

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

IN THE MATTER of the Resource Management Act 1991  
AND of appeals under clause 14 of the First  
Schedule of the Act  
BETWEEN SOUTHLAND FISH AND GAME COUNCIL  
(ENV-2018-CHC-037)  
(continued on last page)  
Appellants  
AND SOUTHLAND REGIONAL COUNCIL  
Respondent

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**MINUTE OF THE ENVIRONMENT COURT  
(22 March 2019)**

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**Introduction**

[1] Southland Fish and Game Council ('Fish & Game') is an appellant and s 274 party to appeals against the Council's decisions on the proposed Southland Water and Land Plan ('pSWLP'). Southland Regional Council ('Council') has applied for directions concerning aspects of the evidence-in-chief filed on behalf of Fish & Game for the forthcoming Topic A hearing of those appeals.<sup>1</sup>

**The Council's application**

[2] The application concerns the two statements of evidence filed on behalf of Fish & Game for Topic A, both from expert witnesses:

- (a) the statement of evidence-in-chief of freshwater ecologist, Professor Death, dated 15 February 2019; and
- (b) the statement of evidence-in-chief of planner, Mr Ben Farrell, dated 17 February 2019.

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<sup>1</sup> Memorandum of counsel for Southland Regional Council, dated 13 March 2019.



[3] Without getting into unnecessary detail at this stage, the issue of concern to the Council in part pertains to the following change to Objective 7 as recommended by Mr Farrell (tracking showing his recommendation):

Any further over-allocation of freshwater (water quality and quantity) is avoided and any existing over-allocation is phased out in accordance with freshwater objectives, freshwater quality limits and timeframes established under Freshwater Management Unit processes or earlier where the resource is being used to a point where a region-wide freshwater numeric outcome(s) are no longer being met.

[4] The Council raises a concern as to whether that part of Mr Farrell's recommendation concerning Objective 7 is within the scope of Fish & Game's appeal (or what other appellants on the provisions seek in their appeals). It goes on to present related submissions on scope (in terms of what Fish & Game can pursue under its appeal and as a s 274 party to other appeals). That includes submissions that neither the Fish & Game appeal nor the Ngā Rūnanga appeal (to which Fish & Game is a s 274 party) appears to have scope "to introduce region-wide limits". It concludes those submissions as follows:

- 33 Accordingly, parties have not been "on notice" as to the inclusion of region-wide numeric outcomes/limits from the appeals. It is submitted that these appeals do not provide scope for the introduction of region-wide numeric outcomes prior to the FMU process.
- 34 If the Court disagrees and considers that there is scope in the appeals to consider the introduction of region-wide numeric outcomes in the Objectives prior to the FMU process, Counsel also considers that some aspects of Fish & Game's evidence should be addressed as part of the Topic B hearing, as discussed below.

[5] However, the Council does not seek orders for strike-out or determinations of the scope matter at this time. Rather, it frames its requested directions as follows:

- (a) How the Court wishes to deal with the issue of whether there is scope in Fish and Game's appeal (or any appeals) to introduce region wide limits / numeric outcomes as part of the Objectives in the pSWLP, ahead of the substantive hearing on Topic A.
- (b) That Professor Death's (and to an extent Mr Farrell's) evidence should be dealt with as follows:
  - (i) Any description or information related to the current state of environment – Topic A;
  - (ii) Any amendments to Objectives 6 and/or 7 to refer to region-wide numeric outcomes/limits (subject to the issue of scope as discussed above) – Topic A;



- (iii) Any amendments to the pSWLP to set out what the numeric outcomes/limits should contain (e.g. the parameters and numbers) – Topic B.

[6] The Council's application also includes submissions on related legal principles.

### **Fish & Game's reply**

[7] In reply, counsel sets out why Fish & Game opposes the application.<sup>2</sup> Counsel records that, in the event the court considers that Fish & Game needs to determine the application at this stage, it would want the opportunity to be heard. Fish & Game does not accept that the evidence seeks relief beyond the scope of its appeal or s 274 notice. Further, in any case, counsel submits that the evidence from experts, in accordance with the Code of Conduct, can be legitimately tendered for the Topic A hearing.

[8] As with the Council, Fish & Game gives detailed reasons for its position including with reference to legal principles. At this stage, we summarise counsel's submissions as follows.

