

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

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of water permit
application RM19.151
under the Regional Plan:
Water for Otago

**BSTGT LTD AND A
P MCQUILKIN, N J
MCQUILKIN, K L
SKEGGS, S A
MCQUILKIN AND G
M TODD BEING
TRUSTEES OF THE
A P MCQUILKIN
FAMILY TRUST**

Applicant

AND

**OTAGO REGIONAL
COUNCIL**

Consent Authority

AND

**TE RŪNANGA O
MOERAKI, KĀTI
HUIRAPA RŪNAKA KI
PUKETERAKI, TE
RŪNANGA O ŌTĀKOU
AND HOKONUI
RŪNANGA
(collectively Kāi Tahu
ki Otago)**

Submitters

**PLANNING EVIDENCE OF TIM VIAL
ON BEHALF OF KĀI TAHU KI OTAGO**

8 June 2021

INTRODUCTION

1. My name is Tim Vial. I hold the qualifications of Bachelor of Arts, Bachelor of Laws and Master of Regional and Resource Planning from the University of Otago. I have 19 years' experience in resource management planning and policy development, including experience in developing freshwater management policy and in assessing the effects of proposals on freshwater resources for Kāi Tahu ki Otago.
2. I am a Full Member of the New Zealand Planning Institute and an accredited hearings commissioner under the Making Good Decisions programme.
3. I am currently employed as a Senior Planner at Aukaha, a consultancy based in Otago and owned by Te Rūnanga o Waihao, Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga. My role at Aukaha is focused on freshwater planning.
4. My evidence addresses the submission of the following parties on water permit application RM19.151 by BSTGT Ltd and A P McQuilkin, N J McQuilkin, K L Skeggs, S A McQuilkin and G M Todd being trustees of the A P McQuilkin Family Trust (**the Applicant**):
 - (a) Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (collectively **Kāi Tahu ki Otago**).
5. I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note and I agree to comply with it. I confirm that the issues addressed in this statement are within my area of expertise except where I state that I am relying on information provided by another party. I have not knowingly omitted to consider material facts known to me that might alter or detract from the opinions expressed.
6. The key documents that I have referred to in preparing my evidence include:
 - (a) Resource Consent Application and Assessment of Environmental Effects prepared by Hilary Lennox, Ahikā Consulting, dated 26 April 2019 (**the application**).
 - (b) Amendments to the application dated 27 November 2020 and 3 March 2021.
 - (c) The evidence of Hilary Lennox, Dean Olsen, Matthew Hickey, and

Tony McQuilkin for the Applicant.

- (d) The Otago Regional Council s42A staff recommending report (**the Officer's report**) and the evidence of Bryony Miller, Bas Veendrick and Hilary Lough.
- (e) The Otago Regional Plan: Water (**RPW**), including Proposed Plan Change 7 (**PPC7**).
- (f) The Partly Operative Otago Regional Policy Statement (**PORPS**).
- (g) The National Policy Statements for Freshwater Management (**NPSFM 2017** and **NPSFM 2020**);
- (h) The following iwi planning documents lodged with ORC:
 - i. Te Rūnanga o Ngāi Tahu Freshwater Policy 1999 (**NTFP**);
 - ii. The Kāi Tahu Ki Otago Natural Resource Management Plan 2005 (**NRMP**); and

SCOPE OF EVIDENCE

- 7. My evidence will address the following matters:
 - (a) The submission on the application by Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga.
 - (b) The relationship of Kai Tahu with wai māori, and the importance of protecting the mauri of water bodies.
 - (c) The statutory direction in the RMA and higher order planning documents that is relevant to the current application including the expression of Te Mana o Te Wai in the NPSFM 2020, and the implications for the assessment of the effects of this application.
 - (d) The role played by Proposed Plan Change 7 (**PPC7**) in enabling a transition to a freshwater planning framework within Otago that is compliant with the NPSFM 2020, and the implications for the appropriate consent term.
 - (e) The residual flow that should be applied to the primary take from the Royal Burn North Branch and New Chums Creek.

EXECUTIVE SUMMARY

- 8. The Kāi Tahu submission on this application arose from concerns that the application does not appropriately protect the mauri of the Royal Burn

North Branch and New Chums Creek, fails to recognise Te Mana o te Wai and does not give sufficient weight to the direction in PPC7.

9. Mauri is a critical element of the spiritual relationship of Kāi Tahu with wai māori, and an important component of an intact mauri is maintaining the natural connectivity and variability of flow of these water bodies.
10. In my opinion, the setting of quantitative residual flows as proposed by Ms King is required to give effect to the NPSFM 2020 and is consistent with the policy direction of the Partially Operative Regional Policy Statement and the Iwi Management Plans.
11. I do not support the visual residual flow conditions proposed by Ms Lennox as there is no certainty that this would provide for the health and well-being of the Royal Burn North Branch and New Chums Creek.

