

**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)

(Continued next page)

JOINT MEMORANDUM IN SUPPORT OF CONSENT ORDER

**TOPIC B7 ISSUES 1, 2, 3, 7, 8, 9, & 10
RELATING TO
POLICIES 20, 24, 28, 39 & 39A, BED DISTURBANCE SECTION TITLE &
ARCHAEOLOGICAL SITES ADVICE NOTES**

3 February 2022

Judicial Officer: Judge Borthwick

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

WYNNWILLIAMS

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

WILKINS FARMING CO
(ENV-2018-CHC-30)

**GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT
COUNCIL & INVERCARGILL CITY 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 joint memorandum relates to appeals against Southland Regional Council's decision on the proposed Southland Water and Land Plan (**pSWLP**), in respect of provisions relating to Topic B7 Other.
- 2 The parties participated in Court-assisted mediation on these appeals on 29 March 2021, and subsequently engaged in informal discussions on some of the issues.
- 3 During Court-assisted mediation and the discussions that followed, the parties have reached agreement on the resolution of the following provisions under appeal:
 - (a) Issue 1 – Policy 39;
 - (b) Issues 2 and 3 – Policy 39A;
 - (c) Issue 7 – Bed Disturbance section title;
 - (d) Issue 8 – Policies 20, 24, 28; and
 - (e) Issues 9 and 10 – Archaeological sites advice note.
- 4 This joint memorandum is filed in support of a draft consent order to resolve the appeals relating to provisions referred to at paragraph 3 above.
- 5 This joint memorandum has been signed by each of the Appellants, the Respondent, and each of the section 274 parties.

The changes agreed, the rationale for the same, and draft Consent Orders

- 6 The changes to the provisions referred to in paragraph 3, as agreed between the parties, are detailed in the draft Consent Order included at **Appendix 1** to this joint memorandum.
- 7 The changes, including the rationale for the same, are also explained in more detail in the affidavit of Matthew McCallum-Clark dated 2 February 2022, attached as **Appendix 2** to this joint memorandum. This affidavit provides an evaluation of the agreed changes in terms of section 32AA of the Act and (where relevant) the higher order policy documents, including in particular the National Policy Statement for Freshwater Management 2020 (**NPSFM**).

- 8 Counsel also record at the outset, that the parties, throughout mediation and informal discussions, were cognisant of the findings in the Court's Interim Decisions¹ and are satisfied that all changes agreed to are consistent with those findings and/or, within the bounds of scope, bring the pSWLP closer to the direction in those decisions.

Details of appeals

- 9 The sub-sections below detail the provisions that were appealed, who appealed each provision, what those appellants sought, and who joined those appeals as section 274 parties.
- 10 As the rationale for the changes agreed and an analysis in line with section 32AA has been provided in the affidavit of Matthew McCallum-Clark, such detail is not reproduced here. Rather, cross-referencing to that reasoning is provided to assist with readability of the suite of documents filed in support of orders being made by consent.

Issue 1 – Policy 39

- 11 Policy 39 relates to applications for resource consent for the use of land for a farming activity. It provides that when considering such an application, the Southland Regional Council should consider all adverse effects of the proposed activity on water quality, whether or not the pSWLP permits an activity with that effect.
- 12 Policy 39 of the pSWLP has been appealed by Southland Fish and Game Council (**Fish and Game**), Federated Farmers of New Zealand, and Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**).
- 13 Fish and Game and Forest and Bird sought that “should” be replaced with “shall” and that effects on water quantity as well as water quality be included in the Policy.
- 14 Federated Farmers of New Zealand sought that the Policy be deleted.
- 15 The following parties joined these appeals as section 274 parties in relation to Policy 39:
- (a) Federated Farmers of New Zealand;

¹ [2019] NZEnvC 208, [2020] NZEnvC 93, [2020] NZEnvC 110, and [2020] NZEnvC 191.

- (b) Forest and Bird;
 - (c) Director-General of Conservation;
 - (d) Dairy Holdings Limited;
 - (e) Ravensdown Limited;
 - (f) DairyNZ Limited;
 - (g) Aratiatia Livestock Limited;
 - (h) Fish and Game; and
 - (i) Ballance Agri-Nutrients Limited.
- 16 Through mediation and subsequent discussions, the parties agreed to amend Policy 39 as set out in the draft consent order and paragraph [15] of the affidavit of Matthew McCallum-Clark in relation to Topic B7.
- 17 The rationale for the changes agreed are also included in that affidavit at paragraphs [16] – [23].

Issues 2 and 3 – Policy 39A

- 18 Policy 39A relates to integrated management. It directs that when considering the cumulative effects of land use and discharge activities within whole catchments, consideration be given to:
- (a) the integrated management of freshwater and the use and development of land; and
 - (b) through the Freshwater Management Unit process, facilitating the collective management of nutrient losses.
- 19 Policy 39A of the pSWLP has been appealed by Te Rūnanga o Ngai Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Ōraka Aparima (**Ngā Rūnanga**); and Forest and Bird.
- 20 Ngā Rūnanga sought to delete the words “when considering the cumulative effects of land use and discharge activities with whole catchments, consider” and replace them with “to improve”.
- 21 Forest and Bird sought to include the coastal marine area in the Policy.
- 22 The following parties joined these appeals as section 274 parties in relation to Policy 39A:

- (a) Aratiatia Livestock Limited;
- (b) Dairy Holdings Limited;
- (c) Director-General of Conservation;
- (d) Southland Fish and Game Council; and
- (e) Royal Forest and Bird Protection Society of New Zealand Incorporated.

