

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2024-412-000041

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

UNDER

s 299 and cl 56 of Schedule 1 to
the Resource Management Act
1991 ("**RMA**")

IN THE MATTER OF

an appeal against decisions on the
freshwater planning instrument-
related parts of the Proposed
Otago Regional Policy Statement
2021

BETWEEN

**OCEANA GOLD (NEW
ZEALAND) LIMITED**

Appellant

AND

OTAGO REGIONAL COUNCIL

Respondent

SUBMISSIONS ON BEHALF OF KĀI TAHU

Dated 14 February 2025

Solicitor instructing:
Chris Ford



Te Rūnanga o **NGĀI TAHU**

15 Show Place
Christchurch 8024
PO Box 13 046,
Christchurch 8042
P: 03 363 8958
E: ttw@ngaitahu.iwi.nz

Counsel acting:
Aidan Cameron

BANKSIDE CHAMBERS

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

SUBMISSIONS ON BEHALF OF KĀI TAHU

May it please the Court:

1. These submissions are filed on behalf of Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (collectively, “**Kāi Tahu ki Otago**” or “**Kā Rūnaka**”); Te Ao Marama Incorporated on behalf of Waihopai Rūnaka, Te Rūnanga o Ōraka Aparima, and Te Rūnanga o Awarua (collectively, “**Ngāi Tahu ki Murihiku**”); and Te Rūnanga o Ngāi Tahu, together referred to as “**Kāi Tahu**”.
2. Kāi Tahu have given notice of their interest in the remaining appeal point raised by the Oceana Gold (New Zealand) Ltd (“**Oceana Gold**”) appeal under s 301 of the Resource Management Act 1991 (“**RMA**”) relating to LF-WAI-O1 of the Proposed Otago Regional Policy Statement (“**PORPS**”).
3. Kāi Tahu have had the benefit of reviewing both the submissions for the appellant and the respondent. As indicated when leave was sought to file a s 301 notice out of time, Kāi Tahu intends to, and will adopt a neutral position on the appeal by Oceana Gold and the relief sought.
4. The purpose of these submissions is to set out some additional background context to the introduction of LF-WAI-O1; how it was ultimately formulated by the Panel; and the importance of the concept of Te Mana o te Wai as being “*rooted in mana, tapu, mauri, whakapapa, the interconnectedness of the elements of te taiao, and the rights and obligations of rakatirataka and kaitiakitaka*”.¹ It is hoped that these submissions are of assistance to the Court in its consideration of the issues raised by Oceana Gold's appeal.

Te Mana o te Wai

5. The submissions for the respondent set out, correctly in my submission, the key provisions of the National Policy Statement for Freshwater Management 2020 (“**NPSFM**”) which sit behind LF-WAI-O1.

¹ Evidence of Edward Ellison on behalf of Kāi Tahu dated 28 June 2023, [15] [CB2296]

6. They include cl 1.3, which describes the fundamental concept of Te Mana o te Wai; the sole objective, which reflects the hierarchy of obligations in Te Mana o te Wai; and Policies 1 and 5; as well as clause 3.2 which address how the NPSFM is to be implemented through lower-order planning instruments.
7. Particularly, under cl 3.1, and the Overview of Part 3: Implementation, the NPSFM says:
 - (1) This Part sets out a non-exhaustive list of things that local authorities **must** do to give effect to the objective and policies in Part 2 of this National Policy Statement, but nothing in this Part limits the general obligation under the [RMA] to give effect to the objective and policies in Part 2 of this National Policy Statement.

(emphasis added)
8. The requirements in cl 3.2, including the requirement to engage with communities and tangata whenua to determine how Te Mana o te Wai applies to waterbodies and freshwater ecosystems in the region, are important mandatory directions which form part of a regional council's obligations under s 62(3) of the RMA.
9. Having engaged with communities and tangata whenua as to the approach to be taken to Te Mana o te Wai in the Otago region, it was then the respondent's obligation to include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to Te Mana o te Wai.² This was the genesis of LF-WAI-O1.

