

**BEFORE THE COMMISSIONER ON BEHALF OF
THE OTAGO REGIONAL COUNCIL**

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of water permit
application RM20.079
under the Regional Plan:
Water for Otago

**BENDIGO
STATION LIMITED**

Applicant

AND

**OTAGO REGIONAL
COUNCIL**

Consent Authority

AND

**TE RŪNANGA O
MOERAKI, KĀTI
HUIRAPA RŪNAKA KI
PUKETERAKI, TE
RŪNANGA O ŌTĀKOU
AND HOKONUI
RŪNANGA
(collectively Kāi Tahu
ki Otago)**

Submitters

PLANNING EVIDENCE OF TIM VIAL

ON BEHALF OF KĀI TAHU KI OTAGO

10 May 2021

INTRODUCTION

1. My name is Tim Vial. I hold the qualifications of Bachelor of Arts, Bachelor of Laws and Master of Regional and Resource Planning from the University of Otago. I have 19 years' experience in resource management planning and policy development, including experience in developing freshwater management policy and in assessing the effects of proposals on freshwater resources for Kāi Tahu ki Otago.
2. I am a Full Member of the New Zealand Planning Institute and an accredited hearings commissioner under the Making Good Decisions programme.
3. I am currently employed as Senior Planner at Aukaha, a consultancy based in Otago and owned by Te Rūnanga o Waihao, Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga. My role at Aukaha is focused on freshwater planning.
4. My evidence addresses the submission of the following parties on water permit application RM20.079 by Bendigo Station Limited:
 - (a) Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (collectively **Kāi Tahu ki Otago**).
5. I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note and I agree to comply with it. I confirm that the issues addressed in this statement are within my area of expertise except where I state that I am relying on information provided by another party. I have not knowingly omitted to consider material facts known to me that might alter or detract from the opinions expressed.
6. The key documents that I have referred to in preparing my evidence include:
 - (a) Application by Bendigo Station Ltd prepared by LandPro Ltd dated 27 February 2020, as amended 22 May 2020 (**the application**)
 - (b) The evidence of William Nicolson, Christina Bright, Richard Allibone, and Grant Porter for Bendigo Station Limited.
 - (c) The Otago Regional Council s42A staff recommending report (**the Officer's report**) and appendices.
 - (d) The Otago Regional Plan: Water (**RPW**), including Proposed Plan Change 7 (**PPC7**).

- (e) The Partly Operative Otago Regional Policy Statement (**PORPS**);
- (f) The National Policy Statements for Freshwater Management (**NPSFM 2017** and **NPSFM 2020**);
- (g) The following iwi planning documents lodged with ORC:
 - i. Te Rūnanga o Ngāi Tahu Freshwater Policy 1999 (**NTFP**);
 - ii. The Kāi Tahu Ki Otago Natural Resource Management Plan 2005 (**NRMP**); and

SCOPE OF EVIDENCE

7. My evidence will address the following matters:
- (a) The submission on the application by Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga.
 - (b) The relationship of Kai Tahu with wai māori, and the importance of protecting the mauri of water bodies.
 - (c) The statutory direction in the RMA and higher order planning documents that is relevant to the current application including the expression of Te Mana o Te Wai in the NPSFM 2020, and the implications for assessment of the effects of the application.
 - (d) The role played by Proposed Plan Change 7 (**PPC7**) in enabling a transition to a freshwater planning framework within Otago that is compliant with the NPSFM 2020, and implications for the appropriate consent term.
 - (e) The residual flow that should be applied to the primary allocation take and the setting of minimum flows for supplementary allocation block(s) in accordance with Method 15.8.1A.2.

EXECUTIVE SUMMARY

8. The Kāi Tahu submission on this application arose from concerns that the application does not appropriately protect the mauri of Bendigo Creek, fails to recognise Te Mana o te Wai and does not give sufficient weight to the direction in PPC7. Mauri is a critical element of the spiritual relationship of Kāi Tahu with wai māori, and an important component of an intact mauri is maintaining the natural connectivity and variability of flow of the water body.

