

**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 TRANSPOWER NEW ZEALAND LIMITED
(ENV-2018-CHC-026)
... (continued on page 11)
Appellants
AND SOUTHLAND REGIONAL COUNCIL
Respondent

Before: Environment Judge J J M Hassan
Environment Judge J E Borthwick

Held: in Invercargill on 12 September 2018 at 10.00 am

Appearances: B J Matheson for Fonterra Co-Operative Group Limited and Dairy NZ Limited
R McClurg and L P Wharfe for Horticulture New Zealand
C Jordan for Aratiatia Livestock Limited
G L Wilkin for Wilkins Farming Co and Mt Linton Station
M R Garbett for Gore District Council, Invercargill City Council and Southland District Council
R Chapman for H W Richardson Group and P Chartres
L Phillips for Beef + Lamb New Zealand
P D Williams for Director-General of Conservation
S Ongley for Southland Fish & Game Council
S Christensen for Meridian Energy Limited, Alliance Group Limited and Transpower NZ Limited
C Lenihan for Federated Farmers of New Zealand (Southland Province), The Terraces Limited, Stoney Creek Station Limited, Robert Grant and Campbell's Block, Waiau River Liaison Committee, Fairlight Station Limited and Gunton Farms Limited
K McRae for Southwood Export Limited, Southland Plantation Forest Company of NZ, Kodansha Treefarm New Zealand Limited
JGA Winchester for Te Rūnanga O Ngāi Tahu and others
C Fowler for Rayonier NZ Limited
S R Gepp for Royal Forest and Bird Protection Society of NZ Inc
S C Ruston for Ballance Agri-Nutrients Limited
H English in person



RECORD OF PRE-HEARING CONFERENCE

Introduction

[1] A pre-hearing conference ('PHC') was convened on 12 September 2018 to hear from parties to the proposed Southland Water and Land Plan ('pSWLP') and make necessary arrangements for mediations and hearings. A Minute was issued on 11 September 2018 proposing an agenda on the basis of memoranda filed and earlier court Minutes. No party sought any additions to it.

Parties granted leave not to appear

[2] The following parties sought and were granted leave not to appear:

- (a) Z Energy Limited;
- (b) BP Oil New Zealand Limited;
- (c) Mobil Oil New Zealand Limited; and
- (d) Invercargill Airport Limited.

[3] Those parties who did not seek leave and did not appear are reminded of their responsibility to seek such leave or make arrangements for agency or other representation at all pre-hearing conferences pertaining to their appeals or s274 party interests.

The content and timing of the 'Initial Planning Statement'

[4] On the Initial Planning Statement to be filed by the Council, parties were referred to the court's 25 July 2018 Minute (particularly at [8]). For the Council, Ms Wyss reported that planning consultant, Mr McCallum-Clark, is underway in preparation of it. She reported that the Council is also producing an updated s32 report (with tracked changes). She informed the court that the Council would be in a position to file it on 19 October 2018.



[5] No parties opposed the Initial Planning Statement. Rayonier NZ Ltd, Southland Fish and Game Council ('F&G') and Royal Forest and Bird Protection Society of New Zealand Inc ('RFB') indicated preferences for certain matters being encompassed in it. Rayonier filed memoranda seeking directions as to matters in ss32(4) and 293 RMA. The issues raised concern the fact that the Council's preparation of the pSWLP pre-dates the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 ('NES-PF').

[6] Counsel were informed that the court is not inclined to make directions at this stage as to what the Initial Planning Statement must address on these matters, nor on whether s293 directions should be made. Rather, the court considers it appropriate for the Council to determine its own position on what the Initial Planning Statement traverses in response to the court's Minute. However, the court noted that parties would no doubt be aware that s32 is also relevant for the court's determination of appeals. Also, the 25 July Minute signals that the court is mindful that s293 could be potentially relevant at some stage.

[7] Therefore, Rayonier's application is left undetermined at this stage. However, directions for the filing of the Initial Planning Statement are confirmed later in this Record.