KĀI TAHU SUBMISSION

12. Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga submitted on the application. The submission relates to the application in its entirety.
13. In summary, the submission asserts that the application:
 - (a) Does not appropriately provide for the Kāi Tahu relationship with water and, specifically, does not protect the mauri of the Royal Burn North Branch and New Chums Creek.
 - (b) Fails to give effect to Te Mana o te Wai as required by the National Policy Statement for Freshwater Management 2020; and
 - (c) Does not give sufficient weight to the objective and policies of PPC7 in respect to the term of the consent.
14. The submission sought the following relief:
 - (a) That the term of consent be no longer than 6 years.
 - (b) Retain existing requirements for water meter(s) and ensure results are recorded and reported via telemetry.
 - (c) Retain existing requirements for a fish screen over the intake structure.
 - (d) Set a minimum flow of 90% of the mean annual low flow (MALF) and an allocation limit of 30% of MALF to protect the mauri of the Royal Burn North Branch and New Chums Creek and to support

Te Mana o te Wai by providing for connectivity and a variability of flow that reflects the natural characteristics of these water bodies.

15. Kāi Tahu have considered the Officer's Report and the Applicant's evidence and have amended the relief sought, namely:

(a) The request for a fish screen over the intakes is withdrawn.

KĀI TAHU RELATIONSHIP WITH WAI MĀORI

16. The Kāi Tahu submission describes the centrality of freshwater to Kāi Tahu identity and wellbeing, namely:

All wai māori is of great significance to Kāi Tahu. Kā Rūnaka have responsibilities through whakapapa to act as kaitiaki and care for catchments as a whole. The right of Kāi Tahu to oversee land, resources, aspirations and wellbeing was protected under the Treaty of Waitangi, and this right still exists today, as recognised by the Ngāi Tahu Settlement.

All water plays a significant role in our spiritual beliefs and cultural traditions, the condition of water is seen as a reflection of the health of Papatūānuku. The loss and degradation of this resource through drainage, pollution and damming is a significant issue for Kāi Tahu ki Otago and is considered to have resulted in material and cultural deprivation.

The primary management principle for Kā Rūnaka is the maintenance and enhancement of the mauri or life-giving essence of a resource. Mauri is a critical element of the spiritual relationship of Kāi Tahu with wai māori, recognising that all elements of the natural environment possess a life force, and all forms of life are related. Mauri can be tangibly represented in terms of elements of the physical health of the land, a river, or surrounding biodiversity.

17. Kāi Tahu is supportive of development within its takiwā, where activities are undertaken in a way that maintains and enhances mauri and gives effect to Te Mana o te Wai.

THE APPLICATION

18. I adopt the description of the proposal as set out in the Officer's report and as summarised in the evidence of Ms Lennox and Mr McQuilkin

19. The Applicant is applying for the replacement of deemed permits that authorise abstraction from the Royal Burn North Branch and New Chums Creek. Primary take is sought for irrigation and stock water.

20. There are two intakes on the Royal Burn North Branch, namely:
- a. The upper intake (**Site 1**) consists of a pipeline located in the Royal Burn North Branch and a small weir structure that allows water to pond around the intake structure.
 - b. The lower intake (**Site 2**) where flow is diverted into the Brodie Race. A manually operated control gate was installed on this intake in August 2019.¹
21. The intake on New Chums Creek consists of a small, stacked stone weir structure that allows water to pool around the gated intake pipe.

RECEIVING ENVIRONMENT

22. I concur with Ms King that the existing deemed permits do not form part of the receiving environment as it cannot be assumed that the existing deemed permits will in fact be replaced, or replaced on the same conditions.
23. The High Court decision of *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council*² affirms that the receiving environment excludes the effects of the activities for which the renewal consents are sought.
24. In assessing the effects of this proposal consideration must be given to the naturalised flows of the Royal Burn North Branch and New Chums Creek.
25. I adopt the description of the Royal Burn North Branch and New Chums Creek as set out in the Officer's report, and as summarised in the evidence of Mr Hickey and Mr Veendrick.
26. The Ministry for the Environment River flows database estimates the Royal Burn North Branch to have a mean flow of 33.7 L/s and a 7DMALF of 10.7 L/s upstream of the upper point of take. New Chums Creek is estimated to have a mean flow of 19.8 L/s and a 7DMALF of 4.7 L/s.³

ACTUAL AND POTENTIAL EFFECTS ON THE ENVIRONMENT

27. Section 104(1)(a) of the Resource Management Act 1991 (**the Act**) requires Council to have regard to any actual and potential effects on the environment of allowing the activity.
28. An assessment of the actual and potential effects of the proposed take on the hydrology of Royal Burn North Branch and New Chums Creek by Mr

¹ Email from Hilary Lennox, 19 May 2021

² *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, [62] – [68]

³ Evidence of Bas Veendrick for the Otago Regional Council, at [23].

