



**WESTPOWER: WAITAHA HYDRO PROJECT**  
**APPLICATION FOR RECONSIDERATION OF CONCESSION DECISION**  
**31 MAY 2022**

**INTRODUCTION**

1. This application for reconsideration is made by Westpower under section 17ZJ of the Conservation Act 1987 (**Conservation Act**) in relation to the Waitaha hydro project (the **project**).
2. Westpower is seeking a reconsideration of the Minister for the Environment's decision on 27 August 2019 to decline its concession application for the project (the **decision**).
3. Without limiting the scope of the reconsideration application, the focus is on the following matters:
  - (a) **ground one**: the interests of Poutini Ngāi Tahu in relation to the project and the requirement under section 4 of the Conservation Act to give effect to the principles of the Treaty of Waitangi;
  - (b) **ground two**: the effects of climate change on biodiversity and public conservation land and resources, and the essential role of renewable electricity generation in meeting our emissions reduction targets and addressing the impacts of climate change on biodiversity and public conservation land and resources;
  - (c) **ground three**: the assessment of values including natural character, landscape and recreational values and the potential impacts of the project on those values; and
  - (d) **ground four**: the approach to legal and planning matters.
4. On the first two matters (Poutini Ngāi Tahu<sup>1</sup> and climate change), the final briefing<sup>2</sup> provided to the decision-maker was entirely inadequate and hence the decision was not properly informed by either Poutini Ngāi Tahu or climate change perspectives. In fact, those perspectives were effectively absent from both the briefing and, therefore, the decision. In undertaking the reconsideration, it will be critical to be fully informed and to place far more focus and weight on these two matters.
5. On the second two matters, while natural character and recreation effects and legal/planning matters were considered in the final briefing and decision, there were significant issues in the approach, including overstatement, omissions and errors that will need to be addressed through the reconsideration process.
6. The decision to decline Westpower's concession relies primarily on the impacts of the project on the experiences of recreational users of the area. As explained, those impacts were overstated in the advice and do not reflect expert views, nor a 'real-world' perspective considering the minute scale of the project structures when viewed in the context of the broader Waitaha Valley and extensive areas of public conservation land on the West Coast. Since the decision, Westpower has also modified the project to significantly reduce the visibility of the intake portals.
7. Westpower's position is that:
  - (a) it is open to the Minister to grant this concession;

<sup>1</sup> Te Rūnanga o Ngāti Waewae and Te Rūnanga o Makaawhio are collectively referred to as 'Poutini Ngāi Tahu'.

<sup>2</sup> The final briefing from the Department to the Minister dated 12 June 2019.

- (b) there is nothing to preclude the Minister from granting this concession; and
  - (c) having considered the grounds under this reconsideration application, including the role of Poutini Ngāi Tahu, the Minister should grant the concession.
8. There were significant flaws and omissions in the process leading to the decision, including in the hearing report<sup>3</sup> and the final briefing to the Minister, which meant that the Minister for the Environment was not placed in a position where he could make an informed, appropriate and lawful decision on Westpower's concession application.

### **The reconsideration process**

9. Following the decision, Westpower, Poutini Ngāi Tahu and the Department engaged in a lengthy discussion in relation to the process to be applied to the reconsideration process.
10. The Department indicated that it did not intend to apply its existing standard operating procedure for reconsideration applications, which Westpower had prior knowledge of and intended to rely on. That required a bespoke process to be developed for the project, which took considerable time and was negotiated between the Department, Poutini Ngāi Tahu and Westpower.<sup>4</sup>

### **The Waitaha project**

11. The Waitaha River is located 38 km south of Hokitika and extends from the main divide of the Southern Alps to the Tasman Sea on the West Coast and is over 40 km in length with a total catchment area of 223 km<sup>2</sup>.
12. The project is located within and on the true right bank of the Waitaha River between the lower end of Kiwi Flat and Macgregor Creek within the Waitaha Valley. The project is predominantly located on stewardship land managed by the Department with some sections of the proposed access road located on private land and/or land managed by Land Information New Zealand. The location of the project is identified on the maps attached as **Appendix One**.
13. The project will produce approximately 110-120 GWh of electricity per year with a maximum or peak output of about 16-20 MW. This is equivalent to providing electricity to approximately 12,000 households.
14. The project is a 'run-of-river' scheme with no instream storage, meaning there is no dam holding water but rather a tunnel that water is diverted through.
15. The project comprises:
- (a) a low weir and diversion structure at the upstream end of Morgan Gorge. There will be no formation of a lake and no submergence of native vegetation, land or terrestrial habitat as a consequence of the weir;
  - (b) a tunnel approximately 1.5 km long, which will convey water from the intake to a powerhouse located below Morgan Gorge. The diverted water is returned to the Waitaha River via a tailrace;

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<sup>3</sup> The hearing report prepared by the Hearing Commissioner dated 1 November 2017.

<sup>4</sup> Westpower reserves its position on the reconsideration process and the matters communicated to the Department as part of the development of the reconsideration process.

- (c) an access road, which is required to provide access to the powerhouse site from the end of the existing public Waitaha Road for both construction and maintenance and inspection of the project infrastructure. The access track is also proposed by Westpower to provide access for public use. The transmission route within the conservation land will follow this access road route; and
- (d) the Westpower proposal to construct an alternative public walking track to provide access to the Waitaha River, avoiding the powerhouse site.

16. A more detailed map of the proposed project is attached as **Appendix Two**.

### **The application process**

17. This concession application has a long history.
18. Westpower took an extensive period of time to develop and design the project, adopting a particularly careful, constructive and proactive approach to its application so as to respect and reflect the public conservation land status.
19. By way of summary, Westpower has been through a comprehensive project design process which:
- (a) commenced in 2005 with initial investigations;
  - (b) involved initial meetings with the Department in 2012;
  - (c) has taken 17 years and extensive resources to get to this point;
  - (d) reflected a process where Westpower considered carefully the alternatives to this location;
  - (e) involved Westpower drawing on its successful experience in implementing the concession for the Amethyst hydro scheme on public conservation land;
  - (f) involved the commissioning of a suite of the top experts available to assist in the design of the project and the assessment and mitigation of potential adverse effects; and
  - (g) involved a robust and iterative process of refining and amending the project design to respond to matters raised by the Department and its experts and stakeholders, including the additional mitigation proposed through the project.
20. In terms of the process that followed:
- (a) the Minister's delegate (the Deputy Director-General) notified an 'intention to grant' the concession on 18 August 2016 (so at that point the intention was to grant the concession);
  - (b) the application was publicly notified on 16 September 2016;
  - (c) the hearing was held between 5 and 8 December 2016;
  - (d) the hearing commissioner issued his final hearing report on 1 November 2017 (**hearing report**);
  - (e) a final briefing to the Minister for the Environment was dated 12 June 2019 (**final briefing**);
  - (f) the decision was made by the Minister for the Environment on 27 August 2019 to decline the application; and
  - (g) a process to negotiate the bespoke reconsideration process was completed in May 2021.

21. There are some particularly notable features of Westpower's concession application, including:
- (a) support from and partnership with Poutini Ngāi Tahu;
  - (b) support from the Conservation Board; and
  - (c) despite being in a conservation area, there are no issues of concern from a biodiversity perspective.

### The decision

22. The decision was made by the Hon David Parker on 27 August 2019.
23. The decision was to decline Westpower's concession application for the project.
24. The decision document records that:
- (a) Westpower had made a *"careful and comprehensive"* application for the concession;<sup>5</sup>
  - (b) the effects on all flora and fauna would be *"minor"*;<sup>6</sup>
  - (c) there would be *"no direct adverse effects on tramping, hunting and other land-based recreational activities"*.<sup>7</sup> In fact, the improved access as a result of the road *"may have a positive effect on recreational tramping and hunting in the area"*;<sup>8</sup>
  - (d) the potential effects on kayaking can be addressed through concession conditions, including through the 'no-take' days offered by Westpower, which would allow for the infrequent attempts to kayak the Morgan Gorge to continue;<sup>9</sup>
  - (e) the adverse effects of the powerhouse and associated infrastructure below Morgan Gorge on natural character would be *"minor"*;<sup>10</sup> and
  - (f) the physical effects on the environment per se are generally modest and the effects on sediment and river morphology would be *"minor"*.<sup>11</sup>
25. The reasons for declining the application can be summarised as follows:
- (a) the intake structures were found to be located in an area with *"very high, near pristine levels of natural character"*;<sup>12</sup>
  - (b) the project area was found to be one of the *"West Coast's top destinations for kayaking and backcountry tramping"*;<sup>13</sup>
  - (c) the effects of the project's intake structures on the surrounding area were found to have a *"significant negative impact on the natural character and the landscape of the area"*;<sup>14</sup>
  - (d) the effects of the project's intake structures on natural character would diminish the intrinsic values of the area above and including Morgan Gorge;<sup>15</sup>

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<sup>5</sup> Paragraph 59.

<sup>6</sup> Paragraph 23.

<sup>7</sup> Paragraph 24.

<sup>8</sup> Paragraph 24. Note the discussion below in relation to the recreational experience (paragraphs 25 and 26 of the decision).

<sup>9</sup> Paragraph 31.

<sup>10</sup> Paragraph 35.

<sup>11</sup> Paragraph 38.

<sup>12</sup> Paragraph 33.

<sup>13</sup> Paragraph 41.

<sup>14</sup> Paragraph 36.

<sup>15</sup> Paragraph 39.

- (e) due to the diminished intrinsic values "*the experience for those using the area will be significantly lessened through the loss of the environment's near pristine, unmodified, wild and remote qualities. This in turn will significantly undermine the area's status as one of the West Coast's top destinations for kayaking and backcountry tramping*";<sup>16</sup>
- (f) the benefits of the project did not in this case "*justify the extensive adverse effect on the area's natural character given its intrinsic values and high recreational values*";<sup>17</sup> and
- (g) the adverse effects on natural character and recreation resulted in the project being inconsistent with the legal framework and planning documents.<sup>18</sup>

26. As explained below, it is Westpower's position that those reasons for decline are not justifiable on the evidence (including expert evidence) and other information before the decision-maker. The nature and extent of the potential effects were overstated in the hearing report and final briefing to the decision-maker, and consequently in the decision itself.

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<sup>16</sup> Paragraph 41.

<sup>17</sup> Paragraph 45.

<sup>18</sup> Paragraph 54.