Topics for and sequence of mediations and hearings

[8] Parties were invited to comment on what the 25 July Minute proposed in terms of the assignment of various pSWLP provisions and matters raised by appeals to hearing tranches (in the Annexure to that Minute referred to as 'Topics A – C'):

- (a) for the Council, Ms Wyss indicated that the court's proposals were generally suitable. She noted an oversight in the Annexure not referring to FMU Policies. She suggested that Topic A should also traverse all objectives (i.e. including Objectives 10 and 17) and Policies 15A and 15B;
- (b) for F&G, Ms Ongley supported the inclusion of FMUs in Topic A (as did Ms Gepp for RFB);
- (c) for Meridian Energy Limited, Mr Christensen supported the inclusion in Topic A of all objectives and Policies 15A and 15B (although suggesting that App E also be added in tandem with those policies);
- (d) for Fonterra Cooperative Group Ltd and Dairy NZ Ltd, Mr Matheson noted the importance of striking the right balance between ensuring sufficient



coverage of provisions in Topic A and not having this hearing become unwieldy by the inclusion of provisions better addressed later. He described App E (along with Policy 16) as being on the cusp in terms of that choice;

- (e) Mr Winchester reserved the position of his client, Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka ('TRONT – HR'), on the content of Topic A.

[9] The court agreed that omission of the FMU policies from Topic A was an oversight. It indicated that it was generally comfortable with the additions suggested by Ms Wyss and encouraged the Council to discuss where the balance is best struck concerning the inclusion of Policies 15A and B and the related App E. As noted, an advantage of interim decisions is their flexible capacity concerning what they may leave open for further consideration, in light of later hearings.

[10] In essence, therefore, the court's present expectation is that Topic A would encompass:

- (a) issues (including state-of-the-environment matters and Physiographic Zones (pp 19-22 pSWLP);
- (b) objectives;
- (c) FMU, Physiographic and Ngāi Tahu policies (and potentially Policies 15A and 15B and related App E);

– subject to recognition of the potential need to revisit some matters in the context of later hearings and, hence, of the proper role of an interim decision.

[11] Directions were made and are now confirmed in this Record:

- (a) for the Council to file a memorandum of counsel on its final position on the content of Topic A, identifying all relevant provisions, appellants and parties; and
- (b) for parties who wish to do so to file memoranda of counsel in response.

[12] The court will determine the final content of Topic A by further Minute.



Evidence and expert conferencing timetable for Topic A

[13] The court indicated that it would have available hearing time for a full bench hearing on Topic A in the weeks commencing 18 and 25 March 2019. It enquired of the Council as to whether it had given thought to a suitable evidence timetable.

[14] While initially indicating a preference for other parties to file evidence first, Ms Wyss confirmed the Council accepted that a traditional filing sequence (whereby the Council goes first) is suitable. That was also the preference of all other parties who spoke on this matter, and the court agrees.

[15] On enquiry by the court as to the intended scope of the Council's evidence-in-chief ('EIC') for Topic A, Ms Wyss noted her need for further instructions. However, she also noted that it would include 'in house science staff' evidence on hydrology, groundwater, and physiographic zones, as well as planning evidence.

[16] We confirm our general observation at the PHC that the matters in Topic A clearly extend beyond planning matters. Rather, they would address technical and science matters including as to state-of-the-environment matters and the 'physiographic' areas or 'zones'.

[17] As to these matters, on behalf of TRONT – HR, Mr Winchester sought clarification from the Council as to which staff or former staff it would call on the matter of hydrographic zones. He explained that his client had been a partner with the Council in the development of related aspects of the notified pSWLP. He also explained that his enquiry was particularly related to a former Council staff member who worked on those zones and whether, if the Council did not intend calling him, he should be subpoenaed or otherwise called such that he could give evidence.

[18] The court encourages the Council and TRONT – HR to further discuss these matters but stopped short of making a direction for the Council to disclose its witness team. However, parties should be aware that the court considers early disclosure of this is important. Hence, the court remains receptive to making a direction by Minute if an application is made.

[19] All parties who spoke favoured the traditional evidence timetable according to the following sequence (including the Initial Planning Statement, and assuming a full bench):



- (a) Initial Planning Statement (and updated s32 report);
- (b) EIC for Council;
- (c) EIC for appellants;
- (d) EIC for s274 parties supportive of appellants;
- (e) EIC for s274 parties opposed to appellants;
- (f) expert witness conferencing and reports;
- (g) rebuttal for appellants and s274 parties supportive of appellants;
- (h) rebuttal for Council and s274 parties supportive of Council;
- (i) Council files six (6) tabbed, indexed and paginated hard copies of all evidence (including exhibits); and
- (j) Topic A hearing commences.

