

Before the Hearings Committee

under: the Resource Management Act 1991

in the matter of: a submission by the Parahirahi C1 Trust in respect of applications by Ngawha Generation Limited for resource consents required for the continued operation of the Ngawha Geothermal Power Station and the Ngawha Expansion Project and a notice of requirement to the Far North District Council by Top Energy Limited

Legal submissions on behalf of the Parahirahi C1 Trust

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LEGAL SUBMISSIONS ON BEHALF OF THE PARAHIRAHİ C1 TRUST

INTRODUCTION

- 1 These submissions are presented on behalf of the Parahirahi C1 Trust (*the Trust*). The Trust lodged a submission conditionally opposing Top Energy's¹ applications for resource consents and a notice of requirement for the continued operation and significant expansion of the Ngawha Geothermal Power Station (*the Proposal*).
- 2 Following these legal submissions, you will hear from two of the Trust's Trustees, Ms Amokura Kawharu and Mr Renata Tane. In addition, the Trust's geoscience expert, Mr Tom Powell, will be presenting evidence (via Skype, as he is currently in Jakarta).

SCOPE OF SUBMISSIONS

- 3 These submissions address:
 - 3.1 The Trust and its role;
 - 3.2 The Trust's position on the Proposal;
 - 3.3 Engagement with Top Energy;
 - 3.4 Resource consent conditions; and
 - 3.5 The Notice of Requirement.

THE TRUST AND ITS ROLE

- 4 The Trust has a special interest in the Proposal as it is kaitiaki of the Ngawha geothermal reservoir (*Ngawha Waiariki*), including the Ngawha Springs hot springs and pools (*the Springs*).
- 5 As Ms Kawharu will explain:
 - 5.1 There is no natural resource that has more cultural value to Ngapuhi than Ngawha Waiariki and the Springs. As kaitiaki, the Trust has a responsibility to protect Ngawha Waiariki and the Springs. The broad objective of the Trust is to "see that Te Waiariki, its environs and historical values associated with these are cared for and preserved for the benefit of the descendants of the original owners".
 - 5.2 The Trust manages the entire Springs complex, which is located partly on land owned by the Trust (the Parahirahi C1 block) and partly on Crown-owned land that the Waitangi

¹ Acting through Ngawha Generation Limited in relation to the resource consents.

Tribunal has recommended be returned to Maori ownership. Pending settlement of the claim, the Four Acres land has been returned to the Trust by way of a lease with nominal rent.

- 6 Ms Kawharu will discuss the Trust and its role in more detail.

THE TRUST'S POSITION ON THE PROPOSAL

- 7 You will hear from Ms Kawharu that, given its kaitiaki responsibilities, the Trust's preference would be for Ngawha Waiariki and the Springs to remain in their natural state (thereby protecting the resource and avoiding "spearing the taniwha").
- 8 The Trust's position is that, if exploitation of the geothermal resource is to continue, and particularly if it is to expand:
- 8.1 The resource consent conditions must protect Ngawha Waiariki and the Springs; and
- 8.2 Given the significant adverse cultural effects of exploiting this resource, there needs to be material cultural benefits arising from the Proposal.
- 9 The Trust therefore seeks that the Proposal be declined consent, unless the conditions are amended as sought by the Trust.
- 10 The Trust is also concerned about the proposed designation over the culturally significant Four Acres land. The Trust seeks the modification of the Notice of Requirement so that it no longer relates to the Four Acres land. In the alternative, it seeks to expressly limit any designation over the Four Acres land to "access" purposes only, with appropriate conditions controlling that access.

ENGAGEMENT WITH TOP ENERGY

- 11 The Trust (with the financial support of Top Energy) commissioned a Cultural Impact Assessment (*CIA*) in 2014². The Trust has considered the *CIA*'s recommendations in forming its view on the Proposal and what consent conditions might be appropriate.
- 12 Since the Proposal applications were lodged, Top Energy and the Trust have entered into without prejudice discussions, which have included technical discussions involving the Trust's geoscience expert, Mr Tom Powell.
- 13 Those discussions have resulted in the Trust and Top Energy reaching agreement on a number of consent conditions. However,

² Cultural Impact Assessment prepared for Parahirahi C1 Trust by Shea Pita & Associated Ltd, dated 19 September 2014 (but not finalised and sent to the Trust until 1 October 2014).

there are various matters on which agreement has not been reached, and these outstanding matters are addressed in these submissions and the Trust's evidence.

