

BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 191

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-029)
... (continued on last page)
Appellants
AND SOUTHLAND REGIONAL COUNCIL
Respondent

Court: Environment Judge J E Borthwick
Environment Commissioner R M Bartlett
Environment Commissioner S G Paine

Hearing: In Chambers at Christchurch

Date of Decision: 6 November 2020

Date of Issue: 6 November 2020

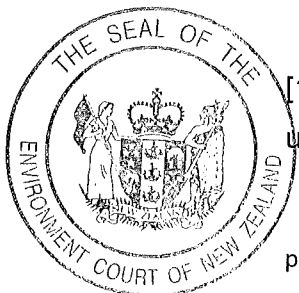
FOURTH INTERIM DECISION OF THE ENVIRONMENT COURT

A: The Southland Regional Council is directed to amend the proposed Southland Water and Land Plan as set out in **Annexure 1**.

REASONS

Introduction

[1] The Southland Regional Council has furnished the court with a report prepared under s 32AA of the Resource Management Act 1991, and the court is now in a position



to confirm certain objectives of the proposed Southland Water and Land Plan.

[2] We will not summarise the contents of the s 32AA report,¹ other than to say that its detail corresponds to the scale and significance of the changes made. Such a report is required where changes are made to, or are proposed for, the proposed Regional Plan. The court endeavoured to provide this analysis in its decisions, including the first Interim Decision (in particular). However, in doing so we were conscious of the fact that only a few planning witnesses comprehensively addressed the higher order planning instruments to which this Regional Plan would give effect when proposing amendments to the same. It was, therefore, possible that we may have overlooked or not properly understood a relevant provision. Given this, it was prudent that a formal report be prepared by the Regional Council in response to the now settled objectives.

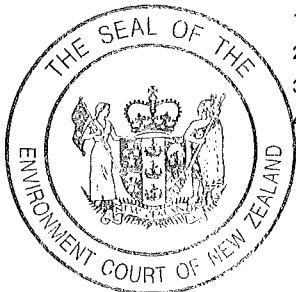
[3] While the court has released decisions on certain policies, these have yet to be confirmed pending a s 32AA report on the same. The Regional Council did not consider a review of policies possible in isolation from the rules.² We agree but have cautioned the parties going forward to respect the court's findings in relation to those policies.³ The balance of the provisions⁴ are now organised into broad topics and referred to mediation which is to be completed by 1 June 2021.⁵ The exception to this is the Infrastructure topic (Topic B6) which may require a hearing.

Discussion

[4] The final wording of the objectives and policies is attached to the court's Minute dated 1 October 2020 and again, to this decision.

Te Tiriti o Waitangi

[5] As directed, the s 32AA report specifically address s 8 of the Resource Management Act 1991. Section 8 provides:



¹ Southland Regional Council, memorandum dated 30 October 2020, Appendix A.

² Southland Regional Council, memorandum dated 25 September 2020 at [15].

³ Minute dated 1 October 2020 at [4].

⁴ The balance includes a single objective, and the policies and rules and other methods.

⁵ Minute dated 22 October 2020 at [18].

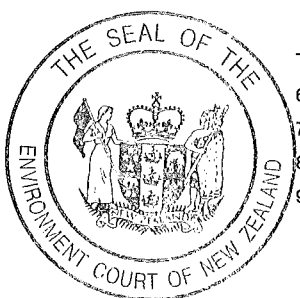
In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[6] The direction in relation to s 8 was given because Te Tiriti principles were, at best, fleetingly addressed in evidence. The Regional Council and Ngā Rūnanga collaborated on this section of the report addressing the requirements of s 8 and the principles of the Treaty.⁶ These parties agree that to “take into account” the principles of the Treaty requires the following:⁷

- (a) the active participation by tangata whenua in resource management decision-making;
- (b) engagement with tangata whenua in good faith;
- (c) reciprocity and mutual benefit will be sought;
- (d) protection of resources of importance to tangata whenua from adverse effects; and
- (e) positive action to protect tangata whenua interests.

