IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 165

IN THE MATTER OF	an appeal under s 58 of the Heritage New Zealand Pouhere Taonga Act 2014
BETWEEN	POUTAMA KAITIAKI CHARITABLE TRUST (ENV-2020-AKL-158) Appellant
AND	HERITAGE NEW ZEALAND POUHERE TAONGA Respondent
AND	FIRST GAS LIMITED Section 274 Party

Court:	Environment Judge MJL Dickey Māori Land Court Judge MJ Doogan Environment Commissioner RM Bartlett
Hearing:	23 – 24 March and 6 April 2021, 24 June 2021 (by VMR)
Last case event:	Reply submissions 24 June 2021
Appearances:	Mr R Gibbs, Ms M Gibbs and Mr H White on behalf of the appellant Ms V Morrison-Shaw for Heritage New Zealand Pouhere Taonga Mr BJ Matheson for First Gas Limited
Date of Decision:	22 October 2021
Date of Issue:	22 October 2021

DECISION OF THE ENVIRONMENT COURT

A: The appeal is dismissed.

B: Costs are reserved. Any application is to be filed within ten working days and any response within a further five working days.

REASONS

Introduction

[1] A decision by Heritage New Zealand to grant First Gas Limited an Archaeological Authority (**Authority**) to modify or destroy an archaeological site has been appealed. The appeal turns not on actual or potential damage to the archaeological site, but on the question of who holds tangata whenua status over the site and the area affected by the works.

[2] The Authority covers works to remove 270 metres of a redundant section of the Kāpuni gas pipeline from land near the Coast at Tongaporūtu, North Taranaki. The redundant pipeline is wrapped in a layer of coal tar enamel (**CTE**) containing asbestos, making its removal necessary in case of erosion around the pipeline. First Gas applied for the Authority on a precautionary basis, as a listed pit/terrace archaeological site (**Q18/77**) is recorded as being in the vicinity of the proposed works.

[3] While there were some differences between the parties as to the exact location of site Q18/77 it is generally understood (and we accept) that it is inland at a distance of approximately 50 to 100 metres from the line of the redundant pipe.

[4] The works to remove the pipe would be carried out entirely within the corridor of a paper road owned by the New Plymouth District Council. The adjoining land on both sides of the paper road is owned by trustees (Ms Parani Josephine Gibbs, Mr Russell Victor Gibbs, and Mr Leigh Joseph Horton) on behalf of a family trust. Mr Gibbs, his wife Ms Parani Gibbs and their children live on and farm this land. They identify with the Te Ahuru hapū of a collective describing itself as Ngā Hapū o Poutama.

[5] It is the Poutama Kaitiaki Charitable Trust (**Poutama**) that has appealed the decision of Heritage New Zealand Pouhere Taonga (**Heritage NZ**) to grant the Archaeological Authority.

The appeal

[6] Poutama's notice of appeal contains the following grounds:

1. The application and assessments are deficient
2. Omission of Te Ahuru and Ngā Hapū o Poutama from the conditions
3. The conditions are deficient
4. The decision and conditions do not provide for the cultural values of Ngā Hapū o Poutama including Te Ahuru
5. There is no rationale or justification to destroy or damage Poutama waahi tapu including archaeological sites as part of this proposed project.

[7] Poutama seeks that the authority be declined or the deficiencies remedied.

[8] The appeal was filed by Tamawaru Hunt, "as Kaitiaki and trustee of the Poutama Kaitiaki Charitable Trust (Poutama)". Mr Hunt did not sign the notice of appeal and did not appear at the hearing of the appeal. The notice of appeal listed Mr Gibbs as the contact person under the address for service. Mr Gibbs, his sister Ms Marie Gibbs and Mr Haumoana White represented Poutama at the hearing. Mr Gibbs and Mr White provided evidence and Ms Marie Gibbs presented submissions and questioned witnesses on behalf of Poutama (essentially acting as a lay advocate).

[9] Of the Poutama representatives who appeared before us only Mr White is Māori. It is not contested that he has whakapapa to Ngāti Tama and has previously identified with Ngāti Tama. From around 2008/2009 he has chosen to identify with the Poutama collective. Mr Gibbs and his sister Ms Marie Gibbs are Pākehā. Their family have farmed the land since 1899. Mr Gibbs' wife (Ms Parani Gibbs) is Maori of Tūhoe descent.

Background

[10] It became clear at the hearing that Poutama do not oppose the removal of the redundant pipe. The appeal instead turns upon the question of whether Poutama, and the Te Ahuru hapū in particular, are tangata whenua holding mana whenua over the work site and Q18/77.

[11] Poutama/Te Ahuru feel a particular sense of frustration at what they see as an unjustified departure by First Gas from a longstanding collaborative arrangement initiated by its predecessor Vector Gas following litigation in 2008-2009. In broad terms, the way that arrangement had worked in the past meant that Poutama/Te Ahuru expected that they would be closely involved from the outset in the planning and execution of a project such as this. It is through this active engagement and monitoring of the works that Poutama/Te Ahuru believe their cultural interests can be best protected, and possibly the need for an authority avoided altogether.

[12] We were directed to various sources which Poutama claim corroborate their status as tangata whenua and also to past recognition of that status by a number of public and other authorities. While the notice of appeal raises the possibility of destruction or damage to Poutama wāhi tapu, no specific evidence was provided concerning actual or potential risk to the archaeological site that is the subject of the authority (Q18/77), or to any other site, and neither were mitigating conditions proposed.

The central issue – contest over tangata whenua status

[13] Poutama's status as tangata whenua is not accepted by Ngāti Tama and Ngāti Maniapoto, or by the public authorities involved in the granting of the Authority and related resource consents.

[14] When First Gas applied for a resource consent from the New Plymouth District Council to remove the pipeline, it was informed that Ngāti Tama were tangata whenua and that Poutama were not tangata whenua in the area affected. First Gas sought and obtained written approval from Ngāti Tama in relation to both the Archaeological

Authority and the resource consent applications.

[15] First Gas stated that it is not appropriate that it makes a determination as to whether Poutama/Te Ahuru are tangata whenua and whether they exercise mana whenua over the land in question. In opening submissions, Mr Matheson for First Gas acknowledged that, while First Gas may have previously referred to Poutama/Te Ahuru as iwi/hapū, it now relies on the determination of status made by Heritage NZ and the New Plymouth Distrcit Council. He stated:[1]

> The position now adopted by those entities, and now accepted by my client, is that Poutama/Te Ahuru are not mana whenua. For the same reasons, my client accepts that Ngāti Tama have mana whenua over the land.

[16] In reply submissions, Mr Matheson noted that, if the Court concludes that Poutama holds mana whenua in respect of the project area alongside Ngāti Tama, then First Gas would consider it appropriate that Poutama be added into conditions alongside (and be treated the same as) Te Runanga o Ngāti Tama. If, on the other hand, the Court concludes that Poutama is not mana whenua in respect of the project area then First Gas would not consider it appropriate for Poutama to be reflected in the conditions. Mr Matheson said: [2]

> 2.16 FGL does not consider it is appropriate for the proposed conditions to afford Poutama (or any member thereof) any direct right to be involved in the project works in a manner that Poutama describes as being "at all levels, including planning and refining the methodology together", and to receive compensation for that involvement:
>
> (a) The Gibbs family are not the landowner of the land in question (and even if they were, that does not necessarily mean that the conditions of an Authority should confer any direct right to be involved in the project directly).
>
> (b) FGL is prepared to consult with the Gibbs family (as adjacent landowners) in a manner that is consistent with the approach taken by FGL to the many other landowners it works with along the alignment of its pipeline network.
>
> [footnotes omitted]

[1] Opening submissions on behalf of First Gas Limited, 19 March 2021 at [1.5].
[2] Submissions in reply on behalf of First Gas Limited, 24 June 2021 at [2.16].

