

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

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-29)
MERIDIAN ENERGY LIMITED
(ENV-2018-CHC-38)
FEDERATED FARMERS OF NEW ZEALAND
(ENV-2018-CHC-40)
TE RUNANGA O NGAI TAHU, HOKONUI
RUNAKA, WAIHOPAI RUNAKA, TE
RUNANGA O AWARUA & TE RUNANGA O
ORAKA APARIMA
(ENV-2018-CHC-47)

(Continued on next page)

**MEMORANDUM OF COUNSEL RE: LEGAL SUBMISSIONS RE S274 STANDING
(WAIAMU RIVER LIAISON COMMITTEE)
31 AUGUST 2018**

Judicial Officers: Judge Hassan and Judge Borthwick

Instructing Counsel for Appellant:
Scholefield Cockroft Lloyd
PO Box 166
Invercargill 9840
Tel: 03 2184089
fergusmore@scholefield.co.nz

Counsel for Appellant:
Clare Lenihan
Barrister
102 Jed Street
Invercargill 9810
Tel: 03 2141674
clare.lenihan@environmentallawyer.co.nz

ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NZ
(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

Introduction

1. On July 13th, 2018, the Liaison Committee lodged s274 notices to the appeals on the Proposed Southland Water and Land Plan (the **Proposed Plan**) of:
 - (a) Meridian Energy Ltd, ENV-2018-CHC-000038;
 - (b) Federated Farmers of New Zealand, ENV-2018-CHC-000040;
 - (c) Royal Forest and Bird Protection Society of New Zealand Incorporated, ENV-2018-CHC-000050;
 - (d) Te Runanga o Ngai Tahu ENV-2018-CHC-000047; and
 - (e) Aratiatia Livestock Limited ENV-2018-CHC-000029

2. The Liaison Committee's interest in the proceedings relates to the following provisions of the Proposed Plan:
 - (a) Objective 10;
 - (b) Policy 26 Renewable energy;
 - (c) Rule 52 Water abstraction, damming, diversion and use from the Waiau catchment;
 - (d) Rule 52A Manapouri Hydro-electric Generation Scheme; and
 - (e) Appendix E Receiving Water Quality Standards.

3. In its s274 notices, the Liaison Committee stated it is interested in:
 - (a) The content of Objective 10, including the matters that must be recognised and provided for;
 - (b) The content of Policy 26, including the requirement to recognise and provide for the location of the generation activity, and the practical constraints of development, operation, maintenance and upgrading of the Manapouri Power Scheme (MPS);

- (c) The content of Rules which apply to the MPS, including Rule 52A, which affords a controlled activity status to the renewal of the water take for the MPS;
 - (d) The content of Appendix E, including the exemption in the instance where a water quality standard is breached as a result of the MPS;
 - (e) The extent to which the above provisions reduce the Regional Council's ability to reconsider, manage and alter the water take for the MPS and its effects on the environment in the future;
 - (f) The impact of the above provisions on:
 - (i) The Waiau River;
 - (ii) Te Wae Wae Lagoon and the surrounding coastal marine area;
 - (iii) Deep Cove;
 - (iv) The ability for the community to realise their aspirations for freshwater, both in terms of quality and quantity, including, but not exclusively, through the National Policy Statement for Freshwater Management.
4. The Respondent has raised the standing of the Liaison Committee (and the Waiau Rivercare Group) as a jurisdictional issue, by Memorandum dated 17 July 2018.
5. The Liaison Committee indicated, by Memorandum to the Court dated 8 August 2018, it would like to file submissions in response to the challenge (and be heard, if the Court wishes to hear from parties). A similar Memorandum was also filed by counsel for the Waiau Rivercare Group, 14 August 2018, and the Court issued directions on 20 August 2018.
6. Perhaps due to an oversight, the Liaison Committee was not included in the Court directions, but the Committee has proceeded on the basis it is appropriate to follow those directions (as set out in a further Memorandum to the Court dated 29 August 2018)

Summary

7. The Liaison Committee has a specific interest in relation to the proceedings when compared to that of the general public. Further, the relationship between the interests of the Liaison Committee and consequent effect of the proceedings on those interests is not remote. There will be a significant disadvantage to the Liaison Committee if it is unable to participate in these proceedings. Therefore it is submitted the Liaison Committee meets the relevant tests to become a party to the appeals it seeks to join.
8. The grounds are set out in more detail in this Memorandum and further elaborated in the affidavit of Mr Peter James Horrell dated 31 August 2018.

