

BEFORE THE OTAGO REGIONAL COUNCIL

UNDER the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 5A (Lindis:
Integrated water management) to the Regional
Plan: Water for Otago

**EVIDENCE OF TIMOTHY MARK VIAL ON BEHALF OF
TE RŪNANGA O MOERAKI, KĀTI HUIRAPA RŪNAKA KI PUKETERAKI,
TE RŪNANGA O ŌTĀKOU AND HOKONUI RŪNANGA (KĀI TAHU)**

INTRODUCTION

1. My name is Timothy Mark Vial. I am employed by Kāi Tahu ki Otago Limited (KTKO Ltd), a regional Kāi Tahu environmental consultancy, as the Principal Planner.
2. I hold Degrees of Bachelor of Arts and Bachelor of Laws and a Master of Regional and Resource Planning from the University of Otago. I am a Full Member of the New Zealand Planning Institute (MNZPI) and an accredited hearings commissioner.
3. I have worked in resource management planning for over 13 years, including five years in various roles for the Dunedin City Council and eight years for KTKO Ltd.
4. I whakapapa to the Kāi Tahu hapū of Ngāi te Ruahikihiki and I am a member of Te Rūnanga o Ōtākou.
5. In preparing this evidence I have reviewed:
 - The statements of evidence of:
 - (i) David Higgins, Upoko,¹ Te Rūnanga o Moeraki
 - (ii) Matthew Dale, Senior Environmental Advisor (Freshwater Management), Te Rūnanga o Ngāi Tahu.
 - National Policy Statement for Freshwater Management 2014 (NPSFM)
 - Operative and Proposed Regional Policy Statement for Otago (RPS and PRPS)
 - Regional Plan: Water for Otago (RPW)
 - Proposed Plan Change 5A (Lindis: Integrated water management) to the Regional Plan: Water for Otago, including the Section 32 Evaluation Report and the Section 42A Officer's Report.
 - Kāi Tahu ki Otago Natural Resource Management Plan 2005 (NRMP).

¹ Appointed Traditional Leader

6. Although this is a Council Hearing I have read the Code of Conduct for Expert Witnesses (Rule 330A, High Court Rules and Environment Court Practice Note) and agree to comply with it. I confirm that I have complied with it in the preparation of this statement of evidence.

SCOPE OF EVIDENCE

7. I have been asked by Kāi Tahu to provide evidence in relation to:
 - The Kāi Tahu relationship with freshwater in Otago.
 - Statutory framework
 - Kāi Tahu submissions on Proposed Plan Change 5A
 - Section 42A Report.

THE KĀI TAHU RELATIONSHIP WITH FRESHWATER IN OTAGO

8. The evidence of Mr Higgins discusses the relationship of the Kāi Tahu with freshwater and the aspirations for the restoration of flows that will support their relationship with the Lindis River.
9. The Kāi Tahu relationship with freshwater in Otago is evolving as whānau give effect to their culture and traditions in an environment under stress from the current challenges of managing land and fresh water in New Zealand.
10. Degraded water quality and water quantity which has contributed to the significant loss of valued freshwater habitats and mahika kai resources, compromises this relationship with freshwater.
11. Kāi Tahu is not opposed to the development or intensification of land uses for farming or other purposes. Kāi Tahu whānau are farmers themselves, and appreciate the need for healthy economies to support people and communities both in Otago and across the takiwā. However, for Kāi Tahu it is not a choice between a healthy economy and healthy waterways. Kāi Tahu believe that both outcomes must be provided for to achieve the purpose of the Act.

STATUTORY FRAMEWORK

Resource Management Act 1991 (the Act)

12. The overall purpose of the Act is to achieve sustainable management by enabling *“people and communities to provide for their social, economic, and cultural well-being and for their health and safety, while*
- (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) *Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*²
13. The principles of the Act require Council to:
- Recognise and provide for the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development [Section 6(a)],
 - Recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga [Section 6(e)].
 - Have particular regard to kaitiakitanga [Section 7(a)].
 - Take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) [Section 8].
14. I concur with Mr De Pelsemaeker that this plan change must safeguard the social, cultural, environmental and socio-economic values supported by the Lindis River to achieve the purpose and principles of the Act.

