accepted in your evidence there is no funding in place for additional monitoring for the MNEMA, correct?

A. I think under our science programme that there is limited funding available. What we do have, and what I mentioned to the Court, we do have some funding available for implementation of the coastal plan. Part of that will be implementation of the methods. One of those methods is method 3A. We are now in the process of prioritising implementation of

those methods now that we've come towards the end, we hope, of the appeals process and there is funding currently in the budget for the next long-term plan for implementation. I did caveat that with, we do have to go through our public consultation process in the long-term plan so I can't say for sure this is the number because that may change as council responds to submissions and other competing priorities, but at the moment there is sufficient funding and it's in the order of \$100,000 for plan implementation and it's an annual amount for the first three years, I believe.

Q. Just returning to my question, it's correct, isn't it, there's no funding ringfenced for monitoring in any council budget.

A. Environment monitoring, no. That's correct. But as I say, we have this separate plan implementation budget that is to be allocated. One of the methods is about developing monitoring and review plans for the coastal plan, which may lead to additional monitoring.

Q. That is a future process, isn't it?

A. It is a future process, because we need to know what the plan says before we know what we're monitoring and reviewing.

Q. If we look at your paragraph 56, doesn't that also represent the current state of play? Basically there are no network streams currently dedicated to assessment monitoring or management of the effects of fishing.

A. That's correct. We're looking at year 1 of the long-term plan, so it will be starting July 2018. That's when our funding will be in place, and when we can start to implement the methods of the plan in earnest, including method 3A.

Q. So moving on from monitoring, the next one was advocacy. Now, that's a failed policy by the council dating back to the operative plan of 2003, isn't it?

A. I wouldn't say it's a failed policy. I gave some examples of our advocacy work.

Q. Well, I suppose I'm picking on your paragraph 33.

A. Mhm.

- Q. It may be that I've given it an unfair criticism, but the essential point made there that the advocacy provisions provide little, if any, useful guidance decision-makers should be contained in non-statutory documents or the LTP. Do you agree with that?
- A. Yes. In relation to decision-makers, I suppose it's useful to clarify that was decision-makers on resource consent applications, rather than decision-makers in council on a range of other matters.
- Q. Now, the next one was education.

THE COURT ADDRESSES MR ENRIGHT – TIMING

1215

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

- Q. So just dealing with the process of future engagement, firstly now obviously that option already exists. It's not a new option on the table in terms of –
- A. No, there's always options to do plan changes at any time.
- Q. I'll deal with, just in light of the time constraints, I'll deal with a couple of discrete issues which are important. The first one relates to the size of the circle at Matarehu so, which is the wāhi tapu adjacent to the Motiti Island.
- A. So I'm in the right place, this?
- Q. Yes, correct, and as you're aware an issue has been raised by Ms Hamm's clients about whether we can move that circle away from the southern tip where her client's property is.
- A. Mhm.
- Q. And just the first point to make to you, and it's in Mr Matehaere's evidence at page 354.
- A. Do you know which volume it's in?
- Q. Hopefully volume 1, I'll check. Volume 1, 304. It's the map which shows the ancient fishing grounds and shellfish gathered at Ngai Te Hapū?

WITNESS REFERRED TO VOLUME 1

- A. Yes.

Q. And just the obvious point, would you accept there are a number of what are called toka or rocks in quite close proximity to the southern tip there of Motiti?

A. Sorry, I'm just – so the numbers relate to toka or fishing grounds? I don't know if I'm looking at the right ...

Q. We've got names such as toka toi I think.

A. Maybe I'm looking at the wrong map. I've got this map.

Q. Yes, that's the map. Oh no, that's not the right one.

A. No, oh, I can see toka, toka toi.

Q. Yes.

A. Toka – it's really hard to read, I'm sorry, toka tapu maybe.

THE COURT: JUDGE SMITH

Which page are we at, Mr Enright?

MR ENRIGHT:

Well, Sir, because we don't have exactly the same pagination. Yes, 354.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

A. I'm on 354 if that's ...

Q. We are on the same page.

A. Okay, excellent.

Q. Well, look, you don't have to read the names but you can see it does plot a number of individual – essentially what the MRMT's evidence is sacred blocks. Does that appear to you?

A. Well, I think that is to just fishing grounds and shellfish resources, but obviously a toka is a rock so ...

Q. Yes, exactly. So probably relevantly the district plan actually lists some but not all of those and I'm just going to produce through you the entries for that.

THE COURT: JUDGE SMITH

So which ones are you particularly referring to?

MR ENRIGHT:

The area, Sir, adjacent to the southern tip of mot – there's a number essentially rocks identified in there, toka tapu so, well –

THE COURT: JUDGE SMITH

The southern tip is shown there is, I can't even see, it's something with a "W" starts and then "T" and something. One's in Wairere Bay.

THE COURT: JUDGE KIRKPATRICK

Unfortunately, the illegitimate overlay, well, I mean, information is available under the Official Information Act. It's not released. It's either available or it's withheld and defacing documents like this is, in my opinion what it's worth, illegitimate. Here we are. It doesn't help us looking at these documents.

THE COURT: JUDGE SMITH

There's actually a much better map in the Motiti Management Plan. My recollection is that in the indexes at the back, all of the features are shown in that information of Mr Ranapia's.

1220

MR ENRIGHT:

Well Sir that was the one I was given but that's fine. I can put that to another witness.

THE COURT: JUDGE SMITH

Well the point I'm making is that those areas are near where the pā, the pā's on that Spit. I know the rest of the Court aren't aware of this but it's on the Spit. The landing areas is actually up where the release, the E and the A are somewhere. Or perhaps the top of the L from official, was it official? But those rocks in the Wairere Bay the point I was making about all of that is that those aren't areas, they're not relatively accessible if you recall - oh, I don't want to go into the whole history but there's a series of shoals that make it very difficult even to bring boats in there which is why they abandoned that as a site. So the question is the purpose, if you're protecting the IBDA what purpose the circle

would serve in protecting the indigenous values that we're talking about. Not the rocks because you'll know that there's hundreds of rocks all around the island including one which is an IBDA which you haven't sought to protect.

MR ENRIGHT:

Well the rock issue is of importance to my client and I think probably it's more helpful especially given the time issues just to produce the district plan which actually does name certain of those rocks, so it's probably an easier way to –

THE COURT: JUDGE SMITH

And it isn't necessary to prove matters that are in a statutory planning document. So a witness does not need to be asked to confirm that something is in a plan. As with any other legislation counsel are entitled to rely on a printed copy. If anybody says that there's a flaw in that's been published we'll hear that but we don't need to prove even the subordinate legislation. Bylaws on a prosecution yes but not in these hearings.

MR ENRIGHT:

Yes Sir. I'm grateful for the direction on that. And Your Honour, Judge Kirkpatrick, I don't think I even to adduce it in light of the point just made so I won't, I don't need to go.

THE COURT: JUDGE KIRKPATRICK

Well if it's going to be referred to we might give it a reference just so that we know what we're talking about. Is it likely to be referred to further in the hearing?

MR ENRIGHT:

In my closing or I may put it to Ms Hansen the planning witness probably so –

THE COURT: JUDGE KIRKPATRICK

Right. So exhibit, what are we up to? K.

THE COURT: JUDGE SMITH

And these are excerpts from the management plan aren't they?

MR ENRIGHT:

Yes. There is another map. It's not very helpful scale but again I can deal with that next, on Monday when we have the next witness.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

Q. And so my final topic Sir is just this issue of the scope which you've raised Ms Noble in exhibit J1 and I suppose end of the day scope's a legal question but would you accept that your table J1 obviously doesn't deal with the findings of the Court itself on what the scope of the submissions was. If you can address that?

A. My table simply refers back to the original submission and it sets out the relief sought verbatim from that submission. It doesn't address scope in any way, shape or form.

Q. Yes and do you also accept that what you've looked at are the submission points but to determine scope normally you need to look at the document as a whole, not just the submission points as recorded by the Council?

A. That's really a legal argument. What I've put here is the relief sought verbatim from the submission but there was additional text around that relief sought.

Q. And you accept don't you that the submission prepared by MRMT was prepared by lay people without expert input?

A. That's my understanding, although I don't know. You would have to ask them.

CROSS-EXAMINATION: MR POU

Q. Ms Noble, just in terms of that question of protection of sea birds that you were - that Mr Enright was talking about and you talked about the Wildlife Act which prevents the taking of seabirds?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. I guess the issue in terms of the protection of seabirds, though, and the protection of adverse effects of that is we looked at the evidence of

Dr Stirnemann where she says to protect those seabirds you actually need to protect the fish and the fish stocks as well.

A. Mhm.

1225

Q. Do you remember that?

A. I remember her evidence and I remember her being questioned and there seemed to be some uncertainty about how well-established those links are between fish stocks and fish and effects. There's a link but exactly what the link is and what you need to protect and where you need to protect it seem to be ...

Q. Rather than going through extensively, I just wanted to put to you that the plan in putting the circle around Motunau Island and where they might roost but not actually providing the protection to the food stock is like protecting their beds but leaving their tables vulnerable and in a sense not necessarily protecting against the adverse effects on those things as well.

A. I think it really goes down to the nub of the interface between the Fisheries Act and the RMA where we're looking at maintaining fisheries stocks and sustainable yields and where are we looking about protecting biodiversity under the RMA and it's not an easy answer.

Q. No, it's not and that's why we're here but in terms of the RMA may need to protect that food source in terms of part of the biodiversity that supports the ecosystem, it is slightly a different function. So you have these sorts of protection areas away from where they sleep, for instance, to ensure that there's something for them to eat.

A. Well, my answer to that would be I don't think we really have enough information on where the fish that they feed on come from. I mean, some of these fish will roam, presumably, across wider areas and I think that becomes very hard to control under an RMA plan.

Q. The information that we have in this hearing was provided – probably the best evidence was provided by Dr Stirnemann and notwithstanding the fact that this issue has been around and has been live for a long time, Dr Stirnemann has provided this evidence and says that's what needs to

be protected if you're going to protect the ultimate habitats of these endangered species, so we can't really go past that, can we?

A. She did and that's where I think the Marine Reserves Act and the creation of MPAs comes into play alongside the Fisheries Act.

Q. But if the council are going to be maintaining the biodiversity of that system, they need to be doing something rather than just saying, "Well, maybe we look at some other legislative framework."

A. And we do have a number of rules and controls in place that look to protect biodiversity and we've identified the areas and their values and that gives us a stronger platform for advocacy. We've got method 3A to look much more closely at the fishing that's occurring and the impacts that it's having and the tools for managing those impacts, whether they be RMA, Fisheries Act, Marine Reserves Act, a combination of all three. So I wouldn't accept it as a do-nothing approach, although it's not a put a rule in the plan now to prohibit the take of fish.

Q. The point my clients want to make is that those legislative frameworks have been in place for a long time. They've been looking at the area in which they live for a long time. They're looking at the resource diminishing and we're saying that there's this obligation to maintain biodiversity and do these particular things but notwithstanding the fact of these overlapping regimes, nobody seems to be doing anything about it and now the ball's in your court and I put it to you and my clients want to put to you that it seems that you're just batting the ball away.

A. I don't think we're batting the ball away. I think we've made quite a strong commitment to look at this much more closely than we have, bearing in mind that when we develop the proposed plan the council didn't even know that it had an ability to control fishing or put in place rules regarding fishing and that situation has evolved since the plan was notified. What council and I as a planner am concerned about is trying to put something in place now that because of the lack of input, consultation, engagement with other parties that will be affected and that affect, I accept, could be positive as well as adverse, we may not end up with a solution through these rules that's actually going to, in reality, improve the situation greatly.

Q. That's the tension that exists in the room, though, Ms Noble. You've got tangata whenua coming and saying, "Our biodiversity is in dire need of protection," and you've got the council coming in – and I don't want to say this facetiously, saying our resources require protection and all we're going to commit to at the moment is a longer look or a more in-depth look, so from the tangata whenua perspective, they've been asking you to look for 10 years and it's only now that you're going to start looking, and tangata whenua are saying it's now time to do a little bit more than just look.

1230

A. And the reason that we're making that change to start looking is because now the legal situation has been clarified and that only happened very recently and in a way we're actually committing ourselves to spending more money than putting rules in a plan that I think have already been described by the appellants' self-policing. That could in a way be less work for us, but I don't think it would be particularly effective.

Q. But you can understand the concerns of tangata whenua in terms of whether or not the council are going far enough to ensure that these depleted stocks aren't further depleted?

A. I absolutely understand those concerns as I understand the concerns that I think commercial and recreational fishers would have and possibly some of those tangata whenua who aren't here in the room about their ability to carry out fishing activities in certain areas being prohibited.

Q. Thank you very much. Now, in terms of the natural character of the areas as a whole, I think – and you mentioned where the stocks drop away this can have an impact on the perception of the natural character. It becomes an area of scarcity?

A. I don't recall mentioning that but I would agree that if maybe all fish had disappeared from an area that would affect the perception of the area.

Q. Or if it's harder to get particular species? For instance, if –

A. You're probably straying more into a landscape expert. I'm not an expert on perceptual values. I'd just be speaking as myself I suppose and it's not something I can comment on.

- Q. That's fair enough. But in terms of – well, it is important because policy 14 says that restoring cultural landscape features is a mechanism that can be used to restore and rehabilitate natural character.
- A. Yes it does.
- Q. So, and where those cultural landscape features are informed by the perceptions of tangata whenua and their ability and their perceptions of them as natural, where they become an area of scarcity or an area depicted as a barren, that has a significant impact on their perception of the character of that area?
- A. Yes, I would accept.
- Q. And it impacts on – and it's not just the numbers, it's probably the quality of the kaimoana itself.
- A. Mhm.
- Q. So those issues are also significant in terms of where the plan needs to ensure against those deficits to ensure the natural character is being preserved. You'd agree?
- A. Although, of course, as I think I mentioned earlier, the natural character of outstanding and high has been assigned, identified in the plan with those impacts in place.
- Q. And the issue is with those impacts in place there's been a decrease and whether that's the evidence, there's been a decrease, it's still high but whether or not the continuation of those impacts will mean that when we come in and we're talking about this again in 10 years, it's still high.
- A. I think probably the more pertinent question at the moment is the restoration question and that seem to be how the appellant's case was being framed. It's about restoring the values.
- Q. Well, it's two ways, isn't it? It's about they want to restore it but part of restoring is to ensure that it doesn't end up in so much deficit that there's nothing to restore?
- A. Yes, I will accept that. I agree with that although I don't think I've heard the evidence that would explain how much of an crease in the current fishing activity or other activities although fishing would seem to be the – the primary activity outlet is going to cause that decline or whether it will

happen anyway, I don't think we've had that evidence in terms of natural character.

Q. Well, I think, and to be fair, everybody says that it's declining and what you're saying is we don't know if it's declining fast enough to have an impact.

A. I'm saying that the decline might be happening, I don't know what the impact of that decline is on natural habitat.

Q. Okay. Now, I just want you to go to exhibit B please and this is probably the last bit I'll take you through.

WITNESS REFERRED TO EXHIBIT B

Q. And just as to contextualise the discussions we have when we get there, it sits within the context of Ngāti Makino or Ngāti Ranginui, wanting to see more than just watching happening and wanting to have more suitable – I mean, this has been a key thing, a key characteristic that they've engaged throughout this process, isn't it?

A. Mhm.

1235

Q. I just want to take you to method 19AA on paragraph 58. Without taking you through all the orange bits, one of the things that characterises all the orange bits that sit in there is that that desire by Ngāti Makino, Ngāti Ranginui, and actually Motiti to offer collaborate approaches or to seek more collaboration in our spatial plans are going to be decided and those sorts of things. Would that be fair?

A. Yes, I'd agree it would be a fair comment.

Q. And then we get to method 19AA.

A. Yes.

Q. It does seem – and I acknowledge the criticism that was made by your counsel that Ngāti Makino and Ngāti Ranginui haven't proposed a new method 18 or 19AA.

A. Mhm.

Q. But in the absence of that, this new method 19AA that sits there isn't really a collaborative thing. It's a wait and see thing, isn't it?

- A. In my opinion, the way it's intended to be read is that you also need to read it with method 19A, the council's commitment to undertaking something regardless or anyway. 19AA was to address those concerns that have been raised by some groups that the council won't do anything, or they won't do anything fast enough, so this was intended to provide a mechanism whereby if a tangata whenua group did have a proposal and it had some additional spatial mechanisms, tools, whatever you want to call them, in mind it could come to the council with that proposal and then the council would be prepared to look at that seriously and investigate how to take it forward. So in that regard, you're right. It doesn't specifically refer to working with or collaboration or partnership, although I very much would see that that would come into play in the second half of that method.
- Q. Again, if a proposal was put and the council didn't investigate it –
- A. The pink is amended suggestions for Motiti Avocados Limited.
- Q. Right. I guess what this says is if tangata whenua come with a proposal, the only obligation on the council is to consider the investigation of the development of it.
- A. Right, and then the next step would be after the investigation is completed to decide what to do with it and it's a bit hard to incorporate that within the wording.
- Q. The only obligation is to consider proposals to investigate. You don't have to investigate.
- A. I guess the intention is that if the proposal stepped up, investigation would occur. The wording may not be the most elegant. The intention is that if a proposal comes to us that has merit, obviously, we don't know what kind of proposal we're going to get. Some of them may be ...
- Q. Isn't that a better reason to work collaboratively towards that proposal?
- A. Again, I would say that would fit in better under method 19A.
- Q. We're talking about management areas.
- A. Well, it's also about sites or areas in the coastal environment of significance or special value to Māori. It's about cultural landscapes and then it's about the planning mechanisms and other methods which could

be management areas to provide protection to identified areas and sites and support customary activities, and it's to investigate the planning mechanisms and other methods which could be management areas to support the social, economic, cultural and recreational aspirations of tangata whenua in the coastal environment and it goes on. There's a few other points in there.

Q. Shouldn't we be able to do the management areas and similar sorts of things that are contemplated in 19AA in the same way, in consultation with tangata whenua?

A. As I think I'd already said, the first part of 19AA is about tangata whenua having an avenue to come to council if we're not moving fast enough with regard to method 19A. That's the intention. Whether the wording is the best wording is maybe another issue.

1240

Q. And I guess Mr Enright took you to a provision in 2003 that was about – which was advocacy, which is about maintaining biodiversity. We're here in 2017. The biodiversity isn't necessarily being maintained.

A. I believe those – sorry.

Q. That's potentially the similar issue that we have with an open whether or not you investigate provision such as 19AA.

A. It is and as I've just said the wording may not be the most elegant.

Q. Now that is my last question but this will be the last time I cross-examine you potentially and I just needed to acknowledge, even though we are here having a bit of an argument, having a bit of debating issues, we do acknowledge the hard work that you have put into here. From Pia, Carlton and all the other people that we've represented, we want to acknowledge that and we want to acknowledge what you have done for the region in that time.

A. Thank you.

Q. Thank you very much.

RE-EXAMINATION: MS HILL

Q. Just a point of clarification while we're still on method 19AA, my friend pointed out that it's in pink where elements of the method have been crossed out. You clarified that those were proposals by Motiti Avocados Limited. Are they proposals that Council supports or not? The amendments.

A. I will have to work through them. I would support in the second paragraph below the first set of italics crossing out the "whether to investigate" so it reads, "When considering such a proposal Council will take into account." So then it's more of a definite action on the Council rather than where, when considering whether to investigate.

Q. But not any of the other pink...

A. I, I don't support the change to the first roman, the roman numeral iv. I don't think it's necessarily fair to expect tangata whenua to develop proposals that provide for the wider community. I'm not too concerned whether the comment about the schedule 1 process sits, whether it sits in the main frame of the method or as an advice note. It's just really a flag that a schedule 1 process will be needed if new provisions are to be brought into the plan.

THE COURT: JUDGE KIRKPATRICK

Is that all?

MS HILL:

If she's finished, that's all I have.

THE COURT: JUDGE KIRKPATRICK

Q. Ms Noble, we're going to interrupt your evidence at this stage. You're no longer in cross-examination but the Court's questions will have to be dealt with next week, so thank you very much. You will be available next week?

A. Yes.

Q. Very good, thank you.

A. Although 4 o'clock is generally my cut-off.

Q. Well, we'll see what we can do. Thank you very much for that.

THE COURT: JUDGE KIRKPATRICK

We're going to move now to the evidence of Mr Hill and that means that the opening for the Attorney-General will also be next week but it seems to us that the more important thing is for the evidence to be provided.

WITNESS STOOD DOWN

WITNESS INTERPOSED

S 274 PARTY: ATTORNEY-GENERAL

THE COURT ADDRESSES COUNSEL – TIMETABLING OF QUESTIONS AND OPENING (12:43:56)

MR PREBBLE CALLS

ANDREW FRANCIS HILL (AFFIRMED)

Q. Can you please confirm your full name is Andrew Francis Hill?

A. I do.

1245

Q. And have you prepared a statement of evidence dated 7 November 2017?

A. I have.

Q. And can you please confirm that your statement of evidence is true and correct to the best of your knowledge?

A. It is.

Q. Now there has been since you provided your evidence to the Court some revision to the proposal that MRMT are putting forward. In light of those – you've obviously been here this week. Have you had an opportunity to see the revised objectives, policies, methods and rules (inaudible 12:46:09)?

A. Yeah, I have had a look at them.

Q. And in light of that has it in any way affected your evidence that has been filed?

A. It has a little bit, just towards the end of my evidence.

Q. So perhaps if you could just address those specific parts for the benefit of the Court?

A. Sure. Okay.

THE COURT: JUDGE KIRKPATRICK

Q. And you're going to do this by reference to your statement are you Mr Hill?

A. Yes I am.

Q. Thank you.

EXAMINATION CONTINUES: MR PREBBLE

A. So the first two sections relate to fishing in the Bay of Plenty and sort of general fisheries management rules, so they remain the same. And the maps at the back obviously are the same. In terms of the other pieces it's really the impacts on the fisheries regime. So as I understand the proposal where we look at paragraph 62, my paragraph 62.

THE COURT: JUDGE KIRKPATRICK

Q. Starts, "First MRMT's proposal?"

A. That's right.

Q. Yes.

EXAMINATION CONTINUES: MR PREBBLE

A. So when it talks about enhancing and developing fisheries resources as I understand it this is more about protecting taonga species and natural character and natural heritage. Paragraph 63, my paragraph 63 talks about the impact on recreational fishing which as I understand it will be less because recreational fishing will be allowed in the broader area. Then paragraph 64 through 67. This is a little bit unclear to me but it's arguably less impact but it really depends on the methods of commercial fishing that are allowed, yeah, and which bottom impacting fishing methods I guess are the ones that are banned, for things like potting for example. So if potting is decided that it has got an impact and is banned then that might have a bigger effect because potting is particular issues at a crayfish fishery.

THE COURT: JUDGE SMITH

Q. Can I ask a question because your maps, you give us very useful maps but there's a huge number of overlays and around Motiti there's some particular overlays like the green area around it and when you look at the reference it simply says "scallop" and I don't know what that means for example –

MR PREBBLE:

Your Honour I was going to ask the witness to more specifically (inaudible 12:58:35) those maps at the back and –

THE COURT: JUDGE SMITH

We can come to that later.

THE COURT: JUDGE KIRKPATRICK

I think we'll continue with your updating.

