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)

MEMORANDUM OF COUNSEL FOR SOUTHLAND REGIONAL COUNCIL
16 October 2020

Judicial Officer: Judge Borthwick

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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.

2 This Memorandum responds to the Court's Minute dated 1 October 2020 (**Minute**). In particular, it addresses the proposed Topic B6 hearing, and the proposed process for mediating Topic B7.

3 It also sets out the parties' responses in relation to the Direction received from the Court on 2 October 2020 (**Direction**) in relation to the timetabling steps for the mediation of Topic B7, the anticipated number of persons attending, and the most suitable location.

Topic B6

4 At paragraphs [8] and [9] of the Minute, the Court notes that before it will set down Topic B6 for hearing, the parties will need to consider the timing and sequencing on this hearing relative to the determination of the other Topic B appeals. If the other parties agree with the Council (in relation to the hearing of the entirety of Topic B6), they are directed to confer and propose a timetable for evidence exchange. If they do not agree, they are to say why and set out the directions they seek.

5 Paragraph [20] directed the Council to confer with the parties and file a memorandum proposing an agreed timetable for evidence exchange and addressing the question of sequencing.

Sequencing

6 The Council set out for the parties its position on the sequencing of Topic B6 relative to the other topics and sought the parties' feedback.

7 The Council and most parties[1] consider that Topic B6 should be heard after Topic B1 has been mediated/resolved. This is due to the relationship that Topic B6 has with policy 20 (which is part of Topic B1). Counsel for the Council considers that policy 20 is appropriately dealt with as part of Topic B1. However, the discussions on Topic B6 would

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[1] Noting that the sequencing of Topic B was not directly addressed by all parties who responded; however, they were all given the opportunity to do so.

benefit from that policy wording being settled prior to the commencement of a hearing on Topic B6.

8 While Meridian agrees that Topic B6 should be heard after Topic B1, it also considers that Topic B6 should not be heard until Topics B2, B3, B4, and B5 have also been mediated/resolved. Meridian provided the following reasons for this position:

> The way that the plan should manage the [Manapōuri Power Scheme (**MPS**)] in the Waiau catchment is closely related not just to the way water takes are addressed (Topic B1) but also to the complex and important questions about water quality and maintenance and enhancement of important values that need to be addressed in Topics B2-5. In particular, Meridian considers that it would be premature to consider the detail of the rules applying to the reconsenting of the MPS before it has been determined what is expected in terms of the management of water quality impacted by farming and other land uses, and what is expected in terms of managing wetlands, biodiversity and stream beds. Given the emphasis the plan places on integrated management (incorporating ki uta ki tai) Meridian considers it would be artificial and inappropriate to determine the provisions that apply to the ongoing operation of the MPS without an understanding of the overall framework the plan establishes for the management of Southland's water, including in the Waiau FMU, and the relationship of water to other natural and physical resources. Meridian has an interest in all the above topics as a section 274 party based on the relationship between land use, water quality and water quantity identified above.

Timetable

9 The Court directed the Council to confer with the parties and file a memorandum proposing an agreed timetable for evidence exchange.

10 The Council prepared a proposed timetable and provided this to the parties for their comment. No party requested any changes to this proposed timetable.

11 The agreed evidence exchange timetable is attached as **Appendix A**.

Scope of the hearing

12 The Court directed the parties, if they do not agree with the entirety of Topic B6 proceeding directly to hearing, to say why and set out the directions they seek.