- 14 The Trust is disappointed with Top Energy's suggestion that its engagement with the Trust has been "one-sided".³ Despite the considerable differences between the Trust and Top Energy in organisational capacity and resources, the Trust has provided Top Energy with proposed tracked changes to consent conditions and as a result of further discussion (including technical conferencing), agreement has been reached on various issues. The inability of the parties to reach agreement on all issues prior to the hearing does not constitute "one-sided" engagement.

RESOURCE CONSENT CONDITIONS

- 15 The key consent conditions of concern to the Trust are the Northland Regional Council (*NRC*) consent conditions. If the Proposal is to be consented, the Trust seeks amendments to conditions relating to two main areas: geothermal issues and cultural issues. Top Energy has agreed to amendments to some conditions to address concerns raised by the Trust, as set out in Dr Mitchell's rebuttal evidence and the accompanying revised NRC conditions.⁴
- 16 The Trust seeks further changes to the amended NRC consent conditions attached to Dr Mitchell's rebuttal evidence, as shown in green underlining and green highlighted strike-through in **Appendix A** to these submissions.

Geothermal issues

- 17 Top Energy's amended NRC consent conditions address a number of the technical concerns raised by Mr Powell. As explained in Mr Powell's supplementary evidence, agreement has been reached in relation to:
- 17.1 Abstraction/injection rates and "load following";
- 17.2 Reservoir pressure; and
- 17.3 Some monitoring issues, although further changes are sought to address Mr Powell's remaining concerns regarding enthalpy monitoring.⁵

³ See para 4.5(c) of Top Energy's Outline of Legal Submissions presented at the hearing on 10 August 2015.

⁴ Appendix Two to Dr Mitchell's rebuttal evidence.

⁵ Mr Powell's supplementary evidence notes that "Top Energy's Revised Conditions do not go far enough, particularly with respect to monitoring of reservoir temperature through measurement of discharge fluid enthalpy". He disagrees with Top Energy's proposed approach of measuring "the enthalpy of existing

18 There are however two key areas of disagreement between the Trust and Top Energy relating to:

18.1 The staging of the proposed expansion of the Ngawha Power Station⁶; and

18.2 Maintaining the characteristics of the Springs⁷.

Staged approach

19 Top Energy has applied to undertake the expansion of the existing Ngawha Power Station in two stages.⁸ It has proposed conditions which require the effects of the first 25MW expansion to be assessed before the second 25MW expansion may commence.⁹

20 Given that Top Energy is seeking to triple the electricity generation from the Ngawha reservoir, it is submitted that a staged approach is necessary to ensure effects are appropriately avoided, remedied or mitigated and that the Proposal meets the “sustainable management” purpose of the RMA. A staged approach is consistent with Policy 5.3.3(3)(e) of the Proposed Regional Policy Statement, which requires consideration of an adaptive management regime to respond to unknown or uncertain adverse effects of regionally significant infrastructure.

21 Mr Powell’s evidence notes that it is common for a geothermal resource to develop new and unanticipated problems when the rate of production is increased.¹⁰ In his experience, numerical models rarely predict all aspects of resource response after large increases in production.¹¹ As a result, he considers that staged development is a prudent approach to achieve sustainable development of geothermal resources.¹²

22 The independent expert geoscience review commissioned by Northland Regional Council also supports staging. Dr Maunder considers that “staging would provide an opportunity to test predicted reservoir and spring responses at a rate of extraction that

wells at the relevant power station” (condition 14). He supports the Trust’s proposed changes to condition 137 to require monitoring of geothermal reservoir temperature (based on well discharge enthalpy) (paragraph 16).

⁶ Powell supplementary evidence, at [6] to [10].

