Before Queenstown Lakes District Council

In the matter of	the Resource Management Act 1991
And	
In the matter of	the Queenstown Lakes District Proposed District Plan Topic 07 Designations

Supplementary Legal Submissions

Dated 21 October 2016

Wyuna Preserve Residents Association (#0744)

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1. **Introduction**

1.1 These supplementary legal submissions are on behalf of Wyuna Preserve Residents Association ("**WPRA**") in respect of Chapter 37 (Designations) of the Proposed District Plan ("**PDP**").

1.2 WPRA made a submission on Chapter 37 opposing the proposed designation 239 (Glenorchy Aerodrome) ("**Designation**") which concerns the Gelnorchy Airstrip ("Airstrip").

2. **Executive Summary**

2.1 These supplementary submissions address three discreet questions which arose in the course of the Designation hearing before Commissioner Rogers on Thursday 20 October 2016.

(a) The relevance of the 'permitted baseline' test in the context of decisions on designations under section 168A of the Resource Management Act 1991 ("**RMA**"), and in the context of Designation 239;

(b) Scope for making recommendations on the relief sought in evidence presented by the WPRA;

(c) The timing of the consenting and development of the Wyuna Preserve.

3. **The permitted baseline and designations**

3.1 *Beadle v Minister of Corrections*[1] ("**Beadle**") considered whether the permitted baseline test would be applicable in the context of a designation.

3.2 The Environment Court held in Beadle that:

> *[I002] As there was no submission to the contrary, for the present case we accept that the obligation to apply the permitted baseline comparisons extends to the applications for regional consents and to the designation requirement.*

3.3 The Court went on to make an assessment of the proposal (for a prison) by applying the permitted baseline to the whole of the proposal.

> *[1009] Now we have to compare the environmental effects of the prison proposal with those of the permitted baseline, to assess whether there are "other or further" adverse effects of the proposal that are to be taken into account in making the judgements under section 174(4) whether the designation requirement should be confirmed, modified or cancelled; and under section 105(1)(b) whether the resource consents should be granted or refused.*

3.4 In the subsequent paragraphs there is no particular distinction made as to whether the permitted baseline is applied as part of the section 171 designation test or as part of the decision on the consents. It appears the

[1] *Beadle v Minister of Corrections* Environment Court Judge Sheppard, Decision No. A74/02, 8 April 2002

Court simply conflated the two into a consideration of the 'proposal'. In that sense, it is not particularly helpful.

3.5 Furthermore, *Beadle* concerned a new development proposal made up of consents and a designation. The Court considered whether it would be appropriate to compare the effects of such a proposal against: the existing lawful activities in the environment; non-fanciful permitted activities; and activities authorised by consent but yet to be implemented. The court's exercise was effectively to 'discount' effects rather than the present situation of formalising a standard over existing activities.

3.6 The High Court in *Save Kapiti Inc v New Zealand Transport Agency and ors* is the leading authority on this point. Its task was to consider whether section 171, which requires an 'assessment of effects in the environment', involves a consideration of the 'future environment' and/ or an application of the permitted baseline concept. It describes the test as follows:

> *[63] the Court of Appeal decision in Hawthorn is the leading authority here. That case at [84] in defining the word "environment" seems to set up two limbs of the future state of the environment:*
>
> *(a) as it might be modified by the utilisation of rights to carry out permitted activity under a district plan; and*
>
> *(b) as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.*
>
> *[64] In the present case the question arises as to what limb a pre-existing designation falls under.*

3.7 The Court considered submissions on *Beadle*, and upheld the board of inquiry's factual decision not to consider a designation as part of the environment on the grounds:

(a) That it would be artificial to incorporate the designation into the future environment when it could not co-exist with the notice of requirement; and

(b) The Board was entitled to find (for a range of reasons) that the designation would be unlikely to be put into effect.[2]

3.8 The facts of the case were a proposed designation for the state highway which was in parallel to an earlier notice of requirement for a link road along the same route. This is not dissimilar to the present case, where the proposed designation is essentially to replace the previous one.

3.9 It is submitted it is not helpful for the Commissioner to use his discretion to reference previous Designation 239 as part of the permitted baseline or future environment test for the following reasons:

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[2] *Save Kapiti Inc v New Zealand Transport Agency and ors* [2013] NZHC 2104 at [14-18], [21]

(a) The proposed Designation will replace the previous Designation, once amended through the PDP process. To state that the previous designation sets the 'permitted baseline' is not the right approach, in a similar vein as considered by the High Court in *Save Kapiti*, because the former will replace the latter. It is more appropriate to consider the existing use of the airstrip as part of the "existing environment" as a starting point.

(b) Although the previous Designation is included in the Operative District Plan, it does not have the status of a permitted activity rule. Otherwise, it would logically follow that unfettered use of the Airstrip could increase in the future and continue to raise the permitted baseline infinitely.

(c) Even if there were merit in applying the baseline or future environment test, there is no certainty as to what that current unregulated level of use is. Therefore it cannot be assessed as to what level of effects can/ cannot be taken into account to assess 'effects on the environment'.

4. **Scope**

4.1 *The notified PDP noise limits:*

(a) The PDP as notified provided Designation 239 was a *'recreation reserve (aerodrome)'*. Recreation reserves are subject to noise constraints based upon Rural and other zones. (Section G condition 9, chapter 37).

(b) The Designation had no associated provisions or explanation in the chapter other than being identified in the general table of listed designations.

(c) Section 6 relates to all 'recreation reserves', therefore as notified, the PDP provides scope that Designation 239 is subject to a noise limit. The subsequent amendments through Council's section 42A reports to amend the Designation to 'local purpose reserve' do not remove that scope that was set at the point of notification.

(d) The combination of this, alongside the WPRA submission, (which seeks to manage use of the airport) creates scope for continued application (and amendment) of that notified noise limit.

4.2 *The WPRA submission*

(a) The submission of the WPRA sought to impose additional controls through the Designation which would seek to ensure that the level of use and operation of the Airstrip were retained as at the level of use prior to August 2015. Some of the suggested provisions to achieve that outcome included specific limits on the licenced operators, restrictions on hours of operations, and flight paths.

(b) The WPRA now consider that the best way to achieve the desired outcome to retain low scale existing use will be through the method of a noise management plan as set out in Mr Hunt’s evidence.

(c) The method of a noise management plan, although not explicitly referenced in the WPRA submission, would be a method which is fairly and reasonably within the scope of submissions on this Designation. The key aspect of case law on 'scope' for determining plan provisions is set out in In *The Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 160:

> *"the test is not about determining whether the policy is named in the submission or appeal documents, but whether the amendments sought are reasonably and fairly raised in the course of the submissions".*[40]

(d) Essentially the test is predicated on a natural justice argument; so as to ensure that all submitters are reasonably put on notice as to what might be a foreseeable and consequential change to the ultimate provisions in a plan review.

(e) The WPRA submission is clear in its intent and objective. The methods for achieving that objective would reasonably be considered as subject to change and refinement in the course of any hearings on the matter.

(f) The WPRA submission explicitly sought 'such further or consequential or alternative amendments as necessary to give effect to the submission'. This further put submitters and the Council on notice that methods to achieve the objective of the submission may reasonably be subject to some variance.

5. **Background of Wyuna Preserve**

5.1 The Wyuna Preserve was created by subdivision consent RM020552, issued 20 September 2005. The consent application was formally received by Council in July 2002. The consent created 34 residential allotments and additional allotments for common areas for access and recreation.

5.2 At the time of subdivision and titling, the Airstrip was designated and the Reserve upon which it sits was owned by DOC. Because there are no reliable records held by the Council, it cannot be said with any certainty as to what level of use existed at the Airstrip at the time of subdivision, or to what extent that use has increased.

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Maree Baker-Galloway / Rosie Hill

Counsel for Wyuna Preserve Residents Association (#0744)

DOUBLE SIDED

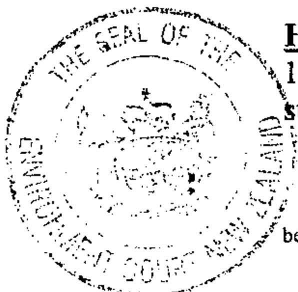
ORIGINAL

Decision No. A074/2002

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of two appeals under section 174 of the Act
BETWEEN	**SHAYRON LEE BEADLE**
	(RMA408/00)
	RONALD WIHONGI and RIANA WIHONGI
	(RMA429/00)
	Appellants
AND	**THE MINISTER OF CORRECTIONS**
	Respondent
AND	
IN THE MATTER	of an appeal under section 120 of the Act
BETWEEN	**THE MINISTER OF CORRECTIONS**
	(RMA306/01)
	Appellant
AND	**THE NORTHLAND REGIONAL COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner D H Menzies



HEARING at Paihia on 10, 11, 12, 13, 14, 17, 18, 19, 20 and 21 September, 8, 9, 10, 11, 12, 23, 24, and 25 October 2001 and 14, 15, and 16 January 2002. (Final submissions received 1 February 2002.)

beadle (dfg)

COUNSEL

G M Illingworth and K R M Littlejohn for S L Beadle, R and R WiHongi (Appellants in Appeals RMA408/00 and 429/00) and for Friends and Community of Ngawha Inc, E Clarke, Te Kereru Trust, and Ngatirangi Ahuwhenua Trust (all under section 271A in Appeal RMA306/01)
P J Milne and D G Allen for the Minister of Corrections
R M Bell and C N Whata for the Northland Regional Council

DECISION

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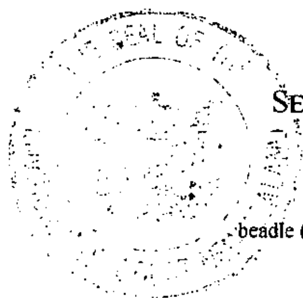

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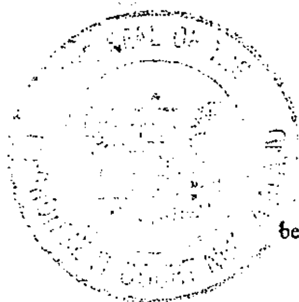

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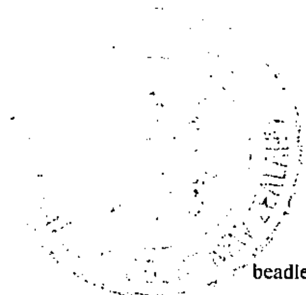


INTRODUCTION

The Proceedings

[1] The Minister of Corrections proposes to establish a new "corrections facility" for the Northland region on a site in the Ngawha locality, about 5 kilometres east of Kaikohe. For that purpose, the Minister's predecessor gave notice of his requirement under the Resource Management Act 1991 that the site be designated in the Far North district plan for "a comprehensive regional prison and associated facilities". The Minister has also applied to the Northland Regional Council for various resource consents that would be needed to develop and maintain the proposed corrections facility.

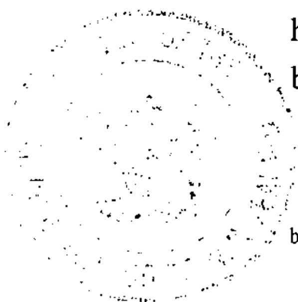
[2] Three appeals to the Environment Court have arisen. Two are appeals against the Minister's decision accepting that the requirement be confirmed. The appellants are opposed to the proposed facility, and seek that the requirement be cancelled. The third appeal was brought by the Minister against a decision by the Regional Council refusing the resource consents. By his appeal the Minister sought that the consents be granted subject to appropriate conditions. That was opposed by the Regional Council and by individuals and groups from the locality.

The Participants

The Minister of Corrections

[3] The Minister of Corrections has responsibility (among other things) for the administration of custodial sentences imposed by the courts in a safe, humane and effective manner, and providing rehabilitative and re-integrative interventions. For that purpose the Minister is responsible for provision of prisons and other correction facilities.

[4] Being a Minister of the Crown, the Minister of Corrections is by section 166 of the Resource Management Act a requiring authority for the purpose of Part VIII of that Act. The current Minister assumed responsibility for the requirement issued by his predecessor for designation of the site; and himself accepted recommendations by the Far North District Council that the requirement be confirmed only in respect



of part of the land identified as site D2, subject to detailed amendments to the recommended conditions.

[5] At the Environment Court hearing the Minister was represented by counsel who presented a full case in support of the amended designation and the resource consent applications, called 26 witnesses, and cross-examined the witnesses called by those opposing them. In addition by consent the affidavit evidence of ten other witnesses (whose testimony was not contested) was admitted by consent without their being called in person.

The Northland Regional Council

[6] The Northland Regional Council is the regional council for the region in which the site is located. The Minister applied to the Northland Regional Council for the resource consents for earthworks and stream-bed works, and water and stormwater discharge permits, required to develop the proposed prison.

[7] The Regional Council appointed two commissioners to hear and decide the applications and submissions on them. The commissioners declined the consents, because of adverse effects on the relationship of tangata whenua with their ancestral lands waters, waahi tapu and other taonga; and failing to enable tangata whenua to provide for their social and cultural well-being.

[8] The commissioners stated that but for those matters the resource consent applications would have been granted.

[9] The Regional Council took an active part in the proceedings before the Environment Court to justify the commissioners' decision declining the resource consents on those grounds, presenting full legal submissions and calling expert evidence.

[10] The Regional Council was not a party to the designation appeals, and made no submission on the substantive merits of those appeals. It stated that it did not support the cases of submitters in opposition to the extent that they contended that the resource consent applications should be declined on non-cultural grounds.

The Far North District Council

[11] The Far North District Council is the territorial authority for the district in which the site is located. The Minister's requirement for designation of the site was accordingly addressed to that Council, which appointed three commissioners to hear the submissions. The District Council adopted the commissioners' recommendation that the requirement be confirmed only in respect of part of the land identified as site D2, and imposed conditions. It made a recommendation to that effect to the Minister as requiring authority.

[12] The Minister accepted the District Council's recommendations, subject to detailed amendments to the recommended conditions. The District Council did not appeal to the Environment Court in respect of those amendments.

[13] Depending on the outcome of these proceedings, the District Council may also have a function in respect of possible future resource consent applications in terms of its district plan for earthworks and works in a stream bed.

[14] The District Council did not seek to be heard on these appeals, and took no part in the proceedings in respect of them.

Shayron Beadle

[15] Ms Shayron Lee Beadle is the director of Ginn's Ngawha Spa Limited which owns land at Ngawha Springs and operates a spa business on it. She contended that the proposed prison would have an adverse effect on the business of the spa.

[16] Ms Beadle had lodged a submission on the Minister's requirement for a designation for the proposed prison. She was substituted for Ngawha Springs Hotel Limited as appellant in the appeal lodged on behalf of that company opposing the requirement.

[17] At the Environment Court hearing, Ms Beadle was represented by counsel (in common with other submitters in opposition) and gave evidence herself in support of her appeal.

[18] Land adjoining that owned by Ginn's Ngawha Spa Limited is owned by another member of the Beadle family. The latter property was not the subject of Ms Beadle's submission or her case before the Court.

Ronald & Riana WiHongi

[19] Ronald Te Ripi WiHongi is of Te Uri o Hua and other hapu of Ngapuhi. He has a lifetime association with the mineral pools at Ngawha Springs.

[20] Ronald's daughter, Riana Akinihi WiHongi, lives at Ngawha Springs Village. She is a kaitiaki of the Ngawha Waiariki, and a trustee of the Parahirahi C1 Trust.

[21] Both of them, father and daughter, are opposed to the proposed prison on the ground that it would detract from the value of the Ngawha Waiariki pools. They lodged submissions on the designation requirement to that effect. They were substituted for Te Ahi Ko Mau as appellant in the appeal lodged in that name opposing the requirement.

[22] At the Environment Court hearing, the WiHongis were represented by counsel (in common with other submitters in opposition), and each of them gave evidence in support of their appeal.

Friends and Community of Ngawha Incorporated

[23] This society was incorporated[1] on 7 December 2000. The society has seven charitable objects, of which we quote these:

> (a) The protection and preservation of Maori cultural and spiritual heritage of Ngawha, its rivers, streams, springs and other waterways above and below ground.
> (b) To promote understanding of the significance of Ngawha and its relationships traditionally and actually to the waterways and communities of Taitokerau.
> ...
> (d) To promote and preserve the fauna, flora and environment throughout the whole of the Ngawha geothermal area.
> (e) To oppose by any lawful means any development of any kind which may prejudice in any way the public enjoyment of Ngawha's geothermal springs and their environs either visually or audibly.

[1] The society was incorporated under the Incorporated Societies Act 1908.

> (f) To promote the well-being of the Ngawha community (comprising Ngawha Springs Village and the surrounding area) ...

[24] The society had lodged a submission in opposition to the Minister's resource consent applications to the Regional Council. It was heard in opposition to the Minister's appeal against the refusal of the resource consents, being represented (in common with other submitters in opposition) by counsel and called evidence. The chairperson of the society, Ms M Mangu was called to give evidence.

[25] As well as its activities in opposition to the proposed prison, the society had also been involved in establishing a community garden, in participating in Waitangi Day observances, and in arranging a public debate, a village festival, an ecumenical church service, and other activities.

Eileen M Clarke

[26] Mrs Eileen McNicol Clarke is a householder at Ngawha Springs.[2] She had lodged a submission opposing the Minister's resource consent applications, and was heard in the Environment Court proceedings in opposition to the Minister's appeal against the decision refusing those consents.

[27] In common with other submitters in opposition to that appeal, Mrs Clarke was represented by counsel and called evidence. In addition Mrs Clarke gave evidence herself.

Te Kereru Trust

[28] Notice had been given that Te Kereru Trust, having been a submitter on the resource consent applications, wished to be heard in the Environment Court proceedings.

[29] However, although the Trust was represented by counsel who appeared for all the submitters seeking to be heard, no evidence was given about the existence, or the status of the Trust, even though they were put in issue by counsel for the Minister.

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[2] She lives at Auckland.

[30] In response to the Court's enquiry on the last day of the hearing, counsel announced that the Trust was not pursuing its notified wish to be heard in the proceedings.

[31] Accordingly we treat Te Kereru Trust as having then withdrawn from the proceedings.

Ngati Rangi Ahuwhenua Trust

[32] The Ngati Rangi Ahuwhenua Trust was established in 1987. It holds about 500 acres of land in and around Ngawha (including the part of the land the subject of the Minister's original requirement identified as D1) in trust for 1208 beneficiaries.

[33] Having lodged a submission on the resource consent applications, the Trust was heard in the Environment Court in opposition to the Minister's case. The chairman of the trustees, Mr A V Clarke, was to have given evidence, but ill-health precluded his doing so. By consent, an affidavit by Mr Clarke was admitted in evidence.

[34] The Minister questioned whether the Trust's notice (under section 271A of the Act) of its wish to be heard had been lodged with the authority of the Trust.

[35] The notice had been signed by Mr Clarke as chairman of the Trust, and there was no dispute that he was chairman at that time. Although the minutes of the Trust did not record express authority for giving the notice, the evidence was that the practice of the trustees is that opposition is recorded, but in the absence of a record of opposition a motion is taken as having been carried; and there was a record of approval of outward correspondence including the notice to the Court. Mr Clarke testified that there had been unanimous support for the action.

[36] We hold that Mr Clarke's authority to give the notice to the Registrar on behalf of the Trust is a matter of the internal management of the Trust's affairs; and we find that his having done so was approved in accordance with the Trustees' practice.

The opponents

[37] The WiHongis, Ms Beadle, and the various submitters who sought to be heard under section 271A in opposition to the proposal, had much in common, and were represented by the same counsel. In this decision we refer to them collectively as "the opponents".

The Proposal

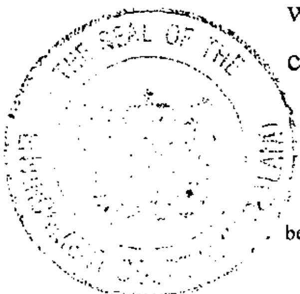
[38] The Minister's proposal is to establish a comprehensive regional corrections facility in Northland for male inmates. It is to contain specialist facilities for youth, for Maori, for high and low security, and for those remanded in custody. In addition to its custodial function, it would provide facilities to address educational, vocational, cultural, spiritual, recreational and criminogenic needs of inmates. It would provide improved security and improved access for those involved in rehabilitation and healing.

[39] The facility is to contain 350 inmates initially, with room to expand to accommodate 450 if needed. There would also be provision for extra beds in some cells for use in emergency.

[40] The facility would cater for all security classifications. Although maximum security inmates would not be permanently accommodated there, ten cells would meet the standard for secure containment of maximum security inmates when they need to be temporarily contained in Northland. In addition to high-medium security beds, and cells for minimum security inmates, there would be 12 self-care units providing a total of 48 beds.

[41] All accommodation (other than five self-care units for up to 20 minimum security inmates) would be enclosed by a high-security perimeter with electronic detection and a 6-metre high wall (containing 16.8 hectares) topped by an anti-scale metal cowl. The units outside the perimeter would be for inmates at the ends of their sentences, and would be electronically monitored.

[42] In addition to inmate accommodation, the facility is to include a health unit with two-bed wards, consulting rooms and a dental room; a whare hui and spiritual centre; a recreation building; education rooms; visiting facilities; a dedicated youth



unit with industry and education spaces; kitchen, laundry and workshop facilities; staff facilities; inmate receiving and gatehouse; and a stores building.

[43] The total building platform would have an area of 21 hectares, of which about 2 hectares would be covered by buildings, a further 5 hectares by roads, paths and carparking spaces, leaving about 14 hectares of open landscaped environment.

[44] The Ngawha Stream, which passes through the site, would be temporarily diverted during site works. The course of the stream would be straightened, and the channel lined, with culverts provided at either end of the secure compound. Part of the peak flow would be diverted around the secure compound during periods of high flows. An eastern tributary of the stream would also be realigned and flood protection works carried out.

[45] Earthworks would be needed to create graded areas for the secure compound and platforms for buildings structures and related outdoor areas. Fill material would be won from other parts of the property and cut material that is unsuitable for use as fill would be disposed of on the land. A two-lane access drive would be constructed across the land from State Highway 12, and the intersection with the highway formed.

[46] Substantial screen planting of trees has already been carried out on the site. Further amenity and screen planting is proposed. The planting is designed to screen the facility from view, especially from the south, as well as to enhance the amenity of the facility. The remainder of the site would be used for agricultural, horticultural and recreational activities.

The Main Issues

[47] Numerous issues were raised in the hearing of these proceedings. In this decision we address all of them that are capable of significantly influencing the outcome.

[48] There are three main issues, on which the parties directed much evidence. The first main issue is whether or not the proposal adequately recognises and provides for the relationship of Maori and their culture and traditions with their ancestral land, waters, waahi tapu and other taonga. This issue involves many aspects and sub-issues. Among them are questions about the localities of battles, the

place of tuakanatanga, the significance of a taniwha of the locality, and kaitiakitanga. It also includes whether or not the Minister had adequately entered into consultation about the proposed corrections facility with iwi, so as to discharge the Crown's duty of consultation as a principle of the Treaty of Waitangi.

[49] The second main issue is whether or not the site is unsuitable by its juxtaposition with the Ngawha Geothermal Field, and whether the safety or health of inmates, visitors and staff are at risk from eruption of gas or other material.

[50] The third main issue is whether or not there would be adverse effects on the social and economic well-being and safety of the people and community of Ngawha Springs, including the attractiveness of the springs and spa located there, from the presence and sight of the proposed corrections facility.

[51] Those main issues are relevant in applying the various criteria stipulated by the Act and subordinate instruments. So we address the evidence and state our findings on them before applying the statutory criteria.

[52] To provide the context, we describe the site and its environment, and set out the affirmative case for the proposed facility, and our findings on the selection of the site. We then state our findings on the development works, to give context to some of the main issues.

Integration of Evidence and Separation of Criteria

[53] First we need to decide questions that arose whether the cases of the submitters in opposition to the resource consents are to be taken into account in deciding the appeals about the designation; and whether availability of alternative sites is confined to adequacy of consideration of them in deciding the resource consent applications, or is to be considered separately and directly.

Integration

[54] The Court is directed to hear together two or more proceedings relating to the same subject-matter, unless it is impractical, unnecessary or undesirable to do so.[3]

[3] Resource Management Act 1991, s 270(1).

[55] No party objecting, or contending otherwise, the Court heard together the two appeals arising from the Minister's requirement for the designation, and the Minister's own appeal against refusal of the resource consents.

[56] However the appellants in respect of the designation requirement (Ms Beadle and the WiHongis) had not given notice (under section 271A of the Act) of any wish to be a party in the Minister's appeal against refusal of the resource consents, or notice (under section 274 of the Act) of any wish to appear in the proceedings of the Minister's appeal. Similarly, none of them: the Regional Council, the Friends and Community of Ngawha Incorporated, Mrs E M Clarke or the Ngatirangi Ahuwhenua Trust had given any such notice in respect of the proceedings of Ms Beadle's and the WiHongis' appeals in respect of the designation requirement. In those circumstances the question arose whether evidence adduced by any party (other than the Minister) was only to be received in respect of the proceedings in which that party was taking part, or was to be received as evidence in all the proceedings that were being heard together.

[57] The Minister expressly consented to the Court taking into account in the appeals about the designation requirement the evidence of Dr M Isaac, and of Messrs R P Brand, R D Beetham and V R C Warren, who had been called on behalf of the Friends and Community of Ngawha Incorporated.

[58] However the Minister observed that counsel for the appellants Ms Beadle and the WiHongis had not sought leave for other evidence to be taken into account in the designation requirement proceedings, in particular that of Dr P W Hohepa (called on behalf of the Regional Council), Mr G Hooker (called on behalf of the Friends and Community of Ngawha Incorporated), Mrs E M Clarke (who gave evidence in support of her own case) and Mr A V Clarke (Ngatirangi Ahuwhenua Trust). Counsel for the Minister contended that it would be unfair to the Minister if the Court were to take into account that evidence on the designation appeals when that is not sought by any party in those proceedings.

[59] Counsel for the Minister observed that when (as contemplated by section 270) two or more proceedings are being heard together, the Court is still hearing two or more proceedings. He submitted that they do not become one proceeding simply because they are being heard together. Counsel accepted that the Court has a discretion under section 276(1)(a) to receive evidence from the other proceedings if it considers appropriate. He contended that it is not appropriate because it is unfair

to the Minister, whose case had been prepared on the basis that the parties to the resource consent proceedings did not wish to take part in the designation requirement appeal, because they had not given notice of any wish to do so.

[60] Counsel for the Regional Council made submissions to the contrary. They contended that one of the benefits of hearing matters together is that it allows the Court in one hearing to receive evidence from different parties to two or more separate proceedings. They urged that there would be practical difficulties if, in a joint hearing, evidence had to be divided up and allocated only to specific proceedings. This, they contended, would cut across the statutory goal of integrated resource management, and may result in relevant evidence in a joint hearing excluded from consideration, risk inconsistent rulings (because evidence is received in one proceeding but not another) and make the hearing process more cumbersome and unwieldly.

[61] The opponents to the Minister's appeal against refusal of the resource consents expressly stipulated that they did not seek to rely on the evidence in the designation requirement proceedings on behalf of Ms Beadle or the WiHongis.

[62] Counsel for the opponents submitted that it would not be possible for the Court to segregate the evidence in one proceeding from that in the other. They contended that as the designated use could not occur without the resource consents, the two sets of approvals are inextricable linked.

[63] In his testimony, Mr Warren gave the opinion that the various elements of the project for which resource consents are required overlap and form a comprehensive whole, the project.

[64] We accept that. Our approach to the question is also influenced by the fact that none of the proceedings are private law proceedings. They are all to be determined for the public purpose of the Resource Management Act 1991. It is our understanding that this shared purpose, as well as efficiency, underlie Parliament's direction that the Court hear together two or more proceedings relating to the same subject-matter, except where it is impractical, unnecessary or undesirable to do so.

[65] The public purpose that they have in common indicates that where more than two or more proceedings are heard together, evidence in any one of the proceedings should be received as evidence in all of them, to the extent that it is relevant. That

assists the Court to make the best decision for the public purpose of the Act. It has been the practice in this Court, and its predecessor the Planning Tribunal, for decades. Of course that practice must be dispensed with in a particular case where it would be impractical, unnecessary or undesirable (particularly if a party would be prejudiced).

[66] We are not persuaded that in this case it would be impractical or unnecessary to receive all the evidence as being evidence in all three proceedings. Rather, we accept the Regional Council's submission that it would be impractical if the Court had to receive evidence for making findings in one or two of the proceedings, but not receive it for making findings in the other or others. We think that would make the decision-making process cumbersome and unwieldy, if not impossible, and would risk inconsistent findings.

[67] Even so, we may have had to take on the added task, if to follow the normal practice would lead to significant prejudice to a party. Certainly the Minister has a strong point in that neither Ms Beadle nor the WiHongis had given notice of their wish to be a party in, or to appear in, the Minister's appeal. However in the end the joint hearing extended over 21 hearing days, and that gave the Minister's counsel opportunity to review the Minister's case in the light of what in fact transpired. There was of course opportunity for the Minister's counsel to cross-examine every witness called on behalf of the opponents, and to present a prepared reply.

[68] Omission of notices stipulated by sections 271A and 274 was not explained, and is not condoned. But bearing in mind that the Court has to make findings leading to determinations in all three proceedings for the same purpose stated by Parliament, it is our judgement that the Minister's case would not be sufficiently prejudiced to outweigh the combined advantages of following the usual practice of receiving the evidence adduced by all parties as evidence in all proceedings. Accordingly that is how we have proceeded in the preparation of this decision.

Separation

[69] Counsel for the Regional Council observed that the resource consent applications have to be considered independently of the designation, and referred to the different criteria applying to each. That was not contested, and we accept that although our findings on fact are made on the totality of the evidence (whichever

party adduced it), we have to arrive at our decision on each proceeding according to the provisions specifically applicable to it.

Relevance of end-use to resource consents

The issue

[70] However the parties differed on another point. That was whether it is relevant to the decision on the resource consent applications that the purpose of the earthworks and streamworks (for which the resource consents are sought) is to establish a corrections facility in which inmates would be detained near a stream or over a geothermal resource.

[71] Counsel for the Minister submitted that the purpose is not relevant to the decisions on the resource consent applications. They should be decided on the basis of the works the subject of the consents sought, not on the basis of effects of the intended use of the land for a corrections facility, a matter beyond the functions of the Regional Council which has primary authority to grant or refuse the consents.

[72] Counsel for the Regional Council submitted that the end-use has to be considered, citing *Royal Forest and Bird Protection Society v Manawatu-Wanganui Regional Council*[4] and *Metekingi v Rangitikei-Wanganui Regional Water Board*.[5]

[73] Counsel observed that the Minister had invoked the national interest and claimed the beneficial use of a prison for the purpose of section 104, and submitted that the opponents were entitled to submit to the contrary.

[74] Counsel for the opponents submitted that it is not possible for the Court to artificially segregate the proposal, that the two sets of approvals (designation and resource consents) are inextricably linked, and that it is appropriate to consider the end-use of the land that exercise of the consents would enable, as potential effects of allowing the activities the subject of the resource consent applications. They contended that if the requirement is confirmed, an inevitable or reasonably foreseeable outcome of granting the consents would be that the designated use (the prison) would be established on the site, so the effects of that use are relevant in considering the resource consent applications, including the effects of the stigma of

[4] [1996] NZRMA 241.
[5] [1975] 2 NZLR 150.

Ngawha Springs as a prison town, and risks of harm from escaping inmates. Counsel cited *Lee v Auckland City Council*,[6] *Aquamarine v Southland Regional Council*[7] and *Cayford v Waikato Regional Council*.[8]

[75] In reply, counsel for the Minister accepted that the effects of the earthworks and stream works in terms of Part II issues require consideration, but not that the effects of end-use of the land for a prison are relevant. He observed that the direction in section 104(1)(a) to have regard to "... any actual and potential effects on the environment of allowing the activity" refers to the effects of allowing the activity for which consent has been applied, and cited *Ngati Rauhoto Land Rights Committee v Waikato Regional Council*.[9] Counsel urged that there is not an objective link between the works and the effects of the prison, nor a sufficient degree of inevitability or reasonable foreseeability. He also referred to *Pokeno Farm Family Trust v Franklin District Council*,[10] and *Gilmore v National Water and Soil Conservation Authority*.[11]

The decisions

[76] We start by considering *Metekingi* and *Gilmore*, as (being judgments of superior Courts) if they stand for propositions in point, we are bound to apply them.

[77] *Metekingi* concerned an application under the Water and Soil Conservation Act 1967 to permit a stream to be dammed for a hydro-electricity station. The owners and lessees of the land objected as the storage lake would take about 700 acres of land out of production. The Appeal Board had rejected their argument that the Act did not provide for resolution of conflict of priorities between land use and water use. On appeal, the Supreme Court[12] accepted that the Act was not primarily aimed at resolving issues between competing land uses, but as the appellants had no other legal forum where they could advance their contentions, and their case was not plainly unconnected with the purpose of the Act, the statutory object of 'soil conservation' should be understood as not precluding the objectors' case.

[6] [1995] NZRMA 241, 262.
[7] (1996) 2 ELRNZ 361.
[8] Environment Court Decision A127/98.
[9] Environment Court Decision A65/97
[10] Environment Court Decision A37/97.
[11] (1982) 8 NZTPA 298, 304.
[12] Cooke J (as he was then).

[78] *Gilmore* was also about a hydro dam under the Water and Soil Conservation Act 1967. The Planning Tribunal had held that it could not consider the end-use of the power for a proposed aluminium smelter. On appeal, the High Court[13] held that the subject *could* be relevant, and that it was for the Tribunal to decide whether in the particular case the end-use of the power was relevant, and what weight to give to it.

[79] The case was remitted to the Planning Tribunal for reconsideration. The Tribunal identified the question as not being an inquiry whether a smelter *should* exist, but whether it *would* exist, since it may never come into existence. The Tribunal found that the generating capacity was not likely to be needed.[14] (In the event, the dam was built, under specific legislative authority, but the smelter never did come into existence).

[80] We have reviewed those cases to see if they stand for propositions in point that we are bound to apply in deciding the difference in this case. In a strict sense, they do not, because they were based on the purposes of a previous Act that was repealed on the enactment of the Resource Management Act 1991. With respect, the most guidance we can draw from them in the 1991 regime is that an end-use *could* be relevant, and that where there is no other forum for consideration of a concern cognate to what is provided for, an Act may be given a liberal interpretation to allow it to be considered on the merits. We now consider whether the Planning Tribunal and Environment Court decisions under the Resource Management Act 1991 reveal further guidance on the point.

[81] On an application by the Canterbury Regional Council for declarations, the Planning Tribunal made a declaration[15] that in considering applications for resource consents, the Regional Council was not limited to considering adverse effects of activities directly related to the Canterbury Regional Council's functions, but was also able to consider adverse effects on other matters under sections 6 and 7 of the Act such as the protection of heritage values of sites, and the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

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[13] Casey J.

[14] *Annan v National Water and Soil Conservation Authority (No 2)* (1982) 8 NZTPA 369.

[15] *Application by the Canterbury Regional Council* [1995] NZRMA 110.

[82] The Planning Tribunal decision in *Lee v Auckland City Council*[16] was cited for a valuable observation about the scope of section 104(1)(i)–

> ... what is allowable under section 104(1)(i) of the Act must be related back to the issues contemplated by the purpose of the Act as it is subject to provisions of Part II. Any decision under section 104(1)(i) cannot be made in a vacuum and on extraneous matters.

[83] In the *Royal Forest and Bird Protection Society* case[17] resource consent applications had been made to a Regional Council for logging native trees. The Environment Court held that section 6(c) issues were relevant even though not related to the Regional Council's functions and they could have been considered in the context of District Council land-use consents.

[84] The *Aquamarine* case[18] concerned resource consent for taking water for export by ship. The Environment Court held that potential adverse effects of the passage of the ships and discharges from them were relevant, even though the passage of the ships did not itself require consent under the Act, and would not be under the direct control of the applicant.

[85] In *Pokeno Farm,* [19] it was held that the fact that a particular activity is authorised under another resource consent or by another council's plan does not preclude the effects of that activity from being assessed in the context of a related proposal.

[86] The *Ngati Rauhoto* case[20] was cited for the proposition that although sections 6, 7 and 8 are to be given effect to the extent material to the circumstances of the case, they could not be used to turn an appeal about a discharge into an appeal about taking geothermal fluid.

[87] The decision in *Cayford's* case [21] was mentioned because the Environment Court held in that case that regard is to be had to the direct effects of exercising the resource consent which are inevitable and reasonably foreseeable, and also to effects of other activities that would inevitably follow from the granting of consent, but that

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[16] [1995] NZRMA 241, 262.
[17] [1996] NZRMA 241.
[18] (1996) 2 ELRNZ 361.
[19] Environment Court Decision A37/97.
[20] Environment Court Decision A65/97.
[21] Environment Court Decision A127/98.

regard is not to be had to effects that are independent of the activity authorised by the resource consent.

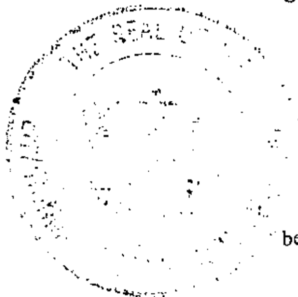
Consideration

[88] From reviewing all those cases, we discern a general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness. Of course the weight to be placed on them has to be case-specific. *Lee's* case is a reminder that a decision-maker should not have regard to matters extraneous to the Act; *Ngati Rauhoto* that an appeal on one topic cannot be turned into an appeal on another; and *Cayford* that consequential effects may be too slightly connected to the consent sought, and too remote.

[89] In the present case, the decision on the point would not necessarily make much difference to the outcome, bearing in mind our decision that findings may be based on the totality of the relevant evidence, but that we have to arrive at our decision on each proceeding according to the provisions specifically applicable to it.

[90] However the Minister expects the Court, in deciding the resource consent applications, to have regard to the purpose of the earthworks and streamworks to create a site for what he urges is a necessary public facility and one that will provide public benefits in Northland. The submitters must be entitled to challenge those claims. But their rights are not limited to direct denial. They must also be entitled to try and prove that the facility would have adverse effects on the environment that should be offset against its positive benefits, and indeed to prevail over them. To preclude submissions and evidence along those lines would be to deprive the Court of the opportunity to make a judgement based on a more complete understanding of the proposal.

[91] So, for what difference it may turn out to make, we hold that in deciding the resource consent applications we are able to have regard to the intended end-use of a corrections facility, and any consequential effects on the environment that might have, if not too uncertain or remote. But we will also need to bear in mind the nature of the consents sought, to avoid turning proceedings about earthworks and streamworks into appeals about use of land for the facility.



THE SITE AND ITS ENVIRONMENT

The Site

[92] The site is part of the Tuwhakino Block. It is in open pasture, having been a dairy farm (known as the Timperley Farm[22] after the previous owners), and has an area of 189.6 hectares. It is generally undulating or rolling, with a flatter central basin bounded by ridges to the east and to the west having some locally steeper slopes. The central (or internal) basin itself slopes from the north to the south, with a steep escarpment at the southern edge to the Ngawha Stream. From State Highway 12, the site extends in a narrow 'pan handle' strip for about 750 metres before widening out into the central basin.

[93] The flatter area is about 207 metres above sea level, and there is a prominent landform within the site (the western hill) rising to 256 metres above sea level.

[94] The Ngawha Stream flows through the site in a generally north-west to south-easterly direction. The stream is incised and meandering, with low gradients and conspicuous banks. An eastern tributary rises in the north-east of the site and flows into the main stream in the central area of the site. The margins of the streams contain a predominance of gorse and pine, with a small area of wetland in the lower portion of the eastern tributary.

[95] The site is currently used for pastoral farming. The land is mostly open pasture (dominated by exotic grass species) with some plantations of exotic tree species (including pinus radiata) and shelter belts. Pines have been planted along some stream margins. Manuka scrubland and gorse are also present on parts of the site. There are exotic rushes on parts of the site that are poorly drained, and there are patches of indigenous sedgeland along the streams.

[96] The site is within the area underlain by the Ngawha Geothermal System. There are some minor surface manifestations of geothermal origin within the site, though none within the site for the secure compound, designated building zones or roads. There are the warm Waitotara mud pools near the western boundary (some 800 metres from State Highway 12), and a small pond called Waiapawa (smoking lake) near the eastern boundary. There are other cold mineralised springs, and areas of cold gas emission (including in the bed of the Ngawha Stream) that may be

[22] Or Timperley's Farm, according to Mr Heaps, see paragraph 5 of his statement of evidence.

associated with fracturing in the cap rock. There are also locations of elevated subsurface temperature.

[97] There are raised concentrations of mercury in topsoils on the site, more widely in topsoil than in subsoil. (Analysis of samples for arsenic and antimony revealed concentrations below levels of concern.)

[98] The Waitotara and Waiapawa ponds are surrounded by bare peaty gumland soils. Manuka and gorse grow around the edge of the Waiapawa Pond.

[99] Although they are part of the site, the Minister does not require those ponds and their surrounds for the proposed corrections facility. They are to be fenced off from the rest of the site for their protection. The Minister is investigating options for transferring control, or perhaps ownership, of the ponds to Maori.

[100] The outflow from the Waitotara ponds is another tributary of the Ngawha Stream. A further tributary joins the main stream from the southern boundary between the site and the Ginn's Ngawha Springs Limited property.

[101] Geologically, the site is close to the contact of volcanic deposits of less than 10,000 years old (basalts) and undifferentiated alluvial deposits of Pleistocene age (less than 1-2 million years old). Those alluvial deposits include old lake sediments. On a larger scale, this contact zone is surrounded and possibly underlain by sedimentary rocks of weak mudstone and sandstone.

[102] The eastern hill is underlain by fractured mudstone with varying degrees of weathering. An area on the eastern hill has been used in the past for quarrying hardfill. The soils underlying the upper terrace on both sides of the stream are alluvial/lake deposit in origin. Below about 1 to 1.5 metres, the soils there are generally wet and soft. The topography of the western hill appears to have been created by an eruption of basaltic lava. An area of eucalyptus trees contains a landslip of about 20 to 30 years ago. There are areas of peat on the site, up to 3 metres deep.

[103] Low-angle slope instability is typical for Northland soil. Within the site there is evidence of shallow slope instability and soil creep on the gentle to moderately steep east-facing slopes, hummocky ground at the toe of the western hill indicates

past downslope movement, and there is evidence of local slumping along the banks of the Ngawha Stream.

[104] Northland has the lowest seismic hazard potential in New Zealand. Three fault lines have been inferred crossing the property, but they are outside the site of the proposed complex. There is no evidence of movement of the faults within the last 10,000 years. No active faults have been mapped in the area.

[105] Following the District Council's decision on the submissions on the Minister's requirement, the Department unconditionally purchased the site.

The Environment of the Site

[106] The site is surrounded by scrub and regenerating bush to the north, east and south-east, and open grassland to the west and south-west. The wider Ngawha basin has rolling topography, with pockets of intensively farmed areas interspersed with areas of regenerating scrub and bush. There are remnant patches and stands of native forest, some of which have been cut over. There are also extensive plantings of pine forest, particularly along the southern and western edges of the basin.

[107] The site is located about 2.3 kilometres south of the settlement of Ngawha, and about a kilometre north of Ngawha Springs village. Access to Ngawha Springs is by a side road from State Highway 12, Ngawha Springs Road, which branches from the highway about 600 metres south-west of the site.

[108] Ngawha Springs village consists of about 60 or 70 houses, and three hot springs complexes. One is on the property of Ginn's Ngawha Spa Limited; one (being part of the Parahirahi Block) is on adjacent property administered by the Parahirahi C1 Trust; and the third is at the guest house called Ngawha Springs Hotel. The property of Ginn's Ngawha Spa Limited (another part of the Tuwhakino Block) also contains remains of a former mercury mine, which are included in a conducted walking tour of that property.

[109] The Ginn's Ngawha Spa Limited property adjoins the site to the south. The closest boundary point of that property is about 50 metres from the proposed facility. The access road on the northern ridge of that property would be about 300 metres from the facility.

[110] Lake Tuwhakino is a large geothermal pool on the Ginn's Ngawha Spa Limited property. Downstream of the site, the outflow from that pool enters the Ngawha Stream which in turn flows into the Mangamutu Stream and then to the Waiaruhe River, a tributary of the Waitangi River. The main Ngawha Stream does not flow into Ngawha Springs, or Ngawha township.

[111] To the north-east of the site, the adjoining land (identified as D1) was initially included in the Minister's requirement, but later deleted at his request. That land is held by the Ngatirangi Ahuwhenua Trust and is part of the Waiwhariki Block. It is characterised by flat, swampy ground with rolling hills. It has areas of wetland, pasture, indigenous trees and predominantly manuka scrubland. The Ngawha marae is located to the south of State Highway 12 about 1.5 kilometres north of the site.

[112] The western headwaters of the Ngawha Stream are located in the vicinity of St Michael's Church on the northern side of State Highway 12. The stream passes under the highway and meanders south towards the site.

[113] The adjoining land to the west of the site (the remaining part of the Tuwhakino Block) is the Kaikohe Golf Course.

[114] Agricultural activity in the surrounding area is a mixture of small rural holdings and large fattening and dairy units.

[115] The Ngawha geothermal reservoir underlies the whole locality at a depth of half a kilometre or more, is covered by a sequence of impermeable sediments that make up a cap rock, and has very limited communication with the surface. The pressures within the reservoir are strongly positive with respect to the surface. Relevant minor surface activity extends over an area of about 180 square kilometres.

[116] A number of possible faults at depth have been inferred from observation of the results of deep geothermal exploration wells. Most of the flow through the geothermal system, and its surface manifestations, occurs on three north-east trending fault zones. These manifestations are confined to localised areas where the isolated deep fault zones act as feeder channels by which a small amount of geothermal fluid reaches the surface causing the known 'thermal' activity (including cold gas emissions). Each of the surface manifestations is fed independently from the deep reservoir.

[117] The possibility of flows outside the fault lines had been tested by drilling wells, some of which were between the faults. One of them[23] was on the Timperley Farm. Those wells, though hot, proved unproductive.

[118] Changes have occurred in the location and intensity of thermal activity at Ngawha in historic times, with some features getting hotter and others cooler. There is evidence of prehistoric hydrothermal eruptions in the area. However the hydrothermal eruptions and changes in activity have been localised along the north-east trending fault zones.

[119] There is a geothermal electricity generating station about 1 kilometre from Ngawha Springs village, operated by Top Energy. It takes about 10,000 tonnes per day of fluid from the geothermal reservoir, cools it, and reinjects it to the ground. It also discharges geothermal gases to the air, in addition to those naturally emitted. It produces about 6 tonnes per year of solid toxic waste in the form of a compound of antimony, with traces of arsenic, mercury and thallium, which is disposed of off-site.

[120] The thermal features at Ngawha emit mercury, which accumulated in the soil. Mercury was mined last century on what is now the Ginn's Ngawha Springs Limited property.

[121] There are also concentrations of hydrogen sulphide in the air of the wider Ngawha area, up to 130 micrograms per cubic metre of air at times. (This level might be considered an odour nuisance, but is far below the level of toxicity.)

[122] Kaikohe is about 5 kilometres to the west of the site. The town has a population of about 4000 people, and contains the principal offices of the Far North District Council, a medical centre, schools, a District Court, a police station, retail, service, sports and recreation facilities.

[123] About 6 kilometres north-west of the site there lies a shallow lake, Lake Omapere.

[23] Well NG-5.

THE AFFIRMATIVE CASE

The Case for a Prison in Northland

Northland need

[124] The Department of Corrections is committed to a regional prisons policy by which (subject to prison and sentence management) inmates are held as near to their own families and communities as practicable, so as to facilitate family visits, and assist inmates' re-integration into the community on release.[24]

[125] There is currently insufficient prison accommodation in the region north of the Bombay Hills; and there is none in Northland. At 1 September 2000, inmates sentenced in Northland courts accounted for 244 of the total male prison population of 5650. At 1 July 2001, 383 of the present male inmate muster had Northland iwi affiliations. There being no corrections facility in Northland, these inmates are housed away from their home region. In the twelve months to June 2001, 1035 people travelled from Northland to visit inmates elsewhere in New Zealand.

[126] Virtually half the current prison population are Maori, and many of them are held in prisons remote from their rohe, with limited opportunities for maintaining close links with their whanau, iwi and communities.

[127] In the absence of a corrections facility in Northland, there is no secure facility for holding in custody persons who are appearing before Northland courts. People have to be transported from Auckland on a daily basis for court appearances in Whangarei, Kaikohe and Kaitaia.

