

Decision Report

Lake Rotoiti Lake Structures

Applications RM17-0206 & others
to
Bay of Plenty Regional Council

7 September 2022

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Appendix 1 Consent Conditions

1 Introduction

[001] The Decision Report deals with consent renewal applications for 295 private, non-commercial, existing jetties, boat ramps, platforms, boatsheds, retaining walls, boardwalks, a bridge and moorings (the structures) on Lake Rotoiti. The existing consents expired between 2017 and 2020 and the consent holders continue to rely on the expired consents as provided for by section 124 of the RMA.

The applications are granted for the reasons herein.

2 Appointments

[002] The Bay of Plenty Regional Council (BOPRC), acting under s34A of the Resource Management Act 1991, appointed Independent Hearing Commissioners Poto Davies¹ and Rob van Voorthuysen² to hear and decide the applications.

[003] Lake structures that extend onto dry land that do not meet the permitted activity standards of the Rotorua District Plan (RDP) require consent under section 9 of the RMA from Rotorua Lakes Council (RLC). Under section 33 of the RMA, RLC has transferred its section 9 duties, powers, and functions for the lake structures to the BOPRC. That means that we are empowered to make decisions on those section 9 matters.

3 Description of the Proposal

[004] The applications are described by Lucy Holden in her Section 42A Report³. We adopt that description, but note some of the more salient matters as follows:

- Te Arawa Lakes Settlement Act 2006 (TALSA) returned ownership of the lakebed⁴ to Te Arawa Lakes Trust (TALT). Under the provisions of the TALSA existing structures (at the commencement date of TALSA) may remain in or on the lakebed without approval or charge by TALT. However, normal consent requirements under the RMA apply to the structures;
- Te Arawa has statutory acknowledgement over the Crown strata of Lake Rotoiti (the space occupied by water and by air above the bed of the Lake). Ngāti Makino has a statutory acknowledgement over areas on the northern margin of Lake Rotoiti;
- Multiple agencies have a lake structure management role, including TALT, BOPRC, RLC, Land Information New Zealand (LINZ), Department of Conservation (DOC) and Maritime NZ. Ms Holden helpfully described these roles⁵. In short, LINZ and DOC issue leases for the structures and Maritime NZ considers navigation and safety matters;
- Lake Rotoiti is a significant natural area (SNA) and outstanding natural feature and landscape (ONFL). The Lake is listed in Schedule 1 of the Regional Natural Resources Plan (RNRP) as a habitat and migratory pathway for indigenous fish and an important habitat of trout. Lake water quality is classified as Managed State Lake (Schedule 9 of the RNRP);
- The Lake Rotoiti Community Association (LRCA) represented some, but not all, of the consent applicants in pre-hearing processes, including formal pre-hearing meetings; and
- The non-notified consent applications for structures at Lake Rotoiti have been granted by BOPRC with an expiry date of 31 December 2051 with DOC and LINZ ten-year licences issued at the time of consent.

¹ Commissioner Davies is an Independent Commissioner (since 2013): grounded in Māori and currently working with elected members of local body government.

² Commissioner van Voorthuysen is an experienced Independent Commissioner, having sat on over 400 Hearings throughout New Zealand since 1998. He has qualifications in natural resources engineering and public policy. In 2020 he was appointed as a Freshwater Commissioner by the Minister for the Environment.

³ Bay of Plenty Regional Council, Officer's Report for multiple limited notified resource consent applications, Section 42A Resource Management Act 1991 (RMA), Lucy Holden, Senior Planner, 3 August 2023. Sections titled "Summary of Proposal", "Background" and "Description of Environment".

⁴ As well as the subsoil and lakebed plants.

⁵ Section 42A Report, section titled "Affected/Interested Parties".

4 Process Issues

4.1 Written approvals, notification, submissions and pre-hearing meetings

[005] Written approvals were obtained from the following agencies:

- Land Information NZ (LINZ);
- Department of Conservation (DOC);
- Fish and Game NZ;
- Rotorua Lakes Council (RLC);
- Te Arawa Lakes Trust (TALT); and
- Maritime NZ (MNZ).

[006] The approvals granted by LINZ, DOC, Fish and Game and RLC were conditional. Ms Holden included the conditions specified by each agency in her recommended suite of conditions⁶. A common condition was that the approvals applied to structures which existed when the TALSA was passed and that the structures must retain their existing footprint. TALT provided conditional approval for each previously unconsented structure.

[007] The applications were limited notified to TALT and additionally to either Ngāti Mākino or Ngāti Rongomai, depending on which iwi's rohe the structures were located in. A submission was received from TALT which was summarised in the Section 42A Report.⁷ We adopt that summary but do not repeat it here for the sake of brevity. We were provided with a copy of the TALT submission.

[008] Pre-hearing meetings were held on 30 August and 25 October 2022 at which the applicants were represented by the LRCA. We were provided with copies of both pre-hearing reports⁸.

4.2 Officer's recommendation

[009] Ms Holden initially recommended⁹ that the majority of the applications be granted for a duration of 30 years subject to a suite of variable conditions, dependant on the type of structure. She did not consider that a 30 year duration was necessarily appropriate for the structures located at Komuhumu/Gisborne Point because TALT considered that the density of structures there impeded the gathering of kōura. She considered that a 10 year duration might be appropriate for the Gisborne Point structures.

[010] At the conclusion of the hearing Ms Holden recommended that all of the applications be granted for a duration of 30 years. She stated¹⁰ *"I do not believe that a shorter duration is necessary to manage adverse cultural effects in any areas of the lake, including Gisborne Point."*

4.3 Hearing, appearances and site visit

[011] We held a hearing in the Arawa Park Hotel in Rotorua on Monday 28 and Tuesday 29 August 2023. We heard (in person or over Zoom) from over 35 individual applicants who spoke to their applications. Lay person evidence¹¹, planning evidence¹² and legal submissions¹³ from the applicants was pre-circulated in conformance with a procedural Minute that we issued. Additional written evidence from other applicants¹⁴ and TALT¹⁵ was tabled at the Hearing. Copies of the legal submissions and evidence are held by BOPRC.

⁶ Section 42A Report, Appendix 4.

⁷ Section titled "Submissions".

⁸ Section 42A Report, Appendix 6.

⁹ Section 42A Report, section titled "Term of Consent".

¹⁰ Hearing Notes, Lucy Holden, Bay of Plenty Regional Council and Rotorua Lakes Council, 29 August 2023.

¹¹ We received around 125 individual statements of pre-circulated evidence from applicants.

¹² Aaron Collier and Burnette O'Connor.

¹³ K R Hulsebosch, (on behalf of Apton Investments Limited), Lara Burkhardt (Gisborne Point applicants and S Chan) and Vanessa Hamm (representing the Lake Rotoiti Structures Group of 18 applicants).

¹⁴ Including Grant Wallace, Don Atkinson, Nick Wiles, and John and Pamela Glennie.

¹⁵ Stevie Blyth-Nepia.