[7] From their perspective, active participation of tangata whenua was not only encouraged, but occurred through the plan drafting processes, the joint Regional Council and Te Ao Marama workshops, the close working relationships between the Regional Council and local Rūnanga, through the Regional Council hearing process and through the hearing before the court. The engagement has been in good faith and is ongoing in the National Policy Statement for Freshwater Management plan-making processes.⁸

[8] That there has been reciprocity and mutual benefit is reflected in the close working relationships and is also at the core of the Charter of Understanding He Huarahi mō Ngā Uri Whakatupu. Mutual benefit has been strengthened through the inclusion of the Interpretation Statement in the pSWLP, which ensures the plan is considered in the context of Te Mana o te Wai.⁹ The protection of resources of importance to tangata whenua, and processes by which this is achieved, is specifically incorporated into



⁶ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [3].

⁷ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [13.2].

⁸ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [13.3].

⁹ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [13.4]-[13.5].

Objectives 4, 5, 14, 15 and 16.¹⁰

[9] Active protection of interests guaranteed to Māori under Article 2 of the Treaty is evident in the objectives resulting from the court's Interim Decisions, which place specific emphasis on ki uta ki tai and Te Mana o te Wai at the fore-front of decision-making about water and land.¹¹

[10] Overall, we are told that the Regional Council is satisfied that the principles of the Treaty, as set out above, have been appropriately taken into account in the objectives as set out in the court's Interim Decisions.¹²

Corrigendum

[11] In the Minute dated 5 August 2020, the court noted a correction was required to Objective 2 in Annexure 1 of the third Interim Decision. The court had inadvertently incorporated the text of a proposed version of the objective, and consequently the version in Annexure 1 was inconsistent with the decision made.

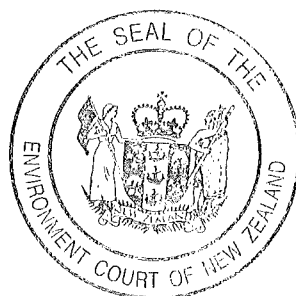
[12] Section 278 of the Resource Management Act 1991 provides that the Environment Court has the same powers as the District Court in the exercise of its jurisdiction. Rule 11.10 of the District Court Rules 2014 specifies (relevantly) that a judgment may be corrected by the court if it contains a clerical mistake or an error arising from an accidental slip or omission.

[13] The correction is now made, and the final version of Objective 2 is set out in **Annexure 1** attached to this decision.

National Policy Statement for Freshwater Management 2020

[14] The National Policy Statement for Freshwater Management 2020 ("NPS-FM 2020") was released after the court made its first three Interim Decisions.

[15] The s 32AA report ("the Report") points out that the Regional Council must give



¹⁰ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [13.6].

¹¹ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [13.7].

¹² Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [13.8].

effect to the NPS-FM 2020 as soon as reasonably practicable.

[16] The Report considers Objective 3 (previously numbered Objective 2) to be more aligned with the NPS-FM 2020 than the Decision-Version of the objective. Objectives 6, 7, 9/9A, 14, 17 and 18 are considered to be consistent with the NPS-FM 2020. Noting that Objective 13/13A and 13B have a wider subject range than the NPS-FM 2020, we are told this objective aligns with the relevant provisions in the NPS-FM 2020. In relation to Objective 10, the Report notes the process for the setting of a flow and allocation regime under the NPS-FM 2020. Clause 3.31 of the NPS-FM 2020 directs the Regional Council to have regard to the importance of the Manapōuri hydro-electric generation scheme.¹³ The Report does not specifically give an opinion on whether Objective 10 gives effect to or is at least consistent with the NPS-FM 2020. That said, the Report concludes that all objectives, including Objective 10, are the most appropriate way to achieve the purpose of the Act and so we infer from this that it does.

[17] The court made editorial changes to Objective 3 (previously numbered Objective 2) to improve consistency with the NPS-FM (2017 amendments). The Report observes that this Objective does not prioritise its various elements in the way that the NPS-FM 2020 does.

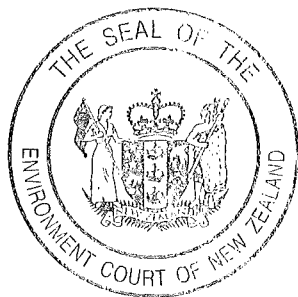
Objective 9B

Objective 9B

The importance of Southland's regionally and nationally significant infrastructure is recognised and its sustainable and effective development, operation, maintenance and upgrading enabled.

[18] In the court's Minute dated 17 August 2020 we set out our interpretation of the phrase "sustainable and effective development" in Objective 9B as pertaining to both the infrastructure *per se* and secondly, the manner of its development relative to the environment. If development is neither sustainable nor effective, it will be contrary to this objective.