9. Kāi Tahu acknowledges that the applicant has taken steps to protect the mauri and health of Bendigo Creek by decommissioning an existing open water race, installing a screened intake in Bendigo Creek, and commissioning a flow meter downstream of the point of take. The current intake on the bed of Bendigo Creek ensures that there is a continuity of flow around and below the point of take.
10. I consider that the primary take will support Te Mana o te Wai, subject to a condition tying the activity to the use of the existing infrastructure. Therefore, I consider that a consent term for the primary take that expires in 2035 is acceptable.
11. However, I do not support the inclusion of a condition providing for an unspecified modification of the intake as there is no certainty that this would continue to give effect to Te Mana o te Wai. However, if such a condition is to be included, I consider that the consent for the primary take should only be granted for a six-year term.
12. The setting of minimum flows for the supplementary take in accordance with Method 15.8.1A.2 is required to provide a 'buffer' between the primary and supplementary takes and to provide for natural flow variability. I do not support the removal of Condition 3 and the amendments to Condition 5 of RM20.079.02 proposed by Mr Nicolson.¹
13. PPC7 introduces provisions to limit the duration of new water permits issued under the RPW to no more than six years. I consider that a six-year term of consent for the supplementary take in accordance with PPC7 is a necessary measure to ensure that the NPSFM 2020 can be implemented in a timely manner through a new Land and Water Regional Plan for Otago.

THE APPLICATION

14. I adopt the description of the irrigation scheme as set out in Section 2 of the application and as summarised in the evidence of Mr Nicolson.
15. Bendigo Station is applying for the replacement of two deemed permits that authorise abstraction from the upper reaches of Bendigo Creek. Primary allocation is sought for the irrigation of pasture, and for stock water and domestic supply. A new supplementary take is sought to irrigate an estimated 82ha of future vineyard.

¹ Evidence of William Nicolson, at 80(ii)

16. The intake in Bendigo Creek is located in a deep pool and the pool has an outflow at or below the level of this intake, meaning that the intake cannot abstract the full flow at the point of take. The intake is passive, relying on gravity rather than pumping to abstract water. The existing intake ensures that a continuity of flow is maintained at the pool outflow.²

BENDIGO CREEK

17. I adopt the description of Bendigo Creek as set out in the Officer's report, and the assessment of MALF and mean flow undertaken by Rain Effects. The MALF of Bendigo Creek is approximately 33 L/s and the mean flow is 120 L/s.
18. The Applicant commissioned the installation of a flow monitoring station on Bendigo Creek in February 2020. The distance between the point of take and the flow monitoring station is approximately 750m.³ Ms Bright concludes that the flow at the point of take, less any abstraction, will be similar to the flow measured at the downstream flow monitoring site.⁴

KĀI TAHU SUBMISSION

19. Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga submitted on the application. The submission relates to the application in its entirety, namely primary and supplementary allocation, and the damming and retake of water from within the reservoir.
20. In summary, the submission asserts that the application:
- (a) Does not appropriately provide for the Kāi Tahu relationship with water and, specifically, does not protect the mauri of Bendigo Creek.
 - (b) Fails to give effect to Te Mana o te Wai as required by the National Policy Statement for Freshwater Management; and
 - (c) Does not give sufficient weight to the objective and policies of PPC7 in respect to the term of the consent.
21. The submission sought the following relief:
- (a) That the term of consent be no longer than 6 years.
 - (b) Retain existing requirements for water meter(s) and ensure results

² Evidence of Richard Allibone for Bendigo Station, at 27 – 29.

³ Evidence of Christina Bright for Bendigo Station, at 3.39.

⁴ Evidence of Christina Bright for Bendigo Station, at 3.43

are recorded and reported via telemetry.

- (c) Retain existing requirements for a fish screen over the intake structure.
- (d) Set a minimum flow of 90% of the mean annual low flow (MALF) and an allocation limit of 30% of MALF to protect the mauri of Bendigo Creek by providing for connectivity and a variability of flow that reflects the natural characteristics of the water body.

22. Kāi Tahu have considered the Officer's Report and the Applicant's evidence and have amended the relief sought, namely:

- (a) A consent term for water permit RM20.079.01 (primary allocation) that will expire on 30 December 2035 is accepted, subject to the current intake being retained for the duration of this consent. Kāi Tahu do not support the provision in the conditions that would enable the Applicant to change to a new unspecified intake design.
- (b) A consent term of six years for water permit RM20.079.02 (supplementary allocation) is accepted.
- (c) The setting of minimum flows for the supplementary allocation are sought to provide for natural variability of flow and for the health and wellbeing of Bendigo Creek. The moving minimum flow threshold for the supplementary take proposed by Mr Nicolson⁵ is not supported by Kāi Tahu.
- (d) The request for a fish screen over the intake is withdrawn.
- (e) A consent term for water permit RM20.079.03 (To dam within and from a reservoir outside the bed of a watercourse) that will expire on 30 December 2035 is accepted.⁶

KĀI TAHU RELATIONSHIP WITH WAI MĀORI

23. The Kāi Tahu submission describes the centrality of freshwater to Kāi Tahu identity and wellbeing, namely:

All wai māori is of great significance to Kāi Tahu. Kā Rūnaka have responsibilities through whakapapa to act as kaitiaki and care for catchments as a whole. The right of Kāi Tahu to oversee land, resources,

⁵ Evidence of William Nicolson, at 80(ii)

⁶ While the PPC7 policies are not applicable to this consent to dam water, a consent term that expires on 30 December 2035 would be consistent with the term of RM20.079.01.

aspirations and wellbeing was protected under the Treaty of Waitangi, and this right still exists today, as recognised by the Ngāi Tahu Settlement.