- [012] We do not separately summarise the matters covered by each of the applicants here, but we sometimes refer to or quote from that material in the remainder of this Decision. We took our own notes of any answers given to verbal questions that we posed to Hearing participants.
- [013] Vanessa Hamm provided verbal Reply submissions at the hearing and written Reply submissions on 5 September 2023. We closed the Hearing on 6 September 2023, having concluded that we required no further information from any of the parties.
- [014] We conducted a site visit by boat on the afternoon of Sunday 27 August 2023. Our itinerary included Okawa Bay; Ōkere Arm; Whangamoā Point to Otaramarae where multiple boatsheds are grouped together; two newly built erosion protection walls (one gabion and one rock wall) at 80 Maniatutu Rd; Gisborne Point; Hauparu Bay; Tapuaekura Bay and lake structures in the bay between Tahunaroa Point and Tūmoana Point. We were accompanied by Helen Creagh, BOPRC's Rotorua Catchments Manager.
- [015] Our site visit demonstrated to us (we acknowledge the following observations to be subjective):
- The vast majority of the lakeshore is undeveloped and contains vegetation (most indigenous) down to the water's edge;
 - Jetties have a low profile (namely they are not highly elevated above the water surface) and very few have posts that rise more than 'knee height' above the timber decking. As the jetties predominantly front developed (or urbanised) parts of the lakeshore, they appear visually unobtrusive, except when viewed from close range. The only highly visible parts of jetties, when viewed from a distance, are white "buffer pads" attached to some of them¹⁶;
 - Wooden retaining walls are generally of a similarly low profile and the lakeshore behind them predominantly comprises mown lawns or domestic gardens in the foreground and houses in the background;
 - Gabion basket retaining walls are arguably more visually intrusive than weathered wooden walls. Rock 'rip rap' retaining walls on the other hand have a more 'natural' appearance and are less visually intrusive than either wooden walls or gabion walls;
 - Boatsheds are more visually dominant than jetties, especially when they are painted in 'non-green' colours. That was particularly the case where some sheds had what appeared to be white roller doors or white coloured roofs. However, boatsheds that were totally green coloured generally merged well into the lakeshore's vegetated backdrop; and
 - Boat ramps (be they wooden or concrete) are visually unobtrusive.

4.4 Consent category

- [016] The applications are a mix of restricted discretionary¹⁷, discretionary¹⁸ and non-complying¹⁹ activities. For the sake of simplicity Ms Holden assessed all the applications together (rather than separately assessing the structures within each of those consent categories). We have adopted the same pragmatic approach.

4.5 Permitted baseline

- [017] When forming an opinion for the purposes of subsection 104(1)(a) of the RMA we may disregard an adverse effect of the activity on the environment if a national environmental standard or a plan permits an activity with that effect.²⁰ Ms Holden advised that while maintenance of existing lake structures was a permitted activity under Rule BW R2 of the RNRP, some applicants may undertake maintenance that differs to the permitted activity rule conditions (such as the timing of maintenance), and so the maintenance activity was included in the applications. On that basis we have not disregarded structure maintenance effects.

¹⁶ Several jetties also had lights stung along their length on elevated poles.

¹⁷ Previously unconsented structures under the Rotorua District Plan.

¹⁸ Regional Natural Resources Plan

¹⁹ National Environmental Standards for Freshwater due to some structures' proximity to a natural wetland.

²⁰ Section 104(2) of the RMA.

[018] The RDP permits existing, lawful (meaning previously consented or permitted) lake structures, including their operation, maintenance, demolition and replacement. All existing lawful structures (those that had a previous consent) meet the RDP permitted activity performance standards²¹. We have therefore disregarded structure maintenance effects landward of the lake bed.

4.6 Te Arawa Lakes Settlement Act 2006

[019] As noted in the Section 42A Report, Te Arawa Lakes Settlement Act 2006 (TALSA) settled Te Arawa's historical Treaty of Waitangi claims relating to fourteen Lakes in the Rotorua District, including Lake Rotoiti. Title to the lake bed was returned to Te Arawa and vested in the Trustees of Te Arawa Lakes Trust (TALT), including ownership of the lakebed, plants attached to the lakebed and subsoil (referred to as the Te Arawa stratum). The Crown retained ownership of the water column and airspace above the lakebed (the Crown stratum).

[020] Vanessa Hamm submitted²² that the "Te Arawa lakebed" was defined to exclude any existing structure situated in or on the lakebed (or in the Crown stratum). That meant that all existing structures, to the extent they sat on (e.g. ramps) or penetrated (e.g. piles of jetties) the lake bed were excluded from the TALSA's transfer of the lake bed to TALT. The Crown through LINZ remained the landlord for those structures on and in the lake bed. TALT is the landlord for any new (post-TALSA) structures in or on the lake bed.

[021] Many applicants referred to the fact that under the TALSA, existing structures (at the commencement date of TALSA) were enabled to remain in or on the lakebed without further approval or charge by TALT. Understandably, those applicants considered it was inappropriate for TALT to be suggesting that some existing structures should be removed to promote a greater shared use of any remaining structures. This was particularly of concern to structure owners at Gisborne Point.

[022] We understand the relevant section of the TALSA is:

"33 Existing structures on Te Arawa lakebeds

(1) *In this section, in the definition of Te Arawa lakebed in section 11, and in sections 34, 35, 40, and 45, **existing structure** means a structure in or on a Te Arawa lakebed, to the extent that it is in or on a Te Arawa lakebed and exists on the settlement date or the inclusion date (as the case may be), regardless of whether the structure, at any time before the settlement date or the inclusion date (as the case may be),—*

- (a) *complied with—*
 - (i) *the Resource Management Act 1991 or any equivalent prior legislation;*
 - or
 - (ii) *a relevant district plan, regional plan, or proposed plan;* or
- (b) *required a resource consent (or any equivalent requirement under prior legislation), which was not obtained or complied with; or*
- (c) *required a concession under the Reserves Act 1977, but that concession was not obtained; or*
- (d) *required the consent of the Crown as the owner of that lakebed and of the Crown stratum, but that consent was not obtained; or*
- (e) *was in any other way unlawful or unauthorised.*

(2) *An existing structure may remain in or on a Te Arawa lakebed or in the Crown stratum, and may be used, occupied, accessed, repaired, maintained, removed, or demolished at any time—*

- (a) *without the consent of the Trustees of the Te Arawa Lakes Trust as the owners of the lakebeds; and*
- (b) *without charge by the Trustees.*

[023] We understand that the settlement date referred to in section 33(1) above is 20 business days after the TALSA commencement date of 1 November 2006. Interestingly, section 33(1) applies to both structures lawfully established under the RMA as well as other structures.

²¹ Under the RDP, most of Lake Rotoiti is an Outstanding Natural Feature/Landscape (ONFL). ONFL: Rule NFL-R1 only has one performance standard – no more than 37% reflectivity value – but lake structures are specifically excluded from needing to comply.

²² Paragraphs 6 and 7.

[024] The intent of the TALSA provisions was conveyed to structure owners in a 2003 letter from the Office of Treaty Settlements²³. That letter advised that existing structures (such as jetties, boatsheds or permanent moorings) would not be affected by the settlement. If existing structure owners were not currently charged rent, they would not be charged post-settlement. However new structures would require Te Arawa permission and could be charged rent.

