



BEFORE THE COMMISSIONER APPOINTED

BY THE SOUTHLAND REGIONAL COUNCIL (ENVIRONMENT SOUTHLAND)

UNDER The Resource Management Act 1991

AND

IN THE MATTER OF A Resource Consent Application by Environment Southland's
Catchment Operations Division (APP-20211135)

AND

IN THE MATTER OF Submission by Te Ao Marama Inc (on behalf of Awarua Rūnanga)

**STATEMENT OF EVIDENCE OF MARGARET AGNES FERGUSON ON BEHALF OF
AWARUA RŪNANGA, 23 AUGUST 2024**

1 INTRODUCTION

- 1.1 My name is Margaret Agnes Ferguson. I am currently employed as an Environmental Advisor by Te Ao Marama Incorporated (referred to herein as TAMI) who represent the four Papatipu Rūnanga of Murihiku on Resource Management and Local Government matters.
- 1.2 I have been asked to provide planning evidence on behalf of Awarua Rūnanga on resource consent application APP-20211135 being Environment Southland's Catchment Operations Division's (the Applicant) proposal to occupy part of the Coastal Marine Area (CMA) with structures to dam and divert water within the Titiroa Stream. The Titiroa Stream is located within the Titiroa Catchment and the Mataura Freshwater Management Unit (FMU)¹.
- 1.3 I hold the following relevant qualifications: a Bachelor of Parks, Recreation and Tourism Management from Lincoln University; an MSc Sustainability, Planning and Environmental Policy from Cardiff University. I am an Associate Member of the New Zealand Planning Institute and an accredited Hearings Commissioner.
- 1.4 I have worked in environmental and resource management policy and planning for 12 years. I have worked in both the private and public sector in the capacity of a Resource Consents Planner and a Resource Management Policy Planner. This evidence is within my areas of expertise namely; analysis of resource consents, plans and policy and their relationship with mana whenua rights, interests and values.
- 1.5 I have read the Code of Conduct for Expert Witness in the Environment Court Practice Note (2023) and I agree to comply with the code. I have not knowingly omitted to consider material facts known to me that might alter or detract from the opinions expressed.

¹ Environment Southland Regional Council Website – interactive maps

2 SCOPE OF EVIDENCE

- 2.1 I have read the evidence, relevant to my area of expertise, provided on behalf of the applicant, the submission from TAMI and other submitters and the processing Planner's Section 42A Report (s42A Report). I agree with the identified areas of concern outlined in the s42A report to include:
- a. Mitigations proposed by the applicant do not address adverse effects on cultural and spiritual values.
 - b. Insufficient information has been provided to ascertain the benefits of the activity.
 - c. Adverse effects on fish passage and inanga spawning.
 - d. Adverse effects on water quality.
 - e. The proposed offsetting of adverse effects on inanga by enhancing inanga spawning habitat does not meet the requirements of the National Policy Statement for Freshwater Management 2020.
- 2.2 I note the evidence of Mr. Whaanga & Ms. Blair describes the cultural values held by Ngāi Tahu whānui in the Titiroa Catchment and in the management of wai/freshwater and the coastal environment generally, and how well the proposal aligns, or does not align, with these values.
- 2.2 My evidence, will address the following matters:
- a. The relationship between Te Ao Marama, Awarua Rūnanga and the Titiroa Stream.
 - b. My understanding of the proposal.
 - c. The effects of the proposal on Ngāi Tahu values and how those effects ought to be considered under the RMA.
 - d. Planning assessment and recommendations.
- 2.3 In preparing my evidence I have considered the following documents:
- Te Rūnanga o Ngāi Tahu Act 1996 (TRoNT Act 1991)
 - Ngāi Tahu Claims Settlement Act 1998 (NTCSA 1998)
 - Te Rūnanga o Ngāi Tahu (Declaration of Membership) Order 2001
 - Resource Management Act 1991 (RMA) (Version as at 5 June 2024)
 - Water Conservation (Mataura River) Order 1997
 - National Policy Statement for Freshwater 2020 (NPSFW 2020)

- Southland Regional Policy Statement (Southland RPS)
- Proposed Southland Water and Land Plan (operative in part) Part A and Part B Maps (2024)
- Te Rūnanga o Ngāi Tahu Freshwater Policy
- Te Tangi a Tauria – the Cry of the People – Iwi Management Plan (2008)
- Application by Environment Southland’s Catchment Operations Division (APP-20211135) (the application)
- Submission by TAMI on behalf of Awarua Rūnanga
- Section 42A Officer’s Report (s42A Report)
- Evidence of Ms. Laura Rose Drummond on behalf of the applicant
- Evidence of Mr. Matthew James Gardner on behalf of the applicant
- Evidence of Mr. Luke Gerard McSoriley on behalf of the applicant
- Evidence of David Conner
- Evidence of Colin Shen Young
- Evidence of Mr Les Frisby
- Evidence of Mr. Dean Whaanga and Ms. Stevie-Rae Blair on behalf of Awarua Rūnanga

3 NGĀI TAHU, TE AO MARAMA AND AWARUA RŪNANGA

- 3.1 Te Rūnanga o Ngāi Tahu (TRoNT) is the iwi authority over most of Te Wai Pounamu/the South Island as recognised in section 15 of Te Rūnanga o Ngāi Tahu Act 1996 (TRoNT Act 1996).
- 3.2 Te Rūnanga o Ngāi Tahu is comprised of 18 Papatipu Rūnanga, who collectively represent the hapū and whānau of Ngāi Tahu, Ngāti Mamoe, Waitaha and their ancestors.
- 3.3 The rohe that the application is within is in the takiwā of Awarua Rūnanga.
- 3.4 For resource management purposes in Murihiku, certain rūnanga take the lead for applications for specific areas. In the Titiroa Catchment, Awarua Rūnanga takes the lead, recognising that other rūnanga in Murihiku (ngā Rūnanga) have an interest in this area.

