

**BEFORE THE COMMISSIONER ON BEHALF OF  
THE OTAGO REGIONAL COUNCIL**

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

**AND**

**IN THE MATTER** of water permit  
application RM20.039  
under the Regional Plan:  
Water for Otago

**PIGBURN GORGE  
LTD AND OTHERS  
(COLLECTIVELY  
PIG BURN WATER  
USERS GROUP)**

**Applicant**

**AND**

**OTAGO REGIONAL  
COUNCIL**

**Consent Authority**

**AND**

**KĀTI HUIRAPA  
RŪNAKA KI  
PUKETERAKI, TE  
RŪNANGA O ŌTĀKOU  
AND HOKONUI  
RŪNANGA  
(collectively Mana  
Whenua)**

**Submitters**

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**PLANNING EVIDENCE OF TIM VIAL  
ON BEHALF OF MANA WHENUA**

**7 September 2021**

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## **ABBREVIATIONS**

<b>PDP</b>	Pattle Delamore Partners, Technical Memorandum prepared for the Otago Regional Council (2020)
<b>LWRP</b>	Otago Land and Water Regional Plan
<b>MALF</b>	Mean Annual Low Flow
<b>NPSFM</b>	National Policy Statement for Freshwater Management 2020
<b>NRMP</b>	Kai Tahu ki Otago Natural Resource Management Plan
<b>NTFWP</b>	Te Rūnanga o Ngāi Tahu Freshwater Policy Statement
<b>ORC</b>	Otago Regional Council
<b>P-ORPS 2021</b>	Proposed Otago Regional Policy Statement 2021
<b>PO-ORPS 2019</b>	Partially Operative Otago Regional Policy Statement 2019
<b>PPC7</b>	Proposed Plan Change 7 (Water Permits) to the Regional Plan: Water for Otago
<b>PWUG</b>	Pig Burn Water Users Group
<b>RMA</b>	Resource Management Act 1991
<b>RPW</b>	Regional Plan Water: Otago

## INTRODUCTION

1. My name is Tim Vial. I hold the qualifications of Bachelor of Arts, Bachelor of Laws and Master of Regional and Resource Planning from the University of Otago. I have 19 years' experience in resource management planning and policy development, including experience in developing freshwater management policy and in assessing the effects of proposals on freshwater resources for Kāi Tahu ki Otago.
2. I am a Full Member of the New Zealand Planning Institute and an accredited hearings commissioner under the Making Good Decisions programme.
3. I am currently employed as a Senior Planner at Aukaha, a consultancy based in Otago and owned by Te Rūnanga o Waihao, Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga. My role at Aukaha is focused on freshwater planning.
4. My evidence addresses the submissions of Kāti Huirapa Rūnaka ki Puketeraki and Te Rūnanga o Ōtākou and Hokonui Rūnanga (collectively **mana whenua**) on water permit application RM20.039 by Pig Burn Water Users Group (**the applicant**). (I note that the name of Hokonui Rūnanga was also attached to the submission in error. Hokonui Rūnanga does not have an interest in the Taiari catchment.)
5. I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note and I agree to comply with it. I confirm that the issues addressed in this statement are within my area of expertise except where I state that I am relying on information provided by another party. I have not knowingly omitted to consider material facts known to me that might alter or detract from the opinions expressed.
6. I undertook a site visit on 2 December 2020 with Fish & Game and the applicant. I am familiar with all take points on the Pigburn mainstem below the Pig Burn Gorge flow recorder.
7. The key documents that I have referred to in preparing my evidence include:
  - (a) "Pigburn – Collective Replacement of Permits to Take and Use Surface Water, Resource Consent Application and Supporting Information" McKeague Consultancy, as amended on 11 September 2020 (**the application**), including the associated technical reports and s92 response.

- (b) The Otago Regional Council s42A staff recommending report (**the s42A report**) and supporting evidence of Dr Allibone.
- (c) The statement of evidence of Edward Ellison for Kāi Tahu ki Otago.
- (d) The evidence submitted by the applicant, including:
  - Ms Perkins, Planning
  - Dr Olsen, Freshwater Ecology
  - Mr Hickey, Hydrology & Aquatic Ecology
  - Mr Bradfield; En Hakkore Limited
  - Ms Smith
  - Ms Weir; Hamilton Runs Limited
  - Mr Mulholland
  - Mr J Herlihy; Greenbank Pastoral Ltd and Hamiltons Dairy Limited
  - Mr G Herlihy; Greenbank Pastoral Ltd and Hamiltons Dairy Limited
- (e) The Otago Regional Plan: Water (**RPW**), including Proposed Plan Change 7 (**PC7**);
- (f) The Partly Operative Otago Regional Policy Statement 2019 (**RPS 2019**) and the Proposed Otago Regional Policy Statement 2021 (**PORPS 2021**);
- (g) The National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**);
- (h) The following iwi planning documents lodged with ORC:
  - i. Te Rūnanga o Ngāi Tahu Freshwater Policy 1999 (**NTFP**);
  - ii. The Kāi Tahu Ki Otago Natural Resource Management Plan 2005 (**NRMP**).

## **SCOPE OF EVIDENCE**

8. My evidence will address the following matters:
- (a) The submissions on the application by Kāti Huirapa Rūnaka ki Puketeraki and Te Rūnanga o Ōtākou, (referred to collectively as 'mana whenua').
  - (b) The relationship of mana whenua with wai māori.
  - (c) The mana whenua relationship with the Pig Burn and Taiari Catchment, as discussed in the evidence of Mr Ellison.

- (d) The statutory direction in the RMA and higher order planning documents that is relevant to the current application including the expression of Te Mana o Te Wai in the NPSFM 2020, and the implications for assessment of the effects of the application; and
- (e) The role played by PC7 in enabling a transition to a freshwater planning framework within Otago that is compliant with the NPSFM 2020, and implications for the appropriate consent term.

**EXECUTIVE SUMMARY**

- 9. The mana whenua submission on this application arises from concerns that the application does not appropriately protect the mauri of the Pig Burn, its headwater tributaries and the Taiari River. Mauri is a critical element of the spiritual relationship of Kāi Tahu with wai māori, and an important component of an intact mauri is maintaining the natural connectivity and variability of flow in the Pig Burn and Taiari River.
- 10. The RMA, NPSFM 2020, RPS 2019, P-ORPS 2021 and Iwi Management Plans all direct that the values of Kāi Tahu for their wāhi tūpuna (ancestral landscapes) are provided for and that mana whenua are actively involved in resource management decision-making affecting these resources and values.
- 11. In my opinion, the proposed flow regime does not safeguard the mauri and life-supporting capacity of the lower reach of the Pig Burn, nor does it provide for Kāi Tahu values and relationship with this awa. The proposed residual flows combination with the cumulative effects of a high level of abstraction will not maintain a continuity of flow in this reach nor will it sustain life-supporting capacity for ecosystems during low flows.