National Policy Statement for Freshwater Management

15. I concur with Mr De Pelsemaeker that this plan change must give effect to the objectives of *Part B: Water Quantity* of the NPSFM. In addition, the *Preamble*,

² Resource Management Act 1991, Section 5

National Significance Statement and Part D. Tāngata whenua roles and interests are relevant for decision making, namely:

Preamble

The Treaty of Waitangi (Te Tiriti o Waitangi) is the underlying foundation of the Crown–iwi/ hapū relationship with regard to freshwater resources. Addressing tāngata whenua values and interests across all of the well-beings, and including the involvement of iwi and hapū in the overall management of fresh water, are key to meeting obligations under the Treaty of Waitangi; and

....

Freshwater objectives for a range of tāngata whenua values are intended to recognise Te Mana o te Wai. Iwi and hapū have a kinship relationship with the natural environment, including fresh water, through shared whakapapa. Iwi and hapū recognise the importance of fresh water in supporting a healthy ecosystem, including human health, and have a reciprocal obligation as kaitiaki to protect freshwater quality.

National Significance Statement

The aggregation of community and tāngata whenua values and the ability of fresh water to provide for them over time recognises the national significance of fresh water and Te Mana o te Wai.

Part D: Objective D1

To provide for the involvement of iwi and hapū, and to ensure that tāngata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to.

Part D: Policy D1

Local authorities shall take reasonable steps to:

- a) Involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region;*
- b) Work with iwi and hapū to identify tāngata whenua values and interests in fresh water and freshwater ecosystems in the region; and*

- c) *Reflect tāngata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region*
16. The inclusion of Te Mana o Te Wai in the Preamble reflects the Treaty Principles (section 8) and provides for the relationship of tangata whenua with freshwater (section 6(e)). Te Mana o Te Wai is incorporated into the NPSFM through the National Significance Statement, which is a korowai³ for the objectives and policies that follow, and through the National Values and Uses for Freshwater in Appendix 1.
17. Therefore, to give effect to the NPSFM this plan change must set a minimum flow and allocation limit for the Lindis River that safeguards its life-supporting capacity, ecosystem processes, and indigenous species, and that reflects Kāi Tahu values and interests.

Regional Planning Framework

18. I adopt the overview of the RPW, RPS and PRPS provisions set out in Table 1 of the Section 42A report. Though I note that the objectives and policies of Part B: Chapter 1 of the PRPS have been omitted from Table 1.
19. Chapter 5 of the RPW provides for the natural and human use values supported by Otago's lakes, rivers and their margins. Objective 5.3.2 promotes the maintenance and enhancement of Kāi Tahu spiritual and cultural beliefs, values and uses. The principal reason for adopting this objective is to protect the relationship that Kāi Tahu has with Otago's water resources. This objective is supported by Policy 5.4.2 that gives priority to avoiding, in preference to remedying or mitigating, adverse effects on the Kāi Tahu values identified in Schedule 1D.
20. Schedule 1D identifies the spiritual or cultural beliefs, values or uses associated with water bodies of significance to Kāi Tahu. The values identified for the Lindis River in Schedule 1D include:

³ Cloak

Code	Mana Interests
MA4	Wāhi taoka: Treasured resources; values, sites and resources that are valued and reinforce the special relationship Kāi Tahu have with Otago's water resources.
Code	Access/Customary Use Interests
MB3	Trails: Sites and water bodies which formed part of traditional routes, including tauraka waka (landing place for canoes).
MB4	Cultural materials: Water bodies that are sources of traditional weaving materials (such as raupō and paru) and rongoā (medicines).

21. The PRPS for Otago provides for Kāi Tahu values in Part B: Chapter 1: 'Kāi Tahu values, rights and interests are recognised and kaitiakitaka is expressed.' The opening whakataukī expresses the ki uta ki tai philosophy discussed by Mr Higgins:

He taura whiri kotahi mai anō te kopunga tai nō ī te pu au. — From the source to the mouth of the sea, all things are joined together as one.

