

**IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH  
I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI**

IN THE MATTER of the Resource Management Act 1991

AND appeals under clause 14 of the First  
Schedule of the Act

BETWEEN DAIRYNZ LIMITED

(ENV-2018-CHC-32)

FONTERRA CO-OPERATIVE  
GROUP LIMITED

(ENV-2018-CHC-27)

(and all other appellants listed in the  
Schedule attached)

Appellants

AND SOUTHLAND REGIONAL  
COUNCIL

Respondent

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**MINUTE OF THE ENVIRONMENT COURT  
(21 December 2021)**

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**Introduction**

[1] The Christchurch Registry has yesterday<sup>1</sup> referred to me memoranda from parties concerning advice filed and served by counsel for DairyNZ Limited and

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<sup>1</sup> Dated 20 December 2021.



Fonterra Co-operative Group Limited (‘the Dairy interests’) that they intend substituting a different expert water quality witness for the one who participated on their behalf in expert witness conferencing.

[2] The matter has been referred to me for a response on behalf of the court<sup>2</sup> in accordance with Judge Borthwick’s instructions. The judge is on long-service and annual leave until the end of January 2022.

### **Background**

[3] The relevant facts appear to be:

- (a) joint witness statements (‘JWS’) were to be filed by technical witnesses by Friday 10 December 2021;<sup>3</sup>
- (b) Mr J Kitto provided a will-say statement prior to conferencing and participated in the relevant water quality expert witnesses conference for the Dairy interests and signed the resultant JWS.
- (c) Counsel for the Dairy interests advised the court and parties on Monday 13 December 2021 that Dr C Depree would provide water quality evidence for them at the scheduled March 2022 hearing in lieu of Mr Kitto;
- (d) evidence-in-chief for appellants is to be filed and served Monday 20 December 2021; that is today;
- (e) memoranda have been filed and served by counsel for Royal Forest and Bird Protection Society of New Zealand Inc (‘Forest and Bird’) and Southland Fish and Game Council (‘Fish and Game’) (15 December 2021) and for Southland Regional Council (‘the Council’) (16 December 2021) indicating their clients would be potentially disadvantaged by the proposed witness substitution.

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<sup>2</sup> Noting that I have been rostered to sit with Judge Borthwick on the Topic B hearing to commence 14 March 2022.

<sup>3</sup> Court Record of PHC Timetable Directions (Topic B) 22 October 2021 at Attachment A.

- (f) more particularly, Forest and Bird/Fish and Game state:
  - (i) their witnesses' evidence will focus on matters not agreed in the relevant JWS;
  - (ii) the witnesses will not know, until Dr Depree's evidence-in-chief is received, the extent to which he agrees/disagrees with matters in the relevant JWS;
  - (iii) they reserve their position until seeing Dr Depree's evidence, including on the need to produce further evidence, the need for further expert witness conferencing, and related costs.
- (g) the Council submits that simply advising the court a witness is to be substituted after conferencing has been completed, without sufficient explanation, is procedurally improper as issues of prejudice are likely to arise. Evidence-in-chief is being prepared in reliance on the relevant JWS, and the matter should be dealt with through an application for leave to substitute witnesses – which would afford the opportunity for opposing submissions;
- (h) on Thursday 16 December 2021 counsel for the Dairy interests responded to the Fish and Game/Forest and Bird and the Council memoranda providing a fuller explanation for the proposed substitution. The election is said to be based on Dr Depree's significant expertise, including his involvement in the Council's freshwater planning process under the NPS-FM (2020) and his ability to address the outcomes of the relevant JWS. Mr Kitto's inability to address questions of hauora traversed in the relevant JWS is noted. Counsel provided an undertaking that Mr Kitto would be available to answer questions on those parts of the JWS to which he is a party. Counsel also indicated that an application would be made to the court seeking leave for the substitution if the court considered it necessary.

## Discussion

[4] If I understand the timetabling directions at footnote 3 correctly, it is possible, in fact likely, that the Dairy interests will have filed evidence-in-chief by Dr Depree by the time this Minute issues. Whilst a consideration this is not in itself determinative. There are questions of potential prejudice, efficiency of process and due process raised by counsel for the other parties at foot. I also find the Dairy interests 13 December 2021 memorandum somewhat pre-emptory for want of reasons. I find however that the dominant considerations are that:

- (a) it is open to a party to call whatever witness it considers will best assist its case and the court's determination of the proceedings. The court should not impede a party in its (or their) related decision-making. Leave is required where a substitution of witnesses would disrupt court timetabling directions, which I apprehend is not the case here;
- (b) furthermore, it is unlikely any good purpose would be served by requiring the Dairy interests to apply for leave for the substitution at this juncture given the evidence-in-chief filing timetable and information now available to the court through the parties' respective memoranda. To do so may simply add unnecessary cost to the hearing process;
- (c) the other parties should not be unduly prejudiced if Dr Depree's evidence departs from either Mr Kitto's will-say statement or JWS contributions, as they have the opportunity to file rebuttal evidence due 22 February 2022. This affords a reasonable time to assimilate and respond to Dr Depree's evidence-in-chief without introducing undue inefficiencies in the evidence production process or, I expect, creating the need for further conferencing;
- (d) counsel's undertaking to make Mr Kitto available for questioning at the hearing is also a relevant consideration.

**Directions**

[5] I direct:

- (a) the court notes the Dairy interests' intention to substitute Dr Depree for Mr Kitto as their water quality witness and finds, in this case, that express leave to do so is not required.
- (b) Mr Kitto is to be available at the hearing for questioning by the court and parties.

[6] Leave is reserved for any party to apply for further (or other) directions.



**R M Dunlop**

**Deputy Environment Commissioner**

Issued: 21 December 2021

### Schedule – List of appellants

ENV-2018-CHC-26	Transpower New Zealand Limited
ENV-2018-CHC-27	Fonterra Co-operative Group Limited
ENV-2018-CHC-29	Aratiatia Livestock Limited
ENV-2018-CHC-30	Wilkins Farming Co Limited
ENV-2018-CHC-31	Gore District Council & others
ENV-2018-CHC-32	DairyNZ Limited
ENV-2018-CHC-33	H W Richardson Group Limited
ENV-2018-CHC-34	Beef + Lamb New Zealand
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-40	Federated Farmers of New Zealand
ENV-2018-CHC-41	Heritage New Zealand Pouhere Taonga
ENV-2018-CHC-44	Wilkins Farming Co Limited (previously Campbell's Block Limited)
ENV-2018-CHC-45	Wilkins Farming Co Limited (previously Robert Grant)
ENV-2018-CHC-46	Southwood Export Limited & Others
ENV-2018-CHC-47	Te Rūnanga o Ngāi Tahu, Hokonui Runāka, Waihopai Runāka, Te Rūnanga o Awarua & Te Rūnanga o Oraka Aparima
ENV-2018-CHC-49	Rayonier New Zealand Limited
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of New Zealand Incorporated