**THE APPLICATION**

- 12. The subject sites and proposal are described in the application and the s42A Report, including the deemed permits subject to the application, the consents sought, and the proposed conditions of consent.
- 13. Collectively, the applicants’ proposed instantaneous rate of take from the Pig Burn ranges from 263 L/S to 383 L/s, as shown by Tables 1 – 3:

**Table 1: Proposed rate of take at flows in the Pig Burn from 10L/s - 70 L/s**

Take	Consent	Consent Holder (s)	Rate applied for	Residual Flow
Take 1: Upper Pig	RM20.039.01	Duncan Cleugh Farming Trust	56 L/s	-

<b>Burn shared take</b>		Pig Burn Gorge Ltd Janine Ruth		
<b>Take 2: Pig Burn Gorge</b>	RM20.039.02	Bradfields / En Hakkore Limited:	7 L/s	-
<b>Take 3: Herlihy Gorge Take:</b>	RM20.039.03	Greenbank Pastoral Limited Hamiltons Dairy Limited	42 L/s	-
<b>Take 4: Weirs</b>	RM20.039.05	Hamilton Runs Limited	56 L/s	-
<b>Take 5: Herlihy Ford Take</b>	RM20.039.04	Greenbank Pastoral Limited Hamiltons Dairy Limited	-	70 L/s
<b>Take 6: Lower Combined Take</b>	RM20.039.06	Sophic Trust Christopher and Dale Mulholland Hamiltons Dairy Limited	60 L/s	10 L/s
<b>Take 7: Concept North Take</b>	RM20.039.07	Concept Farms Ltd	42 L/s	10 L/s
<b>Total Proposed Rate of Take</b>			<b>263 L/s</b>	

**Table 2: Proposed rate of take at flows in the Pig Burn from 70 L/s to 199L/s**

<b>Take</b>	<b>Consent</b>	<b>Consent Holder (s)</b>	<b>Rate applied for</b>	<b>Residual Flow</b>
<b>Take 1: Upper Pig Burn shared take</b>	RM20.039.01	Duncan Cleugh Farming Trust Pig Burn Gorge Ltd Janine Ruth	56 L/s	-
<b>Take 2: Pig Burn Gorge</b>	RM20.039.02	Bradfields / En Hakkore Limited:	7 L/s	-
<b>Take 3: Herlihy Gorge Take:</b>	RM20.039.03	Greenbank Pastoral Limited Hamiltons Dairy Limited	42 L/s	-
<b>Take 4: Weirs</b>	RM20.039.05	Hamilton Runs Limited	56 L/s	-
<b>Take 5: Herlihy Ford Take</b>	RM20.039.04	Greenbank Pastoral Limited Hamiltons Dairy Limited	70 L/s	70 L/s
<b>Take 6: Lower Combined Take</b>	RM20.039.06	Sophic Trust Christopher and Dale Mulholland	60 L/s	10 L/s
<b>Take 7: Concept North Take</b>	RM20.039.07	Concept Farms Ltd	42 L/s	10 L/s

<b>Total Proposed Rate of Take</b>	<b>333 L/s</b>	
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**Table 3: Proposed rate of take at flows in the Pig Burn equal to or greater than 200 L/s**

<b>Take</b>	<b>Consent</b>	<b>Consent Holder (s)</b>	<b>Rate applied for</b>	<b>Residual Flow</b>
<b>Take 1: Upper Pig Burn shared take</b>	RM20.039.01	Duncan Cleugh Farming Trust Pig Burn Gorge Ltd Janine Ruth	56 L/s	-
<b>Take 2: Pig Burn Gorge</b>	RM20.039.02	Bradfields / En Hakkore Limited:	7 L/s	-
<b>Take 3: Herlihy Gorge Take:</b>	RM20.039.03	Greenbank Pastoral Limited Hamiltons Dairy Limited	42 L/s	-
<b>Take 4: Weirs</b>	RM20.039.05	Hamilton Runs Limited	56 L/s	-
<b>Take 5: Herlihy Ford Take</b>	RM20.039.04	Greenbank Pastoral Limited Hamiltons Dairy Limited	70 L/s	70 L/s
<b>Take 6: Lower Combined Take</b>	RM20.039.06	Sophic Trust Christopher and Dale Mulholland	110 L/s	200 L/s
<b>Take 7: Concept North Take</b>	RM20.039.07	Concept Farms Ltd	42 L/s	10 L/s
<b>Total Proposed Rate of Take</b>			<b>383 L/s</b>	

14. There is an error in Table 2 of the Officer's report. The proposed combined rate of take between Mulhollands and Sophic Trust at flows above 200 L/s is 110 L/s.

#### **DESCRIPTION OF THE ENVIRONMENT**

15. The hydrology of the Pig Burn and its headwater tributaries is described in the application and associated technical report (Hickey 2020), in the PDP technical memorandum (July 2020), and in the evidence of Mr Hickey, Dr Olsen and Dr Allibone. In summary:
- (a) The proposal represents a significant hydrological alteration in the natural flow regime (Hickey 2020);

- (b) Flow statistics provided by the applicant are based on the flows measured in the Pig Burn at the Gorge flow recorder during the irrigation season. There are two takes upstream of the flow recorder and the flow statistics are representative of the observed (or modified) flows rather than the natural flows (PDP 2020);
- (c) The long term modified 7D MALF and naturalised 7D MALF is likely to be greater than the observed 7D MALF of 53 L/s;
- (d) There are two losing and two gaining reaches as the Pig Burn flows across the Maniototo Plain to the confluence. Losses to groundwater in the upper losing reach are approximately 90 L/s. Losses in the lower losing reach are approximately 27 L/s (Hickey 2021);
- (e) Losses can vary significantly depending on groundwater levels (PDP 2020). It is assumed that losses to groundwater are not lost from the system overall because flows reappear in the lower reaches of the Pig Burn (Hickey, 2020);
- (f) Drying in the lower losing reach “.. *may or may not be an annual event naturally*” (Hickey 2020).<sup>1</sup> Additional gauging by ORC on 21st January 2020 indicates that a flow above 30 l/s is required to maintain connectivity in the lower losing reach of the Pig Burn (Hickey 2020, 2021);<sup>2</sup>
- (g) The effect of abstraction is to extend the length and duration of the reaches that would naturally have very low flows or be dry, most notably in the lower losing reach below the Patearoa Waipiata Road Bridge (Hickey 2020).

**16.** The ecology and instream values of the Pig Burn are described in the application and associated technical report (Hickey 2020), and in the evidence of Mr Hickey, Dr Olsen and Dr Allibone. In summary:

- (a) Longfin eel have been recorded throughout the section of the Pig Burn affected by takes (Hickey 2020, Allibone 2021). Longfin eels are classified as “at risk, declining” (Olsen 2021).
- (b) A habitat model for the Pig Burn for the reach from Hamilton Road

<sup>1</sup> Hickey 2020, pp.12.

