BEFORE INDEPENDENT HEARING COMMISSIONERS
AT DUNEDIN

MAI I KĀ KAIKŌMIHANA MOTUHAKE
KI ŌTEPOTI

UNDER	the Resource Management Act 1991 ("**RMA**")
AND	
IN THE MATTER OF	the Proposed Otago Regional Policy Statement 2021 (non-freshwater parts) ("**PORPS**")
AND	the **MW** – Mana Whenua, **RMIA** – Resource management issues of significance to iwi authorities in the region

---

LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU

Dated 20 January 2023

Solicitor instructing:
Jessica Riddell

Te Rūnanga o NGĀI TAHU

15 Show Place
Christchurch 8024
PO Box 13 046,
Christchurch 8042
P: 021 226 9328
E: jessica.riddell@ngaitahu.iwi.nz

Counsel acting:
Aidan Cameron

BANKSIDE CHAMBERS

Level 22, 88 Shortland St
Auckland 1010
PO Box 1571, Shortland St
Auckland 1140
P: +64 9 307 9955
E: aidan@bankside.co.nz

LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU

May it please the Commissioners | Ki kā Kaikōmihana

Introduction and summary | Whakatakika me te whakarāpopototaka

1. Kāi Tahu,[1] as mana whenua, have a unique and abiding interest in the sustainable management of te taiao – the environment – within the Otago region.

2. As Edward Ellison describes, Kāi Tahu are dedicated to the sustainable management of resources and the achievement of sound environmental outcomes.[2] The overarching objective of Kai Tahu is to build a stronger environmental, economic, social and cultural base for their people, mō tātou, ā, mō kā uri ā muri ake nei – for both present and future generations.

3. This is the first opportunity for Kāi Tahu to address you as Commissioners on your task in making recommendations to the Otago Regional Council ("**ORC**") on the content of the PORPS. As such, these submissions cover those matters which sit at the core of the Kai Tahu submission – their identity, their relationship with te taiao, and the history associated with that relationship.

4. These submissions also address topics of particular importance to Kāi Tahu – namely the Mana Whenua or "**MW**" provisions, and the "**RMIA**" provisions of the PORPS, which address resource management issues of significance to iwi authorities in the region. These provisions sit at the strategic or overarching level within the PORPS, alongside the SRMR[3] provisions.

5. This is acknowledged by ORC through their inclusion in the introductory and overview parts of the PORPS. That approach is consistent with statutory recognition of the interests of mana whenua in te taiao in ss 6(e), 7(a) and 8 of the RMA – strong directions which must be borne in mind at every stage of the planning process.[4]

---

1 The term Kāi Tahu is used interchangeably (as context requires) to represent both the mana whenua of the region, as well as the three Kāi Tahu submitters who lodged submissions on the PORPS, namely Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Runanga (collectively, Kāi Tahu ki Otago); Waihōpai Rūnaka, Te Rūnanga Ōraka Aparima and Te Rūnanga o Awarua (collectively, Ngāi Tahu ki Murihiku); and Te Rūnanga o Ngāi Tahu ("**TRONT**").

2 BoE of Edward Ellison, [12].

3 Significant resource management issues for the region.

4 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].

6. The key task before you under s 59 of the RMA requires you to:[5]

   (a) recognise and provide for the relationship of Kāi Tahu and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka under s 6(e);

   (b) have particular regard to kaitiakitaka under s 7(a); and

   (c) take into account the principles of Te Tiriti o Waitangi | the Treaty of Waitangi under s 8.

7. In doing so, you will also assist the ORC to comply with its obligations to prepare the PORPS in accordance with the provisions of Part 2, as required under s 61(1)(b) of the RMA. The recommendations you make in relation to the MW and RMIA provisions will have important, flow on effects for your consideration of other domain or topic-specific provisions later in this hearings process.

8. Counsel encourages the Commissioners to carefully evaluate and place significant weight on the evidence of Kāi Tahu tohuka whakaatu – its expert witnesses – in arriving at your recommendations.

9. Their cultural evidence is an expression of Kāi Tahu rakatirataka, which is protected through s 6(e) of the RMA and Article 2 of Te Tiriti, and acknowledged through the Crown's settlement of historical Treaty breaches in Te Waipounamu. It is the Kāi Tahu perspective that ought to drive the issues, objectives, policies and methods in the MW and RMIA provisions, as required by the lodestars in ss 6(e), 7(a) and 8.

10. The provisions annexed to Appendix 1 of the evidence of Sandra McIntyre are the most efficient and effective means of achieving the RMA's purpose in relation to matters of significance to mana whenua and Kāi Tahu as the iwi authority of the region.

