ices Ltd,[108] the High Court considered the impact of s 6(e) in the context of an application for an enforcement order under s 314 of the Act. In overturning the Environment Court decision the Court found that in terms of s 314, an activity could be found to be offensive or objectionable if a reasonable Maori person found this to be so. Justice Salmon based this interpretation on the importance of waahi tapu[109] as found in s 6(e):[110]

> It must bear heavily in this case that protection of waahi tapu is a matter of national importance.
>
> ...
>
> Through the legislature, the community has declared that the relationship of Maori and their waahi tapu is a matter of national importance, which all persons exercising powers and functions under the Act must recognise and provide for.
>
> ...

On appeal in *Watercare Services Ltd v Minhinnick* the Court of Appeal noted the approach of the High Court to waahi tapu and s 6(e), and commented that "[o]ne of the issues in this case is whether Salmon J elevated this aspect beyond its undoubtedly important compass to one of almost decisive influence".[111] The Court of Appeal reversed the High Court decision and Tipping J held that the objective test under s 314 should be based on the community at large, rather than the reasonable Maori person. In relation to s 6(e) the Court found that the presence of waahi tapu on the site in question did not justify the narrower approach taken by the High Court, and that while any Maori dimension that may arise will be important, it will not be decisive. In the end, other factors such as social or economic well-being may be more cogent, when a court as a representative of the community as a whole decides whether the matter is offensive or objectionable under s 314.[112]

The High Court in *Minhinnick* made a strong statement of the importance of s 6(e) and the concept of waahi tapu in the application of the Act, but this has been read down to some extent by the Court of Appeal. It will be interesting to observe whether the courts will alter the weight given to s 6(e) as a result of this Court of Appeal decision. In fact, there are general principles expounded by both Courts that are of interest. The High Court emphasised that s 6 identifies the protection of waahi tapu as a matter of national importance and that real

108 [1997] NZRMA 533 (HC).

109 This expression is not defined in the RMA, but it is defined in s 2 of the Historic Places Act 1993 as "a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense".

110 [1997] NZRMA 533, 560 and 564 (HC).

111 [1998] 1 NZLR 294, 301; [1998] NZRMA 113, 120 (CA).

112 Ibid 124–125.

meaning should be given to this. The Court of Appeal agreed but added a note of caution that s 6(e) is not of decisive importance and must be interpreted subject to s 5. In some ways, the real issue in this aspect of the case was the effect of s 6(e) on the threshold test under s 314. These decisions are, however, useful in defining the role that s 6(e) and the concept of waahi tapu will play in influencing resource management decisions.

1. Ownership of Section 6 Resources

A number of decisions made under s 3(1)(g) of the Town and Country Planning Act 1977 had held that for land to constitute Maori ancestral land, it had to be in the ownership of Maori. This principle was, however, overruled in the High Court in *Royal Forest and Bird Protection Society (Inc) v WA Hapgood Ltd.*[113] In the context of the RMA the courts have placed no weight on whether the resource in question continues to be owned by Maori. In *Gill v Rotorua District Council*, Judge Kenderdine noted that the relationship with the ancestral land will endure irrespective of anyone who lives there.[114] Similarly, in *CDL Land New Zealand Ltd v Whangarei District Council* the fact that Maori no longer owned ancestral land did not deter the Court from refusing a proposed plan change on the basis of s 6(e).[115] The decisions on other resources also illustrate that ownership by Maori is not a prerequisite for protection under the RMA.

2. Refusal of Applications on the Basis of Section 6

On a number of occasions the matters of national importance under s 6(e) have been the justification for refusing resource consent for a proposed activity. The resources in question vary from case to case, although there has been an emphasis on the waahi tapu ground under s 6(e). Waahi tapu can cover a variety of resources, which may also fall under other s 6(e) grounds such as ancestral lands, water, sites and taonga. In *CDL Land* the Environment Court considered a proposal for a plan change to allow for a low-density housing development.[116] The tangata whenua adduced evidence that there was a cultural and traditional relationship with the land as ancestral land, water, sites, waahi tapu and other taonga

113 (1987) 12 NZTPA 76 approved by the Court of Appeal in *EDS v Mangonui County Council* [1989] 3 NZLR 257. See the discussion of this issue in Bielby, S., "Section 3(1)(g) of the Town and Country Planning Act 1977" (1988) 6 *Auckland University Law Review* 52, 60–62, and Tamihere, J., "Te Take Maori: A Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law" (1985) 5 *Auckland University Law Review* 137, 139–143.

