

**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 non-freshwater parts of the **LF** –  
Land and Freshwater provisions of  
the **PORPS**

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**LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU**

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## LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU

### May it please the Commissioners | Ki kā Kaikōmihana

#### Introduction and summary | Whakatakika

1. These submissions are filed in support of the Kāi Tahu position on the non-freshwater parts of the Land and Freshwater (“**LF**”) provisions of the PORPS.
2. The division of the PORPS into “freshwater” and “non-freshwater” parts, in an attempt to comply with the directions of the High Court in declaratory relief proceedings brought by the Council, has added significant complexity to what is already a procedurally challenging task. While Kāi Tahu does not wish to revisit the conclusions reached by the High Court, it wishes to highlight some of the issues caused by the way in which the ‘split’ was undertaken.
3. The lack of consistency and/or logic in the way that the split has occurred has caused a number of problems for submitters, ORC and the Commissioners alike. That is not least because, when viewed through a te ao Māori lens, and consistent with the concept of ki uta, ki tai, many of the matters that remain within the “non-freshwater” parts of the PORPS, and particularly, the LF provisions, will impact upon Te Mana o te Wai and the mauri of freshwater bodies and the ecosystems they support which are earmarked for the next process.
4. That said, Kāi Tahu acknowledges that it must address the provisions that are the subject of this hearing; and seek relief in relation to them. Its principal concern relates to the difficulty of ensuring that, regardless of split, the PORPS continues to provide for the integrated management of land and freshwater within the region.
5. These submissions address the legal issues that arise out of the evidence, and the differences of opinion between the Kāi Tahu witnesses and the witnesses for ORC and other submitters, namely:
  - (a) the requirements in relation to the role of takata whenua under the National Policy Statement for Freshwater Management 2020 (“**NPSFM**”);
  - (b) the role of Te Mana o te Wai, and the need to transition from a “balancing” approach to one that puts the health and wellbeing of water bodies and related ecosystems first;
  - (c) the use of Māori land, and the relationship with the National Policy Statement on Highly Productive Land (“**NPS-HPL**”); and
  - (d) the ability to discern between, and prioritise different forms of primary production under the NPS-HPL.

### The “split” between freshwater and non-freshwater parts

6. This section of the submissions summarises the position of Kāi Tahu in relation to the divisions of the PORPS. This position was shared with ORC officers and legal counsel following the declaratory relief proceedings and prior to the Council’s final decision on how to “split” the PORPS. To that extent, the criticisms made will not be unfamiliar to ORC, but may be new to the Commissioners.

#### *The High Court’s judgment*

7. In its judgment on the ORC’s application for declaratory relief, the High Court held that ORC was not entitled to treat the entirety of the PORPS as a freshwater planning instrument.<sup>1</sup> Instead, ORC was required to review the PORPS to identify those parts that “relate to freshwater”. The Court held that it was only those parts that relate to freshwater that could go through the freshwater planning process under s 80A of the RMA.
8. The Court sought to provide guidance to ORC in its task of dividing the PORPS into “freshwater” and “non-freshwater” parts, by saying that “relates to freshwater” in s 80A(3) of the RMA means:
- (a) “...directly relate to the maintenance or enhancement of freshwater quantity or quality”;<sup>2</sup> and
  - (b) “...relate directly to matters that will impact upon the quality or quantity of freshwater, including groundwater, lakes, rivers and wetlands”.<sup>3</sup>
9. The Court considered that only those parts of the NPSFM that give effect to freshwater quality or quantity were relevant to the freshwater planning process.<sup>4</sup> While *obiter*, these comments have informed the approach taken by ORC, through what Kāi Tahu says is an unduly narrow interpretation.

#### *Exclusion of provisions relating to cultural values from the “freshwater” parts*

10. In particular, several provisions relating to cultural values, mana whenua values in freshwater, and mana whenua involvement in freshwater management were excluded from the freshwater planning instrument on the basis that these do not relate to freshwater quality and quantity.<sup>5</sup>
11. ORC’s reason for excluding those provisions was centred on paragraph 196 of the Judgment, where the High Court said that “*there are parts of the [NPSFM], particularly the fundamental concept of Te Mana o te Wai and ki uta ki tai, that refer to the values tangata whenua attach to the*

<sup>1</sup> *Otago Regional Council v Royal Forest and Bird Society Incorporated* [2022] NZHC 1777, [2022] NZRMA 565 (“**Judgment**”) at [170]-[171].

