In Confidence

Office of the Minister for the Environment

Office of the Minister of Agriculture

Chair, Cabinet

National Policy Statement for Highly Productive Land 2022

Proposal

1 This paper seeks Cabinet's approval of the National Policy Statement for Highly Productive Land 2022 (NPS-HPL), prepared under the Resource Management Act 1991 (RMA).

2 The NPS-HPL (see Appendix 1) will protect highly productive land (HPL) for land-based primary production by requiring local councils to identify, map and manage HPL, and to ensure it is available for present and future land-based primary production.

3 Subject to Cabinet's agreement, the Minister for the Environment will recommend the NPS-HPL to the Governor-General in Council for approval, and then proceed to issue the NPS-HPL by notice in the New Zealand Gazette.

Relation to government priorities

4 The NPS-HPL complements the Labour Party's 2020 manifesto commitment to promote the primary sector based on the *Fit for a Better World* roadmap. The roadmap intends to accelerate the productivity, sustainability and inclusiveness of the primary sector to deliver value for all New Zealanders.

5 The NPS-HPL will work in a complementary way with the National Policy Statement on Urban Development 2020 (NPS-UD) and its objective to deliver well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing. Urban intensification enabled under the NPS-UD is anticipated to reduce the demand for outward urban growth on highly productive land.

6 The NPS-HPL supports:

6.1 the Government Policy Statement on Housing and Urban Development, in supporting resilient, sustainable, inclusive, and prosperous communities

6.2 the Government's overarching policy objectives for the housing market, particularly in supporting the creation of a housing and urban land market that credibly responds to population growth and changing housing preferences, that is competitive and affordable for renters and homeowners, and is well-planned and well-regulated

6.3 the Government's commitment to honouring Te Tiriti o Waitangi / the Treaty of Waitangi, particularly by involving Treaty partners throughout the development and implementation of this NPS, and avoiding further restrictions on Māori landowners when developing Māori customary land or Māori freehold land.

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Executive summary

7 Highly productive land is important for land-based primary production, exports and domestic food production. New Zealand is losing its HPL to land fragmentation and urban development, which includes rural lifestyle subdivision and urban expansion.

8 The NPS-HPL will restrict the further loss of HPL. It requires local councils to identify, map and manage HPL within their regions and districts.

9 There has been an extensive engagement process, including public consultation and targeted engagement with local authorities, Māori groups, primary sector and non-government organisations to develop, test and refine the NPS-HPL. Overall there has been a large degree of support for the intent of the NPS-HPL.

10 In late 2021, the Ministry for the Environment (MfE) and Ministry for Primary Industries (MPI) ("officials") held targeted consultation on an exposure draft [DEV-21-MIN-0194 refers]. Officials undertook a final targeted engagement in April 2022 to test amendments to the draft.

11 Subject to Cabinet approval, the NPS-HPL will be gazetted and come into effect 28 days later.

Background

Aotearoa New Zealand is losing its most productive land

12 Highly productive land is important for land-based primary production, exports and domestic food production. Approximately 15 percent of New Zealand's land cover is considered highly productive.

13 The *Our Land 2021* state of the environment report has shown that New Zealand is losing its most productive land due to land fragmentation and urban development, which includes rural lifestyle subdivision and urban expansion.

14 From 2002 to 2019, urban development on HPL increased 30 percent, and the development of lifestyle blocks increased 59 percent. The losses of HPL have been mainly in food growing hubs in Auckland, Waikato, Hawke's Bay, Horowhenua and Canterbury.

15 Fragmentation of HPL can reduce agricultural productivity and shift land use out of commercial production. The fragmentation is particularly driven by rural lifestyle developments, which are generally less productive and not commercially viable.

Development of the NPS-HPL

16 In August 2019, Cabinet agreed to release the *Valuing Highly Productive Land* discussion document for public consultation [DEV-19-MIN-0202 refers]. The document proposed that a national policy statement (NPS) – ie the NPS-HPL – be prepared under the RMA, to avoid further irreversible loss of HPL and promote its sustainable management.

17 Section 46A(3) of the RMA requires the Minister for the Environment, when proposing to issue a national direction (ie an NPS or a national environment standard), to have the proposed national direction reported on by either a board of inquiry or by an

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alternative process. The Minister established an alternative process for the NPS-HPL [DEV-19-MIN-0202 refers]. See Appendix 2 for a recommendations report.

18 The Minister for the Environment now recommends that the NPS-HPL be issued under section 52 of the RMA.[1]

Purpose and content of the NPS-HPL

19 The overall focus of the NPS-HPL is to protect highly productive land from inappropriate subdivision, use and development (including urban development), and ensure that sufficient HPL is available for primary productive use, both now and in the future.

20 To do this, the NPS-HPL requires local authorities to spatially map large, geographically cohesive areas of predominately LUC 1, 2 and 3 land within their regions as HPL, with some discretion to include other classes of LUC land based on certain local factors. A transitional definition of HPL applies until this mapping is completed.

21 On land that is mapped as HPL, local authorities are required to support primary production activities, by managing reverse sensitivity effects, enabling activities that are associated with primary production use, and identifying opportunities to improve the productive capacity of HPL.

22 Local authorities are also required to protect HPL by avoiding or managing activities that result in the loss of HPL. Lifestyle development – one of the biggest causes of loss of HPL – is to be avoided, while urban development is to be directed away from productive land where possible.

23 The NPS-HPL also recognises that there are some activities that may need to occur on HPL, and provides for these, for example some infrastructure development, or restoration of areas of indigenous biodiversity.

24 The NPS-HPL is consistent with the NPS-UD and the National Policy Statement for Freshwater Management 2020 (NPS-FM). It will provide for urban rezoning on HPL, but only if the land is needed to meet demand for housing and/or business, alternatives are not feasible, and there are greater benefits from the rezoning.

25 The NPS-HPL enables a consenting pathway for some areas of HPL to convert to non-primary production uses where the land is subject to constraints on its use that mean it is not economically viable for land-based primary production.

26 This pathway will allow permanent constraints to be assessed on a case-by-case basis, and the intent is that this only occurs in exceptional circumstances where the applicant has met certain tests. The tests are intentionally strong. They specifically exclude the potential economic benefit of using the HPL for purposes other than land-based primary production; and will not allow the size of the parcel to be used to, by itself, demonstrate the land is not economically viable for primary production.

27 Providing this pathway avoids the risk of land being locked into land-based primary production where it cannot be used for this purpose. This is the most practicable

[1] An NPS states the objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA. Councils must ensure that their policy statements and plans “give effect" to an NPS and must “have regard to” relevant provisions in an NPS when considering resource consent applications.

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approach relative to the alternative which is to consider permanent constraints at the mapping stage.

28 The term "land-based primary production" – and the associated link to activities that are dependent on the soil resource of the land – is intended to recognise that there is discretion over what type of land-based primary production can occur on HPL, including food and fibre production. The intention is to balance the weight across primary sectors instead of prioritising one sector over the other. In considering options for urban rezoning, councils are required to consider the relative productive capacity of land.

29 An integrated management policy highlights the key interactions between HPL, urban development and freshwater management and will assist with identifying any trade-offs that will need to be considered. This policy will be managed through guidance and implementation support.

30 The section 32 report for the NPS-HPL that accompanies this Cabinet paper (see Appendix 3) provides a detailed evaluation of the appropriateness, effectiveness and efficiency of the provisions in achieving the purpose of the RMA and associated implementation risks.

Resource management reform and the National Planning Framework

31 The Natural and Built Environments Bill (NBA) is proposed as the primary replacement of the RMA in the Government's resource management reform. The NBA will require that the National Planning Framework (NPF) made under it, and all plans, promote specified environmental outcomes.

32 The NPF will play the role of current national direction but as an integrated framework, and with specific functions for conflict resolution and setting strategic direction.

33 Existing national direction, including the NPS-HPL, will be transitioned into the first iteration of the NPF.

NPS-HPL consultation process

Public engagement

34 Public engagement on the *Valuing Highly Productive Land* discussion document ran from August to October 2019, as part of a Government roadshow on proposals for national direction. The roadshow included over 60 meetings across New Zealand and was attended by over 7,500 people.

35 This engagement involved public and primary sector-focused meetings, sessions with local government, and hui with local iwi/Māori. Ninety percent of the 250 submissions received indicated full or partial support for the overall intent to better protect and manage HPL.

Targeted engagements

36 Throughout 2020 and 2021, officials conducted several workshops with local government and primary sector subject matter experts to discuss key themes from submissions relating to the criteria to identify HPL, and urban expansion capabilities. In October/November 2021, officials tested the workability of the exposure draft with a

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targeted group of identified stakeholders from local government, industry and Māori organisations.

37 Officials undertook a final targeted engagement in April 2022 to test amendments in relation to permanent constraints, activities to be provided for on specified Māori land, and involvement of tangata whenua.

Consideration of the principles of te Tiriti o Waitangi / the Treaty of Waitangi

38 Officials carried out an assessment of the impacts on Māori, and consistency of the NPS-HPL with Te Tiriti o Waitangi / the Treaty of Waitangi (see Appendix 4). The assessment was carried out in accordance with the guidance set out in Cabinet Circular CO(19)5, and with advice from the Crown Law Office.

39 Officials identified that:

39.1 only a small percentage of Māori customary land and Māori freehold land is likely to be identified as HPL, and that imposing further restrictions on the subdivision, use and development of such land would not be necessary for achieving the purpose of the NPS-HPL

39.2 avoiding further restrictions on these types of Māori land acknowledges the rights of Māori to exercise tino rangatiratanga over this land and also reinforces the principle of redress.

40 The definition of "specified Māori land" in the NPS-HPL will be consistent with that of "protected Māori land" in the NBA. As categories within this definition, Māori customary land and Māori freehold land will have the same meaning as in Te Ture Whenua Māori Act 1993 / Māori Land Act 1993.

41 The NPS-HPL seeks to avoid further constraining the use of Māori customary land and Māori freehold land and intends to provide greater flexibility for development to occur on such land compared to general land.

42 The NPS-HPL will affect the different priorities of iwi, hapū and whānau, including land being rezoned as urban, land being protected for its freshwater values, as well as opportunities for the development of Māori land. For these reasons, councils are directed to actively involve tangata whenua in implementing the NPS-HPL consistent with requirements under the RMA and Local Government Act 2002.

Final steps

43 A section 32 evaluation report is provided in Appendix 3. The Minister for the Environment is required to have particular regard to this report prior to recommending the making of the new NPS-HPL. The Minister has confirmed to have done so.

Policy Implementation, monitoring and evaluation

44 The objective and policies in the NPS-HPL will apply from its commencement date. The NPS-HPL gives local authorities implementation timeframes for some elements of the policy, for example the requirement to map highly productive land.

45 A plan detailing the implementation, monitoring and evaluation support for the NPS-HPL has been prepared which includes MfE and MPI releasing a series of fact sheets

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to accompany the NPS-HPL upon gazettal. Technical workshops and guidance will be available in the months following the NPS-HPL coming into effect.

46 Monitoring and evaluation of the NPS-HPL will be led by the MfE Policy Implementation and Delivery team, with annual reporting.

Timing and 28-day rule

47 No waiver of the 28-day rule is sought.

48 Once approved by the Executive Council, the NPS-HPL will be gazetted and come into effect 28 days later.

Compliance

49 The NPS-HPL complies with:

49.1 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993

49.2 the principles and guidelines set out in the Privacy Act 2020

49.3 relevant international standards and obligations

49.4 the Legislation Guidelines (2018 edition).

Regulations Review Committee

50 We consider there are no grounds for the Regulations Review Committee to draw this instrument to the attention of the House of Representatives under Standing Order 327.

Certification for Executive Council

51 The Parliamentary Counsel Office (PCO) did not draft the NPS-HPL. It has been drafted by a former PCO drafter contracted by MfE. PCO does not draft NPSs, as they are secondary legislation made by the Minister for the Environment (per sections 52(4) and 52(5)(a) of the RMA).

