

In the High Court of New Zealand
Dunedin Registry

CIV-2021-412-000089

I Te Kōti Matua O Aotearoa
Ōtepoti Rohe

Under the Declaratory Judgments Act 1908
In the Matter of an application under the
Declaratory Judgments Act 1908
Between **OTAGO REGIONAL COUNCIL**
Plaintiff
And **ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED**
Defendant

Synopsis of Legal Submissions for **Ngā Rūnanga**

Dated: 27 January 2022

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MAY IT PLEASE THE COURT:

INTRODUCTION

1. These submissions are made on behalf of Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga, and Te Rūnanga o Ngāi Tahu (collectively **Ngā Rūnanga**).
2. Te Rūnanga o Ngāi Tahu is the statutorily recognised representative tribal body of Ngāi Tahu whānui (as provided by section 15 of the Te Rūnanga o Ngāi Tahu Act 1996 (**TRONT Act**)) and was established as a body corporate on 24 April 1996 under section 6 of the TRONT Act.
3. Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (**Kāi Tahu ki Otago**) are four of the 18 Papatipu Rūnanga of Ngāi Tahu Whānui that are statutorily recognised under the TRONT Act and are mana whenua within the Otago region.
4. Otago Regional Council (**ORC**) notified the Proposed Otago Regional Policy Statement (**PORPS**) on 26 June 2021. Kāi Tahu ki Otago and Te Rūnanga o Ngāi Tahu made submissions on the PORPS.

SUMMARY OF POSITION

5. The interest of Ngā Rūnanga in these proceedings relate to ensuring appropriate provision is made for recognising and providing for the relationship of Ngāi Tahu whānui with their ancestral lands, waters and other taonga in the process of the hearing and decision making on the PORPS. This is to be achieved by way of an integrated approach to management of the Otago Region's resources under the Resource Management Act 1991 (**RMA**).
6. Ngā Rūnanga support the ORC's request for the Court to make declarations 1 and 2 set out at paragraph 24 of the ORC's statement of claim.
7. Ngā Rūnanga submit that the PORPS is for the purpose of providing for the integrated management of natural and physical resources of the Otago Region and must give effect to the National Policy Statement for Freshwater Management 2020 (**NPSFM**). The affidavit of Mr Ellison explains that in Te Ao Tahu the management of all aspects of the environment is interconnected, and centred around wai Māori. The affidavit of Ms McIntyre explains how the PORPS has been written to recognise and give effect to that approach to environmental management.

Declaration 1

8. The issue before the Court on declaration 1 is whether the PORPS is a freshwater instrument as defined in section 80A(2)(a) of the RMA.
9. Ngā Rūnanga submit that the PORPS meets the definition of a *freshwater planning instrument* under the RMA because it is a regional planning statement *for the purposes of giving effect to a national policy statement for freshwater management*.

Declaration 2

10. The issue before the Court on declaration 2 is whether the ORC has correctly interpreted section 80A(3) of the RMA in making the decision that the entirety of the PORPS relates to freshwater.
11. Ngā Rūnanga submit that the correct interpretation of section 80A(3) is that the words *relates to freshwater* encompass all parts of freshwater planning instruments that are for the purpose of giving effect to the NPSFM.
12. Ngā Rūnanga submit that the ORC correctly interpreted section 80A(3) when it came to the view that the entirety of the PORPS relates to freshwater in the context of:
 - (a) the history of the review that has led to the PORPS;
 - (b) the national direction in the NPSFM;
 - (c) the ORC's duties to take an integrated planning approach under the RMA; and
 - (d) the affidavit evidence of Ms Sandra McIntyre for Ngā Rūnanga that describes how the PORPS is an integrated planning document that, as a whole, either seeks to give effect to the NPSFM or relates to freshwater planning.¹

JURISDICTION

13. The declarations are sought under the Declaratory Judgments Act 1908 (**Act**). The following provisions of the Act are relevant to the Court's jurisdiction to make the requested declarations:

3 Declaratory orders on originating summons

¹ Affidavit of Sandra Jean McIntyre, dated 21 December 2021 at [12].

Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute ... such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute ... or of any part thereof.

4 Effect of declaratory orders

Any declaration so made on any such originating summons shall have the same effect as the like declaration in a judgment in an action, and shall be binding on the person making the application and on all persons on whom the summons has been served, and on all other persons who would have been bound by the said declaration if the proceedings wherein the declaration is made had been an action.

14. Section 3 of the Act provides express provision for the making of declaratory orders where, among other things, any person has done an act the legality of which depends on the construction of any statute. Ngā Rūnanga submit that section 3 applies as the ORC propose to prepare the PORPS under the freshwater planning process in its entirety. The legality of this action is subject to the correct construction of section 80A(1)-(3) of the RMA.
15. The breadth of the Court's jurisdiction under section 3 of the Act has been affirmed by the Supreme Court in *Mandic v Cornwall Park Trust Board*.² The Court has jurisdiction to determine the declarations requested by the ORC despite no other proceeding being brought by the parties before the Court.
16. As set out at section 4 of the Act, the proposed declarations, if made, will be binding on the ORC and all other parties as if "*the proceedings wherein the declaration is made had been an action*".³
17. The jurisdiction conferred on the Court to make a declaratory order is discretionary.⁴ Section 10 of the Declaratory Judgments Act 1908 states:

10 Jurisdiction discretionary

The jurisdiction hereby conferred upon the High Court to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

² *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194.