⁷ Powell supplementary evidence, at [13] and [14].

⁸ EIC Burdett, at [2.8] and [6.1]. See also proposed conditions 7 and 8.

⁹ Proposed condition 13.

¹⁰ SOE Powell, at [21].

¹¹ SOE Powell, at [24].

¹² SOE Powell, at [19].

is approximately twice the current rate".¹³ Similarly, the NRC Officer's Report notes that the second stage "will require a period of monitoring of actual changes against modelled prediction before proceeding – if the results provide the necessary evidential support for this to occur."¹⁴

23 Although the consent conditions proposed by Top Energy do provide for a form of staging (conditions 10-13), the Trust seeks amendments to these conditions to ensure that the Proposal is appropriately staged to avoid, remedy or mitigate effects. In particular, the Trust seeks:

23.1 A new condition 13(c) to expressly require the Council to certify that the Reservoir and Spring Modelling Update report satisfies the condition 13(b) pre-conditions prior to the second 25MW expansion; and

23.2 Amendments to conditions 10-12 to increase the monitoring period between stages and require two reservoir tracer tests.

Monitoring between stages

24 Top Energy and the Trust disagree as to how long the monitoring period between the first 25MW expansion and the second 25MW expansion should be.

25 In his evidence-in-chief, Mr Burnell for Top Energy considered that a two year period is sufficient to obtain "the important information required for recalibration of the numerical reservoir models".¹⁵ In his rebuttal evidence, Mr Burnell maintains his opinion that a two year period is sufficient. However, in response to concerns raised by the Trust, Top Energy now proposes a three year monitoring period between the stages.¹⁶

26 In Mr Powell's opinion, a two or three year observation period is too short.¹⁷ He considers that a four year observation period with one complete tracer test may be an option. However, he considers it would be prudent to provide for a five year observation period to allow for the possibility of two reservoir tracer tests.¹⁸

27 Mr Powell's view that a three year monitoring period is insufficient is supported by Dr Maunder's Geoscience Review Report. Dr Maunder

¹³ Ngawha Geothermal Expansion Project Geoscience Review of Resource Consent Application prepared by Earth Consult for Northland Regional Council dated June 2015, p60.

¹⁴ NRC Officers Report, p71-72.

¹⁵ EIC Burnell, at [13.7].

¹⁶ Rebuttal Burnell, at [3.14].

¹⁷ Powell supplementary evidence, at [6].

¹⁸ Powell supplementary evidence, at [7].

recommends that the Commissioners “consider formalising through a condition of consent, staging of the increase with approval of the second stage subject to a review after a period of say five years from commissioning of the fourth unit”.¹⁹ [*emphasis added*]

- 28 The Trust therefore seeks that conditions 10-12 be amended to require a five year monitoring period between stages with provision for two reservoir tracer tests.

Maintaining Spring characteristics

- 29 Ensuring that the characteristics of the Springs will be maintained is critically important to the Trust. Ms Kawharu will explain that “the Springs have been enjoyed by generations of people who have visited them for their unique properties... [and] any physical change brought about by the Proposal would represent an uninvited and unwelcome change to a natural cultural icon”.²⁰
- 30 The NRC Officer’s Report agrees that “there is an evident potential impact on the cultural well-being of tangata whenua if firm assurance cannot be given that both the characteristics of the geothermal reservoir and the Ngawha Springs outflows from it will not be adversely affected” and acknowledges that there is a potential risk of adverse effects on the Springs if or when both new plants were to be in operation.²¹
- 31 Although a staged approach would allow problems which develop during the expansion to be identified and addressed, ongoing adaptive management is required to address problems identified after both expansion stages are established.
- 32 Mr Powell has expressed concerns that the Proposal may alter the chemistry of the Springs, particularly in relation to the potential loss of gas from the reservoir.²²
- 33 Top Energy accepts the need to protect the Springs.²³ In his rebuttal evidence, Dr Mitchell expresses the view that the conditions “already provide for the outcome needed to be achieved (protection of the springs) and therefore no changes to the conditions are necessary.”²⁴ The Trust disagrees. The NRC Officer’s Report similarly raises an issue with the adequacy of the current conditions by identifying that “the conditions do not currently provide a

¹⁹ Ngawha Geothermal Expansion Project Geoscience Review of Resource Consent Application prepared by Earth Consult for Northland Regional Council dated June 2015, p60.