52 A detailed vires review is required before the NPS can be submitted to MfE's Chief Legal Advisor for certification (Appendix 6). The review and the certification process are required under the CabGuide (on the website of the Department of the Prime Minister and Cabinet) and are the final steps in the process before the NPS can be submitted to the Executive Council for approval.

53 MfE's Chief Legal Advisor has certified the new NPS-HPL as being suitable for submission to Cabinet and the Executive Council (see Appendix 6).

Regulatory Impact Analysis

54 A Regulatory Impact Statement (RIS) is attached in Appendix 6.

55 The Regulatory Impact Assessment team at the Treasury has determined that the RIS template in Appendix 6 would be appropriate for this proposal, and delegated quality assurance responsibility to MPI and MfE. This assessment of the RIS has been led by the RIA panel within MPI (RIA panel).

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56 The RIA panel considers the RIS for the proposed NPS-HPL as appropriate in recognising why action is required now, rather than waiting for changes to the RMA to be completed. The RIA Panel regards the RIS to be concise, consulted and conscious of how legislative changes will be implemented and monitored. The RIA Panel considers the RIS as clear in its assessment of risks and limitations and meets the Quality Assurance criteria.

Climate Impact Panel Assessment (CIPA)

57 The Ministry for the Environment confirms that the CIPA requirements do not apply to this proposal.

Communications and publicity

58 Officials will publish the NPS-HPL in the New Zealand Gazette , provide a copy of the NPS-HPL to every local authority, and provide a summary of the Minister for the Environment's decision to those who had made submissions (as required by section 52(3)(c) of the RMA).

59 The MfE, MPI and Treasury websites will publish the Regulatory Impact Statement within 30 working days of the final decision on the NPS-HPL being taken

60 A press release will be issued following Cabinet approval of the NPS-HPL. This will likely generate an overall positive reaction, as demonstrated from the submissions received during public consultation in 2019. However, there may be opposing reactions from some landowners who may face the loss of opportunity for future land development. General concerns from the public will be addressed through a communications strategy.

Proactive release

61 We intend to proactively release this paper in full following gazettal, subject to redactions as appropriate under the Official Information Act 1982.

Agency consultation

62 Officials have provided the following agencies with a draft copy of this Cabinet paper for comment: Department of Conservation, Department of Internal Affairs, Kāinga Ora – Homes and Communities, Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Defence, Ministry of Education, Ministry of Housing and Urban Development, Ministry of Social Development, Ministry of Transport, Te Arawhiti, Te Puni Kōkiri, The Treasury, and Waka Kotahi New Zealand Transport Agency.

63 The Department of the Prime Minister and Cabinet has been informed.

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Recommendations

The Minister for the Environment and the Minister of Agriculture recommend that Cabinet:

1 **note** that New Zealand is losing its most productive land due to land fragmentation from urban development, which includes rural lifestyle subdivision and urban expansion

2 **note** that Cabinet invited the Minister for the Environment and the Minister of Agriculture to develop and consult on a National Policy Statement for Highly Productive Land (NPS-HPL), to reduce this loss [DEV-19-MIN-0202 refers]

3 **note** that the NPS-HPL will be a national direction under the Resource Management Act 1991 (RMA)

Content of the NPS-HPL

4 **note** that the NPS-HPL seeks to restrict the further irreversible loss of highly productive land (HPL), therefore ensuring that it is available for use both now and for future generations

5 **note** that to ensure HPL is protected, regional councils and territorial authorities will be required to:

5.1 identify and map areas of HPL within their region

5.2 support primary production activities, by managing reverse sensitivity effects, enabling activities that are associated with primary production use, and identifying opportunities to improve the productive capacity of HPL

5.3 avoid or manage activities that result in the loss of HPL

6 **note** that the NPS-HPL:

6.1 recognises that there are some activities that may need to occur on HPL, and provides for these (for example, some infrastructure development, or restoration of areas of indigenous biodiversity)

6.2 will provide for urban rezoning on HPL, but only if the land is needed to meet demand for housing and/or business, alternatives are not feasible, and there are greater benefits from the rezoning

6.3 enables a consenting pathway for some areas of HPL to convert to non-primary production uses where the land is subject to constraints on the use of land that mean it is not economically viable for land-based primary production

6.4 is consistent with the National Policy Statement on Urban Development 2020 and the National Policy Statement for Freshwater Management 2020

6.5 will identify and resolve interactions and trade-offs between HPL, urban development and freshwater

7 **note** that existing national direction, including the NPS-HPL, will be transitioned into the first iteration of the National Policy Framework (NPF) that will be made under the

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35eapiw7r9 2022-09-15 12:13:24

proposed Natural and Built Environments Act, which will be the primary replacement of the RMA in the Government's resource management reform

Preparing the NPS-HPL

8 **note** that there has been extensive consultation with the public, local authorities, Māori groups, primary sector and non-government organisations to develop, test and refine the NPS-HPL; and that overall there has been a large degree of support for the intent of the NPS-HPL

9 **agree** that the definition of "specified Māori land" in the NPS-HPL will be consistent with the definition of "protected Māori land" in the proposed Natural and Built Environments Act

Supporting documentation for the NPS-HPL

10 **note** the section 32 report attached as Appendix 3

11 **note** that the Minister for the Environment considers the making of the NPS-HPL appropriate under section 52 of the RMA

Bringing the NPS-HPL into force

12 **authorise** the Minister for the Environment and the Minister of Agriculture to make minor drafting amendments to the NPS-HPL and supporting documents as required prior to gazettal, to ensure it gives effect to its policy intent

13 **invite** the Minister for the Environment to submit the final NPS-HPL to the Governor-General in Council for approval

14 **note** that the NPS-HPL will be notified in the New Zealand Gazette following its approval

15 **note** that the NPS-HPL 2022 will come into effect 28 days after its notification in the New Zealand Gazette.

Authorised for lodgement

Hon David Parker
Minister for the Environment

Hon Damien O'Connor
Minister of Agriculture

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Appendix 1: National Policy Statement for Highly Productive Land

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Appendix 2: Recommendations report

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Appendix 3: Section 32 report

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Appendix 4: Treaty of Waitangi Analysis report

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National Policy Statement for Highly Productive Land: Impact on Māori and consistency with The Treaty of Waitangi (Te Tiriti).

In assessing the impact of the National Planning Standard for Highly Productive Land (NPS-HPL) on Māori, we have followed guidance set out in Cabinet Circular CO (19)5, as well as advice from the Crown Law Office.

Crown obligation to give effect to principles of Te Tiriti

As part of the Crown, there is an obligation for Ministry for Primary Industry (MPI) and Ministry of the Environment (MfE) to ensure that the NPS-HPL is developed in a way that is consistent with the principles of the Treaty of Waitangi (Te Tiriti). These principles are generally agreed to include:

- **Partnership**: Both the Crown and Māori have a positive duty to act in good faith, fairly, reasonably and honourably towards the other;
- **Active protection**: The Crown has a positive duty to protect Māori interests - which may include property, taonga, resources, mātauranga etc ; and
- **Redress:** Past wrongs give rise to a right to redress. This principle includes the need to avoid the creation of fresh injustice.

The principle of Partnership requires Treaty partners to act reasonably and with the utmost good faith towards each other. Acting in good faith in this context means taking the necessary steps to understand how the NPS-HPL affects Māori interests, and to make decisions informed by this knowledge. The principle of Partnership also implies a role for Māori in decision-making on issues that affect Māori interests. Necessarily, this will involve striking a balance between the tino rangatiratanga of Māori and the Crown's right to govern.

The principle of Partnership and involvement of Māori in in decision making on issues that affect Māori interests overlaps with that of Active Protection, which speaks to the Crown's obligation to actively protect Māori interests, including the exercise of tino rangatiratanga over taonga. As a key taonga for Māori, we need to be cognizant of not only protecting Highly Productive Land, but also Māori interests related to Highly Productive Land including any HPL that is Māori land i.e. the ability for Māori to make decisions about the use of Māori land to meet their needs and aspirations.

The principle of redress is also an important consideration in the context of the NPS-HPL, given the potential of the policy to restrict certain land uses. It is important to recognise and avoid impacting on past redress, for instance by avoiding imposing restrictions on the utilisation of land that has been provided through a Treaty settlement process, unless there are overriding national imperatives. In terms of ensuring that historical Treaty claims are lasting and acceptable to most New Zealanders; The Office for Māori Crown Relations — Te Arawhiti[1] recommend that:

- *Treaty settlements should not create further injustices — in practice, this means any redress or remedy should be fair for the groups concerned. In providing redress to one group, care should be taken not to harm the interests of other groups.*
- *Durable settlements must be fair, achievable and remove the sense of grievance — the process of negotiation is intended to ensure that the Crown and a group sign a deed of*

[1] What principles and guidelines underpin the resolution of overlapping interests? | New Zealand Government (www.govt.nz)

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settlement only when both parties are satisfied that it is fair, and the group agrees that their grievances will finally be settled.

- *The Crown must deal fairly and equitably with all groups — the Crown must have consistent policies and practices, and the redress for each group should be fair in relation to the redress received by others.*

Statutory obligations

In addition to the Crown's obligation to act consistently with the principles of Te Tiriti, there are other relevant legislative requirements to consider Te Tiriti and the effect of the NPS-HPL on Māori. These notably include:

Public Service Act 2020

Subpart 3 of the Act, which outlines the Crown's relationships with Māori, specifies that:

- the role of the public service to include "supporting the Crown in its relationships with Māori under the Treaty of Waitangi"; and
- the role of public service leadership to include "developing and maintaining the capability of the public service to engage with Māori and to understand Māori perspectives."

Resource Management Act 1991

Part 2 of the RMA, which describes the purpose and principles of the Act, states that persons exercising functions under the RMA must:

- **Section 6(e)** - Recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga as a matter of national importance;
- **Section 6(g)** - Recognise and provide for the protection of recognised customary activities as a matter of national importance;
- **Section 7(a)** - Have particular regard to kaitiakitanga; and
- **Section 8** - Take into account the principles of the Treaty.

There are also a range of specific purpose sections in the RMA, for example those that relate to the Mana Whakahono a Rohe. These sections and other specific provisions in the Act that relate to Māori are not relevant to the creation of the NPS-HPL, although they are relevant to implementation and are discussed briefly below.

In addition to these Acts, there are several relevant Treaty Settlement Acts and commitments which need to be considered to ensure that the NPS-HPL is consistent with these arrangements.

Approach to analysis

In order to understand the impact of the NPS-HPL on Māori, we asked the following questions:

- What are the Māori interests in the policy area?
- How will Māori be affected by the NPS-HPL? Is there a disproportionate effect?
- Are there any unintended consequences for Māori, and if so, how can these be mitigated?

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We have endeavoured to answer these questions in three parts:
Part 1: Consideration of the impact of the NPS-HPL on owners of types of Māori land;
Part 2: Assessment of relevant treaty settlement legislation and agreements; and
Part 3: Consideration of submissions on 2019 Discussion Document and the 2021 Exposure Draft.
Part 4: Description of the policy responses informed by this analysis.

1. Overview of Māori land in New Zealand

What is Māori land?

Māori land is defined in the Te Ture Whenua Māori Act 1993 (TTWMA). The purpose of the TTWMA is to recognise that land is *he taonga tuku iho* to Māori, a treasure that has been passed down across generations. In recognition of this, the Act was designed to promote the retention of land in Māori ownership, and to facilitate the utilisation of land for the benefit of owners, whānau and hapū. Under the Act, Māori land is defined to include the following:

- **Māori customary land** - land that has not been acquired by the Crown and continues to be held in accordance with tikanga Māori. Māori customary land typically has not had its ownership investigated and determined by the Māori Land Court. Only a small number of customary land blocks remain in New Zealand today, totalling approximately 1,200 hectares;[2]
- **Māori freehold land** - land that has been investigated by the Māori Land Court and issued a freehold order or was set aside by the Crown as Māori freehold land and awarded by Crown Grants to specific individuals. Māori freehold land is typically held by individuals who retain shares together as tenants in common. Today almost all Māori land is Māori freehold land. There is approximately 1.4 million hectares of Māori freehold land in New Zealand - roughly five percent of total land.

