IN THE ENVIRONMENT COURT
AT AUCKLAND

ENV-2016-348-040

IN THE MATTER of the Resource Management Act 1991 (the **Act**)

A N D

IN THE MATTER of appeals pursuant to clause 14 of the First Schedule to the Act

BETWEEN **MOTITI ROHE MOANA TRUST**

(ENV-2015-AKL-134)

NGATI MAKINO HERITAGE TRUST

(ENV-2015-AKL-140)

NGATI RANGINUI IWI INCORPORATED SOCIETY

(ENV-2015-AKL-141)

Appellants

A N D **BAY OF PLENTY REGIONAL COUNCIL**

Respondent

A N D **Various**

Section 274 parties

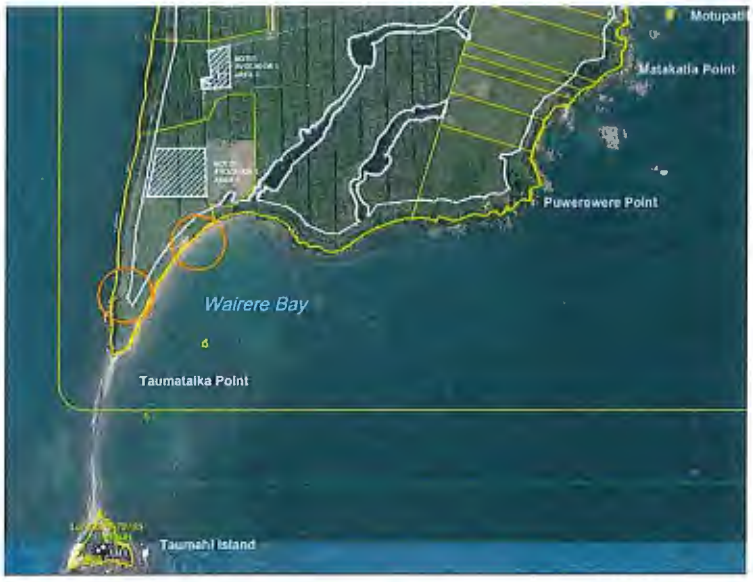
SUBMISSIONS ON BEHALF OF MOTITI AVOCADOS LIMITED

MAY IT PLEASE THE COURT:

1. Motiti Avocados Limited (**MAL**) owns 145ha of land on Motiti Island mainly used as an avocado orchard. Key infrastructure vital to the operation of the avocado orchard includes the existing barge landing on the southwest coast of Motiti Island which is located in the coastal marine area. MAL also has an airstrip, but the barge landing is used to ship harvested avocadoes to the mainland (and indeed transport anything that cannot be readily transported by light aircraft).

2. On 20 March 2017 MAL was granted resource consent to undertake a 13 lot subdivision for 11 rural house sites, two jointly owned ancillary lots, and an orchard block within the area

identified as Motiti Avocados 2 Area D. This area is shown on Planning Map 1 from the Motiti Environmental Management Plan, included below:



3. The orange circles show the "Identified Landing Areas (See Planning Map 4)", which are shown in more detail on Planning Map 4 as follows:

4. MAL has the potential to be directly affected by changes to rules which could affect the barge landing, or changes to the policy framework as it applies to the coastal environment including Motiti Island. If fishing controls are put in place, this could impact on the saleability of the rural lots that will be available for sale when the land is subdivided.

5. MAL is calling one witness, Mr Andrews Collins, who will be providing expert planning evidence.

General context

6. MAL's concerns are with the specific relief sought for a marine spatial plan for Motiti Island. In principle, MAL is not concerned with the broader architecture provisions that would enable further marine spatial plans to be implemented through a full Schedule 1 process, however, if provisions to provide for this are to be included in the plan, then MAL prefers the Council's wording.

7. At the heart of the matter, the appellants seek to prohibit fishing and other activities in broad wāhi tapu areas, and to restrict certain fishing activities in a broader wāhi taonga area. Aside from the practical implications of this, the relief sought raises procedural issues as well. This issue is discussed in the evidence of Joanna Noble[1] and Andrew Collins.[2] On the issue of scope I adopt the submissions of Counsel for the Respondent (paragraphs 75-77).

8. A key question for the Court is whether the provisions proposed by the appellants are the most appropriate way to maintain indigenous biological diversity by protecting indigenous flora and fauna from fishing activities. It is my submission that the appellant MRMT's proposed prohibited activity rules are not appropriate as such a stringent preclusion of fishing activities and structures is not supported by the evidence.

