BEFORE THE FRESHWATER HEARINGS PANEL
AT DUNEDIN

MAI I KĀ KAIKŌMIHANA MOTUHAKE
KI ŌTEPOTI

UNDER	the Resource Management Act 1991 ("**RMA**")
AND	
IN THE MATTER OF	the Proposed Otago Regional Policy Statement 2021 (freshwater and non-freshwater parts) ("**PORPS**")

MEMORANDUM OF COUNSEL FOR KĀI TAHU IN RESPONSE TO MINUTES #9 (FPI), #15 AND #18 (NON-FPI)

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May it please the Commissioners | Ki kā Kaikōmihana

Introduction and summary

1. This memorandum is filed in response to the Panel's directions in Minute #9 (FPI) and Minutes #15 and #18 (non-FPI).

2. The Minutes seek responses from the parties on the following issues:

   (a) the implications of the Supreme Court's decision in *Port Otago* for the PORPS (FPI and non-FPI); and

   (b) the implications of the National Policy Statement on Indigenous Biodiversity ("**NPS-IB**") (non-FPI).

3. Counsel have already responded to Minute #16 (non-FPI) in relation to resourcing issues, in a memorandum dated 25 July 2023.

Port Otago

4. Counsel has had the benefit of reviewing the Otago Regional Council's ("**ORC**") submissions on the FPI, made during the hearing on 28 August 2023, in addition to the memorandum filed by counsel for Meridian Energy Ltd ("**MEL**") dated 4 September 2023.

The orthodox position remains unaffected

5. The first point is that the orthodoxy which has followed the Supreme Court's decision in *King Salmon* remains unaffected by the *Port Otago* decision. The ordinary principles of statutory interpretation apply.[1] Importantly, the language in which policies are expressed remains significant, and differences in expression matter.[2] Policies may be expressed in such directive terms that a decision-maker has no choice but to follow it, *"assuming no other conflicting directive"*. Finally, conflicts between policies are likely to be rare if policies are properly construed, and any apparent conflict may dissolve if close attention is paid to the way in which policies are expressed.[3] None of that is new.

6. The Supreme Court also went on to blend the ratio of its judgments in *King Salmon* and *Trans-Tasman Resources*, when considering the standard that applies to the avoidance policies in the NZCPS. In *King Salmon*, the Court held that avoidance of "minor or transitory effects" was not required in order to comply with the relevant policies.[4]

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1 *Port Otago*, at [60].
2 *Port Otago*, at [61].
3 *Port Otago,* at [62].
4 *King Salmon*, at [145].

7. In *Trans-Tasman Resources*, the Supreme Court qualified the requirement in s 10(1)(b) of the relevant Act to "protect the environment from pollution" by reading in a requirement to protect from "material harm", noting that temporary harm can be material,[5] and that conditions may be imposed to remedy or mitigate the level of harm below the material threshold.[6]

8. The key conclusion is at [68], where the Court held:

> All of the above means that the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.

9. The first part of that conclusion is a reflection of [105] in *King Salmon*, where the Court held that the meaning of "inappropriate" should be interpreted against the backdrop of what is sought to be preserved or protected. In my submission, the second part does no more than to restate *King Salmon*, albeit in language adopted from *Trans-Tasman*.

10. Counsel for ORC in his opening submissions on the FPI submitted that it remained to be seen whether this was a significant shift from the concept of minor or transitory effects in *King Salmon*, and that material has a range of meanings from "more than de minimis" to "major".[7]

11. Counsel respectfully submit that this is an unhelpful lens through which to view matters. The better approach is to identify the converse, ie that only harm which is *"immaterial"* will not result in conflict with an avoidance policy. There is little (if any) difference between that which is *"immaterial"*, and that which is *"minor or transitory"*.

12. Importantly, it is noted that Glazebrook J gave the reasons in *Port Otago*. Along with William Young J (who dissented in *King Salmon*), Glazebrook J was the only other Supreme Court Judge who sat on *King Salmon*. If the Court had intended to set a drastically new test, or to indicate that the majority in *King Salmon* erred, you would expect the Court to have said that expressly.

The key difference

13. The key difference in *Port Otago* arises from the important qualification in paragraph 5 above, that directive policies may leave no room for choice *"assuming no other conflicting directive"*.

14. In *Port Otago*, there was such a conflicting directive. Policy 9 of the NZCPS included the directive verb "requires", and the Court held that

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5 *Trans-Tasman Resources Ltd*, at [252], [292]-[293], and [309]-[311].

6 *Trans-Tasman Resources Ltd,* at [261], [292], and [318]-[319]. This includes conditions that adopt an adaptive management regime: *Port Otago,* at [67].