³ Declaratory Judgments Act 1908, s 4; *Mandic v Cornwall Park Trust Board*, above n 2, at [8].

⁴ Declaratory Judgments Act 1908, s 10.

18. The question of the Court's discretion to make declaratory orders under the Act was addressed by the Court of Appeal in *Electoral Commission v Tate*. The Court of Appeal held that:⁵

[30] ...There may be a number of sound reasons why a declaratory judgment or order should be refused. Examples of grounds on which such judgments or orders have been declined are cases where the question is one of mixed law and fact, or where the question is an abstract or hypothetical question, or where the order would have no utility...

[31] The courts cannot, however, refuse to give or make a declaratory judgment or order on a ground which is inconsistent with the courts' essential function. Broadly speaking, that function is to interpret and apply the law to the facts of a particular case. With respect to statutes, the courts have the function of authoritatively construing legislation, that is, determining the legislation's legal meaning so far as is necessary to decide a case before it. ...It is the courts' task to interpret and enforce provisions which confer rights, or impose duties, or vest powers in named persons or bodies, including governmental agencies. In discharging this task they are giving effect to the will of Parliament... To the extent that the task is not discharged a person or body may be deprived of a statutory right, or may fail to perform a statutory duty, or may be divested of an intended power. Consequently, it is imperative that persons or bodies have access to courts of law to determine the rights, duties or powers which Parliament has conferred on them by statute.

19. Ngā Rūnanga submit that there is a sufficiently clear and undisputed factual situation upon which the proposed declarations can be made. The questions to be answered by the Court are questions of legal interpretation in respect to the interpretation of section 80A(1)-(3) of the RMA.
20. The declaratory orders requested are of public importance. The current version of section 80A of the RMA is new, being enacted in July 2020. Further, the proposed directions have particular importance for Ngā Rūnanga with respect to how the freshwater planning process is to be utilised in Otago to ensure the recognition and application of:
- (a) Te Mana o Te Wai and ki uta ki tai as set out in the NPSFM; and
 - (b) the purpose of regional policy statements to provide for integrated management required by sections 30 and 59 of the RMA.
21. The jurisdiction conferred by section 3 is limited to addressing questions of legal interpretation. An application for a declaration under the Act does not invite the

⁵ *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA) at [30] – [37].

High Court to address the merits of any decision made.⁶ Examples of cases where this limit of jurisdiction has been discussed include:

- (a) In *Institute of Cadastral Surveying Incorporated v Land Information New Zealand* the High Court distinguished an application for a declaration under the Act from an application for Judicial Review and stated:⁷

Thus the Court is not being called upon to scrutinise the process by which the Rules for Cadastral Survey 2010 (or any other Rules under the Cadastral Survey Act) were made by the Surveyor-General or the validity of those Rules. Rather, it is being asked to construe the relevant legislation as it stands.

- (b) In *Brook Valley Community Group Inc v Trustees of the Brook Waimarama Sanctuary* the High Court stated:⁸

[82] The purpose of assessing the validity of regulations is not an opportunity to assess the reasonableness of the policy being promoted (here, the use of certain VTAs to eradicate pests in select areas): the focus is on the legal limits of the power, not the merits of its use.

- (c) In *Auckland Regional Council v North Shore City Council* the Court of Appeal stated:⁹

In conclusion it must be stressed that the appeal and declaratory proceedings and the argument in this Court have been concerned solely with issues of vires: that is to say, with the kind of provisions that are permissible in regional policy statements. They have not been concerned with the merits or otherwise of the particular provisions challenged in the proposed Auckland regional policy statement.

22. Much of the affidavit evidence before the Court relates to the merits of the ORC's decision-making. Ngā Rūnanga submit that, while this affidavit evidence provides helpful context to the legal questions before the Court, the merits of the ORC's decisions are not the subject of the Court's decision-making in this case.

LEGAL QUESTIONS

23. The Court's jurisdiction to make the requested declarations relate to the interpretation of sections 80A(1)-(3) of the RMA. Ngā Rūnanga submit that the

⁶ *Secretary for Internal Affairs v Kilbirnie Tavern Limited* HC Wellington CIV 2007-485-1988, 7 May 2008; *Melville v NRMA Insurance New Zealand Limited* HC Wellington CB70/01, 17 April 2002.

⁷ *The Institute of Cadastral Surveying Incorporated v Land Information New Zealand* [2012] NZHC 1335 at [28].