[20] The court took a longer morning recess. This was to enable Ms Wyss to consider possible dates for such an evidence timetable (on the assumption that the court makes the sought mediation directions and the hearing commences on 18 March 2019). After the recess, Ms Wyss reported that, having testing various possible scenarios, she considered there would not be sufficient time on an assumption that the hearing commenced at that time. Hence, the Council sought a later hearing start.

[21] The court did not make directions on this. However, directions are now made for the reasons at [29].

Mediations

[22] Several parties spoke in favour of the court making directions for mediation of Topic A matters. These included Meridian, Fonterra, Dairy NZ, various farming interests represented by Ms Lenihan, F&G and RFB. The Council proposed that the court make directions once the Initial Planning Statement is available and parties have had opportunity to respond to it.

[23] On the other hand, Mr Winchester indicated that TRONT – HR does not support a mediation direction for Topic A. He emphasised his client's view that it is important to avoid unnecessary delay in securing environmental protections. He queried whether parties would be better directing their time to evidence preparation, unless mediation is undertaken in parallel. He asked that any mediation directions provide for short timeframes and confined focus.



[24] The court indicated that its present view is that the Council is right in proposing that the court withhold from making directions on mediation until the Initial Planning Statement is available. In particular, that is because of the potential relevance of that document to the nature of mediation (including as to any specified agenda). Hence, this will be the subject of a Minute to issue in due course. However, at this stage, parties should note that the court considers that there is force in TRONT – HR’s suggestion that mediation be undertaken in parallel with evidence preparation, rather than as a prior step to it. That is particularly in the sense that undue delay in scheduling a hearing should be avoided. Also, parties should anticipate that directions would encompass preparation of a mediation agenda with a view to ensuring proper focus and timeliness. Further, as is the standard approach, parties would be expected to abide directions of the mediator. Finally, there is the practical rider of ensuring that there is an available Environment Commissioner. Enquiries are underway. As soon as the position on that is clear, parties will be notified by Minute.

[25] In addition, for Fonterra and Dairy NZ, Mr Matheson asked whether directions could also be made such as to allow for early Topic B mediations on what he termed ‘technical’ matters. He commented that there are several pSWLP provisions that fit that description in that they are not particularly reliant on finalisation of objectives and policies in Topic A. As such, use could be made of the available time now, prior to the Topic A hearing, for relevant parties to mediate on them. He noted that the court would be able to simply receive agreed mediation outcomes without making consent order decisions unless and until appropriate to do so.

[26] This suggestion was supported by several parties, including the Director-General of Conservation, the territorial authorities, TRONT – HR, farming interests and Beef & Lamb.

[27] The parties were informed that the court would be open to making directions for Topic B technical issue mediation provided that any applications:

- (a) are made jointly with the Council;
- (b) clearly identify issues (by way of questions) for mediation; and
- (c) confirm that:
 - (i) the matters can properly be treated as discrete and not overlapping with provisions or matters for the substantive hearing; and



- (ii) the parties accept that the court may simply receive any agreed outcomes and not make consent orders unless and until the court is satisfied this would be appropriate.

Potential hearing dates and related directions

[28] The court agrees that the indicated commencement date of 18 March 2019 is too tight, all things considered. Given other hearing commitments, parties should now work on the basis that the court is now looking to schedule a two-week hearing in late May 2019.

[29] Although no directions on this were made at the PHC, the court considers it prudent to have the Council now propose a timetable based on that assumption, and that provides for the sequence set out at [19]. This should be on the further assumption that mediation(s) will occur in parallel, rather than having to precede evidence filing. We see no particular difficulties in such an approach. It has some advantage in helping inform parties of their respective evidential positions, for the purposes of testing matters in mediation.

[30] A direction is, therefore, made for the Council to file a memorandum of counsel proposing a timetable. This should be on the assumption of a late May hearing (and hence, with the last timetabled item being completed by the end of the second week in May). Timetable directions can be anticipated to be made by Minute.

Preliminary procedural matters

[31] No one opposed Federated Farmers' application to amend its appeal. The application was granted and a direction made for Federated Farmers to file a tracked change updated appeal document (showing the change it requested by memorandum).