23 Through mediation and subsequent discussions, the parties agreed to amend Policy 39A as set out in the draft consent order and paragraph [26] of the affidavit of Matthew McCallum-Clark in relation to Topic B7.

24 The rationale for the changes agreed are also included in that affidavit at paragraphs [27] – [32].

Issue 7 – Bed Disturbance section title

25 The title of the Bed Disturbance section of the pSWLP was appealed by Forest and Bird.

26 Forest and Bird sought to amend the title of the Bed Disturbance section to include wetlands.

27 No parties joined the appeal as section 274 parties in relation to the title of the Bed Disturbance section.

28 Through mediation and subsequent discussions, the parties agreed to amend the title of the Bed Disturbance section as set out in the draft consent order and paragraph [35] of the affidavit of Matthew McCallum-Clark in relation to Topic B7.

29 The rationale for the agreed change is also included in that affidavit at paragraph [36].

Issue 8 – Policies 20, 24 and 28

30 Policy 20 relates to the management of water resources. It requires that the taking, abstraction, use, damming or diversion of surface water and groundwater is managed to:

- (a) recognise the use and development of Southland's land and water resources can have positive effects;

- (b) avoid, remedy or mitigate adverse effects from the use and development of surface water and groundwater resources on certain values and habitat; and
 - (c) ensure water is used sufficiently and reasonably.
- 31 Policy 24 relates to water abstraction for community water supply. It provides policy direction to recognise the need for, and assign priority to, the provision of water for community water supply when allocating water provided that:
 - (a) significant adverse effects are avoided, remedied or mitigated; and
 - (b) a water demand management strategy is part any application for a new or replacement water permit or an amendment to an existing water permit.
- 32 Policy 28 relates to structures and bed disturbance activities of rivers (including modified watercourses) and lakes. It requires that structures, bed disturbance activities and associated discharges in the beds and margins of lakes, rivers and modified watercourses are managed to avoid, remedy or mitigate adverse effects on certain values and habitats.
- 33 Policies 20, 24, and 28 of the pSWLP have been appealed by Heritage New Zealand Pouhere Taonga (**Heritage New Zealand**).
- 34 Heritage New Zealand also appealed Policy 29, seeking that reference to historic heritage values be inserted in the Policy. This change has been addressed as part of Topic B4.
- 35 Heritage New Zealand sought that Policies 20, 24, and 28 be reinstated as notified.
- 36 The following parties joined this appeal as section 274 parties in relation to these policies 20, 24 and 28:
 - (a) Federated Farmers of New Zealand;
 - (b) Invercargill City Council Water Manager;
 - (c) Oil Companies;
 - (d) Fonterra Co-operative Limited; and
 - (e) Te Rūnanga Ngai Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Ōraka Aparima.

- 37 Through mediation and subsequent discussions, the parties agreed to amend Policies 20, 24, and 28 as set out in the draft consent order and paragraph [40] of the affidavit of Matthew McCallum-Clark in relation to Topic B7.
- 38 The rationale for the changes agreed are also included in that affidavit at paragraphs [41] – [47].

Issues 9 and 10 – Archaeological sites advice note

- 39 Rules 32B, 43, 53, 55, 57, 58, 59, 59A, 60, 61, 62, 63A, 64, 66, 67, 68, 72, 73, 75, 77, and 78 of the pSWLP relate to various land use and disturbance activities.
- 40 These Rules were appealed by Heritage New Zealand.
- 41 Heritage New Zealand sought the consistent location of the advice notes in these rules, and where the advice note was not included, the inclusion of it.
- 42 Te Rūnanga Ngai Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Ōraka Aparima joined this appeal as a section 274 party.
- 43 Through mediation and subsequent discussions, the parties agreed that the advice note in Rules 57, 58, 59, 60, 61, 62, 64, 66, 67, 68, 72, 73, 75, 77, and 78 should be relocated to be consistently located at the beginning of the rule cascade for each rule. They also agreed that the same advice note should be added to Rules 32B, 43, 53, 55, 59A, and 63A (at the beginning of the rule cascade). This is set out in the draft consent order and paragraph [50] of the affidavit of Matthew McCallum-Clark in relation to Topic B7.
- 44 The rationale for the changes agreed are also included in that affidavit at paragraphs [52] – [57].

Orders sought

- 45 All parties are satisfied that all matters proposed for the Court's endorsement are within the scope of submissions and appeals, fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

46 For the avoidance of doubt, the parties are satisfied that the amendments give effect to the National Policy Statement for Freshwater Management 2020, insofar as there is scope to do so.

47 The parties are also satisfied that the changes appropriately respond to the direction from the Court in its Interim Decisions.²

48 The parties therefore respectfully request that the Court make the orders sought in **Appendix 1** to this memorandum.

