

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHU**

Decision No. [2022] NZEnvC 44

IN THE MATTER of the Resource Management Act 1991

AND an appeal under clause 14 of the First
Schedule of the Act

BETWEEN TE RŪNANGA O KAIKŌURA &
TE RŪNANGA O NGĀI TAHU

(ENV-2020-CHC-46)

(...continued on separate page)

Appellants

AND MARLBOROUGH DISTRICT
COUNCIL

Respondent

Environment Judge J J M Hassan – sitting alone under s279 of the Act

In Chambers at Christchurch

Date of Consent Order: 25 March 2022

CONSENT ORDER

A: Under s279(1)(b) of the Resource Management Act 1991, the Environment
Court, by consent, orders that:

- (1) the appeal is allowed, and Marlborough District Council is directed
to:

TROK AND TRONT & Ors v MDC – pMEP – Topic 1 Cultural Matters Consent Order



- (a) amend the proposed Marlborough Environment Plan as set out in Appendix 1 attached to and forming part of this consent order; and
 - (b) make any consequential amendments to the numbering of provisions and relevant planning maps resulting from (a) above.
- (2) the appeal otherwise remains extant.

B: Under s285 of the Resource Management Act 1991, there is no order as to costs.

REASONS

Introduction

[1] This proceeding concerns several appeals by Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu¹ and others² against part of a decision of the Marlborough District Council in relation to Volume 1: Ch 3, Volume 2: Ch 2 (for scheduled heritage sites) and multiple chapters (for rules enabling papakāinga) and Volume 3: Appendix 13 of the proposed Marlborough Environment Plan (‘pMEP’) that were allocated to Topic 1 – Cultural Matters.

[2] The court has now read and considered the consent memorandum of the parties dated 21 December 2021 which sets out the agreement reached to resolve all appeal points allocated to the cultural matters topic.

Other relevant matters

[3] Dallas Hemphill has signed the consent memorandum recording agreement to the relief sought. While we have noted his signature, the court records he is no

¹ ENV-2020-CHC46.

² Heritage New Zealand Pouhere Taonga, ENV-2020-CHC-36; Te Rūnanga a Rangitāne o Wairau, ENV-2020-CHC-39; Trustpower Limited, ENV-2020-CHC-50; Te Rūnanga o Ngāti Kuia Trust, ENV-2020-CHC-70.

longer a party, having previously been a s274 party to the withdrawn Te Ātiawa o Te Waka-a-Māui Trust appeal.

[4] Marlborough Forest Industry Association Incorporated also signed the consent memorandum. They are not recorded as a party and did not participate in mediation.

[5] A number of parties gave notice of an intention to become a party to these appeals under s274 of the Resource Management Act 1991 ('RMA'). Of those whose interest extends to this topic, four withdrew that interest.³ Despite having an interest in this topic, the consent memorandum records Ngāti Koata Trust did not participate in mediations. A Minute dated 21 March 2022 was issued affording a further opportunity to Ngāti Koata Trust to raise any opposition to, or issue with, the agreement of the parties sought in the joint memorandum. No response was received. As a reminder, I record that if a party no longer has an interest in a topic or appeal it has a duty to formally withdraw its interest, as failing to do so can lead to delay and costs for other parties. All remaining s274 parties whose interest extends to this topic have signed the consent memorandum setting out the relief sought.

[6] The consent memorandum records that the appeal points resolved by this order are sufficiently discrete and will not affect the resolution of any other appeal. Further, it records the parties' assurance that there are no issues of scope or jurisdiction.⁴

Appeal points resolved without amendment to plan provisions

[7] Heritage New Zealand Pouhere Taonga and Te Rūnanga a Rangitāne o

³ Te Ātiawa o Te Waka-a-Māui Trust gave notice withdrawing its s274 interest on 20 July 2021. Save the Wairau River Incorporated gave notice withdrawing its s274 interest on 2 August 2021. Nelson-Marlborough Fish and Game Council gave notice withdrawing its s274 interest on 12 August 2021. Environmental Defence Society Incorporated gave notice withdrawing its s274 interest on 22 December 2020.

⁴ Consent memorandum dated 21 December 2021 at [9]-[10].

