

IN THE HIGH COURT OF NEW ZEALAND  
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA  
ŌTEPOTI ROHE

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

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**UNDER** the Resource Management Act 1991

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

**BETWEEN** **KĀI TAHU**

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

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

**AND** **QUEENSTOWN LAKES DISTRICT COUNCIL**

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

Appellants

**AND** **OTAGO REGIONAL COUNCIL**

Respondent

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**JOINT MEMORANDUM OF COUNSEL SEEKING CONSENT ORDERS**  
**Dated:** 30 September 2024

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## JOINT MEMORANDUM OF COUNSEL SEEKING CONSENT ORDERS

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### MAY IT PLEASE THE COURT:

#### Introduction

- 1 There are five Appellants in these proceedings:
  - 1.1 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, “**Kāi Tahu**”) (CIV-2024-012-000038);
  - 1.2 Otago Fish and Game Council and Central South Island Fish and Game Council (together, “**Fish and Game**”) (CIV-2024-012-000037);
  - 1.3 Oceana Gold (New Zealand) Limited (“**Oceana Gold**”) (CIV-2024-012-000041);
  - 1.4 Queenstown Lakes District Council (“**Queenstown Lakes**”) (CIV-2024-012-000040); and
  - 1.5 Royal Forest and Bird Protection Society of New Zealand Incorporated (“**Forest and Bird**”) (CIV-2024-012-000042).
- 2 Each of the five Appellants has appealed against decisions of the Respondent on the freshwater planning instrument parts of the Proposed Otago Regional Policy Statement 2021 (“the **PORPS**”) under Section 299 and Clause 56 of Schedule 1 of the Resource Management Act 1991 (“the **Act**”).
- 3 A first case management conference was set down for all appeals on 17 June 2024.
- 4 The parties filed a joint memorandum of counsel dated 12 June 2024 seeking alternative dispute resolution for the appeals.
- 5 The case management conference was subsequently vacated, and directions given in the Court’s Minute dated 13 June 2024. The proceedings were

adjourned to a further case management on 2 October 2024 to allow for the parties to attend mediation.

6 Annexure 1 sets out each PORPS provision appealed against, the appellant(s) for each, and the parties which have given notice of intention to appear.

7 In total, 15 provisions were appealed.

### **Mediation of the provisions under appeal**

8 Mediation occurred from Monday 19 August to Monday 26 August 2024 with the assistance of former Environment Court Judge Borthwick.

9 Kāi Tahu were able to resolve their appeal points on LF-VM-O2- Clutha Mata-au FMU vision and LF-VM-O4 – Taiari FMU vision outside of the formal mediation process. Consent memoranda and draft orders on those provisions will be filed with the Court separately, at or about the time of filing this memorandum. This memorandum deals with the remainder of the provisions under appeal (including appeal points by Kāi Tahu on other provisions).

10 Consent orders are sought for 7 of the remaining provisions under appeal, namely:

10.1 LF-WAI-P1 – Prioritisation

10.2 LF-FW-O9 – Wetlands

10.3 LF-FW-P10A – Managing wetlands

10.4 LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste

10.5 LF-FW-M6 – Regional Plans

10.6 LS-LF-P21 – Land use and fresh water

11 In each provision above, the parties have identified an error or errors of law and, in each case, agree that there is a straightforward outcome, such that it would be appropriate for the Court to substitute its own judgment for that of the Council.

12 This is on the basis that all parties either agree on the proposed solution (or have agreed to abide the outcome), and/or the remedy arising from the finding of an error of law seems inevitable.<sup>1</sup>

13 However, all counsel acknowledge that:

13.1 There is no jurisdiction to make an order unless the Court finds that there has been an error of law<sup>2</sup>; and

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

14 Some provisions had been appealed by multiple appellants.

15 The following table lists the provisions under appeal, the appellants for each provision and, if resolved, which consent memorandum deals with the provision:

Provision	Kāi Tahu	Fish & Game	Oceana Gold	Queenstown Lakes	Forest & Bird	
LF-WAI-O1 – Te Mana o te Wai			✓			Unresolved
LF-WAI-P1- Prioritisation			✓	✓		This consent memorandum
LF-FW-O1A – Visions set for each FMU and rohe		✓				Unresolved
LF-VM-O2- Clutha Mata-au FMU vision	✓	✓				Kāi Tahu consent memorandum / unresolved for Fish & Game's appeal
LF-VM-O3 – North Otago FMU vision		✓				Unresolved
LF-VM-O4 – Taiari FMU vision	✓	✓				Kāi Tahu consent memorandum / unresolved for Fish & Game's appeal
LF-VM-O5 – Dunedin & Coast FMU vision		✓				Unresolved
LF-VM-O6 – Catlins FMU vision		✓				Unresolved
LF-FW-O8 – Fresh water		✓				Unresolved
LF-FW-O9 – Wetlands					✓	This consent memorandum
LF-FW-P10A – Managing wetlands	✓		✓		✓	This consent memorandum

<sup>1</sup> *MacKenzie Irrigation Company Ltd v Meridian Energy Ltd* HC Wellington CIV-2005-485-2192, 27 June 2006 at [17], cited with approval in *Man O'War Farm Ltd v Auckland Council* [2017] NZHC 202 at [28].

<sup>2</sup> *Man O'War Farm Ltd v Auckland Council* [2017] NZHC 202 at [33]

Provision	Kāi Tahu	Fish & Game	Oceana Gold	Queenstown Lakes	Forest & Bird	
LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste			✓	✓		This consent memorandum
LF-FW-M6 – Regional Plans			✓			This consent memorandum
LF-FW-M7 – District plans			✓			This consent memorandum
LS-LF-P21 – Land use and fresh water	✓		✓		✓	This consent memorandum

16 To enable orders to be made about individual PORPS provisions subject to multiple appeals, the draft orders filed with this memorandum seek to consolidate the proceedings.

### **PORPS freshwater planning process documents**

17 The following documents from the PORPS freshwater planning process are potentially relevant to the Court and found at the links below, along with relevant national policy directions:

17.1 The decisions version of the PORPS, with changes tracked against the notified version: <https://www.orc.govt.nz/media/qtuf1spi/new-2307-updated-evchc-tracked-decisions-version-of-proposed-otago-regional-policy-statement-1.pdf>

17.2 Submission of Kāi Tahu on the PORPS: <https://www.orc.govt.nz/media/13666/kai-tahu-ki-otago-te-runanga-o-moeraki-kati-huirapa-runaka-ki-puketeraki-te-runanga-o-otakou-and-hokonui-runanga-fpi030-sandra-mcintyre.pdf>

17.3 Further submission of Kāi Tahu on the PORPS: <https://www.orc.govt.nz/media/13951/kai-tahu-ki-otago-fsfpi030-sandra-mcintyre.pdf>

17.4 Submission of Fish and Game on the PORPS: <https://www.orc.govt.nz/media/13658/fish-and-game-councils-otago-fish-and-game-council-and-central-south-island-fish-and-game-council-fpi037-nigel-paragreen.pdf>

17.5 Further submission of Fish and Game on the PORPS: <https://www.orc.govt.nz/media/13946/fish-and-game-councils-fsfpi037-nigel-paragreen.pdf>