⁸ *Brook Valley Community Group Incorporated v The Trustees of the Brook Waimarama Sanctuary Trust & Others* [2017] NZHC 1844 [4 August 2017] at [82].

⁹ *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 11-12.

questions for the Court's determination in considering proposed declarations 1 and 2 are as follows:

- (a) does the PORPS fall within the meaning of *freshwater planning instrument* defined within section 80A(2) of the RMA; and
- (b) has the ORC correctly interpreted section 80A(3) of the RMA in making the decision that all of the PORPS *relates to freshwater*?

24. For the reasons that follow, Ngā Rūnanga submit that the answer to both questions (a) and (b) above is 'yes'. Accordingly, proposed declarations 1 and 2 can be made.

THE FRESH WATER PLANNING PROCESS

25. Ngā Rūnanga adopt and do not unnecessarily repeat the submissions of the ORC at paragraphs 9 to 30 of its synopsis of legal submissions in relation to:

- (a) the parliamentary background to the freshwater planning process; and
- (b) the implementation of the freshwater process.

26. The Select Committee report on the Resource Management Amendment Bill 2020 makes it clear that the intent of the freshwater planning process is to assist regional and unitary councils to meet the deadline for implementing the requirements of the NPSFM. The process is intended to achieve this purpose through implementing a streamlined one-step process with limited rights on appeal.¹⁰ The deadline for implementing the NPSFM is as soon as *reasonably practicable*¹¹ and the deadline for notifying all freshwater planning instruments that are for the purpose of giving effect to the NPSFM is 31 December 2024.¹²

27. The Select Committee report on the Resource Management Amendment Bill 2020 stated:¹³

As mentioned at the start of this commentary, a significant reform from this bill would be the introduction of a new freshwater planning process for regional or unitary councils that are carrying out regional freshwater functions. Those councils would be required to follow the new freshwater planning process for proposed regional policy statements and regional plans (including changes to them) that contain provisions that give effect to the National Policy Statement for Freshwater Management or otherwise relate to freshwater.

¹⁰ Resource Management Amendment Bill (180-2) (select committee report) at 4.

¹¹ National Policy Statement for Freshwater Management 2020 [NPSFM].

¹² Resource Management Act 1991, s 80A(4)(b).

¹³ Resource Management Amendment Bill (180-2) (select committee report), above n 10, at 4.

REGIONAL POLICY STATEMENTS TO BE PREPARED IN AN INTEGRATED MANNER

28. The ORC has obligations to prepare the PORPS in a manner that provides for the integrated management of natural and physical resources of the Region:
- (a) Section 30 of the RMA requires that the ORC's functions include the establishment, implementation, and review of objectives, policies, and methods to achieve *integrated management* of the natural and physical resources of the region.
 - (b) Section 59 of the RMA provides that the purpose of a regional policy statement is to achieve the purpose of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve *integrated management* of the natural and physical resources of the whole region.
29. In terms of the meaning of integrated management, in *New Zealand Shipping Federation of New Zealand v Marlborough District Council* the Environment Court held, in the context of the development of the Marlborough Sounds Resource Management Plan, that:¹⁴
- Integrated management and the MDC's function under the RMA therefore, appears to relate to generic integration of broadly defined resources at a wide regional level. It recognises that the protection of one resource may have positive or negative effects on the other. It may apply for example, to how natural and physical resources relate to each other within the ecosystem, or how, through the provisions of Part II of the RMA, ...*
30. The requirement for a regional policy statement to achieve integrated management of resources across the whole region is relevant to the legal question of whether the ORC has correctly interpreted section 80A(3) of the RMA in making the decision that all of the PORPS *relates to freshwater*. The importance of integrated management to resource planning is reflected in the NPSFM as it seeks to give effect to Te Mana o te Wai as described in the NPSFM. It is also reflected in the purpose of the RMA, which includes the duties to: recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as a matter of national importance,¹⁵ have regard to kaitiakitanga¹⁶ and take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).¹⁷

¹⁴ *New Zealand Shipping Federation of New Zealand v Marlborough District Council* Environment Court W38/06, 30 May 2006 at [106].

¹⁵ Resource Management Act 1991, s 6(e).

¹⁶ Section 7(a).

¹⁷ Section 8.

NPSFM 2020

31. A *freshwater planning instrument* as defined in section 80A(2) of the RMA includes a planning document that gives effect to a national policy statement for freshwater management. The NPSFM is a national policy statement for freshwater management.
32. The NPSFM came into effect in September 2020 and has strengthened and clarified the direction for freshwater management in New Zealand. The NPSFM reinforced the importance of Te Mana o te Wai (as described in the document) and ki uta ki tai under clauses 3.2(2)(e) and 3.5(1) of the NPSFM 2020.¹⁸ For Kāi Tahu ki Otago integrated management ki uta ki tai is fundamental to freshwater management. This role of ki uta ki tai is described in the PORPS.¹⁹

Application of the NPSFM

33. The NPSFM applies to:²⁰

... all freshwater (including groundwater) and to the extent that they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area).