7 Opening submissions for ORC dated 28 August 2023 at [19].

to *"recognise that something is required is to accept that it is mandatory"*.[8]

15. No such conflicting directive policy existed in *King Salmon*. Policy 8 of the NZCPS provides that decision-makers should "*recognise the significant existing and potential contribution of aquaculture*" to social, economic and cultural well-being by, inter alia, providing for aquaculture activities *"in appropriate places"*. The drafting of that policy leaves considerable flexibility and scope for choice as to where aquaculture activity may take place.[9]

16. Importantly, the word "*require"* is not used as a directive verb in any other policy in the NZCPS.

17. It also does not feature in the NPS-REG. Those policies require decision-makers to "*recognise and provide for*", "*have particular regard to*", "*have regard to*", and "*provide for…to the extent applicable to the region or district*" a range of different matters.[10] Those policies are drafted in much more flexible, less prescriptive language.[11] They do not carry the same weight or direction.

18. The policies of the NPS-ET are of a similar vein. The benefits of the National Grid must be recognised and provided for.[12] Certain matters must be considered or had regard to.[13] Arguably, the only truly directive policy in the NPS-ET, which is similar to the situation in *Port Otago*, relates to established electricity transmission assets, where decision-makers *"must enable the reasonable operational, maintenance and minor upgrade requirements"* of those assets.[14]

Conclusion on Port Otago

19. For that reason, counsel sees the Supreme Court's decision in *Port Otago* as one which turns on its own particular facts, rather than upsetting the established orthodoxy which has existed since the Court's earlier decision in *King Salmon*.

20. The outcome of *Port Otago* was a direct application of the *King Salmon* matrix for reconciling potentially conflicting policies (at [130]). To that end, counsel disagrees with the submissions made by counsel for ORC and MEL which tend to suggest a more radical shift.

21. When considering the potentially competing policy directives, including between the avoidance policies in the NZCPS, the NPS-FM, and more

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8 *Port Otago*, at [69].
9 *King Salmon*, at [126]-[131].
10 NPS-REG, Policies A, B C1, C2, E1-E4, and F.
11 *King Salmon*, at [126].
12 NPS-ET, Policy 1. See also Policy 2.
13 NPS-ET, Policies 3 and 4.
14 NPS-ET, Policy 5. "Enable" can have directive force, depending on the context in which it is used: *Southern Cross Healthcare Ltd v Eden-Epsom Residential Society Inc* [2023] NZHC 948 at [117]-[122]. The inclusion of "must" in Policy 5, which is a mandatory direction (cf "require"), adds further weight to the policy.

recently, the NPS-IB, and the enabling, but less directive policies in relation to electricity transmission, renewable energy and other non-national level directives, greater weight should still be given to those policies which require avoidance of adverse effects on particular environments or species.[15]

Implications of the NPS-IB (for non-FPI parts)

22. Counsel has also had the benefit of reviewing counsel for the ORC's memorandum on the implications of the NPS-IB dated 8 September 2023, in relation to non-FPI parts of the PORPS.

23. Counsel agrees with the statements of law in paragraphs 2 to 4 of the ORC memorandum.

24. Counsel also agrees with the summary of submissions, which provide almost-unlimited scope to address the implementation of the NPS-IB in the PORPS (non-FPI parts), in paragraphs 5 to 7 of the ORC memorandum.

Specified Māori land (NPS-IB) and Māori land (PORPS)

25. Mr Maclennan, in his supplementary evidence, identifies that the definition of Māori land contained in the reply report by Mr Adams for the MW chapter is broader than the definition of specified Māori land in the NPS-IB.

26. Notwithstanding that, Mr Maclennan then, and in my submission appropriately, applies the directions in cls 3.12 and 3.18 of the NPS-IB to the definition of Māori land proposed by Mr Adams.[16] As Mr Maclennan identifies, the definition of Māori land in the PORPS was developed to address specific circumstances regarding the acquisition and alienation of Māori land in Otago, as well as recognising and providing for use and development of ancestral lands under s 6(e) of the RMA.[17]

27. In Mr Maclennan's view, that definition has been determined in accordance with the principles of partnership, participation and protection and achieve the requirements of the NPS-IB. I support that approach.[18] It is consistent with the decision-making principles in cl 1.5 of the NPS-IB, as well as with Objective 2.1(1)(b) and recognising the mana of Kāi Tahu as kaitiaki within their takiwā; and Policies 1 and 2.

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15 Acknowledging, especially from a Kāi Tahu perspective, that s 8 of the RMA will continue to have both procedural and substantive obligations: *King Salmon* at [88].