- 17.6 Submission of Oceana Gold on the PORPS:  
<https://www.orc.govt.nz/media/13677/oceana-gold-new-zealand-ltd-fpi031-alison-paul.pdf>
- 17.7 Further submission of Oceana Gold on the PORPS:  
<https://www.orc.govt.nz/media/13955/oceana-gold-fsfp031-alison-paul.pdf>
- 17.8 Submission of Queenstown Lakes on the PORPS:  
<https://www.orc.govt.nz/media/13683/queenstown-lakes-district-council-fpi046-erin-auchterlonie.pdf>
- 17.9 Further submission of Queenstown Lakes on the PORPS:  
<https://www.orc.govt.nz/media/13957/queenstown-lakes-district-council-fsfp046-alyson-hutton.pdf>
- 17.10 Submission of Forest and Bird on the PORPS:  
<https://www.orc.govt.nz/media/13687/royal-forest-and-bird-protection-society-of-new-zealand-fpi045-chelsea-mcgaw.pdf>
- 17.11 Further submission of Forest and Bird on the PORPS:  
<https://www.orc.govt.nz/media/13948/forest-and-bird-fsfp045-chelsea-mcgaw.pdf>
- 17.12 Panel report and recommendations (together with Appendix 1 and 2) on the Freshwater and Non-Freshwater parts of the PORPS 21:  
<https://www.orc.govt.nz/media/xrmfs3e0/panel-recommendations-report-update-with-addendum-changes.pdf>
- 17.13 Appendix 6 to the Panel's report and recommendations - Hearing Panel Recommendations for decisions on submissions and reason:  
<https://www.orc.govt.nz/media/kvpgrzab/appendix-6-freshwater-planning-instrument-hearings-panel-recommendations.pdf>
- 17.14 Council decisions on freshwater parts of the pORPS 21:  
<https://www.orc.govt.nz/media/10bluspa/decisions-of-council-porps-2021-freshwater-planning-instrument.pdf>
- 17.15 National Policy Statement for Freshwater Management 2020:  
<https://environment.govt.nz/assets/publications/National-Policy-Statement-for-Freshwater-Management-2020.pdf>

17.16 New Zealand Coastal Policy Statement 2010:  
<https://web.archive.org/web/20240510065726/https://www.doc.govt.nz/globalassets/documents/conservation/marine-and-coastal/coastal-management/nz-coastal-policy-statement-2010.pdf>

### **Jurisdiction to make orders**

- 18 All appeals are made under clause 56 of Schedule 1 of the Resource Management Act 1991 (“**RMA**”).
- 19 Clause 56 is part of the freshwater planning process in Part 4 of Schedule 1 of the RMA.
- 20 Clause 56 concerns appeals to the High Court by submitters on a freshwater planning instrument provision or matter relating to the freshwater planning instrument for which a regional council accepted a recommendation of the freshwater hearings panel.
- 21 Under clause 56 the appellant must have addressed the provision or matter in the appellant’s submission.
- 22 Clause 56(4) provides that sections 299(2), 300 to 308, and Part 11A of the RMA apply with all necessary modifications.
- 23 Section 299(2) of the RMA provides that an appeal to the High Court must be made in accordance with the High Court Rules 2016, except to the extent that those rules are inconsistent with ss 300 to 307.
- 24 High Court Rule 20.19 deals with the Court’s powers after it has heard an appeal. Relevantly, it provides as follows:

#### **20.19 Powers of court on appeal**

- (1) After hearing an appeal, the court may do any 1 or more of the following:
- (a) make any decision it thinks should have been made:
  - (b) direct the decision-maker—
    - (i) to rehear the proceedings concerned; or
    - (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
    - (iii) to enter judgment for any party to the proceedings the court directs:

- (c) make any order the court thinks just, including any order as to costs.

- 25 The High Court has previously held that there is nothing in ss 300 – 307 of the RMA which is inconsistent with the powers vested in the Court by r 20.19.<sup>3</sup>
- 26 The Court's powers under r 20.19 can only come into play where the Court is first satisfied that the decision challenged on appeal was made pursuant to an error of law.<sup>4</sup> Once it is, however, the powers of the Court are very extensive.<sup>5</sup> While the usual remedy on an appeal from a specialist tribunal is to remit a matter back, the position may be different where all parties agree on a solution or the remedy arising from the finding of an error of law seems inevitable.<sup>6</sup>
- 27 There can be no expectation that, in every case, consent orders are suitable for approval through appeals to the Court.<sup>7</sup> Appeals against planning instruments are a public law process, and there must be due consideration given to the wider public interest in the promulgation of planning instruments.<sup>8</sup> However, the Court can take into account the breadth of any participation in an appeal when determining how the wider public interest is best served.<sup>9</sup>
- 28 In this case, all parties to all appeals (17 in total) either support or will abide the Court's decision on the proposed relief.

### **The PORPS**

- 29 The PORPS was notified as a single freshwater planning instrument on 26 June 2021.
- 30 Because of questions being raised by some submitters about the freshwater planning process being applied to the whole of the PORPS, the ORC applied for a declaratory judgment from the High Court as to whether the PORPS in its entirety could be treated as a single freshwater planning instrument.
- 31 In *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777 the High Court declared that the ORC's

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<sup>3</sup> *Man O'War Farm Ltd v Auckland Council* [2017] NZHC 202 at [26].

<sup>4</sup> *Man O'War Farm*, above n 3 at [33].

<sup>5</sup> *McGechan on Procedure* (online looseleaf ed, Thomson Reuters, Wellington) at [HR20.19.01].

<sup>6</sup> *MacKenzie Irrigation Company Ltd v Meridian Energy Ltd* HC Wellington CIV-2005-485-2192, 27 June 2006 at [17], cited with approval in *Man O'War Farm*, above n 3 at [28].

<sup>7</sup> *Waitaki Irrigators Collective Ltd v Canterbury Regional Council* [2018] NZHC 2064 at [32].

<sup>8</sup> *Meridian Energy Ltd v Canterbury Regional Council* HC Christchurch CIV-2010-40902604, 23 May 2011 at [11], cited with approval in *Waitaki Irrigators*, above n 4 at [32].

<sup>9</sup> *Combined Canterbury Provinces v Canterbury Regional Council* [2016] NZHC 1965 at [10].



determination that the whole of the PORPS was a freshwater planning instrument, was in error; that the ORC was required to decide which parts of it relate to freshwater and will be subject to the freshwater planning process; and that the ORC would then have to notify those parts of the PORPS which are to be treated as a freshwater planning instrument and begin again the freshwater planning process as to those parts.

32 By Council resolution on 15 September 2022 the ORC decided which parts of the PORPS related to freshwater and would be subject to the freshwater planning process.

33 The ORC publicly notified the freshwater planning instrument parts of the PORPS under section 80A(4)(a) of the RMA on 30 September 2022.

34 On 3 May 2023 the Chief Freshwater Commissioner convened a Freshwater Hearings Panel from 10 May 2023 for the freshwater planning instrument parts of the PORPS under clause 38 of Schedule 1 of the RMA.

35 The Freshwater Hearings Panel heard submissions on the freshwater planning instrument part of the PORPS during August and September 2023.

36 The Freshwater Hearings Panel then prepared a report dated 21 March 2024 making its recommendations on the freshwater planning instrument parts of the PORPS.

37 On 27 March 2024 the ORC accepted each recommendation in the report of the Freshwater Hearings Panel on the freshwater planning instrument parts of the PORPS.

38 The ORC publicly notified its decisions on 30 March 2024.

39 The appeals that are the subject of these proceedings followed.

### **Statutory framework**

40 A regional policy statement forms part of the cascade of planning instruments from the national to the local. It sits at an intermediate level. It must give effect to a national policy statement, coastal policy statement, or national planning

standard.<sup>10</sup> Regional and district plans are subordinate and must give effect to the regional policy statement<sup>11</sup>.

41 A regional policy statement must achieve the purpose of the RMA, that is sustainable management as defined in section 5, by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of its natural and physical resources<sup>12</sup>.

42 ORC must prepare its regional policy statement in accordance with:

42.1 its functions under section 30;

42.2 Part 2;

42.3 its obligation to prepare an evaluation report in accordance with section 32;

42.4 its obligation to have particular regard to the evaluation report prepared in accordance with section 32;

42.5 a national policy statement;

42.6 a New Zealand Coastal Policy Statement;

42.7 a national planning standards; and

42.8 any relevant regulations<sup>13</sup>.