[025] We find that the TALSA is evidence that, at least at the time of settlement, existing structures were considered by Te Arawa to have acceptable effects on Māori cultural values and interests. In that regard we concur with the evidence of Derek Nolan who said:

While I accept that the RMA enables cultural effects to be considered on any renewal application for these structures, so the BOPRC rightly has to consider the issues, it doesn't seem reasonable at Lake Rotoiti for such a key component of the voluntary agreement – an acceptance of cultural effects from the existing structures remaining – to be effectively overturned by a decline of RMA consents, or undermined by a grant of RMA consents for only a short term. So, while the Settlement may have been a separate process, the structures and any cultural effects arising which are being considered under the RMA are the same that applied then and were accepted by Te Arawa.

5 Section 104, 104B and 104D matters

[026] We now address the relevant aspects of the applications in terms of sections 104 of the RMA.²⁴

[027] However, before doing so we consider it useful to summarise some of the matters that were commonly raised by the applicants in their written and verbal statements of evidence, including:

- Lake Rotoiti is a unique and special place that that is appreciated and valued by the structure owners;
- the existing structures are part of the Lake's history and add to the character of the Lake;
- lakeshore properties have often been in family ownership for several generations. Many of the lakebed structures have been in existence for many decades (some for over one hundred years) and have been regularly maintained and kept in good repair over that time. Maintenance includes replacing native timber or 'galvanised iron' piles with treated timber piles and regularly replacing worn or broken timber decking;
- many existing boatsheds have been in existence since the 1950's;
- classic wooden boats are stored in boatsheds or moored at jetties as they are difficult (if not impossible) to launch from public boat ramps, they need protection from the weather when not in active use, and being permanently moored (or stored) in the Lake helps with their preservation;
- jetties are essential to enable elderly and less mobile people to board moored boats;
- jetties and private boat ramps are very often shared with neighbouring properties, including neighbours who do not have lakefront properties, thereby taking significant pressure off the public launching facilities;
- public boat ramps are difficult to access (due to roading conditions), have limited parking for cars and boat trailers and are often very congested and crowded (particularly in summer);
- the removal of any private boat ramps would exacerbate the congestion at public ramps;
- in the absence of jetties, boats would be 'dragged up' onto lakeshore beaches and reserves, which would be both environmentally damaging and inconvenient;
- boats moored at jetties are kept in the water all day, are easily accessed for multiple daily excursions, and can be rapidly deployed to assist in emergency situations²⁵ should the need arise;
- when not in active use most boats are stored in boatsheds or garages and never leave the Lake Rotoiti properties (with boat trailers not being warranted for use on the road);
- structure owners have often planted native plants on the foreshore to help prevent bank erosion and provide a natural habitat for lake wildlife;
- the current consent process had 'dragged on' for six years at great personal and financial cost to the applicants; and
- as most boats never leave Lake Rotoiti the risk of introducing noxious pests to the Lake was negligible.

²³ Section 42A Report, Appendix 7.

²⁴ On the evidence we are satisfied that any 'non-complying' activities comfortably pass through the s104D(1)(a) gateway.

²⁵ Such as assisting other boats or recreational users in distress.

[028] We agree with Mr Collier that the value of consent holder investment in the structures is significant, and under s104(2A) of the RMA that is a matter we should have regard to. In our view that primarily favours a longer consent duration.

5.1 Actual and potential effects on the environment

[029] Having reviewed the documentation we find that we should address the following matters:

- Positive effects
- Environmental effects
- Biosecurity risks
- Māori cultural values and interests
- Gisborne Point structures
- Consent duration

5.1.1 Positive effects

[030] The evidence of many applicants outlined in some detail the positive effects of the structures. That included enabling recreational use of the Lake (particularly by elderly or less able people), avoiding congestion at public boat ramps, and avoiding disturbance of the Lake beaches and foreshore (such as would occur if boats were instead 'beached' when not in use).

[031] Ms Holden considered that granting the applications would yield positive effects including:

- Enabling water based recreational activities through the provision of safe and convenient boat access to the Lake; and
- Providing aquatic habitat (for example habitat walls) which can contribute to biodiversity conservation and support the survival of kōura (freshwater crayfish) and kākahi (freshwater mussels).

[032] These positive effects naturally weigh in favour of granting the applications.

5.1.2 Environmental effects

[033] Ms Holden discussed potential effects on a range of matters including:

- Lakeshore erosion;
- Lake hydrology;
- Effects of Lake level fluctuations of structure performance;
- Lake water quality;
- Natural character and landscape;
- Amenity;
- Public access; and
- Wetlands.

[034] She noted that the structures are existing permanent structures that have been in place and maintained for many years. No changes were proposed to those structures other than their occasional repair and maintenance. Lake shore and lakebed erosion and hydrological effects were unlikely. BOPRC inspects the structures periodically and Ms Holden advised she had reviewed several structure compliance inspection reports. None of them raised issues around erosion or hydrological effects. The structures were all built under the current Lake operating regime and so adverse effects from Lake level fluctuations are unlikely.

- [035] Lake water quality was of concern to TALT. Paul Scholes'²⁶ technical review²⁷ concluded that some chromated copper arsenate (used to treat timber) would leach in the first few weeks of new timber being placed in the Lake, but leaching would reduce significantly thereafter. Structures are rebuilt infrequently and not all at the same time, so any such leaching would be localised and immediately diluted. Elevated contaminants might remain in the sediment near a rebuilt structure, but would be distributed diffusely and would not adversely affect aquatic organisms or breach the water classification standards after reasonable mixing.
- [036] The structures have been in place for a long time and so arguably do not unduly detract from of the Lake's 'natural character'. They are part of the landscape. The structures are generally constructed of timber or concrete with low reflectivity. Jetties and platforms are low lying with no railings, and so are not visually prominent. Boatsheds are mainly adjacent to residential areas and are generally of a small scale. However, retaining walls can be visually dominant and areas with a high density of jetties (such as Gisborne Point) reflect a more built urban character. Having said that, those jetties generally abut developed residential areas with limited natural character.
- [037] It is relevant that the Lake was found to be an ONFL with the existing structures in place.²⁸ It is therefore axiomatic that at that time those structures did not detract from the Lake's outstanding natural and landscape status. That must still be the case now. Consequently, we agree with counsel Lara Burkhardt that *"the natural character of the lake, or at least the Gisborne Point area, is sufficiently maintained with the current structures so that the lake in front of the Point is an ONFL. There is no need to focus on "cumulative effects" further"*
- [038] In terms of amenity, the lake structures are all privately owned and either adjoin private land, RLC owned reserves, or DOC owned conservation reserve. Structures adjoining private land are likely to have a low level of usage (compared to public ramps for example) and are unlikely to affect the amenity enjoyed by other Lake users. Structures adjoining RLC or DOC owned land may enhance amenity by improving public access to the Lake.
- [039] Privately owned jetties that occupy public space are available for public use, although Ms Holden advised that is not widely known. We discuss that further in section 8 of this Decision.
- [040] The 33²⁹ structures listed in Appendix 3 of the Section 42A Report are reportedly³⁰ within 10m of a natural wetland (as defined under the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NPS-FM). Consequently, any future maintenance or replacement activities involving earthworks (defined as alteration or disturbance of land) would trigger the need for consent under the NPS-FM. We agree with Ms Holden that routine conditions of consent can suitably avoid or mitigate effects on those wetlands.
- [041] Having regard the Ms Holden's assessment and the large volume of applicant evidence presented at the Hearing, we are satisfied that, subject to the imposition of suitable conditions of consent, the above potential adverse effects will be no more than minor and they do not weigh against granting consent for the lake structures. Nor do they necessitate a short consent duration.