Wairau sought to include new areas in Appendix 13 as sites of cultural significance. The parties have instead agreed to an alternate process for such work which would allow consultation with landowners and other affected parties. This process will be pursued through variation to the pMEP. The parties therefore no longer wish to pursue this appeal point.⁵

[8] Te Rūnanga o Ngāti Kuia Trust sought a number of changes related to provisions for enabling papakāinga. As a result of the agreed amendments to the definitions of papakāinga and papakāinga unit and the insertion of a new papakāinga-permitted activity to Urban Residential 3 Zones, the appellant no longer wishes to pursue the other appeal points related to papakāinga.⁶

Orders

[9] The court makes this order under s279(1) RMA, such order being by consent, rather than representing a decision or determination on the merits pursuant to s297. The court understands for present purposes that:

- (a) all relevant parties to the proceedings have executed the memorandum requesting this order; and
- (b) all parties are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction and conform to the relevant requirements and objectives of the RMA, including, in particular, pt 2



J J M Hassan
Environment Judge



⁵ Consent memorandum dated 21 December 2021 at [8(p)].

⁶ Consent memorandum dated 21 December 2021 at [8(q)].

List of Appellants

ENV-2020-CHC-46	Te Rūnanga o Kaikoura & Te Rūnanga o Ngai Tahu
ENV-2020-CHC-36	Heritage New Zealand Pouhere Taonga
ENV-2020-CHC-39	Te Rūnanga a Rangitāne o Wairau
ENV-2020-CHC-50	Trustpower Limited
ENV-2020-CHC-70	Te Rūnanga o Ngāti Kuia Trust

Appendix 1

Volume 1:

3. Marlborough's tangata whenua iwi

Amend Objective 3.2, as follows:

[RPS]

Objective 3.2 – A strong relationship between the Council and Marlborough's tangata whenua iwi in the delivery of outcomes that enables support iwi to exercise kaitiakitanga.

Marlborough's tangata whenua iwi believe that the exercise of kaitiakitanga is essential to protecting the mauri of natural resources and to fulfilling a duty to ensure the environment is left in the same or better condition than the current state for future generations. This objective recognises the role of the Council in enabling opportunities for Marlborough's tangata whenua iwi to exercise kaitiakitanga. The nature of the opportunities is identified in other provisions of this Chapter. However, all policies and methods require a strong, positive relationship between the Council and the iwi authorities in order for the provisions to be implemented successfully and meaningfully. The objective therefore places emphasis on the development and maintenance of that relationship.

Amend Objective 3.3, as follows:

[RPS]

Objective 3.3 – Natural and physical resources are managed in a manner that has particular regard to the spiritual and cultural values of Marlborough's tangata whenua iwi as kaitiaki and respects and enables supports tikanga Māori.

It is important to iwi that in sustainably managing Marlborough's natural and physical resources, appropriate recognition is given to tikanga Māori when having regard to the spiritual and cultural values of iwi. This is important for iwi as observing tikanga is part of the ethic and exercise of kaitiakitanga.

Amend Objective 3.6, as follows:

[RPS]

Objective 3.6 – Resource management decision making processes that give particular consideration to recognise the cultural and spiritual values of Marlborough's tangata whenua iwi, and their relationship to lands, water, wāhi tapu and wāhi taonga

Through a number of the issues described in 3A to 3J, Marlborough's tangata whenua iwi have clearly identified that current decision making processes on resource management matters do not always appropriately consider recognise the cultural and spiritual values of Marlborough's tangata whenua iwi. While there has been ongoing consultation between the Council and Marlborough's tangata whenua iwi in the preparation of the MEP, it is important this continues as the MEP is implemented and monitored in the future. On-going consultation and involvement in decision

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making will help to ensure that the cultural and spiritual values of Marlborough's tangata whenua iwi are given recognition.

This can be achieved through Mana Whakahono ā Rohe agreements.

Amend Policy 3.1.2, as follows:

[RPS]

Policy 3.1.2 – An applicant will be encouraged, as best practice to consult early in the development of a proposal (for resource consent or plan change) so that cultural values of Marlborough's tangata whenua iwi can be taken into account.