<sup>2</sup> Hickey 2020, Memo on the PDP review of the Pig Burn Hydrology, “*This gauging indicates a flow well above 30 l/s is required below the Mulholland take point to guarantee connection through to O’Neil Rd.*”

downstream to the Patearoa Waipiata Road Bridge indicates that habitat for longfin eel increases with increasing flow (Allibone, 2021).

- (c) Upstream fish passage is required for juvenile longfin eel from 1 December to 30 April each year. A continuous flow path is required to enable elver to migrate upstream (Allibone, 2021).
- (d) The major limitation on elver passage will be the lower drying reach (Allibone, 2021).

17. There is insufficient information in the application on the naturalised flows of the headwater tributaries of the Pig Burn and the contribution of those tributaries to flows in the main stem. Consequently, the effects of Take 1 on flows in the Pig Burn main stem are not quantified.

#### **MANA WHENUA SUBMISSION**

18. A submission on the application was lodged by Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga. Mr Ellison has confirmed that the inclusion of Hokonui Rūnanga on the submission was an error.
19. The submission discusses the relationship of mana whenua with wai māori (freshwater) and the Taiari Catchment and the obligation to provide for that relationship under Te Tiriti O Waitangi / the Treaty of Waitangi and the purpose and principles of the Resource Management Act (RMA).<sup>3</sup>
20. Mana whenua are concerned about the extent of over-allocation in Otago which degrades the mauri of awa (rivers) and undermines the role of mana whenua as rakatira and kaitiaki of all natural resources.<sup>4</sup> The proposed primary allocation and instantaneous rate of take has the potential to result in very low flows persisting in the Pig Burn for long periods.<sup>5</sup>
21. Mana whenua consider that the granting of a long-term consent would not give effect to Te Mana o te Wai. They are concerned that the term of consent sought by the applicant would entrench over-allocation in this catchment and delay effective implementation of the outcomes sought through the PORPS 2021 and the Land and Water Regional Plan (**LWRP**)

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<sup>3</sup> Submission by Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga, paragraphs 2.1, 5.1, 5.9 and 5.15

<sup>4</sup> Submission by Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga, paragraph 2.5

<sup>5</sup> Submission by Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga, paragraph 5.18.

when that is notified in 2023.<sup>6</sup>

- 22.** Mana whenua expressed support for an amended proposal subject to:
- (a) A six-year term of consent;
  - (b) A minimum flow of 90% of MALF;
  - (c) Above the minimum flow, retaining at least 50% of flow in the Pig Burn;
  - (d) Installing a fish screen over the intake structure at each point of take; and
  - (e) The water takes being metered, recorded and reported via telemetry.

### **MANA WHENUA RELATIONSHIP WITH WAI MĀORI**

- 23.** The cultural evidence of Mr Ellison describes the centrality of freshwater to mana whenua identity and wellbeing.
- 24.** The whakapapa of mana whenua, water and land are integrally connected, and this relationship is fundamental to the identity of mana whenua. This whakapapa connection carries rakatirataka rights and also imposes a kaitiakitaka obligation on mana whenua to protect wai and all the life it supports, in accordance with customs and knowledge developed over many generations.
- 25.** Water is the lifeblood of the whenua and te taiao, and of the many life forms that depend on it. As a result, wai māori is very significant for mana whenua, both for its practical applications, and for the spiritual meaning it embodies. Rivers are a symbol of the permanence of wai māori, and a source of spiritual meaning and connection for kā rūnaka.
- 26.** Connection to wai māori is supported and sustained through the availability and use of mahika kai, and the retention and transfer of associated knowledge (mātauraka) across the generations. This requires that whānau are able to continue to access mahika kai and carry out customary practices. For mahika kai use to be sustained, populations of species must be present across all life stages and must be plentiful enough for long term sustainable harvest.
- 27.** Indigenous species are valued as taoka by Kāi Tahu, as are the habitats

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<sup>6</sup> Submission by Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga, paragraph 5.8

through which taoka species survive and thrive. Taoka species associated with water bodies include not only species such as fish including tuna (eel), kōura (freshwater crayfish) and kākahi (freshwater mussels) that live in the water, but also the birds that use rivers and wetlands for feeding or breeding. Protecting and maintaining the mauri of species and habitat is a critical function of kaitiakitaka.

28. The Taiari is unique amongst rivers in Otago, in that it is the only one that is open from the headwaters to the sea, providing unfettered access for native fish migration. This makes the Taiari a prime candidate for the restoration of native habitats for species like tuna and īnaka. Tuna (Longfin eels) are recorded in the lower Pig Burn.
29. Mana whenua have established a set of principles to guide freshwater management in the Pig Burn catchment. These principles reflect the values and relationships, and the tikaka, of mana whenua in relation to wai māori, as discussed above. These principles provide a framework for assessing the effects of the current proposal on Te Mana o te Wai and cultural values.

#### **MANA WHENUA RELATIONSHIP WITH THE TAIARI CATCHMENT AND THE PIG BURN**

30. The cultural evidence of Mr Ellison describes the mana whenua relationship with the Taiari and the Pig Burn. Over hundreds of years of settlement and occupation, mana whenua developed seasonal practices across the breadth of their takiwā, from the coastal kāika to the inland pā. The extensive use of the Taiari for mahika kai is evident across the whole catchment, with mahika kai sites having been identified along the length of the awa. and the centrality of freshwater to Kāi Tahu identity and wellbeing. Appendix 3 in Mr Ellison's evidence demonstrates that the Pigburn and surrounding areas formed part of the pattern of occupation and use by tūpuna.
31. The loss of mahika kai habitats and access to mahika kai has had far-reaching effects for mana whenua, which include a loss of connection, an inability to exercise kaitiakitaka and a reductive effect on te taiao, with consequent effects on the people of kā rūnaka. Many of these effects are reflected in the landscape around Pigburn, such as the changes that were seen to important cultural landmarks like Tunaheketaka (Lake Taiari) in the early settlement period.