Background to formation, role and operation of the Liaison Committee

9. The reasons for the Liaison Committee having an interest greater than the public generally were only briefly alluded to in their s274 notices. Since engaging counsel, the Liaison Committee has obtained a number of relevant documents from the Respondent to support its case that it has an interest greater than the public generally in relation to the appeals it seeks to join on the Proposed Plan.
10. Mr Horrell, the chair of the Liaison Committee, has sworn an affidavit (dated 31 August 2018, filed with this Memorandum) which contains the following important points:
 - (a) The history relating to the role and genesis of the Liaison Committee dates back to the early 1970's, when adverse effects arose along the Lower Waiau Rive as a result of operation of the Power Scheme. A Waiau Action Group lobbied hard for weed and erosion control and maintenance of the fence along the riverside (as once the river in essence disappeared, there was no barrier between farms¹);
 - (b) For six years from 1990-1996, members of various organisation came together with the then ECNZ to form the Waiau Working Party, as part of ECNZ applying for resource consents for the Power Scheme. The parties

¹ Paragraph 13 affidavit of Peter Horrell 31 August 2018.

negotiated what became a joint submission recommending proposed conditions of consent to Council and, also recommended that when assessing the applications under s104 of the Act, Council take account of the various Heads of Agreement reached with members of the Waiau Working Party, as mitigation of the adverse effects identified by them²;

- (c) One of those agreements was between the Electricity Corporation of New Zealand (**ECNZ**), Federated Farmers and the Southland Regional Council (the **Waiau Agreement**³). The Waiau Agreement recognised, amongst other things, the likely existence of adverse effects on landowners in the Waiau catchment arising from the use of the Lower Waiau River for the Power Scheme and the importance of the mitigation of those adverse effects for farmers and other landowners in the Waiau catchment. It also recognised the loss of stock access to water as a result of the need to fence river berms as a result of lowering of the Waiau River;
- (d) The Waiau Agreement also provided for a special rating district to be established⁴. This was followed by formation of Waiau River Liaison Committee (from a group of local landowners), to complete the process of necessary actions to fulfil the Waiau Agreement with ECNZ in connection with its consent application for the Power Scheme;
- (e) Through the Waiau Agreement, Meridian provide annual funding⁵ for the Liaison Committee to carry out, as a minimum:
 - (i) Maintenance of an effective flood channel in the Waiau riverbed from the Mararoa Weir to the river's mouth;
 - (ii) Maintenance of fences erected as a consequence of the Power Scheme;
 - (iii) Maintenance of the fence areas free of weeds; and

² Paragraphs 16-18

³ Paragraphs 19 and Exhibit 1

⁴ Clause 7.3.

⁵ \$200,000 annually, adjusted for inflation, plus \$1 for every dollar of rates collected from ratepayers in the special rating district., clause 7.3, Waiau Agreement, exhibit A, affidavit of Peter Horrell.

- (iv) Any surplus of funds is accrued and retained by the Liaison Committee for a disaster relief fund or other lawful purposes.
- (f) The special rating district has broader objectives than those contained in the Waiau Agreement. The notice states the benefits likely to accrue to properties within the Special Rating District directly or indirectly, are flood protection, improved drainage, noxious plant control, stock fencing on main channel, erosion control, maintenance of high quality water resource and protection of community assets⁶.
- (g) The Committee has responsibility for scoping out and planning work for each financial year. The Respondent Council is consulted and Meridian are a Liaison Committee member, having a vote on any proposal, along with other Committee members. Once the budget is approved by the Liaison Committee, it carries out the work (by contracting 3rd parties or through Council staff)⁷.
- (h) The role of the Waiau Committee has expanded over time and has included consideration of investigating nesting sites for Black Billed gulls and Black Fronted terns⁸, funding a scientific study of E.coli on the Orawai River and a social history documentary about the Waiau catchment, all with approval of Meridian⁹.
- (i) The Terms of Reference (TOR) for all eight (8) River Liaison Committees had only recently (August 2018) come to the attention of Mr Horrell. Mr Horrell does not consider the TOR provide any guidance or limits for the Liaison Committee¹⁰. Rather, it is considered the label of a “River Liaison Committee” (and the accompanying TOR) are more of a vehicle by which the more specific legal requirements of the legally binding Waiau Agreement and the Special rating District Notice can be fulfilled¹¹.

⁶ Paragraphs 28 and Exhibit B to affidavit of Peter Horrell dated 31 August 2018.