EXAMINATION CONTINUES: MR PREBBLE

- A. That, oh... Paragraph 70, my paragraph 70. Again less of an issue if some take is still allowed. And that goes to paragraph 72 and 73 the same. Less depending on the detail but particularly again if potting is banned in the entire area then that is likely to have impact stated.
- Q. Thank you Mr Hill. Obviously you've been here for a few days and you have heard the evidence from Dr Stirnemann which provided the MPI material on by-catch of sea birds. I was wondering if for the benefit of the Court you could describe the measures broadly that MPI are putting in place to address the sea bird by-catch?
- A. Sure. So I think it has been referred to already the national plan of action for seabirds that's in place. A collaborative effort that's been put together that sets objectives for protecting sea birds in New Zealand. The way that those objectives are put into place is through fisheries plans, so there's particular fisheries planning objectives that are in place, particularly in the inshore fisheries. So that's where we're looking at or MPI is looking at opportunities for – so some of those objectives are, all New Zealand commercial fishing vessels are shown to be implementing current best practice mitigation measures relevant in their area. Recreational and customary non-commercial fishers understand the risks their fishing activities pose to seabirds, relevant organisations support and promote the use of best practice mitigation measures and it is the cultural norm in New Zealand to use such methods. Capture rates are reducing in all New Zealand fisheries in accordance with reduction targets

and the relevant planning documents for those fisheries. So that's the type of flavour that comes through. Then there's a range of mandatory measures that have been put in place on commercial fishing vessels to mitigate the impact on seabirds of the particular method that you're using. So if there's a trawler with wires that go down into the water, there'll be lines floating behind it to scare the birds off. For things like longlines, there are weights to keep the longlines, you know, low in the water and quicker sinking, so those type of measures. There's also voluntary measures looking at vessel-specific risk mitigation plans, so looking at how individual vessels can change their practices to avoid releasing offal at the same time as fishing is taking place, because that attracts the birds. Any measure that can reduce that is going to have a lesser impact on seabirds.

1250

- Q. There has also been some interest in your maps at the back of your evidence, which are maps 21 and 22. I was wondering if it might be useful for the Court for you to go through and address what are the key regulations in place around this particular area?
- A. The first thing I'd like to say is that the way the fisheries management system operates in New Zealand is that it is cut up into areas based on populations of fish, so fish stocks.

THE COURT: JUDGE KIRKPATRICK

- Q. These are the statistical areas based on likely fish population?
- A. Not the statistical areas, the quota management areas.
- Q. At some stage I'll be interested in why they're different sizes and shapes.
- A. Yep. The quota management areas define the stock boundaries, and so the key mechanism for managing fisheries is to set a sustainable catch limit and so it's set at that stock level. So we monitor the catch within those areas and assesses stocks within the biological stock unit, which makes sense. You know, that's where the breeding occurs.

THE COURT: JUDGE SMITH

Q. One of the things I am struggling with, the quota management area, is it going right up past ...

A. It varies by different stocks based on species. There will be some more information on quota management areas. So that manages at the stock level, but then there are lots of other, you know, more finer-scale issues which needs to be addressed, so that's where these other overlays come in. So there's a range of regulation, you know, a wide range of fisheries tools that can be used in terms of seasonal closures, method closures. There's some that aren't on here about the, some (inaudible 12:55:06) fish species can't be sold commercially in New Zealand so there's a whole range of mechanisms that are in place, so that's what these are. Does that answer your question about the general flavour of the ...

1255

Q. Yes, it's trying to understand what applies at Motiti. I've got to say it was a little difficult for me. I think others probably understand but I'm struggling.

A. And then when you look at the, probably the second map then is the better one, the finer spatial scale one, you raised the particular point about the green area which is regulation 22 of the Commercial Fishing Regulations and that actually should say "a prohibition on taking scallops" so that was an error in the map, apologies.

Q. Yes.

A. So there's no dredging of the scallops or the kina or no taking of scallops allowed.

THE COURT: COMMISSIONER LEIJNEN

Q. Is that for a limited period of time?

A. No, that's just a standard prohibition.

Q. Just a standard prohibition, thank you.

THE COURT: JUDGE SMITH

- Q. And then that blue line that we see there just off to the east of Motiti which is within the area we're talking about, that seems to be about when you can take scallops, is it, in the other area?
- A. Which is that one? I get a bit confused in these as well.
- Q. Yes, it's this blue line here. I'm not sure what that ...
- A. Oh that one there, yes, the big grey thing, yes, so that's a restriction on time of day to collect scallops.
- Q. What does that mean?
- A. Limits commercial fishing for scallops to daylight hours.
- Q. Right, thank you.
- A. And it's in place to, as an effort control and for compliance purposes.

THE COURT: JUDGE KIRKPATRICK

- Q. What is the effect that that controls? Is that an effect on the scallop fishery or an effect on something else?
- A. On the scallop fishery so fishers can only fish for scallops during daylight, commercial fishers can only fish for scallops during daylight hours in that area.
- Q. So at night that's to protect the scallops presumably in terms of their own feeding or movement or ...
- A. I think it's more, it sounds like it's more for compliance purposes so the ability to actually see people going and fishing.
- Q. See them?
- A. Yes.

THE COURT: JUDGE SMITH

- Q. So I take it that the difference between the orange line and the blue is that you've got a size limit in the orange lines for scallops and the blue you don't have a size limit but you've got a time limit, time of the day, is that the ...
- A. I think that is correct.
- Q. All right. Yes, I understand that and I think that follows.

- A. That would be the extent of the Coromandel scallop fishery, so that will be a different stock which is why the lines sits where it does I think.
- Q. Thank you. So all the black dots we can – those are, as I understand it, for recreational fishers so they're not anything to do with commercial?
- A. That's right so that's where, the top one, the Amateur Fishing Regs.
- Q. So the only other thing we've got then is the yellow dots, is that right?
- A. You've got the yellow dots and you've got the cross-hatched ones.
- Q. Oh the blue cross-hatch, yes.
- A. And the black cross-hatch as well.
- Q. Yes.
- A. It's going in a different direction. So pair trawling and pair Danish seining is prohibited so that's two vessels doing it –
- Q. Two vessels with a big, big, net.
- A. – so that's a bulk harvesting method, yes, so you can't do that and then there's a restriction, the 51 is a restriction on mesh size.
- Q. Yes.

THE COURT: JUDGE SMITH

- Q. Sorry, is that a recent prohibition because I see that your figures show Danish trawling in this area?
- A. Pair Danish trawling.
- Q. Oh, I see, it's only on pair –
- A. Danish seining.
- Q. – it says Danish seining, it's only pair –
- A. It's two vessels so that's a, generally bulk harvesting method, yes.
- Q. Yes, but is this different because you've got a map showing that there has been Danish seining in this area?
- A. Single vessel.

THE COURT: JUDGE KIRKPATRICK

Yes, that will be a single vessel.

THE COURT: JUDGE SMITH

- Q. Oh so that's pair, so I need to add "pair" Danish seining.

A. Yes. All right and then the size of the nets, yes, I understand that. Thank you that's helpful.

THE COURT: JUDGE KIRKPATRICK

Q. In 10A in between "certain fishing methods"?

A. So no commercial fisher shall use for taking fish a box net, purse seine net, Danish seine net, trawl net or lampara net or set nets of a total length exceeding 1000 metres in Tauranga Harbour, so that one just relates to Tauranga Harbour.

Q. Okay, all right.

A. Which as you've said is a complicated little area for lots of restrictions (inaudible 12:59:32).

EXAMINATION CONTINUES: MR PREBBLE

Q. They've also been during the last few days some questions around the state of key stocks in the Bay of Plenty and I understand you have obtained some MPI diagrams that are available online which describe some of the key stocks in the FMA which includes the Bay of Plenty area.

A. Yep.

1300

Q. I'd like to introduce this, please, through the witness if Your Honours permit that, and I understand we're up to exhibit L.

THE COURT: JUDGE KIRKPATRICK

Yes.

MR PREBBLE:

The bundle behind is actually the bundle of authorities that goes with our submissions but you can get them in as well.

THE COURT: JUDGE KIRKPATRICK

Thank you. So exhibit L through Hill.

EXAMINATION CONTINUES: MR PREBBLE

- Q. If you could just, please, take us through those diagrams and describe to the Court what they show.
- A. Sure. So if you haven't been here listening, there were, you know, some individual species and stocks in the area that were – there was quite a lot of discussion about them, so I've requested off MPI just some summary information for them. So every year there's a stock assessment plenary that is put out. It's put out twice a year, actually. There's a May one and a November one. That's online on the MPI website and that's where all of the information on the science that's been done, the stock assessments that have been undertaken, is all collated there. So these are directly taken from that document. So I don't know which one you'd like to start with.

THE COURT: JUDGE KIRKPATRICK

- Q. Well, just to confirm, CRAY2 is crayfish, is it?
- A. Crayfish, yep.
- Q. SNA1 is snapper?
- A. Snapper 1, yep, snapper.
- Q. And KAH1 is kahawai?
- A. Yep.
- Q. And TRE1 is trevally?
- A. That's correct.
- Q. And we see the landings presumably is how much of it's brought on shore to –
- A. That's right.
- Q. – from fishing vessels into New Zealand. I don't know what happens if it's taken – it's fished for in New Zealand waters and then removed from those waters.
- A. Shall I answer that? So that is – this is EEZ catch and it has to be landed into New Zealand.

- Q. It has to be. Okay, so even foreign vessels are required to land their catch in New Zealand, all right, and then you've got the TACC w – total allowable commercial catch, is that right?
- A. Yep.
- Q. And that shows where those have been implemented so it's throughout the period for crayfish, introduced in '83, '84 for snapper, introduced in 2002, 2003 for kahawai, introduced in '86, '87 for trevally.
- A. Yep, that's right, so 1986 is when the quota management system came in.
- Q. Right.
- A. Yep, that is correct. So it's the commercial landings versus the TAC.
- Q. So kahawai initially in the beginnings of the TAC method was not controlled by TAC, was implemented in 2002?
- A. Well, I'm not entirely sure. It may not have been in the quota management system from the get-go because when they – when the QMS was brought in in 1986 there weren't that many species that were part of it and then there were a whole lot that came in later. So I'm not entirely sure when kahawai came in.
- Q. Yes, that's what – so snapper and trevally were there from the beginning, crayfish possibly as well. We don't know because the figures don't go back far enough.
- A. I'm pretty it was but...
- Q. Right, but not trevally? Got it?
- A. Mhm.
- Q. Thank you.
- A. So we can start with crayfish. Does that – that seems to be a species that is particularly interesting.
- Q. Yes.
- A. So crayfish, if you look at the – if you go to the second page of that one where there's the map. So this actually is – I'm not saying it's a good picture but it's a reasonable good way that described the harbour strategy standard that MPI uses to manage fish stock. So that's where a target level is established that equates generally to the maximum sustainable

yield for that stock. So the target biomass that MPI strives to achieve through fisheries management tools is that the stock is maintained at that BMSY level. The legislation requires that to be at or above, and we can talk about that with some of these others that actually are maintained above. But a target level is established, then the stock is assessed against that target level, and that's shown in that orangey sort of line through the limit. There's a soft limit that's established. So that's a trigger point where action must be taken. Stocks naturally fluctuate, so they can fluctuate around the target but once it hits the soft limit there's an obligation to make – to take action. If it gets to the hard limit, that's considered to require closure of the fishery.

Q. Yes. We're looking at crayfish to start.

A. Yeah.

1305

Q. And we just cross to the soft limit.

A. Yep.

Q. And the trajectory would indicate we may be on our way to the hard limit.

A. Yeah. So what's happened in that fishery is that there have been concerns around it. There's anecdotal evidence and others that the stock is under pressure. There was a cut in 2014, I think it was, and then a voluntary cut by the industry themselves. It went from 236 tonnes down to 200 tonnes through the TACC reduction. There was a further voluntary reduction by the industry down to 150 tonnes and the stock assessment has been brought forward to try and get a handle on what's happening with that stock. So it's at the soft limit. Something needs to be done. You'd almost guarantee that there would be a TACC reduction but they're also looking at other mechanisms that may be able to be used. So there's various conversations and workshops being held to try and understand what else might need to be done in that fishery in terms of area closures or seasonal closures and the like.

Q. And the voluntary cut, is that a unanimous action on the part of all cray fishermen who say, "We're all going to go to this"?

A. Yeah. That's right.

- Q. And do they then turn to the Ministry and say, "You can now enforce this," or do the Ministry say, "No, we're still dealing with our TAC. If you've got a voluntary cut below that, that's a matter for you."
- A. That's right. It's not a legislative thing that we could prosecute someone for breaching.
- Q. No. It's amongst themselves.
- A. Yeah, but saying that it would be monitored against that new catch limit, so the MPI would know.
- Q. I understand you would know, but should a single vessel breach that limit, you couldn't take action?
- A. No.
- Q. Their peers might take action?
- A. Yep, yep.

EXAMINATION CONTINUES: MR PREBBLE

- Q. Now, I take it that comes from Cape Reinga right down to the East Cape, does it?
- A. This is the bit where I wanted to describe the quota management area. So the little map shows the various areas and you can compare that to the crayfish one and you can see cray 2 is in a different orientation and in a different area than the snapper 1. Snapper 1 does go all the way up to Northland. It's understood that there are at least two sub stocks within that area, possibly three. There's a Northland one and a Hauraki/Bay of Plenty stock.

THE COURT: JUDGE KIRKPATRICK

- Q. If you were to find that there were differentiated stocks, you might then adjust your areas?
- A. Yes, that can be done. It's a legislative change that's required, but it can be done.
- Q. But at this stage you're not able to delve down into the numbers?
- A. No, not at the subgroup level.
- Q. It looks to me you can only use the whole regional figure.

- A. What it does look like is that the Northland stock is in better shape as a stock as a whole.
- Q. I understood that the Bay of Plenty stock is likely to be lower.
- A. Lower, that's right.
- Q. Therefore it might be closer to the hard limit.
- A. It may be, yep. Difficult to determine. The red line shows, again, the target level is a soft limit and a hard limit. This has been at the soft limit for some time and there has been management action taken in that fishery so there's been, you know, cameras on boats and there's been a reduction in the recreational take. There's a size limit change. The bag limit has been altered. So there has been management action that's done. Again, it doesn't appear that it's, you know, having the effect that would be desirable, so there will be more work that needs to be done in that fishery as well.
- Q. Well, I mean, roughly, because the scales are a bit difficult, you can see that around about the time of introducing the QMS the steep decline stopped very close to the hard limit and then there's - with some adjustments in the TAC we've seen some, I suppose recovery might be the right word to the soft limit but then you've got a drop down so that's where you're saying -
- A. Yeah.
- 1310
- Q. - look into it?
- A. Something else needs to be done. That is exactly the, you know, your observation about the timing of the stopping that decline, that is the QMS introduction and actually snapper one was one of the major drivers. You know, the status of the inshore fish stocks and particularly snapper particularly in Auckland, you know, for that area because of the population bases was one of the drivers for it.
- Q. All right. Thank you. And kahawai?
- A. Kahawai. Yep. So kahawai -
- Q. Not a very popular stock until relatively recently?

- A. Yeah, and it's a popular recreational fishery obviously. And it's not, yeah, it's arguably of high value for no recreational sort of game fishing perspective rather than a commercial. This is one stock that's actually managed above the MSY and that's for that reason that it's, you know, abundance for recreational take is considered high, so that one has a much higher biomass target. Actually another thing that I just wanted to note in these graphs, snapper one as well is the estimate of the maximum sustainable yield or the target. So if you look at the snapper one. So the target level that left-hand axis and there was a bit of debate, discussion about this earlier on, was around 40% of B0 and what that actually meant. So B0 is unfinished biomass.
- Q. And how's that calculated?
- A. They – clever maths. They work it backwards and model it. I'm not a stock assessment scientist but that, it's all done in a –
- Q. What was that? Harvested mass was it?
- A. Virgin biomass. Unfished.
- Q. Unfished mass. Yes.
- A. Yeah.
- Q. A bit like demographics except it's slightly easier to count people.
- A. So it's just an interesting point that fisheries management and the way our fish stocks are managed and this is in New Zealand and internationally as well, is to take fish stocks down to a percentage of the virgin biomass so it's fished down to the maximum sustainable yield which is where the fishery is at its most productive. So that's 40%. The estimate for snapper is that that's 40% of the virgin biomass. The kahawai stock is managed at a level of 52% of the virgin biomass.
- Q. And trevally?
- A. And trevally is, you can see the front graph in the QMA area –
- Q. Page 2 of that is completely different.
- A. Yeah. Now this is - goes to a little bit of how stocks are assessed. So there is no formal stock assessment for trevally. So that means for this stock the index we have is a catch per unit effort index. So catch –
- Q. What's the unit?

- A. So it's how much catch you get per unit of fishing effort.
- Q. Oh, right. So a standardised ship?
- A. Yeah. Yeah, and the standardised just mean that, yeah, all of the, they tried to compare apples with apples. So there's again clever maths that's done to try and remove some of the differences that might happen, you know, throughout a year or through different vessels have different catching abilities, et cetera, so, so that's, the standardised CPU is an index is one index of abundance and that's what's shown on that one.
- Q. So the increase doesn't mean increased catch. It means increased return for effort?
- A. Yeah. Which, you know, kind of –
- Q. Which means –
- A. – intuitively –
- Q. – it's finding easier to get the fish, yes.
- A. – intuitively says that this stock would be –
- Q. Less they are sitting with the line out.
- A. Yeah. In terms of the other stocks there's, so they're all assessed in slightly different ways. So the kahawai stock assessment is done based on age data so it's very important to understand the age structures, so that's from commercial and recreational fish so that's taken from shed sampling for the commercial fishery and from boat ramps surveys for the recreational fishery. There's also recreational of CPUE which again is based on boat ramp surveys and also aerial sightings is used, so that's looking at where the schools of fish are. Snapper is done by a catch at age data, tagging data and it also incorporates long-line CPUE which is considered to be a reasonable index to put into the model. And the crayfish stuff is done on commercial catch per unit effort data, so that's kilograms per pot lift and also based on observer and logbook length data and tagging data as well.
- Q. Thank you. Very interesting.

1315

EXAMINATION CONTINUES: MR PREBBLE

- Q. Obviously, there's been a number of species that have been mentioned. One other one that has been specifically referred to a number of times is hāpuka. I wonder if you could just mention your understanding around that?
- A. Yes, so hāpuka is quite complex and complicated. It's one that hasn't, they haven't devised a group stock assessment methodology for it, so the TACC for hāpuka is 480 tonnes and the current catch, commercial catch is less than that so it's about 287 tonnes from 2015/2016.

THE COURT: JUDGE KIRKPATRICK

- Q. So, it's assessed at 480.
- A. Yes.
- Q. But the current catch?
- A. Catch is 287.
- Q. 287.
- A. And there's an estimated recreational take of 74 tonnes.
- Q. Recreational take 74?
- A. Yes. And so stock status information of that one is known to be a gap in the system and is something that is being looked at just to try and understand the specifics of that particular fishery. There's –
- Q. The objective would be to gather enough information for hāpuka then to be managed in a similar way?
- A. In a similar way to these, yes.
- Q. All right and what period of time do you think it would take to be able to do that?
- A. To be able to – as you get to that point, I'm not sure.
- Q. All right.
- A. There has been, you know, observations of low catches of hāpuka and they're harder to catch particularly in shallow water and my understanding of that is hāpuka are typically found in deeper water, and so that's their preferred habitat and so as it's fished down, which it undoubtedly has been based on that information I just gave you about catch, it retreats,

you know, its range is retreated from shallow water so that would probably be something that you'd expect to see at this point.

Q. So a sort of analogy, a terrestrial analogy would be that thus far the fishermen have been getting the low hanging fruit or the shallow-swimming fish.

A. Yes.

Q. And that obviously it gets harder and harder the deeper you go?

A. Mhm.

Q. Further offshore more ocean to fish in?

A. Yes. Yes, that's right, there's a cost associated with going further, yes.

Q. Obvious.

MR PREBBLE ADDRESSES THE COURT – NO FURTHER QUESTIONS

(13:17:20)

JUDGE KIRKPATRICK ADDRESSES ALL COUNSEL – TIMING

COURT ADJOURNS: 1.18 PM

COURT RESUMES: 2.00 PM

CROSS-EXAMINATION: MS HILL

Q. Now, you're no relation of mine, are you?

A. Not that I'm aware of.

MR POU:

No, that was my first question.

CROSS-EXAMINATION CONTINUES: MS HILL

Q. Would it be a fair summary of your evidence that there are mechanisms in the Fisheries Act which could achieve the same or at least similar outcomes to the appellant's proposal?

A. Yeah, I would say that. There's the bigger – in terms of maintaining the stocks at a level that is at an appropriate biomass level and that can be adjusted under the Fisheries Act, and then there's the individual tools that can be put in place to exclude certain fishing methods from certain areas, seasonal closures, that type of thing.

Q. If the Court was minded to put in place some provisions to grant some relief to the appellant, and then MPI looked at its own mechanisms to address this particular area, how would it take into account the mechanisms that were in place in the coastal plan?

A. There is in the Fisheries Act an obligation to take into account coastal plans, but it would be complicated in terms of different scales of the tools, so they'd be nested, effectively, within all of the tools that exist already and within the broader, you know, quota management area, sort of tools. So it would be complex.

CROSS-EXAMINATION: MS JORDAN – NIL

CROSS-EXAMINATION: MR ENRIGHT

Q. Mr Hill, starting with your exhibit L, you'd accept that what you've presented are models and not data, is that correct?

A. Yeah. That's right.

Q. And you haven't shown the aerobars on any of the modelling of abundance, have you?

A. The maps and the graphs are taken from the website, so all of the information is available within that. So that's quite a complex scientific document that lays out all of the different techniques that we use, all of the various aerobars and the assumptions that were made. So there's quite a lot in there and it's quite complex, the individual stock assessments models that are used.

Q. But the point is that there are margins of error for each of the figures 2, aren't there?

A. Yes, there are.

Q. But they're not showing on the figures you've presented us?

A. They're not shown on the figures, no.

Q. In terms of the soft limit, would you accept that relates to the fish and the fishery and not the species that are reliant on them?

A. Yes. You're saying that it's a single species model?

Q. Exactly.

A. That is the way that things are currently undertaken. We are moving towards a more ecosystem-based approach, which is when you're starting to look at all those different linkages. There is an obligation under the Fisheries Act to consider associated independent species, so that is taken into account, but by and large it's a single-stock model.

Q. And they're all pelagic species, too, that your data relates to, correct?

A. For the kahawai and the trevally?

1405

Q. Mhm.

A. Yes.

Q. And we – sorry, Dr Stirnemann received through MPI some data around by-catch over a seven year period 2010/2017 and it would seem there has been no decline in the seabird by-catch over that period, it's quite a substantial by-catch figure, do you accept that?