114 (1993) 2 NZRMA 604, 618.

115 [1997] NZRMA 322.

116 Ibid. While this case does not consider the resource consent process, the application of s 6(e) is of interest.

existed there. In particular, there were waahi tapu in the area, including burial sites and a sacred creek. The plan change was disallowed on the basis that it would fail to give effect to s 6(e). The Court stated that "[t]he value of the relationship of the Ngati Kahu with the subject land, and its traditional and cultural significance for them, is clear and strong. The direction of section 6(e) is plainly applicable."[117]

In *TV3 Network Services Ltd v Waikato District Council* the High Court considered tangata whenua opposition to the placement of a television transmitter on a hill identified as waahi tapu. In physical terms, it was found that the ground disturbance would be less significant than would occur from farming the land, but the hapu argued that the proposal would still be considered desecration due to the ancestral relationship with the area. Justice Hammond commented that the effects of the activity, while low in physical terms, must extend to protuberance in a cultural context. The Court also accepted that where a matter of national importance is raised, it is logical for an applicant to consider whether there are any viable alternate sites.[118] Further, the failure to formally designate waahi tapu in planning instruments does not preclude those matters from being raised under s 6(e) in a consent hearing. The High Court affirmed the Environment Court decision that the translator would offend the cultural uniqueness and waahi tapu in the area, and the application was declined on that basis.[119] In the similar case of *Mason-Riseborough v Matamata-Piako District Council* the Environment Court addressed the proposed placing of a cellular radio base station on a mountain that was waahi tapu to Maori. The strength of this relationship was explained in evidence by the tangata whenua. Judge Whiting noted the primacy of Part II and held that due to the cultural sensitivity of the mountain, technology must give way to culture. His Honour continued:[120]

> It is true that the sacred mountain has been compromised by the water reservoir and by the power lines and supports that serve it. This was done at a time when the relationship of Maori and their land and the cultural issues arising from that relationship were not taken account of. We cannot put that right. We can, ... say that in these circumstances there is to be no more desecration.

In *Te Runanga o Taumarere v Northland Regional Council* the Tribunal considered the customary fishing grounds of the tangata whenua. In terms of s 6(e), the Tribunal stated that any discharge of sewerage effluent would not recognise the

117 Ibid 329. In this case the Court found that while the principle of consultation was satisfied, the proposal did not satisfy s 6(e).

118 [1997] NZRMA 539, 551 (HC). The need to consider alternative sites, the use of which would prevent an infringement of Maori interests, is a protective mechanism in itself. This approach was also evident in *Te Runanga o Taumarere* [1996] NZRMA 77.

119 Ibid 549.

120 Environment Court, A 143/97, 11 December 1997, 26.

relationship of Maori and their culture and traditions with the waters as a habitat for shellfish customarily taken for Marae hospitality.[121] In *Director-General of Conservation v Marlborough District Council* the tangata whenua opposed the granting of consent for a marine farm in the Marlborough Sounds. Judge Kenderdine accepted an argument by iwi that under s 6(e) the relationship between iwi and an area should be considered in a wider context than the site in question. There should be recognition and provision for the relationship with ancestral lands and waters as a whole, rather than restricting it to particular sites. The proposal was found not to recognise or provide for this relationship.[122]

3. Other Approaches to Section 6 Matters

Obviously not every interest raised under s 6(e) will preclude the granting of a consent. In some cases the claim of the relationship may not be supported by evidence, and in others the court may allow the proposal to proceed and find other means to protect the Maori interests. The courts have been clear that where s 6(e) interests are raised, this will not automatically lead to absolute protection of those interests. In the High Court in *Minhinnick*, Justice Salmon noted that not every activity involving a waahi tapu area will be offensive or objectionable.[123] In *TV3 Network Services Ltd v Waikato District Council* Justice Hammond referred to the *Minhinnick* approach and stated that "[f]or myself, I too would not support *per se* objections by Maori. A rule of reason approach must surely prevail: the question is whether, objectively, the particular kind of activity is intrinsically offensive to an established waahi tapu, or other cultural considerations."[124] Similarly, the proposition that an exclusionary veto over a proposal exists in favour of Maori has been consistently rejected.[125]