<sup>2</sup> Judgment at [192].

<sup>3</sup> Judgment at [202].

<sup>4</sup> Judgment at [192].

<sup>5</sup> See eg RMIA-WAI-I2, LF-WAI-P2, LF-WAI-M1, LF-WAI-E1, and LF-WAI-AER1.

*quality of freshwater and the need for those values to be recognised in the management of freshwater issues”.*

12. ORC interpreted that paragraph, in the broader context of the Court’s attempt to provide guidance as to the differentiation between parts that “directly relate” to freshwater quality and quantity, and those that did not, as the High Court “*exclud[ing] references to...the values that mana whenua attach to freshwater*” from the freshwater planning process.<sup>6</sup>
13. Counsel submits that conclusion results from an overly simplistic (and narrow) interpretation of the Court’s findings. Rather than exclude those provisions from consideration, in my submission the Court was indicating the absence of a clear link – while ultimately leaving the final determination as to what “*directly relates to freshwater quantity or quality*” to ORC.
14. The result of that overly simplistic result has been to divorce provisions which, on Kāi Tahu’s view, go squarely to freshwater quantity or quality from their immediate context, requiring them to be considered alone in a separate process. ORC failed to consider whether or not a direct relationship existed between the provisions and the process, and simply acted to exclude them.

#### *Giving effect to the NPSFM*

15. One of the complexities that arises out of the Judgment is the Court’s conclusion at paragraph 207 that whatever split is undertaken, that “*does not mean the fundamental concept[s] of Te Mana o te Wai, ki uta ki tai and integrated management can be disregarded in either process*”. In making decisions on the non-freshwater parts of the PORPS, the Commissioners are still required to give effect to the NPSFM and the directions set out therein. As the Court held at paragraph 208, those concepts will be “*fundamental to regional councils in the formulation of a proposed regional policy statement*”.<sup>7</sup>
16. The Court went on to say that regional councils may choose to prepare a specific freshwater plan for the sole purpose of giving effect to the NPSFM, so that all provisions in those documents will go through the freshwater planning process.<sup>8</sup> ORC has placed particular weight on the words “*directly related to*” in reaching an outcome on the split.
17. An alternative interpretation of the Court’s guidance is that, insofar as it relates to a regional policy statement, those provisions which are intended to give effect to the NPSFM ought to go through the freshwater planning process. The words “*directly related to*” ought to be read in that context, and subject to that requirement.
18. Counsel submit that, if a more holistic approach had been taken which focussed on what was necessary to give effect to the NPSFM, the resulting split would have looked very different to what is before the Commissioners now. In particular, provisions that inform Te Mana o te Wai, ki uta ki tai,

<sup>6</sup> Recommendation report by ORC at [21].

<sup>7</sup> And to the Environment Court on appeal, where rights of appeal remain.

<sup>8</sup> Judgment at [210].

and the mauri of freshwater bodies and the ecosystems they support, would have been managed together through a bespoke process designed to implement the relevant national direction. This is particularly so for Te Mana o te Wai, which is a construct that does not exist outside of the NPSFM.

19. Failure to take a holistic approach to implementing the NPSFM has led to a number of anomalies, including:
  - (a) the exclusion of references (in the freshwater planning process) to the integrated or holistic management of water and other resources, on the basis that a link to integrated management alone is insufficient to relate to freshwater quantity or quality – see, in particular, LF-WAI-P3 (Integrated management / ki uta ki tai) which provides crucial policy direction for management of both water quantity and quality;
  - (b) the apparently indiscriminate division of issues statements, objectives, policies and methods relating to Te Mana o te Wai between the two processes;
  - (c) the exclusion of provisions that, in addition to freshwater quality, relate to soil management (through adopting a “sole purpose” test, as opposed to a “direct relationship”); and
  - (d) exclusion of key definitions from the freshwater planning instrument, which are essential to the interpretation of key objectives and policies.
  