A. I haven't actually looked at the trend across all of that data so I can't answer that question.

- Q. The by-catch as illustrated in her exhibit didn't just relate to seabirds, for example, there were pods of dolphins involved in by-catch, that kind of thing as well even for one-off events, do you accept that's another aspect to the by-catch issue?
- A. Yes.
- Q. In terms of hāpuka, do you agree that's essentially a gap in the system because there's no good way to measure their abundance within the, either the Bay of Plenty or the MNEMA itself?
- A. So fisheries is a continually evolving, fisheries management is a continually evolving system and fisheries science is the same, and that's true in New Zealand as it is globally, so more information is being collected. We have better understanding of how to assess stocks, different ways of doing it, the correct way to do it, the most accurate way to do it. There have been some assumptions that have been made that are then found to be, you know, inaccurate, so there's a range of things that have to be, that need to be progressed and need to be done. Hāpuka, a method of doing a good stock assessment for that would be one of those, but there's a range of, you know, things that continue to evolve and continue to be collected.
- Q. And, again, specifically in relation to hāpuka, the fishery has essentially reached a state functional extinction in the Bay of Plenty, is that a fair comment?
- A. No.
- Q. Well, we have the commercial catch for groper BOP set out in the evidence or it was annexed to MRMT's section 186A application, you'd be familiar with the significant reduction in catch of groper or hāpuka, as we'd prefer to call it, the Bay of Plenty?
- A. I don't know that, no.
- Q. It's attachment to Mr Matehaere's evidence at page 722.
- A. I would've seen it then at some stage.
- Q. I'm hoping that's the same one. I'm hoping that's the right bundle page number, 722, if that's the correct page number on para 1 you'll see has a ...

A. So, that's volume?

Q. Volume 1.

WITNESS REFERRED TO VOLUME 1

A. To functionally extinct. My understanding of the term is that the species can't perform its role in the ecosystem so it's more usually, you know, talked about in things, in terms of things like crayfish and lobster who perform a particular function. So I don't think it's an appropriate characterisation of the status of hāpuka stocks. I accept that there has been a decline and the information I've provided is, you know, demonstrates here.

Q. That's consistent, isn't it, it's just a term for decline in terms of commercial catch trending substantially downwards.

A. So the figures that I had and that I said before was that the catch limits that TACC is not being fully caught.

Q. Is not being, what, sorry?

A. Fully caught.

Q. Right.

A. There could be a range of regions for that?

Q. So your essential position is that MRMT has remedies under the Fisheries Act and doesn't need to resort to the RMA, is that a fair summary?

A. Yes.

Q. And MRMT sort of disagrees with two basic reasons. The first is that there's been a failure by MPI to engage with MRMT on the processes that have been initiated by MRMT under the Fisheries Act and the second is that the RMA and the Fisheries Act operate for different purposes and protect different values. Now, if you accept proposition 2 ...

A. Can you repeat proposition 2?

Q. The RMA and the Fisheries Act operate for different purposes and protect different values.

A. So I'm not a planner so I'm not an expert on the RMA.

Q. Sure.

A. So I can talk to the Fisheries Act.

1410

- Q. Okay. Well, we'll come back to that, then. In terms of the engagement issue, do you accept that MRMT applied for both Taiapure and Mataitai in 2010 within the MNEMA?
- A. No, I don't accept that. That's not my understanding.
- Q. Have you been the evidence of Mr Matehaere and Mr Sayers?
- A. I have.
- Q. Both?
- A. Yep.
- Q. Okay. We'll find that document for you. You accept that there are a number of email exchanges in 2010 from MRMT to MPI in relation to a proposed Taiapure and Mataitai?
- A. Yeah, discussions.
- Q. Yes. You personally weren't involved in that?
- A. No.
- Q. So you can't comment further in terms of personal information.
- A. No.
- Q. Well, MRMT says it made those applications, they were rejected and there was a lack of interest by the Ministry in pursuing them. Do you have a response to that?
- A. As I said, my understanding is that there was a number of conversations that were held and so things did move forward but that it never got to the stage of being a formal application.
- Q. Do you accept that essentially that will be reflected in the paper trail produced by MRMT in terms of email exchanges?
- A. There would be the email exchange, yep.
- Q. It is common ground that MRMT lodged a section 186 application in January 2016.
- A. Yes, it's attached to my evidence, the response.
- Q. That was lodged prior to the lapse of the exclusion zone for the *Rena*.
- A. Mhm.
- Q. Do you agree that had the Minister granted it, the five year exclusion zone would have continued under the 186 application?

- A. No, but I can say that the reason that was declined was because it hadn't met the tests.
- Q. Yes. We might be talking about cross-purposes. Essentially there is evidence that during the five year exclusion there was an increase in abundance around Otaiti necessarily because boats were excluded from the area. Do you accept that proposition?
- A. Yeah. My understanding is that – and I wasn't here for all of the evidence earlier about the apology.
- Q. So you'd accept the proposition that clearly if people are excluded there's going to be an increase in biodiversity because there's no fishing going on.
- A. There's an interesting question here about the mobility of species and all those type of things. If you exclude fishing from a small area, then there will be species that move in and out of that area, so there will be – and they will be able to be taken elsewhere. So the whole way that the stocks are managed takes that into account.
- Q. That's the halo effect, isn't it?
- A. No, that's not what I said. I wasn't referring to that.
- Q. Well, you're not an ecologist, are you?
- A. No.
- Q. So you'd defer to the evidence of the ecologist in relation to how the exclusion zone affected the abundance of biodiversity?
- A. Yes.
- Q. Okay. So just returning to my question, you'd accept that had the Minister granted the 186 application at the time it was lodged by MRMT, whatever the abundance was present during the exclusion zone would have continued?
- A. I can say that if the Minister had granted it, there would have been a temporary closure.
- Q. Yes, exactly. So the reason the Minister gave – and you may have it attached to your evidence, but I'm referring to an attachment to Mr Matehaere at page 449, which is the Minister's letter dated 9 June 2017.

A. Yep, that is attached to mine as well.

1415

Q. It might be attached to your evidence as well, I think.

A. I can just find it. Sorry, what was the date? The?

Q. 9 June 2017.

A. 9 June 2017, yep.

Q. So the reason the Minister gives for rejecting the 186A application filed by MRMT, as stated in the second paragraph, is that it, the proposal, would have to be supported by all of the relevant tangata whenua groups. The Minister says that he received no such collective proposal. That was the reason for rejection of the 186A application. Do you agree?

A. Yep, that is in the letter. There's a range of other bits that are included in here too.

Q. Yes, so –

A. "I cannot be satisfied," the last paragraph. "I cannot be satis" –

THE COURT: JUDGE KIRKPATRICK

Well, we can read the letter so we don't need to prove the text of Mr Guy's letter. Let's go to questions about what arises from it.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

Q. So the reference to relevant tangata whenua groups, which tangata whenua groups are you referring...

A. So I wasn't involved in this process and I'm not an expert on the various, you know, customary experience in the Bay of Plenty so yep, I can't answer that question.

Q. You can't answer. That's fine. So do you accept, though that there's an expectation of consensus under Fisheries Act where an application is made under 186A or for that matter taiāpure that there's consensus reached as between different iwi and hapū with a relevant interest?

A. Again, I don't know how that would all play out in terms of overlapping interests and those type of things. I understand it's complex.

Q. Because, well, the proposition I want to you is that this benefit of the Fisheries Act regime is that there is an expectation that whoever the

relevant tangata whenua groups are will reach a consensus and then that's presented for a ministerial approval, and in contrast in the RMA consensus is not required.

A. Again, I'm not an expert, but my understanding is it's not consensus, but I think just generally within the fisheries management regime it is important that all people with an interest are enabled to have their views put into a process. So that happens for the fisheries management decisions that I'm more familiar with, making sure that all of the various, you know, recreational, commercial, customary, environmental, that all of those groups are party to that or have an opportunity for input into that decision.

Q. Do you acknowledge that you received from MRMT a submission on the future of our fisheries dated December 2016?

A. Yes.

Q. And that hasn't been responded to, correct?

A. So that actually is my job at MPI. I manage that process. So yes, we received submissions. We receive a lot of submissions. There was a, you know, a reply given, so's that an acknowledgement given, and all of those submissions have been, you know, read and reviewed and are fed into the process that we're still operating.

Q. So when you say "acknowledgement" that's simply that you've received it rather than a substantive acknowledgement to the issues raised, correct?

A. Yeah, that's right, and that's the same process that was undertaken for everybody else who put in a submission, which was a lot of people. It got quite a lot of coverage.

Q. Now in your evidence you've claimed that you're an independent expert and you're complying with the Code of Conduct, correct?

A. Sure, yep.

Q. Would that be perhaps not quite correct because, as I understand it, you would give policy advice to the Minister and presumably you are subject to the Minister's directions in terms of your opinions that you give, is that fair?

A. No, it's not fair.

Q. Okay.

A. Independent, free and frank advice provided to the Minister.

Q. Okay, so in terms of the Fisheries Act, I just want to take you through some of the Coastal Policy Statement policies, which is in the casebook, if you have that.

UNIDENTIFIED SPEAKER:

Your casebook?

MR ENRIGHT:

Yes, thank you, in tab 11.

UNIDENTIFIED SPEAKER:

If you turn to tab 11, you'll see it's the New Zealand Coastal Policy statement.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

A. Is that the same as that?

Q. Yes, it's the same thing. One of the issues you haven't looked at in your evidence is the dividing line between what the Fisheries Act covers and what the RMA covers. Do you accept that?

A. Yes.

Q. So if you look at policy 13 of the Coastal Policy Statement, and it's 13(2), I just want to suggest to you that many or possibly all of the list in (2) are not dealt with by the Fisheries Act.

A. Again, I'm not a planner.

1420

Q. Yes, sure.

A. But in terms of the Fisheries Act, there is requirements in the environmental principles relating to biodiversity and those type of things and associated independent species, avoid, remedy, mitigate impacts on the aquatic environment. So where the difference is between that regime and this regime, you know, I'm not really qualified to say. I can talk to what's in here.

THE COURT: JUDGE KIRKPATRICK

Q. If you'll allow me, I want to clarify this because it was also raised with Ms Hill. You're referring to section 9, are you?

A. I am, yep. I'm referring to both sections 8 and 9. 8 is the purpose statement.

Q. And those are the two provisions that you say bring in resource management principles into the Fisheries Act considerations?

A. Yes. They're the ones that look at ...

Q. Sustainability?

A. Yes, and managing adverse effects of fishing on the aquatic environment.

Q. Okay. So I don't need to look further in the Fisheries Act for other references to resource management principles?

A. There are some other tests in there. There's the tests around making sure that the coastal policies and the regional coastal plan is taken account of, and those type of things.

Q. Where is that?

A. In 11(2)(A).

THE COURT: JUDGE SMITH

Q. When you responded a moment ago, were you looking at policy 13(2)?

A. Yep.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

Q. Just on that, would you accept as a general proposition that sections 8, 9, and 11 relate to maintenance of fisheries resorts?

A. No, I don't.

Q. Section 8 refers to sustainability, maintaining potential of fisheries resources to meet reasonably foreseeable needs of future generations?

A. Yep.

Q. You also agree the definition of utilisation, again, is the focus, isn't it?

A. I'd say that brings in the idea of conservation, conserving. That's been one of the definitions of utilisation.

THE COURT: JUDGE KIRKPATRICK

There's a point at which you're in submission. He's said he's not a planner. He's not a lawyer either. Interpretations, meanings, definitions, I think we'll do in the submissions.

MR ENRIGHT:

This witness is very much quasi-legal evidence, so I don't need to ...

THE COURT: JUDGE KIRKPATRICK

Well, I think there's no escaping that scope and jurisdiction are at the heart of the case. I'm not trying to be overly strict.

MR ENRIGHT:

Sure.

THE COURT: JUDGE KIRKPATRICK

I'm saying if you are delving into the interpretation of sections of legislation, there's a point at which I'd rather that you focused on submissions on the law and ask him matters of evidence, I mean, you might convert your question into one about how he approaches matters of policy, but I'm not encouraging you do necessarily, rather than asking him how he interprets the legislation.

1425

MR ENRIGHT:

Yes, Sir, thank you.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

Q. So the same question, if we go back to coastal policy statement, and I just suggest to you that policy 15(c) lists what are the, potentially a list of landscape values and I'd suggest to you that a number if not all of those attributes are not matters governed by the Fisheries Act.

A. I think aspects of them are.

Q. Which aspects?

- A. Ecological and dynamic components. I don't actu – understand fully what that means, but ... vegetation, threaten to wildlife.
- Q. Okay and of those would you agree –
- A. Wil –
- Q. Have you finished?
- A. Yes.
- Q. Of that list which you've just identified but it's for the specific purpose of the Fisheries Act isn't it not for other purposes?
- A. Sorry, repeat that again, I didn't understand your question?
- Q. You're saying, for example, the reference to wildlife is a matter dealt with under the Fisheries Act but or for the purposes set out in the Fisheries Act, is that fair?
- A. Anything in the Fisheries Act is for the purpose of section 8 of the Fisheries Act.
- Q. Sure. So the Fisheries Act doesn't protect outstanding natural landscapes that's not a sort of a feature of the Fisheries Act?
- A. Not – that terminology isn't used, no.
- Q. And it doesn't protect outstanding natural character?
- A. Again, that terminology isn't used and I'm not a planner, but the definitions of those, as I understand it, there will be aspects of that that would be, so if you look at the environmental principles it does talk about habitats. It does talk about associated independent species and it does talk about biological diversity of the aquatic environment being maintained so those ideas come in through there.
- Q. Yes, but you would agree that they are limited to whatever the purposes of section 8, 9 and 11 are, correct?
- A. Yes, so eight being ensuring sustainability which captures the avoiding, remedying and mitigating and their principles being that you need to, anyone exercising duties of cares under the Act have to abide by those principles so, yes, I'm not a lawyer so, but that's my interpretation of it as a fisheries manager.
- Q. Okay. And just the final topic is I just question whether you've sort of overstated the risk posed to the Fisheries Act regime if this Court

approves the MNEMA rules framework under the RMA, do you think that's a fair criticism of you?

A. No. In my opening questions I talked about what the revised proposal looks like and I think that is less, because there's some level of recreational fishing to be allowed and smaller exclusions for some of the other methods, as I understand it. So that would have, you know, less of an impact.

Q. Well, what you seem to have done in your evidence is that you looked at all the bad consequences if the Court were to approve the proposed rules framework but you haven't looked at any of the positive consequences.

A. Mhm.

Q. Is that a fair point?

A. What would be a positive consequence?

Q. Well, for example, there's no discussion in your evidence about the benefits of having a prohibited status rule in terms of the halo effect.

A. I've got a view around the halo effect and in terms of fisheries management as a tool for fisheries management I think it's not going to be a solution to some of the fisheries – you know, if they're rebuilding fisheries or whatever, that's not through the halo effect. So if there needs to be – if protection is required in certain areas then the Fisheries Act does allow that to happen if there are areas that are particularly significant, you know, for customary purposes there are tools in the Fisheries Act to put those in place, so there are ways that things can be done.

Q. And again, you'd accept that's limited, though, to sections 8, 9 and 11 for those purposes.

A. There was actual tools that are parts of the Fisheries Act. There's quite wide-ranging powers.

1430

CROSS-EXAMINATION: MR POU

Q. Sir, I'll try and boil down. I'll try and do this in five minutes. When I look at these quota management areas, compared to the size of the coastal

marine area in the Bay of Plenty Regional Council, they're huge, aren't they?

A. Yep.

Q. And so the Fisheries Act is concerned with sustainability within those huge quota management areas.

A. It is.

Q. And if I just have a look at the hāpuka, the bass, hāpuka and bass, bass.

A. Bass.

Q. All about the bass. That's such a large area. It starts almost at East Cape and stretches around to the west coast, doesn't it? It's the whole thing.

A. Yep, yep, it's a large area.

Q. Now if we've got a sustainable catch that's within there, theoretically, and while this might be an exaggeration, that entire catch could be taken within the Bay of Plenty region, for instance, you take more here than over there, and so the lack of granularity or the lack of refinement could result in a depletion in one area and you can justify the sustainability by an overpopulation in another area.

A. So as I explained before, so the stock, the biological stock, is the unit that needs to be assessed and so that's where that level of the TAC applies and that applies to quota, you know, management purposes, and then there are the ability to use finer spatial scale tools to address finer spatial scale issues.

Q. And those spatial tools are like taiāpure and mātaimai?

A. Those are two, but there's also, you know, just method closures, seasonal closures, those type of things.

Q. Are you aware, are you aware that the taiāpure management committee participated in the declaration in support of the Motiti Rohe Moana Trust's application here because those finer tools aren't working either?

A. The finer – the...

Q. Those finer tools, for instance, the taiāpure that sits there, Ngāti Ranginui are here. They've got a, they've got a rohe moana out there, they've got mātaimai here, and they're in here supporting Motiti because what they

see is everybody saying that there's all these tools that can save their fisheries but they continue to see a decline.

- A. So I would argue then that the decline problem – so what you're saying is that there are some areas, smaller spatial scale areas, that are managed and that that's not doing enough, so the focus then would seem to me to be at the bigger scale, at the population scale, to ensure that there are fish that are then in those finer areas, so I think you're almost arguing for the –
- Q. But – no, no, but increasing the population of hāpuka in the North Cape does nothing for the connection to hāpuka by Motiti Islanders or Te Arawa fishermen who used to go out and hunt them, but that's what I'm saying is it seems that you're trying to fillet a fish with the back end of a knife.
- A. If we can manage stocks at the big level, if MPI can actually set sustainable catch limits and rebuild those stocks back to the target levels that have been stated, then there will undoubtedly be benefits for the Bay of Plenty.
- Q. Isn't that exactly what they're saying over here, "If we can build the stocks in that area, there will undoubtedly be benefits for the wider area"?
- A. No, it's too small.

RE-EXAMINATION: MR PREBBLE – NIL

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN – NIL

QUESTIONS FROM THE COURT: COMMISSIONER POMARE – NIL

QUESTIONS FROM THE COURT: COMMISSIONER PRIME – NIL

QUESTIONS FROM THE COURT: JUDGE SMITH

- Q. So I just wanted to clarify a few things first.
- A. Sure.
- Q. And thank you for your evidence. There's a lot of base information there. If species are killed as by-catch, is that lawful under the Fisheries Act, is it?

- A. Are you talking about sea birds and those type of things?
- Q. Well, and we see sea lions, whales, dolphin, leatherbacks, are all listed in this area.
- A. Yeah, it is a – if it's taken in the course of a, you know, fishing method then it's, it's...
- Q. It provides an exception to the various Acts that otherwise protect them?
- A. Yeah, yeah, that's right. Defence, I think, is how it's termed, yep.

THE COURT: JUDGE KIRKPATRICK

Section 68B(4) of the Wildlife Act is a defence.

THE COURT: JUDGE SMITH

I just wanted to know. I didn't know.

QUESTIONS FROM THE COURT CONTINUES: JUDGE SMITH

- Q. So essentially those by-catches become lawful, I presume, if they're reported, is it, and if they're not, they're not?
- A. There is yep, reporting requirements, yep.
- Q. Yes, reporting requirements, yes. So my understanding from looking at the various graphs you've performed, and I'm sorry, I want to be – try to deal with a broad brush rather than digging into individual graphs, is there appears to be a variability in areas in which fishing effort is put into.
- A. Yep.
- 1435
- Q. And it can be said that some years they seem to focus on one area, another year another area.
- A. Yep.
- Q. And I don't really need to know why but it's clear that the whole of the area is used but would it be fair to say that there seems to be a concentration at least along the east coast near the drop-off?
- A. Which particular map are you looking at?
- Q. All of them.
- A. Yeah, yep.
- Q. I'm just asking you a general question if you agree.

- A. Well, yeah, I think that is right. So I think there's – it's where, you know, fish are found. Like, there'll be places where fish are particularly looking to –
- Q. Which tends to be along the east coast, looking at the diagram. You haven't – we've got some from Ms Stirnemann as well showing the compound over 10 years from fisheries which tends to show that the deeper water is less fish than that along the edge and in shore.
- A. Yep, for these particular species that are caught, yes.
- Q. And this area we tend to see it going from Tūhua in-shore right down probably to Te Paepae o Aotea, which is right on a very steep drop-off there, and the fishing tends to be in-shore, of which, of course, Motiti is part of that more general catchment. Do you agree with that general principle?
- A. Yep, I think that's probably fair from the maps, yep.
- Q. So a displacement from any one area within that is almost inconsequential in terms of its effect on fishing, isn't it?
- A. I mean, there is fishing that has taken place here.
- Q. No, no, I'm just saying –
- A. So if that does get excluded –
- Q. – that if you displaced it from one particular area within that area I'm talking about, the in-shore area, one particular percentage, we're told that, you know, it's something in – at the moment, about 0.1% of the area at the moment that's covered by taiāpure, et cetera, but if you displaced from any one particular area it would have to be quite a large percentage before it was going to change fishing effort significantly.
- A. I can't answer in the specifics but it would depend on the particular species, I think, yeah.
- Q. Well, can I give you a specific?
- A. Yep, sure.
- Q. Because we know that Otaiti was closed for four years by the harbourmaster. Has Fisheries got any information that that changed the ability of fishermen to collect their quota?
- A. Yes, I'm not aware of any studies.

- Q. Well, I'm asking you if you know as an expert of any information.
- A. No, I don't, no.
- Q. So there's no information to show that it's – that that displacement created any impact under the Fisheries Act –
- A. Yeah, that's correct, yep, not that I'm aware of.
- Q. – on fish or – what are the – what do you control? Fisheries and fishery management?
- A. Yep.
- Q. No evidence that there was any impact on fisheries or fishery management?
- A. Not that I'm aware of, no.
- Q. According to my calculations – somebody had better check for me because my maths must be terrible nowadays – I think it was a three-nautical mile. If it was a three nautical-mile that would be a 120-kilometre exclusion, square kilometre exclusion. Now I just want to talk about these targets there, all the L series, because, with respect, it appears that the soft target has been the target for MPI in respect of snapper because you'll see it plateaued for around a decade at the soft target.
- A. It's definitely not the target. The target is the target level that's on there.
- Q. Well, why would it have plateaued? That means no further – we're no further – were you continuing to impose further restrictions during that period?
- A. It means that there haven't been, so it's got to a level that would require some additional action.
- Q. No, no, I'm looking, if you look – sorry.
- A. So I'm looking here –
- Q. Figure 2, yes.
- A. Yeah, yep.
- Q. You see it comes up and there's a flat line for about 10 years from 2000, looks like about 2008 to about 2014.
- A. Yep.

- Q. I'm not sure how long that is. It might – eight or 10 years. It's sat on that line, on the soft target line.
- A. Yep, that's correct from the graph.
- Q. Now the only way you'll achieve that is by artificial intervention, isn't it?
- A. Yep, and there has been interventions that have happened so there have –
- Q. But they appear to be interventions to fish it to the soft limit.
- A. No, no, there have been interventions that – so the example that I gave was the increase in the minimum legal size and reduction in bag limits. So there have been –
- Q. So it was declining and the way you've maintained it at the soft target is by imposing further restrictions in that period?
- A. Trying to and then seeing what happens and then if that hasn't had the desired effect then there will be more restrictions that will need to be put in place. So this would suggest to me that there's a need for further action, and this is the –
- Q. Well, there is now. I'm looking at where it dips down again.
- A. Yeah.
- Q. But the target, having a flat line on a target line is normally an indication that it's reached equilibrium and you've allowed it to be fished down to that level.
- A. There's a dynamic to all of this, so, you know, there's changes in fishing behaviour, there's changes in recreational take, that is something that needs to be –
- Q. So you're saying that there were interventions in this period and it just happens to be highly unusual you get a flat line?
- A. Yeah, yep.
- Q. Okay. That's really interesting. I've never seen one before I suppose it's possible. Do you accept the evidence that we've had is that the fish stock in the Bay of Plenty has been declining and is worse than the rest of the catchment? I think you said that yourself earlier.
- A. Yeah, yep. No, I think that there's certainly – and the crayfish one is interesting because if you look at –

- Q. I'm talking about snapper. I just want to focus on snapper.
- A. Oh, we're talking about snapper? Yeah, my understanding is there's a suggestion of that but I know they've had trouble in the – with the science to actually separate out the Bay of Plenty from the Hauraki areas –
- 1440
- Q. So we've had two - the ecologists seem to have agreed on a range of figures between 10 and 14%. Have you got any evidence that would be different to that for the Bay of Plenty?
- A. So the information in the stock assessment plenary states that there was a, I think it was a 14% figure but that that was ultimately not considered to be robust and so the two stocks were put together as one unit because there was a problem with the science in the –
- Q. But what I'm asking, we've had evidence from ecologists. Have you got different evidence that gives a different figure from 10 to 14?
- A. No, I'm just going on the information I have from a fisheries perspective which is what's in the – generally which says that there is a... So I think it's fair that the Bay of Plenty –
- Q. And your hard limit is that 10% for snapper?
- A. For snapper –
- Q. Because it's just a line. It doesn't have a figure beside it.
- A. Oh, yes, it is 10%.
- Q. Right. So you would agree if it got to 10% you're getting into a relatively critical situation?
- A. Yes. That would typically necessitate a closure of the fishery.
- Q. Now I'm just looking at 9C, that's your Act. That would be habitat not only at a regional scale, tax scale but also at an individual fine scale. That's I think your answer to Mr Pou?
- A. Yeah, absolutely.
- Q. So in this case the areas that are marked, those ones with the yellow on them have been identified, several of them at least have been identified as nationally or regionally significant habitat for fisheries, an ecosystem including fish. So that would therefore be of particular significance for fisheries management?