#### **STATUS OF THE APPLICATION**

32. The status of the application is discussed in Section 5 of the s42A Report. The application was lodged with Council on 12 February 2020 and an amended application was lodged on 11 September 2020, after notification of PPC7.<sup>7</sup> The following rules are applicable:
- (a) Rule 12.1.4.1 applies to the re-take of surface water as a restricted discretionary activity.
  - (b) Rule 12.1.4.4 applies to the taking of surface water, as primary allocation, as a restricted discretionary activity.
  - (c) The proposed transfer of point of take is a discretionary activity under s136(2)(b)(ii) of the RMA.
33. I agree with Ms King that s.136 of the RMA is relevant as the applicant proposes transferring the whole or part of two water permits, namely:
- (a) The Mulholland take is being transferred from its current location upstream to the combined take; and
  - (b) Part of the Hamiltons Dairy primary allocation will be transferred from the Herlihy Ford Take downstream to the combined take point at flows below 70 L/s. The Hamiltons Dairy primary allocation is a combined total of 459,875 cubic metres across both take sites from 1 July to 30 June in the following year.<sup>8</sup>
34. The status of the application under PPC7 is unclear. If the application was relodged after notification of PPC7 it should be assessed as a non-complying activity under Rule 10A.3.2, as the consent duration sought is more than six years.
35. Overall, I concur with Ms King that it is appropriate to applying a 'bundling' approach and that the application should be considered as a **discretionary activity**. However, if the application was relodged after notification of PPC7, it should be considered as a **non-complying activity**

#### RELEVANT STATUTORY DIRECTION

36. The Officer's Report provides an assessment of the application against the higher order documents. In general, I agree with Ms King's assessment, and I do not consider it is necessary to discuss the statutory direction in detail. Instead, I will highlight matters that I consider are of

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<sup>7</sup> Section 42A report, Section 3.1

<sup>8</sup> Proposed consent RM20.039.06, Condition 4

relevance to the mana whenua submissions and offer my planning assessment where my opinion differs from that expressed by Ms King.

37. I agree with Ms King that the provisions of PC7 are a relevant consideration under s104 RMA, as are the NPSFM 2020, the RPS 2019, the PORPS 2021, and the relevant iwi management plans (Kāi Tahu ki Otago Natural Resource Management Plan 2005 and the Te Rūnanga o Ngāi Tahu Freshwater Policy Statement 1999).

### **Recognition and provision for Kāi Tahu interests and values in Part 2 RMA**

38. The concerns underlying the Kāi Tahu submissions relate directly to Part 2 of the RMA, particularly to sections 6(e), 7(a) and 8, and to the implementation of these provisions through the NPSFM 2020 and the concept of Te Mana o te Wai.
39. The evidence of Mr Ellison describes the depth and breadth of the relationship of mana whenua with wāi māori, and particularly with the Taiari Catchment and the Pig Burn, as discussed above. Council is required to recognise and provide for that relationship.
40. Section 7(a) requires Council to have particular regard to kaitiakitaka. Mr Ellison is mandated to exercise kaitiakitaka in the Pig Burn and the Taiari catchment. As discussed in Mr Ellison's evidence, implicit in kaitiakitaka is maintaining a balance between the right to access and use natural resources, and the responsibility to care for te taiao, with a focus on providing a sustainable base for the generations of the future. This is the underpinning meaning of the whakataukī, *Mō tātou, ā, mō kā uri a muri ake nei* (for us and our children after us).
41. Section 8 of the RMA requires Council to take into account the principles of the Treaty of Waitangi when exercising its functions and powers under the RMA. It has been held that taking into account the principles of the Treaty of Waitangi requires the following:<sup>9</sup>
- (a) The active participation by tangata whenua in resource management decision-making;
  - (b) Engagement with tangata whenua in good faith;
  - (c) Seeking of reciprocity and mutual benefit;
  - (d) Protection of resources of importance to tangata whenua from

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<sup>9</sup> Aratiatia Livestock Limited and Ors v Southland Regional Council [2019] NZEnvC 191 at [6]

adverse effects; and

(e) Positive action to protect tangata whenua interests.

42. In my view, it is evident that giving effect to sections 6(e), 7(a) and (8) of the RMA requires active protection of the relationship of Kāi Tahu with the Pig Burn and the Taiari catchment. The replacement of these deemed permits provides an opportunity to recognise and provide for the relationship of mana whenua with the Pig Burn by restoring natural flow variability and connectivity from the headwaters to the confluence with the Taiari River.

### **National Policy Statement for Freshwater Management 2020 and Te Mana o te Wai**

43. Te Mana o te Wai is a fundamental concept in the NPSFM 2020 and refers to “...*the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.*”<sup>10</sup>

44. Te Mana o te Wai encompasses six principles that inform the implementation of the NPSFM 2020:

- (a) Mana whakahaere;
- (b) Kaitiakitanga;
- (c) Manaakitanga;
- (d) Governance;
- (e) Stewardship;
- (f) Care and respect.<sup>11</sup>

45. The objective of the NPSFM 2020 is to ensure that natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems.
- (b) second, the health needs of people (such as drinking water).
- (c) third, the ability of people and communities to provide for their

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<sup>10</sup> National Policy Statement for Freshwater Management 2020, s.1.3.

<sup>11</sup> National Policy Statement for Freshwater Management 2020, s.1.3

social, economic, and cultural well-being, now and in the future.

46. Policy 1 requires that Te Mana o te Wai is given effect to in freshwater management. Policy 2 requires that tangata whenua are actively involved in freshwater management and Māori freshwater values are identified and provided for.
47. I agree with Ms King that the application is not consistent with Policy 1 of the NPSFM 2020.<sup>12</sup> The proposed residual flows of 10 – 20 L/s for Takes 6 and 7 in combination with abstraction that ranges from 263 – 383 L/s will not give effect to Te Mana o te Wai, as discussed below.
48. While there is yet to be a substantial body of case law on the NPSFM 2020, decisions of the Environment Court on the concept of Te Mana o Te Wai in the NPSFM 2017 remain relevant in my view, as the NPSFM 2020 builds on the provisions of the NPSFM 2017. In *Aratiatia Livestock Limited and Ors v Southland Regional Council [2019]* the Environment Court emphasised that the concept of Te Mana o te Wai introduced in the NPSFM 2017 represents a significant paradigm shift in freshwater management. This decision sets out three key understandings:

*The first key understanding*<sup>13</sup>

49. Te Mana o te Wai refers to the integrated and holistic wellbeing of a freshwater body. Upholding Te Mana o te Wai acknowledges and protects the mauri of the water.<sup>14</sup>
50. While mauri is not defined under the NPSFM 2017 or NPSFM 2020, the Environment Court has noted that all things (animate and inanimate) have mauri, a life force. Being interconnected, the mauri of water provides for the hauora (health) and mauri of the environment, waterbodies and the people.<sup>15</sup> The evidence of Mr Ellison affirms this understanding of mauri.
51. The implication of the Court's first key understanding is that water bodies themselves must be in a state of hauora before use can be considered. The mauri and hauora of water is, therefore, expressly linked with its use.<sup>16</sup>

*The second key understanding*<sup>17</sup>

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<sup>12</sup> S42A Report, Section 8.4

<sup>13</sup> *Aratiatia Livestock Limited and Ors v Southland Regional Council [2019]* NZEnvC 191 at [17]

<sup>14</sup> *Ibid* at [17]

<sup>15</sup> *Ibid* at [46]

<sup>16</sup> *Ibid* at [60]

<sup>17</sup> *Ibid* at [58] – [59]