49 No party has any issue as to costs.

50 For completeness, it is noted that the order, if granted, resolves all appeals in relation to:

- (a) Policy 39 (Issue 1);
- (b) Policy 39A (Issues 2 and 3);
- (c) Bed Disturbance section title (Issue 7);
- (d) Policies 20 and 24 (Issue 8); and
- (e) Rules 43, 53, 55, 59A, 63A, 57, 58, 59, 60, 61, 62, 64, 66, 67, 68, 72, 75, and 77 (Issues 9 and 10);

and partially resolves the appeals in relation to:

- (f) Policy 28 (Issue 8). Policy 28 is also under appeal in relation to Issue 1 of Topic B4. That appeal is also proposed to be resolved by consent. See paragraphs [11] to [16] of the Joint Memorandum in relation to Topic B4 and paragraphs [16] to [23] of the affidavit of Matthew McCallum-Clark in relation to the same.
- (g) Rule 32B (Issues 9 and 10). Rule 32B is also under appeal in relation to Issues 33, 34, 35, 36, and 37 of Topic B2. That appeal is also proposed to be resolved by consent. See paragraphs [76] to [88] of the Joint Memorandum in relation to Topic B4 and paragraphs [110] to [118] of the affidavit of Matthew McCallum-Clark in relation to the same.
- (h) Rule 73 (Issues 9 and 10). Rule 73 is also under appeal in relation to Issue 10 of Topic B4. That appeal is also proposed to be

² [2019] NZEnvC 208, [2020] NZEnvC 93, [2020] NZEnvC 110, and [2020] NZEnvC 191.

resolved by consent. See paragraphs [33] to [38] of the Joint Memorandum in relation to Topic B4 and paragraphs [50] to [56] of the affidavit of Matthew McCallum-Clark in relation to the same.

- (i) Rule 78 (Issues 9 and 10). Rule 78 is also under appeal in relation to Issues 12, 13, 14, and 16 of Topic B4. This appeal remains unresolved and is to be heard as part of Tranche 1.

DATED this 3rd day of February 2022



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P A C Maw / A M Langford

Counsel for Southland Regional Council

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D Allan

Counsel for Aratiatia Livestock Limited

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V Hamm

Counsel for Ballance Agri-Nutrients Limited

resolved by consent. See paragraphs [33] to [38] of the Joint Memorandum in relation to Topic B4 and paragraphs [50] to [56] of the affidavit of Matthew McCallum-Clark in relation to the same.

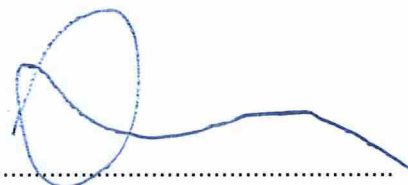
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DATED this 3rd day of February 2022

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P A C Maw / A M Langford

Counsel for Southland Regional Council

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D Allan

Counsel for Aratiatia Livestock Limited

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V Hamm

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- (i) Rule 78 (Issues 9 and 10). Rule 78 is also under appeal in relation to Issues 12, 13, 14, and 16 of Topic B4. This appeal remains unresolved and is to be heard as part of Tranche 1.

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B Williams

Counsel for Dairy Holdings Limited

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B Matheson / K Forward

Counsel for DairyNZ Limited

.....

P Williams

Counsel for Director-General of Conservation

.....

R Gardner

Counsel for Federated Farmers of New Zealand

.....

S Gepp

Counsel for Fish and Game

.....

B Williams

Counsel for Dairy Holdings Limited



.....

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.....

S Gepp

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.....

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.....
B Matheson / K Forward

Counsel for DairyNZ Limited

.....
P Williams

Counsel for Director-General of Conservation

Neil Wilson

.....
P Wilson

~~R Gardner~~

~~Counsel~~ for Federated Farmers of New Zealand

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S Gepp

Counsel for Fish and Game

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B Williams

Counsel for Dairy Holdings Limited

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B Matheson / K Forward

Counsel for DairyNZ Limited

.....

P Williams

Counsel for Director-General of Conservation

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R Gardner

Counsel for Federated Farmers of New Zealand



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S Gepp

Counsel for Fish and Game



.....
B Matheson / K Forward

Counsel for Fonterra Co-operative Limited

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S Gepp

Counsel for Forest and Bird

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C Owen

Counsel for Heritage New Zealand Pouhere Taonga

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M Morris

Counsel for Invercargill City Council Water Manager

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M Christensen

Counsel for Ravensdown Limited

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B Matheson / K Forward

Counsel for Fonterra Co-operative Limited



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S Gepp

Counsel for Forest and Bird

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C Owen

Counsel for Heritage New Zealand Pouhere Taonga

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M Morris

Counsel for Invercargill City Council Water Manager

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M Christensen

Counsel for Ravensdown Limited

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B Matheson / K Forward

Counsel for Fonterra Co-operative Limited

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S Gepp

Counsel for Forest and Bird

Vanilla C.M. Owen

.....

C Owen

Counsel for Heritage New Zealand Pouhere Taonga

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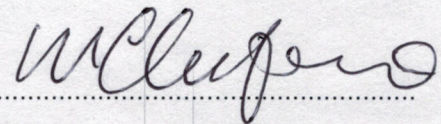
Counsel for Heritage New Zealand Pouhere Taonga

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M Morris

Counsel for Invercargill City Council Water Manager

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M Christensen

Counsel for Ravensdown Limited

Adlene Lennon

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J Winchester / S Lennon

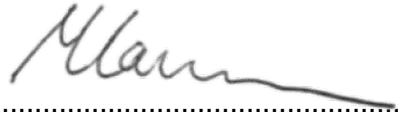
Counsel for Ngā Rūnanga

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M Laurenson

For Oil Companies

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J Winchester / S Lennon

Counsel for Ngā Rūnanga



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M Laurensen

For Oil Companies

Appendix 1 – Draft consent order

**BEFORE THE ENVIRONMENT COURT
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UNDER the Resource Management Act 1991

