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)

LEGAL SUBMISSIONS OF COUNSEL FOR SOUTHLAND REGIONAL COUNCIL REGARDING SCOPE FOR RELIEF SOUGHT BY WILKINS FARMING COMPANY LIMITED

4 March 2022

Judicial Officer: Judge Borthwick

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

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

WYNNWILLIAMS

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 These legal submissions are filed on behalf of the Southland Regional Council (**Council**) in respect of the appeal of Wilkins Farming Company Limited (**Wilkins**) against the Council's decision on the proposed Southland Water and Land Plan (**pSWLP** or **Plan**).

Summary

2 In these submissions I will:

(a) set out the background to these jurisdictional issues;

(b) outline the legal principles relevant to scope in a planning context; and

(c) apply those legal principles to the facts in this case.

3 For the reasons detailed in full below, I will submit that Wilkins does not have scope in its submission or appeal for the relief it now seeks in relation to Policy 42.

4 I will also submit that Wilkins does not have scope for the relief it seeks in relation to Appendix L.5.

5 On this basis, I submit that the appeal by Wilkins on Policy 42 should be dismissed, and the appeal on Appendix L.5 should be limited to whether the Garvie Aquifer should be reinstated into the Plan.

Introductory remarks

6 At the outset, Counsel records that these submissions do not respond to the allegations made in pages 2 to 3 and 9 to 11 of Ms Carruthers' legal submissions. They are simply irrelevant to the jurisdiction questions before this honourable Court, and this Court does not have jurisdiction to consider allegations of negligence made against the Council. For the record, those allegations are strenuously denied by the Council.

7 Further, it would appear that Part 1 of Ms Carruthers submissions:

(a) Contain significant evidence from the bar;

(b) Relate to a separate process, being the review of existing resource consents in a potentially overallocated catchment, a process that is (for present purposes) beyond the jurisdiction of this honourable Court.

(c) Fail to recognise that Policy 42 is about replacement permits, not the treatment of existing permits the subject of a review; and

(d) Are largely irrelevant to the question of whether scope exists with respect to the relief that Wilkins is seeking to pursue.

8 Further, Ms Carruthers has not set out the legal principles against which decisions on scope fall to be considered. It therefore follows that she has not examined the key issues involved in this jurisdictional challenge against those established principles.

9 For completeness I note that these submissions do not address the merits of the relief that Wilkins seek (the background and reasoning for which is discussed at length in Ms Carruthers' legal submissions[1]). That is a matter to be determined at a substantive hearing, should this Court find that Wilkins have scope to pursue its appeal and/or the relief it now seeks.

10 Finally, I note that Ms Carruthers' submissions suggest that the Court should "utilise s293 to improve and update to wording of Policy 42" should the Court find that Wilkins does not have scope to seek its preferred relief through the appeals process.[2] Whether section 293 should be engaged is beyond the scope of this jurisdictional challenge as to scope. These submissions are limited to the jurisdictional matter of whether there is scope for Wilkins to seek the changes sought.

Background

11 Wilkins has previously been put on notice that the relief it seeks may go beyond that raised in its notice of appeal and submission. Wilkins responded by way of a memorandum to the parties dated 9 April 2021 asserting that it did have scope. The Council did not agree, and so raised the jurisdictional issues with the Court.

12 As a result of the Memorandum of Counsel dated 27 October 2021 on behalf of Wilkins, which continued to seek the relief sought through mediation, it is now necessary for the Court to determine whether there is sufficient scope in Wilkins' appeal for the Court to have jurisdiction to make the amendments now requested.

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1 At paragraphs 1 to 20, 25 to 28, 34, and 35 of Part 1, in relation to Policy 42.

2 Legal Submissions of Ms Carruthers dated 11 February 2022 at [33].

Legal principles relevant to scope

13 Through the appeals process, the Court can only make amendments to the pSWLP to the extent that the Court has jurisdiction (or scope) to do so. The Environment Court's jurisdiction on appeal is not unlimited, as the Court is not a planning authority with executive functions.[3]

14 The principles relating to the Court's jurisdiction to amend a proposed plan on appeal are generally well understood.

15 Clause 14 of Schedule 1 of the RMA empowers people to appeal against plan decisions:

> **14 Appeals to Environment Court**
>
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
>
> (a) a provision included in the proposed policy statement or plan; or
>
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
>
> (c) a matter excluded from the proposed policy statement or plan; or
>
> (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.
>
> (2) However, a person may appeal under subclause (1) only if—
>
> (a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and
>
> (b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.

