

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

ENV-2018-CHC-26 to 50

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of appeals under clause
14 of Schedule 1 to the
Act relating to the
proposed Southland
Water and Land Plan

BETWEEN **WAIHOPAI RŪNAKA,
HOKONUI RŪNAKA,
TE RŪNANGA O
AWARUA, TE
RŪNANGA O ORAKA
APARIMA, and TE
RŪNANGA O NGĀI
TAHU (collectively
NGĀ RŪNANGA)**

**Appellants in ENV-
2018-CHC-47**

AND **SOUTHLAND
REGIONAL COUNCIL**

Respondent

**LEGAL SUBMISSIONS FOR NGĀ RŪNANGA ON SCOPE ISSUES REGARDING
RELIEF ON RULE 78**

7 June 2023

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MAY IT PLEASE THE COURT

1. These submissions are filed on behalf of Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima, and Te Rūnanga o Ngāi Tahu (collectively **Ngā Rūnanga**), and respond to the Court's directions for parties involved in the Topic B, Tranche 1 hearing on rule 78 to assist the Court with its consideration of the scope to make amendments to rule 78.
2. Rule 78 relates to drainage works in modified watercourses and a key issue before the Court is the extent to which the Court has scope from relief sought in appeals to implement a consenting regime under the rule, in contrast to the current permitted activity status of activities regulated by the rule.

The legal position on scope

3. The Court has already had reason to consider scope issues earlier in this hearing regarding proposed changes to Rule 20A. In Annexure 1 to its 5th Interim Decision¹, the Court set out a summary of the case law on scope at paragraphs [2] to [6]. For present purposes, counsel is content to adopt that summary as an accurate statement of the law.
4. The remainder of these submissions will seek to apply that framework to the appeal point by Ngā Rūnanga on rule 78. These submissions do not address the question of scope arising from other relevant appeals.

Ngā Rūnanga appeal point

5. The notice of appeal by Ngā Rūnanga, at appeal point 37 on page 12, expressly appeals the decisions version of rule 78. The decisions version is as follows:

Rule 78 – Weed and sediment removal for drainage maintenance

- (a) *The removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity, is a permitted activity provided the following conditions are met:*
- (ai) *general conditions (e), (f), (g), (h) and (l) set out in Rule 55A; and*
 - (i) *the activity is undertaken solely to maintain or restore the drainage capacity of a modified watercourse that has previously been modified or maintained for drainage maintenance or restoration purposes at that location; and*

¹ *Aratiatia Livestock Limited v Southland Regional Council*[2022] NZEnvC 265

- (ii) *the activity is restricted to the removal of aquatic weeds and plants or sediment deposits; and*
- (iia) *the removal of river bed material other than aquatic weeds, plants, mud or silt is avoided as far as practicable; and*
- (iii) *any incidental bed disturbance is only to the extent necessary to undertake the activity and must not result in lowering of the bed below previously modified levels; and*
- (iv) *upon completion of the activity, fish passage is not impeded as a result of the activity; and*
- (iv) *the operator takes all reasonable steps to return any fish captured or stranded by the activity to water immediately; and*
- (v) *between the beginning of June and the end of October, there is no disturbance of the spawning habitat of trout; and*
- (xiii) *where the modified watercourse is spring-fed, removal of aquatic weeds and plants is only to the extent that is necessary to undertake the activity and is kept to the absolute minimum.*

Note: In addition to the provisions of this Plan and any relevant district plan, any activity which may modify, damage or destroy pre-1900 archaeological sites is subject to the archaeological authority process under the Heritage New Zealand Pouhere Taonga Act 2014. The responsibilities regarding archaeological sites are set out in Appendix S.

- (b) *The removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall and any associated bed disturbance and discharge resulting from the carrying out of the activity that cannot meet one or more of the conditions of Rule 78(a) is a discretionary activity.*

6. Appeal point 37 in the appeal by Ngā Rūnanga is set out below:

Appeal point	Provision of pSWLP	Relief Sought	Reasons for relief
37	Rule 78	Add a new clause: <u>(xv) No activity in relation to drainage maintenance shall significantly adversely affect the habitat or health of any taonga species as identified in Appendix M.</u>	The rule applies to modified watercourses, but does not recognise or protect taonga species or their habitat that may be found or established within the watercourse. The amendment also provides for the removal of aquatic plants which could include taonga species.

7. It is accepted that the appeal point does not explicitly state that a resource consent is required for any activity which does not comply with this condition. It is submitted however that it does not need to, as that outcome is the clear intention of the relief sought where there is failure to comply with the new permitted activity standard sought by Ngā Rūnanga.

Submissions on interpretation of relief sought

8. The starting point for interpreting the relief sought is submitted to be considering the decisions version of rule 78. On its face it is a permitted activity rule in clause (a), which then sets a number of conditions to be met in order for the activity to be permitted. The activity being regulated in clause (a) is:

“The removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity...”

9. The structure of the conditions set out in sub-clauses (i) to (xiii) is then clear that compliance must be shown with every condition in order for the activity to qualify as being permitted. This is through the use of the word “and” at the end of each sub-clause, which clearly shows an inclusive drafting intention. Clause (b) of rule 78 confirms this intention by stating that:

*“... [an] activity **that cannot meet one or more of the conditions of Rule 78(a)** is a discretionary activity.”* (emphasis added)

10. It is accepted that there are issues with the validity and certainty of the decisions version of rule 78, in that it reserves a number of discretions and involves potentially subjective judgments as to whether the activity complies with the permitted activity standards.
11. The additional sub-clause which the Ngā Rūnanga appeal seeks to add is that *“no activity in relation to drainage maintenance shall significantly adversely affect the habitat or health of any taonga species as identified in Appendix M.”*
12. This relief is identical to that sought in the original submission by Ngā Rūnanga dated 1 August 2016. The specific relief sought by Ngā Rūnanga is in Appendix 3 to that submission. On page 11 of that Appendix, in relation to rule 78, although the submission states that the rule as notified was supported in part, concerns were expressed in relation to the habitats of taonga species. As far as relief is concerned, two additional permitted activity sub-clauses were sought, one of which is identical to that sought in the appeal.