34. Receiving environment is defined as:²¹

Includes, but is not limited to, any water body (such as a river, lake, wetland or aquifer) and the coastal marine area (including estuaries).

Te Mana o te Wai

35. The fundamental concept in the NPSFM is Te Mana o te Wai. Part 1.3 of the NPSFM states:

1.3 Fundamental concept – Te Mana o te Wai

Concept

- (a) *Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.*

¹⁸ NPSFM, above n 11, cl 3.2(2)(e), 3.5(1).

¹⁹ Affidavit of Anita Jayne Dawe, dated 13 September 2021 Exhibit 1 at 415.

²⁰ NPSFM, above n 11, cl 1.5.

²¹ Clause 1.4(1).

(b) *Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement.*

36. Te Mana o te Wai prioritises the health and wellbeing of the water bodies. Of secondary importance are the health needs of the people, followed by the ability of people and communities to provide for social, economic and cultural wellbeing, now and in the future.²²

37. The NPSFM includes the following key policies:

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.*

ki uta ki tai

38. The NPSFM also specifically recognises and provides for a ki uta ki tai approach. The NPSFM requires that, as part of giving effect to Te Mana o te Wai, every regional council must “*adopt an integrated approach, ki uta ki tai, to the management of freshwater*”.²³

39. Ki uta ki tai is a cornerstone of Te Ao Tahu – the Ngāi Tahu worldview of human-environment relationships and environmental and resource management and expresses the Kāi Tahu understanding of the interconnectivity of all things in the environment by whakapapa. The literal translation is from the mountains to the sea. However, as is set out in the affidavit of Mr Ellison, a ki uta ki tai approach involves the holistic management of the interrelated elements within the natural environment. Ki uta ki tai is not limited to literal connections along a waterbody as may be understood from a western geographic or hydrological paradigm. Recognition and consideration of the interconnections between wai, whenua and wai tai across an entire landscape is part of a ki uta ki tai approach. For Ngā Rūnanga there is no distinction between whenua and wai; wai māori is part of the

²² Clause 2.1.

²³ Clause 3.2(2)(e).

whenua and they are inseparable. Similarly, the coastal environment cannot be separated from the whenua, or wai tai (coastal waters) from wai māori (freshwater).²⁴ This is reflected in parts (b) and (c) of NPSFM Clause 3.5.

40. Clause 3.5 of the NPSFM requires:

- (1) *Adopting an integrated approach, ki uta ki tai, as required by Te Mana o te Wai, 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; and*
 - (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; and*
 - (d) *encourage the co-ordination and sequencing of regional or urban growth.*
- (2) *Every regional council must make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of:*
 - (a) *the use and development of land on freshwater; and*
 - (b) *the use and development of land and freshwater on receiving environments.*

Te Mana o te Wai and ki uta ki tai in plan making

41. It is the position of Ngā Rūnanga that managing the natural and physical resources of the Otago Region is not discharged in a discrete section(s) of the PORPS. Rather, to properly give effect to the NPSFM and achieve the purpose of the RMA, threads of integrated management are woven through the entirety of the PORPS. Such an approach was endorsed by the Environment Court in *Aratiatia Livestock Limited v Southland Regional Council* in the context of the Southland Proposed Water and Land Plan. The Court stated:²⁵

²⁴ Affidavit of Sandra Jean McIntyre, above n 1 at [12].

²⁵ *Aratiatia Livestock Limited v Southland Regional Council* [2019] NZEnvC 208 at [19], [40] & [63].

[19] *Te Mana o te Wai will be achieved when regional policy statements and plans consider and recognise Te Mana o te Wai, and in doing so recognise the connection between water and the broader environment - te hauora o te taiao (the health of the environment), te hauora o te wai (the health of the waterbody) and te hauora o te tangata (the health of the people) - noting that values identified by the community, including tangata whenua, will inform the setting of freshwater objectives and limits (policy AA 1).*

...

[40] *The proposed plan seeks also to manage water in a way that encompasses the Ngai Tahu philosophy of "ki uta ki tai". Ngai Tahu are tangata whenua of Murihiku (including all of Southland). In accordance with ki uta ki tai water, land and people are interconnected and natural resources are to be managed in a way that responds to their connectivity. We understand the architecture of the plan, in particular the notified objectives and policies, to express this philosophy. Consequently, there is no specific or separate section in the proposed plan that "deals with" tangata whenua. To reinforce this approach, the plan acknowledges that tangata whenua values and interests have been identified and reflected in the management of fresh water and associated ecosystems and - we were told - 'threaded' through these higher order provisions.*

...