[9] First, Mr Farrell's evidence concerning Objective 6 is "exactly the relief in Fish & Game's appeal" and his evidence concerning Objective 7 is within the scope of its appeal. Counsel submits that, insofar as Mr Farrell recommends for changes to be made to Objective 7 (including in terms that differ from what is specified in Fish & Game's appeal), it is consistent with his role as an independent expert to do so. Further, Fish & Game is not constrained to seeking relief that is "identical to the words stated in" its appeal. Moreover, it notes that Mr Farrell's evidence could also be relevant to the court if, after hearing the evidence, it applies s 293 (subject to proper process).

[10] Second, in the evidence of the Council's own planning witness (Mr McCallum-Clark), there is recognition that "the key issue on Objective 7 is whether over-allocation can be defined prior to FMU processes". Mr Farrell's evidence is also in response to Mr McCallum-Clark's, including in opining that Objectives 3 and 6 and Policies 15B, 17A, 40 and 42 do not provide sufficient protection in the interim period (prior to FMU processes occurring) and that it is appropriate to amend Objective 7 so that it captures Mr McCallum-Clark's concept of "practical over-allocation". Counsel points out that Mr Farrell relies on Professor Death's evidence to inform his planning opinion on the way to achieve interim definition of over-allocation (whether by using the term 'over-allocation' or another term).

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<sup>2</sup> Memorandum of counsel on behalf of Fish & Game, dated 20 March 2019.



[11] In counsel's view, the inclusion in the pSWLP of numeric outcome states, for the purpose of determining 'over-allocation' prior to FMU processes, is a matter within the scope of its appeal (whether these are termed 'interim' limits/outcomes or otherwise).

[12] Regarding Professor Death's evidence, counsel submits that freshwater ecologists should not be constrained from considering numeric outcomes for 'ecosystem health', or for safeguarding life-supporting capacity, as that matter is highly relevant to Topic A issues (acknowledging it will also be relevant to Topic B, particularly Appendix E). Fish & Game seeks to rely on Professor Death's evidence in its entirety at the Topic A hearing to support the following parts of its appeal:

- (a) Objectives 6 and 7 and Policies 45 and 47; and
- (b) the state of the environment in the Southland Region.

[13] Therefore, Fish & Game opposes the Council's directions.

### Section 274 parties' positions on the application

[14] Various s 274 parties have indicated their positions, although a number of them have done so by short emails. Given the very short time these parties had to provide responses, we do not criticise any for that informality. Indeed, we treat all responses as being preliminary, given all parties were under such time pressures.

Support application	Oppose application
Federated Farmers of New Zealand, Meridian Energy Limited, Balance Agri-Nutrients Limited and Horticulture New Zealand	Ngā Rūnanga parties <sup>3</sup> , Royal Forest and Bird Protection Society of New Zealand Inc.

### Discussion

[15] We decline to determine the application at this time. We agree with Fish & Game that it would be inappropriate to determine the application without full opportunity to be heard. Nor do we identify any compelling wider procedural need to determine the

<sup>3</sup> Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga O Oraka Aparima, Te Rūnanga O Ngāi Tahu.



application now. As we explain, we are far from persuaded at this stage that there is any valid issue of scope nor other procedural justification for the application. Noting that our observations on those matters are preliminary at this stage, subject to hearing submissions if need be in due course, we are in any event satisfied that any procedural consequences for other parties could be readily answered in costs. Further, determining the application at this stage would pose inevitable risk of serious delay and other disruption to the staged appeal hearings directed. That would not be in the interests of the parties, nor the public at large.

[16] Fish & Game fairly observes that principles on scope do not dictate that a party can only seek the exact wording of provisions that it has offered in its notice of appeal. We do not go further on that matter at this stage, as it should properly be a matter for testing in a hearing if need be.

[17] Turning to the Topic A hearing, the application offers the following fair description:

35 The Topic A hearing covers the over-arching provisions of the pSWLP that are important to setting the high-level direction of the pSWLP, including the Issues (including state of the environment matters), Physiographic Zones, Objectives, Ngāi Tahu Policies 1 and 3, Physiographic Policies 4 to 12, and Freshwater Management Unit Policies 45 to 47.

[18] It is important to bear in mind the RMA's intended hierarchical relationship between plan objectives, policies and rules (including that rules are for "achieving the objectives and policies of the plan").<sup>4</sup> Related to that, it is to be expected that a planning witness considering what is the most appropriate objective (in this case, Objective 7) will bear in mind the rules and other methods intended to implement it.