⁷ Paragraphs 31 and 32 affidavit of Peter Horrell dated 31 August 2018

⁸ Paragraphs 33 and 34 affidavit of Peter Horrell dated 31 August 2018

⁹ Paragraphs 35 affidavit of Peter Horrell dated 31 August 2018

¹⁰ Paragraphs 39 affidavit of Peter Horrell dated 31 August 2018

¹¹ Paragraph 40 affidavit of Peter Horrell dated 31 August 2018

- (j) The Waiau agreement terminates when the consents expire – when Meridian obtain new consents. The current consents expire in 2031, but Meridian could surrender its current consents and seek replacement new consents at anytime before then. The Agreement provides the parties will negotiate in good faith the extension of the terms of the agreement on such terms as are then appropriate¹².

Law - Interest greater than the public generally

11. Section 274 of the Resource Management Act 1991 (RMA) provides:

274 Representation at proceedings

- (1) The following persons may be a party to any proceedings before the Environment Court:..
- (d) a person who has an interest in the proceedings that is greater than the interest that the general public has, but the person's right to be a party is limited by section 308C if the person is a person A as defined in section 308A and the proceedings are an appeal against a decision under this Act in favour of a person B as defined in section 308A.

12. The High Court in *Meadow 3 Limited v Van Brandenburg*¹³ held the leading case for determining the question of a greater interest is *Purification Technologies Ltd v Taupo DC*¹⁴, highlighting that the interest must be one of some advantage or disadvantage which is not remote.

13. In more recent Environment Court cases¹⁵, the test has been held as:

- (a) Whether the interest of the claimant for the status is different from (as in greater than) that of the general public, and

¹² Clause 7.1 Waiau Agreement.

¹³ *Meadow 3 Limited v Van Brandenburg High Court Dunedin CIV 2008-412-000140 [5 June 2008] Pankhurst, J., at [32].*

¹⁴ *Purification Technologies Ltd v Taupo District Council [1995] NZ RMA 197 at 204*

¹⁵ *Wallace Group v Auckland Council [2017] NZEnvC 106 citing Sandspit Yacht Club Marina Society Inc v Auckland Council...and Lindsay v Dunedin City Council... ;*

(b) Whether this interest is specific when compared to that of the general public.

14. The question of advantage or disadvantage has been incorporated into the first question in paragraph 13a and clarified so that

“it is the relationship between the interest and consequent effect of the proceedings which is relevant on the interest, rather than the actual interest itself which is important”¹⁶.

Issues raised by Respondent

15. The Liaison Committee does not disagree with any of the cases cited by the Respondent, but disagrees with application of those cases, particularly in light of the context set out in the affidavit of Mr Horrell.

16. In the context of the relevant considerations highlighted by the Courts, the Respondent has raised the following difficulties with the Liaison Committee being able to claim standing under s274:

(a) The mere fact of owning land and being a ratepayer is not enough¹⁷ - it is the relationship between interest and consequent effect of the proceedings on the interest, rather than interest itself which is important...the key theme is some advantage or disadvantage: such must be direct and not just emotional or intellectual¹⁸.

(b) Being a representative group will not automatically qualify a group as having an interest greater than the general public¹⁹.

(c) Although a person with official duties that may be affected by an outcome may have a qualifying interest²⁰, the Liaison Committee does not appear to have responsibilities that would be affected.

¹⁶ *Wallace Group Limited v Auckland Council* [2017] NZEnvC 106

¹⁷ Paragraph 24 citing *Federated Farmers v Hastings District Council Hawkes Bay Province v Hasting District Council* [2016] NZEnvC 141 at [17].

¹⁸ Citing *Wallace Group limited v Auckland Council* [2017] NZEnvC 106, at [25].

¹⁹ Paragraph 26, citing *Mangawhai Heads Holdings ltd v Kaipara District Council* [2011] NZEnvC 203, at [13]-[14].

- (d) The Liaison Committee is a Committee of Council with Terms of Reference that establish it as a way for the Council to communicate with ratepayers. It does not appear to have a specific purpose which would qualify it as having interest greater than public. The Terms of reference do not extend to being involved in planning appeals.
- (e) The Respondent concludes that in line with the cited caselaw and Terms of Reference, on the face of their section 274 notice, the Liaison Committee does not appear to meet the test to join the listed appeals, as set out in s274.