[17] The position of Heritage NZ was clearly stated in the opening submissions of its counsel Ms Morrison-Shaw:[3]

> Ngā Hapū o Poutama (Poutama) and Te Ahuru have claimed tangata whenua status for an area extending from Onetai (Awakino) in the north through to Pukearuhe in the south - including the First Gas Limited (First Gas) project area. While Heritage NZ has previously recognised Poutama as tangata whenua (for some archaeological authorities granted pre 2020), Heritage NZ reviewed its position in March 2020. This review followed concerns being raised by Ngāti Tama and Ngāti Maniapoto; the receipt and consideration of further information about Poutama; and the removal of Poutama/Te Ahuru from local authority tangata whenua lists.
>
> As a result of its review, Heritage NZ determined that Poutama/Te Ahuru did not satisfy the requirements of the tangata whenua definition set out in the Heritage New Zealand Pouhere Taonga Act 2014 (Heritage Act). Accordingly, Poutama/Te Ahuru were not recognised as such during the processing and grant of the archaeological authority to First Gas for the removal of part of the Kāpuni pipeline.

The Statutory Framework: Heritage New Zealand Pouhere Taonga Act 2014

Purpose of Act and functions of Heritage NZ

[18] The purpose of the Heritage New Zealand Pouhere Taonga Act 2014 (**Heritage Act**), as set out in s 3 of the Act, is "to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand."

[19] Heritage NZ is a statutory entity established under the Heritage Act. It is responsible for administration of the Act and its functions include:[4]

> …
>
> (c) To advocate the conservation and protection of historic places, historic areas, wāhi tūpuna, wāhi tapu and wāhi tapu areas:
>
> ...
>
> (e) To issue authorities in accordance with this Act:
>
> ...
>
> (i) To act as a heritage protection authority under Part 8 of the Resource Management Act 1991 for the purposes of protecting –

[3] Submissions on behalf of Heritage NZ, dated 19 March 2021, at [2]-[3].
[4] Section 13, Heritage Act.

(i) the whole or part of a historic place, historic area, wāhi tūpuna, wāhi tapu, or wāhi tapu area; and

(ii) land surrounding the historic place, historic area, wāhi tūpuna, wāhi tapu, or wāhi tapu area that is reasonably necessary to ensure the protection and reasonable enjoyment of the historic place, historic area, wāhi tūpuna, wāhi tapu, or wāhi tapu area.

Principles of Act

[20] All persons performing functions and exercising powers under the Act must recognise the following principles:[5]

(a) the principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and

(b) the principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should —

(i) take account of all relevant cultural values, knowledge, and disciplines; and

(ii) take account of material of cultural heritage value and involve the least possible alteration or loss of it; and

(iii) safeguard the options of present and future generations; and

(iv) be fully researched, documented, and recorded, where culturally appropriate; and

(c) the principle that there is value in central government agencies, local authorities, corporations, societies, tangata whenua, and individuals working collaboratively in respect of New Zealand's historical and cultural heritage; and

(d) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tūpuna, wāhi tapu, and other taonga.

[21] The words and phrases in Māori in s 4(c) and (d) are interpreted as follows in s 6:

tangata whenua means, in relation to a particular place or area, the iwi or hapū that holds, or at any time has held, mana whenua in relation to that place or area

wāhi tapu means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense

[5] Section 4, Heritage Act.

> **wāhi tapu area** means land that contains 1 or more wāhi tapu
>
> **wāhi tūpuna** means a place important to Māori for its ancestral significance and associated cultural and traditional values, and a reference to wāhi tūpuna includes a reference, as the context requires, to –
>
> (a) wāhi tīpuna
>
> (b) wāhi tūpuna
>
> (c) wāhi tipuna

Authorities and applications

[22] Section 42(1) of the Act provides:

> (1) Unless an authority is granted under section 48, 56(1)(b), or 62 in respect of an archaeological site, no person may modify or destroy, or cause to be modified or destroyed, the whole or any part of that site if that person knows, or ought reasonably to have suspected, that the site is an archaeological site.

Minor effects application

[23] Pursuant to s 44(b) of the Act an application may be made for authority to undertake an activity that may modify or destroy a recorded archaeological site if the effects of the activity on the site or sites in question will be no more than minor. This was the provision under which First Gas sought and obtained the Authority to remove the redundant pipe.

[24] Section 47(5) of the Act requires Heritage NZ in considering a minor effects application under section 44(b) to have regard to:

> (a) the significance of a site or sites in relation to evidence of the historical and cultural heritage of New Zealand; and
>
> (b) the extent to which the proposed activity will modify or destroy the site or sites.

[25] Importantly, a minor effects application under s 44(b) is specifically exempted from the requirement to include, as part of the application, an assessment of:[6]

> (i) the archaeological, Māori, and other relevant values of the archaeological

[6] Section 46(2)(g), Heritage Act.

site in the detail that is appropriate to the scale and significance of the proposed activity and the proposed modification or destruction of the archaeological site; and

(ii) the effect of the proposed activity on those values; …

Power to grant an Authority

[26] Heritage NZ has a broad discretion under s 48 to grant an authority in whole or in part subject to any conditions it sees fit, or to refuse to grant an authority. It must make its determination in accordance with the requirements of ss 49-52.

Appeal

[27] A right of appeal in relation to the exercise of the power to determine an application for an authority is conferred by s 58 on "any person who is directly affected by the exercise of [that] power". Section 59(1) provides:

> **59 Decision on appeal**
>
> (1) In determining an appeal made under section 58, the Environment Court—
>
> (a) must, in respect of a decision made on an application made under section 44, have regard to any matter it considers appropriate, including—
>
> (i) the historical and cultural heritage value of the archaeological site and any other factors justifying the protection of the site:
>
> (ii) the purpose and principles of this Act:
>
> (iii) the extent to which protection of the archaeological site prevents or restricts the existing or reasonable future use of the site for any lawful purpose:
>
> (iv) the interests of any person directly affected by the decision of Heritage New Zealand Pouhere Taonga:
>
> (v) a statutory acknowledgement that relates to the archaeological site or sites concerned:
>
> (vi) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tūpuna, wāhi tapu, and other taonga; and
>
> (b) may confirm or reverse the decision appealed against or modify the decision in the manner that the Environment Court thinks fit.

[28] As the Court noted in the *King v Heritage New Zealand Pouhere Tāonga (**King**)* case:[7]

> … the relevant statutory frame in which this appeal must be determined is that provided by the HNZPTA, and not the RMA.

[29] This requires that the focus be on the particular archaeological site and not the wider area.[8]

The Authority

[30] The Authority was granted by Heritage NZ to First Gas on 24 August 2020. Consultant archaeologist Mr Ivan Bruce is designated as the approved person for the purposes of s 45 of the Act. Section 45 requires an applicant such as First Gas to nominate a person with the required skills for approval by Heritage NZ as the person authorised to undertake the activity covered by the authority.

[31] By letter dated 8 July 2020, Mr Bruce wrote to Heritage NZ in support of the application. His letter helpfully sets out important factual context, and also explains in clear terms why the application was made on the basis that the effects of the proposed works were considered to be no more than minor. The relevant sections of his letter are set out below:[9]

> First Gas Ltd are in the process of making an application to modify an archaeological site of (Q18/77) under a General Archaeological Authority for a site where the effect will be no more than minor
>
> First Gas are in the process or removing a short, now redundant section, of the 1968 Kapuni Line, as indicated in the attached figure. The methodology for these works is appended to the authority application. I consider that given works involved in putting the line in place involved considerable excavation, including mechanical excavation of a benched platform for the pipeline, these removal works have a low chance of encountering and/or modifying in-situ archaeological evidence. Due to the relatively small extent of the proposed works it can be expected that any effects on this site, will be minor, if any at all.
>
> This application is being made on precautionary basis.