[32] As to the applications for strike out of s274 notices (on which directions have been set and submissions received for a determination on the papers):

- (a) no one opposed the application by Waiau Rivercare Group for leave for their filing of supplementary submissions and an affidavit in response to Meridian's submissions. The application was granted and the supplementary material tendered will, therefore, be considered;



- (b) in response to the enquiry in the memorandum of counsel for Waiiau River Liason Committee, it is confirmed that the timetable directions (with which it has complied) are extended to encompass this party.

[33] A decision will be issued shortly on these applications.

Further matter concerning any capacity for Council hosting website

[34] A matter not raised at the PHC, but which the court now seeks clarity on, is whether the Council is in a position to provide a hosting service for documents in the proceedings through its website. An example of such a facility can be accessed on <https://www.qldc.govt.nz/planning/district-plan>. If possible, this could prove a valuable reference source for parties, particularly bearing in mind that many are interested in discrete aspects. A direction to report on this is made. In the meantime, parties must ensure any documents filed are also duly served on relevant parties.

Directions


[35] Therefore, it is directed:

- (a) the Council must file the Initial Planning Statement (and may file its updated s32 evaluation) by **19 October 2018**;
- (b) the Council must file a memorandum of counsel by **Wednesday 19 September 2018**:
 - (i) setting out its proposed substance for the Topic A hearing, including all relevant pSWLP provisions and identifying related appellants and parties;
 - (ii) proposing an evidence and expert witness conferencing timetable on the basis described in this Record, on the assumption of a late early 2019 hearing commencement;
 - (iii) reporting on what, if any, document hosting service the Council could provide via its website;
- (c) any party may respond to that Council memorandum by memorandum of counsel filed by **Wednesday 26 September 2018**;
- (d) pending further direction, the Council and all parties filing any document in the proceeding must also ensure due service on relevant parties;



- (e) Federated Farmers must file an updated tracked change copy of its notice of appeal, in accordance with leave granted by this Record, by **Friday 21 September 2018**;
- (f) leave is reserved to the Council to seek further or other directions to address anything that was addressed in the PHC and which it considers may have been inadvertently overlooked in this Record, by memorandum to be filed by **Wednesday 19 September 2018**;
- (g) pending any further Minute issued on these matters, leave is reserved to any party to seek:
 - (i) by joint memorandum with the Council, mediation directions in accordance with this Record;
 - (ii) further directions on relevant matters.





J J M Hassan
Environment Judge



J E Borthwick
Environment Judge

Issued: **12 SEP 2018**

List of Appellants

ENV-2018-CHC-027	Fonterra Co-Operative Group Limited
ENV-2018-CHC-028	Horticulture New Zealand
ENV-2018-CHC-029	Aratiatia Livestock Limited
ENV-2018-CHC-030	Wilkins Farming Co
ENV-2018-CHC-031	Gore District Council, Southland District Council and Invercargill City Council
ENV-2018-CHC-032	DairyNZ Limited
ENV-2018-CHC-033	H W Richardson Group Limited
ENV-2018-CHC-034 & 035	Beef + Lamb New Zealand
ENV-2018-CHC-036	Director-General of Conservation
ENV-2018-CHC-037	Southland Fish & Game Council
ENV-2018-CHC-038	Meridian Energy Limited
ENV-2018-CHC-039	Alliance Group Limited
ENV-2018-CHC-040	Federated Farmers of New Zealand
ENV-2018-CHC-041	Heritage New Zealand Pohere Taonga
ENV-2018-CHC-042	Stoney Creek Station Limited
ENV-2018-CHC-043	The Terraces Limited
ENV-2018-CHC-044	Campbell's Block Limited
ENV-2018-CHC-045	Robert Grant
ENV-2018-CHC-046	Southwood Export Limited, Southland Plantation Forest Company of NZ, Southwood Export Limited
ENV-2018-CHC-047	Te Rūnanga O Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga O Awarua and Te Rūnanga O Oraka Aparima
ENV-2018-CHC-048	Peter Chartres
ENV-2018-CHC-049	Rayonier New Zealand Limited
ENV-2018-CHC-050	Royal Forest and Bird Protection Society of NZ Inc