13. It is submitted that the permitted activity sub-clause sought by Ngā Rūnanga can readily be interpreted on its face as requiring a resource consent to be sought when the activity affects the habitat or health of any taonga species. It is submitted that compliance with this condition is capable of being objectively ascertained and the permitted activity standard can be regarded as sufficiently certain, with the clear intention that failure to comply with the condition would require a consent to be sought. Similarly the list of taonga species in Appendix M is clear and is not subject to appeal.
14. The requirement that the activity cannot *significantly* affect the habitat or health of a taonga species is however a qualifier that could introduce subjectivity, but is consistent with the drafting style of some other permitted activity conditions in the decisions version of rule 78. It is submitted that it does not detract from the clear intention of the relief to not permit drainage maintenance activities that adversely impact the habitat and health of taonga species.
15. This potential for subjectivity can be resolved by clear evidence before the Court which demonstrates, as a matter of fact, how and in what circumstances the permitted activity condition would be breached or complied with. The Court has clear and objective expert evidence before it, including:
- (a) the evidence in chief of Mr Michael Skerrett², Ms Ailsa Cain, and Dr Jane Kitson³ for the Topic A hearings, all dated 15 February 2019;
 - (b) the Joint Witness Statement of Freshwater Ecology Experts, dated 1 December 2021, which clearly and comprehensively identifies the impacts of drainage maintenance activities on taonga species in modified watercourses, and concludes that these activities cannot be effectively managed through a permitted activity rule such as rule 78;
 - (c) the statement of evidence of Dr Jane Kitson, dated 20 December 2021 outlining significant concerns about the effect and operation of rule 78 and the effects of relevant activities on both waterbodies and taonga species;
 - (d) the Joint Witness Statement of Ecology and Cultural Experts, dated 15 May 2023, which again made it clear how widespread and significant the effects of drainage maintenance activities are on taonga species; and
 - (e) the uncontroverted oral evidence given by those witnesses in Court during the week commencing 29 May 2023, which advised the Court on

² See paras 65 – 91 for example

³ See paras 34 – 55 for example

numerous occasions of the level and extent of environmental harm caused to the habitat and health of taonga species by drainage maintenance activities, and their presence in every modified watercourse in Southland.

16. It is therefore submitted that the relief sought in the Ngā Rūnanga appeal regarding rule 78 is clear that the consequence of failure to comply will require a resource consent to be sought. Clause (b) of the decisions version of rule 78 provides that the activity status for any breach of any condition of clause (a) is wholly discretionary.
17. The result is that there is ample scope available from the Ngā Rūnanga appeal to enable the Court to find that rule 78 should not, on the merits, permit relevant drainage maintenance activities. The Court has scope to conclude that it is more appropriate for a rule to be imposed requiring resource consents to be sought for drainage maintenance activities throughout the entire network of modified watercourses in Southland, due to the significantly adverse impact of those activities on the habitat and health of taonga species.

Application of case law on scope

18. It is anticipated that other parties to the appeal might suggest that there is, in a technical sense, scope for the relief in the Ngā Rūnanga appeal to enable the imposition of a rule requiring resource consents for drainage maintenance activities in modified watercourses. It is also anticipated that those parties might also say that such relief may not fairly and reasonably be sought nor imposed because if the outcome (a consenting regime) could not reasonably have been foreseen from the original submission or notice of appeal.
19. It has been held that, for there to be scope, relief sought must be “necessary and desirable” and “foreseen as a direct or otherwise logical consequence of a submission”⁴. Although it dealt specifically with the question of consequential amendments to primary relief sought, the High Court has also held that changes should not be made to the plan through the appeal process that could not have been anticipated from reading the notice of appeal⁵.

⁴ *Gertrude’s Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [99]

⁵ *Ibid*

20. An earlier High Court case is authority for the proposition that the question of whether amendments to a plan are reasonably and fairly raised in submissions, is to be approached in a realistic, workable fashion⁶.
21. In this instance, the same permitted activity sub-clause has been sought throughout the process by Ngā Rūnanga. There is no modification of relief nor consequential relief sought. If the requirements sought by that relief are not met, then both rule 78 as notified and the decisions version required consent to be sought for failure to comply with permitted activity conditions. There can be no question that this outcome can be foreseen as a direct or otherwise logical consequence of the Ngā Rūnanga submission and appeal, in the same way that it was a self-evident consequence of the drafting of the rule as notified and following decisions on submissions.
22. It is accepted that all readers of the submission might not have fully appreciated how serious the damage to the habitats or health of taonga species of relevant drainage maintenance activities might be, how widespread those taonga species are throughout modified watercourses in Southland, nor that what many view as “drains” are in fact rivers. It is submitted to be the case however that the consequence of breach of the requested standard (ie. triggering a consent being required) has always been and remains entirely clear and foreseeable.
23. Therefore, it is submitted that persons with a potential interest in the appeal could foresee a consenting requirement (at least up to discretionary activity status, but potentially something less stringent) being approved by the Court for rule 78 either as a direct or otherwise logical consequence of the Ngā Rūnanga appeal.

DATED this 7th day of June 2023



J G A Winchester
Counsel for Ngā Rūnanga

⁶ *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC)