

BEFORE THE ENVIRONMENT COURT

Decision No. A 119 /2009

IN THE MATTER of an appeal under Section 120 of the
Resource Management Act 1991 (**the
Act**)

BETWEEN DES HEKE KAIAWHA
(ENV-2009-AKL-177)
Appellant

AND B A Y O F P L E N T Y R E G I O N A L
C O U N C I L
Respondent

Judicial Conference: 5th November 2009 at Tauranga

Court: Environment Judge J A Smith
Environment Commissioner H A McConachy

Appearances: Mr M Sharpe, Ms J Bain, for Mr D H Kaiawha and Ngati He
Mr J J Hassan for the New Zealand Transport Agency
Ms M H Hill for the Bay of Plenty Regional Council

Date of Decision: 5th November 2009

ORAL DETERMINATION OF THE ENVIRONMENT COURT

A. **Amendments to the consent as per annexure A in relation to Condition 22
and Condition 16.1 of Consent 65435.**

B. **There is no order as to costs.**



REASONS FOR THE DECISION

Introduction

[1] This appeal related to a consent granted to the New Zealand Transport Agency for works involving earthworks, discharge of stormwater, diversion of surface water, taking of surface water, construction and operation of an intake structure, culverts and a proposed bridge over the Kaituna River associated with the Tauranga eastern link (TEL).

The Issues

[2] This appeal raised two issues. Firstly, that Ngati He sought a representative to be appointed to the tangata whenua advisory group, and secondly, that the tangata whenua be involved in developing a cultural monitoring earthworks protocol.

[3] It is fair to say that both the Regional Council and the Transport Agency recognised the issues. It was accepted that Ngati He had an interest in the area by virtue of koiwi relating to ancestors who had been involved in battles in the area. Ngati He did not assert mana whenua. But nevertheless, Ngati He stated that it had interests in the area, pursuant to Section 6(e) of the Resource Management Act. That issue did not appear to be disputed by the other parties. The concern was how this issue could be addressed, given that parties who did hold mana whenua were reluctant to involve Ngati He in its protocols directly.

The Process

[4] The parties have undertaken a cooperative and constructive approach to finding a resolution in this matter, annexed as **A**. They have reached agreement that Ngati He shall be entitled to a mandated representation on the TEL tangata whenua advisory group to advise the cultural and environmental effects in relation to the construction of the TEL and the consent holder must make such arrangements as are necessary to arrange for such appointment.

[5] The other issue as to involvement in the development of protocols was what more complex. The parties have adopted an approach of creating a parallel



protocol to that with mana whenua. Interestingly enough all other hapu and iwi parties including those who hold mana whenua were also interested in entering into this parallel protocol. That is now in draft form and is annexed to this decision as **B**. The intent is that when that is finalised with the hapu and iwi it will be filed with the Regional Council in accordance with the condition inserted now as 16.1. This provides that:

At least six weeks prior to commencement of works, the consent holder shall submit to the Chief Executive of the Regional Council or a delegate a copy of the further Protocols for the Tauranga Eastern Motorway Construction as agreed between the consent holder and various parties, that those parties intend will parallel Protocols, dated 30 September 2009 and which details the procedures for particular purposes under section 6(e) to be taken by all parties to this Parallel Protocol in the event of a discovery of any archaeological site or koiwi being uncovered during the exercise of this consent and also for the monitoring of earthworks. Should the Parallel Protocol still be in draft stage at the time of submission, the final version of the document shall be submitted to the Chief Executive of the Regional Council or delegate as soon as it is completed.

Commentary

[6] Although this document was presented to the Court in a consent order form, we have determined to issue a determination in order that we can identify the importance of the approach adopted by the parties and commend the parties on their constructive approach to important issues in relation to cultural matters under Section 6(e) of the Act.

[7] Often issues of mana whenua mean that hapu who may have cultural interests in an area conflict with existing hapu who held mana whenua over any rights to participation. We recognise that the rights of parties who hold mana whenua are important. Nevertheless, the Act also recognises as important the relationships of various hapu, iwi, with sites of cultural significance. This includes not only historical sites, such as areas of previous battles, but can often involve major landmarks which are related to by whakapapa or otherwise. In that regard the concept of being able to develop parallel protocols to recognise these cultural interests represents a way forward for parties in this area when they are faced with such conflicts.

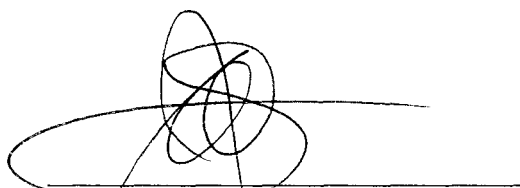


I want to commend all of the parties for the constructive way they have found to address this matter. I am hopeful that it will represent a method by which other iwi

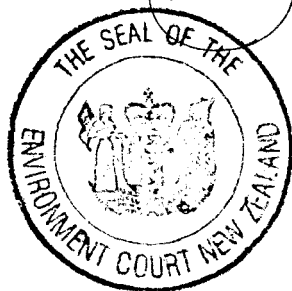
and hapu can recognise various cultural interests of parties where those parties do not hold mana whenua to a particular area.

[9] No party seeks costs. I understand any issues have been resolved in that regard and accordingly, the Court makes no order as to costs.