- 3.5 Te Ao Marama Inc. (TAMI) is an environmental entity which represents Ngā Rūnanga ki Murihiku for resource management and environmental issues. TAMI is made up of the four Murihiku Rūnanga Papatipu – Awarua, Hokonui, Ōraka Aparima and Waihōpai.
- 3.6 The Te Rūnanga o Ngāi Tahu Act 1996 (the TroNT Act) and the Ngāi Tahu Claims Settlement Act 1998 (the Settlement Act) (NTCSA 1998) give recognition to the status of Papatipu Rūnanga as kaitiaki and mana whenua of the natural resources within their takiwā. Mr. Whaanga & Ms. Blair explains that mana whenua status is conferred through a combination of whakapapa and ahi kā.

4 AWARUA RŪNANGA RELATIONSHIP WITH TITIROA CATCHMENT

- 4.1 The Titiroa Stream, in conjunction with the ToeToe estuary and the neighbouring Mataura awa are water bodies recognised by the Crown as outlined in Schedule 104 and 42 of the Ngāi Tahu Claims Settlement Act 1998:
- Schedule 104 Statutory Acknowledgement for Raikura/Te Ara a Kiwa (Rakiura/Foveaux Strait Coastal Marine Area), and
 - Schedule 42 Statutory Acknowledgement of the Mataura River.
- 4.2 Under Section 206 of the NTCSA 1998, the Crown acknowledges Ngāi Tahu cultural, spiritual, historic and traditional association with Statutory Acknowledgment Areas.
- 4.3 Under Section 211 of the NTCSA 1998, any member of Ngāi Tahu whānui may cite this statutory acknowledgement as evidence of the association of Ngāi Tahu with the area(s). Mr. Whaanga & Ms. Blair has done this in the appendices their evidence.
- 4.4 The significance of the Mataura River for fisheries values, and by proxy its tributaries, is recognised in the Water Conservation (Mataura River) Order 1997. The Mataura River and Titiroa Stream are important sources of mahinga kai².

5 THE PROPOSAL

² Te Tangi a Tauira 1998, Mahinga kai is central to the Ngāi Tahu ki Murihiku way of life. The collection and processing of mahinga kai is an important social and economic activity.

- 5.1 In summary, relying on the application and the s42A Report, I understand resource consents are required for the following:
- a. A coastal permit to occupy the Coastal Marine Area (CMA) with a tide gate structure.
 - b. A coastal permit to occupy the Coastal Marine Area (CMA) with a weir structure.
 - c. A water permit to dam and divert water from within the Titiroa stream.
- 5.2 The purpose of the proposal is to protect inland areas from tidal flooding and to enhance land drainage³.
- 5.3 The tide gate and weir structures, along with the water diversion, previously held resource consent AUTH-204122 approved 29 October 2015. However, this resource consent expired on 29 October 2020. In this instance, my evidence will speak to the application for a new activity, and not a 'replacement coastal permit' as described by the applicant.
- 5.4 I understand the Titiroa Stream is to be dammed by a weir, and then water diverted approximately 80m north of the weir, to flow through an artificial channel to the true left. The Tide gates are to be located within the artificial channel, approximately parallel to the location of the weir. The diverted water then re-enters the main Titiroa stream approximately 120m below the weir.
- 5.5 The tide gates are to open and close on tidal inflows to reduce the potential for tides to create higher water levels upstream of the structures and inundate landform. My understanding is the weir can be over-topped during flood events irrespective of the gates. The applicant advises the tide gates will have influence on approximately 11,500 ha of land within the Titiroa catchment.
- 5.6 I understand downstream of the proposed structures, the Titiroa Stream feeds into the Fortrose Harbour which is identified as being a Regionally Significant wetland and a Sensitive Water body.⁴

6 MANAGING THE ACTIVITY UNDER THE RESOURCE MANAGEMENT ACT 1991

³ Section 42A Report, Page 4

⁴ Proposed Southland Water and Land Plan, Appendix A

- 6.1 The identification, assessment and management of adverse effects is central to managing the use, development or protection of natural and physical resources under the RMA. The purpose of the Act is *“to promote the sustainable management of natural and physical resources”*⁵. A key component of sustainable management is *“avoiding, remedying or mitigate any adverse effects of activities on the environment”*⁶. Under Section 88(2)(b) of the RMA, any resource consent application is required to include an Assessment of Environmental Effects (AEE) in accordance with Schedule 4 to the RMA.
- 6.2 The term ‘effects’ is defined in s3 of the RMA as *“includes-*
(a) Any positive or adverse effect; and
(b) Any temporary or permanent effect; and
(c) Any past, present or future effect; and
(d) Any cumulative effect which arises over time or in combination, and also includes-
(e) Any potential effect of high probability; and
(f) Any potential effect of low probability which has a high potential impact”
(emphasis added).
- 6.3 The term ‘environment’ is defined in s2 of the RMA as *“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) of this definition or which are affected by those matters”
- 6.4 For completeness, I note the effects on Ngāi Tahu whānui and their cultural values are captured within the definition of **‘environment’**.

