IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

UNDER	s 299 and cl 56 of Schedule 1 to the Resource Management Act 1991 ("**RMA**")
IN THE MATTER OF	an appeal against decisions on the freshwater planning instrument-related parts of the Proposed Otago Regional Policy Statement 2021
BETWEEN	**TE RŪNANGA O MOERAKI, KĀTI HUIRAPA RŪNAKA KI PUKETERAKI, TE RŪNANGA O ŌTĀKOU AND HOKONUI RŪNANGA** First Appellants
AND	**TE AO MARAMA INCORPORATED ON BEHALF OF WAIHOPAI RŪNAKA, TE RŪNANGA O ŌRAKA APARIMA, AND TE RŪNANGA O AWARUA** Second Appellants

(continued overleaf)

NOTICE OF APPEAL

Dated 22 April 2024

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AND **TE RŪNANGA O NGĀI TAHU**

Third Appellants

AND **OTAGO REGIONAL COUNCIL**

Respondent

NOTICE OF APPEAL

To: the Registrar of the High Court at Dunedin

And

To: the Respondent

The appellants in the proceeding identified above, Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (collectively, "**Kāi Tahu ki Otago**" or "**Kā Rūnaka**"); Te Ao Marama Incorporated on behalf of Waihopai Rūnaka, Te Rūnanga o Ōraka Aparima, and Te Rūnanga o Awarua (collectively, "**Ngāi Tahu ki Murihiku**"); and Te Rūnanga o Ngāi Tahu together referred to as "**Kāi Tahu**", hereby give notice that they are appealing to the Court against the decisions of the Otago Regional Council ("**ORC**") on the freshwater planning instrument parts of the Proposed Otago Regional Policy Statement 2021 ("**PORPS**"), which were made on 27 March 2024 and publicly notified on 30 March 2024 ("**Decisions**"), pursuant to cl 56 of Schedule 1 to the Resource Management Act 1991 ("**RMA**").

1. Kāi Tahu ki Otago, Ngāi Tahu ki Murihiku and Te Rūnanga o Ngāi Tahu lodged submissions on the freshwater planning instrument parts of the PORPS ("**FPI**"); filed evidence in support of their submissions; and attended the hearing of submissions on the FPI between 28 August and 18 September 2023.

2. Kāi Tahu are not trade competitors for the purposes of section 308D of the RMA.

3. Kāi Tahu hold and exercise rakatirataka within the Kāi Tahu Takiwā and have done so since before the arrival of the Crown. The rakatirataka of Kāi Tahu resides within the papatipu rūnaka. The Crown and Parliament have recognised the enduring nature of that rakatirataka through Article II of Te Tiriti o Waitangi, the 1997 Deed of Settlement between Ngāi Tahu and the Crown, and the 1998 Ngāi Tahu Claims Settlement Act ("**NTCSA**") in which Parliament endorsed and implemented the Deed of Settlement.

4. Accordingly, Kāi Tahu have a unique and abiding interest in the sustainable management of te taiao – the environment – within the Otago region. Whilst the takiwā of Kāi Tahu Whānui extends over the

vast majority of Te Waipounamu, and as acknowledged in the text of the PORPS itself, three Kāi Tahu ki Otago papatipu rūnaka have marae based in Otago. These are Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, and Te Rūnanga o Ōtākou, whilst the fourth, Hokonui Rūnanga, is based in neighbouring Southland.

5. Three Ngāi Tahu ki Murihiku rūnaka – Awarua Rūnanga, Waihopai Rūnanga and Ōraka-Aparima Rūnanga – are based in Southland but also share interests with Kāi Tahu ki Otago in South Otago, the Mata-au Clutha River, and the inland lakes and mountains.

6. Through their submissions on the FPI, Kāi Tahu sought the adoption of a "ki uta, ki tai" approach, a resource management approach which emphasises the holistic management of integrated elements within the natural environment, demonstrating the interconnectedness of environmental systems and forming a basic tenet of Kāi Tahu resource management practises and perspectives. The approach recognises that what occurs on land will have a direct consequence for its neighbouring rivers, lakes and the coastal environment; and when this interconnectivity is not recognised or managed well, land-based activities can have a direct detrimental effect on those other environments, including their mauri.