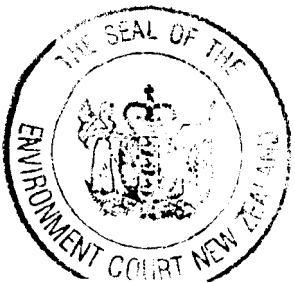
DATED at TAURANGA this 16^L day of November 2009



J A Smith
Environment Judge



ANNEXURE 1 - DRAFT CONSENT ORDER



1376653.3

under: the Resource Management Act 1991 (*Act*)

in the matter of: an appeal under section 120 of the Act against a decision of Bay of Plenty Regional Council to grant consent for earthworks associated with the construction of the Tauranga Eastern Motorway

between: **Ngati He**
(ENV-2009-AKL-000177)
Appellant

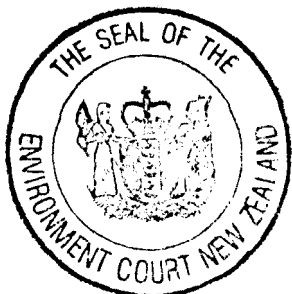
and: **Bay of Plenty Regional Council**
Respondent

and: **NZ Transport Agency**
Applicant

Draft Consent Order

Dated:

2009



REFERENCE: John Hassan (john.hassan@chapmantripp.com)
Joanna Bain (joanna.bain@chapmantripp.com)

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**CHAPMAN
TRIPP**

BEFORE THE ENVIRONMENT COURT

Environment Judge Smith sitting alone under section 279 of the Act

In Chambers at Tauranga

DRAFT CONSENT ORDER

Introduction

- 1 The Court has read and considered the appeal and the memorandum of the parties dated 5 November 2009 concerning the resource consent to undertake earthworks associated with the construction of the Tauranga Eastern Link (formerly known as the Tauranga Eastern Motorway) (*Earthworks Consent No. 65435*).
- 2 No person has given notice of intention to become a party under s274.
- 3 The Court is making this order under s279(1)(b) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to s297. The Court understands for present purposes that:
 - (a) All parties to the proceedings have executed the memorandum requesting this order;
 - (b) All parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the Resource Management Act, including in particular Part 2.

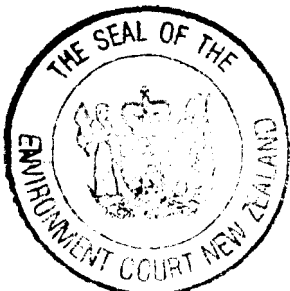
Order

- 4 Therefore the Court orders, by consent, that the relief sought under the appeal is allowed insofar as the decision appealed is now amended as follows.

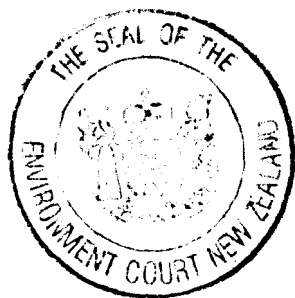
First Ground of Appeal

- 5 The first ground of the appeal is resolved by the inclusion of a new condition [22] in Earthworks Consent No. 65435 as follows:

[22] *Ngati He shall be entitled to mandated representation on the Tauranga Eastern Link Tangata Whenua Advisory Group to address the cultural environmental effects in relation to the construction of the Tauranga Eastern Link and the consent holder must make such arrangements as are necessary to arrange for such appointment.*



**ANNEXURE 2 - PARALLEL PROTOCOLS FOR TAURANGA EASTERN
LINK CONSTRUCTION**



1376653.3

**PARALLEL PROTOCOLS FOR TAURANGA EASTERN LINK
CONSTRUCTION**

Between

NZ Transport Agency

and

Nga Potiki,.....

Ngati He

Ngati Pukenga

Waitaha

Tapuika

Ngati Whakaue ki Maketu



1.0 PURPOSE

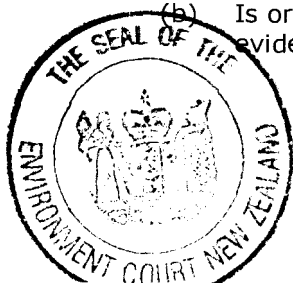
- 1.1 These protocols set out the particular procedures that NZ Transport Agency (NZTA) and its consultants and contractors will follow during the Tauranga Eastern Link construction works including the Mangatawa Papamoia Block Inc. lands south of the motorway incorporating the stormwater wetlands, Kaituna Road formation, Tauranga City Council bulk watermain, and specified contractor's areas.
- 1.2 These protocols are for particular purposes under section 6(e) of the Resource Management Act 1991 (RMA) namely to recognise and provide for those ancestral relationships (whanaungatanga) of Nga Potiki, Ngati He, Ngati Pukenga, Waitaha, Tapuika and Ngati Whakue ki Maketu with the **Project Area** by reason of:
- (a) kekeritanga and kauhanga riri; or
 - (b) *[specify any other relevant section 6(e) purpose here];*
- within or in the vicinity of the **Project Area**.
- 1.3 For the avoidance of doubt, the parties acknowledge that:
- (a) These protocols do not relate to the exercise of mana whenua by hapu and iwi over the **Project Area**. The **TEL TWAG Earthworks Protocol** has been agreed by those members of the TEL TWAG who have mana whenua over the **Project Area**, being Nga Potiki, Ngati Pukenga, Waitaha, Tapuika, and Ngati Whakaue ki Maketu; and
 - (b) Arrangements in section 3.0 of these protocols prevail over and substitute for the arrangements in section 3.0 and Attachment A of the **TEL TWAG Earthworks Protocol** where there is any inconsistency on the matters to which these protocols apply and these protocols amend the TEL TWAG Earthworks Protocol accordingly, and
 - (c) Except as provided in (b) above, nothing in these protocols shall compromise, limit or otherwise impede the protocols and relationships provided for in the **TEL TWAG Earthworks Protocol**.
- 1.4 These protocols reflect the minimum requirements of the NZTA in accordance with statutory obligations under the Historic Places Act 1993 and the Protected Objects Act 1975.