[63] *If we are correct in our understandings, and this approach is indeed threaded through the proposed plan, this is a fundamental shift in perspective around management of this natural resource...*

42. The above discussion from the Environment Court related to the development of the Southland Proposed Water and Land Plan, which is a regional plan. The current proceedings relate to a regional policy statement. Ngā Rūnanga argue that the importance for integrated management to be woven through the entirety of the PORPS is even greater in this case than it was in *Aratiatia Livestock Limited v Southland Regional Council*²⁶ on account of the direction of section 30 of the RMA for the regional policy statements to achieve integrated management of the natural and physical resources of the region.

ORC'S DECISION THAT PORPS IS A FRESHWATER PLANNING INSTRUMENT

43. The ORC considered the PORPS at its meeting on 16 June 2022 and:²⁷
- (a) adopted the officers' report presented to it;

²⁶ *Aratiatia Livestock Limited v Southland Regional Council*, above n 25.

²⁷ Affidavit of Anita Jayne Dawe, above n 19 at 408.

- (b) decided that the PORPS was a freshwater planning instrument as defined in section 80A(2) of the RMA; and
 - (c) approved the PORPS and the associated report under section 32 of the RMA for public notification.
44. The officers' report adopted by the ORC described the integrated nature of the PORPS as is required by section 59 of the RMA and explained the links between the freshwater chapter and other specific resource management chapters within the PORPS.²⁸
45. The officers' report adopted by the ORC stated:²⁹

[23] Significant parts of the PORPS 2021 are clearly able to be classified as a freshwater planning instrument, either because they are designed to give effect to a national policy statement for freshwater, or because they are a matter that relates to freshwater. For other parts it is less straight forward.

[24] Staff advice is that the PORPS 2021 as a whole should be considered a freshwater planning instrument for the following reasons:

- a. The underpinning philosophy of the RMA demands an integrated approach to the management of natural and physical resources.*
- b. Ki uta ki tai - from the mountains to the sea - is a progressive natural management planning approach which also reflects Te Ao Māori.*
- c. It is best planning practice to draft plans and policy statements in this way to properly recognise and plan for interdependencies, co-dependencies, and interconnectedness.*
- d. The integrated management chapter of PORPS 2021 has been drafted to ensure that conflicts between competing demands for resources can be resolved and has adopted an approach of interconnectedness.*

DECLARATION 1: IS THE PROPOSED OTAGO REGIONAL POLICY STATEMENT A FRESHWATER PLANNING INSTRUMENT?

46. The ORC seeks declaration 1 from the Court confirming, as a matter of law, that the PORPS is a freshwater planning instrument under section 80A(1) – (3) of the RMA.
47. Ngā Rūnanga support the making of declaration 1.
48. Freshwater planning instrument is defined in section 80A(2), which states:

²⁸ At 395-397.

²⁹ At 394-395.

A freshwater planning instrument means—

- (a) *a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management:*
- (b) *a proposed regional plan or regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a)):*
- (c) *a change or variation to a proposed regional plan or regional policy statement if the change or variation—*
 - (i) *is for the purpose described in paragraph (a); or*
 - (ii) *otherwise relates to freshwater.*

49. Section 80A(2) sets out three separate tests for when a document is a freshwater planning instrument:

- (a) Ngā Rūnanga submit that the PORPS meets the first test contained in section 80A(2)(a) of the RMA.
- (b) The second test in 80A(2)(b) applies only if the first test is not met. Therefore, the second test in 80A(2)(b) does not apply in this case. Despite this, Ngā Rūnanga support the submission of the ORC that the PORPS *relates to water*.³⁰
- (c) The third test is not relevant to these proceedings as the PORPS is not a variation.

50. Ngā Rūnanga submit that the PORPS meets the first test contained in section 80A(2)(a) of the RMA because:

- (a) the PORPS is a regional planning statement;
- (b) the NPSFM is a national policy statement for freshwater management; and
- (c) the PORPS is *for the purpose of giving effect to a national policy statement for freshwater management*.

51. Ngā Rūnanga submit that the PORPS is *for the purpose of giving effect to a national policy statement for freshwater management* for the following reasons:

- (a) The purpose of the current review of the PORPS is to comply with recommendations from the Minister for the Environment that the ORC take all necessary steps to ensure that its planning framework represents

³⁰ Submissions of Counsel for Otago Regional Council, dated 24 December 2021 at [236].

a fit for purpose freshwater management planning regime that gives effect to the relevant national instruments, including the NPSFM.³¹

(b) The express intention for the PORPS is to give effect to the NPSFM. The Council officers' report dated 6 June 2021 and the section 32 report notified along with the PORPS set out the basis upon which the ORC considers that the PORPS gives effect to the NPSFM as required by section 62(3) of the RMA.³² The Council officers' report recognises the importance placed on Te Mana o te Wai and ki uta ki tai in the NPSFM and sets out the ORC's view on how the PORPS give effects to those concepts.³³

52. The PORPS also gives effect to other national policy statements.³⁴ Ngā Rūnanga submit that this does not prevent the PORPS falling within the definition of freshwater planning instrument contained within section 80A(2)(a) of the RMA. Section 80A(2)(a) of the RMA does not require a freshwater planning instrument to be *solely* or *only* for the purpose of giving effect to the NPSFM.³⁵

53. For the purposes of declaration 1, the PORPS is either a freshwater planning instrument or it is not. Forest and Bird seeks that declaration 1 be declined. However, it does not contest the position of the ORC and Ngā Rūnanga that the PORPS is a freshwater planning instrument. The submissions of Forest and Bird focuses on whether the ORC was wrong in law in its application of section 80A(3). That issue is relevant to declaration 2, addressed below. As Forest and Bird does not argue that the PORPS is not a freshwater planning instrument, Ngā Rūnanga submit that there is no basis upon which Forest and Bird can pursue relief that declaration 1 be declined.