²⁰ Kawharu statement, at [26].

²¹ NRC Officer’s Report, p70.

²² SOE Powell, at [41].

²³ Top Energy Opening Legal Submissions, at [8.27].

²⁴ Dr Mitchell rebuttal evidence, at [3.16].

mechanism for addressing the possible scenario where the expansion project is completed and in operation and more than minor adverse effects on the Ngawha springs subsequently occur".²⁵

- 34 Top Energy is seeking to rely on Conditions 35(b) and Condition 13(b)(iii) as sufficient to protect the Springs.²⁶
- 35 Condition 35(b) does require the Reservoir Management Plan (*RMP*) to contain operational requirements and procedures necessary to achieve the objective of not causing any "significant" changes in the characteristics of the Ngawha Springs. However, it is submitted that potential adverse effects on the Springs would be more appropriately addressed by way of a standalone condition requiring maintenance of the characteristics of the Springs (in the same way as conditions 24-31 address maintenance of reservoir pressure).
- 36 Condition 13(b)(iii) requires that, before the second expansion stage can proceed, the Reservoir and Spring Modelling Update report must show that the second 25MW power station can be undertaken while not causing any significant changes in the characteristics of the Ngawha Springs. Condition 13(b)(iii) does not however protect the Springs in relation to any potential effects that materialise after the second 25MW power station is operating.
- 37 In light of the limitations of proposed Conditions 35(b) and 13(b)(iii) described above, the Trust seeks new conditions 31A and 31B that:
- 37.1 Require Top Energy to maintain the characteristics of the Ngawha Springs;
 - 37.2 Provide for the Peer Review Panel to identify the appropriate baseline characteristics for the Springs (including temperature, water chemistry, gas chemistry and suspended solids); and
 - 37.3 Incorporate wording which was previously in Condition 35(b) in relation to natural variability and changes as a result of activities undertaken by other parties.
- 38 The Trust also seeks:
- 38.1 Amendments to Condition 35(b) so that the RMP is required to include requirements and procedures to maintain the characteristics of the Springs as set out in Condition 31A;
 - 38.2 New conditions 36(g) and (h) requiring the RMP to set out the measures which would be used to maintain the characteristics

²⁵ NRC Officer's Report, page 72.

²⁶ Dr Mitchell rebuttal evidence at [3.14] – [3.16] and Top Energy opening legal submissions at [8.27].

of the Springs. These conditions expand on condition 35, by identifying the injection of non-condensable gas as an option to address changes in water chemistry and requiring that no stormwater or wastewater is injected into the reservoir. The latter requirement is important to ensure that only fresh water, not contaminated water, is injected into Ngawha Waiariki; and

- 38.3 New condition 128(g) is also proposed to expressly provide that the Peer Review Panel's functions include recommending the implementation of mitigation measures to address any adverse effects.

Cultural issues

Kaitiaki Advisor

- 39 Top Energy has accepted that the conditions should provide for the appointment of a Kaitiaki Advisor and should set out the responsibilities of that role. The Trust supports these conditions in principle. Ms Kawharu will explain how this role will enable the Trust to fulfil its role as kaitiaki, by ensuring the Trust is present and participating in the oversight of Top Energy's operations.
- 40 The Trust has proposed amendments to the relevant conditions²⁷ to ensure the Kaitiaki Advisor is appropriately informed to carry out his/her functions and the role is effective (and not "toothless"). Subject to those amendments, the Trust considers that the Kaitiaki Advisor role contributes to the requirement for the Commissioners to have particular regard to kaitiakitanga (s7(a) RMA).

