BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

ENV-2020-CHC-127

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of a notice of motion under section 149T(2) to decide proposed Plan Change 7 to the Regional Plan: Water for Otago (referred to the Environment Court by the Minister for the Environment under section 142(2)(b) of the Act)
	OTAGO REGIONAL COUNCIL
	Applicant
AND	**TE RŪNANGA O MOERAKI, KĀTI HUIRAPA RŪNAKA KI PUKETERAKI, TE RŪNANGA O ŌTĀKOU AND HOKONUI RŪNANGA (collectively Kāi Tahu ki Otago)**

[Continued over]

LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU KI OTAGO, NGĀI TAHU KI MURIHIKU AND TE RŪNANGA O NGĀI TAHU (COLLECTIVELY NGĀ RŪNANGA)

11 March 2021

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AND	**WAIHŌPAI RŪNAKA, TE RŪNANGA ŌRAKA APARIMA AND TE RŪNANGA O AWARUA (collectively Ngāi Tahu ki Murihiku)**
AND	**TE RŪNANGA O NGĀI TAHU**

Submitters

MAY IT PLEASE THE COURT

Introduction

1. These legal submissions are made on behalf of Kāi Tahu ki Otago, Ngāi Tahu Ki Murihiku and Te Rūnanga o Ngāi Tahu (collectively referred to as **Ngā Rūnanga**).

2. For Ngā Rūnanga, the relationship with their takiwā is one of whakapapa and ahi kā with extensive occupation and use patterns. As kaitiaki, Ngā Rūnanga are bound to ensure the wairua and mauri of the land and water are maintained. Degradation of the waterways and land negatively impacts on the mana of individuals and their hapū and iwi, as well as their collective identity.

3. The reason for Ngā Rūnanga to be involved in resource management issues in the Otago region arises not only from the recognition of their interests in Part 2 of the Resource Management Act 1991 (**RMA**), but is inextricably linked to the settlement of Treaty of Waitangi claims, including *Te Kereme* that resulted in the Ngāi Tahu Claims Settlement Act 1998 (**Settlement Act**).

4. While the Settlement Act was intended to result in the recognition and protection of mahinga kai, the evidence shows this has not happened. As explained in the statements of evidence of Ms McIntyre and Ms Bartlett, the submissions of Ngā Rūnanga arise from deep concerns about:

(a) the failure of the existing planning framework in Otago to appropriately recognise and make provision for the relationship of Kāi Tahu with freshwater in the region; and

(b) the risk that long term resource consents granted within that framework will lead to entrenchment of over-allocation and further marginalisation of Kāi Tahu interests and values for another generation.

5. It is submitted that the prevailing resource management paradigm in Otago is predicated on water being regarded as freely available for use and as a commodity, rather than being valued in its own right and being made available for the instream needs of waterbodies. This commoditisation and consumption paradigm, and the desire for this to continue to prevail over other values, is apparent from the evidence of a number of submitters.

6. The current position is founded on a series of historical and cumulative legislative actions which has resulted in authorisations to use water for limited and discrete uses being transformed into longer-term and often expanded authorisations for very different purposes. The continuation of these rights has often been exempt from regulation and has involved allocation of a valuable resource for "free" in economic and environmental terms.[1] On the other hand, this regime and the unregulated use and allocation of water has had, and continues to have, very significant costs to the environment – and in particular to the rights and interests of Ngā Rūnanga. Instream values and the needs of water bodies have been largely ignored.

7. Water abstraction in Otago is characterised by heavy allocation pressure on some water bodies and by increasing demand. The pressure on water bodies is exacerbated by the continuance of deemed permits that are exempt from regulation until their expiry in October this year. The rights attaching to these permits have become more entrenched over the same period that Ngā Rūnanga have experienced the loss of their economic and spiritual base associated with water bodies.

8. Proposed Plan Change 7 (**PC7**) is founded on the fact that the operative Regional Plan: Water for Otago (**Water Plan**) does not offer flow and allocation regimes for catchments in the Otago Region which give effect to the NPSFM 2020. It is also deficient in appropriately recognising or providing for the rights, interests and values of Ngā Rūnanga in freshwater (and fails to identify the relationship, established by the Settlement Act, of Ngāi Tahu ki Murihiku to freshwater in parts of the region).[2]

9. It is submitted to be very clear that there is a significant problem which needs to be addressed, which is identified in both the Skelton Report and the Minister for the Environment's direction for PC7 to be referred to this Court. The Minster's direction means that PC7 is, as a matter of fact and law, a matter of national significance.[3] It is notable that a number of parties appear to deny the existence of a problem or seek to diminish its significance, and also appear to call into question the basis for and merits of the Minister's Direction. This Court must however, when making a

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1 Statement of Evidence of Sandra McIntyre at [38] – [41] and Appendix 1.

2 The Settlement Act 1998 describes whakapapa links to Te Mata-au in general terms in Schedule 40. Also, as set out at paragraph [46] of the statement of evidence of Maria Bartlett, the Te Rūnanga o Ngāi Tahu (Declaration of Membership) Order 2001 describes membership of the iwi authority in accordance with section 9 of the Te Rūnanga o Ngāi Tahu Act 1996), and describes the takiwā of each papatipu rūnanga.

3 RMA, section 142.

determination on PC7, have regard to the Minister's reasons for making a direction. It is not a matter that can be ignored, and there is submitted to be no reasonable basis for the Court to accept the "do nothing" approach advanced by some parties. To do so would involve the Court not properly having regard to the Minister's direction and would simply perpetuate the status quo.