## GROUND ONE: POUTINI NGĀI TAHU AND SECTION 4 OF THE CONSERVATION ACT

27. There was a significant omission in the process, final briefing and the decision in relation to section 4 of the Conservation Act, with essentially no consideration of the principles of the Treaty of Waitangi and the views and aspirations of Poutini Ngāi Tahu.
28. Poutini Ngāi Tahu exercise tino rangatiratanga within their respective takiwā and are the kaitiaki of the natural and physical resources on the West Coast.
29. A letter from Poutini Ngāi Tahu in relation to this reconsideration process and decision is attached as **Appendix Three**.
30. There was an absence of meaningful engagement by the Department with Poutini Ngāi Tahu through the process and leading up to the decision. That lack of meaningful engagement is demonstrated in the final briefing to the decision-maker which confirms that while there was some limited engagement (in 2014-2016), there was no substantive engagement or process to understand the views and aspirations of Poutini Ngāi Tahu between 2016 and the making of the decision in 2019. That is despite Poutini Ngāi Tahu indicating that they supported the project.
31. The final briefing report contained half a page of high-level analysis (out of a 73 page report) in relation to the Department's engagement with Poutini Ngāi Tahu, and the views and aspirations of Poutini Ngāi Tahu on the project. The approach falls significantly short of the standard required by section 4 and the requirement to give effect to the principles of the Treaty of Waitangi.
32. Given the significant role that section 4 of the Conservation Act should play in concession decision-making (noting the effect of the Supreme Court's decision in *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation*<sup>19</sup> (**Ngāi Tai**)), it is a significant omission that there was:
  - (a) no recommendation in the final briefing to the decision-maker on section 4 or Poutini Ngāi Tahu; and
  - (b) no mention of section 4 or Poutini Ngāi Tahu in the decision.
33. Following the decision, Poutini Ngāi Tahu communicated their significant concerns with the Department's process through a number of letters. For example, there were letters sent by Poutini Ngāi Tahu including on 15 April 2020, 15 June 2020 and 12 November 2020. Those letters are attached as **Appendix Four**.
34. Those letters expressed significant concern that the process, advice and decision had not reflected section 4 of the Conservation Act, the Treaty principles or the views or aspirations of Poutini Ngāi Tahu. The decision-maker was not placed in the position of being able to consider the interests of Poutini Ngāi Tahu on the project, what relevant Treaty principles apply and how to give effect to those Treaty principles under section 4 of the Conservation Act.
35. Given the significant role of section 4 in any decision under the Conservation Act and the decision of the Supreme Court in *Ngāi Tai*, the position of Poutini Ngāi Tahu must be fully understood and must be given significant focus and weight in the reconsideration process.

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<sup>19</sup> *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 [2019] 1 NZLR 368. This decision concerned a challenge by Ngāi Tai ki Tamaki against the granting of two commercial concessions for guided walking tours on Motutapu and Rangitoto islands. Te Rūnanga o Ngāi Tahu was an interested party and appeared before the Supreme Court in this case.

## **Poutini Ngāi Tahu - a project partner**

36. If there had been proper engagement with Poutini Ngāi Tahu, the final briefing to the decision-maker would have been properly informed as to the views and aspirations of Poutini Ngāi Tahu in relation to the project. If that engagement had occurred, that information would have been available to the decision-maker and could have been meaningfully factored into the decision.
37. As an example, Poutini Ngāi Tahu have always held an aspiration to enter into a partnership with Westpower in relation to the project. Poutini Ngāi Tahu and Westpower have reached a partnership agreement in relation to the project. If the concession is granted and the project proceeds, Poutini Ngāi Tahu and Westpower will be project partners, and Poutini Ngāi Tahu will have a financial interest in the project.
38. That is particularly relevant under section 4 of the Conservation Act, as the Supreme Court confirmed in *Ngāi Tai* that the economic interests of an Iwi are key relevant considerations under the Conservation Act.<sup>20</sup> The Supreme Court further stated:<sup>21</sup>

*"enabling iwi or hapū to reconnect to their ancestral lands by taking up opportunities on the conservation estate (whether through concessions or otherwise) is one way that the Crown can give practical effect to Treaty principles."*
39. That is exactly what the project provides: an opportunity for Poutini Ngāi Tahu to reconnect with their whenua through this project, and for Poutini Ngāi Tahu to benefit economically from the project.
40. The strong support for the project from Poutini Ngāi Tahu, and the fact that Poutini Ngāi Tahu are project partners, must be a critical factor in this reconsideration process and strongly supports the grant of the concession.
41. The decision-maker on the reconsideration will need to engage directly with Poutini Ngāi Tahu to ensure that the implications of this partnership are fully and clearly understood.

## **Section 4 of the Conservation Act and Ngāi Tai**

42. Section 4 of the Conservation Act states:

***"4 Act to give effect to Treaty of Waitangi***

*This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi."*

43. In summary, the Supreme Court in *Ngāi Tai* confirmed that:
  - (a) section 4 is a powerful provision which should not be narrowly construed, but should be given a broad and generous interpretation (which reflects other statements of the Supreme Court to the same effect);<sup>22</sup>
  - (b) section 4 requires more than procedural steps: substantive outcomes for Iwi may be necessary;<sup>23</sup>

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<sup>20</sup> *Ngāi Tai* at [69].

<sup>21</sup> *Ngāi Tai* at [52(c)].

<sup>22</sup> *Ngāi Tai* at [50(a)] and [52(a)]. See also *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [151]; and *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [52]–[59].

<sup>23</sup> *Ngāi Tai* at [52(b)].

- (c) enabling iwi or hapū to reconnect to their ancestral lands by taking up opportunities on public conservation land (whether through concessions or otherwise) is one way that the Crown can give practical effect to Treaty principles;<sup>24</sup>
- (d) section 4 should not be seen as being trumped by other considerations under conservation legislation, and section 4 is not merely part of a balancing exercise where it is weighed and assessed against the other relevant considerations. What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with section 4, in a way that best gives effect to the relevant Treaty principles;<sup>25</sup> and
- (e) iwi economic aspirations are relevant under conservation legislation, and in appropriate circumstances a right of preference can be afforded to iwi.<sup>26</sup>

44. In particular, the Supreme Court stated:<sup>27</sup>

*"[54] We acknowledge that s 4 does not exist in a vacuum and a number of other factors must be taken into account in making a decision on a concession application. For example, in the present case, the direction given in s 4 must be reconciled with the values of public access and enjoyment in the Reserves Act designations relating to the Motu. Those values are also reflected in s 6(e) of the Conservation Act, which lists as one of the functions of DoC the **fostering of the use of natural and historic resources for recreation** and allowing their use for tourism to the extent that this is not inconsistent with the conservation of such resources. They are also a feature of s 8(e) of the HGMP Act. This complexity is also reflected in the Auckland CMS. **But s 4 should not be seen as being trumped by other considerations like those just mentioned. Nor should s 4 merely be part of an exercise balancing it against the other relevant considerations. What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles.***

*[55] How these observations are applied to a particular decision will depend on which Treaty principles are relevant and what other statutory and non-statutory objectives are affected."*

45. The Supreme Court also commented on the following provision that was contained in the Conservation General Policy (and the General Policy for National Parks):

*"The Conservation Act 1987, and all the Acts listed in its First Schedule, must be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi (section 4, Conservation Act 1987). Where, however, there is clearly an inconsistency between the provisions of any of these Acts and the principles of the Treaty, the provisions of the relevant Act will apply."*

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<sup>24</sup> *Ngāi Tai* at [52(c)].

<sup>25</sup> *Ngāi Tai* at [54].

<sup>26</sup> *Ngāi Tai* at [69].

<sup>27</sup> At [54], emphasis added.



46. The Supreme Court stated:<sup>28</sup>
- "[77] We disagree with that statement, which effectively says s 4 is trumped by other statutory provisions. As noted earlier, what is required is that those other statutory provisions be applied consistently with the s 4 requirement."*
47. Those powerful statements from the Supreme Court, the Treaty principles and the interests of Poutini Ngāi Tahu must be a critical factor in the reconsideration decision.
48. Poutini Ngāi Tahu have confirmed that the Treaty principles that are relevant to this concession application include:<sup>29</sup>
- (a) partnership;
  - (b) rangatiratanga;
  - (c) reciprocity and mutual benefit;
  - (d) informed decision-making; and
  - (e) active protection.
49. The letter from Poutini Ngāi Tahu confirms how each of these Treaty principles apply to both this reconsideration application and the concession application, and it will be critical for the decision-maker on the reconsideration to meet and hear directly from Poutini Ngāi Tahu to develop a full understanding of these matters.

#### **Implications for reconsideration decision**

50. As noted above, a proper consideration of section 4 and the views and aspirations of Poutini Ngāi Tahu were effectively absent from the final briefing, and there was no mention of section 4 or Poutini Ngāi Tahu in the decision.
51. The Supreme Court has been clear on the fundamental role of section 4 in this type of decision (noting *Ngāi Tai* was itself a concession case). Critically, the Treaty principles cannot be trumped by or merely balanced out against other relevant considerations (such as, in this case, perceived effects on recreation or natural character). Rather, those other statutory objectives (eg natural character and recreation) can only be pursued to the extent consistent with those Treaty principles, and in a manner that best gives effect to those principles.<sup>30</sup>
52. In this context, that means that even if concerns remain about the impacts of the project on natural character or recreation, the Treaty principles are not to be trumped by those concerns. Rather, as the Supreme Court stated, those other statutory objectives can only be pursued to the extent consistent with the Treaty principles and in a manner that best gives effect to those principles. That will require a fundamentally different type of analysis in the reconsideration decision to that undertaken in the final briefing and the decision.
53. On that basis, it is open to the decision-maker on this reconsideration application to grant the concession if it is considered that the Treaty principles and section 4 support that outcome, despite any residual concerns around matters such as natural character and recreation (noting those effects

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<sup>28</sup> *Ngāi tai* at [77].

<sup>29</sup> Poutini Ngāi Tahu letter attached as **Appendix Three**.

<sup>30</sup> *Ngāi Tai* at [54].

were overstated and have been further reduced). In fact, there would be a compelling case for the granting of the concession in those circumstances.

54. The decision-maker on the reconsideration will need to engage directly and meaningfully with Poutini Ngāi Tahu to hear those matters directly from the Treaty partner, and will need to receive robust advice on the impact of section 4 and the *Ngāi Tai* decision in terms of this reconsideration application.

## GROUND TWO: CLIMATE CHANGE, RENEWABLE ENERGY AND CONSERVATION

55. The second key factor in this reconsideration process relates to the potentially devastating impacts of climate change including on biodiversity and public conservation land and resources, and the key role that renewable energy projects must play in meeting our emissions reduction targets and combatting climate change.
56. That must include the potential to locate renewable energy projects on public conservation land.
57. In particular, it is smaller renewable energy projects such as Waitaha that need to be pursued. Consenting large-scale hydro is not feasible in the current regulatory context, and we need hydro as part of the renewable energy mix.
58. It takes many years to get projects ready for consenting (17 years in this case). If projects such as Waitaha as not able to be consented, then it is not clear where renewable energy generation will come from and how the Government will achieve its renewable energy targets.
59. Again, this matter was not dealt with in any meaningful way in the advice provided to the decision-maker and consequently in the decision. For example:
- (a) the hearing report barely mentions climate change and does not discuss the impact of climate change on biodiversity and public conservation land or resources at all. While the hearing report accepted the NZ Energy Strategy as relevant, it emphasised the small contribution of the project to the NZ Energy Strategy goal recommending that the Minister:  
*"give little weight to any contribution the proposed activity might make to the Energy Strategy goal."*<sup>31</sup>
  - (b) the final briefing to the Minister simply restates the hearing report findings on this matter.<sup>32</sup> While the final briefing briefly notes the positive effects of renewable energy on conservation and in achieving our renewable energy goals, that briefing reiterates the hearing report conclusion that the project will make a small contribution to achieving the NZ Energy Strategy;<sup>33</sup> and
  - (c) the decision includes one very brief reference to the threat of climate change and the role of renewable energy in addressing the impacts of climate change, and states that the project's benefits do not outweigh the adverse effects on natural character.<sup>34</sup>
60. That advice is not fit for purpose in the current climate change emergency. With respect, if that logic applies, then very little in the way of renewable energy generation would be consented. Rather, it is the cumulative benefit from many smaller generation projects that is needed to meet the climate change emergency and the Government's renewable energy goals.

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<sup>31</sup> Hearing report p 21 and 22.

<sup>32</sup> Final briefing paragraph 176.

<sup>33</sup> Final briefing paragraphs 181-182.

<sup>34</sup> Decision paragraph 45.

