

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2020] NZEnvC 93

IN THE MATTER of the Resource Management Act 1991
AND of appeals under clause 14 of the First
Schedule of the Act
BETWEEN ARATIATIA LIVESTOCK LIMITED
(ENV-2018-CHC-029)
... (continued on last page)
Appellants
AND SOUTHLAND REGIONAL COUNCIL
Respondent

Court: Environment Judge J E Borthwick
Environment Commissioner R M Bartlett
Environment Commissioner S G Paine

Hearing: at Christchurch on 15, 16 and 17 June 2020

Appearances: P A C Maw and A M Langford for Southland Regional Council
M R G Christensen for Horticulture New Zealand, Ballance Agri-
Nutrients Limited, Federated Farmers of New Zealand and
Ravensdown Limited
D A Allan for Aratiatia Livestock Limited
M R Garbett for Gore District Council, Southland District Council and
Invercargill City Council
P D Williams and D van Mierlo for Director-General of Conservation
S W Christensen and H J Tapper for Meridian Energy Limited
C Lenihan for Federated Farmers of New Zealand
J G A Winchester and S K Lennon for Waihopai Rūnaka, Hokonui
Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima
and Te Rūnanga o Ngāi Tahu (collectively Ngā Rūnanga)
M R Garbett for Gore District Council, Southland District Council and
Invercargill City Council
R Donnelly for Waiau Rivercare Group

Date of Decision: 29 June 2020

Date of Issue: 29 June 2020

SECOND INTERIM DECISION OF THE ENVIRONMENT COURT



REASONS

Introduction

[1] This decision addresses the architecture of the proposed Southland Water and Land Plan and the interpretation and implementation of Te Mana o te Wai and ki uta ki tai by the plan.

[2] It is the second Interim Decision of the court in relation to the higher order provisions of the proposed Southland Water and Land Plan. While the court was able to make detailed findings on many of the plan's objectives and policies in its first decision, a final decision has not been released because the interpretation and implementation of the National Policy Statement for Freshwater Management 2014 (amended 2017), in the context of this plan, remained at large.

[3] Having set out our interpretation in the first decision, we recorded that if the court's interpretation was not available and/or the scheme of the plan does not implement the National Policy Statement for Freshwater Management (NPS-FM) in the manner we suggest, this would have implications for the drafting of the higher order provisions which, when considered individually, are weakly drawn.

Background

[4] Before the 1840 Treaty of Waitangi, Ngāi Tahu ki Murihiku recognised the mana of water (water's integrity, respect, prestige and authority).¹ The Treaty upholds the mana of water² and the Crown, through the NPS-FM, has declared³ that it is a matter of national significance that the management of fresh water is through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management.

[5] Likening Te Mana o te Wai to a korowai or cloak, Ngā Rūnanga regard Te Mana o te Wai as the overarching framework for freshwater management and, by association,



¹ Proposed Southland Water and Land Plan (Decisions Version, 4 April 2018) (pSWLP), Introduction: Partnership between the Southland Regional Council and Ngai Tāhu ki Murihiku at 8.

² Te Mana o te Wai: The Health of our Wai, the Health of our Nation (Kāhui Wai Māori, Report to Hon Minister David Parker, April 2019) at 5. See Cain, supplementary evidence, 17 April 2020 at [18] and [72].

³ We do not use "declared" in any technical sense pursuant to the RMA.

land management, as this directly impacts on water, particularly its use and quality.⁴ If Te Mana o te Wai is the cloak, then the tikanga and cultural heritage of Ngāi Tahu ki Murihuku are the warp and weft of that cloak. Reflecting the mātauranga (knowledge/wisdom) that all environmental elements are connected and must be managed in a way that responds to this connectivity, “ki uta ki tai” is Ngāi Tahu ki Murihuku tikanga that is embodied in the proposed Southland Water and Land Plan.⁵

[6] Returning to the first Interim Decision we said – and we say again – Te Mana o te Wai [and indeed ki uta ki tai] while expressed in the NPS-FM in te reo Māori, benefits all New Zealanders.⁶ Te Mana o te Wai is not a “Māori centric” but a “water centric” approach.⁷ This is made explicit through the Objective AA1 and Policy AA1⁸ of the NPS-FM which provides that when considering and recognising Te Mana o te Wai the values identified through engagement and discussion with the community, including tangata whenua, must inform the setting of freshwater objectives and limits to come.