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(ENV-2018-CHC-31)

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(ENV-2018-CHC-32)

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CONSENT ORDER

**TOPIC B7 ISSUES 1, 2, 3, 7, 8, 9, & 10
RELATING TO
POLICIES 20, 24, 28, 39 & 39A, BED DISTURBANCE SECTION TITLE &
ARCHAEOLOGICAL SITES ADVICE NOTES**

Judicial Officer: Judge Borthwick

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**ROYAL FOREST AND BIRD PROTECTION SOCIETY
OF NEW ZEALAND**
(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

- [A] Under section 279(1) of the Resource Management Act 1991, the Environment Court, by consent, orders that the appeal is allowed in accordance with Annexure A to this Order.
- [B] Under section 285 of the Resource Management Act 1991, there is no order as to costs.

REASONS

Introduction

- 1 The following parties have appealed provisions of the proposed Southland Water and Land Plan as they relate to Topic B7:¹
 - (a) Federated Farmers of New Zealand (**Federated Farmers**);
 - (b) Heritage New Zealand Pouhere Taonga;
 - (c) Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**);
 - (d) Southland Fish and Game Council (**Fish and Game**); and
 - (e) Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihōpai Rūnaka, Te Rūnanga o Awarua, and Te Rūnanga o Oraka Aparima (**Ngā Rūnanga**).

- 2 The Court has read and considered the joint memorandum of the parties dated 3 February 2022, which proposes to resolve the appeals that relate to:
 - (a) Policy 39 (Issue 1);
 - (b) Policy 39A (Issues 2 and 3);
 - (c) Bed Disturbance section title (Issue 7);
 - (d) Policies 20, 24 (Issue 8); and
 - (e) Rules 43, 53, 55, 59A, 63A, 57, 58, 59, 60, 61, 62, 64, 66, 67, 68, 72, 75, and 77 (Issues 9 and 10);and partially resolve the appeals in relation to:
 - (f) Policy 28 (Issue 8). Policy 28 is also under appeal in relation to Issue 1 of Topic B4. That appeal is also proposed to be resolved by consent. See paragraphs [11] to [16] of the Joint Memorandum in relation to Topic B4 and paragraphs [16] to [23] of the affidavit of Matthew McCallum-Clark in relation to the same.

¹ The particular provisions each party has appealed is set out in the joint memorandum of the parties dated 3 February 2022.

- (g) Rule 32B (Issues 9 and 10). Rule 32B is also under appeal in relation to Issues 33, 34, 35, 36, and 37 of Topic B2. That appeal is also proposed to be resolved by consent. See paragraphs [76] to [88] of the Joint Memorandum in relation to Topic B4 and paragraphs [110] to [118] of the affidavit of Matthew McCallum-Clark in relation to the same.
 - (h) Rule 73 (Issues 9 and 10). Rule 73 is also under appeal in relation to Issue 10 of Topic B4. That appeal is also proposed to be resolved by consent. See paragraphs [33] to [38] of the Joint Memorandum in relation to Topic B4 and paragraphs [50] to [56] of the affidavit of Matthew McCallum-Clark in relation to the same.
 - (i) Rule 78 (Issues 9 and 10). Rule 78 is also under appeal in relation to Issues 12, 13, 14, and 16 of Topic B4. This appeal remains unresolved and is to be heard as part of Tranche 1.
- 3 The Court has also read and considered the affidavit of Matthew McCallum-Clark dated 2 February 2022, which provides an analysis of the changes proposed by the parties in terms of section 32AA of the Resource Management Act 1991 (**Act**).
- 4 The following parties gave notice of their intention to become parties under section 274 of the Act and have signed the joint memorandum of the parties dated 3 February 2022:²
- (a) Aratiatia Livestock Limited;
 - (b) Ballance Agri-Nutrients Limited;
 - (c) Dairy Holdings Limited;
 - (d) DairyNZ Limited;
 - (e) Director-General of Conservation;
 - (f) Federated Farmers;
 - (g) Fish and Game;
 - (h) Fonterra Co-operative Limited;

² The particular appeal each party has joined as a s274 party is set out in the joint memorandum of the parties dated 3 February 2022.

- (i) Forest and Bird;
 - (j) Invercargill City Council Water Manager;
 - (k) Ngā Rūnanga;
 - (l) Oil Companies; and
 - (m) Ravensdown Limited.
- 5 The Court is making this order under section 279(1)(b) of the Act; such order being by consent pursuant to section 297, rather than representing a decision or determination on the merits. The Court understands that for the present purposes that:
- (a) all parties to the proceedings have executed the memorandum requesting this order;
 - (b) all parties are satisfied that all matters proposed for the Court's endorsement are within the scope of submissions and appeals, fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the Act, including in particular Part 2.

Order

- 6 Therefore, the Court orders, by consent, that the proposed Southland Water and Land Plan be amended as set out in **Annexure A** to this Order.
- 7 The Order resolves the appeals as they relate to the following provisions:
- (a) Policy 39;
 - (b) Policy 39A;
 - (c) Bed Disturbance section title;
 - (d) Policies 20 and 24; and
 - (e) Rules 43, 53, 55, 59A, 63A, 57, 58, 59, 60, 61, 62, 64, 66, 67, 68, 72, 75, and 77;
- and partially resolves the appeals in relation to:
- (f) Policy 28;

- (g) Rule 32B;
- (h) Rule 73; and
- (i) Rule 78.