7 EFFECTS ON NGĀI TAHU WHĀNUI

⁵ Section 5(1) of the Resource Management Act

⁶ Section 5(2)(c) of the Resource Management Act

7.1 Relying on the evidence by Mr. Whaanga & Ms. Blair and the submission by TAMI, I understand the effects on cultural values to be as follows:

- a. The tide gate and weir structures adversely impact threatened species (Taonga) and their habitats by impacting on fish passage and the velocity of the stream.
- b. The tide gate and weir structures prohibit fish from moving freely having a negative effect on the ability of fish to reproduce.
- c. The fish survey submitted with the application is considered to be inadequate given the survey area is significantly small. Moreover, the survey did not cover all species for example kanakana, which Ngāi Tahu consider as a key environmental indicator of health.
- d. The application has not sufficiently assessed alternative options to have the tide gate and weir installed.
- e. The application has not sufficiently assessed what the outcome would be of removing the weir and tide gate and the actual impact on the land from inundation.
- f. The application fails to address climate change and the requirements for future design of structures to accommodate this.
- g. The application inadequately addresses mitigation opportunities. It is not considered that by improving habitat, fish migration improves.
- h. The application is inconsistent with Te Tangi a Tauria – Iwi Management Plan, the relevant sections of which will be discussed further in my evidence.
- i. The application is considered to be inconsistent with other statutory planning documents as it relates to cultural values and associations.
- j. Ngāi Tahu consider the structures to be existing unlawfully given AUTH – 204122 expired on 29th October 2020 and no new application was lodged prior to this date.

7.2 Mr. Whaanga & Ms. Blair confirms the proposal will adversely affect the ability of mana whenua to exercise kaitiakitanga, impact on the Hauora (health) of the water bodies, degrade mauri including through the diversion and interruption of flow from distinct ecosystems adversely affecting mahinga kai. Mr Whaanga & S Blair states that the proposal fails to provide for integrated management of the catchment – ki uta ki tai, because *“it proposes to artificially ensure the water does not reach places where it originally should. Water is being treated as a problem to be removed rather*

*than understanding that this land is designated flood land and therefore should be managed as such*⁷.

- 7.3 In his evidence in chief, Mr. McSoriley addresses the Awarua Runanga submission and correctly interprets the outcome sought by mana whenua being the removal of the tide gates, retirement of the surrounding land parcels and implementation of a management plan to restore the land to wetlands to provide better long-term flood management for the wider area.
- 7.4 Mr. McSoriley acknowledges that it is for iwi to explain the cultural effects however he concludes *“It is not clear to what extent that (sic) activity has any direct impact on the customary relationship of Ngāi Tahu ki Murihiku with freshwater resources in Southland”*⁸. I trust Mr. Whaanga & Ms. Blair’s evidence now answers this question and provides the rationale for the preferred outcome sought by mana whenua.
- 7.5 Mr. Whaanga & Ms. Blair’s assessment of the effects of the proposal fundamentally differs from that of Mr. McSoriley who is focused on the fact there is a *‘functional need’* for the structures to exist and operate⁹. Mr. Whaanga & Ms. Blair has considered the proposal in the wider context of ki uta ki tai, Kaitiakitanga and Rangatiratanga and posed questions around whether the tide gates are in fact fit for purpose for now and the future, of which their conclusion is that they are not.
- 7.6 I note the s42A report confirms the proposal is likely to have adverse effects on cultural and spiritual values arising from the location of the activity, being within a Statutory Acknowledgement Area, as well as adverse effects on the waterway and taonga species¹⁰.
- 7.7 In light of Mr Whaanga & S Blair’s evidence and the Section 42A report, there is no doubt the proposal adversely affects Ngāi Tahu cultural values. The next section of my evidence considers to what extent this conclusion should influence the decision of the consent authority to grant or decline the application under the RMA.

⁷ Paragraph 32, Statement of Evidence of Dean Whaanga and Stevie Rae-Blair

⁸ Page 31 of Evidence in Chief of Luke Gerald McSoriley for Southland Regional Council, 16 August 2024

⁹ s82 of Evidence in Chief of Luke Gerald McSoriley for Southland Regional Council, 16 August 2024

¹⁰ Page 22 of the Section 42A Report.

8 CONSIDERATION OF NGĀI TAHU CULTURAL VALUES UNDER THE RMA

8.1 Section 104(1) of the RMA sets out the matters which a consent authority must consider in determining a resource consent application. These matters are listed at Section 3.1.1(1) of the s42A report for completeness¹¹.

8.2 I note the consideration of a resource consent application is also subject to Part 2 of the RMA, and regard must be had to any relevant provisions of the relevant national planning standard(s), regulation or national policy statement document(s); relevant provisions of the regional policy statement and any plan or proposed plan; and other matters the consent authority considers relevant and reasonably necessary to determine the application.