13 Meridian does not agree that the whole of Topic B6 should proceed to hearing without an opportunity for mediation on some aspects for the following reasons:

> The Council's justification for not following the mediation pathway for the whole of Topic B6 appears to rely entirely on Meridian's indication that it will not agree to an activity status which contemplates that the Council might refuse to grant the necessary consents to allow the nationally important Manapouri Power Scheme to continue to operate in conformance with a flow and allocation regime established for the Waiau FMU. Topic B6 includes several matters which should be addressed independently of consideration of the activity status of the reconsenting of the MPS under Rule 52A, and it is appropriate that these matters be referred to mediation in the first instance. In particular:
>
> a. Policy 26A is a general infrastructure policy and has no direct relationship with Rule 52A. It is relevant to infrastructure providers across the Region and derives from Objective 9B. Policy 26 is contested by F&B, Ngā Runanga, and Transpower. Meridian is not an appellant in relation to this policy;
>
> b. Rule 4[9](ab) is not concerned with the reconsenting of the MPS. It is a rule addressing maintenance and currently provides for takes but not diversions of water. Meridian's appeal on this rule is joined by Ngā Runanga as a section 274 party;
>
> c. Appendix E is being considered as part of Topic B2 and is likely to require significant reconsideration in light of the NPS-FM 2020 and the Court's findings in Topic A. The relationship of Appendix E to the MPS is a matter that is clearly put in issue under the NPS-FM 2020, and Meridian considers this matter should be considered as

> part of the B6 mediation process rather than in isolation as part of Topic B6.
>
> Meridian agrees that other parts of Topic B6 are linked (Policy 26, Rules 52, 52A and 52B) and does not oppose [the Council's] suggestion that these can be referred to hearing without mediation.

14 Transpower also do not agree with the whole of Topic B6 proceeding directly to hearing for the following reasons:

> Transpower is involved in Topic B6 both as an appellant and as a s 274 party to Policy 26A.
>
> Our understanding is Council considers Topic B6 should go straight to hearing on the basis that Meridian had advised it would not be prepared to mediate the controlled activity status for the re-consenting of the Manapouri Power Scheme and given the activity status of a rule is fundamentally linked to the policies which it implements, it is the Council's position that the whole of the topic relating to Rule 52A, being Topic B6 (Infrastructure) should be referred directly to hearing.
>
> We consider it would be useful for the amendments sought by Transpower to Policy 26A to be mediated in the first instance rather than proceeding straight to a hearing. As Topic B6 is made up of two subtopics (water takes and Waiau/Manapouri), and Policy 26A comes under the water takes subtopic, while the Waiau/Manapouri subtopic may be required to go straight to hearing for the above reasons, we do not see why the water takes subtopic could not proceed first to mediation.

15 The Council has considered Meridian and Transpower's reasons for their positions as set out above. The Council maintains its position that the issues in Topic B6 are too interrelated for some issues to be mediated separately from the issues to be heard by the Court.

Topic B7 mediation process

16 At paragraphs [13] to [15] of the Minute the Court set out a proposed process for mediation of Topic B7. The Council was directed to confer with the parties and file a memorandum responding to the mediation

process as set out by the Court and, if a date for mediation is known, propose directions to achieve the same.[2]

17 As at the time of filing, no date for mediation is known and therefore no directions are proposed.

18 The Council considered the Court's proposed mediation process, and had some suggestions as to how the process may be managed. Counsel for the Council provided a tracked version of paragraphs [13] to [15] of the Minute to the parties which incorporated the Council's suggestions and invited the parties to comment on the same. A copy of the tracked version of the proposed process that was provided to the parties is attached as **Appendix B**.

19 Counsel for the Council consider that this amended process (subject to the amendments agreed to below) is a more efficient and effective use of resources. It will allow for mediation to occur with a much shorter lead in time by distributing part of the section 32AA evaluation of the options among the appellants that are seeking the relief. Each appellant will be intimately familiar with the relief sought and the costs and benefits of that relief such that the section 32AA evaluation would not be a particularly onerous task for each of them to complete. The Council's proposed process also avoids the need for the Council to attempt to interpret the relief sought and complete the section 32AA evaluation without any further information than the reasons given in the notice of appeal.

20 The feedback received from the parties in relation to the proposed mediation process was varied.[3] Some parties supported the Court's

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2 Minute of the Environment Court dated 1 October 2020 at [21].