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[7] *King v Heritage New Zealand Pouhere Tāonga* [2018] NZEnvC 214 at [30].

[8] *King* at [31] citing *Greymouth Petroleum Limited v Heritage New Zealand Pouhere Tāonga* [2016] NZEnvC 11.

[9] Ivan Bruce to Kathryn Hurren, Heritage NZ 8 July 2020, Common Bundle at page 0058-0059.

…

> The site Q18/77, consists of a pit and terrace complex, considered conjunctive to a nearby pa site (Q18/66) recorded upland to the south west. Q18/77 was recorded by Kath and Nigel Prickett in 1975, prior to the development of the Maui pipeline. The pipeline (constructed 1968) being removed as part of this project had already been installed at the time of Prickett's site record. All field evidence of this site was "totally destroyed" by the construction of the Maui Line in 1975, as noted in update to the site record made by Kelvin Day during a visit to this location in February 2005. No archaeological evidence was recorded along the route of the pipeline section during Day's 2005 field work and no archaeological evidence was reported during the removal of the adjoining section of pipe to the north, in 2010.
>
> The proposed section of pipe to be removed is situated in generally close spatial proximity to the closest recorded site of Q18/77, the extent of which is not clear from the NZAA site record and can no longer be accurately relocated in the field. I consider it to be within the limits of standard archaeological practice to include any archaeological material that may possibly be encountered during these proposed works as part of site Q18/77.

[32] The application recorded consultation with Ngāti Tama as tangata whenua. The conditions of the Authority relevantly provided as follows:[10]

> 5. As no protocols between the authority holder and Te Runanga o Ngati Tama were provided with the authority application, the following shall apply:
>
> a) Access for Te Runanga o Ngati Tama shall be enabled in order to undertake tikanga Māori protocols consistent with any requirements of site safety.
>
> b) Te Runanga o Ngati Tama shall be informed 48 hours before the start and finish of the archaeological work.
>
> c) If any kōiwi (human remains) are encountered, all work should cease within 20 metres of the discovery. The Heritage New Zealand Pouhere Taonga Archaeologists, New Zealand Police and Te Runanga o Ngati Tama must be advised immediately in accordance with Guidelines for Kōiwi Tangata/Human Remains (Archaeological Guideline Series No.8) and no further work in the area may take place until future actions have been agreed by all parties.
>
> d) Te Runanga o Ngati Tama shall be informed if any possible taonga of Māori artefacts are identified to enable appropriate tikanga protocols to be undertaken, so long as all statutory requirements under the Heritage New Zealand Pouhere Taonga Act 2014 and the Protected Objects Act 1975 are met.
>
> e) Te Runanga o Ngati Tama shall be provided with a copy of any

[10] Authority 2021/039, 24 August 2020 at [5], Common Bundle at pages 0070.

> reports completed as result of the archaeological work associated with this authority and be given an opportunity to discuss it with the s45 approved person if required.

This is not a statement of mana whenua status.

Issues for determination

[33] The issues for determination are as succinctly set out by Heritage NZ in its opening submissions:

(a) Whether Poutama/Te Ahuru come within the meaning of the term 'tangata whenua' such that they:

(i) should have been consulted (as tangata whenua) about the Authority under (s.46); and

(ii) have a right to appeal the Authority as a 'directly affected' party (under s 58);

(b) whether the application, assessments and conditions are appropriate.

[34] Section 58 of the Heritage Act provides that only parties directly affected by an authority have the right to appeal it. Ms Morrison-Shaw referred us to case law finding that the term "directly affected" applies to:[11]

a) Any person with a proprietorial interest in the land;

b) The applicant for the authority the subject of the appeals;

c) Tangata whenua who are linked to the site through their ancestry;

d) Other persons without a proprietorial interest in the land, such as children and grandchildren being directly affected by a proposal to dig up a grandparent's grave.

[35] While we acknowledge that there is a potential issue as to whether Poutama in whose name the appeal was lodged can properly be regarded as a "person who is directly affected" we will proceed on the basis that it is the entity authorised to represent the collective describing itself variously as Poutama/Te Ahuru and Ngā Hapū o Poutama. The primary issue is whether Poutama/Te Ahuru are tangata

[11] *King v Heritage New Zealand Pouhere Taonga* [2018] NZENVC 214 at [40] citing *Campaign for a Better City v New Zealand Historic Places Trust* [2004] NZRMA493(HC).

whenua linked to the site through their ancestry. It is common ground that Poutama does not own the land on which site Q18/77 is located or under which the redundant pipe lies, the former belonging to the Gibbs Family Trust and the latter being paper road owned by New Plymouth District Council. Poutama/Te Ahuru do not therefore qualify as someone "directly affected" by reason of a proprietary interest in the land. Although not the primary focus of the Poutama appeal, an issue was raised during the hearing as to whether Poutama/Te Ahuru may nonetheless be a person directly affected because the proposed works may disturb the grave of a moko of Mr Gibbs and Ms Parani Gibbs. We turn to this issue after addressing the primary focus of the appeal which centres on the contested question of whether or not Poutama/Te Ahuru are tangata whenua in relation to site Q18/77 and the area affected by the site removal works.

The status of Poutama / Te Ahuru as tangata whenua

[36] The question is whether Poutama the iwi and/or Te Ahuru the hapū can properly claim status as tangata whenua in relation to site Q18/77 and the land for which First Gas holds the Authority. We earlier set out the definition of the term "tangata whenua" as meaning "In relation to a particular place or area, the iwi or hapū that holds, or at any time has held, mana whenua in relation to that place or area."

[37] The terms "iwi", "hapū", and "mana whenua" are not defined in the Act.

[38] The Williams dictionary of the Māori language under the entry for "whenua" defines *tangata whenua* as "*people belonging to any particular place, natives."*[12]

[39] The adoption of words and phrases from the Māori language into statute has been commonplace for decades and there is considerable case law addressing matters of interpretation. In 2000 the Court of Appeal in litigation over the Māori fisheries settlement reviewed a range of statutory references to the word "iwi", including that in the Historic Places Act 1993, (the predecessor to the Heritage Act). The Court of Appeal concluded:[13]

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12 Dictionary of the Māori language, Williams 7th Edition at p494.

13 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commissions* [2000] 1 NZLR 285

> These usages by parliament simply reflect the common use in New Zealand society and modern times of the word "iwi" as meaning a traditional tribe… the iwi are the people of the tribe, not their leaders or representatives. Iwi are collectives of Māori with a shared whakapapa.

[40] In He Papakupu Reo Ture (Dictionary of Māori Legal Terms) "iwi" is defined as a descent group or nation:[14]

> This term is used in the source texts to refer to a larger descent group, often comprised of a number of smaller, related descent groups, all sharing a common founding ancestor, with geographically distinct territorial boundaries.

[41] In the same text "hapū" is defined as an extended family group:[15]

> The hapū is the primary political unit in traditional Māori social organisation and consists of whānau groupings, descended from a common ancestor. Hapū retain importance as autonomous social and political units, despite the term 'hapū' being, somewhat misleadingly, translated as 'sub-tribe'.

[42] And "mana whenua" is defined in He Papakupu Reo Ture as "authority over land" or "territorial rights":[16]

> This term literally means power, authority, jurisdiction, influence or governance over land or territory.