8 There is no order as to costs.

DATED this day of 2022

J E Borthwick
Environment Judge

ANNEXURE A

- 1 The title of the Bed Disturbance section is to be amended as follows (new text underlined):

Bed disturbance activities in river and lake beds and wetlands

- 2 Rules 32B, 43, 53, 55, 57, 58, 59, 59A, 60, 61, 62, 63A, 64, 66, 67, 68, 72, 73, 75, 77, and 78 are to be amended as follows:
- (a) The advice note (set out at (c) below) in Rules 57, 58, 59, 60, 61, 62, 64, 66, 67, 68, 72, 73, 75, 77, and 78 is to be relocated so that it is consistently located at the beginning of the rule cascade for each rule.
 - (b) The advice note (set out at (c) below) is to be added to Rules 32B, 43, 53, 55, 59A, and 63A (at the beginning of the rule cascade).
 - (c) For completeness, the advice note referred to above is:

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.

- 3 Amended text for Policy 39, Policy 39A, Policy 20, Policy 24 and Policy 28 (deleted text in strikethrough, new text underlined):

Policy 39 – Application of the permitted baseline

When considering any application for resource consent for the use of land for a farming activity, the Southland Regional Council ~~shall~~should consider all adverse effects of the proposed activity on water quality, whether or not this Plan permits an activity with that effect.

Advice Note: Nothing in this policy affects the ability of the Council to take into account the effects of activities lawfully occurring at the date an application is made when determining the existing environment.

Policy 39A – Integrated management

When considering the cumulative effects of land use and discharge activities within whole catchments, consider:

1. how to improve the integrated management of freshwater and the use and development of land including the interactions between freshwater, land and associated ecosystems (including estuaries and the wider coastal area); and
2. through the Freshwater Management Unit process, facilitating the collective management of nutrient losses, including through initiatives such as nutrient user groups and catchment management groups.

Policy 20 – Management of water resources

Manage the taking, abstraction, use, damming or diversion of surface water and groundwater so as to:

...

1. avoid, remedy or mitigate adverse effects from the use and development of surface water resources on:

...

(k) historic heritage values;

...

Policy 24 – Water abstraction for community water supply

Recognise the need for, and assign priority to, the provision of water for community water supply when allocating water:

1. provided that significant adverse effects on the following are avoided as a first preference, and if unable to be avoided, are mitigated or remedied:

...

(h) historic heritage values; and

...

**Policy 28 – Structures and bed disturbance activities of rivers
(including modified watercourses) and lakes**

Manage structures, bed disturbance activities and associated discharges in the beds and margins of lakes, rivers and modified watercourses, to avoid, remedy or mitigate adverse effects on:

...

12. navigational safety; ~~and~~

13. landscape values; and

14. historic heritage values.

Appendix 2 – Affidavit of Matthew McCallum-Clark dated 2 February 2022

**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)

(Continued next page)

AFFIDAVIT OF MATTHEW MCCALLUM-CLARK

**TOPIC B7 ISSUES 1, 2, 3, 7, 8, 9, & 10
RELATING TO
POLICIES 20, 24, 28, 39 & 39A, BED DISTURBANCE SECTION TITLE &
ARCHAEOLOGICAL SITES ADVICE NOTES**

2 February 2022

Judicial Officer: Judge Borthwick

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

WYNNWILLIAMS

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

WILKINS FARMING CO
(ENV-2018-CHC-30)

**GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT
COUNCIL & INVERCARGILL CITY 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

I, Matthew Eaton Arthur McCallum-Clark, of Christchurch, Consultant, solemnly and sincerely affirm:

- 1 My qualifications and experience are set out in my Statement of Evidence in Chief dated 14 December 2018.
- 2 While this affidavit in part records the reasoning and conclusion of the experts present at mediation, in places I express my professional opinion. For this material, I confirm that I have read and am familiar with the Code of Conduct for expert witnesses contained in the Environment Court Practice Note 2014. I agree to comply with that Code. Other than where I state that I am relying on the evidence of another person, my opinions are within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.
- 3 This affidavit provides an evaluation in accordance with section 32AA of the Resource Management Act 1991 (**Act**) to accompany the draft consent order to which this affidavit relates.¹ Within the context of the section 32AA assessment, I have also assessed the higher order policy documents including in particular, the National Policy Statement for Freshwater Management 2020 (**NPSFM**).
- 4 As with any negotiated outcome, the position arrived at by the parties does not necessarily reflect my professional opinion of what the best wording would be. In my opinion, in part, some of the wording is acceptable rather than preferred. That said, the agreed outcome was the result of considerable discussion and investment in time and thought, which I respect. I have attempted to set out below the reasoning that the Court has required to be provided, based on my understanding and recollections of the discussion that occurred.

Introduction

- 5 This affidavit relates to those issues under Topic B7 where an outcome has been agreed between the parties, namely:
 - (a) Issue 1 – Policy 39;
 - (b) Issues 2 and 3 – Policy 39A;

¹ Minute of the Environment Court dated 22 October 2020, at [12].



- (c) Issue 7 – Bed Disturbance section title;
- (d) Issue 8 – Policies 20, 24, 28; and
- (e) Issues 9 and 10 – Archaeological sites advice note.