3 Counsel for the Council notes that responses to Counsel's emails were only received from: Alliance Group Ltd; Aratiatia Livestock Ltd; Beef + Lamb New Zealand; Campbell's Block Ltd; DairyNZ Ltd; Director-General of Conservation; Royal Forest and Bird Protection Society of New Zealand Inc; Southland Fish and Game Council; Federated Farmers of New Zealand; Fonterra Co-operative Group; Horticulture New Zealand; Meridian Energy Ltd; Ngā Rūnanga; Peter Chartres; Rayonier New Zealand Ltd; Robert Grant; Stoney Creek Station Ltd; the Territorial Authorities (Gore District Council, Invercargill City Council, and Southland District Council); The Terraces Ltd; Transpower New Zealand Ltd; Ballance Agri-Nutrients Ltd; Fairlight Station Ltd; Gunton Farms Ltd; Invercargill City Council Water Manager; Invercargill Airport Ltd; the Oil Companies (Z Energy, BP Oil NZ, and Mobil Oil NZ); Mt Linton Station; Ravensdown Ltd; and Wilkins Farming Company Ltd.

No response was received from the following parties: H W Richardson Group Ltd; Heritage New Zealand Pouhere Taonga; Southwood Export Ltd, Kodansha Treefarm New Zealand Ltd, and Southland Plantation Forest Company of New Zealand; Dairy Holdings Ltd; DR and JAE Pullar Ltd; Fulton Hogan Ltd; Grant & Rachel Cockburn; Hamish English; Mt Peel Ltd; Murray & Tania Willans; Owen Buckingham; Robert Kempthorne; Twin Farms Ltd; and Waiau Rivercare Group.

proposed process with the Council's amendments (either in part or in its entirety), others supported the Court's proposed process without any amendment, and others still did not support either version of the proposed process.

21 Counsel for the Council has endeavoured to capture the issues raised by the various parties below:

(a) Many parties confirmed that they were happy with the approach suggested by the Council, with one party suggesting that the same process should be followed for all mediations.

(b) Some parties raised an issue with section 274 parties being included in the direction at paragraph [14](c)(ii) of Appendix B, as the section 274 parties are simply supporting or opposing the relief sought by the appellant. The Council agrees that the relief sought by section 274 parties is necessarily tied to the relief sought by the appellant and therefore there is no benefit in a section 274 parties separately preparing a section 32AA report. Accordingly, Counsel for the Council considers that paragraph [14](c)(ii) as set out in Appendix B should be amended to read "the appellants are to provide …" rather than "the parties are to provide …".

(c) Some parties preferred the Court's proposed process without amendment. The Director-General gave the following reasons for this preference:[4]

> It is not considered efficient or effective to require all parties, including s 274 interested parties, to provide a full s 32 evaluation ahead of mediation. Rather it is considered that the Regional Council is well placed to undertake this task, using information provided by the parties in advising of their interests in the topic, and reasons for seeking change[s] (step (a) [i.e. paragraph [14](a)]). Requiring all parties to provide such an evaluation ahead of mediation will be potentially onerous and duplicative. This is particularly so where a number of s 274 parties are supporting a common appellant and appeal point. Furthermore, some parties

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4 Ngā Rūnanga also indicated that they largely support the Director-General's comments.

> are likely to be better placed to provide particular aspects of a s 32 evaluation, i.e. environmental, cultural, economic or social, and it is considered most efficient if parties contribute the information which they are able to (through step (a) of the Court's proposed process) rather than being required to undertake a full s 32 evaluation for each appeal point that they seek or have an interest in. The Council's evaluation against the recent Essential Freshwater package will also be relevant to and inform the s 32 analysis.
>
> In practical terms, a mediated outcome may (and frequently will) differ from proposed wording sought in an appeal. Requiring all parties to provide a s 32 evaluation ahead of mediation may have the effect of entrenching parties positions, and so frustrate the achievement of mediated outcomes.
>
> …
>
> At paragraph 7 of the 1 October Minute, the Court asks parties to consider whether the mediation process proposed for Topic B7 would address differences regarding whether expert conferencing should precede mediation. The DGC confirms that if the process as set out in the Court's minute of 1 October is adopted, that will address the matters raised by the DGC in this respect.