7. Kāi Tahu see the adoption of a "ki uta, ki tai" approach as being pivotal to achieving the integrated management of natural and physical resources of the Otago region. Kāi Tahu participated, with their objections noted, in the split hearing of the freshwater and non-freshwater parts of the PORPS, following the High Court's decision in *Otago Regional Council v Royal Forest & Bird Protection Society of New Zealand Inc* [2022] NZHC 1777, and the division of the policy statement into "freshwater" and "non-freshwater" parts.[1]

8. As ORC, as the relevant regional council under cl 56 of Schedule 1 to the RMA, accepted the recommendations of the freshwater hearings

[1] It is noted that the effect of the High Court's decision in *ORC* has since been nullified by a legislative amendment introduced as part of the previous Government's resource management reforms, through amendments to s 80A of the RMA: Natural and Built Environments Act 2023, sch 16, Part 4.

panel ("**Panel**") appointed to hear submissions on the FPI, a right of appeal is available to the High Court only on points of law.[2]

9. Kāi Tahu supports, and does not appeal against, the vast majority of ORC's Decisions on the FPI, which support the outcomes sought in the Kāi Tahu submissions.[3]

10. However, in a number of discrete areas, Kāi Tahu say that the ORC has erred in law, as set out below in more detail below, by:

    (a) providing for potential further development of hydro-electricity generation schemes within the Clutha (Mata-au) and Taiari catchments, in circumstances where it had no scope (nor evidence) to rely upon;

    (b) failing to implement the Panel's recommended inclusion of reference to Māori freshwater values and amenity values within LF-FW-P10A, in the absence of any evidence to the contrary; and

    (c) failing to include reference to improvement of water bodies, where those water bodies are degraded, in LF-LS-P21 in a manner which fails to give effect to Policy 5 of the National Policy Statement for Freshwater Management ("**NPSFM**").

First error of law – providing for potential further development of hydro-electricity generation schemes within the Clutha (Mata-au) and Taiari catchments – LF-VM-O2 and LF-VM-O4

LF-VW-O2 – the Clutha (Mata-au) FMU Vision

11. In their submission, Kāi Tahu ki Otago supported the notified version of LF-VM-O2, as that objective applies to the Clutha (Mata-au) catchment, subject to amendments. The Mata-au takes its name from Kāi Tahu whakapapa, which traces the genealogy of water (or wai)

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2 RMA, Sch 1, cl 56(1). A further right of appeal is available with leave to the Court of Appeal: RMA, s 308, which applies with all necessary modifications pursuant to cl 56(4) of Sch 1 to the RMA.

3 For the avoidance of doubt, failure to appeal against the acceptance of a particular recommendation of the Freshwater Hearings Panel should not be taken as Kāi Tahu having accepted that recommendation, or the Panel's reasoning, for all purposes, particularly those outside the FPI and PORPS processes. Kāi Tahu's concern in this appeal has necessarily been focussed on errors of law identified in ORC's Decisions.

back to the separation of Raki (the sky father) from Pāpātuānuku (the earth mother).[4]

12. Ngāi Tahu ki Murihiku also submitted in support of LF-VM-O2, seeking to retain the content of the objective, subject to the changes sought in the Kāi Tahu ki Otago submission, and a further amendment relating to a perceived unnecessary duplication between the overarching vision for the Freshwater Management Unit (or "**FMU**") and the visions for its five constituent rohe (or areas).

13. Te Rūnanga o Ngāi Tahu supported both submissions.

14. As part of their submission on the relevant objective, Kāi Tahu supported recognition of the national significance of the Clutha hydro-electricity system (LF-VM-O2(6) as originally notified).

15. In their recommendations on the FPI, which were accepted by the ORC in its Decisions, the Freshwater Hearings Panel ("**Panel**") recommended an amendment to LF-VM-O2, apparently in response to a submission by Contact Energy Ltd, the owner and operator of the Clutha hydro-electricity system, to include specific reference to the potential for future development being *"provided for within this modified catchment"* (at [328] of Appendix Two).

16. The Panel identified the Contact submission as the basis for the recommended change; and also referred to the evidence of Mr Boyd Brinsdon, Head of Generation – Hydro at Contact, and Ms Claire Hunter for Contact Energy Ltd at paragraphs 325-327 of the decision.

17. Kāi Tahu say that the Panel, and therefore the ORC as Respondent, erred in law when it found that the proposed change:

    (a) fell within the scope of Contact's submission; and/or

    (b) was supported by the evidence provided by Contact at the hearing of its submission on the FPI.

18. Earlier in its recommendations, the Panel identified that ORC's reporting planner, Ms Felicity Boyd, had accepted Contact's submission to recognise and provide for 'the operation, maintenance,

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4 Evidence of Edward Ellison at [27] and [46].

and upgrading' of the Clutha hydro-electricity system in sub-clause (6) of LF-VM-O2.