Māori land is not specifically defined in the RMA however there is reference to Māori land in the following provisions:

- **Section 11** – this section places restrictions on the subdivision of land. However the restrictions do not apply to Māori land within the meaning of TTWMA unless that Act otherwise provides.
- **Section 108** – this section provides conditions of resource consents which could include a condition requiring a financial contribution be made. Section 108(9) provides that a financial contribution excludes a contribution of Māori land within the meaning of TTWMA unless that Act otherwise provides.
- **Section 186** - provides compulsory acquisition powers for network utility operators. However the section does not apply if the network utility operator is a responsible SPV and the "the land is protected Māori land".[3]
- **Section 189** - provides for heritage protection authority to give notice to a territorial authority of its requirement for a heritage order for the purpose of protecting an area of land (other than private land). Private land is defined as including "Māori land within the meaning of section 4 of Te Ture Whenua Māori Act 1993".
- **Section 353** - provides that part 10 of TTWMA shall apply to the service of notices under the RMA on owners of Māori land.

[2] https://www.maorilandcourt.govt.nz/assets/Documents/Publications/MLU-2019.pdf
[3] Unclear what is meant by "protected Māori land" as this term is not defined. However it likely takes the same definition as "protected Māori land" in the Infrastructure Funding and Financing Act 2020 as the specific subsection was inserted by that Act.

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Māori land is also referenced within the: Urban Development Act 2020; Infrastructure Funding and Financing Act 2020; and Public Works Act 1981. As well as referencing customary and freehold land (as defined under TTWMA), the definitions of Māori land used in these other Acts also include types of 'treaty settlement land' that has been either returned to Māori as part of redress for the settlement of Treaty of Waitangi claims; or by the exercise of rights under a Treaty Settlement Act.

The following is an analysis of the distribution of Māori customary and freehold land and a description of some of the historic and existing constraints on the development of this land.

Distribution of Māori customary and freehold land in New Zealand

The approximate 1.4 million hectares of Māori customary and freehold land in New Zealand represents five percent of all land nationally. The majority of Māori land is held within rohe in the North Island, with only 5 percent (66,600 ha) of Māori land held in Te Waipounamu. The majority of Māori land is concentrated in the Aotea (29 percent, 413,000 ha), Waiariki (22 percent, 304,700 ha) and Tairāwhiti (19 percent, 269,100 ha) rohe.[4] Table 1 below provides a breakdown of Māori land titles by rohe. Maps in Appendix 1 shows the spatial extent of Māori land in New Zealand, with the land considered to be the more versatile and productive land highlighted in red (based on amount of land classified as Land Use Capability[5] (LUC) 1-3). A table of the distribution of Māori customary and freehold land is also provided in Appendix 1.

Table 1 - Māori customary and freehold land titles by rohe

Māori Customary Land Titles:

Rohe	#	Area (ha)
Taitokerau	5	38.5573
Waikato-Maniapoto	13	48.2919
Waiariki	2	453.2479
Tairāwhiti	2	4.8688
Tākitimu	1	0.2124
Aotea	15	659.1240
Te Waipounamu	0	0.000
Total	38	1204.3023

Māori Freehold Land Titles:

Rohe	#	Area (ha)
Taitokerau	5,443	138,091.8391
Waikato-Maniapoto	3,747	124,027.6245
Waiariki	5,146	304,270.5733
Tairāwhiti	5,352	269,064.3947
Tākitimu	1,390	88,001.7129
Aotea	4,019	412,257.5746
Te Waipounamu	2,359	66,633.3540
Total	27,456	1,402,347.0731

Constraints on Māori customary and freehold land

Māori land is constrained by several factors that distinguish it from general title land. These constraints relate to both the physical characteristics and distribution of Māori land, as well as governance and statutory barriers to its utilisation.

[4] https://www.maorilandcourt.govt.nz/assets/Documents/Publications/MLU-2019.pdf

[5] The LUC classification system is the most used system to classify land in New Zealand. It considers physical factors (rock type, soil, slope, severity of erosion, and vegetation) and inventory factors (climate, the effects of past land-use, and potential for erosion). These factors are used to classify land into eight classes based on the long-term capability of that land to sustain one or more productive uses. Land that is classified as Class 1 under the LUC system is the most versatile and has the fewest limitations for use, while Class 8 is the least versatile with the highest limitations for use.

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These barriers to the utilisation of Māori land are a product of the historic appropriation and reparations of land made by the Crown, as well as systemic challenges arising from difficulties in reconciling customary Māori communal ownership with a land ownership system heavily based on individual land titles.

The key constraints on Māori customary and freehold land include:

- Collective ownership; and
- Land quality;

Collective ownership, as a constraint is discussed in detail in Appendix 2, while land quality and utilisation of Māori customary and freehold land is discussed in Appendix 3.

In summary:

- Collective ownership results in challenges making decisions on the use of land, and/or increased costs for the ongoing management of the land (e.g. a trust). A block may have many thousands of owners, so often a structure is set up to manage the land resulting in additional costs.
- Māori land is often less desirable land, more likely to be remote or low quality. The appendices contain an analysis of Māori land by LUC class (as an approximation for quality, noting that LUC does not consider all factors, e.g. transport), which shows that in most areas Māori land is predominantly of higher class land (i.e. lower quality land) than freehold or general land in the region.
- Māori Land is often landlocked and not well served by existing infrastructure which constrain the utilisation of this land. These constraints are compounded by the limited access Māori collectives have to finance and/or funding in order to address these physical constraints.
- As a consequence of the issues identified above, Māori land is comparatively less utilised than general title land.

Any policy that affects land needs to be cognisant of these inherent characteristics of Māori customary and freehold land.
The specific policy choices that address this issue are discussed in section 4.

2. Te Tiriti o Waitangi settlement commitments

In addition to its obligations under Te Tiriti, the Crown has made commitments to individual iwi through Te Tiriti settlement redress (outlined in settlement deeds and settlement acts).
The core elements of these settlement deeds and settlement acts relevant to the NPS-HPL are outlined below. All Post Settlement Governance Entities were invited to participate in testing the Exposure Draft of the NPS-HPL in October-November 2021 as part of the Ministry for Environment 'engagement reset' – see section 3 below for results of this engagement.

Commitment to have regard for certain matters in policy development

The Crown has committed through Te Tiriti settlement deeds and legislation to 'recognise and provide for' and 'have particular regard to' certain post-settlement legal frameworks when exercising a function, power or duty under the RMA (including developing policy). The following settlement acts

35eapiw7r9 2022-09-15 12:13:55

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have been identified as containing provisions, which require an assessment for the purposes of the NPS-HPL to consider whether there is an interaction / matters to be considered and provided for:

- The Te Awa Tupua status and the four Tupua te Kawa intrinsic values for the Whanganui River[6]
- Te Mana Tupua and the four Ngā Toka Tupua intrinsic values of Te Waiū-o-Te-Ika (Whangaehu River).[7]
- Te Ture Whaimana o Te Awa o Waikato (the Vision and Strategy for the Waikato River)[8] and Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010
- Fiordland (Te Moana o Atawhenua) Marine Management Act 2005
- Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019
- The Ngāti Manawa Claims Settlement Act 2012
- Ngāti Whare Claims Settlement Act 2012
- Te Arawa Lakes Deed of Settlement 2004

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (Te Awa Tupua Act) imposes an obligation on the Crown when making decisions on proposals within a National Policy Statement (NPS) that relate to the Whanganui River, or an activity within its catchment that affects the Whanganui River, to 'have particular regard' for the Te Awa Tupua status[9] and Tupua te Kawa (its intrinsic values), in addition to Te Pā Auroa, the new legal framework for the Whanganui River[10] within their plans (local authorities when preparing regional and district plans). The act also requires councils to recognise and provide for Te Awa Tupua and tupua te Kawa when making Regional Policy Statements, plans and District Plans.

Te Awa Tupua status of the Whanganui River affords the river the status of a legal person and requires decision makers to consider the Whanganui River as an indivisible living whole, which incorporates all its physical and metaphysical elements. Any activity that is captured by the proposed NPS-HPL in the Whanganui River and catchment area will require that decision-makers recognise and provide for the above legal personhood status and the intrinsic values of the Whanganui Rver (Tupua te Kawa).

Overall, the policy recommendations discussed in Part 4 of this analysis provide a mechanism to uphold Te Awa Tupua's status by contributing to the values of Tupua te Kawa (Table 2).

Tupua te Kawa

Tupua te Kawa are the intrinsic values that represent the essence of Te Awa Tupua. These values are described within the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017:

1) ***Ko te Awa te mātāpuna o te ora***: *the River is the source of spiritual and physical sustenance*
   Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.

[6] Te Awa Tupua (Whanganui River) River Claims Settlement Act 2017 (no. 7), section 15(3)
[7] Ngāti Rangi Claims Settlement Act 2019 (no. 40), section 109(3)
[8] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (no. 24), section 17
[9] Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements (s12). Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person. (s14(1))
[10] Section 15 of Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

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2) ***E rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa:*** *the great River flows from the mountains to the sea*
Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.

3) ***Ko au te Awa, ko te Awa ko au:*** *I am the River and the River is me*
The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being.

4) ***Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua***: *the small and large streams that flow into one another form one River*
Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.

There are no direct negative conflicts identified between the proposed NPS-HPL and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. While Te Awa Tupua encompasses the Mountains to the Sea and activities in the catchment that may affect the river, freshwater is out of scope of the proposed NPS-HPL (except for the retirement of land from land-based primary production for the purpose of improving water quality) and this reduces the crossover with the Te Awa Tupua Act. We note that if there is crossover, the Te Awa Tupua Act will override the NPS-HPL. Where there is crossover, there is alignment between the intent of the provisions in the proposed NPS-HPL and the outcomes sought from the Te Awa Tupua Act. The mapping of HPL and development of provisions to give effect to this NPS will be developed in consultation with tangata whenua and will also need to take into account and provide for Te Awa Tupua.
Engagement with Whanganui iwi has occurred as part of the Essential Freshwater hui in early 2019. No written submission on the Draft NPS-HPL were received from Whanganui iwi. Ngā Tangata Tiaki and all Post Settlement Governance Entities were invited to participate in Exposure Draft testing in October 2021. Regular updates have been provided since then via MfE Kōmiromiro Pānui. This engagement has resulted in specific provision for tangata whenua involvement in giving effect to the NPS-HPL and specific provision for the subdivision, use and development of specified Māori land. Continued updates on the implementation process are likely to be useful.

<u>Ngāti Rangi Claims Settlement Act 2019</u>

The Ngāti Rangi Claims Settlement Act 2019 (Ngāti Rangi Act) imposes an obligation on the Crown when making decisions on proposals within a NPS that relate to the Whangaehu River, or an activity within its catchment that affects the Whangaehu River, to 'have particular regard' for the Te Mana Tupua o Te Waiū-o-Te-Ika[11] (legal person status) and the intrinsic values of the Whangaehu River (Ngā Toka Tupua)[12].

Ngā Toka Tupua are the intrinsic values that represent the essence of Te Waiū-o-Te-Ika, namely—
(a) Ko te Kāhui Maunga te mātāpuna o te ora: The sacred mountain clan, the source of Te Waiū-o-Te-Ika, the source of life:

[11] Te Waiū-o-Te-Ika is a living and indivisible whole from Te Wai ā-moe to the sea, comprising physical (including mineral) and metaphysical elements, giving life and healing to its surroundings and communities (s107).
[12] Section 108 of Ngāti Rangi Claims Settlement Act 2019

35eapiw7r9 2022-09-15 12:13:55

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Hapū, iwi, and all communities draw sustenance and inspiration from the river's source on Ruapehu and extending to all reaches of the catchment.