9. If the Court nevertheless finds that it is appropriate to impose the smaller two nautical mile fishing exclusion zones, then in my submission those zones are more appropriately named to reflect what they are trying to achieve – based on the bulk of the appellant MRMT's evidence this appears to be the maintenance (and enhancement) of indigenous biological diversity.

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[1] Statement of Evidence of Joanna Noble dated 7 November 2017, at [72].
[2] Statement of Evidence of Andrew Collins at [7.31].

The case for Motiti Avocados Limited

10. The key issue for MAL is that it has continued use and access to its landing areas and can operate its orchard without complication. It also seeks a planning framework which will enable the renewal of any existing barge landing to be considered on its merits without unnecessary complexity. MAL has an interest in making sure that the planning framework is clear, particularly after its lengthy involvement in the Motiti District Plan process resulting in the Motiti Island Environmental Management Plan.

11. It was part of the process for the District Plan that wāhi tapu sites were recorded and listed in Appendix 3 of the plan, which itself runs to over 300 pages. One of those sites is Taumaihi Island, which has identifier M20 and is identified in Appendix 3 as Matarehua Pa.[3]

12. The appellants propose wāhi tapu areas that have a radius of one nautical mile (1.85km) and a diameter of two nautical miles (3.7km). However, beyond a general reflection of relationship and/or improvement in mauri, the evidence filed in support of the appellants' relief does not clearly articulate the cultural values that are sought to be protected by these expansive wāhi tapu areas which are larger in scale than Motiti Island itself. Existing ASCV 25 already reflects the relationship of tangata whenua with the broader MNEMA and includes a description of specific sites.

13. The term wāhi tapu is defined in the RCEP as "a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense" which is stated to be the definition from s 2 of the Historic Places Act 1993.[4] It seems to need more than an historic connection. The evidence of Nepia Ranapia incudes karakia about the history of the various wāhi tapu. In my submission however, the evidence does not substantiate the scale of the broad wāhi tapu areas sought to be spatially identified with regulatory effect.

14. For example, there is no evidence as to why Matarehua Pa should be protected by a two nautical mile diameter in the coastal marine area when the district plan provides a 10m periphery.[5] Mr Ranapia, who is the well known and well respected author of Appendix 3 to the District Plan gave clear evidence that he did not set the buffer, and that such a buffer was not necessary in order to protect Matarehua itself. MAL seeks that if the Court imposes the 1 nautical mile fishing exclusion zones, it directs that the one at the southern tip of the island ('Matarehu') be pulled back to the southern tip of the island which would still provide a 500m+

[3] Also Toka A16, and Archaeological Site V14/41.
[4] Now replaced of course by the Heritage New Zealand Pouhere Taonga Act 2014.
[5] Motiti Island Environmental Management Plan, Rule 3.2.4

radius. Alternatively the northern boundary of that zone can be more refined so as to avoid the landing areas and be set back from mean high water springs.

15. One concern of MAL is that there is the potential for overlapping policy frameworks, and the Matarehu wāhi tapu zone seems to exemplify that. Although it appears from one of the plans filed in the evidence of Di Lucas that the wāhi tapu is pulled back from the Island itself, this is not entirely clear, and in any event, MAL's preference would be for the zone to be amended as just discussed.

16. In terms of recognising wāhi tapu, for comparison I note that to enter a wāhi tapu area on the New Zealand Heritage List / Rarangi Korero under the Heritage New Zealand Pouhere Taonga Act 2014 (which may relate to an area in the common marine and coastal area) then the application must be supported by sufficient evidence.[6]

17. Further, just as the Fisheries Act 1996 provides specific legislation for managing fisheries, the Marine and Coastal Area (Takutai Moana) Act 2011 also provides an avenue for recognising and protecting wāhi tapu areas, although the threshold for establishing recognition under this Act is very high.[7] This can be through recognition in an order or agreement (a wāhi tapu protection right) or in a planning document. A planning document may identify issues, objectives and policies for management of the customary marine title area, and may include any matter that can be regulated under the RMA, among other legislation.[8]

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[6] Heritage New Zealand Pouhere Taonga Act 2014, s 68(4) provides: If the Council is satisfied that an application is supported by sufficient evidence, the Council must proceed to determine the application by—

(a)publicly notifying the application; and

(b)giving notice of the application to—

(i)every person that—

(A)is the owner of the land on which the wāhi tūpuna, wāhi tapu, or wāhi tapu area or part of the wāhi tūpuna, wāhi tapu, or wāhi tapu area is located; or

(B)has a registered interest in the land on which the wāhi tūpuna, wāhi tapu, or wāhi tapu area or part of the wāhi tūpuna, wāhi tapu, or wāhi tapu area is located; and

(ii)the appropriate iwi or hapū; and

(iii)the local authorities that have jurisdiction in the relevant area.