20. The provision-by-provision approach adopted by ORC has also separated policies from their related objectives or methods. Amendment to a key objective in one process may substantially alter the rationale for a policy in the other; and changes to a policy or method in one process may mean that they no longer relate back to the relevant higher-order direction in the other. To illustrate the difficulties this has created, attached and marked **Appendix 1** is a table showing the “split” in order of the relevant objectives, as well as the policies and methods which sit beneath them.
  
21. No relief is sought from the Commissioners in relation to the way in which the split has occurred. ORC is *functus officio* in that regard, and the decision to split is not subject to challenge. However, these criticisms are offered as helpful background context for the key points that arise out of the evidence on those provisions that remain part of the “non-freshwater” process.

### The role of takata whenua under the NPSFM

22. The evidence provided by Kāi Tahu cultural witnesses describes:<sup>9</sup>
- (a) the centrality of wai to Kāi Tahu cultural identity, and the rakatira rights and kaitiakitaka obligations that arise from the whakapapa relationship with water;
  - (b) the importance to mana whenua of recognising the interconnectedness of the whenua, wai māori, and wai tai; and
  - (c) the degradation that has occurred through failure to recognise and reflect this interconnectedness in resource management processes to date.
23. The importance of these issues to Kāi Tahu is reinforced by the policy direction in the NPSFM, including:
- (a) the sole Objective and its emphasis on the health and well-being of water bodies and freshwater ecosystems;
  - (b) the need to give effect to Te Mana o te Wai under Policy 1;
  - (c) the requirement to actively involve takata whenua in freshwater management (including decision-making processes), and the identification and provision for Māori freshwater values pursuant to Policy 2;
  - (d) the integrated management of freshwater and the “whole-of-catchment” approach required under Policy 3;
  - (e) the requirements under cl 3.2 to:
    - (i) engage with takata whenua in determining how Te Mana o te Wai applies to water bodies and freshwater ecosystems;
    - (ii) enable the application of mātauranga Māori to the management of freshwater;
    - (iii) adopt an integrated approach, ki uta ki tai, to the management of freshwater;
    - (iv) include an objective within the regional policy statement for the region that describes how the management of freshwater in the region will give effect to Te Mana o te Wai;
  - (f) the requirements under cl 3.4 to actively involve takata whenua in the processes identified above; and to adopt a ki uta, ki tai approach under cl 3.5.

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<sup>9</sup> See references in the evidence of Sandra McIntyre at [99].

*Mana whakahaere*

24. In her primary evidence, Ms McIntyre supports the intent behind LF-WAI-P2, P3 and M1 and the expression of Kāi Tahu rakatirataka and kaitiakitaka as it relates to the Kāi Tahu relationship with wai.<sup>10</sup> She seeks to retain reference in LF-WAI-P2 to the “environmental, social, cultural and economic” relationships of Kāi Tahu with water bodies, which is proposed to be deleted in the section 42A report. In her opinion, this reflects the breadth and depth of the Kāi Tahu relationship as described by Edward Ellison.<sup>11</sup>
25. The exercise of mana whakahaere, which is the principle that this policy relates to, includes the power and authority to make decisions that maintain, protect and sustain the Kāi Tahu relationship with freshwater. That relationship is not purely “cultural”, but social, economic, and environmental as well. If the words that are sought to be deleted are removed, there is a real risk that the expression of Kāi Tahu rakatirataka in LF-WAI-P2 will be diluted as Ms McIntyre suggests. The wording proposed by Kāi Tahu is also consistent with the overarching emphasis on environmental, social, cultural and economic wellbeing in s 5 of the RMA.
26. The evidence of Dr Freeman for OWRUG, Federated Farmers and Dairy NZ seeks to remove reference in LF-WAI-P2 to giving practical effect to rakatirataka, and to the active involvement of mana whenua, and seeks to limit their involvement to decision-making processes (and not to freshwater management more generally). The concern is that the drafting of the proposed policy could lead to the situation where Kāi Tahu is a potentially affected party in respect of all applications for resource consents relating to water.
27. In her rebuttal evidence, Ms McIntyre explains why that concern is unfounded. She identifies, correctly in my view, that LF-WAI-P2 has a much broader focus than simply the question of affected party status; and is drafted in a way that implements the policy direction in the NPSFM referred to above. Ms McIntyre says, and I agree, that Dr Freeman’s amendments would fail to give effect to the NPSFM. The requirement for active involvement is embedded in Policy 2, as is the reference to “freshwater management” more broadly.

