BEFORE INDEPENDENT HEARING COMMISSIONERS
AT NAPIER

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE
KI NEPIA

IN THE MATTER	of the Resource Management Act 1991
IN THE MATTER	of the hearing of submissions on applications for resource consents from the Hawke's Bay Regional Council in respect of the taking of tranche 2 water from the Tukituki Basin by Tuki Tuki Awa Limited, Buchanan No. 2 Trust, Plantation Road Dairies Limited, Te Awahohonu Forest Trust, I & P Farming Limited, Springhill Dairies Partnership, Papawai Partnership and Purunui Trust.

MEMORANDUM OF COUNSEL FOR APPLICANTS RESPONDING TO MEMORANDUM 1

(7 OCTOBER 2022)

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MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. This memorandum responds to directions issued by the Commissioners in their Memorandum 1, dated 22 September 2022. Those directions request that, by Friday 7 October 2022, the Applicants:

    a. Explain how the potentially unallocated volume of approximately 1.5 million cubic metres of water per annum (Mm^3/yr) apparently reserved for other mitigation purposes is proposed to be used (see paragraph 177 of the Reporting Officer's s42A report).

    b. Provide any new or updated information prepared on behalf of the Applicants that is directly relevant to the topics set down for expert conferencing that is to occur during October 2022.

2. Responses to those questions are provided below.

The proposed use for the "potentially unallocated volume"

3. The Applicants' latest modelling and land use and irrigation needs assessment demonstrates that the Applicants can use approximately 8.5Mm^3/yr efficiently for irrigation. Based on that irrigation volume and the optimisation arrived at via catchment modelling, approximately 4.5Mm^3/yr would be used for augmentation. Together, that makes a total take of approximately 13Mm^3/yr. Given that Applicants collectively applied for the full 15Mm^3/yr Tranche 2 allocation, that leaves a residual volume of approximately 2Mm^3/yr.

4. The increase of potentially unallocated water from the previously reported 1.5Mm^3/yr residual volume, noted in the Commissioners' Memorandum, reflects the further rigorous interrogation undertaken by the Applicants and their consultants about how that water can most efficiently be used, and it also reflects a desire by the Applicants to ensure that there is a substantial (and meaningful) volume of water available for Manawhenua.

5. The Applicants have been reluctant to provide too much detail about how this proposed water might be made available to Manawhenua because that has been the subject to on-going communication and consultation with Manawhenua. Those discussions are on-going, and the Applicants' respect the right of Manawhenua to maintain their opposition to the proposed take if they wish to do so.

6. The Applicants therefore do not consider that this water is "surplus" such that the full volume should not be approved for taking – rather the Applicants proposal is for the water takes to be consented, and to be made available to be formally transferred to Manawhenua on request. Exactly when and how that water might be called for and used is a matter for Manawhenua, and Manawhenua would be responsible for seeking any resource consents for its use (and providing appropriate augmentation) at that time. While such a

proposal is, in counsel's understanding unique in the context of a resource consent, it does represent a substantive response to the obligations under the RMA and the regional planning framework to recognise and provide for the relationship of Maori with their ancestral land (and water), and it will help facilitate the exercise of rangatiratanga by Manawhenua over their whenua.

7. This outcome is also consistent with the Environment Court's decision in the Lake Rotorua Plan Change 10 decision, in which, while in the context of a regional plan rather than a resource consent, the Environment Court emphasised the importance of allowing Manawhenua the resources to be able to develop their ancestral land, in the context of a catchment-wide limitation on the ability to discharge nitrogen. The Court's decision recorded the following evidence of the Iwi Collective in that case:[1]

> **[26]** At paragraph 5.1 of the Stage 2 Cultural Impact Assessment (CIA) attached to the evidence of Ms NM Douglas, the Environmental Manager for the Te Arawa Lakes Trust, it says:
>
> > … Ideally, for the Iwi Collective, the best possible allocation of nitrogen to Settlement Land is one that allows for unfettered use and development of that land in a way that is consistent with the tikanga, practices and values systems of each of the Iwi Collective iwi and hapu groups. Given that that ideal is not possible, the Credible Futures Approach represents one compromise to allowing for some development of the Settlement Land in a way that emphasises the values of mana whenua.
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> **[27]** The CIA describes the core mana whenua values of tino rangatiratanga, mauri, wai, whakapapa, kaitiakitanga, utu, muru and tau-utuutu and describes how the Credible Futures Approach will contribute to meeting them. Other matters raised in the CIA include:
>
> (a) Treaty settlement land owners should have the freedom to use our allocation as we see fit within the 435tN limit (recognising that iwi decision-making processes have a very high-level of internal scrutiny and debate and are required to uphold tikanga including kaitiakitanga).
>
> (b) Having to apply for consent to use the nitrogen allocation for Treaty settlement land undermines rangatiratanga. Requiring mana whenua to make an application to an external body to make decisions about our taonga undermines our role.
>
> (c) The allocation should go directly to the landowner, so that we can make those decisions as communities, in accordance with our tikanga and values.

8. As noted earlier, discussions with Manawhenua are on-going. If there is no support for the concept of allowing this allocation to be consented and placed on hold for Manawhenua to be used by them as and when they choose to do so, then the Applicants would amend their applications so as to only seek a taking of approximately 13Mm^3/yr, thereby leaving about 2Mm^3/yr available to be the subject of a future resource consent application by another applicant. Any effects associated with the reduced take will be within the envelope of the originally assessed take, however updated modelling for the reduced take will be provided in the evidence to be presented at November's hearing.

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[1] *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2021] NZRMA 271

Updated information

9. In response to the evidence of the regional council's groundwater modelling witness, Mr Thomas, Mr Weir (groundwater modelling expert for the Applicants) has updated his groundwater modelling report. That update involves calibration of the model to small stream flow monitoring data supplied by the regional council and includes further uncertainty analysis. This updated report was made available to the regional council and to Mr Thomas on Wednesday 28 September. Conferencing is proposed for 10 October.

10. The results of that updated modelling have been supplied to the Applicants' well interference expert, Ms Rabbitte. Ms Rabbitte is currently updating her report and will provide that to the regional council's well interference experts at least a week prior to conferencing, currently scheduled for 17 October.

11. Please advise if any further clarification is required.

B J Matheson

Counsel for the Applicants