Veendrick concludes that:

- (a) The proposed combined rate of take from the Royal Burn North Branch and New Chums Creek exceeds both the reported mean flow and 7DMALF of these waterbodies. The proposed abstraction represents a significant proportion of the flow in these waterbodies.⁴
 - (b) The magnitude of the proposed take has the potential to significantly decrease the flow downstream of the proposed abstractions. Without an appropriate residual flow condition this may result in a seepage flow below the point of take for considerable periods of time.⁵
 - (c) The proposed visual residual flows below the take points are unlikely to reduce the pressure on Royal Burn North Branch and New Chums Creek at low flows.⁶
 - (d) A residual flow of 90% of 7DMALF at the Royal Burn North Branch upper intake and New Chums Creek intake is supported.⁷
 - (e) A residual flow of 90% of 7DMALF at the Royal Burn North Branch lower intake is potentially restrictive for the applicant due to the potential for losses to groundwater between the upper and lower intakes and 50:50 flow sharing is supported at this take site.⁸
29. The permits this application seeks to replace were originally granted prior to 28 February 1998 and Ms King concludes that they retain their primary allocation status in accordance with Policy 6.4.2 of the RPW. Further, the Applicant has reduced the combined rate of take sought to 89.5 L/s which reflects upgraded intake infrastructure on the Royal Burn North Branch and historical use on New Chums Creek.⁹
30. In my opinion there is scope under the RPW to reduce allocation to mitigate the effects of the combined take on the health and wellbeing of these waterbodies. Policy 6.4.2A provides for the grant from within primary allocation of **no more water** (emphasis added) than has been taken under the existing consent in at least the preceding five years.

⁴ Evidence of Bas Veendrick for the Otago Regional Council, at paragraphs [12] and [32]

⁵ Evidence of Bas Veendrick for the Otago Regional Council, at paragraph [59]

⁶ Evidence of Bas Veendrick for the Otago Regional Council, at paragraphs [13] and [33]

⁷ Evidence of Bas Veendrick for the Otago Regional Council, at paragraph [61]

⁸ Evidence of Bas Veendrick for the Otago Regional Council, at paragraphs [52] and [61]

⁹ Assessment of historic use, Method 10A.4.1, which was notified as part of Plan Change 7

31. Further, the setting of residual flows at the point of take is available under the RPW to manage the effects of the proposed abstraction on the hydrology of these waterbodies.
32. Ms King recommends a residual flow of 9.6 L/s on the upper Royal Burn North Branch take, 50:50 flow sharing at the lower Royal Burn North Branch take, and a residual flow of 4.2 L/s on the New Chums Creek take to mitigate the effects of abstraction on these waterbodies.

RELEVANT STATUTORY DIRECTION

33. The Officer's Report provides an assessment of the application against the higher order documents. In general, I agree with Ms King's assessment, and I do not consider it is necessary to discuss the statutory direction in detail. Instead, I will highlight matters that I consider are of relevance to the Kāi Tahu submissions.
34. I agree with Ms King's assessment that resource consent is required under the Regional Plan: Water (**RPW**) and proposed Plan Change 7 (Water Permits) of the RPW (**PPC7**). Overall, the application must be considered as a restricted discretionary activity in accordance with section 88A(1A), being the activity status that applied under the RPW when the application was lodged.
35. I also agree with Ms King that the provisions of PPC7 are a relevant consideration under s104 RMA, as are the NPSFM 2020, and the Partially Operative Regional Policy Statement 2019 (**PORPS**). The relevant iwi management plans are the Kāi Tahu ki Otago Natural Resource Management Plan 2005 (**NRMP**) and Te Rūnanga o Ngāi Tahu Freshwater Policy Statement 1999.

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

36. The concerns underlying the Kāi Tahu submissions relate directly to Part 2 of the RMA, particularly to sections 6(e), 7(a) and 8, and to the implementation of these provisions through the NPSFM 2020 and the concept of Te Mana o te Wai.
37. The submission describes the depth and breadth of the relationship of Kāi Tahu with the region's waterbodies. Aspects of this relationship include:
 - (a) The ongoing ability to refer to recognisable characteristics of water bodies to maintain connections with history and traditions.