## The climate change emergency

61. Prime Minister Jacinda Ardern has stated that climate change is:

*"one of the most pervasive crises of our time."*<sup>35</sup>

62. The Government has declared a climate change emergency recognising that:

*"climate change is one of the greatest challenges of our time."*<sup>36</sup>

63. In seeking that the climate change emergency declaration be passed, the Prime Minister stated:<sup>37</sup>

*"We issue declarations sparingly. The reason we have done this today is that those cases where we do issue declarations are often where there are threats to life, threats to property, or civil defence emergencies. If we do not respond to climate change, we will continue to have those emergencies on our shore. ... I encourage every member of this House to take the issue of climate change with the utter seriousness that it deserves. Vote in favour of this declaration today. Be on the right side of history. Be part of the solution we must collectively deliver for the next generation."*

64. The effects of climate change are already being experienced in New Zealand, and include temperature change, drought, flooding, extreme weather patterns, ocean acidification, and sea level rise.<sup>38</sup> The 2020 'Our Atmosphere and Climate' Report stated that, among other measures, in New Zealand temperatures are already increasing, glaciers are continuing to melt and sea levels are rising at twice the rate compared to when records began.<sup>39</sup>

## Climate change and biodiversity

65. Climate change will have a significant impact on biodiversity and public conservation land and resources. The Prime Minister has stated:

*"climate change is closely interlinked with another crisis of a planetary scale – that of global biodiversity loss."*<sup>40</sup>

66. The Minister of Conservation, Hon Kiritapu Allan, has stated:

*"We are living in an incredibly dire situation when it comes to biodiversity loss"*<sup>41</sup>

and

*"with 4000 of our species threatened or at risk of extinction and increasing pressure from invasive pests, land and sea use, and climate change, we need to put our words into action."*<sup>42</sup>

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<sup>35</sup> Rt Hon Jacinda Ardern, "United Nations General Assembly: 76th General Debate Statement" Beehive Website, 25 September 2021 [United Nations General Assembly: 76th General Debate Statement | Beehive.govt.nz](https://www.beehive.govt.nz/united-nations-general-assembly-76th-general-debate-statement).

<sup>36</sup> Motions - Climate Change - Declaration of Emergency - New Zealand Parliament ([www.parliament.nz](http://www.parliament.nz)).

<sup>37</sup> Motions - Climate Change - Declaration of Emergency - New Zealand Parliament ([www.parliament.nz](http://www.parliament.nz)).

<sup>38</sup> Intergovernmental Panel on Climate Change (IPCC) Global Warming of 1.5: Special Report: Summary for Policy Makers (IPCC, Geneva, 2018) [www.ipcc.ch/sr15/chapter/spm/](http://www.ipcc.ch/sr15/chapter/spm/) p 5 and 7.

<sup>39</sup> "United Nations General Assembly: 76th General Debate Statement" Beehive Website, 25 September 2021 [United Nations General Assembly: 76th General Debate Statement | Beehive.govt.nz](https://www.beehive.govt.nz/united-nations-general-assembly-76th-general-debate-statement) and Our Atmosphere and Climate 2020, Ministry for the Environment and Statistics New Zealand p 28-30, and 43.

<sup>40</sup> Rt Hon Jacinda Ardern, "United Nations General Assembly: 76th General Debate Statement" Beehive Website, 25 September 2021 [United Nations General Assembly: 76th General Debate Statement | Beehive.govt.nz](https://www.beehive.govt.nz/united-nations-general-assembly-76th-general-debate-statement).

<sup>41</sup> Imogen Wells "Government launches plan to turn around state of New Zealand's biodiversity" NewsHub 20 April 2022, quoting Minister Kiritapu Allan.

<sup>42</sup> Minister Kiritapu Allan, "Taking action on biodiversity challenges" Beehive Website, 20 April 2022 [Taking action on biodiversity challenges | Beehive.govt.nz](https://www.beehive.govt.nz/taking-action-on-biodiversity-challenges).

67. Renewable energy generation is one of the key means of addressing climate change and the potentially devastating impact of climate change on biodiversity. For that reason, the connection between climate change, renewable energy and biodiversity should be central to this reconsideration decision. As noted above, that was effectively absent from the advice and the decision.
68. New Zealand is not on track to meet either its emissions reduction targets or renewable energy targets, with significant new renewable energy generation being required. Opportunities to reduce emissions with the tools available today needs to be realised immediately to set the country on track for accelerated emission reductions in future years.
69. Around one-third of Aotearoa's land area is public conservation land (and 85% of the land on the West Coast is public conservation land). It is simply not feasible to expect renewable energy generation to be scaled up urgently, but for that not to occur on public conservation land. To the contrary, public conservation land must be a key part of the renewable energy generation solution.
70. Westpower has commissioned a report from Boffa Miskell in relation to the potential effects of climate change on biodiversity (attached as **Appendix Five**).<sup>43</sup> That report confirms that climate change poses a significant threat that will exacerbate the decline in biodiversity and affect public conservation land and resources more generally.<sup>44</sup>

#### **New Zealand's emissions reduction targets**

71. The Government has committed to a range of measures to achieve the Intergovernmental Panel on Climate Change's (**IPCC's**) recommendation of limiting global warming to 1.5 degrees, above pre-industrial levels.<sup>45</sup> New Zealand has, under the Paris Agreement,<sup>46</sup> also committed to strengthen its response to climate change. The Climate Change (Zero Carbon) Amendment Act 2019 (**Zero Carbon Act**) enacted in 2019 provides the framework for developing and implementing New Zealand's climate change policies.<sup>47</sup>
72. In 2019, after the concession decision was made, the Government gave effect to these commitments, by setting the following emissions reduction targets:
  - (a) under the Paris Agreement, a nationally determined contribution to reduce net greenhouse gas emissions by 50% below gross 2005 levels by 2030;<sup>48</sup> and
  - (b) under the Zero Carbon Act, to reduce net emissions of greenhouse gases (except biogenic methane) to net-zero by 2050 and reduce emissions of biogenic methane to 24–47% below 2017 levels by 2050, including to 10% below 2017 levels by 2030.
73. Importantly, the Zero Carbon Act (section 5ZN) makes it clear that all decision-makers may take into account the emissions reduction targets, which applies to the reconsideration decision to be made in the context of this concession application.

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<sup>43</sup> Boffa Miskell Limited 2022, 'Waitaha Hydro Scheme: The role of the Waitaha Hydro Scheme in climate change mitigation and reducing climate related impacts on New Zealand's natural environment'.

<sup>44</sup> Boffa Miskell report p 4-7.

<sup>45</sup> Intergovernmental Panel on Climate Change Global Warming of 1.5: Special Report: Summary for Policy Makers (IPCC, Geneva, 2018) [www.ipcc.ch/sr15/chapter/spm/](http://www.ipcc.ch/sr15/chapter/spm/).

<sup>46</sup> Under the United Nations Framework Convention on Climate Change.

<sup>47</sup> Boffa Miskell report p 2.

<sup>48</sup> Announced ahead of COP26 in October 2021.

## New Zealand's renewable energy generation goals

74. As reflected in the Climate Change Commission's recommendations, renewable energy generation and the transition to a low emissions economy, is the: <sup>49</sup>  
*"keystone in New Zealand's climate change response."*
75. Increased renewable energy generation is critical if New Zealand is to meaningfully respond to climate change. To meet our emissions reduction targets and transition to a decarbonised economy, greater renewable generation of electricity is needed to displace fossil fuels.
76. The Interim Climate Change Commission (**ICCC**) recommended to the Government that it should set a goal of having 100% of New Zealand's electricity supply from renewable generation by 2035. The Government accepted this goal but has instead an aspirational goal of reaching 100% renewable electricity by 2030.<sup>50</sup>
77. This goal is part of the transition to a net-zero carbon economy by 2050 and is supported by a renewable energy work programme.
78. The Climate Change Commission released a road map to achieve the Government's emissions reduction targets and recommended that the Government decarbonise the energy system and ensure the electricity sector is capable of meeting future needs. This includes by setting a target for 50% of all energy consumed being from renewable sources by 31 December 2035 and reiterating the Government's renewable generation targets.
79. These targets reflect the Government's on-going commitment to reducing emissions. Minister Woods stated in response to ICCC's Report on Accelerated Electrification:<sup>51</sup>  
*"New Zealanders are calling for a clean, green and carbon neutral economy. Increasing our renewable electricity will play a big part in helping us get there."*
80. To achieve the Zero Carbon Act 2050 targets, the Government has prepared an Emissions Reduction Plan. Following receipt of the Climate Change Commission's recommendations the Government released an Emission Reduction Plan discussion document for public consultation in October 2021 and our first Emission Reduction Plan in May 2022.<sup>52</sup>
81. The Emission Reduction Plan recognises that one of the most significant emission reductions must occur in the energy sector as a vital step towards achieving New Zealand's first Emissions Budget. The plan sets a short-term focus to reduce energy emissions, in large through accelerating the development and uptake of new renewable energy generation. Building on the Government's target of 100% renewable electricity by 2030, in line with the Climate Change Commission's

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<sup>49</sup> Boffa Miskell report p 11.

<sup>50</sup> The Government's commitment to a low emissions future has been consistently stated and was reiterated by Prime Minister Jacinda Ardern, in her address to the United Nations General Assembly, where she spoke of New Zealand's ambitious plans to tackle climate change and the country's goal of 100% renewable energy generation by 2035. Rt Hon Jacinda Ardern, "New Zealand National Statement to United Nations General Assembly 2019" Beehive website, 25 September 2019, [New Zealand National Statement to United Nations General Assembly 2019 | Beehive.govt.nz](#).

<sup>51</sup> "NZ embracing renewable electricity future" Hon Megan Woods, 16 July 2019, [beehive.govt.nz](#).

<sup>52</sup> The Ministry for the Environment. 2021. Te hau mārohi ki anamata | Transitioning to a low-emissions and climate-resilient future: Have your say and shape the emissions reduction plan. Wellington: Ministry for the Environment and Ministry for the Environment. 2022. Te hau mārohi ki anamata, Towards a productive, sustainable, and inclusive economy: Aotearoa New Zealand's First Emission Reduction Plan (2022-2025).

recommendations, the plan also introduces an additional target of 50% of total final energy consumption coming from renewable sources by 2035.<sup>53</sup>

### **The role of renewable energy generation in meeting the Government's emissions reduction targets**

82. Major electrification to displace fossil fuels is central to New Zealand meeting its emissions reduction targets. Increased electrification will of course require the rapid expansion of renewable energy generation to meet this increased demand.
83. Westpower recently engaged Mr Erik Westergaard to provide an independent expert assessment of the New Zealand's energy demand in light of the Government's goals to decarbonise the economy and the role of renewable energy generation, particularly hydro generation, including the Waitaha project, in fulfilling this demand. Mr Westergaard's report is attached as **Appendix Six**.
84. Mr Westergaard concludes in his report that:<sup>54</sup>
  - (a) electricity demand is already increasing in New Zealand and will significantly increase if the Government's renewable electricity generation goals are to be achieved by 2030;
  - (b) thermal generation must cease and the New Zealand economy must decarbonise and electrify to meet the 2030 renewable electricity target;
  - (c) to ensure electricity demand can be met by 100% renewable electricity by 2030, New Zealand needs new additional electricity equivalent to approximately 20 medium windfarms (for example Meridian Energy's Westwind in Wellington) or 12 large wind farms (for example Mercury Energy's Turitea in Manawatū);
  - (d) there are currently 24 renewable electricity generation projects that have either been consented or are in the consenting process and almost all would need to be built to meet the 2030 electricity demand. However, there is a real risk that many projects are unlikely to be consented (given challenging regulatory requirements) or may not be constructed (due to investment decisions);
  - (e) even if all of those proposed renewable electricity generation projects are constructed, there will be a significant shortfall in renewable electricity generation required to meet the 2050 net-zero emissions target, that shortfall being equivalent to 54 medium windfarms or 32 large windfarms;
  - (f) the project will lower electricity costs and increase security of supply incentivising a move to electrification on the West Coast and will displace thermal generation in New Zealand reducing CO<sub>2</sub> emissions by 100,000 tonnes annually; and
  - (g) new renewable electricity generation projects are required as a matter of urgency to support the Government's emissions reduction targets and the impacts of climate change.

