Patuharakeke – Counsel's Notes
13 November 2023

1. Preliminaries

- Appreciate the accommodation by the Panel and Northport, and the opportunity to address the Panel directly. Given the significance of this issue to Patuharakeke, I deeply regret not being able to present these submissions on the marae. Enormous thank you to Ms Shaw for stepping in. Have been able to listen to most of audio and received briefing from team.

- Understand some expert conferencing continues to occur, but the proposed cultural mitigation conditions have been carved out of that process. Must record some concern about the ability of my client's experts to be able to respond to most recent set of conditions. Experts remain willing to engage.

2. Core concern

- Express recognition by the Environment Court of Patuharakeke's relationship with moana and adjacent whenua. Refer legal submissions at paras 1.1-1.6.

- A contextual bi-cultural analysis is required: Te Tangi a te Manu: Aotearoa New Zealand Landscape Assessment Guidelines', Tuia Pito Ora New Zealand Institute of Landscape Architects, July 2022: https://nzila.co.nz/media/uploads/2022_09/Te_Tangi_a_te_Manu_Version_01_2022_.pdf Refer in particular at 4.01 Our concept of 'landscape' is the foundation, explicitly or implicitly, of any assessment we carry out. And 4.02 – These Guidelines seek a concept of 'landscape' appropriate for Aotearoa New Zealand in the context of the bi-cultural partnership founded on the Treaty of Waitangi; and refer 3.32-3.34[1] and the increasing recognition of Pūkenga.

- Cf Stephen Brown's evidence, paras 85, 105, and especially 106- 107, and 108: "Overall, therefore, whilst acknowledging the issues raised by Mr Farrow in his peer review of landscape effects, I am of the opinion that those effects have been accurately and appropriately identified, acknowledging that my assessment has not specifically addressed the complex issue of cultural landscape values."

- A reclamation represents the greatest magnitude of effects on the moana: by definition a reclamation destroys the moana.

- Refer legal submissions at 2.1-2.6, CVAs and Ms Chetham's evidence.

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[1] *Pūkenga*

3.32 Knowledge is held in many places within Te Ao Māori and amongst tāngata whenua. Very often, the groups and individuals who hold knowledge and expertise specific to their group have not gained this through mainstream education. This knowledge and those genuine knowledge holders are highly respected and valued by their respective groups.

3.33 Such knowledge is equally as valid as knowledge held in Western knowledge systems. Indeed, in some circumstances, it may be appropriate that knowledge held by pūkenga is afforded primacy over that held according to Western knowledge systems, including in consequent consideration of effects. Consideration of what has primacy is a matter for decision-makers.

3.34 Access to pūkenga and their knowledge may require the seeker to show some commitment and demonstrate the context and purpose for which the information is sought. Pūkenga expertise should be resourced in a way and at a level that is commensurate with those of a Western knowledge system expert.

3. Legal framework

- The "high law": Te Tiriti and Tikanga considerations; *McGuire*, *Trans-Tasman*, and *Tauranga Environmental Protection Society*: Refer legal submissions, para 3.3 – 3.12, and summary at para 3.13.

- "No right of veto" because of cultural effects per se, but the appropriate policy framework must be applied, and any adverse effects must be appropriately avoided, remedied or mitigated. Those steps must be undertaken through the lens directed by the appellate Courts.

- Refer Board of Inquiry's decision on Watercare's Waikato Awa take – at para 227-231 noting it was uncontested that the potential biophysical effects were minimal, and that Watercare had not commissioned any CVAs from iwi:[2]

> 223. We have significant concerns about the ability of the proposal, as applied for, to provide adequately for the cultural well-being of people and communities in terms of section 5(2). Our concerns are also relevant to the matters which we must recognise and provide for in terms of section 6(e), being the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, have particular regard to in terms of section 7(a), being kaitiakitanga, and take into account in terms of section 8, being the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). We consider that the cultural effects of the Application have not been explored adequately by Watercare in its decision not to prepare (or to have prepared on its behalf) a cultural impact assessment. More fundamentally, we consider this has resulted in a lost opportunity for Watercare to engage meaningfully with taangata whenua and actively involve them in the management of a highly culturally significant taonga. Both the River Settlement Act and Te Ture Whaimana describe the indivisible relationship between Waikato-Tainui and the awa, and the connection between the two. We consider that the approach taken by Watercare did not appropriately provide for the relationship of taangata whenua and river iwi with the awa, or have particular regard to kaitiakitanga, or take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and in particular the principle of rangatiratanga or self-management.