Engagement

10. As Mr Ellison describes, rūnaka had their first discussions with the respondent about Te Mana o te Wai and the PORPS in early 2020, pre-dating its current formulation in the NPSFM. Mr Ellison noted *"some reservations about engaging with this term, given our experience of the way te reo meanings have been modified when co-opted in policy and legislative documents (as, for example, kaitiakitanga in the RMA)".*³

² NPSFM, cl 3.2(3).

³ Evidence of Edward Ellison on behalf of Kāi Tahu dated 28 June 2023, [14]. [CB2296]

11. As Mr Ellison says, despite those reservations, it was important for Kāi Tahu to provide their own interpretation of Te Mana o te Wai, so that what the term meant to them as mana whenua was “*clearly visible*”. Kāi Tahu held a wānaka (or discussion) in June 2020 to develop a statement for their interpretation of Te Mana o te Wai, which was further refined over months before being finalised in the version which was attached to Mr Ellison’s evidence as Appendix 2.⁴

12. That statement reads:

Te Mana o te Wai

The mauri of Otago’s water bodies and their health and well-being is protected, and restored where it is degraded, and the management of land and water recognises and reflects that:

- (1) water is the foundation and source of all life – nā te wai ko te hauora o kā 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,
- (3) each water body has a unique whakapapa and characteristics,
- (4) water and land have a connectedness that supports and perpetuates life, and
- (5) Kāi Tahu exercise rakatirataka, manaakitaka and their kaitiakitaka duty of care and attention over wai and all the life it supports.

13. The statement was also supported by a narrative, which explained the Kāi Tahu relationship with wai.

14. As Mr Ellison noted in his evidence, during the earlier hearing on the non-freshwater parts of the PORPS, there was some discussion about what was meant in the NPSFM description of Te Mana o te Wai by “*restoring and preserving the balance between the water, the wider environment, and the community*”.⁵

⁴ See Appendix 2 to the evidence of Edward Ellison on behalf of Kāi Tahu dated 28 June 2023. [CB2315]

⁵ Evidence of Edward Ellison on behalf of Kāi Tahu dated 28 June 2023, [16]. [CB2296]

15. Mr Ellison said:

[...] Restoring and preserving the balance cannot be done by trading off the wai or te taiao against the needs and desires of the community. This has been tried for too many years and has resulted in continuing degradation of wai māori and wai tai. Rather, it requires us to understand and prioritise the natural balance in te taiao and to carry out our activities in a way that does not disrupt that natural balance. It is only if we look after the wai that it will be able to look after us.

16. That process of engagement is confirmed by the respondent in the section 32 report which supported the draft notified version of the PORPS, noting that engagement with papatipu rūnaka consultancy services⁶ extended to those entities “*advising on the meaning of Te Mana o te Wai in Otago and co-drafting provisions for the Land and Freshwater chapter with ORC*”.⁷
17. The section 32 report for the freshwater parts of the PORPS also noted at paragraph 376:

LF-WAI – Te Mana o Te Wai

376. Policy 1 of the NPSFM requires councils to manage freshwater in a way that gives effect to Te Mana o Te Wai. Objective LF-WAI-O1 sets out the Kāi Tahu expression of Te Mana o Te Wai in Otago. Objective 1 of the NPSFM requires freshwater management to prioritise first, the health and wellbeing of water bodies and freshwater ecosystems; second, the health needs of people; and third, the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future. This is reflected in Policy LF-WAI-P1 which requires this prioritisation to be implemented in decision-making.

Evidence

18. The role of LF-WAI-O1 in setting out the Kāi Tahu expression of Te Mana o te Wai in Otago was confirmed in the evidence of Felicity Boyd for the respondent at paragraph 713 of her s 42A report.⁸ It was also confirmed by Ms Sandra McIntyre, an expert planning witness on behalf of Kāi Tahu ki Otago, at paragraphs 96 and 97 of her evidence

⁶ Aukaha (for Kāi Tahu ki Otago) and Te Ao Marama Incorporated (for Ngāi Tahu ki Murihiku).