43 Section 62 stipulates what a regional policy statement must contain. Section 62(3) is important. As noted above, it sets out the position of a regional policy statement in the hierarchy of planning instruments made under the RMA and provides:

*“(3) A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement, a New Zealand coastal policy statement, or a national planning standard.”*

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<sup>10</sup> Section 62(3) RMA.

<sup>11</sup> Sections 67(3) and 75(5) of the RMA.

<sup>12</sup> Section 59 of the RMA.

<sup>13</sup> Section 61(1) of the RMA.

- 44 Relevant to these appeals is the National Policy Statement for Freshwater Management 2020 ("**NPSFM**") and the New Zealand Coastal Policy Statement 2010 ("**NZCPS**").
- 45 The NPSFM sets out what a regional policy statement must do in connection with freshwater:
- 45.1 Contain an objective on how management of the freshwater of a region gives effect to Te Mana o te Wai<sup>14</sup>.
- 45.2 Contain long-term visions for freshwater management units.<sup>15</sup>
- 45.3 Include provisions for the integrated management of the effects of the use and development of land on freshwater and the use and development of land and freshwater on receiving environments<sup>16</sup>.
- 46 The PORPS must give effect to the NPSFM and the NZCPS<sup>17</sup>.

### **The appeals and errors of law**

- 47 The provisions under appeal are dealt in the following sections of this memorandum in the order in which they appear in the PORPS.
- 48 Each provision on which an order is sought was submitted on by each appellant, enabling the appellant to appeal under clause 56 of Schedule 1 of the RMA. The relevant part of the submission is referenced as each provision is dealt with in this memorandum.
- 49 The errors of law identified in this memorandum are those that the parties were able to agree as errors, and the resulting proposed corrections, and can generally be described as the clear and obvious errors of law.
- 50 Other appeal points on other alleged errors of law are withdrawn, except for the Fish and Game appeal, and one part of the Oceana Gold appeal, which are to proceed to hearing.
- 51 In other words, the errors identified, and relief sought in this memorandum are the only instances which the parties considered to be clear and obvious.

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<sup>14</sup> Clause 3.2(3) of the NPSFM

<sup>15</sup> Clause 3.3(1) and (2) of the NPSFM

<sup>16</sup> Clause 3.5(2) of the NPSFM

<sup>17</sup> Section 62(3) of the RMA

52 Other instances, where parties considered the PORPS could be improved upon or an underlying concern addressed, but no underlying error of law was identified, are not the subject of this memorandum.

### **LF-WAI-O1 – Te Mana o te Wai**

53 Oceana Gold submitted on LF-WAI-O1<sup>18</sup> and has appealed on the basis that it requires restoration of degraded water bodies, contrary to policy 5 of the NPSFM, which requires improvement.

54 The parties did not reach agreement at mediation and this appeal point will proceed to hearing.

### **LF-WAI-P1 – Prioritisation**

55 Queenstown Lakes<sup>19</sup> and Oceana Gold<sup>20</sup> both submitted on LF-WAI-P1-Prioritisation and have appealed that policy for different reasons.

56 The Decisions Version of LF-WAI-P1 reads:

#### ***LF-WAI-P1 – Prioritisation***

*In all decision-making fresh water in Otago, prioritise:*

*(1) first, the health and well-being of water bodies and freshwater ecosystems, (te hauora o te wai) and the contribution of this to the health and well-being of the environment (te hauora o te taiao), together with and the exercise of mana whenua to uphold these,*

*(2) second, the health needs of people, (te hauora o te tangata) interacting with water through ingestion (such as drinking water and consuming resources harvested from the water body) and immersive activities (such as harvesting resources and primary contact), and*

*(3) third, the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future.*

[Shading added to indicate the parts at issue.]

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<sup>18</sup> Oceana Gold's submission dated 29 November 2022, Appendix 1, page 3 and further submission dated 3 February 2023, pages 28 - 30

<sup>19</sup> Queenstown Lakes further submission dated 3 February 2023 at pages 6 and 20

<sup>20</sup> Oceana Gold's submission dated 29 November 2022, Appendix 1, pages 4 - 5 and further submission dated 3 February 2023, page 30

LF-FW-P1(1)

57 Oceana Gold appealed the inclusion of: “*the contribution of this to the health and well-being of the environment (te tauora o te taiao)*” in LF-FW-P1(1).

58 Under the NPSFM there is a hierarchy of obligations set out in Te Mana o te Wai that prioritises:

“*first, the health and well-being of water bodies and freshwater ecosystems*”; and

“*third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future*”<sup>21</sup>.

59 The hierarchy of obligations is restated as the sole objective of the NPSFM.<sup>22</sup>

60 The NPSFM requires regional councils to:

“*apply the hierarchy of obligations, as set out in clause 1.3(5):*

(i) *when developing long-term visions under clause 3.3; and*

(ii) *when implementing the NOF under subpart 2; and*

(iii) *when developing objectives, policies, methods, and criteria for any purpose under subpart 3 relating to natural inland wetlands, rivers, fish passage, primary contact sites, and water allocation*”<sup>23</sup>

61 The health and well-being of water bodies and freshwater ecosystems must be prioritised over matters such as the social, economic and cultural well-being of people and communities.

62 ‘*Environment*’ is defined in the RMA and includes—

(a) *ecosystems and their constituent parts, including people and communities; and*

(b) *all natural and physical resources; and*

(c) *amenity values; and*

(d) *the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters*

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<sup>21</sup> Clause 1.3(5) of the NPSFM

<sup>22</sup> Clause 2.1 of the NPSFM.

<sup>23</sup> Clause 3.2(2)(c) of the NPSFM

63 By including reference to the “*health and well-being of the environment (te tauora o te taiao)*” the ORC erred in law because this would require decision-making concerning freshwater to extend the first priority to include its contribution to matters which do not form part of the first priority, including matters which are part of the third priority.

64 There is a clear and obvious amendment to resolve this error, which is set out below (with amendments shown in red underline and strikethrough):

***LF-WAI-P1 – Prioritisation***

In all decision-making affecting fresh water in Otago, prioritise:

(1) first, the health and well-being of *water bodies* and *freshwater* ecosystems (te hauora o te wai) ~~and the contribution of this to the health and well-being of the environment (te hauora o te taiao) together with~~ and the exercise of *mana whenua* to uphold this these,

***LF-FW-P1(2)***

65 Queenstown Lakes appealed the exclusion of basic sanitation from the health needs of people in clause 2 of policy LF-WAI-P1.

66 The NPSFM describes the second priority in the hierarchy of obligations as “*the heath needs of people (such as drinking water)*”.<sup>24</sup>

67 Terms defined in the National Planning Standards issued under section 58E of the RMA and used in the NPSFM have the meanings in those Standards, unless otherwise specified.<sup>25</sup>

68 In the PORPS ‘*drinking water*’ is defined to have the same meaning as in the National Planning Standards 2019.

69 The definition of ‘*drinking water*’ in the National Planning Standards is:

*‘water intended to be used for human consumption; and includes water intended to be used for food preparation, utensil washing, and oral or other personal hygiene’.*

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<sup>24</sup> Clause 1.3(5)(b) of the NPSFM

<sup>25</sup> Clause 1.4(3) of the NPSFM

- 70 The NPSFM does not specify that ‘*drinking water*’, used in the second limb of the hierarchy of obligations, is to have a meaning different to that in the National Planning Standards. Therefore, the meaning in the Standards applies.
- 71 The wording adopted by ORC describes the health needs of people “*interacting with water through ingestion (such as drinking water...)*”. By doing so some of the elements of ‘*drinking water*’ as defined in the NPSFM, and the PORPS, are excluded. Ingestion excludes “*food preparation, utensil washing, and oral or other personal hygiene*”.
- 72 This is an error of law in that it is contrary to the NPSFM, to which the PORPS must give effect.
- 73 The parties consider that the following amendments to clause 2 of policy LF-WAI-P1 resolve the error (with amendments shown in red underline and ~~strikethrough~~):

***LF-WAI-P1 – Prioritisation***

In all decision-making affecting fresh water in Otago, prioritise:

[...]