[128] The new corrections facility in Northland has been designed to enable the Department to apply its integrated offender management programme for re-integration of offenders and to reduce re-offending. The Department seeks to provide programmes and training concentrating on rehabilitation and respect for the needs of individual inmates.

[24] This policy follows recommendations in reports by committees chaired by Sir Maurice Casey (1981) and Sir Clinton Roper (1989), and experience with the first regional prison at Hastings.

[129] Mr Ron WiHongi agreed that his concern in making his submission had been that there should not be a prison anywhere in Tai Tokerau, and that to him it is not a prison that they want.

National need

[130] Mr J Hamilton, the Department's Project Director for the proposed Northland facility, testified that the Ministry of Justice has projected that by October 2003 the number of male inmate beds required nationally will be 6792, and 7651 by September 2008. Without the Northland facility, the Department would be 538 beds short of projected demand by October 2003. If the 350-bed facility in Northland is fully occupied, the Department would still be 167 male beds short in April 2004. Because unexpected and uncontrollable external factors can cause increased needs, the practical shortage of beds for male inmates may be higher than currently projected.

[131] Prison accommodation in Auckland, the region nearest to Northland, is under severe pressure and is inadequate to meet current and future needs. Currently there are about 136 inmates from Northland housed in Auckland. This in turn displaces inmates from Auckland to other regions.

[132] Counsel for the opponents put to Mr Hamilton that the urgency he referred to was of the Government's own making. The witness was not able to answer that, but he assured the Court that the Minister was certainly not asking the Court to "cut any corners" in its scrutiny of the project.

[133] Mr Paul WiHongi deposed that in his experience those who have whanau in prison experience feelings of hopelessness and despair, and that having a prison in their home will not give an opportunity to break cycles. He considered that prison is not the answer, and that the community must work towards preventative solutions.

[134] The Regional Council stated that it had taken no account of penological issues, and that its refusal of the resource consents had not been based on the end-use of the site for a prison. Its counsel submitted that it would be appropriate for the Court to take into account all positive and negative aspects of the works; and acknowledged that prisons serve an important social function. They submitted that the prison does not have to be located at Ngawha, and does not have to involve such extensive earthworks and diversion of a stream.

[135] The criteria for deciding the appeals against the requirement do not call for the Court to review the Minister's objective for the proposal. So the opinions of Messrs Ron and Paul WiHongi about the value of a prison, or of having one in Northland, do not bear on the decision of those appeals.

[136] However we accept the correctness of the Regional Council's submission that positive and negative effects of the works are to be considered in deciding the resource consent applications, and we have given our reasons for holding that we are able to have regard to the intended end-use of a corrections facility. That is a context in which the WiHongis' opinions could be relevant.

[137] Ideally, prisons and other corrections facilities should not be needed anywhere. But regrettably, for whatever reasons, some people's behaviour is aggressively hostile to others' rights and freedoms. The use of prisons and other corrections facilities for detention and rehabilitation of the worst offenders is a policy of the New Zealand Government, a political matter, and it is not for the Environment Court to express an opinion whether or not it is a sound policy.[25] The Court can take judicial knowledge of the Government's active programme to pursue preventative solutions which might break cycles of crime and address feelings of hopelessness and despair. The integrated offender-management programme described in evidence is one example. Whether the programme is well directed, and adequately resourced, are also political questions on which the Court should not form an opinion.

[138] We address the opinions of Messrs Ron and Paul WiHongi that there should not be a prison in Tai Tokerau in the next section of this decision.

[139] Accepting, as we do, that the Government has a policy of having prisons and other correction facilities, on the evidence we find that there is a need for a further facility as proposed, and that there is a need for one in Northland (as well as in other regions).

Positive Effects

[140] It was the Minister's case that as well as meeting a national and regional need, the proposed prison would have other positive effects.

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[25] *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 198 (CA).

[141] Mr J Hamilton testified that there is potential for 70 per cent of the staff positions of the facility being filled by local people, and that a suitable pool of candidates is available in Northland. In addition there would be opportunities for local individuals and organisations to be involved in supply of goods and services. The facility would contribute about $8.4 million per annum to the Northland economy by payment of salaries and wages, and a further $2.8 million per annum purchasing materials, food, health services, programmes and maintenance.

[142] Mr Kenderdine testified that the current estimate of the cost of construction and fit-out of the facility is $92 million and a total of $100 million for completion. He gave a schedule of the estimated construction workforce, rising from 10 to 20 at the start of earthworks to as many as 370, then reducing to 20 to 40. He deposed that apart from a core of on-site managers, most construction employment would be of short-term duration (3 to 6 months) related to the particular skills needed at specific stages. Mr Kenderdine expected that the majority of the skilled workforce would commute daily from their homes from distances of up to 100 kilometres or more, but any from further afield would be likely to seek temporary accommodation.

[143] Mr M C Copeland, a consulting economist, reviewed direct and indirect employment and income effects of the proposal and concluded that they would be positive and significant during the construction phase and thereafter during the operational phase.

[144] Mr Copeland had also examined impacts of the prison on utilities, and concluded that it would enable more efficient use of them. It would also assist to broaden the economic base for the district, making it less susceptible to cyclical downturns in agriculture and forestry. Mr Copeland also rejected opposition based on loss of agricultural production, observing that the opportunity cost of the land would have been reflected in the purchase price for the site. He also dismissed claims that the cost of the prison would bring better benefits if diverted to market gardening, or health and education infrastructure improvements.

[145] Mr Copeland concluded that the proposal would bring substantial economic benefits to the Far North District in increased employment, incomes and economic activity; a broader economic base; and more efficient utilisation of infrastructure. He was not cross-examined; and we accept his conclusions.

[146] Ms N Barton is an experienced resource-management planning consultant. Having been responsible for social impact assessments and consultation in respect of several major projects, she had been engaged by the Department of Corrections to make an independent peer review of the consultation process and social impact assessment of the Northland regional prison project.

[147] From her peer review, Ms Barton concluded that the community would benefit from the central location of the site, and with the economic benefits, the net social impact would be positive.

[148] The testimony of Mrs B Edmonds confirmed that from her long experience in the Ngawha community that a prison in the locality would have positive effects for families of inmates from Northland. She agreed that a lot of the good that can be achieved with the prison could be achieved at another location in Northland.

[149] Mrs Bella Tari, a member of the Ngati Rangi hapu, gave the opinion that the prison would be an opportunity for Ngati Rangi to participate in the healing process for inmates, consistent with the tradition of healing at Ngawha Springs. She observed that healing is not exclusive to women, or to those who have never committed a crime. She considered that if Ngapuhi want to seek change with these people, then bringing inmates to a place of healing is an appropriate place to start.

[150] Mr M Anania, another member of Ngati Rangi, gave the opinion that the prison facility would provide an opportunity to assist in the rehabilitation of Maori inmates who are of Ngapuhi descent.

[151] The opinions of Messrs Ron and Paul WiHongi that there should not be a prison in Tai Tokerau are in conflict with those of Ms Edmonds and Mrs Tari. They are not consistent, either, with reducing lengthy travel for those in custody who are appearing before Northland courts, or with the Department's wish to apply its integrated offender-management programme for rehabilitation of inmates from Northland.

[152] Although we respect the opinions of Messrs Ron and Paul WiHongi on the topic, we are persuaded on the evidence that in present and foreseeable conditions there is a need for a corrections facility in Northland, and we so find.

Selection of the Site

The issue

[153] It was the appellants' case that adequate consideration had not been given to alternative sites for the proposed corrections facility, both in factual enquiry and in consultation, resulting in selection of an inappropriate site. In particular reliance was placed on the extent of earthworks needed to develop the subject site.

[154] The Minister's response was that all correction facilities of the scale proposed need significant earthworks, and most sites in Northland are likely to have significance for Maori. Counsel urged that it was appropriate that further consideration was given to the chosen site after it had been selected, so that it was given more full site-specific assessment than alternative sites.

The evidence

[155] Mr Warren agreed with the initial approach that had been taken by the Department of Corrections in inviting owners to offer properties for the project, and then reducing those offered to a short list. He observed that the Timperley property was not one of those originally offered. Mr Warren also deposed that the comparison methodology used by the Department and its advisers was of a kind widely used in that kind of work.

[156] However Mr Warren also expressed criticisms of the site selection process. He said–

> If adequate consideration had been given to alternative sites then one would not expect the final preferred site to be located in the middle of the only geothermal resource north of Waiwera, with a cost penalty of $30 - $40 million more than on a normal site.
>
> ...
>
> ... detailed investigation of the subject site should have put up red flags as soon as the extent of site modification and likely level of costs became apparent. In my view, this should have led to a revisiting of the consideration of alternative sites.
> Whilst agreeing with much of the approach taken to the comparison of alternative sites, the results speak for themselves. The process has proved to be flawed as a result of which I have reached the conclusion that "adequate consideration" was not given to alternative sites.

[157] In cross-examination, Mr Warren was asked whether his concern was with the outcome of the process rather than the process itself. He affirmed that he considered the outcome as important, and that if the outcome is poor, then it was his opinion that the process had failed. He agreed that it was a fair summary that because in his view the site is unsuitable and expensive, therefore the process must have been inadequate.

[158] Evidence was given by Mr W G Whewell, an official of the Department who had supervised the site selection process. He described in detail a methodical process in which (over two and a half years) the Department and independent consultants had considered and evaluated 74 possible sites, in a context of consultation with the public, and Maori in particular. The witness deposed that in evaluating them, appropriate weight had been given to environmental, social and cultural concerns.

[159] During the process the Department had adjusted the guidelines in response to representations received. The final site selection criteria had been circulated to over 2500 people. At all stages Maori cultural issues had been considered, with consultation with iwi and other Maori organisations.

[160] The subject site (D2) had not been included in the site selection process until after shortlisting the final four sites, when the combined site D1 and D2 had been fully evaluated against two other shortlisted sites. The Minister's decision to proceed with a site at Ngawha had been conditional on acquiring the land of site D2, and on a satisfactory technical report. The subsequent technical evaluation of the site D1 and D2 had shown that it scored very well and ranked ahead of the other two, sites A and C. A cultural report on it by Ngatirangi Ahuwhenua Trust was also favourable.

[161] Mr Whewell gave the opinion that if site D2 had been evaluated on its own, without the ecologically sensitive site D1, that may well have made D2 even more attractive. Later claims of cultural issues in respect of site D1, if well founded, would have made site D1 even less suitable.

[162] Mr Whewell identified a number of respects in which the subject site, D2, rates particularly well. He referred to its being close to one of the three service centres of Northland (within the central triangle of Whangarei, Dargaville and Kaikohe); being located off State Highway 12; the significant degree of tangata

whenua and kaitaiki support; the ability for visual impact to be low and to be mitigated; the availability of water and sewage services; the ability to protect the water, soil and ecological values of the site; the potential for greater relative economic benefits for the immediate community than a site nearer Whangarei would; and the high level of acceptance of the proposed facility in the general community.

[163] In short, Mr Whewell concluded that the subject site, D2, is a suitable site, is preferable to the other 74 sites considered; and that it meets the objectives for the work.

[164] In cross-examination Mr Whewell was asked about a property in Wakelins Road near Puketona that a witness for the opponents was to suggest as an alternative site for the corrections facility. In that regard Mr Whewell agreed that Kerikeri Airport is the best serviced airport between Whangarei and Kaitaia. He was asked whether a location within a few kilometres of that airport would be a significant advantage for servicing a prison, and responded in the negative, observing that there are a large number of other criteria which provide a stronger lead to a location. He agreed that Kerikeri would be a suitable community to be near.

[165] Mr Whewell testified that a points scoring system had been used in the first phase of reducing the number of site options, but had not been used to narrow the selection to a single site because a weak score on one category can be masked.

[166] Asked about the influence of Ngatig Rangi hapu as tangata whenua and kaitiaki in respect of the D1 site, Mr Whewell responded that in relation to the land (as distinct from the geothermal resource) there was an identified hierarchy or leading responsibility; and that Ngatirangi Ahuwhenua Trust hold responsibility for the piece of land being D1. Mr Illingworth suggested that the advice Mr Whewell had given the Minister had been misleading because the Department were not going to take any steps to mitigate the concerns of those opposed on cultural grounds, but simply ignore those concerns and believe the opposing faction. The witness disagreed with that, on the basis that the site is now located on D2. The moving of the site mitigated the effect.

[167] Mr Whewell gave his understanding that the site of a significant battle (which has spiritual significance to some) was in the Waiwharihi Block, which does not contain the final site.

[168] Mr P J Cunningham is an independent consultant who had overseen preparation of a technical report on, and evaluation of, alternative short-listed sites by a multi-disciplinary team of eleven consultants. In his testimony he described the methods followed, which involved scoring the potential effects and engineering issues that a prison would have on each site to assist in the decision-making process. Alternative weightings were used to test the sensitivity of the weighting and scoring process.

[169] The original four sites had been reduced to three on withdrawal of site B. In the first assessment site C was preferred, and site D1 rejected on ecological grounds. The addition of site D2 enabled re-evaluation. Sites A and C were technically feasible, but on the basis of the lowest overall effects Sites D1 and D2 were preferred, with the building platform and prison development on Site D2 and Site D1 being reserved as a buffer.

[170] Mr Cunningham deposed that deletion of site D1 does not alter the ranking of Site D2 in comparison with Sites A and C. He gave the opinion Site D2 is preferable over Sites A and C on both environmental and operational grounds. He reported that the Minister had made the final site selection decision.

[171] Having reviewed the evidence, Mr Bhana deposed that the process of selecting a suitable site had included consideration of a large number of alternatives, and that the detailed approach taken to consultation and involvement of the wider community pointed to a careful evaluation of the selection of the site. The witness observed that the subject site had not been predetermined, and that once it had come into consideration it had been fully evaluated and compared with the other shortlisted sites and identified as preferable. He gave the opinion that proper consideration had been given to alternative sites.

Findings on site selection

[172] Mr Warren's condemnation of the site selection process was based on his disapproval of the site ultimately selected, because of the location and scale of earthworks required and the resultant cost.

[173] We accept that the site will be expensive to develop for the proposed prison, and that it is likely that another site could have been found that would have been less expensive to develop.

[174] Later in this decision we address the opponents' claims that the proposal represents an inefficient and uneconomical use of resources, particularly because of the additional cost of the earthworks. Having reviewed the evidence on that, in the light of our understanding of the law, we hold that the cost of developing the site is part of the responsibility of the Minister as promoter, and not an appropriate matter to influence the Court's decision in these proceedings.

[175] On the criticism of the selection process based on inadequate consultation, that is also a topic addressed more fully later in this decision. The outcome is that we find no basis for holding the consultation process deficient.

[176] In any event, we do not find persuasive the approach adopted by Mr Warren, in which he argues that because he does not approve of the site, the process of selecting it must have been flawed. That seems to us to be working backwards.[26] We prefer the method adopted by Mr Bhana, of reviewing the method and the steps taken, and expressing an opinion on that basis.

[177] Having ourselves reviewed the evidence of how the site was selected, Judge Sheppard and Commissioner Catchpole are satisfied that the process was a rigorous one, and was conducted systematically and with integrity. Commissioner Menzies' view is that a system was adopted, and the subject site was not predetermined. We all accept Mr Bhana's opinion, and find that adequate consideration was given to alternative sites.

Development Works

[178] Considerable works are proposed for development of the site for the corrections facility. To create platforms for the buildings and grounds (including recreation and horticulture) within the secure compound, an area of about 21 hectares is to be levelled. The stream is to be diverted temporarily, and high-level flows (greater than about 1.7 cubic metres per second) directed permanently to the diversion channel. The main channel would be straightened, and constructed to restrict velocities to no more than 0.3 metres per second, allowing fish to pass upstream.

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[26] Cf *Arrigato Investments v Auckland Regional Council,* [2001] NZRMA 481 (CA); *Dye v Auckland Regional Council* [2001] NZRMA 513; 7 ELRNZ 209, paragraph [13].

[179] Most of the buildings are to be single-storey. The exceptions are the gatehouse, administration and mechanical plant rooms, which would be about 8 metres high. The recreation building would have a similar height.

[180] In addition it is proposed to have five self-care units and an associated communal building (about 140 square metres) for a total of 20 inmates outside the secure perimeter. These units are for preparing inmates for release from custody, and would be located to the north of the access road on a small flat area presently in pasture, about 350 metres west of the entry point to the car-parking area. The area to be occupied by these units would be 3150 square metres. They would be single-storey residential style buildings, with a mesh security fence.

[181] The security perimeter would consist of a 15-metre wide 'no-go' area between the nearest building and a 4.5-metre high inner fence. A further 10-metre wide 'sterile' zone would lie between the inner fence and the 6-metre high wall. Beyond that there would be a further 20-metre wide 'no-go' grassed zone clear of buildings and landscaping.

[182] The standard lighting of the perimeter would be a minimum of 5 lux at a height of 1.5 metres above ground level. This would dissipate to under 1 lux at 35 metres from the fence. When required in security alerts, the light level will rise to 50 to 60 lux directly under the light standards, with an average of 20 lux across the access roads and sterile zone. The lighting plan incorporates the need to direct light at the facility, not towards neighbouring properties.

[183] Of the 21 hectares to be levelled, about 2 hectares would be covered by buildings, and 5 hectares by roads, paths and car-parking areas, leaving about 14 hectares of open landscaped environment through which the stream would meander.

[184] The extent of the earthworks has been minimised to retain the integrity of the site, and leave the western ridge predominantly intact, by creating a series of benches across the site. The total quantity of the earthworks involved is of the order of 450,000 cubic metres.

[185] The works also include formation of a two-lane access road from State Highway 12 to the compound, stormwater diversion and treatment works, and provision of water-supply and sewage lines connecting with the Kaikohe systems. The alignment for the access road generally sidles along the existing contour and

would involve cuts and fills of less than 2 metres vertical. A water storage tank with capacity for 600 cubic metres would be provided to cater for peak fluctuations and dry periods. Stormwater detention ponds would be provided to reduce suspended sediment and chemical levels, and attenuate peak runoff to the stream.

[186] The earthworks on the site would involve cuts of up to 8 metres, and filling in the range of 2 metres to 7 metres. Most of the fill material would be obtained from excavation of the secure compound and associated areas, and from excavation within the property, principally the western hill, the south-western slope of a eucalyptus grove, and the eastern hill. Material from earthworks that is not suitable for fill would be placed in areas of the site not required for the secure compound or buildings, including the eastern hill (where it would replace material cut for filling). The amount of material to be backfilled there could be of the order of 100,000 cubic metres. The deposit areas would be contoured, topsoiled and re-grassed.

[187] If concentrations of mercury are found in excavated materials, they would be diluted by mixing with uncontaminated material in the process of excavation and placement. However the natural sediments in the Ngawha Stream have more mercury than do the soils that are to be excavated.

[188] Some filling material may need to be imported from a borrow pit at the end of Quarry Road, Kaikohe, about 4 kilometres from the site, or from the Puketona Quarry, some 22 kilometres from the site.

[189] An erosion and sediment management plan would be prepared for Regional Council approval. Runoff of silt and sediment from the work would be controlled so as to avoid adverse impact on stream water. Measures for mitigation of dust are to be adopted. Batter slopes are to be designed to minimise risk of erosion. The completed works would include grassing and planting, and installation of stormwater drains and ponds.

[190] Areas of diffuse gas emissions have been observed at some locations in the existing streambed, but none within the area of the proposed works. If any geothermal gas seeps are discovered in the course of the earthworks or streamworks, the vents are to be protected with gravel so that they would still vent freely to the surface.

[191] To shorten the time required for consolidation of filling, wick drains are to be installed where filling is more than 1 metre deep. These are pervious plastic strips about 3 millimetres thick and 100 millimetres wide, wrapped in geotextile cloth, and would be inserted into holes drilled in the low-permeability soil layers. They would be placed at between 1 and 2 metre spacing, and would extend to hard ground. A layer of sand and gravel drainage blanket would be placed over the wick drainage area, which would be drained to discharge outside the filling.

[192] It is expected that there would be more than 20,000 wick drains, going to depths of between 5 and 20 metres. Once the entire fill load has been transferred to the soil structure, the drains would cease to flow. The total quantity of water that would be extracted by the wick drains would be about 30,000 or 40,000 cubic metres.

PHYSICAL EFFECTS

The Issue

[193] It was the case for the appellants that designation of the site would not be compatible with the provisions of Part II of the Act designed to protect community health and safety. Reliance was placed on sections 5(1) and (2) and section 7(f) of the Act.[27]

[194] In particular, it was contended that there is a low but appreciable and potentially serious risk of hydrothermal eruption and/or toxic gas discharges on or near the site. It was claimed that the low-lying location of the proposed building platform is at risk of accumulation of gas, the effect of which would almost certainly be disastrous on persons who are not free.

[195] The other opponents (the section 271A parties) also contended that there would be potential for geological and geothermal repercussions as a result of the proposed land disturbances (hydrothermal eruption, subsidence), and due to location of the prison in an active geothermal system.

Earthworks

[196] First, we consider the claims of physical effects caused by the proposed earthworks. We address the hazard of hydrothermal and seismic activity later.

The issue

[197] Counsel for the section 271A parties submitted that under section 104(1)(a) regard has to be had to the potential for geological and geothermal repercussions as a result of the proposed land disturbances, such as hydrothermal eruption and subsidence. He also submitted that in considering the requirement for designation of the site, by combination of section 174(4) and section 171(1) the Court is to have regard to any effects of the work on the environment that are set out in the notice of

[27] S 7(f) directs functionaries to have particular regard to "Maintenance and enhancement of the quality of the environment."

requirement under section 168(3)(c). They include the physical effects of the land disturbances to implement the designation.

Effects of works in triggering hydrothermal activity

[198] Mr R P Brand is an experienced consulting exploration geologist, who has had a personal interest in the geology of Northland. He gave the opinion that historically, hydrothermal eruptions have been triggered as a result of lake evacuation from the Ngawha Basin, and that similar events may occur as a result of the extensive earthworks that are proposed for stripping and removing soil and subsoil for the development. He gave the opinion that initiation of an eruption may be from a shallow gas pocket and close-by boiling water, which turns to steam as pressure is released.

[199] Mr Brand gave the opinion that a major eruption has potential for discharge of considerable quantities of ground-hugging carbon dioxide that would have lethal consequences for both prison inmates and staff and the local community; and could also necessitate a temporary shutdown of the geothermal power station. The witness cited occurrences of widespread asphyxiation by carbon dioxide recorded at Lake Nyos in Cameroon in 1986 (about 1700 deaths) and on the Dieng Plateau in Indonesia in 1979 (146 deaths). He observed that the Ngawha geothermal system is particularly noted for its high carbon dioxide content, and that the volume of carbon dioxide currently passing through the system is approximately 20 kilograms per second or 1728 tonnes per day.

[200] Mr Brand continued that since carbon dioxide is heavier than air, any lethal gas cloud would accumulate in topographic lows, like the valley at Ngawha, where on a windless day it would cover an area of 5 square kilometres to a depth of 2 metres, with disastrous effects on both the inmates of the prison facility and the local community of Ngawha.

[201] Mr R D Beetham is an engineering geologist with considerable experience in site investigations and assessment for large projects. He has had little experience with geothermal hazards, but he has had extensive experience with the evaluation of earthquake, landslide, and volcanic hazards.

beadle (dfg)

[202] Mr Beetham deposed that groundwater lowering of more than several metres, together with deeper excavations that are proposed at the site, may be the type of overburden unloading that could trigger new hydrothermal eruptions at the site.

[203] Dr M Isaac is an experienced geologist who is the author of a standard reference work on the geology of Northland, senior author of another, and sole author or co-author of at least seven other publications on Northland geology. Dr Isaac gave the opinion that excavation of unsuitable material would have a similar effect to draining the prehistoric lake bed, in that the lithostatic and hydrostatic pressure would be reduced, adding to the risk of hydrothermal eruption.

[204] Mr J V Lawless is a senior consulting geothermal scientist with extensive knowledge of the Ngawha geothermal system, and many other geothermal fields. He concluded that measures had been incorporated in the engineering design of the project to avoid the very low risk that geothermal activity might have adverse effects on the development, and to ensure that the even lower risks that the development might have on the geothermal resource and geothermal activity in the area are avoided or minimised.

[205] Mr Lawless testified that the proposed works would not affect geothermal manifestations on the site by burying them or diversion of water into them. Buffer zones have been placed around all known thermal manifestations and along the inferred fault lines, and sediment traps are to be placed downstream of significant earthworks. He regarded that as a very conservative approach. He also deposed that thermal manifestations on the site would not be indirectly affected by effects on the deep reservoir that feeds them, because the reservoir would not be affected in any way by the project.

[206] Mr Lawless gave his reasons for his opinion that the potential for the prison development to affect the geothermal system is infinitesimal. In short, the deepest of the wick drains would be 20 metres deep, but the impermeable cap rock overlying the geothermal reservoir is 500 metres thick and there is very little communication through it. The proposed works would be far shallower than the reservoir, they would not penetrate or encounter it, and they could not affect it. Further, because of the broadly distributed nature of the fluid recharge to the reservoir, and the positive pressures within it, there is no potential for surface works, diversion of surface waters, or temporary diversion of shallow groundwater by wick drains to indirectly affect the reservoir.

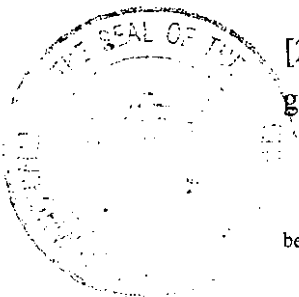
[207] Mr Lawless acknowledged that removal of overburden from above geothermal systems can in rare cases artificially induce hydrothermal eruptions. He considered it an extremely remote possibility in the case of the proposed works, because the site had been investigated to a sufficient depth to eliminate the possibility. He observed that no hydrothermal eruptions had been recorded during the period of mercury mining in the hottest area at Ngawha Springs to a depth at least as great as the cuts proposed for the development of the corrections facility.

[208] Mr Lawless gave the opinion that the gas release scenario given by Mr Brand is unrealistic and of very low probability, as it would require a very large hydrothermal eruption which has a very low risk of occurring.

[209] In cross-examination Mr Lawless confirmed that the removal of several hundred thousand cubic metres of soil would not be significant in relation to the reservoir 500 metres below the cap rock. He explained that it is the thickness, not the total quantity removed, that is important, and the proposal is to remove about 5 metres. An eruption would have to start at great depth, and removing the quantity of overburden proposed would have negligible effect on pressures at those great depths. On the basis of detailed investigation of the building site and to a lesser extent the eastern hill, he was confident that the proposed excavation could not induce a hydrothermal eruption on the building site.

[210] Dr M A Grant is an experienced geothermal reservoir engineer and resource analyst. He has professional experience of over 50 geothermal fields, and is senior author of the standard industry text on geothermal reservoir engineering. In the 1980s he had provided the reservoir engineering (hydrology) assessment of an exploration and drilling programme at Ngawha, published in two reports. He had also published two scientific papers on possible development of Ngawha and four papers on wells at Ngawha.

[211] Dr Grant deposed that a hydrothermal eruption could not be induced by excavation, as such an induced eruption would need boiling temperatures. He added that although it had been prudent initially to avoid (by buffer zones) features such as faults, fractures and existing vents, given the level of investigation that had occurred, there would be no need for a buffer zone around any new weaknesses.



[212] This witness added perspective to his evidence that the effect on the geothermal reservoir of excavating several hundred thousand tonnes of soil would be

trivial. He did that by testifying that over an area of 10 square kilometres (only a part of the geothermal field) the following load is applied or removed:

(a) 100,000 tonnes when 10 millimetres of rain falls, then drains:

(b) 2,000,000 tonnes when barometric pressure changes by 20 millibars:

(c) up to 1,000,000 tonnes twice daily due to earth tides.

[213] In cross-examination Mr Brand stated that as a local resident and a Far North District Council ratepayer he believed that having a prison at Ngawha would be a serious drain in the resources of the Far North. He accepted that he had a minor vested interest in not wishing the prison to continue.

[214] In re-examination Mr Brand was asked whether his scientific assessment had been affected at all by any personal interest, and he replied that it had not.

[215] Mr Brand stated that he is primarily a petroleum geologist and that his own involvement in geothermal matters involved hydrocarbons associated with geothermal emissions. He had looked at Ngawha with regard to its methane and ethane contents, and in geochemical surveys in Taranaki where there is a geothermal system. Apart from that he had not been involved in any studies about geothermal issues.

[216] In re-examination Mr Brand was asked whether his evidence was within or outside his area of expertise. The witness responded that it was largely within his field of expertise in as much as his profession was to look at all aspects of the Earth including down to 6 or 7 kilometres depth, whether or not it contains an extra heat component as a result of geothermal activity. Mr Brand was also asked to what extent his qualifications and studies involved chemical analysis. He responded that chemical analysis forms a large part of hydrocarbon exploration and oil field development.

[217] The differing evidence on this issue is between Mr Brand, Mr Beetham and Dr Isaac (all of whom consider that the proposed earthworks could trigger a hydrothermal eruption), and Mr Lawless and Dr Grant (both of whom rejected the possibility). There is no question that if a major hydrothermal eruption were to occur in the vicinity, there would be serious risk to people, including staff and inmates of the proposed prison. However the magnitude of the consequences of such an eruption, if it did occur, is a separate question from the possibility of it occurring.

[218] The question whether the proposed excavations could trigger a hydrothermal eruption is a question about the behaviour of geothermal systems. The expertise of Mr Lawless and Dr Grant is in geothermal systems and geothermal reservoirs. That is the science to which both of them have devoted their professional careers. The reasons stated by them for disallowing the possibility derive from their knowledge of Ngawha Geothermal System, and of geothermal systems generally.

[219] Mr Brand, Mr Beetham and Dr Isaac are all geologists by profession. However, despite the extensive knowledge of each of them of various aspects of geology (including especially in the case of Dr Isaac, and also Mr Brand, the geology of Northland), none of them has made the Ngawha geothermal system, or other geothermal systems, the particular focus of his professional work.

[220] On the question of the response of the Ngawha Geothermal System to the proposed excavations, we place more reliance on the opinions of the two experts who are more particularly qualified in respect of geothermal systems generally, and the Ngawha Geothermal System in particular, than we do on the opinions of the three experts in other aspects of geology who lack that specific expertise. In addition we find persuasive the reasons given by Mr Lawless and Dr Grant for their opinions. The reasons given by the others depend on features, such of substantial shallow gas pockets in the cap rock, for which there does not appear to be evidence.

[221] In summary, the claim that the proposed excavation and site works would or might trigger a hydrothermal eruption has not been made out and we do not accept it.

Mercury concentrations

[222] Being in a geothermal field, the soil of the site contains some minerals of geothermal origin, notably mercury, which may be disturbed by the proposed site works. Two main questions arose about effects on the environment of those works. The first was whether the presence of mercury in the surface soil following completion of the works would imperil the health and safety of inmates. The second was whether the works, including use of excavated material for filling, would result in leaching of minerals which would contaminate the waterways of the locality.

Mercury and other toxic minerals in soil

[223] Mr Brand gave the opinion that high mercury and boron levels in the soils and subsoils would require that all excavated material from the site would need sealed disposal.

[224] Mr Beetham deposed that the soils at the site are possibly contaminated by geothermal minerals other than mercury, naming stibnite and boron.

[225] Mr Lawless responded that analyses had been carried out for antimony (stibnite is antimony sulphide) and arsenic, and no levels of either had been found that approached the trigger levels of concern. The highest concentration of arsenic found was 15 milligrams per kilogram, and the highest concentration of antimony found was 1 milligram per kilogram.

[226] Dr Isaac observed that there is significant variation in the mercury values between adjacent sampling sites, and considered that there may be small areas within the area of the proposed development with higher mercury contents than the values determined to date. He considered this necessitated additional work and interpretation by a suitably qualified environmental geochemist who has relevant experience.

[227] Dr Isaac added that to ensure the findings are accepted by all parties, the study would have to be undertaken by experts who have no association with the Department of Corrections and paid for by an independent body. However counsel for the opponents stated that they placed no reliance on that.

[228] In cross-examination, Dr Isaac stated that he did not have qualifications in geochemistry, he did not have experience in geothermal or volcanic system hazards, nor did he have relevant experience in assessment of site contamination hazards such as those related to mercury, and it is outside his expertise to judge whether the work done by Mr Starke was adequate. He stated that the probability of harm to inmates of mercury ingestion is low, but unquantified.

[229] Mr Lawless reported raised concentrations of mercury in soils at depths of 1 to 5 metres on the site of the secure compound and associated areas where

earthworks and buildings are planned; and more widely in topsoil above lake sediments.

[230] Mr C Hickling, a consulting civil engineer, testified that it is not intended that any soil be removed from the site. He also deposed that where topsoil is under areas to be filled, it will generally be filled over, and where it needs removal, it will be temporarily stockpiled clear of earthworks, from which it would be removed for topsoiling. Excess topsoil would be disposed of in the northern disposal area, a process in which the double handling would dilute any higher mercury concentrations.

[231] Mr Hickling added that runoff from the temporary stockpile across grass land would intercept mercury particles, and that if monitoring shows elevated mercury concentrations peat bed or other filters are available.

[232] Mr Lawless deposed that in the unlikely event that soil is excavated which contains mercury at concentrations which could constitute a health hazard due to leaching, it would be placed in a secure fill area, well upstream of neighbouring properties. Topsoils and sub-soils would be kept separate. The fill area would be designed so that any leachate could be monitored so that if leaching raises the level in stream waters immediately downstream above the drinking water standard (2 ppb) the fill area would be sealed from above.

[233] Mr Lawless expressed himself to be satisfied that the measures to be put in place would avoid or mitigate the risks from mercury in the soil as a result of the work, referring to conditions of consent suggested by the Regional Council.

[234] In cross-examination Mr Lawless testified that in the areas of excavation there are wide differences between the mercury levels, some very low and some very high.

[235] Mr W Starke is a consulting geo-environmental and geotechnical engineer, with 12 years' experience of geo-environmental engineering issues related to contaminated land. He gave the opinion from his risk assessment that the site is safe from risk to human health from soil mercury.

[236] From his soil geochemistry investigations he had concluded that in respect of human health risk from mercury, using conservative assumptions, the topsoil at the

site can be safely re-used for a prison land-use, and the subsoil that would be left exposed at the site would also be safe for a prison land-use. In reaching that opinion, Mr Starke had derived extra-conservative maximum exposure values, taking into account the possibility of ingestion of soil by a rugby-playing inmate.

[237] Mr Starke had assumed that topsoil would be excavated, stockpiled and replaced, a process in which the topsoil would be mixed; but he had made no such assumption in respect of subsoil, which might be in a slope or bank, even though a person would not be exposed to it for any length of time. He had also had 32 leachate tests carried out in an acidic environment to simulate worst-case conditions which do not exist at the site.

[238] Mr Starke referred to Dr Isaac's comment that not enough work has been done to characterise and quantify the different materials to be removed. Mr Starke disagreed with that comment, relying on the work detailed in his own testimony to determine the health and safety issues of soil mercury.

[239] Responding to Dr Isaac's recommendation that the excavation and containment of sediment with mercury warranted consideration by an environmental geochemist with appropriate experience, Mr Starke described in detail the leachate tests that he had carried out.

[240] We find that Mr Starke possesses the professional expertise appropriate to give opinion evidence on this question, and appropriate to supervise the proposed works to ensure that exposed surfaces do not have concentrations of minerals that are unsafe for users of the land, including inmates playing football. We have no reason for doubting his professional objectivity and scientific integrity, and we do not accept any need for further study by an expert paid for by an independent body (even if one could be found).

[241] Accepting Mr Starke's opinion, and with the assurance of the proposed Condition for analysis for mercury content of samples taken monthly during earthworks, we find that both topsoil and subsoil can safely be re-used on site. The claimed adverse environmental effect in this respect has not been made out.

Mercury in groundwater and streams

[242] Mr Beetham deposed that excavations at the site would be mainly carried out below the present groundwater table, and groundwater inflows into excavations are likely to be large and would need to be disposed of. He continued that groundwater at the site could be contaminated with mercury and other geothermal minerals, and may be readily discharged into waterways without prior treatment.

[243] Mr Lawless responded that this is not consistent with what the investigations had shown. Groundwater from the investigation drill holes had been analysed for mercury, and none had shown any detectable mercury with a detection limit of 0.1 ppb, even when samples of soil from the same drillholes had shown elevated mercury contents.

[244] Mr McPherson was asked in cross-examination what would happen if groundwater encountered in excavation contained high concentrations of mercury. The witness responded that the groundwater would be the same as had always been flowing from the site, and would flow to the existing stream-bed or the new diversion channel.

[245] Mr Lawless testified that mercury and its naturally-occurring inorganic compounds are all relatively insoluble. He reported that leaching trials had been carried out on samples with elevated mercury concentrations, and that in most cases no mercury had been leached from the samples. In a few cases detectable mercury could be leached with acid solutions, but at very low concentrations. In the worst case, the leachate had only twice the mercury content (4 ppb) allowed by the New Zealand Drinking Water Standard,[28] so he considered that an acceptable level could be achieved by only two-fold dilution in the stream.

[246] Mr Lawless concluded that there is a very low probability of any leachate from the shifted soil significantly affecting the quality of the water in the streams, as the soil to be removed has a lower mercury content than that measured in existing natural sediments in the Ngawha Stream. (The highest measured concentration in the site soils was 248 mg/kg, but the sediments in the stream had been measured at up to 688 mg/kg mercury.)

[28] Citing a maximum acceptable value of 2 ppb according to the Standard.

[247] Finally, Mr Lawless reported that mercury content had been measured in samples of groundwater from deep geotechnical drillholes, and from surface water draining from the area of trial wick drains. The limit of detection was 0.1 ppb, and none had been found to contain detectable mercury. The witness was confident that installation of the wick drains, and the outflow of groundwater from the site due to excavation and drainage, would not add to the dissolved mercury content of the Ngawha Stream.

[248] Mr Lawless reported that levels of boron measured in groundwater from boreholes on the prison site were 0.1 to 5.7 milligrams per litre.

[249] Dr D S Sheppard is an experienced environmental geochemist. He has had professional experience on 7 New Zealand geothermal systems, and has made specific studies of mercury in the environment.

[250] Dr Sheppard gave the opinion that unless mercury is physically washed into the streams, mercury in the soils would not be released to waterways in the area during excavation or after subsequent reburial. His main reason for that opinion was that mercury is either attached to organic material (and the bond is very strong), or is in a sulphide compound, cinnabar, which is extremely insoluble, and it could only be released if exposed to strong acid. Organic matter in the subsoil would create a reducing environment, acid would not be produced, so mercury would not be leached by self-produced acid.

[251] Dr Sheppard also testified that for this project, high mercury topsoils are to be mixed with low-mercury topsoils, so the resulting mercury concentration levels would be much less than the concentrations which have been determined as safe. The witness also referred to the use of sediment traps with runoff over grassed areas. If monitoring of runoff and drainage water showed significant levels of mercury, it could be dealt with by techniques such as running through peat beds.

[252] Dr Sheppard also deposed that any soil, subsoil or sediment from sediment traps which had elevated concentrations of mercury could be safely disposed of in either of the fill areas and covered with sufficient clean fill to prevent physical erosion. The witness observed that the results of leaching tests described by Mr Starke showed that in practice the soils do not release significant concentrations of mercury.

[253] Mr Starke deposed that it is very unlikely that any leachate generated from the site soils would contain significant amounts of mercury, nor could they raise mercury concentrations in the stream to an unacceptable level.

[254] We prefer the opinions of Dr Sheppard, Mr Starke and Mr Lawless to that of Mr Beetham. Again there is the assurance of the proposed condition for analysis for mercury content of samples taken monthly during earthworks. In relation to the existing high concentration of mercury in the natural sediments of the Ngawha Stream, the claim that mercury and other geothermal minerals resulting from the proposed works would contaminate waterways was not made out.

Ecological effects

[255] Evidence about ecological effects of the project was given by Mr W B Shaw, a qualified and experienced consulting ecologist who had made an ecological survey of the site and had prepared a conservation management plan for the property.

[256] Mr Shaw deposed that some negative effects on the stream are likely during the construction phase, but the combination of stream bank rehabilitation and planting would lead to an overall improvement in water quality. He testified that indigenous fish would not be affected, and potential fish passage would not be compromised. He considered it very unlikely that potential light spill would have significant effect on kiwi. There is potential for positive ecological restoration works, which could include participation by inmates. It was Mr Shaw's conclusion that net positive ecological effects are likely.

[257] The opinions expressed by Mr Shaw were not challenged by any party by cross-examination or contradictory evidence. We accept them, and find accordingly.

Effects on water quality

[258] Effects of the project on the quality of surface waters had been studied in detail by a qualified consulting environmental scientist, Ms P M Scott. This witness gave reasons for her opinions that existing water quality and aquatic environments are poor, and that the potential effects of proposed works on water quality will be avoided, remedied or mitigated by implementation of the proposed discharge management and sediment control measures.

[259] Ms Scott's opinions were not challenged by any party by cross-examination or contradictory evidence. We accept them, and find accordingly.

Effects on indigenous freshwater fish

[260] Mr M J McGlynn, an experienced environmental consultant, had made a survey of streams on the Timperley property and elsewhere on the Ngawha Stream. He testified that the fisheries habitats on the property are of low value, probably due to the combined effects of geothermal inflows and effects from dairy farming.

[261] Mr McGlynn deposed that realignment of the stream would have a temporary impact on ecological processes, and that the proposed fencing and planting of the riparian margins would result in an overall improvement of habitat. He also testified that the design of culverts would allow for fish passage.

[262] Mr McGlynn's evidence was not challenged by any party by cross-examination or contradictory evidence. We accept it, and find accordingly.

Hazard from geothermal activity

[263] It was the case for the appellants that there is a low but appreciable and potentially serious risk of hydrothermal eruption and/or toxic gas discharges on or near the site; that the proposed building platform is low-lying where there is a risk of gas accumulation, the effect of which would almost certainly be disastrous on persons who are not free.

[264] Concerning the probability of such an occurrence as low, we were reminded that by section 3 of the Act the term 'effect' extends to "any potential effect of low probability which has a high potential impact". However the parties appearing under section 271A of the Act reminded us that the definition in section 3 is not applicable to the duty imposed by section 104(1)(a) to have regard to the actual or potential effects on the environment of allowing the activity. That duty is to have regard to effects that are actual and potential.[29]

[265] In reply to suggestions that the hazard is much greater at Rotorua and Taupo, counsel for the appellants reminded us that the inmates would not be voluntarily

[29] *Dye v Auckland Regional Council* [2001] NZRMA 513; 7 ELRNZ 209 (CA).

choosing to be there, and that they and prison staff would have limited rights of egress.

[266] Counsel for the section 271A parties submitted that under section 104(1)(a) regard has to be had to the potential for geological and geothermal repercussions as a result of the proposed land disturbances, such as hydrothermal eruption and subsidence. He also submitted that in considering the requirement for designation of the site, by a combination of section 174(4) and section 171(1) the Court is to have regard to any effects of the work on the environment that are set out in the notice of requirement under section 168(3)(c). They include the physical effects of the land disturbances necessary to implement the designation.

[267] Again we accept that if a major hydrothermal eruption occurred at or near the site, there would be serious risk to people, including staff and inmates of the proposed prison. We start by reviewing the evidence about the likelihood (hazard) of a hydrothermal eruption affecting the site. Next we consider the evidence of other geothermal activity affecting it. In that context we also address claims about the adequacy of buffer zones from which building is excluded. Then we address claims about hazard and risk of gas emissions.

Likelihood of hydrothermal eruption affecting the site

[268] Mr Beetham testified that the geothermal field is presently active and the craters are recent. He testified that there is a possibility that a new hydrothermal eruption could occur at or near the site, which could splatter the proposed prison site with mud, and could rapidly release a large quantity of ground-hugging gas (carbon dioxide and hydrogen sulphide) which would have potential to asphyxiate residents in the valley basin.

[269] In cross-examination Mr Beetham agreed that he had not himself carried out a risk assessment of a hydrothermal eruption at the site, and that he would defer to Mr Lawless's experience on the subject.

[270] Mr Beetham deposed that ejecta and mud from hydrothermal eruptions can travel up to several kilometres, citing an event at Waimangu in 1917 where mud had reputedly travelled 3,200 metres from the vent, and debris from a house destroyed by the blast had been transported 1600 metres.

[271] Mr Lawless commented that this event had not been a normal hydrothermal eruption but part of a period of major instability in the Waimangu-Rotomahana geothermal system, caused by an injection of magma during the 1886 eruption of Mt Tarawera. He deposed that it is not comparable with the situation at Ngawha.

[272] Dr Isaac agreed that there is a chance of further hydrothermal eruption, and that parts of the site with alignment of geothermal features are more susceptible than others. He considered the risks associated with this site are too great, and that it is simply not wise to site the facility in the Ngawha Geothermal Field.

[273] In cross-examination Dr Isaac stated that the hazard of a hydrothermal eruption is low. In re-examination he was asked whether the degree of hazard is so low that it could be discounted for practical purposes, and the witness responded that he could not agree with that, because he expected to see quantification, the craters dated, and careful consideration of the likely faulting pattern to revise the buffer zones.

[274] Mr Lawless deposed that all parts of the area overlying the Ngawha geothermal system have some degree of hydrothermal eruption risk (as is the case with any geothermal area world-wide) as a result of some profound geological disturbance to the system such as a major earthquake or an injection of fresh magma to the system. However it is far less likely to have the type of small, frequent hydrothermal eruptions that are observed at Rotorua for example, because the Ngawha system is well capped, the amount of geothermal liquid reaching the surface is less than 1% of that at some of the large systems in the Taupo Volcanic Zone, and except right on one of the conduits feeding the hottest springs, there is not a boiling point for depth temperature gradient.

[275] Mr Lawless gave the opinion that the frequency of future hazardous geological events can be predicted from the frequency of past events. He gave detailed reasoning for his opinion that the large hydrothermal eruptions at Ngawha occurred not less than about 5,000 years ago and not more than 15,000 years ago, and that it has since waned until the present. From that he concluded that the likelihood of a hydrothermal eruption somewhere in the Ngawha area is very much less than that of a hydrothermal eruption in Rotorua (where there have been several occurrences within the past year), at Taupo (where the last occurrence at Tauhara was within 30 years), at Wairakei (where there was an occurrence at Alum Lakes within the past year), a volcanic eruption at Auckland (last occurrence within 600

years), anywhere in the central volcanic region (last occurrence within 150 years), Taranaki (last occurrence probably within the last 500 years), or a severe earthquake in the lower North Island (two within the past 150 years), or the West Coast of the South Island (several within the past 100 years).

[276] On differential probability of hydrothermal eruption within the Ngawha area, Mr Lawless deposed that areas close to current or past thermal activity, including past hydrothermal eruptions, are at higher risk of future eruptions, and that the area of greatest risk is close to the Ngawha Springs themselves. However the witness gave the opinion that this risk is very remote, since the last eruption large enough to leave a detectable crater took place thousands of years ago.

[277] Mr Lawless observed that the site for the corrections facility is not close to current or past thermal activity or sites of previous hydrothermal eruptions, and gave the opinion that the likelihood of an eruption there is less than elsewhere over the Ngawha geothermal system. Although he could not eliminate the possibility of a hydrothermal eruption at Ngawha, it would be an occurrence of very low probability comparable with the occurrence of volcanic eruptions.

[278] Mr Lawless acknowledged that it is remotely conceivable, though improbable, that in future geothermal activity could shift and/or intensify to the point where it threatens damage to facilities close to the activity. However he observed that hydrothermal eruptions and changes in activity have been localised along the north-east trending fault zones. He gave the opinion that it is highly unlikely that the building site would be affected by natural changes in thermal activity, as it had been specifically sited away from both thermal features and the fault zones that are controlling their locations.

[279] Mr Lawless acknowledged the possibility of an antithetical fault set more or less at right angles to the fault set postulated by him. He observed that numerous geological studies had not found it necessary to postulate a north-west fault through the building site. He stated that the likelihood of an increase in permeability near the surface such as is caused by faults, during the life of the proposed facility, is extremely low, like the possibility of a seismic event in Northland.

[280] In cross-examination it was put to Mr Lawless that it is important to know the structure of the allochthon cap rock. The witness did not agree, and observed that what is important is to know how it behaves as a whole. He accepted that a

proper understanding of the degree of permeability of the cap rock, and the extent to which it is faulted is crucial. He testified that the cap rock acts as a whole as a seal, and that although the faults allow a very small amount of fluid through, they still contain the pressure.

