

**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 TRANSPOWER NEW ZEALAND LIMITED
 (ENV-2018-CHC-26)
 ... (continued on last page)
 Appellants
AND SOUTHLAND REGIONAL COUNCIL
 Respondent

**MINUTE OF THE ENVIRONMENT COURT RE: MEDIATION
(2 April 2019)**

Introduction

[1] This Minute is released for the purpose of case managing certain topics to mediation. The parties have also requested the facilitation of two topics at an expert conference and this will be the subject matter of a separate Minute.

Proposed mediation

[2] Addressing mediation first, the Council, agreeing with the parties, seeks mediation on the following provisions:¹

- (a) Objective 2

Water and land is [sic] recognised as an enabler [sic] of primary production and the economic, social and cultural wellbeing of the region.

¹ We note that the parties additionally requested mediation on policies 9A, 14, 17 and 18. Without giving reasons, the Council does not agree with this proposal.



(b) Objective 9B

The effective development, operation, maintenance and upgrading of Southland's regionally significant and critical infrastructure is enabled.

(c) Objective 10

The national importance of existing hydroelectric generation schemes, including the Manapōuri hydro-electric generation scheme in the Waiau catchment, is provided for, recognised in any resulting flow and level regime, and their structures are considered as part of the existing environment.

(d) Objectives 13-13B

Enable the use and development of land and soils to support the economic, social, and cultural wellbeing of the region (objective 13).

The quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land (objective 13A).

The discharges of contaminants to land or water that have significant or cumulative adverse effects on human health are avoided (objective 13B).

(e) The inclusion of historic heritage in objectives 9 and 13

The court does not know what this refers to.

(f) New objective X

The court does not know what this refers to.



(g) Policy 4.3

Prohibiting dairy farming and intensive winter grazing, and decision-makers generally not granting resource consents for cultivation.

Discussion

[3] The Regional Council did not produce an Initial Planning Statement as directed in the court's Record of Pre-hearing Conference issued on 12 September 2018. Instead, the Regional Council filed an updated s 32 evaluation.² The bench has not read this 350 plus page report and so our impression of the proposed Regional Plan is not much further advanced from what we said in July 2018.

[4] The purpose of the Initial Planning Statement was outlined in the Minute dated 25 July 2018 and, amongst other matters, the Statement was to make clear to the court and the parties the architecture of the plan (see **attached**). At the Pre-hearing Conference, the court said that it would not make any directions on mediation until it had received the Initial Planning Statement and then directions would only follow after the filing of evidence-in-chief.

[5] It is worth reminding counsel what the court said in its Minute dated 22 March 2019:

[18] It is important to bear in mind the RMA's intended hierarchical relationship between plan objectives, policies and rules (including that rules are for "achieving the objectives and policies of the plan"). Related to that, it is to be expected that a planning witness considering what is the most appropriate objective (in [that] case, Objective 7) will bear in mind the rules and other methods intended to implement it.

[19] It is also to be expected that a planning witness would draw from foundation opinion from other experts in forming that opinion ...



² Memorandum of counsel dated 19 October 2018.

[6] I highlight the above statement, because the expert conference on the water quality of lakes, surface water quality and freshwater ecology may well involve state-of-the-environment inputs which the above provisions respond.

[7] While an Environment Commissioner is available to mediate between 6-10 May 2019, it is the view of the bench that the higher priority should be arriving at a settled understanding of the environment. There is now no time available for mediation with the first tranche of rebuttal due to be filed 8 May and completed by 22 May.

[8] Moreover, it is unlikely that the court will make a final decision on any matter until the conclusion of the proceedings. Instead it is the court's preference to release either detailed Minutes giving guidance on the court's response to the Topic A provisions or an Interim Decision. If that were the court's approach, the parties may seek mediation following the release of the same.

Outcome

[9] I decline to refer the proceedings to mediation at this stage.