10. The aim of PC7 is to change the practice of issuing water permits with long durations under the Water Plan. PC7 is intended to provide an interim planning and consenting framework for the assessment of resource consent applications to:

(a) Replace deemed permits expiring in 2021;

(b) Renew any other permit to take and use surface water (including groundwater managed as surface water) expiring prior to 31 December 2025; and

(c) Provide direction on the consent duration for all water permits to take and use water.

11. The PC7 provisions would essentially enable the assessment of applications and the issuing of resource consents subject to conditions for a short duration, during which time a new regional planning framework will be prepared. The PC7 framework is consistent with the response of the Minister for the Environment to the Skelton Report.[4] It is intended to be largely "procedural" rather than substantive in nature. Unlike recent planning processes in neighbouring regions, PC7 is genuinely about "holding the line" in terms of preventing further environmental degradation and inappropriate decision-making through the application of a manifestly inadequate current planning framework.

12. PC7 is far from ideal. But it is largely an appropriate response to a unique set of circumstances and a regrettable history of mismanagement and inaction. For that reason, there is a risk in seeking that PC7 go much further than is intended, and seeking to make it something that it is not.[5]

13. The development of a new and appropriate planning framework for the region will take time, and it will take time to start having practical effects on the environment

4 ORC Key Issues report, Appendix C

5 This is apparent from the complexity that parties are seeking to impose on Schedule 10.A.4 for example, which runs the risk of undermining the purpose and scope of PC7. The proposed introduction of a restricted discretionary activity rule by the Council falls into the same category.

once it is implemented. If however long term allocation decisions are made through granting consent for replacement of deemed permits or renewal of other consents before this framework is in place, there can be no question that its effectiveness will be undermined.

14. Consistent with original and further submissions, Ngā Rūnanga generally support PC7 on the basis that:

(a) The current planning framework is not capable of managing water allocation, including replacement of deemed permits, in a way that addresses over-allocation, has appropriate regard to Ngā Rūnanga rakatirataka and kaitiakitaka or is consistent with the requirements of the RMA and the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**); and

(b) An interim approach is necessary to ensure that long term unsustainable water allocations are no longer locked in place before an appropriate planning framework is developed to give effect to the NPSFM 2020 and Part 2 of the RMA. Part 2 of the RMA includes a duty to recognise and provide for the relationship of Māori and their customs and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga under section 6(e); to have particular regard to kaitiakitanga under section 7(a), and to take into account the principles of the Treaty of Waitangi under section 8.[6]

15. If there is a concern about "rights" that might be affected in terms of existing users of water, and about the cost of seeking short-term consents or bringing about changes or improvements in water use, then several matters are submitted to be relevant:

(a) The basis for those "rights", which have never been properly tested against the RMA, has effectively created significant benefits for their users for free in an environmental and economic sense, while resulting in significant costs to the environment;

(b) These "rights" need to be set against the context of the rights, expressed in legislation, that Ngā Rūnanga have been guaranteed and which have

6 How the principles of the Treaty of Waitangi ought to be "taken into account" is set out in the memorandum from Philip Maw, Wynn Williams to Tom de Pelsemaeker (12 November 2020) at Appendix H to the Statement of Evidence of Tom de Pelsemaeker. Ngā Rūnanga largely agree with the analysis in that memorandum.

not been upheld. In most instances, the evidence is clear that privileges have been granted, some for well in excess of a century, that have never had any regard for the rights and interests of Ngā Rūnanga; and

(c) During the same time period in which the rights associated with deemed permit holders have increased, Ngā Rūnanga have experienced significant physical, economic and spiritual loss, as the mauri of waterbodies and sources of mahika kai have declined due to the loss of quantity and quality of water in the rivers, streams and wetlands.[7]

16. This has resulted in an understandable loss of confidence in the resource management system to ensure that legal rights and interests in freshwater are appropriately recognised in Otago. Seen in this context, some short-term inconvenience and additional cost for users that might result from PC7 is hardly unfair or unreasonable.[8] It should at least enable users some additional time to prepare for the significant changes in practice and thinking that will be required in order to properly give effect to the requirements of the NPSFM 2020, which is a luxury that users in some other regions do not have.

The need for PC7

17. Despite the issues identified in the Skelton Report and the Minister for the Environment's direction for PC7 to be referred to this Court, some parties have argued that PC7 is unnecessary, or that PC7 should be amended to better give effect to the NPSFM 2020.

18. In summary, the available alternatives to PC7 (with or without minor amendments) are:

(a) A continuation of the status quo, which will result in decisions on resource consent applications that will compromise the effectiveness of the impending new regional planning framework; or

(b) An amended PC7 that attempts to give effect to the NPSFM 2020. As has been outlined above, this is not acceptable to Ngā Rūnanga because it has not involved mana whenua to the degree anticipated by the NPSFM

7 Statement of Evidence of Edward Ellison at [76] – [94].

8 In fact, one of the intentions of PC7 is to provide a relatively easy consenting pathway, through the controlled activity rule, which should require less information and cost than the restricted discretionary provisions in the Operative Plan.

2020. The result would inevitably be inadequate from both a substantive and procedural perspective.

19. Each of the alternatives is discussed below, including their consistency with the principles of the Treaty of Waitangi.

20. The position of Ngā Rūnanga is that PC7 is necessary. It is not however intended that it give effect to the NPSFM 2020, nor that it should be subject to further changes that attempt to give effect to the NPSFM 2020. Rather, PC7 should provide an interim regime that ensures that the effectiveness of the new freshwater planning framework, which is currently in development, is not compromised. In the circumstances, allowing time to correct the settings for freshwater management in Otago and not repeat the mistakes of the past is submitted to be critical.