Kāi Tahu – an introduction | Kāi Tahu – he whakatakika

11. Edward Ellison ONZM, chair of Aukaha and one of two mana whenua representatives on the ORC's Strategy and Planning Committee during the development of the PORPS, describes Kāi Tahu Whānui as the collective of individuals who descend from Waitaha, Kāti Mamoe and the five primary hapū of Kāi Tahu, namely, Kāti Kurī, Ngāti Irakehua, Kāti Huirapa, Ngāi Tūāhuriri and Ngāi Te Ruahikihiki.[6]

12. Waitaha is used to describe, collectively, the ancient indigenous groups who lived in Te Waipounamu (the South Island) prior to the migrations of Kāti Mamoe from Heretaunga in the early 17th century,

---

5 Namely, to arrive at provisions that achieve the purpose of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region: RMA, s 59.

6 BoE of Edward Ellison, [7].

and the migration of Kāi Tahu approximately a century later.[7] The three collectives, Waitaha, Kāti Mamoe and Kāi Tahu, merged through conquest and intermarriage. Reference to Kāi Tahu whakapapa includes and acknowledges the whakapapa connection to Waitaha and Kāti Mamoe.

The Kāi Tahu takiwā

13. Whilst the takiwā of Kāi Tahu Whānui extends over the vast majority of Te Waipounamu, the four runaka that comprise Kāi Tahu ki Otago represent whānau and hapū within the Otago region.

14. The interests of Kāi Tahu ki Otago in inland lakes and mountains and along the Mata-au (the Clutha River) are shared with Ngāi Tahu ki Murihiku, the collective used to describe mana whenua in the Southland region (and represented at these hearings through Evelyn Cook, the Waihōpai Rūnaka representative on the Board of Te Ao Marama, and Maria Bartlett, Kaitohutohu Matua of Te Ao Marama). The areas of shared interest originate from the seasonal hunting and gathering economy that was a distinctive feature of the southern Kāi Tahu lifestyle, and do not necessarily align with regional council boundaries.[8]

The relationship of Kāi Tahu ki te taiao – the environment

15. Edward Ellison also describes how Kāi Tahu are bound through whakapapa to the land, water and all life supported by them.[9] In his evidence, he speaks eloquently of the Kāi Tahu relationship with wai – water – as a central element in Kāi Tahu creation traditions and an early presence in the whakapapa of te ao – the world in which we live.

16. He describes how the many unions of Raki[10] begot offspring who were responsible for creating the elements that, together, constitute te taiao – the mountains, rivers, forests, seas and all forms of life.[11] He explains that as Kāi Tahu claim the same descent from Raki and his wives, so too is Kāi Tahu connected through whakapapa to all things he created.

17. Mr Ellison also explains how those whakapapa connections create the spiritual relationships that drive respect for the mauri – or life force – of te taiao, and the rights inherent within rakatirataka and the associated and fundamental duties of kaitiakitaka.[12]

18. Finally, he describes how this concept of whanaukataka – or relationship building through whakapapa – gives rise to ‘ki uta, ki tai’, a resource management approach which emphasises the holistic

---

7 BoE of Edward Ellison, [8].
8 PORPS, Part 1, MW – Introduction.
9 BoE of Edward Ellison, [13]-[15].
10 Known in other areas as Ranginui – the sky father.
11 BoE of Edward Ellison, [15].
12 BoE of Edward Ellison, [16].

management of integrated elements within the natural environment, demonstrating the interconnectedness of environmental systems and forming a basic tenet of Kāi Tahu resource management practises and perspectives.[13] What occurs on land will have a direct consequence for its neighbouring rivers, lakes and the coastal environment; and when this interconnectivity is not recognised or managed well, land-based activities can have a direct detrimental effect on those other environments, including their mauri.[14]

The settlements for historical breaches of Te Tiriti o Waitangi

19. Consideration of the Kāi Tahu perspective on the integrated management of the natural and physical resources of the Otago region cannot occur in a vacuum. It must, by necessity, take into account the position as it exists today as a result of the Crown's acknowledged historical breaches of Te Tiriti o Waitangi.

20. The contemporary relationship between the Crown and Kāi Tahu is defined by three core documents:

    (a) Te Tiriti o Waitangi,

    (b) the Ngāi Tahu Deed of Settlement 1997; and

    (c) the Ngāi Tahu Claims Settlement Act 1998 ("**Settlement Act**").

21. In addition to, and consistent with, the statutory considerations under the RMA, the obligations and principles contained in these documents apply to ORC as an arm of the Crown.[15]

22. The Deed of Settlement and the Settlement Act resolved Te Kerēme, the Ngāi Tahu Claim, which is discussed in detail in the evidence of Messrs Edward and Matapura Ellison and Higgins. The nine "tall trees" of Te Kereme, consisting of eight major land transactions and mahika kai as the ninth tree, resulted in a Waitangi Tribunal inquiry which found that the Crown had failed to protect Kāi Tahu whānau from the scourge of alienation of land, and the loss of mahika kai, with a corresponding loss of an economic base and opportunities to undertake cultural practices.[16]

23. Two of these trees, the Ōtākou and Kemp purchases, in addition to the relationship of Kāi Tahu with mahika kai,[17] are addressed directly in the evidence of Edward and Matapura Ellison respectively.[18] The impact of these purchases on the ability of Kāi Tahu to provide for its own future economic, social and cultural development was a key

---

13 BoE of Edward Ellison, [17].
14 BoE of Edward Ellison, [18].
15 *Ngāti Maru ki Hauraki Inc v Kruithof* [2005] NZRMA 1 (HC) at [57].
16 BoE of Edward Ellison, [70].
17 Which is addressed throughout the cultural evidence filed by Kāi Tahu.
18 BoE of Edward Ellison, [50]-[51]; BoE of Matapura Ellison, [9]-[16].

element of the Tribunal's findings. As the long title to the Settlement Act records, the Tribunal found that the Crown's actions in acquiring some 34.5 million acres of land for the paltry sum of £14,750 left Kāi Tahu with "insufficient land to maintain [their] way of life, and to enable [their] full participation in subsequent economic development".

The Crown apology

24. Section 6 of the Settlement Act contains the Crown apology to Kāi Tahu.

25. Section 6(2) of the Settlement Act recorded the unconscionable and repeated breached of Te Tiriti by the Crown in its dealings with Kāi Tahu in the purchases of its land, which included the eight "tall trees" referred to above. The Crown also acknowledged that it had failed to set aside adequate lands for Kāi Tahu and to provide adequate economic and social resources, in relation to those deeds of purchase.

26. Section 6(3) recorded the Crown's acknowledgement that it has breached Article 2 of Te Tiriti by failing to preserve and protect Kāi Tahu of such use and ownership of their land and valued possessions as they wished to retain.

27. Importantly, section 6(7) of the Settlement Act recognises Kāi Tahu as "the tangata whenua of, and as holding rangatiratanga within, the takiwā of [Kāi] Tahu Whānui". This is important as it specifically provides that the Crown recognises rakatirataka, in fulfilment of its Treaty obligations. Section 6(8) of the Settlement Act also provides that the Crown wishes to "enter a new age of co-operation with [Kāi] Tahu".

Other settlements of note

28. Counsel also acknowledge the role played by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 ("**Fisheries Settlement**") and the Māori Commercial Aquaculture Claims Settlement Act 2005 ("**Aquaculture Settlement**"). As discussed by Ms Stevens in her evidence,[19] these settlements, which were conducted on a national basis, provide for the allocation of resources, as well as (in the case of the Fisheries Settlement) providing the basis for recognition of customary fishing rights through the establishment of contemporary management tools such as taiāpure.

29. The Aquaculture Settlement is particularly relevant to the amendments sought by Kāi Tahu in relation to MW-M5(3A), discussed further below. As explained by Ms Stevens, it is the experience of Kai Tahu that the intent and purpose of the Aquaculture Settlement can be undermined if regional coastal plans do not anticipate and provide for the gazettal of "new space" in the region.[20] Put another way, the Aquaculture

19 BoE of Tanya Stevens, [25]-[27] and [28]-36] respectively.
20 BoE of Tanya Stevens, [36].

Settlement can create an entitlement, but if the relevant resource management framework does not appropriately provide for that entitlement to be implemented, it is difficult if not impossible for new space to be taken up.

Witnesses | Kā tohuka whakaatu

30. You will hear evidence from the following witnesses as part of the Kāi Tahu presentation of its submission points on the MW and RMIA provisions of the PORPS (in no particular order):

Cultural

(a) Edward Ellison ONZM. As referred to earlier, Mr Ellison is the chair of Aukaha, the regional environmental entity ("**REE**") for Kāi Tahu ki Otago, and was one of the two mana whenua representatives on the committee responsible for overseeing the preparation of the PORPS. Mr Ellison is also the Upoko of Te Rūnanga o Ōtākou.

(b) David Higgins, Upoko of Te Rūnanga o Moeraki and a past Board member of the former Ngāi Tahu Māori Trust Board.

(c) Matapura Ellison, chairperson of Kāti Huirapa Rūnaka ki Puketeraki, and the Rūnaka representative on the Board of TRONT, where he also holds the role of Kaiwhakahaere Tuarua (Deputy Chair of TRONT).

(d) Justin Tipa, chair of Te Rūnanga o Moeraki, as well as the Rūnanga representative on the Board of TRONT. In addition to his Kāi Tahu roles, Mr Tipa works as the Director of Māori Strategy at Fonterra.

(e) Brendon Flack, a Takata Tiaki for Puketeraki Marae, as well as chair of the East Otago Taiāpure Management Committee.

(f) Evelyn Cook. Ms Cook is the Waihōpai Rūnaka representative on the Board of Te Ao Marama, the REE for Ngāi Tahu ki Murihiku, as well as representing mana whenua interests in governance roles with the Invercargill City Council, Environment Southland, and the ORC.

