

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2024-412-000037 /
000038 / 000040 / 000041 / 000042

UNDER the Resource Management Act 1991

IN THE MATTER of appeals under Section 299 and Clause 56 of Schedule 1 of the Act

BETWEEN **KĀI TAHU**

AND **OTAGO FISH AND GAME COUNCIL AND CENTRAL SOUTH ISLAND FISH AND GAME COUNCIL**

AND **OCEANA GOLD (NEW ZEALAND) LIMITED**

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**

AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

Appellants

AND **OTAGO REGIONAL COUNCIL**

Respondent

JOINT MEMORANDUM OF COUNSEL SEEKING CONSENT ORDERS
Dated: 24 September 2025

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JOINT MEMORANDUM OF COUNSEL SEEKING CONSENT ORDERS

MAY IT PLEASE THE COURT:

Introduction

- 1 The background to these appeals is set out in the joint memorandum of counsel seeking consent orders dated 30 September 2024 (“the **Consent Memorandum**”) and the Court’s judgment dated 22 November 2024 (“the **Judgment**”).
- 2 On 8 January 2025 orders were sealed in terms of the Court’s judgment. The appeals were consolidated, and allowed in part with respect to the following freshwater provisions of the Proposed Otago Regional Policy Statement 2021 (“the **PORPS**”):
 - 2.1 LF-WAI-P1 – Prioritisation
 - 2.2 LF-FW-O9 – Wetlands
 - 2.3 LF-FW-P10A – Managing Wetlands
 - 2.4 LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste
 - 2.5 LF-FW-M6 – Regional plans
 - 2.6 LF-LS-P21 – Land use and freshwater
 - 2.7 LF-VM-O2 – Clutha Mata-au FMU vision
 - 2.8 LF-VM-O4 – Taiari FMU vision
- 3 In the Consent Memorandum Oceana Gold (New Zealand) Limited (“**OGL**”) withdrew its appeal in respect of LF-FW-M7. This was recorded in the Court’s minute of 22 November 2024.
- 4 The appeals then remaining were:
 - 4.1 OGL’s appeal in respect of LF-WAI-O1; and

- 4.2 Otago Fish and Game Council and Central South Island Fish and Game Council's ("**Fish and Game**") appeal in respect of LF-WAI-O1A, LF-VM-O2 to O6 and LF-FW-O8.
- 5 By notice dated 26 November 2024 these appeals were set down for hearing on 13 October 2025.
- 6 By notice dated 13 December 2024 Fish and Game discontinued its appeal, leaving only OGL's appeal on LF-WAI-O1 live.
- 7 Section 301 parties to the OGL appeal on LF-WAI-O1 have withdrawn as follows:
- 7.1 Federated Farmers of New Zealand Incorporated by notice dated 13 November 2024, recorded in the Court's minute dated 14 November 2024.
- 7.2 Beef and Lamb New Zealand Limited by notice dated 4 December 2024, recorded in the Court's minute dated 9 December 2024.
- 7.3 Manawa Energy Limited by notice dated 16 December 2024.
- 7.4 Otago Water Resource User Group Incorporated by notice dated 17 December 2024, recorded in the Court's minute dated 19 December 2024.
- 7.5 Real Group Limited by notice dated 19 December 2024.
- 7.6 NZSki Limited by notice dated 19 December 2024.
- 7.7 Queenstown Lakes District Council by notice dated 11 February 2025.
- 7.8 Fish and Game by notice dated 12 February 2025.

The Remaining OGL Appeal

- 8 OGL, Otago Regional Council ("**ORC**"), Royal Forest and Bird Protection Society of New Zealand Incorporated ("**Forest and Bird**") and Kāi Tahu (together, "**the Remaining Parties**") have each filed submissions on the remaining appeal in accordance with the Court's directions of 7 October 2024.
- 9 OGL submitted that LF-WAI-O1 should be amended as follows:

LF-WAI-01 – Te Mana o te Wai

Otago's water bodies and their health and well-being are protected, and **restored improved** where they are degraded, so that the mauri of those water bodies is protected, and the management of land and water recognises and reflects that:
...

10 ORC and Forest and Bird submitted that no amendment is required.

11 Kāi Tahu adopted a neutral position and abided the decision of the Court.

Agreed resolution of the remaining OGL appeal

12 The parties have now agreed that LF-WAI-01 should be amended as follows:

LF-WAI-01 – Te Mana o te Wai

Otago's water bodies and their health and well-being are protected, and restored **or improved** where they are degraded, so that the mauri of those water bodies is protected, and the management of land and water recognises and reflects that:
...

