

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

UNDER the Resource Management Act 1991

IN THE MATTER of appeals under Clause 14 of the First Schedule of the Act

BETWEEN

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

FONTERRA CO-OPERATIVE GROUP
(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)

(Continued next page)

**REPORTING MEMORANDUM OF COUNSEL FOR SOUTHLAND REGIONAL
COUNCIL RESPONDING TO DIRECTIONS IN INTERIM DECISION
3 February 2020**

Judicial Officer: Judge Borthwick

Respondent's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 379 2467

Solicitor: P A C Maw
(philip.maw@wynnwilliams.co.nz)

WYNNWILLIAMS

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

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

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

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

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

SOUTHLAND FISH AND 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 POUHERE 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, KODANSHA
TREEFARM NEW ZEALAND LIMITED, SOUTHLAND
PLANTATION FOREST COMPANY OF NEW ZEALAND**
(ENV-2018-CHC-46)

**TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA,
WAIHOPAI RUNAKA, TE RUNANGA O AWARUA & TE
RUNANGA 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 NEW ZEALAND**
(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

MAY IT PLEASE THE COURT

- 1 This Memorandum of Counsel is filed on behalf of the Southland Regional Council (**Council**) in respect of the appeals against the Council's decision on the proposed Southland Water and Land Plan (**pSWLP**).
- 2 On 20 December 2019, the Court issued its interim decision on the Topic A hearing for the pSWLP appeals (**Interim Decision or Decision**).¹
- 3 Paragraph [347] of the Interim Decision directs the Council to, having conferred with the parties, file and serve a reporting memorandum setting out a proposed timetable for the exchange of evidence and submissions. Alternatively, paragraph [348] provides that the parties may request the proceedings be set down for a pre-hearing conference in the week commencing 10 February 2020.²
- 4 The Council has liaised with the parties as directed and files this memorandum recording the parties' preferences.
- 5 For the reasons that follow, the parties would prefer that a pre-hearing conference is convened.

The parties' preferences

- 6 Paragraph [347] of the Interim Decision provides specific directions for the parties to:
 - (a) address the interpretation and implementation of Te Mana o te Wai and ki uta ki tai in the pSWLP and any other matter they consider relevant to the scheme of the plan in general;
 - (b) address how the plan is to take into account the principles of the Treaty of Waitangi; and
 - (c) indicate whether they wish to be heard on these matters.
- 7 Notwithstanding these directions, throughout the body of the Decision the Court indicates that it will seek submissions and/or evidence on a number of other specific objectives and policies.

¹ Decision No. [2019] NZEnvC 208.

² Interim Decision at [349].

- 8 Having engaged with the parties, it has become apparent that there is a high level of uncertainty about whether the Court intends the parties to prepare further evidence and/or submissions on all of the matters where it has indicated in the body of the Decision that these would be sought, or whether in the first instance the Court would like to receive evidence and/or submissions only on the matters set out at paragraph [347] of the Decision.
- 9 Given this uncertainty, the majority of the parties would prefer the Court convene a pre-hearing conference in Invercargill to seek clarification and discuss forward directions.
- 10 While the Council is conscious of ensuring the most efficient process is adopted to resolve the appeals on the pSWLP, in the circumstances it considers a pre-hearing conference will be the most efficient way to proceed.

Availability for pre-hearing conference

- 11 At paragraph [348], the Court states that if a pre-hearing conference is preferred, this will occur in the week commencing Monday, 10 February 2020.
- 12 In liaising with the parties, the Council has ascertained the availability of parties in the week of 10 February 2020. All parties are available to attend a pre-hearing conference on Monday 10 February 2020. Alternatively, all parties other than Meridian Energy Limited are available to attend on Thursday 13 or Friday 14 February 2020.

Preparation for pre-hearing conference

- 13 In order to ensure that the pre-hearing conference is as efficient and effective as possible, it has been suggested that all parties will need to come to the pre-hearing conference in a position to indicate what issues arising from the Interim Decision they intend to participate in, and what evidence / submissions they intend to produce so that appropriate timetable directions can be made.