**Te Mana o te Wai**

28. Te Mana o te Wai is now a central freshwater concept. It has been part of the NPSFM since 2014 but has become more prominent in the 2017 and then 2020 iterations. Underpinning the NPSFM 2020 is the “fundamental concept” of Te Mana o te Wai, which is described as:<sup>12</sup>

Te Mana o te Wai is a concept that 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

<sup>10</sup> BoE of Sandra McIntyre at [99]-[102].

<sup>11</sup> Ibid at [100].

<sup>12</sup> NPSFM 2020, cl 1.3.

Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

29. In *Aratiatia Livestock Limited and Ors v Southland Regional Council* the Environment Court emphasised that the concept of Te Mana o te Wai represents a significant paradigm shift in freshwater management. In *Aratiatia*, the Court observed that Te Mana o te Wai is not a Māori centric but a water centric approach; and while expressed in te reo Māori, Te Mana o te Wai benefits all New Zealanders.<sup>13</sup> The decision set out three key understandings:

*The first key understanding*<sup>14</sup>

30. 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>15</sup>
31. While mauri is not defined under the NPSFM in either its 2017 or 2020 (or 2022) iterations, 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>16</sup> This is supported by the evidence of the Kāi Tahu witnesses.
32. 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>17</sup>

*The second key understanding*<sup>18</sup>

33. As a matter of national significance under the NPSFM 2017, the health and wellbeing of water were to be placed at the forefront of discussions and decision-making. Only then could hauora be provided for by managing natural resources in accordance with ki uta ki tai.
34. 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>19</sup>

35. 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.

<sup>13</sup> *Aratiatia Livestock Limited and Ors v Southland Regional Council* [2019] NZEnvC 191 at [6].

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

<sup>15</sup> *Ibid* at [17].

<sup>16</sup> *Ibid* at [46].

<sup>17</sup> *Ibid* at [60].

<sup>18</sup> *Ibid* at [58] – [59].

<sup>19</sup> *Ibid* at [61] – [62].



36. 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.
37. 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>20</sup>
38. In a more recent decision in Otago, the Environment Court held that *“under Te Mana o te Wai the choice between the health and well-being of water bodies and freshwater ecosystems on the one hand and the health needs of people or their social, economic and cultural well-being on the other, is a false dichotomy”*.<sup>21</sup>
39. In my submission, there has been a paradigm shift from the previous status quo that allowed the “trading off” of the wellbeing of waterbodies and freshwater ecosystems. The NPSFM 2020 clarifies the hierarchy of obligations to ensure that the health and well-being of waterbodies and freshwater ecosystems is the first priority, to be considered before the health needs of people and the ability of people and communities to provide for their social, economic and cultural wellbeing, now and in the future.
40. In the context of the provisions of the PORPS, the NPSFM 2020 does not allow for the mauri and health of the water body to be traded off or ‘balanced’ against the drive to minimise economic costs.
41. With respect to counsel for OWRUG, Federated Farmers and DairyNZ, the reference to “restoring and preserving the balance between the water, the wider environment, and the community” does not require that freshwater values need to be balanced against economic activity.<sup>22</sup> As the Court has held, within any allocative regime, the needs of water are required to be at the forefront of all discussions and decisions on fresh water.<sup>23</sup> The focus on “restoring” balance recognises this key understanding, by requiring that, first, work is required to improve the health of waterbodies. “Preserving” that balance requires that uses of land and water must be undertaken in a way that ensures the natural balance of te taiao is not disrupted, so that if the wai is cared for, so too are the people who rely upon it.<sup>24</sup>

<sup>20</sup> Ibid at [7].

<sup>21</sup> *Otago Regional Council, Plan Change 7 Water for Otago*, Interim Decision [2021] NZEnvC 164 at [321]. At [354] the Court also observed that “under Te Mana o te Wai the choice between the use of drinking water to provide for the health needs of people and protecting the health of fresh water is again a false dichotomy”.

<sup>22</sup> Cf legal submissions for OWRUG, Federated Farmers and Dairy NZ at [104] and [119].

<sup>23</sup> *Aratiatia*, above n 13 at [18], [59] and [224].

<sup>24</sup> This point is made explicitly in guidance produced by the Ministry for the Environment (“MfE”) in relation to the National Objectives Framework of the NPSFM, where officials stated that the reference to balance is **not** “intended to signal a trade-off between Te Mana o te Wai and other goals. It emphasises that healthy freshwater is a prerequisite for a healthy wider environment and community, and that it is vital

42. Finally, it is my submission that the 'health' of a waterbody as a first order priority, includes its cultural health. Recently the Environment Court accepted the description provided by Te Rūnanga o Ngāi Tahu and papatipu rūnanga that:<sup>25</sup>

*When Ngā Rūnanga talk about mahinga kai, they are not just talking about the availability of a food resource. They are talking about the spiritual essence, the lifeforce (mauri) and health (hauora) of water bodies and of the spiritual and cultural practices that healthy water bodies sustain.<sup>455</sup> They are concerned that mātauranga (knowledge) associated with customary mahinga kai activity will be lost if water is degraded,<sup>456</sup> a loss that was likened to the loss of a language.*

43. In essence, mahika kai values and mauri cannot be separated from the requirements relating to the health of the water body.
44. Counsel respectfully disagrees with the submission of counsel for OWRUG, Federated Farmers and DairyNZ where he argues that mauri must be a cultural value, and is therefore a "third tier" consideration.<sup>26</sup> In my submission, that submission fails to read the NPSFM, and the concept of Te Mana o te Wai, in a holistic and integrated fashion, and ignores the centrality of mauri to the health and wellbeing of water bodies and freshwater ecosystems. It also fails to recognise the role of mauri in sustaining both hauora, the health of the water body **and** the health of people, as recognised by the Environment Court in the *Aratiatia* interim decision referred to above.

### **Integrated management**

45. The submissions of counsel for OWRUG, Federated Farmers and DairyNZ explain, at some length, the submitters' views on the concept of integrated management and the need for objectives, policies and methods which expressly acknowledge the social and economic needs of Otago communities, including the farming and rural sectors, in order (in their view) to achieve integrated management.<sup>27</sup>
46. Counsel has previously addressed the Kāi Tahu perspective on integrated management during the hearing of submissions on the IM chapter. That perspective is reflected in the drafting of IM-P1. In summary, integrated management requires, first, the prioritisation of the life-supporting capacity and mauri of the natural environment, *and then* the ability of people and communities to provide for their social, economic and cultural wellbeing, now and in the future. That is consistent with an approach which

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to keep those elements in balance": MfE *Guidance on the National Objectives Framework of the National Policy Statement for Freshwater Management* (2023, Wellington) at 16-17.

<sup>25</sup> Ibid at [420].

<sup>26</sup> Legal submissions for OWRUG, Federated Farmers and DairyNZ at [68].

<sup>27</sup> Legal submissions for OWRUG, Federated Farmers, and DairyNZ at [98]-[110]. Counsel makes a number of inter-related arguments, which (for the avoidance of doubt) are not accepted by Kāi Tahu. This response focusses on the core thrust of that argument.

acknowledges the “core” role of environmental protection within sustainable management.