(d) Forest & Bird and Fish & Game provided the following response to the Court's proposed process and the Council's proposed amendments:

> 1. The pSWLP has been extremely expensive for Forest & Bird and Fish & Game to participate in, with both expending more than their budgets for the full pSWLP process on Topic A alone. They appreciate the robustness of the Court's proposed approach, but they must seek opportunities to reduce their cost of participating in planning processes where

possible. The alternative is to not participate at all.

2. Regarding conferencing, they are aware of the duty on expert witnesses under the Practice Note, but consider that some co-ordination of conferencing is beneficial to ensure all parties can participate at the optimal time. There is limited value in some witnesses reaching agreed positions on matters without others being present. They consider that conferencing prior to mediation is not the most efficient option because the expert witnesses must cover the full range of issues where-as many issues may be resolved at mediation. As the Court has not made any direction requiring conferencing, they simply seek to record that they are unlikely to be in a position to pay for witnesses to conference prior to mediation.

3. Regarding the proposed technical papers, the position is similar. Regional council papers setting out the relevant facts and resource management issues arising may assist with mediation, however Forest & Bird and Fish & Game consider that this this has been well covered in the Topic A evidence. Due to resource limitations, Fish & Game and Forest & Bird's technical experts are unlikely to be in a position to review/contribute to those reports, because these parties need to reserve their resources for expert witness conferencing, evidence preparation and hearing. Again, this response is provided to inform the Court's decision on the appropriate direction regarding technical papers.

4. Regarding the requirement for a pre-mediation s 32AA report, Forest & Bird and Fish & Game respectfully submit that this may be inefficient:

the detail of relief sought can change significantly at mediation and the s 32AA report is most useful in evaluating provisions that have been put forward for the Court's determination or approval. In addition, the s32AA report is likely to duplicate at least some of the information that was proposed to be provided in the direction at [19] of the Minute (relating to the Essential Freshwater package). For those reasons, this direction is not supported.

5. The alternative direction proposed by the regional council for all parties to provide a s32AA evaluation of their preferred provisions is opposed as inefficient and out of reach for less well-resourced parties.

(e) Meridian raised that, at paragraph [13] of the Minute, the Court comments that the mediation process is for the mediating commissioner to determine. Accordingly, they consider it is important to obtain confirmation from the mediating commissioner that they are agreeable to the proposed process in advance of any preparation for mediation.

22 The Council has considered the parties' positions as set out above and acknowledges the constraints that all parties are operating under. However, the Council's position remains that the appellants are best placed to outline the relief sought and carry out a section 32AA evaluation of that relief in advance of mediation.

Timetabling steps, number of attendees, and location

23 In accordance with the Direction, the Regional Council asked the parties to, in relation to Topic B7, provide their responses on the following:

(a) the timetabling steps for the mediation;

(b) the number of persons anticipated to attend the mediation; and

(c) the most suitable location for mediation.

Timetabling steps

24 Counsel for the Council respectfully seeks that the Direction for the parties to provide timetabling steps for the mediation of Topic B7 be amended so that this is filed once the proposed process for mediation has been settled.

25 Given the disagreement as between the parties regarding the proposed process for mediation of Topic B7, particularly in relation to whether or not a section 32AA analysis should be carried out on all relief sought prior to mediation, Counsel for the Council considers it would be more efficient to prepare a timetable once the process for mediation has been finalised by the Court / mediating commissioner.

Number of attendees at mediation

26 The parties anticipate that between 28 and 46 persons will attend the mediation of Topic B7. Given the lack of response from some parties, Counsel anticipates that this number may underestimate the attendees.

