

**BEFORE THE ENVIRONMENT COURT  
AT CHRISTCHURCH**

**ENV-2018-CHC-000030**

**ENV-2018-CHC-000040**

**UNDER**

the Resource Management  
Act 1991 ("RMA")

**IN THE MATTER**

of appeals under Clause 14  
of the First Schedule to the  
RMA in relation to the  
decision on the proposed  
Southland Water and Land  
Plan

**BETWEEN**

**WILKINS FARMING  
COMPANY LTD**

**Appellant / s274 Party**

**AND**

**FEDERATED FARMERS OF  
NZ INC**

**Appellant / s274 Party**

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**LEGAL SUBMISSIONS ON BEHALF OF WILKINS FARMING COMPANY LTD  
AND FEDERATED FARMERS OF NZ INC**

**SCOPE**

**31 August 2022**

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**AND**

**SOUTHLAND REGIONAL  
COUNCIL**

**Respondent**

## MAY IT PLEASE THE COURT

### Introduction

1. Both Wilkins Farming Company Limited (**Wilkins**) and Federated Farmers of New Zealand Incorporated (**Federated Farmers**) have appeal and section 274 interests in the permitted activity standards for intensive winter grazing (**IWG**).
2. Both Wilkins and Federated Farmers have challenged whether there is scope for the amendments proposed by Council to:
  - (a) Reduce the *area* of IWG from 15% to 10%; and
  - (b) Reduce the *slope* of land on which IWG can occur from 20° to 10°.
3. I was given leave to file submissions addressing scope within 5 working days of receipt of the Council's closing submissions.<sup>1</sup>

### Background

4. The 10% and 10° controls were proposed by Council on 11 November 2021 as its preferred relief.<sup>2</sup>
5. The Council's preferred relief was used as the "base document" for the witness conferencing that occurred on 17-18 November and 9-10 December 2021.<sup>3</sup> The B5 – Farming attachment to the Planning Joint Witness Statement dated 10 December 2021 (**Planning JWS**) shows the amendments to the base document in green and the unchanged text in red.<sup>4</sup>
6. The appellants provided evidence in chief on 20 December 2021. Each appellant was to provide evidence in support of the provisions proposed in the Planning JWS.
7. Ms Dines' evidence of 20 December 2021 is a prime example of this occurring:
  - (a) Wilkins' appeal sought the deletion of Rule 20(a)(iii)(3)(D) and (E);

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<sup>1</sup> NOE, p2247.

<sup>2</sup> NOE, p1144, lines 13 – 22.

<sup>3</sup> NOE, p1146, lines 1 – 5.

<sup>4</sup> See page 5 for relevant provisions.

- (b) The equivalent provisions (Rule 20A(a)(vi)(4) and (5)) were agreed to be deleted at expert conferencing and are shown as deleted on page 5 of the B5 – Farming attachment to the Planning JWS;
  - (c) Ms Dines provided evidence in support of their deletion on 20 December 2021.
8. No appellant provided evidence in support of the 10% and 10° controls proposed by Council in November and appearing in the B5 – Farming attachment to the Planning JWS. Ms Gepp submits that appellants did not need to give evidence in support of the provisions they were seeking.<sup>5</sup> There is no basis for such a submission.

**Who says there is scope?**

9. While agreeing with me that Rule 20A is “proposed by Council,”<sup>6</sup> Ms Gepp submits that scope for the 10% and 10° derives from:
- (a) The Forest & Bird appeal in that:
    - (i) It sought to make IWG a prohibited activity in four of the physiographic zones;<sup>7</sup> and
    - (ii) It includes a catch-all of, in the alternative, “any wording that would adequately address the reasons for its appeal” where the general reasons included implementing Council’s function to maintain and improve water quality;<sup>8</sup>
  - (b) The Fish & Game appeal in that:
    - (i) It includes a general relief clause to make “such other changes” to the provisions to “address the reasons for the appeal”.<sup>9</sup>
10. Mr Maw agrees.<sup>10</sup> He also relies on the fact that the Fish & Game appeal seeks “specific slope restrictions... ranging from 4 degrees to 16 degrees” for IWG.<sup>11</sup> He refers to pages 34 – 37 of the Notice of Appeal.<sup>12</sup> He has obviously misread the appeal. It clearly seeks to:

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<sup>5</sup> Closing submissions for Forest & Bird and Fish & Game, para 47.  
<sup>6</sup> Closing submissions for Forest & Bird and Fish & Game, para 45.  
<sup>7</sup> Closing submissions for Forest & Bird and Fish & Game, para 49(b).  
<sup>8</sup> Closing submissions for Forest & Bird and Fish & Game, para 49(a).  
<sup>9</sup> Closing submissions for Forest & Bird and Fish & Game, para 49(c).  
<sup>10</sup> Closing submissions for Southland Regional Council, para 150.  
<sup>11</sup> Closing submissions for Southland Regional Council, para 150.  
<sup>12</sup> Closing submissions for Southland Regional Council, footnote 102.

- (a) Retain the 5m setback for land with a slope of less than 4 degrees;
  - (b) Increase the 5m setback to 10m for land with a slope between 4 and 16 degrees; and
  - (c) Increase the 5m setback to 20m for land with a slope greater than 16 degrees.
11. Mr Maw suggests the changes “are also being pursued by Aratiatia, Director-General of Conservation, Nga Runanga and the Dairy Interest Parties.”<sup>13</sup> With respect, this submission is mischievous:
- (a) Those are the other parties with an appeal on Rule 20;<sup>14</sup>
  - (b) Those are the parties not seeking any amendments to the version of Rule 20A attached to the Joint Witness Statement Planning which appears in the August Consolidated Plan;<sup>15</sup>
  - (c) None of those parties called evidence in support of either the 10% or 10° controls;
  - (d) None of those parties have an appeal point seeking to limit the area of IWG nor the slope on which it occurs;
  - (e) None of those parties are “pursuing” the introduction of the controls, and nor could they.
12. It is the Council that has proposed and is pursuing the change.
13. It is attempting to rely on the Forest & Bird and/or Fish & Game appeal to do so. I explain why that is not possible below.

### **Analysis**

14. In the notified version of the pSWLP, IWG was controlled via Rule 23.
15. Forest & Bird and Fish & Game both submitted on Rule 23:
- (a) Forest & Bird sought to decrease the area of IWG in three physiographic zones and to increase the setback from waterbodies.<sup>16</sup>

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<sup>13</sup> Closing submissions for Southland Regional Council, para 148.

<sup>14</sup> August Consolidated Plan, page 78, Rule 20, Footnote 63.

<sup>15</sup> August Consolidated Plan, page 89, Rule 20A.

<sup>16</sup> <https://www.es.govt.nz/repository/libraries/id:26gi9ayo517q9stt81sd/hierarchy/about-us/plans-and-strategies/regional-plans/proposed-southland-water-and-land-plan/documents/background->

It did not seek to amend the area in other zones nor to restrict the slope.

- (b) Fish & Game sought to decrease the area of IWG in two of the three physiographic zones raised by Forest & Bird, to increase the setback from waterbodies on land with a slope of less than 4 degrees and to clarify the method for measuring the setbacks required on land with a slope greater than 4 degrees.<sup>17</sup> It did not seek to amend the area in other zones nor to restrict the slope.
16. In the decisions version of the pSWLP, IWG is controlled via Rule 20(a)(iii).
17. Forest & Bird and Fish & Game both filed appeals on Rule 20(a)(iii):
- (a) Forest & Bird sought to provide for greater setbacks from waterbodies.<sup>18</sup>
  - (b) Fish & Game sought to clarify the drafting of the good management practices in (3), increase the setbacks from waterbodies in (4) and exclude IWG from critical source areas. For land with a slope greater than 16°, it sought a setback of 20m from waterbodies.<sup>19</sup>
18. The specific relief sought in the appeals is within scope of the submissions.
19. However, it would have been beyond the scope of the submissions for the appeals to seek to introduce the 10% and 10° controls. Ms Gepp overlooks this constraint, as does Mr Maw, despite it being addressed in the agreed legal submissions as to scope dated 12 July 2022.<sup>20</sup>
20. It cannot now be done in reliance on the request to make “such other changes” that address the “reasons for [the Fish & Game] appeal”<sup>21</sup> or as an “alternative” way to “address the reasons” for the Forest & Bird appeal.