- A. So typically this one, fish, of particular significance fisheries management, it's a habitat that –
- Q. I'm not asking what you may do. I'm just saying that it's already been identified in another plan as, that's why. Just let me finish the question, as a, either a regional or nationally significant habitat? So my question of you, has MPI taken any steps to avoid adverse effects on those habitats that have been identified in those plans?
- A. Can I just go back to my answer to this question and give you an example about habitat? A habitat that has a, is particularly important for a particular life stage of a fish for example. So the bryozoan beds off Separation Point between Golden and Tasman Bay they're, you know, bryozoans they create habitat and they protect juvenile fish. So that's an area that's been protected from bottom impacting fishing methods to protect that particular... It's of significance to fisheries management because it protects a species.
- Q. So then it seems to me quite clear from your answer that policy 13 2 and policy in 15C are not matters that you are having regard to because you're not addressing natural character?
- A. I don't know what the benefits of these would be to particular fisheries management.
- Q. My point is that the Act we operate under says that you have to recognise that natural character is, consists of natural features, landscapes and amenity values but your Act doesn't deal with that. It deals with fisheries management –
- A. That's right.
- Q. – and the extent to which it's relevant is if it's a habitat issue that relates to a fisheries management issue?
- A. So that's that one. There's the other bit about the aquatic environment, adverse effects of fishing -
- Q. Well, okay. I'll ask you the same question. In respect of the adverse effects of fishing within this area have you, has the fishery, MPI taken any steps to avoid adverse effects on those?

- A. There's the ban on the taking of scallops. There's all those other tools that we've talked about, so there's a range of things that have been done and there are a range of things that could be done, if that was considered necessary.
- Q. Well I suppose my question is what has MPI done to protect the significant habitats for example at Motunau or the other ecosystems that have been identified in the various overlays of the regional plan?
- A. Yeah. So there are the range of exclusions that are in place already, for various reasons and not specifically for that purpose necessarily.
- Q. Because my understanding is under your Act you are required to take into account the regional plan aren't you?
- A. Mhm.
- Q. Do you know if MPI has considered the regional policy statement when it came to reviewing its fisheries in this area?
- A. I don't know the specifics of that.
- Q. Well one would have expected the Minister to give us evidence that they had taken the RPS into account –
- A. Mhm.
- Q. – given the statutory requirement to do so, wouldn't you agree?
- A. Well it is a statutory requirement so there would have been consideration given to it.
- 1445
- Q. And you agree that your evidence doesn't contain it?
- A. Doesn't contain the specifics of that, no, it doesn't.
- Q. Well, were you aware that there was an RPS that identified outstanding natural character in a number of these areas within this?
- A. Again, I'm not a – this isn't my particular area so there's a range of things that are taken into account.
- Q. Well, did you read the evidence of the other parties before we came to Court?
- A. Yeah, yep.
- Q. Were you aware that that was a core issue in this case?
- A. Yeah, I was, yep.

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

- Q. Mr Hill, could we turn to your maps starting – and if you've got the same pagination, I think it's about page 904. You've got a bundle of what I would call heat maps. Before those.
- A. Those ones?
- Q. Yes. It's headed "commercial fishing".
- A. Yep.
- Q. It seems to be for three different years and I'm interested in the variability of the pattern, so in 2010/2011 the area around Motiti didn't appear to have very much taken and in fact low heat to the east, a little bit of heat to the northwest.
- A. Mhm.
- Q. Then the year following, quite a bit of heat and getting closer to Motiti and then the year following again, less heat and I suppose – you may have answered this already when you were addressing Judge Smith's questions, is this just the movement of fish and the choices of the fishermen?
- A. Yeah. That's correct.
- Q. Right.
- A. The middle one was when the exclusion zone was in place.
- Q. Yes, well, you see a big gap around Astrolabe Reef/Otaiti, but all of that heat that you see between Motuhaku and Motunau, there was a bit of that the year before but then the year after, as well as a bit of avoidance of at least the east of Astrolabe, there's avoidance of that other area. So that's simply that maybe they tried up there and they decided there's nothing here, let's move somewhere else.
- A. Yeah, I think that is right.
- Q. Now, you, presumably, can do a heat map like this for the whole of the Bay of Plenty.
- A. Yep.
- Q. I want to confirm something. Generally speaking, most of these fisheries that we've been talking about here would go to the continental shelf and

they fish along that drop-off or they fish inshore of that. They wouldn't tend to go offshore?

A. It would depend on your type of fishing. If they were a pelagic species, then they would be moving around. Not all fishing methods are required to be recorded to the letter. If you look on here, there's specific – actually, it's in the start of appendix C.

Q. Yes, hang on. Okay.

A. Yeah, it's those methods.

Q. Trawling, set netting, longline, vessels over six metres.

A. Yeah. You might be aware that one of the changes that's been brought in is the electronic reporting and digital monitoring, so this is the cameras on commercial fishing vessels, and the first phase of that is bringing in GPS reporting across all the fleet and electronic reporting across all the fleets. So that's going to address this problem.

Q. So that will expand?

A. Yes.

Q. I mean, presumably the work you do in terms of the QMS generally and calculating the TAC and all the rest of it, you need as much data as you can get, don't you?

A. Absolutely.

Q. Basically, the data comes from the fishing boats.

A. It actually depends on the fisheries. There's fisheries-dependent data and fisheries-independent data. Fisheries-dependent data is based on the reported catch information. So that's how you can do your catch-type information, but there are some specific trawl surveys and specific survey work that gets undertaken. That's when someone like NIWA goes in and does it.

Q. Okay, right.

A. The survey gets paid for.

Q. Yes. You do have independent or control-type work.

A. Yeah.

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- Q. So those heat maps are, on that basis, those three heat maps that you've got are purely circumstantial, if you like, in terms of how the pattern of fishing occurs around Motiti?
- A. Yes, I guess so, yes.
- Q. Is that typical of inshore fishing around New Zealand?
- A. Yes it is. Some of it's done on purpose so there is sort of rotational fishing that does take place. I know it happens with rock lobster and certainly with pāua is another stock, not relevant here, where fishers themselves –
- Q. They're not as mobile?
- A. Yes, that's right, so fishers, well, rest areas and move around in that regard so you'd expect to see some of the pattern for that type of fishing.
- Q. But for snapper and trevally, it's not –
- A. It's usually – it will follow the fish really.
- Q. Following the fish wherever you think they may be?
- A. Yes.
- Q. Okay. So then we go onto your next set of maps and you start with all reported commercial fishing events so, and this is back in 2010, so this isn't necessarily when you've got the full, GPS full camera stuff?
- A. No, that's only just starting to be rolled out now. It's on the deep-water fleet at the moment. It's coming into the inshore.
- Q. So is this – is all of this from 2010 based on log reports by the fishermen?
- A. Yes.
- Q. Okay and, again, it's a number of reported start positions with the, a kind of a heat mapping per degree minute and then you've got trawl lines, can you just explain how the trawl lines and the coloured squares fit together?
- A. So the trawl line is a straight line between the start and end of the tow.
- Q. So they do – so you log both starting and end?
- A. Yes, but it doesn't unless you go in a straight line so that –
- Q. No, I was going to say.
- A. We don't have the rest of the information. Again, that's something that will be fixed by the new information base that's coming through.

- Q. If you got full GPS, yes. So, but you plot both of them on this map, so the squares show the intensity of start positions and then the trawl lines show where they went from there?
- A. That's right.
- Q. Okay.
- A. Another thing to note is that there's different maps. Although they all look the same, the scale colours are different. You still have to – if you're trying to do a like-for-like comparison, you need to be a bit careful.
- Q. Yes. This first one is all reported commercial fishing events, and then obviously you start getting into breaking them down to a later stage, bottom trawl, bottom longlining, et cetera. So that's where it is important to make sure you've got them at the start, and then you've got some that are in between, which is the commercial trawl fishing. That's part of what gives you a very clear idea of getting out to the drop-off, doesn't it?
- A. Yep.
- Q. All right. The impression I get from looking at these is that the variety of standard fishing methods can occur anywhere around this part of the Bay of Plenty.
- A. Yes.
- Q. There are no particular focus points for certain fishing types with the possible exception of set nets, as you might expect, because they tend to be in very shallow waters, close in.
- A. Yes.
- Q. If we were to zoom out and look at more of the Bay of Plenty, will we see a difference in these patterns or will it be replicated across the Bay of Plenty?
- A. As I understand it, it will be replicated across the Bay of Plenty. There will be certain places where there will be particular habitats for the fish. During the year there will be ins and outs.
- Q. I understand. You've put this evidence forward because you consider that it does represent what is happening to the degree of the information-gathering methods.
- A. Yeah.

- Q. You want it to be accurate.
- A. Yes.
- Q. And what you are telling us is that you have got increasing degrees of accuracy being provided by the data.
- A. Yes. It's been identified.
- Q. Right. Am I right that most of your inspectors are on the fishing vessels themselves.
- A. They're observers on fishing vessels and then there are Fisheries officers.

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- Q. On Ministry patrol vessels?
- A. That's right. And on land, on the boat ramps and such.
- Q. Yes, sure. How many vessels do you have operating in the Bay of Plenty?
- A. That is in here somewhere. I can't remember offhand.
- Q. Well, are there dedicated Fisheries patrol vessels for the Bay of Plenty?
- A. Yes. It's the mid-central region. At the back of the evidence there's information about the number of vessel trips that were done and the number of prosecutions that are underway.
- Q. I did read this.
- A. Yep.
- Q. Did the Defence Force help at all?
- A. They do, but typically in the deeper ocean.
- Q. You have aerial surveillance by the Defence Force and you have open ocean by naval vessels?
- A. Yep.
- Q. Do any of your officers accompany the Defence Force on those?
- A. Yes, they do.

QUESTIONS ARISING – NIL

WITNESS EXCUSED

MS HILL RE-CALLS**JOANNA BARBARA NOBLE (ON FORMER OATH)****QUESTIONS FROM THE COURT: JUDGE SMITH**

Q. I just want to be sure, and I don't think this is contentious, I think you confirmed it, that one of the objectives of the regional coastal plan is to protect integrated habitats.

A. I don't know that it's worded quite that way.

Q. No, I know it's not worded quite that way but I thought you conceded the point so I'm checking whether or not that's the case.

A. We've got one objective, which is about achieving integrated management. That has a whole series of subclauses, one of which is about planning for and managing cumulative effects. Another one is about promoting sustainable management for the Bay of Plenty fisheries and then we had other objectives under natural heritage objectives. Objective 2 is about protecting the attributes and values of the identified areas. Objective 2A is safeguarding integrity, form, functioning and resilience of the coastal environment and sustain its ecosystem, so that's more of an integrated objective.

Q. I'm not looking at individual policies. I'm asking you if you look at all those policies, the NZCPS, your RPS, would you agree with me that one of your objectives is to protect the integrated habitats – well, sorry, is to address and identify outstanding integrated habitats and protect them?

1500

A. I wouldn't say it's an objective per se but that would be a desirable outcome when you look at all the different objectives integrated management of them would be –

Q. Because you probably just heard from Mr Hill that they're focused on a species –

A. Yes.

Q. – you know, one snapper or trevally or, et cetera, but that's not the way the –

A. No. It's much broader.

- Q. – regional plan is looking at identifying outstanding natural character and where it identifies an integrated habitat as outstanding such as in this case –
- A. Yes.
- Q. – there are several then I would have thought that one of its objectives, in fact it's mandatory under the NZCPS is to avoid adverse effects –
- A. Yes, yes.
- Q. - protect or maintain those habitats?
- A. Yeah, you're right. We have identified some sort of integrated systems in some areas and then the protect (inaudible 15:00:38) supply –
- Q. And it's true that several of those are identified in this very hearing?
- A. So particularly Motunau and Otaiti.
- Q. Yes, plus that little stack of rocks which we're not addressing today, but nevertheless. Those are two examples. Now I'm just going to put another issue of principle which I think is a fundamental stopping - sticking point for me is it is correct that the regional plan focuses on activities when it comes to control. You made that very clear in answer to questions earlier. Could I put to you the problem with focusing on activities is it's reactive? If nobody makes an application nothing happens?
- A. It is to some degree and that reflects the fact that we're dealing with the coastal marine area which isn't owned by anyone as such. It's a bit different to when we're on land and people own land and we know that they want to do things within that land they, they feel they have a certain right as a property owner to use and develop their land. We're in the commons if you like and –
- Q. So the difficulty –
- A. – there's not a great deal of activity –
- Q. – with that is that it doesn't, and I'll go and drill into it in a moment, but I just want to put the general principle to you, that the Council has upon it proactive, mandatory requirements. It can't avoid by doing nothing?
- A. No and I don't think we do –
- Q. Well I'm just checking you would agree with that. *Opoutere* decision is very clear example that the Council has a mandatory obligation to identify

outstanding natural character, et cetera, and that's not the issue in this case –

A. Mmm.

Q. – and to put in place objectives, policies and if they're outstanding, rules?

A. Yes. That's what the CPS says.

Q. It's mandatory isn't it?

A. Yes.

Q. So it's not a question, it seems to me it cannot be an answer to say, well we achieved that by putting in place activity rules because –

A. Well -

Q. – because if you've got an obligation to protect, sorry, if you've got a obligation to protect, I just want to finish the question, if there's an obligation to protect that might arise even if there's no activity?

A. But... Sorry, I'm just trying to work through. So it's an activity that's not covered by 12(1) because all our rules over all those 12(1) activities which... So we're talking about activities that really were unforeseen –

Q. No I'm saying that activities don't address all of the potential adverse effects?

A. Could you give me an example please?

Q. Yes.

A. Apart from taking fish, which is the obvious one.

Q. No, Motunau's an example. If you have an obligation to avoid adverse effects on the IBDAA areas there that may be more than just stopping people interfering with it?

A. So I'm thinking of the ways that the Motunau could be impacted. There could be a discharge. We control discharges. There could be destruction or damage of the foreshore and seabed by dredging. We control dredging. There could be a structure put in place that causes some damage to the island. We control structures. There could be a vehicle dropped off that drives across the foreshore and seabed. We'd control that kind of disturbance. There could be deposition of material. We control that. There could be a reclamation. We control that. There could be aquaculture. We control that. There could be emission of noise. We

control that. There could be the take of coastal water which we also control and there could be mining which we control. There could be destruction of vegetation which we control. There – I guess the only other thing is the taking of fish which we don't control in the plan currently as has been established and potentially something associated with vessel movements. I'm just struggling to think of what's not controlled that we've missed. What have we missed?

Q. Well I would have thought there's many things for you and think about terrestrial for example –

A. But our rules don't go onto the land.

Q. No, no, but I'm just saying we can think of examples in the water but I don't – the short point you're saying is no adverse effect can occur unless it's through an activity. Is that the point you're making? Because that - just don't follow the logic of that –

A. Well I'm stru –

Q. But if that is your point that's fine.

A. – I'm struggling to see how you have an adverse effect without somebody doing something.

1505

Q. Well, climate change is an example, adverse effect –

A. That we can control.

Q. – and declining species is another example. Invasive species of plants and animals are another example.

A. Yes, so we do have rules around biosecurity. I'm not sure how we can have a rule controlling climate change in the Coastal Plan.

Q. Well, I'm not saying you – but the question is does that address your obligation to avoid adverse effects? That was my question.

A. Yes.

Q. Okay.

A. My answer.

Q. Because it is fair to say that your – the entire approach of this plan in relation to this part of the CMA is based around that adverse – is around activity rules, isn't it?

- A. Yes, absolutely.
- Q. Other areas such as the port actually have zoning and –
- A. Have their own set, but still the rules within that are activity based.
- Q. So if we conclude that there are adverse effects on those outstanding values, IBDA, ONC, ONFL –
- A. Yes.
- Q. – would you agree that the Court then needs to consider what the appropriate response is to avoid those effects?
- A. Yes.
- Q. And that includes potential adverse effects as well as actual?
- A. I guess that then comes down to a degree of high likely those potential effects are and the significance of those effects.
- Q. Now I want to turn onto a completely different issue now which is moving away from the IBDA, et cetera, to the cultural issue, and I want to turn now to look at policy, and I did have it marked specially, NZCPS policy 2, and in particular 2(f) which you told us too wasn't mandatory, but nevertheless you agree with me that in preparing the Regional Policy Statement you'd have to have regard to policy 2?
- A. Yes.
- Q. And it says to provide opportunities for tangata whenua, et cetera, et cetera. You've read that?
- A. Mhm.
- Q. And I'm particularly interested in (ii) and (iii).
- A. Yes.
- Q. I just want to read them into the record so we have them in. "Providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua."
- A. Yes.
- Q. Now in respect of this area marked in green do you consider that you have adopted appropriate methods for the management, maintenance and protection of that taonga?
- A. Largely yes. The obvious gap, if you like, are the taonga fish species. So we have protections around their habitat and activities that could disturb

that habitat, discharges that could affect those taonga. What we don't have is controls around the taking of the taonga species.

Q. Which of the two options that are now before the Court, the Regional Council option and for MRMT, do you think most appropriately, or better – I don't really think it matters to anyone here, I don't know if it matters to you and I'm happy if you want to qualify it – more appropriately would achieve that outcome?

A. Appropriately in terms of section 32 of the RMA.

Q. Yes.

A. I support the Council's proposal and for the reasons that are discussed in my evidence, some of those reasons may have changed slightly given the proposal's changed and evolved, but still around the effectiveness I – there are some serious questions around effectiveness.

Q. Yes, and in fact you promote instead method 19 and 19 – 19A and 19AA, don't you?

A. Method 3A in terms of this fisheries issue is really the key one, I think, although 19AA and 19A could be another –

Q. Well, I'm talking about cultural at the moment, yes, so –

A. Yep. Just solely cultural. They're all intertwined.

Q. Well, no, no, but I'm turning you to (inaudible 15:08:58). I said I was changing the issues but yes, I appreciate your answer, thank you.

A. Yeah, yeah.

Q. And then under 3, now you've obviously had regard to the Fisheries Regulations. You've heard the discussion, questions of Mr Hill today.

A. Yes.

Q. Rules, by-laws, et cetera, which I don't think anyone would argue would include the full gamut of options available. Are you satisfied that that ensures sustainability of the fishing resource? You've, I think, sat through the entire case.

A. Most of it.

Q. Heard all the ecological evidence, including their own ecologist.

A. Yes.

Q. Do you consider that Council's provisions achieve sustainability of the resource?

A. Sustainability under the RMA or –

Q. Well, the fish – this is – under policy 3(f)(iii). I'm specifically addressing that policy.

A. Yes, these are sustainability measures under other pieces of sort of legislation, that's why I'm just getting a bit confused about what the question is.

1510

Q. Well, rules are rules under plans as well. So in other words, all of the methods together, are you satisfied that they achieve policy 2F3?

A. 2F3 asks us to provide for opportunities for tangata whenua to exercise kaitiakitanga over a variety of items in the coastland environment through measures such as having regard to regulations, rules, bylaws, relating to ensuring sustainability of fisheries resources and then it gives examples under Fisheries Act legislation and other non-commercial Māori customary fishing, which again seems to sit under the Fisheries Act. So I read that as it's directing us, when we're developing our coastal plan, to have regard to those other regulations and mechanisms under other Acts. I appreciate we may be taking a different interpretation, but that's how I'd read it.

Q. I'm looking at policy 3A which you referred to a moment ago.

A. Yes.

Q. I cannot see anything in the natural heritage methods that requires the council to review or undertake any assessment as to whether or not the provisions of its plan are avoiding adverse effects on OMCs, ONFLs, IBDAAs.

A. You mean the review cycle and process?

Q. Well, any obligation on the council at all.

A. So that would come under method 1. We haven't specified that we – everything that we're going to do but we will develop and implement and monitor and review and report to assess the effectiveness of the plan and

whether the plan objectives have been achieved, and obviously those plan objectives include protecting IBDAAs, ONCs, ONFLs.

- Q. As I understood it, your position before the Court – and perhaps I’ve misunderstood it – was that you acknowledged that there were shortcomings within the plan at the moment and that the appropriate way in which that would be reviewed is by a process beyond this plan to undertake that assessment. With respect, it appears to me that the method you are relying on is a method contained – it’s not in the plan at the moment, it’s in your proposed provisions – which is in relation to cultural matters, not in relation to natural heritage matters. It’s contained within cultural and historic heritage. It doesn’t relate to your obligations under New Zealand coastal policy statements.
- A. Method 1 is our overall method to develop a monitoring and review plan that will look at all of the objectives of the coastal plan, including those relating to natural heritage. Obviously as that monitoring and review progresses, if we find we are not achieving our objectives then we will need to adjust the plan accordingly, or our implementation accordingly.
- Q. Yes, but you acknowledged, I thought, in evidence that the plan currently doesn’t achieve that and it requires a further process and what I understood you to say to the Court was that the council wanted the opportunity to do that in a consultative process.
- A. In terms of taking fish and taking those aspects that we didn’t think we had any ability to control.
- Q. This plan doesn’t currently avoid adverse effects on ONCs, ONFLs, IBDAAs. Do you then say that we would need to change the plan to make it do that? Method 19AA clearly doesn’t do that, does it?
- A. Method 19AA is more in response to Ngāti Makino and Ngāti Ranginui appeal points, which were very different.
- Q. The point I’m getting at is that it doesn’t answer the critical question in this case as to whether or not you’ve – the plan has effectively addressed the question of avoiding adverse effects and adverse significant effects.

A. Yes. That's something the Court will have to consider, bearing in mind that when the plan was notified we didn't think that we could control the effects of fishing.

Q. Nevertheless, method 19A and 19AA are not about that issue, are they?

A. No. Method 3A is about that issue, and the more general method 1 about monitoring and reviewing the effectiveness of the plan.

Q. We'll go back to 3A, because it seems to me that there is a difficulty with 3A in that 3A is not a method of the sort that you suggested would be appropriate, because essentially it's a research provision and investigate options. There's no obligation to do anything at all during the life of the plan and no obligation to consult anyone which, as you said earlier, was one of the key issues you were trying to address. It could simply introduce a change in the normal way.