All water plays a significant role in our spiritual beliefs and cultural traditions, the condition of water is seen as a reflection of the health of Papatūānuku. The loss and degradation of this resource through drainage, pollution and damming is a significant issue for Kāi Tahu ki Otago and is considered to have resulted in material and cultural deprivation.

The primary management principle for Kā Rūnaka is the maintenance and enhancement of the mauri or life-giving essence of a resource. Mauri is a critical element of the spiritual relationship of Kāi Tahu with wai māori, recognising that all elements of the natural environment possess a life force, and all forms of life are related. Mauri can be tangibly represented in terms of elements of the physical health of the land, a river, or surrounding biodiversity.

24. Kāi Tahu is supportive of development within its takiwā, where activities are undertaken in a way that maintains and enhances mauri and gives effect to Te Mana o te Wai.

RELEVANT STATUTORY DIRECTION

25. The Officer's Report provides an assessment of the application against the higher order documents. In general, I agree with Mr Horrell's assessment, and I do not consider it is necessary to discuss the statutory direction in detail. Instead, I will highlight matters that I consider are of relevance to the Kāi Tahu submissions.
26. I agree with Mr Horrell's assessment that resource consent is required under the Regional Plan: Water (**RPW**) and proposed Plan Change 7 (Water Permits) of the RPW (**PPC7**). Overall, the application must be considered as a discretionary activity under the RPW.
27. I also agree with Mr Horrell that the provisions of PPC7 are a relevant consideration under s104 RMA, as are the NPSFM 2020, and the Partially Operative Regional Policy Statement 2019 (**PORPS**). The relevant iwi management plans are the Kāi Tahu ki Otago Natural Resource Management Plan 2005 (**NRMP**) and Te Rūnanga o Ngāi Tahu Freshwater Policy Statement 1999.

Recognition and provision for Kāi Tahu interests and values in Part 2 RMA

28. The concerns underlying the Kāi Tahu submissions relate directly to Part 2

of the RMA, particularly to sections 6(e), 7(a) and 8, and to the implementation of these provisions through the NPSFM 2020 and the concept of Te Mana o te Wai.

- 29.** The submission describes the depth and breadth of the relationship of Kāi Tahu with the region's waterbodies. Aspects of this relationship include:
- (a) The ongoing ability to refer to recognisable characteristics of water bodies to maintain connections with history and traditions.
 - (b) The spiritual, cultural and physical importance of maintaining or restoring the mauri of waterbodies.
 - (c) Use of the waterways and the mahika kai they support.
 - (d) The experience of visiting the water body.
 - (e) Involvement, as kaitiaki, in monitoring and improving freshwater resources; and
 - (f) Passing on traditions, knowledge, and values to successive generations.
- 30.** Section 7(a) requires Council to have particular regard to kaitiakitanga.
- 31.** Section 8 of the RMA requires Council to take 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:⁷
- (a) The active participation by tangata whenua in resource management decision-making.
 - (b) Engagement with tangata whenua in good faith.
 - (c) Seeking of reciprocity and mutual benefit.
 - (d) Protection of resources of importance to tangata whenua from adverse effects; and
 - (e) Positive action to protect tangata whenua interests.
- 32.** In my view, it is evident that giving effect to sections 6(e), 7(a) and (8) of the RMA requires active protection of the relationship of Kāi Tahu with Bendigo Creek by providing for the health and well-being of this waterbody.

⁷ Aratiatia Livestock Limited and Ors v Southland Regional Council [2019] NZEnvC 191 at [6]
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Te Mana o te Wai - National Policy Statement for Freshwater Management 2020

- 33.** Te Mana o te Wai is a fundamental concept in freshwater management. It was first introduced in the NPSFM 2017 and its significance has been expanded in the NPSFM 2020. The NPSFM 2020 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.*”⁸
- 34.** The concept of Te Mana o te Wai also recognises the relationship of tangata whenua with freshwater, including through:
- (a) the principles of mana whakahaere and kaitiakitanga that recognise the authority and obligations of tangata whenua in regard to sustaining the health and well-being of, and their relationship with, freshwater; and
 - (b) requiring regional councils to actively involve tangata whenua in freshwater management.
- 35.** The objective of the NPSFM-2020 is to ensure that natural and physical resources are managed in a way 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.
- 36.** This objective and Policy 1 give effect to Te Mana o te Wai in freshwater management. Policy 2 requires that Māori freshwater values are identified and provided for.
- 37.** While there is yet to be a substantial body of case law on the NPSFM 2020, decisions of the Environment Court on the concept of Te Mana o Te Wai in the NPSFM 2017 remain relevant in my view as the NPSFM 2020 builds on the provisions of the NPSFM 2017. The Environment Court in *Aratiatia Livestock Limited and Ors v Southland Regional Council [2019]*