19. However, neither that submission point, nor any other part of the Contact submission, read holistically, provides scope for the proposed amendment to apply on a catchment-wide basis.

20. In addition, there was no evidence before the Panel to support provision, within LF-VM-O2, for the potential for future development that is not part of the Clutha hydro-electricity scheme within the *entire* Clutha (Mata-au) catchment. The Clutha (Mata-au) FMU catchment covers the following five rohe (or areas):

    (a) Upper Lakes;

    (b) Dunstan;

    (c) Manuherekia;

    (d) Roxburgh; and

    (e) Lower Clutha.

21. The size of the Clutha (Mata-Au) catchment is shown most clearly on MAP1 to the PORPS, which is reproduced below in Figure 1:

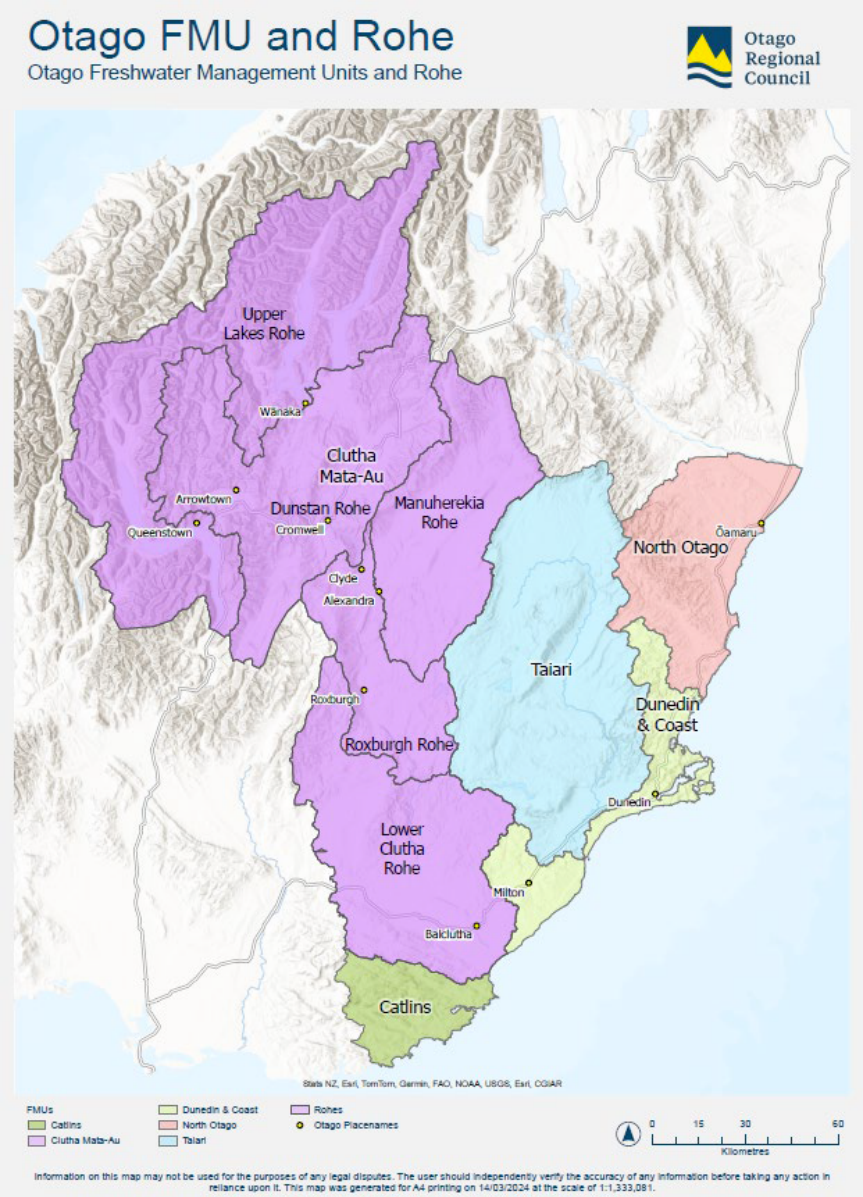

Figure 1 – MAP 1 to the PORPS, identifying FMUs within the Otago region

22. The Clutha (Mata-au) catchment covers the entire area in purple above, including Whakatipu-wai-māori (Lake Wakatipu), Lakes Wanaka and Hāwea, Lake Dunstan, the Manuherekia River and other important tributaries of the Clutha River / Mata-au, St Bathans, and other landmarks.