6 In this affidavit I first set out the relevant legal tests under s32AA of the Act and then provide an evaluation in accordance with s32AA for each of the provisions that have been agreed.

Section 32AA of the Act

7 Section 32AA of the Act requires:

- (1) *A further evaluation required under this Act—*
 - (a) *is required only for any changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed (the changes); and*
 - (b) *must be undertaken in accordance with section 32(1) to (4); and*
 - (c) *must, despite paragraph (b) and section 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes; and...*

8 The core of section 32 of the Act is in sub-section (1), which requires a decision-maker to (relevantly):

...

- (b) *examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—*
 - (i) *identifying other reasonably practicable options for achieving the objectives; and*
 - (ii) *assessing the efficiency and effectiveness of the provisions in achieving the objectives; and*
 - (iii) *summarising the reasons for deciding on the provisions; and*

...

9 Sub-section (2) specifies how the analysis under section 32(1)(b)(ii) is to be undertaken. In summary, this requires an assessment of the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the provisions, and an assessment of the risk of acting or not acting if there is uncertain or insufficient information.

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- 10 Section 32(3) is not relevant given the proposed Southland Water and Land Plan (**pSWLP**) is not an amending proposal, rather it is a whole new plan.
- 11 Section 32(4) may be relevant where the provision is a rule and will impose a greater or lesser restriction on an activity to which a national environmental standard applies than the existing restrictions in that standard.

Evaluation in accordance with section 32AA for each provision where a change has been agreed

- 12 In accordance with the requirements of sections 32(1) and 32(2), in relation to each provision where a change has been agreed I:
- (a) list the most relevant objectives;
 - (b) explain the "other reasonably practicable options" for achieving the objectives;
 - (c) summarise the reasons for the changes agreed; and
 - (d) provide an assessment of benefits, costs, and risks as required by section 32(2).

Issue 1 – Policy 39

- 13 Policy 39 of the pSWLP has been appealed by Southland Fish and Game Council, Federated Farmers of New Zealand, and Royal Forest and Bird Protection Society of New Zealand Incorporated.
- 14 The following parties joined these appeals as section 274 parties in relation to Policy 39:
- (a) Federated Farmers of New Zealand;
 - (b) Royal Forest and Bird Protection Society of New Zealand Incorporated;
 - (c) Director-General of Conservation;
 - (d) Dairy Holdings Limited;
 - (e) Ravensdown Limited;
 - (f) DairyNZ Limited;
 - (g) Aratiatia Livestock Limited;

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- (h) Southland Fish and Game Council; and
 - (i) Ballance Agri-Nutrients Limited.
- 15 The mediated outcome for Policy 39 is (deleted text in strikeout, new text underlined):

Policy 39 – Application of the permitted baseline

When considering any application for resource consent for the use of land for a farming activity, the Southland Regional Council ~~shall~~should consider all adverse effects of the proposed activity on water quality, whether or not this Plan permits an activity with that effect.

Advice Note: Nothing in this policy affects the ability of the Council to take into account the effects of activities lawfully occurring at the date an application is made when determining the existing environment.

Relevant objectives

- 16 While all the objectives of the pSWLP are relevant and have been considered, in terms of assessing whether Policy 39 is the most appropriate way to achieve the objectives, the most relevant objectives for this provision are Objective 1, Objective 2, Objective 3, Objective 6 and Objective 18.

Reasonably practicable options

- 17 Section 32(1)(b)(i) requires the identification of “other reasonably practicable options” for achieving the objectives. The reasonably practicable options I have identified and considered are the Decisions Version wording, and the tracked changes version set out in paragraph 15 above.

Explanation and reasons for the changes agreed

- 18 In my opinion, the amendment to the policy to reflect that Council “shall” rather than “should” consider all adverse effects when considering resource consent applications is a better reflection of the paradigm shift that the pSWLP is intended to deliver, as set out in the Court’s interim decisions. This was confirmed during the mediation discussions where it was agreed that the use of the word “shall” provides clear guidance to the Council when considering resource consent applications.



- 19 Through mediation and subsequent discussions between the parties it was agreed that the Policy should not restrict consideration of permitted activities that are occurring at the time an application is made.
- 20 I note that Section 95D of the Act provides the Council with discretion on whether or not to apply the permitted baseline. This policy provides clarity and certainty to potential applicants as to how the Council intends to exercise that discretion.

Benefits, costs and risk assessment

- 21 The practical implications of the changes made to the policy are to apply a higher threshold for consideration of consent applications. However, this is not considered to make substantial changes to the way the Policy is implemented. On this basis, pursuant to section 32AA(1)(c), my analysis in relation to the efficiency and effectiveness of the changes to Policy 39 is brief.
- 22 The change to the Policy, particularly the change from "should" to "shall", is considered to be more effective and efficient as it will discourage applications being made that seek to exploit the narrow range of permitted farming activities that may have losses that are unregulated. While the risk of this occurring is reduced in the short-term by Regulations 15-25 of the National Environmental Standard for Freshwater now applying, the risk remains for other forms of intensification managed by the pSWLP that are not managed by those Standards. The main cost of the agreed change to this Policy will lie in some lost opportunities to potential applicants who wished to advance an application relying on a permitted baseline of a different farming activity, as this Policy is more directive. However, those kinds of applications are unlikely to be aligned with the NPSFM or the objectives of the pSWLP.
- 23 Overall, having considered the options, the wording of the provision agreed by the parties (and set out at paragraph 15 above) is considered to be the most appropriate way to achieve the objectives of the pSWLP.

