BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

ENV-2018-CHC-000030

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 LIMITED** **Appellant**
AND	**SOUTHLAND REGIONAL COUNCIL** **Respondent**

REPLY SUBMISSIONS ON TOPIC B1 – WATER ALLOCATION

11 MARCH 2022

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MAY IT PLEASE THE COURT

INTRODUCTION

1. In accordance with the timetable filed with the Court on 4 February 2022:

   (a) On 11 February 2022 I filed a memorandum addressing the preliminary issues raised in relation to the parts of the appeal by Wilkins Farming Company Limited (Wilkins) seeking to amend:

      (i) Policy 42 (Topic B1, Issue 6); and

      (ii) Appendix L.5 (Topic B1, Issue 17).

   (b) No section 274 parties filed submissions on (or after) 18 February 2022.

   (c) On 4 March 2022 counsel for the Southland Regional Council (Council) filed legal submissions in response.

   (d) I now provide brief comments in reply.

POLICY 42: OPTIONS AVAILABLE TO THE COURT

2. Council submits the Wilkins appeal on Policy 42 should be dismissed[1] in the event the Court finds there is no scope in its submission or appeal for the relief it seeks.

3. Council submits the context provided in my earlier memorandum is "irrelevant".[2] As this Court well knows, context is everything.[3]

4. I reply to the introductory remarks made in paragraphs 7 – 10 as follows:

   (a) It is the Council, not the consent holders, that has potentially over-allocated the resource and only discovered the problem after releasing its decision on submissions.

   (b) It is the Council, not Wilkins or the Court, attempting to cast the question as narrowly as "whether there is scope for Wilkins to seek

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1 Paragraph 5
2 Paragraph 6
3 *McGuire v Hastings District Council* [2002] 2 NZLR 577

the changes sought". There has been no agreement on the jurisdictional question to be answered.

(c) It is the Council, not Wilkins, who has insisted on this matter being considered by way of legal submissions and who has not provided a step in the process for evidence on the matter. To the extent my earlier memorandum addresses factual matters, it needed to.

(d) The review that is currently underway is a review of the Council's allocation of the resource. It is not a "review of existing resource consents" in the sense implied in paragraph 7(b) and (c). I accept an outcome of the review may be a decision by Council to then take the step of issuing s129 "review" notices of certain consent holders. However, a number of applications for renewal / replacement consents have been lodged with Council and are currently on hold. Policy 42 is the key policy to be considered by Council when it processes these applications.

(e) There is no dispute as to the established principles, particularly the application of a liberal interpretation where a broad reference is sufficient[4] and the issue should be approached in a realistic workable fashion.[5]

5. The Council's submission that "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" misstates the law. The Court's jurisdiction is not confined to the scope of the appeals before it. Using section 293 the Court can direct the Council to prepare changes to "address any matters identified by the Court".

6. The same can be said of the Council's submission that "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."[6] Again, s293 provides this jurisdiction in the event the Court, Council or other parties can identify any person who may be potentially affected by the amendments sought and is not already engaged in the appeals process.

7. It can also be said of the Council's submission that Wilkins would not have been entitled to challenge the amendments made to Policy 42 by the decision and support, instead, the notified version.[7] A submitter is entitled to appeal

[4] Paragraph 20
[5] Paragraph 25
[6] Paragraph 26
[7] Paragraphs 36, 38 and 45

a provision that the decision on submissions proposes to include.[8] Where the provision is challenged by way of submission, any proposed changes to that provision can be challenged on appeal. The notified version is always an option for a submitter to seek on appeal. To suggest otherwise is, quite frankly, ludicrous.

8. I also note that the submissions from Council, for the first time, identify its potential concerns with the wording first tabled by Wilkins in April 2021. Council is reading the draft wording as:

   (a) being simply an information requirement on applicants;[9]

   (b) intended "to enable existing water permit holders in over-allocated catchments to reapply for the same amount of water".[10]

9. This is not Wilkins' intent.

10. Policy 42 "provides policy direction for how over-allocation is to be resolved".[11] This is not in dispute.

11. In my submission, the most appropriate way forward is to:

   (a) First, confirm whether Council has in fact over-allocated the resource and, if so, collaboratively develop the fair and equitable solution;

   (b) Then, amend the Policy to reflect the solution.

12. This Court must be satisfied as to the appropriateness of the wording of Policy 42. I have taken some care to provide the context, to demonstrate that the current wording is unreasonable.

13. If the Council continues to insist on Policy 42 being finalised in advance of it being known whether the Council has over-allocated the resource and what that means for consent holders at renewal / replacement, then Wilkins seeks either:

   (a) The notified version of Policy 42; or

   (b) The version set out in paragraph 4 of my 27 October 2021 memorandum.

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8 Schedule 1, clause 14(1)(b)
9 Paragraph 40
10 Paragraph 41
11 Paragraph 42

14. If that cannot be achieved within the confines of the Wilkins appeal, there is no doubt it can be achieved:

    (a) As to the former, by allowing an Amended Notice of Appeal in support of the notified version of Policy 42 (opposing the changes made by the decision); or

    (b) As to the latter, by utilising s293 of the Act.

APPENDIX L5

15. There is simply no doubt that the Wilkins' submission opposed the proposed restrictions to the groundwater resource in the vicinity of its operations.

16. Nor is there any doubt that the Council's decision to delete the Garvie Aquifer reduced the remaining available resource in the Wendonside Groundwater to 10%.

17. Nor is there any doubt that the Wilkin's appeal challenged the use of random or arbitrary figures and sought to use an alternate methodology.

18. There is no risk of any person with an interest in the extent of the groundwater resource being made available for allocation being unaware of the fact Wilkins is opposed to the arbitrary restrictions in the pSWLP.

19. In my submission, Council is failing to step back and consider the question of scope in accordance with the established principles, particularly the application of a liberal interpretation where a broad reference is sufficient[12] especially when both the submission and appeal were prepared by a layperson.

DATED 11 March 2022

B S Carruthers
Counsel for Wilkins Farming Company Limited

[12] Paragraph 20