A. Which would involve consultation.

Q. Well, it might, depending on who you consult.

A. It would involve consultation. Whether those we consulted were happy with that level of consultation would be another issue. Again, the way we're going to implement these methods, we're only just starting to look closely at this. The case law and the jurisdiction issue is still being resolved, which I think explains in part the lack of detail in that method. We're still not quite sure what it is that we're going to have the ability to do.

QUESTIONS ARISING – NIL

WITNESS EXCUSED

RESPONDENT CASE CONCLUDES

THE COURT ADDRESSES PARTIES – TIMING

COURT ADJOURNS: 3.17 PM

COURT RESUMES ON MONDAY 4 DECEMBER 2017 AT 2.01 PM

EXHIBIT M1 PRODUCED – MAP OF ONCS

EXHIBIT M2 PRODUCED – MAP OF ONFLS

THE COURT – JUDGE KIRKPATRICK

Now, the matter that Mr Enright referred to, a memorandum from the New Zealand Rock Lobster Industry Council Limited. Is there anyone here for the Council? No? What we have is a memorandum from Ms Appleyard with today's date referring to various matters. All right. I think we now come to the opening – midway through – of the Attorney-General's case. Thank you, Mr Prebble.

MR PREBBLE MAKES OPENING SUBMISSIONS

MR PREBBLE CALLS**DEBORAH JOANNE FREEMAN (AFFIRMED)**

Q. Afternoon, Dr Freeman. Could you please confirm for the Court that your full name is Deborah Joanne Freeman?

A. Yes.

Q. You've prepared a statement of evidence dated 7 November 2017?

A. Yes.

Q. Could you please confirm that your statement of evidence is true and correct to the best of your knowledge?

A. Yes, it is.

Q. We have had some material put into the Court on a number of DOC reserves and other areas. Are you aware of that material?

A. Yes.

Q. I understand you have prepared a list from DOC's database that I'd like to produce.

EXHIBIT N PRODUCED – DOC LIST

Q. If you could take the Court through that material with reference to the current proposal.

A. Certainly. There are two pages. The first is the list of current type 1 marine reserves, and the second is a list of the current type 2 marine protected areas as defined by the current New Zealand MPA policy. The first page of marine reserves, there are currently 44 marine reserves. They range in latitudinal extent from the Kermadec Islands to Campbell Island in the Southern Antarctic Islands. The largest marine reserves are around the sub-Antarctic islands and the Kermadec Islands. The largest of the marine reserves around mainly New Zealand is Hikurangi marine reserve on the Kaikoura coast, which is about 100 kilometres squared. The smaller marine reserve is on the South Island's west coast at just under 0.2 kilometres squared. The average mainland marine reserve is about 16 kilometres squared. So I gather from the area of the wāhi tapu areas is about 140 kilometres squared, which would be larger than any current mainland marine reserve. The second page has the type 2 marine protected areas which are areas that may or may not have a biodiversity

protection purpose, but would attract a protection standard so that it enables the recovery or the maintenance of biodiversity. There are a few fisheries closures in there, but also cable protection zones. These all tend to be quite large areas, particularly the cable protection zones, and the largest one is the Hauraki Gulf cable protection zone.

1515

Q. So the cable protection, is that to protect electrical cables or telephone cables or both?

A. Yes, that's right.

EXAMINATION CONTINUES: MR PREBBLE

Q. Thank you, Dr Freeman. Are you also aware of the Court minute that's dated 18 October 2017?

A. Yes.

Q. The Court mentioned there that it was interested in the position of the Kermadecs with regard to the Regional Coastal Plan, as I understand it. Could you please explain to the Court the range of protected, protective measures that are unavailable around the Kermadecs and the Subantarctic islands and how that relates to the Regional Coastal Plan?

A. Sure. So the Kermadec and the Subantarctic islands all have a range of protection and management measures. For the Kermadec Islands there is the marine reserve covering the entire territorial sea. There is also an underlayer of the benthic protection area which covers the territorial sea and the EEZ and that was established under the Fisheries Act. For the Subantarctic islands there are a lot of layers, so for the Auckland Islands, for example, there is a marine mammal sanctuary and a marine reserve, and the island itself is also a national nature reserve so the intertidal area is fully protected as well. This was a recent MPA forum process to consider MPAs for Campbell Island, the Bounty Islands and Antipodes Island, and that resulted in three new marine reserves and three new type 2 marine protected areas which were built on the existing benthic protection areas that were already in place around those islands. The Subantarctic –

THE COURT: JUDGE SMITH

Q. But those MPAs were through the Minis – Primary Industries, were they?

A. The type 2 MPAs were, yes, and –

Q. So that's not the ones that came through the Resource Management Act?

A. No, no.

Q. What, where – what are those controls over them?

A. Yes, so the Regional Coastal Plan became operative in September this year and that includes the range of restrict –

Q. So what area was that for, sorry, the reg –

A. For the Kermadec and the Subantarctic Islands, so that includes Snares Island, Auckland Islands, Campbell Island and the Bounty and Antipodes Islands.

Q. And that was operative in September, did you say?

A. Yes. So the Regional Coastal Plan has a range of restrictions on activities related to natural character, kaitiakitanga and –

Q. Sorry, natural character, kaitiakitanga, did you say?

A. Yes, and cultural and historic heritage, and they're also aiming to address two of the key threats to the islands which were recognised to be oil spills and marine biosecurity breaches. So some of the restrictions that were put in place were around vessel access to the islands, because vessels are the key way of getting to these islands.

Q. Yes.

A. So there is a restriction on heavy fuel oil which applies to the territorial sea, so no vessel can use heavy fuel oil in the territorial sea. There is also a restriction related to hull fouling so any vessel –

Q. Sorry?

A. To hull fouling.

Q. Hull? Did you hear the word?

A. Hull fouling, sorry.

Q. Hull fouling. Sorry, I apologise, just difficult hearing.

A. So any vessel that goes closer to one kilometre, sorry, 1000 metres or one kilometre, must demonstrate and maintain a clean hull, and there are also restrictions on access and anchoring and that's related to vessel

size, so different size vessels can access different points in the island. So there's not necessarily a restriction on fishing per se under the Regional Coastal Plan. It's a restriction on vessels of which fishing vessels are a subset.

THE COURT: COMMISSIONER LEIJNEN

Q. Do those vessel sizes relate to what that vessel is capable of doing in terms of the fishing?

A. Yes, certainly. There's a range of sizes of fishing vessels that, yes, the Kermadecs and southern Subantarctic Islands. The use of vessel size in this case was as a proxy for the risks associated with oil spills and hull fouling.

Q. Just those two? Not their method of fishing?

A. No.

THE COURT: JUDGE SMITH

Q. Wasn't there originally proposed in the plan a control over types of fishing and was opposed by the fishing industry?

A. I'm not –

Q. And that's how I think the orders came to the Court because their appeals...

A. Right.

Q. But you don't know?

A. I'm not aware of that, no.

Q. Okay, I won't take it any further then.

UNIDENTIFIED SPEAKER:

Do note that these are the recent ones she's referring to and they specifically...

UNIDENTIFIED SPEAKER:

Can we just go to – is it –

THE COURT: JUDGE SMITH

Q. The Bounty and Campbell in the type 2, bottom trawling and Danish seine are prohibited.

A. That's correct.

Q. So that's what you're referring to in relation to the bottom protection measures that were put in place?

A. That's right, so...

1520

Q. I see.

A. There were already benthic protection areas in place and they restricted bottom trawling and dredging, and to achieve the protection standard to be considered to be a type 2 marine-protected area there needed to be additional restriction of Danish seining, which was put in place at the same time that the marine reserves were established.

Q. Just out of interest, are the areas that you refer to there based on some linear surface measure or are they based on depth?

A. The areas are calculated in various ways, so they could be calculated using GIS, which is basically a surface area. That can sometimes differ from what's in the Order in Council, just because there are different ways of calculating the area of those reserves.

THE COURT: JUDGE KIRKPATRICK

Q. We're really interested in how this came about, so can you tell us anything about the studies that were undertaken as to the benthic values, whether it was identified as an outstanding diversity area? Because I see they're both quite big. One is 1761 square kilometres.

A. Mhm.

THE COURT: JUDGE SMITH

Q. So did they study the whole area? Did they do transects? What type of information did they base – did they conclude it was an outstanding biodiversity area? That's what we're really interested in for this case.

A. The initial approach that the Sub-Antarctic Marine Protection Forum was a dual representation of the Sub-Antarctic islands biodiversity within

MPAs and they initially looked at the entire Sub-Antarctic islands as one unit. But then received scientific advice on the value of each island group, noting that each of the islands had its own distinctive biodiversity and also noted the international status of the islands as well as World Heritage areas and noting their significant ecological value. So they ended up considering each island on its own merits and that's why there were marine protected areas established at each of the four island groups that they considered.

Q. So I take it they – for the purpose of the regional plan – would have concluded that they were outstanding biological diversity, the areas that are covered by this marine – it's a closure, isn't it, really?

A. Yeah. They were quite separate processes, so the marine protected area process was a separate process from the regional plan process.

Q. The MPAs are even larger than the fishing controls. Does that mean that there could be fishing inside the MPA?

A. Yes. The Bounty Islands territory, part of it establishes a marine reserve and the remainder of the territory is the type 2 marine protected area. It was designed in that way so that the existing bottom longline fishing for ling could continue but there are still restrictions on other fishing methods in the MPA.

THE COURT: JUDGE KIRKPATRICK

That was very helpful, thank you. That was the kind of information I wanted to get from a witness rather than relying on the consent memoranda that the parties had filed.

CROSS-EXAMINATION: MS HILL

Q. Good afternoon, Dr Freeman. Your particular expertise is rocky reef ecology, is that correct?

A. Yes.

Q. And the evidence that you've annexed in the Rena proceedings obviously focuses on Otaiti, or Astrolabe Reef?

A. Yes.

Q. But you do say that you've also surveyed Motunau, Motuhapū, and Motiti. Is that correct?

A. That's correct. In 2006.

Q. 2006?

A. Yes.

Q. Okay. Do you have any familiarity with the other reef areas closer to Astrolabe which form part of this proposal? So that's Te Papa, Porotiti and Okarapu reefs?

A. Not that I can recall. I think the site that we surveyed at Motiti is at the northern end of the island.

1525

Q. Okay. In your evidence you note that at least prior to the *Rena* incident that Otaiti has what you described as high ecological values and supporting a range of habitats.

A. Yes.

Q. And you also described it as having diverse and abundant marine species.

A. Yes.

Q. You note that it had those qualities, notwithstanding that it supported fishing.

A. Yes, although I did note that the area would have been impacted by fishing just being the cause of routine fishing operations as fish, the stocks were fished down.

Q. You go on at paragraph 35, and you disagreed with a statement that the indirect, what was described as the indirects of fishing have altered shallow water communities. So is that still your view?

A. It is still my view. I think while the evidence for the traffic cascade is supported by research at north-eastern New Zealand at three sites, at least. There is yet to be other evidence from other sites around the country, so I think there is some certainty around whether that same type of trophic cascade would happen elsewhere in New Zealand. It is possible, but I think there is an uncertainty around it.

- Q. So there's uncertainty applied to the rest of New Zealand, but is that different in relation to, I guess, this cluster of reefs that we find within the MNEMA? Are you likely to draw a similar conclusion in relation to those other reefs given their proximity to Astrolabe?
- A. I think so. I think the degree to which fishing would have had an impact on areas within - on reefs within this area would have been variable, just because of aspects such as accessibility and sea conditions and those kind of factors which influence where people go to fish.
- Q. Are you aware of any studies that have occurred in relation to those other reefs on this particular issue, so the impact of fishing on, I guess, the biological communities or habitats of the reef?
- A. I'm not aware of any focused studies on the impacts of fishing, but there certainly has been ecological surveys of various sites within this area.
- Q. Actually, I think you referred to an ecological survey in 2011 in relation to some of the other reefs.
- A. Yes.
- Q. Did that study consider this particular issue about the impact of fishing?
- A. I think you're referring to the ...
- Q. At paragraph 53 I think you referred to it. It's titled "Reef Monitoring Report". A report by Gregor and Young in 2011. You say it suggested no obvious shift that a community structure has occurred, but that was in relation to the *Rena*. Did those studies consider more generally the impact of fishing on the benthic habitats?
- A. Not that I can recall, no.
- Q. Do you know whether it considered the impact of invasive fishing techniques or methods such as what we've been discussing this afternoon on the reef structure?
- A. Not that I can recall. I think that the study was focused on the impacts of the *Rena*.
- Q. Do you know whether there have been any studies that have considered the impact of those types of fishing methods on the reef structures particular to this cluster of reefs?
- A. Not that I can think of, no.

Q. On those types of fishing techniques or methods having an impact on these particular reef habitats?

A. No, I can't recall any studies in this area.

1530

Q. We've talked a little bit around buffers and the appropriateness of the size of an area designed to protect against boundaries. If we're focusing on that issue of techniques that might damage the reef sub-strait, do you have an opinion as to what would be an appropriate buffer to avoid that occurring? How far away does a boat need to be to protect the reef area?

A. It certainly depends on the type of reef habitat and the type of fishing and the degree of fishing effort, as well. It can be quite difficult to clearly define the ecological effects of some fishing methods, or the point at which an effect occurs. So for example the approach that we take with marine protected areas is to – rather than look specifically at the aspects of fishing, it does look at the types of fishing under the assumption that these types of fishing influence the maintenance or recovery of biodiversity. So for example bottom trawling, Danish sailing and dredging are known to have an impact on the benthic environment and so are considered not to allow the maintenance or recovery of the biodiversity. As I say, it does really depend on the type of reef habitat as well. The impact on, for example, kelp forest habitat of fishing will be quite different from the impact on a reef that has associated fragile species.

Q. When an MPA is being designed, what sort of process occurs to define an appropriate area? I'm just talking about in relation to this specific issue of managing the impact on the reef structure.

A. I guess the first step in terms of designing a marine protected area is to define the objectives, what you're trying to achieve by establishing the protected area. That in turn forces you to look at the specific features and values associated with achieving those objectives so, for example, you would likely need information on the distribution of habitats, species movement ranges, for example. The other aspect is there can be objectives other than those relating to the ecological aspects as well, which may need to be taken into account. In addition with marine

protected areas, at least, there is a need to avoid the impacts on existing uses and so that can certainly change the design of an MPA and I think we had a discussion last week about the curious design of some existing marine reserves, and that's largely been undertaken to avoid impacts on existing users. I guess the other component is what specific objective you're trying to achieve. If it's purely biodiversity protection, then the design of the MPA is likely to be quite different than if it was designed to achieve both conservation and fisheries outcomes. The design of the MPA will be quite different depending on what objective you have for that area.

Q. Just a couple of points of clarification in relation to your contribution to the joint – what we're calling the joint statement. Do you have the joint statement in front of you?

A. Yes.

Q. There's an area of, perhaps, difference between you and Dr De Luca from some of the other experts in two aspects, and I just wanted to ask you to clarify your position on those. So the first one is at point 2, which is a generic statement that the wider Bay of Plenty has been significantly adversely affected by fishing and your response is that the wider Bay of Plenty marine environment have been affected by fishing but you say the spatial distribution has a degree of impact across the wider Bay of Plenty. Are you able to elaborate on what you mean by that?

A. Yes. I'd certainly agree that this area and the wider Bay of Plenty will have been affected by fishing, but the spatial distribution of fishing effort and catches varies across the Bay of Plenty, and also the vulnerability of different habitats to fishing varies as well, so I think the footprint is not uniform across the Bay of Plenty. There will be some areas that have been more impacted than others, and some areas that may be relatively unimpacted by the fishing pressure. There may be some areas that have localised depletion of fisheries resources, but other areas where those fisheries resources are in relatively good condition. So I agree there has been an impact, but I think it's spatial variable.

- Q. But you're unable to comment more specifically in relation to the particular areas within the marina?
- A. Only that I would have thought that the more potentially inaccessible or exposed areas would probably have a reduced level of fishing impacts, so Otaiti, for example, tends to be more exposed and difficult to access so I would have thought that the effects of fishing would have been reduced at that site relative to some of the other sites.
- Q. And would you draw a similar conclusion to the other reefs which are in close proximity to Otaiti which I raised earlier?
- A. I think that's reasonable to assume, yes.
- Q. The other statement that I would like you to clarify is point 9, which is around this idea of the marine environment being at a crisis point where immediate action must be taken, and your response was that you agreed – and I'm assuming you're referring to Dr De Luca because she held the same view. You agreed that immediate action is not required. Are you able to elaborate on what you mean by "immediate action" and why you think that's not required?
- A. I certainly think that in this area and in the wider Bay of Plenty there are some areas that are compromised in terms of their ecological integrity, so their ecological health has been reduced. Certainly some species have been affected more than others. I don't see that we're on the brink of an ecosystem collapse or anything particularly urgent, although certainly there is a broader urgency for biodiversity protection more generally as identified through the New Zealand biodiversity action plan and some of the international agreements that New Zealand is a signatory to, for example.
- Q. So your last comment relates to New Zealand more generally, or are you talking about specific to this area?
- A. I think that's more of a general statement, I think, but certainly for this particular area I don't see an immediate need for action.
- Q. I appreciate that you might not be in a position to comment on behalf of the Crown, but I'm just interested in your opinion being somebody that's been involved in the design of marine protected areas. Ms Noble gave

evidence to the effect that there is some money within her budget to undertake what she described as a research and review and collaborative exercise for stakeholders locally to look to better understand the values and then look at options and possible solutions for addressing those. Is that something that you consider is a worthwhile exercise and, I guess, a feasible exercise locally and is it the sort of thing that DOC would likely wish to be involved in?

- A. I think certainly gathering information to inform management or protection of this area is certainly a worthwhile thing. As to whether it is something that DOC would be involved in, I couldn't comment, but I do note that obviously DOC is one of the – along with MPI – is the leads for the New Zealand MPA policy so I would have thought that DOC would have had an interest.

THE COURT ADDRESSES COUNSEL – TIMING

COURT ADJOURNS: 3.40 PM

COURT RESUMES: 3.55 PM

CROSS-EXAMINATION: MR RYAN – NIL

THE COURT: JUDGE SMITH TO MR RYAN

Q. Mr Ryan, I see you've joined us. Do you have any questions for this witness?

A. I don't, Sir.

A. Just while I'm on my feet, Your Honours, there was an issue that arose on Monday about the location within the plan of the *Rena* carve-out.

Q. Yes.

A. And I've seen documents, a document circulated by Ms Noble which places that at effectively the section or recognition at the start of part 3 and part 4 of the plan and I can indicate just very briefly that Lowndes support the location of that wording as proposed by Ms Noble and the parties have been asked to confer as to whether they agree with that proposition and I'm waiting to hear overnight.

THE COURT: JUDGE SMITH

One of the issues that has come up from the appellants, you'll be aware now that Otaiti is seeking a damage destruction removal provision flora and fauna for three nautical miles around Otaiti. You can see the circle. Now, it's clear that it's not intended to interfere with the conditions of the, that are settled for the *Rena*, which haven't quite been settled but are somewhat settled, and the question then would arise would such a rule interfere with the conditions on *Rena*? Is that something you've turned your mind to? Because it would be quite helpful to have a brief submission if you think it would help, but obviously not right now but I'm just wondering if it's something you have turned your mind to?

MR RYAN:

The wording of the agreed carve out, for want of a better word, provides that the provisions in the Motiti natural environment area don't apply to the *Rena* and related consents.

THE COURT: JUDGE SMITH

Well, the area definitely includes Otaiti and the *Rena*. But the only constraint would be essentially for people who might be there fishing, but I don't recall any condition about fishing, but I do recall one about diving but I don't recall there was any provision in that for divers to take fish with spear guns or otherwise, so on the face of it, it doesn't appear the provisions would conflict and I wonder if you'd had a look at that to see whether there could be any potential for conflict.

MR RYAN:

I haven't had a specific look, Your Honour, but offhand I don't believe there would be a conflict.

THE COURT: JUDGE SMITH

Because most of the evidence, as I recall, was about diving for basically viewing, wasn't it?

MR RYAN:

There were some conditions around site surveys and particularly an event, a major storm events, and looking whether there was anything that needed to be cleared up.

THE COURT: JUDGE SMITH

That's right. That might involve flora or fauna and I think – it may be that Mr Enright or somebody might have recognised that the need to be a specific provision that allowed monitoring, in other words, that would require sampling and removal. Obviously if you took a piece of steel out, it's inevitably going to have anemones and flora and fauna on it.

MR RYAN:

Yes. My view, Sir, is that the wording that's proposed by the parties and referred to in the document from Ms Noble makes it pretty clear that the specific provisions within the marina doesn't apply to the *Rena* consent.

THE COURT: JUDGE SMITH

I don't recall there being any specific provisions about general fishing or taking of flora or fauna generally. It wasn't intended to be separately controlled.

MR RYAN:

That's correct. There is a provision around an advisory in the event of warnings in terms of public health warnings, in the event of any elevated levels.

THE COURT: JUDGE KIRKPATRICK

When Mr Casey QC was here at the beginning of the hearing, he reserved a place, as it were, and I'm just wondering having just told us what you have told us, have you now said what your client requires or will there be more time required later today or tomorrow?

MR RYAN:

No, I've seen what Mr Casey has said, Sir, and I don't wish to take that further.

THE COURT: JUDGE KIRKPATRICK

Lowndes is not involved further in this hearing?

MR RYAN:

No.

CROSS-EXAMINATION: MR ENRIGHT

Q. Dr Freeman, the first question you were asked about the joint witness statement, paragraph 9 of your response, this is the issue of immediate action. Now, I assume you'll be very familiar with the New Zealand policy statement because it's obviously an implemented document.

A. I have a general understanding of it. I'm broadly familiar with it.

- Q. The question is, would you agree that none of policies 11, 13, 14 or 15 require a tipping point if protection is required?
- A. I'm not sure I can answer that. I'm more familiar with policy 11.
- Q. Let's focus on policy 11.
- A. Mhm.
- Q. In terms of – you'll be familiar with category 11A which is, amongst other things, the rare and threatened species.
- A. Yes.
- Q. Would you agree that to give effect to policy 11A you don't wait for a tipping point or a crisis? We need to take protective measures now through the coastal planning. Do you agree with that?
- A. My reading of this as a scientist suggests not. I'm less familiar with how this has been influential.
- Q. You, I suppose, defer to the planning witnesses around that policy?
- A. I think so, yes.
- Q. That's fine. Can we go to exhibit E3, which is the proposed rules that Mr Lawrence has put up? Rules 1 and 3. It's a question that's already come up today in rule 3. Each of the bullet point items breaching involve disturbance of the seabed. I think you've already given a partial answer but I just want to be clear on that. What's your evidence on that?
- A. Is this page 10?
- Q. It's rule 3, so hopefully it should be on page 8.
- A. Mine is on page 10.
- Q. Okay. I think possibly you're looking at the mark-up version but it's the same words, anyway.
- A. Oh, right.
- Q. Can you go through each of those bullet points? Which of those involve disturbing the seabed, either directly or indirectly?
- A. All of those could involve disturbance of the seabed. Dredging and trawling, bottom trawling, at least, target the seabed and benthic habitats. If it's Danish sailing, then that involves disturbance of the seabed. Purse seining is less likely to. Potting, yes, may have an impact on the seabed. It's generally considered that it has a smaller footprint, just because of the

size of the pots and the like. But it does depend on the fragility of the seabed as well, so if potting occurs on particularly fragile and sensitive habitats it would have more of an impact than if it was occurring on less sensitive habitats. Gill netting, there is bottom gill netting so that can have an impact on seabed communities, but there is also mid-water gill netting as well, which would be less likely to have an impact on seabed communities.

