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To	Stephen Daysh	**25 October 2018**
From	James Winchester, Hamish Harwood and Charlotte Coyle	
Subject	Poutama – "Other iwi authority" notation on Te Puni Kokiri website	

1. In accordance with the directions set out in Minute 6, we have set out below our opinion in relation to the following matters:

   (a) any differences in decision making regarding the status of iwi authorities for notices of requirement and resource consents versus plan making under Schedule 1 to the RMA;

   (b) relevant case law as to the status of iwi authorities;

   (c) the nature and details of the Te Puni Kokiri process for determining iwi authorities under section 35A of the RMA; and

   (d) a composite map showing the geographic areas or rohe of iwi authorities recorded on the Te Puni Kokiri website.

Differences in decision-making requirements

2. The RMA does not require local authorities to treat the submissions or views of iwi, iwi authorities or tangata whenua any differently than any other submission when looking at designations and resource consents. However Part 2 of the RMA must be considered. We note that there are separate requirements of consultation for policy statements and plans under Schedule 1.

Notices of requirement/designations

3. Section 171 sets out the mandatory considerations that a territorial authority must have particular regard to when considering a notice of requirement. Section 171 does not differentiate between iwi or iwi authorities and other submitters. Consideration of the matters under section 171(1) is subject to Part 2 of the RMA and the effects on the environment of allowing a requirement can include cultural matters and effects on tangata whenua.

4. Under section 171(1)(a) decision-makers will need to have particular regard to the RPS and other higher order documents, which may provide further direction on how iwi or iwi authorities' views are taken into account. Section 171(1)(b) is also potentially relevant to the extent that alternative sites, routes and methods might have differing impacts on matters of concern to iwi groups.

5. Section 171(1)(d) states that a territorial authority must have particular regard to any other matter the territorial authority considers reasonably necessary in order to make a recommendation. This may include the views of iwi or iwi authorities, but it is at the territorial authority's discretion.

Resource consents

6. Section 104 is similar to section 171 in that it does not differentiate between iwi or iwi authorities and other submitters.

7. Like section 171, section 104 requires a consideration of effects on the environment, which includes cultural and spiritual effects, and the relevant provisions of any RPS or other plan. Under section 104(1)(c) any other matter the consent authority considers relevant and reasonably necessary can be considered.

Part 2

8. Both sections 104 and 171 are subject to Part 2 of the RMA. A territorial authority must therefore recognise and provide for section 6 matters, which includes the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other Taonga (section 6(e)). Under section 7(a) the Council must have particular regard to kaitiakitanga,

9. These provisions do not refer to iwi or iwi authorities, rather they apply to all Māori and those who exercise mana whenua over an area.

10. As we note below, the Court in *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 93 found that more than one group can have mana whenua over an area.

Schedule 1 of the RMA

11. Schedule 1 of the RMA, which provides for the preparation and change of policy statements and plans by local authorities, has more prescriptive requirements to consult iwi authorities. Clause 2 requires that a proposed regional coastal plan must be prepared in consultation with iwi authorities of the region. Clause 3 requires that proposed policy statements and plans must be prepared in consultation with the tangata whenua of the region who may be so affected, through iwi authorities. Clause 3B provides further specifics as to consultation under Clause 3. Clause 4A requires that before notifying a proposed policy statement or plan, a local authority must have regard to any advice received from iwi authorities.

Relevant case law as to the status of iwi authorities

12. In an early case involving a resource consent appeal, *Whakarewarewa Village Charitable Trust v Rotorua DC*, Planning Tribunal W61/94, the Tribunal made an observation about possible future recognition of the Trust, which was not material to the outcome nor to any of the material findings. The Tribunal commented that, due to their common ancestry and bond of the relevant hapu with world renowned tourist attractions, the Whakarewarewa village was in a unique situation where the village could very well exist as an "*iwi local* [sic] *authority*", and was a "*prime example of a situation to which the iwi authority provisions of the Act could apply*".

13. It appears that these observations were made by the Tribunal on the basis that there was no recognised iwi authority for the area at that time, and hence somewhat of a vacuum in terms of which entity should exercise kaitiakitanga. As such, we consider that the circumstances of the Tribunal's *obiter* comments may be somewhat unique and of limited guidance for present circumstances.