2.0 DEFINITIONS

In this document, words marked in bold have meanings as follows:

"Archaeological Site" is defined in the Historic Places Trust Act 1993 to mean any place in New Zealand that:

- (a) Either -
 - (i) Was associated with human activity that occurred before 1900; or
 - (ii) Is the site of the wreck of any vessel where that wreck occurred before 1900; and
- (b) Is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand.



“**Archaeological Authority**” means the New Zealand Historic Places Act approval gained for the project and provided as **Attachment B**.

“**Authorised Receiver**” means a hapu group who has gained such status under the Protected Objects Act 1975.

“**Consultant**” means the person nominated as the team leader for the NZTA management, supervision and quality assurance professional services contract. This person is responsible to the NZTA for supervising the **Contractor** who executes the physical works contract.

“**Contractor**” means the contractor awarded the contract for the Tauranga Eastern Link highway construction and/or maintenance works.

“**Discovery Area**” means an area around the discovery that:

- (a) The **Project Archaeologist**, the NZ Historic Places Trust, Nga Potiki, Ngati He, Ngati Pukenga, Waitaha, Tapuika, and/or Ngati Whakaue ki Maketu considers has a high probability of containing **Archaeological Sites, Koiwi** or **Taonga** similar to those already discovered, and that warrants careful consideration; and/or
- (b) The **Contractor** determines is necessary as a safety buffer zone separating those investigation **Archaeological Sites** or retrieving **Koiwi** or **Taonga**, from those carrying out other construction and/or maintenance activities, so as to provide an acceptable level of safety to all persons, and ensure the protection of the area and all material contained within.

“**kauhanga riri**” means battlefield.

“**kekeritanga**” means affray, battle, skirmish.

“**Koiwi**” means human skeletal remains.

“**Kokowai**” means a deposit of Iron Oxide.

“**mana whenua**” means customary authority exercised by an iwi or hapu in an identified area, as defined in section 2 of the RMA.

“**Monitor**” means an earthworks monitor appointed in accordance with clause 3 below.

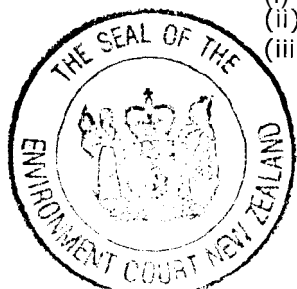
“**Nominated Representatives**” means Ngati He, Ngati Pukenga, Nga Potiki, Waitaha, Tapuika, Ngati Whakaue ki Maketu or his/her nominee.

“**Project Archaeologist**” means Mr Ken Phillips [or other archaeologist engaged by the NZTA].

“**Project Area**” means the area in which the construction works for the Tauranga Eastern Link will take place.

“**Taonga**” means an object that:

- (a) relates to Maori culture, history, or society; and
- (b) was, or appears to have been -
 - (i) manufactured or modified in New Zealand by Maori; or
 - (ii) brought into New Zealand by Maori; or
 - (iii) used by Maori; and



If a **Taonga** is more than 50 years old, it is defined as “**Taonga Tuturu**” under the Protected Objects Act 1975 and is subject to the provisions of that Act.

“**TEL TWAG**” means the Tauranga Eastern Link Tangata Whenua Advisory Group.

“**TEL TWAG Earthworks Protocol**” means the protocol agreed by the NZTA and Nga Potiki, Ngati Pukenga, Waitaha, Tapuika, and Ngati Whakauae ki Maketu dated 30 September 2009 (a copy of which is provided for reference in **Attachment C**).

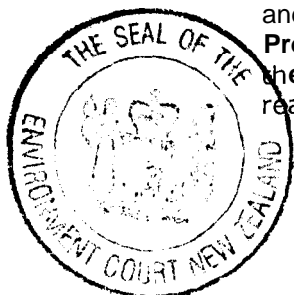
“**Waahi Tapu**” as defined in the Historic Places Act 1993, means a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense.

3.0 MONITORING OF EARTHWORKS

- 3.1 Each iwi or hapu signatory to these protocols shall provide up to 3 nominated and trained Monitors who will form a pool of up to 18 Monitors in total.
- 3.2 The Contractor shall select each Monitor (or pair of Monitors) as required from a list of the Monitors on a rotating basis and in accordance with the additional protocols for reimbursement set out in **Attachment A**.
- 3.3 The Contractor shall give the relevant Monitor(s) one week’s notice of the intention to remove topsoil from a certain area.