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<sup>53</sup> Ministry for the Environment. 2022. Te hau mārohi ki anamata, Towards a productive, sustainable, and inclusive economy: Aotearoa New Zealand's First Emission Reduction Plan (2022-2025) at p 202.

<sup>54</sup> Erik Westergaard, *Waitaha Hydro Scheme: Electricity demand and Renewable Electricity Targets*. Report prepared for Westpower Limited paragraphs 8-18.

## What type of new renewable energy generation should be built?

85. As discussed in Mr Westergaard's report,<sup>55</sup> as evidenced by the power outage of 9 August 2021, it is critical that New Zealand develops a range of renewable energy generation plant types, including hydro, to ensure we have reliable baseload energy, ensuring security of supply and resilience.
86. On that evening there was not enough generating capacity to meet the demand for energy from customers (a new record) resulting in several thousands of households having their power disconnected. The electricity shortfall arose in part because of the absence of key thermal generating units (fuelled by gas and coal) from the market (which as discussed above will need to be removed to meet the Government's 100% renewable energy target), and by the inherent variability of renewable energy generation – wind generation suddenly declined due to a lack of wind and no amount of solar generation would have helped as this was after sundown.
87. As Mr Westergaard explains,<sup>56</sup> increased regulation has made it more and more challenging to deliver large scale infrastructure projects in New Zealand. It is therefore highly unlikely that large schemes such as large-scale hydro dams will be able to be consented in this country without significant legislative change, creating a real risk that the shortfall in renewable energy generation cannot be addressed by 2050 (the date at which emissions are to be reduced to net-zero).<sup>57</sup> This means that either security of supply is put at risk or some of the existing thermal plants will need to remain operating beyond 2030.
88. To meet the 2050 targets, smaller scale renewable energy generation projects like the Waitaha project that have a small footprint and appropriately avoid, remedy or mitigate adverse effects on the environment, will be critical. Companies such as Westpower, developing smaller run-of-river schemes, therefore need to be incentivised to develop these smaller scale renewable energy generation projects.
89. If New Zealand's response to climate change is to be both fast and far reaching,<sup>58</sup> then regulatory and policy support for new renewable energy projects, including projects such as the Waitaha project, is critical.

## Role of New Zealand's public conservation land in addressing climate change

90. It is critical that public conservation land plays a meaningful role in assisting the Government to meet its emission reduction and renewable energy targets and conserve the natural values found on public conservation land from the impacts of climate change.
91. As discussed above, climate change is a significant threat to New Zealand, including to biodiversity and public conservation land and resources. As discussed in the Boffa Miskell report:<sup>59</sup>

*"New Zealand's changing climate is already affecting nearly every aspect of the Department of Conservation's (DOC) responsibilities in the management of Public Conservation Land (PCL)."*

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<sup>55</sup> Erik Westergaard report paragraph 31.

<sup>56</sup> Erik Westergaard report paragraph 76-81.

<sup>57</sup> Under the Zero Carbon Act the target is to reduce net emissions of greenhouse gases (except biogenic methane) to net-zero by 2050 and reduce emissions of biogenic methane to 24–47% below 2017 levels by 2050.

<sup>58</sup> MFAT briefing to incoming Minister – November 2020 "A paradigm shift in global action on climate change in the next decade is essential to avert catastrophic outcomes. We have a compelling national interest in continuing to champion faster and more far-reaching global action to reduce emissions because our wellbeing depends on the effectiveness and speed of others' decarbonisation efforts."

<sup>59</sup> Boffa Miskell report p 8 and Department of Conservation. 2020. Department of Conservation Climate Change Adaptation Action Plan.



92. New Zealand has over 8.6 million hectares of conservation land, featuring a range of natural and historical resources that could be utilised in the provision of new renewable energy to combat climate change. Boffa Miskell consider that conservation land "*presents significant opportunities*" to reduce greenhouse gas emissions, and enable New Zealand to meet its reduction targets by:<sup>60</sup>
- (a) removing and storing carbon from the atmosphere through the protection and enhancement of natural ecosystem carbon sinks; and
  - (b) preventing carbon emissions entering the atmosphere by utilising the natural resources where appropriate to generate renewable energy generation.
93. The utilisation of natural resources on public conservation land for renewable energy generation would make a significant contribution to New Zealand's emission reduction and renewable energy generation targets.
94. Under the Conservation Act, 'conservation' is defined as<sup>61</sup>:
- "the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations."*
95. In order to protect our natural and historic resources, the Minister and Department will have to take a proactive approach to renewable energy generation on public conservation land. Given the threat that climate change presents for biodiversity and public conservation land and resources, addressing climate change (including through promoting renewable energy generation on public conservation land) must be a key priority.
96. Boffa Miskell's expert view is that given the emission reduction opportunities on public conservation land and the purpose of the Department, public conservation land must play:<sup>62</sup>
- "a critical role in mitigating and adapting to the impacts of climate change to meet New Zealand's climate change and biodiversity commitments."*
97. As explained by Boffa Miskell, the National Climate Change Risk Assessment rated the effects of "*climate change under a high-emission scenario*" on the environment as "*major*".<sup>63</sup> Therefore, applying a net-benefit approach, and considering that the project would have only negligible-low impacts on environmental values and poses a low risk of exacerbating climate change impacts on the local environment or restricting adaptation pathways, Boffa Miskell conclude that the project:<sup>64</sup>
- "is assessed to generate net-positive outcomes for the natural environment. Through supporting the achievement of New Zealand's emission reduction targets and Te Mana o Te Taiao 2025 implementation plan, strategically the project is a ready action in a 'joined up effort' to address the interdependent crises of climate change and biodiversity loss."*
98. Boffa Miskell's expert view is that the project would support meeting the Government's emission reduction and renewable electricity generation targets and that the negligible – minor environmental

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<sup>60</sup> Boffa Miskell report p 8.

<sup>61</sup> Conservation Act section 2.

<sup>62</sup> Boffa Miskell report p 8.

<sup>63</sup> Boffa Miskell report p 7.

<sup>64</sup> Boffa Miskell report p 13.

impacts of the project would be "*well offset*"<sup>65</sup> by the positive impacts that mitigating climate change will have.<sup>66</sup>

99. The state of biodiversity in New Zealand is already "*incredibly dire*",<sup>67</sup> and climate change poses a significant threat that will exacerbate the decline in biodiversity.
100. If New Zealand's species and ecosystems, including those present in the Waitaha catchment, are to be protected and enhanced for future generations then all practicable efforts must be made to limit global warming to 1.5°C and below.
101. To mitigate the most severe climate impacts to biodiversity, New Zealand must meet its climate change commitments and rapidly transition the energy sector to a carbon zero state. New Zealand is not on track to meet either its emissions reduction targets or renewable electricity generation targets, with significant new generation being required.
102. Opportunities to reduce emissions with the tools available today need to be realised immediately to set the country on track for accelerated emission reductions in future years. The utilisation of resources on public conservation land for renewable electricity generation, including the project, presents such an opportunity.
103. Public conservation land can and must be part of the solution for mitigating and adapting to the impact of climate change on present and future generations.
104. These matters are directly and highly relevant to the decision on this concession application under the Conservation Act.

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<sup>65</sup> Boffa Miskell Report p 12.

<sup>66</sup> Boffa Miskell report p 10.

<sup>67</sup> Imogen Wells "Government launches plan to turn around state of New Zealand's biodiversity" NewsHub 20 April 2022, quoting Minister Kiritapu Allen.

### GROUND THREE: NATURAL CHARACTER AND TRAMPING

105. This ground was covered in more detail in the final briefing and decision (as opposed to grounds one and two which were effectively absent).
106. The key findings in the decision relating to natural character and tramping were that:
- (a) there would be no direct adverse effects on tramping, hunting and other land-based recreational activities. In fact, the improved access as a result of the road may have a positive effect on recreational tramping and hunting;<sup>68</sup>
  - (b) the adverse effects of the powerhouse and associated infrastructure below Morgan Gorge on natural character, would be "*minor*";<sup>69</sup>
  - (c) the intake structures were found to be located in an area with "*very high, near pristine levels of natural character*";<sup>70</sup>
  - (d) the project area was found to be one of the "*West Coast's top destinations for kayaking and backcountry tramping*";<sup>71</sup>
  - (e) the effects of the project's intake structures on the surrounding area were found to have a "*significant negative impact on the natural character and the landscape of the area*";<sup>72</sup>
  - (f) the effects of the project's intake structures on natural character would diminish the intrinsic values of the area above and including Morgan Gorge;<sup>73</sup>
  - (g) due to the diminished intrinsic values "*the experience for those using the area will be significantly lessened through the loss of the environment's near pristine, unmodified, wild and remote qualities. This in turn will significantly undermine the area's status as one of the West Coast's top destinations for kayaking and backcountry tramping*";<sup>74</sup>
  - (h) the benefits of the project did not in this case "*justify the extensive adverse effect on the area's natural character given its intrinsic values and high recreational values*";<sup>75</sup> and
  - (i) the adverse effects on natural character and recreation resulted in the project being inconsistent with the legal and planning documents.<sup>76</sup>

#### Key points to note

107. The key points to note under this ground include:
- (a) the project has been carefully and sensitively designed to fit with the public conservation land context, including the surrounding natural character values;
  - (b) there will inevitably be some impact from a project such as this on natural character (as is the case for any physical works in a conservation area), in the immediate vicinity, but that impact

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<sup>68</sup> Paragraphs 24 -26.

<sup>69</sup> Paragraph 35.

<sup>70</sup> Paragraph 33.

<sup>71</sup> Paragraph 41.

<sup>72</sup> Paragraph 36.

<sup>73</sup> Paragraph 39.

<sup>74</sup> Paragraph 41.

<sup>75</sup> Paragraph 45.

<sup>76</sup> Paragraph 54.

has been minimised as far as practicable and is minor, temporary and manageable if viewed in context; and

- (c) the Departmental reports and consequently the decision failed to adequately consider the context within which the project sits. This context is critical for assessing the significance of the natural character and tramping values and the impact of the project on those values, including for example that the project area is already modified by structures and human activities and the intake structures are small and will only be experienced fleetingly by those very few people who undertake recreational activities in the area.<sup>77</sup> This context is discussed further below.

108. The draft hearing report was provided to Westpower for comment. Serious concerns were raised including a number of issues identified by Paul Radich QC. Attached as **Appendix Seven** is the letter from Paul Radich QC that explains the flaws in the draft hearing report.

109. While some amendments were made to the draft hearing report, this did little to address the concerns expressed by Paul Radich QC. Concerns remaining in the final hearing report included, for example:<sup>78</sup>:

- (a) while Westpower's position on natural character values and effects was included in the report there was no analysis or discussion of this material;
- (b) the report explicitly preferred lay submitter opinion over the objective views of independent experts leading to an overstatement of values and effects on those values;<sup>79</sup>
- (c) the report failed to assess the natural character and tramping values and effects on those values in context and in a pragmatic way, leading to an overstatement of values and effects;<sup>80</sup> and
- (d) the report failed to provide sufficient and detailed reasoning for conclusions and recommendations concerning natural character and tramping.