22. The following objectives and policies of Part B: Chapter 1 are relevant to this plan change:

Objective 1.1: The principles of Te Tiriti o Waitangi are taken into account in resource management decisions.	
Policy 1.1.2: Taking the principles of Te Tiriti o Waitangi into account	
(c)	Take into account Kāi Tahu views in resource management decision-making processes and implementation, particularly regarding the relationship of their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka;
(d)	Ensure Kāi Tahu have the prerogative to: <ul style="list-style-type: none"> i. Identify their relationship with their ancestral lands, water, sites, wāhi tapu, and other taoka; and ii. Determine how best to express that relationship.

(e)	Ensure Kāi Tahu are able to exercise kaitiakitaka.
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Objective 1.2: Kāi Tahu values, rights and interests and customary resources are sustained.	
Policy 1.2.1: Managing the natural environment to support Kāi Tahu wellbeing	
(a)	Ensuring resources support their customary uses and cultural values.
(b)	Safe-guarding the life-supporting capacity of natural resources.

Ngāi Tahu Claims Settlement Act 1998 (NTCSA)

23. The Waitangi Tribunal Ngāi Tahu Report 1991 investigated the “nine tall trees” of Te Kerēme (Wai 27, the Ngāi Tahu claim), namely the eight regional purchases of Ngāi Tahu lands over two decades between 1844 and 1864, and Ngāi Tahu claims to mahinga kai resources (the “ninth tree”). This was the culmination of a claims process that unfolded over 140 years. Section 4.7.11 of the 1991 Report records the following excerpt from the Court of Appeal ruling of Sir Robin Cooke:

“the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.”⁴

24. The resulting NTCSA included as cultural redress a number of mechanisms to recognise and give practical effect to Ngāi Tahu mana over taonga resources and wāhi tūpuna. These cultural redress mechanisms include Statutory Acknowledgements, Tōpuni and nohoanga. The statutory acknowledgement for the Mata-au is set out in Schedule 40 of the NTCSA.

25. The Lindis River is the largest tributary of the main stem of the upper Mata-au. The mauri of the Mata-au system depends upon the health and function of its tributaries, as part of the whole ki uta ki tai approach to resource management.

⁴ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641

Kāi Tahu ki Otago Natural Resource Management Plan (NRMP)

26. The Council must take into account relevant planning documents recognised by an iwi authority when preparing a plan or plan change under the Act.⁵ The NRMP is a relevant planning document recognised by Te Rūnanga o Ngāi Tahu.
27. The NRMP expresses Kāi Tahu ki Otago values, knowledge and perspectives on natural resource and environmental management issues. The plan is an expression of kaitiakitaka. The objectives and policies of Section 5.3 Wai Māori are relevant to this plan change:

Objectives	
i.	The spiritual and cultural significance of water to Kāi Tahu ki Otago is recognised in all water management.
ii.	The waters of Otago are healthy and support Kāi Tahu ki Otago customs.
v.	Flow regimes and water quality standards are consistent with the cultural values of Kāi Tahu ki Otago and are implemented throughout the Otago Region and lower Waitaki Catchment.

Policies	
2.	To promote the cultural importance of water to Kāi Tahu ki Otago in all water management within the Otago Region and lower Waitaki Catchment.
4.	To protect and restore the mauri of all water.
7.	To promote to the Otago Regional Council and Environment Canterbury minimum flow levels, flow regimes, lake levels and lake operating levels for lakes and rivers that recognise and provide for Kāi Tahu ki Otago cultural values and the healthy functioning of associated ecosystems.

Conclusion on the Statutory Framework

28. The statutory framework strongly directs Council to recognise and provide for the relationship of Kāi Tahu with the Lindis River in determining the minimum flow and primary allocation, including:

⁵ Resource Management Act 1991, s.662A(a)

- Avoiding, in preference to remedying or mitigating, adverse effects on the Kāi Tahu values identified in Schedule 1D of the RPW.
- Ensuring the resources of the Lindis River support their customary uses and cultural values.
- Safe-guarding the life-supporting capacity of natural resources.
- Ensuring Kāi Tahu is able to exercise kaitiakitaka.
- Protecting and restoring the mauri of the Lindis River.

