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LAKE TARAWEA

Our reference
1027395

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Tēnā koe Libby

Lake Tarawera wastewater scheme - role of Lake Rotokākahi Control Board

Introduction

- 1 We understand that:
 - 1.1 Stage 1 of the reticulated wastewater scheme is well underway (commencing in May 2023). This is the construction of the wastewater mains network, being all equipment installed into the road to collect sewage from each property and transport it to the main Wastewater Treatment Plant.
 - 1.2 Stage 2 will be later this year, with the connection of properties to the mains network, including onsite installation of Low-Pressure Grinder Pumps and connections from each property.
 - 1.3 The Lake Rotokākahi Control Board (**Control Board**) may be considering opposing the Stage 1 pipeline that runs past the Lake Rotokākahi and there is a suggestion of an injunction being sought to prevent the installation of the pipeline near the Lake.
 - 1.4 The Rotorua Lakes Council (**Council**) has advised the relevant part of the pipeline is entirely within legal road as shown below (the yellow line is depicting the extent of the road parcel, and the dotted blue line is the pipeline location):



Figure 1: Satellite image of the Northeastern end of Lake Rotokākahi provided by Council.

- 2 Accordingly, you have asked us to provide advice on the status and powers of the Control Board. In particular, you have asked:
- 2.1 What is the legal nature of the Control Board?
 - 2.2 What is the exact area of land over which the Control Board has ownership and/or authority?
 - 2.3 Is the Control Board governed by laws such as the Local Government Act 1974 (**LGA 74**) or 2002 (**LGA 02**) and the Resource Management Act 1991 (**RMA**) or does it have some specific carve out from such laws of general application?
 - 2.4 Is the Control Board subject to the Council's powers to install the Stage 1 pipeline past the Lake?

Overview

- 3 In summary, our views are:
- 3.1 The Control Board was formally established as a result of a statutory provision in the Māori Purposes Act 1931, requiring the Lake to be administered and controlled by the Control Board and giving the Governor General the power to appoint the members of the Board (the last set of members appear to have been appointed in 1998).
 - 3.2 In August 1970, Lake Rotokākahi was declared Māori Freehold Land by the Māori Land Court and it recorded 1042 people as being entitled to the land as tenants in common in various proportions.
 - 3.3 In January 2007, a qualified certificate of title was issued for the Lake and the current record of title (updated in 2020) specifies a number of 'responsible trustees' for administering the Lake on behalf of the beneficial owners of the Lake. Those responsible trustees are a different group of people from the Control Board members appointed in 1998.
 - 3.1 This suggests the responsible trustees administering the Lake for the beneficial owners could be different from the Control Board (which has the statutory right to administer and control the Lake) or that there is a further document we have not been able to locate (for example, a further Gazette Notice appointing different members to the Control Board or a further Māori Land Court order). However, we do not consider this is necessary to determine because which entity (or whether both entities consist of the same people or not) controls and administers, or owns, the Lake, does not alter the fact the land where the pipeline is located is on legal road, not the Lake.
 - 3.2 We have found nothing publicly available that suggests the Control Board has any specific rights or powers in relation to what happens on land adjoining the Lake, over and above the recognition given to any other relevant Māori entity under the law. For example, Council will have its own internal protocols/policies on who and when it consults with iwi related entities within the District (which may include the Control Board). An example is the Council's Significance and Engagement Policy does specifically acknowledge that 'importance to Te Arawa' is one of the criteria it will use to assess the significance of a decision (which influences the engagement Council will undertake). That Policy also acknowledges that Council should actively provide opportunities for Māori and tangata whenua to contribute to its decision-making processes.
 - 3.3 There is no suggestion in the Māori Purposes Act 1931 that the Control Board's powers extend beyond the Lake itself. This is consistent with the information supporting the registration of the Freehold Order in 2006, which included a 'sketch

plan,' which is the same plan used in the qualified record of title, which is consistent with the Lake shape and area.