9.3 In this instance Ngāi Tahu cultural values are a matter to be considered in terms of Section 6(e), Section 7 (a) and Section 8 of Part 2 of the RMA and the following relevant planning documents:

- a. the National Policy Statement for Freshwater 2020,
- b. the National Environmental Standard for Freshwater 2020
- c. the Southland Regional Policy Statement,
- d. the proposed Southland Water and Land Plan 2024
- e. the New Zealand Coastal Policy Statement
- f. the Regional Coastal Plan
- g. Southland District Plan
- h. Te Tangi a Taurira – Iwi Management Plan

9 PLANNING ASSESSMENT AND RECOMMENDATION

9.1 My evidence above outlines the RMA framework in which cultural values are to be considered within decision-making. The identification of and understanding of Cultural values are but one component for the consent authority to consider when determining a resource consent application. The remainder of my evidence includes an assessment of the environmental effects; and an assessment of the proposal against the relevant provisions of the RMA, followed by my conclusions

¹¹ Page 26 of Section 42A Report

and recommendation(s). All of which I consider add further weight and support to the submission by TAMI and cultural evidence provided by Mr. Whaanga & Ms. Blair.

10 Assessment of Environmental Effects

10.1 Section 104(1)(a) of the RMA requires the consent authority to have regard to any actual or potential effects of allowing an activity. The applicant's AEE¹², and evidence in chief of Mr McSoriley concludes "*The activity is having ongoing adverse effects on natural tidal processes in the Titiroa Stream and is also likely to be having an adverse effect on inanga spawning. These effects are on-going and are directly related to the function of the tide gate infrastructure*¹³." The Section 42A Report concludes overall the effects on river values, to include cultural and spiritual values, fish passage, inanga spawning, and water quality are such that the recommendation is to decline the resource consent. Overall I cannot but assume this means the adverse effects are significant.

10.2 Relying on the Section 42A report, the application, submissions and all evidence, to include in particular Mr. Whaanga & Ms. Blair's, I consider the proposal to have the following key adverse effects:

Effects on water quality and water quantity,

Effects on fish passage,

Effects on flora and fauna and associated habitats;

Effects on receiving coastal environment (upstream and downstream)

Effects on cultural values (as fully described in Mr Whaanga & Ms. Blairs evidence)

Water Quality, Quantity and Fish Passage

10.3 In relation to effects on water quality, water quantity and fish passage, the Pattle Delamore Partners (PDP) report dated November 2022 determined that;

Overall, the Titiroa tidegates probably have a significant and detrimental effect on spawning migrations of inanga in the Titiroa River and there is little chance this can be remediated by modifying the tidegates or altering their operation.

¹² WSP, Resource Consent Application, Titiroa Tide Gates and Weir Infrastructure, Section 4, page 7

¹³ WSP, Resource Consent Application, Titiroa Tide Gates Section 11, Conclusion, page 34

The evidence of Ms Drummond provided further discussion on how the proposal impacted fish passage, water quantity and quality noting overall it was not possible to 'avoid', 'remedy' or in part 'mitigate' the adverse effects of the proposal. This would suggest that the adverse effects are in fact significant to unacceptable.

- 10.4 Mr. Whaanga & Ms. Blair's evidence raises concerns relating to the mitigation and offsetting options provided. Mr. Whaanga & Ms. Blair considers that Ki uta ki tai is impeded, Kaitiakitanga not upheld, nor mauri given due respect. In my opinion the adverse effects on water quality, quantity and fish passage are significant.

Effects on flora and fauna and associated Habitats

- 10.5 Mr. Whaanga & Ms. Blair discusses the loss of Flora and Fauna associated with the structures within the Titiroa Stream and its impact on, mahinga kai. She attributes this loss to overall habitat degradation and associated resource depletion, legislative barriers that impede access, and changes in land tenure that affect ability to access resources.¹⁴

Effects on receiving Coastal Environment (upstream and downstream)

- 10.6 Mr. Whaanga & Ms. Blair's evidence has described what effects the proposal has on Ngāi Tahu values and explains the wider context in which Ngāi Tahu assesses this proposal. From a Ngāi Tahu perspective the cultural area impacted by the structures extends out to the ToeToe Estuary downstream of the gates, and as far as the tidal influence upstream of the gates. In the absence of any cultural expert by the applicant, the decision maker must assume Mr. Whaanga & Ms. Blair's evidence to be true and correct.
- 10.7 In comparison Mr. Gardner's evidence outlines the physical boundaries of the proposal. Figure 2 on page 6 of his evidence shows an extensive network of drainage within a relatively defined area. Mr. Gardner states "*These drains are critical to allowing the surrounding area to be used for productive farming purposes*" and in essence concludes the removal of the structures would therefore impact the productivity of the landform.
- 10.8 Given the extent of the modification which has occurred to date (supported by the tide gates and weir) on land that would otherwise predominately be a wet area, it is

¹⁴ Paragraph 51 of Statement of Evidence of Dean Whaanga and Stevie-Rae Blair

not a surprise to me that the results of any modelling showing the removal of the gates would likely make this existing drainage network ineffective, with associated inundation consequences for affected land.