Peer Review Panel

- 41 Top Energy's proposed conditions provide for a Peer Review Panel and for the Kaitiaki Advisor and one further appointee to be "observer representatives" for the Trust. The Trust considers that the Kaitiaki Advisor should be a full participating member of the Peer Review Panel, in relation to cultural implications.
- 42 It is acknowledged that, unlike the technical members of the Peer Review Panel, the Kaitiaki Advisor would not be truly independent. However, as Ms Kawharu will explain, only the Trust has the appropriate expertise to fill this role, and would do so diligently. It is important that the Kaitiaki Advisor is a full participating member of the Peer Review Panel, so that his/her contributions on these issues are meaningful and to address the negative effects on the Trust's mana. The Trust has proposed amendments to condition 127 to address this issue.

²⁷ Conditions 40A, 127, 143A, 146A, 146B, 146G, 146H, 146I, 146J.

Cultural Indicators Monitoring Plan

- 43 Top Energy has accepted that the monitoring programme should include cultural indicators. Proposed condition 143A requires a Cultural Indicators Monitoring Plan (*CIMP*) to be prepared. The Trust generally supports condition 143A. Ms Kawharu will explain the importance of science-based monitoring results being considered within the cultural context to enable the Trust to fulfil its role as kaitiaki.
- 44 The Trust has proposed minor amendments to the relevant conditions to ensure the CIMP is effective and the conditions are workable. Subject to those amendments, the Trust considers that the CIMP contributes to the requirement for the Commissioners to provide for the relationship of the Trust with its taonga (s6(e) RMA) and have particular regard to kaitiakitanga (s7(a) RMA).

Ngawha Springs Management

- 45 The Trust has proposed conditions which provide for the preparation of a Ngawha Springs Management Plan and funding for cultural monitoring and the management, maintenance and upgrade of the facilities at the Springs.²⁸ As Ms Kawharu will explain, these conditions would produce material cultural benefits, to help to balance out the adverse effects of exploiting this resource.
- 46 As I will explain in more detail in the next section of these submissions, the Ngawha Springs Management conditions are critical to address the adverse cultural effects of the Proposal and to ensure that the requirements of section 104 and the sustainable management purpose of the RMA are met.
- 47 Conditions of this nature, which provide for community benefits, can properly be imposed where they are for a resource management purpose.²⁹ The conditions proposed by the Trust address adverse effects which only arise as a result of the Proposal and address those effects directly at the point of impact (i.e. the Springs).

Statutory Framework

- 48 If the Proposal is to be granted consent, the Trust is seeking a package of conditions to adequately protect Ngawha Waiariki and the Springs from potential adverse effects and to address cultural effects by providing for a Katikati Advisor, Cultural Indicators Monitoring and Ngawha Springs Management. In the Trust's submission, these conditions are necessary to ensure the Proposal satisfies the sustainable management purpose of the RMA.

²⁸ Conditions 146D-F.

²⁹ *Wood v West Coast Regional Council* (NZEnvC C127/99, 19 July 1999), at 10. *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402, at 81-82.

Section 104

- 49 Section 104 of the RMA requires you to weigh all relevant matters, including the benefits of the Proposal, and possible adverse effects of the Proposal, "subject to" the matters set out in Part 2 of the RMA.

Part 2

- 50 As discussed in the evidence of Ms Kawharu, the Proposal would cause adverse cultural effects which cannot be adequately avoided, remedied or mitigated. These adverse cultural effects would:
- 50.1 Cause further damage to the Trust's relationship with its taonga, contrary to section 6(e);
 - 50.2 Interfere with the Trust's role as kaitiaki of Ngawha Waiariki and the Springs, contrary to section 7(a); and
 - 50.3 Inhibit the active protection of Māori interests and recognition of rangatiratanga, principles of the Treaty of Waitangi recognised in section 8.
- 51 The adverse cultural effects would not occur if it were not for the Proposal.
- 52 The Trust's proposed conditions, including the Ngawha Springs Management conditions, would ensure the Proposal provides cultural benefits. These benefits would help to balance the adverse cultural effects and address key Part 2 issues.