J E Borthwick
Environment Judge



Issued: 2 April 2019

List of appellants

ENV-2018-CHC-27	Fonterra Co-Operative Group Ltd
ENV-2018-CHC-28	Horticulture New Zealand
ENV-2018-CHC-29	Aratiatia Livestock Limited
ENV-2018-CHC-30	Wilkins Farming Co
ENV-2018-CHC-31	Gore District Council, Southland District Council and Invercargill City Council
ENV-2018-CHC-32	DairyNZ Limited
ENV-2018-CHC-33	H W Richardson Group Limited
ENV-2018-CHC-34 & 35	Beef + Lamb New Zealand
ENV-2018-CHC-36	Director-General of Conservation
ENV-2018-CHC-37	Southland Fish & 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-42	Stoney Creek Station Limited
ENV-2018-CHC-43	The Terraces Limited
ENV-2018-CHC-44	Campbell's Block Limited
ENV-2018-CHC-45	Robert Grant
ENV-2018-CHC-46	Southwood Export Limited, Southland Plantation Forest Company of NZ, Southwood Export Limited
ENV-2018-CHC-47	Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua & Te Rūnanga o Oraka Aparima
ENV-2018-CHC-48	Peter Chartres
ENV-2018-CHC-49	Rayonier New Zealand Limited
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of NZ Inc

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BETWEEN TRANSPOWER NEW ZEALAND LIMITED
(ENV-2018-CHC-26)

FONTERRA CO-OPERATIVE GROUP
LIMITED
(ENV-2018-CHC-27)

HORTICULTURE NEW ZEALAND
(ENV-2018-CHC-28)

ARATIATIA LIVESTOCK LIMITED
(ENV-2018-CHC-29)

WILKINS FARMING CO
(ENV-2018-CHC-30)

GORE DISTRICT COUNCIL, SOUTHLAND
DISTRICT COUNCIL & INVERCARGILL
CITY COUNCIL
(ENV-2018-CHC-31)

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

H W RICHARDSON GROUP LIMITED
(ENV-2018-CHC-33)

BEEF + LAMB NEW ZEALAND
(ENV-2018-CHC-34 & 35)

DIRECTOR-GENERAL OF
CONSERVATION
(ENV-2018-CHC-36)



SOUTHLAND FISH & GAME COUNCIL

(ENV-2018-CHC-37)

MERIDIAN ENERGY LIMITED

(ENV-2018-CHC-38)

ALLIANCE GROUP LIMITED

(ENV-2018-CHC-39)

FEDERATED FARMERS OF NEW
ZEALAND

(ENV-2018-CHC-40)

HERITAGE NEW ZEALAND POHERE
TAONGA

(ENV-2018-CHC-41)

STONEY CREEK STATION LIMITED

(ENV-2018-CHC-42)

THE TERRACES LIMITED

(ENV-2018-CHC-43)

CAMPBELL'S BLOCK LIMITED

(ENV-2018-CHC-44)

ROBERT GRANT

(ENV-2018-CHC-45)

SOUTHWOOD EXPORT LIMITED,
SOUTHLAND PLANTATION FOREST
COMPANY OF NZ, SOUTHWOOD
EXPORT LIMITED

(ENV-2018-CHC-46)

TE RŪNANGA O NGĀI TAHU, HOKONUI
RŪNAKA, WAIHOPAI RŪNAKA, TE
RŪNANGA O AWARUA & TE RŪNANGA
O ORAKA APARIMA

(ENV-2018-CHC-47)



PETER CHARTRES

(ENV-2018-CHC-48)

RAYONIER NEW ZEALAND LIMITED

(ENV-2018-CHC-49)

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NZ INC

(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

**MINUTE OF THE ENVIRONMENT COURT
(25 July 2018)**

Introduction

[1] Various memoranda have been filed in response to the respondent's proposed topic groupings for mediations and hearings on the appeals. Some parties raise issues as to availability on various proposed dates for mediations. Those matters will be managed by the assigned Environment Commissioner who will, if need be, make associated directions.

[2] However, for the reasons I traverse in this Minute, the court considers that an appropriate first step is for a pre-hearing conference to be held at the earliest opportunity and for the purposes of assisting the fair and efficient conduct and disposition of proceedings. The parties should anticipate that the conference will be in Invercargill, rather than by teleconference. There will be further communication with the parties concerning the date and venue once those matters are arranged. Mediations will be scheduled following the conference.