23. The Clutha hydro-electricity scheme is primarly associated with three structures, the Hāwea Dam, the Clyde Dam, and the Roxburgh Dam.[5] These structures are managed in an integrated / interdependent

[5] Evidence of Boyd Brinsdon at [19].

manner.[6] The Clyde and Roxburgh Dam have resulted in the formation of both Lake Roxburgh and Te Wairere / Lake Dunstan.[7]

24. The Clutha hydro-electricity scheme covers only a small part of the Clutha (Mata-au) catchment, being limited to Lake Hawea and part of the mainstem of the Clutha / Mata-au River.

25. The only support for an extension of the wording of LF-VM-O2 to cover potential future development, if at all, is found in an answer by Mr Brinsdon to a question by Commissioner Cubitt, where he said:

> *…I think a Regional Policy Statement needs to be open to consideration of any scheme on the Clutha, because as our evidence suggests, the Clutha is significantly altered. That is, pretty much, irreversible. My particular view is that, of a scheme altered in that nature, there is significant benefits in enhancing that, rather than looking umm, I don't think many New Zealanders have an appetite to go to new rivers and with new dams, I think we might have passed those days, but enhancing what we have on the Clutha I think makes sense for New Zealand.*

26. Nowhere in Mr Brinsdon's evidence, or his response to questioning from the Panel, did he advocate for a *catchment-wide* approach to new development within the Clutha (Mata-au) FMU. At best, his evidence was addressed at potential enhancements "on the Clutha", meaning the main stem of the River and the lakes. Mr Brinsdon was not advocating for a broader change, encompassing (for example) Whakatipu-wai-māori or the Manuherekia.

27. In accepting the change to LF-VM-O2 recommended by the Panel to provide for future development potential within the *entire* Clutha (Mata-au) FMU, ORC erred in law as it:

    (a) misinterpreted the scope of Contact's submission, and the relief available pursuant to that submission;

    (b) arrived at a finding in circumstances where the true and only reasonable conclusion on the evidence contradicts the determination; and

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6 Evidence of Boyd Brinsdon at [19].
7 Evidence of Boyd Brinsdon at [10].

(c) failed to identify the out-of-scope nature of its proposed change, the lack of any evidence to support it, and the likely implications of the proposed relief for Kāi Tahu, and thereby breached Kāi Tahu's rights to natural justice.

LF-VM-O4 – the Taiari FMU Vision objective

28. Kāi Tahu say that the Panel, and therefore ORC, erred by extending the wording of LF-VM-O4, which applies to the Taiari catchment, to also cover potential further development of the Waipōuri, Deep Stream and Paerau/Patearoa hydro-electricity generation schemes.

29. The changes made did not fall within the scope of any submissions on LF-VM-O4, including by Manawa Energy Ltd, the owner and/or operator of those schemes. The extension of LF-VM-O4 to cover potential future development of the identified schemes was also not "a matter identified by the Panel or any other person during the hearing" pursuant to cl 49(2) of Schedule 1 to the RMA.

30. Accordingly, ORC erred in law by accepting the Panel's recommended amendment to LF-VM-O4, as it:

(a) misinterpreted the scope of Manawa Energy Ltd's submission, and the relief available pursuant to that submission;

(b) arrived at a finding in circumstances where the true and only reasonable conclusion on the evidence contradicts the determination; and

(c) failed to identify the out-of-scope nature of its proposed change, the lack of any evidence to support it, and the likely implications of the proposed relief for Kāi Tahu, and thereby breached Kāi Tahu's rights to natural justice.

The alleged errors were material to ORC's Decisions on the relevant objectives

31. The above errors of law were material, in that they result in a significant shift in the focus of LF-VM-O2 and O4 from providing for the necessary "operation, maintenance, and upgrading" of ***existing*** schemes on both the Clutha / Mata-au River and within the Taiari FMU, towards

recognising and providing for future development opportunities in a manner not anticipated by the parties, the National Policy Statement for Renewable Electricity Generation 2011, or the NPSFM.

32. The proposed changes materially alter the policy support for potential future development across a significant swathe of the Otago region, in circumstances where Kāi Tahu had no opportunity to be heard on the proposed amendments. In all of the circumstances, those errors were material to the ORC's Decisions in relation to those objectives.

Second error of law – failure to include recommended references to Māori freshwater values and amenity within LF-FW-P10A

33. Kāi Tahu submitted in support of LF-FW-P9 and P10, subject to an amendment sought in relation to LF-FW-P9.[8] LF-FW-P9 and P10 addressed provisions aimed at protecting and restoring Otago's natural wetlands.

34. This is supported by the Kāi Tahu ki Otago vision statement dated 27 November 2020, which was attached to the evidence of Mr Ellison on behalf of Kāi Tahu ki Otago. The vision statement records Kāi Tahu ki Otago's vision that waterways are restored to the way they were when tūpuna knew them, with existing wetlands restored and the area of wetlands increased.

New policy – LF-FW-P10A

35. In their recommendations report, the Panel recommended deleting LF-FW-P9 and P10, and replacing them with a new policy (LF-FW-P10A) addressing the management of all wetlands within the Otago region.

36. In doing so, the Panel noted at paragraph 439 of its recommendations comments from the reporting planner, Ms Felicity Boyd, that some aspects of cl 3.22(4) of the NPSFM, namely Māori freshwater values and amenity values, were not addressed through LF-FW-P9 and P10.

37. Clause 3.22(4) of the NPSFM states that every regional council:

> must make or change its regional plan to include objectives, policies, and methods that provide for and promote the restoration of natural inland wetlands in its region, with a

[8] To amend a typographical error in the sub-clause applying to specified infrastructure.

> particular focus on restoring the values of ecosystem health, indigenous biodiversity, hydrological functioning, **Māori freshwater values, and amenity values.**
>
> (emphasis added)

38. The Panel went on at paragraph 441 to say:

> 441. While this clause applies to a regional plan and not a regional policy statement, we note that all the matters of focus that are listed are addressed in LF-FW-O9. These matters will also need to be considered where the NPSFM effects management hierarchy applies to a proposed activity. Ms Boyd advises that no submitter sought amendments to add Māori freshwater values and amenity values to LF-FW-P9 and LF-LW-P10. However, as these provisions are part of the freshwater process, we can recommend amendments that are outside the scope of submissions. **We consider that addition of Māori freshwater values and amenity values would aid to implement LF-FW-O9 and ensure that the PORPS is consistent with the NPSFM.**
>
> (references omitted, emphasis added)

39. Despite the conclusion reached by the Panel at paragraph 441, LF-FW-P10A does not refer to either Māori freshwater values or amenity values.

40. Accordingly, in accepting and adopting the recommended text of LF-FW-P10A, the ORC erred in law by arriving at an outcome where the true and only reasonable conclusion contradicts the determination.

The error of law is material to ORC's Decisions on the new policy

41. The error of law pleaded in paragraph 40 above is material to ORC's Decision(s) to adopt the new policy and to delete LF-FW-P9 and P10. The Panel clearly identified the need to refer to both Māori freshwater values and amenity values within the new policy, finding at paragraph 441 that doing so would aid to implement LF-FW-O9 and ensure that the PORPS is consistent with the NPSFM.

42. Failure to include those matters within the Decisions version of LF-FW-P10A has meant that the policy does not refer to relevant matters which will be required to be inserted in objectives, policies and methods within lower-order regional plans, creating the potential for inconsistency between the higher-order PORPS and the lower-order plans that are supposed to give effect to them.

43. In all of the circumstances pleaded above, the error of law in not including reference to Māori freshwater values and amenity values within LF-FW-P10A was material to ORC's Decisions in relation to that policy.

Third error of law – failure to give effect to NPSFM Policy 5 within land use policy – LF-LS-P21

44. LF-LS-P21 is the key provision within the FPI which applies to the interface between land use activities and freshwater quantity or quality.

45. Kāi Tahu submitted in support of LF-LS-P21, subject to an amendment to refer to ecosystem values, along with the inclusion of a sub-clause addressed at managing riparian margins to maintain or enhance habitat and biodiversity values, reduce sedimentation of water bodies, and support improved functioning of catchment processes.[9]

The section 42A report

46. At paragraph 1750 of the s 42A report, the reporting planner, Ms Boyd, accepted Kāi Tahu's submission point in recommending alternative wording for LF-LS-P21, requiring that the health and well-being of freshwater ecosystems (as well as water bodies) is maintained or, if degraded, improved. Ms Boyd opined that this amendment was necessary to ensure that LF-LS-P21 gave effect to Policy 5 of the NPSFM.