⁸ National Policy Statement for Freshwater Management 2020, s.1.3.

emphasised that the concept of Te Mana o te Wai introduced in the NPSFM 2017 represents a significant paradigm shift in freshwater management. This decision sets out three key understandings:

*The first key understanding*⁹

38. 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.¹⁰
39. 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 (health) and mauri of the environment, waterbodies and the people.¹¹
40. 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. The mauri and hauora of water is therefore expressly linked with its use.¹²

*The second key understanding*¹³

41. 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.
42. The health and well-being of water bodies and freshwater ecosystems is now the first priority of freshwater management under the NPSFM 2020.

*The third key understanding*¹⁴

43. 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 must also provide for the health of the waterbody, the health of the environment and the health of the people.
44. This positive obligation is continued and strengthened in the NPSFM 2020

⁹ Aratiatia Livestock Limited and Ors v Southland Regional Council [2019] NZEnvC 191 at [17]

¹⁰ Ibid at [17]

¹¹ Ibid at [46]

¹² Ibid at [60]

¹³ Ibid at [58] – [59]

¹⁴ Ibid at [61] – [62]

with the requirement to provide for the health and well-being of water bodies and freshwater ecosystems becoming the first priority in Objective 2.1.

45. This direction is a significant shift from the approach to managing water takes and discharges in the RMA to date. The Court notes: *“the usual RMA focus on the scale and significance of effects of resource use [is redirected] onto the mauri or life force of water and the enquiry becomes how do users of resources protect the water's mauri and health?”*¹⁵
46. It is acknowledged that the applicant has taken steps to protect the mauri and health of Bendigo Creek by decommissioning an existing open water race, installing a screened intake in Bendigo Creek, and commissioning a flow meter downstream of the point of take. In contrast to a water race or a diversion channel the current intake on the bed of Bendigo Creek ensures that there is a continuity of flow around and below the point of take.
47. Protection of natural flow variability in the water body will be strongly influenced by the management of the supplementary take. A minimum flow is required that will provide a ‘buffer’ between the primary and supplementary take to ensure that flow variability is maintained
48. In my opinion, subject to the setting of appropriate minimum flows for the supplementary take, the application gives effect to the NPSFM 2020.

Partially Operative Regional Policy Statement (PORPS) 2019

49. Council made parts of the proposed Regional Policy Statement operative in January 2019. All of the remaining provisions, excluding provisions relating to port operations, have now been made operative and were added to the PORPS on March 15, 2021. As a result, the Regional Policy Statement for Otago 1998 is now revoked.
50. Full consideration of the operative provisions of the PORPS is now required. The relevant provisions of the PORPS that are relevant to the Kāi Tahu submissions include:
 - (a) **Objective 1.2 and Policy 1.2.1:** Recognise and provide for the integrated management of natural and physical resources to support the wellbeing of people and communities in Otago.
 - (b) **Objective 2.1 and Policy 2.1.2:** The principles of Te Tiriti o Waitangi are taken into account in resource management

¹⁵ Ibid at [7]

processes and decisions, including recognising and providing for the relationship of Kāi Tahu's culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka;

- (c) **Objective 2.2 and Policy 2.2.1:** Manage the natural environment to support Kāi Tahu wellbeing by safeguarding the life-supporting capacity of natural resources.
 - (d) **Objective 3.1:** The values (including intrinsic values) of ecosystems and natural resources are recognised and maintained or enhanced where degraded.
51. Objective 1.2 and Policy 1.2.1 of the Partially Operative RPS 2019 seek to achieve integrated management by, among other matters: coordinating the management of interconnected natural and physical resources, including recognising that values and effects may extend beyond the immediate point of take and promoting methods that reduce or negate the risk of exceeding sustainable resource limits. Method 15.8.1A.2 of the RPW sets out the process for calculating the minimum flow(s) for supplementary allocation to provide for natural flow variation.
52. Mauri, as discussed above, is a critical element of the Kāi Tahu relationship with wai māori, recognising that all elements of the natural environment possess a life force, and that all forms of life are connected through whakapapa. Maintaining a continuity of flow below the point of take and providing for natural flow variation will safeguard the mauri of Bendigo Creek.
53. It is my assessment that the application is consistent with Objective 2.1 and Policy 2.1.2, Objective 2.2 and Policy 2.2.1, and Objective 3.1, subject to the setting of minimum flows for the supplementary take that recognise and provide for the intrinsic values of Bendigo Creek.
54. Overall, I conclude that the application is consistent with the provisions of the PORPS.