(b) *He wai-ariki-rangi, he wai-ariki-nuku, tuku iho, tuku iho*: An interconnected whole; a river revered and valued from generation down to generation:
Hapū, iwi, and all communities are united in the best interests of the indivisible river as a gift to the future prosperity of our mokopuna.

(c) *Ko ngā wai tiehu ki ngā wai riki, tuku iho ki tai hei waiū, hei wai tōtā e*: Living, nurturing waters, providing potency to the land and its people from source to tributary to the ocean:
Hapū, iwi, and all communities benefit physically, spiritually, culturally, and economically where water and its inherent life-supporting capacity is valued and enhanced.

(d) *Kia hua mai ngā kōrero o ngā wai, kia hua mai te wai ora e*: The latent potential of Te Waiū-o-Te-Ika, the latent potential of its hapū and iwi:
Uplifting the mana of Te Waiū-o-Te-Ika in turn uplifts the mana of its hapū and iwi, leading to prosperity and growth for hapū and iwi.

There are no direct negative conflicts identified between the proposed NPS-HPL and the Ngāti Rangi Claims Settlement Act 2019. The proposed NPS-HPL provides for the retirement of land from land-based primary production for the purpose of improving water quality and nothing in the NPS-HPL overrides the NPS for Freshwater Management and principle of Te Mana o Te Wai. We note that should an activity provided for in the NPS-HPL potentially affect the Whangaehu River the Ngāti Rangi Act will override the NPS-HPL.

The mapping of HPL and development of provisions to give effect to this NPS will be developed in consultation with tangata whenua and will also need to take into account and provide for Te Mana Tupua o Te Waiū-o-Te-Ika.

Engagement with iwi has occurred as part of the Essential Freshwater hui in early 2019. No written submission on the Draft NPS-HPL were received from iwi from this region. All Post Settlement Governance Entities were invited to participate in Exposure Draft testing in October 2021. Regular updates have been provided since then via MfE Kōmiromiro Pānui. This engagement has resulted in specific provision for tangata whenua involvement in giving effect to the NPS-HPL and specific provision for the subdivision, use and development of specified Māori land. Continued updates on the implementation process are likely to be useful.

<u>Te Ture Whaimana o Te Awa o Waikato</u>

The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Nga Wai o Maniapoto (Waipa River) Act 2012, Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, require officials to have particular regard to the Te Ture Whaimana o Te Awa o Waikato, which is incorporated into the Waikato Regional Policy Statement and has a vision of:

> *"a healthy Waikato River that sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come"*[13].

[13] Schedule 2 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

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Te Ture Whaimana prevails over any national policy statements that affect the Waikato River and its tributaries[14], including the NPS-HPL where its policies affect the Waikato River, its tributaries and its catchment.

The Waikato River Authority, and the joint management agreements signed with various regional and district councils, provide the five river iwi with a much higher level of involvement in governance and decision-making relating to the river and its catchment than the proposals to strengthen Māori values and interests in various planning documents (i.e. District Plans, Regional Plans and Regional Policy Statements). In most planning documents at present, it only directs councils to work collaboratively with tangata whenua to identify their values and aspirations. Te Ture Whaimana already provides the values and aspirations for the awa through its objectives. Where relevant these objectives will need to be considered by Councils when mapping HPL.

Waikato River Authority provided a written submission to the Draft NPS-HPL in 2019 and were engaged in testing the Exposure Draft in 2021 which has resulted in specific provision for tangata whenua involvement in giving effect to the NPS-HPL and specific provision for the subdivision, use and development of specified Māori land. Continued updates on the implementation process are likely to be useful.

Fiordland (Te Moana o Atawhenua) Marine Management Act 2005

The Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 imposes obligations when people are exercising functions or powers "in" the Fiordland (Te Moana o Atawhenua) Marine Area, which will not be captured by the NPS-HPL. The proposed NPS-HPL will not apply "in" the Marine Area, because none of these areas qualify as an "highly productive land" as defined by the proposed NPS.

Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019

Under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019[15], the Ministry for the Environment would be required to have particular regard to the "environmental covenant" that Ngāti Porou may prepare under the settlement act when preparing a National Policy Statement or National Environmental Standard. The covenant will relate to:

(a) promoting the sustainable management of the natural and physical resources of ngā rohe moana o ngā hapū o Ngāti Porou; and

(b) protecting the integrity of ngā hapū o Ngāti Porou, including their cultural and spiritual identity with ngā rohe moana.

At the time of this assessment, no covenant is in place. Therefore, no assessment of its potential interaction with the NPS-HPL can be undertaken. However, it is considered that the preservation of highly productive land from inappropriate land use and development would be considered promoting sustainable management of natural and physical resources.

[14] Section 12(1)(a) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, 13(1)(a) of the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 and 8(2) of the Nga Wai o Maniapoto (Waipa River) Act 2012.

[15] Section 31 of the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019

35eapiw7r9 2022-09-15 12:13:55

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The Ngāti Manawa Claims Settlement Act 2012

The Ngāti Manawa Claims Settlement Act 2012 imposes obligations on all persons exercising functions and powers under the Resource Management Act 1991 that affect the Rangitaiki River must have particular regard to the habitat of tuna (*anguilla dieffenbachia* and *anguilla australis*) in that river.[16]
It is considered that the NPS-HPL would be required to have particular regard to the habitat of tuna (anguilla dieffenbachia and anguilla australis) to give effect to the requirements of this Settlement Act.
It is considered that the NPS-HPL would not have an effect on the habitat of tuna, as it is considered the NPS-HPL will not have a detrimental effect on the Rangitaiki River.

Ngāti Whare Claims Settlement Act 2012

All persons exercising functions and powers under the Resource Management Act 1991 that affect the Rangitaiki River must have particular regard to the habitat of tuna (*anguilla dieffenbachia* and *anguilla australis*) in that river.[17]
It is considered that the NPS-HPL will not affect the habitat of tuna in the Rangitāiki River and will not conflict with the Bay of Plenty's requirement to recognise, provide for and have particular regard to the 'Rangitāiki River Document'.

Te Arawa Lakes Deed of Settlement 2004

Clause 9 – NPSs: If the Minister for the Environment decides to issue a National Policy consult with the Governance Entity (in accordance with section 46(a) of the Resource Management Act 1991) before preparing the proposed National Policy Statement. In the case of a National Policy Statement relating to lakes or freshwater bodies in general, the Minister will balance Te Arawa's views with those of other persons with interests in lakes or freshwater bodies. Statement relating to lakes or freshwater bodies in general. In this case, the NPS-HPL does not directly affect the lakes and so this clause doesn't apply here.

Statutory Acknowledgements

There are three key terms used in settlement legislation that relate to statutory acknowledgements. They are each defined in the settlement acts and vary, as the text of the acts have been refined overtime. The three key terms are:

Statutory acknowledgement - means the acknowledgement made by the Crown that acknowledges the statement of association in relation to the cultural redress for a specific statutory area (which are generally set out in schedules to the settlement act).

Statutory area - means an area described in the schedule to the settlement act that the statutory acknowledgement applies to (i.e. rivers, lakes, land parcels, geothermal fields etc).

Statement of association - means the statement made by the relevant iwi of their particular cultural, historical, spiritual, and traditional association with the statutory area. These statements are contained in a schedule to the settlement act.

[16] Section 125 of the Ngati Manawa Claims Act 2012
[17] Section 129 of the Ngāti Whare Claims Settlement Act 2012

35eapiw7r9 2022-09-15 12:13:55

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As part of the treaty settlement process, settlement legislation is passed that gives effect to the agreement between the iwi and the Crown. These settlements include statutory acknowledgement areas. A statutory acknowledgement is an acknowledgement by the Crown that recognises the mana of a tangata whenua group in relation to specified areas - particularly the cultural, spiritual, historical and traditional associations with an area. These acknowledgements relate to 'statutory areas' which include areas of land, geographic features, lakes, rivers, wetlands and coastal marine areas.

Locations of statutory areas in settlements are shown on the Māori Land Spatial Dataset (r31.5.2017), with the text of each statement of association set out in Schedules to the Settlement Act that establishes them (i.e. explains the significance of the land). The statutory acknowledgment requires the relevant consent authority to have regard to statutory area in deciding, under section 95E of the RMA, whether the trustees (iwi) are affected persons in respect of an application for a resource consent for an activity within, adjacent to, or that directly affects a statutory area. While a statutory acknowledgement may vary for each claimant group, in essence, a statutory acknowledgement requires councils to:

- Forward summaries of all relevant resource consent applications to the relevant claimant group governance entity - and to provide the governance entity with the opportunity to waive its right to receive summaries;
- Have regard to a statutory acknowledgement in forming an opinion as to whether the relevant claimant group may be adversely affected in relation to resource consent applications concerning the relevant statutory area; and
- Within the claim areas, attach for public information a record to all regional policy statements, district plans, and regional plans of all areas affected by statutory acknowledgements.

Statutory acknowledgements can be used in submissions to consent authorities, the Environment Court and the Heritage NZ, as evidence of a specific claimant group's association with a statutory area.

Once settlement legislation is passed, Councils have a statutory obligation to amend their plans (district and regional) to include the statutory acknowledgement areas and statements of association. As claims are progressively settled, more and more councils will need to comply with statutory acknowledgements. Entering into agreements on consultation on consents before the establishment of a statutory acknowledgements.

The requirement for iwi to be considered an affected party for the purposes of an activity on requiring consent on a piece of land that is subject to a statutory acknowledgment will not be affected by the NPS HPL Land covered by statutory acknowledgments encompasses general land, which would not be afforded the same discretion as specified Māori land under the current policy 3.9(2).

Treaty Settlement Land

The spatial extent of Treaty Settlement land changes as iwi claims are settled and given effect to. The distribution and LUC classification of types of ‘treaty settlement land’ has been carried out using a GIS spatial layer based on 2017 information. The total amount of Treaty Settlement Land in NZ that is LUC 1-3 is 32160 hectares, represents 3% of all Treaty Settlement Land.

Table 2 shows the distribution of land classified as LUC1-3 on Treaty Settlement Land. Table 3 shows the main types of Treaty Settlement Land.

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Table 2 – Amount of Māori Treaty Settlement Land (TSL) that is LUC 1-3 by region

Region	Total Treaty Settlement Land (TSL) -as at 2017	Amount of TSL that is LUC 1-3 (hectares)	% of total TSL that is LUC 1-3
Waikato Region	66948.2	10838.6	16.3
Southland Region	32241.9	3675.6	11.5
Auckland Region	21651.6	1323.2	6.1
Manawatu-Whanganui Region	13757.3	775.8	5.9
Canterbury Region	73061.8	2354.8	4.2
Taranaki Region	2323.0	92.1	4.0
Nelson Region	9512.7	263.3	2.8
Northland Region	114108.8	2802.9	2.5
Bay of Plenty Region	294699.1	6035.6	2.2
Wellington Region	11475.8	76.9	1.7
Hawke's Bay Region	142899.9	1700.0	1.2
Marlborough Region	24832.6	293.8	1.2
Tasman Region	65341.7	590.6	0.9
Gisborne Region	51496.0	486.2	0.9
Otago Region	104306.0	843.5	0.8
West Coast Region	42217.8	7.2	0.02
NZ Total	**1070874.2**	**32159.9**	**3.1**

Table of the type of Treaty Settlement Land that is LUC1-3.

Cultural Redress subject to Reserves or Conservation Act (excl Māori reserves/reservation)	1178.7	3.7
Commercial property	5442.7	16.9
Crown Forest Licensed Land	21057.4	65.5
Cultural Redress	755.9	2.4
Cultural redress properties, to vest in fee simple and be administered as a Māori reservation	11.5	0.0
Cultural redress property, to vest in fee simple and subject to a lease	5.4	0.0
Lease of Te Waihora sites	626.9	1.9
Licensed Land	1164.3	3.6
Vested in Te Arawa	47.9	0.1
Waikato-Tainui Settlement Land	1831.1	5.7
Total	32159.9	100

3. Engagement

A Draft NPS was published in August 2019 as part of a Discussion Document 'Valuing Highly Productive Land'. Regional hui across New Zealand were held, as part of the Essential Freshwater

35eapiw7r9 2022-09-15 12:13:55

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roadshow from August to October 2019. Eight submissions were received representing Māori organisations, a summary of submissions was published in July 2020.