Section 6(e) – relationship of Māori with their ancestral land, water, sites, waahi tapu, and other taonga

- 53 Section 6(e) requires you to "recognise and provide for" the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, and other taonga. This provision requires you to consider not just physical effects, but also the historical, traditional and spiritual aspects of these relationships.³⁰ This provision will be of considerable importance when you are assessing the Proposal.
- 54 Ngawha Waiariki and the Springs are taonga. The PC1 block and the Four Acres land are ancestral land.
- 55 The requirement to "recognise and provide for" requires "actual provision" to be made for this matter of national importance. It is not sufficient for you to consider this issue and then fail to provide for the Trust's relationship with these taonga.³¹

³⁰ *Ngati Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407.

³¹ *Bleakly v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC), at [72].

56 It is submitted that the package of provisions proposed by the Trust, particularly the Ngawha Springs Management conditions, are necessary to recognise and provide for s6(e) of the RMA.

Section 7(a) - Kaitiakitanga

57 Section 7(a) requires you to have “particular regard to” kaitiakitanga. This requirement is central to the Trust’s submission, as it is the kaitiaki of Ngawha Waiariki and the Springs.

58 It is submitted that the suite of changes to consent conditions proposed by the Trust are necessary to have particular regard to kaitiakitanga.

Section 8 – Treaty of Waitangi

59 Section 8 sets out your duty to take into account the principles of Te Tiriti o Waitangi. The principles of the Treaty of Waitangi include the active protection of Māori interests, mutual obligations to act reasonably and in good faith (including consultation), mutual and common benefit, partnership, and recognition of rangatiratanga.³²

60 The package of conditions proposed by the Trust are consistent with these principles, in particular they would actively protect the Trust’s interests in relation to the Springs, provide for mutual and common benefit, and recognise rangatiratanga.

Section 5

61 The sustainable management purpose of the RMA includes enabling people and communities to provide for their cultural wellbeing and avoiding, remedying and mitigating adverse effects. This purpose is informed by the directions in sections 6, 7 and 8.

62 While Top Energy points to renewable energy, economic and social benefits associated with the Proposal,³³ these benefits do not trump the section 6, 7 and 8 cultural issues arising from the Proposal. It is submitted that the Trust’s proposed changes to the consent conditions (including in relation to the management and upgrade of the facilities at the Springs) are necessary to address the adverse cultural effects of the Proposal and provide cultural benefits. Applying the required overall broad judgment, it is only with the proposed changes to the consent conditions the Proposal would meet the sustainable management purpose of the RMA.

Statutory documents

63 The statutory documents, discussed in Dr Mitchell’s evidence, provide support for the changes to the conditions proposed by the Trust.

³² *Carter Holt Harvey Limited v Te Runanga o Tuwharetoa Ki Kawerau* (High Court, AP42/02, 12 December 2002), at [27].

³³ Top Energy Opening Legal Submissions, at Section 6.

- 64 The Proposed Regional Policy Statement recognises the importance of cultural values in resource management decision-making and places particular emphasis on recognising and providing for the role of kaitiaki:

Objective 3.12: Tangata whenua kaitiaki role is recognised and provided for in decision-making over natural and physical resources.

Policy 8.1.2: The regional and district councils shall when ... processing resource consents...

(a) Recognise and provide for the relationship of tangata whenua and their culture and traditions with their ancestral land, water, site, waahi tapu, and other taonga;

(b) Have particular regard to kaitiakitanga; and

(c) Take into account the principles of the Treaty of Waitangi including partnership.

Policy 8.3.1: The regional and district councils shall support tangata whenua to have a kaitiaki role in the management of their land, resources, and other taonga.

- 65 Similarly, the Regional Water and Soil Plan recognises the importance of cultural and spiritual values relating to groundwater and associated surface water resources and the importance of the role of kaitiaki in resource management:

Policy 6.4.3: To have particular regard for kaitiakitanga and consider options for the involvement of tangata whenua in monitoring the use, development and protection of resources within the Northland region.

Policy 10.5.8: When allocating groundwater, to recognise, and as far as practical, provide for the cultural and spiritual values held by the tangata whenua for the groundwater resources and associated surface water resources.