21. It is submitted that of the three options, PC7, subject to the modifications recommended by Ms McIntyre, is the most appropriate way of meeting the relevant statutory tests. Importantly, for Ngā Rūnanga, it is also the most consistent with the principles of the Treaty of Waitangi and their application.[9]

22. Section 8 of the RMA requires ORC takes 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) Reciprocity and mutual benefit will be sought;

(d) Protection of resources of importance to tangata whenua from adverse effects; and

(e) Positive action to protect tangata whenua interests.

9 Memorandum from Philip Maw, Wynn Williams to Tom de Pelsemaeker (12 November 2020) at Appendix H to the Statement of Evidence of Tom de Pelsemaeker.

10 *Aratiatia Livestock Limited and Ors v Southland Regional Council* [2020] NZEnvC 191 at [6].

Alternative 1 – a continuation of the status quo

23. The operative Water Plan does not give effect to the NPSFM 2020 because it is incapable of addressing over-allocation, and is deficient in its ability to manage the effects of water abstraction, particularly the effects on values of importance to Ngā Rūnanga. The direction it provides for decision-making is also inconsistent with the direction in the NPSFM 2020 through prioritising consumptive use over instream values and not giving appropriate consideration to cumulative effects.[11]

24. The Kāi Tahu submission refers to a concern that the current policy framework favours long consent durations even in over-allocated catchments. Likewise, Mr de Pelsemaeker identifies this as an issue that is likely to frustrate a timely transition to giving effect to the NPSFM 2020 (a concern shared by Ms McIntyre).[12]

25. It is quite clear that if permits continue to be granted under the current planning framework for timeframes of up to 35 years, this will undermine the new regional planning framework and limit its ability to give effect to the NPSFM 2020. It is also submitted that long term water allocation decisions (that will persist into and beyond the life of the new framework) are inappropriate because they are inconsistent with the Te Mana o Te Wai paradigm – a long-term consent duration amounts to prioritising use ahead of any other considerations.[13]

26. There appears to be little debate that Treaty principles have not been taken into account under the current planning framework, nor the decision-making under it. As Mr Ellison outlines in his statement, until recently, most resource consents were granted for the maximum term available under the RMA of 35 years, or over three times the statutory life of a regional plan. The evidence of Mr Whaanga is that mana whenua have a long held principle that the decisions of this generation should not bind the next generation, even more so when the mauri of the wai and the whenua are degraded and the duty of kaitiakitanga demands that it must be restored.[14] If the current trend towards granting consents for terms that extend into the life of the new regional planning framework continues, Kāi Tahu will be locked out of freshwater management for another generation.[15]

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11 Statement of evidence of Sandra McIntyre at [11].

12 Statement of evidence of Tom de Pelsemaeker at [154]; statement of evidence of Sandra McIntyre at [71].

13 An explanation of Te Mana o Te Wai is set out at Appendix A to these submissions.

14 Statement of evidence of Dean Whaanga at [36].

15 Statement of evidence of Edward Ellison at [129].

27. This situation is submitted to be fundamentally inconsistent with the Treaty principles, and would undermine the ability of Kai Tahu to exercise rakatirataka and kaitiakitaka. It is submitted therefore that long term decisions on the renewed or new permits must be made in the context of a new planning framework that gives effect to the NPSFM rather than the existing one.

28. The decision of the Environment Court in *Clutha District Council v Otago Regional Council*[16] is also relevant to the issue of consent duration in the context of PC7. The Court declined an appeal by the District Council, seeking a 35-year term for a permit to take and use surface water from the north branch of Te Mata-Au. The Regional Council granted the consent for a 25-year term, and the Environment Court upheld that decision.

29. The Court noted that there is a policy in Kāi Tahu ki Otago Natural Management Plan to oppose the grant of permits for the taking of water for a period of 35-years. In order to protect Kāi Tahu ki Otago values, the policy on 35-year consent durations is predicated as an action that must not occur.[17] Further, it is a general policy to protect and restore the mauri of all water.

The Water Plan does not give effect to the NPSFM 2020 – Ngā Rūnanga values

30. The NPSFM 2020, specifically policy 2, requires that tangata whenua are actively involved in freshwater management (including decision-making processes), and that Maori freshwater values are identified and provided for. In addition, it is noted that the fundamental concept in the NPSFM 2020 is Te Mana o Te Wai, which is discussed in further detail below.

31. It is submitted that the existing objectives and policies in Chapter 6 of the Water Plan that direct decisions on water abstraction do not recognise Ngā Rūnanga values, and therefore cannot give effect to the NPSFM 2020.

32. Schedule 1D (referred to in Policy 5.4.1) identifies spiritual and cultural beliefs, values and uses of significance to Kāi Tahu, and Policy 5.4.2 requires that priority

16 [2020] NZEnvC 194.

17 Kai Tahu ki Otago Natural Resource Management Plan 2005, 5.3.4 Wai Mäori General Policies; Policy 25. There is also an equivalent policy in Te Tangi a Tauira - Kaupapa 3.5.14.17, as set out in Appendix 4 to the Statement of Evidence of Maria Bartlett.

is given to avoiding effects on these values in the management of freshwater.[18] As set out in the evidence of Mr Ellison, Schedule 1D was intended to ensure that Kāi Tahu values associated with freshwater would be appropriately considered.

33. Schedule 1D is not however referred to in:

(a) any other objectives or policies within Chapter 6 relating to water abstraction; or

(b) any of the restricted discretionary rules in Chapter 12 that apply to most water abstraction.