16 It is worth noting that there are aspects of Mr Adams' proposed definition which Kāi Tahu does not agree with, namely that the definition applies to land owned by Te Rūnanga o Ngāi Tahu or its constituent papatipu rūnaka *only* in relation to papakāika development, as opposed to all development; and the rejection of the inclusion of "leased" within what is now sub-clause (8) of the definition.

17 Supplementary evidence of Andrew McLennan at [66].

18 Subject to the caveats in fn 16 above.

Relationship between the ECO policies and MW-P4

28. ECO-P4 includes a requirement to follow the effects management hierarchy when making decisions related to certain activities in SNAs or those adversely affecting indigenous species and ecosystems that are taoka to mana whenua, on native reserves and Māori land. ECO-P6 requires the application of the effects management hierarchy more generally in relation to applications for resource consent.

29. By contrast, MW-P4 provides that Kāi Tahu are able to develop and use land and resources within native reserves and Māori land in accordance with mātauraka and tikaka, to provide for their economic, cultural and social aspirations, including for papakāika, marae and marae-related activities. The related method, MW-M5, provides for the use of native reserves and Māori land in accordance with MW-P4, and requires recognition of Kāi Tahu rakatirataka by enabling mana whenua to lead in the management of adverse effects of such use on the environment.

30. One of the issues in trying to bring through a coherent and cohesive framework for the management of Māori land, especially where national direction requires certain policy directives to be implemented in certain areas, is that there can be a risk that directives in one location are diluted by directives in others, and the overall impact of that policy direction is lost. Mr Bathgate identifies this potential risk at para 20 of his evidence, and the difficulties that might be created by amending ECO-P3, P4 and P6 to provide an exception for Māori land, which may detract from plan clarity and efficiency.

31. Mr Bathgate has instead recommended changes to the recommended new method, ECO-M4D, to align the framing of that method with MW-M5. This would ensure that the PORPS is read as a whole, as required,[19] and would ensure that alternative policy approaches to ECO P3 – P6 are available for Māori land. I support that approach.

Application of the NPS-IB to the coastal environment

32. Paragraph 1.4(2) of the NPS-IB notes that if there is a conflict between the provisions of the NPS-IB, and the NZCPS, then the latter prevails.

33. The NZCPS applies to the coastal environment. The NPS-IB applies to indigenous biodiversity in the terrestrial environment throughout Aotearoa New Zealand, which is defined to mean land and associated natural and physical resources above mean high-water springs. The definition excludes the coastal marine area.

34. Therefore, there is the potential for conflict between the NPS-IB and the NZCPS in relation to land between mean high-water springs, and the landward boundary of the coastal environment.

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[19] *Port Otago*, at [60]. See also, in relation to resource consents, *R J Davidson Family Trust* at [73].

35. One of those areas of potential conflict is in the management of indigenous biodiversity on Māori land. As the cultural witnesses for Kāi Tahu explained, there are a number of Native Reserves within the coastal environment. As currently drafted, those Reserves will not be treated the same (under what was CE-P5, and which is now proposed to be included in the ECO chapter) as Reserves that are located further inland. This is because of the absence of any exceptions to Policy 11 of the NZCPS for Māori land, which has been replicated within CE-P5.

36. I agree with Mr Bathgate when he says that the an alternative approach to the management of indigenous biodiversity on Māori land is also required within the coastal environment. From a legal perspective, and as noted earlier, s 8 of the RMA provides both "procedural and substantive obligations" on decision-makers.[20] The requirement to take into account the principles of the Treaty of Waitangi, including the principle of active protection and partnership, recognises the rakatirataka of whānau, hapū / rūnaka and iwi over ancestral lands, including along the coast.[21] Policy which acknowledges this in one location, but not within the coastal environment, risks creating a double standard and the potential for a modern Treaty breach.

37. Another way of looking at the issue is that, insofar as the NZCPS relates to Māori land,[22] its policies provide incomplete coverage (ie it does "cover the field"),[23] and so reference to ss 6(e) and 8 of the RMA can be made to "fill the void" and provide a similar regime within the coastal environment to that within other areas.

Conclusion on NPS-IB

38. In summary, counsel support the amendments sought in Appendix 1 of Mr Bathgate's supplementary evidence.

Dated 15 September 2023

Aidan Cameron
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20 *King Salmon*, at [88].
21 Which is also enshrined under s 6(e) of the RMA.
22 As opposed to those matters addressed in Policy 2 of the NZCPS, which are broader in scope.
23 *King Salmon*, at [88] and [90].