

**BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH**

**I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

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) ... (continued on last page) Appellants
AND	SOUTHLAND REGIONAL COUNCIL Respondent

**MINUTE OF THE ENVIRONMENT COURT
(31 August 2020)**

Introduction

[1] This Minute is issued in response to the Regional Council's memoranda dated 4 August and 21 August 2020.

[2] On 4 August 2020 the Regional Council, on behalf of all parties, presented their agreed wording on the Topic A provisions without providing any supporting explanation, including the source of the court's jurisdiction to delete an objective. Consequently, the court had to request an explanation which has been provided by Mr McCallum-Clark in an affidavit¹ and brief of evidence.²

[3] To expedite the proceeding, in this Minute we will indicate provisions over which the court remains concerned. If a provision is not discussed it is because the court is accepting of the change proposed and/or Mr McCallum-Clark's evidence in support.

¹ Affirmed 21 August 2020.

² Dated 20 July 2020, the brief was prepared for the purpose of expert conference. No party has objected to the court considering the brief.



[4] Having reflected further on the directions given in relation to s 32AA of the Act, it seems prudent these be cancelled, pending the parties' response.

Objective 18

[5] Having considered what Mr McCallum-Clark has had to say, it is the court's view that Objective 18 should be retained in some form.

[6] In the first Interim Decision, in response to evidence led by several parties, the court suggested alternative wording although, in doing so, held no firm view as to its final form. At paragraph [65] we set out our understanding that "...all objectives and policies were intended to express Te Mana o te Wai and ki uta ki tai. The structure (architecture) of the plan is to progressively elaborate on these outcomes with each successive objective building on the foregoing".

[7] At paragraph [290] we said the objective (as proposed to be worded by the court) was to give effect³ to Objectives 1 and 3.

[8] Objective 18 (in any form) promotes change. This outcome differs from Objectives 1 and 3, which are concerned with both resource management practice and end goals. Importantly, if retained the objective bridges the period prior to the introduction of Freshwater Management Units and responds to Southland's degrading water quality. In contrast with Objective 3, Objective 18 employs active wording.⁴

[9] That said, if all counsel now say the objective is to be deleted, they are to succinctly, but this time comprehensively, set out the court's jurisdiction to delete this objective. Note: it is our preliminary view that the s 32AA report will need to address the extent to which the other objectives address the subject-matter of Objective 18 including the need to improve degrading (degraded) water in the interim period. That aside, the court is looking for assistance as to the extent to which the objectives are the most appropriate way to achieve the purpose of the Act with specific consideration to be given to the higher order planning documents.

³ 'Give effect to' is not used in any technical sense, but simply as per ordinary usage.

⁴ In the second Interim Decision the court reiterates its concern with the passive language employed in Objective 3.



Objectives 13, 13A and 13B

[10] The parties propose two changes. First, moving the enabling part from the end of the objective to become the chapeau and second, substituting the words “may be used” for “are used”.

[11] Addressing the movement of the enabling part to the end of the objective, the planners do not comment on the court’s reasoning at paragraph [250] that the objective is to secure certain environmental outcomes before land and soils may be used. If correct, we remain of the view that the location of the enabling part is important to ensure those outcomes are secured and not relegated to be addressed on a case-by-case basis by applicants for resource consent. The location of the enabling part is not merely syntax and, in that regard I add, that the court does not set out to tinker with otherwise appropriate language and arrangement of plan provisions.

[12] Mr McCallum-Clark says the change is not a critical one to make. Unless other parties can persuade us to a different view, the arrangement of the objective as set out in the first Interim Decision will be confirmed subject to the words “may be used” being substituted.

Life-supporting capacity Objective 9/9A – clause (a)

[13] The court agrees with the reasons given for retaining “life-supporting capacity”. We also agree with Mr Hodson’s remark set out in Mr McCallum-Clark’s July Brief, that the terms ‘ecosystem health’ and ‘life-supporting capacity’ are overlapping.⁵ This is consistent with the understanding of other divisions of the Environment Court as discussed at paragraphs [136]-[138] of the first Interim Decision.