14. In a later case, *Porirua CC v Transit NZ*, EnvC W52/01, the Court recorded as a matter of fact (and it did not appear to be contested by any other party) that the relevant site fell within the rohe of Ngati Toa, which was represented by Te Runanga o Toa Rangatira, an iwi authority defined under section 2 of the RMA. It stated that "*Ngati Toa is the recognised tribe with tangata whenua status within the wider Porirua area*". This was recorded with regard to a number of sites of cultural and spiritual significance that would be affected by a roading proposal. There was however no further analysis of such sites nor of cultural matters elsewhere in the decision, and it appears to have only been mentioned as part of the factual context. To the extent that any guidance can be drawn from the *Porirua* case, it suggests a more orthodox interpretation of the meaning of the term "iwi authority".

15. Two other cases are *Trustees of Tuhua Trust Board v Minister of Local Government* [2012] NZEnvC 202 which dealt with a district plan for Tuhua (or Mayor Island) and *Hoete v Minister of Local Government* [2012] NZEnvC 282 which dealt with a district plan for Motiti Island. In both instances, given that the islands were not within any other district, the Minister of Local Government was required to prepare a district plan for each island.

16. The approach of the Environment Court was similar in both cases in having to take a different view to what constituted an iwi authority due to the nature of each "district". In *Tuhua*, the Court held that the "*Trust Board is a group that represents hapu in a district for the purposes of the [RMA] … given that Tuhua is a separate district, we tentatively conclude that the Trust Board is an iwi authority within that district*". In *Hoete*, it observed "*just as in the case of* Tuhua*, we consider that the wording and definition of iwi authorities must, in the circumstances of a smaller district such as Motiti, infer that subgroups who have a direct interest in the land. This situation is however not as clear as* Tuhua*, and a great many people whakapapa to the Island*."

17. In *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 93 the Environment Court looked at the role of Tūwharetoa in the application for a resource consent to use the Rotokawa geothermal resource. Ngāti Tahu and Ngāti Whaoa Runanga Trust held mana whenua in respect of Lake Rotokawa and the geothermal resource, and they denied that Tūwharetoa held any mana whenua at Rotokawa and opposed a role for that iwi authority in relation to the consents.

18. This case was not about whether Tūwharetoa is an iwi authority (which was not in dispute), but rather whether the Regional Council had taken into account section 6(e) and 7(a) matters of the relationship of Maori and their culture and traditions with taonga, and kaitiakitanga. Tūwharetoa was recognised by the Council as having mana whenua over their rohe, and that its rohe spanned the Taupo District overlapping with other iwi. The Court heard extensive evidence from Tūwharetoa about its history and role in the district, and found that the application for resource consent fell within the rohe of Tūwharetoa.

19. *Panuku Development Auckland Ltd v Auckland Council* [2018] NZEnvC 179 concerned the resource consent applications by Panuku for infrastructure development for the America's Cup. This case also involved mana whenua issues and a kaitiaki engagement plan. There was no discussion of the status of iwi authorities under the RMA, however the Court included a condition requiring engagement with mana whenua and the development of an America's Cup kaitiaki engagement plan. It referred to the 19 iwi authorities that are recognised in the Unitary Plan. There was no dispute as to whether any groups, other than those identified in the Unitary Plan, were iwi authorities or other iwi authorities.

Te Puni Kokiri process for determining iwi authorities under section 35A of the RMA

20. Sections 35A and 36B-E were inserted into the RMA in 2005. They deal with a duty to keep records about iwi and hapu and joint management agreements respectively.

21. Section 35A deals with the duty to keep records about iwi and hapu, and throughout that section differentiates between "*each iwi authority*" for the district, and "*groups that represent hapu*". We note that section 35A(2)(a)(i) provides that the Crown must provide to each local authority information on iwi authorities within the region or district of a local authority and the areas over which one or more iwi exercise kaitiakitanga within that region or district. Subsection (ii) requires the Crown to provide the same information about "*any groups that represent hapu*".

22. Section 35A(5) provides that if information recorded regarding iwi authorities and groups that represent hapu conflicts with a provision of any other enactment, advice given under another enactment, or a determination made under another enactment, the other enactment prevails.

23. Sections 36B-E provide for joint management agreements to be entered into between local authorities and identified groups, including iwi authorities and groups that represent hapu. Based on the statutory distinction and our understanding of the factual position, it appears that Poutama would be more likely to fall into the latter category of a "group that represents hapu", although this latter position is not itself entirely clear.

24. As discussed above, the case law on the meaning of iwi authority is limited in terms of content and guidance. The circumstances where there has been some doubt about iwi authority status do appear to have been relatively unique and fact-specific, and/or have been the subject of *obiter* findings. In our view, the case law does not provide support for recognition of Poutama as an iwi authority. Other than the list maintained by Te Puni Kōkiri, there is nothing to suggest that Poutama should be regarded as an iwi authority for the purposes of the RMA.

25. The Te Puni Kōkiri website states that Te Kāhui Māngai gives information on iwi identified in the Māori Fisheries Act 2004, and those iwi/hapū that have begun the process of negotiating settlement of their historical Treaty of Waitangi claims; this includes their rohe, hapū, marae, and the organisations whose mandates to represent these iwi/hapū have been recognised by the New Zealand Government. These representative organisations are:

    (a) Mandated Iwi Organisations and Recognised Iwi Organisations in the Māori Fisheries Act 2004; and

    (b) mandated bodies recognised for Treaty of Waitangi settlement purposes, including Treaty negotiations and post-settlement governance entities.

26. Te Kāhui Māngai also includes:

    (a) iwi authorities and groups that represent hapū for the purposes of the RMA;

    (b) National and Urban Māori organisations that have statutory associations with representative iwi organisations ("Other Māori Organisations"); and

    (c) Urban and Institutional Marae.

27. It is clear that Te Kāhui Māngai focuses on identified and mandated iwi for the purposes of the Māori Fisheries Act and Treaty of Waitangi settlements. From our review of this directory, almost all of the identified iwi authorities for the purposes of the RMA fall into those categories.

28. There are however some organisations recorded as "other iwi authorities" for the purposes of the RMA. Of relevance is an advisory note on the website in respect of such bodies as follows "*Note that the term "iwi authority" is defined in the RMA only for the purposes of that Act. This does not in itself specifically imply formal Crown recognition of that group as an iwi, nor formal recognition by the Crown of that "iwi authority" to act on behalf of that iwi*".

29. Another entry states "*Other iwi authorities for the purposes of the Resource Management Act 1991 have not been formally recognised by the New Zealand Government on the same basis as the representative organisations of the iwi/hapū listed above*". It is not however clear from the website what the basis for their recognition is.

30. The Council made a request under the Official Information Act 1982 (**OIA**) to Te Puni Kōkiri in relation to this matter. The information provided by Te Puni Kōkiri indicates that Te Kāhui Māngai was never intended to be seen as having the function of recognising iwi or hapū mandates or constituting proof of a group's status as an iwi. The information received from Te Puni Kōkiri also appeared to acknowledge that not only was their process for identification of Poutama flawed, but also that the recognition was not appropriate on the merits.

31. Further we note that Ngāti Tama and Ngāti Maniapoto who are recognised iwi authorities, were not consulted by Te Puni Kōkiri about Poutama's recognition and have subsequently confirmed that they did not recognise Poutama as an iwi authority.

32. These factors indicate that the Council is not obliged, on the basis of Te Kāhui Māngai, to itself recognise Poutama as an iwi authority. We note that Te Kāhui Māngai does not constitute binding Crown advice to the Council regarding the status of tangata whenua groups for the purposes of section 35A of the RMA. Further, Ministry for the Environment advice to the Council confirms that being identified on Te Kāhui Māngai is not intended to constitute Government recognition of a tangata whenua group for the purposes of section 35A(2A) of the RMA.

33. We understand that, at this point, the Council has not recognised Poutama as an iwi authority for the purposes of the RMA.

Map showing the geographic areas or rohe of iwi authorities recorded on the Te Puni Kokiri website

34. We understand the Council will provide maps separately to the Hearings Commissioner outlining the boundaries of rohe which are relevant in the present circumstances.