- (b) The spiritual, cultural and physical importance of maintaining or restoring the mauri of waterbodies.
 - (c) Use of the waterways and the mahika kai they support.
 - (d) The experience of visiting the water body.
 - (e) Involvement, as kaitiaki, in monitoring and improving freshwater resources; and
 - (f) Passing on traditions, knowledge, and values to successive generations.
- 38.** Section 7(a) requires Council to have particular regard to kaitiakitanga.
- 39.** Section 8 of the RMA requires Council to take into account the principles of the Treaty of Waitangi when exercising its functions and powers under the RMA. It has been held that taking into account the principles of the Treaty of Waitangi requires the following:¹⁰
- (a) The active participation by tangata whenua in resource management decision-making.
 - (b) Engagement with tangata whenua in good faith.
 - (c) Seeking of reciprocity and mutual benefit.
 - (d) Protection of resources of importance to tangata whenua from adverse effects; and
 - (e) Positive action to protect tangata whenua interests.
- 40.** In my view, it is evident that giving effect to sections 6(e), 7(a) and (8) of the RMA requires active protection of the relationship of Kāi Tahu with the Royal Burn North Branch and New Chums Creek by setting residual flows that maintain the natural connectivity and variability of flow of these water bodies

Te Mana o te Wai - National Policy Statement for Freshwater Management 2020

- 41.** Te Mana o te Wai is a fundamental concept in freshwater management. It was first introduced in the NPSFM 2017 and its significance has been expanded in the NPSFM 2020. The NPSFM 2020 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.*”

¹⁰ Aratiatia Livestock Limited and Ors v Southland Regional Council [2019] NZEnvC 191 at [6]

*It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.*¹¹

42. The concept of Te Mana o te Wai also recognises the relationship of tangata whenua with freshwater, including through:
- (a) the principles of mana whakahaere and kaitiakitanga that recognise the authority and obligations of tangata whenua in regard to sustaining the health and well-being of, and their relationship with, freshwater; and
 - (b) requiring regional councils to actively involve tangata whenua in freshwater management.
43. The objective of the NPSFM-2020 is to ensure that natural and physical resources are managed in a way that prioritises:
- (a) first, the health and well-being of water bodies and freshwater ecosystems.
 - (b) second, the health needs of people (such as drinking water).
 - (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.
44. This objective and Policy 1 give effect to Te Mana o te Wai in freshwater management. Policy 2 requires that Māori freshwater values are identified and provided for.
45. While there is yet to be a substantial body of case law on the NPSFM 2020, decisions of the Environment Court on the concept of Te Mana o Te Wai in the NPSFM 2017 remain relevant in my view as the NPSFM 2020 builds on the provisions of the NPSFM 2017. The Environment Court in *Aratiatia Livestock Limited and Ors v Southland Regional Council [2019]* emphasised that the concept of Te Mana o te Wai introduced in the NPSFM 2017 represents a significant paradigm shift in freshwater management. This decision sets out three key understandings:
- The first key understanding*¹²
46. 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

¹¹ National Policy Statement for Freshwater Management 2020, s.1.3.

¹² *Aratiatia Livestock Limited and Ors v Southland Regional Council [2019] NZEnvC 191* at [17]

the mauri of the water.¹³

47. While mauri is not defined under the NPSFM 2017 or NPSFM 2020, the Environment Court has noted that all things (animate and inanimate) have mauri, a life force. Being interconnected, the mauri of water provides for the hauora (health) and mauri of the environment, waterbodies and the people.¹⁴

48. 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.¹⁵

*The second key understanding*¹⁶

49. As the matter of national significance under the NPSFM 2017, the health and wellbeing of water are to be placed at the forefront of discussions and decision-making. Only then can hauora be provided for by managing natural resources in accordance with ki uta ki tai.

50. 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*¹⁷

51. 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.

52. 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.

53. 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*

¹³ Ibid at [17]

¹⁴ Ibid at [46]

¹⁵ Ibid at [60]

¹⁶ Ibid at [58] – [59]

¹⁷ Ibid at [61] – [62]

of resources protect the water's mauri and health?”¹⁸

54. It is acknowledged that the applicant has taken some steps to protect the mauri and health of Royal Burn North Branch and New Chums Creek by upgrading the intake infrastructure for the lower Royal Burn North Branch take and reducing the primary take sought from these waterbodies.
55. The Applicant has also proposed that no water will be abstracted from the Royal Burn North Branch for irrigation if the flow in the Royal Burn drops below 5 L/s above the LOFTS take. However, the purpose of this low-flow condition is to minimise the potential adverse effects of the Royal Burn North Branch takes on downstream users rather than to protect instream values.¹⁹
56. In my opinion, the abstraction of a significant proportion of the flow in these waterbodies does not uphold Te Mana o te Wai nor does it provide for the health and well-being of these water bodies. The setting of appropriate residual flows is required to provide for Te Mana o te Wai and the health and wellbeing of Royal Burn North Branch and New Chums Creek.