34. Rule 12.1.4.8 sets out the matters for discretion for the restricted discretionary Chapter 12 rules. It is submitted that the *Last Chance* decision provides a relevant summary of the shortcomings of the matters of discretion in this context, quite apart from the ability to properly have regard to the NPSFM 2020. The decision observes that the values in Schedule 1D are not included as a matter of discretion under Rule 12.1.4.8 and cannot be considered:[19]

> The matters of discretion listed in rule 12.1.4.8 do not specifically refer to 'cultural values', 'Kāi Tahu values' or 'Schedule 1', or 'Schedule 1D' …I note that the RPW includes several other restricted activity rules which include, as a matter of discretion, "Any adverse effect of the activity on: (i) Any natural and human use value identified in Schedule 1 for any affected water body". Further, restricted discretionary activity rule 12.C.2.4 includes a matter of discretion that states 'Any adverse effect…on any natural or human use value, including Kāi Tahu values…'. The ORC did not include a similar matter of discretion under rule 12.1.4.8 and, given such effects are referenced in other rules one can only conclude it was a conscious and deliberate decision to not include such a matter under rule 12.1.4.8. This confirms to me that I have limited ability to consider effects of the activities on wider cultural values.

The NPSFM 2020, section 104 and section 104C

35. Some submitters have suggested that there is the potential for the NPSFM 2020 to be considered (under section 104(1)(b)) when renewal decisions are made under the operative Water Plan.

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18 See Appendix 2 to the Statement of Evidence of Maria Bartlett. In Plan Change 1A, Policy 5.4.3 was emphasised so that effects on existing uses were to be avoided. This gave equivalent protection to existing uses as was afforded to Kāi Tahu values.

19 Decision on application lodged on 14 August 2019 by Last Chance Irrigation Company Limited, issued on 14 July 2020 (RM19.281).

36. The replacement of the deemed permits under the operative Water Plan is however pursuant to either a restricted discretionary or discretionary activity rule. The vast majority of the deemed permits would be treated as restricted discretionary, as they are all captured within the primary allocation definitions (only supplementary allocations in excess of the first supplementary allocation block are discretionary).

37. To the extent that the restricted discretionary activity rule is relevant, it is submitted that this will raise significant interpretation issues as to whether or not the NPSFM 2020 could be considered. Under section 104C of the RMA, when considering applications for a restricted discretionary activity, the Regional Council must consider only those matters over which a discretion is restricted in national environmental standards or other regulations, and matters over which it has restricted the exercise of its discretion in its plan or proposed plan.

38. Similar to the ability to consider effects on cultural values, the NPSFM 2020 is not explicitly included in the matters of discretion under Rule 12.1.4.8. It is also submitted that it cannot simply be "read in" implicitly to any of the identified matters.

39. The consideration of the NPSFM 2020 in the context of consent applications could therefore be limited (and is likely to be the subject of considerable debate) as to the extent it can be considered under section 104C of the RMA – let alone be given significant weight.

40. In terms of the minority of applications for discretionary activities, the consent authority must, subject to Part 2, have regard to any relevant provisions in the documents listed under section 104(1)(b). The list includes any relevant provisions of a national policy statement, so would enable consideration of the NPSFM 2020.

41. By reference to the *RJ Davidson Trust* line of case law, it is submitted that reference to Part 2 of the RMA would not be necessary for discretionary activities. References to Part 2 under section 104 will only be justified in cases of genuine uncertainty and this is not one of those cases. Notwithstanding that implementation steps, and engagement with mana whenua and the wider the community will be required to fully implement NPSFM 2020 in Otago, it is submitted that this does not amount to uncertainty of meaning in the sense contemplated by the Supreme Court in *King Salmon*.[20] The objective, and policies, are clear in their meaning.

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20 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

While implementation in some respects will be ongoing, and specific implementation steps are required to be undertaken, that would not mean that recourse to Part 2 of the Act is appropriate, and particularly not to read down or re-interpret the objective or polices of the NPSFM.

42. It is submitted that, consistent with what the Supreme Court found regarding the NZCPS in *King Salmon*,[21] the NPSFM 2020 is "intended to give substance to the principles in Part 2". In fact, the hierarchy of obligations relevant to Te Mana o Te Wai, as set out in part 1.3(5) of the NPSFM 2020, are all derived from the sustainable management purpose of the RMA. In that respect, it is respectfully submitted that the obligations in Te Mana o Te Wai are not matters outside the sustainable management purpose of the RMA, but are in fact derived directly from the RMA's purpose as set out in Part 2.[22] Therefore, it could not reasonably be submitted that the NPSFM 2020 is incomplete.

43. It may be suggested that reference to Part 2 would be necessary because economic and social considerations have not been given sufficient priority in the NPSFM 2020. It is submitted, however, that this is deliberate and the NPSFM 2020 does, in any event, "cover the field",[23] in the sense contemplated by the Supreme Court in *King Salmon*. Merely because economic and social wellbeing considerations are not prioritised in the way that some parties may prefer, does not mean that the clear statement of priority set out in the NPSFM 2020 is invalid.

44. Despite this, it is submitted that a "do nothing" approach and reliance on the NPSFM 2020 through the consenting process is not the most appropriate method. Quite apart from the material limitations on having regard to the NPSFM 2020 for restricted discretionary activities, there are other significant problems in seeking to apply the NPSFM 2020 even assuming it could be fully considered, such that it cannot be said to be an effective alternative to PC7.

45. In terms of an assessment under section 104, the consent authority must "have regard to" relevant provisions. It is well established that the term "have regard to" is

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21 The Court found that the NZCPS was "intended to give substance to the principles in Part 2", and that it "translates the general principles to more specific or focussed objectives and policies" at [89].