Regional Plan: Water for Otago

55. Mr Horrell has assessed the application against the relevant policies in the RPW, including the PPC7 policies. I agree with his assessment of those policies. I discuss below the context for PPC7 as this is relevant to the weighting that should be given to this plan change.

Proposed Plan Change 7

56. The adequacy of the RPW to manage freshwater water abstraction was assessed in the Skelton Report (2019) in light of the imminent expiry of the transitional provisions for deemed permits under s386 of the RMA. The Minister concluded from the Skelton Report that the current framework for managing freshwater resources within the Otago region was not fit for purpose and not in line with the then-current national directions, including the NPSFM.
57. In response to that report, the Minister for the Environment directed the Otago Regional Council (**Council**) to prepare a plan change to the Otago Regional Plan; Water (proposed PC7) and has used his powers to 'call in' that plan change to be heard and determined by the Environment Court.
58. Proposed PC7 seeks to create a consenting pathway to allow deemed permits and expiring water permits to be authorised with a new water permit for a short term. The purpose of this plan change is not to give effect to the NPSFM 2020, but to maintain the status quo while Council develops a freshwater planning framework which gives effect to the NPSFM 2020 and the PORPS. The short consent term promoted by PPC7 provides a safeguard to ensure that the ability to implement the new planning framework is not undermined by consents with terms extending beyond the life of a new Land and Water Regional Plan.
59. The new planning framework includes a revised Regional Policy Statement and a Land and Water Regional Plan (**LWRP**). Aukaha has worked with Kāi Tahu ki Otago to define Te Mana o te Wai as an objective, policies and methods for inclusion in the Regional Policy Statement. This definition, objectives and policies are attached to my evidence as Appendix 1.
60. The work undertaken by mana whenua to define Te Mana o te Wai is the beginning of a substantial programme of work with ORC that will inform the development of the LWRP and will recognise and validate Kāi Tahu rights, interests and responsibilities in freshwater management and give effect to the NPSFM 2020.
61. To ensure that the new planning framework can be effectively implemented, I consider that longer term consents should only be granted where there is a reasonable certainty that the activity will give effect to Te Mana o te Wai.
62. As discussed, I consider that the existing intake will ensure that the exercise of the primary take will appropriately provide for Te Mana o te Wai. Therefore, I agree with Mr Horrell's assessment of the appropriate consent

term for RM20.079.01 (primary allocation), subject to a minor reduction in term to ensure compliance with Policy 10A.2.3(b) of PPC7. This resource consent should be granted for a term that will expire on 30 December 2035.

- 63.** I agree with Mr Horrell's assessment of the weight that should be given to Policy 10.A.2.2 and the outcomes that this policy seeks to achieve, namely to:
- (a) Enable the transition to the long-term sustainable management of Otago's freshwater resources by ensuring new permits to take water can be considered under a new allocation framework once the Land and Water Plan is notified; and
 - (b) Minimise further land-use intensification prior to the notification of the Land and Water Plan.
- 64.** I concur with Mr Horrell that the appropriate consent term for RM20.079.02 (supplementary allocation) is six years to give effect to Policy 10.A.2.2 of PPC7.

Residual Flow

- 65.** Policy 6.4.7 of the RPW requires an assessment of the need for a residual flow at the point of take to provide for aquatic ecosystems and natural character.
- 66.** I concur with Mr Horrell that the positioning of the intake structure being an open pipe that is located on the bed of Bendigo Creek enables a residual flow to be maintained past the intake.¹⁶ The current positioning ensures that the intake cannot abstract the full flow at the point of take.
- 67.** Mr Allibone recommends that the water intake pipe be set in the intake pool such that flow is maintained at the pool outflow to provide for ecological values.¹⁷
- 68.** However, as noted by Mr Horrell, the Applicant could make changes to the intake that could alter the provision of this residual flow, for example by moving to a pumped take. Mr Horrell recommends a condition of consent that requires the provision of a continuous connected residual flow downstream of the point of take for a distance of no less than 750 metres should there be a change to the intake structure.¹⁸

¹⁶ Otago Regional Council, s42A Staff Report, section 7.3

¹⁷ Evidence of Richard Allibone for Bendigo Station, at 29

¹⁸ Otago Regional Council, s42A Staff Report, section 7.3

69. In my opinion, there is no certainty that a shift to an unspecified future method of take would provide a similar residual flow to that provided by the current intake structure. Further, I concur with Ms Bright that a requirement to provide a continuous connected residual flow rather than a quantitative residual flow would add unnecessary monitoring and compliance.¹⁹