[19] In common with all objectives, Objective 9B is subject to the Interpretation



¹³ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [8.10].

Statement. We directed any party disagreeing with the court's interpretation to advise the court by filing a memorandum. No party disagreed.¹⁴

[20] Given the contentious nature of the subject-matter (infrastructure), we record our agreement with the s 32AA Report's assessment which, having considered the Regional Policy Statement, the National Policy Statement for Renewable Electricity Generation and the National Policy Statement for Electricity Transmission, together with the NPS-FM 2020, concluded this was the most appropriate way of achieving the purpose of the Act.

[21] Noting the court's discussion of the Regional Policy Statement in the first Interim Decision, the s 32AA Report records that the objective makes clear that any development, upgrading, maintenance and use of regionally and nationally significant infrastructure needs to be undertaken in both a sustainable and effective manner. The inclusion of "sustainable and effective" in Objective 9B reflects the pSWLP foundation of Te Mana o te Wai and ki uta ki tai, and also the NPS-FM 2020 objective that is to ensure that natural and physical resources are managed in a way that prioritises:¹⁵

- (a) first, the health and well-being of water bodies and freshwater ecosystems
- (b) second, the health needs of people (such as drinking water)
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

Water Conservation orders

[22] Each objective has been considered against the region's two Water Conservation Orders and the Report concludes they are not inconsistent with the same.¹⁶

Other Regional Plans

[23] The objectives have also been considered in the context of the other Regional Plans¹⁷ and are not inconsistent with them.¹⁸

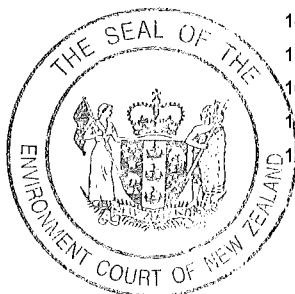
¹⁴ Joint memorandum of counsel dated 9 September 2020 at [16].

¹⁵ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [7.11]; NPS-FM 1.3(5).

¹⁶ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [14.5].

¹⁷ Regional Coastal Plan 2013 and Regional Air Plan 2016.

¹⁸ Southland Regional Council, memorandum dated 30 October 2020, Appendix A at [14.8].



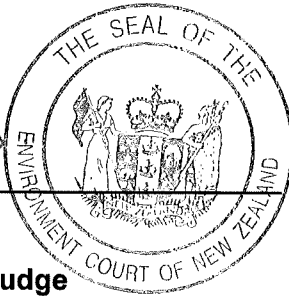
Outcome

[24] The report prepared under s 32AA of the Act confirms that the objectives, as amended by the court, are the most appropriate way to achieve the purpose of the Act. That being the case, we will direct the Southland Regional Council to amend the proposed Southland Water and Land Plan to incorporate the provisions set out in **Annexure 1**.

For the court:

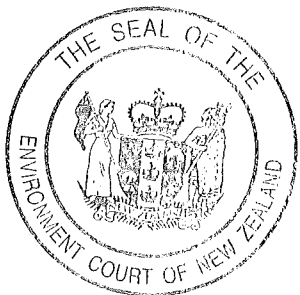
J E B

J E Borthwick
Environment Judge

The seal of the Environment Court of New Zealand is circular. It features the text "THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND" around the perimeter. In the center is the coat of arms of New Zealand, which includes a shield supported by two figures, a crown on top, and a scroll at the bottom with the motto "EUREKA".

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 |



Annexure 1

Interpretation Statement¹

All persons exercising functions and powers under this Plan and all persons who use, develop or protect resources to which this Plan applies shall recognise that:

- (i) Objectives 1 and 2 are fundamental to this plan, providing an overarching statement on the management of water and land, and all objectives are to be read together and considered in that context; and
- (ii) The plan embodies ki uta ki tai and upholds Te Mana o Te Wai and they are at the forefront of all discussions and decisions about water and land.

Objective 2²

The mauri of water provides for te hauora o te taiao (health and mauri of the environment), te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).

Objective 3³

Water and land are recognised as enablers of the economic, social and cultural wellbeing of the region.