- With those comments, turn to the applicable policy framework including Policy D.1.4 (refer legal submissions, para 3.17, 3.21-22, 4.2-4.9). This is a place of significance that should be afforded the appropriate weighting, despite it not being mapped in a regional plan.

4. Alternatives

- Refer legal submissions, para 2.6, and *Tauranga Environmental Protection Society*, para 2.6(d) quoting [151], and [142]-[143]:

> [142] As determined in Issue 4, both the IW 2 and NH 4 Policies of the RCEP require consideration of whether it is "practicable" and "possible" to avoid adverse effects and whether alternative locations are "practical". If it is practicable to avoid the proposal's adverse effects on the area of spiritual, historical or cultural significance to Ngāti Hē, the proposal must not proceed under Policy IW 2. If there are practical alternative locations of the infrastructure, or it is possible to avoid the proposal's adverse effects on the Māori values of Te Awanui as ONFL 3, then the proposal must not proceed under Policy NH 4, NH 5(a)(ia) and NH 11(1)(a) and (b).
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> [143] Either way, applying *EDS v King Salmon*, the practicability, practicality, and possibility of alternatives is a material fact which directly affects the available outcome of the application. This is more than something that "may be relevant" as the Court characterised them.241 *EDS v King Salmon* has overtaken *Meridian Energy Ltd v Central Otago District Council* in that regard. In this context, given the nature of the application and the relevant law, the Court was legally required to examine the alternatives in order to determine whether they are practicable, practical and possible with respect to the meaning of those terms in the relevant

[2] https://www.epa.govt.nz/assets/FileAPI/proposal/NSP000046/Boards-decision/Watercare_Decision-updated_17_June_2022-v2.pdf

> policies of the RCEP. Furthermore, the Court is required to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal. The Court's findings would determine whether the relevant adverse effects must, as a matter of law, be avoided under Policies IW 2 and NH 4 of the RCEP.

- See also para 186, Board of Inquiry's decision on Watercare's Waikato Awa take (emphasis added):[3]

> 186. There was some issue about whether Watercare has delayed in its pursuit of alternatives and should have been further along the route towards reducing its reliance on water from the river by now. Not all the delays in this consenting process have been of Watercare's making, but the static queue of applications over the past decade should have been a clear enough indication to everyone that the amount of the allocable resource (by which we mean the water flowing in the river rather than the river as a whole) is less than the demand for allocation. That indication should alert everyone to the need to accelerate their pursuit of alternatives. From our understanding of the evidence of other large- scale alternatives, the cost of them tends to make applicants keen to know whether water from the river, as a lower cost option in financial terms, is available before investing substantial sums in other higher cost alternatives. **A wider view of the costs involved, including non-financial costs, is required to identify sustainable options**.

- Alternatives were not explored in a manner commensurate with the nature and the degree of cultural effects, refer legal submissions at [2.6].[4] No consideration of "cultural effects" – search for "cultural" in the Issues and Options assessment and there are 5 hits for agricultural and horticultural and a total of 6 for cultural. (Cultural references are to statements – at 9.2.3.1 and 9.2.3.2 that the proposed design were assessed against various factors but no analysis or reasoning, or any attempt to separately assess effects on cultural values; and at 10.2.1 "The ability to select the construction form and methodology to manage environmental, social and cultural considerations while also targeting construction cost optimisation.")

- Sometimes (often) the right thing to do is neither the easiest nor the cheapest (eg Waka Kotahi and Mt Messenger project).

5. Conditions

- Cultural conditions put forward thus far woefully inadequate: a considered submission based on 25 years' experience and Patuharakeke evidence. (It is unclear what changes will be made in closing version.)

- What do the conditions substantively offer?

  - A Kaitiaki Roopu, funded maybe c. $200,000 over its life? Might not start for 10 – 15 years or longer.

  - Completely inadequate to fund the range of measures proposed at conditions 234, 246 and 247 (even if they those conditions were seen to be sufficient – which they are not).