In a number of cases claims by Maori that s 6(e) matters are at stake have been unsuccessful because of a lack of evidence. On the question of evidence, Judge Treadwell in *Greensill v Waikato Regional Council* noted that various members of an iwi or hapu are entrusted with details of waahi tapu, but that information may not be generally shared with the iwi or hapu. The tangata whenua between themselves accept the concept of waahi tapu without question and further accept without question the word of a person who has knowledge of a par-

121 [1996] NZRMA 77, 92–93. Interestingly, the Tribunal also considered s 6(a) (which relates to the protection of the coastal environment from inappropriate subdivision, use and development) as a mechanism for protection of Maori interests. Judge Sheppard noted that appropriateness can be judged in terms of cultural responses to a proposal.

122 Environment Court, W 89/97, 22 September 1997, 18.

123 [1997] NZRMA 533, 564 (HC).

124 [1997] NZRMA 539, 548 (HC).

125 See supra note 106.

ticular site or area. Thus if a kaumatua simply says that a place is waahi tapu then that is the end of the matter.[126] In that case, the tangata whenua declined to provide specific evidence of waahi tapu, rather it was stated that the area in general was waahi tapu. Judge Treadwell noted that while this was the right of the tangata whenua, they are not the decision-making authority "... and cannot simply assert a proposition and leave the Tribunal bereft of evidence to enable an acceptable provision to be made for protection of waahi tapu".[127]

In *Te Rohe Potae O Matangirau Trust v Northland Regional Council* the Environment Court emphasised that findings relating to the existence of waahi tapu are made in the same manner as for any other question of fact, on evidence of probative value.[128] While kaumatua evidence is frequently helpful, where claims are challenged the question is not to be resolved simply by accepting an assertion of belief or tradition by a kaumatua or anyone else.[129] In *TV3 Network Services* the High Court referred to a reluctance by hapu to reveal particulars of areas of cultural sensitivity. The Court noted that the legitimacy of that concern is recognised by s 42 of the Act.[130] That section allows a consent authority to make a specified order where it is satisfied that the order is necessary to avoid serious offence to tikanga Maori or to avoid the disclosure of the location of waahi tapu.

In several cases the courts have been unable to find sufficient evidence of probative value on s 6(e) matters. In *Tautari v Northland Regional Council*[131] the Tribunal found that evidence established a relationship between Maori and the stream subject to the application; however, it did not establish that the proposal would adversely affect that relationship. It was further held that there was no evidence, beyond vague and undemonstrated assertions, that there was waahi tapu that would be affected by the proposal.[132] In *Gill* the Tribunal stated that it was very doubtful that there existed any waahi tapu on the site in question. It was, however, held that the land in question was ancestral land of great significance to Maori and was therefore relevant under s 6(e).[133] In *Te Rohe Potae O Matangirau* there was conflicting evidence from Maori as to the existence of waahi tapu and the Court discerned that in fact there was strong evidence against

126 Planning Tribunal, W 17/95, 6 March 1995, 12.

127 Ibid 13.

128 Environment Court, A 107/96, 18 December 1996, 11–12.

129 The Court noted that the *Greensill* (supra note 126) comment that a kaumatua's statement is the end of the matter, refers to iwi or hapu practice rather than the Planning Tribunal's method: ibid 12.

130 [1997] NZRMA 539, 552 (HC).