47. It is not the role of integrated management, under the guise of enabling policies for extractive and other resource-intensive uses, to attempt to “balance” or reconcile the potential for conflict by putting those uses on an equal footing, or allowing for trade-offs. To do so removes all meaning from the requirement to sustain the life-supporting capacity of the natural environment *at the same time as* enabling people to provide for their social, economic, and cultural wellbeing.<sup>28</sup> As counsel noted in oral submissions during hearings on the IM chapter, unless you prioritise the life-supporting capacity and mauri of the natural environment, you do not “pass go”.

### **The use of Māori land and the NPS-HPL**

48. In earlier submissions on the MW / RMIA provisions of the PORPS, counsel set out the argument for a more enabling set of provisions for the use of Māori land, which allow Kāi Tahu to lead in the management of any adverse effects of such use on the environment. It is accepted that any such provisions have to give effect to the NPS-HPL, as a national policy statement prepared under s 45 of the RMA.
49. As Ms McIntyre notes in paragraph 108 of her primary evidence, the directive nature of the NPS-HPL could impose limitations on the ability of takata whenua to use and develop Māori land for its intended purpose.<sup>29</sup> LF-LS-P19(2) requires that land-based primary production is prioritised on highly productive land, which would affect Māori land at Karitane.<sup>30</sup> Ms McIntyre has recommended an amendment to P19(2) to provide an exception for uses in accordance with MW-P4, to ensure that the provisions for highly productive land do not conflict with the intent of those enabling policies.
50. In my submission, and as Ms McIntyre notes in paragraphs 35 and 36 of her primary evidence, support for this approach can be found in cls 3.8 and 3.9 of the NPS-HPL.
51. Clause 3.8 requires territorial authorities to avoid subdivision of highly productive land except in specified circumstances. There is an exception provided for “specified Māori land”, which is a defined term that is similar to, but narrower than, the definition of Māori land developed for the PORPS and discussed in detail during the MW / RMIA hearings.
52. Clause 3.9 requires territorial authorities to avoid the inappropriate use and development of highly productive land, again with exceptions for both

<sup>28</sup> RMA, s 5. *Environmental Defence Society Inc v The New Zealand King Salmon Company* [2014] NZSC 38, [2014] 1 NZLR 593 at [24](d).

<sup>29</sup> This would only be exacerbated if, as counsel for OWRUG, Federated Farmers, and DairyNZ appears to submit at his paragraph 123, the same recognition should be extended to all land used for food and fibre production, not just highly productive soils. This submission is opposed by Kāi Tahu, because of the potential impact it may have on the ability of whānau to exercise tino rakatirataka and kaitiakitaka over their own resources.

<sup>30</sup> As discussed in the evidence of Matapura Ellison.

specified Māori land **and** for purposes associated with a matter of national importance under s 6 of the RMA.

53. The proposed amendments to LF-LS-P19(2) in Ms McIntyre's evidence are consistent with the exceptions for Māori land, and s 6 matters, in the NPS-HPL. The s 6(e) matter of national importance sits at the core of the more enabling approach to the use of Māori land put forward by Kāi Tahu. In my submission, the inclusion of specified Māori land and ancestral lands within cls 3.8 and 3.9 of the NPS-HPL is, in part, recognition of the importance of those relationships and ensures that regulation, however well-intentioned, does not further alienate Māori from being able to exercise their tino rakatirataka, kaitiakitaka, and mana over their lands. This interpretation is also consistent with Te Tiriti principles of autonomy, active protection, and redress, which must be taken into account under s 8.

**The need to discern between, and prioritise, different forms of primary production under the NPS-HPL**

54. Finally, Ms Bartlett points to the need to be able to discern between, and prioritise, different forms of primary production under the NPS-HPL when giving effect to it through the PORPS in her primary evidence.<sup>31</sup>
55. The NPS-HPL has adopted a definition of "land-based primary production" which means:
- production, from agricultural, pastoral, horticultural, or forestry activities, that is reliant on the soil resource of the land.
56. Ms Cook explains in her evidence how the establishment of permanent exotic carbon forests, particularly within the Catlins area, is transforming natural and cultural landscapes within that takiwā.<sup>32</sup> The effect, as Ms Bartlett describes, is to lock up land that might otherwise be used for different land-based primary production activities in perpetuity.<sup>33</sup> Ms Bartlett seeks a more restrictive definition of "land-based primary production" to exclude permanent forestry, and make it clear that other forms of land-based primary production are to be prioritised.<sup>34</sup>
57. Ms Bartlett relies on the section 32 analysis undertaken by the Ministry for the Environment ("MfE") as part of the preparation of the NPS-HPL, in support of her argument for a more restrictive definition. In particular, she notes MfE's statement that linking the definition to reliance upon the soil resource of the land "*allows councils to retain discretion over what type of land-based primary production can occur on what type of [highly productive land]*"; and "*if forestry is considered to be unsuitable for a particular piece of [highly productive land], it can still be restricted*".<sup>35</sup>

