

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH**

**I TE KOTI TAIAO O AOTEAROA
ŌTAUTAHI ROHE**

IN THE MATTER of the Resource Management Act 1991
(the Act)

A N D

IN THE MATTER of appeals pursuant to clause 14 of the
First Schedule to the Act

BETWEEN **SOUTHLAND FISH AND GAME COUNCIL**

(ENV-2018-CHC-37)

**ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NEW ZEALAND**

(ENV-2018-CHC-50)

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

(ENV-2018-CHC-47)

Appellants

A N D **SOUTHLAND REGIONAL COUNCIL**

Respondent

JOINT MEMORANDUM OF COUNSEL SEEKING A RULING ON SCOPE

22 May 2020

MAY IT PLEASE THE COURT:**Introduction**

1. This Memorandum of Counsel is filed on behalf of Ballance Agri-Nutrients Limited, Federated Farmers of New Zealand (Southland), Horticulture New Zealand, and Ravensdown Limited (“the Parties”).
2. This Memorandum responds to paragraph [6] of the Court’s Minute dated 18 May 2020 and the Memorandum of Counsel for Ngā Rūnanga dated 20 May 2020.
3. In contrast to what appears to be the Court’s understanding of the purpose of Ms Treena Davidson’s statement of evidence dated 17 April 2020¹, the Parties apprehend that Ngā Rūnanga are requesting that Ms Davidson’s evidence on matters other than Objectives 1 and 3 be considered and decided on by the Court either:
 - (a) Because that evidence is within ‘the scope provided by the appeals’, or
 - (b) Through a s293 process.²
4. This Memorandum is in relation to the first matter.
5. Further, the question of whether evidence on Objectives 1 and 3 is within the scope of the appeals has been discussed throughout the course of the hearing, but no formal ruling has been made. The Court has noted in the Interim Decision that while there are no direct appeals on these objectives there “appears” to be scope under Ngā Rūnanga’s appeal to align the provisions of the plan better with the NPSFM and Te Mana o Te Wai and ki uta ki tai.³ The

¹ Paragraph [4] of the Court’s Minute of 18 May 2020.

² Footnote 4 on page 4 of Counsel for Ngā Rūnanga’s Memorandum dated 20 May 2020.

³ Interim Decision at [78].

Parties respectfully submit that that is incorrect, and consequently, have lodged a Notice of Motion to seek a ruling on this question.

6. The Parties accept that the Court is entitled to have called for additional evidence on Objectives 1 and 3⁴ where the purpose of that evidence is to determine whether Objectives 1 and 3 (and any 'structural' i.e. non-substantive changes) give effect to the National Policy Statement for Freshwater Management 2014 as part of its consideration about whether to exercise a discretion under s293.
7. The Parties submit that the Court is not entitled to make substantive changes to Objectives 1 and 3 (and consequential amendments to other Objectives) because those changes are out of scope of the Ngā Rūnanga appeal. This application is made so that the question of scope can be determined.
8. The Parties submit that the appropriate process with respect to this matter should be as follows:
 - (a) The Court should first determine if the Ngā Rūnanga appeal provides scope for the changes to all Objectives sought in Ms Davidson's evidence.
 - (b) If that answer to question (a) is no, then:
 - (i) The hearing in June should determine whether Objectives 1 and 3 are in accordance with⁵ the 2017 amendments to the National Policy Statement for Freshwater Management 2014 ("NPS") without those changes;

⁴ Court Minute dated 18 May 2020.

⁵ s 66(1)(ea) RMA

- (ii) If, having heard the evidence, the Court is of the view that the answer to question (a) is no, then should the Court exercise its discretion under s293 in some way? That should include consideration of which formulation of the Objectives would best be in accordance with the NPS.
 - (c) If the answer to question (a) is yes (that the changes sought are within scope), then the June hearing should be about what version of the Objectives contained in the additional evidence filed by all parties are in accordance with the NPS.
- 9. In addition, if the Court is minded to consider exercising its discretion under s293 of the Act, the Parties seek directions that any party to all appeals to this proposed Plan who wishes to be heard on that issue be given the opportunity to do so before the Court allocates any further hearing time beyond that set down in June 2020. The reasons for this request are also set out below.