[281] Mr Lawless also testified that quite a lot is known about the structure of the allochthon cap rock, particularly from the geologist who had logged the geothermal wells. The witness reported that it is mainly marine sediment mudstones, and that there is no continuous aquifer within it that is capable of conducting large quantities of geothermal fluid at depth.

[282] Mr Lawless also explained that greater knowledge of faults would not affect his estimate of the likelihood of a hydrothermal eruption. If it was established that there is a fault cutting across the building platform and if there was some evidence that the fault had been conducting geothermal fluid to the surface in the past (such as evidence of past and present thermal activity), then he would recommend that the facility be shifted away from the fault line. But he observed that there are many faults, and only a few are large and active enough to act as vents for the geothermal system.

[283] Mr Lawless did not agree with the opinion of Mr Brand that it would be possible by using electric logs in wells and bores to complete a database of detailed information about the cap rock: clay content, porosity, fluid and gas content. Mr Lawless deposed that those techniques, although standard in the petroleum industry, are not standard practice in the geothermal industry for two reasons. The first was that in the geothermal industry there is not the same large database of information for correlation with electric logs as there is in the petroleum industry. The second was that many of the downhole tools used in the petroleum industry do not work in geothermal wells because they are too hot, although he agreed that the temperature would not preclude using an electric log in the upper half of the cap rock. Mr Lawless also testified that his examination of the deep well logs prepared by DSIR showed that some of them had passed through fault zones within the allochthon.

[284] Dr Grant testified that electric logs are very problematic in geothermal conditions (except in sedimentary rocks), are not routinely used, and had so far not to his knowledge ever been used for the purpose of measuring fluid/gas saturations. He added that electric logs could not be used as a means of compiling information about

the cap rock, because all the wells are cased through the cap rock. In cross-examination he explained that it would be necessary to drill a well expressly for the purpose, and given that the cap rock is sedimentary, you would get something but he doubted it would be much use. He added that with the exception if a small number of geothermal fields in the United States and Mexico (which are in sandstone), the results of electric logs in geothermal fields have not been useful.

[285] Mr Lawless accepted that it is difficult to see how the current hydrothermal system could produce a large hydrothermal eruption. Past eruptions may have occurred in conditions of significantly hotter temperatures and higher pressures than at present, and it would have taken a major geological event to open a fracture over such a vertical interval. He believed the evidence led to the conclusion that future hydrothermal eruptions are improbable or certainly of very low frequency.

[286] Dr Grant agreed with Mr Lawless that there is negligible hazard of hydrothermal eruption. He considered the possibility of faults is largely irrelevant to this issue, explaining that as the subsurface temperatures show no boiling or near-boiling conditions, a hydrothermal eruption is not possible whatever structural weaknesses may or may not exist.

[287] Dr Grant deposed that the average vertical permeability of the caprock is measured directly from the known pressure differential and known flow of geothermal fluid, and that this known low permeability limits the ability of the cap rock to transmit pressure or sustain flow of gas.

[288] Dr Grant also testified that zones in the cap rock containing gas have limited capacity, due to limited permeability. He reported that such a pocket had been intersected by Well NG1, and had quickly been depleted. He also testified that the characteristics of the cap rock were already known, and that he had himself determined the overall permeability of the cap rock by calculating from the known pressure difference. In cross-examination he confirmed that this cap rock is extremely impermeable, and this is a distinctive feature of the Ngawha Geothermal Field.

[289] Dr Grant referred to suggestions that fractures could form, or gas pockets be released, causing an eruptive event. He gave the opinion that all these were highly improbable, requiring very special coincidences, and testified that the geologic history of the field confirmed that judgement. The witness deposed that the risk of

an eruption, hydrothermal or volcanic, at Ngawha is much less than volcanic eruption in Auckland or earthquake in Wellington.

[290] Of the suggestion that the field itself might heat up and so generate hazard of hydrothermal eruption, Dr Grant observed that this would require injection of cubic kilometres of magma, a major volcanic event, and is much less likely in Northland than, for example, in Auckland.

[291] In his testimony, Mr Beetham asserted that the evidence of Mr Lawless does not present an objective assessment of the potential for hydrothermal eruptions at the proposed site. In response to a question from the Court about that, Mr Beetham accepted that the understanding of a geothermal field is a subject on which expert opinions can differ without one of them being completely unprofessional. He based his charge of lack of objectivity on what he understood to be differences between the evidence given by Mr Lawless and contents of a scientific paper of which Mr Lawless had been a co-author.

[292] In re-examination, Mr Beetham agreed that since preparing his statement of evidence he had read Mr Lawless's supplementary statement explaining the opinions expressed in his evidence compared with what had been in the scientific paper of which he had been co-author. Mr Beetham stated his belief that investigation by trenching, detailed study and dating of the previous eruption has not been done to justify the opinion expressed by Mr Lawless in his evidence. Mr Beetham also agreed that he deferred to Mr Lawless's expertise in geothermal matters, and that he had no remaining criticism of him.

[293] Courts are entitled to expect that those who are called to give expert evidence are objective in forming their opinions. A charge that a professional person lacked objectivity in giving expert evidence to the Court is a serious matter. It implies that the formation of the witness's opinion is influenced by the outcome that suits the case of the party calling the witness.

[294] Mr Beetham's charge that Mr Lawless's evidence had lacked objectivity had not been put to Mr Lawless in cross-examination. Although it appeared from the answers given in re-examination that Mr Beetham did not wish to press his charge, it was not withdrawn as such.

[295] A difference between experts about the adequacy of evidence to support an opinion is not itself a ground for finding a lack of objectivity in the evidence of one of them. We have reviewed the matters initially relied on by Mr Beetham, and we do not find in them, or in any other evidence before the Court, any basis for finding that Mr Lawless's testimony lacked that objectivity which the Court is entitled to expect. We find that the evidence discloses no foundation for Mr Beetham's charge against Mr Lawless.

[296] On the main issue, there is no question that a hydrothermal eruption could occur anywhere in a geothermal field as a result of some profound geological disturbance to the system such as a major earthquake, or an injection of fresh magma. However we accept Mr Lawless's opinion that without such a major disturbance, an eruption is less likely at Ngawha than at Rotorua or in the Taupo Volcanic Zone, because of the relatively small amount of geothermal liquid reaching the surface at boiling point. We also accept his opinion that the prison site, being located away from thermal features, is less likely to be affected than parts of the field closer to them.

[297] We also accept Dr Grant's opinion that while the absence of boiling conditions at or near the surface remains, a hydrothermal eruption would not occur without such a profound disturbance. In the light of that, we do not accept that further investigation of the date of previous eruptions, and of the faulting pattern, is necessary to be able to discount the hazard.

[298] We return to the point that the inmates would not be voluntarily choosing to be in the Ngawha Geothermal Field, and that they and prison staff would have limited rights of egress. Even so, the probability of a major eruption that might affect the proposed prison is smaller than the risk accepted voluntarily by the residents of Ngawha Springs Village. It is far smaller than the risks accepted voluntarily by the residents of Auckland, Rotorua, Taupo, and Wellington.

[299] Of course prison inmates are not to be placed in any risk of harm from natural disasters greater than the population generally. However in our judgement the hazard of hydrothermal eruption affecting the subject site is so remote that it would be disproportionate to decide that it is unsuitable for a prison for that reason.

Effects of other geothermal activity on the prison

[300] Mr Beetham testified that there is evidence that volcanic risk or hazards from volcanic activity at Ngawha is low, probably lower than Auckland. In re-examination he stated that there could be more work done to investigate when geothermal eruptions occurred, whether eruption breccias were thrown out, and if so, how many and how far, and whether there was more than one such event. Without that he could not say what the risk of eruption is.

[301] Mr I D McPherson, a specialist consulting geotechnical engineer, testified that the area of the western hill from which material is to be excavated had been drilled to confirm that the proposed cuts would not encounter geothermal activity.

[302] The witness also deposed that as the geothermal reservoir is more than 500 m below the surface, and because of the low permeability of the upper soil layers, the risk of the wick drains encountering and releasing a large amount of geothermal hot fluid and gas is extremely low. He reported that in current field trials involving over 300 wick drains to a depth of 15 to 20 metres, no geothermal activity had been observed.

[303] Mr McPherson also presented a table of methods established to avoid or mitigate effect of wick drains on the geothermal aquifer. If hot water is encountered, with no outflow or gentle outflow for only a short time, sand drains are to be installed instead of wick drains. If there is a continuing or very significant outflow, the holes are to be sealed. (This evidence corrected an apparent misunderstanding by the Regional Council commissioners.)

[304] We accept Mr McPherson's opinions and find that appropriate precautions are available to ensure that the works would not disturb geothermal activity. On Mr Beetham's supposition about ejecta from a geothermal eruption, it is our judgement that this hazard is so remote that it can sensibly be disregarded.

Buffer zones

[305] Mr Brand gave the opinion that a lack of quality site investigatory evidence raises considerable doubt as to the validity of the proposed buffer zones. He described the buffer zones as having been adopted somewhat arbitrarily from the

presence of geothermal hazards, that is, inferred faults, gas emissions and hydrothermal eruption craters.

[306] Mr Brand referred to high mercury concentrations found close to the Ngawha Stream as a zone of weakness within the near-surface over considerable periods.

[307] Dr Isaac also referred to the areas of mercury mineralisation and areas of elevated groundwater temperatures. He suggested that if it was felt necessary to erect buffer zones around other geothermal features, then it may also be necessary to erect buffer zones about these.

[308] Mr Lawless regarded that suggestion about the high mercury areas as unconvincing, as the anomaly is seen only in the topsoil, not in the underlying subsoil. It is not necessarily a sign of any thermal activity on the site. The actual mercury contents measured, up to 248 milligrams per kilogram, were low compared with those found adjacent to the vigorous thermal features in the wider area. Mr Lawless remarked that mercury is known to be mobile in the near-surface environment, and stated that he suspected the accumulation of mercury was by organic matter in a poorly-drained area near the Ngawha Stream, rather than of deep-seated origin through gases flowing up a fault.

[309] Mr Brand referred to temperatures some 6 degrees Celsius above normal at 20 metres depth in two boreholes in and close to the site, which he described as indicating movement of hot hydrothermal fluids through fractures in the otherwise impervious lake sediments.

[310] Mr Lawless considered that those slightly elevated temperatures may represent some slight admixture of thermal fluid to the groundwater. He considered that they might equally well be moving laterally through the permeable peat horizons in the lake sediments. He gave the opinion that it is not convincing evidence of thermal activity on the site.

[311] Mr Brand asserted that creation of the buffer zones was "...at best hopeful and at the worst disingenuous". He recognised the east-north-east lineations, but considered just as likely an associated antithetic north-west trend paralleling the form of the Ngawha Basin. Mr Brand gave the opinion that the entire area merits 'buffer zone' status and that any building there should be of minimal impact, and should not entail long-term occupation of the area by people.

[312] Dr Isaac deposed that alignment of surface features is probably a reasonable indication of faults that penetrate both the deep basement and the cap rock; that recognition of faults at Ngawha is difficult; that the risk of fault rupture is small, the greater hazard may be upflow of geothermal fluids (including carbon dioxide). He agreed that the inference of three east-north-east to north-east trending fault patterns was reasonable, but it is possible that other faults as yet unidentified cross the area but have no surface expression. More work would be required to verify the inferred fault pattern, and to prove or disprove the presence of north-north-west to south-south-west structures.

[313] Mr Lawless testified that he had discarded the possibility of north-west faults crossing the site for want of evidence to support it. Even if such a fault could be inferred, he did not consider that sufficient reason to place a buffer zone there, because drilling had shown the area cold at depth, and there was no evidence of previous thermal activity on the site.

[314] Mr Lawless gave evidence about the buffer zones that he had recommended so as to identify parts of the property where buildings might be permitted without restriction, and parts where there is some risk. Detailed investigation had been made of the building site and to a lesser extent the eastern hill. Buffer zones had been constructed extending to 200 metres from active thermal features, and 100 metres from inactive but possible paths. A 100-metre buffer zone had been constructed around the cold gas seep near a low-lying creek intersection to the south of the site and to the west of the Waiapawa Pond, as it is not a thermal feature.

[315] Dr Grant gave the opinion that there would be no need for a buffer zone around any new weaknesses if such were found, given the level of investigation that has already occurred. Of Mr Brand's assertion that the entire area merits 'buffer zone' status, and Dr Isaac's opinion that it is simply not wise to site the facility in the Ngawha Geothermal Field, Dr Grant testified that he did not consider that a reasonable approach to a potential but remote geothermal hazard.

[316] We accept that the point of the buffer zones was to locate the buildings away from what were supposed to be the parts of the site at greater risk of hydrothermal eruption. Mr Lawless's buffer zones extend to somewhat arbitrary distances from the known features. No one suggested the use of different distances. We do not regard the buffer zones as inappropriate in that respect.

[317] Although it is possible that faults trending north-north-west to south-south-west may exist, there is no evidence for inferring that such faults exist. In the absence of such evidence, construction of buffer zones about such suppositious features is not justified. Moreover, we accept Dr Grant's opinion that, in the light of the better knowledge gained since the buffer zones were first delineated, further revision of the buffer zones is not justified.

Gas emissions

[318] We now address the opponents' claim about hazard of gas emissions, and risk to inmates and staff from them.

[319] Mr McPherson reported that gas emissions had been identified in the existing streambed at some locations, but none of those were in the area of proposed works. The site within the security perimeter generally slopes down towards the stream, so in calm conditions any gas would flow towards the stream, which has a culvert outlet available for passage of any gas. All buildings are at least 5 metres above the stream-bed, and floor levels have to be at least 150 millimetres above the surrounding ground if paved, or 225 millimetres if unpaved. All cell accommodation is to be mechanically ventilated.

[320] Mr Lawless testified about a detailed survey by his staff in August 2001 which had traversed the full length of the Ngawha Stream through the construction site and the section of the upper (eastern) tributary that would be affected by the diversion. The witness reported that his staff had not found any gas vents comparable to those known upstream or downstream of the prison site. They had found two areas where small intermittent gas bubbles were coming to the surface of the stream but with no detectable change in temperature of the stream, but he was not sure that they were of geothermal origin (being too small to readily sample and analyse). Even if they were of geothermal origin, they had rates of emission an order of magnitude less than the other geothermal vents known in the area. Mr Lawless considered that they had no practical significance in terms of constituting a hazard, but recommended that they be re-examined after the stream has been drained and cleared of vegetation.

[321] Mr Lawless acknowledged the possibility, under certain climatic conditions, that a low-level natural odour (hydrogen sulphide) would occur within the proposed facility. However because of the distance of the buildings from active vents, and the

buffer zone around natural thermal activity, he had no reason to suppose that the frequency of such events would be as common as occurs at Ngawha Springs Village.

[322] The witness referred to concerns that the proposed stream works might cover up and seal geothermal vents in the stream. He confirmed that no such vents are known to exist in the area to be affected. He added that even if there were, allowance would be made for permanent venting of the gas through a gravel pack and/or standpipe, in accordance with standard procedure in the geothermal energy industry in New Zealand. Covering the vents with gravel would have no adverse effect on the geothermal resource and would not pose any hazard to the facility, because the gas would be allowed to freely vent. It would neither increase the total quantity of gas emitted, nor seal off the vents so that sub-surface pressure could build up.

[323] Mr Lawless testified that the geothermal gases in the area had been established by numerous surveys and found to constitute 97 % carbon dioxide, 2 % methane, 0.5 % hydrogen sulphide, and 0.5 % nitrogen. There is no sulphur dioxide in the Ngawha gases.

[324] Mr Lawless deposed that the level of methane is far below any level of concern regarding toxicity or inflammability, and that it could not accumulate in depressions, being lighter than air. The occupational safety and health limit for carbon dioxide is about 240 times the World Health Organisation limit for hydrogen sulphide to avoid health effects (150 micrograms per cubic metre), so the latter is the controlling limit.

[325] Mr Lawless testified that measured hydrogen sulphide levels within the area are far below accepted limits of toxicity. However he accepted that both carbon dioxide and hydrogen sulphide are heavier than air, and could accumulate in low-lying areas.

[326] Mr Lawless gave the opinion that, given the lack of direct gas emission within the prison site, the probability of gas reaching toxic levels within the prison development is very low. In addition, positive ventilation of all sleeping areas of the prison would avoid the risk of harm. Further, hydrogen sulphide levels in the buildings are to be monitored, and an automatic detection and alarm system installed if necessary. The witness added that as the site is sloping there is no possibility of dangerous gas accumulations outdoors within the secure compound. It would be

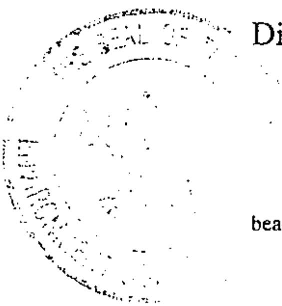
remotely possible for gases to accumulate at the stream, but he deposed that they would be vented through the culverts, even in time of flood.

[327] In cross-examination Mr Lawless reported that the elevated ground temperature found on the site of the secure compound was a temperature of 20 degrees, not detectable as warm to touch. He also deposed that the elevated mercury levels in that area are a factor of 100 less that the levels measured close to the active spring, and that he did not find that convincing evidence of thermal activity on the site. The witness reported that test pits had been dug on a 50-metre grid covering the entire area to be excavated, with a number of boreholes to greater depth, and a large number of wick drains. He gave the opinion that it is extremely unlikely that any further areas of gas emissions would be found.

[328] Asked in cross-examination about an incident in 1979 at Dieng, Indonesia, in which 142 people had been killed following a gas discharge, Mr Lawless deposed that it was not clear to him that the incident had been purely a hydrothermal eruption. He testified that very large gas eruptions can only occur where there are comparatively low temperatures for the gas to accumulate. The witness explained that this is not the case at Ngawha, and he eliminated any connection between the Dieng event and potential risk at Ngawha.

[329] Asked in cross-examination about an incident in 1986 at Lake Nyos, Cameroon, in which about 1700 people had been killed following a discharge of mainly carbon dioxide gas, Mr Lawless gave the opinion that the model postulated by the scientists who had studied the event did not apply to Ngawha because the cause of the discharge had been a pneumatic eruption, not a hydrothermal eruption, and the hydrogen sulphide concentration in the gas was extremely low.

[330] Dr Grant described Mr Brand's reference to the Lake Nyos event as specious, explaining that the event was neither geothermal nor hydrothermal. Dr Sheppard testified that neither the Dieng nor the Lake Nyos event was connected with geothermal systems, the one being from a volcanic vent, the other from degassing lake waters. He gave the opinion that comparing those occurrences with the situation at Ngawha was inappropriate as the diffusive flow of carbon dioxide over most of the area of the Ngawha geothermal system is quite different from the sudden and dramatic discharges of huge quantities of carbon dioxide such as occurred at Dieng and Lake Nyos.



[331] Mr Lawless agreed that if there was a large volume of permeable material within the allochthon, there would be a possibility of a cold gas eruption. Counsel for the opponents put to him that at the present state of scientific knowledge not enough is known about the allochthon to be sure that there are not dangerous accumulations of gas. The witness gave two reasons for not agreeing with that. The first was that the gas composition in all the cases quoted had differed from the gas at Ngawha. The second was that everything that is known about the geology of the allochthon is inconsistent with the presence of a large volume of material of high permeability. Gas pockets had been encountered in geothermal drilling, but had dissipated within hours. Small pockets have no real significance to risk assessment. The scenario is significantly different from the commonly accepted view of the allochthon and to the way in which the faults in it appear to operate.

[332] Mr Lawless observed that the lakes at Ngawha are not as large or as deep as Lake Nyos; and that accumulations of gas within the earth can be eliminated because there is no evidence of extensive high permeability zones sufficiently close to the surface of the cap rock, and the temperatures at a depth of about 1 kilometre are not as low.

[333] Mr Lawless was also asked in cross-examination about the gas vent at the creek confluence to the west of the Waiapawa Pond already mentioned. He testified that the south-eastern border of the secure perimeter would be about 150 metres from that vent, and the nearest building a little more.

[334] Mr Lawless also agreed that the site of the self-care units is one where there are multiple gas vents. He deposed that it is not intended to lower overburden pressure there by excavation, nor to install large areas of asphalt or concrete slabs in areas of present or past thermal activity within the secure compound or the self-care units.

[335] Dr Sheppard deposed that the risk of gas build-up in buildings is likely to be very low because in the unlikely event of high gas flows, the building design provides good ventilation at ground level and there would be no fully enclosed basement areas where gas could accumulate.

[336] Based on the evidence we find that the gas emission hazard is very remote, and the precautions taken to protect prison inmates and staff are sufficient. In our judgement this hazard was overstated by the opponents, and was not made out.

Seismic risk

[337] Seismic risk is within Mr Beetham's particular expertise, he being manager of the Earthquakes section of the Institute of Geological and Nuclear Sciences, and having professional experience of hazard assessment for earthquakes. In cross-examination he testified that seismic activity in Northland is the lowest in the country, and the recurrence interval for faulting is regarded as long, in terms of thousands of years.

[338] Acknowledging that Ngawha has a low level of seismicity, Mr Lawless reported that there is no evidence that the inferred faults are still active. He considered that leaving the 50-metre buffer zone around mapped faults would not only avoid areas of thermal activity, but would also avoid siting any structure on the faults, with the secondary benefit of avoiding any seismic hazard from fault movement.

[339] On the evidence we find no basis for rejecting the subject site for a prison on the ground of seismic risk.

Effects on Ngawha Springs

[340] The Regional Council commissioners accepted claims that there is a physical connection between the springs at Ngawha Springs and the site, and found that the proposal would sever that physical connection, referring in that context to the proposed wick drains, and to sealing gas emissions from the stream bed.

[341] By their amended appeal the WiHongis claimed that Ngawha Springs would be polluted and degraded by the presence of the prison. Dr C Barlow gave the opinion that it would be a major tragedy if the springs and mineral pools fell into disuse through geological and other types of interventions and disturbances from the proposed construction of a Government prison facility.

[342] In respect of those findings, Mr Lawless gave evidence on three matters. First he deposed that no gas vent is known to exist in the area of the stream proposed to be realigned. Secondly, he explained that if any is discovered, the proposal is not to seal it, but to protect it with gravel so that it would be able to vent freely. That would neither increase the total quantity of gas emitted, nor seal off the vent or allow sub-surface pressures to build up.

[343] Thirdly, in respect of the wick drains Mr Lawless confirmed that their purpose is not to seal off the flow of water: it is to temporarily accelerate the flow of groundwater so the process of settlement on the building site will occur more quickly. If geothermal activity is encountered in installing a wick drain, the drain would be withdrawn. Mr Lawless deposed that the channel would then fill with soft sediment and seal itself, and only if it did not would the drain be grouted. He gave the opinion that this would not "sever the physical connection between the springs and the application area" (as found by the commissioners) because there is no physical connection between Ngawha Springs and the site except in the sense that both are part of the surface of the Earth.

[344] The testimony of Mr McPherson about the function of the wick drains was consistent with that described by Mr Lawless.

[345] Dr Grant addressed the findings by the Regional Council commissioners that there is a real physical connection between the springs and the application site, and the wick drains would seal off emissions of waters, steam and cold gas. This witness confirmed that there is no real, physical connection between the springs and the application site. He gave the opinion that there would be no measurable effect on the geothermal reservoir, or its flow to Ngawha Springs, from the construction of the prison and the associated earthworks; and no measurable change would occur at Ngawha Springs as a consequence of the prison construction.

[346] Dr Grant added that the commissioners' finding had mistaken the purpose of the wick drains, confirming that those drains have nothing to do with controlling geothermal fluid, and would not produce a disturbance that could reach Ngawha Springs or the geothermal reservoir.

[347] Dr Grant also addressed Mr Brand's evidence that an eruption or uncontrolled blowout has the potential to deplete the underlying geothermal reservoir and temporarily shut down part of the geothermal system, including the springs, baths and power plant, and that this would mean temporary suspension of activities at Ngawha. Dr Grant gave the opinion that this evidence mistakes the size of the geothermal resource. He explained that an eruption or blowout would involve a flow of the order of a hundred tonnes an hour, and that such events typically last a few hours, or days at the most. Over that time such a flow would take perhaps a millionth of the fluid in the geothermal reservoir. He considered it a gross

exaggeration to describe that loss as depletion, and it would not cause any suspension.

[348] Mr Gordon Te Haara testified that the waters of Tuwhakino D2 have no effects on Ngawha Springs, because they flow away from them.

[349] On the evidence we find that there is no physical connection between the subject site and the springs at Ngawha Springs; that the wick drains would have no effect at all on those springs; that the proposed prison would not result in pollution or other degrading effect on the springs; and that no proposed activity in respect of gas seeps or vents would affect the springs either.

Effects on Lake Omapere

[350] Concern had been expressed at the primary hearing of the resource consent applications of possible inter-connections between the site and Lake Omapere. By their amended appeal the WiHongis claimed that Lake Omapere would be polluted and degraded by the presence of the prison.

[351] Mr Brand deposed that there is continuity in the higher heat content of the subsurface Waipapa basement which constitutes the geothermal reservoir of the Ngawha Geothermal System and which in turn gives rise to the many hot and cold water soda-rich springs evident at the surface between Ngawha and Omapere Lake. He gave the opinion that any major irreversible change in one part of the geothermal system is likely to affect the whole.

[352] In that respect, Mr Lawless gave the opinion that in physical terms there is no possibility that the development would affect Lake Omapere. He cited a number of reasons.

[353] First, Mr Lawless observed that the site and the lake are about 6 kilometres apart, and that Lake Omapere is about 20 metres higher in elevation than the majority of the prison site. The witness considered that this represents a considerable hydrological gradient, implying that the areas are not directly hydrologically connected. He added that this also means that any activities at Ngawha could not cause sediment to flow to Lake Omapere.

[354] Secondly, Mr Lawless testified that Lake Omapere drains to the west coast, by the Utakura River, while the Ngawha area drains to the east coast by the Waiaruhe River. They are in separate catchments.

[355] Mr Lawless deposed that the near-surface geology of the Ngawha-Kaikohe area is comprised of a large number of geologically diverse units, many of which are clay-rich and of low permeability. He gave the opinion that it is very unlikely that any laterally extensive sub-surface aquifers exist which could provide a sub-surface connection between Lake Omapere and Ngawha area.

[356] Dr Grant testified that the geothermal reservoir is at high pressure relative to ground surface. He explained that this means that recharge water does not derive from rainfall on the ground directly above, or from Lake Omapere: the reservoir is at such high pressure that water would flow upwards, not downwards.

[357] We accept the evidence of Mr Lawless and Dr Grant, and find that there is no physical connection between the site and Lake Omapere. We find that the proposed works will have no effect on that lake. The claims to the contrary were not made out, and we do not accept them.

Traffic effects

[358] Evidence on effects of the proposal on traffic conditions was given by a qualified and experienced consulting traffic engineer, Mr D S McCoy. He gave detailed reasons for the opinions that the expected level of traffic generated by the prison would have no more than minor effect on the existing road network; that the proposed prison access from State Highway 12, including local road widening and construction of a right turn bay, would ensure safe access to and from the site; and that access to adjoining properties would be improved without affecting through traffic.

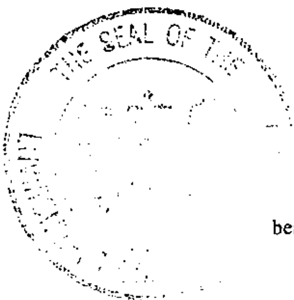
[359] Mr McCoy's opinions were not challenged by cross-examination or contradictory evidence. We accept them, and find accordingly.

Noise effects

[360] Mr X G N Oh, a consulting acoustics engineer, deposed that he had assessed the potential noise effects of the proposed prison. He gave detailed reasons for his

conclusions that the proposed site is well located with a minimum separation distance between the security fence and any existing dwelling of 500 metres; that there would be no significant noise effects from prison activity; and that the small increase in noise for road traffic is not likely to be noticed by residents near State Highway 12.

[361] Mr Oh's conclusions were not challenged by cross-examination or contradictory evidence. We accept them, and find accordingly.



MAORI CULTURAL AND TRADITIONAL ISSUES

[362] The amended appeal by the WiHongis contained grounds for their opposition to the designation of the prison site, including Maori traditional occupation of land in and about Ngawha, streams and springs, and cultural values in respect of it (citing section 6(e) of the Act), kaitiakitanga (section 7(a)), and Maori rights under the Treaty of Waitangi (section 8).

[363] Those grounds were stated more clearly and fully by counsel for the opponents in their address. First it was their case that the designation would fail to recognise the relationship of Nga Hapu o Ngawha and of Ngapuhi with their ancestral lands, their water, their sites and their taonga. Secondly, they contended that in making the requirement the Minister failed to have sufficient regard to the role of Nga Hapu o Ngawha and Ngapuhi generally as kaitiaki of the Ngawha geothermal resource (including its surface manifestations in the Ngawha landscape) as a taonga of Nga Hapu o Ngawha and the most precious resource of Ngapuhi. Thirdly, it was contended that the Minister's process of consultation with Maori was deeply and fatally flawed, both by failing to recognise and include all kaitiaki, and by lack of evidence that in the consultation process, the Minister had himself considered the Ngawha Geothermal Resource Report by the Waitangi Tribunal, and had himself considered the attitudes of those consulted who were opposed to the proposed prison.

[364] The commissioners appointed by the Northland Regional Council to hear and decide the resource consent applications had found that –

> To grant the applications would result in significant adverse effects on the ancestral lands, water, waahi tapu and other taonga of Ngati Rangi and Ngapuhi. It would also fail to enable them as tangata whenua, to provide for their social well-being.

[365] The commissioners expressly recorded that, but for the issues of Maori cultural importance, they would have granted the consents. In the proceedings in the Environment Court, it was the Regional Council's case that the consents should be refused for Maori cultural grounds.

[366] In that respect it was the Regional Council's case that the proposed works would fail to enable some (at least) of Ngawha Maori to provide for their cultural well-being, in that it demeans the mana and wairua of Ngawha and devalues their

traditions, including their traditional association with Takauere (a taniwha). It was also contended that the works fail to recognise and provide for the relationship of Ngawha Maori and their traditions with the land, water and other taonga of Ngawha.

[367] The Regional Council also invoked the Treaty principle of active protection, and claimed that this demands that consideration be given to reasonable alternatives, and as alternative works are not possible, alternative locations should be considered but, for the Minister's own reasons, those had not been pursued.

[368] The Regional Council joined issue over the consideration of tuakanatanga, claiming that regional councils cannot be expected to make findings on this in deciding resource consent applications.

[369] The Regional Council also questioned according a role as primary kaitiaki in respect of the site to a whanau derived from title having been vested in their tupuna by the Native Land Court. Counsel advanced criticism of individualisation of Maori land by that Court, and claimed that it was a trend that had been reversed by Parliament.[30]

[370] In his reply to the WiHongis' appeal, the Minister denied that the WiHongis have mana whenua status or are kaitiaki in respect of the D2 site, and claimed that proper weight had been given to Maori interests as required by sections 6(e) and 7(a). He also asserted that he had at all times taken into account the principles of the Treaty of Waitangi.

[371] The result then was that major issues in these proceedings were Maori traditional and cultural issues, and much evidence and feeling was devoted to them.

Differing Attitudes among Maori

[372] Maori were not of one accord over the traditional and cultural issues raised in the hearing. Opinions were confidently expressed on both sides.

[30] Mr Whata relied on remarks by the then Minister of Maori Affairs in Parliament in moving the introduction of the Bill which on enactment became Te Ture Whenua Maori Act/Maori Land Act 1993.

[373] Ms Mangu gave evidence of a survey of attitudes among residents of Ngawha Springs Village in late 1999 and stated her belief that they were almost unanimously opposed to the prison; and a subsequent survey in the Village in which 3 people had indicated support for the prison, 41 against, and 7 undecided. The results of a more general survey had been 22 in support, 245 opposed, and 15 undecided.

[374] Mr J S Torbet testified that he had made enquiries among residents of Ngawha Springs Village, from which he had found that the Friends and Community of Ngawha Incorporated did not represent the consensus view in Ngawha Springs Village, that many did not wish to align themselves with either view, and that the active opposition through the society or Mr WiHongi represent a small proportion of the households in the Ngawha Springs Village. In cross-examination he accepted that responses to Ms Mangu's survey showed 51 residents of Ngawha Springs Village had signified opposition to the prison.

[375] Bishop Waiohau (Ben) Te Haara deposed that from his discussions within Ngapuhi, there were many who support the proposal, many who were against it, and many who took a more neutral position.

[376] Mr J Hamilton responded to Ms Tipene's claims that the Department had been critical to destruction of whanau relationships in Ngati Rangi, and had worked to ruin them as a hapu. He observed that Ms Tipene offered no evidence to support that statement. He affirmed that the Department had at all times endeavoured to maintain relationships with the wider community, both Maori and pakeha, but especially Ngati Rangi, including those who opposed the building of the facility. Mr Hamilton also stated that the Department had actively supported initiatives such as a recent hui to try and ensure that those relationships were maintained. He added that that while not agreeing with the opponents' views, it had at all times respected them and provided opportunity for them to be discussed.

[377] Mr C Fraser in cross-examination accepted that the dissent in the local community was significant and substantial, but there is also a considerable measure of support.

[378] Mr Ron WiHongi gave his opinion that the prison should not proceed unless all of the hapu of Ngawha area agreed with it.

[379] Mr M Anania agreed that the proposal had caused a lot of disagreement within Ngati Rangi, and gave the opinion that the dissension had largely been from a small number of very vocal opponents who had always been very strongly opposed to the prison and to continuing any consultation with the Department. He considered that a unified view is unlikely given the many groups involved in Ngawha and in Ngapuhi.

[380] It is the Court's understanding that the Resource Management Act regime allows for differing points of view to be expressed and explained. That is true for the ultimate question whether a project is to be allowed to proceed or not. It is also true in respect of questions that arise in the course of deciding the ultimate issue, such as questions over whether a decision to grant consent recognises and provides for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, or whether particular regard is had to kaitiakitanga.

[381] It is also our understanding that the Resource Management Act does not provide for decisions on proposals to made according to whether more people support the proposal or more oppose it. Where Parliament has wanted decisions to be made on that kind of basis, it has provided for elections or polls.

[382] But the Resource Management Act provides for decisions to be made after consideration of the reasons for the attitudes of those who express them, of the evidence that is presented, and by reference to the purpose of the Act and the criteria for decision stated or implied in it, and in instruments made under it.[31] So we do not find it necessary to make any finding on the dispute whether more people of the Ngawha locality, or of any wider area, are opposed to the prison than support it.

[383] In the same way, we have no right to expect that all Maori will necessarily agree on questions such as the particular relationship of Maori, and their culture and traditions, with particular land, water, and so on. Parliament has not restricted its direction in that regard to Maori having a particular status. The role of decision-makers under the Resource Management Act is to identify carefully the question raised by the statutory provision, to hear the attitudes and evidence of the parties in the proceedings on that question, and then make its findings. The duty to do so cannot be avoided because Maori are not in agreement over it.

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[31] *Contact Energy v Waikato Regional Council* Environment Court Decision A004/00, paragraph 254; *Wanganui District Council* Environment Court Decision C211/00, paragraph 17.

[384] The Maori cultural and traditional questions in these proceedings were regarded as important by all the parties and witnesses, and also by the Court. Various people indicated having taken offence at attitudes and parts taken by others, or at events and actions prior to or during the course of the hearing.

[385] To the extent that evidence or questions in cross-examination were objectionable in law, all parties had opportunity to raise objections at the time, and if they wished, to have the Court rule on them. But it is not the Court's business to protect parties or witnesses from the possibility that the attitudes or testimony of another witness might upset them, nor to relieve witnesses of the duty to answer questions in cross-examination to which no objection in law was raised. When appropriate, the Court allowed opportunity for an apology to be expressed. There is no occasion for any such matters of personal sensitivity or offence to be recorded in more detail in this decision.

Tuakanatanga

The issue

[386] It was the case for the Minister that the tangata whenua witnesses called on his behalf rely on seniority (tuakanatanga), ability, acceptance and knowledge as a basis for their authority to speak on behalf of the Te Haara whanau and/or Ngati Rangi. Counsel for the Minister expressly stated that tuakanatanga is not relied on except to assist the Court in determining issues of authority and weight.

[387] The Regional Council submitted that it was not in a position to judge whether or not tuakanatanga is the tikanga of Ngapuhi, and to require regional councils (and ultimately the Environment Court) to make an assessment of who is and who is not tuakana would be a recipe for an administrative quagmire. The Regional Council acknowledged that Bishop Te Haara and the other kaumatua and the kuia who gave evidence for the Minister were senior persons of Ngati Rangi or Ngapuhi, whose views deserved careful consideration. Counsel submitted that tuakanatanga is not a matter to which the Regional Council should be obliged to give considerable weight.

[388] However the evidence for the Regional Council and for the opponents challenged the notion that tuakanatanga is part of the tikanga of Ngati Rangi and of Ngapuhi.

The evidence

[389] Bishop Te Haara's evidence contained these passages about tuakanatanga:

> 2. Within Ngati Rangi hapu, I am recognised as a Tuakana (senior elder) of the whanau most closely associated with the land known as Tuwhakino. The Tuakana is recognised as the senior person in relation to others of a whanau or hapu. The proposed prison site (D2) is part of Tuwhakino and is now owned by the Minister. At one time this particular block was owned by my grandfather. I am the senior kaitiaki representative in relation to the block and Tuwhakino generally.
>
> ...
>
> 8. Tikanga comprises various concepts and one of them is the Tuakana/Teina mentioned above. Literally this means elder and younger but in effect it is much more important. I will say it is the manner by which one exercises eldership towards whanau, hapu and iwi. The balance between teina and tuakana has to be based on trust and transparency.
>
> 9. In Maori cultural terms, the tuakana had rights above that of teina. It was offensive for a teina to publicly correct or disagree with the tuakana; in bygone days it could have resulted in banishment for the offender or some other form of discipline. Today discussions and ideally consensus is the preferred option.

[390] In his evidence in reply, the Bishop deposed that the tuakana role relates to seniority, qualifications and experience, and testified that his brother Gordon and he were the accepted senior tuakana for the Te Haara whanau. Of the opinions given by Dr Hohepa (called to give evidence on behalf of the Regional Council), Bishop Te Haara observed that Dr Hohepa is not from Ngati Rangi and is not of Ngawha, cannot speak as to Ngati Rangi tikanga, and he (the Bishop) did not agree with his (the Doctor's) interpretation of Ngapuhi tikanga, which were inconsistent with what he (the Bishop) knew about Ngapuhi tikanga.

[391] Bishop Te Haara explained that tuakana denotes seniority but does not mean that that person is right and everybody else is wrong. It is relevant to the decision making process and to the question of who has authority to speak on particular issues. He had never relied on his tuakana status in coming to opinions. He had consulted with others and reached a consensus view, but tuakanatanga was one of the bases on which he had mandate to speak in relation to the Tuwhakino block and on other matters relating to Ngati Rangi.

[392] Mr Gordon Te Haara, a kaumatua of Ngati Rangi, supported the evidence of the Bishop on the tuakana and teina practice in Ngati Rangi. He testified that the Bishop, as living heir of the last Ngati Rangi Chief Heta Te Haara, had agreed in consultation with the Te Haara whanau and many kaumatua and kuia of Ngati Rangi and others that the particular site is appropriate for the prison facility. The witness

deposed that this was the appropriate way for Ngati Rangi to make decisions, and that Ngati Rangi kaumatua had proceeded with traditional methods of decision-making which take into account the wider view.

[393] Mr Reuben Clarke, another kaumatua of Ngati Rangi, confirmed that tuakanatanga is important as to which has the right to be spokespeople on behalf of a whanau or a hapu, but that it does not prevent others expressing their own opinion.

[394] Mr M Anania testified that the site is within the rohe of Ngati Rangi, and that the decision-making processes within Ngati Rangi are based on the kawa of consensus decision-making within the context of the final say being with kaumatua and tuakana. He deposed that the principle of matua tuakana/teina is also applied to iwi and hapu levels, not just whanau.

[395] Mr Wallace WiHongi of Ngati Mahia, Te Uri o Hua and Ngati Hine, stated his belief in the right of tuakana to speak, in accordance with tradition, devolved to Ben Te Haara and his whanau, he being tuakana. The witness added that the clear purpose of this concept in modern times is to maintain the future survival and order of Maori, and in this instance Ngati Rangi. He deposed that women exercise tuakanatanga too. In cross-examination he agreed that Nga Hapu o Ngawha have a right to speak about the geothermal taonga of Ngawha.

[396] Mr H T Gardiner is an independent consultant on Maori cultural matters, and has considerable experience with the application of the provisions of Part II of the Resource Management Act 1991 that relate to those matters.

[397] Mr Gardiner testified that the Te Haara family, and in particular Bishop Te Haara and Mr Gordon Te Haara, being direct descendants of Heta Te Haara to whom the Tuwhakino block was awarded in 1873 by the Native Land Court, are tuakana of the land in question. He explained that in traditional Maori society the tuakana has the right to determine the broad direction and operational policies of the group over which he has authority, and the younger sibling or teina is to support those decisions. The witness deposed that in contemporary Maori society, the role of tuakana is still generally observed across and within most tribes, and is clearly important to Ngati Rangi.

[398] Mr Gardiner also deposed that the WiHongi whanau, who are affiliated to Te Uri o Hua hapu, have no authority by whakapapa to disturb the rights of the tuakana line to speak on the spiritual or cultural issues of the D2 site on the Tuwhakino block. The witness acknowledged that the Clarke whanau are Ngati Rangi, but deposed that they are teina to Bishop Te Haara and Mr Gordon Te Haara, who are their tuakana. So although they have a right to speak on the spiritual and cultural issues of the Tuwhakino block, the overriding authority for making decisions is vested in the tuakana line, and where there is dispute over spiritual matters relating to the land, the view of the tuakana should be accorded greatest weight.

[399] Mr Gardiner was the object of criticism similar to that made of Dr Hohepa, namely that he is not of Ngati Rangi.

[400] Ms Mangu testified that Mrs Anania and Mrs Agnes Clarke were both tuakana to Bishop Ben Te Haara, being his older sisters; and that Mr Gordon Te Haara's father was older than Agnes Te Haara. The witness was asked whether she accepted that Bishop Ben Te Haara was the accepted and acknowledged senior spokesperson for Ngati Rangi, and she responded:

> In some respects that would be correct.

[401] Dr P W Hohepa is the Maori Language Commissioner, and has extensive university teaching experience in anthropology, structural linguistics and Maori language culture and history. He is of Te Mahurehure, Ngapuhi ki Hokianga, with family links to other Ngapuhi groups. He was called as a witness by the Regional Council.

[402] Dr Hohepa gave the opinion that consensus decision-making is Ngapuhi tikanga, not tuakanatanga tane. The witness accepted that most families use some kind of pecking order of control in whanau, but deposed that this does not extend through adulthood, where the right of all to have a say was inalienable. He acknowledged that it can happen that seniormost males are selected as the recognised leaders of a whanau, hapu or iwi for certain functions, but stated that the Ngapuhi database did not support the existence of tuakanatanga or tuakanatanga tane as the formal and permanent Ngapuhi tikanga of long standing in its patterns of leadership. Ability was also a requirement.

[403] Dr Hohepa continued–

> I acknowledge that Bishop Waiohau Ben Te Haara is a leader and spokesperson of Ngati Rangi and he does not need a non-existent 'tikanga' of tuakanatanga to establish that. He is clearly a leader and spokesperson of Ngati Rangi through seniority and ability and choice and that is in accordance with Ngapuhitanga.

Significance of tuakanatanga

[404] We have reviewed the claims of the parties and the evidence concerning tuakanatanga. We have not been persuaded that this concept has significance for the Court's decision in these proceedings.

[405] First, the Court has to make findings on issues raised by the purpose of the Resource Management Act which is described in section 5, and the particular aspects of that purpose described in sections 6(e), 7(a) and 8. None of those sections indicates that persons of a particular status are to be preferred over others.

[406] Rather, on the issues raised by those provisions, findings have to be made on the evidence. Even where the evidence of one or more witnesses is in conflict with that of other witnesses, the Court has to make a finding. In doing so, it may give greater weight to the testimony of a witness of greater experience of the subject, or it may be persuaded by the evidence of another witness who may lack customary authority but whose testimony carries conviction for other reasons.

[407] In this case, Bishop Te Haara's claimed status as tuakanatanga was put forward only to assist the Court in determining issues of authority and weight. Neither the Minister, nor the Bishop himself, claimed that the Bishop's asserted status as tuakana meant that the Court could only accept their evidence, and could not accept conflicting evidence of others. All that was claimed was that his status was a factor, along with others, that should add weight to the testimony of those witnesses.

[408] In these proceedings the Court has no occasion to make any finding about who has the right to speak on behalf of any whanau, hapu or iwi, according to its tikanga. No opinion on that topic is to be inferred from anything in this decision.

[409] On factual issues where there is conflicting testimony, such as the existence of relationships of the kinds described in section 6(e), and the effects on kaitiakitanga, the Bishop's claimed status as tuakana is no more relevant than his (undoubted) status as Bishop. We imply no disrespect. Rather, his holding the position of Bishop is worthy of respect, but has no bearing on the acceptability of his testimony about the relationships and effects on which findings have to be made. Similarly, his status as tuakana, accepted by some but not by others, deserves respect, but it also has no bearing on the acceptability of his testimony on those questions. Instead, weight might be given to his testimony on account of the extent of his own knowledge and experience of the subject land, and the relationships of Maori and their culture and traditions, with that land, and the exercise of kaitiakitanga in respect of it.

[410] We forsake making any finding about the significance of tuakanatanga in Ngati Rangi and Ngapuhi, or whether Bishop Te Haara is indeed entitled to that status, simply because there is no need to decide those questions in order to make the findings required to determine these proceedings. We imply no disrespect to the Bishop, or to any who regard him as tuakana.

***Takauere*, a Taniwha**

The issue

[411] In their amended appeal in respect of the prison designation, the WiHongis claimed that the prison would interfere with their relationship with the taniwha Takauere, and that the proposed wick drains would be a gross intrusion upon the domain of Takauere.

[412] In their decision refusing the Minister's resource consent applications, the hearing commissioners appointed by the Regional Council made a finding that the whole area, including waterways, is within the domain of taniwha, especially Takauere, and that the proposed earth and stream works are a desecration.

[413] Counsel for the Regional Council submitted that the area has a special nature, manifested by the presence of the taniwha, Takauere, who is revered by many within Ngapuhi. He contended that the earthworks and stream works would adversely affect Takauere, in two ways. The first was a potential direct effect of interference with the pathways of the taniwha to the surface. The second was an indirect effect

on the mana, wairua, and mauri of Takauere by adverse effect on the mana, wairua, and mauri of the land and the stream.

[414] In response the Minister submitted that the taniwha has little if any modern-day significance to Ngati Rangi, that the works will not cause any interference with the taniwha, or with the belief in it, and are not generally considered by Maori to demean the taniwha or his domain.

The evidence

[415] Mr Ron WiHongi gave evidence about the taniwha *Takauere*, whom he described as the guardian of all the waters of Tai Tokerau. The witness testified that *Takauere* can take many forms, can manifest itself as a kauri log, or as a tuna (eel), and can appear in any waterway, above the ground and under it.

[416] In his testimony Mr Ron WiHongi said –

> In no way can Takauere be merely regarded as a mascot in the Pakeha manner.

[417] Mr Ron WiHongi spoke of the wick drains as altering the natural flow and disturbing the aquifer, the home of *Takauere*. He deposed that its mana is subsurface, and is released in the form of healing springs; and he also referred to poisonous gases, saying –

> Whenever the taniwha flatulates whatever is growing around the holes are killed off.
> No one knows with certainty the space, the time, the depth, or the place that Takauere will appear next. Sometimes all that is left is a rusty residue.

[418] In his testimony Dr Hohepa asked, rhetorically, –

> ... I am asking who is responsible for looking after the rights, health and welfare of our esoteric kaitiaki or minder, the taniwha Takauere, and the taonga called ngawha ... Rationalising him out of existence or as a figment of metaphysicalness as mentioned in several statements of evidence in no way guards the guardian. Suggesting that while taniwha have favourite residences on and under the surface and favoured routes, they can be polluted out of lakes or forced to go elsewhere by physically destroying his residence and routes is really a nasty and callous suggestion and in no way does that guard the guardian.

[419] In another passage of his testimony, Dr Hohepa said–

> ... all the vents and areas where ngawha flow are the tracks of Takauere. To deliberately decide to seal off areas of 'ngawha' leaks with fillers does hinder the traditional free movement of the taniwha, Takauere and does literally throw mud in his eyes.