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<sup>31</sup> BoE of Maria Bartlett at [46]-[53].

<sup>32</sup> BoE of Evelyn Cook at [14].

<sup>33</sup> BoE of Maria Bartlett at [52].

<sup>34</sup> BoE of Maria Bartlett at [53].

<sup>35</sup> BoE of Maria Bartlett at [49].

58. Ms Boyd has not recommended the adoption of Ms Bartlett's suggested exclusion, on the basis that the NPS-HPL does not explicitly state that local authorities may adopt more stringent measures than those set out in the NPS-HPL,<sup>36</sup> and the general obligation to give effect to the NPS-HPL noted in cl 3.1 of the NPS-HPL.
59. In my submission, the absence of an express acknowledgment that documents promulgated under the NPS-HPL may be more stringent than the NPS-HPL itself<sup>37</sup> is not fatal to the proposed exception. As Ms Bartlett notes, a national policy statement may include constraints or limits on the content of policy statements or plans.<sup>38</sup> They may also include methods or requirements, and specifications for those methods or requirements must be applied, to achieve the objective.<sup>39</sup>
60. When read against the single objective for the NPS-HPL, which is to protect highly productive land for use in land-based primary production, both now and for future generations,<sup>40</sup> the purpose of the NPS-HPL is to provide a series of minimum standards or requirements which every local authority must meet in order to *protect* highly productive land. So long as the ORC complies with its duty to meet those minimum standards or requirements, there is no restriction on its ability to go beyond the minimum to apply a more stringent approach in the particular circumstances of a region (or, as may be the case in the Catlins, a particular area within that region).<sup>41</sup>
61. In that way, decision-makers are still constrained by the requirement to "give effect to" the NPS-HPL,<sup>42</sup> but within those constraints, scope remains to adopt an approach which responds to the particular context of a region or area by demanding greater protection. The statement in cl 3.1(2) of the NPSFM is, when viewed in that context, no more than a restatement of existing law.
62. For those reasons, and for the reasons set out in Ms Bartlett's evidence, counsel submit that the proposed amendment to the definition of "land-based primary production" is both appropriate and entirely consistent with the ORC's duty to give effect to the NPS-HPL.

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<sup>36</sup> Cf Cl 3.1(2) of the NPSFM, which explicitly states that nothing in Part 3 of the NPSFM prevents a local authority adopting more stringent measures than required by that National Policy Statement.

<sup>37</sup> Cf RMA, s 43B(1) in relation to national environmental standards, which is explicit.

<sup>38</sup> RMA, s 45A(2)(d).

<sup>39</sup> RMA, s 45A(2)(b).

<sup>40</sup> NPS-HPL, Objective 1.

<sup>41</sup> Cf the NPS-REG, which proscribes the content of regional policy statements and plans to ensure that there is minimum provision for renewable electricity generation activities. A regional policy statement which failed to include that minimum provision would fail to "give effect to" the NPS-REG. A relevant policy statement or plan could be more enabling of those activities, without failing to give effect to minimum requirements.

<sup>42</sup> *King Salmon*, above n 28 at [91].

**Conclusion**

63. In conclusion, Kāi Tahu seeks the amendment to the LFW provisions set out in Appendix 1 to Ms McIntyre's evidence, and in the evidence of Ms Bartlett.