1605

Q. Dr Stirnemann raised as a sixth bullet point the issue of longlining because of the bycatch impact on seabirds. Can you comment on whether longlining involves either directly or indirectly disturbance of the seabed?

A. There are different forms of longlining, so surface longlining and bottom longlining, for example. So bottom longlines can drape across the seabed. They're less likely to have an impact on benthic habitats just because of their small footprint and generally they're not dragged along the seabed. They're less likely to have an impact in that regard.

Q. Do you agree with Dr Stirnemann that longlining involves a risk of bycatch in terms of rare and threatened seabirds within the marina?

A. It certainly poses a risk.

Q. Would you accept that each of the five bullet points plus the longlining methods would all cause significant adverse effects to the maintenance of indigenous biodiversity within the marina to the extent that they take place?

A. Yes. Certainly those methods can prevent the maintenance or recovery of biodiversity. As I mentioned before, that's their approach that is taken with the marine protected areas standards. It's assumed that those methods do prevent the maintenance or recovery of biodiversity. Particularly bottom trawling, Danish sailing, and dredging, especially if they occur on sensitive habitats.

Q. So would you agree that the list of five bullet points plus the longlining represent the most invasive types of taking of indigenous flora and fauna that could arise?

- A. Mhm. I think there's three different impacts associated with these methods. There's the physical impact, the disturbance of seabed, for example. There's the removal of biomass itself, so the removal of targeted and associated species. Then there's the incidental effects, such as the bycatch. So there's three quite different effects and the degree to which those fishing methods can impact a particular area really depend on the nature and extent of the different habitats, the species that are present, the actual fishing efforts. So, for example, how many bottom trawlers are going over a particular area, how many longlines are set in that area, and I think all of these in combination can tell you a lot about the type of impact that those methods have.
- Q. In terms of those impacts you've just identified, would you agree that the methods proposal, rule 3, will protect the outstanding values in the wāhi tapu areas by creating a buffer area where those more invasive methods are prohibited? Would you accept that?
- A. The wāhi tapu areas where removal of marine life is prohibited I think certainly provides a more cautionary approach to protection. From my perspective, I see that as certainly a more precautionary approach rather than an effects-based approach. Whereas I think in the remainder of the marina, I think it appears to me to be more of an effects-based management regime where a number of fishing methods have been identified that could potentially have an impact on marine life in those areas.
- Q. The question was, I suppose, if you can see the map beside you, as you know, the marina is the green area and then we have the individual wāhi tapu identified in red circles, but does it play out a useful buffer role to have those more invasive methods identified in rule 3 prohibited in terms of how it enhances or protects the outstanding values in the wāhi tapu?
- A. I think having an area outside the wāhi tapu where impacts are further reduced, I think that provides a useful buffer and I think it would provide for enhanced protection with the wāhi tapu.
- Q. And so it would play a protective role, but also assist restoration within the wāhi tapu areas of indigenous biodiversity. Would you agree?

- A. I think that's reasonable, yes.
- Q. Okay. So in terms of proposed rule 1, do you agree that the proposed prohibition on taking of indigenous flora and fauna will maintain indigenous biodiversity within the wāhi tapu areas?

1610

- A. Yes. I think that rule does provide as mentioned in the proportionary approach to protection and maintenance and recovery of biodiversity so that should enable that maintenance or recovery to occur.
- Q. And it would also play a restorative role for indigenous biodiversity, again, within the wāhi tapu areas?
- A. Yes, I agree with that.
- Q. In your written evidence at paragraph 105 – this is a response to some evidence from another person but that's not material – you refer to, you say having quoted Mr White's evidence, there would be a benefit to fisheries because of the abundance of target species. Then you say, "I agree that previously-harvested species commonly increase in size and abundance when fishing ceases. My own research confirms this." It's a given, is it, then, that allowing the taking of indigenous flora and fauna reduces the size and abundance of the target species?
- A. Yes, yes.
- Q. And do you agree that taking of indigenous flora and fauna has a sinking lid effect on indigenous biodiversity? If it's uncontrolled, it will continue to reduce indigenous biodiversity within either the marina or the Bay of Plenty generally?
- A. It's a possibility. I think it certainly depends on the particular fisheries management regime and the amount of fishing effort that was occurring in that area. It may be that certainly there have been historical declines across the Bay of Plenty. Whether or not those are stabilised or increased or decreased within this particular area, I'm unsure.
- Q. Now, just going to your paragraph 11, this is your primary evidence dated November 2017, second sentence, you refer to Otaiti Astrolabe Reef had high ecological values and was recognised as being both regionally and nationally significant. So the question is, is that a view you personally

hold? You've personally dived Otaiti so you're able to comment on its values. Do you agree it's of significance in terms of its biodiversity values?

A. This statement was in relation to the regional coastal plan where it is significant.

Q. Yes.

A. I haven't undertaken any analysis to establish whether it's nationally significant, although some research that I was involved in, which is why I surveyed this area in 2006, did show that Otaiti, at least, had very high diversity relative to other sites across the north-eastern biogeographic region, so certainly regionally significant. I refer to the proposed regional coastal plan in terms of identifying Otaiti as regionally significant rather than nationally significant.

Q. And if we go to your appendix A, which is the earlier evidence you gave in paragraph 39.

A. Yes.

Q. I think there you refer to Astrolabe Reef ranking within the 90th percentile of data for invertebrate species abundance richness, and that data highlights the particular high biodiversity value of the reef. Again, you would support that statement as correct?

A. Yes. That was what the survey was referring to earlier.

1615

Q. If we go back to paragraph 38, the first sentence, you refer to rocky reefs are one of the most productive diverse habitats including a range of values. Presumably that statement will apply to each of the reefs that are within the proposed wāhi tapu areas for the marina.

A. I think that's more of a general statement about rocky reefs. I think the degree to which they're productive or diverse will be very site-specific.

Q. In terms of cultural values, I presume I would defer to the tangata whenua evidence on those matters.

A. Yes.

Q. Just at paragraph 40, you refer to Astrolabe or Otaiti reef as a nationally significant scenic dive site.

- A. Yes.
- Q. Would you agree that if the broad framework proposed by MRMT were implemented, then those values would be, if anything, further enhanced because we'll have protections in place for flora and fauna?
- A. Certainly from my experience with marine protected areas where these sort of prohibitions are in place, they do tend to attract tourists. It is very site-specific, though, and it does depend on things like accessibility and infrastructure and the like. But certainly the marine protected areas are common.

THE COURT: JUDGE SMITH

- Q. I think Mr Enright meant it slightly differently. Do you think – you've already said it's attractive and nationally significant. Is the ban on removal of flora and fauna likely to impact negatively on its attraction as a dive site? I think that was the question.
- A. Potentially, I mean, scuba diving and snorkelling is one fishing method, so if there was a prohibition on those activities within the wāhi tapu then it may have an impact on its value as a dive site. But conversely there are also divers that visit these areas because they are protected for photography or scientific research purposes.

CROSS-EXAMINATION CONTINUES: MR ENRIGHT

- Q. Would it be a benefit that divers know that any other vessels in the area are not there for the purposes of taking flora and fauna? There's no competing activity between scenic diving and fishing, for example.
- A. I'm not sure if there would be. Sorry, can you ask the question again?
- Q. Don't worry. I'll leave that question. I want to ask you about the size of the proposed wāhi tapu and as you know each of the proposed wāhi tapu other than Motiti is one nautical mile.
- A. Mhm.
- Q. Dr Stirenmann made a comment that essentially the experience with other marine reserves to date suggests the one nautical mile is the absolute minimum. Preferably they should be larger in terms of indigenous biodiversity. Would you agree with that comment?

- A. It depends on a range of things. It depends on the particular objectives that you're trying to achieve, and also the distribution of habitats, species, foraging ranges, the need to avoid adverse effects on existing users, for example. So there's a range of things that could affect the design and size of marine protected areas. Another consideration is the compliance and management as well, so the ability to effectively monitor a protected area in terms of compliance.
- Q. If you were just wearing your hat as a marine biologist, so you can put to one side other considerations like existing use, et cetera, would you agree with Dr Stirnemann that the at-minimum size should be the one nautical mile?
- A. No.
- Q. What would your view be on that at minimum?
- A. It's site-specific and it depends on the particular spatial arrangement of species and habitats at that site. There are a number of marine reserves, for example, that are a lot smaller than this and they are still effective. It completely depends on the protection objectives for that site.
- Q. So in this situation where we don't have perfect information about the values present for the individual wāhi tapu, would you agree it's appropriate to take a more precautionary approach to the size of the wāhi tapu, a bigger size is better?
- A. Yes, I do and I think in terms of protecting the values associated with the rocky reefs at the site, which I gather is the primary objectives, from starting a bathometric chart of this area it does look like the wāhi tapu do fully encompass the reef system that they state for the buffer of settlement around them, and that's generally a good design of a protected area to achieve protection of rocky reefs, at least.
- Q. As you know, Otaiti is proposed to have a three nautical mile radius, and again that was supported by Dr Stirnemann in terms of the presence of seabirds and their ability to forage in their habitats. Do you support the size of that, if the Court decides to approve the rules framework?

1620

- A. Certainly for seabirds I think it's difficult to say. No current marine protected areas are designed to protect seabirds because seabirds are specifically excluded from the Marine Reserves Act. So marine reserves are more designed around representation of habitats rather than wildlife or marine animals, for example. I think it would be reasonable to assume that if you have a large area in such areas as this that it would provide some support for seabirds foraging in that area and certainly for seabirds they do tend to forage over long distances, which would correlate with the need for a larger type of protected area to support them.
- Q. In light of the answer you've just given me, do you therefore agree it's reasonable in terms of the size proposed for Otaiti, three nautical miles?
- A. If the protection of seabirds was part of the objectives for that area, then I think a three nautical mile radius area would certainly provide some support for seabird species.
- Q. I want to understand your appendix A evidence at paragraph 110. You say there it's possible that naturally uncommon species may occur on the reef. This is Otaiti Reef specifically. Now, I think what you're saying there is that naturally uncommon species – in other words, they would fall within the rare and threatened category policy 11A of the CPS, correct?
- A. Yes.
- Q. Okay. Can you give some examples of what naturally uncommon species may be present at Otaiti? What were you referring to there?
- A. I've only been involved in the conservation status assessment for marine invertebrates, so that's from my experience in that.
- Q. Yes.
- A. We have listed a range of species as naturally uncommon under that classification process, and my reference here was that it is possible that sometimes invertebrates occur at the site, but I haven't seen them mentioned in any survey reports.
- Q. Okay. So you're saying it's possible, but there's no data to draw a conclusion on?
- A. That's correct. Yes.

Q. And would that also apply to the other wāhi tapu areas that have been identified?

A. Yes.

Q. It's possible that we have naturally uncommon species within the one nautical mile radius?

A. Yes, it is possible.

Q. Okay. Can you comment – we had some evidence from Mr Hill about MPI's data and I just wonder if you could comment on whether DOC had any input into the last fish stock reviews for either snapper or kahawai in terms of the BOP.

A. I personally didn't, but I'm not sure if it applies to any other staff member.

Q. And are you able to tell us whether there's a Government decision or direction that prevents DOC participating in fisheries management decisions?

A. I'm not aware of – no.

Q. You don't know?

A. No.

Q. That's fine. How long typically does it take to get a marine reserve established?

A. It is very variable. Some of them are quite rapid, others very lengthy. I think the average is eight or 10 years. They are quite long processes for marine reserves.

Q. Do you accept that climate change creates a further pressure for marine ecosystems in New Zealand?

A. Yes.

Q. Also the issue of related points of changes in sea temperature or acidity arising from the effects of climate change?

A. Yes.

1625

CROSS-EXAMINATION: MR POU – NIL

RE-EXAMINATION: MR PREBBLE – NIL

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN

- Q. Dr Freeman, you gave some – in an answer to some of the questions regarding the nature of the sites that have been identified as wāhi tapu and the character of those sites, you said that in terms of their intactness, I think we're talking about, the range of diversity and so forth, that it would depend on a whole lot of things and one of them you mentioned was access. In other words, it was easy to access the fishing, perhaps. What are the other sorts of variables? That's what I want to investigate with you. Would one of those variables be the – and it is slightly related to access but the proximity to where people live, in other words, the shoreline. Would that be one of them? And is there any relationship to the drop-off zone as well? Does that have any relationship to the nature of the environment there?
- A. There are a range of factors that could influence the degree of intactness of the site. The ability to access the site is one of those, and it's related to proximity to populations as well in terms of the volume of people that may be going to a site. Another quite important factor is the other stressors that are operating at that site, so whether there are, for example, a discharge or some sort of pollution or other stressors, not just around the fishing influence but also these other factors which might influence the ecological integrity or intactness of that site. There's also the issue of how vulnerable those habitats are as well, so some types of habitats are quite resilient to impacts. So that could affect the degree of intactness as well. It depends a lot on how vulnerable those habitats are to those particular stressors at that site.
- Q. Are there positives that can affect it as well? You talked about stressors. Are there positive features of the environment that might assist?
- A. Certainly in terms of resilience, high diversity has been shown to influence resilience to other impacts, so if there are a range of species present at a site there's kind of redundancy in the ecological functions so that if there is an impact at that site the whole community may be more resilient to that impact if it is more diverse.

Q. One of the evidence that we had earlier from an ecologist earlier was around the network regime.

A. Mhm.

Q. Is it possible that there is some sort of networking operation in this sort of operation or this area?

A. Certainly I would see these sites as a type of network. I think there would be the removal of species between the different wāhi tapu and also between the wāhi tapu and the rest of the marina. So it certainly could operate as a network. I think in terms of the broader network of protected or managed areas of New Zealand, I think there could be connectivity between these sites and other protected and managed areas across the Bay of Plenty and more widely, just through the movement of species.

QUESTIONS FROM THE COURT: JUDGE SMITH

Q. Perhaps just to start I want to be clear about what your evidence was in respect of these IBDAAs. Do you accept that those IBDAAs are in gradual decline?

1630

A. I think it's plausible. I think there certainly has been historical declines within this area and across the wider region. I'm not aware of any particular studies focused on previously harvested or harvested species in these areas that would – that show that decline at these sites –

Q. I was hoping to get a bit more information from you but let's finish that question first -

A. Sure.

Q. – So was there anything you wanted to add?

A. Only that I gather there are a lot of anecdotal observations from these areas and –

Q. You've dived a number of these sites but you haven't dived them since 2015?

A. That's right. So I dived Otaiti in 2015 and then a number of these sites in 2006.

- Q. So when you dived in 2015 it was before the Harbourmaster's ban was lifted?
- A. Yes.
- Q. And you accept that there's been a reduction in species on the reef since then or do you not know?
- A. I think that's reasonable to assume that there would have been a decrease in species once the exclusion zone was lifted.
- Q. And I think the Court concluded that it was recovering which I think is consistent with your evidence that it did decline as a result of the *Rena* but has improved since, especially with the exclusion?
- A. I think certainly the exclusion zone I think it's plausible that it would have allowed an increase in previously harvested species.
- Q. Now Motunau you've dived there?
- A. Yes.
- Q. At the time you dived I presume there was a good array of species. Did you also go into the rift as well?
- A. No and I'm disappointed I didn't, so I have no familiarity with that particular site.
- Q. Right. But I take it you don't dispute the fact that they've been identified as outstanding areas of biological diversity?
- A. No. Certainly that rift if it has the set water species in shallow water that is quite a unique type of habitat so that certainly would, yeah, I would, I think that would be a significant feature.
- Q. And then we have Motuhaku which I think you said you've also dived at?
- A. Yes.
- Q. So I take it - I didn't understand your evidence to be disputing the values that the Regional Council has assessed in those areas that it's part of an outstanding natural character area. That there are on the three sites we've discussed and a couple of others which we're going to in a moment, they're identified as areas of outstanding biological diversity under 11(a) and I take it you're not disputing any of that?
- A. No.

- Q. And some of those values have you had a look to see what the Council identified as those attributes and values –
- A. Yes.
- Q. – and you'll see that they're not only fish species but there's other things. Sponges, reefs and in fact they're identifying entire habitats. What we call on land an ecotone. Are you familiar with the phrase?
- A. Yes.
- Q. And ecotone consists not only of all of the species within it but the physical features that make up the habitat as well and you know, you've obviously specialised in rocky reefs as an ecotone. That would be fair wouldn't it?
- A. Yes.
- Q. So you would agree that most of these have been identified as habitats, as ecotones or ecosystems?
- A. Yes I would agree with that.
- Q. Yes. So it goes beyond just fish doesn't it?
- A. It does, certainly.
- Q. Because fish need things to feed on and they don't all feed on smaller fish. Many of them feed on flora and fauna and that's often what attracts them to a particular area isn't it?
- A. Yes it is.
- Q. Plus shellfish and all the other things that gather the sponges and et cetera. We have a whole system that's interdependent to some degree?
- A. Yes.
- Q. Now as I understand it the features of the Otaiti are, to a lesser extent but nevertheless still outstanding, reflected in the fact, what your proper meaning is exhibit, I think you'll find exhibit M far more helpful because although it's not a full bathymetric it does show a few of the gradients in, so exhibit M. Perhaps the witness could be shown that. that's the new one but the reason I'm using it is it's the... But you'll see underlying the areas there's some basic bathymetrics. What it seems to show is that we have a gradual fall off between Porotiti and Otaiti but relatively gradual. There's an area obviously which I don't think is rocky reef habitat between

Porotiti and Otaiti but it's nevertheless associated not only with Otaiti but with Te Papa, Porotiti and Okarapu. Do you see the –

WITNESS REFERRED TO EXHIBIT M

A. Yes.

Q. Now that would be very familiar to you be that would be what I would have thought many specialists of your sort would have seen as a habitat as a whole rather than dividing it into tiny little sections. Would that be fair?

A. Yeah. I mean certainly, I guess it represents a subcluster of different habitat types in –

1635

Q. Which are often used, well, we were told, for example, crayfish tend to like to go off and have a – go off to feed on the sandy areas at times, snapper when they're spawning tend to like to be over open sandy bottoms, so they need a range of habitats, don't they?

A. That's right, so, for example, the crayfish, they certainly do reside on reefs for a lot of the year but certainly when they're moulting and when they're feeding they do go into soft sediments to do that.

Q. Now we can't guarantee that they'll go to the sediments between Porotiti and Te Paepae but it is nevertheless some of the type of habitat that they may use.

A. Yes.

Q. And if we were going to look at an area that formed an integrated ecotone, I just wonder, and nobody's brought it up, I'm asking you because you're obviously a leading expert in this area, whether or not the grouping of those four IBDA's into a single system, in other words a circle round those, wouldn't make more sense than this individualisation because then we would have an area, a longer area, a longitudinal area, constituting rocky reef habitat, sandy bottomed habitat, intermediate habitat, different gradients, and then that cluster around Okarapu, Porotiti and Te Paepae. Do you see what I'm meaning in those?

A. Yes.

Q. And thus a bigger circle, which might not go three miles off to the north, but nevertheless would include the area between Porotiti and Te Paepae

which is much more than one nautical mile. So we actually would get in a circle which would probably contain between Okarapu and Otaiti three miles in total but it might be a sausage shape rather than a circle. Now is there any magic to a circle as opposed to a sausage shape or another shape that might encompass those features?

A. Yeah, there is in terms of protected area design, so the general idea is that you try to reduce as much as you can the ratio between the perimeter and the area, just reduce the edge of that, so generally, so a circle is generally more effective in terms of protection than a sausage.

Q. So what about a circle that was based, for example, somewhere between Porotiti and Taiti that might include both of those areas but wouldn't be based upon one? Do you follow me?

A. I think so. So a –

Q. That would still give you a three kilometre – three-nautical mile circle but it would include Te Paepae, Te Porotiti and Okarapu, for example.

A. Yes, I think that would certainly provide a comprehensive protection to that system of reefs and soft sediment habitat but also have the effect of reducing that (inaudible 16:37:28) to area ratios that provide more effective protection.

Q. And I notice that Motuhaku, which is shown as a – is actually a radius of two nautical miles so, of course, it – much of that is included, includes the feature. Is that sufficient or do you think it has to be stood off from the feature, or, in this case, because the feature, I presume, has reefs in it, then having a two-diameter circle based over the top of it is sufficient? Two-nautical mile, sorry.

A. Yeah, I think certainly two nautical miles would be sufficient to protect the reef association for the species and any species that sort of venture out on to soft sediment.

Q. And as you said, it looks like it includes all of the actual bathymetric features as well.

A. Yes, that's right, yep.

Q. And Motunau, what's shown there on the face of it seems to include almost all of the reef features with a little bit of associated deeper waters as well.

A. That's right.

Q. So that would be inclusive. Now Matarehu, I'm – you probably would – angels would fear to tread here, but again this is another site that involves two features. We've got Matarehu and we've got Taumaihi, and something that might be based further towards the (Māori 16:38:38) end and take a circle off the island would still have a two-nautical mile diameter but would include water rather than land, which I assume from the reef or ecology point of view is likely to include more reef than land.

A. Well, the –

Q. Or do you think there's an association between reefs and land?

A. There certainly can be and often that, that mountains to sea approach is quite effective in terms of a true ecosystem approach to protected areas.

Q. I'll need to check. I think you've covered walks in para 38. In your view, would no intervention, in other words – sorry, I'll put it another way. Would the Regional Council provisions, as they're currently proposed to this Court, would they avoid adverse effects on those biodiversity values on those sites we've just discussed?

A. My understanding of the Regional Council proposal, it obviously recognised these overlays and then has a range of methods to help achieve the objectives for those areas, so I gather there's objectives around or methods around advocacy and education and also research as well to inform sort of future decision making around the biodiversity values of those areas. So I think we see the potential for the proposal to achieve effective protection.

1640

Q. Thank you. Do you consider that Motiti and Tuhua, for example, that's two examples within the bay on the edge and inside of the drop-off, have been more impacted than other areas in the Bay of Plenty region?

A. Tuhua, obviously there's a marine reserve there now, as well as a fisheries close, adjacent to it. Historically it was a very popular fishing

destination and still is for recreational fishing in the area outside the marine reserve. And, yeah, obviously Motiti is a destination for fishers as well. I don't know if I can comment on the relative importance in terms of the wider Bay of Plenty.

Q. Thank you. Now, we have an exhibit I which I won't give to you unless you would like it which identifies the species that have been identified, the by-catch species, not only birds but mammals as well. You're aware that Otaiti is identified as an IBDA in part because it's a haul-out for sealions and fur seals?

A. Yes, yes.

Q. Were you aware that there'd been 12 seals caught this year in the region?

A. Only from that particular table. I wasn't aware of it from earlier.

Q. Does that concern you? It seems quite a lot given the resident population here is very low.

A. Yeah. I gather that data is from the wider fisheries management area and I would be uncertain as to whether those particular animals that were caught came from that colony. There are other colonies within the Bay of Plenty.

Q. And they were, I think, almost all long-lined weren't they, perhaps with one example.

A. I'm not sure. I'd have to have another look at the table.

Q. I think they were. Does that concern you, about long-lining? Especially when we also see that albatross has been caught on long-line as well.