Analysis

17. For reasons set out above and further detailed in the affidavit of Mr Horrell, it is clear that, contrary to the assertion of the Respondent:
- (a) Although the Liaison Committee consists of landowner/ratepayers, this is not the sole claim it has to have an interest greater than the public generally.
 - (b) Although the Liaison committee is a representative group, it is representative of one of the parties to the binding Waiau agreement (Federated Farmers), working alongside the other two parties, the Respondent and Meridian to carry out specific tasks.
 - (c) The Liaison Committee is not one set up merely “to maintain better communication with the Council” (as set out in the TOR). It has “official duties” – those set out in the Waiau Agreement (including “other lawful purposes”), in the Special Rating District Notice, and as expanded in recent times by agreement of the Parties.
 - (d) The Liaison Committee is not merely a committee of Council within the limited terms of reference.
 - (e) Although RMA advocacy is not specifically mentioned in the Waiau Agreement or the Special Rating District Notice, the Waiau Agreement in particular was borne out of an RMA process and once the current consents expire, the Liaison Committee will need to participate in a further RMA

²⁰ Te Runanga O Taumarere v Northland Regional Council PT Auckland A08 1/95, 21 August 1995.

consent exercise. It is implicit that the Liaison Committee at some stage would need to engage in RMA processes given the current role it has and who it represents.

Having an advantage or disadvantage

18. In terms of the tests set out in the various Environment Court cases cited, the Liaison Committee considers it has an interest greater than the public generally given:
 - (a) The reasons for its formation (to represent farmers and landowners adjacent to the Lower Waiau adversely affected by the operation of the Power Scheme);
 - (b) Its current specific operation and role (under the Waiau Agreement and the Special Rating District Notice), all of which arose as a direct result of the exercise of the consents granted under the Resource Management Act (**RMA**) for operation of the Power Scheme.

19. In terms of the advantages and disadvantages of being excluded from participating in the Proposed Plan appeals, Mr Horrell notes:
 - (a) It is important for the Committee to be involved in any decisions about activity status of consents and other issues relating to the Power Scheme, as the current Waiau Agreement with Meridian expires when the consents expire. The Committee is uncertain about whether the Agreement will continue if at all, and consider it vitally important to be involved in any reconsenting process.
 - (b) There are matters not included in the current consents the Liaison Committee consider could be included in any future consent i.e. fencing and weed control, along with measure to avoid, remedy or mitigate erosion on the Lower Waiau that occurs as a result of operation of the Manapouri Scheme.
 - (c) Although Meridian's existing consents can continue until they expire in 2031, in its appeal notice, Meridian indicates (not necessarily as an intention) that an application could be made under Rule 52A at any time (by

Meridian) – either before or after the Respondent has established surface water flow and level regimes in the Waiau catchment as part of Freshwater Management Unit limit setting²¹. So, depending on what Meridian decides, the Waiau Agreement could expire any time before 2031 if Meridian obtains replacement consents²².

20. If unable to participate in the appeals it seeks to join, Mr Horrell notes the Liaison Committee (and members and interests it was established to fulfil) will be disadvantaged including:
 - (a) If the activity status for renewal of consents for Meridian is a controlled activity and the Waiau Agreement is not renewed, the landowners the Liaison Committee was established to protect and benefit could potentially suffer great disadvantage if there is no replacement agreement and no or limited ability for consent conditions to be imposed to avoid, remedy or mitigate adverse effects of the operation of the Manapouri Power Scheme (**the Power Scheme**) on the Lower Waiau River (and the adjoining landowners).
 - (b) If Meridian's appeal is successful, the situation will be even more disadvantageous, as it appears Meridian are seeking to have the controlled status extend to an increased take, not just the current take, and want the current water take included as part of the existing environment, in which case I understand all the effects suffered to date, which are ongoing, will essentially be disregarded²³.
21. Further, increased consideration of the Power Scheme through objectives and policies as well as Rule 52A, would remove the Liaison Committee's ability to meaningfully influence the future resource consent process.
22. If however the activity status under Rule 52A is discretionary, the Council could consider any adverse effects of the Power Scheme on the Lower Waiau River and impose consent conditions around erosion, fencing and weed control, and the

²¹ As required under the National Policy Statement for Freshwater Management 2017

²² Paragraphs 47-49 affidavit of Peter Horrell

²³ Refer to paragraphs 50-52

Liaison Committee could meaningfully participate in and potentially influence the outcome of the consent process²⁴.

- 23. The Liaison Committee has a specific interest in relation to the proceedings when compared to that of the general public. Further, the relationship between the interests of the Liaison Committee and consequent effect of the proceedings on those interests is not remote. There will be a significant disadvantage to the Liaison Committee if it is unable to participate in these proceedings. Therefore it is submitted the Liaison Committee meets the relevant tests to become a party to the appeals it seeks to join.
- 24. The Liaison Committee seeks costs be reserved.



.....
Clare Lenihan
Counsel for the Liaison Committee

31 August 2018
.....

²⁴ Paragraphs 50-52 affidavit of Peter Horrell