4.0 GENERAL PROCEDURES FOLLOWING THE ACCIDENTAL DISCOVERY OF POSSIBLE ARCHAEOLOGICAL SITES, KOIWI OR TAONGA

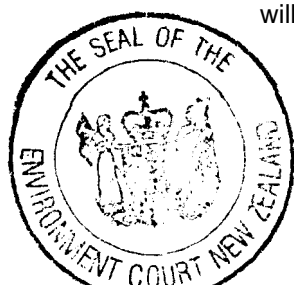
- 4.1 Immediately following the discovery of possible **Archaeological Sites, Koiwi** and/or **Taonga**, the Monitor will advise the **Project Archaeologist** and on receiving that advice the **Project Archaeologist** will inspect the **Discovery Area** and advise the **Contractor**, if necessary, to cease all work in the **Discovery Area**.
- 4.2 The **Contractor** will then immediately advise the **Consultant** who in turn will notify the following persons of the discovery:
- ▶ NZTA Principal Project Manager (or the Team Project Manager if the Principal Project Manager is unavailable);
 - ▶ The **Project Archaeologist** is Ken Phillips and he may appoint additional archaeological support as is required;
 - ▶ The **Nominated Representatives**;
 - ▶ The Regional Archaeologist at NZ Historic Places Trust; and
 - ▶ The NZ Police if any **Koiwi** are uncovered, as required by section 14 of the Coroners Act 2006. The Police will report the finding to the designated Coroner in accordance with section 15(2) of the Coroners Act 2006.
- 4.3 The **Contractor** will then secure the **Discovery Area** to ensure the area (and any objects contained within) remains undisturbed and meets health and safety requirements.
- 4.4 NZTA’s Project Manager will ensure that representatives of the **Contractor** and/or **Consultant**, as appropriate, are available to meet and guide the **Project Archaeologist**, the Police and the **Nominated Representatives** to the **Discovery Area**. The **Contractor** and **Consultant** will assist with any reasonable requests that any of these people may make.



- 4.5 As public notification of the discovery may result in desecration or unauthorized removal of material from the site, no information will be released to the media except as authorized by NZTA's Project Manager, in consultation with the **Nominated Representatives**.
- 4.6 The **Contractor** and **Consultant** will ensure the area is treated in accordance with the conditions of the **Archaeological Authority** provided in **Attachment 6**.
- 4.7 Work in the **Discovery Area** will not recommence until authorised by the NZTA's Principal Project Manager, after consultation with the **Nominated Representatives**, NZ Historic Places Trust, NZ Police and any other authority with statutory responsibility, to ensure that all statutory and cultural requirements have been met.
- 4.8 All parties will work towards ensuring work recommences in the shortest possible time, while ensuring that any possible **Archaeological Sites, Koiwi** or **Taonga** are protected until as much information as practicable is obtained and a decision is made regarding their appropriate management.
- 4.9 All human remains that are disturbed and all artefacts found shall have the location recorded by the **Project Archaeologist** using GPS and the date, time and details of the find as supplied by the archaeologist.

5.0 FURTHER PROCEDURES IN THE EVENT THAT KOIWI ARE DISCOVERED

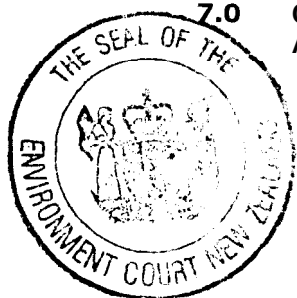
- 5.1 As soon as practicable after the **Consultant** has given notice to the **Nominated Representatives** that **Koiwi** have been discovered, the **Nominated Representatives** will inspect the site and advise the **Consultant** as to the appropriate cultural/religious ceremony (whakanoa) to be undertaken at the site.
- 5.2 If the **Nominated Representatives** wish to undertake such ceremonies, the **Nominated Representatives** will make the necessary arrangements for these ceremonies to happen at the site as soon as practicable.
- 5.3 Once these ceremonies are completed, the **Project Archaeologist** in consultation with the NZ Police and the **Nominated Representatives** will inspect the skeletal remains.
- 5.4 The **Project Archaeologist** will record details of the **Koiwi**, the site of discovery, and any other relevant facts, and these records will be made available to the NZ Police and/or the **Nominated Representatives**.
- 5.5 If the **Koiwi** are Maori, and the NZ Police and/or Coroner have no uncertainty or suspicion about the **Koiwi**, the **Nominated Representatives** and Kaumatua will then gather up the **Koiwi** and remove them from the site.
- 5.6 In the event that the NZ Police and/or the Coroner have any uncertainty or suspicion about the **Koiwi**, they are responsible for making any records they require and for any **Koiwi** that they remove from the site,
- 5.7 If the **Koiwi** are Maori and the NZ Police and/or Coroner remove only part of the **Koiwi**, the **Nominated Representatives** and Kaumatua will remove the remaining **Koiwi**. If the **Koiwi** are non-Maori, the **Project Archaeologist** will be responsible for removing any remaining exposed **Koiwi**.