Draft agenda

- 14 In order to assist the Court, the parties have prepared a draft agenda for the pre-hearing conference. This is attached as **Appendix A**.

Directions sought

15 Counsel respectfully seeks directions that:

- (a) a pre-hearing conference be convened in Invercargill on Monday 10 February 2020 to discuss the directions in the Interim Decision.
- (b) all parties attending the pre-hearing conference are to be in a position to indicate what issues arising from the Interim Decision they intend to participate in, and what evidence / submissions they intend to produce.

DATED this 3rd day of February 2020



.....
P A C Maw / A M Langford
Counsel for the Southland Regional Council

Appendix A – Items to discuss at pre-hearing conference

- 1 What evidence and/or submissions are sought now and are to be included in the timetable sought by the Court?
 - (a) Only those matters specifically noted in the directions at paragraph [347] / [349] of the interim decision (i.e., submissions and evidence on only the interpretation and implementation of Te Mana o te Wai and ki uta ki tai in the plan, any other matter relevant to the scheme of the plan in general, and how the plan takes into account the principles of the Treaty); or
 - (b) All evidence and/or submissions indicated throughout the body of the interim decision as evidence and/or submissions that will be sought:
 - (i) *Treaty Principles* - [32] – “The parties are to expect that the court will seek further submissions on whether, or how, the Treaty principles are taken into account in this plan.”
 - (ii) *Te Mana o te Wai and ki uta ki tai* - [56] – “We posit that all provisions of the plan are to be interpreted and applied in a manner that gives effect to Te Mana o te Wai and implemented in accordance with ki uta ki tai. This is what the plan means when it talks about Te Mana o te Wai being ‘fundamental to the integrated framework for freshwater management in Southland’. If this is not the correct interpretation, then we can only say again it behoves the parties to set out their understanding of the scheme of the proposed plan (in other words its plan’s architecture) so that the court has a basis upon which to assess their planning evidence.”
 - (iii) *Objectives 1 & 3* - [80] – “... we will seek further submissions and evidence on whether Objectives 1 and 3 (Te Mana o te Wai) should be identified as the Korowai Objectives and korowai be defined as a method of plan interpretation.”
 - (iv) *Objective 6* - [128] – “We will seek further submissions on whether the omission of certain types of waterbodies was intentional on the part of some parties and secondly, whether the omission could frustrate the approach of recognising the

inter-connectedness of the water bodies and addressing water holistically.”

- (v) *Objectives 9 & 9A* - [140] – “We will seek submissions / evidence on the meaning of [life supporting capacity] within the context of a water quantity objective and to identify the policies that implement the same.”
- (vi) *Objectives 9 & 9A* - [157] – “We will make directions seeking further submissions on:
 - (1) the meaning of “life-supporting capacity” in sub-clause (a);
 - (2) support for proposed sub-clause (b).”
- (vii) *Objective 9B* - [182] – “If the plan was amended to include the definition of ‘regionally significant infrastructure’ the objective could be simplified by omitting critical infrastructure. This is a matter on which we seek submissions.”
- (viii) *Objective 9B* - [183] – “We will direct the parties to file submissions that:
 - (1) identify the resource management issues addressed by this objective;
 - (2) respond to the court’s proposition that properly constructed, Objective 9B is to be interpreted and applied in a manner that gives effect to Te Mana o te Wai and can be implemented in accordance with ki uta ki tai; and
 - (3) comment on the court’s proposed wording for Objective 9B at paragraph [179] including the amending of the pSWLP to include the term “regionally significant infrastructure” and consequential deletion of “critical infrastructure” from the objective.”
- (ix) *Objective 10* - [219] – “Meridian is to confirm whether, from its perspective, we have correctly understood Objectives 9B and 10 outlined in the previous paragraph. Secondly, Meridian will make clear what is ‘enhancement’.”