110. Despite Westpower bringing these issues to the Department's attention,<sup>81</sup> the final briefing did not analyse Westpower's concerns about the hearing report's reliance on lay submissions, and included only cursory comments on the issue.<sup>82</sup> The final briefing is predominantly based on the findings of the hearing report and therefore also suffers from the same issues.<sup>83</sup>

111. The final briefing therefore failed to provide the decision-maker with an accurate, contextual and pragmatic analysis of the natural character and tramping values and the potential effects on those values. The final briefing did not present a balanced view of the impacts of the project on the values of this area or the broader context that needs to be considered.

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<sup>77</sup> Rob Greenaway, *Waitaha Hydro Scheme: Recreation*, and Tourism Assessment of effects assessed the area as having a 'low use' for recreation.

<sup>78</sup> Westpower's concerns with the final hearing report were set out in Westpower's response to the Department dated 30 November 2017.

<sup>79</sup> See hearing report p 27, 48, 62- 63, 73-74, 82-83, 93 and 96 where the hearing commissioner found lay submissions on natural character and tramping to be "key" and "persuasive".

<sup>80</sup> See hearing report p 76 where the hearing commissioner concluded that the effects on tramping values were moderate and "maybe even higher" despite Westpower's expert concluding that the effects were predominantly "moderate to nil".

<sup>81</sup> Westpower raised these issues in its response to the Department dated 30 November 2017. Westpower also raised issues with the draft briefing to the Minister on 26 November 2018.

<sup>82</sup> Final briefing paragraphs 45 and 268-275.

<sup>83</sup> Final briefing paragraphs 40 and 260-275.

112. The failings of the hearing report and final briefing are reflected in the decision:

- (a) the decision has significantly overstated the natural character and tramping values and the impact on those values, for example:
  - (i) the decision describes the area as "*near to pristine*"<sup>84</sup> and "*untouched*"<sup>85</sup>, which, according to expert views, it is not (due to the presence of infrastructure such as bridges, huts and tracks and also several land use consents and concessions for works in the bed of the river and schist extraction operations occur in Macgregor Creek);<sup>86</sup>
  - (ii) the decision describes the Morgan Gorge as "*awe-inspiring*"<sup>87</sup>. The expert analysis concluded that when the natural character values of the Morgan Gorge are assessed in the broader West Coast context, the Gorge is one of many equally unique gorges on the West Coast;
  - (iii) the decision found the tramping values to be of much greater significance than as determined by expert analysis.<sup>88</sup> For example, the decision states that, the project "*...in turn will significantly undermine the areas status as one of the West Coast's top destinations for kayaking and backcountry tramping.*"<sup>89</sup> However, the experts assessed recreational values quite differently, including that tramping use in the Waitaha area was "*low*";<sup>90</sup> and
  - (iv) the decision found the impacts of the project on both natural character and tramping to be "*significant*"<sup>91</sup> when the expert view was that the effects would be "*high*" at the immediate location and low to moderate at a broad scale. This is discussed further below;
- (b) the decision has omitted key context from the assessment of natural character and tramping values and the effects on those values. For instance, there is no meaningful discussion of expert evidence that the scale of the project should be assessed in the context of the entire public conservation land of the West Coast; that the project site is not located in a national park; and that the Waitaha catchment is not unique in the West Coast landscape;
- (c) the decision includes numerous references throughout to lay submitters' opinions<sup>92</sup> while in comparison there is minimal reference to expert views; and

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<sup>84</sup> Decision paragraph 5.

<sup>85</sup> Decision paragraph 39.

<sup>86</sup> See, for example, decision paragraphs 34 – 41, while the Minister in acknowledges the site is impacted by pest species, at paragraph 38 of the decision the Minister refers to the area as being "*only impacted by recreational activities and structures.*" This is incorrect. The area is modified by other activities such as schist extraction operations in Macgregor creek, other concessions and land use consents, and disturbance from helicopters. Further, while Westpower's experts concluded that at a local level (that is within the immediate vicinity of the project) the effects on natural character would be high, considering the project at a broader, pragmatic level the effects would be low or moderate to low, particularly since there is only a very low use of recreational activities in the area such that very few people would experience the modifications and even then, only fleetingly.

<sup>87</sup> Decision paragraph 44.

<sup>88</sup> Decision paragraphs 5, 6, 24 and 41.

<sup>89</sup> Decision paragraph 41. See, also decision paragraphs 6, 24, 40, 41 for similar overstatements of the tramping value of the valley.

<sup>90</sup> Rob Greenaway report.

<sup>91</sup> Decision paragraphs 5, 6, 36, 41, 44-45.

<sup>92</sup> Decision paragraphs 5 – 8, 25 – 26, and 36 – 45.

- (d) throughout the decision, submissions are referenced creating the impression that there were a large number of submissions on this issue when in fact there were less than 40 out of 3,264 submissions that were substantively concerned about tramping.

113. Had the above issues not occurred, and the hearing report and final briefing accurately reflected the expert advice, the decision-maker would have been informed of the key contextual matters that are central to this decision.

#### **Low level of recreational use**

114. As discussed above, the final briefing and decision do not reflect the expert views that were provided including in relation to recreational effects. For example, Mr Greenaway is a recreation expert who provided an expert report on the application.

115. Mr Greenaway found that the Waitaha area currently receives a "low" level of use for all of the recreational activities undertaken in the catchment, which includes tramping, mountaineering and hunting. His primary findings included the following:

- (a) approximately 50 hunters use the Waitaha Valley area annually;
- (b) fewer than 150 trampers and day visitors access Kiwi Flat annually;
- (c) all land-based recreational activities in the Waitaha Valley would be able to continue with only indirect effects;
- (d) at a local level, while the effects for tramping and hunting in the Kiwi Flat area and from the top of Morgan Gorge to Douglas Creek will be "high", due to the location of new infrastructure in a backcountry-remote setting, the effect for the remainder of the area will be "moderate to nil";
- (e) at a regional level, the effect of the project on West Coast recreation and tourism generally will be very slight due to the high number of alternatives available for all activities affected by the project and the relatively low level of use of the Kiwi Flat area;
- (f) it would be possible to improve tramping access to the Valley to support recreational use of the area, to address changes in recreation amenity generally; and
- (g) while hydro development is not necessarily compatible with the recreation management category given to the area under the West Coast Conservation Management Strategy (CMS), the outcomes in the CMS for the Hokitika Place will still be achieved with the project in place.

116. As noted above, following the release of the hearing report Westpower proposed further recreational mitigation, including a \$250,000 fund and additional 'no-take' days for kayaking, and Westpower has an option to purchase a strip of land adjacent to the river to provide enhanced access to the lower reaches of the Valley.<sup>93</sup>

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<sup>93</sup> It is noted that Westpower proposes several mitigation measures to address the effects of the project on recreation including establishing a Trust in partnership with local outdoor educational specialist Tai Poutini Polytechnic and providing an initial contribution of \$250,000 to promote and enhance kayaking on the West Coast. Westpower also proposes to provide four (as opposed to the original two) "no take" days per year and will explore a regime which would allow the hydro scheme to be shut down at short notice for short periods to allow the conditions in the lower abstraction reach to normalise so that kayaking training could take place in the lower abstraction reach. Westpower has secured an option for the access road and confirms this mitigation can be provided.

117. The final briefing to the Minister and the decision inaccurately states the recreational values to be significant and that the effects on recreational users will be significant. That is not a conclusion that can reasonably be reached on the basis of the information (and specifically the expert information) that was provided. As discussed in Paul Radich QC's letter (attached as **Appendix Seven**), despite detailed expert evidence and legal submissions on the nature of the project's effects and on mitigation, the rationale for the hearing panel's conclusion that there are adverse effects that cannot adequately be mitigated is largely non-existent.<sup>94</sup>

### **Impacts on landscape, natural character and visual amenity**

118. The hearing report and final briefing contain the following key findings in terms of the effects on landscape, natural character and visual amenity and other values:

- (a) the area that would be affected by the project holds very high natural character, landscape and visual amenity values, including intrinsic values;
- (b) the activity would have significant adverse effects on those values; and
- (c) those adverse effects cannot be mitigated.

119. However, that conflicts with the expert analysis that has been provided by Westpower.

120. In his comprehensive report on natural character (submitted as part of the application), landscape and visual amenity, Boffa Miskell's landscape expert James Bentley (peer reviewed by Gavin Lister of Isthmus Consulting) considered the following points were important for assessing the impacts of the project in the broader context:

- (a) no active pest control is undertaken on this stewardship land;
- (b) there are numerous other river catchments on the West Coast with similar features such as gorges, hot springs and glaciers and therefore the catchment is not considered unique;
- (c) the project area occupies a short section (less than 3km including the extraction reach) of the overall length of the 40km long Waitaha River;
- (d) the intake structures above Morgan Gorge occupy a far smaller area again;
- (e) the area is not rated at the highest end of the naturalness spectrum due to a number of modifications including pests, tracks, huts, a swing bridge and its use for hunting and kayaking. There are several land use consents and concessions for works in the bed of the river and schist extraction operations occur in Macgregor Creek; and
- (f) the upper Waitaha catchment and project area are not within areas listed as constituting an outstanding natural landscape or feature within the Westland District Plan or the West Coast Regional Policy Statement. However, given the landscape qualities and values found in this part of the catchment and the high level of naturalness, it is likely that the upper Waitaha catchment would be considered an outstanding natural landscape and that the Morgan Gorge would be considered as an outstanding natural feature within this landscape. However, in that context, the project is an appropriate development (in terms of natural character,

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<sup>94</sup> Letter from Paul Radich QC dated 5 July 2017 paragraph 23 (attached as **Appendix Seven**).

landscape and visual amenity) as the underlying features that comprise and define the outstanding natural landscape and features are protected.

121. Having regard to the above context, Mr Bentley reached the following conclusions on the project's effects on natural character, landscape and visual amenity:
- (a) at a broad, upper Waitaha catchment scale, the effects on natural character, landscape and visual amenity would be low or moderate to low due to the small and defined footprint of the project which avoids damming the river, forming a lake or creating large cuts for access roads. It is in close proximity to the boundary with the lower Waitaha catchment and away from the truly wild and more remote areas further upstream beyond Waitaha Gorge;
  - (b) the effects of the project on Morgan Gorge will not affect the overall biophysical, associational and sensory values of the gorge to a significant degree and, therefore, will not reduce its 'outstandingness' as a feature. The weir will appear close to the entrance of the gorge along with the intake structure, the river will maintain its course through the gorge despite reduced flows and the natural eroding of the broader gorge by fluvial processes will continue;
  - (c) despite the project's small footprint, there will be natural character effects at a more localised level, namely, at the intake and the powerhouse sites;
  - (d) there will be a moderate level of effect in terms of river flow on the perceptual aspects of natural character effects through the abstraction reach. However, natural freshes and floods will continue to occur. The river will essentially continue to operate as it does naturally, albeit with reduced flows during drier periods. Abiotic and biotic natural character effects would be minor for the abstraction reach;
  - (e) there will be a high level of landscape effects at a local scale (eg within the immediate location of the intake structures). At a broader level, this drops to low. There will be no effect on the landscape values associated with Waitaha River hot springs within the gorge;
  - (f) it is considered that the project is consistent with the protection of necessary values of the upper Waitaha catchment under Policy C of Policy 4.8 of the Westland District Plan; and
  - (g) the mitigation measures proposed and the iterative design process have enabled the project to sit well within its landscape and respond to its setting and to acknowledge the outstanding landscape, natural character and visual amenity values the upper Waitaha catchment holds by avoiding potentially major effects. Overall, it is considered that the project is appropriate in terms of natural character, landscape and visual amenity despite the fact that at more local levels some effects are assessed as being moderate to high. But at a broader scale, the effects are low or minor. Conditions are recommended to ensure that effects do not reach a level that is inappropriate to the landscape, features and setting.
122. Mr Bentley and Mr Lister are both leading landscape experts. Their views should carry considerable weight in a decision-making process and the hearing commissioner did not appropriately consider or give weight to those expert views. Rather preference and significant weight was given to lay submitter opinion. That is one of the significant flaws in the hearing report, final briefing and the decision. While submitters can of course express views and they must be considered, real care is needed to give appropriate consideration and weight to those expert views



on matters such as landscape and natural character, which are routinely the subject of expert evidence. Case law supporting this approach to the assessment of lay submitter opinion vs expert views is provided in **Appendix Eight**.