5.1.3 Biosecurity risks

- [042] We understand TALT's view to be that private boat ramps, slipways and boat courts pose a biosecurity risk to Lake Rotoiti in terms of introducing noxious aquatic weeds to the Lake or transferring weeds to other lakes.

²⁶ BOPRC Senior Environmental Scientist.

²⁷ Section 42A Report, Appendix 9.

²⁸ In certain more developed parts of the Lake we understand that the ONFL excludes a buffer strip between the shore and a short distance offshore.

²⁹ The S42A Addendum removed Boat court B367A from Appendix 3.

³⁰ Some applicants disputed the 'naturalness' of some wetlands and considered they were abandoned Japanese water gardens.

- [043] We heard from David Rowe (an applicant and former Principal Scientist with NIWA specialising in freshwater ecology) who addressed that matter. He advised that the main unwanted macrophyte species in NZ were already present in Lake Rotoiti. The only ones not present were *Utricularia gibba* and *Hydrilla verticillate*. *Utricularia* is confined to several Hawke's Bay lakes including Lake Tutira. Mr Rowe considered the risk of boats using Lake Rotoiti private boat ramps introducing that weed to lake Rotoiti was negligible. We agree, particularly as many applicants advised that their boats never leave Lake Rotoiti. *Hydrilla* is confined to northern NZ lakes and is spread by birds.
- [044] As part of the post-hearing reply material, we received a copy of a document relating to BOPRC's intended mobile phone application for the self-certification of boats and trailers. This was referred to by a number of submitters. We encourage BOPRC to complete the development of that application and make its availability widely known to the consent applicants and thereafter encourage its use through normal communication and media channels.
- [045] Mr Rowe discussed the Asian clam (*Corbicula fluminea*) which is now present in the Waikato River and considered its introduction to Lake Rotoiti would be highly problematic and probably irreversible. Several applicants³¹ advised they would ban boats used in the Waikato River catchment from using their private boat ramps. In light of that, we were of the view that conditions should be imposed that precluded the use of boats from the Waikato River catchment using all privately owned boat ramps. We put that suggestion to the hearing participants as we considered it to be an easily enforced condition, as the structures are privately owned and the owners presumably control who uses them, even when their properties are rented out³².
- [046] Surprisingly, and somewhat disappointingly, our suggestion gained little support. In her end of hearing report Ms Holden advised:
- My concern with a condition banning Waikato boats is that it would be very challenging to monitor or enforce. I was informed by Greg Corbett, Regional Council Biosecurity Manager, that Asian clams are now an Unwanted Organism under the Biosecurity Act, which does provide powers. He advised that in effect, this already regulates the risk of boats moving clams from the Waikato River system. Mr Corbett advised that residual ballast/bilge water within the boat would be a risk regardless of how well cleaned the vessel is. Proving that internal ballast systems of ski boats are dry, or have been treated, will be very difficult. Biosecurity New Zealand are currently responsible for this.
- [047] We have reluctantly not imposed a condition relating to boats used in the Waikato River catchment.
- [048] Finally, on the matter of biosecurity, we note that some jetties are used in catfish trapping endeavours, through the use of fyke nets attached to the structures. That is clearly a beneficial activity.

5.1.4 Māori cultural values and interests

- [049] Effects on Māori cultural values and interests were the primary focus of the Hearing. Before we address these matters, we wish to acknowledge and record our acceptance of the evidence of TALT representative Stevie Blyth-Nepia who stated:
- "... Te Arawa have always maintained that Te Arawa lakes are a taonga and our relationship as Te Arawa with the lakes and their surrounding environments has always been the foundation of our identity, cultural integrity, wairua, tikanga and kawa. The Settlement addresses a number of Crown actions and omissions that have caused ongoing grievance to Te Arawa through returning the ownership of fourteen lakebeds, fisheries redress and the mandate for the Rotorua Te Arawa Lakes Strategy Group."
- [050] In our view Māori cultural values and interests include effects on kōura and kākahi and the harvesting of those native species. We address that matter first.

³¹ Including Te Toroa Ltd represented by Mr Rowe.

³² Rental agreements could simply preclude the use of such boats.

- [051] Alastair Suren's³³ technical review³⁴ noted that kōura and kākahi are mostly nocturnal so would not be active during the day when people are most active on the Lake. He advised lake structures provide habitat for kōura and kākahi. Aquatic plants often colonise submerged structures in lakes and provide food and shelter for a wide range of invertebrates, including kōura. Degraded water quality and invasive plants and animals (including catfish) were likely to have had far greater effects on the abundance of kōura and kākahi in lake Rotoiti than man-made structures.
- [052] BOPRC technical advisor Ian Kusabs³⁵ considered³⁶ ramps, jetties and lakeshore protection structures generally provided good habitat for kōura, which can often be locally abundant around the structures. However, he advised that tall growing macrophytes obstruct kōura movement and kākahi abundance. He thought that exotic weed removal might therefore provide some localised improvement in habitat.
- [053] In response to that technical advice, Ms Holden recommended a consent condition requiring structure consent holders to keep the lakebed 3 metres beyond the end and 3 metres each side of a boat ramp or slipway (where practicable) free of aquatic pest weeds. On the evidence of many applicants, we are not persuaded that is a 'workable' condition as it may be difficult for 'lay people' to consistently distinguish aquatic pest weeds from native aquatic plants³⁷. We are also mindful that conditions must relate to the effects of the boat ramps and slipways and as Ms Barry-Piceno said, "*[the] lake structures do not cause the effect, so the conditions [requiring weed removal] do not meet the Newbury or Estate Homes test.*"
- [054] Nevertheless, we consider that should structure owners wish to remove aquatic pest weeds on their own initiative (some applicants indicated that they already do that), then that should be facilitated by BOPRC. For example, Rhys Knauff said:
- As farmers, we are also very used to managing pest weeds, and would therefore be happy to assist with the removal of pest weed species from in front of our wall and ramp. ... We would be happy to do this with guidance from the Regional Council. I see that the Regional Council have an important role to play in terms of education and training in terms of weed control as well as the publication of guidance.*
- [055] However, we do not consider that 'guidance' can be 'required' by way of consent condition³⁸.
- [056] TALT were concerned that vertical timber retaining walls did not provide suitable habitat for kōura. We understand their preference was for any replacement walls to be constructed of gabions or rock 'rip-rap'. We find that to be a reasonable request, but accept the evidence of some applicants³⁹ that rock gabions are difficult to install and in Lake Rotoiti gabions tend to rust and lose their structural integrity. That would not be the case with rock 'rip rap'. As we observed on our site visit, rock 'rip rap' also has a more natural appearance. We find that ideally rock 'rip rap' should be used when an entire retaining wall is being replaced, but other solutions may be equally suitable and the consent conditions should be flexible in that regard.
- [057] TALT were also concerned about lakebed structures impeding their ability to harvest kōura and kākahi, particularly in areas such as Gisborne Point. Relevantly, the observation of many Gisborne Point applicants was, despite lakebed structures providing habitat for kōura, few if any kōura inhabit the area. The evidence from applicants was that the Lake is relatively shallow at Gisborne Point⁴⁰ and so it is easy to wade around the jetties or climb over them, particularly close to the shore. Some jetties even have steps that enable people to climb up and over them.
- [058] Regarding access to the Lake for kōura harvesting activities, as noted by Mr Collier, there are a number of publicly available access points to the Lake (often facilitated by esplanade reserves), and vegetation along