- 5.8 The **Nominated Representatives** are to advise the **Contractor** of the portion of the **Discovery Area** that is thereby waahi tapu, and whether it is to be removed off site under Clauses 6 and 7 below or to only be removed from the **Discovery Area** to the adjacent swale/berm area of the new road foundation.
- 5.9 Soil to be removed with **Koiwi** shall be as follows:
- ▶ Single human remain - shall be an amount appropriate to cover the bottom and first layer of the human remain of the plot where the human remain is to be re-buried.
 - ▶ More than one human remain - shall be an amount appropriate to cover the bottom and first layer of the human remains of the plot where the human remains are to be re-buried.
- 5.10 In the event that there is a need to remove the **Koiwi** from the soil but that it is delayed on the project site, then the **Nominated Representatives** and **Project Archaeologist** shall jointly take the material to the on-site archaeology office.
- 5.11 Clothing artefacts found with such human remains shall not be removed from the remains and shall be re-buried with the human remains.
- 5.12 Artefacts found with human remains shall be handed to the relevant hapu as determined by the Maori Land Court, provided that they are an Authorised Receiver of such material under the Protected Objects Act 1975.
- 6.0 **RESPONSIBILITY OF RE-BURIAL OF HISTORICAL KOIWI**
- 6.1 **Koiwi** remains are to be reburied in the nominated manner of the relevant hapu and location.
- 6.2 It is the responsibility of the **Contractor** to ensure such remains are disposed of as required and that all costs associated with such actions are the responsibility of the **Contractor**. Costs to be met by the **Contractor** are:
- ▶ Purchase of plot or plots at a nominated cemetery;
 - ▶ Purchase of Plaque and inscription to mark designated plot;
 - ▶ Payment of labour to re-bury **Koiwi**; and
 - ▶ Expenses relating to appropriate ceremonies for re-burial services.
- Costs to be met by the relevant Hapu shall be:
- ▶ Purchase of an appropriate container/vessel for **Koiwi**; and
 - ▶ Transportation of disturbed remains and the surrounding soil for re-burial.
- 6.3 No such material is to be transported or re-buried without the **Nominated Representatives'** authority.

7.0

CUSTODY OF TAONGA (EXCLUDING KOIWI) OR MATERIAL FOUND AT AN ARCHAEOLOGICAL SITE



- 7.1 The **Project Archaeologist** will have initial control of, and responsibility for, all material contained in the **Discovery Area**.
- 7.2 No object will be removed from the **Discovery Area** until it has been determined in consultation between the **Project Archaeologist** and the **Nominated Representatives**, if it is associated with an **Archaeological Site** or the object is **Taonga** (be it **Taonga Tuturu** or otherwise).
- 7.3 If the object is of Maori origin and found in an **Archaeological Site** and/or is a **Taonga Tuturu**, the **Project Archaeologist** will record the object and notify the Ministry for Culture & Heritage of the finding as required under the Protected Objects Act 1975. The **Project Archaeologist** will then retain the material at the on-site archaeology office for the Maori Land Court to make a determination on ownership. If the object is European in origin, the landowner has a legal right to ownership. It is acknowledged that there will be occasions when the origin of the material is difficult to determine, in which case the artefact shall be placed with the Tauranga Museum.
- 7.4 If the object is a **Taonga** and less than 50 years old the Taonga shall be taken to the nominated holding site for the project.

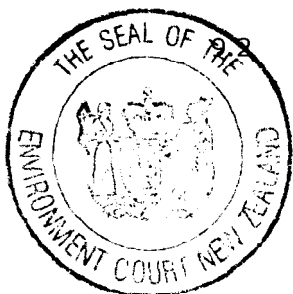
8.0 KEY CONTACTS

| | Name | Phone Contact Details |
|--|---------------------------------------|------------------------------|
| NZTA Principal Project Manager | Andrew Scott | 07 927 6001 |
| NZTA Consultant Representative | Tim Haig | 07 578 0896 |
| NZ Police Representative | Greg Clarke | 07 577 4300 |
| Nominated Representatives: Tapuika | Dean Flavell | 07 577 7483 021 277 1606 |
| Waitaha | Maru Tapsell and Sandy Potaka | 07 5770112 |
| Ngati Pukenga | Rehua Smallman | 07 5441550 |
| Ngati He | [insert name(s)] | [insert ph number] |
| Ngati Potiki | Colin Reeder and Matire Duncan | 021 100 3045 021 181 1253 |
| Ngati Whakaue ki Maketu | Maria Horne/ Willie Tapsell | 07 5332101 |
| Project Archaeologist | Ken Phillips | 027 2769919 |
| NZHPT Regional Archaeologist | Rachel Darmody | 07 578 1219 |

9.0 SAFETY REQUIREMENTS

- 9.1 Prior to any **Nominated Representatives** entering any site, the **Contractor** will induct the **Nominated Representatives** in the **Contractor's** Health & Safety procedures and practices on the site. The **Nominated Representatives** hereby warrant that all the **Nominated Representatives** will comply with these procedures and practices provided the **Contractor** provides the **Nominated Representatives** with any requisite safety items such as hard hats, for the time during which the **Nominated Representatives** are on the site.

The Contractor or Engineer to the Contractor shall have the right to order any **Nominated Representative** who fails to comply with these procedures and



practices, to leave the site. The **Nominated Representatives** hereby further warrants that all **Nominated Representatives** will comply with any such order.

10.0 INSTRUCTING THE CONTRACTOR

10.1 Any requests which the **Nominated Representatives** may make with regard to the **Nominated Representatives** performing any ceremony or duty on the site pursuant to these protocols shall be addressed to the **Consultant** only.

11.0 VARIATION TO THESE PROTOCOLS

11.1 The terms and conditions of these protocols may be varied at any time by mutual written agreement of the NZTA and the **Nominated Representatives**.

12.0 MANDATE OF NOMINATED REPRESENTATIVES

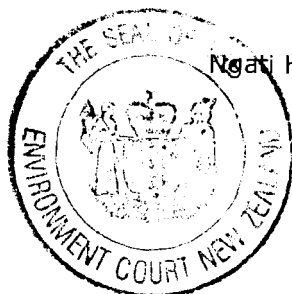
12.1 Prior to engaging in the procedures set out in clauses 4 to 7 (inclusive) above, each Nominated Representative will provide to the other parties to these protocols written confirmation of his or her mandate to engage in these procedures for or on behalf of the Nominated Representative's iwi or hapu.

13.0 ADDRESSES FOR SERVICE

| | | |
|-------------------------|-----------------------------------|---|
| NZ Transport Agency | Andrew Scott | PO Box 430 Tauranga |
| | Rawhiti Moses | PO Box 973 Hamilton |
| Tapuika | Dean Flavell | 205 No. 1 Road Te Puke |
| Waitaha | Maru Tapsell and Sandy Potaka | c/- Hone Devon 465 Matapihi Road RD5 Matapihi |
| Ngati Pukenga | Rehua Smallman | 612 Welcome Bay Road RD5 Tauranga |
| Nga Potiki | Colin Reeder and Matire Duncan | PO Box 8217 Cherrywood Tauranga |
| Ngati Whakaue ki Maketu | Maria Horne and Willie Tapsell | c/- Maketu Postal Agency Maketu RD9 Te Puke |

Ngati He

[insert details of
contact persons and



address for service]



ATTACHMENT A - PROTOCOLS FOR REIMBURSEMENT FOR MONITORING

1.0 EARTHWORKS MONITORING

The following principles will apply:

- ▶ Hapu monitors must have the relevant experience or attendance at training sessions provided by the NZTA.
- ▶ The ~~site specific details and extent of the~~ monitoring schedule will be agreed by the parties to this protocol before monitoring begins.
- ▶ The Contractor shall select a Monitor or pair of Monitors from the list of Monitors, on a rotating basis.
- ▶ Adequate notification of the monitoring schedule for the project is to be agreed by all parties.
- ▶ All requirements related to the Health & Safety and the project site will be followed to ensure the safety of Maori Monitors on-site.

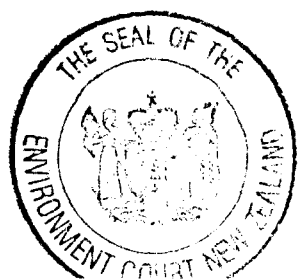
The reimbursement rate is:

- ▶ Agreed number of hours as per the monitoring schedule.
- ▶ Pre-agreed lump sum hourly rate (\$40.00 as 2009 rates) per hour.

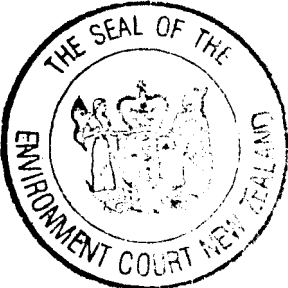
2.0 CEREMONIES

Where the opportunity for ceremonies, including site blessings, have been taken up by the **Nominated Representatives**, the NZTA will provide the following:

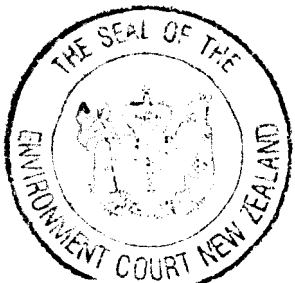
- ▶ Morning or afternoon refreshments for ceremonies.
- ▶ Transport to the ceremony site.
- ▶ All safety gear if required.
- ▶ Reimbursement of pre-agreed Marae expenses.



Attachment B - NZHPT Approval



Attachment C - TEL TWAG Earthworks Protocol



In the Environment Court
At Auckland

ENV-2009-304-00099

under: the Resource Management Act 1991 (Act)

In the matter of: an appeal under section 120 of the Act against a decision of Bay of Plenty Regional Council to grant consent for earthworks associated with the construction of the Tauranga Eastern Motorway

between: **Ngati He**
(ENV-2009-AKL-000177)
Appellant

and: Bay of Plenty Regional Council
Respondent

and: NZ Transport Agency
Applicant

Joint Memorandum of Counsel in Support of Draft Consent Order

Dated: 5 November 2009



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CHAPMAN
TRIPP

**JOINT MEMORANDUM OF COUNSEL IN SUPPORT OF DRAFT
CONSENT ORDER**

May it please Your Honour:

- 1 The parties to this appeal seek an order by consent in terms of the draft Consent Order **attached** as Annexure 1 to this memorandum.