The testing of the exposure draft of the NPS-HPL was aligned with the MfE Post Settlement Governance Entities (PSGE) 'reset process' undertaken in response to feedback to streamline and coordinate engagement on National Direction with Resource Management Reform. In October 2021 all PSGE's were invited to receive a copy of the draft NPS-HPL and attend online workshops to discuss.

Those that responded and participated in testing the Exposure Draft included seven of the eight Māori organisations that submitted on the NPS-HPL during the 2019 public consultation:

- Waikato River Authority
- Te Arawa River Iwi Trust
- Te Whakakitenga o Waikato Incorporated (Waikato Tainui)
- CNI Iwi Land Management Ltd (CNIILML)
- Te Rūnanga o Ngāi Tahu
- Te Akitai Waiohua Waka Taua
- Muaūpoko Tribal Authority.

One additional participant representing Whenua Rangitira and an Iwi technician for Iwi Te Uri Taniwha te Hapu, Ngapuhi me Ngati Awa te Iwi, Taiamai ki te Takutai Moana te Iwi also participated.

Updates on the timeframes and key matters under consideration post Exposure Draft testing were also provided via the MfE quarterly 'Te Kōmiromiro Pānui'.

What have we heard from submissions?

We received 16 submissions on the 2019 Discussion Document which discussed the NPS-HPL in the context of Māori land and Te Tiriti o Waitangi – see Summary of Submissions Document, July 2020. The eight representing Māori included:

- Waikato River Authority
- Te Arawa River Iwi Trust
- Te Whakakitenga o Waikato Incorporated (Waikato Tainui)
  15 October 2019
  10 October 2019
- CNI Iwi Land Management Ltd (CNIILML)
- Te Rūnanga o Ngāi Tahu
- Te Kaahui o Rauru
- Te Akitai Waiohua Waka Taua
- Muaūpoko Tribal Authority

Key points that were raised in these submissions included:

- Māori land should be considered separately from general title land due to the number of constraints on the utilisation of Māori land;
- The need to avoid placing further restrictions on the utilisation of Māori land which has historically been under-utilised;
- The development of Papakāinga in particular should be provided for on Māori land; and
- The need for iwi/hapu involvement in the implementation of the NPS-HPL.
- Support for the broad definition of Māori land in particular the inclusion of Treaty settlement land and right of first refusal land.

35eapiw7r9 2022-09-15 12:13:55

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Submissions noted that Māori land typically faces a number of restrictions in regard to its use and development, including the issues identified earlier in this section (e.g. multiple ownership, land quality). These submitters put forward that it would be inappropriate to consider Māori land in the same way as other freehold land which doesn't face similar constraints.

Both council and iwi submitters raised concerns about the potential of the NPS-HPL to place further restrictions on the utilisation of Māori land, which was seen to undermine the ability of tangata whenua to determine their own needs-based outcomes for their land, and not in keeping with the spirit of Te Tiriti. Submitters argued that the NPS-HPL needs to better recognise the historical context of Māori land, as well as past efforts by the Crown to unlock the potential of Māori land and alleviate the challenges faced by Māori land owners.

The potential impact of the NPS-HPL on the ability to develop Māori land for papakāinga was an area of particular concern for iwi and council submitters. A number of submissions voiced the need to ensure that the NPS-HPL does not act as another barrier to what is already seen as a complex, onerous and time-consuming process for Māori looking to utilise their land to provide affordable and sustainable housing solutions for whānau. This was noted to be important given the current shortage of affordable housing in New Zealand and its disproportionate effect on Māori, particularly in growth regions.

There was also general support through submissions for providing for the involvement of iwi, hapū and Māori landowners throughout the implementation of the NPS-HPL.

Te Ao Māori view and *HPL*

Feedback from the 2019 Discussion Document which was reiterated during exposure draft testing in November 2021 highlighted:

- the general support for protecting highly productive lands for primary production purposes
- the importance of highly productive land to the health and wellbeing of marae, hapū, whānau and the wider community
- the general support for the policy intent to give councils and their communities the flexibility to identify highly productive land based on a range of considerations.

Notwithstanding this general support, the review of the Exposure Draft for the purposes of identifying alignment with the proposed Natural and Built Environments Act undertaken by BECA[18] (December 2021) concluded that '*the outcome of providing greater recognition of Te Ao Māori is not provided for*', and '*further investigation is required to consider the role of Te Ao Māori for highly productive land and related outcomes*'.

4. Discussion and policy responses

In developing the NPS-HPL, our recommendations have considered how the NPS-HPL can best recognise and provide for Māori values and aspirations and uphold the principles of Te Tiriti o

[18] National Planning Framework – Review of National Direction Instruments | 4264592-274569840-46 | 23/12/2021 |

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Waitangi. The NPS-HPL sets direction that applies nationally: each local authority will need to give effect to this direction, alongside other relevant commitments stipulated in local Treaty settlement legislation and Joint Management Agreements. We have therefore been mindful that our recommendations uphold and strengthen Te Tiriti in the context of managing highly productive land, while allowing local authorities flexibility in managing their local arrangements and working with iwi and hapū to determine appropriate ways to manage and protect highly productive land.

From our analysis of submissions and consideration of Māori land, we have identified two key issues to address. These are:

A. Specific provisions which provide for Māori aspirations and interests
B. Providing for iwi participation in mapping and implementation of the NPS-HPL

The following sections outline how these issues are addressed through the NPS-HPL.

A. Specific provisions which provide for Māori aspirations and interests

The NPS-HPL includes specific provisions which are intended to ensure that the policy does not unnecessarily constrain the ability of iwi, hapū and whanau to utilise Māori land.

Subdivision, use and development of Māori land that is mapped as HPL is not inappropriate under clause 3.8 or 3.9. However, territorial authorities must take measures to ensure that any subdivision of highly productive land:

(a) avoids if possible, or otherwise mitigates, any potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
(b) avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on surrounding land-based primary production activities.

The Exposure Draft (October 2021) had proposed to limit the subdivision and use to papakainga development and associated infrastructure. Following requests from Treaty Partners and Te Arawhiti to expand the range of activities that may occur on specified Māori lands, an alternative wording consistent with Māori purpose zone (as defined in the National Planning Standards) was also considered: to encompass a range of activities *'that specifically meet Māori cultural needs, including (but not limited to) residential and commercial activities'.* This was tested in further targeted engagement in April 2022.

9(2)(h) [redacted] [legally privileged].

On balance it was considered that the most important matter for this National Direction to stipulate was that the subdivision, use and development avoids, or otherwise mitigates cumulative loss of HPL and reverse sensitivity effects on HPL. This would effectively limit the scale and intensity of activities that may occur but not the type of activities.

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It is noted that local authorities and other National Direction (in discussion with tangata whenua) will be able to define any other relevant considerations/ appropriate restrictions or enablement for the subdivision and /or use of Māori land.

This approach also recognises;

- that less than 3% of LUC1-3 is Māori customary and freehold land
- the existing and historic restrictions on the use of this land
- the Treaty principles of active protection and redress.

The definition of 'specified Māori land' in the NPS-HPL is intended to capture land in which Māori have a special interest, to ensure the Government and local authorities understand and deliver their obligations in accordance with the Treaty of Waitangi (te Tiriti) including the Crown's the right to govern New Zealand and to represent the interests of all New Zealanders.

The definition of specified Māori land in the NPS-HPL is as follows:

(a) Māori customary land or Māori freehold land (as defined in Te Ture Whenua Māori Act 1993):
(b) land vested in the Māori Trustee that—
(i) is constituted as a Māori reserve by or under the Māori Reserved Land Act 1955; and
(ii) remains subject to that Act:
(c) land set apart as a Māori reservation under Part 17 of Te Ture Whenua Maori Act 1993 or its predecessor, the Māori Affairs Act 1953:
(d) land that forms part of a natural feature that has been declared under an Act to be a legal entity or person (including Te Urewera land within the meaning of section 7 of the Te Urewera Act 2014):
(e) the maunga listed in section 10 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014:
(f) land held by or on behalf of an iwi or hapū if the land was transferred from the Crown, a Crown body, or a local authority with the intention of returning the land to the holders of the mana whenua over the land

The limbs of the definition are described below:

Limb (a)
This limb is the definition of Māori land in the Te Ture Whenua Maori Act 1993.

Limbs (b) and (c)
These limbs relate to Māori reservations established under Te Ture Whenua Māori Act 1993 or its predecessors or Māori reserves under the Māori Reserved Land Act 1955. Only those reserves constituted by or under the Māori Reserved Land Act 1955 that 'continue to be vested in the Māori Trustee' are captured by limb (b). These reserves are deemed under that Act to be Māori freehold land. Māori reservations under the Te Ture Whenua Māori Act 1993 or its predecessors are 'inalienable' and also unable to be compulsorily acquired under any Act including the Public Works Act.

Limb (d)

35eapiw7r9 2022-09-15 12:13:55

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This limb refers to land that forms part of a natural feature that has been declared under an Act to be a legal entity or person (including Te Urewera land within the meaning of section 7 of the Te Urewera Act 2014). Some parts of these areas do include LUC1-3 soils eg 38ha of Te Urewera land and river margins alongside the Waikato River and Whanganui River. Exempting these areas from undue restrictions imposed by the NPS-HPL will avoid impinging on these Settlement Acts.

Limb (e)

This limb refers to the maunga listed in section 10 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. This limb is not relevant to the implementation of the NPS-HPL policy as these maunga do not comprise LUC1-3 land but is included for consistency with decision on the NBA/SPA definition.

Limb (f)

This limb is intended to capture land that has been returned not via a settlement process but returned, for example, under the powers of the Waitangi Tribunal. A similar provision is also included as part of "protected land" under s 17 of the Urban Development Act and s 11 of the Infrastructure Funding and Financing Act.

Exempting specified Māori land from NPS-HPL restrictions on subdivision (and subsequent use and development of that land under clause 3.9) will have a relatively small effect on the continued availability of highly productive land in New Zealand. This is primarily due to the small amount of land under consideration (114,000 ha or 0.03 per cent of total LUC 1–3 land), as well as the likelihood of this land being converted for urban or rural lifestyle purposes. In general, Māori land does not face great development pressure as this land is typically far from urban centres. In addition, constraints under the Te Ture Whenua Māori Act 1993, which require 75 per cent of ownership interests to support the sale of Māori freehold land, also promotes the likelihood of this land remaining in Māori possession. The proposed definition and clause 3.8(1)(b) also recognises that Māori consider HPL as a taonga – emphasised in their general support for purpose and intent of the NPS-HPL during consultation and engagement.

Clause 3.8 and 3.9 (and definition of specified Māori land) recognises the use of these categories of specified Māori land is constrained in a number of ways and provides for the ability of Māori to express tino rangatiratanga over these lands. Tino rangatiratanga implies the right of Māori to self-determination over the management of their assets and taonga, and how to best provide for the social, economic, cultural and environmental wellbeing of whānau.

The alternative of restricting subdivision of HPL on these types of Māori land is not consistent with s6 (e) and (g) of the RMA and therefore is not the preferred option.

Consideration was given to including the following within the definition of 'specified Māori land'

- Treaty Settlement Land (limb h of the IFFA definition); and
- former Māori customary land or Māori freehold land (as defined in Te Ture Whenua Māori Act 1993) that had its status changed to 'general land owned by Māori' under the Māori Land Court after 1 July 1993; or Part 1 of the Māori Affairs Amendment Act 1967 (limb i of the IFFA definition); and
- former Māori customary or freehold land that acquired under the Public Works Act and subsequently returned as 'general land owned by Māori' and continues to hold the same

35eapiw7r9 2022-09-15 12:13:55

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significance to Māori as customary and freehold land (a limb which was included in the Exposure Draft version of the NPS-HPL)

The primary rationale for excluding these categories of Māori land from the definition of specified Māori land is that 'general land' should be subject to the same legal framework irrespective of ownership. It is also noted that:

- section 133 of Te Ture Whenua Māori Act (TTWMA) provides a pathway for these types of land to change to Māori freehold land (limb (a) of the definition in NPS-HPL);
- there is an opportunity for land to be rezoned as 'Special Purpose Zone- Māori Purpose Zone' land, as defined in the National Planning Standards. This then means that this land will not be subject to restrictions imposed by NPS-HPL.