[14] We are no longer concerned with Objective 14 which also refers to ‘life-supporting capacity’, the drafting of that objective is sufficiently clear. The same cannot be said for Objective 9/9A sub-clause (a), which grammar does not support the four or possibly five attributes which management of water is to safeguard. As we have noted elsewhere,

⁵ At [21].



lists can be a cumbersome technique particularly when – as is the case here – the list includes both outcomes e.g life-supporting capacity and aquatic ecosystem health and secondly, generic reference to ‘values’.

[15] Clause (a) of the objective⁶ presently reads:

The quantity of water in surface waterbodies is managed so that:

- (a) ~~the~~ aquatic ecosystem health, life-supporting capacity,⁷ the values of outstanding natural features and landscapes, the natural character and historic heritage values of waterbodies and their margins are safeguarded;

[16] Subject to what the parties say, we suggest amending clause (a) to lead with the broader term ‘life-supporting capacity’ and to couple this with the related ‘aquatic ecosystem health’. Secondly, to clearly differentiate each of the listed attributes as shown next:

The quantity of water in surface waterbodies is managed so that:

- (a) the life-supporting capacity and aquatic ecosystem health, the values of outstanding natural features and landscapes, the natural character and the historic heritage values of waterbodies and their margins are safeguarded;

Thus, Objective 9/9A, set out in full, would read:

The quantity of water in surface waterbodies is managed so that:

- (a) the life-supporting capacity and aquatic ecosystem health, the values of outstanding natural features and landscapes, the natural character and the historic heritage values of waterbodies and their margins are safeguarded;
- (b) there is integration with the freshwater quality objectives and values⁸ (including the safeguarding of human health for recreation); and
- (c) provided that (a) and (b) are met, surface water is sustainably managed, in accordance with Appendix K to support the reasonable needs of people and communities to provide for their economic, social and cultural wellbeing.⁹

⁶ First Interim Decision, Annexure 1.

⁷ Seeking further submissions on meaning of life-supporting capacity.

⁸ Submissions are sought on sub-clause (b) introduced by the primary producers. “Values” does not appear to imply “freshwater quality objectives”.

⁹ Reordered in line with Objective 2.



[17] We will direct that any party opposing the amendment is to file and serve a memorandum giving reasons. Further directions will then issue.

Objective 9B

[18] No party proposes amending the court's version of this objective.

[19] Mr McCallum-Clark has not directly answered the court's enquiry whether, in the context of this objective, 'sustainable and effective' development concerns both the infrastructure per se and secondly, the manner of its development relative to the environment. He says instead 'sustainable and effective' concerns the development of the infrastructure and its ongoing operation.¹⁰

[20] As we record at paragraph [180] of the first Interim Decision we intend the meaning of "sustainable and effective" to refer to both the infrastructure and the manner of its development relative to the environment. If development is neither sustainable nor effective, it will be contrary to this objective.

[21] It may be that the Interpretation Section now puts the issue beyond doubt. However, if that is not the case, or a party does not accept that sustainable and effective has the meaning set out above at paragraph [20], the drafting is not as the court intended. Given that, we will direct that counsel file a memorandum if they disagree with the meaning of the objective as set out at paragraph [20] above and in light of the Interpretation Section. Further directions will then issue.

Sections 32 and 32AA

[22] As noted, reflecting on the matter further, it may be better to leave this task for when the court is in a position to reach a view on all Topic A provisions.

Directions

[23] I direct:

¹⁰ Affidavit at [38].



- (a) the directions issued at paragraph [8] of the Minute dated 17 August 2020 to file an evaluation pursuant to s 32AA are cancelled;
- (b) counsel are to file a joint (preferably) memorandum by **Wednesday 9 September 2020**, addressing, as indicated, above:
 - (i) paragraph [9] – Objective 18;
 - (ii) paragraph [12]– Objective 13;
 - (iii) paragraph [17] – Objective 9/9A; and
 - (iv) paragraph [21] – Objective 9B.

[24] Leave is reserved for parties to seek further (or other) directions.



J E Borthwick
Environment Judge

Issued: **3 1 AUG 2020**



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