Issues 2 and 3 – Policy 39A

- 24 Policy 39A of the pSWLP has been appealed by Te Rūnanga o Ngai Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and



Handwritten signature in blue ink, possibly reading 'M. M. M.', with a circled '11' below it.

Te Rūnanga o Ōraka Aparima; and Royal Forest and Bird Protection Society of New Zealand Incorporated.

25 The following parties joined these appeals as section 274 parties in relation to Policy 39A:

- (a) Aratiatia Livestock Limited;
- (b) Dairy Holdings Limited;
- (c) Director-General of Conservation;
- (d) Southland Fish and Game Council; and
- (e) Royal Forest and Bird Protection Society of New Zealand Incorporated.

26 The parties' agreed outcome for Policy 39A is (new text underlined):

Policy 39A – Integrated management

When considering the cumulative effects of land use and discharge activities within whole catchments, consider:

1. how to improve the integrated management of freshwater and the use and development of land including the interactions between freshwater, land and associated ecosystems (including estuaries and the wider coastal area); and
2. through the Freshwater Management Unit process, facilitating the collective management of nutrient losses, including through initiatives such as nutrient user groups and catchment management groups.

Relevant objectives

27 While all the objectives of the pSWLP are relevant and have been considered, in terms of assessing whether Policy 39A is the most appropriate way to achieve the objectives, the most relevant objectives are Objective 1, Objective 2, Objective 3, Objective 4, Objective 6, Objective 7, Objective 13 and Objective 18.

Reasonably practicable options

28 Section 32(1)(b)(i) requires the identification of "other reasonably practical options" for achieving the objectives. The reasonably practical options I have identified and considered are the Decisions Version

wording, and the agreed wording set out in tracked changes in paragraph 26 above.

Explanation and reasons for the changes agreed

- 29 In my opinion, the inclusion of the wording "how to improve the integrated management..." is activating the language of the policy and placing a higher standard of assessment when considering the cumulative effects of land use and discharge activities. This provides better alignment with the outcomes sought in the higher order objectives listed above and is consistent with the interim decisions from the Court.
- 30 The addition of the 'wider coastal area' within the policy aligns with Objective 1 of the pSWLP which seeks to manage natural resources in an integrated way by recognising connectivity between freshwater, land and the coast. Parties were also cognisant that this wording would better align with the NPSFM, specifically Policy 3 and Clause 1.5.

Benefits, costs and risk assessment

- 31 With respect to the assessment of benefits, costs and risks required by section 32(2), I am of the opinion that the outcomes from each of the two options considered for this Policy are likely to be similar, with the agreed change giving a slight improvement in integrated management outcomes. The amendments apply a more active stance to the policy and require consideration of a wider range of waterbodies and linkages, through explicitly including coastal areas. While attaching specific benefits and costs as a result of these changes are difficult, it does confirm an overall direction of the pSWLP to improve integrated management and give effect to ki uta ki tai. This better enables the achievement of the objectives of the pSWLP and the NPSFM.
- 32 Overall, having considered the options, the wording of the provision agreed by the parties (and set out at paragraph 26 above) is considered to be the most appropriate way to achieve the objectives of the pSWLP.

Issue 7 – Bed Disturbance section title

- 33 The title of the Bed Disturbance section of the pSWLP was included in the appeal lodged by Royal Forest and Bird Protection Society of New Zealand Incorporated.

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34 No parties joined the appeal as section 274 parties in relation to the title of the Bed Disturbance section.

35 The agreed amendment to the Bed Disturbance section title is (new text underlined):

Bed disturbance activities in river and lake beds and wetlands

36 The agreed change is editorial in nature and I consider there are no environmental, economic, social, or cultural effects that will result from this change. Accordingly, pursuant to section 32(1)(c), no detailed analysis of this change has been undertaken. I consider that the amendment to the title of the Bed Disturbance section of the pSWLP is appropriate as it will ensure consistency within the section and be clearer for plan users.

Issue 8 – Policies 20, 24 and 28

37 Policies 20, 24, and 28 of the pSWLP have been appealed by Heritage New Zealand Pouhere Taonga (**Heritage New Zealand**).

38 Heritage New Zealand also appealed Policy 29, seeking that reference to historic heritage values be inserted in the Policy. This change has been addressed in the affidavit relating to Policy 29 (being Topic B4 Issues 2, 3, 4 & 5).

39 The following parties joined this appeal as section 274 parties in relation to these policies 20, 24 and 28:

- (a) Federated Farmers of New Zealand;
- (b) Invercargill City Council Water Manager;
- (c) Oil Companies;
- (d) Fonterra Co-operative Limited; and
- (e) Te Rūnanga Ngai Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Ōraka Aparima.

40 The agreed outcome for Policies 20, 24, and 28 is (deleted text in strikethrough, new text underlined):

Policy 20 – Management of water resources

Manage the taking, abstraction, use, damming or diversion of surface water and groundwater so as to:

...

1. avoid, remedy or mitigate adverse effects from the use and development of surface water resources on:

...
 (k) historic heritage values;

...

Policy 24 – Water abstraction for community water supply

Recognise the need for, and assign priority to, the provision of water for community water supply when allocating water:

1. provided that significant adverse effects on the following are avoided as a first preference, and if unable to be avoided, are mitigated or remedied:

...
 (h) historic heritage values; and

...