In relation to the S133 pathway, Te Arawhiti have advised that Māori may not wish to change the status of their land, citing reasons that:

- claimant groups seek to avoid the jurisdiction of the Māori Land Court over their land because they associate the court with the historical land loss for which they make their claims
- the application of Te Ture Whenua Māori Act brings a further complication for claimant groups because beneficial ownership of the settlement assets passes to descendants (consistent with the make-up of the claimant group as descendants of named ancestors) whereas if their land becomes Māori freehold land the beneficial ownership passes to successors (who are not always descendants, so beneficial ownership of redress land over time, if it is Māori freehold land, differs from the membership of the claimant group – an example of this and the problems it causes is the WAI51 (Waitomo claim) settlement).

In terms of quantum of land, the 'general land owned by Māori' (status changes and public works land returned) categories are relatively small (estimated to be hundreds of hectares not thousands) in comparison to Treaty Settlement Land which amounts to 32159 hectares of land that is Land Use Capability 1-3 or 22% of all Māori land categories including Māori customary and freehold land identified as LUC1-3.

The treaty implications of excluding these categories are also dependent on whether the NPS-HPL imposes new restrictions or whether this land is already restricted by higher order legislation. Analysis of Treaty Settlement Land that is LUC1-3 estimates that 3.7 % of this land is subject to higher order legislation (eg subject to Reserves Act or the Conservation Act), restricting what that land can be used for. The greatest category (65%) of Treaty Settlement Land is forest land some of which is restricted to use in forestry some isn't.

70% of this forestry land (that is LUC1-3) returned as Treaty Settlement Land is Waikato and the South Island (Te Waipounamu) (representing 45% of all TSL that is LUC1-3). We understand that these Iwi/Hāpu settlement claimant groups specifically opted not to have treaty settlement land returned as Māori freehold land managed under the Māori Land Court because they associate this court with the historical land loss for which they make their claims. These Iwi/Hapū may expect flexibility on the use of this forestry land to reflect Iwi/Hapū priorities.

17% of Treaty Settlement Land (5442 hectares) that is LUC1-3 has been classified as commercial redress and would be subject to restrictions imposed by the NPS-HPL if not included in the definition. In comparison to the whole HPL resource across NZ this is a very small amount, however, it represents a lot in terms of a Māori asset base.

35eapiw7r9 2022-09-15 12:13:55

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The question arises as to whether ensuring that this 'commercial' redress land needs to be managed and regulated consistently with other LUC1-3 land and override specific Māori interests and priorities. This may be appropriate if an ahistorical perspective was adopted. However, considering the Treaty breaches that have occurred (and which the Crown has accepted) this approach may appear to be unreasonable and contrary to the Treaty principle of partnership and redress ie it hints of repeating the sentiments expressed continually throughout the nineteenth century ie "what was good for the white man was certainly not good for Māori." Pg 13 The Crown's engagement with Customary Tenure in the Nineteenth Century (waitangitribunal.govt.nz).

In considering whether Settlement land and other general land owned by Māori that is not subject to TTWMA should be excluded from the substantive provisions of the NPS HPL, the Crown must consider a number of objectives and principles which may be in conflict, including:

- The principle of active protection of Māori interests – in this case the option of excluding such land from the restrictions of the NPS HPL
- The principle of redress to recognise and avoid impacting on past redress unless overriding considerations apply
- The objective of protecting HPL
- The interests of the Crown as kawanatanga in maintaining effective, efficient and principled legal frameworks to govern and manage land (and other matters more generally).

The balance here is whether the principles of active protection and redress outweighs the other two objectives. In terms of the objective of protecting HPL, we note that the area concerned is only a small proportion of the total HPL resource in New Zealand. Not subjecting this land to the restrictions of the NPS HPL is unlikely to have a material impact on the overall objective of protecting HPL.

On the other hand, the Crown's interests in maintaining an effective, efficient and principled legal framework for land is a significant consideration. The land in question was acquired and/or returned through the Treaty Settlement process (or in the case of small areas, through other legislative avenues), but is otherwise general land able to be used and disposed of in ways that other general land is. Exempting this land from the controls of the NPS HPL is arguably more difficult to justify, as this land is not subject to the same restrictions as TTWM Act freehold land.

There is a risk that excluding Treaty Settlement Land from restrictions imposed by the NPS HPL implies that 'general land owned by Māori' is not subject to the same laws as all other land of the same type owned by different groups of New Zealanders. It could be seen to exempt land from the laws of the land by virtue of its ownership, rather than underlying limitations on its use and governance. Whilst these categories were only intended to be a discrete subset of 'general land owned by Māori' with particular characteristics and not apply to all general land, this could call into question the fairness and reasonableness of Government policy.

There is also a risk that such a decision could be perceived as implying the Crown will and should always avoid applying policy instruments that could devalue assets acquired through the Treaty settlement process. This could have far-reaching consequences across a wide range of policy decisions, making it difficult for the Crown to apply new law for a range of purposes.

35eapiw7r9 2022-09-15 12:13:55

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9(2)(h) [redacted]

9(2)(h) [redacted]

Officials note potential litigation risks arising from this decision:

- Treaty partners involved in exposure draft testing were supportive of the broad definition of specified Māori land, particularly the inclusion of treaty settlement land (including right of first refusal land)
- Officials have not consulted with Treaty partners on the removal of these two categories from the definition

B. Providing for iwi participation in mapping and implementation of the NPS-HPL

Iwi and hapū involvement in local decision-making

Giving effect to Te Tiriti means providing Māori with meaningful opportunities to participate and work in partnership with central and local government. A key part of this, which was raised in submissions, is ensuring that local iwi and hapū retain the ability to participate in local government decision-making throughout the implementation of the NPS-HPL and the development of regional and district plans and policy statements.

The NPS-HPL is an instrument under the Resource Management Act 1991 (RMA), which provides for iwi and hapū participation in local government decision-making in a number of ways. When giving effect to the NPS-HPL through their plans, local authorities will need to consider Part 2 of the RMA, which states that persons exercising powers under the RMA must take into account the principles of Te Tiriti, including the principle of partnership, and must recognise and provide for the following as matters of national importance:

> **Section 6(e)** - the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga; and
> **Section 6(f)** - the protection of historic heritage from inappropriate subdivision, use, and development.

Practically, this means that local authorities will need to work with iwi and hapū to appropriately map, manage and protect highly productive land throughout the planning process. Schedule 1 of the

35eapiw7r9 2022-09-15 12:13:55

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RMA requires local authorities to consult mana whenua, through local iwi authorities, and take into account any relevant planning documents recognised by an iwi authority when preparing a policy statement or plan. Local authorities must also provide iwi authorities with a draft of the proposed policy statement or plan, allow iwi authorities adequate time and opportunity to consider the draft document and provide any advice, and have particular regard to any advice received from those iwi authorities on the draft document.

Councils must also consider any relevant iwi participation arrangements, which detail agreed ways in which mana whenua may participate in resource management and decision-making processes under the RMA. Existing joint management agreements will also inform local decision-making.

The Exposure Draft was based on the understanding that the existing provisions under the RMA provide iwi and hapū with the ability to participate in the implementation of the NPS-HPL at a local (Regional) level, and that the inclusion of further provisions to this effect under the NPS-HPL is not needed. Feedback received during Exposure Draft testing was that this assumption needed to be revisited. Treaty Partners and Council's queried the basis for why the NPS-HPL would not specifically direct mana whenua involvement in the mapping of HPL and in preparing objectives, policies and rules for its protection in the same way that the NPS-FM does.

Existing RMA/LGA mechanisms for involving Māori

The existing Schedule 1 RMA requirements are all legal obligations which ensure that iwi authorities are consulted with in relation to regional policy statements, and plan changes, and that their views are taken into account by decision makers. This includes complying with the requirements of any existing relevant iwi participation legislation.

In relation to local authority plan making, Schedule 1 clause 3(1)(d) states that the local authority "shall" consult the tangata whenua of the area who may be so affected, through iwi authorities.[19] The definitions of "tangata whenua"[20] and "iwi authorities"[21] under the RMA are footnoted. These definitions do not capture individual Māori landowners. Iwi authorities may not be representative of Māori land owners.

There are also other relevant provisions in Schedule 1, including clause 1A(1) and 1B which provides that a proposed policy statement or plan must be prepared in accordance with any applicable Mana Whakahono a Rohe or iwi participation legislation. However, these are unlikely to provide for consultation with individual Māori landowners and vary from iwi to iwi.

Parts 2 and 6 of the Local Government Act 2002 (LGA) provide principles and requirements for local authorities that are intended to facilitate participation by Māori in decision-making processes. In particular, section 81 requires local authorities to establish and maintain processes for Māori contribution to decision-making. Section 82 also provides a set of principles which local authorities

[19] "Shall" is a mandatory requirement and must be carried out. We also do not necessarily agree with the statement in the NPS-FW s 32 Evaluation that "the existing RMA mechanisms for promoting Māori involvement in [planning] processes is not mandatory and rely on individual councils approaches and the capacity and capability of both regional councils and iwi/hapū." But we do not have a full understanding of the context in which this was stated. Perhaps the authors were also focussing on the definition of "iwi authority".

[20] Tangata whenua, in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area. Mana whenua means customary authority exercised by an iwi or hapu in an identified area.

[21] Iwi authority means the authority which represents an iwi and which is recognised by that iwi as having authority to do so.

35eapiw7r9 2022-09-15 12:13:55

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must follow in relation to consultation, including the need to involve people who are "affected" by decision making. Section 82(2) provides that "a local authority must ensure that it has in place processes for consulting with Māori in accordance with subsection (1)."

RMA Schedule 1 clause 3(2) provides that a local authority "may" consult anyone else during preparation of a policy statement or plan. "May" is a discretionary power which does not mandate consultation and may not be applied consistently by each regional authority.

However, clause 3(4) states that when a local authority considers clause 3(2), it must undertake the consultation in accordance with section 82 of the LGA. Therefore, linking the two Acts together, there is an obligation on local authorities to identify people affected by a proposed plan change and to consult with them (although there remains some discretion on how the principles in s 82 LGA are applied).

Application to NPS-HPL

The principles of Te Tiriti under s8 of the RMA (and reflected in s4 of the LGA) may justify further provision for engagement with Māori beyond iwi authorities for the purposes of the NPS-HPL.

The application of the NPS-HPL directly affects Māori landowners. Through engagement we have heard that some Māori landowners are not represented by iwi/hapū authorities and want to be identified as 'mana whenua' in their own right , therefore the principles of active protection, partnership and participation should be considered and applied as far as possible. The Crown's Treaty obligations towards Māori is a mandatory consideration, particularly with respect to how the NPS-HPL will be implemented by local authorities.

In general terms, the greater the extent that Māori interests will be affected by a policy proposal, the greater the requirement for express consultation with those affected. In the analysis of the how much Māori customary and freehold land and Treaty Settlement Land was LUC1-3 within each region, it was identified that this ranged between 1% and 67%. This regional variation indicates the importance of involving tangata whenua in giving effect to this NPS in that it will affect the different priorities of the different iwi/hapū/whanau in terms of land being rezoned urban, protecting freshwater values and development of Māori land.

Having regard to the definition of "iwi authority" and its reference in Schedule 1, we consider that the provisions in Schedule 1 of the RMA do not mandate consultation with individual owners of "Māori lands" for the purpose of HPL mapping or plan-making.