'Initial Planning Statement' sought prior to mediation

[3] The respondent's further memorandum dated 17 July 2018 proposes some refinements to its originally proposed topic list and explains the respondent's intended approach to resourcing of mediation sessions. In particular, the court notes the respondent's intention that, depending on topics, sessions would be attended by staff, an expert planning consultant, a technical expert and legal counsel.

[4] The court appreciates the consideration that the respondent has given to these matters.

[5] The court observes that, while appeals do not challenge the entire proposed Southland Water and Land Plan ('pSWLP'), several challenge fundamental aspects of it and its underpinnings. Further, determination of the appeals in due course must be in accordance with the statutory framework of the Resource Management Act 1991 ('RMA'). That includes its specifications as to matters such as the relationships of:

- (a) the pSWLP to higher order documents (including national policy statements ('NPSs') and the Regional Policy Statement ('RPS');
- (b) pSWLP objectives to Part 2 RMA; and
- (c) pSWLP objectives to policies and rules and other provisions.

[6] Given those matters, the court considers that it would be of assistance if the respondent was able to provide an early explanation of the pSWLP's relevant underpinnings and design approach ('Initial Planning Statement'). It envisages this would be a first step, before mediations on particular topic areas get underway.

[7] While the s32 and s32AA reports and other material that informed the respondent's pSWLP decisions will elucidate these things to some extent, those reports are now outdated insofar as those decisions have changed the notified version. Therefore, the court sees value in a refreshed and comprehensive analysis being provided in advance of mediations. The court envisages this Initial Planning Statement being in the form of planning evidence by the respondent's lead planning witness, being a witness with appropriate understanding of these matters, supported by relevant reference material.



[8] Without seeking to limit what could be usefully addressed in this Initial Planning Statement, the court identifies the following questions as matters that could be usefully covered:

- (a) what NPSs are the pSWLP intended to give effect to? Is that qualified, in any relevant sense, for any of the relevant NPS (referring, for instance to the statement concerning the National Policy Statement for Freshwater Management 2014 ('NPSFM') that prefaces the region-wide objectives)?
- (b) are there any relevant national environmental standards?
- (c) is it the respondent's view that the Southland Regional Policy Statement 2017 is fully up-to-date in giving effect to relevant NPSs and, if not, how is this intended to be managed in the consideration of the pSWLP?
- (d) what is the relevant state-of-the-environment information underpinning the pSWLP, including in respect of the provisions on Physiographic Zones and the water quality of related water bodies?
- (e) what s30 RMA functions (particularly as pertaining to use of land, river beds, take and use of water and discharges) and pt 2 purpose and principles are intended to be addressed by the pSWLP's provisions?
- (f) what are the relevant linkages as between pSWLP including:
 - (i) objectives and related policies and rules?
 - (ii) appendices and related rules?
 - (iii) definitions and related provisions?
- (g) what rules specify relevant assessment matters, standards and controls for the determination of resource consent applications for:
 - (i) water take/use?
 - (ii) land uses?
 - (iii) discharges?
- (h) pending the processes intended for provision of Freshwater Management Units ('FMUs'), under existing rules, can related policies be achieved or are there any gaps in being able to do so?
- (i) does the pSWLP seek to regulate over-allocation both in terms of water quantity and quality or just water quantity (noting the reference to 'quality' in Policy P16.1(b)(ii))? If it seeks to regulate over allocation in a quality sense, which rules do so?



[9] The court also signals that, purely from the perspective of drafting quality, there are some vagaries that would be ideally addressed at some stage (leaving aside any views as to the merits or otherwise of provisions under appeal). These include uncertainties and inconsistencies in regard to words and phrases such as:

- (a) 'avoid, where practicable, otherwise remedy or mitigate', 'avoid, in preference', 'minimise' and 'avoid significant' adverse effects' (including in terms of the directions intended by relevant policy and the relationship of policies to objectives);
- (b) 'implementing' 'good management practice' (and whether 'implementing' means 'complying with' or something else);
- (c) 'farming activity, 'landholding' and 'dairy platform'.