³³ BOPRC Senior Environmental Scientist.

³⁴ Section 42A Report, Appendix 9.

³⁵ Fisheries biologist.

³⁶ Section 42A Report, Appendix 9.

³⁷ We understand consent is required to remove native aquatic plants.

³⁸ Conditions cannot purport to bind third parties.

³⁹ Including David Harris.

⁴⁰ Some applicants (including Miles Nathan) say that is a result of north westerly winds over the last 20 years constantly washing floating lake weed and dead sprayed weed onto Gisborne Point where it has gradually rotted down and formed mud.

the foreshore provides more of an access barrier than do the structures. Importantly, at the hearing TALT representative Haimona Te Nahu advised that TALT's issue with the structures was not that they impeded access to kōura, but rather the existing structures (we understand particularly wooden retaining walls) did not provide kōura habitat.

- [059] We find on the evidence that the adverse effects of the structures on the abundance kōura and kākahi are negligible and if anything, those effects are positive in terms of providing habitat. Nor do the structures unduly impede the harvesting of kōura and kākahi.
- [060] TALT sought to promote the sharing of structures. As we noted previously, the evidence of many applicants was that structures are already shared, both formally and informally, between adjoining properties or between families, although in some areas of the Lake sharing is not practical for a variety of reasons. On the evidence we find that ample sharing of structures already occurs.
- [061] At the hearing we asked the TALT representatives to summarise their concerns. Mr Te Nahu advised that in TALT's view the structures only "*take from the Lake*". He explained his use of the word "*take*" related to people enjoying the recreational attributes of the Lake. We see no issue with the structures facilitating recreational use of the Lake. After all, "*the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers*" is a matter of national importance⁴¹ which we must recognise and provide for. Having said that, we have amended Condition 5.1(d) to provide what we understand⁴² to be an element of "giving back", as discussed further in section 8 of this Decision.
- [062] TALT wished the lakebed structure owners to acknowledge TALT's ownership of the lake bed. It was clear to us from the majority of the applicants' evidence that TALT's lakebed ownership was both acknowledged and highly respected. However, TALT wished to see a consent condition imposed that required the consent holders to acknowledge TALT's ownership. The majority of the applicants who addressed that matter were either supportive or ambivalent about such a condition. Out of respect for TALT's view on this matter we have imposed a condition requiring consent holder acknowledgment.
- [063] The issue of structures located within 100m of each other or within 400m of a terrestrial site of cultural significance having any adverse cultural effect was disputed by many applicants. The evidence of some applicants⁴³ that TALT has readily approved new structures located with 100m of existing structures. We address that matter in section 8 of this Decision.
- [064] Finally, we wish to address the tikanga Māori principles centered on aroha (respect), tau utuutu (reciprocity) and kawenga (responsibility) raised by Ms Blyth-Nepia. As we have already stated (in section 5 of this Decision) the overwhelming weight of evidence from the applicants was that they respect both the Lake and TALT's ownership of the lake bed. Most if not all applicants explained how they felt a responsibility to respect and enhance the Lake's values, including through participating in environmental enhancement activities⁴⁴ and teaching their children and grandchildren to value and respect⁴⁵ "*the cultural features and important historical sites around the Lake*". We find that is in accord with the principle of reciprocity or 'giving back' to use the words of Mr Te Nahu.

5.1.5 Gisborne Point

- [065] TALT were concerned about what they considered to be a 'proliferation' of private structures at Gisborne Point. Ms Holden initially queried whether a shorter consent duration would be appropriate for those structures. We are not persuaded that is necessary. The evidence was that the 'density' of private structures at Gisborne Point was no greater than in other highly urbanised parts of the Lake. Miles Nathan

⁴¹ RMA s6(d).

⁴² Based on our experience in the Waikato River catchment.

⁴³ Including Donald Atkinson.

⁴⁴ Such as riparian planting, weed management, participation in the lake Water Quality Society, voluntarily precluding 'Waikato River catchment' boats from using private boat ramps, catfish catching using fyke nets attached to jetties, bird monitoring, protecting dabchick nesting areas (including inside boatsheds), not dragging boats over the beach and foreshore areas, and replacing retaining walls with 'habitat walls'.

⁴⁵ John and Pamela Gaddum.

advised that there are 44 jetties at Gisborne Point servicing 173 dwellings, indicating that the sharing of structures already occurs.

[066] The evidence from some applicants was that no new private structures had been built at Gisborne Point since 1975⁴⁶. Roy Duffy helpfully demonstrated (based on information provided by BOPRC) that since 2006 the only new Lake structures established at Gisborne Point were two new public jetties, two new public retaining walls and one new public boat ramp. Those structures were all approved and licenced by TALT.

[067] We are not persuaded that the structures at Gisborne Point unduly impede the gathering of kōura. For example, David Harris⁴⁷ said:

We don't have a problem with Kōura being searched for and feel that our jetty is not stopping this activity, as the water around our jetty is very shallow allowing easy wading around or stepping over it, there is even an added rail for this event.

[068] As noted by counsel Lara Burkhardt, many of the Gisborne Point applicants support the replacement of retaining walls with rock wall alternatives, when necessary, which would assist in providing habitat for kōura, which the jetties already do.

[069] At the hearing we asked the TALT representatives what their concern was with a concentration of structures in any one area (such as Gisborne Point). Mr Te Nahu responded that it had three components, namely a decline in kōura, a decline in water quality and algae blooms. We have already found that the structures have not contributed to a decline in kōura. We understand the decline in lake water quality results from adjoining land use activities (such as agricultural runoff and septic tank seepage). Mr Te Nahu thought that the boats using the structures would leak fuel and oil into the Lake, however we received no evidence of that being a problem. We understand that algae blooms are related to a decline in water quality and normal weather patterns.

[070] On the evidence we do not consider that structures at Gisborne Point should be singled out for special treatment in terms of consent duration.

5.1.6 Consent duration

[071] We understand that the applicants initially sought a duration of 35 years, but as a result of the pre-hearing meetings nearly all of the applicants now support a duration of 30 years. Apton Investments Limited⁴⁸ sought a duration of 20 years.