Construction of the plan

[7] In the first Interim decision we posited that the plan was drafted in such a way that all objectives and policies were intended to express Te Mana o te Wai and ki uta ki tai. We said the structure (architecture) of the plan is to progressively elaborate on these outcomes with each successive objective building on the foregoing. If correct, then all the provisions of the plan are to be interpreted and applied in a manner that considers and recognises Te Mana o te Wai⁹ and implements it in accordance with ki uta ki tai.¹⁰ This is what was meant when the drafters of the plan said “Te Mana o te Wai is

⁴ Cain, EIC 15 February 2019 at [85]; supplementary evidence, 17 April 2020 at [37] and [41].

⁵ Cain, EIC 15 February 2019 at [18] and [41].

⁶ First Interim Decision at [20].

⁷ Waitangi Tribunal (2019) *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Report No. Wai 2358) at 355 cited in joint submission of the Southland Fish and Game Council and Royal Forest and Bird Protection Society of New Zealand Inc dated 14 June 2020 at [13].

⁸ Amongst other provisions.

⁹ National Policy Statement for Freshwater Management (2017), Objective AA1.

¹⁰ At [56] of the first Interim Decision the court said “...all provisions of the plan are to be interpreted and applied in a manner that gives effect to Te Mana o te Wai and implemented in accordance with ki uta ki tai”. As correctly pointed out by one counsel, it is the National Policy Statement that is to be given effect and not Te Mana o te Wai *per se* and pursuant to Objective AA1 of the NPS-FM the proposed plan is to consider and recognise Te Mana o te Wai in the management of fresh water. That said, the use of ‘gives effect to’ arises in the context of the court’s interpretation of Te Mana o te Wai. The court sets out elsewhere, its understanding of the National Policy Statement and the matter of national significance to which it applies. See *Aratiatia Livestock Limited and others v Southland Regional Council* [2019] NZEnvC 208 (first Interim Decision).



fundamental to the integrated framework for freshwater management in Southland".¹¹ The court considered the evidence within this framework, but was unable to finalise the decision while the interpretation and implementation of the NPS-FM under this plan remained at large. We also said that, if our interpretation is correct, this needed careful explanation.¹²

[8] At this hearing no party or witness contested the court's interpretation and this decision resolves the plan's construction by inserting a new interpretation statement into the body of the plan. While labelled "Interpretation Statement", the new provision addresses matters both of plan process and interpretation. The direction applies to all users of natural and physical resources and to persons exercising functions and powers in relation to the administration and implementation of the plan's provisions.

[9] The Interpretation Statement that is agreed upon by the parties and their witnesses follows:

Interpretation Statement

Objectives 1 and 2 are fundamental to this plan, providing an overarching statement on the management of water and land, and all objectives are to be read together and considered in that context.

The plan embodies ki uta ki tai and upholds Te Mana o Te Wai and they are at the forefront of all discussions and decisions about water and land.

[10] The Interpretation Statement expressly recognises Objectives 1 and 2¹³ as being foundational to the plan, providing an overarching statement on the management of water and land. All objectives are to be read together and considered in this context. Secondly, the entire plan – not just Objectives 1 and 2 – embody ki uta ki tai and uphold Te Mana o te Wai. Consequently, these approaches are at the forefront of all discussions and decisions about water and land. As a matter of process, this does not allow for the Regional Council (particularly in its capacity as consent authority) to trade off those fundamentals to enable other approaches. As a matter of interpretation, the plan's



¹¹ pSWLP above n 1, Introduction at 6. Oxford English Dictionary (Online, Oxford University Press) defines "fundamental", a noun, as meaning "[a] basic or primary principle, rule, law, or article, which serves as the groundwork of a system; an essential part".

¹² First Interim Decision at [65].

¹³ Objective 2 was formerly Objective 3.

provisions are not to be read down and considered in isolation separate from Objectives 1 and 2. Rather, land, water and people are to be considered holistically.

[11] All parties agree, as do we, that Ngā Rūnanga's notice of appeal confers scope for the court to make this amendment to the plan.¹⁴ Subject to the directions at the end of this decision, we would approve its inclusion.

[12] We turn next to the two objectives expressly addressed in the Interpretation Statement. Objective 1 is a statement about the ki uta ki tai management philosophy:

Objective 1

Land and water and associated ecosystems are sustainably managed as integrated natural resources, recognising the connectivity between surface water and groundwater, and between freshwater, land and the coast.