Policy 28 – Structures and bed disturbance activities of rivers (including modified watercourses) and lakes

Manage structures, bed disturbance activities and associated discharges in the beds and margins of lakes, rivers and modified watercourses, to avoid, remedy or mitigate adverse effects on:

- ...
12. navigational safety; and
 13. landscape values; and
 14. historic heritage values.

Relevant objectives

- 41 While all the objectives of the pSWLP are relevant and have been considered, in terms of assessing whether Policy 20, 24 and 28 are the most appropriate way to achieve the objectives, the most relevant objectives are Objective 1, Objective 2, Objective 3 and Objective 9/9A.

Reasonably practicable options

- 42 Section 32(1)(b)(i) requires the identification of “other reasonably practicable options” for achieving the objectives. The reasonably practicable options I have identified and considered are the Decisions Version wording, the agreed wording shown in tracked changes in paragraph 40 above.

Explanation and reasons for the changes agreed

- 43 The changes discussed between the parties are a reflection of the requirement for the Plan to address historic heritage values in order to

give effect to the objectives of the Plan following the Courts interim decision.² On that basis, pursuant to section 32AA(1)(c) this section 32 analysis will necessarily be brief.

- 44 Overall, the parties were in agreement that activities relating to the use of water and land have the potential to adversely affect historic heritage values and that it is appropriate for these values to be managed. The reinstatement of historic heritage values into these provisions further particularises the requirement in Objective 9/9A to manage surface water bodies so that historic heritage values of those waterbodies are safeguarded.

Benefits, costs and risk assessment

- 45 With respect to the assessment of benefits, costs and risks set out in section 32(2), I am of the opinion that including historic heritage values in Policies 20, 24 and 28 is necessary to achieve Objective 9/9A. I consider there will be relatively minor costs to applicants and the community resulting from this change. Many heritage items and locations are protected through other legislation, and in these cases there will be no additional cost. In other situations, there may be some costs to modify applications to avoid or suitably protect historic heritage values.
- 46 In terms of section 32(2)(c), I do not consider there is uncertain or insufficient information about the subject matter of the provisions in this context therefore a full risk assessment is not required. However, I do consider that not including reference to historic heritage values in these policies results in a higher risk of losing heritage values in the region.
- 47 Overall, having considered the options, the wording of the provisions agreed by the parties (and set out at paragraph 40 above) is considered to be the most appropriate way to achieve the objectives of the pSWLP.

Issues 9 and 10 – Archaeological sites advice note

- 48 Rules 32B, 43, 53, 55, 57, 58, 59, 59A, 60, 61, 62, 63A, 64, 66, 67, 68, 72, 73, 75, 77, and 78 of the pSWLP were included in the appeal lodged by Heritage New Zealand Pouhere Taonga.

² First Interim Decision [2019] NZEnvC 208 at [150].

- 49 Te Rūnanga Ngai Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Ōraka Aparima joined this appeal as section 274 party.
- 50 The parties agree that the advice note in rules 57, 58, 59, 60, 61, 62, 64, 66, 67, 68, 72, 73, 75, 77, and 78 should be relocated to be consistently located at the beginning of the rule cascade for each rule. They also agree that the same advice note should be added to rules 32B, 43, 53, 55, 59A, and 63A (at the beginning of the rule cascade).
- 51 For completeness, the advice note referred to above is:

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.

Relevant objectives

- 52 While all the objectives of the pSWLP are relevant and have been considered, the most relevant objectives for this provision are Objective 1, Objective 2, Objective 3 and Objective 9/9A.

Reasonably practicable options

- 53 Section 32(1)(b)(i) requires the identification of “other reasonably practicable options” for achieving the objectives. The reasonably practicable options I have identified and considered are the Decisions Version wording, the agreed changes set out in paragraph 50 above.

Explanation and reasons for the changes agreed

- 54 The changes agreed between the parties are a reflection of the requirement for the Plan to address historic heritage in order to give effect to the objectives of the Plan following the Courts interim decisions.³ I consider that the change to the location of the advice note is largely editorial in nature and will not have any material change in effect. On that basis, pursuant to section 32AA(1)(c) this section 32 analysis will necessarily be brief.

³ First Interim Decision [2019] NZEnvC 208 at [150].

55 Overall, the parties consider that including the advice note on historic heritage matters within additional rules, and ensuring a consistent location of those advice notes, would ensure consistency across the pSWLP and provide a higher level of ease for the users of the pSWLP (by alerting them to their obligations under the Heritage New Zealand Pouhere Taonga Act 2014). By locating the advice notes at the beginning of the rule cascade it will also be clear that the advice note is applicable to the whole rule and not only the first sub clause.

Benefits, costs and risk assessment

56 With respect to the assessment of benefits, costs and risks set out in section 32(2), I am of the opinion that as the outcomes from each of the two options of the wording of this Policy are difficult to distinguish; there is little to no difference in the benefits and costs. However, there may be a minor benefit from a reduction in risk that the archaeological authority process may be overlooked.

57 Overall, having considered the options, the changes agreed by the parties and set out at paragraph 50 above are considered to be the most appropriate way to achieve the objectives of the pSWLP.

Matthew McCallum-Clark

Affirmed at Kaiapoi)
this 2nd day of February)
2022, before me:)

A Solicitor/Deputy Registrar of the High Court of New Zealand/
Justice of the Peace

Toni Laura Dempsey
Solicitor
Christchurch