Introduction

- 2 The NZ Transport Agency (*NZTA*) is the applicant for three resource consents (Reference Nos. 65435, 65436 and 65437) for all activities associated with earthworks, the discharge of stormwater, diversion of surface water, taking of surface water, and construction and operation of the Intake structure, culverts and the proposed bridge over the Kaituna River, associated with the Tauranga Eastern Link (TEL) (formerly known as the Tauranga Eastern Motorway).
- 3 On 18 March 2009, the Appellant lodged an appeal regarding the decision of the Respondent to grant a resource consent to authorise earthworks associated with the construction of the TEL (*Earthworks Consent No. 6.5435*) (Appeal).
- 4 The Appellant seeks the following relief in respect of Earthworks Consent No. 65435:
- 1, *Ngati He representative is appointed to the TEM Tangata Whenua Advisory Group to address the cultural environmental affects [sic] outlined above in relation to the construction of the TEM.*
 2. *Tangata Whenua involved develop a cultural monitoring earthworks protocol other than the version provided by the Applicant.*
- 5 There are no section 274 parties to the Appeal.
- 6 Since the Appeal was lodged, representatives of the parties have entered into discussions with the aim of reaching resolution of the Appeal.
- 7 A judicial telephone conference was convened by the Court on 14 October 2009, during which the parties agreed that:
- 7.1 The first ground of the Appeal could be appropriately addressed by way of consent order; and
 - 7.2 A judicial settlement conference be set down for 5 November 2009 at 2pm in Tauranga, and that prior to this, the parties should embark on further discussions to try and resolve the second ground of the Appeal.



8 In a Minute of Judicial Telephone Conference dated 16 October 2009, the Court made the following observations:

“[4] Mr Kaiawha accepts that the first ground of appeal would be appropriately addressed by a court order that:

Ngati He shall be entitled to appoint a representative to the TEM Tangata Whenua Advisory Group to address the cultural environmental effects in relation to the construction of the TEM.

[5] Ms Hill considers that such an order would appropriately address this concern. Mr Hassan acknowledges that such an order could also be made, He says that the Transport Agency has already made such an offer, and accordingly does not object to the order being made.

[6] Therefore, the court has directed that the parties liaise with a view to the final wording of such a consent order in relation to the first ground of appeal. ”

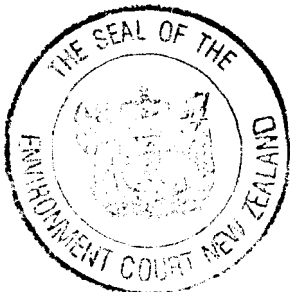
9 With respect to the second ground of the Appeal, the Court recorded the following in the Minute of Judicial Teleconference dated 16 October 2009:

“[7] In relation to the second ground of appeal, Mr Kaiawha says that Ngati He want to be involved in the protocol that has been entered into between the Transport Agency and other hapu and iwi groups in relation to the TEM.

[8] Mr Hassan points out that there are some relational difficulties in including another party in that protocol. Ms Hill advises that this protocol is not a condition of the consent in relation to this matter, but is simply referred to as being provided to the Regional Council in due course.

[9] Ms Hill acknowledges, as does Mr Hassan, that there is nothing to prevent the court from making either a further order in respect of this resource consent, or a condition in respect of the consent relating to a protocol with Ngati He. Both Ms Hill for the Regional Council and Mr Hassan for the Transport Agency appeared to be agreed that Ngati He does have legitimate cultural interests in the area, given that warriors from Ngati He had fallen in battle in this area and koiwi may be inter-mingled with those of other hapu and iwi, subject of the existing protocol.

[10] Given the cultural interest of Ngati He, the issue then turns upon how this can be properly represented in terms of



the resource consent. From the court's perspective there appears to be no impediment to the court placing, in relation to Ngati He only, a further protocol condition which could operate in parallel with the existing protocols of other groups.

[11] Alternatively, some other arrangement may be entered into that does not offend relationships with the Transport Agency and other hapu and iwi groups. Mr Kaiawha, for example, indicated that there were a number of projects being undertaken by the Transport Agency of interest to Ngati He at the moment, and that it might be possible to enter into a general memorandum of understanding which may obviate the necessity of any particular conditions being placed upon this consent at all."

- 10 Following the judicial conference, further settlement discussions took place between the Appellant and the NZTA. Associated with these, both the Appellant and the NZTA have met with current members of the "TEM Tangata Whenua Advisory Group", the official name for which is the "Tauranga Eastern Link Tangata Whenua Advisory Group" (TEL TWAG). Those present members comprise representatives of Ngaiterangi, Ngati Pukenga, Nga Potiki, Waitaha, Te Arawa Lakes Trust, Tapuika and Ngati Whakaue ki Maketu as iwi and hapu. Together with the NZTA, on 30 September 2009, they agreed the protocol referred to in the Minute of Judicial Teleconference (*Existing TEL WAG Protocol*)
- 11 In those meetings, those representatives confirmed their support for two key matters pertaining to the settlement which has now been reached as described in this Memorandum, namely:
 - 11.1 Entitlement of Ngati He to mandated representation on TEL TWAG, and
 - 11.2 Establishment of a second protocol, to which Ngati He would be party together with those representatives, and the NZTA and which would work in parallel with the Existing TEL TWAG Protocol (*Parallel Protocol*).
- 12 The key terms of the Parallel Protocol were discussed and settled in principle, subject to hapu ratification, at a meeting on 2 November 2009. A draft is attached as Annexure 2 to this Memorandum.
- 13 While a draft parallel protocol has been agreed in principle, the Appellant and the other TEL TWAG signatories will need to go back to their respective hapu and iwi to ratify this protocol,
- 14 The Appellant's ratification meeting has been scheduled for 22 November 2009. Subject to resolving any final matters of detail arising from the hapu ratification processes, the parties anticipate



having the Parallel Protocol agreed and in place by 7 December 2009.