Objective 6⁴

Water quality in each freshwater body, coastal lagoon and estuary will be:

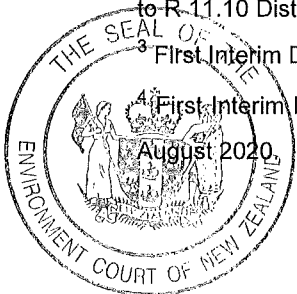
- (a) maintained where the water quality is not degraded; and
- (b) improved where the water quality is degraded by human activities.

¹Second Interim Decision [2020] NZEnvC 93 and Third Interim Decision [2020] NZEnvC 110.

² Second Interim Decision [2020] NZEnvC 93, Third Interim Decision [2020] NZEnvC 110 and Minute dated 5 August 2020. Note: as signalled, the court will issue corrigendum and correct the third Interim Decision pursuant to R 11.10 District Court Rules.

³ First Interim Decision [2020] NZEnvC 93.

⁴ First Interim Decision [2020] NZEnvC 93, memorandum of counsel dated 4 August 2020 and Minute dated 31 August 2020.



Objective 7⁵

Following the establishment of freshwater objectives, limits, and targets (water quality and quantity) in accordance with the Freshwater Management Unit processes:

- (a) where water quality objectives and limits are met, water quality shall be maintained or improved;
- (b) any further over-allocation of freshwater is avoided; and
- (c) any existing over-allocation is phased out in accordance with freshwater objectives, targets, limits and timeframes.

Objective 9/9A⁶

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 (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.

Objective 9B⁷

The importance of Southland's regionally and nationally significant infrastructure is recognised and its sustainable and effective development, operation, maintenance and upgrading enabled.

Amend Issues: p 17⁸

Some of these activities can have positive effects on the natural environment, for example, bridges and culverts allow access across a river without disturbing the bed. Other activities, such as infrastructure, are important to enable people and

⁵ First Interim Decision [2020] NZEnvC 93 and memorandum of counsel dated 4 August 2020.

⁶ First Interim Decision [2020] NZEnvC 93, Minute dated 31 August 2020 and memorandum of counsel dated 9 September 2020.

⁷ First Interim Decision [2020] NZEnvC 93 and memorandum of counsel dated 4 August 2020.

⁸ Memorandum of counsel dated 4 August 2020 and Minute dated 31 August 2020.



communities to provide for their economic, cultural, and social wellbeing. These activities can also have adverse effects on the environment, including generating sediment, disturbing habitat and preventing fish passage.

Objective 10⁹

The national importance of the existing Manapōuri hydro-electric generation scheme in the Waiau catchment is provided for and recognised in any resulting flow and level regime.

Objective 13¹⁰

Provided that:

- (a) the quantity, quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land; and
- (b) the health of people and communities is safeguarded from the adverse effects of discharges of contaminants to land and water; and
- (c) ecosystems (including indigenous biological diversity and integrity of habitats), are safeguarded,

then land and soils may be used and developed to enable the economic, social and cultural wellbeing of the region.

Objective 14¹¹

The range and diversity of indigenous ecosystems and habitats within rivers, estuaries, wetlands and lakes, including their margins, and their life-supporting capacity are maintained or enhanced.

⁹ First Interim Decision [2020] NZEnvC 93 and memorandum of counsel dated 4 August 2020

¹⁰ First Interim Decision [2020] NZEnvC 93, Minute dated 31 August 2020, memorandum of counsel dated 9 September 2020 and memorandum of counsel dated 25 September 2020.

¹¹ First Interim Decision [2020] NZEnvC 93, memorandum of counsel dated 4 August 2020 and Minute dated 31 August 2020.

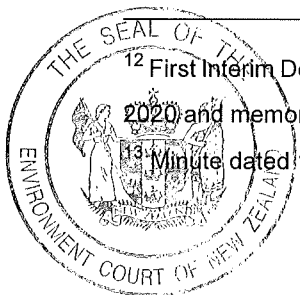


Objective 17¹²

Preserve the natural character values of wetlands, rivers and lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats, and protect them from inappropriate use and development.

Objective 18¹³

All persons implement environmental practices that optimise efficient resource use, safeguard the life supporting capacity of the region's land and soils, and maintain or improve the quality and quantity of the region's water resources.



¹² First Interim Decision [2020] NZEnvC 93, memorandum of counsel dated 4 August 2020, Minute dated 31 August 2020 and memorandum of counsel dated 25 September 2020.

¹³ Minute dated 11 September 2020.