22 An explanation of the derivation of the obligations is set out at Appendix B to these submissions.

23 In *King Salmon*, in relation to 'incomplete coverage', the Court commented at [90] that "there may be instances where the NZCPS does not "cover the field" and a decision maker will have to consider whether Part 2 provides assistance in dealing with the matter(s) not covered." In relation to 'uncertainty', the Court commented at [88] that "if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to Part 2 may well be justified to assist in a purposive interpretation."

not equal to the term “give effect to”, which is what the new future planning framework is required to do[24] regarding the NPSFM 2020. Even if the NPSFM 2020 was given very considerable weight and there was no recourse to Part 2 of the RMA, the consideration of the NPSFM 2020 under section 104 would not amount to its implementation. This would require *ad hoc* case-by-case assessment of individual applications, involving interpretation an application of the NPSFM 2020 on an individual basis for each application, all set against the context of a manifestly inadequate regional planning framework.

46. It is submitted that consideration of the NPSFM 2020 under section 104 on a case-by-case basis could not give effect to the NPSFM 2020, in a fundamental way. Part 3.5 of the NPSFM 2020 establishes that Te Mana o Te Wai requires a ki uta ki tai approach, which in turn requires that local authorities must:

(a) recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wahapū (estuaries) and to the sea;

(b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and

(c) manage freshwater, and land use and development, in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects, including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.

47. It is submitted that a ki uta ki tai approach, and therefore Te Mana o Te Wai, cannot be fully realised in the context of making decisions, or conditions, for individual consent applications. The need for mana whenua to be involved in those processes would be highly inefficient and an undue burden on resources. This is apparent particularly when considering the significant investment of time and effort currently under way between the Council and mana whenua, in an appropriate and carefully considered manner, consistent with the expectations of the NPSFM 2020 and Treaty principles.

48. For all of these reasons, any assertion that the NPSFM 2020 can be given effect to, without PC7 and via section 104, is fundamentally flawed.

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24 See section 67(3) of the RMA

It would not be appropriate to rely on section 124 as a holding measure

49. If it is the intention of some parties that section 124 of the RMA could be relied upon to exercise existing rights, under their existing permits, until a new planning framework is operative (i.e. reactivating renewal applications made under the existing planning framework, and/or completely bypassing the PC7 provisions), it is submitted this would be both an invalid and inappropriate use of section 124.

50. Section 124 is intended to cover situations where a consent applicant has lodged an application for renewal, so that they can exercise their existing rights while the application is processed and any appeals on the application are heard and determined. It is not for the purpose of putting an application "on hold" for an indefinite period while existing rights are exercised without further scrutiny or regulation.

51. This intention is supported by the statutory limits within the RMA regarding how long a consent can be placed "on hold" for. It is open for an applicant to request that its application be placed "on hold", and while the consent application is "on hold", the applicant could continue to exercise its rights under section 124. A notified consent application can however only be suspended for a maximum of 130 working days (approximately 6 months). After 130 working days has elapsed, it is at the consent authority's discretion to return the application to the applicant, or to continue to process the application.

52. It would be a misuse of section 124 for applicants to put their application on hold indefinitely in order to wait for it to be entirely assessed against a new and appropriate freshwater planning framework[25], quite apart from the inappropriateness of maintaining the existing consents, without any further scrutiny, for a significant period[26]. In any event, the continuation of granting of long-term consents in the context of existing over-allocation, and the environmental and cultural effects of that, is not acceptable to Ngā Rūnanga. It is also anticipated that this position is not one which the Council, properly appreciating its statutory role and functions, would accept.

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25 Section 88A would apply in any event

26 This would likely preserve paper over-allocation and could act as an incentive to increase actual takes up to that allocation for each deemed permit.

53. For completeness, in so far that it is relevant to applicants seeking to extend irrigable area, it is submitted that section 124 will not allow an applicant to carry out activities that go beyond what is provided for in existing consents. If an application for resource consent is for an activity on a greater scale and/or covering a greater area of land than is covered by the original consent, section 124 cannot be relied upon. The section does not envisage nor cover any further consents being granted under the umbrella of the original consent but merely preserves the status quo.[27]

It is not appropriate to rely on section 128

54. Section 128(1)(a) of the RMA specifies that a consent authority may review the conditions of consent where there is provision for review in the consent, while section 128(1)(b) allows for a review to occur to align the levels, flows, rates or standards set by an operative regional rule.

55. Some parties have suggested that the ability to reassess resource consents, once a new planning framework is in place, can be provided through consent reviews under section 128 of the RMA. Section 128(1)(b) only applies to operative rules, so cannot be relied upon until a new planning framework is operative.

56. It is also submitted that that reliance on consent condition reviews will be ineffective in making significant changes in freshwater management in catchments which are substantially over-allocated, or where significant changes to minimum flows or other measures are required to give effect to the NPSFM 2020.

57. This is because, although section 128(1)(b) provides for the use of consent condition review processes to ensure existing consented water takes are made subject to minimum flow provisions and may go some way to addressing over-allocation, the use of review processes may not be able to phase out over-allocation in its entirety or in all circumstances. In this respect, the Regional Council does not have the power to cancel a consent upon review, and would only be able to reduce the amount taken by a certain extent.[28] It is also anticipated that consent holders would resist material changes or reductions to takes or consented uses on the basis of the non-derogation principle.[29]

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27 *Steiner v Wharfe Environment Court Wellington* W61/2000, 29 September 2000 at 4 and 10.