Partially Operative Regional Policy Statement (PORPS) 2019

57. Council made parts of the proposed Regional Policy Statement operative in January 2019. All of the remaining provisions, excluding provisions relating to port operations, have now been made operative and were added to the PORPS on March 15, 2021. As a result, the Regional Policy Statement for Otago 1998 is now revoked.
58. Full consideration of the operative provisions of the PORPS is now required. The relevant provisions of the PORPS that are relevant to the Kāi Tahu submissions include:
 - (a) **Objective 1.2 and Policy 1.2.1:** Recognise and provide for the integrated management of natural and physical resources to support the wellbeing of people and communities in Otago.
 - (b) **Objective 2.1 and Policy 2.1.2:** The principles of Te Tiriti o Waitangi are taken into account in resource management processes and decisions, including recognising and providing for the relationship of Kāi Tahu's culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka;

¹⁸ Ibid at [7]

¹⁹ Evidence of Hilary Lennox for the Applicant, at paragraph [40].

- (c) **Objective 2.2 and Policy 2.2.1:** Manage the natural environment to support Kāi Tahu wellbeing by safeguarding the life-supporting capacity of natural resources.
- (d) **Objective 3.1:** The values (including intrinsic values) of ecosystems and natural resources are recognised and maintained or enhanced where degraded.
59. Objective 1.2 and Policy 1.2.1 of the Partially Operative RPS 2019 seek to achieve integrated management by, among other matters: coordinating the management of interconnected natural and physical resources, including recognising that values and effects may extend beyond the immediate point of take and promoting methods that reduce or negate the risk of exceeding sustainable resource limits. This objective and policy are given effect by Policy 6.4.7 of the RPW, which enables the setting of residual flows at the point of take to provide for aquatic ecosystems and the natural character of waterbodies.
60. Mauri, as discussed above, is a critical element of the Kāi Tahu relationship with wai māori, recognising that all elements of the natural environment possess a life force, and that all forms of life are connected through whakapapa. Maintaining a rate of flow below the points of take that reflects naturalised flow rates is required to safeguard the mauri of the Royal Burn North Branch and New Chums Creek.
61. It is my assessment that the setting of residual flows at the point of take that reflect natural flow conditions is required for consistency with Objective 2.1 and Policy 2.1.2, Objective 2.2 and Policy 2.2.1, and Objective 3.1.
62. Overall, I conclude that the setting of quantitative residual flows for the take from Royal Burn North Branch and New Chums Creek is required by the objectives and policies of the PORPS.

Regional Plan: Water for Otago

63. Ms King has assessed the application against the relevant policies in the RPW, including the PPC7 policies. I agree with her assessment of those policies. I discuss below the context for PPC7 as this is relevant to the weighting that should be given to this plan change.

Proposed Plan Change 7

64. The adequacy of the RPW to manage freshwater water abstraction was assessed in the Skelton Report (2019) in light of the imminent expiry of the

transitional provisions for deemed permits under s386 of the RMA. The Minister concluded from the Skelton Report that the current framework for managing freshwater resources within the Otago region was not fit for purpose and not in line with the then-current national directions, including the NPSFM.

65. In response to that report, the Minister for the Environment directed the Otago Regional Council (**Council**) to prepare a plan change to the Otago Regional Plan; Water (proposed PC7) and has used his powers to 'call in' that plan change to be heard and determined by the Environment Court.
66. Proposed PC7 seeks to create a consenting pathway to allow deemed permits and expiring water permits to be authorised with a new water permit for a short term. The purpose of this plan change is not to give effect to the NPSFM 2020, but to maintain the status quo while Council develops a freshwater planning framework which gives effect to the NPSFM 2020 and the PORPS. The short consent term promoted by PPC7 provides a safeguard to ensure that the ability to implement the new planning framework is not undermined by consents with terms extending beyond the life of a new Land and Water Regional Plan.
67. I concur with Ms King that consents for a longer duration are now a non-complying activity and are therefore not anticipated by PPC7. Consents for a duration more than six years will only be granted where:
 - (a) The activity will have no more than minor adverse effects (including no more than minor cumulative effects) on the ecology and the hydrology of the surface water body (and any connected water body) from which the abstraction is to occur; and
 - (b) The resource consent granted will expire before 31 December 2035

Proposed Freshwater Planning Framework for Otago

68. The proposed freshwater planning framework includes a revised Regional Policy Statement and a Land and Water Regional Plan (**LWRP**).
69. Aukaha has worked with Kāi Tahu ki Otago to define Te Mana o te Wai as an objective, policies and methods for inclusion in the Regional Policy Statement. This definition, objectives and policies are attached to my evidence as Appendix 1.
70. The work undertaken by mana whenua to define Te Mana o te Wai is the

beginning of a substantial programme of work with Council that will inform the development of the LWRP and will recognise and validate Kāi Tahu rights, interests and responsibilities in freshwater management and give effect to the NPSFM 2020.