- (2) second, the health needs of people (te hauora o te tangata) interacting with *water* through:
- (a) ingestion (such as drinking of water and consuming resources harvested from the *water body*), ~~and~~
  - (b) immersive activities (such as harvesting resources and primary contact), and
  - (c) personal hygiene activities (such as food preparation, utensil washing, oral hygiene, showering and flushing the toilet), and

- 74 The amendment retains the decided wording but adds personal hygiene activities. The parties consider this to be the clear and obvious remedy to the omission of water for personal hygiene, contrary to the NPSFM.

- 75 The additional sub-clause is structured in a manner consistent with the existing wording (ie by reference to activities followed by examples). That is why the formulation is “*personal hygiene activities*” followed by examples.
- 76 Similarly, in the examples listed, rather than saying “*other personal hygiene*” (which does not make sense the way the clause is structured) the words used instead state the other personal hygiene activities of “*showering and flushing the toilet*”.
- 77 The insertion of the word “of” in sub-clause (a) is to make it clear the reference is to the act of drinking water, rather than the defined term. This is because the defined term does not make sense in the context of ingestion.

#### **LF-FW-O1A, LF-VM-O2 to O6, and LF-FW-O8**

- 78 Fish and Game appealed these objectives because they omitted to reference the protection of habitat of trout and salmon, recreational opportunities to access and use water bodies, and the abundance and safety of food to harvest from water bodies.
- 79 LF-FW-O1A is an objective added to the decisions version of the PORPS as long-term visions which apply to each FMU. It includes common vision statements taken from the FMU specific visions LF-VM-O2 to O6, and clauses taken from LF-FW-O8.
- 80 The appeal therefore relates to all of these objectives, albeit for each omission for which relief is sought, the relief would apply to one only of LF-FW-O1A, the FMU specific long-term visions LF-VM-O2 to O6, or LF-FW-O8, not all three. They are appealed by Fish and Game in the alternative.
- 81 The parties did not reach agreement at mediation and this appeal will proceed to hearing.

#### **LF-VM-O2 and LF-VM-04**

- 82 Agreement was reached outside of mediation on the Kāi Tahu appeal in respect of these objectives.
- 83 These are the subject of separate consent memoranda, to be filed at or about the same time as this memorandum.



## LF-FW-09 – Wetlands

84 Forest & Bird submitted on LF-FW-09<sup>26</sup> and appealed on the basis that clause 2 requires “no net decrease” in wetland extent, contrary to the NPSFM and the New Zealand Coastal Policy Statement 2010 (“**NZCPS**”).

85 The Decisions Version of LF-FW-09 - Wetlands reads:

### **LF-FW-09 – Wetlands**

*Otago’s wetlands are protected from inappropriate subdivision, use and development and, where degraded, restoration is promoted so that:*

- (1) *mahika kai and other mana whenua values are sustained and enhanced now and for future generations,*
- (2) *there is no net decrease, and preferably an increase, in the extent and diversity of wetland indigenous ecosystem types and habitats, and*
- (3) *there is no reduction and, where degraded, there is an improvement in wetland ecosystem health, hydrological functioning, amenity values, extent or water quality, and*
- (4) *their flood attenuation and water storage capacity is maintained or improved*

[Shading added to indicate the part at issue.]

86 ‘Wetland’ is defined in the RMA:<sup>27</sup>

*“**wetland** includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions”.*

87 Clause 1.5 of the NPSFM provides that it applies:

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

88 The preamble to the NZCPS states that its purpose is to:

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<sup>26</sup> Forest and Bird’s submission dated 29 November 2022 at pages 7 – 8

<sup>27</sup> Section 2 of the RMA

*“...state policies in order to achieve the purpose of the Act in relation to the coastal environment...”*

89 Policy 1 of the NZCPS is about the extent and characteristics of the coastal environment. The coastal environment extends beyond the coastal marine area.

90 ‘Natural inland wetland’ is defined in the NPSFM<sup>28</sup> as:

*“a wetland (as defined in the Act) that is not:*

*(a) in the coastal marine area; or*

*(b) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural inland wetland; or*

*(c) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or*

*(d) a geothermal wetland; or*

*(e) a wetland that:*

*(i) is within an area of pasture used for grazing; and*

*(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless*

*(iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply*

[Emphasis added.]

91 Natural inland wetlands are subject to the policy direction of the NPSFM. Wetlands in the coastal environment are subject to the policy direction in the NZCPS. Wetlands as defined in the RMA are subject to s6(a).

92 Further, wetlands are also managed differently depending on their location. Wetlands can occur in the coastal marine area, the broader coastal environment and outside of the coastal environment.

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<sup>28</sup> Clause 3.21(1) of the NPSFM

93 Below is a table illustrating the general application of the NPSFM and the NZCPS to the three different locations mentioned above.

National Direction	Outside Coastal Environment	Coastal Environment	Coastal Marine Area
NZCPS	x	✓	✓
NPSFM	✓	✓	x

94 Both the NZCPS and the NPSFM apply to natural inland wetlands in the coastal environment.

95 LF-FW-O9 as decided does not distinguish between wetlands subject to different policy direction.

96 By failing to distinguish between wetlands subject to different policy directions the ORC has made an error of law with respect to LF-FW-O9(2) because it fails to give effect to the NPSFM and the NZCPS. This is because:

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

96.2 Clause 3.22 of the NPSFM provides that for some listed activities, effects on natural inland wetlands can be managed by applying the effects management hierarchy.

96.3 Policy 11(a) of the NZCPS requires the avoidance of adverse effects of activities on listed items concerning indigenous biodiversity which coastal wetlands may contain.

96.4 LF-FW-O9(2) provides that there is to be *“no net decrease”* in the extent and diversity of wetland indigenous ecosystem types and habitats. This allows for loss of extent of natural inland wetlands, if the loss is offset elsewhere, which is contrary to policy 6 of the NPSFM (to the extent that clause 3.22 of the NPSFM does not apply), and is contrary to policy 11(a) of the NZCPS.

97 To resolve the error of law in relation to clause 2 of objective LF-FW-O9 the parties consider that the following amendments are required (with amendments shown in red underline and ~~strikethrough~~):

## LF-FW-09 – Wetlands

Otago’s wetlands are protected from inappropriate subdivision, use and development and, where degraded, restoration is promoted so that:

- (1) mahika kai and other *mana whenua* values are sustained and enhanced now and for future generations,
- (2) ~~there is no net decrease, and preferably an increase,~~ in relation to the extent and diversity of ~~wetland~~ indigenous ecosystem types and habitats;  
~~and~~
  - (a) for wetlands outside the coastal marine area, there is no net decrease, and preferably an increase, and
  - (b) for natural inland wetlands, there is no decrease, and preferably an increase, other than as provided by the NPSFM, and
- (3) there is no reduction and, where degraded, there is an improvement in wetland ecosystem health, hydrological functioning, *amenity values*, extent or *water* quality, and
- (4) their flood attenuation and water storage capacity is maintained or improved.

98 The changes are such that ‘*no net decrease*’ does not apply to natural inland wetlands (which excludes the coastal marine area), which brings the provision into line with the NPSFM, and removes the conflict with policy 11(a) of the NZCPS. The inclusion of “other than as provided by the NPSFM” recognises that for a small number of activities listed in clause 3.22 of the NPSFM, effects on natural inland wetland may be “offset” in limited circumstances such that there would be “no net decrease”.

99 For wetlands outside the coastal marine area, which are not natural inland wetlands, the ‘*no net decrease*’ wording is retained, which is consistent with the NPSFM (other than policy 6 which only applies to natural inland wetlands) and the ability for consent authorities to take into account offsetting or compensation for any adverse effects under s104(1)(ab) of the Act.