- (x) *Objective 10* - [225] – “We will direct Meridian to file submissions and evidence in response to the court’s discussion above and also to address directly the following matters:
- (1) with reference to the outcomes sought under Objective 10, is the opportunity sought to increase electricity generation capacity by using water more efficiently or effectively?
 - (2) is an outcome of using water more efficiently or effectively that the mauri of the water is acknowledged and protected?
 - (3) does Objective 9B apply to any of Meridian’s activities and if so which?”
- (xi) *Objectives 13, 13A & 13B* - [254] – “... we will seek further submissions/evidence responding to the structure of the objective as set out at paragraph [251].”
- (xii) *Objective 14* - [259] – “In relation to the retention of ‘life supporting capacity’ in [Objective 14] we will reconsider that in the light of any submissions made on that term in Objectives 9 and 9A.”
- (xiii) *Objective 17* - [280] – “We will direct the parties file further submissions and/or evidence in response to the court’s discussion and to address whether the objective, properly directed, is to address natural character values that are significance to the region.” [sic]
- (xiv) *Objective 18* - [290] – “Acknowledging that the language of “improved” land use and water management is not perfect, we will seek submissions/evidence on whether the objective would be strengthened by focusing on behavioural change outcome.” [sic]
- (xv) *Policies 4-12A* - [305] – “The parties will confirm whether ‘dairy farming of cows’ is intended.”
- (xvi) *Policies 4-12A* - [310] – “If Policies 4-12A apply to farming activities only, as was contended by some of the parties,

would this be made clearer by amending the section heading to Policies 4-12 to read ‘Physiographic Zone Policies for Farming Activities’?”

(xvii) *Policies 4-12A* - [320] – “Subject to confirmation that the policies apply only to farming activities, amend the heading to Policies 4-12 to read ‘Physiographic Zone Policies for Farming Activities’.”

(xviii) *Policies 4-12A* - [321] – “Subject to confirmation, amend ‘dairy farming’ to read ‘dairy farming of cows’.”

(xix) *Policy 3* - [326] – “If the court’s interpretation and implementation of Te Mana o te Wai and ki uta ki tai is accepted, we could accept the amendment as being the most appropriate way to achieve Objective 15. Thus:

Policy 3 Ngāi Tahu ki Murihiku taonga species

To manage activities that adversely affect taonga species, identified in Appendix M, and their related habitats.

If not, more fulsome wording articulating how the outcomes are to be provided is required.”

(xx) *Policy 45* - [335] – “The arguments are complex and, as a matter of natural justice, we decline to give our finding on the matter without hearing further from interested parties.”

(xxi) *Annexure 1* – “...For some provisions the court has proposed alternative wording, in which case we indicate that the provision is “proposed to be amended.” The parties are invited to respond to the same while respecting the court’s findings in relation to the wording proffered by the parties”.

- 2 Clarification on whether 1(b)(xxi) above can include, for example, submissions seeking the Court delay making any final findings on certain issues until they can be fully traversed in Topic B (e.g. Policies 4-12 overlap and are potentially inconsistent with Policy 16, a Topic B matter. Their interrelationship has not been fully traversed yet).

- 3 Expectations / process for:
 - (a) The hearing of additional evidence and submissions sought by the interim decision and how this will interact with Topic B.
 - (b) Whether the Court intends to refer the objectives and policies discussed at paragraph 2 above to mediation or expert conferencing once there is a settled view on the scheme of the plan (as indicated at [346]), and if so:
 - (i) How the Court anticipates that a settled view on the scheme of the plan will be achieved (e.g. a further interim decision?).
 - (ii) How this will interact with Topic B.
- 4 Clarification on whether there are any final findings in the interim decision that the Regional Council is required to have regard to in accordance with section 104(1)(b) as having changed the wording of the proposed plan.
- 5 The scope for the changes proposed by the Court, specifically in relation to:
 - (a) Korowai Objectives; and
 - (b) Objective 18.