- 66 The Proposed Regional Policy Statement also recognises, in the context of managing significant regional infrastructure, the importance of protecting the relationship of iwi with taonga, providing positive effects to the community of interest and/or resource affected, and managing effects through adaptive management:

Policy 5.3.3:

(1) Allow adverse effects arising from the establishment and operation of new regionally significant infrastructure and the re-consenting of existing operations where: ...

(c) **Damage to and/or loss of the relationship of iwi with** ancestral sites, sites of significance, waahi tapu, customary activities and/or **taonga is avoided or otherwise agreed to** by the affected iwi or hapu; and

(d) In addition to the matters outlined in 1) (a) – (c) above, other adverse effects are avoided, remedied or mitigated to the extent that they are no more than minor.

...

(3) When managing the adverse effects of regionally significant infrastructure decision makers will give weight to:

...

(d) The extent to which the adverse effects of the activity can be practicably reduced. Such an assessment shall also take into account appropriate measures, when offered, to **provide positive effects**, either within the subject site or elsewhere provided that the positive effect accrue to the community of interest and/or resource affected; and

(e) Whether a monitoring programme for an identified significant adverse effects with unknown or uncertain outcomes could be included as a condition of consent and an **adaptive management regime** (including modification to the consented activity) is used to respond to such effects.

(emphasis added)

Conclusion on statutory framework

- 67 Counsel submits that the package of proposed conditions sought by the Trust is necessary in order for the Proposal to meet the requirements of Part 2 of the Act and align with the statutory planning documents.
- 68 The proposed conditions would address the cultural effects of the Proposal which would not be present if it were not for the Proposal and which infringe s5, s6(e), s7(a) and s8 of the RMA. The proposed conditions address those effects directly at the point of impact (the Springs). It is submitted that the Trust's proposed conditions can be lawfully imposed as they:
- 68.1 Are for a resource management purpose;
 - 68.2 Fairly and reasonably relate to the development proposed; and
 - 68.3 Are not unreasonable.

THE NOTICE OF REQUIREMENT

How is the Trust affected?

- 69 The Trust understands that Top Energy is seeking to designate part of the Four Acres land for access purposes (ie for access to construct and service the pipelines).
- 70 It is however unclear on the face of the notice of requirement (*NOR*) whether or not the Four Acres land is included in the proposed designation.
- 71 The *NOR* states that the land to which the designation applies is shown in the Top Energy Pipeline Easement Designation Plan (dated 9 December, reference A14021_32). That plan shows yellow dashed lines across part of the Four Acres land, which is labelled "Access through HMQ Land" (as distinct from the solid yellow lines showing the "Pipeline Easement and Designation"). The land schedule in the AEE to the *NOR*³⁴ includes the Four Acres land with the comment "Land to be subject of Notice of Requirement to designate pipeline. Access easement".³⁵ The AEE does not discuss the effects of this "access easement" over the Four Acres land.
- 72 The lack of clarity regarding the effects of the *NOR* on the Four Acres land is reflected in comments in the Officer's Report on the *NOR* to the effect that the Four Acres land "is not part of" the *NOR*.³⁶ The Officer's Report does however also refer to the Four Acres land as having "been highlighted within submissions as culturally significant and should be subject to further consultation on whether this area can be used or whether it should be avoided. The use of an alternative access solution within this area should be achievable and will maintain and not diminish the relationship of Maori to this importance [sic] and culturally significance [sic] parcel of land."³⁷
- 73 Top Energy did not consult with the Trust regarding any proposed designation of the Four Acres land, despite engaging with the Trust in relation to the resource consent applications.
- 74 Despite the Trust's submission objecting to any designation over the Four Acres land, and the issues raised in the Officer's *NOR* Report, Top Energy's opening legal submissions do not clarify the position in relation to the Four Acres land. The Four Acres land is simply not mentioned.

³⁴ Appendix A, "Private and Public Land Schedule".

³⁵ At row 24.

³⁶ FNDC *NOR* Officer's Report, at [3.32] (under Section 171(1)(d) heading) and [4.8].