Iwi Management Plans

71. The Kāi Tahu ki Otago Natural Resource Management Plan 2005, and the Te Rūnanga of Ngāi Tahu Freshwater Policy Statement are other matters which are relevant in considering this application under s104(1)(c).
72. I consider that the following direction in the iwi management plans, both in general objectives and policies and in those specifically relating to freshwater and mahika kai/ biodiversity objectives and policies, are particularly relevant:
- (a) Recognition and support for the rakatirataka and kaitiakitaka of Kāi Tahu ki Otago, upholding their mana through management of resources, and effective participation in resource management activities.²⁰
 - (b) Ki uta ki tai management of resources, and management for future generations.²¹
 - (c) Recognition, in all water management, of the spiritual and cultural significance of water to Kāi Tahu ki Otago.²²
 - (d) Healthy waters that support Kāi Tahu customs; and²³
 - (e) Protection and restoration of mauri, and recognition that each waterway has its own mauri, mana, values and uses;²⁴
73. In my opinion, the setting of quantitative residual flows that allow 90% of 7DMALF to remain in these water bodies is required by the relevant objectives and policies of the Iwi Management Plans.

Conclusion on the Statutory Direction

74. In summary, the RMA, NPSFM, PORPS and Iwi Management Plans all direct that the health and well-being of water bodies and freshwater ecosystems are prioritised when assessing applications to take water. The

²⁰ NRMP 5.2.1, 5.2.3 and 5.2.4; NTFP 6.4

²¹ NRMP 5.2.2;

²² NRMP 5.3.3.1, 5.3.3.5, 5.3.4.2.2, 5.3.4.2.7; NTFP 6.1

²³ NRMP 5.3.3.2; NTFP 6.3

²⁴ NRMP 5.3.4.2.4; NTFP 6.2

setting of residual flows at the point of take is required to provide for the health and well-being of the Royal Burn North Branch and New Chums Creek by maintaining a rate of flow that reflects naturalised flow rates.

WEIGHTING OF THE OPERATIVE AND PROPOSED PLAN

75. I concur with Ms King that the provisions of the PPC7 are particularly directive and are a significant departure from the operative provisions of the RPW. In my opinion, the provisions of PPC7 should be given significant weight, as they are an interim step to achieving the purpose of the Act and giving effect to the NPSFM 2020.
76. The early decision on weighting between proposed and operative plans in resource consent decision-making was *Hanton v Auckland City Council* [1994] A10/94 which was later confirmed by the Court of Appeal in *Bayley v Manukau CC* [1999] 1 NZLR 56. In those cases, the Court said there is no one general rule about weighting but that each case should be considered based on its own circumstances. The decisions identified relevant factors to consider including: the stage in the planning process of the proposed plan, possible injustice, and the extent to which the proposed plan provisions may implement a coherent pattern of objectives and policies.
77. In more recent cases, the Environment Court has indicated that it may be appropriate to give more weight to a proposed plan than an operative plan, particularly when dealing with issues not adequately managed in an operative plan (for example, *Auckland Regional Council v Waitakere Council* A065/08).
78. The stage a proposed plan is in the planning process is one matter for the consent authority to consider when placing 'weight' on the provisions of the operative and proposed plans, but it is not the sole determinant. Other matters must also be considered, including:
- (a) The age of the operative plan provisions;
 - (b) The reason for the change in position in the proposed plan; and
 - (c) Potential injustice to the applicant or other parties.
79. In my opinion, the age of the operative RPW and the fact that PPC7 was directed by the Minister for the Environment to deal with a significant 'gap' in this operative plan are relevant matters that ought to be considered under s104(1)(c) of the RMA and influence the relative weight given to the two

documents under s104(1)(b).

CONSENT CONDITIONS

80. Policy 6.4.7 of the RPW requires an assessment of the need for a residual flow at the point of take to provide for aquatic ecosystems and natural character. I agree with the residual flows proposed by Ms King for the Upper Royal Burn North Branch take and New Chums Creek take (Conditions 4 and 6 of RM19.151.01) and the requirement for modification of the existing weirs to provide these residual flows (Conditions 7, 8 and 13 of RM19.151.01).