- 10.9 It is my opinion that the permitted baseline is not a drained, farmed landform, but an intertidal area with a tidal reach that is being restricted by solid structures having a negative impact on the flora and fauna within this ecosystem. I would consider therefore the effects on the receiving environment to be significant.

11. STATUTORY PLANNING DOCUMENTS

- 11.1 I note the relevant planning provisions identified and assessed in both the s42A report and application however I consider there are other provisions pertinent to the assessment of this application which have been omitted. My evidence will now turn to these provisions. For completeness, where there is an exhaustive list of provisions, considered to be all just as relevant, I have itemised these in Appendix 1. I have then discussed those provisions which I believe will most greatly assist the decision maker within the body of this evidence.

New Zealand Coastal Policy Statement

- 11.2 **Policy 1** Extent and Characteristics of the Coastal Environment. Policy 1 confirms recognition of the coastal environment, whilst including a number of variables, in particular it identifies “c) areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands, and the margins of these; g) items of cultural and historic heritage in the coastal marine area or on the coast; and h) inter-related coastal marine and terrestrial systems, including the intertidal zone”. Relying on Mr. Whaanga & Ms. Blairs evidence, I consider the area of impact of the structures to be wider than that which is addressed in the application.
- 11.3 **Policy 5** Land or waters managed or held under other Acts. I note that Te Runanga o Ngāi Tahu has made an application for Customary Marine Title under Marine and Coastal Area (Takutai Moana) Act 2011 around the South Island. Policy 5(2) requires regard to be had to publicly notified proposals for statutory protection of

land or waters in the coastal environment and the adverse effects of activities on the purposes of that proposed statutory protection.

- 11.4 **Policy 10** Reclamation and de-reclamation requires the avoidance of reclamation of land in the coastal marine area unless there is no practicable alternative; and the reclamation provides significant regional or national benefit. In my opinion the area of land that would otherwise be subject to 'natural flooding', being the normal ebb and flow of an unrestricted tide, is potentially 'reclaimed land' and therefore subject to Policy 10 of the NZCPS. I would have interest in understanding further the applicants position on this matter.
- 11.5 As it relates to **Policy 10 above, Policy 13** Preservation of natural character confirms that natural character of the coastal environment is the natural movement of water and sediment.¹⁵
- 11.6 **Policy 17** Protect historic heritage in the coastal environment from inappropriate subdivision, use and development. I note that historic heritage in this context is defined as per the RMA. I direct your attention to the reference within the definition of 'cultural' as a quality that contributes to historic heritage along with sites of significance to Māori.¹⁶
- 11.7 **Policy 21** Enhancement of Water Quality in the Coastal Environment recognizes the impact of water quality on ecosystems, natural habitats and can restrict use on a range of activities, to include cultural practices. To improve water quality the policy directs restoring water quality that supports activities and engagement with mana whenua to identify areas where they have particular interest. Mr. Whaanga & Ms. Blair has provided sufficient evidence to support the connection Ngāi Tahu have with this area and the surrounding areas such as ToeToe Estuary and for what purposes.
- 11.8 **Policy 24** Identification of Coastal Hazards. I also note the relationship between **Policy 24 and Policy 25(d) and (e)** which state respectively to encourage the location of infrastructure away from areas of hazard risk where practicable; and discourage hard protection structures and promote the use of alternatives to them.

¹⁵ Policy 13(2)(d) of the New Zealand Coastal Policy Statement 2010

¹⁶ Part 1 Interpretation, Resource Management Act 1991

- 11.9 **Policy 26** Natural defenses against Coastal hazards. As it relates to Policies 24 and 25, Policy 26 seeks to provide for protection, restoration or enhancement of natural defenses that protect coastal land uses from coastal hazards and recognize that such natural defenses include estuaries, intertidal area, wetlands. This policy is not promoting the use of hard structures as a means to address coastal hazards. Quite the contrary.
- 11.10 I am of the opinion the tide gates have created the false sense of land security and therefore in need of protection, as alluded to in Section 11.4 above with my comments on whether this is in fact 'reclaimed land'. The presence of the tide gates may mitigate any flooding on land upstream of the structures, but the holding back of the tide presumably then shifts the coastal process 'problem' elsewhere. The removal of the tide gate would in fact allow the water to flow where it naturally seeks to flow and by proxy providing flood management that is arguably of benefit to a wider area than just the area north of the structures.

National Policy Statement for Freshwater Management 2020

- 11.11 I agree with the s42A report assessment as it relates to the identified provisions of the NPSFW 2020 with the exception of the interpretation that "there appears to be a functional need for the activity in this location¹⁷". In particular I note, and agree with, the following comment: "*The hierarchy described in the objective, and through **Policy 1, Te Mana o Te Wai**, prioritises the health and wellbeing of the river and ecosystem above the economic and social benefits that arise from the activity. For the purposes of this application that is likely to mean prioritizing the avoidance and mitigation of adverse effects more than beneficial economic and social effects.*"¹⁸
- 11.12 I agree with the comment relating to **Policy 5** in which Mr. West surmises Policy 5 requires the health and wellbeing of degraded water bodies and freshwater ecosystems be improved and that the installation of the tide gates and weir structures appear to have adverse effects, in particular associated with inanga spawning, habitat and fish passage. Relying on the evidence of Mr. Whaanga & Ms. Blair, I consider the proposed mitigations to address the adverse effects on fish to fall short of that required by Policy 5 of the NPSFM 2020.