70. I recommend the following amendment to proposed Condition 5 of RM20.079.01

5. (a) *The method for taking water at NZTM 2000 E1314483 N5018116 must be via an open pipe positioned above the bed of Bendigo Creek as described in the Application and Assessment of Environmental Effects received by the Consent Authority on 10 May 2020 and as shown in **Appendix 2**, ~~unless clause (b) applies.~~*

~~(b) — The method for taking water at NZTM 2000 E1314483 N5018116 may be modified, provided the following is adhered to:~~

~~(i) A continuous connected residual flow is maintained at all times immediately downstream of the point of take for a distance of no less than 750 metres;~~

~~(ii) The Consent Authority is notified of the change in method of taking no less than 15 working days before any changes to the intake are undertaken; and~~

~~(iii) The Consent Holder must notify the Consent Authority in writing of the completion of the intake establishment no less than 10 working days following completion of works as outlined in (ii) and must provide photographs of the new method of intake. Photographs must be in colour and be no smaller than 200 x 150 millimetres in size and be in JPEG~~

71. I do not support the inclusion of a condition providing for an unspecified modification of the intake because there is no certainty that this would continue to give effect to Te Mana o te Wai. However, if such a condition is to be included, I consider that the consent should only be granted for a six-year term for the reasons that I have expressed in paragraph 61.

Supplementary Take and Minimum Flows

72. Policy 6.4.9 provides for the taking of water as supplementary allocation subject to a quantitative minimum flow that ensures that no less than 50%

¹⁹ Evidence of Christina Bright for Bendigo Station, at 3.48

of the natural flow remains instream. Supplementary allocation enables the filling of storage dams during periods of high flow while maintaining natural flow variability.

73. The formula for calculating minimum flows for supplementary takes is set out in Method 15.8.1A.2 namely:

Supplementary minimum flow = Primary allocation + Supplementary allocation block(s)

74. I concur with the Commissioner that the minimum flow for the first supplementary block is 150 L/s and that the minimum flow for the second supplementary block is 250 L/s.²⁰

75. In my opinion, Mr Nicolson has misinterpreted Policy 6.4.9 and Method 15.8.1A.2.²¹ At flows up to 150 L/s measured at the downstream flow meter only primary allocation of 50 L/s can be taken. Supplementary allocation can only be taken at flows above 150 L/s.

76. I do not support the removal of Condition 3 and the amendments that Mr Nicolson proposes to Condition 5 of RM20.079.02.²² The use of the in-creek flow meter in conjunction with the abstraction meter to determine what the minimum flow is and to ensure that abstraction does not occur below a moving threshold would add unnecessary monitoring and compliance.

77. Further commentary on the supplementary flow policies is provided by Ms Bright.²³ In my opinion, Ms Bright has misinterpreted Policies 6.4.9 and 6.4.10. The starting point is Policy 6.4.9 which provides for blocks of supplementary allocation where that is appropriate. Policy 6.4.10 then provides for further supplementary allocation in addition to that provided under Policy 6.4.9. The interpretation of Policy 6.4.10 as an alternative to Policy 6.4.9 is not consistent with the wording of Policy 6.4.10.

78. I recommend the following amendments to Conditions 3 and 5 of RM20.079.02:

3. The rate of abstraction as supplementary allocation must not exceed:

a) 100 litres per second when flows in Bendigo Creek at NZTM 2000 E1314218 N5018598 are at or above 150 litres per second;

²⁰ Otago Regional Council, Directions of the Commissioner, Minute 2

²¹ Evidence of William Nicolson, at 80(ii)

²² Evidence of William Nicolson, at 80(ii)

²³ Evidence of Christina Bright for Bendigo Station, at 3.54 – 3.55.

b) 110 litres per second when flows in Bendigo Creek at NZTM 2000 E1314218 N5018598 are at or above 250 litres per second;

c) 160 litres per second combined with Water Permit RM20.079.01 when flows in Bendigo Creek at NZTM 2000 E1314218 N5018598 are at or above 300 litres per second;

5. This consent must not be exercised when flows in Bendigo Creek at NZTM 2000: E1314218 N5018598 are below 150 L/s.

Iwi Management Plans

79. The Kāi Tahu ki Otago Natural Resource Management Plan 2005, and the Te Rūnanga of Ngāi Tahu Freshwater Policy Statement are other matters which are relevant in considering this application under s104(1)(c).