123. Again, a 'real-world' view is required here – there will be visual effects when standing directly in front of the intake structures, but they are minor when viewed in the broader context of, for example, the broader Waitaha Valley. Additional context important for assessing the impacts of the project include the following:
- (a) a significant proportion of the land on the West Coast is public conservation land, 85% – 1.912 million hectares. For a project of this nature on the West Coast, it is unavoidable that public conservation land will be involved (and as noted above Westpower went through the process of considering alternatives to public conservation land);
  - (b) the project is as non-intrusive as possible, being a 'run of the river' scheme as opposed to a dam. The project has a small and defined footprint which avoids damming the river, forming a lake or creating large cuts for access roads. Most of the infrastructure will be underground and there will only be two particular points at which infrastructure will be visible (the intake site and the powerhouse site);
  - (c) the visitor experience of the project's infrastructure is temporary and only visible on a very small portion of the route used by trampers and the structures (particularly following the additional design work discussed below) are designed to blend in with the natural environment as far as possible;
  - (d) the Waitaha catchment is 31,561 Ha (0.017% of the West Coast public conservation land). The total project footprint once operational is 3.62 ha (0.000002% of the West Coast public conservation land), with a maximum construction footprint of 4.14 ha.<sup>95</sup> The area of the intake structures is a far smaller area again. The scale of the project in the overall regional context means the extent of any effect will be very limited, as demonstrated in the maps attached in **Appendix One**;
  - (e) the Conservation Act expressly contemplates that structures and infrastructure can be placed on public conservation land, both by the Department in its management functions (such as huts, tracks and bridges) and by other parties (such as infrastructure through the concessions process);
  - (f) it is common for visitors to experience structures and infrastructure on public conservation land, including DOC huts, tracks, bridges, roads and transmission infrastructure, and as noted above, this applies to the Waitaha catchment;
  - (g) while the upper Waitaha catchment would be considered an outstanding natural landscape and that the Morgan Gorge would be considered as an outstanding natural feature within this landscape:
    - (i) the features of the landscape are not uncommon in West Coast upper river catchments and Morgan Gorge is one of many such gorges on the West Coast; and

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<sup>95</sup> The access road comprises the biggest portion of the footprint whereas the intake structures are only a very small portion of the footprint.

- (ii) the project is an appropriate development (in terms of natural character, landscape and visual amenity) as the underlying features that comprise and define the outstanding natural landscape and features are protected; and
  - (h) the project is not occurring within a national park or one of New Zealand's highest rated conservation areas, the river is not subject to a water conservation order and there are areas of existing modification and disturbance. It is in close proximity to the boundary with the lower Waitaha catchment and away from the truly wild and more remote areas further upstream beyond Waitaha Gorge.
124. The need to undertake activities on conservation land carefully and sensitively is well understood by Westpower. Westpower has a proven history of respecting those values through its work, including through the Amethyst hydro scheme, which has a very small environmental footprint.
125. Westpower adopted a particularly careful, constructive and proactive approach to this application in recognition of the status of the land as public conservation land, seeking to avoid effects where it can or otherwise remedying or mitigating effects, in accordance with expert advice. The objective of the intake design was to ensure that the impact on the surrounding environment was minimised to an acceptable level.
126. There will inevitably be some impact from a project such as this (as is the case for any physical works in a conservation area), but that impact has been minimised as far as practicable and is minor, temporary and manageable if viewed in context.
127. However, it is critical when assessing the impact of the intake structures on the surrounding environment to consider the broader context within which the works will be situated as opposed to confining this assessment to only the immediate location of the project. This includes recognising that the impacts on tramping will be minimal and temporary – trampers coming across the intake (along with other existing structures such as the adjacent hut and bridge) will notice those structures only briefly and move on. There are numerous tramping opportunities on the West Coast, and this will be a minimal and temporary impact on just one of them.
128. If a pragmatic view is adopted the benefits of small-scale hydro renewable energy (including in terms of the significant implications for conservation arising from climate change), and the interests of those using the Waitaha Valley for tramping can both be accommodated – those outcomes are not mutually exclusive.

### Updated mitigation and reports

129. As noted above, the key concern in the Departmental reports<sup>96</sup> and decision<sup>97</sup> was the effects of the project's intake structures (portals and weir) on the natural character of the Morgan Gorge and the flow on effect on recreational users.

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<sup>96</sup> The final briefing provides: "*The powerhouse and other infrastructure at Macgregor Creek and the weir and other intake structures upstream of Morgan Gorge will be visible to trampers using the current DOC track which runs along the true right bank of the river, and those accessing the river. This will change the experience from an undeveloped backcountry remote setting to one where industrial-style structures will be present.... A condition is proposed in the Officer's Report requiring Westpower to provide alternative track access that is to avoid the powerhouse site construction area.*" at paragraphs 94 – 95.

<sup>97</sup> The decision states: "*The proposed location of the weir and intake structure above Morgan Gorge is in a near to pristine, wild yet accessible, area with high conservation values. The adverse effects of the activity would significantly impact its natural character. As a result, the intrinsic value of the area as well as the enjoyment and appreciation of the area by members of the public will decline. I am particularly concerned about the impact of the area changing from a near-natural state on the experience of recreational users*"

130. While Westpower maintains its position that the impacts of the intake structures on natural character have been suitably remedied and mitigated to an acceptable level, following the decision, Westpower has undertaken a further comprehensive design assessment to determine whether any additional measures can be adopted to reduce the adverse effects of the intake structures on natural character.
131. This design assessment involved the establishment of an expert consultant group<sup>98</sup> who were tasked with collaborating to identify additional practicable measures to reduce the impact of the intake structures on natural character, compared with the existing design.
132. Following meetings and a site visit to the top of the Morgan Gorge, the consultant group identified three options to mitigate the impact of the intake structures on the Morgan Gorge. These three options are discussed in Westpower's landscape report attached as **Appendix Nine**.<sup>99</sup>
133. The preferred option involves maintaining two portals at the current intake location, but significantly reducing the size of the access portal from 5m x 7.5m to 3m x 3m.
134. This reduction is possible because the large (at least 13 tonne) digger previously assumed to be needed for the construction and maintenance of the intake structures is no longer required and a smaller digger (five tonne) will suffice. This is a significant reduction in the size of the access portal, resulting in a considerably smaller opening in the rock.
135. In addition, the consultants agreed that the entrance to the portals could be left as uncovered rock and designed to blend in with the natural lines of the surrounding schist, rather than strengthening the outer facing edges of the entrance with concrete and geometrically shaping the entrance. This will give the portals a more naturalistic cave-like appearance and further reduce the level of effect on natural character.
136. As can be seen from **Figures 1 and 2** below this new design will further reduce the effects of the project on natural character.

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*who use the area. Their experience and perception of the area will be degraded, noting that recreation is a feature of the Act's conservation purpose.*" at paragraph 5.

<sup>98</sup> This expert consultant group consisted of, Mr Bentley (landscape architect), Mr Lister (landscape architect), Mr Matheson (engineer), and Mr Black (tunnel expert).

<sup>99</sup> Westpower report 'Update on design features in relation to landscape, natural character and visual amenity' dated May 2022 (attached as **Appendix Nine**).

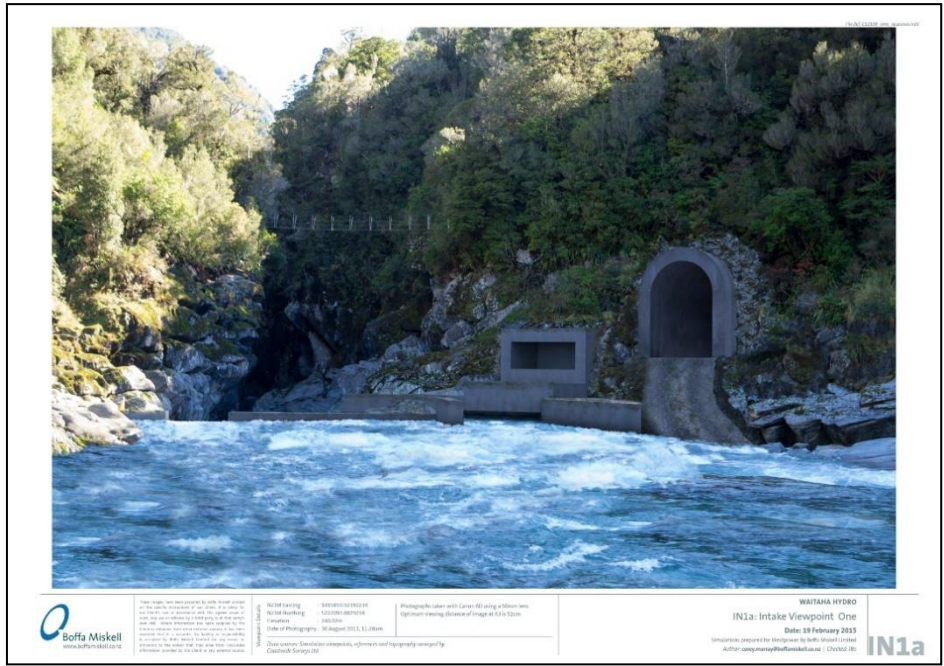


Figure 1 – Previous intake simulation image



Figure 2 – New visual simulation of the intake (after 10 years)<sup>100</sup>

137. A suggestion was also made by the consultants that there may be no need for a digger to be located at the intake structure at all if maintenance can be undertaken by alternative technology such as using water jets to clear flood debris. This would mean that the access portal would only need to be sized for human access, reducing the size of the access portal even further. However, the feasibility of removing the digger and relying on other technology for maintenance purposes is

<sup>100</sup> For the full sized images please refer to Appendix A of Westpower's landscape report attached as Appendix Nine to this application.

yet to be fully tested and there is therefore some risk that this option is not practicable and cannot be implemented. Westpower will explore whether this mitigation could also be adopted.