131 Planning Tribunal, A 55/96, 24 June 1996.

132 Ibid, 19–20.

133 (1993) 2 NZRMA 604, 617.

the presence of waahi tapu.[134] In *Te Atiawa Tribal Council* the Court found no evidence that the proposal to deposit sand in the coastal marine area would damage traditional kaimoana beds.[135]

In the event that Maori have been able to provide sufficient evidence of waahi tapu, the courts will not necessarily prevent the proposed activity from commencing. The mechanism for protection in these cases is not a refusal of consent, rather it is the imposition of controls such as conditions of consent. In *Banks* the Tribunal granted consent on the basis that the conditions imposed would satisfy the s 6(e) matters.[136] In *Isobel Berkett* the Court held that the consent could be granted subject to consent notices being registered on the certificates of title of Maori ancestral land. This was held to satisfy the requirements under s 6(e).[137] In *Te Atiawa Tribal Council* the consent was granted subject to a condition whereby the applicant provided a bond which was to be used should the kaimoana beds be adversely affected. There was also an amended condition imposed to provide for a monitoring programme that included a protocol for dealing with any artefacts that may be discovered.[138] In *Boswell v Gisborne District Council*, a condition of consent provided for the protection of urupa and the ceasing of nearby trucking operations at the time of a burial ceremony.[139] In contrast, in *Aqua King (Anakoha Bay)* Judge Kenderdine held that a condition of consent that iwi may continue gathering kaimoana in the area of a proposed marine farm was not sufficient to protect Maori interests. Her Honour held that the wider concern of alienation from the coastal resource in the area (due to the already high presence of marine farms) would not be satisfied by the condition.[140]

VI. SECTION 7 — OTHER MATTERS

The last major protective mechanism that will be considered in this analysis is s 7 of the Act. Obviously s 7(a) is the most relevant, but other paragraphs of s 7 have also been considered in this context. Sections 7(c) (maintenance and enhancement of amenity values) and 7(e) (heritage values) are of particular relevance in terms of Maori interests. In *Minhinnick* the High Court commented on the overlap between ss 6(e) and 7(e), and noted that the Act accords a greater

134 Environment Court, A 107/96, 18 December 1996, 14.
135 Environment Court, A 15/98, 13 February 1998, 13.
136 Planning Tribunal, A 31/95, 20 April 1995, 25.
137 Environment Court, A 6/97, 23 January 1997, 17.
138 Environment Court, A 15/98, 13 February 1998, 17–18.
139 Environment Court, A 23/98, 12 March 1998, 21.
140 Environment Court, W 71/97, 30 June 1997, 15.

degree of protection to heritage values that are also waahi tapu.[141] In *Gill* the Tribunal stated that s 7(e) is not restricted to protection under the Historic Places Trust legislation, nor is it reliant upon any relic or archaeological remains which would normally be the subject of heritage orders. Her Honour held that to Maori a significant site has a value that transcends such issues.[142] The central provision in terms of Maori interests is s 7(a):

> 7. **Other Matters —** In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to —
>
> (a) Kaitiakitanga:

This provision, while not a matter of national importance as is the case under s 6, is still found within the important Part II of the Act. In addition, the obligation to "have particular regard to" those matters is a high one. The Resource Management Amendment Act 1997 revised the definition of kaitiakitanga in s 2 of the principal Act. The definition as originally enacted stated that "'[k]aitiakitanga' means the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself". The incorporation of kaitiakitanga in this manner has attracted some criticism. Tomas commented:[143]

> There are inherent dangers in defining Maori concepts by reference to seemingly analogous English legal terms. The most obvious is that they arise from different, and often conflicting, ideologies. The translation process enables subtle redefinition of the Maori concept. The resultant hybrid is both ill-defined and ill-suited to its new statutory framework.

In *Rural Management*, Judge Treadwell held that the RMA does not restrict the concept of kaitiakitanga to Maori:[144]

> Where [kaitiakitanga] is mentioned in the Act the concept is as binding on a consent authority as it is upon an applicant. It tells all the people of this country including Maori that the taonga must be guarded and treasured.

His Honour found that in this case the Council had lived up to the concept of kaitiakitanga. The Judge adopted a similar approach in *Greensill*:[145]

141 [1997] NZRMA 553, 560 (HC).
142 (1993) 2 NZRMA 604, 618.
143 Tomas, N., "Implementing Kaitiakitanga under the RMA" (1994) 1 *New Zealand Environmental Law Reporter* 39.
144 [1994] NZRMA 412, 422.
145 Planning Tribunal, W 17/95, 6 March 1995, 6.