A. I think –

Q. I can give you the numbers if you want them.

A. – one aspect to take into account is their population status, so New Zealand fur seals are classified as not threatened. So they are a recovering species.

Q. Shy albatross. Do you know anything about those?

A. No.

Q. Bullers and Pacific we've had one. Diving petrel. 53 dolphin. But I mean it's, the difficulty, it seems to me, is that if the answer is always, "We've never done a study so we don't know what the impact of all of this is," that

seems to be an argument that because nobody's bothered to find out it's okay. That can't be correct as an assumption. Surely it must, on a precautionary principle we should – if we don't know what the outcome is we should assume it's not good.

A. I think you're right to a degree. I think in terms of identifying whether those figures are concerning you'd need to know more about the population status of these species.

Q. Well, we were told that the black petrel, for example, I think it was, somebody told – I think it was highly endangered or something, one of the top risk categories.

A. Yes.

Q. With the seven of those – and we were told that it depends on, and there's a very low resident population of those, for example. But the difficulty seems to me that given the paucity of anyone undertaking any studies that seems to be based as a reason not to do anything.

A. My understanding is that there has been a risk assessment for seabirds undertaken that identifies the risk of commercial fishing to the threat of seabird species. By fishing method, as well, so it identifies which particular fishing methods are likely to have the most impact on those species.

Q. What about things like leatherback turtles? There's 26 leatherback turtles in the past few years.

A. Mhm.

Q. Has there been a risk assessment on that?

A. Not that I'm aware of, no, no.

Q. And sealions and seals?

A. Not that I'm aware of. I don't think there's been a particular risk assessment approach, but certainly there is a threat management plan for New Zealand sealions.

Q. Given that some of those animals are the ones identified as having values in these IBDA's, do you think we should just disregard that information or is that something that we should take into account as being concerning

or should we say, “Oh, well, we don’t know so we should put it to one side”?

A. Mhm. I think if there are protection objectives for those species at this site then certainly you would want to look at the full suite of pressures on those species such as tourism activity. There are a range of activity that can influence those species.

Q. Just finally talking about this, one of the issues that seems to have been at large, and I don’t know if you have a view so I’ll just ask you.

A. Mhm.

Q. Is the association between fish abundance and bird, seabird population. Do you want to express any view on that?

1645

A. Yeah, from my understand - and my experience with working in these ecosystems certainly sea birds do associate with schooling fish and I gather there have been some surveys showing that the number and the extent of these schools of fish has been declining over recent years. Well not necessarily recent years but actually over sort of two to three decades. So, yeah, I think it’s reasonable to assume that if the species (inaudible 16:45:32) seabirds are actually foraging as to finding then that is, yeah, I think it is reasonable to assume that it will have an impact on predators.

Q. In other cases where there’s been a lot of work done with waders for example and their energy displacement from roosts through activity from people, boats, et cetera which shows that they lose weight if they’re having to fly often. So one assumes there must be an association with sea birds about the amount of fishing effort they have to get to get food –

A. Mmm.

Q. – In other words how far they have to fly from their nesting site for food but you're not aware of any studies having been done?

A. Not for sea birds, yeah, I’m not that familiar with the sea birds.

Q. But it’s a reasonable inference do you think from what we do know about birds and their feeding –

- A. Yeah, certainly for any predator that has to expend energy to forage for its food then there will be a relationship between its condition and the energy it needs to expend to find that food.

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

- Q. Dr Freeman, I'd like to pull the focus back a little bit and ask you in light of your experience throughout the Bay of Plenty how you would compare this area, to use His Honour's term, the ecotone that Otaiti and the associated rocks and reefs represent with other areas in the Bay of Plenty. Is it comparable to any others or does it stand on its own?

- A. Certainly from the studies that I've been involved in Otaiti is a stand out in terms of its sessile benthic invertebrate diversity. I'm not aware of any other studies that necessarily highlight any one of these areas as particularly important. I'm thinking of surveys for reef fish for example which have shown that largely the reef fish fauna at these sites is basically representative of a lot of the inshore Bay of Plenty islands so there's nothing particularly distinctive about the reef fish fauna. Yeah, those are the, yeah, two components I can think of.

- Q. In relation to rock lobsters or crayfish the area according to an exhibit that Mr Hill presented for crayfish CRA2 appears to include the whole of the bay of Plenty and in fact all the way around to East Cape and then it actually goes round the top of the Coromandel Peninsula and includes the Hauraki Gulf –

- A. Yes.

- Q. – and it's not quite clear to me on the size of the map involved where the line that heads off. I'm not sure actually where it hits the land, but in any event it seems to be a large statistical area. Is the crayfish fishery around these islands significant within that statistical area?

- A. I'm not sure to be honest. I've certainly seen the figures for the wider CRAY2 area but I'm not sure of the extent of the fishing effort in this particular area.

Q. Well in terms of the study that you undertook of the species, within this area of the Bay of Plenty and Coromandel and Hauraki Gulf where did you go to undertake your research?

A. So the study that I was involved in assessed reef fish and sessile benthic invertebrates so it didn't include lobsters. But the sites that we surveyed as part of that study were from Cape Runaway I think was the easternmost, or potentially a little bit further than that. Up to the Aldermen Islands.

Q. Right. Well again how does this particular area compare to any of the others that you've studied for those species?

A. So for the benthic invertebrates, so Otaiti was the stand out in terms of –

Q. Again the stand out, yes.

A. Yeah, that's the stand out. So reef fish, I would have to look again at the data but I don't recall that any particular site stood out in terms of diversity.

Q. Nothing else stood out. All right.

1650

QUESTIONS ARISING: MR ENRIGHT

Q. Dr Freeman, you were asked by His Honour Judge Smith about the proposal by the council to have methods other than rules. So my question is, which is more likely to maintain indigenous biodiversity, a rule that prohibits the taking of flora or fauna or a regime in which there are no rules but methods put forward by the council?

A. I think the proposal by MRMT provides certainty in a precautionary approach, at least for the wāhi tapu. I think the council proposal, it could achieve something similar, I gather, but as it stands at the moment it – there would need to be more work to achieve a similar degree of biodiversity.

Q. And you can just say if it's outside your expertise, for example, in the area of planning but obviously if there's a rule prohibiting the taking of flora and fauna, that gives a hard line as compared to sort of advocacy education or other methods. You accept that?

A. I think so, yes.

- Q. Is that something you'd defer to the planners on, perhaps?
- A. Yeah. I guess it's just – from my understanding, the regional council proposal could get to that kind of proposal with advocacy, with education, with the research to inform the future process.
- Q. I see. That explains your answer. So in the long run it might get there?
- A. Yes.
- Q. You were asked about exhibit I. Now, were you aware that Dr Stirnemann asked MPI for the GPS co-ordinates of where all the bycatches took place?
- A. I am aware that that has happened, yes.
- Q. In that case, I'll just put to you a letter from UPI refusing to release those GPS co-ordinates.

THE COURT: JUDGE KIRKPATRICK

Well, hang on. Why are you putting that to this witness? This is an employee of the Department of Conservation and she's not a policy officer, either.

MR ENRIGHT:

Well, Sir, I'm happy to deal with it another way. The point I'm making – I take Your Honour's point – is that we did ask about it.

THE COURT: JUDGE KIRKPATRICK

I'm sure you did, and subject to proof – although it's something that is within the Minister of Primary Industries own knowledge, so Mr Prebble should be able to address it, I'm not quite sure you should use – when this witness was called, essentially at your request, for the evidence that she has provided and I suppose I sense possibly that Mr Prebble, if I weren't raising this issue with you he might be objecting and I probably would uphold that.

MR ENRIGHT:

Sir, I withdraw the question.

QUESTIONS ARISING: MS HILL

- Q. Dr Freeman, the question was put around the different approaches the councils and the appellants. How relevant, or what is the relevance, of the enforceability of the regime in your view?
- A. I think the certainty to provide the maximum ability to achieve its objectives, then it does need to be enforceable and enforced. From my experience with marine protected areas, if an area isn't enforced, it basically prevents – well, it can prevent the recovery or the biodiversity at those sites, so certainly the area does need to be enforceable and enforced.

WITNESS EXCUSED

CASE FOR ATTORNEY-GENERAL CONCLUDES

THE COURT ADDRESSES COUNSEL – TIMING

COURT ADJOURNS: 4.55 PM

COURT RESUMES ON TUESDAY 5 DECEMBER 2017 AT 10.00 AM

EXHIBIT O PRODUCED – RESPONSE OF MPI DATED 1 DECEMBER

EXHIBIT P1 PRODUCED – A3 DOCUMENT

EXHIBIT P2 PRODUCED – SMALL MAP

EXHIBIT P3 PRODUCED – DOCUMENT

MS HAMM MAKES OPENING SUBMISSIONS

MS HAMM CALLS

ANDREW MICHAEL COLLINS (SWORN)

Q. Mr Collins, your full name is Andrew Michael Collins?

A. Yes.

Q. And you've prepared a statement of evidence dated 7 November 2017?

A. Yes, I did.

Q. That's your evidence for this proceeding?

A. Yes, it is.

Q. I'd like to ask you to comment on some of the exhibits that have been produced recently. M1, M2 and P1, 2 and 3.

WITNESS REFERRED TO EXHIBITS

Q. Mr Collins, just firstly looking at exhibit M1 and M2, are you aware that the pink circles reflect what is now referred to as the trust as the wāhi tapu areas?

A. Yes, I am.

Q. Do you have any comments to make about these exhibits? I think M2 is just a closer version of M1.

A. Yes, I do. When I'm asked to make comments I go through a succession of thoughts to myself. One is obviously the primary question for the Court is whether any of the circles are necessary, the wāhi tapu circles, and then if the Court decides, you know, that it is the next question that comes to my mind is are all the circles necessary, all of the reduced list necessary, and then I think about naming and then I'll go to the detail of

the amended plan but on the matter of whether they're all necessary I just wondered if I could recap the statuses that apply to these circles because apart from the, say, Motiti Island margin, which is an IBDA, Otaiti is an IBDA and Motunau. There are four other outstanding natural character or six of them, so Motunau is both IBDA and outstanding character, as is Otaiti and then the four reefs there, Okurapu, Porotiti, Te Papa and over to Motuhaku, they're all outstanding natural character areas so what I'm left I s'pose wondering whether they were all appropriate to be labelled as wāhi tapu with the associated prohibitions is the, probably the rationale for the Mukutai one which does not appear to be, if you like, buffering a particular ONC or IBDA area and, of course, the issue that is central to your client's case, the Matarehu one where it's founded on IBDA area only I guess I could say. That area is, of course, ONFL, as the Judge has pointed out, talking at Matarehu now. It is ONFL already. It is an area of significant cultural value already. It is an area of high character but, look, it's not outstanding or the IBDA area and I do question if it's needed at all.

1050

- Q. So if I can ask you to look then at exhibit P1 which is the specific ...
- A. P1 is the one tabled this morning?
- Q. Yes.
- A. Yes, with the circles showing the 400 square metres exclusions.
- Q. Exclusion for the – so what comments do you have about that plan?
- A. I note the intent to exclude the barge landings existing and consented which I would support. Given my prior comment about whether the whole area should be wāhi tapu at all, I do have question whether it needs to be right up to Mean High Water Springs and I would envisage a pulling back from the Mean High Water Springs perhaps an offset of 100 metres right along that Wairere Bay coast such that if a wāhi tapu area was to be imposed, it would encapsulate A15 (Māori 10:52:20), it would encapsulate A18 Taukatai and, of course, A17 and Taumaihi Island itself, but I would – sorry, there's another exhibit I probably need to refer to. If

the Court recalls the IBDA margin around Motiti Island has that cut out or gap at the southern end of the island.

THE COURT: JUDGE SMITH

Q. Yes, I was just trying to find that. Do we have that –

A. I've got it in my evidence.

Q. Yes, okay, if we could turn to your evidence, thank you.

A. If you were to go to the maps in my attachments 2 and ...

EXAMINATION CONTINUES: MS HAMM

Q. I think that's the map 43B.

A. 43B, thank you. Just as we're passing through, 43A shows the ONFL over this area that we picked up before. Yes, 43B, you'll see the red margin around Motiti –

THE COURT ADDRESSES COUNSEL – COPY POOR QUALITY – UNABLE TO SEE (10:53:29)

EXAMINATION CONTINUES: MS HAMM

Q. So, Mr Collins, perhaps if you do point to exhibit A which is up on the board.

A. Is this exhibit A?

THE COURT: JUDGE SMITH

Q. Yes.

A. It does actually show here but you'll have to have good vis –

Q. Well, no, if you describe it then it goes into the transcript.

EXAMINATION CONTINUES: MS HAMM

Q. Can you just describe it in words please?

A. The IBDA which is the Motiti Island margin goes around almost the entire circumference of the island except that it stops here where my –

1055

Q. So can you just describe –

THE COURT: JUDGE SMITH

Q. So it's just before we – it's in Wairere Bay, just before we get to the landing area, I think, isn't it?

A. Yes, it is. So the area of the consented landing is not in the IBDA A area, and then neither is the remainder of Wairere Bay, going around towards the causeway, and then up the west coast of – coming up from the causeway now past the existing barge landing, that's not IBDA A either, and then it starts just up the coast a bit further. So I guess one suggestion I had, which might be that that offset of, say, 100 metres might apply around that area of the coast excluding the causeway itself, but where the IBDA A doesn't apply and what that would allow would be the barge landing activities and perhaps a bit of shell collecting or long-line, you know, sorry, recreational fishing off the beach as well, so unless the Court thought there was a pressing need for the wāhi tapu to go right to mean high water springs, but I haven't seen that.

Q. But I thought the key point you were making is that it's not associated with any IBDA at that end of the island.

A. No.

Q. Taumaihi Island appears to be covered by an IBD B.

A. B, correct.

Q. I must say, given the scale, we had a little trouble as to whether or not the IBDA A was right at the southern tip, so that's very helpful. So it's IBB B and that's on the Taumaihi Island itself, isn't it?

A. The B one is, yes.

CROSS-EXAMINATION: MS HILL

Q. In your brief of evidence you're referring to the original proposal by the appellants and you are aware that we're now looking at a different scenario because you've just taken the Court through elements of that, and it's my understanding that both your client and you held the view that there were issues with the original proposal and you shared, I understand, Council's view around both procedural or lack of consultation and enforcement, so challenges around enforcing the original proposal. Do

you have any revised observations to make in relation to those two matters, so the process and the enforcement, in light of the amended proposal?

- A. Well, I think the revised proposals are better than the original proposals. I guess the reservations I have regarding the appropriateness of even the revised ones relates to the two – we have the two rules, which are regarding prohibited rules 1 and 2 relate to the smaller wāhi tapu circles and then the prohibited rule 3, the wider Motiti natural area. It's those – the appropriateness of those, I think, has been tested through this process that we're in now but I do have reservations that – I mean, certainly when I read the submissions, I read it in terms of I understood a spatial plan was being sought, I understood a desire to methodologies and so on, but I didn't get any sense in the submission or the Council's summary of submissions or, indeed, until quite recently, about the controls on fishing, so I guess my reservations are that there's certainly thousands of people that fish out there, and – both recreationally and a lesser number but – of commercial fishing people. I don't see that they've really been involved in this process.

Q. Thank you, and in relation to the enforcement aspect?

- A. I took some degree of comfort, I think, from, was it Mr Fraser's evi – I mean, he – the concerns are there in that I know Council's not currently geared up for that kind of enforcement, so I believe those concerns are still there but I heard the Q & A about photos and about responding to complaints. I think it would place council in a difficult situation, especially with the lack of, I guess knowledge this is coming, so that concern remains.

1100

- Q. At paragraph 7.6 of your evidence you note that there are some other areas in the region which have overlapping high values. I think you referred to Tauranga Harbour at one point as an example.
- A. Yes.
- Q. If the proposed prohibitions are imposed and sought and they're not tied to specific values which could be described as perhaps exceptional to this

area, do you perceive any planning – wider planning issues arising from the council?

A. Well, my fundamental view that there are these other areas with multiple overlapping values I think that that's a fact in Tauranga Harbour and a number of others. I support the method of being able to bring in marine spatial planning mechanisms through an appropriate consultation or valuation process. I think that's fine, so I wouldn't rule out the ability to have marine spatial plans. But yes, I imagine it's going to lead to quite some desire for parties and other areas for similar prohibitions.

Q. You've referred a couple of times to the first scheduled process and I know that your evidence was that is the preferred approach in this case. Is that still your view in light of the revised policy?

A. It is. What I might add is that I think one of the criticisms has been the lack of timeframes, if you like, around these other methods and so on and in fairness to council I do understand that it's only recently that this jurisdictional issue has become clearer while still subject to appeal. At least you know that it's an area that you can look at under current case law. So that's happened quite recently. I accept that. But I guess it's this timing issue. So I accept – I think the first scheduled process would also give a more robust answer but I accept the evidence that there is an issue out there that needs acting on sooner rather than later.

Q. Then just dealing with the related matter which is the development zone issue, and I appreciate that your client isn't a party to those other appeals but I have expressed some opinions in those provisions, and those are policies IR1 and IR2 and the proposed method 19AA.

A. Yes.

Q. So you deal with those at paragraph 7.30, I think, of your evidence. My understanding is you consider those provisions to be appropriate but you suggested some refinements to the new method 19AA. Could you just explain, I guess, in summary form the reasons behind your refinements of what you're seeking to achieve in relation to those?

1105

- A. Certainly. Yes, so just to be clear, I don't suggest any changes to either of those suggested policies. I think they are appropriate. With method 19AA, I suggested a change in the first couple of lines because it did feel a bit to me as I was reading it that Council will consider whether to investigate whether to act and it just seemed like a little bit tortuous so I thought that might be a bit simpler to say Council will consider proposals from tangata whenua for additional mechanisms, so that was the reason behind the first suggested change. In roman numeral (iv) I feel that there is a need still to have regard to the wider community, and by that I don't mean having to go get approval from everyone or anything like that, it's simply that when putting proposals for all the reasons and purposes set out in those other roman numerals, I just felt there needs to be something in there for the wider community, and I say that really – well, I suppose clients' participation, for example, right through all the District Plan processes, right through this process, indicates a degree of interest, for example, in what happens Motiti and I think that's valid, so I think just having regard to these wider matters would be appropriate.
- Q. Thank you, and –
- A. Sorry, and there's a third one, I – what I was intending to do there was to probably firm up. I'm not a huge fan of advice notes generally so I was just trying to move it from the advice note to acknowledge that if, when going through a process like this, a plan change process would be required, I – looking at it now, I'm just not sure whether my wording does achieve quite what I intended because it almost implies, "And whether or not to implement it through a plan change process," almost implies it is an option not to go through a plan change process and that's not what I intended. I think I meant that to say would be, "And whether or not to implement it which would require a plan change process."
- Q. Thank you, that was the query I had around it so you've answered that. That's helpful. Mr Lawrence had some reservations around this provision. One point he made was that he didn't think that there should be what he referred to as a check-list of matters for Council to consider. Do you have any comments to make around that?

- A. I think it's appropriate as it is. It's probably important to provide guidance of matters to be taken into account and that's what that list provides.
- Q. And Ms Noble had explained that this was intended to sit in with method 19, so method 19 – sorry, it should be 19A, I think – is the method where Council undertakes to carry out a range of things in consultation with tangata whenua and Ms Noble's evidence was that 19AA was a mechanism available in case that wasn't moving quickly enough, that tangata whenua could initiate their own proposal. Do you have any comments to make about the interrelationship of those two provisions?
- A. Only that I understand that the two are to be read, I guess, in tandem with each other and that method 19A would be – there'd be an expectation on Council to implement that method, and then method 19AA is that alternative method, so I would agree with Ms Noble on that one. Yep.

CROSS-EXAMINATION: MR PREBBLE – NIL

CROSS-EXAMINATION: MR ENRIGHT

- Q. Mr Collins, just dealing with the location of the Matarehu proposed circle for wāhi tapu and you've helpfully identified that there are IBDA A and ONFL values within the circle as proposed by MRMT, correct?
- A. I just want to make sure I didn't count too many As. Sorry, there's ONFL and IBDA B.
- Q. Yes.
- A. And that's over Taumaihi Island.
- 1110
- Q. Yes, but there's also IBDAA within the Matarehu wāhi tapu circle isn't there, and I think you explained earlier where the lines are.
- A. As drawn on this exhibit with the one nautical mile radius it would, where it intersects with the island on both sides, at that point that would still be IBDA along the Motiti margin. I think it stops just as it enters Wairere Bay.
- Q. Yes and because the scale is hard to read off the map M2, I think you were referring to sheet 12 may assist you just with locating it. If the Court is looking at a redraw of the Matarehu circle assume - if it were to approve it, but if it was looking at a redraw would you agree the circle should

include areas covered that are IBDA because they are outstanding in quality or height?

A. If the Court was minded to do that, then yes. It's not my planning opinion of what is needed, but yes, if the Court was minded to.

Q. As a reflection of 6C RMA, amongst other principles. Correct?

A. The IBDA is already a layer of protection giving effect, yes.

Q. Yes you're right. Policy 11, CPS. Okay. And you've recommended that – again, if the Court decides to impose a wāhi tapu for Matarehu, you've recommended that it be at least 100 metres off the shoreline in those areas that are not IBDA. That was your recommendation, correct?

A. Yes.

Q. So the 100 metres is to address from your perspective existing uses on that part of the island. Is that correct?

A. It's an attempt to be accommodating. Personally, I'm not persuaded why this extra wāhi tapu notation is needed at all and, if it is, whether it's appropriately named as wāhi tapu or maybe a biodiversity restoration area. But yes, the exclusion was to allow for those existing uses and potential recreational beach access issues.

Q. Again, if the Court was minded to impose, the reason you've selected 100 metres is to reflect existing uses that take place on the southern tip of Motiti, correct? Is that a fair summary?

A. To be perfectly honest, it was an arbitrary number that would account for those existing uses and some, I would suggest.

Q. Okay. Would you agree the 100 metres was recommended by you absent of any consideration of the cultural values?

A. No, I wouldn't accept that. What I would like to point out is the whole area is an area of significant cultural value that's not under any challenge and the various toka, A18, A17, I would expect there to remain if the wāhi tapu mechanism was to be adopted, I'd expect those to incorporate those toka.

Q. Okay. But you accept you're not an expert in section 6E or cultural matters?

A. Yes, I do, yep.

Q. And would you agree also that your proposal for a 100 metre offshore line for Matarehu wāhi tapu, if it's approved, also does not have any – give any considerations in ecological evidence?

1115

A. I've been here through some of the hearing but I can't recall specific evidence on the ecological values of that strip there, no.

Q. In that regard, of course, you don't say you have any expertise in ecology.

A. No.

Q. So that's an issue we'll have to look elsewhere.

A. Yep. Correct.

Q. Okay. Just dealing briefly, because you've already had your counsel take you through it, but exhibits P1, P2 and P3, if we just look at P1, there seems to be a degree, slight anomaly, in that the area recorded in Council records as the location of the western landing doesn't match the actual position of the western landing?

A. Yes, I agree. I think the photo shows that.

Q. And also just confirmation the eastern landing has not been constructed, correct?

A. That's correct.

Q. And the resource consent that's in place for both eastern and western landing does not expired until 2040, correct?

A. Correct.

Q. Now the proposition has been put earlier that if the Court decides to impose proposed rule 2, we could either address the two consented landings by way of map or line plan or by way of the wording in the rule itself. Would you agree that a suitable, suitably worded carve out would address your concerns about protecting those two landings from the effect of rule 2?