- 3.4 Lake Rotokākahi has a qualified record of title, meaning no formal survey defining the boundaries of the Lake has been deposited with Land Information New Zealand (LINZ). The sketch plan in the record of title is an approximate guide to the location of the boundaries, but it is not determinative. The legal road also does not have a surveyed boundary and the LINZ mapping showing the road does have a margin of error of 1-100m. This does leave the exact boundary of the Lake and road open to challenge by third parties or debate by the Lake owners. However, given the nature of the subject land is a Lake and the documents do not suggest any land is involved (other than the islands in the Lake), we consider it is likely that the boundaries of the Lake follow the normal margin/edge of the Lake.
- 3.5 The RMA, LGA 74, and LGA 02 do not expressly identify the Control Board as having any exemptions and the Control Board has no special role under those Acts (over and above the extent to which they recognise the role of Māori and tangata whenua in local government decision making and consenting). The Māori Purposes Act 1931 also does not provide any exemption from any laws.
- 3.6 The Council has broad powers to construct and install any works it considers necessary for sewage and stormwater drainage in its district. It has specific powers to do this on private land under section 181 of the LGA 02, and section 12 of the LGA 02 gives the Council full capacity to undertake any activity for the purposes of performing its role, which includes managing its wastewater network (including on Council's legal road). If the works were on private land, there is a requirement in section 181 of the LGA 02 to obtain prior written consent from the owner of the land or if no consent can be obtained, the process set out in Schedule 12 of the LGA 02 needs to be followed.
- 3.7 As the proposed pipeline is entirely within legal road and the Council is the owner of that land, owner's consent is not really an issue. The Council can proceed to construct the pipeline, subject to obtaining any consents that may be necessary to do so (eg, a resource consent). There is no requirement in section 181 of the LGA 02 to obtain the consent of the Control Board for Land outside of the Lake. However, as noted above, there may be consultation requirements with mana whenua as a result of Council's own policies or protocols, which we have assumed were considered at the time the Council decided to proceed with this pipeline proposal.
- 3.8 As we can find no specific powers that require the Control Board to approve the construction of the pipeline on the legal road adjoining the Lake, the most likely way it could pursue an injunction would be to instigate a judicial review of the Council's decision to proceed with the construction of the pipeline on the basis Council followed an incorrect process when making that decision. For example, due to inadequate consultation, omitting to consider a relevant matter, unreasonableness or making an error of law. As part of such a proceeding, the Control Board can seek an order prohibiting the Council taking any further action in reliance on the statutory power in question (ie, continuing with the pipeline construction), subject to any terms and conditions the Court sees fit. These can also be sought on an interim (urgent) basis to prevent construction continuing (ie, before a full hearing of the substantive issues).

4 We set out our reasons for these conclusions below.

The legal nature of the Lake Rotokākahi Control Board

History of the Control Board and ownership of the Lake

- 5 We have found reference to a 1922 agreement between Te Arawa and the Crown in relation to the Te Arawa Lakes, but we have not been able to obtain a copy of that agreement to confirm if this was the inception of the Control Board. However, a 1922 newspaper article and

a historical summary as part of the Treaty settlement process for Te Arawa suggests the agreement refers to a special board to be appointed for the control of Lake Rotokākahi (as part of an out of Court settlement for litigation relating to ownership of the Lake)¹.

- 6 The Control Board was formally constituted in 1926 by Order in Council by the Governor-General² (pursuant to section 14 of the Native Land Amendment and Native Land Claims Adjustment Act 1923 (now repealed)). The Order in Council vested the 'control and management' of the Lake and 'the island therein' in the Control Board, which consisted of 10 listed members. The power in the previous 1923 Act is now recorded in section 21 of the Māori Purposes Act 1931 (still in force) which states that administration and control of the Lake shall be by the Board of Control, consisting of at least 6 members:

The administration of Rotokākahi Lake (or Green Lake), situate in the Waiariki Māori Land Court District, together with the islands therein, including the Punaruku Island, shall be controlled by a Board of Control constituted by the Governor-General, consisting of not less than 6 persons, of whom 5 shall be members of the Tuhourangi and Ngatitumatawera Subtribes of the Arawa Tribe.