Jurisdiction to make an order by consent

13 The Court's jurisdiction to make orders is discussed at paragraphs 18 to 27 of the Consent memorandum and paragraphs 15 to 21 of the Judgment.

14 All parties acknowledge:

14.1 there is no jurisdiction to make an order unless the Court finds that there has been an error of law; and

14.2 if there has been an error of law, whether and on what terms an order should be made is for the Court to determine, notwithstanding any agreements reached between the parties.

Error of law

The submissions filed by the Remaining Parties

15 In their submissions, OGL submitted that there has been an error of law, ORC and Forest and Bird submitted that there has not been an error of law, and Kāi Tahu did not feel a need to express a view as to whether there has been an error of law or not.

- 16 None of the Remaining Parties contend that the use of “restore” in LF-WAI-O1 means that all degraded water bodies must be restored to their natural pre-human state as an absolute outcome which must be achieved, although in its submissions OGL was concerned that the decisions version of the PORPS could be interpreted as requiring that.
- 17 All Remaining Parties accept that in the context of the National Policy Statement for Freshwater Management 2020 (“**NPSFM**”) and the PORPS the use of “restore” or “improve” in LF-WAI-O1 must encompass a range of outcomes. This is clear from the National Objectives Framework in subpart 2 of Part 3 of the NPSFM (“**NOF**”), which prescribes in detail how outcomes to improve the quality and quantity of freshwater are to be set and achieved.

The distinction between “restore” and “improve”

- 18 Although the Remaining Parties differ as to whether “restore” is necessarily more onerous or stringent than “improve”, they now agree that there is relevant distinction between the two words.
- 19 The distinction is that inherent in the concept of restoration is a move to a former state, whereas improvement may be to a former state but may also be to something other than a former state.
- 20 In the context of LF-WAI-O1, the Remaining Parties accept that restoration would be to a former state closer to the natural state preceding degradation, whereas improvement could provide for a range of outcomes, and could be to a former state or some other improved state, so that the mauri of those water bodies is protected.
- 21 To achieve this objective the required state of restoration (or improvement as per the agreed amendment) will be described or defined in a regional plan giving effect to the PORPS (and the NPSFM, including the NOF). Restoration encompasses states such as pre-human, pre-European, pre-development, pre-vegetation clearance and other former states. Improvement encompasses former states¹ but also other improved states.

¹ Provided the former state is an improvement. There may be instances where a former state is more degraded.

The error of law identified

- 22 The error which has become apparent is that by using only the word “restore” the prospect of improvement other than to a former state is excluded.
- 23 This matters because when water bodies and their health and wellbeing are degraded, restoration to a former state is not always possible. Sometimes there can be improvement, but not to a former state. This is especially so in Otago, where some water bodies are heavily modified.
- 24 LF-WAI-O1 is the objective in the PORPS required under clause 3.2(3) of the NPSFM to describe how the management of freshwater in the region will give effect to Te Mana o te Wai.
- 25 As set out in the submissions for Kāi Tahu, the notified wording of LF-WAI-O1 relied heavily on the Kāi Tahu expression of Te Mana o te Wai as a concept. However, at the time the objective was originally drafted, the focus was on the restoration of the mauri of Otago’s water bodies – rather than of the water bodies themselves. This was amended through the Decisions Version to resolve the potential need to define the mauri of those water bodies as the overarching objective, but with the potentially perverse outcome of applying the restoration objective to those water bodies themselves – which was not an outcome that the appellant, Kāi Tahu or the ORC had contended for.
- 26 Giving effect to Te Mana o te Wai is not confined to restoration of water bodies to a former state and must include other potential improvements. This aspect is expanded on below under the heading “*Te Mana o te Wai*”.
- 27 To align with the concept of Te Mana o te Wai, LF-WAI-O1 must be expressed broadly enough to include improvement to water body health and well-being even if that is not restoration to a natural pre-degradation state.
- 28 Failing to do so is the error of law.