138. In an effort to further minimise the impact of the intake on tramping, Westpower will explore whether it could be possible to divert the section of the track that follows after the swing bridge (going towards the Kiwi Flat Hut) to continue through the bush. This section would be directly opposite to the intake structures and would be approximately 1000m long. With the track continuing through the bush until it reaches the Labyrinth Creek, trampers would be surrounded trees which would limit the close view of the structures. The geography of this specific location will need to be assessed to determine the feasibility of the idea.
139. Westpower approached its landscape experts Mr Bentley<sup>101</sup> and Mr Lister<sup>102</sup> to comment on the updated design of intake structures with both agreeing that the updated design was "*meaningful*" and "*worthwhile*".
140. While both Mr Bentley and Mr Lister have re-confirmed their previous observations, Mr Bentley acknowledges that the new features have been carefully designed, and allow the intake structures to fit better within the environment and Mr Lister agrees that the current intake structure locations result in the least disturbance to the adjacent area compared to other options. Mr Lister also considers that the weir is a clean minimalist structure that will have the least interruption to natural patterns, and the steel sheathing will provide a more naturalistic finish. Mr Lister considers the smaller size of the access portal and its rough-hewn form will respond well to the natural pattern of schist, therefore achieving a lighter touch.
141. Westpower considers the updated design will ensure the project has the lowest impact on the natural character of the area, and the lowest impact on the visual amenity, mitigating the effects of the project on the wild and scenic values to an acceptable level, all the while being achievable and practical from an engineering and operational perspective.
142. As noted above, despite its small scale and minimal footprint the project will unavoidably have some effect on the immediate environment. However, a key contextual consideration is the degree to which the project's effects on natural character will be experienced. It is critical in assessing the impact of the project to focus on the fact that the intake structure will be small (very small within the context of the Waitaha Valley) and only experienced fleetingly by those very few people who undertake recreational activities such as tramping in the area.<sup>103</sup>
143. It is considered that with the proposed updates, the design features sufficiently mitigate and minimise the effects to the level where the unavoidable intrusions can be perceived as acceptable to the degree where they are sympathetic to the values of the landscape in view of the ongoing conservation of New Zealand natural resources and continued appreciation of the outdoors.
144. All effects of the project, except those relating to natural character, are negligible to minor. The impact on natural character has been minimised as far as practicable and is minor, temporary and manageable if viewed in the broader context. In this context, Westpower's position is that the

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<sup>101</sup> James Bentley, *Memo: Proposed Waitaha Hydro Scheme – Landscape assessment of scheme in light of updated portal design*, 2022. Report prepared for Westpower Limited (Attached as **Appendix Ten**).

<sup>102</sup> Gavin Lister, *Memo: Proposed Waitaha Electricity Project Landscape Peer Review*, 2022. Report prepared for Westpower Limited (Attached as **Appendix Eleven**).

<sup>103</sup> Rob Greenaway report assesses recreational use in the area as "low".

impact on natural character and other values is acceptable to provide renewable electricity generation, which is much needed to address New Zealand's climate emergency.

## GROUND FOUR: LEGAL AND PLANNING MATTERS

145. The decision and the reconsideration decision are required to be made under Part 3B of the Conservation Act.
146. The comments made earlier in this application are relevant to the legal tests to be applied. For example:
- (a) as explained under **ground one**, the Supreme Court in *Ngāi Tai* has confirmed the powerful effect of section 4 of the Conservation Act and the Treaty principles: hence there is a need for the decision-maker to fully understand the views and aspirations of Poutini Ngāi Tahu and give effect to Treaty principles in making this reconsideration decision;
  - (b) as explained under **ground two**, the potentially devastating impacts of climate change on biodiversity and public conservation land and resources, and the importance of renewable energy generation in addressing those matters, is directly relevant to this reconsideration decision and the definition of 'conservation' under the Conservation Act:  
  
*"the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations."*
  - (c) further, the Zero Carbon Act (section 5ZN) now makes it clear that all decision-makers may take into account the emissions reduction targets, and that provision applies to the reconsideration decision to be made in the context of this concession application;
  - (d) as explained under **ground three**, had the Minister been provided with the full context in relation to the impacts on natural character and tramping, then the conclusion that the project was inconsistent with the legal tests and the planning framework would not be reached.
147. The decision included a number of conclusions concerning legal and planning matters that need to be reconsidered as part of this process, including:
- (a) the project is contrary to the provisions of the Conservation Act or the purpose for which land is held;
  - (b) there are no adequate or reasonable methods for remedying, avoiding or mitigating the adverse effects of the project; and
  - (c) the project is not consistent with the West Coast Conservation Management Strategy (**CMS**).
148. Had each of the above matters been correctly assessed in the advice provided to the Minister, the decision would very likely have reached a different conclusion.

### **There is no statutory impediment to granting this concession**

149. Contrary to the findings in the decision, there is no statutory impediment to granting this concession. Further, given the position of Poutini Ngāi Tahu, the importance of renewable energy generation in combatting climate change, and the further mitigation of effects on natural character now proposed, there is a strong alignment between the project and the purposes and provisions of the Conservation Act.
150. In summary:

- (a) Part 3B of the Conservation Act expressly contemplates that applications for concessions for infrastructure on public conservation land can be made;
- (b) the project is not inconsistent with the provisions of the Conservation Act or the purpose for which the land is held;
- (c) there are appropriate methods to avoid, remedy and mitigate any residual adverse effects;
- (d) the project is consistent with the conservation planning documents including the CMS; and
- (e) there are no other grounds under the Conservation Act or otherwise that prevent the granting of the concession.

151. These matters are dealt with below.

### **Part 3B of the Conservation Act**

152. The concession regime is set out in Part 3B of the Conservation Act. The concessions process under Part 3B involves the Minister considering a number of matters under section 17U and other provisions of Part 3B.
153. As noted above, the Department (through Mr Mike Slater) had earlier notified an 'intention to grant' this application. That decision was based on the Department's original report.
154. If the application was considered to be 'contrary' to the Conservation Act then the Department at the time was required to decline the application. That did not happen and there were no material matters raised in the submissions and hearing, which have not been adequately responded to and addressed by Westpower, that should lead to a change of approach whereby the analysis and conclusions reached in the Department's original report, and the 'intention to grant' decision, are no longer valid. There were no submissions or evidence provided that would reasonably support such a change in approach, including on technical expert, legal, or planning matters.
155. This application relates to stewardship area administered under the Conservation Act. The Act, as with most conservation legislation, provides for both the protection of these places, and for their enjoyment and use, depending on the protected area designation of the individual area concerned. Elements of this principle can be seen in the purpose and principle statements of other conservation legislation such as the National Parks Act 1980, Reserves Act 1977, Marine Reserves Act 1971 and the Marine Mammals Protection Regulations 1992.
156. It is important to emphasise that the Conservation Act is not premised on absolute preservation/protection with no provision for use of public conservation land or resources. That was accepted in the decision.<sup>104</sup>
157. The definition of 'conservation' under the Act is as follows:
- "the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations".*
158. 'Preservation' is defined in section 2 as:

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<sup>104</sup> Paragraph 31.



*"in relation to a resource, means the maintenance, so far as is practicable, of its intrinsic values"* (emphasis added).

159. 'Protection' is defined in section 2 as:

*"in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes (a) its restoration to some former state; and (b) its augmentation, enhancement, or expansion"* (emphasis added).

160. Consequently, the definitions of 'preservation' and 'protection' are not premised on absolute protection or preservation, and the Act must be read more broadly.

161. In particular, in 1996 Part 3B was introduced into the Conservation Act to provide a specific and detailed regime allowing for applications for concessions of this nature on public conservation land. The Conservation Act clearly contemplates and addresses the potential for applications for physical infrastructure. Many of the provisions in Part 3B expressly contemplate the potential for physical infrastructure to be placed on public conservation land – that is the very purpose of the concessions regime under Part 3B of the Conservation Act.

162. There were submissions in the hearing stated that this concession could not be granted because it is inherently inconsistent with the Conservation Act. That approach does not reflect Part 3B of the Act. There is an express statutory discretion for the Minister to consider and, if appropriate, grant this concession.

163. Further, the Conservation Act is not a 'no-use', 'no-change' or 'no-effects' statute. Again, this was accepted in the decision.<sup>105</sup>

164. Part 3B envisages that there can be uses of, changes to and effects on conservation land and resources. For example, section 17U(1)(c) refers to:

*"Any measures that can reasonably and practicably be undertaken to avoid, remedy or mitigate any adverse effects of the activity."* (emphasis added)

165. These provisions contemplate that there can be residual adverse effects of an activity, as long as reasonable and practicable steps have been taken to avoid, remedy and mitigate those effects.

166. In *Back Country Helicopters v Minister of Conservation*<sup>106</sup> the High Court said:

*"[28] As will be apparent, the effects of the activity are at the heart of the required Ministerial analysis in granting or withholding a concession. Unstated in s 17U, but obviously relevant, **is the extent to which effects may be avoided, remedied or mitigated by conditions**. Section 17X allows the Minister to impose conditions on concessions. Foremost is the power to impose "such conditions as [the Minister] considers appropriate" for "the activity itself, the carrying out of the activity, and the places where it may be carried out."* (emphasis added)

167. This authority reinforces the point that the consideration of effects is a key part of the concession decision as is the extent to which those effects can be avoided, remedied or mitigated. The granting of a concession for infrastructure is not inherently inconsistent with the legislation. Rather,

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<sup>105</sup> Paragraph 31.

<sup>106</sup> [2013] NZHC 982, at [28].

a detailed assessment and consideration of the effects of the project and mitigation proposals is required. That is the exercise that both Westpower and the Department have undertaken.

168. In summary, there is nothing inherently unlawful about granting an application of this nature, nor is a hydro development inherently inconsistent with the scheme or text of the conservation legislation.

**Section 17U(3): purpose for which the land is held**

169. Section 17U(3) of the Conservation Act provides:

*“The Minister shall not grant an application for a concession if the proposed activity is contrary to the provisions of this Act or the purposes for which the land concerned is held.”*

170. As stated by Paul Radich QC in his opinion (dated 5 July 2017) in response to the draft hearing report (attached as **Appendix Seven**), to say simply that, because adverse effects were identified at a certain level, the project must be contrary to the provisions of the Conservation Act and contrary to the purposes for which the land is held is inconsistent with the statutory scheme.
171. An activity such as a hydro scheme cannot be said to be inherently inconsistent with the Conservation Act or the purpose for which the land is held. That contention does not reflect the nature of the project or wording of the Conservation Act.
172. There must be a threshold or materiality test that needs to be applied to determine whether section 17U(3) is triggered. Westpower acknowledges that there will be effects from the project. However, those effects will be avoided, remedied and mitigated, and granting the concession, with appropriate conditions, would not be inherently inconsistent with the Conservation Act or purpose of this stewardship area.
173. It has not been established that this application is inconsistent with the provisions of the Conservation Act or the purpose for which this land is held (stewardship area). The Department's 'intention to grant' decision appropriately recognises that this decision must be made in the context of the broader provisions under Part 3B of the Conservation Act, including the measures to avoid, remedy or mitigate adverse effects. That earlier 'intention to grant' report presented an option to the decision-maker to decline the application under section 17U(3). Appropriately, the decision-maker did not select that option.
174. There has been no new information provided through submissions or the hearing that should lead to a change of view on this matter.
175. The hearing report does not provide any reason or justification for the view that the proposed activity is inconsistent with the purpose for which the land is held. That view cannot be based on an assumption (as is the case in the hearing report) that if there are effects of a certain magnitude, that automatically must mean the project is inconsistent with the purpose for which the land is held.
176. If the approach adopted in the hearing report was applied more broadly, very little activity could ever be undertaken on public conservation land. For example, a DOC hut would have high landscape and natural character effects when one is standing in the immediate locality, and on that analysis would be inconsistent with the purpose for which the land is held.
177. Section 17U(3) is a broadly stated provision and the threshold for breaching it must be a high one, otherwise very few structures could be erected on public conservation land. There are all types of

structures in national parks (such as the huts for commercial customers only on the Routeburn Track) and these have been (and continue to be) authorised under the more stringent provisions of the National Parks Act.