A. Yes, I believe a suitably worded carve out could be formulated to protect Motiti Avocados interests. I'd probably have some residual concern about rule 2 as it applies elsewhere. Well, just its necessity.

Q. And just moving to your evidence, nowhere in your evidence do you address the New Zealand Coastal Policy Statement, do you?

A. No, and, look, I'd like to acknowledge that is a bit of a result of some haste and in hindsight I wish I had. I have considered it and I'm more than happy to answer questions.

Q. Okay, so you make – you accept that point.

A. Yep.

Q. The evidence – I mean, and you'd agree policies 11, 13, 14 and 15 are all highly relevant in planning terms to the proposed rules framework?

A. Yes.

Q. Do you agree with Ms Noble that there is a gap in the proposed rule framework? As she said, the gap relates to fishing or we would call it taking of indigenous flora and fauna within the NEMA. Do you agree there is that gap?

A. I agree that the Regional Coastal Environment Plan does not control that through rules at present.

Q. And do you agree that if the Court finds on the evidence that the gap means the outstanding values referred to in policies 11, 13 and 15 are not being protected, that we need a rules framework in place to avoid the adverse effects of taking of indigenous flora and fauna?

A. Well, I don't necessarily accept that. I feel there's a lot of rules in the Coastal Plan at the moment which avoid the adverse effects on indigenous biodiversity in terms of policy 11, Coastal Policy Statement, on natural character in terms of – that must be policy 13, and so on. So I think there are quite a suite of rules in there at the moment which protect the values recorded there and also the habitat itself. So I think the only gap, Sir, is the, that, the, as you say, the taking of flora and fauna.

1120

Q. In the MNEMA?

A. Yep.

Q. So in terms of your answer, you accept, don't you, that it's mandatory to include rules to protect the values identified in policies 13 and 15 of the Coastal Policy Statement?

- A. Yes, so it's mandatory to ensure that plans identify areas, well, I'm sorry, I'm doing 13 first, identify areas where preserving natural character requires objective policies and rules.
- Q. And the same position applies, doesn't it, for 15 at D?
- A. Sorry, I was looking at 11. Yes, so 15, at 14B, the restoration of natural character, it talks about providing policies, rules and methods directed at restoration or rehabilitation, that's 14B. What was the other one?
- Q. Well, I was going to ask you about 14 next but since you've –
- A. Okay, yes.
- Q. That's another point just that you accept, don't you, that to address restoration in policy 14 also requires rules as referred to in 14B?
- A. Yes.
- Q. And 15(D) requires use of rules to protect the values identified in 15?
- A. Yes and in relation to ONFLs, correct.
- Q. But, again, it's not – this is an issue which as you've agreed you didn't address in your written evidence, the CPS issues?
- A. I did not address that, no.
- Q. So you were asked questions about the, and you made comment on the issue of whether we needed different first schedule process in the absence of other parties to this process, correct?
- A. Mhm, yes.
- Q. So do you accept that this is a first schedule process therefore it is a public process?
- A. I certainly accept this is a first schedule process and that the parties involved have obviously been through that first schedule process. Where the appeal scope is derived from submission scope and I think the legality has been tested through declarations there. I'm not contesting that in any way at all. I am making the observation that for effective participation to happen by parties that are not necessarily lawyers themselves, but for the community to effectively participate. The mechanism they do that is by looking at what the submissions ask for, judging if they could be effected and joining proceedings accordingly and I don't believe that the

rules with the exclusions or prohibitions proposed could have been readily understood by those sort of people.

Q. But the answer to my question was “yes” there’s a public process of the first schedule process?

A. This is a first schedule process, correct.

Q. And do you accept that if the Court decides not to impose a rules framework now for MNEMA, indigenous biodiversity within MNEMA would continue to decline until such time as there is a rules framework in place?

A. I don’t – I do accept the evidence of the ecologists and as you’ve pointed out I am not one myself. I understand the evidence of the ecologists to be that a decline is evident. Reading the (inaudible 11:24:27) statement of the ecologists, I understand that there is not agreement, I mean, it’s not necessarily at a tipping point or a crisis point and that there is time to, if you like, do this through a consultant of, you know, do the research, do the consultation, hear stakeholder views and put it in place, so I think that’s still an option.

Q. Yes, but in the meantime, indigenous biodiversity values will continue to decline within MNEMA?

A. There will be an element of that, yes.

1125

Q. And do you agree that policy 11 in terms of the protective framework does not require a tipping point?

A. Correct, yes that’s true.

Q. In terms of the issue of enforcement you answered questions from my friend Ms Hill about that and I think you said that to some extent the concerns raised by Mr Fraser to your mind had been addressed. Correct?

A. Well I, I actually defer to his experience with enforcement. I’ve not personally been involved in enforcement proceedings.

Q. Sure. Okay. That’s fine. And if we just go back to your written evidence. There’s just some aspects of your evidence which have been sort of superseded by the changes in the rules. Would you agree?

A. Probably, yes.

- Q. And we won't go through them all but just some examples. Well high level. One of the concerns you raised was that originally the wāhi tāpu circle for Matarehu extended over the land on the southern tip. You accept that's not the case anymore don't you?
- A. Yes. If the modified proposal was accepted.
- Q. Yes. So it's sonly within the CMA?
- A. Correct.
- Q. Issues that you've raised about the consent, resource consenting regime none of them will apply either do they because the consenting rules have been removed?
- A. Correct.

CROSS-EXAMINATION: MR POU

- Q. I just want to take you to your paragraph 7.19. Where you talk about, it's the part where you don't agree with one of the Council's additions around the greater cultural sites. And if I'm clear the reason that you don't agree with it is because it just creates a repetition?
- A. I think that's the primary reason I referred there to objective 15 in the iwi resource management section and the associated method which to me is, you know, achieves the same thing.
- Q. So it's not that the provision itself is offensive. It's just that it's somewhere else?
- A. Oh, correct. What we are finding is having gone through, and I personally wasn't involved, but certainly a client was for years of process and as the Motiti Environmental Management Plan or the District Plan the wāhi tāpu were thoroughly researched and I note Ms Hamm's deference to the expertise of Mr Ranapia there who – which was great, so that comprehensive process has been followed. But the more objectives and the more policies there's almost a feeling that it invites yet more identification of wāhi tāpu and on a land area that would, you know, that is of concern to Motiti Avocados and to some extent with the circles and prohibitions being proposed here and then called wāhi tāpu that, that departs from my understanding of wāhi tāpu from a planning perspective.

So no there's nothing offensive in that C. I just see it's repeating objective 15 and possibly lending more weight to more wāhi tāpu.

Q. Because I want to be clear. We're not talking necessarily about wāhi tāpu. We're talking about cultural sites?

A. Yes.

Q. Which aren't necess, and you're clear that those aren't necessarily wāhi tāpu?

A. Yes I am.

Q. Might be a pā site?

A. Mmm.

Q. Yes?

A. Correct.

Q. And these particular provisions don't just apply to Motiti so it's important to see these within the context of the mainland as well?

A. Oh, yes, yes. But so does objective 15 I think apply throughout the region.

Q. And, well it's not evidence in this – I mean I take your point. We're trying to take an integrated approach and looking at all these provisions within different areas within this plan all fit together and try and figure out how they fit together well.

A. Yes.

Q. That's correct?

A. Correct.

1130

Q. In a sense?

A. Yep.

Q. But we need to keep in mind that from where, for instance, Ngāti Makino's marae is all the way to the east, that's a huge raupatu zone where Māori were actually pushed off that land and they're rediscovering where these sites are as they come back onto it. You're aware of that?

A. Not in specific detail, but generally I can say yes.

Q. So it's really important for people like Ngāti Makino who are finding these places that have been degraded after the raupatu to actually find them,

to not just identify them as in method A, but actually enable the restoration of them as well.

A. Yeah, I can see why that's important and if I may be clear, I don't feel really strongly whether that clause C stays in or goes out. I was merely pointing out that it appears to me to be quite a bit of duplication of objective 15.

Q. Thank you for that. I'll just take you now to your amendments to method 19AA, and that's at 7.30. In particular, you see your amendment at iv.

A. Yep.

Q. Now, just given this aversion to repetition, I'd just like you to consider at the bottom, G, so you've got two things. You've got two things. You've got the council considering – you've got the proposals that have been made by tangata whenua and then you've got what the council considers. You'll see there at G the extent to which the proposal provides for the social, economic or cultural wellbeing of the wider community. So hasn't that addition that you've suggested to put in done exactly the same thing? Hasn't it created a repetition?

A. I can see why you might think that, but no, just for the reasons you also said, the roman numerals are what the proponent would look to be achieving with its proposal and then the matters to be taken into account by council are in the alpha letters. So I just felt it was relevant that in putting a proposal together there's at least regard to the wider community.

Q. That regard to the community is the council's role in terms of the letters that follow, isn't it?

A. If I had to choose, certainly G is the most important and it's one of these areas where it wouldn't have any significant planning implications if my addition to roman numeral iv was not accepted.

Q. The last thing in terms of the deletion of to investigate the development of where you've – I just want to be clear, the tangata whenua that I represent see a collaborative way of developing these proposals. You've called it tortuous, but those twists and turns and walking down that tortuous role are what tangata whenua see as the development of that relationship into the future. So in terms of that, would you – you don't

necessarily oppose tangata whenua working together with the council to investigate?

A. Certainly not.

Q. Which would reflect the wording, those words that you've sought to have deleted. So are you wedded to those being deleted as well, in that context?

A. No, I'm not wedded. I actually put those forward, thinking they might be something that the appellants might see attractive. I just felt, as I think I said, that, you know, the methods saying you're going to consider, let's investigate whether to act, just seems one step too many. The intent was to actually make it more of a collaborative process a bit more positive.

RE-EXAMINATION: MS HAMM – NIL

COURT ADJOURNS: 11.35 AM

COURT RESUMES: 11.53 AM

QUESTIONS FROM THE COURT: COMMISSIONER LEIJNEN – NIL

QUESTIONS FROM THE COURT: COMMISSIONER POMARE – NIL

QUESTIONS FROM THE COURT: COMMISSIONER PRIME – NIL

QUESTIONS FROM THE COURT: JUDGE KIRKPATRICK

Q. I just have one thing I'd like to take up with you, Mr Collins. It's this issue that both Ms Hill and Mr Enright asked you about in terms of awareness and participation. Now I suppose the issue is the extent to which the people you say might have been involved would have become involved or whether they'd rather be fishing, as it were. I mean, in your experience, and you've got a great deal of experience in planning matters, is that as important as a review of what the submissions did say and the extent to which the relief now sought is based on those submissions, or should we go off hypothesising about who might have got involved had it been drawn to their attention?

A. Well, Sir, in my experience over various processes, I can recall processes where marine industry and recreation groups have got reasonably actively involved, so I would say they'd, yep, I mean, they will get involved if they think something's really important to themselves or their members and certainly the commercial fishing people do.

Q. Well, there is, of course, the ongoing process that's now potentially in front of the Court of Appeal but we're told by counsel that one of the participants thinks that it's no longer a live issue. So if they choose not to become involved because they think that it's not a live issue then there isn't a lot the Court can do, is there?

A. No, I suspect not. I suppose for me the issue as a planner is whether, whether those that might have wanted to have got involved in the beginning would have recognised that this is what, even close to what,

you know – I have been involved in aquaculture proceedings, for example, where by virtue of the nature of aquaculture quite a large area of water area was going to be excluded for commercial fishing and I can assure you they were pretty active, involved in that process.

QUESTIONS FROM THE COURT: JUDGE SMITH

Q. Perhaps if I can just pick on that because you'll be aware that through the *Rena* process many of those parties were engaged and much of the evidence was about the concerns of people who lived on Motiti about the waters in the surrounding areas.

A. I'll have to accept that. I wasn't part of the *Rena* process but I do, I accept that.

Q. Okay, and, of course, in that process this plan came up and the RPS was a matter of, highly contentious matter in which there were decisions issued.

A. Yes.

Q. And you were aware of that or not?

A. The – well, I'm aware of the contentious decisions regarding the *Rena*.

Q. Well, not only the *Rena* but around Motiti. In fact, many of these values and ONCs, et cetera, were the matter of appeals –

A. Yes.

Q. – which resolved at various levels, but the matter was raised to – in that – and that was as a result of the change to the New Zealand Coastal Policy Statement which much of this is what we're discussing today, the changes that occurred to the New Zealand Coastal Policy Statement.

A. Right.

Q. So it would be hard to say that, for example, parties who were involved in the declaration proceedings wouldn't be aware that the declaration proceedings were about these very proceedings we have in front of us today. Were you aware of that?

A. I was aware that some parties were involved in the declaration process.

Q. But did you know the declaration was about these proceedings?

A. Yes, yes, I do.

- Q. And did you know that prior to that there was an application to strike out as well?
- A. Yes, yes, I've read those determinations too.
- Q. Yes, so one would have to say, given the amount of press I've seen on the issue, it's probably one of the best known issues in New Zealand as far as the coastal marine area is concerned.
- A. Yeah, I don't wish to challenge that. I mean, I accept that there were those processes and I think wise judgments were made there actually. I'm not – I'm happy that it's within the realm of the RMA to deal with some of these things.
- Q. Okay, so I just want to get on now to where this – because the processes that I've said have been very public processes and it started with the New Zealand Coastal Policy Statement which, of course, was then led to variation, one to the Regional Policy Statement. So the ONCs that apply around this area, what is called in the Regional Policy Statement map 21A – I presume that's – I don't know if that's as was proposed or not, but it has – the policy statement identifies six outstanding natural character areas within the Motiti natural environment area.
- A. Yes.
- Q. That's settled and operative, isn't it?
- A. Yes, it is.
- Q. And it's clear that the values there – I don't want to go through them unnecessarily because I don't think there's a dispute about it – not only include what you might call general character issues about water and rocks and things but also talk about habitats and processes and, in fact, biological diversity as well. Is that reasonable?
- A. Yes, they do talk about all of that and in addition perceptual attributes as well which include four, four of them, the fishing and dive experiences.
- Q. Yes, so it's a relatively extensive, and I must say as the result of the Court process, but it includes, for example, that Astrolabe Reef is a regular haul-out for seals.
- A. Yes.
- Q. So we know, and there's discussions about birds and other processes.

A. Yes.

Q. And you would agree with me that the Act requires the Regional Coastal Plan to give effect to the RPS?

A. Yes.

1200

Q. Now, there's no dispute that it does. The one question in this case is it identifies IBDA as over all of them except Motuhaku Island doesn't it?

A. Ah?

Q. By all of the I mean all of the six that were identified as outstanding natural character?

A. I don't believe they're over those reefs there. I've – the IBDA's are over Otaiti, Motunau ...

Q. Well, that was my question because it talks – I thought it wasn't in dispute that it included those areas but I could be wrong.

A. Yes, the –

Q. You understand it includes Astrolabe.

A. Astrolabe.

Q. And Motunau?

A. Yes and Motiti Island fringe, margin, yes.

Q. Well, parts – yes ...

A. But the various reefs in terms of Te Papa, (inaudible 12:00:59), they're outstanding natural character but they're not IBDA's.

Q. Yes, part of the problem is because we haven't been given the maps with the RCEP, I'm going to have to rely on you and it's a little unclear whether those were identified as IBDA's areas or not but they, nevertheless, are outstanding natural character areas.

A. Yes, they are.

Q. And they identified habitat and biodiversity issues as part of those features?

A. Yes.

Q. So if we're looking at a mechanism here, then as a combination of policy 11A and 13A, those six we talked about are in frame, are they one,

one way or the other? Either is outstanding natural character including habitat values or for the IBDA values which include habitat clearly?

A. Yes, they are and I'll just note also policy 13(2) makes express reference to the biophysical and ecological sort of aspects and experiential-type attributes, it's all part of natural character, yes.

Q. And we have restoration are the provisions, but at least as a starting point we have to avoid adverse effects on those, so the question when we're looking at provisions you would agree with me the question is what's the most appropriate or better provisions that avoid adverse effects on those features and particular the habitat features and biodiversity features?

A. Yes, correct.

Q. Right, so that starting point, I understand your comment. I'm not going to discuss Matarehua. You've answers all the questions about that. That doesn't have – the only IBDA is the, if I can call it the general, and I don't mean that in a derogatory way, but the general one around most of Motiti Island?

A. That's the only bit of IBDA.

Q. Yes, but the core values there were about bird nesting sites and Pohutakawa, but it does protect the areas even if they don't have Pohutakawa.

A. Yes.

Q. And there's good reasons for that, but there is less or little discussion about the water, the underwater values, if I can put it that way, in respect of that IBDA isn't there?

A. That's correct, yes.

Q. Yes and so I can understand your distinction through all of that, but it's clear, you mentioned flora and fauna values when Mr Enright was asking questions and it's clear that those flora and fauna values are included within the ONC and IBDA rankings in respect of those sites we discussed with the exception of Motiti Island?

A. That's correct.

Q. Now, on that basis, if we were looking to have some form of further control, do you think there's any significance in the fact that Motuhaku for

some reason is not included as an IBDA even though it's an outstanding natural character. In other words, is that a reason to treat it differently or would you accept it should be treated the same as the Astrolabe and Motunau?

A. I think that can be treated the same. I see natural character is it encompasses a lot of elements including the biodiversity so covers it.

Q. Right, that's (inaudible 12:04:11) line of questions, thank you. Now, the other two issues really I have are issues about entirely separate matters. One is about the methods. Now, the curiosity I find about the method is the methods about cultural matters not about avoiding adverse effects on matters under 11A, 13A and 15 or even 14 directly although it might indirectly, would you agree with me that if you're looking at methods to avoid adverse effects on natural values, biodiversity values, it would be better to have a consultative method that enabled these areas to be identified in a more ordered way than just relying on people taking submissions in respect of individual sites?

A. Yes, but I think that's where I read, like the method 19A and also 3A.

1205

Q. I think it's its intent, but it's curiously placed within the cultural. I think maybe it's intended that method 3A also feeds into that.

A. That's right.

Q. But you would agree with me that for clarification there should be an orderly identification of what sites require further protection from adverse effects.

A. Yeah. I mean, I think that is what's required. I must admit, I listened in on Dr De Luca's evidence where she was also making a, I suppose, a case or expressing the view of looking at these holistically and then making a bit of a plan of what would be the most appropriate action.

Q. So what we have with many of these sites is culture is definitely a part but there are often other factors included as well.

A. Yes.

Q. We've already identified a number of them.

A. Yes.

- Q. What I'd call the overlays of different levels of value.
- A. Yes, there's many overlays, many values.
- Q. And Tauranga Harbour would be a perfect example of that sort of thing.
- A. Yes.
- Q. There's other areas.
- A. Yes.
- Q. And that leads me on to the question, and unless you can help me I think we're going to have to hunt through the operative plan – are you familiar with the operative regional coastal plan?
- A. Well, I've used it many times. I'm reasonably familiar but I've only got here exhibit B, the selection of extracts that we're using.
- Q. I think Mr Enright – and I suspect Mr Pou as well – would criticise this plan as being simply a repetition in parts, not word for word but a similar approach to dealing with these issues of saying, yes, we'll look into them and they say that that is part of the former coastal plan which I think has been operative for 15-odd years, can't remember now.
- A. Yeah, yep.
- Q. And we're simply saying, yes, we'll get to it and thus never be reached, and that's the timeliness issue. Do you have – have you looked at the coastal plan?
- A. Yeah.
- Q. Did it have provisions similar to those now proposed and what makes you think that the council will actually undertake this now rather than defer it to the next plan?
- A. Good question. I do think that the operative regional coastal plan as well as the proposed have a number of methods which are non-regulatory and they include education, research, advocacy, service delivery, and so on. So they have that in common. I'm aware of a number of non-statutory methods that have been in council's workplans year after year. I think Ms Noble alluded to some of the programmes that have been put in place. I think some of the inaction on this particular issue, the stuff that's at the heart of this issue, has probably stemmed from the fact that it is quite recently – since the declarations in the High Court determinations – that

council has become aware of its jurisdiction to be able to control the taking of flora and fauna under the RMA and so, you know, allowing some benefit of doubt there, I get the sense that I quite earnestly am wanting to collaborate with MPI, collaborate with other conservation and stakeholders and use that method 3A and method 19A that's there. So I had optimism that the case for urgency has been made.

Q. You would agree with me, wouldn't you, that given the integrated management that's intended in respect of CMA that the best course would be for parties – including MPI – and the councils and other interested parties to work together in the long term to find solutions to these issues?

A. Yeah, I think that would be the best outcome and policy 4 of the New Zealand coastal policy statement is all about that integration and I think that that would be the best way of going forward.

Q. As you say, given it's new and still a disputed issue, I suppose one has to say that that may take some time to bed in. If the decision is upheld in superior Courts it would require a different approach by a number of parties.

A. Yes. I think that's a fair comment.

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QUESTIONS ARISING – NIL

WITNESS EXCUSED

S 274 PARTY CASE CONCLUDES (MOTITI AVOCADOS LTD)

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Notes of Evidence Legend

National Transcription Service

Indicator	Explanation
Long dash –	<p>Indicates interruption:</p> <p>Q. I think you were – (<i>Interrupted by A.</i>)</p> <p>A. I was – (<i>Interrupted by Q.</i>)</p> <p>Q. – just saying that – (<i>First dash indicates continuation of counsel's question.</i>)</p> <p>A. – about to say (<i>First dash indicates continuation of witness' answer.</i>)</p> <p>This format could also indicate talking over by one or both parties.</p>
Long dash (within text)	<p>Long dash within text indicates a change of direction, either in Q or A:</p> <p>Q. Did you use the same tools – well first, did you see him in the car?</p> <p>A. I saw him through – I went over to the window and noticed him.</p>
Long dash (part spoken word)	<p>Long dash can indicate a part spoken word by witness:</p> <p>A. Yes I definitely saw a blu – red car go past.</p>
Ellipses ... (in evidence)	<p>Indicates speaker has trailed off:</p> <p>A. I suppose I was just... (<i>Generally witness has trailed off during the sentence and does not finish.</i>)</p> <p>Q. Okay well let's go back to the 11th.</p>
Ellipses ... (in reading of briefs)	<p>Indicates the witness has been asked to pause in the reading of the brief:</p> <p>A. "...went back home."</p> <p>The resumption of reading is noted by the next three words, with the ellipses repeated to signify reading continues until the end of the brief when the last three words are noted.</p> <p>A. "At the time...called me over."</p>
Bold text (in evidence)	<p>If an interpreter is present and answering for a witness, text in bold refers on all occasions to the interpreter speaking, with the <i>first</i> instance only of the interpreter speaking headed up with the word "Interpreter":</p> <p>Q. How many were in the car?</p> <p>A. Interpreter: There were six.</p> <p>Q. So six altogether?</p> <p>A. Yes six – no only five – sorry, only five. (<i>Interpreter speaking – witness speaking – interpreter speaking.</i>)</p>
Bold text in square brackets (in evidence)	<p>If an interpreter is present and answering for a witness, to distinguish between the interpreter's translation and the interpreter's "aside" comments, bold text is contained within square brackets:</p> <p>Q. So you say you were having an argument?</p> <p>A. Not argue, I think it is negotiation, ah, re – sorry. Negotiation, bartering. [I think that's what he meant] Yeah not argue.</p> <p>Motiti Rohe Moana Trust & Ors v BOP Regional Council – ENV-2015-AKL-134 (27 Nov 2017)</p>