[420] Ms E M Clarke also expressed concern about sealing gas emissions for the stream bed, and described them as *Takauere* "having mud thrown in his eye".

[421] Mr Lawless responded that there is no intention through the earthworks to seal up any existing geothermal vents or emissions and that there is no potential for the prison to affect the geothermal system.

[422] In cross-examination Dr Hohepa testified that there are myriad taniwha in North Auckland, and agreed that quite an extensive part of Tai Tokerau is under the influence of taniwha.

[423] Bishop Te Haara gave his understanding that the taniwha was a term used by tohunga to determine the appropriateness or inappropriateness of certain action that must be taken by a tribe whenever there was a disaster or mishap that was about to occur within the tribe. A taniwha was regarded as a manifestation of an unnatural occurrence. Taniwha were used to support the decision-making of a tohunga.

[424] In commenting on evidence by Dr Hohepa, the Bishop said that in the old days the taniwha was used to explain the inexplicable. If bad things occurred then it might be attributed to the taniwha being offended, so people considered it important not to offend the taniwha. Bishop Te Haara did not accept that the taniwha is guardian of the geothermal resource, asserting that it is the hapu of Ngawha who are the kaitaiki.

[425] The Bishop testified that his elders had never mentioned *Takauere* to him, and that it is not one of their taonga. He gave the opinion that the concept was being used by people for their own purposes. Bishop Te Haara gave the opinion that using the site for caring for those who have needs and helping to heal them would not offend the taniwha if there is such a manifestation in one's mind.

[426] In cross-examination, the Bishop agreed that a taniwha often symbolised how important a particular resource was.

[427] Mr Reuben Clarke gave the opinion that *Takauere* was being misused to fight a prison, and that this was offensive to him (Mr Clarke).

[428] Mrs Bella Tari denied that the wick drains, which would not even go into the hot waters, would have any effect on the taniwha. In cross-examination she stated that the drains would not interfere with the taniwha's existence.

[429] Mr Anania deposed that a taniwha is a mythical creature, and in the case of *Takauere*, is the guardian of Lake Omapere, and a mascot for the North Auckland rugby team. He gave the opinions that the prison would not bother *Takauere* at all, that the wick drains and stream works would not affect him, nor would he bother the inmates; and that the taniwha should not have been used as a basis of declining consent for the prison.

[430] Mr A Sarich testified that based on stories from his old people, within the myths and legends, *Takauere* did travel to Ngawha. This witness did not testify that the proposed works would impede the taniwha's travel.

[431] Mr Wallace WiHongi deposed that the taniwha was a specific size and it did not extend through the underground waterways from Omapere to Ngawha. It lives in its ana (lair) on the eastern side of Lake Omapere, and does travel, having been as far away as Awarua, 25 kilometres from Omapere. The opponents had portrayed the taniwha as all-extensive, but it is not.

[432] Mr Wallace WiHongi also deposed that the taniwha adapts to its environment so if the geothermal passages were affected for some reason by the prison, *Takauere* would adapt to this environment also. He would simply find other passageways and other places to reside. The prison and the taniwha can co-exist.

[433] In cross-examination Mr Wallace WiHongi affirmed that *Takauere* is a taonga, deserving of respect, that he has mana and wairua, and presides over the geothermal activities of the area, including Ngawha. He explained that this way:

> The taniwha Takauere is regarded as something of an elder statesman, his importance to us is in his association with important ancestors, he does not influence personally Lake Omapere nor the geothermal field of which Ngawha Springs is a part, he has absolutely no influence on the temperature, on the chemical content, on the curative properties of Ngawha Springs.
>
> ...the pathways that the taniwha uses through Ngawha Springs lead to Owhareiti, another important lake at Pakaraka where Takauere's master Nukutawhiti lies, Takauere uses the Ngawha pathway to gain access to

> Owhareiti where he visits his former master's resting place, it is not the only pathway to Owhareiti.

[434] Mr Gardiner deposed that taniwha are highly adaptable to their environment and gave his firm view that the temporary stream diversion would not affect the taniwha. He considered that the essential nature of the taniwha is internal to the minds of those who uphold its presence, and that physical changes are unlikely to deter that presence; that to the extent that he is real in the minds of some, the earthworks and the facility would not affect the residence or movement of the taniwha *Takauere*.

[435] Dr Hohepa described the taniwha *Takauere* as an esoteric minder or guardian, and a taonga of Ngapuhi. In cross-examination the witness explained that by esoteric he meant that it is a minder that is spiritual, metaphysical, non-tangible.

Findings in respect of the taniwha, **Takauere.**

[436] From the evidence that we have reviewed, we find that there are people who believe in the existence of the taniwha, *Takauere*, and respect what it stands for. It may be that there are some differences of detail among them about the nature, and the behaviour of *Takauere*. What is clear is that this taniwha is not a human person, nor a physical creature. To describe it as a mythical, spiritual, symbolic and metaphysical being may be incomplete or inaccurate, but will suffice for the present purpose.

[437] The Resource Management Act 1991, and the jurisdictions of decision-makers under it, are creations of the Parliament which has protected these rights–

> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.[32]

> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or private.[33]

[438] Consistent with those precepts, the Court respects the right of people who believe in the taniwha, *Takauere*.

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[32] New Zealand Bill of Rights Act 1990, s 13.
[33] Ibid, s 15.

[439] Even so, the Act and the Court are creations of the Parliament of a secular State. The enabling purpose of the Resource Management Act is for the well-being of people and communities, and does not extend to protecting the domains of taniwha, or other mythical, spiritual, symbolic or metaphysical beings. The definition of the term 'environment' in section 2(1) does not extend to such. Although sections 6(e), 7(a) and 8 are sometimes referred to as protecting Maori spiritual and cultural values, those sections have been carefully worded. Their meaning is to be ascertained from their text and in the light of the purpose of the Act.[34] Neither the statutory purpose, nor the texts of those provisions, indicates that those making decisions under the Act are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities.

[440] There are difficulties in expecting a judicial body to decide questions about mythical, spiritual, symbolic or metaphysical beings. First, although findings might be made about sincerity of belief, there is no reliable basis for deciding conflicting claims about the beings the subject of the belief. For example, if some say that proposed earthworks would impede passages of the taniwha to the surface, and others say that they would not, the question is not susceptible of proof, nor of a judicial finding based on the evidence. The flow in the stream will remain. None of the vents in the stream is to be blocked, the earthworks will not interfere with any known gas vents, and if any new vent is discovered, it is not intended to be blocked. The taniwha's pathways are not physical passages that can be measured, and (at least on some accounts) the dimensions of the taniwha vary from time to time.

[441] The second aspect of the difficulty is that judicial findings are based on what the deciders of fact are persuaded is more probably than not the fact. While respecting the freedoms of those who believe in *Takauere*, the members of the Court are not compelled to find that the taniwha exists, or that its pathways and other characteristics would be adversely affected, if we are not persuaded by the evidence of those facts.

[442] We have attentively listened to the evidence about *Takauere*, and have reviewed it all carefully. We fully accord respect to those who do believe in *Takauere*. Nothing in the decision is to be taken as belittling them, or the importance that their belief in *Takauere* has for them.

[34] Interpretation Act 1999, s 5.

[443] None of us has been persuaded for herself or himself that, to whatever extent *Takauere* may exist as a mythical, spiritual, symbolic or metaphysical being, it would be affected in pathways to the surface or in any way at all by the proposed prison, or any earthworks, streamworks, or other works or development for the prison.

[444] In respect of tuakanatanga, the Regional Council submitted that it was not in a position to judge whether or not tuakanatanga is the tikanga of Ngapuhi, and that to require regional councils to make an assessment of who is, and who is not, tuakana would be a recipe for an administrative quagmire. The Council urged that tuakanatanga is not a matter to which a regional council should be obliged to give considerable weight. Yet in regard to the taniwha, *Takauere*, the Regional Council urged that the Court place considerable weight on claims that the earthworks and streamworks would interfere with the pathways of the taniwha to the surface, and would indirectly affect *Takauere's* mana, wairua, and mauri.

[445] For ourselves, we do not accept that making findings about tuakanatanga is as problematic as making findings about a taniwha. The first may be difficult, but is capable of determination when it is necessary. Disputes about a taniwha are simply not justiciable.

[446] The outcome is that the Court does not accept that the claims about the taniwha, *Takauere*, should influence its decision in these proceedings.

Maori Relationship with other Ancestral Taonga

[447] We now address the issues arising from section 6(e), which we quote–

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[448] Because of the importance of this provision in the Act, and the importance placed on it in these proceedings by the Regional Council and the opponents, we consider separately the several relationships referred to.

Do Maori have a relationship with the site as ancestral land?

[449] Mr Hooker testified to Te Roroa's spiritual links with the Ngawha area, and gave the opinion that any signficant alteration to the landscape appearance of Ngawha, such as construction of the prison, could only destroy those spiritual links, and make impossible visits to ancestral land, once vast amounts of concrete occupy the site. The witness did not give any evidence of any such visits to the site in past.

[450] Bishop Te Haara, as a senior kaitiaki representative, and based on his knowledge of the tikanga of Ngati Rangi, deposed that use of the site for a prison facility would not offend their relationship with their ancestral land. He stated that he was satisfied that the Crown is protecting their ancestral lands.

[451] Mr Reuben Clarke, another kaumatua of Ngati Rangi, confirmed that there are no significant cultural issues pertinent to Tuwhakino D2, and that appropriate processes are in place with the Department of Corrections should any issues arise. Mr Anania deposed that the Minister had recognised and provided for Ngati Rangi's relationship to its ancestral land and the waters on and under that land, including protecting the two ponds which are taonga.

[452] Mr Gardiner gave the opinion that the prison would not affect the mauri or the wairua of the area. The mauri of existing physical features is unlikely to be affected by coming into contact with the physical elements of the prison; and the mauri of the water and land is likely to come under greater threat of degradation from farming pollutants and previous mining activities than from the proposed works and activities on the site. He gave the opinion that there are no significant spiritual or cultural issues affecting the Ngawha Stream of the Tuwhakino land.

[453] From the evidence we find that Te Roroa have a traditional relationship with land in the Ngawha locality in general as an area that was once occupied by their ancestors; and that there is no evidence of Maori having a traditional relationship with the site itself as ancestral land. There was no evidence of substance for any cultural expression of a relationship any Maori have with the site as ancestral land that would be precluded or impaired by the proposed prison or development works.

Do Maori have a relationship with water on the site?

[454] Mr Ron WiHongi deposed that the Ngawha stream through the site is tapu because a tributary drains from a swamp where there are bones of people killed in a battle in the early 1800s.

[455] Dr Hohepa deposed that the proposed diversion and realignment of the stream would adversely affect the mauri of the stream at the prison site. He also testified that use of the stream for the relief and medical needs of prisoners caused concern, in that there are water table and geothermal links between the prison site and the Ngawha Springs.

[456] Mrs Eileen Clarke deposed that it would be offensive to have this part of the taonga that is the geothermal aquifer modified and constrained as proposed, and that the offence would be compounded by use of the stream by male inmates (a number of whom would have been incarcerated for crimes of violence against women) for spiritual purification and cleansing.

[457] Bishop Te Haara, based on his knowledge of the tikanga of Ngati Rangi, deposed that use of the site for a prison facility would not offend their relationship with the waters of Tuwhakino. In evidence in reply he denied that interfering with the stream would cause offence to Ngati Rangi and denied that the stream is tapu. He stated that he was satisfied that the Crown is protecting their waters.

[458] In response to the concerns expressed by Dr Hohepa and Mrs Clarke about inmates bathing in the stream, the Bishop testified that the stream through the prison site is not geothermal, is not tapu, and the inmates would not be interacting with the geothermal resource.

[459] Mr Gordon Te Haara testified of the stream that runs through the proposed prison site that there are traces of sulphur towards the middle, that eeling takes place at the top and the bottom of the stream but not in the middle on the Tuwhakino D2 land because of the sulphur. He added that to his knowledge this was not a traditional area of food gathering for Ngati Rangi. The witness also deposed that the stream is not tapu, and has little fish life where it flows through Tuwhakino D2. As kaitiaki, Ngati Rangi had agreed to the proposed alteration to the stream and that it would not harm the mauri, nor cause any issue for the whanau living within the boundaries of Ngati Rangi.

[460] Mr Gordon Te Haara confirmed that the geothermal ponds, Waitotara and Waiapawa, are not affected by the proposed prison facilities and earthworks, as they are to be fenced off and reserved, the margins planted, and excised from the designation.

[461] Mr Gardiner refuted Mr Ron WiHongi's suggestion that the waters that flow through the D2 site are tapu because they come from the site of the Battle of Waiwhariki. Ngati Rangi kaumatua had not identified any reason for the water of the stream to be tapu. The prison would not impose any threat to the existing mauri attributable to the water, land and vegetation on the site. He had not been able to establish that any battle occurred in the adjacent Waiwhariki block. Even if there had, any tapu would have been restricted to the immediate area of the battle.

[462] We start by finding that Maori do have a cultural and traditional relationship with the Waiapawa and Waitotara Ponds. In compliance with the duty under section 6(e) the Minister has recognised and provided for that relationship by agreeing to fence them off for their protection, and to exclude them from the designation. They would not be affected by the works for which authority is sought by the Minister's resource consent applications.

[463] Next we refer to the concerns expressed by Mrs Clarke and Dr Hohepa about use of the stream by inmates. We have found no evidence at all of any intention that the stream be used in that way. It has been disclaimed by counsel for the Minister.

[464] We now refer to Mr WiHongi's claim that the Ngawha Stream through the site is tapu, a claim that is disputed by Bishop Te Haara, by Mr Gordon Te Haara, and by Mr Gardiner. Such a claim is easily made, and when it is disputed, evidence of conduct that is consistent with the claim can give weight to it. In this case there was no evidence of anyone having behaved in a way that would be consistent with the stretch of the Ngawha stream through the Timperley land being regarded as tapu. Mr Gordon Te Haara's unchallenged evidence that eeling takes place in parts of that stretch is not consistent with Mr WiHongi's claim.

[465] The site is part of the total district around Ngawha Springs, and Maori have a diffuse and general cultural and traditional relationship with all that ancestral land. However the relationship is focused on the surface manifestations of the geothermal field. The use of the Timperley land for a prison, and the works proposed to develop

the land for that purpose, would not affect the geothermal field or any surface manifestations of it in any significant way, nor would it impair that relationship.

[466] We find that in protecting the ponds, the Minister has made the recognition and provision required for the relationship of Maori and their culture and traditions with water on the site.

Do Maori have a relationship with sites on the land?

[467] There was evidence of historic battles in the district.

[468] In his testimony Mr Ron WiHongi acknowledged the battle of Waiwhariki that occurred at Puketona, and referred to an earlier battle of Waiwhariki that had taken place in Taiamai in the early 1800s, before muskets. He stated that a swamp of Waiwhariki is said to be filled with bones as a result of the battle, and a stream which comes from Waiwhariki Swamp joins the Ngawha Stream and continues on through the Timperley land that had been purchased by the Department of Corrections for a prison. In cross-examination the witness pointed on an aerial photograph to the site of the battle, being to the north-east of St Michael's Church and 2 kilometres towards Ohaeawai. Asked to point to the battle site on a map, he pointed to a position south of Ohaeawai, and west of Pakaraka.

[469] In cross-examination the witness agreed that the waahi tapu area of the battle site was to the east of Ngawha Springs Road, not on the Minister's land.

[470] Bishop Te Haara also testified that he knows the history of the site and that there have been no known battles on it. He deposed that the nearest battle site is Marunui (site of the Battle of Ohaeawai) where St Michael's Church now stands. He added that the battle of Waiwhariki occurred at Puketona, and not on the site now known as Waiwhariki.

[471] Mr Anania identified the site of the battle of Waiwhariki 16 kilometres from Tuwhakino "as the crow flies".

[472] In cross-examination Mr J Hamilton deposed to the belief that no specific event is recorded on the proposed prison site.

[473] Having reviewed the testimony we find that there is no evidence of any battle site on the Timperley land.

[474] It was not suggested that there is any other site on the land with which Maori have any cultural or traditional relationship.

Do Maori have a relationship with any waahi tapu on the site?

[475] Mr Hooker stated his belief that following the Battle of Pikoi in 1790 (as places where blood of people of mana had stained the soil and two people had been speared to death) there are two waahi tapu on Tuwhakino block. Asked in cross-examination where the soil had been stained with blood, the witness replied that he could not be specific, as his informant (now deceased) had merely referred to the stream and said the site was close to the golf course. Asked if he was able to say where the two people had been killed, he agreed that it was outside the Minister's site, but said that it was very close to it. He agreed that he could not go so far as to suggest that there are waahi tapu sites on the Minister's property, but there was a possibility.

[476] Bishop Te Haara testified that there are no waahi tapu sites on Tuwhakino D2. The land had been common ground as far back as he could remember. There are no particular rules about what you can and cannot do on this site. In evidence in reply the Bishop testified directly that it is not true that the site is subject to waahi tapu.

[477] The Bishop also deposed that the stream is not subject to awa tapu, and that claims that it is tapu because it comes from a battle site are not correct.

[478] In reply to evidence by Mr Hooker that two waahi tapu declared by Te Maunga are on the Tuwhakino block, the Bishop observed that Mr Hooker is not Ngati Rangi, is not one of the kaitiaki of Tuwhakino, and is not in a position to speak as to taonga on the land. The Bishop continued that there had never been any reference to the site being waahi tapu, that if it had been it would have been known to his tupuna Heta Te Haara, who would have passed that knowledge on and ensured that any waahi tapu were protected when he parted with title to the land. Heta Te Haara had protected a burial site by setting aside some 30 acres of land.

[479] Mr Gordon Te Haara testified that his kaumatua had never mentioned any waahi tapu on Tuwhakino D2, and that the particular site is free of waahi tapu. He described activities that had been carried out on the D2 land during his lifetime and deposed that for Ngati Rangi, those activities confirmed that no waahi tapu exists on that land.

[480] Mrs Bella Tari, who had grown up in the Ngawha area, also testified that the prison site is not waahi tapu. Mr Anania testified that he was not aware that there are any waahi tapu issues on this site.

[481] Mr Wallace WiHongi testified that he had been told by his elders which areas are waahi tapu, and that his elders had been very particular about land and its state. If a piece of land was tapu, he was informed as a young boy and instructed on how to conduct himself on the land. Tapu land was identified and known to all people of the hapu. The Tuwhakino block had never been mentioned, and the hapu had had free access to it without any need to participate in noa activities (cleansing or neutralising the tapu).

[482] Mr Gardiner confirmed that there are no waahi tapu sites on the D2 site of the Tuwhakino block of land.

[483] On the totality of the evidence we do not find that Maori have a cultural or traditional relationship with any waahi tapu on the prison site.

Do Maori have a relationship with any other taonga on the site?

[484] Bishop Te Haara deposed that the Ngawha geothermal resource, including surface manifestations, are a taonga. But he had never held the view that the taonga extends to all of the land above the field. He testified that the significant surface manifestations on the Tuwhakino land are to be protected by the Minister, and he was satisfied that they would not be harmed.

[485] The Bishop rejected Dr Hohepa's claim that the Ngawha Stream is a taonga, and expressed his disagreement with the Doctor's claim that realignment of the stream would adversely affect the mauri of the stream.

[486] We find that save in respect of the general diffuse relationship with the land of the Ngawha district as ancestral land, and with the geothermal field and system as a valued taonga, Maori have no cultural or traditional relationship with any taonga on the Timperley land other than with the Waiapawa and Waitotara Ponds. As mentioned already, the relationship with them has been recognised and provided for. Gas vents have been excluded from the sites of development works. The site of the proposed prison and works contains no other taonga, nor would the works interfere with the geothermal system in any way.

The Holistic Approach

[487] On one matter there was common ground: that traditional Maori viewed the environment holistically, in that elements of the environment are treated as inter-related.

[488] Dr Hohepa deposed that Ngapuhi viewed Ngawha, the geothermal reservoir and fluid and springs, as including all the areas of geothermal emissions, including Lake Omapere, and not an artificially and arbitrarily partitioned-off piece of land.

[489] The witness stated that in holistic terms the proposal is a physical interference with the ngawha taonga including Takauere. He described it as deeply offensive affecting both human and esoteric kaitiaki. In cross-examination he explained that the geothermal resource has to be seen as part of the landscape, the whole environment of Ngawha.

[490] Mr Hooker stated with respect to his belief that the prison would adversely affect the tapu, taonga and wairua of Ngawha, that he was referring to the total Ngawha area in a totally Maori holistic manner, not only the designated site, but the whole area, above the ground and below the ground. His view was that the wairua is one and indivisible.

[491] Ms Chanel Clarke stated her opposition to the facility because of the adverse impact it would have on the historical, cultural, visual and spiritual character of the district as a whole. Her testimony contained these passages explaining her attitude–

> 24. ... The current site cannot be seen in isolation from this early Maori history and later contact history. The historic value of the area as a whole needs to be taken into account and with such significant sites across the whole Bay of Islands area, including inland areas such as Ngawha, it is

imperative that these sites are kept free from large scale developments which significantly alter the natural features of the site as the construction of the corrections facility proposes to do.
25. The proposed site chosen for the regional corrections facility cannot be seen in isolation from the early history of the surrounding area and also the physical and cultural significance of the area as a geothermal resource.
...
31. ... The whole Ngawha resource cannot be divided into separate distinct parts (such as a reservoir, surface manifestation, fluid and gas) and is viewed as a complete whole.
...
40. ... While there is some difference of opinion as to the tapu nature of the stream, nevertheless it, like many of the other features discussed cannot be seen in isolation from Ngawha Springs and the general surrounds, which are rich in cultural and historical significance. Realigning this stream will alter the integrity of this culturally significant feature and indeed the integrity of the area as a whole.
41. The proposed site chosen for the regional corrections facility cannot be seen in isolation from the early history of the surrounding area and also the physical and cultural significance of the area as a geothermal resource.

[492] Mr R Thompson, the architect engaged by the Department to develop the cultural concept for the prison, also deposed that the Maori world is holistic. In relation to the concept for the prison, he testified that the site is to be developed for the benefit of all people and more specifically iwi of Tai Tokerau; tikanga is to include long-term sustainability, protection of resources, restoration of the ecological, spiritual, natural, historic issues and beautification; resources especially waterways are to be protected, and improvements made to protect and enhance the whenua. He referred to details in the design to respect nga maunga, Ngawha Stream, and symbolic weaving together of the elements of the facility as an integrated whole. The witness also described the principles for modifying the ground and creating and arranging spaces to inscribe the land with meaning so as to reinforce the cleansing and healing process.

[493] In cross-examination Bishop Te Haara agreed that traditionally Maori viewed the environment holistically. Similarly, in cross-examination in the context of not separating a lake from its bed, Mr Gardiner accepted that in traditional terms, when one views objects they are viewed in a holistic fashion; and that the pre-contact Maori attitude towards land and the life it carried was holistic.

[494] In his address in reply, counsel for the Minister reminded us (correctly) that the evidence does not show that the site of the proposed works is land that has any particular cultural or spiritual significance. The ponds have been excluded and protected, and the nearest identified battle site is beyond the Timperley property.

[495] We accept that evidence about the traditional Maori view of the environment. But that does not justify a finding, as urged by counsel for the Regional Council, that because the district in general was once occupied by ancestors of Maori, activity on a site within the district, such as the proposed prison and its development works, is to be seen as a desecration.

[496] We also accept Mr Thompson's testimony that the project has been deliberately designed to respond to the Maori holistic view of the environment, and his particular reference to respecting nga maunga, the Ngawha Stream, and to symbolic weaving together of the elements of the facility as an integrated whole, and creating and arranging spaces to inscribe the land with meaning. We find that the proposed works express the Maori holistic view of the environment, and recognise and do not demean any relationship that Maori have with the land.

[497] There are specific provisions in the Resource Management Act concerning Maori cultural and traditional values. Section 6(e) calls for recognition and provision for the relationships of Maori and their culture and traditions that are described. The Maori traditional 'holistic' view of the environment does not warrant treating those provisions as if they extended to diffuse relationships with whole districts, and with features many kilometres distant, as Lake Omapere is from the prison site.

Kaitiakitanga

The attitudes of the parties

[498] Another important duty is imposed on functionaries by section 7(a)–

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to–
> (a) Kaitiakitanga ...

[499] By their amended appeal, the WiHongis claimed to be holders of mana whenua in respect of an area of land that included the subject land D2, and to have the role of kaitiaki.

[500] In that respect, the Regional Council's hearing commissioners made the finding that –

> The overwhelming evidence presented to us is that Ngati Rangi are kaitiaki of the application site.[35]

[501] Despite that, in the Environment Court hearing, the Regional Council challenged that finding by its own hearing commissioners made on what they considered "overwhelming evidence". Instead the Regional Council criticised Ngati Rangi's claim to be kaitaiki of the land as being derived from the Te Haara whanau's succession from Heta Te Haara in whom the Tuwhakino Block had been vested by the Native Land Court. It was the Regional Council's case that, because the Native Land Court decision was an expression of individualisation of Maori land, the Court should not recognise kaitiakitanga based on that title.[36]

[502] The Regional Council acknowledged the ancestral connection of the Te Haara whanau, and accepted that Ngati Rangi should be accorded special recognition in the area. It argued that it is too restrictive to single out one hapu, that a more flexible approach is required, and submitted that nga hapu o Ngawha collectively act together as kaitiaki.

[503] The Regional Council submitted that kaitiakitanga is guardianship in accordance with customary values, which have as their starting point respect for the mana, wairua and mauri of the resources affected. It contended that this had not been "encompassed in the Minister's proposals when the identified kaitiaki have no idea whatsoever as to the scale of the works involved or their implications, in Maori terms, for the environment".[37] The Regional Council also argued that having regard to kaitiakitanga requires the Crown to satisfy the kaitiaki that there is no reasonable alternative to the scale of earthworks and streamworks involved.[38]

[504] The opponents adopted the submissions for the Regional Council in these respects.

[505] In his reply to the WiHongis' appeal, the Minister stated his understanding that the Te Haara family holds mana whenua status over the site D2, and did not accept that the WiHongis are kaitiaki or have mana whenua status in relation to the site D2.

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[35] Report and Decision, pg 11.
[36] Submissions of counsel for the Northland Regional Council, paragraphs 9.12 to 9.15.
[37] Ibid, paragraph 12.19.
[38] Ibid, paragraph 12.20.

The Regional Council's challenge to Native Land Court decision

[506] Before we review the main evidence on kaitiakitanga, we address the Regional Council's challenge to Ngati Rangi's claim to be kaitiaki based on the Regional Council's impugning of the Native Land Court 1873 decision vesting the Tuwhakino Block in Heta Te Haara.

[507] The objection taken by the Regional Council to the Native Land Court's decision was not directed at some aspect of the specific decision itself. Rather, the Regional Council takes exception to the decision as giving effect to a practice of individualisation of titles to Maori land. From questions asked by counsel for the Regional Council in cross-examination of Mr Gardiner, it appears that the Regional Council regards the individualisation of titles as a breach of the Treaty of Waitangi. The Court was not informed whether the Regional Council has adopted a consistent policy of questioning all decisions by the Native Land Court concerning land in its region that gave effect to that practice.

[508] As the Regional Council's criticism is not specific to the particular decision vesting the Tuwhakino Block in Heta Te Haara, but is a general objection to individualisation of titles to Maori land, it is an objection to the policy, a political position. The Regional Council is, of course, an elected body, and there are respects in which it might properly take part in campaigns on political issues. However the Regional Council's part in these proceedings is as the primary decision-maker on the Minister's resource consent applications under the Resource Management Act 1991. We are unsure that *in that capacity* taking part in political issues is within the Regional Council's functions under that Act.[39]

[509] In any event the functions of the Environment Court do not extend to taking sides on political issues, and it has no authority to make findings about "breaches" of the Treaty, or to entertain claims impugning decisions of the Native Land Court. We hold that these proceedings do not provide an appropriate forum for resolution of the issue about individualisation of titles to Maori land.

[510] We decline to form any opinion about that practice, or about whether the 1873 Native Land Court decision was in any way questionable for that or any other reason, or is questionable now. If the Regional Council wishes to have that decision set aside, it will have to find another forum.

[39] Resource Management Act 1991, s 30.

[516] Mr Anania testified that the Tuwhakino block is within the rohe of Ngati Rangi, and the decision on the use of the land according to Ngati Rangi tikanga rests primarily with the Te Haara whanau, and generally with Ngati Rangi. He gave the opinion that claims that the prison violates Maori culture are unfounded. He denied that Te Roroa iwi are kaitiaki of Tuwhakino.

[517] Mr Gardiner also testified that from his research although Ngati Rangi, Ngati Hine and Te Uri o Hua share the kaitiaki duties over the Ngawha Springs and the geothermal resource, Ngati Rangi are kaitiaki in respect of the D2 site on the Tuwhakino block of land and the waters that flow through and under that site. While members of Te Uri o Hua and Ngati Hine hapu have a general interest in the D2 area, it is Ngati Rangi which has primary responsibility for being kaitiaki.

[518] Mr Gardiner explained that kaitiaki status is based on possession or authority over land; and although the land was disposed of in the 19th century, the Te Haara whanau are specifically responsible kaitiaki for the Tuwhakino land and the D2 site and the waters which run through or under the site, and retain spiritual and cultural authority over the area. He testified that the Department of Corrections had listened to the kaitiaki and properly provided for their relationship with the Ngawha stream.

[519] In cross-examination Mr Gardiner accepted that a decision which affected the resources of an area which were important to several hapu would involve the rangatira of those hapu. That is consistent with the evidence of Dr Hohepa that what is under the land, the taonga called Ngawha, is the business of a multitude of tribal guardians because its use affects all others beyond the demarcated land holdings. He stated that there has to be wide decision-making and consensus.

[520] Mr Ron WiHongi deposed that prior to the grant of the Tuwhakino Block to Heta Te Haara there had been ten owners of the land, and that they were of Te Uri o Hua hapu o Ngapuhi, not Ngati Rangi, and were his tupuna. He claimed that this gave him the right as kaitiaki also.

[521] Mr Hooker deposed that at the time of the Battle of Pikoi, about 1790, kaitiakitanga to the Ngawha area was held jointly by Te Uri o Hua and Ngati Pou; and gave the opinion that Ngati Rangi could not have succeeded to any kaitiakitanga rights additional to those they had obtained from Ngati Pou. Mr Hooker stated that he could not support Mr Gardiner's view that Ngati Rangi had primary kaitiakitanga

over the Tuwhakino block, a view he considered had been influenced more by consideration of European concepts of surveys and land titles than Maori custom.

Findings on kaitiakitanga

[522] From our review of evidence it appears that there is general acceptance that Ngati Rangi (and particularly the Te Haara whanau) are kaitiaki of Tuwhakino Block, and indeed the primary kaitiaki in respect of it. We accept that Te Uri o Hua also have a claim to be kaitiaki in respect of a general area that includes the Tuwhakino block based on occupation prior to 1790. However there was no evidence that Te Uri o Hua had in recent decades, prior to the Minister's proposal, asserted their claim to kaitiakitanga in respect of the D2 land or exercised any kaitiakitanga in respect of it.

[523] Accordingly we find that Ngati Rangi (particularly the Te Haara whanau) are the primary kaitiaki in respect of the site (Tuwhakino D2). We also find that Te Uri o Hua have a claim to be kaitiaki in respect of a general area that includes that block too, although that claim depends on conditions more than two centuries ago, and not having been asserted or exercised in recent decades, is additional to Ngati Rangi's role as kaitiaki.

[524] We also find that Ngati Rangi, as the primary kaitiaki, are satisfied that the Minister's proposal has particular regard to kaitiakitanga. We do not accept the suggestion that their satisfaction on the point is questionable on the basis that they did not understand the scale of the proposed works. We find that the scale of the works is not as significant as the extent to which the project has been deliberately designed to respond to the cultural matters raised by the primary kaitiaki, that it excludes the geothermal ponds on the site that are valued taonga, and would not interfere with the geothermal system (in respect of which Ngati Rangi shares kaitiakitanga with other Ngawha iwi, and indeed all of Ngapuhi) in any way.

[525] The assertion by the WiHongis, of Te Uri o Hua, that the proposal does not have particular regard to kaitiakitanga appears to be based on the understanding that the works will affect the geothermal system. Earlier in this decision we reviewed the expert evidence on that question. We found that the works will not affect the geothermal system in any way at all.

[526] In the result we find that the proposed works and designation have particular regard to kaitiakitanga.

Principles of the Treaty of Waitangi

[527] The other important provision of Part II of the Act is section 8–

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[528] The principles of the Treaty that were raised in these proceedings were the principle of consultation, and the principle of active protection. We consider them in turn.

The Principle of Consultation

The Issue

The opponents' contentions

[529] The opponents submitted that the Minister had a duty to consult with iwi on the proposal, and that "the Minister's consultation process was deeply and fatally flawed", and "falls far short of meeting the minimum legal requirements, especially having regard to the importance of what is at stake for those involved".

[530] The first ground of that contention was that importance had been given in the consultation process to Ngati Rangi hapu and its spokesman, Bishop Ben Te Haara; that this had meant that "those outside the Ngati Rangi 'in-crowd' (the Bishop's close associates) had been left feeling unimportant and unrecognised", and "feeling, rightly or wrongly, that their views do not matter to the Minister nearly as much as the views of those from Ngati Rangi who have been saying what the Minister wants to hear"; and that this amounted to "a travesty of the whole notion of consultation," in that "instead of all kaitiaki being 'heard' (in the natural justice sense) on an equal footing, some appear to have been 'heard' more than others".

[531] The second ground of the contention was that the evidence called on behalf of the Minister did not establish whether the Waitangi Tribunal Report had been drawn to the attention of the Minister, nor whether the information gathered in the

community had been reported accurately back to the Minister; and it was claimed that some information "which may have been reported back to the Minister, was incorrect (ie the report which indicated that there was a high level of community acceptance at Ngawha in respect of the prison proposal)".

The attitudes of other parties

[532] The Regional Council's hearing commissioners made a finding that extensive consultation had been undertaken by the applicant with tangata whenua. The Regional Council's case in the Environment Court proceedings did not challenge the adequacy of the Minister's consultation with iwi.

[533] Counsel for the Minister pointed out that section 8 does not impose a duty to apply Treaty principles in every case. The duty is to have particular regard to the principles of the Treaty.

[534] The Minister accepted that he had a duty to consult relevant tangata whenua. It was his case that the Te Haara hapu were the relevant tangata whenua, the site being their ancestral land, and that there had been extensive and appropriate consultation with them, both in respect of the requirement for designation of the prison, and in respect of the resource consent applications. It was claimed that the consultation had extended to the WiHongis and their hapu, and to the Ngati Rangi Ahuwhenua Trust.

The Minister's media release

[535] On the opponents' contentions of inadequate consultation, additional submissions were presented later, following the issue on behalf of the Minister of a media release prior to the hearing of the proceedings having been completed.

[536] On 12 October 2001, a media statement and speech notes were issued from the office of the Minister and placed on his website. The media statement was a precis of a speech the Minister intended to make at the Annual General Meeting of the Far North Justices of the Peace Association. It contained the following sentence:

> ... let me say, I am pleased that a regional prison will be built at Ngawha. It will be a community asset and nothing like the 19th century Mt Eden Prison, which I intend to close.

[537] In a statement to the Court, the Minister said that he had not written those words, and although the press release had been authorised by him, he had not read those words until they had been faxed to him prior to the meeting. He added that after seeing the speech notes, he had removed the reference to the proposed prison being built at Ngawha, because he had been well aware that the proposal for Ngawha was not a matter for him to comment on. At the meeting he had not expressed confidence that the prison would proceed at Ngawha, nor had he made any statement about the suitability of the Ngawha site.

[538] The Minister acknowledged that the media release should have made clear that the decision as to whether the facility would proceed at the Ngawha site was one for the Court. He affirmed that he had not intended to influence the Court or to imply that opposing parties' cases would not be given careful and impartial consideration by the Court. The Minister apologised to the Court.

[539] Additional contentions on consultation were made on behalf of the opponents arising from the Minister's media release. We quote the relevant passage from counsel's additional submissions:

> 5. If, at the time he gave his speech, the Minister had been properly aware if the concerns of those in the Ngawha community who are opposed to the prison proposal, it is highly unlikely that he would have allowed material concerning that proposal to go out from his office without it being carefully vetted, let alone permitting it to be released to the media without his even looking at it at all. It is also highly unlikely that he would have presented a speech mentioning the proposed prison in even the limited form which he has admitted and as is described in the supporting documents which he himself has tendered to the Court.
>
> 6. As the Court well knows, all persons exercising functions and powers under the Act are required to give effect to the provisions of Part II. Of course, that must include a Minister acting as a decision-maker. But if a Minister has not properly been made aware of concerns in the local community, including in particular the concerns of Maori as *tangata whenua* and/or as *kaitiaki*, it is surely impossible for the Minister to carry out his function in accordance with the requirements of the Act.
>
> 7. The relevance of the admissions made by the Minister is that they provide support for the arguments advanced earlier concerning consultation and the protection of Maori interests. The Minister has admitted conduct which, with all due respect, may properly be described as both casual and careless. Indeed it may be said that the Minister's conduct was completely lacking in any sensitivity to the concerns of those in the local community for whom the prison proposal represents a desecration of a very special place.
>
> 8. An available inference is, therefore, that the Minister's officials had not bothered to acquaint him properly with the concerns of the local community. Alternatively, the Minister had not taken in such advice as he had been given. Either way, the situation represents an abject failure so far as the consultation process is concerned. How could any opponent of the prison proposal who had been 'consulted' by the Minister's officials be expected to believe that his or her message had 'got through' to the decision-making

level in circumstances where the responsible Minister admits releasing material to the media in which the outcome of the adjudicative process is treated as a forgone conclusion?

The Minister's response

[540] Counsel for the Minister submitted that this issue was an attempt to make a mountain out of a molehill. Counsel observed that that the issue arises from a few ill-chosen words, which were not the words of the Minister but of someone in his office who had prepared the press release on his behalf.

[541] Counsel announced that the Minister had been well aware that he should not make statements about the merits of the issues before the Court or the likely outcome of the proceedings, and had not done so. Counsel also pointed out there was no evidence that what the Minister actually said at the meeting of the Justices of the Peace was objectionable.

[542] Furthermore, counsel maintained that the adequacy of the consultation on the Minister's behalf is not to be measured by whether the Minister agrees with the issues raised, nor by what advice the Minister may have received as to the possible outcome of the proceedings.

[543] Counsel observed that the Minister's position is no different from that of a developer who has an application before the Court, in that a developer is entitled to tell the public what type of development is proposed (at least where that is not in issue before the Court). Counsel also observed that a statement released by the Minister's office in 2001 is not relevant to the adequacy of the site selection process that ended in 1999.

The Requirements of the Law

[544] There is no dispute that the Minister had a duty, in accordance with the Treaty principle of consultation, to consult with Maori over the proposal. The dispute is over the adequacy of the consultation that was made. Before reviewing the evidence on that question, we should establish what the requirements of the law are in respect of such consultation.

[545] Counsel for the opponents relied on an article by Paul Beverley *The Mechanisms for the Protection of Maori Interests Under Part II of the Resource*

Management Act 1991[41] which collects many of the materials available in this respect. Counsel for the Minister preferred to rely on the case law direct, and particularly the desirable features of consultation with Maori that were identified more recently by the Environment Court in *Land Air Water Association v Waikato Regional Council.*[42]

[546] Even the section of Mr Beverley's article that relates to consultation extends over 13 printed pages. We do not need to consider all the contents. Our present purpose is to consider two particular questions that arise in this case, namely: Who should be consulted? and What should be the content?

[547] Mr Beverley suggested dual purposes of consultation.[43] The first is recognition of the rights of Maori under the Treaty as a party who has a right to be consulted (the recognition limb). The second purpose is to obtain appropriate and accurate information on the potential effects on affected Maori (the information limb).

[548] For the present, we provisionally accept that description of the purposes of the consultation principle. From them we draw that the Maori who are to be consulted are those who hold rangatiratanga or kaitiakitanga in respect of the natural and physical resources affected by the proposal, and those who possess appropriate and accurate information on the potential effects of the proposal on affected Maori. In a particular case, the second class might extend beyond those who hold rangatiratanga or kaitiakitanga in respect of the resource affected.

[549] The dual purposes may also inform the content of the consultation. Those consulting need to impart enough about the proposal that those consulted are able to respond with appropriate and accurate information on the potential effects on affected Maori, so that it may be considered by the decision-maker. The consulting party, while entitled to have a working plan in mind, has to keep its mind open and be ready to change or even start afresh. However, although consultation involves meaningful discussion, it does not require agreement, and does not necessarily involve negotiation towards an agreement.[44] As counsel for the Minister submitted, the principle does not give a right to veto any proposal.[45]

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[41] (1998) 2 NZJEL 121.
[42] Environment Court Decision A110/01, paragraph [453].
[43] 2 NZJEL 121, 131.
[44] See *Wellington International Airport v Air New Zealand* [1993] NZLR 671, 675.
[45] *Watercare Services v Minhinnick* [1998] NZRMA 113 (CA).

[550] In its decision in the *Land Air Water* case, the Environment Court identified the information purpose. That does not mean that it rejected the purpose identified by Mr Beverley as the recognition purpose. Rather, it does not appear that any party submitted that this was a possible purpose of consultation as a principle of the Treaty.

[551] From our review of the Minister's submissions, and the list of desirable features identified in the *Land Air Water Association* decision, they are not inconsistent with the propositions in the previous two paragraphs. Accordingly we adopt them for the purpose of this decision.

The Evidence

[552] We now review the evidence on the consultation carried out on the Minister's behalf.

Witnesses for the Minister

[553] Mr J Hamilton, the Project Director responsible for the proposed Northland regional corrections facility, testified that the Crown's obligations to its Treaty partner had always been a significant part of the project. He deposed that in the spirit of partnership the Department had deliberately sought out and entered into discussions with the Ngati Rangi hapu, the kaitiaki of the site, and had built strong relationships with the hapu development committee and with key Ngati Rangi leaders.

[554] Mr Hamilton summarised numerous meetings he had had with the committee and individual meetings with its members; and reported having attended a two-day hui sponsored by Ngati Rangi at Ngawha Marae. The witness also reported that senior representatives of Ngati Rangi and supporters from wider Tai Tokerau had visited Wellington and met with the Minister, the Associate Minister, the Minister of Maori Affairs, and other Members of Parliament. Meetings had also been held with senior staff of the Department of Corrections.

[555] Mr Hamilton testified that many of Ngati Rangi's concerns about aspects of the project had been addressed at an early stage; and that this had ensured that their status as kaitiaki of the land had been clearly recognised. He reported that the Department had entered into a formal memorandum of partnership with Ngati Rangi

as kaitiaki. This instrument provides a framework by which issues can be resolved. The memorandum also provides procedures relating to the discovery of wahi tapu, koiwi or taonga on the site.

[556] Mr Hamilton confirmed that although the Crown's relationship with Ngati Rangi would continue to be special, it would not exclude other Maori and the wider community from becoming involved in the project; and that the Department had been actively pursuing development of relationships with other Ngawha hapu and with wider Ngapuhi. The Department had provided extensive information about the proposed facility and earthworks, listened to concerns, and actively sought feedback from Maori and from the public at large. Mr Hamilton had taken part in meetings with Mr Ron WiHongi and members of his whanau and with members of Parahirahi C1 Trust; with the community liaison group (three occasions); with the Ngawha Marae Committee; with Hone Harawira and Cyril Chapman to discuss effective consultation with the wider Tai Tokerau; and with owners of adjacent properties (two occasions). He had also attended a meeting of the Community Board, a community meeting at Ngawha Springs Hall; and a public meeting at Kaikohe to hear views primarily of those opposed to the facility. He had attended a briefing in Whangarei of the Northland Urban-Rural Mission to explain the Minister's objectives and listen to concerns of members. There had also been ongoing liaison with other Government agencies, including Te Puni Kokiri.

[557] It was put to Mr Hamilton in cross-examination that consultation should have taken place with all the hapu who claimed to be kaitaiki of the geothermal resource. The witness responded that he did not see that given that there was to be no interference with the resource and no impact on the resource, but the Department had still endeavoured to have as wide consultation as possible.

[558] Mr Hamilton stated that the relationship with Ngati Rangi had not been exclusive of other hapu, and that the Department had worked very closely with Ngati Rangi to include other hapu and consult with them. He continued that the representatives of Ngati Rangi did actually ensure that there was consultation with the other hapu, and that he had been in meetings with Ron WiHongi and others. We quote from the record of the cross-examination of the witness on this point by Mr Illingworth:[46]

[46] Transcript of evidence page 12, line 26.

> ... why the great emphasis on one only of a group of hapu all of whom have an equal interest in this project? Ngati Rangi have the status of guardian over the land on which the facility is being built, that is our clear understanding and that has always been my understanding and I don't think that that has been challenged, and because the nature of the work will impact upon that land and also because of the importance of developing relationships with the local community which I referred to in my evidence then we obviously had had a significant focus on our relationship with Ngati Rangi. However as I said before even though there is no evidence to suggest that we will have any impact upon the geothermal resource or the springs at Ngawha, we have endeavoured to consult with all parties, but I agree that there has been a greater emphasis on the relationship with Ngati Rangi but that that is not at the exclusion of others, and in fact they have been able to communicate far more effectively with other hapu than on occasion with respect of the Department.
>
> So can we have it clear do you accept that all of the hapu referred to in the Waitangi report have a proper basis upon which to be heard and consulted in relation to this project? No, not in respect of the geothermal resources, we are not impacting upon that resource, however we do obviously to build a relationship that has driven our consultation with others.
>
> I suggest to you that is an extraordinarily blinkered approach to take in this matter? The issue is not whether or not consulted because we definitely have consulted, what you have asked me is whether the primary driver for that consultation was an acknowledgement of the geothermal issues and what I am saying is that no, that has not been the primary driver for the consultation that has gone on.

[559] Mr C Fraser is an official of the Department of Corrections who had personally been involved in consultation on the project to ensure that the Northland community were informed of the nature of the proposal, and that the Department was informed of community concerns so they could be considered and addressed as far as practicable. In his testimony he described ten phases of the consultation process (from a broad regional focus to a site-specific focus), describing the focus of each phase, the information provided by the Department, the methods used and the main issues raised. He produced details of numerous key meetings and summaries of the main issues.

[560] In the first phase, meetings had included representatives of Te Rarawa and other Northland iwi.

[561] In the second phase, a bilingual brochure was issued which addressed Maori cultural issues. Seventeen key meetings with iwi included Te Tai Tokerau Trust Board, Te Runanga of Nga Puhi, and a meeting with Nga Puhi at Awataha Marae.

[562] Specifically for consultation with tangata whenua, a Mr G Martin had been appointed as community liaison advisor to advise on cultural matters, provide local contact, maintain informal dialogue with Maori and facilitate the interface between Maori and the Department.

[563] The third stage included 22 meetings, mostly with Maori groups, including a meeting at Kaikohe with the late Mr Graham Rankin, a respected senior kaumatua of Ngapuhi.

[564] Mr Fraser reported that at the site-selection phase, iwi had expressed in numerous meetings the prime importance to them of accessibility of the site and a central location near an urban service centre. The site-selection criteria were changed as a result of those and other comments.

[565] In phase 4 the amended guidelines were published and the public were invited to register possible sites. Among the 74 put forward was the Ngawha site D1 submitted on behalf of Ngatirangi Ahuwhenua Trust. This phase also included a tour of the Hawkes Bay regional prison by representatives of each hapu of Te Tai Tokerau.

[566] Phase 5 focused on publication of preliminary investigations and evaluation of four short-listed sites, and inviting comments. There were a number of public meetings as well as numerous small group and individual discussions in the communities associated with the four sites. Face-to-face consultation focused on neighbouring communities, hapu, and adjoining property-owners.

[567] In this phase there were meetings with neighbours of the Ngawha site, with Mr Ron WiHongi and Ms R Tipene, and with Te Runanga a Iwi o Ngapuhi. At the latter, opposition was expressed to any prison in Ngapuhi Whaanui, the majority preferring "an institution that will give Ngapuhi Whaanui total autonomy and control in the management, delivery, and rehabilitation of our people". In cross-examination Mr Fraser gave his perception that this dissent was more of a social nature concerned with the prison rather than with environmental effects.

[568] Phase 6 had started with a mail-out of 700 information packs concerning the preferred Ngawha site. They were sent (among others) to the people of Ngawha, of Ngawha Springs, and others in the vicinity of the site. A brochure was delivered to all houses in Kaikohe.