Only Marlborough's tangata whenua iwi can identify their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. This means that iwi are in the best position to determine whether a proposal will affect areas of significance for iwi. ~~Consultation undertaken – It is therefore important that consultation with iwi occurs~~ early in the ~~process of planning of~~ a development (either by resource consent or plan change) ~~to ensure effects allows the effects on the cultural values to beare~~ appropriately identified and addressed. ~~Early consultation with Marlborough's tangata whenua iwi is therefore considered to be best practice when preparing an assessment of effects on cultural values~~

Amend Policy 3.1.3, as follows:

[RPS]

Policy 3.1.3 – Where an application for resource consent or plan change is likely to affect the relationship of Marlborough's tangata whenua iwi and to their culture and traditions, decision makers shall consider how:

- (a) the ability for tangata whenua to exercise kaitiakitanga is maintained;
- (b) mauri is at least ~~maintained or improved where degraded~~, particularly in relation to fresh and coastal waters, land and air;
- (c) mahinga kai and natural resources used for customary purposes are maintained or enhanced and that these resources are healthy and accessible to tangata whenua;
- (d) the special relationship between tangata whenua and ngā wai will be recognised and provided for.
- (e) traditional and cultural Māori uses and practices relating to natural and physical resources such as mahinga maataitai, wāhi tapu, papakāinga and taonga raranga are recognised and provided for.

These matters must be assessed by decision makers when considering an application for resource consent or a plan change in which there is a likelihood that particular values of significance to iwi may be adversely affected. The matters to be assessed in relation to the mauri of waterbodies are particularly detailed given the significance of water resources to iwi. Dependent on the circumstances of the consent application or plan change, these matters may need to be assessed. This can only be done with the assistance of a hearings commissioner with expertise in tikanga Māori.

Amend Policy 3.1.4, as follows:

[RPS]

Policy 3.1.4 – Encourage iwi to develop iwi management plans that may include:

- (a) specific requirements to address the management of coastal waters, land and air resources, including mauri, and in relation to Sections 6(e), 7(a) kaitiakitanga and 8 of the Resource Management Act 1991;

- (b) protocols to give effect to their role as kaitiaki of water and land resources;
- (c) sites places, areas and landscapes of **historic and/or** cultural significance;
- (d) descriptions of how the document is to be used, monitored and reviewed; and
- (e) the outcomes expected from implementing the management plan.

Encouraging Marlborough's tangata whenua iwi to develop and implement iwi management plans will assist to achieve two significant outcomes. Ultimately, it will assist the Council to meet its requirements relating to Māori in the resource management planning process, especially when preparing new resource management policy and plans. Secondly, because the plans belong to the iwi that prepared them, they will assist those iwi to identify and express the values and relationships they have with their resources and how they ought to be protected, maintained or enhanced. Iwi management plans can provide a framework for consultation both for plan review and resource consent processes. Including the matters identified within (a) to (e) of the policy and implementing an iwi management plan will build and strengthen partnerships between iwi and the Council, and build trust and good relationships.

Insert a new Policy 3.1.9 as follows:

Policy 3.1.9 - Customary access to sites of significance, mahinga kai, customary material or harvesting areas is encouraged in subdivision and development through landowner agreements or through wider public access arrangements.

Customary access is necessary to enable Tangata Whenua Iwi to exercise kaitiakitanga and to actively maintain their relationship with sites of significance, lands, waters, wāhi tapu and wāhi taonga. Where resources or sites are located on private land, access arrangements such as agreements or case by case permissions are essential before entry can occur. Permission to enter private land is entirely at the discretion of the landowner. This policy acknowledges this and highlights that the Council encourages such agreements to be considered by resource consent applicants and through plan change processes.

Insert two new policies to address the management of unidentified sites of significance to Marlborough's tangata whenua iwi, as follows:

[RPS, R, C, D]

Policy 3.1.10 - Recognise that there are sites and places of significance to Marlborough's tangata whenua iwi that have not been included in Schedule 3 of Appendix 13. Adverse effects on these sites and places of significance should be avoided, remedied or mitigated, having regard to:

- (a) the values of the site or place of significance, including effects on the spiritual and cultural values of Marlborough's tangata whenua iwi;**
- (b) the position of all relevant iwi, and whether there are any matters of tikanga which need to be observed;**
- (c) the views of Heritage New Zealand Pouhere Taonga, if relevant;**
- (d) any cumulative effects, especially where the site or place is part of a group of similar related sites or places;**
- (e) efforts by the resource user to retain important features of the site or place of significance, or spiritual and cultural values of Marlborough's tangata whenua iwi;**
- (f) whether accidental discovery protocol and/or cultural monitoring is proposed or sought by iwi in relation to the activity; and**
- (g) whether the activity can be undertaken at an alternative location, where the adverse effects on the site or place of significance or place can be avoided; and**
- (h) how the application will affect both tangible and intangible values.**