81. Ms Lennox proposes that Conditions 4, 5 and 6 should be replaced with one condition that states the following:

*Water must not be abstracted from a point of take when a continuous residual flow extending 50 metres downstream from that point of take cannot be maintained.*²⁵

82. In my opinion, a requirement to provide a visual residual flow rather than a quantitative residual flow would add unnecessary monitoring and compliance. Further, there is no certainty that a visual residual flow would provide for the health and wellbeing of these waterbodies. Mr Veendrick similarly concludes that an appropriate residual flow is required to mitigate the effects of the proposed abstraction on these water bodies.

83. Kāi Tahu ki Otago do not support 50:50 flow sharing at low flows at the lower Royal Burn North Branch take (Site 2). In my opinion, a residual flow of 90% of 7DMALF is required to provide for the health and well-being of the Royal Burn at this location.

Condition 5: The Consent Holder must maintain a residual flow of at least 9.6 litres per second at the intake on the Lower Royal Burn (Site 2) at all times when the Consent Holder is exercising this consent to abstract water from the Creek.

84. Ms Lennox has expressed concern over proposed Conditions 7, 8 and 13, and the requirement to install a pipe below the partial weirs to provide the recommended residual flows.²⁶ In my opinion, these concerns can be addressed by rewording Conditions 7, 8 and 13:

Condition 7: a) The Consent Holder must install a rated weir below the

²⁵ Evidence of Hilary Lennox for the Applicant, at paragraph [148]

²⁶ Evidence of Hilary Lennox for the Applicant, at paragraphs [149] – [152]

intake at the Upper Royal Burn take at NZTM 2000 E1275616 N5012955 to provide the residual flow specified in Condition 4 prior to the first exercise of this consent. b) The Consent Holder must provide the Consent Authority photographs of the weir within 10 working days following installation. Photographs must be in colour and be no smaller than 200 x 150 millimetres in size and be in JPEG form.

Condition 8: a) The Consent Holder must install a rated weir below the intake on New Chums Creek at NZTM 2000 E1274643 N5015072 to provide the residual flow specified in Condition 6 prior to the first exercise of this consent. b) The Consent Holder must provide the Consent Authority photographs of the weir within 10 working days following installation. Photographs must be in colour and be no smaller than 200 x 150 millimetres in size and be in JPEG form.

Condition 13: The rated weir as required by Conditions 7 and 8 must be maintained in good working order, to ensure the weir is performing as designed. Records must be kept of all inspections and maintenance, and these should be made available to the Consent Authority on request

85. In my opinion, the installation of a rated weir structure would better provide for naturalised flows and flow variability below the points of take than a pipe depending on the design of the weir. I recommend that the design of the weirs take this into account. Further, the installation of rated weirs designed for these locations by a suitably qualified hydraulic engineer would address the concerns of Ms Lennox.

86. It is my understanding that there is no existing weir structure at this location that would enable the Applicant to maintain a residual flow below the lower Royal Burn North Branch take, as required by Condition 5. In my opinion, this should be addressed through a new condition of consent:

Condition xx: a) The Consent Holder must install a rated weir below the intake at the Lower Royal Burn take at NZTM 2000 E1275632 N5012344 to provide the residual flow specified in Condition 5 prior to the first exercise of this consent. b) The Consent Holder must provide the Consent Authority photographs of the weir within 10 working days following installation. Photographs must be in colour and be no smaller than 200 x 150 millimetres in size and be in JPEG form.

A consequential amendment to Condition 13 would then be required to ensure that this weir was maintained in good working order and performing

as designed.

CONSENT DURATION

- 87.** In my opinion, the Applicant has not sufficiently considered Te Mana o te Wai or taken steps to mitigate the effects of the application. In effect the Applicant seeks to continue the status quo. I do not support the granting of this consent for a period of 15 years as recommended by Ms King.

CONCLUSION

- 88.** The applicant has taken some steps to protect the mauri and health of Royal Burn North Branch and New Chums Creek by upgrading the intake infrastructure for the lower Royal Burn North Branch take and reducing the primary take sought from these waterbodies.
- 89.** However, the abstraction of a significant proportion of the flow in the Royal Burn North Branch and New Chums Creek below the point of take does not uphold Te Mana o te Wai nor does it provide for the health and well-being of these water bodies.
- 90.** In my view, the setting of quantitative residual flows as proposed by Ms King is required to give effect to the NPSFM 2020 and is consistent with the policy direction of the PORPS and the Iwi Management Plans.