Planning

(g) Sandra McIntyre. Ms McIntyre is a Principal Planner at Aukaha. Ms McIntyre has over 30 years' experience in resource management planning and policy development at all levels of government.

(h) Maria Bartlett. As noted earlier, Ms Bartlett is Kaitohutohu Matua with Te Ao Marama, with over 20 years' experience in resource management strategy, policy and planning.

(i) Tanya Stevens. Ms Stevens is a Senior Policy Advisor with TRONT, in its Te Whakaariki/Strategy team. Prior to joining that team in April 2022, Ms Stevens was employed by TRONT as a Senior Planner for eight years. She has over 15 years' experience in planning and has whakapapa connections to Ngāti Kuri and Ngāi Tūāhuriri hapū.

31. Michael Bathgate has also filed evidence of behalf of Kai Tahu, in his role as a Senior Planner at Aukaha. Mr Bathgate's evidence is principally directed at other chapters of the PORPS, and he will give evidence during later hearings.

32. You will also hear evidence from Ms Ailsa Cain in support of the Cain Whānau submission. This evidence provides a compelling example of Kāi Tahu landowners with strong connections to their whenua which has been the subject of Te Tiriti breaches. The evidence demonstrates some of the issues highlighted in the Kāi Tahu evidence and submissions. Kāi Tahu accepts and respects the right of individuals and whānau to make their own submissions on the PORPS.

Issues | Kā take

33. There are three key issues that have arisen out of the section 42A reports and supplementary evidence provided by ORC; as well as the expert evidence filed by Kāi Tahu and other submitters in relation to the MW and RMIA provisions of the PORPS. They are:

(a) the proposed definition of Māori land in the Interpretation section of the PORPS, and its importance (in particular) for MW-P4 and MW-M5;

(b) the use and development of Māori land and resources under MW-P4 and MW-M5; and

(c) the recognition of rakatirataka and references to partnership in the MW and RMIA provisions.

Legal principles | Kā mātāpono ture

34. The key legal principles that apply to the development of objectives, policies, and methods within a regional policy statement and the relevant statutory criteria which inform them are well settled and unlikely to be in dispute.[21]

---

[21] As set out in the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593; and, specifically in relation to a regional policy statement, the Court of Appeal's decision in *Port Otago Limited v Otago Regional Council* [2021] NZCA 638, [2022] NZRMA 165. While the *Port Otago* decision remains subject to appeal, its application of the principles in *King Salmon* is widely accepted as orthodoxy.

35. Rather than provide a general summary of the legal principles that relate to the Kāi Tahu submission,[22] counsel will address those that have arisen out of the evidence.

Issue 1 | Te take tuatahi – proposed definition of Māori land

36. As Ms McIntyre describes, the PORPS as notified included provisions relating to the use of Māori land or ancestral land and Kāi Tahu involvement in decision-making affecting such land.[23] The notified definition was limited to that which fell within the ambit of Te Ture Whenua Māori Act 1993 ("**TTWM**").

Kāi Tahu position

37. Following discussions at pre-hearing meetings regarding the application of provisions relating to Māori land, Kāi Tahu proposed a new definition of "Māori land" to apply to all policies relating to the use of ancestral land. This is a more inclusive definition of Māori land, extending beyond land held under TTWM to properly recognise the "ancestral land base".[24] It is also intended to provide sufficient flexibility for hapū and whānau to meet their aspirations for reconnection to this land base, and to respond to the challenges of natural hazards likely to be exacerbated by the effects of climate change.[25]

38. The Kāi Tahu definition incorporates various categories of land that are regarded by mana whenua as having an equivalent purpose to Native Reserves,[26] including land that may be purchased by papatipu rūnaka in the vicinity of existing Native Reserves to offset land that has been lost.

The ORC position

39. The ORC, through its reporting officer Mr James Adams, supports a revised definition of Māori land to replace the earlier, more restrictive definition of land under TTWM. However, he disagrees with the inclusion of the following two categories:

    (a) land owned by TRONT or its constituent papatipu rūnaka; and

    (b) land owned or leased by a person or persons with evidence of Kāi Tahu whakapapa connection to the land.[27]

---

22 An excellent summary of which can be found in Paul Majurey and Christian Whata "Chapter 14 – Māori" in Derek Nolan (ed) *Environmental and Resource Management Law* (7th ed, LexisNexis, Wellington, 2020).

23 BoE of Sandra McIntyre, [31].

24 BoE of Sandra McIntyre, [32].

25 Supplementary evidence of James Adams for ORC, [37]-[40].

26 Being land that was excluded from land purchases, granted by the Native Land Court, or otherwise set aside as described in the introduction to the MW chapter. See also BoE of Sandra McIntyre, [33].

27 Where documentary evidence of whakapapa connection is provided from either the Māori Land Court or the TRONT Whakapapa Unit.