Te Mana o te Wai

- 29 Te Mana o te Wai is relevant to all freshwater management.²
- 30 Every regional council must give effect to Te Mana o te Wai.³

² Clause 1.3(2) NPSFM

³ Clause 3.2(2) NPSFM

- 31 As noted above, every regional council must also include an objective in its regional policy statement that describes how the management of freshwater will give effect to Te Mana o te Wai.⁴
- 32 Te Mana o te Wai must also inform the interpretation the NPSFM and provisions in the PORPS required by the NPSFM.⁵
- 33 It is apparent from the NPSFM that giving effect to Te Mana o te Wai in connection with degraded water bodies may require improvement other than to a former (more natural) state.
- 34 The fundamental concept of Te Mana o te Wai⁶ in the NPSFM is broader than restoration to a former state. It is about the fundamental importance of water and recognition that protecting the health of freshwater protects the health and well-being of the wider environment.
- 35 While the concept speaks to “restoring and preserving the balance between the water, the wider environment and the community”, that is different to a requirement to restore all water bodies. Restoring and preserving the balance between those matters⁷ could be achieved through improvements to water bodies other than restoration to a former state. There is more to the health of freshwater than how close it is to a former state.
- 36 Te Mana o te Wai is encompassed in 6 principles⁸ which are broader in focus than restoration to a former state:
- 36.1 The kaitiakitanga principle describes the obligations of tangata whenua to “...*preserve, restore, enhance, and sustainably use freshwater*...”. [Emphasis added.] Enhancement may be other than to a former state.
- 36.2 The governance principle describes the responsibility of those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future. The health and well-being of freshwater is broader than restoration to a former state.

⁴ Clause 3.2(3) NPSFM

⁵ Clause 3.2(4) NPSFM

⁶ Clause 1.3 NPSFM

⁷ Which was also a matter addressed in the evidence of Edward Ellison on behalf of Kāi Tahu at [16].

⁸ Clause 1.3(4) NPSFM

- 36.3 The stewardship principle describes the obligations of all New Zealanders to manage freshwater in a way that ensures it sustains present and future generations. What is necessary to sustain present and future generations may include non-restorative matters. In certain circumstances, this may include, for example, improving water quantity and quality and storing that water for continued use by future generations for drinking, electricity generation and irrigation (where appropriate).
- 37 There is a hierarchy of obligations in Te Mana o te Wai⁹ which prioritises first the health and well-being of water bodies and freshwater ecosystems, secondly, the health needs of people, and thirdly, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future. These obligations are broader than restoration to a natural pre-degradation state.
- 38 The Te Mana o te Wai hierarchy of obligations is reproduced as the sole objective of the NPSFM.¹⁰
- 39 There are 15 NPSFM policies¹¹ to achieve that objective (ie the Te Mana o te Wai hierarchy of obligations), repeated in full below:

Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.

Policy 2: Tangata whenua are actively involved in freshwater management (including decision- making processes), and Māori freshwater values are identified and provided for.

Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.

Policy 4: Freshwater is managed as part of New Zealand’s integrated response to climate change.

Policy 5: Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.

⁹ Clause 1.3(5) NPSFM

¹⁰ Clause 2.1(1) NPSFM

¹¹ Clause 2.2 NPSFM

Policy 6: *There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.*

Policy 7: *The loss of river extent and values is avoided to the extent practicable.*

Policy 8: *The significant values of outstanding water bodies are protected.*

Policy 9: *The habitats of indigenous freshwater species are protected.*

Policy 10: *The habitat of trout and salmon is protected, insofar as this is consistent with Policy 9.*

Policy 11: *Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided.*

Policy 12: *The national target (as set out in Appendix 3) for water quality improvement is achieved.*

Policy 13: *The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends.*

Policy 14: *Information (including monitoring data) about the state of water bodies and freshwater ecosystems, and the challenges to their health and well-being, is regularly reported on and published.*

Policy 15: *Communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with this National Policy Statement.*

40 The NPSFM policies are how the Te Mana o te Wai hierarchy of obligations is to be achieved. They relate to the quality and quantity of freshwater.

41 With the exception of policy 6, no policy applies by reference to restoration. Generally, positive elements of the status quo are to be protected, and action to improve the quality and quantity of freshwater is required. Consider, for example:

41.1 Policy 5 (which ORC has submitted is primarily given effect in the PORPS in LF-FW-P7(1)¹²) specifically provides for the improvement of the health and well-being of degraded water bodies and freshwater eco-systems.

¹² ORC submissions at paragraphs [14], [31], [32], [39], [65] and [76.4].