Tim Vial

8 June 20219

Appendix 1

**Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku Te Mana o te Wai definition,
objective and policies**

Te Mana o Te Wai

Water is a central element in Kāi Tahu creation traditions. It was present very early in the whakapapa of the world: in the beginning there was total darkness, followed by the emergence of light and a great void of nothingness. In time Maku mated with Mahoronuiatea which resulted in great expanses of water, then Papatuanuku and Takaroa met and had children after which Takaroa took a long absence. Papatūanuku met Rakinui and they had many children who conspired to force their parents coupled bodies apart to let the light in. They were also responsible for creating many of the elements that constitute our world today - the mountains, rivers, forests and seas, and all fish, bird and animal life. The whakapapa and spiritual source of water and land are connected, and water bodies are the central unifying feature that connects our landscapes together. The spiritual essence of water derives from the atua and the life it expresses is a reflection of the atua.

The whakapapa of mana whenua and water are also integrally connected. There is a close kinship relationship, and mana whenua and the wai cannot be separated. The tūpuna relationship with water, and the different uses made of the water, provide a daily reminder of greater powers – of both the atua and tūpuna. This relationship continues into the present and future and is central to the identity of Kāi Tahu. The mana of wai is sourced from the time of creation and the work of the atua, invoking a reciprocal relationship with mana whenua based in kawa, tikanga and respect for water's life-giving powers and its sanctity.

The kinship connection engenders a range of rights and responsibilities for mana whenua, including rakatirataka rights and the responsibility of kaitiakitaka. Kaitiakitaka encompasses a high duty to uphold and maintain the mauri of the wai. If the mauri is degraded it has an impact not only on the mana of the wai but also on the kinship relationship and on mana whenua. The mauri expresses mana and connection, which can only be defined by mana whenua. Recognising rakatirataka enables mana whenua to enjoy their rights over water bodies and fulfil their responsibilities to care for the wai and the communities it sustains.

The condition of water is seen as a reflection of the condition of the people - when the wai is healthy, so are the people. Kawa and tikanga have been developed over the generations, based on customs and values associated with the Māori world view that span the generations. Recognising and honouring te mana o te wai and upholding the mauri of the wai is consistent with this value base.

Each water body is unique. This is a reflection of its unique characteristics and whakapapa, and it means that each river has different needs. Management and use must recognise and reflect this.

Objectives

O1 Te Mana o Te Wai

The mauri of Otago's water bodies and their health and well-being is protected, restored where it is degraded, and land and water is managed in a way that recognises and reflects that:

- (1) water is the foundation and source of all life - na te wai ko te hauora o ngā mea katoa,
- (2) there is an integral kinship relationship between water and Kāi Tahu whānui, and this relationship endures through time, connecting past, present and future, and
- (3) each water body has a unique whakapapa and characteristics that must be provided for,
- (4) water and land have a connectedness that supports and perpetuates life,
- (5) Kāi Tahu are enabled to exercise their kaitiakitaka duty of care and attention over wai and all the life it supports.

Policies

LF-P1 Prioritisation

In all management of fresh water in Otago, prioritise:

- (1) first, the health and well-being of water bodies and freshwater ecosystems, te hauora o te wai and te hauora o te taiao, and the exercise of mana whenua to uphold these,²⁷
- (2) second, the health and wellbeing needs of people, te hauora o te tangata, interacting with water through ingestion (such as drinking water and consuming harvested resources) and immersive activities (such as harvesting resources and bathing), and
- (3) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

LF-P2 Mana whakahaere

Recognise and give practical effect to Kāi Tahu rakatirataka in respect of fresh water by:

- (1) facilitating partnership with, and the active involvement of mana whenua in freshwater management processes,

²⁷ In matters of mana, the associated spiritual and cultural responsibilities connect natural resources and mana whenua in a kinship relationship that is reciprocal and stems from the time of creation.

- (2) sustaining the environmental, social, cultural and economic relationships of Kāi Tahu with water bodies,
- (3) providing for a range of customary uses, including mahika kai, specific to each water body, and
- (4) incorporating mātauranga into decision making, management and monitoring processes.

LF-P3 Holistic management/ ki uta ki tai

Manage use of fresh water in accordance with tikanga and kawa, using a holistic approach that:

- (1) sustains and restores water flows, water quality, form and function that reflect the valued characteristics of the water body, including seasonal needs and variability,
- (2) sustains and restores the habitats of mahika kai and indigenous species, including taoka species associated with the water body,
- (3) provides for safe contact with fresh water and consumption of mahika kai and drinking water,
- (4) recognises, sustains and restores the connections between waterbodies (large and small, surface and ground, fresh and brackish or saline, permanently flowing, intermittent and ephemeral),
- (5) sustains and restores connections between fresh water bodies and the coastal environment,
- (6) recognises the connections between land and water and manages the effects of land use and development on freshwater,
- (7) has regard to foreseeable climate change risks, and
- (8) has regard to cumulative effects and the need to apply a precautionary approach where there is limited available information or uncertainty about potential adverse effects.