⁷ Section 32 Evaluation Report – Freshwater Planning Instrument parts of the Proposed Otago Regional Policy Statement, September 2022, [34](e). [CB94]

⁸ Section 42A Report, [713]. [CB859]

on the non-freshwater parts of the PORPS (which she adopted in her evidence on the freshwater aspects at paragraphs 39 and 45).⁹

19. While Ms Boyd made a number of recommendations to improve the wording of LF-WAI-O1, including in response to submissions by Kāi Tahu, she did not recommend any changes to the chapeau of the objective, which read:

The mauri of Otago's water bodies and their health and well-being is protected, and restored where it is degraded, and the management of land and water recognises and reflects that: [...].

20. The Court will note the obvious relationship between the Kāi Tahu statement of Te Mana o te Wai, attached to the evidence of Mr Ellison, and the notified wording of LF-WAI-O1 supported by Ms Boyd.

Decision

21. In its Decision, the respondent (adopting the reasoning of the Freshwater Hearings Panel appointed to hear submissions) accepted that a subtle change to the placement or use of the word “mauri” within the objective was appropriate. It did so because of a concern regarding the lack of a ready definition of mauri (including within the PORPS, the RMA and the NPSFM), and the potential for that to cause difficulties or potential uncertainties of meaning.¹⁰
22. The Panel considered that a change in wording of the introductory wording to LF-WAI-O1 could achieve what they perceived its intention to be, and importantly, *“without weakening the underlying protection approach to freshwater management which accords with the Te Mana o te Wai concept”*.¹¹ The change altered the placement of mauri within the chapeau from the sole aim of the actions in the LF-WAI chapter, to being the outcome of those actions. The Panel found that this sequencing more closely aligned with the approach utilised in cl 1.3(1) of the NPSFM as to the concept of Te Mana o te Wai in the NPSFM, and did not require what it saw as the difficult approach of attempting to define mauri.¹²

⁹ Evidence of Sandra McIntyre on behalf of Kāi Tahu dated 28 June 2023, [39]-[45]. **[CB2366]**

¹⁰ Recommendation Report, Appendix Two, [44]-[50]. **[CB3205]**

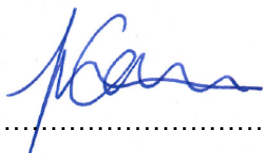
¹¹ Recommendation Report, Appendix Two, [48]. **[CB3206]**

¹² Recommendation Report, Appendix Two, [49]. **[CB3206]**

The Kāi Tahu position

23. Kāi Tahu did not appeal against the respondent's decisions on LF-WAI-O1. While Kāi Tahu have a firm and clear understanding of what mauri is,¹³ and how the mauri of Otago's water bodies is affected by other activities,¹⁴ it ultimately accepted that the Panel's recommendations, and the Council's decision which relied upon those recommendations, were available to them as a matter of law.
24. What remains critically important, from a Kāi Tahu perspective, is that the objective reflects the original intent of the Kāi Tahu statement on Te Mana o te Wai, to the extent that can be said to be consistent with (and giving effect to) the concept of Te Mana o te Wai in the NPSFM and the requirements of s 62(3) of the RMA. That includes the centrality of mauri, its protection and ultimate restoration, to LF-WAI-O1.
25. That is why Kāi Tahu have sought, admittedly belatedly, to join Oceana Gold's appeal, as they saw potential for that protection to be undermined by amendments which may have extended beyond the scope of the appeal – to the point that the central role of mauri in the outcome directed by LF-WAI-O1 may have been diminished.
26. The appeal and relief sought by Oceana Gold in paragraph 84 of its submissions does not alter the centrality of mauri to the objective. For that reason, Kāi Tahu do not feel they have a need to express a firm view as to whether or not the reorganisation of the objective, in the manner described above, amounted to an error of law, and will abide the decision of the Court on that matter.

Dated 14 February 2025



A M Cameron

Counsel for Kāi Tahu

¹³ As to which, see the evidence of Edward Ellison on behalf of Kāi Tahu dated 28 June 2023, [20]-[23]. **[CB2297]**

¹⁴ As to which, see the evidence of Edward Ellison on behalf of Kāi Tahu dated 28 June 2023, [61]-[70] **[CB2306]**; Evelyn Cook, [7]-[12] and [21]-[32] **[CB2323]** **[CB2327]**; Justin Tipa, [23]-[25] **[CB2419]**; and Brendan Flack, [34]-[50] **[CB2281]**.