28 Section 128(1)(c) is intended to confer a limited power for a consent authority to review the conditions of the resource consent, but is not intended to open the door to cancellation of the consent itself. See [23], *Barrett v Wellington CC* [2000] NZRMA 481 (HC).

29 *Aoraki Water Trust v Meridian Energy Limited* 11 ELRNZ 207 particularly at [41].

58. Since 1 January 2016, it is understood that ORC has granted 31 resource consents to replace deemed permits. It is submitted that these consents have the potential to undermine the new regional planning framework, particularly the 26 that have been granted for a term of more than 15 years. Despite the limitations of section 128, it is acknowledged that there may need to be some reliance on this section, out of necessity and to the extent possible, in relation to the 31 resource consents that have already been granted. However, for the reasons stated above, it is an inadequate "backstop" and reliance on it should be completely minimised.

Summary of these alternatives

59. It is submitted that all of these options are either materially flawed or inappropriate, and do not provide any reasonable or effective pathway to tackle the current problem. They involve somewhat artificial or strained application of statutory processes and provisions, and reflect an unwillingness on the part of their proponents to "grasp the nettle". The reality is that PC7 already buys water users time, and provides a pathway to enable a suitable transition to the future regulatory framework. By contrast, these options can be characterised as "kicking the can down the road", and achieving very little other than perceived short-term convenience.

Alternative 2 – amending PC7 to attempt to give effect to the NPSFM 2020

60. This is not a viable option and would not be consistent with the Minister's direction. PC7 should not be amended to better give effect to the NPSFM 2020 because the intent of PC7 is not to establish a framework that fully gives effect to the NPSFM 2020, but rather to provide a "holding pattern" that:

(a) Allows existing activities to continue, without increasing their impact, for the short period required to develop and put in place an NPSFM-compliant framework;

(b) Facilitates timely review and reassessment of these activities within the new framework;

(c) Minimises the potential for substantial long-term water allocation decisions to be made in a planning framework that has been shown to be inadequate to achieve the purpose of the RMA; and

(d) Increases the ability for a new regional planning framework to do this effectively.

61. Further, as noted earlier in these submissions, to give effect to the NPSFM 2020 mana whenua must be involved in developing a freshwater planning framework. This must also be done in a way that appropriately takes into account Treaty principles. This could not occur in an effective or appropriate manner under the options promoted by other parties.

62. The most effective way that this process can be effectively carried out in Otago is by approving PC7 (subject to Ms McIntyre's recommendations), which would in turn provide time for the engagement process between ORC and mana whenua to be completed. It is also the only way that the principles of the Treaty of Waitangi can be effectively taken into account.[30] Either dispensing with PC7 and seeking to apply the NPSFM 2020 to individual consent applications, or amending PC7 in an attempt to give effect to the NPSFM 2020 would not be acceptable, because both processes would bypass mana whenua involvement. This is a critically important matter for Ngā Rūnanga.

63. As outlined in the evidence of Mr Ellison,[31] the engagement of Kāi Tahu in the development of a new regional planning framework is an opportunity to provide for cultural values and interests in wai māori and reflects the resetting of the Treaty partnership with the Council. This process is entirely consistent with the processes envisaged by the NPSFM 2020, in particular clause 3.4.

64. A particular focus for Otago rūnaka has been defining Te Mana o te Wai within Otago. The expectation of Kāi Tahu is that their definition of Te Mana o te Wai will underpin the new planning framework, appropriately provide for rakatirataka and kaitiakitaka, and will provide a foundation for the restoration of the mana and mauri of wai māori within Otago. It is submitted that this expectation is consistent with both the NPSFM 2020 and the principles of the Treaty of Waitangi.

65. Likewise, Ngāi Tahu ki Murihiku are working with the Council to improve the regional planning framework for freshwater to ensure that decision-making does not entrench the status quo or the decisions of the past.[32]

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30 See *Aratiatia Livestock Limited and Ors v Southland Regional Council* [2020] NZEnvC 191at [6].

31 At [114]-[119].

32 Statement of evidence of Dean Whaanga at [35].

Section 67(3) requirement

66. PC7 was never intended to give effect to the NPSFM 2020, and it cannot do so in either a procedural or substantive way. In this way, it may be argued that PC7 falls short of the requirement in section 67(3)(a) of the RMA, whereby a regional plan (and a change to a regional plan) must give effect to any national policy statement. We adopt the analysis in the opening legal submissions for the ORC regarding the need for PC7 to give effect to the NPSFM 2020, and in particular the identification that this does not need to happen immediately.

67. It is submitted, in any event, that:

(a) The Minister's direction and reasons are relevant. The Minister has acknowledged that PC7 cannot give effect to the NPSFM 2020, and that it is intended as an interim measure;

(b) Given the unique circumstances in Otago, PC7 is submitted to be consistent with section 67(3)(a) in that it is intended to ensure that the new regional planning framework is in a position to give effect to the NPSFM 2020. Rather than PC7 itself giving effect to the NPSFM 2020, it will ensure that the subsequent regional plan can do so. It is submitted that it will be more effective in providing this foundation, given that the "do nothing" and enhanced PC7 options cannot give effect to the NPSFM 2020 in any event.

Alternative 3 – proceed with PC7, with minor amendments

68. To avoid undermining the ability for the new regional planning framework to give effect to the NPSFM 2020:

(a) There must be a clear incentive for applicants to apply for short term consents as controlled activities, relative to seeking a consent for a non-complying activity; and

(b) Long term consents must only be granted for true exceptions.

All consents must be short-duration consents

69. Ms McIntyre has recommended that the maximum consent duration provided for in PC7 be reduced to ten years to ensure that all abstractions will be reassessed during the life of the new regional plan.