52. As the matter of national significance under the NPSFM 2017, the health and wellbeing of water are to be placed at the forefront of discussions and decision-making. Only then can hauora be provided for by managing natural resources in accordance with ki uta ki tai.
53. The health and well-being of water bodies and freshwater ecosystems is now the first priority of freshwater management under the NPSFM 2020.  
*The third key understanding*<sup>18</sup>
54. The NPSFM 2017 made it clear that, in using water, the health of the environment, the waterbody and the people must also be provided for. This direction imposed a positive obligation on all persons exercising functions and powers under the RMA to ensure that when using water, people must also provide for the health of the waterbody, the health of the environment and the health of the people.
55. This positive obligation is continued and strengthened in the NPSFM 2020 with the requirement to provide for the health and well-being of water bodies and freshwater ecosystems becoming the first priority in Objective 2.1.
56. This direction is a significant shift from the approach to managing water takes and discharges in the RMA to date. The Court notes: *“the usual RMA focus on the scale and significance of effects of resource use [is redirected] onto the mauri or lifeforce of water and the enquiry becomes how do users of resources protect the water’s mauri and health?”*<sup>19</sup>
57. In accordance with the principle of mana whakahaere,<sup>20</sup> mana whenua have developed seven management principles they consider are important to give effect to Te Mana o te Wai in accordance with Policy 1 of the NPSFM and to sustain their relationship with the Pig Burn and the Taiari Catchment, namely:
- (a) Principle 1 - that the behaviour of the Pig Burn should mimic the natural behaviour of the river system;
  - (b) Principle 2 - The contribution of the Pig Burn to flow in the main stem of the Taiari River should mimic the proportionate contribution of this tributary under natural flow conditions;
  - (c) Principle 3 – that the setting of residual flows and allocation limits

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<sup>18</sup> Ibid at [61] – [62]

<sup>19</sup> Ibid at [7]

<sup>20</sup> The power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater

should recognise the interconnectedness of the Pig Burn catchment from its headwaters to its confluence with the Taiari River, and its connection to the wider Taiari system;

- (d) Principle 4 - that the water quality at the confluence should reflect the water quality at the source;
- (e) Principle 5 - that the setting of residual flows and allocation limits should enable resilient ecosystems in this catchment;
- (f) Principle 6 - that management of the Pig Burn should enable mana whenua to breathe life into their relationship with this awa and the Taiari Catchment; and
- (g) Principles 7 – that management and use of the Pig Burn should reflect the principles manaakitaka and reciprocity.<sup>21</sup>

**58.** I acknowledge that the applicant has taken some steps to give effect to Te Mana o te Wai in the Pig Burn Catchment by:

- (a) reducing the Herlihy Ford Take from 111 L/s to 70 L/s,<sup>22</sup>
- (b) adopting a residual flow of 70 L/s at the Herlihy Ford Take, and
- (c) combining three takes at a new shared intake at flows below 70L/s, providing ecological benefits for the 1km reach from the downstream end of the upper drying reach to the combined take location (Allibone 2021).

**59.** Mana whenua also acknowledge the proposal developed by applicant to enhance an existing wetland on the Kirkwood property near the confluence of the Pig Burn.<sup>23</sup>

**60.** Ms King recommends residual flows at the Combined take (Take 6) and the Concept North take (Take 7) of 10 L/s - 20 L/s to ensure the connection of water from mountains to sea is maintained. However, Ms King acknowledges that the proposed abstraction is large and will therefore have a minor effect on Te Mana o te Wai/ki uta ki tai.<sup>24</sup>

**61.** In my opinion, the proposed residual flows for Takes 6 and 7 in combination with abstraction that ranges from 263 – 383 L/s will have more than minor adverse effects on Te Mana o te Wai / ki uta ki tai. Flows above 30 L/s are

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<sup>21</sup> Evidence of Edward Ellison

<sup>22</sup> Evidence of Gavan Herlihy at [36, 38]

<sup>23</sup> Evidence of Gavan Herlihy at [17]

<sup>24</sup> S42A Report; Section 7.7 Effects on Cultural Values

required to maintain connectivity in the lower reach of the Pig Burn below Take 6 (Hickey 2020). The proposed residual flow at Take 6 does not maintain connection ki uta ki tai during low flows nor does the residual flow at Take 7 ensure a proportionate contribution of flow to the Taiari at the confluence.

62. I concur with Ms King that NPSFM 2020 Policy 7 is relevant to this application, namely:

*Policy 7: The loss of river extent and values is avoided to the extent practicable.*

63. Ms King concludes that the proposed minimum and residual flows will provide for no loss of river extent or values. I disagree. The lower reach of the Pig Burn requires flows above 30 L/s to maintain connectivity (Hickey 2020), and the proposed residual flows will not maintain this. Further, the evidence of Dr Olsen (2021) confirms that there is a reduction in habitat as the residual flow reduces.<sup>25</sup>

64. Council has adopted Policy 5.4.2 A in the RPW to implement Policy 7, and I discuss this below.

65. Overall, I conclude that the application is inconsistent with the NPSFM.

#### **Partially Operative Regional Policy Statement 2019 (RPS 2019)**

66. Council made parts of the proposed Regional Policy Statement operative in January 2019. Most of the remaining provisions, excluding provisions relating to port operations, have now been made operative and were added to the RPS 2019 on March 15, 2021. As a result, the Regional Policy Statement for Otago 1998 is now revoked.

67. Full consideration of the operative provisions of the RPS 2019 is now required. The relevant provisions of the RPS 2019 that are relevant to the mana whenua submissions include:

- (a) **Objective 1.2 and Policy 1.2.1:** Recognise and provide for the integrated management of natural and physical resources to support the wellbeing of people and communities in Otago.
- (b) **Objective 2.2 and Policy 2.2.1:** Manage the natural environment to support Kāi Tahu wellbeing by safeguarding the life-supporting capacity of natural resources.

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<sup>25</sup> Evidence of Dr Olsen, at [43]

- (c) **Objective 3.1:** The values (including intrinsic values) of ecosystems and natural resources are recognised and maintained or enhanced where degraded.
  - (d) **Policy 5.4.3:** Apply a precautionary approach to activities where adverse effects may be uncertain, not able to be determined, or poorly understood but are potentially significant or irreversible.
68. Policy 1.2.1 of the RPS 2019 seeks to achieve integrated management by, among other matters: coordinating the management of interconnected natural and physical resources, including recognising that values and effects may extend beyond the immediate area; and promoting methods that reduce or negate the risk of exceeding sustainable resource limits.
69. Policy 1.2.1 requires an holistic assessment of the effects of abstraction on the Pig Burn from the headwater tributaries to the Taiari confluence, and the contribution to cumulative effects on the Taiari River system, rather than a narrow focus on effects at the point of take. In my opinion, there is insufficient information in the application on the following matters:
- (a) The naturalised flow of the headwater tributaries and the effects of Take 1 on flow in the Pig Burn main stem.
  - (b) The effects of a proposed rate of take (Takes 3 – 5) that ranges from 98 L/s – 168 L/s on both the extent and duration of the upper losing reach; and
  - (c) The cumulative effects of Takes 3 – 5 on flows in the Pig Burn below the Herlihy Ford Take. Mr Hickey (2020) confirms that losses to groundwater are not actually lost from the system as flows reappear in the lower reaches of the Pig Burn. Consequently, these takes will have a cumulative effect on groundwater and flow in the lower Pig Burn.
70. Objective 3.1 requires the intrinsic values of ecosystems and natural resources to be recognised and maintained where they are degraded. Tuna (Longfin eels) are reported in the lower Pig Burn. The restoration of habitat for this taoka species is a priority for mana whenua.
71. In accordance with Policy 5.4.3 a precautionary approach is required to activities where the adverse effects may be uncertain.
72. In my opinion, there is insufficient information to conclude that the application is consistent with the provisions of the RPS 2019.