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[documents/submissions/Summary%20of%20Decisions%20Requested.pdf](#) at page 484 (hard copy) and 487 (online)

<sup>17</sup> As above at pages 524 – 525 (hard copy) and 527 – 528 (online)

<sup>18</sup> Notice of Appeal, paragraph 8 refers to Table 1 with page 9 showing the relevant part of Table 1.

<sup>19</sup> Notice of Appeal, paragraph 8(a) on page 8 refers to Appendix A with pages 34 – 35 of Appendix A showing the changes sought.

<sup>20</sup> See in particular paragraphs 8 and 14-19.

<sup>21</sup> Notice of Appeal, paragraph 8(a) on page 8.

21. Allowing that to occur would leave the pSWLP in a form that could not reasonably have been anticipated resulting in potential unfairness.<sup>22</sup> The 10% and 10° controls are far from a “foreseeable consequence” of the changes sought to the IWG rule in these appeals.<sup>23</sup>
22. Especially when the agreed components of Rule 20A provide greater setbacks from waterbodies,<sup>24</sup> exclude IWG from critical source areas<sup>25</sup> and provide a definition of slope.<sup>26</sup> The appellants have been successful. There is no need to find another or alternative way to address the reasons for the appeal.
23. If Forest & Bird and/or Fish & Game were of the view that the 10% and 10° controls were needed to “address the reasons for its appeal(s)” it would have filed evidence in chief in December 2021 in support of those provisions. It did not do so. It could have filed rebuttal evidence in support of the 10% control. It did not do so. It is clearly a recently developed argument as the Council clutches at straws to establish scope.
24. In conclusion:
  - (a) A number of agreed changes have been made to the rule, including providing greater setbacks from waterbodies,<sup>27</sup> excluding IWG from critical source areas<sup>28</sup> and providing a definition of slope amendments – all as sought in the specific relief in the appeals by Forest & Bird and Fish & Game;
  - (b) However, the specific relief sought in Table 1 of the Forest & Bird appeal and Appendix A of the Fish & Game appeal do not provide scope for the 10% and 10° controls;
  - (c) This is accepted by both Ms Gepp and Mr Maw;
  - (d) They instead rely on the “other” or “alternative” changes requests for relief as providing the ability to make any change related to the reasons for the appeal;

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<sup>22</sup> Agreed Legal Submissions of Counsel for SRC on Scope, dated 12 July 2022, paragraphs 18 and 19.

<sup>23</sup> Agreed Legal Submissions of Counsel for SRC on Scope, dated 12 July 2022, paragraph 13.  
<sup>24</sup> August Consolidated Plan, Rule 20A(a)(iii) on pages 88 (SRC) and 90 (all other parties).

<sup>25</sup> August Consolidated Plan, Rule 20A(a)(iv) on pages 88 (SRC) and 90 (all other parties).

<sup>26</sup> August Consolidated Plan, Rule 20A, Note at end on pages 89 (SRC) and 92 (all other parties).

<sup>27</sup> August Consolidated Plan, Rule 20A(a)(iii) on pages 88 (SRC) and 90 (all other parties).

<sup>28</sup> August Consolidated Plan, Rule 20A(a)(iv) on pages 88 (SRC) and 90 (all other parties).

- (e) This is not a valid approach. The ability to rely on the “other” or “alternative” changes request for relief is not only constrained by the reasons for the appeal but also by the scope of the submissions;
- (f) The submissions do not provide scope to introduce the 10% and 10° controls; and
- (g) Even if they did, it would be grossly unfair to introduce the 10% and 10° controls on all farms across Southland through reliance on the general reasons for these appeals to the pSWLP.

**DATED** 31 August 2022



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B S Carruthers  
Counsel for Wilkins Farming Co Ltd  
and Federated Farmers of NZ Inc