16 There are two limbs to a determination of scope. Any amendments made through the appeals process must be both:

(a) within the scope of an appeal on the pSWLP; and

(b) within the scope of a submission on the pSWLP.

17 The key principles are further addressed below.

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3 *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC) at [111].

Within the scope of an appeal

18 The scope of an appeal to the Environment Court is determined from the document that initiated the proceedings, in this case Wilkins' notice of appeal.[4]

19 A key consideration is procedural fairness, as "adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of a reference."[5]

20 While an appeal can only be made on a "provision or matter" referred to in a person's submission, these words should be given a liberal interpretation. A broad reference to the provision or matter is sufficient to give the Court jurisdiction to consider the appeal.[6]

21 It is sufficient if the changes can fairly be said to be foreseeable consequences of any changes directly proposed in the notice of appeal.[7] In Westfield *(NZ) Limited v Hamilton City Council*, the High Court held:[8]

> I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss 292 and 293 of the Act: see *Applefields*, *Williams and Purvis*, and *Vivid*, supra.
>
> On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.
>
> Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who

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4 *Scholes v Canterbury Regional Council* [2010] NZEnvC 29 at [13].

5 *Westfield (NZ) v Hamilton City Council* [2004] NZRMA 556 (HC) at [74].

6 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) at [15].

7 *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC), at [73]; *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [115].

8 *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC), at [72]-[74].

> seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in sections 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would not have been within the reasonable contemplation of those who saw the scope of the original reference.

Within the scope of a submission

22 Any amendments proposed before the Court must also be within the scope of a submission. The orthodox test for whether an appeal is within the scope of a submission was outlined by the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* as follows:[9]

> The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. … It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

23 The High Court in *Albany North Landowners v Auckland Council* confirmed that the reasonably foreseen logical consequence test applied in *Westfield (NZ) Limited v Hamilton City Council* conforms to the orthodox "reasonably and fairly raised" test laid down in *Countdown Properties (Northlands) Ltd v Dunedin City Council*.[10]

24 In *Re an application by Vivid Holdings Ltd*, the Environment Court refined the test in *Countdown Properties (Northlands) Ltd v Dunedin City Council* and identified that any decision of the Council, or requested of the Environment Court on appeal, must be:[11]

(a) fairly and reasonably within the general scope of:

(i) an original submission; or

(ii) the proposed plan as notified; or

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9 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC), at page 41.

10 *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [115].

11 *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC), at [19].

(iii) somewhere in between

25 Issues of scope should be approached in a realistic workable fashion rather than from a perspective of legal nicety.[12] It is not fatal that a submission does not identify the provision that is sought to be amended. In *Albany North Landowners v Auckland Council*, the High Court stated:[13]

> [149] First, as noted at [114] and [135], there can be nothing wrong with approaching the resolution of issues raised by submissions in a holistic way — that is the essence of integrated management demanded by ss 30(1)(a) and 31(1)(b) and the requirement to give effect to higher order objectives and policies pursuant to ss 67 and 75 of the RMA. It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions.

26 However, there is no jurisdiction for the Court to make amendments to such an extent where those who are potentially affected have not had the opportunity to participate.[14] This would not achieve procedural fairness. The purpose of notifying a plan and the submissions and further submissions process is to inform everyone about what is proposed "otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[15]

Application of legal principles to relief sought by Wilkins

27 As set out above, case law has established that the relief sought must be within the scope of the appeal and the appeal must be within the scope of the original submission. Further, any relief must be fairly and reasonably within the general scope of the plan as notified and an original submission.

Policy 42(2)

28 The Wilkins appeal seeks changes to Policy 42(2).

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12 *Royal Forest and Bird Protection Society of New Zealand Inc v Southland District Council* [1997] NZRMA 408 (HC) at page 10; *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [56] and[59].

13 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [149].

14 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [66].

15 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [55].