**Dated** 9 May 2023

**A M Cameron**  
Counsel for Kāi Tahu

**Appendix 1 - Split in Land and Freshwater chapter of the Proposed Otago RPS**

Section	“Freshwater” process	“Non-freshwater” process (current hearings)
LF-WAI Te Mana o te Wai	Objective LF-WAI-O1 – Te Mana o te Wai <ul style="list-style-type: none"> <li>• Policy LF-WAI-P1 – Prioritisation</li>   <li>• Part of Principal Reasons</li> </ul>	<ul style="list-style-type: none"> <li>• Policy LF-WAI-P2 – Mana whakahaere</li> <li>• Policy LF-WAI-P3 – Integrated management/ki uta ki tai</li> <li>• Policy LF-WAI-P4 – Giving effect to Te Mana o te Wai</li> <li>• Methods</li> <li>• Explanation and part of Principal Reasons</li> </ul>
LF-VM Visions and Management	Objective LF-VM-O2 – Clutha Mata-au FMU vision Objective LF-VM-O3 – North Otago FMU vision Objective LF-VM-O4 – Taieri FMU vision Objective LF-VM-O5 – Dunedin & Coast FMU vision Objective LF-VM-O6 – Catlins FMU vision <ul style="list-style-type: none"> <li>• Policy LF-VM-P5 – Freshwater Management Units (FMUs) and rohe</li> <li>• Policy LF-VM-P6 – Relationship between FMUs and rohe</li> <li>• Explanation</li> </ul>	Objective LF-VM-O7 – Integrated management <ul style="list-style-type: none"> <li>• Methods</li> <li>• Principal Reasons</li> </ul>
LF-FW Fresh water	Objective LF-FW-O8 – Fresh water <ul style="list-style-type: none"> <li>• Policy LF-FW-P7 – Fresh water</li> <li>• Policy LF-FW-P15 – Stormwater and wastewater discharges</li> <li>• Method LF-FW-M6 – Regional plans</li> <li>• Method LF-FW-M7 – District plans</li> <li>• Method LF-FW-M8 – Action plans</li> </ul> Objective LF-FW-O9 – Natural wetlands <ul style="list-style-type: none"> <li>• Policy LF-FW-P9 – Protecting natural wetlands</li> <li>• Policy LF-FW-P10 – Restoring natural wetlands</li> </ul>	<ul style="list-style-type: none"> <li>• Policy LF-FW-P11 – Identifying outstanding water bodies</li> <li>• Policy LF-FW-P12 – Protecting outstanding water bodies</li> <li>• Method LF-FW-M5 – Outstanding water bodies</li> <li>• Method LF-FW-M9 – Monitoring</li> <li>• Method LF-FW-M10 – Other methods</li>   <li>• Policy LF-FW-P8 – Identifying natural wetlands</li> </ul> Objective LF-FW-O10 – Natural character

	Part Explanation; Principal Reasons	<ul style="list-style-type: none"> <li>• Policy LF-FW-P13 – Preserving natural character</li> <li>• Policy LF-FW-P14 – Restoring natural character</li> </ul>
LF-LS – Land and soil	<ul style="list-style-type: none"> <li>• Policy LF-LS-P18 – Soil erosion</li>   <li>• Policy LF-LS-P21 – Land use and fresh water</li>   <li>• Method LF-LS-M11 – Regional plans</li> </ul>	<p>Part Explanation</p> <p>LF-LS-O11 – Land and soil</p> <ul style="list-style-type: none"> <li>• Policy LF-LS-P16 – Integrated management (Maintaining soil quality)</li> <li>• Policy LF-LS-P17 – Soil values</li> <li>• Policy LF-LS-P19 – Highly productive land</li> </ul> <p>LF-LS-O12 – Use of land (Land and freshwater)</p> <ul style="list-style-type: none"> <li>• Policy LF-LS-P20 – Land use change</li> <li>• Policy LF-LS-P22 – Public access</li> <li>• Method LF-LS-M12 – District plans</li> <li>• Method LF-LS-M13 – Management of beds and riparian margins</li> <li>• Method LF-LS-M14 – Other methods</li> <li>• Explanation; Principal Reasons</li> </ul>