80. I consider that the following direction in the iwi management plans, both in general objectives and policies and in those specifically relating to freshwater and mahika kai/ biodiversity objectives and policies, are particularly relevant:

- (a) Recognition and support for the rakatirataka and kaitiakitaka of Kāi Tahu ki Otago, upholding their mana through management of resources, and effective participation in resource management activities.²⁴
- (b) Ki uta ki tai management of resources, and management for future generations.²⁵
- (c) Recognition, in all water management, of the spiritual and cultural significance of water to Kāi Tahu ki Otago.²⁶
- (d) Healthy waters that support Kāi Tahu customs; and²⁷
- (e) Protection and restoration of mauri, and recognition that each waterway has its own mauri, mana, values and uses;²⁸

81. In my opinion, this application is consistent with the relevant objectives and policies of the Iwi Management Plans, subject to the recommended amendments to the conditions of RM20.079.01 and RM20.079.02.

Conclusion on the Statutory Direction

²⁴ NRMP 5.2.1, 5.2.3 and 5.2.4; NTFP 6.4

²⁵ NRMP 5.2.2;

²⁶ NRMP 5.3.3.1, 5.3.3.5, 5.3.4.2.2, 5.3.4.2.7; NTFP 6.1

²⁷ NRMP 5.3.3.2; NTFP 6.3

²⁸ NRMP 5.3.4.2.4; NTFP 6.2

82. In summary, the RMA, NPSFM, RPS and Iwi Management Plans all direct that the health and well-being of water bodies and freshwater ecosystems are prioritised when assessing applications to take water. The current intake structure provides for the health and well-being of Bendigo Creek by providing a continuity of flow below the point of take. The setting of minimum flows for the supplementary take in accordance with Method 15.8.1A.2 is required to provide for natural flow variability.

WEIGHTING OF THE OPERATIVE AND PROPOSED PLAN

83. In the s42A Report, Mr Horrell considers that reduced weight should be given to PPC7 due to its current status and the timing of the application.
84. The early decision on weighting between proposed and operative plans in resource consent decision-making was *Hanton v Auckland City Council* [1994] A10/94 which was later confirmed by the Court of Appeal in *Bayley v Manukau CC* [1999] 1 NZLR 56. In those cases, the Court said there is no one general rule about weighting but that each case should be considered based on its own circumstances. The decisions identified relevant factors to consider including: the stage in the planning process of the proposed plan, possible injustice, and the extent to which the proposed plan provisions may implement a coherent pattern of objectives and policies.
85. In more recent cases, the Environment Court has indicated that it may be appropriate to give more weight to a proposed plan than an operative plan, particularly when dealing with issues not adequately managed in an operative plan (for example, *Auckland Regional Council v Waitakere Council* A065/08).
86. The stage a proposed plan is in the planning process is one matter for the consent authority to consider when placing 'weight' on the provisions of the operative and proposed plans, but it is not the sole determinant. Other matters must also be considered, including:
- (a) The age of the operative plan provisions;
 - (b) The reason for the change in position in the proposed plan; and
 - (c) Potential injustice to the applicant or other parties.
87. In my opinion, the age of the operative RPW and the fact that PPC7 was directed by the Minister for the Environment to deal with a significant 'gap' in this operative plan are relevant matters that ought to be considered under

s104(1)(c) of the RMA and influence the relative weight given to the two documents under s104(1)(b).

- 88.** I concur with Mr Horrell that the objective and policies of PPC7 are directive. In my opinion, the policies of PPC7 regarding consent duration should be given full weight.

CONCLUSION

- 89.** The applicant has taken steps to protect the mauri and health of Bendigo Creek by decommissioning an existing open water race, installing a screened intake in Bendigo Creek, and commissioning a flow meter downstream of the point of take. The current intake on the bed of Bendigo Creek ensures that there is a continuity of flow around and below the point of take.
- 90.** I consider that the primary take will support Te Mana o te Wai, subject to a condition tying the activity to the use of the existing infrastructure. I consider that a consent term for the primary take that expires in 2035 is acceptable if such a condition is applied. In my view this will give effect to the NPSFM 2020 and will be consistent with Objective 2.1 and Policy 2.1.2, Objective 2.2 and Policy 2.2.1, and Objective 3.1 of the PORPS.
- 91.** I consider that to be consistent with the NPSFM 2020 and the PORPS the setting of minimum flows for the supplementary take in accordance with Method 15.8.1A.2 is required to provide a 'buffer' between the primary and supplementary takes and to provide for natural flow variability. I consider that a six-year consent for the supplementary take in accordance with PPC7 is a necessary measure to ensure that the NPSFM 2020 can be implemented in a timely manner through a new Land and Water Regional Plan for Otago.