100 Wetlands outside of the definition of ‘*natural inland wetland*’ (ie those to which clause 2(a) applies) are listed as exclusions in the definition of natural inland wetland.

- 101 The nature of those types of wetlands, and application of clause 2(a) only outside of the coastal marine area, makes any conflict with policy 11(a) of the NZCPS unlikely
- 102 To the now limited extent of potential for conflict with policy 11(a) of the NZCPS remains for those wetlands outside of the coastal marine area but within the coastal environment, any conflict resolves by reference to the CE– Coastal Environment chapter (especially CE-P5 – Coastal indigenous biodiversity) and, if necessary, policy 11 of the NZCPS.
- 103 Because natural inland wetlands are dealt with separately in clause 2(b) there is no scenario where clear and directive provisions in the NPSFM and NZCPS (and the provisions in the PORPS giving effect to them) come into conflict.

### **LF-FW-P10A – Managing wetlands**

- 104 Kāi Tahu<sup>29</sup>, Forest and Bird<sup>30</sup> and Oceana Gold<sup>31</sup> all submitted on LF-FW-P10A – Managing wetlands and appealed that provision.
- 105 The Decisions Version of LF-FW-P10A reads:

#### ***LF-FW-P10A – Managing wetlands Otago’s wetlands are managed:***

- (1) *in the coastal environment, in accordance with the NZCPS in addition to (2) and (3) below,*
- (2) *by applying clause 3.22(1) to (3) of the NPSFM to all wetlands, and*
- (3) *to improve the ecosystem health, hydrological functioning and extent of wetlands that have been degraded or lost by promoting:*
- (a) *an increase in the extent and condition of habitat for indigenous species,*
  - (b) *the restoration of hydrological processes,*
  - (c) *control of pest species and vegetation clearance, and*

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<sup>29</sup> Kāi Tahu’s submission dated 29 November 2022 at pages 22 – 23 and further submission dated 3 February 2023 at pages 11 and 14 – 15

<sup>30</sup> Forest and Bird’s submission dated 29 November at pages 8 – 9

<sup>31</sup> Oceana Gold’s submission dated 29 November 2022 at pages 10 – 12 and further submission dated 3 February 2023 at pages 47 – 49 and 51

- (d) *the exclusion of stock, except where stock grazing is used to enhance wetland values.*

[Shading added to indicate the part at issue.]

106 Forest and Bird and Oceana Gold both appealed on the basis that LF-FW-P10A(1) and (2) wrongly applies clause 3.22 of the NPSFM to all wetlands, including wetlands in the coastal marine area.

107 Clause 3.22 of the NPSFM is a policy specific to natural inland wetlands. These are defined in clause 3.21 as:.

natural inland wetland means a wetland (as defined in the Act) that is not:

(a) in the coastal marine area; or

(b) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural inland wetland; or

(c) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or

(d) a geothermal wetland; or a wetland that:

(i) is within an area of pasture used for grazing; and

(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless

(iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply

108 Clause 3.22 of the NPSFM says that the loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted except in certain limited circumstances. Clause 3.22 then provides an exception for specified activities occurring in “natural inland wetlands” if certain criteria are met, including management of effects through the effects management hierarchy (defined in clause 3.21(1) of the NPSFM).

109 Applying clause 3.22 of the NPSFM to all wetlands, including in the coastal environment, is contrary to the NZCPS which provides that adverse effects on certain values must be avoided (for example, polices 11, 13, 15 and 16).

110 Further, as OceanaGold’s notice of appeal states, there was no evidential basis for the more stringent measures of clause 3.22 to apply to wetlands which are not natural inland wetlands, and the Panel failed to consider the more onerous

obligations on an applicant to prove and establish the criteria under clause 3.22 of the NPSFM for all types of wetlands. Furthermore, the extension of clause 3.22 to all wetlands was inconsistent with the Panel's findings that a wetland which was not a natural inland wetland would still be subject to the provisions of the RMA and protective polices in the NPSFM<sup>32</sup>.

- 111 Any application of clause 3.22 of the NPSFM must therefore be limited to its application under the NPSFM, which is to natural inland wetlands.
- 112 As part of its appeal against ORC's decisions on the PORPS, Kāi Tahu challenged ORC's adoption of the Panel's recommendations in relation to clause 3 of policy LF-FW-P10A, specifically as it related to Māori freshwater values.
- 113 Māori freshwater values are a defined term under the NPSFM. In summary, they represent the compulsory value of mahinga kai (or, in the Kāi Tahu dialect, mahika kai) and any other value identified for a particular FMU or part thereof through collaboration between tangata whenua and the relevant regional council.
- 114 Clause 3.22(3) of the NPSFM provides that every regional council must make or change its regional plan to ensure that any application for an activity referred to in cl 3.22(2) is not granted unless, inter alia, the Council is satisfied that the applicant has demonstrated how each step of the effects management hierarchy will be applied to any loss of extent or values of an affected natural inland wetland, particularly (without limitation) in relation to Māori freshwater values, in addition to other values.
- 115 Clause 3.22(4) of the NPSFM requires every regional council to make or change its regional plan to include objectives, policies, and methods that provide for and promote the restoration of natural inland wetlands in the region, with a particular focus on restoring, inter alia, Māori freshwater values.
- 116 The Panel's recommending report recommended including reference to Māori freshwater values in the policy.
- 117 Specifically in relation to cl 3.22(4), the Panel said at paragraph of Appendix Two of its recommendations report<sup>33</sup>:

*“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*

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<sup>32</sup> Freshwater Hearings Panel Report, at paragraph [419]

<sup>33</sup> Hearing Panel Report, section 8.2.4 at paragraph [441]

*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...would aid to implement LF-FW-O9 and ensure that the PORPS is consistent with the NPSFM.***

[Emphasis added.]

118 That recommendation was not carried through to the Decisions Version of the PORPS, apparently in error.

119 The Panel's omission is inconsistent with cl 3.22(4) of the NPSFM.

120 To resolve the errors of law in relation to Policy LF-FW-P10A the parties propose the following wording change to (with amendments shown in red underline and strikethrough):

#### **LF-FW-P10A – Managing wetlands**

Otago's wetlands are managed:

- (1) in the coastal environment, in accordance with CE – Coastal environment ~~the NZCPS in addition to (2) and (3) below, and~~
- (2) by applying clause 3.22(1) to (3) of the NPSFM to ~~all~~ natural inland wetlands, and
- (3) to improve the ecosystem health, hydrological functioning and extent of *wetlands* that have been degraded or lost by promoting:
  - (a) an increase in the extent and condition of habitat for indigenous species,
  - (b) the restoration of hydrological processes,
  - (c) control of pest species and vegetation clearance, and
  - (d) the exclusion of stock, except where stock grazing is used to enhance wetland values, and
- (4) to sustain and enhance Māori freshwater values.



- 121 The amendment to clause (1) makes explicit that the Coastal Environment chapter of the PORPS (which gives effect to the NZCPS) applies to wetlands in the coastal environment.
- 122 The amendment to clause (2) makes explicit that clause 3.22 of the NPSFM applies to natural inland wetlands only.
- 123 The addition of clause (4) corrects the apparent omission of the Freshwater Hearings Panel in failing to add Māori freshwater values in accordance with its conclusion cited above.
- 124 The addition of clause (4) also gives effect to clause 3.22(4) of the NPSFM and the policy direction in LF-FW-O9, which refers to mana whenua values being sustained and enhanced.

**LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste**

- 125 Queenstown Lakes<sup>34</sup> and Oceana Gold<sup>35</sup> submitted on LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste and appealed that provision.
- 126 The Decisions Version of LF-FW-P16 reads:

***LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste***

*Minimise the adverse effects of direct and indirect discharges containing animal effluent, sewage, greywater and industrial and trade waste to fresh water by:*

- (1) *phasing out existing discharges containing sewage or industrial and trade waste directly to water to the extent practicable,*
- (2) *requiring:*
- (a) *new discharges containing sewage or industrial and trade waste to be to land,*

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<sup>34</sup> Queenstown Lakes submission dated 29 November 2022 at page 5 and further submission dated 3 February 2023 at pages 8, 19 and 21

<sup>35</sup> Oceana Gold's submission dated 29 November 2022 at page 12 and further submissions dated 3 February 2023 at pages 51 - 57

- (b) *discharges of animal effluent from land-based primary production to be to land,*
  - (c) *that all discharges containing sewage or industrial and trade waste are discharged into a reticulated wastewater system, where one is made available by its owner, unless alternative treatment and disposal methods will result in improved outcomes for fresh water,*
  - (d) *implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring from reticulated wastewater systems,*
  - (e) *on-site wastewater systems and animal effluent systems to be designed and operated in accordance with best practice standards,*
  - (f) *that any discharges do not prevent water bodies from meeting any applicable water quality standards set for FMUs and/or rohe,*
- (3) *to the greatest extent practicable, requiring the reticulation of wastewater in urban areas, and*
- (4) *promoting source control as a method for reducing contaminants in discharges.*

[Shading added to indicate the part at issue.]

127 'Wastewater', 'sewage', 'greywater' and 'industrial and trade waste' are all defined terms in the PORPS. Those definitions are:

**“Wastewater:** *means any combination of two or more the following wastes: sewage, greywater or industrial and trade waste*

**Sewage:** *means human excrement and urine*

**Greywater:** *means liquid waste from domestic sources including sinks, basins, baths, showers and similar fixtures, but does not include sewage, or industrial and trade waste.*

***Industrial and trade waste:*** means liquid waste, with or without matter in suspension, from the receipt, manufacture or processing of materials as part of a commercial, industrial or trade process, but excludes sewage and greywater.”

- 128 By definition, wastewater must always contain either sewage or industrial and trade waste.
- 129 Sewage, greywater, and industrial and trade waste may be part of wastewater or may be a separate substance (in which case, it is not wastewater as defined).
- 130 The appeals of Queenstown Lakes and Oceana Gold concern clause 2(a) of LF-FW-P16.
- 131 LF-FW-P16 is to implement LF-FW-O1A(8), which provides:
- (8) direct discharges of wastewater to water bodies are phased out to the extent reasonably practicable*
- 132 Clause 2(a) of LF-FW-P16 prevents new discharges to water which further clause 1 (phasing out existing discharges) and achieve objective LF-FW-O1A(8). Commonly, new discharges with lesser adverse effects are a way of phasing out existing discharges.
- 133 As notified, the policy (then LF-FW-P15 – Stormwater and wastewater discharges) provided for a preference for discharges of wastewater to be to land rather than to water, unless adverse effects associated with a discharge to land are greater than a discharge to water.
- 134 As decided, all new discharges containing sewage or industrial and trade waste are required to be to land.
- 135 Oceana Gold provided evidence that discharges may be to a contained artificial water body (such as its silt ponds) with no discharge to a natural waterbody but would nonetheless be contrary to this policy.<sup>36</sup> Commonly contained artificial water bodies are used to capture contaminants and prevent their release into the broader environment.
- 136 The parties submit that the following errors of law have been made:

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<sup>36</sup> Evidence of Claire Hunter dated 28 June 2023 at [66]

- 136.1 The Freshwater Hearings Panel's recommendation removed the ability in the notified PORPS for new discharges of wastewater to be to water, when the adverse effects of a discharge to land are greater without a proper basis in the evidence and submissions to do so.
- 136.2 As recommended the policy fails to refer to wastewater, despite the policy being to give effect to LF-FW-O1A(8) (regarding wastewater) and the Freshwater Hearing Panel's recommending report referring to wastewater being addressed in this policy<sup>37</sup>.
- 136.3 The Freshwater Hearings Panel's report did not refer to or consider the evidence that clause 2 would prevent discharges to constructed water bodies from which there is no discharge to natural water.
- 136.4 Clause 2(a) of LF-FW-P16 is inconsistent with clause (1) and objective LF-FW-O1A(8) in that clause 2(a) prevents the phasing out of existing discharges by replacing existing discharges in a way that reduces adverse effects.

- 137 To resolve these errors of law the parties submit that the following amendments are required to policy LF-FW-P16 (with amendments shown in red underline and strikethrough):

**LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste**

Minimise the adverse *effects* of direct and indirect *discharges of wastewater, containing* animal effluent, *sewage, greywater and industrial and trade waste to fresh water* by:

- (1) phasing out existing *discharges of wastewater, containing* sewage or *industrial and trade waste* directly to fresh water to the extent practicable,
- (2) requiring:
  - (a) new *discharges of wastewater, containing* sewage or *industrial and trade waste* to be to *land, unless:*
    - (i) the adverse effects associated with a discharge to land are demonstrably greater than a discharge to fresh water, or
    - (ii) the adverse effects associated with a discharge to water are significantly less than, and replace, an existing discharge(s), or
    - (iii) the discharge is to a constructed water body from which there is

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<sup>37</sup> Section 1.5 of the Hearing Panel Report, from paragraph [138]

no discharge of water or contaminants

**LF-FW-M6 – Regional Plans**

138 Oceana Gold submitted on LF-FW-M6 – Regional Plans<sup>38</sup> and appealed that provision.

139 The Decisions Version on LF-FW-M6 – Regional Plans reads:

***LF-FW-M6 – Regional plans***

*Otago Regional Council must publicly notify a Land and Water Regional Plan and, after it is made operative, maintain that regional plan to:*

- (1A) implement the required steps in the NOF process in accordance with the NPSFM,*
- (3) identify water bodies that are over-allocated and the methods and timeframes for phasing out that over-allocation (including through environmental flows and levels and limits) within the timeframes required to achieve the relevant freshwater vision,*
- (5A) provide for the allocation and use of fresh water in accordance with LF-FW-P7A, including by providing for off-stream water storage,*
- (7) identify and manage wetlands in accordance with LF-FW-P7, LF-FW-P9 and LF-FW-P10 while recognising that some activities in and around wetlands are managed under the NESF and the NESCF,*
- (8) manage the adverse effects of stormwater and discharges containing animal effluent, sewage, or industrial and trade waste in accordance with LF-FW-P15 and LF-FW-P16, and*
- (9) recognise and respond to Kāi Tahu cultural and spiritual concerns about mixing of water between different catchments*

[Shading added to indicate the part at issue.]

140 Oceana Gold appeals on the basis that the method fails to correctly reference the policy it is to implement, LF-FW-P10A. The method instead mistakenly references former policies LF-FW-P9 and LF-FW-P10 which do not exist in the notified Decision Version. The policy also fails to reference the NPSFM.

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<sup>38</sup> Oceana Gold's further submission dated 3 February 2023 at page 57

- 141 These are simple drafting errors with a straightforward drafting solution.
- 142 To resolve the errors the following amendment is required (with amendments shown in red underline and strikethrough):

### **LF-FW-M6 – Regional plans**

Otago Regional Council must publicly notify a Land and Water Regional Plan and, after it is made operative, maintain that regional plan to:

- (1A) implement the required steps in the NOF process in accordance with the NPSFM,
- (3) identify water bodies that are over-allocated and the methods and timeframes for phasing out that over-allocation (including through environmental flows and levels and limits) within the timeframes required to achieve the relevant freshwater vision,
- (5A) provide for the allocation and use of fresh water in accordance with LF-FW-P7A, including by providing for off-stream water storage,
- (7) identify and manage wetlands in accordance with LF-FW-P7, ~~LF-FW-P9~~ and LF-FW-P10<sup>A</sup> while recognising that some activities in and around wetlands are managed under the NPSFM, NESF and the NESCF,
- (8) manage the adverse effects of stormwater and discharges containing animal effluent, sewage, or industrial and trade waste in accordance with LF-FW-P15 and LF-FW-P16, and
- (9) recognise and respond to Kāi Tahu cultural and spiritual concerns about mixing of water between different catchments.