³⁷ FNDC *NOR* Officers Report, at [3.12].

The Trust's position on the NOR

- 75 The Trust seeks the modification of the NOR to exclude the Four Acres land. Ms Kawharu will explain the cultural significance of the Four Acres land.
- 76 It is submitted that designating the Four Acres land does not meet the requirements of s171 of the RMA on the grounds that:
- 76.1 Adequate consideration has not been given to alternatives. This requirement is informed by Part 2³⁸ and the requirements to provide for the relationship of Maori with their ancestral lands and taonga, to have particular regard to kaitiakitanga, and to take into account the principles of the Treaty of Waitangi. Dr Mitchell identifies two alternative access options; one would require a more substantial stream crossing and the other would require more substantial upgrading of the pipeline access road.³⁹ In determining that the use of the Four Acres land is "appropriate", there is no indication that Dr Mitchell has given appropriate weight to the cultural significance of the Four Acres land. It is submitted that Top Energy has not given adequate consideration to alternatives.
- 76.2 The proposed work and designation in relation to the Four Acres is not "reasonably necessary" to achieve the Proposal objectives. Access to the pipeline via the Four Acres land could be achieved by other means and designating the culturally significant Four Acres land is not clearly justified.
- 76.3 The proposed designation does not recognise and provide for the Trust's relationship with its ancestral land, contrary to s6(e), and does not take into account the principles of the Treaty of Waitangi including active protection, acting reasonably and in good faith (including consultation), and recognition of rangatiratanga, contrary to s8.
- 77 The Trust accordingly seeks a recommendation from the Commissioners that the proposed designation be modified to exclude the Four Acres land.
- 78 If the Commissioners are not minded to recommend modification of the NOR to exclude the Four Acres land, it is submitted that at a minimum the NOR must:
- 78.1 Clearly limit the purpose of any designation over the Four Acres land to access purposes only;

³⁸ It is "subject to Part 2".

³⁹ EIC Mitchell, at [7.14] – [7.15]. Dr Mitchell suggests there is a "public right of way" over the Four Acres land, this is incorrect.

78.2 Include conditions of access that address the Trust's concerns regarding:

- (a) Damage to and degradation of the road; and
- (b) Potential interference with people visiting the pools or the Trust undertaking maintenance or construction.

79 Such conditions are necessary in order for the NOR to meet the requirements of Part 2 of the Act, including ensuring that adverse effects are appropriately mitigated. The Trust's proposed conditions are set out in **Appendix B**.

CONCLUSION

80 The Trust's key concern in relation to the Proposal is to ensure that adverse cultural effects of the Proposal are avoided, remedied, and mitigated, including by appropriately recognising Ngawha Waiariki and the Springs as taonga and the Trust's role as kaitiaki.

81 The Trust seeks that the consents and notices of requirement for the Proposal are declined, unless the conditions set out in Appendices A and B, or conditions to like effect, are imposed on any consents or designation. It is submitted that the package of proposed conditions sought by the Trust are necessary in order for the Proposal to meet the requirements of Part 2 of the Act, including ensuring that adverse effects are appropriately avoided, remedied or mitigated.

82 In a moment I will hand over to the representatives of the Trust, Ms Amokura Kawharu and Mr Renata Tana, who will give more background about the Trust, explain its relationship with Ngawha Waiariki and the Springs, and discuss the cultural effects of the Project.

83 Following the Trustees' statement, the Trust's expert, Mr Tom Powell will present evidence (via Skype). Mr Powell is a consultant geoscientist and a Research Associate with the University of Canterbury. Mr Powell's evidence outlines the potential physical and chemical effects of the Project on the Ngawha geothermal resource and proposes changes to consent conditions to avoid, remedy and mitigate those effects.

Paula Brosnahan / Teresa Weeks
Counsel for the Parahirahi C1 Trust
13 August 2015

**APPENDIX A – CHANGES TO NRC RESOURCE CONSENT
CONDITIONS SOUGHT BY THE TRUST**

**APPENDIX B – CHANGES TO DESIGNATION CONDITIONS
SOUGHT BY THE TRUST**