178. The decision concludes that due to the severity of adverse effects, granting the concession would be contrary to the provisions of the Conservation Act and the purposes for which the land is held. For the reasons outlined in this application for reconsideration, Westpower's position is that is not a justifiable conclusion. Once the decision-maker receives full information and robust advice, it will be apparent that, despite some residual adverse effects (which are now lower than when the decision was made), the project would not be contrary to the provisions of the Conservation Act or the purposes for which the land is held, in terms of section 17U(3) of the Conservation Act.

**Section 17U(2)(b): adequate or reasonable methods to remedy, avoid or mitigate adverse effects**

179. In his response to the draft hearing report, Paul Radich QC noted the key errors of law and other procedural and substantive flaws in the draft hearing report. This included an omission of key components of Westpower's case including the effects and mitigation relating to natural character and tramping. Those issues flowed through to the final briefing and ultimately the decision.
180. The decision concludes that it is appropriate to decline the application under section 17U(2)(b) of the Conservation Act because there are no adequate or reasonable methods for remedying, avoiding or mitigating the adverse effects on natural character or the associated effects on intrinsic values and recreational enjoyment. For the reasons outlined earlier in this application, the final briefing to the decision-maker did not provide a full or accurate description of the effects or the proposed mitigation.
181. It is Westpower's position that, as explained in this reconsideration application, the effects are nowhere near as high as stated, and to the extent that there are residual adverse effects, there are adequate or reasonable methods for remedying, avoiding or mitigating the adverse effects. The more recent work to minimise the visibility of the intake structure further reinforces that position.
182. As discussed above, it is not an automatic consequence that because effects may be considered to be high in the immediate location of the intake structures, the project must be declined. As emphasised throughout Westpower's application, the Part 3B concession scheme can enable suitable developments despite localised effects and the project must also be viewed in the broader context.
183. In addition, as has been discussed above, Westpower is also now proposing to update the design of the intake structures which will significantly reduce the visual impact of the project and therefore the impact on those very few who undertake recreation in the area.
184. The project is carefully and sensitively designed to fit with the public conservation land context. The proposed mitigations will operate to address the effects such that there will be very little residual impact. The project can co-exist with other activities such as kayaking and tramping, and the proposed mitigations will operate to ensure those experiences can continue and be enhanced.
185. The reality is that this is a relatively low-impact proposal on stewardship land. Westpower has worked very hard to design a low-impact proposal and has used the top experts available to identify potential adverse effects and the best way to avoid, remedy and mitigate those effects.

186. Ultimately it is not possible to have structures on conservation land without some form of residual adverse effect. This applies to DOC huts and bridges as well as to infrastructure proposals such as this one.
187. Westpower has continuously modified the project to address concerns raised by the Department or interested parties. The proposed mitigation has addressed most of the adverse effects and Westpower's view is that the residual effects are acceptable and must be viewed in context.
188. Consequently, it is not appropriate to decline the application under section 17U(2)(b).

**Section 17W(1): consistency with conservation planning documents**

189. Section 17W(1) of the Conservation Act provides:

*"Where a conservation management strategy or conservation management plan has been established for a conservation area and the strategy or plan provides for the issue of a concession, a concession shall not be granted in that case unless the concession and its granting is consistent with the strategy or plan."*

190. The project is consistent with the relevant conservation planning documents.

191. It is important to note that section 17T(2) of the Conservation Act (as it existed at the time of the original Department report) provided:

*"If the Minister is satisfied that the complete application does not comply with or is inconsistent with the provisions of this Act or any relevant conservation management strategy or conservation management plan, he or she shall, within 20 working days after receipt of the application, decline the application and inform the applicant that he or she has declined the application and the reasons for declining the application."*

192. If the application was considered to be inconsistent with the conservation planning documents, then the Department was required to decline the application. The Department did not do that. Rather the Department issued the 'intention to grant' decision and there is no new information or material change in circumstances to alter that earlier position.

193. As part of its application, Westpower provided detailed expert planning analysis addressing the issue of consistency with the conservation planning documents, and that analysis concluded that the project was consistent with those documents. The Department's original report (on which the 'intention to grant' decision was based) also undertakes a detailed analysis of the conservation planning documents and largely concludes that the project is consistent with the conservation planning documents.

194. Paul Radich QC in his response to the draft hearing report noted that the key errors of law and other procedural and substantive flaws in the draft hearing report included a failure to undertake a careful analysis of the purposes of the Conservation Act, and the purposes for which the land is held and of the CMS.

195. While the hearing Commissioner did make some amendments to the draft hearing report in response, this did little to address the concerns expressed by Paul Radich QC.

196. The hearing report reaches the conclusion that, as the effects are considered to be high, there is an automatic inconsistency with the conservation planning documents. As the final briefing notes, the

final decision-maker is not bound by these findings in the hearing report, and that report does not take into account the further mitigation proposed by Westpower.

197. Westpower does not agree with the approach or analysis in relation to the planning documents reflected in the hearing report and subsequent advice. There are a number of issues:<sup>107</sup>
- (a) the hearing report assesses effects to be 'high' when that is not the case (and the views of experts are discounted without explanation or reason);
  - (b) as above, the hearing report does not appropriately factor in the mitigation proposed by Westpower (including the additional mitigation proposed after the hearing);
  - (c) the hearing report does not conduct a robust or appropriate planning analysis – the assumption is that if effects are of a certain nature and scale, that must mean that the project is inconsistent with the conservation planning documents; and
  - (d) there is no robust or expert planning analysis of:
    - (i) the individual wording of the objectives and policies;
    - (ii) how the objectives and policies should be read alongside other objectives and policies in the CMS;
    - (iii) how the documents should be read as a whole; or
    - (iv) how the ultimate determination of 'inconsistency' was reached through the type of planning analysis referred to above.
198. Following receipt of the draft briefing report, Westpower raised a number of significant concerns with the draft briefing including the inappropriate guidance on the interpretation of planning documents, including legally incorrect guidance on how the project's consistency with the relevant planning documents should be assessed.
199. While several amendments were made, the final briefing needs to be approached with caution. A number of Westpower's concerns remained including that the detail of Westpower's position<sup>108</sup> on the statutory requirements of the concession regime (including in relation to section 17W and the project's consistency with the CMS) was not included in the final briefing to provide necessary balance and ensure the Minister was informed about the views held by Westpower.
200. The final briefing includes only cursory references to the Department's original report's conclusion and Westpower's position that the project was consistent with many of the CMS policies and objectives.<sup>109</sup> There is an absence of any discussion about the project's consistency with some CMS provisions and what that may mean for the project's consistency with the CMS as a whole.
201. In assessing a concession application's consistency with the relevant conservation documents (including a CMS), a decision-maker must adopt a holistic approach. That is, consider a proposal's consistency with the relevant policies as a whole. This requires the decision-maker to undertake a

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<sup>107</sup> Westpower's concerns with the final hearing report were set out in Westpower's response to the Department dated 30 November 2017.

<sup>108</sup> The draft briefing to the Minister included only a very high-level summary of Westpower's position on the matter of consistency with the Conservation Act as set out in Westpower's letter to the Department dated 30 November 2017.

<sup>109</sup> Final briefing paragraphs 200, 202 and 217.

balancing exercise and apply a broad judgment in determining whether or not the overall the proposal is consistent with the relevant conservation planning documents.

202. However, in assessing the project's consistency with the CMS the hearing report applied an narrower assessment. The final briefing provided incorrect guidance on the assessment required by section 17W of the Conservation Act explicitly stating that the Minister in assessing the project's consistency with the CMS was not to adopt a holistic approach in determining whether or not overall the project was consistent with the CMS.<sup>110</sup>
203. In accordance with this narrow assessment, the hearing report, final briefing and decision concluded that even though the project was consistent with most CMS policies, because the project was inconsistent with some CMS policies, the project was unavoidably inconsistent with the CMS. That is a significant error of law.
204. The narrow approach adopted was at odds with the Department's original report (on which the 'intention to grant' decision was based). The Department's original report correctly assessed Westpower's application in a holistic manner and following a detailed analysis of the conservation planning documents, largely concluding that the project was consistent with the conservation planning documents, prior to the 'intention to grant' decision.
205. There is no specific judicial guidance on this matter under the Conservation Act. However, support for a holistic assessment is provided by the Resource Management Act 1991 (**RMA**) where decision makers must similarly assess whether an application is 'contrary' to the objectives and policies in the relevant planning documents.<sup>111</sup>
206. The plain and ordinary meaning of 'contrary' as per the RMA statutory tests and 'inconsistent' under the Conservation Act CMS tests are, according to case law, synonymous.<sup>112</sup>
207. It is well established under RMA case law<sup>113</sup> that that the consistency of an application with objectives and policies should be assessed holistically. Further detailed discussion of this relevant case law is provided in **Appendix Twelve**.
208. As noted, the adoption of the narrow assessment in assessing the project's consistency with the CMS is an error of law and does not comply with section 17W of the Act.<sup>114</sup> Paul Radich QC noted that to say simply that, because adverse effects were identified, the project must be contrary to the provisions of the CMS is inconsistent with the statutory scheme.<sup>115</sup>
209. Had the correct 'holistic' assessment been undertaken then the project would have been found to be, as a whole, consistent with the CMS.

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<sup>110</sup> Final briefing paragraph 195.

<sup>111</sup> Section 104D(1)(b) of the RMA.

<sup>112</sup> *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [738], [745] – [746], *Yaldhurst Rural Residents Assoc Inc v Christchurch City Council* [2012] NZEnvC 39 at [72] – [73], *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 at [24], *Panuku Development Auckland Ltd v Auckland Council* [2018] NZEnvC 179 at [642] and [663].

<sup>113</sup> *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (Dye).

<sup>114</sup> Westpower's response to draft hearing report (dated 6 July 2017) and Westpower's response to the draft briefing to the Minister dated 26 November 2018 set out Westpower's concerns about the hearing report's assessment of the project's consistency with the CMS.

<sup>115</sup> Paul Radich QC opinion dated 5 July 2017 (attached as **Appendix Seven**) provided as part of Westpower's response to the draft hearing report.

210. For the reasons outlined above, it was not appropriate for the decision to conclude that the project would be inconsistent with the CMS and that it had to be declined under section 17W(1) of the Conservation Act.

**Conclusion**

211. In conclusion, Westpower's position is that:

- (a) for the reasons stated, following the reconsideration process, the concession should be granted;
- (b) the decision-maker on the reconsideration (which Westpower understands will be the Minister of Conservation) should meet with both Poutini Ngāi Tahu and Westpower, and should visit the project site, prior to making the reconsideration decision;
- (c) there should be new advisors involved in this reconsideration process that were not involved in the briefings that led to the decision, to bring impartiality and independence to the process. There is no criticism intended in this suggestion, but rather it is to protect the interests of all involved including the Minister, Department, Poutini Ngāi Tahu and Westpower. We will write separately on this matter; and
- (d) Westpower reserves the right to submit further material through the process to address or clarify matters that may arise.

**Appendix One**  
**Maps**



**Appendix Two**  
**Maps**

**Appendix Three**  
**Letter from Poutini Ngāi Tahu**

**Appendix Four**  
**Previous Poutini Ngāi Tahu Letters**

**Appendix Five**  
**Boffa Miskell Report**

**Appendix Six**  
**Erik Westergaard Report**

**Appendix Seven**  
**Paul Radich QC Letter**

## **Appendix Eight**

### **Case law on Lay Opinion vs Expert Views**

**Appendix Nine**  
**Westpower's Landscape Report**



**Appendix Ten**  
**James Bentley Report**

**Appendix Eleven**  
**Gavin Lister Report**

## Appendix Twelve

### Case law on Holistic Assessment of Planning Provisions