[569] Mr Fraser testified that the Department had identified Ngati Rangi as the relevant kaitiaki and in respect of the D2 site, particularly the Te Haara whanau. So in respect of earthworks, streamworks and architectural design consultation had primarily been with Ngati Rangi (including the Te Haaras) since the works would affect their ancestral lands and waters. In respect of operation of the facility, there was an effort to consult with other hapu and wider Ngapuhi. He reported that some of those who were strongly opposed to the facility had been unwilling to engage in discussions.

[570] The ensuing consultation focused on the Kaikohe and Ngawha areas and particularly on iwi and adjoining property owners. Key meetings included Ngatirangi Ahuwhenua Trust, Ms Beadle and her sister, and a public meeting at Ngawha Springs.

[571] Following notification of the Minister's requirement, Phase 7 of the consultation process was directed to understanding the concerns of stakeholders and ensuring that they understood the project and how it was likely to affect them. Individual meetings were held on request to discuss concerns and answer questions about the project. A meeting with submitters was held at which sixteen submitters and 8 others attended.

[572] Phase 8 of the consultation process followed the requirement hearing. Specialist Maori design consultants were engaged to help ensure a traditional cultural perspective in the plans. The architect Mr Rewi Thompson is of Maori descent, and his professional practice emphasises design that incorporates Maori cultural elements. He deposed to having been involved in many consultative meetings (including with people from Ngati Rangi and Ngati Hine).

[573] Concept plans were presented at meetings of the wider Ngati Rangi hapu, and a hui involving Ngati Rangi, Te Runanga o Ngapuhi, Te Uri-o-Hua, Ngati Whatua, Hiku o Te Ika and Te Kauhanganui Trust at which some time was spent discussing

design issues. Design issues were also discussed at two meetings with Te Tai Tokerau interim working party.

[574] Numerous further meetings were held over the resource consent applications to the Regional Council and the assessment of environmental effects of implementing those consents. Thirteen Maori groups were identified by the Regional Council for consultation. Again the meetings included (among others) Te Runanga o Ngapuhi, Ngati Rangi, Te Uri-o-Hua and Ngati Hine hapu, and specifically Riana and Ron WiHongi.

[575] In phase 9 of the consultation process, meetings were held with adjacent landowners, iwi, and submitters. In addition meetings of Trust beneficiaries were held in Whangarei and at Auckland. In practice it proved difficult to identify and establish contact with the great many owners of blocks of Maori land held in collective ownership adjoining the site.

[576] The tenth phase of consultation included meetings with the community liaison group and attendance at a public meeting at Kaikohe which about 150 people attended. Mr Fraser's note recorded: "The meeting was boisterous and most of those attending were opposed to the project."

[577] Mr Fraser testified that two meetings had been held specifically for discussion between the Department and the WiHongis to explain the proposal, are to discuss their concerns and how they could be addressed.

[578] In cross-examination Mr Fraser was asked whether, during the consultation process, it had been explained to the community that the proposed facility would accommodate in part maximum security prisoners. The witness referred to the first information pack which stated "accommodating all security levels of inmates", and to the second information pack which stated "a small number of cells for maximum security inmates". In re-examination he agreed that the notice of requirement itself also referred to inmate accommodation ranging from low through medium to maximum security.

[579] Mr Fraser was also asked whether the community had been told that some units would be situated outside the security perimeter. He responded that design solutions of that nature had not been addressed until further down in the process.

[580] Ms Barton testified to having reviewed the Department's consultation process. She gave the opinions that the time allowed for each phase had been sufficient for discussion with and obtaining responses from interested parties; that the material distributed had been clear and timely, and enabled those consulted to make informed and useful responses; that responses had influenced a number of decisions, including site selection criteria and site layout and design. The witness considered that the department had made a genuine effort to consult and had shown considerable good faith in consultation.

[581] In cross-examination, Ms Barton confirmed that in her review she had been aware that there was diversity of views about the proposal among the residents of Ngawha Springs village, some being quite strongly opposed.

[582] Bishop Te Haara confirmed that there had been extensive consultation between the Minister's representatives and Ngati Rangi and the Te Haara whanau, in the spirit of partnership under the Treaty of Waitangi. The matter had been discussed in the whanau, and although some were opposed, the family consensus was in support.

[583] In evidence in reply, Bishop Te Haara denied that those who were involved in discussions with the tribe had been hiding information from Ngati Rangi. In February 1999 there had not been a great deal to tell people; they had not had details of the proposal until much later, but he, Gordon Te Haara, and others had strived to keep wider Ngati Rangi involved. A committee had been formed for discussions with the Minister, made up of organisations based in Ngawha, and anyone could join.

[584] Mr Gordon Te Haara, a senior kaumatua of Ngati Rangi, and a kaitiaki of Tuwhakino, testified that the Department of Corrections had consulted with Ngati Rangi and Ngapuhi. He had been involved in many meetings since 1998, in which the Minister's representatives had presented their views and ideas and sought the views of the community and iwi on their proposals. In cross-examination he explained that the consultation was done with wider Ngati Rangi.

[585] Mr Reuben Clarke testified that other hapu had been offered a role but some had chosen not to take part. He agreed that the other Ngawha hapu have a role in relation to ensuring the Ngawha geothermal taonga is protected, but stated that their

role is more limited in relation to the Tuwhakino land. Ngati Rangi has long held customary authority over Tuwhakino.

[586] Mr M Anania testified that Ngati Rangi had been properly consulted, the consultation being carried out with those kaumatua and others who represent Ngati Rangi and with the Te Haara whanau as the primary kaitiaki of the site and the waters on and under it.

[587] In reply to testimony by Ms R Tipene that she had found out about the prison by accident, Mr Anania referred to a special meeting in February 1999 at which there had been discussions with beneficiaries of the Ngati Rangi Ahuwhenua Trust about use of the D1 site for a prison. Mr Anania observed that this had been well before the Minister's decision adopting Ngawha as his preferred site. He also observed that Ms Tipene had made it clear that she was opposed to a prison anywhere near Ngawha and that she did not wish to consult with the Department of Corrections over the issue. She had been free to take part in discussions with the Department but often had chosen not to do that.

[588] Mr Anania reported that it had been his experience that the Department had gone to great lengths to involve Ngati Rangi in the proposal and to seek its views, and that those who were opposed to the prison had been given ample opportunity to express their views. He agreed that there had been no general hui of Ngati Rangi in 1999 to discuss the prison proposal, and explained that this was because the proposal at that stage related only to land of the Ahuwhenua Trust and it had been appropriate that the discussions be held with the trustees.

[589] On consultation with Te Roroa iwi, Mr Anania testified that this consultation had been carried out as part of a hikoi in February 2001, when Mr A Sarich and he had taken the proposed memorandum of partnership with the Minister around Te Tai Tokerau. He reported that Te Roroa had responded that they were not necessarily in support of the building of the facility for inmates in the north. Mr Anania also testified that Ngati Rangi had regularly reported to the other Ngawha hapu by takiwa meetings. He also testified to meetings at which the proposed earthworks and stream works had been talked about, and that he had attended meetings at Auckland of shareholders of the adjoining block on that subject, at which Bishop Te Haara and Mr Gordon Te Haara had been present.

[590] On consultation with Te Roroa, Mr A Sarich, a kaumatua from Waimate North, described a meeting at Pakanae Marae held on 8 July 2000 at which Department of Corrections officials had met with a large number of people from Waimamaku, Kokohuia, Pakane, Whirinaki, Rawene and Oamania areas. Mr Gordon Te Haara and Mr Anania had also been present.

[591] On consultation with Te Rarawa, Mr Sarich referred to a meeting held on 30 August 2000 at which representatives of the Department had met with members of Te Rarawa, some of whom he named, and with three from Te Runanga o Te Aupouri.

[592] Mr Sarich also referred to a meeting on 22 September 2000 at which representatives of the Department had met with Far North Iwi at Kaitaia, including representatives of Te Aupouri, Ngati Kuri and Ngati Kahu. The witness reported that quite a lively discussion had ensued, both for and against the proposed prison.

[593] Mr Sarich described a further meeting on 26 February 2001 at which an itinerary for a further round of consultation meetings with various hapu and iwi of the Far North, Ngati Whatua, and other areas of Te Tai Tokerau had been discussed with representatives of Te Tai Tokerau and Te Aupouri. Over following days meetings had been held with Te Aupouri, Te Rarawa, the Chairperson of Te Tai Tokerau Maori Trust Board, Ngati Kahu Trust Board and Te Tai Tokerau District Maori Council. At the meeting with Ngati Kahu Social Services and Te Runanga O Ngati Kuri Ngai Takoto, those groups had brought together quite a delegation. Meetings were also held with the regional director of the Ministry of Maori Development, a spokesperson for Ngati Hine, with a number of people of Ngati Wai Runanga, and with representatives of Ngati Whatua. The witness reported that Mr Taoho ('Mighty') Nathan (an elder of Te Roroa) had stated that he wanted to stay out of any consultation concerning the facility. In cross-examination he agreed that Te Roroa, which had a long association with the Ngawha area, had not been consulted prior to the designation hearing or the Regional Council hearing.

[594] Mr Sarich also referred to a hui on 28 July 2001 designed to bring together the opposers and supporters, to provide an opportunity for both sides to meet to listen to each others perspective.

[595] Mr Gardiner deposed that the Department of Corrections had conducted numerous discussions with all of the major iwi entities and Maori organisations, including Te Runanga o Ngapuhi, Te Tai Tokerau Trust Board and the New Zealand Maori Council. It had engaged the hapu and organisations in the immediate area over the construction of the prison itself once the site had been selected. Efforts had been made to engage the three key hapu in the Ngawha area, although some were not prepared to take an active part in the consultation. It had consulted with those who were mandated to speak on behalf of the hapu. It had provided opportunity for whanau, hapu, iwi and Maori to express their views and have them considered, including those who opposed the proposal. From his experience, Mr Gardiner described the consultation as commendable, extremely extensive, and well exceeding the level of consultation that more usually occurs.

[596] Mr R Thompson described his consultation with Ngati Rangi as with those having mana whenua and being kaitiaki of the site in respect of cultural safety. He described the cultural concerns that had been expressed to him, and the way in which they had been addressed in development of the cultural concept, including impact on whenua.

[597] Mr Thompson deposed that he had consulted with Ngati Rangi in an appropriate and meaningful way, and had responded to their concerns in developing the cultural concept.

[598] Mr Gordon Te Haara referred to suggestions that the prison would have a negative visual impact. The witness responded that the proposal incorporates features of the land into the design, which incorporates tikanga concepts. Ngati Rangi continues to be consulted on the design and their views continue to be taken into account, particularly about retaining the natural flow of the stream through the site.

Witnesses for the opponents

[599] Dr Hohepa, a witness called on behalf of the Regional Council, asserted that Ngapuhi nui tonu, especially iwi and hapu such as Te Roroa and Ngati Pou, had not been consulted in a clear, formal and culturally sensitive way. He continued that the rights of other kaitiaki hapu to discuss the possible disturbance of their ngawha taonga should be heeded.

[600] Dr Hohepa gave the opinion that some 60,000 Ngapuhi live in Auckland out of a total of 100,000; and about 6,000 live in Wellington. He stated that no formal consultation had taken place with Ngapuhi in Wellington, nor with some 4,000 of them who work for, or are associated with consultancies, for Government.

[601] (Dr Hohepa had been called as a witness on behalf of the Regional Council, which expressly disclaimed any question of the adequacy of consultation with iwi. The apparent inconsistency between that disclaimer and asking its witness to read a statement of evidence that contained those statements is not clear to the Court.)

[602] In cross-examination Mr Ron WiHongi agreed that he understood the scope of the earthworks and streamworks involved in the proposal, that he had been on a site visit with other opponents when officials from the Department had fully explained the extent by reference to stakes in the ground.

[603] Ms Riana WiHongi questioned the Minister's consultation. In cross-examination she agreed that she had attended meetings at which the Minister's representatives had presented what they were going to do, and that she had voiced her views on the matter. The witness testified that she had also voiced her views at meetings at Ngawha marae, had made submissions to the District Council and to the Regional Council, had attended the Regional Council's prehearing meeting and had taken part in a site visit. In re-examination she explained that the Minister's officials had not treated her as tangata whenua, but as an afterthought. She referred to the architects coming to show them plans that looked complete, and that it was offensive to her that someone from another tribe came to tell her what was on the land and was not willing to listen to tangata whenua.

[604] Mr Waiora WiHongi testified that at all the hui he had attended at which the Department of Correctinos was present, he had only heard them tell what they proposed to do, and that they had not actually listened to what the people were saying, but had formed an allegiance with those who were in agreement with their plans.

[605] Mr Tamaiti WiHongi testified that he had attended every meeting he could reach, he had gone to meetings at Northland College, at Ngawha Marae, at Ngawha Springs community hall, at Kohewhata Marae and many others, and that people had said very clearly how they felt about the prison being sited at Ngawha and about having a prison at all. He felt that they had been ignored.

[606] Mr Hooker testified that no consultation had taken place with Te Roroa, an iwi with ancestral associations with Ngawha. He produced copies of correspondence between Te Roroa and the Minister from March to August 2001 protesting about lack of consultation.

[607] Ms R Tipene is Ngati Rangi, though not of the Te Haara whanau. She lives in Whangarei and has an interest in family land lying to the north of the subject land, containing the closest occupied building to the site for the facility. She gave her attitude of being "opposed to our whenua being used to lock up our own", and deposed that from September 1999 the Department of Corrections "just ran over the locals and those in opposition and ignored or did not speak with those who would be most affected, like ourselves". In cross-examination she explained that her family's primary concern was that had their grandfather been alive, he would not have allowed this to progress.

Payments for consultation services

[608] Mr J Hamilton was asked in cross-examination if any of the persons called as witnesses on behalf of the Minister had been given indications that they would receive benefits if the project goes ahead. The witness responded that all the Ngati Rangi witnesses were supporting the project because they believed it would bring benefits to Ngati Rangi and the wider community by bringing inmates back and by bringing a higher level of activity to Kaikohe. He added that there had been no individual assurances in respect of personal benefit.

[609] The witness was asked if any benefits, financial or otherwise, had been given to any of those witnesses. He responded that over three years or so people of Ngati Rangi had been paid for services they had given to the Crown in time, in advice, and in organising hui on behalf of the Department, and participating in public hearings, and this had been by normal payment for services.

[610] At the request of counsel for the opponents, the Department provided the Court with a list of payments made during the consultation process. The list was identified as Exhibit 10. In order to protect the privacy of the individuals named, publication of the list without leave of the Court was prohibited. Consistent with that, we refrain from naming, in this decision, the witnesses who were cross-examined about payments recorded in the list as having been made to them.

[611] One witness was asked what a payment made to him had been for. He replied that it had been to do with a lot of research, which had been put forward to the Far North District Council, for time spent and documents collected, and for attendance at a hearing.

[612] That witness was asked about another payment, of $57.00 for reimbursement of a power account for an office at Kaikohe for continuing discussions with the Minister's representatives. Other payments had been for reimbursement of caterers who provided food at a two-day meeting resulting in settling a memorandum of partnership. He agreed that there had been payments to him in remuneration for helping the Department with its consultation with tangata whenua.

[613] Another witness was asked what payments that had been made to him had been for. He replied that they had been for –

> ... consultation, dealings with Maori organisations, Government agencies, WINZ, the Federation of Maori Authorities, runanga, trust boards throughout Tai Tokerau, whanau groups, marae consultation, a whole raft of other other activities, organising meetings, venues, people to attend, kaumatua and all that sort of thing.

[614] The witness agreed that he had spoken at many of the meetings in support of the proposal. He denied that he had been promised payment for any future activities.

[615] Another witness agreed that the total of the amounts paid to him came to over $9600, and that he considered he was worth it.

Responses to consultation

[616] Mr Kenderdine deposed that an initial intention of culverting the stream under the secure area had not been favoured by Ngati Rangi and was abandoned.

[617] Mr Rewi Thompson had been engaged by the Department of Corrections at the nomination of Ngati Rangi for the cultural design advisory team for the facility. He deposed that he had incorporated in the layout and building design numerous suggestions by them.

[618] Mr Fraser testified that issues raised during consultation had been considered and addressed as far as practical through amendments to the design approach,

mitigation measures (landscaping and conservation management) and proposals for ongoing monitoring and community liaison. Early consultation had been taken into account in site evaluation and site selection.

Findings on consultation

[619] Counsel for the opponents contended that the consultation process had been defective both in respect of who had not been consulted, and in respect of failure to inform the Minister of the responses of those who were consulted. The submissions about the Minister's media release were related to that second question. We will make our findings on those elements of consultation separately. The evidence about payments can only be relevant to the second question, so we will consider it in that context.

Adequacy of the class of those consulted (the recognition limb)

[620] We have to consider whether those who were consulted included those who hold rangatiratanga or kaitiakitanga in respect of the natural and physical resources affected by the proposal, and those who possess appropriate and accurate information on the potential effects of the proposal on affected Maori.

[621] There was no evidence about rangatiratanga in respect of the resources affected. Presumably that is because the land had been alienated by Heta Te Haara more than a century ago.

[622] We have already made our findings about those who primarily hold kaitiakitanga in respect of the site are Ngati Rangi (particularly the Te Haara whanau) and that Te Uri o Hua also hold kaitiakitanga in respect of a general area that includes that block, although it is additional to Ngati Rangi's role as kaitiaki.

[623] The evidence supports the claim that the consultation was particularly with Ngati Rangi, and especially with the Te Haara whanau. Although that was criticised by the opponents, we do not accept that this was objectionable. There was no dispute that Ngati Rangi are at least the primary kaitiaki in respect of the land where it is proposed to build the prison.

[624] The hapu which holds ancillary kaitiakitanga in respect of the general area that includes the site, Te Uri o Hua, were plainly also consulted. That is clear from the testimony of Mr J Hamilton and Mr Fraser of the Department, and from the testimony of Mr Ron WiHongi and Ms Riana WiHongi. Mr Waiora WiHongi and Mr Tamati WiHongi had also attended meetings, even though the former felt that the Department had not been listening, and the latter said he felt ignored.

[625] The evidence of Mr Fraser and Mr Sarich establishes that the other hapu of Ngawha, Ngati Hine, were consulted, and the evidence of Mr Fraser and Bishop Te Haara that the runanga o Ngapuhi was consulted. There was also consultation with iwi further afield, Te Rarawa (according to the testimony of Mr Fraser and Mr Sarich) and with Te Roroa (Mr Anania and Mr Sarich). Mr Hooker denied that Te Roroa were consulted, but we accept the testimony of Mr Anania and Mr Sarich on the point, supposing that Mr Hooker was not among those Te Roroa who were consulted.

[626] The evidence also shows that the consultation extended even further to Te Aupouri, Ngati Kahu, Ngati Kuri, Ngati Whatua, and included Te Tai Tokerau Trust Board.

[627] We refer to Dr Hohepa's criticism that no formal consultation had taken place with Ngapuhi living in Auckland and Wellington. The Maori cultural tradition is one of living collectively in whanau, hapu and iwi and of ahi kaa. If the appropriate whanau, hapu and iwi are consulted, both the recognition and the information purposes of consultation can be met. We do not accept that as a matter of law the Treaty principle of consultation requires a proponent to trace every member of every tribe to wherever in the world he or she has gone, and consult with them individually.

[628] The opponents' main criticism about the scope of the classes of Maori who were consulted was that it failed to have sufficient regard to those having kaitiakitanga in respect of the geothermal resource. Counsel expressly did not claim that they had not been heard at all. Rather the complaint was that they had been left with the feeling that their views did not matter to the Minister nearly as much as the views of Ngati Rangi; that they felt unimportant and unrecognised; that some had been heard more than others.

[629] We do not accept that the consultation process was defective in that respect. It is not the geothermal resource that stands to be affected by the Minister's proposal, it is the Tuwhakino D2 land, and the stretch of the Ngawha stream that passes through it. As Ngati Rangi hold the primary kaitiakitanga role in respect of those resources, and have done for more than a century, it was appropriate that consultation with them was regarded as the first priority, and indeed their views were important to the Minister. The views of others were also canvassed, particularly those of Te Uri o Hau. However because their kaitiakitanga in respect of the resources to be affected (Tuwhakino D2 and the stretch of Ngawha Stream through it) is additional to that of Ngati Rangi, we find that consultation with Te Uri O Hua was not defective by being supplementary to that with Ngati Rangi.

[630] In short, we find that the range of the whanau, hapu, iwi, and runanga with whom the Minister's consultation was conducted was adequate for both the recognition and the information purposes.

Adequacy of the response to the comments of those consulted (the information limb)

[631] The appellants contended that the information purpose had not been met in that there was no evidence of what information gathered in consultation was reported to the Minister, that there was not even evidence that the Waitangi Tribunal's report on the Ngawha Geothermal Resource had been drawn to the Minister's attention, and that a report to the Minister of a high level of community acceptance of the proposed facility had been incorrect. So the challenge is not that insufficient information was gathered, but that the information was not reported to the Minister.

[632] Since the media release issued by the Minister's office cannot bear on the recognition purpose of consultation, we infer that it is to be considered in the context of the challenge to the achievement of the information purpose of consultation with Maori.

[633] As counsel for the Minister observed in his final submissions, there was nothing in the notices of appeal, or statements of issues, or statements of evidence to put the Minister on notice that inadequate reporting to the Minister of information gathered in consultation was in issue. If counsel for the opponents had wanted a list of all the reports provided to the Minister and details of every Ministerial briefing, timely notice of that should have been given.

[634] Further, in respect of a decision to issue a designation requirement, the collective knowledge of the officials in the Department of Corrections can be treated as the knowledge of the Minister.[47]

[635] We do not consider that reliable evidence about what was before the Minister (or his predecessor) can be gained from the fact that certain witnesses called on behalf of the Minister were not aware of what had been placed before him.

[636] The Waitangi Tribunal's report was made in 1993 on claims by trustees of the Parahirahi C1 Maori reservation in respect of the Ngawha Geothermal Resource. The main text occupies 185 pages, and the covering message to the Minister of Maori Affairs states–

> ... a full appreciation of the quite complex and novel issues involved could only be had by a perusal of the whole report.

[637] Those who do make a perusal of the whole report will be amply rewarded by that impressive document. Officials of the Department of Corrections were aware of it. However, as the proposed corrections facility and its development works have no physical effect on the geothermal system, we are not persuaded that the Minister himself had necessarily to have the report drawn to his attention before deciding to require designation of the site, and to make resource consent applications for the development works.

[638] Those who oppose the proposal are not able to accept the correctness of a report that there is a high level of community acceptance of the project. The evidence shows that there is a considerable level of community acceptance, and there is a considerable level of opposition in the community. Whether the level of community acceptance is correctly described as 'high' is a matter of opinion on which reasonable people might sincerely differ.

[639] In the event, the Minister's decision to require designation of the site, and make the requisite resource consent applications, were not the effective decisions on whether the project can proceed. In these proceedings the Environment Court has authority to confirm, modify or cancel the requirement,[48] and to grant or refuse the

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[47] *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608, 613 (HL). The decision was not of the kind entrusted to the Executive Council by the National Development Act 1979 for which direct consideration by Ministers was required: see *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 183 (CA).

[48] Resource Management Act 1991, s 174(4).

resource consents.[49] Valuable as the Waitangi Tribunal report is, in deciding these appeals this Court has to make its own findings of fact on the evidence presented at its own hearing.

[640] The opponents have had full opportunity to present to the Court, face-to-face in a public sitting, all the information that they possess that they consider should influence the Court's decisions. They had the services of experienced professional counsel and expert witnesses. They took full advantage of those opportunities, and also of the opportunity to cross-examine the witnesses called on behalf of the Minister.

[641] Counsel for the opponents maintained that the defects in the consultation process bring into question the adequacy and reasonableness of the site selection process. That is a separate question from adequacy of consultation with Maori. Counsel also contended that the Minister had an on-going role by continuing to press the requirement before the Court. He observed that the Court is not in a position to repeat the site selection process, nor to carry out any consultation process of its own.

[642] We addressed the site selection process earlier in this decision. We do not accept that the process was defective on account of the failure (if such there was) to draw to the Minister's attention the Waitangi Tribunal report; nor on account of reporting 'high' community acceptance, even if no more than 'considerable' community acceptance was justified.

[643] It is true that the Minister has continued in the Court proceedings to seek the designation and resource consents. It is also true that the Court is not in a position to carry out its own consultation process. However the hearing of these proceedings has provided us with abundant information that is relevant to the issues on which we have to make findings in the process of deciding the appeals. We include in that the Waitangi Tribunal report on the Ngawha Geothermal Field (produced as an exhibit), evidence of the variety of beliefs and attitudes of Maori (especially those based on their culture and traditions), and the variety of opinion in the community generally about the proposed facility. We have no doubt that anyone who wished to do so has had full opportunity to present the Court with evidence on all relevant issues.

[644] We have now to consider the significance to meeting the information purpose of consultation with Maori of the media statement released by the Minister's office.

[49] Ibid, ss 290 and 105(1).

[645] It might be expected that the Minister, in his capacity as requiring authority for the designation and as applicant for the resource consents, would have satisfied himself that the case for the designation and the consents was sound, and to that extent might properly feel confidence in a successful outcome.

[646] That is not to accept that the Minister's position is no different from that of any developer. As a Minister of the Crown he shares particular responsibility for the integrity of the Treaty partnership, and for observing the conventions about the relationship between the Executive and the Judiciary.

[647] In conformity with those conventions, he himself recognised that it was not appropriate during the course of the Court proceedings for a statement to be published in his name implying that the outcome was forgone, and in his favour. It was regrettable that the media release issued by the Minister's office included the passage quoted; and his apology was appropriate.

[648] Even so, the thoughtless action was not his personally, but that of a staffer in the Minister's office. On reading the speech notes, the Minister recognised the transgression, and in the statement presented by counsel he told the Court that he had omitted it from the speech delivered orally.

[649] The opponents suggest that he may still have said something of the kind, but we have no evidence of that. We accept the Minister's statement to the Court.

[650] In any event, for the purpose of questioning the adequacy of the consultation to meet the information purpose, what is significant is the fact that the Minister himself recognised that a statement on his behalf that the prison would be built at Ngawha was inappropriate. Whatever may be said about the staffer, it is that recognition by the Minister which denies the claim that the Minister's conduct was casual and careless, or lacked sensitivity to the opponents' concerns. Similarly it negates the suggestion that the opponents' concerns had not got through to the Minister. He himself recognised that the offending sentence was inconsistent with the Court's duty to decide on those concerns independently of the Executive.

[651] In summary, we do not accept that the issue of the media release from the Minister's office demonstrated a failure in meeting the information purpose of consultation with Maori, nor that any other basis was established for doubting that

this purpose was met in respect of informing the Minister. In addition that purpose has been fully met by the proceedings in the Environment Court.

<u>The significance of payments</u>

[652] We have reviewed the evidence of payments by the Department of Corrections to various residents of the locality for services rendered, mostly in the consultation process.

[653] The Minister could not be expected to carry out the consultation personally. Engagement of people with local knowledge was reasonable and practical. Engagement of opponents of the proposal would be counter-productive. We find no objection in principle to the Department making payments to those who provided services.

[654] Of course there is a risk of payments of amounts that so greatly exceed the value of the services provided that they might be misunderstood as buying people's support for the project. It is not the task of the Environment Court, of its own initiative, to probe for evidence of misdoing of that kind. None was revealed in the answers to cross-examination of the Minister's witnesses, or in any other evidence.

[655] There is no basis for the Court to find that the consultation process was defective on account of payments made to local residents for services provided to the Department.

[656] In summary we do not accept that what Mr Beverley called the information purpose of consultation with Maori, was frustrated by imperfections in reports to the Minister, by the media statement released by the Minister's office, by payments for services to local residents who supported the proposal, or otherwise. We find that the Minister had a full and respectful process of consultation with Maori carried out, in accordance with the consultation principle of the Treaty of Waitangi; and we reject the claims that the process was so flawed that the Minister failed in the duty to take into account the consultation principle of the Treaty.

The Principle of Active Protection

[657] The other Treaty principle that was raised in the proceedings is the principle of active protection of Maori taonga.

The attitudes of the parties

[658] In that respect it was the case for the Regional Council that where Maori cultural and traditional relationships would be adversely affected, but the project must proceed in the public interest, this principle demands that consideration is given to alternative methods or sites. It was contended that alternative locations had not been considered for the Minister's own reasons. The Regional Council urged that a prison could be achieved with substantially less earthworks, and in a locality in Northland which is not a place of cultural importance, and that reasonable alternatives had not been properly investigated and considered.

[659] The section 271A parties also submitted that the duty of active protection had been given scant regard.

[660] The Minister joined issue with the claim that he was under a duty to actively protect Maori taonga, submitting that section 8 does not go that far. His counsel argued that the requirement is to have particular regard to the Treaty principles, not to apply them in every case; and that duty is not absolute but is qualified by reasonableness in the prevailing circumstances –citing the opinion of the Privy Council in *New Zealand Maori Council v Attorney-General* [50] (the Broadcasting case). Counsel observed that the principle of active protection derives from recognition of rangatiratanga, and in relation to the Tuwhakino block, rangatiratanga had been ceded.

[661] In addition, the Minister argued that he is ensuring that the taonga of most importance to Ngapuhi and to nga hapu o Ngawha is actively protected. If the Regional Council is suggesting that the duty of active protection requires that no significant earthworks are carried out by the Crown or its agencies on Maori ancestral land without complete agreement by tangata whenua, that was denied. There is no right of veto.

[50] [1994] 1 NZLR 513, 517.

[662] Counsel for the Minister also addressed the Regional Council's contention that the principle demands that consideration be given to alternative methods or sites. The Minister accepted that if proposed works have significant adverse effects on Maori relationships with their taonga, then he should demonstrate that adequate consideration had been given to alternatives.

[663] In relation to the present case the Minister submitted that the evidence does not establish that there would be significant adverse effects, or significant interference with Maori relationships with the land, the stream, or the underlying geothermal resource. He also contended that alternatives had been properly considered and discarded; and that all alternative sites would have required significant earthworks. Counsel referred to the Judgment of the High Court in *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council and Glendon Trust.* [51]

The law on the active protection principle

[664] In its opinion in the Broadcasting case,[52] the Privy Council said of the principle of active protection–

> Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate Government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the Government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

[665] The Hazardous Substances and New Organisms Act 1996 is cognate with the Resource Management Act 1991, and by section 8 imposes a duty similar to that imposed by section 8 of the Resource Management Act. In a case under the 1996 Act cited by counsel for the Regional Council, *Bleakley v Environmental Risk*

[51] High Court, Wellington, AP6/01; 25 June 2001, Chisholm J.
[52] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC).

Management Authority,[53] the Full Court held that the words "other taonga" in section 6 of the 1996 Act (corresponding with section 6(e) of the 1991 Act) are not limited to the merely physical and tangible, but extends to matters that have spiritual or intrinsic value beyond their physical properties.

[666] Counsel for the Regional Council referred to dicta in the Judgment of Justice Goddard. To provide context we quote parts of the preceding paragraphs as well–

> 25. [The Authority sought guidance from the Court on how spiritual values] can be measured, quantified, weighed, and balanced in accordance with the requirements of the methodology and the Act.
> 26. ... the situation must be assessed on a case by case basis. Each application under the Act will have to be determined in context of the issues arising and in light of the purpose of the Act. No blueprint for spiritual values can be developed for slavish application in every case.
> 27. In that regard two overstatements appear in the majority's decision. The first is the expressed view that spiritual beliefs 'are different' from taonga as understood in previous cases and 'are not amenable to active protection in the same way as more tangible taonga'. The second is the statement that 'active protection as sought by Ngati Wairere would mean decisions under the Act should be made according to tenets of Maori spiritual beliefs, as defined from time to time, and the principles of the Treaty do not go so far'.
> 28. I cannot agree with either statement as correctly interpreting either the Act or Treaty principles. Active protection under the Act may, in some cases, require decisions to be made according to tenets of Maori spiritual belief, where those are significant. As I have said, whether they are significant in any particular case will depend on all the circumstances and the issues arising.

[667] The *Glendon* case[54] concerned application of district plan objectives and policies for protection of heritage resources. The High Court rejected a claim that the Environment Court had erred in law by considering what protection was appropriate in the case, and rejected a claim that the Environment Court had erred in law in holding that protection was not synonymous with preserving the status quo and prohibiting development. Justice Chisholm held that this rigid proposition did not accurately reflect the Act or the district plan. Having quoted section 5 of the Act, the learned Judge said–

> When there is an issue about whether the use or development is compatible with sustainable management those required to exercise functions or powers under the Act have to evaluate all relevant matters and undertake the balancing exercise contemplated by subs (2). In situations involving Maori spiritual and cultural values sections 6, 7 and 8 will also come into play.

[53] High Court, Wellington, AP177/00; 2 May 2001, McGechan and Goddard JJ.
[54] *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council and Glendon Trust* (High Court, Wellington, AP6/01; 25 June 2001, Chisholm J).

[668] Later in his Judgment, Justice Chisholm said–

> ... it needs to be recognised that an application for consent to use or develop a resource is not automatically ruled out because one of the matters referred to in s8 is brought into play.

[669] The learned Judge also referred to the Judgment in the High Court in *Minhinnick v Watercare Services* [55] where it had been held that this section was not intended to confer individuals with a right to veto a legitimate proposal. (That conclusion had been endorsed by the Court of Appeal,[56] which observed that argument to the contrary serves only to reduce the effectiveness of the principles of the Treaty, rather than to enhance them).

[670] Counsel for the Regional Council also referred to a decision of the Planning Tribunal: *Te Runanga o Taumarere v Northland Regional Council,*[57] and a decision of the Environment Court: *Mason-Riseborough v Matamata-Piako District Council.*[58] Of course they do not provide authoritative statements of the law, as the judgments in the superior Courts do. With respect, they are examples of application of section 8 in the particular circumstances of those cases. They do not assist in the interpretation of section 8, or its application to the circumstances of this case.

[671] From the text of section 8, and the Judgments in the superior Courts, we derive these propositions as representing the law about the active protection principle to be applied in this case.

> The person making a decision on a designation requirement or resource consent application has to take into account the principle of the Treaty by which the Crown has an obligation of active protection of Maori property and taonga, which are not limited to physical and tangible resources but extends to spiritual and intrinsic values. The Crown's obligation is not absolute, being qualified by its other responsibilities as the Government, but is to take such action as is reasonable in the circumstances prevailing at the particular time. It may, in some cases where they are significant, require decisions to be made according to tenets of Maori spiritual belief. It does not necessarily require preserving the status quo and prohibiting development of a resource. It does not imply a veto of development by those asserting Maori interests.

[672] It is true that in the *Runanga o Taumarere* case, the Planning Tribunal held that to have neglected to investigate the feasibility of an alternative effluent disposal method which avoided offence to Maori was to fail to honour the principle of active

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[55] [1997] NZRMA 553, 571 (Salmon J).
[56] *Watercare Services v Minhinnick* [1998] 1 NZLR 294; [1998] NZRMA 113; 3 ELRNZ 511.
[57] Environment Court Decision A081/95.
[58] 4 ELRNZ 31.

protection. However at the time that decision was given, the Tribunal did not have the benefit of the Judgments of the superior Courts cited above, none of which support the Regional Council's contention that the principle demands that consideration is given to alternatives. We consider that the contention was too broadly stated, and is not an element of the law on this Treaty principle of general application. However consideration of alternatives may, in some cases, be a way of testing whether proposed development of resources is reasonable in the prevailing circumstances.

Application of the law to the case

[673] We now review the respects on which the proposal protects Maori taonga.

[674] First, the site was not selected by random, but as a result of a deliberate process that allowed for Maori interests to be considered. (We described the site selection process more fully earlier in this decision.)

[675] Secondly, the site finally selected is not Maori property, having been alienated more than a century ago, and developed and used for pastoral farming.

[676] Thirdly, save for the geothermal pools that are to be protected, the property contains no battle site, waahi tapu or other taonga. There is no evidence of the development site having being used for any cultural or traditional observances.

[677] Fourthly, the site contains no significant surface manifestations of geothermal activity, and the works will not physically affect Ngawha Springs, Lake Omapere, or the geothermal system in any way. The hearing commissioners' findings about sealing of gas vents and the functioning of wick drains were not correct.

[678] Fifthly, the whanau and hapu who have exercised customary authority over the property for more than a century support the proposal.

[679] Sixthly, although considerable earthworks and streamworks are necessary, the terracing of the building platforms and the realignment of the stream have been planned in accordance with the wishes of tangata whenua.

[680] Seventhly, the Minister has agreed that the geothermal ponds on the site with which the hapu o Ngawha have a relationship are specifically to be protected.

[681] Eighthly, the Minister has agreed to protocols to apply in the event of the discovery of waahi tapu, koiwi or other taonga on the site.

[682] Ninthly, the proposal has been designed so that potential effects on the quality of the water in the Ngawha Stream would be avoided, remedied or mitigated; its habitat for indigenous fish would be improved; and net positive ecological effects are likely. Human wastes would not be disposed of on site, but conveyed to the Kaikohe sewage treatment system.

[683] Tenthly, the corrections facility would be about a kilometre distant from, and would not be visible from, the mineral pools at Ngawha Springs which is the focus of the geothermal taonga of the Ngapuhi iwi.

[684] Although the Minister has sought to protect Maori property and taonga in at least those ten ways, the Regional Council and the other opponents seek that the site not be developed, and the prison be developed elsewhere. The basis for that is that it would be an affront to the mana of Ngapuhi for earthworks of the scale proposed, stream alignment and a prison to be located within the total area of the geothermal field. Obviously that attitude is not shared by all Ngapuhi, but it is strongly held by some.

[685] In these proceedings the Environment Court is exercising functions and powers under the Resource Management Act in relation to managing the use and development of natural and physical resources. As such the Court's duty under section 8 is to take into account the principles of the Treaty. In taking into account the Treaty principle of the Crown's obligation of active protection of Maori property and taonga, it is our judgment that the Crown has taken deliberate steps to do so, at least in the ten respects just listed, and that this action was reasonable in the prevailing circumstances. The fact that some Maori prefer preservation of the status quo, and a veto on, or prohibition of, development of all land within the geothermal field (an area of 180 square kilometres) does not lead us to conclude that the Crown's protection of Maori property and taonga was deficient in the circumstances of this case.

OTHER NON-PHYSICAL EFFECTS

[686] We have reviewd the evidence and stated our findings on the physical effects of the proposal, and Maori cultural and traditional issues arising from it. We now address other non-physical effects that were raised in evidence.

Visual effects

[687] Ms Beadle expressed concern that the siting of the prison would affect the operation of the spa as a result of its visibility, mentioning parts of the spa property from which it would be visible.

[688] The only witness qualified to give opinion evidence on visual effects of the proposal was Mr F Boffa, an experienced landscape architect. Ms Beadle stated that with respect to visibility, she relied on his evidence.

[689] Mr Boffa gave detailed evidence to support his opinion that overall the visual effect of the project would be minor. He deposed that the site had been well chosen, and is well sited and designed, to minimise its visual impact and landscape effects, which can be effectively contained and adequately mitigated.

[690] In particular Mr Boffa testified that the facility would be visible from the area south of State Highway 12 generally between the golf course and the marae; from the northern edge of Ngawha Springs village; from the Ginn's Ngawha Spa Limited property (particularly the northern ridge); and from Ngawha Springs Road between the power station turnoff and Ngawha Springs village. He considered that there would be no adverse visual effects from the State highway, Ngawha Springs Road, or Ngawha Springs village.

[691] Mr Boffa gave his opinion that sight of the corrections facility from the Ginn's Ngawha Spa Limited property would be minor, and it would be completely screened once the proposed mitigation planting is fully established in 4 or 5 years. From the geothermal valley itself, the proposed facility would not be visible. The main tourist attractions on the Ginn's property would not be adversely affected in visual terms.

[692] Mr Boffa's testimony was not challenged by cross-examination or contradictory evidence. We accept it, and adopt his opinions as our findings.

Lighting effects

[693] Ms Beadle expressed concern that security lighting of the facility would be visible to a wide viewing audience, and at night would form a constant reminder of the scale and type of facility that exists. She was concerned that the lighting would be on all night, and would cause a glow over a large area.

[694] Evidence was given by Mr K M Gibson, a consultant lighting engineer, on the effects of lighting at the prison on the surrounding environment, adjacent residential properties, and vehicle traffic. The witness testified that the requirements of the transitional and proposed district plans concerning glare and light spill would be met. He gave reasons for his opinions that due to distances, intervening landforms and landscaping and the types of luminaires proposed, glare would not be a source of irritation or nuisance to the adjacent residential properties, township or vehicle traffic.

[695] In particular Mr Gibson testified that the intended perimeter lights would direct all light intensities downwards, and there would be no lighting directed above the horizontal. All inner lighting would be similar to the perimeter lights or small fluorescent lamps. The illumination levels under the perimeter luminaires at ground level (a maximum of 60 lux, and standard lighting of 40 lux directly below the luminaires) would be relatively low. The proposed lighting would not present a glow in the sky effect, or a glow over the area, even on a misty or wet night. Any light spill would avoid any impact on Ngawha Springs Village and the springs.

[696] Mr Gibson's testimony was not challenged by cross-examination or by contradictory evidence. We accept it, and adopt his opinions as our findings.

Non-physical Effects on Ngawha Springs

[697] We have already stated our finding that the proposal would not have any physical effect on the Ngawha Springs. Now we address the claims of non-physical effects on the springs and the bathing pools at Ngawha Springs.

The evidence

[698] Mr Ron WiHongi described the Ngawha springs as healing waters that heal physically and give sustenance to wairua. In his testimony he asked the rhetorical question–

> How are the Ngawha Waiariki to survive the interference that is planned to enable the prison to be built?

[699] Dr Hohepa gave this opinion in his testimony–

> ... the physical proximity of the prison to the springs, creating its own presence with an adjacent entry way, the aurora and glow of prison lighting and the physical effect its closeness will have on the serenity, peace and ahua (physical and spiritual nature) of the springs. These concerns, and that of women who feel that the prison presence and use of the prison ngawha stream is totally inappropriate to them as women must surely be respected.

[700] In cross-examination Dr Hohepa agreed that his concern was a psychological effect of having a prison near the springs, that

> ... I would hate to see a time when we think Ngawha and a prison leaps up into our minds. That's what I mean from psychological effects.[59]

[701] Mr M Rakena testified that Ngawha is a taonga known throughout New Zealand and the world for its healing powers, and that a prison would undermine this. He did not explain how that would occur.

[702] Mr R R H H Hau, alias R Thompson, stated that he found it offensive for a prison to be sited next to the taonga known as Ngawha Springs, that "to cage people at Ngawha, to kill them in spirit, is to cage and destroy the life-giving essence of Ngawha itself".

[703] Mr T Ogle testified that to him it would be an insult to place a prison anywhere near the great healing powers of Ngawha Springs, that it would destroy the respect shown to the area and the image of Ngawha as a whole. He also gave the opinion that rehabilitation in prison is outdated, solves nothing, and he would not want that in his backyard.

[59] Transcript of evidence page 297, line 26.

[704] Mr Waiora WiHongi testified that the prison would have grave effects on the whenua, the waterways and on Maori culture and beliefs, and would destroy the natural qualities of healing for the body and soul that Ngawha Springs has to offer. He described it as an insult for the Department of Corrections to want to build a prison in Ngawha for Ngapuhi, as Ngapuhi embraces a whole tribe of people, not just a few.

[705] In cross-examination, Mr J Hamilton agreed that there was evidence that some of the tangata whenua regard the Ngawha Springs as a place of healing and therapy. He gave his understanding that building the proposed facility would have no impact on the underlying geothermal resource, nor would it impact on the springs of Ngawha.

[706] Mr Lawless testified that as the building site is located between the two northernmost of the three north-east trending fault zones, it is horizontally as well as vertically removed from the exploitable geothermal resource. He deposed that there is no potential for the project to adversely affect the Ginn's Ngawha Spa operation, or the public springs at Ngawha, or other cold springs and gas seeps in the wider area.

[707] Mr Anania testified that the stream that runs from the prison site does not mingle with the springs, and deposed that the prison will not harm the mauri of the geothermal resources.

[708] In cross-examination Mr Wallace WiHongi deposed that the lake and the springs are interconnected and inter-related, and the land of Ngawha with the lake, so a significant effect on mana whenua of the land could result in a significant effect on the mana of Ngawha. In traditional thinking the land is kin to Maori.

[709] Mr Gardiner testified that there are no connecting streams, or rivers or surface tributaries that link from the D2 site on the Tuwhakino block to the Ngawha Springs, so what happens on the prison site will not be transported to the Ngawha Springs area.

[710] Dr C Barlow deposed that the Ngawha Springs are an historic site and should remain "undisturbed by the ravages promoted under the guise of modernism".

[711] Mr Albert Clarke stated that the Ngati Rangi Ahu Whenua Trust believed that the wairua of Ngawha would be changed forever, and a significant taonga of Te Tai Tokerau destroyed.

[712] Mr D Rankin testified that the lake [Omapere] and the springs were the last taonga of Ngapuhi, and were under threat from the project. If it proceeds their mana as kaitiaki would be gone, and that a place of violence and punishment should not be placed there.

[713] Ms R Martin testified that the Ngawha area is a taonga tuku iho on the surface as well as underneath, and gave the opinion that the imposition of a prison on this site would desecrate the taonga.

[714] Ms M Lee stated that she was against a prison at Ngawha because it would be built over the waters of the taonga, would be a desecration against tikanga and a place of anger and violence that would destroy the spirit of positive healing.

[715] Mr Hooker deposed that resort by Te Roroa to the Ngawha pools for healing and cultural experiences must be preserved from inappropriate development such as prisons, which he described as the antithesis of all that Ngawha stands for.

[716] Mr D B Cunneen had regularly bathed in the pools for relief of arthritis. He deposed that if a prison is erected nearby, the restfulness of the place would be lost, and he would not like to go there. In cross-examination he was not able to tell how visible the prison buildings and structures would be from the springs at Ngawha.

[717] Mrs A M G Sheppard gave the opinion that with a prison there Ngawha would become known for a prison, like Paremoremo has; and that this association would affect people's feelings of Ngawha as a place of peace and rest, and the healing benefits of the pools would be lost to all those who may otherwise have come there.

[718] Ms E M Clarke gave her belief that the Ngawha waters (a taonga of all Ngapuhi) are life-giving and healing, and associated with Papatuanuku. In the following passages Ms Clarke stated her concerns clearly–

> 8. With this in mind, it is offensive, in my view, to have this part of the taonga that is the geothermal aquifer modified and constrained in the proposed manner and for this proposed purpose. This offence is

compounded by the injustice of an intended aim of the Barnes and Thompson design requiring this modification, i.e. the use of the stream by male inmates (a number of whom will be incarcerated for crimes of violence against woman) for 'spiritual purification and cleansing'. Meanwhile, the victims will not be afforded the same opportunity as the perpetrators to access the healing power of this taonga, nor to enjoy the luxury of bathing in 'small pools of warm water'. In fact they will be completely alienated from the resource...

9. It is likely that many women, mothers, and their children, will no longer be able, or indeed willing, to access the healing powers of this resource either on this, or neighbouring sites, because they will simply be too frightened by the threat of the harm that may be inflicted on them by known violent offenders, just 500 metres distant, claims of secure containment notwithstanding.

10. ... I am affronted that [the Minister] seeks to modify in such a way the aesthetic, let alone esoteric, nature of this site which is so significant to women and in particular those within the hapu of Ngapuhi.

11. In a similar manner, and with reference to the allusion of the life-giving passage of the woman, the intention to reform the meandering passage of the stream into a more controlled and direct route because this is where it passes through the secure part of the compound, is objectionable, reflecting as it does the abuse of women, of which a number of inmates within this proposed institution, will be guilty.

[719] That witness's elder daughter, Chanel, expressed her own attitude in this respect–

31. While Mr Lawless can give evidence as to the effects on the geothermal taonga from the 'scientific' perspective he is not able to comment on the effects that such development will have in Maori terms upon the mauri and character of this taonga and whanau relationships with this taonga.

...

42. The Ngawha Springs, another significant physical and cultural feature, are merely a few metres from the proposed site and ... hold a 'special place in the mind of Ngapuhi and also particularly Ngati Rangi. Taniwha both good and bad inhabit the water and give the region its special qualities of healing and reconciliation'.

43. These are qualities which will be seriously compromised by the closeness of the proposed prison site. They will also be qualities to which Ngati Rangi descendants such as myself, who suffer from chronic illnesses to which the pools provide some immediate relief will now be unwilling to access.