[072] As we referred to earlier, Ms Holden initially recommended a duration of 30 years, but was unsure if that should apply to the structures at Gisborne Point⁴⁹. At the end of the hearing, she recommended 30 years for all structures.

[073] TALT's submission sought a duration of 10 years and at the hearing the TALT representatives confirmed that was still the relief sought.

[074] From the available documentation we understand⁵⁰ that TALT's desire for a 10 year duration stems from He Mahere Taiao mō ngā Wai o Te Arawa⁵¹ and a desire to protect the Te Arawa's intergenerational relationship with the Lake and ensure an opportunity to participate in future decision-making for the Lake. In particular, TALT staff intend to continue gathering information about the structures and expect to better understand the impacts of the structures in 10 years' time. While respecting that desire, we find that the effects of the structures should be determined now on the basis of the evidence presented to the hearing.

⁴⁶ Richard Gaddum.

⁴⁷ jetty B90 at 47 Wharetoroa Drive at Gisborne Point.

⁴⁸ Jetty B154, boat ramp B154A and jetty B155

⁴⁹ Section 42A Report, section titled "Term of Consent".

⁵⁰ Section 42A Report, page 36.

⁵¹ Te Arawa Lakes Environmental Plan. November 2019

We also observe that it has been 17 years since the TALSA was enacted and that would arguably have provided ample time for Te Arawa to “understand the impacts of the structures.”

- [075] At the hearing we asked the TALT representatives what might be different in ten years’ time such that the existing structures would warrant reconsideration. Mr Te Nahu indicated that related to upgrading the structures with ‘new technologies’. When we pressed him on what that meant he said he had no particular ‘new technologies’ in mind other than replacing existing retaining walls with rocks or gabions (namely the use of habitat walls). We note the recommended conditions addressed that issue.
- [076] As did many applicants, Ms Holden noted that the policy in He Mahere Taiao mō ngā Wai o Te Arawa regarding a 10-year term referred to circumstances in which a longer term would be considered:

Policy 7.2.5: *The duration of resource consents for lake structures should not exceed 10 years. However, the Lakes Trust is open to a longer consent term where Objective 7.2D is met.*

Objective 7.2 D: *Promote and provide for structures that:*

- *Enable shared use.*
- *Mitigate cultural, spiritual and/or cumulative impacts.*
- *Are located and designed appropriately.*
- *Are safe to use and not hazardous for cultural practices.*
- *Provide multiple benefits e.g. ecological, recreational, cultural*

- [077] On the evidence before us we are satisfied that the criteria in Policy 7.2.D are met, perhaps other than the need to mitigate cultural and spiritual impacts to the satisfaction of TALT. However, for the reasons we discussed in section 5.1.4 of this Decision, we do not find that provides justification for a 10-year consent duration.
- [078] Under RMA section 113(1)(b) we must state the reasons for deciding on a shorter duration if we impose one that is shorter than what was specified in the applications (which we now take as 30 years). As we discuss below, in this case we find there are no such reasons.
- [079] Given the provisions of the TALSA referred to in section 4.6 of this Decision, it seems to us that a shorter duration cannot be used as a mechanism to ‘force’ the removal of existing lakebed structures. As submitted by Ms Hamm⁵², at the time of settlement “...these very structures with their cultural effects were agreed to by Te Arawa.” Instead, in our view a shorter duration would only be justified if there was uncertainty about the adverse effects arising from the structures, such that those effects should be reassessed at the end of a short consent duration and a decision made on whether or not the consented activity should be discontinued. That would only be the case if the adverse effects in ten years’ time were both significant and unable to be mitigated or remedied.
- [080] On the evidence before us we fail to see that being a realistic proposition. We have already found that the existing structures do not have any more than minor adverse effects on landscape, visual, water quality, aquatic ecology and biosecurity matters. That situation is unlikely to be different in ten years’ time.
- [081] We acknowledge that some of the existing structures are said by TALT to have more than minor adverse effects on Māori cultural values and interests. We acknowledge TALT’s view on that matter. However, in terms of TALT’s Cultural Mapping Report we are not persuaded that adverse cultural effects arise simply because structures are located within 100m of each other or within 400m of a terrestrial site of cultural significance such as a marae, urupā or historical pa. We note the absence of site-specific evidence as to why such blanket assumptions would be appropriate. As noted by Mr Batchelar, the Environment Court has previously determined that there needs to be an evidence based, site specific assessment which demonstrates that a short duration is required. Our questioning of the TALT representatives at the hearing did not elucidate any such site-specific information.

⁵² Paragraph 9.

[082] The Court has also said that a short consent duration would not be justified solely on the basis that it is required to meet Council's Treaty of Waitangi obligations, or as a method of recognising and providing for the relationships of Māori under RMA s6(e) or s7 (with respect to kaitiakitanga).

[083] In terms of relevant case law, Ms Burkhardt and Ms Hamm both submitted that the latest decision in respect of term of consent was *Ngāti Kuku Hapu v Bay of Plenty Regional Council* [2023] NZEnvC 163. It referenced at [108] the case of *Brooke-Taylor v Marlborough District Council* EnvC W67/2004, where the Court noted that:

... it is not efficient in terms of s.5 to require applicants to submit a full application in 10 years for a structure designed to last 50 years, when there is nothing to suggest the proposed jetty requires re-evaluation from an RMA perspective at the end of the decade.

[084] We find our view on the inappropriateness of a short duration to be consistent with the Court's finding.

[085] Finally, we question the administrative efficacy of a 10 year consent duration. This was an issue raised by many applicants, including Paul Lambert who said:

The evaluation in 10 years will be very similar to the evaluation today, and the current consent process has consumed 5 years of time, with funding provided by consent holders (and ratepayers). Reconsenting at short intervals imposes uncertainty and cost on consent holders to re-address issues that should be adequately addressed by the current process.⁵³

[086] Having regard to the above matters we find that all the applications should be granted for a duration of 30 years.

[087] An interesting issue arises as to when the new duration should commence, namely from the date the existing consents expired or from the date of this Decision. In this case we consider that the new consent duration should commence from the date of the granting of the applications in accordance with s123(d) of the RMA.

[088] Having said all of the above, we observe that the review condition (CR.1(b)) provides a broad discretion to BOPRC to "add, modify and/or delete consent conditions to deal with any adverse effect on the environment or on the relationship of tangata whenua with Lake Rotoiti that occurs as a result of the exercise of" the consents. That may provide some comfort to Te Arawa.

5.2 National environment standards and other regulations

[089] Apart from the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 in relation to 'wetlands', no other relevant national environmental standards or regulations were brought to our attention and we are not aware of any.

5.3 National policy statements

[090] The NPSFM is applicable. Our own assessment follows.

[091] The sole Objective 2.1(1) of the NPSFM is:

The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems*
- (b) second, the health needs of people (such as drinking water)*
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future*

⁵³ Paul Lambert.