29 Policy 42 as notified stated:

> **Policy 42 – Consideration of water permit applications**
>
> When considering resource consent applications for water permits:
>
> 1. consent will not be granted if a waterbody is fully allocated, or to do so would result in a waterbody becoming over allocated or over allocation being increased;
>
> 2. consents replacing an expiring resource consent for an abstraction from an over-allocation waterbody may be granted with a lesser volume and rate or take proportional to the amount of over-allocation and previous use;
>
> 3. installation of water measuring devices will be required on all new permits to take and use water, and existing permits in accordance with the Resource Management (Measurement and Reporting of Water Takes) Regulations 2010;
>
> 4. where appropriate, minimum level and/or flow cut-offs and seasonal recovery triggers on resource consents for groundwater abstraction will be imposed;
>
> 5. conditions will be specified relating to a minimum flow/level, in accordance with Appendix L, to all new or replacement resource consents (except for water permits for community water supplies and waterbodies subject to minimum flow and level regimes established under any water conservation order) for:
>
> (a) surface water abstraction, damming, diversion and use; and
>
> (b) groundwater abstraction where there is Riparian, Direct or High degree of hydraulic connection in accordance with Policy 23 “Stream Depletion Effects” and the stream depletion effect exceeds two litres per second.

30 For context I have summarised the subclauses of Policy 42 as notified:

(a) Subclause (1) provided direction that resource consents would not be granted if a waterbody was fully allocated or the granting of a consent would result in over allocation or further over allocation.

(b) Subclause (2) provided policy direction to decision makers considering applications for resource consents which replace expiring resource consents for water takes from over-allocated waterbodies. It directed that these applications may be granted with a reduced volume and rate or take proportional to the amount of over-allocation and previous use.

(c) Subclause (3) required water measuring devices for new and replacement consents.

(d) Subclause (4) directed that certain limits in relation to minimum level and/or flow as well as seasonal recovery triggers be imposed on resource consents for groundwater abstraction where appropriate.

(e) Subclause (5) required, for new and replacement resource consents (except those for community water supplies or waterbodies where a Water Conservation Order specifies certain limits), that conditions be imposed relating to minimum flow/level for all surface water takes and uses and for groundwater takes where there is Riparian, Direct or High degree of hydraulic connection.

31 When examining scope, it is useful to consider the structure of Wilkins' original submission. Wilkins' original submission included an overview of the company history, and included general issues and concerns with the Plan and relief sought in relation to these matters, followed by relief sought in relation to specific provisions of the Plan.[16]

32 Wilkins' original submission sought specific relief in relation to Policy 42 (as opposed to raising a general issue or concern in relation to allocation). Wilkins' submission opposed Policy 42 and sought the specific relief set out below:[17]

> **Reason**
>
> We are not satisfied with the scientific reasoning to establish that a particular application is *fully allocated*. We also point out that water demands, land uses etc change during the timeframe of a consent so that allocation of an aquifer can change from time to time.
>
> **Relief**
>
> Scientific proof to establish aquifer allocation must be independently achieved using internationally approved techniques. Allocation status of an aquifer needs to allow provision for review as water uses change from time to time.

33 Wilkins' original submission's opposition (in part) to Policy 42 related to the scientific reasoning used by Council to establish that a waterbody

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16 Submissions of Wilkins Farming Company Limited at page 4.

17 Submissions of Wilkins Farming Company Limited at page 15.

was over-allocated and the perceived lack of ability to review the allocation status of a water body over the life of the Plan. Specifically, the submission sought to have aquifer allocation established, independently, using internationally approved techniques. Further, it sought to allow the ability to change the allocation status of a waterbody over time as water usage changes. It did not provide any specific changes to allocation.

34 The decisions version of Policy 42, specifically subclause (2), amended Policy 42 as notified to read:

> (2) except for non-consumptive uses, consents replacing an expiring resource consent for an abstraction from an over-allocation waterbody ~~may~~ will generally only be granted ~~with a lesser volume and~~ at a reduced rate ~~or take~~, the reduction being proportional to the amount of over-allocation and previous use, using the method set out in Appendix 0;

35 The notice of appeal filed by Wilkins included an appeal on the Council's decision on "Policy 42 – Consideration of water permit applications, 2)". Specifically, it sought the following relief:

> *Policy 42 – Consideration of water permit applications* should read… *If a groundwater management zone is within the last 10% of its primary groundwater allocation limit, then existing consent holders should be offered consent renewal options before further allocating groundwater to new applicants.*

36 It is understood that Wilkins is no longer seeking the relief set out in their notice of appeal (as set out above) and instead is seeking first "a fair and equitable outcome for the water users affected by the Council's negligence (if it transpires the resource is indeed over-allocated)" or either the notified version of Policy 42 or the version set out in the Memorandum of Counsel on behalf of Wilkins dated 27 October 2021. Therefore, these submissions do not further address whether there is scope for Wilkins to pursue the specific relief included in the notice of appeal set out at paragraph 35 above. It is submitted that there is no scope to seek that Policy 42 revert to the wording as notified.