DECLARATION 2: INTERPRETATION OF SECTION 80A(3) OF THE RMA

Issue before the Court

54. The ORC seeks declaration 2 from the Court confirming as a matter of law that the ORC is entitled to continue to prepare the PORPS in its entirety under the freshwater planning process.

³¹ Affidavit of Anita Jayne Dawe, above n 19, at 2.

³² At 394 and 850 – 853.

³³ At 394-395 and 850 – 853.

³⁴ At 849 – 850.

³⁵ This can be contrasted to other parts of the RMA where the phrases '*solely for the purpose of*' and '*only for the purpose of*' are used. See Resource Management Act 1991, s 2 definition of 'aquaculture activities'; ss 64A(5), 99(2)(b) & 99A(2)(c), 64A(5).

55. The issue raised by Forest and Bird is whether the ORC has correctly interpreted section 80A(3) of the RMA in making the decision that the entirety of the PORPS *relates to freshwater*?
56. Section 80A(3) states:
- A regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1. However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—*
- (a) *prepare that part in accordance with this subpart and Part 4 of Schedule 1; and*
- (b) *prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1 or, if applicable, subpart 5 of this Part.*
57. Section 80A(3) starts with a direction that a freshwater planning instrument must be prepared in accordance with the freshwater planning process. However, if the Council is *satisfied* that only part of the instrument relates to freshwater then that part of the instrument must be prepared in accordance with the standard plan making process contained in Part 1 of Schedule 1 of the RMA.
58. Ngā Rūnanga submit that the use of the word *satisfied* confers a merits decision on the relevant council. It is for the council to review the freshwater planning instrument and satisfy itself whether only parts of it relate to freshwater or whether the instrument relates to freshwater in its entirety.
59. The ORC has carried out an assessment of the PORPS and come to the view that it is satisfied that PORPS *relates to freshwater* in its entirety. The merits of the ORC's decision are not the subject of these declaration proceedings.
60. For the reasons below, Ngā Rūnanga support the making of declaration 2.

Interpretation of section 80A(3)

61. Ngā Rūnanga submit that the ORC correctly interpreted section 80A(3) when it came to the view that the entirety of the PORPS *relates to freshwater* in the context of:
- (a) the history of the review that has led to the PORPS,
- (b) the national direction in the NPSFM;
- (c) the ORC's duties to take an integrated planning approach through the PORPS, give effect to the NPSFM and achieve the purpose of the RMA; and

- (d) the affidavit evidence of Ms Sandra McIntyre for Ngā Rūnanga that describes how the PORPS is an integrated planning document that, as a whole, relates to freshwater.³⁶

62. Ngā Rūnanga submit that the correct interpretation is that the words *relates to freshwater* in section 80A(3) encompass all parts of a freshwater planning instrument that are for the purpose of giving effect to the national policy statement for freshwater management. This is because:

- (a) Section 80A(3) is to be interpreted in light of its purpose and within the context of the freshwater planning framework established by section 80A RMA.³⁷
- (b) The intent of the freshwater planning process is to assist regional and unitary councils to meet the deadline for implementing the requirements of the NPSFM through implementing a specialist one step process with limited appeal rights.³⁸
- (c) As a result of the above purpose, a freshwater planning instrument is defined in section 80A(2)(a) as any “*regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management*”.
- (d) The above interpretation would best give effect to Parliaments’ intention as it would allow all parts of regional policy statements and plans that are for the purpose of giving effect to the NPSFM to be included in the streamlined freshwater planning process. This would enable the relevant councils to give effect to the NPSFM fully and quickly. The interpretation would also be consistent with the general framework of the RMA that directs regional policy statements to provide for integrated management.
- (e) To limit the interpretation of the words *relates to freshwater* to the effect that parts of a freshwater planning instrument that are for the purpose of giving effect to the NPSFM would be excluded from the freshwater planning process, as is suggested by Forest and Bird,³⁹ would undermine the intention of parliament for the freshwater planning process. This is because it would reduce the speed within which councils could give effect to the NPSFM to its full extent.

³⁶ Affidavit of Sandra Jean McIntyre, above n 1, at [12].

³⁷ Interpretation Act 1999, s 5(1).

³⁸ Resource Management Amendment Bill (180-2) (select committee report), above n 10, at 4.