[43] The definition of "mana whenua" in He Papakupu Reo Ture draws on the extensive discussion of the term in Te Mātāpunenga, a text also published in 2013 as a compendium of references to concepts and institutions of Māori customary law. A review of the entries in Te Mātāpunenga in relation to the term "mana whenua" suggests a degree of caution is warranted in how the term is used and understood. The authors note:[17]

> The phrase *mana whenua* has been held to link political responsibilities (the protection of people, particularly members of a tribal group under traditional leadership) and other land-related authority.

[44] They go on however to note that ambiguity in the use of mana whenua and its

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(CA) at [205] & [206].

[14] He Papakupu Reo Ture: A Dictionary of Māori Legal Terms [2013], at page 15.

[15] He Papakupu Reo Ture, at page 7.

[16] He Papakupu Reo Ture, at page 38.

[17] Te Mātāpuenga: A compendium of references to the concepts and institutions of Māori customary law; Benton, Frame & Meredith, Victoria University Press [2013], at [178].

companion term *mana moana* has made its use a vexed issue, with the appropriateness of its use challenged by some Māori and other commentators. At the same time, other commentators identify the term mana whenua as a key component of tribal identity. It has also been regarded as synonymous with the term *tangata whenua.*[18]

[45] In the Resource Management Act 1991 the term "mana whenua" is defined as "customary authority exercised by an iwi or hapū in an identified area".

[46] It is here relevant to recall the statutory direction at s 4 of the Heritage Act requiring all persons performing functions and exercising powers to recognise; "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tūpuna, wāhi tapu and other taonga."[19]

[47] Save for the requirement to "provide for" as well as "recognise" this provision is almost identical to s 6(e) of the Resource Management Act. The following from the Court's decision in the *Director-General of Conservation v Taranaki Regional Council* (***Mt Messenger***) case is pertinent:[20]

> [236] We concur with the approach of this Court in the Ngati Hokopū case, which considered s 6(e). Decision makers must not only recognise but also provide for the relationship of Māori with their ancestral lands, water, wāhi tapu and other taonga. Section 6(e) is not concerned with the ancestral land, water, sites, wāhi tapu and other taonga in themselves, but with the relationship of Maori with those things and the culture and tradition surrounding them. In that case, the Court noted that the Maori word for 'relationship' is 'whanaungatanga', and then cited the following from the Law Commission's 'Maori Custom and Values' paper:
>
> > Of all of the values of tikanga Māori, whanaungatanga is the most pervasive. It denotes the fact that in traditional Māori thinking relationships are everything – between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Māori world together is whakapapa identifying the nature of relationships between all things.
>
> [footnotes omitted]

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18 Te Mātāpuenga, at [178].

19 Section 4 Heritage Act at set out above at [20].

20 *Director-General of Conservation v Taranaki Regional Council* [2019] EnvC 203 at [236]; Māori Custom and Values in New Zealand Law, NZ Law Commissions at [130], as cited in *Ngāti Hokopū Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EC), at [39]; refer also to submissions of Heritage NZ, dated 19 March 2021 at [34].

[48] We think it is clear that the term "tangata whenua" as used and defined in the Heritage Act is directed towards the iwi or hapū which holds or at any time has held customary authority over an area by reason of ancestral connection through whakapapa to that place or area.

[49] We agree with counsel for Heritage NZ that the term "tangata whenua" in this context means more than simply identifying as Māori. It requires a whakapapa connection to the land.[21]

[50] In relation to site Q18/77 Ngāti Maniapoto acknowledge Ngāti Tama as the iwi holding mana whenua. There is authoritative corroboration of the status of both Ngāti Maniapoto and Ngāti Tama as tangata whenua in the sources referred to by counsel for Heritage NZ.[22] This includes various reports of the Waitangi Tribunal and the Ngāti Tama treaty settlement. Of particular relevance is the provision of cultural redress to Ngāti Tama in areas that surround site Q18/77. They include areas to the south at Pukearuhe, to the west at Mount Messenger, to the north at Tongapōrutu, and statutory acknowledgement of a coastal marine area encompassing all the coastline adjacent to site Q18/77 to a considerable distance north (to the south bank of the Mokau river) and south (to the north bank of the Papatiki stream).[23]

[51] The Court in the *Mt Messenger* case rejected an argument made on behalf of Poutama that Ngāti Tama derive authority from their treaty settlement. We endorse and adopt the following from that decision:[24]

> [333] First we accept as incontrovertible the fact that Ngāti Tama are tangata whenua exercising mana whenua and kaitiakitanga over the land affected by the designation. We do not accept the submission made by Poutama that Ngāti Tama derive authority from their Treaty settlement. The Treaty settlement is not the source of Ngāti Tama's mana whenua and kaitiakitanga but it is a form of legal and political recognition of their mana whenua and kaitiakitanga that carries considerable weight.

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[21] Māori Custom and Values in New Zealand Law, NZ Law Commission at [130], as cited in *Ngāti Hokopū Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 at [39], refer Submissions on behalf of Heritage NZ, 19 March 2021 at [34].

[22] Submissions on behalf of Heritage NZ, 19 March 2021, at [35] and sources noted at footnote 51.

[23] Ngāti Tama Claims Settlement Act 2003, Part 4, Part 5 and Schedules 1 to 14.

[24] *Director-General of Conservation v Taranaki Regional Council* [2019] EnvC 203 at [333].

[52] In this case Poutama did not directly challenge the status of Ngāti Maniapoto or Ngāti Tama, instead raising something of a collateral challenge on the basis that they were also tangata whenua with respect to the area affected by the proposed works and that in the past both Ngāti Maniapoto and Ngāti Tama had recognised them as such. We accept as did the Court in the *Mt Messenger* case that there could in principle be more than one tangata whenua in a given area:[25]

> [234] Case law from this Court and the Maori Appellate Court on similar issues indicates that there is no reason in principle why there could not be more than one tangata whenua in a given area. There is also High Court authority upholding a distinction drawn by the Environment Court between a group holding kaitiakitanga in a place and a second group with a weaker kaitiaki relationship.
>
> [footnotes omitted]

[53] We accept that in a case such as this where there is conflicting evidence concerning tangata whenua status the "rule of reason" approach set out in *Ngāti Hokopu ki Hokowhitu v Whakatane District Council (**Ngāti Hokopu**)*[26] is the appropriate method to apply.

[54] The approach adopted by the Court in *Ngāti Hokopu* requires consideration of the evidence against a range of factors: [27]

- whether the values correlate with physical features of the world (places, people);
- people's explanations of their values and their traditions;
- whether there is external evidence (eg Māori Land Court Minutes) or corroborating information (eg waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issue and (potentially) changed by the value-holders;
- the internal consistency of people's explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

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[25] *Director-General of Conservation v Taranaki Regional Council* [2019] EnvC 203 at [234].
[26] *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111.
[27] *Ngāti Hokopu* at [53] and submissions on behalf of Heritage NZ, dated 19 March 2021, at footnote 41.

> • In a Court of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are "rules" as to how to weigh or assess evidence.
>
> [footnotes omitted]

Tangata whenua status - the Poutama position

[55] Attached to the notice of appeal is a document entitled Te Whakapuakitanga o Poutama. For present purposes it is relevant to note the following paragraphs from that document:[28]

> Poutama is one of the tuturu tangata whenua (first nation iwi) from the time before the great fleet arrived in Aotearoa. As the generations have passed, Poutama is recognised as a man, an Atua, the land, and iwi who are still on the land and carry his name to this day.
>
> Poutama are the collective hapū who descend from Poutama and Panirau through Rakeiora, who had chosen to remain on the land mass known as the Poutama land block, or remain connected to the same lands or those who are whangai (adopted) according to Poutama kawa and tikanga.

[56] Fourteen hapū are listed under the heading 'Ngā Hapu o Poutama'. They include Te Ahuru. Two marae are listed; one at Te Kauwau Pa and one at Tongapōrutu Pa described as the wharenui o Te Ahuru.[29] Mr White owns and occupies the land on which Te Kauwau Pa is located and the Gibbs family occupy and farm the land on which the Tongapōrutu Pa and wharenui is located.