Not all sites or places of significance or value to iwi will be included in Schedule 3 Appendix 13. This may be because the process of including sites has not yet occurred, or alternatively, because iwi choose to keep some sites silent. In some instances the best protection for tangata whenua sites and places is to retain knowledge of those places at a whānau, hapū or iwi level. In other instances, iwi may choose to protect sites or places in the plan through inclusion in Schedule 3 Appendix 13. Policy 3.1.10 provides for unrecorded/unlisted sites or places where through consultation or other practice, it becomes apparent that they are at risk. The policy includes both tangible and intangible values. Tangible values are those that are physical, while intangible are those values that are intrinsic, experiential and not physical.

[RPS, R, C, D]

Policy 3.1.11 - Adverse effects on any urupā, including associated cultural values, not listed in Schedule 3 of Appendix 13 should be avoided by applying best practice to ascertain whether an urupā may be present on an application site.

Urupā contain kōiwi which are human remains. Not all known urupā will be listed in the Plan, either because the process has not yet occurred or because iwi choose to remain silent about those sites. In addition, while knowledge of the location of urupā is held within an iwi, there are some instances where the old markers traditionally used to indicate urupā sites have themselves been removed, damaged, or have moved with the changing environment.

Best practice can prevent damage or destruction to urupā not listed in Schedule 3 of Appendix 13 through:

- Assessment of the content of Iwi Management Plans
- Assessment of Archaeological Association information
- Consultation and engagement with all relevant iwi
- Use of cultural monitor, if urupā is suspected
- In all cases, use and practical implementation of Accidental Discovery Protocol.

Amend Method 3.M.1, as follows:

[RPS]

3.M.1 Developing partnerships

Developing effective partnerships with Marlborough's tangata whenua iwi will be important in promoting resource management and taking into account the principles of the Treaty of Waitangi/Te Tiriti o Waitangi. This may include the Council facilitating and practically assisting iwi to develop iwi management plans as a mean of expressing kaitiakitanga. It could also include Marlborough's tangata whenua iwi assisting the Council to facilitate an increase in its awareness of the principles of the Treaty of Waitangi/Te Tiriti o Waitangi, particularly how those principles apply in a Marlborough context. How the partnerships will be expressed on an ongoing basis may be in the form of protocols, memorandums of understanding, strategies or the like. Regardless of what form the partnerships are expressed in, a fundamental component will be simple good faith.

Amend Method 3.M.3, as follows:

[RPS, R, C, D]

3.M.3 Consideration of iwi management plans

Iwi management plans will be used and taken into account to:

- *assist in the identification of issues of resource management significance to Marlborough's tangata whenua iwi, including recognition of these issues through the Council's decision-making functions;*
- *provide cultural context and understanding of values underpinning the relationship between iwi and the environment;*

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- understand, acknowledge and account for the importance of local knowledge and guidance about the environment;
- assist in the identification of sites, places, areas and landscapes of cultural significance~~heritage resources~~;
- assist in the determination of the nature and extent of consultation that may be required over particular activities or places of importance;
- assist in the development of resource management policy; and
- assist decision makers to make an informed decision with respect to a proposal or development of policy.

For the reasons listed above, iwi management plans are an essential resource for applicants and as such, the Council will provide access to iwi management plans via the Council website, with the relevant iwi authority's consent. Iwi authority websites may provide a further resource to applicants.

Amend Method 3.M.4, as follows:

[RPS, R, C, D]

3.M.4 Consultation

Because only Marlborough's tangata whenua iwi can identify their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga, it is important that where a proposal is likely to affect the values of one or more of Marlborough's tangata whenua iwi, an applicant is encouraged to consult early in the development of the proposal.

Consultation with Marlborough's tangata whenua iwi will identify the type and/or location of resource consent applications, notices of requirement and plan change requests that are of interest to each iwi. The Council will then provide iwi with information on those applications as they are received in order for iwi to establish which applications may have an impact on the relationship with land, water wāhi tapu or wāhi taonga, or otherwise on their cultural values. Information and feedback provided by iwi informs decision making involved with the processing of applications.