³⁹ Submissions of Counsel for Royal Forest and Bird Protection Society of New Zealand Incorporated, dated 20 January 2022 at [20].

- (f) Forest and Bird criticise the ORC and Ngā Rūnanga interpretation of section 80A(3) of the RMA on the basis that it would justify further proposed regional policy statements and variations going through the freshwater planning process and frustrate the intent to streamline that process.⁴⁰ Ngā Rūnanga submit that it is Parliament's purpose for such documents to go through this freshwater planning process (which is streamlined through implementing a specialist one step process with limited appeal rights) as opposed to limiting the number of planning documents that go through that process.

63. Ngā Rūnanga further submit that the ORC correctly interpreted section 80A(3) of the RMA in its decision that all parts of the PORPS *relate to freshwater*.

- (a) It was the intention of the statutory drafters that the phrase, "*giving effect to the NPS-FM*", contained in section 80A(2) of the RMA is to capture "*the NPS-FM requirements to consider and recognise Te Mana o te Wai and to recognise the interactions of Ki uta ki tai between the ecosystems of freshwater, land and sensitive receiving environments including the coast*."⁴¹
- (b) As part of giving effect to Te Mana o Te Wai (as described in the NPSFM) and taking a ki uta ki tai approach, the ORC must carry out integrated planning across the whole environment.⁴² This includes addressing a broad range of resource management matters such as land use and development and the coordination and sequencing of regional or urban growth.⁴³
- (c) As set out in the Council officers' report⁴⁴ and the affidavit of Ms Sandra McIntyre for Ngā Rūnanga,⁴⁵ the PORPS seeks to take an integrated approach to water and other resources in the region in order to give effect to the NPSFM and achieve the purpose of the RMA. Ms McIntyre's affidavit sets out examples of the clear links to freshwater planning across the entire structure and framework of the PORPS.⁴⁶ The examples in Ms McIntyre's affidavit are not exclusive. Other links also exist as set out in the legal submissions for the ORC from paragraphs 57 to 204.

⁴⁰ At [86].

⁴¹ At 89.

⁴² NPSFM, above n 11, cl 3.5.

⁴³ Clause 3.5.

⁴⁴ Affidavit of Anita Jayne Dawe, above n 19, at 394-395.

⁴⁵ Affidavit of Sandra Jean McIntyre, above n 1, at [10].

⁴⁶ At [58].

(d) The implications of Forest and Bird's interpretation of section 80A(3) would be that decision making on the PORPS would become fragmented. As set out in the affidavit of Ms McIntyre, parts of the PORPS that are intended to give effect to the broad principles of Te Mana o te Wai and ki uta ki tai in the NPSFM would be separated from the freshwater planning process. The result would be that it will be more difficult for the ORC to achieve the freshwater outcomes required by the NPSFM.⁴⁷

64. Ngā Rūnanga submit that, in the context of the intention for the freshwater planning process, the requirement for the ORC to carry out integrated development with respect to the PORPS and give effect to Te Mana o te Wai and a ki uta ki tai approach, it was lawfully within the scope of section 80A(3) for the ORC to come to the view that the entire PORPS *relates to freshwater*.

Forest and Bird Arguments

65. This section responds to arguments raised by the synopsis of submissions for Forest and Bird.

(a) Forest and Bird submit that section 80A(3) does not permit the ORC to determine that the parts of the PORPS that relate to coastal water *relate to freshwater* under section 80A(3) of the RMA.⁴⁸ Forest and Bird make this argument on the basis that the definition of *freshwater* in the RMA expressly excludes *coastal waters*. Ngā Rūnanga accepts that the definition of freshwater excludes coastal water. However, the fact that coastal water is separately defined in the RMA from freshwater does not exclude coastal water or the coastal environment from being *related to freshwater*. The NPSFM expressly applies to coastal environments where these environments are affected by freshwater.⁴⁹ That freshwater management is relevant in the coastal environment is demonstrated in the case of *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated*, where the High Court held that the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 made under the RMA apply to natural wetlands in the coastal marine area.⁵⁰ Ngā Rūnanga submit that if the correct interpretation is applied, it is within the scope of section 80A(3) for the ORC to find that the parts of the PORPS that relate to the coastal

⁴⁷ At [58].

⁴⁸ Submissions of Counsel for Royal Forest and Bird Protection Society of New Zealand Inc, above n 39, at 30-41.

⁴⁹ NPSFM, above n 11, cl 1.5.

⁵⁰ *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113 at [125].

environment meets the meaning of *relate to freshwater* under section 80A(3) of the RMA.