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3 https://www.epa.govt.nz/assets/FileAPI/proposal/NSP000046/Boards-decision/Watercare_Decision-updated_17_June_2022-v2.pdf

4 [2.6] In light of all of the above, Patuharakeke would have expected that the applicant's alternatives assessment would go beyond what appeared to be a very Northport-centric, cost-centric, and operational-centric alternatives assessment. None of the alternatives assessment incorporated any clear criteria that weighed the costs and benefits of the alternatives against cultural, social, economic and environmental effects – particularly, the impacts of each alternative on the relationship of Patuharakeke with its tāonga, which is at the heart of s 6(e) and which cascades through the New Zealand Coastal Policy Statement (NZCPS) and the Northland Regional Plan (NRP).

- The development of a cultural indicators hub programme for monitoring, without any necessary feedback loops or consequences if adverse effects are identified.

- Compared to other large projects:

  - Those put offered by Waste Management in April 2023 for the regional landfill at Wayby Valley (noting that the Court's decision is pending, but the closing submission conditions can be provided if helpful):

    - At the conclusion of the operation, the return of 1,000 ha of ancestral land taken from Ngati Manuhiri in the late 1800s.

    - Within that whenua, the development of a 125 ha pest-proofed/fenced sanctuary into which tāonga species are to be relocated and permanently protected (including the transfer of a fund to provide for the long term maintenance of the pest fence and pest control).

    - Widespread pest control on the adjacent land, including in adjacent DOC land.

    - The immediate provision of housing on site for the immediate return to the whenua of whanau through the payment of up to $2Mto assist with construction of up to 6 dwellings.

    - The provision of a separate $10M bond specifically in favour of mana whenua to address any potential effects in the future that the Auckland Council bond might be inadequate to address.

    - Other specific consent conditions.

    - Payment of between $35,00 - $75,000 per year to the Community Trust and Tangata Whenua Executive Committee .

  - Watercare's water take from Waikato Awa – June 2022:[5]

    - Initial funding of $2M to the Waikato River Clean-up Trust within 12 months of grant of consent

    - Thereafter, annual funding of $2M for the duration of the water permit.

    - A range of other measures.

  - Other large projects.

6. Lapse date

- Lapse date - a 35 year lapse date (or even 20 years) is extraordinary. Sword of Damocles that puts Patuharakeke and other iwi into a terribly invidious position in

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5 https://www.epa.govt.nz/assets/FileAPI/proposal/NSP000046/Boarddecision/Watercare_decision_addendum_17_June_2022.pdf

terms of their absolute commitment to care for the takutai moana, but knowing that at "any moment" it could be taken away.

- If a long lapse date, even 8-10 years, then key actions should commence now.

7. Activity status of district consents

- Interesting arguments.
- Context is key. Issues description of NOSZ.[6]
- Objectives: **NOSZ-O1 Natural Environment** Protect and enhance the natural, ecological, landscape, cultural and heritage values of the Natural Open Space Zone. Refer also policies. These must be applied according to their terms.
- Definition of Port Activities: "means the use of land and/or building **within the Port Zone** for port related activities, including but not limited to: …".
- Activities have flavour of "commercial services" or potentially "infrastructure".

8. Where to from here?

- Consent should be declined, primarily on the basis of identified and unchallenged, and significant residual cultural effects.
- Northport can complete the further work identified by expert witnesses for Patuharakeke, eg further monitoring, calibration of models etc.
- Northport can revisit its assessment of cultural effects, complete the range of work that should have been completed, including proposed cultural mitigation package and engage in a tika manner with Patuharakeke and the other iwi.
- If Northport and affected Iwi reach a point where they consider the proposal is adequate, then matters might be able to be resolved, or Northport can proceed with an appeal before the Environment Court.
- In the meantime, Northport can proceed with its consented – but not yet constructed – berth.

Bal Matheson

Counsel for Patuharakeke Te Iwi Trust

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[6] The Natural Open Space Zone (NOSZ) identifies areas of open space land primarily managed for the conservation and protection of natural resources. The land is generally in Council or Department of Conservation ownership. Examples of such land include: bush reserves, headlands, natural wetlands and parts of the coastline. The Natural Open Space Zone provides for the natural, ecological, landscape, cultural and heritage values of these open spaces. … The Natural Open Space Zone is characterised by minimal buildings and structures, largely undeveloped areas and open expanses of land. Land may have limited public access and infrastructure such as car parks, walking tracks and camp grounds