- 7 The most recent Gazette notice we can find is a 1998 by Gazette notice appointing members to the Control Board. They are:

Tame Amotama	Akuhata Morrison	Anaru Rangiheuea	Raymond Staite
John Delamere	Bryce Morrison	Boy Reweti	Rawhira Tokahi Te Aonui
Wharerahi Metcalf Wallace Hawe	Tona Nuri	Ropata Lindsay Scott	Louise Waaka
Frank Maika	Joe Pene	Alan Skipwith and Hepa Skipworh	Monte Wickliffe

- 8 We can find no other publicly available records which set out any other powers or purposes for the Control Board.
- 9 In August 1970, Lake Rotokākahi was declared Māori Freehold Land³ by the Māori Land Court and it recorded 1042 people as being entitled to the land as tenants in common in various proportions.
- 10 A Māori Land Court order confirming the status of the land as Māori Freehold Land under the Te Ture Whenua Māori Act 1993 (**TTWMA**) was made in December 2006. This order stated the same individuals listed above 'as members of the Authorising Board of Control for Lake Rotokākahi' were 'to be noted on the memorial of the Certificate of title' and a qualified record of title was issued in January 2007.
- 11 The current qualified record of title for the Lake records the Māori Freehold Land status and lists a number of individuals 'as responsible trustees jointly' for the beneficial owners of the Lake (updated in 2020). This list is not the same as the members of the Control Board referred to in the 1998 Gazette Notice or the Māori Land Court order (which are consistent with each other). The 'responsible trustees' on the current record of title are:

¹ [Rotorua lakes agreement, 1922 – Te Tiriti o Waitangi – the Treaty of Waitangi – Te Ara Encyclopedia of New Zealand](#) and [Te Arawhiti - Te Arawa Lakes](#)

² "Constituting Board of Control for Rotokākahi Lake (or Green Lake)" (22 July 1926) 49 *New Zealand Gazette* 2153, at 2158.

³ By order made under section 161 of the Māori Affairs Act 1953 (now repealed).

- 11.1 Adrian Mathews (also known as Adrian Rawhira Mathews)
 - 11.2 Bob Te Aonui (also known as Robert Leslie Te Aonui)
 - 11.3 Kepa Winiata (also known as Michael Kepa Kemp Wilson Winiata)
 - 11.4 Marisa Balle (also known as Marisa Heni Balle)
 - 11.5 Michele Hawe (also known as Michele Matire Hawe)
 - 11.6 Nero Panapa (also known as Anthone Newowharetiti Panapa)
 - 11.7 Peter Moke
 - 11.8 Wally Lees (also known as Wally Victor Hohepa Lee)
 - 11.9 William Roach (also known as William Austin Kiritapu Roach)
 - 11.10 Warena Morgan (also known as Warena Rangi Morgan).
- 12 In August 2020, there was a vesting order from the Māori Land Court, vesting the land and assets in the responsible trustees listed above, as 'responsible trustees jointly' as it appears there was a change in trustees around that time.
- 13 'Responsible trustees' are usually trustees of a trust constituted under the TTWMA, who are responsible for the administration of the trust and managing how the land and assets are used for the benefit of the owners.⁴ The TTWMA identifies general functions of responsible trustees (carrying out the terms of the trust, proper administration of the business of the trust, preservation of the assets of the trust and collection and distribution of the trust). There are also general trustee obligations in the Trusts Act 2019 that will apply (eg, the duty to act honestly and for the benefit of the beneficiaries, the duty to act in good faith and the duty to exercise powers for a proper purpose).
- 14 We have not been able to locate the relevant Trust Deed for this trust and we have not been able to determine the relationship between the Control Board and the responsible trustees for the owners of the Lake. The Māori Land Court portal (Pātaka Whenua) records the Control Board as the 'Land Administrator'. However, we do not consider we need to, to be able to answer the questions you have asked because the pipeline is proposed for legal road, not the Lake.