There are no appeals in relation to this objective.

[13] Objective 2 (DV) states:¹⁵

Objective 2

The mauri of waterbodies provide for te hauora o te tangata (health and mauri of the people), te hauora o te taiao (health and mauri of the environment) and te hauora o te wai (health and mauri of the waterbody).

[14] While there were no appeals against Objective 2, the court recommended in the first Interim Decision the objective be amended to adopt the active language used in the NPS-FM and clearly put the rights and obligations of people (as the users of land and water) in the frame. Thus, "the mauri of water 'will be acknowledged and protected so that it provides' for te hauora o te tangata ...". Many planning witnesses regard the court's wording as an improvement. However, they do not go as far as to say that the pSWLP would not give effect to NPS-FM without the suggested amendment. While on the one hand, no single provision by itself gives effect to the NPS-FM, on the other, for several witnesses the inclusion of the Interpretation Section was material to reaching their view that the pSWLP does now give effect to the NPS-FM.¹⁶



¹⁴ See Transcript (Maw) at 241-242; notice of appeal, Ngā Rūnanga and Ngāi Tahu, 17 May 2028, at [8(d)].

¹⁵ This objective has been renumbered, it appears as Objective 3 in the pSWLP.

¹⁶ See Transcript (Dunning) at 231-232; Davidson at 225; Kirk at 228-229.

[15] We remain concerned with the expression of Objective 2, but accept that its outcome is only attainable if people acknowledge and protect the mauri of water and the Interpretation Statement clarifies the role and relevance of this objective in the plan.¹⁷ Subject to clarification as to whether the sense of the objective would be improved by amending the term “waterbodies” to “water” and secondly a minor grammatical amendment to the word ‘provide’ so that it reads ‘provides’¹⁸ the decision-version of the objective will not otherwise be amended.

[16] Thus, amend Objective 2 to read:

Objective 2

The mauri of waterbodies provides for te hauora o te taiao (health and mauri of the environment) and te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).¹⁹

Treaty of Waitangi

[17] Finally, we directed that the parties respond on the question as to how the pSWLP took into account the principles of the Treaty of Waitangi.²⁰ Many parties did not respond to the court and while the Regional Council did file planning evidence, that evidence was not confirmed by the relevant witness.

[18] The parties are aware of the duty of the court under s 8 of the Resource Management Act 1991.²¹ How is the court to take into account the principles of the Treaty, if not given evidence on this topic? We will come back to the question later but in the meantime, we remind the parties that they will need to be cognisant of s 8 in future hearings and/or ADR processes.

¹⁷ Transcript (Cain) at 232.

¹⁸ ‘Mauri’ is a singular not plural term.

¹⁹ Note, we have retained the order of taiao, wai and tangata as recommended by Mr McCallum-Clark in this 2019 evidence.

²⁰ Record of PHC held 10 February 2020.

²¹ Section 8 states “In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)”.



Outcomes

[19] Any party opposing in principle amending Objective 2 (renumbered) to read "The mauri of waterbodies provides for ..." is directed to file a memorandum giving reasons by **Friday 3 July 2020**.

[20] Parties are to confer and confirm where in the pSWLP the Interpretation Statement is to be included and secondly, whether the statement needs to be introduced by reference to the persons to whom it applies. If there is no settled view on the matter, the planning witnesses will be directed to conference on the same.

[21] Finally, directions will be released separately on the outstanding matters in Topic A of the appeals on the pSWLP.

For the court:



J E Borthwick
Environment Judge



The seal is circular with the text "THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND" around the perimeter. In the center is the coat of arms of New Zealand, featuring a shield with a crown on top, a ship on the left, and a bird on the right.

List of appellants

ENV-2018-CHC-26	Transpower New Zealand Limited
ENV-2018-CHC-30	Wilkins Farming Co
ENV-2018-CHC-36	Director-General of Conservation
ENV-2018-CHC-37	Southland Fish and Game Council
ENV-2018-CHC-38	Meridian Energy Limited
ENV-2018-CHC-39	Alliance Group Limited
ENV-2018-CHC-40	Federated Farmers of New Zealand
ENV-2018-CHC-41	Heritage New Zealand Pouhere Taonga
ENV-2018-CHC-47	Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima and Te Rūnanga o Ngāi Tahu
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of New Zealand Incorporated