- [092] As we have found that the effects of the structures on lake water quality and lake ecology are no more than minor, Objective 2.1(1)(a) is most relevant to the issue of lake shore retaining walls. TALT was of the view that new and replacement retaining walls should be constructed of either gabions or rock rip-rap in order to provide habitat for kōura. We discussed that earlier in this Decision. Objective 2.1(1)(c) is relevant to the ability of the structure owners and users to access the Lake and protect their properties from lake shore erosion. We are satisfied that can occur in manner that does not detract from achieving Objective 2.1(1)(a).
- [093] Given that the applications involve lake shore structures we consider the most relevant NPSFM policies to be Policies 1, 2 and 15.
- [094] Policy 1 is to manage freshwater in a way that gives effect to Te Mana o te Wai. The NPSFM states that Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. This largely replicates NPSFM Objective 2.1 which we addressed above.
- [095] Policy 2 is that tangata whenua are actively involved in freshwater management (including decision making processes) and Māori freshwater values are identified and provided for. In this case that was achieved through the applicant's consultation and prehearing meetings with TALT, our consideration of the TALT submission and TALT's appearance at the hearing.
- [096] Policy 15 is that communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with the NPSFM. Granting the applications subject to a suite of appropriate conditions will achieve that outcome.
- [097] In overall terms we find that approving the applications, subject to a suite of appropriate conditions of consent, would be consistent with the NPSFM.

5.4 Regional Policy Statement, RNRP and RDP

- [098] Ms Holden assessed⁵⁴ the applications against these statutory instruments and we adopt her assessment without repeating it here. We understand her conclusion to be that granting the applications, subject to the imposition of suitable conditions of consent, would not be inconsistent with the relevant provisions of those instruments. We agree and note that Mr Collier did not seem to take issue with Ms Holden's assessment⁵⁵.
- [099] Counsel Lara Burkhardt referred to the provisions of the RDP and RNRP. We understand her submissions to be that with regard to the relevant provisions of those instruments, the outstanding issue in each case is Māori cultural values⁵⁶. However, we agree with Ms Burkhardt⁵⁷ that *"In this case, it is unlikely that the plan intended for wholesale restrictions to be imposed on consents for existing structures, or groups of them. The objectives and policies are not of a "sinking lid" type that require a specific outcome."*
- [100] In particular, we find that the applications⁵⁸ requiring a non-complying activity consent under the RDP are able to pass through the section 104D(1)(a) 'minor effects' gateway.

5.5 Iwi and hapū management plans

- [101] Ms Holden discussed⁵⁹ the Te Tuapapa o nga Wai o Te Arawa, which is Te Arawa Cultural Values Framework. Ms Holden concluded that in most areas of the Lake, re consenting the lake structures would be largely consistent with Te Arawa's Framework. However, she noted that He Mahere Taiao mō ngā Wai o Te Arawa indicated that the structures at Komuhumu/ Gisborne Point did not align with Te Arawa's aspirations to enhance access to the Lake for cultural practices, the physical connection of Te Arawa hapū

⁵⁴ Section 42A Report, sections titled "Rotorua District Plan", "Regional Natural Resources Plan" and "Regional Policy Statement".

⁵⁵ Ms O'Connor did not address the statutory instruments.

⁵⁶ Legal Submissions on behalf of the Gisborne Point Applicants, 23 August 2023, paragraph 13.

⁵⁷ Ibid paragraph 33.

⁵⁸ As we noted previously, these are the structures that did not have existing resource consent.

⁵⁹ Section 42A Report, section titled "Other matters (S104(1)(C)).

and iwi to the Lake, and the ability to pass on cultural practices to Te Arawa Tamariki. We discussed that particular matter in sections 5.1.4 and 5.1.5 of this Decision.

5.6 Other matters

[102] Some applicants expressed a desire for better communication with TALT which could be facilitated by some form of 'community liaison group'. As Ms Burkhardt⁶⁰ submitted many applicants " *support addressing cultural concerns kanohi ki te kanohi, and through a "group" to address concerns in a partnership rather than an adversarial approach.*" We found that to be an option worth exploring and so we asked the TALT representatives about that at the hearing. Mr Te Nahu responded that TALT's preference was to liaise with the Te Arawa Lakes Strategy Group (TALSG) which better represented Te Arawa's status as a Treaty partner. He advised the TALSG was currently being reviewed and so the formation of any sort of community liaison group' for lake structures should follow that review process. That being the case we have not pursued the 'community liaison group' any further.

[103] No other relevant matters were brought to our attention, and we are not aware of any.

6 Part 2 matters

[104] Following the Court of Appeal's judgement on *RJ Davidson Family Trust v Marlborough District Council* we have not separately assessed Part 2 matters as we consider that the relevant plan provisions have clearly given effect to Part 2 and so assessing the Part 2 matters "would not add anything to the evaluative exercise".

7 Determination

[105] Pursuant to the powers delegated to us by the Bay of Plenty Regional Council under section 34A(1) of the Resource Management Act 1991 (which includes section 9 RMA functions, powers and duties transferred to them by the Rotorua Lakes Council), we record that having considered the evidence and legal submissions and the BOPRC Section 42A Report; and having considered the various requirements of the RMA, we find that:

- a) Based on the evidence before us, the actual and potential adverse effects of the applications are either no more than minor or can be suitably avoided, remedied or mitigated by readily enforceable consent conditions;
- b) The applications if granted will have substantial positive effects; and
- c) The applications are consistent with the provisions of the relevant existing statutory instruments.

[106] We therefore **grant** the applications.

[107] Our reasons are set out above and are expanded upon in the body of this Decision.

8 Consent conditions

[108] Ms Holden initially recommended a suite of conditions that would vary depending on the type of structure authorised. We had a number of queries regarding those conditions which we put to the hearing. We also received comments on the recommended conditions from 'lay person' applicants and from planners Aaron Collier and Burnette O'Connor.⁶¹ We asked Ms Holden, Mr Collier and Ms O'Connor to 'caucus' on the conditions in light of our questions and come back to us with a revised suite of recommended conditions. We received the revised suite of conditions on 5 September 2023.

[109] We have considered the revised conditions and undertaken our own assessment of their clarity, certainty practicality and necessity. In doing so we were mindful of the 'Newbury' tests referred to by Craig Batchelar. These tests require that any condition must:

⁶⁰ Ibid paragraph 29(h).

⁶¹ We received evidence from experienced planner Craig Batchelar, but as a structure part-owner he appropriately advised his evidence was not to be taken as 'expert evidence'.

- Be for a resource management purpose, not for an ulterior one;
- Fairly and reasonably relate to the development authorised; and
- Not be so unreasonable that no reasonable planning authority could have imposed them.

[110] Without intending any disrespect to Ms Holden, Mr Collier and Ms O'Connor, we consider that the final suite of recommended conditions would benefit from substantial amendments to clarify their intent, simply their wording, and avoid unduly onerous and unnecessary obligations. We find that:

- We were not told what the relevant RDP rules were for existing lake structures. We have assumed them to be Rules RURZ-40.1, RESZ-R24.1, WTRZ-R3.3 and CNSZ-R8.3, but it may also be Rule 10.3.1 so we have listed all of those rules;
- The word "shall" should generally be replaced with the word "must" to reflect modern drafting style;
- Condition 3.1(b) was a newly recommended condition, but we consider it to be appropriate and it addresses the issue regarding "fairy lights" on high poles that we observed on several jetties. We have however amended the wording relating to the height of the jetty above the Lake surface to be consistent with the RLC's RDP rule RESZ-R24.1.c;
- Condition 4.1 (a) can simply refer to the BOPRC consent plan;
- Condition 4.2(a) should require the BOPRC request to be in writing;
- Condition 4.3(c) should be amended to refer back to the recommendations of the suitably qualified and experienced professional;
- The conditions should not refer to 'construction' as that denotes a new structure which would require a separate consent. Accordingly, references to "construction and maintenance" in the first and second columns of the conditions table should be amended to "Repair and maintenance";
- Condition 5.1(a) should refer to "lake water discoloration";
- Condition 5.1(b) should require the consent holder to inform BOPRC in writing of the of the erosion and sediment control methods to be used;
- Condition 5.1(c) should impose an "as far as is practicable" obligation on the consent holder, consistent with the terminology used in Condition 5.1(d). It should also refer to "the lakeshore", again to be consistent with Condition 5.1(d);
- We have amended Condition 5.1(d) to require enhancement of the lakeshore. We consider that to be consistent with TALT's desire see a "giving back to the Lake". This could be achieved by way of additional lake shore planting or the placement of rocks to stabilise the lakeshore and provide aquatic habitat;
- Conditions 5.3 and 5.4 should be amended to impose an actual obligation on the consent holder;
- Condition 5.4 as recommended to us was cumbersome. We have simplified its wording and imposed a new condition 5.4A regarding written confirmation from DOC that they have no objection to the works proceeding. Condition 5.5 should be similarly amended;
- The first part of condition 6.1 should be amended to refer to the consent holder's acknowledgement of Te Arawa's ownership of the lakebed. The second part of condition 6.1 should be recast as an Advice Note, because it is explanatory information as opposed to an enforceable consent holder obligation;
- Condition RY.1 should be amended to impose an actual obligation on the consent holder. It should also be simplified to refer to repair or maintenance that results in replacement parts being used on the structure and the subjective term "substantial maintenance" should be omitted;
- We agree with Mr Collier that the weed removal condition originally recommended by Ms Holden (WR.1) should be omitted for the reasons discussed in the body of this Decision. Having said that, we observe that many applicants advised that they cleared dislodged weed that washed up on the foreshore, although some lamented the absence of a disposal facility for that weed;
- Condition 7.1 should be simplified and amended to impose a definitive and enforceable obligation on the consent holder;

- Condition 8.1 should be simplified and amended to impose an enforceable obligation on the consent holder and avoid subjective phrases. The second part of the condition sought to impose an obligation on the public (a third party) and so we have amended the wording accordingly;
- Condition 9.1 should be limited to repair and maintenance works below the water surface. We agree with David Rowe that it would be unduly onerous (and impractical in some situations) to relocate any kōura 500m away. In the absence of any definitive evidence on a more suitable distance we have opted for a distance of 50m;
- Condition 9.1 should apply to all boat ramps and retaining walls, including replacement retaining walls subject to the HW conditions;
- Where existing retaining walls are to be replaced, condition HW.1 should be amended to make it mandatory to use a habitat wall. This will ensure that kōura habitat is actually improved over time which we understand was one of the primary matters of concern to TALT;
- Condition HW.3 (which is now HW.2 under our conditions) requires substantial redrafting including to:
 - Refer explicitly to the proposed use of an alternative habitat wall design that is not consistent with Advice Note 17;
 - Not require the alternative design to be certified by the BOPRC because our amended condition HW.1 requires a habitat wall be constructed and all what is now condition HW.2 does is provide an evidential basis (as determined by a suitably qualified professional) for a habitat wall design that differs from a standard wall design referred to in Advice Note 17;
 - Clearly specify the contents of the alternative habitat wall report, including whether the site is suitable habitat for kōura or kākahi and whether the materials proposed to be used will have any adverse effects of Lake water quality;
 - Document the structural integrity of the wall and its erosion protection functionality
 - Not provide information on costs as that is not material to the environmental effects of the alternative wall design; and
 - Not require the report to document how the recommended solution meets Te Arawa Lakes Trust's objectives for the health and wellbeing of the Lake as that is a vague and subjective requirement.
- What was condition HW.4(b) should be omitted because Condition 9.1 now applies to replacement retaining walls;
- We are not persuaded that alternative habitat retaining wall designs need to be formally certified by the BOPRC. We have therefore merged what was conditions HW.4 and HW.5 (now condition HW.3) and require the design plans of the habitat wall to be provided to BOPRC. We have also stated that works on the alternative habitat wall cannot commence until such time as written confirmation is received from the BOPRC. That will enable BOPRC to evaluate the alternative habitat wall design and decide whether or not it is suitable. We envisage that any unsuitable designs would be discussed between BOPRC and the applicant and any areas of concern resolved through those discussions;
- Unfortunately, the recommended advice notes were not numbered sequentially (there was no note 10 or note 18) so we have amended the numbering. That required us to make a judgement call on which advice notes should be referred to in the conditions. The following bullet points refer to the advice note numbering that is now in our Appendix 1;
- Advice Note 2(a) should refer to the footprint of the structure at the date of grant, namely 8 September 2023;
- Advice Note 6 should be amended to clarify its meaning;
- Advice Note 7 did not make sense to us and so we have simplified it;
- Advice Note 12 should be amended to clarify its meaning;
- The last sentence of Advice Note 14 regarding the contents of a letter that would be addressed to TALT should be omitted as it assumes that TALT will not promptly respond to any such letter and we have no evidence that will be the case;
- Advice Note 17 should not refer to gabion baskets for the reasons discussed in the body of this Decision; and

- We have inserted Advice Note 20 to advise how DOC and Fish and Game may be contacted.

[111] The conditions we have imposed address the above matters.

[112] We note that in her pre-circulated evidence Ms O'Connor commented on recommended condition 8.1 regarding an additional requirement to provide information to the public informing them of what reasonable use of the jetty by its owner constituted. She suggested signage at public access points to the Lake stating that "*public use of structures shall not prevent an owner of a structure accessing that structure at any time, and if requested to move to enable access, members of the public shall abide that request*". We do not find that to be within the scope of our consideration and note that in any case we cannot purport to bind third parties including the general public.

[113] The conditions we have imposed are attached as Appendix 1 to this Decision.

[114] Given the extent of amendments that we have made to the final suite of recommended conditions it is conceivable that they may now contain minor mistakes or defects. Accordingly, should the Council, Ms Hamm or Ms Burkhardt identify any minor mistakes or defects in the attached conditions, then we are prepared to issue a revised schedule of conditions under s133A of the RMA correcting any such matters. Consequently, any minor mistakes or defects in the amended conditions should be brought to our attention prior to the end of the 20-working day period specified in section 133A of the RMA.

Signed by the commissioners:



Poto Davies



Rob van Voorthuysen (Chair)

Dated: 7 September 2023