### **LF-FW-M7 – District Plans**

- 143 Oceana Gold withdraws its appeal on LF-FW-M7.

## LF-LS-P21- Land use and freshwater

144 Kāi Tahu<sup>39</sup>, Forest & Bird<sup>40</sup> and Oceana Gold<sup>41</sup> submitted on policy LF-LS-P21- Land and freshwater and appeal that provision.

145 The Decisions Version of LF-WAI-P1 reads:

### ***LF-LS-P21 – Land use and fresh water***

*The health and well-being of water bodies and freshwater ecosystems is maintained to meet environmental outcomes set for Freshwater Management Units and/or rohe by:*

*(1) reducing or otherwise maintaining the adverse effects of direct and indirect discharges of contaminants to water from the use and development of land,*

*(2) managing land uses that may have adverse effects on the flow of water in surface water bodies or the recharge of groundwater,*

*(3) recognising the drylands nature of some of Otago and the resulting low water availability, and*

*(4) maintaining or, where degraded, enhancing the habitat and biodiversity values of riparian margins.*

[Shading added to indicate the part at issue.]

146 The appeals of Kāi Tahu and Forest & Bird are in relation the chapeau of policy LF-LS-P21. Both parties alleged the same error of law; that LF-LS-P21 fails to give effect to Policy 5 of the NPSFM.

147 Policy 5 of the NPSFM requires improvement of degraded waterbodies. Policy 5 is produced below:

*“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*

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<sup>39</sup> Kāi Tahu’s submission dated 29 November 2023 at page 29

<sup>40</sup> Forest and Bird’s submission dated 29 November 2023 at page 10

<sup>41</sup> Oceana Gold’s submission dated 29 November 2022 at page 14 and further submission dated 3 February 2023 at pages 58 – 59

*and freshwater ecosystems is maintained and (if communities choose) improved.”*

[Emphasis added.]

- 148 Policy LF–LS–P21 requires maintenance of the health and well-being of water bodies and freshwater ecosystems.
- 149 This policy accordingly fails to implement the direction in Policy 5 NPSFM to improve the health and wellbeing of waterbodies and freshwater ecosystem where they are degraded.
- 150 Oceana Gold’s appeal is in relation to clause 4 of policy LF-LS-P21.
- 151 The Panel recommendation was that LF-LS-P21(4) read:
- “maintaining or, where degraded, enhancing the values of riparian margins.”*<sup>42</sup>
- 152 That recommendation was incorrectly carried through to the Decisions Version of the PORPS in error. The words ‘*habitat and biodiversity*’ have been added without any basis in submissions, evidence, or the Freshwater Hearing Panel’s report.
- 153 In clause 1 there is an obvious typographical error in referring to ‘*maintaining the adverse effects*’ of discharges rather than ‘*managing*’ those effects.
- 154 To resolve these errors of law the parties submit that the following amendment is required (with amendments shown in red underline and ~~striketrough~~):

#### **LF–LS–P21 – Land use and fresh water**

The health and well-being of water bodies and freshwater ecosystems is maintained or, if degraded, improved to meet environmental outcomes set for Freshwater Management Units and/or rohe by:

(1) reducing or otherwise managing ~~maintaining~~ the adverse effects of direct and indirect discharges of contaminants to water from the use and development of land,

(2) managing land uses that may have adverse effects on the flow of water in surface water bodies or the recharge of groundwater,

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<sup>42</sup> Hearing Panel Report, section 2.8.2 at paragraph [272]



(3) recognising the drylands nature of some of Otago and the resulting low water availability, and

(4) maintaining or, where degraded, enhancing the ~~habitat and biodiversity~~ values of riparian margins.

### **Resulting status of appeals**

- 155 Oceana Gold's appeal continues to the extent that it relates to LF-WAI-O1.
- 156 Fish and Game's appeal on LF-FW-O1A, LF-VM-O2 to O6, and LF-FW-O8 continues.
- 157 Otherwise, all appeal points are withdrawn except for the errors of law the subject of this memorandum, and the two memoranda separately filed by Kāi Tahu, with no issue as to costs.

### **Orders sought**

- 158 Counsel respectfully submits that:
- (a) as all parties with an interest in the matters in this memorandum agree (and all others abide); and
  - 159 (b) given that the remedy arising from the finding of an error falls within the category of an inevitable outcome in each case,
- these are appropriate circumstances for the Court to substitute its own judgment for that of the ORC.
- 160 All parties seek the orders sought in the draft consent order filed with this memorandum by consent.
- 161 If the Court determines for any provision that an error of law has been made, but that the Court ought not to substitute its own judgment as submitted in this memorandum, then the parties seek that the provision be remitted back to the Freshwater Hearings Panel for reconsideration.
- 162 Where a party to an appeal is signing this memorandum on the basis that it does not have an interest in one or more provisions, that is indicated in the signature block for that party. On those provisions the party is agreeing to abide the decision of the Court.



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

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27 September 2024

Date



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M Baker-Galloway / L McLaughlan  
Counsel for Otago Fish and Game Council and Central South Island Fish and Game  
Council

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27 September 2024

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Date



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A Cameron / C Ford  
Counsel for Kāi Tahu

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Date



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

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30 September 2024

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Date

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
J Campbell / B Watts  
Counsel for Queenstown Lakes District Council

\_\_\_\_\_  
Date



\_\_\_\_\_  
M Garbett / R Kindiak  
Counsel for Dunedin City Council  
(Relating to LF-FW-P1 and LF-FWP16, and otherwise abide the decision of the Court)

\_\_\_\_\_  
27 September 2024

Date



\_\_\_\_\_  
L Burkhardt  
Counsel for Manawa Energy Limited  
(abiding the decision of the Court)

\_\_\_\_\_  
23 September 2024

Date



\_\_\_\_\_  
C Thomsen / K Simonsen  
Counsel for Beef + Lamb New Zealand Limited

\_\_\_\_\_  
27 September 2024

Date

*P. Walker*

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

\_\_\_\_\_  
27 September 2024

Date

\_\_\_\_\_  
J Campbell / B Watts  
Counsel for Queenstown Lakes District Council

\_\_\_\_\_  
Date

*Mr. Galea*

\_\_\_\_\_  
M Garbett / R Kindiak  
Counsel for Dunedin City Council  
(Relating to LF-FW-P1 and LF-FWP16, and otherwise abide the decision of the Court)

\_\_\_\_\_  
27 September 2024

Date



\_\_\_\_\_  
L Burkhardt  
Counsel for Manawa Energy Limited  
(abiding the decision of the Court)

\_\_\_\_\_  
23 September 2024

Date

\_\_\_\_\_  
C Thomsen / K Simonsen  
Counsel for Beef + Lamb New Zealand Limited

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date



\_\_\_\_\_  
J Campbell / B Watts  
Counsel for Queenstown Lakes District Council

\_\_\_\_\_  
27 September 2024

Date



\_\_\_\_\_  
M Garbett / R Kindiak  
Counsel for Dunedin City Council  
(Relating to LF-FW-P1 and LF-FWP16, and otherwise abide the decision of the Court)

\_\_\_\_\_  
27 September 2024

Date



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L Burkhardt  
Counsel for Manawa Energy Limited  
(abiding the decision of the Court)

\_\_\_\_\_  
23 September 2024

Date

\_\_\_\_\_  
C Thomsen / K Simonsen  
Counsel for Beef + Lamb New Zealand Limited