Summary

- 15 In summary, this means that:
- 15.1 The Control Board was formally established as a result of a statutory provision in the Māori Purposes Act 1931 requiring the Lake to be administered and controlled by the Control Board and giving the Governor General the power to appoint the members of the Board (the last set of members appear to have been appointed in 1998).
 - 15.2 In December 2006 there was a Māori Land Court order declaring the land as Māori Freehold Land under the TTWMA and the information supporting a request for a certificate of record to be issued noted that the members of the Control Board were 'to be noted on the memorial of the Certificate of title' when it was declared Māori Freehold land. However, the current record of title specifies a different set of people

⁴ Section 210 of the Te Ture Whenua Māori Act 1993.

from the Control Board members as 'responsible trustees' for administering the Lake on behalf of the beneficial owners of the Lake.

- 15.3 This suggests the responsible trustees administering the Lake area for the beneficial owners could be different from the Control Board (which has the statutory right to administer and control the Lake) or that there is a further document we have not been able to locate (for example, a further Gazette Notice appointing different members to the Control Board or a further Māori Land Court order).
- 15.4 Either way, we do not consider it necessary to determine this issue for this advice. This is because regardless of which entity (or whether both entities consist of the same people or not) controls and administers, or owns, the Lake, this does not alter the fact that the land the Council proposes to install the pipeline on is legal road and not the Lake itself.
- 15.5 We have found nothing publicly available that suggests the Control Board has any specific rights in relation to what happens on land adjoining the Lake over and above the recognition given to any other relevant Māori entity under the law. For example, the Council will have its own internal protocols on who and when it consults with iwi related entities within the District (which may include the Control Board). One example is the Council's Significance and Engagement Policy which specifically acknowledges that 'importance to Te Arawa' is one of the criteria it will use to assess the significance of a decision (which influences the engagement Council will undertake). That Policy also acknowledges that Council should actively provide opportunities for Māori and tangata whenua to contribute to its decision-making processes.

What is the exact area of land over which the Lake Rotokākahi Control Board has how ownership and/or authority?

- 16 The Control Board is given the statutory right to administer and control the Lake, along with its islands. There is no suggestion in the Māori Purposes Act 1931 that its control extends beyond the Lake itself.
- 17 This is consistent with the information supporting the registration of the Freehold Order in 2006, which includes a 'sketch plan' (which is the same plan used in the qualified record of title):

Sketch Plan for Rotokākahi (Green Lake)



Sketch Plan only

Figure 2: Sketch plan of Lake Rotokākahi used in the freehold order and record of title.

- 18 Lake Rotokākahi has a qualified record of title. It is qualified because no formal survey defining the boundaries of the Lake has been deposited with LINZ. The sketch plan in the record of title is an approximate guide to the location of the boundaries, but it is not determinative. The legal road also does not have a surveyed boundary and the LINZ mapping showing the road does have a margin of error of 1-100m. This does leave the exact boundary of the Lake and road open to challenge by third parties or debate by the Lake owners. However, given the nature of the subject land is a Lake and the documents do not suggest any land is involved (other than the islands in the Lake), we consider it is likely that the boundaries of the Lake follow the normal margin/edge of the Lake.
- 19 In terms of whether the boundaries of the Lake may have moved over time due to erosion or accretion and therefore, it may have increased or decreased the overall size of the Lake, we do not consider this would make a difference to the area subject to control by the Board of Control and/or the owners. This is because section 315 of the LGA 74 states that every accretion to any road along any margin of a lake caused by the action of the lake shall form part of the road.⁵ Further, where there is any erosion along the margin of any lake caused by action of the lake, the portion of road eroded, shall continue to be road.⁶ Therefore, regardless of whether the Lake's boundaries have moved over time by way of accretion or erosion, the Council continues to have ownership over the road and any land accumulated (or eroded) on the Lake boundary.

Is the Control Board governed by laws such as the Resource Management Act 1991 and Local Government Act 1974/2002, or does it have an exemption from such laws of general application?

- 20 The RMA, LGA 74, and LGA 02 do not expressly identify the Control Board as having any exemptions from relevant laws. In addition, the Control Board has no special role under those Acts (over and above the extent to which they recognise the role of Māori and tangata whenua in local government decision making and consenting). For example, when considering resource consents under the RMA, the Council must recognise and provide for the relationship of Māori with 'their ancestral lands, water, sites, waahi tapu and other taonga'. Under the LGA 02, the Council has an obligation to facilitate participation by Māori in local authority decision making processes.⁷
- 21 The legislation governing the Control Board is the Māori Purposes Act 1931, which also does not provide any exemption from any laws.

Is the Lake Rotokākahi Control Board bound by the Council's powers to install the pipeline after two cultural impact assessments?

- 22 The Council has broad powers to construct and install any works it considers necessary for sewage and stormwater drainage in its district. It has specific powers to do this on private land under section 181 of the LGA 02 and section 12 of the LGA 02 gives the Council full capacity to undertake any activity for the purposes of performing its role, which includes managing its wastewater network (including on its own land). If the works were on private land, there is a requirement in section 181 of the LGA 02 to obtain prior written consent from the owner of the land or if no consent can be obtained, the process set out in Schedule 12 of the LGA 02 needs to be followed.
- 23 As the proposed pipeline is entirely within legal road and the Council is the owner of that land,⁸ the owner's consent is not really an issue. The Council can proceed to construct the pipeline, subject to obtaining any consents that may be necessary to do so (eg, resource consents). There is no requirement in section 181 of the LGA 02 to obtain the consent of the Control

⁵ Section 315(4) of the Local Government Act 1974.

⁶ Section 315(5) of the Local Government Act 1974.

⁷ Section 6 of the Resource Management Act 1991 and section 4 of the Local Government Act 2002.

⁸ Section 316 of the Local Government Act 1974

Board. However, as noted above, there may be consultation requirements with mana whenua as a result of Council's own policies or protocols, which we have assumed were considered at the time the Council decided to proceed with this pipeline proposal.

- 24 The two cultural impact assessments are really part of informing the decision-making process for the Council as they provide important information and input from iwi on management, activities and impacts on the relevant land and if a resource consent is required, issues raised in a cultural impact assessment are often reflected in consent conditions. A cultural impact assessment has no impact on whether the Control Board must approve works adjoining the Lake, which would need to be explicitly set out in the legislation establishing the Control Board, one of its founding documents or by virtue of its ownership of land where the pipelines are to be installed. We are not aware there is any such explicit recognition of the Control Boards powers extending outside of the Lake itself and the pipeline is located on Council land.

Injunctions

- 25 You have not asked about the injunction issue specifically, but for completeness, we briefly address injunctions.
- 26 As we can find no specific powers that require the Control Board to approve the construction of the pipeline on the legal road adjoining the Lake, the most likely way it would seek an injunction would be to pursue a judicial review of the Council's decision to proceed with the construction of the pipeline on the basis Council followed an incorrect process when making that decision. For example, due to inadequate consultation, omitting to consider a relevant matter, unreasonableness or making an error of law.
- 27 If the proceeding is a judicial review proceeding, the Judicial Review Procedure Act 2016 applies. This allows the Court to issue an order prohibiting the Council taking any further action in reliance on the statutory power in question (ie, continuing with construction of the pipeline), subject to the terms and conditions the Court sees fit. This can include a condition requiring an undertaking as to damages to compensate any party from any damage sustained through the injunction. These can also be sought on an interim (urgent) basis to prevent construction continuing (ie, before a full hearing of the substantive issues).

Conclusion

- 28 Our conclusions are set out in the Overview above. We are happy to discuss any of the issues above.

Ngā mihi



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