[57] The document describes an extensive 'rohe potae o Poutama' or area of interest. This area ranges from Onetai (Awakino) in the north through to Pukearuhe in the south.[30]

[58] The works to remove the redundant pipeline and site Q18/77 are within an area Poutama recognises as part of the rohe of the Te Ahuru hapū.

[59] Mr White acknowledged in response to questions that while he personally supported removal of the redundant pipe the final say would rest with the landowners

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[28] Te Whakapuakitanga o Poutama, at page 6.
[29] Te Whakapuakitanga o Poutama, at page 9.
[30] Te Whakapuakitanga o Poutama, at page 8.

or the hapū on the land.[31]

[60] Extensive documentary evidence was filed on behalf of Poutama and we were also referred to a range of additional sources which was said to support or corroborate their claim to tangata whenua status. While we have considered all the evidence, we can dispose of the appeal largely on the basis of the concession properly made by Poutama witnesses that the Te Ahuru hapū do not have a whakapapa connection to the land. We see this as fatal to the claim to tangata whenua status as that term is used in the Act. We also consider that the lack of a whakapapa connection at the hapū level also means that the claim to tangata whenua status on behalf of Poutama the iwi also fails. We also consider that the iwi claim must fail due to lack of corroborating evidence of an iwi known as Poutama or Ngā Hapū o Poutama in both historical and contemporary times.

[61] It is common ground that Mr Gibbs and his siblings do not have a Māori whakapapa.

[62] During re-examination the following exchange took place between Ms Gibbs and Mr White:[32]

> Q. So you said to Ms Morrison-Shaw that hapū do not necessarily need to have an ancestral connection to be, have mana whenua or customary authority. My question was: do all of the Poutama hapū have an ancestral connection to Poutama?
>
> A. No.
>
> Q. Which ones don't?
>
> A. Te Ahuru don't.

[63] Mr White was asked several questions by the Court about how the Gibbs whānau became part of Poutama:[33]

> Q. So is – and I just want to be clear – is it that the Gibbs whānau have become part of Poutama through whāngai or something else?

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31 Notes of evidence, at page 282, lines 10-15.
32 Notes of evidence, at page 276, lines 1-10.
33 Notes of evidence, at page 278, lines 13-16.

> A. No, I always claim that I adopted them, but they've had a long association, 1898, they've been there since 1898.

[64] As we understand it the reference to 1898 relates to the date on which the Gibbs family first purchased the land. In his evidence Mr White had referred to the Gibbs whānau rekindling the ahikāroa of the land. He was asked by the Court for clarification:[34]

> Q. And I think in part of your brief you say that the Gibbs have rekindled the ahikāroa on this land.
>
> A. Yes.
>
> Q. But that phrase, to rekindle ahikāroa, don't you need a whakapapa connection?
>
> A. No, not necessarily.

[65] Mr White described the circumstances in which he regarded the Gibbs whānau as coming under the korowai of Poutama through steps such as wanting to convert the farm into Māori title and to have "all things Māori here". He noted that they had been burying their dead on the land and once you start burying your dead on the land that connects you forever.

[66] He was then asked for further clarification as to how the Gibbs whānau became a hapū of Poutama and the following exchange took place:[35]

> Q. When it comes to Māori take to the land and as I understand ahikā, to rekindle the ahikā in the way that you are describing, that to me presupposes that there is a pre-existing relationship through whakapapa that a hapū are re-asserting from mai rānō. It is a different situation to what you described as the Gibbs' connection to the land which comes about through a non-Māori whakapapa but a long association with the land and a deep connection with it. My question really is, under tikanga, and particularly under Poutama tikanga, how is it that the Gibbs' whānau can become a hapū of Poutama?
>
> A. Well simply because I would not support a whānau. I would support a wider hapū then the benefits then go to a wider group and that is the way I saw it. They are prepared to make their lands available for all and they have and to me, you are carrying out the duties of a hapū group.
>
> Q. All right. And again just to be clear, when referring to the whāngai

[34] Notes of evidence, at page 278, lines 17-22.
[35] Notes of evidence, at page 279, lines 2-34.

> concept, is that the – are you saying that the Gibbs' whānau have become part of Te Ahuru and part of Poutama through a whāngai relationship.
>
> A. Oh look my comment was really a throw away comment in terms of a whāngai. They approached me about it and that was my response. I am not quoting any legal –

[67] As to a whakapapa connection, when asked under cross-examination whether the hapū Te Ahuru had a tūpuna, Mr White said Tūhoe. He was asked for clarification of this by the Court and confirmed that he had nominated Tūhoe because Mr Gibbs' wife Ms Parani Gibbs is Tūhoe. He also referred to a Tūhoe connection to the West Coast and Te Āti Awa that he had been told about. He was then asked whether he recalled the way the Māori Land Court had dealt with this issue in its 2011 decision on the Gibbs application to convert the farm into a Māori Reservation. Mr White confirmed that he recalled that decision and the following exchange took place:[36]

> Q. His [Judge Harvey] decision was that while there certainly is a connection through Tūhoe it's not of the kind that can displace the tangata whenua status of those who whakapapa to the land here, and I'm paraphrasing, but do you agree with Judge Harvey's or the way Judge Harvey dealt with that question in the 2013 decision or 2011 decision?
>
> A. Yeah I do.

[68] Mr White was also asked whether Poutama has a register of members. He responded no and then the following exchange took place:[37]

> Q. And what is required in order to become a member of Poutama then if there's no register of members. Is – do you need a whakapapa to the land?
>
> A. What's that?
>
> Q. What is the criteria to become a member of Poutama, do you need a whakapapa to the land?
>
> A. You have to have a love of the land.
>
> Q. A love of the land. So is it based on land ownership?
>
> A. Poutama is generally a land-based group of people, hapū. Every hapū that are registered with Poutama Taumata are on land blocks.
>
> …

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[36] Notes of evidence, at page 280, lines 22-27.
[37] Notes of evidence, at page 242, lines 18-27 & line 33-34; and at page 243, line 1.

> Q. And what is the criteria for joining as a hapū of Poutama? Is it that you own land in the area?
>
> A. Yeah, yeah. That's basically it.

[69] During cross-examination it became clear from the Poutama witnesses that the current membership of the Te Ahuru hapū consists of the Gibbs whānau, meaning Mr Gibbs and Ms Marie Gibbs, their siblings, partners and children.[38]

[70] Mr Gibbs was also questioned under cross examination, and by the Court about the circumstances in which the Gibbs whānau came to be seen or characterised as the Te Ahuru hapū of Poutama. Though his evidence was less clear Mr Gibbs did not refute or contradict the points made by Mr White.