[7] In accordance with s 51 and 58 of the act, to establish a right / title under the act the right must have been exercised / held since 1840, continues to be exercised / held in accordance with tikanga and has not been extinguished as a matter of law.

[8] Section 85 provides:

(1) A customary marine title group has a right to prepare a planning document in accordance with its tikanga.

(2) The purposes of the planning document are—

(a) to identify issues relevant to the regulation and management of the customary marine title area of the group; and

(b) to set out the regulatory and management objectives of the group for its customary marine title area; and

(c) to set out policies for achieving those objectives.

(3) A planning document may include any matter that can be regulated under the enactments specified in subsection (5), including matters that are relevant to—

(a) promoting the sustainable management of the natural and physical resources of the customary marine title area; and

(b) the protection of the cultural identity and historic heritage of the group.

18. While I do not submit that the Heritage New Zealand Pouhere Taonga Act or the Marine and Coastal Area (Takutai Moana) Act necessarily precludes the relief sought by the appellants, I simply draw the Court's attention to the cross-over with these other pieces of legislation and the avenues available for recognition and management of wāhi tapu areas.

19. Looking beyond the spatial identification of the proposed wāhi tapu areas, it is my submission that there is no need for a rule prohibiting structures. Within the MNEMA:

(a) The RCEP rules effectively prohibit structures within IBDA A and ONC (rule SO 14); and

(b) To the extent that Motiti Island is not completely encircled by an IBDA A or ONC, it is completely encircled by an ONFL and as Mr Lawrence acknowledged anyone seeking resource consent for a new structure within the ONFL would have their work cut out for them.

20. The bulk of the appellant's case and evidence relates to indigenous biological diversity / fishing, which would be amply addressed by parts 1 and 3 of the proposed prohibited activity rule (as Mr Lawrence also acknowledged).

21. I note finally for completeness that if the Court were minded to impose some sort of overlay through this process, to give wider expression to those central features with overlays of the highest order (IBDA A and ONC), then Otaiti and Motunau Island exhibit both these values, with some other proposed wāhi tapu areas having at least an ONC rating. However Matarehua engages neither Policy 11(a) nor 13(1)(a) of the NZCPS. It is one of two proposed wāhi tapu areas which has neither an IBDA A nor an ONC overlay at its heart. Accordingly, there does not appear to be the same impetus for a further overlay to protect the identified values of Taumaihi Island.

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(4) A planning document may relate—
(a) only to the customary marine title area of the group; or
(b) if it relates to areas outside the customary marine title area, only to the part of the common marine and coastal area where the group exercises kaitiakitanga.
(5) The planning document may include only matters that may be regulated under—
(a) the Conservation Act 1987 or the Acts listed in Schedule 1 of that Act:
(b) the Heritage New Zealand Pouhere Taonga Act 2014:
(c) the Local Government Act 2002:
(d) the Resource Management Act 1991.

The planning provisions

22. MAL does not object to the introduction of a pathway for a marine spatial plan to be developed for Motiti Island and, as expressed in the evidence of Andrew Collins, MAL is generally supportive of the wording proposed by the Regional Council, with a few exceptions. These exceptions are:

    (a) MAL does not consider that amending Objective 4 to include new clause (c) is necessary.[9]

    (b) New Method 19AA needs refining.[10]

    (c) Schedule 6A needs to clarify that the Motiti Island Environmental Management Plan shall prevail in relation to wāhi tapu and wāhi taonga sites above the CMA boundary.[11]

23. The reasons for these exceptions are addressed in Andrew Collins' evidence, which I submit should be preferred for a less complex and more efficient planning process, and a full consultative process for affected parties in the development of a specific marine spatial plan.

DATED at **TAURANGA** this 5th day of December 2017

Vanessa Jane Hamm

Counsel for Motiti Avocados Limited

[9] Statement of Evidence of Andrew Collins dated 7 November 2017, at 7.20.
[10] At 7.30.
[11] At 7.2.