44. ... Should the proposed prison be constructed, I am of the opinion that my grandmother will not partake of the healing waters for relief of medical problems and general well-being. I say this because, like others she will have a sense of anxiety about bathing in pools in such close proximity to the Corrections facility and as a consequence I suspect she will not go.

The Minister's response

[720] The Minister's response was first, that there will be no physical interference with the geothermal resource, springs or pools; that some Maori deny that there

would be any 'spiritual' pollution of the resource, while others claim that there would; that the issue was raised only the late in the process; and that those claiming harm represent a limited range of Maori groups.

[721] Counsel urged that what is relevant is not the traditional Maori view, but whether objectively the particular activity is intrinsically offensive to cultural considerations (citing *Minhinnick's* case),[60] and how the effects of the proposal may impact on the relationship of Maori with the springs and pools (citing *Mahuta v Waikato Regional Council*[61]). He questioned whether reasonably informed Maori people understanding what is proposed would be offended in cultural or spiritual terms.

[722] The Minister also maintained that the relationship of Maori, their culture and traditions, with the springs and pools at Ngawha is appropriately recognised and provided for by acknowledging their importance to Ngapuhi, and ensuring that they would not be harmed.

Findings

[723] It is true that the Minister's case acknowledged the importance to Ngapuhi of the springs and pools at Ngawha, and provided for them by designing the proposal so that they would not be physically harmed. The question is whether, despite that, the Court's decision should be influenced by attitudes held by some Maori (though not by others) that the presence of the prison out of sight about a kilometre away but within the same geothermal field would be offensive. These attitudes were variously described as psychological effects (by Dr Hohepa); in cultural terms as affecting mana, wairua and mauri (Mr Albert Clarke, Mr Rankin); in terms of effects on dignity as being insulting, offensive, objectionable, desecrating, affronting (Mr Hau, Mr Ogle, Mr Waiora WiHongi, Ms Martin, Ms Lee, Mrs Clarke, Ms Chanel Clarke's grandmother); or in terms of fear, anxiety, loss of restfulness and peace (Mr Cunneen, Mrs Sheppard, Mrs Clarke, Ms Chanel Clarke).

[724] In this jurisdiction it is well established that claims about people's attitudes, and fears, however genuinely held, have to be assessed objectively,[62] and if unsubstantiated by factors properly cognisable under the Act, should not influence

[60] *Minhinnick*, supra.
[61] Environment Court Decision A91/98.
[62] *Allens Service Station v Glen Eden Borough Council* (1985) 10 NZTPA 400 (HC).

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the decision.[63] If it is found on probative evidence that there would be no adverse actual or potential effect on the environment of allowing the activity, then the fact that some people remain fearful and unconvinced by the weight of evidence is not a relevant matter to be taken into account.[64] Fears can only be given weight if they are reasonably based on real risk.[65]

[725] So without questioning the sincerity of the witnesses, we consider whether there are objective bases for the various attitudes described.

[726] The unchallenged objective evidence is that the prison would be about a kilometre from the springs and pools; it would not be visible from them; that the inmates would not be using the Ngawha stream; that the lighting would not present a glow in the sky effect, or a glow over the area, and would avoid any impact on the springs; and that there would be no significant noise effects from prison activity. We find no objective basis for Dr Hohepa's testimony.

[727] No objective bases were offered for the attitudes expressed by Mr Hau, Mr Ogle, Mr Waiora WiHongi, Mr Wallace WiHongi, Dr Barlow, Mr Albert Clarke, Mr Rankin, Ms Martin, Ms Lee, or Mr Hooker. The objective evidence about noise leaves no basis for the attitudes of adverse effects on the peace and restfulness of the pools expressed by Mr Cunneen and Mrs Sheppard. The sincerity of none of them was questioned. Rather it is a matter of the extent to which their genuinely felt attitudes influence decisions under the Resource Management Act.

[728] Nor do we belittle Mrs Clarke's eloquent representation of the plight of victims of violence against women, and the value of the comfort they can obtain from bathing in the pools. However the basis of her attitude that inmates (some of whom may have been guilty of highly regrettable abuse of women, causing them long-term harm) will have access to bathing in the mineral waters is not supported by the objective evidence before the Court.

[729] Later in this decision we address the risk of inmates escaping. Regrettably, on the record, there is a risk. However the evidence shows that escaped inmates tend to leave the district of the prison promptly. The possibility of an escaped inmate harming a woman who has come to Ngawha Springs for bathing in the mineral pools is remote. The suggestions that people would not bathe in the pools because of that

[63] *Hawkes Bay Hospital Board v Napier City Council* (1986) 11 NZTPA 404.
[64] *Telecom v Christchurch City Council* Environment Court Decision W165/96.
[65] *Shirley Primary School v Christchurch City Council* Environment Court Decision C136/98.

risk describes a self-denying restraint without a sound basis in reality. Without in any way demeaning the witnesses who put it forward, or people whose behaviour might be affected in that way, we are not able to find a sufficient objective basis for influencing a decision under the Act on the basis that some people might be dissuaded from using the pools for fear of harm by an escaped inmate.

[730] We now refer to the claims that it would be insulting, offensive, objectionable, desecrating, or affronting that a prison is established in the Ngawha district, or that the mana, wairua and mauri of Ngapuhi, of the land or of the geothermal taonga would be affected. There is no unanimity about that. Some feel in those ways, others do not. There is no objective right or wrong about it. There is nothing intrinsically offensive about the facility, nor any objective basis for feeling insulted, or offended, or affronted by its existence, or that mana, wairua or mauri would in any way be undermined by its location. The Minister has recognised the interest of Ngapuhi in the geothermal resource and the Ngawha springs. His proposal has been developed and designed to respect Maori culture, and so as to avoid any physical harm to them. If some Maori remain offended, that is regrettable. But they do not have a veto, and we find no basis for their sense of affront to warrant influencing the decision in these proceedings.

Ngawha Springs an Outstanding Natural Feature

[731] A further ground advanced by the opponents was that the surface manifestations of the geothermal resource are 'outstanding natural features' which ought to be protected from inappropriate use. It was contended that the site is at the heart of the only significant geothermal area in Northland, a region in which geothermal landscape features are an unusual resource that ought to be preserved for the benefit of the community.

[732] That relates to section 6(b) of the Act, which reads–

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> ...

[733] The Minister's response was that there is nothing to indicate that the site for the proposed facility is one of any great significance, and to the extent that the ponds on the property are of significance, they are protected and the development avoids them.

[734] However the opponents' claim was not that the site is an outstanding natural feature, but that the surface manifestations of the geothermal resource are.

[735] The surface geothermal manifestations are plainly a natural feature. It is not necessary for us to make a finding in this decision whether the feature qualifies as outstanding, because the Minister's proposal would not make any use of, or otherwise affect, any of the surface geothermal manifestations that make up the natural feature. Any gas vents found on the site, however small, are to be protected.

[736] It is our finding that the proposal recognises and provides for the protection of the surface manifestations of the Ngawha Geothermal Field from inappropriate use and development.

Efficient Use of Resources

The positions of the parties

[737] Another ground of opposition relied on by the appellants was that the proposal represents an inefficient and uneconomical use of resources in two respects. The first was that it is an extravagant and wasteful use of unusual and important natural features. The second respect was that it is an extremely uneconomical way to provide a prison facility in Northland. Counsel quoted a passage from the Planning Tribunal decision in *Olsen v Minister of Social Welfare*.[66]

[738] In particular reliance was placed on three inter-related features. First, that the site is swampy, subject to flooding, and has a stream running through the middle of the building platform. The second feature was that the proposal would involve spending a substantial sum on special works over and above what would be required for a more 'normal' site. The third feature is that there are other, more 'normal' sites which could easily have been chosen in preference to this one. Counsel urged that

[66] [1995] NZRMA 385.

efficiency must include at least some assessment of whether the economics are sound.

[739] It was the Minister's case that the economics of the project and the construction costs are not a relevant concern for the Environment Court. Counsel urged that a decision whether the locational advantages and community and tangata whenua support for this site outweigh any additional capital costs that may be involved is for the Minister to make; and that it is the long-term economics, including operational costs, that are relevant, rather than establishment costs.

The law applicable

[740] This ground was based on section 7(b) of the Act, which we quote–

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to -
>
> ...
>
> (b) The efficient use and development of natural and physical resources:

[741] In *New Zealand Rail v Marlborough District Council* [67] the appellant contended that financial viability of a project was a relevant consideration under Part II of the Act, in that if the proposal was not viable, then it is in conflict with Part II. The law on that point is contained in this passage from the judgment of Justice Greig–[68]

> Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s 5(2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7(b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.

[67] [1993] 2 NZLR 641; [1994] NZRMA 70 (HC).
[68] [1994] NZRMA 70, 88.

[742] In *Imrie Family Trust v Whangarei District Council* [69] the Planning Tribunal held that although the economic effects of a proposal on the environment need to be considered, it is only to the extent that they affect the community at large, not the effects on the expectation of individual investors.

[743] *Olsen v Minister of Social Welfare* concerned a requirement for a designation. The passages from the Planning Tribunal decision that were quoted by counsel for the appellants were–[70]

> The question of adequacy of consideration in the present case largely depends on the advice given to the Minister for his consideration by the Department. We found on the evidence given to us that, apart from very cursory attention to cost of total relocation, the Department effectively accepted that the works should proceed on is site because it was an existing site.
>
> ...
>
> This brings us to the question of "adequacy". The Department virtually ignored the RMA. It did not set its mind to the repercussions of an enlarged centre upon the environment, indeed, the only evidence we can find as to any consideration by the Department in that regard is contained in the notice of requirement
>
> ...
>
> If this is the extent of the matters brought to the attention of the Minister, and on the evidence we have little to suggest otherwise, then it is inadequate under present legislation. We find as a fact that there has been no in-depth investigation of alternative sites in the context of the RMA and in the context of Part II of that Act to which we have previously referred. It is not sufficient to state that economics or convenience, or existing inadequate facilities, are any reason for the creation of a large and permanent security institution within a residential community.

[744] In *Marlborough Ridge v Marlborough District Council* [71] the Environment Court recognised that there is a distinct economic approach to sustainable management in the Act, derived from various provisions including sections 5(2) and 7(b), and said–[72]

> ... our isolation of the economic jargon in the RMA may lead to incorrect confinement of economic issues and principles and misunderstanding of their relevance to the RMA. If, as we understand it, economics is about the use of resources generally, [see R.A. Posner Economic Analysis of Law 4th Edition (1992) p.7] then resource management can be seen as a subset of economics. Bearing that in mind will prevent unnecessary debates as to whether the use of the word 'efficiency' in the RMA is about 'economic' efficiencies or some other kind. All aspects of efficiency are 'economic' by definition.

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[69] [1994] NZRMA 153; 1B ELRNZ 274.
[70] Pages 395 - 397.
[71] [1998] NZRMA 73; 3 ELRNZ 483.
[72] Paragraph 4.3.

[745] In that decision the Court agreed with *Imrie Family Trust*. Although it expressed some doubts about whether it is impermissible or irrelevant to have regard to the benefits of a proposal for its promoter, it did not make a decision to that effect.

[746] The Environment Court is, of course, bound to apply the law as found by the High Court in *New Zealand Rail*. So our starting point is that the broad aspect of the economic effect of a proposal on the community at large is a relevant consideration, but that the financial viability of a project, the profitability or otherwise of the venture and the means by which it is to be accomplished, are not relevant considerations. Consistent with that we hold, following *Imrie Family Trust* and *Marlborough Ridge*, that economic effects on the expectations of individual investors, and the benefits for the promoter are not relevant. We are not aware that in so holding, we are differing from *Olsen*.

[747] Of course in this case the promoter is a Minister of the Crown, and the cost will be met from public funds. However the fact that public funds are to be employed does not mean that the financial viability of the project, and the means by which it is to be accomplished, are relevant factors.

[748] We accept the Minister's submissions and hold that the extent to which public funds should be allocated to a corrections facility is a policy issue for the Minister.[73] It is not appropriate for local authorities exercising functions under the Resource Management Act 1991 (or for the Environment Court on appeal) to decide that the amount that the Minister considers appropriate is uneconomical, extravagant or wasteful. The Minister will be accountable for the expenditure of public funds to the electorate and to Parliament.[74]

[749] Having established our understanding of the extent to which efficient use of resources is a relevant consideration, we now review the evidence before the Court.

The evidence

[750] Mr Brand gave the opinion that the geotechnical case for the proposed prison development has "no real foundation because of the large additional costs associated with its development upon a soft valley floor and the added risks of being within a

[73] Cf *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 185 (CA).
[74] Perhaps also to the Controller and Auditor-General.

major geothermal system". He considered that the proposed earthworks may be impossible to accomplish within a sensible time and cost frame.

[751] Mr Brand questioned the time and efficiency of dewatering the site through installing wick drains, and stated that it is probable that the wick drains would still be discharging an artesian water flow for evermore.

[752] In cross-examination Mr Brand stated that he is not qualified in civil engineering matters.

[753] Mr Beetham testified that the site is surrounded by large recently active hydrothermal eruption craters and would require extensive and costly remedial works to make it suitable for the proposed prison. He gave the opinion that the costs and risks of development of this site would be very high, and it is likely to cost $30 million to $40 million more to develop than a more 'normal' site.

[754] In cross-examination Mr J Hamilton stated that he regarded the project as an economical and efficient project. He accepted that it is a substantial project; that there is some surface material that would have to be removed for the building platform; and that a small amount of it may require different storage or placement because of concentrations of mercury.

[755] Mr P J Cunningham rejected the suggestion that the cost of development of the subject site is abnormal, and asserted that the costs are not abnormal in comparison with similar developments.

[756] In response to Mr Beetham's opinion that the project is not economically feasible or efficient, estimating $10 million for earthworks and $20 million for wick drains, Mr Kenderdine testified that the Department's estimates are $4.5 million for bulk earthworks and $1.6 million for wick drains. Cross-examined about the estimate for wick drains, Mr Kenderdine reported that the average depth of wick drains in an on-site trial had been between 11 and 12 metres, and the drains had cost in the order of $5 to $6 installed.

[757] In response to Mr Beetham's claim that unsuitable organic peat material should be cut to waste, Mr Hickling described geotechnical investigations showing that much can be re-used as fill, and if the estimated quantity is not available,

adequate volumes of bulk fill are available from the eastern hill and the imported volumes already provided for.

[758] Addressing Mr Brand's opinion about the cost of importing free-draining rock fill because volumes of potential borrow from the eastern and western hills will be inadequate, Mr Hickling gave the opinion that adequate volumes of suitable fill will be available from the main site area, the eastern hill borrow area, and outside quarry reserves.

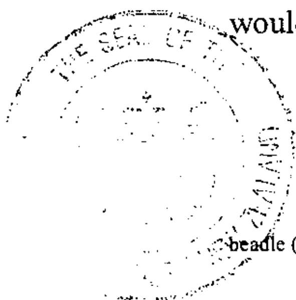
[759] Mr Hickling also addressed Mr Brand's claim that 420,000 cubic metres of soft soils would be unsuitable for fill and should be removed from the site and disposed in sealed areas due to contamination with mercury. Mr Hickling deposed that soft soils under the main fills are being drained with wick drains, not excavated, and he estimated the volume of material to be cut at about 185,000 cubic metres.

[760] Mr Hickling responded to Mr Brand's opinion that removal of more than 500,000 cubic metres of soil and subsoil to a depth of 8 metres would be required. Mr Hickling testified that it is not proposed, and gave his opinion that it would not be required, to remove volumes of greater than 500,000 cubic metres to form the site. He added that Mr Brand's evidence about a volume greater than 500,000 cubic metres appeared to have been based on a false assumption.

[761] We have already referred to the unchallenged evidence of Mr Copeland, who gave reasons for rejecting opposition based on loss of agricultural production, and claims that the cost of the prison would bring better benefits if diverted to market gardening, or health and education infrastructure improvements. This witness gave the opinions that the proposal would bring substantial economic benefits to the Far North District in increased employment, incomes and economic activity; a broader economic base; and more efficient utilisation of infrastructure.

Findings

[762] Although the opponents' case was overstated, we accept that the site will be expensive to develop for the proposed prison, particularly because of the subsurface conditions. We accept that it is likely that another site could have been found that would have been less expensive to develop.



[763] However to the extent that relates to the monetary cost of development on the site, we hold that this is part of the overall judgement made by the Minister as promoter; and that other factors would also have been part of that judgement, including his assessment of locational advantages, community and tangata whenua support, and operational costs. On the understanding we have reached of the law, whether the monetary cost is uneconomical is not an appropriate matter to influence the Court's decision in these proceedings. Accordingly we do not need to analyse the conflicting opinions of the witnesses in detail. We reject the opponents' contentions in that respect, and make no finding on that question.

[764] The other aspect of this topic was the claim that the proposal represents an extravagant and wasteful use of the natural resources involved, by which we took counsel to mean the land of the site, and the stream.

[765] The land has been used for a dairy farm. We have no evidence on the performance of the farm, but we infer that it produced food, and a return to the owners for their investment in time and capital. However there can be no assurance that it would have continued to be used as a dairy farm in the future.

[766] The corrections facility would replace the dairy farm, using land that has been used for food production. The facility would meet a pressing public need. It is a question of judgement whether sustainable management of the natural and physical resources would be better served by the land being used for food production than for the facility. In the absence of evidence contradicting Mr Copeland, we do not accept that the use of the land for a dairy farm, or market gardening, or health or educational infrastructure would serve that purpose better than its use for the corrections facility.

[767] Our conclusion is that the opponents' challenge on the basis of inefficient use of natural and physical resources has not been made out.

Heritage Values

[768] The appellants also claimed that the designation would fail to recognise and protect the heritage value of the area. Counsel advanced that claim with particulars related to Ngawha having been a historic destination for its natural mineral pools and spa facilities, as a place of historic significance, and a place of healing, therapy peacefulness and restoration. It was asserted that placement of a prison in the centre

of Ngawha Springs, immediately adjacent to the two main spa sites would undermine attempts to redevelop the area as a tourist destination.

[769] The Minister responded that the proposal does not involve the placement of a prison in the centre of Ngawha Springs, and that the building site is physically separated from Ngawha Springs by a ridge and would not be visible from any of the springs. Counsel observed that the springs are not recognised in the district plan for any heritage value, and there is no evidence that the heritage value the two springs have extends to the prison site.

[770] Ms Chanel Clarke testified that important features of the site may exist under the ground, referring particularly to the possibility of evidence of early Maori occupation. Her testimony contained this passage–

> The proposed protocol which will address the issue of any unknown sites, and or related taonga or human remains uncovered during earthworks by conducting an appropriate blessing is offensive to the tupuna who may rest there and indicates a wanton destruction of not only possible burial sites, but also local and nationally important physical and cultural features.

[771] Dr R E Clough is a qualified and experienced archaeologist and cultural heritage consultant. He had made an archaeological assessment of the site, including historic research and a field inspection. He reported that no archaeological sites were identified within the development site, and gave reasons for his professional opinion that it is unlikely that any would be unearthed during development.

[772] Dr Clough added that in the unlikely event that any archaeological sites are unearthed during development, with the proposed conditions and protocols there would be no effect on archaeological values.

[773] Dr Clough's testimony was not challenged by cross-examination or by contradictory evidence, save by Ms Clarke's expression of concern. The conditions and protocol are standard and widely accepted. We do not understand any principled reason for Ms Clarke's reservations.

[774] We accept Dr Clough's testimony and opinions, and adopt them as our findings.

[775] We do not accept the appellants' submission that the site of the prison would place it in the centre of Ngawha Springs, immediately adjacent to the two main spa sites. The prison would be about a kilometre distant from the springs and pools at Ngawha Springs, and would not be visible from them.

[776] From Mr S Hamilton's evidence we do not accept that the proposed facility would undermine attempts to redevelop the area as a tourist destination. We do not accept the assertion that the proposal fails to recognise and protect the heritage value of the area.

Social effects

[777] Another part of the appellants' case was that the proposal fails to enable the people of the area to provide for their social well-being in that, as happened at Paremoremo and elsewhere, 'Ngawha' will become synonymous with 'prison' and would lose its identity as 'the place of healing'.

[778] That claim was not accepted by the Minister, whose counsel submitted that no compelling evidence had been provided to support it, and that it is not consistent with the expert evidence of Ms Barton and Mr S H S Hamilton.

[779] Mr S H S Hamilton is a chartered accountant with 15 years' consulting experience, particularly in the hospitality industry, and with professional knowledge of the tourism industry. He had visited Ngawha Springs village, and gave his opinion that the corrections facility would have no material effect on the pools complexes.

[780] Mr Hamilton had also considered whether the facility would detrimentally affect the perception or image of the area. He acknowledged that there is a possibility that it could cause negative perceptions in the minds of some existing visitors, but observed that there is little (if any) evidence of the kind at other tourism locations near corrections facility, citing Turangi as an example.

[781] We have already referred to Ms Barton's evidence. Her review of the social effects of the proposal addressed the preconstruction and construction phase separately from the operational phase. She reviewed likely demands on accommodation by the workforce, additional employment and economic activity,

apprehensions of property devaluation, and concerns for personal safety and property security. Ms Barton concluded that there would not be an adverse impact on social services and facilities during the construction phase.

[782] In respect of the operational phase, Ms Barton had considered the socio-economic impact of corrections facilities on Turangi, including attitudes about whether crime in the town was to be ascribed to inmates' families and associates, or to locals; attitudes to inmates' partners coming to live in the town; concerns about personal safety and property security related to escapees (including those breaching parole). Ms Barton gave the opinion, based on her research, that the risk to the community generally in New Zealand from escaped prisoners is low, and is not directly related to the proximity of a prison.

[783] The witness also described the investigations that had led her to the opinions that there would be sufficient accommodation for employees coming to the district, that the combined needs of inmates and employees would not place undue pressure on health services, and that there is considerable spare capacity in schools for their families.

[784] Ms Barton gave her opinion that the proposal would not have significant adverse social effects on the community, and that the net social impact would be positive.

[785] Although Ms Barton was cross-examined on her testimony about consultation, her evidence on social effects was not challenged by cross-examination or by contradictory evidence by a witness qualified to give opinion evidence on the topic.

[786] We accept Ms Barton's testimony and opinions, and adopt them as our findings.

[787] To the extent that this ground of appeal is based on anticipated perceptions by people, we adhere to the established practice in this jurisdiction that there is no place in the process for the Court to be influenced by mere perceptions of harm which are not shown to be well founded.[75]

[75] *Northern Wairoa Dairy Co v Dargaville Borough Council* Planning Tribunal Decision A181/82; *Affco v Hamilton City Council* Planning Tribunal Decision A3/84; *Purification Technologies v Taupo District Council* [1995] NZRMA 197; *Contact Energy v Waikato Regional Council* Environment Court Decision A04/2000.

[788] Overall, we conclude that the claims that the prison proposal would be inconsistent with enabling the people of Ngawha Springs to provide for their social well-being have not been shown to be well unfounded, and we do not accept them.

Fears of harm or damage caused by escaping prisoners

[789] Earlier in this decision we have referred to concerns expressed about harm or damage that might be caused in the Ngawha and Ngawha Springs locality by prisoners who may escape from custody at the prison.

[790] Ms Beadle reported that visitors had expressed such concerns to her, and gave the opinion that the perceived risk would discourage visits to Ngawha Springs. For herself, Ms Beadle testified that she feared the idea of a prison next door, and gave the opinion that altering the buildings to ensure absolute safety from possible outbreaks would be incredibly costly.

[791] We have already quoted Mrs Eileen Clarke's concern that many women will be frightened by the threat of the harm that may be inflicted on them by known violent offenders, claims of secure containment notwithstanding. We have also recorded Ms Chanel Clarke's understanding of a sense of anxiety that would be experienced by her grandmother about bathing in pools so close to the corrections facility. Others indicated similar concerns.

[792] However Ms Barton testified that she had not found evidence that prisons pose a significant adverse impact on security of property or personal safety in communities near them. She gave the opinion that the risk to the community from escaped prisoners is low, and is not directly related to the proximity of a prison.

[793] The Minister of Corrections would be responsible for ensuring that all reasonable measures are taken to preclude escapes from custody at all corrections institutions. Regrettably, experience indicates that inmates do escape from existing prisons. It would be unrealistic to suppose that nobody imprisoned in a regional corrections facility for Northland (wherever it is located) would escape from custody. Concern by residents of the Ngawha and Ngawha Springs locality about harm or damage that might be caused by fugitive inmates is understandable.

[794] However the independent evidence reported by Ms Barton does not provide support for those concerns. Understandable as they are, in reality they are not supported by an objective basis.

[795] Further, to the extent that there is any risk of harm or damage caused by escaped prisoners, the risk is not linked to the location of the prison. The risk (such as it is) would exist in whatever locality a prison is established. We do not accept that the people of any particular part of Northland are entitled to have the risk redirected to some other district, any more than the people of Northland would be entitled to have people from Northland who are sentenced to imprisonment sent to corrections facilities elsewhere in the country to transfer the risk.

[796] Ms Mangu testified that the Friends and Community of Ngawha had submitted a tender to lease land from the Department of Corrections, and that if successful the society had intended to use the land to establish a pilot scheme for rehabilitation of young criminal offenders in Northland, training facilities for prison officers and other Department of Corrections employees in tikanga Maori, the adoption of restorative justice practices for both inmates and staff, and the establishment of employment initiatives by organic gardening and other environmentally acceptable uses.

[797] In our opinion the offer by the Friends and Community of Ngawha to assist with young offenders, and restorative justice practices for inmates, was a commendable response that showed a realistic understanding of the needs of many who have the attention of the criminal justice system, and also an appropriate recognition of the low risks of having such people in the locality for rehabilitation.

[798] In summary, we do not accept that there is any significant risk of harm or damage caused by escaping prisoners, nor that this is a matter that should influence the outcome of these proceedings.

Effects on Ginn's Ngawha Spa

Effects on the business and its potential

[799] In Ms Beadle's notice of appeal, it was alleged (among other things) that the prison would destroy the business operation of Ginn's Ngawha Spa Limited at the

spa, would severely compromise plans to undertake restoration and expansion planned for the spa.

[800] The Minister joined issue with those claims, and contended that they were not supported by any compelling evidence.

[801] In her testimony Ms Beadle described in general terms the business undertaking of the spa and its history, and deposed that a prison on the adjacent Timperley property would have a direct effect on the current operation of the spa as a result of its visibility and because its location would be widely known. In particular, Ms Beadle claimed that visitors to the spa would, rightly or wrongly, either have their sense of peacefulness marred, and their stay disrupted, after learning of the existence of the prison next door; or they would simply stop coming to Ngawha.

[802] In cross-examination, Ms Beadle described recent improvements to the company's property, painting the exterior of the building containing backpacker accommodation facilities, upgrading the pools, and clearing in the Tiger Bath pool area and the mercury mine ruins.

[803] In cross-examination Ms Beadle also agreed that she had refused requests for information about the number of guests in the accommodation units, and had declined to provide financial information or business plans about the operation. She had also refused to meet a landscape consultant who had been engaged by the Department of Corrections to advise on siting the prison to mitigate visual effects.

[804] Ms Beadle did not provide in her evidence to the Court any detailed information about the occupancy of the accommodation, nor did she provide any detailed information about the financial performance of the business or about any business plans for its future operation.

[805] Mr S H S Hamilton had also visited the Ginn's business. He described the Ginn's property as very run-down and almost uninhabitable, reporting that both the hotel and pools buildings were in a very poor state of repair and did not give the appearance of trading. Having no information on visitor numbers or profitability of the current venture, he deposed that he would be surprised if the visitor facilities and activities were profitable after allowing for overheads, repairs and maintenance. The

witness gave the opinion that the proposed corrections facility would have no material detrimental effect (if any) on existing patronage levels.

[806] Mr Hamilton also referred to guided walking tours on the Ginn's Ngawha Spa Limited property conducted by a Mr Hansen, who advised him that $6 per head was paid to the Ginn's company as a concession for access to the property. Mr Hamilton was sceptical of Mr Hansen's advice that in the year ended December 2000 he had hosted approximately 5000 visitors on his tours, and considered very unrealistic Mr Hansen's expectation that in a few years there would be between 50,000 and 90,000 visitors annually doing the tour. Mr Hamilton stated that he did not believe that potential view of the prison from the property would be detrimental to the tour.

[807] Mr Hamilton also gave his opinion about the tourism potential of the Ginn's Ngawha Spa Limited's business. In summary, even assuming a major redevelopment he considered it unlikely that a redeveloped business could attract sufficient visitors to be financially viable. It would be very risky financially, and would struggle to earn a commercial return on investment.

[808] In cross-examination, Mr Hamilton agreed that the capital investment might be able to be spread over a period, and that it might be practical to provide bathing facilities without substantial accommodation facilities, or to provide relatively modest accommodation.

[809] We have already reported Mr Lawless's opinion that there is no potential for the project to adversely affect the Ginn's Ngawha Spa operation.

[810] We have no wish to state findings that might be seen by Ms Beadle as belittling the value of her company's business. However it was she who made the allegation in her notice of appeal, and in her testimony to the Court, that the prison would destroy the spa business, and compromise plans for restoration and expansion. Accordingly we are not able to avoid the duty of stating our findings on those allegations. Ms Beadle's own refusals to provide accommodation occupancy and financial information, and to meet with consultants investigating mitigation possibilities, deprived the Court of the possibility of more complete independent assessments of her allegations.

[811] We did take the opportunity to visit the company's premises, and were courteously conducted over much of the property by Ms Beadle's sister. We do not wish to add to Ms Beadle's feelings on reading adverse descriptions, so without stating details we record that our own observations were fully consistent with those reported by Mr Hamilton, whose expertise and professional objectivity we accept. In short, we find that at present the property is run-down, the buildings are in poor repair, and we share his doubt whether the income of the business exceeds its overheads.

[812] With regard to future restoration and expansion of the business, we find that considerable capital investment would be needed. Whether injected at once or by increments over a period, that investment would be very risky, and it is doubtful whether the business could yield a commercial return on investment.

[813] We also find that the proposed prison would have no significant adverse effect on the success of the business (such as it is) now, nor on the potential (such as it is) for restoration and expansion. These allegations by Ms Beadle have not been made out.

Consultation

[814] Ms Beadle made allegations of inadequate consultation with her. However there is no evidence that she is Maori, so the consultation principle of the Treaty of Waitangi cannot be invoked. It is not evident that the Minister had any legal duty of consultation with Ms Beadle.

[815] Mr J Hamilton deposed that he had endeavoured to meet with Ms Beadle, that it had been very difficult to arrange a meeting, and that a meeting had eventually occurred. He had endeavoured to ascertain whether the Beadles' concerns could be met, and had indicated that various concerns could be met by the Department giving undertakings, which were subsequently given in writing. He gave the opinion that the Beadles' concerns were based on misconceptions either about the project or about their own business plans, a context in which it had been difficult to have meaningful discussions.

[816] Mr Fraser also gave evidence of attempts at consultation with Ms Beadle.

[817] In the previous section of this decision we gave our finding that the proposed prison would have no significant adverse effect on the success of the business, nor on its potential for restoration and expansion. In the light of that finding, we hold that the Minister had no duty at law to consult with Ms Beadle, and her complaints about the adequacy of the attempts made by the Minister's officials and agents in that regard cannot provide a ground for opposition to the requirement.

STATUTORY CRITERIA

[818] The proceedings before the Court are two appeals under section 174 of the Resource Management Act, and one appeal under section 120 of that Act. The criteria to be considered on appeals under those sections are stated separately. Although many of them are common to both, we consider them in turn, as separate decisions have to be made on each class of appeal.

Section 171 considerations

[819] The jurisdiction of the Environment Court on an appeal arising from a requirement for a designation is conferred by section 174. Subsection (4) of that section directs that in determining an appeal, the Court is to have regard to the matters set out in section 171.

[820] Section 171(1) gives directions to territorial authorities considering requirements:[76]

> (1) Subject to Part II, when considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to–
> (a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and
> (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and
> (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and
> (d) All relevant provisions of any national policy statement, New Zealand coastal policy statement, regional policy statement, proposed regional policy statement, regional plan, proposed regional plan, district plan, or proposed district plan.

The role of Part II

[821] The introductory part of section 171(1) is prefaced by the words "Subject to Part II". Placed there, at the start of a provision identifying matters to which regard

[76] Section 171(1) as amended by s 87 of the Resource Management Amendment Act 1993 and s 36 of the Resource Management Amendment Act 1997.

is to be had (not a provision about whether the requirement is to be confirmed, cancelled or modified), the subjection to Part II applies to the directions about what is to be had in regard. Its effect is to defeat the direction to have regard to the classes of matter listed, where to do so would conflict with anything in Part II.[77]

Relevance of land disturbance effects

[822] Counsel for the submitters referred to the direction in section 171(1) to have regard to the matters set out in the notice given under section 168 (and any further information supplied), and to all submissions. They contended that this has the effect of extending the matters that are to be taken into account into virtually a 'catch-all category' (relying on *Olsen's* case[78]), with the result that the Court is not confined to effects of the use of the site for a prison, but should also consider the proposed land disturbances, the cultural effects, and the potential safety issues. They argued that the designation requirement and the resource consent applications rely on each other for success of either, and the project as a whole.

[823] We do not accept those submissions, and we do not accept that this was what was held in *Olsen*'s case.

[824] Each of the three appeals before the Court now is brought under specific authority. The appeals by Ms Beadle and the WiHongis were brought under section 174 of the Act and seek that the designation requirement be cancelled. The appeal by the Minister was brought under section 120 of the Act, and seeks that the Regional Council's decision refusing the resource consents be cancelled, and the consents granted.

[825] Because the three appeals are being heard together, the evidence adduced by a party in one of the appeals may be received as evidence in either of the other appeals, to the extent that it is relevant to an issue that arises in that appeal.

[826] But that does not mean that the issues in any one of the appeals are also issues in either of the others.

[77] Cf *Minister of Conservation v Kapiti Coast District Council* Planning Tribunal Decision A024/94; *Paihia and District Citizens Assn v Northland Regional Council* Planning Tribunal Decision A77/95; *Russell Protection Society v Far North District Council* Environment Court Decision A125/98; *Bungalo Holdings v North Shore City Council* Environment Court Decision A025/01.
[78] *Olsen v Minister of Social Welfare* [1995] NZRMA 385.

[827] The issue in the Beadle and WiHongi appeals is whether the site should be designated for the corrections facility. If the requirement is upheld, the designation would authorise the use of the land for that purpose, whether or not it would otherwise be authorised by the district plan as a use of that land.

[828] The issue in the Minister's appeal is whether resource consents should be granted for the earthworks and streamworks proposed for development of the site for use as a corrections facility. If the appeal succeeds, the Minister would be authorised to carry out those works.

[829] So the subject-matter of each of the appeals differs from that of the others, and the criteria specified for deciding the appeals under section 120 differ (at least to some extent) from those specified for deciding appeals under section 174.

[830] But although the current proposal for the facility requires the earthworks and streamworks for which resource consents are sought, those works would not necessarily be required for any use of the land for a corrections facility. A different design of the facility would require development works that would differ at least in detail.

[831] So although the designation requirement and the resource consent applications are related, they are not necessarily critical to each other.

[832] *Olsen's* case concerned a designation requirement, but it did not involve related resource consent applications, so the issue raised by the submitters in these proceedings did not arise in *Olsen's* case. The Tribunal's observation in *Olsen* that was relied on by the submitters reads–[79]

> It would be difficult to visualise anything which could be excluded from consideration.

[833] We do not infer that this passage was intended to mean that parties to resource consent proceedings under section 271A, who had not lodged appeals under section 174 or given notice under section 271A or section 274 of their desire to be heard on someone else's appeal under section 174, could be entitled to have the Court consider matters they wished to raise about the designation.

[79] Ibid, pg 393.

[834] In any event the scope of the challenge available to a party whose status depends on section 271A has now been authoritatively clarified by the High Court in *Transit New Zealand v Pearson*.[80] Such a party is confined to the issues raised in the original notice of appeal or reference on which he or she is heard.

[835] Counsel urged that it would be contrary to good resource management practice to confine the assessment of the resource consent applications to their subject matter without considering the effects of the designation. We do not accept that. Good resource management practice calls for people to identify carefully the proceedings in which they wish to take part, and to give the appropriate notice identifying them. It is not good resource management practice to give notice of a wish to be heard on an appeal against the resource consents, and without having given the requisite notice, expect to be permitted to pursue the effects of the designation.

[836] As we observed earlier in this decision in relation to the end-use point, it may make no difference to the outcome in this case. But as a matter of law, we hold that the submitters are not entitled, by a side-wind from their joining the appeal against the resource consents, to advance their own case about the effects of the designation.

Contents of requirement

[837] Section 168 prescribes procedure for giving notice to a territorial authority of a requirement for a designation. By section 171(1) and 174(4), the Court is directed to have regard to the matters set out in the notice. We therefore quote subsection (3) of section 168, which directs what is to be included in the notice–

> (3) A notice under subsection (1) or subsection (2) shall be in the prescribed form and shall include-
> (a) The reasons why the designation is needed; and
> (b) A description of the site in respect of which the requirement applies and the nature of the proposed public work, project or work, and any proposed restrictions; and
> (c) The effects that the public work or project or work will have on the environment, and the ways in which any adverse effects may be mitigated, and the extent to which alternative sites, routes, and methods have been considered; and
> (d) Any information required to be included in the notice by a plan or regulations; and
> (e) A statement of the consultation, if any, that the requiring authority has had with persons likely to be affected by the designation, public work, or project or work; and

[80] High Court, Dunedin, AP166/01; 18 December 2001, William Young, J.

> (f) A statement specifying all other resource consents that the requiring authority may need to obtain in respect of the activity to which the requirement relates, and whether or not the requiring authority has applied for such consents.

[838] The Minister's notice of requirement extends over twelve pages with three maps attached. We have regard to all its contents without quoting the document.

[839] The requirement was specifically for designation of the Timperley property in the Far North District Council's district plan for –

> The construction, operation, maintenance and upgrading of a comprehensive regional prison and associated facilities and the authorisation of all ancillary activities and facilities including, but not limited to:
>
> - Inmate accommodation ranging from low, through medium, to maximum security;
> - ...

[840] The notice contains a statement of the Minister's objectives;[81] a description of the site and the locality; a full description of the nature of the work and proposed restrictions; a five-page consideration of potential environmental effects and proposed mitigation measures; a summary of the consideration that had been given to alternative sites, routes and methods; a list of the resource consents required; and a description of the consultation undertaken with parties likely to be affected.

Necessity for achieving the objectives of the work

[841] The issue in section 171(1)(a) is whether the designation is reasonably necessary for achieving the objectives of the public work for which the designation is sought. That issue is not whether the technique of designation is reasonably necessary, but whether the project or work is reasonably necessary.[82]

[842] It was the appellants' case that the designation of the particular site is not reasonably necessary for achieving the objectives of the public work (the construction of a prison in central Northland) because a number of serious adverse effects are likely to be caused, other sites are available for the purpose, and the most serious adverse effects would be avoided of another site is chosen.

[81] The objectives are quoted later in the decision.
[82] *Bungalo Holdings v North Shore City Council* Environment Court Decision A052/01.

[843] The objectives of the proposed regional corrections facility were identified in the notice of requirement, as follow–

- To establish a comprehensive regional prison to serve the population of Northland on a site which can accommodate foreseeable inmate needs and numbers;
- To establish that facility on a site which is economically and technically feasible and appropriately located in relation to service delivery and visitors;
- To locate the facility within easy travelling distance of one of the main service centres in Northland;
- To have this facility operational during the year 2002.

The evidence

[844] Mr Warren remarked that potentially the objectives could be met by locating the prison on any one of thousands of sites. In respect of the second objective, the witness observed that for the site to be technically feasible, an extraordinary amount of site modification and work is necessary, and gave the opinion that because of the extensive works and additional costs the site would not meet the objective of being economically feasible.

[845] On the fourth objective, Mr Warren gave the opinion that a failure in the process of identifying sites or inadequate allowance of time should not over-ride sound resource management practice.

[846] Mr J Hamilton deposed that the technique of designation is necessary to meet the objectives of the proposed work, in order to authorise the proposed uses of land, which is a non-complying activity in respect of which the Minister had been advised that consent would be difficult if not impossible to obtain.

[847] The witness also addressed the necessity of the project itself. He gave the opinion that proposed new prisons in South Auckland and Dunedin would not meet the objective of the Northland proposal of being within easy travelling distance of one of the main service centres in Northland, and would not serve the population of Northland or be conducive to rehabilitation of Northland inmates, being distant from family and whenua.

[848] Mr Hamilton explained why the designation is sought for the whole site, not just the main facility. It would enable the control of buffer areas and provision of mitigation, would enable use of some of the pasture for employment and training of

inmates, and would enable flexibility for future developments like the proposed self-care units outside the main compound. He observed that as the Department owns the whole site, designation of it all would not adversely impact on a private owner.

[849] The witness referred to the pools on the site, which are to be fenced and are not required for the corrections facility. He informed the Court that the Minister accepts that the ponds and their surrounds can be omitted from the area subject to the designation. In cross-examination about transferring ownership of the pools, Mr J Hamilton referred to provisions in the Maori Land Act that may cover the situation, and that Ngati Rangi would be involved in the decision-making.

Findings on reasonable necessity

[850] If Mr Warren's opinion that the objectives could be met by locating the prison on any one of thousands of sites is correct, it confirms that the objectives have correctly been cast in general terms so that they are "divorced from the method of attainment" [83] and not to pre-empt the issues referred to in paragraphs (a) to (d) of section 171(1).

[851] We refer to the appellants' claim that the particular site is not reasonably necessary for achieving the objectives because of serious adverse effects that would be caused, that could be avoided by using other sites. That claim overlaps with the content of paragraph (b), the adequacy of consideration of alternative sites. In any event, the outcome of our consideration of the evidence is that the opponents' case of serious adverse effects has not been made out.

[852] The only challenge to the designation meeting the second objective related to the cost of the earthworks for site development. Earlier in this decision we gave our reasons for holding that it is not for the territorial authority (or the Environment Court on appeal) to decide whether the cost of developing the site is economically feasible, that being a matter for which the Minister would be responsible to the electorate.

[853] On the evidence about the regional and national need for a prison in Northland, the last objective is understandable for the Department's executive responsibilities, although now unrealistic.

[83] *STOP Action Group v Auckland Regional Authority* High Court Wellington M514/85; 31 July 1987, Chilwell J, page 29.

[854] However for the purpose of section 171(1)(a), a decision-maker could not allow a requiring authority to rely on an objective of that kind to be weighed against alternative sites in that the extra time involved in securing them would fail the time objective. That would preclude proper consideration of the issues raised by paragraphs (b) and (c).[84] Therefore we interpret the reference to objectives in paragraph (a) as being to objectives cast so as not to limit the scope of the issues to which regard is to be given under section 171(1).

[855] Accordingly we hold that necessity for achieving the objective of having the facility operational during 2002 should not influence our decision of the appeals by those opposed to the designation.

[856] In summary, we find that the designation is reasonably necessary for achieving the objectives of the public work.

Adequacy of consideration of alternatives

<u>The issue</u>

[857] The appellants contended that adequate consideration had not been given to alternative sites because there had not been adequate factual enquiry and consultation, so the process had been flawed.

[858] The Minister's response was that this argument confused consultation about the subject site with site selection and elimination of other sites. Counsel observed that the direction in paragraph (b) is not to have regard to the adequacy of consideration given to the subject site, but to whether adequate consideration had been given to alternative sites.

[859] The Minister also denied that the consideration of alternative sites had been flawed in respect of factual enquiries or consultation.

[860] We accept that the focus of paragraph (b) is whether adequate consideration has been given to alternative sites, routes and methods, not whether adequate consideration has been given to the subject site.

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[84] Cf *Whangarei City v Northland Area Health Board* Planning Tribunal Decision A120/86.

Evidence of consideration of alternative sites

[861] Earlier in this decision we reviewed the evidence of the site selection process, in which a number of sites were considered and eliminated, leading to the selection of the subject site. We stated our findings that adequate consideration had been given to alternative sites.

[862] We have also rejected criticisms of consultation with Maori.

[863] Mr Brand described a site at Wakelins Road, in the relative proximity of Kaikohe and Kerikeri, as an example which he considered presented a much more suitable site from a geotechnical and hydrological perspective for a facility such as that proposed. He gave a comparison in a number of respects of the putative site at Wakelins Road with the Timperley Farm site. In cross-examination Mr Brand was not able to state who the relevant hapu are in relation to the Wakelins Road site.

[864] In this respect Mr Brand appears to have misunderstood the Court's role. The Court does not have the executive function of deciding the most suitable site. Although the proceedings include an appeal against the Minister's requirement for a designation, the executive responsibility for selecting the site, and for deciding to proceed with the project on it, remains that of the Minister, for which he may be accountable to Parliament or the electorate.

[865] In addition, as Mr Warren observed, there may be many possible sites for the public work. However many sites have been considered, it may always be possible for another to be identified. It has long been established that having regard to whether adequate consideration has been given to alternative sites does not require the appellate body to eliminate speculative alternatives or suppositious options.[85]

Alternative methods

[866] Mr Hamilton gave the opinion that there is no method other than a prison to meet the objectives, and that despite the best efforts of the Department to reduce re-offending, and introduction of home detention, there is unfortunately an urgent need for a regional prison in Northland.

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[85] *Adamson Taipa v Mangonui County Council* High Court Auckland M101/81; 23 October 1981, Speight J.

[867] Mr Whewell deposed that re-development of existing prison sites had been considered, but rejected for two reasons. The first was that the existing sites had already been expanded to the stage where further expansion would impact on the Department's capability to reduce re-offending. The second was that it would not meet the regional prisons policy.

[868] Those opinions were not challenged, and we accept them.

Alternative routes

[869] Alternative routes may be applicable where a route or line is proposed to be designated, as in the case of a road or an electricity line. Consideration of alternative routes is not appropriate in the case of the proposed prison the subject of these proceedings.

Finding on adequacy of consideration of alternatives

[870] For the reasons given, we find that adequate consideration has been given to alternative sites and methods, and that consideration of alternative routes was not required.

Reasonable expectation of use of alternatives

[871] It was the appellants' case that it would not be unreasonable to expect the Minister to use an alternative site because serious adverse effects are likely if the subject site is used, effects that would be avoided if another site is chosen.

[872] Mr Warren remarked that the technical issues related to a large new prison in Northland could be satisfied within a wide compass of sites, and that there is nothing technical about the proposal that would render it unreasonable to expect the requiring authority to use an alternative site.

[873] Counsel for the Minister observed that the appellants' case in this respect was premised on the Court accepting that designation of the subject site would lead to serious adverse effects that could be avoided at another site, and contended that the appellants had not established those points on the evidence. Counsel also submitted

that paragraph (c) only becomes relevant if consideration of alternative sites had been inadequate.

[874] We accept the Minister's submissions in both respects. We have found that adequate consideration was given to alternative sites and methods; and that implementing the designation on the subject site would not have the serious adverse effects alleged. In those circumstances, it would be unreasonable to expect the requiring authority to use an alternative site or method.

Relevant provisions of statutory instruments

[875] Paragraph (d) of section 171(1) directs that particular regard be had to all relevant provisions of various instruments made under the Act. In this case regard has to be paid to no fewer than six instruments: the Northland Regional Policy Statement, the proposed Northland Water and Soil Plan, the transitional regional plan, the proposed Northland Air Quality Plan, the proposed Far North District Plan, and the transitional Far North District Plan (Bay of Islands section). Each of them is a substantial document.

[876] The effect of paragraphs (c) to (f) of section 104(1) is that in considering the resource consent applications we have also to have regard to all those instruments.

[877] To limit the task as far as we are able, we will give consideration to each of the instruments once for both purposes.

[878] However the directions in section 104(1) are limited to the objectives, policies and rules which are relevant to the actual and potential effects of allowing the activity identified following the inquiry directed by section 104(1)(a).[86] Accordingly we defer considering the statutory instruments until we have had regard to the environmental effects of allowing the resource consents, as directed by section 104(1)(a).

Section 104 considerations

[879] Section 104(1) prescribes matters to which a consent authority is to have regard in considering a resource-consent application. The subsection is prefaced by

[86] *Smith Chilcott v Auckland City Council* [2001] 3 NZLR 473; 7 ELRNZ 126; paragraph [31].

the words "Subject to Part II ..." In the context, as in section 171(1), that phrase has the effect of defeating the direction to have regard to the matters listed, where to do so would conflict with anything in Part II.