Tim Vial

10 May

Appendix 1

**Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku Te Mana o te Wai definition,
objective and policies**

Te Mana o Te Wai

Water is a central element in Kāi Tahu creation traditions. It was present very early in the whakapapa of the world: in the beginning there was total darkness, followed by the emergence of light and a great void of nothingness. In time Maku mated with Mahoronuiatea which resulted in great expanses of water, then Papatuanuku and Takaroa met and had children after which Takaroa took a long absence. Papatūanuku met Rakinui and they had many children who conspired to force their parents coupled bodies apart to let the light in. They were also responsible for creating many of the elements that constitute our world today - the mountains, rivers, forests and seas, and all fish, bird and animal life. The whakapapa and spiritual source of water and land are connected, and water bodies are the central unifying feature that connects our landscapes together. The spiritual essence of water derives from the atua and the life it expresses is a reflection of the atua.

The whakapapa of mana whenua and water are also integrally connected. There is a close kinship relationship, and mana whenua and the wai cannot be separated. The tūpuna relationship with water, and the different uses made of the water, provide a daily reminder of greater powers – of both the atua and tūpuna. This relationship continues into the present and future and is central to the identity of Kāi Tahu. The mana of wai is sourced from the time of creation and the work of the atua, invoking a reciprocal relationship with mana whenua based in kawa, tikanga and respect for water's life-giving powers and its sanctity.

The kinship connection engenders a range of rights and responsibilities for mana whenua, including rakatirataka rights and the responsibility of kaitiakitaka. Kaitiakitaka encompasses a high duty to uphold and maintain the mauri of the wai. If the mauri is degraded it has an impact not only on the mana of the wai but also on the kinship relationship and on mana whenua. The mauri expresses mana and connection, which can only be defined by mana whenua. Recognising rakatirataka enables mana whenua to enjoy their rights over water bodies and fulfil their responsibilities to care for the wai and the communities it sustains.

The condition of water is seen as a reflection of the condition of the people - when the wai is healthy, so are the people. Kawa and tikanga have been developed over the generations, based on customs and values associated with the Māori world view that span the generations. Recognising and honouring te mana o te wai and upholding the mauri of the wai is consistent with this value base.

Each water body is unique. This is a reflection of its unique characteristics and whakapapa, and it means that each river has different needs. Management and use must recognise and reflect this.

Objectives

O1 Te Mana o Te Wai

The mauri of Otago's water bodies and their health and well-being is protected, restored where it is degraded, and land and water is managed in a way that recognises and reflects that:

- (1) water is the foundation and source of all life - na te wai ko te hauora o ngā mea katoa,
- (2) there is an integral kinship relationship between water and Kāi Tahu whānui, and this relationship endures through time, connecting past, present and future, and
- (3) each water body has a unique whakapapa and characteristics that must be provided for,
- (4) water and land have a connectedness that supports and perpetuates life,
- (5) Kāi Tahu are enabled to exercise their kaitiakitaka duty of care and attention over wai and all the life it supports.

Policies

LF-P1 Prioritisation

In all management of fresh water in Otago, prioritise:

- (1) first, the health and well-being of water bodies and freshwater ecosystems, te hauora o te wai and te hauora o te taiao, and the exercise of mana whenua to uphold these,²⁹
- (2) second, the health and wellbeing needs of people, te hauora o te tangata, interacting with water through ingestion (such as drinking water and consuming harvested resources) and immersive activities (such as harvesting resources and bathing), and
- (3) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

LF-P2 Mana whakahaere

Recognise and give practical effect to Kāi Tahu rakatirataka in respect of fresh water by:

- (1) facilitating partnership with, and the active involvement of mana whenua in freshwater management processes,

²⁹ In matters of mana, the associated spiritual and cultural responsibilities connect natural resources and mana whenua in a kinship relationship that is reciprocal and stems from the time of creation.

- (2) sustaining the environmental, social, cultural and economic relationships of Kāi Tahu with water bodies,
- (3) providing for a range of customary uses, including mahika kai, specific to each water body, and
- (4) incorporating mātauranga into decision making, management and monitoring processes.

LF-P3 Holistic management/ ki uta ki tai

Manage use of fresh water in accordance with tikanga and kawa, using a holistic approach that:

- (1) sustains and restores water flows, water quality, form and function that reflect the valued characteristics of the water body, including seasonal needs and variability,
- (2) sustains and restores the habitats of mahika kai and indigenous species, including taoka species associated with the water body,
- (3) provides for safe contact with fresh water and consumption of mahika kai and drinking water,
- (4) recognises, sustains and restores the connections between waterbodies (large and small, surface and ground, fresh and brackish or saline, permanently flowing, intermittent and ephemeral),
- (5) sustains and restores connections between fresh water bodies and the coastal environment,
- (6) recognises the connections between land and water and manages the effects of land use and development on freshwater,
- (7) has regard to foreseeable climate change risks, and
- (8) has regard to cumulative effects and the need to apply a precautionary approach where there is limited available information or uncertainty about potential adverse effects.