40. In relation to the first category, he cites what he sees as the "very broad" ambit and the potential to capture within the definition general land that Kāi Tahu might purchase. In relation to the second category, his concern is with the potential inclusion of leased land that is in private, non-Māori ownership, raising questions regarding what ought to happen on termination of a lease.

Kāi Tahu response – land owned by TRONT or papatipu rūnaka

41. In response to the first concern, the ORC has already accepted that the extension of the definition beyond land held under TTWM is appropriate, as it better recognises the historical relationship between Kāi Tahu and these lands, including land that has been returned through the Settlement Act.[28] Mr Adams' proposed definition already acknowledges that general land could be purchased by Kāi Tahu (or their whānau) and fall within the definition of Māori land, under his fourth and seventh categories, namely:

    (a) general land owned by Māori that was previously Māori freehold land and is in the ownership of Kāi Tahu whānui; and/or

    (b) land owned by a person or persons with evidence of Kāi Tahu whakapapa connection.

42. In that respect, ORC's concern regarding the breadth of the proposed definition appears to be more apparent than real.

43. In any event, the Kāi Tahu definition of Māori land better implements the direction in s 6(e) to recognise and provide for the relationship Kāi Tahu has with their ancestral lands.

44. The settled interpretation of "ancestral lands" includes all land which has, at one time, been owned by ancestors.[29] The nature of the Kāi Tahu relationship with any given land within its takiwā is a matter of fact and degree that may vary in accordance with the circumstances.[30]

45. The Crown has acknowledged its failure to set aside adequate lands for Kāi Tahu use, and to provide adequate economic and social resources for Kāi Tahu.[31] It has also acknowledged its failure to

---

28 Supplementary evidence of James Adams for ORC, [36].

29 *Royal Forest and Bird Society v Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81, in relation to s 3(1)(g) of the Town and Country Planning Act 1977; affirmed in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA). See also *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [101] and fn 121. The statement by Ms McLean for Transpower Ltd at her [6.33(a)] that the definition of Māori land goes beyond those matters protected under s 6(e) is based upon a misapprehension as to the definition of "ancestral lands".

30 See, for example, *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 (HC).

31 Settlement Act, s 6(2).

preserve and protect Kāi Tahu use and ownership of such of their land as they wished to retain.[32]

46. Those failures are directly relevant to the relationship of Kāi Tahu with their whenua, including general land that they may wish to purchase. There was very little reserve land set aside in Otago and, as Edward Ellison notes, less than 50% of the land that *was* reserved remains in the ownership of whānau and hapū.[33] As a result, the current ownership of ancestral land by whanau is not limited to land in Native Reserve or TTWM tenure.

47. Furthermore, alienation of land has been associated with a corresponding loss of opportunities for cultural use by Kāi Tahu whānau.[34] Matapura Ellison describes the approach his papatipu rūnaka at Karitane has adopted in purchasing land where they are able to, with the view to establishing a viable papakāika development.[35] Mr Ellison notes that some communally owned land at Karitane is right on the sea, and is subject to the effects of coastal erosion, making it unsuitable for papakāika.[36]

48. Mr Tipa explains some of the realities associated with developing on existing Native Reserves,[37] and the need to ensure that there is appropriate infrastructure, sufficiently enabling provisions, and appropriate protection of mana whenua values for both reserved lands *and* the wider areas surrounding them.

49. These are just two examples of the need for a broader definition expressed by Ms McIntyre in her evidence,[38] one that provides a better ability for Kāi Tahu to reconnect with the whenua.

Kāi Tahu response – leasehold land

50. The ORC's second concern, in relation to leasehold land, ought to be no different to general land held by Kāi Tahu that (however unlikely it may be) could be bought and sold on the open market. If freehold land can be developed according to a more permissive framework and then on-sold, there would appear to be no reason to distinguish leasehold land on the basis that the underlying title is held by someone else.

51. On termination of any lease, the land (if developed) would enjoy the same existing use rights under s 10 of the RMA as other developed land. There is no logical basis upon which to treat leasehold land any differently from freehold land in that respect.

---

32 Settlement Act, s 6(3).
33 BoE of Edward Ellison, [93].
34 BoE of Edward Ellison, [70].
35 BoE of Matapura Ellison, [36].
36 BoE of Matapura Ellison, [36].
37 BoE of Justin Tipa, [26]-[30].
38 See para 35 above.

52. Including land leased by a person with evidence of a Kāi Tahu whakapapa connection within the definition of Māori land also ensures that the definition does not create anomalies based purely on tenure. It would avoid, for example, arbitrarily excluding a Kāi Tahu holder of a Crown pastoral lease from the definition, where inclusion of that land within the definition would better recognise and provide for their relationship with it.[39]

Conclusion

53. In conclusion, the definition of Māori land included in Ms McIntyre's Appendix 1 is the most appropriate, efficient and effective means of implementing the strong directions in ss 6(e), 7(a) and 8 of the RMA in relation to the policies that rely upon it.