¹⁷ Section 42A Report, Page 33,

¹⁸ Section 42A Report, Page 32

- 11.13 I consider Section 3.24 (Rivers) of the NPSFM 2020 to be pertinent in this instance and note the comment by Mr. West “... *the proposal does result in a loss of river values*”¹⁹. Section 3.24 confirms the loss of values must be avoided unless it is considered there is a functional need for the activity in this location and the effects are managed by applying an effects management hierarchy.
- 11.14 It is my opinion there is not a functional need for the structures to be in the location they are. Functional need’ as defined in the NPSFM 2020 “*means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment*”²⁰. I consider the ‘functional need’ is an artificial need being the result of land reclamation and then subsequently inappropriate land use activity.
- 11.15 For completeness, the proposal does result in a loss of river values, and the NPSFM 2020 directs this to be avoided. The only way to avoid this loss is to remove the structures; a position also stated by Ms. Drummond at paragraph 42(a) of her Evidence in Chief “*There is no way to avoid the effects of the activity without removing the tide gate structure and giving back the land to full tidal inundation and flooding*”.
- 11.16 I am drawn to the comment in Mr. McSoriley’s evidence, in reference to the removal of gates in which he considers this to be unrealistic and further states “...*I do not consider the RMA or Statutory plans seek a nil effect environment*”²¹. I disagree and consider any directive to ‘avoid’ is seeking exactly that, a nil effect on the environment which can only be achieved by not undertaking the activity in the first place.

Southland Regional Policy Statement

- 11.17 I note the provisions identified and assessed in the s42A report i as they relate to the Southland Regional Policy Statement. and draw the decision makers attention to the following:
- 11.18 **Objective TW.4** relates to sites of cultural significance being appropriately managed and protected. At Section 5 I outline the relationship Ngāi Tahu have with the Titiroa Stream. Mr. Whaanga & Ms. Blair further outlines the cultural values and associations Awarua Rūnanga in particular have with this area. Whilst it is not

¹⁹ Section 42A Report, page 33

²⁰ National Policy Statement for Freshwater Management 2020, Page 23

²¹ Paragraph 56, Evidence in Chief of Luke Gerald McSoriley for Southland Regional Council, 16 August 2024

identified on a planning map as either a Wāhi Tahu, Wāhi Taonga, it is obvious this area holds significant value to Māori.

- 11.19 **Objective WQUAL.1** Water Quality goals require water quality within the region to safeguard the life supporting capacity of water and related ecosystems; safeguard the health of people and community; is maintained and improved in accordance with NPSFM 2020 and is managed to meet the reasonable foreseeable social, economic and cultural needs of future generations. Mr. Whaanga & Ms. Blair's evidence addresses the issue of water quality and the concerns mana whenua have with this proposal as it relates to mahinga kai practices.
- 11.20 I draw the relationship between Objective WQUAL.1 and **Objective WQUAL.2** which focuses on Lowland water bodies, of which the Titiroa Stream is considered to be such body of water. Mr. Whaanga & Ms. Blair's evidence goes into detail in respect of the concept of Ki uta ki tai and integrated management of which Objective WQUAL.1 and 2 and **Policy WQUAL.12** (Integrated Management) are ultimately directing.
- 11.21 **Policy RURAL.5** Effects of Rural Land development confirms that the effects of rural land development shall be managed and practices encouraged so that water quality is maintained or enhanced. I am of the opinion that inappropriate land use activity has been allowed for historically which, in a contemporary context, now has a negative impact on water quality.
- 11.22 Whilst Ms. Drummond's evidence at paragraph 40 suggests the gates provide free stream flow and drainage when open and therefore at that point have no significant adverse effects on water quality, this policy is still relevant because the time of greatest concern to mana whenua is when the gates are closed and water movement is restricted.
- 11.23 **Policy BIO.2** provides direction on the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. Mr. Whaanga & Ms. Blair's evidence confirms the Titiroa stream is a habitat where Kanakana have been present, and they, coupled with inanga, are taonga species. Policy BIO.2(iii) in particular requires the decision maker to have regard to the potential adverse effects of the loss of, or damage to, buffering of significant ecosystems or habitats of fauna.

- 11.24 In my opinion this is a relevant policy because the structures impede the natural flow between the upstream and downstream and significantly impede the natural flow between the (freshwater and salt) inanga and kanakana habitat. For completeness I note Ms. Drummond's evidence at paragraph 30 *"The presence and operation of the Titiroa tide gates means that inanga in the river upstream of the tide gates may be prevented or delayed from migrating to spawning areas downstream of the gates"*.
- 11.25 **Policy NH.3** Precautionary approach confirms a precautionary approach is required towards managing the effects of climate change and sea level rise, and any associated changes in the scale and frequency of natural hazards, to ensure potential adverse effects are avoided or mitigated. Mr. Whaanga & Ms. Blair's evidence addresses the issue of climate change. She confirms when applying the concept of ki uta ki tai to natural hazard management, it would include utilizing areas that in their natural state (ie prior to any development) were considered the 'wet' areas for the purposes of receiving inundation. This approach is supported by the policy direction to use 'natural defences' in the NZCPS Policy 26.
- 11.26 **Policy NH.8** directs the protection, recreation, enhancement of natural features and landforms to provide protection from natural hazards.