37 As set out in the Memorandum of Counsel on behalf of Wilkins dated 27 October 2021, and the legal submissions of Ms Carruthers filed on 11 February 2022, Wilkins seeks that either Policy 42 revert to the notified version or the following changes be made to Policy 42(2):

2. Except for non-consumptive uses, ~~consents replacing an expiring~~ applications to replace a resource consent for an abstraction from an over-allocated waterbody prior to the determination of freshwater objectives, limits and targets through the freshwater management unit process will, ~~generally only be granted at a reduced rate, the reduction being proportional to the amount of over-allocation and previous use,~~ using the method set out in appendix 0:

   (a) For irrigation use, be required to:

      (i) Justify the seasonal allocation on the basis it represents efficient allocation and use of the water; and

      (ii) Demonstrate the minimum instantaneous rate required to operate the irrigation infrastructure.

   (b) For group or community water supplies, be required to:

      (i) Identify works proposed to improve the efficiency of water distribution and use; and

      (ii) Demonstrate how water demand will be managed during periods of water shortage.

   (c) For other uses, be required to demonstrate that usage does not result in wastage or inefficient use of water.

38 It is submitted that there are two issues with the relief that Wilkins now seeks in relation to Policy 42. First, that the relief is not within the scope of its appeal, and second, even if the notice of appeal was amended (for which no application for leave has been lodged), it is not within the scope of its original submission.

39 The relief sought in Wilkins' appeal is to give priority over the last 10% of a primary groundwater allocation limit to existing resource consent holders, before a new applicant could be allocated that water. The appeal also sets out the reasons for seeking this relief, but those reasons do not in and of themselves, extend the jurisdiction of the Court.

40 The relief now sought, as set out in the Memorandum dated 27 October 2021 and the legal submissions of Ms Carruthers dated 11 February 2022, seeks to replace Policy 42(2) with direction on the information to be included in a resource consent application to replace an expiring resource consent (prior to the Freshwater Management Unit process being completed), as summarised below:

(a) for irrigation use, applications are to justify the amount of water being taken and demonstrate the rate required to operate irrigation infrastructure;

(b) for community water supplies, applications are to identify how efficiency of water distribution and use will be improved and demonstrate how water demand will be managed during water shortages; and

(c) for all other water uses, applications are to demonstrate that usage does not result in wastage or inefficient use of water.

41 The relief now sought does not propose a method to give priority to existing consent holders to apply for the last remaining primary groundwater allocation before it is granted to a new applicant, as was sought in Wilkins notice of appeal. Instead it seeks to enable existing water permit holders in overallocated catchments to reapply for the same amount of water as they are currently authorised to take, provided they:

(a) justify their seasonal allocation and demonstrate the minimum rate required to operate their infrastructure (for irrigation);

(b) identify works to improve efficiency and demonstrate how demand will be managed in water shortages (for group or community water supplies); or

(c) demonstrate that the usage is not inefficient or wasteful (for all other uses).

42 Even when applying a liberal interpretation of Wilkins' appeal, it is submitted that interested parties/persons were not given adequate notice, and that is it not a foreseeable consequence of Wilkins' appeal, that Policy 42(2) could be replaced to the extent that it simply provides policy direction on the information to be included in replacement resource consent applications, and that the Policy would no longer give policy direction for how over-allocation is to be resolved.

43 In addition, the relief now sought is not within the scope of Wilkins' original submission. Wilkins' original submission raised concerns with the scientific methodology used to determine whether a waterbody was over-allocated. It did not propose to change Policy 42(2) in the way now sought (enabling existing water permit holders in overallocated

catchments to reapply for the same amount of water as they are currently authorised to take provided certain information and assessments are included in a resource consent application). Wilkins' submission raised no issue with how Policy 42(2) proposed to resolve over-allocation, only the scientific methodology for determining whether the water body was over-allocated. It is submitted the relief now sought was not fairly and reasonably within the general scope of the submission and instead seeks to replace Policy 42(2) with a new consenting pathway for existing resource consent holders.