27 Some parties indicated that their attendance may vary between the different subtopics.

Location

28 The majority of parties consider that Invercargill is the most suitable location for mediation. The remainder either expressed a preference for Christchurch, any location in the South Island, or no preference at all.

29 In relation to the location, the Oil Companies noted that it would appreciate flexibility to participate remotely, given the discrete interests in Topic B7 and its limited interest in those matters.

Directions

30 Counsel for the Council respectfully seeks that the Direction for the Council to file a proposed schedule setting out timetabling steps for the mediation of Topic B7 be amended so that the same is to be filed following the settling of the proposed process for mediation.

DATED this 16th day of October 2020

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

Appendix A

Proposed evidence exchange timetable

Step	Due date
Evidence-in-chief for the Council to be filed and served	8 weeks before hearing commences
Evidence-in-chief for Appellants to be filed and served	6 weeks before hearing commences
Evidence-in-chief for s 274 parties to be filed and served	4 weeks before hearing commences
Rebuttal evidence for all parties to be filed and served	2 weeks before hearing commences
Council to file five (5) tabbed, indexed and paginated hard copies of all evidence (including exhibits) with the Court	1 week before hearing commences
Topic B6 hearing commences	Hearing commences

Appendix B

Excerpt from Court's Minute dated 1 October 2020:

[13] Presently, mediation tends to unfold organically, with the parties setting out their respective positions at the commencement of mediation. I propose to modify this format insofar as the Environment Commissioner (if appointed) will work with the parties to:

(a) facilitate the identification of contested facts and opinions, the resolution of which may or will be important for the parties to agree as a basis for subsequently settling the matter(s) in dispute.

While it is for the commissioner to determine, I suggest this process be commenced by the Regional Council setting out the relevant facts and background (including their understanding of the significant resource management issues that arise), with the other parties afforded an opportunity to review and complement that material as necessary;

(b) as part of (a) lead, in advance of mediation, a robust distillation of the issues in dispute to provide the basis for the parties' agenda at mediation.

[14] To achieve this, prior to the mediation ~~the Regional Council will~~:

Firstly

(a) the Regional Council will confer with each of the parties on their interest(s) in Topic B7 and reasons for seeking change. If the planning witnesses or other expert witnesses for two or more parties have conferenced independently in accordance with the Court's Practice Note and reached an agreed position on relief, their joint witness statement will be provided to the Regional Council; [2] and

(b) the Regional Council will circulate technical paper(s) setting out relevant facts and significant resource management issues that arise from the same and inviting comment from the parties' expert advisors for inclusion in the paper(s).[3] As this is a Regional Plan, I anticipate these reports will be from persons other than the planning witnesses.

Secondly

[2] The primary sector is an example of where this occurred during Topic A hearing.

[3] In making this suggestion, the court is not proposing a 'will-say' brief as proposed by the Regional Council.

(c) prior to the mediation~~, circulate~~:

(i) the Regional Council will circulate the final copy of the technical paper(s);

(ii) the parties are to provide to the Regional Council the specific relief that is sought, and an evaluation of that relief in accordance with sections 32(1)(a),[4] (1)(b)(ii), (2), (3) and (4). The Regional Council will then compile and circulate an options paper which identifies the relief proposed by the parties and evaluates the relief in line with s 32AA of the Act;[5] and

(iii) the Regional Council will provide an indication, without prejudice, as to whether ~~the Regional Council~~it will:

- consider adopting with or without amendment the relief sought;
- propose an alternative relief and evaluating the relief in line with s 32AA or;
- support the Decision Version of the pSWLP (without amendment).

[15] I will direct the parties to respond to the above proposal.

[4] In relation to Objective 16 only. All other objectives will have been evaluated as part of the Topic A process.

[5] Noting that the relief sought will constitute s 32(1)(b)(i), and s 32(1)(b)(iii) can only be completed during mediation (following a settled position having been reached).