Furthermore, it should be noted that although sections 81 and 82 of the LGA contain broader Māori consultation requirements than Schedule 1 of the RMA (which only provides for iwi authority consultation), local authorities can make judgments about the manner in which these requirements for consultation with Māori apply to their decision-making, so do not necessarily mandate consultation with affected landowners either.

Therefore, we do not consider that existing requirements under Schedule 1 of the RMA or Parts 2 and 6 of the LGA necessarily address the issues raised during engagement for Māori to be involved in HPL mapping and planning, particularly in relation to mana whenua (Māori landowners).

On this basis, specific direction on the involvement of mana whenua in giving effect to the NPS HPL has been provided for: both in mapping (Clause 3.4), and preparation of Objectives, Policies, and Rules in District Plans (Clause 3.3).

35eapiw7r9 2022-09-15 12:13:55

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(Clause 3.4) It is recommended that regional councils are directed to undertake the mapping:

(a) in collaboration with all relevant territorial authorities; and

(b) in consultation with tangata whenua, as required by clause 3.3; and

(c) at a level of detail that identifies individual parcels of land or, where appropriate for larger sites, parts of parcels of land.

Reasoning:

Regional Councils are directed to make decisions regarding areas that must be mapped, additional areas that may be mapped and also areas that must not be mapped. Clause 3.2 in the Exposure Draft already directed regional councils on how to undertake the mapping, requiring them to collaborate with all relevant territorial authorities and to undertake the mapping at an appropriate level of detail. It is therefore considered appropriate to clarify in this clause (rather than in guidance) that consultation with mana whenua will be required. We do not consider this should be left to guidance, particularly when it was requested (by mana whenua) and there may lack consistency in how mana whenua are engaged through the Schedule 1 process. It also aligns with the requirements to engage with mana whenua in implementing the NPS FM.

Similarly, it is recommended that territorial authorities be directed to collaborate with mana whenua in the preparation of objectives, policies, rules and methods in to the NPS HPL as follows:

(Clause 3.3) Tangata whenua involvement

(1) *In giving effect to this National Policy Statement through regional policy statements, regional plans, and district plans, every local authority must actively involve tangata whenua (to the extent they wish to be involved).*

(2) *The active involvement must include consultation with tangata whenua that is:*

(g) early, meaningful and, as far as practicable, in accordance with tikanga Māori; and

(h) undertaken at the appropriate levels of whānau, hapū, and iwi decision-making structures, recognising that:

some delegates will have to represent the interests and perspectives of more than one group; and

some committees are not always fully representative of every iwi and hapū in the region; and

each constituent group will continue to be entitled to make submissions on notified plans and retain all other rights to be heard and have standing for appeals.

Reasoning:

It is noted that this could be provided as guidance or as a specific clause. On balance we recommended that this be provided as a specific clause for the following reasons:

- Addresses deficiencies with Schedule 1 process in terms of timing and level of mana whenua involvement by providing specificity to the RMA definition of tangata whenua / mana whenua
- Will likely transition better into the Natural and Built Environments Act (NBA)/National Planning Framework (NPF) given that it addresses a finding from the BECA review of the Exposure Draft that *the outcome of providing greater recognition of te ao Māori (under the NBA) is not provided for* and *'further investigation is required to consider the role of Te Ao Māori for highly productive land and related outcomes'*.

5. Conclusion

35eapiw7r9 2022-09-15 12:13:55

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The results of this Treaty Analysis alongside engagement and feedback from Treaty Partners through the development of the NPS has resulted in specific provisions relating to the involvement of tangata whenua in giving effect to this NPS and in providing for the subdivision, use and development of specified Māori land. The analysis has confirmed that there is significant variation in the amount of Māori customary and freehold land within each region, (ranging between 1% and 70%). This regional variation indicates the importance of involving tangata whenua in giving effect to this NPS in that it will affect the different priorities of the different iwi/hapū/whanau in terms of land being rezoned urban, protecting freshwater values and development of specified Māori land.

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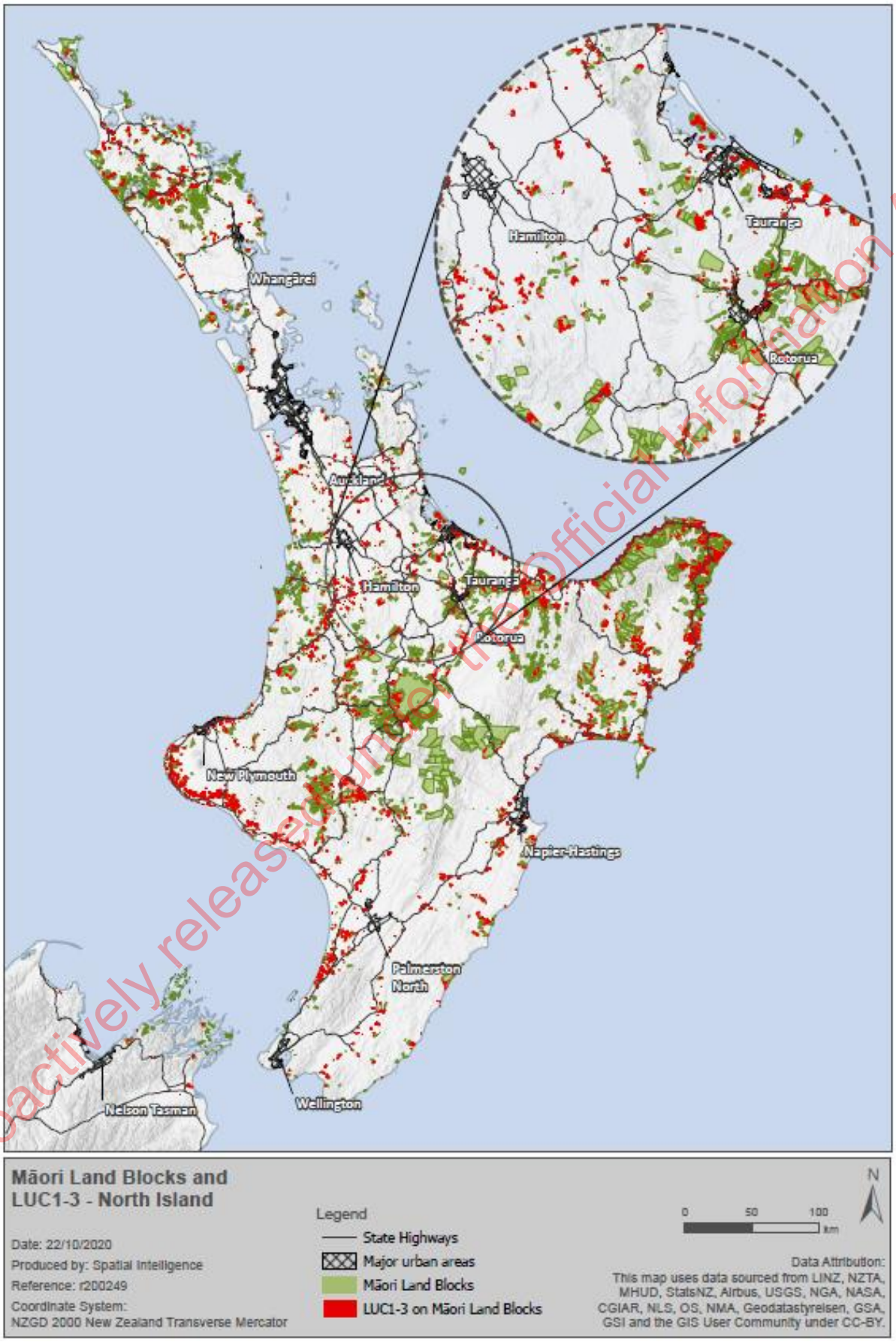
Appendix One: Māori customary and freehold land and LUC1-3



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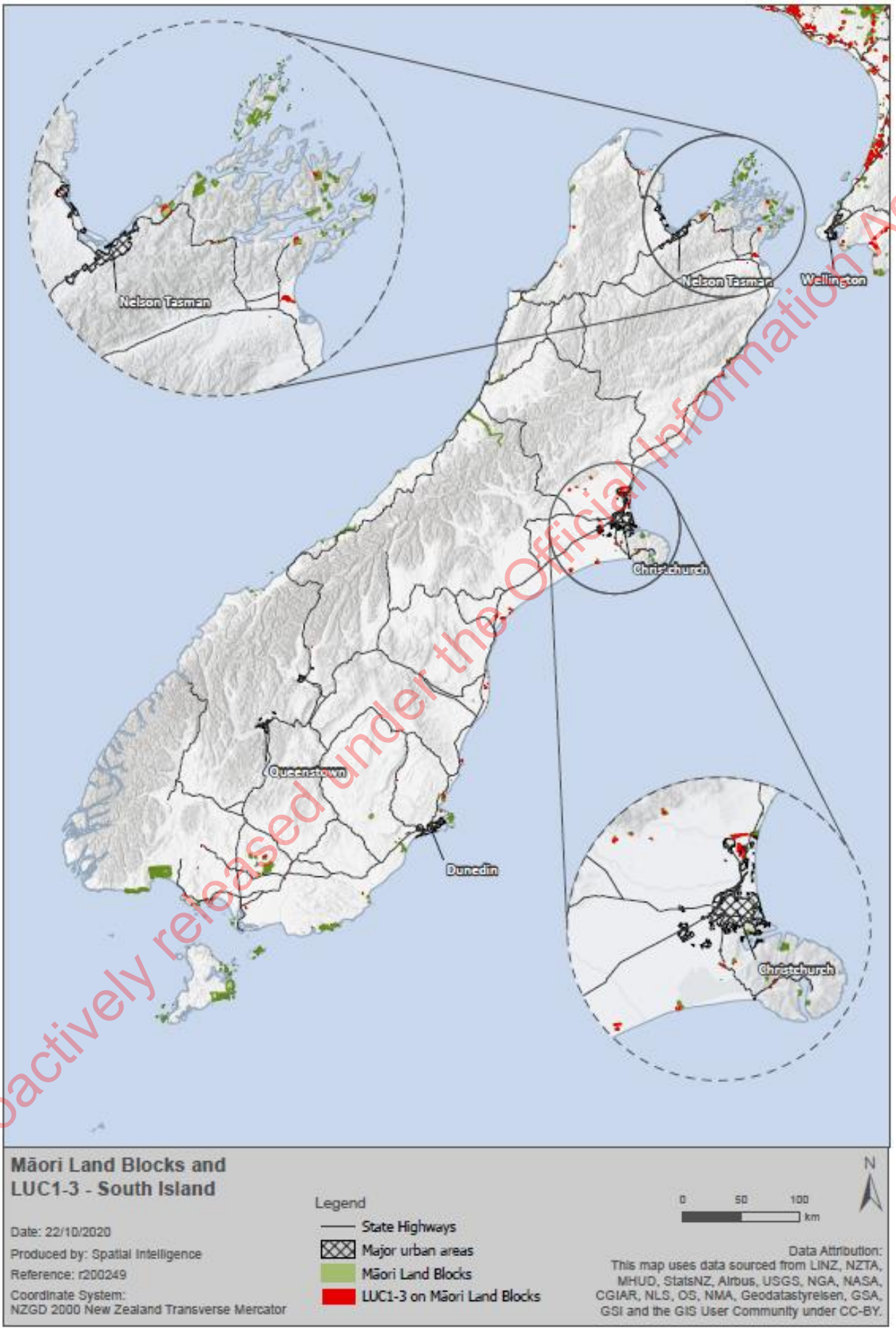

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Table 1 – Amount of Māori customary and freehold land that is LUC 1-3 by region

Region (Local Authority)	Total customary and freehold land within the Region	Amount customary and freehold land that is LUC 1-3 (hectares)	% of customary and freehold land land that is LUC 1-3
Tasman Region	105.6	74.3	70.3
Taranaki Region	29291.4	13065.4	44.6
Canterbury Region	4647.1	1320.7	28.4
Auckland Region	7099.3	1231.1	17.3
Wellington Region	12479.0	2144.5	17.2
Nelson Region	1466.6	160.8	11.0
Gisborne Region	212559.9	19889.1	9.4
Bay of Plenty Region	231156.2	21068.2	9.1
Manawatu-Whanganui Region	178093.8	16058.7	9.0
Northland Region	124325.3	8228.3	6.6
Waikato Region	297664.0	18575.5	6.2
Hawke's Bay Region	178718.5	10359.3	5.8
Marlborough Region	7247.4	224.5	3.1
Otago Region	5889.3	179.7	3.1
West Coast Region	5582.1	158.2	2.8
Southland Region	25276.1	338.7	1.3
NZ Total	**1321601.5**	**113077.2**	**8.6**

It is important to note that not all of this land would necessarily meet the criteria for being as HPL ie being zoned Rural and large and geographically cohesive (refer to analysis in section 4). This regional variation in LUC 1-3 on Māori land (customary and freehold) does however indicate the importance of involving tangata whenua in decisions on areas to be included and excluded from the mapping, particularly where having more or less land mapped as HPL may affect the different priorities of the different iwi/hapu/whanau -ie land being rezoned urban, protecting freshwater values, development of Māori land.