## **Proposed Otago Regional Policy Statement 2021**

- 73.** The PORPS 2021 was notified on 26 June 2021. I agree with Ms Perkins that this planning document gives effect to the direction of the NPSFM 2020 and that a reasonable degree of weight should be given to it.
- 74.** I have evaluated below the relevant provisions of the PORPS 2021 as set out in the s.42A Report:

### Mana Whenua

- 75.** The relevant provisions from the Mana Whenua Chapter are:
- MW-O1 – Principles of Te Tiriti o Waitangi
- MW-P2 – Treaty principles
- MW-P3 – Supporting Kāi Tahu well-being
- 76.** MW-P3 requires the management of the natural environment to support Kāi Tahu well-being by:
- (a) Protecting Kāi Tahu values and relationships to resources and areas of significance, and restoring these uses and values where they have been degraded by human activity; and
  - (b) Safeguarding the mauri and life-supporting capacity of natural resources.
- 77.** Kāi Tahu values and relationship to the Pig Burn have been degraded by the operation of deemed permits in this catchment. The replacement of these deemed permits should include measures to enable the restoration of the Kāi Tahu values in this catchment, including mahika kai values.
- 78.** In my opinion, the proposed flow regime does not safeguard the mauri and life-supporting capacity of the lower reach of the Pig Burn, nor does it provide for Kāi Tahu values and relationship with this awa. The proposed residual flow for Take 6 in combination with the cumulative effects of a high level of abstraction will not maintain a continuity of flow in this reach nor will it sustain life-supporting capacity during low flows.

### Integrated Management

- 79.** The relevant provisions from the Integrated Management Chapter are set out in the s42A report. I have evaluated the most relevant provisions for this application and have identified provisions that are not discussed by Ms King.

80. In summary, the relevant integrated management objectives are:

***IM-01-Long term vision***

*The management of natural and physical resources in Otago, by and the people of Otago, including Kāi Tahu, and as expressed in all resource management plans and decision making, achieves healthy, resilient, and safeguarded natural systems, and the ecosystem services they offer, and supports the well-being of present and future generations, mō tātou, ā, mō kā uri ā muri ake nei.*

***IM-02-Ki uta ki tai***

*Natural and physical resource management and decision-making in Otago embraces ki uta ki tai, recognising that the environment is an interconnected system, which depends on its connections to flourish, and must be considered as an interdependent whole.*

***IM-03-Environmentally sustainable impact***

*Otago's communities carry out their activities in a way that preserves environmental integrity, form, function, and resilience, so that the life-supporting capacities of air, water, soil, ecosystems, and indigenous biodiversity endure for future generations.*

81. In my opinion, the ongoing abstraction of flows that are large in proportion to the size of the Pig Burn, combined with the low residual flows proposed for some of the takes, will not contribute to resilience in the river environment and its ecosystems, and is inconsistent with IM-O1 and IM-O3. The failure to provide for connected flow is inconsistent with IM-O2 and will not preserve the integrity and natural function of the water body as required by IM-O3.

82. The relevant integrated management policies include:

***IM-P2 – Decision priorities***

*Unless expressly stated otherwise, all decision making under this RPS shall:*

- 1. firstly, secure the long-term life-supporting capacity and mauri of the natural environment,*
- 2. secondly, promote the health needs of people, and*
- 3. thirdly, safeguard the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*

***IM-P3 – Providing for mana whenua cultural values in achieving integrated management***

*Recognise and provide for Kāi Tahu's relationship with natural resources by*

- 1. enabling mana whenua to exercise rakatirataka and kaitiakitaka,*

2. *facilitating active participation of mana whenua in resource management decision making,*
3. *incorporating mātauraka Māori in decision making, and*
4. *ensuring resource management provides for the connections of Kāi Tahu to wāhi tūpuna, water and water bodies, the coastal environment, mahika kai and habitats of taoka species.*

***IM-P13 – Managing cumulative effects***

*Otago's environmental integrity, form, function, and resilience, and opportunities for future generations, are protected by recognising and specifically managing the cumulative effects of activities on natural and physical resources in plans and explicitly accounting for these effects in other resource management decisions.*

***IM-P15 – Precautionary approach***

*Adopt a precautionary approach towards proposed activities whose effects are uncertain, unknown or little understood, but could be significantly adverse, particularly where the areas and values within Otago have not been identified in plans as required by this RPS.*

83. I have already discussed my opinion in respect to the failure of the application to secure the long-term life-supporting capacity and mauri of the Pig Burn and to provide for the relationship of Kāi Tahu to the awa.
84. I note the requirement in IM-P15 that a precautionary approach apply where there could be significantly adverse effects on values that are yet to be identified in current plans, including values that are required to be identified by the PORPS 2021. Ms King has acknowledged that, although the Pig Burn is not identified in Schedule 1D of the RPW, mana whenua values relating to the water body must be considered. Ms King considers the effect on these values are minor. As I have already discussed, I disagree with her assessment on this point and, given the uncertainties I have identified in paragraph 71 of this evidence (including inadequate consideration of cumulative effects), I consider it would be appropriate to take a precautionary approach in this case.

**LF – Land and Freshwater**

85. The Te Mana o Wai objective LF-WAI-01 (set out in the evidence of Mr Ellison), and policies LF-WAI-P1, LF-WAI-P2 and LF-WAI-P3 are fundamental to upholding Te Mana o te Wai and must be given effect to when making decisions affecting fresh water.<sup>26</sup>

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<sup>26</sup> Proposed Otago Regional Policy Statement 2021, LF-WAI-P4

- 86.** LF-WAI-P3 requires that the use of freshwater and land is managed in accordance with tikaka and kawa, using an integrated approach. The key elements of integrated management include:
- (a) Recognising and sustaining the connections and interactions between surface and groundwater, permanently flowing and intermittent reaches of water bodies (LF-WAI-P3(1));
  - (b) Sustaining and wherever possible restoring the connections and interactions between land and water, from the mountains to the sea (LF-WAI-P3(2));
  - (c) Sustaining and wherever possible restoring the habitats of mahika kai and indigenous species, including taoka species associated with the water body (LF-WAI-P3(3));
  - (d) Managing the effects of the use and development of land to maintain or enhance the health and well-being of freshwater (LF-WAI-P3(4)); and
  - (e) Having regard to cumulative effects and the need to apply a precautionary approach where there is limited information or uncertainty about potential adverse effects LF-WAI-P3(2)).
- 87.** I have discussed these matters above, and for the reasons discussed, I consider the application is inconsistent with Policy LF-WAI-P3.