> Unfortunately [kaitiakitanga] is now defined in the Act. The definition is an all embracing definition in that it does not use the word "includes". Had that word been used then the general concept of Kaitiakitanga would have been relevant. However, this word which embraces a Maori conceptual approach now has a different meaning ascribed to it by statute, ... the concept of guardianship is now applicable to any body exercising any form of jurisdiction under this Act.

These statements clearly indicated that the Maori concept of kaitiakitanga was not relevant, given the clear statutory definition provided in the Act. The Resource Management Amendment Act 1997 inserted two important changes in this context. First, s 2(4) inserted a new definition of kaitiakitanga:

> "Kaitiakitanga" means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

Secondly, s 3 of the Amendment inserted into s 7:

> (aa) [T]he ethic of stewardship.

The new definition overrules the approach taken in *Rural Management* and *Greensill*, and opens the way for arguments under s 7(a) based on a purely Maori perception of kaitiakitanga. Section 7(aa) provides for a situation where stewardship is exercised by persons apart from the tangata whenua such as a consent authority.

The *Rural Management* approach has not necessarily resulted in a refusal to have particular regard to the Maori concept of kaitiakitanga. In *Aqua King (Anakoha Bay)*, *Director-General of Conservation* and *Marlborough Seafoods*, Judge Kenderdine applied the concept of kaitiakitanga in the context of applications for coastal permits for the establishment of marine farms. In all three cases the Court considered applications for permits in areas where there already existed a high presence of marine farming. In *Aqua King (Anakoha Bay)*, Judge Kenderdine found that the iwi were actively exercising kaitiakitanga and that the granting of further permits in this context would compromise the last remaining areas in that bay that are free of marine farming. This would impact on the mana of the iwi due to the restriction of its ability to exercise kaitiakitanga. In terms of s 5 of the Act this was found to be a major adverse effect.[146] In *Director-General of Conservation* the Court noted evidence that "... kaitiakitanga is linked to rangitiratanga because it is a natural consequence that the tangata whenua want to protect what the iwi have a right to control and use".[147] Further, it was argued that the granting of consents without proper consultation with iwi and despite their objections, would negate their ability to exercise kaitiakitanga over the area.

146 Environment Court, W 71/97, 30 June 1997, 14–15.
147 Environment Court, W 89/97, 22 September 1997, 20.

The permits were refused on the basis of a failure to comply with the broader grounds under s 5.[148] In *Marlborough Seafoods*, Judge Kenderdine again found that the high presence of marine farms already in the area made it even more important for iwi to retain kaitiakitanga over the remaining uncompromised areas. The tangata whenua had argued that there is no point stating an iwi has the kaitiakitanga of an area if it has no involvement in what occurs. The Court again found that this interference with kaitiakitanga would result in the proposal not meeting the purpose of the Act under s 5.[149]

These cases demonstrate an important link between kaitiakitanga and consultation. The exercise of kaitiakitanga would seem to require consultation on the use of resources as a minimum. Kaitiakitanga, however, cannot be restricted to consultation; rather it encompasses a more ongoing form of responsibility.[150] The cases also demonstrate that the courts are willing to give real weight to the concept of kaitiakitanga as expressed in s 7(a).

As was the case with other protective mechanisms there have been occasions where s 7(a) has been argued by Maori but there has been insufficient evidence to establish that a proposal would infringe the principle of kaitiakitanga. In *Te Runanga o Taumarere*, Judge Sheppard held that the evidence did not fully establish the application of kaitiakitanga to the resource in question, nor did it demonstrate how the proposal would affect that concept. It was found, however, that the concern expressed amounted to a different way of expressing the s 6(e) matters and kaitiakitanga did not need to be separately addressed.[151] In *Te Rohe Potae O Matangirau* there was conflicting evidence as to who exercised the role of kaitiakitanga. The Court found, however, that as the evidence did not establish that the proposal would interfere with this role, there was no need to make a finding on kaitiakitanga status.[152]