Issue 2 | Te take tuarua – MW-P4 and MW-M5 – use and development of Māori land and resources

54. Many of the submissions above apply with equal force to the Kāi Tahu submission on MW-P4 and MW-M5. The intent of these provisions is to provide clearer direction in relation to the management of Māori land, the rationale for which is set out in Ms McIntyre's evidence at paragraphs 26 to 36.

Kai Tahu position

55. In its submission, Kāi Tahu sought amendments to MW-P4 to ensure that the clause focussed on enabling the use of Māori land, leaving any restrictions on that use to be assessed in the context of a district plan. Accordingly, it sought the deletion of three sub-clauses which (as notified) sought to constrain this enabling policy. Minor amendments were sought to MW-M5, which have now been superseded by the proposed inclusion of a definition of Māori land.

ORC position

56. In his supplementary evidence, Mr Adams for the ORC has agreed to the deletion of the three sub-clauses.[40] He correctly identifies that the areas in which the ORC seeks to constrain use (particularly, health and safety and effects on matters of national importance) are addressed elsewhere in the PORPS.[41]

57. He proposes some consequential amendments to MW-M5 to assist with implementation and interaction with other provisions.[42] Mr Adams says the changes are intended to require district and regional plans to

---

39 See also, in that regard, s 5 of the Crown Pastoral Land Act 1998, as amended by the Crown Pastoral Land Reform Act 2022, which also requires the Crown to recognise and provide for Māori relationships with ancestral land where, inter alia, consent for a discretionary pastoral activity is sought.

40 Supplementary evidence of James Adams for ORC, [60].

41 Ibid.

42 Supplementary evidence of James Adams for ORC, [63].

provide a pathway for Kāi Tahu to develop their lands where there is conflict with other matters of national importance.[43]

Kāi Tahu response

58. Ms McIntyre has reviewed Mr Adams' proposed amendments to MW-M5 and recommended an amendment to the "pathway" clause to require recognition of Kāi Tahu rakatirataka (discussed further below) and allow Kāi Tahu to lead in the management of any adverse effects of such use on the environment. While Ms McIntyre supports the general intent of Mr Adams' proposed amendments, she considers that her suggested amendment is necessary to avoid unnecessary constraints on the ability of mana whenua to make decisions about the use of their whenua.[44] This is particularly vital where there have been historic barriers to development or underdevelopment.[45] The PORPS represents a significant opportunity to unlock native reserves and Māori land for Kāi Tahu whānau. As discussed in the evidence of Evelyn Cook, the Catlins area is a good example of such land, where recognition of Kāi Tahu rakatirataka would enable whānau to better use and develop their own land.[46]

59. If the ORC is to be consistent in its approach, then Ms McIntyre's proposed drafting ought to be preferred. MW-M5 is the primary method aimed at implementing the policy direction in MW-P4. Reference to matters of national importance have been removed from MW-P4, in reliance upon their inclusion elsewhere in the PORPS. If reference to other matters of national importance is to be removed from MW-P4, then they have no place in MW-M5.

60. In any event, it is important not to be too prescriptive at this stage as to how conflicts with other matters of national importance are to be managed. The majority of the Supreme Court in *King Salmon* held that the "*scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice"* when promulgating plans and policy statements.[47] It is also well-established that there is no internal hierarchy as between different matters of national importance in s 6 of the RMA.[48]

61. Other mandatory relevant considerations, including kaitiakitaka under s 7(a) and the principles of Te Tiriti under s 8, may also carry more weight than matters of national importance under s 6, depending on

---

43 Ibid.
44 BoE of Sandra McIntyre, [72(c)].
45 BoE of Maria Bartlett, [42] – [45].
46 BoE of Evelyn Cook, [15].
47 *King Salmon*, above n 21 at [91] and [127]. See also *Port Otago*, above n 21 at [81].
48 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC). See also *Freda Pena Reweti Whanau Trust v Auckland Regional Council* HC Auckland CIV-2005-404-356, 9 December 2005 at [72].

the particular circumstances.[49] Given the potential for site and/or location-specific factors to influence those judgements, it is important that higher-order directions do not ultimately stifle them through the application of broad brush policy.

62. For those reasons, Kāi Tahu remains of the view that the most appropriate, efficient and effective wording of MW-M5 is that contained in Ms McIntyre's Appendix 1.

Responses to other submitters' positions – Dunedin City Council

63. Mr Freeland for Dunedin City Council ("**DCC**") has sought the reintroduction of the three sub-clauses referred to above into MW-P4, on the basis that their exclusion would result in the absence of consideration of adverse effects on, inter alia, matters of national importance when developing Māori land.[50] As Ms McIntyre explains, when read holistically with her proposed MW-M5, the need to manage adverse effects of the use and development of Māori land remains clear.[51] Ms McIntyre's approach recognises and provides for rakatirataka in determining how such effects should be managed.