Application seeking ruling as to scope

- 10. The parties seek a ruling that all evidence relating to proposed changes to Objectives 1 and 3 (and consequential amendments) is beyond scope of the Ngā Rūnanga appeal, and therefore is excluded from the Court's consideration of the substantive wording of the proposed plan provisions.
- 11. The Parties have not provided an affidavit in support of this application because the evidence that would have been in an affidavit is already before the Court by way of the appeals, and evidence of Ms Sue Ruston dated 8 May 2020.

12. The reasons for the application are as follows:
- (a) The scope of an appeal is determined by the notice of appeal.⁶
 - (b) The Environment Court may only consider evidence which is within the scope of an appeal.⁷
 - (c) There were no appeals on Objectives 1 and 3.
 - (d) Therefore, evidence relating to Objectives 1 and 3 are not “on” those aspects of the proposed plan which are before the Court.⁸

Exercise of the Court’s discretion under s293

13. If the Court is minded to consider exercising its discretion under s293 to order the Council to prepare changes to Objectives 1 and 3, and to other Objectives as a consequence, the Parties seek directions that any parties be heard on that at the earliest opportunity. The reasons for this request are as follows:

- (a) This proposed plan is an ‘interim’ plan and does not include any Freshwater Management Unit (“FMU”) processes. The Council has commenced work on the FMU processes and will be required to progress plan changes or a new proposed plan in accordance with the 2017 amendments to the NPS, or a new National Policy Statement on Freshwater if and when it is gazetted in due course. Importantly, the new National Policy Statement on Freshwater, when gazetted, is expected to set out how Te Mana ō Te Wai and Ki uta ki tai Objectives must be implemented in provisions which will replace the plan currently before the Court.

⁶ Section 290 of the Act.

⁷ *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, at [30].

⁸ *Clearwater Golf Resort Ltd v Christchurch City Council* AP 34/02 (HC) at [69]; *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616 at [139] ff.

- (b) One of the outcomes sought in this plan which is before the Court is to direct and encourage positive changes to Southland's water quality. The Parties consider that those positive changes are only likely to be implemented once this proposed plan becomes operative. The Parties are therefore desirous that this plan be made operative as soon as practicable. The proposed plan was notified in 2016, and the appeal period ended on 17 May 2018, over two years ago.
- (c) These appeals have already been the subject of 16 days of hearing time. If the Court is of the view that it should exercise its discretion under s293 to consider the substantial changes to all of the Objectives as identified in Ms Davidson's evidence, the Parties consider that would require full public notification. That is because they introduce fundamental changes to Objectives which will have implications, not only for other Topic A provisions, but also for Topic B provisions.
- (d) Following the June hearing, the Court is still to direct the filing of submissions and evidence (or an alternative procedure such as expert conferencing or mediation) to respond to the Court's interim decision on Topic A matters, and potentially to set a hearing to consider submissions and evidence.
- (e) If a s293 process is to occur, it is submitted that for reasons of efficiency the Court should make that decision prior to all parties having to expend time and resources responding to the Court's interim decision.
- (f) However, the Parties request that, before making any decision to exercise its discretion under s293, the Court direct that all parties on all appeals who wish to do so may make submissions on the utility and appropriateness of the Court requiring the parties to embark on a s293 process.

- (g) The Parties note that given the substantial hearing time which is likely to still be required to hear the remaining Topic A and Topic B matters, they are concerned that the costs and resources required for a s293 process relative to any possible benefits of such a process given the short time before replacement provisions will need to be in place, may begin to impact on their ability to provide the Court with the level of assistance that they would otherwise wish.

14. Counsel are available at short notice for a teleconference to discuss the above, if it would assist the Court.

DATE: 22 May 2020



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