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Appendix Two – Constraints on Māori customary and freehold Land

Māori customary and freehold land (as defined by Te Ture Whenua Māori Act 1993) is almost exclusively owned by the descendants of the original owners, having been passed down successive generations to the current landowners.[22] This process has led to Māori land titles becoming increasingly fragmented as additional owners inherit land and receive a diminishing share in the land. The fragmentated nature of these land titles presents challenges to the utilisation of Māori land, including: the need to balance competing views, lack of governance, high administration costs, restrictions on the alienation of land, and access to capital. In addition, the utilisation of this land must take place in a manner that is consistent with tikanga Māori and in recognition of the kaitiaki role of Māori in regard to the Māori estate.

There are approximately 2.3 million ownership interests across 27,490 blocks of Māori customary and freehold land. A significant amount of these interests is held by owners who either live far from the land or are unaware that they are owners at all. There is also anecdotal evidence of interests being held by deceased persons or owned by the same person under different names.[23] Given the nature of these ownership interests, reaching consensus on how Māori land should be utilised and managed is often a difficult process, as land managers balance these challenges with competing views on land use and the idea of a quadruple bottom line (social, cultural, environmental, and economic outcomes).

The Te Ture Whenua Māori Act 1993 attempts to manage the issue of title fragmentation by establishing collective ownership structures where representatives are elected to administer land interests on behalf of owners.[24] The most common among these structures are Ahu Whenua Trusts and Māori Incorporations. Ahu Whenua Trusts are governed by elected trustees and are designed to promote the use and administration of the land in the interest of landowners. Ahu Whenua Trusts make up 68 percent of all Māori land management structures and administer the majority of Māori land (approx. 751,000 ha).[25] Māori Incorporations operate similar to a limited liability company where landowners are shareholders who own shares in the incorporation, rather than individual land blocks. There are a much smaller number of Māori Incorporations, with about 160 Incorporations managing approximately 280,000 ha of Māori land. A significant number of Māori reservations also exist, however they account for much less land (22,000 ha). Table 1 below provides a breakdown of Māori land management structures by rohe.

Table 1 – Number of Māori customary and freehold land management structures by rohe

Rohe	Total	Māori Incorporations	Ahu Whenua Trusts	Māori Reservations	Whenua Tōpū Trusts	Pūtea Trusts	Other Trusts
Taitokerau	1,136	15	518	588	1	0	14
Waikato-Maniapoto	1,309	16	962	296	4	1	30
Waiariki	2,215	28	1,570	552	8	1	56
Tairāwhiti	1,350	63	978	273	5	0	31
Tākitimu	532	5	396	113	4	0	14
Aotea	1,259	23	837	366	10	0	23
Te Waipounamu	605	10	430	136	2	0	27
Total	8,406	160	5,691	2,324	34	2	195

[22] Tanira Kingi. 2013. Cultural bastions, farm optimisation and tribal agriculture in Aotearoa. https://www.grassland.org.nz/publications/nzgrassland_publication_2583.pdf

[23] https://www.maorilandcourt.govt.nz/assets/Documents/Publications/MLC-2011-May-Judges-Corner-Isaac-CJ.pdf

[24] Tanira Kingi. 2013. Cultural bastions, farm optimisation and tribal agriculture in Aotearoa. https://www.grassland.org.nz/publications/nzgrassland_publication_2583.pdf

[25] Māori Land Court data (excel spreadsheet)

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Māori customary and freehold land management structures face high administration costs, not only in a purely economic sense, but also in regard to the time and volunteer effort often required, particularly in the case of Māori Trusts where it is not uncommon for trustees to donate their time or work for minimal compensation.[26] This is another burden or constraint affecting the development of Māori land.

There is also a significant amount of Māori customary and freehold land (246,000 ha) with no management structure in place, approximately 18 percent of Māori land. While some of this land is managed by Te Tumu Paeroa, the Māori trustee, on behalf of landowners, a lot of this land is not intensively utilised. Table 2 shows the number of Māori land blocks with and without management structures.

Table 2 – Māori customary and freehold land blocks with and without management structures

Rohe	# Structures	# Blks with Structures	# Blks without Structures	Area vested (ha)	Area not vested (ha)
Taitokerau	1,136	1,529	3,919	85,686.6001 (62%)	52,443.7963 (38%)
Waikato-Maniapoto	1,309	1,685	2,075	95,865.6562 (77%)	28,210.2602 (23%)
Waiariki	2,215	2,493	2,655	272,608.7272 (89%)	31,115.0940 (11%)
Tairāwhiti	1,350	1,705	3,649	217,568.9910 (81%)	51,500.2725 (19%)
Tākitimu	532	618	773	70,202.0542 (80%)	17,799.8711 (20%)
Aotea	1,259	2,097	1,937	372,923.9816 (90%)	39,922.7170 (10%)
Te Waipounamu	605	1,387	972	42,103.2396 (64%)	24,141.9760 (36%)
Total	8,406	11,514	15,980	1,157,347.3883 (82%)	246,203.9871 (18%)

Another issue related to the collective ownership of Māori land, is that under Te Ture Whenua Māori Act 1993, Māori freehold land can only be sold with the agreement of 75 percent of the beneficial interests in the land (or shares in the case of a Māori incorporation). Māori customary land cannot be sold. This makes it difficult for iwi and hapū to realise economic gains from the sale of Māori land, as well as making it more likely for this land to remain in Māori possession. The flow on effect of this, is that it becomes difficult for Māori landowners to raise capital, as banks are less willing to hold Māori land as debt security. This further restricts the ability of iwi and hapū to use the land more intensively.

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[26] Tanira Kingi. 2013. Cultural bastions, farm optimisation and tribal agriculture in Aotearoa. https://www.grassland.org.nz/publications/nzgrassland_publication_2583.pdf.

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Appendix Three - Land quality and utilisation of Māori customary and freehold land

The majority of Māori customary and freehold land is constrained by a range of topographic, soil and climatic factors that restrict what forms of primary production the land can be used for. Multiple-use land (LUC1-4), which is suitable for a range of horticultural and cropping activities as well as pastoral and forestry uses, makes up only 18 percent of Māori customary and freehold land. Land suitable only for pastoral or forestry activities comprises 65 percent of Māori customary and freehold land, with the remaining 17 percent of Māori customary and freehold land being either suitable only for conservation or biodiversity purposes or unavailable for use (i.e. water bodies, existing infrastructure and settlements).

Compared to the distribution of LUC classes nationally, a higher proportion of Māori customary and freehold land is vested in less productive/versatile land (i.e. LUC5-7) and a lower proportion vested in our best growing land (i.e. LUC1-4). At a national level, LUC1-3 comprises 15 percent of total land but only 9 percent of Māori freehold and customary land (113,200 ha). The proportion of the national LUC1-3 land that is Māori freehold and customary land is approximately 3%. This implies that at the surface level, the NPS-HPL may have a lesser impact on Māori customary and freehold land compared to general title land as a lower proportion of Māori customary and freehold land will be captured by the policy. However conversely, this also highlights the potential impact of further impeding the utilisation of the best Māori customary and freehold land given the relatively small amount of to begin with. Figure 1 and Table 1 below show the distribution of Land Use Capability (LUC) classes across Māori customary and freehold land.

Table 1 – LUC class share of Māori customary and freehold land and total land[27]

Land Use Capability Class	Maori Customary and Freehold Land Area (ha)	% of Māori land	% LUC class in New Zealand
LUC1	7,496	1%	1%
LUC2	31,377	2%	5%
LUC3	74,373	6%	9%
LUC4	122,323	9%	10%
LUC5	6,260	0%	1%
LUC6	458,569	35%	28%
LUC7	399,419	30%	21%
LUC8	152,341	12%	22%
Other	71,962	5%	3%
Total (ha)	**1,324,121**	**100%**	**100%**

Utilisation of Māori customary and freehold land

Due to limitations in the quality of Māori customary and freehold land and the constraints of collective ownership, a large portion of Māori customary and freehold land is relatively 'un-developed'. Research commissioned by MPI found 960,000 ha of Māori customary and freehold land (69 percent) to be either 'unproductive' or 'underutilised'. The report suggested that if this land was brought up to average industry benchmarks for productivity, total benefits would include an additional $8 billion in gross output and 3,600 jobs over a 10-year period.[28]

The lion's share of Māori customary and freehold land is currently in natural forest, about 43 percent. This study suggested that 54 percent of Māori land is suitable for pastoral farming and cropping but only 36

[27] * *Does not include Maori land on Chatham or Stewart Islands* ***Other includes water, infrastructure and settlements*

[28] https://www.mpi.govt.nz/dmsdocument/4261-Growing-the-Productive-Base-of-Maori-Freehold-Land

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percent is used for these purposes. Table 2 and Figure 2 below provide a breakdown of Māori customary and freehold land according to current land use.

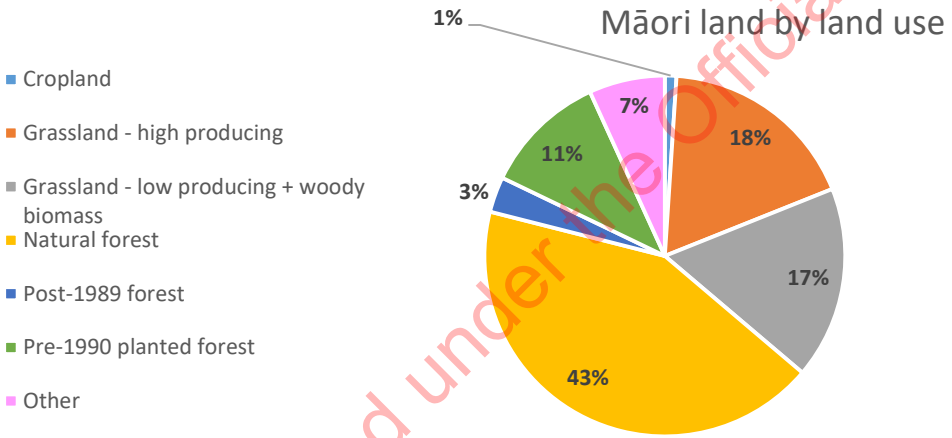
Table 2 – Māori customary and freehold land by land use

Land Use Mapping Class (2016)	Area (ha)	Percentage
Cropland	13,908	1%
Grassland - high producing	239,965	18%
Grassland - low producing + woody biomass	231,255	17%
Natural forest	572,981	43%
Post-1989 forest	42,694	3%
Pre-1990 planted forest	148,094	11%
Other	91,343	7%
Total (ha)	**1,248,897**	**100%**

**Does not include Maori land on Chatham or Stewart Islands*

***Other includes settlements, infrastructure, water, mining, rocky and beachy areas.*

Figure 2 – Māori customary and freehold land by land use



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Appendix 5: Regulatory Impact Statement

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Appendix 6: MfE Chief Legal Advisor certification

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