- 15 As previously noted to Your Honour, the NZTA intends to seek funding from its Board at a meeting scheduled for 18 December 2009 for a discrete package of enabling works and will tender for this package of works prior to Christmas 2009. It is anticipated that, subject to the resolution of this appeal, these enabling works could commence at the end of January 2009.
- 16 Accordingly, only minor consequential amendments are required to existing Condition 16.1 of the Consent the subject of the Appeal in essence to reflect:
- 16.1 The fact that there will be both the Existing TEL TWAG Protocol and the Parallel Protocol, and
- 16.2 The need to provide a more truncated period for submission to the Regional Council of the draft or final Parallel Protocol prior to commencement of works,
- 17 Against that background, the terms of settlement reached are reflected in the attached draft Consent Order and are now described.

First Ground of Appeal

- 18 With respect of the first ground of the Appeal, the parties are agreed that this can be met by the inclusion in Earthworks Consent No. 65435 of a new condition 22 as follows:

Ngati He shall be entitled to mandated representation on the Tauranga Eastern Link Tangata Whenua Advisory Group to address the cultural environmental effects in relation to the construction of the Tauranga Eastern Link and the consent holder must make such arrangements as are necessary to arrange for such appointment.

Second Ground of Appeal

- 19 With respect to the second ground of the Appeal, as noted above, the parties are agreed that this can be met by making minor consequential amendments to existing condition 16.1 of the Consent to reflect the intended Parallel Protocol and adjust the timing for provision of the documents to the Regional Council, The fact that the Existing Protocol is now agreed and has already been provided to the Council can be reflected also. Therefore, the parties are agreed that the second ground of the appeal can be met by modifying condition 16.1 as follows (inserted text shown as underlined text, deleted text shown as strike-through text):



At least 6 weeks 3 months prior to commencement of works, the consent holder shall submit to the Chief Executive of the Regional Council or delegate a copy of the further Protocols for Tauranga Eastern Motorway Construction as agreed between the consent holder and various parties, that those parties intend will parallel Protocols dated 30 September 2009 agreed as between the consent holder and various parties and which details the procedures for particular purposes under section 6(e) to be taken by all parties to this Parallel Protocol in the event of a discovery of any archaeological site or koiwi being uncovered during the exercise of this consent and also for the monitoring of earthworks. Should ~~that the Parallel Protocol~~ protocol still be in draft stage at the time of submission, the final version of the document shall be submitted to the Chief Executive of the Regional Council or delegate as soon as it is completed.

- 20 Accordingly, the parties agree that with respect to the second ground of the Appeal, an order can be made by consent, in terms of the draft Consent Order attached to this Memorandum,

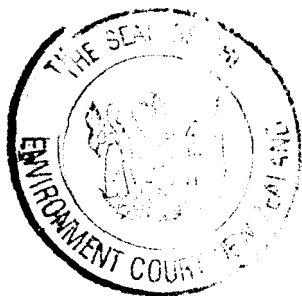
Other matters

- 21 With reference to paragraph [11] of the Minute of the Court referred to in paragraph 9 above, while outside the scope of the Appeal, the Appellant and the Applicant wish to record their common Intention to work towards developing a relationship Memorandum of Understanding that will be relevant to future projects of the Applicant that are of Interest to the Appellant.

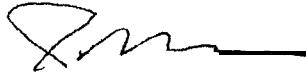
- 22 The Appellant and the Respondent have also progressed discussions with respect to a side agreement that relates to the Appellant's ancestral relationship with the TEL project area.

Conclusion

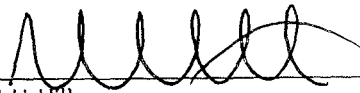
- 23 The parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the Resource Management Act 1991, including in particular Part 2.
- 24 The parties respectfully invite the Court to allow the Appeal as set out in the attached draft Consent Order.



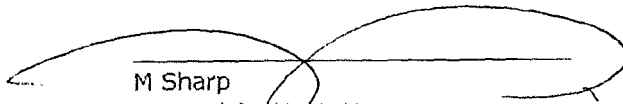
Dated: 5 November 2009



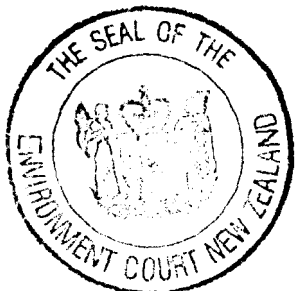
J J Hassan
Counsel for the NZ Transport Agency



M H Hill
Counsel for Bay of Plenty Regional
Council



M Sharp
Counsel for Ngati He



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