Environmental effects

[880] The first item in the list of matters to which a consent authority is to have regard is–

> (a) Any actual and potential effects on the environment of allowing the activity.

[881] In this case, it was not suggested that having regard to any actual or potential effects on the environment would conflict with anything in Part II.

[882] As the resource-consent applications before the Court in these proceedings relate to the earthworks and streamworks, not to the use of the land for the proposed prison, in carrying out the direction we have regard to the effects of allowing the earthworks and streamworks for which resource consents are sought, not to the effects of allowing the prison as a land use (being a matter the subject of the designation requirement, to which section 171 applies).

[883] The term 'effect' is defined in section 3. However that definition does not apply to the use of the term in section 104(1)(a).[87] Potential effects are effects which may happen, or they may not.[88]

[884] The term 'environment' is defined in section 2(1)–

> Environment" includes–
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[885] The submitters contended that regard must be had both to the physical disturbances to the landform, the groundwater, streams, and the receiving environment; and also to the cultural impact of those disturbances on Maori people

[87] *Dye v Auckland Regional Council* [2001] NZRMA 513; 7 ELRNZ 209; paragraph [41].
[88] Ibid, paragraph [39].

and communities. They urged that the potential effects include potential for geological and geothermal repercussions as a result of the proposed land disturbances, and the effect of the ultimate use of the site as a prison, including cultural impact, risks from escaping inmates, and risks to inmates and the neighbouring community due to location of the prison in an active geothermal system.

[886] We have already given our reasons for holding that the submitters, who were heard on the Minister's appeal against refusal of the resource consents, are not entitled to make a separate case in respect of the use of the land as a prison (for which authority is sought not by resource consent but by designation). In any event, we have considered the evidence about cultural impacts, risks from escaping inmates, and risk of eruptions, and have rejected them.

[887] Earlier in this decision we considered the evidence on claims of actual and potential effects of the disturbances to the landform, groundwater, streams and receiving environment; and the potential for the proposed works to cause geothermal activity. We have not accepted any of those claims.

[888] In summary we find that there would not be actual or potential effects on the environment of allowing the activities the subject of the resource-consent applications.

Statutory instruments

[889] As already mentioned, the effect of paragraphs (c) to (f) of section 104(1) is that in considering the resource consent applications we have to have regard to various instruments made under the Act. Because in considering the designation requirement we have to have particular regard to the same instruments, we address them later in a separate section of the decision.

Other relevant and necessary matters

[890] Section 104(1)(i) provides that in considering the resource consent application, the consent authority is to have regard to any other matters it considers relevant and reasonably necessary to determine the application.

[891] In this decision we have already addressed in detail the several matters raised in issue by the parties. We have also to have particular regard to no fewer than six instruments made under the Act. Even though we fully recognise the importance of the decision in these proceedings, we consider that such an abundance of evidence and instruments will provide a fully sufficient basis for making the judgements called for. We are not aware of any other matters that are relevant and reasonably necessary to determine the application.

Discharge considerations

[892] Section 104(3) provides–

> (3) Where an application is for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or 15B (relating to discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects on the environment of allowing the activity, have regard to–
> (a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant's reasons for making the proposed choice; and
> (b) Any possible alternative methods of discharge, including discharge into any other receiving environment.

[893] That provision is applicable to our consideration of the applications for discharge to the Ngawha Stream of stormwater runoff, both from the construction sites, and from the roofed and paved areas of the facility post-construction.

[894] The nature of the discharges is that they will have been treated by detention ponds in accordance with the accepted Auckland Regional Council standard. The sensitivity of the receiving environment is not great, being a stream in a farming area that receives runoff from dairy farming. The Minister's advisers considered discharge to soakpits instead of discharge to the stream direct, but concluded that this would not be a practicable alternative. The effect of the project on the quality of the water in the stream would be that the quality would be better than if the property continued to be a dairy farm.

[895] For those reasons, we find that section 104(3) does not indicate that the discharge applications should be declined.

[896] Parts of section 107 relevant to discharge of contaminants prescribe–

> **107. Restriction on grant of certain discharge permits–** (1) Except as provided in subsection (2), a consent authority shall not grant a discharge

permit ... to do something that would otherwise contravene section 15 ... allowing–

(a) The discharge of a contaminant or water into water; or

(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or

...

(d) Any conspicuous change in the colour or visual clarity:

...

(g) Any significant adverse effects on aquatic life.

(2) A consent authority may grant a discharge permit ... to do something that would otherwise contravene section 15 ... that may allow any of the effects described in subsection (1) if it is satisfied–

(a) That exceptional circumstances justify the granting of the permit; or

(b) That the discharge is of a temporary nature; or

(c) That the discharge is associated with necessary maintenance work–

and that it is consistent with the purpose of this Act to do so.

(3) In addition to any other conditions imposed under this Act, a discharge permit ... may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.

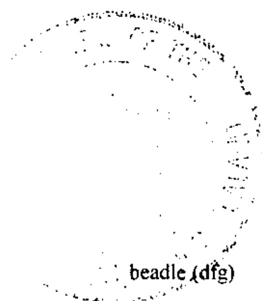
[897] The prospect of discharge of contaminants into water arises from runoff of stormwater from disturbed ground during the construction works. Although the runoff is to be diverted to detention ponds and treated before discharge in accordance with sound practice, during the construction phase, it may not be practicable to remove all contaminants at all times prior to discharge. The contaminant content of the discharge may be capable of being noticed, but on the evidence it would not cause a conspicuous change in colour or visual clarity, nor have any significant adverse effect on aquatic life. Conditions can be imposed requiring the consent holder to undertake and maintain diversion and treatment works specified in the appropriate Auckland Regional Council technical standard.

[898] The prohibition imposed by subsection (1) is subject to subsection (2), which allows the grant of a discharge permit authorising discharge of contaminants into water if the discharge is of a temporary nature, and it is consistent with the purpose of the Act to do so.

[899] The works for developing the prison site are to be temporary, and the stormwater runoff from the earth disturbed for those works will also be temporary.

[900] We find that granting consent would be consistent with the statutory purpose because the design of the development, and the conditions of consent, would avoid, remedy or mitigate the adverse environmental effects by requiring diversion, detention and discharge of the runoff in accordance with sound practice.

[901] Accordingly we hold that that the stormwater discharge consent for the construction phase is not prohibited by section 107.



STATUTORY INSTRUMENTS

[902] As already mentioned, section 104(1) directs that when considering a resource-consent application, a consent authority is to have regard to various instruments made under the Act. In deciding the Minister's appeal, the Court has the same duty.[89]

[903] The scope of the Court's duty under section 171(1)(d) to have particular regard to the statutory instruments is similar to that imposed by section 104(1). To avoid repetition, we have particular regard to relevant provisions of them in respect of the required designation for the purpose of section 171(1)(d), and in respect of the resource-consent applications for the purpose of section 104(1)(c) to (f).

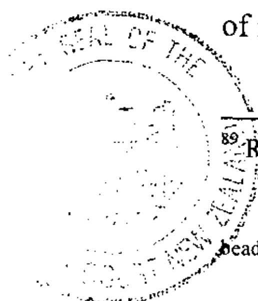
[904] Of the instruments to which we are to have particular regard, two are transitional plans that were prepared under earlier legislation. For that reason the duty to have particular regard to them might be defeated by conflict with Part II of the 1991 Act. In respect of the other instruments, prepared specifically for the Resource Management Act regime, we are not aware of any potential conflict with Part II that might defeat the duty to have particular regard to them.

Northland Regional Policy Statement

[905] Relevant provisions of the Northland Regional Policy Statement were identified in Mr Bhana's evidence. We have considered them all, but mention only those that bear significantly or specifically on issues in these proceedings.

[906] The description of the Ngawha Geothermal Field identifies "the considerable cultural and spiritual value to tangata whenua" of the hot water seepages and springs, "used for bathing by local residents and visitors for some therapeutic purposes".

[907] The description of partnership principles of the Treaty of Waitangi recognises tangata whenua as a Treaty partner, and states that tangata whenua are expected to have a key role in resource management through consultation, education, monitoring and investigations, and that their involvement respects them as kaitiaki o nga taonga tuku iho. A policy of consultation with tangata whenua is elaborated, as are policies of identification and protection of waahi tapu and other heritage features.



89 Resource Management Act 1991, s 290(1).

[908] Cultural purposes are among the purposes of the objectives for maintenance and enhancement of water quality in all classes of water body, including groundwater and streams. Similarly in respect of discharges of contaminants, traditional Maori cultural values are among those identified for consideration. Policies for controlling the quantity and flow of water bodies also recognise that some water bodies may be identified as taonga.

[909] There is a policy of promoting soil conservation as an integral part of all land use and development activities, particularly to minimise erosion and avoid off-site sedimentation.

[910] There is an important section on natural hazards, although it does not identify geothermal or seismic hazards. There is another section on hazardous substances, which does not identify natural concentrations of mercury or other hydrothermal products, but a section on energy mentions Ngawha geothermal field as a potential energy source.

[911] The transitional regional and district plans to which we have particular regard, having originally been prepared under the previous regimes, may not fully accord with the purpose of the Resource Management Act 1991, or the regional policy statement prepared under it. However the proposed regional and district plans prepared under the 1991 Act are all required not to be inconsistent with the regional policy statement.[90] In addition, the proposed district plan is not to be inconsistent with any regional plan in regard to any matter of regional significance or for which the Regional Council has primary responsibility.[91]

[912] Referring to the findings stated earlier in this decision on Treaty principles, Maori cultural and traditional relationships, and kaitiakitanga, we find that the proposed designation and resource consents would not offend the provisions of the regional policy statement in those respects.

[913] The regional policies against erosion and sedimentation are to be implemented by the more detailed and particular provisions of the proposed regional water and soil plan; and we consider the proposed earthworks and streamworks in that context.

[90] Ibid, s 67(2) and s 75(2).
[91] Idem.

Proposed Northland Water & Soil Plan

[914] The proposed regional water and soil plan was publicly notified in 1995, and Variation No 1 on 30 August 1997. Submissions on the proposed plan and variation were heard and decided, and a revised version of the plan incorporating the amendments decided on was published on 7 November 1998. References have been lodged with the Environment Court in respect of a number of provisions, but have not yet been determined.

[915] Variation No 2 was publicly notified on 27 October 2001 (before the hearing of these proceedings could be completed). A number of submissions had been received by 14 December 2001 when the period for lodging submissions elapsed.

Objectives and Policies

[916] Consistent with Part II of the Act and the regional policy statement, the plan recognises tangata whenua as a partner to the Treaty of Waitangi. It acknowledges that tangata whenua take a holistic approach to the management of the environment and its resources. It contemplates that the Regional Council, in decision-making, requiring information on the application of Treaty principles to individual proposals, and weighing that information against other matters under consideration. Subject to the legislation, it also allows for each iwi to indicate its own customary, traditional and cultural preferences for water management in its tribal territory, and ensuring that the spiritual, social, and economic connections between tangata whenua as kaitaiki and water and land resources are protected. The plan also provides for protection of waahi tapu, urupa and other sites of cultural and spiritual significance.

[917] In general terms the plan has an objective of integrated and co-ordinated management of natural and physical resources; an objective for maintenance and enhancement of water quality for cultural (and other) purposes; and a policy of managing water bodies recognised (by an iwi or judicial authority) as taonga of special significance having particular regard to those cultural values.

[918] For groundwater management, the objectives are sustainable use and management of the resources, to avoid land subsidence, saltwater intrusion, and similar effects and (specifically in respect of geothermal waters) lowering the temperature in aquifers and springs.

[919] In respect of land management there are policies of maintaining soil quality, (including depth) as far as practicable, of avoiding or reducing discharge of sediment and minimise soil losses particularly on erosion-prone land. There are also policies of promoting stream-side management recognising the benefits, protecting or enhancing stream-side vegetation, particularly indigenous vegetation; and having regard to cultural and spiritual values held by tangata whenua when considering applications for land-disturbance activities.

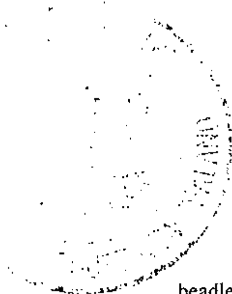
[920] There is a map identified as Schedule C of the appendixes of the plan (as revised) that shows the approximate boundary of the geothermal field as defined by resistivity survey. Mr Lawless agreed that the boundary shown on the map is approximately the same as is accepted in many scientific publications representing the results of a resistivity survey at a particular depth. At a shallower or greater depth one would draw a slightly different boundary. The purpose of the resistivity survey was to define the high temperature reservoir at the depth that could be economically drilled, that is 500 metres depth to possibly twice that.

Status of works

[921] The proposed plan contains elaborate rules about the status of runoff and discharge of stormwater, diverting surface water, and land disturbance activity (in general and in streamside management areas). The Minister accepted that resource consents are required in respect of land disturbance (including cut and fill), damming and realigning the Ngawha Stream, stream-bed works, discharge of treated stormwater and treated runoff from land disturbance to the Ngawha Stream or tributaries, and incidental discharges from the stormwater collection systems on the site. Initially the Regional Council had suggested that resource consent may be required for the wick drains. However an effect of Variation No 2 (in respect of which no submissions were received) is to make them a permitted activity.

[922] The earthworks for site development involve about 440,000 cubic metres of cut and fill excavations for buildings platforms and other structures. The rule applicable is Rule 33.2–

> The following land disturbance activities are controlled activities:
> 1. Any *earthworks* which:
> (i) Is not located on *erosion prone land*, and is not in the streamside management area.
> (ii) the volume moved or disturbed is greater than 5000 m3 in any 12 month period.
> Is a controlled activity provided that the following conditions are met:



(a) There are no more than minor adverse effects on soil conservation beyond the property boundary.
(b) The Environmental Standards in Section 32 are complied with.
Matters subject to control
The matters over which the Northland Regional Council will exercise control are:
(a) The adequacy of sediment and runoff control measures.
(b) The location of any borrow and fill areas.
(c) The adequacy of site rehabilitation and revegetation measures to control sediment discharge and adverse effects on soil conservation.
(d) Information and monitoring requirements.

[923] The site of the proposed earthworks is not erosion-prone land, and to the extent that it is not in the streamside management area (a strip of land varying between 3 metres and 20 metres in width from the bank edge of a watercourse) the works qualify as a controlled activity if conditions (a) and (b) are met.

[924] In respect of Condition (a), there was no issue. That condition would be met.

[925] Turning to Condition (b), Section 32 of the plan contains a set of environmental standards for land disturbance works, to avoid or minimise erosion and contamination of surface waters, and interference with waahi tapu, urupa, and other sites of spiritual or cultural significance to Maori. Revegetation is required and batters and side castings are to be stabilised to avoid slumping. Earthworks are to incorporate stormwater controls to prevent scour and sediment discharge. Traditional and cultural relationships of tangata whenua with the land and water are to be recognised and provided for.

[926] There was no issue that the proposed works would be carried out in a way that meets the standards for protection of natural and physical resources.

[927] The text of the particular standard to protect waahi tapu and other cultural sites is in paragraph 32.1.5–[92]

> The activity shall not interfere with or destroy any waahi tapu, as defined in the definitions, urupa or any other sites known to the local iwi which are of spiritual or cultural significance to Maori, which have been identified to the Regional Council.

[928] There are pools on the property that have cultural significance to Maori. They are the Waitotara and Waiapawa pools, and the Minister has proposed that they be fenced off and protected.

[92] As amended by decisions on submissions.

[929] Mr Warren stated that–

> ... the considerable evidence by tangata whenua concerning the spiritual and cultural significance of the area to them raises a real concern as to whether this standard can be met.

[930] For ourselves we do not find that a general statement that evidence raises a real concern as to whether the standard can be met assists us. We consider that compliance with the standard requires identification of the issue, consideration of the evidence, and making a finding on the issue from the evidence.

[931] The issue is whether or not the activities the subject of the resource consent applications would interfere with or destroy any waahi tapu (as defined), urupa, or other sites that fulfil the conditions in the standard. We have reviewed the evidence in that regard earlier in this decision. Neither Mr Warren nor any other witness provided probative evidence (as distinct from bald and general assertions) of the existence of any waahi tapu (however defined), urupa or other site which had been identified to the Regional Council and that would be interfered with or destroyed by the proposed activities.

[932] Without repeating the details set out earlier in this decision, we find that the proposed earthworks would not interfere with or destroy any waahi tapu, urupa, or other sites of spiritual or cultural significance to Maori, which have been identified to the Regional Council. We have also reviewed the evidence about relationships of Maori, and their culture and traditions, with the land and water of the site, and have found none that would be adversely affected by the works.

[933] Consequently we hold that the proposed earthworks outside the streamside management area are a restricted controlled activity, the discretion being restricted to the four matters listed in Rule 33.2.1.

[934] The proposed earthworks within the streamside management area are discretionary activities. Variation No 2 makes no practical difference in that respect. Culverts are permitted activities if they do not obstruct the free flow of water. However two of the proposed culverts do not meet that condition (requiring gratings to prevent escapes) and are controlled activities.

[935] Water pipelines crossing watercourses are permitted activities, but those carrying sewage from the prison crossing watercourses are discretionary activities. The proposed damming of the stream is a discretionary activity, as are the diversions

and realignment of the stream, and the bank protection works and other stream improvement and drainage works.

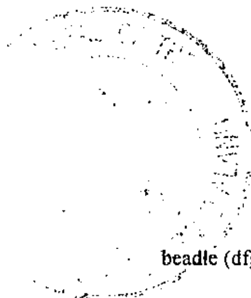
[936] The Regional Council informed the Court of its understanding that the effect of Variation No 2 would be that post-construction stormwater discharges would comply with the conditions for a permitted activity; and that the wick drains would also qualify for that status. Without rehearsing the detail of the reasoning, we understand that neither of those submissions was challenged, and we accept them.

[937] However, diversion and discharge of stormwater associated with the land disturbance activities is a controlled activity outside the streamside management area, and a discretionary activity where the runoff passes to a streamside management area. The post-construction diversion and discharge of stormwater, draining an area exceeding 4 hectares, is a discretionary activity.

Assessment

[938] The plan prescribes assessment criteria for various classes of consent. These are expressed in general terms, and have some contents in common. In the light of the findings we have already made on the opponents' claims of adverse environmental effects, we do not quote or summarise them all. We note that assessment of discharge permit applications is to include the sensitivity of the receiving environment including its cultural values; that the assessment of damming and diversion is to include the extent to which the natural character of the environment is maintained, and the extent to which cultural values are adversely affected, and maintenance of fish movement; and assessment of land disturbance is to include the scale of the activity, proximity to any identified significant natural feature, waahi tapu or urupa and effects on them.

[939] The proposal involves specific soil conservation measures to minimise erosion and avoid off-site sedimentation, and revegetation of exposed areas in accordance with an erosion and sediment management plan. Diversion channels and sediment detention ponds would be included. The flow of the Ngawha Stream is to be diverted from the site during the works to maintain the quality of the water.



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[940] Native orchid habitats are to be protected by fencing. Unsuitable exotic riparian vegetation is to be replaced by more suitable species, and proposed fencing and planting of the riparian margins would result in an overall improvement of fish habitat. Culverts have been designed to allow for passage of fish.

[941] Although the streambed works would interrupt flow in the Ngawha Stream for a short period, the flow in the tributaries would ensure that there would still be downstream flow at all times, and no adverse effects are likely. Otherwise no structures are proposed that would inhibit passage of fish, and no undesirable erosion of the streambed is likely. The proposed works would not create any increased flooding upstream or downstream, nor any increased restrictions on drainage of flood waters or other significant effects beyond the property.

[942] The stormwater collection system would direct runoff from hard surfaces and roofs to settlement ponds (designed in accordance with the standard Auckland Regional Council TP10) and from there to the Ngawha Stream. The system is to be designed to accommodate 1-in-50-year 15-minute storm events. The rate and volume of stormwater would not noticeably increase the volume or velocity of flows beyond the property, and the quality of the water is likely to improve compared with the present uncontrolled runoff from the dairy farm.

[943] The Regional Council expects to carry out monitoring at regular intervals to ensure ongoing compliance, especially during or after heavy rain.

[944] Evidence was given by Mr G E Heaps, a qualified soil conservator and Regional Council consents officer. This witness gave the opinion that the proposed earthworks and associated stormwater discharges, works in the beds of watercourses and ongoing stormwater discharges from the site, if carried out in compliance with the recommended conditions, would have no more than minor adverse effect on the environment. Any short-term effects on water quality would be no more than minor and in the longer term the water quality is likely to be better than it is at present. In summary, this officer gave the opinion that the proposals would be consistent with the objectives and policies of the regional policy statement and revised proposed regional water and soil plan.

[945] Mr Warren expressed doubt about compliance with the environmental standard limiting reduction in clarity of the stream water from sedimentation. Asked in cross-examination the witness stated that he was aware of the silt protection measures proposed by the Minister's engineers, and that he would have no objection to the fixing of a condition directed at securing compliance with the standard, in terms of a detailed erosion and sediment management plan.

[946] We have already given our findings about the limits of the holistic approach in making decisions under the Resource Management Act, and about the design of the proposal to respond to that view of the environment. We have not found that Maori have a cultural or traditional relationship with the site that would be adversely affected by giving effect to the designation or by exercising the resource consents. The only taonga on the property, the Waiapawa and Waitotara pools, are to be protected.

[947] The proposal was put before the Court in an integrated way, co-ordinating the designation requirement and the resource consent applications, and although the geothermal activities are a taonga of cultural significance, they would not be affected by the prison that would be authorised by the designation, nor by the development works that would be authorised by the resource consents. Those works are to be carried out so as to avoid, remedy and mitigate any adverse effects on the natural and physical resources affected, including in particular sediment and runoff control and revegetation.

[948] In summary, it is our judgement that the works that would be authorised by the resource consents (whether controlled activities or discretionary activities), and (to the extent relevant) the prison land-use that would be authorised by the designation, considered by the assessment criteria of the proposed Regional Water and Soil Plan, would serve the objectives and policies of that plan, and indirectly those of the regional policy statement.

Transitional Regional Plan

[949] The transitional regional plan consists principally of a general authorisation under the Water and Soil Conservation Act 1967 and a set of bylaws. The Regional Council announced that the transitional regional plan rules are largely superseded by

provisions of the proposed Regional Water and Soil Plan and they are no longer in contention.

[950] The only rules of the transitional plan that are relevant to the proposed works were originally in the general authorisation under the 1967 Act. The discharge of post-construction stormwater, being from a roofed and paved area exceeding 2500 square metres, is not permitted by the general authorisation incorporated in the transitional regional plan, and a discharge permit is required in that regard. The proposed streambed works are not authorised either, so resource consent is also required for them.

[951] The transitional district plan does not provide assessment criteria for deciding the applications in those respects. In our judgement because the stormwater system includes silt detention ponds to the appropriate technical standard, and would not have flooding or significant water quality effects, the consent required by reference to the transitional regional plan deserves to be granted on appropriate conditions. Likewise the proposed streambed works would be sufficiently controlled by the proposed conditions as to avoid, remedy or mitigate adverse effects on the environment, and on that basis should be granted.

[952] Although the relevant provisions of this transitional plan were prepared in terms of the Water and Soil Conservation Act 1967, which was repealed by the Resource Management Act 1991, we are not aware of any reason why having particular regard to this instrument would conflict with anything in Part II.

Proposed Northland Air Quality Plan

[953] Rule 10.1.2 of the proposed plan prescribes that discharge of dust is not to result in any dust nuisance that is offensive or objectionable to neighbouring landowners and occupiers or their properties.

[954] The Minister having been advised that compliance with that rule would be achieved did not apply for resource consent in respect of the proposed air quality plan. The Regional Council did not take issue with that, and there was no evidence providing a basis for doubting that advice.

Proposed Far North District Plan

[955] The Far North District Council publicly notified its current proposed district plan on 27 April 2000. The District Council is now at the stage of hearing submissions on the proposed instrument.

[956] There is a section of the proposed district plan setting out tangata whenua values and perspectives, with reference to the holistic approach to the management of the environment and its resources, echoing the content of the regional policy statement in that regard. Related objectives and policies are to be implemented by identification of sites of value to Maori, and by various rules governing development.

[957] The proposed district plan identifies the Waiariki pool as a site of Maori cultural significance. No other special provisions in the plan affect the subject property.

[958] By the proposed district plan, the site is in the General Rural zone. The objectives and policies are based on sustainable management of the natural and physical resources found in rural areas. Rural and agricultural activities and the need to accommodate change are recognised along with maintaining the life-supporting capacity of soils and protecting significant vegetation, habitats, outstanding landscapes and natural features.

[959] The rules for the zone classify activities by reference to standards for permitted activities. Rule 8.6.5.1.2 restricts the intensity of residential development to one residential unit per 4 hectares of available land. The definition of 'residential unit' does not apply to the accommodation proposed for the corrections facility.

[960] Rule 8.6.5.1.4 limits the maximum area of impermeable surfaces to 15 % of the site area or 5000 square metres, whichever is the less. Rule 8.6.5.2.2 limits the maximum site coverage for controlled activities to 20 % or 8000 square metres, whichever is the less.

[961] Rule 8.6.5.1.6 limits traffic intensity for new activities to 100 one-way movements. Rule 8.6.5.3.1 limits traffic intensity for new activities as a restricted discretionary activity to 200 one-way movements.

[962] Prisons are not specifically provided for. However Rule 8.6.5.4 defines an activity in the Rural General zone as a discretionary activity if it is an integrated development.

[963] Mr Bhana gave the opinions that the rules for integrated development encompass activities of a similar kind (in terms of their effects on the physical environment) to those proposed for the prison development; and that the proposed buildings could comply with the standards in the plan. Those opinions were not challenged, and we accept them.

[964] The district plan classifies excavation and filling in excess of 2000 square metres on sites in the Rural General zone as a discretionary activity. The assessment criteria encompass similar issues to those in the proposed regional water and soil plan.

[965] The standards for permitted activities include a requirement that buildings and impermeable surfaces are set back from the edge of rivers. The setback for rivers less than 3 metres in width is equal to 10 times the average width of the river where it passes through the site. An activity that does not meet that standard becomes a discretionary activity.

[966] Mr Bhana relied on Mr Boffa's evidence and gave the opinion that the prison buildings would not be visible to a wide audience and where they would be particularly visible, proposed planting would mitigate any visual effects so that they would be compatible with other buildings in the area. Mr Bhana also gave the opinion that the prison would not result in visual domination, loss of privacy or sunlight to adjacent properties.

[967] The witness acknowledged that development of the prison would have some effect on the life-supporting capacity of soils immediately and directly affected by buildings and impermeable surfaces, and observed that this is a minimal area of the site and a natural consequence of any building development of the proposed scale. He concluded that an activity which had the potential for similar effects on the environment as the proposed prison would be in accordance with the assessment criteria for discretionary activities in the General Rural zone provided it is designed in similar fashion to avoid, remedy or mitigate the effects on the environment.

[968] We refer (without repeating) to our findings about the holistic approach, to the protection of the Waitotara and Waiapawa pools, and to there being no other site of value to Maori that would be affected.

[969] We find that the proposed prison would not be incompatible with the rural activities that the proposed district plan contemplates and provides for in the General Rural zone. The size of the site is such that intensity of development is not in issue. The proposals for runoff, treatment and discharge of stormwater are such that the extent of impermeable surfaces are not an issue. The unchallenged evidence shows that traffic safety and efficiency is not an issue. The proposed riparian planting serves the purpose of the setback provisions.

[970] In summary, it is our judgement that the designation of the site for the prison, and the detailed plans for its development, would be compatible with the proposed district plan.

Transitional District Plan

[971] The relevant section of the transitional district plan is the former Bay of Islands County District Scheme. The district scheme was prepared under the Town and Country Planning Act 1977 commencing in 1987. It was made operative on 21 December 1992. By section 373 of the Act, it was deemed to be the district plan for the part of the Far North District to which it related.

[972] Mr Warren observed that the transitional district plan had been prepared under the Town and Country Planning Act 1977, and advised that he had not accorded it any weight.

[973] The transitional plan contains objectives and policies recognising and providing for traditional, cultural, spiritual and ancestral links between tangata whenua and any land or water bodies.

[974] The plan records that tourism proposals for Ngawha Springs not having come to fruition, the area set aside for tourist accommodation there had been significantly reduced, but retaining provision for redevelopment of the site previously occupied by the Ngawha Springs Hotel.

[975] By the transitional district plan, the site is zoned Rural 1C (Catchment Protection), a zone to protect areas within water supply catchments.

[976] A wide range of activities are permitted in the Rural 1C zone, including kokiri centres, marae development, outdoor recreation and entertainment activities excluding motorsports and firearms sports. However educational institutions, licensed premises, rural industries, timber processing facilities and wineries are discretionary activities.

[977] The development standards require internal yards of 10 metres for packhouses and coolstores, and 3 metres for others. There is no height limit and the maximum building coverage is 25% of the site area.

[978] Mr Bhana adopted Mr Boffa's opinion that the prison would not adversely affect the visual qualities of the neighbourhood; Mr Gibson's opinion that lighting of the prison would have minimal effects; Mr Oh's opinion that it would not have adverse noise effects; and the opinions of Bishop Te Haara and other witnesses that there would be no adverse impact on cultural values and that the net effect is likely to be beneficial. Mr Bhana also adopted Mr McCoy's opinion that any potential adverse traffic safety effects would be satisfactorily avoided, remedied or mitigated by the proposed intersection works on State Highway 12. He further adopted the evidence of Messrs Alderton and Hickling that adverse effects on water quality and quantity would be avoided, remedied or mitigated by the proposed construction methods, stream protection and stormwater control measures, and as required by the proposed conditions of the resource consents.

[979] We accept the review of that evidence. We have already given our findings that the proposal would not limit any potential that may exist for tourism development at Ngawha Springs. There is no evidence of any current need for water catchment protection that would limit the use of the Timperley land. In our judgement the proposed prison on the site would be compatible with the rural activities contemplated by the transitional district plan for the Rural 1C zone, and nothing in the transitional district plan would preclude giving effect to the designation, or granting the resource consents, on the proposed conditions.

[980] Although this instrument was prepared under previous legislation, we are not aware of any reason why having particular regard to it would conflict with anything in Part II.

CONDITIONS

Designation

[981] Counsel for the Minister presented a revised set of conditions to be attached to the designation in the event that the requirement is confirmed. The Far North District Council has indicated its agreement to the revised conditions, and the opponents have not signified any opposition, or any wish to be heard in respect of them.

[982] Having reviewed the revised conditions, we are satisfied that they would be appropriate to protect the public and private interests likely to be affected by the designation, and would be effective in avoiding, remedying and mitigating any adverse environmental effects arising from the exercise of the designation.

[983] The revised conditions intended for the designation are set out in Appendix 1 to this decision.

Resource consents

[984] The Regional Council refused the resource consents applied for by the Minister on what may be summarised as Maori cultural grounds. Its commissioners stated that but for those matters the resource consents would have been granted in accordance with good resource management practice, they attached to their decision a set of conditions that they would have imposed had the applications been granted.

[985] In his evidence to the Court Mr G E Heaps, a Regional Council consents officer, proposed some amendments to the conditions attached to the commissioner's decision. Subsequently, a further revised version of those proposed conditions was prepared and agreed to by the Minister and the Regional Council. The opponents have not signified any opposition to the revised conditions, or any wish to be heard in respect of them.

[986] We have considered the revised conditions, and are satisfied that they would be appropriate and effective in avoiding, remedying and mitigating any adverse environmental effects arising from the exercise of the resource consents.

[987] The revised conditions are contained in Appendix 2 to this decision.

PERMITTED BASELINE COMPARISONS

Does the duty apply to regional consents and designation requirements?

[988] We have attended to the various duties expressly stated in the Resource Management Act for the consideration of the designation requirement and the resource consent applications. We have now to consider whether the law obliges us also to make permitted baseline comparisons in respect of any of them.

[989] There are three different aspects of permitted baseline comparisons. The first is to compare the environmental effects of the activity the subject of consideration with the environmental effects of activity actually being carried out lawfully on the land. The second is to compare them with the environmental effects of hypothetical activity that (not being fanciful) could occur on the land as a permitted activity under the relevant plan. The third is to compare the environmental effects of the subject activity with those of an activity authorised by an earlier resource consent that has not been implemented.[93]

[990] At least in the case of applications for land-use consent,[94] and for subdivision consent,[95] the first two comparisons are obligatory; and it is for the consent authority to decide whether or not the third is appropriate in the circumstances.[96]

[991] However as far as we were aware, neither the Act nor the case-law states whether the obligation to make permitted baseline comparisons extends to designation requirements or to applications for regional resource consents (those required by sections 12-15). Therefore we invited counsel to offer submissions on those questions.

[992] Mr Littlejohn submitted that there is no legal or policy basis to restrict the obligation to make permitted baseline comparisons to land-use consents under section 9(1). He offered three reasons.

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[93] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA); *Smith Chilcott v Auckland City Council* [2001] 3 NZLR 473; 7 ELRNZ 126 (CA); *Arrigato v Auckland Regional* [2001] NZRMA 481 (CA).
[94] *Bayley* supra, and *Smith Chilcott* supra.
[95] *Arrigato* supra.
[96] *Arrigato*, supra.

[993] The first reason was that the practice of permitted baseline comparison arose out of notification duties under section 94, which apply to all consent authorities, and are driven by the status of the activity, not by its nature.

[994] The second reason was that there is no implicit restriction of the duty to land-use activities in the reasoning of the Courts in developing the obligation.

[995] The third reason was that the statements of the restriction on activities in sections 9(1), 13, 14 and 15 all envisage a baseline or level of permitted effects (expressly provided for in regional plans), below which resource consent would not be required. Counsel submitted that activities having effects for which resource consent is not required could be seen as being "as of right".

[996] Mr Littlejohn also submitted that the public policy reasons for the permitted baseline approach in relation to section 9(1) referred to in *Barrett v Wellington City Council*[97] apply equally to activities requiring regional consents; and that in this case the Court would be entitled to disregard adverse effects of activities expressly authorised by the regional plans.

[997] Mr Bell also submitted that the obligation to make permitted baseline comparisons applies to applications for regional consents. He asserted that in any particular case an assessment of effect on the environment of an activity for which consent is sought may involve enquiry into a wide range of environmental matters, and evaluation of the effects (even with regard to what is permitted under the rules of the plan) is one of evaluation based on particular facts. Mr Bell also submitted that application of the permitted baseline test is not necessarily determinative, observing that some activities are classified as permitted because they have particular social utility despite their adverse effects, citing taking of water for firefighting, and coastal structures for navigational safety, as examples.

[998] Mr Bell submitted that the structure of duties in Part III, in which some activities are prima facie allowed unless controlled by rule, and others are prima facie prohibited, does not make any difference for this purpose. In *Arrigato* the permitted baseline obligation was applied to a subdivision application although section 11(1) makes subdivision prima facie prohibited.

[97] [2000] NZRMA 481 (HC).

[999] Mr Milne also submitted that there is no clear reason why the permitted baseline practice should not be extended to applications for regional consents and to designation requirements, and agreed with other counsel that it should apply to applications under sections 12 to 15. He suggested that the 'permitted' part of the baseline should be treated as applying to all activities for which a certificate of compliance would have to be issued (if applied for). Mr Milne cited *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council and Glendon Trust* [98] in which Justice Chisholm held that in evaluating the cultural and spiritual effects of proposed activity (in terms of Part II) the Environment Court had been entitled to take into account activities that could be undertaken as of right.

[1000] In respect of designation requirements, Mr Milne observed that unlike section 104, section 171 does not expressly require that regard is to be had to environmental effects of the proposed activity (though he acknowledged that consideration of environmental effects is required in terms of Part II, and particularly section 5(2)(c)).

[1001] Mr Milne suggested that in practice the permitted baseline will have little applicability in the context of an activity that might be designated. That may be so, but it does not affect the principle.

[1002] As there was no submission to the contrary, for the present case we accept that the obligation to apply the permitted baseline comparisons extends to the applications for regional consents and to the designation requirement.

Application of the permitted baseline comparisons

[1003] In the present case there was no evidence of any unimplemented resource consent affecting the subject land, so we are relieved of the duty of considering whether the third baseline comparison is appropriate in the circumstances of the case. We make comparisons of the effects of the regional consents, and of the designation, separately.

[1004] The purpose of the comparison is to consider whether the environmental effects of the proposal exceed a putative baseline of acceptable environmental effects that are inferred from the existing lawful activities and hypothetical permitted

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[98] High Court, Wellington, AP6/01; 25 June 2001, Chisholm J.

activities, as explained in this passage from the judgment of the Court of Appeal in *Arrigato v Auckland Regional Council*[99]–

> Thus the permitted baseline in terms of Bayley, as supplemented by Smith Chilcott, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the sections 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[1005] The first aspect of the baseline is the environmental effects of existing lawful activities on the site. They are the environmental effects of a working dairy farm, particularly diffuse discharges to the Ngawha Stream and tributaries of runoff contaminated by cattle, and impact of stock on riparian and other vegetation.

[1006] The second aspect is to identify the environmental effects of non-fanciful hypothetical activity permitted by the applicable plans. The wick drains are permitted, so we treat their effects (if any) as being within the baseline. So is drain-clearing and maintenance. In addition 2000 cubic metres per year of earthworks can be carried out anywhere on the land except in the stream-side management areas.

[1007] Turning to land-use activities, those permitted by the transitional district plan are readily identified, so the baseline includes the effects of kokiri centres, marae development, outdoor recreation and entertainment activities excluding motor sports and firearms sports. By the proposed district plan permitted activities are limited by the performance standards (detailed earlier in this decision) stipulating intensity of residential development, maximum area of impermeable surfaces, maximum site coverage, and traffic intensity.

[1008] So the environmental effects that make up the permitted baseline are those of depasturing by dairy cows and of milking operations; diffuse discharges of contaminants from that activity to the stream and its tributaries; drainage by wick drains; and 2000 cubic metres per year of earthworks (except in the stream-side area). In land use, they are the environmental effects (such as they may be) of kokiri centres, marae development, outdoor recreation and entertainment activities excluding motor sports and firearms sports, residential development up to one unit per 4 hectares, and other undefined activities, limited to impermeable surfaces not

[99] [2001] NZRMA 481 para [29].

exceeding 15% of site area or 5000 square metres, site coverage not exceeding 20% or 8000 square metres, and traffic up to 100 vehicle movements per day.

[1009] Now we have to compare the environmental effects of the prison proposal with those of the permitted baseline, to assess whether there are "other or further" adverse effects of the proposal that are to be taken into account in making the judgements under section 174(4) whether the designation requirement should be confirmed, modified or cancelled; and under section 105(1)(b) whether the resource consents should be granted or refused.

[1010] The proposal involves discharges of potentially contaminated stormwater runoff to the stream and its tributaries. We find that the environmental effects of those discharges would be considerably less than the existing diffuse discharges, because of the elaborate proposals for diversions and detention ponds in accordance with the appropriate technical standard. Also, the proposed stream works on the eastern tributary would have less adverse effect on the environment than normal drain-clearing and maintenance operations.

[1011] However the scale of the land disturbance proposed considerably exceeds the extent permitted, even outside the stream-side management area (2000 cubic metres per year), and has "other or further" adverse effects beyond the baseline. The environmental effects of *using* the land for the proposed prison fall outside the permitted baseline, because a prison is neither existing nor permitted on the site, and the extent of the impermeable surfaces and site coverage exceed the standards.

[1012] We find therefore that in making the judgements referred to, we are not to take into account the effects of discharge of contaminants or of the wick drains, as they are not "other or further adverse effects" than the adverse effects included in the permitted baseline. However the effects of the other earthworks and streamworks proposed, and those of the scale and intensity of the accommodation, the extent of impermeable surfaces, and site coverage (being "other or further adverse effects" beyond the baseline), are to be taken into account in making those judgements, to which we now proceed.

JUDGEMENTS

[1013] In preceding sections of this decision we have made our findings about the affirmative case for the proposal; about the claimed physical effects on the environment; the Maori cultural and traditional issues raised; and the other non-

physical effects claimed. We have considered the application of important provisions of Part II to which our attention was drawn, and have found that elements relied on have been appropriately recognised and provided for, paid particular regard, and appropriately taken into account. We have attended to the considerations prescribed by the Act for the designation appeal and the resource consent applications; and we have made the permitted baseline comparisons required by case-law. We have considered the conditions that might be imposed on the designation and the resource consents, if confirmed and granted, to avoid, remedy or mitigate any adverse effects on the environment.

[1014] Having done those things, we have now to make judgements to confirm, cancel or modify the designation requirement,[100] and to grant or refuse the resource consents sought.[101] Those judgements are to be informed by the purpose of the Act stated and described in section 5, which reads–

> **5. Purpose**– (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while–
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[1015] Those judgements are to be made independent of the parties' attitudes, by standing back and viewing the designation and resource consents from that perspective.

[1016] We have found that there is a public need for a regional prison in Northland. We have also found that the proposed prison would bring substantial economic benefits to the Far North district, and that the net social effect would be positive. Moreover, the proposed prison is capable of providing, and is intended to provide, opportunities for the rehabilitation of inmates. In that regard, we accept that its location near a place highly reputed for healing is appropriate.

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[100] Resource Management Act 1991, s 174(4).
[101] Ibid, s 105(1).

[1017] Although the opponents questioned it, we find that the proposal would enable people and communities to provide for their cultural well-being, as well as their social and economic and social well-being, and for the health and safety of the inmates as well as the people and communities of the region.

[1018] We do not seek to belittle the opposition. Many Maori expressed the belief that the proposed prison would adversely affect their taonga of the Ngawha geothermal field, and we respect their attitudes. However the proposal involves active protection of the only significant geothermal manifestations on the site. The works would not affect the geothermal field in any physical way. The prison would be a kilometre distant from the mineral springs and pools that are the focus of the taonga and the activity around it, and would not be visible from them. In our judgement it would be out of perspective and disproportionate to allow the opponents' attitudes to prevail over the need for the prison, and the extent to which it would enable people and communities to provide for their social, economic and cultural well-being, and for their health and safety.

[1019] Our consideration of subsection (2)(a) was focused on the potential of the soils of the site, and the potential of the geothermal system. Both are appropriately sustained to meet foreseeable needs of future generations. Subsection (2)(b) calls for particular consideration of the Ngawha Stream. The quality of the stream water and the ecosystems of it and of the land would be improved.

[1020] The goal of subsection (2)(c) is avoiding, remedying, or mitigating any adverse effects of activities on the environment. That has also been a goal of the design of the proposed facility, and of the conditions both of the designation and of the resource consents. From a full examination of both, we are satisfied that this goal would be appropriately attained.

[1021] The result is that in the judgement of each of us, the purpose of the Act would be better served by confirming the requirement for the designation, and by granting the resource consent applications, in each case subject to the proposed conditions, rather than by cancelling the requirement or by refusing any of the consents.

beadle (dfg)

DETERMINATIONS

[1022] For the reasons given in this decision, the Court makes the following determinations:

[1023] **Appeal RMA408/00** by **SHAYRON LEE BEADLE** and **Appeal RMA429/00** by **RONALD WIHONGI** and **RIANA WIHONGI** are both disallowed;

[1024] The requirement by the Minister of Corrections for designation of the site for a regional prison is confirmed;

[1025] The conditions set out in Appendix 1 to this decision are imposed on that requirement and designation.

[1026] The question of costs is reserved.

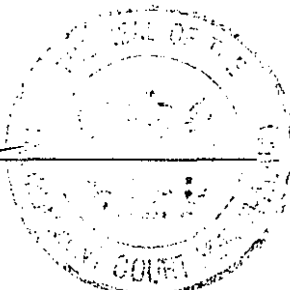
[1027] **Appeal RMA306/01** by **THE MINISTER OF CORRECTIONS** is allowed, and the decisions on behalf of **THE NORTHLAND REGIONAL COUNCIL** refusing the Minister's resource consent applications are cancelled.

[1028] Each of the resource consent applications by the Minister of Corrections described in Appendix 2 to this decision is granted, for the terms, and subject to the conditions set out in that Appendix in respect of each.

[1029] The question of costs is reserved.

DATED at **WELLINGTON** on 8th April 2002.

For the Court:



D F G Sheppard
Environment Judge

Appendix 1

NORTHLAND REGIONAL PRISON

Designation Conditions

This designation is for a Regional Corrections Facility for Northland and relates to the following:

The construction, operation, maintenance and upgrading of a comprehensive regional prison and associated facilities and the authorisation of all ancillary activities and facilities including, but not limited to.

- *Inmate accommodation ranging from low, through medium, to maximum security;*
- *Staff facilities;*
- *Administration;*
- *Rehabilitative programmes;*
- *Inmate employment;*
- *Vocational training;*
- *Recreation and exercise facilities;*
- *Horticultural areas;*
- *Visitors centre;*
- *Staff and visitor car parking;*
- *Internal roading;*
- *Security fences, lights and towers;*
- *All other associated or ancillary land-use activities and all structures and facilities normally associated with a comprehensive regional prison.*

The designation shall extend to all land included in Certificate of Title 46D/1389, being Lot 2 DP 89625 owned by the Minister (as shown on plan ASK-100E) but shall exclude the Waitotara and Waipawa Ponds and land in the vicinity of those ponds as more particularly shown on plan ASK-100G (to be prepared).

Site Development

1. All custodial, industry and office buildings shall be generally located in the building area shown on plan ASK100E.

   Screening trees shall be planted so as to soften the visual impact of any buildings located on the southern ridge of the area shown as the building

area, when viewed from Ngawha Springs Village or the adjoining Beadle property.

2. No buildings are to be erected within 450 metres of State Highway 12, being the area which has a common boundary with the property owned by J M and M A Anderson. In the event that the property comes under the Minister's ownership or control, this condition shall cease to have effect.

3. No building (excluding farm, storage or accessory buildings) shall be constructed or excavation works exceeding five metres in net depth (after cut and fill) shall be undertaken, within the geothermal buffer areas shown on plan ASK100E, and shall be in accordance with the conditions of the resource consents granted by the Northland Regional Council.

4. The entrance to Site D2 from State Highway 12 is to be formed to Transit New Zealand guidelines and standards. Transit New Zealand should be invited to review the access engineering proposals in the light of current traffic densities and average speeds past the proposed access point. As a minimum, there shall be a right turn bay constructed prior to any building-related earthworks being undertaken on the site.

Landscaping

5. A landscaping and planting plan for the designated site shall be submitted to the Far North District Council. The plan is to be prepared following consultation with those landowners with a boundary in common with the designated site. The plan shall be developed with the objectives of:

- Enhancing existing landscape features such as significant vegetation and remaining lengths of unculverted watercourses;
- Utilising native species in key areas such as riparian margins;
- Mitigating visual impact, particularly from the Ngawha Village and adjoining properties.

The landscaping plan is to contain a programme for monitoring new plantings in order to ensure their initial establishment and long term success.

Lighting

6. A lighting plan shall be submitted to the Far North District Council. The plan shall show and describe the location, type, and intensity of lighting for all facilities planned on the site. Light spill shall be directed into the perimeter "sterile" areas or in similar manner to mitigate any impact on Ngawha Village.

Noise Emissions

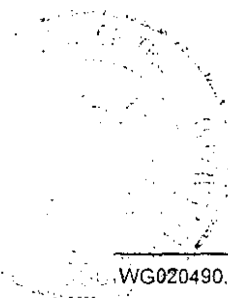
7. Activities on the site shall not exceed the following noise levels as measured within the boundary of any site zoned residential or within the notional boundary of any dwelling on any other site zoned rural:

   0700 to 2200 hours – 50 dBA L10
   2200 to 0700 hours – 45 dBA L10 and
   (the following day) – 75 dBA Lmax

   Sound levels shall be measured in accordance with New Zealand Standard NZS 6801:1991 Measurement of Sound, and assessed in accordance with NZS 6802:1991 Assessment of Environmental Sound.

   Construction noise shall meet the limit recommended in, and shall be measured and assessed, in accordance with NZS 6803P:1984 The Measurement and Assessment of Noise from Construction, Maintenance and Demolition work.

   The monitoring of these levels shall be an agenda item for regular discussion with the proposed Community Liaison Group.



Discovery of Archaeological or Cultural Artefacts

8. Prior to commencement of site works and building construction, tangata whenua shall be consulted and a management plan developed setting out the protocols to be observed in the event of discovery of koiwi (human remains).

9. An appointed archaeologist shall be on call during excavation works. If archaeological evidence is uncovered during the development of the site, the archaeologist will advise on appropriate mitigation measures.

10. In the event that any archaeological materials are discovered during site works or building construction, Schedule 1 of the Memorandum of Partnership between the Ngati Rangi Development Committee and the Department of Corrections (dated 2 March 2001) and conditions 18 and 19 of the Northland Regional Council land use consent shall apply.