[19] It is also to be expected that a planning witness would draw from foundation opinion from other experts in forming that opinion. Professor Death's evidence as a freshwater ecologist is of that nature. Insofar as he traverses methods, that is in his role as a freshwater ecologist. He is not a planning witness. As is also appropriate, Mr Farrell does not recommend that the court determine rules or methods in the PDP as a consequence of Topic A.



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<sup>4</sup> Section 68(1) RMA.

[20] It would be clearly beyond the ambit of Topic A to do so.

[21] Further, a planning witness would be expected to consider the state of the environment in formulating an opinion on the appropriateness or otherwise of an objective (in this case Objective 7). Again, it is to be expected that Mr Farrell would rely on Professor Death in those matters.

[22] Turning to Objective 7, the Council decision version the subject of appeals is as follows:

**Objective 7**

Any further over-allocation of freshwater (water quality and quantity) is avoided and any existing over-allocation is phased out in accordance with freshwater objectives, freshwater quality limits and timeframes established under Freshwater Management Unit processes.

[23] There is a related issue:

**Water Quantity**

Water has a range of values, both instream and for abstraction and use. Historically, Southland has had an abundance of water, with modest limits on use being appropriate. However, more recently there has been increasing demand for the use of water for a variety of activities, and an improved understanding of the linkage between water quantity and quality. The primary allocation thresholds in this Plan are therefore intended to be precautionary, with fixed allocation limits to be developed and implemented within the FMU sections of this Plan over time.

[24] On the face of the wording of the decision version of those provisions, the following key issues emerge:

- (a) is there presently over-allocation of freshwater (water quality and quantity)?
- (b) if so, would further over-allocation of freshwater (water quality and quantity) be avoided under existing primary allocation thresholds pending FMUs?
- (c) are primary allocation thresholds in the PDP precautionary?

[25] On the face of the evidence, our preliminary view is that both statements of evidence legitimately pertain to those issues for Topic A concerning Objective 7 (and its related Issue).

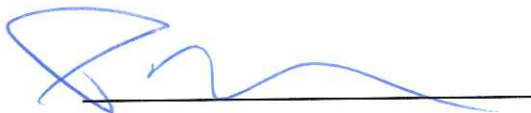


[26] As a further observation in response to concerns raised in the application about parties who are not involved in Topic A, we have previously signalled the potential for interim decisions to issue for various topics until such time as greater finality may be appropriate. For example, that could encompass leaving matters in Topic A open to an appropriate extent pending consideration of Topic B and so forth. As such, we have no present concern that any real issue would arise that cannot be fairly and appropriately addressed during the course of our hearings.

### Conclusion

[27] Therefore, the Council's application is adjourned *sine die* on the basis that further directions will be made concerning further legal submissions and a potential hearing for any required determination in due course. In the meantime, parties should prepare for the Topic A hearing mindful of the preliminary observations we make herein concerning the application.

[28] As some costs would have been incurred by parties in relation to the application, it is proper we reserve costs. However, there is no present need for timetabling as it can be anticipated that, in due course when decision(s) on the PDP begin to issue, timetabling directions for costs and replies would be made.



**J J M Hassan**  
Environment Judge



**J E Borthwick**  
Environment Judge



Issued: **22 MAR 2019**

### List of appellants

ENV-2018-CHC-27	Fonterra Co-Operative Group Ltd
ENV-2018-CHC-28	Horticulture New Zealand
ENV-2018-CHC-29	Aratiatia Livestock Limited
ENV-2018-CHC-30	Wilkins Farming Co
ENV-2018-CHC-31	Gore District Council, Southland District Council and Invercargill City Council
ENV-2018-CHC-32	DairyNZ Limited
ENV-2018-CHC-33	H W Richardson Group Limited
ENV-2018-CHC-34 & 35	Beef + Lamb New Zealand
ENV-2018-CHC-36	Director-General of Conservation
ENV-2018-CHC-37	Southland Fish & 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-42	Stoney Creek Station Limited
ENV-2018-CHC-43	The Terraces Limited
ENV-2018-CHC-44	Campbell's Block Limited
ENV-2018-CHC-45	Robert Grant
ENV-2018-CHC-46	Southwood Export Limited, Southland Plantation Forest Company of NZ, Southwood Export Limited
ENV-2018-CHC-47	Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua & Te Rūnanga o Oraka Aparima
ENV-2018-CHC-48	Peter Chartres
ENV-2018-CHC-49	Rayonier New Zealand Limited
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of NZ Inc