70. The expiry date for the deemed permits means that the consent processes for replacement of these will inevitably occur before a new framework is in place.

71. The operative planning framework is relatively permissive of long-term resource consents and there are no rules or directive policy guidance to limit consent terms. Further, it is submitted that ORC practice has been to favour long consent durations, with consents for water takes routinely being granted for 35 year terms up to the point of notification of PC7.

72. The assessment of and decision-making for these consents under the current framework would be likely to result in outcomes that would severely hamper the ability to give effect to the NPSFM 2020 in many of Otago's catchments for a considerable period.

73. There is nothing in law to suggest that plan provisions cannot direct consent durations that are less than statutory maximums. As set out in the evidence of Ms McIntyre, in other regions, it is normal practice to grant consent for water abstractions for terms of ten years or less.

Discouraging the grant of consent for non-complying activities

74. Ms McIntyre has also recommended amendments to the non-complying activity policy to ensure that longer term consents do not become the default but rather can only be granted in rare circumstances where the outcomes will be consistent with achieving the purpose of the RMA.

75. A prohibition on the granting of such applications, if it could have been legally effective, would have been simpler and a more preferable option. The present facts and circumstances mean that a prohibited activity status would at best "send a signal" but could not prevent applicants from applying for consent until the relevant rule became operative. Ms McIntyre has therefore suggested it would be more effective and efficient for non-complying status to be enhanced by strong direction around the granting of consent.

76. The issue of whether policies can direct decision-makers to generally not grant non-complying activity consents has been discussed by the Environment Court in *Carter Holt Harvey v Waikato Regional Council*.[33]

77. The particular policies in that case were to provide strong guidance to decision-makers, directing them to generally not grant non-complying activity resource consent applications for the taking of surface water. It was argued by some parties that the policies were essentially creating prohibited activities, and amounted to fixed rules, fettering the discretion of the decision-maker.

78. The Court upheld the rules, finding that the strong guidance in the policies was appropriately against the grant of non-complying activities, but that it was still open to decision-makers to decide each application based on its merits. The Court cited section 104(1)(b) of the RMA, under which decision-makers need only "have regard to" the provisions contained in regional plans, and as such, it was open for the decision-maker to afford less weight to some policies than others when evaluating an application.

79. The Environment Court discussed this issue more recently, and preferred the use of the word “avoid” and/or “prohibit” to “generally not granting”, or “not grant”. The reason for that was that use of those words better addressed the activities and effects that were to be prohibited or avoided.[34]

80. Several parties are arguing for exemptions to the short duration consent provisions under PC7 for particular activities. The most frequently cited exception is for community water supplies, as proposed by the Ministry for the Environment. Other activities which seek exemptions include hydro-electricity generation and dams; snowmaking; frost-protection and irrigation, in certain cases.

81. Parties have also argued that short duration consents will result in uncertainty for financial investments, while others state it is a barrier to improving irrigation efficiency. It is unclear how short duration consents can result in uncertainty for obtaining finance, given that PC7 applies to replacement permits for existing irrigation activities.

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33 *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 at 99-101.

34 *Aratiatia Livestock Limited v Southland Regional Council* [2019] EnvC 208 at [314]-[318].

82. It is also unclear why a short-term permit would frustrate investment in more efficient irrigation technology, as this would be a benefit to the permit holder as much as the environment, unless the consent holder is doubtful they will likely secure the same allocations and conditions under a new freshwater planning framework. It is submitted that this scenario again illustrates why short-term consents and an interim 'hold the line' approach is needed to enable meaningful change in catchments which have issues with over-allocation[35] or insufficient flows.

83. Concerns about the cost of engaging in the renewal process for short-term consents can also be largely addressed by controlled activity status becoming effective as soon as possible (possibly through an interim decision of the Court), and by ensuring the simplicity of that consenting regime as proposed by PC7 is largely maintained.

84. The position of Ngā Rūnanga on consent duration issue is clear - all consents granted must be short duration, without exceptions. Any exceptions will undermine the ability of a new planning framework to give effect to statutory direction, including the NPSFM 2020. It is submitted that the number of requests for exemptions and the arguments about the need for long term consents for certainty reinforce the argument that long term consents will act as a barrier to meaningful change in freshwater management, particularly in catchments where change is needed to give effect to the NPSFM 2020.

Summary and conclusion

85. Given the history outlined in the evidence for Ngā Rūnanga, and the very real concerns that are held, there is a considerable burden and duty felt by the current generation to ensure that the ability to achieve restoration of both the environment and cultural identity, through a new regional planning framework, is not lost.

86. From the perspective of Ngā Rūnanga, the most important aspects of PC7 are its ability to ensure that the new regional planning framework will not be undermined by the granting of consents which have a long-term duration, and its ability to prevent further degradation of the environment until such a time that the new plan is operative. In order to achieve this, it is willing to accept the ongoing impacts of short-term consents which effectively extend the current unsatisfactory situation,

35 Noting that a number of long term renewals have already been granted, particularly in the Taieri catchment

and largely forego its rights and interests being recognised or provided for through that short-term consent process.

87. For Ngā Rūnanga, PC7 is an appropriate response to a unique set of circumstances and, of the three alternatives available, it is the most consistent with the principles of the Treaty of Waitangi and the only one that will enable durable and effective management of freshwater in Otago.

DATED this day of March 2021

James Winchester/Sal Lennon
Counsel for Ngā Rūnanga

Appendix A

Te Mana o Te Wai

1. Te Mana o Te Wai is the "fundamental concept" in the NPSFM 2020, and it is submitted that the higher order provisions of the NPSFM 2020 are clearer and more directive than its predecessor about the hierarchy of priorities in giving effect to the fundamental concept of Te Mana o te Wai.