64. Mr Freeland's approach also ignores the requirement for district and regional councils to make thorough-going attempts to reconcile policies relating to the use and development of Māori land with other, potentially conflicting, policies when promulgating lower order documents.[52] On a proper reading of the PORPS, the concerns he raises do not arise.

Response to other submitters –Transpower

65. Ms McLeod for Transpower argues that the drafting of MW-P4 as agreed between Ms McIntyre and Mr Adams does not give effect to the National Policy Statement for Electricity Transmission 2008 ("**NPSET**"), because it does not address potential reverse sensitivity effects on the National Grid. She recommends an amendment to Policy EIT-INF-P15 to address this issue, including a specific reference to Māori land.

66. Ms McIntyre responds to the issues raised by Ms McLeod in her rebuttal evidence.[53]

67. In our submission the drafting of MW-P4 is not inconsistent with the NPSET. This matter will be addressed in more detail in legal

---

49 *Ngāti Maru Iwi Authority Inc v Auckland City Council & Anor* HC Auckland AP18-SW01, 24 October 2002 at [20]. See also *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407, [2012] NZRMA 523 at [68].

50 BoE of Paul Freeland for DCC, [10].

51 Rebuttal evidence of Sandra McIntyre, [13].

52 As required under the established orthodoxy in *King Salmon,* above n 21 at [129]), and *Port Otago*, above n 21 at [82].

53 Rebuttal evidence of Sandra McIntyre, [8] – [12].

submissions for the Energy, Infrastructure and Transport (**EIT**) chapter.

Issue 3 | Te take tuatoru – recognition of rakatirataka and references to partnership

68. The third and final issue is the appropriate recognition of rakatirataka and reference to partnership in the MW and RMIA provisions. Ms McIntyre addresses this at her paragraph 75 in relation to MW-O1 and MW-E1.

Kāi Tahu response to submissions opposing the framing of MW-O1

69. Kāi Tahu made further submissions opposing requests by other parties who sought the dilution of the recognition of rakatirataka and kaitiakitaka, and insertion of other parties' issues into the RMIA chapter. Kāi Tahu also opposed submissions which sought to amend the reference in MW-O1 to giving effect to the principles of Te Tiriti by means of a partnership approach, on the basis that s 8 of the RMA only requires those principles to be taken into account.[54]

70. Those requests have, in our submission, rightly been rejected by Mr Adams in his section 42A report.[55]

71. Three points can be made in response to those submitters.

72. The first point is to reiterate that the RMA leaves "*considerable flexibility and scope for choice*" as to how obligations under s 8 of the RMA are to be complied with.[56] Requiring the principles of Te Tiriti to be given effect to through a partnership approach is one option available to a regional council in preparing a regional policy statement, and is consistent with the constitutional status of Te Tiriti as "*essential to the foundation of New Zealand*",[57] and the guarantee of rakatirataka under Article 2 of Te Tiriti.

73. The Supreme Court in the *Trans-Tasman Resources* decision held that a broad and generous approach to the construction of Treaty clauses is required.[58] The Court also held that an intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.[59]

---

54 In particular, Federated Farmers, Fonterra, and the Otago Water Resource User Group.

55 Section 42A Report, Chapter 4, [102].

56 *King Salmon*, above n 21 at [91] and [127].

57 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 1888 (HC) at 210.

58 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NSC 127, [2021] 1 NZLR 801 at [8], [149]-[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

59 *Trans-Tasman Resources*, above n 58 at [151] per William Young and Ellen France JJ, and Williams J at [296].

74. While *Trans-Tasman Resources* was decided under a different Treaty clause,[60] the Court's reasoning is relevant to the Commissioners' consideration of how it chooses to respect Treaty principles for the following reasons:

(a) The relevant section begins by stating that "[*i*]*n order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act…*". Phrased in that way, the Crown's responsibility to give effect to Treaty principles is not so much a creature of statute, but a matter of constitutional law.[61]

(b) One of the principal ways in which the Crown's obligations are met is the requirement to "take into account" effects of activities on existing interests.[62] So, requirements to "give effect to" and "take into account" Treaty relationships are entirely capable of standing side-by-side.

(c) The Court held that the way in which s 12 of that Act[63] was framed did not have the effect of ousting Treaty principles themselves, which was not surprising given their "constitutional significance".[64]

75. Requiring those involved in resource management processes and decisions to "give effect to" Treaty principles via a partnership approach is entirely consistent with the "broad and generous approach" that is required to be taken to the interpretation of Treaty clauses.

76. The second point is that, although there is an internal hierarchy within ss 6 to 8,[65] the Court has previously held that whether an obligation to "take into account" Treaty principles under s 8 has more or less importance than other obligations in ss 6 and 7 involves an *"interpretative exercise which must ultimately depend on the relevant subject matter of each of the three sections and the context of the evaluation"*.[66]

77. The context in this case is the strong relationship between Kāi Tahu and their whenua, as recognised by the Settlement Act, and the historical actions of the Crown which acted to undermine that relationship. A requirement to "take into account" Treaty principles in

---

60 Namely s 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

61 See also the Heritage New Zealand Pouhere Taonga Act 2014; the Education and Training Act 2020; as well as the Natural and Built Environments Bill.