[71] Mr Gibbs was asked when Te Ahuru became a hapū, was it after the Reservation application in 2004 or after the 2011 decision or some time prior. His response was that he could not give a date, but it had happened. When asked whether his parents were part of Te Ahuru or was Te Ahuru in existence when his parents were alive, Mr Gibbs responded that if you look at Te Ahuru as being an embryo you could say yes.[39]

[72] Under cross examination Mr Gibbs also accepted that his wife, who has Ngāi Tūhoe whakapapa does not have a whakapapa connection to either Ngāti Maniapoto or Ngāti Tama.[40]

[73] Mr Gibbs was asked who other than his family was in the Te Ahuru hapū. He responded; "a number of nieces and nephews and in-laws and people come and go I suppose." He also mentioned the various whāngai who come and live with the family for various times.[41]

[74] In response to further questions from the Court as to whether Te Ahuru hapū became part of Poutama through the tikanga of whāngai Mr Gibbs said yes that was a Poutama tikanga. When asked to elaborate on the nature of this tikanga Mr Gibbs

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[38] Notes of evidence, at page 309, line 35 & page 310, lines 1-26.
[39] Notes of evidence, at page 307, lines 5-25.
[40] Notes of evidence, at page 308, lines 1-20.
[41] Notes of evidence, at page 310, lines 10-25.

said that tikanga was not in the nature of an adoptee, not from a parent to a child, the nurturing wasn't necessarily as a child:[42]

> The nurturing began at whānau level, and it was nurturing, not with kai and nurturing with dealing with wāhi tapu. Dealing with taniwha for example. Burying the dead, culturally, you know, a strong emphasis on nurturing a cultural capacity I suppose, for safety but there was also a strong expectation that the nurturing would be, was for a purpose and it would be repaid and the purpose being that, like our moko at Poutama are not separate or pushed away from their ancestral lands and the iwi as a whole.

[75] As the Court noted in the *Mt Messenger* decision the commitment demonstrated by Mr Gibbs and his siblings to the incorporation of Māori cultural values into the life of the whānau can be seen as a constructive and positive force not only for them but also for their children and those yet to come.[43]

[76] However, while there is clear evidence of this commitment to the incorporation of Māori values, what is lacking is the necessary whakapapa connection to the land that is the subject of this appeal. An added difficulty, noted by the Court in the *Mt Messenger* decision is that there is little or no corroborating evidence to support the claim that there was historically, or is in contemporary times a recognised hapū or iwi collective known as Ngā Hapū o Poutama.

[77] Poutama argued that their status as tangata whenua has been confirmed by the Māori Land Court in the decision of his Honour Judge Harvey in 2011, and also by the Maniapoto Trust Board, by Te Rūnanga o Ngāti Tama pursuant to an agreement signed in 2013 and also by the Waitangi Tribunal. They argue that Te Ahuru belonging to Poutama has been confirmed according to Poutama tikanga and also confirmed by Judge Harvey who, they said, found that it was undisputed that Poutama welcomed the "applicants" (the Gibbs family) into their tribe:[44]

> When the considered, consistent, and genuine view of Poutama and Te Ahuru is that the proposal would have a significant and adverse impact on Te Ruataniwha, an area of cultural significance to us, and on Maori values, it is not open for the Court to decide it would not. The view and tikanga of Poutama and Te Ahuru is determinative of our values, effects and significance.

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42 Notes of evidence, at page 319, lines 24-30.
43 *Director General of Conservation v Taranaki Regional Council* [2019] NZ EnvC203 at [337].
44 Supplementary Synopsis of Submissions on behalf of Poutama, 21 June 2021, at [33].

[78] Poutama argued that the latest Waitangi Tribunal findings (with respect to the Rohe Potae claims) confirmed Poutama are tangata whenua. They said this was uncontested and incontrovertible and argued therefore that "it is not open to this Court to promote or insist on a binary (TRoNT and MMTB) tangata whenua landscape over Poutama".[45]

[79] A further argument was that "errors and assumptions in the *Mt Messenger* decision should not be repeated in this one". In conclusion they argued that the need for an archaeological authority could be avoided if First Gas simply worked in accordance with the longstanding collaborative relationship that had existed between Poutama, Te Ahuru and First Gas.[46]

[80] For the reasons that follow we conclude that the Poutama representatives have overstated or misunderstood the effect of Judge Harvey's 2011 decision and recent findings of the Waitangi Tribunal.

[81] Judge Harvey's 2011 decision concerned an application by Mr Gibbs and Ms Parani Gibbs together with their accountant Mr Horton as trustees of the Gibbs Family Trust to establish a Māori Reservation over the family farm (227 hectares of general land).[47]

[82] Judge Harvey recorded in the decision that the applicants were supported by tangata whenua including Ngā Hapū o Poutama and whānau and hapū affiliating primarily with Ngāti Maniapoto and Tainui waka.[48] Te Rūnanga o Ngāti Tama opposed the application on the basis that it would set an unintended precedent permitting "non-tangata whenua" to create a large Māori reservation in areas that traditionally fall within the domain of other iwi, in this instance Ngāti Tama. Such groups could then act contrary to the wishes of tangata whenua across a range of environmental, cultural, social, economic and political considerations.

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45 Supplementary Synopsis of Submissions on behalf of Poutama, 21 June 2021, at [46].
46 Supplementary Synopsis of Submissions on behalf of Poutama, 21 June 2021, at [51].
47 *Gibbs v Te Runanga o Ngāti Tama* [2011] 274 AOT MB 47 (MLC).
48 *Gibbs* at [4].

[83] The objection raised by Ngāti Tama was upheld and the application to establish the reservation was declined.

[84] In passages relied upon by Poutama, Judge Harvey recorded that Ngā Hapū o Poutama have given their unqualified support to the Gibbs and the applications to establish the reservation. Judge Harvey recorded:[49]

> [78] … Indeed Haumoana White gave evidence endorsing the applications and it was Mr White whom the Gibbs rely on for their evidence of customary and historical Māori connection to the land. …

[85] Judge Harvey said:[50]

> [79] It is undisputed that Ngā Hapū o Poutama have welcomed the Applicants into their tribe. For many years both Poutama and the Applicants have worked together and their efforts to act as kaitiaki over their respective lands.

And further:

> [81] In short, I accept the submission that there is no legal impediment set out in the Act, having regard to the Preamble and the principles, that one of the tangata whenua groups claiming an interest in these lands has cloaked the current owners of those lands with the responsibility of kaitiaki and custodian. But whether that is sufficient to enable the granting of an order creating a reservation under s 338 of the Act for the exclusive benefit of the Applicants and their whānau is a separate question.

[86] Judge Harvey's conclusion on that separate question was as follows:[51]

> [147] In summary, my conclusion is that for the creation of a Māori reservation for the purposes claimed and to cover such a large area of land where the beneficiaries are limited to the Gibbs family, a lack of traditional customary connection to the land is fatal to the application as it is currently framed. …

[87] After noting that Māori reservations have a special and unique purpose and have been granted over relatively limited areas to protect particular Māori interests and values according to tikanga Māori, Judge Harvey concluded:[52]

> [147] … Central to those interests is whakapapa to the land in a Māori sense. It is through that whakapapa that the customary connection is anchored. It is

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49 *Gibbs v Te Runanga o Ngāti Tama* [2011] 274 AOT MB 47 (MLC) at [78].
50 *Gibbs* at [79]-[81].
51 *Gibbs* at [147].
52 *Gibbs* at [147]

> over many generations of Māori being born, then living and dying on the land, and through all the events in between, that the crucial historical connection to the land is established to create the status of tangata whenua.

[88] Judge Harvey also found:[53]

> [144] … my overall conclusion is that the applicants do not possess a customary connection to the land in terms of tikanga Māori sufficient to justify their claims to tangata whenua status to support the applications for the creation of a large Māori reservation for the benefit of a limited beneficiary class.

[89] It is important to note that Poutama or "Ngā Hapū o Poutama" were not a party to that proceeding. Mr White appeared as a witness in support of the Gibbs' application. The issue as to whether or not Poutama were tangata whenua was not before Judge Harvey and not a matter decided in that case.

[90] Poutama also referred us to the Waitangi Tribunal Petroleum Report, arguing that the status of Poutama as tangata whenua is confirmed in that report.[54] In that report it was recorded that Ngā Hapū o Poutama were granted a watching brief and leave was given to present evidence and question witnesses and make submissions. The Tribunal recorded "Ngā Hapū o Poutama are connected to both Ngāti Tama and Maniapoto."[55]

[91] Mr White gave evidence on behalf of Ngā Hapū o Poutama. The Tribunal noted:[56]

> Ngā Hapū o Poutama told us that they hold mana whenua in the area south of Tongaporutu that includes the stretch of coastline between Mangapukatea (also known as Locked Gate) and Te Rua Taniwha (Twin Creeks). … The Gibbs family have lived on the land for many years. According to hapū representative Haumoana White, current owners Russell Gibbs and his wife, Parani (who is from Tuhoe), have been accepted into Ngā Hapū o Poutama.