KĀI TAHU SUBMISSIONS ON PROPOSED PLAN CHANGE 5A

29. Kāi Tahu sought a minimum flow of 1,000 l/s from October to May, and a primary allocation limit of 1,000 l/s to provide for their relationship with the Lindis River. This minimum flow and allocation limit provides for:

- Meaningful continuity of flow to the confluence with the Mata-au. The evidence of Mr Dale is that a minimum flow of 1,000 l/s will provide connection through both the upper and lower losing reaches, and will provide high surety that flows at the Mata-au confluence will not drop below 400 l/s.
- Increased flow variability.
- Aquatic ecosystems and the wider needs of mahika kai, taoka species and other species of importance to Kāi Tahu.

30. In my opinion, the management regime sought by Kāi Tahu safeguards the social, cultural, environmental and socio-economic values supported by the Lindis River.

SECTION 42A REPORT

Precautionary Approach to River Management

31. I concur with Mr De Pelsemaecker that a precautionary approach is inherent in the Act and NPSFM, and that the proposed allocation limits and minimum flows need to be robust enough to ensure that the outcomes for important community values are meaningful.

32. The current over-allocation of water from the Lindis River pursuant to deemed water permits does not provide for the full range of community values, including Kāi Tahu values, associated with the river. In particular, the current extended drying reaches means that there is no continuity of flow in an average year. A meaningful continuity

of flow to the confluence is sought by Kāi Tahu to provide for their relationship with the Lindis River.

Rationale for the Proposed Summer Minimum Flow

33. The proposed minimum flow of 750 l/s contributes to the social and cultural well-being of the community but there may be a risk to those values downstream of the State Highway 8 Bridge due to low flows. I consider that a higher minimum flow will further reduce the risk to Kāi Tahu values and taoka species, as discussed in the evidence of Mr Dale.

Amending the Proposed Minimum Flow

34. In my opinion, amending the plan change proposal to provide for a lower summer flow (450 l/s or less) would not achieve sustainable management and would be contrary to the NPSFM. A lower summer minimum flow would not provide meaningful connection with the Mata-au and would not provide for Kāi Tahu values.
35. Council uses Table 4 of the Section 42A Report to justify dismissing the Kāi Tahu proposed 1,000 l/s minimum flow option. That analysis uses the existing allocation as a basis, rather than the proposed allocation limit of 1000 l/s, and is not modified for efficient irrigation practices, as was done in Table 3. Table 4 appears to be the sole justification for rejecting the flow regime proposed by Ngāi Tahu. This does not accord sufficient significance to Te Mana o Te Wai and the Kāi Tahu values to be protected in the Lindis River.

CONCLUSION

36. In Appendix 2 Council has identified that applying the flow regime requested by Kāi Tahu (1000 l/s in summer and 1600 l/s outside the irrigation season), would generally maintain iwi values and reduce the risk to those values. In contrast, the proposed 750 l/s summer minimum flow provides lower surety and increases the risk to Kāi Tahu values. It is not clear on what basis lesser provision for those values is warranted.
37. The Act elevates the relationship of Kāi Tahu to whenua (land) and wai taonga (water) as a matter of national importance to be recognised and provided for in decision-making, requires regard to kaitiakitaka and requires that the Treaty of

Waitangi principles be taken into account. The NPSFM provides a strong directive regarding the identification and reflection of tangata whenua values in fresh water management and decision-making. The flow regime proposed by Kāi Tahu gives effect to the NPSFM, including Te Mana o Te Wai.

34. This statutory context strongly directs Council to actively recognise and provide for Kāi Tahu values in the Lindis River. The flow regime proposed by Kāi Tahu for the Lindis River is a balanced proposal that incorporates consideration of existing users of the river system, as required in a Treaty partnership. The proposed summer minimum flow and primary allocation ensures that the cultural values associated with the river are restored through the proposal, and can be handed down to the next generation - mō tātou, ā, mō kā uri ā muri ake nei. Kāi Tahu Whānui deserve no less than full recognition of their values when flow is restored to the Lindis River.



Tim Vial
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