62 Which include interests in the settlement of a historical or contemporary Treaty claim.

63 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

64 *Trans-Tasman Resources*, above n 58 at [150].

65 *Trans-Tasman Resources,* above n 58 at [56].

66 *Ngāti Ruahine*, above n 48 at [68].

that context may require something more than simply "supporting", "considering" or parroting the words of s 8 in the relevant objective.

78. Kāi Tahu submit that the "something more" in this case is the requirement to give effect to Treaty principles through utilising a partnership approach.

79. The third point is to note that MW-O1 is framed in such a way as to implement both ss 6(e), 7(a) and 8 of the RMA. Although it refers to "the principles of Te Tiriti", it is impossible to view those principles in a vacuum by reference only to s 8, as the submitters in opposition appear to suggest. The Crown's duty of "*active protection of Māori people in the use of their land and waters to the fullest extent practicable*"[67], as a direct response to its guarantee of rakatirataka under article 2, is both inextricably linked to, and finds expression in:[68]

    (a) the requirement to recognise and provide for that relationship under s 6(e); and

    (b) the duty to have particular regard to kaitiakitaka under s 7(a).

80. In that way, MW-O1 does not only address s 8, and should not be confined to it. The wording recommended by Mr Adams is the most appropriate, efficient and effective means of implementing all of the relevant directives in Part 2, and should be preferred.

MW-E1 – references to partnership

81. Finally, and in response to a submission by the Otago Water Resource Users Group ("**OWRUG**"), Mr Adams in his section 42A report recommended an amendment to MW-E1 to include a reference to ensuring mana whenua engagement with and participation in resource management "in partnership with local authorities".[69]

82. In her evidence-in-chief, Ms McIntyre said that the wording requested by OWRUG and Mr Adams' recommended amendment suggests that the role and participation of Kāi Tahu in resource management is limited by such partnership.[70] Ms McIntyre considers that this does not appropriate reflect the rakatirataka and kaitiakitaka role of Kāi Tahu, as described by Kāi Tahu cultural witnesses.

---

67 As described by the Court of Appeal in the *Lands case* (*New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA)) at 664.

68 *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 1111 (EnvC) at [37]; *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (EnvC) at [76]. See also *Tuwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 93, [2018] NZRMA 520 at [46]-[47].

69 Section 42 A Report, Chapter 4, [251].

70 BoE of Ms McIntyre, [75].

83. She has suggested a further amendment in her Appendix 1, to remove the word "in" and replace it with "<u>including through</u> partnership with local authorities".

84. Partnership is just one of the principles of Te Tiriti that will need to be given effect to under MW-O1. The Environment Court has recently held that taking into account the principles of Te Tiriti requires:[71]

(a) the active participation by tangata whenua in resource management decision-making;

(b) engagement with tangata whenua in good faith;

(c) the pursuit of reciprocity and mutual benefit;

(d) protection of resources of importance to tangata whenua from adverse effects; and

(e) positive action to (actively) protect tangata whenua interests.

85. While the principle of partnership underpins many of those required actions, it is not the only principle that requires implementation. The principles of rakatirataka, active protection, the duty to act reasonably and in good faith; and equity also require implementation through the PORPS and lower order documents promulgated under it.

86. It would be inappropriate for MW-E1 to be cast in such a way that could limit how Te Tiriti principles are to be implemented in ensuring mana whenua engagement with, and participation in, resource management processes and decision-making.

87. The amendments proposed by Ms McIntyre in her Appendix 1 are the most appropriate, efficient and effective means of conveying the true meaning of MW-O1 and the policies that sit beneath it.

Conclusion

88. Kāi Tahu looks forward to its participation in the hearings on the PORPS. They seek outcomes which reflect the strong directions in ss 6(e), 7(a) and 8, directions which must be borne in mind at every stage of this process, both procedurally and in the recommendations that you make.

89. The MW and RMIA provisions are of critical importance to the expression of Kāi Tahu rakatirataka, kaitiakitaka and mana, sitting (as they do) at the strategic level within the internal structure of the PORPS.

---

71 *Aratiatia Livestock Ltd & Ors v Southland Regional Council* [2020] NZEnvC 191 at [6].

90. The combined evidence of the Kāi Tahu witnesses provides a compelling argument for the adoption of the amendments set out in Ms McIntyre's Appendix 1 to those chapters, in order for the PORPS to fully capture Kāi Tahu aspirations for the future benefit of its whenua, whānau and the Otago region as a whole.

Dated 20 January 2023

A M Cameron | J A Riddell
Counsel for Kāi Tahu