[92] While the Tribunal recorded the evidence and submissions put forward by Ngā Hapū o Poutama the status of Ngā Hapū o Poutama as tangata whenua was not a

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53 *Gibbs v Te Runanga o Ngāti Tama* [2011] 274 AOT MB 47 (MLC) at [144].
54 The Report on the Management of the Petroleum Resource, Waitangi Tribunal [2011].
55 The Report on the Management of the Petroleum Resource, at [3.1.3].
56 The Report on the Management of the Petroleum Resource, at [6.4].

matter at issue and the Tribunal made no relevant findings with respect to that question.

[93] Poutama also referred us to the report of the Waitangi Tribunal into the Rohe Potae claims. That most recent volume of that report was released in December 2020 and is entitled Te Mana Whatu Ahuru Volume VI.[57] It attempts a comprehensive inventory and assessment of all 278 claims heard in the inquiry.

[94] In that report the claim on behalf of Ngā Hapū o Poutama (Wai 1747) is considered. This is the same claim that was granted a watching brief in the Petroleum inquiry. The claim was originally lodged by Mr White and Ms Parani Gibbs in 2008 with a more detailed Statement of Claim lodged in 2011. The Tribunal recorded that the claim was lodged on behalf of Ngā Hapū o Poutama and the claimants were "descendants of the original owners of the lands known as the Poutama block".[58]

[95] The Tribunal outlined in summary form the nature of the Wai 1747 claim and went on to find that the claim was well founded. The Tribunal reached this conclusion having considered the extent to which its findings on general issues affecting the Rohe Potae Māori applied to this claim and secondly whether the claim raised specific local allegations or issues requiring additional Tribunal findings. There was then a list of findings on general issues. No specific findings with respect to local allegations or issues were recorded. The only evidence provided in support of the claim was a relatively short brief of evidence from Mr White.[59]

[96] The Tribunal noted the rohe identified by Poutama and said:[60]

> Speaking to their whakapapa, Poutama acknowledged associations with Ngāti Maniapoto to the north, Ngāti Hauā, Ngāti Rangatahi, and Ngāti Maru to the east and Ngāti Mutunga and Ngāti Tama to the south.

[97] Although the Poutama representatives did not refer us to it, in the same section of its report the Waitangi Tribunal also reported on another claim lodged by Mr

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57 Te Mana Whatu Ahuru, Waitangi Tribunal [2020].
58 Te Mana Whatu Ahuru, at page 1022.
59 Te Mana Whatu Ahuru, at pages 1023-1025.
60 Te Mana Whatu Ahuru, at page 982.

White. The Wai 529 claim was lodged by Paraone Lake and Mr White in 1995 on behalf of "Te Iwi o Mokau". The Waitangi Tribunal also found that this claim is well founded. The Statement of Claim for Wai 529 is available on the Tribunal's public record of inquiry.[61] It records the claimants as descendants of the people of Mokau, Te Rohe o Poutama. It goes on to say; "uniquely the claimants descend from the Tupuna of Ngāti Tama and Ngāti Maniapoto". Under the heading "Identification of Claimants" the claim records that Mr White; "is a descendant of the Tupuna of this land. Those Tupuna being the issue of Ngati Tama and Ngāti Maniapoto who clearly indicated that their Tūrangawaewae was the whenua of Mokau Mohakatino."

[98] It is also noteworthy that the Tribunal makes no reference to an iwi or hapū collective known as Poutama or "Ngā Hapū o Poutama" or of a hapū known as "Te Ahuru" when it reviewed the tribal landscape covered by its inquiry in Chapter 2 of the first volume of its Te Mana Whatu Ahuru report. There is reference to contest around the Mokau area between Ngāti Maniapoto hapū and Ngāti Tama in the pre-Treaty period. There is also reference to various hapū who occupied the Mokau Coast including the Poutama lands, but this does not include any reference to a hapū known as "Te Ahuru".[62]

[99] Notwithstanding the finding that the Wai 1747 claim lodged by Mr White and Ms Parani Gibbs was well founded, we are not persuaded that such limited findings as are recorded in this report amount to authoritative confirmation that Ngā Hapū o Poutama are tangata whenua exercising mana whenua over site Q18/77 and the area affected by the pipe removal works. The status of Poutama/Te Ahuru as tangata whenua over these areas is directly in issue in this case and we are required to make a fact-based evaluation on the evidence before us.[63] To the extent that it is relevant, we see the change in the position taken by Mr White in the Wai 529 claim, the Wai 1747 claim and now in the evidence before us as more indicative of a contemporary political division between Mr White and his Ngāti Tama whanaunga, than as evidence of a

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[61] Wai 898, 1.1.0019 pdf (justice.govt.nz).

[62] Te Mana Whatu Ahuru, Waitangi Tribunal [2018] at [2.6.2.4].

[63] *Ngāti Maru Trust v Ngāti Whatua Orakei Whai Maia Limited* [2020] NZHC 2768, at [120]. Cited with approval in *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, at [104], cited in Opening Submissions on behalf of Heritage NZ, dated 19 March 2021, at [25]-[26].

distinctive iwi or hapū collective known as Poutama or Ngā Hapū o Poutama. It appears to us that the emergence of Poutama or Ngā Hapū o Poutama is a relatively recent development and we agree with the evidence of Mr Greg White on behalf of Ngāti Tama that Poutama lacks the characteristics of a traditional iwi or hapū.[64]

[100] We also note that Poutama in their evidence and submissions have not directly addressed or refuted a number of relevant findings in the *Mt Messenger* decision, which were upheld by the High Court on appeal.[65] The Court in that case noted the relevance of certain findings in the Taranaki report and the Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims report which it concluded were more in alignment with conclusions reached by expert historian Mr Paul Thomas about the status of Poutama:[66]

> [323] Mr Thomas summarised his evidence as follows:
>
> > The crux of my evidence is that land rights in the Mokau-Poutama area during the nineteenth century were complex, disputed and subject to change. But one constant was that there are no historical records, at least as far as I am aware, that refer to a tribal group known as Nga Hapu o Poutama. Instead a wide range of individuals, hapū, iwi, and pan tribal groups asserted rights in the area. Particularly important amongst these various groups were Ngati Tama and Ngati Maniapoto. They were at the forefront of the struggle for land rights. It would seem, from the evidence that is available that local people and hapū were tied, in a complex but powerful way, to one or both of these iwi.
>
> [324] We have not found it necessary to refer in depth to the points of difference between Mr Stirling and Mr Thomas, as we consider that the appeal can be resolved primarily on the basis of the findings we have made in relation to Mrs Pascoe's connection to the land and to Poutama. We would observe, however, that Mr Thomas' conclusions are more in alignment with what the Waitangi Tribunal has found in its Taranaki and Ngati Tama/Ngati Maniapoto cross-claim report. The way in which the Ngati Tama settlement progressed and the lack of any record of protest by representatives of the collective now calling itself Poutama also lend support to Mr Thomas' conclusions that the hapū/iwi with primary affiliation to the area affected by the Project are Ngati Tama and Ngati Maniapoto.
>
> [325] We prefer Mr Thomas' evidence on this central issue. His findings also lend weight to Mr Dreaver's conclusion that those small number of Maori with

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64 Statement of Evidence of Gregory Lloyd White, 11 December 2020, at [27]-[37].