LF-VM-04 – Vision and Management-Taiari FMU

- 88.** Mr Ellison, in his evidence, has identified aspects of the Taiari FMU freshwater vision described in LF-VM-O4 that reflect mana whenua aspirations for the Taiari. While some of these relate to the broader catchment rather than specifically to the Pig Burn, the objective of sustaining the ongoing relationship of Kai Tahu with wāhi tūpuna is relevant.
- 89.** As Mr Ellison has explained, connection to wāhi tūpuna is sustained through mahika kai, and the retention and transfer of associated mātauraka across the generations. To achieve the vision in LF-VM-O4, I consider it is important to take active steps to sustain remaining mahika kai values in the Pig Burn. In my opinion, the application is inconsistent with this objective because it fails to provide for the life cycle needs of tuna – particularly the ability for elvers to migrate readily.

90. The relevant freshwater objectives and policies are identified by Ms King in the Section 42A Report. The objective for Otago's water bodies and their catchments is that:
- (a) The health of the wai supports the health of the people and thriving mahika kai.
  - (b) Water flow is continuous throughout the whole system.
  - (c) The interconnection of freshwater including groundwater is recognised; and
  - (d) Native fish can migrate easily and as naturally as possible and taoka species and their habitats are protected.<sup>27</sup>
91. I have discussed each of these matters above, and consider the application is inconsistent with this objective, particularly through the effects of the low proposed residual flows in exacerbating the disconnection of flow in some reaches.

#### Conclusion on the Proposed Otago Regional Policy Statement 2021

92. In my opinion, the application is inconsistent with several objectives and policies of the PORPS 2021, because:
- (a) the proposed takes and residual flows do not safeguard the mauri and life-supporting capacity of the lower reach of the Pig Burn;
  - (b) they do not provide for Kāi Tahu values and relationship with this awa, particularly in respect to sustaining the remaining tuna population;
  - (c) they will not contribute to resilience in the river environment and ecosystems;
  - (d) they will result in a loss of river values and extent, and the effects of this are not addressed in accordance with the NPSFM 2020 effects management hierarchy; and
  - (e) cumulative effects are not adequately considered.

#### **Regional Plan: Water for Otago**

93. I generally agree with the assessment of the relevant provisions of the Regional Plan Water (RPW) set out in the s42A report, with the exception of the points discussed below.

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<sup>27</sup> Proposed Otago Regional Policy Statement 2021

94. The RPW has recently been updated as required by clause 3.24(1) (rivers) of the NPSFM to include Policy 5.4.2 A

*The loss of river extent and values is avoided, unless the council is satisfied:*

- (a) that there is a functional need for the activity in that location; and*
- (b) the effects of the activity are managed by applying the effects management hierarchy.*

95. The NPSFM requires Council to ensure that an application which causes a loss of river extent and values is not granted unless:

- (a) The Council is satisfied that the applicant has demonstrated how each step in the effects management hierarchy will be applied to any loss of extent or values of the river (including cumulative effects and loss of potential value), particularly (without limitation) in relation to the values of: ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity; and
- (b) any consent granted is subject to conditions that apply the effects management hierarchy.<sup>28</sup>

96. The effects management hierarchy is defined in clause 3.21 of the NPSFM as an approach to managing the adverse effects of an activity on the extent or values of a river (including cumulative effects and loss of potential value) that requires that:

- (a) adverse effects are avoided where practicable; and*
- (b) where adverse effects cannot be avoided, they are minimised where practicable; and*
- (c) where adverse effects cannot be minimised, they are remedied where practicable; and*
- (d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; and*
- (e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; and*
- (f) if aquatic compensation is not appropriate, the activity itself is avoided.*

97. In my opinion, the application is inconsistent with Policy 5.4.2A. Flows above 30 L/s are required in the lower reach of the Pig Burn to maintain

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<sup>28</sup> National Policy Statement for Freshwater Management 2020, clause 3.24(3)

connectivity (Hickey 2020). In my opinion, the proposed residual flow for Take 6 in combination with the cumulative effects of a high level of abstraction will result in a loss of river extent and values during low flows. The applicant has not demonstrated how each step in the effects management hierarchy will be applied to the loss of extent or values of the Pig Burn resulting from a residual flow of 10 L/s at Take 6.

98. In Section 8.7 of the s42A report Ms King concludes that the application is consistent with Objective 6.3.1 and Policy 6.4.7 as the proposed residual flows will ensure flow is retained to maintain the life-sustaining capacity for aquatic ecosystems and their natural character. I disagree with this conclusion. The proposed residual flow of 10 L/s for Take 6 will not ensure there is flow in the lower reach of the Pig Burn to maintain the life-sustaining capacity of aquatic ecosystems.
99. Overall, I consider the application is inconsistent with the provisions of the operative RPW that require a loss of river extent and ecosystem values to be avoided.

#### **Proposed Plan Change 7 (Water Permits) (PC7)**

100. Ms King notes that the RPW is not a NPSFM 2020 compliant plan.<sup>29</sup> Proposed PC7 establishes an interim planning framework to enable a transition from deemed permits to RMA water permits while this framework is being developed.<sup>30</sup>
101. Mana whenua are actively working in partnership with Council to develop this freshwater planning framework which includes the P-ORPS and the LWRP.
102. The mana whenua submission on this application arose from concern that the replacement of these deemed permits with a long consent term would delay effective implementation of the outcomes sought through the P-ORPS 2021 and the LWRP when that is notified in 2023.
103. Ms King in assessing the objectives and policies of PPC7 notes that Policy 10A.2.3 applies irrespective of any other policies concerning consent duration. This policy directs that new resource consents to replace deemed permits only be granted for a duration of no more than 6 years except where the activity will have no more than minor adverse effects (including no more than minor cumulative effects) on the ecology and the hydrology of the

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<sup>29</sup> Section 42A report, section 7.9.