44 For completeness, I record that I disagree with the submission by Ms Carruthers at paragraph 33 of her legal submissions that "it is clearly within the scope of Wilkins' appeal … to pursue changes aimed at: (i) [p]roviding priority to existing consent holders". This argument ignores the second limb of the scope test, namely whether a matter was reasonably and fairly raised in a submission. Wilkins' submission only raised an issue with the method of calculating whether a water body is overallocated, and did not touch on priority at all.

45 I also disagree with Ms Carruthers' submission, also at paragraph 33, that it is clearly within the scope of Wilkins' appeal to pursue changes aimed at "[r]eversing the changes to (1) and (2) made in the decision so as to retain discretion and provide alternatives to a reduced rate (such as volume, or cut-offs)." Such changes were not sought, nor alluded to, in the notice of appeal filed by Wilkins.

Appendix L.5.1

46 The Wilkins appeal sought changes to Appendix L.5.

47 Appendix L.5 as notified included sections titled "Y.5.1" relating to unconfined aquifers and "Y.5.2" relating to confined aquifers. The Wendonside and Upper Mataura Groundwater Zones' primary allocation limits were included in Table Y.4 of section Y.5.1. The annual allocation and irrigation cut off limits for the Garvie Aquifer were included in Table Y.6 of section Y.5.2.

48 The decisions version of Appendix L.5 does not include Table Y.6 relating to the Garvie Aquifer and retains Table Y.4 (now Table L.4), which includes the primary allocation limit for the Upper Mataura and

Wendonside Groundwater Zones. The primary allocation limits themselves were also amended from those notified.

49 By way of background, when the Plan was notified the Garvie Aquifer was classified as a separate groundwater resource from the overlying unconfined aquifer. However, improved data showed that the Garvie Aquifer was "leaky" and the hearings panel considered it was appropriate to manage all groundwater in the Wendonside Groundwater Zone as a single resource.[18] Therefore, Table Y.6 was recommended to be deleted.[19]

50 Wilkins' original submission sought the following relief in relation to Appendix L, Y.5.2 (relating to the Garvie Aquifer):[20]

> **Reason**
>
> We oppose the proposal to lift the irrigation cut off limit from 136m to 146m as this could potentially restrict our access to water during crucial times of the growing season.
>
> **Relief**
>
> Remove irrigation cut-offs in Garvie aquifer until sound environmental, economic and social due diligence has be obtained.

51 The notice of appeal filed by Wilkins included an appeal against the Council's decision on Appendix L.5 and sought the following relief:

> That the groundwater restrictions should be based on a transparent and consistent formula applied fairly across all ground water zones. This is to demonstrate that the water abstraction does not have significant detrimental effects on the aquifer level using the existing pump test and ongoing well, piezo and flowmeter monitoring techniques. The use of random or arbitrary figures is not appropriate. What would be more appropriate is to use information obtained from such a formula suggested applied in a local context factoring in KNOWN environmental risks and resource availability.

52 Wilkins now seeks the following relief in relation to Appendix L.5.1:[21]

a) Amend the primary groundwater allocation limits in Table 4 of Appendix L.5.1:

   i. Upper Mataura from 10.40 to 33.7;

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18 Section 42A Hearing Report: Proposed Southland Water and Land Plan dated April 2017 at page 470.

19 Report and Recommendations of the Panel – Appendix A (Decisions on Submissions) at page 137.

20 Submission of Wilkins Farming Company Limited at page 22.

21 As set out in the Memorandum dated 27 October 2021 and the Legal Submissions of Counsel on behalf of Wilkins dared 11 February 2022.

ii. Wendonside from 9.56 to 16.7;

b) Add a note below Table 4 in Appendix L.5.1 to read:

The primary allocation for groundwater takes is equal to 35 percent of the rainfall recharge occurring over the relevant land area where the water is to be taken, except in Upper Mataura and Wendonside where it is equal to 35 percent of the rainfall recharge occurring over the relevant land area and its watershed.

c) Reinsert the confined part of the Garvie Aquifer to Appendix L.5.2.

53 It is submitted that the relief now sought by Wilkins, except the relief relating to the reinstatement of the confined part of the Garvie Aquifer, is not within the scope of its original submission and therefore there is no scope to seek this relief on appeal.