Policy 5 of the NPSFM

47. Policy 5 of the NPSFM provides as follows:

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

48. A regional policy statement must give effect to a national policy statement, pursuant to s 62(3) of the RMA. "Give effect to" is a strong

[9] Submission point 00226.206 (FPI030.042).

directive which is intended to constrain decision-makers.[10] Put simply, it means "implement".[11] A requirement to give effect to a policy which is framed in a specified and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction. A policy framed in such a way may leave little flexibility or scope for choice.

49. Policy 5 of the NZCPS is one such policy. It requires decision-makers to manage freshwater to ***ensure*** that the health and well-being of degraded water bodies and freshwater ecosystems is improved. Room for choice is preserved only in respect of all other water bodies and freshwater ecosystems, where communities can choose to require their improvement, presumably through a Schedule 1 process.

The final wording of LF-LS-P21 as recommended

50. In the final version of LF-LS-P21, the Panel failed to carry across the recommended amendments to the policy to include the words *"or if degraded, improved"* within the body of the chapeau to the policy. This is despite the Panel recording the requests by submitters for changes to the chapeau, and Ms Boyd's acceptance that the wording could be simplified, adopting the amendments sought by Contact and others in a manner consistent with LF-FW-P7 and Policy 5 of the NPSFM, at paragraph 265 of Appendix 2.

51. In adopting the Panel's final recommended wording, the ORC erred in law by:

    (a) failing to give effect to Policy 5 of the NPSFM in recommending a version of LF-LS-P21 which did not require freshwater to be managed in a way that ensures degraded water bodies are improved;

    (b) arriving at an outcome where the true and only reasonable conclusion contradicts the determination; and / or

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10 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [91].

11 *King Salmon*, above n 7 at [77].

(c) failing to give reasons as to why the words *"or, if degraded, improved"* should not be included within LF-LS-P21, despite the apparent consensus to the contrary.

The error of law was material to ORC's Decisions in relation to LF-LS-P21

52. The above errors of law pleaded in paragraph 51 above were material to ORC's Decisions in relation to LF-LS-P21.

53. The requirement to improve degraded water bodies, as required by Policy 5 of the NPSFM, goes to the heart of the purpose which sits behind the promulgation of the NPSFM. As the Minister responsible for the NPSFM said when it was first promulgated (in its current form) in 2020, the regulations (including the NPSFM) were intended to deliver on the Government's commitment to stopping further degradation, showing material improvements within five years, and to restore our waterways to health within a generation.[12]

54. The same wording (*"or if degraded, improved"*) can be found in LF-FW-P7, which is the key policy for the setting of environmental outcomes, attribute states, environmental flows and levels, and limits in relation to freshwater.

55. The failure by the Panel, and therefore, the ORC, to bring through the recommended amendments to LF-LS-P21, results in exactly the sort of inconsistency in direction which is the antithesis of a "ki uta, ki tai" approach to freshwater management.

56. The failure to provide any reasons to support the exclusion of the reference to improvement within LF-LS-P21 is also material, in the sense that those parties who submitted on the policy are deprived of any understanding as to why the wording was excluded.

57. For all of those reasons, the error was material.

Relief sought

58. Kāi Tahu seeks the following relief:

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12 https://www.beehive.govt.nz/release/new-rules-place-restore-healthy-rivers

(a) in relation to LF-VM-O2 and O4, deletion of references to potential further development for hydro electricity within these catchments and/or schemes as being provided for;

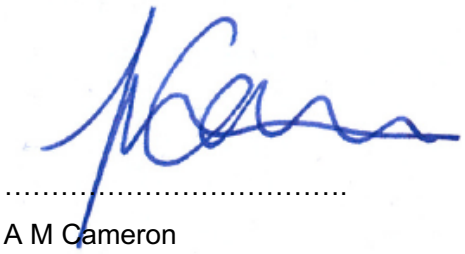
(b) in relation to LF-FW-P10A, inclusion of the words “Māori freshwater values” and “amenity values” within sub-clause (3) of that policy;

(c) in relation to LF-LS-P21, inclusion of the words *“or if degraded, improved”* within the chapeau to the policy;

(d) such other alternative relief necessary to give effect to the reasons for the appeal, including any consequential relief or amendments; and

(e) costs of and incidental to this appeal.

Dated 22 April 2024



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A M Cameron

Counsel for Kāi Tahu

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Documents for service on the appellants may be left at that address or may be sent to the appellant’s solicitor:

(a) by post to PO Box 13-046, Christchurch 8042; or

(b) by email to ttw@ngaitahu.iwi.nz, with copies to counsel at aidan@bankside.co.nz.