2. The hierarchy of obligations implicit in Te Mana o Te Wai is set out in detail, to ensure that the health and well-being of waterbodies and freshwater ecosystems is the **first priority**, to be considered **before** the health needs of people and the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future.

3. In the context of the NPSFM 2017, the Environment Court, in its Interim Decision on the Proposed Southland Water and Land Plan,[36] discusses Te Mana o te Wai, the paradigm shift that is mandated by the NPSFM 2017 and its practical implications. The most important conclusions of the Court are its three key understandings.

4. Whilst the Court's decision was given in the context of the NPSFM 2017, it is submitted that the NPSFM 2020 has not materially changed the Court's key understandings. If anything, the NPSFM 2020 gives greater support to these key understandings as it strengthens the prominence and application of Te Mana o te Wai.

The first key understanding[37]

5. Te Mana o te Wai refers to the integrated and holistic wellbeing of a freshwater body. Upholding Te Mana o te Wai acknowledges and protects the mauri of the water. [38]

6. 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 and mauri of the environment, waterbodies and the people.[39] The mauri of water is, therefore, expressly linked with its use.[40]

36 *Aratiatia Livestock Limited and Ors v Southland Regional Council* [2019] NZEnvC 208.
37 At [17].
38 At [17].
39 At [46].
40 At [60].

7. 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.

Second key understanding[41]

8. 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.

Third key understanding[42]

9. 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 also provide for the health of the waterbody, the health of the environment and the health of the people.

10. The Court understood that this direction is at odds with the usual line of inquiry when it comes to water takes and discharges. The usual inquiry is how health will be impacted by a change in water quality (or quantity).

11. Te Mana o te Wai requires councils to properly engage with individual Papatipu Rūnanga to understand their priorities for freshwater, what resources are valued, and how the fundamental concept and the hierarchy of obligations within Te Mana o te Wai can be given effect to.

12. It is submitted that Te Mana o te Wai, as mandated by the NPSFM 2020, is a fundamental and intentional shift in perspective around management of water. Environmental compromises and trade-offs have resulted in the environmental degradation we see today, and Te Mana o te Wai is intended to shift the spotlight back to the wellbeing of the waterbody.

41 At [58]-[59].
42 At [61]-[62].

Appendix B

The hierarchy of obligations in Te Mana o Te Wai and derivation from Part 2

1. The position of Ngā Rūnanga is that the hierarchy of obligations relevant to Te Mana o Te Wai, as set out in part 1.3(5) of the NPSFM 2020, are all derived from the sustainable management purpose of the RMA. In that respect, it is respectfully submitted that the obligations in Te Mana o Te Wai are not matters outside the sustainable management purpose of the RMA, but are in fact derived directly from the RMA's purpose as set out in Part 2 of the RMA.

2. What the NPSFM 2020 seeks to do is prioritise aspects of sustainable management in the specific context of freshwater. To be clear, it is submitted that this prioritisation does not amount to incompleteness in respect of giving effect to Part 2.

3. It is therefore submitted that the NPSFM 2020 is not incomplete and that recourse to Part 2 of the RMA is not required.

4. For ease of reference, part 1.3(5) of the NPSFM 2020 and section 5 of the RMA respectively state:

> (5) There is a hierarchy of obligations in Te Mana o te Wai 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.

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables 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.

5. It is submitted that the first obligation in Te Mana o Te Wai, *the health and wellbeing of water bodies and freshwater ecosystems*, is derived from the references in section 5 to:

(a) Protection of natural resources;

(b) Sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(c) Safeguarding the life-supporting capacity of water and ecosystems.

6. It is submitted that the second obligation in Te Mana o Te Wai, *the health needs of people (such as drinking water)*, can be derived from the following references in section 5:

(a) Managing the use, development, and protection of natural resources in a way, or at a rate, which enables people and communities to provide for health and safety; and

(b) Safeguarding the life-supporting capacity of water.

7. The third obligation in Te Mana o Te Wai, *the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future*, is respectfully submitted to be derived from following parts of section 5:

(a) Sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being; and

(b) Sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.

8. Other aspects of Part 2 of the RMA are also submitted to be potentially relevant to these matters, but have not been separately addressed given that the relationship between the Te Mana o Te Wai obligations and the sustainable management purpose of the RMA as outlined in section 5 is abundantly clear. Reprioritisation of the RMA's sustainable management purpose in the NPSFM 2020, as it relates to the circumstances which apply to freshwater, cannot result in incompleteness in the NPS.

9. Furthermore, as we outline below, the NPSFM 2020 does not purport to do anything materially different in terms of its coverage or intent than the previous NPS.

Other interpretations of the NPSFM 2020

10. For completeness, it may be suggested by other parties that, while the health and well-being of waterbodies and freshwater ecosystems are the first priority, that there may still need to be a "trading off" or a balancing of the priorities in order to ensure any approach to managing freshwater provides for the health needs of the people, and the ability of communities to provide for their wellbeing.

11. It is submitted that this interpretation is incorrect and not available. The premise of Te Mana o te Wai, as has been explained above, is that it protects the mauri and hauora of the water. It is only when the waterbody is in a state of hauora that it is able to provide for the environment, human health and human use.

12. It is submitted that the use and explanation of the hierarchy of obligations in the NPSFM 2020 removes any doubt there has been a definitive shift from the paradigm that allowed the "trading off" the wellbeing of waterbodies and freshwater ecosystems.