54 In its original submission, Wilkins sought amendment to the irrigation cut-off level in the Garvie Aquifer. Table Y.6 of Appendix L, Y.5.2 relating to the Garvie Aquifer, which included an irrigation cut-off limit of 146 m asl, was deleted in the decisions version of the Plan and the confined Garvie Aquifer is no longer identified as a separate groundwater resource from the overlying unconfined aquifer. The Garvie Aquifer is instead managed as part of the Wendonside Groundwater Zone as a single groundwater resource. The Wendonside Groundwater Zone does not have an irrigation cut-off level.

55 Given Wilkins' original submission sought relief related to the irrigation cut-off level in the Garvie Aquifer, and taking a liberal interpretation of its notice of appeal which raised concerns with groundwater restrictions in relation to Appendix L.5, there may be scope for the relief sought by Wilkins to reinsert the confined part of the Garvie Aquifer in Appendix L.5.2. However, the notice of appeal did not specifically seek reinstatement of the Garvie Aquifer and so parties were not on notice that this might be an outcome that Wilkins were pursuing.

56 Turning to the relief sought in relation to the primary groundwater allocation limit for the Wendonside Groundwater Zone. Although under the decisions version of the Plan the Garvie Aquifer is to be managed as part of the unconfined aquifer in the Wendonside Groundwater Zone, irrigation cut-offs, which Wilkins' submission related to, are not determinative of primary allocation limits for groundwater zones.

57 Wilkins' original submission did not seek any relief in relation to the annual allocation for the Garvie Aquifer, nor was any relief sought in its submission relating to the primary groundwater allocation limit for the Wendonside Groundwater Zone. Wilkins' submission related only to the irrigation cut-offs for the Garvie Aquifer, for which none exist for the Wendonside Groundwater Zone. Given the irrigation cut-off and primary allocation limits are two distinct limits, other persons with an interest in the primary allocation limit would not be on notice that Wilkins were seeking changes to either the Garvie Aquifer or the Wendonside primary allocation limit.

58 For these reasons, it cannot be said that relief sought in relation to the Wendonside Groundwater Zone primary allocation limit is fairly and reasonably raised in Wilkins' original submission, and therefore cannot be sought on appeal.

59 Similarly, Wilkins' original submission did not seek any relief and did not include any reference to the primary allocation limit for the Upper Mataura Groundwater Zone or primary allocation limits for groundwater zones generally in Appendix L.5, Y.5.1, Table Y.4. As with the relief sought in relation to the Wendonside Groundwater Zone primary allocation, other persons with an interest in the Upper Mataura primary allocation limit would not be on notice that Wilkins was seeking a change to the primary allocation limit. It is submitted that the relief sought in relation Upper Mataura Groundwater Zone primary allocation limit is not fairly and reasonably raised in Wilkins' original submission, and therefore such relief cannot be sought on appeal.

60 As set out at paragraph 19 above, a key principle when considering the scope of an appeal is procedural fairness. I submit that potentially interested persons, who may have sought to participate in such an appeal, were not on notice that Wilkins might seek significant changes to the allocation limits in the Wendonside and Upper Mataura Groundwater Management Zones by way of its notice of appeal.

61 In relation to the note sought to be included below Table L.4 in Appendix L.5.1, this note explains how the primary allocation limits for the Upper Mataura and Wendonside Groundwater Zones, and other groundwater zones, are calculated. As set out above, Wilkins' submission did not seek relief in relation to the primary allocation limits in Appendix L.5,

Y.5.1, Table Y.4, and in particular does not seek to amend how the primary allocation limits for the Upper Mataura or Wendonside are calculated. For these reasons, it is submitted that Wilkins' original submission does not provide scope for it to now seek on appeal the insertion of the explanatory note, set out at paragraph 52 above, below Table L.4 in Appendix L.5.1.

Conclusion

62 For the above reasons, the Council does not consider that the relief sought by Wilkins is fairly and reasonably raised within its original submission and other persons with an interest in the relevant provisions would not be on notice that such changes were proposed. Accordingly, such relief cannot now be pursued on appeal.

63 Given the relief sought is outside the scope of Wilkins' original submission, the Court does not have jurisdiction to grant the relief sought.

DATED this 4th day of March 2022

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