

BEFORE THE SOUTHLAND REGIONAL COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of application for resource consent for the
Lake Te Anau to Manapouri multi use trail

BY **THE FIORDLAND TRAILS TRUST**
Applicant

**MEMORANDUM OF COUNSEL FOR THE APPLICANT SEEKING
SUSPENSION OF PROCESSING OF APPLICATION AND RESCHEDULING
OF HEARING**

6 September 2019

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MAY IT PLEASE THE COMMISSIONER:

1. The Fiordland Trails Trust have sought land use consent under rule 74 Proposed Southland Water and Land Plan (PSWLP) retrospectively for the modification of a natural wetland not far from Frazers Beach, Lake Manapouri. The land use consent is sought for the formation of a trail along a section of Leg 6 of the Lake 2 Lake Trail located between Lake Manapouri and Lake Te Anau.
2. The application is set down to be heard in Te Anau on 18 September 2019.
3. The Applicant has lodged its evidence with Council.
4. The next step is filing and service of the submitters' expert evidence (if any).
5. This application seeks the suspension of the processing of the application and the rescheduling of the hearing to allow the Applicant to make an application for an additional resource consent.

Background

6. While this Counsel was briefing the ecology evidence it was determined that evidence from an expert hydrologist should be obtained to ensure all relevant effects were adequately addressed for the decision maker. This resulted in the Applicant instructing David Hamilton a senior water resources engineer to review the "*hydrological aspects*" of the application.
7. Mr Hamilton recommended, in addition to the two culverts proposed as part of the application¹, a third culvert be installed to mitigate any effects on the interflow of groundwater through the upper top soil layer between the upstream and downstream sides of the trail. This culvert is to be approximately in the middle of the wetland crossing. Attached to this memorandum as Attachment 1 is a copy of a plan drawn by Mr Hamilton².
8. Mr Hamilton's report was appended to and relied on by the Applicant's expert ecologist, Mr Beale and, in turn, by its expert planner, Mr

¹ And referred to in the public notice.

² The exact location of the centre culvert would be subject to ground-truthing, Mr Hamilton having not visited the site.

McSoriley. Counsel was instructed to amend the application at the start of the hearing to include the third culvert in the location shown on the plan.

9. Counsel had turned his mind to the issue of the scope in the Application to seek a third culvert. The position of the Applicant was to be that the third culvert was within the scope of the Application for land use consent to disturb the wetland.

Grounds for Application

10. Under s 14(2) and (3) no person may divert water³ unless it is expressly allowed by (relevantly) a rule in a regional plan. Diversion is not defined in the RMA or relevant plans, but non-flowing groundwater can be diverted by turning it aside or deflecting it⁴. It is submitted the proposition that turning aside or deflecting groundwater that is flowing or seeping is also a diversion of water under s 14.
11. It became apparent when briefing the planning evidence that the third culvert and trail would create a deflection and displacement of groundwater. Therefore s 14 is relevant.
12. The reason a s 14 consent was not required for the first two proposed culverts is because they are to be located within the bed of existing waterways and therefore did not divert any water.
13. As a consequence of this conclusion, Counsel and Mr McSoriley reviewed the PSWLP⁵ and determined there is no permitted activity rule that allows the diversion of groundwater in a wetland. The permitted activity rules for diversions contemplate either subsurface drainage and diversion for farming activities or minor diversions in the beds of lakes and rivers. Neither of these rules apply in natural wetlands.
14. If there is no rule expressly allowing the diversion of water in the regional plan a resource consent is required⁶. To date the Applicant has only sought a s 9 land use consent under rule 74.

³ Water means fresh water in all its physical forms whether flowing or not and whether over or under the ground, see s 2.

⁴ *Chatham Islands Seafoods Ltd v Wellington RC* EnvC A018/04

⁵ Culverts are a permitted activity under the Operative Regional Water Plan.

⁶ See s 14(3)(a).

15. As such the Applicant is of the view that it requires a discharge consent to authorise the diversion of water through the third culvert to the downstream side of the trail so it can give effect to the mitigation recommended by Mr Hamilton. It is intending on making such an application and has instructed Mr McSoriley to prepare the application with input from Mr Hamilton.
16. Generally all applications for necessary resource consents should be made at the same time so they can be considered together in order for a comprehensive assessment of the effects to be undertaken⁷. Here the need for a third culvert was only identified after the application had been made.
17. It is submitted it would be artificial, inefficient and frustrate a full assessment of the effects if the s 9 and s 14 applications were to be heard separately.
18. The evidence of Mr Hamilton makes it clear there is a link between the two applications and the latter consent is necessary to mitigate the effects of the former. They are in effect one activity and should be determined together.
19. Secondly the Trust is a not-for-profit volunteer organisation that relies on donations to fund its work on the Lake 2 Lake Trail that it undertakes for the benefit of the Southland community. It has limited resources so wishes to see these processes progressed efficiently.

Orders Sought

20. It is submitted the Commissioner could rely on powers under part 4 RMA to regulate the hearing process, particularly s 4 Commissions of Inquiry Act 1908⁸ to set down the scheduled hearing for a later date. However Counsel is mindful of the timing requirement in s 103A to complete a hearing for a notified application and as such it may be more helpful to rely on other statutory powers.
21. The Applicant applies to have the processing of the application suspended under s 91A to allow the application for the consent for the

⁷ See s 91, *AFFCO NZ Limited v Far North DC (No 2)* [1994] NZRMA 224 and *Zwart v Gisborne DC* [2014] NZEnvC 96.

⁸ See s 41 RMA.

diversion to be made⁹. It is submitted none of the exclusions in s 91A(3) are applicable. It is understood the only suspension of time under s 88B was for approximately 13 working days after the consent authority made a s 92 request. There have been no other known exclusions of time under s 88B and under s 88E(8) the time limits would still be less than 130 working days.

22. It is anticipated by the Applicant that it would be appropriate for this matter to remain on hold until a decision is made (if non-notified) or until the application has caught up with the current application and is ready to proceed to hearing (if notified).
23. Counsel is available for a telephone conference at short notice if that would assist and the Commissioner has the delegation to address this matter. Otherwise Counsel is available to discuss the matter with Council staff.



CP Thomsen
Counsel for the Applicant
6 September 2019

⁹ Another option is s 37, but this option is preferred.

Attachment 1



Figure 1: Drone image of section of trail showing proposed remediation work