Ecological Protection and Enhancement

11. A Conservation Management Plan for the designated site, identifying areas recommended for protection and actions and procedures to maintain or enhance these areas, shall be submitted to the Far North District Council. This plan is to include indigenous flora areas around the Waiatotara Pond, Waiapawa Pond, the shrub land area to the east of this pond and riparian areas adjacent to streams. The plan is to be prepared in consultation with Ngati Rangi representatives and the Department of Conservation. The plan shall include:

- Details of proposed fencing to exclude stock from areas recommended for protection, areas of existing shrub land, remnant indigenous habitat and linkage areas, with the proposed stock fencing being suitable for the free movement of indigenous wildlife.

- Details of the need for any culverts or stream works to provide for fish passage and where necessary any culverting or diversion of any

stream shall be of sufficient size and design so that water velocities do not preclude fish passage at normal flows, and no physical barriers preclude fish passage.

- Details of the presence of indigenous orchids on the designated site, including the sun orchid *Thelymitra malvinie* and the need for associated protective measures.

- Details of the fencing of areas recommended for protection and an associated programme for achieving this fencing.

The Conservation Management Plan shall contain an implementation programme relating to all of the above and a mechanism for ensuring ongoing consultation with interested parties and review provisions.

The Plan shall also provide for the removal or ongoing control of environmental pest plants from the property and for effective pest control within riparian strips and shrub lands.

Community Liaison

12. The requiring authority shall establish a Community Liaison Group as a forum for informing the local community of, and receiving feedback on, the activities undertaken in accordance with the designation. It will be an ongoing point of contact between the requiring authority and the community. The Community Liaison Group shall be formed within two months of a designation being included in the district plan pursuant to section 175 of the Act and shall have its first meeting at that time.

    The Community Liaison Group shall comprise, as a minimum, one representative from each of the following:

    - Far North District Council;
    - Ngati Rangi;

- Ngapuhi
- other Ngawha hapu;
- Ngawha Springs township land owners;
- adjacent rural landowners;
- Kaikohe business community;
- prison management;
- New Zealand Police.

It shall be the responsibility of the requiring authority to convene the meetings and to cover the direct costs of running the meetings.

The requiring authority shall provide an opportunity for the Community Liaison Group to meet at least twice during the course of each year, and subject to agreement by prison management, which will not be unreasonably withheld, when otherwise sought by any of its members.

The requiring authority shall not be in breach of this condition if any one or more of the named groups do not wish to be members of the Community Liaison Group or to attend any meetings.

It is anticipated that the Community Liaison Group will formulate its own protocols in respect of its role. Its functions may include, but not be limited to:

(i) appointment of new committee members;

(ii) giving advice on appropriate protocols that may carried out during the construction or operation of the prison to address cultural and spiritual issues;

(iii) having input in to the landscaping plan for the prison development;

(iv) providing feedback to the requiring authority on any issues that may arise from the community as being of concern during the construction and operation of the prison;

(v) providing input to the implementation and/or effectiveness of any of the conditions on the requirement.

Cultural

13. The requiring authority shall formalise a Memorandum of Understanding with appropriate representatives of the local Maori community. The Memorandum shall set out the parameters for the establishment of an ongoing relationship between the authority and the Maori community. One objective of the Memorandum shall be to provide a forum for discussion and, if needed resolution, of existing and future cultural issues. (The Minister shall not be in breach of this condition if any of the relevant hapu or other representatives of the local community choose not to enter into or adhere to such an agreement/understanding.)

Appendix 2

CONDITIONS AND CONSENTS – NORTHLAND REGIONAL CORRECTIONS FACILITY

Consent is hereby granted by the Northland Regional Council for the listed consents.

To undertake the following activities on Lot 2 DP 89625 (CT 46D/389) Blk XVI Omapere SD and Road Reserve Blks XV and XVI Omapere SD, Map References P05:887-445 and P05:875-453 to P05:841-437 in the catchment of Ngawha Stream:

A: EARTHWORKS AND STREAMBED CONSTRUCTION WORKS AND ASSOCIATED LAND USE CONSENTS AND WATER AND DISCHARGE PERMITS

01 Land Use Consent: Land disturbance, including:

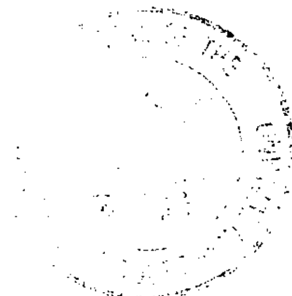
- *cut and fill excavations for site formation works for building platforms and for fill borrow or dump areas, and access formation;*
- *works associated with the construction, maintenance and alteration of wick drains overlying the aquifer listed in Schedule C of the Regional Water and Soil Plan for the purpose of facilitating ground consolidation;*
- *land disturbance within the streamside management area of waterbodies; and*
- *all other incidental land disturbance associated with earthworks for the project.*

02 Land Use Consent: Land disturbance including:

- *land disturbance within the beds of waterbodies on the site associated with damming, diversion, bank protection or construction access;*
- *the placement of structures and the carrying out of works in the bed of the Ngawha Stream and/or its tributaries, including construction of an earth embankment dam on Ngawha Stream;*
- *bank protection works on Ngawha Stream and its tributaries; and*
- *all other land disturbance within the beds of waterbodies on the site incidental to the works.*

03 Water Permit:

- *taking, use or diversion of groundwater from wick drains;*
- *temporary damming and diversion of the entire flow of Ngawha Stream to facilitate the permanent realignment of its bed;*
- *any damming or diversion associated with the carrying out of works and placement of structures in the bed of Ngawha Stream and/or its tributaries, incidental to the works;*



- *temporary damming and diversion of water associated with runoff from earthworks;*

- *diversion of stormwater and/or runoff to and from the stormwater collection systems on site;*

- *diversion of runoff from land disturbance in general; and*

- *all other taking, use, damming and diversion of water incidental to the works.*

04 *Discharge Permit: Discharge of runoff to water and/or to land from land disturbance. In particular:*

- *the discharge of runoff associated with site formation works;*

- *discharges of sediment and/or other contaminants associated with the realignment of streams; and*

- *all other discharges of water or sediment to water and/or to land incidental to the works.*

These consents shall be exercised in accordance with the following conditions:

1 Subject to any changes required to meet the conditions of these consents, the Consent Holder shall ensure that the works are constructed generally in accordance with Department of Corrections, Northland Regional Corrections Facility Plan numbers ASK-100; EC26-1.01, 1.02, 1.03 and 1.04; EC27-1.01; ECIM-3; ECOO-1.01, 1.02, 1.03, 1.04, 1.05 and 1.07; EC23-1.01, 1.02, 1.03 and 1.04 (attached) and with the erosion and sediment control plan ("ESCP") referred to below. (In the event of conflict the approved ESCP shall prevail.)

2 The Consent Holder shall notify the Regional Council in writing at least two weeks before earthworks are to commence, of the intended commencement date of those works.

3 The Consent Holder shall, prior to any discharges into the new diversion channel, notify the Regional Council at least 48 hours beforehand.

4 To minimise the risk of erosion, no bulk earthworks shall be carried out between 31 May and 30 September in any year without the prior written approval of the Regional Council.

5 The Consent Holder shall, at least 10 days prior to the commencement of earthworks, lodge with the Regional Council an Erosion and Sediment Control Plan ("ESCP") which sets out the practices and procedures to be adopted in order that compliance with the conditions of these consents is achieved. The ESCP shall (as a minimum) include the following:

(a) The expected duration (timing and staging) of the major cut and fill operations, disposal sites for unsuitable materials, stream diversions and major culvert installations;

(b) Erosion and sediment controls including specific pond design, including calculations;

(c) Catchment boundaries for the sediment control structures;

(d) The commencement and completion dates for the implementation of the proposed erosion and sediment controls;

(e) Diagrams and/or plans, of a scale suitable for on-site reference, showing the locations of the major cut and fill operations, disposal sites for unsuitable materials, erosion and silt control structures/measures, and water quality sampling sites;

(f) The name and contact telephone number of the person responsible for monitoring and maintaining all silt detention structures; and

(g) Contingency provisions for the potential effects of large/high intensity rain storm events.

6 The ESCP shall be prepared and maintained in consultation with the Regional Council.

7 The Consent Holder may review and amend the ESCP in consultation with the Regional Council, at any time, during the term of the consent. The Consent Holder shall undertake the activities authorised by this consent in accordance with the ESCP.

8 To minimise contamination, any silt detention structures shall be constructed to such dimensions, and maintained to such standards to ensure that the discharge of sediment (suspended solids) from disturbed areas does not cause suspended solids levels measured 10 metres downstream of any sediment detention system discharge to the stream, to be more than 100 grams per cubic metre above levels at a control site established upstream of all earthworks areas. Such structures shall be maintained for the duration of all earthworks and until vegetation has been successfully established to the satisfaction of the Regional Council.

9 Discharges from the works shall not cause either of the following effects on adjacent receiving water bodies at the point of entry of the discharges to the diversion channel, when compared with measurements at a point 10 metres upstream of the southern tributary:

(a) The production of any conspicuous oil or grease films, scums or foams, or floatable materials; and

(b) A reduction in visual clarity by more than 40%.

10 The Consent Holder shall remove accumulated sediment from each sediment/ stormwater detention structure before the sediment level reaches one third of its volume (holding capacity). All sediment removed from the sediment detention structures shall be placed in a stable position where it will not enter any waterbody nor re-enter any sediment detention structure.

11 Water quality (suspended solids, visual clarity) shall be monitored by the Consent Holder not less than once during all heavy rainfall events and weekly during the period of earthworks. This frequency may be reduced to monthly when sediment management procedures are found to be effective in maintaining existing water quality conditions.

12 Total mercury in the Ngawha Stream shall be analysed by the Consent Holder at least once per month during the period of earthworks from a point between 100 metres-150 metres downstream of the spoil disposal area. Should water in the Ngawha Stream have a mercury content greater than the New Zealand Drinking Water Standards (2 ppb), and greater than at the point of entry to the diversion channel, the use of peat beds, or such practices as recommended by a suitably qualified geochemist, shall be employed. If the above criteria cannot be met with the above methods, then the spoil disposal area containing mercuric soils shall be permanently sealed with an impermeable membrane.

13 The results of all water quality monitoring required by Conditions 11 and 12 shall be forwarded to the Regional Council no later than 31 May each year, and include where necessary an interpretation of the results. All samples taken are to be analysed at a laboratory with registered quality assurance procedures, and all analyses are to be undertaken using standard methods. [Registered Quality Assurance Procedures are procedures which ensures that the laboratory meets good management practices and would include registrations such as ISO 9000, ISO Guide 25, Ministry of Health Accreditation, amongst others.]

14 The Consent Holder shall minimise contamination of surface water by ensuring that slash, soil, debris and detritus is not placed in a position where it may enter any waterbody. Prior to the discharge of flows into the new diversion channel, all loose and erodible material shall be removed, and areas stabilised to prevent scouring and downstream sedimentation in excess of those levels specified in Condition 8 above.

15 All areas of bare land (including batters) shall be established with suitable vegetation or other suitable groundcover within three months of the completion of earthworks in each area, to, so far as is practicable achieve an 80% ground cover within six months following completion of works in that area. Temporary mulching shall be carried out to achieve total ground cover of any areas of ground left bare or unprotected for more than one month.

16 The Consent Holder shall ensure a copy of these consents, including the plans referred to in Condition 1 are held on site and are provided to each contractor carrying out works under these consents.

17 Refuelling and servicing of machinery shall be carried out in such a way that soil or water at the site is not contaminated. If any accidental spillage of oil or fuel to land occurs, all contaminated soil shall be collected and removed to a disposal site approved by the Regional Council.

18 The Consent Holder's operations shall not give rise to any discharge of contaminants, which in the opinion of an Enforcement Officer of the Regional Council is noxious, dangerous, offensive or objectionable at or beyond the property boundary. Dust mitigation measures shall be adopted to ensure compliance with this condition.

19 The Consent Holder shall, immediately following the temporary cessation of water flows into the Ngawha Stream, check the bed of the stream for fish and koura/kewai (crayfish), and where practicable remove these to a suitable upstream habitat.

20 Notwithstanding the other conditions of this consent, earthworks which have the potential to impact upon sites of significance to local iwi shall be carried out in accordance with the **attached** Ngati Rangi Hapu Protocol and Procedures document.

21 In the event of archaeological sites or koiwi being uncovered, activities in the vicinity of the discovery shall cease. The Consent Holder shall then consult with the Ngati Rangi Hapu and the New Zealand Historic Places Trust, and shall not recommence works in the area of the discovery until and unless the relevant Historic Places Trust approvals have been obtained.

22 The Consent Holder may apply at any time to the Regional Council under Section 127(1)(a) of the Act to change or cancel any condition of the consent which relates to:

(a) Methods of controlling environment effects;

(b) The location, methods or frequency of monitoring environment effects; or

(c) The method or frequency of reporting information.

23 The Regional Council may, in accordance with Section 128 of the Act, serve notice on the Consent Holder of its intention to review the conditions of these consents. Such notice may be served during April after the commencement of the consents, and thereafter at yearly intervals. The review may be initiated for any one or more of the following purposes:

(a) To deal with any adverse effects on the environment that may arise from the exercise of the consent and which it is appropriate to deal with at a later stage, or to deal with any such effects following assessment of the results of the monitoring of the consents and/or as a result of the Regional Council's monitoring of the state of the environment in the area;

(b) To require the adoption of the best practicable option to remove or reduce any adverse effect on the environment;

(c) To deal with any inadequacies or inconsistencies the Regional Council considers there to be in the conditions of the consents, following the establishment of the activity the subject of the consents;

(d) To deal with any material inaccuracies that may in future be found in the information made available with the application (notice may be served at any time for this reason); and

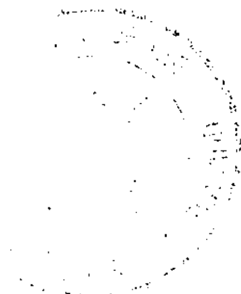
(e) To change existing, or impose new limits on suspended solids.

The Consent Holder shall meet all reasonable costs of any such review.

24 These consents shall lapse on the expiry of five years after the date of commencement of the consents, unless they are given effect to before the expiry of

this period, or such longer period as may be granted in accordance with the provisions of Section 125 of the Act.

EXPIRY DATE: **30 APRIL 2010, or five years after the date of commencement of earthworks, whichever is the sooner.**



B: STORMWATER RUNOFF AND LONG TERM USE OF THE BED OF WATERCOURSES

05 Land Use Consent:

- *The placement of structures and the carrying out of works in the bed of Ngawha Stream and/or its tributaries, including permanent realignment of the bed of Ngawha Stream and its eastern tributary;*
- *A single sewer pipeline crossing of Ngawha Stream within the secure compound;*
- *Sewer pipeline crossings of drains and other watercourses;*
- *Land disturbance arising from activities in the streambed incidental to the activities listed above;*
- *Culverts in the bed of Ngawha Stream;*
- *The placement, use and repair of an earth embankment dam in the bed of Ngawha Stream; and*
- *All other land disturbance within the beds or the streamside management area of waterbodies on the site incidental to the works or structures;*

06 Water Permit:

- *Permanent diversion of Ngawha Stream and its eastern tributary through a realigned bed;*
- *Intermittent damming of Ngawha Stream on an ongoing basis by way of restricted capacity culvert beneath an earth embankment dam;*
- *Intermittent diversion of dammed water via a diversion channel and the eastern tributary of Ngawha Stream; and*
- *Any other taking, use, damming or diversion of water incidental to the works covered by consents 05, 06 and 07;*

07 Discharge Permit:

The permanent discharge of stormwater to Ngawha Stream and/or its tributaries, and all discharges to and from the stormwater collection systems over the life of the facility.

These consents shall be exercised in accordance with the following conditions:

25. *Subject to any changes required to meet the conditions of these consents, the Consent Holder shall ensure that the works are constructed generally in accordance with the Department of Corrections, Northland Regional Corrections Facility Plan numbers ASK-100; EC26-1.01, 1.02, 1.03 and 1.04; EC27-1.01; ECIM-3; ECOO-1.01, 1.02, 1.03, 1.04, 1.05 and 1.07; EC23-1.01, 1.02, 1.03 and 1.04 (attached)*

26 After construction has ceased, any discharges of stormwater shall not cause any of the following effects on adjacent receiving water bodies immediately downstream of the earth embankment dam when compared with measurements immediately upstream of the earth embankment dam:

(a) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials; and

(b) A reduction in visual clarity by more than 40%.

27 The Consent Holder may apply at any time to the Regional Council under Section 127(1)(a) of the Act to change or cancel any condition of the consents which relates to:

(a) Methods of controlling environment effects;

(b) The location, methods or frequency of monitoring environment effects; or

(c) The method or frequency of reporting information.

28 The Regional Council may, in accordance with Section 128 of the Act, serve notice on the Consent Holder of its intention to review the conditions of these consents. Such notice may be served during April after the commencement of the consents, and thereafter at yearly intervals. The review may be initiated for any one or more of the following purposes:

(a) To deal with any adverse effects on the environment that may arise from the exercise of the consents and which it is appropriate to deal with at a later stage, or to deal with any such effects following assessment of the results of the monitoring of the consent and/or as a result of the Regional Council's monitoring of the state of the environment in the area;

(b) To require the adoption of the best practicable option to remove or reduce any adverse effect on the environment;

(c) To deal with any inadequacies or inconsistencies the Regional Council considers there to be in the conditions of the consents, following the establishment of the activity the subject of the consents;

(d) To deal with any material inaccuracies that may in future be found in the information made available with the application (notice may be served at any time for this reason); and

(e) To change existing, or impose new limits on suspended solids.

The Consent Holder shall meet all reasonable costs of any such review.

29 These consents shall lapse on the expiry of five years after the date of commencement of the consents, unless the consents are given effect to before the expiry of this period or such longer period as may be granted in accordance with the provisions of Section 125 of the Act.

EXPIRY DATE: **31 MARCH 2037**

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-000724
[2013] NZHC 2104

BETWEEN	SAVE KAPITI INCORPORATED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent
	THE BOARD OF INQUIRY INTO THE MACKAYS TO PEKA PEKA EXPRESSWAY PROPOSAL Decision-maker

CIV-2013-485-000744

BETWEEN	ALLIANCE FOR A SUSTAINABLE KAPITI INCORPORATED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 10 July 2013

Appearances: RJB Fowler QC for Appellant Save Kapiti Incorporated
Dr M O'Sullivan for Appellant Alliance for a Sustainable Kapiti Incorporated
J Hassan and K Viskovic for Respondent
H C Andrews and J Duffin for Board of Inquiry into the Mackays to Peka Peka Expressway Proposal
D Gilbert for Board of Inquiry into the Peka Peka to North Otaki Expressway Proposal

Judgment: 19 August 2013

JUDGMENT OF D GENDALL J

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Introduction

[1] In April 2012, the New Zealand Transport Authority (NZTA) applied to the Environmental Protection Authority (EPA) for 29 resource consents and a notice of requirement to build north of Wellington the Mackays to Peka Peka Expressway project (the Expressway), a state highway. A Board of Inquiry (the Board) was appointed by the Minister for the Environment under s 149J of the Resource Management Act 1991 (the Act) and a hearing was held between November 2012 and January 2013. The Board issued their final report and decision on 12 April 2013, which confirmed the notice of requirement and granted the resource consents,

subject to certain conditions. Save Kapiti Incorporated (Save Kapiti) and Alliance for a Sustainable Kapiti Incorporated (Alliance) appeal against this decision.

[2] Section 149V of the Act provides that an appeal from the Board of Inquiry's decision may only be on a question of law.

Narrative

[3] The Kapiti Coast District Council (KCDC) had been developing plans for another road in this general area prior to this decision – the Western Link Road (WLR). In 1997 the KCDC issued a notice of requirement for a designation for the WLR along the "sandhills" route in the same area as the Expressway. This notice of requirement for a designation was for a four lane road, with two lanes in some parts. The notice of requirement was confirmed in 1998 by an independent hearing commission. Final confirmation of the designation didn't occur until July 2006 because of appeals. There were to be three stages of construction and seven sections. A number of regional consents were obtained for the construction of stage one. In 2008 the KCDC decided the WLR would be reduced in scope to just two lanes.

[4] In parallel with this development, the NZTA developed plans for the Expressway – a four lane road, passing through the middle of medium and high density housing and wetland areas, with a total of 1360 dwellings within 200 metres of the proposed route. The Expressway would pass through much of the same area as the WLR.

Procedural History

[5] The Resource Management Act sets out the procedure for applications of this kind.

[6] A requiring authority can give notice to a territorial authority of its requirement for a designation for a project or work.[1] A designation is a provision made in a district plan to give effect to a requirement made by a requiring authority.[2]

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[1] Section 168(2) of the Act.
[2] Section 166.

[7] As a requiring authority,[3] NZTA can give notice that it requires a designation – a provision in the district plan needed for a project. If a designation is included in a district plan, s 9(3) of the Act (which allows land to be used for a non-complying use if it is otherwise expressly allowed by a resource consent or under existing use rights) does not apply to a public work or project undertaken by a requiring authority under the designation.[4] No person can without the consent of the requiring authority, do anything in relation to the land subject to the designation that would prevent or hinder a public work, project or work to which the designation relates.[5] The provisions of a district plan shall apply in relation to any land that is subject to a designation only to the extent that the land is used for a purpose other than the designated purpose.[6] A designation can be removed on notice by a requiring authority if it is no longer required.[7] Designations lapse five years after the date they are included in a district plan unless they have already been given effect to or a territorial authority determines on application that substantial progress to give effect to them has been, and continues to be, made and fixes a longer period for their expiry.[8]

[8] As I have noted above, NZTA lodged their present application for one notice of requirement and 29 resource consents with the Environmental Protection Authority (EPA).[9] The EPA recommended to the Minister that a Board of Inquiry consider the matter.[10] The Minister made a direction to that effect because he thought the matter was of national significance.[11] The Minister, as required, gave detailed reasons for this direction:[12]

[9] Thus the matter was referred to the Board. It is necessary to set out what a Board must consider on such an application. Generally the Board must have regard

[3] NZTA is a requiring authority under the Act, approved as such under s 167(3) in 1994.
[4] Section 176(1)(a).
[5] Section 176(1)(b).
[6] Section 176(2).
[7] Section 182.
[8] Sections 184 and 184A of the Act.
[9] Section 145.
[10] Section 146.
[11] Sections 147, 142(3).
[12] Section 147(5).

to the Minister's reasons for making a direction in relation to the matter; and consider any information provided to it by the EPA under s 149G of the Act.[13]

[10] If the application is for a resource consent, then s 149P provides that the Board must apply ss 104 – 112 of the Act as if it were a consent authority. Relevantly here, s 104 provides in part:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
>
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.
>
> ...

[11] The Board, therefore, must consider the actual and potential effects on the environment, but may disregard the adverse effects of the activity on the environment if the plan permits an activity with that effect (known as the permitted baseline test). It also must consider the relevant provisions of a plan or proposed plan.

13 Section 149P(1).

[12] If the application is for a notice of requirement for a designation, then s 149P provides that s 171 applies. The relevant provisions provide:

> **171 Recommendation by territorial authority**
>
> (1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
>
> (a) any relevant provisions of—
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

[13] Thus the Board must consider the effects of allowing the requirement on the environment, particularly considering provisions of a plan, and must also consider whether adequate consideration has been given to alternative methods if the requirements of s 171(1)(b) of the Act are met.

Decision of the Board of Inquiry

[14] The Board here issued an extensive report granting the resource consents and confirming the notice requirement.

[15] The Board began by outlining the proposal and the application before them. They outlined a brief history of the roading issues in the area, and the history of this particular project. They referred specifically to the reasons the Minister directed the application to the Board, and said that they have considered these reasons throughout the report.[14]

[16] They then dealt with a number of preliminary legal issues that arose during the hearing. The Board considered both whether the WLR should form part of the "environment" under ss 104 and 171 of the Act, and whether they should use their discretion to allow it to be part of the permitted baseline analysis (under s 104, and perhaps also s 171).

[17] The Board considered the environment first. They referred to the decision of the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Limited* (*Hawthorn*).[15] The Court of Appeal considered there that the "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out a permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears that those resource consents will be implemented. It found that the environment does not include the effects of resource consents that might be made in the future.

[18] The Board accepted that the WLR could form part of the existing environment as being a provision in the district plan for a permitted activity. However, they found the WLR was not a viable alternative to the expressway – there had been no request for funding, and it did not have all the regional consents

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[14] At [50]

[15] *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299; [2006] NZRMA 424 (CA).

required. Furthermore, there was no prospect of the WLR proceeding if the present application was to succeed. It would not be credible to conclude that the future environment might be modified by utilisation of the WLR designation, if the expressway proceeded. Thus the Board held that they could not consider the WLR to form part of the environment.

[19] The Board also pointed out that, although a designation is included in a district plan as if it were a rule, that does not mean a designation is a rule and so it could be argued that the WLR does not amount to a permitted activity. Thus it would need to be considered as an unimplemented resource consent under *Hawthorn*. The test would be whether the WLR designation and remaining resource consents would be likely to be implemented if the Expressway project proceeds. For the reason that the Board considered the WLR was not viable, they considered it would not meet the test. They said this decision was consistent with the decision of the Environment Court in *Villages of NZ (Mt Wellington) Ltd v Auckland CC.*[16] There, the appellant challenging a notice of requirement already had a resource consent for a development on land required by the local authority for public playing fields. The Court accepted that the *Hawthorn* principle applied, that is, that the effects of the Council's proposal were to be measured against the "future environment". However, under *Hawthorn* it was necessary to consider whether the consented development was likely to proceed. The consented development would and could not proceed if the designation was implemented. Therefore the Court could not measure the effects of the Council's proposal against the "future environment".

[20] The Board then considered whether the WLR should form part of a permitted baseline test. They pointed out that such a test would not be helpful as the WLR and the expressway overlap. Furthermore, the law was unclear whether the permitted baseline test could be extended to apply to designations or requirements for regional resource consents under s 171 when the permitted baseline is not expressly included in that section, unlike s 104. They accepted that, as no submissions had been received on the issue, they should assume it could.

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[16] *Villages of NZ (Mt Wellington) Ltd v Auckland CC* EnvC A023/09.

[21] The Board then said it could be argued that the WLR designation provides a permitted baseline on the basis that it enables construction of a highway on the designated route as a permitted activity under the plan. However, while a realistic and reasonable development of itself, the WLR was too fanciful because it could not co-exist with the Expressway. Alternatively, they could consider it as an activity authorised by an unimplemented resource consent, but again ruled that option out because there was no prospect of it being implemented if the current application succeeded. The Expressway, if granted, would supersede the WLR. They then considered that even if the WLR could form part of the permitted baseline, they would use their discretion to exclude it, for the reasons noted above.

[22] However, in saying that, the Board did make reference to the WLR throughout the report. They accepted the NZTA's position that the WLR designation to an extent was relevant because:

(a) It showed a four line highway had previous been found acceptable;

(b) It has influenced land use since 1956 and residents had developed their expectations to accommodate it and its likely effects;

(c) Residents considered the WLR designation as the first step in a development; and

(d) The WLR designation had acted as a barrier, creating a degree of severance along the line.

[23] The Board then said overall, however, that the particular fact of the WLR designation was of no great weight in their considerations.

[24] They then addressed whether the NZTA had considered alternatives, in accordance with s 171. On this aspect, the Board examined the consultation process the NZTA underwent in deciding on the Expressway. They found the NZTA considered a number of options, including the WLR. The Board concluded that the

consideration of alternatives had been sufficiently broad and varied to meet the test for adequate consideration.

[25] The Board then considered the effects of the expressway project, including the effect on public health, noise, culture and heritage and air quality (to name a few). In assessing the effect on noise levels, the Board referred to the evidence of Ms Wilkening, who completed a study and concluded that the effect on noise of the Expressway was no worse than that of the WLR. They also compared the proposed Waikanae bridge in the Expressway with the Waikanae bridge in the WLR, but explicitly said this was for context only, in considering the effect on hydrology and storm water. In considering the effect on culture and heritage, the Board summarised evidence that the Expressway was preferred for the purposes of wahi tapu than the WLR. However, the Board did not consider this expressly in their conclusion on this effect. Likewise, they referred to evidence of Professor Manning who considered the WLR would have been worse for climate change than the Expressway.

[26] However, at other points in the report the Board was at pains to say the WLR was not part of the permitted base line.

[27] Ultimately, the Board granted the application. They concluded the decision of which alternative to choose was NZTA's not the Board's, who had no jurisdiction to say which alternative was correct. They just needed to be satisfied that there had been adequate consideration of alternatives. The Board noted they were required to apply ss 104 and 171 of the Act, but both sections were subject to Part 2, and in the event of conflict, they were overridden by Part 2. And on this, the Board found the application met the requirements of Part 2.

Submissions

Submissions for Alliance for a Sustainable Kapiti Incorporated

[28] In this appeal the Alliance for a Sustainable Kapiti Incorporated (the Alliance) submits the Board made two errors of law – the decision not to include the WLR as part of the baseline, and the failure to consider the Minister's reasons for directing the matter to the Board.

[29] It is suggested here that the reasons for saying the WLR was not part of the "baseline" were wrong. The Board declined to consider the WLR as part of the permitted baseline as it said it was not a viable alternative. However, the Alliance contends this is a misinterpretation of *Hawthorn* which merely allows a permitted baseline analysis which removes certain effects from consideration. This is not the same as providing an alternative.

[30] The Alliance argues that there are inconsistencies in the Board's reasoning here. When considering whether the WLR designation formed part of the environment, the Board said the WLR could only become relevant if analogous to an existing but unimplemented resource consent. However, when considering whether the WLR formed part of the permitted baseline test, they preferred to consider it as a hypothetical activity rather than an unimplemented resource consent. The Alliance contends that the WLR should have been considered analogous to an unimplemented resource consent.

[31] The Alliance also submits that the Board misapplied *Beadle v Minister of Corrections*[17] as the question is whether the hypothetical activity was realistic in and of itself, not whether it was fanciful in relation to any other project. Furthermore, the Alliance says the WLR was not fanciful – resource consents had been granted and the release of funds was approved.

[32] Next, the Alliance contends the Board was wrong to consider that the WLR was not a viable alternative. It was not dependent on the Expressway – it had already been approved and was a permitted activity. They argue that actually the WLR supersedes the Expressway project as it had already been approved. And the Board, it says, was wrong as to funding – funding, it is claimed, had been released. Furthermore, this was an irrelevant consideration, and does not in any event discount the WLR as a baseline. The defining criteria for an activity to be part of the permitted baseline is that the project had received a resource consent, because the purpose of the test is to remove from consideration effects that have already been consented to. The WLR did have resource consents.

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[17] *Beadle v Minister of Corrections* EnvC A74/2002, 8 April 2002.

[33] The Alliance also argues that the Board's use of the WLR above was inconsistent with not using the WLR as a baseline. Furthermore, the WLR it used was the wrong one – a four lane road was not acceptable to the community. The resource consent for this would have lapsed after five years, so in 1961, and thereafter NZTA twice revisited the four lane WLR and rejected it because the community severance was seen as being too severe. Furthermore, the Alliance suggested the WLR has never been regarded as a barrier as the Board contended.

[34] The Board, according to the Alliance, also did not acknowledge the WLR as part of the existing environment, but incorporated other plan changes into the existing environment that only resulted from the WLR designation.

[35] Furthermore, the Board, it is said, then inconsistently used the WLR as a baseline later in their report. The Alliance accepts that the Board did not explicitly accept Ms Wilkening's evidence but they did draw heavily on it. They also used the WLR as a permitted baseline when considering specific sections of the Expressway and the Waikanae bridge.

[36] The Alliance argues this inconsistency must be resolved – the Board cannot refuse to use the WLR in the permitted baseline but then use it to discount serious adverse effects.

[37] Secondly, the Alliance submits the Board was required by the Act to have regard to the Minister's reasons for directing the matter to the Board, but they did not. They did not consider that the Expressway would represent a significant change in the use of land from its current state, a state that supports a number of different activities and land uses. The Expressway project, it is said, affects housing, food production, and equestrian activities. There will be a huge loss of amenity values, which, it is said, was only addressed by the Board in very broad terms.

[38] The Alliance asks that the decision be overturned and a new Board be appointed to reconsider the application.

Submissions for Save Kapiti Incorporated

[39] Save Kapiti submits the Board's decision placed pivotal emphasis and reliance on significant positive effects of the Expressway to the environment. However, it says the Board was wrong in its decision in excluding the WLR from the "environment". Including it as part of the environment would neutralise the positive effects of the Expressway.

[40] It argues the WLR is part of the "environment" in two ways:

(a) Because it is included in a district plan, it is a permitted activity. It does not need to be credible or viable, but it is anyway; or

(b) Designation is equivalent to a granted but unimplemented resource consent. So according to *Hawthorn*, likelihood of implementation is relevant. The WLR here was likely to be implemented.

[41] Section 175(1)(d) of the Act (which is now s 175(2)(a)) includes a designation as if it were a rule in a district plan. It is submitted the Board was wrong to draw a distinction between a deemed rule and an actual rule. A designation actually can proceed as of right without a resource consent under s 176, and is given exclusive priority and protection over other rules in a plan. Thus a designation can be considered as a permitted activity under *Hawthorn*. Furthermore, whether or not an activity is fanciful is not even a criterion. That aspect of whether an activity for which there is a designation is fanciful had already been considered when the designation was incorporated into the district plan.

[42] Even if it was, the WLR designation was not fanciful because of its exclusive priority and protection. The question of funding is irrelevant as the designation should be taken at face value as if it were a rule. The fact there were no regional consents was also irrelevant, as there was a finding by the Board that these would not be obtained, as the designation was only in stage one. The fact that the WLR could not co-exist with the Expressway is not the test. The Board relied on *Villages* (above) which is distinguishable as it concerned a resource consent, not a designation which is in a very different position. Furthermore, that case was wrong

because in *Hawthorn* the previous on-site unimplemented consent was incompatible with the application under consideration, but was taken into account. There is no principled reason why an inability to co-exist creates a lack of credibility, it just means that the WLR designation remains as a legitimate back up option. Section 177 of the Act expressly provides for overlapping designations. If the WLR designation was no longer credible, it could have been removed under s 182 of the Act.

[43] Even if designation was not equivalent to a permitted activity, it could be considered as an unimplemented resource consent. Save Kapiti submits the designation was likely to be implemented. It also highlights the same inconsistency the Alliance did of the use by the Board of unimplemented private plan changes around the WLR designation as part of the environment.

Submissions for NZTA

Environment

[44] The NZTA argue that the Board was correct to exclude the WLR from the "environment". In *Queenstown Central Limited v Queenstown Lakes District Council*[18] the High Court said a "real world" approach was required, without artificial assumptions, creating an artificial future environment. The appellant's submission that the Board was wrong in this "real world" assessment, excluding the WLR as non credible, is a matter of fact, not of law.

[45] The argument that the Board was required to discount the positive effects of the expressway project on the environment is contrary to what the RMA directs. Section 171 of the Act does allow for the consideration of alternatives, but it is said the WLR was not an alternative given the Project objectives. If the WLR designation were included, the true benefits to people would be artificially under-weighted simply because the designation remained in the district plan.

[46] Save Kapiti's submission that the Board gave undue weight to the Expressway's positive effects is a matter of fact and not of law. In any event NZTA

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[18] *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 1324.

maintains the Board did consider all the positive and negative effects of the Expressway.

[47] Furthermore, any alleged error was immaterial because the Board was more than satisfied that the requirements in Part 2 were met, and s 171 is subject to Part 2.

Permitted Baseline

[48] NZTA argues that s 171 does require the Board to have particular regard to provisions in a plan, which includes the designation pursuant to s 166. The Alliance does not take issue with this, but instead focuses on the permitted baseline test. NZTA submit that the Board did consider this anyway by holding that the WLR designation would no longer be required with the Expressway designation in place.

[49] There was no error of law in finding that the WLR was not part of the baseline. Under s 104(2), this is a matter of discretion for the decision maker. While there is no equivalent provision in s 171, NZTA accepts that a similar rationale applies. NZTA suggests the Board was entitled not to treat the WLR designation as part of the baseline as part of their discretion. This is not an error of law.

[50] In any event, according to NZTA, a finding the WLR was part of the baseline would have made no difference – the effect of the permitted baseline comparison is only to diminish the *adverse* effects of the project, not the positive effects. The Board did not do this exercise, and still approved the project.

Minister's reasons

[51] Finally, the Board is not directed to consider the Minister's reasons – they are to have regard to them. NZTA submitted the Board did consider the Minister's reasons, and they expressly said so. The Board found the project was essential to achieving the project's objectives of management of land use. The Board also considered amenity values generally, and specifically matters of noise, air quality, construction impacts, public health, water quality and social effects. They were not required to expressly record a disagreement with the Alliance's position.

[52] Furthermore, it is said this argument is about findings on the evidence, which again is outside the scope of the appeal.

[53] Finally, any error would be immaterial because the substantive content of the Minister's reasons were central to what the Board considered. The Board did consider the amenity values.

Submissions for the Board of Inquiry

[54] The Board submits generally that findings as to the relevance of the WLR were factual, based on the evidence before them, that the two roads could never co-exist. The WLR is only a backup-up option. And, finally, the Board noted that, like resource consents, designations are permissive, not mandatory, thus the existence of a designation does not mean that it will necessarily be pursued.

Analysis

[55] To begin it must be remembered that an appeal like the one before me can only be on a question of law.[19]

[56] The High Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*[20] set out that an error of law will only arise if the lower court/tribunal:

(a) Applied a wrong legal test; or

(b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or

(c) Took into account matters which it should not have taken into account; or

(d) Failed to take into account matters which it should have taken into account.

---

[19] Section 149V.

[20] *Countdown Properties (Northlands) Limited v Dunedin City Council* (1994) 1B ELRNZ 150; [1994] NZRMA 145

[57] The principles to be applied are well known and dealt with by the Supreme Court in *Bryson v Three Foot Six Limited.*[21]

> An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly unsupportable.
>
> An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36 a state of affairs 'in which there is no evidence to support the determination' or 'one in which the evidence is inconsistent with and contradictory of the determination' or 'one in which the true and only reasonable conclusion contradicts the determination'. Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test...

[58] Any error of law must be material before an appellate court will grant relief.[22]

[59] In my view, it is important to note at the outset that any arguments on whether the WLR designation was credible and non-fanciful are questions of fact, not law.

[60] This appeal turns principally on three questions:

(a) Should the WLR designation have been considered as part of the "environment";

(b) Should the WLR designation have been included as part of the "permitted baseline";

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[21] *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721 at [25] – [26].

[22] *RFBPS v With A Habgood Ltd* (1987) 12 NZTPA 76 (HC); *Falkner v Gibson DC* [1995] 3 NZLR 622; [1995] NZRMA 462 (HC); *Countdown Properties (Northlands) Ltd v Dunedin CC* [1994] NZRMA 145, partially reported at (1996) 1B ELRNZ 150 (HC); *BP Oil NZ Ltd v Whitaker CC* [1996] NZRMA 67 (HC); *Urawa Land Ltd v Auckland Council* (2011) 16 ELRNZ 417 (HC).

(c) Did the Board fail to consider the Minister's reason of considering this a proposal of national significance of a change in land use resulting from the expressway?

Should the WLR designation have been considered as part of the "environment"?

[61] As noted above, s 104 requires the Board to consider any actual and potential effects on the environment of allowing the activity, and s 171 requires the Board to consider the effects on the environment of allowing the requirement, having particular regard to any relevant provisions of a plan.[23]

[62] Environment is defined as including:[24]

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[63] As stated above, the Court of Appeal decision in *Hawthorn* is the leading authority here. That case at [84] in defining the word "environment" seems to set up two limbs of the future state of the environment:

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23 As to the different analysis required, see Broker's Resource Management at [A171.02] which says: The obligation to assess effects in the consideration of designation requirements is subtly different from the obligation applying to resource consent applications (under s 104). Firstly, under s 171(1), what is required is consideration of the effects on the environment having particular regard to the matters in paragraphs (a)-(d) (whereas s 104 requires regard to actual and potential effects of allowing the activity alongside regard to the other matters in s 104(1)(a)-(c)). Secondly, under s 171(1), the obligation is to consider the effects on the environment "of allowing the requirement" whereas s 104(1)(a) refers to "allowing the activity". However, unlike a resource consent, a designation itself has a restrictive effect on land use and subdivision as well as authorising the work.

24 Section 2.

(a) as it might be modified by the utilisation of rights to carry out permitted activity under a district plan; and

(b) as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

[64] In the present case the question arises as to what limb a pre-existing designation falls under. As noted above, Save Kapiti argues a designation falls under the first limb, as it is a superior right under a district plan. A permitted activity is one authorised by the district plan, that does not require a resource consent.[25] A designation is a special provision in a district plan to enable certain work or a particular activity to be undertaken on certain land, regardless of what the rules in the plan might otherwise say may be done on that land. A designation has the effect of not allowing anyone to undertake any activity that would prevent or hinder the designated work, without the prior written consent of the "requiring authority" which holds the designation. It is to be included in a district plan as if it were a rule.[26]

[65] If a designation is considered to be equivalent to a permitted activity, then the test is whether the environment "might be" modified by its use. In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council*[27] Fogarty J said this notion of "might" applies only to permitted uses and has nothing to do with "likelihood". Likelihood only applies to whether existing resource consents, which are for activities not permitted, will be implemented.[28] Later the Judge said it should be understood that [84] of the *Hawthorn* decision leaves intact the qualification on taking into account permitted uses where the activity is only a very remote possibility, so long as it is not fanciful.[29]

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25 Section 87A(1).
26 Section 175.
27 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324.
28 At [19].
29 At [56].

[66] If, however, however a designation is considered as an unimplemented resource consent, then the rationale in *Villages* referred to a [19] above could apply and an activity that could not co-exist with the activity under consideration would not form part of the future environment.

[67] However, recent case law has emphasised that [84] of *Hawthorn* is not to be read as a code.[30] In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller*, Justice Fogarty highlighted the problem that the Courts are increasingly finding themselves asked to analogise a resource management problem to fit into the text of [84].[31] In *Queenstown Central Ltd* Justice Fogarty said in reference to *Hawthorn*.[32]

> That decision recognised the importance of context...[84] was a summary only, and itself should not be read out of context.
>
> Section 104D, and indeed the RMA as a whole, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment...

[68] Those two cases involved an objective in the operative plan (which was considered part of the future environment) and a coal mining licence (which was not).

[69] Based on this "real world" approach, the question becomes why the Court of Appeal in *Hawthorn* said a permitted activity could be part of the future environment, but an unimplemented resource consent could not unless it was likely to be implemented. It depends on whether the distinction the Court of Appeal sought to draw was between activities that were likely to happen and those that were not, or whether it was between activities the effects of which had already been consented to and those that had not.

[70] I think logically it must be the former. As was said in *Queenstown Central Ltd,* it is not appropriate to consider a future environment that is artificial.

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30 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815; [2013] NZRMA 239 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324.

31 At [24].

32 *Queenstown Central Limited* at [84].

Incorporating a designation into the future environment, when it cannot co-exist with the Expressway, I am satisfied would be artificial. The Board was entitled to find the WLR was unlikely to be put into effect, so was entitled to exclude it from its environment.

[71] It is also important to remember that the Board is required to consider whether the requiring authority had given adequate consideration to the alternatives. The enquiry is not into whether the best alternative has been chosen.[33] I am satisfied here that the Board did make this enquiry, and that it has not been challenged in any real way on appeal.

Should the WLR designation have been included as part of the permitted baseline?

[72] When forming an opinion for the purposes of s 104(1)(a) of the Act a consent authority such as the Board here under s 104(2) may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

[73] As noted above, this is often referred to as the "permitted baseline" assessment. Its original is in a decision of the Court of Appeal which stated the appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right by the plan.[34]

[74] The test set out in *Bayley* was further explained by the Court of Appeal in *Smith Chilcott Ltd v Auckland City Council*[35] In particular, the Court explained the approach which should be taken to determining what could be done "as of right" (to use the words of *Bayley*) on a particular site. The Court of Appeal in *Smith Chilcott* said:[36]

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33 *Waimairi DC v Christchurch CC C030/82 (PT),* (under the similar s 118(1)(d) TCPA) applied in *Estate of P A Moran v Transit NZ EnvC* W055/99; *Quay Property Management Ltd v Transit NZ EnvC* W028/00.

34 *Bayley v Manukau City Council* [1999] 1 NZLR 568; [1998] NZRMA 513.

35 *Smith Chilcott Ltd v Auckland City Council* [2001] NZLR 473 (CA).

36 At [26].

> We begin with what is allowed under the relevant plan. In accordance with the purpose of the legislation anything that is permitted but fanciful does not provide a realistic indication of what is permitted and a proper point of comparison. There must be a practical fact specific assessment. The test is perhaps best captured in a single expression as the discussion at the hearing indicated. Of the various phrases used in *Barrett* and elsewhere, "not fanciful" appears to us to set the standard appropriately. It follows that any permissible use qualifies under the permitted baseline test unless in all the circumstances it is a fanciful use.

[75] The components of the permitted baseline test as set out in *Bayley* and *Smith Chilcott* were drawn together by the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council*[37] as follows:

> Thus the permitted baseline in terms of Bayley, as supplemented by Smith Chilcott Ltd, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[76] In that case the Court considered whether to include unimplemented resource consent activities in the permitted baseline comparison. On this, the Court went on to say:[38]

> ...Mr Brabant argued that following the granting of a resource consent, the holder has an equal right to do what is allowed as would have been the case had the plan allowed it. That is so but, as Mr Burns and Mr Loutit submitted, there is a material difference between what is allowed under a plan and what is allowed under a resource consent. The plan represents a consensus, usually after very extensive community and regional involvement, as to what activities should be permitted as of right in the particular location. There is therefore good reason for concluding, as was done in *Bayley*, that any such permitted activities should be treated as part of the fabric of the particular environment.
>
> Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand

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37 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323.
38 At [34] and [35].

> the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[77] If the WLR designation in the present case was considered as an unimplemented resource consent, the rationale in *Arrigato* applies. The Board found the WLR designation would be superseded by the Expressway designation, and so to discount the adverse effects of the Expressway would be incorrect.

[78] If the WLR designation was considered a permitted activity under the district plan, then to be included in the permitted activity it must be non fanciful. Addressing this aspect, in my judgment, the Board was entitled to make the factual finding that the WLR designation was fanciful.

[79] However, even if the WLR designation could have been included as part of the permitted baseline, then there would still be no error of law. The Board said they would exercise their discretion not to consider the WLR designation because of the above reasons, and I am satisfied here they were entitled to do this.

[80] Furthermore, I agree with the submission advanced by NZTA that it would have not made the difference the appellant contends. Positive effects of allowing the activity are not relevant to the assessment of the permitted baseline.[39]

[81] The Board was at pains to point out that the WLR designation was not part of the baseline throughout their report. Although they referred to evidence that used the WLR as a baseline, they came to no conclusion on that aspect, and it can only be assumed that in light of such comments, the Board did not in fact use the WLR as a baseline.

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[39] *Kalkman v Thames-Coromandel DC* EnvC A152/02, applied in *Rodney DC v Eyras Eco-Park Ltd* [2007] NZRMA 1 (HC). This is reinforced by s 104(2) which provides that a consent authority "may disregard an adverse effect on the environment if the plan permits an activity with that effect". (Emphasis added)

Did the Board fail to consider the Minister's reason of considering this a proposal of national significance of a change in land use resulting from the expressway?

[82] I am satisfied that this ground of appeal has no merit. Paragraphs [47] to [50] of the Board's decision set out the Ministers reasons for making the direction here in terms of s 139P(1) of the Act. And in paragraph [50], the Board records that in:

> The various sections of this report (the Board has) considered the Minister's reasons for directing this matter to us.

[83] I am satisfied here that the Board did turn their mind to the Minister's reasons – it is clear from the report. Their assessment of those reasons is not a matter for an appeal on a question of law.

Conclusion

[84] For the reasons I have outlined above, the appeal is dismissed on all grounds.

Costs

[85] No submissions were made to me at the hearing of this matter on the issue of costs. Costs therefore are reserved.

[86] If costs are in issue here and counsel are unable to agree between themselves on costs, they may file memoranda on costs (sequentially) and, in the absence of any party indicating they wish to be heard on the issue, I will decide the question of costs based on all the material before the Court and the memoranda filed.

....
D Gendall J

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