Kaitiakitanga has been recognised and provided for by a number of means under the Act. In terms of a resource consent application, one method of protection is to decline the application. In *Haddon* the Tribunal found that the kaitiakitanga of the tangata whenua could be recognised by involvement in the monitoring of the activity and in the longer term by acknowledgment in the relevant coastal plans.[153] In *Sea-Tow* the Tribunal found that the role of kaitiaki

148 Ibid 20–21.

149 Environment Court, W 12/98, 20 February 1998, 18, 24–25.

150 Cf *Marlborough District Council v New Zealand Rail Ltd* [1995] NZRMA 357, 384 where the Tribunal seemed to limit the ambit of kaitiakitanga to consultation.

151 [1996] NZRMA 77, 93. See also *Ngatiwai Trust Board v Whangarei District Council* [1994] NZRMA 267, 281–282.

152 Environment Court, A 107/96, 18 December 1996, 15. See also *Tautari v Northland Regional Council* Planning Tribunal, A 55/96, 24 June 1996, 19–20.

153 [1994] NZRMA 49, 65.

was recognised by inclusion in a working party to study the resource in question and could be further realised by involvement in monitoring.[154]

VII. OTHER MECHANISMS FOR PROTECTION

This analysis has focussed on the major mechanisms for the protection of Maori interests under Part II of the RMA. There are of course a number of other specific mechanisms that have not been addressed, and these are found both within the resource consent process and the wider Act. One of these arises under s 274 and involves the appearance of the tangata whenua at proceedings to which they are not a party.[155] There are many others that are most relevant to Maori issues under the Act.[156] Of course there is also the matter of policy statements and plans, and the protection of Maori interests found within those instruments. Local authorities have been in the process of reviewing these policy statements and plans, and the direction of Part II in terms of Maori issues should be manifest in the instruments that emerge. The protective mechanisms found therein should both express and reinforce the protection already found within Part II of the Act.[157]

VIII. CONCLUSION

The RMA does provide a range of mechanisms for the protection of Maori interests. In particular, these interests are enshrined in the overriding purpose and principles sections of the Act. The courts in the resource management field have made genuine and successful attempts to honour the directives found in, for

154 [1994] NZRMA 204, 217. On the issue of monitoring see also *Tautari v Northland Regional Council* Planning Tribunal, A 55/96, 24 June 1996, 20.

155 This is on the basis that the tangata whenua has an interest in the proceedings greater than the public generally; see s 274(1). For recent examples, see *Mason-Riseborough v Matamata-Piako District Council*, Environment Court, A 143/97, 11 December 1997 and *Marlborough Seafoods v Marlborough District Council*, Environment Court, W 12/98, 20 February 1998.

156 See, eg, the transfer of powers to an iwi authority under s 33, the general matters for consideration under ss 104 and 105, and the appointment of a Maori Land Court Judge under ss 250 and 252. For a very useful analysis of the range of mechanisms available see Boast, R. & Edmonds, D., "The Treaty of Waitangi and Maori Resource Management Issues" in Brookers *Resource Management* (1991).

157 In *Director-General of Conservation v Marlborough District Council*, Environment Court, W 89/97, 22 September 1997, 17, Judge Kenderdine criticised both the application and the consent authority decision for failing to account for the directions in the relevant planning instruments.

example, ss 5, 6(e), 7(a) and 8.[158] This is evident in the many decisions where consent for a proposed activity has been declined on the basis that it would infringe the relationship of Maori with the particular resource. The reality of these types of resource consent proceedings is that a court is required to balance the interests of Maori with those of the applicant and at times the community at large. Often these conflicting interests are difficult to reconcile and the courts have continued to refine their approach to this form of environmental protection. Where the evidence of such interests is strong, the protection may come in the form of a declined application or in a restriction on the exercise of the consent. If anything, the courts have of late taken a more protective stance and have utilised a wider range of provisions within the Act. In the near future, the synthesis of the Part II protective mechanisms and those found within the emerging planning instruments will be of particular interest.

158 The issue of whether the RMA is enacted in a manner that appropriately recognises Maori and the Treaty of Waitangi is another matter.