\_\_\_\_\_  
Date



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P Page / B Irving  
Counsel for Otago Water Resource Users Group  
26 September 2024

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Date



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M Baker-Galloway / L McLaughlan  
Counsel for NZSki Limited  
27 September 2024

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Date



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D Allen / C Easter  
Counsel for Contact Energy Limited  
(Abiding the decision of the Court)

24 September 2024

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Date



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H Jopp  
Counsel for Federated Farmers of New Zealand Incorporated

27 September 2024

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Date



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P Page / B Irving  
Counsel for Dairy NZ Limited  
26 September 2024

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Date



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M Baker-Galloway / L McLaughlan  
Counsel for Real Group Limited  
27 September 2024

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Date



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B Williams / R Robilliard  
Counsel for Fonterra Limited

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27 September 2024

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Date



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J Macdonald  
Counsel for Central Otago District Council  
(Relating to LF-FW-P1 and LF-FWP16, and otherwise abide the decision of the Court)

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20 September 2024

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Date

## ANNEXURE 1

Provision	Appellants	Section 301 Parties
LF-WAI-O1 – Te Mana o te Wai	<ul style="list-style-type: none"> <li>• Oceana Gold (New Zealand) Limited</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Queenstown Lakes District Council</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Water Resource Users Group</li> <li>• NZSki Limited</li> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Real Group Limited</li> <li>• Federated Farmers of New Zealand Incorporated</li> </ul>
LF-WAI-P1- Prioritisation	<ul style="list-style-type: none"> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Queenstown Lakes District Council</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Queenstown Lakes District Council</li> <li>• Dunedin City Council</li> <li>• Kāi Tahu</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> <li>• Fonterra Limited</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Central Otago District Council</li> <li>• Dairy NZ Limited</li> <li>• Otago Water Resource Users Group</li> <li>• Federated Farmers of New Zealand Incorporated</li> <li>• NZSki Limited</li> <li>• Real Group Limited</li> </ul>
LF-FW-O1A – Visions set for each FMU and rohe	<ul style="list-style-type: none"> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Water Resource Users Group</li> <li>• Kāi Tahu</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Dairy NZ Limited</li> </ul>



Provision	Appellants	Section 301 Parties
LF-VM-O2- Clutha Mata- au FMU vision	<ul style="list-style-type: none"> <li>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 “<b>Kāi Tahu</b>”</li> <li>Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>	<ul style="list-style-type: none"> <li>Otago Regional Council</li> <li>Oceana Gold (New Zealand) Limited</li> <li>Kai Tāhu</li> <li>Dairy NZ Limited</li> <li>Manawa Energy Limited</li> <li>Beef + Lamb New Zealand Limited</li> <li>Otago Water Resource Users Group</li> <li>NZSki Limited</li> <li>Contact Energy Limited</li> <li>Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>Real Group Limited</li> <li>Federated Farmers of New Zealand Incorporated</li> </ul>
LF-VM-O3 – North Otago FMU vision	<ul style="list-style-type: none"> <li>Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>	<ul style="list-style-type: none"> <li>Otago Regional Council</li> <li>Oceana Gold (New Zealand) Limited</li> <li>Manawa Energy Limited</li> <li>Beef + Lamb New Zealand Limited</li> <li>Otago Water Resource Users Group</li> <li>Kāi Tahu</li> <li>Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>Dairy NZ Limited</li> </ul>
LF-VM-O4 – Taiari FMU vision	<ul style="list-style-type: none"> <li>Kāi Tahu</li> <li>Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>	<ul style="list-style-type: none"> <li>Otago Regional Council</li> <li>Oceana Gold (New Zealand) Limited</li> <li>Queenstown Lakes District Council</li> <li>Kai Tāhu</li> <li>Dairy NZ Limited</li> <li>Manawa Energy Limited</li> <li>Beef + Lamb New Zealand Limited</li> <li>Otago Water Resource Users Group</li> <li>NZSki Limited</li> <li>Contact Energy Limited</li> <li>Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>Real Group Limited</li> <li>Federated Farmers of New Zealand Incorporated</li> </ul>
LF-VM-O5 – Dunedin & Coast FMU vision	<ul style="list-style-type: none"> <li>Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>	<ul style="list-style-type: none"> <li>Otago Regional Council</li> <li>Oceana Gold (New Zealand) Limited</li> <li>Manawa Energy Limited</li> <li>Beef + Lamb New Zealand Limited</li> <li>Otago Water Resource Users Group</li> <li>Kāi Tahu</li> <li>Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>Dairy NZ Limited</li> </ul>

Provision	Appellants	Section 301 Parties
LF-FW-O6 – Catlins FMU vision	<ul style="list-style-type: none"> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Water Resource Users Group</li> <li>• Kāi Tahu</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Dairy NZ Limited</li> </ul>
LF-FW-O8 – Fresh water	<ul style="list-style-type: none"> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Water Resource Users Group</li> <li>• Kāi Tahu</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Dairy NZ Limited</li> </ul>
LF-FW-O9 – Wetlands	<ul style="list-style-type: none"> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Dairy NZ Limited</li> <li>• Otago Water Resource Users Group</li> <li>• Federated Farmers of New Zealand Incorporated</li> <li>• NZSki Limited</li> <li>• Real Group Limited</li> </ul>
LF-FW-P10A – Managing wetlands	<ul style="list-style-type: none"> <li>• Kāi Tahu</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Oceana Gold (New Zealand) Limited</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Water Resource Users Group</li> <li>• NZSki Limited</li> <li>• Contact Energy Limited</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Federated Farmers of New Zealand Incorporated</li> <li>• Dairy NZ Limited</li> <li>• Real Group Limited</li> <li>• Queenstown Lakes District Council</li> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>

Provision	Appellants	Section 301 Parties
LF-FW-P16 – Discharges containing animal effluent, sewage, greywater and industrial and trade waste	<ul style="list-style-type: none"> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Queenstown Lakes District Council</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Queenstown Lakes District Council</li> <li>• Dunedin City Council</li> <li>• Kāi Tahu</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> <li>• Fonterra Limited</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Central Otago District Council</li> <li>• Dairy NZ Limited</li> <li>• Otago Water Resource Users Group</li> <li>• Federated Farmers of New Zealand Incorporated</li> <li>• NZSki Limited</li> <li>• Real Group Limited</li> </ul>
LF-FW-M6 – Regional Plans	<ul style="list-style-type: none"> <li>• Oceana Gold (New Zealand) Limited</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Queenstown Lakes District Council</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Water Resource Users Group</li> <li>• NZSki Limited</li> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Real Group Limited</li> <li>• Federated Farmers of New Zealand Incorporated</li> </ul>
LF-FW-M7 – District plans	<ul style="list-style-type: none"> <li>• Oceana Gold (New Zealand) Limited</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Queenstown Lakes District Council</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Water Resource Users Group</li> <li>• NZSki Limited</li> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Real Group Limited</li> <li>• Federated Farmers of New Zealand Incorporated</li> </ul>

Provision	Appellants	Section 301 Parties
LF-LS-P21 – Land use and fresh water	<ul style="list-style-type: none"> <li>• Kāi Tahu</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Oceana Gold (New Zealand) Limited</li> </ul>	<ul style="list-style-type: none"> <li>• Otago Regional Council</li> <li>• Oceana Gold (New Zealand) Limited</li> <li>• Manawa Energy Limited</li> <li>• Beef + Lamb New Zealand Limited</li> <li>• Otago Water Resource Users Group</li> <li>• NZSki Limited</li> <li>• Contact Energy Limited</li> <li>• Royal Forest and Bird Protection Society of New Zealand Incorporated</li> <li>• Federated Farmers of New Zealand Incorporated</li> <li>• Dairy NZ Limited</li> <li>• Real Group Limited</li> <li>• Queenstown Lakes District Council</li> <li>• Otago Fish and Game Council and Central South Island Fish and Game Council</li> </ul>