Proposed Southland Water and Land Plan (operative in part)

- 11.27 I note the provisions identified and assessed in the s42A report. The following provisions are to be read in conjunction with those listed in Appendix 1.
- 11.28 **Objective 6** confirms water quality in each freshwater body, coastal lagoon, and estuary will be maintained where the water quality is not degraded and, improved where the water quality is degraded by human activities.
- 11.29 **Objective 18** requires all persons implementing environmental practices that optimise efficient resource use, safeguard the life supporting capacity of the region's land and soils, and maintain or improve the quality and quantity of the region's water resources
- 11.30 **Policy 26A** Recognises and provides for the sustainable and effective development, operation, maintenance and upgrading of regionally and nationally significant

infrastructure in a way that avoids where practicable, or otherwise remedies or mitigates, adverse effects on the environment. Emphasis has been placed on whether this infrastructure is regionally or nationally significant. When viewed within the wider coastal processes system it is not clear how these structures benefit an area beyond the 11ha upstream landform.

- 11.31 **Policy 28(a)(5)** seeks to manage structures, bed disturbance activities and associated discharges in the beds and margins of lakes, rivers and modified watercourses, to avoid where reasonably practicable, or otherwise remedy or mitigate adverse effects on the spiritual and cultural values and beliefs of tangata whenua.
- 11.32 **Policy 30** relates to drainage maintenance to ensure drainage maintenance within beds of modified watercourses and their margins are managed in a way that avoids, where practicable, or remedies or mitigates adverse effects on aquatic environment; or maintains or enhances the habitat value including fish passage. Ms Drummond's evidence confirms the effects on fish passage are unable to be avoided, remedied and mitigated in their entirety.
- 11.33 **Policy 33** seeks to protect significant indigenous vegetation and significant habitats of indigenous fauna and maintain indigenous biodiversity associated with natural wetlands, lakes and rivers and their margins.
- 11.34 **Policy 34** seeks to recognise the importance of wetlands and indigenous biodiversity, particularly their potential to improve water quality, offset peak river flows and assist with flood control, through encouraging the maintenance and restoration of existing natural wetlands and the creation of new wetlands; and the establishment of wetland areas and associated indigenous riparian plantings.
- 11.35 The policies above interrelate and in my opinion all provide a very clear avoidance direction on activities that adversely effect water bodies, and the coastal environment.

Regional Coastal Plan

- 11.36 I note the provisions identified and assessed in the s42A report pertaining to the Regional Coastal Plan and outline the following provisions also considered to be relevant in this instance. .
- 11.37 **Objective 4.2.1** seeks to ensure that only those activities and development that have a functional need to be located within the coastal marine area or for which there is no practicable alternative location outside the coastal marine area are situated there. My evidence addresses 'functional need' at paragraph 11.14 above. **Policy 5.3.6** Activities and Structures relates to Objective 4.2.1
- 11.38 **Policy 4.3.1** addresses the timing of an activity and in particular seeks to manage the times of day, month or year of activities where this avoids, remedies or mitigates the adverse effects of an activity on the coastal environment. Mr. Whaanga & Ms. Blair's evidence outlines the concerns mana whenua have with the tide gate being a solid restrictive barrier to fish movement for a certain period of time. Ms. Drummond's evidence confirms the adverse effects are unable to be avoided, remedied or mitigated in their entirety. In my opinion this policy is applicable should the decision maker have mind to grant this consent and apply conditions of consent relating to timing
- 11.39 For completeness, not only is the length of time the tide gates open or closed an issue, but the frequency of opening and closing.
- 11.40 **Policy 5.4.1.4** seeks to promote an understanding of the interactions between the various parts of ecosystems to ensure the life supporting capacity of ecosystems is safeguarded. Mr. Whaanga & Ms. Blair speaks extensively to the concept of integrated management or ki uta ki tai. This is foundational to Mātauranga Māori and directs mana whenua in the management of Te Taiao. Mr. Whaanga & Ms. Blair has identified the relevant sections of Te Tangi a Tauira – Iwi Management Plan which speak to integrated management and expectations in practice of mana whenua.
- 11.41 **Objective 5.7.1** seeks to recognise and have regard to the need to protect heritage values of sites, buildings, places or areas within the coastal environment. My evidence at paragraph 11.6 refers also to heritage values. Mr. Whaanga & Ms. Blair's fulsome evidence has gone to extensive lengths to describe the relationship

mana whenua have with the Titiroa Stream and conclude the intrinsic and extrinsic values which are expected to be protected in this instance.