- (b) Forest and Bird submit that the RMA precludes regional coastal plans from undergoing the freshwater planning process as the basis for demonstrating that the RMA distinguishes the responsibility for the management of the coastal marine area from other environments.⁵¹ Forest and Bird's argument in this respect conflates the process for the making of a regional policy statement from the making of a regional coastal plan. As a regional policy statement, the PORPS is subject to the explicit direction in the RMA for regional policy statements to "*achieve integrated management of the natural and physical resources of the whole region*".⁵² Regional coastal plans are subject to a different requirement being to "*promote the integrated management of a coastal marine area and any related part of the coastal environment*".⁵³ The requirements for the development of a regional coastal plan are not a valid or relevant reason to limit the application of the freshwater planning process.
- (c) For the reasons set out in these submissions Ngā Rūnanga fundamentally disagree with Forest and Bird's submission that the matters that relate to freshwater in the PORPS are limited to the sections Land and Freshwater domain, MW-Mana whenua and RMA Resource Management issues of significance to iwi authorities in the region.⁵⁴ Ngā Rūnanga agrees that the above parts of the PORPS are for the purpose of giving effect to the NPSFM and relate to freshwater. However, for the reasons set out in these submissions the ki uta ki tai approach to freshwater management directed by the NPSFM is woven throughout the entire PORPS. To limit the PORPS in the way suggested by Forest and Bird would be contrary to the ki uta ki tai approach and therefore to the NPSFM.
- (d) Forest and Bird submit that the requirement in clause 65(2)(b) of Schedule 1 of the RMA for freshwater commissioners appointed by the Minister for the Environment to have collective knowledge and expertise in freshwater quality, quantity and ecology demonstrates that the freshwater planning process is not tailored for wider resource

⁵¹ Submissions of Counsel for Royal Forest and Bird Protection Society of New Zealand Inc, above n 39, at [46].

⁵² Resource Management Act 1991, s 59.

⁵³ Section 64(2).

⁵⁴ Submissions of Counsel for Royal Forest and Bird Protection Society of New Zealand Inc, above n 39, at [105] and [106].

management matters such as those contained in the PORPS.⁵⁵ Ngā Rūnanga submit that Forest and Bird’s submission imposes an unduly narrow approach to the scope of the expertise available on a freshwater hearings panel. Persons with expertise in freshwater quality, quantity and ecology can have expertise in the integrated management of resources. Further, Freshwater commissioners appointed by the Minister are required to have expertise beyond the matters emphasised by Forest and Bird. They are also required to have collective knowledge of the RMA in general and tikanga Māori and mātauranga Māori. Freshwater commissioners are also required to be joined on the freshwater hearings panel by two persons who are nominated by the relevant regional council and one person nominated by local tangata whenua.⁵⁶ Such persons may have particular expertise in broader resource management matters as required. Finally, the Chief Freshwater Commissioner is required to consider the specific needs of the panel in relation to the particular instrument to be heard at the time of appointing the panel.⁵⁷ In doing so the Chief Freshwater Commissioner has the ability to ensure that there is sufficient knowledge on the panel in relation to integrated management or other matters where an integrated document such as the PORPS is to be heard. Ngā Rūnanga submits that the requirements for the constitution of a freshwater panel are broad enough to ensure the proper hearing of the PORPS under the freshwater planning process, particularly given that expert evidence and reports can be provided as part of the process.

CONCLUSION

66. Overall, Ngā Rūnanga submit that the ORC’s decision that the PORPS is a freshwater planning instrument in its entirety is correct in the context of the provisions of the PORPS, the NPSFM and the RMA framework that requires an integrated approach to freshwater management. Accordingly, declarations 1 and 2 should be made.

Dated this 27th day of January 2022



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⁵⁵ At [26] – [29] & [97].

⁵⁶ Resource Management Act 1991, sch 1 cl 59(1)(c)(i).

⁵⁷ Schedule 1 cl 59(6).

List of Authorities

Enactments

1. Declaratory Judgments Act 1908, ss 4, 10.
2. Interpretation Act 1999, s 5(1).
3. Resource Management Act 1991, ss 2, 6(e), 7(a), 8, 59, 64(2), 64A(5), 80A(4)(b), 99(2)(b), 99A(2)(c), sch 1 cl 59(1)(c)(i), cl 59(6)

Cases

4. *Aratiatia Livestock Limited v Southland Regional Council* [2019] NZEnvC 208.
5. *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
6. *Brook Valley Community Group Incorporated v The Trustees of the Brook Waimarama Sanctuary Trust & Others* [2017] NZHC 1844 [4 August 2017].
7. *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA).
8. *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194.
9. *Melville v NRMA Insurance New Zealand Limited* HC Wellington CB70/01, 17 April 2002.
10. *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113.
11. *New Zealand Shipping Federation of New Zealand v Marlborough District Council* Environment Court W38/06, 30 May 2006.
12. *Secretary for Internal Affairs v Kilbirnie Tavern Limited* HC Wellington CIV 2007-485-1988, 7 May 2008.
13. *The Institute of Cadastral Surveying Incorporated v Land Information New Zealand* [2012] NZHC 1335.

Other

14. National Policy Statement for Freshwater Management 2020.
15. Resource Management Amendment Bill (180-2) (select committee report).