~~Where a Council officer is aware in preparing a report on a consent application or plan change~~processing resource consent applications, notices of requirement or plan change requests, and the circumstances of the application indicate that issues of cultural or spiritual significance to Māori may be present, this will be brought to the attention of the applicant~~consultation with the iwi who may be affected will occur.~~

Consultation may result in the iwi advising an applicant that a cultural impact assessment or cultural values report is required to document iwi values and provide appropriate measures to avoid, remedy or mitigate any adverse effects of the proposal on those values.

Amend Method 3.M.6, as follows:

[RPS, R, C, D]

3.M.6 Cultural impact assessment reports and cultural value reports

A cultural impact assessment report is a professionally prepared assessment of the potential impacts of a given activity on resources and values of importance to tangata whenua. Such a report documents iwi values associated with an area and provides appropriate measures to avoid, remedy or mitigate any adverse effects on those values.

Cultural impact assessment reports are an effective means of providing cultural and technical input, mainly with respect to resource consent applications under the RMA. Such reports ~~should~~ can form part of a resource consent application's assessment of environmental effects. Iwi will

advise an applicant or developer ~~that if~~ a cultural impact assessment report is needed. Reports may be requested by an applicant or developer as part of pre-resource consent consultation or a resource consent assessment of effects, but it is the iwi that will advise if a cultural impact assessment report is required. The report will be prepared by the iwi or someone identified by iwi as appropriate to prepare the report. Iwi authorities may have protocols around the production and use of cultural impact assessments. The costs associated with preparing the report are met by the applicant.

Cultural value reports are similar to cultural impact reports but are focussed on providing information on the nature and extent of cultural interests in a given area, as opposed to assessing impacts of a specific proposal.

Amend Method 3.M.7, as follows:

[RPS, R, C, D]

3.M.7 Decision making processes

Where an application for resource consent or plan change may have an effect on the relationship of Marlborough's tangata whenua iwi and their culture and traditions, the Council will consider appointing a commissioner(s) with expertise in tikanga Māori to the hearing committee charged with hearing and deciding the application. It may also be appropriate to undertake the hearing, if one was to occur, on marae.

The Council will support iwi members to become certified commissioners and provide opportunities for these commissioners to participate in hearings.

Insert a new method 3.M.9, as follows:

3.M.9 Customary Access

Where there are sites of interest to Marlborough's tangata whenua iwi that they may wish to access, the Council will encourage Plan Change or resource consent applicants to consider whether or not customary access is possible. While respecting the private property rights of landowners, formal access agreements between landowners and iwi will be encouraged by the Council to solidify arrangements where appropriate or necessary.

Volume 2:

6. Urban Residential 3

Insert a permitted rule and associated standards to provide for papakainga in the Urban Residential 3 zone, as follows:

[D]

6.1.X. Papakāinga.

6.3.X.X. A maximum of five papakāinga units are permitted on a Record of Title.

6.3.X.X. A minimum land area of 80m² must be provided for each papakāinga unit.

6.3.X.X. Any setbacks required under Standards 6.2.1.4, 6.2.1.5, 6.2.1.6, 6.2.1.8, 6.2.1.9, 6.2.1.12 are to the external boundary of the site and do not apply between units on the site.

25. Definitions

Amend definitions in Chapter 25, as set out below:

Māori Cultural values	Any natural attribute, area, place or thing (tangible or intangible) which is of physical, economic, social, cultural, historic and/or spiritual significance to tangata whenua iwi.
Papakāinga	means a traditional Māori settlement area on Māori land, <u>or on land obtained through Treaty settlement legislation and owned by an iwi entity or held in trust for the benefit of iwi, that is used and occupied in accordance with principles of tikanga and kaitiakitanga,</u> and includes activities associated with residential living.
Papakāinga unit	means a self-contained residential unit or units <u>residential dwelling,</u> used or intended to be used for residential activity <u>and activities associated with residential living,</u> located on Māori land, <u>or on land obtained through Treaty settlement legislation and owned by an iwi entity or held in trust for the benefit of iwi</u> and associated with a marae or tribal housing.
Site of significance to Marlborough's tangata whenua iwi	as identified in Schedule 3 of Appendix 13