- 11.42 **Objective 6.1.1** and **Policy 6.1.1** relate to the maintenance and enhancement of the natural values, and protection of the uniqueness of the estuarine ecosystem. Cultural values are to be included in this scope of naturalness.
- 11.43 **Objective 7.2.2.1** and **Policy 7.2.2.1** both relate to the quality of freshwater where it enters the Marine Coastal Environment. Mr. Whaanga & Ms. Blair has addressed the values associated with the Estuarine areas and the principles of the mixing of waters. Any activity must uphold the requirements of these provisions.
- 11.44 **Policy 7.2.2.4** speaks specifically to the management of waters for cultural purposes. Relying on the evidence of Mr. Whaanga & Ms. Blair, I consider the proposal is contrary to this policy.
- 11.45 **Policy 9.1.3** confirms that where any right of exclusive occupation is granted, and not fully exercised within a reasonable period, the unoccupied allocation may be subject to review. I consider this policy is relevant should the decision maker be of mind to grant this consent and apply conditions of consent. **Policy 9.1.3** deals with the duration of a right to occupy. I note the applicant has applied for a 15 year consent term whilst Mr West recommends a 5 year term.
- 11.46 **Objective 11.2.1** is at the heart of the mana whenua position. Is the location of the structure appropriate and can the adverse effects be avoided, remedied or mitigated? If not, then **Policy 11.2.1** would direct the activity to not occur. Ms. Drummonds evidence has clearly outlined the ability for the activity to avoid, remedy and mitigate the adverse effects on fauna, to the extent that the only reasonable option is to avoid and provide aquatic offsetting and compensation. It appears the applicant is relying on the fact that the activity has always been there and is a functional need, to be the mitigating factor.
- 11.47 Mr West has quite rightly identified that there is a discussion around the legality of the structure. This relates to the expiring of the previous consent and the time lapse to seek a new consent. In this case, the decision maker must look towards **Objective 11.3.1** Legality of Structures, **Policy 11.3.1** Existing Structures providing public benefit, **Policy 11.4.1** Repair, Maintenance, reconstruction, alteration or

upgrading of existing lawful structures and finally **Policy 11.5.1** Removal of Structures.

- 11.48 The final provisions of relevance for the decision maker are **Objective 12.1.2** which requires the avoidance, remedy or mitigation of interference with coastal processes where it could cause adverse effects. My evidence has discussed the impact of the structure on the natural coastal process. Mr. Whaanga & Ms. Blairs evidence has discussed the impact of the structure on the ability for an integrated management approach to managing the coastal environment. Ms Drummond's evidence has advised that it is not possible to remedy or mitigate the adverse effects of the proposal on instream life. Therefore the only option is to avoid, meaning the removal of the structure and reinstatement of the area to the pre tidegate state.

Southland District Plan

- 11.49 The application is to occur within Esplanade Reserve ER64 Titiroa Stream as shown on the Southland District Plan Maps. The policies relevant to this application in this instance are:

11.50 **TW-O1** which recognises the importance of and to provide for Māori culture and traditions with ancestral lands, sites, water, wāhi tapu and other taonga.

11.51 **TW-P1** which recognises and provides for Tangata Whenua to exercise kaitiakitanga in the management of and decision-making process regarding natural and physical resources, with particular regard to Iwi Management Plans.

11.52 **CE-O1** seeks that the coastal environment is managed in an integrated and sustainable way that:

- a. Preserves the natural character of the coastal environment from inappropriate subdivision, land use and development.
- b. Protects Outstanding Natural Features and Landscapes from inappropriate subdivision, land use and development.
- c. Maintains Visual Amenity Landscapes.
- d. Recognises and provides for the importance of coastal resources to Māori.
- e. Provides for the protection of items of historic heritage.
- f. Protects areas of significant indigenous vegetation and significant habitats of indigenous fauna.
- g. Takes into account coastal hazard risks.

h. Provides for the maintenance and enhancement of public access to and along the Coastal Marine Area.

11.53 Mr. Whaanga & Ms. Blairs evidence expresses at length the integrated management approach embedded within Te Ao Māori. In my opinion the way in which an adjacent reserve is used is inextricably linked to how the stream is managed and vice versa.

Te Tangi a Taurira

11.54 Mr. Whaanga & Ms. Blair has undertaken a full assessment of the proposal against Te Tangi a Taurira – Iwi Management Plan which I adopt for the purposes of my evidence.

11.55 Based on the above, and relying on Mr. Whaanga & Ms. Blair's evidence, I do not consider that the applicant has been able to demonstrate that all effects on the proposed activity will be minor. In fact, I consider the evidence all points towards the activity having adverse effects that are significant and unable to be remedied or mitigated. In my opinion therefore the only option is to avoid in this instance. The realization of 'avoid' is to remove the tide gates and weir and provide for the natural flow of water to resume.

11.56 I note the s42A report in its recommendation to decline the application, cites a number of issues that remain unresolved as to their effect on the environment and that there is an expectation on the applicant to provide additional information at the hearing. It is my opinion that if there is insufficient evidence to fully ascertain the nature and scale of the effects of the proposal on the environment, then the consent authority should adopt a precautionary approach and decline the consent.

CONCLUSION

12. The Titiroa Stream, being part of the wider Titiroa Catchment is of culturally significant value to Ngāi Tahu whanui. Mr. Whaanga & Ms. Blair has discussed at length these values and the impact the proposal has on them. She has also clearly outlined the preferred outcome sought by mana whenua, being the removal of the tidegates and the restoration back to wetlands, bush and waterways by repurposing some of the land owned by Environment Southland.

13 My evidence above outlines the planning framework for which the Ngāi Tahu values are to be considered within, in the course of assessing this application. On balance, I consider the adverse effects on cultural values to be significant and therefore recommend the application as being heard should be declined. I do not consider

the applicant is able to mitigate or remedy all adverse effects satisfactorily and therefore the only option is to adopt and avoidance approach.

23 August 2024