[10] The scope of appeals may impede the extent to which drafting infelicity issues are able to be addressed, except to the extent s293 RMA may be employed. Any s293 RMA direction is to be after hearing related appeals (s293(1)). However, there may be benefit in allowing the Initial Planning Statement to also traverse drafting infelicity issues that could be usefully addressed at some stage (perhaps using tracking to identify any drafting updates that the respondent proposes).

[11] To be clear, the Initial Planning Statement would be in addition to the evidence the respondent would subsequently file on topics to be heard. As such, any evidence offered in reply by appellants would be reserved until such time as sequential evidence exchange for topic hearings is directed.

Respondent's proposed topics

[12] The court has some reservations about the logic of the respondent's proposed topic list and sequence.

[13] One is a general one, namely that it would be preferable for the consideration of appeals on a planning instrument such as this to follow the general sequence indicated in s32 RMA, whereby objectives are considered and determined before related policies, rules and other provisions. Under that approach, overarching objectives and related issues (and the underpinning state-of-the-environment information) would be heard at the outset. Mediations do not necessarily have to follow the same sequence but, as a



general rule, it is desirable that they do. Also, the court is mindful that mediation is not always an effective first stage, particularly where it concerns fundamental issues concerning the philosophical direction of the planning instrument.

[14] According to that logic, ideally, most pSWLP Issues and Objectives and the underpinning state-of-the environment information, would be dealt with at the outset. In essence, that would be for the purposes of providing an initial 'horizontal' consideration of the pEMP before the later topic-by-topic 'vertical' consideration. If need be, that could be on the basis that allowed for any necessary further scrutiny of particular objectives in the context of later topic hearings (such as through the mechanism of an initial interim decision). In the context of the pSWLP, the court's present thinking is that this first hearing could also address the policies that pertain to the Physiographic Zones, FMUs and Ngāi Tahu matters.

[15] Possibly, those Objectives that are sufficiently confined and discrete could be left aside for later topic-specific consideration. For instance, that may be appropriate for Objective 10 (on hydro-electric schemes) and Objective 17 (on wetlands).

[16] Furthermore, it is not immediately obvious why wastewater and agricultural effluent are dealt with towards the end whilst the apparently related topics of water quality and discharges are dealt with towards the beginning of the proposed sequence of topics.

[17] Considering all of that, the court offers the following possible alternative sequence of topics/topic groupings (with a view to both hearings and related mediations):

- (a) Topic A: Horizontal consideration of pSWLP's issues, objectives and specified policies:
 - (i) Issues (including state-of-the environment matters),
 - (ii) Physiographic Zones;
 - (iii) Objectives (possibly except for 10 and 17);
 - (iv) Ngāi Tahu Policies 1 – 3, Physiographic Policies 4 – 12A and FMU Policies 44 – 47;



- (b) Topics B1 – B7 Vertical consideration of remaining objectives, policies, rules and other provisions pertaining to:
- B1 Water Take;
 - B2 Water Quality/Discharge [possibly in conjunction with or immediately prior to Wastewater and Agricultural Effluent];
 - B3 Wetlands/Indigenous Biodiversity (including Objective 17);
 - B4 Bed Disturbance;
 - B5 Farming [possibly in conjunction with or immediately prior to Cultivation];
 - B6 Infrastructure (including Objective 10);
 - B7 Other (remaining provisions).
- (c) Any s293 directions.

[18] Potentially, under such a sequence, a full court could be convened for Topic A. This would potentially enable separate divisions to hear subsequent topic clusters so as to achieve a quicker determination overall of all appeals.

[19] However, the first pre-hearing conference will provide opportunity for parties to express any views on these matters including proposed topic groupings. Also, it can be anticipated that directions that follow would reserve capacity for the assigned Environment Commissioner to make further directions as are seen appropriate for the fair and efficient conduct of mediations.

Confirmation of pre-hearing conference arrangements

[20] The Hearing Manager, Ms McKee, will further communicate on and confirm date and venue arrangements for the pre-hearing conference. The parties should pencil in Friday 17 August 2018, as inquiries are presently being made as to an available venue on that date.



J J M Hassan
Environment Judge

Issued: 25 JUL 2018



J E Borthwick
Environment Judge