65 Poutama (with D and T Pascoe) sought leave from the Supreme Court to appeal the High Court's decision. The application was refused: *Poutama Kaitiaki Charitable Trust and D and T Pascoe v Taranaki Regional Council and others* [2021] NZSC 87.

66 *Director-General of Conservation v Taranaki Regional Council* [2019] EnvC 203 at [323]-[325].

> ancestral links to the Project area who choose to be represented by the Poutama Trust are most likely to have whakapapa connections to either Ngati Maniapoto or Ngati Tama. This is certainly true of Mr H White, the only person of Maori ancestry who appeared before us as a witness for Poutama. His whakapapa links to Ngāti Tama are clear and not contested.
>
> [footnotes omitted]

[101] We conclude therefore that Poutama/Te Ahuru are not tangata whenua as that term is used in the Act. That disposes of the primary issue on the appeal as it was argued before us. There is however a residual question that arose during the course of the hearing as to whether Poutama/Te Ahuru may be considered a "directly affected" person by reason of potential disturbance to the grave of a moko of Mr Gibbs and Ms Parani Gibbs.

Disturbance of Wāhi Tapu/Mokos grave?

[102] The focus of the Poutama appeal was on recognition of their claim to status as tangata whenua. As we understand it, on the basis of that status they would then be able to re-establish what they described as the "collaborative" relationship with First Gas which would see them closely involved in a project such as this and resourced to do so.

[103] In oral evidence Mr Gibbs confirmed that he supported removal of the pipe and says that in fact "we insisted on removal of the pipe. The issue is how the pipe is removed."[67] He went on to refer to the collaborative processing in the following way:[68]

> … we did it and we did it as part of the collaborative process stemming from the Gibbs vs Vector Gas decision, where the High Court provided for the kaitiakitanga of the whānau and Poutama as an iwi and in the conditions, Te Ahuru and Poutama are entitled to participate in any discussions with engineers. The effect of that is to participate in the planning and after that be remunerated for your participation and that's what's been in place since that – I think it was a 2009 High Court decision. …

[104] Questioned about the consulting fees / engagement fees paid to either himself

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[67] Notes of evidence, at page 293 lines 23-25.
[68] Notes of evidence, at page 293 lines 28-36 & page 294 line 1.

or to Poutama, Mr Gibbs could not recall the amount, other than agreeing that it was "months and months of work" and Poutama may have been paid more than $200,000.[69]

[105] In an email to First Gas[70] Te Ahuru had confirmed had there would be no impact on archaeological sites numbered 77 and 89 (the site that is the subject of the Heritage NZ Authority being Q18/77). Mr Gibbs said that email had been written on the expectation of a collaborative process involving Poutama so that any impact on those sites could be avoided.

[106] Under questioning Mr Gibbs gave this view of what Poutama could achieve if involved in the work: [71]

> … we can manage the effects of a minor project like that during that participation, and as an example partway along that area so the, partway along the 270-metre section for this project there's wāhi tapu there and the top was opened up during, like, just the first scrape on one part of it was during the 2006 realignment, and it was immediately put back exactly how it was when that area was pegged off and voided so the damage wasn't done, and we have that ability via that collaborative process which was endorsed in that High Court decision *Gibbs v Vector Gas* to manage those effects to a large extent, to avoid those effects to a large extent. Sometimes you can't but in general we're able to minimise, you know, avoid a lot of effects or minimise.

[107] We note that in this oral evidence Mr Gibbs mentioned a wāhi tapu site part-way along the 270 metre pipeline. His evidence did not elaborate on this site, neither did he provide any further information in cross-examination or in response to questions from the Court, though requested to do so.[72]

[108] Also emerging from cross-examination was a question as to whether Mr Gibbs' grandchild was buried in the vicinity of the road reserve where the pipeline is to be removed. Considering that he knew the location of the pipeline in the road reserve, he was asked whether, with such knowledge, the Gibbs would have positioned the grave in close proximity. He said he did not know but "it's right there".[73] Further

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69 Notes of evidence, at page 301 line 10 – page 302 line 13
70 Notes of evidence, at page 327 line 33.
71 Notes of evidence, at page 299 lines 24-32.
72 Notes of evidence, at pages 320-321 & 327-329;
73 Notes of evidence, at page 303 lines 27-30.

questioned by the Court as to whether it was in the project area he said "Depends what you mean by project area. Its – I've, yes I'd say it's in the project area."[74] He agreed he knew the location of the pipeline very well and that he had been present when the child was buried. He explained that Poutama would "normally manage" wāhi tapu areas by being present and telling the workers where to dig and what to avoid. He agreed that he wants conditions requiring that Poutama must be involved so that they can influence the project.[75] He said they had to be involved anyway as First Gas needs to access the pipeline through their property.

[109] Mr Gibbs agreed he had not mentioned any wāhi tapu or the potential presence of his grandchild's grave because he said he had expected the collaborative process to take place and there would be no impact if Poutama was involved in the pipeline removal.[76] Poutama's appeal is that the conditions in the Authority do not provide for the cultural values of Poutama and Te Ahuru but questioned as to why Poutama had not proposed any Mr Gibbs did not have a clear answer. Neither were any conditions proposed during the remainder of the hearing or raised in closing submissions for Poutama.

[110] We find it inherently implausible that Mr Gibbs, his wife or his whānau would choose to bury a family member within the corridor of the redundant pipe. Mr Gibbs knows the location of the pipes in use and the redundant sections. He has been involved in earlier pipeline works. He is an articulate witness and has a good command of the extensive documentary evidence put forward on behalf of Poutama. The inference we draw from the relative lack of clarity about actual or potential impacts on moko's grave or wāhi tapu in the vicinity of the proposed works is that there is no such risk.

[111] We therefore conclude, in addition to our finding that Poutama/Te Ahuru are not tangata whenua, that neither are they otherwise a directly affected person for the purposes of s 58.

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74 Notes of evidence, at page 304 line 17.
75 Notes of evidence, at page 305 lines 19-31
76 Notes of evidence, at pages 327-328

[112] That finding is sufficient for us to dismiss the appeal. For completeness, we also note that findings that Poutama/Te Ahuru are not tangata whenua and that they are not otherwise directly affected by reason of actual or potential impacts on a gravesite or other wāhi tapu also mean that their other grounds of appeal must also fail. We can see no material deficiency in the application and the assessments nor in the omission of Te Ahuru and Ngā Hapū o Poutama from the conditions and neither do we consider that the conditions themselves are deficient in any material way. It is appropriate that the decision and conditions do not provide for the cultural values of Ngā Hapū o Poutama including Te Ahuru because they are not tangata whenua in relation to site Q18/77 or in relation to the area in which the pipe removal works would be carried out. Ngāti Tama are appropriately recognised as tangata whenua over these areas and the conditions provide for this. It would be wrong in principle to add non-tangata whenua to such conditions. Finally, there is no credible evidence that the proposed works will destroy or damage Poutama wāhi tapu including archaeological sites.

Findings

[113] We find pursuant to the matters for determination in paragraph [33] that Poutama/Te Ahuru are not tangata whenua and as such:

(a) There was no requirement to consult with them as tangata whenua about the Authority under s 46 of the Heritage Act.

(b) They do not have a right to appeal the Authority as a "directly affected" party under s 58 of the Heritage Act.

[114] The processes followed by First Gas and Heritage NZ were appropriate to the scale and nature of the project and the requirements of the Heritage Act and the application, assessments and condition were not deficient.

[115] The appeal is dismissed.

[116] Costs are reserved. Any application is to be filed within ten working days and

any response within a further five working days.

MJL Dickey
Environment Judge

MJ Doogan
Maori Land Court Judge

RM Bartlett
Environment Commissioner