<sup>30</sup> Section 42A report, section 8.8

surface water body (and any connected water body) from which the abstraction is to occur. In that case, a consent may be granted with an expiry of up to 31 December 2035.<sup>31</sup>

- 104.** Ms King concludes that a consent term expiring on expiring on 31 December 2035<sup>32</sup> is consistent with the direction provided through PC7, as adverse effects on the natural character, amenity, recreation, hydrology and instream values within Pig Burn will be no more than minor.<sup>33</sup>
- 105.** I disagree with Ms King's conclusion. The proposed residual flows in combination with a high level of abstraction do not maintain connection ki uta ki tai during low flows. Flows below 30 L/s in the lower reach of the Pig Burn will not maintain the life-sustaining capacity of aquatic ecosystems. In my opinion, the proposed activity will have more than minor adverse effects and the 6-year limit on consent duration should therefore apply.

#### **Iwi Management Plans**

- 106.** The Kāi Tahu ki Otago Natural Resource Management Plan 2005 and the Te Rūnanga of Ngāi Tahu Freshwater Policy Statement are other matters which are relevant in considering this application under s104(1)(c).
- 107.** I consider that the following direction in the iwi management plans, both in general objectives and policies and in those specifically relating to freshwater and mahika kai/ biodiversity objectives and policies, are particularly relevant:
- (a) Recognition and support for the rakatirataka and kaitiakitaka of Kāi Tahu ki Otago, upholding their mana through management of resources, and effective participation in resource management activities.<sup>34</sup>
  - (b) Ki uta ki tai management of resources, and management for future generations.<sup>35</sup>
  - (c) Recognition, in all water management, of the spiritual and cultural significance of water to Kāi Tahu ki Otago.<sup>36</sup>
  - (d) Healthy waters that support Kāi Tahu customs,<sup>37</sup> and

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<sup>31</sup> Section 42A report, section 8.8

<sup>32</sup> Now amended to 1 January 2034

<sup>33</sup> Section 42A report, section 10

<sup>34</sup> NRMP 5.2.1, 5.2.3 and 5.2.4; NTFP 6.4

<sup>35</sup> NRMP 5.2.2

<sup>36</sup> NRMP 5.3.3.1, 5.3.3.5, 5.3.4.2.2, 5.3.4.2.7; NTFP 6.1

<sup>37</sup> NRMP 5.3.3.2; NTFP 6.3

- (e) Protection and restoration of mauri, and recognition that each waterway has its own mauri, mana, values and uses.<sup>38</sup>

108. These matters are all discussed by Mr Ellison in his evidence. In my opinion, this application is inconsistent with the relevant objectives and policies of the Iwi Management Plans. The proposed residual flows in combination with a high level of abstraction do not maintain connection ki uta ki tai during low flows nor does it protect and restore the mauri of the Pig Burn.

### **Conclusion on the statutory direction**

109. In summary, the RMA, NPSFM 2020, RPS 2019, P-ORPS 2021 and Iwi Management Plans all direct that the values of Kāi Tahu for their wāhi tūpuna (ancestral landscapes) are provided for and that mana whenua are actively involved in resource management decision-making affecting these resources and values.

110. In my opinion, the proposed flow regime does not safeguard the mauri and life-supporting capacity of the lower reach of the Pig Burn, nor does it provide for Kāi Tahu values and relationship with this awa. The proposed residual flows combination with the cumulative effects of a high level of abstraction will not maintain a continuity of flow in this reach nor will it sustain life-supporting capacity for ecosystems during low flows.

### **CONSENT DURATION**

111. PC7 creates a consenting pathway to allow deemed permits and expiring water permits to be authorised with a new water permit, on the same conditions as the existing take, for a short-term. The renewal of deemed water permits for a six-year term is supported by mana whenua.

112. PWUG is now proposing a consent term expiring 1 January 2034 to align with the expiry of the Maniototo Irrigation Company (MIC) permits.<sup>39</sup>

113. In their submission, mana whenua requested that above the minimum flow, at least 50% of the flow in the waterway is left in the waterway. Mana whenua are seeking a primary allocation limit that provides for the health and well-being of the Pig Burn. Ms King considers that if a new allocation limit is to be set, it should be set through the Schedule 1 process as it relates to a full catchment and needs to consider a wider range of factors that

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<sup>38</sup> NRMP 5.3.4.2.4; NTFP 6.2

<sup>39</sup> Evidence of Claire Perkins, at [52]

cannot be considered through this consent process.<sup>40</sup>

- 114.** I note that allocation limits in this catchment will be set through the LWRP. In my opinion, granting a consent term that expires on 1 January 2034 would hinder the implementation of these allocation limits and would frustrate progress towards addressing over-allocation in the Taiari Catchment.

## **CONCLUSION**

- 115.** I consider that the application does not give effect to Te Mana o te Wai, as required by the NPSFM 2020, in that it does not support the health and wellbeing of Pig Burn. It does not protect the mauri of the water body, and so does not provide for the relationship of Kai Tahu with wai māori, as required by Policy 2 of the NPSFM 2020 and Objectives 2.1 and 2.2 and Policies 2.1.2 and 2.2.1 of the RPS. It does not adequately consider the relationship between Pig Burn and connected groundwater, as required by PORPS Objective 1.2 and Policy 1.2.1.
- 116.** I consider the application is also inconsistent with a number of objectives and policies in the PORPS 2021 because it does not safeguard the mauri and life-supporting capacity of the Pig Burn and does not provide for Kāi Tahu values and relationship with this awa.
- 117.** The application will result in a loss of river values and extent, and the effects of this are not addressed in accordance with the NPSFM 2020 effects management hierarchy. In terms of Policy 5.4.2 A of the RPW, I consider this means that consent cannot be granted.
- 118.** The planning framework in the RPW is inadequate to manage the replacement of deemed permits in a way that is consistent with the requirements of the NPSFM 2020 and achieves the purpose of the RMA. I consider that the RPW is particularly deficient in respect to meeting the requirements of sections 6(e), 7(a) and 8 of the RMA.
- 119.** The Otago Regional Council has notified the Water Permits Plan Change (PC7) to provide an interim planning framework to manage the replacement of deemed permits while it transitions toward the sustainable management of surface water resources in Otago. PC7 introduces provisions to limit the duration of water permits issued under the RPW to no more than six years.

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<sup>40</sup> Section 42A report, section 7.7

- 120.** If the Commissioner disagrees with my assessment of the application against RPW Policy 5.4.2 A and determines that consent can be granted, I consider that a six-year consent in accordance with PC7 is a necessary measure to ensure that the NPSFM 2020 can be implemented in a timely manner.
- 121.** As Mr Ellison has discussed the NPSFM 2020 gives a central role in freshwater management to mana whenua, and this is being recognised in a partnership approach between ORC and Kāi Tahu in development of a new RPS and Land and Water Regional Plan. However, if long term consents are granted to replace these deemed permits before this framework has been put in place, the ability of Kāi Tahu to exercise their rakatirataka and kaitiakitaka in respect to freshwater resources in this catchment will be hampered for another generation.
- 122.** I do not agree it is appropriate in these circumstances to place greater weight on the provisions of the RPW than PC7 in terms of consent duration.

**Tim Vial**

**7 September 2021**