- 41.2 In contrast, policy 6 provides: “There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted”, suggesting that in that specific context restoration to a former extent is the desired outcome.¹³
- 41.3 Policy 7 provides that the loss of river extent and values is avoided to the extent practicable. This includes rivers which in parts of Otago have been heavily modified. Related to this policy, clause 3.24 of the NPSFM prescribes a policy to this effect which must be included in regional plans.
- 41.4 Policy 9 provides that the habitats of indigenous freshwater species are to be protected. Policy 10 provides that the habitat of trout and salmon is to be protected, subject to protecting the habitat of indigenous freshwater species. The habitats to be protected may also have been modified. Related to this policy, clause 3.26 of the NPSFM prescribes a mandatory regional plan objective regarding fish passage and instream structures, and requirements for related policies. This contemplates improvement which is not to a former natural pre-degradation state.
- 42 To give effect to its policies and achieve its objective (ie the Te Mana o te Wai hierarchy of obligations) the NPSFM includes a prescriptive framework for managing freshwater (the NOF).
- 43 It is apparent from aspects of the NOF that sometimes there must be improvement which is not restoration to a former state:
- 43.1 The compulsory values listed in Appendix 1A of the NPSFM include human contact activities such as swimming, waka, boating, fishing, mahinga kai and water skiing, and habitats and conditions to support threatened species. These are things which may be improved by restoration to a former state but may also be improved otherwise.
- 43.2 The other values listed in Appendix 1B of the NPSFM include drinking water supply, wai tapu, transport and tauranga waka, fishing, hydro-electric power generation, animal drinking water, irrigation, cultivation, and production of food and beverages, and commercial and industrial use. These are also things which may be improved by restoration to a former state but may also be improved otherwise

¹³ Clause 3.22 of the NPSFM prescribes a mandatory policy to be included in all regional plans to avoid loss of extent of natural inland wetlands, protect their values, and promote their restoration.

- 43.3 The compulsory values apply to every freshwater management unit (“**FMU**”)¹⁴ and regional councils must consider whether the other values apply to an FMU or part of and FMU¹⁵.
- 43.4 Regional councils must identify an outcome for every applicable value.¹⁶ The nature of the values, especially with respect to Otago’s modified water bodies, is that identified outcomes may or may not be a return to a former state.
- 44 As noted above, LF-WAI-O1 is required under clause 3.2(3) of the NPSFM to describe how the management of freshwater in the region will give effect to Te Mana o te Wai.
- 45 That may include restoration of degraded water bodies to a former natural pre-degradation state, where appropriate.
- 46 But Te Mana o te Wai is about more than restoration to a former state and may also require other forms of improvement to degraded water bodies.
- 47 LF-WAI-O1 cannot be limited to restoring degraded water bodies to a former state and must be broad enough to include other forms of potential improvement.

Remedy

- 48 There is a clear and obvious amendment to resolve the error:

LF-WAI-O1 – Te Mana o te Wai

Otago’s water bodies and their health and well-being are protected, and restored **or improved** where they are degraded, so that the mauri of those water bodies is protected, and the management of land and water recognises and reflects that:

...

- 49 The Remaining Parties submit that this amendment falls within the category of inevitable outcome such that the Court may substitute its own judgment for that of the ORC to correct the error.
- 50 If the Court determines that an error of law has been made, but that the Court ought not to substitute its own judgment as submitted in this memorandum, then

¹⁴ Clause 3.9(1) NPSFM

¹⁵ Clause 3.9(2) NPSFM

¹⁶ Clause 3.9(3)

the Remaining Parties seek that the provision be remitted back to the Freshwater Hearings Panel for reconsideration.

- 51 If the order sought is granted, then the remaining OGL appeal, and all interests of the Remaining Parties in the remaining OGL appeal, are at an end. The hearing scheduled for 13 October 2025 can be vacated. There are no other outstanding freshwater appeals on the PORPS..
- 52 There is no issue as to costs. The Remaining Parties agree that costs should lie where they fall.



S J Anderson / T M Sefton
Counsel for the Otago Regional Council

23/9/2025

Date



A Cameron
Counsel for Kāi Tahu

23 September 2025


Date



P Anderson / M Downing
Counsel for Royal Forest and Bird Protection Society of New Zealand Incorporated

23 September 2025

Date



P Walker / S Christensen
Counsel for Oceana Gold (New Zealand) Limited

23 September 2025

Date